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ARTICLE

Tribal Representation and Assimilative Colonialism

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Abstract. There are 574 federally recognized domestic dependent tribal nations in the United States. Each tribe is separate from its respective surrounding state(s) and governs itself. And yet, none of them have the power to send representatives to Congress. Our democratic representative structures function as if tribal governments and the reservations they govern do not exist. But tribal citizens do not simply live within a state and are not simply governed by that state like any other state citizen. Rather, it is tribal law and tribal governments—not state law or state governments—that primarily govern and shape the lives of tribal citizens living on reservations. Tribal governments are not complementary or subsidiary to state governments—they are frequent rivals for power and resources. This system, simply put, doesn't make sense. Tribes should have their own representation in the federal government. This Article makes the case for why and examines how this seemingly obvious omission in our democratic structuring came to pass.

This Article examines the democratic mismatch between existing governments—which include not only 50 states, but also 574 federally recognized tribes—and the representative democratic structure that is built into the Constitution around the institution of the state. It details the failed attempts of tribal governments to obtain representation, either as states or outside of statehood. This history reveals a story about race, power, colonialism, and institutions. Attempts by white majorities to hold onto political power within states included denying Native peoples' individual rights and denying statehood to largely Native areas until Native people assimilated or white citizens outnumbered them.

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These dynamics, which this Article dubs "assimilative colonialism," have not only shaped our existing democratic structures but have also had a lasting effect on Native relationships with political power. The nefarious brilliance of assimilative colonialism was to offer American political power to Native peoples—whether citizenship, statehood, or delegates—only and always at the cost of what made them Native. As a result, many Native people justifiably view American political power not as empowering but as dangerous. Assimilative colonialism has thus held back the emergence of Native movements for political reform by making it impossible to even imagine tribal representation in a real sense since it seemed only possible through assimilation.

It is long overdue that we step back and examine the legacy of assimilative colonialism in American representative democracy. We ought to think about structural reform and what representative structures could—and maybe should—have been on the table for tribal governments and their citizens since the beginning. We ought to be asking: What would American democratic structures look like if we truly incorporated tribal governments as equal sovereigns within the United States?

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Introduction

The United States is a government composed of other governments. Our representative democracy's structure reflects a commitment to this multiplicity as a virtue. The choice to keep many layers of government—including local ones—allows for us to have it both ways. Decisions about more local aspects of our lives are made by members of our local community, who understand local realities and are more likely to share our beliefs. And yet, we also have a voice in the national democratic whole through our representation in Congress. We further balance minority voices and majority rule by having both a federal system built upon state governance and a bicameral legislature that balances the voices of the people and the states.[1]

But there is a mystery hiding in the current configuration of fifty states. Why aren't there any Indian states? Why aren't the 574 federally recognized domestic dependent tribal nations given a single representative? Though each tribal nation has a separate government, separate citizens, and in many cases separate territory from surrounding states, tribal citizens are lumped together with the surrounding state's citizens—voting as if they were simply any other citizen of the state in which they reside.[2] Tribal citizens[3] are geographically grouped with the citizens of states as if their reservations and separate tribal governments did not exist.[4]

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1. *See, e.g.*, U.S. CONST. art. I, §§ 2-3, *amended by* U.S. CONST. amend. XVII (describing the process whereby the people of the states choose their representatives); *id.* art. I, § 10 (describing limits on state powers); *id.* art. IV, §§ 3-4 (describing the process for admitting new states and guaranteeing them a republican form of government and federal protection from invasion or domestic violence).

2. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.01[2] (LexisNexis 2023); *see also* Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 757 (2006) ("To some degree, the very purpose of an Indian reservation is to provide a refuge from state governments.").

3. Throughout this piece, I use the term "tribal citizens" as the primary term to describe the population whose representation I am discussing. By this term, I mean members of federally recognized Indian tribes. As such they are "citizens" of their tribal nations. By focusing on this group, I in no way deny the Indianness or indigeneity of other Native peoples within or outside of the United States and its legal system. It is simply beyond the scope of this Article to address the broader questions of Indigenous identity and the legal status that different Native groups or persons have in tribal, state, or federal legal systems. This Article is focused on a uniquely federal legal fact: the insistence on conquest and absorption of the tribal governments within the United States system without setting up distinct democratic representation for these governments. Nor is this Article meant to suggest that these federally recognized tribal governments are perfect government actors or always acting in their citizen's best interests. They are, simply put, governments like any other.

4. *See County Lines/State Lines/Tribal Lands*, ARCGIS, https://perma.cc/Z33T-L4ZU (last updated Mar. 21, 2023) (comparing county boundaries with reservation boundaries). *Compare 2020 American Indians and Alaska Natives in the United States Wall Maps*, U.S.

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Moreover, even though tribes and their citizens are in numerous ways exempt from state law, tribal citizens can vote in state elections that may not affect their rights or their lives on their reservations.[5] Tribal citizens are apportioned into states for representation in Congress, despite frequent tension and competition between state and tribal governments. It all makes very little sense.

As a scholar who focuses on tribal governments, I am often asked why it is that none of the Indian tribes can send their own representatives to Congress. It is a bit of a puzzle. Tribes are, after all, recognized under federal law as domestic dependent governments with lawmaking authority wholly independent of states.[6] Today, tribes still collectively control around 100 million acres of land (approximately the size of California).[7] Individually, nineteen tribes' reservations are larger than the state with the smallest land base: Rhode Island.[8] Two tribes, the Navajo Nation and the Cherokee Nation,

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CENSUS BUREAU, https://perma.cc/4JBQ-Q94Q (last updated June 8, 2022) (mapping "American Indian reservations (federal and state recognized), off-reservation trust lands (ORTLs), Oklahoma tribal statistical areas (OTSAs), tribal designated statistical areas (TDSAs), state designated tribal statistical areas (SDTSAs), Alaska Native Regional Corporations (ANRCs), and Alaska native village statistical areas (ANVSAs)"), *with Congressional District Map*, GOVTRACK, https://perma.cc/V4D2-VM5H (archived Jan. 18, 2024) (mapping United States congressional districts in 2023).

5. As the Supreme Court has described, "from the very first days of our Government, the Federal Government had been permitting the Indians largely to govern themselves, free from state interference," Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685, 686-87 (1965), and thus "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply," McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 170-71 (1973) (quoting U.S. DEP'T OF THE INTERIOR, FEDERAL INDIAN LAW 845 (1958)).

6. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 583 (1832) ("In the executive, legislative, and judicial branches of our government, we have admitted, by the most solemn sanctions, the existence of the Indians as a separate and distinct people, and as being vested with rights which constitute them a state, or separate community—not a foreign, but a domestic community—not as belonging to the confederacy, but as existing within it, and, of necessity, bearing to it a peculiar relation."), *abrogated by* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) ("The Indian territory is admitted to compose a part of the United States. . . . They may, more correctly, perhaps, be denominated domestic dependent nations.").

7. NAT'L CONG. OF AM. INDIANS, TRIBAL NATIONS AND THE UNITED STATES: AN INTRODUCTION 10 (2020) (specifying that 100 million acres are controlled by American Indian or Alaska Native Tribes), https://perma.cc/22CB-QNG3; 1 FOREST SERV., U.S. DEP'T OF AGRIC., FOREST SERVICE ROADLESS AREA CONSERVATION: FINAL ENVIRONMENTAL IMPACT STATEMENT app. at A-3 (2000), https://perma.cc/L2RW-7LDF (noting that California's land mass is about 102 million acres).

8. NAT'L CONG. OF AM. INDIANS, *supra* note 7, at 10.

are similar in population to a small state, boasting around 400,000 tribal members each.[9]

As it turns out, there is no satisfying answer to this question. The system design is not based on well-thought-out and justified neutral principles—quite the opposite. As this Article details, the reasons why tribes are not treated as units of representative governance in the United States are intertwined with America's history of racism and colonialism and the general stickiness of our institutional arrangements.

This Article argues that the continued exclusion of tribal governments from the structure of the United States's representative democracy reveals an underlying hypocrisy that is entwined with our racial and colonial past. Indian tribes are—and always have been—governments. Yet rather than being embraced by a democratic governance project that ostensibly celebrates multi-layered governance as a virtue, Indian tribes have been delegitimized and dismissed as units of American government—deemed incapable of being part of American democratic structure because of their racial and cultural identity. Indian tribes were excluded from our political structures because they were non-white governments, and whenever they were offered political power, it was on terms that were coercive or destructive to their racial, cultural, and political identities.[10]

This Article names this nefarious and powerful aspect of American colonialism "assimilative colonialism." While assimilative colonialism has taken many forms and employed many strategies to refashion Indigenous groups into the dominant culture's likeness, in this case it notably included the practice of offering American political power—whether citizenship, the right to vote, or the possibility of statehood—only on terms of racial, cultural, or political erasure.[11] This Article explores how assimilation functioned as a powerful part of the United States's political project of conquest and both directly and indirectly complicated the democratic project for Native peoples. First, it empowered white majorities to exclude Indian tribes and tribal citizens from political power on explicitly racial and cultural terms because becoming more "white" or

9. Simon Romero, *Navajo Nation Becomes Largest Tribe in U.S. After Pandemic Enrollment Surge*, N.Y. TIMES (May 21, 2021), https://perma.cc/2YBS-9PFL.

10. *See infra* Part I.B-.D.

11. I in no way think that I am the first person to identify this practice, or the important role it has played in the United States. Far from it, I believe we talk about colonialism or settler colonialism in broad terms that are importantly inclusive of this dynamic that I am calling assimilative colonialism. I seek, however, to focus on this narrower slice of the American colonial project to talk about the specific role that it has had on our political and legal structures. Naming it helps us talk about it. I do not mean to overstate a claim to novelty. Many other scholars write about what I am calling "assimilative colonialism." *See, e.g.*, *infra* notes 61, 65.

"civilized" was accepted as a prerequisite to political power for tribal citizens.[12] Assimilative colonialism thus allowed for racial gatekeeping of political institutions and the right to participate in them, and thereby shaped which governments became states, who had the right to control state elections, and tribes' exclusion from representative democratic structures.[13] Moreover, in key episodes where Native political power was a possibility, assimilative colonialism's predominance ensured that the states stayed white-controlled and that Indigenous governments would be considered unworthy of wielding power in the United States until they assimilated or white citizens became the majority, thereby making them no longer Indigenous-controlled governments.[14]

Assimilative colonialism, I argue, has not only shaped our existing democratic structures but has also had a lasting impact on Native relationships with political power. Assimilative colonialism's nefarious brilliance was to offer American political power only and always at the cost of what made Indians *Indians* and to therefore make American political power seem—not empowering—but dangerous. Tribal citizens and tribal nations have been, understandably, skeptical of American political power or inclusion with the American democratic project because of the legacy of assimilative colonialism and the fear that American political power could be dangerous to their survival.[15]

This is not to undermine or reject the legitimacy of many tribes and their citizens' principled preference to be separate nations from the United States or to say that inclusion within the United States on any terms is not inherently a part of conquest. Rather, I argue that assimilative colonialism has limited the imaginative possibilities of inclusion for tribal citizens within the United States's legal and political system. Native people have not demanded seats in Congress or a statehood-like status for tribal nations in part because it was impossible to imagine that such things could exist without surrendering tribal cultures, political identities, or self-governance. This Article suggests that expanding the imaginative possibilities for tribal representation—and cleansing ourselves of the limiting assumptions imposed by assimilative colonialism—is long overdue. It is time for us all to ask the hard questions about where tribal nations *should* fit within our democratic system and interrogate solutions that better serve the United States's fundamental commitment to representative democracy for all.

Indeed, there is nothing inevitable or inherent about the United States's representative arrangement of 50 states, 100 Senators, and 438 Representatives.

12. *See infra* Part I.B.

13. *See infra* Part I.B-.C.

14. *See infra* Part I.B.

15. *See infra* Part I.A.

In fact, the emergence of several of the states carries a legacy of white supremacy that ought to give us pause.[16] As such, we ought to be skeptical of the status quo and willing to think in structural terms about what representative structures could be and maybe always should have been if statehood and political power had not been so inextricably intertwined with white power.

The Article begins in Part I by introducing assimilative colonialism and examining its role in the development of Native political power in the United States. I first introduce assimilative colonialism as a key part of understanding this history of political exclusion and explain how it is set up by the myths of Indianness as incompatible with American political power and of tribes themselves as anti-democratic. Although tribes were once separate foreign nations at the beginning of the United States, by the mid-nineteenth century, the United States insisted that tribes were conquered domestic dependent nations while paradoxically treating Indianness as foreign or un-American. This served a distinct political purpose in the colonial process. The concept that Indians were foreign or un-American was manufactured—an aspect of assimilative colonialism that served the ends of the American colonial project by exerting coercive power over Indian tribes and tribal citizens.

The Article next recounts a history of Native attempts to obtain political power—whether through representation, statehood, or citizenship—to demonstrate the role that assimilative colonialism played in shaping our democratic institutions and the relationship between tribal citizens and American political power. Whether in the form of citizenship, representation, or statehood itself, political power always came with an assimilative colonial cost for tribal citizens. The denial of Native birthright citizenship was motivated not only by desires to hold onto assimilative colonialism's power over the institution but also by fears of Native political power within western states. The configuration and admission of several states into the union was a race-conscious gatekeeping project that worked to preserve white power by drawing borders, granting citizenship, and delaying the admission of new states until they were white enough, particularly among the western states with large populations of Native peoples.[17]

Next, I examine the failed attempts at tribal statehood or tribal representation at both the federal and state levels. These rare efforts at securing a voice for Native peoples were often intertwined with assimilative colonial expectations for the tribes involved or failed due to the concerns of white majorities. Establishing a Native state or states was floated at various times but never came close to a reality—in some instances because of explicitly racial

16. *See infra* Part I.B.2.

17. *See infra* Part I.B.2.

fears about other non-white territories getting ideas. The most serious effort to secure a Native state was the effort spearheaded by the Five Tribes to have a Native-controlled state called the State of Sequoyah, instead of what eventually became the State of Oklahoma.[18] This was always an option that had assimilative colonial costs for the Five Tribes, and its failure is viewed by some as a mixed blessing since it allowed the tribes to keep their own separate political structures rather than be absorbed into the State of Sequoyah.

Finally, Part I concludes with a discussion of the attempts to secure or utilize delegates. The Treaty of New Echota promises the Cherokee Nation a congressional "delegate"—a promise that the Cherokee Nation has recently sought to enforce.[19] The other tribal delegate attempt is in Maine, where three tribes have been given the right to select non-voting representatives to the state legislature.[20] While this has been a point of pride for the state, the tribal representatives have little power. They cannot vote on or freely sponsor legislation, and, at significant moments of disagreement with the state, the tribes did not use the power of the delegates to resolve these conflicts or exert political power.[21] Instead, the tribes stopped sending delegates altogether.[22]

The throughline of these historical accounts is assimilative colonialism. Tribes are never offered political power on their own terms. They are not treated like political equals or partners. Tribes and tribal citizens are offered political power on terms that are destructive or hollow.

Part II examines the peculiarities and inadequacies of the status quo of tribal citizen participation and representation within our current system of representative democracy. Tribal citizens have a strange and often strained relationship with non-Indian governments at the local, state, and federal level. There exists not only systemic distrust but also instances of what I call "democratic mismatch." Tribal citizens who live on reservations are not governed by state law to the same degree as other Americans, and yet they can vote in state elections. By contrast, federal laws matter a great deal to tribes and tribal citizens. They are subject to a large, unique, and complex set of federal laws that specifically govern them: federal Indian law. And yet, tribal citizens are inadequately and indirectly represented at the federal level via the states—their frequent rival sovereigns. I describe these asymmetries as democratic mismatches because we ideally want the laws that exert the most local or direct control over our lives to be the ones that we have the most power to shape through our democratic structures. The promise that citizens can so structure

18. *See infra* Part I.C.

19. *See infra* Part I.D.2.

20. *See infra* Part I.D.1.

21. *See infra* Part I.D.1.

22. *See infra* Part I.D.1.

their lives represents one of the great strengths of federalism and local governance. By contrast, because federal law controls much of the local services and policies for tribal citizens, it is concerning that the structures for federal representation fail to represent tribal voices strongly or directly. It is even more concerning that our federal democratic structures rely on the States to advocate for tribal concerns.

This is not to say that tribes have not been successful at advancing their agendas in Congress. Recent successes in tribal lobbying have created the sense that Congress has become a more effective site for Native advocacy—compared, at least, to the Supreme Court. However, a review of relevant research suggests these successes are not the result of tribes wielding *electoral* political power—that is, being an important voting block wielding democratic power within representative government—but because they have invested tremendous time and energy in *lobbying*. This Article suggests that tribal governments have had to build up this lobbying infrastructure because of the importance of federal law over their destinies and because they were not powerful enough without it. In other words, this lobbying success is an innovation that occurred as a hydraulic reaction to the denial of real electoral political power in the form of direct representation. Tribes shouldn't need to lobby to the degree that they do—but they've had to learn how.

The Article concludes, in Part III, with a discussion of remedies—the new imaginative possibilities if we recognize and reject assimilative colonialism and its legacy in our current system. The current system has many well-documented places where it has fallen short in allowing tribal citizens to participate equally and effectively in American democracy.[23] But this is a harm not only to the individual rights of tribal citizens, but also to their collective rights and to the rights and statuses of their sovereigns: tribal governments. The status quo structure of the United States does not explicitly deny individual Indians the right to vote—it denies them a governmental structure that reflects their right to self-determination. Recognition of this harm cannot lead us to a remedy from within our framework of individual rights.[24] This is a

23. *See, e.g.*, *Developments in the Law—Indian Law*, 129 HARV. L. REV. 1652, 1735-41 (2016) (discussing numerous instances of Native American electorate vote denial and dilution); Jeanette Wolfley, *You Gotta Fight for the Right to Vote: Enfranchising Native American Voters*, 18 U. PA. J. CONST. L. 265, 270 (2015) ("Indian and Alaska Native voters have been underrepresented, and still today, basic voter access issues pose serious obstacles in Indian country."); Milan Kumar, Note, *American Indians and the Right to Vote: Why the Courts Are Not Enough*, 61 B.C. L. REV. 1111, 1132-40 (2020) (describing how voter identification laws, ballot collection restrictions, mail-in ballots, voter dilution, lack of translation, and intimidation all suppress the Native vote).

24. Moreover, it is clear—even within the democratic story of our country—that discrimination against the political power of minority-majority governments can exist alongside a prohibition on racial discrimination in civil and political rights. Nebraska, Oklahoma, New Mexico, and Arizona were all admitted to the union on the condition

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harm that cannot be disaggregated into many individual rights violations. Remedying this failing cannot happen without a willingness to reinterrogate the structure and to do what we have never done before: offer tribal governments political power *on their own terms*. This, I argue, must be a collaborative process with tribal nations.

Successfully seating the Cherokee delegate in Congress could be a first step, but it should also open the door to a more robust conversation about democratic reform. We should seriously consider structural reform to our democratic institutions that would better suit tribal governments and their interests. I propose a series of possibilities to help the reader think through the kind of options that ought to be on the table if we approach tribes for these conversations. One is, of course, tribes becoming states. But not every tribe may want to become a state. Setting aside the political difficulties and questions about scale, the institution of statehood itself might not work for tribal governments because it comes with a package of limitations that tribes may still find assimilative. We may need to think about voting representation outside of the institution of statehood.

Looking to other representative systems from around the globe that give their indigenous populations unique rights to representation can give us ideas. Particularly interesting is how New Zealand's Māori citizens can opt-in to separate representation. Rather than paternalistically proposing a way to include tribes in our democracy, we ought to bring tribes to the table to determine what kind of a voice they would like to have and under what conditions or circumstances.

Our republic has a history of white supremacy. This Article demonstrates that our present-day government and constitutional structure have been shaped by that history and are part of that legacy. The absence of tribal representation in our democratic structure undermines America's commitment to representative democracy. This Article seeks to shatter our sense of the inevitability of our current structure of democratic representation and to undermine the idea that our current democratic-republican arrangement is race-neutral.

America can admit that it has wronged its Indigenous peoples. But we tend to focus almost exclusively on the taking of Native land or violence against Native peoples. This focus leaves Native peoples forever in the past and perpetuates their invisibility throughout the rest of American history. But it also obscures the reality that not just Native people, but Native *governments*

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that they not engage in such discrimination. Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 129-31 (2004) (collecting and summarizing the various conditions imposed on the states for admission into the union in a table).

have been denied equal status, rights, power, and respect by the United States since the beginning. In that way, this selective admission about America's harm to Native people is a story that we tell to obfuscate the contemporary problems of Native peoples—including the one discussed by this Article.[25] This must come to an end.

The truth is that Native people and—more importantly for the purposes of this Article—the governments they chose to create did not disappear after their lands were taken and populations decimated. They survived these initial atrocities. Yet the United States has continually dismissed the legitimacy of these governments' sovereign authority, diminished their ability to self-govern, and denied them any real political power—as their eventual dissolution has been either assumed or sought after. But tribes defied all those expectations and survived. It is time we reformed our democracy to reflect their resilience and continued existence.

I. Assimilative Colonialism and Tribal Political Power

This Part introduces assimilative colonialism and examines the role it has played in attempts by Native people to gain more political power and the relationship Native people have with American politics. What this Article dubs "assimilative colonialism" included the practice of offering American political power—whether citizenship, the right to vote, or the possibility of statehood—only on terms of racial, cultural, or political erasure. Assimilation functioned as a powerful part of the political project of conquest. Assimilative colonialism not only had a hand in shaping our existing democratic structures but has also had a lasting impact on Native relationships with political power. By offering American political power only and always at the cost of Indian cultural or political identity, assimilative colonialism perverted the entire concept of political power for Native people in the United States by giving them good reason to view American political power not as empowering but as dangerous. This makes the skepticism that many tribal citizens and tribal nations have of American political power or participation in American politics eminently understandable—a rational fear that American political power would be dangerous to their survival and self-determination as Native peoples.

25. In her seminal work *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, Kimberlé Crenshaw wrote similarly about how the idea that the law is race-neutral obscures the many ways that race is still shaping law and American society and how recognizing the mythologies currently supporting the status quo is an important step toward dismantling it. Kimberlé Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1378-85 (1988).

