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ARTICLES

THE SPECTER OF INDIAN REMOVAL: THE PERSISTENCE OF STATE SUPREMACY ARGUMENTS IN FEDERAL INDIAN LAW

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In the 2022 case of Oklahoma v. Castro-Huerta*, the Supreme Court departed from one of the foundational cases in federal Indian law,* Worcester v. Georgia*. Chief Justice John Marshall's 1832 opinion had dismissed state power over Indian Country. But in* Castro-Huerta*, the Court took precisely the kind of arguments about state power that Chief Justice Marshall rejected in* Worcester *and turned them into the law of the land—without any recognition of the arguments' Indian Removal–era origins.*

This Article corrects the Court's oversight. Relying on rarely utilized archival sources, it provides a historical narrative of the development of what the Article terms the theory of state supremacy*, first articulated by the southern state legislatures in the Removal Era to justify state power over Native nations and eradicate Native sovereignty. Even though* Worcester *rejected this theory, Supreme Court Justices and state litigants have continued to invoke its tenets in Indian law cases from the late nineteenth century to the present.* Castro-Huerta*, then, is just the latest and most egregious example. And the decision's use of Removal-era arguments revives the specter of Indian Removal in the present day.*

This Article reveals that the continued use of state supremacy arguments defies constitutional law and federal Indian affairs policy, produces an inaccurate history of Native nations and federal Indian law, and perpetuates the racism and violence that characterized the Removal

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Era. Ultimately, this Article seeks to counter future attacks on tribal sovereignty and combat the broader revival of long-rejected federalism arguments.

"Could Alabama, if denied the right to legislate co-extensive with her limits, be said to be sovereign? Can she be considered sovereign, when the operation of her laws, although she wills it otherwise, is confined to particular districts and sections of the State?"

— Alabama House of Representatives Committee on Indians and Indian Affairs (1831).[1]

"Indian country is part of the State, not separate from the State. . . . [A]s a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country."

— *Oklahoma v. Castro-Huerta* (2022).[2]

INTRODUCTION

Almost two centuries separate the statements above, yet both address the same issue: a state's authority to exercise its jurisdiction over Cherokee Nation territory lying within the state's borders.[3] In 1830, the Alabama legislature was frustrated with the Cherokee Nation,[4] which held title to a substantial portion of the lands within the state and had erected a

1. H.R. Journal, 12th Sess., at 93 (Ala. 1831).

2. 142 S. Ct. 2486, 2493 (2022).

3. As discussed in more detail throughout this Article, the experience of the Cherokee Nation parallels that of the Chickasaw, Choctaw, Muscogee (Creek), and Seminole Nations, which are collectively known as the "Five Civilized Tribes." Grant Foreman, The Five Civilized Tribes: Cherokee, Chickasaw, Choctaw, Creek, Seminole, at vii (1934). These Native nations, whose original homelands comprise the current southeastern United States and who were removed to Indian Territory (present-day Oklahoma) in the 1830s and 1840s, are designated as "civilized" because of their early acceptance of Christianity and Anglo-American forms of agriculture, education, political institutions, and dress. See id. (stating that the name resulted from those tribes' "progress and achievements"). Because of the paternalistic nature of the "civilized" label, I have chosen to use the term "Five Tribes" when referring to these nations as a group. For a recent history of the nations' experience of the United States' "civilization" programs and Indian Removal, see generally Claudio Saunt, Unworthy Republic: The Dispossession of Native Americans and the Road to Indian Territory (2020).

4. In 1830, the Alabama legislature—following the example of Georgia and Mississippi—considered a bill to extend state law over Native lands and peoples within the state's borders to induce the Native nations to cede their lands and remove west of the Mississippi River. Ala. H.R. Journal, 12th Sess., at 14, 118; see also Act of Dec. 19, 1829, 1829 Ga. Laws 98; Act of Jan. 19, 1830, ch. 1, 1830 Miss. Laws 5. The bill was referred to the House Committee on Indians and Indian Affairs, which produced a report justifying Alabama's authority to exercise such jurisdiction based on history, the U.S. Constitution and treaties, and other states' laws. Ala. H.R. Journal, 12th Sess., at 27, 92–96. In supporting Alabama's jurisdictional rights, the report denigrated Cherokee sovereignty over its territory, referring to the Cherokee as "a conquered people." Id. at 95. The proposed bill failed, id. at 257, but the Alabama legislature eventually succeeded in passing a state law extension act in 1832. See Act of Jan. 16, 1832, 1831–1832 Ala. Laws 7. For more details on this history and the justifications in the Committee on Indians and Indian Affairs report, see infra sections I.B, II.A.

constitutional government.[5] Competing with other polities within its own limits and unable to exercise jurisdiction over the whole of its claimed territory, Alabama questioned whether it could be considered truly sovereign.[6]

In 2022, the Cherokee Nation's territory—now in Oklahoma following the Trail of Tears—was at issue once again. In *Oklahoma v. Castro-Huerta*, the Supreme Court considered whether Oklahoma could exercise criminal jurisdiction over non-Indians who committed crimes against Indians[7] within the Cherokee Nation Reservation, which stretches across fourteen counties and includes the city of Tulsa.[8] In 2020, *McGirt v. Oklahoma* recognized that portions of eastern Oklahoma remained Indian Country, precluding state jurisdiction over certain crimes.[9] Enraged by this decision, Oklahoma appealed to the Court to restore its authority, characterizing *McGirt*'s effect on its criminal justice and civil regulatory systems as "calamitous."[10] Like Alabama, Oklahoma worried about its status, claiming that "the fundamental sovereignty of an American State is at stake."[11]

Despite the different times and different circumstances, Alabama's and Oklahoma's appeals were strikingly similar: They relied on strong notions of state sovereignty. Both communicated their beliefs in a concept of absolute territorial jurisdiction in which sovereigns exercise their authority over all their claimed territory and the peoples who reside on it.[12] Without this ability, they claimed their status as sovereigns was no

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5. See William G. McLoughlin, Cherokee Renascence in the New Republic 388–401 (1986) (studying the development and content of the Cherokee Constitution of 1827); Saunt, supra note 3, at 37–38 (describing the extent of Cherokee lands within southern states).

6. See Ala. H.R. Journal, 12th Sess., at 92–93 ("The question under consideration presents, first, the *vexata quaestio* whether Alabama is a sovereign State."); id. at 93 ("[E]ither Alabama or the Cherokees must give up their pretentions to govern; otherwise we shall exhibit . . . the novel spectacle of two sovereigns . . . making laws for the government of the same people, at the same time; . . . a state of things that never has or can exist.").

7. This Article uses the terms "Native" and "Indian" to describe the Indigenous peoples of the United States. The term "Indian" is used in its historical context and as part of key terms of art like "Indian affairs" and "Indian Country." See Michael Yellow Bird, What We Want to Be Called: Indigenous Peoples' Perspectives on Racial and Ethnic Identity Labels, Am. Indian Q., Spring 1999, at 1, 7–11.

8. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2491–92 (2022). For a description of the Cherokee Reservation, see Maps, Cherokee Nation, https://www.cherokee.org/about-the-nation/maps/ [https://perma.cc/89VE-YXT2] (last visited July 31, 2023).

9. 140 S. Ct. 2452, 2459 (2020).

10. Petition for a Writ of Certiorari at 3, *Castro-Huerta*, 142 S. Ct. 2486 (No. 21-429), 2021 WL 4296002.

11. Id.

12. For background on territorial sovereignty and its rise, see generally Lisa Ford, Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836 (2010) (studying the early nineteenth-century relationship between white settlers' claims of territorial sovereignty and the exercise of criminal jurisdiction over Indigenous peoples in Georgia and New South Wales); Charles S. Maier, Once Within Borders: Territories of

longer secure. Furthermore, the two states pointed to the same culprit undermining their jurisdiction: Native sovereignty. Tribal power, they argued, threatened state power by prohibiting jurisdiction over Native lands and Native peoples physically within state borders.[13] Alabama and Oklahoma used state sovereignty rhetoric as a response to this threat, hoping to gain public support and federal protection for the maintenance of state supremacy.

Yet, other than the times in which they were articulated, there is one major difference between the states' arguments: their status as law. In the 1830s, politicians from Alabama and other southern states made arguments based on state sovereignty to justify legally eradicating Native nations in their push for Indian Removal. But the U.S. Supreme Court rejected the southern states' theory wholesale in *Worcester v. Georgia*,[14] "[t]he foundational case in federal Indian law."[15] Chief Justice John Marshall held that state law "can have no force" within the territories of Native nations because the Constitution gave the federal government authority over Indian affairs and recognized the independence of Native nations.[16]

But in 2022, the Supreme Court took the states' rejected arguments from two centuries earlier and made them law. In *Castro-Huerta*, the Court proclaimed that states have jurisdiction over their entire territories notwithstanding the presence of Native nations.[17] Finding no federal law preempting state authority, the Court held that states possess the ability to exercise jurisdiction over non-Indian-on-Indian crimes within Indian Country.[18] In the span of a few sentences, *Castro-Huerta* upended foundational principles of Indian law by endorsing the very theory of state supremacy the Court's predecessors had rebuffed.[19] And it did so without recognizing the roots of the state supremacy arguments it sanctioned.

Power, Wealth, and Belonging Since 1500 (2016) (charting the development of modern territoriality and its connection to ideas of sovereignty). For more discussion of this concept as used by the southern states in the Removal Era, see infra section II.A.4.

13. See infra section I.B (discussing the conflict over jurisdiction).

14. See 31 U.S. (6 Pet.) 515, 561 (1832) ("The whole intercourse between the United States and [the Cherokee] nation, is, by our constitution and laws, vested in the government of the United States. The act of the state of Georgia, under which the plaintiff in error was prosecuted, is consequently void, and the judgment a nullity.").

15. Sidney L. Harring, Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century 25 (1994).

16. *Worcester*, 31 U.S. (6 Pet.) at 561.

17. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2493 (2022).

18. Id. at 2491, 2494–501.

19. Id. at 2504 ("To be clear, the Court today holds that Indian country within a State's territory is part of a State, not separate from a State. Therefore, a State has jurisdiction to prosecute crimes committed in Indian country unless state jurisdiction is preempted.").

As many Indian law scholars have pointed out, the *Castro-Huerta* decision is a fundamentally flawed one.[20] The majority ignored history, precedent, and the current direction of Indian affairs policy to reach its result.[21] In his dissent, Justice Neil Gorsuch labeled the case "an embarrassing new entry into the anticanon of Indian law" and derided the majority: "Truly, a more ahistorical and mistaken statement of Indian law would be hard to fathom."[22]

As this Article contends, however, the *Castro-Huerta* decision did not happen overnight. Similarities between recent arguments in the Court and Alabama's Removal-era appeal are not a mere coincidence. Rather, they are part of a larger historical phenomenon in legal controversies over tribal sovereignty. For Indian affairs has long been the site of jurisdictional conflict between the federal and state governments and Native nations, or, in the words of nineteenth-century Georgia legislators, the site of "collisions of rival sovereignty."[23] And as part of these conflicts over the past two centuries, states and jurists have responded to Native nations' assertions of sovereignty with a collection of arguments—all based on the notion that states are the only legitimate and constitutionally grounded sovereigns within their territory—that seek to delegitimize the existence and exercise of tribal power.[24] This *theory of state supremacy*—this Article's term for the ideology from which these arguments emanate—comprises three tenets: (1) State territorial jurisdiction is absolute; (2) tribal sovereignty is nonexistent; and (3) federal power is a limited yet valuable asset for upholding state authority against internal threats, namely tribal

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20. See, e.g., Gregory Ablavsky, Too Much History: *Castro-Huerta* and the Problem of Change in Indian Law, 2023 Sup. Ct. Rev. 293, 313–20, 344–50 [hereinafter Ablavsky, Too Much History] (arguing that the *Castro-Huerta* decision exemplified "bad history" in Indian law); Dylan R. Hedden-Nicely, The Reports of My Death Are Greatly Exaggerated: The Continued Vitality of *Worcester v. Georgia*, 52 Sw. L. Rev. 255, 259 (2023) [hereinafter Hedden-Nicely, The Reports of My Death] (arguing that if "taken out of context," *Castro-Huerta* "could be read as a total abrogation of *Worcester*"); Gregory Ablavsky & Elizabeth Hidalgo Reese, Opinion, The Supreme Court Strikes Again—This Time at Tribal Sovereignty, Wash. Post (July 1, 2022), https://www.washingtonpost.com/opinions/2022/07/01/castro-huerta-oklahoma-supreme-court-tribal-sovereignty/ (on file with the *Columbia Law Review*) (pointing out that *Castro-Huerta* relies on "cherry-picked ancillary cases and late-19th-century arguments with subsequently overruled foundations"); Elizabeth Hidalgo Reese, Conquest in the Courts, The Nation (July 6, 2022), https://www.thenation.com/article/society/supreme-court-castro-huerta/ (on file with the *Columbia Law Review*) ("The opinion is unmoored from the key cases of federal Indian law and divorced from the realities of American history."); Nick Martin, The Supreme Court's Attack on Tribal Sovereignty, Explained, High Country News (July 1, 2022), https://www.hcn.org/articles/indigenous-affairs-justice-law-the-supreme-courts-attack-on-tribal-sovereignty-explained (on file with the *Columbia Law Review*) (stating that *Castro-Huerta* "breaks with centuries of established federal Indian law").

21. See infra Part IV.

22. *Castro-Huerta*, 142 S. Ct. at 2511, 2521 (Gorsuch, J., dissenting).

23. Resolution of Dec. 18, 1829, 1829 Ga. Laws 267, 270.

24. See infra Part II and sections III.A–.B.

power. And from the Removal Era to the present day, states have continually sought to use arguments deriving from these tenets to establish their supremacy over Native nations.

But these arguments are not just abstract articulations of jurisdiction or the implementation of historical ideas regarding federalism. At its core, the theory of state supremacy was a results-oriented logic for Native deportation.[25] In the 1820s and 1830s, a cadre of elite, southern, Euro-American politicians constructed the state supremacy theory to appease the voracious land hunger of their settler constituents.[26] This "legal ideology of removal"[27] sought to nullify federal law that protected Native nations and justify the Euro-American invasion and appropriation of Native lands. As several U.S. senators put it, state laws supported by this ideology would force Native peoples either to submit to conquest by "being incorporated into the body politic" or to "be speedily induced to remove to the west of the Mississippi."[28]

The subjugation of Native peoples was not the state supremacy theory's only goal; the theory also sought to perpetuate the subjugation of Black people. Afraid that federal power over Native peoples would lead to the abolition of slavery, Alabama legislators claimed: "If [Congress] can say to the state of Alabama, that Indians cannot be citizens, it can by a similar exercise of municipal power within its limits, say that Negroes shall not be slaves."[29]

Worse, the southerners' arguments were ultimately successful. Even though the Supreme Court rejected the state supremacy theory, southern state courts, President Andrew Jackson, and Congress endorsed it.[30] This multipronged legal assault—combined with settler violence and military

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25. For a discussion of Indian Removal as a form of "deportation," see K-Sue Park, Self-Deportation Nation, 132 Harv. L. Rev. 1878, 1884–85, 1898–904 (2019). Although several scholars have recently, and convincingly, argued that "removal" was a capacious term in the early republic and served as euphemism for "expulsion," "deportation," and "genocide," this Article continues to use the term to reflect the language used at the time. See Jeffrey Ostler, Surviving Genocide: Native Nations and the United States From the American Revolution to Bleeding Kansas 6–7, 365–68 (2019) (debating whether Removal qualifies as "genocide" or "ethnic cleasning"); Saunt, supra note 3, at xiii–xiv (noting that "'Removal' is . . . unfitting for a story about the state-sponsored expulsion of eighty thousand people"); Samantha Seeley, Race, Removal, and the Right to Remain 7–8 (2021) (describing how the multiple meanings of "removal" helped to "hid[e] its devastation" and occlude its true impact).

26. For a more detailed explanation of the theory's historical origins and uses, see infra Part II and section I.B.

27. See Tim Alan Garrison, The Legal Ideology of Removal: The Southern Judiciary and the Sovereignty of Native American Nations 5 (2002) (defining the "southern removal ideology" as the percolation of "threads of the long tradition of anti-Indian legal prejudice into a formal legal position that justified the expropriation of Native American land").

28. The Report, S. Recorder (Milledgeville, Ga.), Apr. 9, 1827, at 2, 2.

29. H.R. Journal, 10th Sess., at 221 (Ala. 1829).

30. See Garrison, supra note 27, at 237–39 (arguing that responsibility for Indian Removal rested with southern state leaders and judges, President Jackson, and Congress).

force—led to Native nations' expulsion from their homelands to Indian Territory and the loss of thousands of lives on the Trail of Tears.[31] And on the Native nations' former lands, southerners built their Cotton Kingdom and initiated the forced migration of one million enslaved Black people to their plantations.[32] Fundamentally, the state supremacy theory served the ends of settler colonialism, erasing Native presence for the benefit of Euro-American conquest and racial hierarchy.[33]

But the continued use of the state supremacy arguments ignores their problematic origins in the Removal Era. The Court and states frame the arguments as abstract and race-neutral principles of federalism when they are anything but. In fact, the Removal-era state supremacy theory is another instance of federalism—specifically state sovereignty—being weaponized to further oppress marginalized communities.[34] Although nullification, secession, and other states' rights positions have been rejected for their racist origins and constitutional infirmities, state supremacy arguments in federal Indian law cases remain in use. Unlike their rejected counterparts, these arguments are accepted as viable legal positions and have been used time and time again.[35] And with the *Castro-Huerta* decision, the Court has taken a theory birthed in the colonialism, greed, and violence of the nineteenth century and made it law in the

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31. See Saunt, supra note 3, at 53–111, 231–302 (discussing the debate over Removal and the subsequent expulsion and extermination of Native peoples).

32. Walter Johnson, Soul by Soul: Life Inside the Antebellum Slave Market 214–15 (1999); Saunt, supra note 3, at 309–12. For a history of the early nineteenth-century expansion of slavery in the southern states, see generally Adam Rothman, Slave Country: American Expansion and the Origins of the Deep South (2005).

33. For an extended discussion of the application of settler colonialism to Native American history, see Frederick E. Hoxie, Retrieving the Red Continent: Settler Colonialism and the History of American Indians in the U.S., 31 Ethnic & Racial Stud. 1153, 1159–63 (2008).

34. There are numerous instances throughout U.S. history in which state sovereignty arguments have been used to subjugate certain racial groups, immigrants, and other minorities. The most famous examples are the federalism conflicts that arose over the continued oppression of Black people. State sovereignty arguments swirled around the perpetuation of slavery during the antebellum period of the nineteenth century, including during the Nullification Crisis, the admission of new states, and disputes over abolition activities and the recovery of escaped enslaved people. See generally 1 William W. Freehling, The Road to Disunion: Secessionists at Bay, 1776–1854 (1990) (discussing federalism conflicts involving southern states in the late eighteenth and early nineteenth centuries, including the Nullification Crisis); 2 William W. Freehling, The Road to Disunion: Secessionists Triumphant, 1854–1861 (2007) (studying the lead-up to and outbreak of the Civil War). And in the twentieth century, white Americans, intent on maintaining state-sanctioned racial segregation, employed states' rights arguments to resist federal policies and court orders that sought to remedy discrimination against Black Americans. See generally George Lewis, Massive Resistance: The White Response to the Civil Rights Movement (2006) (recounting the segregationist opposition to civil rights from the 1940s to the 1960s).

35. See infra Part III.

twenty-first century. Now more than ever, it is time to bury the state supremacy arguments with the past.

But doing so must start with the past. Historians have written about the longstanding hostility between Native nations and states.[36] Southern Indian Removal—with its aggressive state officials and courts, constitutional debates, and the famed Cherokee cases—has garnered a large share of attention in Native history,[37] legal history,[38] and American constitutional history.[39] And historians of federalism have begun to focus on how states in the early republic continually appealed to the Constitution and the federal government to rid themselves of competing sovereigns, including Native nations.[40]

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36. For key recent works on this topic, see generally Gregory Ablavsky, Federal Ground: Governing Property and Violence in the First U.S. Territories 201–30 (2021) [hereinafter Ablavsky, Federal Ground] (describing conflicts over Indian affairs that occurred with the admission of Tennessee and Ohio to the Union); Deborah A. Rosen, American Indians and State Law: Sovereignty, Race, and Citizenship, 1790–1880 (2007) (tracing the development of state laws that applied to Native peoples); Bethel Saler, The Settlers' Empire: Colonialism and State Formation in America's Old Northwest (2015) (studying the impact of territorial policies and Wisconsin statehood on Native peoples in the region); Gregory Ablavsky, Empire States: The Coming of Dual Federalism, 128 Yale L.J. 1792, 1824–27, 1855–61 (2019) [hereinafter Ablavsky, Empire States] (compiling states' attempts to eradicate tribal sovereignty in the late eighteenth and early nineteenth centuries).

37. For Native histories focused on southern Indian removal, see generally Grant Foreman, Indian Removal: The Emigration of the Five Civilized Tribes of Indians (3d ed. 1972); Michael D. Green, The Politics of Indian Removal: Creek Government and Society in Crisis (1982); Ostler, supra note 25; Theda Perdue & Michael D. Green, The Cherokee Nation and the Trail of Tears (2007); Saunt, supra note 3.

38. For legal histories focused on southern Indian removal, see generally Ford, supra note 12; Garrison, supra note 27; Harring, supra note 15, at 25–44; Jill Norgren, The Cherokee Cases: The Confrontation of Law and Politics (1996).

39. For American constitutional histories focused on southern Indian removal, see generally Akhil Reed Amar, The Words that Made Us: America's Constitutional Conversation, 1760–1840, at 634–40 (2021) (examining Removal with a focus on the interaction between the executive and judicial branches of the federal government); Gerald Leonard & Saul Cornell, The Partisan Republic: Democracy, Exclusion, and the Fall of the Founders' Constitution, 1780s–1830s, at 200–07 (2019) (exploring Removal as a conflict in which the Marshall Court and Andrew Jackson's Democratic Party fought over constitutional meaning); Jill Lepore, These Truths: A History of the United States 215–16 (2018) (arguing that Removal was a Jacksonian policy made possible by Jackson ignoring Supreme Court decisions); Stephen Breyer, The Cherokee Indians and the Supreme Court, 87 Ga. Hist. Q. 408, 425–26 (2003) (arguing that the Cherokee cases ultimately strengthened the power of the Supreme Court); Joseph C. Burke, The Cherokee Cases: A Study in Law, Politics, and Morality, 21 Stan. L. Rev. 500, 501, 530–31 (1969) (using the Cherokee cases as a study of the Marshall Court's motivations).

40. See Alison L. LaCroix, The Interbellum Constitution: Union, Commerce, and Slavery in the Age of Federalisms (forthcoming 2024) (manuscript at 249–348) (on file with the *Columbia Law Review*) [hereinafter LaCroix, The Interbellum Constitution Manuscript] (tracing the development of "fractal federalism" in the legal relationship between the Cherokee Nation, Georgia, and the United States); Ablavsky, Empire States, supra note 36, at 1795–96, 1824–27, 1855–61 (partially finding American federalism's origins in conflicts between states and Native nations in the post-Revolution and Founding Eras).

Building on these histories, this Article's first aim is descriptive. It provides a historical narrative of the development of the state supremacy theory, returning to the progenitors of this theory—Removal-era southern state legislatures—to describe the theory's legal and rhetorical features. And it constructs this narrative by relying on rarely utilized archival sources, namely reports written by southern U.S. senators and state legislators that first justified the extension of state law over Native peoples and lands as a means of erasing tribal power. The Article then explores how the theory has continued to influence Indian law cases from the late nineteenth century to the present.

In brief, the narrative goes like this: Rooted in state hostility from the Founding Era, states' arguments for authority over Indian affairs first coalesced into a comprehensive legal and rhetorical onslaught in the early nineteenth century. In the 1820s and 1830s, Euro-American politicians in the South constructed a novel theory of state supremacy to justify southern state laws that sought to eliminate Native nations within their borders legally and physically.[41] Although the U.S. Supreme Court rejected the southern states' arguments in the 1832 case of *Worcester v. Georgia*,[42] the states emerged victorious when the federal government forcibly removed the Cherokee, Choctaw, Chickasaw, Muscogee (Creek),[43] and Seminole Nations from the South to Indian Territory.[44] As if the dispossession and death accompanying Removal were not enough of a blow to tribal power, the southern state supremacy theory endured in the field of federal Indian law. In the late nineteenth century, the Court utilized state supremacy arguments to assist in the assimilation of Native peoples and lands into the United States.[45] And in the late twentieth and early twenty-first centuries, Native power's resurgence prompted both Justices and state litigants to revive the arguments to undermine tribal sovereignty.[46] As this history shows, the legacy of Indian Removal continues to impact the progress of Native nations.

The second aim of this Article is to provide a new analytical approach to federal Indian law. Indian law scholars have made forceful arguments about how the Doctrine of Discovery, racism, and outdated stereotypes concerning Native peoples have shaped Indian law cases since the

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41. See infra Part II and section I.B.

42. 31 U.S. (6 Pet.) 515, 544–45, 549–51, 559–62 (1832).

