American Indian Law: Native Nations and The Federal System

Cases and Materials

Seventh Edition

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Chapter 2

Recurring Issues in Tribal Federal Legal Relations

A. FUNDAMENTAL DEFINITIONAL QUESTIONS.

1. What Is an Indian Tribe or Nation?

b. Definitions of "Tribe" Under Federal Statutes

Insert on pg. 126, after the end of the section.

Yellen v. Confederated Tribes of the Chehalis Reservation
United States Supreme Court
594 U.S. ___ (2021)

The United States Supreme Court recently issued its opinion in *Yellen v. Confederated Tribes of the Chehalis Reservation*, 594 U.S. ___ (2021), holding that the term "Tribal government" as defined by the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") includes Native Alaskan Corporations (ANCs), as well as federally-recognized tribal governments. Justice Sotomayor wrote the majority opinion, joined by Chief Justice Roberts, Justice Breyer, Justice Kavanaugh and Justice Barrett, and joined in part by Justice Alito. The CARES Act allocated 8 billion of monetary relief to "Tribal governments," and the statute defines "Tribal government" as the "recognized governing body of an Indian tribe" as defined by the Indian Self-Determination and Education Assistance Act (ISDA). Several tribal governments brought suit, alleging that the Alaska Native corporations were not "Tribal governments" because they are private companies incorporated under state law, they are not listed on the "Federally Recognized Indian Tribes List" established by a 1994 statute, and they are not in a "government-to-government relationship" with the United States.

Justice Sotomayor examined the language of the CARES Act and read this in connection with the ISDA definition, which includes Alaska Native Corporations, to find that Congress confirmed that "eligibility" for the benefits accorded under the Alaska Native Claims Settlement Act was sufficient to constitute eligibility for services available to "an Indian tribe." The Court affirmed "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."

Justice Gorsuch wrote a dissenting opinion, joined by Justice Thomas and Justice Kagan. Justice Gorsuch rejected the notion that Alaska's "for-profit Alaska Native Corporations (ANCs) qualify as "Tribal governments." Gorsuch noted that the ANCs had already received the benefits from the CARES Act that were allocated to corporations, as well as the funds that were allocated to the villages for per capita assistance. The only question was whether ANCs were entitled to the "additional funds" statutorily reserved for "Tribal governments." The additional funds were $450 million dollars, and these funds would go to other tribal governments if the ANCs failed to meet the eligibility test. Gorsuch placed emphasis on the need for "recognition" of government status, pointing out that, after the enactment of the Alaska Native Claims Settlement Act, a majority of Alaska Native Villages sought, and were granted, "federal recognition" as tribal governments, making them "indisputably eligible for CARES Act relief."

Gorsuch found that the CARES Act provides that a "Tribal government" is the "*recognized* governing body of an Indian Tribe." The reference to "recognition" denotes "formal recognition between the federal government and a tribal government that triggers eligibility for the full panoply of special benefits given to Indian tribes." For this reason, Justice Gorsuch and the other dissenting justices would have affirmed the

Court of Appeals' finding that ANCs are not "Tribal governments" for purposes of Title V of the CARES Act.

c. Achieving Federal Recognition

Insert on pg. 129, before the first full paragraph.

In 2015, the Department of the Interior updated its standards for federal recognition to cover acknowledgement of tribes that had not previously been recognized, as well as those that had previously been recognized, but currently lack federal recognition:

25 C.F.R. § 83.11

§ 83.11 What are the criteria for acknowledgment as a federally recognized Indian tribe?

Effective: July 31, 2015

The criteria for acknowledgment as a federally recognized Indian tribe are delineated in paragraphs (a) through (g) of this section.

(a) Indian entity identification. The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900. Evidence that the group's character as an Indian entity has from time to time been denied will not be considered to be conclusive evidence that this criterion has not been met. Evidence to be relied upon in determining a group's Indian identity may include one or a combination of the following, as well as other evidence of identification.

(1) Identification as an Indian entity by Federal authorities.

(2) Relationships with State governments based on identification of the group as Indian.

(3) Dealings with a county, parish, or other local government in a relationship based on the group's Indian identity.

(4) Identification as an Indian entity by anthropologists, historians, and/or other scholars.

(5) Identification as an Indian entity in newspapers and books.

(6) Identification as an Indian entity in relationships with Indian tribes or with national, regional, or state Indian organizations.

(7) Identification as an Indian entity by the petitioner itself.

(b) Community. The petitioner comprises a distinct community and demonstrates that it existed as a community from 1900 until the present. Distinct community means an entity with consistent interactions and significant social relationships within its membership and whose members are differentiated from and distinct from nonmembers. Distinct community must be understood flexibly in the context of the history, geography, culture, and social organization of the entity. The petitioner may demonstrate that it meets this criterion by providing evidence for known adult members or by providing evidence of relationships of a reliable, statistically significant sample of known adult members.

(1) The petitioner may demonstrate that it meets this criterion at a given point in time by some combination of two or more of the following forms of evidence or by other evidence to show that a significant and meaningful portion of the petitioner's members constituted a distinct community at a given point in time:

(i) Rates or patterns of known marriages within the entity, or, as may be culturally required, known patterned out-marriages;

(ii) Social relationships connecting individual members;

(iii) Rates or patterns of informal social interaction that exist broadly among the members of the entity;

(iv) Shared or cooperative labor or other economic activity among members;

(v) Strong patterns of discrimination or other social distinctions by non-members;

(vi) Shared sacred or secular ritual activity;

(vii) Cultural patterns shared among [community]. These patterns must function as more than a symbolic identification of the group as Indian. They may include, but are not limited to, language, kinship organization or system, religious beliefs or practices, and ceremonies;

(viii) The persistence of a collective identity continuously over a period of more than 50 years, notwithstanding any absence of or changes in name;

(ix) Land set aside by a State for the petitioner, or collective ancestors of the petitioner, that was actively used by the community for that time period;

(x) Children of members from a geographic area were placed in Indian boarding schools or other Indian educational institutions, to the extent that supporting evidence documents the community claimed; or

(xi) A demonstration of political influence under the criterion in § 83.11(c)(1) will be evidence for demonstrating distinct community for that same time period.

(2) The petitioner will be considered to have provided more than sufficient evidence to demonstrate distinct community and political authority under § 83.11(c) at a given point in time if the evidence demonstrates any one of the following:

(i) More than 50 percent of the members reside in a geographical area exclusively or almost exclusively composed of members of the entity, and the balance of the entity maintains consistent interaction with some members residing in that area;

(ii) At least 50 percent of the members of the entity were married to other members of the entity;

(iii) At least 50 percent of the entity members maintain distinct cultural patterns such as, but not limited to, language, kinship system, religious beliefs and practices, or ceremonies;

(iv) There are distinct community social institutions encompassing at least 50 percent of the members, such as kinship organizations, formal or informal economic cooperation, or religious organizations; or

(v) The petitioner has met the criterion in § 83.11(c) using evidence described in § 83.11(c)(2).

(c) Political influence or authority. The petitioner has maintained political influence or authority over its members as an autonomous entity from 1900 until the present. Political influence or authority means the entity uses a council, leadership, internal process, or other mechanism as a means of influencing or controlling the behavior of its members in significant respects, making decisions for the entity which substantially affect its members, and/or representing the entity in dealing with outsiders in matters of consequence. This process is to be understood flexibly in the context of the history, culture, and social organization of the entity.

(1) The petitioner may demonstrate that it meets this criterion by some combination of two or more of the following forms of evidence or by other evidence that the petitioner had political influence or authority over its members as an autonomous entity:

(i) The entity is able to mobilize significant numbers of members and significant resources from its members for entity purposes.

(ii) Many of the membership consider issues acted upon or actions taken by entity leaders or governing bodies to be of importance.

(iii) There is widespread knowledge, communication, or involvement in political processes by many of the entity's members.

(iv) The entity meets the criterion in § 83.11(b) at greater than or equal to the percentages set forth under § 83.11(b)(2).

(v) There are internal conflicts that show controversy over valued entity goals, properties, policies, processes, or decisions.

(vi) The government of a federally recognized Indian tribe has a significant relationship with the leaders or the governing body of the petitioner.

(vii) Land set aside by a State for petitioner, or collective ancestors of the petitioner, that is actively used for that time period.

(viii) There is a continuous line of entity leaders and a means of selection or acquiescence by a significant number of the entity's members.

(2) The petitioner will be considered to have provided sufficient evidence of political influence or authority at a given point in time if the evidence demonstrates any one of the following:

(i) Entity leaders or other internal mechanisms exist or existed that:

(A) Allocate entity resources such as land, residence rights, and the like on a consistent basis;

(B) Settle disputes between members or subgroups by mediation or other means on a regular basis;

(C) Exert strong influence on the behavior of individual members, such as the establishment or maintenance of norms or the enforcement of sanctions to direct or control behavior; or

(D) Organize or influence economic subsistence activities among the members, including

shared or cooperative labor.

(ii) The petitioner has met the requirements in § 83.11(b)(2) at a given time.

(d) Governing document. The petitioner must provide:

(1) A copy of the entity's present governing document, including its membership criteria; or

(2) In the absence of a governing document, a written statement describing in full its membership criteria and current governing procedures.

(e) Descent. The petitioner's membership consists of individuals who descend from a historical Indian tribe (or from historical Indian tribes that combined and functioned as a single autonomous political entity).

(1) The petitioner satisfies this criterion by demonstrating that the petitioner's members descend from a tribal roll directed by Congress or prepared by the Secretary on a descendancy basis for purposes of distributing claims money, providing allotments, providing a tribal census, or other purposes, unless significant countervailing evidence establishes that the tribal roll is substantively inaccurate; or

(2) If no tribal roll was directed by Congress or prepared by the Secretary, the petitioner satisfies this criterion by demonstrating descent from a historical Indian tribe . . . . [Petitioner can make such a demonstration by providing] evidence including, but not limited to ***:

(i) Federal, State, or other official records or evidence;

(ii) Church, school, or other similar enrollment records;

(iii) Records created by historians and anthropologists in historical times;

(iv) Affidavits of recognition by tribal elders, leaders, or the tribal governing body with personal knowledge; and

(v) Other records or evidence.

***

25 C.F.R. § 83.12

§ 83.12 What are the criteria for a previously federally acknowledged petitioner?

Effective: July 31, 2015

(a) The petitioner may prove it was previously acknowledged as a federally recognized Indian tribe, or is a portion that evolved out of a previously federally recognized Indian tribe, by providing substantial evidence of unambiguous Federal acknowledgment, meaning that the United States Government recognized the petitioner as an Indian tribe eligible for the special programs and services provided by the United States to Indians because of their status as Indians with which the United States carried on a relationship at some prior date including, but not limited to, evidence that the petitioner had:

(1) Treaty relations with the United States;

(2) Been denominated a tribe by act of Congress or Executive Order;

(3) Been treated by the Federal Government as having collective rights in tribal lands or funds; or

(4) Land held for it or its collective ancestors by the United States.

(b) Once the petitioner establishes that it was previously acknowledged, it must demonstrate that it meets:

(1) At present, the Community Criterion; and

(2) Since the time of previous Federal acknowledgment or 1900, whichever is later, the Indian Entity Identification Criterion and Political Authority Criterion.

3. What is the Extent of Tribal Territory, or Indian Country?

b. Defining "Indian Country"

iv. Determining the Boundaries of an Indian Reservation

Insert on pg. 176, after note 4.

Nebraska v. Parker
United States Supreme Court
136 S.Ct. 1072 (2016)

Justice THOMAS delivered the opinion of the Court.

The village of Pender, Nebraska sits a few miles west of an abandoned right-of-way once used by the Sioux City and Nebraska Railroad Company. We must decide whether Pender and surrounding Thurston County, Nebraska, are within the boundaries of the Omaha Indian Reservation or whether the passage of an 1882 Act empowering the United States Secretary of the Interior to sell the Tribe's land west of the right-of-way "diminished" the reservation's boundaries, thereby "free[ing]" the disputed land of "its reservation status." *Solem v. Bartlett*, 465 U. S. 463, 467 (1984). We hold that Congress did not diminish the reservation in 1882 and that the disputed land is within the reservation's boundaries.

I

A

Centuries ago, the Omaha Tribe settled in present-day eastern Nebraska. By the mid-19th century, the Tribe was destitute and, in exchange for much-needed revenue, agreed to sell a large swath of its land to the United States. In 1854, the Tribe entered into a treaty with the United States to create a 300,000-acre reservation. Treaty with the Omahas (1854 Treaty), *Mar. 16, 1854, 10 Stat. 1043*. The Tribe agreed to "cede" and "forever relinquish all right and title to" its land west of the Mississippi River, excepting the reservation, in exchange for $840,000, to be paid over 40 years. *Id.,* at 1043-1044.

In 1865, after the displaced Wisconsin Winnebago Tribe moved west, the Omaha Tribe agreed to "cede, sell, and convey" an additional 98,000 acres on the north side of the reservation to the United States for the purpose of creating a reservation for the Winnebagoes. Treaty with the Omaha Indians (1865 Treaty), *Mar. 6, 1865, 14 Stat. 667-668*. The Tribe sold the land for a fixed sum of $50,000. *Id.*, at 667.

***

Then came the 1882 Act, central to the dispute between petitioners and respondents. In that Act, Congress again empowered the Secretary of the Interior "to cause to be surveyed, if necessary, and sold" more than 50,000 acres lying west of a right-of-way granted by the Tribe and approved by the Secretary of the Interior in 1880 for use by the Sioux City and Nebraska Railroad Company. Act of *Aug. 7, 1882 (1882 Act), 22 Stat. 341*. The land for sale under the terms of the 1882 Act overlapped substantially with the land Congress tried, but failed, to sell in 1872. Once the land was appraised "in tracts of forty acres each," the Secretary was "to issue [a] proclamation" that the "lands are open for settlement under such rules and regulations as he may prescribe." §§1, 2, *id.,* at 341. Within one year of that proclamation, a nonmember could purchase up to 160 acres of land (for no less than $2.50 per acre) in cash paid to the United States, so long as the settler "occup[ied]" it, made "valuable improvements thereon," and was "a citizen of the United States, or . . . declared his intention to become such." §2, *id.,* at 341. The proceeds from any land sales, "after paying all expenses incident to and necessary for carrying out the provisions of th[e] act," were to "be placed to the credit of said Indians in the Treasury of the United States." §3, *id.,* at 341. Interest earned on the proceeds was to be "annually expended for the benefit of said Indians, under the direction of the Secretary of the Interior." *Ibid.*

The 1882 Act also included a provision, common in the late 19th century, that enabled members of the Tribe to select individual allotments, §§5-8, *id.*, at 342-343, as a means of encouraging them to depart from the communal lifestyle of the reservation. See *Solem, supra* at 467. The 1882 Act provided that the United States would convey the land to a member or his heirs in fee simple after holding it in trust on behalf of the member and his heirs for 25 years. §6, 22 Stat. 342. Members could select allotments on any part of the reservation, either east or west of the right-of-way. §8, *id.*, at 343.

After the members selected their allotments—only 10 to 15 of which were located west of the right-of-way—the Secretary proclaimed that the remaining 50,157 acres west of the right-of-way were open for settlement by nonmembers in April 1884. One of those settlers was W. E. Peebles, who "purchased a tract of 160 acres, on which he platted the townsite for Pender." *Smith v. Parker,* 996 F. Supp. 2d 815, 828 (Neb. 2014).

B

The village of Pender today numbers 1,300 residents. Most are not associated with the Omaha Tribe. Less than 2% of Omaha tribal members have lived west of the right-of-way since the early 20th century.

Despite its longstanding absence, the Tribe sought to assert jurisdiction over Pender in 2006 by subjecting Pender retailers to its newly amended Beverage Control Ordinance. The ordinance requires those retailers to obtain a liquor license (costing $500, $1,000, or $1,500 depending upon the class of license) and imposes a 10% sales tax on liquor sales. Nonmembers who violate the ordinance are subject to a $10,000 fine.

The village of Pender and Pender retailers, including bars, a bowling alley, and social clubs, brought a federal suit against members of the Omaha Tribal Council in their official capacities to challenge the Tribe's power to impose the requirements of the Beverage Control Ordinance on nonmembers. Federal law permits the Tribe to regulate liquor sales on its reservation and in "Indian country" so long as the Tribe's regulations are (as they were here) "certified by the Secretary of the Interior, and published in the Federal Register." 18 U. S. C. §1161. The challengers alleged that they were neither within the boundaries of the Omaha Indian Reservation nor in Indian country and, consequently, were not bound by the ordinance.
***

II

We must determine whether Congress "diminished" the Omaha Indian Reservation in 1882. If it did so, the State now has jurisdiction over the disputed land. *Solem*, 465 U. S. at 467. If Congress, on the other hand, did not diminish the reservation and instead only enabled nonmembers to purchase land within the reservation, then federal, state, and tribal authorities share jurisdiction over these "opened" but undiminished reservation lands. *Ibid.*

The framework we employ to determine whether an Indian reservation has been diminished is well settled. *Id.* at 470-472. "[O]nly Congress can divest a reservation of its land and diminish its boundaries," and its intent to do so must be clear. *Id.* at 470. To assess whether an Act of Congress diminished a reservation, we start with the statutory text, for "[t]he most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands." *Hagen v. Utah*, 510 U. S. 399, 411 (1994). Under our precedents, we also "examine all the circumstances surrounding the opening of a reservation." *Id.* at 412. Because of "the turn-of-the-century assumption that Indian reservations were a thing of the past," many surplus land Acts did not clearly convey "whether opened lands retained reservation status or were divested of all Indian interests." *Solem, supra,* at 468. For that reason, our precedents also look to any "unequivocal evidence" of the contemporaneous and subsequent understanding of the status of the reservation by members and nonmembers, as well as the United States and the State of Nebraska. *South Dakota v. Yankton Sioux Tribe,* 522 U. S. 329, 351 (1998). Because of "the turn-of-the-century assumption that Indian reservations were a thing of the past," many surplus land Acts did not clearly convey "whether opened lands retained reservation status or were divested of all Indian interests." *Solem*, *supra* at 468. For that reason, our precedents also look to any "unequivocal evidence" of the contemporaneous and subsequent understanding of the status of the reservation by members and nonmembers, as well as the United States and the State of Nebraska. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998).

A

As with any other question of statutory interpretation, we begin with the text of the 1882 Act, the most "probative evidence" of diminishment. *** Common textual indications of Congress' intent to diminish reservation boundaries include "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests" or "an unconditional commitment from Congress to compensate the Indian tribe for its opened land." *Solem, supra,* at 470. Such language "providing for the total surrender of tribal claims in exchange for a fixed payment" evinces Congress' intent to diminish a reservation, *Yankton Sioux*, *supra*, at 345, and creates "an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished," *Solom, supra* at 470-471. Similarly, a statutory provision restoring portions of a reservation to "the public domain" signifies diminishment. *Hagen,* 510 U. S., at 414. In the 19th century, to restore land to the public domain was to extinguish the land's prior use—its use, for example, as an Indian reservation—and to return it to the United States either to be sold or set aside for other public purposes. *Id.*, at 412-413.

The 1882 Act bore none of these hallmarks of diminishment. The 1882 Act empowered the Secretary to survey and appraise the disputed land, which then could be purchased in 160-acre tracts by nonmembers. *22 Stat. 341*. The 1882 Act states that the disputed lands would be "open for settlement under such rules and regulations as [the Secretary of the Interior] may prescribe." *Ibid.* And the parcels would be sold piecemeal in 160-acre tracts. *Ibid.* So rather than the Tribe's receiving a fixed sum for all of the disputed lands, the Tribe's profits were entirely dependent upon how many nonmembers purchased the appraised tracts of land.

From this text, it is clear that the 1882 Act falls into another category of surplus land Acts: those that "merely opened reservation land to settlement and provided that the uncertain future proceeds of settler purchases should be applied to the Indians' benefit." *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U. S. 425, 448 (1975). Such schemes allow "non-Indian settlers to own land on the reservation." *Seymour*

v. Superintendent of Wash. State Penitentiary (1962). But in doing so, they do not diminish the reservation's boundaries.

Our conclusion that Congress did not intend to diminish the reservation in 1882 is confirmed by the text of earlier treaties between the United States and the Tribe. See *Mattz v. Arnett*, 412 U. S. 481, 504 (1973) (comparing statutory text to earlier bills). In drafting the 1882 Act, Congress legislated against the backdrop of the 1854 and 1865 Treaties—both of which terminated the Tribe's jurisdiction over their land "in unequivocal terms." *Ibid.* Those treaties "ced[ed]" the lands and "reliquish[ed]" any claims to them in exchange for a fixed sum. *10 Stat. 1043-1044*; see also *14 Stat. 667* ("The Omaha tribe of Indians do hereby *cede, sell, and convey* to the United States a tract of land from the north side of their present reservation . . . " (emphasis added)). The 1882 Act speaks in much different terms, both in describing the way the individual parcels were to be sold to nonmembers and the way in which the Tribe would profit from those sales. That 1882 Act also closely tracks the 1872 Act, which petitioners do not contend diminished the reservation. The change in language in the 1882 Act undermines petitioners' claim that Congress intended to do the same with the reservation's boundaries in 1882 as it did in 1854 and 1865. Petitioners have failed at the first and most important step. They cannot establish that the text of the 1882 Act evinced an intent to diminish the reservation.

B

We now turn to the history surrounding the passage of the 1882 Act. The mixed historical evidence relied upon by the parties cannot overcome the lack of clear textual signal that Congress intended to diminish the reservation. That historical evidence in no way "*unequivocally* reveal[s] a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." ***

Petitioners rely largely on isolated statements that some legislators made about the 1882 Act. Senator Henry Dawes of Massachusetts, for example, noted that he had been "assured that [the 1882 Act] would *leave an ample reservation*" for the Tribe. 13 Cong. Rec. 3032 (1882) (emphasis added). And Senator John Ingalls of Kansas observed "that this bill practically breaks up that portion at least of the reservation which is to be sold, and provides that it shall be disposed of to private purchasers." *Id.*, at 3028. Whatever value these contemporaneous floor statements might have, other such statements support the opposite conclusion—that Congress never intended to diminish the reservation. Senator Charles Jones of Florida, for example, spoke of "white men purchas[ing] titles to land *within* this reservation and settl[ing] down with the Indians on it." *Id.*, at 3078 (emphasis added). Such dueling remarks by individual legislators are far from the "clear and plain" evidence of diminishment required under this Court's precedent. ***

More illuminating than cherry-picked statements by individual legislators would be historical evidence of "the manner in which the transaction was negotiated" with the Omaha Tribe. *Id.* at 471. In *Yankton Sioux*, for example, recorded negotiations between the Commissioner of Indian Affairs and leaders of the Yankton Sioux Tribe unambiguously "signaled [the Tribe's] understanding that the cession of the surplus lands dissolved tribal governance of the 1858 reservation." 522 U. S. at 353. No such unambiguous evidence exists in the record of these negotiations. In particular, petitioners' reliance on the remarks of Representative Edward Valentine of Nebraska, who stated, "You cannot find one of those Indians that does not want the western portion sold," and that the Tribe wished to sell the land to those who would " 'reside upon it and cultivate it' " so that the Tribe members could "benefit of these improvements," 13 Cong. Rec. 6541, falls short. Nothing about this statement or other similar statements unequivocally supports a finding that the existing boundaries of the reservation would be diminished.

C

Finally, we consider both the subsequent demographic history of opened lands, which serves as "one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers," ***, as well as the United States' "treatment of the affected areas, particularly in the years immediately following the opening," which has "some evidentiary value." *** Our cases suggest that such evidence might "reinforc[e]" a finding of diminishment or nondiminishment based on the text. *** But this Court has never relied solely on this third consideration to find diminishment.

As petitioners have discussed at length, the Tribe was almost entirely absent from the disputed territory for more than 120 years. Brief for Petitioners 24-30. The Omaha Tribe does not enforce any of its regulations—including those governing businesses, fire protection, animal control, fireworks, and wildlife and parks—in Pender or in other locales west of the right-of-way. 996 F. Supp. 2d, at 832. Nor does it maintain an office, provide social services, or host tribal celebrations or ceremonies west of the right-of-way. *Ibid.*

This subsequent demographic history cannot overcome our conclusion that Congress did not intend to diminish the reservation in 1882. And it is not our role to "rewrite" the 1882 Act in light of this subsequent demographic history. *DeCoteau,* 420 U. S., at 447. After all, evidence of the changing demographics of disputed land is "the least compelling" evidence in our diminishment analysis, for "[e]very surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation, yet we have repeatedly stated that not every surplus land Act diminished the affected reservation." ***

Evidence of the subsequent treatment of the disputed land by Government officials likewise has "limited interpretive value." *** Petitioners highlight that, for more than a century and with few exceptions, reports from the Office of Indian Affairs and in opinion letters from Government officials treated the disputed land as Nebraska's. Brief for Petitioners 24-38; see also 996 F. Supp. 2d, at 828, 830. It was not until this litigation commenced that the Department of the Interior definitively changed its position, concluding that the reservation boundaries were in fact not diminished in 1882. See *id.,* at 830-831. For their part, respondents discuss late-19th-century statutes referring to the disputed land as part of the reservation, as well as inconsistencies in maps and statements by Government officials. Brief for Respondent Omaha Tribal Council et al. 45-52; Brief for United States 38-52; see also 996 F. Supp. 2d, at 827, 832-833. This "mixed record" of subsequent treatment of the disputed land cannot overcome the statutory text, which is devoid of any language indicative of Congress' intent to diminish. *Yankton Sioux*, *supra*, at 356.

Petitioners' concerns about upsetting the "justifiable expectations" of the almost exclusively non-Indian settlers who live on the land are compelling, *Rosebud Sioux*, *supra*, at 605, but these expectations alone, resulting from the Tribe's failure to assert jurisdiction, cannot diminish reservation boundaries. Only Congress has the power to diminish a reservation. *DeCoteau*, 420 U. S., at 449. And though petitioners wish that Congress would have "spoken differently" in 1882, "we cannot remake history." *Ibid.*

***

In light of the statutory text, we hold that the 1882 Act did not diminish the Omaha Indian Reservation. Because petitioners have raised only the single question of diminishment, [1] we express no view about whether equitable considerations of laches and acquiescence may curtail the Tribe's power to tax the retailers of Pender in light of the Tribe's century-long absence from the disputed lands. Cf. *City of Sherrill v. Oneida Indian Nation of N. Y.,* 544 U. S. 197, 217-221 (2005).

The judgment of the Court of Appeals for the Eighth Circuit is affirmed.

It is so ordered.

McGirt v. Oklahoma
United States Supreme Court
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, (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. But, in seeking to de-

fend the state-court judgment below, Oklahoma has put aside whatever procedural defenses it might have and asked us to confirm that the land once given to the Creeks is no longer a reservation today.

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, (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. 138 S.Ct. 2026, 201 L.Ed.2d 277 (2018).

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. ***

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*, 510 U.S. 399, (1994) (emphasis deleted). Likewise, Congress might speak of a reservation as being " 'discontinued,' " " 'abolished,' " or " 'vacated.' " *Mattz v. Arnett*, 412 U.S. 481, 504, (1973). Disestablishment has "never required any particular form of words," *Hagen*, 510 U.S., at 411. 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*, 577 U. S. 481, (2016).

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." Starting in the 1880s, Congress sought to pressure many tribes to abandon their communal lifestyles and parcel their lands into smaller lots owned by individual tribe members. See 1 F. Cohen, Handbook of Federal Indian Law § 1.04 (2012) (Cohen), discussing General Allotment Act of 1887, ch. 119, 24 Stat. 388. Some allotment advocates hoped that the policy would create a class of assimilated, landowning, agrarian Native Americans. See Cohen § 1.04; F. Hoxie, A Final Promise: The Campaign To Assimilate 18–19 (2001). Others may have hoped that, with lands in individual hands and (eventually) freely alienable, white settlers would have more space of their own. See *id.*, at 14–15; cf. General Allotment Act of 1887, § 5, 24 Stat. 389–390.

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. Act of Mar. 3, 1893, ch. 209, § 16, 27 Stat. 645–646. A year later, the Commission reported back that the Tribe "would not, under any circumstances, agree to cede any portion of their lands." S. Misc. Doc. No. 24, 53d Cong., 3d Sess., 7 (1894). 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, 93 S.Ct. 2245 ("[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., at 1079–1080 ("[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)).

It isn't so hard to see why. The federal government issued its own land patents to many homesteaders throughout the West. These patents transferred legal title and are the basis for much of the private land ownership in a number of States today. But no one thinks any of this diminished the United States's claim to sovereignty over any land. To accomplish that would require an act of cession, the transfer of a sovereign claim from one nation to another. 3 E. Washburn, American Law of Real Property *521–*524. And there is no reason why Congress cannot reserve land for tribes in much the same way, allowing them to continue to exercise governmental functions over land even if they no longer own it communally. Indeed, such an arrangement seems to be contemplated by § 1151(a)'s plain terms. Cf. *Seymour*, 368 U.S., at 357–358.

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.[4]. 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, 104 S.Ct. 1161. 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.

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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. *New PrimeInc.* v. *Oliveira*, 139 S.Ct. 532, 538–539, (2019). That is the only "step" proper for a court of law. To be sure, if during the course of our work an 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. *Ibid.* 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." 465 U.S. at 470, (citing *United States v. Celestine*, 215 U.S. 278, 285, (1909)).

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. 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.

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. *Id.*, at 478. Notably, too, *Solem* suggested that whatever utility historical practice or demographics might have was "demonstrated" by this Court's earlier decision in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, (1977). See *Solem*, 465 U.S., at 470. And *Rosebud Sioux* hardly endorsed the use of such sources to find disestablishment. Instead, based on the statute at issue there, the Court came "to the firm conclusion that congressional intent" was to diminish the reservation in question. 430 U.S. at 603. At that point, the Tribe sought to cast doubt on the clear import of the text by citing subsequent historical events—and the Court rejected the Tribe's argument *exactly because* this kind of evidence could not overcome congressional intent as expressed in a statute. *Id.*, at 604–605.

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The dissent charges that we have failed to take account of the "compelling reasons" for considering extratextual evidence as a matter of course. *Post*, at 2487 – 2488. 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.

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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.

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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. See *McBratney*, 104 U.S., at 624. 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.

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. And if the threat of unsettling convictions cannot save a precedent of this Court, see *Ramos* v. *Louisiana*, 140 S.Ct. 1390, 1406–1408, (2020) (plurality opinion), it certainly cannot force us to ignore a statutory promise when no precedent stands before us at all.

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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. And it is precisely because those doctrines exist that we are "fre[e] to say what we know to be true ... today, while leaving questions about ... reliance interest[s] for later proceedings crafted to account for them." *Ramos*,140 S.Ct., at 1047 (plurality opinion).

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, with whom Justice ALITO and Justice KAVANAUGH join, and with whom Justice THOMAS joins except as to footnote 9, dissenting.

In 1997, the State of Oklahoma convicted petitioner Jimcy McGirt of molesting, raping, and forcibly sodomizing a four-year-old girl, his wife's granddaughter. McGirt was sentenced to 1,000 years plus life in prison. Today, the Court holds that Oklahoma lacked jurisdiction to prosecute McGirt—on the improbable ground that, unbeknownst to anyone for the past century, a huge swathe of Oklahoma is actually a Creek Indian reservation, on which the State may not prosecute serious crimes committed by Indians like McGirt. Not only does the Court discover a Creek reservation that spans three million acres and includes most of the city of Tulsa, but the Court's reasoning portends that there are four more such reservations in Oklahoma. The rediscovered reservations encompass the entire eastern half of the State—19 million acres that are home to 1.8 million people, only 10%–15% of whom are Indians.

Across this vast area, the State's ability to prosecute serious crimes will be hobbled and decades of past convictions could well be thrown out. On top of that, the Court has profoundly destabilized the governance of eastern Oklahoma. The decision today creates significant uncertainty for the State's continuing authority over any area that touches Indian affairs, ranging from zoning and taxation to family and environmental law.

None of this is warranted. What has gone unquestioned for a century remains true today: A huge portion of Oklahoma is not a Creek Indian reservation. Congress disestablished any reservation in a series of statutes leading up to Oklahoma statehood at the turn of the 19th century. The Court reaches the opposite conclusion only by disregarding the "well settled" approach required by our precedents. *Nebraska* v. *Parker*, 136 S.Ct. 1072, 1078, (2016).

Under those precedents, we determine whether Congress intended to disestablish a reservation by examining the relevant Acts of Congress and "all the [surrounding] circumstances," including the "contemporaneous and subsequent understanding of the status of the reservation." 136 S.Ct., at 1079 (internal quotation marks omitted). Yet the Court declines to consider such understandings here, preferring to examine only individual statutes in isolation.

Applying the broader inquiry our precedents require, a reservation did not exist when McGirt committed his crimes, so Oklahoma had jurisdiction to prosecute him. I respectfully dissent.

I

The Creek Nation once occupied what is now Alabama and Georgia. In 1832, the Creek were compelled to cede these lands to the United States in exchange for land in present day Oklahoma. The expanse set

aside for the Creek and the other Indian nations that composed the "Five Civilized Tribes"—the Cherokees, Chickasaws, Choctaws, and Seminoles—became known as Indian Territory. See F. Cohen, Handbook of Federal Indian Law § 4.07(1)(a), pp. 289–290 (N. Newton ed. 2012) (Cohen). Each of the Five Tribes formed a tripartite system of government. See *Marlin v. Lewallen*, 276 U.S. 58, 60, (1928). They "enact[ed] and execut[ed] their own laws," "punish[ed] their own criminals," and "rais[ed] and expend[ed] their own revenues." *Atlantic & Pacific R. Co. v. Mingus*, 165 U.S. 413, 436, (1897).

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In the wake of the [civil] war, a renewed "determination to thrust the nation westward" gripped the country. Cohen § 1.04, at 71. Spurred by new railroads and protected by the repurposed Union Army, settlers rapidly transformed vast stretches of territorial wilderness into farmland and ranches. See *id.*, at 71–74. The Indian Territory was no exception. By 1900, over 300,000 settlers had poured in, outnumbering members of the Five Tribes by over 3 to 1. See H. R. Rep. No. 1762, 56th Cong., 1st Sess., 1 (1900). There to stay, the settlers founded "[f]lourishing towns" along the railway lines that crossed the territory. S. Rep. No. 377, 53d Cong., 2d Sess., 6 (1894).

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Attuned to these new realities, Congress decided that it could not maintain an Indian Territory predicated on "exclusion of the Indians from the whites." S. Rep. No. 377, at 6. Congress therefore set about transforming the Indian Territory into a State.

Congress began by establishing a uniform body of law applicable to all occupants of the territory, regardless of race. To apply these laws, Congress established the U. S. Courts for the Indian Territory. Next Congress systematically dismantled the tribal governments. It abolished tribal courts, hollowed out tribal lawmaking power, and stripped tribal taxing authority. Congress also eliminated the foundation of tribal sovereignty, extinguishing the Creek Nation's title to the lands. Finally, Congress made the tribe members citizens of the United States and incorporated them in the drafting and ratification of the constitution for their new State, Oklahoma.

In taking these transformative steps, Congress made no secret of its intentions. It created a commission tasked with extinguishing the Five Tribes' territory and, in one report after another, explained that it was creating a homogenous population led by a common government. That contemporaneous understanding was shared by the tribal leadership and the State of Oklahoma. The tribal leadership acknowledged that its only remaining power was to parcel out the last of its land, and the State assumed jurisdiction over criminal cases that, if a reservation had continued to exist, would have belonged in federal court.

A century of practice confirms that the Five Tribes' prior domains were extinguished. The State has maintained unquestioned jurisdiction for more than 100 years. Tribe members make up less than 10%–15% of the population of their former domain, and until a few years ago the Creek Nation itself acknowledged that it no longer possessed the reservation the Court discovers today. This on-the-ground reality is enshrined throughout the U. S. Code, which repeatedly terms the Five Tribes' prior holdings the "former" Indian reservations in Oklahoma. As the Tribes, the State, and Congress have recognized from the outset, those "reservations were destroyed" when "Oklahoma entered the Union." S. Rep. No. 101–216S. Rep. No. 101–216, pt. 2, p. 47 (1989).

II

Much of this important context is missing from the Court's opinion, for the Court restricts itself to viewing each of the statutes enacted by Congress in a vacuum. That approach is wholly inconsistent with our precedents on reservation disestablishment, which require a highly contextual inquiry. Our "touchstone" is congressional "purpose" or "intent." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343, (1998). To "decipher Congress' intention" in this specialized area, we are instructed to consider three categories of evidence: the relevant Acts passed by Congress; the contemporaneous understanding of those Acts and the historical context surrounding their passage; and the subsequent understanding of the status of the reservation and the pattern of settlement there. Solem v. Bartlett. The Court resists calling these "steps," because "the only 'step' proper for a court of law" is interpreting the laws enacted by Congress. *Ante*, at 2467 – 2468. Any label is fine with us. What matters is that these are categories of evidence that our precedents "direct[ ] us" to examine *in determining* whether the laws enacted by Congress disestablished a reservation. *Hagen v. Utah*, 510 U.S. 399, 410–411, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994). Because those precedents are not followed by the Court today, it is necessary to describe several at length.[2]. The Court resists calling these "steps," because "the only 'step' proper for a court of law" is interpreting the laws enacted by Congress. *Ante*, at 2467 – 2468. Any label is fine with us. What matters is that these are categories of evidence that our precedents "direct[ ] us" to examine *in determining* whether the laws enacted by Congress disestablished a reservation. *Hagen v. Utah*, 510 U.S. 399, 410–411, (1994). Because those precedents are not followed by the Court today, it is necessary to describe several at length.

In *Solem v. Bartlett*, 465 U.S. 463, (1984), a unanimous Court summarized the appropriate methodology. "Congress [must] clearly evince an intent to change boundaries before diminishment will be found." *Id.*, at 470, (internal quotation marks and alterations omitted). This inquiry first considers the "statutory language used to open the Indian lands," which is the "most probative evidence of congressional intent." *Ibid.* "Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Ibid.* But "explicit language of cession and unconditional compensation are not prerequisites" for a finding of disestablishment. *Id.*, at 471.

Second, we consider "events surrounding the passage of [an] Act—particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress." *Ibid.* When such materials "unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation," we will "infer that Congress shared the understanding that its action would diminish the reservation," even in the face of "statutory language that would otherwise suggest reservation boundaries remained unchanged." *Ibid.*

Third, to a "lesser extent," we examine "events that occurred after the passage of [an] Act to decipher Congress' intentions." *Ibid.* "Congress' own treatment of the affected areas, particularly in the years immediately following the opening, has some evidentiary value, as does the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with [the areas]." *Ibid.* In addition, "we have recognized that who actually moved onto opened reservation lands is also relevant." *Ibid.* "Where 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." *Ibid.* This "subsequent demographic history" provides an "additional clue as to what Congress expected would happen." *Id.*, at 471–472.

***

Today the Court does not even discuss the governing approach reiterated throughout these precedents. The Court briefly recites the general rule that disestablishment requires clear congressional "intent," *ante*, at 2462 – 2463, but the Court then declines to examine the categories of evidence that our precedents demand we consider. Instead, the Court argues at length that allotment alone is not enough to disestablish a reserva-

tion. *Ante*, at 2462 – 2465. Then the Court argues that the "many" "serious blows" dealt by Congress to tribal governance, and the creation of the new State of Oklahoma, are each insufficient for disestablishment. *Ante*, at 2465 – 2467. Then the Court emphasizes that "historical practices or current demographics" do not "by themselves" "suffice" to disestablish a reservation. *Ante*, at 2467 – 2468.

***

The Court instead announces a new approach sharply restricting consideration of contemporaneous and subsequent evidence of congressional intent. The Court states that such "extratextual sources" may be considered in "only" one narrow circumstance: to help " 'clear up' " ambiguity in a particular "statutory term or phrase." *Ante*, at 2467 – 2468, 2469 – 2470 (quoting *Milner v. Department of Navy*, 562 U.S. 562, 574(2011), and citing *New Prime Inc.* v. *Oliveira*, 139 S.Ct. 532, 538–539 (2019)).

But, if that is the right approach, what have we been doing all these years? Every single one of our disestablishment cases has considered extratextual sources, and in doing so, none has required the identification of ambiguity in a particular term. That is because, while it is well established that Congress's "intent" must be "clear," *ante,* at 2469 – 2470 (quoting *Yankton Sioux Tribe*, 522 U.S., at 343, 118 S.Ct. 789), in this area we have expressly held that the appropriate inquiry does not focus on the statutory text alone.

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III

Applied properly, our precedents demonstrate that Congress disestablished any reservation possessed by the Creek Nation through a relentless series of statutes leading up to Oklahoma statehood

A

The statutory texts are the "most probative evidence" of congressional intent. *Parker*, 136 S.Ct., at 1079 (quoting *Hagen*, 510 U.S., at 411). The Court appropriately examines the Original Creek Agreement of 1901 and a subsequent statute for language of disestablishment, such as "cession," "abolish[ing]" the reservation, "restor[ing]" land to the "public domain," or an "unconditional commitment" to "compensate" the Tribe. *Ante*, at 2462 – 2465 (internal quotation marks omitted). But that is only the beginning of the analysis; there is no "magic words" requirement for disestablishment, and each individual statute may not be considered in isolation. See *supra,* at 2487 – 2488; *Hagen*, 510 U.S., at 411, 415–416 (when two statutes "buil[d]" on one another in this area, "[both] statutes—as well as those that came in between—must therefore be read together"); see also *Rosebud Sioux Tribe*, 430 U.S., at 592, (recognizing that a statute "cannot, and should not, be read as if it were the first time Congress had addressed itself to" disestablishment when prior statutes also indicate congressional intent). In this area, "we are not free to say to Congress: 'We see what you are driving at, but you have not said it, and therefore we shall go on as before.' " *Id.*, at 597, (quoting *Johnson v. United States*, 163 F. 30, 32 (C.A.1 1908) (Holmes, J.)). Rather, we recognize that the language Congress uses to accomplish its objective is adapted to the circumstances it confronts.

For example, "cession" is generally what a tribe does when it conveys land to a fellow sovereign, such as the United States or another tribe. See *Mitchel v. United States*, 9 Pet. 711, 734, (1835); *e.g.*, 1856 Treaty, Art. I, 11 Stat. 699. But here, given that Congress sought direct allotment to tribe members in order to enable private ownership by both Indians and the 300,000 settlers in the territory, it would have made little sense to "cede" the lands to the United States or "restore" the lands to the "public domain," as Congress did on other occasions. So too with a "commitment" to "compensate" the Tribe. Rather than buying land from the Creek, Congress provided for allotment to tribe members who could then "sell their land to Indians and

non-Indians alike." *Ante*, at 2463; see *Hagen*, 510 U.S., at 412, (a "definite payment" is not required for disestablishment). That other allotment statutes have contained various "hallmarks" of disestablishment tells us little about Congress's intent here. Contra, *ante,* at 2465 – 2466, and n. 5. "[W]e have never required any particular form of words" to disestablish a reservation. *Hagen*, 510 U.S., at 411,. There are good reasons the statutes here do not include the language the Court looks for, and those reasons have nothing to do with a failure to disestablish the reservation. Respect for Congress's work requires us to look at what it actually did, not search in vain for what it might have done or did on other occasions.

What Congress actually did here was enact a series of statutes beginning in 1890 and culminating with Oklahoma statehood that (1) established a uniform legal system for Indians and non-Indians alike; (2) dismantled the Creek government; (3) extinguished the Creek Nation's title to the lands at issue; and (4) incorporated the Creek members into a new political community—the State of Oklahoma. These statutes evince Congress's intent to terminate the reservation and create a new State in its place.