Moreover, because becoming more "civilized" was the gateway to political power for Native peoples, white majorities were empowered to exclude Indian tribes and Native peoples from political power on explicitly racial and cultural terms. Assimilative colonialism allowed for racial gatekeeping over political institutions and rights. This shaped which governments became states, who had the right to control those state elections, and tribes' exclusion from representative democratic structures. In key episodes where Native people fought for more political power or it was contemplated for them, assimilative colonialism's predominance ensured that the most powerful unit of subnational government, the states, remained white-controlled and that indigenous governments were considered unworthy of wielding power in the United States until they assimilated or White citizens became the majority.

A. Manufacturing Assimilative Colonialism

The United States has ensured that tribes or tribal citizens would not become politically threatening within the United States by doing something profoundly coercive: It manufactured an incompatibility between tribes or tribal identity and American political power. This Subpart explores how these ideas were manufactured as part of the colonial processes to serve distinct political ends. Assimilation is often seen as a predominately *cultural* project based on views of white superiority, but this Subpart also illustrates that it always had *political* ends as well. Assimilation was aimed not just at tribal citizens but also at tribal governments. Assimilative colonialism's political project included manufacturing two myths: first, that Indianness and American political power were incompatible, and second, that tribes themselves were anti-democratic.

While tribes were separate foreign nations at the beginning of the United States, the continued insistence that Indians were conquered yet foreign or that Indianness was un-American served distinct political purposes within American colonialism. They both furthered the American colonial project of exerting coercive power over Indian tribes and tribal citizens, and found their way into numerous American treaties, laws, and policies throughout the nineteenth and twentieth centuries. The United States did not present American participation in American political structures as something available to Indians. Instead, it presented American political loyalty and rights as incompatible with Indians, unless they were to give up their Indianness in all of its forms and assimilate into white society.

Richard Henry Pratt—a captain, future brigadier general, and architect of Indian boarding schools—described these assimilationist schools as not only attempts to destroy tribal cultures but as acts of *political* violence. Pratt made the slogan "Kill the Indian in him, and save the man" a famous shorthand for the assimilationist policies of the boarding schools of this era, but it just as

aptly describes the legal prerequisite for Indian citizenship during this time.[26] "Indians" could not be American citizens until they had destroyed what made them Indians in the first place. In the same speech in which Pratt made his famous "Kill the Indian in him, and save the man" remark, he also described the purpose of the era's assimilationist policies and practices as instruments of American political power designed to erode tribal political identities:

> Transfer the savage-born infant to the surroundings of civilization, and he will grow to possess a civilized language and habit. . . . [Even older children] lose the already acquired qualities belonging to the side of their birth, and gradually take on those of the side to which they have been transferred. . . .
>
> The [Indian boarding] school at Carlisle is an attempt on the part of the government to do this. Carlisle has always planted treason to the tribe and loyalty to the nation at large. . . . Carlisle fills young Indians with the spirit of loyalty to the stars and stripes . . . .[27]

The United States gave Native people good reason to view the American political participation or loyalty as something that would be destructive to their Indianness. It was ingrained into the philosophy of one of the most destructive federal policies that Native people ever experienced.

American citizenship is another prime example of how assimilative colonialism manifested in American law. The United States engaged in a particularly nefarious manipulation of the purpose and nature of political rights surrounding the franchise of citizenship. The early incompatibility of Native peoples and American citizenship is quite logical. Native people were citizens of entirely separate nations from the United States, and so requiring loyalty to the United States and their tribal nations would split allegiances across two different nations who were often at odds with one another.[28] But even after tribes were absorbed into the United States—with or without their consent—the United States somewhat paradoxically continually laid claim to Native peoples, their land, and their tribal governments, all while maintaining that their loyalties to those tribal governments were at odds with loyalty to the United States.[29]

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26. R.H. Pratt, *The Advantages of Mingling Indians with Whites, in* PROCEEDINGS OF THE NATIONAL CONFERENCE OF CHARITIES AND CORRECTION AT THE NINETEENTH ANNUAL SESSION HELD IN DENVER, COL. 45, 46 (Isabel C. Barrows ed., 1892).

27. *Id.* at 56-57.

28. Alexandra Witkin, *To Silence a Drum: The Imposition of United States Citizenship on Native Peoples*, 21 HIST. REFLECTIONS 353, 363 (1995) (citing FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 153 (1942)); *see also* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831) ("The counsel have shown conclusively that they are not a state of the union, and have insisted that individually they are aliens, not owing allegiance to the United States.").

29. It is noteworthy that the assimilationist era of which General Pratt was a part occurred fifty years after the Supreme Court held that tribes were not foreign but "domestic dependent nations." *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

After initially excluding Native peoples from American citizenship, the United States turned the franchise into leverage for its expanding colonial project or into unwanted "liberation" from tribal ways of life.[30] These citizenship policies were some of the most coercive colonial practices used by the United States in the history of its relationship with Native peoples.[31] It set up a dichotomy whereby realizing American citizenship—and exercising political power within the United States—came at the cost of tribal identities and the erosion of tribal sovereignty or lands. This process is described in *Elk v. Wilkins*,[32] the Supreme Court case that held Native people did not gain birthright citizenship under the Fourteenth Amendment:

> [In Minnesota, Indians must] make proof, to the satisfaction of the court, that they were sufficiently intelligent and prudent to control their affairs and interests, that they had adopted the habits of civilized life, and had for at least five years before been able to support themselves and their families; and thereupon they should be declared by the court to be citizens of the United States . . . .[33]

In holding that John Elk was not a citizen, the Court did not dispute anything about this process of assimilation as a prerequisite for citizenship. Instead, the Court affirmed that logic, writing: "The fact that he has abandoned his nomadic life or tribal relations, and adopted the habits and manners of civilized people, may be a good reason why he should be made a citizen of the United States, but does not of itself make him one."[34] The problem with Elk's claim for citizenship was that he could not unilaterally say that he had cast off his Native ways and then claim American citizenship: The United States had to also participate in and sanction his assimilation.[35]

The treaties at issue in *Elk* were not an anomaly. Through numerous treaties, laws, and policies, American citizenship—something that ought to be—an avenue for exercising and amassing political power within the United States, became something dangerous.[36] Many treaties contained provisions

30. Frederick E. Hoxie, *What Was Taney Thinking? American Indian Citizenship in the Era of* Dred Scott, 82 CHI.-KENT L. REV. 329, 333-34 (2007) (discussing early versions of this rhetoric that permeated Thomas Jefferson's views on Indian policy whereby Jefferson advocated for the "civilization" for Indians as a way to "foster the evolution of Indian social life in the direction of commercial agriculture and western-style social organization"); Witkin, *supra* note 28, at 380.

31. *See* Willard Hughes Rollings, *Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West, 1830-1965*, 5 NEV. L.J. 126, 131 (2004).

32. 112 U.S. 94, 109 (1884).

33. *Id.* at 104-05.

34. *Id.* at 109.

35. "To be a citizen of the United States is a political privilege which no one, not born to, can assume without its consent in some form." *Id.*

36. *See* Bethany R. Berger, *The Anomaly of Citizenship for Indigenous Rights*, *in* HUMAN RIGHTS IN THE UNITED STATES: BEYOND EXCEPTIONALISM 217, 219-21 (Shareen Hertel &

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requiring tribal citizens to accept an allotment of land—thus relinquishing their collective land ownership claims within the tribe—before they would be given American citizenship.[37] Other treaties offered citizenship to Indians who adopted "civilized" customs or otherwise gave up their Indian ways of life.[38] The price of American citizenship was that tribal citizens give up their lives as Native peoples and citizens of their tribal nations and "live like white people"[39] or even "become white."[40]

As a result, many Native peoples became highly suspect of American citizenship and even resisted it.[41] Despite receiving citizenship from Congress in 1843, the Stockbridge Indians "refused to accept its validity and persuaded Congress to revoke the legislation and enter into a treaty restoring their status as a tribe."[42] The Wyandotte signed a treaty in 1855 wherein they accepted United States citizenship and dissolved the tribe but "found its impact so damaging" they successfully petitioned Congress for a new treaty in which they "began anew a tribal existence."[43] And a band of Kickapoo Indians refused

Kathryn Libal eds., 2011) (describing how offers of citizenship to Native peoples from the United States often also meant the dissolution of tribal governments and an end to tribal relations); Hoxie, *supra* note 30, at 339-40 ("During the 1820s, as the debate over removal spread across Georgia, Alabama, and Mississippi, local politicians turned repeatedly to state citizenship as a tool for forcing removal.").

37. The following treaties mandated the acceptance of an allotment before the award of citizenship: Treaty, Kickapoo Tribe-U.S., art. III, June 28, 1862, 13 Stat. 623 [hereinafter Treaty with Kickapoo Tribe]; Treaty, Delaware Tribe-U.S., arts. III, IX, July 4, 1866, 14 Stat. 793 [hereinafter Treaty with Delaware Tribe]; Treaty, Seneca Nation et al.-U.S., art. XIII, Feb. 23, 1867, 15 Stat. 513; Treaty, Pottawatomie Tribe-U.S., art. VI, Feb. 27, 1867, 15 Stat. 531 [hereinafter Treaty with Pottawatomie Tribe]; Treaty, Sioux Tribes-U.S., art. VI, Apr. 29, 1868, 15 Stat. 635; Treaty, Choctaw Nation-U.S., art. XIV, Sept. 27, 1830, 7 Stat. 333.

38. *See, e.g.*, Treaty with Delaware Tribe, *supra* note 37, art. IX; Treaty with Kickapoo Tribe, *supra* note 37, art. III; Treaty with Pottawatomie Tribe, *supra* note 37, art. III.

39. Rollings, *supra* note 31, at 131.

40. DAVID J. SILVERMAN, RED BRETHREN: THE BROTHERTOWN AND STOCKBRIDGE INDIANS AND THE PROBLEM OF RACE IN EARLY AMERICA 4 (2010) ("[There was a] paradoxical nature of the Brothertowns' quest to survive as Indian people even as they adopted United States citizenship, which many Americans, including Indians, referred to as 'becoming white.'").

41. *See, e.g.*, Rollings, *supra* note 31, at 129.

42. Berger, *supra* note 36, at 220 (citing Treaty, Stockbridge Tribe-U.S., Nov. 24, 1848, 9 Stat. 955).

43. *Id.* (quoting Treaty, Seneca Nation et al.-U.S., pmbl., art. XIII, Feb. 23, 1867, 15 Stat. 513).

to accept American citizenship until 1985 after being presented with a treaty that initially required that they accept the habits of civilization.[44]

The Pueblo Indians went through a similar struggle over the question of American citizenship in 1849. Shortly after the United States assumed control over New Mexico, James S. Calhoun was appointed by President Taylor as Indian agent of Santa Fe in April 1839.[45] A Mexican statute had made the Pueblos citizens of Mexico, and, by the terms of the Treaty of Guadalupe Hidalgo of 1848, Pueblo people were thereby entitled to American citizenship.[46] However, whether the Pueblos wanted American citizenship was another matter entirely. The Pueblos wanted protection from raids but to otherwise live as separate self-governing communities.[47] They were deeply wary that further ties to the United States—including citizenship and voting in federal elections—would come with further federal or state encroachments on their lives, laws, and self-governance.[48] The Pueblos complained "daily" and "beg[ged] for relief" from the current and past levels of encroachment by outside governments on their lands and lives.[49]

Calhoun proposed that, instead of full citizenship, the Pueblos accept a "ward" status under the Nonintercourse Act of 1834 which protected Indian lands from sale without congressional approval.[50] The "ward" status prevented the Pueblos from having to accept the full obligations of United States citizenship and being subject to the same laws as the non-Indians currently living in the territory.[51] For Calhoun, part of this ward status meant that the Pueblo Indians would forgo voting in municipal, state, and federal elections.[52] In a letter to the tribal citizens of Taos Pueblo, Calhoun implored them not to "take your chance to become citizens" because they would "be governed, not by your own laws, but by such as the Americans and Mexicans here may make for

44. *Id.* (citing *Around the Nation; 143 Renegade Kickapoos Accept U.S. Citizenship*, N.Y. TIMES (Nov. 22, 1985), https://perma.cc/9ALB-7DXU).

45. MAURICE CRANDALL, THESE PEOPLE HAVE ALWAYS BEEN A REPUBLIC: INDIGENOUS ELECTORATES IN THE U.S.-MEXICO BORDERLANDS, 1598-1912, at 180-82 (2019).

46. *Id.* at 182, 184.

47. *Id.* at 183-89.

48. *Id.* at 187-88.

49. *Id.* at 186 (quoting Letter from J.S. Calhoun to Orlando Brown (Nov. 16, 1849), *in* THE OFFICIAL CORRESPONDENCE OF JAMES S. CALHOUN WHILE AGENT AT SANTE FÉ AND SUPERINTENDENT OF INDIAN AFFAIRS IN NEW MEXICO 78, 79 (Anne Heloise Abel ed., 1915)).

50. An Act to Regulate Trade and Intercourse with the Indian Tribes, and to Preserve Peace on the Frontiers, ch. 161, 4 Stat. 729 (1834) (repealed 1953); CRANDALL, *supra* note 45, at 185-86.

51. *Id.* at 185-87.

52. *Id.* at 185-86.

you."[53] Ultimately, sixteen of the twenty-two pueblos chose to opt out of full political citizenship and instead asked for Calhoun's wardship system, reiterating that their "separate . . . political existence" was of the utmost importance to them alongside their lands.[54] This ultimately led to the successful extension of the Nonintercourse Act over their lands in 1851.[55] That extension persisted until 1876, when the Supreme Court held that the Nonintercourse Act could not apply to the Pueblos because they were "Indians only in feature, complexion, and a few of their habits; in all other respects superior to all but a few of the civilized Indian tribes of the country, and the equal of the most civilized thereof."[56] They therefore were not an "Indian tribe" as contemplated in the Nonintercourse Act.[57]

In 1887, Congress passed the Dawes Act, or General Allotment Act, which made breaking up Indian lands and encouraging individual land ownership in exchange for citizenship a national policy.[58] The Act provided that after accepting an allotment of land, anyone who "has voluntarily taken up . . . his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States."[59]

The imposition of United States citizenship during this period is characterized by many scholars as a colonial imposition if not outright political repression.[60] There are also many accounts of citizenship ceremonies or rituals conducted by United States government officials wherein Indians would ceremonially shoot their "last arrow" and then be told by a United States government agent that they would no longer live as Indians; rather, they

53. *Id.* at 187 (quoting Letter from James S. Calhoun to the Indians of the Pueblo of Taos (Feb. 2, 1850), *in* THE OFFICIAL CORRESPONDENCE OF JAMES S. CALHOUN WHILE AGENT AT SANTE FÉ AND SUPERINTENDENT OF INDIAN AFFAIRS IN NEW MEXICO, *supra* note 49, at 136, 137).

54. *Id.* at 188 (quoting Letter from J.S. Calhoun to Orlando Brown (Nov. 15, 1849), *in* THE OFFICIAL CORRESPONDENCE OF JAMES S. CALHOUN WHILE AGENT AT SANTE FÉ AND SUPERINTENDENT OF INDIAN AFFAIRS IN NEW MEXICO, *supra* note 49, at 76, 78).

55. *Id.* at 192.

56. United States v. Joseph, 94 U.S. 614, 616-17 (1876).

57. *Id.* at 617.

58. Dawes Act, ch. 119, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C.).

59. *Id.* § 6.

60. *See, e.g.*, Witkin, *supra* note 28, at 355 ("Efforts to extend citizenship to Native Americans can be characterized as 'repressive emancipation.' The term describes the attempt to liberate a people from conditions they themselves do not consider oppressive.").

would live as white people.[61] By one estimate, one half of all Native people became American citizens through the process created in the Dawes Act.[62]

Moving into the twentieth century, the United States also made citizenship available to the large number of Indians who had served in World War I.[63] When the Indian Citizenship Act[64] came about shortly thereafter in 1924, many tribes opposed it. They viewed citizenship as another attempt to force assimilation onto their members or as a legitimate threat to—if not outright conflict with—their sovereignty.[65]

American citizenship thus emerged as a franchise intertwined with "civilization" and the prospect of "civilizing" Native peoples by assimilating them into the rest of American society.[66] This created among many Native peoples a

61. Bethany R. Berger, *Birthright Citizenship on Trial:* Elk v. Wilkins *and* United States v. Wong Kim Ark, 37 CARDOZO L. REV. 1185, 1239 (2016); OF UTMOST GOOD FAITH: THE CASE OF THE AMERICAN INDIAN AGAINST THE FEDERAL GOVERNMENT OF THE UNITED STATES—AS DOCUMENTED IN TREATIES, SPEECHES, JUDICIAL RULINGS, CONGRESSIONAL BILLS AND HEARINGS FROM 1830 TO THE PRESENT 92-94 (Vine Deloria, Jr. ed., 1971) (including a full transcription of one of these ceremonies); FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880-1920, at 180 (1984); Fatma E. Marouf, *Regrouping America: Immigration Policies and the Reduction of Prejudice*, 15 HARV. LATINO L. REV. 129, 156 & n.178 (2012); Gloria Valencia-Weber, *Racial Equality: Old and New Strains and American Indians*, 80 NOTRE DAME L. REV. 333, 334 (2004).

62. Rollings, *supra* note 31, at 134.

63. *Id.* Some Indians still protested being subject to the draft. *See, e.g.*, *Ex parte* Green, 123 F.2d 862, 863 (2d Cir. 1941) (denying habeas relief after an Onondaga man protested being subject to the draft and argued that the Six Nations remained "an independent nation by virtue of the treaties").

64. An Act to Authorize the Secretary of the Interior to Issue Certificates of Citizenship to Indians, ch. 233, 43 Stat. 253 (1924) (repealed 1952).

65. *See* Michael D. Oeser, *Tribal Citizen Participation in State and National Politics: Welcome Wagon or Trojan Horse?*, 36 WM. MITCHELL L. REV. 793, 806 (2010); S. MISC. DOC. NO. 45-8, at 2 (1877) ("The undersigned [delegates and agents of the Choctaw and Chickasaw Nations] respectfully submit . . . their apprehension that the enactment of the provisions . . . will result in violations of the foregoing treaty provisions . . . ."); S. MISC. DOC. NO. 45-18, at 1 (1878) ("The undersigned delegates, representing the Seminole and the Creek nations of Indians, respectfully present their remonstrance against the enactment of any law interfering with the internal affairs of Indian tribes by making any members of a tribe who are within its jurisdiction citizens of the United States without the full and free consent of such tribe, expressed by and through its proper legislative authority."); Brian Doyle, Note, *Let Them Play: Reestablishing Iroquois Tribal Passports*, 35 SUFFOLK TRANSNAT'L L. REV. 421, 426 (2012) (describing the Iroquois Confederacy's "outspoken . . . opposition to the Citizenship Act" and collecting sources).

66. *See* Witkin, *supra* note 28, at 360-61.

skepticism, if not downright distrust, of American citizenship as anything other than a force for destroying their identities, communities, and nations.

A similar dynamic played out with state citizenship. After the Indian Citizenship Act, many tribal citizens were still denied state citizenship or the right to vote in state elections.[67] In New Mexico, following World War II, Native leaders acknowledged the lack of representation was a serious problem for their communities but held onto fears that states would use the Indian vote as an excuse to tax them or increase state political control on their lands.[68] These intense fears of state voting, particularly among some of the Pueblo Indians, complicated the litigation efforts to achieve state citizenship as well as Native peoples' integration into New Mexico state politics generally.[69]

This dynamic came into play as well in the possibility of Indian statehood, which was, as I will discuss later, rarely contemplated, or else conditioned on assimilation. Statehood presented "a Faustian bargain" in that "it promised to place Native sovereignty and self-government on a clearer constitutional footing, but at the cost of those aspects of Native governance that make Native nations indigenous."[70]

Many contemporary Native leaders and scholars struggle with the tension created by the manufactured incompatibility between indigeneity and citizenship.[71] Some, such as Robert Porter, suggest that in light of this history of forced assimilation, American citizenship remains a threat and ought to be regarded as genocide.[72] Others, such as Michael D. Oeser, focus on the continued incompatibility of real dual sovereignty as it has developed in the context of tribal nations that still seek to exist with a level of independence

67. *See infra* Part I.B.1.

68. Mathew G. McCoy, *Hidden Citizens: The Courts and Native American Voting Rights in the Southwest*, 58 J. SW. 293, 301 (2016).

69. *See id.* at 301-02.

70. *See* Gregory Ablavsky, *Sovereign Metaphors in Indian Law*, 80 MONT. L. REV. 11, 27 (2019); *see also* Stacy L. Leeds, *Defeat or Mixed Blessing? Tribal Sovereignty and the State of Sequoyah*, 43 TULSA L. REV. 5, 9-10 (2007) ("The loss of the Sequoyah statehood movement . . . actually preserved the political existence and sovereignty of tribal nations within Oklahoma.").

71. Nick Martin, *The Elusive Dream of a Functioning Native Caucus*, NEW REPUBLIC (Nov. 2, 2020), https://perma.cc/EA8E-TJWG (describing the sentiment that even while discussing the possibilities of Native representatives in Congress, "a cynical internal voice does still whisper that our continued participation in the American political scene . . . is only a further part of the long game of assimilation—that by having us compete in the institutions produced by and used to uphold colonization, we can slowly lose sight of how ghastly the American machine has been and continues to be toward Indigenous people").

72. Robert B. Porter, *The Demise of the* Ongwehoweh *and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107, 167-72 (1999).

and freedom from federal control.[73] Oeser describes how any form of political participation in the United States government is—no matter how necessary given the contemporary political realities—on a theoretical level incompatible with independent tribal sovereignty since "by participating in non-tribal political processes, tribes and tribal citizens consent to state and federal jurisdiction over reservation land and residents."[74] This view remains strong within certain tribes to this day. Most famously, members of the Haudenosaunee or Iroquois Confederacy are well known for their rejection of American and Canadian government rule and their refusal to vote or carry passports as an act of defiance.[75]

The United States not only made American political power seem incompatible with Indian identity; it made the existing Indian exercises of political power—tribal governments—seem "un-American." There is a cruel irony as well as an inconsistency to the way that American Indian governments and their laws have been described as "alien," "different," and generally "othered" by American legal actors and institutions.[76] American Indian tribal governments have a recognized legal status as governments within the United States, and with that status comes a particular role in the American government's ecosystem. Though American Indian tribal governments have been "domestic dependent nations" within the United States since 1831, when Chief Justice John Marshall described them as such,[77] cultural and racial biases paired with the political incentives of the American colonial project have obscured the truth of tribal status in general American legal discourse and succeeded in sowing perpetual skepticism of tribal institutions.[78]

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73. *See generally* Oeser, *supra* note 65.

