2024-2025

Teacher's Memorandum to accompany

Getches, Wilkinson, Williams, Fletcher, Carpenter & Singel

FEDERAL INDIAN LAW, 7th ed.

Prepared by:

Matthew L.M. Fletcher

Professor, University of Michigan Law School

INTRODUCTION

We mourn the loss of Charles Wilkinson. Along with David Getches and (later) Rob Williams, Charles made this book into what it is today.

The United States Supreme Court decided one Indian law case in the 2023 Term, *Becerra v. Northern Arapaho Tribe*, 602 U.S. __, 144 S. Ct. 1428 (2024) (page 73). After the momentous 2022 Term, which saw challenges to the very foundations of federal Indian law, this last Term was quiet. The three Democratic appointees, joined by Justice Gorsuch, continued to form a four-justice front defending the foundational principles of federal Indian law. The Chief Justice and Justice Barrett remain the most likely of the remaining justices to join them, but for tribal advocates, their voting patterns remain mercurial.

This update also includes the World Intellectual Property Organization's new Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge, adopted on May 26, 2024, in Geneva. This historic treaty requires patent applicants to disclose when their patent applications are based on Indigenous Peoples' traditional knowledge and is part of a broader movement by Indigenous Peoples to address the dispossession and appropriation of their intellectual and cultural property.

The memorandum includes materials added in earlier updates on *Haaland v. Brackeen* (page 149), *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin* (page 60), *Arizona v. Navajo Nation* (page 211), *Oklahoma v. Castro-Huerta* (page 113), *Ysleta del Sur Pueblo v. Texas* (page 195), *Denezpi v. United States* (page 51), *United States v. Cooley* (page 131), *Yellen v. Confederated Chehalis Tribes* (page 238), *McGirt v. Oklahoma* (and its related case *Sharp v. Murphy*, formerly *Carpenter v. Murphy*) (page 92), *Lewis v. Clarke* (page 56), *Upper Skagit Indian Tribe v. Lundgren* (page 58), *Washington Dept. of Revenue v. Cougar Den* (page 137), and *Herrera v. Wyoming* (page 226). We also highlight materials from the Supreme Court's non-decision in the so-called culverts case, the latest Supreme Court decision in the long-running *United States v. Washington* fishing rights litigation.

In previous updates, we included new materials on Indian country voting rights (p. 23) and Indian country health care (p. 76). We also added additional Nation Building and Lawyering Notes, some of which are much lengthier than Notes included in the book – *Carcieri* (page 3) and labor relations (page 11), others involving issues not resolved until the conclusion of the book – *Patchak* (page 8), Dakota Access Pipeline (page 17), and Bears Ears (page 207).

In the international and comparative law arena, we added a brief mention of Canada's legislation, passed in 2021, to align its national laws with the United Nations Declaration on the Rights of Indigenous Peoples (page 259). This 2024 update includes a reference to Canada's United Nations Declaration on the Rights of Indigenous Peoples National Action Plan 2023-2028 that "provides a roadmap of actions Canada needs to take in partnership with Indigenous [P]eoples to implement the principles and rights set out in the UN Declaration and to further advance reconciliation in a tangible way."

Comments on the memorandum and on the 7th edition are most welcome and appreciated, and can be directed to Matthew L.M. Fletcher, University of Michigan Law School, at nimrod@umich.edu. Permission is hereby granted to reproduce any or all of this memorandum for teacher or student use in any course that is based upon **GETCHES, WILKINSON, WILLIAMS, FLETCHER, AND CARPENTER CASES AND MATERIALS ON FEDERAL INDIAN LAW (7th ed. 2017)**.

Matthew L.M. Fletcher, Kristen A. Carpenter, and Wenona T. Singel
Ann Arbor, Michigan, Boulder, Colorado, and East Lansing, Michigan
August 2024

CHAPTER 5

THE FEDERAL-TRIBAL RELATIONSHIP

SECTION A.

TRIBAL PROPERTY INTERESTS

Add to end of notes on page 321:

INDIAN LAWYERING NOTE:

THE *CARCIERI* PROBLEM*

Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 5308 (formerly 25 U.S.C. § 465), authorizes the Secretary of the Interior to acquire land in trust for the benefit of Indians and Indian tribes:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

Section 7 authorized the Interior Secretary to declare new reservations on acquired trust lands. 25 U.S.C. § 5101 (formerly § 467) ("The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: Provided, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.").

Section 5 authorizes the Interior Secretary to acquire land in trust for "Indians," a term of art defined a later section of the IRA as "all persons of Indian descent who are members of any recognized Indian tribe *now under Federal jurisdiction*. . . ." 25 U.S.C. § 5129 (formerly § 479).

In *Carcieri v. Salazar*, 555 U.S. 379 (2009), the Supreme Court held that the Interior Secretary may not acquire land in trust for the benefit of the Narragansett Indian Tribe. Id. at 382-83, 395-96. The State of Rhode Island challenged the Secretary's decision to take land into trust on the ground that the tribe, which the federal government recognized as an Indian tribe in 1983, was not under federal jurisdiction in 1934, the date of the enactment of the IRA. The federal

* Materials in this Note are derived from Matthew L.M. Fletcher, Federal Indian Law § 7.3 (2016).

government and the tribe argued that "now" meant at the time of the Interior Secretary's decision to acquire land in trust. The Court agreed with the state.

The Court undertook statutory construction under which it concluded that the definition of "Indian" was unambiguous. The Court looked to the "ordinary meaning of the word 'now,' " and located contemporaneous dictionary definitions of the word that suggested the word "ordinarily" refers to a "present" time or moment. *Carcieri*, *supra*, at 388. The Court pointed to a statement made by John Collier, architect of the IRA and the Commissioner of Indian Affairs, in 1936, two years after the IRA's enactment: "Section 19 of the Indian Reorganization Act . . . provides, in effect, that the term 'Indian' as used therein shall include—(1) all persons of Indian descent who are members of any recognized tribe *that was under Federal jurisdiction at the date of the Act*. . . ." Id. at 390 (quoting Letter from John Collier, Commissioner, to Superintendents (Mar. 7, 1936)) (emphasis in original). The Court concluded by noting that no party ever claimed the Narragansett Indian Tribe was under federal jurisdiction in 1934, and shut the door to further proceedings by declaring that it would hear no evidence to the contrary.

Justice Breyer's concurrence argued that "now" in § 479 [currently codified at 25 U.S.C. § 5129] might be more inclusive of tribes than it appears from the *Carcieri* facts. Id. at 397. While the Interior Department compiled a list of 258 tribes it recognized in 1934, Breyer suggested that in fact there might have been many, many more that "the Department did not know [about] at the time." Id. at 398.

Professor Bill Rice argued that the decision throws a monkey wrench in modern Indian affairs:

> This decision will create a cloud upon the trust title of every tribe first recognized by Congress or the executive branch after 1934, every tribe terminated in the termination era that has since been restored, and every tribe that adopted the IRA or [Oklahoma Indian Welfare Act] and changed its name or organizational structure since 1934. It will also result in incessant litigation to determine which of the over 500 tribes fall within its terms and prohibit future trust acquisitions for such tribes as are finally found to be within its net.

G. William Rice, The Indian Reorganization Act, the Declaration on the Rights of Indigenous Peoples, and a Proposed Carcieri "Fix": Updating the Trust Land Acquisition Process, 45 Idaho L. Rev. 575, 594 (2009).

On March 12, 2014, the Interior Solicitor issued an opinion on the definition of "under federal jurisdiction" for IRA purposes. Dept. of Interior, Office of the Solicitor, The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act, M–37029 (March 12, 2014). The Solicitor opined that there is no plain meaning of "under federal jurisdiction." The Solicitor then concluded that whether an Indian tribe was "under federal jurisdiction" in 1934 is a two-part inquiry:

> Thus, having closely considered the text of the IRA, its remedial purposes, legislative history, and the Department's early practices, as well as the Indian canons of construction, I construe the phrase "under federal jurisdiction" as entailing a two-part inquiry. The first question is to examine whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction, i.e., whether the United States had, in 1934 or at some point in the tribe's history prior to 1934, taken an action or series of actions—through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members—that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government. Some federal actions may in and of themselves demonstrate that a tribe was, at some identifiable point or period in its history, under federal jurisdiction. In other cases, a variety of actions when viewed in concert may demonstrate that a tribe was under federal jurisdiction.
>
> * * *
>
> Once having identified that the tribe was under federal jurisdiction prior to 1934, the second question is to ascertain whether the tribe's jurisdictional status remained intact in 1934. For some tribes, the circumstances or evidence will demonstrate that the jurisdiction was retained in 1934. In some instances, it will be necessary to explore the universe of actions or evidence that might be relevant to such a determination or to ascertain generally whether certain acts are, alone or in conjunction with others, sufficient indicia of the tribe having retained its jurisdictional status in 1934.

Id. at 19.

The Solicitor for the Department of the Interior under the Trump Administration withdrew M-37029 and issued procedures significantly limiting the power of the Interior Secretary to take into trust for tribes in January 2020. *See* M-37055 (withdrawal of M-3729); M-37054 (procedures). In April 2021, the Solicitor under the Biden Administration withdrew M-37055 pending additional tribal consultation, effectively restoring M-37029 as the governing law for the time being. *See* M-37070. In 2024, the First Circuit affirmed the power of the Secretary to acquire land in trust for the Mashpee Wampanoag Tribe. Littlefield v. Dept. of the Interior, 85 F.3d 635 (1st Cir.), cert. denied, 144 S. Ct. 1117 (2024).

The litigation involving the trust land acquisition for the Grand Traverse Band of Ottawa and Chippewa Indians is also instructive of how these post-*Carcieri* situations are analyzed. The Grand Traverse Band is a signatory to treaties with the United States in 1836 and 1855, but suffered through "administrative termination," whereby the Department of the Interior refused to acknowledge the tribe from the 1870s until 1980 based on a misreading of the treaty language. The Interior Board of Indian Appeals held that the tribe remained "under federal jurisdiction" in 1934 even though the tribe did not enjoy federal recognition, largely because of its retained treaty rights:

> We agree with the Regional Director that the historical record supports his finding that the Tribe was under Federal jurisdiction in 1934. The Tribe is the successor to the Grand Traverse Ottawas and Chippewas, who signed treaties with the United States reserving commercial and subsistence fishing rights. Grand Traverse Band of Chippewa and Ottawa Indians v. Director, Michigan DNR, 971 F. Supp. 282, 285, 288 (W.D. Mich. 1995) (Tribe's rights under 1836 and 1855 treaties), aff'd, 141 F.3d 635 (6th Cir. 1998). The treaty-reserved fishing rights included a servitude, or easement of access over land surrounding the Indians' traditional fishing grounds, that remained in effect even after the land became privately owned. 141 F.3d at 639. When the United States took action in the 1970s to protect the tribal treaty-reserved rights, it did so on its own behalf and on behalf of, i.e., as trustee for, the tribes whose rights were subject to Federal protection. See United States v. Michigan, 471 F. Supp. 192, 203 (W.D. Mich. 1979). The Board has previously recognized that when the United States continues to hold land in trust for a tribe or its members, it cannot reasonably be disputed that the tribe is under Federal jurisdiction. See Village of Hobart, 57 IBIA at 20 n.23. In the present case, in 1934, the Tribe undoubtedly held a reservation of Federally protected fishing rights and other associated property rights, and those legal rights could be neither diminished nor terminated by the Secretary's improper de facto "termination" of the Federal government's relationship with the Tribe, based on his erroneous interpretation of the 1855 treaty. See Grand Traverse Band, 369 F.3d at 968. In our view, the existence of hunting and fishing rights, reserved in and protected by Congressionally ratified treaties, and for which the United States continued to have an obligation, is as compelling and dispositive evidence to demonstrate that the Tribe was under Federal jurisdiction in 1934 as would be the case if the United States had held land in trust for the Tribe.

Grand Traverse County Board of Commissioners v. Midwest Regional Director, Bureau of Indian Affairs, 61 IBIA 273, 281-82 (2015). It seems that extant treaty rights provide considerable evidence that an Indian tribe was "under federal jurisdiction" in 1934, but what about tribes that are not signatories to treaties with the United States?

Litigation challenging the Secretary of the Interior's authority to acquire land in trust for tribes more recently federally recognized since 1934 has exploded. E.g., Littlefield v. Mashpee Wampanoag Tribe, 951 F.3d 30 (1st Cir. 2020); Confederated Tribes of Grand Ronde Community of Oregon v. Jewell, 830 F.3d 552 (D.C. Cir. 2016); Upstate Citizens for Equality, Inc. v. United States, 841 F.3d 556 (2d Cir. 2016); Poarch Band of Creek Indians v. Hildreth, 656 Fed.Appx. 934 (11th Cir. 2016); Big Lagoon Rancheria v. State of California, 789 F.3d 947 (9th Cir. 2015); KG Urban Enterprises, Inc. v. Patrick, 693 F.3d 1 (1st Cir. 2012); Littlefield v. Dept. of the Interior, 2023 WL 1878470, at *7-9 (D. Mass. Feb. 10, 2023), appeal filed; Mashpee Wampanoag Tribe v.

Bernhardt, 466 F. Supp. 3d 199 (D.D.C. 2020); No Casino in Plymouth v. Jewell, 136 F.Supp.3d 1166 (E.D. Cal. 2015).

For detailed commentary on the issues arising from *Carcieri*, see Bethany Sullivan and Jennifer Turner, The Continued Impact of *Carcieri* on the Restoration of Tribal Homelands: In New England and Beyond, 27 Roger Williams U. L. Rev. 322, 339-40 (2022); Bethany C. Sullivan & Jennifer L. Turner, Enough is Enough: Ten Years of *Carcieri v. Salazar*, 40 Pub. Land & Resources L. Rev. 37 (2019), and William Wood, Indians, Tribes, and (Federal) Jurisdiction, 65 U. Kan. L. Rev. 415 (2016). For broader discussion of pressures on reservation lands during the Trump administration, see Kristen A. Carpenter and Angela R. Riley, Privatizing the Reservation?, 71 Stan. L. Rev. 791 (2019).

INDIAN LAWYERING NOTE:

THE *PATCHAK* PROBLEM

Prior to 2012, once the Secretary of the Interior exercised discretion to acquire land in trust for Indians or tribes, the Quiet Title Act (QTA) barred any challenges to that discretion. 28 U.S.C. § 2409a(a). The QTA is actually a waiver of federal sovereign immunity allowing persons to sue the United States to quiet title to disputed property, but the Act bars any such challenges to Indian trust lands:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands . . . .

Id.

In *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012), the Supreme Court held that individuals challenging the authority of the Secretary of the Interior to acquire land in trust for the benefit of Indian tribes under 25 U.S.C. § 5108 [formerly 25 U.S.C. § 465] are not barred by the Quiet Title Act, 28 U.S.C. § 2409a(a) & (d), from bringing suit. The challenger had wanted to bring a *Carcieri* challenge to the trust acquisition after the land had already been acquired. In 2014, Congress enacted the Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113–179, Sept. 26, 2014, 128 Stat.1913, confirming the authority of the Secretary to take land into trust for the tribe, ratifying the trust acquisition, and stripping the federal courts of jurisdiction over the *Patchak* remand and other potential challenges to the tribe's trust lands:

> (a) IN GENERAL.—The land taken into trust by the United States for the benefit of the Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians and described in the final Notice of Determination of the Department of the Interior (70 Fed.Reg. 25596 (May 13, 2005)) is reaffirmed as trust land, and the actions of the Secretary of the Interior in taking that land into trust are ratified and confirmed.
>
> (b) NO CLAIMS.—Notwithstanding any other provision of law, an action (including an action pending in a Federal court as of the date of enactment of this Act) relating to the land described in subsection (a) shall not be filed or maintained in a Federal court and shall be promptly dismissed.

Pub. L. No. 113–179, § 2. The statute was the brainchild of the tribe's general counsel, Zeke Fletcher, who quietly worked behind the scenes on Capitol Hill to secure its passage.

In *Patchak v. Zinke*, 583 U.S. 244 (2018), a sharply divided Supreme Court affirmed the validity of the Gun Lake Trust Land Reaffirmation Act from a separation of powers challenge. While normally the Court looks askance at efforts by Congress to strip federal courts of jurisdiction

over pending cases, in this instance Congress was merely affirming the Secretary's decision and therefore eliminated all challenges to the Secretary's authority by doing so, as Justice Breyer's concurrence explains:

> Congress then enacted the law here at issue. Gun Lake Trust Land Reaffirmation Act, Pub.L. 113–179, 128 Stat. 1913. * * * The first part "reaffirm[s]," "ratifie[s]," and "confirm[s]" the Secretary's "actions in taking" the Bradley Property "into trust," as well as the status of the Bradley Property "as trust land." § 2(a). The second part says that actions "relating to" the Bradley Property "shall not be filed or maintained in a Federal court and shall be promptly dismissed." § 2(b). Read together, Congress first made certain that federal statutes gave the Secretary the authority to take the Bradley Property into trust, and second tried to dot all the I's by adding that federal courts shall not hear cases challenging the land's trust status. The second part, the jurisdictional part, perhaps gilds the lily, perhaps simplifies judicial decisionmaking (the judge need only determine whether a lawsuit relates to the Bradley Property), but, read in context, it does no more than provide an alternative legal standard for courts to apply that seeks the same real-world result as does the first part: The Bradley Property shall remain in trust.
>
> The petitioner does not argue that Congress acted unconstitutionally by ratifying the Secretary's actions and the land's trust status, and I am aware of no substantial argument to that effect. See * * * Brief for Federal Courts and Federal Indian Law Scholars as Amici Curiae 6–11 (citing numerous examples of tribe-specific Indian-land bills). The jurisdictional part of the statute therefore need not be read to do more than eliminate the cost of litigating a lawsuit that will inevitably uphold the land's trust status.
>
> This case is consequently unlike United States v. Klein, 13 Wall. 128, 20 L.Ed. 519 (1872), where this Court held unconstitutional a congressional effort to use its jurisdictional authority to reach a result (involving the pardon power) that it could not constitutionally reach directly. Id., at 146; see Bank Markazi v. Peterson, 578 U.S. ——, ——, and n. 19, 136 S.Ct. 1310, 1324, and n. 19, 194 L.Ed.2d 463 (2016). And the plurality, in today's opinion, carefully distinguishes from the case before us other circumstances where Congress' use of its jurisdictional power could prove constitutionally objectionable. Ante, at 906, and n. 3, 918, n. 6. Here Congress has used its jurisdictional power to supplement, without altering, action that no one has challenged as unconstitutional. Under these circumstances, I find its use of that power unobjectionable. And, on this understanding, I join the plurality's opinion.

Patchak, 583 U.S. at 261-62.

In 2013, the Department of the Interior amended 25 CFR Part 151, the federal fee-to-trust acquisitions. *See* Land Acquisitions: Appeals of Land Acquisition Decisions, 78 Fed. Reg. 67928 (Nov. 13, 2013). This amendment, referred to as the "Patchak patch," requires the agency official that agrees to acquire land in trust for an Indian or tribe formally notify interested parties and publish that information in local newspapers to reach unknown interested parties (presumably such as persons like Patchak himself). Once that notice is given, those parties have 30 days to invoke administrative remedies to challenge the decision. If those administrative remedies are not pursued, then the new rule provides that the affected party has not exhausted their remedies.

Examples of the publication of an agency official decision include *Land Acquisitions; Ho-Chunk Nation of Wisconsin, Keecak Site, City of Beloit, Rock County, Wisconsin*, 87 Fed. Reg. 30248 (May 26, 2022), and *Land Acquisitions; Wilton Rancheria*, 86 Fed. Reg. 32974 (June 23, 2021). Failure to invoke those administrative remedies will lead to the dismissal of the appeal. *E.g.*, Hall v. Northwest Regional Director, Bureau of Indian Affairs, 68 I.B.I.A. 65 (2021).

SECTION B.

THE FEDERAL-TRIBAL RELATIONSHIP AS A SOURCE OF FEDERAL POWER

PART 2. TREATY ABROGATION

Add to the end of the note on *Indian Treaty Abrogation and Congressional Intent* on page 361:

NATION BUILDING NOTE:

TRIBAL LABOR RELATIONS

Indian tribal gaming operations employ about 450,000 non-Indians. Most gaming operations are relatively modest affairs, with a few on either extreme of the bell curve generating an enormous windfall for tribes or losing money. The bigger, more successful casinos tend to employ few tribal members, in large part, because there are simply not enough tribal members to staff a sizeable casino. Most casinos can be staffed by a significant plurality, or even a majority, of tribal members. Non-Indian gaming operations are often unionized, and it was only a matter of time before labor unions began organizing Indian casino employees.

The key federal labor relations law is the National Labor Relations Act of 1935 (NLRA), 29 U.S.C. § 151 et seq., administered and enforced by the National Labor Relations Board (NLRB). Labor can file grievances against management through processes established by the NLRB. State and federal government employers are protected from certain labor organizing techniques, most notably strikes. Tribal governments are not mentioned in either the statute or the legislative history. Notably, the NLRA was enacted a year after the Indian Reorganization Act of 1934, 25 U.S.C. § 5301 et seq. (formerly 25 U.S.C. § 461 et seq.).

The Sixth Circuit recently decided two cases involving the NLRB's assertion of jurisdiction over two Michigan Indian tribes. In the first, *NLRB v. Little River Band of Ottawa Indians Tribal Government*, 788 F.3d 537 (6th Cir. 2015), cert. denied, 136 S.Ct. 2508 (2016), a split panel held that the National Labor Relations Act could be asserted against the tribal casino operation. The court first concluded that federal statutes of general applicability should apply to Indian nations – as in the *Coeur d'Alene* framework, see page 359 – because tribal authority over nonmembers is limited:

> Comprehensive federal regulatory schemes that are silent as to Indian tribes can divest aspects of inherent tribal sovereignty to govern the activities of non-members. We do not doubt that "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." Wheeler, 435 U.S. at 323, 98 S.Ct. 1079. Yet, such residual sovereignty is "unique and limited." Id. As explained above, the Supreme

> Court has held several aspects of tribal sovereignty to regulate the activities of non-members to be implicitly divested, even in the absence of congressional action, and it is axiomatic that tribal sovereignty is "subject to complete defeasance" by Congress. It would be anomalous if certain aspects of tribal sovereignty—namely, specific powers to regulate some non-member activities—are implicitly divested in the absence of congressional action, see generally Cohen's Handbook § 4.02(3), at 226–42, but those same aspects of sovereignty could not be implicitly divested by generally applicable congressional statutes.

Id. at 549. The court therefore applied the *Coeur d'Alene* framework:

> We find that the *Coeur d'Alene* framework accommodates principles of federal and tribal sovereignty. . . . [T]here is a stark divide between tribal power to govern the identity and conduct of its membership, on the one hand, and to regulate the activities of non-members, on the other. The *Coeur d'Alene* framework begins with a presumption that generally applicable federal statutes also apply to Indian tribes, reflecting Congress's power to modify or even extinguish tribal power to regulate the activities of members and non-members alike. See 751 F.2d at 1115; cf. Montana, 450 U.S. at 557, 101 S.Ct. 1245. The exceptions enumerated by *Coeur d'Alene* then supply Indian tribes with the opportunity to show that a generally applicable federal statute should not apply to them. The first exception incorporates the teachings of *Iowa Mutual* and *Santa Clara Pueblo* that if a federal statute were to undermine a central aspect of tribal self-government, then a clear statement would be required. By this mechanism, the *Coeur d'Alene* framework preserves "the unique trust relationship between the United States and the Indians." *Grand Traverse Band*, 369 F.3d at 971 (quoting Blackfeet Tribe, 471 U.S. at 766, 105 S.Ct. 2399). We therefore adopt the *Coeur d'Alene* framework to resolve this case.

Id. at 551. The court's application of that framework placed the onus on the tribe to get out from under the federal statute:

> Under the *Coeur d'Alene* framework, since there is no treaty right at issue in this case, the NLRA applies to the Band's operation of the casino unless the Band can show either that the Board's exercise of jurisdiction "touches exclusive rights of self-governance in purely intramural matters" or that "there is proof by legislative history or some other means that Congress intended [the NLRA] not to apply to Indians on their reservations."

Id. Though the tribe argued that the Act and the Board's assertion of jurisdiction effectively abrogated the tribe's internal self-governance authority:

> The Band forwards two arguments for its contention that application of the NLRA undermines its right of self-governance: first, the regulations targeted by the

> Board's order protect the net revenues of the casino, which, pursuant to the IGRA, fund its tribal government. Second, the Band stresses that application of the NLRA would invalidate a regulation enacted and implemented by its Tribal Council.

Id. at 552. The court systematically rejected all those claims. Id. at 552-55.

In dissent, Judge McKeague slammed the majority's reasoning, referring to the *Couer d'Alene* framework based on the Supreme Court's *Tuscarora* decision as a "house of cards":

> So what changed to justify the NLRB's new approach? Congress has not amended the NLRA or in any other way signaled its intent to subject Indian tribes to NLRB regulation. Nor has the Supreme Court recognized any such implicit intent. The NLRB "adopted a new approach" and "established a new standard" based on its recognition that some courts had begun to apply other generally applicable federal laws to Indian tribes notwithstanding Congress's silence. San Manuel, 341 NLRB at 1055, 1057, 1059. These courts, the NLRB observed, found support for this new approach in a single statement in a 1960 Supreme Court opinion, Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 116, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960): "[I]t is now well-settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests." The statement buttressed the Court's holding, but was not essential to it. While the Tuscarora statement has blossomed into a "doctrine" in some courts in relation to some federal laws, closer inspection of the Tuscarora opinion reveals that the statement is in the nature of dictum and entitled to little precedential weight. In reality, the Tuscarora "doctrine," here deemed to grant the NLRB "discretionary jurisdiction," is used to fashion a house of cards built on a fanciful foundation with a cornerstone no more fixed and sure than a wild card.

Id. 557-58.

A few weeks later, a different panel of the Sixth Circuit – also split 2-1 – applied the *Little River* holding in *Soaring Eagle Casino and Resort v. NLRB*, 791 F.3d 648 (6th Cir. 2015), cert. denied, 136 S.Ct. 2509 (2016), to reach the same result in a matter involving the Saginaw Chippewa Indian Tribe. Unlike *Little River*, the tribe directly tied its authority over nonmembers to its treaty right to exclude persons from its reservation.

The court first rejected the tribe's claim that its general, treaty-reserved power to exclude persons from its reservation precluded application of the National Labor Relations Act:

> Although, given the protective language employed by the Supreme Court when assessing tribal treaty rights, the question is a close one, ultimately we conclude that a general right of exclusion, with no additional specificity, is insufficient to bar application of federal regulatory statutes of general applicability.

> Unless there is a direct conflict between a specific right of exclusion and the entry necessary for effectuating the statutory scheme, we decline to prohibit application of generally applicable federal regulatory authority to tribes on the existence of such a treaty right alone. . . . The 1864 Treaty states that the Isabella reservation land would be "set apart for the exclusive use, ownership, and occupancy [by the Tribe]." 14 Stat. 657. . . . [T]he 1864 Treaty language establishes a general right of exclusion for the Tribe. The treaty language does not, however, give the Tribe the specific power to condition authorization and entry of government agents . . . . Nor does it detail with any level of specificity the types of activities the Tribe may control or in which it may engage. . . . Although, as explained below, the existence of the Treaties remains relevant to our analysis of the Tribe's right of inherent sovereignty, we do not find that the general right to exclude described in the 1855 and 1864 Treaties, standing alone, bars application of the NLRA to the Casino.

Id. at 661.

The court then rejected the *Little River* panel's reasoning in adopting the *Coeur d' Alene* framework, proposing one of its own that would have mandated a contradictory outcome:

> The *Little River* majority concluded that the NLRA applies to on-reservation casinos operated on trust land. *Little River*, 2015 WL 3556005, at *13–17. Given the legal framework adopted in Little River and the breadth of the majority's holding, we must conclude in this case that the Casino operated by the Tribe on trust land falls within the scope of the NLRA, and that the NLRB has jurisdiction over the Casino. We do not agree, however, with the *Little River* majority's adoption of the *Coeur d'Alene* framework, or its analysis of Indian inherent sovereignty rights. We thus set out below the approach that we believe is most consistent with Supreme Court precedent and Congress's supervisory role over the scope of Indian sovereignty, and why we respectfully disagree with the holding in *Little River*.

Id. at 662. The *Soaring Eagle* panel focused its analysis on the *Montana-Hicks* line of cases, see pages 602-605 (*Montana*), 631-638 (*Hicks*), in which the Supreme Court held that tribal civil jurisdiction over nonmembers is limited, even on tribally owned lands. Id. at 662-67. The court then adopted a presumption that statutes of general applicability apply to Indian tribes absent a clear statement from Congress that they do not apply. Id. at 666-67. Even so, the court would have concluded that the Act *does not* apply under the *Montana-Hicks* framework:

> We believe that the weight of these factors supports our conclusion that the NLRA should not apply to the Casino. We consider relevant: (1) the fact that the Casino is on trust land and is considered a unit of the Tribe's government; (2) the importance of the Casino to tribal governance and its ability to provide member

> services; and (3) that Lewis (and other nonmembers) voluntarily entered into an employment relationship with the Tribe. We recognize that our determination would have inhibited the Board's desire to apply the NLRA to all employers not expressly excluded from its reach. But Congress retains the ability to amend the NLRA to apply explicitly to the Casino, if it so chooses. See Bay Mills, 134 S.Ct. at 2037 ("[I]t is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity.") We note, however, that to the extent Congress already has acted with respect to Indian sovereignty and Indian gaming, it has shown a preference for protecting such sovereignty and placing authority over Indian gaming squarely in the hands of tribes. In the same year Congress enacted the NLRA, it also passed the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § [5301] et seq., to strongly promote Indian sovereignty and economic self-sufficiency, and to move federal policy away from a goal of assimilation. . . . Thus, although Congress was silent regarding tribes in the NLRA, it was anything but silent regarding its contemporaneously-stated desire to expand tribal self-governance. And, more recently, Congress enacted the IGRA "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments," and "to ensure that the Indian tribe is the primary beneficiary of the gaming operation." 25 U.S.C. § 2702; see also id. § 2710(b)(2)(B)(i) (requiring that "net revenues from any tribal gaming" are only be used, inter alia, "to fund tribal government operations or programs," "to provide for the general welfare of the Indian tribe and its members," and "to promote tribal economic development"); id. §§ 2710(b)(2)(F),(d)(1)(A)(ii) (describing required contents of tribal ordinances or tribal-state compacts regarding employment practices of gaming employers); Bay Mills, 134 S.Ct. at 2043 (Sotomayor, J., concurring) ("And tribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases may be the only means by which a tribe can raise revenues." (internal quotation marks omitted)).

Id. at 668-69. But since the *Little River* panel decision was first, the *Soaring Eagle* court's analysis could not control. En banc petitions were denied, despite the fact that four of the five active Sixth Circuit judges to have heard these cases disagreed with the controlling framework adopted by the *Little River* panel and the NLRB acquiesced to the cases being reheard. The Supreme Court, short a justice, denied petitions for ceriorari in 2016.

In a third case, the National Labor Relations Board refused jurisdiction over the casino owned by the Chickasaw Nation of Oklahoma based on the treaty rights argument made by the tribe, *Chickasaw Nation d/b/a Winstar World Casino*, 362 NLRB No. 109 (June 4, 2015). The relevant treaty provision guaranteed the tribe's right to be free of federal legislation and control without its consent:

> The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation . . . the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the [Nation]; . . . the U.S. shall forever secure said [Nation] from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs.

7 Stat. 333. The Chickasaw Nation became a party to this treaty in 1837. Oklahoma Tax Commission v. Chickasaw Nation, 515 U.S. 450, 465 fn. 15 (1995).

This specific treaty language certainly bars a federal statute that is silent as to its application to Indian tribes and is not otherwise an "Indian Affairs" statute: "These obligations include securing the Nation from and against all laws except (as relevant here) those passed by Congress under its authority over Indian affairs." *Chickasaw Nation d/b/a Winstar World Casino*, *supra*, at 4.

Other recent tribal challenges to NLRB jurisdiction – and to the jurisdiction of other federal agencies such as the Consumer Financial Protection Board – have not been successful. *E.g.*, *Casino Pauma v. National Labor Relations Board*, 888 F.3d 1066 (9th Cir. 2018); *CFPB v. Great Plains Lending, LLC*, 846 F.3d 1049 (9th Cir.), *cert. denied*, 138 S. Ct. 555 (2017).

Many tribes have or will adopt the regressive strategy of adopting "right-to-work" laws, which are laws that are intended to undermine labor union recruiting and organizing strategies. Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. Rev. 691, 725 (2004). Other tribes are more interested in welcoming labor activity, so long as the activity is conducting in accordance with tribal laws that treat casino employees as governmental employees. But, as with the case of the Little River Band, one labor union can undo this regime by persuading the NLRB that the mere existence of a tribal ordinance is a violation of the NLRA. What should tribes do?

For an argument that tribal labor laws create a form of healthy disruption to existing labor relations archetypes by potentially discarding the adversarial relationship assumed to be predominant by federal law, see Matthew L.M. Fletcher, Kathryn E. Fort, and Wenona T. Singel, *Tribal Disruption and Tribal Relations*, *available at* https://ssrn.com/abstract=2401711.

SECTION C.

THE FEDERAL-TRIBAL RELATIONSHIP AS A SOURCE OF INDIAN RIGHTS

PART 2. EXECUTIVE AGENCY CONFLICTS IN THE ADMINISTRATION OF FEDERAL TRUST RESPONSIBILITY TO INDIANS

Add to the end of notes on page 402:

INDIAN LAWYERING NOTE:

THE DAKOTA ACCESS PIPELINE*

Starting April 2016, American Indian people led by members of the One Mind Youth Movement began to gather on the shores of Lake Oahe on the Standing Rock Indian Reservation in North Dakota in an effort to stop the completion of the Dakota Access Pipeline (DAPL). See Saul Elbein, *The Youth Group That Launched a Movement at Standing Rock*, N.Y. Times, Jan. 31, 2017. By the end of the year, thousands of American Indians and others had gathered there, establishing permanent camps on federal and tribal lands, and for the most part successful in temporarily stopping the construction of the pipeline by putting enormous political pressure on the Obama Administration.

DAPL is a 1,172 mile pipeline running from the Bakken oil shale fields of western North Dakota to oil terminals in Illinois. The pipeline originally was to run near the City of Bismarck, North Dakota, but the pipeline owners chose to route the pipeline under Lake Oahe. Lake Oahe was formed in the 1960s when the United States Army Corps of Engineers and the Bureau of Reclamation established several dams on the Missouri River under the Pick-Sloan dam project. The United States condemned over 200,000 acres of reservation lands owned by the Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe for the project, lands that are now flooded. See generally *South Dakota v. Bourland*, 508 U.S. 679 (1993).

Because the DAPL would run underneath a portion of the Lake Oahe federal public lands (the confiscated reservation lands), and the Missouri River, the Army Corps had an obligation to review and decide whether to authorize the construction of the pipeline through the issuance of an easement. The tribes retain hunting and fishing rights, and perhaps *Winters* rights to groundwater

* Portions of this Note derive from commentaries published in Law360.com by Matthew L.M. Fletcher.

and a homeland at Lake Oahe. Additionally, as many as 18 million Americans depend on the groundwater in the Oglalla Acquifer.

In *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, the Standing Rock Sioux Tribe lost an initial federal court challenge to DAPL in September 2016, only to learn minutes later that the Obama Administration would dramatically reverse its position and delay the issuance of the final easement required to complete the pipeline. In a few short months, three federal agencies (Interior, Army, and Justice) issued a report, Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions, *available at* https://bia.gov/cs/groups/public/documents/document/idc2-060030.pdf, intended to address the lack of adequate consultation between the Army Corps and tribal stakeholders.

However, the Trump Administration effectively ordered the Army Corps to issue the easement in the early weeks of the new administration, which the Corps did. Litigation restarted. Montana law professor Monte Mills helpfully described the key legal arguments:

> Religious Freedom and Restoration Act
>
> According to the Cheyenne River Sioux Tribe, oil running through the pipeline would represent the fulfillment of a generations-old prophesy, passed down through the oral traditions of tribal members, that warned of a Black Snake coming to defile the sacred waters necessary to maintain the tribes' ceremonies. Beyond the environmental concerns often at the center of the pipeline protests, the tribe's motion for an injunction squarely defines final authorization of the pipeline by the Corps as an existential threat: destruction of the tribes' religion and way of life.
>
> The Constitution's First Amendment guarantees the exercise of religion free from governmental interference. But the Supreme Court, in *Lyng v. Northwest Indian Cemetery Protection Association*, in 1988 upheld the Forest Service's approval of a road across an area on federal land sacred to local tribes even while recognizing the road could have devastating effects on their religion.
>
> Then in 1993, Congress enacted the Religious Freedom and Restoration Act (RFRA), which requires that the government demonstrate a compelling interest and use the least restrictive means to achieve that interest if its actions will substantially burden religious practice.
>
> In other words, even if approving the Dakota Access Pipeline served a compelling governmental interest, RFRA may require the U.S. Army Corps of Engineers to show that the pipeline easement under Lake Oahe would have the least impact on tribal religion. That approach would be consistent with the Supreme Court's broad application of RFRA in a 2014 case not involving tribal interests or

federal lands and may pose a significant challenge to the corps, which considered but rejected a different route that did not pose the same threat to the tribes.

Both the Corps and company behind the Dakota Access Pipeline argue that the risk of spill from the pipeline is minimal and that the tribes failed to raise these religious concerns in a timely manner. In addition, the Corps contends that, consistent with the Lyng case, governmental action on federal land should not be restricted because of religious concerns raised by local tribes.

Thus, resolution of the case will turn upon whether the court recognizes the legitimacy of the tribal religious concerns and broadly applies RFRA or, instead, chooses to prioritize federal authority over federal land to the detriment of those concerns. ***

Arbitrary or capricious decisions?

In addition to their religious concerns, the Sioux Tribes challenge the Corps' decisions based on the rights they reserved in treaties made with the federal government in 1851 and 1868.

The Constitution recognizes treaties as the "supreme law of the land" and, according to a 2016 analysis done by the Solicitor of the U.S. Department of the Interior, both the Standing Rock and Cheyenne River Sioux retain treaty-reserved water, hunting, and fishing rights in Lake Oahe.

Before reversing course in February, the Corps refused to issue the easement last year in order to further understand and analyze those treaty rights.

Importantly, federal law generally allows courts to set aside arbitrary or capricious agency decisions. In a February 14th filing, the Standing Rock Sioux Tribe asks the court to review the Corps' about-face under that standard and argues that the federal trust responsibility, recognized by the Supreme Court since the early 1800's, demands more than just a cursory review of tribal treaty rights.

Monte Mills, How will Native tribes fight the Dakota Access Pipeline in court?, The Conversation, Feb. 15, 2017, *available at* https://theconversation.com/how-will-native-tribes-fight-the-dakota-access-pipeline-in-court-72839.

Recent decisions from the Ninth Circuit may bolster the tribal claims. In the *United States v. Washington* culverts subproceeding (see page 923), 853 F.3d 946 (9th Cir. 2017), *aff'd by an equally divided Court*, 138 S.Ct. 1832 (2018), the court held that off-reservation hunting and fishing rights impliedly included the right to a healthy fisheries habitat. And in *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, 849 F.3d 1262 (9th Cir. 2017), the

court held that *Winters* rights (see page 819 of the casebook) include the right to groundwater. These precedents may be helpful to the Lakota tribes fighting against DAPL.

On March 7, 2017, Judge Boasberg denied the tribes' motion for a preliminary injunction. *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 239 F. Supp. 3d 77 (D.D.C. 2017), *appeal dismissed*, 2017 WL 4071136 (D.C. Cir., May 15, 2017). However, on June 14, 2017, Judge Boasberg held that the Army Corps did not comply with the National Environmental Policy Act, and ordered review. *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 255 F. Supp. 3d. 101 (D.D.C. 2017). The court ultimately rejected the challenges on the merits. *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 301 F. Supp. 3d 50 (D.D.C. 2018). Oil began to flow in June 2017.

However, in March 2020, the federal district court held that the federal government was required to prepare an environmental impact statement. *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 440 F.Supp.3d 1 (D.D.C. 2020). In a subsequent opinion, the court vacated the permit issued for Dakota Access, over the objections of the pipeline company, which claimed catastrophic economic losses:

> Dakota Access's central and strongest argument as to the second Allied-Signal prong is that shutting down the pipeline would cause it, and the industries that rely on it, significant economic harm, including substantial job losses. See, e.g., DA Remedy Br. at 32 (stating that shutdown would "pose an existential threat to DAPL" due to "massive" revenue loss). It submits declarations stating that DAPL could lose as much as $643 million in the second half of 2020 and $1.4 billion in 2021 if shut down pursuant to the Court's order. See ECF No. 509-9 (Declaration of Glenn Emery), ¶ 10. "All of these financial losses would be absorbed by the owners of Dakota Access," particularly Energy Transfer Partners, the current parent company of DAPL after a merger with Sunoco. See DA Remedy Br. at 33; Standing Rock VI, [440 F.Supp.3d 1 (D.D.C. 2020).]
>
> In addition, both Dakota Access and many amici argue, shutting the pipeline down would have serious repercussions for the entire North Dakota oil industry. "There is no viable pipeline alternative for transporting the 570,000 barrels of Bakken crude that DAPL is capable of carrying each day," Dakota Access states, and railroads do not have the capacity "to fill the breach." DA Remedy Br. at 35–36; see ECF No. 504 (Amicus Brief of State of North Dakota) at 11 ("An increase in crude by rail volumes sufficient to offset current pipeline deliveries by DAPL would take an unknown amount of time to assemble the required tank cars, engines, and crews, and to ensure market destinations would be prepared for a surge in rail volume."). Several states also argue that their grain farmers would be harmed by having to pay a premium for railroad cars once oil, which is more valuable by volume, enters that market and drives up prices. See ECF No. 514 (Amicus Brief

of IN, MT, AL, AR, IA, KS, KY, LA, NE, OH, SD, TX, UT, and WV) at 9–10. "[M]any North Dakota oil producers," meanwhile, with no way to get their oil to market, "would have no choice but to respond by 'shutting in' some of their wells and ceasing production entirely," with consequent effects on the workers at those wells. See DA Remedy Brief at 35 (citing ECF No. 509-11 (Declaration of Jeff D. Makholm), ¶ 17; then citing Emery Decl., ¶¶ 14, 18). Specifically, Dakota Access estimates, "producers would have to shut-in between 3,460 and 5,400 wells, stranding up to 34.5% of North Dakota crude production." Id. at 36; see also, e.g., North Dakota Br. at 8 (estimating that "[e]ach of those wells represents 1.6 full time jobs") (citing ECF No. 504-2 (Declaration of Lynn Helms), ¶ 10). This would also have a reverberating effect on the state of North Dakota, whose economy derives a large part of its revenue from oil and gas taxes, largely from the Williston Basin, which includes the Bakken fields that supply DAPL. See North Dakota Br. at 2–3; DA Remedy Br. at 4; see also North Dakota Br. at 2 (explaining that "despite the small overall size of North Dakota's economy, [it] is a large producer of oil and natural gas").

The Tribes and other amici respond that these projected consequences are "wildly exaggerated" because, following "a precipitous collapse in oil prices, demand, and production" caused in part by the COVID-19 pandemic, "production in North Dakota has [already] plummeted." ECF No. 527 (Tribes Remedy Brief) at 21–22; see also ECF No. 531 (Amicus Brief of Members of Congress) at 9 ("Since [the Court's last remedy Opinion in this case in] 2017, the price and demand for oil has plummeted due to factors well beyond the operation of this pipeline."); ECF No. 519 (Amicus Brief of North Dakota Petroleum Council) at 8 ("In recent weeks, of course, the coronavirus pandemic has turned the nation's economy and the oil industry upside down."). They point out that North Dakota estimates that "as many as 5,000 wells may now be shut-in" because of "the current economic situation," North Dakota Br. at 3 n.4, noting that this is more than the number of wells Dakota Access claimed would be affected by a DAPL shutdown. See Tribes Remedy Br. at 22–23; see also id. at 23 (citing news articles reporting that North Dakota well shut-ins have now increased to 7,000). Other briefs allude to the pandemic, admitting some effect on the oil market but maintaining more optimism than realism. See, e.g., N.D. Petroleum Council Br. at 8 ("In recent weeks, of course, the coronavirus pandemic has turned the nation's economy and the oil industry upside down. Nevertheless, NDPC continues to hope and expect that our country's economy and the industry will recover in coming months."); North Dakota Br. at 12 ("[T]he potential impacts of the COVID-19 pandemic are impossible to quantify due to rapidly changing oil prices, employment numbers, and capital investment plans ...."). The Tribes further claim that this drop in production may mean that there will be "little or no increase in rail transportation." Tribes Remedy Br. at 25

> (citing ECF No. 527-2 (Declaration of Marie Fagan), ¶ 5). And to the extent that a DAPL shutdown causes crude-oil demand to drop even further or its transportation to switch to railroads, the Tribes argue that with "some participants in the North Dakota oil market [facing] increased costs," "other participants," such as railroads and other oil-producing states, would "benefit from the shift." Tribes Remedy Br. at 26 (citing ECF No. 272-2 (Third Declaration of Richard Krupewicz), ¶ 30; then citing Fagan Decl., ¶ 7). Defendant-Intervenors, for their part, dismiss the Tribes' take on the pandemic, calling their analysis of the continuing effects of a pandemic-depressed oil market "bearish" and "erroneous[ ]." DAPL Remedy Rep. at 17–18.
>
> The Court need not pick apart the various positions in these disputes, for it is clear that at least some immediate harm to the North Dakota oil industry should be expected from a DAPL shutdown, even if its effects are tempered by a decreased demand for oil. See DA Remedy Rep. at 18 (averring that "demand for [the pipeline]'s services has remained strong"). Indeed, the Court does not take lightly the serious effects that a DAPL shutdown could have for many states, companies, and workers. Losing jobs and revenue, particularly in a highly uncertain economic environment, is no small burden. Ultimately, however, these effects do not tip the scales decisively in favor of remanding without vacatur.

Standing Rock Sioux Tribe v. United States Army Corps of Engineers, 471 F.Supp.3d 71, 82-84 (D.D.C. 2020). The D.C. Circuit affirmed the district court on the merits, but reversed on the remedy. 985 F.3d 1032, 1039 (D.C. Cir. 2021).

After the notes page 413, add

PART 4. INDIAN COUNTRY VOTING RIGHTS

In recent years, Indian country voting rights have become a hot topic. Until the early years of the 21st century, American Indian voters made much impact on only a few federal and state elections. This part surveys the history and law of Indian country voting rights.

The History of American Indian Citizenship and Voting Rights.*

In the original text of the Constitution, now repealed by the Reconstruction Amendments, Article I, Section 2, provided in relevant part:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. . . .

The passive voice of the Constitution authorizes an unnamed entity to determine apportionment of congressional representatives and direct taxes by counting "free Persons" and "three fifths" of the persons who were then enslaved, and excluding "Indians not taxed." The entity, government, or official that "shall ... determine" is unnamed in the text, but since the requirement is included in Article I, presumably Congress must make the enumeration. Scholars sometimes gloss over the passive voice in the text by inserting Congress as an entity via brackets into the Constitution's text: "To be sure, the Census Clause goes on to vest in Congress the authority to effect the actual enumeration 'in such Manner as [it] shall by Law direct." Thomas R. Lee, The Original Understanding of the Census Clause: Statistical Estimates and the Constitutional Requirement of an "Actual Enumeration," 77 Wash. L. Rev. 1, 21 n.94 (2002).

The meaning of the phrase "Indians not taxed" was never definitively determined by the Supreme Court, nor could it have been. The Framers never defined the phrase, and there is virtually no discussion in the political world of the ratification era parsing through its terminology. However, the Court in the notorious *Dred Scott* case, 60 U.S. (19 How.) 393 (1857), arguably added a gloss to the meaning of the Indians Not Taxed Clause. *Dred Scott* involved a claim to individual rights by a Black person, a former slave, alleging his freedom. Justice Taney's opinion held that the Constitution contained no text authorizing Black persons, enslaved or free, to become American citizens eligible for individual rights protections. Id. at 404. Taney compared Black persons to Indians. Taney asserted that Indians were loyal to their tribes and not the United States

* Excerpted from Matthew L.M. Fletcher, Politics, Indian Law, and the Constitution, 108 Calif. L. Rev. 495, 528-31 (2020).

or any State, and savage. Taney argued, however, that Congress possessed the power, if it chose, to recognize Indians as citizens. Out of this horror show of legal analysis, there is a gloss on the meaning of the Indians Not Taxed Clause: Dred Scott generally implies that the "taxed" language of the clause is akin to American (or federal) citizenship.

States and lower courts in the antebellum era tended to acknowledge a difference between Indians as well, usually focusing on the relative civilization of an Indian person, whether the Indian person had abandoned their tribal relations, and whether the Indian person had given up their treaty rights. See, e.g., United States v. Elm, 25 F. Cas. 1006, 1007 (N.D.N.Y. 1877) ("If defendant's tribe continued to maintain its tribal integrity, and he continued to recognize his tribal relations, his status as a citizen would not be affected by the fourteenth amendment; but such is not his case. His tribe has ceased to maintain its tribal integrity, and he has abandoned his tribal relations, as will hereafter appear ...."); Anderson v. Mathews, 163 P. 902, 906 (Cal. 1917) ("Neither the members of the group nor, so far as known, the members of the tribe, were subject to, or owed allegiance to, any government, except that of the United States and the state of California, and, prior to 1848, that of Mexico."); Bd. of Comm'rs of Miami County v. Godfrey, 60 N.E. 177, 180 (Ind. App. 1901) ("So long as he remained an Indian, he was under the control of the United States as an Indian. But he voluntarily does what the law says makes him a citizen. This change of his tribal condition into individual citizenship was primarily his own voluntary act. He cannot be both an Indian, properly so called, and a citizen."); In re Liquor Election in Beltrami County, 163 N.W. 988, 989 (Minn. 1917) (noting that the right to vote in state and local elections extended to "[p]ersons of mixed white and Indian blood, who have adopted the customs and habits of civilization" and "[p]ersons of Indian blood ... who have adopted the language, customs and habits of civilization, after an examination before any district court of the state, in such manner as may be provided by law, and shall have been pronounced by said court capable of enjoying the rights of citizenship within the state").

State citizenship and federal citizenship were separate questions under the Constitution before the Reconstruction Amendments and, in regards to Indian citizenship, after the Reconstruction Amendments. Under that regime, states could, and occasionally did, extend the suffrage or other rights to Indians, offering up their own definitions of "Indian." The State of Michigan, for example, in 1850 recognized Indians as citizens, so long as they became "civilized." MICH. CONST.. art. 7, § 1 (1850).

The original Article I text that included the Indians Not Taxed Clause was repealed by the Reconstruction Amendments. However, Section 2 of the Fourteenth Amendment retained the Indians Not Taxed language. That section provides, "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."

The Framers of the Fourteenth Amendment certainly understood that the Amendment was never intended to change the legal status of Indians. This is why Section 2 retains the "Indians Not

Taxed" phrase. Congress debated the status of Indians extensively during the debates around the 1866 bill that granted citizenship to freed slaves, with the large majority of the members refusing to extend citizenship to Indians. George Beck, The Fourteenth Amendment as Related to Tribal Indians: Section I, "Subject to the Jurisdiction Thereof" and Section II, "Excluding Indians Not Taxed," 28 Am. Indian Culture & Res. J. 37, 37-38 (2004); R. Alton Lee, Indian Citizenship and the Fourteenth Amendment, 4 S.D. Hist. 198, 212 (1974). During the debates on the Fourteenth Amendment that followed shortly thereafter, Congress reconfirmed its intent to preclude Indian citizenship.

Finally, after the ratification of the Fourteenth Amendment, the Senate issued a report confirming its understanding that the ratification did not affect Indians at all:

> It is worthy of mention that those who framed the fourteenth amendment, and the Congress which proposed it, as well as the legislatures which adopted it, understood that the Indian tribes were not made citizens, but were excluded by the restricting phrase, "and subject to the jurisdiction," and that such has been the universal understanding of all our public men since that amendment because a part of the Constitution ....
>
> During the war slavery had been abolished, and the former slaves had become citizens of the United States; consequently, in determining the basis of representation in the fourteenth amendment, the clause "three-fifths of all other persons" is wholly omitted; but the clause "excluding the Indians not taxed" is retained.

S. Rep. 41-268, at 10 (Dec. 14, 1870).

The main conclusion of that report was that the Fourteenth Amendment did not unintentionally abrogate Indian treaties. The Committee on the Judiciary, the authors of the opinion, concluded that Indian tribes, still listed in the Commerce Clause, remained sovereign nations with which the United States might still enter into treaties. Thus, the sovereign-to-sovereign relationship remained intact and undisturbed by the Fourteenth Amendment, even if there was still no consensus about the meaning of the Indians Not Taxed Clause. The primary purpose was to deny citizenship to Indians.

The Supreme Court confirmed that understanding in *Elk v. Wilkins*. In the case, an Indian person who lived among white people, spoke English, and was educated attempted to vote. The Court held that Indians could not vote unless Congress enacted a statute authorizing Indians to vote, or, perhaps, extending citizenship to Indians. Just as the *Dred Scott* Court assumed Congress had the power to create a class of taxable Indians, the *Elk* Court agreed that Congress had that power. The Court listed numerous treaties and statutes that conferred American citizenship on Indian people. Unfortunately, Congress had not done so for John Elk. Congress did extend

citizenship to all Indian people born in the United States by statute in 1924 to "member[s]" of "tribe[s]," 18 U.S.C. § 1401(b).

Elk v. Wilkins

United States Supreme Court, 1884

112 U.S. 94; 5 S.Ct. 41; 28 L.Ed. 643 (1884)

Justice GRAY delivered the opinion of the Court.

[In 1880, John Elk attempted to vote in the city council election in Omaha, Nebraska. Charles Wilkins, the clerk, refused to register him as a voter because Elk was an Indian. Elk claimed to have "severed his tribal relation to the Indian tribes, and had fully and completely surrendered himself to the jurisdiction of the United States, and still so continues subject to the jurisdiction of the United States; and avers that, under and by virtue of the fourteenth amendment to the constitution of the United States, he is a citizen of the United States, and entitled to the right and privilege of citizens of the United States."]

By the constitution of the state of Nebraska, art. 7, § 1, 'every male person of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the state six months, and in the county, precinct, or ward for the term provided by law, shall be an elector: First, citizens of the United States; second, persons of foreign birth who shall have declared their intention to become citizens, conformably to the laws of the United States on the subject of naturalization, at least thirty days prior to an election.' * * *

The plaintiff, in support of his action, relies on the first clause of the first section of the fourteenth article of amendment of the constitution of the United States, by which 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside;' and on the fifteenth article of amendment, which provides that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.' * * * The petition, while it does not show of what Indian tribe the plaintiff was a member, yet, by the allegations that he 'is an Indian, and was born within the United States,' and that 'he had severed his tribal relations to the Indian tribes,' clearly implies that he was born a member of one of the Indian tribes within the limits of the United States which still exists and is recognized as a tribe by the government of the United States. Though the plaintiff alleges that he 'had fully and completely surrendered himself to the jurisdiction of the United States,' he does not allege that the United States accepted his surrender, or that he has ever been naturalized, or taxed, or in any way recognized or treated as a citizen by the state or by the United States. Nor is it contended by his counsel that there is any statute or treaty that makes him a citizen.

The question then is, whether an Indian, born a member of one of the Indian tribes within the United States, is, merely by reason of his birth within the United States, and of his afterwards voluntarily separating himself from his tribe and taking up his residence among white citizens, a citizen of the United States, within the meaning of the first section of the fourteenth amendment of the constitution. Under the constitution of the United States, as originally established, 'Indians not taxed' were excluded from the persons according to whose numbers representatives and direct taxes were apportioned among the several states; and congress had and exercised the power to regulate commerce with the Indian tribes, and the members thereof, whether within or without the boundaries of one of the states of the Union. The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the president and senate, or through acts of congress in the ordinary forms of legislation. The members of those tribes owed immediate allegiance to their several tribes, and were not part of the people of the United States. They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian. Indians and their property, exempt from taxation by treaty or statute of the United States, could not be taxed by any state. General acts of congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them. Const. art. 1, §§ 2, 8; art. 2, § 2; Cherokee Nation v. Georgia, 5 Pet. 1; Worcester v. Georgia, 6 Pet. 515; U. S. v. Rogers, 4 How. 567; U. S. v. Holliday, 3 Wall. 407; Case of the Kansas Indians, 5 Wall. 737; Case of the New York Indians, Id. 761; Case of the Cherokee Tobacco, 11 Wall. 616; U. S. v. Whisky, 93 U. S. 188; Pennock v. Commissioners, 103 U. S. 44; Crow Dog's Case, 109 U. S. 556; S. C. 3 SUP. CT. REP. 396; Goodell v. Jackson, 20 Johns. 693; Hastings v. Farmer, 4 N. Y. 293.

The alien and dependent condition of the members of the Indian tribes could not be put off at their own will without the action or assent of the United States. They were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe, or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of particular tribes to become citizens on application to a court of the United States for naturalization and satisfactory proof of fitness for civilized life; for examples of which see treaties in 1817 and 1835 with the Cherokees, and in 1820, 1825, and 1830 with the Choctaws, * * * in 1855 with the Wyandotts, * * * in 1861 and in March, 1866, with the Pottawatomies, * * * in 1862 with the Ottawas, * * * and the Kickapoos, * * * and acts of congress * * * concerning the Brothertown Indians; and * * * concerning the Stockbridge Indians[.] * * *

Chief Justice TANEY, in the passage cited for the plaintiff from his opinion in *Scott v. Sandford*, 19 How. 393, 404, did not affirm or imply that either the Indian tribes, or individual members of those tribes, had the right, beyond other foreigners, to become citizens of their own will, without being naturalized by the United States. His words were: 'They' (the Indian tribes) 'may without doubt, like the subjects of any foreign government, be naturalized by the authority

of congress, and become citizens of a state, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.' But an emigrant from any foreign state cannot become a citizen of the United States without a formal renunciation of his old allegiance, and an acceptance by the United States of that renunciation through such form of naturalization as may be required law.

* * *

[The Fourteenth Amendment] contemplates two sources of citizenship, and two sources only: birth and naturalization. The persons declared to be citizens are 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof.' The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance. * * * Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indiana tribes, (an alien though dependent power,) although in a geographical sense born in the United States, are no more 'born in the United States and subject to the jurisdiction thereof,' within the meaning of the first section of the fourteenth amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign nations. * * * Slavery having been abolished, and the persons formerly held as slaves made citizens, this clauses fixing the apportionment of representatives has abrogated so much of the corresponding clause of the original constitution as counted only three-fifths of such persons. But Indians not taxed are still excluded from the count, for the reason that they are not citizens. Their absolute exclusion from the basis of representation, in which all other persons are now included, is wholly inconsistent with their being considered citizens. * * *

* * *

The treaty of 1867 with the Kansas Indians strikingly illustrates the principle that no one can become a citizen of a nation without its consent, and directly contradicts the supposition that a member of an Indian tribe can at will be alternately a citizen of the United States and a member of the tribe. That treaty not only provided for the naturalization of members of the Ottawa, Miami, Peoria, and other tribes, and their families, upon their making declaration, before the district court of the United States, of their intention to become citizens, * * * but, after reciting that some of the Wyandotts, who had become citizens under the treaty of 1855, were 'unfitted for the responsibilities of citizenship,' * * * and that such persons, and those only, should thereafter constitute the tribe, it provided that 'no one who has heretofore consented to become a citizen, nor the wife or children of any such person, shall be allowed to become members of the tribe, except by the free consent of the tribe after its new organization * * *.

Since the ratification of the fourteenth amendment, congress has passed several acts for naturalizing Indians of certain tribes, which would have been superfluous if they were, or might become without any action of the government, citizens of the United States. [The Court describes Acts of Congress granting citizenship to "any of the Winnebago Indians in the state of Minnesota"; "any adult members of the Miami tribe in Kansas, and of their minor children"; and "any of the chiefs, warriors, or heads of families of the Stockbridge Indians."]

* * * The national legislation has tended more and more towards the education and civilization of the Indians, and fitting them to be citizens. But the question whether any Indian tribes, or any members thereof, have become so far advanced in civilization that they should be let out of the state of pupilage, and admitted to the privileges and responsibilities of citizenship, is a question to be decided by the nation whose wards they are and whose citizens they seek to become, and not by each Indian for himself. * * *

* * *

The law upon the question before us has been well stated by Judge Deady in the district court of the United States for the district of Oregon. In giving judgment against the plaintiff in a case resembling the case at bar, he said: 'Being born a member of 'an independent political community' – the Chinook – he was not born subject to the jurisdiction of the United States-not born in its allegiance.' *McKay v. Campbell*, 2 Sawy. 118, 134. And in a later case he said: 'But an Indian cannot make himself a citizen of the United States without the consent and co-operation of the government. The fact that he has abandoned his nomadic life or tribal relations, and adopted the habits and manners of civilized people, may be a good reason why he should be made a citizen of the United States, but does not of itself make him one. To be a citizen of the United States is a political privilege which no one, not born to, can assume without its consent in some form. The Indians in Oregon, not being born subject to the jurisdiction of the United States, were not born citizens thereof, and I am not aware of any law or treaty by which any of them have been made so since.' *U. S. v. Osborne*, 6 Sawy. 406, 409. * * * The plaintiff, not being a citizen of the United States under the fourteenth amendment of the constitution, has been deprived of no right secured by the fifteenth amendment, and cannot maintain this action. Judgment affirmed.

HARLAN, J., dissenting.

* * *

At the adoption of the constitution there were, in many of the states, Indians, not members of any tribe, who constituted a part of the people for whose benefit the state governments were established. This is apparent from that clause of article 1, § 3, which requires, in the apportionment of representatives and direct taxes among the several states 'according to their respective numbers,' the exclusion of 'Indians not taxed.' This implies that there were, at that time, in the United States, Indians who were taxed; that is, were subject to taxation by the laws of the state of which they were residents. Indians not taxed were those who held tribal relations, and therefore

were not subject to the authority of any state, and were subject only to the authority of the United States, under the power conferred upon congress in reference to Indian tribes in this country. The same provision is retained in the fourteenth amendment; for, now, as at the adoption of the constitution, Indians in the several states, who are taxed by their laws, are counted in establishing the basis of representation in congress. * * * Surely every one must admit that an Indian residing in one of the states, and subject to taxation there, became, by force alone of the act of 1866, a citizen of the United States, although he may have been, when born, a member of a tribe. The exclusion of Indians not taxed evinced a purpose to include those subject to taxation in the state of their residence. Language could not express that purpose with more distinctness than does the act of 1866. * * *

* * *

NOTES

1. *Elk* was a companion case of sorts to the saga of Standing Bear.* *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695 (D. Neb. 1879) (No. 14,891). Many of the same lawyers participated in both cases.

Federal district court Judge Elmer Scipio Dundy, Nebraska's first federal district court judge, held that Standing Bear, a Ponca tribal leader, and of his co-petitioners, were entitled to petition for a writ of habeas corpus in federal court. In May 1877, the United States military forced the Ponca Nation, including Standing Bear's family, at gunpoint to leave their Nebraska homelands on the Niobrara River and walk to Oklahoma in the Ponca Trail of Tears. In Oklahoma, one-quarter of survivors perished from a malaria outbreak, including Standing Bear's son, Bear Shield. Standing Bear had already lost his daughter, Prairie Flower, on the deadly walk south. In January 1879, Standing Bear took his son's bones and left Oklahoma to return to the Niobrara River to bury his son. General Sherman ordered Standing Bear to be arrested and imprisoned. General Crook reluctantly did so.

Standing Bear's speech after the hearing before Judge Dundy is the stuff of legend. Ultimately, the court concluded that Standing Bear possessed the legal capacity to bring a petition for a writ of habeas corpus. The court also concluded that no Act of Congress or treaty authorized the federal government to forcibly remove the Ponca Nation. Judge Dundy later would rule that the Ponca removal was illegal.

Standing Bear's loudest proponent, Thomas H. Tibbles, would later persuade John Elk into attempting to cast a vote in a federal election in Omaha, which led to *Elk v. Wilkins*. Adrea Korthase, Judge Richard G. Kopf—Deconstructing the Mythology of the Standing Bear Case,

* This Note is excerpted from Matthew L.M. Fletcher, Federal Indian Law § 3.8, at 94 (2016). The authors thank Adrea Korthase, alum of Michigan State University College of Law, for her research on *Elk* and *Standing Bear*.

Turtle Talk blog post (May 11, 2013), https://turtletalk.wordpress.com/2013/05/11/judge-richard-g-kopf-deconstructing-the-mythology-of-the-standing-bear-case/.

2. By World War I, Congress had made about half of American Indians citizens. A very high percentage of eligible American Indian men served in the armed forces during the war, which became a fact point that led Congress to enact the Indian Citizenship Act of 1924, 43 Stat. 253, codified as amended at 8 U.S.C. § 1401(b). See Granting Citizenship to Certain Indians, S. Rep. No. 66-122, at 1; S. Rep. No. 66-122, at 1 (1919) (noting 10,000 of 33,000 eligible Indians served in the armed forces during World War I).*

American Indian citizenship under state law after 1924 was, perhaps, more complicated than under federal law. For many courts, Indian citizenship meant the extension of state criminal and regulatory jurisdiction over Indian off-reservation activities. E.g., State v. Big Sheep, 243 P. 1067 (Mont. 1926) (criminal jurisdiction); Red Hawk v. Joines, 278 P. 572 (Or. 1929) (action in replevin). In People v. Chosa, 233 N.W. 205 (Mich. 1930), for example, decided six years after the citizenship act, the Michigan Supreme Court held that Indians who had become citizens had necessarily abandoned their off-reservation treaty rights and could be prosecuted under state law. Forty years later, the Michigan Supreme Court would reverse *Chosa* to hold that Indian people retained treaty rights absent congressional abrogation. People v. Jondreau, 185 N.W.2d 375, 380 (Mich. 1971) ("[T]he foundations upon which *Chosa* rested have not stood the test of time.").

Other state courts, however, would hold that the United States retained its "guardianship" over American Indian trust and reservation property. E.g., In re Long's Estate, 249 P.2d 103 (Okla. 1952) (barring probate of Indian trust property). The Supreme Court of Idaho, for example, rejected a Fourteenth Amendment constitutional challenge to a ban on liquor sales to Indians, holding that Indians were a group of people "genetic[ally]" inclined to be harmed by liquor. State v. Rovick, 277 P.2d 566, 569 (Idaho 1959) ("It is unnecessary to review the genetics or to indulge in a scientific analysis or discussion of anthropogeny to discover the reasons for the interdictions. Suffice to say that the historic background of laws prohibiting sale of intoxicants to Indians is well recognized and must now be considered as firmly established.").

Some states, such as Michigan, authorized Indians to vote even before the Reconstruction but imposed vague obligations on Indians based on the "civilized" character of an Indian, whether the Indian was a ward of the federal government, or whether the Indian had renounced tribal status or treaty rights. By the early twentieth century, the remaining states that resisted allowing Indians to vote concluded that reservation Indians were not residents of the state in which the reservation was located. E.g., Allen v. Merrell, 305 P.2d 490 (Utah 1956) (rejecting Indian voting rights claim because he was not a resident of non-reservation lands), vacated, 353 U.S. 932 (1957); Porter v. Hall, 271 P. 411 (Ariz. 1928) (same). Contra Harrison v. Laveen, 196 P.2d 456 (Ariz. 1948)

* The material in this Note is excerpted from Matthew L.M. Fletcher, States and Their American Indian Citizens, 41 Am. Indian L. Rev. 319, 331-32 (2017).

(holding reservation Indians were residents). In 1962, New Mexico became the last state to recognize voting rights for American Indians when its supreme court held that Navajo Nation members are entitled to vote in state elections, rejecting the residence claim. Montoya v. Bolack, 372 P.2d 387 (N.M. 1962). Several counties in areas of high American Indian population and land ownership remain covered by the Voting Rights Act and subject to suit. Jeanette Wolfley, You Gotta Fight for the Right to Vote: Enfranchising Native American Voters, 18 U. Pa. J. Const. L. 265 (2015).

TESTIMONY BEFORE THE HOUSE COMMITTEE ON ADMINISTRATION SUBCOMMITTEE ON ELECTIONS

HEARING ON NATIVE AMERICAN VOTING RIGHTS: EXPLORING BARRIERS AND SOLUTIONS

Patty Ferguson-Bohnee, February 11, 2020

* * *

III. Voting Barriers

Barriers to voting include isolating conditions that reduce opportunities and participation, structural or institutional barriers that limit voter participation through the passage of laws or policies that reduce voter participation, and election administration issues.

Isolating conditions such as language barriers, socioeconomic disparities, lack of access to transportation, lack of residential addresses, lack of access to mail, and the digital divide limit Native American political participation. These isolating conditions limit the ability of Native Americans to participate in elections and run for office. Today, states and counties either fail to consider these realities or intentionally exploit them in ways that gives rise to the modern forms of voter suppression we see in Indian Country. These include closing and moving polling locations out of reservation communities where transportation is limited, limiting access to voting in Indian Country based on a lack of permanently Americans with Disabilities Act compliant buildings on Tribal lands, adopting strict voter ID laws, and the push towards vote by mail, among others.

Poverty

Native Americans face obstacles in voting as a part of their socioeconomic reality. The poverty race at 7.8%, compared to the national average of 4.4%. Native Americans also have the lowest labor force participation rate.

Language Barriers

Many Native Americans also face language barriers when it comes to voting. Some Native Americans have limited English proficiency and require language assistance. There are over 370,000 Native American language speakers. Of these, about 84,000 Native Americans report speaking English "less than very well." Only a handful of Native languages are written and not every speaker can read their native language. Without adequate translations, both oral and written, Native language speakers are at a disadvantage when trying to participate in the electoral process.

Section 203 of the Voting Rights Act requires language assistance to be effective. Specifically, Section 203 mandates "[w]henever any State or political subdivision [covered by the section] provides registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language." 52 U.S.C. § 10503(c). As of 2016, jurisdictions in ten states must provide language assistance to Native American and Alaska Native voters under Section 203.

However, not all jurisdictions provide adequate language assistance. Despite the lack of compliance, the Department of Justice has only brought one case to enforce Section 203 in the last ten years. United States v. Shannon County (D.S.D., April 23, 2010), available at https://www.justice.gov/sites/default/files/crt/legacy/2010/12/15/shannon_moa.pdf. However, during the same period, several tribes brought litigation to enforce the provisions of Section 203, and several jurisdictions admitted to doing nothing to comply with Section 203. In 2014, San Juan County, Utah, moved to an all vote-by-mail system that did not account for translations for Navajo language speakers. Navajo voters who needed language assistance were required to travel several hours round trip to the sole in-person voting location to obtain assistance. In Alaska, two separate lawsuits were filed to secure language assistance for rate for Native Americans in the US is 26.2%, while the national poverty rate is 14.0%. Native Americans are also more likely to be unemployed and have the highest unemployment rate of any Yu'pik language speakers under Section 203. Nick v. Bethel, No. 3:07-cv-00098, 2010 WL 11639983, at *1–2 (D. Alaska Jan. 20, 2010); Stipulated Judgment and Order, Toyokak v. Mallott, No. 3:13-cv-00137-SLG-LCL (D. Alaska 2014) available at https://www.narf.org/nill/documents/20150910_alaska_voting_settlement.pdf. After a lawsuit, the government the state of Alaska agreed via a settlement to comply with Section 203 for the purposes of providing language assistance to Native American language speakers. Even though Yu'pik is a written language, state officials were refusing to both written and oral materials in the Yu'pik language.

Infrastructure

As a part of their unique reality, many Tribal communities do not have the same infrastructure and access to information as other Americans. Some of these limitations in

infrastructure include lack of paved roads and a digital divide, including the lack of broadband, telephone services, and electricity generally.

The lack of paved roads on reservation lands hinders access to voting locations, including early voting locations, polling locations and voter registration sites. During inclement weather, unpaved roads may become impassable and further impede voters. The Indian Reservation Roads (IRR) program has reported that they take care of more than 144,000 miles of roads and over 60% of those roads are unpaved. According to the BIA, approximately 17,130 miles of existing roads in the National Tribal Transportation Facility Inventory are unimproved and earth surface roads. When considering only BIA and tribal roads, the percent of unpaved roads increases to 80%. In addition, 27% of all the bridges in the IRR system are deficient.

Another unique barrier Native Americans face is the lack of broadband available on reservations. Only 58.3% of all Tribal lands have the option to connect to high-speed broadband, while 97.3% of urban areas have access to high speed broadband. Without internet, Native Americans cannot easily access online voter registration or election polling locations, ballot or even candidate information. Many states mandate polling locations have electricity, which can be problematic for tribes because 14% of homes on reservations have no access to electricity, compared to the national rate of 1.4%. Accordingly, elections administrators may not provide a polling location on reservations in areas lacking electricity or be forced to rely on generators to sustain the polling location for long periods of time. This creates an added difficulty because the Help America Vote Act (HAVA) statutorily mandates accessible voting machines at every polling location.

Nontraditional Addresses and Home Mail Delivery

While 84% of the U.S. population lives in urban areas, many Native Americans and Alaska Natives live in rural communities. These communities lack traditional street addresses, and locations for homes are usually described in terms of landmarks, cross roads, and directions. Numerous roads on reservations are unimproved dirt or gravel roads, and "many miles of these roads are impassable after rain or snow. Because of the poor quality of the road systems on Indian reservations, many of the roads are unnamed and not serviced by the U.S. Postal Service. . . . A significant number of these reservation residents have no traditional street addresses." Brief for National Congress of American Indians as Amici Curiae supporting Petitioners, Crawford v. Marion County at 11-12 (2008), available at https://sct.narf.org/documents/crawford/merits/amicus_ncai.pdf.

Due to the lack of traditional addresses, "[m]ost reservation residents do not receive mail at their homes and either pay to maintain a post office box in a nearby town or receive their mail by general delivery at a trading post or other location. Some reservation residents have to travel up to seventy miles in one direction to receive mail." Id. at 12. In Arizona, for example, only 18% of reservation voters outside of Maricopa and Pima Counties have physical addresses and receive

mail at home. The Navajo Nation, the largest reservation in the United States—the size of West Virginia, does not have an addressing program, and most people live in remote communities. The Navajo Reservation has over 10,000 miles of road, 86% of which are unpaved. Residents have "little to no vehicle access, only post office boxes, sometimes shared by multiple families." Similarly, "[t]here is no home delivery in the Tohono O'odham Nation, where there are 1,900 post office boxes and some cluster mail boxes. . . . Residents come to the post office every two or three weeks to get their mail. Due to the lack of transportation, the condition of the roads, and health issues, some go to post office only once per month."

The lack of traditional addresses can create barriers related to voter registration, voter ID requirements, and the implementation of voting by mail. Native American voters should not face these barriers for the sole reasons of not having a traditional street address or not being able to receive home mail delivery. However, the lack of formal addresses in Indian Country makes it especially hard for voters to comply with address requirements to register to vote or to produce identification in order to vote on election day. Voters may be placed in the wrong precinct, their ID address may not match the voter rolls, and voters may not receive their election mail timely, if at all. Further, they may not receive election mail because they may only check their mailbox once a month due to the distance they must travel to pick up their mail.

Housing

Intertwined with many aspects of the inherent barriers that Native Americans face in voting is the nationwide housing crisis affecting many tribal communities. In a 2017 report, HUD notes that housing availability on reservations and in other tribal communities are considered "extreme by any standard." Homelessness amongst Native Americans has largely taken the form of overcrowding. Homeless Native Americans living on Tribal lands depend upon couch surfing as their primary source of shelter. HUD found that between 42,000 and 85,000 people in Tribal areas are couch surfers, staying with friends or relatives only because they had no place of their own. As a result, nearly 16% of Tribal households experience overcrowding compared to the national rate of 2%.

The lack of housing in tribal communities directly affects the ability of Native Americans to register and to vote. In particular, state and local governments structure many of their voting procedures and policies around requirements of voters proving a physical address. This becomes problematic when registering to vote, complying with voter ID laws, receiving official election mail, and verifying your voter registration against the voter roll at the polls.

Access to Polling Locations

Increasing accessibility to voting locations, early voting and election day polling locations, is crucial to the protection of Native American voting rights. In a 2018 survey conducted by the Native American Voting Rights Coalition, 10% of respondents in New Mexico, 15% in Arizona, 7% in Nevada, and 29% in South Dakota identified distance from polling locations as one of the

many problems associated with in-person voting. Early voting opportunities with polling locations hours away effectively amount to no access to in-person early voting in light of the practical effects of requiring voters to travel such distances. The federal district court in Nevada acknowledged the reality that these distances impede voting when it found that a polling location 16 miles away from the Pyramid Lake Paiute Reservation constituted an unburden on voters. This undue burden is not unique to voters living on the Pyramid Lake Paiute Reservation. For example, in Mohave County, Arizona there were only three in-person early voting locations countywide. Most residents of the County lived near one of these locations, however, for the Kaibab-Paiute Tribe the closest of the three locations was located 285 miles away, and required on-reservation voters to travel for five to seven hours if they wanted to vote early in person. These distances and compounded by the socioeconomic difficulties Native American voters face because of a decreased access to public transportation, personal transportation, or requisite funds to travel such distances simply to vote.

Vote by Mail

Vote by mail is not a simple or easy task for Native American voters. Native Americans are less likely to have mail delivered to their homes, especially when living on tribal lands. Many onreservation voters live in rural areas where it is common for mail to arrive late or not at all. Reservation residents often rely on post office boxes that may be 45 minutes to a 2-hour drive away. The difficulties accessing mail make voting by mail difficult because traveling to the P.O. Box to pick up your ballot and then returning it can be an all-day task, without a car, it may be impossible. Voting early by mail on-reservation is largely unreliable. Thus, vote by mail is not as accessible for Native Americans living on reservation as it is for off-reservation voters.

Vote-by-mail can effectively eliminate voting opportunities for some Native American and Alaska Native Communities if no polling locations are available within the tribal communities. In 2008, the Alaskan government eliminated polling locations for Alaska Native villages as part of a "district realignment" that resulted in voters having to travel by plane in order to vote. Alaska contemplated moving to a vote-by-mail system and Alaskan Native voters responded with extreme concerns. Because mail is delivered via plane, Alaska Natives already have to wait two to three weeks to receive mail, and even longer if service is delayed by weather conditions. With federal elections taking place in October and November, delays caused by inclement weather render mailin elections impracticable in Alaska. In 2016, the Pyramid Lake and Walker River Paiute Tribes in Nevada filed a lawsuit prior to the 2016 general election in order to get polling locations on the reservation. In 2016, San Juan County, Utah switched a mail-only voting system and offered inperson early voting only in the majority white part of the County; the Navajo Nation sued to ensure in-person locations and compliance with the language assistance requirements under Section 203 of the Voting Rights Act. In North Dakota, closure of polling locations on the Mandan Hidatsa Reservation resulted in voters having to travel 80-100 miles in order to cast a ballot. For the Kaibab Paiute Tribe in Arizona, voters had to travel 280 miles one way in 2016 and 2018 in order to vote early in person. When Pima County closed early voting on the Pascua Yaqui

Reservation in 2018, Pascua Yaqui voters reported that it took over two hours to participate in early voting using public transportation.

