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(UN) VANISHING THE TRIBE

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The U.S. Supreme Court has revived century-old rhetoric that frames Tribal sovereignty as vanishing. The logic in this reasoning is often cloaked behind concerns for states' equal footing and interests. But once the veneer is removed, the Court's reliance upon what I term the "vanishing Tribe trope" reveals a lawless foundation and ultimately harms the legal principles of sovereignty it purports to enforce.

Like nation–state sovereignty, Tribal sovereignty is rooted in international norms reflecting the self-determination rights of peoples to territorial integrity, political unity, and freedom from intervention. International legal norms recognize dominant–dependent sovereign relations, like those between the U.S. federal government and Tribes, as negotiated power imbalances between sovereigns that nevertheless preserve each sovereign's respective sovereignty and thereby preserve sovereignty broadly. While, Tribal sovereignty has long been a volatile legal doctrine, federal Indian law's international roots are nevertheless reflected in the federal Indian legal principle that Tribal self-government should be preserved unless Congress clearly expresses otherwise.

Such legal principles, however, are seemingly only as durable as the value courts place on Tribes. In the late nineteenth century, despite the fortitude of sovereignty terminology, courts often dismissed Tribal sovereignty because they perceived Tribes as vanishing. Tribes would soon be gone, so the thinking went, and so courts need only give passing concern to threats to Tribal sovereignty, as those threats would soon be moot. In short, Tribal sovereignty was "temporary and precarious." But Tribes did not vanish. Rather, Tribes are thriving, and their sovereignty is now framed in their perpetual rights to self-determination. So why did the U.S. Supreme Court hold in Oklahoma v. Castro-Huerta *that Tribal sovereignty had once again*

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been implicitly divested? In citing historically fraught, late-nineteenth-century cases, the Court has revived antiquated views of Tribes as inferior and inevitably vanishing. Tribes' vanishing status permits the Court to abandon judicial restraint and condone unauthorized intrusions into Tribal sovereignty. In Castro-Huerta*, the Court was disturbingly out-of-step with contemporary understandings of Tribal sovereignty; the majority's decision threatens the legal foundations on which Tribes may rely in planning for a future.*

To anticipate a future that includes Tribes necessitates contending with the Court's renewed embrace of the vanishing Tribe legal doctrine, which envisions a Tribe-less future. Castro-Huerta *envisions the Tribal–federal sovereign-to-sovereign framework as crumbling pillars limply bracing a precarious and temporary Tribal sovereignty. Anticipating Tribal futures requires dismissing these crumbling pillars and contending not just with the vanishing Tribe trope, but also with the need to build an entirely new sovereign-to-sovereign framework.*

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INTRODUCTION

The plains were being dug up; the buffalo were being annihilated to starve the Indians and make way for cows; the vanishing tribes were being herded like cattle onto reservations.[1]
Marc Reisner

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1. MARC REISNER, CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER 35 (1986) (describing the history of western water use policies, implying in 1986 that after the Tribes were successfully vanished, the remaining water wars were fought exclusively by non-Native players).

Nineteenth and early twentieth century American sentiments included few expectations for the future of Tribal Nations.[2] American policymakers, statesmen, journalists, and average citizens assumed Native Americans were doomed to extinction.[3] The Tribes will invariably vanish, and any surviving Natives will be absorbed into the American polity. This belief reflected: (1) explicit governmental policies to drive off, contain, assimilate, and violently exterminate Native people;[4] (2) implicit policies to ignore, and thereby silently approve of, otherwise unsanctioned intrusions and aggressions towards Native people and their land;[5] (3) a description of the then-diminishing Native American population;[6] and—most

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2. This Article uses the terms "Tribal Nations," and "Tribes" interchangeably to refer to the juridical states of the Indigenous Peoples located within the United States. Similarly, the terms "Native," "American Indian and Alaska Native," "Native American," and "Indigenous" are used interchangeably to refer to Indigenous persons of North America. This Article intentionally capitalizes these terms as feasible to signal dignity and comport with English capitalization norms regarding sovereigns. *See* Angelique EagleWoman (Wambdi A. Was'teWinyan), *The Capitalization of "Tribal Nations" and the Decolonization of Citation, Nomenclature, and Terminology in the United States*, 49 MITCHELL HAMLINE L. REV. 623, 627, 635 (2023). *See also* GREGORY YOUNGING, ELEMENTS OF INDIGENOUS STYLE: A GUIDE FOR WRITING BY AND ABOUT INDIGENOUS PEOPLES 77 (2018) ("Indigenous style uses capitals where conventional style does not. It is a deliberate decision that redresses mainstream society's history of regarding Indigenous Peoples as having no legitimate national identities; governmental, social, spiritual, or religious institutions; or collective rights.").

3. *See* BRIAN W. DIPPIE, THE VANISHING AMERICAN: WHITE ATTITUDES AND U.S. INDIAN POLICY 10–11, 150–51, 351 (1982) ("Opinion was virtually unanimous: 'That they should become extinct is inevitable.'").

4. President Andrew Jackson, On Indian Removal (Dec. 6, 1830) (transcript available in the United States National Archives and Records Administration) ("[T]he benevolent policy of the Government . . . in relation to the removal of the Indians . . . will separate the Indians from immediate contact with settlements of whites; free them from the power of the States; enable them to pursue happiness in their own way and under their own rude institutions; will retard the progress of decay, which is lessening their numbers, and perhaps cause them gradually, under the protection of the Government and through the influence of good counsels, to cast off their savage habits and become an interesting, civilized, and Christian community.").

5. *See, e.g.*, United States v. Sioux Nation of Indians, 448 U.S. 371, 378 (1980) (describing the decision by the executive branch to "quietly" stop enforcing provisions of the Fort Laramie Treaty of 1868 aimed at preventing the incursion of non-Indian miners into the Black Hills); Robert J. Miller & Torey Dolan, *The Indian Law Bombshell:* McGirt v. Oklahoma, 101 B.U. L. REV. 2049, 2057–58 (2021) (describing the events leading to the forced removal of the Muscogee (Creek) Nation to the Indian Territory in the 1830s, noting "[t]he Tribe and settler communities were in constant tension, often erupting in acts of violence, due to Alabama's imposition of state law and the settlers' violent efforts to take land and property from the Creeks. The federal government failed to fulfill its treaty obligations to protect the Tribe from settlers and state jurisdiction—even arguing that it was unable to stop it.").

6. DIPPIE, *supra* note 3, at 345 ("The Bureau of Indian Affairs conceded that between 1920 and 1925 Indians averaged 22.8 deaths per 1,000 persons each year—double the rate for the white population. . . . Propaganda aside, the Indian death rate was abnormally high.").

notably—(4) a moral blessing in support of "manifest destiny," or the idea that American territorial expansion by white settlers is both inevitable and preordained.[7]

"Vanishing" is a usefully vague term. Depending on the needs of its invoker, it can reference the actual deletion of Tribal Nations by conquest and the actual decrease in the Native population by warfare, disease, and environmental strain.[8] Consider the 1863 Senate Report in which M. Steck, Superintendent of Indian Affairs, described encroaching white settlement such that "the Indian must soon be swept from the face of the earth. If every red man were a Spartan, they would find it impossible to withstand this overpowering influx of immigration."[9]

The vanishing Indian rose to be a popular literary device and significant contributor to the American cultural myth, most prominently on display in the 1826 publication *The Last of the Mohicans*.[10] The myth that Indians can only ever be in the past, never the future, quickly extended beyond popular fiction to become a habit of thought.[11] Natives are not just vanishing; their vanishing is inevitable. Courts and legal actors quickly incorporated the "vanishing Indian" trope into legal doctrine.[12] Consequently, a hallmark trait of the vanishing Indian trope is its legal capacity to self-fulfill.[13]

The ambiguity of "vanishing" can also reference the absorption of Native people into the American polity, such that Native people cease being citizens of their Tribes and the Tribal Nations consequently cease to exist. Because Indians' demise was so certain, policies promoting the incorporation of Native individuals into dominant society were justified as the only way to avoid death and extermination.[14] Embedded in the embrace of the vanishing Indian is a racial supposition that vanishing, particularly in relation to Tribal invocations of sovereignty, is for the

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7. *See* John O'Sullivan, *Annexation*, 17 U.S. MAG. & DEMOCRATIC REV. 5, 5, 9 (1845) ("[O]ur manifest destiny to overspread the continent allotted by Providence for the free development of our yearly multiplying millions. . . . All this without agency of our government, without responsibility of our people—in the natural flow of events, the spontaneous working of principles . . . .").

8. *See, e.g.*, Johnson v. M'Intosh, 21 U.S. 543, 590 (1823) ("But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest.").

9. *In re* Gen. Adjudication of All Rts. to Use Water in Gila River Sys. & Source, 35 P.3d 68, ¶ 21 (Ariz. 2001) (en banc) (quoting S. Rep. No. 102-133, at 2 (1991)).

10. 1 JAMES FENIMORE COOPER, *The Last of the Mohicans: A Narrative of 1757*, *in* THE LEATHERSTOCKING TALES 467, 467–878 (James Franklin Beard et al. eds., 1985).

11. *See generally* Kathryn E. Fort, *The Vanishing Indian Returns: Tribes, Popular Originalism, and the Supreme Court*, 57 ST. LOUIS U. L.J. 297, 310 (2013).

12. *See generally id.* (examining the U.S. Supreme Court's self-perception as a public historian and its problematic embrace of the vanishing Indian framework); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990) (exploring the conceptual roots of colonial conquest that includes a "will to empire" and reliance on the "vanishing Indian" trope to justify legal doctrines such as *terra nullius* (land belonging to no one)); Robert N. Clinton, *Readdressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 79 (1993) [hereinafter *Readdressing the Legacy of Conquest*].

13. *Readdressing the Legacy of Conquest*, *supra* note 12, at 80.

14. Fort, *supra* note 11, at 313.

best.[15] Because Tribes are perceived to be vanishing, courts have imported an interpretive lens that they *must* vanish, and thus their sovereignty can only ever be understood as vanishing.[16] In what I term the "vanishing Tribe trope," courts have embraced the vanishing Indian motif to fully inform the legal contours of Tribal sovereignty. Because Tribes must vanish, courts can legally intrude into Tribal sovereignty in ways that would be intolerable under contemporaneous international understandings of sovereignty.[17]

"Sovereignty" generally refers to the international interaction between mutually recognized juridical nation–states. "Tribal sovereignty" references comparable concepts in federal Indian law, including territorial integrity, political unity, and the exclusion of external authority.[18] In contrast to nation–states, however, Tribal sovereignty is framed as a protectorate status, acknowledging the submission of Tribes to the United States, reflected in federal Indian law's consistent characterization of Tribes as "domestic dependent nations."[19] Courts have struggled with how to understand the sovereignty imbued within a domestic dependent nation.[20] Tribal Nations are somewhat sovereign but also subject to absolute congressional authority.[21]

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15. *See generally* ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005) [hereinafter WILLIAMS, JR., LIKE A LOADED WEAPON] (detailing the ways in which the Court has relied upon racism in its federal Indian law jurisprudence).

16. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. 1, 25–26 (1831) (Johnson, J., concurring) ("[A]t what time did this people acquire the character of state? . . . The general policy of the United States, which always looked to these Indian lands as a certain future acquisition, not less than the express words of the treaty of Hopewell, must so decide the question.").

17. *See infra* Parts III–IV; *see also* Fort, *supra* note 11, at 317.

18. *See, e.g.*, Worcester v. Georgia, 31 U.S. 515, 559 (1832) (holding the State of Georgia lacks regulatory jurisdiction within the Cherokee Nation, noting "[t]he Indian nations had always been considered as distinct, independent political communities"); Williams v. Lee, 358 U.S. 217, 223 (1959) (holding that the State of Arizona lacks adjudicatory jurisdiction over a civil claim against a Navajo defendant for a contract executed on the reservation, because such adjudicatory jurisdiction would "infringe on the right of the Indians to govern themselves").

19. *Cherokee Nation*, 30 U.S. at 17.

20. Maggie Blackhawk, *Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 85–86 (2023) [hereinafter *Foreword*] (noting initially, Native advocates succeeded in limiting the United States' power over Indian affairs to only external or foreign affairs powers designated by the Constitution, "[b]ut over [the course of] the long nineteenth century . . . the United States . . . govern[ed] Indian Country to the ground").

21. Lone Wolf v. Hitchcock, 187 U.S. 553, 565–66 (1903) (holding Congress has nonjusticiable plenary power over Indian affairs that includes the power to unilaterally abrogate treaty obligations to the Kiowa based on a premise that Indian people are an ignorant and dependent race); *see also* Haaland v. Brackeen, 599 U.S. 255, 272–73 (2023) (upholding the constitutionality of the Indian Child Welfare Act by reaffirming that Congress is constitutionally empowered with plenary authority over Indian affairs, to the exclusion of both the states and other branches of the federal government).

The federal trust responsibility[22]—or the federal government's simultaneous recognition of Tribal Nations with dependent status and assumption of federal protector obligations towards Native people—is one tool for navigating this protector–protectorate dynamic. It derives in part from the Law of Nations[23] and serves as a legal check on the otherwise illiberal tendencies of the conqueror. The trust responsibility is in many ways fundamental to the Law of Nations, or *jus gentium*—recognizing the legal capacity for each sovereign to form binding agreements while also recognizing basic legal standards for engagement between the sovereigns.[24] The Law of Nations recognizes the unequal sovereign status of protector and protected while also recognizing the sovereignty in both. Tribes may have diminished sovereignty, but that sovereignty is still recognizably sovereign. Under the federal–Tribal relation enshrined in the federal trust responsibility, Tribal sovereignty should only be modified pursuant to clear statements by Congress, the protector sovereign.[25] These principles of sovereignty are comparable to the likely hesitation with which courts would approach arguments to restrict the sovereignty of Rhode Island or Wyoming, even without turning to the U.S. Constitution. They would likely continue to hesitate even if physical components of their sovereign shifted, such as if Rhode Island's already small land mass was further decreased by coastal erosion or if Wyoming's already small population continued to decrease. But the U.S. Constitution also happens to reflect and embrace Tribes as a component of American federalism,[26] recognizing Tribes even while Indians are also recognized as U.S. citizens.[27]

From the moment of conquest through a substantial portion of the twentieth century, the vanishing Tribe trope was a factually accurate description of Indigenous people and Tribal Nations.[28] The Indigenous population of North America is estimated to have swung from 7,000,000 at pre-European contact to a nadir of

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22. United States v. Mitchell, 463 U.S. 206, 225 (1983) ("[There is an] undisputed existence of a general trust relationship between the United States and the Indian people.").

23. Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, *"We Need Protection from Our Protectors": The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENV'T & ADMIN. L. 397, 413 (2017).

24. Mark W. Janis, *International Law and Treaties*, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 507, 507–508 (James D. Wright ed., Elsevier, 2d ed. 2015).

25. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978) ("[A] proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent."); United States v. Dion, 476 U.S. 734, 738 (1986) ("We have required that Congress' intention to abrogate Indian treaty rights to be clear and plain."). In its earliest jurisprudence, the Court has taken a role in defining the metes and bounds of Tribes' protectorate status, but generally as a means of defining the sovereignty of Tribes. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

26. Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1816–17 (2019) [hereinafter *Federal Indian Law*].

27. Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495, 530–31 (2020).

28. Russell Thornton, *Native American Demographic and Tribal Survival into Twenty-First Century*, 46 AM. STUD. 23, 23–24 (2005).

375,000 in 1900.[29] In addition to the unknown number of Tribal Nations that were completely decimated, the federal government terminated federal recognition of over 100 Tribes between 1953–1970.[30]

Today however, the Native population is growing.[31] Termination of Tribes has been repudiated.[32] The federal government currently recognizes a sovereign-to-sovereign relation with 574 Tribes.[33] Critically, the federal government embraces a policy of self-determination toward Tribes—recognizing the rights of Tribes to exist and self-govern.[34] To employ the vanishing Tribe trope today would be counterfactual.

In addition to a factual description, courts have used the vanishing Tribe trope aspirationally. The Tribes are vanishing, and they *should* vanish. It is this second prong that enabled courts from the nineteenth century through the early twentieth century to legally justify intrusions into Tribal sovereignty that would otherwise offend the international understanding of sovereignty.[35] Rationales such

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29. *Id. See also* DIPPIE, *supra* note 3, at 122–132 (describing the convenient extinction doctrine, in which nineteenth century advocates argued population estimates of Native Americans were pervasively exaggerated and unreliable).

30. Michael C. Walch, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181, 1186 (1983); Notice of Termination of Federal Supervision over Property and Individual Members Thereof, 35 Fed. Reg. 11,272, 11,273 (July 14, 1970).

31. Nicholas Jones et al., *Improved Race and Ethnicity Measures Reveal U.S. Population Is Much More Multiracial*, U.S. CENSUS BUREAU (Aug. 12, 2021), https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html [https://perma.cc/KU5H-JUYW] (noting that the American Indian and Alaska Native populations alone grew by 27.1%, and the American Indian and Alaska Native in combination population grew by 160% since 2010); *see also* Robert Maxim, Gabriel R. Sanchez & Kimberly R. Huyser, *Why the Federal Government Needs to Change How It Collects Data on Native Americans*, BROOKINGS INST. (Mar. 30, 2023), https://www.brookings.edu/articles/why-the-federal-government-needs-to-change-how-it-collects-data-on-native-americans/ [https://perma.cc/J9TY-LUB8] ("Native Americans identify as two or more races at significantly higher rates than [white, Black, and Asian] groups. . . . Additionally, Native Americans are the only census-defined 'racial' group that is also a political and legal classification."); DIPPIE, *supra* note 3, at 347 (citing 1938 OFF. OF INDIAN AFFS. ANN. REP. 209) (noting John Collier, Commissioner of the Office of Indian Affairs, opened his 1938 report, to the Secretary of Interior, "with a triumphant declaration, printed in bold face type: 'THE INDIANS ARE NO LONGER A DYING RACE.'").

32. Special Message to Congress on Indian Affairs, 1 Pub. Papers 575 (July 8, 1970) (calling for a rejection of "the deadly extremes of forced termination and constant paternalism").

33. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 88 Fed. Reg. 2112, 2112–16 (Jan. 12, 2023).

34. *See, e.g.*, Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203, 2204 § 3(b) ("The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy . . . .").

35. *See, e.g.*, United States v. Rogers, 45 U.S. 567, 572 (1846) (holding that Rogers, a white man, cannot be naturalized as a citizen of the Cherokee Nation and treated as

as racial inferiority; perceived lack of government, laws, and property concepts; or warfare-like tendencies have all been raised to justify diminishing Tribal power and recognizing concurrent or even exclusive federal and state powers within Tribal territories.[36] These repugnant judicial holdings were made contemporaneous to legislative and executive policies that largely supported the logic underpinning the decisions.[37]

But federal Indian policy has since shifted. Critically, in 1924 Congress extended U.S. citizenship to all Tribes, solidifying an embrace of Native people as dual-citizens and Tribes as sovereigns reconcilably situated within the territorial confines of the United States.[38] Since 1970, Congress has not used its plenary Indian affairs authority to abrogate a treaty, terminate a Tribe, or restrict Tribal jurisdiction. But despite this shift in federal policy, since 1978 the U.S. Supreme Court has altered the metes and bounds of Tribal sovereignty through the judicially created implicit divestiture doctrine.[39] Despite the lack of congressional action, the Court has found various expressions of Tribal authority to be beyond Tribes' dependent status.[40] Scholars have excoriated the implicit divestiture doctrine throughout its existence.[41]

Until 2022, the implicit divestiture doctrine was limited to restricting Tribal expressions of sovereignty. State powers in Indian country have generally been consistently restricted to the extent they impinge Tribal self-government.[42] This has been especially true within the criminal sphere, in which crimes involving Indian

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a foreign citizen for jurisdictional purposes, in part because the Tribes are not foreign nations because "Indians" is to be understood as racial, and because the Indians are an "unfortunate race" that require saving "from the consequences of their own vices").

36. *See infra* Parts III–IV.

37. *See, e.g.*, General Allotment Act of 1887, Pub. L. No. 49-105, 24 Stat. 388.

38. Act of June 2, 1924, Pub. L. No. 68-175, 43 Stat. 253. *See infra* Section III.A.

39. *See* Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 665–66 (2006) [hereinafter *The Iron Cold*] (describing the implicit divestiture doctrine as amounting to "a decision by the Supreme Court that it will not recognize certain exercises of tribal authority" and noting that while it originated in *Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823), it remained untouched until it was reincarnated during the Burger Court, beginning with *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978)).

40. Bethany R. Berger, *Justice and the Outsider: Jurisdiction over Nonmembers in Tribal Legal Systems*, 37 ARIZ. ST. L.J. 1047, 1050 (2005) (arguing that the Court's jurisprudence rests on the assumption that "jurisdiction over nonmembers and legal issues shaped by outside influence, such as those involving commerce with nonmembers, have little to do with tribal self-government").

41. *See generally, e.g.*, Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666, 687–709 (2016) (arguing that questions of tribal jurisdiction should be dismissed by the court as political questions); Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623 (2011); John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes from the* Cohen's Handbook *Cutting-Room Floor*, 38 CONN. L. REV. 731 (2006); Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 438–39 (2003); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1 (1999).