***

In sum, in statute after statute, Congress made abundantly clear its intent to disestablish the Creek territory. The Court, for purposes of the disestablishment question before us, defines the Creek territory as "lands that would lie outside both the legal jurisdiction and geographic boundaries of any State" and on which a tribe was "assured a right to self-government." *Ante*, at 2462. That territory was eliminated. By establishing uniform laws for Indians and non-Indians alike in the new State of Oklahoma, Congress brought Creek members and the land on which they resided under state jurisdiction. By stripping the Creek Nation of its courts, lawmaking authority, and taxing power, Congress dismantled the tribal government. By extinguishing the Nation's title, Congress erased the geographic boundaries that once defined Creek territory. And, by conferring citizenship on tribe members and giving them a vote in the formation of the State, Congress incorporated them into a new political community. "Under any definition," that was disestablishment. *Ibid.*

***

B

Under our precedents, we next consider the contemporaneous understanding of the statutes enacted by Congress and the subsequent treatment of the lands at issue. The Court, however, declines to consider such evidence because, in the Court's view, the statutes clearly do not disestablish any reservation, and there is no "ambiguity" to "clear up." *Ante*, at 2469 – 2470 (internal quotation marks omitted). That is not the approach demanded by our precedent, *supra*, at 2487 – 2489, and, in any event, the Court's argument fails on its own terms here. I find it hard to see how anyone can come away from the statutory texts detailed above with *certainty* that Congress had no intent to disestablish the territorial reservation. At the very least, the statutes leave some ambiguity, and thus "extratextual sources" ought to be consulted. *Ante*, at 2469 – 2470.

***

According to reports published by Congress leading up to Oklahoma statehood, the Five Tribes had failed to hold the lands for the equal benefit of all Indians, and the tribal governments were ill equipped to handle the largescale settlement of non-Indians in the territories. See *supra*, at 2483 – 2484; *Woodward*, 238 U.S., at 296–297. ***

The Creek shared the same understanding. In 1893, the year Congress formed the Dawes Commission, the Creek delegation to Washington recognized that Congress's "unwavering aim" was to " 'wipe out the

line of political distinction between an Indian citizen and other citizens of the Republic' " so that the Tribe could be " 'absorbed and become a part of the United States.' " P. Porter & A. McKellop, Printed Statement of Creek Delegates, reprinted in Creek Delegation Documents 8–9 (Feb. 9, 1893) (quoting Senate Committee Report); see also S. Doc. No. 111, 54th Cong., 2d Sess., 5, 8 (1897) (resolution of the Creek Nation "recogniz[ing]" that Congress proposed to "disintegrat[e] the land of our people" and "transform[ ]" "our domestic dependent states" "into a State of the Union").

***

In addition to their words, the contemporaneous actions of Oklahoma, the Creek, and the United States in criminal matters confirm their shared understanding that Congress did not intend a reservation to persist. Had the land been a reservation, the federal government—not the new State—would have had jurisdiction over serious crimes committed by Indians under the Major Crimes Act of 1885. See § 9, 23 Stat. 385. Yet, at statehood, Oklahoma immediately began prosecuting serious crimes committed by Indians in the new state courts, and the federal government immediately ceased prosecuting such crimes in federal court. ***

***

Lacking any other arguments, the Court suspects uniform lawlessness: The State must have "overstepped its authority" in prosecuting thousands of cases for over a century. *Ante*, at 2471. Perhaps, the Court suggests, the State lacked "good faith." *Ibid.* In the Court's telling, the federal government acquiesced in this extraordinary alleged power grab, abdicating its responsibilities over the purported reservation. And, all the while, the state and federal courts turned a blind eye.

But we normally presume that government officials exercise their duties in accordance with the law. Certainly the presumption may be strained from time to time in this area, but not so much as to justify the Court's speculations, which posit that government officials at every level either conspired to violate the law or uniformly misunderstood the fundamental structure of their society and government. Whatever the imperfections of our forebears, neither option seems tenable. And it is downright inconceivable that this could occur without prompting objections—from anyone, including from the Five Tribes themselves. Indians frequently asserted their rights during this period. The cases above, for example, involve criminal appeals brought by Indians, and Indians raised numerous objections to land graft in the former Territory. See Brief for Historians et al. as *Amici Curiae* 28–31. Yet, according to the extensive record compiled over several years for this case and a similar case, *Sharp* v. *Murphy*, *post*, p. —— (*per curiam*), Indians and their counsel did not raise a single objection to state prosecutions on the theory that the lands at issue were still a reservation. It stretches the imagination to suggest they just missed it.

C

Finally, consider "the subsequent treatment of the area in question and the pattern of settlement there." *Yankton Sioux Tribe*, 522 U.S., at 344. This evidence includes the "subsequent understanding of the status of the reservation by members and nonmembers as well as the United States and the [relevant] State," and the "subsequent demographic history" of the area. *Parker*, 136 S.Ct., at 1079, 1081; see *Solem*, 465 U.S., at 471. Each of the indicia from our precedents—subsequent treatment by Congress, the State's unquestioned exercise of jurisdiction, and demographic evidence—confirms that the Creek reservation did not survive statehood.

First, "Congress' own treatment of the affected areas" strongly supports disestablishment. *Id.*, at 471. After statehood, Congress enacted several statutes progressively eliminating restrictions on the alienation and taxation of Creek allotments, and Congress subjected even restricted lands to state jurisdiction. Since

Congress had already destroyed nearly all tribal authority, these statutes rendered Creek parcels little different from other plots of land in the State. *** rather, Congress eliminated both restrictions on the lands here and the Creek Nation's authority over them. Such developments would be surprising if Congress intended for all of the former Indian Territory to be reservation land insulated from state jurisdiction in significant ways. The simpler and more likely explanation is that they reflect Congress's understanding through the years that "all Indian reservations as such have ceased to exist" in Oklahoma, S. Rep. No. 1232, 74th Cong., 1st Sess., 6 (1935), and that "Indian reservations [in the Indian Territory] were destroyed" when "Oklahoma entered the union," S. Rep. No. 101–216, p. 47S. Rep. No. 101–216, p. 47 (1989).

That understanding is now woven throughout the U. S. Code, which applies numerous statutes to the land here by extending them to the "*former* reservation[s]" "in Oklahoma"—underscoring that no reservation exists today. ***

Second, consider the State's "exercis[e] [of] unquestioned jurisdiction over the disputed area since the passage of " the Enabling Act, which deserves "weight" as "an indication of the intended purpose of the Act." *Rosebud Sioux Tribe*, 430 U.S., at 599. As discussed above, for 113 years, Oklahoma has asserted jurisdiction over the former Indian Territory on the understanding that it is not a reservation, without any objection by the Five Tribes until recently (or by McGirt for the first 20 years after his convictions). See Brief for Respondent 4, 40. The same goes for major cities in Oklahoma. Tulsa, for example, has exercised jurisdiction over both Indians and non-Indians for more than a century on the understanding that it is not a reservation. See Brief for City of Tulsa as *Amicus Curiae* 27–28.

***

Under our precedent, Oklahoma's unquestioned, century-long exercise of jurisdiction supports the conclusion that no reservation persisted past statehood. See *Yankton Sioux Tribe*, 522 U.S., at 357, 118 S.Ct. 789; *Hagen*, 510 U.S., at 421; *Rosebud Sioux Tribe*, 430 U.S., at 604–605. "Since state jurisdiction over the area within a reservation's boundaries is quite limited, the fact that neither Congress nor the Department of Indian Affairs has sought to exercise its authority over this area, or to challenge the State's exercise of authority is a factor entitled to weight as part of the 'jurisdictional history.' " *Id.*, at 603–604 (citations omitted).

Third, consider the "subsequent demographic history" of the lands at issue, which provides an " 'additional clue' " as to the meaning of Congress's actions. *Parker*, 136 S.Ct., at 1081 (quoting *Solem*, 465 U.S., at 472). Continuing from statehood to the present, the population of the lands has remained approximately 85%–90% non-Indian. See Brief for Respondent 43; *Murphy v. Royal*, 875 F.3d 896, 965 (C.A.10 2017). "[T]hose demographics signify a diminished reservation." *Yankton Sioux Tribe*, 522 U. S., at 357. The Court questions whether the consideration of demographic history is appropriate, *ante*, at 2468 – 2469, 2473 – 2474, but we have determined that it is a "*necessary* expedient." *Solem*, 465 U.S., at 472 (emphasis added); see *Parker*, 136 S.Ct., at 1081. And for good reason. Our precedents recognize that disestablishment cases call for a wider variety of tools than more workaday questions of statutory interpretation. *Supra*, at 2488. In addition, the use of demographic data addresses the practical concern that "[w]hen an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of state and local governments." *Solem*, 465 U.S., at 471–472.

Here those burdens—the product of a century of settled understanding—are extraordinary. Most immediately, the Court's decision draws into question thousands of convictions obtained by the State for crimes involving Indian defendants or Indian victims across several decades. This includes convictions for serious crimes such as murder, rape, kidnapping, and maiming. Such convictions are now subject to jurisdictional challenges, leading to the potential release of numerous individuals found guilty under state law of the

most grievous offenses.[9] Although the federal government may be able to reprosecute some of these crimes, it may lack the resources to reprosecute all of them, and the odds of convicting again are hampered by the passage of time, stale evidence, fading memories, and dead witnesses. See Brief for United States as *Amicus Curiae* 37–39. No matter, the court says, these concerns are speculative because "many defendants may choose to finish their state sentences rather than risk reprosecution in federal court." *Ante*, at 2479. Certainly defendants like McGirt—convicted of serious crimes and sentenced to 1,000 years plus life in prison—will not adopt a strategy of running out the clock on their state sentences. At the end of the day, there is no escaping that today's decision will undermine numerous convictions obtained by the State, as well as the State's ability to prosecute serious crimes committed in the future.

Not to worry, the Court says, only about 10%–15% of Oklahoma citizens are Indian, so the "majority" of prosecutions will be unaffected. *Ibid.* But the share of serious crimes committed by 10%–15% of the 1.8 million people in eastern Oklahoma, or of the 400,000 people in Tulsa, is no small number.

Beyond the criminal law, the decision may destabilize the governance of vast swathes of Oklahoma. The Court, despite briefly suggesting that its decision concerns only a narrow question of criminal law, ultimately acknowledges that "many" federal laws, triggering a variety of rules, spring into effect when land is declared a reservation. *Ante*, at 2480 – 2481.

State and tribal authority are also transformed. As to the State, its authority is clouded in significant respects when land is designated a reservation. Under our precedents, for example, state regulation of even non-Indians is preempted if it runs afoul of federal Indian policy and tribal sovereignty based on a nebulous balancing test. This test lacks any "rigid rule"; it instead calls for a "particularized inquiry into the nature of the state, federal, and tribal interests at stake," contemplated in light of the "broad policies that underlie" relevant treaties and statutes and "notions of sovereignty that have developed from historical traditions of tribal independence." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 144–145 (1980). This test mires state efforts to regulate on reservation lands in significant uncertainty, guaranteeing that many efforts will be deemed permissible only after extensive litigation, if at all.

In addition to undermining state authority, reservation status adds an additional, complicated layer of governance over the massive territory here, conferring on tribal government power over numerous areas of life—including powers over non-Indian citizens and businesses. Under our precedents, tribes may regulate non-Indian conduct on reservation land, so long as the conduct stems from a "consensual relationship[ ] with the tribe or its members" or directly affects "the political integrity, the economic security, or the health or welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 565–566 (1981); see Cohen § 6.02(2)(a), at 506–507. Tribes may also impose certain taxes on non-Indians on reservation land, see *Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 198 (1985), and in this litigation, the Creek Nation contends that it retains the power to tax nonmembers doing business within its borders. Brief for Muscogee (Creek) Nation as *Amicus Curiae* 18, n. 6. No small power, given that those borders now embrace three million acres, the city of Tulsa, and hundreds of thousands of Oklahoma citizens. Recognizing the significant "potential for cost and conflict" caused by its decision, the Court insists any problems can be ameliorated if the citizens of Oklahoma just keep up the "spirit" of cooperation behind existing intergovernmental agreements between Oklahoma and the Five Tribes. *Ante*, at 2481. But those agreements are small potatoes compared to what will be necessary to address the disruption inflicted by today's decision.

The Court responds to these and other concerns with the truism that significant consequences are no "license for us to disregard the law." *Ibid.* Of course not. But when those consequences are drastic precisely because they depart from how the law has been applied for more than a century—a settled understanding that our precedents demand we consider—they are reason to think the Court may have taken a wrong turn in its analysis.

* * *

As the Creek, the State of Oklahoma, the United States, and our judicial predecessors have long agreed, Congress disestablished any Creek reservation more than 100 years ago. Oklahoma therefore had jurisdiction to prosecute McGirt. I respectfully dissent.

Justice THOMAS, dissenting.

[Omitted]

Notes

1. In the wake of the McGirt decision, there have been numerous challenges to the state's criminal and civil regulatory authority over the Muscogee (Creek) Nation's reservation, and also with respect to the reservations of other tribal Nations in the region that share a similar history. The state of Oklahoma filed its own action against the Department of Interior, alleging that the DOI illegally removed the state's authority to regulate coal mining on lands within the Muscogee (Creek) Nation's reservation. See State of Oklahoma v. U.S. Dept. of Interior, CV-21-719-F, Complaint filed in U.S. District Court for the Western District of Oklahoma, dated July 16, 2021. The claims are still unresolved as of the date of this update.

2. In their recent article on *McGirt v. Oklahoma*, Professors Hedden-Nicely and Leeds argue that the Court's decision signals a positive change in its policy toward tribes that could have ripple effects well beyond Eastern Oklahoma. As we have discussed extensively throughout this book, the Supreme Court has long adhered to a series of foundational principles in federal Indian law. As stated by Cohen's Handbook of Federal Indian Law, those principles are:

> (1) an Indian tribe possesses, in the first instance, all the inherent powers of any sovereign state; (2) a tribe's presence within the territorial boundaries of the United States subjects the tribe to federal legislative power and precludes the exercise of external powers of sovereignty of the tribe . . . but does not by itself affect the internal sovereignty of the tribe; and (3) inherent tribal powers are subject to qualification by treaties and by express legislation of Congress, but except as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.02[1] (Nell Jessup Newton ed., 2012)

   However, As noted by the late Dean David Getches, for the past forty years the Court has moved away from these foundational principles. Instead, "the touchstone of the Supreme Court's federal Indian jurisprudence has been to employ a 'subjectivist' approach whereby it 'gauges tribal sovereignty as a function of changing conditions'—demographic, social, political, and economic—and the expectations of non-Indians that may be potentially impacted by the exercise of tribal power." Hedden-Nicely and Leeds, *A Familiar Crossroads: McGirt v. Oklahoma and the Future of the Federal Indian Law Canon*, 50 N.M. L. REV. 300, 301 (2021). Not surprisingly, tribes and tribal interests have suffered greatly before the Supreme Court during this time, losing up to seventy-one percent of their cases. The tide seems to have turned since Justices Sotomayor and Gorsuch have been appointed to the Court. Since Justice Gorsuch's appointment, in particular, tribes have been overwhelmingly successful before the Supreme Court. But, it was not until *McGirt* that the Court heard a case that was alleged to have a significant affect on non-Indians, putting the "Court's competing jurisprudential

philosophies— its foundation principles versus its 'subjectivist' approach—on a collision course." *Id.* As reported by Hedden-Nicely and Leeds,

> In a powerful and uncharacteristically passionate decision, Justice Gorsuch wrote for a 5-4 majority, upholding treaty-based rights to re-recognize the historic reservation boundaries of the Muscogee (Creek) Nation, the fourth largest Indigenous nation in the United States. The decision was the fourth consecutive treaty-rights victory and seemed to solidify a shift toward a consistent approach rooted in foundational principles.
>
> The victory was short-lived. Just weeks after the Court's decision in *McGirt*, Justice Ruth Bader Ginsburg passed away, once again shifting the make-up of the United States Supreme Court. As a result, Federal Indian law once again finds itself at a crossroads. The *Murphy* and *McGirt* decisions are landmark decisions that bring change to the legal landscape of much of Oklahoma. It remains to be seen whether the perceived new Supreme Court era in Indian law is here to stay. *Id.*

We may not have much longer to wait. The State of Oklahoma recently filed a petition for writ of certiorari in *Oklahoma v. Bosse*, a capital case involving a non-Indian defendant convicted of murdering three citizens of the Chickasaw Nation within the exterior boundaries of the Chickasaw Reservation. Bosse was granted post-conviction relief based on the Supreme Court's decision in *McGirt* and Oklahoma has appealed to the United States Supreme Court. Among other issues, Oklahoma asked the Court to overrule *McGirt*. *See*, Petition for Writ of Certiorari at I, Oklahoma v. Bosse (U.S. Aug. 10, 2021) (No. __-____). Oklahoma's approach seems to be to double-down on the subjectivist arguments that failed in *McGirt* and hope that Justice Coney-Barrett will be persuaded where Justice Bader Ginsburg was not. Among other things, the State is arguing, without evidence, that

> [t]he decision in *McGirt* now drives thousands of crime victims to seek justice from federal and tribal prosecutors whose offices are not equipped to handle those demands. Numerous crimes are going uninvestigated and unprosecuted, endangering public safety. Federal district courts in Oklahoma are completely overwhelmed. Thousands of state prisoners are challenging decades' worth of convictions—many of which involve crimes that cannot be reprosecuted. The effects have spilled into the civil realm as well, jeopardizing hundreds of millions of dollars in state tax revenue and calling into question the State's regulatory authority within its own borders. *Id.* at 2.

Most of Oklahoma's arguments do not measure up to the facts on the ground, nor are Oklahoma's arguments related to state taxation consistent with basic principles of federal Indian law. *See, e.g.*, Hedden-Nicely and Leeds 50 N.M. L. Rev at 344-47; Hedden-Nicely and Mills, *The Civil Jurisdictional Landscape in Eastern Oklahoma Post McGirt v. Oklahoma*, Rocky Mountain Mineral Law Foundation Natural Resources Law Network (Aug. 2020). Oklahoma's position was made even more precarious by a recent decision by the Oklahoma Court of Criminal Appeals, which ruled that McGirt was not a retroactive ruling and would not be applied to reverse convictions that pre-dated *McGirt*. Matloff v. Wallace, 2021 OC CR 15 (Court of Criminal Appeals 2021). As a result, the "thousands of state prisoners," noted by Oklahoma will not be able to challenge their convictions and arguably renders *Bosse* moot. Nonetheless, should the Court take it up, its decision in *Bosse* will provide yet another datapoint on where its policy related to federal Indian law might be headed.

B. EQUAL PROTECTION QUESTIONS POSED BY INDIAN LEGISLATION

1. Indian Classifications as Political Rather than Racial

Insert on pg. 196, after note on *Babbit v. Williams*.

See Brackeen v. Haaland, Ch. 7, *infra.*

C. CANONS OF CONSTRUCTION FOR INTERPRETING THE TRIBAL-FEDERAL LEGAL RELATIONSHIP

Insert on pg. 220, before notes on Indian Law Canons of Construction.

See Washington State Dept. of Licensing v. Cougar Den, Ch. 4(B)(5)(b), *infra.*

See Herrera v. Wyoming, Ch. 7(A)(2), *infra.*

See In Re CSRBA, Ch. 7(B)(1), *infra.*

Chapter 3

Tribal Sovereignty and its Exercise

C. FEDERAL JUDICIAL AND LEGISLATIVE RESPONSES TO INHERENT TRIBAL SOVEREIGNTY

1. Federal Judicial Plenary Power Purporting to Preempt Tribal Sovereignty

Insert on pg. 308, after note 6.

United States v. Cooley
United States Supreme Court
141 S.Ct 1638 (2021)

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, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981); see also *Strate v. A–1 Contractors*, 520 U.S. 438, 456, n. 11, 117 S.Ct. 1404, 137 L.Ed.2d 661 (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, 8 L.Ed. 483 (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, 98 S.Ct. 1079, 55 L.Ed.2d 303 (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, 128 S.Ct. 2709, 171 L.Ed.2d 457 (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, 98 S.Ct. 1079. Tribes also lack inherent sovereign power to exercise criminal jurisdiction over non-Indians. See *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 212, 98 S.Ct. 1011, 55 L.Ed.2d 209 (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, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (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, 101 S.Ct. 1245, 67 L.Ed.2d 493 (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, 101 S.Ct. 1245. 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, 101 S.Ct. 1245 (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. See, *e.g., Plains Commerce Bank*, 554 U.S. at 328–330, 128 S.Ct. 2709; *Nevada v. Hicks*, 533 U.S. 353, 358–360, and n. 3, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001); *South Dakota v. Bourland*, 508 U.S. 679, 694–696, 113 S.Ct. 2309, 124 L.Ed.2d 606 (1993); *Duro v. Reina*, 495 U.S. 676, 687–688, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990); *Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 426–430, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989) (plurality opinion). In doing so we have reserved a tribe's inherent sovereign authority to engage in policing of the kind before us. Most notably, in *Strate v. A–1 Contractors*, 520 U.S. 438, 456–459, 117 S.Ct. 1404, 137 L.Ed.2d 661 (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, 121 S.Ct. 1825, 149 L.Ed.2d 889 (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, 110 S.Ct. 2053. 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, 110 S.Ct. 2053. But tribes "have inherent sovereignty independent of th[e] authority arising from their power to exclude," *Brendale*, 492 U.S. at 425, 109 S.Ct. 2994 (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, 110 S.Ct. 2053 (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, 128 S.Ct. 2709 (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 (citing *Atkinson*, 532 U.S. at 657, n. 12, 121 S.Ct. 1825, and *Strate*, 520 U.S. at 457–458, 117 S.Ct. 1404). 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, 128 S.Ct. 2709 (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, 128 S.Ct. 2709. Given the close fit between the second exception and the circumstances here, we do not believe the warnings can control the outcome.

[11]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.

Insert on pg. 358.

DOLGENCORP, INC v. The MISSISSIPPI BAND OF CHOCTAW INDIANS

United States Court of Appeals, Fifth Circuit.
746 F.3d 167 (2014)

JAMES E. GRAVES, JR., Circuit Judge:

Dolgencorp, Inc. and Dollar General Corp. (collectively "Dolgencorp") brought an action in the district court seeking to enjoin John Doe, a member of the Mississippi Band of Choctaw Indians, and other defendants (collectively "the tribal defendants") from adjudicating tort claims against Dolgencorp in the Choctaw tribal court. The district court denied Dolgencorp's motion for summary judgment and granted summary judgment in favor of the tribal defendants, concluding that the tribal court may properly exercise jurisdiction over Doe's claims. Because we agree that Dolgencorp's consensual relationship with Doe gives rise to tribal court jurisdiction over Doe's claims under *Montana v. United States,* 450 U.S. 544, 564–66 (1981), we AFFIRM the district court's judgment.

BACKGROUND

Dolgencorp operates a Dollar General store on the Choctaw reservation in Mississippi. The store sits on land held by the United States in trust for the Mississippi Band of Choctaw Indians, and operates pursuant to a lease agreement with the tribe and a business license issued by the tribe. At all relevant times, Dale Townsend was the store's manager. The tribe operates a job training program known as the Youth Opportunity Program ("YOP"), which attempts to place young tribe members in short-term, unpaid positions with local businesses for educational purposes. In the spring of 2003, Townsend, in his capacity as manager of the store, agreed to participate in the YOP. Pursuant to this program, John Doe, a thirteen-year-old tribe member, was assigned to the Dollar General store. Doe alleges that Townsend sexually molested him while he was working at the Dollar General store.

In January 2005, Doe sued Dolgencorp and Townsend in tribal court. Doe alleges that Dolgencorp is vicariously liable for Townsend's actions, and that Dolgencorp negligently hired, trained, or supervised Townsend. Doe further alleges that the assault has caused him severe mental trauma, and seeks "actual and punitive damages in a sum not less than 2.5 million dollars."

Dolgencorp and Townsend filed motions in the tribal court seeking to dismiss Doe's claims based on lack of subject-matter jurisdiction. The tribal court denied both motions. Both parties petitioned the Choctaw Supreme Court for interlocutory review of the lower court's order denying the motions to dismiss. Under an analysis based on *Montana v. United States,* 450 U.S. 544 (1981), the Choctaw Supreme Court held that subject-matter jurisdiction existed as to both Dolgencorp and Townsend and therefore dismissed the appeal, remanding the case to the lower court.

On March 10, 2008, Dolgencorp and Townsend filed an action in the U.S. District Court for the Southern District of Mississippi against the tribal defendants. Dolgencorp and Townsend allege that the tribal court lacks jurisdiction over them. . . . ***

The district granted Townsend's motion but denied Dolgencorp's motion. ***

Dolgencorp appealed. Dolgencorp does not contend that there are disputed questions of material fact; instead, it argues that the district court erred in its legal determination that the *Montana* consensual relationship exception was satisfied.

DISCUSSION

This case deals with the inherent sovereign authority of Indian tribes. Indian tribes can be viewed as independent sovereign communities that have lost some aspects of sovereignty. *See, e.g., United States v. Wheeler,* 435 U.S. 313, 322–23, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978).

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, 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.

Id. at 323. The Supreme Court has recognized that "both the tribes and the Federal Government are firmly committed to the goal of promoting tribal self-government, a goal embodied in numerous federal statutes." *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334–35 (1983). Moreover, "[t]ribal courts play a vital role in tribal self-government, ... and the Federal Government has consistently encouraged their development." *Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 14–15 (1987).

Generally, Indian tribes retain the power to govern themselves and to control relations between members of the tribe. *See Wheeler,* 435 U.S. at 326. On the other hand, "by virtue of their dependent status," Indian tribes have been largely divested of control over external relations; *i.e.* "relations between an Indian tribe and nonmembers of the tribe." *See id.* In other words, "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana,* 450 U.S. at 564.

In *Montana,* the Supreme Court recognized that generally, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." 450 U.S. at 565. However, the Court explained:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. 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.[2]

Id. The Court later held that "*Montana's* consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself." *Atkinson Trading Co., Inc. v. Shirley,* 532 U.S. 645, 656 (2001). Despite the limitations recognized in *Montana* and subsequent cases, the Court has consistently acknowledged that "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." *Iowa Mut.,* 480 U.S. at 18.

"[W]here tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts." *Strate v. A–1 Contractors,* 520 U.S. 438, 453 (1997). ***

Dolgencorp presents several arguments as to why tribal court jurisdiction over Doe's tort claims is not justified under the *Montana* consensual relationship exception.

I. Commercial relationship

Under *Montana,* a tribe may regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, *or other arrangements.*" 450 U.S. at 565 (emphasis added). Relying on a single repudiated appellate opinion, Dolgencorp argues that " 'other arrangements' ... also must be of a commercial nature." *** In other words, Dolgencorp argues that noncommercial relationships do not give rise to tribal jurisdiction under the first *Montana* exception. We decline to impose such a restriction, which does not appear to be supported by any compelling rationale. Moreover, such a requirement would be easily satisfied in this case. Although Doe worked for only a brief time at the Dollar General store and was not paid, he was essentially an unpaid intern, performing limited work in exchange for job training and experience. This is unquestionably a relationship "of a commercial nature."

II. Nexus

Dolgencorp argues that there is no nexus between its participation in the YOP and Doe's tort claims. We disagree. The conduct for which Doe seeks to hold Dolgencorp liable is its alleged placement, in its Dollar General store located on tribal lands, of a manager who sexually assaulted Doe while he was working there. This conduct has an obvious nexus to Dolgencorp's participation in the YOP. In essence, a tribe that has agreed to place a minor tribe member as an unpaid intern in a business located on tribal land on a reservation is attempting to regulate the safety of the child's workplace. Simply put, the tribe is protecting its own children on its own land. It is surely within the tribe's regulatory authority to insist that a child working for a local business not be sexually assaulted by the employees of the business. The fact that the regulation takes the form of a tort duty that may be vindicated by individual tribe members in tribal court makes no difference. *See, e.g., Attorney's Process,* 609 F.3d at 938. To the extent that foreseeability is relevant to the nexus issue, as Dolgencorp suggests, it is present here. Having agreed to place a minor tribe member in a position of quasi-employment on Indian land in a reservation, it would hardly be surprising for Dolgencorp to have to answer in tribal court for harm caused to the child in the course of his employment.[4]

Dolgencorp confuses the merits of Doe's case with the question of tribal jurisdiction. It may very well be that Dolgencorp did not do, or fail to do, anything that would cause it to be held liable to Doe. The nexus component of the tribal jurisdiction question, however, centers on the nexus between the *alleged* misconduct and the consensual action of Dolgencorp in participating in the YOP.

III. The effect of *Plains Commerce*

Dolgencorp argues that *Plains Commerce* narrowed the *Montana* consensual relationship exception, allowing tribes to regulate consensual relationships with nonmembers only upon a showing that the specific relationships "implicate tribal governance and internal relations." In *Plains Commerce,* 554 U.S. at 334–35, the Supreme Court described the *Montana* consensual relationship exception as follows:

> The logic of *Montana* is that certain activities on non-Indian fee land (say, a business enterprise employing tribal members) or certain uses (say, commercial development) may intrude on the internal relations of the tribe or threaten self-rule. To the extent they do, such activities or land uses may be regulated. Put another way, certain forms of nonmember behavior, even on non-Indian fee land, may sufficiently affect the tribe as to justify tribal oversight. While tribes generally have no interest in regulating the conduct of nonmembers, then, they may regulate nonmember behavior that implicates tribal governance and internal relations.

(citation and parenthetical omitted). The Court further stated:

> [Indian] laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations. See *Montana,* 450 U.S., at 564.

Id. at 337.

We do not interpret *Plains Commerce* to require an additional showing that one specific relationship, in itself, "intrude[s] on the internal relations of the tribe or threaten[s] self-rule." It is hard to imagine how a single employment relationship between a tribe member and a business could ever have such an impact. On the other hand, at a higher level of generality, the ability to regulate the working conditions (particularly as pertains to health and safety) of tribe members employed on reservation land is plainly central to the tribe's power of self-government. Nothing in *Plains Commerce* requires a focus on the highly specific rather than the general.

Dolgencorp notes the statement in *Plains Commerce* that "a business enterprise employing tribal members ... *may* intrude on the internal relations of the tribe or threaten self-rule," and that "[t]o the extent [it does], [its] activities ... may be regulated." 554 U.S. at 334–35 (emphasis added). This statement expresses nothing more than the uncontroversial proposition that a tribe cannot impose any conceivable regulation on a business simply because it is operating on a reservation and employing tribe members. However, such a limitation is already built into the first *Montana* exception. Under that exception, the tribe may only regulate activity having a logical nexus to some consensual relationship between a business and the tribe or its members. *See, e.g., Philip Morris,* 569 F.3d at 941 ("The mere fact that a nonmember has some consensual commercial contacts with a tribe does not mean that the tribe has jurisdiction over all suits involving that nonmember, or even over all such suits that arise within the reservation; the suit must also arise out of those consensual contacts.").

Our conclusion is strengthened by the fact that since *Plains Commerce* was decided, no court has, despite finding a consensual relationship with a nexus to a tribal regulation, rejected tribal jurisdiction because the relationship did not "implicate tribal governance and internal relations."[5] We also note that any discussion in *Plains Commerce* of tribal authority to regulate nonmember conduct under *Montana* is dicta; its result is based on a holding that *Montana* does not allow a tribe to regulate the sale of land owned by a non-member. *See, e.g.,Plains Commerce,* 554 U.S. at 340 ("*Montana* provides that, in certain circumstances, tribes may exercise authority over the conduct of nonmembers, even if that conduct takes place on non-Indian fee land. But conduct taking place on the land and the sale of the land are two very different things.").[6]

***

AFFIRMED.

JERRY E. SMITH, Circuit Judge, dissenting:

For the first time ever, a federal court of appeals upholds Indian tribal-court tort jurisdiction over a non-Indian, based on a consensual relationship, without a finding that jurisdiction is "necessary to protect tribal self-government or to control internal relations." *Montana v. United States,* 450 U.S. 544, 564 (1981). The majority's alarming and unprecedented holding far outpaces the Supreme Court, which has never upheld Indian jurisdiction over a nonmember defendant.

***

F. TRIBAL SOVEREIGN IMMUNITY

1. In Federal and State Courts

Insert on pg. 471, before the notes

Lac Du Flambeau Band of Lake Superior Chippewa v. Coughlin

United States Supreme Court

599 U.S. ___ (2023)

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.

Coughlin eventually filed a motion in Bankruptcy Court, seeking to have the stay enforced against Lendgreen, its parent corporations, and the Band (collectively, petitioners). Coughlin also sought damages for emotional distress, along with costs and attorney's fees. See § 362(k) (providing a damages award to individuals injured by willful violations of the automatic stay).

Petitioners moved to dismiss. They argued that the Bankruptcy Court lacked subject-matter jurisdiction over Coughlin's enforcement proceeding, as the Band and its subsidiaries enjoyed tribal sovereign immunity from suit. The Bankruptcy Court agreed; it held that the suit had to be dismissed because the Bankruptcy Code did not clearly express Congress's intent to abrogate tribal sovereign immunity.

In a divided opinion, the Court of Appeals for the First Circuit reversed, concluding that the Bankruptcy Code "unequivocally strips tribes of their immunity." *In re Coughlin*, 33 F.4th 600, 603–604 (CA1 2022). . . . We granted certiorari to address the lower courts' inconsistent holdings.

II

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.

B

To "abrogate sovereign immunity," Congress "must make its intent ... 'unmistakably clear in the language of the statute.' " *Financial Oversight and Management Bd. for P. R. v. Centro De Periodismo Investigativo, Inc.*, 598 U. S. ——, ——, 143 (2023). This well-settled rule applies to federally recognized tribes no less than other defendants with sovereign immunity. *Ibid.* We have held that tribes possess the "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). Our cases have thus repeatedly emphasized that tribal sovereign immunity, absent a clear statement of congressional intent to the contrary, is the "baseline position."

This clear-statement rule is a demanding standard. If "there is a plausible interpretation of the statute" that preserves sovereign immunity, Congress has not unambiguously expressed the requisite intent.

The rule is not a magic-words requirement, however. To abrogate sovereign immunity unambiguously, "Congress need not state its intent in any particular way." *Cooper*, 566 U.S., at 291. Nor need Congress "make its clear statement in a single [statutory] section." The clear-statement question is simply whether, upon applying "traditional" tools of statutory interpretation, Congress's abrogation of tribal sovereign immunity is "clearly discernable" from the statute itself.

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.*

When faced with analogously structured provisions in other contexts, we have noted their all-encompassing scope. See, *e.g.*, *Taylor v. United States*, 579 U.S. 301, 305–306 (2016) (characterizing as "unmistakably broad" a criminal statute defining "commerce" to include a list of specific instances in which the Federal Government would have jurisdiction, followed by a

broad residual phrase). We find the strikingly broad scope of § 101(27)'s definition of "governmental unit" to be significant in this context as well.

The catchall phrase Congress used in § 101(27) is also notable in and of itself. . . . The pairing of "foreign" with "domestic" is of a piece with those other common expressions. . . . [For example], 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

Other aspects of the Bankruptcy Code reinforce what § 106(a)'s and § 101(27)'s plain text conveys.

Through various provisions, the Bankruptcy Code offers debtors a fresh start by discharging and restructuring their debts in an "orderly and centralized" fashion. The automatic-stay requirement, for example, keeps creditors from "dismember[ing]" the estate while the bankruptcy case proceeds. The Code's discharge provision enjoins creditors from trying to collect debts that have been discharged in a bankruptcy case. § 524(a). And its plan-confirmation provisions, as relevant here, "bind ... each creditor" to whatever repayment plan the bankruptcy court approves, "whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." § 1327(a); see also, *e.g.*, §§ 1141(a), 1227(a).

These protections sweep broadly, by their own terms. To facilitate the Code's "orderly and centralized" debt-resolution process, Collier on Bankruptcy ¶1.01, these provisions' basic requirements generally apply to *all* creditors. . . .

. . .

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. . . .

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. 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, 134 S.Ct. 2024; *Santa Clara Pueblo*, 436 U.S., at 57–58, 98 S.Ct. 1670. 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.' "

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.[4]

[4] Given this holding, we need not decide whether tribes qualify as purely "domestic" governments. Compare Brief for Petitioners 33 (insisting tribes are not clearly domestic governments), and *post*, at 1706 – 1709 (GORSUCH, J., dissenting) (similar), with Brief for Respondent 40–41 (contending that they are). See also *infra*, at 1700 – 1701.

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 ex-

pressed 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 1695 – 1696, 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.

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.

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.

* * *

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

It is so ordered.

Justice THOMAS, concurring in the judgment [Omitted].

Justice GORSUCH, dissenting.

Until today, there was "not one example in all of history where [this] Court ha[d] found that Congress intended to abrogate tribal sovereign immunity *without* expressly mentioning Indian tribes somewhere in the statute." *In re Greektown Holdings, LLC*, 917 F.3d 451, 460 (CA6 2019) (internal quotation marks omitted). No longer. The Court reads the phrase "other foreign or domestic government," 11 U.S.C. § 101(27), as synonymous with "any and every government," *ante,* at 1695 – 1696—all for the purpose of holding that § 106(a) of the Bankruptcy Code abrogates tribal sovereign immunity. It is a plausible interpretation. But plausible is not the standard our tribal immunity jurisprudence demands. Before holding that Congress has vitiated tribal immunity, the Legislature must "unequivocally express" its intent to achieve that result. *C & L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001) (internal quotation marks omitted).

Respectfully, I do not think the language here does the trick. The phrase "other foreign or domestic government" could mean what the Court suggests: every government, everywhere. But it could also mean what it says: every "other foreign ... government"; every "other ... domestic government." And properly understood, Tribes are neither of those things. Instead, the Constitution's text—and two centuries of history and precedent—establish that Tribes enjoy a unique status in our law. Because this reading of the statute is itself (at worst) a plausible one, I would hold that the Bankruptcy Code flunks this Court's clear-statement rule and reverse.

Insert on pg. 473, after note 2.

Lewis v. Clarke
United States Supreme Court
137 S.Ct. 1285 (2017)

Justice SOTOMAYOR delivered the opinion of the Court.

Indian tribes are generally entitled to immunity from suit. This Court has considered the scope of that immunity in a number of circumstances. This case presents an ordinary negligence action brought against a tribal employee in state court under state law. We granted certiorari to resolve whether an Indian tribe's sovereign immunity bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment and for which the employees are indemnified by the tribe.

We hold that, in a suit brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated. That an employee was acting within the scope of his employment at the time the tort was committed is not, on its own, sufficient to bar a suit against that employee on the basis of tribal sovereign immunity. We hold further that an indemnification provision does not extend a tribe's sovereign immunity where it otherwise would not reach. Accordingly, we reverse and remand.

I
A

The Mohegan Tribe of Indians of Connecticut traces its lineage back centuries. Originally part of the Lenni Lenape, the Tribe formed the independent Mohegan Tribe under the leadership of Sachem Uncas in the early 1600's. ***

As one means of maintaining its economic self-sufficiency, the Tribe entered into a Gaming Compact with the State of Connecticut pursuant to the Indian Gaming Regulatory Act, 102 Stat. 2467, 25 U.S.C. § 2701 *et seq.* The compact authorizes the Tribe to conduct gaming on its land, subject to certain conditions including establishment of the Gaming Disputes Court. See 59 Fed.Reg. 65130 ***

Of particular relevance here, *** Mohegan Tribe Code § 4–52 provides that the Gaming Authority "shall save harmless and indemnify its Officer or Employee from financial loss and expense arising out of any claim, demand, or suit by reason of his or her alleged negligence ... if the Officer or Employee is found to have been acting in the discharge of his or her duties or within the scope of his or her employment." The Gaming Authority does not indemnify employees who engage in "wanton, reckless or malicious" activity. Mohegan Tribe Code § 4–52.

B

Petitioners Brian and Michelle Lewis were driving down Interstate 95 in Norwalk, Connecticut, when a limousine driven by respondent William Clarke hit their vehicle from behind. Clarke, a Gaming Authority employee, was transporting patrons of the Mohegan Sun Casino to their homes. For purposes of this appeal, it is undisputed that Clarke caused the accident.

The Lewises filed suit against Clarke in his individual capacity in Connecticut state court, and Clarke moved to dismiss for lack of subject-matter jurisdiction on the basis of tribal sovereign immunity. Clarke argued that because the Gaming Authority, an arm of the Tribe, was entitled to sovereign immunity, he, an employee of the Gaming Authority acting within the scope of his employment at the time of the accident, was similarly entitled to sovereign immunity against suit. According to Clarke, denying the motion would abrogate the Tribe's sovereign immunity.

The trial court denied Clarke's motion to dismiss. *Id.,* at *8. The court agreed with the Lewises that the sovereign immunity analysis should focus on the remedy sought in their complaint. To that end, the court identified Clarke, not the Gaming Authority or the Tribe, as the real party in interest because the damages remedy sought was solely against Clarke and would in no way affect the Tribe's ability to govern itself independently. The court therefore concluded that tribal sovereign immunity was not implicated. ***

The Supreme Court of Connecticut reversed, holding that tribal sovereign immunity did bar the suit. The court agreed with Clarke that "because he was acting within the scope of his employment for the Mohegan Tribal Gaming Authority and the Mohegan Tribal Gaming Authority is an arm of the Mohegan Tribe, tribal sovereign immunity bars the plaintiffs' claims against him. Of particular significance to the court was ensuring that "plaintiffs cannot circumvent tribal immunity by merely naming the defendant, an employee of the tribe, when the complaint concerns actions taken within the scope of his duties and the complaint does not allege, nor have the plaintiffs offered any other evidence, that he acted outside the scope of his authority." To do otherwise, the court reasoned, would " 'eviscerate' " the protections of tribal immunity. Because the court determined that Clarke was entitled to sovereign immunity on the sole basis that he was acting within the scope of his employment

when the accident occurred, it did not consider whether Clarke should be entitled to sovereign immunity on the basis of the indemnification statute.

We granted certiorari to consider whether tribal sovereign immunity bars the Lewises' suit against Clarke, 137 S.Ct. 31 (2016), and we now reverse the judgment of the Supreme Court of Connecticut.

II

Two issues require our resolution: (1) whether the sovereign immunity of an Indian tribe bars individual-capacity damages against tribal employees for torts committed within the scope of their employment; and (2) what role, if any, a tribe's decision to indemnify its employees plays in this analysis. We decide this case under the framework of our precedents regarding tribal immunity.

A

Our cases establish that, in the context of lawsuits against state and federal employees or entities, courts should look to whether the sovereign is the real party in interest to determine whether sovereign immunity bars the suit. In making this assessment, courts may not simply rely on the characterization of the parties in the complaint, but rather must determine in the first instance whether the remedy sought is truly against the sovereign. If, for example, an action is in essence against a State even if the State is not a named party, then the State is the real party in interest and is entitled to invoke the Eleventh Amendment's protection. For this reason, an arm or instrumentality of the State generally enjoys the same immunity as the sovereign itself. Similarly, lawsuits brought against employees in their official capacity "represent only another way of pleading an action against an entity of which an officer is an agent," and they may also be barred by sovereign immunity.

The distinction between individual- and official-capacity suits is paramount here. In an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself. This is why, when officials sued in their official capacities leave office, their successors automatically assume their role in the litigation. The real party in interest is the government entity, not the named official. "Personal-capacity suits, on the other hand, seek to impose *individual* liability upon a government officer for actions taken under color of state law. "[O]fficers sued in their personal capacity come to court as individuals," *Hafer,* 502 U.S., at 27 and the real party in interest is the individual, not the sovereign.

The identity of the real party in interest dictates what immunities may be available. Defendants in an official-capacity action may assert sovereign immunity. An officer in an individual-capacity action, on the other hand, may be able to assert *personal* immunity defenses, such as, for example, absolute prosecutorial immunity in certain circumstances. But sovereign immunity "does not erect a barrier against suits to impose individual and personal liability.

B

There is no reason to depart from these general rules in the context of tribal sovereign immunity. It is apparent that these general principles foreclose Clarke's sovereign immunity defense in this case. 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." 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.

In ruling that Clarke was immune from this suit solely because he was acting within the scope of his employment, the court extended sovereign immunity for tribal employees beyond what common-law sovereign immunity principles would recognize for either state or federal employees. The protection offered by tribal sovereign immunity here is no broader than the protection offered by state or federal sovereign immunity.

Accordingly, under established sovereign immunity principles, the Gaming Authority's immunity does not, in these circumstances, bar suit against Clarke.

III

The conclusion above notwithstanding, Clarke argues that the Gaming Authority *is* the real party in interest here because it is required by Mohegan Tribe Code § 4–52 to indemnify Clarke for any adverse judgment.

