

COORDINATED SOVEREIGNTY: FEDERAL TOOLS FOR RESOLVING STATE-TRIBE CONFLICT

ALEXANDRA FAY*

American federalism describes the constitutional relationships between three kinds of sovereign political bodies: the federal government, the fifty states, and 575 federally recognized Indian tribes. Yet federalism scholarship often elides the third sovereign, instead focusing exclusively on the relations between states and the federal sovereign. Previously, I argued that trilateral federalism should frame federal approaches to issues involving tribal governance. This Article continues that work with a structural examination of federal statutory interventions to resolve conflicts between America's domestic sovereigns, the states, and tribes.

State-tribe conflict is a perennial feature of federal Indian law. This Article engages with examples across various substantive fields of law—including family law, criminal justice, gaming, taxation, and public health—to articulate four models of federal statutory intervention: (1) Federal Preemption, (2) Opt-In, (3) Guided Compacting, and (4) Noninterference. This Article considers their relative strengths, weaknesses, and appropriate contexts. Finally, this Article applies these models to the case study of traffic enforcement in Oklahoma Indian country, a major site of state-tribe conflict in the wake of the Supreme Court's 2020 decision, in *McGirt v. Oklahoma*.

Introduction	644
I. Federalism Problems	656
A. Tribes in Our Constitutional Order	656
B. Jurisdictional Incoherence	665
II. Federal Solutions	676

* Alexandra Fay is an Assistant Professor of Law at the University of Tulsa College of Law, located on the Muscogee (Creek) Nation Reservation within the State of Oklahoma. This Article has benefited from generous support and feedback from Angela Riley, Matthew Fletcher, Kevin Washburn, Aziz Huq, Lauren van Schilfgaarde, Wenona Singel, Kate Fort, Grant Christensen, Liz Reese, Grace Carson, and Henry Ishitani.

A. Federal Preemption.....	678
B. Opt-In.....	684
C. Guided Compacting	689
D. Noninterference	695
1. Unguided Compacting	696
2. Unilateral Action	706
III. Application: Indian Country Traffic Enforcement	711
A. The Problem.....	711
B. Modeling Solutions	720
Conclusion	724

INTRODUCTION

The United States of America formally recognizes 625 domestic sovereign governments.¹ Of these domestic sovereigns, fifty are states of the Union. The other 575 are tribal nations.² In the early years of the American experiment, the domestic sovereigns ruled over their own territories, delineated by relatively clear boundaries. Their zones of governance were mutually exclusive, subject only to federal supremacy; the State of Georgia could not extend its laws into Cherokee Nation territory,³ just as the State of Connecticut could not intrude into the governmental functions of the State of Massachusetts.⁴

Despite formal boundaries, our domestic sovereigns have always had a contentious relationship. State-tribe conflict, fueled by land-hungry settlers and the American obsession with westward expansion,⁵ shaped the development of federal law, the administrative state, and the national

1. Puerto Rico, Guam, American Samoa, the United States Virgin Islands, and the Northern Mariana Islands are not included in this count because the United States does not use the language and forms of sovereignty to characterize its relationship with the territories. See *Puerto Rico v. Sanchez Valle*, 579 U.S. 59, 68–71 (2016) (distinguishing the territories from states and Indian tribes, finding that Puerto Rico and the other territories do not benefit from the dual sovereignty doctrine because the ultimate source of their governmental authority stems from the United States federal government).

2. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 91 Fed. Reg. 4102, 4102 (Jan. 30, 2026).

3. *Worcester v. Georgia*, 31 U.S. 515, 520 (1832) (“The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described in which the laws of Georgia can have no force . . .”).

4. See *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2493 (2022) (likening state and tribe boundaries in the Early Republic to the boundary between New York and New Jersey).

5. Matthew L. Fletcher, *Retiring the “Deadliest Enemies” Model of Tribal-State Relations*, 43 TULSA L. REV. 73, 73 (2007).

budget in the Early Republic.⁶ Over time, this relationship deteriorated further. Good fences make good neighbors; strong relationships need healthy boundaries. The following two centuries of federal Indian policy—featuring Removal, Allotment, and Termination—shifted, eroded, and confused the jurisdictional lines between state and tribal authority.⁷ While the United States has since disclaimed those destructive policies, we still live with their legacy of dysfunctional federalism. This Article identifies strategies to minimize this dysfunction across various essential fields of governance.

States and tribes occupy a coequal plane in our federalist structure today, but their political statuses have distinct histories and legal formulations. The people of the original thirteen states formally joined our current federal order by ratifying the Constitution. The Equal Footing Doctrine ties the other thirty-seven to this origin story.⁸ Meanwhile, tribal nations associated with the federal government through treaties. In Matthew Fletcher’s terms, these sovereign-to-sovereign relationships were defined by the duty of protection—an established doctrine of international customary law, by which weaker sovereigns surrendered resources, authority, or territory in exchange for protection by a stronger state.⁹ The Marshall Court referenced this protected status when it dubbed tribes “domestic dependent nations” in 1831.¹⁰

Both states and tribes are subject to federal supremacy, and conversely, the federal government owes both states and tribes various duties. As the national sovereign, the federal government claims exclusive authority over immigration and international relations.¹¹ The federal government also holds authority and responsibility over domestic relations among the domestic sovereigns. The Commerce Clause affirmatively vests Congress with the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹² While some observers read this provision narrowly, seeing it

6. See STEPHEN J. ROCKWELL, *INDIAN AFFAIRS AND THE ADMINISTRATIVE STATE IN THE NINETEENTH CENTURY* 1–3 (2010).

7. See Alexandra Fay, *Tribes and Trilateral Federalism: A Study of Criminal Jurisdiction*, 56 ARIZ. ST. L.J. 53, 75–78, 88–95 (2024).

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

9. Matthew L.M. Fletcher, *The Dark Matter of Federal Indian Law: The Duty of Protection*, 75 MAINE L. REV. 305, 309 (2023).

10. *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1, 17 (1831).

11. *Kleindienst v. Mandel*, 408 U.S. 753, 765–66 (1972).

12. U.S. CONST. art. I, § 8, cl. 3.

as governing only commercial or economic activity,¹³ others take the Commerce Clause as a broader description of the federal structure.¹⁴ And the Commerce Clause is not the only source for federal authority over state-tribe relations. Jurists cite diplomatic relations predating the Constitution,¹⁵ a constellation of Constitutional provisions including the War, Territories, and Spending Powers,¹⁶ as well as the practice of the Washington Administration.¹⁷ Using these various authorities, commentators, including Gregory Ablavsky and Supreme Court Justice Neil Gorsuch, articulate an originalist federal role as intermediary between tribe and state interests.¹⁸

This federal role combines both power and responsibility. The so-called Indian plenary power is mediated by the federal government's trust

13. *United State v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring) (contending that “[a]t the time the original Constitution was ratified, ‘commerce’ consisted of selling, buying, and bartering, as well as transporting for these purposes”); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 657 (2012) (Scalia, J., dissenting) (“[T]he decision to forgo participation in an interstate market is not itself commercial activity”); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 146 (2001) (arguing under an originalist analysis that “‘Commerce’ means the trade or exchange of goods (including the means of transporting them)”).

14. Emphasis on “among the several states” and “with Indian tribes,” not on “commerce.” See AKHIL AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 107–08 (2005) (suggesting that jurists refer to the Clause “not as ‘the commerce clause,’ but rather as the ‘international-and-interstate clause’ or the ‘with-and-among clause.’”); Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 164–65 (2010) (evincing from the “among the several States” language a collective action test for Congressional power); see also *Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 594–99 (Ginsburg, J., concurring in part) (arguing that Congress had the prerogative to enact the Affordable Care Act under a broad reading of the commerce clause).

15. See *Haaland v. Brackeen*, 143 S. Ct. 1609, 1647–48 (2023) (Gorsuch, J., concurring); COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1.02 (Nell Jessup Newton & Kevin K. Washburn eds., 2024) [hereinafter COHEN’S HANDBOOK].

16. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1050–51 (2015); COHEN’S HANDBOOK, *supra* note 15, § 6.01 (finding federal authority in Indian affairs in the Commerce Clause, Treaty Clause, Spending Clause, Territory/Property Clause, Admissions Clause, War Powers Clause, and Offences Clause).

17. Ablavsky, *supra* note 16, at 1018–20.

18. *Id.* at 1051–52. Justice Neil Gorsuch has asserted that an originalist account of federal power in Indian Affairs demands broad Congressional authority to “preserve th[e] equilibrium between Tribes and States,” in what he calls “the Constitution’s Indian-law bargain.” *Haaland*, 143 S. Ct. at 1647, 1653 (2023) (Gorsuch, J., concurring). For a breakdown of Gorsuch’s originalist argument, see M. Henry Ishitani & Alexandra Fay, *Revising the Indian Plenary Power Doctrine*, 29 MICH. J. RACE & L. 1, 13–16 (2024). See generally Gregory Ablavsky, *Structural Federal Indian Law after Brackeen*, 67 ARIZ. L. REV. 291 (2025) (taking the analysis further and setting out a robust conception of structural federal Indian law).

responsibility.¹⁹ Or in Fletcher's formulation, the federal government is bound to fulfill the duty of protection it owes tribal nations.²⁰ This Article explores these structural relationships and responsibilities, and it suggests that the United States federal government has not only the power but an outstanding obligation to intervene in state-tribe jurisdictional conflict.²¹

In a prior article, I sketched out a vision of American federalism using criminal jurisdiction in Indian country.²² This Article follows from that project, expanding from the narrow criminal case study to a broad investigation of jurisdictional problems across various areas of governance. Given the modern permeability and uncertainty of tribal boundaries, many aspects of tribal government feature jurisdictional struggle. As I have illustrated at length, criminal justice has long been a place of conflict between tribes and states.²³ And since that article's publication, the State of Oklahoma has tried to expand its authority even further on tribal land, claiming the power to prosecute, not only all non-Indians, but nonmember Indians as well.²⁴

Criminal law is not exceptional. States also assert authority to tax economic activity on tribal land. Oklahoma now claims tax authority over

19. See Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. F. ON C.L. & C.R. 1, 42 (2003).

20. Fletcher, *supra* note 9, at 309.

21. I do not go as far suggesting that this obligation is judicially enforceable by tribes. See *Arizona v. Navajo Nation*, 143 S. Ct. 1804, 1816 (2023) (holding that the United States is not obligated to take affirmative steps to secure tribal water rights at odds with the states seeking to divvy up the Colorado River). Still, I argue that Congress's responsibility to mitigate state-tribe conflict is more than a mere ethical obligation. It arises as a matter of constitutional structure. One might argue it is a facet of the federal government's trust responsibility toward tribes, though such a characterization does not improve the issue of enforceability. Only politics, not litigants, can compel Congress to take action to facilitate the resolution of Indian country jurisdictional problems.

22. See generally Fay, *supra* note 7 (using criminal jurisdiction to describe tribal political status in our national constitutional order).

23. See generally *id.* (describing state encroachment in the late nineteenth century and attacks on tribal jurisdiction in the twentieth century).

24. See *City of Tulsa v. O'Brien*, 2024 OK Crim. App. 31, ¶¶ 26–27, 588 P.3d 908, 927; *Stitt v. City of Tulsa*, 2025 OK Crim. App. 5, ¶ 8, 565 P.3d 857, 859–60. The applicability of state hunting and fishing regulations to Indians on the *McGirt* reservations is presently being considered in federal district court. See *Cherokee Nation v. Free*, No. 25-cv-00630 (N.D. Okla. June 11, 2026). The Oklahoma Attorney General issued an opinion finding that tribal members and Five Tribes nonmembers were exempted from state hunting regulation on the *McGirt* reservations as a matter of preemption under the *Bracker* Balancing Test. Okla. Att'y Gen. Op. 2025-19 (Dec. 18, 2025), <https://turtletalk.blog/wp-content/uploads/2025/12/ag-opinion-2025-19-2025-ok-ag-19.pdf> [<https://perma.cc/8JQN-W7YK>].

tribal members who live and work on the reservation.²⁵ When federal courts uphold state taxes, residents, workers, and businesses can be subjected to double taxation for work in Indian country, leaving tribes in a bind: forego taxation or discourage economic development.²⁶ States and tribes routinely struggle over access to and authority to regulate natural resources, especially water.²⁷ States and tribes come into conflict over child welfare law, competing for jurisdiction over tribal children despite Congressional intervention with the Indian Child Welfare Act.²⁸ States and tribes struggle for jurisdiction over tort claims arising on reservations.²⁹ In all these areas and more, states too often remain the “deadliest enemies” of tribes.³⁰

Of course, not all state-tribe federalism problems necessarily stem from a place of hostility. Just as states are not well situated to regulate the ownership and movement of guns due to Americans’ freedom to travel and the dormant commerce clause,³¹ states and tribes likewise face structural barriers to coherent governance at their borders. Indeed, in many situations, states and tribes share common goals. But incomplete, uncertain, or redundant jurisdiction complicates policymaking and enforcement.³² For example, the enforcement of child support orders

25. See *Stroble v. Okla. Tax Comm’n*, 2025 OK 48, ¶¶ 10–12, 588 P.3d 179, 182–83. As I write from the Muscogee Nation Reservation within the State of Oklahoma, I will continue to rely on local examples of state-tribe conflict and cooperation. Since the *McGirt* decision of 2020, Tulsa has been a major epicenter of Indian law development.

26. While double taxation is unconstitutional when done by two states, it is constitutional when the taxing authorities are a tribe and a state. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191–93 (1989). See COHEN’S HANDBOOK, *supra* note 15, § 10.05 (“The Problem of Multiple Tribal and State Taxation”).

27. See *e.g.*, *Montana v. United States*, 450 U.S. 544, 566 (1981) (rejecting tribal authority to regulate nonmember fishing on the reservation); *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1266–67 (9th Cir. 2017).

28. See *e.g.*, *Haaland v. Brackeen*, 143 S. Ct. 1609, 1622–23 (2023); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 30–39 (1989); *Fisher v. Dist. Ct. Sixteenth Jud. Dist.*, 424 U.S. 382, 382–86 (1976) (per curiam); *Doe v. Mann*, 415 F.3d 1038, 1039 (9th Cir. 2005).

29. See *e.g.*, *Strate v. A-1 Contractors*, 520 U.S. 438, 422 (1997).

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

31. See Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 74, 80, 114 (2014) (citing gun regulation as an example of a spillover problem).

32. See SUSAN JOHNSON ET. AL., GOVERNMENT TO GOVERNMENT: MODELS OF COOPERATION BETWEEN STATES AND TRIBES 2–3 (2002) (describing common interests and incomplete jurisdiction); see *e.g.*, Noah D. Hall & Benjamin C. Houston, *Law and Governance of the Great Lakes*, 63 DEPAUL L. REV. 723, 723–24 (2014) (describing the complexity of regulating the Great Lakes system involving two countries, various states, and many tribal nations).

is complicated by the ordinary movement of individuals across jurisdictional lines.³³ State and tribal courts are not constitutionally mandated to offer one another full faith and credit.³⁴ While Congress has specifically mandated full faith and credit for tribal child custody proceedings,³⁵ many states and tribes do not automatically share information.³⁶ Thus, when family members lawfully move across reservation borders, parents often face greater difficulty getting the financial support they are due. In this way, even when state and tribe legislators and judges might agree on the just outcome, they may still struggle to achieve that outcome.³⁷ Federal intervention can resolve these kinds of transboundary federalism problems.³⁸

While Indian law scholars have written abundantly on each of these topics, few have approached these problems holistically.³⁹ Those who

33. See Kathryn E. Fort, *Waves of Education: Tribal-State Court Cooperation and the Indian Child Welfare Act*, 47 TULSA L. REV. 529, 532 (2012).

34. Different states take different approaches. Some states have chosen to accord tribal court judgments full faith and credit, while others are far more reluctant to enforce tribal orders. See Grant Christensen, *Article IV and Indian Tribes*, 110 IOWA L. REV. 629, 646–48 (2025); Kevin K. Washburn, *A Different Kind of Symmetry*, 34 N.M. L. REV. 263, 268–69 (2004); see also Korey Wahwassuck, *The New Face of Justice: Joint Tribal-State Jurisdiction*, 47 WASHBURN L. REV. 733, 743 (2008) (discussing the role of tribal-state forums to facilitate cooperation between tribal and state courts, including full faith and credit).

35. 25 U.S.C. § 1911(d) (from the Indian Child Welfare Act, discussed at length in Part II).

36. This information problem in child support has recently been addressed by federal legislation to give tribes direct access to federal tax information documenting child support obligations. Supporting America's Children and Families Act, Pub. L. No. 118–258, § 201 (2025). States and tribes can voluntarily enter into agreements providing for information sharing, such as parent employment information, salary information, addresses, insurance, and other relevant personal information. See, e.g., Child Support Agreement Between the Nez Perce Tribe and the State of Washington, Department of Social and Health Services, Division of Child Support, Nez Perce Tribe-Wash., Aug. 27, 2001, 12–13 (2001), www.dshs.wa.gov/sites/default/files/ESA/dcs/documents/nezperce.pdf [<https://perma.cc/VA2Q-CFV6>].

37. Some tribes and states have taken action absent federal direction to address child support problems. The State of Washington has ten intergovernmental agreements with tribal nations addressing this issue. See *Tribal Agreements and Codes*, WASH. ST. DEP'T OF SOC. & HEALTH SERVS.: ECON. SERV. ADMIN., <https://www.dshs.wa.gov/esa/division-child-support/tribal-agreements-and-codes> [<https://perma.cc/CT3G-RJ36>] (last visited Aug. 18, 2026).

38. Cooter & Siegel, *supra* note 14, at 117–18; Steven G. Calabresi & Lucy D. Bickford, *Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law*, in *FEDERALISM AND SUBSIDIARITY* 123, 144–48 (James E. Fleming & Jacob T. Levy, eds., 2014).

39. See, e.g., Pippa Browde, *Sacrificing Sovereignty: How Tribal-State Tax Compacts Impact Economic Development in Indian Country*, 74 HASTINGS L.J. 1, 6 (2022); Fort, *supra* note 33, at 531; Rebecca Tsosie, *Negotiating Economic Survival: The*

have taken a broader view of state-tribe conflict typically focus exclusively on compacting, or intergovernmental agreements, as the most practical solution.⁴⁰ This Article offers a trans-substantive review of state-tribe federalism problems and articulates legislative models for federal intervention. These models are abstracted from existing statutory structures. To be sure, compacting is an important model, but it is not the only option. Each model has its relative strengths and weaknesses, prerequisites and perils. No model will fit every federalism problem, and each can be adapted for different applications. Indeed, implementing a hybridization of multiple models is often most appropriate.

This Article distills four models of federal legislative intervention to resolve state-tribe conflict: (1) Federal Preemption, (2) Opt-In, (3) Guided Compacting, and (4) Noninterference.

The Federal Preemption Model is characterized by clear mandates from Congress. In many cases, Congress may unilaterally define the extent of state and tribal jurisdiction. Federal preemption is a one-size-fits-all solution, setting common ground rules nationwide. It may foreclose possibilities of state-tribe negotiation, and it limits local variation. This model utilizes statutory preemption and represents the zenith of federal power. We see such rules in the Indian Child Welfare Act (ICWA).⁴¹ Under ICWA, Congress determined that tribal courts have exclusive jurisdiction over child custody cases involving Indian children domiciled or residing on reservations and Indian children who are wards of the tribal court.⁴² For other cases involving Indian children, state courts owe tribes notice and the opportunity to intervene and transfer cases to tribal court.⁴³ Even when cases remain in state court, ICWA imposes notable burdens on state proceedings: These include the higher standard of active efforts to keep Indian families together, qualified expert witnesses, and mandatory placement preferences should

Consent Principle and Tribal-State, Compacts under the Indian Gaming Regulatory Act, 29 ARIZ. ST. L.J. 25, 28 (1997); Washburn, *supra* note 34, at 265; Jennifer E. Pelphrey, Note, *Oklahoma's State/Tribal Water Compact: Three Cheers for Compromise*, 29 AM. INDIAN L. REV. 127, 127 (2004). But see Kirsten Matoy Carlson, *Congress and Indians*, 86 U. COLO. L. REV. 77, 82 (2015) (presenting an exhaustive review of Indian-related bills introduced and enacted in Congress from 1975 to 2013).

40. See, e.g., David H. Getches, *Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding Self-Government*, 1 REV. CONST. STUD. 120, 122 (1993); Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 HARV. L. REV. 922, 923 (1999).

41. 25 U.S.C. §§ 1901–1963.

42. 25 U.S.C. § 1911(a). The Supreme Court observed that prior to ICWA, many federal and state courts already recognized exclusive tribal jurisdiction over Indian children domiciled on reservations, and in ICWA Congress affirmed that line of caselaw. *Miss. Band Choctaw Indians v. Holyfield*, 490 U.S. 30, 42 (1989).

43. 25 U.S.C. § 1911(b)–(c)

the child be separated from the family.⁴⁴ No consent was needed from states or tribes for these baseline child welfare rules to come into effect.⁴⁵ In 2023, the Supreme Court affirmed that Congress has the power to unilaterally invade state legal proceedings and impose such rules to protect the integrity of Indian families and Indian tribes.⁴⁶ The Preemption Model is most appropriate when policy problems demand uniformity across jurisdictions and when states and tribes are least incentivized to cooperate absent federal mandates. Since this model relies on federal coercion, it faces legal challenges and greater political opposition.

The Opt-In Model depends on consent. Just like the prior model, the Opt-In Model features a jurisdictional arrangement where most substantive terms are set out in federal statutes. Unlike the prior model, the Opt-In Model only goes into effect when tribes and states sign on. This distinction offers more flexibility. It is more responsive to the fact that different tribes have different circumstances and priorities. This model also avoids concerns of anti-commandeering or other forms of federal overreach. The Opt-In Model is abstracted from Public Law 280, the federal statute that allows states to assume delegated concurrent jurisdiction over Indian country premised on tribal consent.⁴⁷ As Part II

44. 25 U.S.C. §§ 1912(d)–(f), 1915(a). *See infra* Section II.A.

45. ICWA is not strictly a Federal Preemption Model statute. Instead, it is a combination of the Federal Preemption Model and the Guided Compacting Model. Section 1919(a) of ICWA authorizes states and tribes to make agreements “respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.” *Id.* § 1919(a). Some tribes and states have used this provision to alter the jurisdictional arrangement set out in the rest of the statute. The Paiute Indian Tribe and Utah have agreed to disclaim exclusive tribal jurisdiction because the tribe does not operate a tribal court. SHANNON KELLER O’LOUGHLIN, ASS’N ON AM. INDIAN AFFS., A SURVEY AND ANALYSIS OF TRIBAL-STATE INDIAN CHILD WELFARE ACT AGREEMENTS 49 (2017), https://www.indian-affairs.org/uploads/8/7/3/8/87380358/icwa_tribal-state_agreements_report.pdf [<https://perma.cc/X2BP-M26V>]. Most agreements maintain the exclusive jurisdiction provision, but several tribes have opted to not exercise exclusive jurisdiction because they lack tribal courts. *Id.* at 47–48 (describing an agreement between the Cowlitz Indian Tribe and the State of Washington by which the tribe gives up exclusive jurisdiction in favor of the state courts, and an agreement between the Houlton Band of Maliseet and the State of Maine, by which the tribe gives up exclusive jurisdiction in favor of two other tribal courts in Maine).

46. *Haaland v. Brackeen*, 143 S. Ct. 1609, 1631 (2023).

47. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588, 588–89 (codified at 18 U.S.C. § 1162 and 28 U.S.C. § 1360). Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 73, 78–80 (codified at 25 U.S.C. §§ 1321–1326). I am looking at the effects of Public Law 280 after its 1968 amendments on tribes in nonmandatory states. Public Law 280 as it applies to the mandatory states falls under the Federal Preemption Model. *See infra* Section II.B.

will explore in greater detail, Public Law 280 is overwhelmingly unpopular, especially in its original form. Even in its amended form, Public Law 280 is still highly flawed.⁴⁸ However, this Article argues that this disfavored termination policy nevertheless represents a useful model for federal intervention. The centrality of tribal and/or state consent allows for greater self-determination and avoids constitutional challenges.

In the Guided Compacting Model, Congress sets the terms for inter-sovereign diplomacy. This form of intervention features tremendous variation—responsive to the incredible diversity of the 575 federally recognized tribes and fifty states. The federal government can set basic rules and constraints on the compacting process, and it may set up processes or offices to review and enforce compacts. Tribes and states set the exact terms. This arrangement allows for customization for every tribe-state relationship, but that customization can mean greater transaction costs for tribal and state actors.⁴⁹ It also means tribes and states may simply decline to compact. The Guided Compacting Model will be most successful in circumstances where tribes and states have compelling reasons to come to the table. The Indian Gaming Regulatory Act (IGRA) is the prime example of guided compacting.⁵⁰ Gaming offers a huge economic boost to many tribes; meanwhile, states enjoy limited regulatory authority over tribal gaming. Under IGRA, tribes and states are directed to negotiate over the most lucrative and controversial forms of gambling.⁵¹ These compacts feature revenue sharing (some states rake in enormous windfalls)⁵² as well as arrangements for regulatory and adjudicatory jurisdiction over non-Indian patrons of tribal gaming operations. Guided compacting allows for diversity and innovation, and

48. See *infra* Section II.B.; see generally DUANE CHAMPAGNE & CAROLE E. GOLDBERG, CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280 (2d ed. 2020) (describing continuing concerns with Public Law 280, including diminished tribal sovereignty, inadequate law enforcement, and jurisdictional confusion).

49. Compared to federal legislation. Of course, in the absence of federal legislation, compacting is more efficient and less costly than litigation. COHEN'S HANDBOOK, *supra* note 15, § 20.06.

50. See *infra* notes 272–76 and accompanying text.

51. 25 U.S.C. §§ 2703, 2710(d).

52. Nationwide, tribal gaming businesses generate tens of billions of dollars in revenue annually. See Nat'l Indian Gaming Comm'n, *2021 Indian Gaming Revenue Jumps to Record High \$39 Billion, Increases 40%*, PR NEWswire (Aug. 10, 2022, at 15:00 ET), <https://www.prnewswire.com/news-releases/2021-indian-gaming-revenue-jumps-to-record-high-39-billion-increases-40-301603722.html>. States take a significant portion. For example, Connecticut has received billions of dollars thanks to its compacts with the Mashantucket Pequot Tribe and the Mohegan Tribe. Kevin Gover & Tom Gede, *The States as Trespassers in a Federal-Tribal Relationship: A Historical Critique of Tribal-State Compacting Under IGRA*, 42 ARIZ. ST. L.J. 185, 209–10 (2010).

it results in greater complexity nationwide. It depends on voluntary state-tribe cooperation.

The last model is characterized by the absence of federal intervention. The Noninterference Model describes the status quo in many areas of Indian country governance. In this model, Congress offers no guidance and instead allows tribes and states to negotiate out in the void. I further divide the Noninterference Model into two categories: unguided compacting and unilateral action.

A prominent example of unguided compacting is tax compacting. States and tribes may enter into inter-sovereign agreements to avoid the double taxation trap set out by the Supreme Court's tax decisions.⁵³ While the Constitution prohibits states from compacting with each other or with foreign nations without Congressional approval, it features no express limitation on state-tribe compacting.⁵⁴ However, state-tribe compacting may be limited such that tribes and states cannot enter into agreements that alter the scope of their jurisdiction absent Congressional consent.⁵⁵ Even with such a limitation, unguided compacting can still enhance effective governance in areas with concurrent or uncertain state and tribe jurisdiction.