42. Williams v. Lee, 358 U.S. 217, 220 (1959).

offenders or victims have been reserved for federal and Tribal prosecutions.[43] In *Oklahoma v. Castro-Huerta*, the U.S. Supreme Court fundamentally shifted the sovereign-to-sovereign jurisdictional schema by enhancing *state* power on Tribal lands.[44] Victor Manuel Castro-Huerta, a non-Indian, non-U.S. citizen, was criminally convicted by the State of Oklahoma for child neglect.[45] His stepdaughter, who has cerebral palsy and is legally blind, was found in extremely poor conditions and was dehydrated and emaciated.[46] His stepdaughter is Cherokee, and the criminal neglect took place on the Muscogee (Creek) Indian Reservation.[47] Typically, the federal government would possess exclusive jurisdiction to prosecute this crime by way of its sovereign relation to Tribes.[48] But in *Castro-Huerta*, Oklahoma argued that it had concurrent jurisdiction to criminally prosecute a crime committed against a Native person on Tribal land.[49] Such an argument is analogous to the State of Connecticut claiming concurrent authority to prosecute a crime committed by a Connecticut citizen in the State of Rhode Island.

Shockingly, the Court agreed with the State of Oklahoma.[50] More shocking still, the Court held that *all* states possess concurrent criminal jurisdiction over non-Indians in Indian country, including over crimes committed against Indian victims.[51] The Court reasoned that states possess this concurrent jurisdiction because, since 1880, the Court no longer views Tribes as distinct nations.[52] The decision stunned Indian country.[53]

The *Castro-Huerta* Court hesitated to articulate its reasoning beyond something shifting in the "latter half of the 1800s."[54] In its broad gesture to the

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43. *See, e.g.*, General Crimes Act of 1817, 18 U.S.C. § 1152 (establishing federal concurrent criminal jurisdiction over interracial crimes in Indian country; but preserving exclusive tribal criminal jurisdiction for crimes in which there is both an Indian offender and an Indian victim, crimes which the Tribe has already prosecuted, and jurisdiction which has already been secured as exclusive by treaty).

44. Oklahoma v. Castro-Huerta, 597 U.S. 629, 633 (2022).

45. *Id.*

46. *Id.*

47. *Id.*

48. 18 U.S.C. § 1152 (providing federal jurisdiction over interracial crimes in Indian country). While Congress has not restricted Tribal criminal jurisdiction over non-Indians, the Supreme Court's 1978 case of *Oliphant v. Suquamish Indian Tribe* stripped Tribes of such criminal jurisdiction altogether and has only been slightly modified by Congress to a small subset of crimes. *See* Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1568 (2016).

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

50. *Id.* at 656.

51. *Id.*

52. *Id.* at 636 (citing Organized Vill. of Kake v. Egan, 369 U.S. 60, 72 (1962)).

53. *See, e.g.*, *NARF/NCAI Joint Statement on SCOTUS Ruling on* Castro-Huerta v. Oklahoma, NATIVE AM. RTS. FUND (July 7, 2022), https://narf.org/castro-huerta-v-oklahoma-scotus-ruling/ [https://perma.cc/F557-Q8M2] (quoting President of the National Congress of American Indians, Fawn Sharp: "The Supreme Court's decision today is an attack on tribal sovereignty and the hard-fought progress of our ancestors to exercise our inherent sovereignty over our own territories").

54. *Castro-Huerta*, 597 U.S. at 636.

nineteenth century, the Court cited a handful of nineteenth century cases.[55] It is in those century-old cases in which the vanishing Tribe trope appears. Prior courts used the poisonous fruits of the vanishing Tribe trope to justify injecting an alternative legal lens to Tribal sovereignty. It is not that Tribal sovereignty is in a protectorate status—other protectorate sovereigns exist and do not diminish over time.[56] Rather, Tribal sovereignty is vanishing because, unlike other protectorate sovereigns, Tribes *should* vanish. Such reasoning was foul at the turn of the twentieth century, during which recently negotiated treaties demarcating the sovereign-to-sovereign boundaries were quickly and frequently dismissed. But its revival in current case law lacks such a contemporaneous policy foundation. Congress and the executive no longer treat Tribes as vanishing. Moreover, such reasoning fails to reconcile Tribes as substantive juridical entities that envision an enduring future for themselves within the contemporary American legal framework.

The *Castro-Huerta* decision is troubling both for the practical operation of criminal justice in Indian country and for the legal assault on Tribal sovereignty. In his dissent, Justice Gorsuch cautioned that, at best, the *Castro-Huerta* decision should be cabined to the "anticanon" of federal Indian law.[57] Scholarly critiques have already similarly called for such a cabining.[58] Like the dissent and the growing scholarly outcry,[59] I also call for limiting the reach of *Castro-Huerta* as a bizarre outlier. But in examining the reasoning in *Castro-Huerta*, there is an undeniable underbelly of anti-Tribal principles that requires contention. Both the majority and the dissent rely upon a body of Indian law that conceptualizes Tribal sovereignty as diminished, vulnerable, and—critically—temporary. *Castro-Huerta* cites an era of

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55. *See infra* Part IV.

56. Seth Davis, Eric Biber & Elena Kempf, *Persisting Sovereignties*, 170 U. PA. L. REV. 549, 559 (2022).

57. *Castro-Huerta*, 597 U.S. at 684 (Gorsuch, J., dissenting).

58. Dylan R. Hedden-Nicely, *The Terms of Their Deal: Revitalizing the Treaty Right to Limit State Jurisdiction in Indian Country*, 27 LEWIS & CLARK L. REV. 457, 461–62 (2023) (arguing that the broad sweep of the Indian law field demonstrates that Tribal freedom from state jurisdiction within Indian country should proceed as a treaty rights analysis rather than the balancing test promoted in *Castro-Huerta*); W. Tanner Allread, *The Specter of Indian Removal: The Persistence of State Supremacy Arguments in Federal Indian Law*, 123 COLUM. L. REV. 1533, 1540–42 (2023) (arguing that the continued use of state supremacy arguments, such as those employed in *Castro-Huerta*, defies constitutional law and federal Indian affairs policy, produces inaccurate histories of Native nations, and perpetuates racism and violence); Gregory Ablavsky, *Too Much History:* Castro-Huerta *and the Problem of Change in Indian Law*, 2023 SUP. CT. REV. 293, 313–20, 355–50 (2023); Dylan R. Hedden-Nicely, *The Reports of My Death Are Greatly Exaggerated: The Continued Vitality of* Worcester v. Georgia, 52 SW. L. REV. 255, 259 (2023).

59. Notably, *Nevada v. Hicks*, 533 U.S. 353 (2001), a case upon which the *Castro-Huerta* decision heavily mirrors in its analysis but only minimally cites and which could have dramatically altered civil jurisdiction on Tribal lands, has been somewhat cabined in its impact. *See, e.g.*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.01(2)(a) (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK] ("*Nevada v. Hicks* is best understood as a case addressing the particular limits of tribal jurisdiction over suits against state officers."); *id.* § 4.02(3)(c)(ii) ("While *Hicks* fits within the recent trend of decisions disfavoring tribes' power to govern the conduct of nonmembers, the analysis employed by the Court distinguishes the case as exceptional.").

Indian law cases that used international legal terms like "treaty" and "sovereignty" but imported alternative meanings based on their assumption (i.e., aspiration) that Tribes would eventually disappear. The importation of these terms and their harmful alternative definitions suggest that *Castro-Huerta* may not be so easily cabined, nor may it be the last case promoting such anti-Tribal principles if we accept its reasoning unchallenged. Increasingly, the conception of Tribes as temporary is out of step with Tribal self-determination. Moreover, it is out of step with international conceptions of both self-determination and sovereignty. This Article seeks to expose the flawed underbelly of *Castro-Huerta* and postulate how a more stabilized view of Tribal sovereignty will serve both Tribes and sovereignty more broadly.

Part I will explore the concept of "sovereignty" and compare how Tribal sovereignty both reflects and diverges from international concepts of sovereignty. Sovereignty may be most frequently referenced regarding nation–states, but its origins actually encompass a plethora of sovereign iterations, including protectorates. Parts II and III will then dissect the cases relied upon in *Castro-Huerta* to tease out the colonizer-based conceptions of Tribal sovereignty that permitted otherwise inconceivable infringements on sovereignty. The implicit divestiture doctrine departs from the Indian law canons to *imply* a vanishing Tribal sovereignty. Such a legal maneuver is only feasible by turning to the racist vanishing Tribe trope of the nineteenth and early twentieth centuries that saw Tribes as both actually vanishing and deserving to vanish because of their perceived savagery. The Court injected sovereignty with a new analytical bent: Tribal sovereignty is different in that it is "temporary and precarious." Part IV will then explore an anticipatory Tribal futures lens as a necessary remedy to *Castro-Huerta*'s embrace of Tribal sovereignty as temporary and precarious. An anticipatory Tribal futures lens seeks to envision how Tribes, as permanent and secure components of American federalism, exist.[60] Such needs include Tribal consent, Tribal representation within the American polity, and an embrace of Tribal judicial forums.

I. International Tribal Sovereignty

A. International Legal Sovereignty

The term sovereignty is largely used in reference to the norms and rules of the international system.[61] Despite centuries of reliance on the concept to inform international order, it still lacks doctrinal certitude. Scholarly attention regarding sovereignty often concerns statehood.[62] Analytic examinations consequently tend to focus on issues of statehood, including intervention, secession, and declarations of

60. *Foreword*, *supra* note 20, at 89–110 (calling for a similar incorporation of sovereignty-preserving principles).

61. *Id.* at 84 ("For much of our history, constitutional meaning with respect to the external constitutional powers of the United States, including the power to colonize, was rooted in the unique vernacular of the law of nations.").

62. *See, e.g.*, Louis Henkin, *That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORDHAM L. REV. 1, 1–2 (1999).

independence.[63] In attempting to define sovereignty, some argue that sovereignty is unlike the dominion of property in which defining features are analogized to a "bundle of sticks"; rather, a sovereign is either sovereign or it is not.[64] But a sovereign's alleged rigidity reveals little about its components. Nor is it true that the loss or impairment of one sovereignty component makes all others crumble. International agreements regarding trade, disarmament, or human rights all reveal sovereigns that are capable of restricting their own authority and that in fact, making such restrictions in relation to other sovereigns is a basic characteristic of sovereignty. Intervention, secession, and declarations of independence are themselves only cognizable when understood in relational terms—how does a sovereign relate to other sovereigns and how does the sovereign relate to individuals governed by the sovereign? International legal sovereignty has thus evolved to refer to the practices associated with mutual recognition between states that enjoy territorial and juridical independence from each other. [65]

The European concept of sovereignty, not ironically, developed contemporaneously with European encounters with Indigenous Peoples.[66] Europeans perceived Indigenous peoples as relating to each other and their land in seemingly wholly foreign ways. The variety of peoples across North and South America is massively vast, encompassing empires, metropolises, loose confederacies, village networks, bands, seasonal gatherings of otherwise disparate small family groups, and distinct communities with both distinct and overlapping

63. *See, e.g.*, Jure Vidmar, *Territorial Integrity and the Law of Statehood*, 44 GEO. WASH. INT'L L. REV. 101, 111 (2012); Henkin, *supra* note 62, at 1–2; *see also* William Bradford, *"Another Such Victory and We Are Undone": A Call to an American Indian Declaration of Independence*, 40 TULSA L. REV. 71, 118–19 (2013) (advocating for an American Indian Declaration of Independence to restore sovereignty to Native Peoples under naturalist conceptions of law).

64. Max Radin, *The Function of States*, 25 OR. L. REV. 83, 86 (1946) ("Sovereignty is there made a fixed and solid concept, subject to neither qualification nor gradation.").

65. STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 3–4 (1999). Krasner acknowledges three additional forms of sovereignty: (1) Westphalian sovereignty, examined below; (2) domestic sovereignty, defined as the formal organization of political authority within the state and the ability of public authorities to exercise effective control; and (3) interdependence sovereignty, defined as the ability of public authorities to regulate the flow of information, ideas, goods, people, pollutants, and capital across the borders. *Id.* at 4. Krasner focuses on international legal sovereignty and Westphalian sovereignty as more central to the question of inter-sovereign interactions.

66. Rashwet Shrinkhal, *"Indigenous Sovereignty" and Right to Self-Determination in International Law: A Critical Appraisal*, 17 ALTERNATIVE: AN INT'L J. INDIGENOUS PEOPLES 71 (2021) ("Sovereignty is an idea of authority, which originated in the controversies and wars, religious and political, of 16th and 17th century of Europe."); Gregory Ablavsky & W. Tanner Allread, *We the (Native) People?: How Indigenous Peoples Debated the U.S. Constitution*, 123 COLUM. L. REV. 243, 254 (2023) (noting the legal thought of empire at the time of the drafting of the U.S. Constitution did not yet distinguish between international and other forms of sovereignty).

territories.[67] When encountered, European legal thinkers perceived Indigenous peoples as quintessentially foreign and along with empire-building urgency, thrust a philosophical probe that articulated property and sovereignty in contrast to the Indigenous peoples of America.[68] Indigenous peoples were consequently understood as lacking property or sovereignty.[69]

Whether Indigenous peoples possessed legally cognizable sovereignty or property rights impacted both the immediate and long-term financial prospects for colonial expeditions. But even if violent conquest and domination were sufficient to wrench control over a particular territory from its occupants, such control could only be maintained within a legal framework that supported the subsequent European sovereign and property interests. Some argued that Indigenous peoples were no different than animals and consequently owned nothing.[70] Others, like philosophers Bartolome de las Casas and Francisco de Vitoria, advocated for the humanity of Indigenous persons, calling for humane treatment by the Spanish and a recognition of Indigenous property interests.[71] But even these calls were coupled with immediate attempts to distinguish Indigenous peoples from other sovereign actors.[72]

The conundrum posed by Indigenous peoples then was the need to reconcile their existence with the desire to consume their lands. Indigenous peoples *needed* to be distinguished. Were they different enough from Europeans to dismiss their rights to property and sovereignty? International legal scholars began developing a factored test for sovereignty that aligned with European values and norms. Sovereignty was most prominent when expressed in terms of the state and its bureaucracy.[73] Tribal iterations of power that tended to manifest in terms of kinship were dismissed as sovereignty-less.[74]

Yet perceived differences between Europeans and Indigenous peoples were not simply a matter of contrast. European philosophers argued that humanity is a linear trajectory of development towards civilization. Europeans were the manifestation of the full attainment of civilization, whereas other cultures existed

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67. *See generally* CHARLES C. MANN, 1491: NEW REVELATIONS OF THE AMERICAS BEFORE COLUMBUS 241–326 (1st ed. 2005) (exemplifying various peoples in Part Three, Landscape with Figures); PEKKA HÄMÄLÄINEN, INDIGENOUS CONTINENT: THE EPIC CONTEST FOR NORTH AMERICA 2 (2022).

68. S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 16 (2d ed. 2004).

69. *Id.* at 18 ("Although they met some standard of rationality sufficient to possess rights, the Indians could be characterized as 'unfit' because they failed to conform to the European forms of civilization with which Vitoria was unfamiliar.").

70. *See, e.g.*, THOMAS HOBBES, LEVIATHAN OR THE MATTER, FORME & POWER OF A COMMONWEALTH, ECCLESIASTICALL AND CIVILL 85 (A.R. Waller ed., 1904) ("For the savage people in many places of *America* . . . dependth on natural lust, have no government at all; and live at this day in that brutish manner . . . .").

71. ANAYA, *supra* note 68, at 16 ("Vitoria held that the Indians possessed certain original autonomous powers and entitlements to land, which the Europeans were bound to respect.").

72. *Id.*

73. HÄMÄLÄINEN, *supra* note 67, at 2.

74. *Id.*

along a spectrum of development. Their underdevelopment invalidated their eligibility for recognized sovereignty. Emer de Vattel, one of the more widely read eighteenth century international law authorities, argued that sovereignty and property were interconnected such that nationhood was legally recognizable only if a nation owned, with actual possession, its territory.[75] Indigenous people lacked property because their borders appeared vague and porous, particularly for nomadic and seasonal communities. Vattel found that "wandering tribes" only have "uncertain occupancy" of territory that "the savages have no special need of and are making no present and continuous use of."[76] He reasoned that sovereignty depended on stationary citizens because the growing population of the Earth would be unsustainable if a nation's territory were "merely [used for] hunting, fishing, and gathering wild fruits."[77] To the convenience of many European speculators, defining sovereignty by European governing norms permitted Europeans to sidestep applying the Law of Nations to Indigenous peoples.[78] This is most prominently evidenced in the United States' incorporation of the doctrine of discovery.[79] David Graeber and David Wengrow critique this dominant narrative regarding a linear progression towards civilization to showcase the ways in which "civilization" has historically been crafted to specifically exclude and demean Indigenous people.[80]

These initial efforts to avoid extending the rights of self-determination and sovereignty to Tribes have proven to be lasting. The differences between Indigenous and European cultural and governing norms cemented into a perception of inferiority. Indigenous peoples were simply less developed and consequently less entitled to international protections.

B. Tribal Westphalian Sovereignty

> *They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people.*[81]
>
> Justice Miller, *United States v. Kagama*

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75. Emer de Vattel, *Occupation of Territory by a Nation*, *in* IMPERIALISM 43, 43–44 (Philip D. Curtin ed., 1971).

76. *Id.* at 44–45.

77. *Id.* at 45.

78. Ablavsky & Allread, *supra* note 66, at 256 (Anglo-Americans "refused to acknowledge Indigenous law *as* law, instead defining peoples as 'lawless'"). *See also* VINE DELORIA, JR. & DAVID E. WILKINS, THE LEGAL UNIVERSE: OBSERVATIONS ON THE FOUNDATIONS OF AMERICAN LAW 121 (2011) ("The real mischief, however, was how and why Europeans could not conceive of peoples governing themselves without formal European-styled institutions and written laws. Instead, they projected their own institutions upon the indigenous peoples' methods of resolving social and political disputes and, seeing that the processes and beliefs were not identical, convinced themselves that Native nations lived in a state of savagery and barbarism.").

79. Johnson v. M'Intosh, 21 U.S. 543, 590 (1823).

80. DAVID GRAEBER & DAVID WENGROW, THE DAWN OF EVERYTHING: A NEW HISTORY OF HUMANITY (2020).

81. United States v. Kagama, 118 U.S. 375, 381 (1886).

Despite early efforts to distinguish and dismiss Indigenous peoples, European and subsequent American relations with Tribes would rely on international sovereignty terms.[82] The political realities of early American–Tribal relations required diplomacy such that European and Tribal Nations engaged in a set of practices, norms, and expectations, in what has been termed "diplomatic constitution."[83] Consequently, terms like nations, treaties, and *sovereignty* were applied to Tribes in the early foundation of the United States with apparent intention.[84] Indigenous peoples were forcibly and oftentimes unwillingly included within the constitutional framework.[85] Tribal sovereignty was, albeit reluctantly, acknowledged and incorporated into federal law,[86] in which Tribes enjoy some juridical recognition,[87] territorial integrity,[88] and political, civil, and criminal authority over their territories.[89]

Scholars are only recently beginning to unravel the international origins of the term "sovereignty" as it applies to federal Indian law.[90] There is current debate

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82. Gregory Ablavsky, *Sovereign Metaphors in Indian Law*, 80 MONT. L. REV. 11, 12 (2019). *See also* EagleWoman, *supra* note 2, at 625 (citing DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW 40 (2001)) (describing the political diplomacy between the newly formed United States and Tribes as the "Sovereign-to-Sovereign Era, with the full recognition of Tribal sovereignty to engage in international political alliances").

83. Ablavsky & Allread, *supra* note 66, at 249.

84. Davis, Biber & Kempf, *supra* note 56, at 552–53; Gregory Ablavsky, *Species of Sovereignty: Native Nationhood, the United States, and International Law, 1783–1795*, 106 J. AM. HIST. 591, 593 (2019) [hereinafter *Species of Sovereignty*]; M. Alexander Pearl, *Originalism and Indians*, 93 TUL. L. REV. 269, 272 (2018); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 119–20 (2002), Ablavsky & Allread, *supra* note 66, at 249.

85. Ablavsky & Allread, *supra* note 66, at 251.

86. Cherokee Nation v. Georgia, 30 U.S. 1, 16 (1831) (acknowledging that Tribes have been uniformly treated as sovereigns from the moment of European contact, evidenced in part by the numerous treaties that have been enacted).

87. *See, e.g.*, Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 88 Fed. Reg. 2112, 2112–16 (Jan. 12, 2023) (detailing a list of the 574 Tribes that presently are recognized with federally recognized Tribal status).

88. 18 U.S.C. § 1151 (defining Indian country); McGirt v. Oklahoma, 140 S. Ct. 2452, 2461 (2020) (upholding the boundaries of the Muscogee (Creek) Indian Reservation pursuant to their 1866 treaty).