A

We have never before had occasion to decide whether an indemnification clause is sufficient to extend a sovereign immunity defense to a suit against an employee in his individual capacity. We hold that an indemnification provision cannot, as a matter of law, extend sovereign immunity to individual employees who would otherwise not fall under its protective cloak.

Our holding follows naturally from the principles discussed above. Indeed, we have applied these same principles to a different question before—whether a state instrumentality may invoke the State's immunity from suit even when the Federal Government has agreed to indemnify that instrumentality against adverse judgments. In *Regents of Univ. of Cal.,* an individual brought suit against the University of California, a public university of the State of California, for breach of contract related to his employment at a laboratory operated by the university pursuant to a contract with the Federal Government. We held that the indemnification provision did not divest the state instrumentality of Eleventh Amendment immunity. 519 U.S., at 426. Our analysis turned on where the potential *legal* liability lay, not from whence the money to pay the damages award ultimately came. Because the lawsuit bound the university, we held, the Eleventh Amendment applied to the litigation even though the damages award would ultimately be paid by the federal Department of Energy. *Id.,* at 429–431. Our reasoning remains the same. The critical inquiry is who may be legally bound by the court's adverse judgment, not who will ultimately pick up the tab.

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.

***

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. An indemnification statute such as the one at issue here does not alter the analysis. Clarke may not avail himself of a sovereign immunity defense.

IV

The judgment of the Supreme Court of Connecticut is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Insert on pg. 487.

Upper Skagit Tribe v. Lundgren
United States Supreme Court
138 S.Ct. 1649 (2018)

Lower courts disagree about the significance of our decision in *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*. Some think it means Indian tribes lack sovereign immunity in *in rem* lawsuits like this one; others don't read it that way at all. We granted certiorari to set things straight.

Ancestors of the Upper Skagit Tribe lived for centuries along the Skagit River in northwestern Washington State. But as settlers moved across the Cascades and into the region, the federal government sought to make room for them by displacing native tribes. In the treaty that followed with representatives of the Skagit people and others, the tribes agreed to "cede, relinquish, and convey" their lands to the United States in return for $150,000 and other promises. Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927.

Today's dispute stems from the Upper Skagit Tribe's efforts to recover a portion of the land it lost. In 1981, the federal government set aside a small reservation for the Tribe. More recently, the Tribe has sought to purchase additional tracts in market transactions. In 2013, the Tribe bought roughly 40 acres where, it says, tribal members who died of smallpox are buried. The Tribe bought the property with an eye to asking the federal government to take the land into trust and add it to the existing reservation next door. Toward that end, the Tribe commissioned a survey of the plot so it could confirm the property's boundaries. But then a question arose.

The problem was a barbed wire fence. The fence runs some 1,300 feet along the boundary separating the Tribe's land from land owned by its neighbors, Sharline and Ray Lundgren. The survey convinced the Tribe that the fence is in the wrong place, leaving about an acre of its land on the Lundgrens' side. So the Tribe informed its new neighbors that it in-

tended to tear down the fence; clearcut the intervening acre; and build a new fence in the right spot.

In response, the Lundgrens filed this quiet title action in Washington state court. [The Tribe filed a motion to dismiss based on sovereign immunity. The Washington Supreme Court, citing to *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992), concluded that tribes do not have sovereign immunity to avoid *in rem* suits. The Supreme Court vacated the decision of the Washington Supreme Court, holding that *Yakima* "resolved nothing about the law of sovereign immunity." However, late in the briefing schedule before the United States Supreme Court, the Lungrens abandoned its reliance on *Yakima* and introduced a new argument that the common law recognized a "immoveable property" exception to sovereign immunity. The Supreme Court remanded the case back to the Washington courts to determine the applicability of this exception].

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 54 character of a private individual." 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). 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. ***

Justice ROBERTS, with whom Justice KENNEDY joins, concurring in the judgment

I join the opinion of the Court in full.

But that opinion poses an unanswered question: What precisely is someone in the Lundgrens' position supposed to do? There should be a means of resolving a mundane dispute over property ownership, even when one of the parties to the dispute—involving non-trust, non-reservation land—is an Indian tribe. The correct answer cannot be that the tribe always wins no matter what; otherwise a tribe could wield sovereign immunity as a sword and seize property with impunity, even without a colorable claim of right.***

Chapter 4

Federal and State Authority in Indian Country

A. THE FEDERAL GOVERNMENT'S PLENARY POWER OVER INDIANS AND INDIAN COUNTRY

1. Sources and Scope of the Power

Insert on pg. 493

Haaland v. Brackeen

United States Supreme Court

599 U.S. ___ (2023)

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." 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." 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."

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. 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.

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.

***

C

Petitioners challenged ICWA as unconstitutional on multiple grounds. They asserted that Congress lacks authority to enact ICWA and that several of ICWA's requirements violate the anticommandeering principle of the Tenth Amendment. They argued that ICWA employs racial classifications that unlawfully hinder non-Indian families from fostering or adopting Indian children. And they challenged § 1915(c)—the provision that allows tribes to alter the prioritization order—on the ground that it violates the non-delegation doctrine.

The District Court granted petitioners' motion for summary judgment on their constitutional claims, and a divided panel of the Fifth Circuit reversed. After rehearing the case en banc, the Fifth Circuit affirmed in part and reversed in part. *** We granted certiorari.

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.' " *** 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. 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. Of course, the treaty power "does not literally authorize Congress to act legislatively," since it is housed in Article II rather than Article I. 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.' " 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.' " 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.' "

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). *** The contours of this "special relationship" are undefined.

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. Indeed, we have only rarely concluded that a challenged statute exceeded Congress's power to regulate Indian affairs.

***

B

Petitioners contend that ICWA exceeds Congress's power. Their principal theory, and the one accepted by both Justice ALITO and the dissenters in the Fifth Circuit, is that ICWA treads on the States' authority over family law. Domestic relations have traditionally been governed by state law; thus, federal power over Indians stops where state power over the family begins. Or so the argument goes.

It is true that Congress lacks a general power over domestic relations and, as a result, responsibility for regulating marriage and child custody remains primarily with the States. But the Constitution does not erect a firewall around family law. On the contrary, when Congress validly legislates pursuant to its Article I powers, we "ha[ve] not hesitated" to find conflicting state family law preempted, "[n]otwithstanding the limited application of federal law in the field of domestic relations generally. 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.

Take the Indian Commerce Clause, which is petitioners' primary focus. *** Petitioners . . . 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." 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." Even the judges who otherwise agreed with petitioners below rejected this narrow view of the Indian Commerce Clause as inconsistent with both our cases and "[l]ongstanding patterns of federal legislation." Rather than dealing with this precedent, however, petitioners virtually ignore it.

***

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 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. 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." 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.

***

[Thus,] [w]hen 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.

***

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. *** [F]or 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." 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.' " Instead, the burden is on the tribe or other objecting party to produce a higher-ranked placement. 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. 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.

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." End of story. That a federal law modifies a state law cause of action does not limit its preemptive effect.

C

Finally, we turn to ICWA's recordkeeping provisions. Section 1951(a) requires courts to provide the Secretary of the Interior with a copy of the final order in the adoptive placement of any Indian child. The court must also provide "other information as may be necessary to show" the child's name and tribal affiliation, the names and addresses of the biological parents and adoptive parents, and the identity of any agency with information about the adoptive placement. Section 1915(e) requires the State to "maintai[n]" a record "evidencing the efforts to comply with the order of preference" specified by ICWA. The record "shall be made available at any time upon the request of the Secretary or the Indian child's tribe." Petitioners argue that Congress cannot conscript the States into federal service by assigning them recordkeeping tasks.

[The Court rejected this argument, concluding that] [t]he anticommandeering doctrine applies "distinctively" to a state court's adjudicative responsibilities. Printz, 521 U.S. at 907. *** As originally understood, the Constitution allowed Congress to require "state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power."

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. ——, ——, 141 S.Ct. 2104, 2113 (2021). 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. 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." 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." 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. *** So an injunction would not give petitioners legally enforceable protection from the allegedly imminent harm.

Petitioners' request for a declaratory judgment suffers from the same flaw. This form of relief conclusively resolves " 'the legal rights of the parties.' " But again, state officials are nonparties who would not be bound by the judgment. Thus, the equal protection issue

would not be settled between petitioners and the officials who matter—which would leave the declaratory judgment powerless to remedy the alleged harm. *** Without preclusive effect, a declaratory judgment is little more than an advisory opinion.

***

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,[.]" That should make the issue open and shut.

* * *

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.

It is so ordered.

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. ***

II

This . . . [is] the heart of today's cases: Did Congress lack the constitutional authority to enact ICWA, as Texas and the private plaintiffs contend? In truth, that is not one question, but many. What authorities do the Tribes possess under our Constitution? What power does Congress have with respect to tribal relations? What does that mean for States? And how do those principles apply in a context like adoption, which involves competing claims of federal, state, and tribal authority?

Answering these questions requires a full view of the Indian-law bargain struck in our Constitution. Under the terms of that bargain, Indian Tribes remain independent sovereigns

with the exclusive power to manage their internal matters. As a corollary of that sovereignty, States have virtually no role to play when it comes to Indian affairs. To preserve this equilibrium between Tribes and States, the Constitution vests in the federal government a set of potent (but limited and enumerated) powers. In particular, the Indian Commerce Clause gives Congress a robust (but not plenary) power to regulate the ways in which non-Indians may interact with Indians. To understand each of those pieces—and how they fit together—is to understand why the Indian Child Welfare Act must survive today's legal challenge.

This is all much more straightforward than it sounds. Take each piece of the puzzle in turn. Then, with the full constitutional picture assembled, return to ICWA's provisions. By then, you will have all you need to see why the Court upholds the law.

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."

When the British crossed the Atlantic, they brought with them their own legal understandings. A seasoned colonial power, Britain was no stranger to the idea of "tributary" and "feudatory" states. E. de Vattel, Law of Nations 60–61 (1805) (Vattel). And it was a long-held tenet of international law that such entities do not "cease to be sovereign and independent" even when subject to military conquest—at least not "so long as self government and sovereign and independent authority are left in the[ir] administration." Worcester v. Georgia, 6 Pet. 515, 561 (1832). For that reason, early "history furnishes no example, from the first settlement of our country, of any attempt on the part of the [C]rown to interfere with the internal affairs of the Indians." Instead, the "settled state of things" reflected the British view that Tribes were "nations capable of maintaining the relations of peace and war; [and] of governing themselves."

Consistent with that understanding, the British regarded "the Indians as owners of their land." Britain often purchased land from Tribes (at least nominally) and predicated its system of legal title on those purchases. The Crown entered into all manner of treaties with the Tribes too—just as it did with fellow European powers.

Ultimately, "the American Revolution replaced that legal framework with a similar one." Oklahoma v. Castro-Huerta, 142 S.Ct. 2486, 2506 (2022) (GORSUCH, J., dissenting). The newly independent Nation wasted no time entering into treaties of its own—in no small part to secure its continued existence against external threats. See, e.g., Articles of Agreement and Confederation, Sept. 17, 1778, 7 Stat. 13. In practice, too, "[t]he new Republic" broadly recognized "the sovereignty of Indian [T]ribes," even if it did so "sometimes grudgingly." As we will see, the period under the Articles of Confederation was marred by significant conflict, driven by state and individual intrusions on tribal land. But the Constitution that fol-

lowed 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).

Given these express provisions, the early conduct of the political branches comes as little surprise. From the beginning, the "Washington Administration acknowledged considerable Native autonomy." G. Ablavsky, Beyond the Indian Commerce Clause, 124 Yale L. J. 1012, 1067 (2015) (Ablavsky 2015). Henry Knox, President Washington's Secretary of War, described the Tribes as akin to "foreign nations, not as the subjects of any particular [S]tate." Letter to G. Washington (July 7, 1789), in 3 Papers of George Washington: Presidential Series 134–141 (D. Twohig ed. 1989). Thomas Jefferson spoke of them as maintaining "full, undivided, and independent sovereignty as long as they chose to keep it," commenting also "that this might be for ever." Notes on Cabinet Opinions (Feb. 26, 1793), in 25 Papers of Thomas Jefferson 271–272 (J. Catanzariti ed. 1992). This view would later feature in a formal opinion of the Attorney General, who explained that, "[s]o long as a [T]ribe exists ... its title and possession are sovereign and exclusive; and there exists no authority to enter upon their lands, for any purpose whatever, without their consent." 1 Op. Atty. Gen. 465, 466 (1821).

What went for the Executive went for Congress. In the first few decades of the Nation's existence, the Legislative Branch passed a battery of statutes known as the Indian Trade and Intercourse Acts. Without exception, those Acts "either explicitly or implicitly regulated only the non-Indians who venture[d] into Indian country to deal with Indians," and "did not purport to regulate the [T]ribes or their members" in any way. R. Clinton, There is No Federal Supremacy Clause for Indian Tribes, 34 Ariz. St. L. J. 113, 134 (2002) (Clinton 2002).

This Court recognized many of these same points in its early cases. For example, in Worcester, the State of Georgia sought to seize Cherokee lands, abolish the Tribe and its laws, and apply its own criminal laws to tribal lands.. Holding Georgia's laws unconstitutional, this Court acknowledged that Tribes remain "independent political communities, retaining their original natural rights." While "necessarily dependent on" the United States under "the settled doctrine of the law of nations," the Court held, "a weaker power does not surrender its independence—its right to self-government, by associating with a stronger and taking its protection[.]" The Cherokee, like other Tribes, remained "a distinct community occupying its

own territory ... in which the laws of [the State] can have no force, and which the citizens of [that State] have no right to enter, but with the assent of the [Tribe] themselves, or in conformity with treaties, and with the acts of [C]ongress." Justice McLean, concurring, put it succinctly: "All the rights which belong to self-government have been recognized as vested in [the Tribes]."

*** [T]he rule of Worcester persisted in courts of law, unchanged, for decades. Recognizing the inherent sovereignty of Tribes, this Court held that States could not tax Indian land. ***

Nor did later developments call this original understanding into doubt. To be sure, in 1871, Congress declared that Tribes (prospectively) are no longer parties "with whom the United States may contract by treaty." But the sponsors of that Act sought only to increase the role of bicameral legislation in managing Indian affairs. The law did not purport to "invalidat[e] or impai[r]" any existing "obligation of any treaty lawfully made and ratified." 25 U.S.C. § 71. And the law did not abridge, nor could it have validly abridged, the long-settled view of tribal sovereignty. In fact, the United States proceeded to enter into roughly 400 further executive agreements with the Tribes practically indistinguishable from the treaties that came before. Keep this original understanding of tribal sovereignty in mind. It provides an essential point of framing.

B

Just as the Constitution safeguards the sovereign authority of Tribes, it comes with a "concomitant jurisdictional limit on the reach of state law" over Indian affairs. McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 171 (1973). As this Court has consistently recognized, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." Rice v. Olson, 324 U.S. 786, 789 (1945). Instead, responsibility for managing interactions with the Tribes rests exclusively with the federal government. To appreciate this point, walk through time once more.

Since the first days of British rule, the Crown oversaw—and retained the power to dictate—the Colonies' engagement with the Indian Tribes. See Clinton 1995, at 1064–1098. In response to a pattern of conflict arising out of colonial intrusion on tribal land, that supervision grew increasingly exacting. In 1743, for example, a British royal commission rejected an effort by the colony of Connecticut to exercise independent jurisdiction over a Tribe within its borders. The decision rested on a now-familiar logic: "The Indians, though living amongst the king's subjects in these countries, are a separate and distinct people from them, they are treated with as such, they have a polity of their own, they make peace and war with any nation of Indians when they think fit, without controul from the English."

***

After the Revolution, the Articles of Confederation gave the newly formed "[U]nited [S]tates ... the sole and exclusive right and power of ... managing all affairs with the Indians, not members of any of the [S]tates." Art. IX (1777). In providing that grant of authority, the

Articles' drafters may have meant to codify the centralized approach the British had pursued. But the "byzantine" document the drafters created, Ablavsky 2015, at 1034, came with a pair of easily exploited loopholes. First, the language of its Indian affairs clause allowed some to claim that various Tribes were " 'members' " of the States and thus "exclusively or principally subject to state legislative control." Clinton 1995, at 1103, 1150. Second, owing to a fear that the phrase "sole and exclusive" could give the misimpression that States lacked power to manage their own affairs, the Articles' drafters added another clause stipulating that "the legislative right of any [S]tate within its own limits be not infringed or violated." Art IX. Taken literally, that provision meant only that the Articles left to States what belonged to the States and to the Tribes what belonged to the Tribes. But some States saw in that language too an opportunity to assert their own control. See Clinton 1995, at 1103, 1107, 1113–1118, 1128–1131.

The result? A season of conflict brought about by state and private encroachments on tribal authority. G. Ablavsky, The Savage Constitution, 63 Duke L. J. 999, 1035–1036 (2014) (Ablavsky 2014). By the time the Constitutional Convention rolled around, "Indian uprisings had occurred ... in the Ohio River Valley and Virginia," "the Creeks and Georgia were on the brink of open warfare," and there was significant turmoil "on the western frontier." Clinton 1995, at 1147. Those events were not lost on the framers. ***

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.

***

Early practice confirmed this understanding. "The Washington Administration insisted that the federal government enjoyed exclusive constitutional authority" over managing relationships with the Indian Tribes. Ablavsky 2015, at 1019. As President Washington put it, the

federal government "possess[ed] the only authority of regulating an intercourse with [the Tribes], and redressing their grievances." Even "many state officials agreed" with President Washington's assessment. Ablavsky 2015, at 1019. South Carolina Governor Charles Pinckney acknowledged that "the sole management of India[n] affairs" is "committed" to "the general Government." Other leading proponents of States' rights reluctantly drew the same conclusion. "[U]nder the present Constitution," Thomas Jefferson lamented, States lack any "right to Treat with the Indians without the consent of the General Government."

For its part, this Court understood the absence of state authority over tribal matters as a natural corollary of Tribes' inherent sovereignty. Precisely because Tribes exist as a "distinct community," this Court concluded in Worcester, the "laws of [States] can have no force" as to them. 6 Pet. at 561. States could no more prescribe rules for Tribes than they could legislate for one another or a foreign sovereign. More than that, this Court recognized that "[t]he whole intercourse between the United States and [each Tribe], is by our [C]onstitution and laws, vested in the government of the United States." Ibid. (emphasis added). State laws cannot "interfere forcibly with the relations established between the United States and [an Indian Tribe], the regulation of which, according to the settled principles of our [C]onstitution, are committed exclusively to the government of the [U]nion." Ibid. (emphasis added). That principle, too, has endured. No one can contest the " 'historic immunity from state and local control' " that the Tribes enjoy, nor the permissibility of constitutional provisions enacted to protect the Tribes' "sovereign status." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 332 (1983). Tuck that point away too.

C

We now know that, at the founding, the Tribes retained their sovereignty. We know also that States have virtually no role to play in managing interactions with Tribes. From this, it follows that "[t]he only restriction on the power" of Tribes "in respect to [their] internal affairs" arises when their actions "conflict with the Constitution or laws of the United States." Roff v. Burney, 168 U.S. 218, 222 (1897). In cases like that, the Constitution provides, federal law must prevail. See Art. VI. This creates a hydraulic relationship between federal and tribal authority. The more the former expands, the more the latter shrinks. All of which raises the question: What powers does the federal government possess with respect to Tribes?

1

Because the federal government enjoys only "limited" and "enumerated powers," we look to the Constitution's text. Notably, our founding document does not include a plenary federal authority over Tribes. Nor was this an accident, at least not in the final accounting. The framers considered a general Indian Affairs Clause but left it on the cutting-room floor. See L. Toler, The Missing Indian Affairs Clause, 88 U. Chi. L. Rev. 413, 444–476 (2021) (Toler). That choice reflects an important insight about the Constitution's Indian-law bargain:

"Without an Indian affairs power," any assertion of unbounded federal authority over the Tribes is "constitutionally wanting." Id., at 476.

Instead of a free-floating Indian-affairs power, the framers opted for a bundle of federal authorities tailored to "the regulation of [the Nation's] intercourse with the Indians." Worcester, 6 Pet. at 559. In keeping with the framers' faith in the separation of powers, they chose to split those authorities "between the [E]xecutive and the [L]egislature." Toler 479. "The residue of Indian affairs power"—all those Indian-related powers not expressly doled out by the Constitution—remained the province of "the sovereign [T]ribes." Id., at 481.

*** Much of modern federal Indian law rests on that commerce power. It demands a closer look.

2

Contained in a single sentence, what we sometimes call "the" Commerce Clause is really three distinct Clauses rolled into one: a Foreign Commerce Clause, an Interstate Commerce Clause, and an Indian Commerce Clause. To be sure, those Clauses share the same lead word: "Commerce." And, viewed in isolation, that word might appear to sweep narrowly—encompassing activities like "selling, buying, and bartering, as well as transporting for these purposes." But it is "well established" that the individual Commerce Clauses have "very different applications," a point the framers themselves acknowledged.

Start with the word "Commerce." From the Nation's earliest days, Indian commerce was considered "a special subject with a definite content," quite "distinct and specialized" from other sorts of "commerce." A. Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 Minn. L. Rev. 432, 467–468 (1941). A survey of founding-era usage confirms that the term "Commerce," when describing relations with Indians, took on a broader meaning than simple economic exchange. Instead, the word was used as a "term of art," Pearl 322, to encompass all manner of "bilateral relations with the [T]ribes," Clinton 1995, at 1145; see also Toler 422 (noting that "Indian commerce" was a "legal ter[m] of art" that was "informed by the practicalities of Indian affairs").

This special usage likely emerged out of an international-law idea widely shared "at the time of the founding": When dealing with a foreign sovereign, the "commercial and noncommercial aspects" of bilateral interactions were "inevitably intertwined" because any intercourse carried potential diplomatic consequences and could even lead to war. Nor was that a speculative possibility when it came to Tribes. As we have seen, even the noncommercial conduct of settlers in the early years was a "continual source of violent conflict [with] Indians," partially motivating the move away from the Articles of Confederation framework. M. Fletcher & L. Jurss, Tribal Jurisdiction—A Historical Bargain, 76 Md. L. Rev. 593, 597 (2017).

At least two terms in the Commerce Clause confirm this special usage. For one thing, the Constitution speaks of "Commerce ... among" when discussing interstate dealings, but "Commerce with" when addressing dealings with tribal and foreign sovereigns. This lan-

guage suggests a shared framework for Congress's Indian and foreign commerce powers and a different one for its interstate commerce authority. More than that, the term "with" suggests that Congress has the authority to manage "all interactions or affairs ... with the Indian [T]ribes" and foreign sovereigns—wherever those interactions or affairs may occur. By contrast, the term "among" found in the Interstate Commerce Clause most naturally suggests that Congress may regulate only activities that "extend in their operation beyond the bounds of a particular [S]tate" and into another. All this goes a long way toward explaining why "Congress's powers to regulate domestic commerce are more constrained" than its powers to regulate Indian and foreign commerce.

For another thing, as nouns, "States" and "Indian Tribes" are not alike—and they were not alike at the founding. "States" generally referred then, as it does today, to a collection of territorial entities. Not so "Tribes." That term necessarily referred to collections of individuals. Want proof? Dust off most any founding-era dictionary and look up the definition of "Tribe." *** This observation sheds light on why ordinary speakers use the two terms differently. It explains, for instance, why it is grammatical to say you are vacationing "in Colorado," but not to say you are vacationing "in Navajo." It explains why it is sensible to say you are meeting "with some Cherokee," but not to say you are meeting "with some New Jersey." But this point also helps us make sense of why the Legislative Branch may regulate commerce with Indian Tribes differently than it may regulate commerce among the States. Because Tribes are collections of people, the Indian Commerce Clause endows Congress with the "authority to regulate commerce with Native Americans" as individuals. By contrast, Congress's power under the Interstate Commerce Clause operates only on commerce that involves "more States than one." In other words, commerce that takes place "among" (or between) two or more territorial units, and not just any commerce that involves some member of some State.

This Court has long appreciated these points of distinction. For example, in United States v. Holliday the Court upheld a federal statute that prohibited the sale of alcohol by non-Indians to Indians—on or off tribal land. Giving the Indian Commerce Clause its most natural reading, the Court concluded that the power to regulate commerce with Indian Tribes must mean the power to regulate "commerce with the individuals composing those [T]ribes." For that reason, too, "[t]he locality of the [commerce could] have nothing to do with the [scope of the] power." More than that, Holliday recognized that this focus on individuals means that Indian commerce must cover "something more" than just economic exchange. While it includes "buying and selling and exchanging commodities," it also extends to the entire "intercourse between the citizens of the United States and those [T]ribes." That "intercourse," the Court recognized, is "another branch of commerce" with Indians, "and a very important one" at that.

If the Constitution's text left any uncertainty about the scope of Congress's Indian commerce power, early practice liquidated it. The First Congress adopted the initial Indian Trade and Intercourse Act, which prohibited the "sale of lands made by any Indians" to non-Indians absent a public treaty. Act of July 22, 1790, ch. 33, § 4, 1 Stat. 138. The law also extended criminal liability to non-Indians who "commit[ted] any crime upon, or trespass against, the person or property of any peaceable and friendly Indian" in Indian country. § 5, ibid. The first of these provisions arguably addressed a narrow question of commerce. But the second "plainly regulated noneconomic" interaction.

Despite that fact, the Act (and its successors) were "not controversial exercises of congressional power." N. Newton, Federal Power Over Indians: Its Sources, Scope, and Limitations, 132 U. Pa. L. Rev. 195, 201, n. 25 (1984). Any doubt about their validity "would have been quieted by the [C]ommerce Clause's commitment of commerce with the Indian [T]ribes to Congress." Ibid. As Justice McLean (riding circuit) recognized, punishing non-Indians for "committing violence upon the persons or property of the Indians," fell "clearly within the scope of the power to regulate commerce with the Indian [T]ribes." Of course, the kinds of criminal trespasses Congress regulated as early as 1790 were not themselves commercial. But a trespass against even one individual Indian could disrupt commerce with that individual. By extension, such a trespass could disrupt dealings with other members of the Tribe and with other allied Tribes too. See Balkin 24–26. Recognizing this, the framers entrusted Congress with the power previously exercised by the British Parliament to "restrain the disorderly and licentious from intrusions" by non-Indians against even individual Indians—all to preserve functioning channels of trade and intercourse "with the Indians." Worcester, 6 Pet. at 552, 556.

3

If Congress's powers under the Indian Commerce Clause are broader than those it enjoys under the Interstate Commerce Clause, "broader" does not mean "plenary." Even the federal government's "power to control and manage" relations with the Tribes under the Indian Commerce Clause comes with "pertinent constitutional restrictions." United States v. Creek Nation, 295 U.S. 103, 110 (1935). Congress cannot, for example, expand the scope of its own power by arbitrarily labeling non-Indians as Indians. Nor can it regulate in peripherally related fields merely by identifying some incidental connection to non-Indians' dealings with Indians. Instead, Congress's actions must still bear a valid "nexus" to Indian commerce to withstand constitutional challenge. As we have seen, too, "the scope of congressional authority" over the Tribes under the Indian Commerce Clause is "best construed as a negative one." Pearl 325. Its text "limits the legislative reach to creating federal restrictions concerning what United States citizens and States may do in the context of Indian [T]ribes." Nothing in the Clause grants Congress the affirmative power to reassign to the federal government inherent sovereign authorities that belong to the Tribes.

In that way, the Indian Commerce Clause confirms, rather than abridges, principles of tribal sovereignty. As it must. It is "inconceivable" that a power to regulate non-Indians' dealings with Indians could be used to "dives[t Tribes] of the right of self-government." Worcester, 6 Pet. at 554. Otherwise, a power to manage relations with a party would become an instrument for "annihilating the political existence of one of the parties." Ibid. No one in the Nation's formative years thought that could be the law. They understood that Congress could no more use its commerce powers to legislate away a Tribe than it could a State or a foreign sovereign. The framers appreciated, too, that they possessed no more "authority to delegate to the national government power to regulate the [T]ribes directly" than they possessed authority to "delegate power to the federal government over other peoples who were not part of the federal union."

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.

In 1885, during the period of assimilationist federal policy, Congress enacted the Indian Major Crimes Act, § 9, 23 Stat. 385. Among other things, that law extended federal-court jurisdiction over various crimes committed by Indians against Indians on tribal lands. Ibid. In United States v. Kagama, 118 U.S. 375 (1886), this Court upheld the constitutionality of that Act. In the process, though, it stepped off the doctrinal trail. Instead of examining the text and history of the Indian Commerce Clause, the Court offered a free-floating and purposivist account of the Constitution, describing it as extending broad "power [to] the General Government" over tribal affairs. Building on that move, the Court would later come to describe the federal power over the Tribes as "plenary."

Perhaps the Court meant well. Surely many of its so-called "plenary power" cases reached results explainable under a proper reading of the Constitution's enumerated powers. Maybe the turn of phrase even made some sense: Congress's power with regard to the Tribes is "plenary" in that it leaves no room for State involvement. But as sometimes happens when this Court elides text and original meaning in favor of broad pronouncements about the Constitution's purposes, the plenary-power idea baked in the prejudices of the day. Cf. Plessy v. Ferguson, 163 U.S. 537 (1896). The Court suggested that the federal government's total power over the Tribes derived from its supposedly inherent right to "enforce its laws" over "th[e] remnants of a race once powerful, now weak." Kagama, 118 U.S. at 384–385. Of course, nothing of the sort follows from "a reasoned analysis derived from the text [or] history ... of the United States Constitution." Clinton 2002, at 163. Instead, the plenary-power idea "constituted an unprincipled assertion of raw federal authority." Ibid. It rested on nothing more than judicial claims about putative constitutional purposes that aligned with contemporary policy preferences.

Nor was anachronistic language the only consequence of this Court's abandonment of the Constitution's original meaning. During what has been called the "high plenary power era of U. S. Indian law," this Court sometimes took the word "plenary" pretty literally. 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). Perhaps most notably, the Court even suggested that Congress's "plenary authority" might allow it to "limit, modify, or eliminate the powers of local self-government 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.

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.

***

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 family-law 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).

***

In recent years, this Court has begun to correct its mistake. Increasingly, it has emphasized original meaning in constitutional interpretation. In the process, it has come again to recognize the Indian Commerce Clause provides the federal government only so much "power to deal with the Indian Tribes." Mancari, 417 U.S. at 551–552. But to date, these corrective steps have not yielded all they should. While this Court has stopped overreading its own plenary-power precedents, it has yet to recover fully the original meaning of the Indian Commerce Clause. *** Today, the Court takes further steps in the right direction.

III

With all the historical pieces of this puzzle assembled, only one task remains. You must decide for yourself if ICWA passes constitutional muster.

By now, the full picture has come into view and it is easy to see why ICWA must stand. Under our Constitution, Tribes remain independent sovereigns responsible for governing their own affairs. And as this Court has long recognized, domestic law arrangements fall within Tribes' traditional powers of self-governance. See, e.g., Fisher, 424 U.S. at 387, 96 S.Ct. 943; Quiver, 241 U.S. at 605, 36 S.Ct. 699. As " 'a separate people' " Tribes may " 'regulat[e] their

internal and social relations' " as they wish. Wheeler, 435 U.S. at 322, 98 S.Ct. 1079 (quoting Kagama, 118 U.S. at 381–382, 6 S.Ct. 1109). In enacting ICWA, Congress affirmed this understanding. It recognized that "there is no resource that is more vital to the continued existence and integrity of Indian [T]ribes than their children." 25 U.S.C. § 1901(3). Yet it also recognized that the mass-removal of Indian children by States and other outsiders threatened the "continued existence and integrity of Indian [T]ribes." Ibid.; see also § 1901(4). By setting out to eliminate that practice, Congress sought to preserve the Indian-law bargain written into the Constitution's text by securing the continued viability of the "third sovereign." S. O'Connor, Remark, Lessons From the Third Sovereign: Indian Tribal Courts, 33 Tulsa L. J. 1 (1997).

No doubt, ICWA sharply limits the ability of States to impose their own family-law policies on tribal members. But as we have seen, state intrusions on tribal authority have been a recurring theme throughout American history. See Ablavsky 2014, at 1009–1037. Long ago, those intrusions led the framers to abandon the loophole-ridden Indian affairs provision in the Articles of Confederation and adopt in the Constitution a different arrangement that commits the management of tribal relations solely to the federal government. Id., at 1038–1051; see also Clinton 1995, at 1098–1165. Recognizing as much, this Court has consistently reaffirmed the Tribes' "immunity from state and local control." Arizona v. San Carlos Apache Tribe of Ariz., 463 U.S. 545, 571, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983) (internal quotation marks omitted). If that immunity means anything, it must mean that States and others cannot use their own laws to displace federal Indian policy.

Nor is there any serious question that Congress has the power under the Indian Commerce Clause to enact protections against the removal of Indian children. Thankfully, Indian children are not (these days) units of commerce. Cf. Fletcher & Singel 897–898 (describing an early practice of enslaving Indian children). But at its core, ICWA restricts how non-Indians (States and private individuals) may engage with Indians. And, as we have seen, that falls in the heartland of Congress's constitutional authority. Recall that the very first Congresses punished non-Indians who "commit[ted] any crime upon [any] friendly Indian." Act of July 22, 1790, ch. 33, § 5, 1 Stat. 138. ICWA operates in much the same way. The mass removal of Indian children by States and private parties, no less than a pattern of criminal trespasses by States and private parties, directly interferes with tribal intercourse. More than that, it threatens the Tribes' "political existence." Worcester, 6 Pet. at 536. And at the risk of stating the obvious, Indian commerce is hard to maintain if there are no Indian communities left to do commerce with.

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 THOMAS, dissenting.
These cases concern the Federal Government's attempt to regulate child-welfare proceedings in state courts. That should raise alarm bells. Our Federal "[G]overnment is acknowledged by all to be one of enumerated powers," having only those powers that the Constitution confers expressly or by necessary implication. McCulloch v. Maryland, 4 Wheat. 316, 405 (1819). All other powers (like family or criminal law) generally remain with the States. The Federal Government thus lacks a general police power to regulate state family law.

***

The majority and respondents gesture to a smorgasbord of constitutional hooks to support ICWA; not one of them works. First, the Indian Commerce Clause is about commerce, not children. Second, the Treaty Clause does no work because ICWA is not based on any treaty. Third, the foreign-affairs powers (what the majority terms "structural principles") inherent in the Federal Government have no application to regulating the domestic child custody proceedings of U. S. citizens living within the jurisdiction of States.

I would go no further. But, as the majority notes, the Court's precedents have repeatedly referred to a "plenary power" that Congress possesses over Indian affairs, as well as a general "trust" relationship with the Indians. I have searched in vain for any constitutional basis for such a plenary power, which appears to have been born of loose language and judicial ipse dixit. And, even taking the Court's precedents as given, there is no reason to extend this "plenary power" to the situation before us today: regulating state-court child custody proceedings of U. S. citizens, who may never have even set foot on Indian lands, merely because the child involved happens to be an Indian.

***

III

The Constitution's text and the foregoing history point to a set of discrete, enumerated powers applicable to Indian tribes—just as in any other context. Although our cases have at times suggested a broader power with respect to Indians, there is no evidence for such a free-floating authority anywhere in the text or original understanding of the Constitution. To the contrary, all of the Government's early acts with respect to Indians are easily explicable under our normal understanding of the Constitution's enumerated powers. For example, the Treaty Clause supported the Federal Government's treaties with Indians, and the Property Clause supported the gifts allocated to Indians. The powers to regulate territories and foreign affairs supported the regulation of passports and penalties for criminal acts on Indian lands. The various war-related powers supported military campaigns against Indian tribes. And the Commerce Clause supported the regulation of trade with Indian tribes.

Moreover, the Founders deliberately chose to enumerate one power specific to Indian tribes: the power to regulate "Commerce" with tribes. Because the Constitution contains one Indian-specific power, there is simply no reason to think that there is some sort of free-floating, unlimited power over all things related to Indians. That is common sense: expressio unius est exclusio alterius. And that is particularly true here, because the Founders adopted the "Indian Commerce Clause" while rejecting an arguably broader authority over "Indian affairs." Accordingly, here as elsewhere, the Federal Government can exercise only its constitutionally enumerated powers. Because each of those powers contains its own inherent limits, none of them can support an additional unbounded power over all Indian-related matters. Indeed, the history of the plenary power doctrine in Indian law shows that, from its inception, it has been a power in search of a constitutional basis—and the majority opinion shows that this is still the case.

A

As the majority notes, some of the candidates that this Court has suggested as the source of the "plenary power" are the Treaty Clause, the Commerce Clause, and "principles inherent in the Constitution's structure." See ante, at ——— – ———; Lara, 541 U.S. at 200, 124 S.Ct. 1628. But each of those powers has clear, inherent limits, and not one suggests any sort of unlimited power over Indian affairs—much less a power to regulate U. S. citizens outside of Indian lands merely because those individuals happen to be Indians. I will discuss each in turn.

1

First, and most obviously, the Treaty Clause confers only the power to "make Treaties"; the Supremacy Clause then makes those treaties the supreme law of the land. Art. II, § 2, cl. 2; Art. VI. Even under our most expansive Treaty Clause precedents, this power is still limited to actual treaties. It does not confer a free-floating power over matters that might involve a party to a treaty.

2

Second, the Commerce Clause confers only the authority "[t]o regulate Commerce ... with the Indian Tribes." "At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." United States v. Lopez, 514 U.S. 549, 585 (1995) (THOMAS, J., concurring). And even under our most expansive Commerce Clause precedents, the Clause permits Congress to regulate only "economic activity" like producing materials that will be sold or exchanged as a matter of commerce.

The majority, however, suggests that the Commerce Clause could have a broader application with respect to Indian tribes than for commerce between States or with foreign nations. That makes little textual sense. The Commerce Clause confers the power to regulate a single object—"Commerce"—that is then cabined by three prepositional phrases: "with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3. Accordingly, one would naturally read the term "Commerce" as having the same meaning with respect to each type of "Commerce" the Clause proceeds to identify. I would think that is how we would read, for example, the President's "appoint[ment]" power with respect to "Ambassadors, ... Judges of the supreme Court, and all other Officers of the United States." There is no textual reason why the Commerce Clause would be different. Nor have the parties or the numerous amici presented any evidence that the Founders thought that the term "Commerce" in the Commerce Clause meant different things for Indian tribes than it did for commerce between States.

Rather, the evidence points in the opposite direction. When discussing "commerce" with Indian tribes, the Founders plainly meant buying and selling goods and transportation for that purpose. For example, President Washington once informed Congress of the need for "new channels for the commerce of the Creeks," because "their trade is liable to be interrupted" by conflicts with England. Henry Knox similarly referred to the "profits of this commerce" with the Creeks in the context of a "trading house which has the monopoly of the trade of the Creeks." And President Jefferson likewise discussed the "commerce [that] shall be carried on liberally" at "trading houses" with Indians. All of this makes sense, given that the Founders both wanted to facilitate trade with Indians and rejected a facially broader "Indian affairs" power in favor of a narrower power over "Commerce ... with the Indian Tribes."

As noted above, that omission was not accidental; the Articles of Confederation had contained that "Indian affairs" language, and that language was twice proposed (and rejected) at the Constitutional Convention. Then, as today, "affairs" was a broader term than "commerce," with "affairs" more generally referring to things to be done. Thus, whatever the precise contours of a freestanding "Indian Affairs" Clause might have been, the Founders' specific rejection of such a power shows that there is no basis to stretch the Commerce Clause beyond its normal limits.

***

B

So where did the idea of a "plenary power" over Indian affairs come from? As it turns out, little more than ipse dixit. The story begins with loose dicta from Cherokee Nation v. Georgia . . . . [There,] Marshall reasoned, Indian tribes were not "foreign state[s] in the sense of the constitution," as shown in part by the Commerce Clause's delineation of States, foreign nations, and Indian tribes. Rather, Marshall reasoned that the Indian tribes occupied a unique

status, which he characterized as that of "domestic dependent nations" whose "relation to the United States resembles that of a ward to his guardian."

Other than this opinion, I have been unable to locate any evidence that the Founders thought of the Federal Government as having a generalized guardianship-type relationship with the Indian tribes—much less one conferring any congressional power over Indian affairs. *** And, if such a general relationship existed, there would seem to be little need for the Federal Government to have ratified specific treaties with tribes calling for federal protection. At bottom, Cherokee Nation's loose dicta cannot support a broader power over Indian affairs.

Nevertheless, Cherokee Nation's suggestion was picked up decades later in United States v. Kagama, 118 U.S. 375 (1886)—the first case to actually apply a broader, unenumerated power over Indian affairs. *** [T]he Court first rejected the idea that the Commerce Clause could support the Act—reasoning that "it would be a very strained construction of th[e] clause, that a system of criminal laws for Indians ... was authorized by the grant of power to regulate commerce with the Indian tribes."

But the Court determined that the Major Crimes Act was constitutional nevertheless. *** Drawing on Cherokee Nation, the Court next asserted that "Indian tribes are the wards of the nation." Kagama, 118 U.S. at 383. Because of "their very weakness and helplessness," it reasoned, "so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power." This power "over th[e] remnants" of the Indian tribes, the Court stated, "must exist in [the federal] government, because it never has existed anywhere else," "because it has never been denied, and because it alone can enforce its laws on all the tribes."

These pronouncements, however, were pure ipse dixit. The Court pointed to nothing in the text of the Constitution or its original understanding to support them. Nor did the Court give any other real support for those conclusions; instead, it cited three cases, all of which held only that States were restricted in certain ways from governing Indians on Indian lands. *** It does not follow from those cases that the Federal Government has any additional authority with regard to Indians—much less a sweeping, unbounded authority over all matters relating to Indians. Cf. Worcester, 6 Pet. at 547 (suggesting that tribes had long been left to regulate their internal affairs). At each step, Kagama thus lacked any constitutional basis.

Nonetheless, in the years after Kagama, this Court started referring to a "plenary power" or "plenary authority" that Congress possessed over Indian tribes, as well as a trust relationship with the Indians. And, in the decades since, this Court has increasingly gestured to such a plenary power, usually in the context of regulating a tribal government or tribal lands, while conspicuously failing to ground the power in any constitutional text and cautioning that the power is not absolute.

The majority's opinion today continues in that vein—only confirming its lack of any constitutional basis. Like so many cases before it, the majority's opinion lurches from one constitutional hook to another, not quite hanging the idea of a plenary power on any of them, while insisting that the plenary power is not absolute. While I empathize with the majority regarding the confusion that Kagama and its progeny have engendered, I cannot reflexively reaf-

firm a power that remains in search of a constitutional basis. And, while the majority points to a few actual constitutional provisions, like the Commerce and Treaty Clauses, those provisions cannot bear the weight that our cases have placed upon them.

At bottom, Kagama simply departed from the text and original meaning of the Constitution, which confers only the enumerated powers discussed above. Those powers are not boundless and did not operate differently with respect to Indian tribes at the Founding; instead, they conferred all the authority that the new Federal Government needed at the time to deal with Indian tribes. When dealing with Indian affairs, as with any other affairs, we should always evaluate whether a law can be justified by the Constitution's enumerated powers, rather than pointing to amorphous powers with no textual or historical basis.

* * *

The Constitution confers enumerated powers on the Federal Government. Not one of them supports ICWA. Nor does precedent. To the contrary, this Court has never upheld a federal statute that regulates the noncommercial activities of a U. S. citizen residing on lands under the sole jurisdiction of States merely because he happens to be an Indian. But that is exactly what ICWA does: It regulates child custody proceedings, brought in state courts, for those who need never have set foot on Indian lands. It is not about tribal lands or tribal governments, commerce, treaties, or federal property. It therefore fails equally under the Court's precedents as it fails under the plain text and original meaning of the Constitution.

***

I respectfully dissent.

3. Criminal Jurisdiction as an Illustration of the Exercise of Federal Power over Indian Affairs

Insert on pg. 529 (before note on juvenile jurisdiction).

Criminal jurisdiction in Indian Country traditionally has been framed by federal law, now codified at 18 U.S.C. 1151 (definition of "Indian Country"); 18 USC 1152 (Indian Country Crimes Act/General Crimes Act); and 18 U.S.C. 1153 (Major Crimes Act).