Moving to vote by mail will preclude Native Americans and Alaska Natives living in communities with unreliable mail delivery systems. Native Americans in many states, including Arizona, New Mexico, Nevada, and South Dakota, do not trust mail-in voting systems. Mail in tribal communities is untimely and inconsistent, creating a preference for Native American and Alaskan Native voters to vote in person.

Voter Identification Barriers

As a natural consequence of the socioeconomic conditions already mentioned, Native Americans are less likely to have the forms of identification that satisfy state law. Thirty-six states have laws requiring voters to show some form of identification at the polls. Of these thirty-six states, only nine (Alabama, Arizona, Idaho, Michigan, North Carolina, South Dakota, Utah, Virginia and Washington) explicitly allow tribal identifications as a form of identification. Of the nine states that allow tribal identifications, four explicitly require tribal identifications to have photos.

Although many Tribes issue IDs, not all Tribes do, and even if they do, they may lack a residential address or a photo.

A voter ID law requiring a residential address went into effect in North Dakota right before the 2018 midterm elections. This law expressly excluded the use of PO Boxes as residential addresses. Over 5,000 Native Americans lacked the requisite form of ID to participate in elections, and none of the six reservations has residential addresses. While Tribes took actions to try to issue free Tribal IDs meeting the new requirements, they often expended resources they did not have.

During the 2006 election, 428 Navajos in Arizona voted provisional ballots that were never counted because they did not present identification at the polls. The Navajo Nation sued alleging that the voter ID law violated Section 2 of the Voting Rights Act; the parties settled expanding the acceptable forms of identification to include certain forms of tribal ID. Despite the settlement, valid forms of tribal identification poll workers continue to reject acceptable tribal IDs in each election due to insufficient poll worker training or because of problems arising with non-traditional reservation addresses.

Lack of Access to Voter Registration

Online voter registration is a tool that states continue to adopt and currently thirty-nine states and Washington D.C. employ this new technology. If a Native American voter living on Tribal lands has access to the Internet, many states offering online registration require that a state-issued ID be utilized in the process thus excluding on-reservation voters who lack state identification.

In several areas throughout the United States, Native Americans report lower awareness of how and where to register to vote and in general, report lower levels of activity by third party groups to conduct registration drives. In a recent survey, ten percent of Native Americans cited long distance travel as a factor in their decisions to not register to vote.

Discrimination

In some areas of the country, Native Americans face discrimination in voting. In San Juan County, nonIndians called Navajo voters "savage," and made other racist comments when they secured an additional representative on the county board of supervisors. In a recent survey conducted by NPR and the Robert Wood Johnson Foundation, they found that "[o]ne in ten Native Americans say they have been personally discriminated against because they are native when trying to vote or participate in politics." Discrimination in America: Experiences and Views of Native Americans (Nov. 2017), available at https://www.rwjf.org/content/dam/farm/reports/surveys_and_polls/2017/rwjf441678/. In this survey, 15% of Native Americans reported that they observed discrimination when Native Americans tried vote.

A recent decision by the Ninth Circuit Court of Appeals found that specific election laws, one discarding ballots cast out of precinct and one prohibiting ballot collection drives, had a discriminatory impact against Native Americans. Democratic National Committee v. Hobbs, 948 F.3d 989 (9th Cir. 2020). Furthermore, the court found that the ban on ballot collection was specifically passed with discriminatory intent to eliminate voting efforts utilized by minority communities, including Native Americans. The Ninth Circuit found that the ballot collection law disenfranchised Native Americans and held that it violated Section 2 of the Voting Rights Act and the 15th Amendment.

* * *

NOTES

1. Professor Ferguson-Bohnee's testimony ended with reference to the Ninth Circuit's recent decision involving Native disenfranchisement in Arizona. That opinion recounted the lengthy history of aggressive state and local discrimination against Native voters:

> In 1912, when Arizona became a State, Indians were not citizens of Arizona or of the United States. In 1924, Congress passed the Indian Citizenship Act, declaring all Indians citizens of the United States and, by extension, of their States of residence. Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b)).

Indian voting had the potential to change the existing white political power structure of Arizona. See Patty Ferguson-Bohnee, The History of Indian Voting Rights in Arizona: Overcoming Decades of Voter Suppression, 47 Ariz. St. L.J. 1099, 1103–04 (2015) (Ferguson-Bohnee). Indians comprised over 14 percent of the population in Arizona, the second-highest percentage of Indians in any State. Id. at 1102 n.19, 1104. Potential power shifts were even greater at the county level. According to the 1910 Census, Indians comprised over 66 percent of the population of Apache County, over 50 percent of Navajo County, over 34 percent of Pinal County, and over 34 percent of Coconino County. Id. at 1104.

Enacted under the Fourteenth and Fifteenth Amendments, the Indian Citizenship Act should have given Indians the right to vote in Arizona elections. The Attorney General of Arizona initially agreed that the Act conferred the right to vote, and he suggested in 1924 that precinct boundaries should be expanded to include reservations. Id. at 1105. However, in the years leading up to the 1928 election, Arizona's Governor, county officials, and other politicians sought to prevent Indians from voting. Id. at 1106–08. The Governor, in particular, was concerned that Indian voter registration—specifically, registration of approximately 1,500 Navajo voters—would hurt his reelection chances. Id. at 1107–08. The Governor sought legal opinions on ways to exclude Indian voters, id., and was advised to "adopt a systematic course of challenging Indians at the time of election." Id. at 1108 (quoting Letter from Samuel L. Pattee to George W.P. Hunt, Ariz. Governor (Sept. 22, 1928)). County officials challenged individual Indian voter registrations. Id. at 1107–08.

Prior to the 1928 election, two Indian residents of Pima County brought suit challenging the county's rejection of their voter registration forms. Id. at 1108. The Arizona Supreme Court sided with the county. The Arizona constitution forbade anyone who was "under guardianship, non compos mentis, or insane" from voting. Ariz. Const. art. VII, § 2 (1910). The Court held that Indians were "wards of the nation," and were therefore "under guardianship" and not eligible to vote. *Porter v. Hall*, 34 Ariz. 308, 271 P. 411, 417, 419 (1928).

Arizona barred Indians from voting for the next twenty years. According to the 1940 census, Indians comprised over 11 percent of Arizona's population. Ferguson-Bohnee at 1111. They were the largest minority group in Arizona. "One-sixth of all Indians in the country lived in Arizona." Id.

After World War II, Arizona's Indian citizens returned from fighting the Axis powers abroad to fight for the right to vote at home. Frank Harrison, a World War II veteran and member of the Fort McDowell Yavapai Nation, and Harry Austin, another member of the Fort McDowell Yavapai Nation, filed suit against

the State. In 1948, the Arizona Supreme Court overturned its prior decision in *Porter v. Hall*. *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456, 463 (1948). Almost a quarter century after enactment of the Indian Citizenship Act of 1924, Indian citizens in Arizona had the legal right to vote.

* * *

For decades thereafter, however, Arizona's Indian citizens often could not exercise that right. The Arizona Supreme Court's decision in *Harrison v. Laveen* did not result in "a large influx" of new voters because Arizona continued to deny Indian citizens—as well as Hispanic and African American citizens—access to the ballot through other means. Berman at 15.

The biggest obstacle to voter registration was Arizona's English literacy test. In 1948, approximately 80 to 90 percent of Indian citizens in Arizona did not speak or read English. Tucker et al., Voting Rights at 285; see also Berman at 15. In the 1960s, about half the voting-age population of the Navajo Nation could not pass the English literacy test. Ferguson-Bohnee at 1112 n.88. For Arizona's Indian—and Hispanic and African American—citizens who did speak and read English, discriminatory administration of the literacy test by county registrars often prevented them from registering. See, e.g., Berman, Arizona Politics at 75 ("As recently as the 1960s, registrars applied the test to reduce the ability of blacks, Indians and Hispanics to register to vote.").

Voter intimidation during the 1950s and 60s often prevented from voting those American Indian, Hispanic, and African American citizens who had managed to register. According to Dr. Berman:

> During the 1960s, it was ... clear that more than the elimination of the literacy test in some areas was going to be needed to protect minorities. Intimidation of minority-group members—Hispanics, African Americans, as well as Native Americans—who wished to vote was ... a fact of life in Arizona. Anglos sometimes challenged minorities at the polls and asked them to read and explain "literacy" cards containing quotations from the U.S. Constitution. These intimidators hoped to frighten or embarrass minorities and discourage them from standing in line to vote. Vote challenges of this nature were undertaken by Republican workers in 1962 in South Phoenix, a largely minority Hispanic and African-American area. ... [In addition,] [p]eople in the non-Native American community, hoping to keep Native Americans away from the polls, told them that involvement could lead to something detrimental, such as

> increased taxation, a loss of reservation lands, and an end to their special relationship with the federal government.
>
> Berman at 14–15.

Democratic National Committee v. Hobbs, 948 F.3d 989, 1019-21 (9th Cir. 2020) (en banc), rev'd, Brnovich v. Democratic National Committee, 141 S. Ct. 2321 (2021).

2. Navajo Nation Attorney General Doreen McPaul also testified about the *Hobbs* case. She explained how Arizona's voting laws impacted Navajo Nation citizens.

TESTIMONY BEFORE THE HOUSE COMMITTEE ON ADMINISTRATION SUBCOMMITTEE ON ELECTIONS

HEARING ON NATIVE AMERICAN VOTING RIGHTS: EXPLORING BARRIERS AND SOLUTIONS

Doreen McPaul, February 11, 2020

* * *

While the Navajo Nation did not participate directly in *DNC v. Hobbs*, a number of its citizens were involved in the case and the decision has a direct impact on Navajo citizens being able to exercise their right to vote. * * * [T]he decision by the 9th Circuit in *Hobbs* focused exclusively on the application of Section 2 of VRA to laws passed by the Arizona legislature.

Out of Precinct Voting

Arizona allows its counties to choose a vote-center or a precinct-based system for in-person voting. In counties that use vote-center system, registered voters may vote at any polling location in the county. In counties using the precinct-based system, registered voters may vote only at the designated polling place in their precinct. Approximately 90 percent of Arizona's population lives in counties using the precinct-based system.

On the Navajo Nation, Apache and Coconino county use a precinct-based system and Navajo county uses a vote-center system. If a Navajo voter tries to vote in Apache or Coconino county, she must vote at her precinct voting location in order for her vote to be counted. If she attempts to vote at a polling location outside of her precinct on election day, she can only cast a

provisional ballot. After election day, if election officials determine the voter voted outside of her precinct, prior to the Hobbs decision, they would discard the provisional ballot in its entirety.

Provisional ballots are commonly used by voters in Arizona. In the 2012 general election, more than 22 percent of all in-person ballots cast were provisional ballots. Arizona is at the top of the list of States that cast provisional ballots. Arizona is also the State that rejects the highest percentage of provisional ballots. One of the most frequent reasons for rejecting provisional ballots in Arizona is that they are cast out-of-precinct.

Native Americans are over-represented among out–of-precinct voters by a ratio of 2 to 1, with 1 in every 100 Native American casting a provisional ballot. During the 2014 and 2016 general elections in Apache, Navajo, and Coconino counties, the vast majority of out-of-precinct ballots were in areas that were almost entirely Native American.

Minority voters often vote out-of-precinct ballots due to their high mobility, fluidity in residential locations, and frequent changes to the precinct and polling place schemes. In addition, a majority of Navajo citizens residing on the reservation do not have traditional street addresses. Of the Navajo Nation's 110 chapters, about 70 of them do not have street names or numbered addresses, which adds up to at least 50,000 unmarked properties. Navajo voters' lack of standard addresses can cause their precinct assignment to be based on guesswork. While state registration forms allow a space for an individual to draw a map location of their resident, these maps often do not allow for sufficient detail to properly locate the residence. In 2012, Apache County, Arizona purged 500 Navajo voters because their addresses were deemed "too obscure."

If the location of a voter's residence is unclear, it can result in counties assigning voters to the wrong precincts. If a voter is placed in the wrong precinct, it can lead to confusion about the voter's correct polling place, longer travel times for the voter to find her correct polling place, and to the county ultimately rejecting the ballot if it determines the voter cast her ballot in the wrong precinct.

Another reason Navajo voters may vote out of precinct is that their precinct polling location is different than their Navajo elections polling location for. For Navajo elections, Navajo voters must vote at the chapter house where they are registered. For example, if a Navajo voter is registered with Fort Defiance Chapter her polling location for all Navajo elections will be at the Fort Defiance chapter house. However, even though the Fort Defiance chapter house is a precinct polling location for Apache County, the individual may actually have to go to another precinct polling location because her residence is not in Apache County's Fort Defiance precinct.

In the 2018 general election, a voter casted her ballot at the Fort Defiance Chapter House for the Navajo elections. She then attempted to cast her ballot in the state elections but was told by the poll workers that she was not registered to vote at that precinct. The poll worker did not inform the voter of her correct precinct polling location. Instead, the voter had to retrieve the information from a volunteer outside of the polling location. The volunteer informed the voter that her precinct

polling location was at the Navajo Nation Museum in Window Rock, 6.3 miles away. If the volunteer had not been present it is unclear how the voter would have learned about her polling location.

The difference in tribal and state polling locations causes confusion, and results in voters casting ballots in the wrong precinct. It also results in voters having to drive to multiple locations to vote in tribal and state elections. Another example is the Coal Mine Mesa Chapter in Coconino County. Coal Mine Mesa Chapter is divided among several county voting precincts. A member of the Coal Mine Mesa Chapter may reside in the Cameron precinct or the Coal Mine Mesa precinct depending on the location of their residence. If this individual wants to vote in both the tribal and state election on election day, she would first have to cast her ballot at the Coal Mine Mesa Chapter house. She would then have to drive 43 miles one way to the Cameron Chapter house to vote in the state election.

For all of these reasons, Navajo voters are more likely than their white counterparts to vote out-of-precinct and cast a provisional ballot. Arizona's policy of rejecting a provisional ballot, cast out of precinct, in its entirety has a disparate impact on Navajo voters. The 9th Circuit's decision found that Arizona's policy of entirely discarding out-of-precinct ballots results in disparate burden on minority voters causing in a substantially higher percentage of minority votes than white voters being discarded.

Criminalization of Ballot Collection Assistance

Prior to Arizona's criminalization of ballot collection, it was common for Navajo voters to provide their ballots to third parties. As the 9th Circuit stated, the criminalization of ballot collection has a pronounced effect in rural counties with significant Native American populations who disproportionately lack reliable mail and transportation services.

Many Navajo individuals live far off main roads, on dirt roads that are not easily accessible. There is no public transportation that allows for the pick-up of citizens at their place of residence. Therefore, if an individual did want to take public transport, she would need to first get from her residence to a pick up site. This severely limits the transportation options for elderly and disabled citizens, who are reliant on relatives or friends for rides. In some parts of the Nation, only one in ten families own a vehicle which further limits transportation options.

In addition, Navajos do not have access to reliable mail service. Due to the remote location and lack of traditional addresses on the Nation, many Navajo citizens must utilize P.O. Boxes to receive their mail. Because the Nation spans three states, three counties in Arizona, one county in Utah, and four counties in New Mexico, an individual's P.O. Box location may be in a different state or county than the individual's residence. A person may reside in Arizona but their P.O. Box and Chapter House is in New Mexico (i.e. Red Lake Chapter and Crystal Chapter) or reside in Utah and their P.O. Box in Arizona (Navajo Mountain Chapter). Some individuals reside in Navajo

County but their P.O. Box and local Chapter House is in Coconino County. (i.e. Birdsprings Chapter).

P.O. Boxes are usually shared by multiple family members. Multiple family members will utilize one box because some family members may not be able to afford their own P.O. Box. The sharing of P.O. Boxes by multiple individuals can lead to lost or delayed ballots and voter notifications, as one family may not provide the other individuals on the P.O. Box with their mail in a timely manner, if at all. Even with multiple family members on one P.O. Box, there are not enough P.O Boxes to serve the community; there are only a limited number of P.O. Boxes available at each location. The post office limits the number of people that can be listed on a P.O. Box, causing individuals who do share P.O. Boxes with their family to be removed from the box.

If an individual is not able to secure a P.O. Box, or is removed from their family box, they may have to travel 30 to 40 miles to the next closest post office. At times this can be in addition to the 30 miles they traveled to reach their local post office. Long travel times to P.O. Boxes make checking the mail a hardship for individuals who are elderly or disabled. It also results in individuals checking their mail less frequently. Some citizens are only able to check their P.O. box once a week or even as little as once every three to four weeks.

For all these reasons many individuals rely on others to help them pick up and drop off mail. These individuals may be related by blood to the voter, or they may be a clan relation. They may also be a non-relation community member who happens to assist the individual at their house. The limitations placed on who can transport a ballot under Arizona law places the burden on low-income, isolated, elderly voters, who may not speak English as a first language, to find a way to get their ballot to a mail-box possibly as far as 30 miles away, in a timely manner.

* * *

NOTES

1. At the same hearing, the Native American Rights Fund provided maps exemplifying the "tyranny of distance" that Alaska Natives and Navajo Nation citizens must travel to vote. We reproduce them here:

Figure 7. Distances from Selected Alaska Native Communities. Graphic by James Tucker

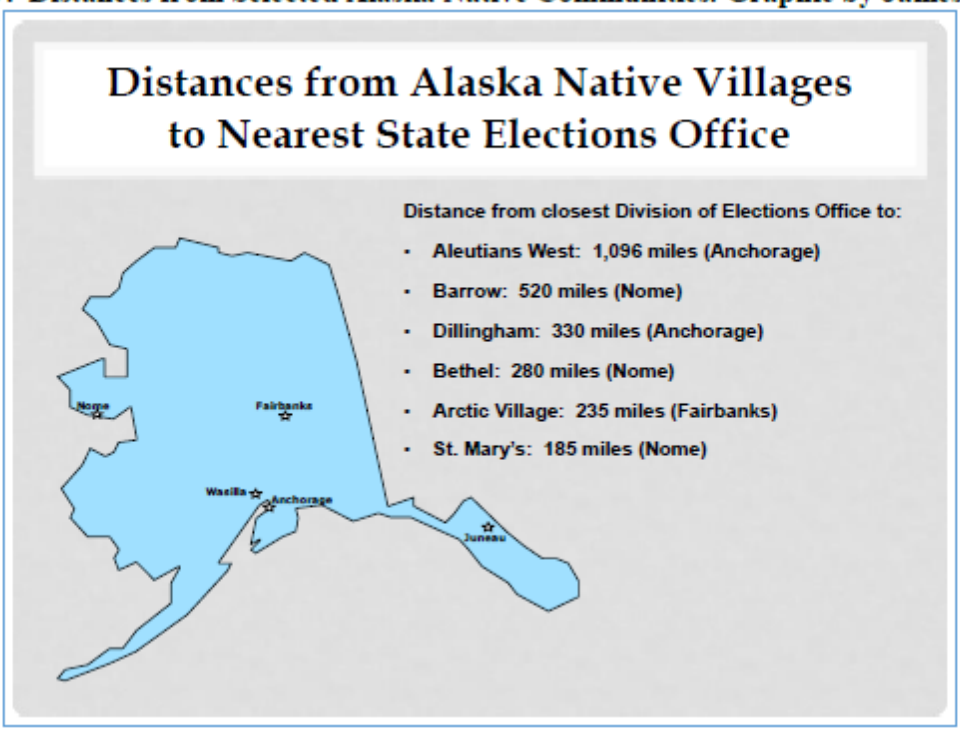
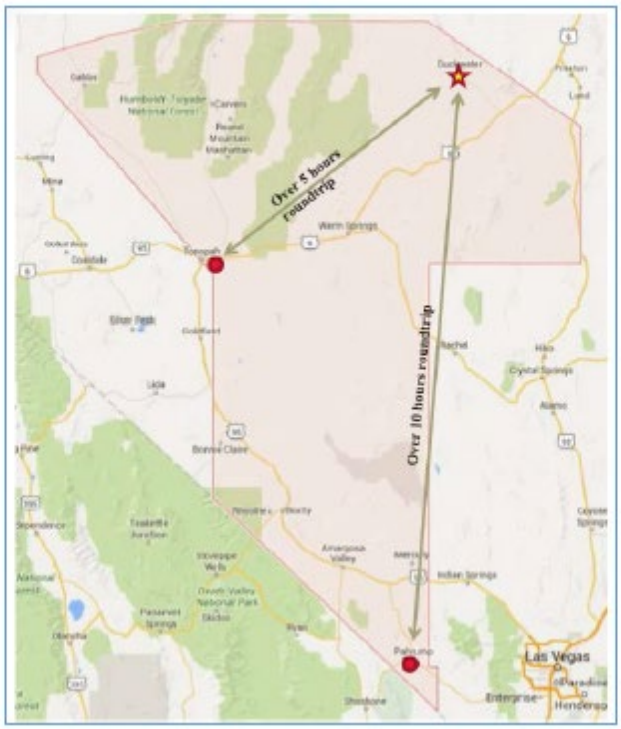


Figure 8. Travel times from the Duckwater Reservation to Nye County, Nevada elections offices. Map by James Tucker



2. The Native American Rights Fund also testified about widespread and specific instances of the overt racism that Indian voters face:

> In the fall of 2016 and spring of 2017, NAVRC [Native American Voting Rights Coalition] oversaw one of the most comprehensive in-person surveys ever conducted in Indian Country about barriers faced by Native voters. A total of 2,800 Native voters in four states completed the in-person survey. In all four states, Native voters expressed the greatest trust in their tribal governments.
>
> Although the federal government was identified by respondents as the most trusted of nontribal governments (federal, state, local), the level of trust ranged from a high of just 28 percent in Nevada to a low of only 16.3 percent in South Dakota. Trust of local government in South Dakota was notably bad with only 5.02% of respondents indicating they most trusted the local government, which is especially significant considering it is the local governments that are most often responsible for the administration of elections.
>
> Native Americans have faced sustained assaults against their sovereignty and their right to vote. States ratified Constitutions that specifically excluded Native people from voting, established cultural purity tests to determine if Native people had sufficiently assimilated before granting them the right to vote, and argued Native self-governance was incompatible with participation in state run elections. This legacy of equating voting with an abandonment of cultural and political sovereignty has resulted in a continued skepticism toward voting within Native communities.
>
> Furthermore, states often made the experience of voting embarrassing for Native voters. Not only would states demand that Native vote disavow and prove they were no longer culturally Native American, states would also impose literacy tests that were impossible for Native voters to pass given their lack of fluency in English.
>
> Clerks also turned away Native voters alleging they were incompetent to vote because of the federal trust responsibility over tribes which was referred to in legalese as a "guardianship." The Arizona Supreme Court accepted this reasoning – that Native Americans were incompetent to vote – in a case that stood for twenty years. [*Porter v. Hall*.] To this day, some elders that can recall humiliating voter experiences discourage younger generations from voting out of disregard for federal and state systems that were cruel to them and a lingering fear that participation in these systems will undermine tribal sovereignty. As one community member explained "People are still apprehensive because it's been taught we can participate in our elections but that's not our election. So if there is a county election

or a state election or a federal election, elders tell their children and it's still true today they don't participate in voting because they feel it's an infringement on our sovereignty."

Consequently, distrust between Native Americans and local, state, and federal governments abounds and was testified to throughout the field hearings. A sampling of these sentiments:

- And I think in general, just a lack of, distrust, of government. Years of discrimination and injustice support that American Indians don't trust government and don't want to participate in this government process.
- Why it's so hard for Native Americans to vote in local elections in Los Angeles is . . . just issues between the United States government and Native Americans and how every promise that was made to us has always been broken. So the amount of distrust among Native Americans and the government is not really good.
- Isolating, keeping isolated, because a lot of it was no trust was really in between from the federal, the state, and county side.

Not only do many Native Americans not trust the local, state, and federal governments, they also do not feel supported by these institutions.

As one community member recounted, "[O]ur lives have been severely compromised by the racists and discriminatory impact of boarding schools, public education, and the harmful federal and state policies that go towards Indian families. Colonization for us meant the control of tribal people by the appropriation of our lands. State and federal jurisdictions over our children and the suppression of our tribal traditions and culture."

As these injustices continue to manifest themselves in present day inequities – poverty, lack of housing, inadequate roads and infrastructure, to name a few – voters disengage from the political process and become apathetic, firm in the belief that nothing will ever change. One witness described how his parents would tell him "We don't get no help from the county. Why should I vote? . . . Leave them alone. Don't bother. That's their system, don't bother."

A tribal councilman explained how "we are from a very rural area, the poorest county in California. We, like most poor communities, have an issue with people wanting to vote. It's not the access to vote. It is the desire to vote. There's no passion their vote sometimes." A tribal member reflected how "[y]ou know, alcoholism, high unemployment and things like that that just affect our ability to feel good about ourselves and really want to voice our opinions and vote."

But discrimination is not just a relic of the past or the effects of past wrongs. Native Americans continue to experience overt discrimination in their everyday lives and when they attempt to vote. In Arizona, racial tensions are so fraught between the Kaibab Band of Paiute Indians and the border town that the pipes sending water to the reservation are regularly blocked by border town residents. In Utah, a witness' Native grandson attempted to play baseball and was accosted by a non-Native woman who "started screaming at him, 'Who in the hell do you think you are? You think you're that good? You damn welfare people are starting to take over.'"

Paternalistic racist attitudes are also prevalent. A Native high-schooler was denied a place on the school volleyball A team because, although she was better than girls on the A team, "the coach said he thought she would feel more comfortable on the B team. And she was so angry . . . she ended up quitting."

These racist attitudes did not stop at residents. Voting officials also displayed racist attitudes, whether intentionally or not. In South Dakota, a poll worker described as a "[n]ice little old lady" was concerned about where she would be sitting while servicing a Native American community and asked field organizers where's a place "that's going to be safe? We don't want to be around people who are drinking. We don't want to be around, you know people who are going to harass us."

Racist attitudes tangibly effect the ability for Native Americans to vote, forcing voters to register and cast their ballots in substandard facilities and hostile conditions. For example:

- In South Dakota, voters were forced to vote in a repurposed chicken coop

- In Montana, the number of registration cards accepted by county officials from Native community organizations was arbitrarily limited to 70 after community organizers were hassled and given "dirty looks" for bringing in too many at a time.

- In South Dakota, the Buffalo County Seat was located Gann Valley which had a population of 12 and was the smallest county seat in the nation. As county seat, the residents of Gann Valley were provided a fully funded polling place that offers early voting and registration opportunities in line with the rest of the state. Twenty-five miles away on the Crow Creek reservation, however, Fort Thompson's 1,200 residents had no early voting location in 2014 and only one satellite voting site open on 2014 Election Day. Despite calls from activists to provide a polling location in Fort Thompson and despite HAVA funding being available to open a polling location in Fort Thompson, the county auditor refused to open a polling location and instead decided to forgo usage of the funds.

• Voters are regularly forced to travel to border towns to cast a vote where there are "issues" and "hostile attitude[s]" and "racist stereotypes" where community members describe being "too intimidated to get the nearest polling" location83 since the county seat "may or may not be welcoming to Native Americans coming from a reservation community."

These negative experiences are exacerbated and reinforced today when Native Americans are denied equal opportunities to register to vote and to cast ballots that are counted. An on-reservation polling place would mean Native Americans would not need to interact with communities and county officials who are hostile toward them. It would also mean tribal officials would not need to rely on the goodwill of a county official in order to secure equal access to the ballot box for their tribal members. Indeed, it is these local discriminatory actions that call out for federal relief.

Not only would federal relief prevent some of the intentional and unintentional barriers to the ballot box facing Native Americans today, federal action would also result in significant savings. Today, discrimination is only addressed on an ad hoc basis, usually through litigation. Native activists have a stunning record of success. Indeed, this success is only partly attributable to the skill of their lawyers. Most often, however, it is the dismal facts and stark injustices – which judges who hail from all geographic and political backgrounds – have been unable to ignore. In the past 12 years there have been 18 cases involving Indian voting rights. Of these eighteen cases, the Native plaintiffs either won or settled to their satisfaction all but one or two. When combined with the cases prior to 2008, the total number of cases is 92 at the time of the printing of our Field Hearing Report, with victories or successful settlements in 85 cases and partial victories in two cases. That is a success rate of 92 percent. As a result, states and local budgets often face not only the cost of ensuring equal access to the ballot box for their Native constituents, but also hefty attorneys' fees when a case is proved. Federal action would clarify responsibilities toward Native constituents and save resources.

In sum, as one tribal member explained "[s]o, yes, I would like you, person at the poll, to respect me as a Native American, respect my culture. But if you can't do that, because if you're going to tell me, say: Well I'm going to have to learn about African-Americans, Hispanics, Mexicans, or whatever they're calling us, then do this. Treat me as a human being and be respectful to my elders, respectful to my children." Likewise, we ask for no more, and no less, than an equal opportunity to vote for all Native Americans.

* * *

Written Statement of Jacqueline De León, Staff Attorney for the Native American Rights Fund, Before the Subcommittee on Elections Committee on Administration, United States House of Representatives, at 13-17 (February 11, 2020).

2. On July 1, 2021, the Supreme Court issued *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021). The Court reversed *Hobbs*, holding that vote denial by states based on partisanship did not violate Section 2 of the Voting Rights Act even though it disproportionately affects voters on the basis of race. *Brnovich*, 141 S. Ct. at 2343-44.

3. In 2024, the Committee on House Administration released a report titled *Voting for Native Peoples: Barriers and Policy Solutions* (July 2024), available at https://democrats-cha.house.gov/sites/evo-subsites/democrats-cha.house.gov/files/evo-media-document/2024_July_Voting%20for%20Native%20Peoples_Report-vm3.pdf.

The report detailed bills introduced to enhance Indian country voting rights, including the Frank Harrison, Elizabeth Peratrovich, and Miguel Trujillo Native American Voting Rights Act (NAVRA), which the report concludes would:

> address many of the barriers discussed in this report by establishing baseline, consistent standards for voting throughout Indian Country, ensuring that Native Americans no longer bear the burden of lengthy, costly litigation to defend and enforce their right to vote. Key provisions of NAVRA include:
>
> ● Establishing a grant program administered by the U.S. Election Assistance Commission to establish state-level Native American Voting Rights Task Forces for the purposes of addressing the barriers to voting in Indian Country.
>
> ● Ensuring federal or federally-funded facilities providing services to Tribal nations offer voter registration services to Tribal members.
>
> ● Improving access to voter registration, polling places, and drop boxes on Tribal lands, including through meaningful Tribal consultation.
>
> ● Streamlining the process for adding polling locations on Tribal lands.
>
> ● Providing uniformity for voting on Tribal lands.
>
> ● Requiring the acceptance of Tribally - or federally-issued ID if an ID is required to vote in federal elections.
>
> ● Ensuring culturally appropriate and effective language assistance, such as requiring language access to be provided orally even if written translation is not culturally permitted.

● Allowing Tribal nations to designate buildings to be used as a person's address for the purposes of registering to vote and picking up and dropping off a ballot.

● Requiring states to provide a reason when rejecting a provisional ballot.

● Allowing extended family, caregivers, Tribal assistance providers, and household members to deliver voter registration, absentee ballots, absentee applications, or a sealed ballot of a voter residing on Tribal lands at a designated location, so long as the person is not receiving any compensation based on the number of ballots returned.

● Requiring prior consent from either the affected Tribe or the U.S. Attorney General, or an order from the D.C. federal district court before a state can reduce the voter accessibility outlined in these provisions.

● Allowing a Tribal nation to make a request to the U.S. Attorney General for federal election observers and requiring the U.S. Department of Justice to consult annually with Tribal nations on issues related to voting.

CHAPTER 6

TRIBAL SOVEREIGNTY AND THE CHALLENGE OF NATION-BUILDING

SECTION B.

INHERENT TRIBAL SOVEREIGNTY AND THE CONSTITUTION

Add to the end of the notes on page 431:

3. In *Denezpi v. United States*, 142 S. Ct. 1838 (2022), the Supreme Court affirmed and extended the *Wheeler* double jeopardy principle to Courts of Indian Offenses, tribal courts created originally by the Department of the Interior and now administered by the Bureau of Indian Affairs under 25 CFR Part 11. These courts colloquially are known as "CFR Courts."

Denezpi committed a crime on the territory of the Ute Mountain Ute Tribe in Colorado. He was prosecuted for an act that violated the Ute Mountain Ute Code and federal law. He was first prosecuted in the CFR Court, then in federal court. Denezpi argued that since the CFR Court is federally administered that the prosecution was federal, making the subsequent federal prosecution invalid under the Double Jeopardy Clause of the Constitution. The Court applied *Wheeler* and rejected Denezpi's claim:

> Our reasoning in *Wheeler* controls here. Denezpi's single act transgressed two laws: the Ute Mountain Ute Code's assault and battery ordinance and the United States Code's proscription of aggravated sexual abuse in Indian country. The Ute Mountain Ute Tribe, like the Navajo Tribe in Wheeler, exercised its "unique" sovereign authority in adopting the tribal ordinance. Id., at 323, 98 S.Ct. 1079. Likewise, Congress exercised the United States' sovereign power in enacting the federal criminal statute. . . . The two laws, defined by separate sovereigns, therefore proscribe separate offenses. Because Denezpi's second prosecution did not place him in jeopardy again "for the same offence," that prosecution did not violate the Double Jeopardy Clause. . . .
>
> Denezpi agrees with much of this—that sovereigns define distinct offenses, that the Tribe and the United States are separate sovereigns, and that his prosecutions involved a tribal offense and a federal offense respectively. See Reply Brief 3–4.2 But he argues that the dual-sovereignty doctrine is concerned not only *1846 with who defines the offense, but also with who prosecutes it. In *Wheeler*,

> the defendant was initially prosecuted in a tribal court; Denezpi, by contrast, was initially prosecuted in a C.F.R. court. While tribal prosecutors in tribal courts indisputably exercise tribal authority, Denezpi claims that prosecutors in C.F.R. courts exercise federal authority because they are subject to the control of the Bureau of Indian Affairs. He concludes that he was therefore prosecuted twice by the United States. And that, he insists, violated the Double Jeopardy Clause because "the dual-sovereignty doctrine does not apply when successive prosecutions are undertaken by a single sovereign, regardless of the source of the power to adopt the criminal codes enforced in each prosecution." Brief for Petitioner 16–17.
>
> We need not sort out whether prosecutors in C.F.R. courts exercise tribal or federal authority because we disagree with Denezpi's premise. The Double Jeopardy Clause does not prohibit successive prosecutions by the same sovereign. It prohibits successive prosecutions "for the same offence." And as we have already explained, an offense defined by one sovereign is different from an offense defined by another. Thus, even if Denezpi is right that the Federal Government prosecuted his tribal offense, the Clause did not bar the Federal Government from prosecuting him under the Major Crimes Act too.

Denezpi, 142 S. Ct. at 1845-46.

Justice Gorsuch, joined by Justices Sotomayor and Kagan, dissented, primarily on the ground that they object to the Supreme Court's dual-sovereignty exception to the Double Jeopardy Clause. However, they also point out that the history of CFR Courts, which is a complicated one at the very least, supported their view that those courts are fundamentally federal:

> Federal prosecutors tried Merle Denezpi twice for the same crime. First, they charged him with violating a federal regulation. Then, they charged him with violating an overlapping federal statute. Same defendant, same crime, same prosecuting authority. Yet according to the Court, the Double Jeopardy Clause has nothing to say about this case. How can that be? To justify its conclusion, the Court invokes the dual-sovereignty doctrine. For reasons I have offered previously, I believe that doctrine is at odds with the text and original meaning of the Constitution. See Gamble v. United States, 587 U. S. ——, ——, 139 S.Ct. 1960, 1996, 204 L.Ed.2d 322 (2019) (dissenting opinion). But even taking it at face value, the doctrine cannot sustain the Court's conclusion.
>
> * * *
>
> To appreciate why, some background about the Court of Indian Offenses helps. Unlike a tribal court operated by a Native American Tribe pursuant to its inherent sovereign authority, the Court of Indian Offenses is "part of the Federal Government." 58 Fed. Reg. 54407 (1993). Really, it is a creature of the Department

of the *1850 Interior. Secretary H. M. Teller opened the court by administrative decree in 1883. As he put it, the court was designed to "civilize the Indians" by forcing them to "desist from the savage and barbarous practices ... calculated to continue them in savagery." 1 Report of the Secretary of the Interior X (June 30, 1883). Apparently, the Secretary and his contemporaries worried that too many Tribes were under "the influence of medicine men" and "without law of any kind," and they thought the Interior Department needed to take a strong hand to impose "some rule of government on the reservations." Id., at X–XI.

Toward these ends, the Secretary instructed the Commissioner of Indian Affairs to promulgate "certain rules" to establish a new "tribunal" and to define new "offenses of which it was to take cognizance." Id., at XII. The resulting "court" was composed of magistrates appointed by the Department who could "read and write English readily, w[ore] citizens' dress, and engage[d] in civilized pursuits." Report of the Commissioner of Indian Affairs 28 (1892) (1892 Report). The Department likewise appointed officers charged with investigating the crimes it created. Federal Office of Child Support Enforcement, IM–07–03, Tribal and State Jurisdiction To Establish and Enforce Child Support 10 (2007). And the regulatory criminal code the Department produced outlawed everything from "old heathenish dances" and "medicine men" and their "conjurers' arts" to certain Indian mourning practices. Rules Governing the Court of Indian Offenses 3–7 (1883) (1883 Rules). The Department's new criminal code also assimilated "the laws of the State or Territory within which the reservation may be located," and instructed that sentences for assimilated offenses should match those imposed by state or territorial law. 1892 Report 30. Unsurprisingly, tribal members often regarded these courts as "foreign" and "hated" institutions. V. Deloria & C. Lytle, American Indians, American Justice 115–116 (1983).

Over time, as the federal government's attitude toward Native American traditions changed, the Department adjusted certain aspects of its regime. Now, some of the old federal offenses aimed at punishing tribal customs are gone. But the regulations still list many crimes created by federal agency officials. 25 C.F.R. §§ 11.400–11.454 (2021). And the regulations continue to assimilate other crimes too. Instead of assimilating state and territorial crimes, federal regulations today assimilate tribal crimes. They do so, however, only if and to the extent those tribal crimes are "approved by the Assistant Secretary [of] Indian Affairs or his or her designee." § 11.449. As before, any federal punishment for assimilated offenses may not exceed the sentence provided for by the assimilated (here, tribal) law. Ibid. Even today, prosecutors continue to be hired and controlled by the Department unless a Tribe opts out of that arrangement. § 11.204. Likewise, the Department retains full authority to "appoint a magistrate without the need for confirmation by

the Tribal governing body." 85 Fed. Reg. 10714 (2020). And the Department retains the power to remove these adjudicators. See 25 C.F.R. § 11.202.

* * *

By anyone's account, the Court of Indian Offenses is a curious regime. When instructing agency officials to create the Court of Indian Offenses, neither Secretary Teller nor anyone else pointed to any Act of Congress authorizing the project. On the contrary, from the beginning, federal officials recognized that these " 'so-called courts' " rested on a "shaky legal foundation." W. Hagan, Indian Police and Judges: Experiments in Acculturation and Control 110 (1966). Even more than that, one might wonder how an executive agency can claim the exclusive power to define, prosecute, and judge crimes—three distinct functions the Constitution normally reserves for three separate branches. See, e.g., United States v. Brown, 381 U.S. 437, 442–443, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965). In these proceedings, however, Mr. Denezpi has not questioned whether the Court of Indian Offenses is statutorily authorized. Nor has he questioned whether the Constitution permits executive officials rather than a judge and jury to try him for crimes. Accordingly, those questions—long lingering and incredibly still unanswered—remain for another day.

* * *

Historical context further indicates that Mr. Denezpi was prosecuted for a federal regulatory crime. As we have seen, the Department of the Interior created the Court of Indian Offenses. And the Department wrote its own criminal code for enforcement in the court. Initially, that code included freestanding federal crimes outlawing everything from "heathenish dances" to "conjurers' arts." 1883 Rules 3–7. Other early regulations assimilated certain state and territorial laws into federal law and defined the punishment for these crimes by reference to these local laws. See Part I–A, supra. As we have seen, too, federal authorities have exercised the power to revise their code from time to time. They have eliminated some offenses and created others. They have chosen to end the assimilation of state and territorial offenses and incorporate instead certain "approved" tribal offenses. Unless it should break some promise made to a particular Tribe, federal authorities could close the whole operation tomorrow just as they chose to open it in the first place.

Denezpi, 142 S. Ct. at 1849-50, 1851, 1853.

Whether the CFR Courts are actually valid courts at all, a question not raised in this case, seems to be an interesting question for the dissenters. Perhaps at another time there will be a vehicle for that challenge.

SECTION C.

THE CONTEMPORARY SCOPE OF TRIBAL SOVEREIGNTY UNDER THE INDIAN CIVIL RIGHTS ACT

Add to the end note 3 on pages 462-63:

4. In *Lewis v. Clarke*, 137 S. Ct. 1285 (2017), the Supreme Court held that state law claims brought against tribal employees in their individual or personal capacities are not barred by tribal sovereign immunity. The case involved an accident allegedly caused by a limousine driver employed by the Mohegan Tribe. The driver was on the clock for the tribe at the time. The accident occurred on non-Indian lands. The plaintiffs brought suit in state court for state law tort more than one year after the accident. The Mohegan Tribe had waived its immunity for such claims in tribal court, with a one year statute of limitations and a damages cap more limited than that under Connecticut law.

The first critical holding in the decision was that individual capacity suits against tribal employees do not implicate tribal sovereignty:

> This is a negligence action arising from a tort committed by Clarke on an interstate highway within the State of Connecticut. The suit is brought against a tribal employee operating a vehicle within the scope of his employment but on state lands, and the judgment will not operate against the Tribe. This is not a suit against Clarke in his official capacity. It is simply a suit against Clarke to recover for his personal actions, which "will not require action by the sovereign or disturb the sovereign's property." *Larson v. Domestic and Foreign Commerce Corp*., 337 U.S. 682, 687, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949). We are cognizant of the Supreme Court of Connecticut's concern that plaintiffs not circumvent tribal sovereign immunity. But here, that immunity is simply not in play. Clarke, not the Gaming Authority, is the real party in interest.

Id. at 1292.

The tribe fervently argued that tribal sovereignty actually *is* implicated when tribal employees are sued for money damages for actions they take on company time. The Mohegan Tribe had adopted a law that it would indemnify any tribal employee for damages awarded against the employee for actions taken during that employment. The Court rejected that claim, holding that the tribe's laws did not affect the underlying individual capacity doctrine:

> Here, the Connecticut courts exercise no jurisdiction over the Tribe or the Gaming Authority, and their judgments will not bind the Tribe or its instrumentalities in any way. The Tribe's indemnification provision does not somehow convert the suit against Clarke into a suit against the sovereign; when Clarke is sued in his individual capacity, he is held responsible only for his individual wrongdoing. Moreover, indemnification is not a certainty here. Clarke will not be indemnified by the Gaming Authority should it determine that he engaged in "wanton, reckless, or malicious" activity. Mohegan Tribe Code § 4–52. That determination is not necessary to the disposition of the Lewises' suit against Clarke in the Connecticut state courts, which is a separate legal matter.

Id. at 1294. The Court did state that tribal employees may still be cloaked in sovereign immunity when they act in an official capacity, the same as federal and state employees. Id. at 1295 ("In sum, although tribal sovereign immunity is implicated when the suit is brought against individual officers in their official capacities, it is simply not present when the claim is made against those employees in their individual capacities.").

Whether a tribal employee is acting within the scope of official authority rather than in an individual capacity apparently will now be left to federal and state courts.* The precursor to Lewis was the Ninth Circuit's decision in *Maxwell v. County of San Diego* (page 471). There, the court held that individual capacity suits against tribally employed emergency responders could proceed, even where the responders arrived on the scene in accordance with an intergovernmental public safety agreement. The affected tribe vigorously argued that their employees' exposure to liability could undermine recently established Indian country governance relationships, but to no avail.

The initial area in which tribal exposure to liability may be expanded under *Lewis* is in state courts. Indian tribes that had been able to limit damages and time frames, and govern the venue, for even off-reservation torts and other possible damages claims through tort claims ordinances may face state courts suits. State tort law is, unlike most other areas of the common law, fairly local. Some states have restrictive liability exposure and others more expansive. Tribes, who have no say in state tort laws whatsoever, may be forced into state tort regimes against their will when they choose to indemnify their employees. *Lewis* could also give plaintiffs two cracks at deep pockets, meaning that a plaintiff might suit both the tribe under a tort claims ordinance and the tribal employee in state court. Tribes may reconsider their tort claims ordinances, a potentially very regressive move under established nation-building theory. Tribes that have purchased liability insurance with the parameters set by their tort claims ordinances may be forced to renegotiate with their insurer.

---

* The following is excerpted from Matthew L.M. Fletcher, A Look at the Impact of Lewis v. Clarke Thus Far," Law360.com, May 16, 2017, *available at* https://www.law360.com/nativeamerican/articles/924746/a-look-at-the-impact-of-lewis-v-clarke-thus-far.

Lewis involved an off-reservation incident, but the court's reasoning does not limit individual liability suits to off-reservation actions. For reservations in Public Law 280-type states, which constitute about 70 percent of all reservations, that might not be significant expansion, as every tort claim against a tribal employee could be brought in state court. But for the remaining tribes, precedents like *Williams v. Lee* (see page 418) generally bar state court jurisdiction over civil suits brought against Indians or tribes arising in Indian country. Or do they, post-Lewis? Indian tribes may soon be defending a rise in individual capacity suits against nonmember tribal employees.

The next area of potential new exposure is in the area of official capacity actions. State and federal officials are governed by official immunity and qualified official immunity doctrines. Whether tribal officials have the same protections remains open after the Lewis decision. Imagine a heated tribal council meeting where one elected official makes a statement that potential defames another elected official. An analogous case is currently pending in the California Court of Appeals based on *Maxwell*. Before Lewis, the tribal elected official who made the statement could assert the general federal Indian law principle that state and federal courts have no jurisdiction over the internal affairs of the tribal government. A federal or state official making the same statement likely would be governed by official immunity. But, potentially, the federal Indian law bar might dissipate in an individual capacity suit because the tribe's interests are not the same as an individual's interest.

5. In *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018), the Supreme Court vacated a Washington Supreme Court decision interpreting *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992), to mean that Indian tribes do not possess immunity from *in rem* suits. In *Upper Skagit*, the tribe had purchased fee land upon which ancestors who had died from smallpox were buried "with an eye to asking the federal government to take the land into trust and add it to the existing reservation next door." *Id*. at 1652. Upon completing a survey of the boundaries, the tribe discovered that a barbed wire fence owned by its neighbors, the Lundgrens, crossed into its territory and informed the Lundgrens of its intent to tear down the fence. The Lundgrens brought a quiet title action.

The Supreme Court, in Justice Gorsuch's first Indian law opinion, remanded the case back to the Washington Supreme Court to address the so-called "immovable property" exception to sovereign immunity:

> At common law, [the Lundgrens] say, sovereigns enjoyed no immunity from actions involving immovable property located in the territory of another sovereign. As our cases have put it, "[a] prince, by acquiring private property in a foreign country, ... may be considered as so far laying down the prince, and assuming the character of a private individual." Schooner Exchange v. McFaddon, 7 Cranch 116, 145, 3 L.Ed. 287 (1812). Relying on this line of reasoning, the Lundgrens argue, the Tribe cannot assert sovereign immunity because this suit relates to immovable

property located in the State of Washington that the Tribe purchased in the "the character of a private individual."

The Tribe and the federal government disagree. They note that immunity doctrines lifted from other contexts do not always neatly apply to Indian tribes. See Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc., 523 U.S. 751, 756 * * * (1998) ("[T]he immunity possessed by Indian tribes is not coextensive with that of the States"). And since the founding, they say, the political branches rather than judges have held primary responsibility for determining when foreign sovereigns may be sued for their activities in this country. * * *

We leave it to the Washington Supreme Court to address these arguments in the first instance. * * * Determining the limits on the sovereign immunity held by Indian tribes is a grave question; the answer will affect all tribes, not just the one before us; and the alternative argument for affirmance did not emerge until late in this case. In fact, it appeared only when the United States filed an amicus brief in this case—after briefing on certiorari, after the Tribe filed its opening brief, and after the Tribe's other amici had their say. * * *

The dissent is displeased with our decision on this score, but a contradiction lies at the heart of its critique. First, the dissent assures us that the immovable property exception applies with irresistible force—nothing more than a matter of "hornbook law." Post, at 1657 – 1661 (opinion of THOMAS, J.). But then, the dissent claims that allowing the Washington Supreme Court to address that exception is a "grave" decision that "casts uncertainty" over the law and leaves lower courts with insufficient "guidance." Post, at 1657, 1662 – 1663. Both cannot be true. If the immovable property exception presents such an easy question, then it's hard to see what terrible things could happen if we allow the Washington Supreme Court to answer it. Surely our state court colleagues are no less versed than we in "hornbook law," and we are confident they can and will faithfully apply it. And what if, instead, the question turns out to be more complicated than the dissent promises? In that case the virtues of inviting full adversarial testing will have proved themselves once again. Either way, we remain sanguine about the consequences.

Id. at 1653-54.

Since the Court's decision in *Upper Skagit*, lower courts have held that tribal immunity bars quiet title actions and municipal foreclosure proceedings related to lands owned by tribes in fee. *E.g.*, *Cayuga Indian Nation of N.Y. v. Seneca County, N.Y.*, 978 F.3d 829 (2d Cir. 2020), cert. denied, 141 S.Ct. 2722 (2021); *Self v. Cher-Ae Heights Indian Community of Trinidad Rancheria*, 274 Cal.Rptr.3d 255 (Cal. Ct. App. 2021).

Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin

United States Supreme Court, 2023

599 U.S. __; 143 S.Ct. 1689

Justice JACKSON delivered the opinion of the Court.

The Bankruptcy Code expressly abrogates the sovereign immunity of "governmental unit[s]" for specified purposes. 11 U. S. C. §106(a). The question presented in this case is whether that express abrogation extends to federally recognized Indian tribes. Under our precedents, we will not find an abrogation of tribal sovereign immunity unless Congress has conveyed its intent to abrogate in unequivocal terms. That is a high bar. But for the reasons explained below, we find it has been satisfied here.

I

Petitioner Lac du Flambeau Band of Lake Superior Chippewa Indians (the Band) is a federally recognized Tribe that wholly owns several business entities. In 2019, one of the Band's businesses, Lendgreen, allowed respondent Brian Coughlin to borrow $1,100 in the form of a high-interest, short-term loan. But Coughlin filed for Chapter 13 bankruptcy before he fully repaid the loan. Under the Bankruptcy Code, Coughlin's filing of the bankruptcy petition triggered an automatic stay against further collection efforts by creditors, including Lendgreen. See §362(a). Yet, according to Coughlin, Lendgreen continued its efforts to collect on his debt, even after it was reminded of the pending bankruptcy petition. Coughlin alleges that Lendgreen was so aggressive in its efforts to contact him and collect the money that he suffered substantial emotional distress, and at one point, even attempted to take his own life.

* * *

I

A

Two provisions of the Bankruptcy Code lie at the crux of this case. The first—11 U. S. C. §106(a)—abrogates the sovereign immunity of "governmental unit[s]." It provides: "Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section." Section 106(a) goes on to enumerate a

list of Code provisions to which the abrogation applies, including the provision governing automatic stays.

The second relevant provision is §101(27). That provision defines "governmental unit" for purposes of the Code. It states that that term

> "means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government."

The central question before us is whether the abrogation provision in §106(a) and the definition of "governmental unit" in §101(27), taken together, unambiguously abrogate the sovereign immunity of federally recognized tribes.

* * *

III

We conclude that the Bankruptcy Code unequivocally abrogates the sovereign immunity of any and every government that possesses the power to assert such immunity. Federally recognized tribes undeniably fit that description; therefore, the Code's abrogation provision plainly applies to them as well.

A

Several features of the provisions' text and structure compel this conclusion. As an initial matter, the definition of "governmental unit" exudes comprehensiveness from beginning to end. Congress has rattled off a long list of governments that vary in geographic location, size, and nature. §101(27) (including municipalities, districts, Territories, Commonwealths, States, the United States, and foreign states). The provision then proceeds to capture subdivisions and components of every government within that list. Ibid. (accounting for any "department, agency, or instrumentality of the United States . . . , a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state"). And it concludes with a broad catchall phrase, sweeping in "other foreign or domestic government[s]." Ibid.

* * *

The catchall phrase Congress used in §101(27) is also notable in and of itself. Few phrases in the English language express all-inclusiveness more than the pairing of two extremes. "Rain or shine" is a classic example: If an event is scheduled to occur rain or shine, it will take place whatever the weather that day might be. Same with the phrase "near and far": If people are

traveling from near and far, they are coming from all over the map, regardless of the particular distance from point A to point B.

The pairing of "foreign" with "domestic" is of a piece with those other common expressions. For instance, if someone asks you to identify car manufacturers, "foreign or domestic," your task is to name any and all manufacturers that come to mind, without particular regard to where exactly the cars are made or the location of the companies' headquarters. Similarly, at the start of each Congress, a cadre of newly elected officials "'solemnly swear' " to "'support and defend the Constitution of the United States against all enemies, foreign and domestic.'" 5 U. S. C. §3331. That oath—which each Member of Congress who enacted the Bankruptcy Code took—indisputably pertains to enemies anywhere in the world. Accordingly, we find that, by coupling foreign and domestic together, and placing the pair at the end of an extensive list, Congress unmistakably intended to cover all governments in §101(27)'s definition, whatever their location, nature, or type.

It is also significant that the abrogation of sovereign immunity in §106(a) plainly applies to all "governmental unit[s]" as defined by §101(27). Congress did not cherry pick certain governments from §101(27)'s capacious list and only abrogate immunity with respect to those it had so selected. Nor did Congress suggest that, for purposes of §106(a)'s abrogation of sovereign immunity, some types of governments should be treated differently than others. Instead, Congress categorically abrogated the sovereign immunity of any governmental unit that might attempt to assert it.

B

* * *

Reading the statute to carve out a subset of governments from the definition of "governmental unit," as petitioners' view of the statute would require, risks upending the policy choices that the Code embodies in this regard. That is, despite the fact that the Code generally subjects all creditors (including governmental units) to certain overarching requirements, under petitioners' reading, some government creditors would be immune from key enforcement proceedings while others would face penalties for their noncompliance. And while the Code is finely tuned to accommodate essential governmental functions (like tax administration and regulation) as a general matter, petitioners would have us find that certain governments are excluded from those provisions' reach, notwithstanding the fact that they engage in tax and regulatory activities too. There is no indication that Congress meant to categorically exclude certain governments from these provisions' enforcement mechanisms and exceptions, let alone in such an anomalous manner. Cf. Law v. Siegel, 571 U. S. 415, 424 (2014) (declining to read into the Code an exception Congress did not include in its "meticulous" and "carefully calibrated" scheme).

C

Our conclusion that all government creditors are subject to abrogation under §106(a) brings one remaining question to the fore—whether federally recognized tribes qualify as governments. Petitioners do not seriously dispute that federally recognized tribes are governments, and for good reason. Federally recognized tribes exercise uniquely governmental functions: "They have power to make their own substantive law in internal matters, and to enforce that law in their own forums." Santa Clara Pueblo, 436 U. S., at 55–56 (citations omitted). They can also "tax activities on the reservation." Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U. S. 316, 327 (2008).

It is thus no surprise that Congress has repeatedly characterized tribes as governments. And this Court has long recognized tribes' governmental status as well. See, e.g., Bay Mills, 572 U. S., at 788–789; Santa Clara Pueblo, 436 U. S., at 57–58. We have done so generally and also in the specific context of tribal sovereign immunity. Tribal sovereign immunity, "we have explained, is 'a necessary corollary to Indian sovereignty and self-governance.'" Bay Mills, 572 U. S., at 788; see also id., at 789 (discussing immunity as an example of tribes' "governmental powers and attributes").

Putting the pieces together, our analysis of the question whether the Code abrogates the sovereign immunity of federally recognized tribes is remarkably straightforward. The Code unequivocally abrogates the sovereign immunity of all governments, categorically. Tribes are indisputably governments. Therefore, §106(a) unmistakably abrogates their sovereign immunity too.

IV

Petitioners raise two main arguments in an attempt to sow doubt into these clear statutory provisions. Neither creates the ambiguity petitioners seek.

A

For their opening salvo, petitioners try to make hay out of the simple fact that neither §101(27) nor §106(a) mentions Indian tribes by name. Had Congress wanted to abrogate tribal sovereign immunity, petitioners claim, the most natural and obvious way to have expressed that intent would have been to reference Indian tribes specifically, rather than smuggle them into a broadly worded catchall phrase.

But, as explained at the outset, supra, at 4, the clear statement rule is not a magic-words requirement. Thus, Congress did not have to include a specific reference to federally recognized tribes in order to make clear that it intended for tribes to be covered by the abrogation provision. As long as Congress speaks unequivocally, it passes the clear-statement test—regardless of whether it articulated its intent in the most straightforward way. Cooper, 566 U. S., at 291.

Trying a different tack, petitioners point to historical practice. In statute after statute, they say, Congress has specifically mentioned Indian tribes when abrogating their sovereign immunity. And in no case has this Court ever found an abrogation of tribal sovereign immunity where the statute did not reference Indian tribes explicitly. See Brief for Petitioners 24–26.

These statistics sound quite noteworthy at first glance. But they do not move the needle in this case. For one thing, none of petitioners' cited examples involved a statutory provision that was worded analogously to, and structured like, the ones at issue here. Moreover, the universe of cases in which we have addressed federal statutes abrogating tribal sovereign immunity is exceedingly slim.

In any event, the fact that Congress has referenced tribes specifically in some statutes abrogating tribal sovereign immunity does not foreclose it from using different language to accomplish that same goal in other statutory contexts. Even petitioners appear to concede this basic point. They agree that Congress could have used a phrase like "every government" or "any government with sovereign immunity" to express unambiguously the requisite intent to abrogate the sovereign immunity of tribes. Id., at 27 (internal quotation marks omitted). For the reasons discussed above, we believe Congress did just that.

B

Petitioners further contend that even if the relevant provisions could theoretically cover tribes, the statute can plausibly be read in a way that preserves their immunity.

1

According to petitioners, the catchall phrase "other foreign or domestic government" might simply capture entities created through "interstate compacts," which cannot neatly be characterized as a State or an instrumentality of a State under §101(27)'s enumerated list. Id., at 40–41 (internal quotation marks omitted). Interpreted in that fashion, petitioners maintain, the catchall phrase would exclude governmental entities that are not purely foreign or purely domestic—like tribes or the International Monetary Fund (IMF). Tr. of Oral Arg. 8–9.

If this interpretation of the statute sounds far-fetched, that is because it is. To find petitioners' construction plausible, we would have to interpret "other foreign or domestic government" to impose a rigid division between foreign governments on the one hand and domestic governments on the other, leaving out any governmental entity that may have both foreign and domestic characteristics (like tribes or the IMF). But Congress has expressly instructed that the word "or," as used in the Code, "is not exclusive." 11 U. S. C. §102(5). As a result, we

have serious doubts that Congress meant for §101(27) to elicit the laser focus on "or" that petitioners' reading of "foreign or domestic" would entail.[7]

The dissent's own arguments undermine any suggestion that Congress adopted such a siloed view. For instance, the dissent repeatedly paints tribes as occupying a hybrid position between foreign and domestic, post, at 6, 8–9 (opinion of GORSUCH, J.), and posits that Territories historically share this hybrid status as well, post, at 10 (describing Territories as tribes' "close comparator"). Yet, as the dissent readily acknowledges, Congress expressly included Territories within §101(27)'s definition of "governmental unit." If, on the dissent's own account, Territories are "neither foreign nor domestic," ibid.—and fall within §101(27)'s purview nevertheless—it is hard to see how §101(27)'s catchall phrase would simultaneously exclude other entities that share that same feature. §101(27) ("'governmental unit' means United States; State; . . . Territory; . . . foreign state; or other foreign or domestic government" (emphasis added)).

In any case, neither petitioners nor the dissent explain why the Code would draw such a line in the sand. None of the carefully calibrated exceptions noted in Part III–B, supra, for governmental units performing regulatory and tax related functions turn on whether a government is purely foreign or domestic. Likewise, it is hard to see why the Code would subject purely foreign or domestic governments to enforcement proceedings while at the same time immunizing government creditors that have both foreign and domestic attributes. Considering that the one thing *every* entity in §101(27)'s enumerated list has in common is its governmental nature—and that is the same characteristic that matters when the Code addresses "governmental unit[s]" from one provision to the next—we are highly skeptical that Congress distinguished between governments in the way petitioners suggest.

* * *

We find that the First Circuit correctly concluded that the Bankruptcy Code unambiguously abrogates tribal sovereign immunity. Therefore, the decision below is affirmed.

Concurring opinion of Justice Thomas omitted.

---

[7] Our dissenting colleague puts forth two hypotheticals that supposedly cast doubt on this conclusion. See post, at 13–14 (opinion of GORSUCH, J.). The first involves choosing a pet that is " 'small or a dog,' " while the second concerns an offer to have "chocolate or vanilla" ice cream. Ibid. But these hypotheticals are not remotely analogous to "foreign or domestic." For one thing, the terms "foreign" and "domestic" are two poles on a spectrum. See supra, at 5–6. Neither "small" and "dog" nor "chocolate" and "vanilla" fit that bill. For another, whereas the pairing of "foreign" and "domestic" often covers the waterfront, see supra, at 6, the dissent's hypothetical pairings do not have that same effect. And unlike animals (which need not be small or doglike) or ice creams (which need not be chocolate or vanilla), every government must be foreign or domestic to some degree; the question is just where on the spectrum it falls. See post, at 6 (observing that the Constitution "appear[s] to 'place Indian [T]ribes in an intermediate category between foreign and domestic states' "); post, at 8 (tribes occupy a " 'hybrid position' between 'foreign and domestic states' ").

Justice GORSUCH dissenting.

* * *

II

The Bankruptcy Code stipulates that, "notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section." §106(a). That language, this Court has previously held, signals a clear intent to abrogate sovereign immunity. See Central Va. Community College v. Katz, 546 U. S. 356, 379 (2006). But as to which sovereigns? The answer to that question lies elsewhere in the Bankruptcy Code. "The term 'governmental unit,'" it says, "means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government." §101(27).

That is a lot of words. For present purposes, however, only the last five matter: "other foreign or domestic government." No one argues any of the other clauses could potentially refer to Tribes. We can further winnow down the options from there. No one thinks Tribes qualify as "foreign . . . government[s]." That leaves only two possibilities. Tribes could qualify as "'domestic governments'"— respondent's lead argument. Tr. of Oral Arg. 41. Or the phrase "other foreign or domestic government," read as a whole, could mean "any and every government"— respondent's backup argument and the one the Court adopts today. Ante, at 4. Neither possibility is the slam dunk our familiar clear-statement rule requires. Consider each in turn.

A

Start with the "domestic government" possibility. At the time Congress adopted the provisions of the Bankruptcy Code at issue before us, the word "domestic" carried only two potentially relevant meanings. It could mean spatially domestic—i.e., within the territorial confines of the United States. Or it could mean politically domestic—i.e., a subpart of the United States. Contemporary definitions support each of those possibilities and only those possibilities. See, e.g., Random House Dictionary of the English Language 581 (2d ed. 1987) ("of or pertaining to one's own or a particular country as apart from other countries"); American Heritage Dictionary 416 (2d College ed. 1982) ("[o]f or pertaining to a country's internal affairs").

If we were to read the term only in its spatial sense, as the First Circuit did below and respondent urges us to do, it makes some sense to speak of Tribes as "domestic." See In re Coughlin, 33 F. 4th 600, 606 (2022). These days, tribal jurisdiction usually falls within the United States' territorial bounds—although that was not true for most of the Nation's history, and became

so only after the West was won. M. Fletcher, Tribal Consent, 8 Stan. J. Civ. Rights & Civ. Lib. 45, 55, n. 63 (2012). Of course, usually does not mean always. Even to this day, all three branches of government struggle to address the status of Tribes that straddle our Nation's borders. See, e.g., 8 U. S. C. §1359 (setting special immigration rules for "American Indians born in Canada"); 22 CFR §42.1(f) (2022) (similar); Matter of Yellowquill, 16 I. & N. Dec. 576, 577–578 (BIA 1978) (interpreting other provisions to not apply to Canada-born "American" Indians); Akins v. Saxbe, 380 F. Supp. 1210, 1218–1222 (Me. 1974) (similar). Evidently, our neighbor to the north has encountered similar difficulties. See R. v. Desautel, 2021 SCC 17 (analyzing traditional cross-border hunting rights).

Focusing only on the spatial meaning of "domestic," however, would miss an obvious point. When it comes to the status of governments, this Court has long recognized that geography takes a backseat. Whether a government qualifies as "domestic" instead usually depends on "the political relation in which one government or country stands to another"; the term has "no relation to local, geographical, or territorial position." Cherokee Nation v. Georgia, 5 Pet. 1, 55 (1831) (Thompson, J., dissenting); see also id., at 16–20 (Marshall, C. J., for the Court). At minimum, this line of thinking leaves open a reasonable possibility that Congress in §101(27) meant the term "domestic" in its political (not geographic) sense. Accordingly, for respondent's primary argument to succeed, he must show that the political relationship between Indian Tribes and the United States is such that the term "domestic government" *clearly* covers them.

That is a burden respondent cannot carry. Properly understood, Indian Tribes "occupy a unique status" that is neither politically foreign nor domestic. National Farmers Union Ins. Cos. v. Crow Tribe, 471 U. S. 845, 851 (1985). Significant evidence supports this understanding. Start with the text of the Constitution. Its terms appear to "place Indian [T]ribes in an intermediate category between foreign and domestic states." Z. Price, Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction, 113 Colum. L. Rev. 657, 670 (2013) (Price). At least two provisions illustrate as much. One is the Commerce Clause, which gives Congress the power to regulate "Commerce" "with foreign Nations," "among the several States," and "with the Indian Tribes." Art. I, §8, cl. 3. The inclusion of that third Commerce Clause power suggests that Tribes were not reachable either by Congress's foreign commerce power or by its domestic (interstate) commerce power. More obscure but no less probative is the Constitution's exemption from the apportionment formula of all "Indians not taxed." Art. I, §2, cl. 3; Amdt. 14, §2. That choice recognizes that Tribes are not fully "domestic" to the United States, and instead stand "separate from the polity." Price 670.

* * *

This Court's later decisions only give further reason to doubt that Tribes are clearly "domestic government[s]." No less than this Court's first case analyzing tribal sovereign immunity, Parks v. Ross, rested on the view that each Tribe remains "in many respects" (but not all) "a foreign and independent nation." 11 How., at 374 (emphasis added); see Wood 1640

(describing Parks as "the first case of record involving tribal immunity"). That language not only weighs against treating Tribes as domestic governments. It does so in precisely the context at issue here—sovereign immunity. If we can assume that Congress "is aware of this Court's relevant precedents," the notion that the Bankruptcy Code abrogates tribal sovereign immunity is sunk. Ysleta del Sur Pueblo v. Texas, 596 U. S. ___, ___ (2022) (slip op., at 13). That seems like an especially safe assumption here, given that Congress adopted its most recent version of §106 after this Court—twice—held that the provision failed our clear-statement rule as to other sovereigns. See United States v. Nordic Village, Inc., 503 U. S. 30, 33–39 (1992); Hoffman v. Connecticut Dept. of Income Maintenance, 492 U. S. 96, 98–104 (1989) (plurality opinion). That the respondent in this case nowhere discussed Parks in his briefing (and had nothing to say about it at argument, see Tr. of Oral Arg. 43) speaks volumes.

* * *

B

Taking the "domestic government" possibility off the table leaves only one other. Respondent falls back on the idea that "foreign or domestic" is really just shorthand for "every government under the Sun." The Court relies solely on this reading, holding that §102(27) "unequivocally abrogates the sovereign immunity of any and every government that possesses the power to assert such immunity." Ante, at 4. Getting to that conclusion from the statutory text requires two interpretive moves. First, the reader must treat the words "foreign or domestic" as a single, undifferentiated clause (rather than as a disjunctive grouping of descriptors). Second, the reader must take that undifferentiated clause to mean "anywhere and everywhere." Each move is plausible; neither is "clear." And a problem with either is game over.

Start with the first move. Respondent would have us read "foreign or domestic" as a unitary clause expressing a single, shared idea. This is what linguists might call a hendiadys—"two terms separated by a conjunction [that] work together as a single complex expression." S. Bray, "Necessary and Proper" and "Cruel and Unusual": Hendiadys in the Constitution, 102 Va. L. Rev. 687, 688 (2016). On occasion, English employs that sort of construct. But those occasions are the exceptions, not the rule. Nor is it clear that is what we have here. As even respondent concedes, "or" in "its ordinary use" instead indicates that "'the words it connects are to "be given separate meanings."'" Brief for Respondent 23 (quoting United States v. Woods, 571 U. S. 31, 45–46 (2013)). A perfectly natural reading, then, would ask whether Tribes clearly qualify as "foreign . . . government[s]" or as "domestic government[s]." And because the answer is "no" on both scores (for the reasons already laid out above) the language flunks the clear-statement rule.

The second move has issues too. The case for treating "foreign or domestic government" as synonymous with "any government anywhere" rests on the premise that the terms are "two extremes," so that—by invoking both—Congress meant to cover every part of an all-inclusive spectrum. Ante, at 5. The Court analogizes to the phrase "near and far," which it argues sometimes

means "all over the map." Ante, at 5–6. But the premise here is faulty and the analogy inapt. "Near" and "far" may well be "two extremes"—one would not speak of a location being both near and far at the same time, for example. When it comes to sovereigns, however, the terms "foreign" and "domestic" do not share that same quality. Rather, as we have seen, an extensive tradition supports treating certain sovereigns—Tribes among them—as sui generis entities falling outside the foreign/domestic dichotomy. That tradition is fatal under the clear statement rule.

How does respondent contend with this problem? At argument, he retreated from his briefing and relied instead on a provision of the Bankruptcy Code stating that, for purposes of that Code, "'or' is not exclusive." Tr. of Oral Arg. 41 (citing §102(5)). From this, respondent reasoned, the Bankruptcy Code abrogates tribal immunity because everyone can agree at least that Tribes bear some qualities of both foreign and domestic governments.

The provision respondent cites simply does not do what he seems to think it does. In common usage, the term "or" can carry two meanings. The first is exclusive. It requires full satisfaction of one—and exactly one—listed condition. The second is inclusive. It requires full satisfaction of at least one listed condition. All §102(5) does is favor the latter meaning for purposes of the Bankruptcy Code. Sound complicated? Just look at an example. Suppose you tell your child that he can get a pet so long as it is "small or a dog." The child can choose a small animal (like a hamster) or a large dog (like a mastiff). But can the child also choose a small dog? If the "or" is inclusive (as respondent argues it is here), the answer is "yes." If it is exclusive, the answer is "no." Critically, however, neither reading covers a medium-sized aardvark. Such an animal may be somewhat small and somewhat doglike, but two near misses do not add up to a hit. This is a simple point but an important one. Regardless of whether "or" is used inclusively or exclusively, one of the input conditions must be satisfied. With this point in mind, respondent's reading collapses. To see why, consider another example. Suppose you are a houseguest, and your host invites you to "help yourself to the chocolate or vanilla ice cream in the freezer." Upon opening the freezer, you find three tubs—vanilla, chocolate, and Neapolitan. For argument's sake, too, let's say the last tub also has a sticky note: "Do not eat without clear permission." Which ice cream can you take? If the host meant "or" exclusively, you may take either chocolate or vanilla, not both. If the host meant it inclusively, you may scoop some of each. In neither event, however, would you have permission to take the Neapolitan ice cream—especially given the cautionary note. As a unique composite, it does not clearly satisfy either of the necessary conditions. So too here. Tribes may have some features of both domestic and foreign governments, but they do not clearly qualify as either, and they have some features found in neither. Accordingly, §102(5) does nothing to rescue respondent's cause.

If anything, §102(5) only sheds light on what the catchall term "other foreign or domestic government" does cover. That phrase sweeps up, as Chief Judge Barron explained in dissent below, certain "otherwise excluded, half-fish, half fowl governmental entities like authorities or commissions that are created through interstate compacts" ("'other . . . domestic government[s]'") and "the joint products of international agreements" ("'other foreign . . . government[s]'"). 33 F.

4th, at 615. Without the catchall, entities of these sorts could potentially fall through the cracks. Tribes, by contrast, are among the most significant entities wielding sovereign immunity. They are a unique form of government—and they alone are nowhere mentioned.

The Court offers two responses. Above the line, it asks why Territories are encompassed within §101(27)'s immunity-abrogation provision if they share the same status of Tribes—neither foreign nor domestic. Ante, at 13. The answer, of course, is that Congress expressly listed Territories; it did not do the same for Tribes. Nor do I see how Congress's choice to include Territories supports the Court's suggestion that the term "other foreign or domestic government" clearly covers all governments. To the contrary, under the Court's interpretation of that term, the express inclusion of Territories becomes curious surplusage. And to the extent the Court thinks Congress mentioned Territories just to be doubly clear that the term "other foreign or domestic government" really does cover all governments—adopting a kind of belt-and-suspenders approach— isn't it odd that Congress left one of the most notable types of sovereigns (a key part of its "belt") at home?

Below the line, the Court simply asserts (without analysis or support) that "the terms 'foreign' and 'domestic' are two poles on a spectrum." Ante, at 12–13, n. 7. It does not grapple, however, with the many decisions of this Court discussed above that contradict that premise—and that do so in the precise context of Indian law (in general) and sovereign immunity (in particular). See supra, at 6–11. Nor does it grapple with the reality that, even if the terms were two poles on a spectrum, many Justices of this Court have suggested that Indian Tribes do not fall along that continuum at all and are instead "just what they [are], Indian [T]ribes." Cherokee Nation, 5 Pet., at 27 (Johnson, J., concurring). Others of course have disagreed. But that disagreement is no help to the Court under our clear-statement rule. It is dispositive the other way.

III

* * *

Setting aside those policy concerns leaves the Court with a methodological one. It fears adopting my approach could transmute our clear-statement rule into some sort of magic words test. Ante, at 10. I do not see how it could. Congress could identify Tribes in any number of unmistakable ways—"Indians," "Native Americans," "Indigenous Peoples," or even (as we have seen) "domestic dependent nations." Congress has had no trouble using language like that in plenty of other statutory contexts. See, e.g., 7 U. S. C. §8310; 42 U. S. C. §8802(17); 49 U. S. C. §5121(g). Alternatively, Congress could identify Tribes by description—for instance, "any other government that operates, in whole or in part, within the territorial bounds of the United States." See 33 F. 4th, at 622 (Barron, C. J., dissenting). Alternatively still, Congress could abrogate all sovereign immunity through some unequivocal statement to that effect—using, for example, the Court's own formulation, "any and every government." Ante, at 4. The only thing Congress cannot do is use "oblique or elliptical language" to "supply a clear statement." West Virginia v. EPA, 597 U. S.

___, ___ (2022) (GORSUCH, J., concurring) (slip op., at 13) (internal quotation marks and alterations omitted). Because that is—at best—what the Bankruptcy Code provides, I respectfully dissent.

NOTES

1. If the search for the original public meaning of the Constitution requires judges to become amateur historians, then it appears the textualist's search for statutory meaning requires judges to become amateur linguists. Like recent cases such as *Yellen v. Chehalis* (page 237) and *Ysleta del Sur Pueblo v. Texas* (page 194), the majority and dissenting justices here spar over phrasing and rephrasing of statutory language. Justice Gorsuch in dissent compared the relevant language here – "other foreign or domestic government," 11 U.S.C. § 101(27) – to the phrases "small or a dog" and "vanilla or chocolate" in an effort to demonstrate that § 101(27)'s catchall phrase did not grammatically capture the entire universe of "governments." Justice Jackson, in her first Indian law opinion, rejected those comparisons for the Court. She offered her own examples, "rain or shine" and "near and far," to show how the language did capture the entire universe of governments.

2. Arguably, resort to grammatical sparring did not win the day for either side. The factual optics of this case were not good for the tribe. The tribe's business, a payday lending operation, flaunted the Bankruptcy Code's automatic stay by continuing to demand payment from the debtor after the debtor filed, allegedly leading the debtor to attempt suicide. The legal optics were not great, either, in that Congress definitely intended the Bankruptcy Act to broadly abrogate governmental immunity. The automatic stay is a critical feature of modern era bankruptcy law and policy as well.

That said, Justice Gorsuch made a compelling argument that Indian tribes are just different than the rest of the governments listed. One potential issue is, now that tribal immunity in bankruptcy cases is abrogated, what does this mean for tribes who are debtors? Can a bankruptcy judge hale a tribal business into bankruptcy court, even if the tribal business is a third party to the bankruptcy action? The Bankruptcy Act grants *enormous* power to bankruptcy judges. *See* 11 U.S.C. § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.").

3. Justice Thomas again wrote separately to question fundamental principles of federal Indian law. He reiterated older arguments from prior cases like his dissent in *Michigan v. Bay Mills Indian*

Community. This time, he insisted that tribal governments do not possess sovereign immunity on the same level as states:

> The Court's tribal immunity doctrine is also out of step with more recent decisions. In Franchise Tax Bd. of Cal. v. Hyatt, 587 U. S. ___ (2019), the Court recognized that the 50 States possess a unique form of immunity that applies of its own force in the courts of sister States, id., at ___–___ (slip op., at 7–16), as well as those of the Federal Government, id., at ___ (slip op., at 12) (collecting cases). This immunity stems from the Constitution itself and belongs only to the 50 States through their ratification of the Constitution or admission to the Union on an equal footing with the original States. See Alden v. Maine, 527 U. S. 706, 713 (1999). As a result, it is distinct from common-law immunity, which depends upon the forum court's sovereign for recognition. Bay Mills, 572 U. S., at 816. By treating tribal immunity like state immunity, the Court's tribal immunity case law has afforded tribes, by judicial fiat, a form of immunity that the Constitution accords to the 50 States, and only the 50 States.

143 S. Ct. at 1703 (Thomas, J., dissenting). No one joined his separate opinion (no judge ever has in an Indian law decision), perhaps because his analysis ignores the sovereign status of tribal governments and the lengthy history of Congressional acts that legislate with tribal immunity in mind.

4. Justice Thomas also pointed out how the Court's analysis might be relevant to a question the Court has not addressed for decades, whether federal statutes of general applicability apply to Indian tribes:

> Finally, this Court's tribal immunity doctrine continues to artificially exempt tribes from generally applicable laws. I warned nearly a decade ago that tribal immunity "will continue to invite problems, including de facto deregulation of highly regulated activities; unfairness to tort victims; and increasingly fractious relations with States and individuals alike." Id., at 825, 134 S.Ct. 2024. This is a case in point. In order to avoid state payday loan regulation, "payday lenders ... often arrange to share fees or profits with tribes so they can use tribal immunity as a shield for conduct of questionable legality." Ibid. Petitioners here rely on tribal immunity to avoid not only state but also federal payday loan regulation. They further seek to leverage this immunity to pursue respondent on his debt while other creditors' collection efforts are stayed. Tribal immunity thus creates a pathway to circumvent vast swaths of both state and federal laws.

