

# A POSSIBLE SOLUTION TO THE PROBLEM OF DIMINISHING TRIBAL SOVEREIGNTY

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## ABSTRACT

The capacity of Indian tribal sovereignty to protect tribes from outside encroachment and interference has steadily diminished from when the concept was first enunciated in the nineteenth century in the Marshall Indian Law Trilogy. This article assumes as a working premise that only bringing tribes into the Constitution as co-equal sovereigns will end the attrition. The article examines how this might happen, either through creative interpretation of existing constitutional text or by amending the Constitution. Each of these proposals is examined to see if it empowers tribes to manage their futures more effectively, is capacious enough to include the vast majority of tribes, maintains the union's security and stability, and has political salience. The article concludes that only the creation of a virtual nationwide election district for all members of a tribe to elect tribal representatives to Congress will meet these criteria. The author concedes that the approach is novel, but hopes it is sufficiently viable to warrant further consideration by others.

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## I. INTRODUCTION

To have or to claim particular rights—that is to be a political subject of any kind is necessarily to inhabit particular forms of imagined or achieved—even if unstable or contested—political space.<sup>1</sup>

This is an article about constitutional federalism and not about Indian tribes. It uses the semi-autonomous sovereign status of Indian tribes to examine whether the current federal structure, which is based on the premise of only two sovereigns, is sufficiently porous to absorb tribes as a third, co-equal sovereign.<sup>2</sup> “[W]hile a few native nations have become real players in the larger American political and economic systems, most tribal rights are based on pillars made not of constitutional granite, but of treaty and trust-soaked sand which can be washed away at the whim of lawmakers or judicial activists.”<sup>3</sup>

As a result of misguided policies, many Indians are among the poorest of the poor<sup>4</sup> without political, social, or economic power to improve their lot. American tribes suffer from a lack of power to protect themselves from the rivalrous desires of non-Indians; at most, they function like weak lobbying groups struggling to have their views represented in Congress

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1. Thomas Biolsi, *Imagined Geographies: Sovereignty, Indigenous Space, and American Indian Struggle*, 32 AM. ETHNOLOGIST 239, 253 (2005).

2. What is paradoxical about the situation of U.S. tribes is that they have already achieved what aboriginal communities in countries like Australia, New Zealand, and Canada want—“[T]ribal sovereignty within a Native homeland (a modern tribal government with its tribal citizenry on its reservation).” *Id.* at 240.

3. DAVID E. WILKINS & HEIDI KIIWETINEPINESHIK STARK, *AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM* 233 (2011). *But see* Jonathan Martin, *G.O.P. Hopeful Finds Tribal Tie Cuts Both Ways*, N.Y. TIMES, May 4, 2014, [http://www.nytimes.com/2014/05/04/us/politics/gop-hopeful-finds-tribal-tie-cuts-both-ways.html?\\_r=0](http://www.nytimes.com/2014/05/04/us/politics/gop-hopeful-finds-tribal-tie-cuts-both-ways.html?_r=0) (describing the Chickasaw Nation as one of the most influential tribes in Oklahoma, “a state where Native Americans are not merely the inheritors of a poignant history but also collectively constitute the state’s largest nongovernment employer outside of Walmart,” with the major source of those jobs being the state’s 110 casinos).

4. According to the Census Bureau, 29.1% of single-race American Indians and Alaska Natives lived in poverty. This was the highest rate of any race group in the country. The poverty rate for the entire country was 15.9%. *American Fact Finder*, CENSUS BUREAU, [http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/12\\_1YR/S0201//popgroup-002|004|006|009|012](http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/12_1YR/S0201//popgroup-002|004|006|009|012).

against the views of those who would do them harm, including the states.<sup>5</sup> A working assumption of this article is that this story will not change unless the root of that powerlessness—the tribes’ position outside our constitutional structure of governance—is transformed somehow.<sup>6</sup> Yet doing that is not easy.

Indian tribes pose a unique federalism problem, functioning like a “federalism football.”<sup>7</sup> They were “excluded from the original compact”—an exclusion that tends to be reproduced and reinforced by the specific dynamics of federal governance.<sup>8</sup> Indeed, “federalism operates as a gridlock that limits the possibilities for significant institutional reforms that would respond to Indigenous claims for proper recognition of their jurisdictional authority.”<sup>9</sup> To the extent that “federalism has evolved in light of Indigenous autonomy demands,” this evolution “is largely taking place at the margins of the federal system, through processes of governance that are layered over, and often in tension with, the formal division of

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5. Martin Papillon, *Adapting Federalism: Indigenous Peoples and Multilevel Government in Canada and U.S.*, (draft paper) (manuscript at 10) (in possession of author). See also *id.* at 15 (commenting that American tribes “face a more fragmented political system in which they seem condemned to engage in electoral politics and lobbying-type activities not only at the federal level but also at the state level,” in contrast to Canada, where tribes can “contain the process at the level of executive, government-to-government negotiations.”) In the negotiation process, because they are outside the mainstream political process, Papillon concludes, it is “easier for [Canadian] Indigenous governments to consolidate their status as representatives of distinct political communities.” *Id.* But see Henry Gass, *Could American Indians decide the Senate majority?* ENV’T & ENERGY DAILY, April 9, 2014, <http://www.eenews.net/eedaily/stories/1059997581/print> (discussing the increasing political power of some tribes in Montana, South Dakota, and Alaska).

6. See Robert Ericson & D. Rebecca Snow, Comment, *The Indian Battle for Self-Determination*, 58 CALIF. L. REV. 445, 487 (1970) (“At first federal concern centered on the consolidation of federal power in the face of the Indians’ potential threat. The Indians can hardly be said to constitute a threat to national power any more, but this interest has been replaced by concern for the smooth running of the federal system. The Indians’ stake in this relationship is the preservation of as much of their original sovereignty as possible, since only with some residuum of resources and independent powers will they be able to participate actively and meaningfully shaping their own roles in national life. The Indians’ interest has remained unaltered over the years . . .”). See also Dario F. Robertson, Note, *A New Constitutional Approach to the Doctrine of Tribal Sovereignty*, 6 AM. INDIAN L. REV. 371, 387 (1978) (the tribal sovereignty doctrine “is in desperate need of a cogent theoretical infrastructure that can withstand systemic political pressures and attitudinal bias”).

7. Carol Tebben, *An American Trifederalism Based upon the Constitutional Status of Tribal Nations*, 5 U. PA. J. CONST. L. 318, 330 (2003).

8. Papillon, *supra* note 5, at 1. For a contrary view of the role Indians played in the framing of the Constitution, see Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1002 (2014) (“the conquest and dispossession of Native peoples were integral to the Constitution’s ratification, shaping subsequent events”).

9. Papillon, *supra* note 5, at 2. See also *id.* (“The relatively rigid constitutional division of powers between federal and state/provincial legislatures creates an ‘institutional gridlock’ that limits the range of possible responses to Indigenous autonomy claims today.”).

powers and intergovernmental regimes” that exemplify U.S. federalism.<sup>10</sup> For some purposes tribes are recognized as sovereigns, albeit “domestic dependent nations;”<sup>11</sup> for others, they are subject to the whim of Congress’s exercise of its plenary power over them or to the judiciary’s oscillating views of their legitimacy and competence.<sup>12</sup> Until the late nineteenth century, tribes were treated as though they were foreign countries, and their members were excluded from citizenship under the Fourteenth Amendment.<sup>13</sup> Today, Indian Country functions as “a series of semi-

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10. *Id.*

11. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831). See also Philip P. Frickey, (*Native American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 438 (2005) (“Although ‘domestic dependent nation’ may sound more like oxymoron than a plausible legal concept, the Constitution supports viewing tribes as both domestic and sovereign, even if it does not clearly support the idea of dependence.”); Julie A. Clement, Comment, *Strengthening Autonomy by Waiving Sovereign Immunity: Why Indian Tribes Should Be “Foreign” Under the Foreign Sovereign Immunities Act*, 14 T. M. COOLEY L. REV. 653, 653 (1997) (“‘Domestic dependent nation’ may be an oxymoron. ‘Nation,’ at the very least, implies independence rather than dependence; ‘domestic’ requires a connection to the United States that precludes being also labeled a ‘nation.’”); Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1195 (2004) (“The domestic legal status of tribes may be indefensible as a doctrinal and normative matter, but it is the present reality for tribes, and will remain so for the foreseeable future.”). Frickey goes on to note: “Because tribal sovereignty is understood as being retained from a tribe’s inherent, preconstitutional sovereignty rather than consisting of delegated power, the exercise of this sovereignty does not entail any federal or state action that would trigger the Constitution.” Frickey, *supra* note 11, at 440.

12. See Krakoff, *supra* note 11, at 1189-90 (“The framework of federal law is inescapable, yet federal law renders tribal sovereignty a fragile concept, resting vulnerably in the hands of potentially unconstrained federal courts that articulate a nebulous common law and legislators who exercise an insufficiently constrained plenary power.”). Indeed, Frickey wonders how “the Court—not Congress with its supposed plenary power, not the executive branch with its authority over relations with other sovereigns—could even plausibly be understood as having an unchecked power to destroy governmental authority that preexists the founding of this country.” Frickey, *supra* note 11, at 466. Krakoff identifies the Court’s decisions depriving tribes of jurisdiction over non-members as the most damaging. Krakoff, *supra* note 11, at 1195 (“The Supreme Court’s decisions that divest tribes of categories of jurisdiction over non-members are doing the most mischief. In the case of the Navajo Nation, they threaten protections for on-reservation employment, inhibit the application of consumer and tort laws, create uncertainty for litigants in tribal court, inhibit the transactional environment, contribute to a chaotic and unpredictable administration of criminal laws, and decrease tax revenue. Taken together these effects could well destabilize the Navajo Nation in ways that ultimately eat away at the vital yet delicate Navajo identity that has managed to persist, despite very long odds.”).

13. See *Elk v. Wilkins*, 112 U.S. 94 (1884) (identifying naturalization as the only path to citizenship). Tribes lost their non-citizen status when they lost the ability to enter into treaties with the federal government. *Indian Appropriation Act of 1871*, ch. 120, 16 Stat. 544, 566 (1871) (“no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . .”). In 1924, Congress passed a law giving Indians citizenship whether it was desired or not. *Citizenship to Indians Act of 1924*, ch. 233, 43 Stat. 253 (1924). See also Tebben, *supra* note 7, at 344 (discussing this statute and the ambiguity of whether Congress or the Fourteenth Amendment is the source of Indian citizenship); Francis Abele and Michael J. Prince, *Four Pathways to Aboriginal Self-Governance*, 36 AM. REV. CANADIAN STUD. 568, 581 (2006) (making the same point with respect to Canadian aboriginal peoples, saying “Canadian citizenship

autonomous federal enclaves” within the boundaries of the states that host their reservations, an “ambiguous status” that has inevitably become “a recipe for enduring conflicts with states.”<sup>14</sup>

Indians also pose a unique American societal problem because they destabilize much that would otherwise be uncontested in our culture if we could just ignore them. They destabilize the myth of the United States’ founding,<sup>15</sup> the assumed basis of property rights,<sup>16</sup> and our cosmology and the central place of humans in it.<sup>17</sup> The persistence of Indians and Indian tribes threaten the self-image of the American melting pot, where differences based on race, ethnicity, or color disappear.<sup>18</sup>

We, in turn, have a long history of destabilizing Indians—we forcibly removed them from lands they had occupied for centuries;<sup>19</sup> we re-formed and then continued to reconstitute them haphazardly on reservations<sup>20</sup> separating them from their traditional land base and from non-Indians; we robbed them of their language, rituals, and heritage by, among other things, removing Indian children from their families and putting them in white-run boarding schools; we limited their capacity to hold non-Indians accountable for crimes committed on Indian lands and against Indian peoples; we insisted that they replicate our governance structures and subject themselves

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is something that was eventually given to Aboriginal peoples, not something that they asked for, wanted, or even accepted.”)

14. Papillon, *supra* note 5, at 3.

15. See generally Hope M. Babcock, *The Stories We Tell, and Have Told, About Tribal Sovereignty: Legal Fictions at Their Most Pernicious*, 55 VILL. L. REV. 803 (2010) (discussing the myths about Indian tribes that had their origins in the Marshall Indian Law Trilogy).

16. Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 133 (2013) (“America’s real property came from dispossessing Indians . . .”). See also Hope M. Babcock, *Reserved Indian Water Rights in Riparian Jurisdictions: Water, Water Everywhere, Perhaps Some Drops for Us*, 91 CORNELL L. REV. 1203 (2006) (discussing the concept of reserved Indian water rights).

17. See generally Hope M. Babcock, “*This I know from my Grandfather:*” *The Battle for Admissibility of Aboriginal Oral History as Proof of Tribal Land Claims*, 37 AM. INDIAN L. REV. 19 (2013).

18. WILKINS & KIIWETINEPINESHIK STARK, *supra* note 3, at 232 (Wilkins asks why this country has not “jettisoned these doctrines, values, and laws that are obviously rooted in prejudicial and racist discourse towards Indians, when much progress has been made in expunging similar discourse regarding African Americans, Asian Americans, women, and other groups.”).

19. See Rosser, *supra* note 16, at 131 (“History would record the subsequent Cherokee Trail of Tears, the Navajo Long Walk, the massacre at Wounded Knee, and the various legal and extralegal mechanisms through which Indian rights were denied and Indian land was taken.”).

20. Jeanne Guillemin, *The Politics of National Integration: A Comparison of United States and Canadian Indian Administrations*, 25 SOC. PROBS. 319, 328 (1978) (“The reservation system originates from British colonial policy which was torn between democratic ideals and dogmatic racism.”).

to oversight if they wanted to enjoy the benefits of the Great Society;<sup>21</sup> we took their identities and made popular cultural symbols of them;<sup>22</sup> and we even tried at diverse times in our history to exterminate them.<sup>23</sup> Adding insult to injury, at various points, perhaps out of a sense of collective guilt,<sup>24</sup> we have romanticized Indians beyond all recognition.<sup>25</sup> But despite

21. See Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within "Our Federalism": Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667, 675 (2006) ("the Indian Reorganization Act of 1934 (IRA) represented the first comprehensive attempt at incorporating Indian tribes as political entities within the legal and political system of the United States.")

22. See Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004-46 (2007) (discussing the appropriation of Indian names by sports teams).

23. See Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657, 669 (2013) ("Native American relations with the United States have a tragic history. Congress has, at various times, pursued policies aimed at the assimilation of tribal members and extinction of tribal cultural and political independence, to say nothing of historic efforts to expel or exterminate native peoples altogether."). See also Guillemin, *supra* note 20, at 319 ("The history of modern nationalism is replete with examples of state strategies for encouraging citizens to identify with the nation's cultural heritage and its political ideals. This same history is also full of instances where sub groups which might resist national allegiance were relegated to the margins of society, or in extreme cases, purged by exile or genocide."). L. Frank Baum, the author of *The Wonderful World of Oz*, penned the following editorial:

The proud spirit of the original owners of these vast prairies inherited through centuries of fierce and bloody wars for their possession, lingered last in the bosom of Sitting Bull. With his fall the nobility of the Redskin is extinguished, and what few are left are a pack of whining curs who lick the hand that smites them. The Whites, by law of conquest, by justice of civilization, are masters of the American continent, and the best safety of the frontier settlements will be secured by the total annihilation of the few remaining Indians. Why not annihilation? Their glory has fled, their spirit broken, their manhood effaced; better that they die than live the miserable wretches that they are. History would forget these latter despicable beings, and speak, in later ages of the glory of these grand Kings of forest and plain that Cooper loved to heroism. We cannot honestly regret their extermination, but we at least do justice to the manly characteristics possessed, according to their lights and education, by the early Redskins of America.

L. Frank Berry, *Editorials on the Sioux Nation*, ABERDEEN SATURDAY PIONEER, December 20, 1890,

[hsmt.history.ox.ac.uk/courses\\_reading/undergraduate/authority\\_of\\_nature/week\\_7/baum.pdf](http://hsmt.history.ox.ac.uk/courses_reading/undergraduate/authority_of_nature/week_7/baum.pdf).

24. See Megan Basham, *Unmasking Tonto: Can Title VII "Make It" in Hollywood?*, 37 AM. INDIAN L. REV. 549, 557-58 (2013) (explaining that white people paint their faces black or red not only as a method of cultural hegemony, in which the dominant "class defines stereotypes as 'common sense' truths" but also as "a multifaceted way of psychologically processing the history of subjugation in the United States—a form of 'apologetic catharsis'"). Basham notes that "often face painting was used mockingly, with overtly stereotypical and exaggerated prosthetic noses, lips, or eyes, and actors would perform with stereotypically exaggerated, ill-spoken behavior," citing as an example of this Tonto's "broken, pidgin English." *Id.* at 555-56.

25. Babcock, *supra* note 15, at 809 n.33 (discussing the influence of James Fennimore Cooper). See also Basham, *supra* note 24, at 559 (discussing the various stages of Hollywood's portrayal of Indians, including their portrayal as "noble savages with mythic spiritual qualities").

this, tribes and their members have endured as discreet centers of self-rule and cultural uniqueness.<sup>26</sup>

The article's starting premise is that Indian tribes, which are largely invisible in our constitutional configuration, must be made visible so that they can better protect their members and so the larger society can benefit from their unique contributions before what is different about tribes disappears.<sup>27</sup> The article explores whether the concept of "Our Federalism" is sufficiently flexible to incorporate tribes as distinct sovereign entities, and whether doing that will benefit them. The article rejects the idea that the "fix" for Indian tribes lies in reforming a particular branch of government or specific Indian policies, even though one or the other of those branches and their policies may have contributed to the sorry state of tribes today. Instead, it focuses on whether changing our constitutional design to include Indian tribes as separate co-equal sovereigns would help them survive: a goal Michael Dorris refers to as a "common denominator" of every Indian campaign since first contact with Europeans.<sup>28</sup> Unless a separate but equal place in our constitutional structure for tribes is found, their current peripheral constitutional position will undermine their continued existence. Even then, it is questionable as to whether at this late date tribes can survive as discrete centers of governance.<sup>29</sup>

While giving Indian tribes the full range of constitutional protections and responsibilities makes them more like other governing bodies, it does not place them within the Constitution's federalism structure nor take account of the fact that their existing governance structures and traditions

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26. Krakoff, *supra* note 11, at 1194 ("Notwithstanding those policy periods, tribes as distinct political bodies have endured. The disruptions and dislocations become a part of their culture, as well as something to attempt to redress politically.").

27. See Michael A. Dorris, *The Grass Still Grows, the Rivers Still Flow: Contemporary Native Americans*, 110 DAEDALUS 43, 62 (1981) ("historically, culturally, philosophically, legally, and in many other respects, tribes really *are* distinct, and it is in their unique qualities that their strengths and traditions reside. Indians are *not* a single ethnic group and show no signs of becoming one.") (emphasis added). See also Tebben, *supra* note 7, at 321 ("A core underlying assumption of the three-sovereign framework is that constitutional inclusion, and a renewed judicial recognition of the constitutional status of tribal governments, have the potential to give greater protection to unique tribal cultures from continued dominance and interference.").

28. Dorris, *supra* note 27, at 47 ("If nothing else, American Indians have been consistent in their objectives. For the nearly five hundred years since continuous contact with the Eastern Hemisphere was established, simple survival has been the common denominator of every major tribal, national, or pan-Indian campaign vis-a-vis the first Europeans and their genetic or cultural descendants.").

29. Robert A. Fairbanks, *Native American Sovereignty and Treaty Rights: Are They Historical Illusions?*, 20 AM. INDIAN L. REV. 141, 149 (1996) ("Whether Native American peoples, and their governments, are sufficiently resilient to survive even another generation or so remains to be seen. The challenges are certainly formidable.").



are different from those of the dominant society.<sup>30</sup> The fact that courts and Congress have placed Indian tribes in a different constitutional status than non-Indian governing bodies,<sup>31</sup> occupying what Gerald Neuman calls “anomalous zones,”<sup>32</sup> makes finding a solution more difficult. There are also vast economic, governance, and geopolitical differences among American tribes. However, since the article is not about Indian tribes other than as a federalism challenge, it does not describe those differences or the erratic judicial, legislative, and executive approaches to tribes over this country’s history—approaches that have reduced them to their current endangered condition.<sup>33</sup> It is enough for this article’s purpose to acknowledge that these differences make finding a single solution to the

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30. See Price, *supra* note 23, at 709 (“[T]here may be distinct, and particularly compelling, normative reasons to accommodate different procedural traditions in the tribal and territorial contexts. The territories, after all, are not even permanently joined to the United States, and Indian tribes possess a sovereignty that long predates the Constitution. Furthermore, both sets of communities have traditions distinct from Anglo-American norms. Adherence to these distinct norms may be important not only to the cultural identity of these communities, but also to the public legitimacy of tribal and territorial prosecutions in the affected communities.”).

31. WILKINS & KIIWETINEPINESIHK STARK, *supra* note 3, at 231 (explaining how the Indian Civil Rights Act imposed “key portions of the bill of Rights in statutory form on tribal governments in their relations with reservation residents, but tribes are still immune from the reach of the federal Constitution”). See also Robertson, *supra* note 6, at 391 (characterizing the Indian Civil Rights Act which “illustrates the intention of Congress to bring the tribes within the conceptual scheme of federalism while simultaneously making more secure their right to tribal autonomy.”).

32. See Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1202-03 (1996). See also *id.* at 1201 (defining an anomalous zone as “a geographical area in which certain legal rules, otherwise regarded as embodying fundamental policies of the larger legal system, are locally suspended.”). See also Price, *supra* note 23, at 658 (“Native American reservations and insular territories of the United States have long been ‘anomalous zones’ of U.S. constitutional law, areas where usual rules do not apply and the Supreme Court’s constitutional analysis has a distressingly ad hoc character. In the nineteenth century, as the United States expanded across the continent and acquired its first overseas territories, the Supreme Court established that Congress has ‘plenary’ governmental authority, beyond its usual limited enumerated powers, with respect to Indian tribes and the territories. The Court further held that constitutional rights and other limitations on governmental action apply only incompletely, if at all, to governance of these areas.”).

33. For readers interested in those issues see, e.g., Ericson & Snow, *supra* note 6, at 446 (“The controversy over the status of the tribe mirrors the unsettled status of the individual Indian in the United States. Two conflicting policies—separation and assimilation—have been formulated to define the Indian’s relationship to this society, but Congress, the ultimate arbiter of Indian affairs, has demonstrated a chronic inability finally to decide which of the two it will pursue. The former policy is designed to separate the Indian from the rest of American society and leave him a degree of self-government through his own institutions. The latter policy is calculated to place the Indian in the cultural ‘melting pot’ and have him enter the mainstream of American society. The coexistence of these conflicting policies has created constant tension and uncertainty of direction in the body of law which governs the Indian and his tribe.”). See generally Alex Tallchief Skibine, *Constitutionalism, Federal Common Law, and the Inherent Powers of Indian Tribes*, 38 AM. INDIAN L. REV. (forthcoming 2014) (tracing the erratic Indian policies of Congress and the Supreme Court).

Indian tribal federalism problem very difficult, and that these entrenched, ill-advised policies have contributed to the uncertain, even perilous, position tribes find themselves in today.

The article begins by briefly describing the current place of tribes in our constitutional configuration. The second part of the article explores the impediments to integrating tribes into the existing bivalent constitutional federal structure, while the third part discusses the inherent plasticity of federalism. The fourth part explains why it is preferable to find an approach that integrates tribes into the Constitution, as opposed to leaving them outside it, even though this eliminates some otherwise appealing solutions and raises the difficulty bar. Extra-constitutional approaches seem neither bold nor permanent enough to warrant discussion in this context, although admittedly they might be politically salient and stress the current federalism arrangement less.<sup>34</sup>

The fifth part describes specific approaches for empowering Indian tribes within a constitutional framework. It is divided into two sections: The first examines approaches that rely on a specific textual enabling power in the Constitution, such as found in the Compact, Territories, Enclave, and Treaty Clauses. The second section looks at those that would require a constitutional amendment, for example, creating a new tribal state, giving tribes separate voting representation in Congress with weighted votes on issues directly affecting their tribal constituents, or creating separate tribal election districts within or among states or even a single election district covering the entire nation. The article evaluates each approach, whether based on the exercise of existing constitutional authority or premised on expanding that authority through the amendment process, to determine the extent to which it might: (1) weaken or threaten the country's stability and security, (2) enhance the capacity of tribes to manage their futures more effectively, (3) be sufficiently receptive to disparities among tribes, and (4) have political salience and thus increase the likelihood of implementation.<sup>35</sup>

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34. Some examples of these are the creation of a U.S. protectorate with enhanced trust responsibilities that is directly responsive to tribal direction; treating tribes like cities; creating a super tribal legislative body that functions in some advisory capacity to the Executive Branch; or devolving more federal executive power to tribes. To the extent that any of these approaches becomes relevant in the discussion of the approaches the article focuses on, they will be mentioned and useful sources identified where more information about them can be found.

