NO SETTLED LAW ON SETTLED LAND: LEGAL STRUGGLES FOR NATIVE AMERICAN LAND AND SOVEREIGNTY RIGHTS

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I. INTRODUCTION

LaDonna Brave Bull Allard, a Lakota historian and activist,[1] had several reasons to oppose the construction of the Dakota Access Pipeline running through and next to the Standing Rock Reservation in North and South Dakota. One was the risk of a burst pipe, which could contaminate the reservoir where the Standing Rock Lakota get their drinking water, and the nearby land, where buffalo literally roam.[2] Another was the affront to the wishes of the Indigenous people of the Dakotas that the land be preserved and respected, both for environmental reasons and to protect a Lakota burial ground.[3] Though any of those reasons alone would have been enough, Ms. Brave Bull Allard's son was also buried next to where the pipeline was to be built.[4]

In 2016, Ms. Brave Bull Allard offered her own land as a place to camp for Indigenous rights and environmental activists and other supporters of the global movement against the Dakota Access Pipeline.[5] That year, at least 4,000 people gathered at Ms. Brave Bull Allard's land and other camps at Standing Rock.[6] Together the protestors delayed the construction of Energy Transfer Partners' oil pipeline.[7] Energy Transfer Partners, militia members, and, to Ms. Brave Bull Allard's horror, the National Guard met the protestors with resistance.[8] As a police officer's daughter,[9] Ms. Brave Bull Allard did not want to believe that an arm of the government would turn against the people in favor of a private corporation, yet that is exactly what it did.[10]

The executive has not been the only branch of government to throw its weight against Indigenous rights in recent years—the judicial branch has, too. In the summer of 2022, the Supreme Court decided *Oklahoma*

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[1] Digital Videorecording: LaDonna Brave Bull Allard at United Nations 2018 Permanent Forum on Indigenous Issues (Laura Waldman 2018) [hereinafter Allard Video] (on file with the CUNY Law Review).

[2] *Id.*

[3] *Id.*

[4] Dana Rubin, *RIP LaDonna Brave Bull Allard, a Voice of Protest and Reverence for Nature*, LINKEDIN (Apr. 20, 2021), https://perma.cc/U2LC-UZSG.

[5] Aliyah Chavez & Mary Annette Pember, *LaDonna Brave Bull Allard 'Changed His tory,'* ICT (Apr. 12, 2021), https://ictnews.org/obituaries/ladonna-brave-bull-allard-changed-history (on file with CUNY Law Review).

[6] Charlie Northcott, *Standing Rock: Are Pipeline Protest Camp Days Numbered?*, BBC (Dec. 2, 2016), https://perma.cc/SZA4-QRL2.

[7] Kolby Kicking Woman, *Dakota Access Pipeline: Timeline*, ICT, https://ictnews.org/news/dakota-access-pipeline-timeline (July 9, 2020) (on file with CUNY Law Review).

[8] Julia Carrie Wong, *Police Remove Last Standing Rock Protesters in Military-Style Takeover*, GUARDIAN (Feb. 23, 2017, 4:52 PM), https://perma.cc/36MD-EKFQ.

[9] Allard Video, *supra* note 1.

[10] *Id.*

v. Castro-Huerta[11] in favor of the State of Oklahoma, overturning the 2020 case *McGirt v. Oklahoma*.[12] *McGirt* represented a significant step toward protecting Native American sovereignty in the United States.[13] In *McGirt*, the Court held that most of Eastern Oklahoma was "Indian country," therefore criminal cases in Indian Country were under the jurisdiction of federal courts rather than state courts, as per the Major Crimes Act.[14] In *Castro-Huerta*, the Court backtracked, differentiating between Mr. McGirt, who was enrolled in a tribe, and Mr. Castro-Huerta, who was not.[15] The Court concluded that Oklahoma could prosecute Mr. Castro-Huerta, since he was not an enrolled tribal member, for a crime committed on the treaty-granted Cherokee reservation.[16] Though seemingly about criminal justice matters, these cases rely on a framework with roots in treaties between tribal nations and the federal government, where they have broad consequences for federal and state jurisdiction over Native American people and land.

Today, Indigenous land is at risk largely because of the greed of extractive industries for natural resources and society's reliance on conventional energy sources. I write this Note from the perspective that today's oil and natural gas have much in common with yesterday's cotton and gold.[17] From 1838 to 1839, settlers in the southeastern United States, enabled by the federal government, drove members of five Native American nations from their homes during the Trail of Tears in an effort to seize land for mining and plantation agriculture.[18] This serves as an example of the "doctrine of discovery" that said white settlers had

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[11] 142 S. Ct. 2486 (2022).

[12] 140 S. Ct. 2452 (2020); *see also* Alex Serrurier, *This Supreme Court Decision Shows How Drastically the Court Has Been Politicized*, ALL. FOR JUST. (July 21, 2022), https://perma.cc/4NWA-ELKC (explaining how the *Castro-Huerta* decision "managed to undo centuries of legal understanding while simultaneously gutting a landmark case from just two years prior," showing that the Court diminished its facade of judicial impartiality because of President Trump's appointment of Justice Amy Coney Barrett to replace late Justice Ruth Bader Ginsburg).

[13] Julian Brave NoiseCat, *The McGirt Case Is a Historic Win for Tribes*, ATLANTIC (July 12, 2020), https://perma.cc/S6GH-LUUP.

[14] *McGirt*, 140 S. Ct. at 2471-72.

[15] Esha Venkataraman, *What Rulings on 'McGirt' and 'Castro-Huerta' Mean for Tribal Relations*, AM. BAZAAR, https://perma.cc/VG2R-CCG6 (July 25, 2022).

[16] *Castro-Huerta*, 142 S. Ct. at 2504-05.

[17] *See* Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RSCH. 387, 392 (2006) ("Once evacuated, the Red man's land would be mixed with Black labour to produce cotton, the white gold of the Deep South.").

[18] *The Indian Removal Act and Trail of Tears*, NAT'L GEOGRAPHIC SOC'Y, https://perma.cc/S9QC-HB4Y (May 20, 2022).

the racial, moral, and spiritual authority to take the lands they wanted.[19] Two general responses to mitigating the harms caused by the discovery doctrine were treaties between the U.S. federal government and tribal nations and the national allotment policy, which carved up remaining land that had been under tribal control into individual plots, with the goal of weakening tribal cohesion.[20]

The cases described *infra* trace the judicial debate over the relationships among tribal nations, the United States, and individual states, which have frequently been formed on a foundation of greed, betrayal, and white supremacist colonial ideology that began well before the founding of the U.S. government. The legislature did not offer tribal members any better protection from displacement and genocide than did the courts, as it was concerned with protecting the interests of settlers' land theft. For example, the Treaty of New Echota in 1835 led to a forced displacement from the southeastern United States to the land now known as Oklahoma,[21] where the *McGirt* and *Castro-Huerta* cases would start almost two centuries later.

This Note asks what justice, if any, is possible for colonized people within a government established by colonizers, and if justice is possible, what frameworks are the most effective at securing it. By exploring the historical backdrop of colonial policies and Supreme Court decisions that led to and enabled settlement, and by tracing the themes that emerge to recent cases and open controversies, this Note intends to unearth the legal vulnerabilities in establishing Native American land and sovereignty rights. It arrives at a place of hope by highlighting the work of Indigenous attorneys, activists, academics, and their allies who are demanding restitution for historical and ongoing harms.

II. THE ROOTS OF DISPOSSESSION

A. Resource Greed Drives Settlers' Theft of Native American Land

The story of the United States' relationship with Indigenous nations and people is one of unjust enrichment, broken promises, and genocide. Stealing land in the name of destined expansion was an easier and more

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[19] *See generally* VFH Radio, *The Doctrine of Discovery*, VA. INDIAN ARCHIVE (Nov. 7, 2009), https://perma.cc/9MJP-P9AL.

[20] *See The General Allotment Act*, PBS: AM. EXPERIENCE, https://perma.cc/4ABM-T8JU (last visited Aug. 3, 2023) ("The [General Allotment Act] was intended to weaken the tribal structure by encouraging the development of individually-owned Native American farms . . . .").

[21] *The Treaty of New Echota and the Trail of Tears*, N.C. DEP'T OF NAT. & CULTURAL RES. (Dec. 29, 2016), https://perma.cc/BEE7-UJHC; *Multi-State: Trail of Tears National Historic Trail*, NAT'L PARK SERV., https://perma.cc/8NXA-UWDF (Aug. 10, 2017).

common practice in the 1830s than today because of the widespread beliefs about white entitlement, cultural supremacy, and Manifest Destiny.[22] Those assumptions are not gone; they still form the foundation for practices of land theft and resource extraction.[23] White supremacy today is partially obscured by guises such as advocacy for states' rights and the business interests of corporations,[24] but in earlier centuries, it placed a heavier reliance on property law, wielded as a weapon to legitimize land theft and enshrine dispossession.[25]

The increased demand for plantations in the southeastern United States on which to grow cotton made Cherokee, Choctaw, Chickasaw, Muscogee (Creek), and Seminole lands desirable to white settlers. Settlers named these five tribal nations the "Five Civilized Tribes"[26] because of their relative degree of assimilation to European customs and because some nation members cultivated crops such as corn, beans, squash, sunflowers, greens, and tobacco.[27] Compounding this appetite for the tribes' land was the discovery of gold in the mountains of the Cherokee Nation in northern Georgia.[28] European settlers found gold in 1828, and a gold rush ensued,[29] drawing thousands of prospectors and miners to the region in a span of a few years.[30] One site of gold mining was Dahlonega[31] (meaning "gold" in Cherokee),[32] a Georgia city that

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[22] *See* REGINALD HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM 83 (1981) ("In moving west American pioneers were perceived, both in Europe and America, as continuing a movement of civilization that had been continuous since the earliest times."). *See generally* 20 REG. DEB. 141 (1828) (statement of Rep. Joseph Richardson) ("Multitudes of Europeans are stretching their views towards America, as presenting the only prospect of their recovery to the freedom and happiness which God and nature designed for man.").

[23] NETWORK ADVOCS. FOR CATHOLIC SOC. JUST., RECOMMIT TO RACIAL JUSTICE 31 (2019), https://perma.cc/DJX5-T5BG.

[24] *See* Jessica Goad & Tom Kenworthy, *State Efforts to 'Reclaim' Our Public Lands*, CTR. FOR AM. PROGRESS (Mar. 11, 2013), https://perma.cc/5XCR-A8YK (advocacy for states' rights); Michelle Christian, *A Global Critical Race and Racism Framework: Racial Entanglements and Deep and Malleable Whiteness*, 5 SOCIO. RACE & ETHNICITY 169, 177 (2019) (business interests of corporations).

[25] Sherally Munshi, *Dispossession: An American Property Law Tradition*, 110 GEO. L.J. 1021, 1030 (2022).