Id. Given that lower courts usually *do* hold that federal statutes of general applicability apply to Indian tribes, this is a strange policy concern. Perhaps there is chatter in the halls of the Supreme Court that some judges are interested in taking up one of those cases.

SECTION D.

NATION BUILDING NOTE:

SELF-DETERMINATION CONTRACTING

After the first full paragraph on page 465, add:

In 2024, the Supreme Court decided *Becerra v. San Carlos Apache Tribe*, 144 S. Ct. 1428 (2024). There, San Carlos Apache Tribe and the Northern Arapaho Tribe sued the federal government for millions of dollars in contract support costs arising from income generated by the tribes' billing of third parties, such as Medicare, Medicaid, and private insurers. The tribes used that income to provide services under the self-determination contract, but the Indian Health Service refused to pay contract support costs arising from those services. The Court agreed with the tribes.

The Court explained how contract support costs arise from the administration of self-determination contracts:

> It is undisputed that IHS must pay the Tribes the Secretarial amount and the contract support costs associated with spending that amount to operate the healthcare programs they assumed from IHS. It is also undisputed that the Tribes' contracts require them to collect program income and that IHS must cover the cost of collecting that income. See Brief for Petitioners 21, 38. The only question is whether IHS must also cover the contract support costs the Tribes incur when they spend program income on the healthcare programs.
>
> A
>
> The ISDA provisions that govern the amount IHS must pay as contract support costs under a self-determination contract are Sections 5325(a)(2) and (a)(3)(A) [of Title 25]. Both provisions peg the amount to the requirements of the contract. Because a self-determination contract requires a tribe to spend program income to further the programs transferred to it in the contract, these provisions require IHS to pay contract support costs when a tribe does so, just as IHS must pay contract support costs to support a tribe's spending of the Secretarial amount.
>
> Section 5325(a)(2) defines contract support costs as "consist[ing]" of "the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract."1 The touchstone for determining which "activities" must receive contract support costs is therefore "the terms of the contract." It follows that if a tribe must collect and spend program income to ensure compliance with its contract, then the reasonable administrative and overhead costs it incurs in doing so are "contract support costs" under Section 5325(a)(2).

The Tribes' contracts and ISDA plainly require them to collect program income and spend it to comply with their contracts. Each self-determination contract entered into under ISDA must contain the provisions of the "model agreement" set forth in Section 5329(c). § 5329(a)(1). The model agreement incorporates into the contract "[t]he provisions of title I of [ISDA]." § 5329(c) (model agreement § 1(a)(1)). Title I of ISDA includes Section 5325(m)(1), which requires tribes to use "program income earned ... in the course of carrying out a self-determination contract" to "further the general purposes of the contract."

The "purposes" of the contract are no mystery. The model agreement requires that each self-determination contract include a "purpose" clause listing the "functions, services, activities, and programs" to be transferred from IHS to the tribe. See § 5329(c) (model agreement § 1(a)(2)). Tribes are thus contractually required to use program income to further the functions, services, activities, and programs transferred to them in their contracts. When they do so and incur reasonable costs for required support services, those costs are "contract support costs" under Section 5325(a)(2).

In addition to satisfying the definition set forth in Section 5325(a)(2), those costs are also "eligible costs for the purposes of receiving funding" under Section 5325(a)(3)(A). That provision specifies two types of "reasonable and allowable costs" that may be reimbursed. First, "direct program expenses for the operation of the Federal program that is the subject of the contract" are covered. § 5325(a)(3)(A)(i). "Direct" contract support costs include the support expenses of particular programs, such as workers' compensation insurance for ambulance drivers or training for emergency room nurses. See § 5304(c). Second, "any additional administrative or other expense incurred by the governing body of the [tribe] and any overhead expense incurred by the tribal contractor in connection with the operation of the Federal program, function, service, or activity pursuant to the contract" are also eligible for funding. § 5325(a)(3)(A)(ii). Such "indirect" contract support costs encompass expenses that benefit multiple programs, such as auditing infrastructure, personnel systems, and legal services. See § 5304(f).

Direct contract support costs incurred when using program income are covered because the functions, services, activities, and programs that a tribe agrees to administer in IHS's stead under a self-determination contract constitute the "Federal program that is the subject of the contract." When IHS administers the Federal program for the tribe's members, it uses congressional appropriations and third-party insurance payments to do so. See 25 U.S.C. §§ 13, 1621e(a); 42 U.S.C. §§ 1395qq(a), 1396j(a). IHS must use the third-party collections to provide healthcare services. See 25 U.S.C. §§ 1621f(a)(1), 1641(c)(1)(B). So IHS's Federal program comprises congressionally funded and third-party funded healthcare.

When that program is transferred to the tribe from IHS, the tribe, rather than IHS, becomes the entity collecting program income and spending it on the Federal program. The tribe's resultant direct contract support costs are incurred "for the operation of the Federal program that is the subject of the contract." Those costs are thus eligible to receive funding under Section 5325(a)(3)(A)(i).

Indirect contract support costs that result from spending program income must be covered by IHS for the same reason. A tribe's self-determination contract requires it to spend program income on furthering the Federal programs, functions, services, or activities it assumes from IHS. §§ 5325(m)(1); 5329(c). When the tribe does so—as IHS did when it operated the program, function, service, or activity—and incurs administrative and overhead expenses, those expenses are incurred "in connection with the operation of the Federal program, function, service, or activity pursuant to the contract." Such expenses are thus eligible for reimbursement under Section 5325(a)(3)(A)(ii).

The self-determination contracts of the San Carlos Apache Tribe and the Northern Arapaho Tribe go to some length to require them to collect program income by maintaining third-party billing systems and generating maximum third-party revenues. See App. 101–102, 184–186. Once the Tribes collect third-party income, they must use it. §§ 5325(m)(1), 5329(c). The Tribes aver that they have collected and spent program income as required by their contracts to carry out the operations IHS transferred to them. Id., at 9–11, 109–115; Brief for Northern Arapaho Tribe 29 ("Northern Arapaho is prepared to prove that every penny of program income was, in fact, spent on activities enumerated in the contractual scope of work."). The reasonable direct and indirect contract support costs they incurred as a result are eligible for repayment under Section 5325(a) because they were incurred to "ensure compliance with the terms of the contract," § 5325(a)(2), and "for the operation of " and "in connection with the operation of " the "Federal program" they assumed from IHS, § 5325(a)(3)(A).

144 S. Ct. at 1440-42. The Court added that the purpose of providing contract support costs was to place tribes in parity with the Indian Health Service, which possesses the benefit of infrastructure that tribes do not always possess:

Aside from being inconsistent with the statute's text, IHS's failure to cover contract support costs for healthcare funded by program income inflicts a penalty on tribes for opting in favor of greater self-determination. Congress designed the statute to avoid such a counterproductive result.

Underlying ISDA was a congressional finding that federal domination of Indian service programs had denied tribes an effective voice in the planning and

implementation of programs responsive to the true needs of their communities. See § 5301(a)(1). Congress thus designed ISDA to promote "maximum Indian participation" in the administration of healthcare programs. § 5302(a). To that end, Congress's consistent directive to IHS is to place contracting tribes in the same financial position as IHS, so that tribes do not face a self-determination penalty when they take control of their own healthcare.

When tribes enter into self-determination contracts and assume control of IHS's programs, they receive the same amount of congressionally appropriated funds to run the programs as IHS would have. See § 5325(a)(1). Congress also allows tribes, like IHS, to fund the programs with income from third-party payers. See 42 U.S.C. §§ 1395qq(a), 1396j(a); 25 U.S.C. § 1621e(a). To be clear, IHS needs to collect these funds just to cover its obligations to tribal members. Indeed, 60 percent or more of the yearly budget of some IHS healthcare facilities relies on third-party revenues. Dept. of Health and Human Servs., Fiscal Year 2024, IHS, at CJ–193; see also IHS, Indian Health Manual § 5–1.1(B) (2024) ("[T]hird-party billing and collections have become critical activities for the IHS.... Safeguarding this revenue stream and related assets is vital to IHS health care programs."). Like IHS, tribes choosing self-determination in healthcare need to collect and spend program income if they are to maintain the same level of services they received from IHS. For that reason, Congress specifically instructed IHS that program income "shall not be a basis for reducing" a tribe's Secretarial amount. § 5325(m)(2).

Contract support costs are necessary to prevent a funding gap between tribes and IHS. By definition, these are costs that IHS does not incur when it provides healthcare services funded by congressional appropriations and third-party income. §§ 5325(a)(2)(A) and (B). But they are costs that tribes must bear when they provide, on their own, healthcare services funded by the Secretarial amount and program income. If IHS does not cover costs to support a tribe's expenditure of program income, the tribe would have to divert some program income to pay such costs, or it would have to pay them out of its own pocket. Either way, the tribe would face a systemic funding shortfall relative to IHS—a penalty for pursuing self-determination.

144 S. Ct. at 1444-45.

After the notes on page 507, add:

SECTION F.

INDIAN COUNTRY HEALTH CARE

[Review the Health Care Note from pages 431-433.]

RESTATEMENT OF THE LAW OF AMERICAN INDIANS

American Law Institute, 2022

Section 4, Reporters' Notes, at 73-74

[T]reaties provided, at least in part, for the health care of the tribe. See, for example:

• Treaty with the Makah, art. 11, Jan. 31, 1855, 12 Stat. 939 ("And the United States further agree to employ a physician to reside at the said central agency, or at such other school should one be established, who shall furnish medicine and advice to the sick, and shall vaccinate them; the expenses of the said school, shops, persons employed, and medical attendance to be defrayed by the United States and not deducted from the annuities.");

• Treaty with the Klamath, etc., art. 5, Oct. 14, 1864, 16 Stat. 707 ("The United States further engage to furnish and pay for the services and subsistence … for the term of twenty years of one physician….");

• Treaty with the Kiowa and Comanche, art. 14, Oct. 21, 1867, 15 Stat. 581 ("The United States hereby agrees to furnish annually to the Indians the physician…, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such [person].").

Courts also recognized a federal government duty to provide health care to Indians. E.g., United States v. Shoshone Tribe of Indians of Wind River Reservation in Wyoming, 304 U.S. 111, 113-36 114 (1938) ("The United States also agreed to provide . . . a physician. . . ."); United States v. Michigan, 471 F. Supp. 192, 234 (W.D. 1979) ("Money was provided to purchase … medicine [and] the services of a physician….."), modified, 653 F.2d 277 (6th Cir.), cert. denied, 454 U.S. 1124 (1981). Congress also provided health care for specific tribes in special statutes. E.g., United States v. State Tax Commission of the State of Mississippi, 535 F.2d 300, 303 (5th Cir. 1976) ("The entire statute (40 Stat. at 573) reads as follows . . . ; For the relief of distress among the full-blood Choctaw Indians of Mississippi, including the pay of one special agent, who shall be a

physician. . . ."); Karuk Tribe of California v. Ammon, 209 F.3d 1366, 1377 (Fed. Cir. 2000) ("These Acts appropriated funds . . . to pay a physician. . . ."), cert. denied, 532 U.S. 941 (2001).

Congress's provision of health-care services to Indians began in the earliest decades of the American republic. See Betty Pfefferbaum, Rennard Strickland, Everett R. Rhoades and Rose L. Pfefferbaum, Learning How to Heal: An Analysis of the History, Policy, and Framework of Indian Health Care, 20 Am. Indian L. Rev. 366, 368-369 (1995/1996); Indian Health Care Improvement Act, Hearings before the Subcommittee on Health and the Environment of the House Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess. 65 (1976) (Statement of Everett R. Rhoades, M.D., President, Assn. of American Indian Physicians).

The primary Congressional authorization for the expenditure of federal resources for the general welfare of American Indians remains the Snyder Act of 1921, Pub. L. 67-85, Nov. 21, 1921, 42 Stat. 208, codified at 25 U.S.C. § 13. See also Koral E. Fusselman, Note, Native American Health Care: Is the Indian Health Care Reauthorization and Improvement Act of 2009 Enough to Address Persistent Health Problems within the Native American Community?, 18 Wash. & Lee J. Civil Rts. & Soc. Just. 389, 395 (2012). Congress transferred primary federal responsibility for Indian health-care administration to the Indian Health Service in 1955. See Transfer Act, Pub. L. 83-568, § 1, 68 Stat. 674 (1954). See also Betty Pfefferbaum, Rennard Strickland, Everett R. Rhoades and Rose L. Pfefferbaum, Learning How to Heal: An Analysis of the History, Policy, and Framework of Indian Health Care, 20 Am. Indian L. Rev. 366, 382 (1995/1996).

The modern federal statutory framework in which Congress fulfills its trust obligations to provide health care to American Indians is the Indian Health Care Improvement Act of 1976. See Pub. L. 94-437, 90 Stat. 1400, codified in part at 25 U.S.C. § 1601 et seq. * * *

NOTES

1. In 1921, Congress passed the Snyder Act, the general federal appropriations authority for Indian affairs programs and services. It provides in relevant part:

> The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes:
>
> General support and civilization, including education.
>
> For relief of distress and conservation of health.
>
> * * *

25 U.S.C. § 13.

2. In general, American Indians who are members of federal recognized Indian tribes are eligible to receive health services from any Indian health care facility so long as they reside "on or near" an Indian reservation.

Morton v. Ruiz

United States Supreme Court, 1974

415 U.S. 199; 94 S.Ct. 1055; 39 L.Ed.2d 270

Justice BLACKMUN delivered the opinion for a unanimous Court.

This case presents a narrow but important issue in the administration of the federal general assistance program for needy Indians:

> Are general assistance benefits available only to those Indians living on reservations in the United States (or in areas regulated by the Bureau of Indian Affairs in Alaska and Oklahoma), and are they thus unavailable to Indians (outside Alaska and Oklahoma) living off, although near, a reservation?

* * *

I

The pertinent facts are agreed upon, although, as to some, the petitioner Secretary denies knowledge but does not dispute them. App. 45—48. The respondents, Ramon Ruiz and his wife, Anita, are Tohono O'odham* Indians and United States citizens. In 1940 they left the Tohono O'odham Reservation in Arizona to seek employment 15 miles away at the Phelps-Dodge copper mines at Ajo. Mr. Ruiz found work there, and they settled in a community at Ajo called the 'Indian Village' and populated almost entirely by Tohono O'odham Indians. Practically all the land and most of the homes in the Village are owned or rented by Phelps-Dodge. The Ruizes have lived in Ajo continuously since 1940 and have been in their present residence since 1947. A minor daughter lives with them. They speak and understand the O'odham language but only limited English. Apart from Mr. Ruiz' employment with Phelps-Dodge, they have not been assimilated into the dominant culture, and they appear to have maintained a close tie with the nearby reservation.

* Editors' Note: The original Supreme Court opinion referred to the "P*pago Indians" and the "P*pago Indian Reservation." It is our understanding that the word "P*pago" is a racial epithet. The relevant tribe is now known as the Tohono O'odham Nation. We will use this name and its variations in our edited text.

In July 1967, 27 years after the Ruizes moved to Ajo, the mine where he worked was shut down by a strike. It remained closed until the following March. While the strike was in progress, Mr. Ruiz' sole income was a $15 per week striker's benefit paid by the union. He sought welfare assistance from the State of Arizona but this was denied because of the State's apparent policy that striking workers are not eligible for general assistance or emergency relief.

On December 11, 1967, Mr. Ruiz applied for general assistance benefits from the Bureau of Indian Affairs (BIA). He was immediately notified by letter that he was ineligible for general assistance because of the provisions (in effect since 1952) in 66 Indian Affairs Manual 3.1.4 (1965) that eligibility is limited to Indians living 'on reservations' and in jurisdictions under the BIA in Alaska and Oklahoma. An appeal to the Superintendent . . . was unsuccessful. A further appeal to the Phoenix Area Director of the BIA led to a hearing, but this, too, proved unsuccessful. The sole ground for the denial of general assistance benefits was that the Ruizes resided outside the boundaries of the Tohono O'odham Reservation.

* * *

II

The Snyder Act,7 42 Stat. 208, 25 U.S.C. § 13, approved November 2, 1921, provides the underlying congressional authority for most BIA activities including, in particular and importantly, the general assistance program. Prior to the Act, there was no such general authorization. As a result, appropriation requests made by the House Committee on Indian Affairs were frequently stricken on the House floor by point-of-order objections. See H.R.Rep.No. 275, 67th Cong., 1st Sess. (1921); S.Rep.No.294, 67th Cong., 1st Sess. (1921); 61 Cong.Rec. 4659—4672 (1921). The Snyder Act was designed to remedy this situation. It is comprehensively worded for the apparent purpose of avoiding these point-of-order motions to strike. Since the passage of the Act, the BIA has presented its budget requests without further interruption of that kind and Congress has enacted appropriation bills annually in response to the requests.

* * *

* * * It is to be that neither the language of the Snyder Act nor that of the Appropriations Act imposes any geographical limitation on the availability of general assistance benefits and does not prescribe eligibility requirements or the details of any program. Instead, the Snyder Act states that the BIA (under the supervision of the Secretary) 'shall direct, supervise, and expend . . . for the benefit, care, and assistance of the Indians throughout the United States' for the stated purposes including, as the two purposes first described, '(g)eneral support' and 'relief of distress.' This is broadly phrased material and obviously is intended to include all BIA activities.

The general assistance program is designed by the BIA to provide direct financial aid to needy Indians where other channels of relief, federal, state, and tribal, are not available. Benefits generally are paid on a scale equivalent to the State's welfare payments. Any Indian, whether

living on a reservation or elsewhere, may be eligible for benefits under the various social security programs in which his State participates and no limitation may be placed on social security benefits because of an Indian claimant's residence on a reservation.

* * *

III

We are confronted, therefore, with the issues whether the geographical limitation placed on general assistance eligibility by the BIA is consistent with congressional intent and the meaning of the applicable statutes, or, to phrase it somewhat differently, whether the congressional appropriations are properly limited by the BIA's restrictions, and, if so, whether the limitation withstands constitutional analysis.

* * *

IV

There is, of course, some force in the Secretary's argument and in the facts that the BIA's budget requests consistently contained 'on reservations' general assistance language and that there was testimony before successive appropriations subcommittees to the effect that assistance of this kind was customarily so restricted. Nonetheless, our examination of this and other material leads us to a conclusion contrary to that urged by the Secretary.

A

In actual practice general assistance clearly has not been limited to reservation Indians. Indeed, the Manual's provision, . . . so heavily relied upon by the Secretary, itself provides that general assistance is available to nonreservation Indians in Alaska and Oklahoma. The rationale proffered for this is:

> 'The situation of Indians in Alaska and Oklahoma has historically been unique. Much of Oklahoma was once set aside as an Indian Territory, and though most of the reservations have been abolished, there remains a large area of concentrated Indian population with tribal organization, living on land held in trust by the United States . . .. A similar situation of large concentrations of native Americans, with few reservations and substantial separate legislation prevails in Alaska . . .. The responsibilities of the Bureau of Indian Affairs in these jurisdictions are substantially similar to the Bureau's responsibilities on the reservations.' Brief for Petitioner 21.

While this exception is not necessarily irrational, it definitely demonstrates that the limitation in the budget requests is not rigidly followed by the BIA, inasmuch as most off-reservation Indians in the two named States are regarded as eligible for general assistance funds.

If, as the Secretary urges, we are to assume that Congress has been aware of the Manual's provision, Congress was just as clearly on notice that the words 'on reservations' did not possess their literal meaning in that context. Surely, some of the reasons for the Alaska-Oklahoma exception are equally applicable to Indians of the Ruiz class.

B

There was testimony in several of the hearings that the BIA, in fact, was not limiting general assistance to those within reservation boundaries and, on more than one occasion, Congress was notified that exceptions were being made where they were deemed appropriate. Notwithstanding the Manual, at least three categories of off-reservation Indians outside Alaska and Oklahoma have been treated as eligible for general assistance. The first is the Indian who relocates in the city through the BIA relocation program and who then is eligible for general assistance for the period of time required for him, under state law, to establish residence in the new location. The second evidently is the Indian from the Turtle Mountain Reservation in North Dakota who lives on trust land near but apart from that reservation. The third appears to be the Indian residing in Rapid City, South Dakota.

In addition, although not controlling, it is not irrelevant that the 'on reservations' limitation in the budget requests has never appeared in the final appropriation bills.

C

Even more important is the fact that, for many years, to and including the appropriation year at issue, the BIA itself made continual representations to the appropriations subcommittees that nonurban Indians living 'near' a reservation were eligible for BIA services. Although, to be sure, several passages in the legislative history and the formal budget requests have defined eligibility in terms of Indians living 'on reservations,' the BIA, not infrequently, has indicated that living 'on or near' a reservation equates with living 'on' it.

* * *

Thus, the usual practice of the BIA has been to represent to Congress that 'on or near' is the equivalent of 'on' for purposes of welfare service eligibility, and that the successive budget requests were for a universe of Indians living 'on or near' and not just for those living directly 'on.' In addition, the BIA has continually treated persons 'off' the reservations as not 'on or near.' In the light of this rather consistent legislative history, it is understandable that the Secretary now argues that general assistance has not been available to those 'off' the reservation. We do not accept the argument, however, that the history indicates that general assistance was thereby restricted to those within the physical boundaries. To the contrary, that history clearly shows that Congress was led to believe that the programs were being made available to those unassimilated needy Indians living near the reservation as well as to those living 'on.' Certainly, a fair reading of the congressional proceedings up to and including the fiscal 1968 hearing can lead only to the

conclusion that Indians situated near the reservation, such as the Ruizes, were covered by the authorization.

* * *

D

Wholly aside from this appropriation subcommittee legislative history, the Secretary suggests that Congress, each year since 1952, appropriated only in accord with the 'on reservations' limitation contained in the BIA Manual. By legislating annually 'in the light of (this) clear provision,' the Secretary argues, Congress implicitly ratified the BIA policy. This argument, also, is not convincing. The limitation has not been published in the Federal Register or in the Code of Federal Regulations, and there is nothing in the legislative history to show that the Manual's provision was brought to the subcommittees' attention, let alone to the entire Congress. To assume that Congress was aware of this provision, contained only in an internally circulated BIA document, would be most strained. But, even assuming that Congress was fully cognizant of the Manual's limitation when the 1958 appropriation was made, the language of geographic restriction in the Manual must be considered in conjunction with the representations consistently made. There is no reason to assume that Congress did not equate the 'on reservations' language with the 'on or near' category that continuously was described as the service area. In the light of the Manual's particular inclusion of Oklahoma and Alaska off-reservation Indians, it would seem that this interpretation of the provision would have been the logical one for anyone in Congress, who in fact was aware of it, to accept.

V

* * *

The overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions. See, e.g., Seminole Nation v. United States, 316 U.S. 286, 296 . . . (1942); Board of County Comm'rs v. Seber, 318 U.S. 705 . . . (1943). Particularly here, where the BIA has continually represented to Congress, when seeking funds, that Indians living near reservations are within the service area, it is essential that the legitimate expectation of these needy Indians not be extinguished by what amounts to an unpublished ad hoc determination of the agency that was not promulgated in accordance with its own procedures, to say nothing of those of the Administrative Procedure Act. The denial of benefits to these respondents under such circumstances is inconsistent with 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.' *Seminole Nation v. United States*, 316 U.S., at 296 . . . , see *Squire v. Capoeman*, 351 U.S. 1 . . . (1956). Before benefits may be denied to these otherwise entitled Indians, the BIA must first promulgate eligibility requirements according to established procedures.

* * *

In view of our disposition of the statutory issue, we do not reach the respondents' constitutional arguments. We intimate no views as to them.

The judgment of the Court of Appeals is affirmed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Affirmed and remanded.

NOTES

1. The *Ruiz* Court agreed with the Secretary of the Interior that the agency was free to limit its services to Indian people provided the agency made such a request to Congress in the appropriations process.

2. Nearly two decades later, in *Lincoln v. Vigil*, 508 U.S. 182 (1993), the Supreme Court held, seemingly contrary to *Ruiz*, that the Indian Health Service could terminate its Indian Children's Program without complying with the Administrative Procedures Act (APA), 5 U.S.C. § 701 et seq. The children's program provided services to disabled children, but had never been explicitly authorized or mandated by Congress. Instead, the Service funded the program from lump sum funding appropriated by Congress.

The Court distinguished *Ruiz* on the ground that the earlier case did not involve an APA challenge:

> Nor, finally, do we think that the Court of Appeals was on solid ground in holding that *Morton v. Ruiz*, 415 U.S. 199 . . . (1974), required the Service to abide by the APA's notice-and-comment provisions before terminating the Program. Those provisions were not at issue in Ruiz, where respondents challenged a provision, contained in a Bureau of Indian Affairs manual, that restricted eligibility for Indian assistance. Although the Bureau's own regulations required it to publish the provision in the Federal Register, the Bureau had failed to do so. Id., at 233–234 . . . . We held that the Bureau's failure to abide by its own procedures rendered the provision invalid, stating that, under those circumstances, the denial of benefits would be "inconsistent with 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.' " Id., at 236 . . . (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 . . . (1942)). No such circumstances exist here.

Lincoln, 508 U.S. at 199.

3. Even where Congress has authorized programs, chronic underfunding is endemic. In two important reports, the United States Commission on Civil Rights condemned the United States for its failures in adequately fulfilling its trust duties to Indian people, particularly in the health care context. United States Commission on Civil Rights, Broken Promises: Continuing Federal Funding Shortfall for Native Americans (Dec. 2018); A Quiet Crisis: Federal Funding and Unmet Needs In Indian Country (July 2003).

4. Federal courts have not ordered the government to provide adequate services to Indian people. E.g., Gilbert v. Weahkee, 441 F.Supp.3d 799, 813 (D.S.D. 2020) (rejecting claim by individual Indians for additional health care services: "Plaintiffs have not successfully stated a breach of trust claim as individuals. . . . Stated differently, plaintiffs have not shown the treaty—or any other source of law—creates an individual trust duty the United States breached by entering into a self-determination contract with the Health Board."), aff'd, 830 Fed.Appx. 496 (8th Cir. 2020), cert. denied, 141 S. Ct. 2760 (2020); Hammitte v. Leavitt, 2007 WL 3013267, at *8 (E.D. Mich., Oct. 11, 2007) (rejecting urban Indians' claim to essential health care services: "Congress makes a lump sum appropriation for Indian health services and Indian services to the IHS and it is up to IHS to allocate the funds in accordance with the statutory obligations and objectives, including funding for urban Native Americans. In other words, Congress has left to the IHS's discretion the allocation of appropriated funds among its units that provide health care services to Native Americans. This includes tribally operated programs and urban Indian programs.").

5. The consequences of underfunding and poor health care services for American Indians are felt daily, but national health crises have brought those inequities into sharp – and tragic – relief:

> The 1918 and 1919 influenza pandemic devastated American Indian communities. In several states in the west and southwest – Arizona, Colorado, Mississippi, New Mexico, and Utah – 4% to 6% of American Indian people died. "Among Alaskan Natives, entire communities were stricken, and some towns were abandoned." Nearly 3,400 Diné (Navajo) people walked on during this time. Overall, 2% of American Indian people walked on because of the pandemic.
>
> A century ago, the federal government treated Indian people as wards of the United States under a repressive guardianship concocted by Congress and the Executive branch. Many Indians couldn't vote. It was a crime to sell liquor to an Indian. Allotment of Indian reservations, and its aftermath, was in full force. Tribal property rights were still considered inferior to those of federal, state, and local property rights.
>
> When the 1918 pandemic hit Indian country, the federal government's response was abysmally inadequate, bordering on non-existent. Locals in Anderson, California forced Indian people into isolation in order to protect themselves. More than 100 students were sick at Stewart Indian School in Nevada,

> and the matron of the school died (no word in local news about how many Indian children walked on). More than 300 students were sick at Greenville Indian School in California, with at least one death reported. This is just a snapshot of the horror show was that was Indian country public health a century ago.
>
> Perhaps the worst part of the story was how the federal government congratulated itself on a job well done, gaslighting writ large. In early 1919, the spokesman for the United States Public Health Service, Dr. Grady Shytles, claimed the mortality rate of Indian people was less than 2%. But by December of 1919, the government admitted that at least 6,000 Indian people died during the pandemic of 1918 and 1919, meaning that a horrific rate of 9% of all Indian cases resulted in death (while worldwide only 2.8% of cases resulted in death).
>
> It appears the COVID-19 pandemic sadly may have a similar impact on Indian people once again. Indian people are disproportionately poor and unhealthy, the awful consequence of centuries of colonialism. Many Indian people live in rural areas, where American health care services are weakest. Professor Kirsten Carlson reported that there is a drastic shortage of intensive care beds in Indian Health Service hospitals. Many Indian tribes depend heavily on gaming and other enterprises to supplement federal self-determination appropriations. The pandemic forced the closure of virtually all Indian gaming facilities, strangling the major revenue stream for tribes. Add in the closure of tribal government operations, and the vast majority of Indian country workers are currently furloughed.

Matthew L.M. Fletcher, Indian Lives Matter: Pandemics and Inherent Tribal Powers, 73 Stan. L. Rev. Online 38, 42-44 (2020), available at https://www.stanfordlawreview.org/online/indian-lives-matter/. See also Kirsten Carlson, Tribal Leaders Face Great Need and Don't Have Enough Resources To Respond to the Coronavirus Pandemic, Conversation (Mar. 25, 2020), available at https://theconversation.com/tribal-leaders-face-great-need-and-dont-have-enough-resources-to-respond-to-the-coronavirus-pandemic-134372.

The National Indian Health Board provided testimony to Congress detailing the impact of the COVID-19 disease on Indian country:

> ***The Numbers: COVID-19 in Indian Country***
>
> As of June 24, IHS has reported 18,240 positive cases, with roughly 67% of positive cases being reported out of the Phoenix and Navajo IHS Areas alone. However, IHS numbers are highly likely to be underrepresented because case reporting by Tribal health programs, which constitute roughly two-thirds of the Indian health system, are voluntary. According to data analysis by APM Research Lab, AI/Ns are experiencing the second highest aggregated COVID-19 death rate at 36 deaths per 100,000. The CDC reported that from March through June 13, 2020

age-adjusted COVID-19 hospitalization rates among AI/ANs were higher than any other ethnicity, at 221.2 per 100,000. Reporting by state health departments has further highlighted disparities among AI/ANs.

- In New Mexico, AI/ANs represent roughly 8% of the population, yet account for over 53% percent of all COVID-19 cases.
- As of this writing, the Oyate Health Center in South Dakota has conducted 544 COVID-19 tests, with 114 confirmed positive case results (20.9%). Of those 114 cases, 13 were reported between June 10 and June 16.
- In Wyoming, AI/ANs account for over 27% of all COVID-19 cases statewide despite representing only 2.9% of the state population.
- Similarly in Montana, where AI/ANs constitute about 6.6% of the state population, over 13% of confirmed COVID-19 cases are among AI/ANs.
- In Arizona where AI/ANs account for roughly 5% of the state population, as of June 28, 2020 they represented 15% of those hospitalized for COVID and roughly 9% of all COVID cases statewide.

Most poignantly, in a data visualization of COVID-19 case rates per 100,000 by Tribal Nation created by the American Indian Studies Center at the University of California Los Angeles, it was found that if Tribes were states, the top five infection rates nationwide would all be Tribal Nations.

The COVID-19 pandemic has further exposed the vast deficiencies in health care access, quality, and availability that exists across the Indian health system. Prior to COVID-19, the Indian health system was beset by an average 25% clinician vacancy rate, and a hospital system that remains over four times older than the national hospital system. Limited intensive care unit (ICU) capacity to address a surge of COVID cases across many IHS and Tribal facilities has strained limited Purchased/Referred Care (PRC) dollars, creating further challenges that are contributing to rationing of critical health care services. Overall, per capita spending within IHS ($3,779) is at only 40% of national health spending ($9,409), making IHS the most chronically underfunded federal health care entity nationwide and thus severely ill-equipped to respond to COVID-19.

For example, while CDC has noted that hand-washing is the number one way of protecting against a COVID-19 infection, water and sanitation infrastructure in Indian Country is significantly underdeveloped. Approximately 6% of AI/AN households lack access to running water, compared to less than half of one percent of White households nationwide. In Alaska, the Department of Environmental Conservation reports that over 3,300 rural Alaskan homes across 30 predominately

Alaskan Native Villages lack running water, forcing use of "honey buckets" that are disposed in environmentally hazardous sewage lagoons.

Because of the sordid history of mineral mining on Navajo lands, groundwater on or near the Navajo reservation has been shown to have dangerously high levels of arsenic and uranium. As a result, roughly 30% of Navajo homes lack access to a municipal water supply, making the cost of water for Navajo households roughly 71 times higher than the cost of water in urban areas with municipal water access. In fact, in a new peer-reviewed study of 287 Tribal reservations and homelands, COVID-19 cases were found to be 10.83 times more likely in homes without indoor plumbing.

Gaps in COVID-19 AI/AN Public Health Data

These existing capacity and resource shortages meant that the Indian health system was woefully unprepared to prepare, prevent, and respond to the COVID-19 pandemic. Available data on AI/AN COVID-19 health disparities reaffirms this central point. Unfortunately, because of high rates of misclassification and undersampling of AI/AN populations in federal, state, and local public health disease surveillance systems, available data likely significantly underrepresents the scope of the impact in Indian Country. To be clear, misclassification of AI/ANs on disease surveillance systems is not unique to COVID-19.

Previous studies have found significantly higher rates of misclassification outside of IHS Contract Health Service Delivery Areas (CHSDA); for all-cause mortality rates in states like Oklahoma; for HIV infections among AI/ANs across five states; and on death certificates reported to CDC. However, the issue has taken a new level of urgency given the unprecedented devastation of this pandemic on underserved communities.

Multiple states with large AI/AN populations including but not limited to Minnesota, Michigan, New York and California are reporting thousands of COVID cases without any information on patient ethnicity, or categorizing cases as "other" on demographic forms. In California for instance, the state has noted that race/ethnicity data is missing for nearly 30% of reported cases. Multiple studies have demonstrated that AI/ANs are more likely to be misclassified as "other" or are omitted from surveillance systems entirely.

Thus, these structural challenges in data reporting only serve to render invisible the disparate impact of COVID19 in Indian Country. Relatedly, Tribal Epidemiology Centers (TEC) continue to face significant barriers in exercising their statutory public health authorities by facing major hurdles in accessing federal and state public health surveillance systems, including for COVID-19 data. These

issues continue to have a direct negative effect on health outcomes for AI/AN Peoples, and are exacerbating the impact of COVID-19 in Indian Country.

Unfortunately, the adverse impacts of COVID-19 in Indian Country extend far beyond these sobering public health statistics. Tribal economies have been shuttered by social distancing guidelines that have also severely strained Tribal healthcare budgets. Because of the chronic underfunding of IHS, Tribal governments have innovatively found ways of maximizing third party reimbursements from payers like Medicare, Medicaid, and private insurance. For many self-governance Tribes, third party collections can constitute up to 60% of their healthcare operating budgets. However, because of cancellations of non-emergent care procedures in response to COVID-19, many Tribes have experienced third party reimbursement shortfalls ranging from $800,000 to $5 million per Tribe, per month. In a hearing before House Interior Appropriations on June 11, 2020, HIS Director Rear Admiral (RADM) Weahkee stated that third party collections have plummeted 30-80% below last year's collections levels, and that it would likely take years to recoup these losses.

These funding shortfalls have forced Tribes across the lower 48 and Alaska to furlough hundreds of workers, curtail available healthcare services, or close down clinics entirely. For example, Tribes in the Bemidji Area reported that nearly 20% of their healthcare system and 35% of their government services staff were forced to be furloughed due to revenue shortfalls. Meanwhile, Tribal business closures have compounded the devastation of the COVID pandemic in Indian Country. According to the Harvard Project on American Indian Economic Development (HPAIED), before COVID-19 hit, Tribal governments and businesses employed 1.1 million people and supported over $49.5 billion in wages, with Tribal gaming enterprises alone responsible for injecting $12.5 billion annually into Tribal programs. During the six week period (through May 4, 2020) whereby all 500 Tribal casinos were closed in response to COVID-19 guidelines, Tribal communities lost $4.4 billion in economic activity, with 296,000 individuals out of work and nearly $1 billion in lost wages.

Extrapolated across the entire U.S. economy, collectively $13.1 billion in economic activity was lost during the same time period, in addition to $1.9 billion in lost tax revenue across federal, state and local governments. In a new visualization created by NIHB, over 193,000 AI/ANs have become uninsured as a result of COVID-19 job losses, with the vast majority of these individuals (72%) lacking access to IHS as well.

Such astronomical losses in Tribal healthcare and business revenue are exacerbating the already disproportionate impact of COVID-19 infections in Indian

> Country, and are further reducing available resources for Tribes to stabilize their health systems and provide critical COVID-19 and related health services to their communities.

Testimony of the National Indian Health Board, Lisa Elgin, Secretary, before the Senate Committee on Indian Affairs, Oversight Hearing On 'Evaluating The Response And Mitigation To The Covid-19 Pandemic In Native Communities', at 5-8 (July 1, 2020).

6. In response to the COVID-19 pandemic that hit the United States in 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") and appropriated $8 billion in relief funding to "tribal governments." The Secretary of the Treasury set aside a large amount of that funding for Alaska Native Corporations ("ANCs"). Numerous federally recognized Indian tribes brought suit to challenge the Secretary's determination, reasoning that ANCs are not "tribal governments." In *Yellen v. Confederated Tribes of the Chehalis Reservation* (see page 237), the Supreme Court confirmed the Secretary's decision and authorized about $500 million to be distributed to the ANCs.

CHAPTER 7

TRIBAL SOVEREIGNTY AND JURISDICTION

SECTION A.

THE ARENA OF FEDERAL AND TRIBAL JURISDICTION: "INDIAN COUNTRY"

PART 2. Post-*Solem* Reservation Boundary Cases

After note on page 531, add a note:

In *Royal v. Murphy*, 875 F.3d 986 (10th Cir. 2017), the court held that the State of Oklahoma did not possess criminal jurisdiction over a Muscogee (Creek) Nation tribal citizen for crimes committed within the historic Muscogee reservation because the reservation had never been disestablished by Congress.

The Supreme Court granted certiorari, with Justice Gorsuch recused from the matter. 138 S.Ct. 2026 (2018). With the case now captioned *Carpenter v. Murphy*, the Court heard oral argument on November 27, 2018 from Oklahoma and the United States on one side and Mr. Murphy and the Muscogee (Creek) Nation on the other side. After oral argument, the Court asked the parties to submit supplemental briefs

> addressing the following two questions: (1) Whether any statute grants the state of Oklahoma jurisdiction over the prosecution of crimes committed by Indians in the area within the 1866 territorial boundaries of the Creek Nation, irrespective of the area's reservation status. (2) Whether there are circumstances in which land qualifies as an Indian reservation but nonetheless does not meet the definition of Indian country as set forth in 18 U. S. C. §1151(a).

The 2018 Term ended without a decision from the Supreme Court. The Chief Justice stated the case would be held over for reargument, but that reargument never happened. Instead, the Court granted cert. in *McGirt v. Oklahoma*, a case with the same legal issues as *Murphy*, but one in which Justice Gorsuch was not recused. Because of the 2020 pandemic, the Court heard oral argument by telephone.

On the dramatic last day of the 2019 Term, the Court held 5-4 that Congress had never terminated the Creek Reservation.

McGirt v. Oklahoma

United States Supreme Court, 2020

__ U.S. __, 140 S.Ct. 2452 (2020)

Justice GORSUCH delivered the opinion of the Court.

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. In exchange for ceding "all their land, East of the Mississippi river," the U. S. government agreed by treaty that "[t]he Creek country west of the Mississippi shall be solemnly guarantied to the Creek Indians." Treaty With the Creeks, Arts. I, XIV, Mar. 24, 1832, 7 Stat. 366, 368 (1832 Treaty). Both parties settled on boundary lines for a new and "permanent home to the whole Creek nation," located in what is now Oklahoma. Treaty With the Creeks, preamble, Feb. 14, 1833, 7 Stat. 418 (1833 Treaty). The government further promised that "[no] State or Territory [shall] ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves." 1832 Treaty, Art. XIV, 7 Stat. 368.

Today we are asked whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law. Because Congress has not said otherwise, we hold the government to its word.

I

At one level, the question before us concerns Jimcy McGirt. Years ago, an Oklahoma state court convicted him of three serious sexual offenses. Since then, he has argued in postconviction proceedings that the State lacked jurisdiction to prosecute him because he is an enrolled member of the Seminole Nation of Oklahoma and his crimes took place on the Creek Reservation. A new trial for his conduct, he has contended, must take place in federal court. The Oklahoma state courts hearing Mr. McGirt's arguments rejected them, so he now brings them here.

Mr. McGirt's appeal rests on the federal Major Crimes Act (MCA). The statute provides that, within "the Indian country," "[a]ny Indian who commits" certain enumerated offenses "against the person or property of another Indian or any other person" "shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a). By subjecting Indians to federal trials for crimes committed on tribal lands, Congress may have breached its promises to tribes like the Creek that they would be free to govern themselves. But this particular incursion has its limits—applying only to certain enumerated crimes and allowing only the federal government to try Indians. State

courts generally have no jurisdiction to try Indians for conduct committed in "Indian country." *Negonsott v. Samuels*, 507 U.S. 99, 102–103 . . . (1993).

The key question Mr. McGirt faces concerns that last qualification: Did he commit his crimes in Indian country? A neighboring provision of the MCA defines the term to include, among other things, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." § 1151(a). Mr. McGirt submits he can satisfy this condition because he committed his crimes on land reserved for the Creek since the 19th century.

The Creek Nation has joined Mr. McGirt as amicus curiae. Not because the Tribe is interested in shielding Mr. McGirt from responsibility for his crimes. Instead, the Creek Nation participates because Mr. McGirt's personal interests wind up implicating the Tribe's. No one disputes that Mr. McGirt's crimes were committed on lands described as the Creek Reservation in an 1866 treaty and federal statute. * * *

At another level, then, Mr. McGirt's case winds up as a contest between State and Tribe. The scope of their dispute is limited; nothing we might say today could unsettle Oklahoma's authority to try non-Indians for crimes against non-Indians on the lands in question. See *United States v. McBratney*, 104 U.S. 621, 624, 26 L.Ed. 869 (1882). Still, the stakes are not insignificant. If Mr. McGirt and the Tribe are right, the State has no right to prosecute Indians for crimes committed in a portion of Northeastern Oklahoma that includes most of the city of Tulsa. Responsibility to try these matters would fall instead to the federal government and Tribe. Recently, the question has taken on more salience too. While Oklahoma state courts have rejected any suggestion that the lands in question remain a reservation, the Tenth Circuit has reached the opposite conclusion. *Murphy v. Royal*, 875 F.3d 896, 907–909, 966 (2017). We granted certiorari to settle the question. * * *

II

Start with what should be obvious: Congress established a reservation for the Creeks. In a series of treaties, Congress not only "solemnly guarantied" the land but also "establish[ed] boundary lines which will secure a country and permanent home to the whole Creek Nation of Indians." 1832 Treaty, Art. XIV, 7 Stat. 368; 1833 Treaty, preamble, 7 Stat. 418. The government's promises weren't made gratuitously. Rather, the 1832 Treaty acknowledged that "[t]he United States are desirous that the Creeks should remove to the country west of the Mississippi" and, in service of that goal, required the Creeks to cede all lands in the East. Arts. I, XII, 7 Stat. 366, 367. Nor were the government's promises meant to be delusory. Congress twice assured the Creeks that "[the] Treaty shall be obligatory on the contracting parties, as soon as the same shall be ratified by the United States." 1832 Treaty, Art. XV, id., at 368; see 1833 Treaty, Art. IX, 7 Stat. 420 ("agreement shall be binding and obligatory" upon ratification). Both treaties were duly ratified and enacted as law.

Because the Tribe's move west was ostensibly voluntary, Congress held out another assurance as well. In the statute that precipitated these negotiations, Congress authorized the President "to assure the tribe ... that the United States will forever secure and guaranty to them ... the country so exchanged with them." Indian Removal Act of 1830, § 3, 4 Stat. 412. "[A]nd if they prefer it," the bill continued, "the United States will cause a patent or grant to be made and executed to them for the same; Provided always, that such lands shall revert to the United States, if the Indians become extinct, or abandon the same." Ibid. If agreeable to all sides, a tribe would not only enjoy the government's solemn treaty promises; it would hold legal title to its lands.

It was an offer the Creek accepted. The 1833 Treaty fixed borders for what was to be a "permanent home to the whole Creek nation of Indians." 1833 Treaty, preamble, 7 Stat. 418. It also established that the "United States will grant a patent, in fee simple, to the Creek nation of Indians for the land assigned said nation by this treaty." Art. III, id., at 419. That grant came with the caveat that "the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, and continue to occupy the country hereby assigned to them." Ibid. The promised patent formally issued in 1852. See *Woodward v. De Graffenried*, 238 U.S. 284, 293–294 . . . (1915).

These early treaties did not refer to the Creek lands as a "reservation"—perhaps because that word had not yet acquired such distinctive significance in federal Indian law. * * * In 1866, the United States entered yet another treaty with the Creek Nation. This agreement reduced the size of the land set aside for the Creek, compensating the Tribe at a price of 30 cents an acre. Treaty Between the United States and the Creek Nation of Indians, Art. III, June 14, 1866, 14 Stat. 786. But Congress explicitly restated its commitment that the remaining land would "be forever set apart as a home for said Creek Nation," which it now referred to as "the reduced Creek reservation." Arts. III, IX, id., at 786, 788. Throughout the late 19th century, many other federal laws also expressly referred to the Creek Reservation. See, e.g., Treaty Between United States and Cherokee Nation of Indians, Art. IV, July 19, 1866, 14 Stat. 800 ("Creek reservation"); Act of Mar. 3, 1873, ch. 322, 17 Stat. 626; (multiple references to the "Creek reservation" and "Creek India[n] Reservation"); 11 Cong. Rec. 2351 (1881) (discussing "the dividing line between the Creek reservation and their ceded lands"); Act of Feb. 13, 1891, 26 Stat. 750 (describing a cession by referencing the "West boundary line of the Creek Reservation").

There is a final set of assurances that bear mention, too. In the Treaty of 1856, Congress promised that "no portion" of the Creek Reservation "shall ever be embraced or included within, or annexed to, any Territory or State." Art. IV, 11 Stat. 700. And within their lands, with exceptions, the Creeks were to be "secured in the unrestricted right of self-government," with "full jurisdiction" over enrolled Tribe members and their property. Art. XV, id., at 704. So the Creek were promised not only a "permanent home" that would be "forever set apart"; they were also assured a right to self-government on lands that would lie outside both the legal jurisdiction and geographic boundaries of any State. Under any definition, this was a reservation.

III

A

While there can be no question that Congress established a reservation for the Creek Nation, it's equally clear that Congress has since broken more than a few of its promises to the Tribe. Not least, the land described in the parties' treaties, once undivided and held by the Tribe, is now fractured into pieces. While these pieces were initially distributed to Tribe members, many were sold and now belong to persons unaffiliated with the Nation. So in what sense, if any, can we say that the Creek Reservation persists today?

To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress. This Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566–568 . . . (1903). But that power, this Court has cautioned, belongs to Congress alone. Nor will this Court lightly infer such a breach once Congress has established a reservation. *Solem v. Bartlett*, 465 U.S. 463, 470 . . . (1984).

Under our Constitution, States have no authority to reduce federal reservations lying within their borders. Just imagine if they did. A State could encroach on the tribal boundaries or legal rights Congress provided, and, with enough time and patience, nullify the promises made in the name of the United States. That would be at odds with the Constitution, which entrusts Congress with the authority to regulate commerce with Native Americans, and directs that federal treaties and statutes are the "supreme Law of the Land." Art. I, § 8; Art. VI, cl. 2. It would also leave tribal rights in the hands of the very neighbors who might be least inclined to respect them.

Likewise, courts have no proper role in the adjustment of reservation borders. Mustering the broad social consensus required to pass new legislation is a deliberately hard business under our Constitution. Faced with this daunting task, Congress sometimes might wish an inconvenient reservation would simply disappear. Short of that, legislators might seek to pass laws that tiptoe to the edge of disestablishment and hope that judges—facing no possibility of electoral consequences themselves—will deliver the final push. But wishes don't make for laws, and saving the political branches the embarrassment of disestablishing a reservation is not one of our constitutionally assigned prerogatives. "[O]nly Congress can divest a reservation of its land and diminish its boundaries." *Solem*, 465 U.S., at 470 . . . . So it's no matter how many other promises to a tribe the federal government has already broken. If Congress wishes to break the promise of a reservation, it must say so.

History shows that Congress knows how to withdraw a reservation when it can muster the will. Sometimes, legislation has provided an "[e]xplicit reference to cession" or an "unconditional

commitment ... to compensate the Indian tribe for its opened land." Ibid. Other times, Congress has directed that tribal lands shall be " 'restored to the public domain.' " [*Hagen v. Utah*.] Likewise, Congress might speak of a reservation as being " 'discontinued,' " " 'abolished,' " or " 'vacated.' " [*Mattz v. Arnett*.] Disestablishment has "never required any particular form of words[.]" But it does require that Congress clearly express its intent to do so, "[c]ommon[ly with an] '[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests.' " [*Nebraska v. Parker*.]

B

In an effort to show Congress has done just that with the Creek Reservation, Oklahoma points to events during the so-called "allotment era." * * *

The Creek were hardly exempt from the pressures of the allotment era. In 1893, Congress charged the Dawes Commission with negotiating changes to the Creek Reservation. Congress identified two goals: Either persuade the Creek to cede territory to the United States, as it had before, or agree to allot its lands to Tribe members. * * * A year later, the Commission reported back that the Tribe "would not, under any circumstances, agree to cede any portion of their lands." * * * At that time, before this Court's decision in *Lone Wolf*, Congress may not have been entirely sure of its power to terminate an established reservation unilaterally. Perhaps for that reason, perhaps for others, the Commission and Congress took this report seriously and turned their attention to allotment rather than cession.

The Commission's work culminated in an allotment agreement with the Tribe in 1901. Creek Allotment Agreement, ch. 676, 31 Stat. 861. With exceptions for certain pre-existing town sites and other special matters, the Agreement established procedures for allotting 160-acre parcels to individual Tribe members who could not sell, transfer, or otherwise encumber their allotments for a number of years. §§ 3, 7, id., at 862–864 (5 years for any portion, 21 years for the designated "homestead" portion). Tribe members were given deeds for their parcels that "convey[ed] to [them] all right, title, and interest of the Creek Nation." § 23, id., at 867–868. In 1908, Congress relaxed these alienation restrictions in some ways, and even allowed the Secretary of the Interior to waive them. Act of May 27, 1908, ch. 199, § 1, 35 Stat. 312. One way or the other, individual Tribe members were eventually free to sell their land to Indians and non-Indians alike.

Missing in all this, however, is a statute evincing anything like the "present and total surrender of all tribal interests" in the affected lands. Without doubt, in 1832 the Creek "cede[d]" their original homelands east of the Mississippi for a reservation promised in what is now Oklahoma. 1832 Treaty, Art. I, 7 Stat. 366. And in 1866, they "cede[d] and convey[ed]" a portion of that reservation to the United States. Treaty With the Creek, Art. III, 14 Stat. 786. But because there exists no equivalent law terminating what remained, the Creek Reservation survived allotment.

In saying this we say nothing new. For years, States have sought to suggest that allotments automatically ended reservations, and for years courts have rejected the argument. Remember, Congress has defined "Indian country" to include "all land within the limits of any Indian reservation ... notwithstanding the issuance of any patent, and, including any rights-of-way running through the reservation." 18 U.S.C. § 1151(a). So the relevant statute expressly contemplates private land ownership within reservation boundaries. Nor under the statute's terms does it matter whether these individual parcels have passed hands to non-Indians. To the contrary, this Court has explained repeatedly that Congress does not disestablish a reservation simply by allowing the transfer of individual plots, whether to Native Americans or others. See *Mattz*, 412 U.S., at 497 . . . ("[A]llotment under the ... Act is completely consistent with continued reservation status"); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 356–358 . . . (1962) (holding that allotment act "did no more than open the way for non-Indian settlers to own land on the reservation"); *Parker*, 136 S.Ct., [1072,] 1079–1080 [2016] ("[T]he 1882 Act falls into another category of surplus land Acts: those that merely opened reservation land to settlement.... Such schemes allow non-Indian settlers to own land on the reservation" (internal quotation marks omitted)).

* * *

Oklahoma reminds us that allotment was often the first step in a plan ultimately aimed at disestablishment. As this Court explained in *Mattz*, Congress's expressed policy at the time "was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing." 412 U.S. at 496 . . . . Then, "[w]hen all the lands had been allotted and the trust expired, the reservation could be abolished." Ibid. This plan was set in motion nationally in the General Allotment Act of 1887, and for the Creek specifically in 1901. No doubt, this is why Congress at the turn of the 20th century "believed to a man" that "the reservation system would cease" "within a generation at most." Solem, 465 U.S., at 468 . . . . Still, just as wishes are not laws, future plans aren't either. Congress may have passed allotment laws to create the conditions for disestablishment. But to equate allotment with disestablishment would confuse the first step of a march with arrival at its destination.

* * *

C

If allotment by itself won't work, Oklahoma seeks to prove disestablishment by pointing to other ways Congress intruded on the Creek's promised right to self-governance during the allotment era. It turns out there were many. For example, just a few years before the 1901 Creek Allotment Agreement, and perhaps in an effort to pressure the Tribe to the negotiating table, Congress abolished the Creeks' tribal courts and transferred all pending civil and criminal cases to the U. S. Courts of the Indian Territory. Curtis Act of 1898, § 28, 30 Stat. 504–505. Separately, the Creek Allotment Agreement provided that tribal ordinances "affecting the lands of the Tribe,

or of individuals after allotment, or the moneys or other property of the Tribe, or of the citizens thereof " would not be valid until approved by the President of the United States. § 42, 31 Stat. 872.

Plainly, these laws represented serious blows to the Creek. But, just as plainly, they left the Tribe with significant sovereign functions over the lands in question. For example, the Creek Nation retained the power to collect taxes, operate schools, legislate through tribal ordinances, and, soon, oversee the federally mandated allotment process. §§ 39, 40, 42, id., at 871–872; *Buster v. Wright*, 135 F. 947, 949–950, 953–954 (C.A.8 1905). And, in its own way, the congressional incursion on tribal legislative processes only served to prove the power: Congress would have had no need to subject tribal legislation to Presidential review if the Tribe lacked any authority to legislate. Grave though they were, these congressional intrusions on pre-existing treaty rights fell short of eliminating all tribal interests in the land.

* * *

[In] 1906 . . . , Congress adopted the Five Civilized Tribes Act. But instead of dissolving the tribal government as some may have expected, Congress "deem[ed] proper" a different course, simply cutting away further at the Tribe's autonomy. Congress empowered the President to remove and replace the principal chief of the Creek, prohibited the tribal council from meeting more than 30 days a year, and directed the Secretary of the Interior to assume control of tribal schools. §§ 6, 10, 28, 34 Stat. 139–140, 148. The Act also provided for the handling of the Tribe's funds, land, and legal liabilities in the event of dissolution. §§ 11, 27, id., at 141, 148. Despite these additional incursions on tribal authority, however, Congress expressly recognized the Creek's "tribal existence and present tribal governmen[t]" and "continued [them] in full force and effect for all purposes authorized by law." § 28, id., at 148.

In the years that followed, Congress [limited the Creek Nation's access to certain resources and money claims]. * * * But Congress never withdrew its recognition of the tribal government, and none of its adjustments would have made any sense if Congress thought it had already completed that job.

Indeed, with time, Congress changed course completely. Beginning in the 1920s, the federal outlook toward Native Americans shifted "away from assimilation policies and toward more tolerance and respect for traditional aspects of Indian culture." 1 Cohen § 1.05. Few in 1900 might have foreseen such a profound "reversal of attitude" was in the making or expected that "new protections for Indian rights," including renewed "support for federally defined tribalism," lurked around the corner. Ibid.; see also M. Scherer, Imperfect Victories: The Legal Tenacity of the Omaha Tribe, 1945–1995, pp. 2–4, (1999). But that is exactly what happened. Pursuant to this new national policy, in 1936, Congress authorized the Creek to adopt a constitution and bylaws, see Act of June 26, 1936, § 3, 49 Stat. 1967, enabling the Creek government to resume many of

its previously suspended functions. *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1442–1447 (C.A.D.C. 1988).[6]

The Creek Nation has done exactly that. In the intervening years, it has ratified a new constitution and established three separate branches of government. Ibid.; see Muscogee Creek Nation (MCN) Const., Arts. V, VI, and VII. Today the Nation is led by a democratically elected Principal Chief, Second Chief, and National Council; operates a police force and three hospitals; commands an annual budget of more than $350 million; and employs over 2,000 people. Brief for Muscogee (Creek) Nation as Amicus Curiae 36–39. In 1982, the Nation passed an ordinance reestablishing the criminal and civil jurisdiction of its courts. * * * The territorial jurisdiction of these courts extends to any Indian country within the Tribe's territory as defined by the Treaty of 1866. MCN Stat. 27, § 1–102(A). And the State of Oklahoma has afforded full faith and credit to its judgments since at least 1994. See *Barrett v. Barrett*, 878 P.2d 1051, 1054 (Okla. 1994); Full Faith and Credit of Tribal Courts, Okla. State Cts. Network (Apr. 18, 2019), https://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=458214.

Maybe some of these changes happened for altruistic reasons, maybe some for other reasons. * * * But whatever the confluence of reasons, in all this history there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation. In the end, Congress moved in the opposite direction.

D

Ultimately, Oklahoma is left to pursue a very different sort of argument. Now, the State points to historical practices and demographics, both around the time of and long after the enactment of all the relevant legislation. These facts, the State submits, are enough by themselves to prove disestablishment. Oklahoma even classifies and categorizes how we should approach the question of disestablishment into three "steps." It reads *Solem* as requiring us to examine the laws passed by Congress at the first step, contemporary events at the second, and even later events and demographics at the third. On the State's account, we have so far finished only the first step; two more await.

This is mistaken. When interpreting Congress's work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us. * * * That is the only "step" proper for a court of law. To be sure, if during the course of our work an

[6] The dissent calls it "fantasy" to suggest that Congress evinced "any unease about extinguishing the Creek domain" because Congress "did what it set out to do: transform a reservation into a State." . . . . The dissent stresses, too, that the Creek were afforded U. S. citizenship and the right to vote. . . . But the only thing implausible here is the suggestion that "creat[ing] a new State" or enfranchising Native Americans implies an "intent to terminate" any and all reservations within a State's boundaries. . . . This Court confronted—and rejected—that sort of argument long ago in *United States v. Sandoval*, 231 U.S. 28, 47–48 . . . (1913). The dissent treats that case as a one-off: special because "the tribe in Sandoval, the Pueblo Indians of New Mexico, retained a rare communal title to their lands." . . . But *Sandoval* is not only a case about the Pueblos; it is a foundational precedent recognizing that Congress can welcome Native Americans to participate in a broader political community without sacrificing their tribal sovereignty.

ambiguous statutory term or phrase emerges, we will sometimes consult contemporaneous usages, customs, and practices to the extent they shed light on the meaning of the language in question at the time of enactment. . . . But Oklahoma does not point to any ambiguous language in any of the relevant statutes that could plausibly be read as an Act of disestablishment. Nor may a court favor contemporaneous or later practices instead of the laws Congress passed. As *Solem* explained, "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." * * *

Still, Oklahoma reminds us that other language in *Solem* isn't so constrained. In particular, the State highlights a passage suggesting that "[w]here non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that de facto, if not de jure, diminishment may have occurred." 465 U.S. at 471, 104 S.Ct. 1161. While acknowledging that resort to subsequent demographics was "an unorthodox and potentially unreliable method of statutory interpretation," the Court seemed nonetheless taken by its "obvious practical advantages." Id., at 472, n. 13, 471 . . . .

Out of context, statements like these might suggest historical practices or current demographics can suffice to disestablish or diminish reservations in the way Oklahoma envisions. But, in the end, *Solem* itself found these kinds of arguments provided "no help" in resolving the dispute before it. * * *

This Court has already sought to clarify that extratextual considerations hardly supply the blank check Oklahoma supposes. In *Parker*, for example, we explained that "[e]vidence of the subsequent treatment of the disputed land ... has 'limited interpretive value.' " * * * [W]hat value such evidence has can only be interpretative—evidence that, at best, might be used to the extent it sheds light on what the terms found in a statute meant at the time of the law's adoption, not as an alternative means of proving disestablishment or diminishment.

To avoid further confusion, we restate the point. There is no need to consult extratextual sources when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help "clear up ... not create" ambiguity about a statute's original meaning. * * * And, as we have said time and again, once a reservation is established, it retains that status "until Congress explicitly indicates otherwise." *Solem*, 465 U.S., at 470 . . . .

The dissent charges that we have failed to take account of the "compelling reasons" for considering extratextual evidence as a matter of course. . . . But Oklahoma and the dissent have cited no case in which this Court has found a reservation disestablished without first concluding that a statute required that result. Perhaps they wish this case to be the first. To follow Oklahoma and the dissent down that path, though, would only serve to allow States and courts to finish work Congress has left undone, usurp the legislative function in the process, and treat Native American

claims of statutory right as less valuable than others. None of that can be reconciled with our normal interpretive rules, let alone our rule that disestablishment may not be lightly inferred and treaty rights are to be construed in favor, not against, tribal rights. *Solem*, 465 U.S., at 472 . . . .

To see the perils of substituting stories for statutes, we need look no further than the stories we are offered in the case before us. Put aside that the Tribe could tell more than a few stories of its own: Take just the evidence on which Oklahoma and the dissent wish to rest their case. First, they point to Oklahoma's long historical prosecutorial practice of asserting jurisdiction over Indians in state court, even for serious crimes on the contested lands. If the Creek lands really were part of a reservation, the argument goes, all of these cases should have been tried in federal court pursuant to the MCA. Yet, until the Tenth Circuit's *Murphy* decision a few years ago, no court embraced that possibility. See *Murphy*, 875 F.3d 896. Second, they offer statements from various sources to show that "everyone" in the late 19th and early 20th century thought the reservation system—and the Creek Nation—would be disbanded soon. Third, they stress that non-Indians swiftly moved on to the reservation in the early part of the last century, that Tribe members today constitute a small fraction of those now residing on the land, and that the area now includes a "vibrant city with expanding aerospace, healthcare, technology, manufacturing, and transportation sectors." Brief for Petitioner in Carpenter v. Murphy, O. T. 2018, No. 17–1107, p. 15. All this history, we are told, supplies "compelling" evidence about the lands in question.

Maybe so, but even taken on its own terms none of this evidence tells the story we are promised. Start with the State's argument about its longstanding practice of asserting jurisdiction over Native Americans. Oklahoma proceeds on the implicit premise that its historical practices are unlikely to have defied the mandates of the federal MCA. That premise, though, appears more than a little shaky. In conjunction with the MCA, § 1151(a) not only sends to federal court certain major crimes committed by Indians on reservations. Two doors down, in § 1151(c), the statute does the same for major crimes committed by Indians on "Indian allotments, the Indian titles of which have not been extinguished." Despite this direction, however, Oklahoma state courts erroneously entertained prosecutions for major crimes by Indians on Indian allotments for decades, until state courts finally disavowed the practice in 1989. See *State v. Klindt*, 782 P.2d 401, 404 (Okla. Crim. App. 1989) (overruling *Ex parte Nowabbi*, 60 Okla.Crim. 111, 61 P.2d 1139 (1936)); see also *United States v. Sands*, 968 F.2d 1058, 1062–1063 (C.A.10 1992). And if the State's prosecution practices disregarded § 1151(c) for so long, it's unclear why we should take those same practices as a reliable guide to the meaning and application of § 1151(a).

Things only get worse from there. Why did Oklahoma historically think it could try Native Americans for any crime committed on restricted allotments or anywhere else? Part of the explanation, Oklahoma tells us, is that it thought the eastern half of the State was always categorically exempt from the terms of the federal MCA. So whether a crime was committed on a restricted allotment, a reservation, or land that wasn't Indian country at all, to Oklahoma it just didn't matter. In the State's view, when Congress adopted the Oklahoma Enabling Act that paved the way for its admission to the Union, it carved out a special exception to the MCA for the eastern

half of the State where the Creek lands can be found. By Oklahoma's own admission, then, for decades its historical practices in the area in question didn't even try to conform to the MCA, all of which makes the State's past prosecutions a meaningless guide for determining what counted as Indian country. As it turns out, too, Oklahoma's claim to a special exemption was itself mistaken, yet one more error in historical practice that even the dissent does not attempt to defend. * * *

To be fair, Oklahoma is far from the only State that has overstepped its authority in Indian country. Perhaps often in good faith, perhaps sometimes not, others made similar mistakes in the past. But all that only underscores further the danger of relying on state practices to determine the meaning of the federal MCA. * * *

* * *

We are also asked to consider commentary from those outside the Tribe. In particular, the dissent reports that the federal government "operated" on the "understanding" that the reservation was disestablished. . . . In support of its claim, the dissent highlights a 1941 statement from Felix Cohen. Then serving as an official at the Interior Department, Cohen opined that " 'all offenses by or against Indians' in the former Indian Territory 'are subject to State laws.' " Ibid. (quoting App. to Supp. Reply Brief for Petitioner in Carpenter v. Murphy, O. T. 2018, No. 17–1107, p. 1a (Memorandum for Commissioner of Indian Affairs (July 11, 1941)). But that statement is incorrect. As we have just seen, Oklahoma's courts acknowledge that the State lacks jurisdiction over Indian crimes on Indian allotments. See *Klindt*, 782 P.2d at 403–404. And the dissent does not dispute that Oklahoma is without authority under the MCA to try Indians for crimes committed on restricted allotments and any reservation. All of which highlights the pitfalls of elevating commentary over the law.[13]

Finally, Oklahoma points to the speedy and persistent movement of white settlers onto Creek lands throughout the late 19th and early 20th centuries. But this history proves no more helpful in discerning statutory meaning. Maybe, as Oklahoma supposes, it suggests that some white settlers in good faith thought the Creek lands no longer constituted a reservation. But maybe,

[13] Part of the reason for Cohen's error might be explained by a portion of the memorandum the dissent leaves unquoted. Cohen concluded that Oklahoma was free to try Indians anywhere in the State because, among other things, the Oklahoma Enabling Act "transfer[red] ... jurisdiction from the Federal courts to the State courts upon the establishment of the State of Oklahoma." App. to Supp. Reply Brief for Petitioner in Carpenter v. Murphy, O. T. 2018, No. 17–1107, p. 1a (Memorandum for Commissioner of Indian Affairs (July 11, 1941)). Yet, as we explore below, the Oklahoma Enabling Act did *not* send cases covered by the federal MCA to state court. . . . Other, contemporaneous Interior Department memoranda acknowledged that Oklahoma state courts had simply "assumed jurisdiction" over cases arising on restricted allotments without any clear authority in the Oklahoma Enabling Act or the MCA, and much the same appears to have occurred here. App. to Supp. Reply Brief for Respondent in Carpenter v. Murphy, O. T. 2018, No. 17–1107, p. 1a (Memorandum from N. Gray, Dept. of Interior, for Mr. Flanery (Aug. 12, 1942)). So rather than Oklahoma and the United States having a "shared understanding" that Congress had disestablished the Creek Reservation, post, at 2496 – 2497, it seems more accurate to say that for many years much uncertainty remained about whether the MCA applied in eastern Oklahoma.

too, some didn't care and others never paused to think about the question. Certain historians have argued, for example, that the loss of Creek land ownership was accelerated by the discovery of oil in the region during the period at issue here. A number of the federal officials charged with implementing the laws of Congress were apparently openly conflicted, holding shares or board positions in the very oil companies who sought to deprive Indians of their lands. A. Debo, And Still the Waters Run 86–87, 117–118 (1940). And for a time Oklahoma's courts appear to have entertained sham competency and guardianship proceedings that divested Tribe members of oil rich allotments. Id., at 104–106, 233–234; Brief for Historians et al. as Amici Curiae 26–30. Whatever else might be said about the history and demographics placed before us, they hardly tell a story of unalloyed respect for tribal interests.[14]

In the end, only one message rings true. Even the carefully selected history Oklahoma and the dissent recite is not nearly as tidy as they suggest. It supplies us with little help in discerning the law's meaning and much potential for mischief. If anything, the persistent if unspoken message here seems to be that we should be taken by the "practical advantages" of ignoring the written law. How much easier it would be, after all, to let the State proceed as it has always assumed it might. But just imagine what it would mean to indulge that path. A State exercises jurisdiction over Native Americans with such persistence that the practice seems normal. Indian landowners lose their titles by fraud or otherwise in sufficient volume that no one remembers whose land it once was. All this continues for long enough that a reservation that was once beyond doubt becomes questionable, and then even farfetched. Sprinkle in a few predictions here, some contestable commentary there, and the job is done, a reservation is disestablished. None of these moves would be permitted in any other area of statutory interpretation, and there is no reason why they should be permitted here. That would be the rule of the strong, not the rule of law.

IV

Unable to show that Congress disestablished the Creek Reservation, Oklahoma next tries to turn the tables in a completely different way. Now, it contends, Congress never established a reservation in the first place. Over all the years, from the federal government's first guarantees of land and self-government in 1832 and through the litany of promises that followed, the Tribe never

[14] The dissent asks us to examine a hodge-podge of other, but no more compelling, material. For example, the dissent points to later statutes that do no more than confirm there are former reservations in the State of Oklahoma. . . . It cites legislative history to show that Congress had the Creek Nation—or, at least, its neighbors—in mind when it added these in 1988. . . . The dissent cites a Senate Report from 1989 and post-1980 statements made by representatives of other tribes. . . . It highlights three occasions on which this Court referred to something like a "former Creek Nation," though it neglects to add that in each the Court was referring to the loss of the Nation's communal fee title, not its sovereignty. * * * The dissent points as well to a single instance in which the Creek Nation disclaimed reservation boundaries for purposes of litigation in a lower court, post, at 2499, but ignores that the Creek Nation has repeatedly filed briefs in this Court to the contrary. This is thin gruel to set against treaty promises enshrined in statutes.

received a reservation. Instead, what the Tribe has had all this time qualifies only as a "dependent Indian community."

Even if we were to accept Oklahoma's bold feat of reclassification, however, it's hardly clear the State would win this case. "Reservation[s]" and "Indian allotments, the Indian titles to which have not been extinguished," qualify as Indian country under subsections (a) and (c) of § 1151. But "dependent Indian communities" also qualify as Indian country under subsection (b). So Oklahoma lacks jurisdiction to prosecute Mr. McGirt whether the Creek lands happen to fall in one category or another.

About this, Oklahoma is at least candid. It admits the entire point of its reclassification exercise is to avoid *Solem*'s rule that only Congress may disestablish a reservation. And to achieve that, the State has to persuade us not only that the Creek lands constitute a "dependent Indian community" rather than a reservation. It also has to convince us that we should announce a rule that dependent Indian community status can be lost more easily than reservation status, maybe even by the happenstance of shifting demographics.

To answer this argument, it's enough to address its first essential premise. Holding that the Creek never had a reservation would require us to stand willfully blind before a host of federal statutes. Perhaps that is why the Solicitor General, who supports Oklahoma's disestablishment argument, refuses to endorse this alternative effort. It also may be why Oklahoma introduced this argument for affirmance only for the first time in this Court. And it may be why the dissent makes no attempt to defend Oklahoma here. * * *

* * *

By now, Oklahoma's next move will seem familiar. Seeking to sow doubt around express treaty promises, it cites some stray language from a statute that does not control here, a piece of congressional testimony there, and the scattered opinions of agency officials everywhere in between. See, e.g., Act of July 31, 1882, ch. 360, 22 Stat. 179 (referring to Creek land as "Indian country" as opposed to an "Indian reservation"); S. Doc. No. 143, 59th Cong., 1st. Sess., 33 (1906) (Chief of Choctaw Nation—which had an arrangement similar to the Creek's—testified that both Tribes "object to being classified with the reservation Indians"); Dept. of Interior, Census Office, Report on Indians Taxed and Indians Not Taxed in the U. S. 284 (1894) (Creeks and neighboring Tribes were "not on the ordinary Indian reservation, but on lands patented to them by the United States"). Oklahoma stresses that this Court even once called the Creek lands a "dependent Indian community," though it used that phrase in passing and only to show that the Tribe's "property and affairs were subject to the control and management of that government"—a point that would also be true if the lands were a reservation. . . . Unsurprisingly given the Creek Nation's nearly 200-year occupancy of these lands, both sides have turned up a few clues suggesting the label "reservation" either did or did not apply. One thing everyone can agree on is this history is long and messy.

But the most authoritative evidence of the Creek's relationship to the land lies not in these scattered references; it lies in the treaties and statutes that promised the land to the Tribe in the first place. And, if not for the Tribe's fee title to its land, no one would question that these treaties and statutes created a reservation. So the State's argument inescapably boils down to the untenable suggestion that, when the federal government agreed to offer more protection for tribal lands, it really provided less. All this time, fee title was nothing more than another trap for the wary.

V

That leaves Oklahoma to attempt yet another argument in the alternative. We alluded to it earlier in Part III. Now, the State accepts for argument's sake that the Creek land is a reservation and thus "Indian country" for purposes of the Major Crimes Act. It accepts, too, that this would normally mean serious crimes by Indians on the Creek Reservation would have to be tried in federal court. But, the State tells us, none of that matters; everything the parties have briefed and argued so far is beside the point. It's all irrelevant because it turns out the MCA just doesn't apply to the eastern half of Oklahoma, and it never has. That federal law may apply to other States, even to the western half of Oklahoma itself. But eastern Oklahoma is and has always been exempt. So whether or not the Creek have a reservation, the State's historic practices have always been correct and it remains free to try individuals like Mr. McGirt in its own courts.

Notably, the dissent again declines to join Oklahoma in its latest twist. And, it turns out, for good reason. In support of its argument, Oklahoma points to statutory artifacts from its territorial history. The State of Oklahoma was formed from two territories: the Oklahoma Territory in the west and Indian Territory in the east. Originally, it seems criminal prosecutions in the Indian Territory were split between tribal and federal courts. See Act of May 2, 1890, § 30, 26 Stat. 94. But, in 1897, Congress abolished that scheme, granting the U. S. Courts of the Indian Territory "exclusive jurisdiction" to try "all criminal causes for the punishment of any offense." Act of June 7, 1897, 30 Stat. 83. These federal territorial courts applied federal law and state law borrowed from Arkansas "to all persons ... irrespective of race." Ibid. A year later, Congress abolished tribal courts and transferred all pending criminal cases to U. S. courts of the Indian Territory. Curtis Act of 1898, § 28, 30 Stat. 504–505. And, Oklahoma says, sending Indians to federal court and all others to state court would be inconsistent with this established and enlightened policy of applying the same law in the same courts to everyone.

Here again, however, arguments along these and similar lines have been "frequently raised" but rarely "accepted." *United States v. Sands*, 968 F.2d 1058, 1061 (C.A.10 1992) (Kelly, J.). "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in this Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 . . . (1945). Chief Justice Marshall, for example, held that Indian Tribes were "distinct political communities, having territorial boundaries, within which their authority is exclusive ... which is not only acknowledged, but guarantied by the United States," a power dependent on and subject to no state authority. *Worcester v. Georgia*, 6 Pet. 515, 557 . . . (1832); see also *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 168–169 . . . (1973).

And in many treaties, like those now before us, the federal government promised Indian Tribes the right to continue to govern themselves. For all these reasons, this Court has long "require[d] a clear expression of the intention of Congress" before the state or federal government may try Indians for conduct on their lands. *Ex parte Crow Dog*, 109 U.S. 556 . . . (1883).

Oklahoma cannot come close to satisfying this standard. * * *

Left to hunt for some statute that might have rendered the MCA inapplicable in Oklahoma after statehood, the best the State can find is the Oklahoma Enabling Act. Congress adopted that law in preparation for Oklahoma's admission in 1907. Among its many provisions sorting out the details associated with Oklahoma's transition to statehood, the Enabling Act transferred all nonfederal cases pending in territorial courts to Oklahoma's new state courts. Act of June 16, 1906, § 20, 34 Stat. 277; see also Act of Mar. 4, 1907, § 3, 34 Stat. 1287 (clarifying treatment of cases to which United States was a party). The State says this transfer made its courts the inheritors of the federal territorial courts' sweeping authority to try Indians for crimes committed on reservations.

But, at best, this tells only half the story. The Enabling Act not only sent all nonfederal cases pending in territorial courts to state court. It also transferred pending cases that arose "under the Constitution, laws, or treaties of the United States" to federal district courts. § 16, 34 Stat. 277. Pending criminal cases were thus transferred to federal court if the prosecution would have belonged there had the Territory been a State at the time of the crime. § 1, 34 Stat. 1287 (amending the Enabling Act). Nor did the statute make any distinction between cases arising in the former eastern (Indian) and western (Oklahoma) territories. So, simply put, the Enabling Act sent state-law cases to state court and federal-law cases to federal court. And serious crimes by Indians in Indian country were matters that arose under the federal MCA and thus properly belonged in federal court from day one, wherever they arose within the new State.

Maybe that's right, Oklahoma acknowledges, but that's not what happened. Instead, for many years the State continued to try Indians for crimes committed anywhere within its borders. But what can that tell us? The State identifies not a single ambiguous statutory term in the MCA that its actions might illuminate. And, as we have seen, its own courts have acknowledged that the State's historic practices deviated in meaningful ways from the MCA's terms. . . . So, once more, it seems Oklahoma asks us to defer to its usual practices instead of federal law, something we will not and may never do.

That takes Oklahoma down to its last straw when it comes to the MCA. If Oklahoma lacks the jurisdiction to try Native Americans it has historically claimed, that means at the time of its entry into the Union no one had the power to try minor Indian-on-Indian crimes committed in Indian country. This much follows, Oklahoma reminds us, because the MCA provides federal jurisdiction only for major crimes, and no tribal forum existed to try lesser cases after Congress abolished the tribal courts in 1898. Curtis Act, § 28, 30 Stat. 504–505. Whatever one thinks about

the plausibility of other discontinuities between federal law and state practice, the State says, it is unthinkable that Congress would have allowed such a significant "jurisdictional gap" to open at the moment Oklahoma achieved statehood.

But what the State considers unthinkable turns out to be easily imagined. Jurisdictional gaps are hardly foreign to this area of the law. See, e.g., *Duro v. Reina*, 495 U.S. 676, 704–706 . . . (1990) (Brennan, J., dissenting). Many tribal courts across the country were absent or ineffective during the early part of the last century, yielding just the sort of gaps Oklahoma would have us believe impossible. Indeed, this might be why so many States joined Oklahoma in prosecuting Indians without proper jurisdiction. The judicial mind abhors a vacuum, and the temptation for state prosecutors to step into the void was surely strong. . . .

