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ARTICLES

COMMERCE WITH THE INDIAN TRIBES: ORIGINAL MEANINGS, CURRENT IMPLICATIONS

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The Supreme Court's 2022 ruling in Oklahoma v. Castro-Huerta *defied much current precedent and practice, as four dissenters protested. But neither side grappled with the Constitution's original meaning. Both text and early practice confirm that the federal power to regulate "commerce with the Indian tribes" was a different, more constrained power than the power to regulate "commerce among the states." But as nineteenth century courts recognized, federal Indian law could also draw on powers inherent in national sovereignty—a wider, but not unbounded, source of authority and one which necessarily excluded interference from states. Even if tribal reservations are now seen as no more independent than states, they have good claims to protection under constitutional safeguards for the free flow of commerce—rather than being treated as colonial dependents of state governments. In contrast to the conformist and assimilationist policies imposed by federal authority in the decades after the Civil War, today's America should be more receptive to the Constitution's original view on Indian tribes—as separate nations within the larger American nation.*

INTRODUCTION: ORIGINALISM HAS NOT REACHED INDIAN LAW

Dissenters denounced the Supreme Court's decision in *Oklahoma v. Castro-Huerta* for disregarding established precedent.[1] In most of the controversial decisions delivered in the spring of 2022, the conservative majority discounted established precedents in the name of restoring or respecting the Constitution's original meaning.[2] In *Castro-Huerta*, the majority did not make that claim. But

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1. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2505-27 (2022) (Gorsuch, J., dissenting).

2. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (state authority to regulate abortion); Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (expanding protection for voluntary prayer in public schools); N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (Second Amendment protection for carrying guns); West Virginia v. EPA, 142 S. Ct. 2587 (2022) (heightened judicial scrutiny of agency interpretations of "major" statutory issues).

nor did the four dissenters, speaking through Justice Gorsuch, rely on the Constitution's original meaning.

The case considered whether Oklahoma could prosecute a crime committed by a non-Indian against an Indian victim, on territory recognized by treaty as reserved for Indians. A bare majority of the Court found the answer to be yes, reasoning that even Indian reservations are part of the surrounding state.[3] The dissenters insisted that the Court's precedents of recent decades required, at minimum, a far more cautious or qualified response to this question.[4] Whatever else it decided, *Castro-Huerta* seems to demonstrate that the Court is not very interested in recovering the Constitution's original meaning as it applies to America's original peoples.

One reason for this lack of interest may be that emphatic precedents seem to claim that Congress has "plenary power" to regulate matters involving Indian tribes.[5] If Congress can do *anything* in this field, it might seem of no great moment whether it shares some of that power with state governments. In more technical terms, *Castro-Huerta* seemed to rely on a preemption analysis, which assumes Congress can assert federal authority as it chooses: if Congress has not legislated, it may be inferred that it has authorized state laws to fill resulting gaps.[6]

There may be another, equally important explanation for the Court's unusual indifference to claims about original meaning in relation to Indian law. It is that, while a great deal of valuable scholarship has explored the historical context of the Constitution's provisions on Indian tribes,[7] few scholars have made much

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3. *Castro-Huerta*, 142 S. Ct. at 2504 (majority opinion) ("Indian country within a State's territory is part of a State, not separate from a State").

4. *Id.* at 2511 (Gorsuch, J., dissenting) ("reservations are not glorified private campgrounds").

5. *See* United States v. Lara, 541 U.S. 193, 200 (2004) (Congress has "plenary and exclusive" authority over Indian affairs); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) (Congress has "plenary power to legislate in the field of Indian affairs"); Morton v. Mancari, 417 U.S. 535, 551 (1974) ("plenary power of Congress to deal with the special problems of Indians"). *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §5.02 (Nell Jessup Newton ed., 2019) ("The term 'plenary' indicates the breadth of congressional power to legislate in the area of Indian affairs . . . . The term . . . has also been employed as a shorthand for general federal authority to legislate on health, safety, and morals within Indian country, similar to the states' police powers over non-Indians.").

6. *See Castro-Huerta*, 142 S. Ct. at 2495 (majority opinion) ("Importantly, . . . the General Crimes Act does not say . . . federal jurisdiction is exclusive in Indian county, or that state jurisdiction is preempted in Indian county.").

7. For highlights of efforts at recovering the original meaning of the Indian commerce clause, see Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 AM. INDIAN L. REV. 57 (1991); Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055 (1995); Matthew L.M. Fletcher, *Preconstitutional Federal Power*, 82 TUL. L. REV. 509 (2007); Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201 (2007); Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999 (2014) [hereinafter Ablavsky, *The Savage Constitution*]; Gregory Ablavsky, *Beyond the Indian Commerce*

effort to extrapolate from the historical record to conclusions about what the Constitution should mean in our time.

This Article argues that the original meaning has many direct applications to current questions on the status of Indian tribal authority within reservations. Part I below argues that Indian tribes must be seen as having claims to an independent political existence—as early Supreme Court rulings recognized. Part II argues that federal power over Indian tribes was understood as a means of excluding outside interference with tribes, by foreign nations but also by U.S. states. Part III argues that federal power to regulate Indian tribes was not seen as "plenary" in the nineteenth century but understood to reach beyond regulation of commerce only for claims of national sovereignty. These were, in turn, understood to have inherent limits. Part IV argues that tribal territories have at least as much claim as states to be free from restrictions on the flow of commerce into and out of their jurisdictions. Part V argues that the special provisions for state criminal jurisdiction on tribal lands, even if (arguably) defensible in the name of preserving order, cannot justify the Court's readiness to extend state taxing and regulatory claims on tribal lands. Part VI concludes with observations on the way tribal claims to autonomy reflect wider concerns which the Constitution was designed to safeguard. These concerns are more resonant today than in the late nineteenth and early twentieth centuries when federal policy sought to coerce Indian assimilation to mainstream American culture.

I. THE HISTORICAL AND CONSTITUTIONAL GROUNDING OF INDIAN SELF-GOVERNMENT

The two references to Indians in the original Constitution suggest, on their face, that Indian tribes were regarded as independent or at least semi-independent entities. They were seen in exactly that way by the most authoritative interpreters of the Constitution in its formative decades.

The first reference is in Article I, Section 2—almost at the very outset. That provision apportions seats in the House of Representatives based on population but excludes from each state's population "Indians not taxed."[8] The same provision indicates that slaves should be counted as three fifths of a person. That painful compromise limited the representational weight that could be claimed by slave-owners but still acknowledged slaves as among the economic or social constituencies counted in the apportionment of House seats.[9] "Indians not

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Clause, 124 YALE L.J. 1012 (2015) [hereinafter Ablavsky, *Beyond the Indian Commerce Clause*]; M. Alexander Pearl, *Originalism and Indians*, 93 TUL. L. REV. 269 (2018); Lorianne Updike Toler, *The Missing Indian Affairs Clause*, 88 U. CHI. L. REV. 413 (2021).

8. U.S. CONST. art. I, § 2, cl. 3.

9. The same formula was adopted to apportion direct taxes, so excluding slaves altogether would have substantially lessened the tax burden on slave-holding states. Counting slaves as full persons (for purposes of allocating seats in the House) would have given extra representation to slave-holding states but not, of course, to persons held as slaves. Whatever one thinks of this compromise, the notable thing is that no such compromise was attempted for "Indians not taxed"—who

taxed"—which seems to mean, outside the reach of state authorities, otherwise keen to impose taxation—stand outside the whole scheme.

"Indian tribes" then appear in Article I, Section 8, setting out powers of Congress. Among these are the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[10] Close attention to the wording suggests that, from the stand-point of federal authority, Indian tribes are akin to foreign nations. Congress can regulate commerce *among* the states—which implies a range of transactions already scattered through the nation, running in many directions across all the various state boundaries. Commerce *with* foreign nations seems to allude to streams of trade that will operate within well-defined channels, seemingly focusing on transactions between the United States, as a whole, and particular foreign nations. The same preposition—"*with* the Indian tribes" —seems to indicate the same sense of focus or limitation, as if this sphere of regulation also concerns the United States as a whole and particular Indian tribes.[11]

It is not necessary to put great weight on the differing prepositions in these clauses, however, to see the general point. Widely divergent early practice in these different areas of "regulation" confirms that these clauses were understood to have differing reach. Throughout American history, the power to regulate commerce "among the states" has been understood to embrace a power to set down rules for actions taken within states that may affect the stream of commerce across state lines.[12] The power has come to be understood as reaching quite deeply or broadly into commercial activity that occurs within states (and even to activity not itself commercial but that may affect commerce indirectly). No one

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presumably would not be reached by federal direct taxes either.

10. U.S. CONST. art. 1, § 8, cl. 3.

11. Somewhat surprisingly, commentators have failed to notice these distinctions. *See* Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149 (2003) (reporting numerous claims from past scholarship that the term "commerce" means the same thing in each clause but failing to notice that the prepositions preceding that word differ from clause to clause). A skeptical response suggests "commerce" may mean different things in each subclause given other textual allocations of power (as to the President in foreign affairs), without pondering the different prepositions before each kind of "commerce" in Article I, Section 8 enumeration. *See* Adrian Vermeule, *Three Commerce Clauses? No Problem,* 55 ARK. L REV. 1175 (2003). Similarly, another commentator takes for granted that "commerce" should mean the same thing in each clause. *See* Nathan Speed, *Examining the Interstate Commerce Clause Through the Lens of the Indian Commerce Clause*, 87 B.U. L. REV. 467 (2007). I have encountered no scholarly work commenting on the implications of the different prepositions.

12. As famously affirmed in Chief Justice Marshall's exposition in *Gibbons v. Ogden*, "[t]he word 'among' means intermingled with. A thing which is among others, is intermingled with them. Commerce among the states, cannot stop at the external boundary line of each State, but may be introduced into the interior." 22 U.S. (9 Wheat.) 1, 74 (1824). He then notes that, "if a foreign voyage may commence or terminate at a port within a State [as at a port on an inland river], then the power of Congress may be extended within a State." *Id.* But he never suggests that the power to regulate "commerce with foreign nations" gives authority to impose regulations "within a foreign nation."

claims Congress has a similar power to impose safety or environmental controls or worker protections for commercial activity in foreign countries. The power to regulate commerce "*with* foreign Nations" does not confer federal power to regulate practices *within* foreign nations. The power to regulate commerce "*with* the Indian Tribes" seems to have been viewed as operating under similar limitations—for good reasons.

When the United States has sought to induce foreign countries to change their domestic practices, it has often done so by negotiating a treaty.[13] The federal government makes treaties with foreign nations because it cannot simply command them to accept U.S. standards. Among the earliest treaties of the United States were treaties with Indian tribes—or "nations," as they were often called in early treaties.[14] Such treaties were negotiated even before the adoption of the Constitution, when the government operated under the Articles of Confederation. As Chief Justice Marshall pointed out, the provision in Article VI making treaties "supreme law of the land" was worded in such a way as to preserve the continuing authority of these earlier treaties—seemingly with conscious reference to Indian treaties as well as treaties with European nations.[15] When the Constitution was put into effect, the Washington administration followed the same procedure—submission to the "advice and consent" of the Senate—with Indian treaties as with all its other treaties.[16]

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13. The first United States treaty, for example, included French promises to exempt U.S. citizens owning property in France from local limitations on inheritance of property by foreigners. Treaty of Amity and Commerce, Fr.-U.S., art. 13, Feb. 6, 1778, 8 Stat. 12, *available at* https://avalon.law.yale.edu/18th_century/fr1788-1.asp [https://perma.cc/F4B4-YWEU]. The same treaty promised that, in the event of war between the two countries, merchants of either who held property in the other's territory should be given six months to sell such property "for the better promoting of Commerce on both sides." *Id.* at art. 22.

14. *See* Treaty with the Delawares, Delaware Nation-U.S., Sept. 17, 1778, 7 Stat. 13 (characterized in its preamble as "articles of agreement with . . . Chief Men of the Delaware Nation"); Treaty with the Six Nations, Six Nations-U.S., Oct. 22, 1784, 7 Stat. 15; Treaty with the Choctaw, Choctaw Nation-U.S., Jan. 3, 1786, 7 Stat. 21.

15. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 519 (1832). The Supremacy Clause adopts different wording for different types of legal commitments. It attributes "supreme Law of the Land" status to "the Constitution" and "the Laws of the United States which shall be made in Pursuance thereof" (that is, laws enacted after the Constitution takes effect) but also to "all Treaties made, or which shall be made, under the Authority of the United States"—embracing treaties already made under the Articles of Confederation. U.S. CONST. art. VI, cl. 2. The framers had particular concern to preserve the status of the treaties made with France during the War of Independence and the 1783 peace treaty with Britain, affirming American independence. But the Framers did not specify that they meant only treaties with European powers. So Chief Justice Marshall had grounds to argue: "The constitution, by declaring treaties already made, as well as those to be made, to be 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." *Worcester*, 31 U.S. at 519.

16. ANDREW C. MCLAUGHLIN, CONSTITUTIONAL HISTORY OF THE UNITED STATES 249-50

A traditional way of enforcing a treaty or of inducing a foreign nation to agree to a treaty is with trade sanctions: the United States can impose a special tariff on a disfavored state or even prohibit all trade with that state.[17] It is the nature of such sanctions to be specific to disfavored nations, so that nations which do conform to U.S. expectations can be accordingly favored.[18] The Constitution, however, seems to prohibit federal trade sanctions against U.S. states by requiring that no tax can be imposed on exports from states (which could include exports to other states)[19] and that import taxes must be uniform among all ports of the United States.[20] Just as there are no such limitations on targeted sanctions against foreign nations, there is no stated limitation in the Constitution on trade restrictions applied to particular tribes. They are, again, left in the position of foreign nations.[21]

The conclusion seemed plain to early constitutional authorities. Chief Justice's Marshall's opinion in *Worcester v. Georgia* canvassed federal legislation and practice over the whole period from before the Constitution's

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(1935). President Washington's initial experience seeking "advice" from the Senate before completing negotiation on a treaty persuaded him not to repeat that process. All subsequent presidents have treated "advice and consent" of the Senate as a single process that can be completed after negotiations are concluded. *Id.* That precedent-setting treaty experience concerned a treaty with an Indian tribe. *Id*.

17. The general embargo on foreign trade, adopted by the Jefferson administration (to exert pressure on European powers to respect U.S. neutrality) was regarded as constitutionally questionable precisely because it sought to restrict trade with all countries—the expected application was to exercise discrimination in the application of trade restrictions. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 640-646 (1833). "The argument was, that the power to regulate did not include the power to annihilate commerce, by interdicting it permanently and entirely with foreign nations." *Id.* at § 646.

18. One of the trade agreements sponsored by the World Trade Organization, for example, commits signatories not to subsidize production (within their own country) of products for export, so that they do not compete unfairly with products made elsewhere. Agreement on Subsidies and Countervailing Measures, art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14.

19. U.S. CONST. art. 1, § 9, cl. 5 ("No Tax or Duty shall be laid on Articles exported from any State."). Since "duties" were associated with tariff charges collected at ports, the inclusion of the term "tax" suggests a concern to include over-land commerce between states, as well.

20. *Id.* art. 1, § 9, cl. 6 ("No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another . . . ."). The clause does not specify that Congress lacks authority to impose a unique tax on overland imports into a particular state, but this seems never to have been attempted. It would surely raise severe constitutional questions if Congress attempted, for example, to pressure a hold-out state to ratify a constitutional amendment by imposing an embargo on its commerce across land borders with other states.

21. Tribes might make treaties with each other—the Constitution imposes no restriction on this practice (already known to exist in 1787). By contrast, the Constitution flatly prohibits states from entering treaties and forbids states, "without the consent of Congress . . . [to] enter into any Agreement or Compact with another State." *Id.* art. 1, § 10, cls. 1, 3.

adoption and through four decades thereafter. Chief Justice Marshall's opinion for the Court concluded that all the relevant measures "manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive."[22]

A few years later, Joseph Story, the most learned justice ever to sit on the Court, offered a still more emphatic characterization in his treatise on the Constitution: an Indian tribe, as it is "exercising the powers of government, and national sovereignty, under the guarantee of the general [i.e., federal] government . . . . is to be deemed politically a state; that is, a distinct political society, capable of self-government."[23]

In New York, James Kent, a jurist who ranked with Story and Marshall in eminence, had already affirmed a similar conclusion, based on his own review of the historical record. The United States "never dealt with those people [Indians] . . . as if they were extinguished sovereignties" but "constantly treated . . . them as dependent nations, governed by their own usages, and possessing governments competent to make and to maintain treaties."[24]

Whatever else one might say about the original understanding, it most certainly was not that Indian reservations are simply part of the surrounding state, as the decision in *Castro-Huerta* claims. As Justice Gorsuch pointed out in the dissenting opinion, many distinctive legal powers and immunities of tribal governments are not reconcilable with the notion that they are mere subdivisions of the surrounding states.[25] Thus, the Supreme Court has affirmed in recent decades that Indian tribal authority retains sovereign immunity—that is, it cannot be sued without its own consent.[26] Nor does prosecution in a tribal court preclude subsequent prosecution in federal court.[27] A tribal court is regarded as a separate

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22. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832). Marshall also emphasized there the associated terminology: "The very term 'nation,' so generally applied to them, means 'a people distinct from others.' . . . 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." *Id.* at 559-60.