[26] Andrew K. Frank, *Five Civilized Tribes.*, ENCYC. OF OKLA. HIST. & CULTURE, https://perma.cc/7NDL-4CEJ (last visited May 1, 2023).

[27] *Southeast Native American Groups*, NAT'L GEOGRAPHIC SOC'Y, https://perma.cc/D7XQ-EERR (July 15, 2022).

[28] *Preludes to the Trail of Tears*, NAT'L PARK SERV., https://perma.cc/M3J3-WA9W (Sept. 5, 2021).

[29] *See id.*

[30] David Williams, *Gold Rush*, NEW GA. ENCYC., https://www.georgiaencyclopedia.org/articles/history-archaeology/gold-rush (Sept. 12, 2018) (on file with CUNY Law Review).

[31] *Id.*

has become known for its recent as well as historical white supremacist activity.[33] For Cherokee people, the sudden influx of miners was known as the "Great Intrusion," and according to one writer in the *Cherokee Phoenix* newspaper, "Our neighbors who regard no law and pay no respects to the laws of humanity are now reaping a plentiful harvest."[34] Settlers hoarded this harvest, and not only symbolically, as many Cherokee people died of starvation after colonists expelled them from their homes.[35]

Since Europeans reshaped the entire North American continent, Indigenous people have lost nearly 99% of their historical lands that are now within the contiguous United States.[36] Currently, most of the Native American lands in the United States, around 56 million acres, are held in trust by the federal government,[37] meaning that the federal government holds title to about 326 Indian land areas it manages as Indian reservations.[38] While these land trust agreements allow tribes to have some measure of sovereignty and authority, the federal government still has ultimate decision-making power. For example, the federal government must approve natural resource development on the lands it holds in trust.[39] The federal government's interest in approving these projects may be enhanced by the economic benefit to states. State governments can tax non-Indian companies that operate on reservations, such as those that engage in mining and drilling.[40] States then drain tribal governments of tax revenue, which has led to lawsuits brought by tribal nations in Washington and California.[41] Henry Cagey, council member of the

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[32] *The Names Stayed*, CALHOUN TIMES & GORDON CNTY. NEWS, Aug. 29, 1990, at 64, https://perma.cc/SL6W-9MFQ.

[33] Ross Terrell, *Dahlonega Officials Preparing for White Supremacist Rally*, GPB NEWS, https://perma.cc/28QV-ENV6 (Aug. 13, 2020, 11:28 PM); Anoa Changa, *A Known White Supremacist Announces Intent to Run for Local Office in Georgia*, NEWSONE (Dec. 4, 2021), https://perma.cc/5LZM-5KL5.

[34] Williams, *supra* note 30.

[35] Ingvill Bryn Rambøl, *Hunger on the Trail of Tears*, NOBEL PEACE CTR. (June 7, 2021), https://perma.cc/6LKL-HXMK.

[36] Justin Farrell et al., *Effects of Land Dispossession and Forced Migration on Indigenous Peoples in North America*, 374 SCIENCE 578, 578 (2021).

[37] *Native American Ownership and Governance of Natural Resources*, U.S. DEP'T OF THE INTERIOR, NAT. RES. REVENUE DATA, https://perma.cc/SG8A-DR4S (last visited Feb. 25, 2023).

[38] *Native Americans and Trusts*, FRIENDS COMM. ON NAT'L LEGIS. (Oct. 5, 2016), https://perma.cc/JC5T-UKE2.

[39] *See generally* U.S. Dep't of the Interior, Nat. Res. Revenue Data, *supra* note 37.

[40] Valerie Volcovici, *Native American Tribes Decry State Taxation of Reservation Energy Projects*, REUTERS, https://perma.cc/LV7S-F2QQ (Jan. 26, 2017, 1:24 AM).

[41] Maya Srikrishnan et al., *Tribes Need Tax Revenue. States Keep Taking It.*, SOURCE N.M. (Dec. 23, 2022, 4:00 AM), https://perma.cc/XK8T-RPJZ.

Lummi Nation, believes Native American nations have already paid all that they need to, because "the property taxes, the business taxes, all the income that [the federal government] generate[s] and run[s] their government [on] is based on the land we ceded."[42] This tax policy furthers an extractive loop because it depletes Native American communities of needed revenue; that in turn makes environmentally hazardous projects harder for tribal governments to refuse, because of the funds they bring in (after the state takes a share in taxes).[43]

Additionally, the legal agreements that describe the land trust relationship with the federal government are "far less clear than modern trust documents drawn up for two willing parties, which carefully specify who controls the assets in the trust and who makes decisions about their use."[44] If Native American lands were truly under tribal control, tribal members would have full leverage when negotiating the terms of their participation in extractive industries, including the ability to reject unwanted extractive projects. As long as the resource interests of government actors compete with the interests of tribal members, the lands remaining in Native American control are vulnerable to further theft and exploitation, and it is essential to strengthen legal protections.

B. An Ineffective Treaty Codifies Partial Sovereignty

Native American people should not need to rely on the federal government to assert their sovereignty, yet historically, it has been the federal government that has granted and retracted sovereignty rights, determining the fates of individuals, families, and tribal nations. Congress passed the Indian Removal Act of 1830 by a vote of 103 to 97, giving the United States power to remove Native Americans from their land and force them to "relocate," leading to the "transfer" of at least 25 million acres of farmland in the Southeast out of Indigenous ownership.[45] Addressing Congress, President Andrew Jackson offered his official justification for the Act, describing the people of the five nations he was expelling as "unwilling to submit to the laws of the States."[46]

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[42] *Id.*

[43] Jamie Vickery & Lori M. Hunter, *Native Americans: Where in Environmental Justice Research?*, 29 SOC'Y & NAT. RES. 36 (2016), https://perma.cc/3RAW-A8VR ("[T]ribes may approve environmentally harmful development . . . often due to the need for economic growth and employment opportunities . . . .").

[44] Friends Comm. on Nat'l Legis., *supra* note 38.

[45] *May 28, 1830 CE: Indian Removal Act*, NAT'L GEOGRAPHIC SOC'Y, https://perma.cc/LHN4-7MN3 (May 20, 2022); *see* Indian Removal Act of 1830, ch. 148, 4 Stat. 411.

[46] Andrew Jackson, U.S. President, Second Annual Message (Dec. 6, 1830), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1902 500, 522 (James D. Richardson ed., 1903).

Ironically, members of the Cherokee Nation relied on U.S. law to oppose their dispossession. In 1830, the Cherokee Nation moved for an injunction against Georgia for violating various treaties between the Cherokee Nation and both the former British colony of Georgia and the United States, noting that the Cherokee "deriv[e] their title from the Great Spirit, who is the common father of the human family, and to whom the whole earth belongs."[47] The Cherokee Nation fought a series of Georgia laws that they considered "outrageous."[48] Among other indignities, these laws confiscated "a large section of Cherokee land," nullified Cherokee law within the confiscated area, banned meetings of Cherokee government members across the state, required contracts between Indians and white settlers to be witnessed by two white people to be valid, and made it illegal for Indians to testify against white people in Georgia courts.[49] The Court did not bar Georgia from enforcing the laws; it held that the Court did not have jurisdiction and denied the Cherokee Nation's request for an injunction.[50] A 1785 treaty that bound the relationship between the Cherokee Nation and the United States had "receiv[ed] [the Cherokee] into the favor and protection of the United States of America."[51]

The Treaty with the Cherokee of 1785 established Cherokee control of Cherokee land. Any non-Indian who settles on Indian land, or who has already settled but does not leave in six months, "shall forfeit the protection of the United States, and the Indians may punish him or not as they please."[52] The United States expects from the Cherokee the loyalty expected of an allied nation.[53] It provides for, in essence, an ambassador, offering "[t]hat the Indians may have full confidence in the justice of the United States, respecting their interests, they shall have the right to send a deputy of their choice, whenever they think fit, to Congress."[54] One specification of the treaty that proved trickier stipulates that the Cherokee are "under the protection of the United States of America, and

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[47] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 3 (1831).

[48] GRACE STEELE WOODWARD, THE CHEROKEES 158 (1963).

[49] *Id.* at 158-59.

[50] *Cherokee Nation*, 30 U.S. (5 Pet.) at 20.

[51] Treaty with the Cherokee, Cherokee-U.S., Nov. 28, 1785, 7 Stat. 18, 18 [hereinafter Treaty of Hopewell], *reprinted in* 2 INDIAN AFFAIRS: LAWS AND TREATIES 8, 8 (Charles J. Kappler ed., 1904) [hereinafter KAPPLER].

[52] Treaty of Hopewell, *supra* note 51, art. V, 7 Stat. at 19, *reprinted in* KAPPLER, *supra* note 51, at 9.

[53] Treaty of Hopewell, *supra* note 51, art. XI, 7 Stat. at 20, *reprinted* in KAPPLER, *supra* note 51, at 10.

[54] Treaty of Hopewell, *supra* note 51, art. XII, 7 Stat. at 20, *reprinted* in KAPPLER, *supra* note 51, at 10.

of no other sovereign whatsoever."[55] Whether this means the Cherokee are sovereign became the issue in *Cherokee Nation v. Georgia*.[56]

The treaty prescribes practices for criminal justice and specifically extradition, issues that later emerged in *McGirt v. Oklahoma* and *Oklahoma v. Castro-Huerta* relating to the identities of victims and the accused. Article VI requires Indians to deliver to the United States for punishment any person, including Indians or "person[s] residing among them," who commits "robbery," "murder," or a "capital crime" against a U.S. citizen.[57] Whether this provision is genuinely intended to extend protection over members of the Cherokee Nation is unclear given that Article III considers the Nation to be under U.S. protection.[58] Under the extradition provision, the Cherokee Nation is obligated to deliver the person who has committed the crime to the United States, where punishment should not exceed the punishment that would be doled out to a citizen who committed the same crime against a citizen.[59] If, however, a U.S. citizen or person under U.S. protection commits a capital crime against an Indian, the treaty does not provide for reciprocal extradition. The person must be punished by the United States as if the victim were a U.S. citizen.[60]

The treaty gives a partial nod to procedural justice by inviting Cherokees to attend the punishment of those convicted of crimes and informing them of the punishment date through an unspecified "some one of the tribes."[61] Still, the profound power imbalance is clearly shown through this double standard. If the United States regarded the Cherokee Nation as a sovereign power, then one would expect the policies to mirror one another, but they do not. The treaty is one of many policies of the time that instrumentalized Indigenous identity by classifying it as a political designation rather than a racial or cultural one. By referring to Cherokee people as a "nation," the language of the treaty gave the Cherokee Nation political recognition, with the capacity to contract with the

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[55] Treaty of Hopewell, *supra* note 51, art. III, 7 Stat. at 19, *reprinted* in KAPPLER, *supra* note 51, at 9.

[56] 30 U.S. (5 Pet.) 1, 16 (1831).