These federal statutes operate to preempt state law in Indian Country, which is consistent with the nature of reservation trust lands, which are held in legal title by the federal government and for the benefit of the Indian tribe, and thus constitute a federal "enclave" which is not formally incorporated into the surrounding state.

States traditionally exercised criminal jurisdiction in Indian Country only when there was not an Indian involved in the crime, either as victim or perpetrator. This is known as the *McBratney/Draper* exception, and it applies to crimes between non-Indians in Indian Country. Congress can authorize a state to assume jurisdiction by delegating its own authority. This latter principle is operative in Public Law 280 states. It does not affect tribal jurisdiction, but allows the state to exercise criminal jurisdiction and has been understood as an alternative to

the traditional federal model, albeit one that now expressly depends upon both tribal and state consent.

This set of principles was altered recently by the Supreme Court's opinion in *Oklahoma v. Castro-Huerta* (No. 21.-329) (June 29, 2022), which upheld the state of Oklahoma's "concurrent" jurisdiction over a crime committed by a non-citizen and non-Indian against an Indian child at a residence in the city of Tulsa. This would have been unexceptional prior to the Supreme Court's 2021 decision in the *McGirt* case, because Oklahoma had long denied the existence of Indian reservations in eastern Oklahoma. The Supreme Court chose not to revisit the holding in *McGirt*, which meant that Tulsa is within "Indian Country," and instead it upheld Oklahoma's jurisdiction over the non-Indian defendant, effectively expanding the rationale of the *McBratney/Draper* line of cases to include cases involving an Indian victim.

We are including a edited version of the Court's analysis below, with the caveat that much of the Court's analysis is not supported by any citations, and many of the citations that are utilized build on dicta from prior cases and/or contravene settled precedents. Thus, we believe that the *Castro-Huerta* case may be limited to its unique facts and context, and it should not be given undue weight or deployed in a way that would unsettle longstanding principles and jurisdictional arrangements in other states.

Oklahoma v. Castro-Huerta
United States Supreme Court
142 S.Ct. 2486 (2022)

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. 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." 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.

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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.

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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.

II

***

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.

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 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." "By 1880 the Court no longer viewed reservations as distinct nations." 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."

***

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. 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." *** 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.

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.

***

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. 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.

***

Importantly, . . . 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.

***

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 leg-

islative intentions unmoored from any statutory text. The Court may not "replace the actual text with speculation as to Congress' intent." Magwood v. Patterson, 561 U.S. 320, 334 (2010). Rather, the Court "will presume more modestly" that "the legislature says what it means and means what it says." ***.

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. For present purposes, the fundamental point is that the text of the General Crimes Act does not preempt state law. And this Court does not "rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that ... it never faced." ***

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.

***

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.

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). *** So the General Crimes Act question—namely, whether that Act preempts inherent state prosecutorial authority in Indian country—was not relevant in those States.

***

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. 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. ***

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. 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." ***

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. Absent Public Law 280, state jurisdiction over those Indian-defendant crimes could implicate principles of tribal self-government. 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.

***

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. Under the Bracker balancing test, the Court considers tribal interests, federal interests, and state interests.

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.

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."

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.[7]

[7] Castro-Huerta notes that many tribes were enemies of States in the 1700s and 1800s. The theory appears to be that States (unlike the Federal Government) cannot be trusted to fairly and aggressively prosecute crimes committed by non-Indians against Indians in 2022. That theory is misplaced for at least two reasons. *First*, the State's jurisdiction would simply be concurrent with, not exclusive of, the Federal Government's. If concurrent state jurisdiction somehow poses a problem, Congress can seek to alter it. *Second*, many tribes were also opposed to the *Federal Government* at least as late as the Civil War. Indeed, some of those tribes, including the Cherokees, held black slaves and entered into treaties with the Confederate government. In any event, it is not evident why the pre-Civil War history of tribal discord with States—unconnected from any statutory text—should disable States from exercising jurisdiction in 2022 to ensure that crime victims in state territory are protected under the State's laws.

IV

The dissent emphasizes the history of mistreatment of American Indians. But that history does not resolve the legal questions presented in this case. Those questions are: (i) whether Indian country is part of a State or instead is separate and independent from a State; and (ii) if Indian country is part of a State, whether the State has concurrent jurisdiction with the Federal Government to prosecute crimes committed by non-Indians against Indians in Indian country.

The answers to those questions are straightforward. On the first question, as explained above, this Court has repeatedly ruled that Indian country is part of a State, not separate from a State. By contrast, the dissent lifts up the 1832 decision in Worcester v. Georgia as a proper exposition of Indian law. But this Court long ago made clear that Worcester rested on a mistaken understanding of the relationship between Indian country and the States. The Court has stated that the "general notion drawn from Chief Justice Marshall's opinion in Worcester v. Georgia" "has yielded to closer analysis": "By 1880 the Court no longer viewed reservations as distinct nations. On the contrary, it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law." Organized Village of Kake, 369 U.S., at 72, 82 S.Ct. 562.

Because Indian country is part of a State, not separate from a State, the second question here—the question regarding the State's jurisdiction to prosecute Castro-Huerta—is also straightforward. Under the Constitution, States have jurisdiction to prosecute crimes within their territory except when preempted (in a manner consistent with the Constitution) by federal law or by principles of tribal self-government. As we have explained, no federal law preempts the State's exercise of jurisdiction over crimes committed by non-Indians against Indians in Indian country. And principles of tribal self-government likewise do not preempt state jurisdiction here.

As a corollary to its argument that Indian country is inherently separate from States, the dissent contends that Congress must affirmatively authorize States to exercise jurisdiction in Indian country, even jurisdiction to prosecute crimes committed by non-Indians. But under the Constitution and this Court's precedents, the default is that States may exercise criminal jurisdiction within their territory. See Amdt. 10. States do not need a permission slip from Congress to exercise their sovereign authority. In other words, the default is that States have criminal jurisdiction in Indian country unless that jurisdiction is preempted. In the dissent's view, by contrast, the default is that States do not have criminal jurisdiction in Indian country unless Congress specifically provides it. The dissent's view is inconsistent with the Constitution's structure, the States' inherent sovereignty, and the Court's precedents.

Straying further afield, the dissent seizes on treaties from the 1800s. But those treaties do not preclude state jurisdiction here. The dissent relies heavily on the 1835 Treaty of New Echota, which stated that Indian country was separate from States, and which the dissent says was preserved in relevant part by the 1866 Treaty. But history and legal development did not end in 1866. Some early treaties may have been consistent with the Worcester-era theory of separateness. But as relevant here, those treaties have been supplanted: Specific to Oklahoma, those treaties, in relevant part, were formally supplanted no later than the 1906 Act enabling Oklahoma's statehood. As this Court has previously concluded, "admission of a

State into the Union" "necessarily repeals the provisions of any prior statute, or of any existing treaty" that is inconsistent with the State's exercise of criminal jurisdiction "throughout the whole of the territory within its limits," including Indian country, unless the enabling act says otherwise "by express words." McBratney, 104 U.S. at 623–624. The Oklahoma Enabling Act contains no such express exception. Therefore, at least since Oklahoma's statehood in the early 1900s, Indian country has been part of the territory of Oklahoma.

***

The dissent incorrectly seeks to characterize various aspects of the Court's decision as dicta. To be clear, the Court today holds that Indian country within a State's territory is part of a State, not separate from a State. Therefore, a State has jurisdiction to prosecute crimes committed in Indian country unless state jurisdiction is preempted. With respect to crimes committed by non-Indians against Indians in Indian country, the Court today further holds that the General Crimes Act does not preempt the State's authority to prosecute; that Public Law 280 does not preempt the State's authority to prosecute; that no principle of tribal self-government preempts the State's authority to prosecute; that the cited treaties do not preempt Oklahoma's authority to prosecute; and that the Oklahoma Enabling Act does not preempt Oklahoma's authority to prosecute (indeed, it solidifies the State's presumptive sovereign authority to prosecute). Comments in the dissenting opinion suggesting anything otherwise "are just that: comments in a dissenting opinion."

From start to finish, the dissent employs extraordinary rhetoric in articulating its deeply held policy views about what Indian law should be. The dissent goes so far as to draft a proposed statute for Congress. But this Court's proper role under Article III of the Constitution is to declare what the law is, not what we think the law should be. The dissent's views about the jurisdictional question presented in this case are contrary to this Court's precedents and to the laws enacted by Congress.

* * *

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. 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.

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

A

Long before our Republic, the Cherokee controlled much of what is now Georgia, North Carolina, South Carolina, and Tennessee. The Cherokee were a "distinct, independent political communit[y]," who "retain[ed] their original" sovereign right to "regulat[e] their internal and social relations."

As colonists settled coastal areas near Cherokee territory, the Tribe proved a valuable trading partner—and a military threat. Recognizing this, Great Britain signed a treaty with the Cherokee in 1730. As was true of "tributary" and "feudatory states" in Europe, the Cherokee did not cease to be "sovereign and independent" under this arrangement, but retained the right to govern their internal affairs. E. de Vattel, Law of Nations 60–61 (1805). Meanwhile, under British law the crown possessed "centraliz[ed]" authority over diplomacy with Tribes to the exclusion of colonial governments.

Ultimately, the American Revolution replaced that legal framework with a similar one. When the delegates drafted the Articles of Confederation, they debated whether the national or state authorities should manage Indian affairs. The resulting compromise proved unworkable. The Articles granted Congress the "sole and exclusive right and power of ... regulating the trade and managing all affairs with the Indians." Art. IX. But the Articles undermined that assignment by further providing that "the legislative right of any state[,] within its own limits," could not be "infringed or violated." Together, these provisions led to battles between national and state governments over who could oversee relations with various Tribes.

When the framers convened to draft a new Constitution, this problem was among those they sought to resolve. To that end, they gave the federal government "broad general powers" over Indian affairs. The Constitution afforded Congress authority to make war and negotiate treaties with the Tribes. It barred States from doing either of these things. And the Constitution granted Congress the power to "regulate Commerce ... with the Indian Tribes." Nor did the Constitution replicate the Articles' carveout for state power over Tribes within

their borders. Madison praised this change, contending that the new federal government would be "very properly unfettered" from this prior "limitatio[n]." The Federalist No. 42, at 268. ***

Consistent with that view, "the Washington Administration insisted that the federal government enjoyed exclusive constitutional authority" over tribal relations. The new Administration understood, too, that Tribes remained otherwise free to govern their internal affairs without state interference. In a letter to the Governor of Pennsylvania, President Washington stated curtly that "the United States ... posses[es] the only authority of regulating an intercourse with [the Indians], and redressing their grievances." Even Thomas Jefferson, the great defender of the States' powers, agreed that "under the present Constitution" no "State [has] a right to Treat with the Indians without the consent of the General Government."

Nor was this view confined to the Executive Branch. Congress quickly exercised its new constitutional authority. In 1790, it enacted the first Indian Trade and Intercourse Act, which pervasively regulated commercial and social exchanges among Indians and non-Indians. Congress also provided for federal jurisdiction over crimes by non-Indians against Indians on tribal lands. States, too, recognized their lack of authority. In 1789, South Carolina Governor Charles Pinckney acknowledged to Washington that "the sole management of India[n] affairs is now committed" to "the general Government." ***

It was against this background that Chief Justice Marshall faced Worcester. After gold was discovered in Cherokee territory in the 1820s, Georgia's Legislature enacted laws designed to "seize [the] whole Cherokee country, parcel it out among the neighboring counties of the state ... abolish [the Tribe's] institutions and its laws, and annihilate its political existence." Like Oklahoma today, Georgia also purported to extend its criminal laws to Cherokee lands. In refusing to sanction Georgia's power grab, this Court explained that the State's "assertion of jurisdiction over the Cherokee nation" was "void," because under our Constitution only the federal government possessed the power to manage relations with the Tribe.

B

Two years later, and exercising its authority to regulate tribal affairs in the shadow of Worcester, Congress adopted the General Crimes Act of 1834 (GCA). That law extended federal criminal jurisdiction to tribal lands for certain crimes and, in doing so, served two apparent purposes. First, as a "courtesy" to the Tribes, the law represented a promise by the federal government "to punish crimes ... committed ... by and against our own [non-Indian] citizens." That jurisdictional arrangement was also consistent with, and even seemingly compelled by, the federal government's treaties with various Tribes. Second, because Worcester held that States lacked criminal jurisdiction on tribal lands, Congress sought to ensure a federal forum for crimes committed by and against non-Indians. Otherwise, Congress understood, non-Indian settlers would be subject to tribal jurisdiction alone. Congress reenacted the GCA in 1948 with minor amendments, but it remains in force today more or less in its original form.

Shortly after it adopted the GCA, the Senate ratified the Treaty of New Echota with the Cherokee in 1836. After the Tribe's removal from Georgia, the United States promised the Cherokee that they would enjoy a new home in the West where they could "establish ... a

government of their choice." Acknowledging the Tribe's past "difficulties . . . under the jurisdiction and laws of the State Governments," the treaty also pledged that the Tribe would remain forever free from "State sovereignties." These promises constituted an "indemnity," guaranteed by "the faith of the nation," that "[t]he United States and the Indian tribes [would be] the sole parties" with power on new western reservations like the Cherokee's.

Over time, Congress revised some of these arrangements. In 1885, dissatisfied with how the Sioux Tribe responded to the murder of a tribal member, Congress adopted the Major Crimes Act (MCA). There, Congress directed that, moving forward, only the federal government, not the Tribes, could prosecute certain serious offenses by tribal members on tribal lands. See 18 U.S.C. § 1153(a). On its own initiative, this Court then went a step further. Relying on language in certain laws admitting specific States to the Union, the Court held that States were now entitled to prosecute crimes by non-Indians against non-Indians on tribal lands. Through all these developments, however, at least one promise remained: States could play no role in the prosecution of crimes by or against Native Americans on tribal lands. See Williams v. Lee, 358 U.S. 217, 220 (1959).

In 1906, Congress reaffirmed this promise to the Cherokee in Oklahoma. As a condition of its admission to the Union, Congress required Oklahoma to "declare that [it] forever disclaim[s] all right and title in or to ... all lands lying within [the State's] limits owned or held by any Indian, tribe, or nation." 34 Stat. 270. Instead, Congress provided that tribal lands would "remain subject to the jurisdiction, disposal, and control of the United States." As if the point wasn't clear enough, Congress further provided that "nothing contained in the [new Oklahoma state] constitution shall be construed to ... limit or affect the authority of the Government of the United States ... respecting [the State's] Indians ... which it would have been competent to make if this Act had never been passed." ***

In the years that followed, certain States sought arrangements different from Oklahoma's. And once more, Congress intervened. *** [I]n 1953, Congress adopted Public Law 280. That statute granted five additional States criminal "jurisdiction over offenses ... by or against Indians" and established procedures by which further States could secure the same authority. ***

By 1968, the federal government came to conclude that, "as a matter of justice and as a matter of enlightened social policy," the "time ha[d] come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions." Richard M. Nixon, Special Message on Indian Affairs (July 8, 1970). Consistent with that vision, Congress amended Public Law 280 to require tribal consent before any State could assume jurisdiction over crimes by or against Indians on tribal lands. Recognizing that certain States' enabling acts barred state authority on tribal lands and required States to adopt constitutional provisions guaranteeing as much, Congress also authorized States to "amend, where necessary, their State constitution or ... statutes." In doing so, however, Congress emphasized that affected States could not assume jurisdiction to prosecute offenses by or against tribal members on tribal lands until they "appropriately amended their State constitution or statutes." To date, Oklahoma has not amended its state constitutional provisions disclaiming jurisdiction over tribal lands. Nor has Oklahoma sought or obtained tribal consent to the exercise of its jurisdiction. Thus, Oklahoma has remained,

in Congress's words, a State "not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within" its borders.

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). 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.

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. 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. Accordingly, only federal and tribal authorities were lawfully entitled to try crimes by or against Native Americans within the Tribe's reservation. 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.

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.

***Nominally, [this case] 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. ***

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 defendanin 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." 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. The Court emphasizes that States normally wield broad police powers within their borders absent some preemptive federal law.

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. 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.

Nor is this " 'notion,' " 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. 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, 119 S.Ct. 1573 (2022). Recently, too, this Court confirmed that Tribes enjoy sovereign immunity from suit. 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.

Because Tribes are sovereigns, this Court has consistently recognized that the usual "standards of pre-emption" are "unhelpful." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980). In typical preemption cases, courts "start with the assumption" that Congress has not displaced state authority. But when a State tries to regulate tribal affairs, the same "backdrop" does not apply because Tribes have a "claim to sovereignty [that] long pre-

dates that of our own Government." McClanahan, 411 U.S. at 172. So instead of searching for an Act of Congress displacing state authority, our cases require a search for federal legislation conferring state authority: "[U]nless and until Congress acts, the tribes retain their historic sovereign authority." Any ambiguities in Congress's work must be resolved in favor of tribal sovereignty and against state power. And, if anything, these rules bear special force in the criminal context, which lies at the heart of tribal sovereignty and in which Congress "has provided a nearly comprehensive set of statutes allocating criminal jurisdiction" among federal, tribal, and state authorities.

B

From 1834 to 1968, Congress adopted a series of laws governing criminal jurisdiction on tribal lands. Those laws are many, detailed, and clear. Each operates against the backdrop understanding that Tribes are sovereign and that in our constitutional order only Congress may displace their authority. Nor does anything in Congress's work begin to confer on Oklahoma the authority it seeks.

1

Start with the GCA, first adopted by Congress in 1834 and most recently reenacted in 1948. The GCA 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 Indian Country.
>
> This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively." 18 U.S.C. § 1152.

As recounted above, Congress adopted the GCA in the aftermath of Worcester's holding that the federal government alone may regulate tribal affairs and States do not possess inherent authority to apply their criminal laws on tribal lands. Responding to that decision, Congress did not choose to exercise its authority to allow state jurisdiction on tribal lands. Far from it. Congress chose only to extend federal law to tribal lands—and even then only for certain crimes involving non-Indian settlers. Otherwise, Congress recognized, those settlers might be subject to tribal criminal jurisdiction alone. ***

2

When Congress enacted the MCA in 1885, it proceeded once more against the "backdrop" rule that only tribal criminal law applies on tribal lands, that States enjoy no inherent authority to prosecute cases on tribal lands, and that only Congress may displace tribal power. Nor, once more, did Congress's new legislation purport to allow States to prosecute

crimes on tribal lands. In response to concerns with how tribal authorities were handling major crimes committed by tribal members, in the MCA Congress took a step beyond the GCA and instructed that, in the future, the federal government would have "exclusive jurisdiction" to prosecute certain crimes by Indian defendants on tribal lands. Here again, Congress's work hardly would have been necessary or made sense if States already possessed jurisdiction to try crimes by or against Indians on tribal reservations. Plainly, Congress's "purpose" in adopting the MCA was to answer the "objection" that major crimes by tribal members on tribal lands would otherwise be subject to prosecution by tribal authorities alone.

3

Consider next the Treaty of New Echota and the Oklahoma Enabling Act. In 1835, the United States entered into a treaty with the Cherokee. In that treaty, the Nation promised that, within a new reservation in what was to become Oklahoma, the Tribe would enjoy the right to govern itself and remain forever free from "State sovereignties" and "the jurisdiction of any State." Treaty with the Cherokee, Preamble, 7 Stat. 478. This Court has instructed that tribal treaties must be interpreted as they "would naturally be understood by the Indians" at ratification. And having just lost their traditional homelands to Georgia, who can doubt that the Cherokee understood this promise as a guarantee that they would retain their sovereign authority over crimes by or against tribal members subject only to federal, not state, law? That was certainly the contemporaneous understanding of the House Committee on Indian Affairs, which observed that "[t]he United States and the Indian tribes [would be] the sole parties" with power over new reservations in the West. This Court has long shared the same view. "By treaties and statutes," the Court has said, "the right of the Cherokee [N]ation to exist as an autonomous body, subject always to the paramount authority of the United States, has been recognized." Talton v. Mayes, 163 U.S. 376, 379–380 (1896).[4]

In 1906, Congress sought to deliver on its treaty promises when it adopted the Oklahoma Enabling Act. That law paved the way for the new State's admission to the Union. But in doing so, Congress took care to require Oklahoma to "agree and declare" that it would "forever disclaim all right and title in or to ... all lands lying within [the State's] limits owned or held by any Indian, tribe, or nation." 34 Stat. 270. Instead of granting the State some new power to prosecute crimes by or against tribal members, Congress insisted that tribal lands

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[4] In a fleeting aside, the Court suggests that the treaty was "supplanted" by the Oklahoma Enabling Act in 1906, which endowed the State with "inherent" authority to try crimes by or against tribal members on tribal lands. But the Court cites no proof for its *ipse dixit*, nor could it. As we shall see, Congress took pains to abide its treaty promises when it adopted the Oklahoma Enabling Act and has never revoked them. Nor may this Court abrogate treaties or statutes by wishing them away in passing remarks. In a Nation governed by the rule of law, not men (or willful judges), only Congress may withdraw this Nation's treaty promises or revise its written laws. Even on its own terms, too, the Court's discussion of the treaty turns out to be dicta. In the end, the Court abandons any suggestion that, with its admission to the Union, the Cherokee's treaties somehow evaporated and Oklahoma gained an "inherent" right to prosecute crimes by or against tribal members on tribal lands. Instead, the Court resorts to a case-specific "balancing test" that acknowledges state law may not apply on tribal lands even in the absence of a preemptive statute.

*** Recognizing as much, this Court in 1896 expressly recognized that the Tribe's "guarantee of self-government" in the Treaty of New Echota remained in force. *Talton*, 163 U.S. at 380. In the years since, this Court and others have recognized the continuing vitality of various aspects of the treaty too. And in this very case, the federal government has confirmed that the Nation's treaties continue to "protect" the Tribe.

"shall be and remain subject to the jurisdiction, disposal, and control of the United States." Ibid. Oklahoma complied with Congress's instructions by adopting both of these commitments verbatim in its Constitution. Art. I, § 3.

*** The Oklahoma Enabling Act and the commitments it demanded in the new Oklahoma Constitution sought to maintain this status quo.***

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).

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.

Consider . . . our own precedents and those of other courts. In 1946 in Williams v. United States, this Court recognized that, while States "may have jurisdiction over offenses

committed on th[e] reservation between persons who are not Indians, the laws and courts of the United States, rather than those of [the States], have jurisdiction over offenses committed there ... by one who is not an Indian against one who is an Indian." In Williams v. Lee, issued in 1959, this Court was clear again: "[I]f the crime was by or against an Indian, tribal jurisdiction or that expressly conferred on other courts by Congress has remained exclusive." As early as 1926, this Court made the same point while speaking directly to Oklahoma. Ramsey, 271 U.S. at 469–470. It is a point our cases have continued to make in recent years. It is a point a host of other courts—including state courts issuing decisions contrary to their own interests—have acknowledged too.

***

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. But the Court suggests this traditional " 'notion' " flipped 180 degrees sometime in "the latter half of the 1800s." 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. The Court's reliance on Draper fares no better, for that case issued a similar disclaimer. Tellingly, not even Oklahoma thinks McBratney and Draper compel a ruling in its favor.. And if anything, the Court's invocation of Donnelly is more baffling still. 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.

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. 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, addressed the prosaic question whether Alaska could apply its fishing laws on lands owned by a native Alaska tribal corporation. 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. Meanwhile, New York ex rel. Cutler v. Dibble allowed New York to use civil proceedings to eject non-Indian trespassers on Indian lands. ***

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.

III

Doubtless for some of these reasons, even the Court ultimately abandons its suggestion that Oklahoma is "inherent[ly]" free to prosecute crimes by non-Indians against tribal members on a tribal reservation absent a federal statute "preempt[ing]" its authority. In the end, the Court admits that tribal sovereignty can require the exclusion of state authority even absent a preemptive federal statute. But then, after correcting course, the Court veers off once more. To determine whether tribal sovereignty displaces state authority in a case involving a non-Indian defendant and an Indian victim on a reservation in Oklahoma, the Court resorts to a "Bracker balancing" test. Applying that test, the Court concludes that Oklahoma's interests in this case outweigh those of the Cherokee. All this, too, is mistaken root and branch.

A

Begin with the most fundamental problem. The Court invokes what it calls the "Bracker balancing" test with no more appreciation of that decision's history and context than it displays in its initial suggestion that the usual rules of preemption apply to Tribes. The Court tells us nothing about Bracker itself, its reasoning, or its limits. Perhaps understandably so, for Bracker never purported to claim for this Court the raw power to "balance" away tribal sovereignty in favor of state criminal jurisdiction over crimes by or against tribal members—let alone ordain a wholly different set of jurisdictional rules than Congress already has.

Bracker involved a relatively minor civil dispute. Arizona sought to tax vehicles used by the White Mountain Apache Tribe in logging operations on tribal lands. The Tribe opposed the effort, pointing to a federal law that regulated tribal logging but did not say anything about preempting the State's vehicle tax.. The Court began by recognizing that the usual rules of preemption are not "properly applied" to Tribes. Instead, the Court started with the traditional " 'backdrop' " presumption that States lack jurisdiction in Indian country. And the Court explained that any ambiguities about the scope of federal law must be "construed generously" in favor of the Tribes as sovereigns. With these rules in mind, the Court proceeded to turn back the State's tax based on a "particularized inquiry into the nature of the state, federal, and tribal interests at stake." The Court judged that "traditional notions of [tribal] sovereignty," the federal government's "policy of promoting tribal self-sufficiency," and the rule requiring it to resolve "[a]mbiguities" in favor of the Tribe trumped any competing state interest.

Nothing in any of this gets the Court close to where it wishes to go. If Arizona had to proceed against the traditional "backdrop" rule excluding state jurisdiction, Oklahoma must. And if Arizona could not overcome that backdrop rule because it could not point to clear federal statutory language authorizing its comparatively minor civil tax, it is unfathomable how Oklahoma might overcome that rule here. The State has pointed—and can point—to

nothing in Congress's work granting it the power to try crimes against tribal members on a tribal reservation. In Bracker, the Court found it instructive that Congress had "comprehensive[ly]" regulated "the harvesting of Indian timber," even if it had not spoken directly to the question of vehicle taxes. Here, Congress has not only pervasively regulated criminal jurisdiction in Indian country, it has spoken to the very situation we face: States like Oklahoma may exercise jurisdiction over crimes within tribal boundaries by or against tribal members only with tribal consent.

The simple truth is Bracker supplies zero authority for this Court's course today. If Congress has not always "been specific about the allocation of civil jurisdiction in Indian country," the same can hardly be said about the allocation of criminal authority. Congress "has provided a nearly comprehensive set of statutes allocating criminal jurisdiction." In doing so, Congress has already "balanced" competing tribal, state, and federal interests—and its balance demands tribal consent. Exactly nothing in Bracker permits us to ignore Congress's directive.

B

Plainly, the Court's balancing-test game is not one we should be playing in this case. But what if we did? Suppose this Court could (somehow) ignore Congress's decision to allow States like Oklahoma to exercise criminal jurisdiction in cases like ours only with tribal consent. Suppose we could (somehow) replace that rule with one of our own creation. Even proceeding on that stunning premise, it is far from obvious how the Court arrives at its preferred result.

In reweighing competing state and tribal interests for itself, the Court stresses two points. First, the Court suggests that its balance is designed to "help" Native Americans. Second, the Court says state jurisdiction is needed on the Cherokee Reservation today because "in the wake of McGirt" some defendants "have simply gone free." On both counts, however, the Court conspicuously loads the dice.

1

Start with the assertion that allowing state prosecutions in cases like ours will "help" Indians. The old paternalist overtones are hard to ignore. Yes, under the laws Congress has ordained Oklahoma may acquire jurisdiction over crimes by or against tribal members only with tribal consent. But to date, the Cherokee have misguidedly shown no interest in state jursidiction. Thanks to their misjudgment, they have rendered themselves "second-class citizens." So, the argument goes, five unelected judges in Washington must now make the "right" choice for the Tribe. To state the Court's staggering argument should be enough to refute it.

Nor does the Court even pause to consider some of the reasons why the Cherokee might not be so eager to invite state prosecutions in cases like ours. Maybe the Cherokee have so far withheld their consent because, throughout the Nation's history, state governments have sometimes proven less than reliable sources of justice for Indian victims. As early as 1795, George Washington observed that "a Jury on the frontiers" considering a crime

by a non-Indian against an Indian could "hardly be got to listen to a charge, much less to convict a culprit." Undoubtedly, too, Georgia once proved among the Cherokee's "deadliest enemies."

Maybe the Cherokee also have in mind experiences particular to Oklahoma. Following statehood, settlers embarked on elaborate schemes to deprive Indians of their lands, rents, and mineral rights. "Many young allottees were virtually kidnaped just before they reached their majority"; some were "induced to sign deeds at midnight on the morning they became of age." Others were subjected to predatory guardianships; state judges even "reward[ed] their supporters [with] guardianship appointments." Oklahoma's courts also sometimes sanctioned the "legalized robbery" of these Native American children "through the probate courts." Even almost a century on, the federal government warned of "the possibility of prejudice [against Native Americans] in state courts."

Whatever may have happened in the past, it seems the Court can imagine only a bright new day ahead. Moving forward, the Court cheerily promises, more prosecuting authorities can only "help." Three sets of prosecutors—federal, tribal, and state—are sure to prove better than two. But again it's not hard to imagine reasons why the Cherokee might see things differently. If more sets of prosecutors are always better, why not allow Texas to enforce its laws in California? Few sovereigns or their citizens would see that as an improvement. Yet it seems the Court cannot grasp why the Tribe may not.

The Court also neglects to consider actual experience with concurrent state jurisdiction on tribal lands. According to a group of former United States Attorneys, in practice concurrent jurisdiction has sometimes "create[d] a pass-the-buck dynamic ... with the end result being fewer police and more crime." Federal authorities may reduce their involvement when state authorities are present. In turn, some States may not wish to devote the resources required and may view the responsibility as an unfunded federal mandate. Thanks to realities like these, "[a]lmost as soon as Congress began granting States [criminal] jurisdiction" through Public Law 280, "affected Tribal Nations began seeking retrocession and repeal." Recently, a bipartisan congressional commission agreed that more state criminal jurisdiction in Indian country is often not a good policy choice. Still, none of this finds its way into the Court's cost-benefit analysis.

2

Instead, the Court marches on. The second "factor" it weighs in its "balance"—and the only history it seems interested in consulting—concerns Oklahoma's account of its experiences in the last two years since McGirt. Adopting the State's representations wholesale, the Court says that decision has posed Oklahoma with law-and-order "challenge[s]." To support its thesis, the Court cites the State's unsubstantiated "estimat[e]" that McGirt has forced it to "transfer prosecutorial responsibility for more than 18,000 cases per year to" federal and tribal authorities. Ibid. Apparently on the belief that the transfer of cases from state to federal prosecutors equates to an eruption of chaos and criminality, the Court remarks casually that traditional limitations on state prosecutorial authority on tribal lands were "insignificant in the real world" before McGirt.

But what does this prove? Put aside for the moment questions about the accuracy of Oklahoma's statistics and what the number of cases transferred from state to federal prosecutors may or may not mean for law and order. Taking the Court's account at face value, it might amount to a reason for Oklahoma to lobby the Cherokee to consent to state jurisdiction. It might be a reason for the State to petition Congress to revise criminal jurisdictional arrangements in the State even without tribal consent. But it is no act of statutory or constitutional interpretation. It is a policy argument through and through.

Nor is the Court's policy argument exactly complete in its assessment of the costs and benefits. When this Court issued McGirt, it expressly acknowledged that cases involving crimes by or against tribal members within reservation boundaries would have to be transferred from state to tribal or federal authorities.. This Court anticipated, too, that this process would require a period of readjustment. But, the Court recognized, all this was necessary only because Oklahoma had long overreached its authority on tribal reservations and defied legally binding congressional promises.

Notably, too, neither the tribal nor the federal authorities on the receiving end of this new workload think the "costs" of this period of readjustment begin to justify the Court's course. For their part, Tribes in Oklahoma have hired more police officers, prosecutors, and judges. Based on that investment, Oklahoma's Tribes have begun to prosecute substantially more cases than they once did. And they have also shown a willingness to work with Oklahoma, having signed hundreds of cross-deputization agreements allowing local law enforcement to collaborate with tribal police. Even Oklahoma's amici concede these agreements have proved "an important tool" for law enforcement.

Both of the federal government's elected branches have also responded, if not in the way this Court happens to prefer. Instead of forcing state criminal jurisdiction onto Tribes, Congress has chosen to allocate additional funds for law enforcement in Oklahoma. Meanwhile, the Solicitor General has offered the Executive Branch's judgment that McGirt's "practical consequences" do not justify this Court's intervention, explaining that the Department of Justice is "working diligently with tribal and State partners" in Oklahoma.

There is even more evidence cutting against the Court's dystopian tale. According to a recent United States Attorney in Oklahoma, "the sky isn't falling" and "partnerships between tribal law enforcement and state law enforcement" are strong. A Federal Bureau of Investigation special agent in charge of Oklahoma has stated that violent crimes " 'are being pursued as heavily as they were in the past, and in some cases, maybe even stronger.' " And the Tribes—those most affected by all this supposed lawlessness within their reservations—tell us that, after a period of adjustment, federal prosecutors are now pursuing lower level offenses vigorously too. The federal government has made a similar representation to this Court. Nor is it any secret that those convicted of federal crimes generally receive longer sentences than individuals convicted of similar state offenses. See, e.g., Bureau of Justice Statistics, Felony Sentences in State Courts, 2006—Statistical Tables 9 (2009) (Table 1.6).

In recounting all this, I do not profess certainty about the optimal law enforcement arrangements in Oklahoma. I do not pretend to know all the relevant facts, let alone how to balance each of them in this complex picture. Nor do I claim to know what weight to give historical wrongs or future hopes. I offer the preceding observations only to illustrate the

one thing I am sure of: This Court has no business usurping congressional decisions about the appropriate balance between federal, tribal, and state interests. If the Court's ruling today sounds like a legislative committee report touting the benefits of some newly proposed bill, that's because it is exactly that. And given that a nine-member court is a poor substitute for the people's elected representatives, it is no surprise that the Court's cost-benefit analysis is radically incomplete. The Court's decision is not a judicial interpretation of the law's meaning; it is the pastiche of a legislative process.

C

As unsound as the Court's decision is, it would be a mistake to overlook its limits. In the end, the Court admits that tribal sovereignty can displace state authority even without a preemptive statute. To be sure, the Court proceeds to disparage a federal statute requiring Oklahoma to obtain tribal consent before trying any crime involving an Indian victim within the Cherokee Reservation. But look at what the Court leaves unresolved. The Court does not pass on Public Law 280's provision that States "shall not" be entitled to assume jurisdiction on tribal lands until they "appropriately amen[d]" state laws disclaiming authority over tribal reservations. 25 U.S.C. § 1324. The Court gestures toward the Cherokee's treaties and the Oklahoma Enabling Act, but ultimately abandons any argument that those treaties were lawfully abrogated or that the Oklahoma Enabling Act endowed Oklahoma with inherent authority to try cases involving Native Americans within tribal bounds. Nor does the Court address the relevant text of those treaties or the Enabling Act—let alone come to terms with our precedents holding that Oklahoma's "grant of statehood" did not include the power to try "crimes committed by or against Indians" on tribal lands. Nothing in today's decision could or does begin to preclude the Cherokee or other Tribes from pressing arguments along any of these lines in future cases. The unamended Oklahoma Constitution and other state statutes and judicial decisions may stand as independent barriers to the assumption of state jurisdiction as a matter of state law too.

The Court's decision is limited in still other important ways. Most significantly, the Court leaves undisturbed the ancient rule that States cannot prosecute crimes by Native Americans on tribal lands without clear congressional authorization—for that would touch the heart of "tribal self-government." At least that rule (and maybe others) can never be balanced away. Indeed, the Court's ruling today rests in significant part on the fact that Tribes currently lack criminal jurisdiction over non-Indians who commit crimes on tribal lands—a factor that obviously does not apply to cases involving Native American defendants.

Additionally, nothing in the "Bracker balancing" test the Court employs foreordains today's grim result for different Tribes in different States. Bracker instructs courts to focus on the "specific context" at issue, taking cognizance of the particular circumstances of the Tribe in question, including all relevant treaties and statutes.. Nor are Tribes and their treaties "fungible." There are nearly 600 federally recognized Indian Tribes across the country. Some of their treaties appear to promise tribal freedom from state criminal jurisdiction in express terms. See, e.g., Treaty with the Navajo, Art. I, June 1868, 15 Stat. 667 (guaranteeing that those who commit crimes against tribal members will be "arrested and punished according to the laws of the United States"). Any analysis true to Bracker must take cognizance of all of this. Any such analysis must recognize, too, that the standards of preemption applicable "in other areas of the law" are "unhelpful" when it comes to Tribes. Instead, courts must

proceed against the " 'backdrop' " of tribal sovereignty with an "assumption that the States have no power to regulate the affairs of Indians on a reservation" or other tribal lands. To overcome that backdrop assumption, a clear congressional statement is required and any ambiguities must be "construed generously" in favor of the Tribes.

The Court today may ignore a clear jurisdictional rule prescribed by statute and choose to apply its own balancing test instead. The Court may misapply that balancing test in an effort to address one State's professed "law and order" concerns. In the process, the Court may even risk unsettling longstanding and clear jurisdictional rules nationwide. But in the end, any faithful application of Bracker to other Tribes in other States should only confirm the soundness of the traditional rule that state authorities may not try crimes like this one absent congressional authorization.[10]

Nor must Congress stand by as this Court sows needless confusion across the country. Even the Court acknowledges that Congress can undo its decision and preempt state authority at any time. And Congress could do exactly that with a simple amendment to Public Law 280. It might say: A State lacks criminal jurisdiction over crimes by or against Indians in Indian Country, unless the State complies with the procedures to obtain tribal consent outlined in 25 U.S.C. § 1321, and, where necessary, amends its constitution or statutes pursuant to 25 U.S.C. § 1324. Of course, that reminder of the obvious should hardly be necessary. But thanks to this Court's egregious misappropriation of legislative authority, "the ball is back in Congress' court."

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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.' " " 'The Court had done its duty,' " even if Georgia refused to do its own. 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

[10] In a final drive-by flourish, the Court asserts that its "jurisdictional holding[s]" today apply "throughout the United States." For emphasis, the Court repeats the point in a footnote. But not only does the Court acknowledge that Congress may preempt state jurisdiction over crimes like this one. The truth is, in this case involving one Tribe in one State the Court does not purport to evaluate the (many) treaties, federal statutes, precedents, and state laws that may preclude state jurisdiction on specific tribal lands around the country. Nor are we legislators entitled to pass new laws of general applicability, but a court charged with resolving cases and controversies involving particular parties who are entitled to make their own arguments in their own cases. The very precedent the Court invokes as authority to reach its decision today recognizes as much—and demands future courts conduct any analysis sensitive to the "specific context" of each Tribe, its treaties, and relevant laws. *Bracker*, 448 U.S. at 145. For that matter, even when it comes to the Cherokee the Court leaves much unanswered. The Court does not confront the relevant text of the Cherokee's treaties, the Oklahoma Enabling Act, or the relevant portions of our precedents interpreting both. And the Court does not mention the terms of Public Law 280 that require Oklahoma to amend its laws before asserting jurisdiction. Even more than all that, the Court ultimately retreats from its claim that statehood confers an "inherent" right to prosecute crimes by non-Indians against tribal members on tribal lands. It rests instead on a "balancing test" that makes anything it does say about the "inherent" right of States to try cases within Indian country dicta through and through.

branches and future courts will do their duty to honor this Nation's promises even as we have failed today to do our own.

c. Implications of Federal Criminal Jurisdiction Statutes for Tribal Jurisdiction

On pg. 534, amend note to read "Notes on Constitutional Implication of Concurrent Federal-Tribal Criminal Jurisdiction."

Note 3 at pp. 537-38: Double Jeopardy, Double Punishment and Tribal Criminal Jurisdiction

Denezpi v. United States (No. 20-7622) (U.S. Supreme Court, June 13, 2022):

In this case, a federal Bureau of Indian Affairs officer filed a criminal complaint against defendant Denezpi, who was a member of the Navajo Nation, for three crimes in connection with an alleged sexual assault and imprisonment involving a Navajo victim. The crimes took place at a residence within the boundaries of the Ute Mountain Ute Reservation. The complaint was filed in the Southwest Regional CFR court that serves the Ute Mountain Ute Reservation. Denezpi pleaded guilty to assault and battery, which is a violation defined by tribal law under chapter 6 of the Ute Mountain Ute Code. Defendant was sentenced to time served—140 days of imprisonment. Six months later, defendant was indicted by a Grand Jury on one count of aggravated sexual abuse under the Major Crimes Act. Defendant moved to dismiss the federal indictment on the grounds that the CFR court was a federal instrumentality and the Double Jeopardy Clause barred a successive federal prosecutions. The district court denied the motion and sentenced defendant to 360 months' imprisonment. The Tenth Circuit affirmed.

Writing for the majority, Justice Barrett upheld the lower court decisions. She did not decide whether the CFR Court was exercising tribal or federal authority, and this case was not resolved under the Dual Sovereignty doctrine, which enables two distinct sovereigns to prosecute the same offense. Rather, in this case, Judge Barrett found that the Clause would not bar the Federal Government from bringing successive prosecutions to punish the defendant for two separate offenses. Defendant was first convicted of assault and battery, as defined under tribal law. Defendant was then convicted of aggravated sexual abuse under the Major Crimes Act. Judge Barrett found that the Double Jeopardy Clause does not bar the second prosecution because it is a separate offense.

Justice Gorsuch dissented, along with Justices Sotomayor and Kagan. The dissenting justices found that a Court of Indian Offenses is "part of the Federal Government" because CFR courts are administrative in nature and created by the Department of Interior. In this case, the federal definition of "Criminal Offenses" includes both federal regulatory crimes and a violation of "an approved tribal ordinance." The Ute Mountain Ute Ordinance defined the crime of "assault and battery" for purposes of the federal Code that was applied by the CFR Court. Because the CFR court is created by federal law and the Code defines the offenses as "federal regulatory crimes," this is the action of the federal government and does not come under the Dual Sovereignty Doctrine.

Justice Gorsuch found that a sovereign should not be able to use another sovereign's laws to prosecute a defendant twice for the conduct at issue, stating that: "what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows."

Insert on pg. 541.

United States v. Bryant
United States Supreme Court
136 S. Ct. 1954 (2016)

Justice GINSBURG delivered the opinion of the Court.

In response to the high incidence of domestic violence against Native American women, Congress, in 2005, enacted 18 U.S.C. § 117(a), which targets serial offenders. Section 117(a) makes it a federal crime for any person to "commi[t] a domestic assault within ... Indian country" if the person has at least two prior final convictions for domestic violence rendered "in Federal, State, or Indian tribal court proceedings." See Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA Reauthorization Act), Pub. L. 109–162, §§ 901, 909, 119 Stat. 3077, 3084.[1] Respondent Michael Bryant, Jr., has multiple tribal-court convictions for domestic assault. For most of those convictions, he was sentenced to terms of imprisonment, none of them exceeding one year's duration. His tribal-court convictions do not count for § 117(a) purposes, Bryant maintains, because he was uncounseled in those proceedings.

The Sixth Amendment guarantees indigent defendants, in state and federal criminal proceedings, appointed counsel in any case in which a term of imprisonment is imposed. *Scott v. Illinois,* 440 U.S. 367, 373–374, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979). But the Sixth Amendment does not apply to tribal-court proceedings. See *Plains Commerce Bank v. Long Family Land & Cattle Co.,* 554 U.S. 316, 337, 128 S.Ct. 2709, 171 L.Ed.2d 457 (2008). The Indian Civil Rights Act of 1968 (ICRA), Pub.L. 90–284, 82 Stat. 77, 25 U.S.C. § 1301 *et seq.,* which governs criminal proceedings in tribal courts, requires appointed counsel only when a sentence of more than one year's imprisonment is imposed. § 1302(c)(2). Bryant's tribal-court convictions, it is undisputed, were valid when entered. This case presents the question whether those convictions, though uncounseled, rank as predicate offenses within the compass of § 117(a). Our answer is yes. Bryant's tribal-court convictions did not violate the Sixth Amendment when obtained, and they retain their validity when invoked in a § 117(a) prosecution. That proceeding generates no Sixth Amendment defect where none previously existed.