43. When referencing the Muscogee Nation or its people, I have dropped the "Creek" identifier for the remainder of this Article to improve readability and to align my work with the Muscogee Nation's recent efforts to drop the misnomer coined by British officials. See Angel Ellis, New Branding Campaign Launched by Muscogee Nation, Mvskoke Media (May 5, 2021), https://www.mvskokemedia.com/new-branding-campaign-launched-by-muscogee-nation/ [https://perma.cc/X67S-C4CF].

44. See sources cited supra note 37.

45. See infra section III.A.

46. See infra section III.B.

beginning of the field.[47] Others have taken a more time-bound approach, studying possible explanations for the Rehnquist and Roberts Courts' overwhelming opposition to tribal interests and solicitude for states.[48] Viewing Indian law cases through the lens of state supremacy offers a new perspective: The state supremacy theory has served as a consistent throughline in the field of federal Indian law. First, the theory explains why Indian law cases have historically used the expansion of state authority as an opportunity to curb tribal power. Second, focusing on the theory reveals a disturbing trend whereby these supremacy arguments from the Removal Era—arguments that are constitutionally infirm, historically inaccurate, and racist—are gaining widespread acceptance among Justices and states. Third, the perpetuation of Removal-era state supremacy arguments in recent Indian law cases uncovers how tied members of the current Court are to a view that state and tribal jurisdictional conflicts are zero-sum games and that states—as opposed to tribes—are the legitimate constitutional sovereigns.[49] And this view contradicts both the original

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47. See, e.g., Robert J. Miller, Jacinta Ruru, Larissa Behrendt & Tracey Lindberg, Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies 52–61 (2010) (discussing how federal courts have consistently applied the Doctrine of Discovery in controversies involving Native nations over the last 200 years); Robert A. Williams, Jr., Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America 151–52 (2005) (identifying a "principle of racism" throughout the Justices' Indian law opinions); Adam Crepelle, Lies, Damn Lies, and Federal Indian Law: The Ethics of Citing Racist Precedent in Contemporary Federal Indian Law, 44 N.Y.U. Rev. L. & Soc. Change 529, 533 (2021) ("Based both in impermissible racial stereotypes and a doctrine of white supremacy, [federal Indian law] case law is overtly racist."); Kathryn E. Fort, The Vanishing Indian Returns: Tribes, Popular Originalism, and the Supreme Court, 57 St. Louis U. L.J. 297, 300 (2013) (noting the continued use of the "vanishing Indian" stereotype in the Court's historical narratives).

48. Legal scholarship has extensively reviewed the Supreme Court's hostility to tribal interests over the past several decades. Matthew Fletcher has argued that tribal losses often stemmed from the Court's interest in larger constitutional problems as opposed to Indian law issues and its tendency to grant certiorari to opponents of tribal interests. See Matthew L.M. Fletcher, Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes, 51 Ariz. L. Rev. 933, 935–37 (2009) (discussing certiorari disparities); Matthew L.M. Fletcher, The Supreme Court's Indian Problem, 59 Hastings L.J. 579, 580, 582–83 (2008) (arguing that the Supreme Court lacks desire to "decide tribal interests" even in cases involving federal Indian law). The late David Getches argued that a proclivity to institute a form of colorblind jurisprudence and uphold American cultural values resulted in antitribal holdings. David H. Getches, Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values, 86 Minn. L. Rev. 267, 268–69 (2001) [hereinafter Getches, Beyond Indian Law]. In particular, Getches contended that the Rehnquist Court's robust support for states' rights resulted in a line of cases from the mid-1980s to 2000 in which state interests prevailed over tribal parties at a disproportionate rate. Id. at 268, 320–23, 344–45.

49. For a similar analysis of federal Indian law as a problem of jurisdictional overlap between Native nations and states that leads to "competitive sovereign erosion," see Michael D.O. Rusco, *Oklahoma v. Castro-Huerta*, Jurisdictional Overlap, Competitive Sovereign Erosion, and the Fundamental Freedom of Native Nations, 106 Marq. L. Rev. 889, 919–30 (2023).

understanding of Indian affairs authority and the Native nations' constitutional status.[50]

This particular view of states and tribes adds to Indian law scholars' analysis of the Court's "subjectivist approach" to Indian law cases.[51] According to these scholars, the Rehnquist and Roberts Courts have ignored foundational Indian law principles in favor of a subjectivist approach that "gauges tribal sovereignty as a function of changing conditions—demographic, social, political, and economic—and the expectations they create in the mind of affected non-Indians."[52] As this Article suggests, the Justices utilize state supremacy arguments in their reasoning to provide both historical and legal justifications for their preferred pro-state-sovereignty outcomes.[53] Even if, as the scholars argue, the Court uses late nineteenth-century allotment policy as the "touchstone" for determining the scope of tribal power in its subjectivist approach,[54] the state supremacy theory indicates that the Court reaches even further back for the incorrect legal principles it deploys to uphold state interests over tribal ones. Thus, we may need to add the Court's reliance on the state supremacy theory to the "rules of judicial subjectivism" going forward.[55]

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50. The recognition of Native nations' sovereignty is enshrined in U.S. constitutional law. "Indian tribes" are listed in the Commerce Clause alongside other sovereigns: foreign nations and the states. U.S. Const. art. I, § 8, cl. 3. And the foundational Indian law cases—*Cherokee Nation v. Georgia* and *Worcester v. Georgia*—explicitly recognize tribal sovereignty under various clauses of the Constitution. See Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) ("The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties."); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16–20 (1831) (recognizing that the acts of the United States under the Treaty Power and Commerce Clause "plainly recognize the Cherokee nation as a state").

51. For an excavation and critique of the "subjectivist" trend in the Supreme Court's Indian law decisions at the end of the twentieth century and beginning of the twenty-first century, see David H. Getches, Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law, 84 Calif. L. Rev. 1573, 1575–76 (1996) [hereinafter Getches, Conquering the Cultural Frontier]; Dylan R. Hedden-Nicely & Stacy L. Leeds, A Familiar Crossroads: *McGirt v. Oklahoma* and the Future of the Federal Indian Law Canon, 51 N.M. L. Rev. 300, 305–07 (2021).

52. Getches, Conquering the Cultural Frontier, supra note 51, at 1575; see also Hedden-Nicely & Leeds, supra note 51, at 305 (citing Getches, Conquering the Cultural Frontier, supra note 51, at 1575).

53. See infra sections III.B, IV.A.

54. Getches, Conquering the Cultural Frontier, supra note 51, at 1622–26; Hedden-Nicely & Leeds, supra note 51, at 339.

55. Getches, Conquering the Cultural Frontier, supra note 51, at 1620. Getches noted three "[r]ules of [j]udicial [s]ubjectivism": (1) the "retreat[]" from Indian canons of construction; (2) the use of nineteenth-century allotment and assimilation policies as the "benchmark" for defining tribal sovereignty; and (3) the balancing of non-Indian interests to reduce the scope of tribal sovereignty "to the Court's own notion of what it ought to look like." Id.

This Article's historical narrative and analytical approach stemming from the state supremacy arguments also break new ground in emphasizing the roles that states have played in the development of federal Indian law. In scholarship focused on Native nations and peoples, legal scholars have almost exclusively focused on the *federal*[56] and *Indian* (or tribal)[57] aspects of federal Indian law. This tendency has obscured the huge influence that states and their arguments have had on current understandings of Native history and the principles of federal Indian law, even when some of the most important Indian law cases pitted a state against a Native nation.[58] Analysis of states and their authority has usually only appeared in scholarship that compares the political statuses of states and Native nations[59] or that explores how states and tribes should work with one another in certain policy areas.[60] By bringing more

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56. See generally Maggie Blackhawk, Federal Indian Law as Paradigm Within Public Law, 132 Harv. L. Rev. 1787 (2019) [hereinafter Blackhawk, Federal Indian Law as Paradigm] (advocating for a new paradigm of federal constitutional law that centers federal Indian law and colonialism); Matthew L.M. Fletcher, Politics, Indian Law, and the Constitution, 108 Calif. L. Rev. 495 (2020) (arguing that the Constitution authorizes Congress to legally classify on the basis of Indian status); Philip P. Frickey, (Native) American Exceptionalism in Federal Public Law, 119 Harv. L. Rev. 433 (2005) (analyzing the incoherence of federal Indian law); Nell Jessup Newton, Federal Power Over Indians: Its Sources, Scope, and Limitations, 132 U. Pa. L. Rev. 195 (1984) (surveying the scope of federal power over Native peoples).

57. See generally Gregory Ablavsky, "With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings, 70 Stan. L. Rev. 1025 (2018) (uncovering the meaning of "tribe" and "Indian" in the late eighteenth-century); Elizabeth A. Reese, The Other American Law, 73 Stan. L. Rev. 555 (2021) (advocating for the integration of tribal law into mainstream understandings of American law); Angela R. Riley, (Tribal) Sovereignty and Illiberalism, 95 Calif. L. Rev. 799 (2007) (arguing for the recognition of tribal sovereignty even when tribal decisions conflict with Western liberal ideals); Gloria Valencia-Weber, Tribal Courts: Custom and Innovative Law, 24 N.M. L. Rev. 225 (1994) (characterizing tribes as a "third sovereign" that must be included in the legal discourse).

58. For a piece of historical scholarship that examines the impact of state law on Native peoples (though omitting thorough analysis of the historical connection between state power and federal Indian law), see generally Rosen, supra note 36 (studying the application of state law to Native peoples from the late eighteenth to the late nineteenth century). When Indian law scholars have focused on the history of states' arguments or authority, it has been to describe the origins of a specific legal principle. See, e.g., Gregory Ablavsky, Beyond the Indian Commerce Clause, 124 Yale L.J. 1012, 1039–52 (2015) [hereinafter Ablavsky, Indian Commerce Clause] (examining the origins of the federal government's exclusive authority over Indian affairs in the Founding Era); Gloria Valencia-Weber, The Supreme Court's Indian Law Decisions: Deviations From Constitutional Principles and the Crafting of Judicial Smallpox Blankets, 5 U. Pa. J. Const. L. 405, 409–13 (2003) (excavating the history of state authority to undermine the constitutional basis for the principles underlying the Court's reasoning in Nevada v. Hicks, 533 U.S. 353 (2001)).

59. See, e.g., Gregory Ablavsky, Sovereign Metaphors in Indian Law, 80 Mont. L. Rev. 11, 20–27 (2019) (discussing analogies between states and Native nations both historically and in the modern era).

60. See, e.g., Matthew L.M. Fletcher, Retiring the "Deadliest Enemies" Model of Tribal–State Relations, 43 Tulsa L. Rev. 73, 81–83 (2007) [hereinafter Fletcher, Deadliest Enemies] (describing how "negotiation and agreement" now characterize tribal–state

attention to state supremacy, especially in the wake of *Castro-Huerta*, this Article hopefully will spur other scholars in the field to consider it alongside federal power and tribal sovereignty in their analyses.[61]

This work on the state supremacy theory has implications for broader federalism issues beyond Indian law. In particular, the revival of state supremacy arguments in the modern Indian law cases suggests that the Rehnquist and Roberts Courts' formalist approach to federalism has been influenced by the history of Indian law.[62] The Court's "New Federalism," which purports to be a return to the original understanding of federalism, involves the resurrection of general ideas about federal, state, and tribal sovereignty that did not hold sway in the early republic and should not today.[63] Furthermore, the recent Indian law cases invoking state supremacy tropes to cabin tribal power reinforce the trend whereby the Court uses dubious constructions of state sovereignty to undermine racial remediation policies.[64] Therefore, Indian law may not be the only

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relations); Katherine Florey, Making It Work: Tribal Innovation, State Reaction, and the Future of Tribes as Regulatory Laboratories, 92 Wash. L. Rev. 713, 763–84 (2017) (analyzing ways in which tribes and states can benefit each other through regulatory innovations).

61. This Article joins a handful of other recent articles that have begun analyzing state power in relation to federal Indian law in the wake of *Castro-Huerta*. See generally Ablavsky, Too Much History, supra note 20 (calling *Castro-Huerta* indicative of the Court's problematic approach of using "too much history" in Indian law jurisprudence); Michael Doran, Tribal Sovereignty Preempted, 89 Brook. L. Rev. (forthcoming 2023), https://ssrn.com/abstract=4473476 [https://perma.cc/FT8N-JJZH] (tracking how the "symmetry for state and tribal authority" has been dismantled, leading to *Castro-Huerta*); Hedden-Nicely, The Reports of My Death, supra note 20 (arguing that *Worcester*'s broad principles remain good law even after *Castro-Huerta*); Dylan R. Hedden-Nicely, The Terms of Their Deal: Revitalizing the Treaty Right to Limit State Jurisdiction in Indian Country, 27 Lewis & Clark L. Rev. 457, 481–91 (2023) [hereinafter Hedden-Nicely, The Terms of Their Deal] (advocating for the application of treaty-rights analysis in Indian law preemption cases rather than *Castro-Huerta*'s balancing test); John P. LaVelle, Surviving *Castro-Huerta*: The Historical Perseverance of the Basic Policy of *Worcester v. Georgia* Protecting Tribal Autonomy, Notwithstanding One Supreme Court Opinion's Errant Narrative to the Contrary, 74 Mercer L. Rev. 845 (2023) (examining Supreme Court cases addressing state power over Native nations to critique the Court's opinion in *Castro-Huerta*); Rusco, supra note 49 (considering *Castro-Huerta*'s role in the erosion of tribal sovereignty). But it departs from this scholarship by providing an overarching historical and theoretical framework for understanding the legal principles used in *Castro-Huerta* within the context of federal Indian law doctrine.

62. This formalist approach is evident in recent Court developments in several areas of constitutional law, including the creation of the anticommandeering doctrine under the Tenth Amendment, see Printz v. United States, 521 U.S. 898, 918–22 (1997), the expansion of state sovereign immunity, see Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 60–73 (1996), and the limitations of Congress's spending power, see NFIB v. Sebelius, 567 U.S. 519, 575–85 (2012).

63. For a critique of the Court's modern originalist approach to federalism, see Alison L. LaCroix, The Interbellum Constitution: Federalism in the Long Founding Moment, 67 Stan. L. Rev. 397, 440–45 (2015) (uncovering understandings of Congress's spending power in the early nineteenth century).

64. See, e.g., Shelby County v. Holder, 570 U.S. 529, 544 (2013) (striking down the coverage formula in section 4 of the Voting Rights Act as a violation of states' "equal

doctrinal area in which robust-yet-inaccurate notions of state power must be confronted. And this analysis of the state supremacy theory will help jurists and legal scholars who work outside the field of federal Indian law to recognize the larger phenomenon of the Court using states' rights arguments shorn of their historical foundations to upset various doctrines.

Still, the overarching purpose of this Article is to undermine the use of state supremacy arguments in federal Indian law cases before the Supreme Court. In tracing the construction of the state supremacy theory by southern state officials in the 1820s and 1830s, it uncovers the flawed reasoning, racist undertones, and goals of legal and cultural elimination that underlay state supremacy arguments.[65] It argues that these enduring arguments not only pose a threat to legitimate sovereigns—Native nations—but also contradict the original understanding of constitutional and Indian law jurisprudence, defying the very first Indian law opinions written by Chief Justice John Marshall.[66] Furthermore, this Article contends that nothing—not history, changes in Indian affairs policy, or Supreme Court precedents—has made the state supremacy theory legally or morally sound in the interim. Rather, the theory's continued use actually defies constitutional law and federal Indian affairs policy, produces an inaccurate history of Native nations and federal Indian law, and perpetuates the racism and violence that characterized the Removal Era.[67]

If Indian Removal is not just the deportation of Native nations and peoples from their homelands but a legal assault on tribal sovereignty, it continues to haunt federal Indian law to this day. Just as the southern states used state law and the theory of state supremacy to legally eradicate Native nations within their borders in the Removal Era, now some states and Justices are seeking to constitutionalize state supremacy to do so once again. And they are using Removal-era arguments marred by colonialism, racial prejudice, and violence. The Court's endorsement of the rejected and flawed state supremacy theory should not go unchallenged at a time when the Court has called for invalidating laws based on racism and

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sovereignty"). For an analysis and critique of the Court's equal sovereignty principle and its use in *Shelby County*, see Leah M. Litman, Inventing Equal Sovereignty, 144 Mich. L. Rev. 1207, 1209–10 (2016).

65. This Article's use of the term "elimination" signifies Euro-American attempts to eradicate indigeneity on the North American continent through cultural assimilation, legal incorporation, and even violence. Its use aligns with the concept in settler colonial theory that the development of settler colonies and states, such as the United States, were "premised on the elimination of native societies." Patrick Wolfe, Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event 2 (1999).

66. See infra section II.C.

67. See infra section IV.B.

colonialism.[68] Advocates, jurists, and legal scholars must counter the Court's and states' use of these Removal-era holdovers. This Article will prepare them to do so.

This Article proceeds in four parts. Part I provides a brief history of the relationship between state authority and Indian affairs in the Founding and Removal Eras, describing the development of the Indian affairs legal regime that southern states challenged in the early nineteenth century. Part II uncovers the creation of the southern states' theory of state supremacy, which arose as they sought to extend state law over Native nations and eradicate tribal power. It identifies the legal bases and rhetorical themes of the state supremacy arguments. The Part also describes the rejection of these arguments in the foundational Indian law case of *Worcester v. Georgia*.[69] Part III turns to the persistence of the state supremacy arguments in the late nineteenth century and then to their revival in the early twenty-first century. It uncovers examples of Justices appropriating these arguments against tribal interests as well as states invoking them as parties to recent Indian law cases before the Court. Part IV argues that the theory of state supremacy now reigns victorious in Indian law with the Court's decision in *Castro-Huerta*.[70] It analyzes the various ways the *Castro-Huerta* majority relied on Removal-era arguments. It also points to the overarching problems in the Court's and state litigants' use of state supremacy arguments in the present day. As the Part illustrates, the constitutional, historical, and racial bases for the state supremacy theory render the theory illegitimate. The Part concludes by considering the potential impacts of *Castro-Huerta* on federal Indian law doctrine.

I. SOVEREIGNTY CONTESTS: STATE AUTHORITY AND INDIAN AFFAIRS IN THE EARLY REPUBLIC

Since the American Revolution, three groups of sovereigns—the national government, the states, and Native nations—have struggled with one another to assert authority over the peoples and territory of the United States. During the first several decades of the early republic, many debates in Indian affairs centered on which level of government—the federal or the state—had the power to treat with Native nations and, by extension, the power to acquire Native lands.[71] As Native peoples soon found out, state governments were more responsive to their land-

68. See Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020) (suggesting that the Court must evaluate the racist origins of laws when assessing their constitutionality). In particular, Justice Neil Gorsuch has called for the Court to overturn the *Insular Cases*, which justify the federal government's power over unincorporated territories, because they rely on "racial stereotypes" that were used to justify U.S. imperialism at the end of the nineteenth century. United States v. Vaello Madero, 142 S. Ct. 1539, 1552 (2022) (Gorsuch, J., concurring).

69. 31 U.S. (6 Pet.) 515 (1832).

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

71. See infra notes 75–79 and accompanying text.

hungry citizenry and were not above employing fraud, violence, and the law to dispossess Native peoples of their land.[72] In comparison to the federal government, states also felt more threatened by the presence of Native nations within their borders, as Native nations could exclude extensive territories from states' jurisdiction.[73] Thus, much of early Indian affairs consisted of states' attempts to fend off the other two sovereigns: They sought to cabin federal power with regard to Native nations while also denying the existence of any form of Native sovereignty. These efforts led to the creation of the state supremacy theory.

This Part recounts that history. It highlights how states, particularly those in the South, challenged federal authority in Indian affairs and tribal sovereignty even as the U.S. Constitution and increasing federal power attempted to restrict states' ability to direct Indian affairs policy. Beginning with the Founding Era, this Part traces the changes in the law regarding which level of U.S. government had authority over Indian affairs, focusing on how the Articles of Confederation gave way to the Constitution and how the Washington Administration instituted the nation's first federal Indian policy. Moving to the Removal Era, it then explains how events led southern states to pursue much more aggressive tactics against Native nations, most explicitly in the form of state law extension acts. Discussion of these acts lays the groundwork for an analysis of the state supremacy arguments that state legislators constructed to support them, the subject of the next Part.

A. *The Founding Era*

1. *State Aggression Under the Post-Revolutionary Legal Order.* — Even as Americans declared their independence from Great Britain, much of the United States did not belong to them. Rather, large portions of territory remained in the possession of Native nations. For example, the Haudenosaunee Confederacy dominated upstate New York, and the Muscogee Confederacy and Cherokee Nation kept Georgia's settlements concentrated along the coast.[74] With the presence of Native nations hampering the states' newly acquired independence and jurisdictions—and many nations siding with the British—state officials quickly sought to eradicate Native peoples' physical presence through either war or

72. See infra notes 75–79, 93–97, 114–123, and accompanying text.

73. See infra notes 74–75, 100–106, and accompanying text.

74. See Robbie Franklyn Ethridge, Creek Country: The Creek Indians and Their World 31 (2003) (recounting the history of the Muscogee in the late eighteenth and early nineteenth centuries); McLoughlin, supra note 5, at 27–30 (studying the history of the Cherokee Nation in the post-Revolutionary period); Alan Taylor, The Divided Ground: Indians, Settlers, and the Northern Borderland of the American Revolution 111–44 (2006) (describing the history of the Haudenosaunee Confederacy during and after the Revolution).

treaties.[75] And after the Revolutionary War, states sought to placate their land-hungry citizens by asserting state authority over Native peoples and divesting them of their lands.[76]

The post-Revolutionary legal order provided a basis for the states' actions. The Articles of Confederation presented an opening for the exercise of state power over Native peoples: Even as it bequeathed the Confederation Congress with the "sole and exclusive right and power" to manage Indian affairs, it limited Congress from interfering with "the legislative right of any State, within its own limits."[77] The ambiguity of the provision created conflict. Congress and state officials constantly clashed over which government had the right to treat with Native nations, and these disputes were on full display at treaty negotiations with the Cherokee, Chickasaw, Choctaw, and Haudenosaunee in 1784 and 1785.[78] In the South, North Carolina and Georgia openly flouted congressional policy, pursuing coercive treaties with Native nations and illegally selling Native land.[79] Caught between states' expansionist aims and federal weakness, Native nations turned to violence. In Georgia, the Muscogee Nation ejected Euro-American settlers from its lands, and the ensuing violence threatened war.[80]

2. *Federal Supremacy in Indian Affairs Under the Constitution.* — Such conflicts led to the creation of a new legal regime. As Greg Ablavsky has expertly traced, concerns over Indian affairs—particularly the aggressive actions of states—served as a major impetus for the drafting and adoption of the U.S. Constitution.[81] In place of the ambiguous provisions of the Articles of Confederation, the Constitution's drafters explicitly positioned Indian affairs within the purview of the federal government's authority.[82] The Constitution gave the federal government control of commerce with the Native

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75. See Colin G. Calloway, The American Revolution in Indian Country: Crisis and Diversity in Native American Communities 108–28, 182–212 (1995) (describing the violence and diplomacy that pervaded Revolution-era relations between the Haudenosaunee and New York and between the Cherokee and Virginia, North Carolina, and Georgia).

76. See Ablavsky, Empire States, supra note 36, at 1826 (highlighting Georgia's and North Carolina's efforts to seize Native lands through treaties and state statutes).

77. Articles of Confederation of 1781, art. IX, para. 4.

78. Gregory Ablavsky, The Savage Constitution, 63 Duke L.J. 999, 1018–33 (2014).

79. Id. at 1027–28.

80. Id. at 1031.

81. Id. at 1033–39.

82. See Ablavsky, Indian Commerce Clause, supra note 58, at 1039–45 (characterizing the Constitution's provisions and early federal practice in Indian affairs as preemptive of state authority); Robert N. Clinton, The Dormant Indian Commerce Clause, 27 Conn. L. Rev. 1055, 1147–90 (1995) (arguing that the Constitution, particularly the Commerce Clause, gave the federal government authority over Indian affairs exclusive of the states); see also U.S. Const. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce . . . with the Indian Tribes").

nations[83] and the exclusive power to enter treaties[84] and declare war,[85] with no exceptions for state sovereignty.

The Washington Administration bolstered this view of federal supremacy, using the Constitution's grant of powers to the federal government to create a centralized Indian policy.[86] In particular, the Administration recognized Native nations as sovereigns, departing from states' claims that these nations were conquered peoples.[87] President George Washington and Henry Knox, the Secretary of War, formulated a policy that focused on pursuing diplomatic relations—treaties—with the Native nations, protecting the nations' rights to land, and instituting "civilization" programs that promoted the adoption of Euro-American forms of agriculture, education, and the market economy.[88]

Yet the creation of federal Indian affairs policy was only one aspect of the Administration's work. Federal officials had to sell Native peoples on the merits of the new Constitution.[89] As part of these "Native ratification debates," Native peoples considered whether the newly empowered federal government would actually restrain the states and Euro-American settlers and promote the autonomy and diplomatic relationships that Native nations expected.[90] Ultimately, many Native nations rejected the Constitution, turning to British and Spanish allies and war to maintain their sovereignty.[91]

In the end, events proved the Native nations right. The Constitution's alteration of Indian affairs authority failed to arrest states' attempts to assert jurisdiction over Native peoples and seize their lands.[92] Angry at the federal government for invalidating earlier land cessions from the Muscogee in the 1790 Treaty of New York, Georgia declared that the exercise of federal power in guaranteeing Indian title within the state was unconstitutional.[93] In 1795, Georgia defied the treaty by selling the state's western territory, which included the disputed Muscogee lands, to land

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83. U.S. Const. art. I, § 8, cl. 3.