There is a final option for state-tribe jurisdictional negotiation: unilateral action. Absent federal intervention, and absent consensus through compacting, the domestic sovereigns can claim jurisdiction functionally resolving jurisdictional uncertainty. This Article focuses on the example of tribal public health monitoring during the 2020 COVID-19 pandemic to explore unilateral action. Unilateral action should be understood as an essential tool in the negotiation of American federalism. This type of action may create conditions for unguided compacting or Congressional intervention. IGRA would not exist but for the Cabazon Band of Cahuilla Indians and Morongo Band of Mission Indians unilaterally asserting their authority to operate high-stakes bingo games

53. See Browde, *supra* note 39, at 5–6; see, e.g., Tax Agreement Between the Saginaw Chippewa Indian Tribe of Michigan and the State of Michigan, Dec. 17, 2010, https://www.michigan.gov/taxes/-/media/Project/Websites/taxes/Tribal/SCIT/2011_SaginawChippewa_AgreementandAppendix.pdf [<https://perma.cc/XGR9-JYGD>].

54. U.S. CONST. art. I, § 10, cl. 3 (“No state shall, without Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power.”). For a discussion of the actual effects of the Compact Clause, see *infra* Section II.D.

55. COHEN’S HANDBOOK, *supra* note 15, § 7.02. In 1978, Congress considered a bill to authorize state-tribe compacting for jurisdiction. The bill passed the Senate but apparently died in committee in the House of Representatives. The draft findings observed the problem of jurisdictional incoherence, the promise of cooperative agreements, and that “[i]t is the responsibility of the Congress to facilitate this process.” *Tribal-State Compact Act of 1978: Hearings on S. 2502 Before the Senate Select Comm. on Indian Affs.*, 95th Cong. 4–5 (1978).

despite California state law.⁵⁶ These tribal claims of inherent sovereign authority revolutionized economic development in Indian country and the regulation of gaming nationwide.

The IGRA example illustrates a broader point: Successful jurisdictional coordination usually warrants a hybrid approach. Unilateral action can inspire Congressional intervention, and that intervention, in turn, likely draws from more than one of the statutory models. IGRA is not only a guided compacting statute, but also a preemption statute. Indeed, one could credibly argue that IGRA and ICWA are both preemption/guided compacting hybrids.⁵⁷ I admit that these models are artificial: They mask the hybridity that characterizes real Indian country legislation. A wholly preemptive statute will rarely be appropriate when dealing with sovereign entities. Conversely, the guidance part of guided compacting requires some use of federal statutory preemption powers. I argue that this typology nonetheless remains useful to articulate the discrete tools at Congress's disposal, accompanied by the understanding that these tools ought to be used together.

By approaching legislative solutions structurally, this Article aims to expand and clarify the world of policy options. By approaching state-tribe federalism problems systematically, this Article attempts to identify the persistent strengths and weaknesses of different statutory structures, to equip advocates and legislators with a guiding rubric for policy fitness. To be sure, legislative effectiveness cannot be solely ascertained from the highest bird's-eye view. This Article uses living examples of effective and ineffective legislative interventions in its examination of the four models, and then it ultimately applies these abstracted models to a major contemporary jurisdictional contest: traffic enforcement in Oklahoma Indian country. This method prioritizes practice and experience to guide the inquiry. By relying on existing legislation, it necessarily limits the world of imagination. This limitation is outweighed by two countervailing considerations: first, that these statutory models have already proven to be politically feasible, and second, that real-world examples provide a richer account of the models' strengths and weaknesses.

This Article is a study in legislative design—an underdeveloped area of legal scholarship. In the legal academy, “legislation” is too often

56. See Matthew L.M. Fletcher, *California v. Cabazon Band: A Quarter-Century of Complex, Litigious Self-Determination*, *FEDERAL LAWYER*, Apr. 2012, at 50–51.

57. Why ICWA is categorized as preemption and IGRA as guided compacting is still intelligible. In the absence of any state-tribe compacting, ICWA would still be a successful statute, whereas in the absence of any state-tribe compacting, IGRA would be a failure.

shorthand for “legislative interpretation.” Scholars focus primarily on the fights for statutory construction in the courts at the expense of statutory design in legislative processes.⁵⁸ This Article recenters legislative design in the project of coordinating our trilateral federalist system. It identifies constitutional tools and restraints as it explores the trans-substantive potential of existing statutory models.

This Article proceeds as follows. Part I describes state-tribe federalism problems. This Part sets out the structural, constitutional context for state-tribe conflict, and then recounts the historical origins of our contemporary jurisdictional confusion. Part I concludes with an overview of enduring jurisdictional conflicts that impair effective government in Indian country. Part II articulates four models of federal legislative intervention. This Part examines the key structural features of each model and considers which factors and circumstances make each model most appropriate. Part III applies the models to the case study of traffic enforcement in Oklahoma. Traffic enforcement is not only necessary for public safety, but also typically critical for funding local governments.⁵⁹ It is a primary point of contact between civilians and their governments,⁶⁰ and a new locus of Indian law production.⁶¹ When *McGirt v. Oklahoma*⁶² forced the state to recognize the continued existence of the reservations of the Five Tribes in 2020,⁶³ this routine public safety

58. See Edward L. Rubin, *Statutory Design as Policy Analysis*, 55 HARV. J. LEG. 143, 144–45 (2018). Much of the work on federalism and legislation identifies areas of interstate conflict and the constitutionality of federal preemption and then proceeds to focus on resulting interpretative problems such as “reverse-Erie” scenarios. See, e.g., Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 494–95 (2008); Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 537–38 (2011); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 681–92 (2001).

59. See Jordan Blair Woods, *Reimagining Traffic Fines and Fees*, 14 U.C. IRVINE L. REV. 936, 939 (2024); Min Su, *Taxation by Citation? Exploring Local Governments’ Revenue Motive for Traffic Fines*, 80 PUB. ADMIN. REV. 36, 36 (2020) (finding that traffic enforcement is likely directed, not only by public safety concerns, but also by a revenue motive); Mike McIntire & Michael H. Keller, *The Demand for Money Behind Many Police Traffic Stops*, N.Y. TIMES (Nov. 2, 2021), <https://www.nytimes.com/2021/10/31/us/police-ticket-quotas-money-funding.html>.

60. See Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471, 1475 (2021) (“Traffic stops are the most common interaction between police and civilians.”).

61. See *infra* Section III.A.

62. 140 S. Ct. 2452 (2020).

63. Robert J. Miller & Torey Dolan, *The Indian Law Bombshell: McGirt v. Oklahoma*, 101 BOSTON U. L. REV. 2049, 2051 (2021).

operation and funding source became a key site of state-tribe contestation.⁶⁴

I. FEDERALISM PROBLEMS

Tribes predate our constitutional order, but today, they are part of our constitutional order. This Part briefly conceptualizes tribes in American federalism. It then describes the range of jurisdictional dysfunction through the lens of horizontal federalism.

A. Tribes in Our Constitutional Order

It is a deliberate choice to describe tribal political status in the language of federalism.⁶⁵ It is a choice I make because I believe the federalism framework is both useful to tribal self-determination and functionally accurate in the present day.⁶⁶

64. See *Hooper v. Tulsa*, 71 F.4th 1270, 1272, 1273 n.2 (10th Cir. 2023); *City of Tulsa v. O'Brien*, 2024 OK CR 31, ¶¶ 1–3, 588 P.3d 908, 913; *City of Tulsa v. Stitt*, 2024 OK CR 31, ¶¶ 2–3, 565 P.3d 857, 857–59; Joint Settlement Agreement Between Plaintiff Muscogee (Creek) Nation and Defendants City of Tulsa et al. at 1, *Muscogee (Creek) Nation v. Tulsa*, (N.D. Okla. 2025) (No. 23-CV-00490); Tristan Loveless, *Stitt Asks OK Supreme Court to Stop Tulsa, Muscogee Nation Jurisdiction Settlement*, NONDOC (Aug. 21, 2025), <https://nondoc.com/2025/08/21/stitt-asks-ok-supreme-court-to-stop-tulsa-muscogee-nation-jurisdiction-settlement/> [<https://perma.cc/T6VA-Q4SX>].

65. In this choice, I align my arguments with Indian law scholars who have long called for more attention to tribal sovereignty as a component of American federalism. See Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617, 631–32 (1994); Wenona T. Singel, *The First Federalists*, 62 DRAKE L. REV. 775, 782 (2014); Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within “Our Federalism”: Beyond the Dependency Paradigm*, 38 CONN. L. REV. 887, 667 (2006); Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 TEX. F. ON C.L. & C.R. 1, 3–4 (2003); Tsosie, *supra* note 39, at 53.

66. But see, JEFF CORNTASSEL & RICHARD C. WITMER, *FORCED FEDERALISM: CONTEMPORARY CHALLENGES TO INDIGENOUS NATIONHOOD* 16–17 (2008) (Lindsay G. Robertson ed., 2008) (describing federal Indian policy since the 1980s as a new era of “forced federalism” in which the federal government coerces tribes to give up aspects of their sovereignty and surrender to state regulation—a bad development for tribes). Corntassel and Witmer describe a federalist structure in which tribes are made subordinate to states, rather than recognized as equals. In contrast, I argue for a vision of our federalism that upholds tribal sovereignty as something equal to and thus insulated from state power. It might be relevant to note that Corntassel and Witmer were writing in a period when the Supreme Court was consistently hostile toward tribal interests. The legal landscape has changed since the 2000s.

Federalism is arguably the global status quo, having supplanted the experiment with nationalism. See Calabresi & Bickford, *supra* note 38, at 123 (observing that we are living in “the Age of Federalism”); Heather K. Gerken, *Federalism as the New*

Federalism is not the only viable option: There is a rich tradition in federal Indian law of reaching for international law, rather than domestic constitutional law to make sense of tribal sovereignty. After all, tribes' relationships with the United States are historically rooted in treaties— instruments of international diplomacy and war.⁶⁷ In a foundational Indian law decision, the Supreme Court relied on the European Law of Nations to determine the effects of Indian property claims.⁶⁸ Tribal representatives participate in the United Nations, at the Permanent Forum on Indigenous Issues and the World Intellectual Property Organization.⁶⁹ Tribal leaders pursue the implementation of the United Nations Declaration on the Rights of Indigenous Peoples in tribal law across the United States.⁷⁰ Leading scholars continue to call on international law to inform and realize tribal self-determination.⁷¹

In my view, international law and human rights talks offer just and righteous ideals, but for the foreseeable future, these ideals remain distant aspirations. In the present moment, they sway neither Congress, the Court, nor our recent presidential administrations. In contrast, federalism offers a pragmatic approach. It is more limited in its ideals but more immediately impactful within domestic United States law and policy.

Nationalism: An Overview, 123 YALE L.J. 1889, 1917 (2014) (observing the emergence of a nationalist school of federalism that has eclipsed traditional nationalism); Robert A. Schapiro, *In the Twilight of the Nation-State: Subnational Constitutions in the New World Order*, 39 RUTGERS L.J. 801, 801–02 (2007) (on the demise of Westphalian nation states).

67. See COHEN'S HANDBOOK, *supra* note 15, §§ 2.02–2.03 (describing British colonial and American treaty-making practice); *Tribal Treaties Database*, OKLA. ST. UNIV. LIBRS., <https://treaties.okstate.edu/> [<https://perma.cc/V5T9-WE8M>] (last visited Aug. 25, 2026) (cataloging the hundreds of treaties between the United States and tribes).

68. *Johnson v. M'Intosh*, 21 U.S. 543, 571–73 (1823) (using the doctrine of discovery to resolve a land dispute involving a conveyance from an Indian tribe).

69. *United Nations Permanent Forum on Indigenous Issues (UNPFII)*, U.N.: DEP'T ECON. & SOC. AFFS., <https://social.desa.un.org/issues/indigenous-peoples/unpfii> (last visited Aug. 27, 2026); *IGC 51 Summary: Indigenous Peoples and Local Communities' Participation*, WORLD INTELL. PROP. ORG. (June 11, 2025), <https://www.wipo.int/en/web/igc/w/news/2025/igc-51-summary> [<https://perma.cc/TMU4-E8QU>].

70. See THE IMPLEMENTATION PROJECT, TRIBAL IMPLEMENTATION TOOLKIT 1–2 (2021), <https://un-declaration.narf.org/wp-content/uploads/Tribal-Implementation-Toolkit.pdf> [<https://perma.cc/4MJC-Z9HW>] (describing strategies for implementation of the UN Declaration on the Rights of Indigenous Peoples, produced by the Native American Rights Fund in partnership with the University of Colorado Law School and the UCLA School of Law).

71. See, e.g., S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 4 (1996); Kristen A. Carpenter, *Indigenous Peoples in International (Treaty) Diplomacy*, 71 UCLA L. REV. 1622, 1624 (2025); Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CAL. L. REV. 173, 175 (2014); Wenona T. Singel, *New Directions for International Law and Indigenous Peoples*, 45 IDAHO L. REV. 509, 511 (2009).

Unlike international human rights law, federalism is routinely invoked by political and legal actors across our political spectrum and at every layer of government. It is presumed to be good, desirable, and even constitutionally mandated⁷²—even if we cannot all quite agree exactly what it means.⁷³ Claims of federalism have both rhetorical and legal power in our politics.⁷⁴ Moreover, conceptions of American federalism *without tribes* arm opponents of tribal sovereignty with misguided states' rights claims.⁷⁵

Federalism is not only a useful tool, but also an accurate description of tribes in our constitutional order. Federalism addresses tribal sovereignty on an appropriate scale.⁷⁶ It concerns power, structures, and politics. American federalism expressly uses the language of sovereignty to describe the inherent powers of the fifty states. To be sure, the fifty states are not politically situated like the member states of the United Nations—their federation precludes international recognition and

72. See Steven G. Calabresi, "A Government of Limited and Enumerated Powers": *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 790 (1995) ("The federal character of the American Constitution is . . . by far its most important structural feature. The only difficult question is how to make sure that it is enforced vigorously and properly.").

Beyond the constitutional mandate, there are normative arguments for adhering to federalism. According to Calabresi and Bickford, federalism is the political organization responsive to subsidiarity—the notion that decisions should be made at the lowest or least centralized competent level of government. Prizing subsidiarity supposedly results in a range of goods, including regional variation, productive competition, useful experimentation, and lower administrative costs. Calabresi & Bickford, *supra* note 38, at 125–129. Not to mention guarding against abuse of power. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

73. See Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1550–51 (2012). David Elazar's concise formulation of federalism as shared rule plus self-rule is a good starting point. DANIEL J. ELAZAR, *EXPLORING FEDERALISM* 12 (1987).

74. See Wenona T. Singel, *The First Federalists*, 62 *Drake L. Rev.* 775, 779–80 (2014).

75. See Alex Tallchief Skibine, *The Court's Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country*, 36 *TULSA L. J.* 267, 268–69 (2000); Tsosie, *supra* note 39, at 94; *Haaland v. Brackeen*, 143 S. Ct. 1609, 1686 (Alito, J., dissenting) (arguing that the Indian Child Welfare Act was unconstitutional because "Congress's power in the area of Indian affairs cannot exceed the limits imposed by the 'system of dual sovereignty between the States and the Federal Government' established by the Constitution.").

76. In the words of Allan Erbsen: "The Constitution allocates sovereign power between governments along two dimensions: a vertical plane that establishes a hierarchy and boundaries between federal and state authority, and a horizontal plane that attempts to coordinate fifty co-equal states that must peaceably coexist." Allan Erbsen, *Horizontal Federalism*, 93 *MINN. L. REV.* 493, 494 (2008). Tribes, like the fifty states, operate in this sovereign matrix, retaining sovereign powers on a co-equal horizontal plane yet subject to federal supremacy.

diplomacy, and they are subject to a supreme national government. In a word, the fifty states are domestic sovereigns: governments recognized as sovereign within domestic American law but not recognized on the international level.

As domestic dependent nations, tribes are also domestic sovereigns with recognized powers of inherent sovereignty limited by federal supremacy.⁷⁷ The nature of tribes' relationships with the federal government is defined in treaties and informed by the Constitution. The Supreme Court describes this political, unequal, inter-sovereign relationship as a trust relationship—in which the United States serves as trustee to tribal beneficiaries.⁷⁸ Meanwhile, scholars have described this relationship as a duty of protection, a mutual arrangement tying weaker tribal sovereigns to the stronger United States.⁷⁹ While the domestic sovereignty of states is limited by the Supremacy Clause, the incorporation of constitutional rights via the Fourteenth Amendment, and a handful of other rules expressly set out in the Constitution, tribal sovereignty is limited by federal statute, and justified by the judicially created doctrine of congressional plenary power over Indian affairs.⁸⁰ At the same time, the federal judiciary formally respects tribal sovereignty and repeatedly tells us that tribes retain their ancient, inherent powers unless, and until, Congress acts unequivocally to abridge such powers.⁸¹

Tribes and states are not the same, but they occupy a common plane of sovereignty in our constitutional order.⁸² As rival domestic sovereigns,

77. The Court articulates this constitutional positionality as follows: "Indian tribes are 'domestic dependent nations' that exercise 'inherent sovereign authority.' . . . As dependents, the tribes are subject to plenary control by Congress. . . . And yet they remain 'separate sovereigns pre-existing the Constitution.' . . . Thus, unless and 'until Congress acts, the tribes retain' their historic sovereign authority." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (citations omitted).

78. *Johnson v. M'Intosh*, 21 U.S. 543, 591 (1823).

79. See Fletcher, *supra* note 9, at 309.

80. See *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974).

81. Judith Resnik refers to both states and tribes as dependent sovereigns, but notes that tribes are more truly distinct sovereigns than the states. Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 679 (1989).

82. A notable distinction highly relevant to this project is the absence of formal tribal participation in federal legislation. Unlike states, tribes are not directly involved or represented in national politics. They lack the so-called "political safeguards of federalism." Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 544, 553 (1954); see also Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 218–19 (2000) (asserting that while Wechsler's account of the political safeguards is unpersuasive, federalism does have political safeguards—in the form of political parties rather than formal constitutional

perhaps it is not surprising that they share a history of strained relations. In other words, tribes and states produce horizontal federalism problems.⁸³ From a bird's-eye view, states and tribes possess relatively equal powers, with neither class of domestic sovereign vested with the authority to overrule the other.⁸⁴ Structurally, that authority lies with the federal government. In practice, the power to name winners and losers in state-tribe conflict has fallen to the federal courts. This Article calls on Congress to intervene proactively, to set out the terms of intergovernmental cooperation, jurisdictional coordination, and ultimately, state-tribe coexistence.

As I choose to employ federalism as the frame for Indian affairs, I recognize yet another option. In addition to federalism and international law, empire offers a third framework for describing the relations between Indian tribes and the United States.⁸⁵ As the Supreme Court observed in *Johnson v. McIntosh*,⁸⁶ the United States' territorial claims are rooted in conquest, and tribes are left to assert their rights in the "[c]ourts of the

structures); Gerald Leonard, *Party as a "Political Safeguard of Federalism": Martin Van Buren and the Constitutional Theory of Party Politics*, 54 RUTGERS L. REV. 221, 227–28 (2001) (observing that the two-party system, an institution not featured in the Constitution nor wanted by the Founding Generation, is now the primary political safeguard for federalism). As this more recent literature on partisan politics as political safeguards illustrates, extra-constitutional institutions can nonetheless be essential to the practice of federalism. Tribes are involved in national politics, even if they are not directly represented in the Senate.

83. As Allan Erbsen argues, some horizontal friction among the subordinate sovereigns is a feature of our constitutional design. Erbsen writes specifically about *interstate* conflict, coequality, and codependence as horizontal federalism, but I suggest that these structural features likewise apply to tribes. See Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 496, 531 (2008).

84. A useful example of this equal sovereignty can be found in sovereign immunity. Sovereign immunity comes in a hierarchy in American law. Neither tribes nor states can use sovereign immunity defenses to shield themselves from suits by the United States. Both states and tribes can use sovereign immunity defenses to shield themselves from each other. See DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS JR., MATTHEW L.M. FLETCHER & KRISTEN A. CARPENTER, *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 452 (7th ed. 2017) (citing *United States v. Yakima Tribal Ct.*, 794 F.2d 1402, 1406–08 (9th Cir. 1986), *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 383 (8th Cir. 1987), *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991)).

85. See Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 383 (1993) (asserting that "[federal Indian law] is inescapably the product both of the colonization of the western hemisphere by European sovereigns and of the corresponding displacement of indigenous peoples"). According to Frickey, the Constitution was designed to "establish[] a government for the colonizers and treat[] Indians and tribes as outsiders." *Id.*

86. 21 U.S. 543.

conqueror.”⁸⁷ In other words, the foundations of federal Indian law rest on the pretensions of empire.⁸⁸ One of the most notable distinctions between tribes and states in our constitutional order is that tribes are subject to congressional plenary power⁸⁹—an extraordinarily broad claim of power unbounded by the Constitution and founded upon presumptions of Indian dependence.⁹⁰ Of course, the history of treaty-making complicates the imperial frame; tribal affiliation with the United States is not simply a story of conquest but also a history of voluntary association among sovereign actors.⁹¹ The extension of American citizenship to all Indians in 1924 further undermines the imperial framework.⁹² The United States’ overseas territories constitute a more paradigmatic example of imperial relations.

87. *Id.* at 588–89.

88. “However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land and cannot be questioned.” *Id.* at 591. In this way, Marshall used the imperialist doctrine of discovery to justify the subordination of Native property rights and ultimately facilitate massive tribal dispossession. *Id.* The Court’s role as colonial agent did not end with the Marshall Trilogy. According to Philip Frickey, the Court remained strikingly active in colonial process in the late twentieth century. Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 7 (1999) (observing that “[a] half-millennium after the colonial process began, in our time of great skepticism concerning colonization, our least democratic branch has become our most enthusiastic colonial agent”).

89. *See United States v. Kagama*, 118 U.S. 375, 384–85 (1886); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903); *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974); *Haaland v. Brackeen*, 143 S. Ct. 1609, 1629 (2023).

90. *See Kagama*, 118 U.S. at 384; Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 649–50, 654–58 (2006); Skibine, *supra* note 65, at 667–68, 673–75; Ishitani & Fay, *supra* note 18, at 2–3.

91. *See* Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45, 52–53 (2012).

92. Indian Citizenship Act, ch. 233, 43 Stat. 253 (1924) (*amended by* Nationality Act of 1940, ch. 876, 54 Stat. 1137 (1940)). *See also* Alexandra Fay, *Citizenship and Empire in Elk v. Wilkins*, 102 WASH. U. L. REV. 1839, 1875–76 (2025) (discussing pathways to citizenship that existed prior to the 1924 Act).

The line between empire and federalism⁹³ is not always clear.⁹⁴ In 1964, William Riker observed that “federalism is the main alternative to empire as a technique of aggregating large areas under one government.”⁹⁵ Though he was writing from an American perspective, Riker’s dichotomy is not so easily applied to Indian tribes. Riker defined federalist constitutions with three conditions: “(1) two levels of government rule the same land and people, (2) each level has at least one area of action in which it is autonomous, and (3) there is some guarantee (even though merely a statement in the constitution) of the autonomy of each government in its own sphere.”⁹⁶ This description maps onto the modern relationship between tribes and the federal government, though the guarantee of tribal autonomy is set out in treaties rather than the 1789 Constitution. Riker also posited that federalism arises when some political actors seeking territorial expansion propose confederation and others are willing to join the union for the sake of military defense.⁹⁷ This account of the origins of federalism also generally fits the relationship between tribes and the federal government—at least the early treaty relations between eastern tribes and the United States that informed the foundational doctrines of federal law. Tribes voluntarily aligned themselves with the United States through treaty negotiations—though of course those negotiations often occurred against a backdrop of coercion.⁹⁸ Tribes became part of the United States constitutional order through formal association under the threat of conquest.⁹⁹ If voluntary affiliation is a key distinction between federalism and empire, then drawing a line between free association and coercion remains a problem. After all, Riker’s conditions for federalism assume a degree of coercion in that the

93. American commentators tend to distinguish federalism from federation and confederacy, deeming the latter two categories as weaker associations more akin to alliances. Non-American authors use federation and federalism more interchangeably. *See, e.g.,* Olivier Beaud, *Federation and Empire: About a Conceptual Distinction of Political Forms*, 16 INT’L J. CON. L. 1199, 1202 (2019). To avoid confusion, I primarily use the term federalism to describe federated constitutions that others would reasonably deem federations.

94. Thomas Jefferson famously referred to American democracy as an “[e]mpire of liberty.” Letter from Thomas Jefferson to George Rogers Clark, FOUNDERS ONLINE (Dec. 25, 1780), <https://founders.archives.gov/documents/Jefferson/01-04-02-0295> [<https://perma.cc/R447-P746>].

95. WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 5 (1964).

96. *Id.* at 11.

97. *See id.* at 12–13. According to Riker, these two conditions are necessary and likely sufficient for the creation of federal constitutions. *Id.* at 13.

98. *See* Fletcher, *supra* note 91, at 50–54.

99. *See id.* at 52.

military defense rationale itself drives weaker polities to union. Riker's general characterizations only do so much to help us distinguish between federalism, empire, and unequal international alliances.

Empire and federalism share basic structural symmetries.¹⁰⁰ In contrast with nation-states, empires and federations both operate on a "pluralistic internal logic."¹⁰¹ In the words of Olivier Beaud, "[a]s political forms, federation and empire are defined by their high tolerance of diversity."¹⁰² Empires have an arguably greater tolerance for diversity because federalism may demand a higher baseline of political homogeneity.¹⁰³ They are both aggregations of states, and for their residents, "nationality is multiple."¹⁰⁴ Modern empires and federalist polities can accommodate various forms of government.¹⁰⁵ Empires can be liberal, just as federations can be autocratic.¹⁰⁶ These structural similarities should not be particularly surprising given that the dominant models for modern federalism developed out of the British imperial system.¹⁰⁷

Of course, there are meaningful structural differences. Empires feature a hierarchy between the center and periphery, between metropole and colonies.¹⁰⁸ They often feature a distinction between citizens and subjects.¹⁰⁹ In contrast, federalism is typically premised on the sovereign equality of affiliated states and the political equality of the peoples of those states.¹¹⁰ The United States Constitution eliminated the metropole—

100. See Beaud, *supra* note 93, at 1200.

101. *Id.* at 1206.

102. *Id.* at 1203.

103. *Id.* at 1204.

104. *Id.* at 1200.

105. *Id.* at 1201.

106. See *id.* Riker also notes that federations are not inherently liberty-protecting structures, despite American mythology. See RIKER, *supra* note 95, at 13–15.

107. See ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 6 (2010). Riker observed that over a third of the federalist governments he was studying in the 1960s grew out of former British colonies, leading him to write that "there is something in the British political tradition that is especially conducive to the federal form . . . although I have never been able to identify what it is." RIKER, *supra* note 95, at 25. I posit that federalism structurally resembles British imperialism, featuring significant local autonomy and partnership with local elites—in practice, though not guaranteed in constitutional terms. See LAUREN BENTON, *A SEARCH FOR SOVEREIGNTY* 294 (2010).

108. Beaud, *supra* note 93, at 1203, 1206.

109. *Id.* at 1206.

110. *Id.* at 1202, 1206.

at least in relation to the states.¹¹¹ The territories are more like colonies than equal member states. It could be argued that tribes fit into both frameworks. As Maggie Blackhawk observes, “the United States Constitution [historically] had two faces: one for the colonizing polity and the other for the colonized.”¹¹²

Given these options, I choose federalism. Federalism’s normative commitments to subsidiarity and the formal equality of member states make it a more useful framework for the protection of tribal sovereignty vis-a-vis the states. Federalism is capable of change over time—it is a pliable structure that can respond to changing conditions while holding fast to foundational commitments.¹¹³ Moreover, American jurists are far more comfortable with the terms of federalism than either empire or international law.

Finally, one might ask whether such a choice is necessary. Why not consider federal Indian law as truly *sui generis* and recognize that tribal sovereignty is not bound by federalism, international law, or the laws of empire? Philip Frickey warned against the “seduction of coherence,”¹¹⁴ observing how the Court has trampled foundational principles of federal Indian law in search of coherence.¹¹⁵ This is true. Any framework that

111. See PETER S. ONUF, *JEFFERSON’S EMPIRE: THE LANGUAGE OF AMERICAN NATIONHOOD* 54–56 (2000) (describing Thomas Jefferson’s ideal for America as a republican empire freed from metropolitan rule).