I
A

"[C]ompared to all other groups in the United States," Native American women "experience the highest rates of domestic violence." 151 Cong. Rec. 9061 (2005) (remarks of Sen. McCain). According to the Centers for Disease Control and Prevention, as many as 46% of American Indian and Alaska Native women have been victims of physical violence by an intimate partner. American Indian and Alaska Native women "are 2.5 times more likely to be

raped or sexually assaulted than women in the United States in general." American Indian women experience battery "at a rate of 23.2 per 1,000, compared with 8 per 1,000 among Caucasian women," and they "experience 7 sexual assaults per 1,000, compared with 4 per 1,000 among Black Americans, 3 per 1,000 among Caucasians, 2 per 1,000 among Hispanic women, and 1 per 1,000 among Asian women." VAWA Reauthorization Act, § 901, 119 Stat. 3077.

As this Court has noted, domestic abusers exhibit high rates of recidivism, and their violence "often escalates in severity over time." *United States v. Castleman,* 134 S.Ct. 1405, 1408 (2014). Nationwide, over 75% of female victims of intimate partner violence have been previously victimized by the same offender *** often multiple times. Incidents of repeating, escalating abuse more than occasionally culminate in a fatal attack.

The "complex patchwork of federal, state, and tribal law" governing Indian country, *Duro v. Reina,* 495 U.S. 676, 680 (1990), has made it difficult to stem the tide of domestic violence experienced by Native American women. Although tribal courts may enforce the tribe's criminal laws against Indian defendants, Congress has curbed tribal courts' sentencing authority. At the time of § 117(a)'s passage, ICRA limited sentences in tribal court to a maximum of one year's imprisonment. 25 U.S.C. § 1302(a)(7) (2006 ed.).[2] Congress has since expanded tribal courts' sentencing authority, allowing them to impose up to three years' imprisonment, contingent on adoption of additional procedural safeguards. 124 Stat. 2279–2280 (codified at 25 U.S.C. § 1302(a)(7)(C), (c)). To date, however, few tribes have employed this enhanced sentencing authority.

States are unable or unwilling to fill the enforcement gap. Most States lack jurisdiction over crimes committed in Indian country against Indian victims. ***

That leaves the Federal Government. Although federal law generally governs in Indian country, Congress has long excluded from federal-court jurisdiction crimes committed by an Indian against another Indian. *** In the Major Crimes Act, Congress authorized federal jurisdiction over enumerated grave criminal offenses when the perpetrator is an Indian and the victim is "another Indian or other person," including murder, manslaughter, and felony assault. § 1153. At the time of § 117(a)'s enactment, felony assault subject to federal prosecution required "serious bodily injury," § 113(a)(6) (2006 ed.), meaning "a substantial risk of death," "extreme physical pain," "protracted and obvious disfigurement," or "protracted loss or impairment of the function of a bodily member, organ, or mental faculty." § 1365(h)(3) (incorporated through § 113(b)(2)). In short, when § 117(a) was before Congress, Indian perpetrators of domestic violence "escape[d] felony charges until they seriously injure[d] or kill[ed] someone." 151 Cong. Rec. 9062 (2005) (remarks of Sen. McCain).

As a result of the limitations on tribal, state, and federal jurisdiction in Indian country, serial domestic violence offenders, prior to the enactment of § 117(a), faced at most a year's imprisonment per offense—a sentence insufficient to deter repeated and escalating abuse. To ratchet up the punishment of serial offenders, Congress created the federal felony offense of domestic assault in Indian country by a habitual offender. § 117(a) provides felony-level punishment for serial domestic violence offenders, and it represents the first true effort to remove these recidivists from the communities that they repeatedly terrorize."). The section provides in pertinent part:

> "Any person who commits a domestic assault within ... Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction any assault, sexual abuse, or serious violent felony against a spouse or intimate

> partner ... shall be fined ..., imprisoned for a term of not more than 5 years, or both...." § 117(a)(1).

Having two prior convictions for domestic violence crimes—including tribal-court convictions—is thus a predicate of the new offense.

B

This case requires us to determine whether § 117(a)'s inclusion of tribal-court convictions is compatible with the Sixth Amendment's right to counsel. The Sixth Amendment to the U.S. Constitution guarantees a criminal defendant in state or federal court "the Assistance of Counsel for his defense." See *Gideon v. Wainwright,* 372 U.S. 335, 339 (1963). This right, we have held, requires appointment of counsel for indigent defendants whenever a sentence of imprisonment is imposed. ***

"As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56 (1978). The Bill of Rights, including the Sixth Amendment right to counsel, therefore, does not apply in tribal-court proceedings. See *Plains Commerce Bank,* 554 U.S., at 337.

In ICRA, however, Congress accorded a range of procedural safeguards to tribal-court defendants "similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Martinez,* 436 U.S., at 57, 98 S.Ct. 1670; see *id.,* at 62–63, 98 S.Ct. 1670 (ICRA "modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments"). In addition to other enumerated protections, ICRA guarantees "due process of law," 25 U.S.C. § 1302(a)(8), and allows tribal-court defendants to seek habeas corpus review in federal court to test the legality of their imprisonment, § 1303.

The right to counsel under ICRA is not coextensive with the Sixth Amendment right. If a tribal court imposes a sentence in excess of one year, ICRA requires the court to accord the defendant "the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution," including appointment of counsel for an indigent defendant at the tribe's expense. § 1302(c)(1), (2). If the sentence imposed is no greater than one year, however, the tribal court must allow a defendant only the opportunity to obtain counsel "at his own expense." § 1302(a)(6). In tribal court, therefore, unlike in federal or state court, a sentence of imprisonment up to one year may be imposed without according indigent defendants the right to appointed counsel.

The question here presented: Is it permissible to use uncounseled tribal-court convictions—obtained in full compliance with ICRA—to establish the prior-crimes predicate of § 117(a)? It is undisputed that a conviction obtained in violation of a defendant's Sixth Amendment right to counsel cannot be used in a subsequent proceeding "either to support guilt or enhance punishment for another offense." *Burgett v. Texas,* 389 U.S. 109, 115 (1967). In *Burgett,* we held that an uncounseled felony conviction obtained in state court in violation of the right to counsel could not be used in a subsequent proceeding to prove the prior-felony element of a recidivist statute. To permit such use of a constitutionally infirm conviction, we explained, would cause "the accused in effect [to] suffe[r] anew from the [prior] deprivation of [his] Sixth Amendment right."

In *Nichols v. United States,* 511 U.S. 738 (1994), we stated an important limitation on the principle recognized in *Burgett*. In the case under review, Nichols pleaded guilty to a federal felony drug offense. 511 U.S., at 740. Several years earlier, unrepresented by counsel, he had

been convicted of driving under the influence (DUI), a state-law misdemeanor, and fined $250 but not imprisoned. *Ibid.* Nichols' DUI conviction, under the then-mandatory Sentencing Guidelines, effectively elevated by about two years the sentencing range for Nichols' federal drug offense. *Ibid.* We rejected Nichols' contention that, as his later sentence for the federal drug offense involved imprisonment, use of his uncounseled DUI conviction to elevate that sentence violated the Sixth Amendment. *Id.,* at 746–747. "[C]onsistent with the Sixth and Fourteenth Amendments of the Constitution," we held, "an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." *Id.,* at 748–749.

C

Respondent Bryant's conduct is illustrative of the domestic violence problem existing in Indian country. During the period relevant to this case, Bryant, an enrolled member of the Northern Cheyenne Tribe, lived on that Tribe's reservation in Montana. He has a record of over 100 tribal-court convictions, including several misdemeanor convictions for domestic assault. Specifically, between 1997 and 2007, Bryant pleaded guilty on at least five occasions in Northern Cheyenne Tribal Court to committing domestic abuse in violation of the Northern Cheyenne Tribal Code. On one occasion, Bryant hit his live-in girlfriend on the head with a beer bottle and attempted to strangle her. On another, Bryant beat a different girlfriend, kneeing her in the face, breaking her nose, and leaving her bruised and bloodied.

For most of Bryant's repeated brutal acts of domestic violence, the Tribal Court sentenced him to terms of imprisonment, never exceeding one year. When convicted of these offenses, Bryant was indigent and was not appointed counsel. Because of his short prison terms, Bryant acknowledges, the prior tribal-court proceedings complied with ICRA, and his convictions were therefore valid when entered. Bryant has never challenged his tribal-court convictions in federal court under ICRA's habeas corpus provision.

In 2011, Bryant was arrested yet again for assaulting women. In February of that year, Bryant attacked his then girlfriend, dragging her off the bed, pulling her hair, and repeatedly punching and kicking her. During an interview with law enforcement officers, Bryant admitted that he had physically assaulted this woman five or six times. Three months later, he assaulted another woman with whom he was then living, waking her by yelling that he could not find his truck keys and then choking her until she almost lost consciousness. Bryant later stated that he had assaulted this victim on three separate occasions during the two months they dated.

Based on the 2011 assaults, a federal grand jury in Montana indicted Bryant on two counts of domestic assault by a habitual offender, in violation of § 117(a). Bryant was represented in federal court by appointed counsel. Contending that the Sixth Amendment precluded use of his prior, uncounseled, tribal-court misdemeanor convictions to satisfy § 117(a)'s predicate-offense element, Bryant moved to dismiss the indictment. The District Court denied the motion, App. to Pet. for Cert. 32a, and Bryant entered a conditional guilty plea, reserving the right to appeal that decision. Bryant was sentenced to concurrent terms of 46 months' imprisonment on each count, to be followed by three years of supervised release.

The Court of Appeals for the Ninth Circuit reversed the conviction and directed dismissal of the indictment. 769 F.3d 671 (2014). Bryant's tribal-court convictions were not themselves constitutionally infirm, the Ninth Circuit comprehended, because "the Sixth Amendment right to appointed counsel does not apply in tribal court proceedings." *Id.,* at 675. But, the court continued, had the convictions been obtained in state or federal court,

they would have violated the Sixth Amendment because Bryant had received sentences of imprisonment although he lacked the aid of appointed counsel. Adhering to its prior decision in *United States v. Ant,* 882 F.2d 1389 (C.A.9 1989), the Court of Appeals held that, subject to narrow exceptions not relevant here, "tribal court convictions may be used in subsequent [federal] prosecutions only if the tribal court guarantees a right to counsel that is, at minimum, coextensive with the Sixth Amendment right." 769 F.3d, at 677. ***

II

Bryant's tribal-court convictions, he recognizes, infringed no constitutional right because the Sixth Amendment does not apply to tribal-court proceedings. Brief for Respondent 5. Those prior convictions complied with ICRA, he concedes, and therefore were valid when entered. But, had his convictions occurred in state or federal court, Bryant observes, *Argersinger* and *Scott* would have rendered them invalid because he was sentenced to incarceration without representation by court-appointed counsel. Essentially, Bryant urges us to treat tribal-court convictions, for § 117(a) purposes, as though they had been entered by a federal or state court. We next explain why we decline to do so.

As earlier recounted, we held in *Nichols* that "an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction." 511 U.S., at 748–749. "Enhancement statutes," we reasoned, "do not change the penalty imposed for the earlier conviction"; rather, repeat-offender laws "penaliz[e] only the last offense committed by the defendant *Nichols* thus instructs that convictions valid when entered—that is, those that, when rendered, did not violate the Constitution—retain that status when invoked in a subsequent proceeding.

Nichols ' reasoning steers the result here. Bryant's 46–month sentence for violating § 117(a) punishes his most recent acts of domestic assault, not his prior crimes prosecuted in tribal court. Bryant was denied no right to counsel in tribal court, and his Sixth Amendment right was honored in federal court, when he was "adjudicated guilty of the felony offense for which he was imprisoned." *Alabama v. Shelton,* 535 U.S. 654, 664 (2002). It would be "odd to say that a conviction untainted by a violation of the Sixth Amendment triggers a violation of that same amendment when it's used in a subsequent case where the defendant's right to appointed counsel is fully respected." 769 F.3d, at 679 (Watford, J., concurring).

***

Our decision in *Burgett,* which prohibited the subsequent use of a conviction obtained in violation of the right to counsel, does not aid Bryant. Reliance on an invalid conviction, *Burgett* reasoned, would cause the accused to "suffe[r] anew from the deprivation of [his] Sixth Amendment right." 389 U.S., at 115. Because a defendant convicted in tribal court suffers no Sixth Amendment violation in the first instance, "[u]se of tribal convictions in a subsequent prosecution cannot violate [the Sixth Amendment] 'anew.' " *Shavanaux,* 647 F.3d, at 998.

***

Because Bryant's tribal-court convictions occurred in proceedings that complied with ICRA and were therefore valid when entered, use of those convictions as predicate offenses in a § 117(a) prosecution does not violate the Constitution. We accordingly reverse the judgment of the Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, concurring.

***

[T]he only reason why tribal courts had the power to convict Bryant in proceedings where he had no right to counsel is that such prosecutions are a function of a tribe's core sovereignty. See *United States v. Lara,* 541 U.S. 193, 197 (2004); *United States v. Wheeler,* 435 U.S. 313, 318, 322–323 (1978). By virtue of tribes' status as " 'separate sovereigns pre-existing the Constitution,' " tribal prosecutions need not, under our precedents, comply with " 'those constitutional provisions framed specifically as limitations on federal or state authority.' " *Ante,* at 1962 (quoting *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56 (1978)).

On the other hand, the validity of Bryant's ensuing federal conviction rests upon a contrary view of tribal sovereignty. Congress ordinarily lacks authority to enact a general federal criminal law proscribing domestic abuse. See *United States v. Morrison,* 529 U.S. 598, 610–613 (2000). But, the Court suggests, Congress must intervene on reservations to ensure that prolific domestic abusers receive sufficient punishment. See *ante,* at 1960 – 1961. The Court does not explain where Congress' power to act comes from, but our precedents leave no doubt on this score. Congress could make Bryant's domestic assaults a federal crime subject to federal prosecution only because our precedents have endowed Congress with an "all-encompassing" power over all aspects of tribal sovereignty. *Wheeler, supra,* at 319. Thus, even though tribal prosecutions of tribal members are purportedly the apex of tribal sovereignty, Congress can second-guess how tribes prosecute domestic abuse perpetrated by Indians against other Indians on Indian land by virtue of its "plenary power" over Indian tribes. See *United States v. Kagama,* 118 U.S. 375, 382–384 (1886); accord, *Lara,* 541 U.S., at 200.

I continue to doubt whether either view of tribal sovereignty is correct. See *id.,* at 215, (THOMAS, J., concurring in judgment). Indian tribes have varied origins, discrete treaties with the United States, and different patterns of assimilation and conquest. In light of the tribes' distinct histories, it strains credulity to assume that all tribes necessarily retained the sovereign prerogative of prosecuting their own members. And by treating all tribes as possessing an identical quantum of sovereignty, the Court's precedents have made it all but impossible to understand the ultimate source of each tribe's sovereignty and whether it endures. See Prakash, Against Tribal Fungibility, 89 Cornell L. Rev. 1069, 1070–1074, 1107–1110 (2004).

Congress' purported plenary power over Indian tribes rests on even shakier foundations. No enumerated power—not Congress' power to "regulate Commerce ... with Indian Tribes," not the Senate's role in approving treaties, nor anything else—gives Congress such sweeping authority. See *Lara, supra,* at 224–225 (THOMAS, J., concurring in judgment); *Adoptive Couple v. Baby Girl,* 133 S.Ct. 2552, 2566–2568 (2013) (THOMAS, J., concurring). Indeed, the Court created this new power because it was unable to find an enumerated power justifying the federal Major Crimes Act, which for the first time punished crimes committed by Indians against Indians on Indian land. See *Kagama, supra,* at 377–380; cf. *ante,* at 1960. The Court asserted: "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection.... It must exist in that government, because it has never existed anywhere else." *Kagama, supra,* at 384. Over a century later, *Kagama* endures as the foundation of this doctrine, and the Court has searched in vain for any valid constitutional justification for this unfettered power. See, *e.g., Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903) (relying on *Kagama's* race-based plenary power theory); *Winton v. Amos,* 255 U.S. 373, 391–392 (1921) (Congress' "plenary authority" is based on Indians' "condition of tutelage or dependency"); *Wheeler, supra,* at 319 (*Winton* and *Lone Wolf* illustrate the "undisputed fact that Congress has plenary authority" over tribes); *Lara, supra,* at 224

(THOMAS, J., concurring in judgment) ("The Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty").

It is time that the Court reconsider these precedents. Until the Court ceases treating all Indian tribes as an undifferentiated mass, our case law will remain bedeviled by amorphous and ahistorical assumptions about the scope of tribal sovereignty. And, until the Court rejects the fiction that Congress possesses plenary power over Indian affairs, our precedents will continue to be based on the paternalistic theory that Congress must assume all-encompassing control over the "remnants of a race" for its own good. *Kagama, supra,* at 384.

5. Federal Executive Power and the Executive Trust Responsibility

b. The Trust Relationship

Insert on pg. 622 [after Note on Settlement of the *Cobell* Litigation].

Arizona v. Navajo Nation
United States Supreme Court
599 U.S. ___ (2023)

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. 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

The Navajo Tribe is one of the largest in the United States, with more than 300,000 enrolled members, roughly 170,000 of whom live on the Navajo Reservation. The Navajo Reservation is the geographically largest in the United States, spanning more than 17 million acres across the States of Arizona, New Mexico, and Utah. To put it in perspective, the Navajo Reservation is about the size of West Virginia.
***
In 1849, the United States entered into a treaty with the Navajos. See Treaty Between the United States of America and the Navajo Tribe of Indians, Sept. 9, 1849, 9 Stat. 974 (ratified Sept. 24, 1850). In that 1849 treaty, the Navajo Tribe recognized that the Navajos were now within the jurisdiction of the United States, and the Navajos agreed to cease hostilities and to maintain "perpetual peace" with the United States. In return, the United States agreed to "designate, settle, and adjust" the "boundaries" of the Navajo territory.

Over the next two decades, however, the United States and the Navajos often were at war with one another. During that period, the United States forcibly moved many Navajos from their original homeland to a relatively barren area in New Mexico known as the Bosque Redondo Reservation.

In 1868, the two sides agreed to a second treaty to put an end to "all war between the parties." The United States "set apart" a large reservation "for the use and occupation of the Navajo tribe" within the new American territory in the western United States. Treaty Between the United States of America and the Navajo Tribe of Indians, June 1, 1868, 15 Stat. 667–668 (ratified Aug. 12, 1868). Importantly, the reservation would be on the Navajos' original homeland, not the Bosque Redondo Reservation. The new reservation would enable the Navajos to once again become self-sufficient, a substantial improvement from the situation at Bosque Redondo. The United States also agreed (among other things) to build schools, a chapel, and other buildings; to provide teachers for at least 10 years; to supply seeds and agricultural implements for up to three years; and to provide funding for the purchase of sheep, goats, cattle, and corn.

In "consideration of the advantages and benefits conferred" on the Navajos by the United States in the 1868 treaty, the Navajos pledged not to engage in further war against the United States or other Indian tribes. The Navajos also agreed to "relinquish all right to occupy any territory outside their reservation"—with the exception of certain rights to hunt. Navajos promised to "make the reservation" their "permanent home." In short, the treaty enabled the Navajos to live on their original land.

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. Under the *Winters* doctrine, the Federal Government reserves water only "to the extent needed to accomplish the purpose of the reservation."

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.

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." 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.

The U. S. District Court for the District of Arizona dismissed the Navajo Tribe's complaint. In relevant part, the District Court determined that the 1868 treaty did not impose a duty on the United States to take affirmative steps to secure water for the Tribe. The U. S. Court of Appeals for the Ninth Circuit reversed, holding in relevant part that the United States has a duty under the 1868 treaty to take affirmative steps to secure water for the Navajos. This Court granted certiorari.

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. 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. 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. 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. 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. So the federal courts in turn must adhere to the text of the relevant law—here, the treaty.[1]

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.

Notably, the 1868 treaty did impose a number of specific duties on the United States. *** 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." So it is here.

***

To be sure, this Court's precedents have stated that the United States maintains a general trust relationship with Indian tribes, including the Navajos. 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." Therefore, unless Congress has created a conventional trust relationship with a tribe as to a particular trust asset, this Court will not "ap-

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[1] [1] The Navajos have suggested that the Jicarilla line of cases might apply only in the context of claims seeking damages from the United States pursuant to the Tucker Act and Indian Tucker Act. See 28 U. S. C. §§ 1491, 1505; see also Brief for Navajo Nation 29. But Jicarilla's framework for determining the trust obligations of the United States applies to any claim seeking to impose trust duties on the United States, including claims seeking equitable relief. That is because Jicarilla's reasoning rests upon separation of powers principles—not on the particulars of the Tucker Acts. As Jicarilla explains, the United States is a sovereign, not a private trustee, and therefore the trust obligations of the United States to the Indian tribes are established and governed by treaty, statute, or regulation, rather than by the common law of trusts. See 564 U. S., at 165, 177. Stated otherwise, the trust obligations of the United States to the Indian tribes are established by Congress and the Executive, not created by the Judiciary.

ply common-law trust principles" to infer duties not found in the text of a treaty, statute, or regulation. 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.

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. 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.

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[T]he Navajos [also] 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. 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 (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. 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.

[T]he 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.[2]

* * *

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 (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 Gorsuch, with whom Justice Sotomayor, Justice Kagan, and Justice Jackson join, dissenting.

Today, the Court rejects a request the Navajo Nation never made. This case is not about compelling the federal government to take "affirmative steps to secure water for the Navajos." Respectfully, the relief the Tribe seeks is far more modest. Everyone agrees the Navajo received enforceable water rights by treaty. Everyone agrees the United States holds some of those water rights in trust on the Tribe's behalf. And everyone agrees the extent of those rights has never been assessed. Adding those pieces together, the Navajo have a simple ask: They want the United States to identify the water rights it holds for them. And if the United States has misappropriated the Navajo's water rights, the Tribe asks it to formulate a plan to stop doing so prospectively. Because there is nothing remarkable about any of this, I would affirm the Ninth Circuit's judgment and allow the Navajo's case to proceed.

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[2] [4] The intervenor States separately argue that the Navajo Tribe's claimed remedies with respect to the Lower Colorado River would interfere with this Court's decree in Arizona v. California, 547 U. S. 150 (2006). The question of whether certain remedies would violate the substance of this Court's 2006 decree is a merits question, not a question of subject-matter jurisdiction. Because we conclude that the treaty imposes no duty on the United States to take affirmative steps to secure water in the first place, we need not reach the question of whether particular remedies would conflict with this Court's 2006 decree.

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II

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, and the Executive Branch can act in accordance with them. 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. 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). 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.

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 (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 (2014). That means courts must look to the "shared expectations of the contracting parties." Air France v. Saks, 470 U. S. 392, 399 (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 (2000).

That exercise entails the application of familiar principles of contract interpretation. Those principles include an implied covenant of "the utmost good faith" and fair dealing between

the parties. They include the doctrine of contra proferentem—the principle that any uncertainty in a contract should be construed against the drafting party. And they include the doctrine of unilateral mistake—the notion that, if two parties understand a key provision differently, the controlling meaning is the one held by the party that could not have anticipated the different meaning attached by the other.

Still other 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. When it comes to the United States, such fiduciary duties must, of course, come from positive law, "not the atmosphere." But the United States has, through "acts of Congress" and other affirmative conduct, voluntarily assumed certain specific fiduciary duties to the Tribes. 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 (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 (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. 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." We sometimes call this interpretive maxim—really just a special application of ordinary contract-interpretation principles—the Indian canon.

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 (1999). 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. 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 (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.

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. 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 (1908).

***

While *Winters* involved a claim brought by the United States, the federal government asserted "the rights of the Indians" themselves. *** [I]n *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 (emphasis added). Congress would not "creat[e] an Indian Reservation without intending to reserve waters necessary to make the reservation livable."

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 (1983) (*Arizona II*), one held to "the most exacting fiduciary standards," Seminole Nation, 316 U. S., at 297. This is no special rule. "[F]iduciary duties characteristically attach to decisions" that involve "managing [the] assets and distributing [the] property" of others. 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. 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."

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. 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.

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. 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. Similarly, the Treaty promised large numbers of animals to the Tribe. Art. XII. 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. 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. Because the Treaty of 1868 must be read as the Navajo "themselves would have understood" it, Mille Lacs Band, 526 U. S., at 196, 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? 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. 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. 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. 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.

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. Indeed, when it comes to the Navajo, the United States freely admits that it holds certain water rights for the Tribe "in trust." 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.

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. 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. 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. 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.

III

The Court does not dispute most of this. It agrees that the Navajo enjoy "water rights implicitly reserved to accomplish the purpose of the reservation." It agrees that the United

States cannot lawfully interfere with those water rights. And it leaves open the possibility that the Navajo "may be able to assert the interests they claim in water rights litigation." Really, the Court gets off the train just one stop short. It insists (and then repeats—again and again) that the United States owes no "affirmative duty" to the Navajo with respect to water, and therefore does not need to take any "affirmative steps" to help the Tribe on that score. This reasoning reflects three errors.

***

B

[T]he Court. . . analyze[d] [this case] under the wrong legal framework. Citing cases like United States v. Jicarilla Apache Nation, 564 U. S. 162 (2011); United States v. Navajo Nation, 537 U. S. 488 (2003) (Navajo I); and United States v. Mitchell, 445 U. S. 535 (1980) (Mitchell I), the Court tries to hammer a square peg (the Navajo's request) through a round hole (our Tucker Acts framework). See ante, at 7–9, and n. 1. To understand why those cases are inapposite, a little background is in order.

When an Indian Tribe seeks damages from the United States, it must usually proceed under the terms of the Tucker Act, 28 U. S. C. § 1491, and the Indian Tucker Act, § 1505. Together, those provisions facilitate suits for money damages in the Court of Federal Claims for claims "arising under the Constitution, laws or treaties of the United States, or Executive orders of the President." Notably, however, the Tucker Acts provide only a selective waiver of sovereign immunity, not a cause of action. To determine whether a Tribe can seek money damages on any given claim, this Court has laid out a two-part test. First, a court must ascertain whether there exists "specific rights-creating or duty-imposing statutory or regulatory prescriptions," producing a scheme that bears the "hallmarks of a more conventional fiduciary relationship," United States v. White Mountain Apache Tribe, 537 U. S. 465, 473 (2003). Second, once a Tribe has identified such a provision, the court must use "trust principles" to assess whether (and in what amount) the United States owes damages. United States v. Navajo Nation, 556 U. S. 287, 301 (2009) (Navajo II).

To describe this regime is to explain why the Court errs in relying on it. The Navajo do not bring a claim for money damages in the Court of Federal Claims under the Tucker Acts (thereby implicating those Acts' selective waiver of sovereign immunity). Rather, the Navajo seek equitable relief in federal district court on a treaty claim governed by the familiar principles recounted above. They do so with the help of 28 U. S. C. § 1362, a provision enacted after the Tucker Acts that gives federal district courts "original jurisdiction" over "civil actions" brought by Tribes "under the Constitution, laws, or treaties of the United States." As this Court has noted, § 1362 serves "to open the federal courts to the kind of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought." Moe, 425 U. S., at 472. That perfectly summarizes the claim that the Navajo advance here—a treaty-based claim bottomed on *Winters* that all agree the United States could bring in its capacity as a trustee. Nor does anyone question that the United States has waived sovereign immunity for claims "seeking relief other than money damages" based on

an allegation that federal officials have "acted or failed to act" as the law requires. 5 U. S. C. § 702.

This Court's decisions have long recognized that claims for equitable relief in federal district court operate under a distinct framework than claims for money damages brought in the Court of Federal Claims under the Tucker Acts. In United States v. Mitchell, 463 U. S. 206 (1983) (Mitchell II), for example, the United States argued that the Court should not allow an action for damages under the Tucker Acts to proceed because the plaintiffs could have brought a separate "actio[n] for declaratory, injunctive, or mandamus relief against the Secretary" in federal district court. This Court agreed with the government's assessment that the plaintiffs could have brought a claim like that—even as it went on to hold that they were free to bring a damages action under the Tucker Acts framework too. *** The cases the Court relies on simply do not enter the picture.

C

After misreading the Navajo's request and applying the wrong analytical framework, the Court errs in one last way. It reaches the wrong result even under this Court's Tucker Acts framework. The second step of the analysis—using "trust principles" to sort out the damages the United States owes clearly has no purchase in this context. (Another tell that the Tucker Acts framework itself has no purchase.) But what about the first step? Historically, this Court's cases have distinguished between regulatory schemes that create "bare trusts" (that cannot sustain actions for damages) and a "conventional" trust (that can make the government "liable in damages for breach" under the Tucker Acts). A close look at those decisions suggests that, even under them, the Tribe's claim should be allowed to proceed.

Take Mitchell II as an example. There, this Court allowed a claim for money damages relating to the mismanagement of tribal forests. On what basis? A patchwork of statutes and regulations, along with some assorted representations by the Department of the Interior. 463 U. S., at 219–224. In holding this showing sufficient to support an action for money damages, this Court observed that, "where the Federal Government takes on or has control" of property belonging to a Tribe, the necessary "fiduciary relationship normally exists ... even though nothing is said expressly" about "a trust or fiduciary connection." Further, where the federal government has "full responsibility" to manage a resource or "elaborate control" over that resource, the requisite "fiduciary relationship necessarily arises." Statements by the United States "recogniz[ing]" a fiduciary duty, the Court explained, can help confirm as much too.

Consider White Mountain Apache Tribe as well. There, this Court allowed a claim for money damages based on the United States' breach of its "fiduciary duty to manage land and improvements" on a reservation. The Tribe defended the right to bring that claim by pointing to a statute declaring certain lands would be " 'held by the United States in trust' " for the Tribe and allowing the Secretary of the Interior to use " 'any part' " of those lands " 'for administrative or school purposes.' " In holding that statute sufficient to support a claim for

money damages, this Court emphasized the United States exercised authority over the assets at issue and had considerable "discretionary authority" over their use.

Held even to these yardsticks, the Navajo's complaint easily measures up. Our *Winters* decisions recognize that the United States holds reserved water rights "[a]s a *fiduciary*" for the Tribes. Arizona II, 460 U. S., at 627–628 (emphasis added). The United States' control over adjacent water sources—including the Colorado River—is "elaborate." Mitchell II. 463 U. S., at 225. It can dole out water in parts of the Colorado by contract. And, of course, the United States has expressly acknowledged that it holds water rights "in trust" for the Navajo, perhaps including rights in the Colorado River mainstream. Given these features, the Navajo's complaint more than suffices to state a claim for relief.

IV

Where do the Navajo go from here? To date, their efforts to find out what water rights the United States holds for them have produced an experience familiar to any American who has spent time at the Department of Motor Vehicles. The Navajo have waited patiently for someone, anyone, to help them, only to be told (repeatedly) that they have been standing in the wrong line and must try another. To this day, the United States has never denied that the Navajo may have water rights in the mainstream of the Colorado River (and perhaps elsewhere) that it holds in trust for the Tribe. Instead, the government's constant refrain is that the Navajo can have all they ask for; they just need to go somewhere else and do something else first.

The Navajo have tried it all. They have written federal officials. They have moved this Court to clarify the United States' responsibilities when representing them. They have sought to intervene directly in water-related litigation. And when all of those efforts were rebuffed, they brought a claim seeking to compel the United States to make good on its treaty obligations by providing an accounting of what water rights it holds on their behalf. At each turn, they have received the same answer: "Try again." When this routine first began in earnest, Elvis was still making his rounds on The Ed Sullivan Show.

If there is any silver lining here it may be this. While the Court finds the present complaint lacking because it understands it as seeking "affirmative steps," the Court does not pass on other potential pleadings the Tribe might offer, such as those alleging direct interference with their water rights. Importantly, too, the Court recognizes that the Navajo "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." After today, it is hard to see how this Court (or any court) could ever again fairly deny a request from the Navajo to intervene in litigation over the Colorado River or other water sources to which they might have a claim. Principles of estoppel, if nothing else, may have something to say about the United States' ability to oppose requests like that moving forward. All of which leaves the Navajo in a familiar spot. As they did at Bosque Redondo, they must again fight for themselves to secure their homeland and all that must necessarily come with it. Perhaps here, as there, some measure of justice will prevail in the end.

B. STATE AUTHORITY IN INDIAN COUNTRY

C. Criminal Jurisdiction as an Illustration of the Exercise of Federal Power over Indian Affairs

b. Federal Criminal Jurisdiction Statutes

Insert on pg. 529, prior to Note on Juvenile Offenders and Federal Jurisdiction.

As the preceding sections demonstrate, criminal jurisdiction in Indian Country traditionally has been framed by federal law, with state jurisdiction allowed only where specifically authorized by Congress. Thus, with the limited exception noted above that the Supreme Court has recognized state criminal jurisdiction for crimes that did not involve an Indian, either as victim or perpetrator, state law has long been considered preempted within Indian reservations. These principles were altered recently by the Supreme Court's opinion in *Oklahoma v. Castro-Huerta*, 142 S.Ct. 2486 (2022), which upheld the state of Oklahoma's "concurrent" jurisdiction over a crime committed by a non-Indian against an Indian child at a residence in the city of Tulsa within the Muscogee-Creek Reservation. *Castro-Huerta* came on the heels of the Court's seminal decision in *McGirt v. Oklahoma*, which held that the Muscogee-Creek Reservation had never been disestablished and continued to constitute Indian country as defined in 28 U.S.C. § 1151. 140 S. Ct. 2452 (2020). Relying on their similar histories and the reasoning from *McGirt*, the Oklahoma Court of Criminal Appeals later found that the reservations of the Cherokee, Choctaw, Chickasaw, and Seminole Nations were never disestablished either, resulting in nearly the entirety of eastern Oklahoma being recognized as Indian country.[3] The Supreme Court chose not to revisit the holding in *McGirt*, which meant that Tulsa is within "Indian Country," and instead it upheld Oklahoma's jurisdiction over the non-Indian defendant, effectively expanding the rationale of the *McBratney/Draper* line of cases to include cases involving an Indian victim.

The *Castro-Huerta* Court was not writing on a blank slate. In fact, on at least five occasions the Court had interpreted the Indian Country Crimes Act to mean that "the laws and courts of the United States, rather than those of [the states], have jurisdiction over offenses committed . . . by one who is not an Indian against one who is an Indian." *Williams v. United States*, 327 U.S. 711, 714 (1946). Five the of justices characterized those decisions as dicta and instead concluded that "[b]y 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 . . . ." *Castro-Huerta*, 142 S.Ct. at 2495. Castro-Huerta had also argued the negative implication of P.L. 280, which expressly authorizes state criminal jurisdiction in just *some* states, was that Congress did *not* intend to extend criminal jurisdiction to states unless it had done so expressly. The Court dismissed this argument by simply observing that "Public Law 280 contains no language preempting state jurisdiction," and, the little analysis the Court did provide was circular—Congress authorized state criminal jurisdiction in P.L. 280 states because it thought it had to based upon the Supreme Court's dicta mentioned above. *Id.* at 2500.

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[3] *Hogner v. State*, 500 P.3d 629 (Okla. Crim. App. 2021); *Sizemore v. State*, 485 P.3d 867 (Okla. Crim. App. 2021); *Bosse v. State*, 499 P.3d 771(Okla. Crim. App. 2021); *Grayson v. State*, 485 P.3d 250 (Okla. Crim. App. 2021).

The Court then observed that "[P]reemption may still occur if the exercise of state jurisdiction would unlawfully infringe upon tribal self-government." *Id.* at 2501. Although on firm doctrinal footing to make this holding, the Court then went far afield by applying its rule from *White Mountain Apache v. Bracker*, which—as you'll learn in subsection 4, *infra*—is a test for determining the scope of state *civil* authority over non-Indians within a reservation that has never been applied in the criminal context. *Id.* The Court likewise pushed beyond the holding of *Bracker* and used its dicta to create a judicial balancing test wherein "the Court considers [state jurisdiction as a function of] tribal interests, federal interests, and state interests." *Id.*

Ultimately, five of the nine justices concluded that this balance of interests favored state concurrent jurisdiction in Eastern Oklahoma. It minimized the tribal interests in this case, concluding that "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." *Id.* It likewise found to infringement on tribal sovereignty because "a state prosecution of a non-Indian does not involve the exercise of state power over any Indian or over any tribe." *Id.* However, western law has long recognized that sovereignty includes not only the right to make positive law and enforce it, but also to rebuff the imposition of authority by other sovereigns (such as states). The Supreme Court simply ignored this critical aspect of sovereignty that has never been divested from tribes. Likewise, it ignored the United States' considerable interest in promoting tribal sovereignty within Indian country and instead characterized the federal interest as merely ensuring that state jurisdiction would not interfere with federal authority to prosecute crimes. The Court found this interest to be minimal since "[s]tate prosecution would supplement federal authority, not supplant federal authority." From this crabbed point of view, it was easy for the Court to find the State's "strong sovereign interest in ensuring public safety and criminal justice within its territory" outweighed the federal and tribal interests in this case. *Id.*

The dissent, written by Justice Gorsuch on behalf of himself and three other justices, excoriated the majority opinion as "a mockery of all of Congress's work from 1834 to 1968." *Id.* at 2517. More egregious (according to Justice Gorsuch) was the majority's failure "to grapple with the backdrop rule of tribal sovereignty." *Id.* at 2518. The dissent also pointed out the fallacy of the majority's assumption that more jurisdiction would result in more public safety, highlighting that studies had repeatedly shown that "in practice concurrent jurisdiction has sometimes "create[d] a pass-the-buck dynamic ... with the end result being fewer police and more crime." *Id.* at 2523. Finally, the dissent criticized the majority for creating nation-wide uncertainty in the law by replacing a bright-line rule regarding state criminal jurisdiction in Indian country with "a case-specific 'balancing test' that acknowledges state law may [or may] not apply on tribal lands even in the absence of a preemptive statute." *Id.* at 2515, n. 4. As a result, although the Court's decision in *Castro-Huerta* may have resolved the question in Oklahoma, it threw the jurisdictional landscape of rest of Indian country into disarray.

5. The Modern Era

c. State Taxing and Regulatory Jurisdiction

Insert on pg. 775.

Washington State Department of Licensing v. Cougar Den, Inc.
United States Supreme Court
139 S. Ct. 1000 (2019)

Opinion

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.

In December 2013, the Washington State Department of Licensing (Department), believing that the state tax was not pre-empted by the treaty, assessed Cougar Den $ 3.6 million in taxes, penalties, and licensing fees. App. to Pet. for Cert. 65a; App. 10a. Cougar Den appealed the assessment to higher authorities within the state agency. App. 15a. An Administrative Law Judge agreed with Cougar Den that the tax was pre-empted. App. to Brief in Opposition 14a. The Department's Director, however, disagreed and overturned the ALJ's order. App. to Pet. for Cert. 59a. A Washington Superior Court in turn disagreed with the director and held that the tax was pre-empted. *Id.*, at 34a. The director appealed to the Washington Supreme Court. 188 Wash. 2d 55, 58 (2017). And that court, agreeing with Cougar Den, upheld the Superior Court's determination of pre-emption. *Id.*, at 69.

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.

***

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; *Seufert Brothers*, 249 U.S. at 198; *Fishing Vessel*, 443 U.S. at 667. 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. 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; see also *Tulee*, 315 U.S. at 684 ("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*, 137 S.Ct. 1504, 1511 (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. 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 (citing *Winans*, 198 U.S. 371; emphasis added). Also compare, *e.g.*, *Fishing Vessel*, 443 U.S. at 677 ("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.

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. 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. 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 (1973).

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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. 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. See also *Puyallup Tribe v. Department of Game of Wash.*, 391 U.S. 392, 402 (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)).

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*, 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*. Second, the treaty protects the Yakamas' right to travel on the public highway with goods for sale. See *supra*. Third, the Washington statute at issue here taxes the Yakamas for traveling with fuel by public highway. See *supra*. 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 (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 (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*, (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 (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 (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 (citing *Winans*, 198 U.S. at 371; 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. ***

[T]he 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. ***

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.

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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.

Chief Justice ROBERTS, with whom Justice THOMAS, Justice ALITO, and Justice KAVANAUGH join, dissenting.

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The tax before us does not resemble a blockade or a toll. It is a tax on a product imported into the State, not a tax on highway travel. The statute says as much: "There is hereby levied and imposed ... a tax ... *on each gallon of motor vehicle fuel*." Wash. Rev. Code § 82.36.020(1) (2012) (emphasis added). It is difficult to imagine how the legislature could more clearly identify the object of the tax. The tax is calculated per gallon of fuel; not, like a toll, per vehicle or distance traveled. It is imposed on the owner of the fuel, not the driver or owner of the vehicle—separate entities in this case. And it is imposed at the same rate on fuel that enters the State by methods other than a public highway—whether private road,

rail, barge, or pipeline. §§ 82.36.010(4), 020(1), (2). Had Cougar Den filled up its trucks at a refinery or pipeline terminal in Washington, rather than trucking fuel in from Oregon, there would be no dispute that it was subject to the exact same tax. See §§ 82.36.020(2)(a), (b)(ii). Washington is taxing the fuel that Cougar Den imports, not Cougar Den's travel on the highway; it is not charging the Yakamas "for exercising the very right their ancestors intended to reserve." *Tulee*, 315 U.S. at 685.

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Recognizing the potentially broad sweep of its new rule, the plurality cautions that it does not intend to deprive the State of the power to regulate when necessary "to prevent danger to health or safety occasioned by a tribe member's exercise of treaty rights." *Ante*. This escape hatch ensures, the plurality suggests, that the treaty will not preempt essential regulations that burden highway travel. *Ante*. I am not so confident.

First, by its own terms, the plurality's health and safety exception is limited to laws that regulate dangers "occasioned by" a Yakama's travel. That would seem to allow speed limits and other rules of the road. But a law against possession of drugs or illegal firearms—the dangers of which have nothing to do with travel—does not address a health or safety risk "occasioned by" highway driving. I do not see how, under the plurality's rule or the concurrence's, a Washington police officer could burden a Yakama's travel by pulling him over on suspicion of carrying such contraband on the highway.

But the more fundamental problem is that this Court has never recognized a health and safety exception to reserved treaty rights, and the plurality today mentions the exception only in passing. *** Adapted to the travel right, the conservation exception would presumably protect regulations that preserve the subject of the Yakamas' right by maintaining safe and orderly travel on the highways. But many regulations that burden highway travel (such as emissions standards, noise restrictions, or the plurality's hypothetical ban on the importation of plutonium) do not fit that description.

The need for the health and safety exception, of course, follows from the overly expansive interpretation of the treaty right adopted by the plurality and concurrence. Today's decision digs such a deep hole that the future promises a lot of backing and filling. Perhaps there are good reasons to revisit our long-held understanding of reserved treaty rights as the plurality does, and adopt a broad health and safety exception to deal with the inevitable fallout. Hard to say, because no party or *amicus* has addressed the question.

The plurality's response to this important issue is the following, portentous sentence: "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." *Ante*. A lot of weight on two words, "may not." The plurality cites assurances from the territorial Governor of Washington that the United States would make laws to prevent "bad white men" from harming the Yakamas, and that the United States expected the Yakamas to exercise similar restraint in return. *Ante*. What this has to do with health and safety regulations affecting the highways (or fishing or hunting) is not clear.

In the meantime, do not assume today's decision is good news for tribal members across the country. Application of state safety regulations, for example, could prevent Indians from hunting and fishing in their traditional or preferred manner, or in particular "usual and accustomed places." I fear that, by creating the need for this untested exception, the unwarranted expansion of the Yakamas' right to travel may undermine rights that the Yakamas and other tribes really did reserve.

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I respectfully dissent.

Justice KAVANAUGH, with whom Justice THOMAS joins, dissenting.