74. *Id.* at 799-800 ("[R]eservation citizens are embracing the demise of tribal governments if they continue to participate in federal and state elections without taking steps to avoid the sovereign conflict that results.").

75. *See, e.g.*, AUDRA SIMPSON, MOHAWK INTERRUPTUS: POLITICAL LIFE ACROSS THE BORDERS OF SETTLER STATES 1, 7 (2014); DAVID E. WILKINS, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM 187 (3d ed. 2010); Brian Kolva, Note, *Lacrosse Players, Not Terrorists: The Effects of the Western Hemisphere Travel Initiative on Native American International Travel and Sovereignty*, 40 WASH. UNIV. J.L. & POL'Y 307, 309-10 (2012); Doyle, *supra* note 65, at 430-31.

76. Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 576-77 (2021) (first quoting Elk v. Wilkins, 112 U.S. 94, 102 (1884); and then quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210-11 (1978)).

77. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

78. *See, e.g.*, S. REP. NO. 112-153, at 48-49 (2013) (describing tribal governments as an "unsuitable vehicle for ensuring the protection of civil rights" in the context of reauthorizing the Violence Against Women Act because they are "racially-exclusive" institutions that lack an "independent judiciary"); Nevada v. Hicks, 533 U.S. 353, 384-85 (2001) (Souter, J., concurring) ("Tribal courts also differ from other American courts

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Just as the United States viewed Indian people as incompatible with Americanness, it similarly othered Native government institutions. As Seth Davis lays out in *Tribalism and Democracy*, in the United States, there is a predominant view woven throughout the history of federal policy and law toward the Indians that tribal governance is somehow inherently undemocratic.[79] Davis argues that the reality of tribal government practice reveals that quite the opposite is true.[80] Tribal governance is compatible with democracy not only because of the democratic substance of many tribal institutions but also because the space tribes currently occupy in the United States requires the kind of constant collaboration with other sovereigns that often protects liberty and democratic values just as federalism does.[81]

The prevalence of these assimilative colonial myths has made arguments that would embrace the role of tribal sovereigns within a constitutional framework not only unpopular but "counterintuitive."[82] So deep-seated is this belief in the incompatibility of not just Indian people but Indian institutions with the United States that it seems controversial, radical, or somehow illogical to raise the idea that the United States—a government premised on being composed of other governments—could better include and embrace the tribal governments it lays claim to.

B. Fears and Denials of Collective Native Political Power Within States

The remainder of this Part embarks on a history of Native attempts at obtaining political power—whether through representation, statehood, or citizenship—and the role that assimilative colonialism played. These attempts and the reactions to them shaped our democratic institutions and the relationship between tribal citizens and American political power. This

(and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges.").

79. Seth Davis, *Tribalism and Democracy*, 62 WM. & MARY L. REV. 431, 434-35 (2020).

80. *Id.* at 436; *see also* Wenona T. Singel, *The First Federalists*, 62 DRAKE L. REV. 775, 781-82 (2014) (arguing that tribal governments' "diversity, pluralism, innovation, and experimentation" are consistent with and promote federalist principles).

81. Davis, *supra* note 79, at 464, 479.

82. *See, e.g.*, Carol Tebben, *An American Trifederalism Based upon the Constitutional Status of Tribal Nations*, 5 U. PA. J. CONST. L. 318, 321 (2003) ("The most effective protection of tribal separateness and empowerment may be found in the acknowledgment, particularly the unclouded judicial acknowledgment, of tribal nations as constitutionally recognized sovereigns. A core underlying assumption of the three-sovereign framework is that constitutional inclusion, and a renewed judicial recognition of the constitutional status of tribal governments, have the potential to give greater protection to unique tribal cultures from continued dominance and interference. This discussion offers the counterintuitive proposition that constitutional inclusion may promote a more meaningful separateness.").

Subpart documents how many of the different forms of political power Native people fought for or that were contemplated for them throughout American history were only available to Native people at an assimilative colonial cost.

This Subpart also discusses how assimilative colonialism shaped the tools available to opponents of Native political power. The collective power of tribal citizens was seen as a political threat to white control. The denial of Native birthright citizenship was politically advantageous to white majorities, since it made the institution of citizenship a bargaining chip for assimilation and assuaged fears of Native political power within western states. Assimilative colonialism allowed for white majorities to wield power over the configuration and admission of several states into the union as an explicitly race-conscious project. Racial gatekeeping worked to preserve white power through choices about how to draw borders, grant citizenship, and delay the admission of new states until they were white enough, particularly among the western states with a large population of Native peoples.[83] In this way, whiteness itself became a prerequisite for statehood.

1. Native citizenship and structural power

Indians did not gain American citizenship through the Reconstruction Amendments.[84] Though it is somewhat unclear in the Fourteenth Amendment's text whether the Amendment's birthright citizenship provision is intended to apply to Indians, the ratification debates over this question makes clear the persistence of the ongoing racist deployment of citizenship. The initial draft of Section 1 of the Fourteenth Amendment proposed by Congress did not include any language about Indians, unlike Section 2, which included the Indians Not Taxed Clause for the purpose of allocating representatives.[85] Senator Doolittle proposed adding the Indians Not Taxed language into Section 1 because he "presume[d]" that the drafters did "not intend by this amendment to include the Indians."[86] This proposition provoked debate about precisely what rights came with the grant of citizenship and fear about where the buck would stop after granting Black Americans citizenship.[87]

83. *See infra* Part I.B.2.

84. *See* Elk v. Wilkins, 112 U.S. 94, 102, 104-05, 109 (1884).

85. CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866); U.S. CONST. amend. XIV, §2.

86. *Id.* at 2890. For further discussion of the road to Indian citizenship, and the Fourteenth Amendment, see DANIEL MCCOOL, SUSAN M. OLSON & JENNIFER L. ROBINSON, NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE 1-20 (2007).

87. CONG. GLOBE, 39th Cong., 1st Sess. 2890-97 (1866).

This debate was dominated not just by racialized rhetoric on the unworthiness of various racial minorities to be American citizens, but also by the clear fear of minorities exercising enough political power to overtake white control of the states. Senator Cowan remarked,

> I have supposed, further, that it was essential to the existence of society itself, and particularly essential to the existence of a free State, that it should have the power, not only of declaring who should exercise political power within its boundaries, but that if it were overrun by another and a different race, it would have the right to absolutely expel them. I do not know that there is any danger to many of the States in this Union; but is it proposed that the people of California are to remain quiescent while they are overrun by a flood of immigration of the Mongol race? Are they to be immigrated out of house and home by Chinese? I should think not. . . .
>
> . . . .
>
> Sir, I trust I am as liberal as anybody toward the rights of all people, but I am unwilling, on the part of my State, to give up the right that she claims, and that she may exercise, and exercise before very long, of expelling a certain number of people who invade her borders. . . .
>
> I think the honorable Senator from Michigan would not admit the right that the Indians of his neighborhood would have to come in upon Michigan and settle in the midst of that society and obtain the political power of the State, and wield it, perhaps, to his exclusion.[88]

Senator Conness responded to Senator Cowan's long discussion of the threat that various minority groups could pose to white political control by stating that fears of "Mongolians" seemed overblown considering present numbers.[89] Senator Doolittle then brought the purpose of his amendment concerning Indian citizenship back to the fore by running through a list of the various tribes of Indians now living in the states and territories, concluding with the warning that—should the amendment apply to Indians—"there are more Indian citizens of Colorado than there are white citizens this moment if you admit it as a State."[90] It was clear that not just minority rights, but the threat their exercise of political power posed to white control was on Congress's mind.

Doolittle's amendment to Section 1 ultimately failed,[91] not because Congress had decided to extend the right to vote to Indians but because enough senators seemed convinced that it was unnecessary.[92] The proposed language in Section 1 already included a limitation on birthright citizenship, restricting it to

88. *Id.* at 2890-91.

89. *Id.* at 2891-92.

90. *Id.* at 2892.

91. *Id.* at 2897.

92. *See id.* at 2896-97.

only those "subject to the jurisdiction" of the United States.[93] At the time, there was significant debate as to whether Indians were considered "subject to the jurisdiction" of the United States as the Amendment specified, with senators advocating that Indians were already excluded from birthright citizenship by this language.[94] The Supreme Court would later affirm the interpretation that Indians were not "subject to the jurisdiction" of the United States within the birthright citizenship clause just a few decades later in *Elk v. Wilkins*.[95]

The Indians Not Taxed Clause remained, however, in Section 2 of the Fourteenth Amendment, which specified that the calculation of representatives should exclude "Indians not taxed."[96] Immediately after the debate provoked by Senator Doolittle's failed amendment to alter Section 1, an amendment to Section 2 passed without objection or discussion, leaving in place the Indians Not Taxed Clause in Section 2.[97]

Explicit constitutional restrictions on voting and citizenship are traditionally viewed as denials of individual rights, but they are also intentional limitations on the political power that the excluded groups could collectively exercise within the United States. Because the Constitution's institutional arrangements gave so much power to the states, controlling state legislatures and seats in Congress was—and is—of the utmost importance to groups.[98] That is why the discussion about minority votes being a threat to white control is focused—including during the ratification debates excerpted above—not on their threat at a county level, or national level, but state-by-state.[99]

The United States similarly limited naturalization of new citizens to "white person[s]" in 1790.[100] Notwithstanding that Black Americans could be naturalized after Reconstruction, racial restrictions remained in force until 1952.[101] Without the ability to vote directly for their state representatives,

93. *Id.* at 2807; *see also* U.S. CONST. amend. XIV, § 1 (retaining "subject to the jurisdiction" in the Amendment's final form).

94. CONG. GLOBE, 39th Cong., 1st Sess. 2893-95 (1866).

95. 112 U.S. 94, 102 (1884).

96. U.S. CONST. amend. XIV, § 2.

97. CONG. GLOBE, 39th Cong., 1st Sess. 2897 (1866).

98. *See generally* Jamal Greene, Note, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 YALE L.J. 1021 (2005).

99. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2890-97 (1866).

100. Naturalization Act of 1790, ch. 3, 1 Stat. 103 (repealed 1795).

101. IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 35 (10th anniversary ed. 2006) (noting that racial restrictions on naturalization persisted until 1952); Immigration and Nationality Act of 1952, ch. 2, § 311, 66 Stat. 239 (codified as amended at 8 U.S.C. § 1422). For a discussion of "racial prerequisite" cases where courts were called upon to determine whether or not litigants were "white" or not for the purposes of naturalization, see LOPEZ above, at 35-55.

non-white noncitizens were often forced to resort to other, less effective means of persuading Congress to make laws on their behalf, such as petitioning and political protest.[102] White politicians not only used the federal government as a tool to limit the political power of racial minorities in the states, but they also used state laws and the separate power of state governments themselves to further prevent minority populations from accessing the ballot.

The use of state law to exclude Black Americans from political participation in the Jim Crow Era is well known,[103] but state law was similarly used as a tool to limit Native voting even after Congress passed the Indian Citizenship Act on June 2, 1924.[104] States with large Native reservations and populations—specifically New Mexico, Arizona, California, North Dakota, South Dakota, Minnesota, Utah, Idaho, Maine, and Washington—all fought against extending state citizenship or granting voting rights to Native people.[105] The original 1858 text of the Minnesota Constitution limited the right to vote to white citizens, immigrants with an intent to nationalize, "[p]ersons of mixed white and Indian blood, who have adopted the customs and habits of civilization[,]" and "[p]ersons of Indian blood . . . who have adopted the language customs and habits of civilization, after an examination before any District Court of the State, in such manner as may be provided by law, and shall have been pronounced by said court capable of enjoying the rights of

102. For some history of petitioning, including tribal citizens making use of this process to make their voices heard, see Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1146 (2016) (discussing uses of petitioning before the adoption of the Constitution); and Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1559-60 (2018) (discussing uses of petitioning between the adoption of the Constitution and the end of the Civil War).

103. *See, e.g.*, *Jim Crow Laws*, HISTORY.COM, https://perma.cc/Q8GL-BSM8 (last updated Apr. 11, 2023).

104. See Rollings, *supra* note 31, at 134-38 (cataloguing state laws that denied Native people the right to vote); Rebecca Tsosie, *The Politics of Inclusion: Indigenous Peoples and U.S. Citizenship*, 63 UCLA L. REV. 1692, 1719-21 (2016) (describing how New Mexico and Arizona used laws and the courts to disenfranchise Indians).

105. MCCOOL ET AL., *supra* note 86, at 9-18 (citing Helen L. Peterson, *American Indian Political Participation*, *in* 311 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 116, 121 (Thorsten Sellin & Marvin E. Wolfgang eds., 1957); COHEN, *supra* note 28, at 157-58; N.D. CONST. art. V, § 121 (1889) (amended 1958); MINN. CONST. art. VII, § 1 (1858) (amended 1868); Montoya v. Bolack, 372 P.2d 387 (N.M. 1962); Allen v. Merrell, 305 P.2d 490, 495 (Utah 1956), *vacated*, 353 U.S. 932 (1957) (per curiam); Shirley v. Superior Ct., 513 P.2d 939, 945 (Ariz. 1973); *In re* Liquor Election in Beltrami Cnty., 163 N.W. 988, 988-89 (Minn. 1917); Swift v. Leach, 178 N.W. 437, 439, 441 (N.D. 1920); Prince v. Bd. of Ed., 543 P.2d 1176, 1178 (N.M. 1975); Porter v. Hall, 271 P. 411, 413, 416-17 (Ariz. 1928), *overruled in part by* Harrison v. Laveen, 196 P.2d 456, 463 (Ariz. 1948)).

citizenship within the State."[106] Similarly, in 1898 the North Dakota Constitution specified that electors may include "[c]ivilized persons of Indian descent who shall have severed their tribal relations two years next preceding such election."[107] States deployed a wide variety of theories, including that Indians lacked state residency, had to meet assimilation requirements, were not taxed, or were legally incompetent to cast their own votes because the United States was their "guardian."[108]

Racial rhetoric and concern about the exercise of Native power permeated state court decisions that denied Native people the right to vote or to obtain state citizenship. In 1928, the Supreme Court of Arizona determined that although Indians were residents of the state, they nevertheless could not vote because they were wards of the federal government, a status that indicated to the court that "Indians were not capable of handling their own affairs in competition with the whites."[109] Natives would not gain the right to vote in Arizona for another twenty years.[110] In *Allen v. Merrell*, the Supreme Court of Utah held that Native people lacked the right to vote, expressing concern about the ability of Native people to influence election outcomes:

> [Because] the Indian population would amount to a substantial proportion of the citizenery, or may even outnumber the other inhabitants, allowing them to vote might place substantial control of the county government and the expenditures of its funds in a group of citizens who, as a class, had an extremely limited interest in its functions and very little responsibility in providing the financial support thereof.[111]

The passage and enforcement of the Voting Rights Act eventually put an end to many states' exclusionary practices or at least gave tribes the tools to challenge them within states.[112] But preventing the citizenship or limiting the enfranchisement of minorities was not the only way that white political leaders acted to preserve states as exclusively white-controlled institutions.

106. MINN. Const. art. VII, § 1 (1858) (amended 1868).

107. N.D. Const. art. V, § 121 (1889) (amended 1958).

108. MCCOOL ET AL., *supra* note 86, at 9-20 (quoting Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831)); *see also* Pamela S. Karlan, *Lightning in the Hand: Indians and Voting Rights*, 120 YALE L.J. 1420, 1430-33 (2011) (reviewing LAUGHLIN MCDONALD, AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS (2010)).

109. *Porter*, 271 P. at 415, 417-19.

110. *Harrison*, 196 P.2d at 463.

111. Allen v. Merrell, 305 P.2d 490, 495 (Utah 1956), *vacated*, 353 U.S. 932 (1957) (per curiam). For a discussion of this case, see Karlan, note 108 above, at 1431.

112. *See generally* MCCOOL ET AL., *supra* note 86, at 45-89; MCDONALD, *supra* note 108 (providing a fantastically thorough analysis of these Voting Rights Act cases). For additional analysis of contemporary voting rights cases in Indian Country and interviews with many of the attorneys involved, see JEAN REITH SCHROEDEL, VOTING IN INDIAN COUNTRY: THE VIEW FROM THE TRENCHES 91-145 (2020).

They also worked to actively prevent majority-minority territories and other political entities from becoming states.

2. Whiteness as demographic prerequisite for admission to statehood in Native areas

As scholars like Juan Perea, Laura Gomez, Kristina Campbell, and others have documented, Congress feared the admission of non-white majority states in the predominately Native and Spanish-speaking Southwest precisely because they were non-white.[113] John Calhoun voiced this sentiment concerning the annexation of the northern Mexican territories in 1848:

> To incorporate Mexico, would be the very first instance of the kind of incorporating an Indian race; for more than half of the Mexicans are Indians, and the other is composed chiefly of mixed tribes. I protest against such a union as that! Ours, sir, is the Government of a white race. The greatest misfortunes of Spanish America are to be traced to the fatal error of placing these colored races on an equality with the white race . . . .
>
> Sir, I should consider such a thing as fatal to our institutions.[114]

As Perea highlights, resistance to the formerly Mexican lands becoming United States territories and then states was tied not only to anti-Latino or anti-Indian sentiment but also to the perception that Mexico had allowed for racial mixing, itself an affront to white purity.[115] However, the fears of Calhoun and others were eventually allayed by the initial annexation of only Mexico's northernmost territories, California and New Mexico, since the case was made that they were sparsely populated.[116]

In annexing both territories, Congress also revised the initial draft language for the Treaty of Guadalupe Hidalgo—which was based originally on the Treaty for the Cession of Louisiana—to give itself discretion over when to admit the formerly Mexican territories as states, rather than promise statehood as soon as possible.[117] With this additional level of discretion, Congress was able to wait for the Latino and Native communities to become

113. *See* Juan F. Perea, *A Brief History of Race and the U.S.-Mexican Border: Tracing the Trajectories of Conquest*, 51 UCLA L. REV. 283, 297-98 (2003); LAURA E. GOMEZ, MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE 43 (2d ed. 2018); Biber, *supra* note 24, at 162-64; ROBERT W. LARSON, NEW MEXICO'S QUEST FOR STATEHOOD 1846-1912, at 155 (1968) (describing fear of Native control as one of several obstacles to New Mexico's statehood).

114. CONG. GLOBE, 30th Cong., 1st Sess. 98 (1848).

115. *See* Perea, *supra* note 113, at 294.

116. *Id.* at 294-95.

117. *Id.* at 296.

disempowered political minorities within each of the relevant territories. Only then were the territories admitted as new states.[118]

California was admitted relatively quickly, just two years after the Treaty of Guadalupe Hidalgo.[119] However, thanks to the California gold rush, a massive influx of white immigrants had drastically changed its demographics—making white Americans the majority by California's admission in 1850.[120] New Mexico, by contrast, retained the demographic makeup it had before it joined the United States: Spanish-speaking former Mexican citizens and Native people.[121] Despite several attempts to draft a constitution and pass legislation in Congress that would help facilitate New Mexico's statehood, the racial demographics of New Mexico remained a sticking point.[122]

As Campbell has put it, "It is beyond dispute that the long delay between the end of the Mexican-American War in 1848 and statehood for New Mexico in 1912 was due to the significant concerns raised by those in Congress about the territory's large non-white population."[123] During this period, congressmen described New Mexico as in need of further assimilation.[124] Fears about racial demographics also merged with concern over a majority Spanish-speaking population. Not until its population became predominately English speaking in 1910 did New Mexico finally became a state.[125] In the legislative history leading up to the New Mexican Enabling Act, Congress continued to prioritize ending Spanish predominance.[126] New Mexico's admission was

118. *Id.* at 296-97.

119. *Id.* at 295, 298.

120. *Id.* at 298.

121. *Id.* at 297-98; GOMEZ, *supra* note 113, at 47.

122. Perea, *supra* note 113, at 299 (citing LARSON, *supra* note 113, at 117, 125).

123. Kristina M. Campbell, *Citizenship, Race, and Statehood*, 74 RUTGERS U. L. REV. 583, 606 (2022).

124. Biber, *supra* note 24, at 166 (quoting 36 CONG. REC., pt. 1, at 361 (1902) (statement of Sen. William Dillingham)). Though not directly analyzed in this Article, similar rhetoric about the natives of Puerto Rico also played a role in the development of doctrine determining the rights and status of the territories. *See, e.g.*, Campbell, *supra* note 123, at 591-92 ("The words Justice White chose to use in his concurrence describing the native peoples of the territories, such as 'savage' and 'uncivilized,' reflect the racist and discriminatory beliefs underlying his legal doctrine of how and when full constitutional protections must be extended to territorial residents." (quoting Downes v. Bidwell, 182 U.S. 244, 302, 306 (1901) (White, J., concurring)); Lisa Maria Perez, Note, *Citizenship Denied: The* Insular Cases *and the Fourteenth Amendment*, 94 VA. L. REV. 1029, 1036-41 (2008).

125. Perea, *supra* note 113, at 300.

126. COMM. ON TERRITORIES, AN ACT ENABLING THE PEOPLE OF NEW MEXICO AND ARIZONA TO FORM A CONSTITUTION AND STATE GOVERNMENT, ETC., S. REP. NO. 61-454, at 25-26 (1910); 36 Cong. Rec., pt. 1, at 188-89.

eventually made with the conditions that English become a required course in education and a qualification for state office.[127]

Arizona shares a similar history. After a brief stint as a territory within the Confederate States of America, Arizona began pushing for statehood after the end of the Civil War.[128] Intertwined with these efforts were similar concerns about the majority non-white population of the state controlling its elections.[129] In both Arizona and New Mexico, debates about statehood were intertwined with debates about racial classifications and caste systems—specifically, the treatment of previously Spanish and Mexican citizens as either "white" or "native."[130] This distinction would control their right to vote in Arizona.[131] The idea of admitting Arizona and New Mexico together as a single state was also put forth, but there was resistance within Arizona, because the English-speaking population of the state viewed themselves as more white and "American[]" than the Spanish-speaking population of New Mexico.[132] This history highlights the way in which race operated to create a de-facto whiteness or assimilation-based prerequisite to statehood itself.[133]

127. Perea, *supra* note 113, at 300; Biber, *supra* note 24, at 162-64.

128. Campbell, *supra* note 123, at 614-15.

129. *Id.* at 614-15. One almost-contemporaneous source documents Senator Bard of California as opposing statehood for Arizona because "the level of intelligence of the average population is not high enough for statehood." Waldemar Westergaard, *Senator Thomas R. Bard and The Arizona-New Mexico Statehood Controversy*, 11 ANN. PUBL'NS. HIST. SOC. S. CAL. 9, 11 (1919).