[57] Treaty of Hopewell, *supra* note 51, art. VI, 7 Stat. at 19, *reprinted* in KAPPLER, *supra* note 51, at 9-10.

[58] *See* Treaty of Hopewell, *supra* note 51, art. III, 7 Stat. at 19, *reprinted* in KAPPLER, *supra* note 51, at 9.

[59] Treaty of Hopewell, *supra* note 51, art. VI, 7 Stat. at 19, *reprinted* in KAPPLER, *supra* note 51, at 9-10.

[60] Treaty of Hopewell, *supra* note 51, art. VII, 7 Stat. at 19, *reprinted* in KAPPLER, *supra* note 51, at 10.

[61] *Id.*

federal government.[62] However, the treaty failed to describe how these conceptions of identity intersect or diverge. This is significant because many people living in and around the Cherokee Nation were and are of mixed racial heritage,[63] including Cherokee Principal Chief John Ross, the main delegate to Washington from the Nation.[64] The complexities of racial and cultural identity in the United States leave open questions about how the law applies to different people based on their family histories, individual life experiences, and how their physical appearance is perceived. As a result, treaties and title dealings allegedly entered into for protection result instead in some Indigenous people and their descendants being questioned about their qualification and identity.[65]

Despite the extension of rights codified by the Treaty with the Cherokee of 1785, the federal government ignored the violent mass expulsion of the "Five Civilized Tribes" from their lands about 50 years later. Whether the treaty's white authors meant the words they wrote and felt the document would offer the Cherokee Nation sincere protection from colonial expansion may be impossible to know. Even to the extent that they were willing to protect Cherokee sovereignty, they were ineffective in doing so. Their ideas were rooted in a worldview that justified their domination, so the Cherokee Nation was described as both a sovereign state and a ward of the federal government, two roles which cannot be reconciled without considerable cognitive dissonance. Regardless, with settlers desperate to seize and claim land, it is possible that no treaty could have prevented the terror and heartbreak that would follow in the centuries ahead.

C. Allotment Further Weakens Native American Control of Land

From 1887 to 1934, during a period known as the Allotment Era, a legislative scheme established through the Dawes Act of 1887 stripped many tribal nations of their land. Individual tribal members were "allotted" plots as a way to achieve the government's goal of Native Ameri-

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[62] *See* Treaty of Hopewell, *supra* note 51, art. IX, 7 Stat. at 20, *reprinted* in KAPPLER, *supra* note 51, at 10 ("[T]he United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and managing all their affairs in such manner as they think proper.").

[63] *See generally* Gregory D. Smithers, *Why Do So Many Americans Think They Have Cherokee Blood?*, SLATE (Oct. 1, 2015, 5:35 AM), https://perma.cc/UG4X-DV6R (explaining that British traders frequently had Cherokee wives).

[64] RACHEL CAROLINE EATON, JOHN ROSS AND THE CHEROKEE INDIANS 1, 56-57 (1914).

[65] *See* Alaina E. Roberts, *As the Country Reckons with Race, Will Tribal Nations Lead the Way?*, HIGH COUNTRY NEWS (Mar. 30, 2021), https://perma.cc/R7KL-852D.

can assimilation into the dominant white agrarian culture.[66] In a 1901 address to Congress, President Theodore Roosevelt said, "[T]he time has arrived when we should definitely make up our minds to recognize the Indian as an individual and not as a member of a tribe. The General Allotment Act is a mighty pulverizing engine to break up the tribal mass."[67] The thin veneer of altruism surrounding allotment rang especially hollow in light of the policy's rollout. Tribal members were often given the least desirable land, land that was inhospitable to agriculture.[68]

While tribal nations' relationships to land and property varied widely, with many groups using private property systems, many other tribal nations regarded land as collectively stewarded, leading to a common perception among settlers that "the Indian way of life and collective use of land [was] communistic and backwards."[69] This clash in values meant that allotment added a layer of harm for people who felt severed from their communities and a shared understanding of their duty to care for the land as a spiritual mandate based on relationships of interconnectedness.[70] Allotment served as a double attack on both tribal nations and individual members:

> With the demise of the frontier, elimination turned inwards, seeking to penetrate through the tribal surface to the individual Indian below, who was to be co-opted out of the tribe, which would be depleted accordingly, and into White society. . . . Over the following three decades, an avalanche of assimilationist legislation, accompanied by draconian Supreme Court judgments which notionally dismantled tribal sovereignty and provided for the abrogation of existing treaties, relentlessly sought the break-

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[66] *See* General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.); *see also Dawes Act (1887)*, NAT'L ARCHIVES, https://perma.cc/E5DD-H7LR (Feb. 8, 2022).

[67] Theodore Roosevelt, U.S. President, First Annual Message (Dec. 3, 1901), *at Mes sage of the President*, U.S. DEP'T OF STATE OFF. OF THE HISTORIAN, https://perma.cc/2L4D-5XXU (last visited July 29, 2023).

[68] *See* Nat'l Archives, *supra* note 66 (explaining that "[t]he land allotted to individuals included desert or near-desert lands unsuitable for farming").

[69] *Land Tenure History,* INDIAN LAND TENURE FOUND., https://perma.cc/6YTL-T7MK (last visited Feb. 25, 2023).

[70] *See id.* (discussing Indian collective use of land); *see also* LINDA HOGAN, DWELLINGS: A SPIRITUAL HISTORY OF THE LIVING WORLD 85 (1995) (describing the traditional belief system of Native people as one that considers "the voice of God, or of gods" being connected to the terrestrial calling and the "creative power that lives on earth [and] inside earth"). *See generally* VINE DELORIA JR., GOD IS RED: A NATIVE VIEW OF RELIGION 65 (3d ed. 2003) ("The structure of [American Indians' and other tribal peoples'] religious traditions is taken directly from the world around them, from their relationships with other forms of life.").

> down of the tribe and the absorption into [w]hite society of individual Indians and their tribal land, only separately.[71]

In 1928, a group of researchers produced the Meriam Report, commissioned by the Secretary of the Interior, which explored the effect of allotment on Native Americans and described the policy's consequences, including extreme poverty and deprivation.[72] Nearly a century later, in 2021, the National Park Service went as far as to acknowledge that allotment was deliberately harmful, writing, "An explicit goal of the Dawes Act was to create divisions among Native Americans and eliminate the social cohesion of tribes."[73] The practice hurt tribes while creating two major problems for individual tribal members allotted land: First, where allotments were time-limited, the end of allotment meant that landowners were forced to shoulder significant tax burdens of which they may not have even been made aware when the government seized their land in tax foreclosures,[74] and second, where allotments could be passed down within families, small plots of land were subdivided into smaller and smaller units with each passing generation until they were rendered useless.[75] This subdivision was known as fractionation.[76]

The Indian Reorganization Act of 1934 ended allotment and ushered in a period of relatively expanded tribal sovereignty through the reservation system,[77] but by then, 90 million acres of land had been transferred out of Native American ownership.[78] In some instances, the law recognized the need for restitution—for example, through the Act of June 11, 1940, which called for the return of taxes to people who paid them on allotments that were "patented in fee . . . without application by or consent of the patentee."[79] More generally, Congress passed the Indi-

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[71] Wolfe, *supra* note 17, at 399-400.

[72] *See generally The Meriam Report*, PROJECT 1492, https://perma.cc/C8JW-9C22 (last visited Feb. 25, 2023).

[73] *The Dawes Act*, NAT'L PARK SERV., https://perma.cc/5EJQ-JP5C (July 9, 2021).

[74] Indian Land Tenure Found., *supra* note 69.

[75] *See Fractionation*, U.S. DEP'T OF THE INTERIOR, https://perma.cc/9W4A-5DRF (last visited Mar. 22, 2023).

[76] *Id.*

[77] Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 5101-29).

[78] *See Land Tenure Issues*, INDIAN LAND TENURE FOUND., https://perma.cc/7VQY-MAYP (last visited Feb. 25, 2023).

[79] Act of June 11, 1940, ch. 315, 54 Stat. 298, 298 (codified as amended at 25 U.S.C. § 352c).

an Claims Commission Act ("ICCA") in 1946,[80] allowing tribal members to bring claims against the United States in order to get money damages or land back as a result of dispossession, abuse of power, and unfair dealing.[81] While this seemed like a long-overdue effort to right wrongs, there was a catch. The ICCA set a five-year limit for receiving claims because Congress wanted to settle the matter of returning land to Indigenous people "with finality."[82] Yet, the last case filed under ICCA was not resolved until 2006, demonstrating that even when certain rights were settled law, they were not necessarily administered correctly.[83] All ICCA cases together awarded plaintiffs $1.3 billion, but much of this award was appropriated back by the federal government for oversight of distribution.[84] This paternalism is ironic, as "[t]he power to dictate how funds would be distributed arose out of the United States' continuing role as Indians' trustee, even though . . . the government paid money to compensate tribes for its shortcomings in that role."[85]

III. ROLE OF THE JUDICIARY

A. Cherokee Nation Has No Standing in Cherokee Nation v. Georgia

In *Cherokee Nation v. Georgia*,[86] the Cherokee Nation asked the Supreme Court to decide whether Georgia could enforce its laws on Cherokee territory, and whether the Cherokee Nation could be classified as a foreign state and therefore have a right to bring a suit against Georgia. Under the Supreme Court's original jurisdiction, without deciding on the merits, the Supreme Court ruled in favor of Georgia, reasoning that, although it was fine for a case to be brought against Georgia in the Supreme Court by a foreign state, the Supreme Court did not have jurisdiction to hear the case because it was brought by the Cherokee Nation. Chief Justice John Marshall said that the Cherokee Nation was not an independent foreign sovereign, but rather that "[t]heir relation to the

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[80] Indian Claims Commission Act, ch. 959, 60 Stat. 1049 (1946) (codified as amended at 25 U.S.C. §§ 70-70w), *terminated by* Act of Oct. 8, 1976, Pub. L. No. 94-465, 90 Stat. 1990.

[81] *Id.*; *see Lead Up to the Indian Claims Commission Act of 1946*, U.S. DEP'T OF JUST., https://perma.cc/FS39-U6RN (Dec. 22, 2020).

[82] U.S. Dep't of Just., *supra* note 81 (quoting United States v. Dann, 470 U.S. 39, 45 (1985)); *see* Indian Claims Commission Act § 12, 60 Stat. at 1052 ("The Commission shall receive claims for a period of five years . . . .").

[83] *See* U.S. Dep't of Just., *supra* note 81.

[84] MICHAEL LIEDER & JAKE PAGE, WILD JUSTICE: THE PEOPLE OF GERONIMO VS. THE UNITED STATES 257-58 (1997).

[85] *Id.* at 258.

[86] 30 U.S. (5 Pet.) 1 (1831).