84. Id. art. I, § 10, cl. 1.

85. Id. art. I, § 8, cl. 11.

86. Ablavsky, Indian Commerce Clause, supra note 58, at 1041–43.

87. Id. at 1061–64.

88. See Colin G. Calloway, The Indian World of George Washington: The First President, the First Americans, and the Birth of the Nation 322–31, 340–41 (2018) [hereinafter Calloway, The Indian World of George Washington] (detailing Washington and Knox's efforts to "define and implement a national Indian policy"); Dorothy V. Jones, License for Empire: Colonialism by Treaty in Early America 166–69 (1982) (discussing Knox's approach to federal Indian affairs policy).

89. Gregory Ablavsky & W. Tanner Allread, We the (Native) People?: How Indigenous Peoples Debated the U.S. Constitution, 123 Colum. L. Rev. 243, 271–86 (2023).

90. Id. at 276–78.

91. Id. at 281–82.

92. Id. at 266–67.

93. Ablavsky, Indian Commerce Clause, supra note 58, at 1045–47.

companies, initiating a decades-long legal dispute.[94] Georgia's vitriol subsided once it entered into the Compact of 1802 with the federal government.[95] In exchange for the state's western territory, the United States agreed to extinguish all remaining Indian title within the state's boundaries.[96] The compact would eventually prove to be another source of frustration, however, when Georgia and other states began to push for the expulsion of Native nations from their borders two decades later.[97]

B. *The Removal Era*

Even though the federal government asserted its supremacy in Indian affairs, the sovereignty contests of the early republic were far from over. In the early decades of the nineteenth century, the federal executive's civilization policy—premised on the eventual assimilation of Native peoples into the United States—gave way to one of deportation, euphemistically known as Indian Removal.[98] Bolstered by the prospect of securing Native lands within their borders, southern states once again attacked federal supremacy and tribal sovereignty in an effort to eliminate the presence of Native nations.

1. *The Escalation of Southern States' Campaigns for Native Land.* — Although the southern states' campaigns for Native land had never completely subsided over the first decade of the nineteenth century, the War of 1812 and its aftermath set the stage for their escalation.[99] Home to the powerful and populous Cherokee, Chickasaw, Choctaw, Muscogee, and Seminole Nations, the southern states remained divided between Euro-American and Native lands.[100] The defeat of the British signaled the

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94. See Charles F. Hobson, The Great Yazoo Lands Sale: The Case of *Fletcher v. Peck* 11–55 (2016) (telling the history of Georgia's actions and the Supreme Court case that resulted from it); see also Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139–43 (1810) (concluding that the land sale was a binding contract and could not be repealed, invalidating Georgia's rescission of such land sales).

95. See Articles of Agreement and Cession, U.S.-Ga., Apr. 24, 1802, reprinted in The Revised Code of the Laws of Mississippi in Which Are Comprised All Such Acts of the General Assembly, of a Public Nature, as Were in Force at the End of the Year 1823; with a General Index 502, 502 (George Poindexter ed., Natchez, Francis Baker 1824) [hereinafter Compact of 1802]; Ford, supra note 12, at 25 (describing the content and significance of the Compact of 1802).

96. See Ford, supra note 12, at 25 (explaining that under the Compact, the United States would "extinguish indigenous title within Georgia's boundaries as soon as it was peaceably possible" (citing Compact of 1802, supra note 95, at 502)).

97. See id. at 137 (highlighting the Georgia governor's invocation of the Compact when advocating for Cherokee Removal in the early 1820s).

98. See Saunt, supra note 3, at 22–26 (describing the transition from the "civilizing" policy to the deportation policy); see also supra note 25.

99. Ford, supra note 12, at 133.

100. See Saunt, supra note 3, at 11–14 (describing the hybrid geographical, political, cultural, and economic reality of the U.S. South in the early nineteenth century).

end of European interest in the Southeast, foreclosing the nations from ever again pursuing their diplomatic strategy of playing off the American and European powers.[101] This end to European interference, as well as the later defeat of the Muscogee Red Sticks—allies of the British—solidified the United States' hold on the region.[102] And the postwar influx of settlement resulted in the admission of Alabama and Mississippi—two states with substantial amounts of territory still in Indian hands[103]—into the Union.[104] The peace also increased British demand for American cotton, heightening settlers' desire for more farmland.[105] Finding themselves with nominal jurisdiction and facing pressure from their citizens to acquire more land for cotton cultivation, the southern states slowly revived arguments for the recognition of their territorial rights and the extinguishment of Indian title.[106]

By the 1820s, these campaigns erupted in force as southern state governments perceived themselves to be under attack from all sides. First, the federal executive failed to secure removal and cession treaties with the Five Tribes despite its declared intentions to remove them west of the Mississippi River.[107] Even worse, President John Quincy Adams "declined to recognize" the 1825 Treaty of Indian Springs, which "ceded the remaining [Muscogee] territory in Georgia," frustrating Georgia's efforts to gain large amounts of Native land for white settlement and angering state officials.[108] The southern states not only protested the federal government's inability to implement its new policy but also

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101. See Ford, supra note 12, at 133 ("The peace with Britain in 1814 . . . cut southeastern Indians off from European trade and diplomacy.").

102. See id. (noting how the 1814 defeat of the Red Sticks led to "huge cessions" of Muscogee land).

103. See Saunt, supra note 3, at 37–38 (noting that the Muscogee owned over 10,000 square miles of land in Alabama and the Choctaw and Chickasaw owned 25,000 square miles of land in Mississippi).

104. J. Michael Bunn & Clay Williams, Mississippi's Territorial Years: A Momentous and Contentious Affair (1798–1817), Miss. Hist. Now (Nov. 2008), https://www.mshistorynow.mdah.ms.gov/issue/mississippis-territorial-years-1798-1817 [https://perma.cc/38YL-34R5] (describing how the population of the Mississippi Territory increased to over 200,000 following the Red Stick War, leading to Mississippi and Alabama statehood).

105. Ford, supra note 12, at 133.

106. Id. at 133–35.

107. See Saunt, supra note 3, at 34–37 (describing how the Cherokee, Choctaw, and Chickasaw Nations refused to cede any lands to the federal government and how the Muscogee Nation extracted guarantees for the security of its lands in Alabama after the cession of its Georgia territory); The Report, supra note 28, at 2 (expressing southern politicians' frustrations with the federal government for the collapse of treaty negotiations with the Choctaw and Chickasaw in 1826).

108. Saunt, supra note 3, at 35–36; see also Treaty of Indian Springs, Creek Nation-U.S., art. I, Feb. 12, 1825, 7 Stat. 237 (ceding Muscogee land).

claimed that the federal treaty abrogation had violated states' rights vested in the treaties.[109]

Second, state officials had to contend with the threat that Native nations' increasing political and economic power posed to them. The combination of the federal government's "civilization" programs and the need to ensure tribal unity around the issue of land cessions led tribal nations to embark on dramatic political state-building projects in the early nineteenth century.[110] The Choctaw and Cherokee nations wrote their first constitutions in 1826 and 1827, respectively.[111] In addition to adopting Euro-American forms of governance, both constitutions enshrined the nations' refusal to cede their land.[112] In writing these constitutions, the Choctaw and the Cherokee confirmed state governments' fears that their territory would forever be divided between two different peoples and two separate governments.

2. *The Southern State Law Extension Acts.* — Caught between the federal government's failure to negotiate removal treaties and perceived Native threats to state sovereignty, southern states took matters into their own hands. Following the advice of U.S. senators from Georgia, Mississippi, and Alabama,[113] state legislatures began enacting laws that extended state civil and criminal jurisdiction over Native lands and the peoples residing on them.[114] The senators predicted that such laws would force the Native nations to either remove west of the Mississippi or incorporate into the state polity without their tribal status or any

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109. See Resolution of Jan. 13, 1827, 1826–1827 Ala. Laws 119, 120; H.R. Journal, 8th Sess., at 183–85 (Ala. 1827).

110. See Duane Champagne, Social Order and Political Change: Constitutional Governments Among the Cherokee, the Choctaw, the Chickasaw, and the Creek 124–75 (1992) (describing changes in the governments of Cherokee, Choctaw, Chickasaw, and Muscogee Nations and these nations' adoption of written law in the 1810s and 1820s).

111. Constitution of the Cherokee Nation of 1827, reprinted in Cherokee Nat'l Council, Laws of the Cherokee Nation 118 (Tahlequah, Cherokee Advoc. Off. 1852) [hereinafter Cherokee Constitution of 1827]; Entries From August 5, 1826, *in* Peter Perkins Pitchlynn, A Gathering of Statesmen: Records of the Choctaw Council Meetings, 1826–1828, at 45 (Marcia Haag & Henry Willis eds. and trans., 2013) [hereinafter Choctaw Constitution of 1826].

112. See Cherokee Constitution of 1827, supra note 111, art. I, § 2 ("The sovereignty and Jurisdiction of this Government shall extend over the country . . . and the lands therein are, and shall remain, the common property of the Nation . . . ."); Choctaw Constitution of 1826, supra note 111, at 50–51 ("The land where we reside belongs to all who are called Choctaw people. If any single district wants to sell its land, and the other two districts do not agree, the single district cannot sell its land.").

113. See The Report, supra note 28, at 2 (relaying the views of Senators John McKinley of Alabama, Thomas Buck Reed of Mississippi, and Thomas Cobb of Georgia, who advocated for the extension of state law over Native peoples).

114. See Garrison, supra note 27, at 3 (detailing the steps that southern state legislatures took to extend jurisdiction over Native lands).

pertinent rights.[115] Eager to eliminate the Native presence within the state either legally or physically, Georgia passed the first extension act in 1828 and two more in the subsequent two years.[116] Mississippi followed with extension acts in 1829 and 1830.[117] The Alabama legislature passed its law in 1832,[118] and the Tennessee legislature passed the South's final extension act in 1833.[119]

When analyzing and comparing all the southern states' extension acts, it is clear that the acts were major developments in the legal disputes over Indian affairs. Wresting jurisdiction away from the federal and tribal governments, southern legislatures deployed various strategies to achieve their aims. Georgia's and Mississippi's legislatures passed the acts but delayed the extension of state laws to Native peoples, hoping to induce them to remove beforehand.[120] These two states also directly attacked Native sovereignty, outlawing the convening of tribal governments, the application of tribal law, and the exercise of any power by tribal officials—with criminal penalties attached.[121] The southern state legislatures also limited or denied citizenship rights to Native peoples—restricting their ability to testify in court and serve in the militia or on juries—as they subsumed Native peoples within their polity.[122] Although none of these laws physically eradicated Native people from within state borders, they legally eliminated Native nations from the states' claimed territories.[123]

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115. See The Report, supra note 28, at 2 ("Either 1st, the Indians will be speedily induced to remove to the west of the Mississippi, or, 2d, being incorporated into the body politic, will soon lose their distinctive character, language, and colour.").

116. Act of Dec. 22, 1830, 1830 Ga. Laws 114; Act of Dec. 19, 1829, 1829 Ga. Laws 98; Act of Dec. 20, 1828, 1828 Ga. Laws 88.

117. Act of Jan. 19, 1830, ch. 1, 1830 Miss. Laws 5; Act of Feb. 4, 1829, ch. 77, 1829 Miss. Laws 81.

118. Act of Jan. 16, 1832, 1831–1832 Ala. Laws 7.

119. Act of Nov. 8, 1833, ch. 16, 1833 Tenn. Pub. Acts 10.

120. See § 7, 1828 Ga. Laws at 89 (delaying implementation to June 1, 1830); ch. 77, § 2, 1829 Miss. Laws at 81–82 (extending civil process to Choctaw and Chickasaw lands but excluding its application to Native peoples).

121. See §§ 7–13, 1829 Ga. Laws at 99–101; § 8, 1828 Ga. Laws at 89; §§ 1, 5, 1830 Miss. Laws at 5–6.

122. See, e.g., §§ 3–4, 1831–1832 Ala. Laws at 7 (allowing Native peoples to testify in state court and record wills and bills of sale but exempting them from military duty, road work, jury service, and taxes); § 9, 1828 Ga. Laws at 89 (denying Native peoples the right to testify in state court).

123. In addition to directly attacking tribal sovereignty and Native peoples, the states added Native lands to counties prior to their cession. Georgia specifically undertook surveys of these lands and held lotteries to distribute the lands to Euro-American settlers. For the history of the ties between county formation and Native dispossession, see K-Sue Park, Property and Sovereignty in America: A History of Title Registries & Jurisdictional Power, 133 Yale L.J. (forthcoming 2023) (manuscript at 38–46), https://ssrn.com/abstract=4374259 [https://perma.cc/UTG8-BYA7].

The states' actions transformed the Removal debates into a constitutional crisis over dueling sovereignties.[124] President Jackson stood behind the states and disclaimed federal authority, stating that the Native nations either had to remove west or submit to state law.[125] Debates in Congress on the Indian Removal Act raged over whether the states had the power to pass the extension acts.[126] And Native peoples wrote letters, submitted petitions, and pursued litigation to make their own constitutional arguments.[127] Ultimately, the Removal debates boiled down to two constitutional questions: Which level of American government had the authority to manage Indian affairs? And did the Constitution recognize and protect Native sovereignty? As discussed in the next Part, the southern states felt that they had clear answers to these questions.

II. CONSTRUCTING THE STATE SUPREMACY ARGUMENTS

The conflict over Removal initiated a new stage in the legal and constitutional debates over Indian affairs authority and tribal sovereignty. Although various states had long deployed justifications for their attempts to assert jurisdiction over Native peoples,[128] the Removal Era witnessed the creation and consolidation of arguments for the principle of state supremacy. Because the southern state governments had taken the unprecedented step of enacting state law extension acts, southern politicians and state legislatures needed to justify their actions. Thus, they wove together a creative—and incorrect—interpretation of the law of nations, the Constitution, British and American policies, and numerous treaties and compacts to construct the *theory of state supremacy*. This theory claimed that state territorial jurisdiction was absolute, tribal sovereignty was nonexistent, and federal power was a limited yet valuable asset for upholding state authority against internal threats, namely tribal power.

It was this theory of state supremacy that led to the creation of the field now known as federal Indian law. Native peoples and their allies responded to the states' justifications and extension acts with their own legal arguments. And their challenges to the state laws, specifically challenges by the Cherokee Nation and Euro-American missionaries, resulted in the Cherokee cases, now known as the foundational Indian law

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124. See Ablavsky & Allread, supra note 89, at 286–89 (describing divergent constitutional interpretations regarding sovereignty and federalism by Native peoples and their Jacksonian opponents).

125. Andrew Jackson, Message From the President of the United States, S. Doc. No. 21-1, at 19–22 (1830).

126. See 6 Reg. Deb. 309–20, 325–29, 344–57 (1830) (recounting congressional speeches that discussed the southern state law extension acts).

127. Ablavsky & Allread, supra note 89, at 288, 291–99.

128. See Ablavsky, Indian Commerce Clause, supra note 58, at 1045–50 (analyzing state sovereignty arguments used to justify state jurisdiction over Native peoples in the early Founding period).

cases.[129] In *Cherokee Nation v. Georgia*[130] and *Worcester v. Georgia*,[131] the Supreme Court distilled the principles that supported the existence of tribal sovereignty, asserted federal Indian affairs authority, and rejected any notion of state supremacy with regard to Native nations and peoples.[132]

This Part draws from state legislative committee reports, an 1827 report authored by three U.S. senators from the South, and the statements of the Jackson Administration to uncover the state supremacy arguments advanced by southern states in the Removal Era.[133] These sources represent the first instances in which state and federal officials laid out a comprehensive case for state jurisdiction over Native peoples and lands within their borders. These officials were the architects of the state law extension acts and federal Removal policy, so looking to their words elucidates the legal interpretations that justified their actions. Also, the Cherokee cases hold the distinction of being significant Supreme Court cases in which the respondent—the State of Georgia—refused to participate, leaving no briefs or oral arguments to analyze.[134] Although many legal scholars have analyzed the Cherokee cases, none have relied on these sources—the actual documents that state officials produced to lay out their arguments for state supremacy.[135] Therefore, to fully excavate the origins of federal Indian law and its ties to the theory of state supremacy, this Part traces the development of the state supremacy arguments utilized in these reports to justify the states' theory. It describes the legal bases southern politicians claimed for their actions, the rhetorical themes they

129. For an in-depth study of these cases, see generally Norgren, supra note 38.

130. 30 U.S. (5 Pet.) 1 (1831).

131. 31 U.S. (6 Pet.) 515 (1832).

132. See infra notes 223–248 and accompanying text.

133. The report authored by the U.S. senators was the product of a conspiracy among southern representatives and senators in the winter of 1826 to 1827 to generate ideas for states to seize Native lands. Saunt, supra note 3, at 37–41. A subcommittee composed of Senators John McKinley of Alabama, Thomas Buck Reed of Mississippi, and Thomas Cobb of Georgia wrote the report, advocating for the use of state law extension acts. The Report, supra note 28, at 2–3. The report also provided a detailed justification for these acts based on state sovereignty principles. Id. Although the committee disbanded, the report was published in the *Southern Recorder* newspaper, which was based in Georgia's then-capital, Milledgeville, and likely spread throughout the South from there. Id. at 2.

134. See Garrison, supra note 27, at 129–30, 176 (noting Georgia officials' refusal to appear before the Supreme Court in both *Cherokee Nation* and *Worcester*).

135. For these works, see supra notes 38–39. Up to this point, Tim Alan Garrison has provided the most detailed study of the southern state supremacy arguments during the Removal Era, but he draws them from three southern state supreme court cases that upheld the state law extension acts and largely repeated the same arguments that state legislators had made years earlier. Garrison, supra note 27, at 5–11. This focus on state supreme courts misses the state legislatures' contemporary role as the recognized "organ of . . . State Sovereignty," H.R. Journal, 8th Sess., at 184 (Ala. 1827), and as the originators of a comprehensive legal theory whose tenets would continue to impact federal Indian law doctrine.

employed, and the Supreme Court's rejection of all these aspects of state supremacy in *Worcester v. Georgia*.[136]

A. *Legal Bases*

At its core, the state supremacy theory was a legal case for state power. This section details the various legal justifications—interpretations of the law of nations, the Constitution, and concepts of territorial sovereignty—that southern politicians deployed to construct their theory.

1. *The Law of Nations.* — Even though the law of nations may seem like a strange starting point for states in the wake of the ratification of the Constitution, it was here that southern officials believed they had the strongest support for territorial supremacy over Native nations.[137] And southerners bolstered their case by relying on the eighteenth-century Swiss jurist Emer de Vattel's treatise *The Law of Nations*, the canonical book on international law during the early republic.[138]

In brief, southern officials' interpretation of the law of nations went like this: First, states, as the successors to a "discovering" nation, possessed the right to exercise absolute dominion over their territory and the people residing thereon.[139] According to their reading of Vattel, nations that discovered North America possessed the right to "possess, occupy and colonize" the continent.[140] Settlement on lands bestowed "absolute sovereignty," which contained the rights of "domain" and "empire," over territory to the discovering nation.[141] In the case of the United States, the discovery of the east coast of North America vested sovereignty in Great Britain, which passed it to the states—specifically "the people of each State within its own limits"—after the Revolution.[142] Even though the people "surrendered a portion of their right of empire or sovereign command" to the federal government when the Constitution was adopted, the states retained the remaining portions of these rights.[143] Moreover, new states acquired these rights because "the United States transferred to the people

136. 31 U.S. (6 Pet.) 515.

137. The law of nations exerted an immense amount of influence on the legal development of the early republic and the discourses of colonialism used to legally subjugate Native peoples, so it is not strange to find that states relied on it. For a useful list of works discussing the law of nations' use in the early republic, see Gregory Ablavsky, Species of Sovereignty: Native Nationhood, the United States, and International Law, 1783–1795, 106 J. Am. Hist. 591, 591–592 & nn.2–3 (2019).

138. See Garrison, supra note 27, at 69–73 (exploring the manner in which American legal professionals and jurists invoked Vattel's treatise, particularly the false narrative that Native peoples did not cultivate their lands, as a rationale for dispossessing them of their lands); see also Emer de Vattel, The Law of Nations 77 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund, Inc. 2008) (1758).

139. The Report, supra note 28, at 2.

140. Id.

141. Id.

142. Id.

143. Id.

of such States[] all of 'high domain' and of 'empire,' acquired by cession from the old States."[144] In other words, the United States transferred this sovereignty to new states that were carved out of the former western territories of the original states. Thus, states both old—Georgia—and new—Mississippi, Alabama, and Tennessee—gained title to all of their territory as well as the ability to exercise jurisdiction over it.

Second, the states contended that Indians were not civilized peoples, so Native nations possessed no rights of soil or sovereignty.[145] Rather, these nations only held a usufructuary interest in their lands.[146] According to southerners' interpretation of Vattel, the ability to cultivate and wholly occupy lands determined the rightful owners of a territory.[147] The discoverers of the North American continent found no such peoples with this ability.[148] Instead, the civilized nations could pursue one of two options, depending on the types of aboriginal people they encountered. For "savage" inhabitants who chose "to live by rapine," the discoverers could exterminate them.[149] Alternatively, the civilized nations could confine those "erratic" inhabitants who were not savage but still refused to labor and were unable to occupy the whole territory.[150] Because of these supposed weaknesses, the Indigenous inhabitants possessed no rights that would prevent civilized nations from exercising their right to "possess, occupy and colonize" the continent.[151]

The Alabama legislature thought recognizing tribal sovereignty at the expense of state jurisdiction "would . . . reverse the judgments of all civilized nations, from the first discovery of America."[152] Additionally, the legislature argued that all settlements in the United States and all extensions of sovereignty from these settlements "have been predicated upon the principle that the Indians have only a usufructuary interest in the soil, and that this interest is subservient to the higher rights of civil society."[153] Therefore, the southerners' view of the law of nations supported southern states' annihilation of Native title and appropriation of Native lands for the benefit of white settlers.[154]

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144. Id.

145. Id.

146. Id.

147. Id.

148. Id.

149. Id.

150. Id.

151. Id.

152. H.R. Journal, 10th Sess., at 222 (Ala. 1829).

153. Id.

154. While representing only one of several perspectives on the law of nations, the southerners' interpretation largely followed the positions that the U.S. Supreme Court had endorsed in the 1823 case of Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 584–85 (1823) ("[E]ither the United States, or the several States, had a clear title to all the lands . . . ,

2. *The U.S. Constitution.* — While the law of nations provided the foundation for state supremacy, the U.S. Constitution, in southerners' eyes, provided further support. Although the document contains no mention of state sovereignty, southern politicians argued that it did not limit fundamental aspects of state sovereignty and that it actually required the federal government to protect state governments.

To support absolute state jurisdiction using the Constitution, southerners argued that there was no provision that granted the federal government either the power to legislate over lands within state limits or authority over Indian affairs. They asserted that the Property Clause[155] did not apply to lands within state borders because the federal government neither could erect a territory within a state's boundaries nor held title to Indian lands within states, since the law of nations granted the right of soil to states.[156] Possessing no territorial jurisdiction over states, the federal government also lacked the authority to control Indian affairs.[157]

Even though the federal government had continually relied on its treatymaking power to enter into agreements with Native nations, the southern states declared that such agreements were not legitimate treaties, unlike those with foreign nations.[158] In the states' view, the treatymaking power could not apply to Native nations because the tribes were not sovereign. According to southern senators, not only did "[s]tates claim and exercise a sovereignty a thousand times greater than can be supposed to exist in any tribe or tribes of Indians within the limits of these states" but also "the idea of making Treaties with them, in the true and legitimate sense of the word, is worse than ridiculous."[159]

The provision of the Constitution that garnered the most attention was the Commerce Clause.[160] Southern politicians creatively interpreted the Constitution to reject Congress's ability to regulate Indian affairs via the Commerce Clause. The southern U.S. senators claimed

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subject only to the Indian right of occupancy, and . . . the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it.").

155. U.S. Const. art. IV, § 3, cl. 2.

156. See Resolution of Dec. 27, 1827, 1827 Ga. Laws 236, 244 ("[N]othing in this part of . . . the Constitution *expressly* or *impliedly* divest[ed] Georgia of the right of sovereignty . . . , and from the very fact, that no such right was surrendered [to] . . . the United States, we are warranted in asserting that the right was *retained* by the State."); H.R. Journal, 20th Sess., at 44 (Tenn. 1833) (finding that "[t]he power to dispose of, and make needful rules and regulations respecting the property of the United States, and the power to exercise general jurisdiction over persons upon it, are essentially different and independent").

157. See Tenn. H.R. Journal, 20th Sess., at 44 ("[The Property Clause] refers to territorial rights. To the power to control and regulate these, and not to the exercise of jurisdiction over Indians, living within the country claimed by them.").

158. See The Report, supra note 28, at 3 (suggesting that treaties between Native Americans and the federal government are mere agreements and therefore unenforceable).