130. *See* Justine Hecht, *The Whiteness of Statehood: A Review of Arizona and New Mexico 1848-1912*, 62 J. SW. 709, 716-23 (2020) (reviewing scholarly literature on the racial dynamics in New Mexico and Arizona and their effects on both territories' efforts to gain statehood).

131. Kristina M. Campbell, *Rising Arizona: The Legacy of the Jim Crow Southwest on Immigration Law and Policy After 100 Years of Statehood*, 24 BERKELEY LA RAZA L.J. 1, 6-7 (2014) ("This led to an effort in the Arizona Territory to reclassify United States citizens of Mexican descent as American Indian rather than White, since at the time Indians were ineligible for United States citizenship, and thus unable to vote. . . . [W]hile Mexicans received American citizenship pursuant to the Treaty of Guadalupe Hidalgo, legislatures with significant Mexican-American populations began to interpret their laws in such a way that only provided 'White Mexicans' constitutional rights, thus prohibiting Mexicans of Indian and African descent (who were commonly called mestizos or mulattoes) from voting, holding public office, practicing law, testifying in court cases involving Whites, or serving on juries.").

132. Hecht, *supra* note 130, at 709-10.

133. Campbell, *supra* note 123, at 610 ("[W]hiteness was—and, I argue, still is—a de facto requirement for statehood.").

C. The Indian States that Never Were

This next Subpart discusses the role that assimilative colonialism played—both through coercive political means for Native peoples and white gatekeeping—in preventing the formation of Native states.

There have been three clear instances where tribal states were contemplated. None came to fruition. The first concerned a treaty with the Delaware tribe in 1778. The treaty signed between the United States and the Delaware shortly after the Revolutionary War contained the following provision:

> [I]t is further agreed on between the contracting parties should it for the future be found conducive for the mutual interest of both parties to invite any other tribes who have been friends to the interest of the United States, to join the present confederation, and to form a state whereof the Delaware nation shall be the head, and have a representation in Congress: Provided, nothing contained in this article to be considered as conclusive until it meets with the approbation of Congress.[134]

Though nothing ever came of this Indian statehood proposal, it was in keeping with the similar "capacious imaginings of the union of many early American leaders" who imagined an expanding United States that might eventually admit parts of Canada or the Caribbean as states.[135]

The second well-documented effort at Native statehood occurred about fifty years later. During the height of the Removal Era, "[i]n 1834, President Andrew Jackson's allies in Congress introduced a bill that would have organized Native nations removed west of the Mississippi into a federal territory . . . . [that] might eventually 'be admitted as a State to become a member of the Union.'"[136]

This effort failed due to opposition from all sides.[137] Tribal leaders opposed the imposition of federal authority and the proposal's superseding of their independent tribal governments into a super-legislature composed of all of the tribes.[138] A Choctaw delegate described the Indian state plan as "fruitful of evil, and only evil, to all the Indian tribes," insisting that while "beautiful in theory," the plan "in practice[] would be destructive to all the long cherished hopes of the friends of the red men."[139] Proponents were clear that the new government was tied to efforts to induce or impose civilization on the Indians.[140] The new government would be, as described by Secretary of War

134. Treaty with the Delawares, U.S.-Delawares art. VI, Sept. 17, 1778, 7 Stat. 13.

135. Ablavsky, *supra* note 70, at 21.

136. *See id.* at 22 (quoting H.R. REP. NO. 23-474, at 14 (1834)).

137. FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 302, 306 (1984).

138. *Id.* at 305-08.

139. *Id.* at 308 (quoting H.R. MISC. DOC. NO. 30-35, at 1-2 (1849)).

140. PRUCHA, *supra* note 137, at 302-03, 305.

Calhoun, "a simple but enlightened system of government" with "laws formed on the principles of our own."[141]

There was strong opposition to the Indian state idea from lawmakers. An Indian state, lawmakers acknowledged, would "totally . . . change" the United States's relationship with the Indian tribes.[142] Other lawmakers opposed the possibility of an Indian state because it would dilute the racial purity of the United States as a white-controlled nation: One southern congressman warned it would "add to our Union men of blood and color alien to the people of the United States."[143] Even worse, it might lead other non-white populations, such as those in Haiti and Cuba, to seek statehood.[144]

The final almost-Indian state came from the same territory that was the subject of the Jacksonian efforts: Oklahoma and the land then-called "Indian Territory."[145] Instead of merging these two territories into one unified State of Oklahoma (as President Theodore Roosevelt preferred), the State of Sequoyah was proposed as a separate state composed of the Indian Territory that was presently home to the reservations of the Five Tribes—Cherokee, Choctaw, Chickasaw, Seminole, and Muscogee (Creek) Nation.[146] Delegates from the tribes held a constitutional convention and drafted a constitution.[147] The Sequoyah Constitution was ratified overwhelmingly in an election in which 75% of the eligible voters participated.[148] Legislation was even introduced in both the House and Senate to admit the State of Sequoyah, but despite tribal efforts to lobby Congress, the state was never established.[149] The Oklahoma plan ultimately won out due to party politics and the concern that a Native state would undermine the party in power.[150] President Roosevelt made public

141. *Id.* at 303 (quoting S. DOC. NO. 18-218, at 544 (2d Sess. 1825)).

142. Ablavsky, *supra* note 70, at 22 (alteration in original) (quoting 10 Reg. Deb. 4769 (1834)).

143. *Id.* (quoting 10 Reg. Deb. 4776 (1834)).

144. *Id.*; *see also* SAM ERMAN, ALMOST CITIZENS: PUERTO RICO, THE U.S. CONSTITUTION, AND EMPIRE 85-86, 91 (2019) (describing the similar role that slippery slope fears about Filipino citizenship played in arguments against recognizing Puerto Ricans as citizens).

145. Leeds, *supra* note 70, at 6-7.

146. *Id.* at 5-6.

147. *Id.*

148. *Id.* at 6.

149. *Id.* (citing 40 Cong. Rec. 47, 7499-7500 (1906); S. DOC. NO. 59-143 (1906) (describing a proposal submitted to the Senate from the citizens of Indian Territory, praying for admission into Union as the State of Sequoyah).

150. *See* ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 164 (1940); *see also* Nathan Dorn, *The State of What?? U.S. States that Never Made the Cut*, LIBR. OF CONG. BLOGS: IN CUSTODIA LEGIS (May 10, 2012), https://perma.cc/5GQS-9E3P ("With Congress and the White House controlled by Republicans, a heavily democratic Native American state stood no chance of being admitted to the Union under the terms presented by the Sequoyah Convention."); *footnote continued on next page*

remarks in favor of the single state option.[151] Following those remarks, the efforts to advance the State of Sequoyah stalled in Congress, allowing Oklahoma to attain statehood in 1907.[152]

As Stacy Leeds has argued, the failure of the State of Sequoyah also allowed for the survival of the Five Tribes, since the terms of the potential constitution described the State of Sequoyah as a successor to the tribal governments.[153] Indeed, the State of Sequoyah would not have been the true realization of tribal statehood. It was, instead, an effort of the Five Tribes to hold onto sovereignty in whatever form they could manage at a time when it appeared they were out of options.[154] Although the tribes originally opposed statehood vehemently as a violation of the treaty promises that their lands would never be absorbed by any state,[155] the Supreme Court had just decided in *Lone Wolf v. Hitchcock* that Congress unilaterally had the "power . . . to abrogate the provisions of an Indian treaty," making these treaty promises feel less secure.[156] Recent federal laws had additionally forced the Five Tribes to accept the allotment of their lands and a sunset date of March 4, 1906, for their tribal sovereignty.[157] A massive influx of white settlers had recently settled in Indian Territory, buying up the allotment of tribal lands that the United States government had made available for purchase.[158] Indians were outnumbered six-to-one in Indian Territory by 1900,[159] and the white population was organizing for statehood separately.[160] This reality made the possibility of Indian statehood—even one

Remembering: The State That Never Was, OKLA. CTR. FOR THE HUMANS (Aug. 31, 2018), https://perma.cc/463D-LTAX ("President Theodore Roosevelt, a Republican himself, wanted joint statehood to eliminate the possibility of a heavily Democratic Indian Territory joining the Union as a state.").

151. Leeds, *supra* note 70, at 6.

152. *Id.*

153. *Id.* at 12-14 (citing SEQUOYAH CONST. art. XVIII, § 1).

154. For more details on the State of Sequoyah movement and discussions, see DEBO, note 150 above, at 160-63 (describing white-citizen advocacy for statehood, and the emergence of the State of Sequoyah in response to the seeming unavoidability of statehood in some form or another); and Leeds, note 70 above, at 8.

155. For a longer discussion of Muscogee (Creek) views and activities leading up to this period of potential statehood in Oklahoma, see Sarah Deer & Cecilia Knapp, *Muscogee Constitutional Jurisprudence: Vhakv Em Pvtakv (The Carpet Under the Law)*, 49 TULSA L. REV. 125, 160-61 (2013).

156. 187 U.S. 553, 566 (1903).

157. Leeds, *supra* note 70, at 8.

158. *See* Robert J. Miller & Torey Dolan, *The Indian Law Bombshell:* McGirt v. Oklahoma, 101 B.U. L. REV. 2049, 2064 (2021) (describing the events leading up to forced allotment in the Curtis Act).

159. Steve Russell, *Sequoyah Rising: Doing What We Can with What We've Got*, KAN. J.L. & PUB. POL'Y, Fall 2009, at 1.

160. *See* Deer & Knapp, *supra* note 155, at 161; DEBO, *supra* note 150, at 159, 164.

that brought an end to separate tribal sovereignty and placed the mass of white voters on equal footing with the tribes' citizens—the lesser of two evils rather than a desirable path to secure representation for tribal interests.[161]

D. Non-Voting Tribal Delegates

The final Subpart of this historical overview discusses the role that assimilative colonialism has played in the attempts to obtain or use non-voting tribal delegates at the federal and state level. Broadly speaking, these delegates have little power and are seen as outside the core system. The same othering of tribes and their citizens that underlies assimilative colonialism itself helps make the irrelevance or relegation of tribal delegates to a separate and less powerful status seem natural.

The Cherokee Nation continues to struggle to seat its delegate, a position that was obtained in a treaty promise with high costs to the Cherokee. For tribes in Maine with representation in the state legislature, some of them have found having non-voting tribal delegates to be so frustrating that they have walked away from the enterprise.

1. Tribal delegates in the state legislature

Of all fifty states, only one gives tribes representation within its state legislature. Maine has three nonvoting tribal representatives in its House of Representatives representing the Penobscot Nation, the Passamaquoddy Tribe, and the Houlton Band of Maliseet Indians.[162]

Penobscot and Passamaquoddy legislative representation was first recorded in 1823 and 1842, respectively, but Maine believes the practice dates back to before the Revolutionary War.[163] An 1850 intratribal agreement among Penobscot parties set the process for choosing their delegate by election, not appointment, and Maine adopted these elections as the process for selecting the delegates by passing a state law in 1866.[164] The Passamaquoddy, composed of two separate reservations, signed an agreement in 1852

161. For a discussion of the balancing of interests in statehood as a sovereignty-protective measure, see Ablavsky, note 70 above, at 27; and Leeds, note 70 above, at 9.

162. S. Glenn Starbird, Jr., Donald Soctomah & Donna M. Loring, *A Brief History of Indian Legislative Representatives in the Maine Legislature*, *in* DONNA M. LORING, IN THE SHADOW OF THE EAGLE: A TRIBAL REPRESENTATIVE IN MAINE, at xvii, xvii-xix (2008) [hereinafter *Starbird Rep.*]; Res. 36, 45th Leg., Reg. Sess. (Me. 1866); *Chronology of Tribal Representation*, ME. STATE LEGISLATURE, https://perma.cc/NB7H-KUCF (archived Jan. 27, 2024).

163. *Starbird Rep.*, *supra* note 162, at xvii. Note when reading the Starbird Report that Maine and Massachusetts were a single state before 1820.

164. *Id.*

establishing their structure of government across the reservations, including a unique process for selecting their delegate.[165] The Passamaquoddy seat alternates every two years between a representative of the tribe's Pleasant Point and Indian Township reservations in Washington County.[166]

State law codified the Passamaquoddy process in 1927.[167] In the 1939 legislature, there was an effort to put the two tribal representatives on "nearly equal footing" with the rest of the state representatives.[168] This effort failed, and several years later, the 1941 legislature ousted the tribal representatives entirely—part of a wave of anti-Indian sentiment that was growing at the time.[169] Beginning in the 1960s, the tribal representatives slowly returned—buoyed by the rising power of nationwide Indian advocacy and tribal citizens finally gaining the right to vote in state elections in 1967.[170] The representatives earned seating and speaking privileges once again in 1975.[171] A seat for the Houlton Band of Maliseet Indians was added in 2010.[172]

The Maine tribal representatives can sit on committees but cannot vote.[173] In addition, changes in the 1990s made it possible for the Maine tribal representatives to sponsor legislation relating to the tribes and co-sponsor any other legislation brought before the House if another voting representative was willing to serve as a co-sponsor.[174] In 1999, the Attorney General of Maine wrote an opinion stating that granting full voting privileges to tribal delegates either in the state legislature or on committees would violate both (1) the Maine and United States Constitutions' principles of "one person, one vote" and (2) the Maine Constitution's clear specifications on the exercise of

165. Grace Murphy, *A Voice for the Tribal Agenda - Frederick Moore III, Described as 'a Charger,' Resumes His Role as a State Representative for the Passamaquoddies*, ME. SUNDAY TELEGRAM (Sept. 22, 2002), https://perma.cc/R88B-GRGS; *Starbird Rep.*, *supra* note 162, at xvii-xvii.

166. *Id.*

167. An Act Relating to Indian Tribes, ch. 148, 1927 Me. Laws 133; *see Starbird Rep.*, *supra* note 162, at xvii-xviii.

168. *Starbird Rep.*, *supra* note 162, at xviii.

169. *Id.*; An Act Relating to Representation of Indian Tribes at the Legislature, ch. 273, 1941 Me. Laws 350 (seating delegates "at the legislature" instead of "to the legislature" and thereby removing their positions as members of the body); Cameron DeHart & Elliot Mamet, *Do Reserved Seats Work? Evidence from Tribal Representatives in Maine*, 23 STATE POL. & POL'Y Q. 285, 288 (2023).

170. *Starbird Rep.*, *supra* note 162, at xviii; DeHart & Mamet, *supra* note 169, at 286-88.

171. *Starbird Rep.*, *supra* note 162, at xviii.

172. DeHart & Mamet, *supra* note 169, at 286.

173. *Starbird Rep.*, *supra* note 162, at xvii-xix.

174. *Id.* at xix.

legislative power by 151 legislators, apportioned by population and reapportioned every ten years.[175]

In a detailed account documenting two years of her time as the Penobscot tribal representative, Donna M. Loring describes the delegate position as frustrating.[176] Though at times she described the position as having some real influence within the Maine legislature,[177] by and large she documents her invisibility and marginalization compared to the rest of the Maine legislators.[178] She describes "what it's like to be a Native American *trying* to influence policy on a state level, *trying* to be heard, *trying* to be visible" and says that while the two tribal representatives are "treated cordially," they are usually not included in discussions where real legislative work gets done, but are instead "for the most part invisible bystanders."[179] Loring highlights the immense challenges of not having the "same legislative standing" as the other legislators.[180] Another colleague describes it as like "having one's arms tied behind one's back" and having to do her best to first "gain the attention of legislators" and then "convince them" in order to represent her tribe's interests.[181] Her account of failed efforts to reform the powers of tribal representatives is particularly striking because of its nuance. She fought hard for both the right to freely sponsor legislation and the right to vote within committees.[182] In testimony to the Rules Committee, she described the inability to cast a vote in the committees she sat on as follows:

> I feel strongly on this issue. I sit in committee day after day and watch as votes are taken and it is as if I am invisible, a non-person. I can see it in the faces of my fellow legislators and on the faces of the general public. There is heaviness in the air, and I know people feel this is not right. The message this sends to everyone in the room is that this person is less important and less valued than everyone else.[183]

But notably, Loring's views on representatives voting did not extend to the full potential of representative power. She was not a proponent of tribal representatives having the power to cast floor votes.[184] She described floor

175. Off. of the Att'y Gen. of the State of Me., Opinion Letter No. 99-1 (Nov. 16, 1999), https://perma.cc/8BYX-DP3R (citing ME. CONST. art. IV, pt. 1, § 2; and Reynolds v. Sims, 377 U.S. 533, 568 (1964)); *Starbird Rep.*, *supra* note 162, at xviii-xix.

176. *See* LORING, *supra* note 162, at xxxi-xxxii, 72-73.

177. *Id.* at 72.

178. *Id.* at xxxi, 94.

179. *Id.* at xxxi (emphasis added).

180. *Id.*

181. *Id.* at xxxi-xxxii.

182. *Id.* at 84-85, 91-94.

183. *Id.* at 94.

184. *Id.* at 119-20.

voting power for the tribal representatives as making the tribes too much like "a political subdivision of Maine."[185] She believed committee voting was the best way to strike a balance between respecting separate sovereignty and exercising enough power within the legislature to shape policy—albeit in an advisory capacity.[186]

In addition to drawing on Loring's first-hand account, political scientists Cameron DeHart and Elliot Mamet examine the role of the 1995 rule change that allowed tribal representatives to sponsor legislation for the first time.[187] Their data tracks representatives' behavior introducing bills to estimate the impact of the rule change on the behavior of tribal representatives and the legislature as a whole.[188]

DeHart and Mamet found that the "nontribal legislators changed their behavior [after the rule change] conditional on the presence of a tribal community in their district."[189] But they found that the "marginal effect of the change" was "negated by the contributions of the tribal legislators themselves" since the tribal legislators sponsored far more tribal-related bills for their colleagues to join.[190] Put simply, it seems that the tribal representatives' new power to at least introduce bills led to the introduction of far more Indian-related bills.[191] The DeHart and Mamet study does not track the success of these pieces of legislation but broadly supports Loring's account of Maine's non-voting delegates having some influence on policy but limited real power.[192] This dynamic creates continued tribal frustration, given the tension between tribal sovereignty and state power.[193]

By population, the tribal-citizen voters in Maine are numerous enough to be reapportioned to control one voting delegate in the 151-member body.[194] But demographic realities have made it impossible for them to elect even one tribal member to the state legislature, even though three former tribal representatives have sought election.[195] A proposal in the 2010 legislative

185. *Id.*

186. *Id.*

187. DeHart & Mamet, *supra* note 169, at 284.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 284, 293, 296.

192. *Id.* at 292, 301.

193. *See* Loring, *supra* note 162, at 82, 86, 91-94 ("I find it degrading and frustrating to sit on committees and watch others raise their hands to vote with the public watching, and have to sit there like a nonperson.").

194. DeHart & Mamet, *supra* note 169, at 288.

195. *Id.* at 288 n.5 ("Donna Loring (Penobscot) [ran] in 2004, David Slagger (Maliseet) in 2012, and Henry John Bear (Maliseet) in 2016.").

session would have grouped the three tribes into a single district with one vote, but it ultimately failed.[196]

Recently, the tribal representatives have had an increasingly strained relationship with the state government. Tensions came to a head in 2015 when, citing a lack of respect for tribal sovereignty and the "paternalistic attitude" of the state, the Passamaquoddy and Penobscot withdrew their representatives from the legislature.[197] Before walking out of the House, Representative Matthew Dana of the Passamaquoddy Tribe said, "Our hope is that someday the state will recognize us for who we are and value the tribes as sovereign partners and engage in a relationship of mutual respect."[198] He continued, "[u]ntil then we simply must decide our own future."[199] His comments followed the Governor's decision to rescind an executive order that had required Maine to consult with its tribes on decisions that affected them and asserting Maine's jurisdiction over all tribal people, lands, resources, and government structures.[200] "We have gotten on our knees for the last time," said Kirk Francis, Chief of the Penobscot Nation.[201] "From here on out, we are a self-governing organization, focused on a self-determining path."[202] Democratic leaders in the Maine House of Representatives urged the tribes to remain.[203] The Passamaquoddy elected to send not a representative but an "ambassador" back to the capitol in 2016.[204]

The breakdown continued in 2018 when the Houlton Band of Maliseet Indians pulled its representative.[205] Houlton Band of Maliseet's Chief Clarissa Sabattus commented that it was "difficult as a sovereign nation when we have a state government that pushes back on things continually."[206] As William Nicholas, chief of the Passamaquoddy Tribe at Indian Township Reservation

196. Leg. Res. 2307, 125 Leg., Reg. Sess. (Me. 2011) (proposal by Passamaquoddy Tribal Representative Madonna Soctomah); DeHart & Mamet, *supra* note 169, at 288 n.5.

197. Alanna Durkin, *Tribal Representatives Withdraw from Maine Legislature*, ASSOCIATED PRESS (May 26, 2015, 12:08 PM PDT), https://perma.cc/U5KQ-28FZ.

198. *Id.*

199. *Id.*

200. Mario Moretto, *Tribes Withdraw from Maine Legislature*, BANGOR DAILY NEWS (updated May 27, 2015), https://perma.cc/E5P9-C2S4.

201. *Id.*

202. *Id.*

203. *Democratic Leaders Urge Passamaquoddy, Penobscot Tribal Representatives to Reclaim Seats In Maine House*, US FED NEWS (USA) (May 27, 2015), https://perma.cc/E3DY-JXH7.

204. *Chronology of Tribal Representation*, *supra* note 162.

205. Marina Villeneuve, *Maine Again Down to Just One Tribal Representative*, ASSOCIATED PRESS (Dec. 8, 2018), https://perma.cc/QA3Q-BTMU.