89. Williams v. Lee, 358 U.S. 217, 219 (1959); United States v. Lara, 541 U.S. 193, 196 (2004).

90. Davis, Biber & Kempf, *supra* note 56, at 553; ANAYA, *supra* note 68, at 103–10 (distinguishing the rights to self-determination of Indigenous Peoples under international human rights law from the sovereignty of nation–states); *Species of Sovereignty*, *supra* note 84, at 593; Pearl, *supra* note 84, at 272; Gregory Ablavsky, *"With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings*, 70 STAN. L. REV. 1025, 1033–35 (2018) [hereinafter *With the Indian Tribes*] (discussing original public meanings of "tribe," "Indian," and "nation" under U.S. and international law); John Howard Clinebell & Jim Thomson, *Sovereignty and Self-Determination: The Rights of Native Americans Under International Law*, 27 BUFF. L. REV. 669, 679 (1978) (arguing that "most" Indian tribes "qualify as states under international law.").

as to whether founding-era historical uses of the term "nations" in reference to Tribes was actually intended to invoke sovereignty.[91] Professor Gregory Ablavsky argues affirmatively, noting federal officials routinely spoke of the "law of nations" and customary international law as applying to their relationships with Natives."[92] Justice Marshall seemed to think as much, stating:

> The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.[93]

Nevertheless, international legal sovereignty makes little conceptual space for juridical entities that lack mutuality—that is, sovereign personalities that enjoy some, but not all, of the powers normally associated with sovereigns.[94] A sovereign state is conventionally defined as having a territory, a population, a government, and formal juridical autonomy.[95] It can become a member of international organizations.[96] If a sovereign is not recognized as an *international* sovereign, then it also tends to not be recognized as a legal actor, which are otherwise only ever states and individuals—the rulers and the ruled.[97] It might be tempting, then, to treat Tribal sovereignty as analytically distinct from "real" sovereignty that enjoys international mutual recognition.[98]

International legal sovereignty is just one iteration of the bundle of sticks comprising sovereignty.[99] The 1648 Peace of Westphalia is traditionally attributed in international law and history as the birth of the modern sovereign state. Westphalian sovereignty refers to the capacity to exclude external actors from authority regarding the governing structures within a given territory.[100] Domestic

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91. Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. L. REV. 201, 259 (2007) ("Referring to tribes as 'nations' was consistent with exercising political jurisdiction over them because at the time the word 'nation' did not necessarily evoke the association with political sovereignty it evokes today."). Though in the next paragraph, Natelson concedes that "the contemporaneous definition of 'nation' did not *exclude* the possibility that some tribes were thought of as sovereign. A member of the founding generation might well think of some tribes as sovereign entities." *Id.*

92. *With the Indian Tribes*, *supra* note 90, at 1044.

93. Worcester v. Georgia, 31 U.S. 515, 559–60 (1832).

94. Michael P. Scharf, *Earned Sovereignty: Juridical Underpinnings*, 31 DENV. J. INT'L L. & POL'Y 373, 374 (2003) (arguing for a view of sovereignty existing on a spectrum, that includes recognition of a range of intermediate sovereign statuses).

95. *Id.* at 375 (citing KRASNER, *supra* note 65, at 9–25).

96. U.N. Charter art. 2, ¶ 1.

97. Henkin, *supra* note 62, at 2. *See also* JACQUES DERIDDA, WITHOUT ALIBI, at xx (Peggy Kamuf ed., 2002) ("Sovereignty is undivided, unshared, or it is not.").

98. Sarah Krakoff, *The Virtues and Vices of Sovereignty*, 38 CONN. L. REV. 797, 801 (2006) ("Underlying the formalist and existential skepticisms about tribal sovereignty is the concern that partial sovereignty is no sovereignty at all.").

99. Davis, Biber & Kempf, *supra* note 56, at 593 (citing HELMUT QUARITSCH, STAAT UND SOUVERÄNITÄT 403–04 (1970) ("*Landeshoheit* was a 'bundle of historically acquired rights' rather than an integrated system of full sovereignty.").

100. KRASNER, *supra* note 65, at 4.

political authorities are the sole arbiters of legitimate behavior.[101] But in a twist, scholars have unearthed the "Westphalian myth": the Peace of Westphalia does not actually achieve the full-throated nation–state sovereignty with which it is credited.[102] The Peace of Westphalia recognizes the sovereign authority of the Holy Roman Empire, but it also allocates separate, albeit lesser sovereign authority to local estates.[103] Westphalian sovereignty—the dawn of sovereignty—contains a protectorate status, acknowledging and negotiating a bundle of sovereignty sticks among multiple stakeholders. Mutuality—the recognition of equal sovereign authority in a fellow sovereign—has come to dominate the definition of sovereignty. But the Peace of Westphalia lacked mutuality.

International sovereign relations historically incorporate dominant–dependent sovereignty relations.[104] From princely states to confederacies, sovereigns have recognized their power imbalance, rejected the infinite warfare that stems from might-makes-right posturing, and negotiated protectorate agreements that acknowledge and respect dissimilar sovereignties. Far from undermining sovereignty, a protectorate defends sovereignty. Other scholars have similarly examined alternative-to-the-nation–state sovereignty regimes.[105] The United States' Tribal sovereignty dynamic in many ways reflects the earliest notions of Westphalian sovereignty, as well as more recent non-nation–state ontological claims of self-identity and self-determination.[106] International legal sovereignty may now be understood to refer to the mutual status of nation–states, but that understanding does not capture the many other forms that sovereignty can take.

As Maggie Blackhawk notes, the United States relied upon international law, such as the doctrine of discovery, to claim a "monopoly on the exercise of power over Native Nations and Native lands."[107] But with regard to *how* that power is wielded, "questions [are] answered by the constitutional law of the United States and not international law."[108] Under U.S. law, a trio of early nineteenth-century cases regarding Tribes, known as the Marshall trilogy, developed a unique and consequential conception of Tribal sovereignty that in some ways borrows from the Law of Nations, and in other ways is exceptional. In *Johnson v. M'Intosh*, Tribes

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101. *Id.* at 20.

102. Davis, Biber & Kempf, *supra* note 56, at 589.

103. *Id.* at 588–89.

104. *Id.* at 593. *See also The Iron Cold*, *supra* note 39, at 652 (noting "'[p]rotection' and nationhood are not mutually exclusive.") (quoting Cherokee Nation v. Georgia, 30 U.S. 1, 55 (1831)).

105. Julie E. Cooper, *Can Jewish Ethics Speak to Sovereignty?*, 4 J. JEWISH ETHICS 109, 121 (2018) (describing the contributions of Jewish thinker Jakob Klatzkin (1882–1925) in rejecting Hobbes's "categorical distinction between a sovereign state and a disorganized 'multitude'" and instead postulating that "non-sovereign" bodies can simultaneously exist as political entities while remaining subject to external jurisdiction).

106. *See, e.g.*, Hum. Rts. Council, *Efforts to Implement the United Nations Declaration on the Rights of Indigenous Peoples: Indigenous Peoples and the Right to Self-Determination*, ¶¶ 5, 12, U.N. Doc. A/HRC/48/75 (2021) (examining the internationally recognized right of Indigenous peoples to self-determination to include a collective right to autonomy and self-government as peoples internally within a State).

107. *Federal Indian Law*, *supra* note 26, at 1819.

108. *Id.*

were held to lack legal title to their territory beyond a possessory interest and were consequently deemed to lack the authority to alienate land title to any entity other than the U.S. sovereign.[109] But Tribes were also recognized as a distinct people.[110] In *Cherokee Nation v. Georgia*, Tribes were held to lack nation–state status but instead occupy a hybrid status of "domestic dependent nation."[111] In *Worcester v. Georgia*, Tribes were held to positively retain some vestiges of sovereignty despite not being nation–states:

> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights . . . . The very term 'nation,' so generally applied to them, means 'a people distinct from others.' The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making treaties.[112]

Like in *M'Intosh* and *Cherokee Nation*, *Worcester* diminished Tribal sovereignty such that Tribes were characterized as "domestic dependent nations" over which the U.S. government had an exclusive right of plenary power. But *Worcester* also held that Tribes retain sovereignty to the exclusion of state law in their territories. The Westphalian boundaries of the protectorate sovereign's authorities in regard to Tribes within the United States had been demarcated.

The United States reasoned that the dependence of Tribes confers to the United States a plenary authority over Indian affairs.[113] The plenary power frames the United States in a guardian posture, which would come to be informed by both international norms of sovereignty and by the perception of Native inferiority. Because Native customs and traditions were perceived as under-baked communes, the United States assumed its trust status to propel Native people towards "civilization."[114] One iteration of this logic was that Tribal sovereignty would only be recognized until Native people could finally be civilized to the point they could be assimilated into the "real" sovereign.[115] For example, in 1886 in *United States v.*

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109. Johnson v. M'Intosh, 21 U.S. 543, 604–05 (1823).

110. *Id.* at 596 ("The peculiar situation of the Indians, necessarily considered, in some respects, as a dependent, and in some respects as a distinct people, occupying a country claimed by Great Britain, and yet too powerful and brave not to be dreaded as formidable enemies . . . .").

111. Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831). *See also id.* at 21 (Johnson, J., concurring) ("I cannot but think that there are strong reasons for doubting the applicability of the epithet *state*, to a people so low in the grade of organized society as our Indian tribes most generally are.").

112. Worcester v. Georgia, 31 U.S. 515, 519 (1832).

113. *Cherokee Nation*, 30 U.S. at 17.

114. *But see id.* at 23 (Johnson, J., concurring) ("It is clear that [the treaty] was intended to give them no other rights over the territory than what were needed by a race of hunters; and it is not easy to see how their advancement beyond that state of society could ever have been promoted . . . .").

115. DIPPIE, *supra* note 3, at 108 ("For the southern Negro, agriculture would define a humble role in life as a member of a permanent American peasant class; for the landed

Kagama, the Court upheld the constitutionality of the Major Crimes Act and rationalized federal intrusion into Tribal territorial sovereignty by recognizing Tribes as sovereign, but nevertheless also "communities *dependent* on the United States" that were "now weak and diminished in numbers."[116] By the turn of the twentieth century, that plenary authority deviated from the Law of Nations to include the authority to unilaterally propel Native people towards civilization, even through the abrogation of treaties without Tribal consent.[117]

The contours of Tribal protectorate, or Westphalian, sovereignty remain seemingly in flux. Some aspects of Tribal sovereignty have been demarcated. For example, state courts have been held to lack adjudicatory jurisdiction over civil claims against Indian defendants for on-reservation conduct.[118] Yet even in 2023, in *Lac du Flambeau v. Coughlin*, the Court declined to specify whether Tribes were "foreign" or "domestic" governments.[119] In upending its Tribal sovereign immunity caselaw by holding that the Bankruptcy Code abrogates Tribal sovereign immunity, the Court reasoned that Tribes are "governmental units."[120] The Court read the Bankruptcy Code's reference to a "foreign or domestic government" as polar ends of a sovereignty spectrum that is sufficiently comprehensive to encompass the unique sovereign character of a Tribal Nation.[121] In doing so, the Court was broadly willing to restrict Tribal sovereignty but did so by acknowledging that Tribes are governments. The Court even declined to define Tribes as "purely 'domestic' governments,"[122] instead stating that the Constitution "appear[s] to 'place Indian [T]ribes in an intermediate category between foreign and domestic states'" and that

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Indian, it would facilitate eventual mergence with white society."). *But see M'Intosh*, 21 U.S. at 589–91 (arguing that while the "general rule" required that the conquered be "incorporated with the victorious nation," the Indian Tribes are different "with whom it was impossible to mix" and so a new rule of discovery in which the "Indian inhabitants are to be considered merely as occupants" is necessary).

116. United States v. Kagama, 118 U.S. 375, 381–82, 384 (1886) ("[The Indians] were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the state within whose limits they resided."). *Foreword*, *supra* note 20, at 86 ("This vision of national power, coupled with the growing power of state governments, meant that the power to civilize allowed the United States to govern Indian Country to the ground by the late nineteenth century.").

117. Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903).

118. Williams v. Lee, 358 U.S. 217, 233 (1959).

119. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382, 397 (2023); *id.* at 402 (Gorsuch, J., dissenting) (alterations in original) (citing *In re* Greektown Holdings, LLC, 917 F.3d 451, 460 (6th Cir. 2019) ("Until today, there was 'not one example in all of history where [this] Court ha[d] found that Congress intended to abrogate tribal sovereign immunity *without* expressly mentioning Indian tribes somewhere in the statute.'").

120. *Coughlin*, 599 U.S. at 398–99.

121. *Id.* at 389–90.

122. *Id.* at 393 n.4.

"tribes occupy a 'hybrid position' between 'foreign and domestic states.'"[123] The *Coughlin* decision was not unanimous, signaling the continuing disparate understandings of Tribal sovereignty within the Court.[124]

In light of the Marshall Trilogy and the immense progeny that developed in its wake and formed the body of federal Indian law, Tribes retain only some of the core features of international sovereignty. Tribes retain significant political independence. Tribes are encouraged to self-govern, including through defining their own membership,[125] developing their own internal governments and judiciaries, developing and enforcing their own laws, and employing sovereign immunity against legal actions.[126] But Congress has plenary authority to dictate how Tribes govern and to what extent their sovereign immunity remains intact.[127] Tribes have territorial integrity, recognized in numerous treaties, congressional acts, and executive orders.[128] States are not authorized to encroach upon or shift Tribal borders. But Congress has plenary power to unilaterally diminish or even extinguish Tribal lands, regardless of Tribal consent. Moreover, U.S. courts, even in the absence of an explicit Congressional act, have found Tribal lands to have diminished.[129] Tribes have some control and jurisdiction within their territory, but that jurisdiction is a far cry from exclusive. Tribes have recognized authority to exercise criminal and civil jurisdiction, including over non-Indians in certain circumstances. But over the last 45 years, that authority has increasingly been under attack by the U.S. Supreme Court.[130]

Because a major arc of federal Indian law has been the simultaneous recognition of Tribal sovereignty and of Congress's plenary power to diminish that sovereignty, the "S" in "sovereignty" as applied to Tribes diverges from the sovereignty envisioned in the international sphere. Nevertheless, the "s" word

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123. *Id.* at 407 (second alteration in original) (quoting Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657, 670 (2013)); *Coughlin*, 599 U.S. at 396 n.7.

124. Justice Gorsuch was the lone dissenter, critiquing the Court's disregard for the Indian law canons and the Court's reading of "foreign or domestic government" as a spectrum as opposed to a binary, with which tribes are neither and should thus be held to operate outside the Bankruptcy Code. *Coughlin*, 599 U.S. at 416 (Gorsuch, J., dissenting). Meanwhile, in his concurrence, Justice Thomas questioned the very existence of Tribal sovereign immunity, presuming that no Tribal sovereignty survived submission to the United States. *Id.* at 399 (Thomas, J., concurring).

125. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978). However, U.S. Supreme Court dicta has increasingly expressed doubt about the role of Tribal membership tied to blood quantum or other forms of ancestry, which they characterize as a proxy for race, while simultaneously critiquing some Tribal membership criteria as too broad to capture "real Indians." *See, e.g.*, Adoptive Couple v. Baby Girl, 570 U.S. 637, 641 (2013) ("This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee.").

126. *See* United States v. Mitchell, 463 U.S. 206, 227 (1983).

127. *See Coughlin*, 599 U.S. at 388.

128. McGirt v. Oklahoma, 140 S. Ct. 2452, 2460–62 (2020).

129. *See* Oneida Cnty., N.Y. v. Oneida Indian Nation of New York State, 470 U.S. 226, 239 (1985).

130. *See infra* Part III.

persists. Tribal sovereignty, despite robust efforts to minimize it, is an integral component of American federalism and increasingly, American sovereignty. But there is an ugly underbelly of Indian law jurisprudence that perceives Tribal sovereignty as even more precarious than just existing subject to the whim of Congress's plenary power.[131] Informed in part by a sense that Tribal protectorate status is due to Tribal inferiority, coupled with a sense that that inferiority is enhanced by affiliation with American "civilization," the vanishing Tribe trope is reappearing as a threat to sovereignty that is untethered from either the norms of international sovereignty or even federal Indian law. In Part II, I introduce the rise of the implicit divestiture doctrine and the Court's increasing willingness to manipulate the contours of Tribal sovereignty out of a sense that Tribes do not belong and are vanishing.

II. IMPLICIT VANISHING

A. Vanishing the Citizen

The vanishing Tribe trope appears in some of the earliest federal jurisprudence.[132] That Tribes still exist is in some ways attributable to the United States' original antipathy towards Tribes. In claiming authority over lands by right of conquest, international law generally required that the inhabitants of conquered lands be integrated into the polity of the conquerors as citizens.[133] Yet neither Americans nor Tribal Nations seemed to desire such integration.[134] Separateness, including separate sovereigns, was the long-negotiated strategy. *Worcester* recognized that Native people who remained under the authority of the Tribe were citizens of those Tribes, rather than of the United States.[135] The separateness policy largely played out in pushing Tribes further and further west and then onto smaller and smaller reservations or reserved areas of land held in trust for the Tribes' benefit.

Eventually, policies shifted from relocating Tribes to emptying the Tribes of their members. In *Elk v. Wilkins*, the Court concluded that because Indians owed primary allegiance to their respective Tribes, they had to be naturalized to become United States citizens.[136] Some of the earliest treaties included provisions providing

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131. *See generally* WILLIAMS, JR., LIKE A LOADED WEAPON, *supra* note 15 (calling for a racial reckoning with Indian law cases and a repudiation of the presumed inferiority of Native peoples the cases invoke).

132. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. 1, 23–24 (1831) (Johnson, J., concurring) ("[I]t was wise to prepare them for what was probably then contemplated . . . to incorporate them in time into our respective governments . . . .").

133. Earl M. Maltz, *The Fourteenth Amendment and Native American Citizenship*, 17 CONST. COMMENT. 555, 556 (2000) (citing 3 E. DE VATTEL, THE LAW OF NATIONS, OR THE PRINCIPLES OF NATURAL LAW: APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS § 201 (Oceana Publications Inc. 1964) (Charles G. Fenwick trans., 1758)).

134. Maltz, *supra* note 133, at 556–57.

135. Worcester v. Georgia, 31 U.S. 515, 530 (1832) ("[T]he United States of America acknowledge[s] the said Cherokee nation to be a sovereign nation . . . that the citizens of the United States shall not enter the aforesaid territory.").

136. Elk v. Wilkins, 112 U.S. 94, 102 (1884).

for naturalization.[137] Removal acts similarly provided opportunities for naturalization.[138] As a policy of separateness gave way to a policy of forced assimilation, naturalization increasingly became tied to a willingness to abandon the Tribe. The General Allotment Act of 1887 conferred citizenship on those to whom allotments were made and on any Indian "who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life."[139]

Abandonment of the Tribe did not necessarily need to be voluntary. Indian status used to be exclusively defined by political affiliation.[140] But blood quantum quickly became a common federal qualifier for determining "Indian" status. Paul Spruhan traces the history of blood quantum, and how it contributed to muddling racial and political status.[141] Where treaty-making and diplomacy had established Tribes' political status, by the 1870s the federal government had emphasized its guardianship authority.[142] Blood quantum only became important as a method of defining Indian and Tribal membership in the early twentieth century.[143] In the early twentieth century, the federal government conflated the concept of blood quantum with the concept of Indians as "incompetent" wards.[144] As Indians gained legal competence, or U.S. citizenship, they lost their Indianness. For example, federal agents perceived the "mixing" of Indians with non-Indian blood to suggest "mixed bloods" were no longer Indian, and thus no longer members of a Tribe.[145] Their Indianness was vanishing.

The Department of the Interior would ultimately enter a series of conflicting decisions regarding Indianness, some enforcing a racial test while others relied on Tribal definitions of citizenship.[146] These conflicting policies mirrored the seemingly haphazard views of Native people and their role within the American polity. Native people were racialized and excluded from the benefits of citizenship. But their exceptional political status incentivized providing access to U.S.

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137. Willard Hughes Rollings, *Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West, 1830-1965*, 5 NEV. L.J. 126, 130 (2004).

138. *Id. See also* Treaty with the Choctaw, Choctaw-U.S., art. XIV, Sept. 27, 1830, 7 Stat. 333 (providing an opportunity for naturalization to interested members of the Choctaw Tribe).

139. General Allotment Act of 1887 § 6, Pub. L. No. 49-105, 24 Stat. 388, 390; INST. FOR GOV'T RSCH., THE MERIAM REPORT: THE PROBLEM OF INDIAN ADMINISTRATION 753 (1928) [hereinafter THE MERIAM REPORT].

140. Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 9–19 (2006).

141. *See id.*

142. *Id.* at 49.

143. *Id.* at 4.

144. *Id.* at 49.

145. *See* Black Tomahawk v. Waldron, 13 Pub. Lands Dec. 683, 683 (1891) (concluding that Jane Waldron, a Sioux mixed-blood, was a citizen of the United States through her paternal white ancestry and therefore not an Indian for purposes of eligibility for receiving a land allotment).

146. Spruhan, *supra* note 140, at 29–30.

citizenship, in part to facilitate the deletion of Tribes and their exceptional sovereignty.

In 1924, the Indian Citizenship Act halted the vanishing Tribal citizen. [147] The Indian Citizenship Act formally embraced the prospect of "dual citizenship" by statutorily extended U.S. citizenship to all Native Americans while preserving the Tribe.[148] In *United States v. Nice*, the U.S. Supreme Court declared that U.S. citizenship is compatible with both Tribal citizenship and the continued federal trust responsibility.[149] The Meriam Report of 1928 provided an exhaustive legal justification for Native American dual citizenship,[150] though the Meriam Report's primary concern was ensuring the federal government could preserve its trust responsibility over Native property "like that of a citizen child."[151]

The 1924 Indian Citizenship Act, especially coupled with the subsequently enacted Indian Reorganization Act of 1934,[152] could have secured the contours of Tribes' sovereignty within the United States. Native people could now enjoy the benefits of U.S. citizenship[153] without sacrificing their citizenship to the Tribe. Moreover, the 1934 Indian Reorganization Act promoted Tribal self-determination and reorganization as a government.[154] Because Tribal members were no longer vanishing, at least by means of abandoning their citizenship, the Tribe's members and the Tribal Nation as a government were also no longer vanishing. It could have been that Tribal Westphalian sovereignty preserved Tribes as protectorates subject to the political whims of Congress but otherwise with security in their territorial integrity and political unity.