23. STORY, *supra* note 17, at § 535.

24. Goodell v. Jackson, 20 Johns. 693, 714 (N.Y. 1823). He reasoned from this history that state governments had only the most limited authority over Indian tribes within their territory. "Chancellor" Kent (who presided over New York's Court of Chancery at the end of his career) won fame for his scholarship as much as his judicial rulings. He was the first professor of law at Columbia College in New York and published the four-volume *Commentaries on American Law*, whose influence and prestige prompted comparisons with Blackstone's *Commentaries on the Laws of England*. *See James Kent Was Appointed the First Professor of Law at Columbia 220 Years Ago*, COLUM. L. SCH., https://www.law.columbia.edu/news/archive/james-kent-was-appointed-first-professor-law-columbia-220-years-ago [https://perma.cc/YSB6-X9LN] (last visited Feb. 10, 2023).

25. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2511 (2022) (Gorsuch, J., dissenting) ("Tribes are sovereigns").

26. Kiowa Tribe of Okla. V. Mfg. Techs., Inc., 523 U.S. 751, 759-60 (1998).

27. United States v. Wheeler, 435 U.S. 313, 329-30 (1978) (holding conviction in Navajo court

jurisdiction, unlike a U.S. territory like Puerto Rico, where local prosecutions cannot be retried in ordinary federal courts.[28] Unlike local governments within states, tribal authorities can impose regulations with the force of law, without having to invoke authority delegated from outside.[29] In all these ways, Indian tribes are more like *analogs* to states than dependent *components* of states.

In some ways, tribes are more independent. The guarantees of the Fourteenth Amendment—due process, equal protection of the laws, and so on—apply to each "State."[30] Those guarantees have all been extended to local government entities as creatures of the state, hence the most famous Equal Protection case—*Brown v. Board of Education of Topeka*—concerns a local government entity.[31] But the Supreme Court has continuously adhered to the view that the Fourteenth Amendment does not, by its own terms, apply to Indian tribal authorities,[32] nor has the Court ever indicated that the amendment extends federal regulatory power over Indian reservations.[33] Tribes are not, for example, bound by the Supreme Court's decision requiring states to recognize same-sex marriage.[34] An express provision of the Fourteenth Amendment seems to reinforce the conclusion that

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did not preclude subsequent federal prosecution); Denezpi v. United States, 142 S. Ct. 1838, 1849 (2022) (holding conviction under Ute tribal code did not preclude subsequent prosecution for violation of federal law, covering same action).

28. Puerto Rico v. Sanchez Valle, 579 U.S. 59, 73-78 (2016) (holding a plea bargain in federal court excluded subsequent prosecution for same gun trafficking activity in Puerto Rico courts since authority for both court systems traces to U.S. Constitution, under which Congress authorized P.R. statutes).

29. *Wheeler*, 435 U.S. at 323-26 (recognizing Indian tribes still possess aspects of sovereignty not withdrawn by treaty or federal statute and so may impose criminal penalties on members without authorization from Congress or any other outside authority).

30. U.S. CONST. amend. XIV.

31. Brown v. Bd. Of Educ., 347 U.S. 483 (1954).

32. Elk v. Wilkins, 112 U.S. 94, 99, 109 (1884) (deciding that the Fourteenth Amendment does not apply to tribes because they are not "subject to the jurisdiction of the United States" as they are "not part of the people of the United States").

33. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55, 58 (1976). The Supreme Court's initial ruling on the Indian Civil Rights Act did not claim Congress was authorized to enact it by its power to enforce the guarantees of the Fourteenth Amendment. The Court did not say clearly how Congress derived authority to enact this measure in 1968 except by affirming, in very general terms, that all aspects of tribal sovereignty are "subject to the superior and plenary control of Congress," while acknowledging at the same that tribes "remain a 'separate people, with the power of regulating their internal and social relations.'" *Id*. at 55, 58 (quoting United States v. Kagama, 118 U.S. 375, 381-82 (1886)). But the Court may have tacitly indicated misgivings about congressional authority by holding that the Indian Civil Rights Act did not confer a private right of action allowing tribal members to sue tribal authorities. *See* Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989).

34. Lilly Knoepp, *Here's How Same-Sex Marriage Laws Differ on Tribal Lands,* BLUE RIDGE PUB. RADIO (Sept. 30, 2021, 10:07 AM), https://www.bpr.org/news/2021-09-30/heres-how-same-sex-marriage-laws-differ-on-tribal-lands [https://perma.cc/G6T8-XK4E].

it does not apply to tribes by repeating the original Constitution's exclusion from representation of "Indians not taxed."[35]

Courts in the nineteenth century thought states could not assert jurisdiction over Indians by trying to tax them.[36] The lands held by tribes were held to be exempt from state taxation.[37] Even the modern Supreme Court has held that tribal authorities have residual authority to contest state taxes and in some cases escape them altogether (as in relation to earnings by Indians from tribal undertakings).[38]

Viewed against these acknowledged exceptions for tribal authority, the Constitution has another provision of considerable relevance to the status of Indian tribes. In Article IV, Section 3, the framers went to the trouble of stipulating that no state could be subdivided without the consent of its own legislature.[39] Georgia seems to have raised this point in the dispute over the claim of the Cherokees to be exempt from state regulation.[40] How could the federal government set up an "independent power within a sovereign state [i.e., Georgia]"?[41] The answer of Chief Justice Marshall has already been quoted: the Cherokees were an independent nation, long before Georgia or the rest of the United States attained independence.[42]

Georgia's challenge—with Marshall's response—remains a formidable obstacle to the reasoning of *Castro-Huerta*. If Indian reservations are simply part of a state, what gives the federal government authority to exempt the residents from state taxation, to pursue prosecutions on their own (even of those who might be previously acquitted in state trials), or to refuse to be sued by state authorities?

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35. U.S. CONST. amend. XIV, § 2. The Fourteenth Amendment begins by affirming, "[a]ll persons born or naturalized in the United States, and *subject to the jurisdiction thereof*, are citizens of the United States." *Id.* § 1 (emphasis added). Section 2 then overrides the original three fifths count for slaves by affirming that representation in the House will be "apportioned among the several States according to their respective numbers, counting the whole number of persons in each State,"—but immediately qualifies this provision with an exception: "excluding Indians not taxed." *Id.* § 2. Indians, when living on their own tribal lands, beyond the reach of state taxes, seem to have been regarded as not "subject to the jurisdiction" of the United States, at least not in the same way as citizens.

36. *See, e.g.*, *In re* Kan. Indians, 72 U.S. (5 Wall.) 737 (1866).

37. *Id.* at 760.

38. *See* McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164 (1973); Bryan v. Itasca Cnty., 426 U.S. 373 (1976); Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995).

39. U.S. CONST. art. IV, § 3.

40. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 589-90 (1832) (M'Lean, J., concurring). The report of the Court's opinion in *Worcester v. Georgia* does not summarize arguments from Georgia, but the concurring opinion of Justice M'Lean takes note of them: "Much has been said against the existence of an independent power within a sovereign state; and the conclusion has been drawn, that the Indians, as a matter of right, cannot enforce their own laws within the territorial limits of a state." *Id.* at 589. He notes that no other state had asserted authority to govern internal affairs of Indian tribes "ever since the adoption of the Constitution." *Id.* at 590.

41. *Id.* at 589.

42. *Id.* at 589-90.

Can the federal government simply recognize any body of people within a state as a separate, federally protected enclave with special privileges compared with others in the state? If the federal government could do all this by unilateral exertion of its own regulatory power, there would seem to be no effectual meaning to the guarantee in Article IV.

It does not require much reflection to see that the Court's reasoning in *Castro-Huerta* is at odds with the most evident provisions of constitutional text and practice. That is reason enough to make a new start. The most reasonable place to start—particularly in the current era of constitutional interpretation—is where the Constitution started, with the original understanding of its provisions on the status of the Indian tribes.

II. FEDERAL POWER EXCLUDES THE STATES BECAUSE IT IS NOT PLENARY

The power to regulate commerce "with the Indian tribes"[43] is a successor to provisions in the Articles of Confederation, and before that, to practices of British colonial authority.[44] The impetus to all these assertions of authority was the fear that Indians might be provoked to make war on frontier settlements if not carefully handled.[45] In the 1750s, Indian tribes had sided with the French against British colonial settlements in the French and Indian War.[46] A generation later, rebellious colonists found that the Indians often took sides with Britain, attacking American outposts.[47] Accordingly, among the first treaties of the newly independent United States were agreements with Indian tribes, seeking to re-establish peace on the frontier.[48]

To put the point most starkly, Indian tribes were a threat to peace. Hence the complaint in the American Declaration of Independence that Britain had, amidst all its other abuses, sought to "bring on the . . . merciless Indian Savages," described in terms that make Indian fighters seem as fearful as the German mercenaries, denounced in a preceding provision.[49] Successive authorities in the

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43. U.S. CONST. art. 1, § VIII, cl. 3.

44. *Worcester*, 31 U.S. (6 Pet.) at 520, 573.

45. *See id*. at 573.

46. DANIEL K. RICHTER, FACING EAST FROM INDIAN COUNTRY: A NATIVE HISTORY OF EARLY AMERICA 184-86 (2001) (on French advantages in recruiting Indian allies). For a particularly vivid account of an Indian massacre of English troops, while assisting the French, see 2 FRANCIS PARKMAN, FRANCE AND ENGLAND IN NORTH AMERICA 1166-94 (Libr. Am. 1983) (1884) ("Fort William Henry," Ch. XV in "Montcalm and Wolfe: Part I").

47. *See* THE FEDERALIST NO. 24, at 157 (Alexander Hamilton) (Clinton Rossiter ed., 1999). It was not, of course, a matter of abstract preference by eastern tribes at the time. As Hamilton candidly noted, Indian tribes were "natural allies" of Britain and Spain "because they have most to fear from us, and most to hope from them." *Id*.

48. For valuable context, see FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 1790-1834, at 26-40 (1962).

49. THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776). The "known rule of warfare" of the Indian fighters is said to be "an undistinguished destruction of all ages, sexes and conditions."

eighteenth century—British Imperial, Confederal, Federal—did not have confidence that they could summon the resources or the political support for the sort of protracted wars that would be necessary to assure complete submission of warlike tribes.[50] So, they tried to accommodate the tribes with treaties in which Indians promised peace and the continental authority promised protection.[51]

In the nature of the situation, promises of protection went along with claims to exclusive regulation of relations with outsiders. As the British did not want French interference, the Confederation Congress did not want British—or French or Spanish—interference with Indian treaty partners.[52] For the same reason, the Confederation also wanted to exclude interference from newly independent American states.[53] Impulsive interference by the states might provoke frontier conflicts which the Confederation might then need to mobilize troops to suppress. Along with foreign powers, the states, too, were seen as threats to the United States' authority on the frontier.[54]

Accordingly, the Articles of Confederation specified that the Confederation Congress would have "*sole and exclusive* right and power of . . . regulating the trade and managing all affairs with the Indians."[55] The phrase "affairs with the Indians" might prompt association with "foreign affairs," assigned to the daily

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Id. The "large Armies of foreign Mercenaries" are said to "compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages." *Id.* at para. 27. The British forces are said to have "plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people." *Id.* at para. 26. In the Declaration's telling, there does not seem much moral difference between the war tactics of "savage" Indians or "barbarous" European forces.

50. ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800, at 20-21 (1997) ("survival" of European settlements understood to depend on "cooperative relationships with surrounding Indian tribes rather than through wars and conflict"); Jennifer Roback, *Exchange, Sovereignty and Indian-Anglo Relations*, *in* PROPERTY RIGHTS AND INDIAN ECONOMIES 5, 11 (Terry L. Anderson ed., 1992) ("Trade with the Indians . . . was profitable. War was costly.").

51. RICHTER, *supra* note 46, at 166-71 (discussing the "culture of diplomacy" among imperial powers dealing with Indian tribes before the French and Indian war).

52. *Id.* at 223-25 (discussing United States concern about British perpetuation of some Indian alliances, from bases near Canada, even after signing the peace treaty ending the American War of Independence).

53. Ablavsky, *The Savage Constitution*, *supra* note 7, at 1009-38 (discussing frustrated hopes of leading Confederation era statesmen, including Washington, Madison, and Hamilton, to exclude states from interfering with Indian tribes).

54. THE FEDERALIST NO. 3 (John Jay), *supra* note 47, at 38-39. The concern proved well founded, down to the end of the Confederation period: "Not a single Indian war has yet been produced by aggressions of the present federal government [under the Articles of Confederation], feeble as it is; but there are several instances of Indian hostilities having been provoked by improper conduct of individual States . . . ." *Id.*

55. ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 4 (emphasis added).

management of a "Department of Foreign Affairs" in 1781.[56] But there were already claimed exceptions, to which the same provision in the Articles gave vague acknowledgement: federal power would extend only to "Indians, not members of any of the states" and then only so far as "the legislative right of any state within its own limits be not infringed or violated."[57] The qualifications likely referred to Indians living outside tribal territories, already submitting to state taxation and control. But the language was notably unclear. *The Federalist No. 42* thus praised the new Constitution for leaving the Indian commerce power "very properly unfettered from two limitations in the articles of Confederation, which render the provision [in the Articles] obscure and contradictory."[58]

The phrasing of the Constitution's Indian commerce clause does not clearly indicate its reach, nor that it must be "exclusive." Recent scholarship has established that the drafting committee had originally intended to incorporate a version of the provision in the Articles and then inadvertently neglected to do so.[59] In the last days of the Philadelphia Convention, this lapse was hastily remedied by folding a new phrase into the already approved provision conferring power to regulate foreign and interstate commerce.[60] If the framers had intended to restrict federal power in this area, or make it less exclusive, compared with the power granted in the Articles, it would have been a unique instance in which the Constitution actually restricted, rather than enlarged federal power.[61]

Early practice confirms that, by the original understanding, this new clause conferred a substantial but still exclusive power. Congress exercised this power by establishing a licensing scheme to limit who could trade with Indian tribes.[62] It would have made no sense to limit commercial relations in this way if states had the authority to circumvent this scheme with their own rival authorizations.

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56. 19 JOURNALS OF THE CONTINENTAL CONGRESS: 1774-1789, at 42-44 (Wash. Gov't Printing Off., 1912). The Articles of Confederation, approved by the Continental Congress in November 1777—barely three years before—were under debate in several states at the time, so the phrase was still current.

57. ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 4.

58. THE FEDERALIST NO. 42 (James Madison), *supra* note 47, at 265 ("What description of Indians are to be deemed members of a State, is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of [state] legislation, is absolutely incomprehensible."). Madison seems to have taken for granted that Indians "not members of a State" would be shielded from state legislation under the new dispensation.

59. *See* Updike Toler, *supra* note 7.

60. *Id.* at 444-46, 460 (pointing out that a to-do list by the chairman of the Committee on Detail included "Indian affairs" with a check mark next to it, indicating committee approval to include it—though this has been obscured, for more than two centuries, by binding tape on the original record).

61. *Id.* at 443.

62. 25 U.S.C. § 177; *see also* PRUCHA, *supra* note 48, at 45-47, 53-55 (for background on policy debate at the time).

In fact, states seem to have accepted that the new federal power was exclusive; until the late 1820s, no state tried to regulate activity in Indian territories.[63] Georgia's effort to assert control over entry into Cherokee territory was thus rejected by the Supreme Court as a radical innovation, defying the established understanding of the constitutional settlement regarding state power and Indian tribes.[64]

The Marshall Court, in rejecting Georgia's authority, depicted federal authority as paramount only because it was limited and necessarily limited because it rested on the recognition that tribes retained an independent status (or semi-independent status, as what Chief Justice Marshall elsewhere described as "domestic dependent nations").[65] The federal government, in fact, limited its exercise of authority to regulating non-Indians interacting with Indians.[66]

The Court in *Castro-Huerta* does not try to explain how or why this original understanding came to be superseded, except to say, vaguely, that it happened in the course of the nineteenth century.[67] Some elements of this story are well-

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63. *See* DEBORAH A. ROSEN, AMERICAN INDIANS AND STATE LAW: SOVEREIGNTY, RACE, AND CITIZENSHIP, 1790-1880, at 19-29 (2007) (describing extensive dispute in New York State courts in the early 1820s over the state's authority to prosecute a Seneca Indian chief for executing a Seneca woman for practicing witchcraft—apparently the first assertion of state authority over Indian-on-Indian crime). State appellate judges were divided and uncertain. The state legislature subsequently voted to pardon the chief in this case but affirmed a limited jurisdiction for the future to protect Indians from "barbarous Indian practices." *Id.* at 29. Rosen finds that assertions of state criminal jurisdiction increased over the course of the century, with nearly three-quarters of states by 1880 claiming jurisdiction in special circumstances (as when Indians committed crimes outside tribal territory or when the victims were non-Indians). *Id.* at 53.

64. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). For impressively detailed background, see Clinton, *supra* note 7 (documenting that leading participants at the Philadelphia Convention sought to exclude states from interfering in Indian affairs, as Hamilton, Madison, and others had, even while serving in the Confederation Congress). Clinton thus reads conferral of the power to "regulate commerce with the Indian tribes" as implicitly excluding states from doing so (on the model of the doctrine that congressional power to regulate interstate commerce implies exclusion of states even when that power remains "dormant," or unexercised). *Id.* at 1181. The difficulty with this analysis, however, is that it seems to make total exclusion of state authority dependent on a grant of total regulatory power in Congress. If Congress had such total authority, it would seem to have full discretion to delegate regulatory authority to states, since the ultimate authority to arrange or rearrange the status of tribal authority would remain with Congress. It is more consistent with the history—and the Constitution's text—to see the Indian Commerce Clause as recognizing pre-existing independence of the tribes, on analogy with the clause governing commerce with foreign nations.

65. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); *see also Worcester*, 31 U.S. (6 Pet.) at 561 (discussing Emer de Vattel's treatise on international law, illustrating foreign practice recognizing sovereignty of client states).

66. PRUCHA, *supra* note 48, at 56 (explaining that federal agents were sent to live with tribes to assist in developing agricultural and cloth-making skills but the "agent's duties were in large part reportorial," monitoring compliance with trade regulations involving outsiders).

67. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2497 (2022) ("the *Worcester*-era

known. The westward spread of settlement left Indian enclaves surrounded by more prosperous and confident white inhabitants, inducing many tribes to sell their lands and migrate further west. Federal authorities thus became less and less concerned about the threat of war with Indian tribes, except in the far West.[68] Even there, a larger army presence after the Civil War ultimately persuaded tribal leaders of the futility of armed resistance. Meanwhile, the Union's success in the Civil War deflated states-rights claims in Congress, allowing the federal government to assert its powers in many new areas.[69] As the federal government became more ambitious in general, it felt free to attempt more ambitious designs in dealing with the Indians.

The question remains whether such larger historical trends justify a wholesale repudiation of the original understanding of limits on federal (and state) power to regulate Indian tribes. It could be argued, with similar logic, that in 1787, it was necessary to reassure small states by allocating two senators for each state in the U.S. Senate, without regard to any state's relative population. After the Civil War, it was no longer necessary to worry about the break-up of the Union, while massive immigration and internal migration intensified population disparities between the largest and smallest states.[70] It does not follow that in this different context, Congress suddenly acquired the authority to reapportion the Senate to

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understanding of Indian country as separate from the State was abandoned later in the 1800s").

68. Terry L. Anderson & Fred S. McChesney, *Raid or Trade? An Economic Model of Indian-White Relations*, 37 J.L. & ECON. 39, 65-71 (1994) (arguing limited available force in early nineteenth century encouraged federal efforts to negotiate treaties by which tribes relinquished land claims to advancing white settlements in the East, while the much greater size of the post-Civil War army in the West made it easier for the federal government to fight Indians than negotiate with them). Major battles ended when the last Apache fighters agreed to return to their reservation in 1887. ROBERT M. UTLEY, FRONTIER REGULARS: THE UNITED STATES ARMY AND THE INDIAN, 1866-1891, at 369-96 (1973).

69. Even while the Civil War continued, Republican majorities in Congress authorized a Department of Agriculture to assist farmers (though they farmed within states), a national currency sustained by a scheme of national banking regulation (supplanting paper currency issued by state banks), support for railway construction (much of it taking place within existing states), eventually followed up by a scheme of regulation of interstate rail service (applied to service even within states).

70. According to the 1790 Census, the then most populous state (Virginia, with 747,610 people) was not quite 13 times larger than the then least populous state (Delaware, with 59,094). *1790 Census: Return of the Whole Number of Persons within the Several Districts of the United States*, U.S. CENSUS BUREAU, https://www.census.gov/library/publications/1793/dec/number-of-persons.html [https://perma.cc/U8N8-B646] (last visited Mar. 3, 2023). By 1920, the then most populous state (New York, with 10.385 million people) was 134 times larger than the then least populous state (Nevada, with 77,407). *1920 Census: Volume 1. Population, Number and Distribution of Inhabitants*, U.S. CENSUS BUREAU, https://www.census.gov/library/publications/1921/dec/vol-01-population.html [https://perma.cc/X2LV-EAZD] (last visited Mar. 3, 2023). So, by the early twentieth century, the disparity between large and small states was more than ten times larger than it had been when the rule of equal representation of states in the Senate had been negotiated at the Founding.

make state representation there proportional to population.

A seemingly plausible fallback is to argue that whatever the original understanding of federal power in this field, it is too late now, in the twenty-first century, to revert to it, because so much federal legislation has developed on the theory that the power to regulate "commerce with the Indian tribes" is, in practice, a grant of plenary federal power over tribes.[71] Indeed, as conservative justices of the Supreme Court have tried to claw back some limits on federal authority to interfere with states, they have frequently agreed to extend state power over Indian tribes—as if this were part of the same project of protecting states against outside interference.[72] To do otherwise, it might be argued, would simply be too disruptive. But these arguments seem to invoke constitutional balance (as between state and federal authority) in disregard of the actual Constitution, certainly in disregard of long-established understandings of the Constitution which still resonate in contemporary case law.[73]

In other areas, the Supreme Court's current majority has displayed considerable sympathy for appeals to the Constitution's original meaning.[74] But there is more than remote history at stake. There is a parallel in the status of treaties with Indian tribes. In 1871, Congress signaled a more confident (or more aggressive) federal stance by enacting a statute which purported to prohibit further treaties with Indian tribes.[75] What Congress did not do was pronounce all past treaties cancelled. And though treaties have often been disregarded, the Supreme Court in recent decades has often insisted that old treaties remain legally binding—as in treaties with the Cherokees that gave rise to the dispute that divided the Court in *Castro-Huerta*, where not even the majority argued that old treaties were altogether irrelevant.[76] Old legal commitments remain relevant amidst changed circumstances because the rule of law cannot survive insouciant disregard of solemn obligations embraced in previous generations. There may be unavoidable exceptions but wholesale indifference to yesterday's binding legal commitments undermines ongoing confidence in the authority of law.

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71. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, at §5.02 (reviewing leading cases, doctrines and some scholarly resistance).

72. *See id*. § 6.01.

73. *See* McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (finding nineteenth century treaties reserved much of eastern Oklahoma for tribes, so the state could not assert jurisdiction over a crime by an Indian perpetrator against an Indian victim.) Four dissenters argued that the treaties had been superseded—not that states must always have had inherent jurisdiction over crimes by or against Indians within state borders. *Id*. at 2482-02 (Roberts, C.J., dissenting).

74. *See supra* note 2 and accompanying text.

75. 25 U.S.C. § 71. Presidents continued to negotiate executive agreements with tribes (which were not subject to Senate ratification) and such agreements were not more generous than formal treaties in the preceding era. *See also* Arthur Spirling, *U.S. Treaty Making with American Indians: Institutional Change and Relative Power, 1784-1911*, 56 AM. J. POL. SCI. 84 (2012).

76. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022). The change of one vote on the Court (as Justice Barrett replaced Justice Ginsburg) left the *McGirt* dissenters in the majority in *Castro-Huerta*, but they did not challenge the treaty interpretations on which *McGirt* rested.

There is a better way to think about the constitutional balance here. It is closer to the Founding view in this area and closer to constitutional traditions developed in the first century after the Founding. It could very well sustain a more structured, focused inquiry, with better delineation of competing claims, than the improvised jumble of precedents that has evolved in recent decades.[77]

III. NATIONAL SOVEREIGNTY AND ITS LIMITING LOGIC

As part of the effort to assure peace on the frontier, early treaties often specified that federal authorities would punish U.S. citizens who committed crimes against Indians and Indians would turn over such offenders when captured on Indian territory.[78] Such "extra-territorial claims" were exceptional and limited to non-Indian offenders.[79] The federal government did not claim authority to punish crimes between Indians in Indian territory until late in the nineteenth century when Congress enacted the Major Crimes Act.[80]

This novel exertion of federal authority was endorsed by the Supreme Court in *United States v. Kagama*.[81] The Court's unanimous opinion agreed that Congress had authority to assert such jurisdiction but scoffed at the notion that it was regulating "commerce with the Indian tribes" in doing so: "it would be a very strained construction of this clause" [i.e., the Indian Commerce Clause] to claim that it conferred federal authority to punish "common-law crimes of

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77. *See* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983) (summarizing precedent this way: "State jurisdiction [over Indian reservations] is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority."). A leading reference work sums up subsequent experience this way: "This test . . . probably yields even more unpredictable results in the field of regulation than it does in that of taxation." WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 350 (7th ed. 2020).

78. *See* Treaty with the Chickasaw, Chickasaw Nation-U.S., art. VI, Jan. 10, 1786, 7 Stat. 24 ("If any citizen of the United States of America, or person under their protection, shall commit a robbery or murder, or other capital crime, on any Indian, such offender or offenders shall be punished in the same manner as if the robbery or murder or other capital crime had been committed on a citizen of the United States of America . . . ."); Treaty with the Creeks, Creek Nation-U.S., art. IX, Aug. 7, 1790, 7 Stat. 35 ("If any citizen or inhabitant of the United States . . . shall go into any town, settlement or territory belonging to the Creek nation of Indians, and shall there commit any crime upon, or trespass against the person or property of any peaceable and friendly Indian or Indians . . . such offender or offenders shall be subject to the same punishment, and shall be proceeded against in the same manner, as if the offence had been committed within the jurisdiction of the state or [federal territorial] district to which he or they may belong, against a citizen or white inhabitant thereof.").

79. *See* Treaty with the Chickasaw, *supra* note 78; Treaty with the Creeks, *supra* note 78.

80. Ch. 341, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153) (reacting to Supreme Court ruling in *Ex Parte* Crow Dog, 109 U.S. 556 (1883), which disclaimed federal jurisdiction over reservation crimes between Indians).

81. 118 U.S. 375 (1886).

murder, manslaughter, arson, burglary, larceny, and the like."[82] The Court instead argued that federal authority did not require a specific enumerated power, since there remained some inherent, residual federal authority over the national territory.[83] The reasoning echoed that of Chancellor Kent in New York State, decades earlier.[84] It would take many more decades before the Court thought it plausible to claim that the Indian Commerce Clause conferred "plenary power" on Congress to regulate Indian reservations.[85]

In recent decades, commentators have denounced *Kagama*'s appeal to inherent sovereign powers as slipping the bounds of the Constitution.[86] Some have noticed it was applied to Indian tribes at roughly the time when the Court invoked similar doctrines to justify racial restrictions on immigration and the exercise of colonial control over territories gained in war (such as Puerto Rico and Guam).[87] Some scholars have therefore claimed the doctrine reflected a generalized readiness to invoke stereotype and deceit to abuse non-white peoples.[88]

But versions of the argument from inherent national authority have repeatedly been embraced in other contexts. To start with, the Constitution does not mention a power to acquire new territory. President Jefferson—a self-styled "strict-constructionist"—accordingly argued that a constitutional amendment would be necessary to authorize the Louisiana Purchase.[89] Congress did not agree. The

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82. *Id.* at 378-79.

83. *Id.* at 381.

84. Goodell v. Jackson, 20 Johns. 693 (N.Y. 1823). The Iroquois (in New York) "have always been, and are still considered by our laws as dependent tribes, governed by their own usages and chiefs, but placed under our protection, and subject to our coercion, *so far as the public safety required it, and no further*." *Id.* at 710 (emphasis added).

85. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989). The "central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Id.* at 192. Earlier cases, even in the twentieth century, do not formulate the power in such sweeping and emphatic terms. The one case cited by the Court for this proposition in *Cotton Petroleum* speaks much more cautiously of the "plenary power of Congress *to deal with the special problems* of the Indians." Morton v. Mancari, 417 U.S. 535, 551 (1974) (emphasis added).

86. *See* Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 35 (1996) (*Kagama*'s "slipshod method of bootstrapping a congressional plenary power over Indian affairs is an embarrassment of logic. Its holding . . . is an embarrassment of humanity.").

87. *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 10 (2002) (comparing *Kagama* with the Insular Cases on colonial control and the Chinese Exclusion case, upholding race-based exclusion of immigration in defiance of treaty commitments).

88. DAVID WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE SUPREME COURT 67-81 (1997).

89. *See* Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803), NAT'L ARCHIVES, *available at* https://founders.archives.gov/documents/Jefferson/01-41-02-0255 [https://perma.cc/959N-5AE6] (last visited Feb. 10, 2023). Jefferson's concern was not mere legalistic fussiness to burnish his credentials as a strict constructionist: "I cannot help believing the

power to acquire new territory has been viewed ever since (through successive territorial acquisitions across North America and to islands in the Pacific and the Caribbean) as an incident of sovereignty.[90] The Constitution enumerates a congressional power to "coin money" but does not authorize making paper money into legal tender.[91] The practice was justified by the Supreme Court by reference to what other sovereigns have routinely done.[92] Similarly, the Constitution enumerates a congressional power to establish a "uniform Rule of Naturalization" but not to control which foreigners may be admitted to the United States in the first place.[93] The Court found that power inherent in national sovereignty.[94] The Eleventh Amendment guarantees that states cannot be sued in federal court without their consent.[95] The counterpart claim of sovereign immunity for the federal government seems to have been assumed from the outset, as an incident of sovereignty, though there is no explicit assertion of such immunity in the text of the Constitution.[96]

It was not, in this larger context, a great leap to claim that the federal government had some inherent authority to maintain minimal order on Indian reservations. If it did not have such power, the reservations could become havens for criminal gangs, for foreign agents preparing attacks on the United States or other threats to basic security. The opinion in *Kagama* spoke in general terms of implications from national sovereignty: "the right of exclusive sovereignty which

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intention [of the Constitution] was [only] to permit Congress to admit into the union new states which should be formed out of the territory for which & under whose authority alone they [the Framers] were then acting. I do not believe it was meant that they [Congress] might receive England, Ireland, Holland &c. into it [by congressional vote alone]." *Id*.

90. *See* STORY, *supra* note 17, at § 644 (reviewing the dispute over the power to acquire territory, raised by the Louisiana Purchase). "The friends of the measure [Louisiana Purchase] were driven to the adoption of the doctrine, that the right to acquire territory was incident to national sovereignty." *Id*.

91. U.S. CONST. art. I, § 8, cl. 5.

92. Legal Tender Cases, 79 U.S. 457 (1870).

93. U.S. CONST. art. I, § 8, cl. 4.

94. Chinese Exclusion Case, 130 U.S. 581, 605-06, 609 (1889) (citing a similar reasoning from the Legal Tender Case (*Knox v. Lee*), then reasoning that the federal government must have "powers which are to be exercised for protection and security" and the "power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States").

95. U.S. CONST. amend. XI.

96. The doctrine is asserted in *The Federalist No. 81* on the basis of general principles, without reference to any particular clause in the Constitution. "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." The FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 47, at 486. The case of *Chisholm v. Georgia*, which provoked the Eleventh Amendment (by asserting that states could be sued in federal court without their consent) did not dispute that the federal government retained such sovereign immunity. 2 U.S. (2 Dall.) 419 (1793). The Federal Tort Claims Act, codified at 28 U.S.C. §§ 2675-2680, does allow suits against the federal government but assumes a background of sovereign immunity where not waived by this or other statutes.

must exist in the national government, and can be found nowhere else."[97] Recent research by Gregory Ablavsky, a scholar who has poured over the historical record in close detail, seems to confirm that the Founders did expect the federal government could claim broader constitutional support for exerting authority over Indian tribes than is indicated by the isolated reference to regulating "commerce with the Indian tribes."[98] In the first decades after the Founding, most regulation of relations with the Indian tribes was conducted by the War Department and the State Department, but none (it seems) by the Treasury.[99]

The question is how far this power might extend. As soon as it is granted that the tribes have in some sense, retained "sovereign" powers of their own, the claim of Congress to override that status looks suspect or disputable. Two analogies with international practice may be suggestive here. It was well established by the time of *Kagama* that military occupation in wartime gave the occupying power the authority to impose a version of criminal justice as an incident of its need (and obligation) to maintain order and security for its own forces and for the civil population now living under its authority. What the occupier could not do was rewrite all the laws of the actual sovereign—those in place before the onset of the conflict—since this would not be necessary to the security of the occupying force.[100]

Another suggestive analogy is with the status of foreign ships in American ports. The general rule in international law has long been that a ship is governed by the state whose flag it flies. Jeremy Bentham, the early nineteenth century legal theorist, expressed the idea by describing a ship as an "ambulatory province" of the home state.[101] What if the ship were in waters adjoining the territory of a foreign state? Only two years after *Kagama*, in *Wildenhus' Case*, the Court faced a dispute regarding jurisdiction to prosecute a Belgian sailor for the

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97. United States v. Kagama, 118 U.S. 375, 380 (1886).