35. See Tarunabh Khaitan, *Dignity as an Expressive Norm: Neither Vacuous Nor a Panacea*. 32 OXFORD J. OF LEGAL STUD. 1, 16 (2012) (referring to disability rights, and saying "legal recognition of minority rights can only follow a threshold level of political consciousness.").

The article concludes by suggesting the creation of a virtual nationwide tribal election district that would aggregate all Indian tribes and their members, regardless of their geographic location. The purpose of this nationwide election district would be to elect a proportionate number of tribal representatives to the House of Representatives based on the percentage of Indians in the entire United States' population. Although the approach means some voters might experience a change in the ethnicity of their elected representative—which could generate political opposition—since the participation of tribal representatives would not be restricted to matters that only affect tribes, tribal representatives would be indistinguishable from non-tribal ones. The number of tribal representatives would need to be large enough to influence matters of concern to tribes, but not large enough to change the balance of political power in the House.

The approach would require an amendment to the Constitution because of the change in how representatives are elected. However, it does not fracture political boundaries by requiring the formation of additional states or pose a threat to national security or internal stability, as there might be if tribes could enter into agreements with foreign countries. This proposal is somewhere on the border of fanciful and possible, neither perfect nor problem-free, and, therefore, only theoretically feasible at a very abstract level. It does, however, have roots in approaches found in other countries and election law scholarship. The hope is that it has sufficient traction to warrant further consideration by those concerned about the problem of diminished tribal sovereignty.

## II. BACKGROUND

The question animating this article is one posed by the late Phillip Frickey: “what exactly should be the position of the tribal sovereign in a constitutional republic as we head into the twenty-first century?”<sup>36</sup> One reason this question exists is because tribes have not been incorporated into the constitutional design of our government either *ab initio* or by virtue of a constitutional amendment.<sup>37</sup> Perhaps the drafters of the Constitution

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36. Frickey, *supra* note 11, at 472 (quoting Frank Pommersheim, Lara: A Constitutional Crisis in Indian Law?, 28 AM. INDIAN L. REV. 299, 305 (2004)). See also *id.* at 484 (“In effect, the Supreme Court has become the site of an ongoing mini-constitutional convention for evaluating the essentially insolvable conundrums of the place of tribes in the American constitutional system.”).

37. *Id.* at 436 (“At the most basic level, tribes have never been brought into the United States through formal means, such as by a constitutional amendment incorporating them into the federal-state design.”). Frickey, however, goes on to note that “[m]ore than three hundred years

considered tribes to be outside the country's political system, so naturally they did not provide for their ultimate incorporation into it.<sup>38</sup>

The Constitution was written in a time when tribes were powerful and occupied much of North America. War, peace, trade, and treaty-making—as contemplated by Articles I and II of the Constitution—were the orders of the day. By the end of the nineteenth century, when tribes had been subjugated, the Constitution no longer fit the context. But the Constitution was never amended formally to incorporate tribes into the constitutional structure, and, ideally, to recognize their unique status and legitimate claims to continued self-government. Instead, Congress simply began legislating as if it had plenary authority over Indian country, and the Court ratified this arrogation of power.<sup>39</sup>

In contrast to the Reconstruction Amendments, for tribes there has never been a “‘constitutional moment’ during which the nation and the nations within it were collectively reorganized.”<sup>40</sup> This makes the “[f]orced judicial incorporation of tribes into the constitutional structure . . . a very different, and far more difficult, venture.”<sup>41</sup>

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after the first colonial encounter, tribes retained a variety of important interests, including novel property rights and a unique kind of sovereignty.” *Id.* at 437.

38. Skibine, *supra* note 33, at 41 (“The argument being considered is that the drafters of the original Constitution contemplated the Indian Tribes to be outside the political system of the United States so, of course, they did not make any provision for their eventual incorporation into the Constitution.”).

39. Frickey, *supra* note 11, at 464. The first recognition of Indian tribal sovereignty most likely occurred when the United States Senate ratified the first treaty with an Indian nation, the Delawares, in 1778. *See* Skibine, *supra* note 33, at 19 n.115.

40. Frickey, *supra* note 11, at 485-86, n. 279; *but see* Tebben, *supra* note 7, at 324 (“Both the tribes and the States are pre-constitutional in the sense that both kinds of governments existed as sovereigns before the creation of the United States Constitution. Moreover, both the tribes and the States have some reserved extra-constitutional sovereign authority that has not been delegated to the national government, even though the delegation process itself was not the same for each kind of government. Both States and tribes are recognized as sovereign governments in the document; both have constitutional status.”).

41. Frickey, *supra* note 11 at 485, n.279. To the extent constitutional principles have been invoked, they rarely reflect any moral high ground vis-à-vis the tribes – more often, the rights of the majority are upheld over any perceived rights of Indians or their tribes. *See* LAURA E. EVANS, POWER FROM POWERLESSNESS: TRIBAL GOVERNMENTS, INSTITUTIONAL NICHEs, AND AMERICAN FEDERALISM 5 (2011) (paraphrasing Madison and saying “the smaller the sphere, the easier it is for the more powerful faction to dominate government,” resulting in “small, often impoverished American Indian populations . . . simply to be left out of local politics.”). Evans advocates that tribes use “institutional niches” in the political realm to develop “generalizable skills,” which doesn’t necessarily lead to their winning high profile battles. *Id.* Rather, “the effects are indirect and of low visibility. In isolation, each new success seems unremarkable; cumulatively, the effects are impressive.” *Id.* at 5-6.

Some Indian law scholars maintain that the Treaty Clause<sup>42</sup> incorporates tribes into the Constitution. But Alex Tallchief Skibine expresses his misgiving about this basis for incorporation, limiting the Clause's usefulness to geographic incorporation.<sup>43</sup> Carol Tebben's trifederalism theory of constitutional incorporation of Indian tribes relies on the Indian Commerce Clause,<sup>44</sup> which, she contends, "recognized that Congress was to deal with the tribes on issues of commerce" as governmental bodies.<sup>45</sup> She finds further support for tribal incorporation in Article 1, clause 3, excluding "Indians not taxed" from state population rolls for purposes of apportioning representatives in the House of Representatives among the states. She sees this phraseology as implicitly recognizing tribal nations as independent of the states and the Union,

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42. Several Indian law scholars support the concept of treaty federalism. See, e.g., RUSSELL BARSH & JAMES HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* 270 (1980) ("Even if the Constitution itself did not guarantee certain inalienable political rights to all citizens, tribes would be entitled to political self-determination by virtue of their agreements with the United States . . . They are political compacts irrevocably annexing tribes to the federal system in a status parallel to, but not identical with, that of the [S]tates."). Frank Pommersheim, for example, lends support to the creation of a national/tribal relationship of "constitutional faith" based on "important foundational understandings relative to the constitutional status of tribal sovereignty and principles of treaty federalism." Frank Pommersheim, *Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy*, 58 MONT. L. REV. 313, 329 n.73 (1997). Richard Monette, on the other hand, rejects the idea of "treaty federalism" because it does not extend to tribes without treaties and instead suggests using the concept of the Equal Footing Doctrine, which would construct a legal equality of treaty situation where one does not technically exist and mirror the doctrine's application to the states. See generally, Richard 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 (1994).

43. Alex Tallchief Skibine, *Redefining the Status of Indian Tribes within "Our Federalism": Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667, 670 (2006). ("In *Johnson v. M'Intosh*, the Court declared that pursuant to the doctrine of discovery, the land of the Indian tribes had been geographically incorporated within the territory of the United States."). But see Biolsi, *supra* note 1, at 244 ("Rehnquist insisted that "upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty." Thus, there are 'inherent limitations on tribal powers that stem from their incorporation into the United States.'") (quoting *Oliphant v. Suquamish Indian Tribe* 435 U.S. 191, 208 (1978)).

44. U.S. CONST. art. I, § 8, cl. 3 (authorizing Congress "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

45. See Tebben, *supra* note 7, at 322 (advocating a theory of trifederalism). See also Skibine, *supra* note 43, at 668 ("Although most scholars would concede that Indian tribes have been incorporated within the territorial limits of the United States, whether they have been incorporated within the political system of the United States is a controversial issue. While some scholars have forcefully argued against such incorporation, other scholars have recently argued that Indian tribes have been incorporated into 'Our Federalism,' either under a system of trifederalism or treaty federalism.").

although she finds this recognition more indirect than what can be found in the Commerce Clause.<sup>46</sup>

Other scholars consider the constitutional status of tribes to be irrelevant because tribes are both “pre-constitutional”—their existence as separate sovereign entities predated the emergence of the United States—and, since they do not owe their existence to the Constitution, they possess “extraconstitutional” authority enabling them to exercise their inherent powers without constitutional constraint.<sup>47</sup> Thus, tribes function as “semi-autonomous nations within a nation,”<sup>48</sup> and claims of tribal sovereignty do not “depend on any document of positive law internal to the United States.”<sup>49</sup> Frickey’s belief that tribes are “preexisting entities with a

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46. Tebben, *supra* note 7, at 322. See also Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 ST. JOHN’S L. REV. 153, 176-77 (2008) (Senator Doolittle discussing the “Indians not taxed clause” of the Fourteenth Amendment and saying “Indians not taxed were excluded because they were not regarded as a portion of the population of the United States. They are subject to the tribes to which they belong, and those tribes are always spoken of in the Constitution as if they were independent nations, to some extent, existing in our midst but not constituting a part of our population, and with whom we make treaties.”) (quoting CONG. GLOBE 49th Cong., 1st Sess. 571 (1866)). Tebben also argues that the Tenth Amendment, by reserving power not only to the states but also to the people inferentially provides support for tribal sovereignty. Tebben, *supra* note 7, at 323 (“These words giving recognition to the reserved power of the States also provide explicit support for the reserved power of Native governments. The amendment goes deeper than stating that the power which is not delegated to the United States government is reserved to the States by including the phrase “or to the people.” The commanding words “to the people,” inclusive of the Native peoples of tribal America as United States citizens, give constitutional cover to self-government in Indian country and to the sovereignty placed in these governments by the people. The Tenth Amendment augments other constitutional language by providing an explicit basis for the constitutional recognition of the sovereign tribal right of self-government.”). Alex Tallchief Skibine builds on Tebben’s approach by suggesting the Court should adopt a Dormant Commerce Clause analytical approach to questions of tribal sovereignty when they arise. Skibine, *supra* note 33, at 5-6 (arguing that this mode of analysis will not “unnecessarily demean tribal sovereignty by arbitrarily and progressively adopting narrower and narrower judicial definitions of tribal self-government . . .”).

47. Biolsi, *supra* note 1, at 243 (“Because [tribes] are preconstitutional—their existence as sovereign polities predates the existence of the United States—they are also extraconstitutional: They exercise their sovereignty without constraint by the federal Constitution or federal law in general . . . . Thus, the Supreme Court as early as 1896 held that the Bill of Rights was not a constraint on what tribal governments do to their own tribal citizens.”) (citing *Talton v. Mayes*, 163 U.S. 376 (1896); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)). Ann Tweedy observes that the three constitutional references to tribes in the Constitution and the Treaty Clause “embody a view that tribes are sovereign, and permanently so, but that their sovereignty operates largely outside of the constitutional framework.” Anne E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and United States v. Lara: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J. L. REFORM 651, 658 (1999).

48. Frickey, *supra* note 11, at 485 n.279.

49. Krakoff, *supra* note 11, at 1155-56.

reservoir of retained, inherent,<sup>50</sup> extra-constitutional authority” formed the basis of his resistance to the idea that there are only “two sovereigns under the Constitution, federal and state, both governed by the founding document,” because tribes “are outside this framework.”<sup>51</sup>

However, the characterization of tribes as possessing extra-constitutional authority because they are pre-constitutional has been problematic given the Supreme Court’s skepticism “about the merits of allowing any extra-constitutional governmental authority within the American polity.”<sup>52</sup> This skepticism has manifested itself in the Court’s recent “decisional path that undercuts tribal prerogatives”<sup>53</sup> and leads to

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50. Price, *supra* note 23, at 697 (“Finally, with respect to Indian tribes, legal recognition that their sovereignty is at least partially inherent and not federally derived is critically important to many Native Americans. This legal principle has political and cultural significance as a belated acknowledgment of tribes’ dignity and standing as political communities. It has also provided a theoretical foundation for autonomous tribal self-government, including criminal enforcement without double jeopardy implications for other sovereigns.”). The concept of dignity and its role in human rights law is its own topic beyond the scope of this paper, other than when it is realized as an expressive norm making negative behavior legally and morally suspect, it may add an additional normative layer to any discussion of full tribal partnership in our federal system of governance. See generally Khaitan, *supra* note 35, at 9 (“As an expressive norm, dignity brings something quite unique to the moral high table”; noting in addition that it is neither consequentialist nor “necessarily egalitarian, although unequal treatment often conveys significant moral meaning.”); see also *id.* at 19 (“‘Dignity’ appears to be indeterminate because it is in fact a single label for very different norms that, nonetheless, have one common presupposition: that meanings expressed by actions matter morally.”). Of additional import for that discussion is Khaitan’s acknowledgment that actions by “collective bodies, including the state, can have expressive meanings, and thereby constitute expressive wrongs,” implying that the state then can correct morally questionable expressive wrongs. *Id.* at 9 n.55.

51. Frickey, *supra* note 11, at 479. Frickey complains additionally that Justice Kennedy, to whom he attributes this view, is guilty of what he calls a more important conceptual mistake of thinking that “the Court has any legitimate authority to incorporate tribes into the constitutional structure in a way that domesticates tribal authority with constitutional values.” *Id.* at 480; see also *id.* at 481 (“Justices Kennedy and Souter are wrong in supposing that the constitutional scheme does not account for the tribes. As Chief Justice Marshall understood long ago in *Cherokee Nation*, the Commerce Clause includes tribes in a list with other acknowledged sovereigns: foreign nations and the states. One need not be able to translate *noscitur a sociis* to recognize that the Constitution places tribes on a sovereign plane. In addition, as Chief Justice Marshall recognized in *Worcester*, the constitutional framework places authority over Indian affairs in the federal, not state, government by its allocation of the treaty power, the commerce power, and the powers concerning war and peace.”). See also *Worcester v. Georgia*, 31 U.S. 515, 519 (1832) (“The very term ‘nation,’ so generally applied to them, means a ‘people distinct from others.’ The [C]onstitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently admits their rank among those powers who are capable of making treaties.”).

52. Price, *supra* note 23, at 659-60 (calling this a “fundamental dilemma” facing both tribes and territories). Pommersheim bemoans the failure of the courts to develop a “meaningful constitutional idiom or discourse,” resulting in “aimless wandering in an (extra) constitutional wilderness.” Pommersheim, *supra* note 42, at 328 (parenthesis contained in original).

53. Frickey, *supra* note 11, at 490 (noting that “several Justices [have] openly challenged the notion that tribes should be recognized as self-governing in the first place”). This recent history

their marginalization precisely because they are not part of the constitutional governance system.

Some scholars find the act of treaty making “imparted a European version of nationhood to the Native party, and as a result, established at least legal parity, in terms of co-equal sovereignty, between aboriginal and European states.”<sup>54</sup> These treaties indicate “beyond question that Indian nations had existed as self-governing nations prior to their contact with Europeans.”<sup>55</sup> However, even though tribes might once have been foreign nations, they clearly are no longer “because of ‘peculiar and cardinal distinctions which exist nowhere else’”—they are “within the boundaries of, were viewed by foreign nations as subject to the authority of, and had entered into treaties in which they acknowledged being under the protection of, the United States.”<sup>56</sup> At most, tribes might be considered a “constitutional hybrid,”<sup>57</sup> like states in some respects and foreign nations in others, occupying an “intermediate category between foreign and domestic states.”<sup>58</sup> While this description does nothing to advance the cause of

stands in stark contrast to Canada and Australia’s recognition of the innate and legitimate exceptionalism of Native peoples in law and fact. *See also id.* (“In 1982, Canada provided greater entrenchment to the unique status of its Natives.”). More recently, it designated a homeland for Native people. Nunavut Lands Claim Agreement Act 1993, S.C., chs. 28-29 (Can.). Australia began struggling anew with the status of its Native peoples in the 1990s, stimulated by a decision of its high court. *Mabo v. Queensland (No. 2)* (1992), 175 C.L.R. 1 (Austl.).

54. Dorris, *supra* note 27, at 49.

55. *Id.* *See also* Fletcher, *supra*, note 46, 172 (“The first Indian treaty, the [1778] Treaty of Fort Pitt, was a treaty of defensive alliance between two foreign nations.”); *See also id.* at 176 (quoting CONG. GLOBE, 39TH CONG., 1ST SESS. 498 (1866) (“From the opening debates, Senator Trumbull asserted that ‘[o]ur dealings with the Indians are with them as foreigners, as separate nations. We deal with them by treaty and not by law’ . . . .”).

56. Frickey, *supra* note 11, at 437-38. *See also* Ericson & Snow, *supra* note 6, at 455 (“With such justification, and the belief that it was a permanent solution, the exchanges of land became an honorable way to avoid dealing with the more difficult and more basic political conflicts of interest inherent in allowing a ‘sovereign nation’ to exist within a state without being incorporated into the federal system.”). *See also* Fletcher, *supra* note 46, at 179 (commenting that the court’s use of the political question doctrine in matters of Indian law is comparable to how the Court treats congressional or Executive branch foreign affairs decisions); *see also id.* at 177 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866). Senator Howard objected to the inclusion of the “Indians Not Taxed” clause in Section 1 of the Fourteenth Amendment because it was unnecessary:

I hope that amendment [adding said clause] to the amendment will not be adopted. Indians born within the limits of the United States and who maintain their tribal relations are not in the sense of this amendment born subject to the jurisdiction of the United States. They are regarded, and always have been in our legislation and jurisprudence, as being quasi-foreign nations.

*Id.*

57. Price, *supra* note 23, at 670.

58. *Id.* (“The sparse guidance the Constitution itself provides on the status of America’s native peoples seems to place Indian tribes in an intermediate category between foreign and



placing tribes in the Constitution, it does emphasize their difference from the current constitutional sovereigns and the improbability of treating them as either the federal government or a state.

Despite various efforts to “constitutionalize” Indian tribes and define tribal sovereignty, it is unquestionable that tribes have never become part of our constitutional federal framework as sovereign governments precisely because their existence as sovereign nations pre-dated the Constitution, and they have historically stood outside the Constitution.<sup>59</sup> Indeed, Carol Tebben argues that tribes cannot have “constitutional status as sovereigns within the governmental structure of the United States” because “[h]istorically, tribes stood as totally independent international sovereigns, each equal in status to the United States government, and the structural relationship of tribal nations to the United States has been based largely upon treaties.”<sup>60</sup> Consistent with that view, some tribes and tribal confederacies have occasionally acted as though they retained “some of the prerogatives of external sovereignty,” for example, by issuing a separate declaration of war against the Axis powers in 1941 and by dispensing tribal passports for some forms of international travel, which are accepted by European nations.<sup>61</sup>

Perhaps the lack of a constitutional tether for Indian tribes is one reason there has been enormous theoretical incoherence on the topic of Indian tribal sovereignty.<sup>62</sup> The federal government considers tribes to be

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domestic states.”). Price comments that “there is no foreign state that can claim sovereignty in U.S. territories, nor any diplomatic context or limitations on U.S. authority that may make compliance with constitutional procedural guarantees impracticable,” even though the United States could renounce sovereignty over both territories and, by implication, tribes. *Id.* at 713.

59. See Frickey, *supra* note 11, at 467-68 (“Just when and how did all the Indian tribes become part of the constitutional system? The answer from constitutional text is never, and if it is to happen, something on the order of a constitutional amendment or renewed, targeted treaty-making would be required. Neither Congress, through its long-established plenary power, nor the Court, through its newer common law of colonialism, ever gave Indian tribes the choice of providing or withholding, the ‘consent of the governed’ to any unilateral aspect of federal control.”). *But cf.* Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. C.R. & C.L. 45, 56 (2012) (maintaining that tribes “have been at least partially incorporated into the American constitutional polity, playing a part alongside the states and the federal government,” even though these arrangements have never been codified).

60. Tebben, *supra* note 7, at 319. See also Elizabeth Hutchinson, *The Dress of His Nation: Romney’s Portrait of Joseph Brant*, 45 WINTERTHUR PORTFOLIO 208, 219 (2011) (“As the term ‘diplomat’ reminds us, Native Americans were not subjects of the British Crown in the eighteenth century. Tribes negotiated as sovereign nations with each other and with representatives of European states.”). Hutchinson comments that European “attitudes of cultural superiority and expansionist ambitions led some Europeans to disregard these relationships, making it important for native leaders to assert their interests, which they often did in diplomatic costume.” *Id.*

61. Dorris, *supra* note 27, at 67 n.47.

62. See Robertson, *supra* note 6, at 373 (describing “the analytical quagmire that has plagued the doctrine of tribal sovereignty since its inception” and saying: “First, tribal

equivalent to a state: “a distinct political society, separated from others, capable of managing its own affairs and governing itself,”<sup>63</sup> albeit subject to the primacy of Congress.<sup>64</sup> But this analogy is fundamentally flawed because tribes are “uniquely different” from states; they were never part of the Union.<sup>65</sup> “Even staunch federalists have to concede that states originally consented to cede some of their sovereignty to form the government of the United States”—something staunch supporters of American Indian tribal sovereignty need not do.<sup>66</sup>

The Supreme Court has further muddied the picture of tribal sovereignty by creating a third category of sovereignty just for tribes—“domestic dependent nation”—a characterization that Skibine calls “‘exceptionally’ bad,” as it has allowed the Court to slowly and surely dismantle “[t]he idea that Indian tribes can continue to thrive as sovereigns outside our constitutional structure.”<sup>67</sup> The consequence of being a

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sovereignty, unlike that which inheres in other autonomous entities, is without an irreducible normative core . . . Second, the doctrine is so vague that any specific powers of self-government which remain vested in the tribes cannot be objectively determined in advance of a pronouncement by the Court. There is neither a principled method of determining which powers the tribes have retained nor which powers have been implicitly invested.”). Robertson blames the “paradoxical characterization of the relationship between the tribes and the United States” as being one of “independent dependence,” which he says flowed from the second and third decisions in the Marshall Indian Sovereignty trilogy for subsequent confusion by courts and for undermining tribal sovereignty. *Id.* at 382.

63. Frickey, *supra* note 11, at 437 (quoting *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831)). See also Fletcher, *supra* note 46, at 180 (“The historical record for the period encompassing, at the very least, 1763 through the Articles of Confederation, the Constitution, and even the ratification of the Fourteenth Amendment, provides remarkably unambiguous support for the proposition that the original understanding of the Framers was that Indian affairs must be dealt with in the context of tribal political relationships with the federal government.”).

64. Frickey, *supra* note 11, at 440 (finding significant in terms of the separateness of tribes that the Articles of Confederation spoke of “managing all the affairs *with* the Indians,” not managing all the affairs *of* the Indians.”) (emphasis added).

65. *Id.* at 485 n.279.

66. Krakoff, *supra* note 11, at 1156 (“Even staunch federalists have to concede that states originally consented to cede some of their sovereignty to form the government of the United States. The staunchest proponents of American Indian tribal sovereignty need not do so.”). A counter argument, if tribal advocates are willing to admit that they conceded their sovereignty to the federal government, is that “a modern understanding of such transfers suggests that in doing so they ought to have been accorded some form of guaranteed representation in the” country’s democratic institutions. Trevor Knight, *Electoral Justice for Aboriginal People in Canada*, 46 MCGILL L.J. 1063, 1108 (2001) (making this point with respect to Canada’s aboriginal peoples and the “democratic institutions of Canada”).