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147. Act of June 2, 1924, Pub. L. No. 68-175, 43 Stat. 253, ("[A]ll noncitizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.").

148. *Id.*

149. United States v. Nice, 241 U.S. 591, 598 (1916) ("Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians, or placing them beyond the reach of congressional regulations adopted for their protection.").

150. THE MERIAM REPORT, *supra* note 139, at 754.

151. *Id.*

152. Indian Reorganization Act of 1934, Pub. L. No. 73-383, 48 Stat. 984.

153. Though some benefits would take years, and even decades, to fully access. *See, e.g.*, Porter v. Hall, 271 P. 411, 417 (Ariz. 1928), *overruled in part by* Harrison v. Laveen, 196 P.2d 456 (Ariz. 1948) (Indians, despite being U.S. citizens could not register because they were wards of the federal government); Trujillo v. Garley, Civ. No. 1353 (D.N.M. Aug. 11, 1948) (finally rejecting New Mexico's law argument that Indians could not vote); Allen v. Merrell, 305 P.2d 490 (1956), *vacated as moot*, 353 U.S. 932 (1957) (upholding Utah's prohibition on Indians' right to vote but vacating following legislative action); 1957 Utah Laws 89–90.

154. Indian Reorganization Act of 1934, Pub. L. No. 73-383, 48 Stat. 984 (codified at 25 U.S.C. § 461 *et seq.*).

But the seeds of the vanishing Tribe trope seem entrenched. For example, blood quantum never went away. It has become deep-rooted in both federal[155] and Tribal definitions of membership,[156] even while it exists alongside political definitions of Tribes.[157] Justice Alito used the first sentence of the Court's opinion regarding the application of the Indian Child Welfare Act to a Cherokee Nation citizen to describe her as "1.2% (3/256) Cherokee."[158] Her blood quantum was not legally relevant to whether the state court was obligated to comply with the provisions of the Indian Child Welfare Act. And yet to the Court, it was. Court perceptions of "Indianness" are tethered to legal tolerance for Tribal sovereignty.[159] Do Tribal lands retain their Indian character?[160] Are exercises of Tribal sovereignty sufficiently related to Tribal activities?[161] Wyoming's sovereignty will not diminish if it adopts a tech culture in place of a cowboy culture. But Tribal sovereignty can seemingly narrow to the extent Native people depart from a sphere of "Indianness." The following two sections describe the rise of the implicit divestiture doctrine as a further departure from the Indian law canons and a deeper embrace of the notion that Tribes are, or at least should be, vanishing.

B. **Oliphant** *and Infringements on Tribal Criminal Jurisdiction*

The U.S. Supreme Court has developed a distinct theory and practice of interpretation in federal Indian law known as the Indian canons of construction.[162] Treaties, agreements, statutes, and executive orders regarding Indian affairs are to be liberally construed in favor of Native people.[163] Tribal sovereignty is preserved

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155. U.S. DEP'T OF JUST., CRIMINAL RESOURCE MANUAL, § 686 (2020) ("To be considered an Indian, one generally has to have both a significant degree of blood and sufficient connection to his tribe to be regarded [by the tribe or the government] as one of its members for criminal jurisdiction purposes.") (alteration in original).

156. *See, e.g.*, MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW, ch.4 (2d ed. 2020).

157. Spruhan, *supra* note 140, at 47.

158. Adoptive Couple v. Baby Girl, 570 U.S. 637, 641 (2013).

159. Consider *State v. Campbell*, 53 Minn. 354, 356 (1893), in which the Supreme Court of Minnesota held that the State lacked criminal jurisdiction over an Indian man for the crime of adultery committed on the White Earth Reservation, "as long as [Indians] retain their tribal relations," but the State did have jurisdiction over the mixed blood woman, because not only was her father white, but she otherwise lived off of Tribal lands.

160. *See* City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 202–03 (2005) ("Given the longstanding, distinctly non-Indian character of the area . . . we hold that the Tribe cannot unilaterally revive its ancient sovereignty . . . .").

161. *See infra* Section III.C.

162. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).

163. *See, e.g.*, Worcester v. Georgia, 31 U.S. 515, 551–57 (1832) (interpreting the Treaty of Hopewell in light of congressional policy to "treat [tribes] as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate"); Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 846 (1982) (alteration in original) (omission in original) ("We have consistently admonished that federal statutes and regulations relating to tribes and tribal activities must be 'construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence.'"); Herrera v. Wyoming, 139 S. Ct. 1686, 1699 (2019) ("Indian treaties must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians.") (internal quotations omitted).

unless Congress's intent to abrogate that sovereignty is clear and unambiguous.[164] Understood as a mechanism to foster the sovereign-to-sovereign structural features between the United States and Tribes, the Indian law canons do not turn on judicial solicitude for helpless minorities, but rather on constitutional structural values.[165] Of course, the Court has frequently avoided invoking the Indian law canons, often by failing to find an ambiguity that requires deferential interpretation.[166]

In its implicit divestiture line of cases, the Court similarly avoided the Indian law canons by avoiding the need to interpret any federal statute, executive order, contract, or other relevant text. Instead, the Court has found *implied* divestiture of Tribal sovereignty. In *Oliphant v. Suquamish Indian Tribe*, the Court held that Tribes lack inherent sovereign authority to criminally prosecute non-Indians. The Court acknowledged dozens of texts,[167] including the 1855 Treaty of Point Elliott,[168] but concluded that none of the texts were dispositive and instead found the texts collectively evidenced a federal assumption that Tribes no longer retain the power to prosecute non-Indians.[169] The Court flipped the Indian law canons. Rather than assume Tribal sovereign powers are retained unless specifically abrogated by Congress, the Court assumed that Tribal powers, simply by virtue of their quasi-sovereign status, had vanished over time.[170]

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164. *See, e.g.*, Nebraska v. Parker, 577 U.S. 481, 488 (2016) (congressional intent to diminish the boundaries of an Indian reservation "must be clear"); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999) ("Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so."); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59–60 (1978) (explaining federal statutes will not be interpreted to "interfere[] with [the] tribal autonomy and self-government . . . in the absence of clear indications of legislative intent"); *Ex parte* Crow Dog, 109 U.S. 556, 572 (1883) ("To give to the clauses in the treaty of 1868 and the agreement of 1877 effect, so as to uphold the jurisdiction exercised in this case, would be to reverse in this instance the general policy of the government towards the Indians, as declared in many statutes and treaties, and recognized in many decisions of this court, from the beginning to the present time. To justify such a departure, in such a case, requires a clear expression of the intention of congress, and that we have not been able to find.").

165. Frickey, *supra* note 41, at 10–11.

166. Alex Tallchief Skibine, *Textualism and the Indian Canons of Statutory Construction*, 55 U. MICH. J. L. REFORM 267, 270 (2022); Matthew L.M. Fletcher, *Textualism's Gaze*, 25 MICH. J. RACE & L. 111 (2020) [hereinafter *Textualism's Gaze*].

167. *Textualism's Gaze*, *supra* note 166, at 123–24 (noting that the Trade and Intercourse Act of 1790, which requires that Tribes turn over American citizens who entered into Indian country without federal permission, did not explicitly divest Tribes of their own jurisdiction, but perhaps could be read to *implicitly* divest Tribes of this jurisdiction).

168. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978).

169. *Id.* at 197 (reasoning in part that Native people were historically lawless, and so they likely, therefore, never possessed the sovereignty to prosecute non-Indians because they never prosecuted anyone).

170. *Id.* at 208. *See also* Ann E. Tweedy, *Unjustifiable Expectations: Laying to Rest the Ghosts of Allotment-Era Settlers*, 36 SEATTLE U. L. REV. 129, 137–38, 144 (2012) (arguing that when the Court has divested Tribes of territorial authority, it has been guided by the assumptions of non-Native people who settled on reservations pursuant to the allotment policy).

Which powers? In *Oliphant*, the Court found that Tribes had lost the power to criminally prosecute non-Indians because, in part, the United States had an overriding interest in protecting the personal liberty of U.S. citizens that weighed against the interests of Tribes.[171] The Court did not point to any specific due process concerns. Rather, the Court stated it "would have been obvious a century ago" that Tribes gave up this power when they submitted to the United States because most Tribes lacked a Tribal court.[172] This lack of prosecutorial authority "should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents."[173]

In *Duro v. Reina*, the Court extended *Oliphant* to hold that Tribes not only lacked criminal jurisdiction over non-Indians but also over nonmember Indians.[174] Where *Oliphant* mentioned U.S. citizenship in passing, *Duro* focused heavily on citizenship as the limiting authority. "Criminal trial and punishment is so serious an intrusion on personal liberty that its exercise over non-Indian citizens was a power *necessarily surrendered* by the tribes . . . ."[175] The Court noted this limitation was in part because Tribal courts could not be trusted.[176] Instead, the "retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members."[177] While the Court expressed doubt as to whether Congress even had the authority to recognize Tribal criminal jurisdiction if Tribes do not provide constitutional protections,[178] Congress did exactly that with the *Duro*-fix, subsequently recognized by the Court as constitutionally valid.[179]

C. Montana *and Inferring the Loss of Tribal Character*

In *Montana v. United States*,[180] the Court extended the general implicit divestiture rule established in *Oliphant* to Tribal civil regulatory jurisdiction.[181]

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171. *Oliphant*, 435 U.S. at 210.
172. *Id.* (citing H.R. REP. NO. 23-474, at 18 (1834)).
173. *Oliphant*, 435 U.S. at 210.
174. Duro v. Reina, 495 U.S. 676, 685 (1990).
175. *Id.* at 693 (emphasis added).
176. *Id.* ("[T]hey are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often 'subordinate to the political branches of tribal governments,' and their legal methods may depend on 'unspoken practices and norms.'").
177. *Id.*
178. *Id.*
179. United States v. Lara, 541 U.S. 193, 197–98 (2004); Defense Appropriations Act for FY 91, Pub. L. No. 101-511 § 8077(b)–(d) (1990) (amending 25 U.S.C. § 1301(2)).
180. Montana v. United States, 450 U.S. 544 (1981).
181. *Id.* at 565–66. Unlike *Oliphant*, which establishes a bright-line rule that Tribes lack any inherent criminal jurisdiction over non-Indians, *Montana* establishes a more general rule that Tribes lack civil regulatory jurisdiction over non-Indians that can be overcome with two exceptions: (1) A Tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the Tribe or its members though commercial dealing, contracts, leases, or other arrangements; and (2) a Tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, economic security, or health or welfare of the Tribe. Matthew L.M. Fletcher

Montana concerned the Crow Tribe's attempt to regulate nonmember hunting and fishing on lands owned by non-Indians located within the reservation.[182] Rather than presume Tribes retain all sovereign powers unless specifically abrogated by Congress, the Court, like in *Oliphant*, flipped the presumption and then further narrowed inherent Tribal powers to only those needed to "determine tribal membership, to regulate domestic relations among members . . . to prescribe rules of inheritance for members . . . [and to do] what is necessary to protect tribal self-government"[183]: powers seemingly tied to "Indianness." The Court reasoned that Tribes' sovereign powers are diminished because their status as diminished sovereigns has implicitly divested them of authority, but it included no reasoning as to why Tribal authority is diminished in this particular way.[184] Interestingly, the Court did not limit its reasoning to implicit divestiture. The Court pointed to allotment and the equal footing doctrine—two justifications it relied on in *Castro-Huerta*.

Allotment—one of the most devastating federal policies you've never heard of. Scholar Nell Jessup Newton described the time between 1877 and 1930 as the "plenary power era."[185] Plenary power over Indian affairs derives from powers enumerated in the U.S. Constitution and the general principles of the federal trust responsibility,[186] but the federal government was enacting statutes that could neither be viewed as effectuating treaty promises nor as regulating trade. So, the Court was forced to develop new rationales to justify federal actions concerning Natives. By the 1870s, the federal government had emphasized its guardianship authority over Tribes and begun to deemphasize the concept of Indians as citizens of autonomous Tribes. The General Allotment Act of 1887, along with numerous other legislative iterations,[187] required the surrender of various reservation lands and other Tribally owned common or trust estates to be subdivided.[188] Those subdivided interests would be held in trust for a limited number of years and "allotted" to individuals. Motivations varied, but generally both land speculators and "friends of the Indians" theorized allotment would be beneficial to Indians as a mechanism to achieve civilization through assimilation.[189] After a number of years, usually 25, the allotted lands became alienable. The hope was that Indians would become private property-

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speculates the *Montana* exceptions exist likely because there are several precedents affirming Tribal civil regulatory and taxing powers over nonmembers that foreclosed a more categorical divesture. *Textualism's Gaze*, *supra* note 166, at 124.

182. *Montana*, 450 U.S. at 547.

183. *Id.* at 564.

184. *Id.* at 565.

185. Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 207 (1984).

186. Haaland v. Brackeen, 599 U.S. 255, 273 (2023).

187. *See, e.g.*, Act of Jan. 14, 1889, ch. 24, 25 Stat. 642 (allotting land to the Minnesota Chippewa); Act of Mar. 3, 1885, ch. 319, 23 Stat. 340 (allotting land to the Umatilla Reservation); Act of Aug. 7, 1882, ch. 434, 22 Stat. 341 (allotting land to the Omaha Reservation).

188. General Allotment Act of 1887, Pub. L. No. 49-105, 24 Stat. 388.

189. COHEN'S HANDBOOK, *supra* note 59, at § 1.04, at 72.

owning farmers.[190] The result was that reservations became checkerboards of varying Indian and non-Indian owned parcels; the fractioned heirships decreased land values, and significant "surplus" lands were sold to white settlers.[191] In 1887, Tribal land totaled 138 million acres. Fewer than 50 years later, when the allotment policy was abandoned, only 48 million acres remained.[192]

The 1928 Merriam Report identified the policy of allotment as a general failure.[193] Allotment was formally repudiated in the 1934 Indian Reorganization Act.[194] But the damage of fractionation had been done, and unfortunately more damage was to come. The practice of assigning new allotments was halted in 1934, but all former allotments remained valid. Worse, the policy of allotment, including the goal of assimilating Indians to have them in turn abandon their Tribes, would follow federal Indian law to disastrous ends.

The *Montana* Court held that the General Allotment Act of 1887 and the Crow Allotment Act of 1920 limited Tribal authority over lands held in fee by non-Indians because the Tribe no longer exercised "absolute and undisturbed use and occupation."[195] In framing the case, the Court observed that because of allotment, approximately 28% of Tribal lands were held in fee by non-Indians—a fact not directly relevant to the Court's reasoning but used to suggest that a shift in character could further shift the jurisdiction of the land.[196] Generating citations that reappeared in *Castro-Huerta*, though buried in a footnote, the Court reminded us that the purpose of allotment "was the eventual assimilation of the Indian population" and the "gradual extinction of Indian reservations and Indian titles."[197] Allotment was consistently "equated with the dissolution of tribal affairs and jurisdiction."[198] Therefore, while the policy to perpetuate allotment was abandoned, the Court extended the dissolution logic to surviving allotments, i.e., Tribes no longer enjoyed regulatory authority on allotted land now owned by non-Indians.

Montana tied Tribal sovereignty to "Tribal interests," injecting a dangerous condition into all future expressions of Tribal sovereignty—does it look Tribal? Or

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190. Kristen A. Carpenter & Angela R. Riley, *Privatizing the Reservation?*, 71 STAN. L. REV. 791, 815 (2019) (recounting historical justifications of allotment and countering contemporary attempts to revitalize allotment as a means to promote economic growth).

191. COHEN'S HANDBOOK, *supra* note 59, at § 1.04, at 73.

192. *Id.*

193. THE MERIAM REPORT, *supra* note 139, at 7, 87 ("It also seems as if the government assumed that some magic in individual ownership of property would in itself prove an educational civilizing factor . . . [It would be a] disastrous attempt to force individual Indians or groups of Indians to be what they do not want to be, to break their pride in themselves and their Indian race, or to deprive them of their Indian culture . . . .").

194. Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*

195. Montana v. United States, 450 U.S. 544, 558–59 (1981)*; see also* Fort Laramie Treaty of 1868, 15 Stat. 649; General Allotment Act of 1887, 24 Stat. 338 (as amended 25 U.S.C. § 331 *et seq.*); Crow Allotment Act of 1920, 41 Stat. 751.

196. *Montana,* 450 U.S. at 548.

197. *Id.* at 559 n.9 (citing Organized Vill. of Kake v. Egan, 369 U.S. 60, 72 (1962); Draper v. United States, 164 U.S. 240, 246 (1896)).

198. *Montana*, 450 U.S. at 559 n.9.

have the Tribal interests vanished? In *Brendale v. Yakima*,[199] a fractured Supreme Court supported state zoning authority over nonmember-owned fee land, in part because the purpose of allotment policy was to destroy Tribal government.[200] In the "open area," used for agricultural, dairy, and residential purposes, the Court found that allotment had destroyed the Tribe's power "to define the essential character of that area,"[201] while the County had a substantial interest in protecting "'the county's valuable agricultural land' [that] lacks 'a unique religious or spiritual significance to the members of the Yakima Nation.'"[202] While the Tribe may have once possessed regulatory authority, it vanished when the area "lost its character as an exclusive tribal resource."[203]

Subsequent implicit divestiture cases have extrapolated upon these rationales.[204] Notably, in *Nevada v. Hicks*,[205] the Court limited Tribal adjudicatory jurisdiction for a civil claim that arose on Tribal trust land. In language mirrored in *Castro-Huerta*, the Court stated that "it is now clear, 'an Indian reservation is considered part of the territory of the State.'"[206] Where Tribes once had territorial integrity under *Worcester*, the states may have regulatory authority on Tribal lands, if balanced against Tribal and federal interests.[207] The state's interest in execution of process is "considerable."[208] But *Hicks* is not about state authority. It concerns whether the Tribe has authority to hear a civil claim against state officers in executing a search warrant on Tribal lands. The Court held that considerable state

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199. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989).

200. *Id.* at 409.

201. *Id.* at 441.

202. *Id.* at 446 (citing Yakima Indian Nation v. Whiteside, 617 F. Supp. 750, 755 (E.D. Wash. 1985)).

203. *Brendale*, 492 U.S. at 447.

204. *See, e.g.*, Strate v. A-1 Contractors, 520 U.S. 438, 456 (1997) (holding tribal courts lack civil adjudicatory authority over non-members on state highways because the easement destroyed the Tribe's "right of absolute and exclusive use and occupation" (quoting South Dakota v. Bourland, 508 U.S. 679, 689 (1993))); Atkinson Trading Co. v. Shirley, 532 U.S. 645, 650 n.1 (2001) (holding the Navajo Nation's imposition of a hotel occupancy tax on nonmembers on non-Indian fee land was invalid because Congress equated alienation subsequent to allotment "with the dissolution of tribal affairs and jurisdiction." (quoting *Montana*, 450 U.S. at 559 n.9)); Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 328–29 (2008) (holding tribes lack adjudicatory jurisdiction over a discrimination claim against a Native family in the sale of fee land by a non-Indian bank because once the land is converted to fee simple, the Tribe loses the "right of absolute and exclusive use and occupation of the conveyed lands" (quoting *South Dakota*, 508 U.S. at 689)).

205. Nevada v. Hicks, 533 U.S. 353, 374 (2001) (holding tribal courts lacked civil adjudicatory authority over civil claims against state officials who entered tribal land to execute a search warrant against a tribal member).

206. *Id.* at 361–62.

207. *Id.* at 362 (citing Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 156 (1980), and White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980)).

208. *Hicks*, 533 U.S. at 364.

interests have the effect of decimating Tribal authority because such authority is "not essential to tribal self-government or internal relations."[209]

III. RETURN OF THE EMPIRE: *CASTRO-HUERTA*

Criminal jurisdiction in Indian country has long been a shared authority amongst sovereigns. Since *Oliphant* and *Duro*, criminal jurisdiction in Indian country has been relatively stable,[210] albeit complex,[211] inefficient,[212] and the proximate cause for much of what is now understood to be the "missing and murdered Indigenous Persons crisis."[213] Tribal Nations exercise inherent sovereign authority to prosecute Indians but are restricted from prosecuting non-Indians for most offenses. Tribal Nations are also restricted from sentencing any offender to incarceration beyond a year (or in some instances up to three years) and are required to operate their criminal justice systems in ways that mirror American courts.[214] The federal government exercises concurrent jurisdiction over interracial crimes and over Indians who commit major offenses.[215] The state exercises exclusive jurisdiction over non-Indian perpetrators who victimize other non-Indians[216] and, pursuant to various statutory authorities, may exercise concurrent jurisdiction over interracial crimes and over Indian offenders regardless of the offense in lieu of the

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209. *Id.*

210. *See* Riley, *supra* note 48, at 1567 (noting that Indian country criminal jurisdiction is largely divided between tribes and the federal government and has been so for decades); Addie C. Rolnick, *Recentering Tribal Criminal Jurisdiction*, 63 UCLA L. REV. 1638, 1646 (2016) (describing Indian country criminal jurisdiction as being "marked by several clear rules").

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

212. INDIAN L. & ORD. COMM'N, *infra* note 218, at 3.

213. *See* Exec. Order No. 14,053, 86 Fed. Reg. 64,337 (Nov. 15, 2021); Exec. Order 13,898, 84 Fed. Reg. 66,059 (Nov. 26, 2019); Center for Women's Global Leadership's Journalism Initiative on Gender-Based Violence & National Indigenous Women's Resource Center, *War on Indigenous Women: A Short Guide for Journalists Reporting on MMIWG*, NAT'L INDIGENOUS WOMEN'S RES. CTR., at 1 (Apr. 28, 2022), https://www.niwrc.org/resources/journalist-resources/war-indigenous-women-short-guide-journalists-reporting-mmiwg [https://perma.cc/VZ3K-BBCM] (identifying and defining the crisis of missing and murdered Indigenous women and girls part of a broader global crisis and part of the problem of colonization and its lasting impacts, including, notably, the lack of recognized Tribal sovereign authority to prosecute crimes committed by non-Indians).