98. Ablavsky, *Beyond the Indian Commerce Clause*, *supra* note 7 (emphasizing expected force of treaty and war powers in addition to "commerce" power, implying a relationship somewhere between actual foreign nations and states within the union).

99. *See* LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 374-82 (1948).

100. Hague Convention (II) with Respect to the Laws and Customs of War on Land, art. 43, Jul. 29, 1899, 32 Stat. 1803 ("The authority of the legitimate power having actually passed into the hands of the occupant [as a result of seizure in war, pending ultimate peace treaty], the latter shall take all steps in his power to re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."). The Convention was seen at the time as an attempt to codify or clarify already established "customs of war," respected in past conflicts at least over the preceding century. This provision was retained in the 1907 Hague Convention (IV) on the same subject and remained in effect during the world wars of the twentieth century. Hague Convention (IV) with Respect to the Laws and Customs of War on Land, art. 43, Oct. 18, 1907, 36 Stat. 2277.

101. For context of Bentham's remark and nineteenth century legal disputes, see 2 D.P. O'CONNELL, INTERNATIONAL LAW OF THE SEA, 735-41 (I.A. Shearer ed., 1982).

murder of a Belgian shipmate on board a Belgian ship, while in a U.S. port.[102] The Belgian government pointed out that the United States had protested when authorities in Antwerp, some years before, had tried to assert local jurisdiction over an American sailor who was injured in a fight with an American crewmate on an American ship in the Belgian port.[103] The United States made the same protest against French authorities when France tried to press criminal charges against an American officer (on a merchant ship) for abusing a member of the crew (also American) while in the harbor of Marseille.[104] In both cases, local authorities eventually accepted the United States' claim for the exemption of crews on American ships from foreign interference.[105]

In *Wildenhus' Case*, the Supreme Court distinguished these cases as less serious incidents, arguing that criminal prosecution was most justified when an extreme crime (here, murder) threatened "the peace or dignity of the country [in whose territorial waters the crime occurred], or the tranquility of the port."[106] Otherwise, "by comity it came to be generally understood among civilized nations that . . . all things done on board, which affected only the vessel, or those belonging to her . . . should be left to be dealt with by the authorities of the nation to which the vessel belonged."[107]

Thus, in the twentieth century, the Supreme Court repeatedly refused to apply federal regulatory measures to crews of foreign-flagged ships, even when they regularly entered U.S. ports.[108] By then, what the Supreme Court had initially described as a matter of comity had come to be seen as a matter of customary international law, obligatory on states (or as much so as anything else in international law). A version of the rule was ultimately codified in the United Nations Convention on the Law of the Sea, limiting application of the coastal state's criminal law to foreign-flag ships except when the "consequences of the [ship-board] crime extend to the coastal State" or the "crime is of a kind to disturb the peace of the [coastal] country."[109]

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102. Mali v. Keeper of the Common Jail (Wildenhus' Case), 120 U.S. 1, 2 (1887).

103. *Id.* at 13.

104. *Id.* at 13.

105. *Id.* at 13-14.

106. *Id.* at 12.

107. *Id.*

108. *See, e.g.*, Lauritzen v. Larsen, 345 U.S. 571 (1952) (rejecting application of the Jones Act provisions on tort liability for ship-board injuries to crew members); Benz v. Compania Naviera Hidalgo, 353 U.S. 138 (1957) (rejecting application of Labor Management Relations Act); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1962) (rejecting application of National Labor Relations Act to crews of foreign-flagged ships).

109. United Nations Convention on the Law of the Sea, art. 27, pt. 1, Dec. 10, 1982, 1833 U.N.T.S. 397. The United States has signed but not ratified this convention but accepts this provision (with many others) as an expression of customary international law, which the United States is eager to claim against other coastal states for protection of its own ships. *See Law of the Sea Convention*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Jan. 5, 2023), https://www.noaa.gov/law-of-sea-convention [https://perma.cc/UVT9-CL2U].

Such analogies are subject to obvious objections. Indian tribes are not sovereign to the same full extent as foreign nations and cannot so readily retaliate in kind against federal over-reach (at least, since the last Indian wars in the late nineteenth century). Rules of international law, moreover, do not necessarily correspond to rules of constitutional construction, since the latter fully bind U.S. courts in ways the former do not.[110] Still, the United States simultaneously asserted a doctrine of sovereign authority over coastal waters broader than what others claimed while accepting limitations in practice to an extent that allowed them to be generally recognized, including by the U.S., as international obligation.[111]

Apart from legal formulas, there was thought to be an inescapable need for supervening federal authority to protect Americans from violence or crime in Indian country. But it is one thing to claim (or assume) a residual security power in the federal government, beyond powers that may be conferred by even a broadly conceived "power to regulate commerce with the Indian tribes." It is something else to claim this residual power is "plenary"—if that means (as one might think) unbounded. *Kagama*, itself, upheld the "*Major* Crimes Act" which extended federal jurisdiction over only a handful of violent crimes but did not purport to be exclusive of Indian jurisdiction and included various exceptions.[112]

If Congress does have an *unlimited* power to exercise "sovereign authority" throughout the United States, that would seem to undermine any constitutional grounding to our federal system. The Supreme Court in recent decades has tried to assert limits on the congressional power to regulate commerce among the

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110. Background assumptions regarding customary international law do sometimes affect the interpretation of U.S. constitutional guarantees. For notable example, Justice Thomas's opinion for the Court in *Franchise Tax Board of California v. Hyatt* examined traditional international practice regarding respect for sovereign immunity of foreign states, as indication of whether the Constitution was understood (in 1788) as forbidding state courts to assert jurisdiction over governments of other U.S. states. 139 S. Ct. 1485 (2019). *See also* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) (explaining the status of Indian tribes with a citation to Vattel's treatise on the law of nations, regarding the status of "dependent nations" in European diplomatic practice outside North America).

111. *See* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2511 (Gorsuch, J., dissenting), (suggesting the continuing relevance of the coastal waters analogy). Justice Gorsuch's dissent cites the emphatic affirmation of sovereignty in the Marshall Court's ruling in *Schooner Exchange v. McFaddon*, a decision which nonetheless acknowledged an accepted limit on national jurisdiction in dealing with foreign warships based on "consent of nations" (i.e., not the unilateral preference of the U.S. government). *Id.*; *see* Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812). In *United States v. California*, the Supreme Court held that the federal government, not the state, had authority over off-shore oil and gas reserves, partly on the ground that responsibility for off-shore waters might often be affected by obligations to foreign nations under international law. 332 U.S. 19 (1947).

112. United States v. Kagama, 118 U.S. 375, 376-77 (1886); *see also* Major Crimes Act of 1885, 23 Stat. 362 (codified as amended at 18 U.S.C. § 1153) (originally covering only seven *major* crimes) (emphasis added to first word in title, as given in the text). For further background on the statute's limited reach, see WILKINS, *supra* note 88, at 69-71.

states[113] and to enforce the guarantees of the Fourteenth Amendment against state and local governments.[114] If there is also a completely unlimited power of inherent sovereignty in the federal government, unrelated to traditional necessities of preserving order,[115] then such efforts to limit the reach of particular constitutional powers were so much wasted effort. In this respect, as perhaps others, federal controls on the tribes are not so much (as some have claimed) outside the Constitution as markers or boundary posts of how far the Constitution can (or cannot reasonably) be extended.

On the other hand, if one thinks federal authority over Indian tribes does draw on a reservoir of inherent national authority (apart from what the Indian commerce clause on its own may confer), many areas of federal regulation affecting tribes could still be readily justified. An important example might be the imposition of federal environmental law on tribal governments. The effect of environmental harms can readily spill over boundaries. There is a recognized international claim to protest environmental spillovers. Before the national environmental statutes of recent decades, disputes between states over water rights and water pollution were sometimes pursued as common law claims before the Supreme Court. The results have been cited in international arbitration over parallel issues.[116] Somewhat consistently with this approach, federal legislation in recent decades has offered tribal authorities the opportunity to participate—on the same basis as state governments—in implementing measures to contain pollution hazards that might drift or flow across tribal boundaries.[117]

Statutory regulation of common law harms—such as the destructive effect of pollution—might be considered only a step beyond prohibition of the most severe common law crimes (affecting peace and property). By contrast, regulation simply seeking to deal with localized or second-level safety concerns may be in a different category, as with statutes aiming to stabilize labor-management relations (rather than protect common law tort or property claims). Thus,

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113. *See* United States v. Lopez, 514 U.S. 549 (1995) (Gun-Free School Zone Act impermissibly intrudes on policy reserved for states); United States v. Morrison, 529 U.S. 598 (2000) (Violence Against Women Act cannot be enforced against intrastate violence); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (Commerce Clause does not allow Congress power to regulate non-activity such as failure to buy insurance).

114. City of Boerne v. Flores, 521 U.S. 507 (1997) (Congressional power to "enforce" Fourteenth Amendment does not go beyond requirements of the Amendment, as adjudged by courts).

115. For resonant example of such claims at the margin, see Cunningham v. Neagle, 135 U.S. 1 (1890) (recognizing executive authority to use deadly force to protect federal officials even in absence of statutory authorization, preempting murder charge under state law).

116. *See, e.g.*, UNITED NATIONS: REPORTS OF INTERNATIONAL ARBITRATION AWARDS: TRAIL SMELTER CASE (UNITED STATES, CANADA) VOL. 3, 1905-1982 (2006), *available at* https://legal.un.org/riaa/cases/vol_III/1905-1982.pdf [https://perma.cc/J2EK-EGD3].

117. Clean Water Act, Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1387); Safe Drinking Water Act, Pub. L. No. 93-523, 88 Stat. 1660 (1974) (codified as amended at 42 U.S.C. § 300f); Clean Air Act, 91 Pub. L. No. 604, 84 Stat. 1676 (1970) (codified as amended at 42 U.S.C. §§ 7401-7671q).

Congress has hesitated to extend the full range of regulatory standards to the operations of state governments. The National Labor Relations Act (NLRA), for example, includes exemptions for employees of state government.[118]

Since the NLRA does not include an explicit exemption for Indian tribes, lower courts are divided on whether it should be applied to commercial concerns owned or conducted by tribes.[119] Courts have also divided on whether regulations of the Occupational Safety and Health Administration should apply to tribal owned or tribal conducted establishments.[120] Courts that have hesitated to apply federal standards invoke a presumption against federal interference—requiring, in effect, that Congress express a clear intention to reach tribal businesses.[121] While these rulings do not expressly acknowledge a constitutional limit on what Congress can reach, they certainly echo rulings of the Rehnquist Court, asserting a presumption against applying federal statutes to state governments (unless there is clear indication of congressional intent).[122]

The Supreme Court in recent decades has affirmed other doctrines seeking to protect state governments from excessive federal interference. Here, too, there is inescapable logic to applying such doctrines to tribal authorities.

One such doctrine is that conditions on federal grants cannot coerce states to comply with conditions not reasonably related to the purpose of the grant.[123] A related doctrine is that new and substantially more demanding conditions cannot be added to grants, after states have come to rely on earlier, more accommodating

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118. 29 U.S.C. §152(2) ("The term 'employer' . . . shall not include the United States . . . or any State or political subdivision thereof . . . ."). No court has thought to anticipate the logic of *Castro-Huerta* by finding that an Indian reservation, as "a part of the State," could be seen as a "subdivision thereof" and consequently claim this exemption for its employees.

119. For review of the cases, see Riley Plumer, *Overriding Tribal Sovereignty by Applying the National Labor Relations Act to Indian Tribes in* Soaring Eagle Casino and Resort v. National Labor Relations Board, 35 LAW & INEQ. 131 (2017).

120. Donovan v. Navajo Forest Prods. Indus., 692 F.2d 709 (10th Cir. 1982) (finding against application of OSHA regulation); Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113 (9th Cir. 1985) (finding OSHA does apply); Reich v. Mashantucket Sand & Gravel, 95 F.3d 174 (2d Cir. 1996) (finding OSHA does apply); Scalia v. Red Lake Nation Fisheries, 982 F.3d 533 (8th Cir. 2020) (finding OSHA regulations do not apply to tribal fishery).

121. William v. Poarch Band of Creek Indians, 839 F.3d 1312 (11th Cir. 2016) (holding Age Discrimination in Employment Act does not apply to tribal employers, even though ADEA does not include a specific exemption, given presumption against application of federal regulation without clear indication Congress meant to apply it to tribes).

122. BFP v. Resolution Tr. Corp., 511 U.S. 531 (1994) (holding federal statute does not preempt foreclosure procedure under state law because such displacement of traditional state jurisdiction requires explicit statutory warrant); Gregory v. Ashcroft, 501 U.S. 452 (1991) (finding the federal Age Discrimination in Employment Act not applicable to state employees because courts should presume against such reach without clear statement of congressional intent); English v. Gen. Elec., 496 U.S. 72 (1990) (finding the federal statute does not preempt state tort claims where not explicit).

123. South Dakota v. Dole, 483 U.S. 203 (1987).

terms.[124] The point of these restraints is to prevent the federal government from leveraging its funding power to coerce the states into activities their own legislatures—and their own voters—might not favor. In short, these doctrines try to prevent federal bullying of states, even where states might, in form, seem to be giving consent to the policy. Some courts have, in fact, acknowledged that the same reasoning can apply to federal grants to tribal authorities.[125]

The federalism cases of recent decades emphasize limits on federal power, even where there are broad powers conferred in the text of the Constitution. This reflects an effort to move the federal balance closer to what was envisioned in earlier times. But states are not alone in their claims. Indian tribes have their own, very considerable claims to protection from overreaching federal interference. They have stronger claims against interference from state governments.

IV. INTERSTATE AND INTERTRIBAL CLAIMS TO THE FREE FLOW OF COMMERCE

The original understanding was that Indian tribes were more independent than states. If the majority opinion in *Castro-Huerta* is right, they are much less independent than states—they are essentially subdivisions of states which for inexplicable reasons (if one accepts that premise) can be beneficiaries of special federal solicitude, when federal authorities choose to exercise it. But states are much better positioned to seek favor from Congress. States have the benefit of constitutional representation in the U.S. Senate. Courts and commentators have therefore reasoned that legislation which passes Congress can be presumed acceptable to most states, since states could otherwise have raised objections in the Senate.[126] That argument does not work for tribes, which are not, of course, represented (as such) in Congress. Nor are they represented (as such) in state legislatures. So, there is no constitutional grounding for the assumption that the absence of federal legislation somehow licenses states to assert their own claims against Indians.

Whatever might follow from seeing "Indian country"[127] as part of the United

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124. Nat'l Fed'n of Indep. Bus. v. Sebelius, 467 U.S. 519 (2012) (ruling against adding new conditions to federal grants compelling states to adopt new programs).

125. Chippewa Cree Tribe v. U.S. Dep't of Interior, 900 F.3d 1152, 1160 (2018) (acknowledging tribe receiving federal grants was entitled to resist funding conditions if they were not "clear and unambiguous" and did not "bear some relationship to the purpose of the federal spending").

126. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552 (1985) ("the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself [by "representing" states "in one branch of the legislature"] rather than in discrete limitations on the objects of federal authority."); *see also* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175-84 (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

127. The term "Indian country" is not pejorative. It frequently appears in the U.S. Code, starting with its definition at 18 U.S.C. §1151.

States, residents should have the same claims as other Americans to the benefits of the free flow of commerce over jurisdictional lines. In this respect, surely, tribal territories should not be less protected than states. Since they are not represented in Congress (or state legislatures)—as tribes—their claims in this respect are more in need of judicial protection.

Ensuring free transit across jurisdictional lines was not at all an arcane or peripheral concern at the Founding. One of the prime inducements for small states to adhere to the new Constitution in 1788 was to secure protection against discriminatory treatment from large states. In particular, states without deep water ports open to ocean-borne commerce—such as Connecticut and New Jersey—found themselves at the mercy of neighbors (such as New York and Pennsylvania) which did have such ports. The states with good ports felt free to impose special tariffs on exports from neighboring states, both to gouge extra revenue and to secure competitive advantage for their own commerce.[128] The Constitution laid down a firm barrier to such self-dealing by prohibiting states from imposing "any Duty of Tonnage" without congressional consent, while simultaneously prohibiting Congress from imposing any "Tax or Duty" on "Articles exported from any State" and prohibiting "Preference . . . by any Regulation of Commerce or Revenue to the Ports of one State over those of another."[129]

What if commerce between states goes by land? If "tonnage" applies only to taxes on ship-board commerce,[130] the Framers seem to have banned interference with commerce across state land borders through a parallel provision, prohibiting states to "lay any Imposts or Duties on Imports or Exports" without congressional consent.[131] A famous decision by Chief Justice Marshall asserted (in dicta) that the provision would apply to traffic across state lines, as well as to "imports or exports" from outside the United States.[132] The Taney Court endorsed the same view on the eve of the Civil War.[133] But soon after the war, the Supreme Court held that the "imposts or duties" clause did not apply to traffic across state lines—a ruling questioned by one Justice at the time and a committed originalist Justice in our time.[134] The Court has seen less need to reconsider its interpretation

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128. *ArtI.S10.C3.1.2 Historical Background on Duties of Tonnage*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/artI-S10-C3-1-2/ALDE_00000029/ [https://perma.cc/A4FB-7A57] (last visited Feb. 17, 2023).