67. Skibine, *supra* note 39, at 5. Here Skibine is reacting to Frickey’s characterization of the approach as being “exceptionalist” because it recognized tribes as being “a government outside the constitutional structure that retained elements of preexisting aboriginal sovereignty.” Frickey, *supra* note 11, at 443. Frickey finds further support for his characterization of tribes as exceptional in the Articles of Confederation, which speak of “managing all the affairs *with* the Indians,” not managing all the affairs *of* the Indians.” *Id.* at 440.

dependent nation within a nation has left tribes trapped<sup>68</sup> and often “relegated to minor spaces, reservations, bread-crumbs of land conceded by the dominant society.”<sup>69</sup> As essentially “stateless minorities,” Indian tribes have also been “more vulnerable to the interests of the regional majority in federal contexts.”<sup>70</sup>

A combination of treaties and reserved off-reservation rights affirm the “semblance of sovereignty” for tribes, giving them at least co-management authority over matters covered by these treaties and entailing “an assumption of coequal sovereignty.”<sup>71</sup> This view lends itself to a conception of tribal sovereignty as “quasi” or “permeated” to the extent tribal members are subject to different sovereigns—federal, state, and tribal—in the same “coterminous physical space.”<sup>72</sup> Thus, tribal sovereignty is not “panoptical,” *i.e.* not a form of “sovereignty [that] is fully, flatly, and evenly operative over each square centimeter of legally demarcated territory” in which all citizens, including tribal members, receive “more or less equal treatment” and “from the imputed standpoint of the state [are] interchangeable as objects of the state’s gaze.”<sup>73</sup> Indeed, with respect to tribal sovereignty, the “state’s gaze” is quite “studiously nonpanoptical,” as sovereignty under those circumstances is “carefully zoned”<sup>74</sup> and limited.

68. Austen L. Parish, *Changing Territoriality, Fading Sovereignty, and the Development of Indigenous Rights*, 31 AM. INDIAN L. REV. 291, 298 (2007).

69. *Id.* at 299 (quoting Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 58-59 (1999)).

70. Papillon, *supra* note 5, at 4 (“[t]he ambiguous status of Indigenous peoples and their lack of direct representation in the federal system further contribute to their vulnerability.”). Papillon, in his comparative analysis of Canadian and U.S. federalism, comments that “State/provincial capitals see Indigenous territorial enclaves as unjustified extensions of federal powers within their jurisdiction while federal authorities have long governed Indigenous lands and communities as colonial outposts in which basic citizenship rights mattered little. *Id.*”

71. Biolsi, *supra* note 1, at 246.

72. *Id.* at 245 (“the lived reality of a graduated, ‘quasi’ (Jackson 1990), or ‘permeated’ sovereignty (Biersteker and Weber 1996:9). Tribal homelands are relegated, under federal law, to a condition of heteronomous political space in which different citizens are subject to different sovereigns in coterminous physical space.”) (citations contained in original).

73. *Id.* at 240 (“The modern state claims, as Benedict Anderson puts it, “sovereignty [that] is fully, flatly, and evenly operative over each square centimeter of a legally demarcated territory” (1991:19). Such panoptical sovereignty—along with the idea of the nation as an imagined community—also implies the more or less equal treatment of citizens, who become, from the imputed standpoint of the state, interchangeable as objects of the state’s gaze.”) (citations and brackets contained in original).

74. *Id.* at 240 (“What results is a system of variegated citizenship in which populations subjected to different regimes of value enjoy different kinds of rights, discipline, caring, and security.” (Ong 1999:217). The state’s gaze, in other words, may be studiously nonpanoptical, its sovereignty purposely not flat, full, or even across its territory but carefully zoned.”) (citations

Regardless of whether tribes are separate nations comparable to states, domestic dependent nations, or quasi sovereigns, over the passage of time, tribes have lost many of the attributes of their sovereignty<sup>75</sup> through a process Skibine calls “implicit divestiture.”<sup>76</sup> The question still remains, however, whether tribes, regardless of their diminished sovereignty, are distinct political units, external sovereigns of some sort, or have they been merged into the dominant political landscape and thus lost their externality? Skibine points to moments in American history when tribes were identified as distinct political units—distinct from the states in which they were located and from the federal government that had become their protector.<sup>77</sup>

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contained in original). See also *id.* at 245 (Aleinikoff calls tribal sovereignty “the semblance of sovereignty.”).

75. See Skibine, *supra* note 43, at 681 (“[T]hrough their original incorporation into United States as well as through specific treaties and statutes, Indian tribes have lost many of the attributes of sovereignty. We concluded that the inherent sovereignty of Indian tribes was limited to their members and their territory: exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes. The dependent status of Indian tribes is necessarily inconsistent with their freedom to determine their external relations.”) (quoting *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650-51 (2001)). Skibine comments that Rehnquist’s quote indicates he:

[S]trongly believed that most tribal powers had been lost not as a result of actions by the political branches of the government but upon the tribes’ “original incorporation” into the United States. Furthermore, this divestiture flowed not because tribal powers are in conflict with federal interests as determined by the Congress, but because of what the Court independently determines flows from the tribes’ dependent status.

*Id.*

76. This Implicit Divestiture Doctrine, according to Skibine, was first used in *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) to describe tribes, but more firmly developed in *Duro v. Reina*, 495 U.S. 676 (1990). Under this doctrine, tribes have been implicitly divested of any vestiges of sovereignty that might be considered inconsistent with their domestic dependent nation status. Skibine, *supra* note 33, at 5.

77. See Skibine, *supra* note 43, at 671 (“Concerning the tribes’ incorporation into the various states’ geographical boundaries, Marshall stated that “[t]he treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states.” On inherent tribal sovereign powers, Marshall asserted that “[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate . . .” Justice Marshall’s conception of the relations between the United States and the tribes seemed to have been very similar to the “protectorate” model, a system first invented by England in 1815, a mere eight years before Johnson.”) See also *id.* at 673 (“The 1871 Act is important in that it represented a desire to more completely incorporate the tribes into the American political system. Also important to the incorporation process was the decision to require treaties to contain specific clauses excluding Indian reservations from being considered part of the state where they were located. Equally relevant was the decision to make Indians citizens not only of the United States, but also of the various states where they reside.”); Ericson & Snow, *supra* note 6, at 456 (“In 1871, after most of the tribes had been settled on reservations, Congress moved to end the most obvious manifestation of its ambivalent treatment of Indians. In a paragraph of an appropriations act the practice of making treaties with Indian nations was ended. From the act’s implicit recognition of the problems of maintaining separate Indian groups a short

Matthew Fletcher finds significance in the courts' treatment of questions concerning Indian tribes as political questions, which enables the courts to avoid dealing with matters that involve political relations between the United States and Indian peoples.<sup>78</sup> Using the political question doctrine in matters of Indian law is comparable to how courts treat congressional or executive branch foreign affairs decisions.<sup>79</sup> Cynthia Cumfer observes that settlers, "[b]y denationalizing native communities without incorporating jurisdiction over them into the white sovereignty, created pressure to develop an alternative for indigenous peoples to Vattel's category of nationhood."<sup>80</sup> However, this was not done, perhaps because acknowledging tribes as "a third category of sovereigns within the borders of the United States" not limited by the Constitution might be considered inconsistent with what it means to be an American citizen.<sup>81</sup>

The theoretical incoherence on the issue of tribal sovereignty<sup>82</sup> and the confusion about recognizing tribes as separate sovereigns, yet subject to

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step brought Congress to the assimilative policies embodied in the legislation of the 1880's."). *But see* Robert A. Fairbanks, *Native American Sovereignty and Treaty Rights: Are They Historical Illusions?*, 20 AM. INDIAN L. REV. 141, 147 (1996) (commenting on the 1871 Act and saying: "Clearly, Congress had concluded that the various Native American peoples no longer deserved, or required, the recognition of respect of a sovereign personality."); Frickey, *supra* note 11, at 440-41 ("Although the abandonment of treaty-making was a matter of internal congressional politics, the symbolism of the action cut against the notion of tribes as sovereigns.").

78. Fletcher, *supra* note 46, at 179 ("As a result of this rule, the interpretation and even constitutionality of federal statutes that apply to members of federally recognized Indian tribes was treated as a political question until the last few decades. This robust denial of finding a justiciable question exemplifies the Supreme Court's understanding that relations between the United States and Indian people are political."). Fletcher finds the list of cases involving Indian law questions that the Supreme Court has side-stepped under the political question doctrine "remarkable." *Id.* at 178, n.131 (listing those cases).

79. *Id.* at 179. *See also id.* at 180 ("The historical record for the period encompassing, at the very least, 1763 through the Articles of Confederation, the Constitution, and even the ratification of the Fourteenth Amendment, provides remarkably unambiguous support for the proposition that the original understanding of the Framers was that Indian affairs must be dealt with in the context of tribal political relationships with the federal government.").

80. Cynthia Cumfer, *Local Origins of National Indian Policy: Cherokee and Tennessean Ideas about Sovereignty and Nationhood, 1790-1811*, 23 EARLY REPUBLIC J. 21, 45 (2003).

81. *See*, Frickey, *supra* note 11, at 472 (commenting that Justice Kennedy's separate opinion in *Lara* indicates that for him "the nature of American citizenship seems inconsistent with the existence of a third category of sovereigns within the borders of the United States that are not limited by the Constitution.").

82. Papillon, *supra* note 5, at 3 ("Indigenous peoples have an ambiguous status in Canada and American federalism. Neither constitution recognized Indigenous peoples either as fully independent polities or as constituent entities of the federal compact."). *See also* Skibine, *supra*, note 33, at 18 ("The court is free to develop, as eloquently put by the late Phillip Frickey, its own 'Common Law for Our Age of Colonialism.'") (quoting Philip P. Frickey, *A Common Law for Our Age of Colonialism*, 109 YALE L.J. 1 (1999)). *See also id.* (describing the Court's approach to dealing with the "nettlesome challenges of modern Indian law," as one "almost completely shorn of any concern for constitutional and historical doctrine, the role of a limited judiciary, and respect

domestic regulation, continues to haunt federal Indian jurisprudence<sup>83</sup> and has left every tribe vulnerable to outside incursions. Despite the endurance of the doctrine of tribal sovereignty,<sup>84</sup> there is a manifest need to reconcile the “Supreme Court’s recently expressed concerns about extra-constitutional governmental authority” with “historical and normative considerations” supporting independent tribal self-government.<sup>85</sup> Yet no clear guidance has emerged from the scholarship regarding the integration of a third category of sovereign into the middle of what is clearly a two-tiered federal system.<sup>86</sup>

### III. WHY IT IS HARD TO INTEGRATE TRIBES INTO OUR CONSTITUTIONAL BINARY SOVEREIGN STRUCTURE

The diversity, number of tribes, their unique forms of internal governance and cultural traditions, the largely toxic shared historical experience with them, non-Indian skepticism about Indian capabilities, competition between Indians and non-Indians over valuable resources, and even the concept of independent tribal sovereign nations create obstacles to inserting tribes into the Constitution’s dual sovereign structure. While none of these problems creates a barrier that cannot be scaled, each figures into the choice and shape of potential constitutional solutions to tribal powerlessness.

#### A. TRIBAL DIVERSITY AND THE NUMBER OF TRIBES AS WELL AS THEIR UNIQUENESS POSE A CHALLENGE TO DESIGNING A

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for those who were here first.”) (quoting FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* 229 (2009)).

83. Frickey, *supra* note 11, at 472 (quoting *U.S. v. Lara*, 541 U.S. 193, 226 (2004) (Thomas, J., concurring)) (“We might find that the Federal Government cannot regulate the tribes through ordinary domestic legislation and simultaneously maintain that the tribes are sovereigns in any meaningful sense. But until we begin to analyze these questions honestly and rigorously, the confusion that I have identified will continue to haunt our cases.”).

84. Robertson, *supra* note 6, at 357 (commenting that the endurance of the doctrine of tribal sovereignty may be “in part attributable to its powerful intuitive attractiveness as a means of ventilating a rather ill-defined residuum of uniquely Indian interests that have survived conquest and subjugation.”).

85. Price, *supra* note 23, at 660-61 (making this point with respect to both tribal and territorial governments). While neither tribes nor territories have direct representation in the federal government, their histories and traditions are “markedly different from those of the American polity at large.” *Id.* at 662.

86. Clement, *supra* note 11, at 664. *See also* Ericson & Snow, *supra* note 6, at 487 (“The tribes’ unique position as a congressionally acknowledged and judicially and historically confirmed, third unit of government within the nation but not included in the federal system necessitates a conceptual structure in which the relationships arise out of a recognition of the stakes of the various parties involved.”).

## CONSTITUTIONAL FEDERALISM SOLUTION

There are 566 federally recognized American Indian tribes and 326 federally recognized American Indian reservations.<sup>87</sup> Tribes vary widely in their traditions, languages, governance structures, size, membership rules, land base, geographic location, and the extent to which they are integrated, if at all, into the surrounding non-Indian society.<sup>88</sup> Moreover, nearly half of the United States total Indian population lives in cities and have very different lives and needs from those Indians who live on reservations, even though many urban Indians keep some kind of contact with their home reservation.<sup>89</sup> This makes finding a constitutional federalism solution that fits all tribes equally very difficult.

The diverse nature of American Indian tribes and their capacity to reinvent and reform themselves in response to external events also prevents them from developing a common perspective on political issues and from organizing into an effective voting bloc. Since elected officials are not dependent on Indian votes to get elected, they need not understand their Indian constituents or their needs. Powerful legislators and influential non-Indian interest groups can easily overwhelm Indian interests in Congress.<sup>90</sup> Any federalism solution that tries to recalibrate this political

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87. *Frequently Asked Questions*, U.S. DEP'T OF INTERIOR BUREAU OF INDIAN AFFAIRS, [www.bia.gov/FAQs/](http://www.bia.gov/FAQs/).

88. In this respect, United States Indian tribes are not much different from Canada's aboriginal peoples, who live in bands of varying size and assimilation, scattered throughout the provinces. Abele & Prince, *supra* note 13, at 571 ("Besides differences due to economic circumstances, geography, and demographics, there are large differences in political history, ideology, and practice among the various Aboriginal nations and peoples.").

89. Dorris, *supra* note 27, at 59 ("Today nearly one half of the total Native American population in the United States could be classified as urban, though studies strongly suggest that the majority of these migrants maintain significant ties with their home communities."). Cf. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 432–34 (2006) (noting "different characteristics, needs, and interests" of urban and rural Latino communities").

90. W. Dale Mason, *Tribes and States: A New Era in Intergovernmental Affairs*, 28 PUBLIUS 111, 115 (1998) ("[M]ost lawmakers, whether in the Congress or in state legislatures, do not have to understand Indian issues because they don't have to; they do not depend on Indian voters to get reelected. This in turn means that powerful legislators and powerful non-Indian interest groups can often overpower Indian interests."). In contrast, in the early days of the republic, "the fear of Indians organizing as political entities hovered as a cloud over the Founders for decades." Fletcher, *supra* note 46, at 165. See also David A. Super, *Protecting Civil Rights in the Shadows*, 123 YALE L.J. 2806, 2813 (2014) (for a minority group to either integrate into the base of a political party or exercise any power to "swing" that party's positions, it "must be sufficiently numerous to interest the political parties . . . [and] one or both parties must actually want the group's support"). The groups must act like a bloc to be able to convince the dominant political party that it "will actually swing *en mass*." *Id.* (italics appearing in original). All three criteria are difficult for Indian tribes to meet. Differences among the tribes may also make it difficult for a single or even a few "opinion leaders" to emerge who can speak for all or most tribes and who are recognized as such. *Id.* at 2815.

imbalance to favor Indians more, or at least to level the playing field with non-Indians, may be viewed by non-Indians as unwelcome.

Additionally, because American Indians are “a geographically dispersed and culturally diverse minority, in addition to being numerically small” in relation to the total population, they do not form a “social stratum” that can become a single oppositional class.<sup>91</sup> This can be contrasted with countries like Mexico where a large Indian population’s opposition to the richer and more socially superior non-Indian populations is easily reduced to a classist paradigm and gains traction for that very reason.<sup>92</sup> American tribes do not constitute a broad base of “the politically and economically repressed”<sup>93</sup> that can define itself en masse in opposition to the dominant culture. Indian tribes in the United States are too different, too small, too isolated, and too geographically dispersed to develop an oppositional political and economic posture on their own behalf. Therefore, unless the proposed federalism approach advantages tribes in some way, they may be politically incapable of enhancing their power on their own.

Even if the government could transform these “relic non-Western societies” into political entities that could then be integrated into the federal bureaucratic hierarchy in some way,<sup>94</sup> there are tribes who have no interest in doing this because it would mean that they would remain “in a fixed position of subordination in a public bureaucratic hierarchy.”<sup>95</sup> This internal schism based on differing tribal perceptions of their sovereign status presents another challenge to finding a one-size-fits-all federalism solution.

#### B. THE AMERICAN HISTORICAL EXPERIENCE WITH INDIAN TRIBES HAS LED TO NEGATIVE PERCEPTIONS ABOUT TRIBES

The United States’ early historical experience with Indian tribes formed the template for future relations with them until the present. It also helped form enduring popular negative stereotypes of Indians that first found solid purchase in early American literature and later in Hollywood caricatures of Indians.

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91. Guillemin, *supra* note 20, at 327.

92. *Id.*

93. *Id.* at 327. Guillemin notes that even Indians who have migrated to cities “remain marginal, relative to the integration of other minorities.” *Id.*

94. *Id.* at 328.

95. *Id.* at 329 (“As a dispersed minority, their best assurance of political representation comes from their corporate status as tribes, yet this same status guarantees a fixed position of subordination in a public bureaucratic hierarchy.”).



The political origins of the United States were quite different from those of Canada, a country with a comparably sized and diverse aboriginal, native population. The United States arose out of a rebellion, at the conclusion of which a constitution was produced and was almost immediately amended in 1791 to add the Bill of Rights. Canada, on the other hand, did not acquire the right to amend its Constitution until 1982, and its Constitution has remained “a work-in-progress” for decades. This created an opportunity for Canada’s aboriginal peoples to use the possibility of constitutional change to improve their situation.<sup>96</sup> Furthermore, the 1982 Canadian Constitution recognized existing aboriginal and treaty rights of its native peoples.<sup>97</sup> As a result, aboriginal self-government in Canada can only be exercised “within the framework of the Canadian Constitution,” and “the particulars of self-government must be negotiated with the federal and provincial or territorial governments.”<sup>98</sup> There is no comparable provision in the United States Constitution, and the resulting experience with the federal and state government for American tribes has correspondingly occurred outside the Constitution. Also, unlike the United States where treating with Indian tribes ended in 1871,<sup>99</sup> the Canadian government continued to negotiate treaties with their aboriginal peoples until 1927.<sup>100</sup> Despite the incorporation of Canada’s aboriginal peoples, now denominated First Nations, into the Canadian Constitution and their continued posture as treating nations, Canada faces the same challenge of “accommodating the extremely heterogeneous Aboriginal order of government” into a federal system of government.<sup>101</sup> Both countries also provided “for the existence

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96. Abele & Prince, *supra* note 13, at 569 (“Canada was not forged as the result of a rebellion of British colonies, of course, but rather emerged stepwise, with full national independence (the capacity to amend the Constitution domestically) not achieved until 1982. The fact that the Canadian Constitution was a work-in-progress for so many decades has meant that the possibility of Aboriginal people in Canada using constitutional change to advance their position persisted for over a century. The 1982 constitutional provisions reflect and entrench a more “modern” vision of the place of Aboriginal people in Canada than would have appeared had their place been permanently entrenched at Confederation in 1867.”).

97. Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 112 (U.K.) (“The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”).

98. Bilosi, *supra* note 1, at 243 (internal quotations and citations omitted). *See also* Guillemin, *supra* note 20, at 323 (“The French, later immigrants who chose to stay in Canada, the Metis, and Indians were permitted considerable cultural autonomy . . . The lack of Dominion Bill of Rights (until 1960) permitted the development of a ‘vertical mosaic’ of diverse minorities under British Canadian rule, with Indians, as the least Europeanized group, relegated to the lowest social order.”).

99. Guillemin, *supra* note 20, at 323.

100. *Id.*

101. Abele & Prince, *supra* note 13, at 570 (commenting on “the increasingly pressing challenge of accommodating the extremely heterogeneous Aboriginal order of government into

of culturally and racially anomalous tribes within their national boundaries and chose to do so by confining them to reservations.”<sup>102</sup>

Another distinguishing feature from the Canadian aboriginal experience is that the growth of the United States depended on, and continues to depend on, displacement of tribes from their land base.<sup>103</sup> Indeed, according to Ablavsky, “using Indians to justify the power of the new national state . . . elevated conquest of Indians to a constitutional principle.”<sup>104</sup> While Canada, where there was less economic pressure for removal of Indians, negotiated a largely peaceful transfer of native lands to the government, the transfer of Indian lands in the United States, particularly in the west, was accomplished principally through military force.<sup>105</sup> The resistance of the western tribes to these military removal campaigns resulted in Indians being cast as the enemy; when ultimately defeated, the federal government and non-Indian citizens considered tribes to be conquered nations, subdued, but still alien.<sup>106</sup>

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federalism. Specifically, we argue that at some point in the not-too-distant future, Canadians will have to decide how Aboriginal self-governments are to be *integrated* in or *associated with* federalism, and what to do about the likelihood that those arrangements suitable for one substantial body of Aboriginal opinion may not be suitable for another.” (emphasis in original). For example, the Mohawk Tribe in Canada has refused to “buy into” what they see as essentially foreign institutions. *See also* Tebben, *supra* note 7, at 320 (“But while the majority of Canadians wish to see native societies integrated within the social and political framework they have created, Mohawks reject the idea of buying into what are essentially foreign institutions. They have recognized the political realities and the necessities of cooperating with Canadian authorities to create institutions and arrangements which will afford the community control over its internal organization, expanded jurisdictional powers, and more flexible external relationships. Canadians perceive these as ultimate objectives; Mohawks assuredly do not.”).

102. Guillemin, *supra* note 20, at 321 (both countries “seized upon the segregation of aboriginal tribes as a suitable means of isolating a non-European population while preserving the honor of the nation.”).

103. *Id.* at 320 (contrasting seventeenth century displacement of eastern Indian tribes by British settlers with seventeenth century New France where there was “less competition for land,” the seigneurial system of land tenure was less intensive in its use of the land for agriculture, and “less exclusive” in maintaining boundaries than either in France or New England. Noting also that the multiplicity of economies—agriculture, fishing, fur trading—“presented few impediments to the integration of French-men and Indian”). *See also id.* (“[T]here was no concerted military action on the part of the French to displace or destroy Indians. The westward expansion of the fur trade in fact relied on the cooperation of woodland tribes.”).

104. Ablavsky, *supra* note 8, at 1008 (“Although few Federalists were rabid Indian-haters of the sort common on the frontier, they had sold the Constitution by promising to use federal power against Indians rather than, as Madison had anticipated, to restrain states.”).

105. Guillemin, *supra* note 20, at 322 (“The peaceful surrender of native lands negotiated by the Canadian government stands in sharp contrast to the military resistance encountered by the United States government.”).

106. *See* Fletcher, *supra* note 46, at 167 (“As John Jay wrote in Federalist No. 3 ‘[n]ot a single Indian war has yet been produced by aggressions of the present federal government, feeble as it is; but there are several instances of Indian hostilities having been provoked by the improper conduct of individual States.’ As a result, Hamilton argued in Federalist No. 25 that the danger from nations such as “Britain, Spain, and . . . the Indian nations . . . is therefore common [to the

The American historical experience with Indian tribes provided a basis for a perception of Indians as primitive, conquered, and alien.<sup>107</sup> These images abounded in books at the Founding and continue as part of our culture, even today.<sup>108</sup> Even Hollywood contributed and continues to contribute to the stereotype of Indians as simple-minded, brutal, uncivilized savages whose existence was seen as a “threat to the dominant class”—“Native Americans were cut down to a simplistic ‘other’ in film, serving as a bloodthirsty stumbling block to settlers, who represented the valiant, legitimate force of civilization, ordained by God to overcome barbarism.”<sup>109</sup> Given the superiority of the majority culture, Indians were expected to disappear.<sup>110</sup> The fact that they instead persisted may have prevented any constructive thinking about how to integrate tribes into the country’s governance structure until countervailing mores demanded something be done to improve their economic and social situation.

Reservations are federal enclaves within the boundaries of states. Some tribal lands contain mineral and renewable resources—*e.g.* water—of great economic value, which do not confine themselves within geopolitical

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entire United States].”) (quoting THE FEDERALIST No. 3 (John Jay), No. 25 (Alexander Hamilton)).