United States resembles that of a ward to his guardian."[87] Any doubt that this view was formed on the basis of white supremacist thinking may be assuaged by the earlier line where he describes the Cherokee as "[a] people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts and our arms."[88] Justice William Johnson concurred, reading the Treaty with the Cherokee of 1785 as the concessions of a sovereign nation to a conquered people.[89]

In dissent, Justice Smith Thompson exposed the hypocrisy of the white supremacist logic in the majority opinion. He believed the Cherokee to be a foreign nation and asked, "[W]here is the authority, either in the constitution or in the practice of the government, for making any distinction between treaties made with the Indian nations and any other foreign power?"[90] Although the hypocrisy Justice Smith Thompson spoke of was widespread, even at the time, there were white settlers who took personal risks by speaking publicly against anti-Native American policies. Because of Tennessee Representative Davy Crockett's relationships with members of the Chickasaw nation, he spoke in Congress opposing Indian removal and "effectively end[ed] his political career."[91]

B. The Federal Government Acts Contrary to the Ruling in Worcester v. Georgia

The federal government is supposed to protect Native American sovereignty by holding state encroachment at bay, yet one way the erosion of sovereignty happens is by heavily emphasizing states' rights. From *Worcester v. Georgia* (1832)[92] to *Solem v. Bartlett* (1984),[93] the Court has continuously held that only Congress can disestablish an Indian reservation, ruling in many instances in favor of Indigenous sovereignty. *Worcester* is a foundational tribal sovereignty case because the Court decided it was unconstitutional for the State of Georgia to regulate whether non-Indigenous people could be present on Indigenous lands.[94]

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[87] *Id.* at 17.

[88] *Id.*

[89] *Id.* at 22-23 (Johnson, J., concurring).

[90] *Id.* at 60 (Thompson, J., dissenting).

[91] *Our History Is World History: Davy Crockett: An Early Supporter of Tribal Sovereignty*, CHICKASAW.TV, https://perma.cc/J47A-9ZG5 (last visited Apr. 30, 2023).

[92] 31 U.S. (6 Pet.) 515, 539-40 (1832).

[93] 465 U.S. 463, 470 (1984).

[94] *See Worcester*, 31 U.S. (6 Pet.) at 518-20.

Supreme Court precedent establishing limited sovereignty rights did not, however, fully ensure an end to the states' myriad abuses.[95]

Part of the historical context for *Worcester* was that many white European settlers had run away to live in Native American communities, yet few Native Americans willingly joined white society.[96] White hostility toward non-white people would have made it nearly impossible to assimilate into white society. Yet, the phenomenon of white defectors could not have been based on material resources, so it would have been puzzling and distressing to white settlers who thought they possessed the superior culture.[97]

Samuel Worcester was a Congregationalist missionary living and working in the Cherokee Nation in the 1830s. There, he taught English and legal rights to Cherokee people[98] and translated large portions of the Bible into Cherokee.[99] The State of Georgia noted that through the process of assimilation, the missionaries were influencing the Cherokee to resist the state's land grab. Georgia decided that those efforts conflicted with settlers' plans to seize lands because Worcester and his fellow missionaries sympathized with, and supported, the Cherokee people's opposition to the state's expansion through Native land theft.[100] Georgia state officials enacted legislation requiring missionaries to have state-issued licenses to work in the Cherokee Nation.[101] The licenses came with an oath of allegiance to Georgia's laws, which Worcester and other mis-

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[95] *See, e.g.*, *Act for the Government and Protection of Indians*, PBS: AM. EXPERIENCE, https://perma.cc/3QDV-Q6NT (last visited Feb. 15, 2023).

[96] *See generally* David Brooks, Opinion, *The Great Affluence Fallacy*, N.Y. TIMES (Aug. 9, 2016), https://www.nytimes.com/2016/08/09/opinion/the-great-affluence-fallacy.html (on file with CUNY Law Review) ("[In eighteenth-century America], the settlers from Europe noticed something: No Indians were defecting to join colonial society, but many whites were defecting to live in the Native American one.").

[97] *Id.* ("Colonial society was richer and more advanced" than Native American society, which "was communal and tribal. . . . And yet people were voting with their feet the other way.").

[98] *See Oklahoma Image Radio Program: Samuel Worcester* (Okla. Image Statewide Humans. Proj. broadcast 1980), *at* Okla. Image Statewide Humans. Proj., *Samuel Worcester*, OKLA. DEP'T OF LIBRS., https://perma.cc/96TF-L8BT (recording can be downloaded by clicking "260.MPG" at the top of the page) (last visited Mar. 18, 2023) ("[Samuel Worcester] taught the 'Three Rs' [reading, writing, and arithmetic]."); *see also Remembering the Time Andrew Jackson Decided to Ignore the Supreme Court in the Name of Georgia's Right to Cherokee Land*, SUSTAINATLANTA, https://perma.cc/W7QA-HWR7 (July 28, 2016) [hereinafter *Remembering the Time*].

[99] Henry Warner Boden, *Worcester, Samuel Austin*, *in* BIOGRAPHICAL DICTIONARY OF CHRISTIAN MISSIONS 748 (Gerald H. Anderson ed., 1999).

[100] *See* Edwin A. Miles, *After John Marshall's Decision:* Worcester v. Georgia *and the Nullification Crisis*, 39 J.S. HIST. 519, 521 (1973).

[101] *Id.*

sionaries refused to take.[102] Worcester decided to remain an unlicensed missionary on Cherokee land and accept the consequences. He did so with the support of some encouraging colleagues and, though eventually imprisoned, took his case to the Supreme Court, which reversed his conviction and found the law unconstitutional.[103]

While the judiciary acted in good faith, state governments and the federal executive and legislative branches undermined it to the extent it related to Native American sovereignty.[104] In 1830, during an address to Congress, President Jackson expressed his intentions to continue the removal of the Cherokee Nation from their ancestral lands.[105] Thus, the victory of *Worcester* was short-lived for the Cherokee because President Jackson refused to enforce the Supreme Court decision.[106] On the contrary, President Jackson continued to endorse the state removal of Cherokee people, and as a result, the Georgia militia terrorized the Cherokee by encroaching on their ancestral land.[107] This would become most fully codified through an ill-gotten treaty.

In 1835, 500 Cherokees claiming to represent the 16,000-person Cherokee Nation agreed to accept a large portion of present-day Oklahoma and $5 million in exchange for 7 million acres of land when they signed the Treaty of New Echota.[108] According to historians, the signers chose to compromise with the U.S. government because they saw no viable alternative in an "increasingly racialized South."[109] For many Cherokees, this was a disingenuous position and an unauthorized surrender. Principal Chief John Ross condemned the treaty, speaking of devastation and death as the "attendants on the execution of this ruinous compact."[110] Despite these protests, with the signed Treaty of New Echota, Jackson had legal justification for commencing the Trail of Tears.

Former Army Private John G. Burnett accompanied some of the nearly 60,000 members of the "Five Civilized Tribes" on the forced

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[102] *See id.*

[103] *Id.* at 524, 527.

[104] *See id.* at 529.

[105] *See* Jackson, *supra* note 46, at 519-23.

[106] Jeffrey Rosen, *Supreme Court History: The First Hundred Years: Court History*, PBS: THIRTEEN, https://perma.cc/TT2L-8JLA (last visited Feb. 25, 2023).

[107] *See Remembering the Time*, *supra* note 98.

[108] N.C. Dep't of Nat. & Cultural Res., *supra* note 21.

[109] Code Switch, *A Treacherous Choice and a Treaty Right*, NPR (Apr. 8, 2020), https://perma.cc/6ZHS-WW7J.

[110] Letter from John Ross, Principal Chief, Cherokee Nation, to the Senate and the House of Representatives (Sept. 28, 1836), *in* 1 THE PAPERS OF CHIEF JOHN ROSS, 1807-1839 458, 460 (Gary E. Moulton ed., 1985).

march[111] over approximately 2,200 miles.[112] In 1890, he shared his recollections in a letter:

> I saw the helpless Cherokees arrested and dragged from their homes, and driven at the bayonet point into the stockades. And in the chill of a drizzling rain on an October morning I saw them loaded like cattle or sheep into [645] wagons and started toward the west.
>
> . . . [M]any of the children rose to their feet and waved their little hands goodbye to their mountain homes, knowing they were leaving them forever. Many of these helpless people did not have blankets and many of them had been driven from home barefooted.
>
> . . . .
>
> In one home death had come during the night. A little sad-faced child had died and was lying on a bear skin couch and some women were preparing the little body for burial. All were arrested and driven out leaving the child in the cabin. I don't know who buried the body.[113]

The horror continued for approximately a decade. Among those killed in this genocidal expulsion were not only Indigenous people but also enslaved African people.[114] Historian Tiya Miles interviewed descendants of enslaved Cherokees, known as Cherokee Freedmen, noting, "Common themes in the responses I received were pain at having their history publicly denied and pride in their ancestors' ability to survive multiple trials."[115] Still, racism and denial remain prevalent, even among members of the Cherokee Nation in the twenty-first century. In 2007, 76.6% of Cherokees who voted sought to revoke the Cherokee Freedmen's tribal citizenship.[116] Though a district court invalidated the referendum, descendants of Cherokee Freedmen have had to struggle for

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[111] John G. Burnett, The Cherokee Removal Through the Eyes of a Private Soldier (Dec. 11, 1890), *in* 3 J. CHEROKEE STUD. 180 (1978), *reprinted in* VOICES OF A PEOPLE'S HISTORY OF THE UNITED STATES 142 (Howard Zinn & Anthony Arnove eds., 1st ed. 2004).

[112] *Trail of Tears National Historic Trail*, NAT'L PARK SERV., https://perma.cc/CU5D-L88Z (Jan. 27, 2023).

[113] Burnett, *supra* note 111, at 143, 145.

[114] Tiya Miles, *Pain of 'Trail of Tears' Shared by Blacks as Well as Native Americans*, CNN (Feb. 25, 2012, 11:20 AM), https://perma.cc/Q2NK-F6DU.

[115] *Id.*

[116] *Cherokees Vote to Limit Tribal Membership*, WASH. POST (Mar. 4, 2007), https://perma.cc/WY83-E2AA (voting to limit Cherokee citizenship to "descendants of 'by blood' tribe members as listed on the Dawes Commission's rolls from more than 100 years ago").

recognition.[117] Adopting the ways of white settlers, including enslaving kidnapped Africans, may have led to white settlers labeling the Cherokee as civilized, but this proximity to whiteness was illusory and ultimately did not confer any benefit on the Cherokee. Rather, it made some tribal members complicit in the United States' other foundational atrocity.