206. *Id.*

describes, "The relationship [with the State of Maine]? There really isn't one at this point."[207]

Maine's experience with tribal delegates suggests three main takeaways that inform our present conversation about tribal representation. First, states and tribes remain largely competing sovereigns, even within attempts to integrate tribes into state political structures. Representation within states is uniquely challenging for tribal sovereigns because—as evidenced by the Governor's actions that led to the withdrawal of representatives—states have competing interests. Second, a tribal voice—if not a vote—can increase the profile of Indian issues. Third, however, a voice alone is not the same as the power to send a voting member to a legislature. Put bluntly, a voice is nice, but it's not the same thing as a vote or structural power for tribal nations themselves. Even though tribal-citizen voters have the power to vote for their regularly apportioned non-tribal representatives, that power is dispersed across legislators in a manner that can render voters largely powerless—except in the unique (and uncommon) electoral circumstances of particularly close elections involving large enough tribal-citizen populations.[208]

2. Tribal delegates to Congress

Statehood was not the only possible way that tribal representation in Congress could have come about within the federal government. The Treaty of New Echota promised the Cherokee Nation a congressional delegate but did not condition it on statehood.[209] At the time, the Cherokee were being forcibly removed to the west to occupy Indian Territory under the Treaty's legal authority.[210]

Article 7 of the Treaty of New Echota states:

> The Cherokee nation having already made great progress in civilization and deeming it important that every proper and laudable inducement should be offered to their people to improve their condition as well as to guard and secure in the most effectual manner the rights guarantied [sic] to them in this treaty, and with a view to illustrate the liberal and enlarged policy of the Government of the United States towards the Indians in their removal beyond the territorial limits of the States, it is stipulated that they shall be entitled to a delegate in the House of

207. *Id.*

208. *See infra* Parts II.C.2-.D.

209. Treaty with the Cherokee, 1835, Cherokee Nation-U.S., art. 7, Dec. 29, 1835, 7 Stat. 478 [hereinafter Treaty of New Echota]; Ezra Rosser, *Promises of Nonstate Representatives*, 117 YALE L.J. POCKET PART 118, 119 (2007) [hereinafter Rosser, *Promises*]; *see* Ezra Rosser, *The Nature of Representation: The Cherokee Right to a Congressional Delegate*, 15 B.U. PUB. INT. L.J. 91, 91, 150 (2005) [hereinafter Rosser, *Nature*].

210. Jess Kung & Shereen Marisol Meraji, *A Treacherous Choice and a Treaty Right*, NPR (Apr. 8, 2020, 12:18 AM ET), https://perma.cc/FJB2-TMUT.

> Representatives of the United States whenever Congress shall make provision for the same.[211]

The Cherokee Nation and its people paid for this promise of representation in blood, as the Treaty of New Echota provided the authorization for the forced relocation of the Cherokee to Oklahoma on the Trail of Tears.[212] Notably, the provision does not recognize the fundamental rights of the tribe or its members to democratic representation but functions as a "laudable inducement" because of the tribe's "great progress in civilization," noting a hope that they might further "improve their condition."[213] This offer itself is part of assimilative colonialist dynamics.

As Ezra Rosser has argued, the language of this treaty is particularly powerful since it is an affirmative promise rather than a conditional possibility.[214] Moreover, as Rosser has reasoned, it does not specify whether or not the promised Cherokee congressional delegate would have the power to cast a vote, since it chose the word "delegate" rather than "agent" or "deputy" and omitted any limits on the delegate's powers as other previous treaties making similar promises had.[215]

There has been a modern push by Cherokee Nation's Chief to seat its long-promised delegate.[216] The Principal Chief of the Cherokee Nation recently appointed Kim Teehee to be its Nation's delegate, and she currently awaits Congress' approval.[217] One of the many questions the Cherokee Nation is

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211. Treaty of New Echota, *supra* note 209, art. 7.

212. *See* Patrick A. Wolf, *Representation for Removal? The Cherokee's Claim to a Congressional Delegate Assessed Under the Canons of Construction*, 99 N.C. L. REV. 223, 225 (2020) (explaining the Treaty of New Echota's role in the Trail of Tears); Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 465 (1994) ("One-fifth of the tribe died on this 'Trail of Tears,' a defining moment for the Cherokee people." (citing GRANT FOREMAN, THE FIVE CIVILIZED TRIBES 281-82 (1934))); *Legal and Procedural Factors Related to Seating a Cherokee Nation Delegate in the U.S. House of Representatives Before the H. Comm. on Rules*, 117th Congress (2022) (statement of Chuck Hoskin, Jr., Principal Chief, Cherokee Nation) [hereinafter *Hoskin Statement*] (quoting Letter from John Ridge to George R. Gilmer (1835)), https://perma.cc/VM39-ZF8F.

213. Treaty of New Echota, *supra* note 209, art. 7.

214. *See* Rosser, *Nature*, *supra* note 209, at 107; Rosser, *Promises*, *supra* note 209, at 119-20; *see also* Wolf, *supra* note 212, at 244 (interpreting the Treaty using the Indian canons and concluding that it creates an affirmative right to a delegate).

215. Rosser, *Nature*, *supra* note 209, at 121-25.

216. Jack Blair, Comment, *Demanding A Voice in Our Own Best Interest: A Call for a Delegate of the Cherokee Nation to the United States House of Representatives*, 20 AM. INDIAN L. REV. 225, 226-27 (1996) (laying out the historical context and democratic benefits of seating a Cherokee delegate).

217. Emily Cochrane & Mark Walker, *House Panel Weighs Whether to Seat a Cherokee Delegate in Congress*, N.Y. TIMES (Nov. 16, 2022), https://perma.cc/72M4-DMVC.

getting in their push to seat Teehee is "why now?"[218] The answer the Nation gives to that question is that it has taken decades to rebuild the Nation's economy and government structures after the United States's colonial violence and policies decimated its institutions and people.[219]

A separate question that many people fail to ask about seating the Cherokee delegate is, "why at all?" The Cherokee Constitution of 1975 included substantial changes to the political structure of the Cherokee Nation that reflected vastly altered political circumstances, including a very different relationship to the United States.[220] The most drastic changes to the Constitution were new clauses creating a self-imposed subordination to the federal government.[221] The 1975 Constitution adopted United States Constitutional supremacy, including a provision that specified: "The Cherokee Nation is an inseparable part of the Federal Union. The Constitution of the United States is the Supreme law of the land; therefore, the Cherokee Nation shall never enact any law which is in conflict with any Federal law."[222] It also gave the United States power over any subsequent constitutional changes by including a new requirement that all further amendments to the Cherokee Nation's Constitution must be approved by the President of the United States.[223]

The possibility of a tribal congressional delegate in Oklahoma came up earlier in the midst of debates about how to structure governance of post-Civil War Indian Territory, which included many Indian tribes. The idea does not seem to have come from tribes but from Congress and remains a bit of a mystery.[224] The possibility of a delegate must have surfaced during a debate about whether to make the Indian Territory a formal federal territory within the United States because Congress introduced a bill providing a procedure for the Five Tribes to send a delegate to Congress.[225] The House Committee on Indian Affairs produced a report endorsing this bill and recommending that

218. Cherokee Nation, *It's Time for Congress to Seat the Cherokee Nation Delegate*, YOUTUBE, at 2:35 (Sept. 22, 2022), https://perma.cc/8J95-M59B (to locate, select "View the live page").

219. *Id.* at 2:38.

220. *See* Elizabeth H. Reese, *The Durability and Dynamism of American Indian Constitutional Reform*, *in* THE CONSTITUTIONAL DESIGN OF ELECTIONS AND PARTIES (Tarun Khaitan, Aziz Huq & Tom Ginsburg eds., forthcoming 2024) (manuscript at 7-8).

221. *See id.* at 8.

222. *Id.* (quoting CHEROKEE NATION CONST. art. I (1975)).

223. CHEROKEE NATION CONST. art. XV, sec. 10 (1975).

224. I am not a legal historian. However, I have spent a fair amount of time searching Congressional records and secondary sources for more information about the origin of this bill and was unable to come up with a clear account of its origins or what happened to it. This is a fantastic place for a true legal historian more experienced than I am to engage in further research and scholarship.

225. H.R. 979, 45th Cong. (1877); H.R. 4868, 45th Cong. (1878).

the Five Tribes be given the right to send a delegate.[226] The report notes that "as far as population, wealth, and intelligence go, these five civilized tribes of Indians should be allowed a Delegate in Congress."[227] The bulk of the report is dedicated to the demographics of the Five Tribes at the time, which had a collective population of 68,703 "citizens"—including 57,503 tribal citizens by treaty, blood, or marriage—that dwarfed the tribal populations of the other territories.[228] The House minority position was that the delegate was a bad idea because it would be chosen by the Five Tribes even though it would represent a territory that encompassed far more tribes and was unnecessary because the Cherokee Nation already had been promised a delegate in the Treaty of New Echota.[229] For their part, the Five Tribes successfully petitioned to have the delegate appointed by the more tribally representative Indian Council of the Territory—a body that had been set up following the Civil War—rather than elected by the population of the Five Tribes.[230]

More importantly, however, the Five Tribes fought against the delegate bill on more fundamental grounds. Its position was that the delegate provision violated the Treaty of New Echota because it took away the right to send a delegate of the Five Tribes' own "*volition*" by making it a federal mandate.[231] Additionally, the Tribes felt that participating in American elections was inappropriate because they were not citizens, and thus the effect of political representation would be to also force citizenship and taxation upon them: "Indeed, by the Constitution of the United States no people can be represented in Congress but citizens of the United States . . . [and thus] the logic or result of the bill will be to make the Indians it affects citizens of the United States . . . ."[232]

Nothing came of this attempt to enshrine a delegate. The bill was amended to reflect the selection process by the territorial council and referred out of committee to be printed,[233] but it appears to have died amidst the growing call for an Indian or Oklahoma territory that circumvented the tribal governments altogether.[234]

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226. H.R. REP. NO. 45-95, at 7-8 (1878).

227. *Id.* at 7.

228. *Id.* at 2, 6.

229. H.R. REP. NO. 45-807, pt. 2, at 1-3 (1878).

230. H.R. REP. NO. 45-1002, at 8-9 (1878); H.R. MISC. DOC. NO. 45-32, at 3-4 (1878).

231. H.R. MISC. DOC. NO. 45-32, at 1-2 (1878).

232. *Id.* at 2.

233. H.R. 4868, 45th Cong. (1878).

234. Annie H. Abel, *Proposals for an Indian State, 1778-1878*, *in* 1 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1907, at 87, 99-102 (1908); *see supra* Part I.C.

The Cherokee Nation was involved in both the State of Sequoyah and the aforementioned attempts to secure delegates. It is telling that there is an absence of equivalent attempts by other tribes. This is no accident. As this Part discussed, the United States actively discouraged similar efforts through a series of policies that made the exercise of American political power seem inherently dangerous to Native nations.

* * *

In compiling the history described in this Part and discussing the role of assimilative colonialism in it, I do not mean to dismiss the legitimate concerns that Native people and tribal governments have about participating in American institutions or being absorbed by them. Quite the opposite: I want to lay out that Native people have very good reasons to feel this way—reasons justified by a mountain of historical evidence.

However, it did not have to be this way and need not be this way going forward. This fear of political participation is due, at least in large part, to the United States government's policies and is a product of assimilative colonialism in its own right. For Native people, it seems almost impossible that tribal governments could be integrated into the federal system in a way that is not destructive to their identity and sovereignty.[235] This is a result of colonial politics that has been particularly effective at discouraging Native political power. It is high time we see that for what it is and depart from it.

II. The Status Quo of Tribal Representation

This Part explores the many ways—which I describe as instances of "democratic mismatch"—whereby the status quo of democratic representation does not make sense for tribal citizens. Colonial violence and disease decimated the size—and thus the political strength—of Native populations throughout the country.[236] And, as discussed above, tribal citizens were not citizens of the

235. Audra Simpson argues that tribes like the Kahnawàke Mohawk are demonstrating a powerful alternative to the politics of "recognition" assumed to be a normative "good" in multicultural politics by exercising a politics of "refusal" which requires acknowledging and upholding separate political sovereignty. SIMPSON, *supra* note 75, at 11. This refusal undermines the legitimacy of conquering nations which traditionally assume the power to "recognize" sovereignty in other groups. *Id.* This seems entirely correct and is in keeping with my analysis. Settler states have wielded political power in coercive, dominating, and binary terms, forcing tribal groups to submit or reject their rule rather than approaching them as potential equal sovereigns willing to discuss what a merger on mutually acceptable terms might look like.

236. *See, e.g.*, CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 27-31, 38-43 (2005) (discussing the effect of disease and the violence of westward expansion on just one tribe: the Nez Perce).

United States throughout most of its history.[237] The transition from independent sovereign nations to domestic dependent sovereign nations that exist within the boundaries of the United States has created a strange and unique status for tribal governments today.

When teaching or explaining the peculiarities of this system and tribal sovereignty's status, I often describe it as the "nobody planned for this" system. This reminder goes a long way to help students accept the undeniably contradictory pieces of doctrine, the unmoored evolution of those contradictions, and the many unanswered questions about tribal status. The survival of tribal governments within the United States was not the plan. Tribes defied the expectation that they would eventually disappear as tribal citizens assimilated into the United States population by choice or by force.[238]

Within the "nobody planned for this" system, a few things are clear. First, tribal citizens are not set up for success in the current electoral system. Tribal citizens are a small population that is spread across the United States, making it particularly difficult for them to mobilize like minority groups with concentrated populations in urban areas.[239] Second, the evolution of federal Indian law doctrine has created multiple kinds of democratic mismatches. There is the assimilative colonial mismatch discussed earlier, where the United States has claimed to conquer tribes and has placed them inside the system of American governance as domestic dependent nations and yet continually others tribes and excludes them from the representative democratic structure.[240] But this is not the only democratic mismatch. There is also the mismatch between the voting populations and boundaries of the laws they live under—tribal citizens vote in state elections despite not being subject to state laws when they are on their reservations.[241] And there is also the mismatch inherent within federal Indian law itself—*federal* law shapes the lives of tribal citizens and the sovereignty of tribal nations in a uniquely powerful way compared to other citizens, and yet they lack the same avenues of structural power within

237. Indian Citizenship Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b)) (granting—or unilaterally imposing—U.S. citizenship on tribal citizens for the first time).

238. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 593 (1832) ("The exercise of the power of self-government by the Indians, within a state, is undoubtedly contemplated to be temporary. . . . It is a question, not of abstract right, but of public policy. . . . [A] sound national policy does require that the Indian tribes within our states should exchange their territories, upon equitable principles, or, eventually, consent to become amalgamated in our political communities."). For a modern discussion of this expectation, see Kathryn E. Fort, *The Vanishing Indian Returns: Tribes, Popular Originalism, and the Supreme Court*, 57 ST. LOUIS U. L.J. 297, 308, 335-36 (2013).

239. *See supra* Part II.A.

240. *See supra* Part I.B.

241. *See infra* Part II.B-.C.

Congress that states and their citizens have to shape those laws.[242] Finally, an even stranger situation has emerged in the realm of tribal advocacy in Congress. Tribes, which are governments, have learned to act like interest groups rather than actual governments in order to wield political power.[243]

A. The Electoral Power and Struggles of Tribal-Citizen Voters

With the arrival, settlement, and growth of the white population, the United States now has a very diluted Native population spread thinly across the United States.[244] Some of the largest concentrations of Indian voters that remain are on reservations. Even so, state boundaries effectively "crack" these tribal populations' political power by splitting many of these majority-Native areas across several states.[245]

Though we might expect that tribal citizens would fare best in local elections where their higher demographic concentrations might give them a chance at controlling a seat or two, tribal voters have struggled to make headway.[246] Local at-large elections have been a particularly effective tool for decreasing Native political power at the local level.[247]

State and local officials have also used at-large voting and the packing and cracking tools of redistricting to ensure that tribal citizens do not achieve meaningful representation.[248] A particularly egregious example is San Juan County, Utah, where at-large voting initially kept Native voters from controlling seats on the school board and county commission. This practice ended only after the county settled a 1983 suit by the Department of Justice, which brought a challenge under Section 2 of the Voting Rights Act and required the county to draw single-member districts.[249] The county redrew districts in 1986, including one Native-controlled district.[250] However, the county then refused to update those very same district boundaries for over three decades, violating the norm—if not legal requirement—of decennial updating. Despite

242. *See infra* Part II.B.

243. *See infra* Part II.D.

244. Emily Rong Zhang, *Native American Representation: What the Future Holds*, 56 IDAHO L. REV. 323, 324 (2020).

245. *Id.* at 325-26 (describing the Navajo Nation and Standing Rock Sioux Reservations as "cracked" by state borders).

246. *Id.* at 332.

247. *Id.* at 333 (citing LAUGHLIN MCDONALD, AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS (2010) (providing an overview of the career of an attorney who worked on these issues)).

248. *See Developments in the Law—Indian Law*, *supra* note 23, at 1735-36.

249. Zhang, *supra* note 244, at 334.

250. *Id.*

demographic changes that would have given Native voters even more power in San Juan County, the county thus ossified its district lines.[251]

The lack of synchronization between state, tribal, and federal elections creates additional challenges for tribal citizens.[252] The three different legal regimes governing each election and the separate administration of elections by states and tribes only further complicate matters.[253] There may be different districts, voting locations, registration systems, and voting requirements, all of which add to the burden on tribal-citizen voters.[254] Even attempts to alleviate these burdens have gone awry. For example, the Navajo Nation has attempted to schedule tribal elections on the same day as state and federal elections.[255] However, the Navajo Nation is organized around chapters and uses its chapter houses as voting precincts.[256] Because the chapters do not share coterminous boundaries with state and federal districts, some voters had to drive great distances on Election Day to vote in both elections.[257]

Native voters have only recently become an electorate with enough power to flip close statewide elections.[258] This occurs in states with comparatively large Native electorates and particularly close or complex races. Native voters are credited by some with Senator Tim Johnson's 2002 victory in South Dakota and Senator John Tester's 2006 victory in Montana.[259] 2004 is frequently cited

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251. *Id.* at 335.

252. Stan Bindell, *Despite Large Population, Hopi Nation Voter Turnout Remains Low. Here's Why*, AZCENTRAL (Nov. 5, 2022, 6:00 AM MT), https://perma.cc/4BCV-B2YE (quoting one Hopi tribal leader who explained based on his experience that "it would be easier" to encourage tribal participation in state and national elections "if tribal and state elections were synchronized" since the obligation to vote in both is cumbersome when not coordinated).

253. *See Developments in the Law—Indian Law*, *supra* note 23, at 1740-41 (discussing the problem of states requiring voter identification to vote yet not counting tribal IDs as valid identification).

254. For a more detailed discussion of burdens on voting, see *id.* at 1732-41.

255. *Id.* at 1741 (discussing the challenge in the Navajo Nation and, briefly, for the Northern Cheyenne).

256. *Id.*

257. *Id.*

258. *See* Oeser, *supra* note 65, at 808-11.

259. Patty Ferguson-Bohnee, *The Struggle for Equal Voting Rights: 45 Years of the Voting Rights Act*, ARIZ. ATT'Y, Nov. 2010, at 26, 27; *see also* JERRY D. STUBBEN, NATIVE AMERICANS AND POLITICAL PARTICIPATION: A REFERENCE HANDBOOK 163 (2006) (describing the Native vote's role in Senator Johnson's razor-thin victory by 528 votes in 2002 and the earlier role of Native voters in electing Democrats in South Dakota); TOVA WANG, ENSURING ACCESS TO THE BALLOT FOR AMERICAN INDIANS & ALASKA NATIVES: NEW SOLUTIONS TO STRENGTHEN AMERICAN DEMOCRACY 11 (2012), https://perma.cc/K3AB-AKNG (describing Senator Tester as crediting the American Indian vote for his victory).

as a "pivotal year" where efforts to turn out the Native vote increased via nationwide campaigns spearheaded by the National Congress of American Indians.[260] In 2010, the strong support of the Alaska Native community played a decisive role in the write-in campaign victory of Alaska Senator Lisa Murkowski after she unexpectedly lost the Republican primary, a reality the Senator has openly acknowledged.[261]

But these examples are far from the norm across the United States. In fact, turnout has remained a consistent problem for Native voters.[262] In 2016, turnout was only about half of eligible Native voters, as much as 14% lower than other racial demographics.[263] Things may have begun to change, however, in the most recent national election cycle where several extremely close elections in battleground states included a notable Native voting population. In 2020, two of the largest precincts on reservations in Arizona saw voter turnout increase by 12-13%.[264] This statistic is emblematic of the turnout improvement that is largely credited with helping President Biden win Arizona in the 2020 presidential race.[265] There were approximately 3.7 million Native and Alaska Native voters in the 2020 election.[266] These voters represented 5.6% of the eligible voters in Arizona and anywhere from 1.4% to 2.5% of the eligible voters in Colorado, Michigan, Minnesota, Nevada, North Carolina, and Wisconsin.[267]

To summarize, while Native people are not entirely without electoral power, they have not become politically powerful until recently. Even then, that power is limited to certain Native voters under specific circumstances.

260. Wang, *supra* note 259, at 10 (citing MCCOOL ET AL., *supra* note 86, at 182; and NAT'L CONG. OF AM. INDIANS, 2004 ANNUAL REPORT 4 (2004), https://perma.cc/G4PL-7RPF); MCCOOL ET AL., *supra* note 86, at 177-78.

261. Wang, *supra* note 259, at 11.

262. *See, e.g.*, Bindell, *supra* note 252 (noting that just over 300 of the 5,000 voting-age Hopi people residing on their reservation chose to vote in the August 2022 primary and quoting a former tribal chair confirming problems with turnout).

263. Mary Annette Pember, *Native Vote Plays Powerful Role, Especially in Swing States*, INDIAN COUNTRY TODAY (Oct. 29, 2020), https://perma.cc/6XQF-MYLC.

264. Felicia Fonseca & Angeliki Kastanis, *Native American Votes Helped Secure Biden's Win in Arizona*, AP NEWS (Nov. 19, 2020), https://perma.cc/A43K-RBPB; Emily Cochrane & Mark Walker, *Indigenous Voters, Gaining Influence, Look to Mobilize*, N.Y. TIMES (Nov. 6, 2022), https://perma.cc/6PXX-CNHH ("Indigenous voters have become a major power center across the country in recent years, including in 2020, when the Navajo Nation and other Indigenous voters helped flip Arizona for President Biden.").