107. See Ablavsky, *supra* note 8, at 1007 (characterizing images of Indians as “savages” became part of the rhetoric of the Federalist Party in its quest for a strong national government). See also Basham, *supra* note 24, at 555 (discussing how Hollywood filmmakers took to heart the famous misquote by General Sheridan that “The only good Indian is a dead Indian” and how “[a]dvancing the stereotype of the one-dimensional, brutal, uncivilized savage served to justify the near genocide that settlers had caused, legitimating the settler as the dominant culture and the cowboy as the hero.”).

108. See generally Babcock, *supra* note 15. See also Basham, *supra* note 24, at 549 (“Whether portrayed as violent savages bent solely on war or as nobly ignorant spiritualists, Native American characters on screen have been portrayed as inferior and (literally or narratively) subservient to the robust, authoritative American cowboy.”). Indeed, one might argue that the continued under-representation of Indians in this country’s “central democratic institutions” demeans “their dignity and worth as citizens” and “reinforces existing inaccurate understandings” of the worth of Indians as a particular group in American society. Knight, *supra* note 66, at 1112 (making this point with respect to Canada’s aboriginal peoples).

109. Basham, *supra* note 24, at 554.

110. Dorris, *supra* note 27, at 47 (The “expected mass demise [of Indians] profoundly affected the nature of early European perceptions and consequent official dealings with Indians, and thus had a lasting impact, through the precedents and language of the accords that marked the establishment of relations between Indians and Europeans, on all later legal relationships.”). See also Cumfer, *supra* note 80, at 43 (“Westering people in Tennessee, as elsewhere, struggled to shape this ambiguous conceptual space. Some early adventurers saw the indigenous inhabitants as more akin to animals than human attributing to them no rights of nationhood. They advocated a doctrine of extermination.”); *Id.* (“The majority of transmontane before 1790 did not agree. Most settlers perceived the indigenous peoples as a separate political sovereignty—a nation—with many advancing a doctrine of conquest and others a policy of accommodation and civilization. Although these inhabitants considered Indians to be “uncivilized,” they did not assign any meaning from this characterization to the doctrine of sovereignty or nationhood.”).

boundaries. “Governments with common territorial boundaries are likely to clash over authority to govern a resource of common interest.”<sup>111</sup> States and their residents, who compete with Indians over the use of and profit from these resources, “tend to view Indian control of resources as a zero-sum game; tribal control and profits mean a loss of control and profit by the state.”<sup>112</sup> Additionally, income earned in Indian Country, for example from gambling or the tax-free sale of cigarettes, is a friction point for many states that house these reservations.<sup>113</sup>

At no time has the federal government loosened its control of Indian lands or diverged from the basic understanding that tribes have only usufructuary rights in those lands and no right to engage in any independent corporate enterprise on tribal lands.<sup>114</sup> This often leaves reservations without an independent economic base except for federal grants.<sup>115</sup> Development of industrial resources and large scale farming “are blocked on several fronts,” and “federal priorities in land use, a lack of managerial and technical expertise on the part of Indians, and unsuccessful competition with state and local interest” have further deprived tribes of gaining any economic independence.<sup>116</sup> The government’s paternal attitude toward tribal development and management of their own resources not only deprives tribes of the opportunity to develop relevant technical skills and knowledge, but also perversely corroborates the false impression that Indians are incapable of managing their own resources and becoming economically independent.

Tribes and their members are not well understood by non-Indians; they are seen as alien and uncivilized.<sup>117</sup> The status of Indians “as a racial and

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111. Mason, *supra* note 90, at 115.

112. *Id.*

113. *Id.* (“For nearly 20 years, the most broadly contentious issue between tribes and states has been gambling operations run on Indian lands by tribal governments. This issue has demonstrated all of the above-listed sources of conflict.”).

114. Guillemin, *supra* note 20, at 323-24. *See also* Cumfer, *supra* note 80, at 44 (“White rhetoric reflected the shift from Cherokee to white land discourse that whittled away rights in a movement that reconstituted the Indian sovereign unit from a “nation” to a “tribe” with territory, or worse, to “tenants” with mere claims. Although Congress referred to Native-American corporate bodies as “tribes” in the 1780s, Tennesseans rarely spoke of “tribes” during that decade to refer to the Indian nations.”).

115. Guillemin, *supra* note 20, at 325.

116. *Id.* This experience is quite different than the experience of Canadian aboriginal peoples where the expectation is that with a little prodding Canada’s native populations will develop communities comparable to other ethnic groups. *Id.* at 326.

117. *See* Knight, *supra* note 66, at 1113 (“Parliament is the face of Canadian democracy, and the exclusion of Aboriginal people from that body undermines their human dignity and threatens to perpetuate stereotypes about that group held by other members of society.”).

cultural minority causes discrimination in most off-reservation contexts.”<sup>118</sup> According to Jeanne Guillemin, “[w]e have just begun to understand the interplay of important variables in determining the level of tolerance for ‘aliens’ within a nation . . . .”<sup>119</sup> The strangeness of Indians challenges the ability and willingness of a European-based democracy, like the United States, to understand a non-Western social unit like a tribe,<sup>120</sup> let alone incorporate tribes into the Constitution as some kind of co-equal sovereign.<sup>121</sup>

### C. INDEPENDENT INDIAN SOVEREIGN NATIONS

The concept of Indian tribal nationhood and tribal sovereignty, while important to Indians for their self-identification as well as to provide legal support for their uniqueness, may be a barrier to their integration into the American constitutional system. If tribes are separate nations, it becomes more difficult to integrate them into the political structure of the United States<sup>122</sup> and raises the specter of tribal members with divided loyalties.<sup>123</sup>

118. Guillemin, *supra* note 20, at 329.

119. *Id.*

120. *Id.* (“Should options for tribal autonomy be taken seriously, another difficult question may arise, that is, how far the government will go to support genuinely independent communities. The question also becomes one of how well a Western democracy can comprehend so non-Western a social unit as a tribe.”).

121. Tebben, *supra* note 7, at 320 (“The conceptualization of a constitutionally sanctioned, three-sovereign government that includes tribes within the structure of American government may represent a stepping stone to a higher and independent tribal nation status.”). For this reason Tebben advocates what she calls “trifederalism,” in which the tribes continue to function as “domestic rather than ‘independent international’ sovereigns,” but that they need to have their constitutional status “as nations within a nation” clarified. *Id.* at 320-21.

122. Menno Boldt & J. Anthony Long, *Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada’s Native Indians*, 17 CANADIAN J. POL. SCI. 537, 552 n.47 (1984) (explaining that “on moral and practical grounds sovereignty cannot exist for a ‘nation’ which is a minority within a state. Because, if every national group in the world were assumed to be entitled to sovereign statehood it would create chaos and threaten the authority of existing states.”). *But see id.* at 549 (The concept of “two or more social systems and associated constitutional networks within one political system” is captured in the concept of “consociational arrangements.”). *See also* KENNETH D. MCRAE, CONSOCIATIONAL DEMOCRACY: POLITICAL ACCOMMODATION IN SEGMENTED SOCIETIES 253-99 (1974) (consociational arrangements “allow[] for the presence of several nations within one sovereign state.”).

123. *See* Thomas Flanagan, *The Sovereignty and Nationhood of Canadian Indians: A Comment on Boldt and Long*, 18 CANADIAN J. POL. SCI. 367, 371 (1985) (saying “Hans Kohn writes that ‘nationalism is a state of mind in which the supreme loyalty of the individual is felt to be due the nation-state’”) (quoting HANS KOHN, NATIONALISM: ITS MEANING AND HISTORY 9 (rev. ed. 1965)). *See also* Boldt & Long, *supra* note 122, at 551 (a nation reflects “a psychological bond that joins a people and differentiates it, in the subconscious conviction of its members, from all other people in a most vital way.”) (quoting Walker Connor, *A Nation is a Nation, is a State, is an Ethnic Group is a . . .*, 1 ETHNIC & RACIAL STUD. 379 (1978)).

It is also unnecessary for determining if tribes deserve coequal status with states.<sup>124</sup>

The concept of tribal sovereignty protects and preserves tribes as “a distinct cultural and political unit.”<sup>125</sup> Tribal political institutions “foster and protect a unique group identity that stems from place-based wisdom and culture.”<sup>126</sup> But at the same time, “[t]he insistence on the right to special status distinguishes Indian ‘activists’ from those of virtually every other minority group, and is often a bone of contention between Native Americans and their potential supporters.”<sup>127</sup>

Similarly, the fact that Indians carry dual citizenship makes Indians different from Americans whose families have immigrated to the United States but who are now citizens of the United States; Indians owe allegiance to a sovereign entity other than the United States.<sup>128</sup> Because Indians are dual citizens, they “claim and exercise citizenship simultaneously in Native nations and in the United States.”<sup>129</sup> Biolsi sees Indians’ dual citizenship as recognition of a “hybrid political space in which the simultaneous existence of two nations in the same physical space is naturalized.”<sup>130</sup> However, he also see this situation as a “zero-sum game of political participation in which time spent participating in the American political system is time taken away from participating in the tribal political system.”<sup>131</sup>

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124. Flanagan, *supra* note 123, at 369. (“The nation-state is the paradigmatic form of political organization in the modern world. Whether Indians are nations and in what sense, are questions of cardinal importance both to them and to Canada.”). Flanagan notes that in Canada the claim of Indians to nation-status is tied to political demands for self-rule on Indian lands. *See id.* at 370 (“The claim of Indians to be nations has arisen as part of a new vocabulary whose main terms are nation, sovereignty, self-determination, and aboriginal rights. Expressing the quintessentially political demand for self-rule of Indians on a fixed land base, this is the vocabulary of national self-determination and international law.”).

125. Krakoff, *supra* note 11, at 1193 (“Sovereignty protects the ability of the group, as a distinct cultural and political unit, to continue to exist. Indeed, the other strands—culture, wisdom, and land—both depend on and foster the continuation of group identity.”).

126. *Id.* at 1194.

127. Dorris, *supra* note 27, at 61.

128. Krakoff, *supra* note 11, at 1194 (“Tribal sovereignty serves to perpetuate that sense of being Navajo as distinct from just being an American Indian by ethnicity.”). *See also* Dorris, *supra* note 27, at 57 (“No other group in this country exists in this dichotomous position . . . but from a Native American point of view, the advantage of dual citizenship are theirs by legal contract and congressional ratification.”).

129. Biolsi, *supra* note 1, at 240.

130. *Id.* at 252.

131. *Id.* at 253 (quoting Robert B. Porter, *The Demise of the Ongwebowed and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 HARV. BLACKLETTER J. 107, 169-70 (1999)). Porter explains that “American citizenship . . . [for] Indigenous peoples undermines the loyalty that one has to one’s Indigenous nation, [and] as the commitment of Indigenous citizens to their Indigenous nation diminishes, dual citizenship will have the effect of destroying the Indigenous nation from within.”

“Granting too much significance to sovereignty and statehood may obscure the real interests of parties in sharing or dividing power,” making it harder to form new relationships “among and within states, governments, and peoples.”<sup>132</sup> Martin Papillon also identifies the push by American tribes for recognition of their inherent sovereignty as a “zero sum game,” in which tribes engage in constant battles with states to preserve their sovereignty.<sup>133</sup> “[B]ecause sovereignty is not absolute, recognizing or reasserting tribal sovereignty does not automatically imply that every tribal act supersedes any inconsistent act by another government,” so the achievement of separate sovereign status may achieve less than hoped.<sup>134</sup> On the other hand, the possession of internal sovereignty—the capacity to govern themselves and their lands—that is not dependent on an external source like the federal government has empowered tribes to challenge the status quo imposed by the institution of federalism.<sup>135</sup>

Thomas Flanagan views claims for nationhood by Canada’s aboriginal peoples as equivalent to a demand for “a share of sovereignty in the federal state”—a state that would be legally analogous to Canadian provinces, as these aboriginal bands would be entitled to full self-government in “constitutionally defined respects.”<sup>136</sup> Under Flanagan’s vision of what aboriginal nationhood would look like, Canada’s First Nations would determine their own “citizenship” and would provide their own members with almost all the services that federal and provincial governments now deliver to native groups.<sup>137</sup> The actions of aboriginal governments would be exempt from judicial review, including challenges implicating some civil

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Porter, *supra* note 131, at 169-70. See also Biolsi, *supra* note 1, at 253 (“In the absence of the need to concern themselves with Indigenous self-government, urban Indians have become increasingly preoccupied with their status as minorities in the American political system and the racism and discrimination that is inflicted upon Indigenous peoples by virtue of that status.”) (quoting Porter, *supra* note 130, at 174).

132. Hurst Hannum, *Sovereignty and Its Relevance to Native Americans in the Twenty-First Century*, 23 AM. INDIAN L. REV. 487, 492 (1999). See also *id.* (noting that “the increasing complexity and interdependence of the modern world require us to look beyond the stark extremes of ‘statehood or nothing,’ or sovereignty versus dependency.”).

133. Papillon, *supra* note 5, at 15. Papillon contrasts this with Canada’s First Nations who engage in negotiations with both the federal and provincial governments to have “their rights-based jurisdictional claims recognized within the parameters of the Canadian Constitution, as an addition to existing authorities.” *Id.* Indeed, “[i]ndigenous self-government in Canada is more about constitutional rights and less about the recognition of external sovereignties.” *Id.*

134. Hannum, *supra* note 132, at 494.

135. Papillon, *supra* note 5, at 6.

136. Flanagan, *supra* note 123, at 372. He sees in these claims the seeds of “treaty federalism.” *Id.*

137. However, many of the attributes of separate nationhood for aboriginal groups listed by Flanagan are those already possessed by tribes in the United States, such as control of tribal membership qualifications, provision of services, and full self-government.

liberty protected by the Canadian Charter of Rights and Freedoms.<sup>138</sup> Flanagan worries that granting tribal bands nationhood would be equivalent to their seceding from the Canadian federal structure.<sup>139</sup> The result would be the creation of aboriginal “enclaves within the Canadian state,”<sup>140</sup> which would turn Canada into a “multination state” resulting in “institutional disarray.”<sup>141</sup> There is little reason to think that the consequence of granting American tribes separate nationhood status would be different.

The diversity of tribes, a lamentable shared historical experience, and even the push for separate nation status create serious challenges to integrating tribes into the Constitution. But none is fatally debilitating. The next part of this article discusses why there is reason to believe that the concept of federalism is sufficiently malleable to incorporate tribes as co-equal sovereigns.

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138. Flanagan, *supra* note 123, at 372.

139. *Id.* (“The essence of a federal system is that the citizen is directly affected by two governments in a scheme of divided jurisdiction. By this criterion, Indian First Nations would virtually secede from Canadian federalism.”). See also Andrew Oldenquist, *Ethnicity and Sovereignty*, 54 *STUD. IN E. EUROPEAN THOUGHT, NATIONALISM AND ITS ALTERNATIVES* 271, 272 (2002) (“‘Nationalism’ is the correct word for ethnic separatism.”). Oldenquist, however, notes that groups with clear cultural/ethnic identity can support the idea of “ethnic” secession. *Id.* at 271.

140. Flanagan, *supra* note 123, at 373-74 (“They would become enclaves within the Canadian state, receiving fiscal subsidies but in other respects constituting *imperia in imperio*. This departure from federalism fundamentally stems from the conceptualization of Indian communities as nations.”). Another reason Flanagan notes that “nationhood” makes no sense, at least for Canada’s aboriginal peoples, is numbers if each tribal unit is counted separately as opposed to aggregated into a single whole. See *id.* at 373 (“The first problem is that of numbers. According to Rupert Emerson, ‘it is a generally plausible assumption that a nation involves societies of substantial magnitude . . . from a million or so people to hundreds of millions.’ There are slightly more than 300,000 status Indians in Canada, plus an indeterminate number of nonstatus Indians and Metis, so that they might add up to a nation if they were all counted together; but current claims go in precisely the opposite direction. Each tribe, or even each band, the opposite is said to be a nation.”) (quoting RUPERT EMERSON, *FROM EMPIRE TO NATION* 99 (1962)).

141. *Id.* at 374 (explaining that “it would be ironic indeed to casually transform Canada into a multinational state. From this perspective, it is as important to be clear about symbolic matters like terminology as it is to evolve workable institutional arrangements for native peoples. Symbolism incompatible with the Canadian political order will inevitably tend to produce institutional disarray, for accepted symbols form the matrix of ideas in which public policy is made.”).



#### IV. THE CONSTITUTIONAL CONCEPT OF FEDERALISM IS SUFFICIENTLY FLEXIBLE TO ACCOMMODATE AN ADDITIONAL SOVEREIGN INSIDE THE SAME NATIONAL BORDER

Tribal sovereignty advocates want “coequal sovereignty, not nested, hierarchical sovereignty or a relationship of scaled sovereignty, in which the ‘highest’ sovereign encompasses the ‘lower’ sovereigns—as in the relationship between the states and the federal government.”<sup>142</sup> This part of the article examines whether the Constitution’s bivalent federal design is sufficiently flexible to incorporate a third co-equal sovereign within the same topographical perimeter.<sup>143</sup>

One indication of flexibility in the constitutional federalism design is apparent in the shifting and blurring of the boundaries between federal and state governments as a result of negotiated solutions to jurisdictional conflicts between the two sovereigns.<sup>144</sup> This “interpretative bargaining” can redistribute “authority at the uncertain margins of state and federal power” in ways that do not necessarily conform to a strict divide between jurisdictions.<sup>145</sup> Erin Ryan explains how states bargain with the federal government for a share of federal capacity over “financial resources, freedom from otherwise operative legal rules, or legal authority to resolve a

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142. Biolsi, *supra* note 1, at 246.

143. Papillon, *supra* note 5, at 1 (commenting on the “relative plasticity of federal systems in adapting to the social fabric of a polity, thus ensuring both the stability of the federal union and its capacity to adapt to the ongoing tensions created by ethnic and linguistic divisions.”). *See also* Boldt & Long, *supra* note 122, at 549-50 (proposing that “ethnic communities meeting certain criteria should be considered as unities (corporate bodies) with moral rights and legal status accorded them as *groups* rather than as *individuals*” and that these ethnic communities, in addition to states, “are entitled to be regarded as right-and-duty bearing entities.”) (citing Vernon Van Dyke, *Human Rights and the Rights of Groups*, 18 AM. J. POL. SC. 725-41 (1974)). According to Richard Monette, “very few scholars unabashedly argue that tribes should strive for a structured relationship on our domestic plane.” Monette, *supra* note 42, at 631 n.89. He argues instead that tribes should be treated as states “for purposes of applying the logic of our Federalism,” which “provides a wholly new direction for federal Indian law.” *Id.* at 633. *But see* Skibine, *supra* note 43, at 693 (“A more interesting question, however, is whether Congress could constitutionally, or would politically, incorporate the tribes within Our Federalism under a third sphere of sovereignty without also making the Fourteenth Amendment applicable to Indian tribes.”).

144. An obvious benefit of finding “territorial borders . . . more permeable and territoriality is less constraining” is the reduction of “the historical reluctance of states to embrace the concept of multiple ‘peoples’ within a state’s borders . . . .” Parrish, *supra* note 68, at 306 (citing, as an example of this, the “globalization of labor and capital,” which “renders the traditional concept of a nation-state—with one distinct, if not imagined, culture—to be unattainable.”).

145. Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 135 (2011). *See also id.* at 135 (recognizing “how interpretive bargaining helps allocate authority at the uncertain margins of state and federal power provides a new lens for understanding the uniquely collaborative process of American governance.”).

collective action problem among the states.”<sup>146</sup> The more the federal government depends on states to achieve its objectives, the more “leverage” the states have in bargaining for increased authority and/or resources and the less likely the superior sovereign will deny them what they want.<sup>147</sup>

Another example of porous geopolitical boundaries between federal and state governments is what Lilas Jones Jarding calls relational federalism: a situation in which there are “fluid and dynamic” relationships among governing entities with overlapping jurisdictions, which are not “clearly agreed upon or set forth in defining documents.”<sup>148</sup> In relational federalism, “power and responsibility for governance are shared among different units, but without clear territorial boundaries or a clear national-subnational division of governmental power.”<sup>149</sup> She views tribal-state interactions as consistent with the concept of relational federalism even though those interactions are not strictly national-subnational or territorial models of federalism.<sup>150</sup>

The concepts of “government-to-government” and “tribes-as-states” are examples of how strict geographic boundaries between tribes and the two recognized sovereigns have blurred to the point of creating some form of shared sovereignty in a single geographic space.<sup>151</sup> These governing relationships came about in the United States in the late 1980s when many federal pollution control laws were amended to add provisions that treated tribes as though they were states for purposes of delegated programmatic

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146. *Id.* at 76. *See also id.* at 87 (states also bargain over regulatory capacity and principle—the normative leverage that federalism values themselves exert on the negotiation.”). Ryan also notes that:

[N]egotiated governance is not just a de facto response to regulatory uncertainty about who should decide, but can be, in and of itself, a constitutionally legitimate way of deciding. More than just a means to an end, carefully crafted federalism bargaining can also be a principled means of allocating state and federal authority in realms of concurrent regulatory interest.

*Id.* at 102.

147. The Supreme Court’s modern federalism jurisprudence “privileges state sovereignty in order to promote efficiency and intergovernmental competition, check governmental tyranny, draw on pluralism and the experimental values of decentralized governance, and reinforce community and democratic participation.” Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 961 (2007).

148. Liliias Jones Jarding, *Tribal-State Relations Involving Land and Resources in the Self-Determination Era*, 57 POL. RES. Q. 295, 295 (2004). Jarding adds that the relational federalism concept “focuses on relationships among government entities that share power without limiting the nature of those relationships.” *Id.* at 302

149. *Id.* at 295

150. *Id.*

151. Biolsi, *supra* note 1, at 246. Biolsi remarks that the government-to-government model has “some remarkable parallels” to the process in Australia of recognizing “Native Title” and also the recognized right of Aboriginal groups to co-manage national parks. *Id.*

authority.<sup>152</sup> Each of these gives federally recognized tribes<sup>153</sup> some official role as “stakeholders” in state and federal policy-making.<sup>154</sup> Inter-jurisdiction conflicts reflecting different state and tribal interests and priorities, which have plagued these areas of overlapping authority, have spawned mechanisms for inter-jurisdictional collaboration and coordination. Examples of these are procedures for formal consultation, framework agreements, and protocols for the resolution of conflicts.<sup>155</sup> The result has been the creation of a “multilevel governance regime” that parallels existing mechanisms governing intergovernmental relations between states and tribal governments.<sup>156</sup>

The fact that there are mid and/or overlapping spaces between federal and state governments is not surprising as adaption to different situations is an attribute of federalism. Federalism allows for “interjurisdictional innovation,” some examples of which are discussed above, as well as the competition among different jurisdictions promised by the cherished federalism “laboratory of ideas.”<sup>157</sup> Nor is it surprising that tribes are entering these spaces as they seek greater control over their resources and self-governance. Although the concept of cooperative tribal-federal agreements shows the plasticity of federalism, since tribes are exercising delegated statutory authority the approach only brings tribes into the

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152. See, e.g., Clean Water Act, 33 U.S.C. § 1377(e) (2006) (providing for treatment as States); Clean Air Act, 42 U.S.C. § 7602(b)(5) (2006) (defining an air pollution control agency to include an agency of an Indian tribe). Even prior to that, the 1975 Indian Self-Determination and Education Act enabled the transfer of the administration of several federal programs from the federal governmental to tribal governments, although several “militant” tribal governments rejected this model because it does not explicitly recognize tribal sovereignty and “perpetuates the hierarchical relationship with the federal government.” Papillon, *supra* note 5, at 7. According to Papillon, 212 of 336 federally recognized tribes have some form of an agreement or compact with the states involving some form of power sharing. *Id.* at 9.

153. Biolsi comments that some “Indian thinkers” criticize what he calls “the Indian ‘national geographic’ of federally recognized tribes” as constituting “ethnic fraud.” Biolsi, *supra* note 1, at 249.

154. Elizabeth Hutchinson, in her article on Joseph Brant, the eighteenth century leader of the Mohawk nation, commented on how some consider Brant’s view of himself as a subject and sovereign participant in the modern transatlantic world, relating to the King of England as an equal, manifested by his refusal to kiss the King’s ring and addressing him as “brother,” as a precedent for modern Indian tribes’ insistence on nation-to-nation diplomacy. Hutchinson, *supra* note 60, at 213-14.

155. See Fletcher, *supra* note 59, at 67-69 (discussing federal-tribal, and state-tribal, and local-tribal agreements: “[h]undreds, if not thousands, of these agreements exist and are in operation at the moment”).