214. 25 U.S.C. §§ 1302–1304 (statutorily extending constitutional, due-process-like restrictions on Tribal courts; limiting Tribal sentencing authority to one-to-three years; and recognizing Tribal jurisdiction over non-Indians for certain enumerated offenses if Tribes satisfy certain criteria)*; see also* Lauren van Schilfgaarde, *Restorative Justice as Regenerative Tribal Jurisdiction*, 112 CAL. L. REV. 103, 110–12 (2024) (describing the ways in which Tribal justice systems have been pressured to assimilate to the Anglo-adversarial model).

215. General Crimes Act of 1817, 18 U.S.C. § 1152; Major Crimes Act of 1885, 18 U.S.C. § 1153.

216. *See* United States v. McBratney, 104 U.S. 621, 624 (1881); COHEN'S HANDBOOK, *supra* note 59, § 9.03, at 763.

federal government.[217] Critically, this layered approach to criminal jurisdiction means that Tribes are divested not only of meaningful authority to define and operate the criminal justice system in operation within their territory, including prosecution priorities, but also of meaningful authority to define criminality in their territory.[218]

At the time *Hicks* was issued, at least one scholar agreed that *Worcester* had fallen as the paradigm of Tribal sovereignty.[219] But rather than usher in a new era of Tribal decline, *Hicks* has been mostly treated as an outlier. Congress has been notoriously silent in response to *Montana*, but when it has acted, it has been to provide partial *Oliphant*-fixes.[220] Then came *Castro-Huerta*.

In *Oklahoma v. Castro-Huerta*, the U.S. Supreme Court held that the federal government and the state have concurrent jurisdiction to prosecute non-Indians for crimes committed against Indians in Indian country.[221] *Castro-Huerta* was brought to the Court as part of a barrage of petitions submitted by Oklahoma in response to the holding in *McGirt v. Oklahoma*.[222] In *McGirt*, the U.S. Supreme Court held that the boundaries of the Muscogee (Creek) Nation's reservation, as defined in its 1866 treaty, remained intact.[223] While the holding meant the de jure status of the reservation had never been altered, the holding had the de facto effect

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217. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588*; see also, e.g.*, Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, § 6, 94 Stat. 1785, 1793 (claiming state civil and criminal jurisdiction over Tribes other than Passamaquoddy and Penobscot); Mohegan Nation of Connecticut Land Claims Settlement Act of 1994, Pub. L. No. 103-377, § 6, 108 Stat. 3501, 3505 (claiming state criminal jurisdiction); Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, Pub. L. No. 100-95, § 9, 101 Stat. 704, 709–10 (claiming state and local civil and criminal jurisdiction).

218. Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 784 (2006); INDIAN L. & ORD. COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES 3 (2013) [hereinafter ROADMAP], https://www.aisc.ucla.edu/iloc/report/files/A_Roadmap_For_Making_Native_America_Safer-Full.pdf [https://perma.cc/N6YG-JFYU].

219. L. Scott Gould, *Tough Love for Tribes: Rethinking Sovereignty After* Atkinson *and* Hicks, 37 NEW ENG. L. REV. 669, 692 (2003) ("[D]octrines of inherent sovereignty and congressional trust responsibility . . . have failed.").

220. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120–23; Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, div. W, § 804, 136 Stat. 840, 898–904.

221. Oklahoma v. Castro-Huerta, 597 U.S. 629, 632 (2022).

222. McGirt v. Oklahoma, 140 S. Ct. 2452 (2020); ROBERT J. MILLER & ROBBIE ETHRIDGE, A PROMISE KEPT: THE MUSCOGEE (CREEK) NATION AND *MCGIRT V. OKLAHOMA* 195 (2023).

223. *McGirt*, 140 S. Ct. at 2459–60. Note, the *Castro-Huerta* Court characterized *McGirt* as holding the Muscogee (Creek) Nation "had never *properly* [been] disestablished," suggesting the Court now regretted this decision and implying the reservation *should* be disestablished. *Castro-Huerta*, 597 U.S. at 633 (emphasis added).

of restoring reservation status for at least six tribes in Oklahoma that were similarly established by treaties.[224] The State of Oklahoma was dumbfounded.[225]

Notably, in cases concerning treaties between Tribes and the U.S. government ratified prior to 1871 (that have not been explicitly abrogated by Congress), courts have afforded the treaties robust jurisprudential authority, frequently upholding treaty provisions as valid.[226] *McGirt* is arguably such a case. Like prior reservation boundary cases, *McGirt* merely upheld the treaty-interpretation norm that reservation boundaries remain guaranteed unless and until Congress expressly states otherwise.[227] It is consequently an unremarkable restatement of doctrine. At least some judges, however, have expressed discomfort with the durability of treaty provisions.[228]

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224. Sara E. Hill, *Restoring Oklahoma: Justice and the Rule of Law Post-*McGirt, 57 TULSA L. REV. 553, 558 (2022)*; see, e.g.*, Hogner v. State, 500 P.3d 629, 635 (Okla. Crim. App. 2021) (finding "Congress did establish a Cherokee Reservation and that no evidence was presented showing that Congress explicitly erased or disestablished the boundaries of the Cherokee Reservation"); Bosse v. State, 484 P.3d 286, *withdrawn*, 495 P.3d 669 (Okla. Crim. App. 2021), *aff'g* 499 P.3d 771, 774 (Okla. Crim. App. 2021) (affirming "trial court's legal conclusion that the Chickasaw Reservation was never disestablished by Congress"); Sizemore v. State, 485 P.3d 867, 870–71 (Okla. Crim. App. 2021) ("Noting that the State of Oklahoma presented no evidence to show that Congress erased or disestablished the boundaries of the Choctaw Nation Reservation, . . . the Choctaw Reservation remains in existence."); Grayson v. State, 485 P.3d 250, 254 (Okla. Crim. App. 2021) ("The record supports the District Court's findings that the United States has not disestablished the Seminole Nation of Oklahoma Reservation."); State v. Lawhorn, 499 P.3d 777, 778 (Okla. Crim. App. 2021) ("[W]e adopt the district court's conclusion that Congress established a Quapaw Nation Reservation in the 1800s.").

225. Miller & Dolan, *supra* note **Error! Bookmark not defined.** at 2101 ("The *McGirt* decision is both a bombshell and a shock for Oklahoma . . . .").

226. *See, e.g.*, Washington State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1006 (2019) (barring the imposition of a state tax on fuel importers on the Yakama Nation as a violation of their 1855 treaty guaranteeing travel by public highway); Herrera v. Wyoming, 139 S. Ct. 1686, 1691–92 (2019) (upholding the Crow Tribe's treaty right to hunt on the "unoccupied lands of the United States" to include the Bighorn National Forest); United States v. Washington, 853 F.3d 946, 979–80 (9th Cir. 2017) (requiring the state to repair or remove barrier culverts that harm the cultivation of salmon and consequently violate the treaty right to engage in off-reservation fishing).

227. *McGirt*, 140 S. Ct. at 2452, 2462*; see also* Solem v. Bartlett, 465 U.S. 463, 481 (1984) (holding the Cheyenne River Act of 1908 did not diminish the Cheyenne River Sioux Reservation because the Act's operative language did not sufficiently evidence a Congressional intent to diminish the reservation); Nebraska v. Parker, 577 U.S. 481, 494 (2016) (holding the 1882 Act did not diminish the Omaha Indian Reservation because the Act lacked a clear Congressional intent to diminish the reservation).

228. *See, e.g.*, Rosebud Sioux Tribe v. United States, No. 20-2062, slip op. at 25 (8th Cir. filed Aug. 25, 2021) (Kobes, J., dissenting) ("I conclude that no one—neither the Government nor the Sioux—understood the Treaty to require a single physician to take care of every Tribe member's health needs for centuries to come.").

In response, Oklahoma initiated a parade of legal challenges.[229] Oklahoma initially sought to overturn *McGirt* to remedy what they perceived as an infringement on Oklahoma's territorial integrity. But as those legal challenges failed, Oklahoma pivoted to challenging the rules of Indian law itself. Drawing upon a "psychological reliance," Oklahoma turned to the allotment-era promise of land unburdened by Tribal regulation.[230] It was this type of legal challenge—questioning the lack of state authority in Indian country—that ultimately garnered a response from the U.S. Supreme Court. Justice Kavanaugh, writing for the majority, portrayed *McGirt* as injecting "sudden significance"[231] that "raised urgent questions" for the non-Indian people who now find themselves living in Indian country,[232] including a concern that state jurisdiction was needed because federal prosecutions and sentencing are too lax.[233]

Critiques about the quality of a justice system should not impact whether a sovereign has jurisdiction. For that analysis, the *Castro-Huerta* Court picks up where *Nevada v. Hicks* left off. *Castro-Huerta* asserts that, rather than having to await a congressional delegation of authority in Indian country, states already automatically possess criminal jurisdiction over non-Indians in Indian country unless preempted by federal law.[234] Despite a robust body of federal Indian country criminal jurisdictional statutes suggesting otherwise, the Court found there was no federal preemption of state jurisdiction.[235]

Like in *Hicks*, the Court then imported the balancing test from *Bracker*, a 1980 Tribal civil taxation case, to weigh whether the exercise of state criminal

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229. Nancy Marie Spears, *Oklahoma, Tribes Clash over Jurisdiction After Supreme Court's* McGirt *Decision*, CRONKITE NEWS (Ariz.) (Mar. 11, 2022), https://cronkitenews.azpbs.org/2022/03/11/oklahoma-tribes-clash-over-jurisdiction-supreme-courts-mcgirt-decision/ [https://perma.cc/2VFD-VFYE]. At a forum in Bartlesville, OK, Governor Stitt stated that *McGirt* was the biggest issue "that's ever hit any state since the Civil War." Susan Riley, *Cherokee Nation Files Brief in Response to State's Efforts to Overturn* McGirt, BARTLESVILLE EXAMINER-ENTERPRISE (Okla.) (Nov. 1, 2021, 3:26 PM), https://www.examiner-enterprise.com/story/news/2021/10/29/cherokees-respond-to-gov-stitt-oklahomas-efforts-reverse-mcgirt/6199373001/ [https://perma.cc/9DME-38CL].

230. Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 71 (1995).

231. Oklahoma v. Castro-Huerta, 597 U.S. 629, 635 (2022).

232. *Id.* at 634 (emphasizing that post-*McGirt*, "the eastern part of Oklahoma, including Tulsa, is now recognized as Indian country. About two million people live there, and the vast majority are not Indians.").

233. *Id.* at 635 ("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."); *see, e.g.*, Rebecca Nagle & Allison Herrera, *Where Is Oklahoma Getting Its Numbers from in Its Supreme Court Case?*, THE ATLANTIC (Apr. 26, 2022) (noting the State of Oklahoma did not provide any citation for the number of prosecutions they claimed to be at issue in *Castro-Huerta*).

234. *See Castro-Huerta*, 597 U.S. at 637.

235. *Id.* at 660–63, 668 (Gorsuch, J., dissenting) (detailing the relevance of the General Crimes Act, the Major Crimes Act, and Public Law 280 and related statutes, assuming a preemption analysis was even valid).

jurisdiction would unlawfully infringe upon Tribal self-government.[236] Under the principles of international Westphalian sovereignty, concurrent criminal jurisdiction by the state absolutely infringes on the Tribe's political integrity and right to self-government. Most definitions of sovereignty are defined based on the exclusion of other concurrent sovereign authority.[237] Moreover, *Castro-Huerta*'s extension of concurrent state jurisdiction into Indian country was made without seeking or obtaining Tribal consent.[238] Tribal consent is critical not just as deference to Indigenous peoples' preferences for how criminal justice is prioritized and implemented within their communities.[239] Concurrent state jurisdiction injects state criminal definitions, sentencing guidelines, criminal justice personnel, and other aspects of the state criminal justice apparatus. To the extent sovereigns diverge on how a criminal justice system should operate, which crimes should be prioritized, and whether restorative justice should be implemented, concurrent jurisdiction erases such opportunities for innovation. At its worst, concurrent jurisdiction denies self-determination.

Implicitly gesturing to stereotypes regarding the lawlessness of Indian country,[240] the Court suggested the addition of state concurrent jurisdiction would be welcomed.[241] But other statutory extensions of concurrent state criminal jurisdiction in Indian country have been far from celebrated. Public Law 280, enacted in 1953, statutorily delegated state concurrent jurisdiction in six states.[242]

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236. *Id.* at 649 (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142–43 (1980)). Notably in *Bracker*, the Court held the state did *not* possess authority to apply its civil tax laws on tribal laws, even though Congress had not expressly prohibited the state from doing so. *Id.* at 152.

237. *See* KRASNER, *supra* note 65, at 4.

238. In 1968, Congress amended Public Law 280 to require Tribal consent for any states seeking to opt in, for which no Tribes have consented. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 401–02, 82 Stat. 73, 78–79.

239. *See, e.g.*, G.A. Res. 61/295 (XXIX), United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) (calling for Indigenous free, prior, and informed consents on legislative or administrative measures that may affect them).

240. *Examining Oklahoma v. Castro-Huerta: The Implications of the Supreme Court's Ruling on Tribal Sovereignty: Hearing Before the Subcomm. for Indigenous Peoples of the U.S. H. Comm. on Nat. Res.*, 117th Cong. (2022) (statement of Carole Goldberg, Professor of Law at UCLA and C.J. of the Court of Appeals of the Hualapai Tribe and C.J. of the Court of Appeals of the Pechanga Band of Indians).

241. *Castro-Huerta*, 597 U.S. at 650–51. *But see* Tafflin v. Levitt, 493 U.S. 455 (1990) (holding that state courts can have concurrent jurisdiction over federal claims except when the interests of the state and federal governments cannot be reconciled or when the statue giving rise to the claim or its legislative history suggest otherwise). The *Castro-Huerta* Court did not weigh whether concurrent state jurisdiction was irreconcilable with federal or Tribal concurrent jurisdiction. *See Foreword*, *supra* note 20, at 119 ("Throughout [*Castro-Huerta*], the Justices ignored American colonialism. Many presumed that intervention into the governments, lands, and lives of colonized peoples caused no harm and that Native people would only benefit from having an additional government looking after them.").

242. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588. The six mandatory states included California, Minnesota (with the exception of the Red Lake Indian reservation), Nebraska, Oregon (with the exception of the Warm Springs reservation), Wisconsin (with the

Since its enactment, impacted Native people and states have expressed disdain.[243] While Public Law 280 did not legally impact Tribal jurisdiction,[244] confusion about the Statute and a perception that state authority is rarely shared have resulted in underdeveloped and underfunded Tribal justice systems.[245]

But in considering the state prosecution of a non-Indian for a crime committed against an Indian in Indian country, the Court found there was no infringement on Tribal self-government, no harm to federal interests, and a strong state sovereignty interest.[246] In breaching Tribal Westphalian sovereignty, the *Castro-Huerta* Court effectively reversed a long-standing jurisdictional principle: that Tribal sovereign authority excludes the operation of other sovereigns' criminal laws unless and until Congress states otherwise.[247] The Court held that while Tribal sovereignty may have initially precluded states from prosecuting crimes on Tribal lands by or against Tribal members without congressional authorization, this traditional "notion" flipped sometime in the "latter half of the 1800s."[248]

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exception of the Menominee reservation, which was subsequently terminated though later re-recognized), and later Alaska. 18 U.S.C. § 1162(a); 28 U.S.C. § 1360(a); CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS, 71–75 (2005). In 1958, Public Law 85-615 added the Alaska Territory. Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545 (codified as amended at 18 U.S.C. § 1162(a), 28 U.S.C. § 1360(a)).

243. Carole Goldberg & Heather Valdez Singleton, *Final Report: Law Enforcement and Criminal Justice Under Public Law 280*, at viii, NAT'L CRIM. JUST. REFERENCE SERV. (2008) (finding through their qualitative and quantitative research on 17 reservation sites that reservation residents subject to concurrent state jurisdiction typically rate the availability and quality of law enforcement and criminal justice lower than reservations that are not subject to concurrent state jurisdiction (i.e. subject to Public Law 280)).

244. *See* Rolnick, *supra* note 210, at 1658 (noting it was not until the 1990s that courts squarely addressed the law's effect on tribal criminal jurisdiction).

245. Korey Wahwassuck, *The New Face of Justice: Joint Tribal-State Jurisdiction*, 47 WASHBURN L.J. 733, 741 (2008) (citing Kevin K. Washburn & Chloe Thompson, *A Legacy of Public Law 280: Comparing and Contrasting Minnesota's New Rule for the Recognition of Tribal Court Judgments with the Recent Arizona Rule*, 31 WM. MITCHELL L. REV. 479, 521 (2004)); *see also* Los Coyotes Band of Cahuilla & Cupeño Indians v. Jewell, 729 F.3d 1025, 1035 (9th Cir. 2013) (holding that the Bureau of Indian Affairs is entitled to deny the Public Law 280 Tribe a 638 self-determination contract to fund law enforcement because it no longer funds law enforcement pursuant to Public Law 280); *see also* Victoria Tauli Corpuz (Special Rapporteur on the Rights of Indigenous Peoples), Report of the Special Rapporteur on the Rights of Indigenous Peoples, ¶ 70, U.N. Doc. A/HRC/30/41, (Aug. 6, 2015) (noting the confusion, delays, and consequent suffering that result from overlapping jurisdiction between national justice systems and Indigenous communities across the globe).

246. *Castro-Huerta*, 597 U.S. at 650–51.

247. *Id.* at 680 (Gorsuch, J., dissenting) (citing Williams v. United States, 327 U.S. 711, 714 (1946); Williams v. Lee, 358 U.S. 217, 220 (1959); United States v. Ramsey, 271 U.S. 467, 469–70 (1926); United States v. Bryant, 579 U.S. 140, 146 (2016); Nevada v. Hicks, 533 U.S. 353, 365 (2001); Solem v. Bartlett, 465 U.S. 463, 465 n.2 (1984); Washington v. Confederated Bands and Tribes of Yakima Nation, 439 U.S. 463, 470–71 (1979); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 170–71 (1973)).

248. *Castro-Huerta*, 597 U.S. at 636.

A. The Equal Footing Doctrine, the "Latter Half of the 1800s," and "Temporary and Precarious" Tribes

The *Castro-Huerta* majority relied upon its 1881 holding in *U.S. v. McBratney*[249] and as the dissent characterized it, a "grab bag of decisions" to justify its doctrinal shift from *Worcester* to *Hicks*.[250] If not already abundantly apparent, federal Indian law struggles to identify its core principles. But if there was an original sin against Tribal political integrity after *Worcester*, it is *McBratney*. Tribal protectorate sovereignty is limited by congressional plenary power. The federal government had exercised that power to extend to itself concurrent jurisdiction over interracial crimes since at least 1817 and over Indian defendants accused of "major" crimes in 1886.[251] But for any other sovereign, Congress was otherwise silent. Tribes retained concurrent jurisdiction over all crimes committed against all persons, and *Worcester* declared states had no authority within Indian country.[252] In *McBratney*, the Court held that states actually do possess jurisdiction, but only over non-Indians who commit crimes against other non-Indians within Indian country, and that this state jurisdiction is to the exclusion of either the federal government or the Tribe.[253] *Castro-Huerta*, therefore, merely extended *McBratney* to state jurisdiction over non-Indians regardless of the citizenship status of their victim.

In *U.S. v. McBratney*, defendant McBratney, a non-Indian, was convicted in federal court for the murder of Thomas Casey, also non-Indian.[254] The crime took place within the boundaries of the Ute Reservation within the exterior boundaries of the State of Colorado pursuant to the General Crimes Act.[255] The Colorado Territory Act of 1861 specifically provided that Indian lands were not to be included within the Colorado territory, including for purposes of jurisdiction.[256] The 1868 Treaty with the Ute Indians specifically provided for federal jurisdiction over crimes involving Indians.[257] While the Colorado Enabling Act of 1875 did not include language specific to Indian lands, it did state that Colorado would be admitted into the Union "upon an equal footing with the original States in all respects whatsoever."[258]

The Court held that the equal footing doctrine necessitates reading the statehood Enabling Act to "necessarily repeal[] the provisions of any prior statute, or of any existing treaty, which are clearly inconsistent therewith."[259] The Court placed a burden on Congress, at least with regard to admitting new states into the Union, that to prevent state jurisdiction on Indian lands, Congress must do so with

249. United States v. McBratney, 104 U.S. 621, 624 (1881).
250. *Castro-Huerta*, 597 U.S. at 682 (Gorsuch, J., dissenting).
251. General Crimes Act of 1817, 18 U.S.C. § 1152; Major Crimes Act of 1885, 18 U.S.C. 1153.
252. Worcester v. Georgia, 31 U.S. 515, 561 (1832).
253. *McBratney*, 104 U.S. at 624.
254. *Id.* at 621.
255. *Id.* at 621–22; 18 U.S.C. § 1152.
256. *McBratney*, 104 U.S. at 623.
257. *Id.* at 622.
258. *Id.* at 623.
259. *Id.*

express words.[260] This is now a statutory interpretation battle with the Indian law canons. The Court held the United States no longer possessed jurisdiction beyond that necessary to carry out the provisions of the Treaty. The Treaty was silent as to crimes committed by non-Indians.[261] So, the Court reasoned that the State of Colorado possessed sole jurisdiction over the murder case.