112. Maggie Blackhawk, *Forward: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 10 (2023). According to Blackhawk, colonialism remains part of our constitutional law, and to ignore it means forfeiting strategies to mitigate the American colonial project. *Id.* at 13. This is one of the strongest arguments against my embrace of federalism. I suggest that the project of theorizing tribal sovereignty into our federalism necessarily requires engaging with the law of colonialism—including the limits of empire that Blackhawk seeks to exploit. In this way, I hope to offer another translation of her mission, rather than an objection.

113. See Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1921–22 (describing the development of American federalism from dual federalism to process federalism and how state autonomy is retained, albeit transformed); see also Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1502–03 (1994) (describing a functional approach to federalism, responsive to an evolving society); Cristina Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2095 (2014) (asserting that “federalism does not consist of a fixed set of relationships. Instead, its parameters are subject to ongoing negotiation . . .”). As Robert Schapiro puts it, “the relevant question is not ‘why federalism,’ but how federalism should best operate.” ROBERT A. SCHAPIRO, *POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS* 6 (2009).

114. Philip P. Frickey, (*Native*) *American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433, 435 (2005). Frickey borrowed the idea from Vicki Jackson. See Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691, 698 (2000).

115. See Frickey, *supra* note 114, at 436.

ignores the colonial history that contextualizes tribal political status poses risks to tribal sovereignty. Still, I endorse trilateral federalism as both a legally correct and pragmatically useful model for tribes in the American constitutional order. Instead of fighting the seduction of coherence by insisting that Indian law is exceptional, I seek to harness the power of that seduction by calling out the incoherence of the status quo and offering a superior, workable model of coherence that prizes and protects tribal self-government.

B. Jurisdictional Incoherence

In the early years following American independence, the jurisdictional boundaries between states and tribes were relatively simple. Eastern tribes formed treaties with the United States, ceding parts of their ancestral homelands in exchange for the guarantee of uninterrupted self-government on reserved territory.¹¹⁶ Tribes typically conceded carveouts of federal jurisdiction over crimes involving non-Indians on tribal land.¹¹⁷ Otherwise, tribal jurisdiction was presumed to be coextensive with tribal land.¹¹⁸ State law had no force beyond these boundaries set out in treaties. The federal government policed interactions between Indians and non-Indians—which largely translated to citizens of the tribes and citizens of the states.¹¹⁹ In the antebellum period, states pushed the boundaries of the law; federal courts and federal troops were compelled to intervene in defense of tribal boundaries.¹²⁰

Over the following 150 years, this clear jurisdictional arrangement grew more complicated. Developments in federal Indian law and policy replaced once-robust boundaries with more porous, more complex jurisdictional schemes. Both states and tribes now enjoy gradations of jurisdiction over Indian country. The modern jurisdictional compromise

116. See Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 7–8 (1995).

117. See *id.* at 3–4.

118. See *id.*

119. See Matthew L.M. Fletcher, *Fletcher's Uncertainty Principle*, 61 TULSA L. REV. 1, 3–4 (2025) (observing how “Indian” was never defined in the Early Republic yet everyone seemed to know what it meant). Today, Indian status is a more complicated, context-specific legal concept. See COHEN’S HANDBOOK, *supra* note 15, § 4.03.

120. John Quincy Adams sent the military to protect the Muscogee (Creek) Nation from Georgians threatening to invade the tribe’s territory. Even Andrew Jackson used federal troops to defend the Muscogee (Creek) Nation from Alabama squatters prior to removal. See ROCKWELL, *supra* note 6, at 145–46. Of course, the Supreme Court also defended the integrity of tribal sovereignty against state encroachment. See *Worcester v. Georgia*, 31 U.S. 515, 521–22, 593–96 (1832). In all of these instances, federal actors asserted federal authority over tribal relations at the expense of the states.

between states and tribes is the subject of a vast volume of legal scholarship, due to its needless complexity. The remainder of this Section describes recurring examples of jurisdictional incoherence resulting from federal legislation and Supreme Court decisions.

So much of our modern jurisdictional complexity stems from Allotment. In 1887, Congress transformed the relationship between states and tribes with the General Allotment Act, also known as the Dawes Act.¹²¹ Allotment was one of the defining policies of the Assimilation Era of federal Indian policy, one that devastated tribes' abilities to self-govern.¹²² The General Allotment Act of 1887 and other targeted allotment acts¹²³ unilaterally broke up reservations, imposed a system of individual private property ownership on Native people, and sold off so-called "surplus" lands to white settlers.¹²⁴ In addition to the initial surplus lands, many more acres of tribal land were sold or swindled into non-Indian hands.¹²⁵ Although these policies violated numerous treaties, the Supreme Court upheld them under its newly articulated doctrine of Congressional Plenary Power.¹²⁶ At the time of the General Allotment Act, tribes had already lost the overwhelming majority of their aboriginal lands.¹²⁷ Of the approximately 138 million acres that remained in tribal hands, nearly 90 million acres were lost to allotment.¹²⁸

121. General Allotment (Dawes) Act, ch. 119, 4 Stat. 388 (1887) (repealed 1934).

122. See COHEN'S HANDBOOK, *supra* note 15, § 2.08(1)(d).

123. The Five Tribes of the Indian Territory were initially excluded from allotment. Congress forcibly broke up their land holdings via the Curtis Act of 1898 and the Five Civilized Tribes Act of 1906. See *id.* § 2.08(4)(f).

124. *Id.* § 2.08(1)(d). Allotment forcibly refashioned tribal property systems. For an account of various tribal property systems prior to allotment, see Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1571–1602 (2001). For a more detailed account of how allotment operated, see Royster, *supra* note 116, at 10–14.

125. See Bobroff, *supra* note 124, at 1610–11. Altogether, allotment was responsible for the loss of nearly two-thirds of tribal land in less than fifty years. COHEN'S HANDBOOK, *supra* note 15, § 2.08(1)(d).

126. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565–68 (1903).

127. Bobroff, *supra* note 124, at 1560.

128. *Id.* at 1560–61. This count includes all land held by tribes and tribal members in 1887 and lost by 1934, when Congress officially rejected allotment. *Id.* Much of this dispossession occurred quite quickly: the tribal land base was down to about 84 million acres by 1891. *Id.* at 1609. For an account of tribal dispossession in Oklahoma, see generally ANGIE DEBO, *AND STILL THE WATERS RUN*, at vii–ix (1940) (describing the swift removal of tribal land within a single generation).

Although Congress eventually repudiated allotment as a bad policy choice, it never properly undid the harm.¹²⁹ Today, the legacy of allotment lives on in checkerboard reservations. For example, on the Agua Caliente Reservation in Southern California (depicted in figure 1), you can travel in a straight line for twenty miles, exiting and reentering the reservation five times.¹³⁰ Similar checkerboard patterns of tribal land status complicate governance for the Rosebud Sioux Tribe and Sisseton Wahpeton Oyate in South Dakota, the Stockbridge-Munsee Community in Wisconsin, and the Navajo Nation in New Mexico (depicted in figure 5).¹³¹ These absurd boundaries complicate state-tribe relations.¹³² In the words of Supreme Court Justice William Douglas:

Checkerboard jurisdiction cripples the United States in fulfilling its fiduciary responsibilities of guardianship and protection of Indians. It is the end of tribal authority for it introduces such an element of uncertainty as to what agency has jurisdiction as to make modest tribal leaders abdicate and

129. See Act of June 18, 1934 (Indian Reorganization Act), Pub. L. No. 73-383, §§ 1–5, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–95 (1988)) (prohibiting further allotment, extending trust status of existing allotments in perpetuity, and authorizing the Secretary of the Interior to take new lands into trust as part of reservations); Royster, *supra* note 116, at 17–18 (“In effect, Congress halted the allotment program where it stood in 1934, and provided that certain ravages of the policy could be in part ameliorated. What Congress did not do, however, was restore fee patented or homesteaded lands to tribal ownership. . . . The vast majority of lands that had passed into fee during the allotment years remains in fee today.”).

130. See Mona de Crinis, *Cahuilla Territory*, FALL/WINTER 2021–22 ME YAH WHAE 58, 67, https://www.aguacaliente.org/documents/Cahuilla_Territory.pdf [<https://perma.cc/5K42-ZC7S>].

131. See Dep’t of Interior, *Indian Lands of Federally Recognized Tribes of the United States*, https://www.doi.gov/sites/doi.gov/files/uploads/12_bia_regions.pdf [<https://perma.cc/Y52G-LDL2>] (last visited Sep. 4, 2026); *Bureau of Indian Affairs Tract Viewer: Mapped Lands in Indian Country*, BUREAU INDIAN AFFS., <https://biamaps.geoplatform.gov/biatracts/> [<https://perma.cc/TXV2-NM7B>] (last visited Sep. 9, 2026). The Navajo Nation spans four states, but the most egregiously checkerboarded portion of the reservation is found in the northwest corner of New Mexico. See *Bureau of Indian Affairs Tract Viewer: Mapped Lands in Indian Country*, *supra*.

132. Indeed, the Supreme Court has considered the serious checkerboard consequences of tying jurisdiction to fee land ownership. See *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 358 (1962) (observing that excluding non-Indian fee lands from Indian country for the purposes of criminal jurisdiction would result in undesirable “checkerboard jurisdiction” and that Congress specifically sought to avoid such an outcome); *DeCoteau v. Dist. Cnty. Ct.*, 420 U.S. 425, 429 n.3 (1975) (noting the possibility of checkerboard jurisdiction as a result of the majority’s decision, and observing that “there will obviously arise many practical and legal conflicts between state and federal jurisdiction with regard to conduct and parties having mobility over the checkerboard territory. How these conflicts should be resolved is not before us.”).

aggressive ones undertake the losing battle against superior state authority.¹³³

The uncertainty resulting from checkerboard jurisdiction impedes effective governance to the detriment of Indians and non-Indians alike.¹³⁴ The following figures illustrate checkerboards that plague Indian country today.

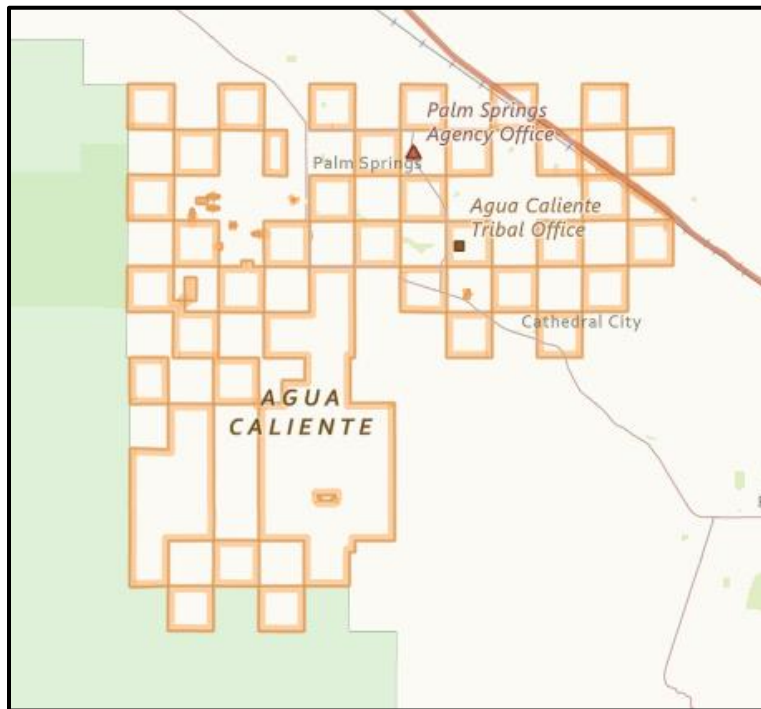


Figure 1. Agua Caliente Reservation¹³⁵

133. *DeCoteau*, 420 U.S. at 467 (1975) (Douglas, J., dissenting).

134. *See Seymour*, 368 U.S. at 358.

135. *Bureau of Indian Affairs Tract Viewer: Mapped Lands in Indian Country*, *supra* note 131.

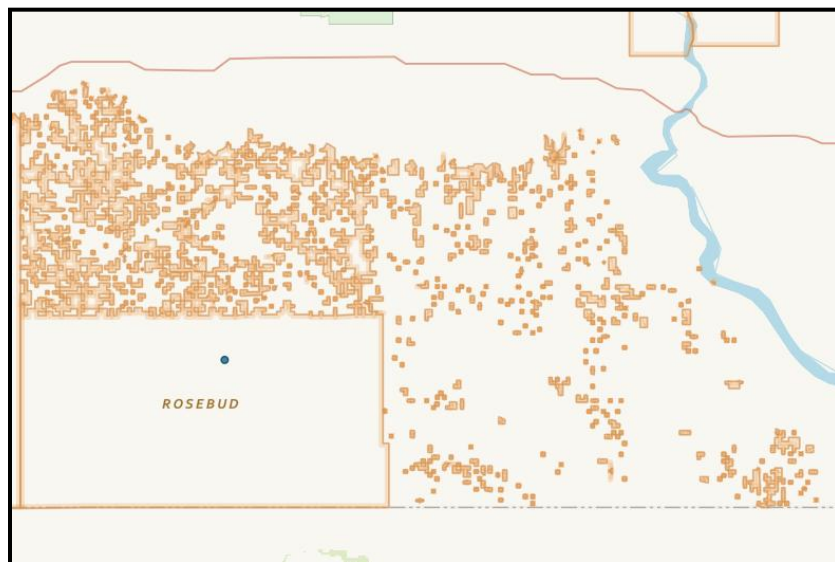


Figure 2. Rosebud Indian Reservation¹³⁶

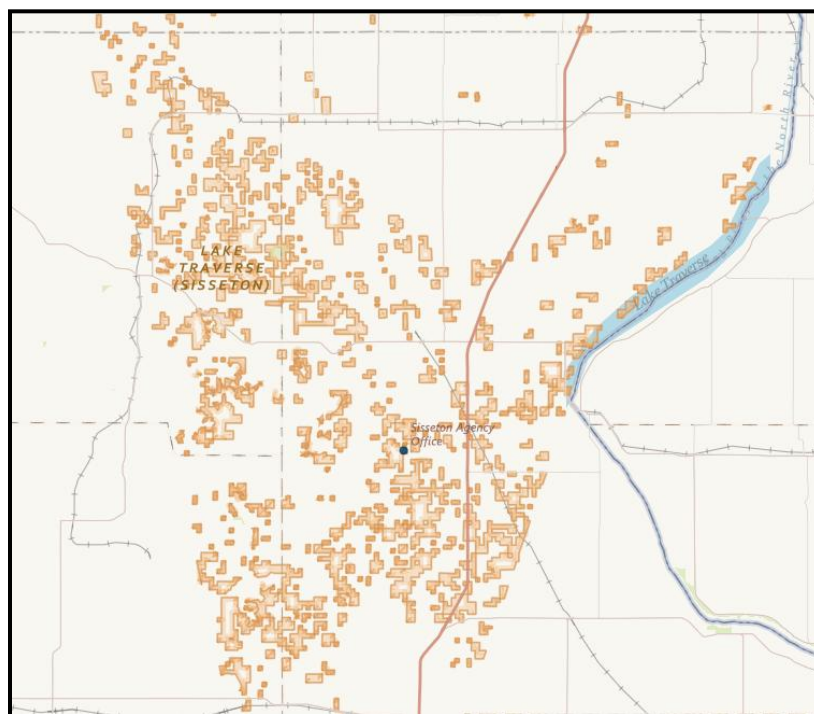


Figure 3. Lake Traverse Reservation¹³⁷

136. *See id.*

137. *See id.*

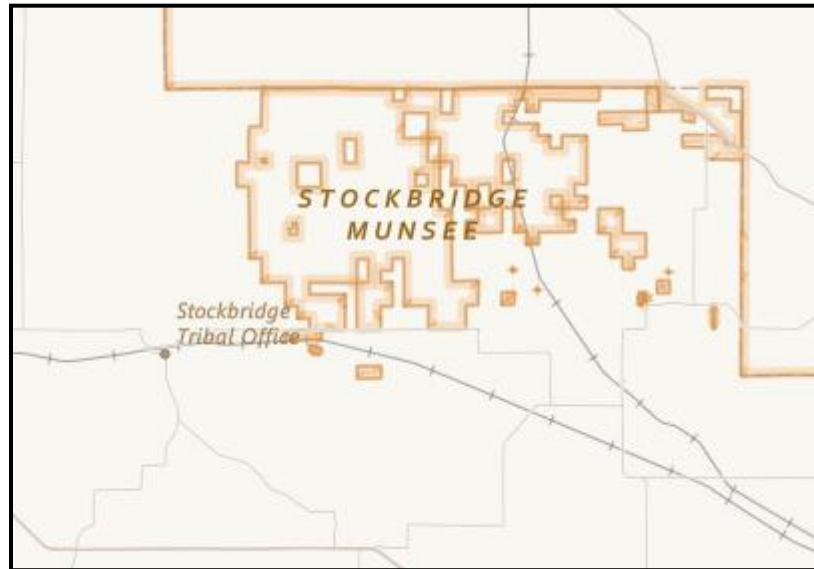


Figure 4. Stockbridge-Munsee Indian Reservation¹³⁸

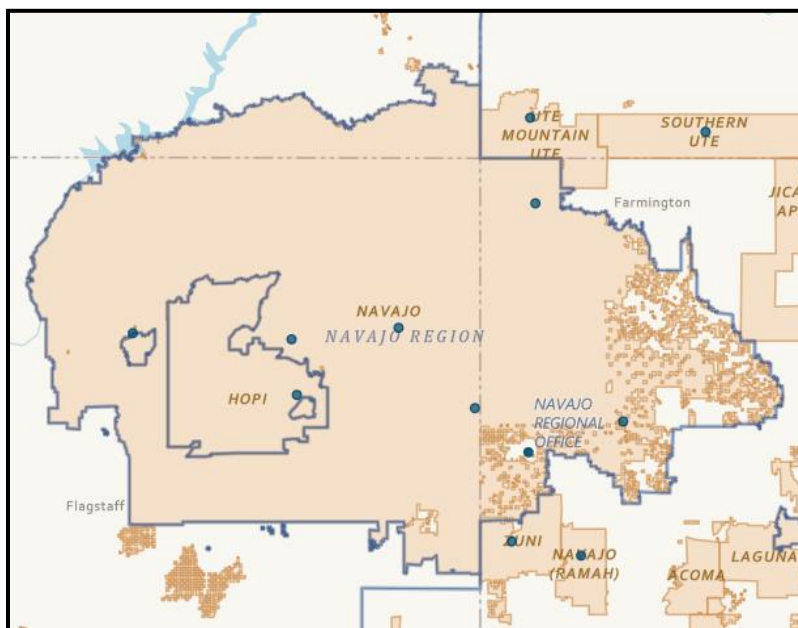


Figure 5. Navajo Nation Reservation¹³⁹

138. *See id.*

139. *See id.*

The Supreme Court has also facilitated the erosion of clear, workable boundaries between the domestic sovereigns. Today, the lines between tribal and state jurisdiction are not only territorial, but also identity based. In its landmark cases of *Oliphant v. Suquamish Indian Tribe*¹⁴⁰ and *Montana v. United States*,¹⁴¹ the Supreme Court further carved up tribal jurisdiction on the basis of individual Indian status. In other words, whether the laws of the state or the tribe apply to any given individual's conduct depends not only on the location of the conduct, but also on the political status of the individual (*i.e.*, tribal member Indian, nonmember Indian, or non-Indian).¹⁴² Judith Royster has argued that these identity-based rules should be understood as further legacies of allotment.¹⁴³

Oliphant and *Montana* limited tribal jurisdiction over non-Indians in criminal and civil matters respectively, resulting in major jurisdictional gaps. Running with the judge-made theory of implicit divestiture,¹⁴⁴ the Court stripped tribes of jurisdiction over non-Indians, asserting that such powers were inconsistent with tribes' status as domestic dependent nations.¹⁴⁵ Their inherent sovereign authority to regulate all people in their territories had been implicitly divested, notwithstanding the absence of any Congressional legislation to this effect and the Indian canons of construction, under which tribes generally retain their inherent sovereign powers absent an express congressional abrogation. In *Oliphant*, the Court categorically stripped tribes of criminal jurisdiction over non-Indians.¹⁴⁶ For decades, scholars and advocates referred to non-Indian crime in Indian country as a jurisdictional gap, where too many offenders

140. 435 U.S. 191 (1978).

141. 450 U.S. 544 (1981).

142. The Supreme Court has been inconsistent with its applications of these two distinctions. Criminal jurisdiction turns on the Indian vs. non-Indian distinction. *See Oliphant*, 435 U.S. at 211–12. In addressing tribal civil jurisdiction, the Court has at times discussed tribal members vs. nonmembers and at other times Indians vs. non-Indians. Sometimes in the same opinion. *See Montana*, 450 U.S. at 565–66. In this Article, I will sometimes refer to Indian status as a shorthand for all of these kinds of distinctions.

143. *See Royster, supra* note 116, at 45–46 (arguing that the *Oliphant* decision and especially the *Montana* decision are directly tied to allotment policy and the resulting prevalence of non-Indians within the bounds of reservations).

144. *See Philip P. Frickey, A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 7 (1999).

145. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. at 208; *Montana*, 450 U.S. at 565.

146. *Oliphant*, 435 U.S. at 195.

escaped prosecution.¹⁴⁷ In recent times, Congress has begun to fill this gap by restoring tribal jurisdiction over a limited set of non-Indian offenders in the 2013 and 2022 Reauthorizations of the Violence Against Women Act.¹⁴⁸

In *Montana*, the Court asserted a general presumption against tribal civil jurisdiction over non-Indians and outlined two exceptions: (1) non-Indians who contract with tribes and essentially consent to tribal jurisdiction, and (2) non-Indians whose conduct profoundly threatens the political integrity, economic security, or health or welfare of the tribe.¹⁴⁹ The Court has made these exceptions extremely narrow.¹⁵⁰ To this day, the Court has only found one case that fits into the latter exception.¹⁵¹

The Court has also extended state jurisdiction onto reservations, resulting in many instances of concurrent jurisdiction. A prominent example of concurrent jurisdiction is the double taxation of non-Indians. Tribes retain broad authority to tax non-Indian activity on trust lands.¹⁵² On non-Indian fee land, tribes retain authority to tax non-Indian activity subject to the *Montana* framework.¹⁵³ Accordingly, tribes can at a minimum tax most commercial interactions between non-Indians and the tribe or tribal members.¹⁵⁴ Meanwhile, the Court has extended state tax authority over non-Indians on tribal territory, in many cases overlapping

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

148. Violence Against Women Act (VAWA) Reauthorization Act of 2022, Pub. L. No. 117-103, 136 Stat. 49, 899–908.

149. *Montana*, 450 U.S. at 565–66.

150. See, e.g., *Strate v. A1 Contractors*, 520 U.S. 438, 442 (1997) (finding that a tort suit against a non-Indian contractor was beyond the tribe’s jurisdiction even though he was only on the reservation because of his contract with the tribe).

151. See *United States v. Cooley*, 141 S. Ct. 1638, 1641 (2021); Comment, *United States v. Cooley*, 135 HARV. L. REV. 411, 415 (2021) (observing that *Cooley* is the first time the Supreme Court has found an example that satisfies the second *Montana* exception).

152. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982). In *Merrion v. Jicarilla Apache Tribe* (1982) the Court found broad tribal tax authority over non-Indians on tribal trust land and tribally owned land, based on both this argument of inherent and essential sovereign power as well as the distinct tribal power to exclude. *Id.* The Court has recognized the power to tax as “an essential attribute of Indian sovereignty” and “a necessary instrument of self-government and territorial management.” *Id.*

153. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 651 (2001).

154. See *id.* at 656 (requiring the tribal tax to “have a nexus to the consensual relationship itself” under *Montana*); COHEN’S HANDBOOK, *supra* note 15, § 10.04(2)(b) (asserting that the “*Atkinson* holding does not apply to taxes with a nexus to commercial relationships between nonmembers and a tribe or its members”).

with tribal tax authority.¹⁵⁵ In its 1989 decision of *Cotton Petroleum Corp. v. New Mexico*,¹⁵⁶ the Supreme Court determined that double taxation poses no constitutional problems, merely a host of practical problems.¹⁵⁷ To be sure, the Court reminds us that Congress has the power to fix the double taxation problem.¹⁵⁸ And until Congress acts, concurrent tribal and state tax authority will persist.

In the heart of Indian country, trouble with tax jurisdiction has only gotten worse. The State of Oklahoma is presently trying to extend its tax jurisdiction to reach tribal members working and residing on reservations.¹⁵⁹ In its attempts to tax the income of tribal members, the State is ignoring a well-established rule, with precedents dating back to the 1860s, that the State cannot tax the income of tribal members derived from the reservation.¹⁶⁰ In more recent times, the Court has repeatedly articulated the prohibition against state taxation of reservation Indians as

155. See *Moe v. Confederated Salish & Kootenai Tribes Flathead Rsr.*, 425 U.S. 463, 483 (1976) (authorizing concurrent state taxation over cigarette sales by Indian business to non-Indian patron); *Washington v. Confederated Tribes Colville Indian Rsr.*, 447 U.S. 134, 160–161 (1980) (authorizing concurrent state taxation over cigarette sales by the tribe to non-Indian patron); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191–92 (1989) (authorizing concurrent state taxation over the non-Indians producing oil and gas); *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 115 (2005) (authorizing concurrent state taxation on gas sales by tribe to non-Indian patrons). These cases authorize state taxation on non-Indians doing business in Indian country, where state authority has not been preempted. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 152 (1980).

156. 490 U.S. 163 (1989).

157. See *id.* at 188. Even though concurrent taxation by multiple states raises constitutional issues, concurrent taxation involving a state and a tribe does not, so long as the taxed activity is “located entirely within the borders of the State . . . and also within the borders of the [reservation].” *Id.* In a prior decision, the Court recognized tribal taxation as “an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management.” *Merrion*, 455 U.S. at 137 (1982). But in *Cotton Petroleum*, the Court was concerned less with the demands of tribal sovereignty and practical governance, and more with states’ rights. See *Cotton Petroleum*, 490 U.S. at 190–91 (discussing the State of New Mexico’s constitutional power to tax and declining to divest the state of such power).

158. According to the Court, “[t]he federal sovereign has the undoubted power to prohibit taxation of the Tribe’s lessees by the Tribe, by the State, or by both, but since it has not exercised that power, concurrent taxing jurisdiction over all of Cotton’s on-reservation leases exists.” *Cotton Petroleum*, 490 U.S. at 189.

159. *Stroble v. Okla. Tax Comm’n*, 2025 OK 48, ¶¶ 9, 12, 588 P.3d 179, 182–83. See also Petition for Writ of Certiorari at i, 32, *Stroble v. Okla. Tax Comm’n*, No. 25-382 (U.S. Oct. 1, 2025) (granting the petition for a writ of certiorari to determine whether the State of Oklahoma can tax the income of a tribal member who lives and works within the tribal reservation).

160. See *Kan. Indians*, 72 U.S. (5 Wall.) 737, 756, 760 (1867).

a *per se* rule.¹⁶¹ Despite these directives from the highest court in the land, Oklahoma strives to rewrite the law and expand the world of double taxation.¹⁶²

The Court has facilitated a steady encroachment of state criminal jurisdiction into Indian country. In *United States v. McBratney*,¹⁶³ the Court extended state criminal jurisdiction over non-Indian offenders who commit crimes against non-Indians on reservations.¹⁶⁴ In *Oklahoma v. Castro-Huerta*,¹⁶⁵ the Court expanded state criminal jurisdiction to include non-Indian offenders who commit crimes against Indian victims.¹⁶⁶ And Oklahoma is again trying to rewrite federal Indian law to expand state power with even more concurrent jurisdiction in Indian country. In *City of Tulsa v. O'Brien*,¹⁶⁷ the Oklahoma Court of Criminal Appeals extended state criminal jurisdiction over all nonmember Indians committing criminal offenses on other tribes' reservations.¹⁶⁸ Given the widespread tribal adoption of VAWA jurisdiction, there is a growing class of Indian country offenders who could be subjected to not only dual but also triple prosecution for the same criminal activity thanks to this regime of concurrent jurisdiction.¹⁶⁹

In addition to jurisdictional gaps and jurisdictional overlap, Indian country also suffers from uncertain jurisdiction. Considering the opacity

161. See *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 179–80 (1973); *California v. Cabazon Band Mission Indians*, 480 U.S. 202, 215 n.17 (1987); *County of Yakima v. Confederated Tribes & Bands Yakima Indian Nation*, 502 U.S. 251, 267 (1992).