159. Id.

160. U.S. Const. art. I, § 8, cl. 3.

that the Commerce Clause only concerned "the establishing of rules, according to which the traffic of equivalent values should be prosecuted."[161] The Tennessee legislature agreed, explaining that the provision "is a power to regulate commerce, and not to exercise jurisdiction."[162] If Congress possessed jurisdiction over Native nations based on its commerce power, then it also had jurisdiction over foreign nations.[163] If not, "entirely different meanings are to be given to the same words in the same sentence," an absurdity in legal interpretation.[164] Moreover, southern states revealed their underlying fears of a broader interpretation of the Commerce Clause. The senators believed that the federal government, in exercising jurisdiction over Native peoples, would transform them from tribal members to citizens of the United States.[165] If the federal government possessed the power under the Commerce Clause to admit Native peoples to the privileges of citizenship, the senators feared it could also do so for Black people, stripping states of their ability to police citizenship rights and maintain slavery.[166] Because such an interference with state powers was unthinkable to them, southern states declared the commerce power limited in scope.

In contrast to their rejection of the provision of any Indian affairs powers in the Constitution, the southerners found several clauses that allegedly required the federal government to protect them from internal threats. The New State Clause[167] was one of these provisions. Echoing southern states' arguments about territorial jurisdiction and the impossibility of imperium in imperio—a government within a government—President Andrew Jackson explicitly asserted that the New State Clause, which forbade the creation of a new state within the territory of an existing one without its consent, bound his hands.[168] According to Jackson, the clause prevented him from interfering with legitimate state laws on behalf of Native peoples.[169] And the clause prohibited the erection of tribal governments within states' limits.[170] Jackson argued that if the Constitution prohibited the creation of a new state within the territory of an established state against its consent, "much less

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161. The Report, supra note 28, at 2. For an in-depth analysis of the original meaning of the Indian Commerce Clause, see Ablavsky, Indian Commerce Clause, supra note 58, at 1023–52.

162. Tenn. H.R. Journal, 20th Sess., at 44.

163. Id.

164. Id.

165. The Report, supra note 28, at 3.

166. Id.

167. U.S. Const. art. IV, § 3, cl. 1.

168. Andrew Jackson, Message From the President of the United States, H.R. Doc. No. 21-2, at 15–16 (1829).

169. Id.

170. Id.

could it allow a foreign and independent government to establish itself there."[171]

Additionally, southern state legislatures invoked Article IV, Section 4 of the Constitution, which authorized the federal government to protect states against "domestic violence."[172] The Alabama legislature framed the situation it faced as a dire threat, stating that the erection of the Cherokee Nation government was "calculated . . . to increase the dangers of domestic insurrection."[173] Even in suggesting that southern states adopt extension acts, the U.S. senators argued that any resistance by Native peoples against the exercise of state jurisdiction "would be such an insurrection as, under the Constitution, the U. States would be bound to repress."[174] Thus, southern states believed themselves constitutionally able to rely on the federal government for the elimination of threats to their sovereignty.

3. *The Equal Footing Doctrine.* — The southern states also relied on the Equal Footing Doctrine—the principle that all states entered the Union with the same rights—to support their theory of state sovereignty. Although not enshrined in the Constitution, the Equal Footing Doctrine had achieved constitutional significance by the 1820s.[175] Initially included in the Northwest Ordinance,[176] "equal footing" language was present in the Compact of 1802[177] for any states that would be carved out of Georgia's western land cessions as well as in the admission acts of Tennessee,[178] Mississippi,[179] and Alabama.[180]

Southern states latched onto this language. They asserted that they not only received the same rights of territorial jurisdiction granted to original states through the law of nations but also possessed the same

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171. Id. at 15.

172. U.S. Const. art. IV, § 4.

173. H.R. Journal, 10th Sess., at 220 (Ala. 1829).

174. The Report, supra note 28, at 3.

175. See Valerie J.M. Brader, Congress' Pet: Why the Clean Air Act's Favoritism of California Is Unconstitutional Under the Equal Footing Doctrine, 13 Hastings W.-Nw. J. Env't L. & Pol'y 119, 133–36 (2007) (summarizing the early statutory history of the Equal Footing Doctrine); see also Ablavsky, Federal Ground, supra note 36, at 201–06 (discussing Tennessee's rejection of federal authority over public lands and Indian affairs shortly after statehood using "equal footing" arguments).

176. See An Ordinance for the Government of the Territory of the United States North West of the River Ohio (1787), reprinted in 32 Journals of the Continental Congress 1774–1789, at 314, 317–20 (1936) (explaining that the Northwest territories shall be admitted on "equal footing" to older states); see also Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 50–51 (conforming the Northwest Ordinance to the Constitution).

177. See Compact of 1802, supra note 95, at 504 ("That the Territory thus ceded, shall form a State . . . with the same privileges, and in the same manner as is provided in the Ordinance of Congress of the thirteenth day of July [1787] . . . .").

178. Act of June 1, 1796, ch. 47, 1 Stat. 491, 491.

179. Act of Mar. 1, 1817, ch. 23, § 1, 3 Stat. 348, 348.

180. Act of Mar. 2, 1819, ch. 47, § 1, 3 Stat. 489, 490.

power to pass legislation concerning Native peoples.[181] As the Alabama legislature pointed out, "[M]ost of the states have, at some time or other, either exercised the power in question, or the still stronger power of forcibly expelling the Indians from their limits . . . ."[182] If Alabama did not possess the power to extend her jurisdiction over Native peoples within her borders, "a power which has been so frequently exercised by other states," then "her sovereignty is not at a footing with the older states."[183] President Jackson echoed these sentiments, contending that because Congress admitted Alabama on the same footing as the original states, the state had the same power over Native peoples as other states—such as Maine and New York—that had long exercised authority over some of their Indigenous inhabitants.[184] Because these states would not support the erection of tribal governments within their borders, the Equal Footing Doctrine allowed Alabama to oppose the same.[185]

4. *Territorial Sovereignty.* — The southern theory of state supremacy relied heavily on the concept of territorial jurisdiction, an idea states had only begun to pursue. In the late eighteenth and early nineteenth centuries, understandings of the nature of jurisdiction were in flux.[186] Although southern states claimed extensive territories, they only sought to exercise jurisdiction over certain races—white and Black—within actual Euro-American settlements.[187] The presence of Native nations within states' claimed territory, paired with states' constrained institutional capacity—their inability to control inferior courts and local law enforcement—discouraged notions of full territorial jurisdiction.[188] As these states sought to fully incorporate their claimed territory and increase the amount of land available for settlement and cotton production,

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181. See The Report, supra note 28, at 3 ("[T]he Federal government has not acquired the *exclusive* right . . . to extinguish the Indian title, or to extend the operation of the municipal laws of any State over the persons of the Indians . . . . [T]hey are *retained* by [the States], and may be exercised at discretion.").

182. H.R. Journal, 10th Sess., at 221 (Ala. 1829).

183. Id.

184. Andrew Jackson, Message From the President of the United States, H.R. Doc. No. 21-2, at 15–16 (1829) ("There is no constitutional, conventional, or legal provision, which allows them less power over the Indians within their borders, than is possessed by Maine and New York."). Although New York and Maine claimed jurisdiction over Native peoples, the exercise of this jurisdiction was both haphazard and strongly contested by Native peoples. For the history of New York's attempts to subject Native peoples to state law in the early nineteenth century, see Rosen, supra note 36, at 23–38.

185. Id.

186. See Ford, supra note 12, at 4 (emphasizing how "settler polities redefined sovereignty at the same time as it was recast in other centers, peripheries, and places in between" in the early nineteenth century).

187. See id. at 30–42, 108–20 (demonstrating how, prior to the 1820s, Georgia settlers refused to prosecute crimes that either involved Native peoples or occurred beyond the boundaries of Euro-American settlements in Indian Country).

188. See id. (analyzing early nineteenth-century instances in which localism prevented Georgia's exercise of state criminal jurisdiction over Native peoples).

however, they transitioned to a territorial basis for jurisdiction.[189] This territorial focus allowed states to not only exercise their authority over profitable lands but also claim the right to appropriate Native lands within their borders.[190]

Southern states' notion of territorial sovereignty contained several premises. First, states argued that they possessed the ability to exercise jurisdiction over all the territory within their boundaries.[191] This right derived from states holding ultimate title to all of their land claims, including lands on which Native nations resided.[192] As the Georgia Senate explained in 1831, no one could deny the state's right to place conditions upon a person residing in the statehouse square in the capital of Milledgeville.[193] Similarly, the state had the power to prescribe conditions on white people seeking to reside in Cherokee territory, as it did in one of its extension acts, because "[s]o far as all the world . . . is concerned, there is no difference between the title, which the State has to her state-house square, and her title to the Cherokee lands."[194] If states could not exercise their jurisdiction coextensive with their limits—a problem created by the recognition of tribal sovereignty—then, according to legislators, states were not truly sovereign.[195]

Because states based their jurisdiction on territory, southern legislators asserted that they possessed the right to legislate for all peoples residing in the state's territory. Alabama legislators stated, "General laws are made for a particular section of country, and they operate with equal force upon every variety of the human species, whatever may be the characteristic differences of complexion, or language . . . ."[196] Therefore, a Turk living in Alabama would be subject to state authority as much as a native-born Alabamian.[197] According to the southern states, because

189. See id. at 133 (observing that because of the demand for land in the wake of the Red Stick War, "Georgia's executive, its legislature, and a goodly portion of its citizens set their hopes on indigenous removal and with it perfect settler sovereignty").

190. See id. at 130 ("State representatives mobilized old common-law doctrines of discovery and conquest not only to divest indigenous people of land but also to defend a thoroughly new understanding of settler statehood.").

191. See, e.g., H.R. Journal, 10th Sess., at 220 (Ala. 1829) ("Upon general principles, [the committee] hold[s] it unquestionable, that all sovereign states have a right of jurisdiction over their entire charged limits and that this right does not depend on the class of subjects upon which it operated.").

192. See supra text accompanying notes 139–154.

193. Resolution of Dec. 26, 1831, 1831 Ga. Laws 266, 272.

194. Id.

195. See, e.g., H.R. Journal, 12th Sess., at 93 (Ala. 1831) ("Can [Alabama] be considered sovereign when the operation of her laws although she wills it otherwise, is confined to particular districts and sections of the State?").

196. Ala. H.R. Journal, 10th Sess., at 220.

197. See id. ("A Turk resident in any part of Alabama, would be as much under the jurisdiction of the state as a native born citizen."). The Georgia legislature echoed the same sentiments: "Georgia has the right to extend her authority and laws over her whole territory, and to coerce obedience to them from all descriptions of people, be them white, red or

people who resided on Native lands lived on territory within state borders, the states' laws should apply to them.

The final premise of this notion of territorial sovereignty was that only one sovereign could exist within a territory. Southern states resurrected the idea that an imperium in imperio was untenable. States conveniently ignored the fact the Constitution created a system of federalism—a system premised on governments existing within a government—when facing the rise of tribal governments within their borders.[198] After the Cherokee Nation wrote its first constitution, the Alabama legislature responded, arguing that either the Cherokee Nation or Alabama would need to give up its "pretensions to govern."[199] If not, the two governments would "exhibit to the world the novel spectacle of two sovereigns, no way dependent upon each other, making laws for the government of the same people at the same time."[200] Because this situation presented "a state of things that never has or can exist,"[201] the Alabama legislature contended that the Cherokee Nation no longer possessed its sovereignty and, therefore, no longer had the authority to govern.[202] Only one sovereign could exist within a territory; for the southern states, that sovereign would be them.

B. *Rhetorical Themes: Development, Criminality, and Humanitarianism*

Beyond legal and constitutional justifications to extend state jurisdiction, southern states also used particular forms of rhetoric to develop the state supremacy theory. Specifically, southern politicians expressed concerns about both internal affairs and the well-being of Native peoples to explicate the political, economic, and moral dimensions of their legal actions.

One of these concerns related to internal development, specifically the obstacle that Native nations presented to the construction of infrastructure as well as to white settlement. Alabama blamed the Cherokee Nation for its undeveloped state, arguing that the Cherokee constitutional government intended "to retard the progress of the internal improvements; and to exclude, from citizenship that valuable portion of emigrants which would otherwise seek among us their permanent houses, and contribute essentially to the wealth and prosperity of the state."[203] Mississippi Governor Gerard Brandon expressed the same concerns,

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black, who may reside within her limits." Resolution of Dec. 27, 1827, 1827 Ga. Laws 236, 249.

198. For an in-depth discussion of the concept of imperium in imperio and its effects on American constitutional thought, see Alison L. LaCroix, The Ideological Origins of American Federalism 13–15, 132–35, 201 (2010) [hereinafter LaCroix, Ideological Origins].

199. Ala. H.R. Journal, 12th Sess., at 93.

200. Id.

201. Id.

202. Id. at 93–95.

203. H.R. Journal, 10th Sess., at 220 (Ala. 1829).

stating that "the prosperity of the state is greatly retarded by a large portion of the most fertile and desirable part of our country still remaining in the possession of savage tribes of Indians."[204] In politicians' eyes, if Alabama and Mississippi failed to extend their laws over Native nations and assert their rights to appropriate lands for infrastructure and white settlement, their states would remain backwaters.

Another southern state concern was the supposed prevalence of crime in Indian territory. States contended that Native nations provided a haven for criminal activity since they were beyond the states' jurisdiction, leaving the states' citizens to suffer. Acting Governor Sam Moore of Alabama claimed that the state's "citizens residing near the borders of those unceded lands, are frequently interrupted in their rights of person and property, by lawless persons, who elude to the pursuit of justice, by being beyond the jurisdiction of our courts."[205] Tennessee feared that in failing to extend its criminal jurisdiction over Cherokee territory, it would "proclaim to all the lovers of disorder and misrule, that an asylum was provided for them, within the jurisdictional limits of one of the sovereign states of the Union."[206] While these statements implied that Native nations were incapable of enforcing criminal laws, Georgia took this line of argument a step further by explaining that it extended its criminal laws for the benefit of Native peoples as well.[207] The legislature contended that the discovery of gold in the Cherokee Nation "had brought into the territory, a numerous body of men, lawless, abandoned, and hostile to the policy of the State."[208] Therefore, the extension act "was necessary to the protection of the persons and property of the Indians from the violence, the intrigues, and the corruptions of the whites."[209] According to these statements, southern states perceived themselves to be fulfilling their responsibilities as sovereigns by using their laws to root out crime.

As seen in Georgia's explanation, southern states claimed that their actions drew from humanitarian concerns for Native peoples. First, despite the economic and political prosperity that Native nations were experiencing, southern states argued that Native peoples remained savage peoples on the brink of extinction due to their proximity to white people.[210] The Georgia legislature pushed for removal because "the association of the white man with the red has generally, if not

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204. H.R. Journal, 12th Sess., at 12–13 (Miss. 1829).

205. H.R. Journal, 13th Sess., at 16 (Ala. 1832).

206. H.R. Journal, 20th Sess., at 42 (Tenn. 1833).

207. Resolution of Dec. 26, 1831, 1831 Ga. Laws 266, 268–70.

208. Id.

209. Id. at 269.

210. For an extended discussion of this argument from the period, see generally Lewis Cass, Review of Documents and Proceedings Relating to the Formation and Progress of a Board in the City of New York, for the Emigration, Preservation, and Improvement of the Aborigines of America, 30 N. Am. Rev. 62 (1830).

uniformly, proved injurious to both."[211] Removal would place Native peoples "beyond the operation of those causes which evidently tend to retard their improvement."[212] Alabama stated that if Indians were not removed, they would "dwindle out a miserable existence in peril of starvation and of violence."[213]

Second, southern states contended that Native peoples required protection from oppressive tribal elites. State legislators latched onto the idea that tribal leaders were the ones who refused to remove and who prevented other tribal members from emigrating. In reference to the Cherokee government prescribing punishments for any tribal member who attempted to sell Cherokee land and emigrate west, the Tennessee legislature asserted that by enacting these penalties, "the artful 'chief' of an ignorant band maintains his usurpations against the benevolent persuasions of the General Government, and against the best *interest* of the deluded Indian."[214] Rather than ignoring the wishes of the Native nation, Tennessee framed the exercise of its jurisdiction as an attempt to aid those Native peoples who were "held in abject and servile control, by a few cunning and artful men."[215] Since many of these tribal leaders were biracial, the states believed that they were not fully Indian and that they lacked legitimacy to speak for the nations.[216] Thus, southern states would save Native peoples, through either state law or forced removal.

A final concern for southern state governments was the rights of their white citizens. Although the states' references to settlement and criminal law were already racialized, some state legislatures specifically invoked the rights of white people in arguing for the extension of state law. In particular, the Tennessee legislature appealed to this concept while calling out its opponents' concerns for Native rights.[217] Legislators asked, "Whilst sympathising for acts of pretended violence, perpetrated on the 'Indian,' shall it be forgotten that the 'white man' too has some rights?"[218] The legislature expressed its frustration that the state's white citizens should be subjected to crime and uncertainty "to gratify the insatiate avarice and ambition of a few lawless 'chiefs' tyrannizing over an ignorant horde."[219] In referring to the rights of white people, states confirmed

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211. Resolution of Dec. 18, 1829, 1829 Ga. Laws 267, 268.

212. Id. at 270.

213. Joint Memorial to the President and Senate of the United States of Jan. 9, 1836, 1835–1836 Ala. Laws 175, 176.

214. H.R. Journal, 20th Sess., at 41 (Tenn. 1833).

215. Id.

216. For discussion of the mixed-race status of many southern Native leaders in the early nineteenth century, see generally Theda Perdue, "Mixed Blood" Indians: Racial Construction in the Early South (2003).

217. See Tenn. H.R. Journal, 20th Sess., at 41.

218. Id.

219. Id.

that their theory of state supremacy was a racialized one tied to the interests of their white citizens.

C. *Rejecting the Pretenses of State Supremacy:* Worcester v. Georgia

The southern states wove together threads from various sources to construct a robust theory of state supremacy—a theory that advanced legal, constitutional, and political arguments. But the reality was that the states' tapestry of supremacy was poorly made and highly contested. Southern legislators' interpretations were not only constitutionally and legally suspect but also at odds with history and fact.

Contemporaries—including Native peoples, their Euro-American allies, and several Supreme Court Justices—recognized these faults. Because President Andrew Jackson had supported the southern states in demanding that the Five Tribes either submit to state law or emigrate west,[220] and Congress had endorsed this position with the passage of the Indian Removal Act,[221] the Cherokee Nation turned to the judicial branch to vindicate their arguments that the state law extension acts were unconstitutional.[222] The first case to appear before the Supreme Court, *Cherokee Nation v. Georgia*, never reached the merits. The Court, in an opinion by Chief Justice John Marshall, held that it did not have original jurisdiction to hear the Cherokee's case, labeling Native nations as "domestic dependent nations," not foreign ones.[223]

But the Supreme Court eventually rejected the southern states' theory. In the 1832 case *Worcester v. Georgia*, the Court, again speaking through Marshall, invalidated Georgia's state law extension acts targeting the Cherokee.[224] The Court held that the state's laws interfered with the Constitution's commitment of Indian affairs to the federal government, with treaties between the United States and the Cherokee Nation, and with acts of Congress that regulated intercourse with Native peoples.[225] In constructing this holding, Marshall undermined the theory of state supremacy's foundational premises while adopting concepts of sovereignty, federalism, and Indian affairs

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220. Andrew Jackson, Message From the President of the United States, H.R. Doc. No. 21-2, at 15–16 (1829) (expressing Jackson's view that state law applied to Native peoples within state borders, so Native peoples would have to remove west to continue adhering to their own laws).

221. See Saunt, supra note 3, at 68–76 (describing how the House and Senate debated and voted on the Indian Removal Act).

222. Scholars have described the Cherokee's litigation campaign in great detail. See generally Garrison, supra note 27; LaCroix, The Interbellum Constitution Manuscript, supra note 40; Norgren, supra note 38.

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

224. 31 U.S. (6 Pet.) 515, 562 (1832).

225. Id. at 561–62.

authority that aligned with original understandings of the Constitution and the historical development of the United States.[226]

First off, southern states' commitment to absolute territorial sovereignty denied the reality of federalism and the states' own admission into the Union. The Constitution explicitly approved of an imperium in imperio, providing that the states would be governments within a government—that of the United States.[227] Also, the southern states' refusal to recognize the power of any other sovereign within their borders ignored the powers that the Constitution granted to the federal government, powers that acted upon individuals and entities within state borders.[228] Furthermore, the Property Clause's acknowledgement that the federal government possessed lands within states and the power to legislate regarding those lands undermined southerners' claims that states held title to all lands within their borders, an essential premise of the territorial jurisdiction for which they argued.[229]

In addition to being at odds with the Constitution's text and structure, southern states' notion of territorial supremacy disregarded the fact that they all had joined the Union with substantial amounts of their territory still in Indian hands.[230] Thus, Congress had knowingly granted sovereign status to territories that it admitted as states despite the fact that certain lands and peoples within those states were subject to another sovereign. In *Worcester*, Marshall clarified that such an arrangement was historically accurate because Native nations had always been considered independent polities separate from any state, even if the nation resided within a state's limits.[231] He also held that a territory divided between two sovereigns was still legally tenable, declaring that the Cherokee Nation was "a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force."[232]

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226. Marshall's *Worcester* opinion also aligned with southern Native nations' understandings of the U.S. Constitution. During the Removal debates, these nations argued that the Constitution assigned exclusive Indian affairs authority to the federal government, recognized the supremacy of treaties, and supported Native nations' status as separate sovereigns. Ablavsky & Allread, supra note 89, at 289–96.

227. See LaCroix, Ideological Origins, supra note 198, at 172–74 ("[T]he Supremacy Clause signaled that multiplicity had become the defining concept of the new republic, a new normative vision distinct from past Anglo-American practice and ideology.").

228. See U.S. Const. art. I, § 8 (granting Congress the power to tax, regulate certain commercial entities, naturalize individuals, and establish post offices and roads within states).

229. The Property Clause says that "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." Id. art. IV, § 3, cl. 2.

230. See Saunt, supra note 3, at 37–38 (describing the vast lands Native peoples held in Alabama, Mississippi, and Georgia).

231. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559–60 (1832) (affirming Native nations' sovereignty irrespective of state borders).

232. Id. at 561.

Moreover, southerners' interpretation of Vattel and the law of nations was incorrect. As Marshall pointed out, the law of nations did not grant the right of soil, and thereby title, to the discovering nation.[233] Rather, discovery gave the nation "the sole right of acquiring the soil and of making settlements on it."[234] Only the discovering nation possessed the ability to purchase lands from the aboriginal occupants; otherwise, Native peoples maintained their ownership of the land.[235] Additionally, Marshall spurned southern officials' contentions that the ability to purchase Native lands passed from Great Britain, the discovering nation, to the states themselves after the Revolution. The *Worcester* opinion stated that the United States now held this right. It was a "universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent."[236]

Most glaringly, the southern theory of state supremacy contradicted both the plain meaning and the original understanding of the Constitution. When considering the text of the Constitution and historical practice since the Founding, southern states' arguments that the federal government did not possess the power to treat with Native nations within state borders fell flat. While politicians in the 1820s and 1830s clamored that Native nations were not sovereign and could not enter into treaties, the Washington Administration and the First Congress had recognized these nations as sovereigns and had pursued diplomatic relations with them.[237] In *Worcester*, Marshall reinforced the historical and constitutional practice of treatymaking with tribes. He pointed out that the United States had used numerous treaties, including one with the Delaware in 1778 and one with the Cherokee in 1785, to establish relationships with Native nations before the Constitution was ratified.[238] His opinion also affirmed that the ratification of the Constitution, with its Supremacy Clause, had transformed all of the Native treaties made before and after 1788 into the supreme law of the land.[239] Thus, the southern state legislatures defied not only fifty years of uninterrupted practice but also constitutional doctrine in passing their state law extension acts.

Southerners' fixation on the Commerce Clause also committed two errors: first, treating the clause as if it could be the sole source of Indian affairs power, and second, conflating authority over Indian affairs with jurisdiction over Native peoples. Although the Commerce Clause had

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233. Id. at 545.

234. Id. at 544.

235. Id. at 544–45.

236. Id. at 560.

237. See Calloway, The Indian World of George Washington, supra note 88, at 357–60 (discussing the First Congress's funding of treaty commissioners and President Washington's efforts at treatymaking); Ablavsky, Indian Commerce Clause, supra note 58, at 1041–43 (describing the Washington Administration's Indian affairs policy).

238. *Worcester*, 31 U.S. (6 Pet.) at 549–51.

239. Id. at 559–60.

always been an essential part of the federal government's authority over Indian affairs, the Washington Administration had viewed it as only one piece of an array of Indian affairs powers, alongside the treatymaking power and the war powers.[240] Chief Justice Marshall placed the Court's imprimatur on this view forty years later. He stated that under the Constitution, Congress possessed the power to declare war, make treaties, and regulate commerce with Indian tribes, thereby claiming full and exclusive jurisdiction over Indian affairs for the federal government.[241] Marshall wrote, "These powers comprehend all that is required for the regulation of our intercourse with the Indians."[242] This statement also pointed out that authority over Indian affairs did not translate into jurisdiction over Native nations and peoples. As Marshall put it, Native nations were "distinct, independent political communities";[243] even though they had come under the protection of the United States, the nations still possessed their "right of self government."[244] With the Native nations existing as sovereign states, the federal government possessed the ability to legislate only on intercourse between itself and the nations, not over the nations and peoples themselves.[245]

The remaining constitutional clauses and doctrines the southern states invoked did not support their cause either. The New State Clause applied only to states wishing to be admitted into the Union, not Native nations that existed outside the United States' constitutional structure.[246] Further, the Constitutional Convention had explicitly rejected proposals for broad federal protection of state territorial jurisdiction in the Clause, desires that southern officials had projected onto it once again.[247] Additionally, the Equal Footing Doctrine did not address the fact that the Constitution committed authority over Indian affairs, including relations with Native nations and Native peoples within state borders, to the federal government.[248] Therefore, despite the states' status as constitutional sovereigns, there existed no provision in the Constitution that delineated

240. Ablavsky, Indian Commerce Clause, supra note 58, at 1041–43.

241. *Worcester*, 31 U.S. (6 Pet.) at 559.