C. Carving Out Sovereignty: Pueblo of Jemez v. United States

A more recent case that laid the groundwork for the outcome in *McGirt* was *Pueblo of Jemez v. United States*, which discussed exceptions to "exclusive use" of land by Native Americans.[118] The Bureau of Indian Affairs officially recognizes 574 tribes within the United States.[119] Among those is the Pueblo of Jemez, located in present-day New Mexico.[120] A particular parcel within the land on which the Pueblo of Jemez people live, and claim to have lived continuously since at least the twelfth century, is called Baca Location No. 1,[121] land that became known as such after the United States granted it to the Luis Maria Cabeza de Baca family in 1860.[122] In 2000, the United States bought Baca Location No. 1 from the Baca family's heirs to make it into the Valles Caldera National Preserve.[123] In 2012, the Pueblo of Jemez filed a claim to restore the land to the tribe under the federal common law of aboriginal Indian title and the Quiet Title Act.[124] In general, the Quiet Title Act allows individuals and entities to commence a civil action in federal

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[117] Cherokee Nation v. Nash, 267 F. Supp. 3d 86, 123 (D.D.C. 2017) (holding that descendants of persons the Cherokee Nation enslaved had the right to Cherokee citizenship under Article 9 of the Treaty of 1866); *see also* Kenneth J. Cooper, *I'm a Descendant of the Cherokee Nation's Black Slaves. Tribal Citizenship Is Our Birthright.*, WASH. POST (Sept. 15, 2017, 10:28 AM), https://perma.cc/4HQC-RBND.

[118] 350 F. Supp. 3d 1052, 1098-1100 (D.N.M. 2018).

[119] *Tribal Leaders Directory*, U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFS., https://perma.cc/AHH7-S7ML (last visited Mar. 22, 2023).

[120] *List of Federally Recognized Tribes*, U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFS., https://www.bia.gov/service/tribal-leaders-directory/federally-recognized-tribes (under "Select a state," select "New Mexico," click "Apply," and scroll down to "Pueblo of Jemez, New Mexico") (last visited Apr. 30, 2023).

[121] Complaint to Quiet Title to Aboriginal Indian Land at 2, 12, Pueblo of Jemez v. United States, 430 F. Supp. 3d 943 (D.N.M. 2019) (No. 12-cv-800), *amended by* 483 F. Supp. 3d 1024 (D.N.M. 2020) [hereinafter Pueblo of Jemez Complaint].

[122] *See* Act of June 21, 1860, ch. 167, § 6, 12 Stat. 71, 72.

[123] Valles Caldera Preservation Act, Pub. L. No. 106-248, § 104, 114 Stat. 598, 600-02 (2000) (repealed 2014); *see also* KURT F. ANSCHUETZ & THOMAS MERLAN, U.S. DEP'T OF AGRIC.: FOREST SERVICE, GENERAL TECHNICAL REPORT RMRS-GTR-196, MORE THAN A SCENIC MOUNTAIN LANDSCAPE: VALLES CALDERA NATIONAL PRESERVE LAND USE HISTORY 36 (2007).

[124] Pueblo of Jemez Complaint, *supra* note 121.

court seeking judgment on their right to clear title to real property. More specifically, it provides for the United States to be a named defendant in a case about a disputed title to real property "in which the United States claims an interest, other than a security interest or water rights."[125] Of note about the land where the Pueblo of Jemez live is that it is rich in geothermal energy-harvesting potential.[126]

The Pueblo of Jemez had the honor of being the first tribal claimant seeking a return of land to have reached trial,[127] and to ultimately win in the Court of Appeals.[128] The significance of this case turned on the Pueblo of Jemez's claim that the federal government's appropriation of land within the tribe's ancestral boundaries happened without the tribe's consent and therefore violated the tribe's exclusive use and occupancy rights. The Pueblo of Jemez claimed it had no notice that the United States granted the land to the Baca heirs.[129] To establish the continuous use of land, tribal members posited that when their ancestors arrived at the area in question, there were "no other Native American villages in the upland area of the Jemez mountains," and that ancestral Jemez people were guided by the *Wav e ma* mountain (Redondo Peak) and the large image of a flying eagle visible on the mountain's summit.[130] The Pueblo of Jemez marked the migration route that ancestors would have traveled through to reach Baca Location No. 1 (the western Jemez homeland).[131] The purported facts raised questions of evidence law. In their amicus brief, Americans for Indian Opportunity et al. argued that although oral history accounts of continuous usage by the Pueblo of Jemez were hearsay, they were nevertheless admissible under the hearsay exception for "ancient documents"[132] and the "residual exception,"[133] a catch-all.[134] The trial court found that pursuant to Rule 803 of the Federal Rules of Evidence, oral tradition evidence could be admit-

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125 28 U.S.C. § 2409a(a).

126 Inst. for Tribal Env't Pros., *Pueblo of Jemez: Leading the Way to a Renewable Future*, N. ARIZ. UNIV., https://perma.cc/A3RY-7RBA (last visited Apr. 30, 2023).

127 Latoya Lonelodge, *Reclaiming Tribal Lands: Tribal Attorney Assists with* Pueblo of Jemez v. United States, INDIANZ.COM (July 12, 2022), https://perma.cc/Q2J9-A2MS.

128 Tierra Marks, *Jemez Pueblo Wins at the United States Court of Appeals for the Tenth Circuit*, BARNHOUSE KEEGAN SOLIMON & WEST LLP (Mar. 28, 2023), https://perma.cc/BF49-3J4G; *see* Pueblo of Jemez v. United States, 63 F.4th 881 (10th Cir. 2023).

129 Pueblo of Jemez Complaint, *supra* note 121, at 12.

130 *Id.* at 5.

131 *Id.*

132 FED. R. EVID. 803(16).

133 *Id.* R. 807.

134 Brief of *Amici Curiae* Americans for Indian Opportunity et al. in Support of Appellant and Urging Reversal at 10-13, Pueblo of Jemez v. United States, 63 F.4th 881 (10th Cir. 2023) (No. 20-2145).

ted, but not to show the truth of the matter asserted. Additionally, the court decided that Rule 807 did not apply, because Rule 807 is reserved for only the most "exceptional circumstances," and in this case, the circumstances were not deemed sufficiently exceptional.[135] After the district court ultimately ruled against the Tribe, the Pueblo of Jemez appealed.[136]

Key to the United States' successful defense in the district court case was the contention that other tribes had also made use of the lands. Under this line of reasoning, the Pueblo of Jemez could not rightly claim exclusive, continuous use based on "unextinguished aboriginal title," and the three exceptions to exclusive use thus did not apply.[137] Referencing a standard from ICCA case law, the United States identified

> the "joint-and-amicable use" exception, [where] two or more tribes or groups might inhabit an area in "joint and amicable" possession without erasing the "exclusive" nature of their use . . . [;] the "dominant-use" . . . exception, [where] proof of the claimant tribe's ability to exclude other Indian groups from the area preserves its "exclusive" use of the land even if it does not exercise that power . . . [;] [a]nd . . . the "permissive-use" exception, [where] the claimant tribe's permission for another group to use the claimed area for specific purposes—such as for trading—may be inferred . . . .[138]

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[135] Pueblo of Jemez v. United States, 366 F. Supp. 3d 1234, 1269 (D.N.M. 2018).

[136] Notice of Appeal, *Pueblo of Jemez*, 63 F.4th 881. The New Mexico Gas Company had joined the suit as an intervenor-defendant to protect their property interests. Justin Horwath, *New Mexico Gas Co. Seeks to Intervene in Land Dispute Between Jemez Pueblo, Feds*, SANTA FE NEW MEXICAN, https://perma.cc/P44Y-GKPX (July 6, 2016). According to the gas company's website, the company serves "5,000 residential and approximately 400 commercial Native American customers," and it "maintain[s] about 350 miles of distribution lines and 220 miles of natural gas transmission lines on Native American land." *Service Area*, N.M. GAS CO., https://perma.cc/X7LZ-S8MW (last visited Feb. 25, 2023). However, given that the Pueblo of Jemez did not contest their pipeline or easement, and the United States won the case, the New Mexico Gas Company declined to file a response brief. Had the Pueblo of Jemez challenged their right to operate on their land, it would have been instructive to note which defenses the company would have raised. *See* Notice as to Intervenor Defendant-Appellee New Mexico Gas Company's Response Brief at 1-3, Pueblo of Jemez v. United States, 430 F. Supp. 3d 943 (D.N.M. 2019) (No. 12-cv-800), *amended by* Pueblo of Jemez v. United States, 483 F. Supp. 3d 1024 (D.N.M. 2020).

[137] Redacted Response Brief for the United States at 3, 22, *Pueblo of Jemez*, 63 F.4th 881.

[138] *Id.* at 5-6 (first citing Strong v. United States, 207 Ct. Cl. 254, 262 (1975)); then citing United States v. Seminole Indians of Fla., 180 Ct. Cl. 375, 383-86 (1967)).

The United States brought in archaeological evidence that multiple Puebloan groups had occupied the Valles Caldera region[139] and had previously brought claims to the same land under the ICCA.[140] However, the United States' argument follows a historical pattern of imposing a Eurocentric, individualistic land use standard on Native Americans' way of relating to land.[141] Historically, tribes in what is now the southwestern United States had land use systems that revolved around family ownership combined with an understanding that other lands were communal grazing areas.[142]

Pueblo of Jemez v. United States established the foundation for *McGirt* by examining the concept of exclusive use in the context of land ownership and tribal sovereignty. The court of appeals acknowledged the Jemez people as the "predominant and primary occupants" of the land in dispute and reversed and remanded the district court's decision.[143] The court instructed that on remand, the Pueblo of Jemez needed to prove that it still had aboriginal title to Baca Location No. 1 and that the 1860 land grant had not extinguished such alleged title.[144] On remand, the district court held that the Pueblo of Jemez could not prove exclusive use and were thus not permitted to claim aboriginal title based on evidence that other Pueblos also used the land.[145] The district court insisted that the United States show specific evidence of other groups' use and occupancy to defeat the Pueblo of Jemez's exclusive use claims.[146] Then, the burden was on the Pueblo of Jemez to prove that one of the three exceptions to exclusive use applied.[147] The case found its way back to the court of appeals, where in 2023, the court held that the Pueblo of Jemez did "hold aboriginal Indian title ownership" to at least some of the lands in question.[148] The court of appeals relied upon the rule that owners of land need to extinguish or abandon their title in

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[139] *Id.* at 8.

[140] *Id.* at 12.

[141] *See* Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1561-62 (2001).

[142] *Id.* at 1587-88.

[143] Pueblo of Jemez v. United States, 790 F.3d 1143, 1148 (10th Cir. 2015).

[144] *Id.* at 1147.

[145] Pueblo of Jemez v. United States, 430 F. Supp. 3d 943, 1219-22 (D.N.M. 2019), *amended by* Pueblo of Jemez v. United States, 483 F. Supp. 3d 1024 (D.N.M. 2020)

[146] *Id.* at 1220.

[147] *Id.* at 1222-23 (noting that the three exceptions to exclusive use are (1) joint-and-amicable use, (2) dominant use, and (3) permissive use).