162. The Supreme Court is letting this happen. The justices denied cert in *Stroble v. Oklahoma Tax Commission* after distributing the case nine times. See Stroble v. Oklahoma Tax Commission, SCOTUSBLOG, <https://www.scotusblog.com/cases/stroble-v-oklahoma-tax-commission/> [<https://perma.cc/52GX-FCHU>] (last visited Sep. 2, 2026).

163. 104 U.S. 621 (1881).

164. *Id.* at 624.

165. 142 S. Ct. 2486 (2022).

166. *Id.* at 2504.

167. 2024 OK CR 31, 588 P.3d 908.

168. *Id.* ¶ 35, 588 P.3d at 921.

169. See *United States v. Wheeler*, 435 U.S. 313, 329–30 (1978) (holding that the Double Jeopardy Clause does not bar duplicative prosecutions arising from tribal and federal authority, thanks to the dual sovereignty doctrine); Angela R. Riley & Sarah Glenn Thompson, *Mapping Dual Sovereignty and Double Jeopardy in Indian Country Crimes*, 122 COLUM. L. REV. 1899, 1925 (2022) (charting eight jurisdictional scenarios featuring tribal/federal dual prosecution); Fay, *Tribes and Trilateral Federalism*, *supra* note 22, at 64 (illustrating the new space of concurrent tribal, state, and federal jurisdiction enabled by VAWA 2022 and *Oklahoma v. Castro-Huerta*). *Tulsa v. O'Brien* expands the universe of defendants subject to tribal, state, and federal concurrent jurisdiction.

of the Montana Test and the fuzziness of Indian status¹⁷⁰—not to mention Oklahoma’s determination to rewrite the rules of Indian country jurisdiction—all layered over checkerboard land statuses, reservation residents and visitors often face jurisdictional uncertainty.¹⁷¹

Sovereign immunity throws yet another wrench into judicial jurisdictional determinations. Both states and tribes can wield sovereign immunity as a shield against litigation from each other and from private citizens.¹⁷² Absent federal intervention, courts are often barred from fully resolving jurisdictional problems.¹⁷³ Sovereign immunity trouble further underscores federal courts’ limitations as the primary arbiters of Indian country jurisdiction.¹⁷⁴

In his work on negotiated constitutionalism, Aziz Huq suggests that sovereign immunity is a feature, not a bug, of our constitutional structure.¹⁷⁵ Borrowing from private law, Huq observes that sovereign immunity doctrine creates property-like constitutional entitlements that enable states to bargain with the federal government.¹⁷⁶ In negotiated federalism, the judiciary’s role is not to establish the final, unalterable lines of state and federal authority, but to make clear the constitutional

170. In the wake of the *McGirt* decision, we are seeing cases complicating the determination of Indian status, thus complicating jurisdictional determinations. See *infra* Section III.B.

171. See Browde, *supra* note 39, at 5 (observing how uncertainty of tax consequences chills economic development in Indian country).

172. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 759 (1998) (finding that sovereign immunity protected tribes from suits by states); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 804 (2014) (holding that waivers of tribal sovereign immunity were constructed too narrowly); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 787–88 (1991) (finding that sovereign immunity protected states from suits by tribes). In contrast, states can be sued by other states without waivers of sovereign immunity, because they apparently consented to such suits at the time of the constitutional convention. See *South Dakota v. North Carolina*, 192 U.S. 286, 316 (1904); *Blatchford*, 501 U.S. at 781–82.

173. Judicial frustration once led Chief Justice William Rehnquist to contemplate an expansion of *Ex parte Young* to allow for suits for damages against tribal officers. *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe Okla.*, 498 U.S. 505, 514 (1991).

174. The sovereign immunity problem is but one reason why the federal courts are ineffective at fixing jurisdictional incoherence in Indian country. As Elizabeth Hidalgo Reese observed, the courts continue to lag behind the other two federal branches and remain out of step with the Federal Policy Era of Tribal Self-Determination. Elizabeth Hidalgo Reese, *The Three Phases of the Tribal Self-Determination Era and the Phase Out of Federal Paternalism*, 125 COLUM. L. REV. FORUM 205, 239 (2025).

175. Aziz Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1635 (2014). He also identifies the anticommandeering doctrine as another feature of negotiated federalism. *Id.*

176. *Id.*

entitlements that each sovereign actor may use for bargaining.¹⁷⁷ In other words, the courts are secondary actors in the allocation of authority in our federalist order.¹⁷⁸ They police the basic rules of the game, but the states and the federal government are the primary actors—the negotiators. In Huq’s view, boundary issues and spillovers are inevitable in our Constitutional system, and intermural bargaining is the obvious solution.¹⁷⁹

While Huq is focused on the relations between states and the federal government, as well as the relations between branches of the federal government, his conception of a negotiated Constitution is useful for tribes. I agree that our federalist system should be understood as negotiated. I agree that courts should not be expected to resolve most inter-sovereign problems. And I agree that instead states—and tribes—should be primary participants in the negotiation. But I doubt whether bargaining among the domestic sovereigns can be successful without Congressional facilitation.

To be sure, much of this negotiation already happens in the absence of federal intervention. I suggest that as a general matter Congress can and should play a role in directing negotiation between the domestic sovereigns. Congress, unlike courts, can address jurisdictional conflict unimpeded by sovereign immunity. Congress can impose comprehensive, coherent jurisdictional rules, or establish processes and fora for inter-sovereign bargaining. Congress is best situated to resolve the complicated federalism problems facing Indian country.¹⁸⁰

II. FEDERAL SOLUTIONS

Our federalist constitutional order has two dimensions, vertical and horizontal. The relationship between states and the federal government is one of vertical federalism, defined by the text and structure of the United States Constitution. The relationship between tribes and the federal government is also vertical federalism, defined by treaties, the trust relationship, and the text and structure of the United States Constitution. The relations among the various states and tribes constitute

177. *Id.* at 1645 (“Rather than a general prohibition, therefore, federalism bargaining has been lubricated by judicial rules that endeavor to create crisp entitlements.”)

178. *Id.* at 1602 (asserting that elected officials, rather than judges, should be policing intermural bargaining).

179. *Id.* at 1656.

180. *But see* Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779, 783–85 (asserting a federal common law fix, in contrast to the majority of scholars who call for legislative fixes for Indian country jurisdiction problems).

horizontal federalism. On the horizontal plane, the domestic sovereigns are coequal and codependent as a matter of constitutional design.¹⁸¹ As illustrated by the examples of sovereign immunity and concurrent taxation authority described previously, the political equality of states and tribes results in federalism problems that can only be wholly resolved through voluntary cooperation or intervention by federal actors.¹⁸²

This role for federal intervention is a feature of our constitutional order, not some unfortunate accident.¹⁸³ Horizontal federalism problems should inform the legitimate scope of federal power. Federal power over interstate and state-tribe conflict is evident in the overall structure of the Constitution, discrete constitutional provisions, and treaties. In particular, the Commerce Clause, the Compact Clause, and the Full Faith and Credit Clause all evince a congressional oversight role in interactions among the domestic sovereigns. In federal Indian law, jurists often describe this authority as part of Congress's plenary power over Indian affairs. I suspect that plenary power talk unnecessarily exoticizes and obscures the role set out for Congress in the Constitution.¹⁸⁴

To fulfill this role, Congress has to do its job and legislate.¹⁸⁵ Unlike courts, legislators have the power to approach federalism problems holistically and implement creative and carefully tailored solutions.

181. See Erbsen, *supra* note 76, at 561 (discussing horizontal federalism with the states, but I borrow his analysis for the tribes as well).

182. See Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 117 (2014) (looking at the Full Faith and Credit Clause, observing how spillover problems are necessary consequences of our constitutional design, and how Congress should resolve them). States may be more limited in their abilities to cooperate formally absent federal oversight. Section 10 of Article I provides that "No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state." U.S. CONST. art. I, § 10. Despite the plain meaning of the text, jurists have disagreed as to its effect on interstate compacting. See David E. Engdahl, *Characterization of Interstate Arrangements: When Is a Compact Not a Compact?*, 64 MICH. L. REV. 63, 65–70 (1965) (describing the peculiar and even contradictory development of the Court's construction of the Compact Clause).

183. See Erbsen, *supra* note 76, at 496 (discussing interstate friction as intentional feature of our constitutional design); Gerken & Holtzblatt, *supra* note 182, at 62–63 (asserting that spillover problems in horizontal federalism generate useful friction that shape national politics).

184. For a fuller discussion of the use and shortcomings of the so-called plenary power doctrine, see generally Ishitani & Fay, *supra* note 18 (discussing the Indian law doctrine of plenary power).

185. This is not to say that the Court has no role to play. IGRA, the paradigmatic guided compacting policy, can rightfully be understood as Congress responding to Court action. See *infra* Section II.C. In this way, the Court can create the conditions for congressional intervention. And it doesn't stop there. As mentioned later, in IGRA Congress responded to the Court's decision in *Cabazon*, which only came about because of unilateral tribal action (*i.e.*, claiming the authority to operate high stakes bingo games beyond the reach of state regulation). See *id.* Tribes, States, the Court, and Congress all

This Part catalogs four existing models for statutory solutions to state-tribe conflict: (1) Federal Preemption, (2) Opt-In, (3) Guided Compacting, and (4) Noninterference. All four of these models draw from existing statutory schemes that directly address horizontal state-tribe relations.

A. Federal Preemption

The Federal Preemption Model features robust federal power and draws clear lines for the whole country. This model offers one-size-fits-all rules, ensuring that politically powerful and politically weak tribes alike can claim the same rights and powers. Likewise, states that embrace collaboration with tribal partners and states that are antagonistic toward tribal sovereignty are both legally obligated to honor these jurisdictional ground rules. The resulting uniformity across Indian country makes enforcement simpler for judges, federal actors, and tribal advocates. It allows for the development of a consistent, national body of law governing implementation.¹⁸⁶ It allows for national political mobilization around contested provisions and common problems.

ICWA serves as the primary source material for the Federal Preemption Model.¹⁸⁷ Congress passed ICWA in response to the alarming rate of Native family separation in the late twentieth century.¹⁸⁸ To

have roles in negotiating our federalism. Congress is best situated to make lasting, effective policy changes.

186. From a professional education standpoint, the substantive rights, powers, and jurisdictional rules featured in a Federal Preemption-type statute are also more accessible. They will be integrated into federal Indian law casebooks and will reach more law students prior to specialization in the field. My federal Indian law students are familiar with the substantive provisions of the Indian Child Welfare Act, but not the substantive provisions of any particular gaming compact facilitated by the Indian Gaming Regulatory Act. As a law teacher, I generally presume that the visibility of discrete practice areas in law school has downstream effects on law-trained professionals—including government attorneys, judicial clerks, judges, politicians, journalists, etc.

187. 25 U.S.C. §§ 1901–63.

188. *See id.* § 1901(3) (finding that “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children.”). In the 1970s, 25–35% of all Native children were removed from their homes. *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affs. of the S. Comm. on Interior and Insular Affs.*, 93d Cong. 15 (1974). Ninety percent of those children were placed with non-Natives. *See* Christie Renick, *The Nation’s First Family Separation Policy*, IMPRINT (Oct. 9, 2018), <https://imprintnews.org/child-welfare-2/nations-first-family-separation-policy-indian-child-welfare-act/32431> [https://perma.cc/U6QD-D6P4]. The removal of Native children from their families was in part a consequence of federal intervention: the Bureau of Indian Affairs’ Indian Adoption Project of the 1960s. Cecilia Nowell, *For Decades, Welfare Laws Kept Native American Families Together. Will the Supreme Court End Them?*, GUARDIAN (Nov. 7,

address this crisis, Congress codified clear jurisdictional rules to coordinate state and tribal courts,¹⁸⁹ and it imposed procedural¹⁹⁰ and substantive protections¹⁹¹ for Indian tribes and families in state proceedings. Notably, by intervening in state court proceedings involving all Indian children,¹⁹² ICWA's reach extends beyond Indian country.

The nationwide jurisdictional rules both codify existing law and clarify the extent of tribal jurisdiction when tribal children are at stake. Tribal courts have exclusive jurisdiction over custody cases involving Indian children domiciled on the tribe's reservation¹⁹³ and those who are wards of the tribal court.¹⁹⁴ In *Mississippi Band of Choctaw Indians v. Holyfield*,¹⁹⁵ the Court asserted that these terms of exclusive tribal jurisdiction had a "strong basis in pre-ICWA case law" and that ICWA essentially confirmed the judicially articulated rules.¹⁹⁶ But Congress did more than just affirm judge-made rules—it made these rules more enforceable by imposing notice requirements on state courts for all involuntary proceedings concerning Indian children¹⁹⁷ and mandating that

2022), <https://www.theguardian.com/us-news/2022/nov/07/supreme-court-native-american-families-indian-child-welfare-act> [<https://perma.cc/GGH4-5XSP>]. Arguably, the crisis of Native family separation goes back further to the history of federal boarding schools. See *id.*; see also BRYAN NEWLAND, BUREAU OF INDIAN AFFS., FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT 53 (2022), https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf [<https://perma.cc/MX82-4C8Q>].

189. 25 U.S.C. § 1911.

190. *Id.* §§ 1911–14. For a neat list of procedural and substantive rights of Native families and tribes, see COHEN'S HANDBOOK, *supra* note 15, §§ 15.04–15.05.

191. 25 U.S.C. §§ 1912–13, 1915 (including the mandate that state courts engage in "active efforts" to prevent the breakup of the family, heightened burdens of proof, the right to qualified expert witnesses, and placement preferences for both foster care and adoption).

192. In ICWA, "Indian child" is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." *Id.* § 1903(4).

193. In ICWA, "reservation" is defined as "Indian country as defined in section 1151 of title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation." *Id.* § 1903(10).

194. *Id.* § 1911(a).

195. 490 U.S. 30 (1989).

196. *Id.* at 42.

197. 25 U.S.C. § 1912(a). To be sure, the facts at issue in *Holyfield* involved a voluntary proceeding, so the notice provision was not triggered. 490 U.S. at 37–39. Rather, the state court primarily erred in determining that it had jurisdiction over the child who was legally domiciled on the reservation. *Id.* at 42, 53.

all states and tribes give full faith and credit to the acts, records, and judicial orders of all tribal child custody proceedings.¹⁹⁸ Moreover, Congress affirmed tribal jurisdiction concurrent with state jurisdiction for Indian children living off reservation.¹⁹⁹

ICWA recognizes the history of tribal family separation as a problem of state-tribe conflict and addresses the problem in multiple ways. The solution is partly jurisdictional. ICWA addresses tribal family separation by clearly affirming the extent of tribal jurisdiction so that more child custody cases proceed in tribal forums. The statute employs notice requirements,²⁰⁰ rights to challenge ICWA violations,²⁰¹ and a full faith and credit guarantee²⁰² to facilitate the jurisdictional solution. But ICWA also works to protect tribes and tribal families in more nuanced ways. Indeed, the statute's impositions on state courts are just as important as its jurisdictional provisions.²⁰³ These impositions—including higher burdens of proof for the removal of tribal children,²⁰⁴ active efforts to keep families together,²⁰⁵ access to qualified expert witnesses,²⁰⁶ and mandatory placement preferences²⁰⁷—adjust the machinery of state legal systems to protect tribal interests. Using state actors and state institutions may be particularly appropriate for a governance area historically dominated by state law.²⁰⁸

To be sure, ICWA does not fit perfectly into the federal preemption box. One part of the statute can be categorized as guided compacting. Under § 1919 of the statute:

198. 25 U.S.C. § 1911(d).

199. See *id.* § 1912(b)–(c). Shannon Keller O'Loughlin, *A Survey and Analysis of Tribal-State Indian Child Welfare Act Agreements* 48–49 (2017), https://www.indian-affairs.org/uploads/8/7/3/8/87380358/icwa_tribal-state_agreements_report.pdf [<https://perma.cc/RLT9-SYLX>].

200. 25 U.S.C. § 1912(a).

201. *Id.* § 1914.

202. *Id.* § 1911(d).

203. See Brief of Casey Family Programs and Twenty-Six Other Child Welfare and Adoption Organizations as *Amici Curiae* in Support of Federal and Tribal Defendants at 17–18, 32, *Haaland v. Brackeen*, 143 S. Ct. 1609 (2023) (No. 21-376, No. 21-377, No. 21-378, No. 21-380) (arguing that state court involvement due to the ICWA exemplifies best practices in child welfare).

204. 25 U.S.C. § 1912(e)–(f).

205. *Id.* § 1912(d).

206. *Id.* § 1912(e)–(f).

207. *Id.* § 1915.

208. See Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L. J. 534, 572–73 (2011).

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.²⁰⁹

In this way, Congress invites states and tribes to adjust the terms of ICWA. In practice, we see occasional examples of tribes voluntarily compacting out of the terms of exclusive jurisdiction set out in the rest of ICWA.²¹⁰ In these cases, the tribes lacked tribal courts and opted to delegate that power to the states.²¹¹

Out of the four models, the Preemption Model offers the greatest degree of uniformity. Nevertheless, there can still be regional variation in actual implementation. Setting aside the compacting provision, ICWA practice looks different in different places.²¹² Some states have legislated their own ICWA statutes to ease and enhance the implementation of the federal mandates.²¹³ These statutes can harmonize ICWA with state law and procedure, and they also fill in the gaps where the federal statute is ambiguous.²¹⁴ States can amend their court rules to eliminate procedural barriers for out-of-state tribes to intervene in ICWA cases.²¹⁵ There can also be differences at the local level. While most ICWA cases go through

209. 25 U.S.C. § 1919(a). ICWA also provides terms for revocation of such agreements. *Id.* § 1919(b).

210. Shannon Keller O'Loughlin, *A Survey and Analysis of Tribal-State Indian Child Welfare Act Agreements* 48–49 (2017), https://www.indian-affairs.org/uploads/8/7/3/8/87380358/icwa_tribal-state_agreements_report.pdf [<https://perma.cc/AQ6L-3KS3>].

211. *Id.*

212. See Fort, *supra* note 33, at 536–37 (explaining how differing levels of ICWA education among state social workers and justice personnel affect implementation and success of the program).

213. Kathryn E. Fort, *The Challenge of Indian Child Welfare Act Enforcement in the Modern Age of Child Dependency*, 135 YALE L.J.F. 789, 814–15 (2026). California, Colorado, Connecticut, Iowa, Louisiana, Maine, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, Washington, Wisconsin, and Wyoming all have state ICWAs. Fletcher et al., *Comprehensive State ICWA Laws*, TURTLE TALK, <https://turtletalk.blog/icwa/comprehensive-state-icwa-laws/> [<https://perma.cc/MJE8-KTMJ>] (last visited Aug. 22, 2026).

214. Fort, *supra* note 33, at 540–541. California, Michigan, Oregon, and Oklahoma have ICWA Benchbooks as well. See Fletcher et al., *supra* note 213.

215. See, e.g., MICH. CT. R. § 8.126(H)(1)–(3) (creating an exception to the pro hac vice requirement for foreign attorneys for ICWA cases).

typical family court processes, some counties have created dedicated ICWA courts.²¹⁶ While implementation may differ state to state, minimum standards set out in ICWA can be enforced in the federal judiciary.

Since the Preemption Model unilaterally imposes restraints on the domestic sovereigns, it may attract more constitutional scrutiny. In *Haaland v. Brackeen*,²¹⁷ litigants challenged the constitutionality of ICWA, claiming that the statute was outside Congress's Article I authority and that it violated the Tenth Amendment and our federalist structure by unlawfully commandeering state courts.²¹⁸ The Supreme Court rejected both lines of argument.²¹⁹ ICWA falls well within Congress's plenary power over Indian affairs,²²⁰ and the requirements it imposes on state court systems do not implicate the Tenth Amendment.²²¹ Although the regulation of family relations has traditionally been left to the states with minimal federal oversight, state regulation can be preempted by federal Indian policy.²²² *Brackeen* admittedly only addresses the constitutionality of the ICWA, but its reasoning would likely protect future legislation in the Preemption Model. Congress has broad authority to protect tribal interests and regulate the relationship between tribes and states.²²³ Of course, just because Congress has the authority to legislate does not mean it has the political will to do so.²²⁴

As the ICWA illustrates, the Preemption Model resolves state-tribe conflict by imposing a one-size-fits-all regulatory scheme nationwide. It can draw jurisdictional lines and even mandate modifications in state (and presumably also tribal) legal systems where jurisdiction overlaps. Variability is limited but can be enhanced through provisions for compacting. Nationwide uniformity allows for the development of

216. See *ICWA Courts*, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, <https://www.ncjfcj.org/child-welfare-and-juvenile-law/icwa-courts/> [<https://perma.cc/C8U8-YACY>] (last visited Aug. 22, 2026) (listing and mapping current ICWA courts).

217. 143 S. Ct. 1609 (2023).

218. *Id.* at 1626–27.

219. *Id.* at 1623.

220. *Id.* at 1627–31.

221. *Id.* at 1631–38.

222. *Id.* at 1629–30.

223. *Id.* at 1661 (Gorsuch, J., concurring) (“[There is no] serious question that Congress has the power under the Indian Commerce Clause to enact protections against the removal of Indian children. . . . [A]t its core, ICWA restricts how non-Indians (States and private individuals) may engage with Indians. And, as we have seen, that falls in the heartland of Congress’s constitutional authority.”). *Id.*

224. Federal preemption is always highly political. See JOSEPH F. ZIMMERMAN, INTERSTATE COOPERATION, at ix (2d ed. 2012).

nationwide best practices. It also limits confusion when parties or resources cross boundaries. The Preemption Model is most appropriate for dealing with enduring nationwide problems, particularly when those problems are too important or too politically difficult to leave to voluntary state-tribe cooperation. The Preemption Model is especially useful when state and tribal actors lack incentives to work together.

The Preemption Model leverages federal supremacy against states and tribes alike. While Congress should of course consider state and tribal perspectives in crafting legislation, the ultimate product does not ask for consent. In this way, the Preemption Model is less respectful to states' and tribes' sovereign status and is perhaps inherently paternalist.²²⁵ Paternalism is sometimes warranted. In Huq's negotiated Constitution, there must be some bargaining limits to ensure core constitutional values (limited government, accountability, liberty),²²⁶ to avoid collective-action failures,²²⁷ to limit negative externalities that cannot be sufficiently internalized through fees and taxes,²²⁸ and to address problematic internalities.²²⁹

In theory, federal overreach is limited by the trust relationship, Article I, the Tenth Amendment, and politics. The trust relationship is rhetorically compelling, but rarely enforceable—especially vis-a-vis Congress.²³⁰ Although this Article insists that Congress's Article I authority must include the power to manage relations among the states and tribes, some members of the Court are skeptical.²³¹ Claims of anticommandeering are another major concern.²³² In *Brackeen*, the Court

225. See Reese, *supra* note 174, at 209–11 (describing the history of unilaterally imposed Indian policy as paternalist, arrogant, and disastrous).

226. Huq, *supra* note 175, at 1667–68 (discussing how intermural bargaining cannot be allowed to diminish the positive externalities of our constitutional structure).

227. *Id.* at 1669–70.

228. *Id.* at 1612.

229. *Id.* at 1613–14 (explaining how institutional biases can compromise rational negotiation and conflict between first and second order preferences, resulting in internal flaws within the state actor that compromise the bargaining process).

230. See COHEN'S HANDBOOK, *supra* note 15, § 6.04[3][c] (“The trust relationship is only a prudential limit on congressional action.”).

231. See Ablavsky, *supra* note 18, at 294, 330–31 (observing Justice Coney Barrett and the *Brackeen* majority's discomfort with Congressional authority in Indian Affairs and Justice Clarence Thomas's hostility to a robust Indian Commerce Clause).

232. See generally *New York v. United States*, 505 U.S. 144 (1992) (articulating and applying the anticommandeering doctrine, which is rooted in the Tenth Amendment); *Printz v. United States*, 521 U.S. 898 (1997) (articulating and applying the anticommandeering doctrine which is rooted in the Tenth Amendment). This relatively recent doctrine is widely criticized. See, e.g., Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism: New York, Printz, and Yeskey*, 1998 SUP. CT. REV. 71, 71–72 (arguing that anticommandeering undermines federal supremacy); Neil S. Siegel,

allowed for federal law to direct the actions of state courts;²³³ intervention into other instrumentalities of state government might raise new alarms. As Ann Tweedy has pointed out, ICWA is not the only place where the federal government has arguably commandeered state governments; Public Law 280's mandatory provisions, the Indian Gaming Regulatory Act's good faith requirement, and the Washington fisheries court orders have all directed state government actors.²³⁴ Tweedy asserts that the Anticommandeering Doctrine categorically does not apply to Indian affairs legislation,²³⁵ but this is not a universal opinion.

B. Opt-In

The Opt-In Model resembles the Preemption Model and adds the critical ingredient of consent. It is a one-size-fits-most approach where Congress creates a uniform regulatory scheme that tribes and states may adopt. This model is based on voluntary cooperation, so states and tribes may opt in or out depending on their local needs and circumstances. The result features more pronounced variation than the Preemption Model, but the variation is contained within a relatively stark binary. This limits

Commandeering and Its Alternatives: A Federalism Perspective, 59 VAND. L. REV. 1629, 1634 (2006) (arguing that anticommandeering doctrine perversely harms state autonomy insofar as it triggers more preemption by removing alternatives). Others accept anticommandeering as an important element of our federalist structure. See, e.g., SCHAPIRO, *supra* note 113, at 96 (preserving anticommandeering in his conception of polyphonic federalism); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 871 (1998) (asserting that Congress can always use its spending power to buy out states when the cost is justified); Huq, *supra* note 175, at 1634–35 (characterizing anticommandeering as a property-like entitlement with which states may bargain).

233. *Haaland v. Brackeen*, 143 S. Ct. 1609, 1632 (2023) (pointing out that anticommandeering only applies to federal interference with states' legislative or executive authority); *id.* at 1636–37 (explaining how requiring state courts to keep records pursuant to ICWA does not constitute unconstitutional commandeering).

234. Ann E. Tweedy, *Anticommandeering & Indian Affairs Legislation*, 62 HARV. J. LEGIS. 39, 71 (2024). The Public Law 280 example is especially striking when examined alongside the Court's decision in *Printz v. United States*. In *Printz*, the Court found that Congress could not commandeer state law enforcement officers to conduct background checks on handgun purchasers—such an invasion of state government violates the Tenth Amendment. *Printz*, 521 U.S. 898, 919, 933 (1997). But in Public Law 280, Congress forces several states to deploy their law enforcement officers on Indian reservations, to ensure public safety. Tweedy, *supra*, at 74–75. Is this commandeering? Public Law 280 was also an unfunded mandate, but somehow never challenged in court. *Id.* at 75–76.

235. Tweedy, *supra* note 234, at 46 (“Only the most egregious intrusions on state sovereignty, such as commandeering a state's legislative process, should be a basis for invalidating such legislation . . .”).

the need for complex bargaining between states and tribes while respecting the domestic sovereigns' powers of self-determination.²³⁶

The paradigmatic opt-in statute is Public Law 280—but only in its amended form.²³⁷ To put it mildly, Public Law 280 is nobody's favorite federal Indian policy.²³⁸ In a nutshell, the statute imposed state criminal jurisdiction (and some civil jurisdiction) over tribes and effectively withdrew federal jurisdiction in those places.²³⁹ Public Law 280 originated as a termination policy,²⁴⁰ and its original form trampled both state and tribal sovereignty.²⁴¹ It was essentially a targeted preemption

236. Not to be confused with Brendan Maher's "Opt-In Federalism," which locates the decision to opt in or out of federal law at the individual level, rather than the state level. See Brendan S. Maher, *The Benefits of Opt-In Federalism*, 52 B.C. L. REV. 1733, 1773 (2011).

237. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified at 18 U.S.C. § 1162, and 28 U.S.C. § 1360). For a comprehensive account of Public Law 280, see generally DUANE CHAMPAGNE & CAROL GOLDBERG, CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280 (2d ed. 2020) (examining Public Law 280 by questioning its efficacy and studying its impacts on tribal communities).

238. COHEN'S HANDBOOK, *supra* note 15, § 7.04[1] n.2 ("Public Law 280 "was criticized from the beginning by Indians and non-Indians alike because it was imposed without any provision for tribal consent to state jurisdiction.") (cleaned up).

239. 18 U.S.C. § 1162; Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L. REV. 535, 552 (1975).

240. Congress passed this statute only two weeks after adopting House Concurrent Resolution 108, announcing the federal policy of termination: unilaterally eliminating tribes' political status in pursuit of total integration. H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953). In 1970, President Nixon famously rejected termination as "morally and legally unacceptable." Special Message to the Congress on Indian Affairs, 213 PUB. PAPERS 564–567 (July 8, 1970). Public Law 280 was intended to facilitate the integration of tribal communities into non-Indian society. Carole Goldberg-Ambrose, *Public Law 280 and the Problem of Lawlessness in California Indian Country*, 44 UCLA L. REV. 1405, 1406 (1997). It was also cheaper for Congress to make states manage public safety in Indian country rather than maintain federal jurisdiction or fund tribal legal systems. *Id.* at 1406, 1408.

241. The original statute mandated that five states—California, Minnesota, Nebraska, Oregon, and Wisconsin—assume jurisdiction over Indian country within their borders. Alaska was later added to the list of mandatory states. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (naming California, Minnesota, Nebraska, Oregon, and Wisconsin as mandatory PL 280 states); Act of Aug. 8, 1958, Pub. L. No. 85-615, § 2, 72 Stat. 545 (adding Alaska to the list of mandatory states); 18 U.S.C. § 1162(a) (showing the current list of mandatory states). Neither these states nor the tribes within their borders could decline this new jurisdictional arrangement.

statute based on ill-conceived presumptions,²⁴² returning poor results.²⁴³ Indeed, the first iteration of Public Law 280 highlights the dangers of unbalanced federal intervention in Indian country jurisdiction. To this day, reservation communities in mandatory Public Law 280 states suffer from inadequate law enforcement.²⁴⁴ The original Public Law 280 is a cautionary tale, not the archetype for the Opt-In Model.²⁴⁵

But in 1968, Congress amended Public Law 280 to require tribal consent in any future extension of state jurisdiction.²⁴⁶ The amendment also allowed for state-initiated retrocession, subject to approval by the federal government.²⁴⁷ This amended form serves as the inspiration for the Opt-In Model.

As amended, Public Law 280 allows tribes and states to voluntarily adopt a new jurisdictional arrangement. Tribes may elect to offer states concurrent jurisdiction in Indian country, if the states are willing.²⁴⁸ One could imagine a version of this model in which states might be empowered by Congress to offer tribes extended jurisdiction—perhaps

242. According to Public Law 280 expert Carole Goldberg-Ambrose, the statute was premised on racist assumptions of lawlessness in Indian country, presuming deficiencies in tribal legal traditions and ignoring histories of dispossession, impoverishment, and colonial violence. Goldberg-Ambrose, *supra* note 240, at 1410–11.

243. According to Carole Goldberg-Ambrose, “Public Law 280 has itself become a source of lawlessness on reservations.” *Id.* at 1418.

244. See Goldberg-Ambrose, *supra* note 240, at 552; CAROLE GOLDBERG & DUANE CHAMPAGNE, LAW ENFORCEMENT AND CRIMINAL JUSTICE UNDER PUBLIC LAW 280, at 6–14 (2007), https://www.tribal-institute.org/download/pl280_study.pdf [<https://perma.cc/U9TD-P8PH>].

245. The constitutionality of Public Law 280—under the anticommandeering doctrine and Article I—has not been reviewed by the Court. Yet observers suggest that the absence of consent from the tribes in the original mandatory states may be problematic. COHEN’S HANDBOOK, *supra* note 15, §7.04[1], at 454 n.2. Review of Congressional power to unilaterally impose state jurisdiction on tribes would have to consider the standard set out in *Morton v. Mancari*: the statute must be “tied rationally to the fulfillment of Congress’ unique obligation toward the Indians.” *Morton v. Mancari*, 417 U.S. 535, 555 (1974).

246. 25 U.S.C. § 1326. Since the amendment, no states have successfully adopted jurisdiction in Indian country under Public Law 280. COHEN’S HANDBOOK, *supra* note 15, § 7.04[3][a]. Utah tried to adopt Public Law 280 jurisdiction, but no tribes within the state consented. *Id.* at 458 n.23. The consent requirement applied only prospectively; it did not upset past adoptions of Public Law 280. See *id.* at 458.

247. 25 U.S.C. § 1323. President Lyndon B. Johnson issued an executive order following the amendment to designate and empower the Secretary of the Interior as the officer to review and accept retrocession. Exec. Order No. 11435, 33 Fed. Reg. 17339 (Nov. 21, 1968). Congress amended the statute once more in 2010, allowing tribes in Public Law 280 states to request the federal government to reassume concurrent jurisdiction. Tribal Law and Order Act of 2010, Pub. L. No. 111–211, § 221, 124 Stat. 2261, 2271–72 (codified at 18 U.S.C. § 1162(d)).

248. 25 U.S.C. § 1321(a)(1).

over victimless crimes committed by non-Indians on reservations or over marital property disputes involving tribal members living off reservation. In either case, Congress would draw up a new jurisdictional arrangement, and tribes and states would be allowed to take it or leave it.

This form of jurisdictional change resembles existing statutes that offer extensions of tribal authority on tribal land premised on procedural conditions. The Tribal Law and Order Act of 2010 (TLOA)²⁴⁹ and the Violence Against Women Reauthorization Acts of 2013²⁵⁰ and 2022 (VAWA)²⁵¹ offer tribes felony jurisdiction²⁵² and limited jurisdiction over non-Indian offenders of dating and domestic violence crimes, respectively.²⁵³ Both statutes demand heightened defendant protections as the cost of implementation.²⁵⁴ Tribes can accept enhanced jurisdiction subject to conditions, or they may decline the bargain. TLOA and the VAWA only involve tribal consent, as they are limited to crimes committed on tribal land, directly affecting tribal members.²⁵⁵ Thus, they are not directly aimed at resolving state-tribe conflict. Still, they may be useful to inform future legislation based on the Opt-In Model.

As another parallel to the Opt-In Model, policymakers might also look to provisions in environmental statutes that direct the Environmental Protection Agency to treat tribes like states. These treatment-as-states provisions can be found in the Clean Water Act,²⁵⁶ the Safe Drinking Water Act,²⁵⁷ and the Clean Air Act.²⁵⁸ They all authorize tribal governments to regulate pollution within a limited sphere. Under the Clean Water Act, conflicts between tribal and state interests are mediated

249. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2261.

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

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

252. Under the Indian Civil Rights Act, tribes are limited to punishing convicted criminals with up to one year of incarceration. 25 U.S.C. § 1302(a)(7) (2006 & Supp. 2010). The Tribal Law and Order Act expands that cap to three years. *Id.* § 1302(b).

253. As discussed in Part I, the Court stripped tribes of criminal jurisdiction over non-Indians in *Oliphant v. Suquamish Indian Tribe* in 1978. *See* discussion *supra* Part I. The VAWA tribal provisions constitute a partial Oliphant fix, restoring tribal jurisdiction over non-Indian crimes closely related to dating and domestic violence.

254. 25 U.S.C. §§ 1302(c), 1304(d).

255. *See* Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 221–22, 124 Stat. 2261 (codified at 18 U.S.C. § 1162(d)); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 904, 127 Stat. 54, 120–23 (codified as amended at 25 U.S.C. § 1304).

256. 33 U.S.C. § 1377(e).

257. 42 U.S.C. § 300j-11(b)(2).

258. *Id.* § 7601(d)(2).

by a federal officer, the Administrator of the Environmental Protection Agency. The Administrator is directed to consult with both tribes and states to resolve any problems arising from discrepancies between tribal and state water standards.²⁵⁹

These examples of tribal criminal jurisdiction restoration and treatment as a state are not archetypical opt-in schemes, since they are primarily concerned with the relations between tribes and the federal government rather than relations between tribes and states. Still, both resolve jurisdictional gaps and jurisdictional uncertainty by enhancing tribal authority. Both feature Congressional authorization, rules of implementation, and tribal consent.²⁶⁰ Unlike Public Law 280, the states have no say in the process. This kind of policy is perhaps less appropriate in situations of concurrent state and tribal jurisdiction, but suitable for filling jurisdictional voids on tribal lands.²⁶¹ In this way, TLOA, VAWA, and treatment as a state may be considered permutations of the Opt-In Model, specific to jurisdictional gap filling.

In theory, the implementation and enforcement of Opt-In Model statutes should be easier than Preemption Model statutes, given that all sovereign participants have assented to the regulatory scheme. Federal agencies can play a role in implementation—in the initial adoption process, perhaps as a first forum for review of legal claims, and in the typical regulation-promulgating gap-filling capacity. Federal courts retain the obligation to enforce the terms and boundaries of the statute. Public Law 280 is admittedly not the most helpful case study for the implementation of opt-in statutes, as no tribes have opted in since the 1968 amendments. (Even as amended, Public Law 280 does not guarantee meaningful improvement in public safety to tribes²⁶² and

259. 33 U.S.C. § 1377(e) (“The Administrator shall, in promulgating such regulations, consult affected States sharing common water bodies and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water.”).

260. 25 U.S.C. § 1304; 18 U.S.C. § 1162.

261. At the time that Congress passed the 2013 Reauthorization of the Violence Against Women Act, states categorically lacked jurisdiction over VAWA offenses. But interestingly, the 2022 Reauthorization coincided with the Court’s *Castro-Huerta* decision. See § 1304; *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2486 (2022). So VAWA can still be understood as a jurisdictional gap-filler from Congress’s perspective, but in practice today it does impact state prosecutorial practice. See Fay, *supra* note 22, at 108–11.

262. See Goldberg-Ambrose *supra* note 240, at 1418; Valentina Dimitrova-Grajzl, Peter Grajzl & A. Joseph Guse, *Jurisdiction, Crime, and Development: The Impact of Public Law 280 in Indian Country*, 48 L. & SOC’Y REV. 127, 129–30 (2014) (finding through empirical study that Public Law 280 was correlated with increased crime and lower median family income).

threatens to cut off sources of federal funding for tribal legal development.²⁶³ It is not a persuasive deal.) A successful opt-in statute would require careful statutory design that appeals to tribes and states alike.

True opt-in statutes should face fewer constitutional challenges than preemption statutes. Consent requirements protect the federal government from claims arising out of the trust relationship and treaty obligations, as well as anticommandeering claims. Roderick Hills argues that consensual relations between states (and by extension tribes) and the federal government are not only legally less suspect but also more efficient than federal conscription of state regulatory authority.²⁶⁴ For the right price, consent can almost always be purchased.²⁶⁵ Thus, Congress can use its spending power to strongly encourage voluntary participation in opt-in schemes.

The Opt-In Model exists in a moderate position between the Preemption Model and the Guided Compacting Model. It allows for variation, at the expense of nationwide uniformity. But that variation is limited and still allows for the development of national experts and the dissemination of best practices. The Opt-In Model respects state and tribal sovereignty by conditioning implementation on consent. Unlike guided compacting, the Opt-In Model offers very limited space for bargaining between tribes and states and thus avoids issues of unequal bargaining power. Since tribes and states may always choose to opt out, this model is only appropriate if the status quo is sustainable.

C. Guided Compacting

The Guided Compacting Model offers more variability and negotiation, subject to statutory limitations. In this model, Congress sets out rules and procedures for state-tribe bargaining. The legislative scheme defines what areas of governance are subject to negotiation, how the domestic sovereigns may enter into compacts, and how those compacts will be enforced. The statute can require federal oversight in any part of this process. Since each compact is between a tribe and a state with overlapping jurisdictional claims, there could be over 575 distinct

263. See Fay, *supra* note 22, at 91–92.

264. Hills, *supra* note 232, at 816–17 (“This article maintains that a requirement that the national government purchase rather than conscript nonfederal governments’ regulatory services will not impede useful intergovernmental cooperation. Moreover, such purchases will avoid the inefficiencies, distributive injustice, and invasion of expressive autonomy that probably would result from the national government’s commandeering of nonfederal governments’ regulatory processes.”).

265. *Id.* at 871.

arrangements. Like the Opt-In Model, this model requires consent from both tribes and states. Guided compacting demands a higher level of voluntary cooperation and likely higher transaction costs for the domestic sovereigns. In setting the terms of compacting, Congress can clarify starting positions and structure incentives to rebalance unequal bargaining power.

State-tribe bargaining has received significant attention in Indian law scholarship as a means for resolving conflicts and improving Indian country governance.²⁶⁶ This emphasis on compacting resonates with a broader movement in constitutional theory. As flagged above, Aziz Huq conceptualizes our constitutional order as a place of negotiation.²⁶⁷ To Huq, inter-sovereign bargaining is the way to achieve needed constitutional change,²⁶⁸ provided that formal constitutional change remains practically impossible.²⁶⁹ Cristina Rodríguez also characterizes federalism as a framework for constant negotiation.²⁷⁰ According to Rodríguez, “federalism does not consist of a fixed set of relationships. Instead, its parameters are subject to ongoing negotiation by the players in the system”²⁷¹ In this way, bargaining is arguably the most appropriate resolution to state-tribe conflict.

The paradigmatic statute for the Guided Compacting Model is the Indian Gaming Regulatory Act of 1988 (IGRA),²⁷² another controversial piece of legislation. In IGRA, Congress responded to the Supreme Court’s 1987 decision in *California v. Cabazon Band of Mission Indians*,²⁷³ which recognized tribal gaming as an inherent sovereign power beyond the reach of state regulation.²⁷⁴ IGRA categorizes gaming into three classes, with the most lucrative and controversial types of

266. See, e.g., David H. Getches, *Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding First Nations Self-Government*, 1 REV. CONST. STUD. 120, 120–22 (1993).

267. Huq, *supra* note 175, at 1605–06 (asserting that conceptualizing federalism as negotiation is more useful than focusing on text, history, or abstract theory).

268. *Id.* at 1656.

269. *Id.* at 1619.

270. Rodríguez, *supra* note 113, at 2095–97.

271. *Id.* at 2095.

272. 25 U.S.C. §§ 2701–2721.

273. 480 U.S. 202 (1987).

274. *Id.* at 221–22. The Court found that PL 280 states could only limit tribal gaming if the state prohibited all gaming as a matter of criminal law. *Id.* at 209–10. *Cabazon* did not specify whether non-PL 280 states could limit tribal gaming by outlawing all forms of gaming statewide, but IGRA applied that standard to all states. 25 U.S.C. § 2710(d)(B).

casino games falling into Class III.²⁷⁵ Under IGRA, tribes must secure compacts with states and receive federal approval before operating any Class III games on tribal land.²⁷⁶

Defenders of IGRA recognize the statute as a means to address the growing non-Indian backlash against tribal gaming with “minimal intrusion upon tribal sovereignty.”²⁷⁷ Congress preempted state attempts to limit tribal gaming by imposing minimum federal standards and creating a mandatory compacting system to regulate the most controversial forms of gaming.²⁷⁸ Congress responded to legitimate concerns about gaming—namely the association of organized crime with gambling institutions.²⁷⁹ At the same time, Congress recognized gaming as “a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.”²⁸⁰ The result was a compromise between state and tribal interests that used government-to-government negotiation to resolve jurisdictional and regulatory disputes.²⁸¹

It is important to note that the Court had already resolved the jurisdictional dispute in *Cabazon* by holding that states lacked the authority to regulate Indian gaming.²⁸² Through IGRA, Congress created a new zone of concurrent jurisdiction by giving states a legally cognizable interest in Class III gaming (*i.e.*, slot machines, casino games, and all the most lucrative forms of gambling outside of bingo). In this way, Congress flexed its plenary power in Indian affairs to limit tribal self-determination by imposing a compacting system that premises tribal

275. 25 U.S.C. § 2703(8). Class I covers traditional games with minimal monetary stakes. Class I gaming is wholly insulated from external regulation. Class II covers bingo and comparable games of chance. *Id.* § 2703(6)-(7). Class II gaming involves some federal oversight, but no role for states. Class III includes everything else. *Id.* §§ 2703(6)-(8), 2710(a)-(b).

276. *Id.* § 2710(d).

277. Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 ARIZ. ST. L. J. 99, 115 (2010).

278. *Id.* at 116–17. The most controversial forms of gaming fall under Class III, which tribes cannot operate without compacts with the states. 25 U.S.C. § 2710(d).

279. *Id.* § 2702(2). State opposition to tribal gaming is also based on claims of protecting residents from immoral activity and guarding states’ market advantage in the gaming industry. *See* Tsosie, *supra* note 39, at 81–82.

280. 25 U.S.C. § 2702(1).

281. Tsosie, *supra* note 39, at 56.

282. *See id.* at 46–47 (recounting the holding of *Cabazon*, which “vindicated the tribes’ sovereign right to establish gaming enterprises and engage in economic development free of state regulation so long as the activity did not violate public policy.”). As Tsosie observes, with the jurisdictional entitlements clarified by the Court, some states and tribes began negotiating over tribal gaming before Congress ever intervened with IGRA. *Id.* at 47–48.

economic development on state consent.²⁸³ Recognizing this important critique, I use IGRA as inspiration for compacting in areas of pre-existing jurisdictional conflict.

Congress defines the scope of compacting under IGRA. Tribes and states may negotiate the applicability of each sovereign's laws and regulations to gaming activity and allocate criminal and civil jurisdiction.²⁸⁴ Jurisdictional negotiations are restricted to causes of action directly related to gaming. For example, the Tenth Circuit has found that IGRA does not authorize the transfer of jurisdiction to states for slip-and-fall personal injury claims arising at tribal casinos.²⁸⁵ IGRA compacting may also involve setting standards for the operation of gaming facilities, tribal taxes, state assessments, remedies for breach of contract, and "any other subjects that are directly related to the operation of gaming activities."²⁸⁶

IGRA features federal oversight. First, IGRA created the National Indian Gaming Commission (NIGC).²⁸⁷ Congress empowered this regulatory body to promulgate rules and regulations to implement IGRA, review tribal gaming ordinances involving Class II and Class III gaming, inspect gaming facilities, and investigate IGRA violations.²⁸⁸ The chair of the Commission may impose fines and even close gaming enterprises that violate the statute.²⁸⁹ Second, IGRA tasked the secretary of the interior with reviewing and approving compacts.²⁹⁰ The secretary has forty-five days to approve or disapprove a submitted compact, otherwise the compact is automatically deemed approved.²⁹¹ This federal approval

283. *See id.* at 65. Rebecca Tsosie observes that IGRA is a limitation on tribal sovereignty, not a source of tribal rights. *Id.* at 49. *See also* CORNTASSEL & WITMER, *supra* note 66, at 134 (criticizing IGRA as the devolution of federal powers and responsibilities to state governments).

284. 25 U.S.C. § 2710(d)(3)(C)(i)–(ii).

285. *Navajo Nation v. Dalley*, 896 F.3d 1196, 1200 (10th Cir. 2018).

286. 25 U.S.C. § 2710(d)(3)(C)(iii–vii). *See* 25 C.F.R. § 293.23 for guidance on the catchall provision. These compacting topics do not include ancillary services relating to hospitality, such as tribal hotels, golf courses, and non-gaming entertainment that might be connected to casinos. COHEN'S HANDBOOK, *supra* note 15, § 16.05.

287. The NIGC is a partially independent commission with three officers. The President of the United States appoints the Chair of the Commission. The Secretary of the Interior appoints two associate commissioners. Two of the three commissioners must be tribal members and no more than two commissioners can be of the same political party. *See* 25 U.S.C. § 2704(b); COHEN'S HANDBOOK, *supra* note 15, § 16.02(3)(a)–(b).

288. *See* 25 U.S.C. § 2706.

289. COHEN'S HANDBOOK, *supra* note 15, § 16.02(3)(a)–(b).

290. 25 U.S.C. § 2710(d)(8).

291. *Id.* § 2710(d)(8)(C). The Secretary may disapprove compacts if they violate IGRA, any other provisions of federal law, or the trust obligations of the United States to Indians. *Id.* § 2710(d)(8)(B).

role mirrors the Compact Clause of the U.S. Constitution's restrictions on interstate compacting.²⁹²

IGRA has an enforcement problem. The statute requires that when a tribe initiates compacting to engage in Class III gaming, the state “shall negotiate with the Indian tribe in good faith to enter into such a compact.”²⁹³ IGRA relies on the federal courts to enforce this provision, and it instructs that states bear the burden of proof to show they bargained in good faith.²⁹⁴ This allocation was intentionally designed to alleviate the typical imbalance of power between states and tribes.²⁹⁵ Unfortunately, Congress's efforts were thwarted by the Supreme Court, when it held in *Seminole Tribe v. Florida*²⁹⁶ that IGRA's waiver of state sovereign immunity was unconstitutional.²⁹⁷ In this way, the Court undermined IGRA's primary enforcement mechanism. Tribes can no longer sue any state in federal court under IGRA violations unless the state voluntarily waives their sovereign immunity. Although the attorney general of the United States may still bring a suit on behalf of a tribe,²⁹⁸ the Court's intervention made the statutory scheme less workable.²⁹⁹

While IGRA is ineffective at forcing states to negotiate with tribes in good faith, states nonetheless come to the table voluntarily. Tribal gaming generates tens of billions of dollars annually,³⁰⁰ and IGRA compacting allows states to take a cut of the profits.³⁰¹ Through revenue-

292. See U.S. CONST. art. I, § 10, cl. 3. (providing that “[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power”).

293. 25 U.S.C. § 2710(d)(3)(A).

294. *Id.* § 2710(d)(7).

295. See COHEN'S HANDBOOK, *supra* note 15, § 16.05(3); see also Tsosie, *supra* note 39, at 55 (observing that states complain that this provision unfairly favors tribes).

296. 517 U.S. 44 (1996).

297. *Id.* at 47. While states can voluntarily waive sovereign immunity through compacting, Congress cannot unilaterally waive state sovereign immunity *prior* to compacting. See *id.* at n.13, 72–73.

298. COHEN'S HANDBOOK, *supra* note 15, § 16.06(2).

299. See Tsosie, *supra* note 39, at 71. In other areas of governance, litigation is often an essential first step toward a negotiated settlement. This is particularly true in the context of tribal water rights. Litigation sets the stage for negotiation, and court decisions bolster tribal bargaining power. See *id.* at 39.

300. Tribal gaming generated over \$40 billion in 2022. COHEN'S HANDBOOK, *supra* note 15, § 16.01. The NIGC reported that the 2024 fiscal year marked a record high of \$43.9 billion in gross gaming revenue. Press Release, National Indian Gaming Commission, NIGC Announces Record \$43.9 Billion in FY 2024 Gross Gaming Revenues (July 31, 2025), <https://www.nigc.gov/nigc-announces-record-43-9-billion-in-fy-2024-gross-gaming-revenues/> [https://perma.cc/RQN4-UAQB].

301. See 25 U.S.C. § 2710(d)(3)(C)(iii) (allowing compacting for assessments by states “as are necessary to defray the costs of regulating such activity”); 25 C.F.R. §

sharing provisions, states can gain hundreds of millions of dollars annually from tribal gaming.³⁰² Such lucrative payouts weigh against long histories of antagonism and adversity between states and tribes.³⁰³ To ensure smoother working relationships, tribes have become increasingly entangled in state politics—both in terms of campaign contributions³⁰⁴ and in the sheer volume of tribal members running for state office.³⁰⁵ In this way, IGRA inspired increased tribal-state engagement not only through compacting but in state policymaking.³⁰⁶

As exemplified by IGRA, the Guided Compacting Model is most effective when states and tribes are both independently incentivized to come to the bargaining table. Congress can structure incentives through legislation and limit imbalances in bargaining power through the terms of compacting.³⁰⁷ Some areas of governance are going to be more prone to immediate rewards for voluntary participation. And guided compacting always allows for the possibility of the failure to compact—

293.27 (clarifying that revenue sharing schemes are legal under IGRA so long as states make meaningful concessions that justify their revenue shares); COHEN'S HANDBOOK, *supra* note 15, § 16.05(2) (noting that meaningful concessions often include exclusivity provisions, limiting non-tribal gaming in exchange for revenue sharing).

302. For example, for the 2024 fiscal year the State of Connecticut reported receiving \$213,403,418 from the Mashantucket Pequot Tribe and Mohegan Tribe casinos. The two gaming tribes gave the State an additional \$92,252,920 from online sports wagering and other online casino business. In total, the State reported \$305,656,338.48 from tribal gaming. This constitutes about two percent of the State's total revenue. *See Transfers to the General Fund*, CONN. DEP'T OF CONSUMER PROT. (2025), <https://portal.ct.gov/dcp/-/media/dcp/gaming/revenue-and-stats/transfers-to-the-general-fund-feb-2026.xlsx?rev=8dc8ced951d9448abdf3f306c791cd03&hash=768D6B0774F99857F382BEAE533C91E1> [<https://perma.cc/6UNS-Q6DA>]; Letter from Sean Scanlon, State Comptroller, to Ned Lamont, Governor of Conn. (Sep. 30, 2024), <https://osc.ct.gov/wp-content/uploads/2024/09/Sept-30-2024-Year-End-Letter-and-Statements.pdf> [<https://perma.cc/FJ5M-DVKD>]. Florida received \$817 million from tribal gaming for the 2024 fiscal year. FLA. OFF. ECON. & DEMOGRAPHIC RSCH., *Revenue Estimating Conference, Indian Gaming Revenues, Executive Summary* (Aug. 4, 2025), <https://edr.state.fl.us/content/conferences/Indian-gaming/archives/250804IndianGaming.pdf> [<https://perma.cc/K9QN-JYQT>].

303. *See* Tsosie, *supra* note 39, at 72.

304. CORNTASSEL & WITMER, *supra* note 66, at 126–27.

305. *Id.* at 129.

306. Some observers worry about the amount of tribal money flowing into state politics that could otherwise fund local programs for tribal communities. *See id.* at 130.

307. *See* Tsosie, *supra* note 39, at 70. For example, IGRA's limits on state taxation and assessments in gaming compacts help to address the imbalance resulting from tribes' typical economic insecurity. The requirement of approval by the Secretary of the Interior works to enforce these rules. In the absence of Congressional intervention, judge-made law shapes incentives for state-tribe cooperation. *See* Browde, *supra* note 39, at 31. Congress might also set up a system to throw money, services, or technical assistance at the participants.

especially in the wake of the Supreme Court's intervention in *Seminole Tribe v. Florida*. However, Congress might find other ways to cajole states into good faith compacting, such as tying relevant federal funding to the successful completion of a compact.

As observed in the prior discussion of ICWA, compacting can and should be layered on top of the Preemption Model.³⁰⁸ Congress can impose a nationwide default structure of coordination between tribes and states that allows the domestic sovereigns to compact variations in implementation. Thus, even if a state and a tribe have a sufficiently bad relationship to thwart compacting, the base level of coordination remains in effect.

The distinction between ICWA and IGRA is not that the former is only preemptive and the latter is only bargained for. Both involve preemption and bargained for components. Indeed, ICWA and IGRA evoke a spectrum of preemption/compacting hybrids. The distinction lies in the balance. ICWA is an illustrative preemption statute because most of its important features come from its universal preemptive terms, whereas IGRA's preemptive features are mostly rules for compacting—excluding of course the background prohibition on unilateral tribal type III gaming. If no states and tribes entered into gaming compacts, IGRA would be a failed statute; whereas if no states and tribes entered into child welfare compacts, ICWA would still be a largely successful statute.