The text of the 1855 treaty between the United States and the Yakama Tribe affords the Tribe a "right, in common with citizens of the United States, to travel upon all public highways." Treaty Between the United States and the Yakama Nation of Indians, Art. III, June 9, 1855, 12 Stat. 953. The treaty's "in common with" language means what it says. The treaty recognizes tribal members' right to travel on off-reservation public highways on equal terms with other U.S. citizens. Under the text of the treaty, the tribal members, like other U.S. citizens, therefore still remain subject to *nondiscriminatory* state highway regulations—that is, to regulations that apply equally to tribal members and other U.S. citizens. See *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–149 (1973). That includes, for example, speed limits, truck restrictions, and reckless driving laws.

The Washington law at issue here imposes a nondiscriminatory fuel tax. THE CHIEF JUSTICE concludes that the fuel tax is not a highway regulation and, for that reason, he says that the fuel tax does not infringe the Tribe's treaty right to travel on the public highways. I agree with THE CHIEF JUSTICE and join his dissent.

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Insert at the end of Chapter 4.

6. Individual Civil Rights of Tribal Members as United States Citizens

Brnovich v. Democratic National Committee
United States Supreme Court
594 U.S. ___ (2021)

The voting rights of tribal members as U.S. citizens were at issue in *Brnovich, Attorney General of Arizona et al. v. Democratic National Committee et al.*, 594 U.S. ___ (2021). In that case, the Democratic National Committee brought a challenge to two recent restrictions enacted by the state of Arizona, which were alleged to violate section 2 of the Voting Rights Act of 1965. The Voting Rights Act protects citizens from unlawful discrimination on the basis of race or color, a right protected by the 15th Amendment.

The Arizona legislature had imposed two recent restrictions, alleged to be necessary to prevent voter fraud. First, in some counties, voters who choose to cast a ballot in person on election day must vote in their own precincts or else their ballots would not be counted. Second, mail-in ballots cannot be collected by anyone other than an election official, a mail carrier, or a voter's family member, household member, or caregiver. The restrictions were alleged to cause significant impediments for minority voters, particularly Native American and Latino voters.

Justice Alito's majority opinion (joined by Chief Justice Roberts, and Justices Thomas, Gorsuch, Kavanaugh, and Barrett) did not focus on these issues. Rather, it generated a list

of five factors that could be used to assess whether under "the totality of circumstances" a State has made the voting "equally open to all" and has given everyone "an equal opportunity to vote." Justice Alito found that the vast majority of Arizona voters were not impacted by the restrictions, and that plaintiffs had not demonstrated any "disparate impact" to minority voters. Justice Alito also found that the mail-in ballot restriction may have been caused by "Partisan politics," but this was not to be confused with "racial" animus. Justice Alito's opinion holds that Arizona's "out of precinct policy" and mail-in ballot restrictions did not violate section 2 of the Voting Rights Act and that the legislature had not enacted HR 2023 with "racially discriminatory purpose."

Justice Kagan wrote a dissenting opinion, joined by Justice Breyer and Justice Sotomayor. Justice Kagan's opinion fully examined the history of suppression of minority voting rights that led to the Voting Rights Act, and the continuing practices of states to marginalize the vote of these groups. The Arizona restrictions "disproportionately affect minority citizens' opportunity to vote." The evidence demonstrated that the "out-of-precinct policy" resulted in Hispanic and African American voters' ballots "being thrown out at a statistically higher rate than those of whites." In addition, Arizona's "ballot-collection ban" made voting extremely difficult for Native American citizens due to the long distances that are required to access mail services, the lack of ready access to an automobile by many tribal members, and the tendency of Native American families to assist one another on the basis of kinship ties (community, clan) rather than the strict categories offered by the Arizona legislature. Kagan's opinion notes that "only 18% of Native Americans in the State have home [mail] delivery, making these restrictions a severe hardship for Native Americans, but not other citizens.

The upshot of this opinion is the meaning of "equality" of citizenship for Native Americans for purposes of the Constitutional rights and liberties that are often taken for granted by other citizens.

Chapter 5

Jurisdiction Under Special Federal Statutes

D. INDIAN CHILD WELFARE ACT

Insert on pg. 844.

Bureau of Indian Affairs Guidelines for Implementing the Indian Child Welfare Act 81 Fed. Reg. 96476 (2016)

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B. Applicability and Verification

It is important to determine at the outset of any State court child custody proceeding whether ICWA applies. Doing so promotes stability for Indian children and families and conserves resources by reducing the need for delays, duplication, appeals, and attendant disruptions. There are two questions to ask in determining whether ICWA applies:

1. Does ICWA apply to this child?
2. Does ICWA apply to the proceeding?

B.1 Determining whether the child is an "Indian child" under ICWA Regulation:

§ 23.2 Indian child means any unmarried person who is under age 18 and either:
(1) Is a member or citizen of an Indian Tribe; or
(2) Is eligible for membership or citizenship in an Indian Tribe and is the biological child of a member/citizen of an Indian Tribe.

§ 23.107 How should a State court determine if there is reason to know the child is an Indian child?
(a) State courts must ask each participant in an emergency or voluntary or involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record. State courts must instruct the parties to inform the court if they subsequently receive information that provides reason to know the child is an Indian child.
(b) If there is reason to know the child is an Indian child, but the court does not have sufficient evidence to determine that the child is or is not an "Indian child," the court must:

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(2) Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an "Indian child" in this part.

(c) A court, upon conducting the inquiry required in paragraph (a) of this section, has reason to know that a child involved in an emergency or child-custody proceeding is an Indian child if:

(1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;
(2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;
(3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;
(4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village;
(5) The court is informed that the child is or has been a ward of a Tribal court; or
(6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.

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Guidelines:

Definition of "Indian child"

The rule reflects the statutory definition of "Indian child," which is based on the child's political ties to a federally recognized Indian Tribe, either by virtue of the child's own citizenship in the Tribe, or through a biological parent's citizenship and the child's eligibility for citizenship. ICWA does not apply simply based on a child or parent's Indian ancestry. Instead, there must be a political relationship to the Tribe.

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Treating the Child as an Indian Child, Unless and Until Determined Otherwise

This requirement (triggered by a "reason to know" the child is an "Indian child") ensures that ICWA's requirements are followed from the early stages of a case and that harmful delays and duplication resulting from the potential late application of ICWA are avoided. For example, it makes sense to place a child that the court has reason to know is an Indian child in a placement that complies with ICWA's placement preferences from the start of a proceeding, rather than having to consider a change a placement later in the proceeding once the court confirms that the child actually is an Indian child. Notably, the early application of ICWA's requirements—which are designed to keep children, when possible, with their parents, family, or Tribal community—should benefit children regardless of whether it turns out that they are Indian children as defined by the statute. If, based on feedback from the relevant Tribe(s) or other information, the court determines that the child is not an "Indian child," then the State may proceed under its usual standards.

B.2 Determining whether ICWA applies

Regulation:

§ 23.103 When does ICWA apply?

(a) ICWA includes requirements that apply whenever an Indian child is the subject of:

(1) A child-custody proceeding, including:

(i) An involuntary proceeding;

(ii) A voluntary proceeding that could prohibit the parent or Indian custodian from regaining custody of the child upon demand; and

(iii) A proceeding involving status offenses if any part of the proceeding results in the need for out-of-home placement of the child, including a foster-care, preadoptive, or adoptive placement, or termination of parental rights.

(2) An emergency proceeding.

(b) ICWA does not apply to:

(1) A Tribal court proceeding;

(2) A proceeding regarding a criminal act that is not a status offense;

(3) An award of custody of the Indian child to one of the parents including, but not limited to, an award in a divorce proceeding; or

(4) A voluntary placement that either parent, both parents, or the Indian custodian has, of his or her or their free will, without a threat of removal by a State agency, chosen for the Indian child and that does not operate to prohibit the child's parent or Indian custodian from regaining custody of the child upon demand.

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Guidelines:

ICWA has provisions that apply to "child-custody proceedings." See the definition of "child-custody proceeding" and associated guidelines in section L of these guidelines. Child-custody proceedings include both involuntary proceedings and voluntary proceedings involving an "Indian child," regardless of whether individual members of the family are

themselves Indian. Thus, for example, a non-Indian parent may avail himself or herself of protections provided to parents by ICWA if her child is an "Indian child."

Involuntary Proceedings

If the child may be involuntarily removed from the parents or Indian custodian or the child may be involuntarily placed, then ICWA applies to the proceeding. If the parent or Indian custodian does not agree to the removal or placement, or agrees only under threat of the child's removal, then the proceeding is involuntary.

Voluntary Proceedings

If the parents or Indian custodian voluntarily agrees to removal or placement of the Indian child, then certain provisions of ICWA still apply. Voluntary proceedings require a determination of whether the child is an Indian child and compliance with ICWA and the regulation's provisions relating to the placement preferences.

See section B.3 of these guidelines for a list of which regulatory provisions apply to each type of proceeding.

A proceeding is voluntary only if the parent or Indian custodian voluntarily agrees to placement, of his or her own free will, without threat of removal.

Voluntary Placements Where Custody of the Child Can Be Regained "Upon Demand"

If the parent or Indian custodian has voluntarily placed the child (upon his or her own free will without threat of removal) and can regain custody "upon demand," meaning without any formalities or contingencies, then ICWA does not apply. These excepted voluntary placements are typically done without the assistance of a child welfare agency. An example is where a parent arranges for a relative or neighbor to care for their child while they are out of town for a period of time. If a child welfare agency is involved, it is recommended that placement intended to last for an extended period of time be memorialized in written agreements that explicitly state the right of the parent or Indian custodian to regain custody of the child upon demand without any formalities or contingencies.

The distinction between a voluntary and involuntary placement can be nuanced and depends on the facts. For example:

- If parent wishes to enter a drug treatment and places the child while in treatment, but can get the child back upon demand even if treatment is not completed, then that is likely a voluntary placement.
- If parent is told they will lose the child unless they enter a drug treatment program during which child is placed elsewhere, that is not a voluntary placement.
- If a parent wishes to enter drug treatment and places the child while in treatment, and is told that they can only get child back if treatment is successfully completed, that is not a voluntary placement.

***

Factors that May Not Be Considered

If a child-custody proceeding concerns a child who meets the statutory definition of "Indian child," then the court may not determine that ICWA does not apply based on factors such as the participation of the parents or the Indian child in Tribal cultural, social, religious, or political activities, the relationship between the Indian child and his or her parents, whether the parent ever had custody of the child, or the Indian child's blood quantum (sometimes known as the "Existing Indian Family" exception). These factors are not relevant to the inquiry of whether the statute applies. Rather, ICWA applies whenever an "Indian child" is the subject of a "child-custody proceeding," as those terms are defined in the statute. ***

B.7 Verifying Tribal membership

Regulation:

§ 23.108 Who makes the determination as to whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member of a Tribe?
***
(b) The determination by a Tribe of whether a child is a member, whether a child is eligible for membership, or whether a biological parent is a member, is solely within the jurisdiction and authority of the Tribe, except as otherwise provided by Federal or Tribal law. The State court may not substitute its own determination regarding a child's membership in a Tribe, a child's eligibility for membership in a Tribe, or a parent's membership in a Tribe.
***

C. Emergency Proceedings

C.1 Emergency proceedings in the ICWA context

Regulation:

§ 23.2 Emergency proceeding means and includes any court action that involves an emergency removal or emergency placement of an Indian child.

Guidelines:

The statute and regulations recognize that emergency proceedings may need to proceed differently from other proceedings under ICWA. Specifically, section 1922 of ICWA was designed to "permit, under applicable State law, the emergency removal of an Indian child from his parent or Indian custodian or emergency placement of such child in order to prevent imminent physical harm to the child notwithstanding the provisions of" ICWA. *** the regulatory definition of emergency proceedings is intended to cover such proceedings as may be necessary to prevent imminent physical damage or harm to the child.

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C.2 Threshold for removal on an emergency basis

Regulation:

…necessary to prevent imminent physical damage or harm to the child.

Guidelines:

ICWA allows for removal of a child from his or her parents or Indian custodian, as part of an emergency proceeding only if the child faces "imminent physical damage or harm." The Department interprets this standard as mirroring the constitutional standard for removal of any child from his or her parents without providing due process.

As a general rule, before any parent may be deprived of the care or custody of their child without their consent, due process—ordinarily a court proceeding resulting in an order permitting removal—must be provided. A child may, however, be taken into custody by a State official without court authorization or parental consent only in emergency circumstances. Courts have defined emergency circumstances as "circumstances in which the child is immediately threatened with harm," including when there is an immediate threat to the safety of the child, when a young child is left without care or adequate supervision, or where there is evidence of serious ongoing abuse and the officials have reason to fear imminent recurrence. The same standards and protections apply when an Indian child is involved. And those standards and protections are reflected in section 1922 of ICWA, which addresses emergency proceedings involving Indian children.

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D. Notice

D.1 Requirement for notice

Regulation:

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§ 23.111 What are the notice requirements for a child-custody proceeding involving an Indian child?

(a) When a court knows or has reason to know that the subject of an involuntary foster-care-placement or termination-of-parental-rights proceeding is an Indian child, the court must ensure that:

(1) The party seeking placement promptly sends notice of each such child-custody proceeding (including, but not limited to, any foster-care placement or any termination of parental or custodial rights) in accordance with this section; and

(2) An original or a copy of each notice sent under this section is filed with the court together with any return receipts or other proof of service.

(b) Notice must be sent to:

(1) Each Tribe where the child may be a member (or eligible for membership if a biological parent is a member) (see § 23.105 for information on how to contact a Tribe);

(2) The child's parents; and

(3) If applicable, the child's Indian custodian.

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F. Jurisdiction

F.1 Tribe's exclusive jurisdiction

Regulation:

§ 23.110 When must a State court dismiss an action?
***
(a) The court in any voluntary or involuntary child-custody proceeding involving an Indian child must determine the residence and domicile of the Indian child. If either the residence or domicile is on a reservation where the Tribe exercises exclusive jurisdiction over child-custody proceedings, the State court must expeditiously notify the Tribal court of the pending dismissal based on the Tribe's exclusive jurisdiction, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.
(b) If the child is a ward of a Tribal court, the State court must expeditiously notify the Tribal court of the pending dismissal, dismiss the State-court child-custody proceeding, and ensure that the Tribal court is sent all information regarding the Indian child-custody proceeding, including, but not limited to, the pleadings and any court record.

Guidelines:

With limited exceptions, ICWA provides for Tribal jurisdiction "exclusive as to any State" over child- custody proceedings involving an Indian child who resides or is domiciled within the reservation of such Tribe. ICWA also provides for exclusive Tribal jurisdiction over an Indian child who is a ward of a Tribal court, notwithstanding the residence or domicile of the child. ***

The mandatory dismissal provisions in § 23.110 apply "subject to" § 23.113 (emergency proceedings) so that the State may take action through an emergency proceeding when necessary to prevent imminent physical damage or harm to the child. Likewise, the mandatory dismissal provisions do not apply if the State and Tribe have an agreement regarding jurisdiction because, in some cases, Tribes choose to refrain from asserting jurisdiction. ***

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Coordination of dismissal and transfer. State and Tribal courts and State and Tribal child-welfare agencies are encouraged to work cooperatively to ensure that dismissal and transfer of information proceeds expeditiously and that the welfare of the Indian child is protected. The rule requires the court to transmit all information in its possession regarding the Indian child-custody proceeding to the Tribal court. Such information would include all the information within the court's possession regarding the Indian child-custody proceeding, including the pleadings and any court record. In order to best protect the welfare of the child, State agencies should also work to share information that is not contained in the State court's records but that would assist the Tribe in understanding and meeting the Indian child's needs.

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F.2 State's and Tribe's concurrent jurisdiction

Regulation:

§ 23.115 How are petitions for transfer of a proceeding made?
(a) Either parent, the Indian custodian, or the Indian child's Tribe may request, at any time, orally on the record or in writing, that the State court transfer a foster-care or termination-of-parental-rights proceeding to the jurisdiction of the child's Tribe.
(b) The right to request a transfer is available at any stage in each foster-care or termination-of-parental-rights proceeding.

Guidelines:

Section 1911(b) of ICWA provides for the transfer of any State court proceeding for the foster-care placement, or TPR to, an Indian child not domiciled or residing within the reservation of the Indian child's Tribe. This provision and § 23.115 recognize that Indian Tribes maintain concurrent jurisdiction over child- welfare matters involving Tribal children, even off of the reservation.

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Availability at any stage. The rule provides that the right to request a transfer is available at any stage in each foster-care or TPR proceeding. Transfer to Tribal jurisdiction, even at a late stage of a proceeding, will not necessarily entail unwarranted disruption of an Indian child's placement. The Tribe or parent may have reasons for not immediately moving to transfer the case (e.g., because of geographic considerations, maintaining State-court jurisdiction appears to hold out the most promise for reunification of the family).

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F.4 Criteria for ruling on a transfer petition.

Regulation:

§ 23.117 What are the criteria for ruling on transfer petitions?
Upon receipt of a transfer petition from an Indian child's parent, Indian custodian, or Tribe, the State court must transfer the child-custody proceeding unless the court determines that transfer is not appropriate because one or more of the following criteria are met:
(a) Either parent objects to such transfer;
(b) The Tribal court declines the transfer; or
(c) Good cause exists for denying the transfer.

Guidelines:

A keystone of ICWA is its recognition of a Tribe's exclusive or concurrent jurisdiction over child- custody proceedings involving Indian children. When the State and Tribe have concurrent jurisdiction, ICWA establishes a presumption that a State must transfer jurisdiction to the Tribe upon request. The rule reflects ICWA section 1911(b)'s requirement that a child-custody proceeding be transferred to Tribal court upon petition of either parent or the Indian custodian or the Indian child's Tribe, except in three circumstances: (1) where

either parent objects; (2) where the Tribal court declines the transfer; or (3) where there is good cause for denying the transfer.

Either Parent Objects

The rule mirrors the statute in respecting a parent's objection to transfer of the proceeding to Tribal court. As Congress noted, "[e]ither parent is given the right to veto such transfer."47 However, if a parent's parental rights have been terminated and this determination is final, they would no longer be considered a "parent" with a right under these rules to object.

While, this criterion addresses the objection of either parent, nothing prohibits the State court from considering the objection of the guardian ad litem or child himself under the third criteria (good cause to deny transfer), where appropriate.

Tribe Declines

If the Tribal court explicitly states that it declines jurisdiction, the State court may deny a transfer motion. It is recommended that the State court obtain documentation of the Tribal court's declination to include in the record.

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F.5 Good cause to deny transfer.

Regulation:

§ 23.118 How is a determination of "good cause" to deny transfer made?
(a) If the State court believes, or any party asserts, that good cause to deny transfer exists, the reasons for that belief or assertion must be stated orally on the record or provided in writing on the record and to the parties to the child-custody proceeding.
(b) Any party to the child-custody proceeding must have the opportunity to provide the court with views regarding whether good cause to deny transfer exists.
(c) In determining whether good cause exists, the court must not consider:
(1) Whether the foster-care or termination-of-parental-rights proceeding is at an advanced stage if the Indian child's parent, Indian custodian, or Tribe did not receive notice of the child-custody proceeding until an advanced stage;
(2) Whether there have been prior proceedings involving the child for which no petition to transfer was filed;
(3) Whether transfer could affect the placement of the child;
(4) The Indian child's cultural connections with the Tribe or its reservation; or
(5) Socioeconomic conditions or any negative perception of Tribal or BIA social services or judicial systems.
(d) The basis for any State-court decision to deny transfer should be stated orally on the record or in a written order.

Guidelines:

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Standard of Evidence

Neither the statute nor the rule establishes a Federal standard of evidence for the determination of whether there is good cause to transfer a proceeding to Tribal court. There is, however, a strong trend in State courts to apply a clear and convincing standard of evidence. The Department notes that the strong trend in State court decisions on this issue is compelling and recommends that State courts follow that trend.

Prohibited Considerations

Advanced stage if notice was not received until an advanced stage. The rule prohibits a finding of good cause based on the advanced stage of the proceeding, if the parent, Indian custodian, or Indian child's Tribe did not receive notice of the proceeding until an advanced stage. This protects the rights of the parents and Tribe to seek transfer where ICWA's notice provisions were not complied with, and thus will help to promote compliance with these provisions. It also ensures that parties are not unfairly advantaged or disadvantaged by noncompliance with the statute. Parents, custodians, and Tribes who were disadvantaged by noncompliance with ICWA's notice provisions should still have a meaningful opportunity to seek transfer.

***

Effect on placement of the child. The rule provides that the State court must not consider *** whether the Tribal court could change the child's placement. This is not an appropriate basis for good cause because the State court cannot know or accurately predict which placement a Tribal court might consider or ultimately order. A transfer to Tribal court does not automatically mean a change in placement; the Tribal court will consider each case on and individualized basis and determine what is best for that child. Like State courts, Tribal courts and agencies seek to protect the welfare of the Indian child, and would consider whether the current placement best meets that goal.

Cultural connections to the Tribe or reservation. The regulations prohibit a finding of good cause based on the Indian child's perceived cultural connections with the Tribe or reservation. Congress enacted ICWA in express recognition of the fact that State courts and agencies were generally ill-equipped to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. As such, State courts must not evaluate the sufficiency of an Indian child's cultural connections with a Tribe or reservation in evaluating a motion to transfer.

Negative perceptions of Tribal or BIA social services or judicial systems. The regulations prohibit consideration of any perceived inadequacy of Tribal or BIA social services or judicial systems. This is consistent with ICWA's strong recognition of the competency of Tribal fora to address child-custody matters involving Tribal children. It is also consistent with section 1911(d)'s requirement that States afford full faith and credit to public acts, records, and judicial proceedings of Tribes to the same extent as any other entity.

Socioeconomic conditions within the Tribe or reservation. The regulations prohibit consideration of the perceived socioeconomic conditions within a Tribe or reservation. Congress found that misplaced concerns about low incomes, substandard housing, and similar factors on reservations resulted in the unwarranted removal of Indian children from their

families and Tribes. These factors can introduce bias into decision- making and should not come into play in considering whether transfer is appropriate.

***

H. Placement Preferences

H.1 Adoptive placement preferences

Regulation:

§ 23.130 What placement preferences apply in adoptive placements?
(a) In any adoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (b) of this section, preference must be given in descending order, as listed below, to placement of the child with:
(1) A member of the Indian child's extended family;
(2) Other members of the Indian child's Tribe; or
(3) Other Indian families.
(b) If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply.
(c) The court must, where appropriate, also consider the placement preference of the Indian child or Indian child's parent.

Guidelines:

In ICWA, Congress expressed a strong Federal policy in favor of keeping Indian children with their families and Tribes whenever possible, and established preferred placements that it believed would help protect the needs and long-term welfare of Indian children and families, while providing the flexibility to ensure that the particular circumstances faced by individual Indian children can be addressed by courts.

Order. Each placement should be considered (without being skipped) in that order; the preferences are in the order of most preferred to least preferred.

Tribe's order of preference. State agencies should determine if the child's Tribe has established, by resolution, an order of preference different from that specified in ICWA. If so, then apply the Tribe's placement preferences. Otherwise, apply ICWA's placement preferences as set out in § 23.131.

The statute requires that a Tribal order of preference be established by "resolution." While different Tribes act through different types of actions and legal instruments, the Department understands that a Tribal "resolution," for this purpose, would be a legally binding statement by the competent Tribal authority that lays out an objective order of placement preferences.

If a Tribal-State agreement on ICWA establishes the order of preference, that would constitute an order of preference established by "resolution," as required by the rule. Such a document would be a legally binding statement by the competent Tribal authority that lays out an objective order of placement preferences. In addition, the statute specifically authorizes Tribal-State agreements respecting care and custody of Indian children.

Consideration of child's or parent's preference. The rule reflects the language of the statute. This language does not require a court to follow a child's or parent's preference, but rather requires that it be considered where appropriate.

H.2 Foster-care placement preferences

Regulation:

§ 23.131 What placement preferences apply in foster-care or preadoptive placements?

(a) In any foster-care or preadoptive placement of an Indian child under State law, including changes in foster-care or preadoptive placements, the child must be placed in the least-restrictive setting that:

(1) Most approximates a family, taking into consideration sibling attachment;

(2) Allows the Indian child's special needs (if any) to be met; and

(3) Is in reasonable proximity to the Indian child's home, extended family, or siblings.

(b) In any foster-care or preadoptive placement of an Indian child under State law, where the Indian child's Tribe has not established a different order of preference under paragraph (c) of this section, preference must be given, in descending order as listed below, to placement of the child with:

(1) A member of the Indian child's extended family;

(2) A foster home that is 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; or

(4) An institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs.

(c) If the Indian child's Tribe has established by resolution a different order of preference than that specified in ICWA, the Tribe's placement preferences apply, so long as the placement is the least-restrictive setting appropriate to the particular needs of the Indian child, as provided in paragraph (a) of this section.

(d) The court must, where appropriate, also consider the preference of the Indian child or the Indian child's parent.

Guidelines:

The placement preferences included in ICWA and the rule codify the generally accepted best practice to favor placing the child with extended family. Congress recognized that this generally applicable preference for placing children with family is even more important for Indian children and families, given that one of the factors leading to the passage of ICWA was the failure of non-Indian child welfare workers to understand the role of the extended family in Indian society. ***

Least restrictive setting. The foster-care placement includes the additional requirement that the placement be the least restrictive setting, which means the setting that most approximates a family. The placement decision must take into consideration sibling attachment and the proximity to the child's home, extended family, and/or siblings. If for

some reason it is not possible to place the siblings together, then the Indian child should be placed, if possible, in a setting that is within a reasonable proximity to the sibling. In addition, if the sibling is age 18 or older, that sibling is extended family and would qualify as a preferred placement. The placement should also be one that allows the Indian child's special needs, if any, to be met.

Order. Each placement should be considered (without being skipped) in that order; the preferences are in the order of most preferred to least preferred.

Tribe's order of preference. See section H.1 of these guidelines on how to account for the Tribe's order of preference, but note that, for foster-care placements, the Tribe's placement preferences should be applied as long as the placement is the least-restrictive setting appropriate to the particular needs of the Indian child.

Consideration of child's or parent's preference. The rule reflects the language of the statute. This language does not require a court to follow a child or parent's preference, but rather requires that it be considered where appropriate.

***

H.4 Good cause to depart from the placement preferences

Regulation:

§ 23.129 When do the placement preferences apply?
…(c) The placement preferences must be applied in any foster-care, preadoptive, or adoptive placement unless there is a determination on the record that good cause under
§ 23.132 How is a determination of "good cause" to depart from the placement preferences made?
***
(b) The party seeking departure from the placement preferences should bear the burden of proving by clear and convincing evidence that there is "good cause" to depart from the placement preferences.
(c) A court's determination of good cause to depart from the placement preferences must be made on the record or in writing and should be based on one or more of the following considerations:

(1) The request of one or both of the Indian child's parents, ***

(2) The request of the child, if the child is of sufficient age and capacity to understand the decision that is being made;

(3) The presence of a sibling attachment that can be maintained only through a particular placement;

(4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the community where families who meet the placement preferences live;

(5) The unavailability of a suitable placement after a determination by the court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or

> with which the Indian child's parent or extended family members maintain social and cultural ties.

Guidelines:

Congress determined that a placement with the Indian child's extended family or Tribal community will serve the child's best interest in most cases. A court may deviate from these preferences, however, when good cause exists.

***

If a party believes that good cause not to comply with the placement preferences exists because one of the factors in § 23.132(c) applies, the party must provide documentation of the basis for good cause.

***

Factors that may form the basis for good cause. The rule's list of is not exhaustive. The State court has the ultimate authority to consider evidence provided by the parties and make its own judgment as to whether the moving party has met the statutory "good cause" standard. In this way, the rule recognizes that there may be extraordinary circumstances where there is good cause to deviate from the placement preferences based on some reason outside of the five specifically-listed factors. The rule thereby retains discretion for courts and agencies to consider any unique needs of a particular Indian child in making a good cause determination.

Flexibility to find there is no good cause even when one or more factors are present. The court retains the discretion to find that good cause does not exist (and apply the placement preferences) even where one or more of the listed factors for good cause is present. Such a finding may be appropriate if other circumstances lead the court to conclude that there is not good cause. For example, if one parent consents and one does not, the court is not mandated to deviate from the preferences – rather it should be able to listen to the arguments of both sides and then decide.

***

H.5 Limits on good cause

Regulation:

> § 23.132 How is a determination of "good cause" to depart from the placement preferences made?
> …(d) A placement may not depart from the preferences based on the socioeconomic status of any placement relative to another placement.
> (e) A placement may not depart from the preferences based solely on ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA.

Guidelines:

***

Ordinary bonding with a non-preferred placement that flowed from time spent in a non- preferred placement that was made in violation of ICWA. If a child has been placed in a non-preferred placement in violation of ICWA and the rule, the court should not base a good-cause determination solely on the fact that the child has bonded with that placement.

A placement is "made in violation of ICWA" if the placement was based on a failure to comply with specific statutory or regulatory mandates. The determination of whether there was a violation of ICWA will be fact-specific and tied to the requirements of the statute and this rule. For example, failure to provide the required notice to the Indian child's Tribe for a year, despite the Tribe having been identified earlier in the proceeding, would be a violation of ICWA. By comparison, placing a child in a non-preferred placement would not be a violation of ICWA if the State agency and court followed the statute and applicable rules in making the placement, including by properly determining that there was good cause to deviate from the placement preferences.

As a best practice, in all cases, State agencies and courts should carefully consider whether the fact that an Indian child has developed a relationship with a non-preferred placement outweighs the long-term benefits to a child that can arise from maintaining connections to family and the Tribal community. Where a child is in a non-preferred placement, it is a best practice to facilitate connections between the Indian child and extended family and other potential preferred placements. For example, if a child is in a non-preferred placement due to geographic considerations and to promote reunification with the parent, the agency or court should promote connections and bonding with extended family or other preferred placements who may live further away. In this way, the child has the opportunity to develop additional bonds with these preferred placements that could ease a transition to that placement.

***

Insert on pg. 904.

7. Constitutional Challenges to ICWA

Brackeen v. Haaland
Fifth Circuit
994 F.3d 249 (2021)

Note on the Fifth Circuit Court of Appeals en banc decision in *Brackeen v. Haaland* (previously *Brackeen v. Bernhardt*), 994 F.3d 249, which concerned the constitutionality of the Indian Child Welfare Act.

This opinion concerned the efforts of non-Indian plaintiffs wishing to adopt Indian children free of the restrictions of the ICWA, and joined by three states (Texas, Louisiana, and Indiana) with very small populations of American Indians, who complained of the onerous nature of compliance with the ICWA. The Defendants, United States and various

Tribal governments argued that the statute is Constitutional, as written, and that the 2016 Regulations that implemented various provisions were also Constitutional. 26 state governments and the District of Columbia filed amicus briefs asking the court to uphold ICWA and the 2016 Rule.

The Fifth Circuit's en banc opinion is quite lengthy (325 pages) and badly fractured, with two main opinions and several separate opinions. Not surprisingly, the court was "equally divided" on several contested issues. The opinion is of marginal value beyond the Fifth Circuit, but it is worth noting that the en banc Court upheld the Constitutional authority of Congress to enact ICWA, and also found that the statute's definition of an "Indian child," which is tied to enrollment in a federally-recognized tribe, or eligibility for enrollment, does not violate the Equal Protection Clause. Thus, the basic premise of ICWA as a statute based on a political, rather than racial, classification is intact.

The contested part of the statute was in the enforcement of the protections, specifically to the extent that they were perceived as impermissibly "commandeering" state agencies. Notably, the Fifth Circuit's en banc opinion is binding only on federal courts in that Circuit and it does not affect the state courts. Of course, it is possible that Texas, Louisiana and Indiana could seek to avoid adherence to the provisions of ICWA and the Final Rule that were held invalid, but that remains to be seen.

E. INDIAN GAMING REGULATORY ACT

Update to **Chapter 5, section D** (Indian Gaming Regulatory Act) at pp. 904-05

In *Ysleta del Sur Pueblo et al v. Texas* (No. 20-493) (U.S. Supreme Court, June 15, 2022), the Court considered whether Texas had the authority to regulate the gaming activities of the Ysleta del Sur Pueblo Indian Tribe, given the language of the 1987 Act that restored the Tribe's federal trust status. The Restoration Act "prohibited" as a matter of federal law "all gaming activities which are prohibited by the laws of the State of Texas." Texas argued that the Restoration Act displaced IGRA and required the Tribe to follow all of the State's gaming laws on tribal lands, as a matter of federal law.

In a 5:4 opinion authored by Justice Gorsuch, a majority of the Supreme Court applied *Cabazon's* "regulatory/prohibitory" distinction and found that the Tribe is only prohibited from engaging in those gaming activities that are also prohibited in Texas. The State could not extend its regulatory laws to tribal lands. Justice Roberts and the other dissenting justices would have applied a "straightforward reading" of the 1987 statute's text to allow all of Texas's gaming laws to apply to the Tribe's land.

F. FEDERAL ENVIRONMENTAL LAWS

2. Federal Executive Power and the Executive Trust Responsibility

a. EPA's Indian Policy

On pg. 946, strike "EPA Policy for the Administration of Environmental Programs on Indian Reservations and replace with:

ENVIRONMENTAL PROTECTION AGENCY
40 CFR Parts 123, 131, 233 and 501
Revised Interpretation of Clean Water Act Tribal Provision

I. General Information
B. What interpretation is the Agency making?

Today's interpretive rule streamlines how tribes apply for TAS under CWA section 518 for CWA regulatory programs including the water quality standards program. It eliminates the need for applicant tribes to demonstrate inherent authority to regulate under the Act, thus allowing tribes to implement a delegation of authority by Congress. Specifically, EPA revises its existing interpretation of CWA section 518 to conclude definitively that this provision includes an express delegation of authority by Congress to Indian tribes to administer regulatory programs over their entire reservations, subject to the eligibility requirements in section 518.
***

II. Background
A. Statutory History

Congress added CWA section 518 as part of amendments made to the statute in 1987. Section 518(e) authorizes EPA to treat eligible Indian tribes in a similar manner as states for a variety of purposes, including administering each of the principal CWA regulatory programs and receiving grants under several CWA funding authorities. Section 518(e) is commonly known as the "TAS" provision, for treatment in a manner similar to a state.

Section 518(e) establishes eligibility criteria for TAS, including requirements that the tribe have a governing body carrying out substantial governmental duties and powers; that the functions to be exercised by the tribe pertain to the management and protection of water resources within the borders of an Indian reservation; and that the tribe be reasonably expected to be capable of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the Act and applicable regulations. Section 518(e) also requires EPA to promulgate regulations specifying the TAS process for applicant tribes. See section II.B.

Section 518(h) defines "Indian tribe" to mean any Indian tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a federal Indian reservation. It also defines "federal Indian reservation" to mean all land within the limits of any reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

B. Regulatory History

Pursuant to section 518(e), EPA promulgated several final regulations establishing TAS criteria and procedures for Indian tribes interested in administering programs under the Act. The relevant regulations addressing TAS requirements for the principal CWA regulatory

programs are:

40 CFR 131.8 for section 303(c) water quality standards (WQS). ***
40 CFR 131.4(c) for section 401 water quality certification ***
40 CFR 123.31-123.34 for section 402 National Pollutant Discharge Elimination System (NPDES) permitting and other provisions, and 40 CFR 501.22-501.25 for the state section 405 sewage sludge management program.***; and
40 CFR 233.60-233.62 for section 404 dredge or fill permitting. ***
***

III. How did EPA interpret the CWA TAS provision in 1991 when establishing TAS regulations for CWA regulatory programs?

The TAS eligibility criteria in section 518(e) make no reference to any demonstration of an applicant tribe's regulatory authority to obtain TAS. Rather, the relevant part of section 518(e)—which is section 518(e)(2)—requires only that the functions to be exercised by the tribe pertain to the management and protection of reservation water resources. As noted above, section 518(h)(1) also defines Indian reservations to include all reservation land irrespective of who owns the land. EPA nonetheless took a cautious approach when it issued the 1991 WQS TAS rule and subsequent regulations described in section II.B above. The 1991 approach required each tribe seeking TAS for the purpose of administering a CWA regulatory program to demonstrate its inherent authority under principles of federal Indian law, including gathering and analyzing factual information to demonstrate the tribe's inherent authority over the activities of nonmembers of the tribe on nonmember-owned fee lands within a reservation.

EPA recognized at the time that there was significant support for the proposition that Congress had intended to delegate authority to otherwise eligible tribes to regulate their entire reservations under the Act. Notably, in a plurality opinion in *Brendale* v. *Confederated Tribes and Bands of the Yakima Nation,* 492 U.S. 408 (1989), Justice White had even cited section 518 as an example of a congressional delegation of authority to Indian tribes. EPA also stated the Agency's interpretation that in section 518, Congress had expressed a preference for tribal regulation of surface water quality on reservations to assure compliance with the goals of the CWA. 56 FR at 64878-79. Nonetheless, in an abundance of caution, EPA opted at the time to require tribes to demonstrate, on a case-by-case basis, their inherent jurisdiction to regulate under the CWA. EPA was clear, however, that this approach was subject to change in light of further judicial or congressional guidance. *Id.*
***

IV. What developments support EPA's revised statutory interpretation?
A. Relevant Congressional, Judicial and Administrative Developments

Since 1991, EPA has taken final action approving TAS for CWA regulatory programs for 53 tribes. Three of those decisions were challenged in judicial actions. The last challenge concluded in 2002. In each of the cases, the reviewing court upheld EPA's determination with respect to the applicant tribe's inherent authority to regulate under the CWA. ***

Notably, the first court to review a challenge to an EPA CWA TAS approval expressed the view that the statutory language of section 518 indicated plainly that Congress intended to delegate authority to Indian tribes to regulate water resources on their entire reservations, including regulation of non-Indians on fee lands within a reservation. *Montana* v. *EPA,* 941

F. Supp. at 951-52. In that case, the applicant tribe, participating as amicus, argued that the definition of "Federal Indian reservation" in CWA section 518(h)(1)—which expressly includes all land within the limits of a reservation notwithstanding the issuance of any patent—combined with the bare requirement of section 518(e) that the functions to be exercised by the applicant tribe pertain to reservation water resources, demonstrates that section 518 provides tribes with delegated regulatory authority over their entire reservations, including over non-Indian reservation lands. *Id.* Because EPA had premised its approval of the TAS application at issue upon a showing of tribal inherent authority, it was unnecessary for the district court to reach the delegation issue as part of its holding in the case. Nonetheless, the court readily acknowledged that section 518 is properly interpreted as an express congressional delegation of authority to Indian tribes over their entire reservations. The court noted that the legislative history might be ambiguous, although only tangentially so, since the bulk of the legislative history relates to the entirely separate issue of whether section 518(e) pertains to non-Indian water quantity rights, which it does not. *Id.* The court observed the established principle that Congress may delegate authority to Indian tribes—per *United States* v. *Mazurie,* 419 U.S. 544 (1975)—and commented favorably on Justice White's statement regarding section 518 in *Brendale. Id.* The court also noted that a congressional delegation of authority to tribes over their entire reservations "comports with common sense" to avoid a result where an interspersed mixing of tribal and state WQS could apply on a reservation depending on whether the waters traverse or bound tribal or non-Indian reservation land. *Id.* Having thus analyzed CWA section 518, the court concluded—albeit in dicta—that Congress had intended to delegate such authority to Indian tribes over their entire reservations.
***

V. EPA's Revised Statutory Interpretation

A. What does today's revised interpretation provide and why?

EPA today revises its interpretation of CWA section 518 and concludes definitively that Congress expressly delegated authority to Indian tribes to administer CWA regulatory programs over their entire reservations, including over nonmember activities on fee lands within the reservation of the applicant tribe, subject to the eligibility requirements in section 518. In doing so, EPA thus exercises the authority entrusted to it by Congress to implement the CWA TAS provision.

The effect of this interpretive rule is to relieve a tribe of the need to demonstrate its inherent authority when it applies for TAS to administer a CWA regulatory program. An applicant tribe still needs to meet all other eligibility requirements specified in CWA section 518 and EPA's implementing regulations. Nonetheless, this rule eliminates any need to demonstrate that the applicant tribe retains inherent authority to regulate the conduct of nonmembers of the tribe on fee lands under the test established by the Supreme Court in *Montana* v. *U.S*. Instead, an applicant tribe can generally rely on the congressional delegation of authority in section 518 as the source of its authority to regulate its entire reservation under the CWA without distinguishing among various categories of on-reservation land. The tribe may, however, need to supply additional information to address any potential impediments to the tribe's ability to effectuate the delegation of authority.

EPA bases its revised interpretation of CWA section 518 on its analysis in section IV above and a careful consideration of comments received. Most importantly, EPA's revised interpretation is based on the plain text of section 518 itself. Section 518(e)(2) requires only that the functions to be exercised by the applicant Indian tribe pertain to the management and protection of water resources "within the borders of an Indian reservation." Section

518(h)(1) then defines the term "federal Indian reservation" to include all lands within the limits of any Indian reservation notwithstanding the issuance of any patent, and including rights-of-way running through the reservation. That definition is precisely the same language that the dissent in *APS* stated is the "gold standard" for an express congressional delegation of regulatory authority to tribes over their entire reservations. *APS,* 211 F.3d at 1302-03. It is also the language that the U.S. Supreme Court reviewed in finding congressional delegations to tribes in other cases. *United States* v. *Mazurie,* 419 U.S. 544 (1975) (delegation of authority to tribes regarding regulation of liquor); *Rice* v. *Rehner,* 463 U.S. 713 (1983) (same). Although the legislative history of section 518 has, of course, remained unaltered since 1987, the plain language of the statute and the above-described developments provide ample support for the revised interpretation.
***

C. What is EPA's position on certain public comments and tribal and state input?
***
6. Existing Regulatory Requirements

Because today's revised statutory interpretation is consistent with existing CWA TAS regulatory requirements, EPA has not revised any regulatory text in the Code of Federal Regulations.

TAS Requirements

Consistent with today's rule, tribes will rely on the congressional delegation of authority in section 518 as the source of their authority to regulate water quality on their reservations. Under the TAS regulations identified in section II.B, tribes would still need to address and overcome any special circumstances that might affect their ability to obtain TAS for a CWA regulatory program (see section V.C.4), and the existing TAS application regulations require submission of a legal statement that would cover such issues. Apart from such special circumstances, the main focus in determining the extent of an applicant tribe's jurisdiction for CWA regulatory purposes will likely be identifying the geographic boundaries of the Indian reservation area (whether a formal or informal reservation) over which the congressionally delegated authority would apply.[14] EPA's existing CWA TAS regulations already provide for applicant tribes to submit a map or legal description of the reservation area that is the subject of the TAS application. *See* 40 CFR 131.8(b)(3)(i); 123.32(c); 233.61(c)(1); 501.23(c). These provisions continue to apply and ensure that each tribe applying for a CWA regulatory program submits information adequate to demonstrate the location and boundaries of the subject reservation.

The existing regulations also provide appropriate opportunities for potentially interested entities to comment to EPA regarding any jurisdictional issues associated with a tribe's TAS application. As mentioned in section II.B above, EPA's TAS regulations for the CWA section 303(c) WQS program include a process for notice to appropriate governmental entities—states, tribes and other federal entities located contiguous to the reservation of the applicant tribe—and provide an opportunity for such entities to provide comment on the applicant tribe's assertion of authority. EPA makes such notice broad enough that other potentially interested entities can participate in the process. 56 FR at 64884. For example, EPA routinely publishes notice of tribal TAS applications for the WQS program in relevant local newspapers covering the area of the subject reservation and in electronic media.

Relationship to Program Approvals

The existing TAS regulations and this rule relate solely to the applications of Indian tribes for TAS eligibility for the purpose of administering CWA regulatory programs. They do not provide substantive approval of an authorized tribe's actual CWA regulatory program. Each program has its own regulations specifying how states and authorized tribes are to apply for and administer the program.

EPA's TAS regulations for the CWA section 402, 404 and 405 permitting programs require an analysis of tribal jurisdiction as part of the program approval process under 40 CFR parts 123, 233 and 501 that are described in section II.B. As described in the Simplification Rule, EPA makes its decisions to approve or disapprove those programs as part of a public notice and comment process conducted in the **Federal Register**. 59 FR at 64340.