[148] Marks, *supra* note 128; Pueblo of Jemez v. United States, 63 F.4th 881, 899 (10th Cir. 2023).

order to be deprived of their land and found the Pueblo of Jemez had not done so.[149]

IV. GAINING AND LOSING GROUND

A. The Sovereignty Case That Affirms Treaty Rights

The core tribal sovereignty issue in *McGirt v. Oklahoma* was whether the treaty rights established by the U.S. government for the Creek Nation in the 1830s still hold. Justice Neil Gorsuch opened the majority opinion by anchoring it in the history that made treaties a necessity in the first place. He wrote, "On the far end of the Trail of Tears was a promise."[150] The promise was that Creek people, forcibly displaced from their lands, would be assured security in their new lands for as long as they remained "a nation."[151] Their sovereignty could be dissolved only through their extinction, through a means such as assimilation, or through an act of Congress.[152] Justice Gorsuch viewed it unfair for the judiciary to make a decision about the dissolution of a nation.[153] Congressional representatives, if they wished to dissolve an Indian nation, would have to be the ones to face the negative political consequences of doing so. They could not push their dirty work off onto the Court.[154]

McGirt clarified the legal status of the Muscogee (Creek) Nation's reservation in Oklahoma. The Court held that reservation lands were outside of the State of Oklahoma's jurisdiction, where previously, all criminal cases had been within the State's purview. Federal law had previously attempted to address the jurisdictional question in criminal cases involving enrolled tribal members on reservation land. These laws include the Federal Enclave Act, Assimilative Crimes Act, Major Crimes Act, Indian Civil Rights Act of 1968, and Tribal Law and Order Act of 2010, among others.[155] The policy behind these attempts has been

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[149] *Pueblo of Jemez*, 63 F.4th at 885.

[150] McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020).

[151] *Id.* at 2460 ("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.'").

[152] *Id.* at 2460, 2467.

[153] *Id.* at 2482.

[154] *Id.* at 2462 ("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.").

[155] Press Release, U.S. Dep't of the Interior, Bureau of Indian Affs., Solicitor Says U.S. Has Criminal Jurisdiction on Reservations Where Tribes Do Not (Apr. 12, 1978), https://perma.cc/E456-49AU. *See also* Brief of *Amici Curiae* Historians et al. in Support of Petitioner at 16-17, *McGirt*, 140 S. Ct. 2452 (citing *Ex parte* Crow Dog, 109 U.S. 556, 571

to prevent state actors from encroaching on Native American sovereignty; if certain matters such as criminal ones were left to the states, states could enact laws that disadvantage Native Americans.[156] In his opinion, Justice Gorsuch asserts that in addition to violating the Constitution, allowing states to reduce federal reservations would "leave tribal rights in the hands of the very neighbors who might be least inclined to respect them."[157]

So, why does a case about sexual crimes against a minor begin with an appeal to honor treaty rights? Jimcy McGirt, a Seminole tribal member,[158] was convicted first in an Oklahoma court and then in federal court[159] for the rape and sexual abuse he inflicted on his ex-wife's four-year-old granddaughter, also a member of the tribe.[160] He committed these crimes on Muscogee (Creek) reservation lands.[161] His first conviction of first-degree rape by instrumentation, lewd molestation, and forcible sodomy occurred at the state level in 1997 and led to a life sentence and two 500-year sentences in prison.[162] One could argue McGirt was hardly the sort of sympathetic figure attorneys might choose for a test case because he had raped a child. However, the facts of his case were such that lawyers were able to advocate for and establish sovereignty rights vis-à-vis state government encroachment. Moreover, the impact of arguing this case had the potential to save the life of a Muscogee citizen, Patrick Murphy.[163]

Both Jimcy McGirt and Patrick Murphy were enrolled tribal members convicted by the State of Oklahoma of committing major crimes on

(1883)) ("The United States' policy concerning 'the Indian country' criminal prosecutions began with federal enactments as early as 1796.").

[156] One way states might do this is by criminalizing federally protected activities that are popular among some tribal members, such as the usage of sacred medicine in religious practice. *See Supreme Court Rules That Religious Group Can Use Illegal Drug in Their Worship Services*, PEW RSCH. CTR. (Feb. 21. 2006), https://perma.cc/U5LW-H532. Some states have also enacted voting laws that disproportionately threaten Indigenous people with disenfranchisement. *See* Katie Friel & Emil Mella Pablo, *How Voter Suppression Laws Target Native Americans*, BRENNAN CTR. FOR JUST. (May 23, 2022), https://perma.cc/GX5H-VDND.

[157] *McGirt*, 140 S. Ct. at 2462.

[158] *Oklahoma Man at Center of Tribal Sovereignty Case Sentenced*, PUB. RADIO TULSA (Aug. 27, 2021, 4:34 PM), https://perma.cc/J75P-3NEG.

[159] Morgan Taylor, *McGirt Sentenced to Life in Federal Prison*, MVSKOKE MEDIA (Sept. 10, 2021), https://perma.cc/JK8Y-4ERP.

[160] D.E. Smoot, *McGirt Found Guilty After Federal Trial*, MUSKOGEE PHOENIX (Nov. 6, 2020), https://perma.cc/3TPX-9C2B.

[161] *Id.*

[162] Press Release, U.S. Att'y's Off., E. Dist. of Okla., Jimcy McGirt Sentenced to Life Imprisonment (Aug. 25, 2021), https://perma.cc/PF5M-8SEG.

[163] *See* Julie Combs, *A Coherent Ethic of Lawyering in Post*-McGirt *Oklahoma*, 56 TULSA L. REV. 501, 501-04, 511-14 (2021).

tribal land.[164] McGirt, with the help of others incarcerated with him, filed a handwritten pro se petition for his case to be heard in federal court.[165] McGirt was inspired by the case of Murphy, who was a similarly situated convicted person who had managed to get his case appealed.[166] In Murphy's case, the crime was murder, and his attorneys appealed his conviction on jurisdictional grounds.[167] The appellate court faced the question of whether the crime occurred in "Indian Country,"[168] "for if it did Oklahoma [had] no jurisdiction over the crime."[169] The U.S. Supreme Court refused to decide Murphy's case, however, because Justice Gorsuch had recused himself due to a conflict: He had worked on the case in a lower court. Without him, the Supreme Court would have likely been split along ideological lines, unable to come to a clear decision.[170]

Despite the atrocious acts of which he was convicted, McGirt's timing in filing the appeal motivated attorneys Ian H. Gershengorn, Zachary C. Schauf, and Allison M. Tjemsland,[171] leading advocates of Native American rights, to take on his case because it had enough parallels with Murphy's. Oklahoma had sentenced Murphy to death,[172] and a victory in *McGirt* meant that Murphy's state conviction would be vacated and he would instead be tried in federal court.[173] In *McGirt*, the attorneys argued that McGirt's trial had been in the wrong jurisdiction, and they won in the U.S. Supreme Court.[174] As a result, McGirt's Oklahoma state conviction was vacated, and he was tried in the U.S. District Court for the Eastern District of Oklahoma, where he was convicted and sen-

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[164] *See id.* at 501 (stating that Murphy was convicted of murder).

[165] Mike W. Ray, *McGirt Not Faring Well in Prison*, SW. LEDGER (Mar. 25, 2021), https://perma.cc/9ZZ9-XXPD.

[166] This Land, *The Ruling*, CROOKED MEDIA, at 06:20 (July 23, 2020), https://crooked.com/podcast/the-ruling/ (on file with CUNY Law Review) (scroll to the bottom of the page, and in the media player, select "10. The Ruling").

[167] *See* Murphy v. State, 124 P.3d 1198, 1200 (Okla. Crim. App. 2005).

[168] "Indian Country" is defined as "(a) all land within . . . *any Indian reservation* under the jurisdiction of the United States Government . . . (b) all *dependent Indian communities* within the borders of the United States . . . and (c) *all Indian allotments, the Indian titles to which have not been extinguished*." 18 U.S.C. § 1151 (emphasis added).

[169] *Murphy*, 124 P.3d at 1200.

[170] *See* This Land, *supra* note 166.

[171] McGirt v. Oklahoma, 140 S. Ct. 2452, 2458 (2020).

[172] *Oklahoman Whose Case Led to McGirt Ruling Gets Life Sentence*, ASSOCIATED PRESS (May 11, 2022, 6:25 PM), https://perma.cc/668F-8FJL.

[173] Press Release, U.S. Att'y's Off., E. Dist. of Okla., Patrick Dwayne Murphy Sentenced to Life Imprisonment for 1999 Murder in Indian Country (May 11, 2022), https://perma.cc/C3F8-UX7B.

[174] *McGirt*, 140 S. Ct. at 2459, 2478.

tenced to serve three life sentences in prison.[175] The Muscogee Nation issued a statement praising McGirt's federal criminal conviction and sentencing.[176] The abuse survivor's mother wished for the Supreme Court case to become known as "the sovereignty decision," because, she felt, "[h]e doesn't deserve to have his name spoken."[177] After the decision in *McGirt*, Murphy's state conviction was also overturned, and he was tried in federal court where he received a life sentence, sparing him from execution by the State of Oklahoma.[178]

The Major Crimes Act of 1885 was central to the outcomes of the *McGirt* and *Murphy* cases. Congress passed the Major Crimes Act in 1885 to confer federal jurisdiction over certain major crimes committed by Native Americans on Native lands, while excluding state jurisdiction.[179] These major crimes include murder, manslaughter, kidnapping, felony child abuse or neglect, arson, burglary, robbery, and certain other felonies.[180] Prior to the Act, these crimes were tried in tribal courts.[181] The Major Crimes Act is part of a legacy of paternalism that embodies the legislature's lack of faith in Indigenous jurisprudence; if it weren't, the Act would have allowed for tribal jurisdiction alone to prevail.[182]

Justice Gorsuch, known for his textualist statutory interpretation,[183] explained the Court's reasoning in *McGirt* in a straightforward way. To summarize: The Major Crimes Act applies to crimes committed by Indians on reservation lands. Congress established the reservation status of the Muscogee reservation. Only Congress can disestablish the reservation status. Congress has not disestablished the reservation status. McGirt's crimes were committed on reservation lands. McGirt is a member of the Seminole Nation. Therefore, the Major Crimes Act

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[175] Press Release, *supra* note 162.

[176] Chris Casteel, *Jimcy McGirt, Whose Supreme Court Case Reshaped Oklahoma Courts, Sentenced to Three Life Terms*, OKLAHOMAN, https://perma.cc/U6NR-PG6N (Aug. 26, 2021, 10:24 AM) ("The sentencing of Jimcy McGirt to three life sentences with no parole—and the U.S. attorney's actions last year to ensure this man's uninterrupted imprisonment—is a prime example of an orderly process that preserves public safety and delivers justice in the lawful, appropriate venue.").