129. U.S. CONST. art. I, § 10, cl. 3; art. I, § 9, cls. 5, 6.

130. The clause does apply to interstate trade delivered by sea, as confirmed in *Polar Tankers v. City of Valdez*. 557 U.S. 1, 6 (2009) (holding invalid a local tax affecting delivery of goods by ships from ports in other states).

131. U.S. CONST. art. I, § 10, cl. 2.

132. Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 449 (1827) ("It may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister State.").

133. *See generally* Almy v. California, 65 U.S. (24 How.) 169 (1861).

134. Woodruff v. Parham, 75 U.S. (8 Wall.) 123, 138-39 (1868) (holding "imposts or duties" clause applies only to sea-borne cargo imported from foreign countries into the United States). *But*

of the "imposts or duties" clause, however, because it has found that the congressional power to regulate "commerce . . . among the several States"[135] precludes states from interfering with interstate commerce, including by attempts to tax trade in out-of-state products.[136]

Yet no case has yet held that the "imposts or duties" clause does not apply to Indian reservations. It can well be argued that "commerce with . . . the Indian tribes"[137] has a special status, akin to commerce with foreign nations, so states should be excluded from imposing their own controls on such commerce (at least when not explicitly authorized by federal statute).[138]

If the Court does not embrace that interpretation, it can achieve a similar result in this area as it has with interstate commerce. There is, after all, much solid historical grounding for the conclusion that the congressional power to regulate "commerce . . . with the Indian tribes"[139] was intended to exclude state regulation. It is at least as well-grounded as the Marshall Court doctrine that federal power over "commerce among the states" excludes state interference with interstate

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see id. at 140-47 (Nelson, J., dissenting) (arguing for application of the clause to all cross-border trade among states). For the most recent endorsement of this latter view, see Camps Newfound v. Town of Harrison, 520 U.S. 564, 621-35 (1997) (Thomas, J., dissenting) (arguing "imposts or duties" clause should apply to commerce across state lines).

135. U.S. CONST. art. 1, § 8, cl. 3.

136. *See* Welton v. Missouri, 91 U.S. 275 (1875) (holding invalid, as violation of Commerce Clause, a state license fee required for importing goods from out of state). For some modern applications, see Complete Auto Transit v. Brady, 430 U.S. 274 (1977) (prohibiting imposition of state sales tax on autos brought into state after purchase outside); J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938) (holding a state tax on gross income unconstitutional for not offsetting share of corporate income generated outside the state).

137. U.S. CONST. art. 1, § 8, cl. 3.

138. The Court has sometimes emphasized the need for greater scrutiny of state laws affecting foreign commerce. In *Japan Line, Ltd. v. Los Angeles County*, it admonished that "a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential." 441 U.S. 434, 448 (1979). So, it is highly doubtful that a state having a land border with Canada would be allowed to tax imports from there just because the tax would not qualify as an "impost or duty" as interpreted by the Supreme Court in *Woodruff*. Apart from the dormant foreign commerce power (excluding state interference with power reserved to Congress, even when it is "dormant"), an actual federal statute will usually preempt state interference with foreign trade. Almost all imports are now covered by international trade agreements of one kind or another—for example, 164 states (including the United States) now adhere to the tariff limitations sponsored by the World Trade Organization. Trade agreements are implemented within the United States by federal legislation. Courts could easily see federal treaties or legislation on Indian affairs as preempting state tax interference. *See* Washington State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000 (2019) (holding a reservation was exempted from special highway usage tax on the basis of an 1855 treaty). Absent such special treaty provisions, as discussed below, courts have often adopted a "balancing" of state and tribal interests in which the latter are judged to be outweighed by state claims.

139. U.S. CONST. art. 1, § 8, cl. 3.

commerce.[140] Federal appellate courts have repeatedly held that when Congress imposes a ban on interstate trade in particular commodities (notably, untaxed cigarettes), that should apply as well to intertribal commerce.[141] It is very hard to see why Indian tribes should be treated as equivalent to states when it comes to bearing the burdens of regulation, but receive none of the protection for free exchange that accrues to states.

As it is, if states do have full control over their borders with Indian territory, they do not even need to collect "imposts or duties" on articles flowing into or out of Indian territory. They can simply demand that tribal authorities collect special taxes at the point of sale in Indian territory and transfer this revenue back to the states—or else face interference with shipments from the demanding state to the targeted Indian territory.[142]

The threat is not at all hypothetical. This is the precise way that Washington State enforced a cigarette tax on the Colville Indian Reservation.[143] To enforce its demand for tax collection by tribal retailers, Washington State officials set up roadblocks to prevent delivery of cigarettes to the Indian reservation until tribal officials agreed to have the tribe act as tax collectors for the state.[144] This arrangement strikes at the heart of any meaningful scheme of tribal sovereignty. It assumes that commerce into tribal territory depends on the consent of the state, so the state can impose a trade blockade on an adjoining reservation— even though it is clearly prohibited from doing that to a neighboring state of the United

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140. The Supreme Court has said it is a "fundamental principle" that "No State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." Bos. Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 329 (1977). Protection from competition arising in neighboring jurisdictions would seem to be just a discriminatory scheme for "providing a direct commercial advantage to local [in-state] business." *Id*. The doctrine has been challenged: *see* Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue, 483 U.S. 232, 265 (1987) (Scalia, J., concurring in part and dissenting in part) (expressing skepticism toward "dormant power" reading of the Interstate Commerce Clause as not consistent with text or original meaning of the Constitution)); *see also* West Lynn Creamery v. Healy, 512 U.S. 186, 209-10 (1994) (Scalia, J., concurring). But this skeptical view about the "dormant power" reach of the Commerce Clause has only persuaded one other justice in the decades since: *see* Dep't of Revenue v. Davis, 553 U.S. 328, 361-62 (2008) (Thomas, J., concurring in judgement).

141. *See* Ho-Chunk, Inc. v. Sessions, 894 F.3d 365 (D.C. Cir. 2018) (holding Contraband Cigarette Trafficking Act (CCTA) applies to tribal commerce because CCTA's reference to "State" implies inclusion of tribal territory); New York v. Grand River Enters. Six Nations, Ltd, No. 1:14-cv-00910, 2019 U.S. Dist. LEXIS 21558 (W.D.N.Y. Feb. 11, 2019) (transactions between tribal reservations in different states qualify as commerce among the states for purposes of Prevent All Contraband Trafficking Act); Big Sandy Rancheria Enters. v. Bonta, 1 F.4th 710 (9th Cir. 2021) (tribe-to-tribe cigarette sales qualify as commerce between states); New York v. Mountain Tobacco Co, 942 F.3d 536 (2d Cir. 2019) (federal Prevent All Cigarette Trafficking Act applies to intertribal sales).

142. *See* Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134 (1980).

143. *See id*.

144. *Id*. at 142.

States (or to a foreign country, for that matter, since the power to regulate commerce with foreign nations belongs to the federal government).[145]

The Supreme Court has, in recent decades, rejected federal "commandeering" of state officials. In *Printz v. United States*, the Court struck down a federal law which required local law enforcement officials to perform background checks to implement a federal gun control measure.[146] The Court insisted that the Constitution implicitly creates a dual system of authority to assure separate lines of accountability: "The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens."[147] A jumble of intermingled authorities would undermine this logic.

But the same reasoning applies as much to Indian territory. Tribes have their own governments, accountable to tribal members. It would undermine this scheme if tribal governments were forced to undertake chores at the behest of outside governments.[148] The separate sovereignty principle that protects state governments against federal commandeering should, for the same reasons, protect tribal governments against state commandeering.

It is true, of course, that states can impose duties on localities within the state, including duties related to tax collection. But county, town, and city governments are creations of the state, whose powers can be delegated or rescinded, granted on condition or superseded by direct state involvement. On no plausible understanding is the relation between tribal territories and states analogous to that between states and their local governments. Forcing a tribe to collect state taxes is much more like Massachusetts demanding that New Hampshire impose a sales tax and share the proceeds with Massachusetts, on threat of preventing taxable merchandise passing from Massachusetts to New Hampshire by truck or train.

From this perspective, the state's blockading capacity against Indian reservations is the counterpart of the commandeering demand. It is not just that the first is used to coerce acceptance of the second. They work as inter-locking arms of coercion, like jaws of a vice. They are both extensions of the same (highly objectionable) premise, that Indian reservations are inherently exposed to demands of state governments, because there is no constitutional doctrine to protect their independence if Congress declines to exert explicit federal protection. This appears so contrary to the background constitutional scheme—so contrary to elements of tribal sovereignty still accepted by the Supreme Court—that it is, at first, quite disorienting to find the same Court endorsing this twisted logic.

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145. U.S. CONST. art. 1, § 8, cl. 3.

146. 521 U.S. 898, 933 (1997); *see also* New York v. United States, 505 U.S. 144 (1992) (against compelling states to adopt legislation to provide nuclear waste sites within their own borders).

147. *Printz*, 521 U.S. at 920.

148. The doctrine does not forbid states to participate in federal programs, including federal regulatory programs, if they agree to do so without undue coercion. Tribes also have been offered the opportunity to implement environmental regulations (as states are authorized to do), if they do not leave these standards to be enforced by federal authorities EPA.

Central to the explanation is the Court's gradual reconceptualization of tribal sovereignty from authority over a defined territory to authority over a defined population. A string of cases has held that, while states cannot impose direct taxes on Indian land holdings or on tribal members operating there, the states can still insist that their own state citizens who are not Indians must pay state taxes when buying from tribal retailers in tribal territory.[149] Otherwise, the Court has held, states would face economic harm from consumers ducking into Indian country to avoid state taxes. Therefore, the Court concludes, there must be a "balancing" of competing state claims to economic protection and Indian claims to self-government.[150]

Massachusetts cannot, of course, claim such protection against New Hampshire (which has no sales tax) because New Hampshire is assumed to be in full control of its own *territory*, not merely of its own citizens. Massachusetts cannot demand that New Hampshire collect Bay State sales tax on Massachusetts citizens, when they happen to slip over the border to make purchases in New Hampshire. Citizenship is not the issue. Each state imposes its own taxes in its own territory and the Constitution prohibits states from reaching across state lines to interfere with the tax policy of other states—or to block transit of commerce across state lines.[151] It would undermine the entire scheme to say New Hampshire's taxing authority should be limited to its own citizens so Massachusetts can make tax claims on transactions involving citizens of Massachusetts as long as they take place in New Hampshire. New Hampshire would lose valuable business opportunities. Meanwhile, citizens of both states would lose some of the liberty-enhancing (and commerce-fostering) benefits of competition between jurisdictions.[152]

Why is the rule different in relation to Indian reservations? In many situations, the Court still recognizes that reservations retain the right to maintain different policies on their own territories.[153] That is how tribal territories in many places came to be hosts of casino gambling. The Court ruled that states could not impose close regulation of such commercial activity on tribal lands.[154] It did not matter that most of those enjoying the betting were non-Indians (along with many of those employed at the casinos).[155] The site of the activity (within Indian territory) was what mattered—not the citizenship of those engaged in it or their status as tribal members or outsiders.[156]

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149. For analysis of relevant cases, see COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, at §8.03(1)(d).

150. For analysis of leading cases, emphasizing shifting emphases from case to case, see CANBY, *supra* note 77, at 169-81.

151. *See* U.S. CONST. art. IV, § 1, cl. 1.

152. For compelling exposition of the principles at work in the Court's interstate tax holdings, see MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION 169-73, 356-72 (2012).

153. *See, e.g.*, California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

154. *Id.*

155. *Id.* at 205.

156. *Id.* at 219-22.

The next section will consider the somewhat tortured path by which court rulings came, in dealing with Indian reservations, to embrace a sort of medieval law-of-the-person instead of modern territorial jurisdiction. The point to emphasize here is that the cases which have developed these strange distinctions are exceptional and peripheral to the original understanding and to the practice of the generations closest to the Founding. The original understanding was that tribal territory should be self-governing and the tribes would not need approval of surrounding states to set their own policy. That applied not only to their own members but to others who entered their territory. Tribes were like states in having claims to near exclusive territorial control—only more so than states. The exceptions for criminal prosecution that emerged in the nineteenth century were, even then, exceptional. These exceptions cannot plausibly form the basis for a whole broad rule of construction when it comes to tribal authority and outside law.

V. FROM PRESERVING ORDER TO PROTECTING STATE REVENUES

In *Castro-Huerta*, the Court's opinion insisted that in allowing Oklahoma to prosecute a non-Indian for a crime against an Indian victim, it was not deciding whether the state could prosecute such a crime if committed by an Indian perpetrator against an Indian victim.[157] The cautious parsing of such distinctions might seem inexplicable, if it were simply true that Indian reservations are "part of the State," as the majority opinion claimed.[158]

There is some historical basis for treating criminal justice as a special category. But it is a very big leap to extend such precedents from criminal prosecution to taxing and regulatory power. In recent decades, the Supreme Court has sometimes spoken as if it were aware of the distinction—but at times ruled as if crossing from one category to the other were a mere hop, skip or jump rather than a perilous, acrobatic leap over a perilous chasm. The Court has thus allowed its rulings on tribal authority to drift very far from the original understanding.

When Chief Justice Marshall looked at the claims of the Cherokee Nation, he emphasized the territorial aspect of its status: "The Cherokee nation, then, is a distinct community occupying *its own territory, with boundaries accurately described*, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves . . . ."[159] Georgia's legislation would not apply, by this account, even to non-Indians who might be present in Cherokee lands. That is what Georgia attempted to do in *Worcester*—in a criminal prosecution of a white missionary, Samuel

157. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2495 n.2 (2022) (stating that whether "a State lacks prosecutorial authority over crimes committed by Indians in Indian country [is] a question not before us"); *id.* at 2504 n.9 (stating that as to "crimes committed by Indians against non-Indians in Indian country . . . we do not take a position on that question").

158. *Id.* at 2493 ("To begin with, the Constitution allows a State to exercise jurisdiction in Indian country. Indian country is part of the State, not separate from the State.").

159. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) (emphasis added).

Worcester.[160] The Supreme Court emphatically rejected Georgia's claims.[161]

The realities of life on the frontier introduced complications, however. When white settlers attacked or robbed Indians, tribes were likely to retaliate—not always with scrupulous focus on the precise individuals responsible for the attack.[162] Settlers could be equally impulsive in retaliating for attacks by particular Indians. They often resorted to indiscriminate punitive raids on the nearest tribal community. In an effort to repress such incidents before they ignited all-out war, early treaties promised to assert federal power to punish Americans responsible for crimes against Indians, even within Indian territory.[163] As President Washington later explained, "[u]nless the murdering of Indians can be restrained by bringing the murderers to condign punishment, all the exertions of the [federal] Government to prevent destructive retaliations by the Indians will prove fruitless . . . ."[164]

For similar reasons, early treaties also provided that the federal government would punish Indians who attacked settlers or their property. The treaties were so respectful of tribal territorial claims, however, that they left tribes to their own devices in ousting white interlopers who unlawfully tried to settle within lands reserved for Indians.[165] Even where treaties promised that the federal government would punish Americans who launched attacks on Indians, federal courts for some time declined jurisdiction for attacks that took place on Indian territory.[166]

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160. *Id*. at 528-30.

161. *See id*. at 534-35.

162. *See* ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 92-125 (1940).

163. For examples during the Confederation period, see Treaty with the Cherokee, Cherokee Nation-U.S., Nov. 28, 1785, 7 Stat. 18; Treaty with the Choctaw, *supra* note 14; Treaty with the Chickasaw, *supra* note 78; Treaty with the Shawnee, Shawnee Nation-U.S., Jan. 31, 1786, 7 Stat. 26; Treaty with the Wyandot, Etc., Wyandot Nation-U.S., Jan. 9, 1789, 7 Stat. 28. Similar provisions appear in the Treaty with the Creeks, Creek Nation-U.S., *supra* note 78. For more background, see PRUCHA, *supra* note 48, at 188-212.

164. George Washington, *Seventh Annual Address*, December 8, 1795, *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, 185 (James Daniel Richardson ed., 1903).