242. Id.

243. Id.

244. Id. at 561.

245. Id.

246. See Ablavsky, Empire States, supra note 36, at 1839–41 (describing how the debates regarding the New State Clause focused on states entering the Union).

247. See id. at 1835–47 (discussing rejected language that would have provided constitutional support for state territorial jurisdiction).

248. The first U.S. Supreme Court case to consider the Equal Footing Doctrine, Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845), would not be decided until 1845. However, in *Pollard's Lessee*, the Court stated that while new states "succeeded to all the rights of sovereignty, jurisdiction, and eminent domain" that the original states possessed, the states' authority was "subject to the rights surrendered by the Constitution to the United States." Id. at 223, 229.

the bounds of state sovereignty or guaranteed absolute territorial jurisdiction to the states.

Although southern politicians' creative interpretations of numerous sources had gained support from the executive and legislative branches of the federal government, the Supreme Court demolished the legal underpinnings of state supremacy. The *Worcester* decision demonstrated that the elaborate theory southerners had constructed for upholding state supremacy and delegitimizing tribal sovereigns was constitutionally and historically baseless.

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Despite its status as a legal victory for Native sovereignty, *Worcester* failed to stop the removal of the Five Tribes. For the Chickasaw and Choctaw Nations, the decision came too late.[249] The Cherokee, Muscogee, and Seminole Nations attempted to hold out, but the avarice of white settlers and the application of military force eventually overcame Native opposition.[250] By the early 1840s, the federal government had removed the Five Tribes to Indian Territory, and thousands of Native lives had been lost en route on the Trail of Tears.[251] Although *Worcester* delivered a blow to the legal premises of the state law extension acts, southern states' desires were ultimately vindicated with Removal.

The effects of the Removal Era, however, were not limited to the violent and destructive deportation of Native nations from the South. The Removal Era also constituted a significant moment in the constitutional history of the United States.[252] The debates in this period provided the foundation of federal Indian law, with its overarching principles of federal authority over Indian affairs and tribal sovereignty.[253] But the debates also formed a theory of state supremacy. And even though the Supreme Court quickly rejected this theory, its legacy would haunt federal Indian law for the next two centuries.[254]

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249. See Saunt, supra note 3, at 87–90, 109 (describing the lead-up to the removal, through coerced treaties, of the Chickasaw and Choctaw Nations).

250. See id. at 238, 247–54, 268–71, 275–81, 300 (describing the violent lead-up to the forced removal of the Cherokee, Muscogee, and Seminole Nations).

251. On the death tolls on the Trail of Tears, see Ostler, supra note 25, at 256, 263, 273–74, 286.

252. See Ablavsky & Allread, supra note 89, at 286–89 (highlighting how the Removal Era featured "debates . . . about many constitutional questions").

253. See id. at 295–96 (describing how, during this period, "the U.S. legal system grappled with Native understandings of sovereignty and federal supremacy, ultimately enshrining their arguments into U.S. constitutional jurisprudence").

254. Although this Article exclusively reviews U.S. Supreme Court cases to trace the impact of the state supremacy theory on federal Indian law doctrine, it should be recognized that during the nineteenth century, the state supremacy theory had the most impact in state supreme courts. Beginning with Georgia, Alabama, and Tennessee during the Removal Era, the theory spread to other state supreme courts as they sought to justify state jurisdiction over Native peoples. See Garrison, supra note 27, at 8–9 (discussing justifications offered by

III. THE PERSISTENCE OF THE STATE SUPREMACY ARGUMENTS

Worcester was nowhere near the final word on the principle of state supremacy in federal Indian law. Over the next two centuries, as Euro-American settlement proceeded across the continent, federal Indian policy vacillated dramatically from Native peoples' expulsion to their assimilation and finally to tribal self-determination.[255] And federal Indian law underwent dramatic changes as well, with the Supreme Court continually tinkering with the bounds of federal, state, and tribal power to reflect the government's—and the Justices'—views on the place of Native peoples within the American empire.[256]

Still, the fact that the contest between federal, state, and tribal sovereigns has continually played out within Indian affairs has given the field of federal Indian law more doctrinal coherence than many recognize. Many of the most impactful Indian law cases have continued to revolve around the role of state authority with regard to Native nations, peoples, and territories. And these ongoing disputes over state power in Indian affairs have allowed the Removal-era state supremacy arguments to persist. Despite their rejection at the outset of the field, Justices and state litigants have appropriated these arguments time and time again. And they have done so to achieve the same ends that southern officials sought during Removal: destroying tribal sovereignty and establishing states' right to absolute territorial jurisdiction.

This Part tracks state supremacy arguments' persistence by analyzing language and concepts in Supreme Court cases that either invoked state supremacy or pitted state interests against those of Native nations.[257] It proceeds chronologically, beginning with cases decided in the late nineteenth century that allowed federal and state power to encroach on tribal sovereignty. It then turns to late twentieth-century cases that coincided with changing notions of federalism, specifically the move from exclusively federal or state jurisdictions to concurrent, overlapping authority embodied in the modern law of preemption.[258] It ends with early twenty-first-century cases that have involved the boldest assertions of state supremacy since Removal.

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state courts to endorse the exercise of state jurisdiction over Indian tribes); see also Rosen, supra note 36, at 46–79 (analyzing post–Removal Era state supreme court cases discussing the issue of state civil and criminal jurisdiction over Native peoples).

255. See infra notes 259–260, 281, and accompanying text.

256. See infra notes 262–308 and accompanying text.

257. This Article does not claim to be comprehensive in its review of Supreme Court cases invoking state supremacy arguments over the course of the almost two centuries since *Worcester*. Rather, this Part focuses on the Indian law cases that relied on state supremacy arguments and characterizations of state interests to announce significant doctrinal principles in the field.

258. See Ablavsky, Too Much History, supra note 20, at 338–39 (describing the simultaneous "change[] in federal Indian law between the late nineteenth and early twentieth centuries" and change in the "law of concurrent jurisdiction").

A. *The Late Nineteenth-Century Cases*

The late nineteenth century witnessed the most destructive period against Native peoples in United States history. As the territory of the United States dramatically expanded, the federal government turned from the expulsion of Native nations through Removal to containment on reservations, using a campaign of land grabs and violence to subdue Native peoples.[259] And with the passage of the General Allotment Act in 1887, the federal government made the breakup of the reservations and the assimilation of Native peoples its overarching goal in Indian affairs.[260] Ultimately, officials hoped that allotment would pave the way for the flurry of new political entities in the West—the federally organized territories and newly admitted states—to assume complete control of the peoples and lands within their borders.[261]

Accompanying this assimilation policy was a series of Indian law cases that bolstered federal and state power at the expense of Native autonomy. In the 1886 case *United States v. Kagama*,[262] the Supreme Court placed its imprimatur on this new order of governance for Indian affairs. In upholding the Major Crimes Act, which gave the federal government criminal jurisdiction over certain crimes committed between Indians,[263] the Court declared that federal power over Indian affairs was not only exclusive but also plenary.[264] Justice Samuel Miller, in delivering the opinion of the Court, rooted this sweeping power in his conception of Native peoples' status, characterizing them as "wards of the nation" who were "*dependent* on the United States."[265] Because of this status, the federal government now had the recognized authority to fully "govern [Native nations] by acts of Congress."[266]

Although *Kagama*'s holding focused on federal power, the case signaled that a new approach to state sovereignty was on the rise at the Court. First, Justice Miller's reasoning revealed that Removal-era notions of state supremacy still brooded under the surface of Indian law doctrine.

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259. See Francis Paul Prucha, The Great Father: The United States Government and the American Indians 315–409 (1984) (describing the federal government's transition to a reservation system in the mid-nineteenth century).

260. See Frederick E. Hoxie, A Final Promise: The Campaign to Assimilate the Indians, 1880–1920, at 70–78 (Bison Books ed. 2001) [hereinafter Hoxie, A Final Promise] (discussing the policy debates that influenced the passage and content of the General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388).

261. See Paul Frymer, Building an American Empire: The Era of Territorial and Political Expansion 153, 162–65 (2017) (describing how the Dawes Act contributed to the subsequent admission of several western states, particularly Oklahoma).

262. 118 U.S. 375 (1886).

263. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified at 18 U.S.C. § 1153 (2018)).

264. See *Kagama*, 118 U.S. at 379–85.

265. Id. at 383–84.

266. Id. at 382.

For example, Miller ignored *Worcester*'s deference for tribal sovereignty, embracing the southern states' binary system. He wrote that "[t]he soil and the people" within the boundaries of the United States were "under the political control of the Government of the United States, or the States of the Union. There exist within the broad domain of sovereignty but these two."[267]

More significantly, *Kagama*'s announcement of plenary power over Indian affairs—while supposedly a power of the federal government—ended up benefiting states as well. As Justice Gorsuch has recognized, *Kagama* "had predictable downstream effects on the relationship between States and Tribes. As Congress assumed new power to intrude on tribal sovereignty, the Constitution's 'concomitant jurisdictional limit on the reach of state law' began to wane."[268] In other words, plenary power bolstered state supremacy at the expense of Native nations.

The cases in which the Court explicitly relied on the Equal Footing Doctrine to value state interests over those of Native nations most clearly expressed this phenomenon. In *United States v. McBratney*[269] and *Draper v. United States*,[270] the Court infringed on federal and tribal jurisdiction by holding that states had criminal jurisdiction over crimes committed between non-Indians on reservations.[271] Using the Equal Footing Doctrine, the decisions asserted that states possessed jurisdiction over non-Indians on Indian lands within state borders unless Congress expressly reserved federal authority.[272] As Justice Edward White wrote in *Draper*, "equality of statehood is the rule."[273] Southern states had argued in the early nineteenth century that the Equal Footing Doctrine granted states absolute territorial jurisdiction.[274] Decades later, the *Draper* Court pirated that argument and held that criminal jurisdiction, even on Native lands, belonged to a state "in virtue of its existence as an equal member of the Union."[275] With much of Indian Country now lying within state borders, *McBratney* and *Draper* implicitly overruled *Worcester*'s holding that state law could not apply within Native territories.

In the same year that the Court decided *Draper*, it also used the conception of state equality to curtail the rights of Native peoples while they were off-reservation. In *Ward v. Race Horse*, the Court held that the Equal Footing Doctrine abrogated the Bannock Nation's off-reservation

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267. Id. at 379.

268. Haaland v. Brackeen, 143 S. Ct. 1609, 1658 (2023) (Gorsuch, J., concurring) (quoting McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 171 (1973)).

269. 104 U.S. 621 (1881).

270. 164 U.S. 240 (1896).

271. *Draper*, 164 U.S. at 247; *McBratney*, 104 U.S. at 624.

272. *Draper*, 164 U.S. at 243–44, 247; *McBratney*, 104 U.S. at 623–24.

273. *Draper*, 164 U.S. at 244.

274. See supra notes 181–185 and accompanying text.

275. *Draper*, 164 U.S. at 247.

hunting rights in Wyoming.[276] According to the Court, "the power of a State to control and regulate the taking of game cannot be questioned."[277] Because the act of admission for Wyoming declared that it would enter the Union on an equal footing with other states, Wyoming possessed the authority to regulate hunting throughout its territory, thereby restricting the Bannocks' right.[278] If Wyoming did not have this power, the opinion stated that "Wyoming, then, will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other States of the Union."[279] In allowing state equality to trump treaty rights, the Court echoed the concerns expressed by Alabama legislators and President Jackson that states had the right to exercise jurisdiction over Native peoples; otherwise, the southern states would not possess the full sovereignty of other states.[280] Thus, at the close of the nineteenth century, the Court had begun to undermine Native sovereignty by employing the flawed arguments that the Marshall Court had rejected six decades earlier.

B. *The Modern Cases*

Despite the destruction that the allotment, assimilation, and termination policies of the federal government wrought, Native nations proved resilient over the course of the twentieth century, ushering in an era of tribal reconstruction and self-determination.[281] The Native resurgence of the late twentieth century and early twenty-first century, however, unwittingly brought about a revival in Removal-era state supremacy arguments. As Native nations asserted their governmental powers, major disputes between them and the states proliferated, resulting in increased litigation. And even as the Executive Branch and Congress supported Native autonomy,[282] the Rehnquist and Roberts Courts took the opposite tack, narrowing the bounds of tribal sovereignty. The Court took on an increasing number of Indian law cases that involved questions of federalism and states' rights, often ruling for states and against tribal interests.[283] And in these cases, the Justices deeply interested in federalism and state sovereignty wrote opinions that appropriated the same state supremacy arguments that the southern states had used in the early nineteenth century.

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276. 163 U.S. 504, 514 (1896), overruled by Herrera v. Wyoming, 139 S. Ct. 1686, 1697 (2019).

277. *Race Horse*, 163 U.S. at 507.

278. Id. at 511, 514.

279. Id. at 514.

280. See supra notes 182–185 and accompanying text.

281. For a history of the resurgence of Native power in the late twentieth century, see generally Charles F. Wilkinson, Blood Struggle: The Rise of Modern Indian Nations (2005).

282. See id. at 177–268.

283. See Getches, Beyond Indian Law, supra note 48, at 268, 320–21, 344–45 (revealing the trend of the Rehnquist Court ruling in favor of state interests in Indian law cases).

At first, the Supreme Court's solicitude for state interests in Indian law appeared in cases that relied more on statutory and treaty interpretation and balancing tests than on foundational principles. For example, in *White Mountain Apache Tribe v. Bracker*, the Court constructed a test to determine whether federal law preempted the operation of state law on non-tribal members on reservations.[284] Dismissing the need to solely rely on Indian law principles, Justice Thurgood Marshall wrote, "This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake."[285] While this test appeared to be a functional and neutral one, later cases began to stack the deck in favor of states. In *New Mexico v. Mescalero Apache Tribe*, the Court provided a way for state law to prevail over federal law even when it interfered with strong federal and tribal interests.[286] According to the opinion, "State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, *unless the state interests at stake are sufficient to justify the assertion of state authority*."[287] And finally, in *Cotton Petroleum Corp. v. New Mexico*, the Court used the preemption test to allow New Mexico to tax oil wells operated by a non-Indian corporation on the Jicarilla Apache Reservation.[288]

Preemption analysis was not the only area in which the Court gave state power more latitude over tribal sovereignty. Cases involving the state taxation of Indian lands and businesses as well as the diminishment of reservations—which, if found, would allow for the exercise of state jurisdiction—went in states' favor.[289] The Court also located state sovereignty in the Constitution, finding that the Eleventh Amendment guaranteed state sovereign immunity from suits by Native nations.[290]

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284. 448 U.S. 136, 144–45 (1980). For an in-depth examination of the Court's preemption cases, see Hedden-Nicely, The Terms of Their Deal, supra note 61, at 481–91.

285. *Bracker*, 448 U.S. at 145.

286. 462 U.S. 324, 334 (1983).

287. Id. (emphasis added).

288. 490 U.S. 163, 186–87 (1989).

289. See South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 358 (1998) (holding that the state has primary jurisdiction over certain tracts that were originally part of the Yankton Sioux Reservation because "Congress diminished the . . . Reservation in the 1894 Act"); Hagen v. Utah, 510 U.S. 399, 421 (1994) (holding that a town situated on the Uintah Indian Reservation is under state jurisdiction because the "Reservation has been diminished by Congress"); South Dakota v. Bourland, 508 U.S. 679, 697 (1993) (holding that the state has primary jurisdiction because the Cheyenne River Tribe lacked regulatory control over its lands); County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 270 (1992) (permitting the state to impose an ad valorem tax on the Yakima Indian Reservation); Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 161 (1980) (permitting the state's tax on cigarette purchases on the Colville Indian Reservation).

290. See Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 268–69, 277–78 (1997) (holding that Tribe's suit against Idaho seeking declaration of ownership of submerged

Even though these cases used balancing and multifactor tests instead of explicitly relying on state supremacy arguments, the Court's continued erosion of tribal sovereignty in Indian law cases paved the way for state supremacy arguments' revival. As described below, both Justices and state litigants began to boldly employ Removal-era state supremacy arguments to not only restrict tribal power but also reverse the foundational principles of Indian law.

1. *Reviving State Supremacy:* Nevada v. Hicks. — The revival began with *Nevada v. Hicks*.[291] In *Hicks*, the State of Nevada challenged a tribal court's jurisdiction over civil claims against the state's game wardens.[292] The game wardens had executed a search warrant against a tribal member on the reservation for a suspected violation of state law outside the reservation.[293] When the search was unsuccessful, the tribal member sued the state officials in tribal court for trespass, abuse of process, and violation of his civil rights.[294] Utilizing the *Montana* test for tribal jurisdiction over nonmembers,[295] the Court held that the Fallon Paiute-Shoshone Tribes did not possess legislative authority over the state officers; therefore, the tribal court lacked jurisdiction over the claims brought against the officers.[296] Writing for the majority, Justice Antonin Scalia explained that the tribe's interest in the authority was not sufficiently weighty because this jurisdiction was not "essential to tribal self-government or internal relations," and Nevada's "interest in the execution of process is considerable."[297] Unlike the late twentieth-century cases, which considered state jurisdiction over nonmembers in Indian Country, Justice Scalia explicitly contemplated state authority over Indians on Indian land.[298] And in supporting such authority, Justice Scalia wove together

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lands was barred by the Eleventh Amendment); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 76 (1996) (holding that the Eleventh Amendment prevented Congress from abrogating state sovereign immunity under the Indian Gaming Regulatory Act to allow for suits by tribes).

291. 533 U.S. 353 (2001).

292. Id. at 357.

293. Id. at 356.

294. Id. at 356–57.

295. In Montana v. United States, 450 U.S. 544 (1981), the Court established a test for determining whether a tribe could exercise civil jurisdiction over nonmembers on the reservation. Although the Court set out the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," it provided for two exceptions. Id. at 565. The first exception allows a tribe to regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Id. The second exception allows a tribe to "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 566.

296. *Hicks*, 533 U.S. at 374.

297. Id. at 364.

298. Id. at 362 ("When, however, state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land . . . .").

various precedents and statements to declare that "[s]tate sovereignty does not end at a reservation's border"; the Court no longer adhered to *Worcester*.[299] He also wrote that when an activity implicates state interests outside the reservation, states possess regulatory authority over tribal members on tribal land.[300] The Court's holding suggested that because it was the state's prerogative to investigate a possible violation of state law, the tribe had no power to interfere despite the fact that the investigation occurred on tribal land.

Beyond its blatant disregard for tribal sovereignty, the Court's opinion echoed the state supremacy arguments from the Removal Era to reverse the foundational principles of Indian law. First, it adopted the view of state territorial sovereignty in which a state has the authority to exercise jurisdiction over all lands and peoples within its borders.[301] Thus, because the Paiute-Shoshone Reservation was located within Nevada's limits, Justice Scalia asserted that the state possessed sovereignty over the reservation.[302] In rejecting tribal authority over the state's officers, he also suggested that the state's territorial jurisdiction was absolute, precluding tribal jurisdiction over a matter involving a tribe's members that occurred on the tribe's lands.[303] Without citing any constitutional provision for this position, the Court weaponized the southern states' contention that states were legitimate constitutional sovereigns while tribal nations were not.[304] This reasoning not only ignored the principles of *Worcester*, which protect tribal sovereignty from state interference, but also endorsed the radical view of jurisdiction that southern states had espoused in the 1820s and 1830s—that only one sovereign had authority over territory within a state.[305]

Second, in claiming that Nevada possessed a substantial interest in executing process for a possible violation of state law,[306] the Court parroted southern states' arguments concerning the enforcement of criminal law on and near tribal lands. The opinion implied that if Nevada could not

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299. See id. at 361 (referencing the Court's departure from Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832), as articulated in White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980)).

300. Id. at 362.

301. See supra section II.A.4.

302. *Hicks*, 533 U.S. at 361–65.

303. See id. at 365 ("[A] State 'can act only through its officers and agents,' and if a tribe can 'affix penalties to acts done under the immediate direction of the [state] government, and in obedience to its laws,' . . . 'the [state] government may at any time be arrested at the will of the [tribe].'" (first, third, and fourth alterataions in original) (quoting Tennessee v. Davis, 100 U.S. 257, 263 (1879))).

304. See id. at 361–62 (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980); Organized Vill. of Kake v. Egan, 369 U.S. 60, 72 (1962); Utah & N. Ry. Co. v. Fisher, 116 U.S. 28 (1885)).

305. See supra section II.A.4 (constructing the state supremacy argument around territorial sovereignty).

306. *Hicks*, 533 U.S. at 363–64, 372–73.

execute search warrants against tribal members on tribal land, the reservation would become a haven for those who violated state law outside the reservation and then returned to the reservation to escape state jurisdiction.[307] Moreover, the Court's holding meant that tribes had no authority to regulate state criminal investigations on the reservation. Just as Alabama, Georgia, and Tennessee had asserted that their officials could enter the Cherokee and Creek nations to arrest criminals,[308] now other states could do the same on reservations, with tribal nations having no say in the matter. In relying on arguments regarding territorial jurisdiction and criminality associated with tribal lands, *Hicks* marked a return to the use of state supremacy principles to cabin tribal sovereignty.

2. *Repackaging the Theory: The Thomas Dissents.* — Although the Court's opinion in *Hicks* demonstrated a willingness to revive and endorse the state supremacy theory of the Removal Era, Justice Clarence Thomas has most clearly embraced the theory in Indian law cases. In several dissents, Thomas repackaged the state supremacy arguments for the modern era. And in doing so, he framed Indian law cases as a zero-sum battle between states and Native nations and indicated a clear preference for the sovereignty of states.

A prime example of Thomas's thinking is his dissent in *Michigan v. Bay Mills Indian Community*.[309] In *Bay Mills*, Michigan sued the Bay Mills Indian Community for operating a casino outside the tribe's reservation in violation of the Indian Gaming Regulatory Act (IGRA)[310] and a compact between the state and the tribe.[311] A majority of the Court held that while IGRA authorized suits to enjoin gaming on Indian lands, the law did not authorize suits for off-reservation gaming activity.[312] Therefore, the tribe's sovereign immunity, which extends to off-reservation commercial activity, precluded Michigan's suit against it.[313] In a dissenting opinion joined by Justices Samuel Alito, Ruth Bader Ginsburg, and Antonin Scalia, Justice Clarence Thomas argued that the Court should overturn tribes' sovereign immunity for off-reservation commercial activities.[314] Thomas contended that such broad tribal immunity was inconsistent with the justifications of sovereign immunity, the limitations on tribal power, and the breadth of

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307. See id. ("[T]he reservation of state authority to serve process is necessary to 'prevent [such areas] from becoming an asylum for fugitives from justice.'" (second alteration in original) (quoting Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525, 533 (1885))).

308. See supra text accompanying notes 205–209.

309. 572 U.S. 782, 814 (2014) (Thomas, J., dissenting).

310. 25 U.S.C. §§ 2701–2721 (2018).

311. *Bay Mills*, 572 U.S. at 785–87.

312. Id. at 804.

313. See id. at 804 (declining to "create a freestanding exception to tribal immunity for all off-reservation commercial conduct").

314. Id. at 814 (Thomas, J., dissenting).

state sovereignty.[315] In particular, allowing a tribe to escape suits undermined "a State's broad regulatory authority over Indians within its own territory."[316] Additionally, Justice Thomas wrote, "Tribal immunity significantly limits, and often extinguishes, the States' ability to protect their citizens and enforce the law against tribal businesses."[317] In Justice Thomas's eyes, tribal sovereign immunity was a loophole through which tribes evaded state regulation and responsibility for harms against state citizens.

By rooting his argument against tribal immunity in state sovereignty concerns, Justice Thomas brought forth several Removal-era arguments. In pointing to states' authority over Indians within state borders, Thomas revealed his sympathy for the idea that a state has absolute jurisdiction over any persons within its territory.[318] According to his dissent, no modicum of sovereignty that tribal nations still possessed justified their exemption from state regulation.[319] When referring to states' inability to protect their citizens and enforce the law against tribal violators, Thomas invoked the southern states' fear of tribal entities harming the states' citizens and undermining states' sovereignty.[320] For Justice Thomas, tribal immunity was the modern-day iteration of the tribal haven of criminality, except now it could be extended outside tribal lands and into the territory of the state, rendering state jurisdiction over its own lands null. His dissent even suggested that tribal immunity threatened the continuing existence of states by allowing tribes to avoid paying state taxes and to violate campaign finance laws.[321] Such a contention raised the same specter that Alabama had constructed in alleging that the existence of the Cherokee Nation prevented the state's development and threatened its existence as a sovereign.[322] Finally, Thomas's emphasis on how immunity injures state citizens—such as by bolstering payday lending and harming tort victims—rather than how it benefits tribal nations and citizens echoed Tennessee's concerns about the need to recognize the rights of white citizens.[323] When viewing tribal commercial activities through Justice Thomas's dissenting opinion, one only sees a threat to states and their citizens—a threat that the Court must eliminate.