[177] *Id.*

[178] Press Release, *supra* note 173.

[179] U.S. DEP'T OF JUST., CRIMINAL RESOURCE MANUAL § 679 (1997), perma.cc/CZH4-45ZH. *See generally* 18 U.S.C. § 1153.

[180] 18 U.S.C. § 1153(a).

[181] U.S. DEP'T OF JUST., *supra* note 179.

[182] *See* Daniel M. Cobb, *Native Americans and the Federal Power*, WONDRIUM DAILY (July 29, 2021), https://perma.cc/798U-CAM5. *See also* Steve Russell, *Making Peace with Crow Dog's Ghost: Racialized Prosecution in Federal Indian Law*, WICAZO SA REV., Spring 2006, at 61, 62.

[183] Josh Blackman, *Justice Gorsuch's Legal Philosophy Has a Precedent Problem*, ATLANTIC (July 24, 2020), https://perma.cc/A5FB-5KG5.

should apply to jurisdiction in McGirt's trial.[184] The majority cut through the dissent's argument that Oklahoma had historically prosecuted alleged crimes by tribal members on reservation land[185] by pointing out the "perils of substituting stories for statutes,"[186] cautioning against the hypocrisy of "treat[ing] Native American claims of statutory right as less valuable than others,"[187] and in this way hearkened back to the dissent in *Worcester*. The Court's argument would have worked even if it had not been informed by history, but it was richer for incorporating the historical context of Indigenous land theft. For example:

> 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.[188]

When explaining that the transfer of individual land plots within reservation boundaries, "whether to Native Americans or others," does not disestablish a reservation, the Court referred to governmental efforts to break down reservations through allotment strategies.[189] The decision addressed a history of accelerated colonization for resource extraction as well:

> Oklahoma points to the speedy and persistent movement of white settlers onto Creek lands throughout the late 19th and early 20th centuries. . . . Maybe, as Oklahoma supposes, it suggests that some white settlers in good faith thought the Creek lands no longer constituted a reservation. But maybe, too, some didn't care and others never paused to think about the question. . . . [T]he loss of Creek land ownership was accelerated by the discovery of oil in the region during the period at issue here. A number of the federal officials charged with implementing the laws of Congress were apparently openly conflicted, holding shares or board positions in the very oil companies who sought to deprive Indians of their lands.[190]

By providing this context, the Court demonstrated respect for the Muscogee Nation and an understanding of the significance of the tribal

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[184] McGirt v. Oklahoma, 140 S. Ct. 2452 at 2478 (2020).
[185] *Id.* at 2497.
[186] *Id.* at 2470.
[187] *Id.*
[188] *Id.* at 2462.
[189] *Id.* at 2464.
[190] *Id.* at 2473.

sovereignty case. Nineteen million acres of eastern Oklahoma, regardless of lack of exclusive use, were affirmed to be Native land.[191] The Court's decision represented, in the words of Choctaw Chief Gary Batton, "a refreshing commitment to the actual law."[192] While some have noted the decision may limit Indigenous people's access to justice,[193] for many, "groundbreaking" would be an inadequately mild term. Muscogee (Creek) Nation citizen and federal Indian law professor Lauren King described her reaction:

> The tears [were] streaming down throughout the opinion, because [Justice Gorsuch] says so many things that we know in our hearts [are] true . . . and it's so often not reflected in the court decisions. . . . [T]oday, the court didn't accept Oklahoma's and the United States' invitation to do that yet again to Indian people. And to see the words written, what we always knew and felt, there's not words to describe how meaningful that is.[194]

For Lakota People's Law Project's Madonna Thunder Hawk, optimism was tempered by experience: "It's a war for us. . . . There are some victories, but the war continues."[195] Her weariness would prove prescient, as the Court would effectively overturn the ruling two years later in *Castro-Huerta*.

B. Undoing the Sovereignty Case in Castro-Huerta

The dissenting justices in *McGirt* worried the case would set a precedent that led other Indigenous groups in Oklahoma to make claims for the restoration of their rights,[196] but they did not have to fear for very long. When the issue came back to the Court less than two years later in *Oklahoma v. Castro-Huerta*, Justice Ruth Bader Ginsburg, considered by some to have been the swing vote that decided *McGirt*, had been re-

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[191] Wayne L. Ducheneaux II, *Oklahoma v. Castro-Huerta: Bad Facts Make Bad Law*, NATIVE GOVERNANCE CTR. (July 14, 2022), https://perma.cc/LQ8Z-4UFP.

[192] News Release, Choctaw Nation of Okla., Historical Facts Led to Supreme Court Ruling in McGirt Case (Aug. 12, 2020), https://perma.cc/7YF8-7G9W [hereinafter Choctaw Nation News Release].

[193] Dominga Cruz et al., *The Oklahoma Decision Reveals Why Native Americans Have a Hard Time Seeking Justice*, WASH. POST (July 22, 2020, 6:00 AM), https://perma.cc/7FX9-UYLP.

[194] This Land, *supra* note 166.

[195] Gloria Rubac, *Indigenous Nations in Oklahoma Win Supreme Court Ruling*, WORKERS WORLD (Nov. 3, 2020), https://perma.cc/ER4Q-TLQF.

[196] Choctaw Nation News Release, *supra* note 192.

placed by Justice Amy Coney Barrett.[197] *Castro-Huerta*, a child neglect case, overturned an important precedent in *McGirt* on tribal sovereignty.[198] One distinction between *Castro-Huerta* and *McGirt* was that Victor Manuel Castro-Huerta was not a tribal member, though the child he was convicted of neglecting was a member of the Cherokee Nation.[199] This time, Justice Brett Kavanaugh wrote the majority opinion, and Justice Gorsuch wrote the dissent.[200]

The two justices could not be farther apart in their reading of *Worcester*, the case about the white missionary welcomed to live on Cherokee land in Georgia. For the dissent, *Worcester*, which held that tribes had the right to determine who could be on their land, was one of the "Court's finer hours," because it recognized that "even in the '[c]ourts of the conqueror,' the rule of law meant something."[201] The majority's interpretation was that the *Worcester* decision was inconsistent with the rulings that followed it.[202] Additionally, in the Court's view, the 1880s treaties on which *McGirt* and the dissent relied had been "supplanted" by the aptly named Oklahoma Enabling Act that formed the state in 1906.[203] Citing examples from case law, the Court demonstrated that it has historically considered the reservations to exist within state jurisdiction.[204] This tautological argument, as Justice Gorsuch pointed out in the *McGirt* opinion, "would be the rule of the strong, not the rule of law."[205]

Some Native American public figures also found themselves divided on the *Castro-Huerta* ruling. Wayne L. Ducheneaux II, executive director of the Cheyenne River Sioux Tribe, disagrees with the majority and argues instead that public safety actually decreases with state jurisdiction.[206] In 1953, several states opted, through a congressional act, Public Law 280 ("PL-280"), to turn criminal jurisdiction for crimes on

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[197] *Justice Ruth Bader Ginsburg Passes, Justice Amy Coney Barrett Seated as Replacement*, PROJECT PRESS (Am. Bar Ass'n Death Penalty Representation Project), Jan. 25, 2021, https://perma.cc/SQ3D-5AET.

[198] *See* Ducheneaux, *supra* note 191 ("*Oklahoma v. Castro-Huerta* sets an unfortunate new precedent: [S]tates have jurisdiction over Native lands, unless Congress acts directly to limit this power or it's determined that states' jurisdiction unlawfully infringes on Tribal sovereignty.").

[199] Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2491-92 (2022).

[200] *Id.* at 2490, 2505.

[201] *Id.* at 2505 (Gorsuch, J., dissenting) (alteration in original) (citation omitted).

[202] *Id.* at 2502 ("*Worcester* rested on a mistaken understanding of the relationship between Indian country and the States. . . . By 1880 the Court no longer viewed reservations as distinct nations.").

[203] *Id.* at 2503; *see id.* at 2514 (Gorsuch, J., dissenting).

[204] *Id.* at 2493-94.

[205] McGirt v. Oklahoma, 140 S. Ct. 2452, 2474 (2020).

[206] Ducheneaux, *supra* note 191.

Indian land over from the federal government to the state.[207] PL-280 is mandatory in Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin and optional in Florida, Idaho, and Washington.[208] The Tribal Law and Order Act of 2010 allows tribal governments to appeal state jurisdiction, but states and tribal governments must be in agreement about ending the PL-280 jurisdiction.[209] Ducheneaux claims that states that have adopted PL-280 added uncertainty and confusion to the criminal legal system; state jurisdiction strains state budgets and law enforcement capacity with unnecessary redundancies; and functional relationships between law enforcement agencies have been damaged, resulting in a loss of services.[210] He also identifies potential impacts beyond public safety risks, citing the threat to tribal economic development, as the ruling potentially "signals the Court's interest in expanding states' civil jurisdiction" and opens the door to "undermine" regulatory legislation that benefits tribal members, including the Violence Against Women Act and the Indian Child Welfare Act ("ICWA").[211] Others, such as David Heska Wanbli Weiden, a citizen of the Rosebud Sioux Tribe and professor of Native American studies, disagree and instead believe that the move from state to federal jurisdiction over serious felony offenses involving Indigenous peoples on reservations has decreased public safety, particularly for Native women, because federal authorities may and often do decline to prosecute reported crimes.[212]

An adjacent case is *Denezpi v. United States*, which addressed whether prosecution of crimes in both tribal courts and federal courts for "distinct offenses arising from a single act" constituted double jeopardy.[213] Justice Barrett wrote for the majority, which held that Merle Denezpi, accused of assault and battery, terroristic threats, and false imprisonment,[214] was not tried for the same crime twice because the criminal codes of each jurisdiction were different.[215] Amanda L. White Eagle,

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[207] Press Release, U.S. Att'y's Off., Dist. of Minn., Frequently Asked Questions About Public Law 83-280, https://perma.cc/CQ6E-MTK5 (May 1, 2015).

[208] *Id.*

[209] *Id.*

[210] Ducheneaux, *supra* note 191.

[211] *Id.*

[212] David Heska Wanbli Weiden, Opinion, *This 19th-Century Law Helps Shape Criminal Justice in Indian Country*, N.Y. TIMES (July 19, 2020), https://www.nytimes.com/2020/07/19/opinion/mcgirt-native-reservation-implications.html (on file with CUNY Law Review).

[213] 142 S. Ct. 1838, 1840, 1842-43 (2022).

[214] *Id.* at 1844.