165. *See, e.g.*, Treaty with the Choctaw, *supra* note 14, at IV ("If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the lands hereby allotted to the Indians to live and hunt on, such person shall forfeit the protection of the United States of America, and the Indians may punish him or not as they please."); Treaty of Greenville art. VI., Aug. 3-Dec. 2, 1795, 7 Stat. 49 ("If any citizen of the United States, or any other white person or persons, shall presume to settle upon the lands now relinquished by the United States, such citizen or other person shall be out of the protection of the United States; and the Indian tribe, on whose land the settlement shall be made, may drive off the settler, or punish him in such manner as they shall think fit . . . .").

166. PRUCHA, *supra* note 48, at 193-95 (describing disclaimed jurisdiction over crimes committed by Indians who murdered whites in Indian territory). Federal courts would still have jurisdiction over covered crimes if they occurred in federal territory not yet incorporated as states

It was not until 1817 that Congress, for the first time, clarified the matter with legislation that, with slight adjustments in 1834, provided the terms of the General Crimes Act, still in force today—providing federal jurisdiction over crimes committed by American citizens and other outsiders in Indian territory.[167] The statutes took care to specify that the jurisdiction did not cover crimes by Indians against other Indians. Such crimes did not seem to threaten general peace.

Even for crimes in tribal lands which it did reach, this legislation did not authorize federal officials to enter tribal territory to make an arrest but merely authorized them to seek to have individual perpetrators delivered up by the tribe—in effect, a frontier version of extradition.[168] There was still a sense that boundaries mattered as between Indian territories and land under federal or state control. The prosecution of crimes within Indian territory by federal authorities was seen as exceptional and justified only by the need to prevent large-scale violence.

As late as 1883, the Supreme Court insisted that federal prosecutors lacked jurisdiction to try an Indian for murder of another Indian on tribal lands, protesting that such a prosecution against "aliens" would "subject them to . . . rules and penalties of which they could have no previous warning."[169] Congress then enacted the Major Crimes Act to reach a few of the most violent or dangerous crimes by Indians against Indians on Indian lands.[170] The Supreme Court upheld this law, as we saw in Part III, as an exercise of background federal sovereignty.[171] Meanwhile, the Supreme Court held in several cases that states could sometimes exert criminal jurisdiction over crimes occurring on tribal lands if neither perpetrators nor victims were Indians.[172] In the early 1950s, Congress added special authorization for a small set of other states to exert criminal jurisdiction over tribal lands but later insisted that states must secure tribal consent before prosecuting crimes that occurred in tribal territory.[173]

(and not within lands recognized as Indian territory). *See id.* at 198-99. Congress may have expected federal courts to retain jurisdiction over crimes committed against visiting Indians on territory within a state.

167. Act of Mar. 3, 1817, ch. 92, 3 Stat. 383; Act of June 30, 1834, ch. 161, 4 Stat. 729 (codified as amended at 18 U.S.C. § 1152).

168. On political context, see PRUCHA, *supra* note 48, at 195 (noting Indian frustration at "the complexity and length of the proceedings" under this legislation and preference of some locals for abbreviated military justice, which Washington officials (and legislators) opposed).

169. Ex Parte Crow Dog, 109 U.S. 556, 571 (1883).

170. 18 U.S.C. § 1153.

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

172. United States v. McBratney, 104 U.S. 621 (1881); Draper v. United States, 164 U.S. 240 (1896). These rulings purported to be based on provisions in the federal legislation accepting Colorado (*McBratney*) and Montana (*Draper*) as states of the Union. *McBratney*, 104 U.S. at 622; *Draper*, 146 U.S. at 242. The opinions have been criticized as unpersuasive. *See* CANBY, *supra* note 77, at 167-68. But it is notable that they rested on particularized claims about individual states rather than a general doctrine of state authority over adjacent tribal territories.

173. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, at §6.04. By Public Law 280,

Even such limited state claims were seen as exceptional. In the frequently cited 1959 ruling in *Williams v. Lee*, the Supreme Court rejected efforts by Arizona to enforce repossession of goods on the Navajo reservation (based on a dispute over payment), even though the store involved was run by a non-Indian.[174] "It is immaterial," explained Justice Black, "that respondent is not an Indian. He was on the Reservation and the transaction with an Indian *took place there*. The cases in this Court have consistently guarded the authority of the Indian governments *over their reservations*."[175]

In 1975, the Court upheld the right of Wind River Indians in Wyoming to order the closing of a bar on their reservation, even though the owners were non-Indians and the adjoining county had authorized liquor sales by the bar.[176] The Tenth Circuit had denied the authority of the tribe to assert control over non-members: "It is difficult to see how such an association of [U.S.] citizens [i.e., the tribe] could exercise any degree of governmental authority or sovereignty over other citizens who do not belong, and who cannot participate in any way in the tribal organization."[177] The Supreme Court firmly rejected this reasoning. Justice Rehnquist's opinion insisted that the "tribes are unique aggregations *possessing attributes of sovereignty over* both their members and *their territory*."[178] In support of this characterization, the decision cited the Warren Court's ruling in *Williams v. Lee* and Chief Justice Marshall's opinion in *Worcester v. Georgia*.[179]

But already, by the early 1970s, the Justices were expressing qualms about encompassing recognition of tribal sovereignty claims. In *McClanahan v. State Tax Commission of Arizona*, the Court rejected Arizona's efforts to tax the income earned by Navajo employees of the tribe on their reservation.[180] But along

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Congress authorized the states of California, Minnesota, Nebraska, Oregon, and Wisconsin to apply their own criminal law on Indian reservations and withdrew federal jurisdiction under the General Crimes Act (for crimes by non-Indians) and the Major Crimes Act (for crimes by Indian perpetrators). Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162). Alaska was later added to the states on this short list. Act of Aug. 8, 1958, Pub. L. No. 85-615, 72 Stat. 545. Others were authorized to apply their criminal law if tribal authorities consented to the jurisdiction. Act of July 10, 2010, Pub. L. No. 111-211, 124 Stat. 2272. The fact that Congress thought to authorize such selective state jurisdiction might seem to cut against the conclusion in *Castro-Huerta* that such jurisdiction has been available to all states since the late nineteenth century (a point urged by Justice Gorsuch's dissent). *See* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2517-18 (2022) (Gorsuch, J., dissenting).

174. 358 U.S. 217, 217, 223 (1959).

175. *Id*. at 223 (emphasis added).

176. United States v. Mazurie, 419 U.S. 544 (1975).

177. United States v. Mazurie, 487 F.2d 14, 19 (10th Cir. 1973), *rev'd*, 419 U.S. 544 (1975). Legislation adopted in 1924 conferred U.S. citizenship on all Indians born within the United States, as discussed in the concluding section *infra*.

178. 419 U.S. 544, 557 (1975) (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832)) (emphasis added).

179. *Id*. at 557-58.

180. 411 U.S. 164 (1973).

the way, Justice Marshall's opinion cautioned that "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption"—the doctrine that congressional preference (rather than inherent Indian sovereignty) would settle disputes about state jurisdiction in Indian territory.[181] "The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power."[182] The metaphor was bizarre. There is no Platonic dialogue in which Socrates discourses on an eternal "form" or "idea" of "sovereignty." The term only came into general use in Western languages in the seventeenth century and was never a theme of legal analysis in antiquity.[183] But the phrasing of the disclaimer well reflected the Court's ambivalence. It was not prepared to resolve claims of tribal authority on the basis of a general principle. The implication seemed to be that courts must instead engage in case-specific balancing of competing claims.

Only a few years later, the Court demonstrated the concerns behind the cautions expressed in *McClanahan*. In *Oliphant v. Suquamish Indian Tribe*, the Court faced rulings by the tribal court of a reservation on Puget Sound in Washington State.[184] The penalties were for recklessly endangering another person, resisting arrest, injuring tribal property, and assaulting a tribal officer.[185] The fines in this case were less than $500, and the two individuals accused were residents of the reservation—though non-Indian.[186] The U.S. Court of Appeals for the Ninth Circuit upheld the sentences on the grounds that Indian tribes "retain those powers of autonomous states that are neither inconsistent with their status nor expressly terminated by Congress."[187] Yet the Supreme Court's ruling, also by Justice Rehnquist, rejected the authority of tribal courts to try non-members.[188]

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181. *Id.* at 172.

182. *Id.*

183. The French jurist Jean Bodin claimed to be the first writer to elucidate the term "sovereignty" in his treatise, first published in 1576. *See* JEAN BODIN, LES SIXE LIVRES DE LA RÉPUBLIQUE (1576), Liv. I, Ch. 8, §1 ("[I]l est ici besoin de former la définition de souvernité parce qu'il n'y a ni jurisconsute, ni philosophe politique, qui l'ait définie" translating to "It is necessary here to define sovereignty because neither jurists nor political philosophers have defined it"). A passionate contemporary advocate for tribal sovereignty asked: "since when did sovereignty, democratically deriving from those over whom it is exercised, become 'platonic?'" Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617, 670 (1994) (arguing tribal governments should be treated in most respects as state governments are in the federal system).

184. 435 U.S. 191 (1978).

185. *Id.* at 194.

186. *Id.* at 194; *see id.* at 203 n.14.

187. Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976) (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560-61 (1832)), *rev'd sub nom.* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

188. *Suquamish*, 435 U.S. at 195.

It cited no actual federal restriction on this jurisdiction nor any court cases squarely grounding this conclusion. It was certainly not based on any general principle recognized in American law at the Founding or for many decades thereafter.[189]

So, tribes were left with some claim to "sovereign" authority for some purposes but not for the most fundamental aspect of sovereignty—the authority to enforce their own law in their own territory. Or to be more precise, tribes were left to enforce their own laws on their own members, but outsiders might have special status, exempting them from tribal jurisdiction, even if they had decided to live within the territorial bounds of the reservation.

This sort of arrangement has never been accepted as between states within the United States. States have never claimed authority to prosecute crimes committed by their own citizens in other states, let alone claimed that their own citizens were exempt from punishment under the law of another state where they were accused of committing a crime.[190] The arrangement is not unknown in international practice. But it is associated with the heyday of Western domination of non-Western countries.

On the eve of the First World War, Lassa Oppenheim's *International Law*, then the leading English-language treatise, explained that "capitulation" treaties were required because non-Christian countries had "not developed their ideas of justice in accordance with Christian ideas" so they could not "preserve the life, property and honour of foreigners before native courts."[191] The alternative that developed was for charges against foreigners—most notably in the Ottoman Empire and in China—to be tried by consuls from their home states, which did not offer juries, lawyers, appellate review, or other procedural safeguards, even if oaths might be taken on Christian Bibles. A late nineteenth century decision of the Supreme Court, *Ross v. McIntyre*, found the practice acceptable, reasoning that the Bill of Rights did not apply overseas.[192] But as Oppenheim's treatise

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189. *See* Peter C. Maxfield, *Oliphant v. Suquamish Tribe: The Whole Is Greater than the Sum of the Parts*, 19 J. CONTEMP. L. 391 (1993).

190. The Constitution requires states to extradite those charged with "Treason, Felony or other Crime" on the "Demand" of the executive authority in the charging state, which might imply that outside states have no authority to prosecute for crimes committed elsewhere. U.S. CONST. art. IV, § 2, cl. 2. That has, at any rate, been the prevailing view on criminal jurisdiction. *See* JOSEPH STORY, COMMENTARIES ON CONFLICTS OF LAWS, FOREIGN AND DOMESTIC §620 (3d ed. 1846) ("The common law considers crimes as altogether local, and cognizable and punishable exclusively in the country, where they are committed.") Almost all cases Story cites to illustrate this general rule are from U.S. states declining jurisdiction over offenses occurring in another U.S. state. For continuing adherence to this doctrine in recent decades, see Jeremy A. Rabkin & Craig S. Lerner, *Criminal Justice Is Local: Why States Disregard Universal Jurisdiction for Human Rights Abuses*, 55 VAND. J. TRANSNAT'L L. 375, 401-10 (2022).

191. 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE §442 (2d ed. 1912).

192. 140 U.S. 453, 464 (1891). The ruling was expressly repudiated regarding application of the Bill of Rights to overseas criminal proceedings under U.S. authority by *Reid v. Covert*. 354 U.S. 1, 18-19 (1957) (rejecting jurisdiction of U.S. military courts over civilian dependents of U.S. service

acknowledged, even by the standards of international law in that era, this was a quite irregular practice: "There is no doubt that the present position of consuls in non-Christian States is in every point an exceptional one, which does not agree with the principles of International Law otherwise universally recognized."[193] In fact, it was almost universally abandoned in international practice, even by Western states, by the mid-twentieth century.[194]

Diplomats, by agreement, are still exempt from local jurisdiction, but may be punished by their home states for criminal conduct in the host state.[195] For somewhat similar reasons, countries hosting U.S. military bases allow U.S. troops to be punished by U.S. military proceedings rather than local courts.[196] These exemptions from local justice can be waived in particular cases (by the home state of diplomats or by the U.S. government in regard to its own military personnel).[197] The arrangement defers to the special function performed by those in the protected category (that is, diplomatic and military personnel). That is why the home state can decide, in a particular case, that this special function will not be compromised (or is outweighed by other considerations in a particular situation) and so waive the normal claim of immunity. The arrangement does not turn on the fact that foreign offenders happen to be nationals of this or that state.

The prevailing rule for extra-territorial jurisdiction over non-Indians looks much more "exceptional" today. It turns on sheer communal affiliation—whether a person does or does not happen to be classified as Indian. There is no recognized procedure to waive the exemption in particular cases (to consign non-Indian offenders to Indian justice). For all that, it no longer has any basis in the historic concern that inadequate judicial proceedings might spark war on the frontier. It does not even purport to rest on doubts about the capacities of contemporary Indian courts to respect due process. Justice Rehnquist's opinion in *Suquamish* acknowledged that tribal courts "resemble in many respects their state counterparts," with "basic procedural rights" guaranteed by federal law "to *anyone* tried in Indian tribal court."[198] Thus, he conceded, "many of the dangers

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members on overseas bases).

193. OPPENHEIM, *supra* note 191, at § 442.

194. Japan persuaded Western powers to abandon the practice as early as the 1890s, after introducing "modern" procedures into its judicial system based on European models. Post-Ottoman Turkey insisted on Western repudiation of extra-territorial jurisdiction after World I in the peace treaty of Lausanne. Treaty of Peace with Turkey Signed at Lausanne, Jul. 24, 1923, 28 L.N.T.S. 11 (1924). With China, Britain and the United States agreed to abandon such claims in 1943 to strengthen their wartime alliance. The post-war Communist government refused to honor any remaining treaties with this provision.

195. *See* Vienna Convention on Diplomatic Relations art. 31, Apr. 18, 1961, 23 U.S.T. 3227, U.N.T.S. 95.

196. *See, e.g.*, Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between Japan and the United States of America, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, Japan-U.S., Jan. 19, 1960, 11 U.S.T. 1652.

197. *See* Vienna Convention on Diplomatic Relations, *supra* note 195, at art. 32.

198. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211-12 (1978).

that might have accompanied the exercise by tribal courts of criminal jurisdiction over non-Indians only a few decades ago have disappeared."[199]

Justice Rehnquist's opinion also acknowledged the warnings of Indian tribes about "the prevalence of non-Indian crime on today's reservations," bound to be aggravated by denial of local criminal jurisdiction over such perpetrators.[200] But he insisted it was for Congress to decide whether to restrict the jurisdiction of tribal courts by race or national origin, rather than apply it on a territorial basis.[201] Despite continuing protest from tribal leaders, Congress has so far responded only in modest ways.[202]

For present purposes, two other points should be emphasized in the comparison with international practice. The first is that when foreigners have been exempted from the jurisdiction of local courts (as in China or Ottoman Turkey in the nineteenth century or diplomats or U.S. military personnel today), that exemption has been secured by a particular treaty between the hosting state and the home state of the exempted foreigners.[203] In principle, the policy has rested on the mutual consent of the two states involved. It was never a generally accepted practice that protections could be claimed without negotiating such an agreement.[204]

Some treaties between the U.S. government and particular Indian tribes may have relevant provisions on the treatment of non-tribal offenders. But, as the Court acknowledged in the *Suquamish* case, that tribe specifically rejected a proposed treaty inviting it to relinquish criminal jurisdiction over non-Indians.[205]

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199. *Id.* at 212 (invoking the Indian Civil Rights Act of 1968).

200. *Id.*

201. *Id.*

202. When the Court followed up *Suquamish* by denying the jurisdiction of tribal courts over Indians from other tribes, Congress did restore tribal criminal jurisdiction over Indians of other tribes. *See* Duro v. Reina, 495 U.S. 676 (1990) (holding that an Indian tribe lacks criminal jurisdiction over an Indian from other tribe), *superseded by statute*, Department of Defense Appropriations Act of 1991, Pub. L. No. 101-511, 104 Stat. 1856, *as recognized in* United States v. Lara, 541 U.S. 193 (2004). This response might seem to reinforce the notion that the underlying concern was not about communal authority but ancestry, per se. Extension of the Violence Against Women Act to tribal jurisdiction may provide some basis for tribal courts to claim further ancillary jurisdiction, as argued by Adam Crepelle. Adam Crepelle, *Tribal Courts, The Violence Against Women Act and Supplemental Jurisdiction: Expanding Tribal Court Jurisdiction to Improve Public Safety in Indiana Country*, 81 MONT. L. REV. 59 (2020).