Four years later, Justice Thomas offered his most vigorous defense of state supremacy in a little-known dissent. In *Upstate Citizens for Equality, Inc.*

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315. Id.

316. Id. at 818.

317. Id. at 823.

318. See supra section II.A.4.

319. *Bay Mills*, 572 U.S. at 815–19 (Thomas, J., dissenting).

320. See supra text accompanying notes 205–209.

321. *Bay Mills*, 572 U.S. at 824–25 (Thomas, J., dissenting).

322. See supra notes 198–203 and accompanying text.

323. *Bay Mills*, 572 U.S. at 824–25 (Thomas, J., dissenting); see also supra text accompanying notes 217–219.

v. United States,[324] a local government and citizens from upstate New York challenged the Secretary of the Interior's decision to take land that the Oneida Nation owned into trust under the Indian Reorganization Act (IRA).[325] After losing at the Second Circuit, the group petitioned for a writ of certiorari, which the Court denied.[326] Justice Thomas, however, issued a dissent from the denial. Concerned about the Secretary's ability "to take state land and strip the State of almost all sovereign power over it," Justice Thomas argued that the Court should take the case to reconsider its precedents under the Indian Commerce Clause.[327] According to the dissent, under the original understanding of the provision, the Indian Commerce Clause only "regulat[es] trade with Indian tribes."[328] Because the IRA allows land to be taken into trust that the tribe already owns, no exchange takes place because "neither money nor property changes hands."[329] Justice Thomas argued that since there is no exchange, there is no trade with Indians taking place.[330] Therefore, the land-into-trust process exists beyond the scope of the Indian Commerce Clause.[331]

Additionally, Justice Thomas expressed his anxieties about the power of the federal government to transfer to the Oneida land that had been under New York's jurisdiction for 200 years. He claimed that such action "would '"seriously burde[n] the administration of state and local governments" and would adversely affect landowners neighboring the tribal patches.'"[332] Furthermore, contrary to the Founders' understanding, the Indian Commerce Clause now gave Congress "the power to destroy the States' territorial integrity."[333] In sum, Justice Thomas found the IRA's land-into-trust procedures contrary to the Constitution's view of state power.

Justice Thomas's dissent fully embodied the southern states' theory of state supremacy from the Removal Era. His creative interpretation of the Commerce Clause, in which the federal government could only regulate trade, followed earlier arguments that the federal government could only establish rules "according to which the traffic of equivalent values should

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324. 841 F.3d 556 (2d Cir. 2016), cert. denied, 140 S. Ct. 2587 (2017).

325. 25 U.S.C. § 5108 (2018).

326. *Upstate Citizens*, 140 S. Ct. at 2587.

327. Id. at 2587 (Thomas, J., dissenting from the denials of certiorari).

328. Id. (internal quotation marks omitted) (quoting Adoptive Couple v. Baby Girl, 570 U.S. 637, 660 (2013) (Thomas, J., concurring)).

329. Id. at 2588.

330. Id.

331. See id. ("It is highly implausible that the Founders understood the Indian Commerce Clause, which was virtually unopposed at the founding, as giving Congress the power to destroy the States' territorial integrity.").

332. Id. (alteration in original) (quoting City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 220 (2005)).

333. Id. (citing *Adoptive Couple*, 570 U.S. at 659 (Thomas, J., concurring)).

be prosecuted."[334] Also, Thomas's concerns about the Indian Commerce Clause giving Congress the ability to interfere with states' territorial integrity reiterated southern states' apprehensions about the clause giving the federal government the power to bestow citizenship upon Indians and enslaved people.[335] Because Thomas's view was contrary to the original understanding of the clause, he had to rely on Removal-era interpretations that nothing in the Commerce Clause authorized the federal government to interfere in states' internal affairs.[336]

The dissent's fears about the transfer of territory and sovereignty over that territory strongly echoed southern rhetoric about the need to protect states' supremacy. Thomas's disbelief in the Secretary of the Interior's authority to take a substantial amount of state land and declare it sovereign Indian territory repeated the southern states' arguments that tribes could not violate states' territorial sovereignty by asserting jurisdiction over portions of land within state boundaries.[337] Similarly, just as southern politicians asserted that allowing the erection of tribal governments within state limits would render the states nonexistent,[338] Thomas contended that the land-into-trust process meant that "Congress could reduce a State to near nonexistence by taking all land within its borders and declaring it sovereign Indian territory."[339] Southern officials and Justice Thomas expressed that a true interpretation of the Constitution did not sanction such action.[340] For them, the Constitution provided protection for state sovereignty.[341] Even though this shared vision of robust state supremacy had no grounding in the original understanding of the Constitution, Justice Thomas resurrected it to eliminate tribal threats and federal overreach.

Thomas's dissenting opinions explicitly took up the banner for the state supremacy arguments in the wake of *Hicks*. And even as Native nations eked out several victories at the Court during this time,[342] Thomas's continual advocacy for state supremacy meant the Removal-era theory persisted during the early Roberts Court. With some of the Justices divulging their openness to the arguments, state litigants and other

334. The Report, supra note 28, at 2.

335. See supra text accompanying notes 165–166.

336. See supra text accompanying notes 161–166.

337. See supra text accompanying notes 198–202.

338. See supra text accompanying notes 198–202.

339. Upstate Citizens for Equality, Inc. v. United States, 140 S. Ct. 2587, 2588 (2017) (Thomas, J., dissenting from the denials of certiorari).

340. See id. ("It is highly implausible that the Founders understood the Indian Commerce Clause . . . as giving Congress the power to destroy the States' territorial integrity.").

341. Id.; see also supra text accompanying notes 160–171.

342. See, e.g., Michigan v. Bay Mills Indian Cmty., 572 U.S. 782 (2014) (deciding case 5-4 in favor of the tribe).

Justices followed suit, appropriating the arguments in hopes of swaying the Court.

3. *Advocating for Supremacy: The States as Litigants.* — The Justices were not the only ones involved in reviving the state supremacy theory. As cases that pitted states against tribal interests came before the Roberts Court, state litigants increasingly invoked state supremacy arguments. For example, in *Nebraska v. Parker*, the State of Nebraska challenged the Omaha Tribe's application of its Beverage Control Ordinance to liquor retailers in the town of Pender.[343] In its brief, Nebraska argued that the Court could not allow a tribe to legitimately exercise its authority over a portion of the state's territory occupied by a population that was 98% non-Indian.[344] Invoking the state's continual claim of jurisdiction over the area and the rights of non-Indians, the state contended that "[f]or over 130 years, the people and businesses of the Pender, Nebraska area have developed justifiable expectations that their community was under the jurisdiction of the State of Nebraska"; therefore, the Court should maintain the status quo.[345]

Three years later, the State of Wyoming took an even stronger stance for state supremacy in *Herrera v. Wyoming*.[346] *Herrera* arose out of Wyoming's prosecution of a member of the Crow Tribe, Clayvin Herrera, for hunting elk in the Bighorn National Forest in violation of state law.[347] Herrera challenged his conviction, arguing that an 1868 treaty between the Crow Tribe and the United States granted tribal members the right to hunt on "unoccupied lands."[348] Wyoming marshalled arguments based on the power of statehood in its brief. The state claimed that the treaty's hunting right "was a temporary right not intended to survive Wyoming's statehood."[349] And Wyoming equated the arrival of a settler government—in the form of statehood—with the outdated

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343. 136 S. Ct. 1072, 1078 (2016).

344. Brief for Petitioners at 20–25, *Parker*, 136 S. Ct. 1072 (No. 14-1406), 2015 WL 7294863.

345. Id. at 51–52. Nebraska's arguments echo those made by the Court in City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197 (2005). There, the Court prevented the Oneida Nation from exercising sovereignty over parcels it had regained possession of after two centuries due to the longstanding history of New York's sovereign control over the territory and its overwhelmingly non-Indian character. 544 U.S. at 214–21 ("This long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude OIN from gaining the disruptive remedy it now seeks.").

346. 139 S. Ct. 1686 (2019).

347. Id. at 1693–94.

348. See id. at 1691 (internal quotation marks omitted) (quoting Treaty Between the United States of America and the Crow Tribe of Indians, Crow Tribe-U.S., art. IV, May 7, 1868, 15 Stat. 650).

349. Brief for Respondent at 20, *Herrera*, 139 S. Ct. 1686 (No. 17-532), 2018 WL 6012360.

concept of the establishment of civilization.[350] According to the brief, statehood "was the moment when civilization arrived."[351] The state's implicit belief that the arrival of Euro-American settlers marked the beginning of civilization in the territories echoed the southern officials' contentions that Native nations could not be recognized as civilized, precluding them from possessing sovereignty equivalent to that of Euro-American governments.[352] Additionally, the assertion that statehood ended the treaty right implied that Wyoming perfected its territorial sovereignty at the moment it entered the Union. Just as the southern states had argued,[353] Wyoming's transition to statehood gave it absolute jurisdiction over all the territory within its borders. Because the state was the only legitimate sovereign, not only did the tribe lose its rights, but its members were also subjected to state regulation.[354]

Nebraska and Wyoming ultimately lost in *Parker* and *Herrera*, with the Court relying on statutory and treaty interpretation to dismiss the states' appeals for supremacy.[355] And in *Herrera*, the Court even overruled *Ward v. Race Horse*,[356] repudiating the notion that statehood impliedly abrogated treaty rights because of the Equal Footing Doctrine.[357]

Still, the state litigants' arguments paved the way for even bolder iterations of Removal-era state supremacy arguments in *Sharp v. Murphy*[358] and *McGirt v. Oklahoma*.[359] *Murphy* and *McGirt* were criminal appeals that presented the same question: whether the 1866 territorial boundaries of the Muscogee Nation constituted an Indian reservation.[360] Both cases involved a tribal member who was convicted in Oklahoma state court for crimes that occurred within the Muscogee Nation's territorial

350. See id. at 48 ("Political leaders saw early settlers as 'uninformed, and perhaps licentious people' whose 'routine defiance of state and federal land laws' was but one disagreeable aspect of the character needed to settle the rough frontier. Statehood, in contrast . . . was the moment when civilization arrived." (citation omitted) (quoting Peter S. Onuf, Territories and Statehood, *in* 3 Encyclopedia of American Political History 1283, 1283 (Jack P. Greene ed., 1984))).

351. Id.

352. See supra text accompanying notes 145–154.

353. See supra text accompanying notes 181–185.

354. See Brief for Respondent, supra note 349, at 20–21 ("Wyoming statehood was not just a legal event, it was a recognition the once wild frontier was no more. And the Crow Tribe understood that its hunting right had ended.").

355. See *Herrera*, 139 S. Ct. at 1694–1700, 1702–03 (holding that statehood does not obliterate treaty rights); Parker v. Nebraska, 136 S. Ct. 1072, 1079–80, 1082–83 (2016) (holding that isolated historical evidence presented by the parties is insufficient to override the textual support of written treaties).

356. 163 U.S. 504 (1896).

357. *Herrera*, 139 S. Ct. at 1697.

358. 140 S. Ct. 2412 (2020) (per curiam).

359. 140 S. Ct. 2452 (2020).

360. Brief for Petitioner at 1–2, *McGirt*, 140 S. Ct. 2452 (No. 18-9526), 2020 WL 583959 [hereinafter *McGirt* Petitioner Brief]; Brief for Petitioner at i, *Murphy*, 140 S. Ct. 2412 (No. 17-1107), 2018 WL 3572365 [hereinafter *Murphy* Petitioner Brief].

boundaries.[361] Those members argued that the state lacked jurisdiction over them because only the federal and tribal governments have jurisdiction over crimes committed by or against Indians on a reservation.[362]

In its briefs in *Murphy* and *McGirt*, the State of Oklahoma argued that the recognition of the Muscogee Reservation—and subsequent loss of state jurisdiction—would result in disaster for the state. First, the state in *Murphy* contended that if the Muscogee Nation maintained a reservation, similar treaties and history with the other Five Tribes required the recognition of the other tribes' reservations.[363] Such a result would reincarnate Indian Territory, "cleaving the State in half" and creating a series of contiguous reservations in eastern Oklahoma encompassing more than 19 million acres of land, 1.8 million residents, and the City of Tulsa.[364] Second, Oklahoma found it implausible that Congress intended to create a new state by combining the Oklahoma and Indian territories while allowing federal and tribal jurisdiction to continue in the eastern half. This division of jurisdiction would contravene the Equal Footing Doctrine because Oklahoma would not have the same rights over this portion of its territory as the original thirteen states had over theirs.[365] Third, the state asserted that the existence of a Muscogee Reservation would "upset[] a century of settled expectations."[366] The state in *McGirt* said this would "force a sea-change in the balance of federal, state, and tribal authority in eastern Oklahoma."[367] The nature of criminal jurisdiction would drastically change, as the federal and tribal courts would acquire criminal jurisdiction over crimes involving Indians. Dozens of federal criminal laws would go into effect, and "thousands of state convictions" would be at risk of reopening.[368] Additionally, tribes could criminally prosecute non-Indians for certain domestic violence offenses.[369] On the civil side, Oklahoma contended that Indians would avoid state taxes—"decimat[ing] state and local budgets"—and that tribal courts would have exclusive jurisdiction over all adoptions and custody disputes involving Indian children.[370] The application of tribal law on these lands would allow tribal nations to regulate the oil and gas industry and exercise

361. *McGirt* Petitioner Brief, supra note 360, at 16; *Murphy* Petitioner Brief, supra note 360, at 1–2.

362. *McGirt* Petitioner Brief, supra note 360, at i, 45; *Murphy* Petitioner Brief, supra note 360, at 15–18.

363. *Murphy* Petitioner Brief, supra note 360, at 2.

364. Id. at 2–3.

365. Id. at 22–23.

366. Id. at 56.

367. Brief for Respondent at 43, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526), 2020 WL 1478582 [hereinafter *McGirt* Respondent Brief].

368. Id.

369. See id. at 45 (describing the impact new conceptions of tribal jurisdiction would have on criminal law).

370. Id. at 44.

civil jurisdiction over non-Indians.[371] Ultimately, Oklahoma argued that it would face "uncertainty for decades to come."[372]

Perceiving the recognition of Indian reservations as a direct threat to its existence, Oklahoma made boldly forthright invocations of the state supremacy arguments. Its rhetoric about being cleft in half directly repeated southern states' claims that the existence of tribal nations within their borders prevented their exercise of territorial jurisdiction.[373] Similar to Alabama questioning whether it could truly be sovereign if portions of its territory were exempt from state jurisdiction,[374] Oklahoma claimed that the Court's recognition of reservations in the former Indian Territory would result in "the largest judicial abrogation of state sovereignty in American history."[375] The *Murphy* briefs also reiterated state legislatures' earlier reliance on the Equal Footing Doctrine, arguing that if the state could not exercise total jurisdiction over the peoples and lands within its eastern half, then it was not equal to the original states.[376] Oklahoma even went beyond the southern states' arguments concerning equal footing, contending that Congress never would have admitted Oklahoma as a state if it had intended for a substantial amount of the state's land to remain under federal and tribal authority.[377] The briefs in each case constructed a historical narrative to support this contention. They pointed out that Congress had prepared Indian Territory for statehood by breaking up the tribes' communal land holdings; replacing federal jurisdiction with territorial, and then state, jurisdiction; and abolishing the tribal governments.[378] Thus, according to Oklahoma, both constitutional principle—the Equal Footing Doctrine—and congressional action supported absolute state supremacy.

Oklahoma also resurrected arguments about criminality, internal development, and the rights of non-Indians. In recounting the history of Indian Territory, Oklahoma framed the federal government's desire to make it a state as a response to the "[r]ampant disorder and lawlessness [that] reigned" there.[379] Southern states' fears about the status of tribal lands as a haven for criminal activity were reiterated in Oklahoma's characterization of Indian Territory as "plagued by corruption, misrule, and crime."[380] Oklahoma repeated this idea in a modern-day context by

371. Id. at 45.

372. Id. at 46.

373. See supra notes 198–202 and accompanying text.

374. See supra note 6 and accompanying text.

375. *McGirt* Respondent Brief, supra note 367, at 3.

376. See *Murphy* Petitioner Brief, supra note 360, at 22–23.

377. See id. at 21.

378. See *McGirt* Respondent Brief, supra note 367, at 14–34 (articulating a history of dismantling tribal sovereignty); *Murphy* Petitioner Brief, supra note 360, at 23–46 (describing the disestablishment of tribal borders as a prerequisite for statehood).

379. *Murphy* Petitioner Brief, supra note 360, at 6.

380. Id. at 9.

citing the case's risk of "reopening thousands of state convictions."[381] The state asserted that as the territorial sovereign, it bore "ultimate responsibility for seeking justice for Indian crime victims."[382]

The briefs adopted this same line of argument for concerns about internal development. Oklahoma argued that contemporaries had pushed for abolishing communal land tenure and tribal sovereignty in Indian Territory because they were obstacles to economic development.[383] Like southern states' contentions that the Five Tribes prevented the construction of infrastructure and white settlement in the South,[384] Oklahoma claimed that non-Indians were frustrated by their inability to own land, participate in tribal governments that taxed them, and enforce business agreements.[385] Updating these arguments for the present day, the state cited concerns from "farmers, ranchers, and other businesses" about the uncertainty attendant with federal and tribal jurisdiction.[386] Additionally, Oklahoma framed the possibility of Indians evading state taxes as a threat to the existence of the state and local governments as they lost revenue.[387] For Oklahoma, the effects on business development and the state government's ability to serve its citizens would repeat the problems non-Indians faced in Indian Territory, contravening Congress's original intent to eradicate these issues with statehood.

Relatedly, Oklahoma raised again the specter of undermining non-Natives' rights by subjecting them to tribal jurisdiction. Echoing southern state legislators' tales of woe concerning white people living near tribal lands,[388] the *McGirt* brief described how non-Indian parents of Indian children would be dragged to tribal court for adoption and custody disputes.[389] And the brief decried how non-Indians would be subjected to tribal criminal jurisdiction for domestic violence offenses and exposed to uncertain tribal civil jurisdiction, including regulations and taxes.[390] Oklahoma also revived southern states' obsession with Native peoples evading state law inside tribal territories by claiming that reservations would create two societies in eastern Oklahoma, one where state law applied to non-Indians and another where Indians would be immune from it.[391] Latching onto Nebraska's argument in *Parker*, the state asserted that upsetting "a century of settled expectations across half of Oklahoma"

381. *McGirt* Respondent Brief, supra note 367, at 43.
382. Id. at 46.
383. *Murphy* Petitioner Brief, supra note 360, at 7.
384. See supra notes 203–204 and accompanying text.
385. *Murphy* Petitioner Brief, supra note 360, at 7.
386. Id. at 56.
387. *McGirt* Respondent Brief, supra note 367, at 44.
388. See supra notes 205–209, 217–219, and accompanying text.
389. *McGirt* Respondent Brief, supra note 367, at 44–45.
390. Id.
391. See id.

made this inequity even greater.[392] As the briefs argued, with large Indian reservations composing the eastern portion of the state, Oklahoma would lose its ability to protect and provide for its non-Indian citizens.[393] Stripping the state of its sovereignty, revived tribal sovereignty would "redraw the map of Oklahoma into a simulacrum of its pre-statehood form."[394]

* * *

On July 9, 2020, some Oklahomans woke up to find themselves living in the Muscogee Reservation. For on that day, the Supreme Court issued its decision in *McGirt*, holding that the Muscogee Reservation had never been disestablished.[395] For the purposes of the Major Crimes Act, the Court recognized that a large portion of eastern Oklahoma is—and always was—Indian Country.[396] Therefore, only the federal government and tribal governments—not the state—had jurisdiction over any crimes involving Indians in the Muscogee Reservation.[397] While headlines inaccurately declared that half of Oklahoma now belonged to the Indians,[398] Oklahoma found that its borders and status as a sovereign state remained intact despite the existence of a large Indian reservation within state limits. Moreover, the "parade of horribles"[399] that Oklahoma

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392. *Murphy* Petitioner Brief, supra note 360, at 56.

393. See id. ("1.8 million Oklahomans live in eastern Oklahoma. Their lives would be drastically changed if this Court were suddenly to declare them all residents of an Indian reservation.").

394. Id.

395. McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020). The Court used the holding in *McGirt* to affirm the Tenth Circuit's decision in *Murphy*, which had held that the Muscogee Reservation was not disestablished. Sharp v. Murphy, 140 S. Ct. 2412, 2412 (2020) (citing *McGirt*, 140 S. Ct. 2452).

396. *McGirt*, 140 S. Ct. at 2459, 2479.

397. For an in-depth analysis of the *McGirt* decision and its impact on federal Indian law doctrine, see generally Hedden-Nicely & Leeds, supra note 51, at 336–48; Robert J. Miller & Torey Dolan, The Indian Law Bombshell: *McGirt v. Oklahoma*, 101 Boston U. L. Rev. 2049, 2068–104 (2021).

398. See, e.g., Cary Aspinwall & Graham Lee Brewer, Half of Oklahoma Is Now Indian Country. What Does that Mean for Criminal Justice There?, Marshall Project (Aug. 4, 2020), https://www.themarshallproject.org/2020/08/04/half-of-oklahoma-is-now-indian-territory-what-does-that-mean-for-criminal-justice-there [https://perma.cc/7T9H-VRST] (inaccurately stating in its headline that the Court recognized half of Oklahoma as part of an Indian reservation); Lawrence Hurley, U.S. Supreme Court Deems Half of Oklahoma a Native American Reservation, Reuters (July 9, 2020), https://www.reuters.com/article/us-usa-court-oklahoma/u-s-supreme-court-deems-half-of-oklahoma-a-native-american-reservation-idUSKBN24A268 [https://perma.cc/P9D5-9DPA] (same); Laurel Wamsley, Supreme Court Rules that About Half of Oklahoma Is Native American Land, NPR (July 9, 2020), https://www.npr.org/2020/07/09/889562040/supreme-court-rules-that-about-half-of-oklahoma-is-indian-land [https://perma.cc/A434-EZ5T] (same).

399. Transcript of Oral Argument at 23, *McGirt*, 140 S. Ct. 2452 (No. 18-9526), 2020 WL 2326045.

described in its argument did not come to pass. Although the Oklahoma Court of Criminal Appeals subsequently recognized the continued existence of the Five Tribes' reservations,[400] the State of Oklahoma and the Five Tribes already had been working on compacts and sovereignty commissions to determine the best path forward for sharing territory and jurisdiction.[401] And even as tribal members have challenged their state criminal convictions and federal prosecutors have had to deal with an influx of criminal cases,[402] the Five Tribes have drastically expanded the capacity of their criminal justice systems.[403] And the Oklahoma Court of Criminal Appeals ultimately held that *McGirt* could not be applied retroactively, stemming any further dismissal of cases.[404]

So what is the significance of the revival of the state supremacy arguments if they rarely secured a majority of the Court's support, at least through *McGirt*? Most of all, these arguments' persistence reveals that the

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400. Chris Casteel, Choctaw, Seminole Reservations Recognized by Oklahoma Appeals Court, The Oklahoman (Apr. 1, 2021), https://www.oklahoman.com/story/news/2021/04/01/choctaw-seminole-reservations-oklahoma-appeals-court-recognizes/4835019001/ [https://perma.cc/M4FY-EF2X]. The Oklahoma Court of Criminal Appeals has also recognized the continued existence of the Quapaw, Ottawa, Peoria, and Miami reservations, keeping nine reservations intact in the state. Curtis Killman, Ottawa, Peoria and Miami Reservations Still Exist, Oklahoma Appeals Court Says, Tulsa World (May 11, 2023), https://tulsaworld.com/news/local/crime-and-courts/appeals-court-decides-reservation-status-of-some-ottawa-county-tribes/article_87d1e676-ef47-11ed-bd43-93ec7ef4af62.html [https://perma.cc/A7JT-5NZD] (last updated June 18, 2023).

401. See, e.g., Intergovernmental Agreement Between the State of Oklahoma and the Choctaw Nation of Oklahoma Regarding Jurisdiction Over Indian Children Within the Tribe's Reservation, Aug. 17, 2020, https://www.sos.ok.gov/documents/filelog/93655.pdf [https://perma.cc/62UL-E5TQ] (setting regulations governing state and tribal jurisdiction over Indian children within the Choctaw Reservation); Muscogee (Creek) Nation, Exec. Order No. 20-03, An Executive Order to Establish the Mvskoke Reservation Protection Commission (July 29, 2020), https://turtletalk.files.wordpress.com/2020/07/executive-order-no.-3-mvskoke-reservation-protection-commission.pdf [https://perma.cc/EAX6-S5VP] (creating commission to analyze post-*McGirt* opportunities and obstacles for Muscogee Reservation governance).

402. For an example of a tribal member challenging a state court conviction, see Petitioner's Post-Hearing Brief Regarding Proposition I of His Successive Application for Post-Conviction Relief at 1, Bosse v. State, 499 P.3d 771 (Okla. Crim. App. 2021) (No. PCD-2019-124), cert. denied, 142 S. Ct. 1136 (2022). For reporting on the influx of criminal cases for federal prosecutors, see Janelle Stecklein, Prosecutors Reviewing Cases, Refiling Charges in Wake of *McGirt* Ruling, Enid News & Eagle (Mar. 26, 2021), https://www.enidnews.com/news/state/prosecutors-reviewing-cases-refiling-charges-in-wake-of-mcgirt-ruling/article_3d370a5e-8e7f-11eb-8c8e-771bb0097483.html [https://perma.cc/37JC-8TFN].