156. Papillon, *supra* note 5, at 7. Papillon notes that these intergovernmental coordination mechanisms have not eliminated conflicts between the three levels of government and discusses the conflicts and tensions that have plagued Indian gaming as an example, which were in part solved by the use of the compact model. *Id.* at 7-9.

157. Ryan, *supra* note 145, at 11-12.

bureaucracy of government in a way that is analogous to the plenary power doctrine—still subject to the dominant, preemptive power of Congress.

Federalism also allows for the adaption of federal rules to local circumstances: “Geographic uniformity is not an inevitable feature of a legal rule. There may be many reasons for governing the same subject by different legal rules at different locations within the same legal system.”<sup>158</sup> The federal government frequently “tailors policies to local preferences” by enacting laws that cover only a specific geographic area, entering into cooperative arrangements with state agencies to implement federal policies, and sometimes even incorporating state law into federal law.<sup>159</sup> Thus, it is common for “rulemakers” to adopt different localized rules reflecting varying physical conditions such as climate, terrain, or the “built environment” because they “perceive that localized differences in behavioral patterns necessitate divergent methods for accomplishing an underlying purpose.”<sup>160</sup> The degree to which localism infiltrates federal policy also illustrates federalism’s elasticity.

To the extent that tribes are similar to local governments, the expansiveness of federalism in this regard should help tribes. Both tribes and local governments provide “autonomous institutions that generate their own local rules,”<sup>161</sup> and are each “intimately involved” in “where and how people live, public safety, work conditions, and education.”<sup>162</sup> Both are powerless, subject to the plenary power of a higher sovereign, be it state<sup>163</sup>

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158. Neuman, *supra* note 32, at 1201.

159. *Id.* at 1202-03. *See also Id.* at 1202 (“Rather than enable local residents to realize their preferences from the bottom up by means of local institutions, legal systems sometimes attempt to accommodate perceived local preferences from the top down.”). But Neuman warns that adapting federal law to local conditions, if carried too far, runs the risk of creating “geographical exceptions to policies otherwise regarded as fundamental”—what he calls “anomalous zones”—as these can become “sites of contestation over the polity’s fundamental values.” *Id.* at 1233.

160. *Id.* at 1201 (explaining that “[t]he perception that objective physical or social conditions vary from place to place may lead rulemakers to pursue a consistent overall policy by adopting different localized legal rules. Varying physical conditions, for example, often call for different rules. The physical differences may be natural—like climate or terrain—or they may involve the built environment.”).

161. *Id.* at 1202 (“In the United States, federalism and local government provide autonomous institutions that generate their own local rules. States and cities have different scales, different constitutional status, and differing scopes of power, but each functions as a vehicle for local self-determination.”).

162. Davidson, *supra* note 147, at 968 (explaining that “local governments are the political institutions that most directly shape our public lives.”).

163. *Id.* at 962 (explaining that “in the cooperative localism context, local governments act neither as subservient departments of state government nor as islands of independent authority.”).

or federal.<sup>164</sup> Both suffer from an “uncertain constitutional status of local government, the structural incommensurability between governments at the local and national level, the triangulation and conflicts of interest that states interject into the federal-local relationship, and the potential of states as intermediate actors to react to any judicial protection of federal empowerment of local government.”<sup>165</sup> Both “occupy a quasi-constitutional nether realm”—their constitutional role “remains fundamentally contested”<sup>166</sup> putting them at a distinct disadvantage in dealing with both reigning jurisdictional authorities. “[I]n contemplating two, and only two, sovereigns, the reigning iconography of our federal scheme too often ignores local governments entirely in conceptualizing federalism or subsumes local governments into a general category of subnational polities controlled by the state.”<sup>167</sup> Tribes, who have suffered the same federalism fate as local governments, also trigger “questions about the fracturing of sovereignty in our federal system.”<sup>168</sup>

Yet tribes, like states, are fundamentally different than local governments because they are not dependent on the act of a higher sovereign for their creation like local governments are, and much of their land and many of their rights are based on treaties. Because both tribes and states existed as independent sovereigns prior to the formation of the United States, they are pre-constitutional and thus different from county and municipal governments, which are creations of state law.<sup>169</sup> While looking

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164. *Id.* at 961 (“[T]he prevailing view of local government identity in federal law is one of fundamental powerlessness, with localities at the whim of the states’ plenary authority. In a lesser-recognized tradition, however, courts have allowed local governments to involve federal authority to resist assertions of state power. This judicial space for federal empowerment has granted local governments both a measure of autonomy to act in the absence of state authority and an ability to check state control.”).

165. *Id.* at 976.

166. *Id.* at 977.

167. *Id.* at 965.

168. *Id.* at 965 n.10.

169. Tebben, *supra* note 7, at 335 (“[W]hile States were sovereign entities predating the national government created by the Constitution, county governments, which were created by state law, were at no time sovereign. Local governments receive constitutional recognition and status only indirectly through the constitutional recognition of the State. The States have not been required by the national government to recognize or honor the sovereignty of local governments, as they have been required to recognize and honor the sovereignty of tribal nations.”) (quoting *Reynolds v. Simms*, 377 U.S. 533 (1964)). Not discussed in this article is the option of treating tribes as though they were cities because this would not bring tribes into the Constitution and the political gains would be minimal, even though treating tribes like cities would not be a large conceptual leap given the similarities between them. Like cities, tribes provide a range of local services to relatively small, geographically constrained population, probably use a representational form of government, and perhaps have “modest ‘taxing power and independent sources of revenue.’” Abele & Prince, *supra* note 13, at 572. On the positive side, the municipality

at the tribes' quest for coequal sovereignty through the lens of localism provides a useful example of federalism's malleability, it places tribes at level lower than states and still leaves them harnessed to the federal sovereign.

Thus, jurisdictional boundaries between governments are neither rigid nor even necessarily terrestrial.<sup>170</sup> The concept of federalism as it has evolved in this country does not necessitate a set number of sovereigns; indeed, the proliferation of subnational sovereigns at the local level belies that myth. Nor does it dictate how those sovereigns must interact for all time. But, while the concept of federalism may be pliable, it is not so to the point of dysfunction where its overall benefits could be lost.

## V. HOW THE CONSTITUTION MIGHT BE ADJUSTED TO INCLUDE A THIRD SOVEREIGN

The next part of the article turns to possible adjustments to the Constitution's bivalent federalism structure and tests those against various criteria to assure, among other things, that federalism's benefits would not be lost if one or more of them is implemented. One thing that makes the task of finding a federalism solution to the problem of diminished tribal sovereignty seemingly intractable<sup>171</sup> is that the current constitutional distribution of power between the federal government and the states is the "product of complex negotiations between competing interests" long since arrived at by the bargaining parties.<sup>172</sup> And that bargain excluded tribes. This decades old arrangement may be difficult to realign to include tribes absent a "significant external shock,"<sup>173</sup> which seems unlikely given modern tribes lack of political and social power.

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approach can be tailored to the uniqueness of each tribe. Abele and Prince, who analyzed the municipal model, found it had few Aboriginal supporters and no support among Aboriginal scholars in Canada. *Id.* at 586 (noting, however, that some provincial governments support the idea, as do non-Aboriginal academics and commentators). Canadian provinces, which are protective of their jurisdiction and also loath to relinquish territory to First Nations, also resisted the concept. *Id.* The municipal approach also decreases the role of the federal government as the principal protector of tribes and, at least theoretically, of the country's treaty responsibilities towards tribes. *Id.*

170. See Biolsi, *supra* note 1, at 240 (discussing the concept of political space as virtual space).

171. Papillon, *supra* note 5, at 4 (noting while "significant change has taken place in both Canada and the U.S. in the relationship between Indigenous peoples and the federal system," that change has occurred "less in the formal structure of the federation than in patterns of governance and policy-making.").

172. *Id.* at 5.

173. *Id.* (explaining that "[t]he balance between forces at the [center] and those in the constituent units is progressively institutionalized, creating interlocking vetoes that make alterations in the overall framework of the federation unlikely . . ."). It is also unlikely that tribes

The entrenched nature of the current power distribution between the federal government and states in the Constitution makes a path of pursuing incremental changes to the governance status of tribes appealing, especially where the cumulative effect of small alterations might lead over time to significant modifications in how tribes are treated.<sup>174</sup> For example, David Super suggests groups on the outside, like tribes, might “achieve petit constitutional status for some of the norms important to them.”<sup>175</sup> However, the only norm of import to tribes in their effort to resist further loss of their sovereignty is co-equal authority with the federal government and the states, and that can only be achieved through large systemic changes in how power is currently distributed under the Constitution.<sup>176</sup>

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will be able to create an enduring and transformative constitutional moment comparable to those created by the civil rights or gender equality movement. *See* Super, *supra* note 90, at 2807-08 (discussing Bruce Ackerman’s “grand constitutionalism” and how constitutional moments can arise during “prolonged ‘down time’” and noting that governmental institutions can advance counter-majoritarian constitutional norms, such as civil liberties and civil rights, in the shadows of mainstream politics.).

174. Papillon, *supra* note 5, at 5. Papillon talks about how incremental change can occur through “layering” the “superposition of new practices and norms over an institution, progressively leading to a disjuncture between formal rules and actual practices.” *Id.* He describes what he calls “effectively parallel regimes of governance,” which have occurred in the United States and resulted in changes in decision-making rules that reflect, “at least partly, the political status of Indigenous governments as representatives of distinctive and autonomous political communities,” while the super-structure, federation, remains unaltered.” *Id.*

175. Super talks about what he calls “petit constitutional moments,” which may be easier to achieve and be in fact more enduring, which he recommends for marginalized groups. *See* Super, *supra* note 90, at 2812 (suggesting that “marginal groups unable to seize the public imagination [to generate a grand constitutional moment] . . . seek to achieve petit constitutional status for some of the norms important to them”).

176. Professor Skibine suggests that tribes are already included in the Constitution based on a theory that the Constitution adopted “preconstitutional powers necessarily inherent in any Federal Government”—powers that the Supreme Court has described “as ‘necessary concomitants of nationality.’” Skibine, *supra* note 43, at 690 (quoting *United States v. Lara*, 541 U.S. 181, 201 (2004)). Skibine does not:

[B]elieve that the commerce power is sufficient to allow Congress to constitutionally incorporate tribes. While the treaty power may have served that purpose, the United States is no longer signing treaties with Indian nations, and contrary to the assertion of some, I do not believe that the treaties already signed accomplished such incorporation. A more interesting possibility is whether Congress can constitutionally incorporate the tribes pursuant to what Professors Cleveland and Frickey have termed the ‘inherent powers.’ These are powers which Justice Breyer acknowledged in his *Lara* majority opinion when he remarked that Congress’s legislative authority in Indian affairs may rest ‘not upon ‘affirmative grants of the Constitution,’ but upon the Constitution’s adoption of preconstitutional powers necessarily inherent in any Federal Government, namely powers that this Court has described as ‘necessary concomitants of nationality.’

*Id.* (internal citations omitted). *See also id.* at 690-91 (propounding a theory of “quasi constitutional incorporation” through the Indian Commerce Clause and the 1787 Northwest Ordinance, noting that the latter holds out the promise of contemplating “an eventual greater incorporation of tribes within the political system of the United States.”).

It is also imperative that any change made in the distribution of power between tribes, the federal government, and the states happens at the constitutional level.<sup>177</sup> Only constitutional status will give the change permanence and vest it with a sufficiently “exalted status.”<sup>178</sup> While obligations and their attendant norms need not be exclusively confined to the Constitution, they gather strength when they are situated in it<sup>179</sup> and help persuade others of the obligation’s supremacy and entrenched status.<sup>180</sup> Characterizing something as constitutional also increases the likelihood that it will prevail in conflicts with lesser order obligations and that “it cannot be changed by ordinary legislation.”<sup>181</sup>

However, constitutionalizing any change to the current sovereignty distribution in the Constitution makes it more difficult for tribes to opt out of any ineffective or even harmful fix to their present situation.<sup>182</sup> Bringing tribes into the Constitution as co-equal sovereigns might result in constitutional norms, like those found in the Bill of Rights,<sup>183</sup> being applied

177. Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1081 (2013) (explaining that constitutional rules can relate to the structure of governmental institutions, protect a fundamental value or norm, or enjoy “sacred status in American society.”).

178. *Id.* at 1151. Primus warns, however, that the label constitutional does not determine whether the rule is textual, supreme or entrenched, let alone enforceable through judicial review and may do no more than imply those results. *Id.* See also Skibine, *supra* note 33, at 4 (“Without such constitutional incorporation, the tribes exist at the ‘whim of the sovereign,’ be it the United States Congress or now the Supreme Court.”).

179. See Super, *supra* note 90, at 2832 (discussing constitutionalizing the “duty” or norm of preventing severe hardship and how greater progress was made in engaging the leadership of both political parties “to appeal to the principle of preventing severe harm” than engaging in partisan politics). *But see* Primus, *supra* note 177, at 1127 (contending that the written text of the Constitution is not the sole source of “constitutional authority,” which can also be found in the “rules and norms and institutions that guide the process of government . . .”). However, one source of these rules, “ethos,” may be problematic for tribes to the extent it rests on heroic “narratives of American history,” which cast Indians as villains not heroes. *Id.* at 1134.

180. Primus, *supra* note 177, at 1150 (establishing that an obligation, a principle, or a norm “has constitutional status” is equivalent “to persuading one’s audience” that it is “supreme, entrenched, and enforceable through judicial review”). Primus describes this to be “a matter of habits of thought.” *Id.*

181. *Id.* at 1081.

182. Krakoff, *supra* note 11, at 1198 (“What is essential, however, is the idea that tribes can opt in or out of any proposed legislative fix. This comports with the notion of experiential sovereignty, which will be different for each tribe. Indian nations know best themselves how much tinkering with legal sovereignty their cultures can withstand. Unlike categorical rules issuing from the Supreme Court, congressional solutions, whether in the form of legislation or negotiated compacts, can be tailored to allow for individual tribal assessment of the gains and losses implicit in any legal fix.”).

183. Skibine, *supra* note 33, at 45. An example of this was enactment of the Indian Civil Rights Act, which applied some parts of the Bill of Rights to tribal courts. Fletcher, *supra* note 59, at 99.



to them because they will have lost the ability to resist their imposition based on their cultural uniqueness as tribes.<sup>184</sup>

Despite the putative costs to tribes of constitutionalizing any change to the power distribution between states, the federal government, and them, this article posits that the only way to enhance tribal sovereignty is to bring tribes into the Constitution as coequal sovereigns. This can be done either through the exercise of some existing constitutional authority, like the Treaty Clause or through the amendment process,<sup>185</sup> for example, to allow the creation of new tribal states within existing states.<sup>186</sup>

In addition to requiring that any change to the current status of tribal sovereignty have a constitutional imprimatur, this article also stipulates that the proposed change must: (1) not weaken the existing federal structure or create an external national security problem, (2) empower tribes to manage their futures more effectively, (3) provide sufficient flexibility to incorporate as many of the different types of tribes without creating disabling and destabilizing disparities among them,<sup>187</sup> and (4) have political salience. The article now turns to a discussion of how existing constitutional authority might be used to enhance tribal sovereignty followed by a discussion of how the Constitution might be amended to achieve the same result.

#### A. USING EXISTING CONSTITUTIONAL AUTHORITY

Changes in constitutional meaning can occur through interpreting constitutional text.<sup>188</sup> For example, Jack Balkin's theory of "Framework

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184. Price, *supra* note 23, at 713 (referring to the tribes' "uniquely compelling claims to maintaining cultural and political norms that depart from federal constitutional requirements").

185. Primus, *supra* note 177, at 1081 (Constitutional rules can relate to the structure of governmental institutions, protect a fundamental value or norm, or enjoy "sacred status in American society."). See also Hannum, *supra* note 132, at 495 (suggesting possibility of constitutional amendment to assure tribal authority/responsibilities).

186. See generally Mila Versteeg & Emily Zachin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. (forthcoming 2014) (discussing the tradition of amending state constitutions and the constitutions of other countries). The authors discuss the conflict between Thomas Jefferson who "famously argued that the earth belongs in usufruct to the living, and, therefore, that each generation should write its own constitution" and James Madison who argued that constitutions should bind future generations as well as the current one. *Id.* at 20 (internal quotations omitted).

187. The presence of urban or landless Indians makes it particularly difficult to find a land-based solution that will nonetheless incorporate them.

188. See, e.g., Versteeg & Zachin, *supra* note 186, at 26 n.145 (quoting Woodrow Wilson's comment characterizing the Supreme Court as "a constitutional convention in continuous session."). See also Primus, *supra* note 177, at 1084 (discussing small-c constitutionalism, the main attribute of which is the decoupling of constitutional status from textuality). See also *id.* at

Originalism” sees “the Constitution as an initial framework for governance that sets politics in motion,” which must “be filled out over time through constitutional construction.”<sup>189</sup> The very title of the article portends of a more expansionist view of textual interpretation. Richard Primus writes: “a large part of the process of constitutional change is about shifting expectations that make it plausible to read a text differently at different times.”<sup>190</sup> According to Primus, a dominant practice can shape people’s “constitutional expectations,” which can turn people’s attention away from the precise words in the Constitution’s text.<sup>191</sup> Indeed, one could argue, as Primus does, that we have the “capacity to read the Constitution to mean the sort of things we believe it would make sense for it to mean—to accord, that is, with our constitutional expectations.”<sup>192</sup> Primus describes the struggle by constitutional law scholars “to close the gap between the text and the set of rules that are recognized as entitled to supremacy, entrenchment, and judicial review” as a “normal dynamic of American constitutional interpretation.”<sup>193</sup>

If Balkin and Primus are right that text is only a starting point, then one way to constitutionalize non-textual norms is to read the text broadly enough to encompass them.<sup>194</sup> Indeed, according to Mila Versteeg and Emily Zachin, the “sparse and rigid framework” of the Constitution together with extant norms of judicial supremacy combine to give the courts

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1090 (discussing a vision of constitutionality that has one basis, text, and “three consistent payoffs (supremacy, [supermajoritarian] entrenchment, judicial reviewability) . . .”).

189. Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 550 (2009). According to Skibine, Balkin juxtaposed his theory of framework originalism with what he called “skyscraper originalism,” under which the Constitution is almost a finished product, which can be built through the amendment process. Skibine, *supra* note 33, at 44 n.313.

190. Primus, *supra* note 177, at 1098 n.45.

191. *Id.* at 1107.

192. *Id.* at 1111.

193. *Id.* at 1106.

194. *Id.* at 1098. Primus also notes that once a rule or principle’s constitutional status is established, even though not based in text, it “may move along the continuum of textuality” and become associated with a particular constitutional clause through the operation of official stories and once so associated may so “color our intuitions about the text that we come to think of the rules as fairly implied by the text rather than merely associated with it.” *Id.* at 1153. *But see* Skibine, *supra* note 33, at 45 (commenting that it is one thing for the court to use its interpretative powers to stretch the Constitution and to make most of the Bill of Rights applicable to the states, but quite another to do that for tribes without help of the Fourteenth Amendment’s Due Process clause).

“remarkable room to make constitutional meaning.”<sup>195</sup> Some ways that might be done to enhance tribal sovereignty are set forth below.<sup>196</sup>

*I. Treating Tribes as Though They Were Inhabitants of a Federal Enclave Like the District of Columbia*

The Enclave Clause of the Constitution<sup>197</sup> authorizes Congress to acquire land from the states by either cession or purchase for the construction of forts, arsenals, dockyards, other “needful buildings,” and for “the Seat of the government of the United States.”<sup>198</sup> State laws are generally preempted in federal enclaves unless enacted before the creation of the enclave,<sup>199</sup> the cession expressly reserved the right of the state to legislate some particular matter,<sup>200</sup> or Congress clearly and unambiguously authorized state regulation within the enclave.<sup>201</sup>

One possibility, therefore, is to interpret the Enclave Clause<sup>202</sup> expansively to include tribal reservations. This is not as farfetched as it might sound because federally recognized Indian reservations are former federal territorial lands reserved for tribes in exchange for tribes ceding their lands to the federal government.<sup>203</sup> Treating Indian reservations as

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195. Versteeg & Zachin, *supra* note 186, at 44.

196. This discussion does not include an expansive reading of the two sections of the Constitution that actually mention Indians. For an analysis of these two provisions, particularly the Indian Commerce Clause, see Robertson, *supra* note 6, at 388-90.

197. U.S. CONST. art. I, § 8, cl. 17 (providing that Congress shall have power “to exercise exclusive Legislation in all Cases whatsoever over such District[s] . . . as may, by Cession of particular States . . . become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.”).

198. Erin Ryan cites the creation of federal enclaves as an example of negotiated federalism where the states trade power with the federal government ceding power in exchange for the application of desired federal policies, like the creation of a national park or the application of some federal law that is viewed as beneficial to the state. Ryan, *supra* note 145, at 37 n.166 (“States also trade power with the federal government in the negotiation of federal enclaves carved out of existing state lands, in which states often cede power in exchange for desired federal policies—such as the creation of a wanted National Park, or the application of the Assimilative Crimes Act, 18 U.S.C. § 13(a) (2006), which allows the borrowing of state law when there is no applicable federal statute.”).

199. *Paul v. United States*, 371 U.S. 245, 264 (1963).

200. *Sundaram v. Brookhaven Nat’l Lab.*, 424 F. Supp. 2d 545, 569 (E.D.N.Y. 2006).

201. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 174 (1988).

202. U.S. CONST. art. I, § 8, cl. 17.

203. Frickey, *supra* note 11, at 439 (“[A] treaty usually involved a tribal cession of preexisting rights (especially to land and related rights such as water, fishing, hunting, and gathering) and a reservation of all that had not been ceded away (again, especially land—hence the term “Indian reservation”). Treaties, therefore, did not ordinarily involve tribal surrender of all rights in return for federal largesse.”).

federal lands within the purview of the Enclave Clause grants those lands constitutional status. However, judging by the District of Columbia, their inhabitants gain little more than self-rule, which tribes already have, and a non-voting House member who can serve and vote on committees.<sup>204</sup> Being an enclave still leaves tribes subject to the “plenary power” of Congress.<sup>205</sup> Yet, the potential remains for additional powers to be granted to tribes and to their congressional representatives under the Enclave Clause—the same way Home Rule powers of the District government have expanded.<sup>206</sup> It is also possible that treating reservations like federal enclaves might dissuade the Supreme Court from allowing state law to diminish tribal authority on reservation lands because state law is so clearly preempted within a federal enclave.

Thus, granting individual tribal reservations federal enclave status alone gains them little more than constitutional stature. Even then, the content of that status is derived from the federal sovereign.<sup>207</sup> While the District of Columbia example provides a basis to argue for at least non-voting members in Congress, achieving that would require an act of Congress, which could easily be rescinded.<sup>208</sup> On the other hand, the use of the Enclave Clause to grow the tribes’ share of the governing pie would not destabilize the existing distribution of power because tribal representatives from those enclaves would have no real legislative power. Nor would the approach strain the constitutional text too badly. Tribal enclaves could reflect tribal differences by establishing separate enclaves for each reservation—although flooding Congress with additional non-voting

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204. This option is discussed in discussion *supra* Part V.A.

205. U.S. CONST. art. I, § 8, cl. 17.

206. District of Columbia Self-Government and Governmental Reorganization Act, Pub L. No. 93-198, 87 Stat. 774 (1973).

207. James Irving, *Self-Determination & Colonial Enclaves: The Success of Singapore and the Failure of Theory*, 12 SINGAPORE YEAR BOOK OF INT’L L. AND CONTRIBUTORS 97, 101 (2008) (describing what author calls the “creation of an exception category of ‘colonial enclaves’ to which special rules apply” listing Hong Kong and Goa among others as examples, and saying, in addition, that these examples “represent outcomes wholly unsupportable according to the colonial rules of self-determination. The populations in question were incorporated into a third state without a vote and either with the active support of the international community or at least with its complicity.”) *See also id.* at 102 (allowing colonial enclaves to continue to exist perpetuates colonialism; they should be returned to the claimant state since the people and land continue to belong to it, and they are too small to “constitute viable states.”).

208. *See* District of Columbia Self-Government and Governmental Reorganization Act, Pub L. No. 93-198, 87 Stat. 774, § 601 (1973) (“Notwithstanding any other provision of this Act, the Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this Act, including legislation to amend or repeal any law in force in the District prior to or after enactment of this Act and any act passed by the Council.”).

members might create implementation problems. Because the proposal does not take away existing political power from states or increase tribal political power, it might have some political salience with non-Indians.