With time, too, Congress has filled many of the gaps Oklahoma worries about. One way Congress has done so is by reauthorizing tribal courts to hear minor crimes in Indian country. Congress chose exactly this course for the Creeks and others in 1936. Act of June 26, 1936, § 3, 49 Stat. 1967; see also *Hodel*, 851 F.2d at 1442–1446. Another option Congress has employed is to allow affected Indian tribes to consent to state criminal jurisdiction. 25 U.S.C. §§ 1321(a), 1326. Finally, Congress has sometimes expressly expanded state criminal jurisdiction in targeted bills addressing specific States. See, e.g., 18 U.S.C. § 3243 (creating jurisdiction for Kansas); Act of May 31, 1946, ch. 279, 60 Stat. 229 (same for a reservation in North Dakota); Act of June 30, 1948, ch. 759, 62 Stat. 1161 (same for certain reservations in Iowa); 18 U.S.C. § 1162 (creating jurisdiction for six additional States). But Oklahoma doesn't claim to have complied with the requirements to assume jurisdiction voluntarily over Creek lands. Nor has Congress ever passed a law conferring jurisdiction on Oklahoma. As a result, the MCA applies to Oklahoma according to its usual terms: Only the federal government, not the State, may prosecute Indians for major crimes committed in Indian country.

VI

In the end, Oklahoma abandons any pretense of law and speaks openly about the potentially "transform[ative]" effects of a loss today. Brief for Respondent 43. Here, at least, the State is finally rejoined by the dissent. If we dared to recognize that the Creek Reservation was never disestablished, Oklahoma and dissent warn, our holding might be used by other tribes to vindicate similar treaty promises. Ultimately, Oklahoma fears that perhaps as much as half its land and roughly 1.8 million of its residents could wind up within Indian country.

It's hard to know what to make of this self-defeating argument. Each tribe's treaties must be considered on their own terms, and the only question before us concerns the Creek. Of course, the Creek Reservation alone is hardly insignificant, taking in most of Tulsa and certain neighboring communities in Northeastern Oklahoma. But neither is it unheard of for significant non-Indian populations to live successfully in or near reservations today. See, e.g., Brief for National Congress of American Indians Fund as Amicus Curiae 26–28 (describing success of Tacoma, Washington,

and Mount Pleasant, Michigan); see also *Parker*, . . . 136 S.Ct., at 1081–1082 (holding Pender, Nebraska, to be within Indian country despite tribe's absence from the disputed territory for more than 120 years). Oklahoma replies that its situation is different because the affected population here is large and many of its residents will be surprised to find out they have been living in Indian country this whole time. But we imagine some members of the 1832 Creek Tribe would be just as surprised to find them there.

What are the consequences the State and dissent worry might follow from an adverse ruling anyway? Primarily, they argue that recognizing the continued existence of the Creek Reservation could unsettle an untold number of convictions and frustrate the State's ability to prosecute crimes in the future. But the MCA applies only to certain crimes committed in Indian country by Indian defendants. A neighboring statute provides that federal law applies to a broader range of crimes by or against Indians in Indian country. See 18 U.S.C. § 1152. States are otherwise free to apply their criminal laws in cases of non-Indian victims and defendants, including within Indian country. . . . And Oklahoma tells us that somewhere between 10% and 15% of its citizens identify as Native American. Given all this, even Oklahoma admits that the vast majority of its prosecutions will be unaffected whatever we decide today.

Still, Oklahoma and the dissent fear, "[t]housands" of Native Americans like Mr. McGirt "wait in the wings" to challenge the jurisdictional basis of their state-court convictions. Brief for Respondent 3. But this number is admittedly speculative, because many defendants may choose to finish their state sentences rather than risk reprosecution in federal court where sentences can be graver. Other defendants who do try to challenge their state convictions may face significant procedural obstacles, thanks to well-known state and federal limitations on postconviction review in criminal proceedings.[15]

In any event, the magnitude of a legal wrong is no reason to perpetuate it. When Congress adopted the MCA, it broke many treaty promises that had once allowed tribes like the Creek to try their own members. But, in return, Congress allowed only the federal government, not the States, to try tribal members for major crimes. All our decision today does is vindicate that replacement promise. * * *

What's more, a decision for either party today risks upsetting some convictions. Accepting the State's argument that the MCA never applied in Oklahoma would preserve the state-court

[15] For example, Oklahoma appears to apply a general rule that "issues that were not raised previously on direct appeal, but which could have been raised, are waived for further review." *Logan v. State*, 2013 OKCR 2, ¶ 1, 293 P.3d 969, 973. Indeed, Justice THOMAS contends that this state-law limitation on collateral review prevents us from considering even the case now before us. . . . But while that state-law rule may often bar our way, it doesn't in this case. After noting a potential state-law obstacle, the Oklahoma Court of Criminal Appeals (OCCA) proceeded to address the merits of Mr. McGirt's federal MCA claim anyway. Because the OCCA's opinion "fairly appears to rest primarily on federal law or to be interwoven with federal law" and lacks any "plain statement" that it was relying on a state-law ground, we have jurisdiction to consider the federal-law question presented to us. See Michigan v. Long, 463 U.S. 1032, 1040–1041, 1044 . . . (1983).

convictions of people like Mr. McGirt, but simultaneously call into question every federal conviction obtained for crimes committed on trust lands and restricted Indian allotments since Oklahoma recognized its jurisdictional error more than 30 years ago. . . . It's a consequence of their own arguments that Oklahoma and the dissent choose to ignore, but one which cannot help but illustrate the difficulty of trying to guess how a ruling one way or the other might affect past cases rather than simply proceeding to apply the law as written.

Looking to the future, Oklahoma warns of the burdens federal and tribal courts will experience with a wider jurisdiction and increased caseload. But, again, for every jurisdictional reaction there seems to be an opposite reaction: recognizing that cases like Mr. McGirt's belong in federal court simultaneously takes them out of state court. So while the federal prosecutors might be initially understaffed and Oklahoma prosecutors initially overstaffed, it doesn't take a lot of imagination to see how things could work out in the end.

Finally, the State worries that our decision will have significant consequences for civil and regulatory law. The only question before us, however, concerns the statutory definition of "Indian country" as it applies in federal criminal law under the MCA, and often nothing requires other civil statutes or regulations to rely on definitions found in the criminal law. Of course, many federal civil laws and regulations do currently borrow from § 1151 when defining the scope of Indian country. But it is far from obvious why this collateral drafting choice should be allowed to skew our interpretation of the MCA, or deny its promised benefits of a federal criminal forum to tribal members.

It isn't even clear what the real upshot of this borrowing into civil law may be. Oklahoma reports that recognizing the existence of the Creek Reservation for purposes of the MCA might potentially trigger a variety of federal civil statutes and rules, including ones making the region eligible for assistance with homeland security, 6 U.S.C. §§ 601, 606, historical preservation, 54 U.S.C. § 302704, schools, 20 U.S.C. § 1443, highways, 23 U.S.C. § 120, roads, § 202, primary care clinics, 25 U.S.C. § 1616e–1, housing assistance, § 4131, nutritional programs, 7 U.S.C. §§ 2012, 2013, disability programs, 20 U.S.C. § 1411, and more. But what are we to make of this? Some may find developments like these unwelcome, but from what we are told others may celebrate them.

The dissent isn't so sanguine—it assures us, without further elaboration, that the consequences will be "drastic precisely because they depart from ... more than a century [of] settled understanding." . . . The prediction is a familiar one. Thirty years ago the Solicitor General warned that "[l]aw enforcement would be rendered very difficult" and there would be "grave uncertainty regarding the application" of state law if courts departed from decades of "long-held understanding" and recognized that the federal MCA applies to restricted allotments in Oklahoma. Brief for United States as Amicus Curiae in Oklahoma v. Brooks, O.T. 1988, No. 88–1147, pp. 2, 9, 18, 19. Yet, during the intervening decades none of these predictions panned out, and that fact stands as a note of caution against too readily crediting identical warnings today.

More importantly, dire warnings are just that, and not a license for us to disregard the law. By suggesting that our interpretation of Acts of Congress adopted a century ago should be inflected based on the costs of enforcing them today, the dissent tips its hand. Yet again, the point of looking at subsequent developments seems not to be determining the meaning of the laws Congress wrote in 1901 or 1906, but emphasizing the costs of taking them at their word.

Still, we do not disregard the dissent's concern for reliance interests. It only seems to us that the concern is misplaced. Many other legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few—are designed to protect those who have reasonably labored under a mistaken understanding of the law. * * *

In reaching our conclusion about what the law demands of us today, we do not pretend to foretell the future and we proceed well aware of the potential for cost and conflict around jurisdictional boundaries, especially ones that have gone unappreciated for so long. But it is unclear why pessimism should rule the day. With the passage of time, Oklahoma and its Tribes have proven they can work successfully together as partners. Already, the State has negotiated hundreds of intergovernmental agreements with tribes, including many with the Creek. See Okla. Stat., Tit. 74, § 1221 (2019 Cum. Supp.); Oklahoma Secretary of State, Tribal Compacts and Agreements, www.sos.ok.gov/tribal.aspx. These agreements relate to taxation, law enforcement, vehicle registration, hunting and fishing, and countless other fine regulatory questions. See Brief for Tom Cole et al. as Amici Curiae 13–19. No one before us claims that the spirit of good faith, "comity and cooperative sovereignty" behind these agreements, id., at 20, will be imperiled by an adverse decision for the State today any more than it might be by a favorable one. And, of course, should agreement prove elusive, Congress remains free to supplement its statutory directions about the lands in question at any time. It has no shortage of tools at its disposal.

The federal government promised the Creek a reservation in perpetuity. Over time, Congress has diminished that reservation. It has sometimes restricted and other times expanded the Tribe's authority. But Congress has never withdrawn the promised reservation. As a result, many of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.

The judgment of the Court of Criminal Appeals of Oklahoma is

Reversed.

[Chief Justice ROBERTS' and Justice THOMAS' dissenting opinions omitted.]

NOTES

1. Within a few weeks of the *McGirt* decision, the Seventh Circuit reversed a lower court decision holding the Wisconsin Oneida reservation had been disestablished. *Oneida Nation v. Village of Hobart*, 968 F.3d 664 (7th Cir. 2020), rev'g, 371 F.Supp.3d 500 (E.D. Wis. 2019). The court relied on *McGirt*'s limitation on the importance of the second and third *Solem* factors:

> To resolve this dispute, we must trace the history of the Oneida Reservation from its establishment by treaty in 1838 through a series of allotment acts passed by Congress around the turn of the twentieth century. If the Reservation remains intact, then federal law treats the land at issue as Indian country not subject to most state and local regulation. The Village argues that the Reservation was diminished piece by piece when Congress allotted the Reservation among individual tribe members and allowed the land to be sold eventually to non-Indians. The district court agreed and granted summary judgment in favor of the Village.
>
> We reverse. The Reservation was created by treaty, and it can be diminished or disestablished only by Congress. Congress has not done either of those things. The governing legal framework—at least when the issue was decided in the district court and when we heard oral argument—was clear. Under *Solem v. Bartlett*, 465 U.S. 463 . . . (1984), we look—from most important factor to least—to statutory text, the circumstances surrounding a statute's passage, and subsequent events for evidence of a "clear congressional purpose to diminish the reservation." Id. at 476 . . . . After this case was argued, the Supreme Court decided *McGirt v. Oklahoma*, —— U.S. ——, 140 S. Ct. 2452, —— L.Ed.2d —— (2020). We read *McGirt* as adjusting the *Solem* framework to place a greater focus on statutory text, making it even more difficult to establish the requisite congressional intent to disestablish or diminish a reservation. The Oneida Nation prevails under both the *Solem* framework and the adjustments made in *McGirt*.
>
> The undisputed facts show no congressional intent to diminish. First, the statutory texts provide no clear indication that Congress intended to eliminate all tribal interests in allotted Oneida land. Second, the Supreme Court has rejected—time and time again—the Village's argument that diminishment can be the result of Congress's general expectation in the late nineteenth and early twentieth centuries that its actions would lead eventually to the end of the reservation system. These general expectations do not show an "unequivocal[ ]" contemporary understanding that the statutes would diminish the Reservation and effectively abrogate the United States' treaty with the Oneida. *Solem*, 465 U.S. at 471 . . . . The Village's argument that Congress intended to diminish the Reservation by allowing land to pass out of Indian hands is antithetical to *Solem* and the well-established legal framework for diminishment. Third, events following Congress's enactment

> of the relevant statute (or statutes) cannot alone support a finding of diminishment in the absence of textual or contextual support. Even if they could, the evidence offered by Village is so inconclusive that it could not justify a finding that the United States unilaterally broke the 1838 Treaty.

Id. at 667-68.

2. Additionally, the first of several criminal appellants and petitioners seeking relief from Oklahoma prosecutions hit the Oklahoma Court of Criminal Appeals. See *Bosse v. State*, 484 P.3d 286 (Okla. Ct. Crim. App. 2021). That case involved a crime committed against Chickasaw Nation members and arose on the Chickasaw Reservation. Briefs are on Turtle Talk here: https://turtletalk.blog/2020/08/05/oklahoma-criminal-appellate-court-asked-to-address-impact-of-mcgirt-on-crime-committed-on-chickasaw-reservation-with-chickasaw-victims/. As was apparent to those on the ground, the Chickasaw, Choctaw, Cherokee, and Seminole nations have very similar histories to that the Creek Nation. As expected, the reasoning of the *McGirt* opinion applied to all of the Five Tribes. E.g., *Ryder v. State*, 489 P.3d 528 (Okla. Ct. Crim. App. 2021) (Choctaw); *Spears v. State*, 485 P.3d 873 (Okla. Ct. Crim. App. 2021) (Cherokee); *Grayson v. State*, 485 P.3d 250 (Okla. Ct. Crim. App. 2021) (Seminole).

3. Jimmy McGirt was not immediately released. Before he could be released, the United States indicted him for the same criminal conduct. He was convicted, but on appeal, the Tenth Circuit reversed the conviction and ordered a new trial. 71 F.4th 755 (10th Cir. 2023).

4. Leading scholarship on the impacts of *McGirt* include Maggie Blachawk, On Power & the Law: *McGirt v. Oklahoma*, 2021 Sup. Ct. Rev. 367 (2021); 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 (2021); and Stacy Leeds & Lonnie Beard, A Wealth of Sovereign Choices: Tax Implications of *McGirt v. Oklahoma* and the Promise of Tribal Economic Development, 56 Tulsa L. Rev. 417 (2021). See also Special McGirt Issue, 56 Tulsa L. Rev. 363-530 (2021).

After note 1 on page 539, add:

The North Carolina Supreme Court held in *State v. Nobles*, 838 S.E.2d 373 (N.C.), cert. denied, 141 S. Ct. 365 (2020), that a non-enrolled Cherokee Indian was not an "Indian" under the Major Crimes Act, 18 U.S.C. § 1153. As the foregoing federal cases allow for, however, an unenrolled "Indian" may still be an "Indian" for purposes of federal jurisdiction.

SECTION C.

STATE CRIMINAL JURISDICTION

1. The Special Case of Non-Indian on Non-Indian Crime in Indian Country

At the end of page 557, add:

Oklahoma v. Castro-Huerta

United States Supreme Court, 2022

__ U.S. __, 142 S.Ct. 2486

Justice KAVANAUGH delivered the opinion of the Court.

This case presents a jurisdictional question about the prosecution of crimes committed by non-Indians against Indians in Indian country: Under current federal law, does the Federal Government have exclusive jurisdiction to prosecute those crimes? Or do the Federal Government and the State have concurrent jurisdiction to prosecute those crimes? We conclude that the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country.

I

In 2015, Victor Manuel Castro-Huerta lived in Tulsa, Oklahoma, with his wife and their several children, including Castro-Huerta's then-5-year-old stepdaughter, who is a Cherokee Indian. The stepdaughter has cerebral palsy and is legally blind. One day in 2015, Castro-Huerta's sister-in-law was in the house and noticed that the young girl was sick. After a 911 call, the girl was rushed to a Tulsa hospital in critical condition. Dehydrated, emaciated, and covered in lice and excrement, she weighed only 19 pounds. Investigators later found her bed filled with bedbugs and cockroaches.

When questioned, Castro-Huerta admitted that he had severely undernourished his stepdaughter during the preceding month. The State of Oklahoma criminally charged both Castro-Huerta and his wife for child neglect. Both were convicted. Castro-Huerta was sentenced to 35 years of imprisonment, with the possibility of parole. This case concerns the State's prosecution of Castro-Huerta.

After Castro-Huerta was convicted and while his appeal was pending in state court, this Court decided McGirt v. Oklahoma, 591 U.S. ——, 140 S.Ct. 2452, 207 L.Ed.2d 985 (2020). In McGirt, the Court held that Congress had never properly disestablished the Creek Nation's reservation in eastern Oklahoma. As a result, the Court concluded that the Creek Reservation remained "Indian country." Id., at —— – ——, ——, ——, 140 S.Ct., at 2459–2460, 2467–2468, 2474. The status of that part of Oklahoma as Indian country meant that different jurisdictional

rules might apply for the prosecution of criminal offenses in that area. See 18 U.S.C. §§ 1151–1153. Based on *McGirt*'s reasoning, the Oklahoma Court of Criminal Appeals later recognized that several other Indian reservations in Oklahoma had likewise never been properly disestablished. See, e.g., State ex rel. Matloff v. Wallace, 2021 OKCR 21, ¶15, 497 P.3d 686, 689 (reaffirming recognition of the Cherokee, Choctaw, and Chickasaw Reservations); Grayson v. State, 2021 OKCR 8, ¶10, 485 P.3d 250, 254 (Seminole Reservation).

In light of *McGirt* and the follow-on cases, the eastern part of Oklahoma, including Tulsa, is now recognized as Indian country. About two million people live there, and the vast majority are not Indians.

The classification of eastern Oklahoma as Indian country has raised urgent questions about which government or governments have jurisdiction to prosecute crimes committed there. This case is an example: a crime committed in what is now recognized as Indian country (Tulsa) by a non-Indian (Castro-Huerta) against an Indian (his stepdaughter). All agree that the Federal Government has jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country. The question is whether the Federal Government's jurisdiction is exclusive, or whether the State also has concurrent jurisdiction with the Federal Government.

In the wake of *McGirt*, Castro-Huerta argued that the Federal Government's jurisdiction to prosecute crimes committed by a non-Indian against an Indian in Indian country is exclusive and that the State therefore lacked jurisdiction to prosecute him. The Oklahoma Court of Criminal Appeals agreed with Castro-Huerta. Relying on an earlier Oklahoma decision holding that the federal General Crimes Act grants the Federal Government exclusive jurisdiction, the court ruled that the State did not have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country. The court therefore vacated Castro-Huerta's conviction. No. F–2017–1203 (Apr. 29, 2021); see also Bosse v. State, 2021 OK CR 3, 484 P. 3d 286; Roth v. State, 2021 OKCR 27, 499 P.3d 23.

While Castro-Huerta's state appellate proceedings were ongoing, a federal grand jury in Oklahoma indicted Castro-Huerta for the same conduct. Castro-Huerta accepted a plea agreement for a 7-year sentence followed by removal from the United States. (Castro-Huerta is not a U.S. citizen and is unlawfully in the United States.) In other words, putting aside parole possibilities, Castro-Huerta in effect received a 28-year reduction of his sentence as a result of *McGirt*.

Castro-Huerta's case exemplifies a now-familiar pattern in Oklahoma in the wake of *McGirt*. The Oklahoma courts have reversed numerous state convictions on that same jurisdictional ground. After having their state convictions reversed, some non-Indian criminals have received lighter sentences in plea deals negotiated with the Federal Government. Others have simply gone free. Going forward, the State estimates that it will have to transfer prosecutorial responsibility for more than 18,000 cases per year to the Federal and Tribal Governments. All of this has created a significant challenge for the Federal Government and for the people of

Oklahoma. At the end of fiscal year 2021, the U.S. Department of Justice was opening only 22% and 31% of all felony referrals in the Eastern and Northern Districts of Oklahoma. Dept. of Justice, U.S. Attorneys, Fiscal Year 2023 Congressional Justification 46. And the Department recently acknowledged that "many people may not be held accountable for their criminal conduct due to resource constraints." Ibid.

In light of the sudden significance of this jurisdictional question for public safety and the criminal justice system in Oklahoma, this Court granted certiorari to decide whether a State has concurrent jurisdiction with the Federal Government to prosecute crimes committed by non-Indians against Indians in Indian country. 595 U.S. ——, 142 S.Ct. 877, 211 L.Ed.2d 585 (2022).1

II

The jurisdictional dispute in this case arises because Oklahoma's territory includes Indian country. Federal law defines "Indian country" to include, among other things, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." 18 U.S.C. § 1151.

To begin with, the Constitution allows a State to exercise jurisdiction in Indian country. Indian country is part of the State, not separate from the State. To be sure, under this Court's precedents, federal law may preempt that state jurisdiction in certain circumstances. But otherwise, as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country. See U.S. Const., Amdt. 10. As this Court has phrased it, a State is generally "entitled to the sovereignty and jurisdiction over all the territory within her limits." Lessee of Pollard v. Hagan, 3 How. 212, 228, 11 L.Ed. 565 (1845).

In the early years of the Republic, the Federal Government sometimes treated Indian country as separate from state territory—in the same way that, for example, New Jersey is separate from New York. Most prominently, in the 1832 decision in Worcester v. Georgia, 6 Pet. 515, 561, 8 L.Ed. 483 this Court held that Georgia state law had no force in the Cherokee Nation because the Cherokee Nation "is a distinct community occupying its own territory."

But the "general notion drawn from Chief Justice Marshall's opinion in Worcester v. Georgia" "has yielded to closer analysis." Organized Village of Kake v. Egan, 369 U.S. 60, 72, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962). "By 1880 the Court no longer viewed reservations as distinct nations." Ibid. Since the latter half of the 1800s, the Court has consistently and explicitly held that Indian reservations are "part of the surrounding State" and subject to the State's jurisdiction "except as forbidden by federal law." Ibid.

To take a few examples: In 1859, the Court stated: States retain "the power of a sovereign over their persons and property, so far as" "necessary to preserve the peace of the Commonwealth." New York ex rel. Cutler v. Dibble, 21 How. 366, 370, 16 L.Ed. 149 (1859).

In 1930: "[R]eservations are part of the State within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards." Surplus Trading Co. v. Cook, 281 U.S. 647, 651, 50 S.Ct. 455, 74 L.Ed. 1091 (1930).

In 1946: "[I]n the absence of a limiting treaty obligation or Congressional enactment each state ha[s] a right to exercise jurisdiction over Indian reservations within its boundaries." New York ex rel. Ray v. Martin, 326 U.S. 496, 499, 66 S.Ct. 307, 90 L.Ed. 261 (1946).

In 1992: "This Court's more recent cases have recognized the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands." County of Yakima v. Confederated Tribes and Bands of Yakima Nation, 502 U.S. 251, 257–258, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992).

And as recently as 2001: "State sovereignty does not end at a reservation's border." Nevada v. Hicks, 533 U.S. 353, 361, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001).

In accord with that overarching jurisdictional principle dating back to the 1800s, States have jurisdiction to prosecute crimes committed in Indian country unless preempted. In the leading case in the criminal context—the *McBratney* case from 1882—this Court held that States have jurisdiction to prosecute crimes committed by non-Indians against non-Indians in Indian country. United States v. McBratney, 104 U.S. 621, 623–624, 26 L.Ed. 869 (1882). The Court stated that Colorado had "criminal jurisdiction" over crimes by non-Indians against non-Indians "throughout the whole of the territory within its limits, including the Ute Reservation." Id., at 624. Several years later, the Court similarly decided that Montana had criminal jurisdiction over crimes by non-Indians against non-Indians in Indian country within that State. Draper v. United States, 164 U.S. 240, 244–247, 17 S.Ct. 107, 41 L.Ed. 419 (1896). The McBratney principle remains good law.

In short, 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.

III

The central question that we must decide, therefore, is whether the State's authority to prosecute crimes committed by non-Indians against Indians in Indian country has been preempted. U.S. Const., Art. VI.

Under the Court's precedents, as we will explain, a State's jurisdiction in Indian country may be preempted (i) by federal law under ordinary principles of federal preemption, or (ii) when the exercise of state jurisdiction would unlawfully infringe on tribal self-government.

In Part III–A, we consider whether state authority to prosecute crimes committed by non-Indians against Indians in Indian country is preempted by federal law under ordinary principles of preemption. In Part III–B, we consider whether principles of tribal self-government preclude the

exercise of state jurisdiction over crimes committed by non-Indians against Indians in Indian country.

A

Castro-Huerta points to two federal laws that, in his view, preempt Oklahoma's authority to prosecute crimes committed by non-Indians against Indians in Indian country: (i) the General Crimes Act, which grants the Federal Government jurisdiction to prosecute crimes in Indian country, 18 U.S.C. § 1152; and (ii) Public Law 280, which grants States, or authorizes States to acquire, certain additional jurisdiction over crimes committed in Indian country, 67 Stat. 588; see 18 U.S.C. § 1162; 25 U.S.C. § 1321. Neither statute preempts preexisting or otherwise lawfully assumed state authority to prosecute crimes committed by non-Indians against Indians in Indian country.

1

As relevant here, the General Crimes Act provides: "Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country." 18 U.S.C. § 1152.

By its terms, the Act does not preempt the State's authority to prosecute non-Indians who commit crimes against Indians in Indian country. The text of the Act simply "extend[s]" federal law to Indian country, leaving untouched the background principle of state jurisdiction over crimes committed within the State, including in Indian country. Ibid.

The Act also specifies the body of federal criminal law that extends to Indian country—namely, "the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States." Ibid. Those cross-referenced "general laws" are the federal laws that apply in federal enclaves such as military bases and national parks. Ibid.

Importantly, however, the General Crimes Act does not say that Indian country is equivalent to a federal enclave for jurisdictional purposes. Nor does the Act say that federal jurisdiction is exclusive in Indian country, or that state jurisdiction is preempted in Indian country.

Under the General Crimes Act, therefore, both the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed in Indian country. The General Crimes Act does not preempt state authority to prosecute Castro-Huerta's crime.

To overcome the text, Castro-Huerta offers several counterarguments. None is persuasive.

First, Castro-Huerta advances what he describes as a textual argument. He contends that the text of the General Crimes Act makes Indian country the jurisdictional equivalent of a federal

enclave. To begin, he points out that the Federal Government has exclusive jurisdiction to prosecute crimes committed in federal enclaves such as military bases and national parks. And then Castro-Huerta asserts that the General Crimes Act in effect equates federal enclaves and Indian country. Therefore, according to Castro-Huerta, it follows that the Federal Government also has exclusive jurisdiction to prosecute crimes committed in Indian country.

Castro-Huerta's syllogism is wrong as a textual matter. The Act simply borrows the body of federal criminal law that applies in federal enclaves and extends it to Indian country. The Act does not purport to equate Indian country and federal enclaves for jurisdictional purposes. Moreover, it is not enough to speculate, as Castro-Huerta does, that Congress might have implicitly intended a jurisdictional parallel between Indian country and federal enclaves.

* * *

Moreover, if Castro-Huerta's interpretation of the General Crimes Act were correct, then the Act would preclude States from prosecuting any crimes in Indian country—presumably even those crimes committed by non-Indians against non-Indians—just as States ordinarily cannot prosecute crimes committed in federal enclaves. But this Court has long held that States may prosecute crimes committed by non-Indians against non-Indians in Indian country. See *McBratney*, 104 U.S. at 623–624; *Draper*, 164 U.S. at 242–246, 17 S.Ct. 107. Those holdings, too, contravene Castro-Huerta's argument regarding the General Crimes Act.

In advancing his enclave argument, Castro-Huerta also tries to analogize the text of the General Crimes Act to the text of the Major Crimes Act. He asserts that the Major Crimes Act grants the Federal Government exclusive jurisdiction to prosecute certain major crimes committed by Indians in Indian country. But the Major Crimes Act contains substantially different language than the General Crimes Act. Unlike the General Crimes Act, the Major Crimes Act says that defendants in Indian country "shall be subject to the same law" as defendants in federal enclaves. See 18 U.S.C. § 1153 ("Any Indian who commits against the person or property of another Indian or other person any of " certain major offenses "shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States"). So even assuming that the text of the Major Crimes Act provides for exclusive federal jurisdiction over major crimes committed by Indians in Indian country, see, e.g., United States v. John, 437 U.S. 634, 651, and n. 22, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978); Negonsott v. Samuels, 507 U.S. 99, 103, 113 S.Ct. 1119, 122 L.Ed.2d 457 (1993), that conclusion does not translate to the differently worded General Crimes Act.

In short, the General Crimes Act does not treat Indian country as the equivalent of a federal enclave for jurisdictional purposes. Nor does the Act make federal jurisdiction exclusive or preempt state law in Indian country.

Second, Castro-Huerta contends that, regardless of the statutory text, Congress implicitly intended for the General Crimes Act to provide the Federal Government with exclusive jurisdiction over crimes committed by non-Indians against Indians in Indian country.

The fundamental problem with Castro-Huerta's implicit intent argument is that the text of the General Crimes Act says no such thing. Congress expresses its intentions through statutory text passed by both Houses and signed by the President (or passed over a Presidential veto). As this Court has repeatedly stated, the text of a law controls over purported legislative intentions unmoored from any statutory text. . . .

To buttress his implicit intent argument, Castro-Huerta seizes on the history of the General Crimes Act. At the time of the Act's earliest iterations in 1817 and 1834, Indian country was separate from the States. Therefore, at that time, state law did not apply in Indian country—in the same way that New York law would not ordinarily have applied in New Jersey. But territorial separation—not jurisdictional preemption by the General Crimes Act—was the reason that state authority did not extend to Indian country at that time.

Because Congress operated under a different territorial paradigm in 1817 and 1834, it had no reason at that time to consider whether to preempt preexisting or lawfully assumed state criminal authority in Indian country. . . .

As noted above, the *Worcester*-era understanding of Indian country as separate from the State was abandoned later in the 1800s. After that change, Indian country in each State became part of that State's territory. But Congress did not alter the General Crimes Act to make federal criminal jurisdiction exclusive in Indian country. To this day, the text of the General Crimes Act still does not make federal jurisdiction exclusive or preempt state jurisdiction.

In 1882, in *McBratney*, moreover, this Court held that States have jurisdiction to prosecute at least some crimes committed in Indian country. Since 1882, therefore, Congress has been specifically aware that state criminal laws apply to some extent in Indian country. Yet since then, Congress has never enacted new legislation that would render federal jurisdiction exclusive or preempt state jurisdiction over crimes committed by non-Indians in Indian country. Additionally, in 1979, the Office of Legal Counsel stated that this Court had not resolved the specific issue of state jurisdiction over crimes committed by non-Indians against Indians in Indian country, and that the issue was not settled. 3 Op. OLC 111, 117–119 (1979). Yet Congress still did not act to make federal jurisdiction exclusive or to preempt state jurisdiction.

On a different tack, Castro-Huerta invokes the reenactment canon. Castro-Huerta points out that, in 1948, Congress recodified the General Crimes Act. Two years before that recodification, this Court suggested in dicta that States lack jurisdiction over crimes committed by non-Indians against Indians in Indian country. See Williams v. United States, 327 U.S. 711, 714, 66 S.Ct. 778, 90 L.Ed. 962 (1946). Castro-Huerta contends that the 1948 Congress therefore intended to ratify the Williams dicta.

Castro-Huerta's reenactment-canon argument is misplaced. First of all, the reenactment canon does not override clear statutory language of the kind present in the General Crimes Act. See BP P.L.C. v. Mayor and City Council of Baltimore, 593 U.S. ——, ——, 141 S.Ct. 1532, 1541, 209 L.Ed.2d 631 (2021). In addition, the canon does not apply to dicta. See Jama v. Immigration and Customs Enforcement, 543 U.S. 335, 349, 351, n. 12, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005). The Court's statements in *Williams* were pure dicta. Indeed, the *Williams* dicta did not even purport to interpret the text of the General Crimes Act. Dicta that does not analyze the relevant statutory provision cannot be said to have resolved the statute's meaning. Moreover, any inference from Congress's 1948 recodification is especially weak because that recodification was not specific to the General Crimes Act, but instead was simply a general recodification of all federal criminal laws. This Court has previously explained that "the function" of the 1948 recodification "was generally limited to that of consolidation and codification." Muniz v. Hoffman, 422 U.S. 454, 474, 95 S.Ct. 2178, 45 L.Ed.2d 319 (1975) (internal quotation marks omitted). This Court does not infer that Congress, "in revising and consolidating the laws, intended to change their policy, unless such an intention be clearly expressed." Id., at 470, 95 S.Ct. 2178 (internal quotation marks omitted).

For many reasons, then, we cannot conclude that Congress, by recodifying the entire Federal Criminal Code in 1948, silently ratified a few sentences of dicta from *Williams*. The reenactment canon does not apply in this case.

Third, Castro-Huerta contends that the Court has repeated the 1946 *Williams* dicta on several subsequent occasions. But the Court's dicta, even if repeated, does not constitute precedent and does not alter the plain text of the General Crimes Act, which was the law passed by Congress and signed by the President. See National Collegiate Athletic Assn. v. Alston, 594 U.S. ——, ——, 141 S.Ct. 2141, 2158, 210 L.Ed.2d 314 (2021).3

Moreover, there is a good explanation for why the Court's previous comments on this issue came only in the form of tangential dicta. The question of whether States have concurrent jurisdiction over crimes committed by non-Indians against Indians in Indian country did not previously matter all that much and did not warrant this Court's review. Through congressional grants of authority in Public Law 280 or state-specific statutes, some States with substantial Indian populations have long possessed broad jurisdiction to prosecute a vast array of crimes in Indian country (including crimes by Indians). See Brief for National Congress of American Indians as Amicus Curiae 20, and n. 2. Indeed, Castro-Huerta notes that "21 States have jurisdiction over crimes 'by or against' Indians in some Indian country." Brief for Respondent 7. So the General Crimes Act question—namely, whether that Act preempts inherent state prosecutorial authority in Indian country—was not relevant in those States.

In any event, this Court never considered the General Crimes Act preemption question. As the Office of Legal Counsel put it, "many courts, without carefully considering the question, have assumed that Federal jurisdictio[n] whenever it obtains is exclusive. We nevertheless believe that

it is a matter that should not be regarded as settled before it has been fully explored by the courts." 3 Op. OLC, at 117. This case is the first time that the matter has been fully explored by this Court.

Until the Court's decision in *McGirt* two years ago, this question likewise did not matter much in Oklahoma. Most everyone in Oklahoma previously understood that the State included almost no Indian country. *McGirt*, 590 U.S., at ——— – ———, 140 S.Ct., at 2498–2499 (ROBERTS, C.J., dissenting). But after *McGirt*, about 43% of Oklahoma—including Tulsa—is now considered Indian country. Therefore, the question of whether the State of Oklahoma retains concurrent jurisdiction to prosecute non-Indian on Indian crimes in Indian country has suddenly assumed immense importance. The jurisdictional question has now been called. In light of the newfound significance of the question, it is necessary and appropriate for this Court to take its first hard look at the text and structure of the General Crimes Act, rather than relying on scattered dicta about a question that, until now, was relatively insignificant in the real world.

After independently examining the question, we have concluded that the General Crimes Act does not preempt state jurisdiction over crimes committed by non-Indians against Indians in Indian country.

2

Castro-Huerta next invokes Public Law 280 as a source of preemption. That argument is similarly unpersuasive.

Public Law 280 affirmatively grants certain States broad jurisdiction to prosecute state-law offenses committed by or against Indians in Indian country. See 18 U.S.C. § 1162. (Other States may opt in, with tribal consent. 25 U.S.C. § 1321.) But Public Law 280 does not preempt any preexisting or otherwise lawfully assumed jurisdiction that States possess to prosecute crimes in Indian country. Indeed, the Court has already concluded as much: "Nothing in the language or legislative history of Pub. L. 280 indicates that it was meant to divest States of pre-existing and otherwise lawfully assumed jurisdiction." Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P. C., 467 U.S. 138, 150, 104 S.Ct. 2267, 81 L.Ed.2d 113 (1984). The Court's definitive statement in Three Affiliated Tribes about Public Law 280 applies to both civil and criminal jurisdiction. And the Court's statement follows ineluctably from the statutory text: Public Law 280 contains no language that preempts States' civil or criminal jurisdiction.

Castro-Huerta separately contends that the enactment of Public Law 280 in 1953 would have been pointless surplusage if States already had concurrent jurisdiction over crimes committed by non-Indians against Indians in Indian country. So he says that, as of 1953, Congress must have assumed that States did not already have concurrent jurisdiction over those crimes. To begin with, assumptions are not laws, and the fact remains that Public Law 280 contains no language preempting state jurisdiction, as the Court already held in Three Affiliated Tribes. Apart from that, Public Law 280 encompasses far more than just non-Indian on Indian crimes (the issue here). Public Law 280 also grants States jurisdiction over crimes committed by Indians. See Conference

of Western Attorneys General, American Indian Law Deskbook § 4.6, p. 250–251 (2021 ed.); cf. *Negonsott*, 507 U.S. at 105–107, 113 S.Ct. 1119. Absent Public Law 280, state jurisdiction over those Indian-defendant crimes could implicate principles of tribal self-government. See White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142–143, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980); Part III–B, infra. So our resolution of the narrow jurisdictional issue in this case does not negate the significance of Public Law 280 in affording States broad criminal jurisdiction over other crimes committed in Indian country, such as crimes committed by Indians.

In any event, to the extent that there is any overlap (or even complete overlap) between Public Law 280's jurisdictional grant and some of the States' preexisting jurisdiction with respect to crimes committed in Indian country, it made good sense for Congress in 1953 to explicitly grant such authority in Public Law 280. The scope of the States' authority had not previously been resolved by this Court, except in cases such as *McBratney* and *Draper* with respect to non-Indian on non-Indian crimes. Congressional action in the face of such legal uncertainty cannot reasonably be characterized as unnecessary surplusage. See Nielsen v. Preap, 586 U.S. ——, —— – ——, 139 S.Ct. 954, 968–970, 203 L.Ed.2d 333 (2019). And finally, even if there is some surplusage, the Court has stated that "[r]edundancy is not a silver bullet" when interpreting statutes. Rimini Street, Inc. v. Oracle USA, Inc., 586 U.S. ——, ——, 139 S.Ct. 873, 881, 203 L.Ed.2d 180 (2019).

In sum, Public Law 280 does not preempt state authority to prosecute crimes committed by non-Indians against Indians in Indian country.

B

Applying what has been referred to as the *Bracker* balancing test, this Court has recognized that even when federal law does not preempt state jurisdiction under ordinary preemption analysis, preemption may still occur if the exercise of state jurisdiction would unlawfully infringe upon tribal self-government. See *Bracker*, 448 U.S. at 142–143, 100 S.Ct. 2578; see also New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333–335, 103 S.Ct. 2378, 76 L.Ed.2d 611 (1983). Under the *Bracker* balancing test, the Court considers tribal interests, federal interests, and state interests. 448 U.S. at 145, 100 S.Ct. 2578.5

Here, *Bracker* does not bar the State from prosecuting crimes committed by non-Indians against Indians in Indian country.

First, the exercise of state jurisdiction here would not infringe on tribal self-government. In particular, a state prosecution of a crime committed by a non-Indian against an Indian would not deprive the tribe of any of its prosecutorial authority. That is because, with exceptions not invoked here, Indian tribes lack criminal jurisdiction to prosecute crimes committed by non-Indians such as Castro-Huerta, even when non-Indians commit crimes against Indians in Indian country. See Oliphant v. Suquamish Tribe, 435 U.S. 191, 195, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978).

Moreover, a state prosecution of a non-Indian does not involve the exercise of state power over any Indian or over any tribe. The only parties to the criminal case are the State and the non-Indian defendant. Therefore, as has been recognized, any tribal self-government "justification for preemption of state jurisdiction" would be "problematic." American Indian Law Deskbook § 4.8, at 260; *see Three Affiliated Tribes*, 467 U.S. at 148, 104 S.Ct. 2267; see also *Hicks*, 533 U.S. at 364, 121 S.Ct. 2304; *McBratney*, 104 U.S. at 623–624; *Draper*, 164 U.S. at 242–243, 17 S.Ct. 107.

Second, a state prosecution of a non-Indian likewise would not harm the federal interest in protecting Indian victims. State prosecution would supplement federal authority, not supplant federal authority. As the United States has explained in the past, "recognition of concurrent state jurisdiction" could "facilitate effective law enforcement on the Reservation, and thereby further the federal and tribal interests in protecting Indians and their property against the actions of non-Indians." Brief for United States as Amicus Curiae in Arizona v. Flint, O. T. 1988, No. 603, p. 6. The situation might be different if state jurisdiction ousted federal jurisdiction. But because the State's jurisdiction would be concurrent with federal jurisdiction, a state prosecution would not preclude an earlier or later federal prosecution and would not harm the federal interest in protecting Indian victims.

Third, the State has a strong sovereign interest in ensuring public safety and criminal justice within its territory, and in protecting all crime victims. See *Dibble*, 21 How. at 370. The State also has a strong interest in ensuring that criminal offenders—especially violent offenders—are appropriately punished and do not harm others in the State.

The State's interest in protecting crime victims includes both Indian and non-Indian victims. If his victim were a non-Indian, Castro-Huerta could be prosecuted by the State, as he acknowledges. But because his victim is an Indian, Castro-Huerta says that he is free from state prosecution. Castro-Huerta's argument would require this Court to treat Indian victims as second-class citizens. We decline to do so.

* * *

We conclude that the Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country. We therefore reverse the judgment of the Oklahoma Court of Criminal Appeals and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice GORSUCH, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

In 1831, Georgia arrested Samuel Worcester, a white missionary, for preaching to the Cherokee on tribal lands without a license. Really, the prosecution was a show of force—an

attempt by the State to demonstrate its authority over tribal lands. Speaking for this Court, Chief Justice Marshall refused to endorse Georgia's ploy because the State enjoyed no lawful right to govern the territory of a separate sovereign. See Worcester v. Georgia, 6 Pet. 515, 561, 8 L.Ed. 483 (1832). The Court's decision was deeply unpopular, and both Georgia and President Jackson flouted it. But in time, Worcester came to be recognized as one of this Court's finer hours. The decision established a foundational rule that would persist for over 200 years: Native American Tribes retain their sovereignty unless and until Congress ordains otherwise. Worcester proved that, even in the "[c]ourts of the conqueror," the rule of law meant something. Johnson's Lessee v. McIntosh, 8 Wheat. 543, 588, 5 L.Ed. 681 (1823).

Where this Court once stood firm, today it wilts. After the Cherokee's exile to what became Oklahoma, the federal government promised the Tribe that it would remain forever free from interference by state authorities. Only the Tribe or the federal government could punish crimes by or against tribal members on tribal lands. At various points in its history, Oklahoma has chafed at this limitation. Now, the State seeks to claim for itself the power to try crimes by non-Indians against tribal members within the Cherokee Reservation. Where our predecessors refused to participate in one State's unlawful power grab at the expense of the Cherokee, today's Court accedes to another's. Respectfully, I dissent.

I

* * *

C

Rather than seek tribal consent pursuant to Public Law 280 or persuade Congress to adopt a state-specific statute authorizing it to prosecute crimes by or against tribal members on tribal lands, Oklahoma has chosen a different path. In the decades following statehood, many settlers engaged in schemes to seize Indian lands and mineral rights by subterfuge. See A. Debo, And Still the Waters Run 92–125 (1940) (Debo). These schemes resulted in "the bulk of the landed wealth of the Indians" ending up in the hands of the new settlers. See ibid.; see also id., at 181–202. State officials and courts were sometimes complicit in the process. See id., at 182–183, 185, 195–196. For years, too, Oklahoma courts asserted the power to hear criminal cases involving Native Americans on lands allotted to and owned by tribal members despite the contrary commands of the Oklahoma Enabling Act and the State's own constitution. The State only disavowed that practice in 1991, after defeats in state and federal court. See Haney, 1991 WL 567868, *1–*3; see also State v. Klindt, 782 P.2d 401, 404 (Okla. Crim. App. 1989); Ross v. Neff, 905 F.2d 1349, 1353 (CA10 1990).

Still, it seems old habits die slowly. Even after renouncing the power to try criminal cases involving Native Americans on allotted tribal lands, Oklahoma continued to claim the power to prosecute crimes by or against Native Americans within tribal reservations. The State did so on the theory that at some (unspecified) point in the past, Congress had disestablished those

reservations. In McGirt v. Oklahoma, this Court rejected that argument in a case involving the Muscogee (Creek) Tribe. 591 U.S. ——, ——, 140 S.Ct. 2452, 2459, 207 L.Ed.2d 985 (2020). We explained that Congress had never disestablished the Creek Reservation. Nor were we willing to usurp Congress's authority and disestablish that reservation by a lawless act of judicial fiat. See id., at ——, 140 S.Ct., at 2481–2482. Accordingly, only federal and tribal authorities were lawfully entitled to try crimes by or against Native Americans within the Tribe's reservation. Ibid. Following *McGirt*, Oklahoma's courts recognized that what held true for the Creek also held true for the Cherokee: Congress had never disestablished its reservation and, accordingly, the State lacked authority to try offenses by or against tribal members within the Cherokee Reservation. See Spears v. State, 2021 OKCR 7, ¶¶ 10–14, 485 P.3d 873, 876–877.

Once more, Oklahoma could have responded to this development by asking Congress for state-specific legislation authorizing it to exercise criminal jurisdiction on tribal lands, as Kansas and various other States have done. The State could have employed the procedures of Public Law 280 to amend its own laws and obtain tribal consent. Instead, Oklahoma responded with a media and litigation campaign seeking to portray reservations within its State—where federal and tribal authorities may prosecute crimes by and against tribal members and Oklahoma can pursue cases involving only non-Indians—as lawless dystopias. See Brief for Cherokee Nation et al. as Amici Curiae 18 (Cherokee Brief) ("The State's tale of a criminal dystopia in eastern Oklahoma is just that: A tale").

That effort culminated in this case. In it, Oklahoma has pursued alternative lines of argument. First, the State has asked this Court to revisit *McGirt* and unilaterally eliminate all reservations in Oklahoma. Second, the State has argued that it enjoys a previously unrecognized "inherent" authority to try crimes within reservation boundaries by non-Indians against tribal members—a claim Oklahoma's own courts have rejected. See Bosse v. State, 2021 OK CR 3, 484 P. 3d 286, 294–295.

Ultimately, this Court declined to entertain the State's first argument but agreed to review the second. Nominally, the question comes to us in a case involving Victor Castro-Huerta, a non-Indian who abused his Cherokee stepdaughter within the Tribe's reservation. Initially, a state court convicted him for a state crime. After *McGirt*, the Oklahoma Court of Criminal Appeals determined that his conviction was invalid because only federal and tribal officials possess authority to prosecute crimes by or against Native Americans on the Cherokee Reservation. See App. to Pet. for Cert. 4a. The federal government swiftly reindicted Mr. Castro-Huerta, and a federal court again found him guilty. Now before us, Oklahoma seeks to undo Mr. Castro-Huerta's federal conviction and have him transferred from federal prison to a state facility to resume his state sentence.

Really, though, this case has less to do with where Mr. Castro-Huerta serves his time and much more to do with Oklahoma's effort to gain a legal foothold for its wish to exercise jurisdiction over crimes involving tribal members on tribal lands. To succeed, Oklahoma must

disavow adverse rulings from its own courts; disregard its 1991 recognition that it lacks legal authority to try cases of this sort; and ignore fundamental principles of tribal sovereignty, a treaty, the Oklahoma Enabling Act, its own state constitution, and Public Law 280. Oklahoma must pursue a proposition so novel and so unlikely that in over two centuries not a single State has successfully attempted it in this Court. Incredibly, too, the defense of tribal interests against the State's gambit falls to a non-Indian criminal defendant. The real party in interest here isn't Mr. Castro-Huerta but the Cherokee, a Tribe of 400,000 members with its own government. Yet the Cherokee have no voice as parties in these proceedings; they and other Tribes are relegated to the filing of amicus briefs.

II

A

Today the Court rules for Oklahoma. In doing so, the Court announces that, when it comes to crimes by non-Indians against tribal members within tribal reservations, Oklahoma may "exercise jurisdiction." Ante, at ——. But this declaration comes as if by oracle, without any sense of the history recounted above and unattached to any colorable legal authority. Truly, a more ahistorical and mistaken statement of Indian law would be hard to fathom.

The source of the Court's error is foundational. Through most of its opinion, the Court proceeds on the premise that Oklahoma possesses "inherent" sovereign power to prosecute crimes on tribal reservations until and unless Congress "preempt[s]" that authority. . . .

But the effort to wedge Tribes into that paradigm is a category error. Tribes are not private organizations within state boundaries. Their reservations are not glorified private campgrounds. Tribes are sovereigns. And the preemption rule applicable to them is exactly the opposite of the normal rule. Tribal sovereignty means that the criminal laws of the States "can have no force" on tribal members within tribal bounds unless and until Congress clearly ordains otherwise. *Worcester*, 6 Pet. at 561. After all, the power to punish crimes by or against one's own citizens within one's own territory to the exclusion of other authorities is and has always been among the most essential attributes of sovereignty. See, e.g., Wilson v. Girard, 354 U.S. 524, 529, 77 S.Ct. 1409, 1 L.Ed.2d 1544 (1957) (per curiam) ("A sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders"); see also Schooner Exchange v. McFaddon, 7 Cranch 116, 136, 3 L.Ed. 287 (1812); E. de Vattel, Law of Nations 81–82 (1835 ed.).

Nor is this " 'notion,' " ante, at ——, some discarded artifact of a bygone era. To be sure, Washington, Jefferson, Marshall, and so many others at the Nation's founding appreciated the sovereign status of Native American Tribes. See Part I–A, supra. But this Court's own cases have consistently reaffirmed the point. Just weeks ago, the Court held that federal prosecutors did not violate the Double Jeopardy Clause based on the essential premise that tribal criminal law is the product of a "separate sovereig[n]" exercising its own "retained sovereignty." Denezpi v. United

States, 596 U.S. ——, ——, 119 S.Ct. 1573, ——, 143 L.Ed.2d 669 (2022) (internal quotation marks omitted). Recently, too, this Court confirmed that Tribes enjoy sovereign immunity from suit. See Michigan v. Bay Mills Indian Community, 572 U.S. 782, 788–789, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (2014). Throughout our history, "the basic policy of Worcester" that Tribes are separate sovereigns "has remained." Williams v. Lee, 358 U.S. at 219, 79 S.Ct. 269.2

* * *

5

The Court's suggestion that Oklahoma enjoys "inherent" authority to try crimes against Native Americans within the Cherokee Reservation makes a mockery of all of Congress's work from 1834 to 1968. The GCA and MCA? On the Court's account, Congress foolishly extended federal criminal law to tribal lands on a mistaken assumption that only tribal law would otherwise apply. Unknown to anyone until today, state law applied all along. The treaty, the Oklahoma Enabling Act, and the provision in Oklahoma's constitution that Congress insisted upon as a condition of statehood? The Court effectively ignores them. The Kansas Act and its sibling statutes? On the Court's account, they were needless too. Congress's instruction in Public Law 280 that States may not exercise jurisdiction over crimes by or against tribal members on tribal lands until they amend contrary state law and obtain tribal consent? Once more, it seems the Court thinks Congress was hopelessly misguided.

Through it all, the Court makes no effort to grapple with the backdrop rule of tribal sovereignty. The Court proceeds oblivious to the rule that only a clear act of Congress may impose constraints on tribal sovereignty. The Court ignores the fact that Congress has never come close to subjecting the Cherokee to state criminal jurisdiction over crimes against tribal members within the Tribe's reservation. The Court even disregards our precedents recognizing that the "grant of statehood" to Oklahoma did not endow the State with any power to try "crimes committed by or against Indians" on tribal lands but reserved that authority to the federal government and Tribes alone. . . . From start to finish, the Court defies our duty to interpret Congress's laws and our own prior work "harmoniously" as "part of an entire corpus juris." A. Scalia & B. Garner, Reading Law 252 (2012); see also Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 184–185, 108 S.Ct. 1704, 100 L.Ed.2d 158 (1988).

C

Putting aside these astonishing errors, Congress's work and this Court's precedents yield three clear principles that firmly resolve this case. First, tribal sovereign authority excludes the operation of other sovereigns' criminal laws unless and until Congress ordains otherwise. Second, while Congress has extended a good deal of federal criminal law to tribal lands, in Oklahoma it has authorized the State to prosecute crimes by or against Native Americans within tribal boundaries only if it satisfies certain requirements. Under Public Law 280, the State must remove state-law barriers to jurisdiction and obtain tribal consent. Third, because Oklahoma has done

neither of these things, it lacks the authority it seeks to try crimes against tribal members within a tribal reservation. Until today, all this settled law was well appreciated by this Court, the Executive Branch, and even Oklahoma.

* * *

D

Against all this evidence, what is the Court's reply? It acknowledges that, at the Nation's founding, tribal sovereignty precluded States from prosecuting crimes on tribal lands by or against tribal members without congressional authorization. See ante, at ——. But the Court suggests this traditional " 'notion' " flipped 180 degrees sometime in "the latter half of the 1800s." Ante, at ——, ——. Since then, the Court says, Oklahoma has enjoyed the "inherent" power to try at least crimes by non-Indians against tribal members on tribal reservations until and unless Congress preempts state authority.

But exactly when and how did this change happen? The Court never explains. Instead, the Court seeks to cast blame for its ruling on a grab bag of decisions issued by our predecessors. But the failure of that effort is transparent. Start with *McBratney*, which the Court describes as our "leading case in the criminal context." Ante, at ——. There, as we have seen, the Court said that States admitted to the Union may gain the right to prosecute cases involving only non-Indians on tribal lands, but they do not gain any inherent right to punish "crimes committed by or against Indians" on tribal lands. *McBratney*, 104 U.S. at 624. The Court's reliance on *Draper* fares no better, for that case issued a similar disclaimer. See 164 U.S. at 247, 17 S.Ct. 107. Tellingly, not even Oklahoma thinks *McBratney* and *Draper* compel a ruling in its favor. See Brief for Petitioner 12. And if anything, the Court's invocation of *Donnelly*, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820, is more baffling still. Ante, at ——, n. 3. There, the Court once more reaffirmed the rule that "offenses committed by or against Indians" on tribal lands remain subject to federal, not state, jurisdiction. *Donnelly*, 228 U.S. at 271, 33 S.Ct. 449; see also *Ramsey*, 271 U.S. at 469, 46 S.Ct. 559.

That leaves the Court to assemble a string of carefully curated snippets—a clause here, a sentence there—from six decisions out of the galaxy of this Court's Indian law jurisprudence. Ante, at —— – ——. But this collection of cases is no more at fault for the Court's decision than the last. Organized Village of Kake v. Egan—which the Court seems to think is some magic bullet, see ante, at ——, ——, n. 2, ——, —— – ———addressed the prosaic question whether Alaska could apply its fishing laws on lands owned by a native Alaska tribal corporation. 369 U.S. 60, 61–63, 82 S.Ct. 562, 7 L.Ed.2d 573 (1962); see also n. 5, supra. Subsequently, the Court cabined that case to circumstances "dealing with Indians who have left or never inhabited reservations set aside for their exclusive use or who do not possess the usual accoutrements of tribal self-government." *McClanahan*, 411 U.S. at 167–168, 93 S.Ct. 1257. Meanwhile, New York ex rel. Cutler v. Dibble allowed New York to use civil proceedings to eject non-Indian trespassers on

Indian lands. 21 How. 366, 369–371, 16 L.Ed. 149 (1859). In Surplus Trading Co. v. Cook, the crime at issue did not take place on tribal lands but on a "supply station of the United States" sold by Arkansas to the federal government. 281 U.S. 647, 649, 50 S.Ct. 455, 74 L.Ed. 1091 (1930). In New York ex rel. Ray v. Martin, this Court merely reaffirmed *McBratney* and held that States could exercise jurisdiction over crimes involving only non-Indians. 326 U.S. 496, 499–500, 66 S.Ct. 307, 90 L.Ed. 261 (1946). Both County of Yakima v. Confederated Tribes and Bands of Yakima Nation and Nevada v. Hicks issued holdings about state civil jurisdiction, not criminal jurisdiction striking at the heart of tribal sovereignty. See 502 U.S. 251, 256–258, 270, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992); 533 U.S. 353, 361, 363, 374, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001).

In the end, the Court cannot fault our predecessors for today's decision. The blame belongs only with this Court here and now. Standing before us is a mountain of statutes and precedents making plain that Oklahoma possesses no authority to prosecute crimes against tribal members on tribal reservations until it amends its laws and wins tribal consent. This Court may choose to ignore Congress's statutes and the Nation's treaties, but it has no power to negate them. The Court may choose to disregard our precedents, but it does not purport to overrule a single one. As a result, today's decision surely marks an embarrassing new entry into the anticanon of Indian law. But its mistakes need not—and should not—be repeated.

* * *

In the 1830s, this Court struggled to keep our Nation's promises to the Cherokee. Justice Story celebrated the decision in *Worcester*: " '[T]hanks be to God, the Court can wash [its] hands clean of the iniquity of oppressing the Indians and disregarding their rights.' " Breyer 420. " 'The Court had done its duty,' " even if Georgia refused to do its own. Ibid. Today, the tables turn. Oklahoma's courts exercised the fortitude to stand athwart their own State's lawless disregard of the Cherokee's sovereignty. Now, at the bidding of Oklahoma's executive branch, this Court unravels those lower-court decisions, defies Congress's statutes requiring tribal consent, offers its own consent in place of the Tribe's, and allows Oklahoma to intrude on a feature of tribal sovereignty recognized since the founding. One can only hope the political branches and future courts will do their duty to honor this Nation's promises even as we have failed today to do our own.

NOTES

1. What remains of the foundational principle of *Worcester v. Georgia* that, absent Congressional authorization, state law has no force in Indian country?

2. *Castro-Huerta* seemingly authorizes states to prosecute non-Indians for crimes committed in Indian country without limitation. Public Law 280 did something similar, but as Justice Sotomayor

pointed out at oral argument, the Court imposed on states "an unfunded mandate to 49 other states to take on a responsibility that they had a choice to take on and most of them didn't want." Oral Argument at 26-27, Oklahoma v. Castro-Huerta (No. 21-429), 2022 WL 1250875. What are the implications, if any, in states that do not want to assert substantial law enforcement powers in Indian country? Is this a chance for tribes and states to further negotiate Indian country criminal jurisdiction?

3. Leading scholarship on the implications of the *Castro-Huerta* decision includes Gregory Ablavsky, Too Much History: Castro-Huerta and the Problem of Change in Indian Law, 2022 S. Ct. Rev. 293 (2022); Stacy Leeds, Robert Miller, Kevin Washburn, and Derrick Beetso, Oklahoma v. Castro-Huerta: Rebalancing Federal—State—Tribal Power, 23 J. App. Prac. & Process 47 (2023).

CHAPTER 8

TRIBAL AND STATE CONFLICTS OVER CIVIL REGULATORY AND ADJUDICATORY JURISDICTION

SECTION A.

CIVIL REGULATORY JURISDICTION IN INDIAN COUNTRY

At the end of page 617, add:

United States v. Cooley

United States Supreme Court, 2021

__ U.S. __, 141 S.Ct. 1638

Justice BREYER delivered the opinion of the Court.

The question presented is whether an Indian tribe's police officer has authority to detain temporarily and to search a non-Indian on a public right-of-way that runs through an Indian reservation. The search and detention, we assume, took place based on a potential violation of state or federal law prior to the suspect's transport to the proper nontribal authorities for prosecution.

We have previously noted that a tribe retains inherent sovereign authority to address "conduct [that] threatens or has some direct effect on . . . the health or welfare of the tribe." Montana v. United States, 450 U.S. 544, 566 . . . (1981); see also Strate v. A–1 Contractors, 520 U.S. 438, 456, n. 11 . . . (1997). We believe this statement of law governs here. And we hold the tribal officer possesses the authority at issue.

I

Late at night in February 2016, Officer James Saylor of the Crow Police Department was driving east on United States Highway 212, a public right-of-way within the Crow Reservation, located within the State of Montana. Saylor saw a truck parked on the westbound side of the highway. Believing the occupants might need assistance, Saylor approached the truck and spoke to the driver, Joshua James Cooley. Saylor noticed that Cooley had "watery, bloodshot eyes" and "appeared to be non-native." App. to Pet. for Cert. 95a. Saylor also noticed two semiautomatic rifles lying on the front seat. Eventually fearing violence, Saylor ordered Cooley out of the truck and conducted a patdown search. He called tribal and county officers for assistance. While waiting for the officers to arrive, Saylor returned to the truck. He saw a glass pipe and plastic bag that

contained methamphetamine. The other officers, including an officer with the federal Bureau of Indian Affairs, then arrived. They directed Saylor to seize all contraband in plain view, leading him to discover more methamphetamine. Saylor took Cooley to the Crow Police Department where federal and local officers further questioned Cooley.

In April 2016, a federal grand jury indicted Cooley on drug and gun offenses. See 21 U.S.C. § 841(a)(1); 18 U.S.C. § 924(c)(1)(A). The District Court granted Cooley's motion to suppress the drug evidence that Saylor had seized. It reasoned that Saylor, as a Crow Tribe police officer, lacked the authority to investigate nonapparent violations of state or federal law by a non-Indian on a public right-of-way crossing the reservation.

The Government appealed. See 18 U.S.C. § 3731. The Ninth Circuit affirmed the District Court's evidence-suppression determination. The Ninth Circuit panel wrote that tribes "cannot exclude non-Indians from a state or federal highway" and "lack the ancillary power to investigate non-Indians who are using such public rights-of-way." 919 F.3d 1135, 1141 (2019). It added that a tribal police officer nonetheless could stop (and hold for a reasonable time) a non-Indian suspect, but only if (1) the officer first tried to determine whether "the person is an Indian," and, if the person turns out to be a non-Indian, (2) it is "apparent" that the person has violated state or federal law. Id., at 1142. Non-Indian status, the panel added, can usually be determined by "ask[ing] one question." Ibid. (internal quotation marks omitted). Because Saylor had not initially tried to determine whether Cooley was an Indian, the panel held that the lower court correctly suppressed the evidence.

The Ninth Circuit denied the Government's request for rehearing en banc. We then granted the Government's petition for certiorari in order to decide whether a tribal police officer has authority to detain temporarily and to search non-Indians traveling on public rights-of-way running through a reservation for potential violations of state or federal law.

II

Long ago we described Indian tribes as "distinct, independent political communities" exercising sovereign authority. Worcester v. Georgia, 6 Pet. 515, 559 . . . (1832). Due to their incorporation into the United States, however, the "sovereignty that the Indian tribes retain is of a unique and limited character." United States v. Wheeler, 435 U.S. 313, 323 . . . (1978). Indian tribes may, for example, determine tribal membership, regulate domestic affairs among tribal members, and exclude others from entering tribal land. See, e.g., Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 327–328 . . . (2008). On the other hand, owing to their "dependent status," tribes lack any "freedom independently to determine their external relations" and cannot, for instance, "enter into direct commercial or governmental relations with foreign nations." *Wheeler*, 435 U.S. at 326 . . . . Tribes also lack inherent sovereign power to exercise criminal jurisdiction over non-Indians. See Oliphant v. Suquamish Tribe, 435 U.S. 191, 212 . . .

(1978). In all cases, tribal authority remains subject to the plenary authority of Congress. See, e.g., Michigan v. Bay Mills Indian Community, 572 U.S. 782, 788 . . . (2014).

Here, no treaty or statute has explicitly divested Indian tribes of the policing authority at issue. We turn to precedent to determine whether a tribe has retained inherent sovereign authority to exercise that power. In answering this question, our decision in Montana v. United States, 450 U.S. 544 . . . (1981), is highly relevant. In that case we asked whether a tribe could regulate hunting and fishing by non-Indians on land that non-Indians owned in fee simple on a reservation. We held that it could not. We supported our conclusion by referring to our holding in Oliphant that a tribe could not "exercise criminal jurisdiction over non-Indians." *Montana*, 450 U.S. at 565 . . . . We then wrote that the "principles on which [Oliphant] relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Ibid.

At the same time, we made clear that *Montana*'s "general proposition" was not an absolute rule. Ibid. We set forth two important exceptions. First, we said that a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Ibid. Second, we said that a "tribe may also retain inherent power 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 . . . (emphasis added).

The second exception we have just quoted fits the present case, almost like a glove. The phrase speaks of the protection of the "health or welfare of the tribe." To deny a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats. Such threats may be posed by, for instance, non-Indian drunk drivers, transporters of contraband, or other criminal offenders operating on roads within the boundaries of a tribal reservation. As the Washington Supreme Court has noted, "[a]llowing a known drunk driver to get back in his or her car, careen off down the road, and possibly kill or injure Indians or non-Indians would certainly be detrimental to the health or welfare of the Tribe." State v. Schmuck, 121 Wash.2d 373, 391, 850 P.2d 1332, 1341, cert. denied, 510 U.S. 931, 114 S.Ct. 343, 126 L.Ed.2d 308 (1993).

We have subsequently repeated *Montana*'s proposition and exceptions in several cases involving a tribe's jurisdiction over the activities of non-Indians within the reservation. . . . Most notably, in Strate v. A–1 Contractors, 520 U.S. 438, 456–459 . . . (1997), we relied upon *Montana*'s general jurisdiction-limiting principle to hold that tribal courts did not retain inherent authority to adjudicate personal-injury actions against nonmembers of the tribe based upon automobile accidents that took place on public rights-of-way running through a reservation. But we also said:

"We do not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway, and to detain and turn over to state officers nonmembers stopped on the highway for conduct violating state law. Cf. State v. Schmuck, 121 Wash.2d 373, 390, 850 P.2d 1332, 1341 (en banc) (recognizing that a limited tribal power 'to stop and detain alleged offenders in no way confers an unlimited authority to regulate the right of the public to travel on the Reservation's roads'), cert. denied, 510 U.S. 931 [114 S.Ct. 343, 126 L.Ed.2d 308] (1993)." 520 U.S. at 456, n. 11, 117 S.Ct. 1404.

We reiterated this point in Atkinson Trading Co. v. Shirley, 532 U.S. 645, 651 . . . (2001), there confirming that Strate "did not question the ability of tribal police to patrol the highway."

Similarly, we recognized in *Duro* that "[w]here jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities." 495 U.S. at 697 . . . . The authority to search a non-Indian prior to transport is ancillary to this authority that we have already recognized. Cf. Ortiz-Barraza v. United States, 512 F.2d 1176, 1180–1181 (CA9 1975). Indeed, several state courts and other federal courts have held that tribal officers possess the authority at issue here. See, e.g., Schmuck, 121 Wash.2d at 390, 850 P.2d at 1341; State v. Pamperien, 156 Ore.App. 153, 155–159, 967 P.2d 503, 504–506 (1998); State v. Ryder, 98 N.M. 453, 456, 649 P.2d 756, 759 (NM App. 1982); see also United States v. Terry, 400 F.3d 575, 579–580 (CA8 2005); *Ortiz-Barraza*, 512 F.2d at 1180–1181; see generally F. Cohen, Handbook of Federal Indian Law § 9.07, p. 773 (2012). To be sure, in *Duro* we traced the relevant tribal authority to a tribe's right to exclude non-Indians from reservation land. See 495 U.S. at 696–697 . . . . But tribes "have inherent sovereignty independent of th[e] authority arising from their power to exclude," *Brendale*, 492 U.S. at 425 . . . (plurality opinion), and here Montana's second exception recognizes that inherent authority.

We also note that our prior cases denying tribal jurisdiction over the activities of non-Indians on a reservation have rested in part upon the fact that full tribal jurisdiction would require the application of tribal laws to non-Indians who do not belong to the tribe and consequently had no say in creating the laws that would be applied to them. See *Duro*, 495 U.S. at 693 . . . (noting the concern that tribal-court criminal jurisdiction over nonmembers would subject such defendants to "trial by political bodies that do not include them"); *Plains Commerce Bank*, 554 U.S. at 337 . . . (noting that nonmembers "have no part in tribal government" and have "no say in the laws and regulations that govern tribal territory"). Saylor's search and detention, however, do not subsequently subject Cooley to tribal law, but rather only to state and federal laws that apply whether an individual is outside a reservation or on a state or federal highway within it. As the Solicitor General points out, an initial investigation of non-Indians' "violations of federal and state laws to which those non-Indians are indisputably subject" protects the public without raising "similar concerns" of the sort raised in our cases limiting tribal authority. Brief for United States 24–25.

Finally, we have doubts about the workability of the standards that the Ninth Circuit set out. Those standards require tribal officers first to determine whether a suspect is non-Indian and, if so, allow temporary detention only if the violation of law is "apparent." 919 F.3d at 1142. The first requirement, even if limited to asking a single question, would produce an incentive to lie. The second requirement—that the violation of law be "apparent"—introduces a new standard into search and seizure law. Whether, or how, that standard would be met is not obvious. At the same time, because most of those who live on Indian reservations are non-Indians, this problem of interpretation could arise frequently. See, e.g., Brief for Former United States Attorneys as Amici Curiae 24 (noting that 3.5 million of the 4.6 million people living in American Indian areas in the 2010 census were non-Indians); Brief for National Indigenous Women's Resource Center et al. as Amici Curiae 19–20 (noting that more than 70% of residents on several reservations are non-Indian).

III

In response, Cooley cautions against "inappropriately expand[ing] the second *Montana* exception." Brief for Respondent 24–25 . . . . We have previously warned that the *Montana* exceptions are "limited" and "cannot be construed in a manner that would swallow the rule." *Plains Commerce Bank*, 554 U.S. at 330 . . . (internal quotation marks omitted). But we have also repeatedly acknowledged the existence of the exceptions and preserved the possibility that "certain forms of nonmember behavior" may "sufficiently affect the tribe as to justify tribal oversight." Id., at 335 . . . . Given the close fit between the second exception and the circumstances here, we do not believe the warnings can control the outcome.

Cooley adds that federal cross-deputization statutes already grant many Indian tribes a degree of authority to enforce federal law. See Brief for Respondent 28–30; see generally 25 U.S.C. §§ 2803(5), (7) (Secretary of the Interior may authorize tribal officers to "make inquiries of any person" related to the "carrying out in Indian country" of federal law and to "perform any other law enforcement related duty"); § 2805 (Secretary of the Interior may promulgate rules "relating to the enforcement of " federal criminal law in Indian country); 25 C.F.R. § 12.21 (2019) (Bureau of Indian Affairs may "issue law enforcement commissions" to tribal police officers "to obtain active assistance" in enforcing federal criminal law). Because Congress has specified the scope of tribal police activity through these statutes, Cooley argues, the Court must not interpret tribal sovereignty to fill any remaining gaps in policing authority. See Brief for Respondent 12.

We are not convinced by this argument. The statutory and regulatory provisions to which Cooley refers do not easily fit the present circumstances. They are overinclusive, for instance encompassing the authority to arrest. See § 2803(3). And they are also underinclusive. Because these provisions do not govern violations of state law, tribes would still need to strike agreements with a variety of other authorities to ensure complete coverage. See Brief for Cayuga Nation et al. as Amici Curiae 7–8, 25–27. More broadly, cross-deputization agreements are difficult to reach, and they often require negotiation between other authorities and the tribes over such matters as

training, reciprocal authority to arrest, the "geographical reach of the agreements, the jurisdiction of the parties, liability of officers performing under the agreements, and sovereign immunity." Fletcher, Fort, & Singel, Indian Country Law Enforcement and Cooperative Public Safety Agreements, 89 Mich. Bar J. 42, 44 (2010).

In short, we see nothing in these provisions that shows that Congress sought to deny tribes the authority at issue, authority that rests upon a tribe's retention of sovereignty as interpreted by Montana, and in particular its second exception. To the contrary, in our view, existing legislation and executive action appear to operate on the assumption that tribes have retained this authority. See, e.g., Brief for Current and Former Members of Congress as Amici Curiae 23–25; Brief for Former U. S. Attorneys as Amici Curiae 28–29.

* * *

For these reasons, we vacate the Ninth Circuit's judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice ALITO, concurring.

I join the opinion of the Court on the understanding that it holds no more than the following: On a public right-of-way that traverses an Indian reservation and is primarily patrolled by tribal police, a tribal police officer has the authority to (a) stop a non-Indian motorist if the officer has reasonable suspicion that the motorist may violate or has violated federal or state law, (b) conduct a search to the extent necessary to protect himself or others, and (c) if the tribal officer has probable cause, detain the motorist for the period of time reasonably necessary for a non-tribal officer to arrive on the scene.

NOTES

1. The Supreme Court, for the first time, held that nonmember actions satisfied the second exception to the *Montana* test. Normally, the *Montana* general rule and its exceptions are considered a civil jurisdiction test, but this situation appears to involve criminal activity. Moreover, the *Montana* rubric usually differentiates between members and nonmembers, while Indian country criminal jurisdiction (see Chapter 7) differentiates between Indians and non-Indians. E.g., 25 U.S.C. § 1301(2) (recognizing the "inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over *all Indians*") (emphasis added). *Cooley* involved a non-Indian in the act of committing serious crimes over which the Crow Nation possessed no criminal jurisdiction, but now (it is clear) possesses civil jurisdiction.

The implications of the Supreme Court's decision may be that Indian tribes that attempt to regulate non-Indian criminal conduct (and nonmember Indian criminal conduct as well) through the imposition of civil fines and civil forfeiture laws, for example, are safe in doing so. E.g., Wilson v. Horton's Towing, 906 F.3d 773 (9th Cir. 2018) (remanding a nonmember's challenge to the Lummi Tribe's exercise of civil forfeiture over their truck, requiring exhaustion of tribal remedies); Miner' Electric, Inc. v. Muscogee (Creek) Nation, 505 F.3d 1007 (10th Cir. 2007) (affirming the civil forfeiture of a nonmember's truck on the grounds of sovereign immunity).

2. What is the purpose of Justice Alito's concurrence? Could it be that the *Cooley* reasoning could be used by lower courts to confirm inherent tribal powers over nonmembers beyond this limited criminal context? Could *Oliphant v. Suquamish Indian Tribe* (see page 575) be subject to reconsideration given the impact of non-Indian/nonmember conduct on Indian tribes and individual Indians? See generally Matthew L.M. Fletcher, *Muskrat Textualism*, 115 Nw. U. L. Rev. 963 (2022).

SECTION C.

PREEMPTION OF STATE LAW

After note 4 on page 683, add:

Washington State Department of Licensing v. Cougar Den, Inc.

United States Supreme Court, 2019

__ U.S. __, 139 S.Ct. 1000

Justice BREYER announced the judgment of the Court, and delivered an opinion, in which Justice SOTOMAYOR and Justice KAGAN join.

The State of Washington imposes a tax upon fuel importers who travel by public highway. The question before us is whether an 1855 treaty between the United States and the Yakama Nation forbids the State of Washington to impose that tax upon fuel importers who are members of the Yakama Nation. We conclude that it does, and we affirm the Washington Supreme Court's similar decision.

I

A

A Washington statute applies to "motor vehicle fuel importer[s]" who bring large quantities of fuel into the State by "ground transportation" such as a "railcar, trailer, [or] truck." Wash. Rev. Code §§ 82.36.010(4), (12), (16) (2012). The statute requires each fuel importer to obtain a license,

and it says that a fuel tax will be "levied and imposed upon motor vehicle fuel licensees" for "each gallon of motor vehicle fuel" that the licensee brings into the State. §§ 82.36.020(1), (2)(c). Licensed fuel importers who import fuel by ground transportation become liable to pay the tax as of the time the "fuel enters into this [S]tate." § 82.36.020(2)(c); see also §§ 82.38.020(4), (12), (15), (26), 82.38.030(1), (7)(c)(ii) (equivalent regulation of diesel fuel importers).

But only those licensed fuel importers who import fuel by ground transportation are liable to pay the tax. §§ 82.36.026(3), 82.36.020(2)(c). For example, if a licensed fuel importer brings fuel into the State by pipeline, that fuel importer need not pay the tax. §§ 82.36.026(3), 82.36.020(2)(c)(ii), 82.36.010(3). Similarly, if a licensed fuel importer brings fuel into the State by vessel, that fuel importer need not pay the tax. §§ 82.36.026(3), 82.36.020(2)(c)(ii), 82.36.010(3). Instead, in each of those instances, the next purchaser or possessor of the fuel will pay the tax. §§ 82.36.020(2)(a), (b), (d). The only licensed fuel importers who must pay this tax are the fuel importers who bring fuel into the State by means of ground transportation.

B

The relevant treaty provides for the purchase by the United States of Yakama land. See Treaty Between the United States and the Yakama Nation of Indians, June 9, 1855, 12 Stat. 951. Under the treaty, the Yakamas granted to the United States approximately 10 million acres of land in what is now the State of Washington, i.e., about one-fourth of the land that makes up the State today. Art. I, id., at 951–952; see also Brief for Respondent 4, 9. In return for this land, the United States paid the Yakamas $ 200,000, made improvements to the remaining Yakama land, such as building a hospital and schools for the Yakamas to use, and agreed to respect the Yakamas' reservation of certain rights. Arts. III–V, 12 Stat. 952–953. Those reserved rights include "the right, in common with citizens of the United States, to travel upon all public highways," "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory," and other rights, such as the right to hunt, to gather roots and berries, and to pasture cattle on open and unclaimed land. Art. III, id., at 953.

C

Cougar Den, Inc., the respondent, is a wholesale fuel importer owned by a member of the Yakama Nation, incorporated under Yakama law, and designated by the Yakama Nation as its agent to obtain fuel for members of the Tribe. App. to Pet. for Cert. 63a–64a; App. 99a. Cougar Den buys fuel in Oregon, trucks the fuel over public highways to the Yakama Reservation in Washington, and then sells the fuel to Yakama-owned retail gas stations located within the reservation. App. to Pet. for Cert. 50a, 55a. Cougar Den believes that Washington's fuel import tax, as applied to Cougar Den's activities, is pre-empted by the treaty. App. 15a. In particular, Cougar Den believes that requiring it to pay the tax would infringe the Yakamas' reserved "right, in common with citizens of the United States, to travel upon all public highways." Art. III, 12 Stat. 953.

* * * [The Washington Supreme Court], agreeing with Cougar Den, upheld the Superior Court's determination of pre-emption. Id., at 69, 392 P.3d at 1020.

The Department filed a petition for certiorari asking us to review the State Supreme Court's determination. And we agreed to do so.

II

A

The Washington statute at issue here taxes the importation of fuel by public highway. The Washington Supreme Court construed the statute that way in the decision below. That court wrote that the statute "taxes the importation of fuel, which is the transportation of fuel." Ibid. It added that "travel on public highways is directly at issue because the tax [is] an importation tax." Id., at 67, 392 P.3d at 1019.

* * *

In sum, Washington taxes travel by ground transportation with fuel. That feature sets the Washington statute apart from other statutes with which we are more familiar. It is not a tax on possession or importation. A statute that taxes possession would ordinarily require all people who own a good to pay the tax. A good example of that would be a State's real estate property tax. That statute would require all homeowners to pay the tax, every year, regardless of the specifics of their situation. And a statute that taxes importation would ordinarily require all people who bring a good into the State to pay a tax. A good example of that would be a federal tax on newly manufactured cars. That statute would ordinarily require all people who bring a new car into the country to pay a tax. But Washington's statute is different because it singles out ground transportation. That is, Washington does not just tax possession of fuel, or even importation of fuel, but instead taxes importation by ground transportation.