265. Cochrane & Walker, *supra* note 264.

266. Pember, *supra* note 263.

267. *Id.*

B. Representative Democratic Mismatch

This Subpart describes and analyzes contemporary discrepancies in democratic logic and representational reality for tribal citizens. These include asymmetries where the power that tribal citizens have over law does not match the power that law exerts over them and instances where the boundaries used for political representation do not track the boundaries of sovereign loyalties. I describe both as "democratic mismatch." Tribal citizens do not pay state income taxes or property taxes, and the default rule is that state law does not apply to them if they live on their reservations (although they are subject to state law when off-reservation just like any other state citizen).[268] It makes little sense that tribal citizens who live within the borders of their tribe's reservation and may work within those borders as well, are treated like any other state citizen for the purposes of state and federal elections.[269]

1. Tribal citizens and state law

The current system includes the following oddity: Tribal citizens who live on reservations have the opportunity to vote in state elections and thus shape law that largely does not govern them.[270] I am not the first person to point out

268. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980) ("When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest."); Bryan v. Itasca County, 426 U.S. 373, 375 (1976) (affirming the inability of states to tax the property of tribal citizens on reservations); Mescalero Apache Tribe v. Jones, 411 U.S. 145, 147 (1973) (affirming the inability of states to tax tribal business activity on tribal trust land and tribal property); Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 470-71 (1979) ("As a practical matter, this has meant that criminal offenses by or against Indians have been subject only to federal or tribal laws, except where Congress in the exercise of its plenary and exclusive power over Indian affairs has 'expressly provided that State laws shall apply.'" (citation omitted) (quoting McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 170-171 (1973))); Washburn, *supra* note 2, at 757 ("Indeed, federal law creates criminal jurisdiction that is exclusively federal and tribal and thus serves to shield Indians from the influence of state officials. Under such circumstances, Indians might be expected to opt out of state and local elections for officials who have little or no impact on their lives." (emphasis omitted)).

269. *See* Dolan, *supra* note 4; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 2, § 14.02[1].

270. "A state ordinarily may not regulate the property or conduct of tribes or tribal-member Indians in Indian country." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 2, § 6.03[(1)(a)] (citing Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 458 (1995) ("'[A]bsent cession of jurisdiction or other federal statutes permitting it' . . . a State is without power to tax reservation lands and reservation Indians." (quoting County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 258 (1976))); Fisher v. Dist. Ct., 424 U.S. 382, 386 (1976) ("The right of [an Indian tribe] to govern itself independently of state law has been consistently protected by federal statute."); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 168 (1973)

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this is concerning. As discussed above, states have objected to it. Following the extension of citizenship to tribal citizens, some state authorities sought to prevent tribal citizens from voting in state elections or receiving state services.[271] As the Supreme Court of New Mexico observed, "[Indians] have the right to participate in the choice of officials, but, under many circumstances, cannot be governed by or be subject to the control of the officials so elected."[272] The Supreme Court of Utah made a similar point: "It is not subject to dispute that Indians living on reservations are extremely limited in their contact with state government and its units and, for this reason also, have much less interest in or concern with it than do other citizens."[273]

Though these efforts to exclude tribal citizens from voting in state elections or receiving state services were also motivated by assimilative colonialism and ultimately failed,[274] there is still a powerful underlying logic to the argument that it is a problem when people can vote for laws that their tax dollars do not fund and that do not govern them to the same degree as their neighbors.[275] Tribal citizens are eligible to receive state services, most notably public education.[276] However, as a practical matter, it is not state programs, but "[f]ederal and tribal programs [that] in fact supply a large part of the public services available to reservation Indians,"[277] and "many state benefit programs [that tribal citizens rely on] have been partially federal from their inception."[278]

Representation through the states does not make a ton of sense for Indian tribes. Tribal citizens who live and work on their reservations can live lives—if they so choose—that are by and large exempt from state law.[279] Yet they not only vote like any other state resident for federal representatives, but they vote like any other state resident in state elections.[280] Tribal citizens do pay state sales taxes when they leave the reservation to purchase goods,[281] but the same

("[T]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." (citation omitted)).

271. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 2, § 14.02[(2)(d)(iii)].

272. Montoya v. Bolack, 372 P.2d 387, 395 (N.M. 1962).

273. Allen v. Merrell, 305 P.2d 490, 494 (Utah 1956), *vacated*, 353 U.S. 932 (1957) (per curiam).

274. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 2, § 14.02[(2)(d)(iii)].

275. *See id.*

276. *Id.* § 14.02[1].

277. *Id.* § 14.02[2(d)(iii)].

278. *Id.*

279. *Id.* § 6.03; *see also* Washburn, *supra* note 2, at 757 ("Under [circumstances that place Indians beyond the reach of state criminal jurisdiction], Indians might be expected to opt out of state and local elections for officials who have little or no impact on their lives.").

280. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 2, § 14.02[1-2(b)].

281. *See id.* § 14.02[2(d)(iii)].

is true for any citizen who lives near state or county borders and frequently buys goods on the other side: In both cases, individuals pay taxes to a sovereign without the right to vote. Without the ability to vote in state elections, tribal citizens would have less power to shape state policy in favor of tribal or tribal-citizen interests. However, as previously discussed, tribal citizens are often frustrated with state legislatures.[282] As I discuss below, tribal citizens have largely not turned out for state elections and have expressed deep distrust in state governments.[283] Additionally, tribal and state sovereigns are generally rivals for resources, territory, and power rather than cooperative and interdependent democratic entities.[284]

Organizing democratic representation as if Native reservations are a part of a state's territory is a disservice to both tribes and states.[285] It is past time to consider what representative structures could better reflect tribal governments and their interests, and avoid the possibility of tribal voter mischief without consequence in state elections.

2. Tribes' unique dependence on federal law

An important part of the need for tribal representation at the federal level is the degree to which *federal law* uniquely shapes the lives of tribal citizens. It is tribal law, not state law, and tribal governments, not state governments, that primarily rule and shape the lives of tribal citizens living on reservations.[286] Congress has plenary power over tribal governments,[287] and this unique

282. *See supra* Part I.D.1.

283. *See infra* Part II.C.

284. *See infra* Part II.C.1.

285. The Supreme Court's recent decision in *Oklahoma v. Castro-Huerta* included language that described Indian reservations as part of a state's territory. 142 S. Ct. 2486, 2502 (2022). However, that decision has not yet been extended beyond its specific facts, which involve the application of one federal law, the Major Crimes Act, to non-Indian crimes with Indian victims committed within Indian Country.

286. *See* Washburn, *supra* note 2, at 756-57 ("Tribal governments often provide numerous services, such as medical and dental care, social services, schools and education, and law enforcement. In other words, the existence of tribal governments tends to undermine the importance of local and state governments. Tribal governments tend to provide even more services than state and local governments routinely provide to their own constituents. It is only natural that Indians have greater interest in their governments than in state governmental institutions. Thus, tribal citizens may not have as much reason to participate in state elections and voting.").

287. United States v. Kagama, 118 U.S. 375, 379-85 (1886) (describing that Congress' plenary power over tribes due to their status as domestic dependent nations includes the ability to unilaterally create federal court jurisdiction and extend it over Indian lands, even over crimes committed by Indians against other Indians on Indian lands); Lone Wolf v. Hitchcock, 187 U.S. 553, 565-66 (1903) (describing that Congress' plenary power over Indians includes the authority to unilaterally abrogate treaty obligations, and noting

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relationship between tribes and the federal government has made federal law—not state law—the other arena of law and policymaking that most affects tribal citizens.[288]

Moreover, a large federal bureaucracy spread across several administrative agencies is responsible for providing entirely separate Indian-specific healthcare, food subsidies, and housing programs to Indian citizens.[289] This massive arm of the administrative state has historically been controlled by non-Indians[290] until hiring preferences for Indians increased tribal-citizen control of the agency.[291] However, tribes have still complained that the officers at the Bureau of Indian Affairs and Indian Health Service are not chosen with enough input from tribal communities.[292] These officials are responsible for much of the policymaking that affects the lives of tribal citizens. Some have suggested that these officers should be elected by tribal citizens or some other democratic mechanism.[293] Yet key officials continue to be appointed by the President, fostering a sense of federal paternalism.[294]

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this power is a political question beyond the federal court's ability to intervene in this power); *see also* Michalyn Steele, *Congressional Power and Sovereignty in Indian Affairs*, 2018 UTAH L. REV. 307, 309 ("To the extent there is a federal power to set the metes and bounds of tribal sovereignty in federal law, the power resides in Congress and is a concomitant of the trust responsibility.").

288. *See* Worcester v. Georgia., 31 U.S. (6 Pet.) 515, 520 (1832) (holding that relations with the Cherokee Nation are regulated solely by the federal government and that Georgia's laws have no authority over the Cherokee Nation).

289. *Basis for Health Services*, INDIAN HEALTH SERV. (Jan. 2015), https://perma.cc/3953-32D3; *IHS Profile*, INDIAN HEALTH SERV. (Aug. 2020), https://perma.cc/NZ28-BHNV; U.S. DEP'T OF AGRIC., FOOD DISTRIBUTION PROGRAM ON INDIAN RESERVATIONS 1 (2020), https://perma.cc/97BN-W97W; *Resources for Tribal Housing & THDES*, U.S. DEP'T HOUSING & URBAN DEV., https://perma.cc/QP3Y-H2QG (archived Feb. 20, 2024).

290. Native employment in the Indian Service and Indian Office, the precursors to the Bureau of Indian Affairs, began growing after a hiring preference was created in the late 1800s, but this hiring preference was part of the federal government's assimilationist policies of the time. The government saw these hires as part of the agenda of civilizing Indian peoples with good, but predominately unskilled, jobs. CATHLEEN D. CAHILL, FEDERAL FATHERS AND MOTHERS: A SOCIAL HISTORY OF THE UNITED STATES INDIAN SERVICE, 1869-1933, at 105-11, 134, 265 (2011). The rise of skilled labor at the turn of the twentieth century was seen as a threat to the Indian Office, and so the Office actively worked to keep skilled Indian employees from working for their own communities. *Id.* at 134-35.

291. Indian employment in the Bureau of Indian Affairs grew to 78% by 2011, part of the general pro-sovereignty renaissance in Indian policy that resulted from tribal and red power activism in the 1960s and 70s. *Id.* at 265; *see also* Morton v. Mancari, 417 U.S. 535, 538, 554-55 (1974) (discussing the Bureau of Indian Affairs hiring preference).

292. STUBBEN, *supra* note 259, at 44-45.

293. *Id.* at 45-46.

294. *See id.*

This too is a fundamental democratic mismatch. As long as federal law holds so much power over tribal citizens, they should have a proportionally strong say over what becomes federal law. This point is most striking in Congress, a body that has *plenary power* over tribes and their citizens. Without stronger representation for tribal citizens, when Congress exercises plenary power over them, its actions do not appear to be an exercise of democratic self-governance but of colonial rule.

C. Competing Sovereigns and Loyalties

1. Rival sovereigns

Beyond the concerns of representative mismatch with tribal citizens wielding power over state law and vice versa, the current system is made worse by the inherent tensions between states and Indian tribes—tensions that have existed since the very beginning of American history.

In the early days of the republic, Indian tribes were not assumed to be subsumed by the federal government or the territories of the states. Instead, the Indian tribes were often at odds with the states (or territories). Competing visions of federal power placed the federal government either in the role of referee or centralized Indian exterminator.[295] Many disputes between various states and tribes were brought on by state attempts to exert power over Indian peoples or governments without their consent.[296] These included attempts by the states to claim Indians and their lands within the state boundaries as part of the states, whether or not tribes or their citizens wanted to be a part of a state.[297]

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295. Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1006-07 (2014).

296. *See, e.g.*, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 7-8 (1831) (adjudicating a conflict arising from Georgia's attempts to exert control over citizens of the Cherokee Nation); Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2492 (2022) (adjudicating a case in which Oklahoma attempted to prosecute crimes committed by non-Indians against Indians in Indian country); Williams v. Lee, 358 U.S. 217, 223 (1959) (explaining that a state court's jurisdiction over reservation affairs would undermine authority of tribal courts); Bryan v. Itasca County, 426 U.S. 373, 375 (1976) (deciding whether Minnesota and its counties have authority to levy tax on the personal property of a reservation Indian on the reservation); U.S. COMM'N ON CIV. RIGHTS, A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY 3 (2003), https://perma.cc/DD8C-SF7L ("[S]ome states have encroached on tribal sovereignty, primarily through attempts to limit tribal government jurisdiction and to tax and regulate tribal enterprise."); David E. Wilkins, *Tribal-State Affairs: American States as 'Disclaiming' Sovereigns*, PUBLIUS, Fall 1998, at 55, 55 ("[S]tates have often acted as if they were the political superiors of tribal nations. Such assertions of state jurisdiction in Indian Country, absent tribal and federal consent, are problematic . . . .").

297. Ablavsky, *supra* note 295, at 1012 ("Virginia's delegates wanted authority over Indians within state borders . . . ."); *id.* at 1020 (noting that New York "argued that the Six Nations were members of the state within their jurisdiction" and sought title to their

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This degree of legal separation between Native people and states has consequences for the ability of Native peoples to achieve representation within states. For example, there is a widespread perception that some state officials justify neglecting their tribal constituencies because they do not pay the same taxes to states.[298] In one survey, many tribal leaders expressed that treatment by state officials reflected the attitude of "no taxes, no representation."[299]

To this day, the states and Indian tribes remain separate sovereigns who are often at odds.[300] When it comes to sharing resources, policy, or negotiating their shared legal spaces such as civil and criminal jurisdiction over non-Indians in Indian Country, tribes and states often find themselves facing off,[301] thereby worsening their historically poor relationships.[302] Though they often work collaboratively as separate sovereigns,[303] states are not ideal representative institutions for tribal citizens. In fact, they are often positioned as the rival or competing sovereign of tribal governments.[304] Although Indians

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lands.); *id.* at 1027-28 (noting that North Carolina tried to confiscate most of the Indian land within its borders by state statute); *id.* at 1076-78 (noting that such disputes continued after ratification of the Constitution); GREGORY ABLAVSKY, FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES 204-05, 212-13 (2021) (documenting similar conflicts between tribes, states, and the federal government over Indian affairs in the first federal territories that would later become Tennessee).

298. *See* U.S. COMM'N ON CIV. RTS., *supra* note 296, at 3-4.

299. STUBBEN, *supra* note 259, at 142.

300. *See, e.g.*, Tassie Hanna, Sam Deloria & Charles E. Trimble, *The Commission on State-Tribal Relations: Enduring Lessons in the Modern State-Tribal Relationship*, 47 TULSA L. REV. 553, 554 (2012) (providing "a history of how some of these leaders of tribal, state and local governments found alternatives to the growing enmity and conflict and found productive ways of dealing with a changed world"); Gover, Stetson and Williams, P.C., *Tribal-State Dispute Resolution: Recent Attempts*, 36 S.D. L. REV. 277, 277 (1991) ("Conflicts between states and Indian tribes have existed for as long as states have existed, and such conflicts are often bitter and prolonged.").

301. *See, e.g.*, Wang, *supra* note 259, at 8 ("[T]here is ongoing friction between states and tribes in some states where the state government has tried to impose rules and jurisdiction over the Native community."); Allison Fabyanske Eklund, Casenote, *When Losing Is Winning: American Indian Tribal Sovereignty Versus State Sovereignty After* Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996)*, 20 HAMLINE L. REV. 125, 126 (1996) ("Consequently, states and the tribes within their borders are often embroiled in jurisdictional and sovereignty-related disputes.").

302. *See, e.g.*, *Starbird Rep.*, *supra* note 162, at 72 (sharing an experience of the Penobscot Nation's representative to Maine, wherein she "candid[ly]" explained to a delegation of visitors that "the tribes' relationship with the state was not a good one").

303. Matthew L.M. Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal-State Relations*, 43 TULSA L. REV. 73, 82 (2007) (discussing the history of tribal-state rivalry and animosity and discussing how relationships have become more cooperative, particularly as of the 1980s).

304. *See* Matthew L.M. Fletcher, *States and Their American Indian Citizens*, 41 AM. INDIAN L. REV. 319, 337-41 (2017) (discussing the status quo of Indian-state relations and the

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are now citizens of states and state laws—and even taxes—apply in certain contexts on tribal land, states routinely reject responsibility for providing many government services to Indians.[305]

2. Tribal citizens in federal, state, and tribal elections

Some of the problems with low turnout among tribal-citizen voters have been attributed to tensions between some tribal citizens' loyalties to the United States and their traditional tribal forms of government.[306] Some tribal-citizen voters simply do not believe that their participation in state or federal elections will make a difference, particularly when compared to the importance of their participation in tribal affairs.[307]

There have been several attempts to measure how tribal-citizen voters feel about the different governments under which they live and to capture the effect, if any, on their participation in local, state, federal, and tribal elections.[308] The general picture painted by existing studies is that tribal citizens have little faith or trust in federal, state, or local governments and see their tribes as the sovereigns they trust the most, are most representative of them, and are most working with their interests in mind.

In a 1994 survey of tribal leaders across the country, no participants said they could trust the federal government to "always" handle Indian affairs responsibly, 11% said "most of the time," 54% said "some of the time," and 32% said "never."[309] Trust in state government was even worse, with only 10% of tribal leaders saying they felt states were working hard to help Native people, while 50.5% said they were working "not very hard," 31% said "not hard at all," and 8.5% said states were working against Native people.[310] These results are

practices of both sovereign conflict and state neglect as it relates to equal protection obligations); *see* U.S. COMM'N ON CIV. RTS., *supra* note 296, at 3-4.

305. *See* Fletcher, *supra* note 304, at 337-41; *see also* U.S. COMM'N ON CIV. RTS., *supra* note 296, at 3-4.

306. Bindell, *supra* note 252 (noting, based on a conversation with former tribal chair Ivan Sidney, that "[s]ome Hopis don't vote because it goes against their community's traditional form of self-government," which at some Mesas involves a system of religious leadership appointing tribal council members).

307. Wang, *supra* note 259, at 8.

308. *See* STUBBEN, *supra* note 259, at 140; NATIVE AM. VOTING RTS. COAL., VOTING BARRIERS ENCOUNTERED BY NATIVE AMERICANS IN ARIZONA, NEW MEXICO, NEVADA AND SOUTH DAKOTA: SURVEY RESEARCH REPORT 1-3 (2018), https://perma.cc/2FYP-8FY4 (showing that tribal citizens report little trust in local government and documenting tribal citizens' self-reported political engagement).

309. STUBBEN, *supra* note 259, at 141-42.

310. *Id.* at 142.

all the more damning considering that 42% of the sampled tribal officials also held federal, state, or local political office at some point in their careers.[311]

A recent study by the Native American Voting Rights Coalition surveyed Native voters living on reservations and in rural areas of four states with large Native populations: Arizona, New Mexico, Nevada, and South Dakota.[312] The write-in commentary resulted in general and state-specific qualitative findings about systemic distrust of non-tribal governments.[313] The surveys asked slightly different questions of voters, but reveal a similar trend: Tribal governments are far and away the most trusted government among tribal-citizen voters.

Table 1

Government Trusted Most to Protect Rights		
	Nevada[314]	**South Dakota[315]**
None/Don't Know	5.90%	3.97%
Local	11.09%	5.02%
State	13.06%	7.95%
Federal	28.00%	16.32%
Tribal	41.95%	66.76%
Total	100%	100%

Table 2

Trust Overall in a Particular Level of Government		
	Arizona[316]	**New Mexico[317]**
None	18.01%	19.60%
Local	16.46%	19.44%
State	28.42%	33.89%
Federal	22.05%	27.41%
Tribal	56.83%	55.48%

311. *Id.* at 148.

312. NATIVE AM. VOTING RTS. COAL., *supra* note 308, at 1.

313. *Id.* at 3 (general findings about voter Native distrust); *id.* at 9-10 (qualitative findings about Nevada Native voter distrust); *id.* at 38-40 (qualitative findings about South Dakota Native voter distrust).

314. *Id.* at 15-16.

315. *Id.* at 45.

316. *Id.* at 77.

317. *Id.* at 111-12.

It is difficult to obtain precise voting numbers, since tribes do not always make their voting data public. However, surveys of tribal members suggest that participation in tribal elections is higher than in any other elections—sometimes by large margins. One small survey found that tribal election participation was as high as 77%, compared to voting in non-tribal elections, which was as low as 42% over a similar period.[318] The Voting Rights Coalition Survey data confirms the greater participation in tribal elections compared to non-tribal ones, though by generally slimmer margins, as displayed in the following table.

Table 3

Reported Voting in Non-Tribal vs. Tribal Elections				
	Nevada[319]	**South Dakota[320]**	**Arizona[321]**	**New Mexico[322]**
Non-Tribal Elections	59.85%	55.80%	65.30%	69.19%
Tribal Elections	69.21%	88.08%	75.60%	73.01%
Difference	9.36%	32.28%	10.30%	3.82%

The level of distrust and tension particularly between states and tribes can at times make it difficult for tribal citizens to participate in state elections. As described by a Native vote organizer in Minnesota, some tribal leaders do not trust the state government enough to even share the information necessary to register to vote—they are too afraid it will be misused.[323]

D. Recent Tribal Successes and the Lobbying Fallacy

While Congress has played a historically important role in Indian affairs since its inception, there has been a powerful wave of contemporary scholarship arguing that Congress is more responsive or capable of responding to Indian law problems and Indian law interests than the courts. Indian law scholarship has little positive to say about the courts; recent scholarship has,

318. STUBBEN, *supra* note 259, at 130.

319. NATIVE AM. VOTING RTS. COAL., *supra* note 308, at 12-13.

320. *Id.* at 42-43.

321. *Id.* at 72-73.

322. *Id.* at 108-09.

323. Wang, *supra* note 259, at 8 (citing Telephone Interview by Tova Wang with Sally Fineday, Exec. Dir., Native Vote All. of Minn. (July 18, 2011)).

instead, suggested that tribes turn away from the Supreme Court and instead to Congress to protect tribal interests.[324]

In the 1960s and 1970s, tribes built up an infrastructure to push their agenda more effectively at the national level. The founding of the National Congress of American Indians in 1941, combined with several high-profile tribal advocacy efforts and a growing Red Power movement in the 1960s and 1970s, created a wave of momentum and "emerging sophistication" in tribal advocacy in Congress.[325]

In total, tribes have been able to achieve important successes with these efforts. Overall, the enactment rate for Indian-related bills is higher than general legislation in this new era.[326] Tribes can even prevent bills from passing if they are able to create unified tribal opposition to quash the legislation.[327] Some even suggest that tribal advocates are as effective at pushing their agenda as some of the well-financed lobbying of the private industry.[328] However, this

324. *See, e.g.*, Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495, 505 (2020) (arguing for federal court deference to the political branches, particularly Congress, about the inherently political aspects of federal Indian law due to the judiciary's limited institutional capacity of the judiciary to address such questions); Maggie Blackhawk, *On Power and the Law:* McGirt v. Oklahoma, 2020 SUP. CT. REV. 367, 402 ("Although *McGirt* is the rare example of a win for Indian Country in the courts, it more closely resembles the success of Native advocates before administrative agencies and Congress."); Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666, 672 (2016) (proposing that tribal litigants use the political question and plenary power doctrines to "give Congress exclusive jurisdiction to decide questions of inherent tribal authority" instead of relying on the Supreme Court's current implicit divestiture doctrine); Michalyn Steele, *Comparative Institutional Competency and Sovereignty in Indian Affairs*, 85 U. COLO. L. REV. 759, 762-65 (2014) (concluding that Congress, not the Supreme Court, is better positioned to define the scope of inherent tribal sovereignty); Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 483 (2005) (documenting how, historically, tribal advocacy in the Supreme Court has reinforced the plenary power of Congress). *But cf.* Kirsten Matoy Carlson, *Congress and Indians*, 86 U. COLO. L. REV. 77, 80 n.6 (2015) (collecting citations to scholarship that described a newfound faith in the courts based on litigation in the 1970s and 1980s).