Another view of these models situates policies on a one-dimensional line. Putting aside the Opt-In Model, one can conceptualize the Preemption Model, the Guided Compacting Model, and the Noninterference Model on a single spectrum. Complete preemption and unguided compacting serve as the poles, and guided compacting sits in between. For most matters of jurisdictional conflict, the appropriate response lies somewhere on this spectrum.³⁰⁹ Some preemption will often be necessary, especially to clear up or correct existing law.³¹⁰

D. Noninterference

The fourth model is defined by the absence of Congressional intervention. In the absence of federal coordination, tribes and states nonetheless take action to resolve jurisdictional problems. For the

308. See *supra* Section II.A–B.

309. If I had to pick a superior model, it would be this combination. However, the Opt-In Model remains useful to constrain state bargaining while avoiding constitutional challenges based in the Tenth and Eleventh Amendments.

310. In the language of law and economics: Bargaining fails when the threshold assignment of entitlements has been made in error such that there are no Pareto efficient moves to be made.

purposes of this Article, I set out two categories of state-tribe negotiation absent federal intervention: (1) Unguided Compacting and (2) Unilateral Action.

1. Unguided Compacting

Unguided compacting occurs when states and tribes voluntarily cooperate to resolve jurisdictional conflicts without the assistance of Congress. Like guided compacting, unguided compacting depends on consent and allows states and tribes to negotiate unique solutions tailored to their needs and resources. There is potential for even greater variation under the Unguided Compacting Model. Unlike guided compacting, Congress does nothing to structure incentives or ameliorate imbalances in bargaining power. This kind of compacting can be initiated by litigation.³¹¹ In other cases, it is the failure of judicial enforcement that leads states and tribes to the bargaining table. Lacking a federal mandate to compact in good faith, the success of unguided compacting is contingent on good relations among the domestic sovereigns.³¹² And good relations depend on the efforts of individual officials.³¹³

Tax compacting serves as an illustrative example of unguided compacting. Tribes have limited tax bases. While states (and derivative local governments) rely heavily on property taxes, tribes cannot impose property taxes on reservation trust lands.³¹⁴ Tribes typically decline to impose income taxes for want of a stable tax base.³¹⁵ Instead, tribes must seek out more creative ways to fund basic government services.³¹⁶ In terms of taxation, tribes rely on consumption and severance taxes.³¹⁷ Tribes also fuel economic development through tribal businesses, including gaming subject to IGRA and other increasingly diverse ventures.³¹⁸

311. See Tsosie, *supra* note 39, at 39 (discussing water compacting and other natural resources disputes).

312. See Matthew L.M. Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Agreements*, 82 U. DETROIT MERCY L. REV. 1, 4 (2004).

313. See *id.* As Part III explores, tribal-state relations may differ from county to county or city to city, based on differing attitudes of state personnel. See *infra* Part III.

314. Browde, *supra* note 39, at 12.

315. *Id.* at 12.

316. Fletcher, *supra* note 312, at 9. According to Cherokee Nation Deputy Attorney General Paiten Taylor-Qualls, strategic business enterprises and compacting comprise the foundational fiscal architecture for tribes in lieu of property taxes.

317. Browde, *supra* note 39, at 13.

318. According to Matthew Fletcher, gaming, natural resources, and tobacco sales have been the primary engines of economic development in Indian country. Fletcher, *supra* note 312, at 10. For a more comprehensive look, see generally ROBERT

As discussed in Part I.B, taxation in Indian country is at times uncertain, disputed, or duplicative.³¹⁹ Tribes possess tax authority as a matter of inherent sovereignty,³²⁰ though that authority is limited over nonmembers.³²¹ States also exercise limited tax authority over nonmembers in Indian country.³²² Under Supreme Court precedents, states may tax nonmembers unless preempted—by federal law or when the state taxes would unlawfully infringe on tribal self-government.³²³ In *White Mountain Apache Tribe v. Bracker*,³²⁴ the Court asserted that evaluating the latter requires consideration of the relative state, federal, and tribal interests at stake.³²⁵ Thus, this analysis is known as the *Bracker* Balancing Test.³²⁶ The *Bracker* Balancing Test is not applied consistently by lower courts, which leads to uncertainty in the taxation of nonmembers.³²⁷ Where the Court has weighed in, it has found many instances in which states' interests in collecting taxes from nonmembers outweighed tribes' interests in retaining exclusive tax authority.³²⁸

J. MILLER & ADAM CREPILLE, *RESERVATION CAPITALISM: ECONOMIC DEVELOPMENT IN INDIAN COUNTRY* (2025) (documenting strategies for sustainable economic development on reservations).

319. According to tax scholar Pippa Browde, Indian country taxation “may be one of the most complex and unpredictable legal issues tribes and states continue to face today.” Browde, *supra* note 39, at 5. For a more recent look at the unique trouble of taxation in Indian country, see generally Alex Zhang, *The Other Taxation: Tribes, Territories, and Fiscal Autonomy*, 126 COLUM. L. REV. 397 (2026) (surveying tax problems in Indian country and in the Territories).

320. See *Washington v. Confederated Tribes Colville Rsr.*, 447 U.S. 134, 152 (1980); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982).

321. See *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 647 (2001).

322. See *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142–45 (1980) (explaining how state tax authority may be preempted by federal law). In contrast, states cannot tax tribes and generally cannot tax tribal members in Indian country. *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 165 (1973); *Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 124 (1993); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765–66 (1985). When the legal incidence of a state tax falls on a tribe or its members, the state tax is preempted. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453 (1995).

323. *White Mountain Apache Tribe*, 448 U.S. at 142.

324. *Id.*

325. *Id.* at 143–45.

326. See, e.g., *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 102 (2005).

327. William McClure & Thomas E. McClure, *Rebalancing Bracker Forty Years Later*, 9 AM. INDIAN L.J. 333, 357–58 (2021). Part of the trouble may be the Court's notion that the weight of tribal interests depends on whether value is generated on the reservation—another nebulous idea impeding consistency. See *Washington v. Confederated Tribes Colville Rsr.*, 447 U.S. 134, 156–57 (1980).

328. Fletcher, *supra* note 312, at 15–16.

The result is double taxation: The tribe and the state exercise concurrent tax authority over nonmembers engaging in commercial transactions with the tribe or tribal members.³²⁹ Although the Court sees no legal problem in double taxation,³³⁰ double taxation is a major economic conundrum for tribes.³³¹ Nonmember consumers will not purchase goods and services from tribal retailers if they will be subject to both state and tribal taxes—not when they can take their business off the reservation and only pay state tax.³³² Likewise, nonmember businesses and contractors will be reluctant to partner with tribes if the partnership exposes them to both state and tribal taxes.³³³ In this way, tribes must choose to either forgo tax revenue or risk chilling economic activity.³³⁴

But states are not always the clear winners in double taxation scenarios. As mentioned in Part I.B, tribal sovereign immunity can prevent states from enforcing their taxes in Indian country.³³⁵ Both tribes and states have incentives to negotiate cooperative frameworks to resolve tax disputes.³³⁶

In Indian country taxation, tax compacts are a common solution to duplication, uncertainty, and enforcement.³³⁷ They come in many varieties across the country.³³⁸ These government-to-government agreements typically feature provisions assigning shares of nonmember tax revenue to tribes and states, administrative processes for accounting and distributing those shares, and waivers of sovereign immunity for the enforcement of the agreements.³³⁹ Tax compacts can also clarify tribal

329. See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 187–88 (1989). For the most comprehensive work on dual taxation in Indian country, see Lauren van Schilfgaarde, *Dual Taxation Entrenchment: Mapping Tribal-State Taxation Compacts and State Statutes* (unpublished manuscript) (on file with author).

330. *Cotton Petroleum*, 490 U.S. at 188.

331. Browde, *supra* note 39, at 5 (observing that double taxation “puts pressure on tribes to choose between tax revenue and economic development”).

332. *Id.* at 20.

333. *Id.*

334. *Id.*

335. See *Okla. Tax Comm’n v. Potawatomi Tribe*, 498 U.S. 505, 514 (1991).

336. Browde, *supra* note 39, at 5–6.

337. See Fletcher, *supra* note 312, at 4.

338. See Browde, *supra* note 39, at 29–30.

339. *Id.* at 28. For example, Michigan’s tribal tax compacts provide that the first \$8 million of nonmember and nonresident member tax revenue is split between the tribe and state such that the tribe keeps two-thirds and remits one-third to the state, but for any nonmember and non-resident member tax revenue beyond \$8 million, the tribe and state take equal halves. *Generic State-Tribal Tax Agreement*, MICH. DEP’T OF THE TREASURY (Nov. 1, 2024), <https://www.michigan.gov/taxes/tribes/generic-state-tribal-tax->

exemptions from state taxes. These exemptions map on to the Supreme Court's Indian country tax jurisprudence while eliminating the uncertainty that plagues those nebulous federal standards. The many tax compacts between the State of Michigan and Michigan-based tribes³⁴⁰ feature boilerplate provisions in which the State recognizes a range of tribal property and activities that are wholly exempt from State taxation.³⁴¹ The exemptions include property primarily used for tribal governmental purposes and construction of tribal infrastructure and administration on tribal land.³⁴² The exemptions also expressly cover purchases of tangible personal property by tribal members, vehicles, mobile and modular homes, home construction and improvement, property purchased for treaty fishing purposes, and income of tribal members within the defined agreement area.³⁴³ The Michigan compacts provide special provisions for the regulation of tribal tobacco and motor fuel sales, restricting tribal retailers and enforcing state taxes on nonmember consumers.³⁴⁴

The Michigan tax compacts showcase a challenge inherent to the Unguided Compacting Model: unequal bargaining power between the state and the tribes. In the formation of the compacts, Michigan was able to demand uniformity across all compacts, leaving limited space for each individual tribe to negotiate specific terms.³⁴⁵ The Bay Mills Indian

agreement [<https://perma.cc/5582-PMZ3>] [hereinafter Michigan Generic Tax Compact]. To ensure enforcement, the Michigan compacts feature waivers of both tribal and state sovereign immunity. *Id.* They also authorize state law enforcement in Indian country but require the involvement of tribal courts. *Id.*; see Fletcher, *supra* note 312, at 38–39.

340. Bay Mills Indian Community, Grand Traverse Band of Ottawa and Chippewa Indians, Hannahville Indian Community, Little River Band of Ottawa Indians, Little Traverse Bay Bands of Odawa Indians, Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians, Nottawaseppi Huron Band of Potawatomi Indians, Pokagon Band of Potawatomi Indians, Saginaw Chippewa Indian Tribe of Michigan, Sault Ste. Marie Tribe of Chippewa Indians. See *Tax Information for Native Americans*, MICH. DEP'T OF THE TREASURY, <https://www.michigan.gov/taxes/tribes/> [<https://perma.cc/C3XM-YKGE>] (last visited Sep. 11, 2026) (providing all ten state/tribal tax compacts that the State of Michigan is currently a party to, with amendments).

341. See Michigan Generic Tax Compact, *supra* note 339; Fletcher, *supra* note 312, at 27–35.

342. Fletcher, *supra* note 312, at 27.

343. *Id.* at 30–34. The compacts resolve uncertainty by defining geographic agreement areas, avoiding legal fights over reservation boundaries, tribal service areas, and distinctions between trust and fee lands. See *id.* at 21.

344. See Michigan Generic Tax Compact, *supra* note 339; Fletcher, *supra* note 312, at 32–34 (describing the refund and quota methods in the boilerplate compact).

345. Fletcher, *supra* note 312, at 6. Tribes are essentially limited to negotiating the extent of the agreement areas. *Id.* This is not trivial, and the discrepancies in agreement area sizes reflect different tribes' differing bargaining power. See *id.* at 43–

Community already had a tax agreement with the State, but Michigan unilaterally terminated that agreement in order to create a new uniform compact.³⁴⁶ Of course, uniformity may benefit some tribes. However, it remains notable that it was the State that made that call. And that basic boilerplate compact remained the basis for future compacts. The Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians did not participate in the original negotiations from 1997–2002,³⁴⁷ but it now has a compact with the State that is limited by the same model.³⁴⁸ The State’s superior bargaining power is also evident in the significant role of state law and state law enforcement in the compacts. As Matthew Fletcher observed, the very framing of much of the compacts as state tax exemptions denotes the State’s intention to read the compacts against the backdrop of state law.³⁴⁹ This viewpoint can be found at the start of the boilerplate compact, in the recital of “Purpose and Intent”: “Except as modified in this Agreement, the provisions of State law relating to the taxes that are subject of this Agreement shall apply to the Tribe, Tribal Members, and Tribal Entities.”³⁵⁰ Without Congressional interference to structure and review compacting, unequal bargaining power between states and tribes will significantly shape the terms of unguided compacting, generally to tribes’ disadvantage.

Unguided compacting is entirely dependent on state and tribe interest convergence. Both parties must have sufficient incentives to come to the table. In guided compacting, Congress can demand good faith efforts to compact, to facilitate state-tribe cooperation.³⁵¹ Unguided compacting requires states and tribes to initiate the compacting process. Trends in tax compacting illustrate the role of incentives. As Pippa Browde observed, double taxation in Indian country can be sorted into

44 (noting the differences in agreement area scope between the Sault Ste. Marie Tribe of Chippewa Indians and the Nottawaseppi Huron Band of Pottawatomí Indians).

346. Fletcher, *supra* note 312, at 6.

347. *Id.*

348. See Tax Agreement Between the Match-E-Be-Nash-She-Wish-Band of Pottawatomí Indians and the State of Michigan, Sep. 17, 2008, https://www.michigan.gov/taxes/-/media/Project/Websites/taxes/Tribal/GLT/2019_Tax_Agreement_MatchEBEBeNashSheWish_Band_of_Pottawatomí_Indians_and_SOM_21_2009.pdf?rev=893ac4f616e24b80b9a06d3521931804&hash=26E92EFBEEB5657CE6F02588C727D956 [https://perma.cc/8D6T-285E].

349. Fletcher, *supra* note 312, at 37–38.

350. Michigan Generic Tax Compact, *supra* note 339; Fletcher, *supra* note 312, at 37.

351. *But see Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996). As IGRA demonstrates, it’s hard to enforce the good faith requirements without the waiver of state sovereign immunity unless Congress or the tribes have some other form of leverage (*e.g.*, federal funding or power to disrupt regional industries through tribal exclusion power).

two buckets: (1) where the tribe acts as retailer to nonmembers, and (2) where the tribe acts as a business partner to nonmembers.³⁵² In the first category, tribes and states are both incentivized to negotiate tax enforcement.³⁵³ While the Court recognizes states' authority to tax many of these transactions, enforcement challenges incentivize state cooperation. And of course, tribes are incentivized to negotiate to preserve revenue streams and market shares. In the second category, the tribal incentive remains the same, but the state incentive dissipates—outside of the retail context, where states are dependent on tribal cooperation, states have little difficulty imposing taxes on nonmember businesses conducting activities in Indian country.³⁵⁴ In her review of tax compacts across the country, Browde found far more compacts governing the first category, where state and tribal incentives are symmetrical, and comparatively few governing the second, where state and tribal incentives are asymmetrical.³⁵⁵ In guided compacting, federal legislation can structure incentives thoughtfully and intentionally. In unguided compacting, incentives are structured by background economic factors and judge-made law.

Unguided compacting is limited, not only by asymmetries in incentives and bargaining power, but perhaps also by the Constitution. Article I expressly limits interstate compacting: “No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power.”³⁵⁶ The text of the Constitution plainly forbids interstate compacting without Congressional oversight,³⁵⁷ but early practice indicates a more ambiguous original understanding.³⁵⁸ As David Engdahl observed, states executed politically and jurisdictionally significant agreements in the early decades after ratification—agreements settling disputed boundaries—without Congressional approval.³⁵⁹ Throughout the nineteenth century, jurists developed a construction of the Compact Clause that twisted the original

352. Browde, *supra* note 39, at 13–14.

353. *Id.* at 31–33.

354. *Id.* at 33–34.

355. *Id.* at 34. The few that fit the second category almost exclusively governed the extraction of natural resources. *Id.* at 34–35.

356. U.S. CONST. art. I, § 10, cl. 3.

357. From the text alone one might think this phrase should be called “the No Compact Clause” rather than its common name, “the Compact Clause.” In his Commentaries, Joseph Story apparently understood the clause to require that all interstate agreements must be submitted to Congress for review and approval. *See* Engdahl, *supra* note 182, at 66–67.

358. *See id.* at 65–66.

359. *Id.*

text to apply to an extraordinarily limited class of interstate agreements.³⁶⁰

In 1893, the Supreme Court endorsed a narrow reading of the Compact Clause in *Virginia v. Tennessee*.³⁶¹ Writing for the Court, Justice Stephen Field asserted that it would be bizarre and unworkable to read the terms “agreement” and “compact” to cover literally every agreement and compact between states.³⁶² Rather, “it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.”³⁶³ Thus, interstate agreements only need Congressional approval if they threaten federal authority. As Engdahl observed, this construction is peculiar given that Congress would never approve any compact that encroached on federal authority, and that such an agreement would be more likely construed as a treaty—which is truly forbidden by the Constitution.³⁶⁴ In Engdahl’s summation: “if consent is required, it cannot be given; and if consent could be given, it is not required.”³⁶⁵ In this way, the Constitution’s prohibition of interstate compacts was refashioned to affirm broad state powers to compact absent federal oversight.

The Compact Clause has no express reference to Indian tribes, nor does any other constitutional provision directly consider state-tribe compacting. Nonetheless, Indian law observers suggest that state-tribe compacting may be constitutionally limited.³⁶⁶ The editors of Cohen’s Handbook make a structural argument: The nature of Congressional supremacy over Indian affairs precludes tribes and states from compacting over the scope of their respective jurisdiction in Indian country absent Congressional consent.³⁶⁷ This suggested limitation mirrors Field’s interpretation of the interstate Compact Clause, supposing that compacts shifting jurisdiction threatened federal supremacy. The Michigan tax compacts do not trouble this interpretation

360. *Id.* at 66–67. In Katherine Mims Crocker’s telling, “the Court has essentially read the Compact Clause out of existence.” Katherine Mims Crocker, *A Prophylactic Approach to Compact Constitutionality*, 98 NOTRE DAME L. REV. 1185, 1190 (2023).

361. 148 U.S. 503, 503–20 (1893). This case concerned a border dispute that the states had resolved in the 1800s without express Congressional approval.

362. *Id.* at 517–18.

363. *Id.* at 519.

364. Engdahl, *supra* note 182, at 67.

365. *Id.* at 68; *see also* Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 287 (2003) (observing precedents that hold “the Compact Clause cannot possibly mean what it says.”).

366. *See* COHEN’S HANDBOOK, *supra* note 15, § 7.02.

367. *Id.* (citing *Kennerly v. Dist. Ct.*, 400 U.S. 423, 423 (1971)).

because federal law already recognizes concurrent state and tribal jurisdiction—these agreements simply coordinate existing authority, rather than reassign or delegate jurisdiction. In contrast, a compact by which a state tried to give a tribe full criminal jurisdiction over all non-Indians would raise alarms.³⁶⁸

Treaties might also impose limitations on state-tribe compacting. Consider the Treaty of 1790 between the United States and the Muscogee (Creek) Nation, ratified just a year after the United States Constitution.³⁶⁹ Article II provides:

The undersigned Kings, Chiefs and Warriors . . . do acknowledge themselves, and the said parts of the Creek [N]ation, to be under the protection of the United States of America, and of no other sovereign whosoever; and they also stipulate that the said Creek Nation will not hold any treaty with an individual State, or with individuals of any State.³⁷⁰

The treaty provision mirrors the constitutional limits on state diplomacy. Of course, tribes can choose to construe inter-sovereign legal instruments as compacts, contracts, or agreements rather than treaties. Yet, the Muscogee Nation and the State of Oklahoma took care to address this 1790 treaty provision in their 1995 Tobacco Compact.³⁷¹ The Compact specified that “[t]he Muscogee will seek to confirm the validity of this compact by asking Congress to enact legislation authorizing the waiver of Article II.”³⁷² Interestingly, the provision noted that “Oklahoma does not agree that the Muscogee must seek this confirmation” and that moreover “the parties understand that this compact will become effective although the validity of the same has not been confirmed as set forth herein.”³⁷³ In this way, the Tribe and State acknowledged the possible legal limitation but went forward with the tobacco tax compact without waiting for Congress’s approval.³⁷⁴

368. On the other hand, if transferring territory by moving borders between states does not threaten federal supremacy, it seems somewhat odd that the lesser concession of jurisdiction would do so.

369. Treaty with the Creeks, 7 Stat. 35 (1790).

370. *Id.* at art. II.

371. Muscogee (Creek) Nation Tobacco Compact with the State of Oklahoma, Muscogee (Creek Nation)–Okla., Dec. 21, 1994 to Jan. 4, 1995, <https://www.sos.ok.gov/documents/filelog/48385.pdf> [<https://perma.cc/9V3B-9AZ3>].

372. *Id.* at 1. The compact included a model act for Congress in its appendix. *Id.* at Exhibit A.

373. *Id.* at 1.

374. Oklahoma withdrew from the compact in 2006. Letter from Gerald Adams, Chief of Staff to Okla. Governor Brad Henry, to A.D. Ellis, Principal Chief of the

In 1978, Congress considered a tribal-state compact bill to authorize state and tribe compacting concerning jurisdiction in Indian country. The bill's author, Senator James Abourezk of South Dakota, asserted that the bill was needed to "provide the necessary consent of the United States" to a vast range of intergovernmental agreements and eliminate any uncertainty around tribes' and states' ability to coordinate their governmental operations.³⁷⁵ Senator Abourezk directly called out the shortcomings of Public Law 280, both in terms of the absence of consent and the lack of variation.³⁷⁶ He presented the tribal-state compact bill as a superior alternative, premised on mutual consent and local expertise.³⁷⁷ The original language of the bill underscored these ideas. Its findings read:

It is evident that the judicial process itself [sic] does not provide the flexibility necessary to address the issues presented by the varying capacities, needs or desires of the various tribal and State and local governments. The jurisdictional issues between the tribes and the State and local governments and the solutions which the parties would desire vary significantly. This variance in local circumstances also precludes resolution of jurisdictional issues between the States and the tribes on any one statutory formula. The issues are local in nature and should, wherever possible, be resolved at the local level on the basis of mutual consent and agreement of the governments involved.³⁷⁸

The bill observed the recent success of compacting and asserted that "[i]t is the responsibility of the Congress to facilitate this process."³⁷⁹

The bill would have preemptively given Congressional consent to all state-tribe compacting regarding the enforcement and application of

Muscogee (Creek) Nation (Feb. 5, 2004), <https://www.sos.ok.gov/documents/filelog/62018.pdf> [<https://perma.cc/5MT9-XQTS>]. The State and the Tribe entered into a new compact for tobacco sales in 2012. Tobacco Tax Compact Between the State of Oklahoma and the Muscogee (Creek) Nation of Oklahoma, Muscogee (Creek Nation)—Okla., Aug. 24, 2012, www.sos.ok.gov/documents/filelog/88574.pdf [<https://perma.cc/3ZZ6-L2D6>]. The 2012 Compact does not include any reference to the 1790 Treaty. *Id.*

375. *Tribal-State Compact Act of 1978: Hearing on S. 2502 Before the S. Comm. on Indian Affs.*, 95th Cong. 1 (1978) (statement of Sen. James Abourezk, Chairman, S. Comm. on Indian Affs.).

376. *Id.* at 1–2.

377. *Id.*

378. Tribal-State Compact Act of 1978, S. 2502, 95th Cong. § 2(c) (1978).

379. *Id.* § 2(d).

any civil, criminal, or regulatory laws, and the allocation of jurisdiction among the domestic sovereigns across subject matters.³⁸⁰ The compacts would be subject to review by the Secretary of the Interior.³⁸¹ The bill established guardrails: The compacts could not involve the alienation, encumbrance, or taxation of tribal property.³⁸² The bill also would have authorized the appropriation of \$20 million for financial assistance for some costs of administration when states and tribes took on obligations beyond those demanded by federal law.³⁸³

Abourezk's bill passed the Senate but died in the House.³⁸⁴ A nearly identical bill was introduced the following year.³⁸⁵ This second compact bill also passed the Senate only to die in the House.³⁸⁶ Without clear authorization from Congress, unguided compacting remains limited by the uncertain specter of constitutional conflict.

This is not to say that unguided compacting does not work as-is. In many areas of Indian country governance, it is essential to effective administration. In addition to coordinating taxation, tribes and states have successfully used unguided compacting in cross deputization to overcome gaps in criminal jurisdiction,³⁸⁷ joint jurisdiction courts offering alternatives to incarceration to address root problems of substance abuse

380. *Id.* § 101(a).

381. As in IGRA, if the Secretary failed to act within sixty days, the compact would essentially be deemed approved. *Id.* § 101(b).

382. *Id.*

383. *Id.* § 102.

384. See David E. Wilkins, *Reconsidering the Tribal-State Compact Process*, 22 POL'Y STUD. J. 474, 481 (Sep. 1994).

385. Tribal-State Compact Act of 1979, S. 1181, 96th Cong. (1979).

386. Wilkins, *supra* note 384, at 481–82.

387. For example, Oklahoma's Secretary of State has 496 cross-deputization agreements on file from 1991 to 2026. OKLA. SEC'Y OF ST., *Record Log: Cross Deputization Agreements* (Aug. 19, 2026) (on file with author). Most of these agreements are available online. *Tribal Compacts and Agreements*, OKLA. SEC'Y OF ST., <https://www.sos.ok.gov/gov/tribal.aspx> [<https://perma.cc/9MH6-MLAU>] (last visited Aug. 21, 2026). The practice of cross deputization between the State of Oklahoma and the thirty-eight federally recognized tribes within its borders is the subject of a future article.

and intergenerational trauma,³⁸⁸ cooperative arrangements to manage natural resources,³⁸⁹ and more.³⁹⁰

2. Unilateral Action

In the absence of federal direction, tribes can respond to jurisdictional uncertainty with direct action to stake out jurisdictional claims. Tribes assert jurisdiction, generally as a matter of inherent sovereignty, and dare objectors to make them stop. Unlike unguided compacting, unilateral action does not depend on states' independent willingness to come to the table. It is a different kind of negotiation. This Section examines tribal responses to the COVID-19 pandemic in 2020, during which tribes established curfews and roadblocks to protect their communities despite opposition from state leadership.

The extent of tribal power to impose quarantine conditions on reservations is not settled in federal law.³⁹¹ Specifically, the reach of tribal authority over the movement and conduct of nonmembers, especially on roads maintained by states or the federal government, remains contested.³⁹²

In the early months of the COVID-19 pandemic, dozens of tribes issued emergency declarations, orders, and response plans to limit the spread of the disease.³⁹³ To state the obvious, capacity for rapid responses to major health crises is essential to good governance. For these responses to be effective, the governments must be able to enforce their regulations on all residents and travelers.

In 2020, tribal communities faced heightened risks. Native people are disproportionately poor and rural, are more likely to have preexisting

388. See Korey Wahwassuck, *The New Face of Justice: Joint Tribal-State Jurisdiction*, 47 WASHBURN L.J. 733, 747–48 (2008) (discussing the Leech Lake/Cass County Joint Powers Agreement of 2006).

389. See Tsosie, *supra* note 39, at 34; Noah D. Hall & Benjamin C. Houston, *Law and Governance of the Great Lakes*, 63 DEPAUL L. REV. 723, 758–60 (2014); Kevin Gover & James B. Cooney, *Cooperation Between Tribes and States in Protecting the Environment*, 10 NAT. RES. & ENV'T 35, 35 (1996).

390. See COHEN'S HANDBOOK, *supra* note 15, § 7.02.

391. See Matthew L.M. Fletcher, *Indian Lives Matter: Pandemics and Inherent Tribal Powers*, 73 STAN. L. REV. ONLINE 38, 38–39 (2020).