Like in *McBratney*, in *Ward v. Race Horse*,[262] the Court held that the hunting rights guaranteed in the Shoshone–Bannock Treaty of 1868 were extinguished by Wyoming's admission to the United States. Also, like *McBratney*, the *Race Horse* Court reasoned that the equal footing doctrine required that the Wyoming Statehood Act be interpreted to repeal the Tribal hunting rights, for otherwise they would be "irreconcilably in conflict" with the power "vested in all the other states of the Union."[263] But *Race Horse* went further than *McBratney* in articulating its reasoning. *Race Horse* referenced a "shift" in circumstances to which *Castro-Huerta* similarly gestured to justify its doctrinal divergence from recognized Tribal sovereignty. *Race Horse* stated that at the time of drafting the Shoshone–Bannock Treaty of 1868, "the progress of the white settlements westward had hardly, except in a very scattered way, reached the confines of the place selected for the Indian reservation."[264] But by the passage of Wyoming's enabling act, it was clear the Tribal treaty right was *not* intended to continue in "perpetuity."[265] Rather, Congress "clearly contemplated the disappearance of the conditions" specified in the treaty.[266] The Tribal treaty rights are therefore only "temporary and precarious."[267] Because Tribal treaty rights are temporary and precarious, they can be treated by the Court as exceptional compared to other international documents. The rights those treaties protect, namely Tribal sovereignty rights, can similarly be treated as temporary and precarious. They are vanishing, and so the legal principles interpreting their validity can be bent.

Also in 1896, the Court affirmed *McBratney*'s criminal jurisdiction holding in *Draper v. United States*.[268] Defendant Draper was convicted of murder on the Crow Indian Reservation.[269] The Court described both the defendant and the victim as "negroes."[270] Like in *McBratney*, the treaty did not specifically restrict the application of state law.[271] And like *McBratney*, the Court framed the question of

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260. *Id.* at 623–24.
261. *Id.* at 624.
262. Ward v. Race Horse, 163 U.S. 504, 516 (1896).
263. *Id.* at 509, 514.
264. *Id.* at 508.
265. *Id.* at 514–15.
266. *Id.* at 509.
267. *Id.* at 515.
268. Draper v. United States, 164 U.S. 240 (1896).
269. *Id.* at 241.
270. *Id.*
271. *Id.* at 242. In fact, the Enabling Act of Montana includes the provision, saying that "Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States." Act of February 22, 1889, 25 Stat. 676, §4. *Draper* waived off this seemingly problematic language by noting "[t]he mere reservation of jurisdiction and control

jurisdiction in light of the equal footing doctrine.[272] But like *Race Horse*, *Draper* also sought to contextualize its seemingly counter-textual reading. The Court noted that at the time of the 1889 Montana enabling act, the federal government was simultaneously pushing its federal policy of allotment:

> The [Allotment] act in question contemplated the gradual extinction of Indian reservations and Indian titles by the allotment of such lands to the Indians in severalty. . . . From these enactments it clearly follows that at the time of the admission of Montana into the Union . . . there was a condition of things . . . but which had become extinct by allotment in severalty, and in which contingency the Indians themselves would have passed under the authority and control of the state.[273]

In effect, the Court construed the privatization of Indian lands through allotment as evidence of the eventual demise of Tribal lands and incorporation of those lands into the State of Montana. The Court therefore reasoned that "sole and exclusive" jurisdiction meant sole and exclusive for crimes by or against Indians.[274] In 1981, *Montana v. United States* reinforced this premise, arguing the purpose of allotment "was the eventual assimilation of the Indian population" and the "gradual extinction of Indian reservations and Indian titles,"[275] which was consistently "equated with the dissolution of tribal affairs and jurisdiction."[276]

McBratney, *Race Horse*, and *Draper* rely upon the equal footing doctrine to undermine the jurisdictional integrity of Tribal lands, and in all three instances, treaties recognizing those Tribal lands. But the equal footing doctrine actually does very little work. Rather, *Race Horse* and *Draper* make clear that the guarantees made to Tribes regarding their sovereign status were tempered by the perceived inevitability of Tribal demise. Treaty promises were only "temporary and precarious." Tribal lands, through allotment, would eventually become part of the state. Therefore the Court, despite the absence of congressional statements, recognized exclusive state jurisdiction to criminally prosecute non-Indians on these transitional lands because that is what would happen when the Tribes inevitably vanished.

The equal footing doctrine was abandoned as a sufficient mechanism to ignore treaty provisions nine years after the *Race Horse* decision.[277] One hundred years later, the Court also repudiated some of the reasoning of *Race Horse*. In

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by the United States of 'Indian lands' does not of necessity signify a retention of jurisdiction in the United States to punish all offenses committed on such lands by others than Indians or against Indians." *Draper*, 164 U.S. at 246.

272. *Id.* at 242.

273. *Id.* at 245–46; General Allotment Act of 1887, Pub. L. No. 49-105, 24 Stat. 388.

274. *Draper*, 164 U.S. at 241, 247.

275. Montana v. United States, 450 U.S. 544, 559 n.9 (1981) (citing Organized Vill. of Kake v. Egan, 369 U.S. 60, 72 (1962); *Draper*, 164 U.S. at 246).

276. *Id.*

277. United States v. Winans, 198 U.S. 371, 382–84 (1905).

Minnesota v. Mille Lacs Band of Chippewa Indians[278] the Court distinguished *Race Horse*, holding that the treaty rights of Chippewa bands survived Minnesota's admission to the Union.[279] *Mille Lacs* described the Tribal treaty hunting rights as "not irreconcilable with a State's sovereignty over the natural resources in the State."[280] The *Mille Lacs* Court additionally clarified that, despite the broad "temporary and precarious" language in *Race Horse*, "[t]reaty rights are not impliedly terminated upon statehood."[281] In 2019, the Court reaffirmed *Mille Lacs* in *Herrera v. Wyoming*.[282]

And yet, not only have *McBratney* and *Draper* not been repudiated, but *Castro-Huerta* doubled down and extended their rationales to permit state criminal jurisdiction over non-Indians for crimes committed against Indians. While *Mille Lacs* may have repudiated the use of the equal footing doctrine to abrogate treaties without express language, the vanishing Tribe trope continues to persist and further inform conceptions of Tribal sovereignty as limited and shrinking.

B. Infringed Tribal Jurisdiction?

Notably, *McBratney*, *Race Horse*, and *Draper* say nothing of Tribal jurisdiction. Their analyses hinge upon whether the United States retains jurisdiction over Tribal lands or whether that jurisdiction has shifted to the state. In fact, the *Castro-Huerta* Court incorrectly characterizes the stakes of the case as whether "the Federal Government h[as] *exclusive* jurisdiction to prosecute [crimes committed by non-Indians against Indians in Indian country]."[283] Even post-*Castro-Huerta*, the federal government *and* Tribes retain concurrent jurisdiction.

In terming what is now the "overarching jurisdictional principle dating back to the 1800s," the Court found that "[s]tates have jurisdiction to prosecute crimes committed in Indian country *unless preempted*."[284] Finding no such preemption,[285] the Court applied the *Bracker* balancing test to consider whether state concurrent jurisdiction was nevertheless prohibited because it infringed on Tribal or federal interests.[286] The Court spent little analytical space examining Tribal

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278. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202–08 (1999).

279. *Id.*

280. *Id.* at 204.

281. *Id.* at 207.

282. Herrera v. Wyoming, 139 S. Ct. 1686, 1694–97 (2019) (noting that "[t]o avoid any future confusion, we make clear today that *Race Horse* is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood").

283. Oklahoma v. Castro-Huerta, 597 U.S. 629, 629 (2022) (emphasis added).

284. *Id.* at 637 (emphasis added).

285. The opinion goes to great lengths to suggest that Public Law 280 is *not* a source of preemption. *Id.* at 647–49. But Public Law 280 plainly does preempt. Public Law 280 includes procedures for a state to obtain such jurisdiction, which includes a requirement that states obtain Tribal consent. *Id.* at 663–64 (Gorsuch, J., dissenting); *see also* 25 U.S.C. § 1321(a); *id.* § 1323(b).

286. *Castro-Huerta*, 597 U.S. at 649. Note, the preemption and infringement tests are typically treated as distinct, but the *Castro-Huerta* holding appears to combine them. Lauren van Schilfgaarde, Aila Hoss, Ann E. Tweedy, Sarah Deer & Stacy Leeds, *Tribal Nations and Abortion Access: A Path Forward*, 46 HARV. J. L. & GENDER 1, 49 (2023).

interests. The Court noted that Tribes lack jurisdiction over non-Indians due to *Oliphant v. Suquamish Indian Tribe*.[287] Of course, like in *Race Horse* and *Draper*, the 1978 U.S. Supreme Court relied upon the *diminishing* nature of Tribes to justify limiting Tribal criminal jurisdiction over non-Indians as "inconsistent with their status."[288] The Court acknowledged there were some exceptions to *Oliphant* "not invoked here."[289] That may be true, but just barely. In 2013, Congress provided a partial *Oliphant*-fix in the Violence Against Women Reauthorization Act, recognizing Tribal jurisdiction to prosecute non-Indians but only for the crimes of domestic violence, dating violence, and violation of a protection order.[290] Native activists fought for decades for such a partial *Oliphant*-fix and finally found galvanizing support by connecting *Oliphant* with its devastating impacts on the missing and murdered Indigenous Persons crisis.[291] Recognizing some of the many impracticalities of this limited jurisdictional recognition, Congress expanded its recognition to six additional offenses just three months prior to the *Castro-Huerta* ruling.[292] Notably, one of these offenses is child violence. "Child violence" is defined in the federal statute as "the use, threatened use, or attempted use of violence against a child."[293] The child neglect inflicted by Mr. Castro-Huerta, even if charged as child abuse, would simply not satisfy the definition of child violence necessary for the Tribe to be able to respond.

The vanishing Tribe trope had previously been used to transform Tribal sovereignty from territory-based to person-based, such that Tribal lands are now perceived to be porous to state encroachment so long as the encroachment does not pertain to Indians. *McBratney* had been extended to New York, an original colony (and thus outside the typical equal footing doctrine analysis), in 1946.[294] Like *Castro-Huerta*, the Court noted that the land in question was mostly "non-Indian," in which "the Alleghany Reservation . . . has only 8 Indian families living among its

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287. *Castro-Huerta*, 597 U.S. at 650; Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978).

288. *Oliphant*, 435 U.S. at 208 (citing Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976)). *Oliphant* is also similar to *Castro-Huerta* in that it considers its holding as a description of how things have always been, rather than a pronouncement of new law. *Castro-Huerta* finds that states have always had concurrent jurisdiction over non-Indians for all crimes, at least since the "1800s." Similarly, *Oliphant* finds that Tribes have lacked jurisdiction over non-Indians since submitting to the United States and that the Court is only just now weighing in because "present-day Indian tribal courts embody dramatic advances over their historical antecedents." *Oliphant*, 435 U.S. at 210.

289. *Castro-Huerta*, 597 U.S. at 650.

290. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54.

291. AMNESTY INTERNATIONAL, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 4 (2007).

292. Violence Against Women Reauthorization Act of 2022, S. 3623, 117th Cong. § 804(3)(B).

293. 25 U.S.C. § 1304(a)(3).

294. New York *ex rel.* Ray v. Martin, 326 U.S. 496, 499 (1946). In a bizarre case of reverse engineering, the Court reasoned that the equal footing doctrine demands that Colorado, upon admission, could not have been granted superior rights to New York. Thus, New York similarly enjoys exclusive jurisdiction over non-Indians who commit crimes against non-Indians in Indian country.

9,000 inhabitants."[295] Emphasizing the limitation of Tribal sovereignty to only Indians and not Tribal lands, the Court declared:

> The entire emphasis in treaties and Congressional enactments dealing with Indian affairs has always been focused upon the treatment of the Indians themselves and their property. Generally no emphasis has been placed on whether state or United States Courts should try white offenders for conduct which happened to take place upon an Indian reservation, but which did not directly affect the Indians."[296]

In 1930, the U.S. Supreme Court analogized Tribal lands to federal military bases, such that federal ownership and use of the lands "without more do not withdraw the lands from the jurisdiction of the state."[297] Rather than perceive Tribal lands as sovereign domains, the Court characterized the Indian reservation differently:

> [It is] a place where the United States may care for its Indian wards and lead them into habits and ways of civilized life. Such reservations are part of the state within which they lie, and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards.[298]

These cases reveal the Court's underlying reliance on the vanishing Tribe trope to inform their approach to Tribal sovereignty—it is not meant to last. All reasoning regarding the contours of Tribal authority and the extent to which other sovereigns are necessary to ensure the rule of law are founded not just in racist ideas about Tribal capacity (which they are), but also in the temporal assumption that Tribes will shortly disappear. Other sovereigns' sovereignty is, therefore, only minimally shaped by relationships with Tribes because those relationships will only ever be short-lived.

C. **Brackeen***:* **Castro-Huerta***'s Immediate Impacts*

In *Haaland v. Brackeen*, the U.S. Supreme Court held the Indian Child Welfare Act of 1978 was a constitutionally valid expression of congressional plenary power over Indian affairs.[299] The Court contended with what scholar Nell Jessup Newton described as its prior attempts to abdicate any role in defining the unique status of Indian Tribes in our constitutional system or accommodating their legitimate claims of Tribal sovereignty and preservation of property.[300] Does Congress have the authority to dictate how state court proceedings operate with regard to Native children? The question is valid, at least in part, because there is no explicit "Indian affairs" power in the Constitution. Consequently, the majority opinion upheld Congress's plenary power pursuant to a combination of the Indian Commerce Clause, Article II's Treaty Clause, the "Constitution's structure [to]

295. *Id.* at 498.
296. *Id.* at 501.
297. Surplus Trading Co. v. Cook, 281 U.S. 647, 650 (1930).
298. *Id.* at 651.
299. Haaland v. Brackeen, 599 U.S. 255, 256 (2023).
300. Newton, *supra* note 185, at 196.

empower Congress to act in the field of Indian affairs," and the trust responsibility.[301]

But even in *Brackeen*, Tribal Nations were constitutionally "strange sovereigns."[302] They are subject to the ultimate sovereignty of the federal government, they govern within the territorial boundaries of the United States, and their members are United States citizens.[303] But unlike the states, they are described as "domestic dependent nations" and are unable to claim rights against the central government through the federalism structure.[304] Perhaps in response to this strangeness, Justice Gorsuch and Justice Thomas engaged in a battle of histories and thereby rehashed many of their arguments from *Castro-Huerta*.

Justice Gorsuch's concurring opinion in *Brackeen* gave a wrenching historical account of the boarding school and Native child removal eras leading up to the passage of ICWA.[305] Justice Sotomayor and Justice Jackson joined that part of the concurrence.[306] In Part II, however, Justice Gorsuch exhaustively examined the drafting process of both the Articles of Confederation and the Constitution.[307] Congressional power over Tribes is contingent on understanding Tribes as sovereigns. He cited Emer de Vattel[308] for the premise that Britain was both familiar with and adopted the understanding that Tribes possessed sovereignty. Britain understood this sovereignty to be akin to a "tributary" or "feudatory" state and that "such entities do not 'cease to be sovereign and independent' even when subject to military conquest—at least not 'so long as self government and sovereign and independent authority are left in the[ir] administration.'"[309] Because the United States adopted the previous treaties negotiated by the British with Tribal Nations and subsequently entered into their own treaties with Tribes, they consequently conceded that Tribal sovereignty is sufficiently capable of making treaties.[310] For Justice Gorsuch, the question of what power Congress has with respect to Tribes triggers questions about what authorities the Tribes possess under the

301. *Brackeen*, 599 U.S. at 297.

302. Newton, *supra* note 185, at 197.

303. *Id.*

304. *Id.*

305. *Brackeen*, 599 U.S. at 298–302 (Gorsuch J., concurring).

306. Justice Sotomayor and Justice Jackson additionally joined Part III of the concurrence, which reaffirms the majority's holding that Congress possesses the necessary constitutional authority to enact ICWA but underscores that this is because the Constitution recognizes Tribes as independent sovereigns. *Id.* at 331–32 (Gorsuch J., concurring).

307. *Id.* at 307–31 (Gorsuch J., concurring). *See also* Gregory Ablavsky, *Clarence Thomas Went After My Work. His Criticisms Reveal a Disturbing Fact About Originalism*, SLATE (June 20, 2023, 1:02 PM), https://slate.com/news-and-politics/2023/06/clarence-thomas-indian-law-originalism-history.html [https://perma.cc/A2Y2-RFJK] (describing the history battle, including Professor Natelson's accusation that Professor Ablavsky's scholarly critique of Professor Natelson's work was "shyster-like").

308. *Brackeen*, 599 U.S. at 308–09 (Gorsuch J., concurring).

309. *Id.* at 308 (alteration in original) (citing Worcester v. Georgia, 31 U.S. 515, 561 (1832)).

310. *Brackeen*, 599 U.S. at 309 (Gorsuch J., concurring).

Constitution.[311] The constitutional "Indian-law bargain" preserves Tribes as independent sovereigns.[312]

Justice Thomas, however, contends there is simply no constitutional space for dual citizens. Justice Thomas reignited the vanishing Tribe trope to distinguish contemporary Natives as "U.S. citizens, who may never have even set foot on Indian lands."[313] Their "Indianness" has vanished. Whatever concerns the founding drafters had for Tribal Nations do not extend to Tribes that have since vanished.[314] For Thomas, congressional powers over Indian affairs are only relevant to Natives who have not yet been absorbed into the United States. But once Natives are "within the jurisdiction of any of the individual states,"[315] they are "incorporated into the bodies politic of the states."[316] In another 2023 case, Justice Kavanaugh performed a comparable rhetorical move in describing Navajos as similarly positioned to other "citizens of the western United States," which conveniently meant they were owed no special obligations beyond the typical U.S. citizen.[317]

Justice Thomas then delivered his death blow to Tribes. He conceded that efforts by states to apply their civil and criminal laws to Indians "may have conflicted with valid federal treaties or statues . . . and courts *at the time* often did not precisely demarcate the constitutional boundaries between state and federal authority."[318] Justice Thomas further conceded that *Worcester* was fairly precise in finding that the State of Georgia could not extend its laws over the territory held by the Cherokee Nation.[319] It's just that, according to Justice Thomas, *Worcester* was wrong. In quoting *Castro-Huerta*, Justice Thomas reminded us that *Worcester* "'yielded to closer analysis,' and Indian reservations have since been treated as part of the State they are within."[320]

Justice Thomas did not say it. But his implication was that to the extent the Constitution acknowledges Tribes, that acknowledgment only extends to Tribes not yet absorbed by the states; that is, Tribes not yet vanished. Unfortunately for Tribes, *Castro-Huerta* completed the absorption process for all Tribes.

The concurrence–dissent back-and-forth of *Brackeen* is part of what will likely be a cascade of cases grappling with *Castro-Huerta*. The Tenth Circuit recently rejected an attempt by the City of Tulsa to use an allotment-era statute to

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311. *Id.* at 307.
312. *Id.*
313. *Id.* at 335 (Thomas, J., dissenting).
314. *Id.* at 346 ("Notably, neither President Washington nor the first Congresses were particularly 'concerned with the remnants of tribes that had been absorbed by the states and had come under their direction and control.'") (quoting FRANCIS P. PRUCHA, THE GREAT FATHER 18–21 (1984)).
315. *Brackeen*, 599 U.S. at 346 (Thomas, J., dissenting).
316. *Id.* at 346–47 (citing U.S. CONST. art. I, § 2, cl. 3).
317. Arizona v. Navajo Nation, 599 U.S. 555, 559 (2023) (holding the United States is not required to take affirmative steps to secure water for the Navajo Reservation pursuant to their 1868 treaty).
318. *Brackeen*, 599 U.S. at 347 (Thomas, J., dissenting) (emphasis added).
319. *Id.* at 347 n.4.
320. *Id.* (quoting Oklahoma v. Castro-Huerta, 597 U.S. 629, 636 (2022)).

extend municipal jurisdiction over all Tulsa's inhabitants, including Indians.[321] A federal district court held that the City of Tulsa possessed subject matter jurisdiction to fine Justin Hooper $150 for speeding, even though Hooper is a Choctaw citizen, and the speeding took place on the Muscogee (Creek) Reservation. The Curtis Act of 1898[322] "continued the campaign for allotment by 'abolish[ing] the existing Creek court system and render[ing] then-existing tribal laws unenforceable in the federal courts."[323] Towards these ends, the Curtis Act conferred jurisdiction to the municipality of Tulsa. The Tenth Circuit held that while the Curtis Act did confer such jurisdiction, it was effectively repealed when Tulsa became a political subdivision of the State of Oklahoma.[324] The U.S. Supreme Court denied the City of Tulsa's petition for writ of certiorari.[325]

IV. UNVANISHING THE TRIBE BY ANTICIPATING TRIBAL FUTURES

> *To be an Indian in modern American society is in a very real sense to be unreal and ahistorical. . . . The primary goal and need of Indians today is not for someone to feel sorry for us and claim descent from Pocahontas to make us feel better. Nor do we need to be classified as semi-white and have programs and policies made to bleach us further. Nor do we need further studies to see if we are feasible. We need a new policy by Congress acknowledging our right to live in peace, free from arbitrary harassment.*[326]
>
> Vine Deloria, Jr.