325. Charles Wilkinson, *"Peoples Distinct from Others": The Making of Modern Indian Law*, 2006 UTAH L. REV. 379, 390-91 (citing a conversation with Forrest Gerard, who was a Blackfeet tribal member and in 1971 became the second American Indian congressional staffer, in which role he was responsible for Indian affairs on the Senate Interior Committee); *see also* Kirsten Matoy Carlson, *Lobbying Against the Odds*, 56 HARV. J. ON LEG. 23, 31-32 (2019) [hereinafter Carlson, *Lobbying Against the Odds*] (further describing this history); Kirsten Matoy Carlson, *Bringing Congress and Indians Back into Federal Indian Law: The Restatement of the Law of American Indians*, 97 WASH. L. REV 725, 730-33 (2022).

326. Carlson, *supra* note 324, at 87, 119.

327. Kirsten Matoy Carlson, *Beyond Descriptive Representation: American Indian Opposition to Federal Legislation*, 7 J. RACE ETHNICITY & POL., 65, 74-76 (2022).

328. Wilkinson, *supra* note 325, at 391 (citing a conversation with Forrest Gerard, in which he compares the quality of tribal representation to Microsoft and U.S. Steel).

success is not at all due to tribal-citizen democratic political power. Indeed, the low turnout and only recently organized Native vote efforts discussed earlier in this piece do not support this timeline. Instead, scholars who study this lawmaking renaissance attribute it to the successful development of tribal nations' (and citizens') ability to act like "interest groups."[329]

In other words, tribes have become highly effective Washington *lobbyists* in order to obtain success in the last fifty years.[330] Like other groups with limited political power, tribes have built an infrastructure to advance their interests that transcends the challenges they face as such a small and invisible minority.[331] As Charles Wilkinson documents in his seminal account on the rise of tribal nations in the 20th century, tribes in the 1950s "with few exceptions . . . . lacked the equipment to make their case in Congress."[332] But by the 1970s, tribal leaders were learning how to fight for their tribe's interests in Congress and engage in effective lobbying—though it would take a "prodigious amount of work."[333] As Wilkinson describes it, efforts like the Menominee restoration championed by the Ada Deer and the return of Taos Pueblo's Blue Lake were the result of a remarkable amount of work on behalf of the tribal advocates.[334]

Tribes had to do a lot of additional work to turn the tides of their invisibility and make their voices heard in Congress. Overall, Indian organization lobbying went up 600% between 1978 and 2012, the majority of which consisted of a 700% increase in the amount of lobbying by tribal governments.[335]

Kirsten Matoy Carlson, the leading scholar attempting to quantify tribal advocacy in Congress, describes the new era of congressional federal Indian law as "emerg[ing] out of a complicated, interactive process of encounters between Indians and non-Indians," where "Indians engage and challenge the

329. Kirsten Matoy Carlson, *Lobbying as a Strategy for Tribal Resilience*, 2018 B.Y.U. L. REV. 1159, 1221.

330. *See id.* at 1159; Wilkinson, *supra* note 325, at 392 ("For better or worse, the nature of democracy in modern America requires that any group affected by federal or state legislation must participate in politics, in lobbying, to protect or improve its situation. Tribes do not somehow control Congress, but they do operate on a surprisingly level playing field, and this has fundamentally changed the making of Indian laws."); STUBBEN, *supra* note 259, at 181-82 (discussing the rise in tribal lobbying and the role of casino money in financing it).

331. Carlson, *Lobbying Against the Odds*, *supra* note 325, at 25-26 (noting that Carlson's own findings mirror other scholars' research documenting lobbying efforts of persons with disabilities and marriage equality activists).

332. WILKINSON, *supra* note 236, at 66.

333. *See, e.g.*, *id.* at 189 (describing the efforts involved with the Menominee Restoration Act).

334. *Id.* at 186-89, 213-17.

335. Carlson, *Lobbying Against the Odds*, *supra* note 325, at 38-40. Notably, these numbers even dwarf the general increase in lobbyists documented by other scholars as occurring over a similar period. *See id.* at 25 & n.11.

political system" and "Congress is not merely a foreign governmental institution but a site of contestation."[336]

These successes are undeniable and important to our understanding of how tribes navigate the political process. Given the importance of federal law in the lives of tribal citizens, it is vitally important that this comparative focus on Congress continues. In large part, I agree with these scholars that Congress—rather than the federal courts—is a more capable and well-suited actor when it comes to making federal Indian law. However, that does not mean that Congress as it is currently structured is in the best possible position to consider tribal interests. These successes have not occurred because tribal-citizen voters have wielded important representative power within our democratic structures. Tribes have become highly active and effective lobbyists. But they never should have had to become lobbyists because they aren't interest groups but rather *governments.*

In a representative democracy, governments do not need to rely on lobbyists or an infrastructure of costly private advocacy to the same degree because *their interests are already represented.* Though they occasionally use them, states don't need lobbyists to the same degree as tribes.[337] It is the job of state and district representatives to advocate for the unique interests of the citizens and governments that they represent. States do, at times, hire lobbyists to advocate to Congress on their behalf. As of 2002, thirty-four states operated offices in Washington, D.C., to fight for their interests.[338] But those offices seem to focus their work on securing appropriations for the states and rely heavily on close relationships with their state's elected representatives.[339] It would be utterly bizarre to think about Maryland as an "interest group."[340] And yet, that is the position that tribal governments and the national organizations that represent their interests find themselves in. Instead of being treated like governments that deserve to be a part of the system of representative democracy, tribal governments are treated like private outside

336. Carlson, *supra* note 329, at 1220-21.

337. It is somewhat difficult to find research or news coverage documenting state lobbying efforts. They are discussed generally or referenced in Kathleen Murphy, *States Lobby Congress for Federal Funds*, PEW: STATELINE (Feb. 8, 2002), https://perma.cc/P2G9-EP5Y.

338. *Id.*

339. *Id.*; RICHARD G. NIEMI & JOSHUA J. DYCK, GUIDE TO STATE POLITICS AND POLICY 13 (2014), https://perma.cc/787T-4ABB. Cities also sometimes hire lobbyists, particularly cities in states that have Senators of the opposite political party as the political preferences of the city. Julia Payson, *Cities Regularly Hire Lobbyists. It Pays Off for the Richest Cities*, WASH. POST (Apr. 1, 2022), https://perma.cc/3QVE-BZPP.

340. *Cf.* Robert J. Reinstein, *Foreword: On the Judicial Safeguards of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 343, 345 & n.12 (2008) (describing states as effectively "special interest groups" that engage in lobbying that "can reflect [what is best for their] parochial and bureaucratic self-interests" or the broader self-interest).

interest groups who need to invest enormous amounts of time and resources to be heard.[341]

Tribal consultation has also emerged—ensuring that the Executive Branch at the very least consults with tribal nations about policies that affect them.[342] Consultation increases transparency and creates some form of accountability through the reporting and response mechanisms that are often required.[343] A more in-depth discussion of consultation is beyond the scope of this Article, but for now, it is adequate to say what consultation is not: Consultation does not give tribal governments a veto or any actual control over the policies that impact them.[344] It simply creates a mechanism for tribal governments to be heard on

341. The rise of tribal campaign contributions has also increased with Indian gaming from the 1990s to the 2000s. Wealth, donations, and therefore potential political influence is concentrated in a handful of tribes, a problem exacerbated by the rising costs. In each of the 2002 and 2004 elections, for example, tribes spent over $7 million dollars, and 80% of that amount in 2002 came from thirty gaming tribes. WILKINS, *supra* note 75, at 194.

342. The Bureau of Indian Affairs defines tribal consultation as "a formal, two-way, government-to-government dialogue between official representatives of Tribes and Federal agencies to discuss Federal proposals." *What is Tribal Consultation*, BUREAU OF INDIAN AFFS., https://perma.cc/3R68-XTR9 (archived Feb. 23, 2024). Consultations are required when an agency action will have substantial direct effects on one or more Indian tribes or their relationship to the federal government and must occur before the federal agency makes its decision. *See id.* "The Federal agency provides sufficient advance notice to appropriate Tribal leaders of upcoming consultation sessions and, following the consultation sessions, explains to those Tribal leaders how the final agency decision incorporates Tribal input." *Id.*

343. *See* Memorandum of April 29, 1994: Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22951 (May 4, 1994) (requiring that agencies hold "open and candid" consultation with tribal governments and assess the impact of agency action on tribal trust resources); Exec. Order No. 13084, 63 Fed. Reg. 27655 (May 19, 1998) (requiring that agencies provide written justification to the Office of Management and Budget when promulgating a regulation that imposes costs on tribal governments); Exec. Order No. 13175, 65 Fed. Reg. 67249 (Nov. 9, 2000) (requiring that agencies provide, when issuing a regulation with tribal implications, a tribal summary impact statement that describes the agency's consultations with tribal leaders, the leaders' concerns, and the agency plans to address those concerns); Memorandum of November 5, 2009: Tribal Consultation, 74 Fed. Reg. 57881 (Nov. 9, 2009) (requiring that agencies designate officials and prepare progress reports on their implementation of Executive Order 13,175); Memorandum of January 26, 2021: Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7491 (Jan. 29, 2021) (requiring that agencies submit summaries of their implementation of Executive Order 13,175 to the Director of the Office of Management and Budget); Memorandum of November 30, 2022: Uniform Standards for Tribal Consultation, 87 Fed. Reg. 74479 (Dec. 5, 2022) (requiring that agencies post public point of contact for tribal consultation, provide notice of consultation, and maintain records of consultation).

344. Tribal consultation has been praised as well as criticized by tribal leaders and scholars. Scholars have highlighted that it is a step in the right direction, yet it has practical shortcomings and fails to meet important standards such as tribal consent. *See, e.g.*, Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame?*, 24 AM. INDIAN L. REV. 21, 21-24 (1999);

footnote continued on next page

those issues without challenging the federal government's monopoly on actual decision-making power.[345] Consultation is not a democratically representative system. It is far closer to the process of notice and comment rulemaking, whereby interested groups are able to provide input on a government action in the hopes of persuading them.[346] As such, consultation is far closer to structured lobbying than it is to representative democratic governance.

Tribal advocates and citizens consistently bring up invisibility, distrust, and the sense that local, state, and federal governments do not take into consideration tribal priorities or fairly allocate resources to tribes.[347] In a survey of current and former tribal leaders, 41% said Congress best protected tribal sovereignty, compared to 23% who said the Supreme Court, and only 6% who said the President.[348] However, 31% said none of the three branches protected their sovereignty.[349] And when asked specifically about how Congress was handling Indian affairs, 75% disapproved.[350] The bottom line is that while congressional policies might be better for tribes and tribal citizens

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Robert J. Miller, *Consultation or Consent: The United States' Duty to Confer with American Indian Governments*, 91 N.D. L. REV. 37, 67 (2015); Letter from Jefferson Keel, President, Nat'l Cong. of Am. Indians, to Tom Vilsack, U.S. Sec'y of Agric. (Dec. 14, 2009) (on file with author), https://perma.cc/YQG7-AMEK ("Tribal concerns boil down to . . . [a fear that consultation is] viewed by federal agencies as merely a procedural requirement. . . . Tribal leaders spend a great deal of time and resources . . . only to receive little response . . . . Sometimes federal agencies ignore or refuse to carry out their responsibilities . . . and there are no mechanisms for accountability.").

345. There has also been a great deal written about where tribal consultation can be either expanded or how it can be reformed. *See, e.g.*, Troy A. Eid, *Beyond Dakota Access Pipeline: Energy Development and the Imperative for Meaningful Tribal Consultation*, 95 DENV. L. REV. 593, 601-04 (2018); Aila Hoss, *Securing Tribal Consultation to Support Tribal Health Sovereignty*, 14 NE. U. L. REV. 155, 178, 180-82 (2022); Michael Eitner, Note, *Meaningful Consultation with Tribal Governments: A Uniform Standard to Guarantee That Federal Agencies Properly Consider Their Concerns*, 85 U. COLO. L. REV. 867, 885, 895-97 (2014); Elizabeth Kronk Warner, Kathy Lynn & Kyle Whyte, *Changing Consultation*, 54 U.C. DAVIS L. REV. 1127, 1136-37 (2020).

346. *See* TODD GARVEY, CONG. RSCH. SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 2 (2017) ("In an effort to ensure public participation in the informal rulemaking process, agencies are required to provide the public with adequate notice of a proposed rule followed by a meaningful opportunity to comment on the rule's content.").

347. *See, e.g.*, Joe McCarthy, *Native American Voters, Long Disenfranchised, Could Play a Decisive Role in the 2020 Election*, GLOBAL CITIZEN (Oct. 12, 2020), https://perma.cc/C7RB-HQV7 ("If the interests of tribal members were taken into consideration at the local, state, and federal levels, then the pandemic wouldn't have had such a devastating impact on communities because resources would have been made available well in advance."); Bindell, *supra* note 252 (capturing voter sentiment that state and federal official do not engage with tribal interests).

348. STUBBEN, *supra* note 259, at 140.

349. *Id.*

350. *Id.* at 141.

than in previous generations, Congress still has a long way to go to earn the trust of tribal citizens.

III. Representative Remedies

This final Part asks that you open your imagination to alternatives to the status quo. It is simply not the case that the fifty states as we know them were the only possible outcome. There have always been other governments in the United States that could have been admitted as "states" but were generally excluded from admission: the precolonial governments that are the Indian tribes. While colonial and territorial governments were often seen as states in waiting, tribes generally were not. And when they were, they were offered statehood only on terms that were intolerably destructive to their culture, identity, sovereignty, or institutions. The absence of tribal states or the failure to admit them into the Union on different terms—ones that didn't deprive them of tribal sovereignty or real representative power within the United States—is just as much a part of the story.

A. Seating the Cherokee Delegate

The Cherokee Nation is, at present, engaging in a campaign to seat their long-promised delegate.[351] The Principal Chief of the Cherokee Nation appointed Kim Teehee to be its delegate, and she currently awaits Congress's approval.[352] The Nation has made seating its delegate as soon as possible a top political priority, releasing an advocacy video[353] and maintaining a website that helps citizens directly lobby Congress for the seats.[354] The House held hearings on seating the delegate,[355] but the issue has failed to gain political traction compared to other issues in Congress.

The Cherokee Nation bargained for a voice in American democracy—specifically, for a delegate in Congress. The delegate term was key to the Treaty of New Echota. After a rumor that the bill ratifying the treaty might be amended to provide an "agent" rather than a "delegate," the head Cherokee

351. Blair, supra note 216, at 226-27 (laying out the historical context and democratic benefits of seating a Cherokee delegate); Clare Foran, *House Panel Plans to Hold Hearing on Push to Seat Cherokee Nation Delegate*, CNN (Nov. 3, 2022, 6:08 PM EDT), https://perma.cc/FWJ7-X4B2.

352. Olafimihan Oshin, *Cherokee Nation Chief Optimistic About Seating Delegate in Congress*, HILL (Dec. 13, 2021, 12:51 PM ET), https://perma.cc/AEW6-EQDA.

353. Cherokee Nation, *supra* note 218.

354. The Cherokee Nation maintains a website that helps people email their member of Congress directly about the delegate. SEAT THE CHEROKEE NATION DELEGATE, https://perma.cc/8LW2-NVQN (archived Feb. 23, 2024).

355. *See Hoskin Statement*, *supra* note 212; Foran, *supra* note 351.

negotiator, John Ridge, objected vehemently.[356] In a letter to the bill's author, he wrote, "If you fail to obtain for us the right of being heard on the floor of Congress, by our Delegate, let the Bill perish here, without the trouble of submitting it to our people only to be rejected."[357]

The terms of this treaty are clear. Article Seven reads, "The Cherokee nation . . . shall be entitled to a delegate in the House of Representatives . . . whenever Congress shall make provision for the same."[358] The phrase "shall be entitled" creates a clear right for the Cherokee to have a delegate, and a duty for the House of Representatives to seat them. It does not say, "if Congress makes provisions," but "when."

The treaty phrasing "whenever Congress shall make provisions" makes eventual obligation clear while allowing time for necessary arrangements. Nearly 200 years is time enough, even with the most generous reading. And there is no question that the Treaty remains good law. A treaty can be dissolved only by unmistakably clear legislation,[359] and just a few years ago the Supreme Court affirmed that these removal-era treaties remain good law.[360]

Some may wonder how other tribes feel about the Cherokee Nation getting a delegate—does it create an inequity with other tribes? Other Cherokee tribes have raised concerns about which contemporary Cherokee nation is the heir or if there can be multiple heirs to the original Cherokee delegate promise.[361] This conflict between the different Cherokee nations will likely be resolved via political or legal processes. But the argument that the rest of the federally recognized tribes—who are not arguable successors to the Treaty of New Echota—would protest the seating of a Cherokee delegate because it would give one tribe a unique right in a way that could be perceived as unequal, misunderstands the distinct nation-to-nation relationship that each tribe has with the federal government. Unlike states, which have a claim to the same status as a "state" and therefore all are equally entitled to the same things under

356. Memorandum from Jenner & Block LLP on the Cherokee Delegate 16 (June 5, 2021) (quoting Letter from John Ridge to George R. Gilmer, *supra* note 212) (on file with author).

357. Hoksin Statement, *supra* note 212 (quoting Letter from John Ridge to George R. Gilmer, *supra* note 212).

358. Treaty of New Echota, *supra* note 209, art. 7.

359. McGirt v. Oklahoma, 140 S. Ct. 2452, 2462, 2469 (2020).

360. *Id.* at 2459 (upholding the Muscogee (Creek) Nation's Reservation Boundaries as established by the United States's 1832 Treaty with the Creek Nation).

361. Hailey Fuchs, *Cherokee Tribes Turn to K Street to Fulfill a 187-Year-Old Promise for a Seat in Congress*, POLITICO (Jan. 10, 2023, 4:30 AM EST), https://perma.cc/8RH8-SSG8.

the Constitution,[362] there is no such clear status of "Indian tribe" with a clearly delineated set of rights and powers in the Constitution. Whatever clarity exists with regard to the status of being an "Indian tribe" in the current state of the doctrine has developed over time with the recognition that different tribes in fact may have different rights based on what they negotiated for in their individual treaty promises with the United States.

So, a delegate would, indeed, be an inequity, but the kind of inequity that is part of the system of individual nation-to-nation agreements—treaties—shaping much of federal Indian law doctrine and the rights, lands, and powers of individual tribes. The Cherokee Nation bargained for this unique provision in exchange for rights and territory it specifically ceded. Seating the Cherokee Nation's delegate is just another treaty right that ought to be upheld by the United States like any other. The National Congress of American Indians affirmed as much in its 2019 resolution supporting the delegate.[363] The resolution reads:

> [T]he National Congress of American Indians (NCAI) fully supports the exercise of tribal treaty rights, including the seating of a Delegate in the U.S. House of Representatives where promised, and calls upon the House of Representatives to fulfill its obligation to tribal nations, including the Cherokee Nation by seating its named Delegate in Congress.[364]

Even with broad support, however, the terms of the treaty require that Congress "make provisions" to seat the delegate, which makes this a treaty right subject to political enforcement.[365]

B. Tribal States

Statehood should remain a possibility for Native tribes. However, it remains a complex and imperfect solution. Statehood comes with a bucket of unique powers as well as limitations that tribes have been traditionally hesitant of—and for good reason.[366] In drafting the Indian Civil Rights Act (ICRA), which applies the majority of the Bill of Rights to tribal governments, Congress was careful to exclude rights which imposed assimilative political

362. States have asserted equal sovereignty claims quite successfully, regardless of its actual legal or textual foundations. *See* Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1211 (2016).

363. Supporting the Assertion of Tribal Treaty Rights to Seat a Delegate in the United States House of Representatives, Res. #ABQ-19-024, Nat. Cong. of Am. Indians (2019), https://perma.cc/E5SJ-5RKZ.

364. *Id.*

365. Treaty of New Echota, *supra* note 209, art. 7.

366. *See* Ablavsky, *supra* note 70, at 27 (discussing the complexities involved in extending statehood to Native nations).

pressure on Indian tribes.[367] Most notably, the Establishment Clause of the First Amendment was omitted in recognition of the important role religion plays in several tribes' governing structures, which they did not want to give up.[368] If consideration of tribal states reemerged, it would be a difficult decision for a great many tribal governments who have decided not to exercise their sovereign powers where these expanded powers came with Bill-of-Rights-like "strings."[369] For some tribes, providing the right to an attorney—though fundamental to American constitutional rights—interferes with their ability to use traditional methods of conflict resolution and instead requires them to conform to the American adversarial justice system model.[370] In other words, statehood itself comes with an assimilative colonial cost.

To allow Indian tribes to fully participate in American governance, we need to think about what form that participation could take other than statehood. What if tribes don't want to be American states? Do we, as we have in the past, deny them political power unless they are willing to conform? To do so would undeniably be assimilative colonialism. To truly brake with assimilative colonialism and its legacy, we will have to think differently.

C. Looking Beyond the Statehood Model

Representation for Indigenous populations or governments is not a problem unique to the United States. I am skeptical of overgeneralization when

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367. S. REP. NO. 90-841, at 6-7 (1967). For a discussion of ICRA's effects, see Matthew L.M. Fletcher, *Resisting Congress: Free Speech and Tribal Law*, *in* THE INDIAN CIVIL RIGHTS ACT AT FORTY 133, 140 (Kristen A. Carpenter, Matthew L.M. Fletcher & Angela R. Riley eds., 2012). *See generally* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 51-52 (1978) (holding that ICRA does not subject tribes to the jurisdiction of federal courts in civil actions for declaratory or injunctive relief).