392. *Id.* at 44–45; Matthew L.M. Fletcher, *Why Tribes Should Have the Power to Enforce Strict Coronavirus Policies*, THE ATLANTIC (July 18, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/tribes-coronavirus-enforcement/614242/>. One would think this claim of jurisdiction over the conduct of nonmembers should pass even the stringent Montana test, as their admission to the reservation very directly threatens the continued existence of the tribe.

393. See *COVID-19 Tribal Documents*, TURTLE TALK BLOG (Aug. 11, 2020), <https://turtletalk.blog/covid-19-tribal-documents/> [https://perma.cc/5E54-2QM2].

conditions that exacerbate the risk of serious illness and death, and are less likely to have access to consistent, quality healthcare.³⁹⁴ Effective quarantine rules to limit transmission were indispensable, especially in the absence of strong leadership at the federal level.³⁹⁵

In this context, the Cheyenne River Sioux Tribe established checkpoints to regulate entry into its reservation.³⁹⁶ While many tribes across the country established similar checkpoints,³⁹⁷ the Cheyenne River Sioux Tribe received particular attention and antagonism, largely thanks to the aggressive posturing of the State of South Dakota.³⁹⁸ Under the leadership of Governor Kristi Noem, South Dakota maintained a lax, hands-off approach to pandemic protection.³⁹⁹ Governor Noem even encouraged state residents to attend mass events.⁴⁰⁰ These policy decisions produced devastating results: By late 2020, the State's COVID-19 tests were coming back positive at over four times the national rate.⁴⁰¹ The Tribe cited both the State's failure to adopt an adequate COVID-19 response plan and the pandemic's disproportionate impact on Native Americans as critical factors in its decision to implement its own COVID-19 monitoring program, to make the Reservation "an island of safety in a sea of uncertainty and death."⁴⁰²

394. See Jessica Arrazola et al., *COVID-19 Mortality Among American Indian and Alaska Native Persons*, CDC (Dec. 11, 2020), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6949a3.htm> [<https://perma.cc/Y3AU-Y4ME>]; Fletcher, *supra* note 391, at 43; Spero Manson & Dedra Buchwald, *Bringing Light to the Darkness: COVID-19 and Survivance of American Indians and Alaska Natives*, 5.1 HEALTH EQUITY 59, 60 (2021); Ann E. Tweedy, *The Validity of Tribal Checkpoints in South Dakota to Curb the Spread of COVID-19*, 2021 U. CHI. L. FORUM 233, 260–68. *But see* Sanya Dosani & Max Cantor, *Covid-19 Devastated Many Communities. But Not Cherokee Nation*, N.Y. TIMES (Mar. 10, 2021), <https://www.nytimes.com/2021/03/10/opinion/covid-chokeee-nation-oklahoma.html?ref=oembed>.

395. See Tweedy, *supra* note 394, at 234–35.

396. *Id.* at 236.

397. *Id.*

398. See *Coronavirus: South Dakota Sioux Refuse to Take Down 'Illegal' Checkpoints*, BBC (May 11, 2020), <https://www.bbc.com/news/world-us-canada-52615311> [<https://perma.cc/9PEC-48QQ>]; Tweedy, *supra* note 394, at 237 (describing the two tribes and the State of South Dakota as "at loggerheads due to diametrically opposed approaches to the necessity of public health measures").

399. Tweedy, *supra* note 394, at 237–38.

400. *Id.* at 240–41.

401. *Id.* at 239. The death rate in South Dakota was similarly well above the national average. *Id.* at 240.

402. Complaint for Injunctive & Declaratory Relief at 4, 13, *Cheyenne River Sioux Tribe v. Trump*, No. 1:20-cv-01709 (D.D.C. June 23, 2020).

On April 1, 2020, Chairman Harold Frazier issued the emergency executive order establishing checkpoints on all major roads through the Reservation.⁴⁰³ The checkpoints were directed to block all out-of-state noncommercial traffic unless the drivers could show proof of Tribal membership or proof of Reservation residency.⁴⁰⁴ The Tribe also enacted curfews, stay-at-home orders, and quarantine requirements for residents who traveled out of state.⁴⁰⁵ The Tribe claimed jurisdiction to impose this comprehensive response plan upon all travelers seeking entrance to the reservation—members and nonmembers alike—as a matter of inherent sovereign authority.⁴⁰⁶ And the measures were largely successful: By June 2020, the Tribe had only six reported COVID-19 cases on the reservation, each identified through the checkpoint system and isolated to prevent community spread.⁴⁰⁷

Both the State and the federal government condemned the Tribe's actions as unlawful. Governor Noem demanded the removal of the checkpoints, threatening legal action.⁴⁰⁸ The Trump Administration backed her up, dispatching White House Chief of Staff Mark Meadows to threaten the Tribe with the withholding of federal COVID-19 relief funding under the CARES Act and the suspension of the Tribe's 638 contract for funding tribal police.⁴⁰⁹

403. Press Release, Cheyenne River Sioux Tribe, Cheyenne River Sioux Tribe to Begin Checkpoints to Protect Tribal Members and Residents from COVID-19 Pandemic, Emergency Executive Order # 02.1-2020-CR (Apr. 1, 2020), <https://turtletalk.blog/wp-content/uploads/2020/04/crst-to-begin-checkpoints-to-protect-tribal-members-and-residents-from-covid-19-pandemic-04-01-2020.pdf> [https://perma.cc/WC49-HPHB].

404. *Id.*

405. Tweedy, *supra* note 394, at 247.

406. Press Release, Big Fire L. & Pol'y Grp., Tribe Fights Back Against Retaliation for Protecting People from COVID-19 Pandemic in Suit Against President and Federal Officials (June 23, 2020), <https://turtletalk.wordpress.com/wp-content/uploads/2020/06/2020-06-23-cheyenne-river-v.-trump-press-big-fire-press-release.pdf> [https://perma.cc/HG6L-E8ES].

407. Complaint for Injunctive & Declaratory Relief at 15, *Cheyenne River Sioux Tribe v. Trump*, No. 1:20-cv-01709 (D.D.C. June 23, 2020). The Tribe reported no community spread and zero deaths, thanks to this tracking system. *Id.*

408. Tweedy, *supra* note 394, at 244.

409. *Id.* at 244–45. Bureau of Indian Affairs officials sent several letters threatening the suspension of the 638 contract. Complaint for Injunctive & Declaratory Relief at 17, 19, 22–23, 26, *Cheyenne River Sioux Tribe v. Trump*, No. 1:20-cv-01709 (D.D.C. June 23, 2020). For a full record of communications according to the Tribe, see *id.* at 17–26.

In response, the Tribe filed a complaint in federal district court in June 2020.⁴¹⁰ The Tribe asked the court for a declaratory judgment to find that the Trump Administration's threats violated the Indian Self-Determination and Education Assistance Act, the trust relationship, and the Treaty of Fort Laramie.⁴¹¹ However, the court never reached a decision. The proceedings were stayed pending administrative proceedings reviewing the federal contract suspension, and the Cheyenne River Sioux Tribe voluntarily took down the checkpoints in March of 2021, after vaccines became widely available.⁴¹²

What does this episode of contestation show? Tribes can pursue unilateral action in areas of uncertain jurisdiction and succeed. While the Cheyenne River Sioux Tribe did not formally change federal law, the Tribe successfully protected its people from a devastating crisis. When cooperation with state counterparts is practically impossible and the stakes are substantial, tribes absolutely should assert inherent sovereign powers and take necessary actions.

Tribal implementation of emergency public health monitoring is only one instance of tribes taking unilateral action to stake out jurisdictional claims. Other examples include tribes unilaterally asserting authority over environmental torts,⁴¹³ protection of the rights of nature,⁴¹⁴ the prosecution of non-Indians outside the VAWA framework,⁴¹⁵

410. Complaint for Injunctive & Declaratory Relief at 1, *Cheyenne River Sioux Tribe v. Trump*, No. 1:20-cv-01709 (D.D.C. June 23, 2020).

411. *Id.* at 35–37.

412. Tweedy, *supra* note 394, at 245.

413. As Helia Bidad observes, mass tort plaintiffs can receive redress and avoid invoking the restrictive Montana framework through litigation strategies aimed at settlement in tribal courts. Helia Bidad, *The Power of Tribal Courts in Ongoing Environmental-Tort Litigation*, 132 YALE L.J.F. 904, 913, 930 (2023).

414. See generally Ashley Dawn Anderson, *Tribal Rights of Nature Laws: Fulfilling Sacred Obligations*, 61 TULSA L. REV. 129 (2026) (surveying the Rights of Nature laws passed by various tribes and enforcement efforts by the White Earth Nation and Sauk-Suiattle Indian Tribe). Rights of nature litigation in tribal courts can extend to non-Indian off-reservation activity. See Wesley James Furlong & Lori E. Blumenthal, *Water Knows No Boundaries: Tribal Jurisdiction over Non-Indians' Off-Reservation Conduct that Threatens On-Reservation Tribal Water Resources*, 48 PUB. LAND & RES. L. REV. 109, 113–21 (2025).

415. See, e.g., *E. Band Cherokee Indians v. Torres*, No. CR 03-1443, 2005 WL 6437828 (E. Cherokee Sup. Ct. Apr. 12, 2005); *E. Band Cherokee Indians v. Martinez*, 15 Am. Tribal Law 45 (E. Cherokee Sup. Ct. 2018); *E. Band Cherokee Indians v. Eckley*, No. CR 03-1308, 2004 WL 5806989 (E. Cherokee Ct. Jan. 27, 2004); *E. Band Cherokee Indians v. Bowers*, No. CR 061599-61, 2007 WL 7080171 (E. Cherokee Ct. Mar. 8, 2007).

intellectual property,⁴¹⁶ digital information,⁴¹⁷ reservation airspace,⁴¹⁸ and a wide range of civil compliance enforced with creative civil contempt powers.⁴¹⁹ Across various substantive areas of governance, tribal jurisdiction is most contested when asserted over nonmembers.⁴²⁰ Cases of tribal unilateral action also underline how tribal sovereign powers at times can be greater than those exercised by states. After all, states cannot hinder Americans' freedom to travel by excluding outsiders at the border, but as the Cheyenne River Sioux Tribe demonstrated, tribes can.

Unilateral tribal assertions of jurisdiction may be most successful in areas that arguably do not involve state interests. Despite Noem's hostility, the policing of people entering reservations during the pandemic only minimally implicates state rights. Of course, I would say the same thing for the taxation of nonmembers on tribal land but for the Court's interference. If you were to assume—as many states and Supreme Court justices apparently do—that states enjoy complete police power within their borders with narrow exceptions for tribal self-government,⁴²¹ then almost any area of uncertain tribal jurisdiction implicates latent state interests.

Unilateral action should also be understood as one stage or tool in inter-sovereign negotiation. Unilateral action by tribes may produce

416. See generally Anthony Hernandez, Note, *Tribal Trademark Law*, 76 STAN. L. REV. 661 (2024) (surveying the trademark laws of the Ho-Chunk Nation, Pascua Yaqui, Mohegan Tribe, and Colorado River Indian Tribes).

417. See generally Stacy Leeds, Samantha Phillips & Mikaela Bledsoe Downes, *Proactive Solutions in Implementing Tribal Digital Sovereignty*, 22 J. CMTY. INFORMATICS 82 (2026) (surveying the Tribal digital sovereignty landscape and proposing future best practices).

418. See generally William M. Haney, *Protecting Tribal Skies: Why Indian Tribes Possess the Sovereign Authority to Regulate Tribal Airspace*, 40 AM. INDIAN L. REV. 1 (2016) (surveying the assertion of tribal airspace rights by the Hualapai and Eastern Band of Cherokee Indian Tribes); Alexandra Fay & Ronnie Gipson Jr., *Turbulence Over Red Lake: An Emergency Landing Triggers a Jurisdictional Storm*, MITCHELL HAMLINE L. REV. (forthcoming 2026) (examining the Red Lake Nation's claim to regulatory jurisdiction over reservation airspace) (draft on file with author).

419. See generally Matthew L.M. Fletcher, *A Primer on Tribal Court Contempt Power*, MICH. ST. U. LEGAL RSCH. STUDS. PAPER NO. 06-08 (2018) (surveying Tribal usage of civil contempt penalties).

420. See TRIBAL SUP. CT. PROJECT, 25TH ANNIVERSARY REPORT 2, 8-9 (2026), <https://sct.narf.org/updatememos/tscp-25-year-report.pdf> [<https://perma.cc/K9ZG-SQAS>].

421. See *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2493 (2022) (“To begin with, the Constitution allows a State to exercise jurisdiction in Indian country. Indian country is part of the State, not separate from the State. To be sure, under this Court’s precedents, federal law may preempt that state jurisdiction in certain circumstances. But otherwise, as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country.”).

conditions conducive to unguided compacting or congressional intervention. As noted previously, the paradigmatic guided compacting statute IGRA would not exist but for tribal unilateral action in gaming.

Finally, unilateral action comes with risks. Tribal claims of power that appear disproportionate to federal judges could result in decisions that undermine tribal sovereignty, should the contestations make it to court.⁴²² Moreover, states too can play at unilateral action. States also make claims of jurisdiction that push the limits of the federal law at the expense of tribal nations. As the following Part documents, in recent years, Oklahoma state actors have pursued unilateral action with gusto.

III. APPLICATION: INDIAN COUNTRY TRAFFIC ENFORCEMENT

This Part uses a developing jurisdictional problem to explore practical applications of the four models. Traffic enforcement in Oklahoma Indian country serves as the case study. The first Section begins with an overview of the jurisdictional challenges of traffic enforcement in Eastern Oklahoma, highlighting the shortcomings of the local Unguided Compacting that is the status quo. The second Section then considers alternative solutions offered by the Preemption Model, the Opt-In Model, and the Guided Compacting Model.

A. The Problem

In 2020, the Supreme Court affirmed that Eastern Oklahoma remains Indian country. In *McGirt v. Oklahoma*, the Court found that Congress had never disestablished the Muscogee (Creek) Nation Reservation.⁴²³ Consequently, the State of Oklahoma lacked jurisdiction to prosecute Jimcy McGirt, an enrolled member of the Seminole Nation of Oklahoma, for a crime he committed within the Muscogee (Creek)

422. As IGRA illustrates, Congressional interference can also result in the diminishment of tribal sovereign authority. *See supra* note 283 and accompanying text.

423. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020) (“Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.”). The United States guaranteed the Muscogee (Creek) Nation a permanent homeland in what is today Oklahoma in exchange for the cession of Muscogee aboriginal homelands east of the Mississippi in a series of treaties, namely those of 1832, 1833, and 1866. *See* Treaty with the Creeks, Muscogee (Creek) Nation-U.S., Mar. 24, 1832, 7 Stat. 366; Treaty with the Creeks, Muscogee (Creek) Nation-U.S., Feb. 14, 1833, 7 Stat. 417; Treaty with the Creek Indians, Muscogee (Creek) Nation-U.S., June 14, 1866, 14 Stat. 785.

Nation Reservation.⁴²⁴ By the same reasoning, the Cherokee Nation Reservation,⁴²⁵ the Choctaw Nation Reservation,⁴²⁶ the Seminole Nation Reservation,⁴²⁷ and the Chickasaw Nation Reservation⁴²⁸ all remain intact and jurisdictionally meaningful to this day.⁴²⁹

Despite the dissenters' dire warnings,⁴³⁰ *McGirt* did not dramatically transform the daily lives of the nearly two million people living within the Five Tribes' Reservations.⁴³¹ But the decision had clear and immediate effects on criminal jurisdiction, including the prosecution of traffic violations. Absent congressional intervention, states lack the authority to prosecute Indians who commit crimes on reservations.⁴³² Oklahoma has never adopted Public Law 280 and thus never received delegated prosecutorial authority over Indians.⁴³³ As subsidiaries of the

424. *McGirt*, 140 S. Ct. at 2459–60 (describing McGirt's tribal status, offense, and postconviction arguments); *Id.* at 2482 (ruling for McGirt, reversing the Oklahoma Court of Criminal Appeals).

425. *Hogner v. State*, 2021 OK Crim. App. 4, ¶ 18, 500 P.3d 629, 635 (2021).

426. *Sizemore v. State*, 2021 OK Crim. App. 6, ¶ 16, 485 P.3d 867, 871 (2021).

427. *Grayson v. State*, 2021 OK Crim. App. 8, ¶ 12, 485 P.3d 250, 254 (2021).

428. *McClain v. State*, 2021 OK Crim. App. 38, ¶ 15, 501 P.3d 1009, 1012 (2021).

429. The Oklahoma Court of Criminal Appeals also recognized smaller reservations in Ottawa County, in the northeast corner of the state. *State v. Lawhorn*, 2021 OK Crim. App. 37, ¶ 9, 499 P.3d 777, 779 (2021) (recognizing the Quapaw Reservation); *State v. Brester*, 2023 OK Crim. App. 10, ¶ 25, 531 P.3d 125, 135 (2023) (recognizing the Ottawa Reservation and Peoria Reservation); *State v. Fuller*, 2024 OK Crim. App. 4, ¶ 13, 547 P.3d 149, 152–53 (2024) (recognizing the Wyandotte Reservation).

430. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2501–02 (2020) (Roberts, C.J., dissenting).

431. As discussed in Part I, tribes have limited jurisdiction over non-Indians. The State retains criminal and civil authority over non-Indians on non-Indian fee land—in other words, the majority of residents on the majority of land within the reservations. Additionally, the restoration of Indian country status has no statistically significant effect on economic activity. Michael K. Velchik & Jeffery Y. Zhang, *Restoring Indian Reservation Status: An Empirical Analysis*, 40 YALE J. ON REGUL. 339, 347, 361–71 (2023).

432. *McGirt*, 140 S. Ct. at 2459 (“State courts generally have no jurisdiction to try Indians for conduct committed in ‘Indian country.’”) (citing *Negonsott v. Samuels*, 507 U.S. 99, 102–03 (1993)). “[A]ll land within the limits of any Indian reservation” is considered Indian country for federal criminal law purposes. 18 U.S.C. § 1151. While the Court has recently expanded state criminal jurisdiction to include non-Indians who commit crimes against Indian victims, *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2494, 2504–05 (2022), it has never found that states have inherent authority to prosecute Indians in Indian country.

433. *Castro-Huerta*, 142 S. Ct. at 2508–09, 2518 (Gorsuch, J., dissenting).

state, municipalities lack jurisdiction to prosecute traffic violations made by Indians within reservation boundaries.⁴³⁴

Oklahoma local governments have strained against the limits of federal law. In the years immediately following *McGirt*, the City of Tulsa challenged the well-established rules of Indian country jurisdiction.⁴³⁵ With some four hundred thousand residents within its borders and one million residents in its greater metropolitan area, Tulsa is the biggest city of Oklahoma Indian country.⁴³⁶ One of the more politically sensational disputes involved the brother of Oklahoma's current governor.⁴³⁷ Governor Kevin Stitt and his older brother, Keith Stitt, are both enrolled citizens of the Cherokee Nation.⁴³⁸ While Kevin Stitt is a vocal critic of tribal sovereignty and the jurisdiction upheld by *McGirt*,⁴³⁹ Keith Stitt recognizes the limits of state criminal jurisdiction in Indian country—

434. See *Hooper v. City of Tulsa*, 71 F.4th 1270, 1273, 1284–88 (10th Cir. 2023).

435. See *id.*; *City of Tulsa v. O'Brien*, 2024 OK Crim. App. 31, ¶¶ 2–3, 13, 36, 588 P.3d 908, 913, 915, 921 (2024); *Stitt v. City of Tulsa*, 2025 OK Crim. App. 5, ¶¶ 2, 7–8, 565 P.3d 857, 858–60 (2025); *Muscogee (Creek) Nation v. Kunzweiler*, No. 25-CV-75, 2025 WL 3729626, at *1 (N.D. Okla. Aug. 12, 2025).

436. *QuickFacts: Tulsa City, Oklahoma*, U.S. CENSUS BUREAU (2024), <https://www.census.gov/quickfacts/fact/table/tulsacityoklahoma/PST045224> [<https://perma.cc/VLH3-2MUH>] (reporting a population estimate of 416,209 for the City of Tulsa); *Tulsa, OK Metro Area*, CENSUS REPORTER (2023), <https://censusreporter.org/profiles/31000US46140-tulsa-ok-metro-area/> (reporting a population of 1,060,423 for the Tulsa Metro Area). Tulsa is primarily located on the Muscogee Nation Reservation, but the northern part of the city overlaps with the Cherokee Nation Reservation. *Tribal Nations Relations Committee*, TULSA CITY COUNCIL, <https://www.tulsacouncil.org/past-projects/tribalrelationscommittee> [<https://perma.cc/5KZV-VWE9>] (last visited Aug. 21, 2026).

437. See Tristan Loveless, *A Tale of Two Brothers: Kevin Stitt Fights to Limit McGirt Ruling, Keith Stitt Uses It to Challenge Ticket*, NONDOC (Jan. 30, 2024), <https://nondoc.com/2024/01/30/keith-stitt-pursues-speeding-ticket-lawsuit-alongside-tribes/> [<https://perma.cc/9QJ5-4ZF5>].

438. *Id.*

439. See, e.g., Okla. Exec. Order No. 2023-32, OKLA. ADMIN. CODE § 1:2023-32 (2026) (describing *McGirt* as “wreak[ing] havoc in nearly half of the State of Oklahoma”); Mike McBride III, Opinion, *Attorney: Stitt Seeks to Keep Eastern Oklahoma from Becoming Reservation? McGirt Settled That*, THE OKLAHOMAN (Sep. 14, 2023, at 21:12 CT), <https://www.oklahoman.com/story/opinion/2023/09/08/opinion-attorney-correcting-misconceptions-about-oklahoma-tribes-mcgirt/70767067007/> [<https://perma.cc/TSW3-P79T>] (quoting Governor Stitt as asserting that “[t]ribal governments disbanded and allotted out all the land in 1907 at statehood”); *Drummond Responds to Stitt’s Misinformation on Tribal Hunting Rights*, OKLA. OFFICE ATT’Y GENERAL (Nov. 21, 2025), <https://oklahoma.gov/oag/news/newsroom/2025/november/drummond-responds-to-stitts-misinformation-on-tribal-hunting-rights.html> [<https://perma.cc/XJ3B-Y487>] (quoting Oklahoma Attorney General Gentner Drummond as asserting that “Gov. Stitt has made a habit of spreading misinformation, especially when it comes to the sovereignty of the tribal nations of Oklahoma”).

especially when a Tulsa police officer ticketed him for driving at seventy-eight miles per hour in a fifty-mile-per-hour zone on the Muscogee Nation Reservation.⁴⁴⁰ Keith Stitt challenged his ticket in Tulsa Municipal Court, asserting that the court lacked jurisdiction because he was an Indian speeding in Indian country.⁴⁴¹ The court rejected his argument, convicted him of aggravated speeding, and imposed a fine of \$250.⁴⁴²

In March of 2025, the Oklahoma Court of Criminal Appeals⁴⁴³ affirmed the trial court's decision.⁴⁴⁴ The court disposed of the *Stitt* case alongside an analogous suit, *City of Tulsa v. O'Brien*.⁴⁴⁵ Relying heavily on *Oklahoma v. Castro-Huerta*, the Oklahoma Court of Criminal Appeals held that the State retained jurisdiction over nonmember Indians who commit crimes on other tribes' reservations, at least for "non-major" crimes.⁴⁴⁶ Thus, as a Cherokee citizen, Keith Stitt could be prosecuted by both the City of Tulsa and the Muscogee Nation for speeding on the reservation. Although this new jurisdictional rule flies in the face of established federal law,⁴⁴⁷ the Supreme Court declined to take

440. Loveless, *supra* note 437. In response to his brother's challenge. Governor Kevin Stitt made the following statement:

Public safety is at stake here. The Tulsa police need to be able to enforce the laws and keep their communities safe. . . . [C]ommunities in eastern Oklahoma need assurance that there is one set of rules, regardless of race or heritage. The City of Tulsa is right. Their opposition is not. And maybe Keith shouldn't speed.

Chloe Abbott, *Gov. Kevin Stitt's Brother Keith Sues City of Tulsa for Speeding Ticket*, NEWS ON 6 (April 4, 2024, at 22:41 CT) <https://www.newson6.com/story/660f73dcaab1683332246bb3/gov-kevin-stitts-brother-keith-sues-city-of-tulsa-for-speeding-ticket> [<https://perma.cc/BXD5-N4K5>].

441. *Stitt v. City of Tulsa*, 2025 OK CR 5, ¶ 2, 565 P.3d 857, 858–59.

442. *Id.* ¶ 3. Judge Mitchell McCune found that the City had jurisdiction over Stitt's speeding offense because of the Curtis Act of 1901, which authorized broad municipal authority prior to Oklahoma statehood. *City of Tulsa v. Stitt*, No. 7569655, 2022 WL 22907971, at *6, *9 (Tulsa Mun. Crim. Ct. Apr. 22, 2022). In the following year, the Tenth Circuit rejected this argument in *Hooper v. City of Tulsa*, holding that even if the Curtis had authorized municipal jurisdiction over Indians in the 1900s, it no longer applied after statehood. 71 F.4th 1270, 1285 (10th Cir. 2023).

443. The highest court in the state for criminal matters. Loveless, *supra* note 437.

444. *Stitt*, 2025 OK CR 5, ¶ 9, 565 P.3d 857, 860.

445. *City of Tulsa v. O'Brien*, 2024 OK CR 31, ¶ 38, 588 P.3d 908, 921 (Okla. Crim. App. 2024) (deciding three months prior to *Stitt v. City of Tulsa*).

446. *Stitt*, 2025 OK CR 5, ¶ 8, 565 P.3d 857, 859–60 (finding that state jurisdiction was not preempted, and that consequently "Oklahoma has concurrent jurisdiction [with the tribes] in Indian country over non-member Indian defendants accused of committing non-major crimes.") (citing *O'Brien*, 2024 OK CR at ¶ 35, 588 P.3d at 921).

447. See *O'Brien*, 2024 OK CR 31, ¶¶ 3–4, 588 P.3d, 913 (Lewis, J. concurring in part and dissenting in part); 25 U.S.C. § 1301(2) (codifying the "Duro Fix," in which

up Stitt's petition for certiorari.⁴⁴⁸ The City of Tulsa continued to ticket and prosecute nonmember Indians for traffic offenses in Indian country.⁴⁴⁹

The Tulsa story does not end here, however. In 2024, the City of Tulsa elected Monroe Nichols IV as its forty-first mayor.⁴⁵⁰ Of the three major candidates, Nichols was the only one who promised to abandon the prior mayor's stance on Indian country jurisdiction, embrace federal law, and halt municipal prosecutions of tribal citizens.⁴⁵¹ He made co-governance with tribal nations a prominent part of his campaign,⁴⁵² and upon his inauguration he appointed Amanda Swope, a citizen of the Muscogee Nation and member of the Oklahoma House of Representatives, as Tulsa's first Director of Tribal Policy & Partnerships.⁴⁵³ On June 25, 2025, Mayor Nichols and Muscogee Nation Principle Chief David Hill signed a settlement agreement where the City of Tulsa agreed to stop prosecuting Indians within the bounds of the Muscogee Reservation and instead refer all Indian traffic cases to the

Congress clarified that the terms of criminal jurisdiction in Indian country depended on Indian status, not specific tribal membership).

448. *Stitt*, 2025 OK CR 5, *cert. denied*, 146 S. Ct. 185 (2025). I, for one, would have loved to see the Stitt brothers fight it out in the Supreme Court over a \$250 speeding ticket. The justices disagreed.

449. Complaint ¶ 6, *Muscogee (Creek) Nation v. Tulsa County*, No. 25-CV-00075 (N.D. Okla. Feb. 13, 2025).

450. Nuria Martinez-Keel, *Monroe Nichols Becomes First Black Mayor of Tulsa in 'Historic and Significant' Election*, KOSU (Nov. 8, 2024, at 04:55 CT) <https://www.kosu.org/politics/2024-11-08/monroe-nichols-becomes-first-black-mayor-of-tulsa-in-historic-and-significant-election>.