203. *See, e.g.*, Vienna Convention on Diplomatic Relations, *supra* note 195.

204. Diplomatic privilege has long been recognized in customary international law, itself understood as flowing from the consent of states to the practice. But the development of a formal international convention in 1961 acknowledged uncertainty, even in this field, about the exact reach and limits of customary practice. *See id.* Ratification of a formal treaty was designed to clarify state obligations. Still, the treaty applies only to those states which ratify it (though virtually all states have done so).

205. *Suquamish*, 435 U.S. at 206 n.16. "For some unexplained reason," says the Court, the treaty with this tribe omitted to say that the tribe would not have jurisdiction over outsiders. Advocates for

So, too, the decision in *Castro-Huerta* purports to rest on a general legal doctrine, not the consent of any particular tribe in Oklahoma to the assertion of state jurisdiction.[206] The reasoning seems to posit a background norm that excludes tribal authority from operating on non-tribal members—except when (for reasons not explained in *Castro-Huerta*) tribal authority may, after all, be allowed to prevail.[207]

The second point to emphasize is that extra-territorial jurisdiction agreements were focused on prosecution for crime. They recognized that criminal prosecution is particularly sensitive because it can result in loss of liberty, perhaps even loss of life. In the nineteenth and early twentieth centuries, western governments claimed a right to protest abuse of their nationals by foreign governments—even to deploy force to retaliate for such abuse. So, extra-territorial justice could be seen as a safeguard of peace.[208] Even today, governments routinely express concern about prosecution of their nationals by a foreign government, even when there is no dispute about jurisdiction but merely a concern that the foreign government may be acting with bias or vindictive excess.[209] Even when

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the tribe claimed this was "because of tribal opposition to relinquishment of criminal jurisdiction over non-Indians" but the Court found no definite "evidence to support this view of the matter." *Id.*

206. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022). *Castro-Huerta* does not mention treaty claims, which had already been analyzed in *McGirt*—to the dissatisfaction of all justices in the *Castro-Huerta* majority (except newly-appointed Justice Barrett), but the *Castro-Huerta* majority still did not challenge the previous *McGirt* holding in this respect. *Id. McGirt* found the state lacked authority to prosecute Indian perpetrators of crimes against Indian victims (the situation in that case) based on treaty commitments. *McGirt,* 142 S. Ct. at 2478. The *Castro* majority did not claim the treaties in this case authorized state prosecutions of crimes by non-Indians but rested its conclusions on supposed general principles of law regarding the status of reservations. *Castro-Huerta*, 142 S. Ct. at 2502-03.

207. The decision speaks of intrusions that limit tribal self-government, as if punishing crime were something minor or peripheral to the purposes of government.

208. Elihu Root, *The Basis of Protection to Citizens Residing Abroad*, 4 AM. J. INT'L L. 517, 521 (1910) (arguing that foreign nationals, when charged with some offense by a host country, must be accorded due process that accords with the world standard or "standard of civilization" but arguing for compensation to the home state as remedy). But quite often, such demands for compensation were enforced—by Western states against governments in Latin America or Asia—by naval guns (a practice inspiring the ironic phrase, "gunboat diplomacy"). So, extra-territorial jurisdiction could be seen as a way to avoid such conflict. *See* CHARLES LIPSON, STANDING GUARD: PROTECTING FOREIGN CAPITAL IN THE NINETEENTH AND TWENTIETH CENTURIES (1985).

209. On July 19, 2022, President Biden issued an Executive Order "Bolstering Efforts to Bring Hostages and Wrongfully Detained United States Nationals Home." Exec. Order No. 14,078, 87 Fed. Reg. 43,389 (July 19, 2022). It seems to equate actions by "[t]errorist organizations, criminal groups, and other malicious actors who take hostages for financial, political or other gain" with "foreign states that engage in the practice of wrongful detention, including for political leverage or to seek concessions from the United States . . ." and reinforces the government's ability to pursue relief from both sets of threats. *Id.* At the State Department Press Briefing on September 26, 2022, Spokesperson Ned Price said: "In just about every single one of our engagements around the world at senior levels,

governments negotiated agreements on exemption from local criminal justice, they did not, however, claim that their nationals could also claim exemption from local taxation or regulatory requirements. These are quite different.

Somehow, the Supreme Court followed this transition when it came to tribal authority over outsiders. Limits on tribal criminal jurisdiction implied the need for outside assistance. Outside authority might compensate itself with tax claims—at least against non-Indians. In its 1980 ruling in *White Mountain Apache Tribe v. Bracker*, Justice Marshall's opinion for the Court acknowledged that "state law is generally inapplicable" to "on-reservation conduct involving only Indians," but "[m]ore difficult questions arise where . . . a State asserts authority over the conduct of non-Indians engaging in activity on the reservation."[210] Such disputes "called for a particularized inquiry into the nature of the state, federal and tribal interests at stake."[211] Subsequent cases invoked this so-called "*Bracker* balancing test" in ways that gave increasing weight to the state's interest in revenue, while reducing the tribal claim to excluding direct interference with its own members (rather than the tribe's claim to set policy for its own territory).[212]

State claims for revenue readily extended into claims to be shielded against the commercial effects of lower taxation by Indian authorities. The Court has, in effect, endorsed the notion that tribal territories must not host commercial competition with the commerce of states.

Recall *Colville Indian Reservation* from the previous section, where Washington State was allowed to require Indians to collect state taxes on sales of cigarettes by tribal vendors on tribal land.[213] It is not a unique case.[214] Justice Brennan's partial dissent responded with the dismayed acknowledgement that the ruling makes "clear that Indian reservations do not partake of the full territorial sovereignty of States or foreign countries."[215] Subsequent cases confirmed that the Court considered actual states to have a constitutionally protected "interest" in reducing competition from lower-tax jurisdictions—if the lower-tax

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we raise cases of American detainees, Americans who are wrongfully detained . . . ." Ned Price, Dep't Spokesperson, U.S. Dep't State, Press Briefing (Sept. 26, 2022), *available at* https://www.state.gov/briefings/department-press-briefing-september-26-2022/ [https://perma.cc/HQ9Y-9Y8Y].

210. 448 U.S. 136, 144 (1980).

211. *Id.* at 145.

212. *See, e.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 175 (1989) (allowing state tax on oil development on tribal land "even though the financial burden of the tax may fall on the . . . tribe" because the immediately taxed entity was non-Indian).

213. Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134 (1980).

214. *See, e.g.*, Muscogee (Creek) Nation v. Pruitt, 669 F.3d 1159 (10th Cir. 2012) (holding, on similar facts, that Oklahoma's practice of seizing cigarette shipments without state tax stamp outside Indian country did not infringe tribal sovereignty, as Indians could still buy taxed cigarettes for their own use).

215. *Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. at 165 (Brennan, J., concurring in part and dissenting in part).

jurisdiction was an Indian reservation.[216]

So, in *Wagnon v. Prairie Band Potawatomi Nation*, the Court held that a tribal owned and operated gas station on tribal territory was required to collect Kansas state motor fuel tax because customers were largely non-Indians from outside the reservation.[217] It is revealing of the tangle in the case law that the majority opinion, by Justice Thomas, acknowledged that the accumulated precedents by then (2005) required an "interest-balancing" assessment which "is not only inconsistent with the special geographic sovereignty concerns that gave rise to [the balancing] test, but also with our efforts to establish 'bright-line standard[s]' in the context of tax administration."[218]

Justice Ginsburg's dissent sought to defend the tribal claim to make its own tax determinations. But, it did so by conceding that, depending on the relevant facts, the state *could* have special claims to object and, so, demand a "balancing" of its "interest" to be free from competition against the tribe's interest in determining rules for its own territory.[219] "Kansas argues that, were the [Potawatomi] Nation to prevail in this case, nothing would stop the Nation from reducing its tax in order to sell gas below the market price."[220] But, if the tribe did that, soothed Justice Ginsburg, "it would be marketing an exemption [from state taxes], much as the smoke shops did in *Colville*, and hence, interest balancing would likely yield a judgment for the State."[221]

Cases of this sort are by no means outliers.[222] They concede that tribal authorities can impose their own taxes on commerce within their territories—but only after accommodating taxation claims of surrounding states, which often means accepting a burden of double taxation which is bound to suppress their own commerce and fundamentally undermine their supposed authority to determine their own rate of taxation. Yet preventing such double taxation has been a persistent rule of decision in cases involving state taxation of revenues earned in other states.[223]

The logic of Indian tax cases is not merely a limitation of Indian sovereignty but almost a repudiation of sovereignty. It is to make tribal communities into something like religious sects which retain the right to prescribe practices for their voluntary adherents. But it is to deny—or at least, greatly abridge—the usual right of sovereigns to settle rules for the territory they control. The logic of these cases is that while outsiders may enjoy the benefits of commerce on Indian territory, the home states of the outsiders have the right to follow them into Indian

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216. *See, e.g.*, Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005).

217. *Id.* at 115.

218. *Id.* at 113 (quoting Ariz. Dep't of Revenue v. Blaze Const. Co., 526 U.S. 32, 37 (1999)).

219. *Id.* at 121-22 (Ginsburg, J., dissenting).

220. *Id.* at 130.

221. *Id.*

222. For other examples, and vigorous criticism, see Adam Crepelle, *Taxes, Theft, and Indian Tribes: Seeking an Equitable Solution to State Taxation of Indian Country Commerce*, 122 W. VA. L. REV. 999 (2020).

223. *See, e.g.*, Comptroller of Treasury of Md. v. Wynne, 575 U.S. 542 (2015).

territory and demand that Indian authorities conform to the rule that the outside states wish to impose.

There are a number of grounds on which the result in *Castro-Huerta* might be defended—that Oklahoma could assert jurisdiction to prosecute a non-Indian accused of child neglect against an Indian minor.[224] As noted above, the practice of allowing states to enforce basic criminal law, at least on non-Indian offenders, goes back to the late nineteenth century, and it would not have been a great stretch to apply the somewhat elusive reasoning of earlier cases to the special circumstances of Oklahoma. The Court has previously acknowledged that states have some claim to impose their most fundamental criminal prohibitions: states cannot regulate casino gaming on Indian territory, for example, unless they have a blanket criminal prohibition on gambling, as Utah does.[225] In *Castro-Huerta*, the majority opinion invoked—somewhat vaguely—the state's claims of sovereignty, which might be extended to suppressing basic crimes that may affect order within the state.[226] Federal law imposes penalties for U.S. citizens who commit sexual acts with children in foreign countries, without regard to whether the victims are U.S. citizens (usually they are not)[227]—and as it happens, Oklahoma was prosecuting actual child abuse in *McGirt* and a perhaps not altogether unrelated charge of extreme child neglect in *Castro-Huerta*.[228] The state claim to prosecute non-Indian perpetrators may draw weight from the inability (under current law) of tribal authorities to prosecute crimes committed by non-Indians.

In sum, a finding that Oklahoma could prosecute crimes committed against Indian victims in Indian lands did not require the Court to rule that the Indian territory there is a part of the state—let alone the general claim that all Indian reservations are parts of the states in which they exist. The complications regarding criminal jurisdiction have their roots (or continuing validity) in the notion that outside powers have some claim to preserve order. None of that explains the larger ambivalence displayed in the tax cases.

The idea that reservations in America need to compensate neighboring states

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224. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2491 (2022).

225. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 209 (1987) ("if the intent of a state law is generally to prohibit certain conduct, it falls within . . . [its] criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation . . . [federal law] does not authorize its enforcement [by the state] on an Indian reservation").

226. *See Castro-Huerta*, 142 S. Ct. at 2493 (documenting a practice of allowing state prosecutions of offenses on Indian territory) (citing New York *ex rel.* Cutler v. Dibble, 62 U.S. (21 How.) 366, 370 (1858)). As the Court's quotation indicates, *Dibble* held that states "retain 'the power of a sovereign over their persons and property, so far as' 'necessary to preserve the peace of the Commonwealth.'" *Id.* (quoting *Dibble*, 62 U.S. (21 How.) at 370). But (as the Court fails to note) *Dibble* involved a very limited, specialized intrusion by state law—imposing criminal penalties on non-Indians trying to settle or reside in land reserved for Indians. *Dibble*, 62 U.S. (21 How.) at 368.

227. *See* 18 U.S.C. §§ 2251, 2253-2257.

228. McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (Roberts, C.J., dissenting); *Castro-Huerta*, 142 S. Ct. at 2491.

for lower prices seems to rest on the unstated premise that states are a real part of America while Indian reservations are tolerated as a courtesy or a mere antiquarian curiosity—which must not make trouble for those around them. They somehow went from being "Indians untaxed" to Indian territory especially taxed. States do not protect their own local governments from tax competition from nearby local governments with lower taxes. States (as we have seen) are not allowed to protect retailers in their territory from products made in other states, even if the latter have lower taxes.[229] While the *Castro-Huerta* majority proclaimed that "reservations are 'part of the surrounding State,'" they remain subject to special liabilities as outsiders to the state.[230]

Tribes cannot realize the promise of self-government if their own policies are trammeled by outside authorities. The claim to tribal sovereignty is a claim of tribal authority to decide how best to develop the potential of the tribal territory for the tribal community. Tribes are not colonies to be regulated for the convenience of the surrounding "metropolitan" state.

To see this logic clearly, courts may need to rethink the status of tribal authority. Perhaps that effort requires rethinking the larger aims and ends of constitutional government in America.

VI. DIVERSITY AND INCLUSION—THE ORIGINAL MEANING

Arguments regarding original meaning may seem particularly remote when it comes to the constitutional status of Indian tribes. On this subject, the concerns of the Founding era may seem as remote as tomahawks and flintlock rifles. But this view is short-sighted in a number of ways.

To start with, brutal methods of warfare were not the only thing early Americans associated with the Indian tribes. In the debates over the proposals that emerged from the Philadelphia Convention, Antifederalists warned against entrusting too much power to a remote government with a menacing military establishment and voracious demands for revenue.[231] Wasn't this simply recreating all that was onerous and oppressive in the British Empire? Was all this really necessary?

Such critics occasionally pointed to the example set by the Indians. They depicted them as among the freest people in America because they were free from the ambitions of European empire builders.[232] Thus, a Maryland Antifederalist

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229. *See generally* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2459 (2019) (noting that "'this "negative" aspect of the Commerce Clause' [referred to as the dormant commerce clause] prevents the States from adopting protectionist measures").

230. *Castro-Huerta*, 142 S. Ct. at 2493 (quoting Organized Vill. of Kake v. Egan, 393 U.S. 60, 72 (1962)).

231. *See generally* Ugonna Eze, *The Anti-Federalists and Their Important Role During the Ratification Fight*, NAT'L CONST. CTR. (Sept. 27, 2017), https://constitutioncenter.org/blog/the-anti-federalists-and-their-important-role-during-the-ratification-fight [https://perma.cc/TLY3-7L4M].

232. *See, e.g.*, *A Farmer V (Part 2), Baltimore Maryland Gazette, 28 March 1788*, *in* THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, VOL. XII, RATIFICATION OF

invoked the model of "the native Indians, who are free and happy, and who prove that self-government is the growth of our soil."[233] A Massachusetts Antifederalist offered a similarly idyllic vision: "With [the Indians] the whole authority of government is vested in the whole tribe. . . . Their government is genuinely democratical."[234]

These were not metaphors spun out in the spur of the moment by polemical pamphleteers. There was already a tradition of viewing Indians as symbols of freedom. At the start of the colonial resistance to British taxation, the "Sons of Liberty" staged a "tea party"—dumping chests of tea into Boston Harbor to protest the new tax on tea, imposed without the consent of the colonial legislatures.[235] The protestors "covered their faces with lamp black and red ochre, [and] dressed themselves as Indians," as Indians were recognized as "the symbol of American freedom in the 18th century."[236]

Indian warriors were taken as symbols of freedom because they were thought to be single-minded in their tribal loyalties, indifferent to the corrupting temptations of European society, with its luxuries, titles, and hierarchies. So in 1789, a new political club in New York gave itself the name of an Indian chief—Tammany—and called its leader the "Sachem."[237] A few decades later, Ohio lawyer Charles Sherman, a veteran of the campaign against the Shawnee tribe, "caught a fancy for [their] great chief . . .'Tecumseh'" and bestowed that name on his son, William Tecumseh, who won subsequent renown as one of the greatest military commanders in the Civil War.[238]

THE CONSTITUTION BY THE STATES: MARYLAND 454 (John P. Kaminski et al. eds., 2015).

233. *Id.*

234. *Agrippa XV, Massachusetts Gazette, 29 January*, *in* THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, VOL. V, RATIFICATION OF THE CONSTITUTION BY THE STATES: MASSACHUSETTS 823 (John P. Kaminski et al. eds., 1998).