Tribes exist and express their sovereignty every day. But the use of the vanishing Tribe trope within the Court's jurisprudence positions Tribes as perpetually situated in the past. The Court concluded that Tribes *should* vanish and consequently narrowed its analytical lens to understand Tribal sovereignty as only ever precarious and temporary. Westphalian sovereignty can accommodate Tribes as a protectorate. But the vanishing Tribe trope cannot. Such reasoning flies in the face of sovereignty broadly, creating an unnecessary category of "temporary and precarious" sovereignty as applied to Tribes. It is an ugly embrace of racism towards Native people, failing to see Indigenous collectives and systems as anything other than not European and thereby concluding they are only savage. If the vanishing Tribe trope is left unanswered, it will be successful in its overt attempt to finally, actually vanish the Tribes.

The use of the vanishing Tribe trope in *Cherokee Nation v. Georgia*, *Rogers*, *McBratney*, and *Race Horse* may at least be explained by the then-dominant

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321. Hooper v. City of Tulsa, 71 F.4th 1270, 1273 (10th Cir. 2023).

322. Curtis Act of 1898, Pub. L. No. 55-517, 30 Stat. 495.

323. *Hooper*, 71 F.4th at 1280 (alterations in original) (citations omitted).

324. *Id.* at 1273.

325. City of Tulsa v. Hooper, 71 F.4th 1270 (10th Cir. 2023), *cert. denied*, 143 S. Ct. 2556 (2023); Curtis Killman, *U.S. Supreme Court Grants One-Week Stay in Tulsa Traffic Ticket Jurisdiction Case*, TULSA WORLD (Oct. 30, 2023), https://tulsaworld.com/news/local/crime-courts/u-s-supreme-court-grants-one-week-stay-in-tulsa-traffic-ticket-jurisdiction-case/article_d15888fe-2bf1-11ee-a274-f7c4fdcfee9d.html [https://perma.cc/M6R6-P5JP].

326. VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 10, 33–34 (1969).

manifest destiny narrative and the accompanying federal policy of assimilating Natives and terminating Tribes. But what are we to make of the *Castro-Huerta* Court's endorsement of these cases: an endorsement made in the twenty-first century in an era of federal support for Tribal self-determination and the growth of Native populations and Tribes? While *Castro-Huerta* may simply extend concurrent state criminal jurisdiction in Indian country, its reasoning invites future intrusions into Tribal jurisdictional integrity and ultimately foretells Tribal vanishment.

It does not need to be this way. *Castro-Huerta* is largely out of step with Tribal, national, and international conceptions of Indigenous peoples. Tribal Nations are actively engaged in their own governance. Congress and the executive profess strong self-determination policies towards Tribes. Internationally, there are growing international human rights and Indigenous rights movements.[327] Following World War I, self-determination has become a recognized international principle.[328] The principle of self-determination has crystallized into a rule of customary international law, applicable to and binding on all nation–states.[329] "Under the principle of self-determination, all self-identified groups with a coherent identity and connection to a defined territory are entitled to collectively determine their political destiny in a democratic fashion and to be free from systematic persecution."[330] The Declaration on the Rights of Indigenous Peoples recognizes Indigenous Peoples as eligible and entitled to such self-determination.[331]

Nation–states are compelled to contend with Indigenous Peoples and their rights to self-determination. *Castro-Huerta*'s embrace of vanishing Tribal sovereignty suggests that the United States is still in want of a sovereign-to-sovereign framework that accommodates Indigenous self-determination. More so, its racist embrace of the vanishing Tribe trope suggests a need to emancipate Tribes. The future currently envisioned by the U.S. Supreme Court does not include Tribes.

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327. *See generally* Daniel Albahary, *International Human Rights and Global Governance: The End of National Sovereignty and the Emergence of a Suzerain World Polity?*, 18 MICH. ST. J. INT'L L. 511 (2010) (conceding that nation–state remains the dominant framework, but under which human rights can serve as a means to hold nation–states accountable).

328. Scharf, *supra* note 94, at 378 (crediting President Woodrow Wilson with elevating the principle of self-determination to the international level in the Fourteen Points of 1916) (citing President Woodrow Wilson, Address Before the League of Nations to Enforce Peace (May 27, 1916), *in* 53 CONG. REC. 8854 (1916) ("We believe these fundamental things: First that every people have a right to choose the sovereignty under which they shall live . . . .").

329. Scharf, *supra* note 94, at 378; *see, e.g.*, U.N. Charter art. 1, ¶ 2; G.A. Res. 2625 (XXV), at 122 (Oct. 24, 1970); Universal Declaration of Human Rights art. 22 (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 1, ¶ 2, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights art. 1, ¶ 1, Dec. 16, 1966, 993 U.N.T.S. 3.

330. Scharf, *supra* note 94, at 379.

331. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples art. 3 (Sept. 13, 2007).

Feminist and critical theory have similarly called for a realigned analytical lens to accommodate an emancipated future, called "anticipatory utopia."[332] Identifying the vanishing Tribe trope has served the necessary explanatory diagnosis[333]—why was Tribal sovereignty so easily intruded upon, and why does it seem to be so vulnerable? To craft remedies, we must anticipate a future that not only includes Tribes but also is emancipated from the vanishing Tribe trope and its ilk.

Under U.S. law, Tribal sovereignty was recognized during the time when European colonial conceptions of statehood hinged on oppressive models like the doctrine of discovery. However, the contemporary legal status of statehood operates more expansively. Notably, statehood cannot be created through the use of force, violating the right of self-determination, or the pursuit of racist policies.[334] I posit that, conversely, a legitimate state under international law cannot diminish the sovereignty of another sovereign through similar means, even a domestic, dependent sovereign, and certainly not without a more finite legal principle than implication. The modern nation–state is simply no longer an island. We have obligations to other nation–states,[335] and I argue, to the sovereigns within the sovereign—i.e., the Tribes within the United States.

Our willingness to perpetuate a definition of sovereignty rooted in colonialism threatens all sovereignty, including that of the United States. The Indigenous Peoples of the United States need not exist in opposition to the United States. In fact, some nation–states have embraced the nation-building potential of their Indigenous Peoples.[336] To the extent we dare envision Tribal sovereignty as operating on a more stable conceptual foundation than "temporary and precarious," we are drastically in need of a meaningful framework. There is simply no federalism

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332. Amy Allen, *Emancipation Without Utopia: Subjection, Modernity, and the Normative Claims of Feminist Critical Theory*, 30 HYPATIA 513, 514 (2015) (quoting SEYLA BENHABIB, CRITIQUE, NORM, AND UTOPIA: A STUDY OF THE FOUNDATIONS OF CRITICAL THEORY 226 (1986) (framing anticipatory utopia as the "properly normative" dimension of critical theory, which "views the present from the perspective of the radical transformation of its basic structure, and interprets actual, lived crises and protests in the light of an anticipated future")).

333. Allen, *supra* note 332, at 524 (quoting Michel Foucault, *Critical Theory/Intellectual History*, *in* CRITIQUE AND POWER: RECASTING THE FOUCAULT/HABERMAS DEBATE 109, 126 (Michael Kelly, ed., 1994) (defining an explanatory diagnosis as more than just a "simple characterization of what we are," but rather, by following "lines of fragility and fracture[,] provid[ing] a model for thinking about how states of domination can be transformed into mobile and unstable fields of power relations within which freedom can be practiced.")).

334. Vidmar, *supra* note 63, at 704 (citing Robert McCorquodale, *The Creation and Recognition of States*, *in* PUBLIC INTERNATIONAL LAW: AN AUSTRALIAN PERSPECTIVE 184, 190–91 (Sam Blay, Ryszard Piotrowicz & Martin Tsamenyi eds., 2005) (arguing statehood requires self-determination and the protection of human rights, in addition to the traditional Montevideo criteria)).

335. *See, e.g.*, David Luban, *Responsibility to Humanity and Threats to Peace: An Essay on Sovereignty*, 38 BERKELEY J. INT'L L. 185 (2020).

336. *See generally, e.g.*, Pablo Rueda-Saiz, *Indigenous Autonomy in Columbia: State-Building Processes and Multiculturalism*, 6 GLOB. CONSTITUTIONALISM 265 (2017).

model that has ever anticipated Tribes beyond feeble wards or fully assimilated populations that consequently vanish into the American polity.

What would a utopian future for Native citizenry actually look like? Robert Clinton has long called for the decolonization of federal Indian law, laying out a utopian agenda that includes (1) a rejection of the plenary power doctrine in favor of legally enforceable doctrines that are more protective of Tribes; (2) the removal of most federal oversight requirements of Tribal actions; (3) a reconceptualized federal trust relationship that sheds its paternalistic vestiges; (4) a severely reduced federal Indian bureaucracy; (5) revived Tribal territorial jurisdiction; and (6) recognition of the dispossession of Indian land as a taking under the Fifth Amendment.[337] In short, Clinton calls for a revival of international legal norms of sovereignty as applied to Tribes in a protectorate status. Maggie Blackhawk similarly calls for an embrace of a range of principles she terms "borderlands constitutionalism," which she notes rely upon the law of nations.[338] Professor Blackhawk examines strategies that preserve several key principles, including recognition of colonized peoples as political entities, preservation of those communities' support for self-determination, respect for the borders and jurisdiction of colonized peoples, collaborative lawmaking, and principles of nonintervention.[339]

But how might Tribes see themselves? Tribal epistemologies have immense visions for themselves, often projecting far beyond the present, including, for example, as far as seven generations. Consider Addie Rolnick's push to employ an "inside out" approach to questions of Tribal jurisdiction.[340] "Outside-in" approaches tend to treat Indian country as primarily a matter of federal and state laws, inviting generalizations and assumptions.[341] Inside-out approaches conversely consider how Tribes might use such a power in the future, as opposed to how Tribes used that power in the past.[342] Anticipatory Tribal futures assume Tribes can and will exist and question how their legal sovereignty should relate to their surrounding sovereigns. I offer these few following considerations for counterpoints to the vanishing Tribe frame that embrace Clinton's call for decolonization while also seeking to frame an inside-out perspective on the future needs of Tribes. At their most basic, anticipatory Tribal futures demand security in the contours of Tribal sovereignty.

A. Tribal Consent

Castro-Huerta is emblematic of a nation–state intruding on another sovereign's territorial jurisdiction without previously seeking or obtaining consent.[343] Unsurprisingly, Tribal advocates would prefer a rule that Tribes can be

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337. *Readdressing the Legacy of Conquest*, *supra* note 12, at 110, 125, 129, 134, 153.

338. *See Foreword*, *supra* note 20, at 89–90.

339. *Id.* at 89–110.

340. Rolnick, *supra* note 210, at 1640.

341. *Id.* at 1643.

342. *Id.* at 1640–41.

343. *Oversight Hearing on Examining* Oklahoma v. Castro-Huerta*: The Implications of the Supreme Court's Ruling on Tribal Sovereignty Before the Subcomm. for*

divested of authority only with their consent.[344] Congress has previously employed such consent requirements. For example, Congress amended the Indian Civil Rights Act ("ICRA") to require that any future extensions of state jurisdiction under Public Law 280 first obtain Tribal consent.[345] No Tribe has ever given such consent. Similarly, in 1971, the Department of the Interior pointed to the importance of Tribal consent in supporting the Quiet Title Act, which waives the sovereign immunity of the United States for quiet title actions, except for lands held in trust for Indians.[346] But even if *Castro-Huerta* did apply the Indian law canons, or even if Congress had expressly extended concurrent criminal jurisdiction to states via legislation, neither route provides an institutional mechanism to facilitate engaging with or obtaining tribal consent.

There is currently no explicit administrative process for broad federal–Tribal engagement.[347] Unlike engagement with foreign nation–states, the State Department does not engage with Tribes.[348] Congress has not legislated that there be a formal, institutional process for Tribal engagement with the federal government. President Clinton issued an executive order in 2000, renewed by Presidents Obama and Biden, that calls for federal agencies to engage in Tribal consultation.[349] Some federal agencies accordingly engage in varying types of

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Indigenous Peoples of the U.S. of the H. Comm. on Nat. Res., 117th Cong., at 7 (2022) (questions for the record of Hon. Jonodev Chaudhuri, Ambassador, Muscogee Creek Nation).

344. Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 TAX LAW. 897, 925 n.95 (2010).

345. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 401–402, 82 Stat. 73, 78 ("The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, *with the consent of the Indian tribe* . . . such measure of jurisdiction . . . to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State . . . .") (emphasis added).

346. 28 U.S.C. § 2409a(a). *But see* Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 223–24 (2012) (holding that the Quiet Title Act does not bar suit from a non-adverse claimant because Patchak only sought to challenge the Government's authority to take land into trust for the Tribe, not claim personal ownership over the land. In acknowledging the potential barrier to Tribes this waiver of sovereign immunity presents, the Court recommended Tribes seek recourse from Congress).

347. There are instances of administrative engagement, such as the mandatory Section 106 consultation process within the National Historic Preservation Act. 54 U.S.C. § 306108.

348. In 2023 this notably changed, in which the State Department initiated a "roundtable" with U.S. Tribes in anticipation of the U.N. Permanent Forum on Indigenous Issues. *See U.S. Department of State*, *Roundtable Discussion for US Engagement at UN Permanent Forum on Indigenous Issues*, UNITED S. & E. TRIBES, INC. (Jan. 17, 2023, 10:00 AM), https://www.usetinc.org/event/u-s-department-of-state-roundtable-discussion-for-us-engagement-at-un-permanent-forum-on-indigenous-issues/ [https://perma.cc/CFS6-A2QH].

349. Executive Order No. 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000); Memorandum from the White House Off. of the Press Sec'y on Tribal Consultation (Nov. 5, 2009), https://obamawhitehouse.archives.gov/the-press-office/memorandum-tribal-consulta

consultations, ranging from discrete meetings with particular Tribes regarding specific projects, to multi-day conferences in which all Tribes are invited to comment on a "Dear Tribal Leader" letter regarding a series of questions posed by the agency. Tribal consultation has been hugely impactful in normalizing communications between federal agencies and Tribes, notably outside the public comment context. Tribes have been able to comment on proposed regulations, express their concerns regarding federal projects, and even promote innovative new strategies like co-stewardship agreements.[350] But Tribal consultation is far from institutional. Even with the executive orders, federal agencies have been inconsistent in their compliance with developing Tribal consultation protocols or implementing them. Consultation policies, to the extent they exist, vary widely across agencies. There is no cause of action for a federal agency's failure to consult. And there is no equivalent to consultation within the legislative branch. Simply, Tribal consultation remains informal, sporadically enforced, and minimally responsive to Tribal interests.

International law calls for nation–states to provide free, prior, and informed consent ("FPIC") to their Indigenous Peoples, identifying the FPIC framework as a more robust, procedural vision for the relation with a collective entitled to self-determination.[351] There is a small but growing body of international jurisprudence regarding the failure of nation–states to provide adequate FPIC to the detriment of Indigenous interests. But there is not yet a meaningful example of what FPIC should look like.

Reframing Tribes from precarious and temporary to secure protectorate sovereigns requires an infrastructure for engagement. The U.N. Expert Mechanism on the Rights of Indigenous Peoples identifies three interrelated and cumulative rights of Indigenous peoples regarding FPIC: (1) the right to be consulted; (2) the right to participate; and (3) the right to their lands, territories, and resources.[352] As the protector sovereign, and as a manifestation of the federal trust responsibility that frames the protector–protectorate dynamic, Congress should domesticate into federal law the right of free, prior, and informed consent as articulated in Article 19 of the Declaration on the Rights of Indigenous Peoples. This should include that

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tion-signed-president [https://perma.cc/U8LK-9PB9]; Memorandum from the White House on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Jan. 26, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/26/memorandum-on-tribal-consultation-and-strengthening-nation-to-nation-relationships/ [https://perma.cc/5LWG-JYMT].

350. *See generally* Robert J. Miller, *Consultation or Consent: The United States' Duty to Confer with American Indian Governments*, 91 N.D. L. REV. 37 (2015).

351. *See, e.g.*, G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples art. 19 (Sept. 13, 2007) (calling for Indigenous free, prior, and informed consents on legislative or administrative measures that may affect them); Hum. Rts. Council, Free, Prior and Informed Consent: A Human Rights-Based Approach, ¶ 5, at 3, U.N. Doc. A/HRC/39/62 (2018) (noting there is "a widespread desire of indigenous peoples to establish a solid, new and different kind of relationship . . . . In this context, the standards of free, prior and informed consent articulated in the Declaration are particularly important to indigenous peoples' relationships with States today and going forward.").

352. Hum. Rts. Council, Free, Prior and Informed Consent: A Human Rights-Based Approach, ¶ 14, at 5, U.N. Doc. A/HRC/39/62 (2018).

Tribes have a right to be consulted on legislative or administrative measures that may affect them. The right anticipates the ability of Tribes to engage in a consultation process. The right, at a minimum, applies to policies and projects impacting or adjacent to Tribal lands, territories, and resources, including ancestral and cultural lands and resources that are not under Tribal ownership.

How might we anticipate a Tribal future that manifests FPIC? A right to be consulted is a positive duty of the federal government to reach out to Tribes. Tribes in turn have a right to participate in the consultation process via their designated officials. This right is a right of Tribes as sovereigns, not just of individual Natives as U.S. citizens. The Tribal consultation process is therefore distinct from public comment periods and administrative processes, such as those governed by the Administrative Procedure Act. Rather, Tribal consultation is sovereign-to-sovereign. It is horizontal engagement, recognizing the distinct sources of power in each, but also the overlapping spheres of impact that any given policy or project may have. It is also responsive to the potentially divergent needs of Tribes, engaging with Tribes as distinct sovereign entities when necessary. Congress should legislate the expectations of federal agencies to engage in meaningful Tribal consultation, but Congress should not dictate how Tribes are to develop their internal protocols. Instead, both the federal and Tribal governments are empowered to meet, be fully informed, and negotiate.

Concretely, this may take the form of renewed treaty-making with Tribes[353] to recognize FPIC. In the alternative, Congress can at least enact a statute to mandate a federal obligation to consult Tribes. In either form, there is a federal cause of action for the failure of a federal agency to engage in meaningful consultation, which includes providing sufficient and comprehensive prior notice, devoting sufficiently empowered agents to participate on the agency's behalf, and participating in good faith via a mutually recognized process. FPIC does not equate to a Tribal veto. A right to consult, a right to participate, and a right to have Tribal lands, territories, and resources be considered does not mean Tribal interests always trump federal interests. It does mean, however, that Tribes are considered part of America's sovereign infrastructure. Tribes are a permanent component of the American legal fabric and are consequently provided some legal infrastructure for communicating with the protector sovereign.

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353. Lorianne Updike Toler, *The Missing Indian Affairs Clause*, 88 U. CHI. L. REV. 413, 414 (2021) (calling for Congress to reinstate treaty-making with Tribes); *see generally* VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE (1985); and VINE DELORIA, JR. & DAVID E. WILKINS, TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS (2000).

B. Representation in the American Polity

They were nevertheless to be subject to the laws of the United States, not in the sense of citizens, but, as they had always been, as wards, subject to a guardian; not as individuals, constituted members of the political community of the United States, with a voice in the selection of representatives and the framing of the laws, but as a dependent community who were in a state of pupilage, advancing from the condition of a savage tribe to that of a people . . . .[354]
Justice Matthews, *Ex parte Crow Dog*

FPIC is just one component of a secure legal infrastructure. Tribes require reliance in their preservation as distinctive political communities that are shielded from assimilation.[355] The "trust doctrine" serves as one constitutional tool that can, and should, be used to guide plenary power in support of self-determination.[356] Citizenship offers representation, but only as individual citizens of the United States. The rights of peoples, including the right to self-determination, are not necessarily reflected in individual representation. Self-government is critical. How can Indigenous peoples help define the sovereign-to-sovereign relation with the United States? Increasingly, Indigenous peoples call for collaborative lawmaking.[357]

Tribes have no mechanism for participating in the legislative process. With no formal representation, Tribes lack meaningful political influence.[358] The U.S. Supreme Court, in *Arizona v. Navajo Nation*, recently reinforced Tribes' lack of political representation in holding the federal government had no judicially enforceable duties to Tribes.[359] The U.S. Constitution provides that representation in the House is to be apportioned among the states by population.[360] Individual Natives are represented via their state senators and congressional representatives. But while free alien residents and three-fifths of the number of slaves were counted,

354. *Ex parte* Crow Dog, 109 U.S. 556, 568–69 (1883).

355. *Foreword*, *supra* note 20, at 90.

356. *Id.* at 95–96, 99.

357. *Id.* at 108–109; *see also* Hum. Rts. Council, Efforts to Implement the United Nations Declaration on the Rights of Indigenous Peoples: Indigenous Peoples and the Right to Self-Determination, ¶ 17, at 6, U.N. Doc. A/HRC/48/75 (2021) (recognizing the importance of Indigenous external self-determination to include participation in decision-making bodies).

358. *But see* Kirsten Matoy Carlson, *Congress and Indians*, 86 U. COLO. L. REV. 77 (2015) (analyzing congressional action related to Indian tribes and finding evidence of tribal political influence).