2. *Use of the Territories Clause to Grant Tribes Equivalent Status to Other American Territories*

Another possibility is for Congress to use the territories clause<sup>209</sup> to convert tribal reservations into territories.<sup>210</sup> This approach does not require a huge conceptual leap; both tribes and territories share the same status as “‘foreign to the United States in a domestic sense,’ though not subject to foreign sovereignty . . . .”<sup>211</sup> In both cases, neither the citizens of American territories nor tribal members consented to the imposition of American sovereignty, nor does it appear likely that the federal government will relinquish its sovereignty over the lands of either.<sup>212</sup> Although tribes and the territories “should enjoy the same autonomy in enforcing their own laws that states do in enforcing theirs,”<sup>213</sup> they suffer from the current Supreme Court’s “skepticism about constitutional exceptionalism,”<sup>214</sup> which creates “grave legal uncertainties” for both.<sup>215</sup>

The parallels between territories and land-based tribes could make this a relatively easy transition for tribes to make. No change in the status of the Union or constitutional text would be required to reach this result, and there should be little political opposition because the tribes gain no real legislative power.

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209. U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”). There are five major “insular” areas under U.S. sovereignty: Puerto Rico, Guam, U.S. Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands. Price, *supra* note 23, at 681.

210. For a detailed discussion of what it means to be an unincorporated territory and the 23 Insular Cases, *see* Skibine, *supra* note 43, at 690.

211. Price, *supra* note 23, at 683 (quoting *Downes v. Bidwell*, 182 U.S. 244, 341-42 (1901) (White, J., concurring)).

212. *Id.* at 713. *See also* Fletcher, *supra* note 59, at 48 (“Tribal consent to federal statutes, regulations, and cases that decide matters critical to American Indian People and tribes long has been lacking”; and propounding a new theory of tribal consent as a way to protect tribal sovereignty from state and federal intrusion).

213. Price, *supra* note 23, at 665.

214. *Id.* at 691.

215. *Id.*

But territories, unlike tribes, have no judicially protected inherent sovereignty,<sup>216</sup> which makes all governmental authority in the territories “federal in character,”<sup>217</sup> not unlike lands covered by Enclave Clause. Territories “were incorporated as part of the federal government and not under a third sphere of sovereignty” like the tribes.<sup>218</sup> This means any power that tribes would have under the Territories Clause would be derivative from the federal government, principally from Congress<sup>219</sup>—a lower status than they now have.

Additionally, the approach does not change the dual sovereignty structure of the Constitution. A separate step would have to be taken to withdraw federal sovereignty over the tribes—a step Congress would be unlikely to take—and, without more, would leave tribes vulnerable to the continued incursion of state sovereignty over them and their lands. The solution leaves unresolved the problem of urban Indians and does not address the vast differences among tribes, which could result in the creation of 325 separate territories of varying size or the aggregation of very different tribes into a few territories—perhaps even a single territory.

While territorial status might gain for the tribes one or more non-voting members in the House of Representatives, comparable to the District of Columbia under the Enclave Clause,<sup>220</sup> they would gain little else. In fact, their independent sovereign status would be reduced.

### 3. *Using the Compact Clause to Negotiate a Power-Sharing Arrangement with the Federal Government, the States, and Tribes*

For over a quarter of a century, the federal government has entered into cooperative agreements with qualified states pursuant to various environmental laws under which the federal government delegates to those

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216. *Id.* at 664 (“First, it treats tribes and territories quite differently despite the practical similarities between them: While case law recognizes retained inherent sovereignty for tribes, territorial governments exercise only delegated federal power.”).

217. *Id.* at 680.

218. Skibine, *supra* note 33, at 43.

219. Price, *supra* note 23, at 682.

220. *Id.* at 661 n.17 (citing 48 U.S.C. §§ 891–894 (2014)). Congressional delegates from the territories and the District of Columbia can sit on committees and even vote in committees, receive the same salary and allowances that that any other member of Congress receives, and except for not being able to vote on the floor “do[] what any member of Congress can do. Glenn Starbird et al., *A Brief History of Indian Legislative Representatives*, MAINE STATE LAW AND LEGISLATIVE REFERENCE LIBRARY (Dec. 9, 2013), [www.maine.gov/legis/lawlib/indianreps.htm](http://www.maine.gov/legis/lawlib/indianreps.htm). See also 48 U.S.C. §§ 1711–1735 (2014) (governing delegates from Guam, American Samoa, and Virgin Islands).

states primacy in the administration of certain programs. Erin Ryan calls these agreements “capacity-based federalism bargains” because they reallocate federal authority to some other sovereign, usually the states.<sup>221</sup> They are basically “bargained for encroachment” by states in which the states “negotiate for federal approval” of agreements that “derogate federal power” and give the states permission to “encroach on federal jurisdiction.”<sup>222</sup> Ryan cites, as examples of these cooperative agreements, state compacts with Congress in which states agree to be constrained by federal law and Congress agrees to create “forums for long-term, iterative sharing of policymaking authority with states.”<sup>223</sup> The experience for tribes under these agreements is mixed and in many cases has resulted in greater state intrusion into tribal affairs.<sup>224</sup>

While this approach could move tribes towards greater parity with states in their dealings with the federal government and could be a source of financial and technical assistance for tribes to begin administering programs that had been run by the federal government, it does not change the basic structural inequality of the three sovereigns in other areas of governance not covered by the compact. Nor does it offer any promise of enhanced tribal participation in that structure, and it leaves the tribes dependent on federal largess with respect to the permanence and contours of any delegated authority and the resources to exercise that authority. Further, since the source of tribal authority in these bargained for arrangements is statutory and constrained by the scope of the power devolved upon them, the sovereignty tribes exercise under this approach is anything but equal. Indeed, preserving “the primacy of the federal government to set national priorities and prescribe standards through which to advance those

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221. Ryan finds these “especially useful in advancing interjurisdictional synergy.” Ryan, *supra* note 145, at 125. Ryan provides a thorough discussion of the topic of negotiating federalism, its perils and benefits, what makes for a successful/unsuccessful bargaining experience and bargained for result, and how negotiation is and could be used to solve some federalism problems. *See generally id.*

222. *Id.* at 40 (saying in addition “[a]s a doctrinal matter, congressional approval is required whenever such an agreement would increase the power of states at the expense of the federal government, effectively reallocating the initial distribution of regulatory authority.”). “Congressional consent to these compacts also saves interstate compacts that might otherwise encroach on Congress’s exclusive authority over interstate commerce.” *Id.* at 41.

223. *Id.*

224. Papillon, *supra* note 5, at 8. Indeed, opponents of these compacts and the triggering devolution of federal programmatic administrative authority view the approach as “forced federalism on Indian nations.” *Id.* at 10. On the other hand, programmatic transfers accompanied by federal funds can enhance the capacity and resources of tribes to administer their own programs, define their priorities, and perhaps even expand the future scope of their activities. *Id.* at 7.

priorities,” while also capturing the benefits of pluralism, is a critical feature of these cooperative regimes.<sup>225</sup> However, preserving federal primacy is inconsistent with the achievement of co-equal sovereignty for tribes.

But, the Compact Clause<sup>226</sup> offers the potential to go several steps beyond federal-tribal cooperative arrangements to administer delegated federal programs or tribal-state compacts negotiated during the 1990s.<sup>227</sup> Horst Hannum suggests the crafting of a “new compact or agreement” between tribes and the federal government “to articulate the minimum content” of authority reserved or delegated to the tribes.<sup>228</sup> These new compacts would be “[g]rounded in the inherent sovereignty of Indian tribes and the United States Constitution, and given substance by the political environment . . . .”<sup>229</sup> Since there are no minimal powers inherent in the concept of sovereignty other than “the ability to define one’s own membership and the nature of governmental institutions,”<sup>230</sup> its content must be negotiated. Thus, the use of the Compact Clause to negotiate for tribes a share of the Constitution’s divided sovereignty might be possible. The content of any such negotiated compact or agreement could allow tribes to assume more power and authority in the federal system than they have at present and could also allow for variations among tribes, as each

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225. Davidson, *supra* note 147, at 967. *See also id.* at 979 (discussing cooperative localism, and saying “the central jurisprudential question of cooperative localism becomes the source and breadth of local authority in that relationship.”).

226. U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”).

227. *See* Fletcher, *supra* note 46, at 181 (“The political relationship between the United States and Indian tribes remains as powerful as ever, but a new and more dynamic relationship between states and Indian tribes is growing. States and Indian tribes are beginning to smooth over the rough edges of federal Indian law—jurisdictional confusion, historical animosity between states and Indian tribes, competition between sovereigns for tax revenue, economic development opportunities, and regulatory authority—through cooperative agreements. In effect, a new political relationship is springing up all over the nation between states, local units of government, and Indian tribes.”). Carol Tebben also talks about “day-to-day interaction” between tribes and states at the local level and the establishment of federal/state/tribal judicial councils where judges representing the three sovereigns can discuss jurisdictional issues arising in their cases. Tebben, *supra* note 7, at 351 (“This day-to-day interaction between the tribe and the State at the local level includes, for example, the cross-deputizing of officers as representatives of both the tribe and the State, local state court extension of full faith and credit to tribal court decisions, local county sheriff enforcement of tribal court decisions, and tribal court extension of full faith and credit to state court decisions.”).

228. Hannum, *supra* note 132, at 495.

229. Maon, *supra* note 90, at 130.

230. Hannum, *supra* note 132, at 494-95.



tribe could negotiate its own compact with the federal government.<sup>231</sup> The proposal would also not threaten the structural integrity of the Union.

Skibine takes Hannum's concept of a compact one step further. He proposes, as a way of including Indian tribes in "Our Federalism,"<sup>232</sup> a "compact of incorporation" similar to the legislation granting Puerto Rico commonwealth status.<sup>233</sup> Skibine's compact would set out "a baseline of tribal sovereignty," which would delineate the relationships among the tribes, the federal government, and the several states: a relationship that could only be changed through renegotiation by the parties.<sup>234</sup> He believes that such a compact would "more permanently" secure the place of tribes "as sovereign entities within Our Federalism."<sup>235</sup>

A negotiated power-sharing agreement like that proposed by Hannum and Skibine reflects the late Phillip Frickey's rejoinder that "[a] proper commitment to constitutionalism in federal Indian law would not bring the Constitution to Indian country by judicial fiat, but instead would encourage a process by which tribes would be integrated into the constitutional framework through negotiation and consent."<sup>236</sup> In other words, "the central constitutional idea" here is that "relations between tribes and the American government should be governed largely by negotiation."<sup>237</sup> The possible use of compacts reflects the evolution of tribal governance "from a highly centralized hierarchical and fairly homogenous system essentially concentrated in federal hands" into what is now "a far more complex multilevel structure of governance" in which tribes could play an increasingly important part in the implementation of federal policies and programs.<sup>238</sup>

Negotiating separate sovereignty agreements with tribes who want to enter into a different relationship with federal and state governments would

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231. *Id.* at 495.

232. Skibine, *supra* note 43, at 694 (explaining that "Indian tribes are not yet considered fully included in Our Federalism," and proposing "that Congress enact a compact of incorporation, the process of which would be similar to the Commonwealth legislation enacted for Puerto Rico.").

233. *Id.*

234. *Id.* at 692. Skibine notes, in addition, that his concept would mean Congress "would lose its plenary power over Indian tribes." *Id.* He finds some urgency in the creation of a compact or "a covenant" with the United States because playing the "game" under the rules set by the Supreme Court "will slowly but surely result in the total subordination of Indian tribes to the interests of the various states where their respective reservations are located." *Id.* at 694-95.

235. *Id.* at 695.

236. Frickey, *supra* note 11, at 470 n.217.

237. *Id.* at 482.

238. Papillon, *supra* note 5, at 13.

not strain constitutional text or the federal structure of government.<sup>239</sup> Depending on the bargaining powers and goals of tribal negotiators, federal-tribal sovereignty compacts could enhance the status of individual tribes in the federal system.<sup>240</sup> Because non-Indians could be part of the negotiation, a negotiated sovereignty compact increases the likelihood that the result will accommodate different interests and rights and, therefore, be acceptable to non-Indians.<sup>241</sup> Sovereignty compacts could also be tailored to reflect the different needs and aspirations of individual tribes and offer an exit option for tribes who can simply rescind the compact and return whatever delegated authority they received under it to the federal government.<sup>242</sup>

On the other hand, whatever authority tribes exercise under such compacts would be constrained by principles of federal sovereignty and preemption.<sup>243</sup> Compacts do not alter the constitutional foundations of American federalism or change its structure to admit Indian tribes; Papillon, when discussing the Canadian version of this model, calls compacts an “institutional adaption of the federal regime.”<sup>244</sup> While the limitations of this approach may increase its political salience overall, the individual negotiated sovereignty agreement’s replacement of state authority with tribal authority would likely create opposition. Compacts also offer little

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239. See Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1108 (2004) (concluding “federal government lacks a plenary, nationwide ‘Indian power,’” and arguing each tribe’s relationship with federal government should be considered individually).

240. On the theory that tribes enter into these negotiations with some “normative leverage” or “morally based power” based on their historic mistreatment at the hand of both federal and state governments, they might have a slight bargaining edge, which could increase if they share “authoritative norms” such as “fairness” and other norms that apply more specifically to the situation in which negotiation is occurring. Ryan, *supra* note 145, at 79 (“Finally, normative leverage is morally based power, compelling the parties in a certain direction based on shared authoritative norms, such as fairness, consistency, patriotism, honesty, and any other values that might apply more locally.”).

241. Hannum, *supra* note 132, at 495 (“[S]overeignty per se is not the solution, although sovereignty remains a valuable concept that Native Americans may use to argue for retaining residual and treaty rights. But both parties also need to recognize—in any relationship short of complete tribal independence—that defining the extent of respective governmental powers, requires mutual consent and the accommodation of often conflicting rights and interest.”). Hannum notes the “willingness” among states “to formulate new arrangements of autonomy, minority rights, delegated powers etc., that seek to arrive at realistic modes of power-sharing rather than to insist on formal delineations of sovereignty.” *Id.*

242. Erin Ryan cites the exit option as an element of genuine consent. Ryan, *supra* note 145, at 13 (For a compact to have “procedural legitimacy,” there must be genuine consent to the ultimate agreement by the parties. This can arise “when parties sufficiently understand their interests, can meaningfully opt out of the agreement, and are faithfully represented at the negotiating table.”).

243. Papillon, *supra* note 5, at 13 (discussing the use of compacts in Canada).

244. *Id.*

permanence, as Congress can renegotiate or modify them. Additionally, there is the very real prospect of vast differences in the contents of each sovereignty compact, depending on the bargaining acumen of the tribal negotiators, enabling differences and inequalities between tribes to emerge and become a source of discord among tribes.

4. *Reactivate the Treaty Clause and Apply it to Tribes as Though They Were Foreign Nations*

Frickey recommended the resumption of treaty-making<sup>245</sup> with Indian tribes.<sup>246</sup> He said doing that, whether under the authority of Article II of the Constitution or by agreements “ratified through bicameralism and presentment, would be a major step toward greater normative doctrinal and practical legitimacy” and would have more than “symbolic” value.<sup>247</sup> Julie Clement sees an added value of extending the simple label of “foreign” to Indian tribes and categorizing them with other independent nations.<sup>248</sup> This change would offset the poor historical record that the tribes have working with Congress.<sup>249</sup> It would also provide a basis for eradicating the label of “dependent nation,” as it would be “a contradiction in terms to exercise plenary power over a sovereign.”<sup>250</sup>

To Clement, a “step toward ‘foreign’ [is] a step away from ‘dependent’” and toward the goals of self-sufficiency and independence.<sup>251</sup> Francies Abele and Michael Prince call the approach advocated by Frickey and Clement “treaty federalism” and declare that relying on diplomatic communication “gives formal recognition to the mutual rights, autonomies,

245. U.S. CONST. art. II, § 2, cl. 2 (“He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .”).

246. A variation on this approach not discussed in this article, other than being briefly mentioned here, is Vine Deloria’s proposal that tribes should “seek the status of an international protectorate under the tutelage of the United States.” See VINE DELORIA, JR., *BEHIND THE TRIAL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE*, 252-55 (1974). In some ways tribes already are *de facto* international protectorates because of their small, weak status. See Hannum, *supra* note 132, at 492 (mentioning that Jackson “has suggested that small, weak states have become *de facto* international protectorates or ‘quasi state,’ i.e., no longer fair game for conquest (as would have been the case under traditional international law) but not really capable of exercising truly sovereign powers on their own.”) (citing ROBERT H. JACKSON, *QUASI-STATES SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD* (1990)).

247. Frickey, *supra* note 11, at 489.

248. Clement, *supra* note 11, at 681.

249. *Id.*

250. *Id.* at 679.

251. *Id.*

and obligations of sovereign communities.”<sup>252</sup> While, concededly, treaties cannot give one foreign state a share in the governance of another state, they might enhance tribal immunity from federal and state intrusion into the management of tribal affairs and provide tribes with a larger share of the social and economic pie.

Reactivating the treaty power with respect to federal-tribal relations is not quite as strange as it may sound, even though the federal government has not entered into treaties with Indian tribes since 1871.<sup>253</sup> Tribes never “voluntarily” relinquished their status as sovereign nations entitled to be engaged with through the treaty mechanism. They have never been “subordinates” of the United States, which is why they relied on treaties to determine their land base and assure their protection.<sup>254</sup> “Before any Europeans came to this country, Indian tribes were certainly foreign nations—foreign to all other nations and to each other.”<sup>255</sup> Clement argues that that situation has not changed, saying “[t]here is no evidence that Indian tribes’ foreign status has been withdrawn by treaty or statute, and there is at least an argument that a nation does not cease being foreign based solely on dependency.”<sup>256</sup>

Abele and Prince, however, question the application of “treaty federalism” in Canada, under which aboriginal governments and the Canadian Crown would be part of a “treaty-based alliance,”<sup>257</sup> because the concept does not require that aboriginal governments actually join the Canadian confederation. Instead, sovereign aboriginal governments would enter into separate relationships with the confederation, the terms of each one of which would be defined in a treaty.<sup>258</sup> They conclude that treaty

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252. Abele & Prince, *supra* note 13, at 582 (discussing the concept in the Canadian context). See also *id.* at 582 (“The Aboriginal idea of “treaty federalism” is not at all alien to the European tradition from which Canadian federalism emerged. Translated into the jargon of modern political science, a “treaty” relationship essentially means that the political, social and economic relations among sovereign nations are based on diplomatic agreements between the governments of these nations, and not on majority decisions based on the demographic weight that each nation possesses. There is no central government but only negotiated and contractual agreement among governments.”) (quoting Thomas O. Hueglin, 1993, *Exploring Concepts of Treaty Federalism: A Comparative Perspective*, INSTITUTE OF INTERGOVERNMENTAL RELATIONS 37 (1993)).

253. 25 U.S.C. § 71 (2006) (providing that “no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . .”).

254. Clement, *supra* note 11, at 665.

255. *Id.*

256. *Id.* at 666.

257. Abele & Prince, *supra* note 13, at 571.

258. *Id.* at 579.

federalism is unlikely to succeed as a way of enhancing the sovereignty of Canada's aboriginal peoples because it "appears to challenge the basic sovereignty of the Canadian state,"<sup>259</sup> making the approach probably unacceptable to the Canadian people. The public reaction in the United States might well be the same.<sup>260</sup>

Treaty federalism also potentially fractures the Union by riddling it with separate nations who could enter into treaties with foreign nations. This approach, more than any other discussed in the article, threatens the national security of the United States unless additional steps were taken to restrict the tribes' treaty-making authority to the United States.

Further, negotiating a treaty in many ways is no different than negotiating a federal-tribal sovereignty compact, where the success with which tribes engage in the process will depend on the same considerations that make the compact a success for the negotiating parties. Treaties are, after all, the end product of a negotiation in which parties compromise their goals. Therefore, there is no assurance that new treaties will end up benefitting all tribes equally, let alone tribes en masse. Even if they do, they will still require Senate ratification, which would be far from assured.

Additionally, since treaties cannot contravene the Constitution, it is unclear how a treaty could create co-equal sovereignty for tribes, let alone change the current constitutional sovereignty balance. Relying on treaty federalism as a means of enhancing tribal sovereignty also emphasizes differences between Indians and non-Indians, which could weaken a sense of "mutual responsibility and sharing connected with a common citizenship."<sup>261</sup> This might reduce the political salience of the approach.

Like any agreement, including those developed under the Compact Clause discussed previously, a treaty could require the development of new political and administrative institutions within tribes. While treaty federalism might prompt the creation of shared institutions to reflect the actual interdependence of tribes and the federal government and "shared

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259. *Id.* at 587. *See also id.* at 588 ("treaty federalism will most likely not become the main pathway to self-determination for Aboriginal peoples.").

260. One difference between the two countries is that the insistence of Canadian aboriginal peoples on the right of self-government stems from a uniquely Canadian source, the 1763 Royal Proclamation, which recognized two distinct political communities "coexisting in a territory and relating to each other with mutual respect." *Id.* at 580. Another basis for this insistence, according to Abele and Prince, is that the "Aboriginal-Canadian relationship was never transformed from a confederal one among sovereign nations to a federal one under centralized constitutional authority with residual powers' held by the Canadian government." *Id.* (quoting Hueglin, *supra* 252, at 9).

261. Abele & Prince, *supra* note 13, at 582 (discussing the concept in the context of the Canadian federation and aboriginal demands for greater self-determination).

jurisdiction over resources and the practical benefits of cooperative arrangements,”<sup>262</sup> these arrangements would require negotiation and run the risk of unsatisfactory resolutions for tribes. Additionally, the exit option for tribes from a treaty would be much more difficult to achieve than under a compact. The problems with this approach under the evaluation criteria, despite its emotional appeal to some scholars and the fact that it implicitly grants tribes separate nation status, make it unviable.

In sum, not one of the approaches based on the use of existing constitutional authority advances the tribes’ sovereignty cause much, if at all. Further, if any approach did advance tribal sovereignty—like using the Treaty power to make tribes more like the federal government and less like states—the approach would probably provoke political opposition. Under the Enclave, Compact, and Territories Clauses, power would continue to flow from Congress and thus lack permanence and retain its federal character.

Even the Treaty Clause, which offers the clearest route to enhanced sovereignty for tribes, would be extremely difficult to implement given how many tribes there are and the differences among them. Negotiating treaties like compacts could exacerbate those differences depending on the bargaining acumen of the tribal negotiators. Treaties might increase the federal benefits that tribes now have and might improve their bargaining posture vis-à-vis the federal and state governments and, once negotiated, the benefits derived under them offer the most permanence of the options discussed.

But, tribes bring little to the bargaining table that would either induce the federal government to enter into treaties with them, let alone negotiate terms that are favorable to tribes that Congress would then ratify. Tribes who successfully negotiate treaties with the federal government begin to look like nations within a nation: an image that runs the risk of fracturing the Union as well as raising national security concerns. Since none of the proposed solutions to diminished tribal sovereignty that relies on existing constitutional authority passes muster under the four evaluation criteria, it is time to see if the Constitution might be amended in a way that solves the problem. The next part looks at three such amendments.

## B. AMENDING THE CONSTITUTION

Anything that requires an amendment to the Constitution is problematic—the process is cumbersome and time-consuming, the results

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262. *Id.* at 583.

uncertain.<sup>263</sup> The few times the Constitution has actually been amended (twenty-seven amendments involving seventeen separate instances) shows “an unusual degree of concern for the document’s stability,” as well as “a pervasive veneration of the Constitutions’ origins and in Americans’ general reluctance to alter it.”<sup>264</sup> “For a constitution to create a democratic system that will remain democratic . . . the constitution’s authors must not only erect a framework of government, but must also ensure the stability of that framework, entrenching it to protect it from the very government it will empower”—in other words, it has to be more difficult to change constitutional text than to amend ordinary law for the original “constitutional endeavor” to succeed.<sup>265</sup> One way of distinguishing constitutions from regular laws, therefore, is “their higher degree of formal entrenchment.”<sup>266</sup>

On the other hand, the amendment process provides an educational opportunity for proponents to educate the public about the wisdom of and need for the amendment and for the ultimate decision to gain broad-based political support, as well as assure a constitutional basis for it. Although a majority decision of the Supreme Court<sup>267</sup> or shifts in popular opinions can change how constitutional text should be read and applied, the only way to permanently change the actual words in the Constitution is through Article V.<sup>268</sup> Arguably the most important reason for “amend[ing] the Constitution to clearly define the place of Indian tribes within our federalism” is that it “would be the right thing to do”<sup>269</sup>—a view shared by Skibine and Frank

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263. Amending the constitution requires a formal supermajoritarian process consisting of congressional action and ratification by three quarters of the states. *See* U.S. CONST. art. V; *see also* Primus, *supra* note 177, at 1100; Versteeg & ZACHIN, *supra* note 186, at 21 (commenting that the U.S. Constitution is amongst the hardest to amend of all constitutions in the world).