Chapter 6

Tribal Rights to Land and Cultural Resources

A. TRIBAL PROPERTY INTERESTS

B. CULTURAL RESOURCES

1. Sacred Sites and Cultural Freedom

Update to **note 5 at pp. 1147**: Assessing the Impact of the Indian Religious Freedom Legislation

Apache Stronghold v. U.S. (No. 21-15295) (Ninth Cir. June 24, 2022):

Apache Stronghold is a non-profit organization, with Indigenous and non-Indigenous members, dedicated to protecting the religious freedom of the Apache people. Apache Stronghold filed a motion for a preliminary injunction seeking to stop a land exchange authorized by Congress in 2014, which would transfer a parcel of U.S. Forest Service land encompassing a highly sacred site, Oak Flats, to Resolution Copper Company for purposes of copper mining. Oak Flats is within the traditional Territory of the Apache people and it has long been considered an important site for ceremonial activities.

Apache Stronghold asserted that the land transfer violated the Religious Freedom Restoration Act, the Free Exercise Clause of the U.S. Constitution's First Amendment, and a trust obligation created by the 1852 Treaty of Santa Fe between the Apaches and the United States. The federal district court denied the motion for a preliminary injunction, and the Ninth Circuit panel upheld that ruling in a split opinion.

Purporting to rely upon *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058 (9th Cir. 2008, en banc), the majority found that RFRA incorporates the same standard to define "substantial burden" that was used in the pre-*Smith* Supreme Court cases, *Sherbert v. Verner* and *Wisconsin v. Yoder*. Under that standard, the Land Exchange failed to meet the test because "no government benefits will be lost" (*Sherbert*) and no "government penalties will be imposed." (*Yoder).* Apache Stronghold argued that if the land was transferred to a private owner, the Apache people would lose their right to access their sacred site, exposing them to liability for trespass. Apache Stronghold further argued that the federal laws that could provide some protection for Indigenous people seeking to access sacred sites on public lands would not apply once the land is under private ownership.

The court disagreed that either issue would give rise to a "substantial burden." The court refused to find that there is a "realistic fear of future criminal trespass liability," and even if a threat of a civil trespass action exists, it would be inappropriate to enjoin the entire Land Exchange.

The court also failed to find an actionable violation of the United States Constitution's Free Exercise Clause due to the fact that the Land Exchange was authorized by a "neutral" law and was not motivated by a desire to infringe upon Apache religious practices. The

court also failed to find an enforceable trust obligation in the 1852 Treaty, which promised to secure "territorial boundaries" for the Apaches and take actions that would enhance their "prosperity and happiness," but did not obligate the government to "control or supervise tribal properties at Oak Flat."

In a strong dissenting opinion, Judge Berzon found that the majority had applied an overly restrictive interpretation of the "substantial burden" test under RFRA and overlooked later federal legislation (RLUIPA) supporting a more expansive definition. Judge Berzon found that Apache Stronghold would have prevailed in its claim had the appropriate standard been used. The majority found that there were two separate tests for "substantial burden" within the meaning of each statute, and it refused to read the RFRA standard in light of the meaning accorded to the RLUIPA standard. The dissent would have construed the statutes together because they concerned similar issues and were meant to define the statutory protections for religious freedom.

2. Cultural Property

a. Tangible Cultural Property

NAGPRA
Draft 43 CFR Part 10

On July 9, 2021, a new set of draft regulations for NAGPRA was published for purposes of consultation with tribal leaders. Draft 43 CFR Part 10. The draft regulations are intended to respond to various critiques that tribal governments have had about the current processes that direct repatriation of ancestral human remains, associated funerary objects, unassociated funerary objects, sacred objects and objects of cultural patrimony. In particular, the draft regulations attempt to integrate the definition of cultural affiliation with geographic locations, making "geographical affiliation" a specific category for claimants.

Chapter 7

The Operation of the Reserved Rights Doctrine: Hunting, Fishing, and Water Rights

A. HUNTING, FISHING, AND FOOD-GATHERING RIGHTS

2. Off-Reservation Food-Gathering Rights

Insert on pg. 1240, after note on "Further Developments in the Pacific Northwest Fishing Litigation":

United States of America v. State of Washington
United States Court of Appeals, Ninth Circuit
853 F.3d 946 (2017)

W. FLETCHER, Circuit Judge

***

In 2001, pursuant to an injunction previously entered in this long-running litigation, twenty-one Indian tribes ("Tribes"), joined by the United States, filed a "Request for Determination"—in effect, a complaint—in the federal district court for the Western District of Washington. *** The Tribes contended that Washington State had violated, and was continuing to violate, the Treaties by building and maintaining culverts that prevented mature salmon from returning from the sea to their spawning grounds; prevented smolt (juvenile salmon) from moving downstream and out to sea; and prevented very young salmon from moving freely to seek food and escape predators. In 2007, the district court held that in building and maintaining these culverts Washington had caused the size of salmon runs in the Case Area to diminish and that Washington thereby violated its obligation under the Treaties. In 2013, the court issued an injunction ordering Washington to correct its offending culverts.

We affirm the decision of the district court.

***

II. Anadromous Fisheries and Washington's Barrier Culverts

Anadromous fish, such as salmon, hatch and spend their early lives in fresh water, migrate to the ocean to mature, and return to their waters of origin to spawn. Washington is home to several anadromous fisheries, of which the salmon fishery is by far the most important. Before the arrival of white settlers, returning salmon were abundant in the streams and rivers of the Pacific Northwest. Present-day Indian tribes in the Pacific Northwest eat salmon as an important part of their diet, use salmon in religious and cultural ceremonies, and fish for salmon commercially.

Roads often cross streams that salmon and other anadromous fish use for spawning. Road builders construct culverts to allow the streams to flow underneath roads, but many culverts do not allow fish to pass easily. Sometimes they do not allow fish passage at all. A

"barrier culvert" is a culvert that inhibits or prevents fish passage. Road builders can avoid constructing barrier culverts by building roads away from streams, by building bridges that entirely span streams, or by building culverts that allow unobstructed fish passage.

Four state agencies are responsible for building and managing Washington's roads and the culverts that pass under them: Washington State Department of Transportation ("WSDOT"), Washington State Department of Natural Resources ("WSDNR"), Washington State Parks and Recreation Commission ("State Parks"), and Washington Department of Fisheries and Wildlife ("WDFW"). Of these, WSDOT, the agency responsible for Washington's highways, builds and maintains by far the most roads and culverts.

***

V. Discussion

Washington objects to the decision of the district court on a number of grounds. It objects to the court's interpretation of the Stevens Treaties, contending that it has no treaty-based duty to refrain from building and maintaining barrier culverts; to the overruling of its waiver defense; to the dismissal of its cross-request against the United States; and to the injunction. We take the State's objections in turn.

A. Washington's Duty under the Treaties

The fishing clause of the Stevens Treaties guarantees to the Tribes a right to engage in off-reservation fishing. It provides, in its entirety:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however*, That they shall not take shell fish from any beds staked or cultivated by citizens.

Fishing Vessel, 443 U.S. at 674, 99 S.Ct. 3055 (emphasis in original). Washington concedes that the clause guarantees to the Tribes the right to take up to fifty percent of the fish available for harvest, but it contends that the clause imposes no obligation on the State to ensure that any fish will, in fact, be available.

In its brief to us, Washington denies any treaty-based duty to avoid blocking salmon-bearing streams:

> [T]he Tribes here argue for a treaty right that finds no basis in the plain language or historical interpretation of the treaties. On its face, the right of taking fish in common with all citizens does not include a right to prevent the State from making land use decisions that could incidentally impact fish. Rather, such an interpretation is contrary to the treaties' principal purpose of opening up the region to settlement.

Brief at 27–28. At oral argument, Washington even more forthrightly denied any treaty-based duty. Washington contended that it has the right, consistent with the Treaties, to block every salmon-bearing stream feeding into Puget Sound:

> The Court: Would the State have the right, consistent with the treaty, to dam every salmon stream into Puget Sound?
>
> Answer: Your honor, we would never and could never do that....

> The Court: ... I'm asking a different question. Would you have the right to do that under the treaty?
>
> Answer: Your honor, the treaty would not prohibit that[.]
>
> The Court: So, let me make sure I understand your answer. You're saying, consistent with the treaties that Governor Stevens entered into with the Tribes, you could block every salmon stream in the Sound?
>
> Answer: Your honor, the treaties would not prohibit that[.]

Oral Argument at 1:07–1:45, October 16, 2015.

> The State misconstrues the Treaties.

We have long construed treaties between the United States and Indian tribes in favor of the Indians. Chief Justice Marshall wrote in the third case of the Marshall Trilogy, "The language used in treaties with the Indians should never be construed to their prejudice." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582, 8 L.Ed. 483 (1832). "If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense." *Id.*

***

Washington has a remarkably one-sided view of the Treaties. In its brief, Washington characterizes the "treaties' principal purpose" as "opening up the region to settlement." Brief at 29. Opening up the Northwest for white settlement was indeed the principal purpose of the United States. But it was most certainly not the principal purpose of the Indians. Their principal purpose was to secure a means of supporting themselves once the Treaties took effect.

Salmon were a central concern. An adequate supply of salmon was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *Winans*, 198 U.S. at 381, 25 S.Ct. 662. Richard White, an expert on the history of the American West and Professor of American History at Stanford University, wrote in a declaration filed in the district court that, during the negotiations for the Point-No-Point Treaty, a Skokomish Indian worried aloud about "how they were to feed themselves once they ceded so much land to the whites." Professor White wrote, to the same effect, that during negotiations at Neah Bay, Makah Indians "raised questions about the role that fisheries were to play in their future." In response to these concerns, Governor Stevens repeatedly assured the Indians that there always would be an adequate supply of fish. Professor White wrote that Stevens told the Indians during negotiations for the Point Elliott Treaty, "I want that you shall not have simply food and drink now but that you may have them forever." During negotiations for the Point-No-Point Treaty, Stevens said, "This paper is such as a man would give to his children and I will tell you why. This paper gives you a home. Does not a father give his children a home? ... This paper secures your fish. Does not a father give food to his children?" *Fishing Vessel*, 443 U.S. at 667 n.11, 99 S.Ct. 3055 (ellipsis in original).

The Indians did not understand the Treaties to promise that they would have access to their usual and accustomed fishing places, but with a qualification that would allow the government to diminish or destroy the fish runs. Governor Stevens did not make, and the Indians did not understand him to make, such a cynical and disingenuous promise. The Indians reasonably understood Governor Stevens to promise not only that they would have access to their usual and accustomed fishing places, but also that there would be fish sufficient to sus-

tain them. They reasonably understood that they would have, in Stevens' words, "food and drink ... forever." As the Supreme Court wrote in *Fishing Vessels*:

> Governor Stevens and his associates were well aware of the "sense" in which the Indians were likely to view assurances regarding their fishing rights. During the negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and the Governor's promises that the treaties would *protect that source of food and commerce* were crucial in obtaining the Indians' assent. It is absolutely clear, as Governor Stevens himself said, that neither he nor the Indians intended that the latter should be excluded from their ancient fisheries, and it is accordingly inconceivable that either party deliberately agreed to authorize future settlers to crowd the Indians out of any *meaningful use* of their accustomed places to fish.

Id. at 676–77, 99 S.Ct. 3055 (citations and internal quotation marks omitted) (emphases added).

***

The facts presented in the district court establish that Washington has acted affirmatively to build and maintain barrier culverts under its roads. The State's barrier culverts within the Case Area block approximately 1,000 linear miles of streams suitable for salmon habitat, comprising almost 5 million square meters. If these culverts were replaced or modified to allow free passage of fish, several hundred thousand additional mature salmon would be produced every year. Many of these mature salmon would be available to the Tribes for harvest.

Salmon now available for harvest are not sufficient to provide a "moderate living" to the Tribes. *Fishing Vessel*, 443 U.S. at 686, 99 S.Ct. 3055. The district court found that "[t]he reduced abundance of salmon and the consequent reduction in tribal harvests has damaged tribal economies, has left individual tribal members unable to earn a living by fishing, and has caused cultural and social harm to the Tribes in addition to the economic harm." The court found, further, that "[m]any members of the Tribes would engage in more commercial and subsistence salmon fisheries if more fish were available."

We therefore conclude that in building and maintaining barrier culverts within the Case Area, Washington has violated, and is continuing to violate, its obligation to the Tribes under the Treaties.

***

The district court issued a permanent injunction in 2013, on the same day it issued its Memorandum and Decision. The court ordered the State, in consultation with the Tribes and the United States, to prepare within six months a current list of all state-owned barrier culverts within the Case Area. The court ordered that identification of a culvert as a "barrier" be based on the methodology specified in the Fish Passage Barrier and Surface Water Diversion Screening and Prioritization Manual ("Assessment Manual") published by WDFW in 2000. ***

Washington declined to participate in the formulation of the injunction on the ground that it had not violated the Treaties and that, therefore, no remedy was appropriate. Washington now objects on several grounds to the injunction that was formulated without its participation. ***

[W]e disagree with Washington's contention that the Tribes "presented no evidence," and that there was a "complete failure of proof," that state-owned barrier culverts have a sub-

stantial adverse effect on salmon. The record contains extensive evidence, much of it from the State itself, that the State's barrier culverts have such an effect. We also disagree with Washington's contention that the court ordered correction of "nearly every state-owned barrier culvert" without "any specific showing" that such correction will "meaningfully improve runs." The State's own evidence shows that hundreds of thousands of adult salmon will be produced by opening up the salmon habitat that is currently blocked by the State's barrier culverts. Finally, we disagree with Washington's contention that the court's injunction indiscriminately orders correction of "nearly every state-owned barrier culvert" in the Case Area. The court's order carefully distinguishes between high- and low-priority culverts based on the amount of upstream habitat culvert correction will open up. The order then allows for a further distinction, to be drawn by WSDOT in consultation with the United States and the Tribes, between those high-priority culverts that must be corrected within seventeen years and those that may be corrected on the more lenient schedule applicable to the low-priority culverts.

***

Conclusion

In sum, we conclude that in building and maintaining barrier culverts Washington has violated, and continues to violate, its obligation to the Tribes under the fishing clause of the Treaties. The United States has not waived the rights of the Tribes under the Treaties, and has not waived its own sovereign immunity by bringing suit on behalf of the Tribes. The district court did not abuse its discretion in enjoining Washington to correct most of its high-priority barrier culverts within seventeen years, and to correct the remainder at the end of their natural life or in the course of a road construction project undertaken for independent reasons.

AFFIRMED.

Insert on pg. 1249:

Herrera v. Wyoming
United States Supreme Court
139 S.Ct. 1686 (2019)

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 hunt-

ing 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 (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. 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.

After prospectors struck gold in Idaho and western Montana, a new wave of settlement prompted Congress to initiate further negotiations.

At the convening, Tribe leaders stressed the vital importance of preserving their hunting traditions. Institute for the Development of Indian Law, Proceedings of the Great Peace Commission of 1867–1868, p. 88 (1975) (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; 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, ***. 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 ad-

mission 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. 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. ***

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 (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 (1999), repudiated *Race Horse*, and he urged the Wyoming court to follow *Mille Lacs* instead of the *Repsis* and *Race* 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. ***

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. ——, (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. *** 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.

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 (citing, *e.g.*, *Lessee of Pollard v. Hagan*, 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.

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. To the contrary, the Court emphasized that Congress "clearly contemplated the disappearance of the conditions" specified in the treaty. *Id.*, at 509. 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.

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 (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.

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. 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. But *Mille Lacs* explained that this conclusion "rested on a false premise." 526 U.S. at 204. 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 (citing *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 682 (1979); *Antoine v. Washington*, 420 U.S. 194,

207–208 (1975); *Puyallup Tribe v. Department of Game of Wash.*, 391 U.S. 392, 398 (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.

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 (citing *United States v. Dion*, 476 U.S. 734, 738–740 (1986); *Fishing Vessel Assn.*, 443 U.S. at 690; *Menominee Tribe v. United States*, 391 U.S. 404, 413 (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.

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. 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. 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—could be described in those terms. 526 U.S. at 206–207. 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. 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. 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. "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.

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. "[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 alterna-

tive 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 Court's 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. *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 361 (1984). 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. "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 (quoting *Dion*, 476 U.S. at 740); see *Menominee Tribe*, 391 U.S. at 412. 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; 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.

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. 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, 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. 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.

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.

The historical record likewise does not support the State's position. See *Choctaw Nation v. United States*, 318 U.S. 423, 431–432 (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, 13No. 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.

***

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. 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, 29No. 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).

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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.

IV

Finally, we note two ways in which our decision is limited. First, we hold that Bighorn National Forest is not categorically occupied, not that all areas within the forest are unoccupied. On remand, the State may argue that the specific site where Herrera hunted elk was used in such a way that it was "occupied" within the meaning of the 1868 Treaty. See *State v. Cutler*, 708 P. 2d 853, 856 (1985) (stating that the Federal Government may not be foreclosed from using land in such a way that the Indians would have considered it occupied).

Second, the state trial court decided that Wyoming could regulate the exercise of the 1868 Treaty right "in the interest of conservation." Nos. CT–2015–2687, CT–2015–2688, App. to Pet. for Cert. 39–41; see *Antoine*, 420 U.S. at 207. The appellate court did not reach this issue. No. 2016–242, App. to Pet. for Cert. 14, n. 3. On remand, the State may press its arguments as to why the application of state conservation regulations to Crow Tribe members exercising the 1868 Treaty right is necessary for conservation. We do not pass on the viability of those arguments today.

* * *

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.

Justice ALITO, with whom THE CHIEF JUSTICE, Justice THOMAS, and Justice KAVANAUGH join, dissenting.

[Omitted]

B. COMPETITION FOR CONTROL OF WATER

1. Source, Quantity, and use of Indian Water Rights

Insert on pg. 1254:

Agua Caliente Band of Cahuilla Indians v.
Coachella Valley Water District
849 F.3d 1262
United States Court of Appeals, (9th Cir. 2017)

OPINION

TALLMAN, CJ:

The Coachella Valley Water District ("CVWD") and the Desert Water Agency ("DWA") (collectively, the "water agencies") bring an interlocutory appeal of the district court's grant of partial summary judgment in favor of the Agua Caliente Band of Cahuilla Indians (the "Tribe") and the United States. The judgment declares that the United States impliedly reserved appurtenant water sources, including groundwater, when it created the Tribe's reservation in California's arid Coachella Valley. We agree. In affirming, we recognize that there is no controlling federal appellate authority addressing whether the reserved rights doctrine applies to groundwater. However, because we conclude that it does, we hold that the Tribe has a reserved right to groundwater underlying its reservation as a result of the purpose for which the reservation was established.

I
A

The Agua Caliente Band of Cahuilla Indians has lived in the Coachella Valley since before California entered statehood in 1850. The bulk of the Agua Caliente Reservation was formally established by two Presidential Executive Orders issued in 1876 and 1877, and the United States, pursuant to statute, now holds the remaining lands of the reservation in trust for the Tribe. The reservation consists of approximately 31,396 acres interspersed in a checkerboard pattern amidst several cities within Riverside County, including Palm Springs, Cathedral City, and Rancho Mirage.

The Executive Orders establishing the reservation are short in length, but broad in purpose. In 1876, President Ulysses S. Grant ordered certain lands "withdrawn from sale and set apart as reservations for the permanent use and occupancy of the Mission Indians in south-

ern California." Similarly, President Rutherford B. Hayes's 1877 Order set aside additional lands for "Indian purposes." These orders followed on the heels of detailed government reports from Indian agents, which identified the urgent need to reserve land for Indian use in an attempt to encourage tribal members to "build comfortable houses, improve their acres, and surround themselves with home comforts." Comm'r of Indian Aff., Ann. Rep. 224 (1875). In short, the United States sought to protect the Tribe and "secure the Mission Indians permanent homes, with land and water enough." Comm'r of Indian Aff., Ann. Rep. 37 (1877).

Establishing a sustainable home in the Coachella Valley is no easy feat, however, as water in this arid southwestern desert is scarce. Rainfall totals average three to six inches per year, and the Whitewater River System—the valley's only real source of surface water—produces an average annual supply of water that fluctuates between 4,000 and 9,000 acre-feet, most of which occurs in the winter months. In other words, surface water is virtually nonexistent in the valley for the majority of the year. Therefore, almost all of the water consumed in the region comes from the aquifer underlying the valley—the Coachella Valley Groundwater Basin.

The Coachella Valley Groundwater Basin supports 9 cities, 400,000 people, and 66,000 acres of farmland. *See* CVWD-DWA, The State of the Coachella Valley Aquifer at 2. Given the demands on the basin's supply, it is not surprising that water levels in the aquifer have been declining at a steady rate. Since the 1980s, the aquifer has been in a state of overdraft, which exists despite major efforts to recharge the basin with water delivered from the California Water Project and the Colorado River. In total, groundwater pumping has resulted in an average annual recharge deficit of 239,000 acre-feet, with cumulative overdraft estimated at 5.5 million acre-feet as of 2010.

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B

Given an ever-growing concern over diminishing groundwater resources, the Agua Caliente Tribe filed this action for declaratory and injunctive relief against the water agencies in May 2013. *** [T]he district court held that the reserved rights doctrine applies to groundwater and that the United States reserved appurtenant groundwater when it established the Tribe's reservation.

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III

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A

For over one hundred years, the Supreme Court has made clear that when the United States "withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (citing U.S. Const. art. I, § 8; U.S. Const. art. IV, § 3); *see also Winters v. United States*, 207 U.S. 564, 575–78 (1908)**;** *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46 (9th Cir. 1981).

In what has become known as the *Winters* doctrine, federal reserved water rights are directly applicable "to Indian reservations and other federal enclaves, encompassing water

rights in navigable and nonnavigable streams." *See Cappaert*, 426 U.S. at 138. The creation of these rights stems from the belief that the United States, when establishing reservations, "intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless." *Arizona v. California*, 373 U.S. 546, 600, (1963); *see also id.* at 598–99, ("It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind—hot, scorching sands—and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.").

***

C

*** We must now determine whether the *Winters* doctrine, and the Tribe's reserved water right, extends to the groundwater underlying the reservation. And while we are unable to find controlling federal appellate authority explicitly holding that the *Winters* doctrine applies to groundwater we now expressly hold that it does.

****Cappaert* itself hinted that impliedly reserved waters may include appurtenant groundwater when it held that "the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater." *Id.* at 143. If the United States can protect against groundwater diversions, it follows that the government can protect the groundwater itself.

Further, many locations throughout the western United States rely on groundwater as their only viable water source. *See, e.g.*, *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 989 P.2d 739, 746 (S. Ct. Ariz. 1999) (en banc) ("The reservations considered in [*Winters* and *Arizona*] depended for their water on perennial streams. But some reservations lack perennial streams and depend for present and future survival substantially or entirely upon pumping of underground water. We find it no more thinkable in the latter circumstance than in the former that the United States reserved land for habitation without reserving the water necessary to sustain life."). More importantly, such reliance exists here, as surface water in the Coachella Valley is minimal or entirely lacking for most of the year. Thus, survival is conditioned on access to water—and a reservation without an adequate source of surface water must be able to access groundwater.

The *Winters* doctrine was developed in part to provide sustainable land for Indian tribes whose reservations were established in the arid parts of the country. And in many cases, those reservations lacked access to, or were unable to effectively capture, a regular supply of surface water. Given these realities, we can discern no reason to cabin the *Winters* doctrine to appurtenant surface water. As such, we hold that the *Winters* doctrine encompasses both surface water and groundwater appurtenant to reserved land. The creation of the Agua Caliente Reservation therefore carried with it an implied right to use water from the Coachella Valley aquifer.

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IV

In sum, the *Winters* doctrine does not distinguish between surface water and groundwater. Rather, its limits derive only from the government's intent in withdrawing land for a public purpose and the location of the water in relation to the reservation created. As such, because the United States intended to reserve water when it established a home for the Agua

Caliente Band of Cahuilla Indians, we hold that the district court did not err in determining that the government reserved appurtenant water sources—including groundwater—when it created the Tribe's reservation in the Coachella Valley.

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AFFIRMED.

Insert on pg. 1265:

IN RE CSRBA
Supreme Court of Idaho
448 P.3d 322 (Idaho 2019)

STEGNER, Justice.

*** The United States Department of the Interior[2] (the United States), as trustee for the Coeur d'Alene Tribe (the Tribe), filed 353 claims in Idaho state court seeking judicial recognition of federal reserved water rights to fulfill the purposes of the Coeur d'Alene Tribe's Reservation (the Reservation).[3] The Tribe joined the litigation. The State of Idaho (the State) and others objected to the claims asserted by the United States and the Tribe. ***

The district court specifically allowed reserved water rights for agriculture, fishing and hunting, and domestic purposes. The district court allowed reserved water rights for instream flows within the Reservation, but disallowed those for instream flows outside the Reservation. The district court disallowed other claims, including a claim on behalf of the Tribe to maintain the level of Lake Coeur d'Alene. The district court then determined priority dates for the various claims it found should proceed to quantification. Generally speaking, the district court held that the Tribe was entitled to a date-of-reservation priority date for the claims for consumptive uses, and a time immemorial priority date for nonconsumptive uses. However, in regard to lands homesteaded on the Reservation by non-Indians that had since been reacquired by the Tribe, the district court ruled the Tribe was entitled to a priority date of a perfected state water right, or if none had been perfected or it had been lost due to nonuse, the Tribe's priority date would be the date-of-reacquisition.

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I. FACTUAL AND PROCEDURAL BACKGROUND
A. History of the Tribe and the Reservation.

In its summary judgment order, the district court adopted the history of the Tribe and the creation of the Reservation as set out by the United States Supreme Court in *Idaho v. United States* (hereafter *Idaho II*), 533 U.S. 262 (2001). That history, as articulated by the U.S. Supreme Court, is as follows:

> The Coeur d'Alene Tribe once inhabited more than 3.5 million acres in what is now northern Idaho and northeastern Washington, including the area of Lake Coeur d'Alene and the St. Joe River. Tribal members traditionally used the lake and its related waterways for food, fiber, transportation, recreation, and cultural activities. The

> Tribe depended on submerged lands for everything from water potatoes harvested from the lake to fish weirs and traps anchored in riverbeds and banks.
>
> ... In 1867, in the face of immigration into the Tribe's aboriginal territory, President Johnson issued an Executive Order setting aside a reservation of comparatively modest size, although the Tribe was apparently unaware of this action until at least 1871, when it petitioned [Tribe's 1872 Petition] the Government to set aside a reservation. The Tribe found the 1867 boundaries unsatisfactory, due in part to their failure to make adequate provision for fishing and other uses of important waterways. When the Tribe petitioned the Commissioner of Indian Affairs a second time, it insisted on a reservation that included key river valleys because "we are not as yet quite up to living on farming" and "for a while yet we need [to] have some hunting and fishing."
>
> Following further negotiations, the Tribe in 1873 agreed to relinquish (for compensation) all claims to its aboriginal lands outside the bounds of a more substantial reservation that negotiators for the United States agreed to "set apart and secure" "for the exclusive use of the Coeur d'Alene Indians, and to protect ... from settlement or occupancy by other persons." The reservation boundaries described in the agreement covered part of the St. Joe River (then called the St. Joseph), and all of Lake Coeur d'Alene except a sliver cut off by the northern boundary.
>
> Although by its own terms the agreement was not binding without congressional approval, later in 1873 President Grant issued an Executive Order directing that the reservation specified in the agreement be "withdrawn from sale and set apart as a reservation for the Coeur d'Alene Indians." The 1873 Executive Order set the northern boundary of the reservation directly across Lake Coeur d'Alene ....
>
> As of 1885, Congress had neither ratified the 1873 agreement nor compensated the Tribe. This inaction prompted the Tribe to petition the Government again [Tribe's 1885 Petition], to "make with us a proper treaty of peace and friendship ... by which your petitioners may be properly and fully compensated for such portion of their lands not now reserved to them; [and] that their present reserve may be confirmed to them." In response, Congress authorized new negotiations to obtain the Tribe's agreement to cede land outside the borders of the 1873 reservation. In 1887, the Tribe agreed to cede
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> "all right, title, and claim which they now have, or ever had, to all lands in said Territories [Washington, Idaho, and Montana] and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation."

The Government, in return, promised to compensate the Tribe, and agreed that

> "[i]n consideration of the foregoing cession and agreements ... the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians ... and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians residing on said reservation."

As before, the agreement was not binding on either party until ratified by Congress.

> In January 1888, not having as yet ratified any agreement with the Tribe, the Senate expressed uncertainty about the extent of the Tribe's reservation and adopted a resolution directing the Secretary of the Interior to "inform the Senate as to the extent of the present area and boundaries of the Coeur d'Alene Indian Reservation in the Territory of Idaho," and specifically, "whether such area includes any portion, and if so, about how much of the navigable waters of Lake Coeur d'Alene, and of Coeur d'Alene and St. Joseph Rivers." The Secretary responded in February 1888 with a report of the Commissioner of Indian Affairs, stating that "the reservation appears to embrace all the navigable waters of Lake Coeur d'Alene, except a very small fragment cut off by the north boundary of the reservation," and that "[t]he St. Joseph River also flows through the reservation." ...
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> ....
>
> Congress was not prepared to ratify the 1887 agreement, however, owing to a growing desire to obtain for the public not only any interest of the Tribe in land outside the 1873 reservation, but certain portions of the reservation itself. ...
>
> But Congress did not simply alter the 1873 boundaries unilaterally. Instead, the Tribe was understood to be entitled beneficially to the reservation as then defined, and the 1889 Indian Appropriations Act included a provision directing the Secretary of the Interior "to negotiate with the Coeur d'Alene tribe of Indians," and, specifically, to negotiate "for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell." Later that year, the Tribe and Government negotiators reached a new agreement under which the Tribe would cede the northern portion of the reservation, including approximately two-thirds of Lake Coeur d'Alene, in exchange for $500,000. The new boundary line, like the old one, ran across the lake, and General Simpson, a negotiator for the United States, reassured the Tribe that "you still have the St. Joseph River and the lower part of the lake." And, again, the agreement was not to be binding on either party until both it and the 1887 agreement were ratified by Congress.
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> ....
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> ... On March 3, 1891, Congress "accepted, ratified, and confirmed" both the 1887 and 1889 agreements with the Tribe. *Idaho II,* 533 U.S. at 265-71 (citations and footnotes omitted).

***

III. ANALYSIS

A. The law regarding federal reserved water rights.

"The existence or absence of a reserved water right is a matter of federal law." *United States v. Idaho,* 135 Idaho 655, 660, 23 P.3d 117, 122 (2001). The federal government "does not defer to state water law with respect to reserved rights." *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.* (hereafter *Agua Caliente),* 849 F.3d 1262, 1269 (9th Cir. 2017).

Federal reserved water rights arise from the United States Supreme Court's decision in *Winters v. United States,* 207 U.S. 564 (1908). In *Winters,* the Supreme Court held that when Congress created an Indian reservation, it also, by implication, reserved water necessary for

the Tribe to achieve the purposes of the reservation. *Id.* at 576, 28. "In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water." *Cappaert v. United States,* 426 U.S. 128, 139 (1976). Intent to reserve water is inferred if the waters are necessary to accomplish the reservation's purposes. *Cappaert,* 426 U.S. at 139.

The Supreme Court held that "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Id.* at 138. Reservation purposes are derived from "the document[s] and circumstances surrounding [a reservation's] creation, and the history of the Indians for whom it was created." *Agua Caliente,* 849 F.3d at 1270. Once established, "the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators." *Cappaert,* 426 U.S. at 138.

B. The Reservation was created by the Executive Order of November 8, 1873.

As a preliminary matter, it is important to determine what governmental act or acts created the Reservation. Implied federal reserved water rights are established *at the time surrounding the creation* of the reservation. *Arizona I,* 373 U.S. at 600 ("We follow *[Winters]* now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created.").

Likewise, a reservation's purposes that require water are also determined at the time surrounding the reservation's creation. *See Cappaert,* 426 U.S. at 138 ("[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation[, and] ... acquires a reserved right ... which vests on the date of the reservation ...."); *Walton I,* 647 F.2d at 47 ("To identify the purposes for which the Colville Reservation was created, we consider the document and circumstances surrounding its creation, and the history of the Indians for whom it was created."). Accordingly, establishing when and how the Reservation was created is integral to determining both the potential purposes of the Tribe and priority dates of certain water rights claims—the central contested issues in these appeals.

Federal reservations and accompanying reserved water rights may be created by executive order. *Arizona I,* 373 U.S. at 598. Indian reservations which are set aside by the executive branch remain valid even absent congressional approval.

The United States Supreme Court and Ninth Circuit have held that the Coeur d'Alene Reservation was established by the 1873 Executive Order. The district court also found the Reservation was created by President Grant's Executive Order of November 8, 1873. We conclude the district court's finding in this regard was correct.

***. Accordingly, the Reservation and any implied water rights were created in 1873 by the executive order. It follows that the Reservation's purposes requiring water must also be established as they were at that time. Therefore, the 1873 documents (both the executive order and the agreement) and surrounding documents and circumstances (i.e., the Tribe's 1872 Petition) will be used to determine the purposes of the Reservation. Additionally, it is appropriate to examine the later 1887 and 1889 Tribal Agreements (the later agreements), which were approved by Congress in the 1891 Act, to aid in understanding the Reservation's purposes.

***

D. The purposes of the Tribe's Reservation.

1. The district court erred by applying the primary-secondary purpose distinction set out in *New Mexico.*

One of the central issues involved in all four appeals is whether the primary-secondary purpose analysis set out in *New Mexico* applies to Indian reservations or if it is limited to non-Indian reservations. The United States and the Tribe argue that *New Mexico* has no application to an Indian reservation. They maintain that because the reservation being considered in *New Mexico* was a national forest, it is distinguishable. The United States and the Tribe contend that the district court's reliance on the *New Mexico* primary-secondary purpose distinction was in error. The State argues that *New Mexico's* primary-secondary analysis applies to Indian reservations because it is derived from United States Supreme Court decisions addressing reservations, which included Indian reservations.

In *New Mexico,* the Supreme Court established the primary-secondary use analysis for determining whether a federally reserved water right would be implied within a United States National Forest. *New Mexico,* 438 U.S. at 701. The Court held, "Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended ... that the United States would acquire water in the same manner as any other public or private appropriator." *Id.* at 702. Under the primary-secondary analysis, water is impliedly reserved for a reservation's primary purposes; it is not, however, reserved for its secondary purposes. *See id.* The United States Supreme Court has not explicitly decided whether *New Mexico's* primary-secondary analysis applies to Indian reservations; as a result, different courts have treated *New Mexico's* application to Indian reservations differently.

a. The reasoning set forth by the jurisdictions declining to apply New Mexico to Indian reservations is persuasive.

Because *New Mexico* did not involve an Indian reservation, at least two state supreme courts have found *New Mexico's* primary-secondary analysis inapplicable to Indian water rights cases. *See, e.g., In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source* (hereafter *Gila V*), 201 Ariz. 307 (2001); *State ex rel. Greely v. Confederated Salish & Kootenai Tribes of Flathead Reservation* (hereafter *Greely*), 219 Mont. 76 (1985). Other courts have found *New Mexico* to be applicable to and therefore binding precedent for Indian reservations. *United States v. Washington,* 375 F. Supp. 2d 1050, 1063-64 (W.D. Wash. 2005); *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.* (hereafter *Big Horn I*), 753 P.2d 76, 96-97 (Wyo. 1988), *aff'd sub nom. Wyoming v. United States,* 492 U.S. 406 (1989).

The Ninth Circuit has recognized that *New Mexico's* primary-secondary analysis, despite not being "directly applicable" to Indian reservations, has several useful guidelines. *See, e.g.,* "*United States v. Adair,* 723 F.2d 1394, 1408 (9th Cir. 1983); *Agua Caliente,* 849 F.3d at 1269. Despite this recognition, the Ninth Circuit has also generally applied *New Mexico* to Indian reservations. *See, e.g., Agua Caliente,* 849 F.3d at 1269.

Wyoming, in *Big Horn I* (and later in *Big Horn III*), adopted the Ninth Circuit's application of *New Mexico,* despite noting that its applicability to Indian reservations had been

brought into question. *Big Horn I,* 753 P.2d at 96. *Big Horn I* held that a reservation may have more than one primary purpose, which may include a homeland purpose, but determined the relevant reservation's treaty only encouraged agriculture; therefore, agriculture was the sole primary purpose of the reservation in that case. *Id.* at 97.

Although this Court has applied *New Mexico,* it has done so only with regard to non-Indian reservations. *See, e.g., Potlatch Corp.,* 134 Idaho at 920. Also, this Court has recognized a distinction between Indian reservations and non-Indian reservations. *Id.* For example, in *Potlatch,* this Court emphasized that Indian reservations are created through a bargained-for exchange between two sovereign entities, while non-Indian reservations are not. *Id.*

As mentioned, at least two other state supreme courts, Montana's and Arizona's, have found *New Mexico* to be inapplicable to Indian reservations. *See generally Greely,* 712 P.2d at 767; *Gila V,* 35 P.3d at 77. The Supreme Court of Montana held that Indian and non-Indian reservations are to be distinguished from one another. *Greely,* 712 P.2d at 767. That court held that Indian reservations, and their reserved water rights, differ from other reservations and their reserved water rights in at least two important ways.[7] *Id.*

First, the two rights have different origins. *Id.* Non-Indian "[f]ederal reserved water rights are created by the document that reserves the land from the public domain. By contrast, aboriginal-Indian reserved water rights exist from time immemorial and are merely recognized by the document that reserves the Indian land." *Id.*

Second, Montana found ownership to be an important distinction. *Id.* "The United States is not the owner of Indian reserved rights; it is a trustee for the benefit of the" tribes. *Id.* In contrast, the United States owns federal reserved rights in all other reservations and has the power to "lease, sell, quitclaim, release, encumber or convey its own federal reserved water rights." *Id.* Bearing these distinctions in mind, the Montana court held that Indian rights "are given broader interpretation in order to further the federal goal of Indian self-sufficiency." *Id.* at 768.

Similarly, the Supreme Court of Arizona held that Indian reservations should be distinguished from non-Indian reservations. *Gila V,* 35 P.3d at 77. *Gila V,* specifically disavowed Wyoming's application of the primary-secondary analysis in *Big Horn III*. *Id.* That court reasoned "[W]hile the purpose for which the federal government reserves other types of lands may be strictly construed, the purposes of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be attained." *Id.* While recognizing the same differences identified by the Supreme Court of Montana, Arizona identified others as well. *Gila V,* 35 P.3d at 74. One such difference is that, in the context of Indian reservations, the government, as trustee of such lands, must act for the Indians' benefit. *Id.* "Thus, treaties, statutes, and executive orders are construed liberally in the Indians' favor." *Gila V,* 35 P.3d at 74.

As mentioned, this Court has also previously noted a distinction between non-Indian reservations and Indian reservations. *Potlatch Corp.,* 134 Idaho at 920 ("*Winters* dealt with the creation of a reservation by treaty, a bargained for exchange between two entities. ... To the contrary, the Wilderness Act is not an exchange; it is an act of Congress that sets aside land, immunizing it from further development. There is no principle of construction requiring the Court to interpret the Wilderness Act to create an implied water right. The opposite inference should apply."). Moreover, this Court has recognized that the "Indian canons of construction" are only to be applied "for the benefit of Indian tribes, not non-Indians." *City of Pocatello,* 145 Idaho at 505.

The reasons given by the Montana and Arizona courts are persuasive as to why the purposes of Indian reservations should not be construed similarly to non-Indian federal reservations. Even more to the point, the primary-secondary distinction runs counter to the concept that the purpose of many Indian reservations was to establish a "home and abiding place" for the tribes. *Winters.,* 207 U.S. at 565, 28 S.Ct. 207. This leads to the consideration of a broader purpose that has been termed the homeland purpose theory, which is more consistent with both Supreme Court precedent and the well-established canons of construction regarding Indian reservations. Notably, the Ninth Circuit appears to have endorsed a homeland purpose theory but still used the *New Mexico* primary-secondary distinction when analyzing reservation purposes. *See Agua Caliente,* 849 F.3d at 1269. Notwithstanding the somewhat contradictory Ninth Circuit precedent, we find the homeland purpose theory is better suited to an Indian reservation. We are unpersuaded *New Mexico* and its primary-secondary analysis should apply to Indian Reservations.

b. The homeland purpose theory gains support from precedent of the U.S. Supreme Court, other jurisdictions, and this Court.

Language in *Winters* suggests a homeland purpose theory may arise in certain reservations. In *Winters,* the Supreme Court lent support to the idea that the reservation at issue was established as a "home and abiding place of the Indians." "*Winters,* 207 U.S. at 565. Years later, the Supreme Court elaborated further that the implied reservation of water on Indian reservations requires enough water "to make the reservation livable." *Arizona I,* 373 U.S. at 599. Moreover, this Court, in interpreting *Winters* and *Arizona I,* wrote "the Supreme Court determined that the creation of the Reservations carried with it the need for water to sustain human life on those Reservations. The purpose for the creation of Reservations was clear—to provide habitable land for the Indian tribes." *Potlatch Corp.,* 134 Idaho at 920. Thus, in certain instances, Indian reservations were created to be a homeland for the tribe and such a homeland would necessarily encompass uses for water related to the tribe's ability to inhabit and live on the land.

On the surface, it might appear that *Winters* and *Arizona I* do not support a broad granting of water rights because both cases only established implied reserved water rights for agricultural purposes.[8] *Winters,* 207 U.S. at 576-77; *Arizona I,* 373 U.S. at 600-01. Importantly, however, these two cases did not involve general water rights adjudications (as is presented in these appeals) and the Court did not have the opportunity to address claims for water rights related to all purposes.[9] *See Big Horn I*, 753 P.2d at 96 (stating that *Winters* is "not authority for limiting reserved water for a permanent homeland reservation to irrigation because the only reserved water rights sought were for irrigation and related uses").

As mentioned, it appears that the Ninth Circuit has endorsed a broad homeland purpose theory as well, despite adding to the confusion by employing the primary-secondary language. *See Agua Caliente,* 849 F.3d at 1269. That court found the broad primary purpose of the Agua Caliente Reservation was "to create a home for the [t]ribe, and water was necessarily implicated in that purpose." *Id.* at 1270. The court further stated reserved water rights are "flexible and can change over time." *Id.* at 1272.

Arizona and Montana have also adopted the homeland purpose theory. The Arizona Supreme Court adopted the homeland purpose theory when it stated that it "agree[d] with the Supreme Court that the essential purpose of Indian reservations is to provide Native American people with a 'permanent home and abiding place,' that is, a 'livable environment.' " *Gila V,* 35 P.3d at 74 (internal citations omitted) (quoting *Winters*, 207 U.S. at 565; *Arizona I*, 373 U.S. at 599). The Arizona Supreme Court further relied on the Ninth Circuit's holding in *Walton I* when observing that this "broad" homeland purpose must be "liberally con-

strued" to allow "tribes to achieve the twin goals of Indian self-determination and economic self-sufficiency." *Id.* at 76 (quoting *Walton I*, 647 F.2d at 47) (additional citations omitted).

In addition, the Supreme Court of Montana has recognized differences between the broad purposes of Indian reservations and the narrow purposes of non-Indian reserved water rights and wrote, "The purposes of Indian reserved rights, on the other hand, are given broader interpretation in order to further the federal goal of Indian self-sufficiency." *Greely,* 712 P.2d at 768 (citations omitted). The language used by the Supreme Court of Montana implies broad purposes similar to the homeland purpose theory.

However, the Supreme Court of Wyoming took a different course and affirmed the lower court's rejection of the homeland purpose theory proposed by the special master,[10] and, in examining the treaty creating the reservation, determined agriculture to be the sole purpose of the reservation. *Big Horn I,* 753 P.2d at 96. The court in *Big Horn I* determined that the treaty language making the reservations the Indians' "permanent home" did "nothing more than permanently set aside lands for the Indians; it [did] not define the purpose of the reservation." *Id.* at 97. Instead, the court focused on the fact that the treaty "encouraged only agriculture," and referred to the reservation as "said agricultural reservations." *Id.* Thus, the Wyoming court determined agriculture was the primary purpose of the reservation, despite appearing to recognize that a homeland purpose could be established under the right circumstances. *See id.* Wyoming also relied on *United States v. Shoshone Tribe of Indians,* 304 U.S. 111, 117-18 (1938) to conclude that agriculture was the sole, primary purpose, despite "the fact that the Indians fully intended to continue to hunt and fish" on the reservation. *Id.* at 97-98.