The facts of this case provide a good example of the tax in operation. Each of the assessment orders that the Department sent to Cougar Den explained that Cougar Den owed the tax because Cougar Den traveled by highway. See App. 10a–26a; App. to Pet. for Cert. 55a. As the director explained, Cougar Den owed the tax because Cougar Den had caused fuel to enter "into this [S]tate at the Washington-Oregon boundary on the Highway 97 bridge" by means of a "tank truck" destined for "the Yakama Reservation." Ibid. The director offers this explanation in addition to quoting the quantity of fuel that Cougar Den possessed because the element of travel by ground transportation is a necessary prerequisite to the imposition of the tax. Put another way, the State must prove that Cougar Den traveled by highway in order to apply its tax.

* * *

III

A

In our view, the State of Washington's application of the fuel tax to Cougar Den's importation of fuel is pre-empted by the treaty's reservation to the Yakama Nation of "the right, in common with citizens of the United States, to travel upon all public highways." We rest this conclusion upon three considerations taken together.

First, this Court has considered this treaty four times previously; each time it has considered language very similar to the language before us; and each time it has stressed that the language of the treaty should be understood as bearing the meaning that the Yakamas understood it to have in 1855. *See Winans*, 198 U.S. at 380–381 . . .; *Seufert Brothers Co. v. United States*, 249 U.S. 194, 196–198 . . . (1919); *Tulee*, 315 U.S. at 683–685 . . .; *Washington v. Washington State Commercial Passenger Fishing Vessel Assn*., 443 U.S. 658, 677–678 . . . (1979).

The treaty language at issue in each of the four cases is similar, though not identical, to the language before us. The cases focus upon language that guarantees to the Yakamas "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." Art. III, para. 2, 12 Stat. 953. Here, the language guarantees to the Yakamas "the right, in common with citizens of the United States, to travel upon all public highways." Art. III, para. 1, ibid. The words "in common with" on their face could be read to permit application to the Yakamas of general legislation (like the legislation before us) that applies to all citizens, Yakama and non-Yakama alike. But this Court concluded the contrary because that is not what the Yakamas understood the words to mean in 1855. *See Winans*, 198 U.S. at 379, 381 . . .; *Seufert Brothers*, 249 U.S. at 198–199 . . .; *Tulee*, 315 U.S. at 684 . . .; *Fishing Vessel*, 443 U.S. at 679, 684–685 . . . .

The cases base their reasoning in part upon the fact that the treaty negotiations were conducted in, and the treaty was written in, languages that put the Yakamas at a significant disadvantage. *See, e.g., Winans*, 198 U.S. at 380, 25 S.Ct. 662; *Seufert Brothers*, 249 U.S. at 198, 39 S.Ct. 203; *Fishing Vessel*, 443 U.S. at 667, n. 10, 99 S.Ct. 3055. The parties negotiated the treaty in Chinook jargon, a trading language of about 300 words that no Tribe used as a primary language. App. 65a; *Fishing Vessel*, 443 U.S. at 667, n. 10, 99 S.Ct. 3055. The parties memorialized the treaty in English, a language that the Yakamas could neither read nor write. And many of the representations that the United States made about the treaty had no adequate translation in the Yakamas' own language. App. 68a–69a.

Thus, in the year 1905, in *Winans*, this Court wrote that, to interpret the treaty, courts must focus upon the historical context in which it was written and signed. 198 U.S. at 381, 25 S.Ct. 662; *see also Tulee*, 315 U.S. at 684, 62 S.Ct. 862 ("It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council"); *cf. Water Splash, Inc. v. Menon*, 581 U.S. ——, ——, 137 S.Ct. 1504, 1511, 197 L.Ed.2d 826 (2017) (noting that, to ascertain the meaning of a

treaty, courts "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties") (internal quotation marks omitted).

The Court added, in light of the Yakamas' understanding in respect to the reservation of fishing rights, the treaty words "in common with" do not limit the reservation's scope to a right against discrimination. *Winans*, 198 U.S. at 380–381, 25 S.Ct. 662. Instead, as we explained in *Tulee*, *Winans* held that "Article III [of the treaty] conferred upon the Yakimas continuing rights, *beyond those which other citizens may enjoy*, to fish at their 'usual and accustomed places' in the ceded area." *Tulee*, 315 U.S. at 684, 62 S.Ct. 862 (citing *Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089; emphasis added). Also *compare*, *e.g., Fishing Vessel*, 443 U.S. at 677, n. 22, 99 S.Ct. 3055 ("Whatever opportunities the treaties assure Indians with respect to fish are admittedly not 'equal' to, but are to some extent greater than, those afforded other citizens" (emphasis added)), *with* post, at —— (KAVANAUGH, J., dissenting) (citing this same footnote in *Fishing Vessel* as support for the argument that the treaty guarantees the Yakamas only a right against discrimination). Construing the treaty as giving the Yakamas only antidiscrimination rights, rights that any inhabitant of the territory would have, would amount to "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more." *Winans*, 198 U.S. at 380, 25 S.Ct. 662.

Second, the historical record adopted by the agency and the courts below indicates that the right to travel includes a right to travel with goods for sale or distribution. See App. to Pet. for Cert. 33a; App. 56a–74a. When the United States and the Yakamas negotiated the treaty, both sides emphasized that the Yakamas needed to protect their freedom to travel so that they could continue to fish, to hunt, to gather food, and to trade. App. 65a–66a. The Yakamas maintained fisheries on the Columbia River, following the salmon runs as the fish moved through Yakama territory. Id., at 62a–63a. The Yakamas traveled to the nearby plains region to hunt buffalo. Id., at 61a. They traveled to the mountains to gather berries and roots. Ibid. The Yakamas' religion and culture also depended on certain goods, such as buffalo byproducts and shellfish, which they could often obtain only through trade. Id., at 61a–62a. Indeed, the Yakamas formed part of a great trading network that stretched from the Indian tribes on the Northwest coast of North America to the plains tribes to the east. Ibid.

The United States' representatives at the treaty negotiations well understood these facts, including the importance of travel and trade to the Yakamas. Id., at 63a. They repeatedly assured the Yakamas that under the treaty the Yakamas would be able to travel outside their reservation on the roads that the United States built. Id., at 66a–67a; see also, e.g., id., at 66a (" '[W]e give you the privilege of traveling over roads' "). And the United States repeatedly assured the Yakamas that they could travel along the roads for trading purposes. Id., at 65a–67a. Isaac Stevens, the Governor of the Washington Territory, told the Yakamas, for example, that, under the terms of the treaty, "You will be allowed to go on the roads, to take your things to market, your horses and cattle." App. to Brief for Confederated Tribes and Bands of the Yakama Nation as Amicus Curiae 68a (record of the treaty proceedings). He added that the Yakamas "will be allowed to go to the

usual fishing places and fish in common with the whites, and to get roots and berries and to kill game on land not occupied by the whites; all this outside the Reservation." Ibid. Governor Stevens further urged the Yakamas to accept the United States' proposals for reservation boundaries in part because the proposal put the Yakama Reservation in close proximity to public highways that would facilitate trade. He said, " 'You will be near the great road and can take your horses and your cattle down the river and to the [Puget] Sound to market.' " App. 66a. In a word, the treaty negotiations and the United States' representatives' statements to the Yakamas would have led the Yakamas to understand that the treaty's protection of the right to travel on the public highways included the right to travel with goods for purposes of trade. We consequently so construe the relevant treaty provision.

Third, to impose a tax upon traveling with certain goods burdens that travel. And the right to travel on the public highways without such burdens is, as we have said, just what the treaty protects. Therefore, our precedents tell us that the tax must be pre-empted. In *Tulee*, for example, we held that the fishing right reserved by the Yakamas in the treaty pre-empted the application to the Yakamas of a state law requiring fishermen to buy fishing licenses. 315 U.S. at 684, 62 S.Ct. 862. We concluded that "such exaction of fees as a prerequisite to the enjoyment of " a right reserved in the treaty "cannot be reconciled with a fair construction of the treaty." Id., at 685, 62 S.Ct. 862. If the cost of a fishing license interferes with the right to fish, so must a tax imposed on travel with goods (here fuel) interfere with the right to travel.

We consequently conclude that Washington's fuel tax "acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve." Ibid. Washington's fuel tax cannot lawfully be assessed against Cougar Den on the facts here. Treaties with federally recognized Indian tribes—like the treaty at issue here—constitute federal law that pre-empts conflicting state law as applied to off-reservation activity by Indians. *Cf. Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–149, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973).

* * *

C

Although we hold that the treaty protects the right to travel on the public highway with goods, we do not say or imply that the treaty grants protection to carry any and all goods. Nor do we hold that the treaty deprives the State of the power to regulate, say, when necessary for conservation. To the contrary, we stated in *Tulee* that, although the treaty "forecloses the [S]tate from charging the Indians a fee of the kind in question here," the State retained the "power to impose on Indians, equally with others, such restrictions of a purely regulatory nature ... as are necessary for the conservation of fish." 315 U.S. at 684, 62 S.Ct. 862. Indeed, it was crucial to our decision in *Tulee* that, although the licensing fees at issue were "regulatory as well as revenue producing," "their regulatory purpose could be accomplished otherwise," and "the imposition of license fees [was] not indispensable to the effectiveness of a state conservation program." Id., at

685, 62 S.Ct. 862. *See also Puyallup Tribe v. Department of Game of Wash*., 391 U.S. 392, 402, n. 14, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968) ("As to a 'regulation' concerning the time and manner of fishing outside the reservation (as opposed to a 'tax'), we said that the power of the State was to be measured by whether it was 'necessary for the conservation of fish' " (quoting *Tulee*, 315 U.S. at 684, 62 S.Ct. 862)).

Nor do we hold that the treaty deprives the State of the power to regulate to prevent danger to health or safety occasioned by a tribe member's exercise of treaty rights. The record of the treaty negotiations may not support the contention that the Yakamas expected to use the roads entirely unconstrained by laws related to health or safety. See App. to Brief for Confederated Tribes and Bands of the Yakama Nation as Amicus Curiae 20a–21a, 31a–32a. Governor Stevens explained, at length, the United States' awareness of crimes committed by United States citizens who settled amongst the Yakamas, and the United States' intention to enact laws that would restrain both the United States citizens and the Yakamas alike for the safety of both groups. See id., at 31a.

Nor do we here interpret the treaty as barring the State from collecting revenue through sales or use taxes (applied outside the reservation). Unlike the tax at issue here, which applies explicitly to transport by "railcar, trailer, truck, or other equipment suitable for ground transportation," see supra, at ——, a sales or use tax normally applies irrespective of transport or its means. Here, however, we deal with a tax applicable simply to importation by ground transportation. Moreover, it is a tax designed to secure revenue that, as far as the record shows here, the State might obtain in other ways.

IV

To summarize, our holding rests upon three propositions: First, a state law that burdens a treaty-protected right is pre-empted by the treaty. See supra, at —— – ——. Second, the treaty protects the Yakamas' right to travel on the public highway with goods for sale. See supra, at —— – – ——. Third, the Washington statute at issue here taxes the Yakamas for traveling with fuel by public highway. See supra, at —— – ——. For these three reasons, Washington's fuel tax cannot lawfully be assessed against Cougar Den on the facts here. Therefore, the judgment of the Supreme Court of Washington is affirmed.

It is so ordered.

Justice GORSUCH, with whom Justice GINSBURG joins, concurring in the judgment.

The Yakamas have lived in the Pacific Northwest for centuries. In 1855, the United States sought and won a treaty in which the Tribe agreed to surrender 10 million acres, land that today makes up nearly a quarter of the State of Washington. In return, the Yakamas received a reservation and various promises, including a guarantee that they would enjoy "the right, in common with

citizens of the United States, to travel upon all public highways." Today, the parties offer dueling interpretations of this language. The State argues that it merely allows the Yakamas to travel on public highways like everyone else. And because everyone else importing gasoline from out of State by highway must pay a tax on that good, so must tribal members. Meanwhile, the Tribe submits that the treaty guarantees tribal members the right to move their goods to and from market freely. So that tribal members may bring goods, including gasoline, from an out-of-state market to sell on the reservation without incurring taxes along the way.

Our job here is a modest one. We are charged with adopting the interpretation most consistent with the treaty's original meaning. *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 534–535, 111 S.Ct. 1489, 113 L.Ed.2d 569 (1991). When we're dealing with a tribal treaty, too, we must "give effect to the terms as the Indians themselves would have understood them." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999). After all, the United States drew up this contract, and we normally construe any ambiguities against the drafter who enjoys the power of the pen. Nor is there any question that the government employed that power to its advantage in this case. During the negotiations "English words were translated into Chinook jargon ... although that was not the primary language" of the Tribe. *Yakama Indian Nation v. Flores*, 955 F.Supp. 1229, 1243 (ED Wash. 1997). After the parties reached agreement, the U.S. negotiators wrote the treaty in English—a language that the Yakamas couldn't read or write. And like many such treaties, this one was by all accounts more nearly imposed on the Tribe than a product of its free choice.

When it comes to the Yakamas' understanding of the treaty's terms in 1855, we have the benefit of a set of unchallenged factual findings. The findings come from a separate case involving the Yakamas' challenge to certain restrictions on their logging operations. Id., at 1231. The state Superior Court relied on these factual findings in this case and held Washington collaterally estopped from challenging them. Because the State did not challenge the Superior Court's estoppel ruling either in the Washington Supreme Court or here, these findings are binding on us as well.

They also tell us all we need to know to resolve this case. To some modern ears, the right to travel in common with others might seem merely a right to use the roads subject to the same taxes and regulations as everyone else. Post, at ——– – ——– (KAVANAUGH, J., dissenting). But that is not how the Yakamas understood the treaty's terms. To the Yakamas, the phrase " 'in common with' ... implie[d] that the Indian and non-Indian use [would] be joint but [did] not imply that the Indian use [would] be in any way restricted." *Yakama Indian Nation*, 955 F.Supp. at 1265. In fact, "[i]n the Yakama language, the term 'in common with' ... suggest[ed] public use or general use without restriction." Ibid. So "[t]he most the Indians would have understood ... of the term[s] 'in common with' and 'public' was that they would share the use of the road with whites." Ibid. Significantly, there is "no evidence [to] sugges[t] that the term 'in common with' placed Indians in the same category as non-Indians with respect to any tax or fee the latter must bear with respect to public roads." Id., at 1247. Instead, the evidence suggests that the Yakamas understood the right-to-travel provision to provide them "with the right to travel on all public highways without being

subject to any licensing and permitting fees related to the exercise of that right while engaged in the transportation of tribal goods." Id., at 1262.

Applying these factual findings to our case requires a ruling for the Yakamas. As the Washington Supreme Court recognized, the treaty's terms permit regulations that allow the Yakamas and non-Indians to share the road in common and travel along it safely together. But they do not permit encumbrances on the ability of tribal members to bring their goods to and from market. And by everyone's admission, the state tax at issue here isn't about facilitating peaceful coexistence of tribal members and non-Indians on the public highways. It is about taxing a good as it passes to and from market—exactly what the treaty forbids.

A wealth of historical evidence confirms this understanding. The Yakama Indian Nation decision supplies an admirably rich account of the history, but it is enough to recount just some of the most salient details. "Prior to and at the time the treaty was negotiated," the Yakamas "engaged in a system of trade and exchange with other plateau tribes" and tribes "of the Northwest coast and plains of Montana and Wyoming." Ibid. This system came with no restrictions; the Yakamas enjoyed "free and open access to trade networks in order to maintain their system of trade and exchange." Id., at 1263. They traveled to Oregon and maybe even to California to trade "fir trees, lava rocks, horses, and various species of salmon." Id., at 1262–1263. This extensive travel "was necessary to obtain goods that were otherwise unavailable to [the Yakamas] but important for sustenance and religious purposes." Id., at 1262. Indeed, "far-reaching travel was an intrinsic ingredient in virtually every aspect of Yakama culture." Id., at 1238. Travel for purposes of trade was so important to the "Yakamas' way of life that they could not have performed and functioned as a distinct culture ... without extensive travel." Ibid. (internal quotation marks omitted).

Everyone understood that the treaty would protect the Yakamas' preexisting right to take goods to and from market freely throughout their traditional trading area. "At the treaty negotiations, a primary concern of the Indians was that they have freedom to move about to ... trade." Id., at 1264. Isaac Stevens, the Governor of the Washington Territory, specifically promised the Yakamas that they would " 'be allowed to go on the roads to take [their] things to market.' " Id., at 1244 (emphasis deleted). Governor Stevens called this the " 'same libert[y]' " to travel with goods free of restriction " 'outside the reservation' " that the Tribe would enjoy within the new reservation's boundaries. Ibid. Indeed, the U.S. representatives' "statements regarding the Yakama's use of the public highways to take their goods to market clearly and without ambiguity promised the Yakamas the use of public highways without restriction for future trading endeavors." Id., at 1265. Before the treaty, then, the Yakamas traveled extensively without paying taxes to bring goods to and from market, and the record suggests that the Yakamas would have understood the treaty to preserve that liberty.

None of this can come as much of a surprise. As the State reads the treaty, it promises tribal members only the right to venture out of their reservation and use the public highways like everyone else. But the record shows that the consideration the Yakamas supplied was worth far

more than an abject promise they would not be made prisoners on their reservation. In fact, the millions of acres the Tribe ceded were a prize the United States desperately wanted. U.S. treaty negotiators were "under tremendous pressure to quickly negotiate treaties with eastern Washington tribes, because lands occupied by those tribes were important in settling the Washington territory." Id., at 1240. Settlers were flooding into the Pacific Northwest and building homesteads without any assurance of lawful title. The government needed "to obtain title to Indian lands" to place these settlements on a more lawful footing. Ibid. The government itself also wanted to build "wagon and military roads through Yakama lands to provide access to the settlements on the west side of the Cascades." Ibid. So "obtaining Indian lands east of the Cascades became a central objective" for the government's own needs. Id., at 1241. The Yakamas knew all this and could see the writing on the wall: One way or another, their land would be taken. If they managed to extract from the negotiations the simple right to take their goods freely to and from market on the public highways, it was a price the United States was more than willing to pay. By any fair measure, it was a bargain-basement deal.

Our cases interpreting the treaty's neighboring and parallel right-to-fish provision further confirm this understanding. The treaty "secure[s] ... the right of taking fish at all usual and accustomed places, in common with citizens of the Territory." Treaty Between the United States and the Yakama Nation of Indians, Art. III, June 9, 1855, 12 Stat. 953 (emphasis added). Initially, some suggested this guaranteed tribal members only the right to fish according to the same regulations and subject to the same fees as non-Indians. But long ago this Court refused to impose such an "impotent" construction on the treaty. *United States v. Winans*, 198 U.S. 371, 380, 25 S.Ct. 662, 49 L.Ed. 1089 (1905). Instead, the Court held that the treaty language prohibited state officials from imposing many nondiscriminatory fees and regulations on tribal members. While such laws "may be both convenient and, in [their] general impact, fair," this Court observed, they act "upon the Indians as a charge for exercising the very right their ancestors intended to reserve." *Tulee v. Washington*, 315 U.S. 681, 685, 62 S.Ct. 862, 86 L.Ed. 1115 (1942). Interpreting the same treaty right in *Winans*, we held that, despite arguments otherwise, "the phrase '*in common with* citizens of the Territory' " confers "upon the Yak[a]mas continuing rights, *beyond those which other citizens may enjoy*, to fish at their 'usual and accustomed places.' " *Tulee*, 315 U.S. at 684, 62 S.Ct. 862 (citing *Winans*, 198 U.S. at 371, 25 S.Ct. 662; emphasis added). Today, we simply recognize that the same language should yield the same result.

With its primary argument now having failed, the State encourages us to labor through a series of backups. It begins by pointing out that the treaty speaks of allowing the Tribe "free access" from local roads to the public highways, but indicates that tribal members are to use those highways "in common with" non-Indians. On the State's account, these different linguistic formulations must be given different meanings. And the difference the State proposes? No surprise: It encourages us to read the former language as allowing goods to be moved tax-free along local roads to the highways but the latter language as authorizing taxes on the Yakamas' goods once they arrive there. See also post, at —— (KAVANAUGH, J., dissenting).

The trouble is that nothing in the record supports this interpretation. Uncontested factual findings reflect the Yakamas' understanding that the treaty would allow them to use the highways to bring goods to and from market freely. These findings bind us under the doctrine of collateral estoppel, and no one has proposed any lawful basis for ignoring them. Nor, for that matter, has anyone even tried to offer a reason why the Tribe might have bargained for the right to move its goods freely only part of the way to market. Our job in this case is to interpret the treaty as the Yakamas originally understood it in 1855—not in light of new lawyerly glosses conjured up for litigation a continent away and more than 150 years after the fact.

If that alternative won't work, the State offers another. It admits that the Yakamas personally may have a right to travel the highways free of most restrictions on their movement. See also post, at —— (ROBERTS, C.J., dissenting) (acknowledging that the treaty prohibits the State from "charg[ing] ... a toll" on Yakamas traveling on the highway). But, the State continues, the law at issue here doesn't offend that right. It doesn't, we are told, because the "object" of the State's tax isn't travel but the possession of fuel; the fact that the State happens to assess its tax when fuel is possessed on a public highway rather than someplace else is neither here nor there. And just look, we are told, at the anomalies that might arise if we ruled otherwise. A tribal member who buys a "mink coat" in a Washington store would have to pay the State's sales tax, but a tribal member who purchases the same coat at market in Oregon could not be taxed for possessing it on the highway when reentering Washington. See post, at —— – ——.

This argument suffers from much the same problem as its predecessors. Now, at least, the State may acknowledge that the Yakamas personally have a right to travel free of most restrictions. But the State still fails to give full effect to the treaty's terms and the Yakamas' original understanding of them. After all and as we've seen, the treaty doesn't just guarantee tribal members the right to travel on the highways free of most restrictions on their movement; it also guarantees tribal members the right to move goods freely to and from market using those highways. And it's impossible to transport goods without possessing them. So a tax that falls on the Yakamas' possession of goods as they travel to and from market on the highway violates the treaty just as much as a tax on travel alone would.

Consider the alternative. If the State could save the tax here simply by labeling it a fee on the "possession" of a good, the State might just as easily revive the fishing license fee *Tulee* struck down simply by calling it a fee on the "possession" of fish. That, of course, would be ridiculous. The Yakamas' right to fish includes the right to possess the fish they catch—just like their right to move goods on the highways embraces the right to possess them there. Nor does the State's reply solve the problem. It accepts, as it must, that possessing fish is "integral" to the right to fish. Post, at ——, n. 2 (ROBERTS, C.J., dissenting). But it stands pat on its assertion that the treaty protects nothing more than a personal right to travel, ignoring all of the facts and binding findings before us establishing that the treaty also guarantees a right to move (and so possess) goods freely as they travel to and from market. Ibid.

What about the supposed "mink coat" anomaly? Under the terms of the treaty before us, it's true that a Yakama who buys a mink coat (or perhaps some more likely item) at an off-reservation store in Washington will have to pay sales tax because the treaty is silent there. And it is also true that a Yakama who buys the same coat right over the state line, pays any taxes due at market there, and then drives back to the reservation using the public highways is entitled to move that good tax-free from market back to the reservation. But that is hardly anomalous—that is the treaty right the Yakamas reserved. And it's easy to see why. Imagine the Yakama Reservation reached the Washington/Oregon state line (as it did before the 1855 Treaty). In that case, Washington would have no basis to tax the Yakamas' transportation of goods from Oregon (whether they might be fuel, mink coats, or anything else), as all of the Yakamas' conduct would take place outside of the State or on the reservation. The only question here is whether the result changes because the Tribe must now use Washington's highways to make the trek home. And the answer is no. The Tribe bargained for a right to travel with goods off reservation just as it could on reservation and just as it had for centuries. If the State and federal governments do not like that result, they are free to bargain for more, but they do not get to rewrite the existing bargain in this Court.

Alternatively yet, the State warns us about the dire consequences of a ruling against it. Highway speed limits, reckless driving laws, and much more, the State tells us, will be at risk if we rule for the Tribe. See also post, at —— – —— (ROBERTS, C.J., dissenting). But notice. Once you acknowledge (as the State and primary dissent just have) that the Yakamas themselves enjoy a right to travel free of at least some nondiscriminatory state regulations, this "problem" inevitably arises. It inevitably arises, too, once you concede that the Yakamas enjoy a right to travel freely at least on local roads. See post, at —— (KAVANAUGH, J., dissenting). Whether you read the treaty to afford the Yakamas the further right to bring goods to and from market is beside the point.

It turns out, too, that the State's parade of horribles isn't really all that horrible. While the treaty supplies the Yakamas with special rights to travel with goods to and from market, we have seen already that its "in common with" language also indicates that tribal members knew they would have to "share the use of the road with whites" and accept regulations designed to allow the two groups' safe coexistence. *Yakama Indian Nation*, 955 F.Supp. at 1265. Indeed, the Yakamas expected laws designed to "protec[t]" their ability to travel safely alongside non-Indians on the highways. See App. to Brief for Confederated Tribes and Bands of the Yakama Nation as Amicus Curiae 21a, 31a. Maybe, too, that expectation goes some way toward explaining why the State's hypothetical parade of horribles has yet to take its first step in the real world. No one before us has identified a single challenge to a state highway speed limit, reckless driving law, or other critical highway safety regulation in the entire life of the Yakama treaty.

Retreating now, the State suggests that the real problem isn't so much about the Yakamas themselves traveling freely as it is with their goods doing so. We are told we should worry, for example, about limiting Washington's ability to regulate the transportation of diseased apples from Oregon. See also post, at —— (ROBERTS, C.J., dissenting). But if bad apples prove to be a public

menace, Oregon and its localities may regulate them when they are grown or picked at the orchard. Oregon, its localities, and maybe even the federal government may regulate the bad apples when they arrive at market for sale in Oregon. The Tribe and again, perhaps, the federal government may regulate the bad apples when they arrive on the reservation. And if the bad apples somehow pose a threat to safe travel on the highways, even Washington may regulate them as they make their way from Oregon to the reservation—just as the State may require tribal members to abide nondiscriminatory regulations governing the safe transportation of flammable cargo as they drive their gas trucks from Oregon to the reservation along public highways. The only thing that Washington may not do is reverse the promise the United States made to the Yakamas in 1855 by imposing a tax or toll on tribal members or their goods as they pass to and from market.

Finally, some worry that, if we recognize the potential permissibility of state highway safety laws, we might wind up impairing the interests of "tribal members across the country." See post, at —— (ROBERTS, C.J., dissenting). But our decision today is based on unchallenged factual findings about how the Yakamas themselves understood this treaty in light of the negotiations that produced it. And the Tribe itself has expressly acknowledged that its treaty, while extending real and valuable rights to tribal members, does not preclude laws that merely facilitate the safe use of the roads by Indians and non-Indians alike. Nor does anything we say here necessarily apply to other tribes and other treaties; each must be taken on its own terms. In the end, then, the only true threat to tribal interests today would come from replacing the meaningful right the Yakamas thought they had reserved with the trivial promise the State suggests.

Really, this case just tells an old and familiar story. The State of Washington includes millions of acres that the Yakamas ceded to the United States under significant pressure. In return, the government supplied a handful of modest promises. The State is now dissatisfied with the consequences of one of those promises. It is a new day, and now it wants more. But today and to its credit, the Court holds the parties to the terms of their deal. It is the least we can do.

[The dissenting opinions of the CHIEF JUSTICE and Justice KAVANAUGH are omitted.]

NOTE

The votes of the Court in *Cougar Den*, *McGirt*, and other cases indicates that Justice Gorsuch's brand of conservativism – textualism – seems to work to the benefit of tribal interests:

> Justice Gorsuch, in his *Washington State Department of Licensing v. Cougar Den* concurrence, seems to have employed what could be called Indian law originalism. In that case, which involved the interpretation of an Indian treaty, Gorsuch relied exclusively on evidence of the understanding of that treaty by the

> Indians who negotiated that treaty, and representations made by those on the American side consistent with the Indian understanding. Gorsuch casually tossed aside any modern understanding that differed or modified the original understanding, framing the issue as "adopting the interpretation most consistent with the treaty's original meaning." Significantly, while dissenters raised the specter of horrific policy consequences flowing from the interpretation of the treaty favored by the majority, Gorsuch was having none of it. Gorsuch's nascent theory of Indian law originalism took the discipline demanded by aspects of Scalia's textualism, most notably the separation of text from judicial policy preferences, and applied it simply.
>
> It is now clear that Cougar Den wasn't a one-time-only deal with Justice Gorsuch. Any textual theory that prioritizes text over the policy preferences of unelected judges – preferences that likely arise from the various structural, institutional, and cognitive biases of the judiciary – is an improvement, perhaps even a paradigmatic improvement. That Justice Ginsburg – the author of *City of Sherrill*, an opinion that pointedly discarded the text in favor of policy preferences – joined Gorsuch's *Cougar Den*'s concurrence and his *McGirt* majority opinion is also suggestive that she shares his views on textualism in the Indian law context.
>
> In short, the deeply split *McGirt* decision shows that the Court still has no dominant theory. Textualism is on the minds of the judges, but the discipline to accept the outcomes that textualism brings prevailed by a solitary vote.

Matthew L.M. Fletcher, *Texualism's Gaze*, 25 MICH. J. RACE & L. 111, 136-37 (2020).

SECTION D.

THE INDIAN CHILD WELFARE ACT OF 1978

After note 3 on page 713, add:

Brackeen v. Haaland

United States Supreme Court, 2023

599 U.S. __, 143 S. Ct. 1609

* * *

Justice BARRETT delivered the opinion of the Court.

This case is about children who are among the most vulnerable: those in the child welfare system. In the usual course, state courts apply state law when placing children in foster or adoptive homes. But when the child is an Indian, a federal statute—the Indian Child Welfare Act—governs. Among other things, this law requires a state court to place an Indian child with an Indian caretaker, if one is available. That is so even if the child is already living with a non-Indian family and the state court thinks it in the child's best interest to stay there.

Before us, a birth mother, foster and adoptive parents, and the State of Texas challenge the Act on multiple constitutional grounds. They argue that it exceeds federal authority, infringes state sovereignty, and discriminates on the basis of race. The United States, joined by several Indian Tribes, defends the law. The issues are complicated— so for the details, read on. But the bottom line is that we reject all of petitioners' challenges to the statute, some on the merits and others for lack of standing.

I

A

In 1978, Congress enacted the Indian Child Welfare Act (ICWA) out of concern that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies." 92 Stat. 3069, 25 U. S. C. §1901(4). Congress found that many of these children were being "placed in non-Indian foster and adoptive homes and institutions," and that the States had contributed to the problem by "fail[ing] to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." §§1901(4), (5). This harmed not only Indian

parents and children, but also Indian tribes. As Congress put it, "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." §1901(3). Testifying before Congress, the Tribal Chief of the Mississippi Band of Choctaw Indians was blunter: "Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People." Hearings on S. 1214 before the Subcommittee on Indian Affairs and Public Lands of the House Committee on Interior and Insular Affairs, 95th Cong., 2d Sess., 193 (1978).

The Act thus aims to keep Indian children connected to Indian families. "Indian child" is defined broadly to include not only a child who is "a member of an Indian tribe," but also one who is "eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." §1903(4). If the Indian child lives on a reservation, ICWA grants the tribal court exclusive jurisdiction over all child custody proceedings, including adoptions and foster care proceedings. §1911(a). For other Indian children, state and tribal courts exercise concurrent jurisdiction, although the state court is sometimes required to transfer the case to tribal court. §1911(b). When a state court adjudicates the proceeding, ICWA governs from start to finish. That is true regardless of whether the proceeding is "involuntary" (one to which the parents do not consent) or "voluntary" (one to which they do).

Involuntary proceedings are subject to especially stringent safeguards. See 25 CFR §23.104 (2022); 81 Fed. Reg. 38832–38836 (2016). Any party who initiates an "involuntary proceeding" in state court to place an Indian child in foster care or terminate parental rights must "notify the parent or Indian custodian and the Indian child's tribe." §1912(a). The parent or custodian and tribe have the right to intervene in the proceedings; the right to request extra time to prepare for the proceedings; the right to "examine all reports or other documents filed with the court"; and, for indigent parents or custodians, the right to court-appointed counsel. §§1912(a), (b), (c). The party attempting to terminate parental rights or remove an Indian child from an unsafe environment must first "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." §1912(d). Even then, the court cannot order a foster care placement unless it finds "by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." §1912(e). To terminate parental rights, the court must make the same finding "beyond a reasonable doubt." §1912(f).

The Act applies to voluntary proceedings too. Relinquishing a child temporarily (to foster care) or permanently (to adoption) is a grave act, and a state court must ensure that a consenting parent or custodian knows and understands "the terms and consequences." §1913(a). Notably, a biological parent who voluntarily gives up an Indian child cannot necessarily choose the child's foster or adoptive parents. The child's tribe has "a right to intervene at any point in [a] proceeding" to place a child in foster care or terminate parental rights, as well as a right to collaterally attack

the state court's decree. §§1911(c), 1914. As a result, the tribe can sometimes enforce ICWA's placement preferences against the wishes of one or both biological parents, even after the child is living with a new family. See Mississippi Band of Choctaw Indians v. Holyfield, 490 U. S. 30, 49–52 (1989).

ICWA's placement preferences, which apply to all custody proceedings involving Indian children, are hierarchical: State courts may only place the child with someone in a lower-ranked group when there is no available placement in a higher-ranked group. For adoption, "a preference shall be given" to placements with "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families." §1915(a). For foster care, a preference is given to (1) "the Indian child's extended family"; (2) "a foster home licensed, approved, or specified by the Indian child's tribe"; (3) "an Indian foster home licensed or approved by an authorized non-Indian licensing authority"; and then (4) another institution "approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs." §1915(b). For purposes of the placement preferences, an "Indian" is "any person who is a member of an Indian tribe," and an "Indian organization" is "any group . . . owned or controlled by Indians." §§1903(3), (7). Together, these definitions mean that Indians from any tribe (not just the tribe to which the child has a tie) outrank unrelated non-Indians for both adoption and foster care. And for foster care, institutions run or approved by any tribe outrank placements with unrelated non-Indian families. Courts must adhere to the placement preferences absent "good cause" to depart from them. §§1915(a), (b).

The child's tribe may pass a resolution altering the prioritization order. §1915(c). If it does, "the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child." Ibid. So long as the "least restrictive setting" condition is met, the preferences of the Indian child or her parent cannot trump those set by statute or tribal resolution. But, "[w]here appropriate, the preference of the Indian child or parent shall be considered" in making a placement. Ibid.

The State must record each placement, including a description of the efforts made to comply with ICWA's order of preferences. §1915(e). Both the Secretary of the Interior and the child's tribe have the right to request the record at any time. Ibid. State courts must also transmit all final adoption decrees and specified information about adoption proceedings to the Secretary. §1951(a).

B

This case arises from three separate child custody proceedings governed by ICWA. 1 A. L. M. was placed in foster care with Chad and Jennifer Brackeen when he was 10 months old. Because his biological mother is a member of the Navajo Nation and his biological father is a member of the Cherokee Nation, he falls within ICWA's definition of an "Indian child." Both the Brackeens and A. L. M.'s biological parents live in Texas.

After A. L. M. had lived with the Brackeens for more than a year, they sought to adopt him. A. L. M.'s biological mother, father, and grandmother all supported the adoption. The Navajo and Cherokee Nations did not. Pursuant to an agreement between the Tribes, the Navajo Nation designated A. L. M. as a member and informed the state court that it had located a potential alternative placement with nonrelative tribal members living in New Mexico. ICWA's placement preferences ranked the proposed Navajo family ahead of non-Indian families like the Brackeens. See §1915(a).

The Brackeens tried to convince the state court that there was "good cause" to deviate from ICWA's preferences. They presented favorable testimony from A. L. M.'s court-appointed guardian and from a psychological expert who described the strong emotional bond between A. L. M. and his foster parents. A. L. M.'s biological parents and grandmother also testified, urging the court to allow A. L. M. to remain with the Brackeens, "'the only parents [A. L. M.] knows.'" App. 96. The court denied the adoption petition, and the Texas Department of Family and Protective Services announced its intention to move A. L. M. from the Brackeens' home to New Mexico. In response, the Brackeens obtained an emergency stay of the transfer and filed this lawsuit. The Navajo family then withdrew from consideration, and the Brackeens finalized their adoption of A. L. M.

The Brackeens now seek to adopt A. L. M.'s biological sister, Y. R. J., again over the opposition of the Navajo Nation. And while the Brackeens hope to foster and adopt other Indian children in the future, their fraught experience with A. L. M.'s adoption makes them hesitant to do so.

2

Altagracia Hernandez chose Nick and Heather Libretti as adoptive parents for her newborn daughter, Baby O. The Librettis took Baby O. home from the hospital when she was three days old, and Hernandez, who lived nearby, visited Baby O. frequently. Baby O.'s biological father visited only once but supported the adoption.

Hernandez is not an Indian. But Baby O.'s biological father is descended from members of the Ysleta del Sur Pueblo Tribe, and the Tribe enrolled Baby O. as a member. As a result, the adoption proceeding was governed by ICWA. The Tribe exercised its right to intervene and argued, over Hernandez's objection, that Baby O. should be moved from the Librettis' home in Nevada to the Tribe's reservation in El Paso, Texas. It presented a number of potential placements on the reservation for Baby O., and state officials began to investigate them. After Hernandez and the Librettis joined this lawsuit, however, the Tribe withdrew its challenge to the adoption, and the Librettis finalized their adoption of Baby O. The Librettis stayed in the litigation because they planned to foster and possibly adopt Indian children in the future.

3

Jason and Danielle Clifford, who live in Minnesota, fostered Child P., whose maternal grandmother belongs to the White Earth Band of Ojibwe Tribe. When Child P. entered state custody around the age of three, her mother informed the court that ICWA did not apply because Child P. was not eligible for tribal membership. The Tribe wrote a letter to the court confirming the same.

After two years in the foster care system, Child P. was placed with the Cliffords, who eventually sought to adopt her. The Tribe intervened in the proceedings and, with no explanation for its change in position, informed the court that Child P. was in fact eligible for tribal membership. Later, the Tribe announced that it had enrolled Child P. as a member. To comply with ICWA, Minnesota placed Child P. with her maternal grandmother, who had lost her foster license due to a criminal conviction. The Cliffords continued to pursue the adoption, but, citing ICWA, the court denied their motion. Like the other families, the Cliffords intend to foster or adopt Indian children in the future.

* * *

II

A

We begin with petitioners' claim that ICWA exceeds Congress's power under Article I. In a long line of cases, we have characterized Congress's power to legislate with respect to the Indian tribes as "'plenary and exclusive.'" United States v. Lara, 541 U. S. 193, 200 (2004); [citing additional cases].

To be clear, however, "plenary" does not mean "free-floating." A power unmoored from the Constitution would lack both justification and limits. So like the rest of its legislative powers, Congress's authority to regulate Indians must derive from the Constitution, not the atmosphere. Our precedent traces that power to multiple sources. The Indian Commerce Clause authorizes Congress "[t]o regulate Commerce . . . with the Indian Tribes." Art. I, §8, cl. 3.

We have interpreted the Indian Commerce Clause to reach not only trade, but certain "Indian affairs" too. Cotton Petroleum Corp. v. New Mexico, 490 U. S. 163, 192 (1989). Notably, we have declined to treat the Indian Commerce Clause as interchangeable with the Interstate Commerce Clause. Ibid. While under the Interstate Commerce Clause, States retain "some authority" over trade, we have explained that "virtually all authority over Indian commerce and Indian tribes" lies with the Federal Government. Seminole Tribe of Fla. v. Florida, 517 U. S. 44, 62 (1996).

The Treaty Clause—which provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties"—provides a second source of power over Indian affairs. Art. II, §2, cl. 2. Until the late 19th century, relations between the Federal

Government and the Indian tribes were governed largely by treaties. Lara, 541 U. S., at 201. Of course, the treaty power "does not literally authorize Congress to act legislatively," since it is housed in Article II rather than Article I. Ibid. Nevertheless, we have asserted that "treaties made pursuant to that power can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal.'" Ibid. And even though the United States formally ended the practice of entering into new treaties with the Indian tribes in 1871, this decision did not limit Congress's power "to legislate on problems of Indians" pursuant to pre-existing treaties. Antoine v. Washington, 420 U. S. 194, 203 (1975) (emphasis deleted).

We have also noted that principles inherent in the Constitution's structure empower Congress to act in the field of Indian affairs. See Morton v. Mancari, 417 U. S. 535, 551– 552 (1974) ("The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself"). At the founding, "'Indian affairs were more an aspect of military and foreign policy than a subject of domestic or municipal law.'" Lara, 541 U. S., at 201. With this in mind, we have posited that Congress's legislative authority might rest in part on "the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that this Court has described as 'necessary concomitants of nationality.'" Ibid. (quoting United States v. Curtiss-Wright Export Corp., 299 U. S. 304, 315–322 (1936)).

Finally, the "trust relationship between the United States and the Indian people" informs the exercise of legislative power. United States v. Mitchell, 463 U. S. 206, 225– 226 (1983). As we have explained, the Federal Government has "'charged itself with moral obligations of the highest responsibility and trust'" toward Indian tribes. United States v. Jicarilla Apache Nation, 564 U. S. 162, 176 (2011); Seminole Nation v. United States, 316 U. S. 286, 296 (1942) ("[T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people"). The contours of this "special relationship" are undefined. Mancari, 417 U. S., at 552.

In sum, Congress's power to legislate with respect to Indians is well established and broad. Consistent with that breadth, we have not doubted Congress's ability to legislate across a wide range of areas, including criminal law, domestic violence, employment, property, tax, and trade. See, e.g., Lara, 541 U. S., at 210 (law allowing tribes to prosecute nonmember Indians who committed crimes on tribal land); United States v. Bryant, 579 U. S. 140, 142–143 (2016) (law criminalizing domestic violence in Indian country); Mancari, 417 U. S., at 537 (policy granting Indians employment preferences); United States v. Antelope, 430 U. S. 641, 648 (1977) (law establishing a criminal code for Indian country); Yankton Sioux Tribe, 522 U. S., at 343 (law altering the boundaries of a reservation); Sunderland v. United States, 266 U. S. 226, 231–232 (1924) (agency action removing the restrictions on alienation of a homestead allotted to an Indian); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U. S. 685, 691, n. 18 (1965) (law granting tribe immunity from state taxation); United States v. Algoma Lumber Co., 305 U. S. 415, 417, 421 (1939) (law regulating the sale of timber by an Indian tribe). Indeed, we have only rarely

concluded that a challenged statute exceeded Congress's power to regulate Indian affairs. See, e.g., Seminole Tribe, 517 U. S., at 72–73.

Admittedly, our precedent is unwieldy, because it rarely ties a challenged statute to a specific source of constitutional authority. That makes it difficult to categorize cases and even harder to discern the limits on Congress's power. Still, we have never wavered in our insistence that Congress's Indian affairs power "'is not absolute.'" Delaware Tribal Business Comm. v. Weeks, 430 U. S. 73, 84 (1977); United States v. Alcea Band of Tillamooks, 329 U. S. 40, 54 (1946) ("The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute"); United States v. Creek Nation, 295 U. S. 103, 110 (1935) (plenary power is "subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions"). It could not be otherwise—Article I gives Congress a series of enumerated powers, not a series of blank checks. Thus, we reiterate that Congress's authority to legislate with respect to Indians is not unbounded. It is plenary within its sphere, but even a sizeable sphere has borders.

B

[The rejects the petitioners' theory that state authority over family law bars Congress from enacting family law statutes.] In fact, we have specifically recognized Congress's power to displace the jurisdiction of state courts in adoption proceedings involving Indian children. Fisher v. District Court of Sixteenth Judicial Dist. of Mont., 424 U. S. 382, 390 (1976) (per curiam).

Petitioners are trying to turn a general observation (that Congress's Article I powers rarely touch state family law) into a constitutional carveout (that family law is wholly exempt from federal regulation). That argument is a nonstarter. As James Madison said to Members of the First Congress, when the Constitution conferred a power on Congress, "they might exercise it, although it should interfere with the laws, or even the Constitution of the States." 2 Annals of Cong. 1897 (1791). Family law is no exception.

C

Petitioners come at the problem from the opposite direction too: Even if there is no family law carveout to the Indian affairs power, they contend that Congress's authority does not stretch far enough to justify ICWA. Ticking through the various sources of power, petitioners assert that the Constitution does not authorize Congress to regulate custody proceedings for Indian children. Their arguments fail to grapple with our precedent, and because they bear the burden of establishing ICWA's unconstitutionality, we cannot sustain their challenge to the law. See Lujan v. G & G Fire Sprinklers, Inc., 532 U. S. 189, 198 (2001).

Take the Indian Commerce Clause, which is petitioners' primary focus. According to petitioners, the Clause authorizes Congress to legislate only with respect to Indian tribes as government entities, not Indians as individuals. Brief for Individual Petitioners 47–50. But we held more than a century ago that "commerce with the Indian tribes, means commerce with the

individuals composing those tribes." United States v. Holliday, 3 Wall. 407, 416–417 (1866) (law prohibiting the sale of alcohol to Indians in Indian country); United States v. Nice, 241 U. S. 591, 600 (1916) (same). So that argument is a dead end.

Petitioners also assert that ICWA takes the "commerce" out of the Indian Commerce Clause. Their consistent refrain is that "children are not commodities that can be traded." Brief for Individual Petitioners 16; Brief for Petitioner Texas 23 ("[C]hildren are not commodities"); id., at 18 ("Children are not articles of commerce"). Rhetorically, it is a powerful point—of course children are not commercial products. Legally, though, it is beside the point. As we already explained, our precedent states that Congress's power under the Indian Commerce Clause encompasses not only trade but also "Indian affairs." Cotton Petroleum, 490 U. S., at 192. * * *

Presumably recognizing these obstacles, petitioners turn to criticizing our precedent as inconsistent with the Constitution's original meaning. Yet here too, they offer no account of how their argument fits within the landscape of our case law. For instance, they neither ask us to overrule the precedent they criticize nor try to reconcile their approach with it. They are also silent about the potential consequences of their position. Would it undermine established cases and statutes? If so, which ones? Petitioners do not say.

We recognize that our case law puts petitioners in a difficult spot. We have often sustained Indian legislation without specifying the source of Congress's power, and we have insisted that Congress's power has limits without saying what they are. Yet petitioners' strategy for dealing with the confusion is not to offer a theory for rationalizing this body of law—that would at least give us something to work with.[4] Instead, they frame their arguments as if the slate were clean. More than two centuries in, it is anything but.

If there are arguments that ICWA exceeds Congress's authority as our precedent stands today, petitioners do not make them. We therefore decline to disturb the Fifth Circuit's conclusion that ICWA is consistent with Article I.

III

We now turn to petitioners' host of anticommandeering arguments, which we will break into three categories. First, petitioners challenge certain requirements that apply in involuntary proceedings to place a child in foster care or terminate parental rights: the requirements that an initiating party demonstrate "active efforts" to keep the Indian family together; serve notice of the proceeding on the parent or Indian custodian and tribe; and demonstrate, by a heightened burden

[4] Texas floated a theory for the first time at oral argument. It said that, taken together, our plenary power cases fall into three buckets: (1) those allowing Congress to legislate pursuant to an enumerated power, such as the Indian Commerce Clause or the Treaty Clause; (2) those allowing Congress to regulate the tribes as government entities; and (3) those allowing Congress to enact legislation that applies to federal or tribal land. Tr. of Oral Arg. 55. According to Texas, ICWA is unconstitutional because it does not fall within any of these categories. We have never broken down our cases this way. But even if Texas's theory is descriptively accurate, Texas offers no explanation for why Congress's power is limited to these categories.

of proof and expert testimony, that the child is likely to suffer "serious emotional or physical damage" if the parent or Indian custodian retains custody. Second, petitioners challenge ICWA's placement preferences. They claim that Congress can neither force state agencies to find preferred placements for Indian children nor require state courts to apply federal standards when making custody determinations. Third, they insist that Congress cannot force state courts to maintain or transmit to the Federal Government records of custody proceedings involving Indian children.

A As a reminder, "involuntary proceedings" are those to which a parent does not consent. §1912; 25 CFR §23.2. Heightened protections for parents and tribes apply in this context, and while petitioners challenge most of them, the "active efforts" provision is their primary target. That provision requires "[a]ny party" seeking to effect an involuntary foster care placement or termination of parental rights to "satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." §1912(d). According to petitioners, this subsection directs state and local agencies to provide extensive services to the parents of Indian children. It is well established that the Tenth Amendment bars Congress from "command[ing] the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." Printz v. United States, 521 U. S. 898, 935 (1997). The "active efforts" provision, petitioners say, does just that.

Petitioners' argument has a fundamental flaw: To succeed, they must show that §1912(d) harnesses a State's legislative or executive authority. But the provision applies to "any party" who initiates an involuntary proceeding, thus sweeping in private individuals and agencies as well as government entities. A demand that either public or private actors can satisfy is unlikely to require the use of sovereign power. Murphy v. National Collegiate Athletic Assn., 584 U. S. ___, ___–___ (2018) (slip op., at 19–20).

* * *

The record contains no evidence supporting the assertion that States institute the vast majority of involuntary proceedings. Examples of private suits are not hard to find, so we are skeptical that their number is negligible. See, e.g., Adoptive Couple v. Baby Girl, 570 U. S. 637, 644–646 (2013) (prospective adoptive parents); In re Guardianship of Eliza W., 304 Neb. 995, 997, 938 N. W. 2d 307, 310 (2020) (grandmother); In re Guardianship of J. C. D., 2004 S. D. 96, ¶4, 686 N. W. 2d 647, 648 (2004) (grandparents); In re Adoption of T. A. W., 186 Wash. 2d 828, 835–837, 850–851, 383 P. 3d 492, 494–495, 501–502 (2016) (en banc) (mother and stepfather); J. W. v. R. J., 951 P. 2d 1206, 1212–1213 (Alaska 1998) (same). Indeed, Texas's own family code permits certain private parties to initiate suits for the termination of parental rights. Tex. Fam. Code Ann. §102.003(a) (West Cum. Supp. 2022); see Reply Brief for Texas 27. And while petitioners treat "active efforts" as synonymous with "government programs," state courts have applied the "active efforts" requirement in private suits too. See, e.g., In re Adoption of T. A. W., 186 Wash. 2d, at 851–852, 383 P. 3d, at 502–503; S. S. v. Stephanie H., 241 Ariz. 419, 424, 388

P. 3d 569, 574 (App. 2017); In re N. B., 199 P. 3d 16, 23–24 (Colo. App. 2007). That is consistent with ICWA's findings, which describe the role that both public and private actors played in the unjust separation of Indian children from their families and tribes. §1901. Given all this, it is implausible that §1912(d) is directed primarily, much less exclusively, at the States.

Legislation that applies "evenhandedly" to state and private actors does not typically implicate the Tenth Amendment. Murphy, 584 U. S., at ___ (slip op., at 20). * * *

Petitioners argue that . . . ICWA regulates a State's "core sovereign function of protecting the health and safety of children within its borders." Brief for Petitioner Texas 66. A State can stop selling bonds or a driver's personal information, petitioners say, but it cannot withdraw from the area of child welfare—protecting children is the business of government, even if it is work in which private parties share. Nor, of course, could Texas avoid ICWA by excluding only Indian children from social services. Because States cannot exit the field, they are hostage to ICWA, which requires them to implement Congress's regulatory program for the care of Indian children and families. Id., at 64–65; Reply Brief for Texas 27. This argument is presumably directed at situations in which only the State can rescue a child from neglectful parents. But §1912 applies to more than child neglect—for instance, it applies when a biological mother arranges for a private adoption without the biological father's consent. See, e.g., Adoptive Couple, 570 U. S., at 643–644. And even when a child is trapped in an abusive home, the State is not necessarily the only option for rescue—for instance, a grandmother can seek guardianship of a grandchild whose parents are failing to care for her. See, e.g., In re Guardianship of Eliza W., 304 Neb., at 996–997, 938 N. W. 2d, at 309–310. Petitioners do not distinguish between these varied situations, much less isolate a domain in which only the State can act. Some amici assert that, at the very least, removing children from imminent danger in the home falls exclusively to the government. Brief for Academy of Adoption and Assisted Reproduction Attorneys et al. as Amici Curiae 14 ("Amici are aware of no state in which a private actor may lawfully remove a child from his existing home"). Maybe so—but that does not help petitioners' commandeering argument, because the "active efforts" requirement does not apply to emergency removals. §1922. If ICWA commandeers state performance of a "core sovereign function," petitioners do not give us the details.

When a federal statute applies on its face to both private and state actors, a commandeering argument is a heavy lift—and petitioners have not pulled it off. Both state and private actors initiate involuntary proceedings. And, if there is a core of involuntary proceedings committed exclusively to the sovereign, Texas neither identifies its contours nor explains what §1912(d) requires of a State in that context. Petitioners have therefore failed to show that the "active efforts" requirement commands the States to deploy their executive or legislative power to implement federal Indian policy.

As for petitioners' challenges to other provisions of §1912—the notice requirement, expert witness requirement, and evidentiary standards—we doubt that requirements placed on a State as

litigant implicate the Tenth Amendment. But in any event, these provisions, like §1912(d), apply to both private and state actors, so they too pose no anticommandeering problem.

B

Petitioners also raise a Tenth Amendment challenge to §1915, which dictates placement preferences for Indian children. According to petitioners, this provision orders state agencies to perform a "diligent search" for placements that satisfy ICWA's hierarchy. Brief for Petitioner Texas 63; Reply Brief for Texas 24; see also Brief for Individual Petitioners 67–68. Petitioners assert that the Department of the Interior understands §1915 this way, 25 CFR §23.132(c)(5), and the Tribes who intervene in proceedings governed by ICWA share that understanding—for example, "the Librettis' adoption of Baby O was delayed because the Ysleta del Sur Pueblo Tribe demanded that county officials exhaustively search for a placement with the Tribe first." Reply Brief for Texas 24–25. Just as Congress cannot compel state officials to search databases to determine the lawfulness of gun sales, Printz, 521 U. S., at 902–904, petitioners argue, Congress cannot compel state officials to search for a federally preferred placement.

As an initial matter, this argument encounters the same problem that plagues petitioners with respect to §1912: Petitioners have not shown that the "diligent search" requirement, which applies to both private and public parties, demands the use of state sovereign authority. But this argument fails for another reason too: Section 1915 does not require anyone, much less the States, to search for alternative placements. As the United States emphasizes, petitioners' interpretation "cannot be squared with this Court's decision in Adoptive Couple," which held that "'there simply is no "preference" to apply if no alternative party that is eligible to be preferred . . . has come forward.'" Brief for Federal Parties 44 (quoting 570 U. S., at 654); Adoptive Couple, 570 U. S., at 654 ("§1915(a)'s preferences are inapplicable in cases where no alternative party has formally sought to adopt the child"). Instead, the burden is on the tribe or other objecting party to produce a higher-ranked placement. Ibid. So, as it stands, petitioners assert an anticommandeering challenge to a provision that does not command state agencies to do anything.

State courts are a different matter. ICWA indisputably requires them to apply the placement preferences in making custody determinations. §§1915(a), (b). Petitioners argue that this too violates the anticommandeering doctrine. To be sure, they recognize that Congress can require state courts, unlike state executives and legislatures, to enforce federal law. See New York v. United States, 505 U. S. 144, 178–179 (1992) ("Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause"). But they draw a distinction between requiring state courts to entertain federal causes of action and requiring them to apply federal law to state causes of action. They claim that if state law provides the cause of action—as Texas law does here—then the State gets to call the shots, unhindered by any federal instruction to the contrary. Brief for Individual Petitioners 62–63, 66–67.

This argument runs headlong into the Constitution. The Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl. 2. Thus, when Congress enacts a valid statute pursuant to its Article I powers, "state law is naturally preempted to the extent of any conflict with a federal statute." Crosby v. National Foreign Trade Council, 530 U. S. 363, 372 (2000). End of story. That a federal law modifies a state law cause of action does not limit its preemptive effect. . . .

C

[The Court rejects the Petitioners' claim that ICWA's recordkeeping requirement violates the Tenth Amendment.]

IV

Petitioners raise two additional claims: an equal protection challenge to ICWA's placement preferences and a nondelegation challenge to the provision allowing tribes to alter the placement preferences. We do not reach the merits of these claims because no party before the Court has standing to raise them. Article III requires a plaintiff to show that she has suffered an injury in fact that is "'fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" California v. Texas, 593 U. S. ___, ___ (2021) (slip op., at 4). Neither the individual petitioners nor Texas can pass that test.

A

The individual petitioners argue that ICWA injures them by placing them on "[un]equal footing" with Indian parents who seek to adopt or foster an Indian child. Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville, 508 U. S. 656, 666 (1993). Under ICWA's hierarchy of preferences, non-Indian parents are generally last in line for potential placements. According to petitioners, this "erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group." Ibid.; see also Turner v. Fouche, 396 U. S. 346, 362 (1970) (the Equal Protection Clause secures the right of individuals "to be considered" for government positions and benefits "without the burden of invidiously discriminatory disqualifications"). The racial discrimination they allege counts as an Article III injury.

But the individual petitioners have not shown that this injury is "likely" to be "redressed by judicial relief." TransUnion LLC v. Ramirez, 594 U. S. ___, ___ (2021) (slip op., at 7). They seek an injunction preventing the federal parties from enforcing ICWA and a declaratory judgment that the challenged provisions are unconstitutional. Yet enjoining the federal parties would not remedy the alleged injury, because state courts apply the placement preferences, and state agencies carry out the court-ordered placements. §§1903(1), 1915(a), (b); see also Brief for Individual Petitioners 63 ("There is no federal official who administers ICWA or carries out its mandates").

The state officials who implement ICWA are "not parties to the suit, and there is no reason they should be obliged to honor an incidental legal determination the suit produced." Lujan v. Defenders of Wildlife, 504 U. S. 555, 569 (1992) (plurality opinion). So an injunction would not give petitioners legally enforceable protection from the allegedly imminent harm.

* * *

B

Texas also lacks standing to challenge the placement preferences. It has no equal protection rights of its own, South Carolina v. Katzenbach, 383 U. S. 301, 323 (1966), and it cannot assert equal protection claims on behalf of its citizens because "[a] State does not have standing as parens patriae to bring an action against the Federal Government," Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez, 458 U. S. 592, 610, n. 16 (1982). * * *

* * *

For these reasons, we affirm the judgment of the Court of Appeals regarding Congress's constitutional authority to enact ICWA. On the anticommandeering claims, we reverse. On the equal protection and nondelegation claims, we vacate the judgment of the Court of Appeals and remand with instructions to dismiss for lack of jurisdiction.

Justice GORSUCH, with whom Justice SOTOMAYOR and Justice JACKSON join as to Parts I and III, concurring.

In affirming the constitutionality of the Indian Child Welfare Act (ICWA), the Court safeguards the ability of tribal members to raise their children free from interference by state authorities and other outside parties. In the process, the Court also goes a long way toward restoring the original balance between federal, state, and tribal powers the Constitution envisioned. I am pleased to join the Court's opinion in full. I write separately to add some historical context. To appreciate fully the significance of today's decision requires an understanding of the long line of policies that drove Congress to adopt ICWA. And to appreciate why that law surely comports with the Constitution requires a bird's-eye view of how our founding document mediates between competing federal, state, and tribal claims of sovereignty.

I

The Indian Child Welfare Act did not emerge from a vacuum. It came as a direct response to the mass removal of Indian children from their families during the 1950s, 1960s, and 1970s by state officials and private parties. That practice, in turn, was only the latest iteration of a much older policy of removing Indian children from their families—one initially spearheaded by federal officials with the aid of their state counterparts nearly 150 years ago. In all its many forms, the

dissolution of the Indian family has had devastating effects on children and parents alike. It has also presented an existential threat to the continued vitality of Tribes—something many federal and state officials over the years saw as a feature, not as a flaw. This is the story of ICWA. And with this story, it pays to start at the beginning.

A

When Native American Tribes were forced onto reservations, they understood that life would never again be as it was. M. Fletcher & W. Singel, Indian Children and the Federal–Tribal Trust Relationship, 95 Neb. L. Rev. 885, 917-918 (2017) (Fletcher & Singel). Securing a foothold for their children in a rapidly changing world, the Tribes knew, would require schooling. Ibid. So as they ceded their lands, Tribes also negotiated "more than 150" treaties with the United States that included "education-related provisions." Dept. of Interior, B. Newland, Federal Indian Boarding School Initiative Investigative Report 33 (May 2022) (BIA Report). Many tribal leaders hoped these provisions would lead to the creation of "reservation Indian schools that would blend traditional Indian education with the needed non-Indian skills that would allow their members to adapt to the reservation way of life." R. Cross, American Indian Education: The Terror of History and the Nation's Debt to the Indian Peoples, 21 U. Ark. Little Rock L. Rev. 941, 950 (1999).

[The concurence recounted a history of Indian boarding schools.]

In 1928, the Meriam Report, prepared by the Brookings Institution, examined conditions in the Indian boarding schools. It found, "frankly and unequivocally," that "the provisions for the care of the Indian children . . . are grossly inadequate." Meriam Report 11. It recommended that the federal government "accelerat[e]" the "mov[e] away from the boarding school" system in favor of "day school or public school facilities." Id., at 35. That transition would be slow to materialize, though. As late as 1971, federal boarding schools continued to house "more than 17 per cent of the Indian school-age population." W. Byler, The Destruction of American Indian Families 1 (S. Unger ed. 1977) (AAIA Report).

B

The transition away from boarding schools was not the end of efforts to remove Indian children from their families and Tribes; more nearly, it was the end of the beginning. As federal boarding schools closed their doors and Indian children returned to the reservations, States with significant Native American populations found themselves facing significant new educational and welfare responsibilities. Historians Brief 13–18. Around this time, as fate would have it, "shifting racial ideologies and changing gender norms [had] led to an increased demand for Indian children" by adoptive couples. M. Jacobs, Remembering the "Forgotten Child": The American Indian Child Welfare Crisis of the 1960s and 1970s, 37 Am. Indian Q. 136, 141 (2013). Certain States saw in this shift an opportunity. They could "save . . . money" by "promoting the *adoption* of Indian children by private families." Id., at 153.

This restarted a now-familiar nightmare for Indian families. The same assimilationist rhetoric previously invoked by the federal government persisted, "voiced this time by state and county officials." L. George, Why the Need for the Indian Child Welfare Act?, 5 J. of Multicultural Social Work 165, 169 (1997). "'If you want to solve the Indian problem you can do it in one generation,'" one official put it. Ibid. "'You can take all of [the] children of school age and move them bodily out of the Indian country and transport them to some other part of the United States.'" Ibid. This would allow "'civilized people'" to raise the children, instead of their families or their tribal communities. Ibid.

In this respect, "[t]he removal of Indian children by [S]tates ha[d] much in common with Indian boarding schools." Fletcher & Singel 952. Through the 1960s and 1970s, Indian-child removal reached new heights. Surveys conducted in 1969 and 1974 showed that "approximately 25–35 per cent of all Indian children [were] separated from their families." AAIA Report 1. Often, these removals whisked children not only out of their families but out of their communities. Some estimate that "more than 90 per cent of non-related adoptions of Indian children [were] made by non-Indian couples." Id., at 2.

These family separations frequently lacked justification. According to one report, only about "1 per cent" of the separations studied involved alleged physical abuse. Ibid. The other 99 percent? "[V]ague grounds" such "as 'neglect' or 'social deprivation.'" Ibid. These determinations, often "wholly inappropriate in the context of Indian family life," came mainly from non-Indian social workers, many of whom were "ignorant of Indian cultural values and social norms." Id., at 2–3. They routinely penalized Indian parents for conditions of "[p]overty, poor housing, lack of modern plumbing, and overcrowding." Id., at 3. One 3-year-old Sioux child, for instance, was removed from her family on the State's "belief that an Indian reservation is an unsuitable environment for a child." Ibid. So it was that some Indian families, "forced onto reservations at gunpoint," were later "told that they live[d] in a place unfit for raising their children." Id., at 3–4.

Aggravating matters, these separations were frequently "carried out without due process of law." Id., at 4. Children and their parents rarely had counsel. Ibid. For that matter, few cases saw the inside of a courtroom. Welfare departments knew that they could threaten to withhold benefit payments if Indian parents did not surrender custody. Id., at 4–5. Nor were threats always necessary. After all the Tribes had suffered at the government's hands, many parents simply believed they had no power to resist. Ibid. One interviewed mother "wept that she did not dare protest the taking of her children for fear of going to jail." Id., at 7. For those Indian parents who did resist, "simple abduction" remained an option. Id., at 5. Parents were, for instance, sometimes tricked into signing forms that they believed authorized only a brief removal of their children. Ibid. Only later would they discover that the forms purported to surrender full custody. Ibid.

Like the boarding school system that preceded it, this new program of removal had often-disastrous consequences. "Because the family is the most fundamental economic, educational, and

health-care unit" in society, these "assaults on Indian families" contributed to the precarious conditions that Indian parents and children already faced. Id., at 7–8. Many parents came to "feel hopeless, powerless, and unworthy"—further feeding the cycle of removal. Id., at 8. For many children, separation from their families caused "severe distress" that "interfere[d] with their physical, mental, and social growth and development." Ibid. It appears, too, that Indian children were "significantly more likely" to experience "physical, sexual, [and] emotional" abuse in foster and adoptive homes than their white counterparts. A. Landers, S. Danes, A. Campbell, & S. White Hawk, Abuse After Abuse: The Recurrent Maltreatment of American Indian Children in Foster Care and Adoption, 111 Child Abuse & Neglect 104805, p. 9 (2021).

All that often translated into long-lasting adverse health and emotional effects. See M. Yellow Horse Brave Heart, The Historical Trauma Response Among Natives and Its Relationship with Substance Abuse: A Lakota Illustration, 35 J. of Psychoactive Drugs 1, 7–13 (2003); U. Running Bear et al., The Impact of Individual and Parental American Indian Boarding School Attendance on Chronic Physical Health of Northern Plains Tribes, 42 Family & Community Health 1, 3–7 (2019). As one study warned: "[E]fforts to make Indian children 'white,'" by removing them from their Tribes, "can destroy them." AAIA Report 9.

C

[The concurrence describes the public policy behind ICWA.]

ICWA is not a panacea. While "[a]dopting ICWA marked one step toward upholding tribal rights," "many [S]tates" have struggled with "effective implementation." Maine Wabanaki–State Child Welfare Truth & Reconciliation Commission, Beyond the Mandate: Continuing the Conversation 12 (2015). Others resist ICWA outright, as the present litigation by Texas attests. See generally M. Fletcher & W. Singel, Lawyering the Indian Child Welfare Act, 120 Mich. L. Rev. 1755 (2022). Still, the statute "has achieved considerable success in stemming unwarranted removals by state officials of Indian children from their families and communities." B. Atwood, Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance, 51 Emory L. J. 587, 621 (2002). And considerable research "[s]ubsequent to Congress's enactment of ICWA" has "borne out the statute's basic premise"—that "[i]t is generally in the best interests of Indian children to be raised in Indian homes." Brief for American Psychological Association et al. as Amici Curiae 10–24.

II

A

* * *

Start with the question how our Constitution approaches tribal sovereignty. In the years before Jamestown, Indian Tribes existed as "self-governing sovereign political communities."

United States v. Wheeler, 435 U. S. 313, 322–323 (1978). They employed "sophisticated governmental models," formed "[c]onfederacies" with one another, and often engaged in decisionmaking by "consensual agreement." 1 B. Pritzker, Native Americans: An Encyclopedia of History, Culture, and Peoples xii (1998).

* * *

[T]he Constitution that followed reflected an understanding that Tribes enjoy a power to rule themselves that no other governmental body—state or federal—may usurp.

Several constitutional provisions prove the point. One sure tell is the federal government's treaty power. See Art. II, §2, cl. 2. Because the United States "adopted and sanctioned the previous treaties with the Indian nations, [it] consequently admit[ted the Tribes'] rank among those powers who are capable of making treaties." Worcester, 6 Pet., at 559. Similarly, the Commerce Clause vests in Congress the power to "regulate Commerce with foreign Nations," "among the several States," and "with the Indian Tribes," Art. I, §8, cl. 3—conferrals of authority with respect to three separate sorts of sovereign entities that do not entail the power to eliminate any of them. Even beyond that, the Constitution exempts from the apportionment calculus "Indians not taxed." §2, cl. 3. This formula "ratified the legal treatment of tribal Indians [even] within the [S]tates as separate and sovereign peoples, who were simply not part of the state polities." R. Clinton, The Dormant Indian Commerce Clause, 27 Conn. L. Rev. 1055, 1150 (1995) (Clinton 1995). (The Fourteenth Amendment would later reprise this language, Amdt. 14, §2, confirming both the enduring sovereignty of Tribes and the bedrock principle that Indian status is a "political rather than racial" classification, Morton v. Mancari, 417 U. S. 535, 553, n. 24 (1974).)

* * *

Even as the Constitutional Convention assembled, a committee of the Continental Congress noted that it "had been long understood and pretty well ascertained" that the Crown's absolute powers to "manag[e] Affairs with the Indians" passed in its "entire[ty] to the Union" following Independence, meaning that "[t]he laws of the State can have no effect upon a [T]ribe of Indians or their lands within the limits of the [S]tate so long as that [T]ribe is independent." 33 Journals of the Continental Congress 1774–1789, p. 458 (R. Hill ed. 1936). That had to be so, the committee observed, for the same reason that individual States could not enter treaties with foreign powers: "[T]he Indian [T]ribes are justly considered the common friends or enemies of the United States, and no particular [S]tate can have an exclusive interest in the management of Affairs with any of the [T]ribes." Id., at 459.

This understanding found its way directly into the text of the Constitution. The final version assigned the newly formed federal government a bundle of powers that encompassed "all that is required for the regulation of [the Nation's] intercourse with the Indians." Worcester, 6 Pet., at 559. By contrast, the Constitution came with no indication that States had any similar sort of power. Indeed, it omitted the nettlesome language in the Articles about the "legislative right" of

States. Not only that. The Constitution's express exclusion of "Indians not taxed" from the apportionment formula, Art. I, §2, cl. 3, threw cold water on some States' attempts to claim that Tribes fell within their territory—and therefore their control. And, lest any doubt remain, the Constitution divested States of any power to "enter into any Treaty, Alliance, or Confederation." §10, cl. 1. By removing that diplomatic power, the Constitution's design also divested them of the leading tool for managing tribal relations at that time.

* * *

D

As we have now seen, the Constitution reflected a carefully considered balance between tribal, state, and federal powers. That scheme predated the founding and it persisted long after. It is not, however, the balance this Court always maintained in the years since. More than a little fault for that fact lies with a doctrinal misstep. In the late 19th century, this Court misplaced the original meaning of the Indian Commerce Clause. That error sent this Court's Indian-law jurisprudence into a tailspin from which it has only recently begun to recover. Understanding that error— and the steps this Court has taken to correct it—are the last missing pieces of the puzzle.

* * *

During what has been called the "high plenary power era of U. S. Indian law," this Court sometimes took the word "plenary" pretty literally. S. Cleveland, Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs, 81 Texas L. Rev. 1, 62 (2002) (Cleveland). It assumed that Congress possesses a "virtually unlimited authority to regulate [T]ribes" in every respect. M. Steele, Plenary Power, Political Questions, and Sovereignty in Indian Affairs, 63 UCLA L. Rev. 666, 670 (2016); see Cleveland 62–74. Perhaps most notably, the Court even suggested that Congress's "plenary authority" might allow it to "limit, modify, or eliminate the powers of local selfgovernment which the [T]ribes otherwise possess." Santa Clara Pueblo v. Martinez, 436 U. S. 49, 56–57 (1978). It is an "inconceivable" suggestion for anyone who takes the Constitution's original meaning seriously. Worcester, 6 Pet., at 554.

The Court's atextual and ahistorical plenary-power move did not just serve to expand the scope of federal power over the Tribes. It also 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. McClanahan, 411 U. S., at 171. It is not hard to draw a through-line between these developments. This Court itself has acknowledged that its plenary-power cases embodied a "trend . . . away from the idea of inherent Indian sovereignty as a bar to state jurisdiction." Id., at 172, and n. 7. It is no coincidence either that this Court's plenary-power jurisprudence emerged in the same era as Indian boarding schools and other assimilationist policies. See D. Moore & M. Steele, Revitalizing Tribal Sovereignty in Treatymaking, 97 N. Y. U. L. Rev. 137, 142 (2022). Rather,

"[f]ederal bureaucratic control over Indian leadership and governments ran parallel to the government's control over Indian children" during this period. Fletcher & Singel 930. Indian boarding schools and other intrusive "federal educational programs . . . could not have been implemented without federal control of reservation governance." Ibid. Nor could any of these federal intrusions on internal tribal affairs have been possible without this Court's plenary-power misadventure.

I do not mean to overstate the point. Even in the heyday of the plenary-power theory, this Court never doubted that Tribes retain a variety of self-government powers. It has always acknowledged that Tribes are "a separate people, with the power of regulating their internal and social relations." Kagama, 118 U. S., at 381–382. They may "make their own substantive law in internal matters." Martinez, 436 U. S., at 55. They may define their own membership. Roff, 168 U. S., at 222. They may set probate rules of their choice. Jones v. Meehan, 175 U. S. 1, 29 (1899). And—especially relevant here—they may handle their own familylaw matters, Fisher v. District Court of Sixteenth Judicial Dist. of Mont., 424 U. S. 382, 387 (1976) (per curiam), and domestic disputes, United States v. Quiver, 241 U. S. 602, 605 (1916). But for a period at least, this Court let itself drift from the "basic policy of Worcester," and with it the Constitution's promise of tribal sovereignty. Williams v. Lee, 358 U. S. 217, 219 (1959).

Doubtless, too, the rise of the plenary-power theory injected incoherence into our Indian-law jurisprudence. Many scholars have commented on it. See, e.g., P. Frickey, Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of Lone Wolf, 38 Tulsa L. Rev. 5, 9 (2002) (describing our doctrine as "riddled with . . . inconsistency"); F. Pommersheim, A Path Near the Clearing: An Essay on Constitutional Adjudication in Tribal Courts, 27 Gonz. L. Rev. 393, 403 (1991) (calling our doctrine "bifurcated, if not fully schizophrenic"). * * *

* * *

IV

Often, Native American Tribes have come to this Court seeking justice only to leave with bowed heads and empty hands. But that is not because this Court has no justice to offer them. 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 and by giving the federal government certain significant (but limited and enumerated) powers aimed at building a lasting peace. In adopting the Indian Child Welfare Act, Congress exercised that lawful authority to secure the right of Indian parents to raise their families as they please; the right of Indian children to grow in their culture; and the right of Indian communities to resist fading into the twilight of history. All of that is in keeping with the Constitution's original design.

Justice Kavanaugh, concurring.

Ijoin the Court's opinion in full. I write separately to emphasize that the Court today does not address or decide the equal protection issue that can arise when the Indian Child Welfare Act is applied in individual foster care or adoption proceedings. See ante, at 1638, 1640, n. 10. As the Court explains, the plaintiffs in this federal-court suit against federal parties lack standing to raise the equal protection issue. So the equal protection issue remains undecided.

In my view, the equal protection issue is serious. Under the Act, a child in foster care or adoption proceedings may in some cases be denied a particular placement because of the child's race—even if the placement is otherwise determined to be in the child's best interests. And a prospective foster or adoptive parent may in some cases be denied the opportunity to foster or adopt a child because of the prospective parent's race. Those scenarios raise significant questions under bedrock equal protection principles and this Court's precedents. See Palmore v. Sidoti, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984). Courts, including ultimately this Court, will be able to address the equal protection issue when it is properly raised by a plaintiff with standing—for example, by a prospective foster or adoptive parent or child in a case arising out of a state-court foster care or adoption proceeding. See ante, at 1638, 1640, n. 10.

[The dissenting opinions of Justices Thomas and Alito are omitted.]

NOTES

1. Justice Gorsuch refers to the "bedrock" principle articulated in *Morton v. Mancari*, 417 U.S. 535, 555 (1974), that federal statutes rationally related to the fulfillment of the trust responsibility are valid in the face of equal protection challenges. Justice Kavanaugh refers to "bedrock equal protection principles" that ostensibly prohibit states from preferring Indian parents over non-Indian parents, for example, where the best interests of the child favor a placement with non-Indian parents.

For further discussion, see Matthew L.M. Fletcher, *Federal Indian Law as Method*, 95 U. Colo. L. Rev. 374 (2024).

2. Conservative advocacy groups and other anti-ICWA parties had brought an onslaught of litigation designed to undermine ICWA and state statutes implementing ICWA. E.g., *Carter v. Tahsuda*, 743 Fed. Appx. 823 (9th Cir. 2018); *Doe v. Piper*, 165 F. Supp. 3d 789 (D. Minn. 2016); *National Council for Adoption v. Jewell*, 156 F. Supp. 3d 727 (E.D. Va. 2015), *vacated as moot*, 2017 WL 9440666 (4th Cir., Jan. 30, 2017). Now that the Supreme Court has upheld the constitutionality of ICWA, those efforts have failed to meet any of the goals of their proponents for several years now.

CHAPTER 9

THE NATION-BUILDING CHALLENGE: MODERN TRIBAL ECONOMIES

SECTION A.

TRIBAL ECONOMIC DEVELOPMENT

The following material is from the Sixth edition of the Getches casebook and is included here by popular request. It has not been updated since the publication of that volume.

After the end of Section A on page 734, add:

1. LAND LEASING IN INDIAN COUNTRY

Indian tribal and allotted lands are leased for a variety of purposes. Agricultural and business leases can provide tribes and individual Indian allottees with significant revenues. Rights of way and other surface leases also provide a source of income for tribal governments. Oil, gas, coal, and other mineral leases are discussed in the next subsection.

Leasing of Indian lands is authorized by 25 U.S.C. § 415(a), originally enacted in 1955, which allows leases of surface resources on the following terms:

> Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary. All leases so granted shall be for a term of not to exceed twenty-five years, except leases of land located outside the boundaries of Indian reservations in the State of New Mexico, and leases of land on [several listed reservations] which may be for a term of not to exceed ninety-nine years, and except leases of land for grazing purposes which may be for a term of not to exceed ten years. Leases for public, religious, educational, recreational, residential, or business purposes (except leases the initial term of which extends for more than seventy-four years) with the consent of both parties may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior. Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for all criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.

REID PEYTON CHAMBERS & MONROE E. PRICE, REGULATING SOVEREIGNTY: SECRETARIAL DISCRETION AND THE LEASING OF INDIAN LANDS

26 Stan.L.Rev. 1061, 1061–68 (1974).

Indian trust land can be leased by its tribal or individual owner only after the Secretary of the Interior has approved the transaction. Surface leasing of Indian land is governed principally by 25 U.S.C. § 415; enacted in 1955, section 415 permits leasing for a wide range of purposes—"public, religious, educational, recreational, residential or business."[2] The basis for the leasing statute and its requirement of approval by the Secretary is in part the commerce clause, which authorizes Congress "[t]o regulate Commerce . . . with the Indian tribes." More broadly, statutes such as section 415, which wholly or partially restrain the alienation of Indian lands, have been sustained as exercises of the federal guardianship or trust responsibility to "protect" the Indians. But while the trust responsibility serves as a source for the Secretary's approval power, it is unclear whether and to what extent it furnishes standards which limit his discretion in administrative exercise of that power.