264. Versteeg & ZACHIN, *supra* note 186, at 21. Versteeg and ZACHIN compare this low rate of amending the federal Constitution to the high rate of amendments to state constitutions, and they report that forty states enacted 8,267 amendments from 1776 to 2005. *Id.* at 46 n.249.

265. *Id.* at 42.

266. *Id.*

267. Primus, *supra* note 177, at 1100.

268. *Id.* at 1114. Other factors that might tilt toward formal constitutional amendment are the clarity of the text the proponents want to revise, its visibility, salience, and the consistency of its interpretation over a sufficiently long period of time to make any change seem less like a departure from constitutional text and more like “the recovery of a correct but now-lost reading.” *Id.* at 1103 n.59 (discussing the circumstances requiring the use of Article V, if change cannot be achieved through the judicial process when “the Court is standing up for a nontextual rule that is broadly unpopular outside the Court.”).

269. Skibine, *supra* note 33, at 45. Because Skibine is pessimistic that this will never happen, he tasks the Court with “finding a way to fit Indian nations into our constitutional structure.” *Id.*

Pommersheim, who believe the only way for tribes to be incorporated into our federalism is through a constitutional amendment.<sup>270</sup>

While some of the proposals discussed in this section are startling, none creates a constitutional revolution.<sup>271</sup> Rather, each is more consistent with a theory of constitutional evolution, reflecting the fact that “all constitutions are crafted over time,” their connotation gradually “determined by a dynamic fueled by their internal tensions and contradictions and their confrontations with a social order over which they have limited influence.”<sup>272</sup> The extra-constitutional status of Indian tribes creates just such a tension and invites confrontation with a social order that currently excludes or dominates them in a way that is inconsistent with this country’s animating principles.

Each of the proposals discussed in this section is designed to give tribes a place in the legislative process while respecting the existing electoral system.<sup>273</sup> Such systems “are notoriously difficult to change, primarily because those people most able to make reforms are the beneficiaries of the status quo and thus unlikely to push for a new system.”<sup>274</sup> Nonetheless, several of these proposals push the boundaries of those systems to achieve a measure of electoral justice for tribes. “[E]lections implicate, and seek to realize, a range of democratic values,” including “the political equality of

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270. Skibine, *supra* note 43, at 690 (agreeing with Pommersheim’s recommendation that a constitutional amendment is the best way to fit Indian tribes within the federal structure, to which Skibine adds such an amendment is “also probably necessary to accomplish a full constitutional incorporation within Our Federalism.”).

271. Gary Jeffrey Jacobsohn, *Revolution or Evolution: The challenges of Constitutional Design*, 48 TULSA L. REV. 235, 242 (2012) (book review) (a constitutional revolution occurs when there is a “paradigmatic displacement in the conceptual prism through which constitutionalism is experienced in a given polity.”).

272. *Id.* at 244.

273. However, working within the existing system has produced very few Indian members of Congress and only one U.S. Senator—Senator Ben Knighthorse Campbell—who was elected in 1993 from Colorado. Martin, *supra* note 3. A current republican senatorial candidate from Oklahoma is encountering thinly veiled racist opposition questioning his identity as an Oklahoman and loyalty to the United States. *Id.*

274. Knight, *supra* note 66, at 1071. This article does not propose changing the basic structure of the electoral system in the United States, which is currently a single member plurality system in which the candidate who wins a plurality of the votes in that district is elected to Congress. For articles proposing changes to that system, see Rob Richie & Andrew Spencer, *The Right Choice for Elections: How Choice Voting Will End Gerrymandering and Expand Minority Voting Rights, from City Councils to Congress*, 47 U. RICH. L. REV. 959 (2013); Lauren R. Weinberg, Note, *Reading the Tea Leaves: The Supreme Court and the Future of Coalition Districts under Section 2 of the Voting Rights Act*, 91 WASH. U. L. REV. 411 (2013). Trevor Knight blames this system for the under representation of Canada’s aboriginal peoples in that country’s parliament, especially because of their geographically dispersed condition, noting the difference between aboriginal peoples and, for example, “geographically concentrated ethnic communities.” See Knight, *supra* note 66, at 1068-69.



all citizens . . . and ensur[e] that minorities are represented adequately in the halls of power.”<sup>275</sup> Indian tribes have a “unique claim” to electoral justice based on “their ancestors having been the original inhabitants of the land, their status as identifiable nations, and their treaty relationships with the federal government.”<sup>276</sup>

Representation in Congress “is a necessary condition for assessing the full practical benefits of participation in that political order.”<sup>277</sup> Without congressional representatives, there is no one who will give voice to tribal concerns, reflect those needs in the legislative process, or help tribal members with problems regarding the federal bureaucracy.<sup>278</sup> Lack of participation in Congress means tribes have less political influence in that body’s decision-making process, and it prevents tribes and their members “from fully accessing the benefits of a democratic system.”<sup>279</sup> While greater representation in Congress would not necessarily “undo the wrongs of the past” done to tribes, it would “provide both short-term benefits and another avenue of dialogue and deliberation to be used in an effort to improve” their future.<sup>280</sup>

Several of the proposals examined in this part of the article come from other countries with indigenous populations. As enticing and useful as some of them are in advancing understanding of the complexity involved in their implementation, it is important to remember that the historical, social, and legal context of indigenous peoples in those countries is quite different from the United States. These differences, therefore, constrain the wholesale adoption of foreign proposals without a more rigorous analysis than this article proposes to do. Nonetheless, these non-United States approaches show that other countries are actively exploring ways to empower their indigenous peoples to protect and further their self-interest, which might give this country some incentive to do likewise. These foreign solutions can also be instructive in helping to shape an eventual solution to the problem of diminished tribal sovereignty in this country and broaden

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275. Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 356 (2014).

276. Knight, *supra* note 66, at 1065 (“Although other identifiable groups in society may have legitimate political claims for guaranteed representation in Parliament, the claim of Aboriginal people is the strongest.”).

277. *Id.* at 1066 (discussing representation of aboriginals in Canada’s parliament). *See also id.* (“[T]he most likely positive results would stem from the legislative learning process that other M.P.’s would go through when faced with a larger number of Aboriginal colleagues.”).

278. *Id.* at 1068.

279. *Id.*

280. *Id.* at 1066 (discussing Canada’s aboriginal peoples and a proposal to increase their representation in Parliament).

awareness of the indirect benefits that might be achieved by any change in majority governance to improve the status of Indian tribes.

The article subjects the proposed solutions presented below to the same criteria applied to the approaches based on existing constitutional text that were discussed above. Two additional criteria spring from the nature of the amendment process. First, the essence of any textual amendment must be “compatible with the document’s aspirational content,” *i.e.* consistent with “directives enshrined in key textual provisions” of the Constitution.<sup>281</sup> To the extent the proposals are designed to eliminate barriers to the benefits of citizenship, such as participating in the electoral process, that criterion is easily met.<sup>282</sup> The second criterion—that any textual change must occur “in an orderly legal manner”—should be assured by following the textual guidance for amending the Constitution.<sup>283</sup>

### 1. *Creation of a Tribal State(s)*<sup>284</sup>

The concept of a tribal state is not new. President Washington recommended that American Indian law focus on giving Indian tribes statehood status in the western lands,<sup>285</sup> and the concept was being

281. Jacobsohn, *supra* note 271, at 235.

282. See Sari Horwitz, *Justice Department considers making request that would add polling sites to tribal lands*, WASH. POST, June 9, 2014, <http://www.washingtonpost.com/world/national-security/justice-department.com> (“Standing by as Native voices, for whatever reason, are shut out of the democratic process is not an option . . . . This proposal would give American Indians and Alaskan Natives a polling place in their community, somewhere to cast their ballots and ensure their voices are heard—something unremarkable to most other citizens.”) (internal quotations omitted).

283. Jacobsohn, *supra* note 271, at 235.

284. This proposal is different from tribal territorially-based rights to off-reservation resources which can raise issues of co-management of “overlapping territory”—what Biolsi describes as “heteronomous political space in which more than one sovereign may exercise jurisdiction in coterminous space and in which political space itself is discontinuous.” Biolsi, *supra* note 1, at 247. Different also from the creation of what Biolsi calls “national indigenous space,” involving “supratribal indigenous rights within an inclusive space that ultimately spans all of the territory of the contiguous United States.” *Id.* at 240. Biolsi cites, as an example of “national indigenous space,” the American Indian Religious Freedom Act Amendments of 1994, 42 U.S.C. § 1996(a), stating this law produces a Native space in which Indian people have indigenous rights across the national landscape, not just within reservation enclaves and noting the existence of “[s]imilar national indigenous rights for Indians codified in federal law include access to eagle feathers in an exemption from the Bald and Golden Eagle Protection Act (16 U.S.C. § 668(a)) and the right to a protected status for use of the phrase Indian made in the sale of artwork and crafts (Indian Arts and Crafts Act of 1990, 18 U.S.C. § 1159).” *Id.* at 248. Biolsi makes the point that these forms of what he calls “portable Indian status” allow urban Indians and those Indians who do not live on reservations to retain their identity and legal status as Indians as well as the right to practice their “indigenous cultures”—“their claim to Indianess”—even when they are surrounded by non-Indians. *Id.*

285. Fletcher, *supra* note 46, at 165.

discussed well into the next century.<sup>286</sup> Since the new tribal state or states would be created out of an existing state, unless Congress or the state within whose borders the new state would be created consented, an amendment to the Constitution is required.<sup>287</sup>

A separate fully autonomous tribal state could be vested with the same powers as non-Indian states and could accrete jurisdiction and authority now resting in the federal government and the states.<sup>288</sup> The new tribal state would be entitled to full representation in both the Senate and the House and thus would be fully integrated into structure of governance on a parallel with non-tribal states. One advantage that Canada has over the United States in making this approach work is that since “[b]and councils and other Aboriginal forms of governance are viewed as a part of the constitutional structure of Canada in a similar manner to the federal and provincial orders of government,”<sup>289</sup> the transfer of jurisdiction and authority to aboriginal bands could occur within the same constitutional framework that includes Canadian provinces without amending the underlying charter. This is not the situation in the United States.

Abele and Prince examine the creation of a new province representing Canada’s entire aboriginal population.<sup>290</sup> They call this approach “adapted federalism” because it requires the creation of a “new form of public government.”<sup>291</sup> Their proposed new province would collect “all the

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286. See generally GEORGE A. SCHULTZ, AN INDIAN CANAAN, ISAAC MCCOY AND THE VISION OF AN INDIAN STATE (1972).

287. U.S. CONST. art. IV, § 3, cl. 1 (“New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”). See also Skibine, *supra* note 43, at 689 (“[T]he ultimate question is whether the current political incorporation, based on a plenary power paradigm, can be changed to at least a quasi-constitutional incorporation based on a self-determination paradigm. The first question is whether Congress has the plenary power to incorporate the tribes as a third sovereign within Our Federalism. One argument against the possibility of such constitutional incorporation is that while Congress can add new territories, Congress can only incorporate such territories as federal territories or as states.”).

288. Abele & Prince, *supra* note 13, at 578 (“The view of public power in this model is that the totality of legislative powers is vested with the federal and provincial governments. Through treaty negotiations, interim measures, administrative arrangements, and policy innovations, certain jurisdictions and authorities can be transferred to Aboriginal governments and institutions.”).

289. *Id.*

290. *Id.* at 575. The authors note that one province—Saskatchewan—is becoming an aboriginal province because of demographic changes. *Id.* (“[T]he existing province of Saskatchewan is well on the way to becoming an Aboriginal province in at least one sense: demographic projections indicate that Aboriginal people will probably form the majority of the electorate of the province by the middle of this century.”).

291. *Id.* at 574 (“[A]dapted federalism’ does incorporate a significant change: creation of a new form of public government as a consequence of the renegotiation of an Aboriginal collectivity’s relationship with the federation.”).

disparate Aboriginal nations and peoples, in all their various political forms, into one body for the purpose of participation in the federation.” But because the new province would not have a single contiguous territory, it would be unique in the Canadian federal structure.<sup>292</sup>

The authors admit that the approach would create difficult implementation problems given the differences among Canada’s First Nations.<sup>293</sup> They speculate that existing provinces would oppose the creation of a new province because it would dilute their power and their respective share of the federal fiscal pie,<sup>294</sup> and they predict the general public might object to such “a large change in Canada’s constitutional order.”<sup>295</sup> Additionally, the proposal creates the allusion, perhaps the reality, of “race-based governments or ethnic enclaves,” as well as the loss of private resource development opportunities in those reserves, if land is transferred out of the public domain to the new tribal province.<sup>296</sup> All these concerns are potential sources of public opposition in the United States.

Conversely, the authors suggest that there would be obvious benefits to creating a fully empowered aboriginal province and incorporating it “as a new order” into Canadian federalism. These include eliminating tensions between the federal, provincial, and aboriginal governments and the “unacceptable social conditions that keep Indian peoples from contributing to the country’s progress.”<sup>297</sup>

If Aboriginal peoples are to exercise their self-governing powers  
within the context of Canada’s federal system, then federal and

292. *Id.* at 575.

293. *Id.* (identifying the questions to be answered: “[H]ow to organize elite representation of such a varied population? Given the variety of governing forms, how to distribute funds within the province?”). See also Dorris, *supra* note 27, at 63 (“Perhaps it is inevitable that no single individual, the product of a particular tribe and experiential background can successfully represent such a diversity of interests . . .”).

294. Abele & Prince, *supra* note 13, at 587 (“It is unlikely, as discussed earlier, that there will be much Aboriginal demand for ‘adaptation’ of the federation by creating new provinces or territories. Should such demand surface—from Labrador perhaps, where residents note that the level of public-sector funding for infrastructure is much better in the territories—provinces would likely accept a new territory (which would remain a federal fiscal responsibility) but resist a new province. They would be concerned about dilution of provincial power and the financial implications of sharing the equalization pie with what would almost certainly be another have-not province.”).

295. *Id.* at 587.

296. *Id.* at 579. Another reason that Abele and Prince cite is the loss of property tax revenue, which does not apply to Indian lands because those lands are not taxed. Abele and Prince see the overall effect of such a proposal to be the “fragmentation rather than convergence” of Canada, which would not be a good thing. *Id.* at 587.

297. *Id.* at 579 (adding “[i]n a democratic age, it is incongruous to maintain any people in a state of dependency. Ending dependency would stimulate self-confidence and social regeneration.”) (internal quotation mark and citation omitted).

provincial governments must make room for this to happen. Instead of being divided between two orders of government, government powers will have to be divided among three orders. This is a major change and one that will require goodwill, flexibility, co-operation, imagination and courage on the part of all concerned.<sup>298</sup>

In the United States, given the constitutional prohibition against the creation of a new state within the jurisdiction of an existing state, a constitutional amendment would be necessary to create any tribal state. Assuming that such an amendment was possible, the dilemma of which tribes might qualify for statehood status, how many tribal states should be created, and which states would lose land to a new tribal state(s) all still remain.<sup>299</sup> One less administratively complex, constitutionally fraught, and more politically salient approach might be to adopt Abele and Prince's idea of aggregating all tribes into a single "virtual" province, here a virtual state, thus skirting the constitutional problem, assured resistance, and the administrative complexities of creating an actual new state.<sup>300</sup>

The tribal state approach fits tribes within the existing federal framework and brings them into the Constitution by making them co-equal sovereigns with the states, thus enhancing their power and sovereign status. But, the approach presents significant practical problems in trying to determine how many new tribal states should be created, what tribes they might encompass, what would happen to non-Indian in-holdings on tribal lands, and whether individuals in tribal states would necessarily elect tribal Senators and representatives as opposed to non-Indian ones. Further, the approach does not address the problem of landless or urban Indians, unless those individuals are affiliated with a particular tribe, and it would likely be opposed by states that might view the approach as reducing their power base. Finally, states based on tribal identity would be ethnic-based political units of which there are no others in this country.

## 2. *Reserved Congressional Tribal Seats*

One way to enhance the political effectiveness of sub-national groups like Indian tribes is to give them voting representation in the House of

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298. *Id.* at 578 (quoting *Final Report*, ROYAL COMMISSION ON ABORIGINAL PEOPLES 2:5 (1996)).

299. *Id.* at 577.

300. The idea of a virtual state is revisited in the form of a single nationwide virtual electoral district later in the article.

Representatives by reserving or dedicating specific seats for them. Interestingly, the concept of dedicated Indian seats is not entirely foreign to this country. Maine has had Indian representatives in dedicated seats in its state legislature since 1823 (Penobscot Nation) and 1842 (Passamaquoddy Tribe),<sup>301</sup> and Wisconsin's legislature has studied the concept.<sup>302</sup>

Tribal representatives can proffer an Indian perspective on issues of importance to Indians like environmental protection, use of natural resources, health, education, and social and criminal justice.<sup>303</sup> Incorporating tribal representatives into the House also moves that body closer to "mirror representation,"<sup>304</sup> where "the characteristics of the representative body mirror[s] the characteristics of those being represented."<sup>305</sup> Mirror representation assumes that "people must share certain characteristics to understand fully the perspective of others with those characteristics" and that no amount of empathy can enable a person without those characteristics to "jump the barriers of experience." Even if some representatives could jump that barrier, "they could not be trusted to do so to promote minority interests."<sup>306</sup>

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301. S. Glenn Starbird, Jr. et al., *supra* note 220 (noting that this situation probably predated the Revolution). Indian representatives of these two tribes served continuously until 1941, when for a brief period they were ousted from "the Hall of the House"; their status reduced to little better than state paid lobbyists. *Id.* Speaking and seating privileges were restored in 1975. *Id.* The ouster occurred after an attempt to place the Indian representatives on a nearly equal footing with non-Indian representatives. *Id.* In 1996, tribal representatives for the first time in the state legislatures entire history, sponsored a Native Bill (An Act to Place Penobscot Land in Trust), which was enacted. *Id.* A rules change in 1999, allowed the tribal representatives to co-sponsor any bill statewide. *Id.* A third band of Indians—the Houlton Band of Maliseet Indians—were added to the Joint Rules in 2010 when the 125th Legislature adopted rules changes granting that band the same privileges as the other two tribes, including: seats on the floor of the state House of Representatives, the privilege of speaking on pending legislation with the speaker's consent, and the right to serve on any joint standing committee as non-voting members. *Id.* In any report of a committee on which a tribal member serves, their position must be noted and included. *Id.* Going further, by granting tribal representatives full voting rights, might have violated both the Maine and the United States constitutions. *Id.*

302. *Id.* (discussing Wisconsin, New Brunswick, and New Zealand legislatures' reviewing the representative status of their respective aboriginal tribes). New Zealand has had a system of guaranteed legislative representation for its Maori people since 1867. Knight, *supra* note 66, at 1073.

303. Glynn Evans & Lisa Hill, *The Electoral and Political Implications of Reserved Seats for Indigenous Australians*, 47 AUSTL. J. OF POL. SCI. 491, 492-93 (2012).

304. *Id.* at 492. Mirror representation, besides improving representation for minority groups in governing bodies, also increases these groups' "electoral salience, group pride and trust in government." *Id.*

305. *Id.* See also Stephanopoulos, *supra* note 275, at 314 ("The essence of [minimalist] democracy . . . is that the interests (preferences, values, opinions) of the population . . . be represented in government.") (quoting RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 165 (2003)).

306. Knight, *supra* note 66, at 1084.

Taking the additional step of reserving or dedicating those seats for tribal representatives is a way of offsetting Indians' lower population numbers and addressing "the legacy of their historical dispossession."<sup>307</sup> Guaranteed separate representation for indigenous peoples can achieve "a certain minimum guaranteed level of representation" as well as affirm their "political distinctiveness."<sup>308</sup> Adding dedicated tribal congressional seats might sensitize non-Indian members of Congress to the unique perspective of Indians as well as their goals and needs.<sup>309</sup> Tribes would become direct players in the legislative process, where they are now outside observers at most. Their presence in Congress would help ensure "that issues of concern to minorities [e.g. Indians] stay on the political agenda" and, through the "moral force" they bring, they would be a reminder to the government "to act in a way sensitive to the concerns" of Indians.<sup>310</sup>

Bringing indigenous voices into the lawmaking body thus helps assure that its actions are representative of the full "range of identities that constitute a society" and the ultimate actions of that body will be more just.<sup>311</sup> Speaking with respect to Australia's aboriginal peoples and the country's governing institutions, John Chesterman commented that "[a] political system has legitimacy problems when the most historically significant and perennially most marginalized and disadvantaged minority group is unable to have a single representative in the federal Parliament."<sup>312</sup>

That said, adding reserved tribal seats to the House of Representatives would require an amendment to the Constitution, as it radically changes the current population-based representational model for the House found in the Constitution.<sup>313</sup> Not amending the Constitution to achieve this result might

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307. Evans & Hill, *supra* note 303, at 493. Evans and Hill report that the New Zealand experience with reserved seats has increased the voting participation of Maori citizens and improved "levels of political efficacy and trust in government." *Id.*

308. Knight, *supra* note 66, at 1075.

309. *Id.* at 1081.

310. *Id.* at 1079.

311. John Chesterman, *Chosen by the People? How Federal Parliamentary Seats Might Be Reserved for Indigenous Australians without Changing the Constitution*, 34 FED. L. REPT. 261, 265 (2006). See also Stephanopoulos, *supra* note 275, at 314 ("Madison wrote that 'it is particularly essential that [the House] should have an immediate dependence on, and an intimate sympathy with, the people.'") (quoting THE FEDERALIST No. 52 (James Madison), at 347 (Harvard Univ. Press ed. 2009)).

312. Chesterman, *supra* note 311, at 284.

313. U.S. CONST. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."). Similar problems are not created for tribal representation in the Senate, as each state is entitled to two Senators regardless of population. Section 5 of the Fourteenth Amendment authorizing Congress to "enforce, by appropriate legislation, the provisions" of the Amendment, raises an interesting question as to whether that

run afoul of the Equal Protection Clause's "one person, one vote principle"<sup>314</sup> because according tribal representatives full membership in the House would dilute the votes of those members who have been duly elected based on population. Another constitutional problem, which could only be cured by amendment, might arise from tribal representatives being elected according to traditional methods for selecting tribal officers and thus not be selected in accordance with Article I, clause 3. This would mean that they cannot be full "members" of the House of Representatives, entitled to vote.<sup>315</sup> A further inequality, unless corrected for, would be introduced by tribal electors having two votes for their representative(s) in every election, as they also are regular electors in general elections.<sup>316</sup>

Moreover, there are logistical problems with dedicating specific seats for tribal representatives.<sup>317</sup> For example, how many dedicated indigenous seats in relation to non-indigenous seats should there be, and how should those representatives be elected—during the general elections or at special elections?<sup>318</sup> Could tribal members vote for tribal representatives and non-Indian representatives? Would every state or voting district have a reserved

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language gives Congress the latitude to interpret the Amendment in a way that allows for designated tribal seats in the House. U.S. CONST. amend. XIV, § 5.

314. *Reynolds v. Sims*, 377 U.S. 533, 558 (1964).

315. *Michael v. Anderson*, 817 F. Supp. 126, 140 (D.D.C. 1993) (holding that allowing territorial representatives to vote in the Committee of the Whole constituted an exercise of legislative power and was, therefore, unconstitutional but for the presence of a savings clause which allowed for a *de novo* vote by the full House excluding the territorial representatives, if there vote was decisive).

316. This distinguishes tribes from non-voting representatives from those U.S. territories who only get to vote because they have no other representatives in Congress. *Starbrid et al.*, *supra* note 301. *See also Michael v. Anderson*, 14 F.3d 623, 623 (D.C. Cir. 1994) (holding the House Rule that allowed territorial delegates to vote in the Committee of the Whole constitutional because it does not "bestow membership" on those delegates). In New Zealand, Maoris are allowed to vote for either a general constituency seat or for a separate Maori seat, of which there are five. *Knight*, *supra* note 66, at 1075.