368. U.S. COMM'N ON CIV. RTS., THE INDIAN CIVIL RIGHTS ACT 5 (1991), https://perma.cc/5RTW-AGK4; Patrick M. Garry, Candice J. Spurlin, Jennifer L. Keating & Derek A. Nelsen, *Tribal Incorporation of First Amendment Norms: A Case Study of the Indian Tribes of South Dakota*, 53 S.D. L. REV. 335, 342 (2008) (collecting sources on tribal opposition to ICRA).

369. Tribes have not all made use of the enhanced sentencing powers available to tribal governments under the Tribal Law and Order Act of 2010; neither have they all expanded criminal jurisdiction over non-Indians under the 2013 and 2022 reauthorizations of the Violence Against Women Act. *See* Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73, 77-78 (codified as amended at 25 U.S.C. §§ 1301-1304); Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258, 2279-80 (codified as amended at 25 U.S.C. § 1302a); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 122-23 (codified as amended at 25 U.S.C. § 1304 and 18 U.S.C. § 2265); Consolidated Appropriations Act of 2022, Pub. L. No. 117-103, tit. VIII, 136 Stat. 49, 901 (codified as amended at 25 U.S.C. §§ 1302-1304).

370. *See* Lindsay Cutler, Note, *Tribal Sovereignty, Tribal Court Legitimacy, and Public Defense*, 63 UCLA L. REV. 1752, 1758, 1764, 1777 (2016).

it comes to the different colonial histories, nationwide values, and legal regimes surrounding Indigenous peoples. However, examining other nations' models of Indigenous representation demonstrates that giving the original polities of the continent—or the descendants of their citizens—their own voices within the ultimate post-colonial multi-ethnic democratic government is not novel.

By looking at these other models of Indigenous representation, we can pivot back to our own system and dream more freely. Undoubtedly, many of the reforms that would address the problems discussed in this Article are either incredibly politically challenging or require a constitutional amendment. Right now, the Constitution entitles only the states to send voting representatives to Congress.[371] To change that, we would need to amend the Constitution. But that does not mean that a constitutional amendment is not the best solution to address the problem. We built the original system without including some of our governments. Of course we might need to remake its foundations to finally make it work for all of our Nation's governments and peoples. This portion of the Article puts several proposals on the table without regard for these considerations.

1. Global models of indigenous representation

The United Nations Declaration on the Rights of Indigenous Peoples notably includes a right to self-determination.[372] Other world constitutions provide several models for Indigenous representation. The Constitution of Bolivia gives the Indigenous people and nations of the country proportional representation and the ability to select their candidates "according to their own democratic communitarian norms."[373] The Constitution of Colombia sets aside two seats in the Senate that are chosen by Indigenous communities and includes a requirement that the Indigenous Senators have previously served as leaders in their traditional communities or Indigenous organizations.[374] The Constitution of Uganda also guarantees seats in the regional assembly to Indigenous community leaders, although it caps the total number of Indigenous representatives allowed in the body at fifteen percent of the total number of seats.[375] The Constitution of Venezuela gives Native peoples a

371. *See, e.g.*, U.S. CONST. art. I, §§ 2-3 (describing the numbers and process for determining the number of representatives and senators for each state).

372. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, art. 3 (Sept. 13, 2007). *See generally* Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173 (2014) (discussing the history of international Indigenous rights concepts, such as self-determination, and their controversial role in Indigenous rights movements today).

373. CONSTITUCIÓN POLÍTICA DEL ESTADO. arts. 147, 210-211 (Bol.).

374. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 171.

375. CONST. OF THE REPUBLIC OF UGANDA (1996) art. 178.

general right to participate in politics and guarantees representation in the National Assembly as well as in local entities.[376] The Constitution of Zimbabwe allocates sixteen seats for chiefs.[377] Norway, Sweden, and Finland also have Sámi Parliaments which, generally speaking, provide authoritative but non-binding advice on Sámi matters to their governments.[378]

Among these models, the most well-known and oldest example of reserved seats are those in the Parliament of New Zealand which were guaranteed to the Māori in the Representation Act of 1867.[379] The Parliament set aside a minimum of four seats in its House of Representatives for Māori men over the age of twenty-one to elect based on three districts drawn for the North Island and one for the South.[380] At the time of its creation, the allocation of four seats was quite small compared to the per capita size of the Māori population (which would have entitled them to between fourteen and sixteen seats).[381] This arrangement was expected to be temporary, as it was believed that the forces of assimilation would instead integrate the Māori and make them individual landowners with property-based voting rights, but the system became permanent after less than a decade.[382] The 1893 Electoral Act gave all New Zealand women, including Māori women, the right to vote.[383] Other election law changes in 1893 and 1896 ensured that landholding Māori and so called "half-caste" Māori (Māori with one European parent) were not able to vote in both general and Māori elections.[384] Instead, Māori eligible for both the general election (called European seats at the time) and the Māori election were able to choose which representative system they wanted to opt into.[385] In 1975, the New Zealand government formalized this process through the "Māori

376. CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, art. 125.

377. CONST. OF ZIMBABWE (2013) art. 120.

378. 1-2 ch. 1, 5, 9 §§ Act on the Sámi Parliament (1995:974), (1995) (Fin.); 1 ch. 1-2 §§ (Svensk författningssamling [SFS] 1992:1433) (Swed.); 2 ch. 1, 3-4 §§ The Sami Act (1987:56) (Nor.). The United Nations Human Rights Committee also recently found that Finland had violated the Sámi people's rights to political participation by interfering with the ability of the Sámi to determine their own representatives by increasing the number of electors without their consent. *See* Press Release, Office of the United Nations High Commissioner for Human Rights, UN Human Rights Experts Find Finland Violated Sámi Political Rights to Sámi Parliament Representation (Feb. 4, 2019), https://perma.cc/C2TT-8NH4.

379. *Māori and the Vote: Setting Up the Māori Seats*, N.Z. HIST. (Nov. 28, 2016), https://perma.cc/VGS7-4ZWY.

380. *Id.*; Māori Representation Act 1867, ss 2-3, 6 (N.Z.).

381. *Māori and the Vote: Setting Up the Māori Seats*, *supra* note 379.

382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.*

electoral option," held alongside or following the census, in which Māori citizens could choose whether they wanted to enroll in the election rolls for general or Māori seats.[386]

When New Zealand turned to electoral reform in the mid-1980s, the Royal Commission on the Electoral System's report suggested that "separate seats had not helped [the] Māori," and so advocated for the abolition of the Māori seats as part of the transition to a mixed-member proportional system.[387] However, the Māori fought vehemently against the abolition of their separate seats and were ultimately successful in retaining their right to separate representation.[388] In the time since the change to the mixed member voting system, the number of seats allocated to Māori representatives has increased from four to seven.[389]

Every five or six years the New Zealand government would hold the "Māori Electoral Option" in which the Māori could decide whether they want to be a part of the "general roll" or the "Māori roll" to vote for representatives.[390] Because they cannot vote in both elections, they were required to pick only one, afterwards allowing the government to appropriately apportion seats based on population.[391] In March of 2023, New Zealand did away with the formal Māori option elections; rather than forcing Māori citizens to wait years for new option elections, New Zealand allowed them to specify which roll they wanted to be on up until three months before any election.[392] Since 1997, the Māori roll has been the choice of between 52% and 58% of Māori voters.[393]

Part of what makes the Māori system so intriguing is that it works for an Indigenous population after diaspora. While it does not allow specific Indigenous governments direct representation, it allows the general Māori population to have a distinct Māori voice in the electoral process.

386. *Maori and the Vote: Change in the 20th Century*, N.Z. HIST. (July 12, 2016), https://perma.cc/89DE-8E5H.

387. *Id.*

388. *Id.*

389. *Id.*

390. *What Is the Maori Electoral Option?*, ELECTORAL COMM'N N.Z., https://perma.cc/7ZUW-32CD (archived Feb. 25, 2024).

391. *How Are Electoral Boundaries Decided?*, ELECTORAL COMM'N N.Z., https://perma.cc/L44K-MD3W (archived May 1, 2024).

392. *What Is the Maori Electoral Option?*, *supra* note 390.

393. *Id.*

2. Imagining a better representative structure for Native nations

Representation through the states simply does not work or make sense for Indian tribes. The status quo of tribal-citizen representation flowing through the states that their reservations are geographically within is a disservice to both tribes and states. We ought to think seriously about the need to develop a representative structure that would better suit tribal citizens, tribal governments, and their interests.

There are many ways to do this. First and foremost, *it should be done with the tribes instead of for them.* Tribal input is paramount in creating a solution that works for Indian Country. Indeed, in writing this Article, I am hesitant to say anything about the structure of such a solution because I believe quite firmly that it is not my place to do so.

However, I recognize that it is difficult for many people to imagine the kind of reordering I envision without concrete examples. As such, I propose a few starting points to think about the scope of such reforms. First, there is always the possibility of tribes becoming states. As discussed above, there are limitations and potentially assimilative colonial costs to that decision—but some tribes may still make that choice, and it ought to be offered to them. The Constitution makes this politically challenging, however, since state legislatures can exercise a de facto veto over any attempt by their citizens to form a new state,[394] and Congress—which is composed of the current states' chosen representatives—decides whether to admit new states and under what circumstances.[395]

But there is also the possibility of creating a non-state entity with state-like characteristics. This new entity—we could call it a "Tribe"—could have a different status, and therefore a different set of limitations, powers, and responsibilities than states. Tribes might send just one senator. Or they might be able to send no senators, but—like states—always get to send at least one representative regardless of their population. They could be required to comply with something like the Bill of Rights but without an establishment clause or with a special exemption for Tribes that cannot afford to pay for indigent counsel. If everything were on the table, the status or representative power a Tribe might have could look a variety of different ways.

Another option, somewhat inspired by the Māori system, is to think of Indian Country collectively as an entity, with representative power akin to a state to send two senators to Congress. This seems abundantly fair. Indian Country is a "state-sized" entity.[396] The Tribes collectively control around 100 million acres of land—approximately the size of California—and,

394. U.S. CONST. art. IV, § 3.

395. *Id.*

396. NAT'L CONG. OF AM. INDIANS, *supra* note 8, at 10.

individually, nineteen tribes' reservations are larger than Rhode Island.[397] These senators could be popularly elected or they could be chosen by a vote of delegates from each of the federally recognized tribal governments. There could even be a hybrid model akin to the Electoral College wherein each tribe controls a certain number of electors based on population, but smaller tribes possess a relatively larger voice. It could be up to each tribal government to decide how their electors are chosen—for example, by tribal popular vote or by the existing tribal government. A system like this would allow for deference to tribal government structure, while simultaneously incorporating tribal sovereign structure into representative democracy. Two tribes, the Navajo Nation and the Cherokee Nation—which each are comparable in population to a state—boast tribal memberships of 300,000 to 400,000 each and continuing to grow.[398] These two tribes in particular have a strong case for two senators of their own.

Indian Country could also be given the ability to send voting representatives to the House. Tribal citizens, both on and off their reservations, could—just as with the Māori roll—decide whether to be counted and apportioned based on where they live along with state citizens or based on their tribal memberships. This would require reapportioning House seats after setting aside the population of tribal citizens that opt into the tribal roll. The number of tribal citizens of each tribe would thus need to be counted as a part of the census, and the number of seats for Indian Country apportioned based on population. That exercise itself would be valuable since there is no tribal-citizen census and the estimates of that population are difficult to make. The number of self-identifying Native Americans or Alaska Natives in the 2020 census was 9.7 million.[399] At the current number of about 761,169 people per seat apportioned in Congress,[400] that population could entitle tribal-citizen voters to twelve to thirteen seats in the House. However, the number of tribal citizens is likely smaller, since the census is a self-reporting racial category. Tribal membership often has more stringent criteria, frequently based on descendancy like many other national citizenships.[401] If data exists on this population, it is not publicly available, and there are not other approximate measures of the size of the tribal-citizen population that are particularly

397. *Id.*

398. Romero, *supra* note 9.

399. Nicole Chavez & Harmeet Kaur, *Why the Jump in the Native American Population May Be One of the Hardest to Explain*, CNN (Aug. 19, 2021, 4:53 PM EDT), https://perma.cc/S9HA-9SC8.

400. Zachary B. Wolf, *See How Your Votes Aren't Equal*, CNN (Oct. 25, 2022, 5:02 AM EDT), https://perma.cc/97Y5-5SAZ.

401. Scott Titshaw, *Inheriting Citizenship*, 58 STAN. J. INT'L L. 1, 4 (2022) ("There are very few rules of law as universally recognized as inherited citizenship . . . .").

reliable.[402] Such a count, however, should likely be tribally administered, as the variations in tribal enrollment are complex; this approach would combat concerns that self-identification of tribal ties exceeds the actual number of tribal citizens.[403]

In terms of how to divide that population into districts, the National Congress of American Indians already has a system for doing so: geography. The Congress uses twelve "regional caucuses" as subnational organizational structures.[404] These are an obvious starting point for constructing tribal congressional districts that could be reapportioned based on the size of the Native roll.

Offering political power to tribes on terms that they want may mean reforming the basic building blocks of our institutions. But we ought to at least consider decoupling the idea of political representation from the exclusive institution of statehood precisely because of the legacy of assimilative colonialism that has haunted this question.

Conclusion

This Article asks what tribal congressional representatives, tribal states, court systems, agencies, and doctrines could and should have been if tribal governments had not been discriminated against but instead were treated with respect, dignity, and acceptance.

The United States continues to dismiss and delegitimize tribal governments as truly equal sovereigns within the American political project, despite tribes' attempts to earn that respect and legitimacy by adopted constitutions or trading land for citizenship. This dismissal continued long after Native peoples were all made citizens of the United States. Even the

402. *See* NAT. CONG. OF AM. INDIANS, POL'Y RSCH. CTR., RESEARCH POLICY UPDATE: 2020 CENSUS RESULTS: REGIONAL TRIBAL LAND DATA SUMMARY app. B (2021), https://perma.cc/YDY7-N75V (explaining that the Census does not collect tribal-citizen data, and that only individual tribes have that data). It is possible that there is an internal number that the Executive Branch has to estimate tribal citizens, but it has not made this number public or disclosed any methodology for calculating it. *See* ERIC C. HENSON, MIRIAM R. JORGENSEN, JOSEPH P. KALT & ISABELLE G. LEONAITIS, NATIVE NATIONS INST., ASSESSING THE U.S. TREASURY DEPARTMENT'S ALLOCATIONS OF FUNDING FOR TRIBAL GOVERNMENTS UNDER THE AMERICAN RESCUE PLAN ACT OF 2021, at 5-6 (2021), https://perma.cc/2PPE-NZHG.

403. *See* NAT. CONG. OF AM. INDIANS, POL'Y RSCH. CTR., CENSUS 2020: CONCERNS ABOUT TRIBAL ENROLLMENT QUESTION (2020), https://perma.cc/AV2U-85A7.

404. *See* Letter from Patrick Anderson, Elec. Comm. Chair, Nat. Cong. of Am. Indians, to the Membership of the National Congress of American Indians (Oct. 8, 2021) (on file with author); *NCAI Leadership*, NAT. CONG. AM. INDIANS, https://perma.cc/E2TG-9KXZ (archived Feb. 23, 2024).

explicit promise the United States made to give the Cherokee Nation a delegate in Congress has not been kept.

Upon arriving on a continent already populated with existing peoples and nations, the most straightforward path to establishing a new nation would be to absorb the peoples *and their governments*. Making use of existing institutions and respecting the integrity of existing borders seems far more efficient and effective than fighting against the status quo of self-determined political ordering. Yet this has not often been the path of colonialism. The existing institutions of government were often dismantled, borders largely ignored, and peoples divided or relocated. The remaining tribal governments in the United States have survived varying degrees of political violence and were ultimately partially absorbed into the United States; they were not integrated into existing political structures.

The relationship between tribal governments and the United States is still one between colonizer and colonized. This relationship unsurprisingly carries a hostility that contributes to a mutual desire not to integrate the two political systems. Part of this is an unavoidable legacy of violent conflict or the rational expression of separate nationalisms that resists merging distinct polities.[405] However, an aspect of this resistance is the result of a series of choices made by the colonizing country—in this case the United States—about how to relate to and absorb the colonized nations. I describe this manufactured incompatibility between Indianness and political power within the United States as an instance of "assimilative colonialism." It is my hope that naming this particular dynamic helps us better recognize it and counteract its effects throughout American law and institutions.

This Article is about Indians in the sense that it highlights the lack of representation for tribal nations as a unique problem. Tribal nations are undeniably separate entities from the states, yet they are denied their own voice in representative democracy. But this Article is also about more than Indians. The story of Native peoples being denied political power and tribal nations being denied a structural role in American democracy is a story about race and American democratic institutions writ large. And it is a story about challenging the immutability of our fifty states and the state system.

This Article is a call to examine not the effects of structural racism but the effects of racism on structure—specifically our current system of representative government. Our fifty-state status quo is neither inevitable nor race-neutral; other geographic configurations or representative structures that

405. *See* SIMPSON, *supra* note 75, at 10 ("[S]overeignty may exist within sovereignty. One does not entirely negate the other, but they necessarily stand in terrific tension and pose serious jurisdictional and normative challenges to each other: Whose citizen are you? What authority do you answer to? One challenges the very legitimacy of the other.").

include representation for tribal governments are possible.[406] This Article argues that we ought to recognize America's present state-based representative system of government as one that reflects not race-neutral representative democratic values, but efforts to create and maintain white political power in the United States.[407] It is increasingly acknowledged that racism is "in the fabric" of America.[408] This Article demonstrates how racism is also part of the structure and "in the bones" of our democratic institutions.

These observations flow from recognizing what our government structure is, but also recognizing what it is not. It is built on this legacy of assimilative colonialism, and it is not a truly representative democracy—not while we continue to exclude tribal governments from our democratic project.

The exclusion of Indians from political power should be a transformative tension. We are not a real republic or a democracy while we have representative institutions built on the continued exclusion of the non-white governments within our system: the Indian tribes. The representative

406. I am certainly not the first person to suggest that the Constitution is not race-neutral or that its structural arrangements are imbued with the history of racial oppression. This critique is, instead, one focused on the democratic and representative aspects of the Constitution—that is, the parts of the Constitution that concern the selection of persons and institutions that wield power in citizens' names, as well as the various allocations of power among those people and institutions. Other scholars have made similar critiques about the role that race plays in the structure of the Constitution, though they have focused on different aspects of our history with racism or the structure of the Constitution. *See* Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423, 424 (1999) ("The Constitution of 1787 was a proslavery document, designed to prevent any national assault on slavery, while at the same time structured to protect the interests of slaveowners at the expense of African Americans and their antislavery white allies."); Richard Delgado & Daniel A. Farber, *Is American Law Inherently Racist?*, 15 T.M. COOLEY L. REV. 361, 364 (1998) (defining inherent racism as consistently "recurrent[]" racism that keeps coming back because it is "imbedded in [the] very structure and makeup" of American law and society); Aziz Rana, *Colonialism and Constitutional Memory*, 5 U.C. IRVINE L. REV. 263, 269 (2015) (pointing out that America's desire to cling to a narrative of the United States as free and equal from the beginning has prevented the United States from realizing that oppressed groups have not been able to achieve "explicit institutional or normative rupture from the American settler past—including its governing structures and prevailing national symbols").

407. *See* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 2-3 (1991) (demonstrating how the ostensibly race-neutral rhetoric used by the Supreme Court in contemporary constitutional doctrine in fact "legitimates racial inequality and domination").

408. *See, e.g.*, Coal. to Save Our Child. v. State Bd. of Educ. of State of Del., 90 F.3d 752, 756 (3d Cir. 1996) ("It is beyond dispute that racism and bigotry continue to tear at the fragile social fabric of our national and local communities . . . ."); Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist, 237 F. Supp. 2d 988, 1029 (E.D. Ark. 2002), *aff'd sub nom.* Little Rock Sch. Dist. v. Armstrong, 359 F.3d 957 (8th Cir. 2004) ("[R]acism still remains a most regrettable part of the nation's social fabric . . . .").

democratic rights of tribal citizens were denied until they were not a threat, either by assimilation or numerical domination. This should haunt us—both until it is no longer true and every day after that to ensure we do not repeat the same mistakes.

This haunting by the hypocritical failures of our past can and should have measurable impacts on our approach to contemporary political problems. We ought to have a special solicitude for the dynamics at play in the debates over representation or power for other majority-minority governments. The obvious implication of this argument in present-day political debates is that we apply heightened scrutiny to the arguments against statehood for Puerto Rico and Washington, D.C.[409] While arguments have been made against admitting D.C. and Puerto Rico as states,[410] we ought to view those arguments with a heightened skepticism to ensure that they are not simply pretextual reasons for preventing majority-minority governments from accessing political power.[411]

This Article suggests we imagine what the structures of representative democracy in the United States could have looked like had tribal governments not been discriminated against from the start. This Article also encourages us to seriously consider the possibility of full and equal representation—even if it requires structural change. Tribal citizens deserve a better answer to the question of why we do not give their governments—the ones that generations of their ancestors fought to preserve—representation in Congress. It may require a different representative structure—one that better represents all of us.

409. *See* Brianna Tucker, *You Asked: Could D.C. and Puerto Rico Ever Become States?*, WASH. POST (Apr. 17, 2023, 9:00 AM EDT), https://perma.cc/3YA4-ZW9Q; Jennifer Kindred Mitchell, *Why Not More States?: States' Importance to Democracy and Statehood's Relevance to Twenty-First Century America*, 48 J. LEGIS. 236, 236 (2022); *see also* Campbell, *supra* note 123, at 629 ("The issues of citizenship, race, and statehood, when viewed through the lens of the racist [territorial-incorporation doctrine] and the white supremacist legacy of the *Insular Cases*, make a powerful case for the abolition of these doctrines as we consider the current statehood bids of Puerto Rico and the District of Columbia, as well as the potential admission of the other United States territories in the future.").

410. Philip Bump, *Puerto Rico Statehood Would Dilute Whose Power Exactly, Sen. Graham?*, WASH. POST (Nov. 8, 2022, 11:05 AM EST), https://perma.cc/664Q-EJ27.

411. *See* Paul Frymer, *The Politics of D.C. Statehood Follow a Well-Worn Path. Here's Why.*, WASH. POST (July 6, 2020, 7:00 AM EDT), https://perma.cc/22U9-N3U8 (suggesting that we view the current move for D.C. statehood within a broader historical and racial context, discussed in much of this Article, and try not to repeat the mistakes of the past).