235. DAVID HACKETT FISCHER, PAUL REVERE'S RIDE 25 (1995).

236. *Id.*

237. Alan Leander MacGregor, *Tammany: The Indian as Rhetorical Surrogate*, 35 AM. Q. 391, 398 (1983). The name is an adaptation of a chief of Lenape Indians in the Delaware Valley in the seventeenth century. There were Tammany clubs in Philadelphia and a number of other cities in the mid-Atlantic region in the late eighteenth century. New York's Tammany Club grew into the Tammany Hall organization that controlled the city's Democratic Party throughout the nineteenth century and well into the twentieth. It started by depicting itself as the voice of honest tradesmen against corrupt elites and retained a populist tinge throughout its long history. *See* GUSTAVUS MYERS, THE HISTORY OF TAMMANY HALL (2d 1917) (ebook), *available at* https://www.gutenberg.org/cache/epub/53115/pg53115-images.html [https://perma.cc/ZY7Y-QPWM]; *Tammany Hall: American Political History*, BRITANNICA (Sept. 14, 2022), https://www.britannica.com/topic/Tammany-Hall [https://perma.cc/KF2A-94GX]. It had at least this much in common with its supposed Indian forebear: its emphasized communal (or party) loyalty.

238. WILLIAM TECUMSEH SHERMAN: MEMOIRS OF GENERAL W.T. SHERMAN 11 (Charles Royster ed., 1990). By some accounts, "William" was only added later, when he was baptized as an 11-year-old. *Id.* at 1085. His family always called him "Cump." *Id.* The lawyer who gave that name to his son was not seen as a whimsical eccentric. He was appointed to the Ohio Supreme Court shortly

Life on Indian reservations today may not look quite so free-spirited or heroic. But Indian tribes still seek something they claimed—and were acknowledged to have of right—at the time of the Founding: a local right to govern themselves. For "many members of tribal nations," as a scholar of Indian law observes, "'sovereignty' is as common and heartfelt a term as 'rights' is to most other Americans."[239] In 1974, on the eve of the bicentennial of the U.S. Declaration of Independence, the National Congress of American Indians released an "American Indian Declaration of Sovereignty," demanding that the federal government "fully recognize inherent aboriginal American Indian sovereignty and the rights and powers of self-government and self-determination."[240]

That claim is not at all anachronistic. More than 500 tribal governments are now recognized by the federal government.[241] They exist because tribal members have clung to their identity, their communal loyalties, central elements of their traditional cultures. Their tenacity is remarkable. It is now officially encouraged, in various ways, by federal policy. But tribal loyalties had to endure half a century of federal efforts to suppress them.

Starting in the late nineteenth century, the federal government openly sought, often by brutal methods, to compel Indians to abandon traditional ways and assimilate to the American mainstream.[242] Children were removed from parents and sent to boarding schools to learn modern ways.[243] Reservations were forbidden to conduct traditional ceremonies.[244] Tribal lands were "allotted" to

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after the birth of the future general. *Id*. General Sherman's "March to the Sea" through the interior of Georgia in the fall of 1864 aimed at driving home to Georgians the dangers of resisting federal authority—a lesson not imparted thirty years earlier, when the state was allowed to defy the Supreme Court's ruling in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). As Sherman wrote to his commander in Washington at the end of this march: "we are not only fighting hostile armies, but a hostile people, and must make old and young, rich and poor, feel the hard hand of war . . . . I know that this recent movement of mine through Georgia has had a wonderful effect in this respect. Thousands who had been deceived . . . now realize the truth, and have no appetite for a repetition of the same experience." Letter to H.W. Halleck (Dec. 24, 1864), *in* SHERMAN, *supra* note 238, at 705.

239. Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1111 (2004).

240. Nat'l Cong. of Am. Indians Gen. Assembly, *American Indian Declaration of Sovereignty, October 24, 1974*, *reprinted in* SOVEREIGNTY, COLONIALISM AND THE INDIGENOUS NATIONS: A READER 12-14 (Robert Odawi Porter ed., 2005). The National Congress of American Indians is an advocacy organization, not a governmental structure, and its nine-point Declaration seems to take for granted a relationship of federal assistance and legal guarantees in the background.

241. *Federally Recognized Indian Tribes and Resources for Native Americans*, USA.GOV, https://www.usa.gov/tribes#:~:text=for%20Native%20Americans-,Federally%20Recognized%20Indian%20Tribes,contracts%2C%20grants%2C%20or%20compacts [https://perma.cc/JEK2-YUWH] (last visited Feb. 10, 2023).

242. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 5, at § 1.04.

243. *See id*.

244. *See id*.

individual farmers, who often ended up succumbing to pressures to sell their allotments to outsiders, diminishing the total of lands under tribal control by more than half.[245] In 1889, the federal Commissioner of Indian Affairs boasted to Congress that by such measures, "[t]he American Indian is to become the Indian American."[246]

In 1924, at the culmination of this trend, Congress conferred U.S. citizenship on all Indians born in the United States—without asking whether they wanted it or accepted it.[247] In fact, some tribes objected, fearing the new status would compromise claims to separate tribal authority.[248] During the Second World War, Indians were subject to military conscription on the same terms as other American citizens (and many served with great distinction on battlefields in Europe and the Pacific).[249] They also came to be subject to federal income taxes on the same terms as other Americans.[250]

But in the 1930s, federal policy had already begun to move in a different direction, with legislation encouraging tribes to build their own governmental institutions and take on more governing responsibility. Despite some episodes of regression and confusion, the general policy of encouraging Indian self-government has been embraced by successive administrations of both political parties. It was given a particular forward push by both the Nixon administration in the 1970s and the Obama administration more recently.[251]

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245. *See id*.

246. *Id*. (citing Comm. Ind. Aff., Ann. Rep., H.R. Exec. Doc. No. 51-1, at vi (1890)). The handbook comments on this and similar pronouncements: "These policies outlawed almost all conduct that was traditionally Indian and sought to substitute conduct that was decidedly white." *Id*. The policies were not implementing prohibitions enacted by Congress but administrative initiatives, imposed as conditions on federal delivery of food and other supplies to highly dependent Indian reservations. *See id*.

247. U.S. citizenship had already been given to those who accepted individual land allotments or established permanent residence outside tribal territory or served in the U.S. military. So, by the time of its enactment, this general legislation changed the status of only a minority of Indians. For review of the successive stages of "naturalization," see Theodore H. Haas, *The Legal Aspects of Indian Affairs from 1887 to 1957*, 311 ANNALS AM. ACAD. POL. & SOC. SCI. 12-22 (1957).

248. *See, e.g.*, Joseph Heath, *The Citizenship Act of 1924: An Integral Pillar of the Colonization and Forced Assimilation Policies of the United States in Violation of Treaties*, ONONDAGA NATION (June 7, 2018), https://www.onondaganation.org/news/2018/the-citizenship-act-of-1924/ [https://perma.cc/4PXA-ZUDX].

249. ALISON R. BERNSTEIN, AMERICAN INDIANS AND WORLD WAR II: TOWARD A NEW ERA IN INDIAN AFFAIRS 159-75 (1999). Bernstein claims participation in the U.S. Army helped generate a "new era in Indian affairs," by providing many young men with experience of life outside their reservations.

250. Choteau v. Burnet, 283 U.S. 691, 696-97 (1931) (holding that Indian status does not exempt earnings from federal income tax).

251. ALAN R. PARKER, PATHWAYS TO INDIGENOUS NATION SOVEREIGNTY: A CHRONICLE OF FEDERAL POLICY DEVELOPMENTS 6-9, 23-24, 81, 121, 134 (2018) (praising both Nixon and Obama initiatives).

In part, this trend may reflect more general sensitivity to the claims of racial and ethnic minorities that gathered momentum in the late-twentieth century. Indians might be seen as one of many minority communities whose past abuse had come to be regretted by later generations of Americans. But no other ethnic groups have been allowed to maintain territorial enclaves where authority is explicitly grounded on formal, legal authority of ethnic self-government. The status of the Indian tribes remains unique.

Still, it is an extreme case of something that was, in fact, more understandable to the Founding generation than to over-confident American leaders in the decades after the Civil War. In that later period, it seemed reasonable for federal authorities to deploy legal coercion to impose a common way of life. There were also, for example, sustained efforts to coerce Catholic immigrants (or their children) to adopt what were seen as mainstream American ways.[252]

In the era of the Founding, American leaders were much more cautious. That is evident from the constitutional scheme they established at the outset. In contrast to the parliamentary systems that developed in other countries, the U.S. Constitution balances the majority in the House against a Senate with equal authority but a separate scheme of election and apportionment.[253] There is also a

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252. *See* Ulysses S. Grant, *December 7, 1875: Seventh Annual Message*, UNIV. OF VA. MILLER CTR., https://millercenter.org/the-presidency/presidential-speeches/december-7-1875-seventh-annual-message [https://perma.cc/67VY-8FT7] (last visited Feb. 9, 2023) (proposing to exclude tax exemptions for church property); *see also Blaine Amendment (U.S. Constitution)*, BALLOTPEDIA, https://ballotpedia.org/Blaine_Amendment_(U.S._Constitution) [https://perma.cc/XPT8-W7KJ] (last visited Feb. 9, 2023) (proposed amendments prohibiting state financial support for religiously affiliated schools). State versions of the Blaine Amendment (added to state constitutions after the failure of the proposed federal amendment) have been found unconstitutional in recent Supreme Court decisions for invidious treatment of religion. *See* Carson v. Makin, 142 S. Ct. 1987 (2022), Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020), Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017). For the culture-shaping ambitions of reformers who backed such measures in the nineteenth century, see PHILIP HAMBURGER, LIBERAL SUPPRESSION: SECTION 501(C)(3) AND THE TAXATION OF SPEECH 60-70 (2018).

253. U.S. CONST. art. I. Britain's House of Lords can force reconsideration of bills passed by the House of Commons but not impose a permanent veto if the measure is reenacted by the Commons. *See What Does the House of Lords Do?*, UNIV. COLL. LONDON, THE CONST. UNIT, https://www.ucl.ac.uk/constitution-unit/explainers/what-does-house-lords-do [https://perma.cc/S7M9-JBVU] (last visited Feb. 9, 2023). Germany's Bundesrat (representing *länder*—constituent states of the federal republic) has a veto only on bills directly affecting the interests of *länder. See The Passage of Legislation in the Bundesrat*, DEUTSCHER BUNDESTAG, https://www.bundestag.de/en/parliament/function/legislation/14legrat-245876 [https://perma.cc/YQ95-RDW8] (last visited Feb. 9, 2023). In Canada and Australia, the "upper house" ("Senate") must consent to bills approved by the "lower house" ("Commons" in Canada, "Representatives" in Australia), but the Cabinet is sustained only by support in the lower house. *See Legislative Process*, PARLIAMENT CAN., https://www.ourcommons.ca/procedure/our-procedure/LegislativeProcess/c_g_legislativeprocess-e.html [https://perma.cc/4A3J-8K2L] (last visited Feb. 9, 2023); *Canadian Parliamentary System,* PARLIAMENT CAN., [https://perma.cc/CGX4-5RVZ] (last

chief executive, wielding a veto on legislation, whose tenure is not dependent on approval in the House.[254] Power is again divided between state and federal governments: federal authority cannot simply displace the separate political authority of state governments. The system is not merely de-centralized but de-centered. No one organ of government can readily claim on its own to speak for "the people." Despite the rhetoric of the Preamble, the actual governing arrangements in the Constitution recognize that "the people" are actually many different communities which may not readily agree on what government should do.

The Founders defended this scheme as protection against impulsive majorities.[255] But the delegates at the Philadelphia Convention knew they could not gain approval for a more centralized scheme.[256] There was too much distrust between different regions of the country and too much determination to keep most governing authority close to the governed—meaning, to different communities, with different priorities.

The constitutional claims for tribal authority are, in some ways, a legacy of a very different America. But they also reflect a fundamental American commitment—above all, to letting different people pursue their happiness in different ways. It is part of what federalism, separation of powers, and the guarantees of the First Amendment sought to assure. Recognizing and protecting tribal authority is a very concrete, tangible, and historic confirmation of a Founding era commitment that retains enduring resonance today.

That is the ultimate rationale for limiting federal power to coerce state governments. It is the rationale for limiting federal—and state—power to coerce tribal authorities, beyond some basic ground rules. Honoring historic commitments to tribal self-determination is a way to recognize the actual promise of American life—a country which can protect and respect very different communities. It is not a new idea. It was disregarded for a substantial part of our history. But it was there at the start.

And it was remembered for some time as the Constitution settled into practice. In the early 1820s, the United States was approaching the fiftieth anniversary of its independence. A participant in the Founding (James Monroe) held the presidency, another (John Marshall) presided over the Supreme Court. They would be succeeded by men who had grown up under the Constitution. The

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visited Feb. 9, 2023); *About the House of Representatives*, PARLIAMENT AUSTL., https://www.aph.gov.au/About_Parliament/House_of_Representatives/About_the_House_of_Representatives [https://perma.cc/VE4G-D9CL] (last visited Feb. 9, 2023). So, by far, the bulk of new legislation is first introduced there.

254. U.S. CONST. art. I, § 7, cl. 2; art. II, § 1, cl. 1.

255. *See, e.g.*, defense of the executive veto in THE FEDERALIST NO. 71 (Alexander Hamilton), *supra* note 47, at 430-31: "The republican principle . . . does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices . . . ."

256. On the disappointed hopes of nationalists at Philadelphia, see PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 35-39 (2010).

new nation seemed to be securely established.

In this moment, Congress approved four sculpted panels to decorate the Capitol rotunda. One shows Indians greeting Pilgrims at the site of the Plymouth Colony in Massachusetts; one shows Pocahontas intervening to protect John Smith at Jamestown in Virginia; one shows William Penn negotiating a treaty of peace with Indians in Pennsylvania; and the last depicts Daniel Boone fighting with an Indian (presumably in what became Kentucky)—but depicted in a personal contest of (roughly equal) individuals.[257]

Needless to say, these depictions omitted a great deal of more bloody and terrible history, skating over brutal and rapacious displacement of Indian tribes that had already occurred in most eastern states. But the panels still suggest how that generation wanted to think of relations with the Indian tribes: not as a triumphant conquest, not even as a tragic, inescapable conflict. Instead, they wanted to depict refugees from the Old World, welcomed by the original inhabitants of the New World. The depictions did not deny cultural differences but affirmed the possibility—or the hope—of sharing the American continent in mutual respect. In effect, these sculpted panels sought to trace the origins of the United States to the first English encounters with much older Americans. They depicted these encounters as the first acts in the separation of Americans from Europe. Before the struggle against the British and the debates over new constitutions, there had been a necessary coming to terms with the original inhabitants—made to seem promising and momentous, not simply fearful. Aboriginal peoples helped to define the distinctiveness of America.

That was already obvious within decades of the Founding. The encounter left its mark on the map. The original states had, as colonies, generally been given names taken from notable people or places in Britain. The states formed after the adoption of the Constitution almost all had local Indian names as did major rivers and mountains and other geographical features. To a large extent, America was what tribes had called it. The encounter with Indian tribes also left a mark on understandings embodied in the federal Constitution.

Contemporary appeals to the Constitution's original meaning are often driven by fear that judges will otherwise spin out new rights from their own imagination. But "originalism" also reflects a background assumption that the original Constitution offers good guidance, because it rests on sensible premises, reasonably balanced.[258] Honoring tribal claims is not more anachronistic than

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257. For background on how they came to be there—and photographs of each—see Vivien Green Fryd, *Imagining the Indians in the United States Capitol During the Early Republic*, *in* NATIVE AMERICANS AND THE EARLY REPUBLIC 297-330 (Frederick E. Hoxie et al. eds., 1999). They are still there in the Capitol rotunda, though perhaps less eye-catching, amidst the many paintings and statutes added later. For views of them in context today, see *Explore the Capitol Campus: The Art Collection,* ARCHITECT CAPITOL, https://www.aoc.gov/explore-capitol-campus/art?search=&artist=All&type%5B53%5D=53&state=All&location=All&page=3 [https://perma.cc/5ZML-NU8F] (last visited Feb. 9, 2023).

258. ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM 47-65 (2017) (arguing the Constitution responds to natural rights claims, to popular sovereignty claims, to

upholding limits on federal authority (and state authority) in other ways. It is a more emblematic or resonant instance of a more general constitutional vision. A Constitution that creates space for tribal self-government is a Constitution acknowledging that the central government is not the fount of all wisdom and that a common life need not be uniform or standardized.

This is more obvious today than it was in the late nineteenth or early twentieth centuries. But it was quite evident to John Marshall and Joseph Story. The Constitution, as its original interpreters saw it, made room for the separate status of the Indian tribes.

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democratic responsiveness claims, thus, satisfying theories of legitimacy from different perspectives).