317. *Evans & Hill*, *supra* note 303, at 495. *See also id.* at 498-500 (illustrating the complexity of this process in Australia). *See also Chesterman*, *supra* note 311, at 280-84 (identifying three solutions each for the Australian Senate and three for its House of Representatives: (1) An indigenous Senator for each state; (2) an Indigenous Senator for states with high Indigenous populations (could lead to under-representation of some Indigenous people); (3) three Indigenous Senators elected on a rotating basis (complicated); (4) six Indigenous House of Representative seats (each state would have one Indigenous member of the House of Representatives); (5) four Indigenous House of Representatives seats (allotted to only those states with large Indigenous populations, which could lead to same under-representation as the Senate proposal); (5) four Indigenous House of Representatives seats where all indigenous electors could vote for a representative and allow entire states to join together to create one electorate such that seats created under this approach would not be 'parts' of different states, but created out of the "entirety of different States.") (emphasis contained in original).

318. *Evans & Hill*, *supra* note 303, at 493-94. *Evans and Hill* have tried to map out how this would work in Australian elections. *See id.* at 495.



tribal seat, regardless of the percentage of Indians in the relevant population?<sup>319</sup> Since there are probably fewer tribal voters in each election district when compared to the general population in the surrounding area, it may be hard to justify any dedicated seats for tribal representatives.<sup>320</sup>

Another potential objection to this solution is that there might be too few reserved tribal seats to make a difference.<sup>321</sup> This could result in tribal representatives being marginalized because they might have problems securing the support of the two major parties,<sup>322</sup> thus not fulfilling the goal of enhancing tribal sovereignty.<sup>323</sup> This problem might be offset by giving a tribal representative a weighted vote, which might have political salience because it would enhance the attractiveness of tribes to non-Indian interest groups. A weighted vote would increase the tribes' ability to logroll to their economic and political advantage, although it would not give them a superior advantage to other interest groups or political units. However, according tribal representatives weighted votes, although morally defensible from an historic perspective and practicably understandable as a means of enhancing the ability of tribes to participate in the legislative process, might well generate political and public opposition to the appearance of special treatment.

What's more, the creation of reserved tribal seats could create problems for urban Indians who are not attached to a separate land base and

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319. *Id.* at 502 (discussing the special problems in Tasmania).

320. *Id.* at 492. *See also* Chesterman, *supra* note 311, at 267 ("New Zealand has reserved seats for Maori since 1867, and currently reserves for Maori representatives seven out of a minimum 120 parliamentary seats.").

321. The increasing political clout of tribes has been reflected in their growing political contributions and has created its own backlash. *See* Martin, *supra* note 3 (quoting Keith Gaddie, a University of Oklahoma political science professor, as saying "[m]ost people didn't worry about the Indians in part because they were everywhere, they sort of looked like everybody else . . . Nobody cared about Native Americans until they got money."). The tribes make no secret of the fact that they want a tribal member in the Senate. *Id.*

322. Evans & Hill, *supra* note 303, at 493-94. For example, their small number and lack of power within the majority party may prevent tribal legislators from influencing the legislative agenda set by party leadership. Additionally, tribal legislators may be placed on committees of limited importance; and supermajority voting rules and the importance of the Senate also give power to the dominant party, as does the need to align the President with the tribal legislators' agenda. *See* Stephanopoulos, *supra* note 275, at 364. Although these remarks were made with respect to the lack of legislative power of the "median legislator"—the legislator who occupies the middle as opposed to an extreme position—they could apply equally to tribal legislators. *Id.*

323. Chesterman, *supra* note 311, at 266 (referring to his problem as "tokenistic."). *See also* Knight, *supra* note 66, at 1080 ("There is the potential for something deeply problematic in the election of representatives who in the end can be outvoted or ignored on any given issue."). *But see* Chesterman, *supra* note 311, at 266 (disagreeing, and saying disempowerment would only occur "if the representatives were to have observer and not voting status.").

are integrated into the non-Indian voting population.<sup>324</sup> The existence of dedicated tribal seats could lessen the obligation of non-tribal members to take account of the perspective of Indians in the legislative process.<sup>325</sup> Since occupants of the tribal seats might vote more often with the Democratic Party because of its greater alignment on issues of concern to tribes, the sudden appearance of reserved tribal seats could change the current balance between the two dominant parties, which would trigger opposition from whichever party that felt its power base was being eroded.<sup>326</sup> Adding dedicated tribal seats would also reduce the number of non-Indian House seats, which might trigger voter opposition in those states whose non-ethnic based congressional seats would be transformed.

In addition, there may be a justified fear that the presence of these groups could “balkanize” the legislature, as other “marginalized” groups might seek special status based on ethnicity, sexual orientation, or religious customs.<sup>327</sup> Counter arguments that Indian tribes “present a unique case for guaranteed representation” because they have political coherence as tribes, because as “prior occupants of the land, they exercised sovereignty over the territory before the appearance of Europeans,” and because some of them are still in treaty relationships with the federal government, may not prevail.<sup>328</sup> Flooding the legislature with dedicated seats based on unique minority interests might further institutionalize the fragmentation of the legislature into voting blocs based on each group’s perceived interests instead of the broader public good.<sup>329</sup>

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324. Evans and Hill propose that urban Indians be given a choice of voting in any dedicated tribal district, even though it is not their own, or vote in the unrestricted voting district in which they live. Evans & Hill, *supra* note 303, at 499. However, this solution adds to the complexity of any designed structural solution to the problem and could weaken the strength of dedicated tribal voting districts.

325. Knight, *supra* note 66, at 1080. Knight reports that critics of affirmative districting in the United States “complain that it leads to ‘ghettoization’ or political marginalization of minorities.” *Id.*

326. Evans and Hill reach this conclusion with respect to Aboriginal candidates more likely to align themselves with the Labor Party. Evans & Hill, *supra* note 303, at 496.

327. See Knight, *supra* note 66, at 1088 (“The histories of racism and discrimination faced by Aboriginal people in Canada and African-Americans in the U.S. have created politically salient identities centered on these characteristics, and the same factors that create the political identity often prevent that identity from finding proportionate expression in the present system.”). See also *id.* (“The evidence that does exist in Canada, however, combined with the evidence of the importance of race in the United States, suggests that groups that have been the subject of systemic racial discrimination have legitimate claims of separate representation.”).

328. *Id.* at 1091.

329. Chesterman, *supra* note 311, at 266. *But cf. id.* at 284 (explaining that tribes who are “uniquely identifiable group[s] with unique historical claims and particularly pressing policy needs” should not cause the door to open wider to other demands for special status, and asserting

Taking balkanization a step further, the idea of special seats reserved for individuals of a particular ethnic identity might perpetuate racial distinctions in American society and amount to “a form of political apartheid.”<sup>330</sup> Insisting that only members of the same group can represent the interests of that group “essentialize[s] individuals to one identity, be it race, gender, or language” when in actuality people have “many identities, and it is impossible to say which will be most politically salient on any given issue.”<sup>331</sup> The proposal also requires ignoring “cleavages” and differences between tribes and between tribal members who live on reservations and Indians who live in urban areas and are unaffiliated with a particular tribe.<sup>332</sup>

Finally, the proposal may alienate tribes who consider themselves to be independent sovereign nations; such tribes might view their participation in the governance structure of the dominant society as legitimizing the colonial state and its institutions.<sup>333</sup> Guaranteed representation in Congress would be inconsistent with the nation-to-nation status that they ascribe to, especially because it could result in the assimilation of tribes into the majority electorate. In this view, specialized tribal election districts would serve as little more than “an electoral device” to bring the experience of “differentiated [tribal] citizenship” into unwanted “full participatory status” in Congress.<sup>334</sup> For those tribes, their membership in the legislative body of another nation would be inappropriate, as would compelling compliance with state electoral rules and state-run elections.<sup>335</sup> Sovereignty to those tribes suggests that tribal representatives would be mere “ambassadors” to Congress since they could not actually be members.<sup>336</sup>

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that “a special case exists for Indigenous Australians to have proportionate representation in the national governing body.”).

330. Knight, *supra* note 66, at 1083.

331. *Id.* at 1084.

332. *Id.* at 1088 (admitting that any proposal based on “a proportionate number of guaranteed Aboriginal seats will end up subsuming a number of salient political differences” within any single election district).

333. Catherine J. Iorns, *Dedicated Parliamentary Seats for Indigenous Peoples: Political Representation as an Element of Indigenous Self-Determination*, 10 MURDOCH U. ELECTRONIC J. OF L. 1, 14 (2003). See also Knight, *supra* note 66, at 1092 (“Many Aboriginal people do not participate in elections precisely because they do not recognize the authority of the Canadian state, and it is felt that exercising the franchise would constitute such a recognition.”). See also *id.* at 1093 (“What it boils down to is we are saying, we are a nation and, by becoming part of someone else’s system, we are going to give that up.”) (quoting G. Hamilton, *Chiefs Reject Offer of Guaranteed Seats in N.B. Legislature: Unanimous in Opposition*, NAT’L POST, March 23, 1999, at A5)).

334. Knight, *supra* note 66, at 1093 (internal citation omitted).

335. Iorns, *supra* note 333, at 9.

336. *Id.* at 10.

Effectiveness, implementation challenges, inclusiveness, and political salience may be serious problems with dedicated tribal seats in Congress. The approach might additionally create instability within Congress, if the numbers became large enough to create a voting bloc of tribal representatives. Thus, the formation of tribal states and the creation of dedicated tribal congressional seats are both problematic. Both would do little to enhance the power of tribes to protect their interests in Congress unless their numbers were sufficiently large to constitute a meaningful voting bloc—the achievement of which might end up being insufficiently inclusive of both Indians and non-Indians, and create divisions among tribes.

Norway has taken a slightly different tack and established a separate parliament in 1989 for its indigenous peoples, known as Sami.<sup>337</sup> The reason given for not integrating Sami into the Norwegian Parliament is that the small size of the Sami population (less than 1% of the country's total population) makes it inappropriate<sup>338</sup>—a reason that resonates here.<sup>339</sup> The Norwegian Sami Parliament meets four times a year. Its thirty-nine representatives are elected by Sami members of the Norwegian population enrolled in an electoral register just for Sami peoples. The elections occur with the same frequency and at the same time as the country's elections for its National Parliament.<sup>340</sup> There are regular meetings between the Norwegian government and representatives of the Sami Parliament, and an agreement between the two requires that each keep the other informed about policy matters and decisions directly affecting the Sami.<sup>341</sup>

The Norwegian Sami Parliament provides a forum for Sami to debate issues relating to their communities.<sup>342</sup> It also functions as an advisory body to the Norwegian government and distributes government funds for the promotion and preservation of Sami culture.<sup>343</sup> Although the Sami

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337. *Indigenous Representation: The Sami Parliaments of Norway, Sweden & Finland Offer an Inspiring Story and a Potential Solution to the Challenges of Improving Indigenous to Non-Indigenous Relations and Giving Indigenous Peoples a Voice within Contemporary Political Structures*, NORDIC SOLUTIONS (Sept. 16, 2013), <http://nordicsolutions.co/indigenous-representation/>.

338. *Id.*

339. American Indians constitute approximately 0.9 percent of the total U.S. population. Press Release, U.S. Census Bureau, 2010 Census Shows America's Diversity (Mar. 24, 2011), [http://www.census.gov/newsroom/releases/archives/2010\\_census/cb11\\_cn125.html](http://www.census.gov/newsroom/releases/archives/2010_census/cb11_cn125.html).

340. *Indigenous Representation*, *supra* note 337.

341. *Id.*

342. Several of the Parliament's subcommittees reflect demographic differences in the Sami population; others deal with specific issues of concern to the Sami. *Id.*

343. *Id.*

Parliament does not have much, if any, political power, it has symbolic significance for the Sami in a country that has a “culturally oppressive history of assimilation . . . .”<sup>344</sup>

While this approach would offer minimal disruption to the current power distribution in this country, and thus would not be as politically controversial as giving tribes dedicated congressional seats, it also offers no increase in power for tribes. An increase in power under this scheme would require the addition of some binding authority on the executive branch requiring it to implement the Indian Congress’s initiatives or giving the Indian Congress the power to veto federal or state legislation that conflicts with its own legislation.<sup>345</sup> To be assured of any beneficial effect for tribes and permanence, the concept would have to be brought into the Constitution in some way, perhaps under section five of the Fourteenth Amendment.<sup>346</sup> To the extent there is value in a single tribal voice representing putative “pan-Indian” interests, then an Indian Congress that congeals these interests into unitary positions holds at least some symbolic value when that voice is carried into the congressional debate on measures that affect tribes across a wide spectrum. In addition, a separate Indian Congress would not conflict with the desires of those Indians who do not want to be merged into the majority’s governance structure.<sup>347</sup>

### 3. *Treating Tribes as Separate Election Districts or as a Single Nationwide Election District*

Another approach involves establishing separate tribal election districts within a single state, spanning several states, or covering the entire

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344. *Id.*

345. An even less satisfactory solution for tribes in terms of maximizing their political influence is the creation of Indigenous community Cabinets to enable direct “input of indigenous views” into the Executive branch. *See* Iorns, *supra* note 333, at 15.

346. U.S. CONST. amend. XIV, § 5 (“The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”). The Supreme Court has cabined Congress’ powers under section five, requiring that the legislation be congruent and proportional to the constitutional harm it seeks to remedy. *See generally* *Tennessee v. Lane*, 541 U.S. 509 (2004) (supporting and expounding on that principle); *Nev. Dept’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *United States v. Morrison*, 529 U.S. 598 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

347. An alternative approach might be the creation of a tribal legislative body within the House of Representatives (like the former Joint Indian Committee on Indian Affairs), composed of tribal representatives who could then advise on matters of concern to various tribes within the legislative body. It might be specifically tasked with the responsibility to “ascertain community and political support for dedicated seats, and devise an appropriate model in consultation with Aboriginal communit[ies].” Iorns, *supra* note 333, at 23 n.60 (citations omitted).

country.<sup>348</sup> This approach would require an amendment to the Constitution because the new members represent a discrete subset of a state's or multiple states' overall population and, therefore, are not elected according to the Constitution. Further, unless modified by an amendment, each member of the subgroup would have the equivalent of more than one vote.<sup>349</sup>

The creation of special tribal election districts has the advantage of maintaining the existing federal structure by treating regional groupings of tribes the same as states from a representational standpoint, but it does not require the formation of additional states.<sup>350</sup> Tribes within an identified election district would have to negotiate among themselves and with the surrounding states to gain maximum leverage in the legislative body—like local governments in a state. This might bring disparate tribes closer together and encourage the formation of political alliances with non-Indians. It would also enable non-Indian congressional representatives from special tribal districts to pursue matters of particular interest to Indians without alienating their non-Indian constituent, which can happen when Indians are elected from regular election districts.<sup>351</sup> The proposal would align tribal “voters’ partisan and policy preferences” with those of their elected representatives and “match” those preferences within each tribal

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348. States often consider a variety of factors in drawing the boundaries of election districts. See Stephanopoulos, *supra* note 275, at 343 (“many states impose additional line-drawing criteria such as compactness, respect for political subdivisions, and respect for communities of interest”).

349. An amendment might be necessary to avoid the constitutional bar against creating states out of existing states, as each tribal election district has the appearance of a carve out from the existing election district. See Evans & Hill, *supra* note 303, at 503 (discussing this problem under Section 29 of the Australian Constitution, and saying “[t]he main problem with the model, which Chesterman foresees, is doubt about its constitutionality. Section 29 of the Constitution states (in part) that ‘A division shall not be formed out of parts of different states.’”). The authors suggest allowing Aboriginal peoples to vote in the district they represent, thus assuring the election of a territory-based electorate. *Id.* An additional problem that might be avoided by an amendment is circumventing Supreme Court decisions casting constitutional doubt on election districts whose boundaries are drawn in such a way as to ensure better minority representation in Congress. See, e.g., *Miller v. Johnson*, 515 U.S. 900 (1995) (striking down a geographically compact affirmatively gerrymandered election district and allowing a state to do this only upon a showing that the boundary had not been set in a way that subordinated traditional districting factors, such as “compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests.”); *Shaw v. Reno*, 509 U.S. 630 (1993) (creation of election districts to ensure that a widely dispersed African-American minority population constituted a majority in two congressional races); Knight, *supra* note 66, at 1097-99. However, since tribes are considered to be political—not racial—groups, this body of case law should not apply to them.

350. The proposal for a separate tribal election district is not that different from at-large districts like Alaska, Delaware, Montana, North and South Dakota, Vermont, and Wyoming as well as the District of Columbia; the difference being that more than one candidate to represent the entire district's population would be elected.

351. Knight, *supra* note 66, at 1090 (making this point with respect to Aboriginal constituents).

election district “and the jurisdiction as a whole.”<sup>352</sup> There would also be no fracturing of national or state boundaries, as those would remain intact, and no threat to national security, which might occur if tribes had political status equivalent to the federal government as might happen in the case of treaty federalism.

However, figuring out what the boundaries of each of these individual or regional election districts should be and determining how many elected representatives each should have would be extremely difficult.<sup>353</sup> An additional problem is how to distinguish tribes from other subnational governments like counties and cities, which might feel equally entitled to additional representation in the House. Applying the same approach to cities and counties would flood the House with new members, making that body’s work more difficult. Although tribes are fewer in number than cities or counties and would be fewer still if grouped into regional units, this “fairness” concern could translate into political opposition to the proposal unless cities and counties see tribes as useful allies in Congress. Finally, as with dedicated tribal seats, voters might object to the change in the ethnicity of their representatives.

The creation of a *virtual* nationwide tribal election district, whose representatives reflect the overall percentage of Indians in the total U.S. population, might avert all of the administrative complexities of this approach.<sup>354</sup> In this virtual election district, Indians, who comprise approximately .9 percent of the total U.S. population,<sup>355</sup> would elect seven of the 435 congressional representatives. There would be no need to give those members additional votes any more than representatives from states with small populations have additional votes, thus avoiding that potential source of opposition. Such a district would include urban Indians and would not privilege the larger tribes or areas with large Indian populations.

The proposal should also pose less of a threat to the prevailing political party balance in Congress because there would be fewer Indian

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352. Stephanopoulos, *supra* note 275, at 304. *See also id.* at 347 (“I have found that House members’ voting records correspond more closely to key district attributes in geographically homogeneous constituencies, but to partisanship in spatially diverse districts.”).

353. Canada’s electoral laws permit consideration of communities of interest or group interests in redrawing election district boundaries. *See Knight, supra* note 66, at 1085-86.

354. Trevor Knight proposes a comparable approach by suggesting that Canada move to a system of proportional representation, which would allow voters, either across a given province or the entire country, “to combine their votes behind specific candidates” or a slate of candidates, thus eliminating “the geographic bias” of the single member plurality electoral system and allowing aboriginal peoples to become more integrated into Canadian culture should they no longer want to be a separate community from the “electoral mainstream.” *Id.* at 1114-15.

355. Press Release, *supra* note 339.

representatives than if such an approach were undertaken on an individual state or even regional basis. In addition, it would not result in the ethnicity of any state's representatives changing. Tribes would have to negotiate among themselves to produce a slate of tribal candidates and unified legislative positions. It might even bring in tribes who do not want to participate directly in the legislative process because of a perceived diminution in their independent nation state status. Tribes would not have to participate in the electoral process under this approach if they did not want to, and could exit at any time, with the caveat that if too many tribes opted out, the approach might lose its effectiveness.

The creation of a single virtual election district for Indians should not balkanize Congress, if done only for Indians, but would reduce the number of non-Indian representatives, thus potentially creating political opposition to it. However, that opposition would be diffused because it is not preordained which state would lose members. Further, it might be muted as states realize they can negotiate with tribal representatives to assure their non-Indian constituents' interests are being met, potentially enhancing tribal political power to protect Indian interests. The creation of a virtual nationwide election district that encompasses all tribes regardless of their size, resources, or geographic location for the selection of tribal representatives would additionally assure the preservation of differences among tribes and could be inclusive of all tribes. It thus offers the potential for a uniform solution to the problem.<sup>356</sup>

Thus, a virtual nationwide tribal election district could have political salience, enhance the ability of tribes to function within the federal framework, be sufficiently inclusive to ameliorate differences among tribes, and fit within the existing constitutional framework. In many ways, the mechanics of the proposal are similar to the Norwegian Sami Parliament where elected Sami tribal members come together to vote on a slate of aboriginal initiatives. Here, the purpose of such a gathering would be to

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356. The idea of a virtual election district corresponds to what Biolsi interchangeably calls "political space" or "political geography" and is occupied by people of different cultures, which transcends any geopolitical boundary and has no attachment to land. See Biolsi, *supra* note 1, at 251; see also *id.* at 240 ("[t]he nation-state is only one among several (perhaps many) political geographies imagined, lived, and even institutionalized under modernity by American Indians.") Tribes already occupy a virtual political space when they fight the dominant culture over the names of sports teams and their mascots. *Id.* at 241. Biolsi sees these fights as neither particularly Indian nor tribal, but as "a matter of U.S. citizens in U.S. territory who happen to be Indian." *Id.* at 251. Biolsi's "political geography is squarely centered in the map of the United States as a (multiracial) nation-state of equal citizens," and the struggle taking place within it is part of "a larger struggle for inclusion in U.S. society, or for cultural citizenship—the right to be Indian and American at the same time in a truly multicultural society." *Id.*



select a slate of candidates who would then be put forward to enrolled tribal electors. The problem of double voting could be solved by preventing enrolled Indian electors from voting for non-Indian representatives; any Indian could choose whether she wanted to be on the general electoral roll or the tribal roll. This would also give tribal members, whether they live on or off a reservation, the option of aligning their political interests with their tribe or the general electorate. However, the idea of a virtual nationwide election district, while avoiding many of the complexities of individual tribal election districts, would be novel challenging, and would require a constitutional amendment with all its attendant difficulties.

Although amending the Constitution is a process that is time-consuming, expensive for proponents, and of uncertain outcome, the process holds out more promise than trying to stretch constitutional text to enable an adjustment in the federal structure to include tribes as co-equal sovereigns. Of the proposals to amend the Constitution, only one emerges with some prospect of helping the tribes without weakening the federal structure, inviting political opposition, or creating divisions among tribes. And that is the creation of a virtual nationwide tribal election district. But to call this a novel concept is an understatement.

## VI. CONCLUSION

It is not easy to construct a solution to the problem of diminishing tribal sovereignty. This article has tested the premise that the best answer lies in bringing tribes into the Constitution as co-equal sovereigns and thus into the governing process. Approaches that arise outside the Constitution offer only temporary piecemeal solutions to an entrenched problem that has left tribes impoverished and powerless. Still, locating solutions within the Constitution is extremely hard.

The article has proposed several different solutions, including some that are under study in other countries with comparable indigenous populations. Some solutions rely on creatively interpreting constitutional text; while others propose amending that text. The article concludes that the amendment path, although difficult and time-consuming with no assurance of a favorable outcome, seems preferable to bleeding a preferred interpretation out of constitutional text.

No proposal emerges unscathed from this discussion. Some are too complex, others are likely to trigger fatal political opposition, and a few even threaten the Union's stability. Still others offer tribes little help, even if they could be implemented, or exacerbate differences among tribes or between reservation and urban Indians. Only one approach holds any

promise: namely, the creation of a virtual nationwide tribal election district for all enrolled Indians who could elect seven representatives to serve as their representatives in Congress. Although novel, Abele and Prince suggested a variant of it as a form of what they call “adapted federalism” as a way to enhance the sovereignty of their country’s First Nations. The approach also passes muster under the four criteria proposed in this article; it would enhance tribal sovereignty without threatening the country’s stability or fracturing any political boundaries, be sufficiently inclusive of all Indians, and potentially be politically salient.

It is imperative that tribes—the original occupants of this country—be given a place in the Constitution equal to that occupied by the states, not only for their survival as distinct political communities, but also for the survival of “the promise of democracy” that this country symbolizes. The failure to do this “does not speak well of our political community . . . .”<sup>357</sup> Although this article has dreamt big in identifying possible solutions to the problem of diminished tribal sovereignty, its goal is much more modest: reinvigorating the effort to find a solution to the problem that so many others have identified.

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357. Knight, *supra* note 66, at 113 (“It does not speak well of our political community that the first peoples of this country have been denied a proportionate place in Parliament . . . . Indeed, until Aboriginal people are included in reasonable numbers in the body that chooses governments and shapes policies, it is not inappropriate to suggest that, for many, Canada will have failed to live up to the promise of democracy.”).