403. See, e.g., Cherokee Nation Works to Ensure Criminal Justice Served Following Oklahoma Court of Criminal Appeals Ruling, Anadisgoi (Mar. 11, 2021), https://anadisgoi.com/index.php/government-stories/527-cherokee-nation-works-to-ensure-criminal-justice-served-following-oklahoma-court-of-criminal-appeals-ruling [https://perma.cc/49PM-PWQT] (describing the Cherokee Nation's $10 million investment in its court system, law enforcement agency, and victims services in the wake of *McGirt*).

404. State ex rel. Matloff v. Wallace, 497 P.3d 686, 694 (Okla. Crim. App. 2021).

jurisdictional arrangement of federal Indian law was far from settled. Even as majorities of the Court continually relied on foundational principles stemming from *Worcester*—recognition of federal plenary power over Indian affairs and respect for tribal sovereignty—legal actors consistently invoked the state supremacy theory of the Removal Era to challenge those principles.

For example, despite Justice Gorsuch's dismissal of Oklahoma's arguments in his majority opinion in *McGirt*, the four-person dissent—authored by Chief Justice John Roberts and joined by Justices Clarence Thomas, Samuel Alito, and Brett Kavanaugh—validated the state's arguments.[405] The dissenting Justices repeated the state's rehashing of the Removal-era state sovereignty arguments, declaring that "the Court has profoundly destabilized the governance of eastern Oklahoma."[406] Thus, even this victory for tribal interests served as a dire warning that the nineteenth-century arguments were still not dead. Rather, these arguments gained new life as Chief Justice Roberts, Justice Alito, and Justice Kavanaugh became determined to protect state power against federal and tribal interference, joining Justice Thomas. Therefore, the many opinions and briefs parroting the state supremacy theory—from the late nineteenth to the twenty-first century—have kept these arguments as viable, if misguided, legal assertions.

IV. STATE SUPREMACY VICTORIOUS: *OKLAHOMA V. CASTRO-HUERTA*

In its 2022 Term, the Court fully adopted the state supremacy theory in a case dealing with the uncertainty surrounding *McGirt*. In *Oklahoma v. Castro-Huerta*,[407] the Court upended the foundational principles of Indian law and the long-settled expectations of criminal jurisdiction in Indian Country. And to justify its decision, the Court finally enshrined the Removal-era theory of state supremacy into the doctrine of Indian law. This came almost two centuries after *Worcester* rejected the theory as incompatible with the Constitution, international law, and tribal sovereignty.

This Part analyzes *Castro-Huerta* through the lens of the state supremacy theory, revealing how the majority opinion closely follows—and endorses—the arguments southern states made. Following the statement of some commentators that the "decision is an act of conquest,"[408] this Part argues that *Castro-Huerta* is the culminating victory for the state supremacy theory and could lead to a dramatic reworking of the jurisdictional landscape in Indian affairs.

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405. McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020) (Roberts, C.J., dissenting).

406. Id.

407. 142 S. Ct. 2486 (2022).

408. Ablavsky & Hidalgo Reese, supra note 20.

Oklahoma's intense legal campaign against Native sovereignty—and the Supreme Court's support of it—reveal that even if the era of Native deportation is over, the legacy of Indian Removal endures. For if Removal is not just the deportation of Native nations and peoples from their homelands but a legal assault on tribal sovereignty, it is clear that such an assault continues to this day. Just as the southern states used state law extension acts and the theory of state supremacy to legally eradicate the existence of Native nations within their borders,[409] Oklahoma, along with other states and some of the Justices, are now seeking to constitutionalize state supremacy to do so once again. Threatened by more assertive exercises of tribal jurisdiction, some states are working to undermine Indian law to establish themselves as the only legitimate sovereign—other than the federal government—within their borders. And now they are bolstered by *Castro-Huerta*.

Yet Native peoples have always countered legal attacks with their own theories and advocacy movements.[410] In the Removal Era, Native peoples were even successful at enshrining their own arguments regarding federal supremacy, the solemnity of treaties, and tribal sovereignty into U.S. constitutional law through a public relations and litigation campaign that resulted in *Worcester*.[411] Knowing that Native nations can do so once again, this Part also charts out potential paths forward in the wake of *Castro-Huerta*. It identifies the constitutional, historical, and dignitary consequences of reviving and legitimizing the state supremacy arguments, hoping to empower legal practitioners and scholars to counter their use. It also maps out the effects of *Castro-Huerta* on federal Indian law doctrine thus far and suggests ways in which advocates can cabin the case's impact.

A. *The Decision*

Brought to the Court in the wake of *McGirt*, *Castro-Huerta* served as the vehicle for undermining the exercise of federal and tribal power in Oklahoma. In the case, the State of Oklahoma argued that it possessed

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409. See supra sections I.B, II.A–.B.

410. See, e.g., Paul Chaat Smith & Robert Allen Warrior, Like a Hurricane: The Indian Movement From Alcatraz to Wounded Knee 272–79 (1997) (describing how the American Indian Movement in the 1960s and 1970s galvanized Native activism and led to innovative, if unsuccessful, policy proposals); Wilkinson, supra note 281, at 102–06, 112 (describing successful challenges to state laws and attempts to advocate for tribes during Senate termination hearings); Maggie Blackhawk, On Power and the Law: *McGirt v. Oklahoma*, 2020 Sup. Ct. Rev. 367, 372–74 (describing "antisubordination measures" that allowed Native peoples to form their own governments and supply social services and infrastructure within the framework of existing federal Indian law).

411. See Ablavsky & Allread, supra note 89, at 289–96 (recounting how Native nations deployed constitutional arguments through newspapers, appeals to the Executive, petitions to Congress, and cases before the Supreme Court).

criminal jurisdiction over non-Indians who committed crimes against Indians in the re-recognized reservations.[412] The state also sought to overturn *McGirt*, citing the alleged chaos in Oklahoma that resulted from the decision.[413] Although the Court refused to reconsider *McGirt*,[414] in a 5-4 decision, the Court narrowed *McGirt*'s effects by holding that states had the authority to prosecute non-Indians who committed crimes against Indians in Indian Country.[415] Interpreting the General Crimes Act, which grants the federal government criminal jurisdiction over non-Indian-on-Indian crime, the majority stated that the Act did not preempt the exercise of state jurisdiction.[416] Therefore, the long-accepted notion that only the federal government had this authority was overturned.[417]

Even though *Castro-Huerta*'s holding itself was monumental, the more far-reaching consequence of the decision was how the Court justified it. Writing for the majority, Justice Kavanaugh began by rejecting one of *Worcester*'s tenets: that Indian Country was separate from the territory of a state, exempting it from state law.[418] He wrote that this principle had "yielded to closer analysis"[419] and that "the *Worcester*-era understanding of Indian country as separate from the State was abandoned later in the 1800s."[420] Justice Kavanaugh then cited snippets of dicta and irrelevant holdings from a range of Indian law cases—including *McBratney*, *Draper*, and *Hicks*—to hold that "the Court's precedents establish that Indian country is part of a State's territory and that, unless preempted, States have jurisdiction over crimes committed in Indian country."[421] With this "background principle" established, the opinion proceeded to analyze the General Crimes Act and Public Law 280 and to engage in *Bracker* balancing.[422] It ultimately concluded that none of these statutes

412. Petition for a Writ of Certiorari, supra note 10, at i, 3–4.

413. Id. at 4.

414. Oklahoma v. Castro-Huerta, 142 S. Ct. 877, 877–78 (2022) (granting certiorari on the question of state jurisdiction alone).

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

416. Id. at 2494–99.

417. See Felix S. Cohen, Handbook of Federal Indian Law 364 (1942) ("Generally speaking, offenses by non-Indians against Indians are punishable in federal courts . . . .").

418. *Castro-Huerta*, 142 S. Ct. at 2493.

419. Id. (internal quotation marks omitted) (quoting Organized Vill. of Kake v. Egan, 369 U.S. 60, 72 (1962)).

420. Id. at 2497.

421. Id. at 2493–94.

422. Id. at 2494–502. *Bracker* balancing refers to the preemption test for state jurisdiction in Indian County as set out in White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143–45 (1980); see also supra text accompanying notes 284–285. Dylan Hedden-Nicely has critiqued the Court and specifically the *Castro-Huerta* majority for their reliance on a balancing test within the preemption analysis, arguing that such an analysis originally relied on treaty interpretation, not on the balancing of federal, state, and tribal interests. Hedden-Nicely, The Terms of Their Deal, supra note 61, at 502–20.

or tests disturbed the supposedly well-established law of state criminal jurisdiction.[423]

In rejecting *Worcester*, Justice Kavanaugh transformed the once-repudiated, Removal-era state supremacy arguments into constitutional principles. He wrote:

> To begin with, the Constitution allows a State to exercise jurisdiction in Indian country. Indian country is part of the State, not separate from the State. . . . [A]s a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country. See U.S. Const.[] [amend. X]. As this Court has phrased it, a State is generally "entitled to the sovereignty and jurisdiction over all the territory within her limits."[424]

This assertion—that the Constitution allows for the exercise of state jurisdiction in Indian Country—adopted southern state legislators' arguments that nothing in the Constitution allowed the federal government to carve out areas of the state from state authority.[425] And Kavanaugh's citation of the Tenth Amendment—which includes no mention of state territorial jurisdiction[426]—converted the provision into a source of constitutional protection of state sovereignty in Indian affairs, much like the New State Clause and Guarantee Clause in the Removal Era.[427] Furthermore, his quotation of *Pollard's Lessee*[428]—the first Supreme Court case concerning the Equal Footing Doctrine[429]—suggested that the doctrine affirmed every state's right to exercise jurisdiction over Native lands through the state's admission into the Union, an argument southern state officials had made.[430] Later in the opinion, Kavanaugh expressly relied on *McBratney* and *Draper* to buttress this point, claiming that statehood and state equality rendered unenforceable any treaty that limited state criminal jurisdiction in Indian Country.[431]

Thus, in the span of a few sentences, the Court had taken the state supremacy arguments of the Removal Era, constitutionalized them, and placed them at the foundation of Indian law. In doing so, it resurrected a concept of absolute territorial sovereignty that had never actually existed in the United States and that does not reflect the

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423. *Castro-Huerta*, 142 S. Ct. at 2494–502.

424. Id. at 2493 (quoting Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 228 (1845)).

425. See supra section II.A.2.

426. See U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

427. See supra text accompanying notes 167–174.

428. 44 U.S. (3 How.) 212.

429. See supra note 248.

430. See supra text accompanying notes 175–185.

431. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2503 (2022).

overlapping, cooperative constitutional structure that exists today.[432] It also flipped the presumption that had characterized Indian law since *Worcester*: Instead of tribal sovereignty preventing the exercise of state authority, state authority should now be assumed unless preempted by federal law.[433] In the Court's view in *Castro-Huerta*, the southern states of the Removal Era were right all along to insist on the supremacy of states over the other sovereigns within the United States.

Castro-Huerta's statement of constitutional principles is not its only issue; its account of the history of Indian law is also fundamentally flawed. Not only did Justice Kavanaugh ignore the fact that *Worcester* involved the same situation—the exercise of state criminal jurisdiction on Native lands within state borders[434]—and came out the other way, but he also asserted that the *Worcester* principle of territorial separation had changed in the late nineteenth century.[435] Justice Gorsuch questioned in his dissent: "But exactly when and how did this change happen? The Court never explains."[436] Rather, the majority looked to *McBratney* and a "grab bag of decisions" to highlight instances in which the Court either allowed for the narrow application of state authority in Indian Country or wrote dicta supporting the exercise of state jurisdiction.[437]

In light of the history recounted in Part III, the *Castro-Huerta* majority made two mistakes with its historical narrative. First, it failed to recognize the historical context of previous decisions. As discussed above, the cases of the late nineteenth century, especially *McBratney* and *Draper*, were decided when the federal government sought to break up Native landholdings and organize them into states and territories.[438] The late nineteenth-century Court supported federal allotment and assimilation policies and sanctioned the supposed end of tribal sovereignty through the use of state supremacy arguments.[439] But the *Castro-Huerta* majority ignored the fact that Native nations overcame the trials

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432. See Heather K. Gerken, Slipping the *Bond*s of Federalism, 128 Harv. L. Rev. 85, 87 (2014) ("The states and the federal government regulate shoulder-to-shoulder in the same, tight policymaking space. In doing so, they have forged vibrant, interactive relationships that involve both cooperation and conflict. They are not . . . engaged in the governance equivalent of parallel play.").

433. *Castro-Huerta*, 142 S. Ct. at 2502–03; see also id. at 2511–13 (Gorsuch, J., dissenting) (critiquing the majority's opinion on the basis that it reversed the presumption that the Court applies to tribes).

434. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 537–38 (1832) (noting that Worcester was prosecuted for a crime committed on Cherokee lands).

435. *Castro-Huerta*, 142 S. Ct. at 2493–94, 2497.

436. Id. at 2520 (Gorsuch, J., dissenting).

437. Id.

438. See supra text accompanying notes 260–261.

439. See supra notes 262–280 and accompanying text.

of the nineteenth century.[440] And in place of the attack on tribal sovereignty, the federal government instituted new policies that provided for tribal self-determination and revitalized the exercise of tribal power within state borders in the late twentieth century—a shift the Court recognized and reinforced.[441] Thus, the political and cultural underpinnings of these cases have long since eroded.

The *Castro-Huerta* majority's second mistake lay in its acceptance of previous cases' parroting of the state supremacy arguments as accurate statements of Indian law doctrine. As discussed above, even as the Court placed its imprimatur on the exercise of state authority in the nineteenth-century cases, it did nothing to disturb the foundational principles of *Worcester*: federal authority over Indian affairs and the recognition of inherent tribal sovereignty.[442] In fact, the Court reiterated and even strengthened these principles, for example, by establishing federal plenary power in *Kagama*.[443] And even when the Court tinkered with the bounds of state and tribal authority in the twentieth century and translated the holding of *Worcester* to the modern era, these background presumptions remained intact.[444] As Justice Hugo Black wrote in *Williams v. Lee*, "Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of *Worcester* has remained."[445] For the *Castro-Huerta* majority to utilize the invocations of state supremacy to dislodge this "basic policy" and fundamentally disrupt criminal jurisdiction in Indian Country is to make a "declaration . . . as if by oracle, without any sense of the history recounted above and unattached to any colorable legal authority."[446]

As if principles and history were not enough to tie *Castro-Huerta* to the Removal Era, Justice Kavanaugh's preemption analysis provides one final connection—a concern for criminal activity in Indian Country. He harkened back to the rhetoric of the southern states in claiming that Oklahoma "has a strong sovereign interest in ensuring public safety and criminal justice within its territory."[447] Just as the southern state legislators claimed that state jurisdiction over Native lands was necessary to curb

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440. See Hoxie, A Final Promise, supra note 260, at 243–44 (describing how Native nations rebuffed assimilation efforts).

441. See Wilkinson, supra note 281, at 177–268 (discussing political and legal shifts empowering tribal sovereignty).

442. See supra text accompanying notes 263–280.

443. See supra text accompanying notes 263–268.

444. See supra text accompanying notes 284–290; see also Ablavsky, Too Much History, supra note 20, at 338–43 (discussing how subsequent case law adapted *Worcester*'s principles for a modern era).

445. 358 U.S. 217, 219 (1959).

446. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2511 (2022) (Gorsuch, J., dissenting).

447. Id. at 2501 (majority opinion).

criminality,[448] Justice Kavanaugh relied on Oklahoma's interests in "protecting all crime victims" and "ensuring that criminal offenders . . . are appropriately punished."[449] Additionally, he turned this concern regarding criminality into a humanitarian one. Justice Kavanaugh stated that Oklahoma had an interest in protecting both non-Indian and Indian crime victims and that if those who committed crimes against Indians were allowed to escape state prosecution, these victims would be treated as "second-class citizens."[450] Thus, in allowing states to exercise criminal jurisdiction over Indian Country, the Court characterized state power as a protection for, not a threat to, Native peoples. And in framing Oklahoma's interests in such a definitive way, Kavanaugh seemingly disregarded Justice Marshall's admonition in *Bracker* to not depend "on mechanical or absolute conceptions of state or tribal sovereignty" in a preemption analysis.[451]

Ultimately, state supremacy emerged victorious with *Castro-Huerta*. The decision fundamentally reversed almost every principle that Chief Justice Marshall had proclaimed in *Worcester* and that had defined federal Indian law ever since. According to Justice Gorsuch in his characterization of the majority's theory of state jurisdiction, "Truly, a more ahistorical and mistaken statement of Indian law would be hard to fathom."[452] And although *Castro-Huerta* appears at first glance to strike at federal power—Justice Kavanaugh claimed that "state jurisdiction here would not infringe on tribal self-government"[453]—the decision's ahistorical narrative and endorsement of the Removal-era state supremacy theory will likely have lasting ramifications on the exercise of tribal sovereignty.

B. *The Consequences of Endorsing Removal-Era Arguments in* Castro-Huerta

Castro-Huerta's endorsement of Removal-era state supremacy theory has made countering the theory more important than ever. Thankfully, Native nations have a plethora of arguments available to them, specifically those naming the many harms caused by the continued use of state supremacy arguments. This section reflects on how Removal-era state supremacy theory harms Indian law jurisprudence as well as Native nations and peoples. It also provides Indian law practitioners and scholars with the tools necessary to counter the theory. It contends that modern-day reliance on the state supremacy theory defies original constitutional jurisprudence and current federal Indian affairs policy, produces inaccurate history, and perpetuates the racism and violence that attended the southern states' actions in the early nineteenth century.

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448. See supra notes 205–209 and accompanying text.

449. *Castro-Huerta*, 142 S. Ct. at 2501–02.

450. Id. at 2502.

451. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980).

452. *Castro-Huerta*, 142 S. Ct. at 2511 (Gorsuch, J., dissenting).

453. Id. at 2501 (majority opinion).

1. *Defying Original Constitutional Understandings and Current Indian Affairs Policy.* — As Part II described, the Removal-era theory of state supremacy misinterpreted constitutional doctrine at the time, and nothing in the interim has changed to support its constitutionality.[454] *Castro-Huerta* cited the Tenth Amendment as support for state territorial jurisdiction, but that amendment has never been used to support state jurisdiction in Indian Country.[455] As several scholars have shown, the Constitutional Convention explicitly rejected any guarantee of state territorial integrity,[456] and the anticommandeering doctrine is largely inapplicable to Indian law.[457] Although *Hicks* suggested that states have broad authority, even over tribal members on tribal land, no federal court has cited Justice Scalia's opinion for that proposition.[458] Moreover, no other Justices have expressed support for Justice Thomas's mistaken construction of the Indian Commerce Clause—a construction its history thoroughly repudiates.[459]

Additionally, *Herrera*'s overruling of *Race Horse* suggests that states no longer can rely on the Equal Footing Doctrine to constrain tribal rights in the name of full territorial sovereignty.[460] Justice Kavanaugh completely bypassed that more recent precedent in *Castro-Huerta* when citing *Pollard's Lessee*, *McBratney*, and *Draper*.[461] He also overlooked the many precedents

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454. See supra section II.C.

455. Cf. Ablavsky, Too Much History, supra note 20, at 316–17 ("Had the Court actually dug into the conventional sources of constitutional law, it would have found th[e] [Tenth Amendment] principle difficult to justify . . . .").

456. E.g., Ablavsky, Empire States, supra note 36, at 1835–42, 1844–47.

457. See Matthew L.M. Fletcher & Randall F. Khalil, Preemption, Commandeering, and the Indian Child Welfare Act, 2022 Wis. L. Rev. 1199, 1202–04 (arguing that the Indian Child Welfare Act (ICWA) avoids commandeering concerns through preemption law and Section 5 of the Fourteenth Amendment); see also Haaland v. Brackeen, 143 S. Ct. 1609, 1631–38 (2023) (rejecting anticommandeering challenges to ICWA).

458. The only Supreme Court case that has extensively cited *Hicks* is *Plains Commerce Bank v. Long Family Land & Cattle Co.*, yet it only did so for its statements on tribal jurisdiction over non-Indians. See 554 U.S. 316, 333–35 (2008). The majority opinion in *Castro-Huerta* included two citations to *Hicks*, but neither supported the proposition that states may have jurisdiction over tribal members in Indian Country. 142 S. Ct. at 2494, 2501. Additionally, a Westlaw search of lower federal court cases citing *Hicks* reveals no instances of a court using this precedent to support state jurisdiction over tribal members on tribal land. Westlaw, https://westlaw.com/ (last visited Aug. 18, 2023) (open the case Nevada v. Hicks, 533 U.S. 353 (2001) and select "Citing References"; then select "Cases" within the "Content types" tab and select "federal courts" and "reported decisions" within the "Filters" tab). Reviewing the 156 cases in the search results discloses no holdings in which a court declares that a state possesses jurisdiction over tribal members on tribal land.

459. See supra text accompanying notes 240–242, 327–342. The Court also rejected a similar interpretation of the Indian Commerce Clause in *Haaland v. Brackeen*. See 143 S. Ct. at 1630–31 ("As we already explained, . . . Congress's power under the Indian Commerce Clause encompasses not only trade but also 'Indian affairs.'" (quoting Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989))).

460. Herrera v. Wyoming, 139 S. Ct. 1686, 1697 (2019).

461. *Castro-Huerta*, 142 S. Ct. at 2493–94.

in which the Court had allowed the federal government to reserve its authority over Native lands and peoples within state borders despite statehood.[462]

Both Justices and states should recognize that *Worcester* provides an original understanding of the Constitution regarding Indian affairs. And they should recognize that *Worcester* repudiated the southern states' theory of state supremacy—namely, their misguided interpretations of the law of nations, absolute territorial sovereignty, and the Constitution.[463] Therefore, invoking these arguments in a modern-day context not only defies an originalist interpretation of the Constitution but also ignores the Court's foundational Indian law jurisprudence.[464]

Beyond the Constitution, the state supremacy arguments defy the current state of federal Indian affairs policy, putting the Court out of step with the political branches. Despite the disastrous Indian affairs policies of the nineteenth and early twentieth centuries, the Executive Branch and Congress have strongly supported tribal self-determination over the past five decades.[465] In particular, Congress has often treated Native nations as states in various pieces of legislation, recognizing that tribes can exercise certain regulatory powers within state boundaries.[466] In its past preemption cases, the Court acknowledged and gave weight to the direction of these policies.[467] Although it did not in *Castro-Huerta*, the Court should once again defer to the Indian affairs policies of the political branches and reject the untenable and outdated notion of state supremacy.

2. *Producing Inaccurate History.* — The perpetuation of state supremacy arguments also legitimizes inaccurate history. The use of history in law often has profound consequences on both Americans' views

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462. See Litman, supra note 64, at 1225 & n.100 (listing cases in which the Court "upheld [state admission] conditions regulating commerce with Native Americans or commerce on Native American lands"); see also David E. Wilkins, Tribal–State Affairs: American States as 'Disclaiming' Sovereigns, Publius, Fall 1998, at 55, 67–73 (discussing instances in which states disclaimed authority over Native peoples and lands through enabling acts and state constitutions).

463. See supra section II.C.

464. For more discussion on how federal Indian law should fit within an originalist framework, see generally M. Alexander Pearl, Originalism and Indians, 93 Tul. L. Rev. 269, 321–36 (2018).

465. See Wilkinson, supra note 281, at 177–268 (discussing political and legal shifts empowering tribal sovereignty).

466. This treatment is especially prevalent in environmental statutes, such as the Clean Air Act, 42 U.S.C. § 7601(d) (2018), the Clean Water Act, 33 U.S.C. § 1377(e) (2018), and the Safe Drinking Water Act, 42 U.S.C. § 300j-11.

467. See, e.g., New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 341 (1983) ("The assertion of concurrent jurisdiction by New Mexico not only would threaten to disrupt the federal and tribal regulatory scheme, but would also threaten Congress' overriding objective of encouraging tribal self-government and economic development.").

of the past and the meaning of law itself.[468] As historian Alfred Kelly once wrote, the Supreme Court's citation of history results in the Court "ma[king] history, since what it declare[s] history to be [is] frequently more important than what the history might actually have been."[469] This connection between law and history is especially consequential in the field of federal Indian law because courts frequently resolve cases based on the historical narratives they construct.[470] Thus, it is important to recognize—and counter—the various ways in which litigants and courts create inaccurate history by utilizing state supremacy arguments.

First, the reliance on state supremacy arguments in *Castro-Huerta* and *Hicks* creates a false historical narrative of the development of federal Indian law doctrine. These opinions suggest that the history of Indian law has been one in which state law has increasingly applied to Native lands and peoples.[471] Yet as discussed above, federal Indian affairs policy has vacillated dramatically over the past two centuries.[472] And the Court has continually tinkered with the bounds of federal, state, and tribal power to align with the direction of federal Indian affairs policy.[473] But federal authority in Indian Country and the maintenance of tribal sovereignty have served as consistent throughlines, cabining state power. This is why the foremost treatise on federal Indian law explicitly states, "Congress's plenary authority over Indian affairs and the tradition of tribal autonomy in Indian country combine to preempt the operation of state law."[474]

The state supremacy theory's hostility to tribal sovereignty also risks undermining the robust historical scholarship that both demonstrates the resilience of Native nations and features the voices of Native peoples.[475] In

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468. See, e.g., Charles A. Miller, The Supreme Court and the Uses of History 25 (1969) ("By writing history into its opinions the Court contributes to the public's view of the American past as much as, and sometimes even more than, professional historians . . . ."); Richard H. Fallon, Jr., The Many and Varied Roles of History in Constitutional Adjudication, 90 Notre Dame L. Rev. 1753, 1759–97 (2015) (analyzing the various ways in which history is used to determine constitutional meaning).