* * *

Between 1890 and 1955, lease terms were limited, by and large, to periods of 5 or 10 years; although business leases were not formally prohibited, the effect was to discourage commercial development and use of Indian trust lands by non-Indians. Under section 415, the lease period may be up to 25 years, with an option to renew for another 25–year period. Subsequent to 1955, section 415 has been amended, and other statutes have been enacted, to extend 99–year leasing authority to * * * tribes.

* * *

When lease terms were limited, it was rare that a particular lease had great cultural or political effects on the tribe. Surface leases were short-term, normally agricultural; mistakes were reversible because the leases were not of great permanence. There was debate, particularly in the late 19th century, as to whether leasing rather than working the land was in the best interests of the individual Indian, and there could be some question about the quality of the bargain struck by the lessor. But the Secretary's concerns about the impact of leasing did not often go beyond those areas. This is no longer the case. The issues that come before the Secretary in the context of approval of long-term business leases are of enormous significance in terms of the lawmaking power of the tribe and its cultural and political future. Some leases may bring large numbers of non-Indians onto the reservation or may entice states to attempt to exercise regulatory and taxing powers over reservations. More than the landscape may be changed: an influx of non-Indians or state authority may interfere with tribal control over the reservation and continuation of tribal culture.

* * *

In order to determine the appropriate standards for exercise of the Secretary's approval power, a judgment must be made as to which policy goals are to be furthered by his leasing supervision. If the goal of leasing is merely the production of income, the Secretary's function could be limited to ensuring that the tribe or individual beneficiary receives fair financial value for the lease. If other policies are of equal or greater importance, however, more could be required: for example, the Secretary could be viewed as having some trust responsibility to preserve a reservation land base, to protect the tribe's continued political existence and governmental self-sufficiency, to preserve the environment of the reservation, to encourage development of a viable economic and social structure on the reservation, to ensure equitable participation in the enterprise by the lessor, or to determine what law (state, tribal, or federal) should apply to

[2] 25 U.S.C. § 415(a).

disputes that arise from the lease enterprise. Perhaps the Secretary's trusteeship could even include an obligation to ensure that the lease is consistent with a broad, coherent rehabilitative strategy of the federal government.

These are not always exclusive or necessary considerations in the exercise of the approval power with regard to any particular lease. But there has been virtually no analysis of how the Secretary should resolve these often competing considerations. * * *

* * *

NOTES

1. Should leasing policy be different when allotted lands are involved? The amendment to the Allotment Act permitting leasing was controversial. See pages ___–___, supra. Many felt that it would defeat the purpose of training the Indians themselves to be farmers. Nevertheless, the debate was won by those arguing that the land base must somehow be made productive for Indians who, by reason of age or physical condition, could not work the land.

There have been recent outreach efforts by the U.S. Department of Agriculture (USDA) to offer its services to Indian farmers and ranchers. USDA's 2007 Census of Agriculture, released and updated in 2009, reports that between 2002 and 2007, there was a 124 percent increase in the number of Indians who were the principal operators of a farm or ranch, with close to 80,000 Indian principal operators nationwide. USDA, Census of Agriculture, 2007, Summary and State Data,Volume 50, Geographic Area Series, Part 51, AC–07–A–51.

2. Restrictions on lease terms and oversight of rentals and other provisions by BIA officials are intended to protect Indian interests. Nevertheless, complaints of unfairness and sharp dealing abound. Experience under the Crow Allotment Act of 1920, 41 Stat. 751, is illustrative.

Congress allotted land suitable for agriculture and grazing to individual Crows. An amendment to the Act allowed competent allottees to negotiate leases of their trust lands without BIA supervision but limited the lease term to five years. The following method was used by leasing agents for non-Indian ranchers to circumvent the limitation. An initial five-year lease with an Indian lessee was executed and the rancher prepaid the entire rent. About a year later, documents were executed that cancelled the lease at a specified future date and created a new five-year lease to begin on the future date. Rent for the added term was paid on execution. The Interior Solicitor ruled that the *in futuro* leases violated the Act's restriction. See also United States v. Labbitt, 334 F.Supp. 665 (D.Mont.1971).

After the *Labbitt* case, a similar practice with the same objective was developed. Five-year leases were executed and the full rents were prepaid. After the first year the leases were simultaneously cancelled and new five-year leases executed effective immediately. Payment for the added term was then made. Crows, many of whom are poor, were induced to go along with the cancellation and re-lease practice in order to get an annual income from the land which they would not have received if the five-year prepaid lease were to run its course. Several allottees sued the leasing agents to set aside such arrangements. They argued that they were locked into the practice by economic necessity and therefore were deprived of being able to have their land free of encumbrances at least once every five years as Congress intended. The disadvantageous leases were perpetuated unless a Crow was fortunate enough to be able to go without income for the five-year term. The practice was upheld because there was inadequate evidence that they were forced by economic pressures to re-lease land to the same ranchers. Stray Calf v. Scott Land and Livestock Co., 549 F.2d 1209 (9th Cir.1976).

3. In the American Indian Agricultural Resources Management Act of 1993, 25 U.S.C. §§ 3701–3745, Congress reaffirmed the Secretary's authority to approve leases on farm and range land for terms up to 25 years. In order to promote tribal self-determination over agricultural lands management on the reservation, tribes may develop 10–year agricultural resource management plans under the Act to govern tribal as well as federal management of agricultural lands. Consistent with the federal trust obligation and federal law, the Secretary is required under the Act to manage agricultural lands in compliance with tribal environmental, historic, or cultural preservation, land

use, and other laws. Significantly, the Act directs the Secretary to establish civil penalties for trespass on agricultural lands such as rangelands, and gives tribes the ability to enforce the Secretary's agricultural trespass regulations in tribal court. The Act specifically entitles those tribal court judgments to full faith and credit in federal and state courts.

4. In Yavapai–Prescott Indian Tribe v. Watt, 707 F.2d 1072 (9th Cir.1983), cert. denied 464 U.S. 1017 (1983), the tribe obtained the approval of the Secretary of the Interior for a lease pursuant to 25 U.S.C. § 415, for a tract of land as an automobile dealership for a term of 25 years with an option to renew for an additional 25 years. Interior Department's regulations accompanying 25 U.S.C. § 415 (now codified at 25 CFR 162.1) require the Secretary to participate in the cancellation of the lease in the event of a breach. The lease approved by the Secretary in *Yavapai–Prescott*, however, provided that the tribe "and/or" the Secretary had the power to terminate in the event of the automobile dealership's default on the lease obligations. When the dealership arranged to sublet the land and sell the business to a partnership, the tribe disapproved of the sublease as a breach of the lease agreement and terminated the lease without the Secretary's approval.

In holding that the tribe could not validly cancel the lease without the Secretary's approval, the court took the view that eliminating the Secretary's approval requirement, while clearly enhancing tribal power to eliminate the unfavorable aspects of a lease, "increases the risk of there being lease terms not consistent with the long-run interests of the tribe." Id. at 1075.

> It is difficult to be certain about how the balance should be struck between the risk of improvidence and the enhancement of tribal power. However, we choose to reduce the risk—a cautious approach admittedly. To some extent our level of anxiety is less than it otherwise might be because, whatever our choice, it lies within the power of the Secretary to set aside our choice at least with respect to the future. Were we to enhance tribal power by recognizing under the circumstances of this case the power of the Tribe to terminate the lease unilaterally, it is likely that the Secretary could nullify the effect of our decision by henceforth approving only leases that required his approval for termination. On the other hand, following our decision in this case the Secretary could abandon his position by changing the regulation to recognize to the extent desired the unilateral power of a tribe to terminate a commercial lease. We believe it is more consistent with the judicial process to accept the Secretary's present choice with respect to the proper balance between enhanced tribal power and increased risks of improvidence and to leave to that office the task of altering that choice.

Id.

5. The Secretary may cancel a lease where a previous approval was not in accord with applicable regulations. It has been held that this does not deprive the lessee of any vested property rights. Gray v. Johnson, 395 F.2d 533 (10th Cir.1968), cert. denied 392 U.S. 906 (1968). Equities favoring the lessee are not considered.

6. In 1970, the Tesuque Pueblo of New Mexico and the Sangre de Cristo Development Company entered into a lease to develop a substantial portion of the tribal lands for residential purposes. The lease was approved by the Department of the Interior. Seven years later at the request of the pueblo, the Department of the Interior disapproved the lease. James Joseph, Undersecretary of the Department, explained:

> The reasons for my disapproval are that the potential development of a subdivision of 16,000 persons in close proximity to the Pueblo of 300 persons poses too great a risk of social, economic and political upheaval for the Pueblo inhabitants to be offset by the benefits they might derive. The presence of 16,000 non-members of the Tribe on the reservation, I believe, poses perhaps insurmountable jurisdictional problems, especially regarding the Tribe and this Department's authority and responsibility over those persons. A subdivision of the magnitude proposed also poses environmental risks that may not be adequately minimized. There are serious questions concerning the quantity, quality and treatment of water that the residents of the subdivision would be otherwise faced with resolving. The lands themselves do not seem to be well suited to a subdivision on the scale and density proposed, especially

in view of the soils, their steepness and the semi-arid climate of the area. If a smaller scale project were proposed, the Tribe would not receive the substantial benefits predicted at first; or, the sale of subleases may now simply not be successful, so that fewer benefits will be derived by the Tribe. All of these concerns, in our view, point out that the project as it is proposed is unworkable. Finally, the Pueblo is now firmly and unalterably opposed to the development and has rescinded its approval of the lease.

Letter dated August 24, 1977, from James Joseph, Undersecretary, to Governor Joe M. Romero, Tesuque Pueblo. The Department's disapproval was upheld against a challenge by the lessee in Sangre de Cristo Development Co., Inc. v. United States, 932 F.2d 891 (10th Cir.1991), cert. denied 503 U.S. 1004 (1992).

7. In Rosebud Sioux Tribe v. McDivitt, 286 F.3d 1031 (8th Cir.2002), a non-Indian lessee had entered into a lease with the tribe to construct a pork production facility on the reservation. A new tribal council was then elected, which opposed the project, and despite the fact that approximately five million dollars had already been expended on construction by the lessee, the BIA voided the lease. The BIA took this action after tribal members and environmental groups filed their own lawsuit to cancel the lease, charging that the BIA had failed to comply with federal environmental law in approving the hog production project. The non-Indian lessee then brought suit against the BIA for voiding the lease. The Eighth Circuit ruled that the non-Indian lessee lacked standing to sue the BIA for voiding the lease. Finding that the leasing statutes relied upon by the lessee to bring suit against the BIA "were enacted to protect Indian interests," the court reasoned that it would be legally inconsistent to interpret these acts "as giving legally enforceable rights to non-tribal or non-governmental parties whose interests conflict with the tribes' interests." Id. at 1037.

8. In Seva Resorts, Inc. v. Hodel, 876 F.2d 1394 (9th Cir.1989), a resort developer sought an injunction to compel the Secretary of the Interior to sign concession and lease agreements for the development of a marina and recreational resort along Lake Powell in the Glen Canyon National Recreation Area on lands belonging to the Navajo Nation and the federal government. The agreements had been negotiated by the tribe with the developer, but subsequent to the negotiations, the tribe began to voice concerns about the developer's ability to complete the $30 million project. The Secretary refused to approve the agreements based on the concerns raised by the Navajo. The Ninth Circuit concluded that the Secretary did not abuse his discretion under 25 U.S.C. § 415 in refusing to approve the lease agreements on Indian lands. The court distinguished *Yavapai–Prescott* by noting that its decision in that case concerned the cancellation of a lease of Indian land without the Secretary's approval.

How does the Secretary's broad discretion to cancel or refuse approval of a lease agreement favored by a tribe affect the willingness of non-Indians to do business with Indians? What effect is it likely to have on the rents that lessees are willing to pay? What advice would you give to a non-Indian client proposing to lease Indian land?

2. MINERAL DEVELOPMENT

Large quantities of fossil fuel and other mineral resources are located on numerous Indian reservations. Coal and lignite deposits on Indian lands have been estimated at 44.2 billion short tons. Indian Mineral Resources Horizons, BIA Division of Energy and Natural Resources (May 1992). Much of the coal is low-sulfur, which means that it can be burned with less pollution and thus its value increases with stricter air pollution controls. The coal resource is heavily concentrated on a few reservations.

In 2009, tribes received $389.5 million in mineral revenues from royalties, rents, and other fees, including $85.4 million in oil royalties, $166.4 million in gas royalties, and $85.5 million in coal royalties. Royalties from minerals other than oil, gas, and coal were $42.1 million. All Reported Revenues, Fiscal Year 2009, U.S. Department of Interior, Bureau of Ocean Energy Management, Regulation and Enforcement. In 2003, the U.S. Department of Interior reported

administering 3,772 mineral leases, licenses, permits, and applications on 2.3 million acres of Indian land, 3,625 of which were oil and gas leases on 1.7 million acres of Indian land. Mineral Revenues 2000, Report on Receipts from Federal and Indian Leases, U.S. Dept. of the Interior, Minerals Management Service, p. 83–84.

The Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a–396g, superseded prior legislation and authorized leases approved by the Secretary after competitive bidding supported by a tribal resolution. Leases under the Act are for a ten-year term that can be extended if there is production, in which case they continue for "as long thereafter as minerals are produced in paying quantities." 25 U.S.C. § 396a. The 1938 Act was intended to give tribes control over mineral leasing decisions. In fact, they were often relegated to granting or withholding consent, merely playing a passive role as recipients of royalties under a lease negotiated between the Bureau of Indian Affairs and the mineral developers. The Secretary of the Interior has promulgated extensive regulations to govern mineral leasing. 25 C.F.R. parts 211–14, 216–17 (1985).

The 1938 Act was an inflexible model for developing Indian minerals. The Act and its attendant regulations were designed to protect tribes and individuals against non-Indian exploitation of Indian mineral estates. But this protective approach did not lead to optimal mineral development of Indian lands. A number of tribes found that they could negotiate operating agreements, joint ventures, or other arrangements with mineral developers that were more advantageous than leases. An agreement conveying rights in a portion of the mineral estate in tribal land, however, was within the scope of the Nonintercourse Act and thus arguably not valid unless authorized or ratified by Congress.

During the Self–Determination Era new legal arrangements for pursuing mineral development have been authorized by Congress that allow tribes greater flexibility and autonomy to tailor deals that fit their particular situations. The Indian Mineral Development Act of 1982 (IMDA), 25 U.S.C. §§ 2101–2108, specifically authorized individual Indians and tribes to negotiate and enter into non-lease mineral agreements. The IMDA is intended to promote Indian self-determination and to maximize financial returns. See *United States v. Navajo Nation I*, page ___, supra. While standard leasing procedures under the 1938 Indian Mineral Leasing Act allow only a narrow range of conditions and types of compensation, the IMDA imposes no restrictions on the terms or types of agreements. For a tribe with the ability to risk some losses and provide development capital, a joint venture agreement might be appropriate. A tribe without its own resource management program might well choose a negotiated lease agreement with fewer risks. The Secretary must approve or disapprove the transaction within 180 days after its submission, considering the best interests of the individual Indian or tribe, as well as the economic return and the potential environmental, social, and cultural effects. The Secretary is also responsible, to the extent of available resources, for providing Indians with advice, assistance, and information during the negotiation of a minerals agreement.

In 2005, Congress passed the Indian Tribal Energy Development and Self–Determination Act (ITEDSA), 25 U.S.C.A. §§ 3501–3506. This statute, unlike IMDA, does not require tribes to obtain the Secretary's approval for each individual action it undertakes in entering into agreements for energy resource development. Rather, it allows tribes to enter into tribal energy resource agreements (TERA) with the Department of Interior that permit tribes to enter into agreements for energy resource development, including rights of way for pipelines and similar actions, without the need for individual approval by the Secretary. See Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control over Mineral Resources*, 29 Tulsa L.Rev.541 (1994), for a comprehensive treatment of the history of federal regulation of mineral development in Indian country.

NOTES

1. Many leases under the Indian Mineral Leasing Act of 1938 remain in force, and raise continuing problems of construction for the courts. Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324 (10th Cir.1982), involved a tribe's effort to invalidate four sales of oil and gas leases on the Jicarilla Apache Indian Reservation on a number of grounds, including the Secretary's failure to comply with regulations on notice and bidding procedures under the 1938 Act, and failure to comply with the National Environmental Policy Act (NEPA). While the Tenth Circuit did find a technical violation of the regulation on notice procedures, it affirmed the district court's decision to decline to order outright cancellation. Instead, the court allowed the lessees to avoid cancellation by paying adjusted bonuses to the tribe. The court also found that the tribe had unreasonably delayed asserting its NEPA claim as a ground for attacking the leases.

> The Tribe commenced the action in April 1976. The four lease sales were held beginning in April 1970 and concluding in September 1972. During the period of lease sales, the law was unclear as to applicability of NEPA to the approval of lease sales by the BIA. In November 1972, however, this court held that NEPA was applicable to Government approval of a 99–year lease of Indian lands in New Mexico. Davis v. Morton, 469 F.2d 593, 597–98 (10th Cir.). It was more than three years after that decision when the Tribe brought this action.
>
> * * *
>
> We feel the trial judge could reasonably find, as he did, that the Tribe was not motivated by good faith concerns for the environmental impact of oil and gas development, that it was motivated by its desire to obtain the maximum possible compensation for the development, and that it was unjust and inequitable to allow the Tribe to use NEPA as a device solely for economic gain.

Id. at 1338, 1340.

2. The Secretary's refusal to approve a mining plan without tribal consent was held a taking in United Nuclear Corp. v. United States, 912 F.2d 1432 (Fed.Cir.1990). United Nuclear Corporation was awarded leases by the Navajo Tribe and they were approved by the Secretary. The company spent over $5 million for exploration. As required by the lease, the company submitted a mining plan that conformed to the Secretary's regulations but the Secretary refused to approve the plan without tribal consent. Part of the majority analysis turned on a belief that the tribe was holding out for more money. The dissent by Chief Judge Nies reframed the dispute as between the Navajo and United Nuclear, and said tribal law should be applied to decide the case in tribal court. Judge Nies refused to base his judgment on assumptions about the tribe's motives.

3. Does the IMLA of 1938 give rise to a fiduciary duty on the part of the Secretary enforceable in monetary damages? The Supreme Court has twice held no. First, in United States v. Navajo Nation (I), 537 U.S. 488 (2003), supra, at pp. 334–339 the Navajo Nation alleged that the Secretary breached his fiduciary duty to the tribe by approving a lease that caused the tribe to receive less than market value royalty rates on a coal lease. The Court held that the IMLA did not contain an express and unequivocal statement of a trust duty, thus, no fiduciary duty existed. On remand, the Federal Circuit found that while the IMLA did not contain an express statement of a trust duty on the part of the Secretary, the "network of statutes and regulations" applicable to coal mining on Navajo land and federal control of the mining did in fact create a trust relationship upon which the Navajo were entitled to damages for breach of that trust. Navajo Nation v. United States, 501 F.3d 1327, 1340–45 (Fed. Cir. 2007). In 2009, the Supreme Court reversed this decision, finding that the IMLA controlled and its lack of express trust language barred the Navajo from obtaining money damages for the alleged breach. See *United States v. Navajo Nation II*, supra, at pp. 339–340, supra ___.

4. Some of the nation's major energy companies held extensive permits and leases for the exploration and strip mining of the rich coal deposits under the Northern Cheyenne and Crow Indian Reservations in Montana. At first, the tribes encouraged these leases, but as the associated

environmental and cultural disruptions became apparent, tribal opinion changed and the tribes sought cancellation of the leases. The Secretary of the Interior responded to a petition of the Northern Cheyenne Tribe by ordering the energy companies and the tribe to conform their leases to a 2,560 acre limitation contained in mineral leasing regulations. This limitation (which the Secretary has authority to waive) effectively canceled the leases, since it was not economically feasible to mine tracts of that size. The Secretary further ruled that the National Environmental Policy Act (NEPA), which had been enacted after the leases, was applicable and ordered the preparation of an environmental impact statement. The Secretary's decision, dated June 4, 1974, contained the following explanation: "As trustee I take cognizance of my responsibility to preserve the environment and culture of the Northern Cheyenne Tribe and will not subvert these interests to anyone's desires to develop the natural resources on that Reservation." In 1976, the Secretary determined that Crow Reservation leases also must conform to the acreage limitations and NEPA. The Crows also brought a suit urging the invalidity of the lease and permits by reason of the Secretary's failure to follow his own regulations in approving them. The court ruled that violations of the acreage limitation were unlawful. Crow Tribe v. Andrus, No. CV–76–10–BLG (D.Mont.1978) (order granting partial summary judgment).

5. The Tenth Circuit Court of Appeals has confronted the difficult task of reconciling the federal government's trust responsibility in managing Indian lands with the contractual obligations arising from mineral leases on those lands in a series of cases involving communitization agreements. Under this type of agreement, lands overlying an established oil field are treated as part of a unit. Drilling operations conducted anywhere within the unit area are deemed to occur on each lease within the communitized area and production anywhere within the unit is considered to be produced from each tract within the unit.

A frequent practice of mineral lessees is to avoid termination of the lease for failure to produce minerals in paying quantities by applying to the Secretary to include the leased lands in a communitization agreement. Under standard lease terms, such approval keeps the lease in force. Failure by the Secretary to approve the agreement, however, means the Indian mineral holder is free to negotiate a new lease, perhaps with better economic terms. See Kenai Oil & Gas, Inc. v. Department of the Interior, 522 F.Supp. 521 (D.Utah 1981), affirmed and remanded, 671 F.2d 383 (10th Cir.1982).

In *Kenai*, a lessee attempted to obtain the BIA Superintendent's approval of a communitization agreement on the eve of the expiration of the ten-year lease term. No production had occurred on Indian lands, but non-Indian lands that would have been included in the communitized area were producing. Had the agreement been approved, all the tracts would have been deemed to be "producing." The court upheld the Superintendent's refusal to sign the agreement based on his judgment as to the best interests of the Indians.

In Cheyenne–Arapaho Tribes of Oklahoma v. United States, 966 F.2d 583 (10th Cir.1992), cert. denied, 507 U.S. 1003 (1993), the Secretary of Interior was found to have breached his trust responsibilities to the tribe by failure to examine all relevant factors, including recent market conditions, before approving the communitization agreement. Then, an en banc panel of the Tenth Circuit Court of Appeals held in Woods Petroleum Corporation v. Department of Interior, 47 F.3d 1032 (10th Cir.1995), cert. denied *sub nom*. Spottedwolf v. Woods Petroleum, 516 U.S. 808 (1995), that the Secretary acted arbitrarily and abused his discretion when he rejected a proposed oil and gas communitization agreement for the sole purpose of causing the expiration of a valid Indian mineral lease and allowing the Indian lessors to enter into new, more lucrative, but identical leases, which Interior then approved. The court offered the Secretary the following guidance in approving or disapproving communitization agreements for Indian mineral interests:

> The power to manage and regulate Indian mineral interests carries with it the duty to act as a trustee for the benefit of the Indian landowners. Yet, as with any trustee-beneficiary relationship, the Secretary's fiduciary duty to the Indians * * * is not boundless and cannot be exercised in a manner that exceeds or flouts the authorizing statute and regulations. When the Secretary deviates from firmly established procedures, or exceeds the limits of his fiduciary duty, we have found an abuse of discretion and have reversed the Secretary.

* * *

> * * * This is not to say that the Secretary may not reject a communization agreement either because an analysis of all relevant factors fairly leads to the conclusion that the particular agreement is not advantageous to the Indians, or because the Secretary determines that it is in the Indian lessor's best interests to forego communization altogether. However, it is to say that the process of evaluating a communization agreement is not a sham process but rather must be exercised in good faith, and the Secretary may not act arbitrarily and inconsistently in exercising his approval powers.

47 F.3d at 1038–1040.

The two judge dissent in *Woods Petroleum* noted the Secretary's "precarious position" when confronted with a decision on approving a communitization agreement for Indian mineral interests:

> If he is presented with a communization agreement that operates to extend underlying leases, he must still consider whether it would be more beneficial to the Indian owners to allow the leases to expire and to negotiate new leases. If he does not consider the market value and marketability of new leases, he breaches his fiduciary duty under *Cheyenne–Arapaho*, supra and the federal law that establishes his obligations to Indian mineral owners. However, if he determines that disapproval of the agreement and the negotiation of new leases is in the best interests of the Indian owners, then he may have acted unreasonably and arbitrarily under the majority's holding here. Moreover, under the majority's reasoning, whether the Secretary's disapproval of a communization agreement is unreasonable and arbitrary depends on a course of events that follows his initial decision and that the Secretary may not be able to predict. Thus, according to the majority, if a communization agreement is disapproved, new leases are negotiated, and a new communization agreement establishing the same unit area as the rejected agreement is submitted to the Secretary, his approval of the second agreement makes his disapproval of the first one unreasonable. However, if the Secretary disapproves an agreement and new leases are negotiated but, for reasons that the Secretary may not been aware of at the time of the disapproval, a new communization agreement is not submitted (or a substantially different communization agreement is submitted), then the disapproval of the first agreement apparently would pass the majority's reasonableness test.

Id. at 1053. The cases are analyzed in Randolph L. Marsh, *Secretarial Discretion in Communitization of Indian Oil and Gas Leases: The Tenth Circuit Speaks With a Forked Tongue,* 32 Tulsa L.J. 779 (1997).

6. Should tribes be allowed to intervene in lawsuits between their mineral lessees and the federal government? What factors should be considered in deciding the issue? In Sanguine, Ltd. v. Department of the Interior, 736 F.2d 1416 (10th Cir.1984), nine Indian owners of oil and gas-producing Indian lands sought to intervene in a lawsuit brought by their lessee. The lessee alleged that the BIA had unlawfully changed its standard form for communitization agreements. The new form did not include a key provision under which production of oil and gas in paying quantities from any zone within the drilling and spacing unit is deemed produced from every zone on each lease within the unit. As a result, production in paying quantities on one lease would no longer serve as a "blanket" extension of the ten-year lease term for other leases in the same drilling unit. After the district court enjoined the government from requiring the lessee to use the new communitization form, the parties entered a consent decree and the government accepted the lessee's standard form agreement. At that point, the Indian mineral owners (the lessors) moved to intervene. The district court denied the motion because it found that the government had adequately represented the Indians' interests. The Tenth Circuit Court of Appeals overruled the trial court, finding that the government failed to file a responsive pleading, did not make many significant arguments, and called no witnesses at the hearing. In short, the government "conceded the case at the outset." 736 F.2d at 1419. See generally Winifred T. Gross, Note, *Tribal Resources: Federal Trust Responsibility: United States Energy Development Versus Trust Responsibilities to Indian Tribes,* 9 Am. Indian L.Rev. 309 (1981).

7. Because tribes are sovereigns as well as landowners, they may seek to control lessees both by contract and by an exercise of the police or taxing power. See pages ___–___, supra. Mustang Production Co. v. Harrison, 94 F.3d 1382 (10th Cir.1996), cert. denied, 520 U.S. 1139 (1997), held that the Cheyenne–Arapaho Tribes of Oklahoma may impose a severance tax on oil and gas production on allotted lands held in trust for tribal members because such lands constitute Indian country over which the tribes have civil jurisdiction and the inherent power to enact and enforce their taxes.

In Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Oklahoma, 725 F.2d 572 (10th Cir.1984), the tribe enacted several ordinances imposing certain licensing, organizational, and tax requirements on its oil and gas lessee some fifty years after the lease was negotiated. The tribe notified Tenneco that a petition for cancellation of the lease had been prepared for non-compliance with the new ordinances. Tenneco then filed suit in federal court seeking declaratory and injunctive relief. The tribal defendants claimed sovereign immunity and argued that the court had no jurisdiction. See Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), page ___, supra. *See generally*, William V. Vetter, *Doing Business with Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 Ariz.L.Rev. 169 (1994). The Court of Appeals held that the tribe could itself claim sovereign immunity but that individually named tribal officials could not: if the tribe lacked the power to pass its mineral leasing ordinance, then any official enforcing it would be acting outside the scope of his or her authority and thus would be subject to suit. The court also held that the district court had federal question jurisdiction. See National Farmers Union Insurance Cos. v. Crow Tribe, 471 U.S. 845 (1985), page ___, supra.

Should tribes have the power to legislate inequitable mineral leases out of existence? Does such power promote or hinder desirable Indian mineral development?

8. Royalties are typically a percentage of the "value" of production. The actual selling price of minerals is treated merely as evidence of value. In Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855 (10th Cir.1986) (en banc), cert. denied 479 U.S. 970 (1986), the tribe filed suit claiming breach of various oil and gas leases executed twenty-five or thirty years earlier. The court of appeals upheld a district court decision that the Secretary had improperly calculated royalties because he failed to use the higher figure as between the amount actually realized by the seller of the final product and the price received at the wellhead. The lease allowed either method to be used. Adopting the dissenting opinion of Judge Seymour upon rehearing of an earlier court of appeals decision (728 F.2d 1555 (10th Cir.1984)), the court held that the Secretary had breached his fiduciary duty by failing to interpret the royalty terms favorably to the tribe, failing to ensure that lessees developed diligently according to lease terms, and failing to ensure protection of leased lands from drainage. See also Shoshone Indian Tribe of the Wind River Reservation v. United States, 56 Fed. Cl. 639 (2003) (holding that government had no fiduciary duty to "maximize" oil and gas revenue from such production; however, government did have a fiduciary duty to value the oil and gas properly upon which royalties were paid, citing 25 U.S.C.A. §§ 396a–396g, and Federal Oil and Gas Royalty Management Act of 1982, §§ 2–309, 30 U.S.C.A. §§ 1701–1757, and 30 CFR 206.103); Enos v. United States, 672 F.Supp. 1391 (D.Wyo.1987) (Secretary must act as fiduciary to Indians when managing oil and gas leasing of allotted lands); Pawnee v. United States, 830 F.2d 187 (Fed.Cir.1987), cert. denied 486 U.S. 1032 (1988) (royalties collected by Interior for the Pawnee Tribe for oil and gas leases did not have to be based on the highest market value); Youngbull v. United States, 17 Indian L.Rep. 4001 (Cl.Ct.1990) (damages awarded for BIA abrogation of trust responsibilities by invalid patent of tribal land depriving tribe of oil and gas lease value of 320 acres).

9. Land patents issued to western settlers pursuant to the Coal Lands Act of 1909 and 1910 conveyed the land and everything in it, except the "coal," which was reserved to the United States. In 1938, the United States restored to the Southern Ute Indian Tribe, in trust, title to previously ceded reservation land interests still owned by the federal government, including the reserved coal in lands patented under the 1909 and 1910 Acts to non-Indian homesteaders.

At the time of the 1909 and 1910 Acts, coalbed methane gas (CBM gas) was considered a dangerous waste product of coal mining. Today, it is considered a valuable energy source. The

Southern Ute reserved coal lands contain large quantities of CBM gas. Relying on a 1981 opinion by the Solicitor of the Department of the Interior that CBM gas was not included in the Acts' coal reservation, oil and gas companies entered into CBM gas leases with the individual landowners of some 200,000 acres of patented land in which the tribe owns the coal. The tribe filed suit seeking a declaration that CBM gas is coal reserved by the 1909 and 1910 Acts.

In Amoco Production Co. v. Southern Ute Indian Tribe, 526 U.S. 865 (1999), the Supreme Court held that surface patentees owned the CBM gas contained in coal which the Southern Ute tribe owns equitable title to under the Coal Lands Acts of 1909 and 1910. The Court found that inasmuch as the common conception of coal in 1909 and 1910 did not include CBM gas, the tribe's right to the coal does not imply ownership of gas even if the right to mine coal in 1909 and 1910 implied the right to release gas incident to coal mining.

Before the Court rendered its decision adverse to the tribe's claim, counsel for the oil companies and the tribe had already negotiated a settlement with a practical solution that hedged the serious losses that either would have faced. The settlement essentially created a partnership with the tribe holding a 32% stake in over 250 CBM spacing units. The companies could keep a decade's worth of royalties that they might have lost if the decision went against them. See Electa Draper, "Amoco, Southern Utes Unite," The Denver Post, May 14, 1999. This compromise resulted in the tribe's mineral production company, Red Willow, reaping millions of dollars a year in revenues enabling further investment in mineral development on and off the reservation. Is this an example of a nation-building approach, good business sense, or both?

NOTE: *PROBLEMS IN FEDERAL MANAGEMENT OF INDIAN MINERAL RESOURCES AND REVENUES*

As early as the 1950s, reports of mismanagement of Indian mineral resources began to surface, but national attention did not focus on the issue until the early 1980s. In early 1982, responding to allegations that tribes and the federal government were losing millions of dollars in stolen oil and underpaid royalties for resources developed on both Indian and federal lands, the Secretary of the Interior appointed the Commission on Fiscal Accountability of the Nation's Energy Resources (better known as the Linowes Commission, after its chairman). The Linowes Commission identified severe problems in royalty management collection processes resulting in underpayment of royalties by as much as ten percent, as well as problems with theft and fraud. "The federal government had operated royalty collection and management on an industry 'honor system,' and that system had failed." Judith V. Royster, *Mineral Development in Indian Country: The Evolution of Tribal Control Over Mineral Resources,* 29 Tulsa L.J. 541, 567 (1994). Following the Commission's report in 1982, the Interior Department abolished the old Conservation Division of the U.S. Geological Survey, which had been in charge of royalty collection for both federal and Indian lands, and replaced it with a new Minerals Management Service (MMS).

Congress responded as well by enacting the Federal Oil and Gas Royalty Management Act (FOGRMA), 30 U.S.C. §§ 1701–1757. The Act provided new procedures for royalty management and added provisions for investigations, hearings, inspections, interest on late or deficient payments, penalties, and criminal and civil enforcement. It also authorized the Secretary to enter into cooperative agreements with states and tribes to work together on inspection, auditing, investigation, and enforcement. Full authority to perform these functions could be delegated to the states but not the tribes. However, delegations to states could not extend over Indian lands without the consent of the tribe or allottee involved.

Despite the initial promise of these measures, Professor Royster notes that the initial effect on royalty collection management and resource theft was minimal because:

> * * * [T]he [FOGRMA] provision for tribal cooperative agreements was not drafted with tribes and their needs and limitations in mind. Interior assumed that tribes could provide staffing, technical expertise, and funding at the same levels as the states, an assumption unwarranted for many tribes. Moreover, the Minerals Management Service did not implement the

> cooperative program. By 1989, only four tribes had entered into cooperative agreements; even then, the federal government retained control of enforcement and ultimate authority to determine which leases would be audited.

Id. at 595–596.

Other royalty management improvements were similarly slow and insufficient. Some aspects of royalty management did improve during the 1980s: reporting errors were reduced, audits and inspections were conducted more regularly, and millions of dollars in royalties and penalties were collected. Nonetheless, by 1989 severe problems with theft and accounting errors remained.

These problems were investigated in 1989 by the specially-created Special Committee on Investigations of the Senate Select Committee on Indian Affairs, which issued a report on fraud, corruption, and mismanagement in American Indian affairs. The Committee found that the federal management of Indian natural resources was still costing the tribes millions of dollars in lost revenues from their non-renewable natural resource base. Special Committee on Investigations of the Senate Select Committee on Indian Affairs, Final Report and Legislative Recommendations: A New Federalism for American Indians, S.Rep. No. 216, 101st Cong., 1st Sess. (1989), pp. 3–23. According to the report:

> The Committee found that simple "smash-and-grab" theft—stealing entire tankfuls of crude oil by force—rarely occurs; but sophisticated and premeditated theft by mismeasuring and fraudulently reporting the amount of oil purchased has been the practice for many years of the largest purchaser of Indian oil in the United States and others. The Department of the Interior and its relevant agencies, charged with stewardship of federal and Indian land, have knowingly allowed this widespread oil theft to go undetected for decades, at the direct expense of Indian owners.
>
> * * *
>
> The Bureau of Land Management (BLM) of the Department of the Interior is the agency charged with being the "watchdog" to detect and prevent the theft of crude oil and natural gas from Indian land. * * *
>
> * * *
>
> * * * Inspectors have relied totally on industry reports and have instituted no competent back-gauging or surveillance program, which would be capable of detecting * * * fraudulent reporting. At the same time, BLM officials actually agreed with other expert witnesses before the Committee that the opportunity to steal crude oil from Indians by fraudulent mismeasurement and reporting is "wide open," a self-fulfilling prophecy given their complete lack of oversight.
>
> BLM officials even failed to report to appropriate law enforcement authorities the pitifully low incidence of theft they logged. Only in one or two instances did BLM simply telephone law enforcement officials, and still no report or file was forwarded, or any follow-up ever made.
>
> * * *
>
> Robert Goodman, Director of BLM Oil and Gas Inspection for Eastern Oklahoma, testified that he failed to contact the FBI regarding oil theft because he "didn't have the proper telephone number." * * * [T]he result is that at least nine full-time BLM inspectors annually recorded only $20,490 in oil theft from Indian lands in nine years. By contrast, the Special Committee uncovered millions in oil theft after only two months of investigation.

Id. at 105, 113–15.

MMS collected approximately $500 million in Indian oil and gas royalties from 1983 through 1987, but during that same period the Senate Select Special Committee on Investigations estimated

potential underpayments at up to $25 million. The Committee said this of MMS's efforts in collecting Indian royalties:

> The problem at MMS is not institutional incompetence as at BIA, or direct antagonism towards Indian interests as demonstrated by the callousness of BLM, but lack of a clear direction and mandate concerning Indians. For years, companies paying Indian royalties have been neither adequately audited by MMS nor sufficiently penalized when they fail to specially account for, and properly pay, Indian royalties. The problem is that Indian royalties comprise such a small part of MMS jurisdiction that they simply fail to be a priority, in part because Congress has not instructed the agency how much resources it should devote to Indian royalties.

Id. at 122.

The Committee did note one positive development. Tribes were becoming more active in the monitoring and oversight of their own oil and gas leases. For example, the Committee pointed to the Southern Ute Tribe's formation of a tribal Energy Resource Division in 1980, and its "formidable array" of professionals, including in-house geologists and a mineral accountant. The Division identified several instances of underpayments of royalties owed to the tribe. The Wind River tribes have installed a sophisticated computer system to evaluate production, sales, and valuation data from the tribes' numerous leases. In 1986 alone, the tribes were able to identify approximately $300,000 in underpayment of royalties through this system. Id. at 122–25.

Congress reacted to the findings of the Special Committee on Investigations by enacting the Indian Energy Resources Act of 1992 (IERA), 25 U.S.C.A. §§ 3501–3506. The Act's purpose is to promote tribal economic self-sufficiency through energy development and to further tribal control of such development. In addition to authorizing grants and technical assistance to the tribes for the purpose of developing tribal regulation of mineral resources, the Act called for the creation of an eighteen-member Indian Energy Resource Commission, charged with developing recommendations for royalty management reforms.

3. TIMBER MANAGEMENT

The evolution of ownership of tribal timber is traced in United States v. Cook, 86 U.S. (19 Wall.) 591 (1873), discussed at page ___, supra and United States v. Shoshone Tribe, 304 U.S. 111 (1938), page ___, supra; and the accompanying notes. In White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145–46 (1980), page ___, supra, the Court described current BIA management practices:

> * * * Under 25 U.S.C. §§ 405–407, the Secretary of the Interior is granted broad authority over the sale of timber on the reservation. * * * Sales of timber must "be based upon a consideration of the needs and best interests of the Indian owner and his heirs." 25 U.S.C. § 406. The statute specifies the factors which the Secretary must consider in making that determination.[13] In order to assure the continued productivity of timber-producing land on tribal reservations, timber on unallotted lands "may be sold in accordance with the principles of sustained yield." 25 U.S.C. § 407. * * * He is authorized to promulgate regulations for the operation and management of Indian forestry units. 25 U.S.C. § 466.
>
> Acting pursuant to this authority, the Secretary has promulgated a detailed set of regulations to govern the harvesting and sale of tribal timber. Among the stated objectives of the regulations is the "development of Indian forests by the Indian people for the purpose of promoting self-sustaining communities, to the end that the Indians may receive from their own property not only the stumpage value, but also the benefit of whatever profit it is capable

[13] Those factors include "(1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs, (2) the highest and the best use of the land, including the advisability and practicality of devoting it to other uses for the benefit of the owner and his heirs, and (3) the present and future financial needs of the owner and his heirs." 25 U.S.C. § 406(a).

> of yielding and whatever labor the Indians are qualified to perform." 25 CFR § 141.3(a)(3).* The regulations cover a wide variety of matters: for example, they restrict clear-cutting, § 141.5; establish comprehensive guidelines for the sale of timber, § 141.7; regulate the advertising of timber sales, §§ 141.8–141.9; specify the manner in which bids may be accepted and rejected, § 141.11; describe the circumstances in which contracts may be entered into, §§ 141.12–141.13; require the approval of all contracts by the Secretary, § 141.13; call for timber cutting permits to be approved by the Secretary, § 141.19; specify fire protective measures, § 141.21; and provide a board of administrative appeals, § 141.23. Tribes are expressly authorized to establish commercial enterprises for the harvesting and logging of tribal timber. § 141.6.

448 U.S. at 145–48.

As the Court's opinion in *White Mountain* attests, "the Federal Government's regulation of the harvesting of Indian timber is comprehensive." Id. at 145. See also In re Blue Lake Forest Products, Inc. v. Hong Kong and Shanghai Banking Corporation, Ltd., 30 F.3d 1138, 1142 (9th Cir.1994) (noting that "federal interests are very extensive" and therefore normally prevail over state interests "in the regulation of timbering on Indian reservations.") Under an extensive federal regime of laws and regulations, for example, sustained yield timber management is required on Indian lands, see 25 U.S.C.A. § 406. Any harvesting of timber on the reservation should insure the future productivity of the land and cut-over areas should be reforested. Cf. 16 U.S.C.A. § 531(b) (Multiple–Use Sustained–Yield Act of 1960 applicable on national forest lands). These types of federally mandated management requirements, as well as significant investments of capital to construct roads and support facilities, means that the costs of Indian timber harvesting can be substantial in relation to revenues.

BIA management of Indian forest lands historically has been described as ranging from "mediocre to abysmal." Angelo A. Iadarola, Indian Timber: Federal or Self–Management? (1979). In United States v. Mitchell, 463 U.S. 206 (1983), the United States was held liable for decades of mismanagement of timber on Indian allotments on the Quinault Reservation in Washington. See also Menominee Tribe of Indians v. United States, 91 F.Supp. 917 (Ct.Cl.1950) (finding federal mismanagement of timber on tribal lands on the Menominee Reservation in Wisconsin).

The same congressional committee that identified massive fraud, corruption, and mismanagement by the federal government in Indian mineral resource development programs, the Special Committee on Investigations of the Senate Select Committee on Indian Affairs, see supra, page ___, found similar problems in the BIA's management of Indian forests. The Committee's hearings in 1989 identified losses to tribes of $330 million in the 1980s alone from the BIA's "poor management of their forests and woodlands." Senate Report 101–216, November 20, 1989, pages 138–140.

The Committee's hearings led to passage by Congress of legislation in 1990 that significantly reformed management of Indian timber. The National Indian Forest Resources Management Act (NIFRMA), 25 U.S.C.A. § 3101 et seq., reaffirmed the federal government's trust responsibility for Indian forest resources, reshaped the statutory framework for the exercise of this trust responsibility, and provided a broadened role for tribes in the management of their own forest resources. Darla J. Mondou, *Our Land is What Makes Us Who We Are: Timber Harvesting on Tribal Reservations After the NIFRMA*, 21 Am. Indian L. Rev. 259 (1997). It is still too early to determine the NIFRMA's impact on Indian forest management. Senator John McCain of Arizona, who co-sponsored NIFRMA, expressed "dismay" at the BIA's "unconscionable" five-year delay in issuing final regulations implementing the Act. Following McCain's harsh criticism, the BIA issued regulations in October, 1995. 60 Fed. Reg. 52250 (1995).

---

* [Ed.] The regulations have been renumbered as 25 C.F.R. § 163, 3(b)(4).

The federal role in Indian timber, no matter how burdensome and poorly administered historically, still has an important part to play in modern tribal economic development efforts. After all, in *White Mountain* it was the extensive regulatory role of the BIA that pre-empted state taxation of the non-Indian businesses involved in on-reservation timber harvesting. The principles of federal Indian law provide reservation economic development with a variety of special rules that cut across the entire spectrum of Indian business dealings. For example, in the previously cited *In re Blue Lake Forest Products* case, supra, the court held that Indian law's principles of federal preemption overrode state commercial law which recognized a security interest in logs harvested on the reservation held by an off-reservation bank under the Uniform Commercial Code. Because of the federal regulations governing the harvesting of Indian timber, title to those logs remained with the United States as the tribe's trustee. The tribe, and not the off-reservation bank, was entitled to the proceeds from the sale of those logs.

Can you think of any other areas of Indian economic development, besides timber harvesting, where federal law, not state law, exclusively governs non-Indians involved in the transaction? Can you see any disadvantages for a tribe's economic development efforts once someone in the bank's position understands that its secured loans to a non-Indian company involved in harvesting tribal timber or other on-reservation business activities might be covered by the special rules of federal Indian law?

NOTE: *FEDERAL INCOME TAXATION OF RESERVATION ENTERPRISES*

For most businesses, federal income tax planning is a major consideration. Reduction or avoidance of tax liabilities can enhance profits or even make the difference between a profitable and losing enterprise. We have seen that the government role in resource management under federal law can be a mixed blessing. Federal income tax law offers particular advantages to tribal businesses and, under certain circumstances, to individual Indians. Because Indian tribes themselves are simply not among the entities made taxable under the Internal Revenue Code, their exemption from federal income taxation is normally not an issue for reservation economic and community development.

The non-taxability of tribes does not apply to individual Indians. Reservation Indians are treated like other "individuals" under the Internal Revenue Code. Although an Indian has no general exemption from federal income taxation simply by being an Indian, see, e.g., Lafontaine v. Commissioner, 533 F.2d 382 (8th Cir.1976), some tax exemptions in favor of individual Indians may be found in treaties and statutes.

The leading case is Squire v. Capoeman, 351 U.S. 1 (1956). Under Section 6 of the General Allotment Act, the Secretary of the Interior was empowered to issue a patent in fee simple to any Indian allottee, deemed "competent and capable of managing his or her affairs * * * and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed." *Squire* involved the question of whether proceeds of the sale of standing timber on an Indian trust allotment should be exempt from federal taxation. The government argued that the language in Section 6 was directed solely at permitting state and local taxation after a transfer in fee. Applying the general rule that exemptions from federal taxation should be clearly expressed in the statute, the government argued that since the statute was silent on the question of federal taxation of restricted allotments, the Indian allottee was responsible for the federal tax.

Interestingly, Section 6 antedated the federal income tax by ten years, a fact that could explain Congress' silence on the issue of federal taxation. Nonetheless, applying the rule that federal statutes should be liberally construed in favor of Indians, the Court held income derived directly from tribal trust and restricted Indian allotted lands is not subject to federal taxes: "The literal language of the proviso evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee. This, in turn, implies that, until such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted." Id. at 7–8.

Subsequent courts have been less than generous to allottees and other Indians asserting extensions of *Squire's* "derived directly" test. The cases have not allowed tax exemptions much beyond the basic income—from, for example, timber, grazing, and farming—derived directly from an allottee's own allotment. See, e.g., Holt v. Commissioner, 364 F.2d 38 (8th Cir.1966), cert. denied 386 U.S. 931 (1967) (Income of tribal member from cattle grazing on tribal trust land held taxable).

The Chickasaw Indian Nation sued the United States, seeking a refund of federal wagering and occupational excise taxes paid by the tribe in connection with its gambling operations. In Chickasaw Nation v. United States, 534 U.S. 84 (2001), instead of applying the Indian law canons of construction, the Supreme Court applied a competing canon that requires tax exemptions to be expressly stated and narrowly construed: "Nor can we say that the pro-Indian canon is inevitably stronger—particularly where the interpretation of a congressional statute rather than Indian treaty is at issue." Id. at 535–536. The Supreme Court refused to interpret the Indian Gaming Regulatory Act as granting tribes the same exemption from federal excise taxes that had been granted to states. See generally George Jackson III, *Chickasaw Nation v. United States and the Potential Demise of the Indian Canon of Construction,* 27 Am. Indian L.Rev. 399 (2002–2003).

4. THE ROLE OF TRIBAL SOVEREIGNTY IN THE MANAGEMENT AND CONTROL OF RESERVATION RESOURCES: A CASE STUDY ON INDIAN TRIBES AND THE ENDANGERED SPECIES ACT

Many Indian tribes have asserted that one of the most significant challenges to their sovereignty and to economic development on the reservation is undue interference by the federal government. This chapter has already discussed the pervasive control exercised historically by federal officials over reservation resources and economic development, with little to show for such efforts. As tribes entered the modern era determined to exercise their sovereignty to achieve self-sufficiency, decades of mismanagement and sometimes even outright corruption within federal agencies left many reservations worse than before, impeding their development efforts.

Many Indians have maintained that they could do a better job of developing and protecting the reservation environment and its resources than federal bureaucrats in Washington and BIA field offices. Popular stereotypes romanticize Indians as the "first environmentalists," but for many tribes, administration by federal agencies of the Endangered Species Act (ESA), one of the most important legislative achievements of the modern environmental movement, posed a threat to their sovereignty and economic self-sufficiency.

Some tribes have used the ESA to protect resources essential to their economic well-being and cultural survival. E.g., Carson–Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257 (9th Cir.1984), cert. denied 470 U.S. 1083 (1985) (water releases from federal dam for Indian reservation fishery upheld under ESA). But at times the ESA has been enforced on Indian reservations by federal agencies in order to protect a threatened species of animal or plant life so as to frustrate or defeat a proposed tribal development project. Ironically, the peril of the species is often the result of major non-Indian development activities, causing tribal leaders to object to putting the burden of belated species protection on chronically underdeveloped reservations. As is so often the case when tribes contemplate strategies for economic development, the principles of federal Indian law provided no clear and unambiguous guidance on what their rights and responsibilities were under the legislation.

The U.S. Supreme Court has held that federal statutes do not abrogate Indian treaty rights unless there is "clear evidence" that Congress actually considered the issue and chose to abrogate the treaty. See pages ___–___, supra; United States v. Dion, page ___, supra. The ESA is silent as

to its applicability to Indian tribes and Indian reservations, but the few decisions that did raise the question gave tribes serious concern. E.g., United States v. Billie, 667 F.Supp. 1485 (S.D.Fla.1987) (applying the Act to a Seminole Indian's non-commercial hunting of panther on the tribe's reservation in Florida). Although the lower court in *Dion* found that the ESA did not abrogate tribal treaty rights to take eagle feathers, the U.S. Supreme Court based its ruling in *Dion* on the Bald Eagle Protection Act and did not reach the general issue of the ESA's applicability in the face of treaty rights. See generally Robert J. Miller*, Speaking with Forked Tongues: Indian Treaties, Salmon, and the Endangered Species Act*, 70 Or.L.Rev. 543, 563–74 (1991); Tim Vollmann, *The Endangered Species Act and Indian Water Rights*, 11 Nat. Resources & Env't 39 (1996); Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance,* 25 Envtl. L. 733, 778–79 (1995).

Professor Charles Wilkinson describes the chain of events leading up to the tribal confrontation with federal officials over administration of the ESA in Indian country in his article, *The Role of Bilateralism in Fulfilling the Federal–Tribal Relationship: the Tribal Rights–Endangered Species Secretarial Order*, 72 Wash.L.Rev. 1063, 1065 (1997).

> During the 1970s, as Congress vastly expanded federal environmental laws, tribes had intermittent brushes with the enforcement of laws protecting animal species, notably eagles. By the mid–1990s, the ESA had become a major concern for tribes. Stresses on the environment had increased, especially in the West. The tribes had become much more active in resource management and development. The Act, fortified by the U.S. Supreme Court's ruling in Tennessee Valley Authority v. Hill, was administered strictly by the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS). Although the environmental impacts had been created by non-Indian development, the tribes were facing considerable pressure from ESA enforcement over matters such as timber harvesting, building construction, water development, and salmon harvesting; tribal leaders strenuously objected to the federal officials' lack of respect for tribal sovereignty and resource management practices. In Congress, legislative proposals regarding ESA reauthorization were pending.

One of the leaders of this movement by Indian tribes challenging federal administration of the ESA in Indian country was Ronnie Lupe, the then Chairman of the White Mountain Apache Tribe of Arizona. In a 1992 speech, Lupe called the Ecological Services Branch of the United States Fish and Wildlife Service (one of the agencies with primary responsibility for enforcing the ESA), "a group of environmental extremists." He also declared, "I see the Endangered Species Act being used as the dominant society's most modern method of performing genocide on the Apache People." Ronnie Lupe, The Challenges of Leadership and Self–Government: A Perspective from the White Mountain Apaches, delivered at Phillips Exeter Academy, October 7, 1992.

Chairman Lupe spoke more temperately in his testimony before the Senate panel considering reauthorization of the ESA in 1995 (referred to in Professor Wilkinson's article). Nonetheless, the chairman insisted that the ESA does not and should not apply to tribes and that Congress should amend the Act by specifically excluding tribes from its requirements.

TESTIMONY OF RONNIE LUPE, CHAIRMAN OF THE WHITE MOUNTAIN APACHE TRIBE PREPARED FOR THE U.S. SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS SUBCOMMITTEE ON

DRINKING WATER, FISHERIES AND WILDLIFE

104th Cong., July 13, 1995.

* * *

FORT APACHE INDIAN RESERVATION

For those of you who are not familiar with our White Mountain Apache people and our land, our reservation homeland, known as the Fort Apache Indian Reservation, is comprised of some 1.6 million acres of lands ranging in elevation from 2,500 feet to over 11,400 feet. We have vast canyons and range land and over 700,000 acres of primarily ponderosa pine forest through which traverse 400 miles of rivers and streams. Our reservation is home to abundant game and fish, including the once endangered Apache trout, elk, bear, mountain lion, pronghorn antelope, deer, wild turkey, osprey and our nation's symbol, the bald eagle.

In pre-reservation days, we were entirely self-sufficient and healthy in mind, body and spirit. The sacred waters which arise on our reservation sustained us. We depended upon wildlife, native plants and our own agriculture for food, shelter and clothing. All life was held sacred and that tradition continues today. The first deer was never struck down during a hunt. We would let it pass so that there would always be one remaining in the forest. Prayers were always offered after the taking of any wildlife, giving honor to the sacrifice of that life for the survival of our families. Prayers are still offered today when animals are hunted and killed.

Apache people never saw ourselves as separate from the earth. We are one with the land. Hunting was not for sport and trophies but to provide food and clothing. Although we have been masters of our lands since time immemorial, the land and its fruits have never been simply for the taking but are elements of our responsibility for stewardship of the lands that the Creator has provided us. Our people have always been taught to respect the land and living things. Individual ownership of land was unknown to us but our responsibility to care for the land was taught to us from an early age.

Our tradition of stewardship continues to guide the natural resource management philosophy of the White Mountain Apache Tribe. Our lands were severely damaged due to mismanagement by the Department of Interior from the time the reservation was first established in 1871. We have since regained managerial control of our lands and are now in the process of repairing the extensive damages that were done to our grazing lands, forests and riparian areas. In the past ten years, the Tribal Council has voluntarily reduced our annual allowable timber harvest from 92 million board feet to 57 million board feet because of our concerns about overcutting our forest and damaging our environment. Included in this reduction has been the removal of several "old growth" timber sales because of our cultural and environmental concerns.

INITIAL EXPERIENCE WITH THE ENDANGERED SPECIES ACT

Despite the damages we have sustained, our reservation remains a refuge for many endangered and sensitive species, both listed and unlisted. Although the Endangered Species Act was passed in 1973, our Tribe had very little involvement with the Act or its implementation until recent years. Initially, we viewed the challenges by environmental groups and the regulatory actions of the U.S. Fish & Wildlife Service regarding endangered species as total hypocrisy. Those who sought to impose the ESA upon our Tribe and our aboriginal lands, made their challenges from cities where they had long ago exterminated native animals and plants and had erected cities of concrete and steel where prairies, wetlands and other wildlife habitat once existed. The species found on our reservation that are listed as "endangered" are rare because there are few healthy habitats elsewhere. Our reservation is home to many of these plants and animals because we have managed our lands well.

In our Apache tradition, we do not manage our lands for the benefit of a particular species. We strive to protect the land and all the life forms that it supports. Our homeland is too vast to manage for just one species. Our reservation traverses five life zones from Upper Sonoran to Sub–Alpine Forests. The diversity of our land provides habitat for a wide variety of plants and animals and each is important to us. The pressures of environmentalists and the Ecological Services Branch of the U.S. Fish and Wildlife Service to manage our lands for a single species was a contradiction to our view of life.

THE ENDANGERED SPECIES ACT DOES NOT APPLY TO INDIAN TRIBES

It has always been our view that the Endangered Species Act does not apply to the White Mountain Apache Tribe and Indian Tribes generally. Nowhere in the Act does it specify that the Act applies to Indian Tribes. Congress has the power to make the Act apply to Tribes but until it has spoken, it cannot be assumed that it applies or that the Tribe is bound by its dictates. In the past four years, we saw increasingly aggressive action by the U.S. Fish & Wildlife Service, perhaps because of lawsuits against that agency, to establish critical habitat and to list endangered species on our tribal lands. Nevertheless, having managed our land so well for hundreds of years, we were confident that the Act would not affect our lands or our people.

Then, one after another, critical habitats were proposed that would include our reservation lands for the loach minnow, Arizona willow, razorback sucker, and Mexican spotted owl. Because our reservation is a refuge for many endangered plants and animals it was probable that new proposals would be made in the future. It soon became apparent that the Congressional goals of tribal self-governance, tribal self-determination and economic self-sufficiency could be paralyzed by third parties filing lawsuits against the U.S. Fish & Wildlife Service to force the Service to declare critical habitat on our reservation. Such a designation would affect our sawmill, ski area, cattle industry, development of recreational facilities and our entire wildlife and land management philosophy. The prospect of our aboriginal lands being controlled by environmental activists living hundreds of miles from our homeland was too much to bear and so we adopted resolution 2–94–060, on February 24, 1994, which prohibits any federal or state agency from entering our Fort Apache reservation for the purpose of conducting any studies or sample collection of any kind whatsoever. We were particularly affronted by the implications that we were not capable of managing our lands.

NOTE

The tension between the tribe and the USFWS described by Chairman Lupe gave rise to an extraordinary series of negotiations between the Chairman and Director of the U.S. Fish & Wildlife Service, the late Mollie Beattie. Beattie was a forester by training, and the first woman to head the Fish & Wildlife Service. She had developed a reputation as an advocate for species conservation through her efforts at reintroducing gray wolves into Yellowstone National Park. Yet, in her negotiations with Lupe, Beattie proved a patient listener who respected the Apaches' strong connection with the Earth. See Jeff Barker, *Indians Agree to Species Pact*, The Arizona Republic, A1, 12, June 5, 1997.

The negotiations between the Apache tribal chairman and the USFWS Director took place in Washington, D.C., but not at the Fish and Wildlife Services office. Chairman Lupe wanted to meet at a neutral site, outdoors, amidst, as he described it "the sound of trees and flowers, with the sounds of birds mingled with laughing children." One type of noise the parties agreed to do without, however: no attorneys were to be present during their meeting.

As a result of their negotiations, Chairman Lupe and Director Beattie agreed to set aside their legal concerns and work toward an improved relationship between the tribe and the Service. They each told their staffs not to be constrained by perceived legal constraints in designing this new type of relationship for federal-tribal cooperation on species and ecosystem management. The process led to

the following "Statement of Relationship," signed by Chairman Lupe and Director Beattie in the Tribal Council Chambers in Whiteriver, Arizona on December 6, 1994.

STATEMENT OF THE RELATIONSHIP BETWEEN THE WHITE MOUNTAIN APACHE TRIBE AND THE U.S. FISH AND WILDLIFE SERVICE

(Dec. 6, 1994).

PURPOSE

Tribal sovereignty and Service legal mandates, as applied by the Service, have appeared to conflict in the past, but both the Tribe and the Service believe that a working relationship that reconciles the two within a bilateral government-to-government framework will reduce the potential for future conflicts.

I. GUIDING PRECEPTS

• The Tribe and the Service have a common interest in promoting healthy ecosystems.

• The Service recognizes the Tribe's aboriginal rights, sovereign authority, and institutional capacity to self-manage the lands and resources within the Fort Apache Indian Reservation as the self-sustaining homeland of the White Mountain Apache people.

• The Service's technical expertise in fish, wildlife, and plants establishes it as a significant resource for the Tribe's management of the ecosystems and associated sensitive species of the Reservation.

• The Service has a trust responsibility and is required to consult with the Tribe, as articulated in Order No. 3175 by the Secretary of the Interior, regarding any of its activities that may affect the Tribe's trust resources and the sustained yield of those resources. Such activities will support the Tribe's self-determination and economic self-sufficiency.

* * *

II. TRIBAL MANAGEMENT

• The Tribe is continuing to institutionalize internal processes for planning, review, regulation, and enforcement to ensure that economic activity on its reservation is consistent with traditional Apache values for living in balance with the natural world.

• The Tribe will complete integrated resource management plans on a watershed basis that promote tribal goals, including sustained yield. These plans will direct the assessment, management, and restoration of ecosystems in accordance with tribal values. * * *

III. COMMUNICATION

• The government-to-government relationship requires working with the White Mountain Apache Tribal Government and its resource management authorities, including the sharing of technical staffs and information, to address issues of mutual interest and common concern. Both the Tribe and the Service recognize, however, that release of tribal proprietary, commercial, and confidential information may be restricted by either the Tribe or the Service.

* * *

• Whenever the Service considers a change in the status of a species that may exist on the Reservation now or in the future, it will promptly notify the Tribe's Endangered Species Coordinator. Concurrently, the Service will indicate what scientific information it presently has, the nature of the Service's concern, and what additional information and management would render unwarranted the elevation of the species to a more protected status or would encourage the delisting of the species.

* * *

IV. COORDINATION

* * *

• The Service and the Tribe will cooperatively develop and propose management practices based upon identified threats to sensitive species and their habitats for incorporation into the Tribal Management Plan (TMP), which consists of the portions of the Ecosystem Management Plan and integrated resource management plans which address sensitive species. This activity will initially take the form of lists of sensitive species, threats, and an assessment of commonality and severity of the threats.

NOTE: *THE SECRETARIAL ORDER ON "AMERICAN INDIAN TRIBAL RIGHTS, FEDERAL–TRIBAL TRUST RESPONSIBILITIES, AND THE ENDANGERED SPECIES ACT"*

In his Senate testimony in 1995, Chairman Lupe spelled out the benefits his tribe had received by negotiating over the ESA, rather than litigating:

> Before the Statement of Relationship, our staff spent many hours trying to negotiate the bureaucratic maze of the Fish & Wildlife Service, understand the nuances of the Endangered Species Act, and posturing for potential litigation. There was little time for active field work. But today we have programs in which we are protecting sensitive habitats using funds from the Service and the labors of our Tribal young. This approach seems to be more directly related to protection of endangered species than bureaucratic fighting and potential litigation.

Both Beattie and Lupe recognized that the approach they had negotiated for federal-tribal cooperation on the ESA could be used as a model for a broader agreement, applying to all federally recognized tribes. Lupe and other tribal leaders, along with tribal resource managers and tribal lawyers from across the country, convened a national meeting on the ESA in 1996 in Seattle, Washington. Out of this meeting, a working group, comprised of twenty-five representatives from all regions of the country, was organized to examine legislative and administrative alternatives and to make its recommendations. After considering various options involving litigation and legislation, the group increasingly focused on the approach taken in the Statement of Relationship that the White Mountain Apache Tribe and the USFWS signed in 1994, and decided to recommend to the tribes that they pursue a joint secretarial order by the Secretaries of the Interior and Commerce based on the concept of the White Mountain Apache–U.S. Fish and Wildlife Service Statement of Relationship.

Following a series of extensive negotiations between the tribal representatives and federal officials, the Secretaries of the Interior and Commerce (the cabinet-level departments with primary legislative authority for enforcing the ESA) issued Secretarial Order No. 3206, "American Indian Tribal Rights, Federal–Tribal Trust Responsibilities, and the Endangered Species Act." Under the 1997 Secretarial Order, the departments will carry out their responsibilities under the Act "in a manner that harmonizes the federal trust responsibility to tribes, tribal sovereignty, and statutory missions of the departments, and that strives to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation." Section 1. The order also recognizes that "Indian lands are not federal public lands or part of the public domain, and are not subject to federal public land laws. They were retained by tribes or were set aside for tribal use pursuant to treaties, statutes, judicial decisions, executive orders or agreements. These lands are managed by Indian tribes in accordance with tribal goals and objectives, within the framework of applicable laws." Section 4.

Section five sets out five principles that form the substantive basis for the order:

> Principle 1. The Departments shall work directly with Indian tribes on a government-to-government basis to promote healthy ecosystems.

> Principle 2. The Departments shall recognize that Indian lands are not subject to the same controls as federal public lands.
>
> Principle 3. The Departments shall assist Indian tribes in developing and expanding tribal programs so that healthy ecosystems are promoted and conservation restrictions are unnecessary.
>
> Principle 4. The Departments shall be sensitive to Indian culture, religion and spirituality.
>
> Principle 5. The Departments shall make available to Indian tribes information related to tribal trust resources and Indian lands and, to facilitate the mutual exchange of information, shall strive to protect sensitive tribal information from disclosure.

The explanatory text accompanying the principles contains a number of important provisions. Principle 3(B) of the order, for example, states that "the Departments shall give deference to tribal conservation and management plans." Another important provision, growing out of the White Mountain Apache experience, states that departmental employees should generally seek tribal permission before entering Indian reservations. The order also encourages the use of dispute resolution processes, evidencing a shared determination on the part of tribes and federal officials to resolve disputes outside of court if possible. Finally, the order includes an appendix that sets out specific, detailed instructions to aid field personnel in on-the-ground administration. See Wilkinson, supra, at 1066, 1074–1085.

Professor Wilkinson, who participated in the negotiations as a tribal representative, makes the following assessment of what tribes achieved through the negotiations leading up to the Secretarial Order:

> These government-to-government negotiations, then, resulted in several advances for the tribes. The Order recognizes the unique characteristics of tribes and tribal lands. It establishes a special place for tribes, tailored to the characteristics of tribal sovereignty and the trust duty, in all the key areas of administration of the ESA. It is also a practical document that focuses on relationships in the field between tribal and federal resource managers. The Order does not accomplish what the tribes would cherish most—a definitive statement that the ESA does not restrict tribes. However, it is neutral on the issue of ESA coverage, gives explicit deference to tribal decisions, and establishes a number of significant procedural steps and substantive requirements before federal officials can seek to apply the ESA to tribes.

Id. at 1083–1084.

The Fish and Wildlife Service has continued to implement the policy outlined in the Secretarial Order. In 2000, the USFWS issued its Final Designation of Critical Habitat for the spikedace and loach minnow, two endangered species found on the White Mountain Apache Tribe's reservation. Under its ruling, the Service announced that it would defer to tribal management plans for the two species.

> The White Mountain Apache Tribe, which has currently occupied loach minnow habitat and potential loach minnow and potential spikedace habitat within its reservation boundaries, produced a Native Fishes Management Plan. After reviewing this plan, we determined that the tribe's management of the species will provide substantial protection for the relevant habitat areas, and that designation of critical habitat will provide little or no additional benefit to the species, particularly since the areas are occupied by the loach minnow. Conversely, designation of critical habitat would be expected to adversely impact our working relationship with the Tribe, the maintenance of which has been extremely beneficial in implementing natural resource programs of mutual interest. In 1994, the Fish and Wildlife Service and White Mountain Apache Tribe signed a Statement of Relationship which formalized our commitment to work cooperatively with the Tribe in promoting healthy ecosystems. Since that agreement, we have worked cooperatively with the Tribe to the significant benefit of threatened and endangered species. In addition to managing the habitats of the spikedace and loach minnow, these programs include management of the

> threatened Mexican spotted owl, management of healthy populations of threatened Apache trout, and other natural resource programs.

Rules and Regulations Department of the Interior Fish and Wildlife Service, 50 C.F.R. part 17 *Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for the Spikedace and the Loach Minnow*, 65 Fed. Reg. 24328–01, 24338 (April 25, 2000) (to be codified at 50 C.F.R. Pt. 17). After weighing the benefits of critical habitat designation on the tribe's reservation against what the ruling called, "the adverse impact on our cooperative natural resource programs," USFWS found that the benefits of excluding reservation lands, "in terms of the spikedace and loach minnow, as well as ecosystems in general, outweigh the benefits of including those areas as critical habitat." Id. See generally Sandi B. Zellmer, *Indian Lands as Critical Habitat for Indian Nations and Endangered Species: Tribal Survival and Sovereignty Come First*, 43 S.D.L.Rev. 381 (1998).

Elsewhere, the USFWS has entered into partnership with the Nez Perce Tribe of Idaho, which is the primary manager of the Grey Wolf Recovery Project on 13,000,000 acres in central Idaho. Beyond management, the tribe is also actively involved in outreach and education, research, and monitoring of the wolves' progress. See Patrick Impero Wilson, *Wolves, Politics, and the Nez Perce: Wolf Recovery in Central Idaho and the Role of Native Tribes*, 39 Nat. Resources J. 543, 553–554 (1999).

NOTE: *THE ROLE OF FEDERAL INDIAN LAW IN RESERVATION ECONOMIC DEVELOPMENT*

Tribal sovereignty as recognized by the Supreme Court includes all inherent powers of self-government not expressly taken away by Congress. What is the relation between this understanding of tribal sovereignty and the "de facto" sovereignty, defined as genuine decision-making control over reservation affairs, that the Cornell and Kalt research identifies as the "first key to economic development?" Have tribes like the White Mountain Apache and Nez Perce now acquired the type of "de facto" sovereignty necessary for economic development according to Professors Cornell and Kalt by mobilizing the concepts of Native nation-building and securing negotiated agreements and partnerships with the USFWS over the enforcement of the ESA and species recovery on their tribal lands?

Some commentators perceive the present majority of the Supreme Court, led by Chief Justice John Roberts, as being disinclined or at least disinterested in providing any meaningful clarification of tribal sovereignty which is necessary to support expanded tribal control over reservations. Thus, for the foreseeable future at least, they have urged tribes and their advocates at least to consider the potential advantages as well as the liabilities of negotiation and settlement as opposed to adjudication.

> In the last analysis, negotiation seems to promise to bring Indians into Indian law far better than does adjudication. Negotiation turns not on incoherent or misunderstood legal doctrines, but on practical realities. Negotiation gives people—including subordinated people—a piece of the legal action and a chance to own, if only partially, both the resolution of particular disputes and a greater sense of the structure and efficacy of the long-term relationships between the parties.

Philip P. Frickey, *Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 Harv.L.Rev. 1754, 1783–1784 (1997). See also Lorie Graham, *Securing Economic Sovereignty Through Agreement*, 37 New Eng.L.Rev. 523, 535–544 (2003); Oliver Kim, *When Things Fall Apart: Liabilities and Limitations of Compacts Between State and Tribal Governments*, 26 Hamline L.Rev. 48, 75–81 (2002); P.S. Deloria & Robert Laurence, *Negotiating Tribal–State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question*, 28 Ga.L.Rev. 365, 373–74 (1994); David H. Getches, *Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding First Nations' Self–Government*, 1 Rev. of Constitutional Studies 120 (1993).

Consider the role of federal Indian law in the types of negotiation and consultation processes which led to the White Mountain Apache Statement of Relationship with the Fish and Wildlife Service

and the Secretarial Order on "American Indian Tribal Rights, Federal–Tribal Trust Responsibilities, and the Endangered Species Act." See page ___, supra. Both documents contain a number of references to the trust doctrine and tribal sovereignty—both judge-created principles of federal Indian law. How would the federal agencies involved in the negotiations that led to the approval of these agreements have gone about justifying their preferential treatment for tribes under the ESA without the special set of rules and principles of federal Indian law developed over the course of nearly two centuries by the Supreme Court, Congress, and the Executive Branch?

The question of whether tribes should pursue negotiation rather than litigation in order to secure their sovereignty and control over reservation development cannot be answered as simply as it is posed. But it cannot be answered at all without considering the principles of federal Indian law. There is, therefore, at least one very important challenge which Indian tribes and the field of Indian law itself share as tribes move into the next century along with the rest of United States society: Can this body of law be developed in a progressive manner, serving to provide a just set of principles for defining the degree of measured separatism that American Indian tribes need for their continued cultural development and survival?

SECTION B.

INDIAN GAMING

1. The Supreme Court's Application of Public Law 280's Regulatory-Prohibitory Distinction

Add to the end of the Notes on page 741:

3. The State of Texas long has opposed gaming activities of the state's tribes, most notably the Ysleta del Sur Pueblo and the Alabama-Coushatta Tribe, restored by an Act of Congress in 1987.

Ysleta del Sur Pueblo v. Texas

United States Supreme Court, 2022

__ U.S. __, 142 S.Ct. 1929

Justice GORSUCH delivered the opinion of the Court.

Native American Tribes possess "inherent sovereign authority over their members and territories." Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 509, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991). Under our Constitution, treaties, and laws, Congress too bears vital responsibilities in the field of tribal affairs. See, e.g., United States v. Lara, 541 U.S. 193, 200, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004). From time to time, Congress has exercised its authority to allow state law to apply on tribal lands where it otherwise would not. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978); Bryan v. Itasca County, 426 U.S. 373, 392, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976); Rice v. Olson, 324 U.S. 786, 789, 65 S.Ct. 989, 89 L.Ed. 1367 (1945). In this case, Texas contends that Congress expressly ordained that all of its gaming laws should be treated as surrogate federal law enforceable on the Ysleta del Sur Pueblo Reservation. In the end, however, we find no evidence Congress endowed state law with anything like the power Texas claims.

I

A

The Ysleta del Sur Pueblo is one of three federally recognized Indian Tribes in Texas. Its reservation lies near El Paso, and the Tribe today includes over 4,000 enrolled members. See About Us, Ysleta del Sur Pueblo (June 2022), https://www.ysletadelsurpueblo.org/about-us. The Tribe traces its roots back to the 1680 Pueblo Revolt against the Spanish in New Mexico. In the revolt's aftermath, the Spanish retreated from Santa Fe to El Paso, and a large number of Ysleta Pueblo Indians accompanied them. S. Rep. No. 100–90, p. 6 (1987) (Senate Report); W. Timmons, El Paso 18 (1990) (Timmons). Soon, tribal members built the Ysleta Mission, the oldest church in Texas, and in 1751 Spain granted 23,000 acres to the Tribe for its homeland. See Senate Report 6–7; Timmons 36.

Things changed for the Tribe after Texas gained statehood in 1845. The State disregarded Spain's land grant and began incorporating a town on tribal lands and issuing land patents to non-Indians. Senate Report 6–7. Over the years that followed, the Tribe repeatedly lost lands "without recompense." Timmons 181. Yet some tribal members remained on parts of their homeland, "determin[ed] to preserve [their] language, customs, and traditions." Ibid. In the late 1890s, the Tribe adopted a constitution to ensure "the survival of [its] ancient tribal organization." Ibid. After years of struggle, the Tribe also won formal recognition from Texas in 1967 and Congress the following year. Id., at 260–261. In its 1968 legislation, Congress assigned its trust responsibilities for the Tribe to Texas. 82 Stat. 93. That trust relationship was important, as it ensured the Tribe would retain the remaining 100 acres of land it possessed and gain access to certain tribal funding programs. See Timmons 261; see also R. Chambers, Judicial Enforcement of the Federal Trust Responsibility to Indians, 27 Stan. L. Rev. 1213, 1233–1234 (1975) (discussing trust obligations).

This arrangement persisted until 1983. That year, Texas renounced its trust responsibilities, asserting that they were inconsistent with the State's Constitution. See 2019 WL 639971, *1 (W.D. Tex., Feb. 14, 2019). The Tribe responded to this development by seeking new congressional legislation to reestablish its trust relationship with the federal government. But that effort quickly became bogged down in a dispute. Of all things, it concerned bingo. Texas, it seems, worried that allowing tribal gaming would have a detrimental effect on "existing charitable bingo operations in the State of Texas." App. to Pet. for Cert. 121. And because Texas judged that its laws would be inapplicable on tribal lands without federal approval, the State opposed any new federal trust legislation unless it included a special provision permitting it to apply its own gaming laws on the Tribe's lands. See ibid.

B

Years of negotiations ensued. But one development during this period turned out to have particular salience even though it did not immediately concern either the Tribe or Texas. In February 1987, this Court issued California v. Cabazon Band of Mission Indians, 480 U.S. 202, 107 S.Ct. 1083, 94 L.Ed.2d 244. In it, the Court addressed Public Law 280, a statute Congress had adopted in 1953 to allow a handful of States to enforce some of their criminal—but not certain of their civil—laws on particular tribal lands. See Bryan, 426 U.S. at 383–385, 96 S.Ct. 2102. Seeking

to apply that statutory direction in the context of Indian gaming, the Court held that, if a state law prohibits a particular game, it falls within Public Law 280's grant of criminal jurisdiction and a State may enforce its ban on tribal lands. Cabazon, 480 U.S. at 209–210, 107 S.Ct. 1083. But if state laws merely regulate a game's availability, the Court ruled, Public Law 280 does not permit a State to enforce its rules on tribal lands. See id., at 210–211, 107 S.Ct. 1083.

The Court then turned to apply this prohibitory/regulatory distinction to California's bingo laws. Much like Texas today, California in 1987 permitted bingo in various circumstances (including for charitable purposes), but treated deviations from its rules as criminal violations. See id., at 205, 208–209, 107 S.Ct. 1083. Because California allowed some bingo to be played, the Court reasoned, the State "regulate[d] rather than prohibit[ed]" the game. Id., at 211, 107 S.Ct. 1083. From this, it followed that Public Law 280 did not authorize the State to apply its own bingo laws on tribal lands. Id., at 210–211, 107 S.Ct. 1083. In reaching this conclusion, the Court rejected California's suggestion that its laws were prohibitory rather than regulatory because they were enforceable by criminal sanctions, explaining that "an otherwise regulatory law" is not enforceable under Public Law 280 merely because a State labels it "criminal." Id., at 211, 107 S.Ct. 1083. "Otherwise," the Court explained, Public Law 280's "distinction" between criminal and civil laws "could easily be avoided." Ibid.