359. Arizona v. Navajo Nation, 599 U.S. 555, 564 (2023) ("The Federal Government owes judicially enforceable duties to a tribe "only to the extent it expressly accepts those responsibilities." (quoting United States v. Jicarilla Apache Nation, 564 U.S. 162, 177 (2011))). "Whether the Government has expressly accepted such obligations 'must train on specific rights-creating or duty-imposing' language in a treaty, statute, or regulation." (quoting United States v. Navajo Nation, 537 U.S. 488, 506 (2003)). That requirement follows from separation of powers principles. As this Court recognized in *Jicarilla*, Congress and the President exercise the "sovereign function" of organizing and managing "the Indian trust relationship." (quoting *Jicarilla Apache Nation*, 564 U.S. at 175).

360. U.S. CONST. art. 1, § 2, cl. 3.

"Indians not taxed" are not to be considered in determining the number of representatives to which a state is entitled.[361] Known as the "democratic deficit," Tribes as sovereigns have no legal representation in Congress and otherwise lack any systemic political power in the American democratic process.[362] Of course, Tribes are notoriously not a political component of the United States.[363] They are separate sovereigns! But if federalism were to seriously contend with "domestic dependent nations," such as treaty federalism,[364] then we all must contend with the utter lack of any representational infrastructure for Tribes within the federal government.

The Cherokee Nation's treaty actually envisioned this very type of representation,[365] and they are currently calling for fulfillment of this long-forgotten treaty provision.[366] Professor Clinton cites two treaties with the Indians as promising "Indian statehood, or at least a delegate in Congress" and notes that "[t]hroughout the nineteenth century discussions consideration was given to forming an Indian, rather than a multiracial, state in the former Indian territory, now eastern Oklahoma."[367] Such "treaty federalism" calls for tribes to be built into the governmental structure.

The Maori have some representation in the New Zealand Parliament.[368] Australia recently rejected a proposed institutional restructuring known as "The

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361. *Id.*

362. Richard B. Collins, *Never Construed to Their Prejudice: In Honor of David Getches*, 84 U. COLO. L. REV. 1, 25–28 (2013).

363. Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 599 U.S. 382, 409 (2023) (Gorsuch, J., dissenting).

364. Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2305 (1989).

365. Treaty of Hopewell art. 12, U.S.-Cherokee Nation, Nov. 28, 1785, 7 Stat. 18. *But see* Cherokee Nation v. Georgia, 30 U.S. 1, 25 (1831) (Johnson, J., concurring) ("It is true, that the twelfth article gives power to the Indians to send a deputy to congress; but such deputy, though dignified by the name, was nothing and could be nothing but an agent . . . . It cannot be supposed that he was to be recognized as a minister, or to sit in the congress as a delegate.").

366. Tribes do not have this. What if we did? *See, e.g.*, Simon Romero, *Cherokees Ask U.S. to Make Good on a 187-Year-Old Promise, for a Start*, N.Y. TIMES (Nov. 14, 2022), https://www.nytimes.com/2022/11/03/us/cherokees-congress-delegate-treaty.html [https://perma.cc/S5C7-WPWE] (describing the demand that Congress honor a treaty and seat a nonvoting delegate).

367. Robert N. Clinton, *The Dormant Indian Commerce Clause,* 27 CONN. L. REV. 1055, 1242 n.470 (1995); Pomp, *supra* note 344, at 924 n.88.

368. Rawiri Taonui, *Ngā māngai – Māori Representation*, TE ARA: THE ENCYCLOPEDIA OF N.Z. (June 20, 2012), https://teara.govt.nz/en/nga-mangai-maori-representation/print [https://perma.cc/8RWF-NKZW]. Note however, public opinion in New Zealand has recently shifted against the Māori. *See, e.g.*, Natasha Frost, *In Rightward Shift, New Zealand Reconsiders Pro-Maori Policies*, N.Y. TIMES (Dec. 16, 2023), https://www.nytimes.com/2023/12/16/world/australia/new-zealand-maori-rights.html [https://perma.cc/3F5W-HX5E].

Voice."[369] Indigenous people would have been delegated non-voting seats in the Parliament, and while they would still lack voting authority, they would have full participatory rights to engage in debate, make formal interventions, and otherwise be "at the table." The Sami of Sweden and Finland occupy distinct "Sami Councils" that formally interact with the national parliaments.[370]

Because federal laws and court decisions apply to all Tribal governments, Tribal Nations have formed collective organizations to provide some unity in addressing U.S. Indian policy.[371] For example, the National Congress of American Indians,[372] the Coalition of Large Tribes,[373] the United South and Eastern Tribes,[374] the All Pueblo Council of Governors,[375] the California Tribal Chairpersons

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369. Lorena Allam, *Rejecting the Voice Shows Australia Is Still in Denial, Its History of Forgetting a Festering Wrong*, THE GUARDIAN (Oct. 14, 2023, 5:50 AM), https://www.theguardian.com/australia-news/commentisfree/2023/oct/14/rejecting-the-voice-shows-australia-is-still-in-denial-its-history-of-forgetting-a-festering-wrong [https://perma.cc/H6ED-9ZXL]; *2023 Referendum National Results*, AUSTL. ELECTORAL COMM'N (Nov. 2, 2023, 3:46 PM), https://results.aec.gov.au/29581/Website/ReferendumNationalResults-29581.htm [https://perma.cc/7XFF-CQPB].

370. *About the Sammi Council*, SAAMI COUNCIL, https://www.saamicouncil.net/en/the-saami-council [https://perma.cc/KL2X-GAG6] (last visited Mar. 24, 2024).

371. EagleWoman, *supra* note 2, at 626–27.

372. National Congress of American Indians was founded in 1944 and "is the oldest, largest, and most representative American Indian and Alaska Native organization serving the broad interests of tribal governments and communities." NAT'L CONG. OF AM. INDIANS, https://www.ncai.org [https://perma.cc/K8ZX-4SMK] (last visited Mar. 24, 2024).

373. COALITION OF LARGE TRIBES, https://largetribes.org [https://perma.cc/23FC-9R9A] (last visited Mar. 24, 2024) (comprising members from large-land based Tribal Nations, including Spokane Tribe of Indians, Shoshone–Bannock Tribes, Cheyenne River Sioux Tribe, Navajo Nation, Rosebud Sioux Tribe, Oglala Sioux Tribe, Ute Indian Tribe, Blackfeet Nation, Eastern Shoshone Tribe, Fort Belknap, Mandan Hidatsa and Arikara Nations, and Sisseton Wahpeton Oyate Tribe).

374. UNITED S. & E. TRIBES, INC., https://www.usetinc.org/about/member-tribal-nations/ [https://perma.cc/Y2CM-T5V7] (last visited Mar. 24, 2024) (comprising 33 federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico, including Eastern Band of Cherokee Indians, Miccosukee Tribe of Indians of Florida, Mississippi Band of Choctaw Indians, Seminole Tribe of Florida, Chitimacha Tribe of Louisiana, Seneca Nation of Indians, Coushatta Tribe of Louisiana, Saint Regis Mohawk Tribe, Penobscot Indian Nation, Passamaquoddy Tribe–Pleasant Point, Passamaquoddy Tribe–Indian Township, Houlton Band of Maliseet Indians, Tunica-Biloxi Tribe of Louisiana, Poarch Band of Creek Indians, Narragansett Indian Tribe, Mashantucket Pequot Tribal Nation, Wampanoag Tribe of Gay Head (Aquinnah), Alabama-Coushatta Tribe of Texas, Oneida Indian Nation, Mi'kmaq Nation, Catawba Indian Nation, Jena Band of Choctaw Indians, The Mohegan Tribe, Cayuga Nation, Mashpee Wampanoag Tribe, Shinnecock Indian Nation, Pamunkey Indian Tribe, Rappahannock Tribe, Chickahominy Indian Tribe, Chickahominy Indian Tribe–Eastern Division, Upper Mattaponi Indian Tribe, Nansemond Indian Nation, and Monacan Indian Nation).

375. ALL PUEBLO COUNCIL OF GOVERNORS, https://www.apcg.org [https://perma.cc/3SVK-8ASK] (last visited Mar. 24, 2024) (comprising Tribal leaders from all 20 Pueblos, including Pueblo of Acoma, Pueblo of Cochiti, Pueblo of Isleta, Pueblo of Jemez, Pueblo of Jemez, Pueblo of Laguna, Pueblo of Nambé, Ohkay Owingeh, Pueblo of

Association,[376] and the Affiliated Tribes of Northwest Indians[377] all participate in various lobbying and advocacy efforts. But their political influence is presently on par with other private coalitions and corporations. They are not treated as governments, sovereigns, or as a necessary piece of the federalism structure.

Assimilation logic seeks to absorb Native people into the American body politic for the purpose of absorbing and consequently erasing the Tribe. At least one irony of this logic is the purposeful exclusion of Native peoples, along with most other people of the United States, such as Black Americans and women, from the body politic at the drafting of the U.S. Constitution.[378] Looking back, it is difficult to see where Tribes can and should be considered. Looking forward, what might representation for the protectorate sovereigns look like?

Tribes exist outside the constitutional bargain, not envisioned in the American representation framework. Nevertheless, Tribes have been forcibly brought into this framework via the assertion of Congress's plenary power. Representation is critical to the democratic project. Adding 574 new congressional representatives, one for each federally recognized Tribe, would most purely reflect the distinct sovereign interests of Tribes. They would also effectively overwhelm the current 535 members of Congress (100 senators and 435 representatives). Yet, adding only one congressional representative would likely undermine the grossly varying interests of Tribes while also failing to account for the significant area of lands under Tribal jurisdiction. Representation could be reserved for just the Tribes with treaty relations with the federal government. For example, the Cherokee Nation has a treaty-recognized right to representation. But many Tribes with treaties do not have such a provision, and many other Tribes have no treaty at all. To the extent treaties are reflections of the sovereign-to-sovereign posture of all Tribes, all Tribes should have representation. The Sami, the Maori, and Australia's proposed "Voice," all offer potential models for representation in the nation–state. But U.S. Tribes are

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Picuris, Pueblo of Pojoaque, Pueblo of San Felipe, Pueblo of San Ildefonso, Pueblo of Sandia, Pueblo of Santa Ana, Pueblo of Santa Clara, Pueblo of Santo Domingo, Pueblo of Taos, Pueblo of Tesuque, Pueblo of Ysleta Del Sur, Pueblo of Zia, and Pueblo of Zuni).

376. CAL. TRIBAL CHAIRPERSONS' ASS'N, https://catribalchairs.org/ [https://perma.cc/D9CF-BG4L] (last visited Mar. 24, 2024) (a coalition of the Southern California Tribal Chairmen's Association, the Central California Tribal Chairmen's Association, and the Northern California Tribal Chairmen's Association).

377. AFFILIATED TRIBES OF NW. INDIANS, https://atnitribes.org/about/our-mission/ [https://perma.cc/2QDQ-DBES] (last visited Mar. 24, 2024) (comprised of 57 Northwest Tribal governments from Oregon, Idaho, Washington, southeast Alaska, northern California, and western Montana).

378. *See generally* TERRY BOUTON, TAMING DEMOCRACY: "THE PEOPLE," THE FOUNDERS, AND THE TROUBLED ENDING OF THE AMERICAN REVOLUTION 4 (2007) ("[M]uch of the revolutionary generation was convinced that, during the postwar decade, the elite founding fathers had waged—and won—a counter-revolution against popular democratic ideals."); WOODY HOLTON, UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION (2007) (arguing that the Framers sought to curtail the embrace of democracy in the aftermath of the Revolution); MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION (2016) (arguing that the Constitution was the result of interest group politics and overwhelmingly reflected elite interests).

culturally and politically distinct in ways the Sami, Maori, and Aboriginal Australians models do not accommodate.

Consequently, Indigenous representation in the U.S. nation–state will likely require a unique model. It could include a variation of the Sami Council model, with several different regional councils made up of coalitions of Tribes. Or Tribes could develop their own inter-Tribal procedures for the purpose of nation–state representation. Varying dynamics of population size, Tribal land size and status, current jurisdictional statuses, governing capacities, cultures, languages, revenues, and numerous other variables would have to be navigated. But while daunting, Tribes are already navigating these differences without the benefit of formal representation. Tribes have navigated these differences since time immemorial. Representation is not impossible in principle.

C. Civil Rights Accountability

In its August 2022 report regarding the United States' implementation of the International Convention on the Elimination of All Forms of Racial Discrimination,[379] the Committee on the Elimination of Racial Discrimination ("CERD") specifically raised concerns regarding the ruling in *Oklahoma v. Castro-Huerta*, particularly the concern that Indigenous women are denied the right of access to justice and reparation.[380] Concurrent state jurisdiction has the practical effect of negating Tribal jurisdiction. CERD recommended that the United States recognize Tribal jurisdiction over all offenders who commit crimes on Tribal lands and increase funding and specific training for those working within the criminal justice system.[381] But what if Tribal justice is illiberal?[382]

Because Tribal sovereignty derives inherently, rather than from the federal government, and because Tribes were not invited to the Constitutional Convention, Tribes are extra-constitutional. This status has been tolerated tepidly, such that congressional plenary power has statutorily extended some of the Bill of Rights protections, while also demoting Tribal sentencing authority to misdemeanors-only status. But when considering a more robust role for Tribal sovereignty, including fully re-recognized Tribal jurisdiction, one of the primary areas of critique concerns the extent to which Tribal courts should be beholden to constitutional due process protections.[383] If Tribes are fully recognized as secure protectorate sovereigns, including with the full right to free, prior, and informed consent, as well as representation in the nation–state government—should they then be expected to comply with the nation–state's expectations for due process?

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379. G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, (Dec. 21, 1965).

380. Concluding Observations on the Combined Tenth to Twelfth Reports of the United States of America, CERD/USA/CO/10-12, ¶ 47 (2022).

381. *Id.* ¶ 48.

382. *See generally* Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799 (2007).

383. *See, e.g.*, Michael Doran, *Redefining Tribal Sovereignty for the Era of Fundamental Rights*, 95 IND. L.J. 87 (2020) (defending implicit divestiture as a justifiable attempt to balance the fundamental constitutional rights of non-Indigenous people against Native extra-constitutionalism).

While extremely rare, when the U.S. Supreme Court has considered Tribal judiciaries, it has expressed hesitation with Tribal due process exceptionalism. As seen in *McBratney*, the Court is willing to eliminate Tribal jurisdiction at the prospect of subjecting defendants to a judiciary that does not guarantee constitutional due process protections. Despite the Supreme Court's fears, very few complaints of actual due process violations have ever been presented to federal judiciaries. This is due in part to the 1978 holding in *Santa Clara Pueblo v. Martinez*, in which the Court preserved Tribal sovereign immunity and limited federal causes of action for allegations of due process violations in Tribal forums to habeas corpus petitions. Disturbingly, federal judicial rhetoric regarding Tribal courts has changed very little from a century ago, often spiraling into unfounded concerns about unknowable Tribal law, custom, and tradition.

But the lack of habeas corpus petitions stemming from Tribal court cases does not mean there are no due process concerns.[384] In fact, as Tribes have reconfigured their governments to more closely align with Western governing norms, due process violations are likely to occur in at least some instances. Several scholars have considered the extent to which a full recognition of Tribal authority would necessitate a more deliberate policing of potential Tribal civil rights violations.[385] In the Indian Law and Order Commission Report, in which a bipartisan commission extensively examined criminal justice in Indian Country pursuant to the Tribal Law and Order Act of 2010 ("TLOA"), the Commissioners advocated for a full *Oliphant*-fix but conceded this was likely feasible only if Tribes acquiesced to full federal review.[386] Both the TLOA and amendments to the Violence Against Women Act ("VAWA") have conditioned recognitions of Tribal criminal jurisdiction on whether Tribes exercising that authority implement additional enumerated due process protections. But the federal due process protections of ICRA, TLOA, or VAWA are not necessarily the only possible iterations of fairness.[387] Rather, they are most relevant in the context of adversarial courts

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384. *See* Wenona T. Singel, *Indian Tribes and Human Rights Accountability*, 49 SAN DIEGO L. REV. 567, 585 (2012) ("In recent years, several tribes have been publicly criticized for allegedly violating human rights . . . includ[ing] race and sex discrimination, failure to provide a fair and public hearing before an independent and impartial tribunal, infringement of freedom of expression and freedom of association, arbitrarily depriving individuals of their property rights, and creating barriers to the right of individuals to freely exercise their culture."); Riley, *supra* note 382, at 838 ("Illiberalism within tribal communities is complicated and nuanced."); Rebecca Tsosie, *Indigenous Women and International Human Rights Law: The Challenges of Colonialism, Cultural Survival, and Self-Determination*, 15 UCLA J. INT'L L. & FOREIGN AFFS. 187, 225 (2010) ("Many scholars are troubled by the idea that tribes would want to be protected but not bound by human rights norms.").

385. Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657, 670 (2013); Gould, *supra* note 219, at 692–93 (arguing that Tribal sovereignty is best protected by first protecting individuals).

386. ROADMAP, *supra* note 218, at 25 ("Congress should establish a new Federal circuit court, the United States Court of Indian Appeals . . . to hear all appeals relating to alleged violations of the 4th, 5th, 6th, and 8th Amendments of the U.S. Constitution by Tribal courts.").

387. *See, e.g.*, van Schilfgaarde, *supra* note 214, at 107 n.15, 123 n.129.

operated by a powerful government, and so the forceful imposition of federal due process protections on Tribes is yet another form of forcible assimilation—in this case, to the adversarial court system. Concerns for civil rights accountability do not necessarily justify the protector sovereign intruding on the internal self-government of the protectorate by dictating the format of their judiciaries. Tribal self-determination must include the sovereign authority to self-determine the format of justice.

Nation–states, as sovereigns, retain the authority to self-determine their justice systems. But they are also held to international human rights standards. Illiberal practices are scrutinized, and nation–states that have willingly subjected themselves to the jurisdiction of regional and international bodies are held accountable for human rights violations. In consideration of the international sovereign principles, Winona Singel has proposed arguably the most appealing solution thus far.[388] She suggests Tribes collectively submit to an inter-Tribal human rights forum.[389] The beauty of this solution is its capacity to offer meaningful accountability, transparency, and relief to litigants while insulating Tribes from the oppressive assimilation pressures of Anglo systems and providing an opportunity to build an organically Indigenous jurisprudence. Given the trajectory of Congress in statutes like VAWA, Tribes will need to steel against congressional insistence that Tribes assimilate to Anglo-adversarial justice.

CONCLUSION

When the U.S. Supreme Court was asked in 1965 to quantify Tribal water rights based on the reasonably foreseeable needs of the Indians, the Court declined, reflecting simply that "[h]ow many Indians there will be and what their future needs will be can only be guessed."[390]

The foundational principles of federal Indian law vest Congress with plenary and exclusive power over Indian affairs, in which Tribal Nations retain important sovereign powers over their members and their territory subject to that plenary power; in exercising that plenary power, the United States has a trust responsibility to Tribal nations.[391] Congress has the authority to further diminish the retained sovereign powers of Tribes, but it must do so explicitly. Absent explicit restraints, Tribes are presumed to retain their inherent sovereign powers. *Castro-Huerta* puts forth an alternate frame in which Tribes are presumed to retain only those powers acknowledged by Congress.

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388. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234, 124 Stat. 2258, 2279–80; Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120–23; Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, div. W, 136 Stat. 49, 840–58.

389. Singel, *supra* note 384, at 570.

390. Arizona v. California, 373 U.S. 546, 601 (1963).

391. COHEN'S HANDBOOK, *supra* note 59, at § 5.04(3)(a)–(b), at 415 (noting that trust responsibility has been applied to limit federal administrative action but only to be a prudential limit on congressional action). *See also* Oklahoma v. Castro-Huerta, 597 U.S. 629, 657 (2022) (Gorsuch, J., dissenting) ("[There is] a foundational rule that would persist for over 200 years: Native American Tribes retain their sovereignty unless and until Congress ordains otherwise.").

Louis F. Claiborne, who as a long-time deputy Solicitor General serving, on-and-off, from 1962 to 1985 and participated in many Supreme Court cases involving Tribes, was skeptical of Tribal sovereignty:

> First, to speak of "sovereign Tribes" within States was undiplomatic, to put it mildly. Second, "sovereign" seemed an ill-fitting word to describe wholly dependent collections of Indians, sometimes of unrelated Tribes, merely subsisting on government "hand-outs" on arbitrarily assigned reservations, often with no governmental structure of their own. Third, to claim tribal sovereignty appeared to be inconsistent with the State jurisdiction within Reservations that had to be conceded (e.g., the *McBratney* rule and the taxability of non-Indian land), not to mention the "plenary" power of Congress. And, finally, in *McClanahan*, if not earlier, the Court had relegated the Indian sovereignty doctrine to the role of a mere "backdrop." I may add that talk of "sovereignty" tends to create unreal expectations in the Indian community. All these problems still exist. But the significant rebirth of tribal institutions makes the claim of sovereignty more persuasive.[392]

Rebirth indeed. The very existence of the 574 federally recognized Tribes exudes an undeniable insistence to continue. *Castro-Huerta* is frankly out of step with the current realities of Tribal governance. Tribes are not vanishing. To reason that they are is antiquated, amoral, illiberal, and unhelpful. It also happens to be against the rule of law, implicating sovereignty itself. But the vanishing Tribe trope is not outlandish. It is deeply rooted in the earliest iterations of federal Indian law, with too many cases eager to lend their support. It is reinforced by an abysmal lack of institutional mechanisms to engage with Tribes as sovereigns.

This means *Castro-Huerta* is an invitation. Do we accept the inevitability of the vanishing Tribe? Or do we finally anticipate a future that requires sovereign-to-sovereign mechanisms?

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392. Louis F. Claiborne, *The Trend of Supreme Court Decisions in Indian Cases*, 22 AM. INDIAN L. REV. 585, 595 (1998).