469. Alfred H. Kelly, Clio and the Court: An Illicit Love Affair, 1965 Sup. Ct. Rev. 119, 123.

470. See Ablavsky, Too Much History, supra note 20, at 298–320 (arguing that there is "too much history" in Indian law, which leads the Court to construct "good" and "bad" history opinions in Indian law cases); Fort, supra note 47, at 301–08 ("Because of the nature of federal Indian law, which requires analysis of treaties and other historical documents, the Court must use historical narrative when deciding Indian law cases." (footnote omitted)).

471. See supra text accompanying notes 299–305, 438–446.

472. See supra text accompanying notes 81–97, 107–127, 259–261, 281–283.

473. See supra text accompanying notes 259–290.

474. Cohen's Handbook of Federal Indian Law § 6.01(1) (Nell Jessup Newton, Robert T. Anderson, Bethany R. Berger, Carole E. Goldberg, John P. LaVelle, Judith V. Royster, Joseph William Singer & Kevin Washburn eds., 2012).

475. See generally Ned Blackhawk, The Rediscovery of America: Native Peoples and the Unmaking of U.S. History (2023) (recounting the central role that Native nations and peoples played in U.S. history); Wilkinson, supra note 281 (demonstrating how Native peoples contributed to the resurgence of tribal sovereignty in the twentieth century).

echoing southern states' views of Native lands as havens for criminal activity and Native nations as incompetent entities, states like Wyoming and Oklahoma present the views of tribal opponents as historical truth.[476] Solely relying on these observations misses the fact that some statements were likely rhetoric calculated to achieve Native dispossession and subjugation. Adopting them also increases the likelihood that future litigants and courts will replicate this inaccurate, one-sided history in briefs and opinions.

Additionally, these framings of the past influence present-day views of Native nations; historically inaccurate arguments reproduce erroneous understandings. As the historian Albert Hurtado has observed, "[V]irtually all historical writing on Indian topics has the potential to affect contemporary Indian life."[477] And legal scholars have compellingly shown how problematic historical narratives and stereotypes continue to shape perspectives on tribes.[478] For example, Kate Fort has shown how the "vanishing Indian" stereotype of the nineteenth century gave rise to a history in which Native nations and peoples are assumed to be absent.[479] The Court has then relied on this history to limit tribal powers because it assumes these powers ceased to exist sometime in the past.[480] Similarly, in the context of the state supremacy theory, state litigants' and the Court's assumption that statehood incorporated Native lands and peoples fully into the state has been used to question tribal sovereignty's continuing existence.[481] Moreover, as seen most explicitly in Oklahoma's briefs and in *Castro-Huerta*, states have projected their characterizations of history into the present, claiming that restored tribal sovereignty will increase criminal

476. These arguments also value the perspective and intentions of settlers and non-Indians over Indians. In *McGirt*, Justice Gorsuch repudiated this tactic. Replying to Oklahoma's contention that "many of its residents will be surprised to find out they have been living in Indian country this whole time," Gorsuch wrote, "But we imagine some members of the 1832 Creek Tribe would be just as surprised to find them there." McGirt v. Oklahoma, 140 S. Ct. 2452, 2479 (2020). For a similar argument that the Court should not give weight to the expectations of settlers from the Allotment era in reservation-diminishment cases, see Ann E. Tweedy, Unjustifiable Expectations: Laying to Rest the Ghosts of Allotment-Era Settlers, 36 Seattle U. L. Rev. 129, 130–31 (2012).

477. Albert L. Hurtado, Public History and the Native American: Issues in the American West, Mont. Mag. W. Hist., Spring 1990, at 58, 59.

478. See, e.g., Williams, supra note 47, at xxvi (arguing that there is a "deeply entrenched national mythology of Indian savagery, epitomized, for example, by the tale of the Indians selling Manhattan for twenty-four dollars"); Russel Lawrence Barsh & James Youngblood Henderson, The Betrayal: *Oliphant v. Suquamish Indian Tribe* and the Hunting of the Snark, 63 Minn. L. Rev. 609, 617–31 (1979) (critiquing Justice William Rehnquist's use of history in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)).

479. Fort, supra note 47, at 308–20.

480. See id. at 321–24 ("The Court's work now treats tribal powers of self-governance as already gone, and the Court's work is taking an active role in creating (diminished recognition of tribal sovereignty) what it claims has already happened (diminished tribal sovereignty).").

481. See supra text accompanying notes 374–378, 424–431.

activity and sow chaos because of the uncertainty and ineptitude that surrounds tribal governments.[482]

As a result, the Removal-era state supremacy theory continues to reach its hand into the present, portraying Native nations as historical and legal contradictions. For modern-day adherents to the theory, Native nations exist as either anachronistic obstacles to law and order or entities that lack any attributes of sovereignty. And these views live on despite the fact that today's Native nations effectively exercise their sovereignty and maintain their existence through good governance.[483]

3. *Perpetuating Racism and Violence.* — The state supremacy arguments have also imposed and continue to impose racial and dignitary harms on Native peoples. Although these harms are closely intertwined with the production of false historical narratives—which are ultimately grounded in white supremacy[484]—it is important to emphasize the specific ways in which the state supremacy theory both overtly racializes state sovereignty arguments and obscures their violent past. Only then can society reckon with the violence that legal actors still perpetrate against tribal sovereignty and Indigeneity when deploying state supremacy arguments.

First, the southern states' theory rested on racist underpinnings. Desiring Native lands, southern officials constructed racial arguments for the dispossession of Natives, contending that savages could neither hold title to land, nor exercise self-government, nor live next to whites.[485] On the other hand, state sovereignty—the power of white citizens—could exercise authority over lands and all peoples residing on them, whether they were white, Black, or Native.[486] This construction of state sovereignty as the embodiment of white supremacy was also calculated to prevent the federal government from interfering with states' internal affairs. Southerners feared that if the federal government had jurisdiction over Indians living within state borders—and could use this authority to transform them into citizens—then it could do the same for enslaved Black people.[487] This history requires the Justices to recognize the racist context that gave rise to the state sovereignty arguments. During its 2019

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482. See supra text accompanying notes 363–394, 447–450.

483. See Matthew L.M. Fletcher, Indian Tribes Are Governing Well. It's the States that Are Failing, Wash. Monthly (Sept. 30, 2021), https://washingtonmonthly.com/2021/09/30/indian-tribes-are-governing-well-its-the-states-that-are-failing/ [https://perma.cc/9VQX-UQCV]; see also Angela R. Riley, Good (Native) Governance, 107 Colum. L. Rev. 1049, 1061–1107 (2007) (analyzing examples of "good Native governance").

484. See supra notes 476–483 and accompanying text.

485. See supra text accompanying notes 145–151, 210–213, 217–219.

486. See supra text accompanying notes 191–197.

487. See The Report, supra note 28, at 3 ("[I]t will be found that the extension of rights to the *Indians* within a State, differs from the like extension of rights to the free negroes and slaves within the same *limits, only in the shade of colour* between the two races—*Abstractly*, there is no difference."); see also supra text accompanying notes 158–159.

Term, in striking down nonunanimous jury verdict laws arising from the Jim Crow era, the Court suggested that it must grapple with the racist origins of laws when assessing their constitutionality.[488] Similarly, the Court and states should contend with the validity of state sovereignty arguments grounded in white supremacy.

Legal practitioners and scholars must also point out how these arguments actually perpetuate racial prejudices. As Bethany Berger has argued, the purpose of defining tribes as racial groups historically has been to "deny tribes the rights of governments."[489] And the state supremacy theory clearly aligns with this trend. Justice Thomas's concern about the harms of tribal sovereign immunity and the states' anxieties about subjecting non-Indians to tribal jurisdiction reiterate the underlying belief that tribal values and institutions are incompatible with the preferences of other races.[490] Rather than recognizing tribes as nations with the powers that other sovereigns possess, some of the Justices and states see only the creation of a racially segregated society with Indians unfairly ruling over non-Indians.[491] Viewing Native peoples as racially biased actors, non-Indians then uphold a racial hierarchy in which Euro-American institutions are supreme.

Finally, the stain of violence associated with these arguments renders them illegitimate. In treating the southern states' theory of state supremacy as a valid legal concept, modern proponents have forgotten how this theory was constructed to justify the mass expulsion of thousands of Native peoples from the Southeast. The Trail of Tears that followed the southern states' actions resulted in the loss of not only the Five Tribes' ancestral homelands but also millions of dollars in Native property and thousands of Native lives.[492] To continue to rely on concepts so intimately tied with Removal is to sanction the destruction and death that accompanied it.

And because Removal is a manifestation of one of America's original sins—colonialism—the other original sin—slavery—can help reveal the

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488. See Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020) (criticizing the plurality opinion in Apodaca v. Oregon, 406 U.S. 404 (1972), for failing to address "the racist origins of Louisiana's and Oregon's laws"); id. at 1410 (Sotomayor, J., concurring) (pointing to the "legacy of racism" underlying the laws in question as "worthy of this Court's attention").

489. Bethany R. Berger, Red: Racism and the American Indian, 56 UCLA L. Rev. 591, 599 (2009).

490. See supra text accompanying notes 317–323, 344–345, 388–394.

491. See, e.g., Carmen Forman, Stitt Again Blasts *McGirt* Ruling, Saying Martin Luther King Jr. Might Be 'Disgusted' by Decision, The Oklahoman (Jan. 17, 2022), https://www.oklahoman.com/story/news/2022/01/17/martin-luther-king-jr-mlk-day-2022-kevin-stitt-mcgirt-ruling/6557404001/ [https://perma.cc/9EXE-H3CK] (quoting Oklahoma Governor Kevin Stitt as stating that "the ruling created two sets of rules for Oklahomans, based on their race" and that "[i]n eastern Oklahoma right now, there is not equal protection under the law").

492. Saunt, supra note 3, at 280–81, 315.

ongoing legacies of such violence in the law.[493] As Justin Simard has compellingly shown, modern courts still commonly cite "slave cases," those cases involving enslaved people, as good law.[494] But, as he argues, modern courts' citations to "slave cases" cause "dignitary harms" by failing to recognize the brutality of slavery.[495] Additionally, these citations often fail to recognize that "[e]very case that treated an enslaved person as property signaled legal approval of a slave society premised on white supremacy."[496] Similarly, jurists' current reliance on the Removal-era state supremacy theory causes dignitary harms. The blatant use of state sovereignty arguments that resulted in the forced emigration of Native peoples not only overlooks the violence involved in Removal but also "ignores the humanity of those subjected to legal subjugation and treats white supremacist [officials] as respected authorities."[497] Furthermore, support of the state supremacy theory signals approval of what the Jackson Administration and southern states did: eliminate Native nations in the South for the benefit of states and their Euro-American citizens.[498] Worse, unlike the law of slavery, the state supremacy theory was not the law in the past.[499] So even as the United States' oppressive treatment of Native nations in the past "has been overruled in the court of history,"[500] the Court in *Castro-Huerta* finally allowed the legal theory that supported such violence to become law and continue its destructive effects.[501]

C. *Federal Indian Law in the Wake of* Castro-Huerta

Castro-Huerta has done more than reveal the problems inherent in relying on the Removal-era state supremacy theory. It also has introduced an immense amount of uncertainty into federal Indian law. With *Worcester* no longer providing the base rule for the application of state law in Indian Country, it is unclear how the Supreme Court and lower courts will use the principle of absolute state territorial jurisdiction. As the Indian law scholar Stacy Leeds has stated, "Read in its most expansive light, this case seems to

493. For discussion of colonialism and slavery as America's original sins, see Blackhawk, Federal Indian Law as Paradigm, supra note 56, at 1805–06.

494. Justin Simard, Citing Slavery, 72 Stan. L. Rev. 79, 81–82 (2020).

495. Id. at 84.

496. Id. at 112.

497. Id. at 84.

498. See supra notes 113–123, 249–251, and accompanying text.

499. See supra section II.C.

500. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (condemning Korematsu v. United States, 323 U.S. 214 (1944)). The literature on the violent and destructive impacts of U.S. Indian affairs policy is substantial. For recent works, see generally Benjamin Madley, An American Genocide: The United States and the California Indian Catastrophe, 1846–1873 (2016); Ostler, supra note 25; Michael John Witgen, Seeing Red: Indigenous Land, American Expansion, and the Political Economy of Plunder in North America (2022).

501. See Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2505 (Gorsuch, J., dissenting) ("Where our predecessors [in *Worcester*] refused to participate in one State's unlawful power grab at the expense of the Cherokee, today's Court accedes to another's.").

support many types of state intrusion into Indian Country with the erasure of Indigenous nations and their rights to be governed by their own laws to the exclusion of state law."[502] There is a possibility that the Court will take the state supremacy theory to its extreme, allowing state law to apply to Native peoples and override tribal law.

And there are currently opportunities for the Supreme Court and other courts to endorse more state supremacy arguments. Conflicts are brewing over federal industrial and environmental regulations[503] and the exercise of state civil jurisdiction in Indian Country.[504] Armed with *Castro-Huerta*, courts may cabin federal and tribal authority further in these areas. And in a recent alarming opinion by the Oklahoma Court of Criminal Appeals, the majority—even as it recognized the existence of the Miami, Ottawa, and Peoria Reservations—suggested that a state may have jurisdiction over Indians who commit crimes against non-Indians in Indian Country because of *Castro-Huerta*.[505] Thus, *Castro-Huerta* opened a Pandora's box of novel legal arguments that may further erode foundational federal Indian law principles.

Native nations still have the chance to contest *Castro-Huerta*, though. First, Native nations can avoid the courts altogether. They can do so by either securing legislation from Congress to explicitly preempt state law—the suggestion made by Justice Gorsuch in his dissent[506]—or entering into compacts with states that provide for a jurisdiction-sharing arrangement—a successful strategy from the past few decades.[507] Second, even if Native nations find themselves in litigation, they may be able to argue around *Castro-Huerta*. The most powerful of these arguments would be that *Castro-Huerta*'s territorial jurisdiction principle applies only to state jurisdiction being exercised over non-Indians in Indian Country and cannot interfere with tribal or federal law as applied to Indians.[508] According to Indian law scholar Dylan Hedden-Nicely, even though the Court departed from *Worcester*'s categorical prohibition on state law's application in Indian Country in some twentieth-century Indian law cases, it did so only "in cases where

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502. Martin, supra note 20 (internal quotation marks omitted) (quoting an interview with Leeds).

503. See, e.g., Oklahoma v. U.S. Dep't of Interior, 640 F. Supp. 3d 1130, 1134–35 (W.D. Okla. 2022) (denying Oklahoma's challenge to the federal government's exercise of jurisdiction over surface mining activities within the Muscogee Reservation).

504. See, e.g., Milne v. Hudson, 519 P.3d 511, 516 (Okla. 2022) (upholding state court jurisdiction over civil protection orders between Indians in Indian Country).

505. See State v. Brester, 531 P.3d 125, 137–38 (Okla. Crim. App. 2023).

506. *Castro-Huerta*, 142 S. Ct. at 2527 (Gorsuch, J., dissenting).

507. See Fletcher, Deadliest Enemies, supra note 60, at 82–83 (describing the increasing trend of tribes and states entering compacts regarding various areas of governance).

508. See 142 S. Ct. at 2526 (Gorsuch, J., dissenting) ("Most significantly, the Court leaves undisturbed the ancient rule that States cannot prosecute crimes by Native Americans on tribal lands without clear congressional authorization—for that would touch the heart of 'tribal self-government.'" (quoting id. at 2500 (majority opinion))).

essential tribal relations were not involved and where the rights of Indians would not be jeopardized."[509] Therefore, Native nations could argue that the case did nothing to displace *Worcester*'s support of tribal self-government, a tenet of Indian law that has been consistently reaffirmed by the Court.[510]

The Court's past Term may also provide some hope that it will cabin the effects of *Castro-Huerta*. In *Haaland v. Brackeen*,[511] a case in which the State of Texas challenged the constitutionality of the Indian Child Welfare Act (ICWA),[512] the Court flatly rejected all the state sovereignty arguments involved. In *Brackeen*, Texas had taken a page out of the southern states' playbook, arguing that the Constitution provided Congress with no power to interfere in state child-custody proceedings.[513] It also contended that the federal government's mechanisms for protecting Indian children and families in these proceedings violated the Tenth Amendment's anticommandeering principle.[514] Texas even cited *Castro-Huerta* in its brief for the proposition that it was allowed to govern child welfare without interference from Congress.[515] Yet the Court held that Congress had the power to enact ICWA because its power in Indian affairs is both "plenary and exclusive."[516] Echoing the *Worcester* principle that federal Indian affairs authority is exclusive, Justice Amy Coney Barrett wrote, "Our cases leave little doubt that Congress's power in this field is muscular, superseding . . . state authority."[517] In particular, she rejected Texas's parroting of the Removal-era state supremacy arguments. She found that the Indian Commerce Clause and other constitutional provisions both bestowed Indian affairs authority to the federal government—to the exclusion of states—and allowed Congress to displace state law.[518] The

509. Hedden-Nicely, The Reports of My Death, supra note 20, at 269 (internal quotation marks omitted) (quoting Williams v. Lee, 358 U.S. 217, 219 (1959)).

510. See McGirt v. Oklahoma, 140 S. Ct. 2452, 2476–77 (2020) (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832), approvingly for the proposition that tribes are "subject to no state authority"); see also Hedden-Nicely, The Reports of My Death, supra note 20, at 269–70 (arguing that *Worcester*'s principle on the tribal right to independence and self-government "remain[s] the law"). Additionally, as Hedden-Nicely has argued, any preemption analysis of the exercise of state authority within a tribe's reservation must rely on that tribe's treaties, not on the balancing of amorphous state and tribal interests as conceived by the Court. Hedden-Nicely, The Terms of Their Deal, supra note 61, at 510.

511. 143 S. Ct. 1609 (2023).

512. Reply Brief for Petitioner the State of Texas at 1, *Brackeen*, 143 S. Ct. 1609 (Nos. 21-376, 21-377, 21-378, 21-380), 2022 WL 5305089.

513. Id. at 4–11.

514. Id. at 23–24.

515. See id. at 4 ("After all, even in cases involving Indians, 'States do not need a permission slip from Congress to exercise their sovereign authority.'" (quoting Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2503 (2022))).

516. *Brackeen*, 143 S. Ct. at 1627 (internal quotation marks omitted) (quoting United States v. Lara, 541 U.S. 193, 200 (2004)).

517. Id.

518. Id. at 1627–31.

Court also held that ICWA aligned with the Tenth Amendment, thereby overcoming the anticommandeering challenges.[519]

With *Brackeen*—and its refusal to accept any state supremacy arguments—following so closely on the heels of *Castro-Huerta*, the question of *Castro-Huerta*'s impact on federal Indian law doctrine remains. ICWA applies inside and outside of Indian Country, yet surprisingly, the Court made no mention of states' territorial jurisdiction like it did in *Castro-Huerta*. In fact, the only citation to the *Castro-Huerta* majority opinion appeared in a footnote in Justice Thomas's dissent.[520] Therefore, the future situations in which the Court will choose to invoke the state supremacy theory to undermine federal and tribal power are unclear. Still, the *Brackeen* dissents held fast to the state supremacy arguments. Justice Alito argued that family law is "a field long-recognized to be the virtually exclusive province of the States."[521] And Justice Thomas once again reiterated his position—and that of Removal-era southern state officials—that nothing in the Constitution authorizes the federal government to encroach on state sovereignty in the name of Indian affairs.[522] Thus, the state supremacy theory lives on at the Court, even if its significance as law remains uncertain.

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As this Article has shown, *Castro-Huerta* is more than a case about a particular issue—criminal jurisdiction in Indian Country. Fundamentally, it is the culmination of two centuries of states and jurists countering the foundational principles of Indian law with the unsound theory of state supremacy. Now, the specter of Indian Removal casts a shadow on Native nations, as the state supremacy arguments have been transformed into legal principles that threaten tribal sovereignty. Still, this Article's description of the harms perpetuated by *Castro-Huerta* will equip advocates with powerful arguments to undermine their continued use. And Native nations always can invoke the promises that the United States has made to them in treaties and policies that still bind the nation to this day. So even as *Castro-Huerta* stands as a victory for state supremacy, it is hopefully a short-lived one.

519. Id. at 1631–38.

520. See id. at 1669 n.4 (Thomas, J., dissenting) (citing Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2502 (2022), for the proposition that Indian reservations are "treated as part of the State they are within").

521. Id. at 1685 (Alito, J., dissenting).

522. Id. at 1677–83 (Thomas, J., dissenting).

CONCLUSION

It is ironic that as the Court says it is more open than ever to overruling precedents grounded in racism and colonialism,[523] it has taken the Removal-era state supremacy theory and made it the law. And the Court did so without any recognition of the theory's historical context or the overwhelming amount of destruction and violence it led to. Yet, in considering the federal government's power over the U.S. territories, some Justices finally have expressed their openness to overruling the racist and imperialist *Insular Cases* of the early twentieth century.[524] This sentiment has extended to Indian law in some respects, with Justices recently questioning the powers of Courts of Indian Offenses, which originally were intended to assimilate Native peoples.[525] Thus, there may be an opening for the Court to chip away at *Castro-Huerta*'s state supremacy principles if it begins to reconsider precedents rooted in colonialism. This small opening, however, remains overshadowed by the Court's continued proclivity to employ arguments shorn of their historical context in order to reach the Justices' preferred legal outcomes—just as it did in *Castro-Huerta*.[526]

But the origins of the state supremacy theory are not the only issue the Court must confront. It must also recognize that state supremacy arguments are being weaponized once again to reenact the jurisdictional conflicts of the Removal Era, with legal actors advocating for the Supreme Court to remove the powers Native nations possess for the benefit of state authority. As several Indian law scholars have argued, the problematic precedents in the field have long served "like a loaded weapon" that can be used to erode the rights of Native nations and peoples.[527] But now the continually rejected and problematic arguments of the past—not precedents—have been resurrected to undermine those rights. Therefore, it is imperative that legal practitioners and scholars compel the Court and states to recognize this harm and relegate this vein of state supremacy arguments to the dustbin of history. There, they can join those state rights' concepts formerly used to uphold slavery and segregation. And rejecting

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523. See, e.g., Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020) (partially invalidating nonunanimous jury verdict law based on racist origins); Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (condemning Korematsu v. United States, 323 U.S. 214 (1944)); see also supra notes 68, 488.

524. See United States v. Vaello Madero, 142 S. Ct. 1539, 1552 (2022) (Gorsuch, J., concurring); id. at 1560 n.4 (Sotomayor, J., dissenting).

525. See Denezpi v. United States, 142 S. Ct. 1838, 1849–50, 1851, 1854–56 (2022) (Gorsuch, J., dissenting).

526. See supra notes 62–64 and accompanying text.

527. Williams, supra note 47, at 136 (internal quotation marks omitted) (quoting *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting)); see also Crepelle, supra note 47, at 532 ("Jurisprudence loaded with grotesque 19th-century racist stereotypes and factual errors about American Indians remains valid precedent.").

them once and for all can lessen the impact of the nation's continuing legacy of settler colonialism and racial oppression.

Promises are powerful. Justice Gorsuch's majority opinion in *McGirt* began with a bold statement recognizing such: "On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever."[528] And *McGirt* validated this promise by recognizing the continuing existence of the Muscogee Reservation, leading to the re-recognition of the other Five Tribes' reservations. Two years later, however, the Court partially reversed itself in *Castro-Huerta* by allowing Oklahoma to exercise jurisdiction over crimes involving Native peoples within those reservations. In the words of Justice Gorsuch, the Court "failed" to do its "duty to honor this Nation's promises."[529]

Justice Gorsuch, however, points out that treaties are not the only sources of promises for Native nations: "Our Constitution reserves for the Tribes a place—an enduring place—in the structure of American life. It promises them sovereignty for as long as they wish to keep it. And it secures that promise by divesting States of authority over Indian affairs . . . ."[530] Thus, tribal sovereignty—and the rejection of state supremacy—lies at the heart of the Constitution itself. And from *Worcester* to *McGirt*, Native nations have endured and successfully overcome states' assaults on Native sovereignty.[531] Now, in the wake of *Castro-Huerta*, tribal advocates and the Court must strive to defy states' "unlawful power grab[s]"[532] again and ultimately dispel the threat that state supremacy poses to Native nations' continuing existence.

528. McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020).

529. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2527 (2022) (Gorsuch, J., dissenting).

530. Haaland v. Brackeen, 143 S. Ct. 1609, 1661 (2023) (Gorsuch, J., concurring).

531. See *McGirt*, 140 S. Ct. at 2463–68, 2482.

532. *Castro-Huerta*, 142 S. Ct. at 2505 (Gorsuch, J., dissenting).