It appears the Court's decision helped catalyze new legislation. After Cabazon, "congressional efforts to pass [Indian gaming] legislation ... that had been ongoing since 1983 gained momentum, with Indian tribes' position strengthened." W. Wood, The (Potential) Legal History of Indian Gaming, 63 Ariz. L. Rev. 969, 1027, and n. 353 (2021) (Wood). In fact, just six months after the decision, in August 1987, Congress finally adopted the Ysleta del Sur and Alabama and Coushatta Indian Tribes of Texas Restoration Act, 101 Stat. 666 (Restoration Act). In that law, Congress restored the Tribe's federal trust status. And to resolve Texas's gaming objections, Congress seemingly drew straight from Cabazon, employing its distinction between prohibited and regulated gaming activity. The Restoration Act "prohibited" as a matter of federal law "[a]ll gaming activities which are prohibited by the laws of the State of Texas." 101 Stat. 668. But the Act also provided that it should not be "construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." Id., at 669.

That was not all Congress did. Because Cabazon left certain States unable to apply their gaming regulations on Indian reservations, some feared the Court's decision opened the door to a significant amount of new and unregulated gaming on tribal lands. See R. Anderson, S. Krakoff, & B. Berger, American Indian Law: Cases and Commentary 479–480 (4th ed. 2020) (Anderson). In 1988, Congress sought to fill that perceived void by adopting its own comprehensive national legislation: the Indian Gaming Regulatory Act (IGRA), 102 Stat. 2467, 25 U.S.C. § 2701 et seq.; Anderson 479–482. IGRA established rules for three separate classes of games. Relevant here, the law permitted Tribes to offer so-called class II games—like bingo—in States that "permi[t] such gaming for any purpose by any person, organization or entity." § 2710(b)(1)(A). Meanwhile, the statute allowed Tribes to offer class III games—like blackjack and baccarat—but only pursuant to

tribal/state compacts. § 2703(8); Anderson 480. To ensure compliance with the statute's terms, IGRA created the National Indian Gaming Commission. § 2704(a).

* * *

D

In 2016, the Tribe began offering bingo. On its view, it was free to offer at least this game because IGRA treats bingo as a class II game for which no state permission is required so long as the State permits the game to be played on some terms by some persons. See 25 U.S.C. § 2710(b)(1)(A). Citing IGRA, the Tribe did not just offer the sort of bingo played in church halls across the country. It also offered "electronic bingo," a game in which patrons sit at "machines [that] look similar to a traditional slot machine." 2019 WL 639971, *5 (internal quotation marks omitted). Unlike typical slot machines, however, "the underlying game is run using historical bingo draws." Ibid.

The State responded by seeking to shut down all of the Tribe's bingo operations. Whatever IGRA may allow, Texas argued, the Fifth Circuit was clear in Ysleta I that the Restoration Act forbids the Tribe from defying any of the State's gaming regulations. And, Texas stressed, under its laws bingo remains permissible today only for charitable purposes and only subject to a broad array of regulations.

* * *

II

A

Before us, the parties offer two very different accounts of the Restoration Act. The State, in its only argument in support of regulatory jurisdiction over the Tribe's gaming activities, reads the Act as effectively subjecting the Tribe to the entire body of Texas gaming laws and regulations . . . . The Tribe understands the Act to bar it from offering only those gaming activities the State fully prohibits. Consistent with Cabazon, the Tribe submits, if Texas merely regulates a game like bingo, it may offer that game—and it may do so subject only to the limits found in federal law and its own law, not state law.

To resolve the parties' disagreement, we turn to § 107 of the Restoration Act, where Congress directly addressed gaming on the Tribe's lands and said this:

"SEC. 107. GAMING ACTIVITIES.

> (a) IN GENERAL.—All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas.

> The provisions of this subsection are enacted in accordance with the tribe's request in Tribal Resolution No. T.C.–02–86 which was approved and certified on March 12, 1986.
>
> (b) NO STATE REGULATORY JURISDICTION.—Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.
>
> (c) JURISDICTION OVER ENFORCEMENT AGAINST MEMBERS.— [T]he courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) that is committed by the tribe ...." 101 Stat. 668–669.

Perhaps the most striking feature about this language is its dichotomy between prohibition and regulation. On the one hand, subsection (a) says that gaming activities prohibited by state law are also prohibited as a matter of federal law (using some variation of the word "prohibited" no fewer than three times). On the other hand, subsection (b) insists that the statute does not grant Texas civil or criminal regulatory jurisdiction with respect to matters covered by this "section," a section concerned exclusively with gaming. The implication that Congress drew from Cabazon and meant for us to apply its same prohibitory/regulatory framework here seems almost impossible to ignore. See Part II–B, infra.

But before getting to that, we start with a careful look at the statute's terms standing on their own. Often enough in ordinary speech, to prohibit something means to "forbid," "prevent," or "effectively stop" it, or "make [it] impossible." Webster's Third International Dictionary 1813 (1986) (Webster's Third); see 7 Oxford English Dictionary 596 (2d ed. 1989) (OED); Black's Law Dictionary 1212 (6th ed. 1990) (Black's). Meanwhile, to regulate something is usually understood to mean to "fix the time, amount, degree, or rate" of an activity "according to rule[s]." Webster's Third 1913; see 8 OED 524; Black's 1286. Frequently, then, the two words are "not synonymous." Id., at 1212.

That fact presents Texas with a problem. The State concedes that its laws do not forbid, prevent, effectively stop, or make bingo impossible. Instead, the State admits that it allows the game subject to fixed rules about the time, place, and manner in which it may be conducted. See Brief for Respondent 5. From this alone, it would seem to follow that Texas's laws fall on the regulatory rather than prohibitory side of the line—and thus may not be applied on tribal lands under the terms of subsection (b).

To be sure, Texas is not without a reply. It observes that in everyday speech someone could describe its laws as "prohibiting" bingo unless the State's time, place, and manner regulations are followed. After all, conducting bingo or any other game in defiance of state regulations can lead not just to a civil citation, but to a criminal prosecution too. See Tex. Occ. Code Ann. § 2001.551(c) (West 2019). In this sense, the State submits, it seeks to do exactly what subsection (a) allows—

"prohibit" bingo that is not conducted for charitable purposes and compliant with all its state gaming regulations.

That much we find hard to see. Maybe in isolation or in another context, Texas's understanding of the word "prohibit" would make sense. But here it risks rendering the Restoration Act a jumble. No one questions that Texas "regulates" bingo by fixing the time, place, and manner in which the game may be conducted. The State submits only that, in some sense, its laws also "prohibit" bingo—when the game fails to comply with the State's time, place, and manner regulations. But on that reading, the law's dichotomy between prohibition and regulation collapses. Laws regulating gaming activities become laws prohibiting gaming activities. It's an interpretation that violates our usual rule against "ascribing to one word a meaning so broad" that it assumes the same meaning as another statutory term. Gustafson v. Alloyd Co., 513 U.S. 561, 575, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995). It's a view that defies our usual presumption that "differences in language like this convey differences in meaning." Henson v. Santander Consumer USA Inc., 582 U.S. ——, ——, 137 S.Ct. 1718, 1723, 198 L.Ed.2d 177 (2017). And perhaps most tellingly, it is a construction that renders state gaming regulations simultaneously both (permissible) prohibitions and (impermissible) regulations. Rather than supply coherent guidance, Texas's reading of the law renders it an indeterminate mess.

The State's interpretation of subsection (a) presents another related problem. Suppose we could somehow overlook the indeterminacy its interpretation yields and adopt the State's view that it may "prohibit" bingo under subsection (a) not merely by outlawing bingo altogether but also by dictating the time, place, and manner in which it is played. On that account, subsection (b) would be left with no work to perform, its terms dead letters all. Yes, subsection (b) says that it does not federalize Texas's civil and criminal gaming regulations on tribal land. But, the State effectively suggests, we should turn a blind eye to all that. It's a result that defies yet another of our longstanding canons of statutory construction—this one, the rule that we must normally seek to construe Congress's work "so that effect is given to all provisions, so that no part will be inoperative or superfluous, void or insignificant." Corley v. United States, 556 U.S. 303, 314, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009) (internal quotation marks omitted).

Seeking a way around these problems, Texas only stumbles on another. The State submits that subsection (b) performs real work even on its reading by denying its courts and gaming commission "jurisdiction" to punish violations of subsection (a) and sending disputes over "regulatory" violations to federal court instead. The dissent also embraces this approach. See post, at 1951 – 1952. But this understanding of subsection (b) only serves to render still another portion of the statute—subsection (c)—a nullity. Titled "Jurisdiction Over Enforcement Against Members," subsection (c) grants the federal courts "exclusive" jurisdiction over violations of subsection (a), and it also permits Texas to "brin[g] an action in [federal court] to enjoin violations of [subsection (a)]." 101 Stat. 669. Put differently, subsection (c) already precludes state courts and state agencies from exercising jurisdiction over violations of subsection (a). To make any sense of the statute, subsection (b) must do something besides repeat that work.

Stepping back, a full look at the statute's structure suggests a set of simple and coherent commands. In subsection (a), Congress effectively federalized and applied to tribal lands those state laws that prohibit or absolutely ban a particular gaming activity. In subsection (b), Congress explained that it was not authorizing the application of Texas's gaming regulations on tribal lands. In subsection (c), Congress granted federal courts jurisdiction to entertain claims by Texas that the Tribe has violated subsection (a). Texas's competing interpretation of the law renders individual statutory terms duplicative and whole provisions without work to perform.

B

Even if fair questions remain after a look at the ordinary meaning of the statutory terms before us, important contextual clues resolve them. Recall that Congress passed the Act just six months after this Court handed down *Cabazon*. See Part I–B, supra. In that decision, the Court interpreted Public Law 280 to mean that only "prohibitory" state gaming laws could be applied on the Indian lands in question, not state "regulatory" gaming laws. The Court then proceeded to hold that California bingo laws—laws materially identical to the Texas bingo laws before us today—fell on the regulatory side of the ledger. Just like Texas today, California heavily regulated bingo, allowing it only in certain circumstances (usually for charity). Just like Texas, California criminalized violations of its rules. Compare *Cabazon*, 480 U.S. at 205, 107 S.Ct. 1083, with Tex. Occ. Code Ann. § 2001.551. Still, because California permitted some forms of bingo, the Court concluded that meant California did not prohibit, but only regulated, the game. *Cabazon*, 480 U.S. at 211, 107 S.Ct. 1083.

For us, that clinches the case. This Court generally assumes that, when Congress enacts statutes, it is aware of this Court's relevant precedents. See Ryan v. Valencia Gonzales, 568 U.S. 57, 66, 133 S.Ct. 696, 184 L.Ed.2d 528 (2013). And at the time Congress adopted the Restoration Act, Cabazon was not only a relevant precedent concerning Indian gaming; it was the precedent. See Part I–B, supra. In Cabazon, the Court drew a sharp line between the terms prohibitory and regulatory and held that state bingo laws very much like the ones now before us qualified as regulatory rather than prohibitory in nature. We do not see how we might fairly read the terms of the Restoration Act except in the same light. After all, "[w]hen the words of the Court are used in a later statute governing the same subject matter, it is respectful of Congress and of the Court's own processes to give the words the same meaning in the absence of specific direction to the contrary." Williams v. Taylor, 529 U.S. 420, 434, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000).

Even beyond that vital contextual clue lie others. In the immediate aftermath of *Cabazon*, Congress adopted not just the Restoration Act; it also adopted other laws governing tribal gaming activities. In these laws, Congress again appeared to reference and employ Cabazon's distinction between prohibition and regulation—and Congress did so in ways demonstrating that it clearly understood how to grant a State regulatory jurisdiction over a Tribe's gaming activities when it wished to do so. Cf. Lagos v. United States, 584 U.S. ——, —— – ——, 138 S.Ct. 1684, 1689 – 1690, 201 L.Ed.2d 1 (2018).

Consider two examples. On the same day it passed the Restoration Act, Congress adopted a statute involving the Wampanoag Tribe. But, contrary to its approach in the Restoration Act, Congress subjected that Tribe's lands to "those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance." Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, § 9, 101 Stat. 709–710 (emphasis added). Shortly after the Restoration Act, Congress adopted another statute, this one governing the Catawba Tribe's gaming activities. In it, Congress provided that "all laws, ordinances, and regulations of the State, and its political subdivisions, shall govern the regulation of ... gambling or wagering by the Tribe on and off the Reservation." Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, § 14(b), 107 Stat. 1136 (emphasis added).

That Congress chose to use the language of *Cabazon* in different ways in three statutes closely related in time and subject matter seems to us too much to ignore. See State Farm Fire & Casualty Co. v. United States ex rel. Rigsby, 580 U.S. 39, 34, 137 S.Ct. 436, 196 L.Ed.2d 340 (2016) (explaining that when Congress "use[s] ... explicit language in one provision," that "cautions against inferring the same limitation in another provision" (internal quotation marks omitted)). For two Tribes, Congress did more than just prohibit on tribal lands those gaming activities prohibited by state law. It said state regulations should apply as a matter of federal law too. Yet for this Tribe Congress did something different. It did not subject the Tribe to all Texas laws that "prohibit or regulate" gaming. It did not subject the Tribe to all laws that "govern the regulation of gambling." Instead, Congress banned on tribal lands only those gaming activities "prohibited" by Texas, and it did not provide for state "regulatory jurisdiction" over tribal gaming.

None of this is to say that the Tribe may offer any gaming activity on whatever terms it wishes. It is only to say that the Fifth Circuit and Texas have erred in their understanding of the Restoration Act. Under that law's terms, if a gaming activity is prohibited by Texas law it is also prohibited on tribal land as a matter of federal law. Other gaming activities are subject to tribal regulation and must conform with the terms and conditions set forth in federal law, including IGRA to the extent it is applicable. See Brief for United States as Amicus Curiae 31–33.3

III

* * *

B

In the end, Texas retreats to the usual redoubt of failing statutory interpretation arguments: an unadorned appeal to public policy. Echoing arguments voiced by the *Cabazon* dissent, the State argues that attempts to distinguish between prohibition and regulation are sure to prove "unworkable." Brief for Respondent 29 (citing 480 U.S. at 224, 107 S.Ct. 1083 (opinion of Stevens, J.)). Indeed, the State suggests that problems are likely to arise in this very case. Under our reading, Texas highlights, courts on remand might be called on to decide whether "electronic bingo" qualifies as "bingo" and thus a gaming activity merely regulated by Texas, or whether it

constitutes an entirely different sort of gaming activity absolutely banned by Texas and thus forbidden as a matter of federal law. And, the State worries, any attempt to answer that question may require evidence, expert testimony, and further litigation.

We appreciate these concerns, but they do not persuade us. Most fundamentally, they are irrelevant. It is not our place to question whether Congress adopted the wisest or most workable policy, only to discern and apply the policy it did adopt. If Texas thinks good governance requires a different set of rules, its appeals are better directed to those who make the laws than those charged with following them.

Even on its own terms, we are not sure what to make of Texas's policy argument. We do not doubt that the Restoration Act's prohibitory/regulatory distinction can and will generate borderline cases. See F. Cohen, Handbook of Federal Indian Law 541–544 (N. Newton ed. 2012). It may even be that electronic bingo will prove such a case. But if applying the Act's terms poses challenges, that hardly makes it unique among federal statutes. Nor is the line the Restoration Act asks us to enforce quite as unusual as Texas suggests. Courts have applied the same prohibitory/regulatory framework elsewhere in this country under Public Law 280 for decades. See id., at 541–547. IGRA, too, draws a similar line to assess the propriety of class II gaming on Indian reservations nationwide. See 25 U.S.C. § 2710(b)(1)(A); see also K. Washburn, Federal Law, State Policy, and Indian Gaming, 4 Nev. L. J. 285, 289–290 (2004). In fact, Texas concedes that another Tribe within its borders—the Kickapoo Traditional Tribe of Texas—is already subject to IGRA and offers class II games. See Tr. of Oral Arg. 91; see also Brief for United States as Amicus Curiae 32. Why something like the Cabazon test can work for one Tribe in Texas but not another is not exactly obvious.

For that matter, Texas's alternative interpretation poses its own "workability" challenges. Under the State's reading, subsection (c) does not just charge federal courts with enforcing on tribal lands a federal law banning gaming activities also banned by state law. It also charges federal courts with enforcing the minutiae of state gaming regulations governing the conduct of permissible games—a role usually played by state gaming commissions or the National Indian Gaming Commission. It's a highly unusual role for federal courts to assume. But on Texas's view, it's a role federal courts must assume, as indeed they have sought to do since Ysleta I. And far from yielding an easily administrable regime, by almost anyone's account that project has engendered a quarter century of confusion and dispute. See Part I–C, supra.

*

Texas contends that Congress in the Restoration Act has allowed all of its state gaming laws to act as surrogate federal law on tribal lands. The Fifth Circuit took the same view in Ysleta I and in the proceedings below. That understanding of the law is mistaken. The Restoration Act bans as a matter of federal law on tribal lands only those gaming activities also banned in Texas.

To allow the Fifth Circuit to revise its precedent and reconsider this case in the correct light, its judgment is vacated, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

[The dissent is omitted].

NOTE

1. *Ysleta*, along with cases like *Yellen v. Chehalis* (page 237, *supra*), demonstrate the dizzying array of linguistic, dictionary, and canonical lines of analysis now employed by the textualist arm of the Supreme Court. History, context, legislative intent – these once-normalized tools of statutory interpretation have gone by the wayside in favor of dictionaries and "ordinary meaning."

2. *Ysleta* also impliedly settles any continued dispute over whether the electronic form of bingo that many tribes engaged in Class II gaming conduct, which Chief Justice Roberts mocked as "about as close to real bingo as Bingo the famous dog," 142 S. Ct. at 1947 n. 1 (Roberts, C.J., dissenting).

2. The Congressional Response to *Cabazon*: The Indian Gaming Regulatory Act

Add to end of notes on page 762:

3. In 2022, a non-tribal gaming company in Washington State brought suit to challenge the constitutionality and legality of Class III gaming compacts signed by the State and approved by the Department of the Interior. *See Maverick Gaming LLC v. United States*, No. 22-cv-05325-DGE (W.D. Wash.). The amended complaint claims that the tribes in Washington enjoy an illegal monopoly:

> 2. Purporting to act pursuant to the Indian Gaming Regulatory Act ("IGRA" or "the Act")—a federal statute regulating gaming on Indian lands—Washington entered into compacts (the "Compacts") with 29 Indian tribes (the "Tribes"). The Compacts grant the Tribes the exclusive right to offer most forms of casino-style gaming (known as "class III" gaming under IGRA). In 2020, Washington passed a new law giving federally recognized Indian tribes the exclusive right to offer sports betting, which had previously been omitted from the list of class III games that Indian tribes could offer. Washington has since amended its compacts with 18 Indian tribes (the "Compact Amendments") to permit them to offer sports betting at tribal casinos.

> 3. At the same time, Washington's criminal laws prohibit any non-tribal entities, such as Maverick, from offering most forms of class III gaming in Washington, including roulette, craps, and sports betting. The U.S. Secretary of the Interior approved this discriminatory tribal gaming monopoly by allowing the Compacts and recent Compact Amendments to go into effect.
>
> 4. With a monopoly over most forms of casino-style gaming, the Tribes have established expansive casino operations in Washington. This class III gaming monopoly has been extremely profitable for the Tribes. In 2017, even before they were permitted to offer sports betting, the Tribes' net receipts from class III gaming totaled approximately $2.56 billion. But the monopoly prevents non-tribal entities from competing on an equal footing with the Tribes.

In 2020, the plaintiff alleges, the state legislature confirmed the tribal monopoly and the related criminal ban on Vegas-style gaming on non-Indians:

> 74. On March 25, 2020, Washington passed a new law, S.H.B. No. 2638, giving Indian tribes in the state a monopoly over sports betting. See 2020 Wash. Legis. Serv. ch. 127. It remains a crime for non-tribal entities to offer sports betting. See Wash. Rev. Code §§ 9.46.220–.222.
>
> 75. The law states:
>
> > It has long been the policy of this state to prohibit all forms and means of gambling except where carefully and specifically authorized and regulated. The legislature intends to further this policy by authorizing sports wagering on a very limited basis by restricting it to tribal casinos in the state of Washington.
>
> 2020 Wash. Legis. Serv. ch. 127, § 1.

The plaintiff also alleges that the State, after amending state law, has executed compact amendments with a majority of Washington tribes that would allow sports betting as well.

> 76. The new act states that "[u]pon the request of a federally recognized Indian tribe or tribes in the state of Washington, the tribe's class III gaming compact may be amended . . . to authorize the tribe to conduct and operate sports wagering on its Indian lands . . . . Sports wagering conducted pursuant to the gaming compact is a gambling activity authorized by this chapter." Wash. Rev. Code § 9.46.0364(1). The statute makes clear that "[s]ports wagering conducted pursuant to the provisions of a class III gaming compact entered into by a tribe and the state pursuant to [Wash. Rev. Code § 9.46.360] is authorized bookmaking and is not

> subject to civil or criminal penalties pursuant to [Wash. Rev. Code § 9.46.225]." Id. § 9.46.0364(2).

See also Amended Complaint, paras. 77-83 (describing the sports betting compacts between the State and 18 tribes).

The plaintiff claims the Class III compacts violate federal law in three ways. First, the State's ban on Class III gaming, including sports betting, violates what the plaintiff calls the "state-permission" requirement of IGRA. The plaintiff argues that 25 U.S.C. § 2710(d)(1)(B)–(C) mandates that Class III gaming may only occur in a state that permits such gaming. The plaintiff argues that since Washington bans all gaming except that conducted by tribes, Class III gaming is not permitted. *See* Amended Complaint, paras. 96-107.

Second, the plaintiff claims that a tribal sports betting monopoly is race discrimination that violates the equal protection component of the Fifth Amendment's Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment:

> 114. The Compact Amendments' race-based preference for Indian tribal sports betting is subject to strict scrutiny. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995).
>
> 115. The Compact Amendments' race-based preference does not fall within the narrow exception outlined in *Morton v. Mancari*, 417 U.S. 535 (1974), because Congress has not authorized and could not authorize a State to grant Indian tribes a monopoly over a commercial activity that is unrelated to uniquely Indian interests, *see Williams v. Babbitt*, 115 F.3d 657, 665 (9th Cir. 1997).
>
> 116. The Compact Amendments' race-based preference for Indian tribal sports betting cannot survive strict scrutiny or even rational-basis review because it is unrelated to the furtherance of Congress's trust obligation to Indian tribes.
>
> 117. Thus, the Compact Amendments' race-based preference for Indian tribal sports betting violates the Constitution's guarantee of equal protection.

See Amended Complaint, paras. 108-21.

Finally, the plaintiff complains that IGRA violates the Tenth Amendment by "ordering" states to negotiate Class III gaming compacts with Indian tribes. *See* Amended Complaint, paras. 122-28.

The federal district court in Washington dismissed the action under FRCP 19 for failure to join the tribal sovereign, which had not waived its immunity from suit. *Maverick Gaming LLC v. United States*, 2023 WL 2138477 (W.D. Wash. Feb. 21, 2023), appeal filed, (9th Cir.) (No. 23-35136).

CHAPTER 10

INDIAN RELIGION AND CULTURE

SECTION A.

PROTECTION OF AMERICAN INDIAN SACRED LANDS AND SITES

After the partial paragraph on page 788, add:

NATION BUILDING NOTE:

BEARS EARS NATIONAL MONUMENT

Congress enacted the Antiquities Act of 1906, 16 U.S.C. §§ 431-433, to protect archeological and Indian sacred sites on federal lands from the depredations of collectors and others. See generally Mark Squillace, *The Monumental Legacy of the Antiquities Act*, 37 Ga. L. Rev. 473 (2003).

In 2015, a coalition of five Indian tribes formally petitioned President Obama to invoke the Antiquities Act to create the Bears Ears National Monument. The highlights of the coalition's proposal identified cultural and environmental justifications for the proposal:

> The proposed Bears Ears National Monument is a place rich in history and culture. It is a place to connect, a place to heal, and a place where Native American Traditional Knowledge can be explored and nurtured so that it continues to inform and illuminate modern life. The Bears Ears Inter-Tribal Coalition, a consortium of five sovereign Indian nations—the Hopi, Navajo, Uintah & Ouray Ute, Ute Mountain Ute, and Zuni—has formally petitioned President Barack Obama to proclaim the Bears Ears National Monument in order to protect this extraordinary area for our Tribes, all Native people, and the nation.
>
> The proposed 1.9 million acre monument is a landscape of deep, carved canyons, long mesas, inspiring arches, and arresting red rock formations. The monument's namesake, the Bears Ears, are twin buttes in the heart of the landscape that rise high above the piñon-juniper forests and canyons that adorn the renowned and majestic Cedar Mesa. It lies in Southern Utah, north of the Navajo Nation and

the San Juan River, east of the Colorado River, and west of the Ute Mountain Ute Reservation. Bears Ears is adjacent to Canyonlands National Park and is every bit the equal of Canyonlands and the other great parks and monuments of the Colorado Plateau.

Ever since time immemorial, the Bears Ears area has been important to Native American people as a homeland. In the mid-1800s, Native Americans were forced fully and violently removed from the area and marched to reservations. But the Native bond to Bears Ears is strong and today is a place that embodies that history. Modern Native American people continue to use the Bears Ears area as a place for healing, ceremonies, and the gathering of firewood, plants, and medicinal herbs.

When they return to Bears Ears today, Native American people feel the presence of their ancestors everywhere. This landscape records their ancestors' migration routes, ancient roads, great houses, villages, granaries, hogans, wikiups, sweat lodges, corrals, petroglyphs and pictographs, tipi rings, shade houses, and burial grounds. Our people are surrounded by the spirits of the ancestors, and embraced by the ongoing evolution of their culture and traditions. For Native American people, Bears Ears is a place for healing. It is also a place for teaching children—Native American children and the world's children—about meaningful and lasting connections with sacred and storied lands.

All of this is threatened—by destructive land uses, such as mining and irresponsible off-road vehicle use and by the rampant looting and destruction of the villages, structures, rock markings, and gravesites within the Bears Ears landscape. The Bears Ears National Monument proposal is a bold and inspired plan to stem the tide of this erosion—and protect Bears Ears for the benefit of all.

Bears Ears Inter-Tribal Coalition, The Tribal Proposal to President Obama for the Bears Ears National Monument, Executive Summary (2015), *available at* http://www.bearsearscoalition.org/wp-content/uploads/2015/01/ExecutiveSummaryBearsEarsProposal.pdf.

On December 28, 2016, President Obama invoked the Antiquities Act, established the Bears Ears National Monument, and issued the following statement:

Today, I am designating two new national monuments in the desert landscapes of southeastern Utah and southern Nevada to protect some of our country's most important cultural treasures, including abundant rock art, archeological sites, and lands considered sacred by Native American tribes. Today's actions will help protect this cultural legacy and will ensure that future generations are able to enjoy and appreciate these scenic and historic landscapes.

> Importantly, today I have also established a Bears Ears Commission to ensure that tribal expertise and traditional knowledge help inform the management of the Bears Ears National Monument and help us to best care for its remarkable national treasures.
>
> Following years of public input and various proposals to protect both of these areas, including legislation and a proposal from tribal governments in and around Utah, these monuments will protect places that a wide range of stakeholders all agree are worthy of protection. We also have worked to ensure that tribes and local communities can continue to access and benefit from these lands for generations to come.

Statement by the President on the Designation of Bears Ears National Monument and Gold Butte National Monument (Dec. 28, 2016).

The Trump Administration proposed shrinking Bears Ears by as much as 90 percent. Julie Turkewitz, Trump Slashes Size of Bears Ears and Grand Staircase Monuments, NEW YORK TIMES, Dec. 4, 2017. Indian tribes sued the federal government to stop that action. Complaint, *Hopi Tribe v. Trump*, No. 17-2590 (D.D.C.), *available at* https://turtletalk.files.wordpress.com/2017/12/doc-1-complaint-00184691x9d7f5.pdf.

The Biden Administration is looking into reversing the Trump Administration's actions to shrink the monument. Zak Podmore, Indigenous leaders call on Biden to enlarge Bears Ears as 25-foot totem pole travels from Washington state to Washington, D.C., SALT LAKE TRIB., July 18, 2021, https://www.sltrib.com/news/2021/07/18/indigenous-leaders-call/.

CHAPTER 11

WATER RIGHTS

Add to end of Chapter 11 on page 891:

SECTION E.

THE DUTIES OF THE FEDERAL GOVERNMENT TO TRIBES

The scope of the federal duty of protection, usually referred to as the trust responsibility, is undefined. In general, the duty of protection between a tribe and the federal government is formed at the ratification of a treaty or a federal act that acknowledges a tribe's sovereignty and/or establishes a tribal homeland, usually a reservation. It is well established that the creation of an Indian reservation through a treaty, statute, Executive order, or other federal act vests ownership in the resources of that reservation to the tribal nation. Restatement of the Law of American Indians § 80 & cmt. a. We are reasonably confident that Congress cannot simply confiscate those resources under the Fifth Amendment, e.g., United States v. Shoshone Tribe of Indians of the Wind River Rsrv. in Wyo., 304 U.S. 111 (1938) (affirming a money damages award to the tribe for the taking of reservation natural resources), but what affirmative obligation the federal government owes tribal nations to ensure access to water is unsettled.

The United States and tribal nations share federally reserved water rights in the western United States under *Winters*. In *Arizona v. California*, the United States asserted both federal and tribal reserved water rights, ultimately prevailing on much of their claim for 25 tribes. However, although the Navajo Nation borders portions of the Colorado River, the federal government chose not to assert the Nation's interests in the main stem of the river, instead claiming only Colorado River tributary water for the Nation. At the same time, the government also blocked the Nation's efforts to intervene on its own behalf to make a claim to the main stem. Decades later, the Nation sued the government under the Administrative Procedures Act to require the government to assess Navajo water rights and to develop a plan to administer those rights.[1]

[1] This material is derived from Matthew L.M. Fletcher, As drought persists in the west, justices to consider Navajo Nation's rights to Colorado River, SCOTUSBlog, March 17, 2023, https://www.scotusblog.com/2023/03/as-drought-persists-in-the-west-justices-to-consider-navajo-nations-rights-to-colorado-river/.

Arizona v. Navajo Nation

United States Supreme Court, 2023

600 U.S. __, 143 S. Ct. __

Justice KAVANAUGH delivered the opinion of the Court.

In 1848, the United States won the Mexican-American War and acquired vast new territory from Mexico in what would become the American West. The Navajos lived within a discrete portion of that expansive and newly American territory. For the next two decades, however, the United States and the Navajos periodically waged war against one another. In 1868, the United States and the Navajos agreed to a peace treaty. In exchange for the Navajos' promise not to engage in further war, the United States established a large reservation for the Navajos in their original homeland in the western United States. Under the 1868 treaty, the Navajo Reservation includes (among other things) the land, the minerals below the land's surface, and the timber on the land, as well as the right to use needed water on the reservation.

The question in this suit concerns "reserved water rights"—a shorthand for the water rights implicitly reserved to accomplish the purpose of the reservation. Cappaert v. United States, 426 U.S. 128, 138, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976); see also Winters v. United States, 207 U.S. 564, 576–577, 28 S.Ct. 207, 52 L.Ed. 340 (1908). The Navajos' claim is not that the United States has interfered with their water access. Instead, the Navajos contend that the treaty requires the United States to take affirmative steps to secure water for the Navajos—for example, by assessing the Tribe's water needs, developing a plan to secure the needed water, and potentially building pipelines, pumps, wells, or other water infrastructure—either to facilitate better access to water on the reservation or to transport off-reservation water onto the reservation. In light of the treaty's text and history, we conclude that the treaty does not require the United States to take those affirmative steps. And it is not the Judiciary's role to rewrite and update this 155-year-old treaty. Rather, Congress and the President may enact—and often have enacted—laws to assist the citizens of the western United States, including the Navajos, with their water needs.

* * *

I

* * *

Under the 1868 treaty, the Navajo Reservation includes not only the land within the boundaries of the reservation, but also water rights. Under this Court's longstanding reserved water rights doctrine, sometimes referred to as the Winters doctrine, the Federal Government's reservation of land for an Indian tribe also implicitly reserves the right to use needed water from

various sources—such as groundwater, rivers, streams, lakes, and springs—that arise on, border, cross, underlie, or are encompassed within the reservation. See Winters v. United States, 207 U.S. 564, 576–577, 28 S.Ct. 207, 52 L.Ed. 340 (1908); see also Cappaert v. United States, 426 U.S. 128, 138–139, 143, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976); Arizona v. California, 373 U.S. 546, 598–600, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963); F. Cohen, Handbook of Federal Indian Law § 19.03(2)(a), pp. 1212–1213 (N. Newton ed. 2012). Under the Winters doctrine, the Federal Government reserves water only "to the extent needed to accomplish the purpose of the reservation." Sturgeon v. Frost, 587 U. S. ——, ——, 139 S.Ct. 1066, 1078, 203 L.Ed.2d 453 (2019) (internal quotation marks omitted); United States v. New Mexico, 438 U.S. 696, 700–702, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978).

The Navajo Reservation lies almost entirely within the Colorado River Basin, and three vital rivers—the Colorado, the Little Colorado, and the San Juan—border the reservation. To meet their water needs for household, agricultural, industrial, and commercial purposes, the Navajos obtain water from rivers, tributaries, springs, lakes, and aquifers on the reservation.

Much of the western United States is arid. Water has long been scarce, and the problem is getting worse. From 2000 through 2022, the region faced the driest 23-year period in more than a century and one of the driest periods in the last 1,200 years. And the situation is expected to grow more severe in future years. So even though the Navajo Reservation encompasses numerous water sources and the Tribe has the right to use needed water from those sources, the Navajos face the same water scarcity problem that many in the western United States face.

Over the decades, the Federal Government has taken various steps to assist the people in the western States with their water needs. The Solicitor General explains that, for the Navajo Tribe in particular, the Federal Government has secured hundreds of thousands of acre-feet of water and authorized billions of dollars for water infrastructure on the Navajo Reservation. See Tr. of Oral Arg. 5; see also, e.g., Consolidated Appropriations Act, 2021, Pub. L. 116–260, 134 Stat. 3227, 3230; Northwestern New Mexico Rural Water Projects Act, §§ 10402, 10609, 10701, 123 Stat. 1372, 1395–1397; Central Arizona Project Settlement Act of 2004, § 104, 118 Stat. 3487; Colorado Ute Settlement Act Amendments of 2000, 114 Stat. 2763A–261, 2763A–263; Act of June 13, 1962, 76 Stat. 96; Act of Apr. 19, 1950, 64 Stat. 44–45.

In the Navajos' view, however, those efforts did not fully satisfy the United States's obligations under the 1868 treaty. The Navajos therefore sued the U. S. Department of the Interior, the Bureau of Indian Affairs, and other federal parties. As relevant here, the Navajos asserted a breach-of-trust claim arising out of the 1868 treaty and sought to "compel the Federal Defendants to determine the water required to meet the needs" of the Navajos in Arizona and to "devise a plan to meet those needs." App. 86. The States of Arizona, Nevada, and Colorado intervened against the Tribe to protect those States' interests in water from the Colorado River.

According to the Navajos, the United States must do more than simply not interfere with the reserved water rights. The Tribe argues that the United States also must take affirmative steps to secure water for the Tribe— including by assessing the Tribe's water needs, developing a plan to secure the needed water, and potentially building pipelines, pumps, wells, or other water infrastructure. See Tr. of Oral Arg. 102 (counsel for Navajo Nation: "I can't say that" the United States's obligation "to ensure access" to water "would never require any infrastructure whatsoever").

* * *

II

When the United States establishes a tribal reservation, the reservation generally includes (among other things) the land, the minerals below the land's surface, the timber on the land, and the right to use needed water on the reservation, referred to as reserved water rights. See United States v. Shoshone Tribe, 304 U.S. 111, 116–118, 58 S.Ct. 794, 82 L.Ed. 1213 (1938); Winters v. United States, 207 U.S. 564, 576–577, 28 S.Ct. 207, 52 L.Ed. 340 (1908); see also Cappaert v. United States, 426 U.S. 128, 138–139, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976). Each of those rights is a stick in the bundle of property rights that makes up a reservation.

This suit involves water. To help meet their water needs, the Navajos obtain water from, among other sources, rivers, tributaries, springs, lakes, and aquifers on the reservation. As relevant here, the Navajos do not contend that the United States has interfered with their access to water. Rather, the Navajos argue that the United States must take affirmative steps to secure water for the Tribe—for example, by assessing the Tribe's water needs, developing a plan to secure the needed water, and potentially building pipelines, pumps, wells, or other water infrastructure.

The Tribe asserts a breach-of-trust claim. To maintain such a claim here, the Tribe must establish, among other things, that the text of a treaty, statute, or regulation imposed certain duties on the United States. See United States v. Jicarilla Apache Nation, 564 U.S. 162, 173–174, 177–178, 131 S.Ct. 2313, 180 L.Ed.2d 187 (2011); United States v. Navajo Nation, 537 U.S. 488, 506–507, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003); United States v. Mitchell, 445 U.S. 535, 542, 546, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980). The Federal Government owes judicially enforceable duties to a tribe "only to the extent it expressly accepts those responsibilities." Jicarilla, 564 U.S. at 177, 131 S.Ct. 2313. Whether the Government has expressly accepted such obligations "must train on specific rights-creating or duty-imposing" language in a treaty, statute, or regulation. Navajo Nation, 537 U.S. at 506, 123 S.Ct. 1079. That requirement follows from separation of powers principles. As this Court recognized in Jicarilla, Congress and the President exercise the "sovereign function" of organizing and managing "the Indian trust relationship." 564 U.S. at 175, 131 S.Ct. 2313. So the federal courts in turn must adhere to the text of the relevant law—here, the treaty.

In the Tribe's view, the 1868 treaty imposed a duty on the United States to take affirmative steps to secure water for the Navajos. With respect, the Tribe is incorrect. The 1868 treaty "set apart" a reservation for the "use and occupation of the Navajo tribe." 15 Stat. 668. But it contained no "rights-creating or duty-imposing" language that imposed a duty on the United States to take affirmative steps to secure water for the Tribe. Navajo Nation, 537 U.S. at 506, 123 S.Ct. 1079.

Notably, the 1868 treaty did impose a number of specific duties on the United States. Cf. Jicarilla, 564 U.S. at 184–185, 131 S.Ct. 2313. For example, the treaty required the United States to construct a number of buildings on the reservation, including schools, a chapel, a carpenter shop, and a blacksmith shop. 15 Stat. 668–669. The treaty also mandated that the United States provide teachers for the Navajos' schools for at least 10 years, and to provide articles of clothing or other goods to the Navajos. Id., at 669. And the treaty required the United States to supply seeds and agricultural implements for up to three years. Ibid.

But the treaty said nothing about any affirmative duty for the United States to secure water. And as this Court has stated, "Indian treaties cannot be rewritten or expanded beyond their clear terms." Choctaw Nation v. United States, 318 U.S. 423, 432, 63 S.Ct. 672, 87 L.Ed. 877 (1943); cf. Jicarilla, 564 U.S. at 173–174, 177–178, 131 S.Ct. 2313; Navajo Nation, 537 U.S. at 506–507, 123 S.Ct. 1079; Mitchell, 445 U.S. at 542, 546, 100 S.Ct. 1349. So it is here.

Moreover, it would be anomalous to conclude that the United States must take affirmative steps to secure water given that the United States has no similar duty with respect to the land on the reservation. For example, under the treaty, the United States has no duty to farm the land, mine the minerals, or harvest the timber on the reservation—or, for that matter, to build roads and bridges on the reservation. Cf. id., at 542–543. Just as there is no such duty with respect to the land, there likewise is no such duty with respect to the water.

To be sure, this Court's precedents have stated that the United States maintains a general trust relationship with Indian tribes, including the Navajos. Jicarilla, 564 U.S. at 176, 131 S.Ct. 2313. But as the Solicitor General explains, the United States is a sovereign, not a private trustee, meaning that "Congress may style its relations with the Indians a trust without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is limited or bare compared to a trust relationship between private parties at common law." Id., at 174, 131 S.Ct. 2313 (internal quotation marks omitted). Therefore, unless Congress has created a conventional trust relationship with a tribe as to a particular trust asset, this Court will not "apply common-law trust principles" to infer duties not found in the text of a treaty, statute, or regulation. Id., at 178, 131 S.Ct. 2313. Here, nothing in the 1868 treaty establishes a conventional trust relationship with respect to water.

In short, the 1868 treaty did not impose a duty on the United States to take affirmative steps to secure water for the Tribe—including the steps requested by the Navajos here, such as determining the water needs of the Tribe, providing an accounting, or developing a plan to secure the needed water.

Of course, it is not surprising that a treaty ratified in 1868 did not envision and provide for all of the Navajos' current water needs 155 years later, in 2023. Under the Constitution's separation of powers, Congress and the President may update the law to meet modern policy priorities and needs. To that end, Congress may enact—and often has enacted—legislation to address the modern water needs of Americans, including the Navajos, in the West. Indeed, Congress has authorized billions of dollars for water infrastructure for the Navajos. See, e.g., Tr. of Oral Arg. 5, 11; Consolidated Appropriations Act, 2021, Pub. L. 116–260, 134 Stat. 3230.2

But it is not the Judiciary's role to update the law. And on this issue, it is particularly important that federal courts not do so. Allocating water in the arid regions of the American West is often a zero-sum situation. See Brief for Western Water Users and Trade Associations as Amici Curiae 13–14, 18–21. And the zero-sum reality of water in the West underscores that courts must stay in their proper constitutional lane and interpret the law (here, the treaty) according to its text and history, leaving to Congress and the President the responsibility to enact appropriations laws and to otherwise update federal law as they see fit in light of the competing contemporary needs for water.

III

The Navajo Tribe advances several other arguments in support of its claim that the 1868 treaty requires the United States to take affirmative steps to secure water for the Navajos. None is persuasive.

First, the Navajos note that the text of the 1868 treaty established the Navajo Reservation as a "permanent home." 15 Stat. 671. In the Tribe's view, that language means that the United States agreed to take affirmative steps to secure water. But that assertion finds no support in the treaty's text or history, or in any of this Court's precedents. The 1868 treaty granted a reservation to the Navajos and imposed a variety of specific obligations on the United States—for example, building schools and a chapel, providing teachers, and supplying seeds and agricultural implements. The reservation contains a number of water sources that the Navajos have used and continue to rely on. But as explained above, the 1868 treaty imposed no duty on the United States to take affirmative steps to secure water for the Tribe. The 1868 treaty, as demonstrated by its text and history, helped to ensure that the Navajos could return to their original land. See Treaty Between the United States of America and the Navajo Tribe of Indians With a Record of the Discussions That Led to Its Signing 2, 4, 10–11, 15 (1968).

19Second, the Navajos rely on the provision of the 1868 treaty in which the United States agreed to provide the Tribe with certain "seeds and agricultural implements" for up to three years. 15 Stat. 669. In the Navajos' view, those seeds and implements would be unusable without water. But the reservation contains a number of water sources that the Navajos have used and continue to rely on. And the United States's duty to temporarily provide seeds and agricultural implements for three years did not include an additional duty to take affirmative steps to secure water, and to

do so indefinitely into the future. If anything, the treaty's express requirement that the United States supply seeds and agricultural implements for a 3-year period—like the treaty's requirement that the United States build schools, a chapel, and the like—demonstrates that the United States and the Navajos knew how to impose specific affirmative duties on the United States when they wanted to do so.

Third, the Navajos refer to the lengthy Colorado River water rights litigation that unfolded in a series of cases decided by this Court from the 1960s to the early 2000s, and they note that the United States once opposed the intervention of the Navajos in that litigation. See Response of United States to Motion of Navajo Tribe To Intervene in Arizona v. California, O. T. 1961, No. 8, Orig. The Navajos point to the United States's opposition as evidence that the United States has control over the reserved water rights. According to the Navajos, the United States's purported control supports their view that the United States owes trust duties to the Navajos. But the "Federal Government's liability" on a breach-of-trust claim "cannot be premised on control alone." United States v. Navajo Nation, 556 U.S. 287, 301, 129 S.Ct. 1547, 173 L.Ed.2d 429 (2009). Again, the Federal Government must "expressly accep[t]" trust responsibilities in a treaty, statute, or regulation that contains "rights-creating or duty-imposing" language. United States v. Jicarilla Apache Nation, 564 U.S. 162, 177, 131 S.Ct. 2313, 180 L.Ed.2d 187 (2011); United States v. Navajo Nation, 537 U.S. 488, 506, 123 S.Ct. 1079, 155 L.Ed.2d 60 (2003). The Navajos have not identified anything of the sort. In addition, the Navajos may be able to assert the interests they claim in water rights litigation, including by seeking to intervene in cases that affect their claimed interests, and courts will then assess the Navajos' claims and motions as appropriate. See 28 U.S.C. § 1362; Arizona v. California, 460 U.S. 605, 615, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983); see also Blatchford v. Native Village of Noatak, 501 U.S. 775, 784, 111 S.Ct. 2578, 115 L.Ed.2d 686 (1991); Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 472–474, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976).3

Fourth, the Tribe argues that, in 1868, the Navajos would have understood the treaty to mean that the United States must take affirmative steps to secure water for the Tribe. But the text of the treaty says nothing to that effect. And the historical record does not suggest that the United States agreed to undertake affirmative efforts to secure water for the Navajos—any more than the United States agreed to farm land, mine minerals, harvest timber, build roads, or construct bridges on the reservation. The record of the treaty negotiations makes no mention of any water-related obligations of the United States at all. See Treaty Between the United States of America and the Navajo Tribe of Indians With a Record of the Discussions That Led to Its Signing.

* * *

The 1868 treaty reserved necessary water to accomplish the purpose of the Navajo Reservation. See Winters v. United States, 207 U.S. 564, 576–577, 28 S.Ct. 207, 52 L.Ed. 340 (1908). But the treaty did not require the United States to take affirmative steps to secure water for the Tribe. We reverse the judgment of the U. S. Court of Appeals for the Ninth Circuit.

It is so ordered.

Justice THOMAS concurring.

* * *

In United States v. Jicarilla Apache Nation, 564 U.S. 162, 131 S.Ct. 2313, 180 L.Ed.2d 187 (2011), . . . we explained that the Federal Government is "not a private trustee" but a "sovereign," id., at 173–174, 131 S.Ct. 2313, and that "[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute," id., at 177, 131 S.Ct. 2313. Accordingly, any legal trusts established or duties self-imposed by the Government for a tribe's benefit are "defined and governed by statutes rather than the common law." Id., at 174, 131 S.Ct. 2313; see also id., at 173, 131 S.Ct. 2313 (emphasizing that " '[t]he general relationship between the United States and the Indian tribes is not comparable to a private trust relationship' "). The Court's opinion today represents a step in the same direction, making clear that tribes' legal claims against the Government must be based on specific provisions of positive law, not merely an amorphous "trust relationship."

However, the Court has also invoked the "trust relationship" to shape at least two other areas of its Indian-law jurisprudence—with questionable results. For example, the Court has identified "the unique trust relationship" with the Indians as the source of pro-Indian "canons of construction" that are supposedly "applicable [only] in Indian law." County of Oneida v. Oneida Indian Nation of N. Y., 470 U.S. 226, 247, 105 S.Ct. 1245, 84 L.Ed.2d 169 (1985); see also EEOC v. Karuk Tribe Housing Auth., 260 F.3d 1071, 1081 (CA9 2001) (refusing to apply the Age Discrimination in Employment Act of 1967 to tribes in part because of those canons). But it is far from clear how such a trust relationship would support different interpretive tools. The first cases to apply those pro-Indian canons did not ground them in any "trust relationship," but in the more basic idea that ambiguous treaty provisions should be construed against the drafting party. See, e.g., Patterson v. Jenks, 2 Pet. 216, 229, 27 U.S. 216, 7 L.Ed. 402 (1829); Worcester v. Georgia, 6 Pet. 515, 552, 31 U.S. 515, 8 L.Ed. 483 (1832); The Kansas Indians, 5 Wall. 737, 760, 18 L.Ed. 667 (1867); Restatement (Second) of Contracts § 206 (1979); Restatement (First) of Contracts § 505 (1932). These canons then "jumped without discussion from the interpretation of treaties to the interpretation of statutes" in the 20th century. A. Barrett, Substantive Canons and Faithful Agency, 90 B. U. L. Rev. 109, 152 (2010). To this day, it remains unclear how the "trust relationship" could justify freestanding pro-Indian canons that authorize courts to depart from the ordinary rules of statutory interpretation.

Next, the Court has also suggested that the "trust relationship" provides the Federal Government with an additional power, not enumerated in the Constitution, to "do all that [is] required" to protect Indians. Morton v. Mancari, 417 U.S. 535, 552, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974) (internal quotation marks omitted); see also Board of County Comm'rs v. Seber, 318 U.S.

705, 715–716, 63 S.Ct. 920, 87 L.Ed. 1094 (1943). In doing so, the Court has apparently used the trust relationship to feed into the so-called plenary power that Congress supposedly enjoys over Indian affairs. But the Court has also approved the use of that power to, among other things, restrict tribal sovereignty and "eliminate tribal rights." See South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343, 118 S.Ct. 789, 139 L.Ed.2d 773 (1998); Washington v. Confederated Bands and Tribes of Yakima Nation, 439 U.S. 463, 501, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979); Haaland, 599 U. S., at ——, —— S.Ct., at —— (THOMAS, J., dissenting) (slip op., at 35). Accordingly, it is difficult to see how such a plenary power could be rooted in a trust relationship with Indians. And it seems at least slightly incongruous to use Indians' trust in the Government as both the basis for a power that can restrict tribal rights and canons of interpretation that favor Indians.

The influence of the "trust relationship" idea on these doctrinal areas is troubling, as the trust relationship appears to lack any real support in our constitutional system. See id., at —— – – ——, —— S.Ct., at —— – —— (slip op., at 26–27). The text of the Constitution (which mentions Indians only in the contexts of commerce and apportionment) is completely silent on any such trust relationship. See Art. I, §§ 2, 8; Amdt. 14, § 2. Further, the trust relationship does not have any historical basis. Its genesis is usually traced to this Court's statement in Cherokee Nation v. Georgia, 5 Pet. 1, 8 L.Ed. 25 (1831), that the relation of the United States to Indians has "resembl[ed] that of a ward to his guardian," id., at 17; see also F. Cohen, Handbook of Federal Indian Law § 2.02[2], p. 117 (2012) (Cohen). However, that statement was dicta, see Haaland, 599 U. S., at —— – ——, —— S.Ct., at —— – —— (THOMAS, J., dissenting) (slip op., at 25–27); and, in any event, the Indian Tribe in that case had a specific treaty calling for the Federal Government's "protection," Cherokee Nation, 5 Pet. at 17. Some treaties with tribes have contained similar provisions; others have not. Compare Treaty With the Wyandots, 7 Stat. 31, with Treaty With the Mohawks, 7 Stat. 61. And, of course, some tribes before and after the Founding engaged in warfare with the Federal Government. Cohen § 1.03[2], at 36; id., § 1.03[3], at 40. In short, the idea of a generic trust relationship with all tribes—to say nothing of legally enforceable fiduciary duties—seems to lack a historical or constitutional basis.

In future cases, we should clarify the exact status of this amorphous and seemingly ungrounded "trust relationship." As a start, it would be helpful to acknowledge that many of this Court's statements about the trust relationship were mere dicta. E.g., Seminole Nation, 316 U.S. at 293–294, 62 S.Ct. 1049 (discrete trust); Mancari, 417 U.S. at 551–552, 94 S.Ct. 2474 (equal protection challenge to Government hiring program); Seber, 318 U.S. at 707, 63 S.Ct. 920 (state taxes on Indian lands). In the meantime, however, the Court should take care to ensure that this confusion does not spill over into yet further areas of the law.

Justice GORSUCH, dissenting.

* * *

II

With a view of this history, the proper outcome of today's case follows directly. The Treaty of 1868 promises the Navajo a "permanent home." Treaty Between the United States of America and the Navajo Tribe of Indians, June 1, 1868, Art. XIII, 15 Stat. 671 (ratified Aug. 12, 1868) (Treaty of 1868). That promise—read in conjunction with other provisions in the Treaty, the history surrounding its enactment, and background principles of Indian law—secures for the Navajo some measure of water rights. Yet even today the extent of those water rights remains unadjudicated and therefore unknown. What is known is that the United States holds some of the Tribe's water rights in trust. And it exercises control over many possible sources of water in which the Tribe may have rights, including the mainstream of the Colorado River. Accordingly, the government owes the Tribe a duty to manage the water it holds for the Tribe in a legally responsible manner. In this lawsuit, the Navajo ask the United States to fulfill part of that duty by assessing what water rights it holds for them. The government owes the Tribe at least that much.

A

Begin with the governing legal principles. Under our Constitution, "all Treaties made" are "the supreme Law of the Land." Art. VI, cl. 2. Congress can pass laws to implement those treaties, see, e.g., Bond v. United States, 572 U.S. 844, 851, 855, 134 S.Ct. 2077, 189 L.Ed.2d 1 (2014), and the Executive Branch can act in accordance with them, see, e.g., Fok Yung Yo v. United States, 185 U.S. 296, 303, 22 S.Ct. 686, 46 L.Ed. 917 (1902). But the Judiciary also has an important role to play. The Constitution extends "[t]he judicial Power" to cases "arising under ... Treaties made, or which shall be made." Art. III, § 2, cl. 1. As a result, this Court has recognized that Tribes may sue to enforce rights found in treaties. See Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 472–477, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976). Other branches share the same understanding. In enacting the Indian Trust Asset Reform Act of 2016, Congress confirmed its belief that "commitments made through written treaties" with the Tribes "established enduring and *enforceable* Federal obligations" to them. 25 U.S.C. § 5601(4)–(5) (emphasis added). The Executive Branch has likewise and repeatedly advanced the position—including in this very litigation—that "a treaty can be the basis of a breach-of-trust claim" enforceable in federal court. Brief for Federal Parties 22–23, n. 5.

What rights does a treaty secure? A treaty is "essentially a contract between two sovereign nations." Washington v. Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. 658, 675, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979). So a treaty's interpretation, like "a contract's interpretation, [is] a matter of determining the parties' intent." BG Group plc v. Republic of Argentina, 572 U.S. 25, 37, 134 S.Ct. 1198, 188 L.Ed.2d 220 (2014). That means courts must look to the "shared expectations of the contracting parties." Air France v. Saks, 470 U.S. 392, 399, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985). All with an eye to ensuring both sides receive the "benefit of their bargain." Mobil Oil Exploration & Producing Southeast, Inc. v. United States, 530 U.S. 604, 621, 120 S.Ct. 2423, 147 L.Ed.2d 528 (2000).

* * *

[Other contract doctrines] impose a "higher degree of scrutiny" on contracts made between parties sharing a fiduciary relationship, given the risk the fiduciary will (intentionally or otherwise) "misuse" its position of trust. 28 R. Lord, Williston on Contracts § 71:53, p. 617 (4th ed. 2020). When it comes to the United States, such fiduciary duties must, of course, come from positive law, "not the atmosphere." Haaland v. Brackeen, 599 U. S. ——, —— – ——, —— S.Ct. ——, —— – ——, —— L.Ed.2d —— (2023) (slip op., at 11–12). But the United States has, through "acts of Congress" and other affirmative conduct, voluntarily assumed certain specific fiduciary duties to the Tribes. Seminole Nation v. United States, 316 U.S. 286, 287, 297, 62 S.Ct. 1049, 86 L.Ed. 1480, 86 L.Ed. 1777 (1942). That raises the specter of undue influence—especially since, in many negotiations with the Tribes, the United States alone had "representatives skilled in diplomacy" who were "masters of [its] written language," who fully "underst[ood] the ... technical estates known to [its] law," and who were "assisted by an interpreter [they] employed." Jones v. Meehan, 175 U.S. 1, 11, 20 S.Ct. 1, 44 L.Ed. 49 (1899).

Put together, these insights have long influenced the interpretation of Indian treaties. "The language used in treaties with the Indians should never be construed to their prejudice." Worcester v. Georgia, 6 Pet. 515, 582, 31 U.S. 515, 8 L.Ed. 483 (1832) (McLean, J., concurring). Rather, when a treaty's words "are susceptible of a more extended meaning than their plain import," we must assign them that meaning. Ibid. Our duty, this Court has repeatedly explained, lies in interpreting Indian treaties "in a spirit which generously recognizes the full obligation of this [N]ation." Tulee v. Washington, 315 U.S. 681, 684–685, 62 S.Ct. 862, 86 L.Ed. 1115 (1942); see also United States v. Winans, 198 U.S. 371, 380–381, 25 S.Ct. 662, 49 L.Ed. 1089 (1905); Choctaw Nation v. United States, 119 U.S. 1, 27–28, 7 S.Ct. 75, 30 L.Ed. 306 (1886). We sometimes call this interpretive maxim—really just a special application of ordinary contract-interpretation principles—the Indian canon. See F. Cohen, Handbook of Federal Indian Law § 2.02, p. 119 (N. Newton ed. 2005); R. Collins, Never Construed to Their Prejudice: In Honor of David Getches, 84 U. Colo. L. Rev. 1, 6–7 (2013).

With time, too, these interpretive insights have yielded some more concrete rules. First, courts must "give effect to the terms" of treaties as "the Indians themselves would have understood them." Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999); see also Tulee, 315 U.S. at 684, 62 S.Ct. 862. Second, to gain a complete view of the Tribes' understanding, courts may (and often must) "look beyond the written words to the larger context that frames the Treaty." Mille Lacs Band, 526 U.S. at 196, 119 S.Ct. 1187. That includes taking stock of "the history of the treaty, the negotiations, and the practical construction adopted by the parties." Choctaw Nation v. United States, 318 U.S. 423, 432, 63 S.Ct. 672, 87 L.Ed. 877 (1943). Third, courts must assume into those treaties a duty of "good faith" on the part of the United States to "protec[t]" the Tribes and their ways of life. See Washington State Commercial Passenger Fishing Vessel Assn., 443 U.S. at 666–667, 99 S.Ct. 3055.

It is easy to see the purchase these rules have for reservation-creating treaties like the one at issue in this case. Treaties like that almost invariably designate property as a permanent home

for the relevant Tribe. See McGirt v. Oklahoma, 591 U. S. ——, ——, 140 S.Ct. 2452, 2461, 207 L.Ed.2d 985 (2020). And the promise of a permanent home necessarily implies certain benefits for the Tribe (and certain responsibilities for the United States). One set of those benefits and responsibilities concerns water. This Court long ago recognized as much in Winters v. United States, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908).

That case involved the Milk River, which flows along the northern border of the Fort Belknap Reservation. Id., at 565–567, 28 S.Ct. 207 (statement of McKenna, J.). Upstream landowners invested their own resources to build dams and reservoirs which indirectly deprived the Tribes living on the reservation of water by reducing the volume available downstream. Id., at 567, 28 S.Ct. 207. The United States sued on the Tribes' behalf to enjoin the landowners' actions. Id., at 565, 28 S.Ct. 207. In assessing the government's claim, the Court looked to the agreement establishing that reservation and found no language speaking to the Tribes' water rights at all. Id., at 575–576, 28 S.Ct. 207. Nevertheless, the Court concluded, the agreement reserved water rights for the Tribes in the Milk River and found for the government. Id., at 577, 28 S.Ct. 207. The Court considered it inconceivable that, having once enjoyed "beneficial use" of nearby waters, the Tribes would have contracted to "give up all th[at]." Id., at 576, 28 S.Ct. 207. After all, the lands described in the reservation "were arid and, without irrigation, were practically valueless," and "communities could not be established" without access to adequate water. Ibid. (internal quotation marks omitted). For these reasons, the agreement's provisions designating the land as a permanent home for the Tribes necessarily implied that the Tribes would enjoy continued access to nearby sources of water. Ibid. A contrary reading, the Court said, would "impair or defeat" the parties' agreement. Id., at 577, 28 S.Ct. 207.

While Winters involved a claim brought by the United States, the federal government asserted "the rights of the Indians" themselves. Id., at 576, 28 S.Ct. 207. This Court's subsequent cases have confirmed as much. In United States v. Powers, 305 U.S. 527, 59 S.Ct. 344, 83 L.Ed. 330 (1939), for instance, this Court cited Winters as authority for its holding that a different treaty impliedly "reserved" waters "for the equal benefit of tribal members." Id., at 532, 59 S.Ct. 344 (emphasis added). So when the reservation was dissolved and the land allotted, "the right to use some portion of tribal waters essential for cultivation passed to the owners" of the individual plots of land. Ibid. (emphasis added). Later, in Arizona I, this Court described Winters as standing for the principle that "the Government, when it create[s an] Indian Reservation, intend[s] to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless." 373 U.S. at 600, 83 S.Ct. 1468 (emphasis added). Congress would not "creat[e] an Indian Reservation without intending to reserve waters necessary to make the reservation livable." Id., at 559, 83 S.Ct. 1468.

* * *

Sometimes the United States may hold a Tribe's water rights in trust. When it does, this Court has recognized, the United States must manage those water rights "[a]s a fiduciary," Arizona

v. California, 460 U.S. 605, 626–627, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983) (Arizona II), one held to "the most exacting fiduciary standards," Seminole Nation, 316 U.S. at 297, 62 S.Ct. 1049. This is no special rule. "[F]iduciary duties characteristically attach to decisions" that involve "managing [the] assets and distributing [the] property" of others. Pegram v. Herdrich, 530 U.S. 211, 231, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000). It follows, then, that a Tribe may bring an action in equity against the United States for "fail[ing] to provide an accurate accounting of " the water rights it holds on a Tribe's behalf. United States v. Tohono O'odham Nation, 563 U.S. 307, 318, 131 S.Ct. 1723, 179 L.Ed.2d 723 (2011). After all, it is black-letter law that a plaintiff may seek an accounting "whenever the defendant is a fiduciary who has been entrusted with property of some kind belonging to the plaintiff," even if the defendant is not "express[ly]" named a "trustee." J. Eichengrun, Remedying the Remedy of Accounting, 60 Ind. L. J. 463, 468–469, and n. 18 (1985) (noting cases); see also A. Newman, G. Bogert, & G. Bogert, Law of Trusts and Trustees § 967, p. 201 (3d ed. 2010) ("fiduciary relationship [is] sufficient to support an action for an accounting" whenever the fiduciary exercises "discretion over trust" assets).

B

With these principles in mind, return to the Navajo's case and start with the most basic terms of the parties' agreement. In signing the Treaty of 1868, the Navajo agreed to "relinquish all right to occupy any territory outside their reservation." Art. IX, 15 Stat. 670. In exchange, the Navajo were entitled to "make the reservation ... their permanent home." Art. XIII, id., at 671. Even standing alone, that language creates enforceable water rights under Winters. As both parties surely would have recognized, no people can make a permanent home without the ability to draw on adequate water. Otherwise, the Tribe's land would be "practically valueless," "defeat[ing] the declared purpose" of the Treaty. Winters, 207 U.S. at 576–577, 28 S.Ct. 207.

Other clues make the point even more obvious. Various features of the Treaty were expressly keyed to an assumption about the availability of water. The United States agreed to build certain structures "within said reservation, where ... water may be convenient." Art. III, 15 Stat. 668. Under the Treaty's terms, too, individual Navajo were entitled to select tracts of land within the reservation to "commence farming" and for "purposes of cultivation." Art. V, ibid. If an individual could show that he "intend[ed] in good faith to commence cultivating the soil for a living," the Treaty entitled him to "receive seeds and agricultural implements." Art. VII, id., at 669. Similarly, the Treaty promised large numbers of animals to the Tribe. Art. XII, id., at 670. Those guarantees take as a given that the Tribe could access water sufficient to live, tend crops, and raise animals in perpetuity.

As we have seen, "the history of the treaty, the negotiations, and the practical construction adopted by the parties" may also inform a treaty's interpretation. Choctaw Nation, 318 U.S. at 432, 63 S.Ct. 672. And here history is particularly telling. Much of the Navajo's plight at Bosque Redondo owed to both the lack of water and the poor quality of what water did exist. General Sherman appreciated this point and expressly raised the availability of water in his negotiations

with the Tribe. Treaty Record 5. Doubtless, he did so because everyone had found the water at Bosque Redondo insufficient and because the Navajo's strong desire to return home rested in no small part on the availability of water there. Id., at 3, 8. Because the Treaty of 1868 must be read as the Navajo "themselves would have understood" it, Mille Lacs Band, 526 U.S. at 196, 119 S.Ct. 1187, it is impossible to conclude that water rights were not included. Really, few points appear to have been more central to both parties' dealings.

What water rights does the Treaty of 1868 secure to the Tribe? Remarkably, even today no one knows the answer. But at least we know the right question to ask: How much is required to fulfill the purposes of the reservation that the Treaty of 1868 established? See Nevada v. United States, 463 U.S. 110, 116, n. 1, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983) (citing cases). We know, too, that a Tribe's Winters rights are not necessarily limited to the water sources found within the corners of their reservation. Winters itself involved a challenge to the misappropriation of water by upstream landowners from a river that ran along the border of tribal lands. 207 U.S. at 576, 28 S.Ct. 207. And here the Navajo's Reservation likewise stands adjacent to a long stretch of the Colorado River flowing through both its Upper and Lower Basins. App. 91. Finally, we know that "it is impossible to believe that when ... the Executive Department of this Nation created the [various] reservations" in the arid Southwest it was "unaware that ... water from the [Colorado R]iver would be essential to the life of the Indian people and to the animals they hunted and the crops they raised." Arizona I, 373 U.S. at 598–599, 83 S.Ct. 1468. Nor does the United States dispute any of this. To the contrary, it acknowledges that the Navajo's water rights very well "may ... include some portion of the mainstream of the Colorado" that runs adjacent to their reservation. Tr. of Oral Arg. 33.

For our purposes today, that leaves just one question: Can the Tribe state a legally cognizable claim for relief asking the United States to assess what water rights they have? Not even the federal government seriously disputes that it acts "as a fiduciary" of the Tribes with respect to tribal waters it manages. Arizona II, 460 U.S. at 627–628, 103 S.Ct. 1382. Indeed, when it comes to the Navajo, the United States freely admits that it holds certain water rights for the Tribe "in trust." Tr. of Oral Arg. 40. And of course, that must be so given that the United States exercises pervasive control over much water in the area, including in the adjacent Colorado River. See Arizona I, 373 U.S. at 564–565, 83 S.Ct. 1468.

Those observations suffice to resolve today's dispute. As we have seen, that exact coupling—a fiduciary relationship to a specific group and complete managerial control over the property of that group—gives rise to a duty to account. See supra, at —— – ——. The United States, we know, must act in a "legally [a]dequate" way when it comes to the Navajo's water it holds in trust. Arizona II, 460 U.S. at 627, 103 S.Ct. 1382. It follows, as the United States concedes, that the federal government could not "legally" dam off the water flowing to their Reservation, as doing so would "interfere with [the Tribe's] exercise of their" water rights. Tr. of Oral Arg. 13. Implicit in that concession is another. Because Winters rights belong to the Navajo themselves, the United States cannot lawfully divert them elsewhere—just as a lawyer cannot dispose of a

client's property entrusted to him without permission. And the only way to ensure compliance with that obligation is to give the Tribe just what they request—an assessment of the water rights the federal government holds on the Tribe's behalf.

* * *

NOTES

1. Note the competing frames of this case. The five-justice majority frames this case as a breach of trust case, invoking the Court's precedents arising from claims for money damages against the United States under the Tucker Act (28 U.S.C. § 1491). E.g., United States v. Navajo Nation, 537 U.S. 488 (2003) (rejecting a money damages claim for breach of trust under the Tucker Act); United States v. Mitchell, 445 U.S. 535 (1980) (same). Keep in mind that Supreme Court precedents demand a much higher burden for tribes to prove a money damages case, even higher than the Tucker Act requires. See generally Matthew L.M. Fletcher, *Restatement as Aadizookaan*, 2022 Wis. L. Rev. 197, 201-04 (noting that the Court's Tucker Act cases lay down an additional "gloss" on top of the Tucker Act requirements that only tribal interests are obligated to meet).

The dissent frames the case as a contract breach between two sovereigns, a relationship originating in the Treaty Power of the Constitution and the Framers' understanding of tribal-federal relations. The dissent also points out that this is not a claim for money damages, instead a claim asking a court to effectively determine the scope of the federal government's general trust obligations to the Navajo Nation vis a vis the tribe's water rights. What the scope of the *enforceable* duty of protection is unclear; to repurpose Justice Gorsuch's language, "even today, no knows the answer." See generally Matthew L.M. Fletcher, *The Dark Matter of Federal Indian Law: The Duty of Protection*, 75 Me. L. Rev. __, manuscript at 2, 4 ("The standard tale told about the federal-tribal relationship incorrectly holds that Congress fills in those gaps as it sees fit. That narrative, supplied by federal actors throughout American history (that is, Congress, the Executive branch, and the judiciary), was usually told in the language of guardianship and plenary power, and more recently in the language of trusteeship. Tribal agency in this supposedly sovereign-to-sovereign relationship was almost always ignored and belittled. . . . This is wrong.") (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4298325.

2. Justice Thomas here brings forth yet another broadside on the foundational principles of federal Indian law, this time attacking the canons of construing Indian treaties (a class of canon of interpretation the Court lately has come to call a "substantive canon" of interpretation). Ironically, though Justice Thomas signs on to a majority opinion that claims devotion to separation of powers between branches of government, which is the key source of the canons of construction in Indian affairs, he insists there is no constitutional hook for the Indian canon.

Curious.

CHAPTER 12

FISHING AND HUNTING RIGHTS

SECTION B.

OFF-RESERVATION FISHING AND HUNTING

Replace note 1 on page 935 with the following:

The Supreme Court granted cert in *Washington v. United States*, the state of Washington's appeal of the culverts injunction. Justice Kennedy, who as a Ninth Circuit judge, had participated in prior en banc proceedings in earlier incarnations of *United States v. Washington*, recused himself from the case. The court heard oral argument but did not issue an opinion, announcing that it was an equally divided court and affirmed the lower court decision. 138 S. Ct. 1832 (2018).

Add subsection 3 to end of page 953:

3. NORTHERN GREAT PLAINS AND ROCKIES

Herrera v. Wyoming

United States Supreme Court, 2019

__ U.S. __, 139 S.Ct. 1686

Justice SOTOMAYOR delivered the opinion of the Court.

In 1868, the Crow Tribe ceded most of its territory in modern-day Montana and Wyoming to the United States. In exchange, the United States promised that the Crow Tribe "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon" and "peace subsists ... on the borders of the hunting districts." Treaty Between the United States of America and the Crow Tribe of Indians (1868 Treaty), Art. IV, May 7, 1868, 15 Stat. 650. Petitioner Clayvin Herrera, a member of the Tribe, invoked this treaty right as a defense against charges of off-season hunting in Bighorn National Forest in Wyoming. The Wyoming courts held that the treaty-protected hunting right expired when Wyoming became a State and, in any event, does not permit hunting in Bighorn National Forest because that land is not "unoccupied." We disagree. The Crow Tribe's hunting right survived Wyoming's statehood, and the lands within Bighorn National Forest did not become categorically "occupied" when set aside as a national reserve.

I

A

The Crow Tribe first inhabited modern-day Montana more than three centuries ago. *Montana v. United States*, 450 U.S. 544, 547, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981). The Tribe was nomadic, and its members hunted game for subsistence. J. Medicine Crow, From the Heart of the Crow Country 4–5, 8 (1992). The Bighorn Mountains of southern Montana and northern Wyoming "historically made up both the geographic and the spiritual heart" of the Tribe's territory. Brief for Crow Tribe of Indians as Amicus Curiae 5.

The westward migration of non-Indians began a new chapter in the Tribe's history. In 1825, the Tribe signed a treaty of friendship with the United States. Treaty With the Crow Tribe, Aug. 4, 1825, 7 Stat. 266. In 1851, the Federal Government and tribal representatives entered into the Treaty of Fort Laramie, in which the Crow Tribe and other area tribes demarcated their respective lands. *Montana*, 450 U.S. at 547–548, 101 S.Ct. 1245. The Treaty of Fort Laramie specified that "the tribes did not 'surrender the privilege of hunting, fishing, or passing over' any of the lands in dispute" by entering the treaty. Id., at 548, 101 S.Ct. 1245.

After prospectors struck gold in Idaho and western Montana, a new wave of settlement prompted Congress to initiate further negotiations. See F. Hoxie, Parading Through History 88–90 (1995). Federal negotiators, including Commissioner of Indian Affairs Nathaniel G. Taylor, met with Crow Tribe leaders for this purpose in 1867. Taylor acknowledged that "settlements ha[d] been made" upon the Crow Tribe's lands and that their "game [was] being driven away." Institute for the Development of Indian Law, Proceedings of the Great Peace Commission of 1867–1868, p. 86 (1975) (hereinafter Proceedings). He told the assembled tribal leaders that the United States wished to "set apart a tract of [Crow Tribe] country as a home" for the Tribe "forever" and to buy the rest of the Tribe's land. Ibid. Taylor emphasized that the Tribe would have "the right to hunt upon" the land it ceded to the Federal Government "as long as the game lasts." Ibid.

At the convening, Tribe leaders stressed the vital importance of preserving their hunting traditions. See id., at 88 (Black Foot: "You speak of putting us on a reservation and teaching us to farm.... That talk does not please us. We want horses to run after the game, and guns and ammunition to kill it. I would like to live just as I have been raised"); id., at 89 (Wolf Bow: "You want me to go on a reservation and farm. I do not want to do that. I was not raised so"). Although Taylor responded that "[t]he game w[ould] soon entirely disappear," he also reassured tribal leaders that they would "still be free to hunt" as they did at the time even after the reservation was created. Id., at 90.

The following spring, the Crow Tribe and the United States entered into the treaty at issue in this case: the 1868 Treaty. 15 Stat. 649. Pursuant to the 1868 Treaty, the Crow Tribe ceded over 30 million acres of territory to the United States. See *Montana*, 450 U.S. at 547–548, 101 S.Ct. 1245; Art. II, 15 Stat. 650. The Tribe promised to make its "permanent home" a reservation of

about 8 million acres in what is now Montana and to make "no permanent settlement elsewhere." Art. IV, 15 Stat. 650. In exchange, the United States made certain promises to the Tribe, such as agreeing to construct buildings on the reservation, to provide the Tribe members with seeds and implements for farming, and to furnish the Tribe with clothing and other goods. 1868 Treaty, Arts. III–XII, id., at 650–652. Article IV of the 1868 Treaty memorialized Commissioner Taylor's pledge to preserve the Tribe's right to hunt off-reservation, stating:

> "The Indians ... shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." Id., at 650.

A few months after the 1868 Treaty signing, Congress established the Wyoming Territory. Congress provided that the establishment of this new Territory would not "impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty." An Act to Provide a Temporary Government for the Territory of Wyoming (Wyoming Territory Act), July 25, 1868, ch. 235, 15 Stat. 178. Around two decades later, the people of the new Territory adopted a constitution and requested admission to the United States. In 1890, Congress formally admitted Wyoming "into the Union on an equal footing with the original States in all respects," in an Act that did not mention Indian treaty rights. An Act to Provide for the Admission of the State of Wyoming into the Union (Wyoming Statehood Act), July 10, 1890, ch. 664, 26 Stat. 222. Finally, in 1897, President Grover Cleveland set apart an area in Wyoming as a public land reservation and declared the land "reserved from entry or settlement." Presidential Proclamation No. 30, 29 Stat. 909. This area, made up of lands ceded by the Crow Tribe in 1868, became known as the Bighorn National Forest. See App. 234; *Crow Tribe of Indians v. Repsis*, 73 F. 3d 982, 985 (CA10 1995).

B

Petitioner Clayvin Herrera is a member of the Crow Tribe who resides on the Crow Reservation in Montana. In 2014, Herrera and other Tribe members pursued a group of elk past the boundary of the reservation and into the neighboring Bighorn National Forest in Wyoming. They shot several bull elk and returned to Montana with the meat. The State of Wyoming charged Herrera for taking elk off-season or without a state hunting license and with being an accessory to the same.

In state trial court, Herrera asserted that he had a protected right to hunt where and when he did pursuant to the 1868 Treaty. The court disagreed and denied Herrera's pretrial motion to dismiss. See Nos. CT–2015–2687, CT–2015–2688 (4th Jud. Dist. C.C., Sheridan Cty., Wyo., Oct. 16, 2015), App. to Pet. for Cert. 37, 41. Herrera unsuccessfully sought a stay of the trial court's order from the Wyoming Supreme Court and this Court. He then went to trial, where he was not permitted to advance a treaty-based defense, and a jury convicted him on both counts. The trial

court imposed a suspended jail sentence, as well as a fine and a 3-year suspension of Herrera's hunting privileges.

Herrera appealed. The central question facing the state appellate court was whether the Crow Tribe's off-reservation hunting right was still valid. The U.S. Court of Appeals for the Tenth Circuit, reviewing the same treaty right in 1995 in *Crow Tribe of Indians v. Repsis*, had ruled that the right had expired when Wyoming became a State. 73 F. 3d at 992–993. The Tenth Circuit's decision in *Repsis* relied heavily on a 19th-century decision of this Court, *Ward v. Race Horse*, 163 U.S. 504, 516, 16 S.Ct. 1076, 41 L.Ed. 244 (1896). Herrera argued in the state court that this Court's subsequent decision in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999), repudiated *Race Horse*, and he urged the Wyoming court to follow *Mille Lacs* instead of the *Repsis* and *Race Horse* decisions that preceded it.

The state appellate court saw things differently. Reasoning that Mille Lacs had not overruled *Race Horse*, the court held that the Crow Tribe's 1868 Treaty right expired upon Wyoming's statehood. No. 2016–242 (4th Jud. Dist., Sheridan Cty., Wyo., Apr. 25, 2017), App. to Pet. for Cert. 31–34. Alternatively, the court concluded that the *Repsis* Court's judgment merited issue-preclusive effect against Herrera because he is a member of the Crow Tribe, and the Tribe had litigated the *Repsis* suit on behalf of itself and its members. App. to Pet. for Cert. 15–17, 31; App. 258. Herrera, in other words, was not allowed to relitigate the validity of the treaty right in his own case.

The court also held that, even if the 1868 Treaty right survived Wyoming's entry into the Union, it did not permit Herrera to hunt in Bighorn National Forest. Again following *Repsis*, the court concluded that the treaty right applies only on "unoccupied" lands and that the national forest became categorically "occupied" when it was created. See App. to Pet. for Cert. 33–34; *Repsis*, 73 F. 3d at 994. The state appellate court affirmed the trial court's judgment and sentence.

The Wyoming Supreme Court denied a petition for review, and this Court granted certiorari. 585 U.S. ——, —— S.Ct. ——, —— L.Ed.2d —— (2018). For the reasons that follow, we now vacate and remand.

II

We first consider whether the Crow Tribe's hunting rights under the 1868 Treaty remain valid. Relying on this Court's decision in *Mille Lacs*, Herrera and the United States contend that those rights did not expire when Wyoming became a State in 1890. We agree.

A

Wyoming argues that this Court's decision in *Race Horse* establishes that the Crow Tribe's 1868 Treaty right expired at statehood. But this case is controlled by *Mille Lacs*, not *Race Horse*.

Race Horse concerned a hunting right guaranteed in a treaty with the Shoshone and Bannock Tribes. The Shoshone-Bannock Treaty and the 1868 Treaty with the Crow Tribe were signed in the same year and contain identical language reserving an off-reservation hunting right. See Treaty Between the United States of America and the Eastern Band of Shoshonees [sic] and the Bannack [sic] Tribe of Indians (Shoshone-Bannock Treaty), July 3, 1868, 15 Stat. 674–675 ("[T]hey shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts"). The *Race Horse* Court concluded that Wyoming's admission to the United States extinguished the Shoshone-Bannock Treaty right. 163 U.S. at 505, 514–515, 16 S.Ct. 1076.