However, Wyoming's reliance on *Shoshone Tribe of Indians* to limit the purposes of the reservation appears misplaced. Instead of limiting tribal rights in the reservation, the United States Supreme Court found that the tribe was entitled to compensation for timber and mineral rights in acreage sold, rights unrelated to agriculture. *Shoshone Tribe of Indians,* 304 U.S. at 118 ("[T]he right of the Shoshone Tribe included the timber and minerals within the reservation."). The Court further noted, "doubts, if there were any, as to ownership of lands, minerals, or timber would be resolved in favor of the tribe." *Id.* at 117. Thus, *Shoshone Tribe of Indians* instead appears to support a broader interpretation of Indian rights than given to it by the Wyoming Supreme Court.

There are two additional United States Supreme Court cases that suggest reservations may be created to further the economic endeavors of tribes, again supporting the conclusion that a broader homeland purpose theory should apply. *Alaska Pac. Fisheries Co. v. United States (Alaska Pacific)*, 248 U.S. 78 (1918); *Fishing Vessel,* 443 U.S. at 686. In *Alaska Pacific,* when determining a tribe could enjoin others from fishing in reservation waters, the United States Supreme Court found that " '[t]he purpose of creating the reservation was to encourage, assist and protect the Indians in their effort to train themselves to habits of industry, become self-sustaining and advance to the ways of civilized life." 248 U.S. at 89. Similarly, the Court in *Fishing Vessel* wrote:

> As in *Arizona v. California* and its predecessor cases, the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living.

443 U.S. at 686, 99 S.Ct. 3055.

Given the substantive differences between Indian and non-Indian reservations, the broad interpretation of Indian reservation rights by the United States Supreme Court, the persuasive reasoning given by the Montana and Arizona courts, the logic supporting the homeland purpose theory, as well as our own precedent, we hold the district court erred in utilizing the primary-secondary analysis set out in *New Mexico.* Therefore, purposes behind the creation of an Indian reservation should be more broadly construed and not limited solely to what may be considered a "primary" purpose.

Further, the argument advanced by the State as to why *New Mexico* should apply to Indian reservations is unavailing. The State argues that because *New Mexico* was derived, in large part, from the United States Supreme Court's decisions addressing Indian reservations, there is no basis for concluding that the Court did not intend for *New Mexico* to apply to Indian reservations. However, the *New Mexico* Court's citations to *Winters* merely reflect a recognition that *Winters* was a seminal reserved water rights case, and reaffirms the requirement that claimed water is necessary to further the purposes of the reservation. *See New Mexico,* 438 U.S. at 700 n.4. We therefore reject this contention by the State and the Objectors' invitation to find that *New Mexico's* primary-secondary distinction should be applied to Indian reservations.

2. The formative documents support application of the homeland purpose theory.

When analyzing the purposes of the Reservation, the district court determined that water rights could be implied for the following primary purposes: agriculture, hunting and fishing, and domestic. In doing so, the district court relied on the primary-secondary distinction established in *New Mexico* to reject secondary purposes as well as the homeland purpose theory.

The United States and the Tribe argue that the broader homeland purpose of the Reservation should be recognized by this Court. The United States contends that properly recognizing the homeland purpose theory will allow water rights for the Tribe's continued traditional activities as well as for commercial and industrial development—claims denied by the district court. In contrast, the State argues that the implied-reservation-of-water doctrine should be applied narrowly. Accordingly, the State and the NIWRG argue that the homeland purpose theory should not be recognized. For the reasons explained below, we hold that the homeland purpose theory should apply to the Tribe's Reservation because it is evidenced by the formative documents.

a. Formative documents and historical circumstances should be used to derive the Reservation's purposes.

When the Arizona Supreme Court recognized the homeland purpose theory, it also held that it would not derive purposes from historical documents and circumstances. *Gila V,* 35 P.3d at 74. The State argues that Arizona's departure from reliance on historical documents in *Gila V* is in error. *Gila V* announced the following reasons for its departure: Reservations are often "pieced together over time[,]" which may create an "arbitrary patchwork of water rights" stemming from different, derived purposes. 35 P.3d at 74. Such patchwork would be inconsistent with the homeland purpose. *Id.* The water rights are *implied,* not expressed, thus the historical reality is irrelevant. *Id.* at 75. Historical searches for purposes tend to focus on the motive of Congress, despite the rule that treaties are to be interpreted as the Indians would have understood them. *Id.* And, importantly, many formative "documents do not accurately represent the true reasons for which Indian reservations were created." *Id.*

We agree with the State that *Gila V* deviates from case law and the established interpretation framework regarding examination of formative documents to determine the purposes for an Indian reservation. Indeed, *Winters* itself suggests that the formative document must be analyzed. *See Winters,* 207 U.S. at 575 ("The case ... turns on the agreement ... resulting in the creation of [the] ... Reservation."). The Ninth Circuit has stated that purposes are derived from "the document[s] and circumstances surrounding [a reservation's] creation, and the history of the Indians for whom it was created." *Agua Caliente,* 849 F.3d at 1270 (quoting *Walton I,* 647 F.2d at 42). This Court has also recognized that the formative document should be examined to determine purposes of a reservation. *See City of Pocatello,* 145 Idaho at 505-07 ("Tribes in this case impliedly received the water rights necessary to sustain the purposes of their reservation with the treaty establishing the Reservation.").

Moreover, the United States Supreme Court has stated that "even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties." *Choctaw Nation of Indians,* 318 U.S. at 432. Years earlier, even after acknowledging the canons of construction favorable to tribes, the Court wrote:

> [T]his court does not possess any treaty-making power. That power belongs by the Constitution to another department of the government, and to alter, amend, or add to any treaty by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe, a treaty. ... We are to find out the intention of the parties by just rules of interpretation applied to the subject-matter; and, having found that, our duty is to follow it as far as it goes and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.

United States v. Choctaw Nation, 179 U.S. 494 (1900) (quoting *Amiable Isabella,* 19 U.S. (6 Wheat.) 1 (1821)). As such, courts are constrained to use the formative documents and circumstances to determine the reservation's purposes. In sum, we agree with the State's argument that *Gila V* went too far in its rejection of the historical documents in determining the reservation's purposes. Treaties are not "living, breathing documents." They are not dynamic and should be viewed in a light consistent with that in which they were created. We are not authorized to rewrite them to undo perceived wrongs.

b. The homeland purpose theory should be recognized when established by the formative documents.

The district court reasoned that utilization of the homeland purpose theory could be so expansive, that it would be "difficult to conceive a beneficial use of water that would not serve the expansive concept of 'the homeland.' " We share the district court's concerns; however, when viewed in the proper context, the homeland purpose theory is not without limits. The tenets of construction instead confine the homeland purpose theory to the parameters contemplated at the time surrounding the Reservation's creation and which are supported by the formative documents and circumstances. *See Arizona I,* 373 U.S. at 600 ("[T]he United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created."); *Agua Caliente,* 849 F.3d at 1270 (Purposes are derived from "the document[s] and circumstances surrounding [a reservation's] creation ...."). Moreover, the Supreme Court has announced that Indian reserved water rights are limited by the "necessity" requirement. *See New Mexico,* 438 U.S. at 700 (citing *Arizona I,* 373 U.S. at 600-01; *Winters,* 207 U.S. at 567).

As the United States Supreme Court has written:

> 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 and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.

Tulee v. Washington, 315 U.S. 681, 684-85, 62 S.Ct. 862, 86 L.Ed. 1115 (1942) (citations omitted).

Given the law set out above demonstrating the United States Supreme Court's broad interpretation of Indian reservations, the multiple canons of construction favoring tribes, the concept that Congress intended to "deal fairly" with the Indians (*see Arizona I*, 373 U.S. at 600), and the nature of Indian reservations in general, it seems logical that a homeland purpose was contemplated and intended by Congress. Thus, the homeland purpose may be established when evidenced by the documents and circumstances creating a reservation.

3. The formative documents and historical context surrounding the Reservation's creation demonstrate a homeland purpose consisting of the following uses: domestic, agriculture, hunting and fishing, plant gathering, and cultural.

The formative documents and circumstances should be analyzed to determine the Reservation's purposes. Accordingly, all of the agreements, as well as the negotiations (including the Tribe's 1872 Petition), Executive Order of 1873, and the 1891 Act should be examined to ascertain the Reservation's purposes, as all are part of the formation of the Reservation and indicative of the parties' intentions.

In the negotiations leading up to the unratified 1873 Agreement, the Tribe's leaders stated, "We think it hard to leave at once old habits to embrace new ones: for a while yet we need [to] have some hunting and fishing." *United States v. Idaho*, 95 F. Supp. 2d 1094, 1103 (D. Idaho 1998) (quoting the Tribe's 1872 Petition), *aff'd Idaho II,* 533 U.S. at 262, 266. The unratified 1873 Agreement stated that "the waters running into said reservation shall not be turned from their natural channel where they enter said reservation." The 1873 Executive Order was brief and stated that the described land would be "withdrawn from sale and set apart as a reservation for the" Tribe. Exec. Order of Nov. 8, 1873.

The subsequently ratified 1887 Agreement introduced language demonstrating a homeland purpose. It reads: "[T]he Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians, ... and no part of said reservation shall ever be sold, occupied, open to white settlement, or otherwise disposed of without the consent of the Indians .... " § 19, 26 Stat. at 1028. The 1887 Agreement further stated that annual payments to the Tribe "shall be expended in the purchase of such useful and necessary articles as shall best promote the progress, comfort, improvement, education, and civilization of" the Tribe. *Id.* That same article also provided for the construction of a saw and grist mill. *Id.*

The language above establishes the basis for a homeland that provides for the "progress, comfort, improvement, education, and civilization" of the Tribe, as well as aboriginal uses associated with "Indian land." *See Menominee Tribe of Indians,* 391 U.S. at 406. The language in the documents in this case differs in a number of critical ways from the treaty in *Big Horn I.*

Big Horn I rejected the homeland purpose theory for the following four reasons: (1) the language setting aside the reservation as a permanent home did not define purposes and instead merely set aside land; (2) the treaty only encouraged agriculture; (3) the treaty referred to the reservations as "agricultural reservations"; and (4) the court relied on *Shoshone Tribe of Indians,* 304 U.S. at 117-18, which noted the "purpose ... [of the reservation was] to create an

independent permanent farming community upon the reservation." *Big Horn I,* 753 P.2d at 96-98. These reasons are distinguishable from the facts in this case.

First, although the Executive Order may have merely set aside (or "set apart") land, the 1887 Agreement explicitly held the Reservation land "as Indian land and as homes .... " § 19, 26 Stat. at 1028. Lands of this nature are not merely "set aside," instead, they carry additional rights and meanings, as evidenced by the Supreme Court holding "the language 'to be held as Indian lands are held' includes the right to fish and to hunt." *Menominee Tribe of Indians,* 391 U.S. at 406. This type of language recognized the intent to establish a homeland and is the basis for the aboriginal uses (hunting, fishing, plant gathering, and cultural uses) claimed by the United States and the Tribe.

Second, the agreements do not solely encourage agriculture; they encourage "the progress, comfort, improvement, education, and civilization of" the Tribe.

Third, none of the documents refer to the Reservation merely as an "agricultural reservation." They clearly recognize the importance of agriculture; however, that is not the sole purpose.

Fourth, as already noted, the reliance by the Wyoming Supreme Court on *Shoshone Tribe of Indians* was flawed. Moreover, the Supreme Court's decision in *Idaho II,* while not binding as to the purposes of the Reservation, does not prescribe a limited agricultural purpose. Instead, *Idaho II* recognized that "the Tribe found the 1867 boundaries [of the proposed Reservation] unsatisfactory, due in part to their failure to make adequate provision for fishing and other uses of important waterways." *Idaho II,* 533 U.S. at 266. *Idaho II* further stated that "[t]ribal members traditionally used the lake and its related waterways [some of which are now located in the Reservation] for food, fiber, transportation, recreation, and cultural activities." *Id.* at 265. This language suggests a purpose broader than a mere "agricultural reservation."

As such, the general purpose of the Reservation was to provide a homeland for the Tribe and that purpose "is a broad one and must be liberally construed." *Agua Caliente,* 849 F.3d at 1270 (quoting *Walton I,* 647 F.2d at 47). The homeland purpose may require water for multiple uses or included purposes. *Gila V,* 35 P.3d at 78. Given the analysis thus far and the language of the Reservation's formative documents, the following uses or included purposes will be recognized as involving water rights: consumptive uses for both domestic (including groundwater) and agriculture; and nonconsumptive uses for hunting (wildlife habitat), fishing (fish habitat), plant gathering (including seeps and springs), and cultural activities—so long as they can be established as aboriginal uses (i.e., uses of water predating the creation of the Reservation). *See Adair,* 723 F.2d at 1413.

a. The district court did not err in rejecting the Tribe's claim to control the water level of the Coeur d'Alene Lake.

The district court denied the Tribe's claim to maintain the level of the Coeur d'Alene Lake (the Lake) at a certain elevation based on a lake level maintenance claim. This determination was correct given the formation of the Reservation. Although Congress may have intended for the Tribe to use the Lake for those purposes listed above (indeed, *Idaho II* listed numerous uses of the Lake), it is difficult to conclude that the inclusion of a minority fraction of the entire Lake[11] within the Reservation evidenced Congress's intent to establish the Tribe as the entity empowered to control the overall level of the Lake.

More importantly, as the Supreme Court noted in *Idaho II,*

> The Act [of Congress dated 1891] also directed the Secretary of the Interior to convey to one Frederick Post a "portion of [the] reservation," that the Tribe had purported to sell to Post in 1871. The property, located on the Spokane River and known as Post Falls, was described as "all three river channels and islands, with enough land on the north and south shores for water-power and improvements."

Idaho II, 533 U.S. at 271, 121 S.Ct. 2135 (second alteration in original) (footnote and citation omitted).

In 1871, the Tribe conveyed the mouth of the Lake to Post for the purpose of harnessing "water-power." Having conveyed this property and the ability to harness the "water-power," the Tribe conveyed any interest it may have had in maintaining the Lake's level.[12] Therefore, the lake level maintenance claim was correctly denied by the district court, as the formative circumstances do not demonstrate that use was intended.

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c. The district court correctly denied industrial, commercial, and aesthetic uses.

The homeland purpose in this case does not encompass industrial or commercial uses. Two Supreme Court cases, *Alaska Pacific*, 248 U.S. at 89 and *Fishing Vessel*, 443 U.S. at 686, have been cited to suggest that some reservations are created to further the economic or commercial endeavors of tribes. Although these two cases demonstrate that industrial purposes may be applicable in some cases, they cannot be used to insert unintended purposes when not evidenced by the formative documents.

The language in the 1887 Agreement provided for a saw and grist mill and for expenditures to "promote the progress, comfort, improvement, education, and civilization of" the Tribe. In support of establishing commercial uses, the United States also points to language found in the Tribe's 1885 Petition. The Petition states, "Our people now need grist and saw mills, proper farming implements, and mechanics to help to teach us and our children proper industrial pursuits, and the use of tools in connection therewith ...." Generally, the Objectors argue that this language and the language in the actual agreements, supports the more limited idea that only agricultural endeavors were intended.

Although tribal agreements must be construed as the Tribe would have understood them, given the focus on agriculture[13] and its importance *at that time*, it appears that both the Tribe and Congress understood the agreements as establishing uses for agricultural endeavors, not every conceivable commercial or industrial venture. The appropriate purposes and uses are confined to those contemplated at the time surrounding the creation of the Reservation. *See Arizona I,* 373 U.S. at 600; *Agua Caliente*, 849 F.3d at 1270.

The State cites to *Big Horn I,* 753 P.2d at 95, *Adair,* 723 F.2d at 1410, and *Department of Ecology v. Yakima Reservation Irrigation District*, 121 Wash.2d 257, (1993) for the proposition that agreements providing for mills do not independently establish intent for commercial uses. That is the case here. There is scant evidence suggesting broader industrial uses should be allowed. If this Court were to imply water for commercial or industrial uses, it would impermissibly write a provision into the tribal agreements. *See Choctaw Nation*, 179 U.S. at 533. Likewise, there is no evidence in the agreement that aesthetic purposes were contemplated. Therefore, the district court did not err in disallowing water rights for industrial, commercial, and aesthetic purposes.

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F. The district court correctly concluded the Tribe's water rights include instream flows on the Reservation.

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These instream-flow claims are for nonconsumptive water rights. Nonconsumptive water rights allow a senior water right holder to prevent others from appropriating water; it is not a right to appropriate or deplete a particular body of water. *Cappaert*, 426 U.S. at 135, 143; *Adair*, 723 F.2d at 1411 (explaining that a water right for instream flows prevents "appropriators from depleting the streams['] waters below a protected level in any area where the nonconsumptive right applies").

While the issue of whether reserved water rights includes protection of upstream fish habitat has not been resolved by the U.S. Supreme Court, some federal circuit and district courts seem at least willing to reach that conclusion. First, in "*Walton I*, the Ninth Circuit considered whether the tribe held a flow-maintenance right in a stream that flowed across both Indian and non-Indian-owned allotments. *Walton I*, 647 F.2d at 48. The court found a reserved water "right to sufficient water to permit natural spawning of the trout[,]" because "preservation of the tribe's access to fishing grounds was one purpose for the creation of the Colville Reservation." *Id.* In determining what constituted "sufficient water," the Ninth Circuit relied on the fact that the fish needed freshwater to spawn. *Id.* at 45.

Similarly, the U.S. district court in *United States v. Anderson*, 591 F. Supp. 1, 5 (E.D. Wash. 1982), *rev'd in part on other grounds,* 736 F.2d 1358 (9th Cir. 1984), found a right to instream flows. After finding that fishing was one of the purposes of the reservation, the district court found that the tribe had a "reserved right to sufficient water to preserve fishing" and the quantity of water sufficient to maintain a certain water temperature to meet the biological needs of fish. *Id.*

Although it did not involve a reserved water rights case, the Ninth Circuit allowed protection for stream flows that provided salmon spawning habitat. *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.,* 763 F.2d 1032, 1033-35 (9th Cir. 1985). The Ninth Circuit[18] recognized a necessity for upstream habitats, even though the flows at issue were over fifty miles away. *Id.*

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The State argues that the district court erred by allowing water rights claims for instream flows on land that is on the reservation but is no longer owned by the Tribe because those rights were alienated through subsequent congressional acts. Given the canons regarding interpretation of Indian treaties and congressional acts, we do not find the State's arguments persuasive.

Reservations are established by a grant of rights from the tribe, not a grant of rights to the tribe. *United States v. Winans,* 198 U.S. 371, 381 (1905). Further, as noted, "Congress will not abrogate Indian rights without clear intent and an express agreement from the Indians." *City of Pocatello,* 145 Idaho at 506 (citations omitted); *Dion,* 476 U.S. at 738, 106 S.Ct. 2216 ("We have required that Congress' intention to abrogate Indian treaty rights be clear and plain."). Indian rights are interpreted "in the sense the Indians themselves would have interpreted" or understood them. *City of Pocatello,* 145 Idaho at 506. Thus, any extinguishment of the Tribe's water rights "is not to be lightly imputed to the Congress," and requires a clear expression of congressional intent. *Dion,* 476 U.S. at 739.

Here, there is no clear or express action by Congress abrogating the Tribe's water rights to instream flows for on-Reservation claims. The language and legislative history of the Indian Appropriations Act say nothing about the Tribe's water rights. 1906 Indian Appropriations Act, ch. 3504, 34 Stat. 325, 335-36. The Indian Appropriations Act provided that each Indian on the Reservation would receive an allotment of 160 acres. 34 Stat. at 335. The Act provided that lands remaining after allotment would be classified, appraised, and "opened to settlement and entry" by non-Indian homesteaders. 34 Stat. at 336. Any surplus lands, that were not sold, remained in trust for the beneficial interest of the Tribe. However, there is no mention of water rights in the Act. *See* 34 Stat. at 335-36. Thus, the Tribe's water rights for instream flows located on the Reservation remain, on both tribal-owned lands and non-tribal owned lands, because there was no clear abrogation by Congress. Accordingly, we affirm the district court's order allowing these rights.

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IV. CONCLUSION

For the foregoing reasons, the decisions of the district court are affirmed in part and reversed in part. We reverse the district court's decisions as follows: first, the district court improperly applied *New Mexico's* primary-secondary distinction and instead should have allowed aboriginal purposes of plant gathering and cultural uses under the homeland purpose theory; second, the priority date associated with nonconsumptive water rights is time immemorial. We affirm the remainder of the district court's decisions and remand for proceedings consistent with this opinion. No costs are awarded.

Justices BRODY and BEVAN concur.

BURDICK, Chief Justice, concurring in part and dissenting in part.

[Reprinted, pg. ___, *infra*].

Insert on pg. 1278:

IN RE: CSRBA
Supreme Court of Idaho
448 P.3d 322 (Idaho 2019)
[off-reservation instream flows]

STEGNER, Justice.

[Facts and procedural history recounted on pg. ___, *supra*.]

The district court . . . granted summary judgment to the State and the Objectors [disallowing] instream flows off of the Reservation. The Tribe and the United States have appealed, contending the district court erred in failing to apply relevant federal law.

***

This is not a situation where there is ambiguity. The Tribe, by entering into the agreement with the United States, agreed to "cede, grant, relinquish, and quitclaim to the United States *all right, title, and claim which they now have, or ever had, to all lands in said Territories and elsewhere,* except the portion of land within the boundaries of their present reservation" in exchange for cash and other considerations. 26 Stat. at 1027 (italics added). Having explicitly relinquished its "right, title, and claim" to lands outside of the Reservation, this constituted a voluntary relinquishment of any claim to off-Reservation water rights, even those that would now arguably benefit an on-Reservation purpose. Bolstering this conclusion is the expansive language in the agreement, by which the Tribe relinquished all right, title, and claim *which they now have, or ever had, ...*" *Id.* By this language the Tribe ceded everything it had or ever had as it relates to off-Reservation instream flows. The district court did not err in rejecting the claims of the Tribe and the United States to instream flows off-Reservation.

The dissent takes issue with this conclusion because it does not believe that the Coeur d'Alene tribal members clearly abrogated their water rights when they relinquished "all right, title, and claim which they now have, or ever had, to *all lands* in said Territories ...." In order to clarify that "water" was part of what the United States meant by the use of the word "lands," one need look no further than Judge Lodge's decision and his recapitulation of the formative documents contained in *United States v. Idaho*, 95 F. Supp. 2d 1094, 1103 (D. Idaho 1998).

In an apparent effort to *clarify the status of the Lake and rivers,* the Senate, on January 25, 1888, passed a resolution which repeated the allegations made by Colonel Carlin and others, and requested a response from the Secretary of Interior:

> Whereas it is alleged that the present area of the Coeur d'Alene Indian reservation, in the Territory of Idaho, embraces 480,000 acres of land ... [and] that Lake Coeur d'Alene, *all the navigable waters of Coeur d'Alene River,* and about 20 miles of the navigable part of St. Joseph River, and part of St. Mary's, a navigable tributary of the Saint Joseph, are embraced within this reservation, except a shore-line of about 3½ miles at the north end of the lake ... that all boats now entering such waters are subject to the laws governing Indian country and all persons going on such lake or waters within the reservation lines are trespassers; and
>
> Whereas it is further alleged that the Indians now on such reservation are located in the extreme southwest corner of the same ... and it being further alleged that all part of such reservation lying between Lake Coeur d'Alene and Coeur d'Alene River and that part between the Coeur d'Alene River and St. Joseph River is a territory rich in the precious metals and at the same time being of no real use or benefit to the Indians: Therefore,
>
> *Resolved,* That the Secretary of the Interior be, and he is hereby directed to inform the Senate as to the extent of the present area and boundaries of the Coeur d'Alene Indian Reservation ... *whether such area includes any portion, and if so, about how much of the navigable waters of Lake Coeur d'Alene and of Coeur d'Alene and St. Joseph Rivers* ... also whether, in the opinion of the Secretary, it is advisable to throw any portion of such reservation open to occupation and settlement under mineral laws of the United States, and if so, precisely what portion; *and also whether it is advisable to release any of the navigable waters aforesaid from the limit of such reservation.*

Ex. 187 at 693.

Responding on behalf of the Secretary of the Interior, the Commissioner of Indian Affairs, on February 7, 1888, reported to the Senate that *"the reservation appears to embrace all the navigable waters of Lake Coeur d'Alene,* except a very small fragment cut off by the north boundary of the reservation which runs 'in a direct line' from the Coeur d'Alene Mission to the head of Spokane River." *Ex.* 213 at 3. ***

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> While withholding its approval of the 1887 agreement, Congress took steps "to acquire ... the northern end of [the 1873] reservation." *Id.* On March 2, 1989, Congress passed the annual Indian Appropriations Act, which included a provision that authorized the Secretary of the Interior "to negotiate with the Coeur d'Alene tribe of Indians for the purchase and release by said tribe of such portions of its reservation not agricultural and valuable chiefly for minerals and timber as such tribe shall consent to sell." Ex. 2288 at 1002.
>
> In August and September of 1889, a three member Commission met with tribal leaders and negotiated for the release of the reservation's northern end. The minutes of the negotiations reveal that the location of *the new boundaries in relation to the Lake and rivers was a matter of concern to both the Tribe and United States.* Known for their sagacity, and aware of the Federal Government's tendency to disregard its commitments to the Indian tribes, the Coeur d'Alenes insisted on defining the terms of any new agreement with precision. At one point during the negotiations, General Simpson, the government's chief spokesman, told tribal leader Chief Seltice that "the Lake belongs to you as well as to the whites—to all, every one who wants to travel on it." Ex. 215 at 9. Seltice replied: "That is your idea about the boundary. You know we do not understand papers; in taking it that way we will not know the boundaries." *Id. General Simpson then offered the United States' proposal for a diminished reservation and prefaced his description of its boundaries by stating: "You all know where the St. Joseph River is. We do not want any of that." Id.* The government's proposal called for a new northern boundary that ran east from the Idaho/Washington territorial line to the west shore of the Lake, meandered the lake shore south to a point directly opposite the mouth of the Coeur d'Alene River, and "thence due east across said lake." *Id.* Thus, the boundary line was drawn so as to bisect the Lake, with the northern two-thirds of Lake excluded from the reservation and the southern one-third of the Lake included within the new reservation boundaries. *See id.* at 14, attach.(map). General Simpson explained to the Tribe that under the government's proposal "*if we buy this land [the northern end of the 1873 reservation] you still have the St. Joseph River and the lower part of the lake and all the meadow and agricultural land along the St. Joseph River.*" *Id.* at 9. With some modification, this proposal became the basis of an agreement signed on September 9, 1889. The agreement provided that it was "not binding on either party until ratified by Congress." *Id.* at 14.

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The treaty negotiations clearly and repetitively referred to "waters" outside the reservation as being part of what the United States sought to purchase from the Tribe. While the treaty speaks in terms of the Coeur d'Alene tribal members relinquishing all "right, title, and claim which they now have, or ever had, to all lands[,]" the agreement included language, which at the time would have conveyed fee simple absolute title to "all lands." In other words, it conveyed everything the Tribe possessed, including the water.

The language "if we buy this land [the northern end of the 1873 reservation] you still have the St. Joseph River and the lower part of the lake and all the meadow and agricultural land along the St. Joseph River" indicates that the other rivers and water that are part of the ceded lands would likewise be ceded. *Idaho,* 95 F. Supp. 2d 1094, 1113 (alteration in original). To conclude otherwise would result in the Treaty being rewritten, which the canons of construction prohibit.

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In sum, the district court correctly determined the entitlement to instream water rights. The Tribe is entitled to water rights on the Reservation. In the nomenclature previously used, this involves the two innermost concentric circles. The Tribe is entitled to control instream flows on the Reservation whether the land physically adjacent to the water is owned by the Tribe or not. However, the Tribe is not entitled to instream flows that are off of the Reservation. Those rights were extinguished when the Tribe conveyed all "right, title and claim which they now have or ever had" to the United States in the 1891 Act of Congress.[20] 26 Stat. at 1027. As a result, the district court did not err in deciding the Tribe had an entitlement to instream water flows on the Reservation and in deciding the Tribe did not have an entitlement to off-Reservation instream flows.

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IV. CONCLUSION

For the foregoing reasons, the decisions of the district court are affirmed in part and reversed in part. ***

Justices BRODY and BEVAN concur.

BURDICK, Chief Justice, concurring in part and dissenting in part.

While I concur with the Majority opinion, I cannot concur with Section F(2). There, the Majority concludes that the Tribe "explicitly relinquished" their right to instream flows in off-reservation water by voluntary act. Because I believe that the Majority's analysis and conclusion on this issue are incorrect, and because I believe that conclusion is incompatible with the rest of the opinion, I respectfully dissent.

To be clear, I have no quibble with the opinion's analysis at large. The opinion goes through great lengths to detail the *Winters* doctrine and the accompanying canons of interpretation. The parties and this Court agree that the Reservation and any implied water rights were created by the Executive Order of 1873. Likewise, it's agreed that when Congress designated the Reservation, it reserved, by implication, the water necessary to achieve the purposes of the Reservation. And no one disputes that to determine the Reservation's purposes, this Court must look to "the 1873 documents (both the executive order and the agreement) and the current documents and circumstances (i.e., the Tribe's 1872 Petition)." The final ratification by Congress in 1891 "incorporated the original reservation as created in 1873 and no rights or purposes have been clearly abrogated by subsequent acts." Guided by the homeland purpose theory and an examination of the formative documents, this Court came to the correct conclusion that the United States reserved the following water rights for the Tribe:

> (1) "consumptive uses for both domestic (including groundwater) and agriculture"; and (2) "non-consumptive uses for hunting (wildlife habitat), *fishing (fish habitat),* plant gathering (including seeps and springs), and cultural activities—so long as they can

> be established as aboriginal uses (i.e., uses of water predating the creation of the Reservation."

The upshot of all this is that Congress set aside the water necessary to achieve the purpose of fishing by providing instream, non-consumptive water rights to preserve the fish habitat. Because some of the fish species native to the Coeur d'Alene Lake spawn into the rivers and streams before returning to the Lake, Congress impliedly set aside the water necessary to maintain the fish habitat there, too. After all, one can't fish if there are no fish. And there are no fish if the fish can't spawn.

Where the Majority and I part company is their conclusion that the Tribe clearly, voluntarily, and unambiguously ceded their right to instreams flows that support the fish habitat in waters outside of the Reservation.

To properly understand why I disagree, it's worth remembering what exactly the Majority claims that the Tribe gave up. To the Tribe, water was of paramount importance:

> [T]he majority of the Tribe's population lived in villages located next to the Lake and rivers. The Tribe's proximity to the watercourses was no coincidence; the Lake and rivers provided resources that were essential to the Coeur d'Alenes' survival. The Tribe depended on the waterways for a year-round source of fish, small mammals, waterfowl and plant materials. The Tribe also depended on the waterways to facilitate the harvest of large mammals and to serve as a means of efficient transportation. Finally, the Tribe's spiritual, religious and social life centered around the Lake and rivers.

United States v. Idaho, 95 F. Supp. 2d 1094, 1101 (D. Idaho 1998). The fishery was the lifeblood of the Tribe. The fishery was a main source of food as the Tribe consumed resident trout and whitefish year-round. *Id.* at 1100. Among other methods of fishing, the Tribe constructed fish traps and weirs which were anchored in the bed and banks of the watercourses—sometimes spanning the width of a river. *Id.* Surplus fish were sometimes dried for later use or traded to other tribes. *Id.*

The cultural significance of this is reflected in the Tribe's negotiations with the United States. The Tribe emphasized the importance of the waterways and fishery to their way of life. For example, in their 1873 Petition, the Tribe explained their dissatisfaction with the land set aside for the Reservation in 1867 because the boundaries failed to include the river valleys. They stated these waterways were not included in their original petition because "in our ignorance, *we thought them a matter of course* ..." and because the Tribe still "need[ed] to have some hunting and fishing." *Id.* at 1103 (emphasis added). In the same vein, the 1873 Agreement expressly provided that off-reservation manipulation of water to the detriment of the Reservation was forbidden: "[T]he waters running into said reservation shall not be turned from their natural channel where they enter said reservation."

But according to the Majority, the Tribe explicitly signed away the rights they had taken great pains to protect. Considering the history and statements just mentioned, the evidence supporting the conclusion that the Tribe *clearly, voluntarily,* and *unambiguously* surrendered their water rights should be unmistakable. After all, "when a tribe and the Government negotiate a treaty, the tribe retains all rights not expressly ceded to the Government in the treaty so long as the rights retained are consistent with the tribe's sovereign dependent status." *United States v. Adair,* 723 F.2d 1394, 1413 (9th Cir. 1983) *(Adair I)* (citing *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 208 (1978)). And, as the Majority points out, "Congress

will not abrogate Indian rights without clear intent and an express agreement from the Indians." *Pocatello v. State,* 145 Idaho 497, 506 (2008).

Yet, the Majority's conclusion is based solely on the following language from the Ratified Agreement of 1887:

> For the consideration hereinafter named, the said Coeur d'Alene Indians hereby cede, grant, relinquish, and quitclaim to the United States, all the right, title, and claim which they now have, or ever had, to all lands in said Territories and elsewhere, except the portion of land within the boundaries of their present reservation in the Territory of Idaho, known as the Coeur d'Alene Reservation.

Where the Majority focuses on the "right, title, and claim" language, it glosses over the language that qualifies it—*"to all lands"* The Tribe ceded "right, title, and claim ... *to all lands* outside the reservation." But does "lands" encompass water rights as well? It's important to remember that while water rights are property rights, they are usufructuary rights; a right to use the water. Let's also recall that in the 1873 Agreement, the Tribe and Congress referred to "the waters" when discussing whether water could be diverted before reaching the reservation. If the Tribe and Congress intended to include water rights in the 1887 Agreement, why not use the same language? Nothing in the 1887 Agreement hints that "lands" was intended to include water rights. Further examination reveals that "all lands in said territories" refers to a passage in prior section of the 1887 Agreement which states that the Tribe was in possession of "a large and valuable *tract of land* lying in the territories of Washington, Idaho, and Montana."

To the majority, "lands" plainly means "land and water." But it seems plain that when the parties said "lands," they meant land, and when the parties said "waters," they meant water. I reach this conclusion for a few reasons. First, as a practical matter, I don't think a contemporary reader would reach the Majority's conclusion based on the language used. Second, the Majority's conclusion inexplicably abandons the canons of construction we are required to use in interpreting these agreements. Third, to my mind, it is simply not possible that the Tribe would have understood "lands" to mean a relinquishment of any interest in water that flowed into the Reservation, but happened to lie on lands outside the Reservation. Lastly, the United States Supreme Court and the Ninth Circuit Court of Appeals have rejected the same "unambiguous" interpretation when presented with the same language. *See Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 195 (1999); *Adair I,* 723 F.2d at 1414.

To begin, I would be hard-pressed to find that the term "lands" unambiguously encompasses water rights in a normal conveyance. The Oxford English Dictionary reveals nine definitions of the word "land." THE OXFORD ENGLISH DICTIONARY VIII 617-18 (2nd 1991). The primary definition reads "the solid portion of the earth's surface, as opposed to *sea, water*." *Id.* at 617. The definition for the plural, "lands," is "[t]erritorial possessions." *Id.* While this seems like the most appropriate definition, it offers little help to the Majority's conclusion because it makes no mention of water. In fact, of all the possible definitions, only *one* explicitly encompasses water: The legal definition. Even then, the legal definition at the time of the agreement only sometimes encompassed water: "Land in its most restricted legal signification is confined to arable ground ... In its more wide legal signification land extends also to meadow, pasture, woods, moors, waters, &c." *Id.* (quoting 1839 Penny Cycle. XIII). This difference in parlance continues today: "When thinking of land, most speakers of the English language visualize the earth's surface. But in law, the word includes everything above and below the surface—even gases, liquids, and buildings." Garner, Bryan, *Garner's Dictionary of Modern Legal Usage* 514 (3rd ed. 2011). Granted, if this were a normal conveyance, then I could understand using the legal definition.

But this is not a normal conveyance. We are dealing, instead, with a Treaty between the United States and the Tribe signed in the late 1800's. This fact leads me to my second conclusion: The Court inexplicably abandons the canons of construction for Indian treaties on this issue.

The 1887 Treaty was one of many such treaties that the United States entered into during the 19th century. To best understand the circumstances of these treaties, it's helpful to look at how the Supreme Court of the United States characterized such negotiations during the era. On one side was the United States—a "powerful nation" with "representatives skilled in diplomacy" and "masters of a written language." *Jones v. Meehan,* 175 U.S. 1, 11 (1899). The representatives would "draw[ ] up" the agreements "in their own language" with an acute understanding of the "modes and forms of creating various technical estates known to their law." *Id.* This stood in stark contrast to the tribes seated at the other side of the negotiation table. They often had "no written language" and were "wholly unfamiliar with all the forms of legal expression." *Id.* Already at a disadvantage, the tribes' position was weakened further by the fact that their "only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States. ..."*Id.* The Supreme Court admonished that these circumstances "must always" be kept in mind when interpreting such treaties. *Id.* at 10, 20 S.Ct. 1. After all, "the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side." *Washington v. Washington St. Comm'l Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 675-76 (1979). Therefore, the treaty "*must* ... be construed, *not according to the technical meaning of its words to learned lawyers*, but in the sense in which they would naturally be understood by the Indians." *Id.* (emphasis added).

For that reason, we must discard the *only* definition of "lands" that explicitly encompasses water because that definition is "the technical meaning of [the] word to learned lawyers." We are left with the question of whether the Tribe "naturally ... underst[ood]" that it was giving up the right to maintain the vitality of its fishery when it surrendered "lands" outside the Reservation.

This is the juncture when we determine ambiguity.

All this leads me to believe that when the Tribe agreed to cede all claim of right to the "lands" outside the Reservation, it was not understood or fathomed that such cessation included the right to water necessary to maintain the fishery. Even if this is what the United States intended the language to mean when they drafted it, I remain unconvinced that this what was "naturally ... understood]" by the Tribe. Even to a fluent English-speaking member of the Tribe, I have a hard time finding that such a surrender of rights would be "naturally understood" in light of the various definitions of lands to a non-lawyer. I also have serious doubts that such a concept would have been adequately translated to the Tribe if no fluent English-speaking tribal members were present.

I'm in good company in my opinion that the Tribe did not "unambiguously" relinquish their right to instream uses when they ceded their claim of right "to all lands."

The United States Supreme Court rejected substantially the same argument when the state of Minnesota presented it (except with usufructuary fishing and hunting rights, rather than instream-flow rights). *Mille Lacs,* 526 U.S. at 195, 119 S.Ct. 1187. There, Minnesota claimed that the following language unambiguously relinquished the Tribe's usufructuary rights:

> And the said Indians do further fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere.

The Supreme Court noted that the language did not mention hunting or fishing rights and was "devoid of any language expressly mentioning—much less abrogating—usufructuary rights." *Id.* To determine whether that language abrogated the tribe's rights, the Court stated it would "look beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.' " *Id.* at 196. The Court found that the Treaty "was designed primarily to transfer Chippewa land to the United States, not to terminate Chippewa usufructuary rights." *Id.* The Court noted "[i]t is difficult to believe that in 1855, the Chippewa would have agreed to relinquish the usufructuary rights they had fought to preserve in 1837 without at least a passing word about the relinquishment." *Id.* at 198. The Court concluded that, "[a]t the very least, the historical record refutes the State's assertion that the 1855 Treaty 'unambiguously' abrogated the 1837 hunting, fishing, and gathering privileges" and, given this "plausible ambiguity[,]" the Court could "not agree with the State that the 1855 Treaty abrogated Chippewa usufructuary rights." *Id.* at 200.

While one may argue that *Mille Lacs* is distinguishable based on the exact nature of the right in question, the Ninth Circuit Court of Appeals' decision in *Adair I* precludes that reasoning because that case dealt with precisely the issue we're faced with here. *United States v. Adair,* 723 F.2d 1394, 1414 (9th Cir. 1983). There, the Ninth Circuit heard claims from the Klamath tribe that their hunting and fishing right included an instream nonconsumptive right to support the health of their fishery. The *Adair I* court noted that when the Klamath Tribe "expressly ceded 'all [its] right, title and claim' to most of its ancestral domain," there was "no indication in the treaty, express or implied, that the Tribe intended to cede any of its interest in those lands it reserved for itself." *Id.* "Nor is it possible that the Tribe would have understood such a reservation of land to include a relinquishment of its right to use the water as it had always used it on the land it had reserved as a permanent home." *Id.* The Ninth Circuit continued: "[N]o language in the treaty ... indicate[s] that the United States intended or understood the agreement to diminish the Tribe's rights in that part of its aboriginal holding reserved for its permanent occupancy and use." *Id.* This led to the conclusion that the treaty "is a recognition of the Tribe's aboriginal water rights and a confirmation to the Tribe of a continued water right to support its hunting and fishing lifestyle" on the reservation. *Id.*

Adair I also responded to Oregon's contention that the tribe no longer held the water right because the tribe no longer owned the land to which the right was appurtenant. Unpersuaded, the *Adair I* court found that this argument "misperceives the history and nature of the [tribe's] reserved water right." *Id.* at 1415 n.24. "[W]hen the Klamath Reservation was created and water was impliedly reserved for the benefit of the Tribe, the Indians owned appurtenant land. *Id.* In a treaty context, the issue was "whether these water rights, once reserved, are terminated by a transfer of the appurtenant land." The court referred to its prior precedent which held that the tribe's "hunting and fishing rights guaranteed by the treaty survived despite the land transfer. *Id.* (citing *Kimball v. Callahan,* 493 F.2d 564, 569 (9th Cir. 1974)). As a result, the court "refused" to "find that the water rights necessary to give meaning to these hunting and fishing rights have been lost because the Tribe has disposed of the appurtenant land ...." *Id.*

The water right here is much different than the usufructuary right to hunt and fish on the lands at issue in *Mille Lacs.* Whereas those rights required physical entry on the *lands* that

the tribe ceded, an instream flow right is nonconsumptive and carries no right of entry. But much like *Mille Lacs,* the historical record in this case refutes the Majority's assertion that the 1887 Treaty "unambiguously" abrogated the Tribe's instream water rights. *Mille Lacs,* 526 U.S. at 200. Given the plausible ambiguity the historical record creates, I can't agree with the Majority that the 1887 Treaty abrogated the Tribe's instream-flow rights. Rather, much like the Ninth Circuit, I view the 1887 Treaty as "a recognition of the Tribe's aboriginal water rights and a confirmation to the Tribe of a continued water right to support its ... fishing lifestyle." *Adair I,* 723 F.2d at 1414. And I can't agree with the Majority because I find it difficult to think that "the water rights necessary to give meaning to these hunting and fishing rights have been lost because the Tribe has disposed of the appurtenant land ...." *Id.* at 1415, n.24.

The Majority seems to suggest that knowledge of "adfluvial" fish behavior is a recent invention. The only connection I can see for including this information is the insinuation that the United States' and the Tribe's arguments are post-hoc justifications for claiming more water rights than were contemplated at the time of the agreements. First, I will set aside for the moment the thought that if a people live in a region since time immemorial they might have a better understanding of the area's ichthyology than the Majority gives them credit for. Rather, my disagreement is with the insinuation. I think an instream water right claim to off-reservation water is much more practically viewed as aligning with the Reservation's purpose. What use are reserved water rights supporting a right to fish and the fishing habitat if part of that habitat can be affected or destroyed by a third party?

To conclude, the Tribe does not have in-stream, non-consumptive water rights to all the waters on the lands they ceded away in the Washington, Montana, and Idaho Territories. However, the Tribe has in-stream water rights for the health and maintenance of their fishery. Because their fishery includes fish that spawn in the tributaries of Lake Coeur d'Alene, the instream water rights which protect the fish habitat extend as far as the fish do. I have trouble envisioning the United States reserving the Reservation to "be held forever ... as homes" for the Tribe without the water necessary for the fish to spawn, rear, and migrate.

Justice HORTON concurs.