451. See KJRH-TV | TULSA | CHANNEL 2, *Tulsa Mayoral Candidates Debate Ahead of Aug. 27 Election*, at 30:00–34:22 (YouTube, Aug. 8, 2024) <https://www.youtube.com/watch?v=29HSzvxieyA> (on file with Wisconsin Law Review) (according to Nichols, “tribal sovereignty can’t be something you’re for when it’s convenient, it has to be something that you stand on all the time”); Tristan Loveless, *Keith, Nichols and VanNorman Talk Homelessness, Juvenile Center and More in Tulsa Mayoral Debate*, NONDOC (Aug. 9, 2024) <https://nondoc.com/2024/08/09/watch-read-tulsa-mayoral-debate-recap/> [<https://perma.cc/2KGM-E6ST>].

452. See Monroe Nichols, *Co-Govern with Tribal Nations*, MONROE FOR MAYOR, <https://www.monroeformayor.com/priorities/co-govern-with-tribal-nations> [<https://perma.cc/RW2D-YHYZ>] (last visited Aug. 19, 2026).

453. *Mayor Nichols Announces Amanda Swope as Director of Tribal Policy & Partnerships*, CITY OF TULSA (Dec. 12, 2024), <https://www.cityoftulsa.org/press-room/mayor-nichols-announces-amanda-swope-as-director-of-tribal-policy-partnerships/> [<https://perma.cc/LP9N-TSHX>]. Mayor Nichols commented that he was proud that the Principal Chiefs of the Muscogee Nation, Cherokee Nation, and Osage Nation (the three Nations that overlap with Tulsa) “all agree that Amanda is the best person to lead as the Director of Tribal Policy and Partnerships here at City Hall.” *Id.*

Muscogee Nation District Court.⁴⁵⁴ The people of Tulsa voted for lawful co-governance, and Mayor Nichols made good on his promise.

The story still does not end here. The City of Tulsa is not a sovereign actor, but a subsidiary of the State of Oklahoma. Governor Stitt has done his best to throw out the settlement, to force Tulsa to continue to exercise criminal jurisdiction over Indians.⁴⁵⁵ And in May of 2026, the Supreme Court of Oklahoma held that the settlement agreement was invalid.⁴⁵⁶ The future of traffic enforcement in the City of Tulsa remains in flux.

As the Tulsa saga demonstrates, jurisdictional coordination in traffic enforcement presently depends on local personnel and local politics. The governor may presently be successful in thwarting the democratic will of Tulsan voters, but Stitt's final term is soon coming to an end. Respect for tribal sovereignty may well be on the ballot again in the 2026 gubernatorial election.⁴⁵⁷

Tulsa is not the only city testing the limits of *McGirt*. The City of Henryetta has gone further. Henryetta has been prosecuting Indians—including Muscogee citizens—on the Muscogee Nation Reservation and claims concurrent jurisdiction over all “general crimes.”⁴⁵⁸ Despite outreach by the Muscogee Nation Attorney General, Henryetta has refused to cooperate with the Nation, not even entertaining a cross-

454. Joint Settlement Agreement Between Plaintiff Muscogee (Creek) Nation and Defendants City of Tulsa et al. at 5, *Muscogee (Creek) Nation v. Tulsa County*, No. 23-CV-00490 (N.D. Okla. June 25, 2025), <https://www.cityoftulsa.org/media/28137/20250623-mcn-cot-settlement-agreement-approved-final.pdf> [<https://perma.cc/RKM8-UL8T>]; see Braden Harper, *MCN and Tulsa Reach Settlement Agreement in Sovereignty Lawsuit*, MVSKE MEDIA (July 2, 2025) <https://www.mvskokemedia.com/mcn-and-tulsa-reach-settlement-agreement-in-sovereignty-lawsuit/> [<https://perma.cc/B2VA-MQHW>].

455. According to Stitt: “No mayor has the authority to pick and choose which Oklahomans are subject to the laws of our state.” Tristan Loveless, *Stitt asks OK Supreme Court to Stop Tulsa, Muscogee Nation Jurisdiction Settlement*, NONDOC (Aug. 21, 2025) <https://nondoc.com/2025/08/21/stitt-asks-ok-supreme-court-to-stop-tulsa-muscogee-nation-jurisdiction-settlement/> [<https://perma.cc/H26L-5M25>].

456. *State ex rel. Stitt v. City of Tulsa*, 2026 OK 39, ¶ 17, 591 P.3d 701, 706.

457. Stitt is in his second four-year term and thus ineligible to run again. *Oklahoma's 2026 Governor's Race: Who's Running?*, NEWS 9 (Sep. 29, 2025, at 17:03 CT), <https://www.news9.com/story/67461d65ef6c021a9ebcd99d/oklahomas-2026-governors-race> [<https://perma.cc/BJF4-RJTN>].

458. Motion to Dismiss and Brief in Support by Defendant City of Henryetta at 1–2, *Muscogee (Creek) Nation v. City of Henryetta*, 809 F. Supp. 3d 1317 (E.D. Okla. 2025) (No. 25-CV-227); Plaintiff's Motion for Preliminary Injunction Before the Honorable Jason A. Robertson at 208–09, *Muscogee (Creek) Nation v. City of Henryetta*, 809 F. Supp. 3d 1317 (E.D. Okla. 2025) (No. 25-CV-227) (testimony of Henryetta City Attorney John Insabella, stating that nothing in his work changed after *McGirt* because he believed that the City of Henryetta retained jurisdiction over all misdemeanor crimes regardless of Indian status; Complaint at ¶ 6, *Muscogee (Creek) Nation v. City of Henryetta*, 809 F. Supp. 3d 1317 (E.D. Okla. 2025) (No. 25-CV-227-GLJ).

deputization agreement for the Henryetta Police Department and the Muscogee Lighthorse Police.⁴⁵⁹ On July 8, 2025, the Muscogee Nation filed a complaint against Henryetta in the Eastern District of Oklahoma, and on November 18, 2025, the court denied Henryetta's motion to dismiss, rejecting its jurisdictional pretensions in strong terms.⁴⁶⁰ The case remains in federal district court.

Jurisdictional coordination varies locally. Fifty miles south of Henryetta, the City of Coweta has a strong working relationship with the Muscogee Nation. The Coweta Police Department and the Muscogee Lighthorse Police are both cross-deputized to enhance public safety for all Coweta residents.⁴⁶¹ Moreover, Coweta has a system for forwarding cases involving tribal defendants to the Muscogee Nation District Court.⁴⁶² According to Coweta Police Chief Mike Bell, coordination with the Muscogee Nation has enhanced policing in Coweta—the number of officers at his disposal essentially doubled under the cross-deputization agreement, and the Muscogee Lighthorse bring resources and technology

459. Plaintiff's Motion for Preliminary Injunction Before the Honorable Jason A. Robertson at 158, *Muscogee (Creek) Nation v. City of Henryetta*, 809 F. Supp. 3d 1317 (E.D. Okla. 2025) (No. 25-CV-227) (testimony of Attorney General Geri Wisner).

460. *Muscogee (Creek) Nation v. City of Henryetta*, 809 F. Supp. 3d 1317, 1324–25 (E.D. Okla. 2025) Judge Jason Robertson denied Henryetta's motion in the following fashion:

What the City seeks is not clarification. It seeks permission to disregard what has already been decided. But the judiciary does not legislate by impatience, and this Court will not pretend settled precedent is an open question. . . . The judiciary speaks in precedent, and that precedent could not be clearer. Public safety is not imperiled by fidelity to the law. . . . Budgetary consequences do not expand jurisdiction. The Constitution does not bend to convenience. Sovereignty is the measure of a Nation's dignity and a Republic's word. . . . The Creek Reservation endures, and so too does the Nation's right to govern its own. In the end, the Court stands where the Constitution still stands: with the law as written, the precedent as binding, and the promise as kept.

Id. at 1324.

461. See *City Addendum: Addition of City to Deputation Agreement for Law Enforcement in the Muscogee Creek Nation*, OKLA SEC'Y OF ST. (March 23, 2021) <https://sos.ok.gov/documents/filelog/94065.pdf> [<https://perma.cc/7PCW-56CR>]; Plaintiff's Motion for Preliminary Injunction Before the Honorable Jason A. Robertson at 114–26, *Muscogee (Creek) Nation v. City of Henryetta*, 809 F. Supp. 3d 1317 (E.D. Okla. 2025) (No. 25-CV-227) (testimony of Coweta Police Chief Mike Bell). The police chief noted that he is fully satisfied with the Muscogee Nation judiciary's handling of transferred cases, and that tribal cases are actually easier than non-tribal cases, because of the assistance of the Muscogee Lighthorse Police. *Id.* at 118, 120.

462. Plaintiff's Motion for Preliminary Injunction Before the Honorable Jason A. Robertson at 119–21, *Muscogee (Creek) Nation v. City of Henryetta*, 809 F. Supp. 3d 1317 (E.D. Okla. 2025) (No. 25-CV-227) (testimony of Coweta Police Chief Mike Bell).

that the Coweta Police lack.⁴⁶³ Police Chief Bell also testified that when the Coweta Police Department calls for backup, the Lighthorse are the first responders, arriving before neighboring state forces.⁴⁶⁴

Jurisdictional coordination varies not only from city to city, but also from tribe to tribe. Compared to the Muscogee Nation, the Cherokee Nation's approach to ensuring lawful, effective traffic enforcement is less litigious and more deferential to local governments. The Cherokee Nation has thirty-six agreements with municipalities for revenue sharing in traffic enforcement.⁴⁶⁵ In all the agreements, the municipal governments are allowed to retain fees and fines resulting from traffic enforcement as "donations" from the Nation, in recognition of the municipal governments' public safety and administrative services.⁴⁶⁶ The agreements only require thirty dollars remitted to the Nation for every "Reservation defendant"—essentially all offenders subject to Cherokee Nation jurisdiction.⁴⁶⁷ Any reservation defendant who wishes to challenge a ticket is referred to tribal court.⁴⁶⁸ Since all the involved municipalities already have cross-deputization agreements, there is no issue with the state police officers pulling over and ticketing tribal members.⁴⁶⁹ In this

463. *Id.* at 122–24.

464. *Id.* at 121.

465. *See Legal Status of the Cherokee Nation Reservation*, CHEROKEE NATION OFF. ATT'Y GENERAL, <https://www.cherokee.gov/our-government/office-of-the-attorney-general/legal-status-of-the-cherokee-nation-reservation/> [https://perma.cc/MJ6U-QGYJ] (last visited Aug. 21, 2026).

466. *See, e.g.*, Memorandum of Agreement between the Cherokee Nation and the City of Stilwell, Cherokee Nation-Stilwell, § 6(D), Oct. 5–Oct. 17, 2023 [hereinafter Cherokee Nation and Stilwell], <https://attorneygeneral.cherokee.org/media/iwqddlog/stilwell.pdf> [https://perma.cc/749H-D3V2].

467. *Id.* § 5(F)–(G). Reservation defendants include "Indian perpetrators and non-Indian perpetrators subject to the special domestic violence jurisdiction of the Nation as acknowledged by the 2013 reauthorization of the Violence Against Women Act." *Id.* § 2. The \$30 remitted is treated as an administrative fee, comparable to what the State of Oklahoma otherwise collects for the Council on Law Enforcement Education and Training (CLEET). *Hooper FAQ*, CHEROKEE NATION OFF. ATT'Y GEN. (Aug. 7, 2023), <https://attorneygeneral.cherokee.org/media/daylca4q/hooper-faq-final.pdf> [https://perma.cc/AA4L-ARAH].

468. *See, e.g.*, Cherokee Nation and Stilwell, *supra* note 466, § 5(D), § 6(C).

469. *Hooper FAQ*, CHEROKEE NATION OFF. ATT'Y GEN. (Aug. 7, 2023) <https://attorneygeneral.cherokee.org/media/daylca4q/hooper-faq-final.pdf>. All cross-deputization agreements can be found on the Oklahoma Secretary of State's website. *See Tribal Compacts and Agreements*, OKLA. SEC'Y OF ST., <https://www.sos.ok.gov/gov/tribal.aspx> [https://perma.cc/9MH6-MLAU] (last visited Aug. 21, 2026).

According to the revenue sharing agreements, they are neither conceding nor conferring jurisdiction on any parties involved but rather establishing "an administrative process under which City peace officers, acting pursuant to a Cross Deputation agreement with the Cherokee Nation . . . may issue criminal citations to [Reservation defendants]."

way, the cities get to continue to ticket and fine tribal members, tribal jurisdiction is honored, and the Nation gets a modest cut of the revenue.

These anecdotes illustrate the range of strategies responding to common issues in Indian country traffic enforcement. Across the *McGirt* reservations, governments have been dealing with three interrelated challenges. First is the logistical challenge of reasserting tribal jurisdiction, including building tribal policing and adjudicative capacity, as well as developing processes to accurately sort defendants into the proper court systems.⁴⁷⁰ In the *McGirt* decision, Justice Gorsuch recognized the incoming shifts in caseloads, observing:

[F]or every jurisdictional reaction there seems to be an opposite reaction: recognizing that cases like Mr. McGirt's belong in federal court simultaneously takes them out of state court. So while the federal prosecutors might be initially understaffed and Oklahoma prosecutors initially overstaffed, it doesn't take a lot of imagination to see how things could work out in the end.⁴⁷¹

Gorsuch was referring to the new docket of criminal cases heading to the federal district courts of Oklahoma. But his observations are similarly applicable to tribal courts.⁴⁷² In addition to major tribal investments in their criminal administrative capacity and recruitment of legal talent to tribal legal systems, cross-deputization agreements and arrangements like the Cherokee Nation revenue-sharing agreements facilitate the redistribution of personnel and resources.

Cherokee Nation and Stilwell, *supra* note 466, § 2. In this way, these unguided compacting agreements avoid possible constitutional objections.

470. Sorting defendants is complicated by the Supreme Court's Rogers Test for Indian status, which looks for a combination of Indian ancestry and political recognition by a tribe or the federal government. *See United States v. Rogers*, 45 U.S. 567, 572–73 (1846); *United States v. Prentiss*, 206 F.3d 960, 972 (10th Cir. 2001). Enrollment is not required. *See COHEN'S HANDBOOK*, *supra* note 15, § 4.03(4). The ancestry prong of the Rogers test places the enrolled descendants of Freedmen in a strange position. The Tenth Circuit reads the Rogers Test to require Indian blood, something many Freedmen descendants cannot prove, despite their status as tribal citizens. *See Clifton Adcock & Allison Herrera, Despite Tribal Citizenship, Traffic Tickets for Freedmen Descendants to Remain in City Court*, KOSU (Aug. 19, 2025, at 18:40 CT), <https://www.kosu.org/local-news/2025-08-19/despite-tribal-citizenship-traffic-tickets-for-freedmen-descendants-to-remain-in-city-court> [<https://perma.cc/9YT5-P9YJ>].

471. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2480 (2020).

472. For example, the Choctaw Nation District Court saw an increase of 789% in all case filings from 2020 to 2023. Judge Amy Pierce, Presentation at the University of Tulsa, College of Law: Who Is an "Indian" for Federal Criminal Law Purposes? (Oct. 10, 2024) (slides on file with author). Traffic and wildlife tickets skyrocketed from a mere fourteen tickets in 2020 to 1,396 tickets in 2023. *Id.*

The second challenge is one-sided: *McGirt* threatens municipalities whose budgets rely on traffic court fines and fees. Local governments stand to lose revenue⁴⁷³ and thus are incentivized to fight the implementation of *McGirt*. Generous agreements like those offered by the Cherokee Nation ameliorate this challenge. Just as in tax compacting, cooperation comes at a cost to potential tribal revenue.

The third challenge has been manufactured by the state courts. This last issue is that of jurisdictional confusion, thanks to the *O'Brien* and *Stitt* decisions recounted previously. In Oklahoma, the rules of municipal prosecution are out of step with established federal law. This jurisdictional uncertainty stalls productive cooperation as both state and tribal actors wait for federal courts to weigh in on the legal discrepancy.

B. Modeling Solutions

Presently, the tribal and local governments of eastern Oklahoma are operating under the Noninterference Model. Jurisdictional coordination in traffic enforcement depends upon local personnel and local relationships, which differ from municipality to municipality and tribe to tribe. Jurisdictional uncertainty resulting from the Oklahoma Court of Criminal Appeals' strained interpretation of federal law emboldens municipalities to reject coordination and subject tribal members to double prosecution. Where relationships are more antagonistic, the parties wait upon federal courts to draw jurisdictional lines. This final Section considers the many ways Congress—should it ever be moved to fulfill its duties and legislate—can intervene to facilitate the resolution of jurisdictional conflict.

Federal preemption is warranted to correct Oklahoma's twisted interpretation of federal law. Just as ICWA drew clear, workable, jurisdictional lines for child custody, an Indian Country Traffic Safety Act (ICTSA) could clarify the bounds of state/municipal and tribal authority. To harmonize Oklahoma traffic enforcement with existing federal Indian law, ICTSA should affirm that tribes have exclusive jurisdiction over all Indian traffic offenses occurring within reservation borders.⁴⁷⁴

473. See Min Su, *Taxation by Citation? Exploring Local Governments' Revenue Motive for Traffic Fines*, 80 PUB. ADMIN. REV. 36, 36 (2020).

474. ICTSA might be packaged with a broader *Castro-Huerta* fix, correcting the Court's assertions that state jurisdiction is liberally presumed on reservations absent clear federal preemption, removing state jurisdiction over crimes committed by non-Indians against Indians in Indian country, and preventing future *O'Brien/Stitt*-style misinterpretations. Oklahoma's bizarre interpretation of its income tax authority should also be corrected, but that is getting pretty far from the subject of traffic safety.

Like ICWA, ICTSA can mandate certain procedures in state courts to ensure that defendants are properly sorted and that tribes have notice of new offenses subject to their jurisdiction. This might include mandatory communication with the local tribe anytime a state officer arrests or cites a driver who claims to be Indian on a reservation. Any driver carrying tribal identification should be promptly transferred to the tribal system. Alleged Indian drivers without formal documentation could be asked to produce evidence of their asserted tribal affiliation in municipal court or tribal court—whichever system picks them up first. Alternatively, the burden could be shifted to the state or an intertribal office to verify affiliation claims with the thirty-eight federally recognized tribes of Oklahoma.

While Congress is at it, ICTSA might as well include a Rogers Fix to simplify the determination of Indian status. A Rogers Fix might define “Indian” for all criminal jurisdiction purposes as anyone enrolled in a federally recognized tribe, making jurisdiction a matter of citizenship.⁴⁷⁵ Or it may keep the allowance for tribal descendants who are not enrolled, but expressly include Freedmen descendants to liberalize the reach of tribal jurisdiction and insulate more tribal relations from the state.

Considering the widespread (though not universal)⁴⁷⁶ success of cross-deputization, ICTSA should also include provisions governing consensual intergovernmental cooperation. This could take the form of either the Opt-In Model or the Guided Compacting Model.

475. This simplification of Indian status to tribal citizenship would also help to clear up a developing problem in the federal courts. Under *United States v. Prentiss*, the Tenth Circuit has held that Indians status (including a showing of Indian blood) and non-Indian status must be proved by the United States as an element of the crime for federal Indian country prosecutions. See 273 F.3d 1277, 1278, 1280 (10th Cir. 2001). This can be difficult. See *United States v. Harper*, 118 F.4th 1288, 1295, 1302 (10th Cir. 2024) (holding that records produced by the Choctaw Nation to verify the defendant’s Choctaw affiliation in anticipation of trial were inadmissible hearsay, so the conviction was reversed). And the Tenth Circuit is now struggling with the question of how to prove non-Indian status for purposes of the General Crimes Act, which grants the federal courts jurisdiction over Indian country crimes committed by Indian offenders against non-Indian victims and crimes committed by non-Indian offenders against Indian victims, but not crimes involving exclusively Indians. See 18 U.S.C. § 1152 (General Crimes Act); *Ex parte Crow Dog*, 109 U.S. 556, 572 (1883) (holding that the General Crimes Act does not authorize federal prosecutions of crimes by Indians against Indians in Indian country); *United States v. Hebert*, 159 F.4th 777, 786 (10th Cir. 2025) (finding “[n]o rational jury could have found beyond a reasonable doubt that Mr. Hebert lacks Indian blood [because the] prosecution introduced no DNA or genealogical evidence to show Mr. Hebert has no ‘Indian ancestors.’”); *United States v. Ruiz*, 164 F.4th 774, 781–82 (10th Cir. 2026) (observing the difficulty in the Tenth Circuit’s current standard for proving non-Indian status, encouraging a reexamination of *Prentiss*).

476. Looking at you, Henryetta.

An opt-in version could set out a one-size-fits-most set of rules for concurrent jurisdiction or cross-deputization and revenue sharing in traffic enforcement. This take-it-or-leave-it arrangement could functionally replicate the Cherokee Nation model, with set terms for cross-deputization and a revenue sharing formula. Congress could replace the thirty dollar remission rate with a more equal distribution. The municipality could be required to remit fifty percent of all ticket revenue collected from Indian offenders. This agreement could go both ways, and fifty percent of all ticket revenue collected by tribal authorities from non-Indian offenders would conversely be remitted to the municipality. Under a cross-deputization model, any driver who challenges the ticket would receive a trial in the appropriate court: Indians would be heard in tribal court, and non-Indians would be heard in state court.

Alternatively, an opt-in ICTSA provision could allow for the delegation or restoration of jurisdiction. Some Indians could be prosecuted in state courts, and some non-Indians could be prosecuted in tribal courts. Tribes may have an interest in adjudicating non-Indians who commit traffic offenses on or near tribal property, or perhaps non-Indians driving vehicles with tribal tags. Additionally, a jurisdiction-shifting version would need some means to prevent duplicative prosecution. While cross-deputization and revenue sharing are already available under unguided compacting, actual jurisdictional change may only be constitutionally permissible with congressional authorization via an ICTSA statute.

The Opt-In Model would most likely preempt additional compacting for cross-deputization and revenue sharing. This would prevent municipalities from holding out for a better deal and hopefully result in tribes retaining a larger portion of traffic enforcement revenue. But it would also override the many existing agreements carefully built up by tribes and local governments. For this reason, the opt-in option is probably less desirable than the guided compacting alternative. Moreover, guided compacting would allow tribes with greater or lesser criminal administrative capacity to negotiate for more or less delegation to state actors.

A guided compacting ICTSA could provide a framework for tribes and local governments to compact for cross-deputization, revenue sharing, or even jurisdictional delegations. Although the IGRA's and the ICWA's compacting provisions operate on the state-tribe level, perhaps an ICTSA could reach local municipality-tribe coordination. State-level

consent would likely be a threshold requirement, as local governments' prosecutorial authority stems from state sovereignty.⁴⁷⁷

Instead of setting a fixed formula for revenue sharing, a guided compacting version of ICTSA would set up procedures, parameters, and federal oversight. Tribes and municipalities would be invited to compact over police coordination, adjudicatory authority, and revenue sharing of fines. ICTSA would place limits on each category. For example, ICTSA could require that all cross-deputization arrangements provide for some forum for civil causes of action for police misconduct.⁴⁷⁸ ICTSA could set minimum and maximum limits on revenue sharing, ensuring that compacts are not overly lopsided. And ICTSA could set up a review process, presumably delegated to the Department of the Interior or the Department of Transportation to ensure conformity with the compacting terms. As in the gaming context, Congress could establish a national commission to promulgate regulations to fill in any gaps in legislative scheme.

Compacting demands higher transaction costs that may act as barriers to smaller tribes. To overcome these barriers, ICTSA should involve funding—for technical training, the compacting process, and the development of tribal public safety infrastructure. This might look something like VAWA, which allows tribes to submit receipts for reimbursement of relevant costs.⁴⁷⁹

For many tribes in Oklahoma, the costs of compacting would not be prohibitive. Larger Oklahoma tribes have highly sophisticated business departments and, across the state tribes, are collectively responsible for tens of billions of dollars of economic impact.⁴⁸⁰ That said, any statute

477. To win over hostile state officials like Governor Stitt, ICTSA might tie states' authorizing traffic compacting to financial incentives, which should of course be reasonably related to the subject of traffic safety.

478. Presently, there is an awkward asymmetry in officer accountability. When state officers act under tribal authority thanks to a cross-deputization agreement to detain or arrest a tribal member, any abuse is not subject to 42 U.S.C. § 1983. But when tribal officers act under state authority under the cross-deputization arrangement to detain or arrest a non-Indian, abuse arising from that interaction is subject to 42 U.S.C. § 1983. See *Barrick v. Kasbaum*, No. CIV-23-129, 2025 WL 2993764, at *5–6 (E.D. Okla. July 9, 2025); Kevin Morrow, *Bridging the Jurisdictional Void: Cross-Deputization Agreements in Indian Country*, 94 N. DAKOTA L. REV. 65, 90–91 (2019). The solution to this problem could be requiring participating tribes to provide an avenue for redress in tribal court. Or Congress could amend the Indian Civil Rights Act to provide a federal cause of action.

479. Liz Hidalgo Reese endorses the VAWA funding model as an improvement to the older competitive grant model, because it gives tribes more flexibility and minimizes federal micromanaging. Reese, *supra* note 174, at 232–33.

480. See KYLE D. DEAN, *THE ECONOMIC IMPACT OF TRIBAL NATIONS IN OKLAHOMA: FISCAL YEAR 2023* 23 (2025), <https://www.unitedforoklahoma.com/wp->

structuring inter-sovereign negotiation across Indian country must keep in mind the incredible disparity among tribal governments. While some Oklahoma tribes may be major economic players, others are dependent on federal funding.⁴⁸¹

A combination of preemption and guided compacting would likely be the most appropriate federal intervention. Congress should use its Indian affairs authority to clarify and improve the basic rules of Indian country jurisdiction. Upon these jurisdictional ground rules, the domestic sovereigns should be encouraged to compact for local coordination subject to federal oversight.

CONCLUSION

State-tribe conflict is a perennial feature of American trilateral federalism. Federal Indian policy history—namely allotment and termination—ensured jurisdictional trouble in Indian country. In more recent years, the Supreme Court’s confused doctrine of implicit divestiture added a new level of incoherence. The federal judiciary continues to struggle to carve out workable jurisdictional lines among the fifty states and 575 federally recognized Indian tribes. This Article argues that judge-made solutions, dealt out on a case-by-case basis and restrained by sovereign immunity, are inadequate. Under federal law, Congress is the national office that wields plenary authority in Indian affairs. In our constitutional structure, Congress must have the power to harmonize the domestic sovereigns. Moreover, Congress bears the responsibility to coordinate states and tribes through federal legislation.

This Article illustrates how Congress has taken action to resolve jurisdictional conflict on several occasions. It used those examples to articulate abstract models for future legislative solutions. The four resulting models—Preemption, Opt-In, Guided Compacting, and Noninterference—have different strengths and are appropriate for different circumstances. In many cases, such as the Oklahoma traffic contestations described in Part III, a hybrid statute involving two or more models may be most effective. In particular, the combination of preemption and compacting can likely address most jurisdictional

content/uploads/2025/06/fiscal-year-2023-tribal-nations-economic-impact.pdf
[<https://perma.cc/C869-RUSY>] (estimating total economic impact of tribes for the year of 2023 at \$23.4 billion).

481. Robert Schapiro warns that interstate economic disparity undermines our federalism, urging increased redistribution through federal programs. Robert Schapiro, *States of Inequality: Fiscal Federalism, Unequal States, and Unequal People*, 108 CAL. L. REV. 1531, 1535–37 (2020). His recommendation for federal grants calibrated to state economic status might be extended to federal policies involving tribes as well. *See id.* at 1537.

conflicts. While this typology surely fails to capture all the possible statutory paradigms, it offers tested models informed by experience. They are tools in the federal toolbox for resolving state-tribe conflict.

* * *