Race Horse relied on two lines of reasoning. The first turned on the doctrine that new States are admitted to the Union on an "equal footing" with existing States. Id., at 511–514, 16 S.Ct. 1076 (citing, e.g., *Lessee of Pollard v. Hagan*, 3 How. 212, 11 L.Ed. 565 (1845)). This doctrine led the Court to conclude that the Wyoming Statehood Act repealed the Shoshone and Bannock Tribes' hunting rights, because affording the Tribes a protected hunting right lasting after statehood would be "irreconcilably in conflict" with the power—"vested in all other States of the Union" and newly shared by Wyoming—"to regulate the killing of game within their borders." 163 U.S. at 509, 514, 16 S.Ct. 1076.

Second, the Court found no evidence in the Shoshone-Bannock Treaty itself that Congress intended the treaty right to continue in "perpetuity." Id., at 514–515, 16 S.Ct. 1076. To the contrary, the Court emphasized that Congress "clearly contemplated the disappearance of the conditions" specified in the treaty. Id., at 509, 16 S.Ct. 1076. The Court decided that the rights at issue in the Shoshone-Bannock Treaty were "essentially perishable" and afforded the Tribes only a "temporary and precarious" privilege. Id., at 515, 16 S.Ct. 1076.

More than a century after Race Horse and four years after *Repsis* relied on that decision, however, *Mille Lacs* undercut both pillars of *Race Horse*'s reasoning. *Mille Lacs* considered an 1837 Treaty that guaranteed to several bands of Chippewa Indians the privilege of hunting, fishing, and gathering in ceded lands " 'during the pleasure of the President.' " 526 U.S. at 177, 119 S.Ct. 1187 (quoting 1837 Treaty With the Chippewa, 7 Stat. 537). In an opinion extensively discussing and distinguishing *Race Horse*, the Court decided that the treaty rights of the Chippewa bands survived after Minnesota was admitted to the Union. 526 U.S. at 202–208, 119 S.Ct. 1187.

Mille Lacs approached the question before it in two stages. The Court first asked whether the Act admitting Minnesota to the Union abrogated the treaty right of the Chippewa bands. Next, the Court examined the Chippewa Treaty itself for evidence that the parties intended the treaty right to expire at statehood. These inquires roughly track the two lines of analysis in *Race Horse*. Despite these parallel analyses, however, the *Mille Lacs* Court refused Minnesota's invitation to rely on *Race Horse*, explaining that the case had "been qualified by later decisions." 526 U.S. at

203, 119 S.Ct. 1187. Although *Mille Lacs* stopped short of explicitly overruling *Race Horse*, it methodically repudiated that decision's logic.

To begin with, in addressing the effect of the Minnesota Statehood Act on the Chippewa Treaty right, the *Mille Lacs* Court entirely rejected the "equal footing" reasoning applied in *Race Horse*. The earlier case concluded that the Act admitting Wyoming to the Union on an equal footing "repeal[ed]" the Shoshone-Bannock Treaty right because the treaty right was "irreconcilable" with state sovereignty over natural resources. *Race Horse*, 163 U.S. at 514, 16 S.Ct. 1076. But *Mille Lacs* explained that this conclusion "rested on a false premise." 526 U.S. at 204, 119 S.Ct. 1187. Later decisions showed that States can impose reasonable and nondiscriminatory regulations on an Indian tribe's treaty-based hunting, fishing, and gathering rights on state land when necessary for conservation. Id., at 204–205, 119 S.Ct. 1187 (citing *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 682, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979); *Antoine v. Washington*, 420 U.S. 194, 207–208, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975); *Puyallup Tribe v. Department of Game of Wash.*, 391 U.S. 392, 398, 88 S.Ct. 1725, 20 L.Ed.2d 689 (1968)). "[B]ecause treaty rights are reconcilable with state sovereignty over natural resources," the *Mille Lacs* Court concluded, there is no reason to find statehood itself sufficient "to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries." 526 U.S. at 205, 119 S.Ct. 1187.

In lieu of adopting the equal-footing analysis, the Court instead drew on numerous decisions issued since *Race Horse* to explain that Congress "must clearly express" any intent to abrogate Indian treaty rights. 526 U.S. at 202, 119 S.Ct. 1187 (citing *United States v. Dion*, 476 U.S. 734, 738–740, 106 S.Ct. 2216, 90 L.Ed.2d 767 (1986); *Fishing Vessel Assn.*, 443 U.S. at 690, 99 S.Ct. 3055; *Menominee Tribe v. United States*, 391 U.S. 404, 413, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968)). The Court found no such " 'clear evidence' " in the Act admitting Minnesota to the Union, which was "silent" with regard to Indian treaty rights. 526 U.S. at 203, 119 S.Ct. 1187.

The *Mille Lacs* Court then turned to what it referred to as *Race Horse*'s "alternative holding" that the rights in the Shoshone-Bannock Treaty "were not intended to survive Wyoming's statehood." 526 U.S. at 206, 119 S.Ct. 1187. The Court observed that *Race Horse* could be read to suggest that treaty rights only survive statehood if the rights are " ' "of such a nature as to imply their perpetuity," ' " rather than " 'temporary and precarious.' " 526 U.S. at 206, 119 S.Ct. 1187. The Court rejected such an approach. The Court found the " 'temporary and precarious' " language "too broad to be useful," given that almost any treaty rights—which Congress may unilaterally repudiate, see *Dion*, 476 U.S. at 738, 106 S.Ct. 2216—could be described in those terms. 526 U.S. at 206–207, 119 S.Ct. 1187. Instead, *Mille Lacs* framed *Race Horse* as inquiring into whether the Senate "intended the rights secured by the ... Treaty to survive statehood." 526 U.S. at 207, 119 S.Ct. 1187. Applying this test, *Mille Lacs* concluded that statehood did not extinguish the Chippewa bands' treaty rights. The Chippewa Treaty itself defined the specific "circumstances under which the rights would terminate," and there was no suggestion that statehood would satisfy those circumstances. Ibid.

Maintaining its focus on the treaty's language, *Mille Lacs* distinguished the Chippewa Treaty before it from the Shoshone-Bannock Treaty at issue in *Race Horse*. Specifically, the Court noted that the Shoshone-Bannock Treaty, unlike the Chippewa Treaty, "tie[d] the duration of the rights to the occurrence of some clearly contemplated event[s]"—i.e., to whenever the hunting grounds would cease to "remai[n] unoccupied and owned by the United States." 526 U.S. at 207, 119 S.Ct. 1187. In drawing that distinction, however, the Court took care to emphasize that the treaty termination analysis turns on the events enumerated in the "Treaty itself." Ibid. Insofar as the *Race Horse* Court determined that the Shoshone-Bannock Treaty was "impliedly repealed," *Mille Lacs* disavowed that earlier holding. 526 U.S. at 207, 119 S.Ct. 1187. "Treaty rights," the Court clarified, "are not impliedly terminated upon statehood." Ibid. The Court further explained that "[t]he *Race Horse* Court's decision to the contrary"—that Wyoming's statehood did imply repeal of Indian treaty rights—"was informed by" that Court's erroneous conclusion "that the Indian treaty rights were inconsistent with state sovereignty over natural resources." Id., at 207–208, 119 S.Ct. 1187.

In sum, *Mille Lacs* upended both lines of reasoning in *Race Horse*. The case established that the crucial inquiry for treaty termination analysis is whether Congress has expressly abrogated an Indian treaty right or whether a termination point identified in the treaty itself has been satisfied. Statehood is irrelevant to this analysis unless a statehood Act otherwise demonstrates Congress' clear intent to abrogate a treaty, or statehood appears as a termination point in the treaty. See 526 U.S. at 207, 119 S.Ct. 1187. "[T]here is nothing inherent in the nature of reserved treaty rights to suggest that they can be extinguished by implication at statehood." Ibid.

Even Wyoming concedes that the Court has rejected the equal-footing reasoning in *Race Horse*, Brief for Respondent 26, but the State contends that *Mille Lacs* reaffirmed the alternative holding in *Race Horse* that the Shoshone-Bannock Treaty right (and thus the identically phrased right in the 1868 Treaty with the Crow Tribe) was intended to end at statehood. We are unpersuaded. As explained above, although the decision in *Mille Lacs* did not explicitly say that it was overruling the alternative ground in *Race Horse*, it is impossible to harmonize *Mille Lacs*' analysis with the Courts prior reasoning in *Race Horse*.

We thus formalize what is evident in *Mille Lacs* itself. While *Race Horse* "was not expressly overruled" in *Mille Lacs*, "it must be regarded as retaining no vitality" after that decision. . . . To avoid any future confusion, we make clear today that *Race Horse* is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood.

* * *

C

We now consider whether, applying *Mille Lacs*, Wyoming's admission to the Union abrogated the Crow Tribe's off-reservation treaty hunting right. It did not.

First, the Wyoming Statehood Act does not show that Congress intended to end the 1868 Treaty hunting right. If Congress seeks to abrogate treaty rights, "it must clearly express its intent to do so." *Mille Lacs*, 526 U.S. at 202, 119 S.Ct. 1187. "There must be 'clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.' " Id., at 202–203, 119 S.Ct. 1187 (quoting *Dion*, 476 U.S. at 740, 106 S.Ct. 2216); see *Menominee Tribe*, 391 U.S. at 412, 88 S.Ct. 1705. Like the Act discussed in *Mille Lacs*, the Wyoming Statehood Act "makes no mention of Indian treaty rights" and "provides no clue that Congress considered the reserved rights of the [Crow Tribe] and decided to abrogate those rights when it passed the Act." Cf. *Mille Lacs*, 526 U.S. at 203, 119 S.Ct. 1187; see Wyoming Statehood Act, 26 Stat. 222. There simply is no evidence that Congress intended to abrogate the 1868 Treaty right through the Wyoming Statehood Act, much less the " 'clear evidence' " this Court's precedent requires. *Mille Lacs*, 526 U.S. at 203, 119 S.Ct. 1187.4

Nor is there any evidence in the treaty itself that Congress intended the hunting right to expire at statehood, or that the Crow Tribe would have understood it to do so. A treaty is "essentially a contract between two sovereign nations." *Fishing Vessel Assn.*, 443 U.S. at 675, 99 S.Ct. 3055. Indian treaties "must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians," *Mille Lacs*, 526 U.S. at 206, 119 S.Ct. 1187, and the words of a treaty must be construed " 'in the sense in which they would naturally be understood by the Indians,' " *Fishing Vessel Assn.*, 443 U.S. at 676, 99 S.Ct. 3055. If a treaty "itself defines the circumstances under which the rights would terminate," it is to those circumstances that the Court must look to determine if the right ends at statehood. *Mille Lacs*, 526 U.S. at 207, 119 S.Ct. 1187.

Just as in *Mille Lacs*, there is no suggestion in the text of the 1868 Treaty with the Crow Tribe that the parties intended the hunting right to expire at statehood. The treaty identifies four situations that would terminate the right: (1) the lands are no longer "unoccupied"; (2) the lands no longer belong to the United States; (3) game can no longer "be found thereon"; and (4) the Tribe and non-Indians are no longer at "peace ... on the borders of the hunting districts." Art. IV, 15 Stat. 650. Wyoming's statehood does not appear in this list. Nor is there any hint in the treaty that any of these conditions would necessarily be satisfied at statehood. See *Mille Lacs*, 526 U.S. at 207, 119 S.Ct. 1187.

The historical record likewise does not support the State's position. See *Choctaw Nation v. United States*, 318 U.S. 423, 431–432, 63 S.Ct. 672, 87 L.Ed. 877 (1943) (explaining that courts "may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties" to determine a treaty's meaning). Crow Tribe leaders emphasized the importance of the hunting right in the 1867 negotiations, see, e.g., *Proceedings* 88, and Commissioner Taylor assured them that the Tribe would have "the right to hunt upon [the ceded land] as long as the game lasts," id., at 86. Yet despite the apparent importance of the hunting right to the negotiations, Wyoming points to no evidence that federal negotiators ever proposed

that the right would end at statehood. This silence is especially telling because five States encompassing lands west of the Mississippi River—Nebraska, Nevada, Kansas, Oregon, and Minnesota—had been admitted to the Union in just the preceding decade. See ch. 36, 14 Stat. 391 (Nebraska, Feb. 9, 1867); Presidential Proclamation No. 22, 13 Stat. 749 (Nevada, Oct. 31, 1864); ch. 20, 12 Stat. 126 (Kansas, Jan. 29, 1861); ch. 33, 11 Stat. 383 (Oregon, Feb. 14, 1859); ch. 31, 11 Stat. 285 (Minnesota, May 11, 1858). Federal negotiators had every reason to bring up statehood if they intended it to extinguish the Tribe's hunting rights.

In the face of this evidence, Wyoming nevertheless contends that the 1868 Treaty expired at statehood pursuant to the *Mille Lacs* analysis. Wyoming does not argue that the legal act of Wyoming's statehood abrogated the treaty right, and it cannot contend that statehood is explicitly identified as a treaty expiration point. Instead, Wyoming draws on historical sources to assert that statehood, as a practical matter, marked the arrival of "civilization" in the Wyoming Territory and thus rendered all the lands in the State occupied. Brief for Respondent 48. This claim cannot be squared with *Mille Lacs*.

Wyoming's arguments boil down to an attempt to read the treaty impliedly to terminate at statehood, precisely as *Mille Lacs* forbids. The State sets out a potpourri of evidence that it claims shows statehood in 1890 effectively coincided with the disappearance of the wild frontier: for instance, that the buffalo were extinct by the mid-1870s; that by 1880, Indian Department regulations instructed Indian agents to confine tribal members " 'wholly within the limits of their respective reservations' "; and that the Crow Tribe stopped hunting off-reservation altogether in 1886. Brief for Respondent 47 (quoting § 237 Instructions to Indian Agents (1880), as published in Regulations of the Indian Dept. § 492 (1884)).

Herrera contradicts this account, see Reply Brief for Petitioner 5, n. 3, and the historical record is by no means clear. For instance, game appears to have persisted for longer than Wyoming suggests. See Dept. of Interior, Ann. Rep. of the Comm'r of Indian Affairs 495 (1873) (Black Foot: "On the other side of the river below, there are plenty of buffalo; on the mountains are plenty of elk and black-tail deer; and white-tail deer are plenty at the foot of the mountain"). As for the Indian Department Regulations, there are reports that a group of Crow Tribe members "regularly hunted along the Little Bighorn River" even after the regulation the State cites was in effect. Hoxie, *Parading Through History*, at 26. In 1889, the Office of Indian Affairs wrote to U.S. Indian Agents in the Northwest that "[f]requent complaints have been made to this Department that Indians are in the habit of leaving their reservations for the purpose of hunting." 28 Cong. Rec. 6231 (1896).

Even assuming that Wyoming presents an accurate historical picture, the State's mode of analysis is severely flawed. By using statehood as a proxy for occupation, Wyoming subverts this Court's clear instruction that treaty-protected rights "are not impliedly terminated upon statehood." *Mille Lacs*, 526 U.S. at 207, 119 S.Ct. 1187.

Finally, to the extent that Wyoming seeks to rely on this same evidence to establish that all land in Wyoming was functionally "occupied" by 1890, its arguments fall outside the question presented and are unpersuasive in any event. As explained below, the Crow Tribe would have understood occupation to denote some form of residence or settlement. See *infra*, at 1701-1702. Furthermore, Wyoming cannot rely on *Race Horse* to equate occupation with statehood, because that case's reasoning rested on the flawed belief that statehood could not coexist with a continuing treaty right. See *Race Horse*, 163 U.S. at 514, 16 S.Ct. 1076; *Mille Lacs*, 526 U.S. at 207–208, 119 S.Ct. 1187.

Applying *Mille Lacs*, this is not a hard case. The Wyoming Statehood Act did not abrogate the Crow Tribe's hunting right, nor did the 1868 Treaty expire of its own accord at that time. The treaty itself defines the circumstances in which the right will expire. Statehood is not one of them.

III

We turn next to the question whether the 1868 Treaty right, even if still valid after Wyoming's statehood, does not protect hunting in Bighorn National Forest because the forest lands are "occupied." We agree with Herrera and the United States that Bighorn National Forest did not become categorically "occupied" within the meaning of the 1868 Treaty when the national forest was created.

Treaty analysis begins with the text, and treaty terms are construed as " 'they would naturally be understood by the Indians.' " *Fishing Vessel Assn.*, 443 U.S. at 676, 99 S.Ct. 3055. Here it is clear that the Crow Tribe would have understood the word "unoccupied" to denote an area free of residence or settlement by non-Indians.

That interpretation follows first and foremost from several cues in the treaty's text. For example, Article IV of the 1868 Treaty made the hunting right contingent on peace "among the whites and Indians on the borders of the hunting districts," thus contrasting the unoccupied hunting districts with areas of white settlement. 15 Stat. 650. The treaty elsewhere used the word "occupation" to refer to the Tribe's residence inside the reservation boundaries, and referred to the Tribe members as "settlers" on the new reservation. Arts. II, VI, id., at 650–651. The treaty also juxtaposed occupation and settlement by stating that the Tribe was to make "no permanent settlement" other than on the new reservation, but could hunt on the "unoccupied lands" of the United States. Art. IV, id., at 650. Contemporaneous definitions further support a link between occupation and settlement. See W. Anderson, A Dictionary of Law 725 (1889) (defining "occupy" as "[t]o hold in possession; to hold or keep for use" and noting that the word "[i]mplies actual use, possession or cultivation by a particular person"); id., at 944 (defining "settle" as "[t]o establish one's self upon; to occupy, reside upon").

Historical evidence confirms this reading of the word "unoccupied." At the treaty negotiations, Commissioner Taylor commented that "settlements ha[d] been made upon [Crow Tribe] lands" and that "white people [were] rapidly increasing and ... occupying all the valuable

lands." *Proceedings* 86. It was against this backdrop of white settlement that the United States proposed to buy "the right to use and settle" the ceded lands, retaining for the Tribe the right to hunt. Ibid. A few years after the 1868 Treaty signing, a leader of the Board of Indian Commissioners confirmed the connection between occupation and settlement, explaining that the 1868 Treaty permitted the Crow Tribe to hunt in an area "as long as there are any buffalo, and as long as the white men are not [in that area] with farms." Dept. of Interior, Ann. Rep. of the Comm'r of Indian Affairs 500.

Given the tie between the term "unoccupied" and a lack of non-Indian settlement, it is clear that President Cleveland's proclamation creating Bighorn National Forest did not "occupy" that area within the treaty's meaning. To the contrary, the President "reserved" the lands "from entry or settlement." Presidential Proclamation No. 30, 29 Stat. 909. The proclamation gave "[w]arning ... to all persons not to enter or make settlement upon the tract of land reserved by th[e] proclamation." Id., at 910. If anything, this reservation made Bighorn National Forest more hospitable, not less, to the Crow Tribe's exercise of the 1868 Treaty right.

Wyoming's counterarguments are unavailing. The State first asserts that the forest became occupied through the Federal Government's "exercise of dominion and control" over the forest territory, including federal regulation of those lands. Brief for Respondent 56–60. But as explained, the treaty's text and the historical record suggest that the phrase "unoccupied lands" had a specific meaning to the Crow Tribe: lack of settlement. The proclamation of a forest reserve withdrawing land from settlement would not categorically transform the territory into an area resided on or settled by non-Indians; quite the opposite. Nor would the restrictions on hunting in national forests that Wyoming cites. See Appropriations Act of 1899, ch. 424, 30 Stat. 1095; 36 CFR §§ 241.2, 241.3 (Supp. 1941); § 261.10(d)(1) (2018).

Wyoming also claims that exploitative mining and logging of the forest lands prior to 1897 would have caused the Crow Tribe to view the Bighorn Mountains as occupied. But the presence of mining and logging operations did not amount to settlement of the sort that the Tribe would have understood as rendering the forest occupied. In fact, the historical source on which Wyoming primarily relies indicates that there was "very little" settlement of Bighorn National Forest around the time the forest was created. Dept. of Interior, Nineteenth Ann. Rep. of the U.S. Geological Survey 167 (1898).

Considering the terms of the 1868 Treaty as they would have been understood by the Crow Tribe, we conclude that the creation of Bighorn National Forest did not remove the forest lands, in their entirety, from the scope of the treaty.

* * *

The judgment of the Wyoming District Court of the Fourth Judicial District, Sheridan County, is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

[The dissenting opinion of Justice Alito is omitted.]

NOTES

1. On remand, the trial level court in Wyoming issued an order adopting the theory of the dissenters in *Herrera* that tribal members cannot benefit from the decision on the basis of claim preclusion. *State of Wyoming v. Herrera*, CT-2014-2687 & 2688 (4th Jud. Dist. Cir. Ct., June 11, 2020), available at https://turtletalk.files.wordpress.com/2020/06/herrera-circuit-court-remand-order.pdf.

2. The Crow Nation sought to re-open the *Crow Tribe v. Repsis* decision in federal court, but the effort failed. Order on Relief from Judgment, No. 92-CV-1002-ABJ (D. Wyo., July 1, 2021), available at https://turtletalk.files.wordpress.com/2021/07/84-dct-order.pdf. The case is on appeal to the Tenth Circuit. For briefs, see Turtle Talk: https://turtletalk.blog/2021/09/29/tenth-circuit-briefs-in-crow-tribe-v-repsis/.

CHAPTER 13

RIGHTS OF ALASKA NATIVES AND NATIVE HAWAIIANS

SECTION A. ALASKA NATIVES: LOOKING FORWARD TO THE PAST?

At the end of page 993, add:

6. ALASKA NATIVE CORPORATIONS

Yellen v. Confederated Tribes of the Chehalis Reservation

United States Supreme Court, 2021

__ U.S. __, 141 S.Ct. 2434

Justice SOTOMAYOR delivered the opinion of the Court.

In March 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act, 134 Stat. 281. Title V of the Act allocates $8 billion of monetary relief to "Tribal governments." 134 Stat. 502, 42 U.S.C. § 801(a)(2)(B). Under the CARES Act, a "Tribal government" is the "recognized governing body of an Indian tribe" as defined in the Indian Self-Determination and Education Assistance Act (ISDA). §§ 801(g)(5), (1). ISDA, in turn, defines an "Indian tribe" as "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act[,] which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 5304(e).

The Department of the Treasury asked the Department of the Interior, the agency that administers ISDA, whether Alaska Native Corporations (ANCs) meet that definition. Consistent with its longstanding view, the Interior Department said yes. The Treasury Department then set aside approximately $500 million of CARES Act funding for the ANCs. The question presented

is whether ANCs are "Indian tribe[s]" under ISDA, and are therefore eligible to receive the CARES Act relief set aside by the Treasury Department. The Court holds that they are.

I

This is not the first time the Court has addressed the unique circumstances of Alaska and its indigenous population. See, e.g., Sturgeon v. Frost, 587 U.S. ——, 139 S.Ct. 1066 . . . (2019); Sturgeon v. Frost, 577 U.S. 424 . . . (2016); Alaska v. Native Village of Venetie Tribal Government, 522 U.S. 520 . . . (1998); Metlakatla Indian Community v. Egan, 369 U.S. 45 . . . (1962). The "simple truth" reflected in those prior cases is that "Alaska is often the exception, not the rule." *Sturgeon*, 577 U.S. at 440 . . . . To see why, one must first understand the United States' unique historical relationship with Alaska Natives.

A

When the United States purchased the Territory of Alaska from Russia in 1867, Alaska Natives lived in communities dispersed widely across Alaska's 365 million acres. In the decades that followed, "[t]here was never an attempt in Alaska to isolate Indians on reservations," as there had been in the lower 48 States. *Metlakatla Indian Community*, 369 U.S. at 51 . . . . As a consequence, the claims of Alaska Natives to Alaskan land remained largely unsettled even following Alaska's admission to the Union as our 49th State in 1959. See Alaska Statehood Act, § 4, 72 Stat. 339; *Sturgeon*, 577 U.S. at 429 . . . .

That changed in 1971 with the Alaska Native Claims Settlement Act (ANCSA). 85 Stat. 688, 43 U.S.C. § 1601 et seq. ANCSA officially dispensed with the idea of recreating in Alaska the system of reservations that prevailed in the lower 48 States. It extinguished Alaska Natives' claims to land and hunting rights and revoked all but one of Alaska's existing reservations. § 1610. In exchange, "Congress authorized the transfer of $962.5 million in state and federal funds and approximately 44 million acres of Alaska land to state-chartered private business corporations that were to be formed pursuant to" ANCSA. *Native Village of Venetie Tribal Government*, 522 U.S. at 524 . . . . These corporations are called ANCs.

Relevant here, ANCs come in two varieties: regional ANCs and village ANCs. To form the regional ANCs, the Act directed the Secretary of the Interior to divide Alaska into 12 geographic regions. § 1606(a). Within each region, Alaska Natives were instructed to "incorporate under the laws of Alaska a Regional Corporation to conduct business for profit." § 1606(d). To form the village ANCs, the Act identified approximately 200 Alaska "Native villages," a term encompassing any community of 25 or more Alaska Natives living together as of the 1970 census. §§ 1602(c), 1610(b), 1615(a). For each Alaska Native village, ANCSA ordered the "Native residents" to create an accompanying village corporation to "hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf " of the village. §§ 1602(j), 1607(a). ANCSA then directed the Secretary to prepare a roll showing the region and, if applicable,

village to which each living Alaska Native belonged. § 1604. Enrolled Alaska Natives then received shares in their respective ANCs. §§ 1606(g), 1607.

B

In 1975, four years after ANCSA's enactment, Congress passed ISDA. 25 U.S.C. § 5301 et seq. ISDA answered the call for a "new national policy" of "autonomy" and "control" for Native Americans and Alaska Natives. H.R. Doc. No. 91–363, p. 3 (1970); see also Menominee Tribe of Wis. v. United States, 577 U.S. 250, 252 . . . (2016) ("Congress enacted [ISDA] in 1975 to help Indian tribes assume responsibility for aid programs that benefit their members").

ISDA decentralized the provision of federal Indian benefits away from the Federal Government and toward Native American and Alaska Native organizations. ISDA allows any "Indian tribe" to request that the Secretary of the Interior enter into a self-determination contract with a designated "tribal organization." § 5321(a)(1). Under such a contract, the tribal organization delivers federally funded economic, infrastructure, health, or education benefits to the tribe's membership.

As originally drafted, ISDA's "Indian tribe" definition did not mention ANCs. H.R. 6372, 93d Cong., 1st Sess., § 1(a) (1973) (defining "Indian tribe" to mean "an Indian tribe, band, nation, or Alaska Native Community for which the Federal Government provides special programs and services because of its Indian identity"). Prior to passage, however, the definition was amended twice to include, first, Alaska Native villages and, second, ANCs. See H.R. Rep. No. 93–1600, p. 14 (1974) ("The Subcommittee amended the definition of 'Indian tribe' to include regional and village corporations established by [ANCSA]"). Today, ISDA defines an "Indian tribe" as "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to [ANCSA], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." § 5304(e).

Despite the express inclusion of ANCs in the definition of "Indian tribe," a question arose in the Interior Department whether the "recognized-as-eligible clause" limits the definition to "federally recognized tribes" only. A federally recognized tribe is one that has entered into "a government-to-government relationship [with] the United States." 1 F. Cohen, Handbook of Federal Indian Law § 3.02[3] (N. Newton ed. 2012). This recognition can come in a number of ways: "from treaty, statute, executive or administrative order, or from a course of dealing with the tribe as a political entity." W. Canby, American Indian Law in a Nutshell 4 (7th ed. 2020). As private companies incorporated under state law, ANCs have never been "recognized" by the United States in this sovereign political sense.

In 1976, the year after ISDA's enactment, the Interior Department's Assistant Solicitor for Indian Affairs issued a memorandum on the status of ANCs under ISDA. App. 44–48. In the Assistant Solicitor's view, the express inclusion of ANCs within the definition of "Indian tribe"

confirmed that ANCs are Indian tribes under ISDA, even though they are not federally recognized tribes. In the decades since, the Interior Department has repeatedly reaffirmed that position. See, e.g., 60 Fed. Reg. 9250 (1995) (ANCs "ha[ve] been designated as 'tribes' for the purposes of some Federal laws," including ISDA); 58 Fed. Reg. 54364 (1993) (ANCs "are not governments, but they have been designated as 'tribes' for the purposes of " ISDA); 53 Fed. Reg. 52833 (1988) (ISDA "specifically include[s]" ANCs).

C

In 2020, Congress incorporated ISDA's "Indian tribe" definition into the CARES Act. 42 U.S.C. § 801(g)(1). Title V of the Act allocates $150 billion to "States, Tribal governments, and units of local government" to compensate for unbudgeted expenditures made in response to COVID–19. § 801(a)(1). Of that $150 billion, $8 billion is reserved for "Tribal governments." § 801(a)(2)(B). A "Tribal government" is the "recognized governing body of an Indian Tribe," as ISDA defines the latter term. §§ 801(g)(5), (1).

On April 23, 2020, the Treasury Department determined that ANCs are eligible for CARES Act relief, and set aside more than $500 million for them (since reduced to approximately $450 million). App. 53–54; Letter from E. Prelogar, Acting Solicitor General, to S. Harris, Clerk of Court (May 12, 2021). Soon after the Treasury Department's announcement, a number of federally recognized tribes (respondents) sued, arguing that only federally recognized tribes are Indian tribes under ISDA, and thus under the CARES Act. Some Tribes further argued that ANCs do not have a "recognized governing body" for purposes of the CARES Act and are ineligible to receive its funding for that reason as well.

The suits were consolidated in the District Court for the District of Columbia, which ultimately entered summary judgment for the Treasury Department and the ANCs. The Court of Appeals for the District of Columbia Circuit reversed. Confederated Tribes of Chehalis Reservation v. Mnuchin, 976 F.3d 15 (2020). In its view, the recognized-as-eligible clause is a term of art requiring any Indian tribe to be a federally recognized tribe. Because no ANC is federally recognized, the court reasoned, no ANC qualifies for funding under Title V of the CARES Act. In so holding, the D. C. Circuit split with the Ninth Circuit, which had held decades prior in Cook Inlet Native Assn. v. Bowen, 810 F.2d 1471 (1987), that ANCs are Indian tribes for ISDA purposes, regardless of whether they have been federally recognized. Id., at 1474.

We granted certiorari, 592 U.S. __, 141 S.Ct. 976, 208 L.Ed.2d 510 (2021), to resolve the Circuit split and determine whether ANCs are eligible for the CARES Act funding set aside by the Treasury Department.

II

All but one of the respondent Tribes agree that ANCs are eligible to receive the CARES Act funds in question if they are Indian tribes for purposes of ISDA. The primary question for the

Court, then, is whether ANCs satisfy ISDA's definition of "Indian tribe." The ANCs ask the Court to answer that question by looking to the definition's plain meaning. Respondents ask the Court to adopt a term-of-art construction that equates being "recognized as eligible for the special programs and services provided by the United States to Indians" with being a "federally recognized tribe," i.e., a tribe recognized by the United States in a sovereign political sense.

A

Starting with the plain meaning, an "Indian tribe" under ISDA is a "tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to [ANCSA], which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 5304(e). The definition's first two clauses are straightforward enough. The first lists entities that might count as Indian tribes under the Act (e.g., tribes, bands, nations). The second, "the Alaska clause," makes clear that Alaska Native villages and ANCs are "includ[ed]." The third, "the recognized-as-eligible clause," requires more analysis. According to that clause, the listed entities must be "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."

ANCs, of course, are "established pursuant to" ANCSA within the meaning of the Alaska clause. They are thereby "recognized as eligible" for ANCSA's benefits. The trickier question is whether eligibility for the benefits of ANCSA counts as eligibility for "the special programs and services provided by the United States to Indians because of their status as Indians."

It does. Contrary to the dissent's view, post, at 2457 – 2458 (opinion of GORSUCH, J.), ANCSA is readily described as a special program provided by the United States to "Indians" (in this case, Alaska Natives). See 43 U.S.C. § 1626 (describing ANCSA's relationship to "other programs"). The scope of that program is substantial: ANCSA made ANCs eligible to select tens of millions of acres of land and receive hundreds of millions of tax-exempt dollars. §§ 1605, 1610, 1611. Not just a one-time payment, ANCSA provides for revenue sharing among the regional ANCs to ensure Alaska Natives across the State benefit from an ongoing equitable distribution of ANC profits. § 1606(i). ANCSA further entrusts ANCs to "hold, invest, manage and/or distribute lands, property, funds, and other rights and assets for and on behalf " of Alaska Natives, who are the ANCs' shareholders, as well as to distribute dividends to them. See §§ 1602(j), 1606(j). Moreover, ANCs and their shareholders are "eligible for the benefits of" ANCSA, § 1606(d), precisely because of their status as Indians. See § 1626(e)(1) ("For all purposes of Federal law, a Native Corporation shall be considered to be a corporation owned and controlled by Natives"); note following § 1601, p. 1136 (ANCSA is " 'Indian legislation enacted by Congress pursuant to its plenary authority under the Constitution of the United States to regulate Indian affairs' ").

Respondents do not deny that the benefits of ANCSA are "a" special program or service provided by the United States to Indians. According to respondents, however, such benefits are

not "the" special programs and services provided to Indians (e.g., healthcare, education, and other social services provided by federal agencies like the Bureau of Indian Affairs and the Indian Health Service). "The" special programs and services, respondents assert, are available only to federally recognized tribes (or, more precisely, to members of such tribes). In respondents' view, ANCs are thus "includ[ed]" in the "Indian tribe" definition's Alaska clause only to be excluded en masse from that definition by the recognized-as-eligible clause.

That would certainly be an odd result. Fortunately, the text does not produce it. ISDA's "Indian tribe" definition does not specify the particular programs and services an entity must be eligible for to satisfy the recognized-as-eligible clause. Given that ANCSA is the only statute the "Indian tribe" definition mentions by name, the best reading of the definition is that being eligible for ANCSA's benefits by itself satisfies the recognized-as-eligible clause.

Consider a similarly worded example. A doctor recommends getting a blood test every six months to "any child, adult, or senior, including anyone over the age of 75 whose blood-sugar levels have tested in the prediabetic range within the last five years, who exhibits the warning signs of Type 2 diabetes." Without further context, it is unclear exactly which warning signs the doctor is referring to, or how many of those signs a child, adult, or senior must exhibit before warranting biannual testing. But it is fair to say that individuals over 75 with prediabetic blood-sugar levels within the last five years should get tested biannually, even if they exhibit no other warning signs. By expressly "including" individuals with that one warning sign, the doctor's recommendation makes clear that particular sign, by itself, is warning enough.

Just so here: Congress' express inclusion of ANCs "established pursuant to [ANCSA]" confirms that eligibility for ANCSA's benefits alone is eligibility enough to be an Indian tribe. ANCs thus satisfy ISDA's Indian tribe definition, regardless of whether they and their shareholders are eligible for federal Indian programs and services other than those provided in ANCSA. At any rate, the one-to-one relationship respondents posit between membership in a federally recognized tribe and eligibility for federal Indian benefits more broadly does not hold in the unique circumstances of Alaska. See Letter from E. Prelogar, Acting Solicitor General, to S. Harris, Clerk of Court (Apr. 22, 2021) ("[T]he federal government has historically provided benefits and services to Alaska Natives who are not enrolled members of a federally recognized Indian tribe"); D. Case & D. Voluck, Alaska Natives and Americans Laws 30 (3d ed. 2012) ("[T]he federal government has, at least since the end of the nineteenth century, provided a wide variety of programs and services to Alaska Natives solely because of their status as Natives"). So ANCSA is not, in fact, the only federal Indian program or service for which ANCs and their shareholders are eligible.

It should come as no surprise that Congress made ANCs eligible to contract under ISDA. After all, Congress itself created ANCs just four years earlier to receive the benefits of the Alaska land settlement on behalf of all Alaska Natives. Allowing ANCs to distribute federal Indian benefits more broadly is entirely consistent with the approach Congress charted in ANCSA.

Accord, 1 American Indian Policy Review Comm'n, Final Report, 95th Cong., 1st Sess., 495 (Comm. Print 1977) (ANCs "might well be the form or organization best suited to sponsor certain kinds of federally funded programs" in Alaska); 43 U.S.C. § 1606(r) ("The authority of a Native Corporation to provide benefits ... to promote the health, education, or welfare of ... shareholders or family members is expressly authorized and confirmed").

Under the plain meaning of ISDA, ANCs are Indian tribes, regardless of whether they are also federally recognized tribes. In so holding, the Court does not open the door to other Indian groups that have not been federally recognized becoming Indian tribes under ISDA. Even if such groups qualify for certain federal benefits, that does not make them similarly situated to ANCs. ANCs are sui generis entities created by federal statute and granted an enormous amount of special federal benefits as part of a legislative experiment tailored to the unique circumstances of Alaska and recreated nowhere else. Moreover, with the exception of Alaska Native villages (which are now federally recognized), no entities other than ANCs are expressly "includ[ed]" by name in ISDA's "Indian tribe" definition. Cf. *Sturgeon*, 577 U.S. at 440 . . . ("All those Alaska-specific provisions reflect the simple truth that Alaska is often the exception, not the rule").

B

Respondents urge this Court to discard the plain meaning of the "Indian tribe" definition in favor of a term-of-art construction. In respondents' view, the 69 words of the "Indian tribe" definition are a long way of saying just 8: An "Indian tribe" means a "federally recognized tribe." If that is right, respondents are correct that ANCs are not Indian tribes, because everyone agrees they are not federally recognized tribes. To prevail on this argument, however, respondents must demonstrate that the statutory context supports reading ISDA's "Indian tribe" definition as a term of art rather than according to its plain meaning. . . . Their efforts are not persuasive.

In arguing for a term-of-art construction, respondents first rely on a series of Acts that terminated various tribes starting in the late 1950s. Those Acts closed tribal membership rolls, specified the division of tribal assets, and revoked tribal constitutions. See, e.g., Act of Sept. 21, 1959, Pub. L. No. 86–322, 73 Stat. 592. Following termination, the tribe and its members were no longer "entitled to any of the special services performed by the United States for Indians because of their status as Indians." § 5, id., at 593. As respondents note, this language resembles (although does not mirror precisely) the final words of ISDA's recognized-as-eligible clause. If being terminated means no longer being "entitled to any of the special services performed by the United States for Indians because of their status as Indians," the argument goes, then being "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians" means being a federally recognized tribe.

Respondents misjudge the relevance of these termination statutes. Those statutes do not contain the words "recognized as eligible"; they do not even contain the word "recognized." Furthermore, the termination statutes use their ISDA-reminiscent phrasing not as a synonym for

termination but to describe just one, among other, consequences of a tribe's constitution being revoked. See, e.g., ibid. ("The constitution of the tribe ... shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction").

Some linguistic similarity between ISDA and the termination statutes does not suggest that the language of the recognized-as-eligible clause was an accepted way of saying "a federally recognized tribe" in 1975. It instead supports a much more limited proposition: A federally recognized tribe that has not been terminated is "entitled" to "special services performed by the United States for Indians," and thereby satisfies ISDA's similarly worded recognized-as-eligible clause. But of course, no one disputes that being a federally recognized tribe is one way to qualify as an Indian tribe under ISDA; it is just not the only way.

Nor is the mere inclusion of the word "recognized" enough to give the recognized-as-eligible clause a term-of-art meaning. True, the word "recognized" often refers to a tribe with which the United States has a government-to-government relationship (particularly when it is sandwiched between the words "federally" and "tribe"). That does not mean, however, that the word "recognized" always connotes political recognition.

"Recognized" is too common and context dependent a word to bear so loaded a meaning wherever it appears, even in laws concerning Native Americans and Alaska Natives. . . . Certainly, "recognized" can signify political recognition; it can also refer to something far more pedestrian. See, e.g., Black's Law Dictionary 1436 (rev. 4th ed. 1968) (defining "recognition" as "[r]atification; confirmation; an acknowledgment that something done by another person in one's name had one's authority"). The type of recognition required is a question best answered in context. See, e.g., 25 U.S.C. § 3002(a)(2)(C)(1) (providing for control over certain cultural items "in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered"); § 4352(3) (defining a "Native Hawaiian organization" as a nonprofit that, among other things, "is recognized for having expertise in Native Hawaiian culture and heritage, including tourism"). In ISDA, the required recognition is of an entity's eligibility for federal Indian programs and services, not a government-to-government relationship with the United States.

Respondents next rely on sources that postdate ISDA. Ordinarily, however, this Court reads statutory language as a term of art only when the language was used in that way at the time of the statute's adoption. . . . In relying on sources postdating ISDA, respondents must show not only that the language of the recognized-as-eligible clause later became a term of art, but also that this term-of-art understanding should be backdated to ISDA's passage in 1975. They cannot make that showing.

Respondents lean most heavily on the Federally Recognized Indian Tribe List Act of 1994 (List Act), enacted almost 20 years after ISDA. See 25 U.S.C. §§ 5130, 5131. The List Act requires the Secretary of the Interior to publish an annual list of "all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." § 5131(a). According to respondents, ANCs' absence from the Secretary's list confirms that they are not "eligible for the special programs and services provided by the United States to Indians because of their status as Indians," § 5304(e), and thus fail ISDA's recognized-as-eligible clause.

Respondents' cross-referencing argument, however, requires the Court to ignore the reason why ANCs are not on the list. True to its full name, the Federally Recognized Indian Tribe List Act tasks the Secretary with maintaining a "'list of federally recognized tribes'" only. Note following § 5130, p. 678. The List Act, moreover, lacks language like that in ISDA expressly "including" ANCs "established pursuant to" ANCSA. § 5304(e). The obvious inference, then, is that ANCs are not on the Secretary's list simply because they are not federally recognized.

History confirms as much. In 1979, 15 years before the List Act was passed, the Secretary began publishing a list of Indian tribes "that have a government-to-government relationship with the United States." 44 Fed. Reg. 7235. In 1988, ANCs were added to the Secretary's list, which had been retitled "Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs," because ANCs are "specifically eligible for the funding and services of the [Bureau of Indian Affairs] by statute" and "should not have to undertake to obtain Federal Acknowledgement" (i.e., federal recognition). 53 Fed. Reg. 52829, 52832. In 1993, the Secretary dropped ANCs from the list, concluding that "the inclusion of ANC[s], which lack tribal status in a political sense, called into question the status" of the other entities on the list. 58 Fed. Reg. 54365. In so doing, the Secretary reaffirmed that ANCs "are not governments, but they have been designated as 'tribes' for the purposes of some Federal laws," including ISDA. Id., at 54364. The List Act, passed the following year, "confirmed the Secretary's authority and responsibility" to maintain a list of federally recognized tribes. 60 Fed. Reg. 9251. Hence, ANCs remained off the list.

To accept respondents' argument, then, the Court would need to cross-reference ISDA's definition of an "Indian tribe" with the Secretary's list, but ignore why ANCs were excluded from that list in the first place. The Court declines to take that doubtful step.

Despite asking the Court to consider post-ISDA statutes to determine whether ANCs are "Indian tribes" under ISDA, moreover, respondents largely fail to address post-ISDA congressional actions that contradict their position. First, consider Congress' treatment of the Cook Inlet Region, Inc. (CIRI), the regional ANC for the ANCSA region covering more than half the Alaskan population. See The Twelve Regions, ANCSA Regional Association (June 1, 2021), https://ancsaregional.com/the-twelve-regions. In 1994, CIRI contracted under ISDA through its designated healthcare provider to offer healthcare benefits to Alaska Natives and American Indians

in Anchorage and the Matanuska-Susitna Valley. See Cook Inlet Treaty Tribes v. Shalala, 166 F.3d 986, 988 (CA9 1999). A group of Alaska Native villages sued, arguing that the Federal Government should have first obtained their approval. Ibid.; see 25 U.S.C. § 5304(l) ("[I]n any case where [an ISDA contract] benefit[s] more than one Indian tribe, the approval of each such Indian tribe" is required). Congress mooted the dispute by passing a bill that waived ISDA's normal tribal approval requirement for CIRI's healthcare contracts. Department of the Interior and Related Agencies Appropriations Act, 1998, § 325(a), 111 Stat. 1597–1598. In so doing, Congress not only assumed CIRI was eligible to enter into ISDA contracts (notwithstanding its lack of federal recognition), but actively cleared the way for it to do so.

Next, consider the Native American Housing Assistance and Self-Determination Act of 1996 (NAHASDA), 25 U.S.C. § 4101 et seq., which incorporates ISDA's "Indian tribe" definition, see § 4103(13)(B). NAHASDA creates a housing block grant program for Indian tribes. § 4111. The regional ANCs (acting through their designated housing authorities) are among the largest recipients of these grants in Alaska, receiving tens of millions of dollars each year. See Dept. of Housing and Urban Development, FY 2020 Final [Indian Housing Block Grant] Funding by [Tribally Designated Housing Entities] & Regions. For years, Congress has passed appropriations riders requiring that the existing recipients of NAHASDA's housing block grants in Alaska (including ANCs) continue to receive those grants. See, e.g., Further Consolidated Appropriations Act, 2020, Pub. L. 116–94, Div. H, Tit. II, § 211, 133 Stat. 3003. Following the D. C. Circuit's decision in this case, Congress awarded additional grants under NAHASDA and emphasized that, "[f]or the avoidance of doubt," the "Indian tribe[s]" eligible for those grants "shall include Alaska native corporations established pursuant to" ANCSA. Consolidated Appropriations Act, 2021, Pub. L. 116–260, Div. N, Tit. V, Subtit. A, § 501(k)(2)(C), 134 Stat. 2077.

Thus, post-ISDA sources prove no more fruitful to respondents than pre-ISDA ones. Even assuming the Court should look to events after 1975, respondents cannot cherry-pick statutes like the List Act without explaining postenactment developments that undermine their interpretation. In the end, the various statutes cited do not support respondents' efforts to exclude ANCs from ISDA by use of a term-of-art construction.

C

Even if ANCs did not satisfy the recognized-as-eligible clause, however, they would still satisfy ISDA's definition of an "Indian tribe." If respondents were correct that only a federally recognized tribe can satisfy that clause, then the best way to read the "Indian tribe" definition as a whole would be for the recognized-as-eligible clause not to apply to the entities in the Alaska clause at all (i.e., to "any Alaska Native village or regional or village corporation," 25 U.S.C. § 5304(e)). On this reading, the way to tell whether a tribe, band, nation, or other organized group or community is an "Indian tribe" is to ask whether it is federally recognized, but the way to tell whether an Alaska Native village or corporation is an "Indian tribe" is to ask whether it is "defined in or established pursuant to" ANCSA. Ibid. Otherwise, despite being prominently "includ[ed]" in

the "Indian tribe" definition, ibid., all ANCs would be excluded by a federal-recognition requirement there is no reasonable prospect they could ever satisfy.

Respondents object (and the dissent agrees) that this construction "produces grammatical incoherence." Brief for Respondents Confederated Tribes of Chehalis Reservation et al. 16; post, at 2454 – 2455. They point out that a modifying clause at the end of a list (like the recognized-as-eligible clause) often applies to every item in the list. . . . The so-called series-qualifier canon can be a helpful interpretive tool, and it supports the idea that the recognized-as-eligible clause applies to every type of entity listed in the "Indian tribe" definition, including ANCs. Given that the entities in the Alaska clause are the closest in proximity to the recognized-as-eligible clause, that canon arguably applies with particular force here.

[H]owever, the series-qualifier canon gives way when it would yield a "contextually implausible outcome." . . . The most grammatical reading of a sentence in a vacuum does not always produce the best reading in context. See, e.g., *Sturgeon*, 577 U.S. at 438 . . . ("Statutory language 'cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme' "); cf. B. Garner, Modern English Usage 784 (4th ed. 2016) (noting the "increasingly common" " 'remote relative,' " i.e., the practice of separating "the relative pronoun (that, which, who) from its antecedent").

Consider an example with the same syntax as the "Indian tribe" definition. A restaurant advertises "50% off any meat, vegetable, or seafood dish, including ceviche, which is cooked." Say a customer orders ceviche, a Peruvian specialty of raw fish marinated in citrus juice. Would she expect it to be cooked? No. Would she expect to pay full price for it? Again, no. Under the reading recommended by the series-qualifier canon, however, the ceviche was a red herring. Even though the 50%-off sale specifically named ceviche (and no other dish), it costs full price because it is not cooked. That conclusion would make no sense to a reasonable customer.

Like applying a "cooked" requirement to ceviche, applying a "federally recognized" requirement to ANCs is implausible in context. When Congress enacted ISDA in 1975, not a single Alaska Native village or ANC had been recognized for a government-to-government relationship with the United States. On respondents' reading, then, the entire Alaska clause originally had no effect. None of its entities qualified as Indian tribes for purposes of ISDA, even though the only entities expressly included in ISDA's definition of an "Indian tribe" are those in the Alaska clause.

The only explanation respondents offer for this highly counterintuitive result is that Congress included Alaska Native villages and corporations in the "Indian tribe" definition on the possibility they might one day become federally recognized. That is highly unlikely. First, the Alaska clause would be redundant on that account. See Brief for Respondents Confederated Tribes of Chehalis Reservation et al. 31 ("[T]he Alaska [clause] is ... best read as redundant"). A federally recognized Alaska Native village or ANC would presumably already fit into one of the pre-existing

ISDA categories of "tribe[s], band[s], nation[s], or other organized group[s] or communit[ies]." 25 U.S.C. § 5304(e).

Second, it is quite doubtful that anyone in 1975 thought the United States was going to recognize ANCs as sovereign political entities. ANCs are for-profit companies incorporated under state law that Congress itself created just four years prior to ISDA. They are not at all the type of entities normally considered for a government-to-government relationship with the United States. Accord, 25 CFR § 83.4 (1994) ("The Department will not acknowledge," i.e., federally recognize, "[a]n association, organization, corporation, or entity of any character formed in recent times unless the entity has only changed form by recently incorporating or otherwise formalizing its existing politically autonomous community"). Indeed, at the time ISDA was enacted, some doubted whether even Alaska Native villages could be federally recognized.8

Respondents counter by pointing to certain organizations created in Alaska in the 1930s that later became federally recognized tribes. One such organization, the Hydaburg Cooperative Association (HCA), was formed under the 1936 Amendment to the Indian Reorganization Act, which authorized Alaska Natives groups "not heretofore recognized as bands or tribes" to organize based on "a common bond of occupation, or association, or residence." Ch. 254, 49 Stat. 1250 (codified at 25 U.S.C. § 5119). The HCA organized around "a common bond of occupation in the fish industry." Constitution and By-Laws of the Hydaburg Cooperative Association, Alaska Preamble (1938). Decades later, the Interior Department acknowledged the HCA as a federally recognized tribe, even though it is of fairly recent vintage and organized around a bond of occupation rather than solely around an ancestral tribal heritage. See 58 Fed. Reg. 54369. If the HCA could be federally recognized, respondents say, some might have thought ANCs could too.

Respondents make too much of the HCA and the small handful of entities like it, which are not comparable to ANCs. Unlike ANCs, the former entities were organized under federally approved constitutions as part of a short-lived attempt to recreate in Alaska a tribal reservation system like that in the lower 48 States. ANCs, by contrast, were incorporated under state law pursuant to legislation that embodied the formal repudiation of that approach. That the Interior Department deemed the HCA and a handful of other entities like it federally recognized tribes decades after ISDA's passage does not mean it was plausible in 1975 to think ANCs would one day become federally recognized tribes, as well.9

Ultimately, respondents resort to the argument that, although the idea of ANCs becoming federally recognized tribes might be farfetched, it is not technically impossible. That is, Congress' plenary power over Indian affairs could conceivably permit it to recognize a government-to-government relationship between an ANC and the United States. Perhaps, but possibility is not the same as plausibility, and both are proper concerns of statutory interpretation. Consider again the example of a restaurant advertising "50% off any meat, vegetable, or seafood dish, including ceviche, which is cooked." On respondents' logic, because the restaurant technically could cook

its ceviche, the only way to read the advertisement is that ceviche is full price unless the restaurant takes an unexpected culinary step.

That is wrong. The best reading of the advertisement is that ceviche is 50% off even if it is not cooked, just as the best reading of ISDA is that ANCs are Indian tribes even if they are not federally recognized. Any grammatical awkwardness involved in the recognized-as-eligible clause skipping over the Alaska clause pales in comparison to the incongruity of forever excluding all ANCs from an "Indian tribe" definition whose most prominent feature is that it specifically includes them.

D

Respondents make a few final arguments to persuade the Court that ANCs are not Indian tribes under ISDA. None succeeds.

Respondents argue first that the ANCs misrepresent how meaningful a role they play under ISDA because the actual number of ISDA contracts held by ANCs is negligible. The Court does not have the record before it to determine the exact number and nature of ISDA contracts held by ANCs or their designees, either historically or currently. The point is largely irrelevant, however. No one would argue that a federally recognized tribe was not an Indian tribe under ISDA just because it had never entered into an ISDA contract. The same is true for ANCs. To the extent respondents argue that ruling for them would be of little practical consequence given the small number of ISDA contracts held by ANCs, quantity is not the only issue. For example, CIRI contracts through a designee to provide healthcare to thousands of Alaska Natives in Anchorage and the Matanuska-Susitna Valley. Brief for CIRI as Amicus Curiae 9. The loss of CIRI's ability alone to contract under ISDA would have significant effects on the many Alaska Natives it currently serves.

Respondents further argue that treating ANCs as Indian tribes would complicate the administration of ISDA. If an ISDA contract will benefit multiple Indian tribes, each such tribe has to agree to the contract before it can go into effect. 25 U.S.C. § 5304(l). Because membership in ANCs and federally recognized tribes often overlap, respondents argue that ANCs will be able to veto any ISDA contract sought by a federally recognized tribe in Alaska.

Without discounting the possibility of administrative burdens, this concern is overstated. The Executive Branch has treated ANCs as Indian tribes for 45 years, yet respondents point to no evidence of such a problem ever having arisen. If such a problem does arise, moreover, the Interior Department may be able to craft an administrative solution. Cf. 46 Fed. Reg. 27178, 27179 (1981) (Indian Health Service regulations establishing an "order of precedence" among Alaskan entities "[f]or the purposes of contracting under" ISDA and requiring authorizing resolutions from "[v]illages, as the smallest tribal units under" ANCSA).

Respondents also warn that blessing ANCs' status under ISDA will give them ammunition to press for participation in the many statutes besides the CARES Act that incorporate ISDA's "Indian tribe" definition. See, e.g., Indian Health Care Improvement Act, § 4(d), 90 Stat. 1401; Native American Housing Assistance and Self-Determination Act of 1996, § 4(12)(B), 110 Stat. 4019–4020; Indian Tribal Energy Development and Self-Determination Act of 2005, [Title V of the Energy Policy Act of 2005], § 503(a), 119 Stat. 764–765.

As the Government notes, however, there may well be statutes that incorporate ISDA's "Indian tribe" definition but exclude ANCs from participation in other ways. See Brief for Federal Petitioner 33–34 (citing, e.g., 7 U.S.C. §§ 1639o(2), 1639p(a)(1) (defining "Indian tribe" to incorporate the ISDA definition, but also requiring participants to exercise " 'regulatory authority over . . . territory of the Indian tribe'")). Moreover, this concern cuts both ways. If respondents' reading prevailed, ANCs would presumably be excluded from all other statutes incorporating ISDA's definition, even those under which ANCs have long benefited. That includes the Indian Tribal Energy Development and Self-Determination Act of 2005, under which ANCs have received millions of dollars of energy assistance. See Brief for Federal Petitioner 33. That also includes NAHASDA, which, as discussed, creates a housing block grant program under which the regional ANCs are some of the biggest recipients in Alaska. See supra, at 2446 – 2447. Currently, over 10,000 Alaskans live in housing units built, improved, or managed by these regional authorities. See Brief for Association of Alaska Housing Authorities as Amicus Curiae 15.

All told, the Court's decision today does not "vest ANCs with new and untold tribal powers," as respondents fear. Brief for Respondents Confederated Tribes of Chehalis Reservation et al. 54. It merely confirms the powers Congress expressly afforded ANCs and that the Executive Branch has long understood ANCs to possess.

III

Almost everyone agrees that if ANCs are Indian tribes under ISDA, they are eligible for funding under Title V of the CARES Act. If Congress did not want to make ANCs eligible for CARES Act funding, its decision to incorporate ISDA's "Indian tribe" definition into the CARES Act would be inexplicable. Had Congress wished to limit CARES Act funding to federally recognized tribes, it could simply have cross-referenced the List Act instead, as it had in numerous statutes before. Instead, Congress invoked a definition that expressly includes ANCs (and has been understood for decades to include them). Today's ruling merely gives effect to that decision.

Nevertheless, the Ute Indian Tribe of the Uintah and Ouray Reservation argues that the CARES Act excludes ANCs regardless of whether they are Indian tribes under ISDA. Recall that the CARES Act allocates money to "Tribal governments." 42 U.S.C. § 801(a)(2)(B). A "Tribal government" is "the recognized governing body of an Indian tribe." § 801(g)(5). According to the Utes, ANCs do not have a "recognized governing body" because that term applies to the governing body of a federally recognized tribe alone.

As the Utes implicitly acknowledge, however, federal recognition is usually discussed in relation to tribes, not their governing bodies. Brief for Respondent Ute Indian Tribe of the Uintah and Ouray Reservation 13 ("The recognized relationship is a political relationship between the United States and the tribe"); see also, e.g., note following 25 U.S.C. § 5130, p. 678 (" '[T]he United State has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationships with those tribes, and recognizes the sovereignty of those tribes' "). In addition, the CARES Act's use of the term "recognized governing body" is borrowed from ISDA itself, which lists the "recognized governing body" of an Indian tribe as one type of "tribal organization" empowered to contract with the government on the tribe's behalf. § 5304(l). In the ISDA context, this term has long been understood to apply to an ANC's board of directors, the ANC's governing body as a matter of corporate law. See, e.g., App. 45 (An ANC's "board of directors . . . is its 'governing body' "); see also Black's Law Dictionary, at 219 (defining "Board of Directors" as "[t]he governing body of a private corporation"). Indeed, respondents do not dispute that the plain meaning of "recognized governing body" covers an ANC's board of directors.

Looking to the plain meaning of "recognized governing body" makes even more sense because nothing in either the CARES Act or ISDA suggests that the term "recognized governing body" places additional limits on the kinds of Indian tribes eligible to benefit under the statutes. In both laws, the term instead pinpoints the particular entity that will receive funding on behalf of an Indian tribe. See 42 U.S.C. § 801(g)(5); 25 U.S.C. § 5304(l). Because ANCs are Indian tribes within the meaning of the CARES Act, an ANC's board of directors is a "recognized governing body" eligible to receive funding under Title V of the Act.

IV

The Court today affirms what the Federal Government has maintained for almost half a century: ANCs are Indian tribes under ISDA. For that reason, they are Indian tribes under the CARES Act and eligible for Title V funding. The judgment of the Court of Appeals for the District of Columbia Circuit is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice GORSUCH, with whom Justice THOMAS and Justice KAGAN join, dissenting.

* * *

I

Everyone agrees that ANCs are entitled to some CARES Act relief. Already, they have received benefits Congress allocated to corporations, like the Paycheck Protection Program. See Brief for Respondent Ute Indian Tribe of Uintah and Ouray Reservation 1 (Brief for Respondent

Ute Tribe). Congress also accounted for ANC shareholders, and all Alaskans, when it directed over $2 billion to the State. In fact, Alaska received more money per capita than all but two other States. Id., at 3; Congressional Research Service, General State and Local Fiscal Assistance and COVID–19: Background and Available Data (Feb. 8, 2021). The Alaska Native Villages received hundreds of millions of those dollars because everyone agrees they qualify as tribal governments for purposes of the CARES Act. See ibid. This suit concerns only the ANCs' claim of entitlement to additional funds statutorily reserved for "Tribal governments." 42 U.S.C. § 801(a)(2)(B). If that counterintuitive proposition holds true, ANCs will receive approximately $450 million that would otherwise find its way to recognized tribal governments across the country, including Alaska's several hundred Native Villages. See Letter from E. Prelogar, Acting Solicitor General, to S. Harris, Clerk of Court (May 12, 2021).

* * *

II

A

Start with the question whether the recognition clause applies to the ANCs. As the nearest referent and part of an integrated list of other modified terms, ANCs must be subject to its terms. Unsurprisingly, the Court of Appeals reached this conclusion unanimously. Lawyers often debate whether a clause at the end of a series modifies the entire list or only the last antecedent. . . . In ISDA, for example, some might wonder whether the recognition clause applies only to ANCs or whether it also applies to the previously listed entities—"Indian tribe[s], band[s], nation[s]," etc. But it would be passing strange to suggest that the recognition clause applies to everything except the term immediately preceding it. A clause that leaps over its nearest referent to modify every other term would defy grammatical gravity and common sense alike. . . .

Exempting ANCs from the recognition clause would be curious for at least two further reasons. First, the reference to ANCs comes after the word "including." No one disputes that the recognition clause modifies "any Indian tribe, band, nation, or other organized group or community." So if the ANCs are included within these previously listed nouns—as the statute says they are—it's hard to see how they might nonetheless evade the recognition clause. Second, in the proceedings below it was undisputed that the recognition clause modifies the term "Alaska Native village[s]," even as the ANCs argued that the clause does not modify the term "Alaska Native . . . regional or village corporation." Confederated Tribes of Chehalis Reservation v. Mnuchin, 976 F.3d 15, 23 (CADC 2020); Brief for Federal Petitioner 46. But to believe that, one would have to suppose the recognition clause skips over only half its nearest antecedent. How the clause might do that mystifies. . . .

* * *

The CARES Act itself offers still further clues. In the provision at issue before us, Congress appropriated money "for making payments to States, Tribal governments, and units of local government." 42 U.S.C. § 801(a)(1). Including tribal governments side-by-side with States and local governments reinforces the conclusion that Congress was speaking of government entities capable of having a government-to-government relationship with the United States. Recall, as well, that the CARES Act defines tribal governments as the "recognized governing body of an Indian Tribe." § 801(g)(5). ANCs, like most corporations, have a board of directors, 43 U.S.C. § 1606(f), and a corporate board may well be the governing body of an enterprise. But they do not govern any people or direct any government.

* * *

The Court's reply creates another anomaly too. If receiving any federal money really is enough to satisfy the recognition clause, many other Indian groups might now suddenly qualify as tribes under the CARES Act, ISDA, and other federal statutes. *2458 A 2012 GAO study, for example, identified approximately 400 nonfederally recognized tribes in the lower 48 States, of which 26 had recently received direct funding from federal programs. GAO, Indian Issues: Federal Funding for Non-Federally Recognized Tribes (GAO–12–348, Apr. 2012). This number does not include additional entities that may have received federal benefits in the form of loans, procurement contracts, tax expenditures, or amounts received by individual members. Id., at 35. And still other groups may have federal rights secured by treaty, which may exist even if the tribe is no longer recognized. Cf. Menominee Tribe v. United States, 391 U.S. 404, 412–413, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). How does the Court solve this problem? With an ipse dixit. See ante, at 2443 ("[T]he Court does not open the door to other Indian groups that have not been federally recognized becoming Indian tribes under ISDA"). The Court's "plain meaning" argument thus becomes transparent for what it is—a bare assertion that the recognition clause carries a different meaning when applied to ANCs than when applied to anyone else.

III

With its first theory facing so many problems, the Court offers a backup. Now the Court suggests that ANCs qualify as tribes even if they fail to satisfy the recognition clause. Ante, at 2447. Because ISDA's opening list of entities specifically includes ANCs, the Court reasons, the recognition clause must be read as inapplicable to them alone. Essentially, the Court quietly takes us full circle to the beginning of the case—endorsing an admittedly ungrammatical reading of the statute in order to avoid what it calls the "implausible" result that ANCs might be included in ISDA's first clause only to be excluded by its second. Ante, at 2448.

But it is difficult to see anything "implausible" about that result. When Congress adopted ANSCA in 1971, it "created over 200 new legal entities that overlapped with existing tribes and tribal nonprofit service organizations." Brief for Professors and Historians as Amici Curiae 27. At that time, there was no List Act or statutory criteria for formal recognition. Instead, as the Court

of Appeals ably documented, confusion reigned about whether and which Alaskan entities ultimately might be recognized as tribes. 976 F.3d at 18; see also Brief for Professors and Historians as Amici Curiae 28; Cohen, Handbook of Federal Indian Law 270–271 (1941). When Congress adopted ISDA just four years later, it sought to account for this uncertainty. The statute listed three kinds of Alaskan entities: Alaska Native Villages, Village Corporations, and Regional Corporations. And the law did "meaningful work by extending ISDA's definition of Indian tribes" to whichever among them "ultimately were recognized." 976 F.3d at 26. It is perfectly plausible to think Congress chose to account for uncertainty in this way; Congress often adopts statutes whose application depends on future contingencies. . . .

Further aspects of Alaskan history confirm this understanding. Over time, the vast majority of Alaska Native Villages went on to seek—and win—formal federal recognition as Indian tribes. See 86 Fed. Reg. 7557–7558 (2021); Brief for Respondent Confederated Tribes of Chehalis Reservation et al. 23. (It's this recognition which makes them indisputably eligible for CARES Act relief. See supra, at 2453.) By the time it enacted ISDA, too, Congress had already authorized certain Alaska Native groups to organize based on "a common bond of occupation, or association, or residence." 25 U.S.C. § 5119. This standard, which did not require previous recognition as "bands or tribes," was unique to Alaska. See ibid. And at least one such entity—the Hydaburg Cooperative Association, organized around the fish industry—also went on to receive federal tribal recognition in the 1990s. 86 Fed. Reg. 7558; see also Brief for Respondent Confederated Tribes of Chehalis Reservation et al. 35–36. Though short lived and not a full government-to-government political recognition, the Secretary of the Interior at one point even listed ANCs as " 'Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs,' " before eventually removing them. Ante, at 2446. And in 1996, Congress considered a bill that would have "deemed" a particular ANC—the Cook Inlet Region, Inc.—"an Indian tribal entity for the purpose of federal programs for which Indians are eligible because of their status as Indians" and required that it be included on "any list that designates federally recognized Indian tribes." H.R. 3662, 104th Cong., 2d Sess., § 121. Of course, the ANCs before us currently are not recognized as tribes. But all this history illustrates why it is hardly implausible to suppose that a rational Congress in 1975 might have wished to account for the possibility that some of the Alaskan entities listed in ISDA might go on to win recognition.

* * *

Having said all this, my disagreement with the Court's "implausibility" argument is a relatively modest one. We agree that linguistic and historical context may provide useful interpretive guidance, and no one today seeks to suggest that judges may sanitize statutes in service of their own sensibilities about the rational and harmonious. Instead, our disagreement is simply about applying the plain meaning, grammar, context, and canons of construction to the particular statutory terms before us. As I see it, an ordinary reader would understand that the recognition clause applies the same way to all Indian groups. And if that's true, there's just no way to read the text to include ANCs as "Tribal governments" for purposes of the CARES Act.

* * *

In my view, neither of the Court's alternative theories for reversal can do the work required of it. The recognition clause denotes the formal recognition between the federal government and a tribal government that triggers eligibility for the full panoply of special benefits given to Indian tribes. Meanwhile, a fair reading of that clause indicates that it applies to ANCs. Accordingly, with respect, I would affirm.

NOTE

There were 17 Indian tribal plaintiffs. Sixteen of the tribes worked together, but a 17th tribe (the Ute Indian Tribe of the Uintah and Ouray Reservation) declined to cooperate with the other tribe and filed its own brief. Normally at the Supreme Court, when one side has multiple parties, the parties work out amongst themselves which parties' advocate will argue the case. The outlier tribe refused to concede on that question as well. On the Friday before oral argument in the case, scheduled for the next Monday, the Court followed its regular procedures in such a situation – it drew lots. Though it had a 1 in 17 chance of being selected, the Ute Tribe was selected. Leah Litman, Kate Shaw, and Melissa Murray of the Strict Scrutiny podcast described the scene and the consequences of this maneuver:

> Kate Shaw:
>
> Sure. Well, actually, just wanted to note something, a procedural wrinkle in that case. So there's a story that came out about the selection of advocates to actually argue in Yellen right after we recorded our episode with the Appellate Project. So remember, this is the case about whether Alaska native corporations, or ANCs, formed under the Alaska Native Claim Settlement Act, are eligible for funds that may be given to Indian tribes under the CARES Act. So in that case there were two sets of briefs on behalf of the tribe, so opposing the disbursement of these funds to the ANCs. One brief, which we highlighted, represented 16 tribes. The other brief, which I had actually just failed to notice before we previewed the case, represented a single tribe, the Ute tribe. So the Ute tribe actually filed a motion requesting divided arguments so that they could argue in addition to the lawyer for the 16 other tribes.
>
> The court denied that motion. Usually in those circumstances counsel just works out who will argue, but at least according to Marcia Coyles' reporting the Ute tribe's position was that they would not consent to the other lawyer arguing.
>
> Leah Litman:

So in those circumstances what does the court do? As Marcia Coyle reported, the court literally draws a name out of a hat to decide who argues the case. And here

Melissa Murray:

So fancy, so fancy.

Leah Litman:

Right. They don't even bother doing an automated spreadsheet like you do for Instagram giveaways. Just a hat.

Kate Shaw:

In some states, literally if there's a tie . . . In the Virginia legislative election two or four years ago maybe, they literally tossed a coin when there was an actual tie. So weirdly, this stuff does happen.

Leah Litman:

So here, because the one lawyer represented 16 respondents and the lawyer for the Ute tribe represented one, there was a 16 out of 17 chance that they'd draw the name of the lawyer for the consolidated brief. But they drew the name of the lawyer for the Ute tribe, and so that's who argued the case. I should say as a disclosure that I know, or at least have met the lawyer for the other 16 tribes, Riyaz Kanji. Our listeners might know him as the lawyer who argued on behalf of the tribes and won in McGirt v. Oklahoma, a major, hugely significant federal Indian law case. And that is who the tribes could have had arguing the case. But that is not what happened, and I think the argument was much poorer for it.

You all talked last week with Professor Matthew Fletcher about how this is, I think, a hard case. And it's hard because I think assessing the implications of the case requires an understanding of Indian law and how contracts and decision making authority are allocated under or as a result of the Indian Self Determination Act, the statute incorporated into the CARES Act. And here the justices seem to be thinking about the consequences for the CARES Act alone, that is, what if you don't give money to ANCs? And just thinking about the case in those terms is a mistake because the case will also determine whether ANCs would be given decision making authority and veto power over contracts as a result of being recognized as tribes for purposes of ISDA, and that could be really huge since if they are recognized as tribes you could have multiple and potentially conflicting veto authority in separate organizations within Alaska between the ANCs and the federally recognized tribes.

> It's also hard because it involves a lot of complex interlocking statutes and competing canons. Would reading ANCs out of ISDA render it superfluous? It depends on your reading about whether Congress thought ANCs might qualify for recognition. Also depends a little bit on your understanding about what ANCs are and what recognition is supposed to serve. And the argument was just a disaster. Justice Sotomayor told the lawyer for the Ute tribe that it was going around in a circle. At one point the advocate conceded he was "having trouble communicating" the dilemma that would be created under the government's determination. Justice Barrett said the case was about only what piece of the pie goes where. And so this to me, just not great.
>
> And I'm not sure how the court's procedures or practices regarding divided argument help or hurt this. If they always grant divided argument or don't consolidate cases, maybe you don't have an incentive to agree to someone else arguing the case. On the other hand, this doesn't seem great either since it effectively gave a holdout considerable power to potentially torpedo a case in the process.

Barking Goldfish, Strict Scrutiny podcast, Transcript at 7-8 (April 26, 2021), available at https://strictscrutinypodcast.com/wp-content/uploads/2021/04/Barking-Goldfish.pdf. See also Marcia Coyle, *Resolving Stalemate, Supreme Court Picked Lawyer for Key Pandemic Argument*, Nat'l L.J., April 20, 2021.

CHAPTER 14

COMPARATIVE AND INTERNATIONAL LEGAL PERSPECTIVES ON INDIGENOUS PEOPLES LEGAL RIGHTS

SECTION B. EMERGING VOICES: INDIGENOUS RIGHTS AND INTERNATIONAL LAW

7. THE UNITED NATIONS HUMAN RIGHTS SYSTEM

NOTES

Page 1105

1. [ADD TO THE END OF NOTE 1] In 2016, the Human Rights Council expanded the mandate of the Expert Mechanism such that it is charged not only with advising the Council on the human rights' of indigenous peoples but also with assisting member states and indigenous peoples in realizing the aims of the UN Declaration on the Rights of Indigenous Peoples. Now comprised of seven members, one from each of the United Nation's seven socio-cultural regions of indigenous peoples, the Expert Mechanism engages with states, indigenous peoples, UN agencies, and industry to help implement the Declaration. In its first five years under the new mandate, the EMRIP has provided technical advice on application of the Declaration with regard to the Sami Parliament Act in Finland, assisted the Maori people in developing a National Action Plan to implement the Declaration in New Zealand, and facilitated dialogue regarding the application of Mexico City's new constitution, incorporating the Declaration as a matter of law.

   In 2020, the Expert Mechanism facilitated dialogue between the Yaqui people and government of Sweden leading to an agreement in principle to repatriate the sacred *Maaso Kova*, consistent with Articles 11 and 12 of the Declaration. *See Expert Mechanism on the Rights of Indigenous Peoples*, UNITED NATIONS HUM. https://www.ohchr.org/en/issues/ipeoples/emrip/pages/emripindex.aspx. *See also* INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS, THE INDIGENOUS WORLD 582-588, 613-671 (2019) (current description of UN mechanisms and procedures focused on Indigenous Peoples).

2. [ADD AFTER THE LAST LINE OF THE FIRST PARAGRAPH, ADD NOTE 2A] Indigenous peoples in the United States, Canada, and other countries have advocated for implementation of the Declaration as a matter of domestic law. In 2021, Canada passed the "United Nations Declaration on the Rights of Indigenous Peoples Act," which creates a framework to bring national laws into alignment with the Declaration. It calls for the designation of a federal minister to create a national action plan, in consultation and cooperation with Indigenous Peoples, to achieve the aims of the Declaration and to provide annual progress reports.

   For the full text Act, see https://parl.ca/DocumentViewer/en/43-2/bill/C-15/first-reading. In 2023, Canada announced its National Action Plan for 2023-2028, available here https://www.justice.gc.ca/eng/declaration/ap-pa/index.html.

3. The national act in Canada follows activism at the province level. For example, in 2019, the Legislative Assembly of British Columbia (B.C.), a province of Canada, unanimously passed the "Declaration on the Rights of Indigenous Peoples Act," 4th Session, 41st Parliament, British Columbia, 2019. Developed jointly between the B.C. government and the B.C. First Nations Leadership Council, the law requires the government "to take all

necessary measures to ensure provincial laws are consistent with the Declaration" through an action plan and annual progress report.

4. In the United States, agencies including the Advisory Council on Historic Preservation have adopted policy and guidelines to implement the Declaration. Several tribes, including the Muscogee (Creek) Nation and Ho-Chunk Nation have adopted the Declaration, either in part or in whole, through tribal law.

   For a summary of these implementation activities in the United States, see the Tribal Implementation Toolkit (2021), a joint publication of the Native American Rights Fund, University of Colorado Law School, and UCLA Law School, available at https://un-declaration.narf.org/wp-content/uploads/Tribal-Implementation-Toolkit-Digital-Edition.pdf.

5. Scholars have made arguments for U.S. federal courts to consider using the Declaration as an interpretive device regarding constitutional and statutory claims in the American Indian context. *See, e.g.,* Kristen A. Carpenter, *Religious Freedoms, Sacred Sites, and Human Rights in the United States, in* COMPARATIVE APPROACHES TO IMPLEMENTATION OF THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (B. Gunn et. al., eds.) (2020) (arguing, among other things, for construction of the First Amendment and Religious Freedom Restoration Act consistent with the Declaration's recognition of indigenous peoples' rights to their religious properties and spiritual relationships with traditional lands).
6. [NEW NOTE] The United Nations General Assembly recently proclaimed 2022-2032 as the "International Decade of Indigenous Languages," to bring awareness to the issue of language discrimination and opportunities for revitalization as experienced by indigenous peoples worldwide. G.A. Res. A/C.3/74/L.19/Rev.1, ¶ 25 (Nov. 6, 2019). The General assembly urged "[s]tates to consider establishing national mechanisms" to realize language rights, including those articulated in the Declaration. How might tribes and their advocates use this General Assembly Resolution and activities of the upcoming Decade to address language loss and revitalization in the U.S., in realms ranging from voting and education to religion and culture? *See* Kristen A. Carpenter and Alexey Tsykarev, *(Indigenous) Language as a Human Right*, 24 UCLA JOURNAL OF INTERNATIONAL LAW AND FOREIGN AFFAIRS 49 (2020).
7. After twenty four years of discussion, Member States of World Intellectual Property Organization (WIPO) adopted a Treaty on Intellectual Property, Genetic Resources, and Associated Traditional Knowledge, GRATK/DC/7 (May 24, 2024), (GRATK Treaty). The operative provisions of the GRATK Treaty require patent applicants to disclose aspects of applications that are based on Indigenous Peoples' traditional knowledge and supports the inclusion of Indigenous Peoples in implementing the Treaty. More generally, the GRATK Treaty reflects a broad-based movement among Indigenous Peoples to address "biopiracy," or the extraction and appropriation of their traditional knowledge about plants and other

living beings. Beyond its particular provisions, the GRATK Treaty is significant as the first ever WIPO treaty to reference Indigenous Peoples and the UN Declaration on the Rights of Indigenous Peoples. The GRATK Treaty will enter into force following signature and ratification by 15 countries. The United States has not yet signed or ratified the GRATK Treaty, but did convene consultations with tribal governments and others in advance of the May 2024 diplomatic conference leading to adoption of the GRATK Treaty. WIPO will convene ongoing discussions about subsequent treaties to protect Indigenous Peoples "traditional cultural expressions" and "traditional knowledge" in 2024 and 2025. For more information, see The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), https://www.wipo.int/tk/en/igc/.

NOTE: ARTICLE 27 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND INDIGENOUS PEOPLES' HUMAN RIGHTS

Add new paragraph after the 2nd full paragraph on p. 1103

Recently the committee has extended its analysis beyond Article 27 and invoked the Declaration in indigenous peoples' cases. In 2019, the Committee wrote in *Tiina Sanila-Aikio v. Finland* that Finland violated the Sami peoples' rights to participate in public life (Article 25) and minority rights (Article 27) as Indigenous Peoples when its Supreme Administrative Court expanded the pool of voters for the Sami Parliament by including individuals who the Sami Parliament had found ineligible to vote. Citing Article 33 of the Declaration, which provides, "[I] ndigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions . . . and the right to determine the structures and to select the membership of their institutions in accordance with their own procedures," the case is notable for the committee's interpretation of the Covenant "in the light of the United Nations Declaration on the Rights of Indigenous Peoples." Tiina Sanila Aikio vs. Finland, CCPR/C/124/D/2668/2015.