[215] *Id.* at 1849; *see* Amanda L. White Eagle, *Amy Coney Barrett Sidestepped a Critical Detail About the History of Tribal Courts in SCOTUS' Double Jeopardy Decision*, SLATE (June 16, 2022, 2:02 PM), https://perma.cc/EJM2-4P6G.

who collaborated on an amicus brief with the Native Amicus Briefing Project, defined the issue as "whether the Ute Mountain Ute Court derives its prosecutorial power from the sovereign power of the tribe or the federal government."[216] White Eagle agreed with the holding, but not with the reasoning. For her, "a tribe's prosecutorial authority stems from its inherent sovereignty authority and not from a grant of federal authority, as Gorsuch argued in his dissent."[217] *Denezpi* sparks questions about a variation on the above criminal jurisdiction cases and asks the Court to further define its position on the true source of tribal authority.

C. The Environmental Stakes of Native American Sovereignty

Threats to Native American sovereignty are threats to the well-being of the natural world. Though it is important not to essentialize or romanticize Indigenous people or suggest that they are homogenous in values and political goals, including with respect to environmentalism,[218] Indigenous people globally have tended to protect land and natural resources from exploitation and destruction, while state governments have tended to enable the irresponsible use of land.[219] Indigenous people have achieved this protection through strategies like litigation, protests, monitoring and patrolling, mapping, and registering and titling land.[220] They steward 80% of the world's biodiversity, despite representing just 5% of the world's population.[221] In the United States, there has been an increased effort to transfer lands back to Native American ownership and partner with tribes to co-manage conserved lands to improve biodiversity and other indicators of ecosystem health.[222] David Treuer, an Ojibwe writer and Professor of English,[223] contextualized the historical significance of the return of land and control, writing, "The total acreage

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[216] White Eagle, *supra* note 215.

[217] *Id.*

[218] *See* Francesca McGregor, *The First Environmentalists: A Dangerous Stereotype?*, MANCHESTER HISTORIAN (May 11, 2020), https://perma.cc/36RD-CNLM.

[219] Eugenia Recio & Dina Hestad, *Indigenous Peoples: Defending an Environment for All*, INT'L INST. FOR SUSTAINABLE DEV. (Apr. 22, 2022), https://perma.cc/39H2-JZN3; *see also* Joseph Lee, *The World Spends Billions to 'Protect' Indigenous Land. Only 17% Goes to Indigenous Peoples.*, GRIST (Oct. 6, 2022), https://perma.cc/QH5H-GB85.

[220] Peter Veit, *5 Ways Indigenous Groups Are Fighting Back Against Land Seizures*, WORLD RES. INST. (June 20, 2018), https://perma.cc/53XN-YCCG.

[221] Gleb Raygorodetsky, *Indigenous Peoples Defend Earth's Biodiversity—but They're in Danger*, NAT'L GEOGRAPHIC SOC'Y (Nov. 16, 2018), https://www.nationalgeographic.com/environment/article/can-indigenous-land-stewardship-protect-biodiversity- (on file with CUNY Law Review).

[222] *See* Jim Robbins, *How Returning Lands to Native Tribes Is Helping Protect Nature*, YALE ENV'T 360, https://perma.cc/G5V3-2VDT (June 4, 2021).

[223] *About: Bio*, DAVID TREUER, https://perma.cc/9K34-FPDP (last visited Feb. 28, 2023).

would not quite make up for the General Allotment Act, which robbed us of 90 million acres, but it would ensure that we have unfettered access to our tribal homelands."[224]

A new movement, Land Back, is not afraid to use civil disobedience tactics to "tak[e] land back under Indigenous control and protection that was never legally ceded in the first place."[225] This movement is growing in power and momentum. In 2019, the Wet'suwet'en people, like demonstrators at Standing Rock, blockaded a gas pipeline, and the Canadian government called in paramilitary troops to break up the protests.[226] Because the Land Back movement had been organizing, the Wet'suwet'en were able to call on their network for support and resist the troops.[227] The movement is attracting non-Indigenous allies as well, because "more non-Indigenous Canadians, especially young people growing up in the midst of the climate crisis, are beginning to understand that when Indigenous people get their land back, the land itself begins to heal and we are all safer."[228]

At the forefront of present efforts, Indigenous lawyers, activists, and academics, along with their allies, are making explicit the connections among land, sovereignty, the environment, justice, and history. Some legal groups such as the Water Protector Legal Collective, which emerged in response to supporting Dakota Access Pipeline frontline demonstrators, focus on a range of interconnected issues including protecting sacred sites and enforcing corporate accountability.[229] Others, like the National Congress of American Indians, work on the public policy front to advance many of the same goals.[230] Regardless of the arena and approach, Riyaz Kanji, who represented the Muscogee (Creek) Nation in *McGirt*, says on his firm's website, "In every dispute or decision facing an Indian tribe or nation, some principle of tribal sovereignty is at stake, even if it is not always apparent on the surface."[231]

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[224] David Treuer, *Return the National Parks to the Tribes*, ATLANTIC (Apr. 12, 2021), https://perma.cc/8GL5-TGS7.

[225] Kanahus Manuel & Naomi Klein, Opinion, *'Land Back' is More Than a Slogan for a Resurgent Indigenous Movement*, GLOBE & MAIL (Nov. 19, 2020), https://perma.cc/FN4H-52X9.

[226] *Id.*

[227] *See id.*

[228] *Id.*

[229] *Our Work*, WATER PROTECTOR LEGAL COLLECTIVE, https://perma.cc/E9R3-QDTH (last visited Feb. 28, 2023).

[230] *Mission & History*, NAT'L CONG. OF AM. INDIANS, https://perma.cc/Y6ZZ-G3AU (last visited Feb. 28, 2023).

[231] *The Firm*, KANJI & KATZEN P.L.L.C., https://perma.cc/YG6D-SJZQ (last visited Feb. 28, 2023).

Just how far could the sovereignty case decision have extended? Alec F. Mouser posits that *McGirt* could be used not just to restrict a state's incursion into Native lands but also to prevent states from encroaching on other treaty rights.[232] Mouser analogizes the case to *Washington v. United States*, in which tribes located in Washington State sued the state for injunctive relief that would restore fish passage through culverts. They argued that tribal fishing rights were protected by the Stevens Treaties,[233] a series of negotiated agreements between Washington Territory and a consortium of tribes living on or near the land that would become Washington State.[234] In addition to providing for exclusively tribal reservations, the treaties preserved tribal members' rights to continue traditional activities such as fishing and hunting outside the bounds of reservations.[235] Fishing was such an important part of people's lives during the time the treaties were negotiated that tribes agreed to accept the terms because they ensured fishing rights.[236] Governor Isaac Stevens, after whom the treaties were named, "repeatedly assured the Indians that there always would be an adequate supply of fish."[237] Yet, Washington's failure to adequately regulate environmental protection led to a decrease in fish runs that the tribes argued violated the Stevens Treaties.[238] Mouser drew a parallel between *Washington* and *McGirt* by highlighting the dissent's claims that enforcing the decision would be impractical.[239] Yet, according to Justice Gorsuch, a state's ease in enforcing treaty rights should be irrelevant to the interpretation of treaties.[240]

Tribes are not alone in recognizing the potential of the *McGirt* and *Washington* decisions to advance environmental protections. With "40 percent of Oklahoma's total monthly oil and gas production" coming from the lands the Court recognized as Indigenous in *McGirt*, and the lands also being "home to the global oil pricing hub of Cushing," the oil

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[232] Alec F. Mouser, Note, *There's Something Fishy About* McGirt*: The Decision's Hidden Effects on Indian Treaty-Based Fishing Rights in the Pacific Northwest*, U. CHI. L. REV. ONLINE (Aug. 13, 2021), https://perma.cc/2325-7CYM.

[233] *Id.*; United States v. Washington, 853 F.3d 946, 954 (9th Cir. 2017), *aff'd by an equally divided court*, 138 S. Ct. 1832 (2018).

[234] *Treaty History with the Northwest Tribes*, WASH. DEP'T OF FISH & WILDLIFE, https://perma.cc/GXE5-2HNS (last visited Feb. 28, 2023).

[235] *Id.*

[236] United States v. Washington, 853 F.3d at 964.

[237] *Id.*

[238] Mouser, *supra* note 232.

[239] *Id.*

[240] *Id.* (quoting McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020)).

and natural gas industries took notice.[241] Oklahoma Governor Kevin Stitt established the insidiously named Commission on Cooperative Sovereignty, which was made up mostly of oil and gas industry representatives, to respond to *McGirt*.[242] Unsurprisingly, the Commission lacked Indigenous representation.[243] It put forward public-facing campaigns allegedly seeking equality under law between Native and non-Native Oklahomans, which some understood to be disingenuous, as they ignored foundational facts about Oklahoma's history and the inequalities Indian law emerged to address.[244] A.J. Ferate, Vice President of Regulatory Affairs for the Oklahoma Independent Petroleum Association, said in a webinar that "he believed the fight against *McGirt* could take 40 years or more to play out and that a 'piecemeal' approach of gaining legal clarity, one issue at a time, would be necessary."[245]

Colonial impulses may take less obviously brutal forms in the United States than they once did, but they have not left. The significance of eroding the rights of some of the nation's most committed guardians of preserved land should be clear—especially in light of global resource depletion, mass extinction, and the high likelihood of more resource wars. But just as the oil industry is making efforts to erode Indigenous sovereignty in order to steal Indigenous resources, Indigenous lawyers are working on many fronts and within many frameworks to return land and restore rights, or create new ones.[246]

V. FRAMEWORKS FOR NATIVE AMERICAN SOVEREIGNTY

A. Political Designation, a Necessary but Insufficient Protection

The legislature and the courts have upheld, and continue to uphold, the settler-colonial worldview, one premised on European superiority that "encode[s] and reproduce[s] the unequal relationships into which Europeans coerce[] the populations concerned."[247] The formation of the United States has been made possible through the racialization of Indig-

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[241] Alleen Brown, *Inside the Oil Industry's Fight to Roll Back Tribal Sovereignty After Supreme Court Decision*, INTERCEPT (Mar. 10, 2021, 9:51 AM), https://perma.cc/7CXC-DQSE.

[242] *Id.*

[243] *Id.*

[244] *Id.*

[245] *Id.*; *A.J. Ferate: Biography*, SPENCER FANE L.L.P., https://perma.cc/WDX4-TMVW (last visited Feb. 25, 2023).

[246] *Land Reparations & Indigenous Solidarity Toolkit*, RES. GENERATION, https://perma.cc/9BNF-BPCN (last visited Feb. 25, 2023).

[247] Wolfe, *supra* note 17, at 387.

enous and Black people.[248] Whereas notions of white supremacy racialized Black people as enslaved due to their Blackness regardless of appearance (i.e., through blood quanta), Indigenous identity was always under threat of erasure by a legal system that equated Indian ancestry with Indigeneity and thereby Native peoples' existence and sovereignty.[249] As this Note has explored, the U.S. government has alternated between regarding Native Americans as likely to become "extinct" through conquest and "inferiority" and regarding assimilation to be their only salvation.

Is "Indian" a political designation, or a racial one? If "Indian" were legally a racial designation, two major complications would immediately threaten Native American sovereignty. The first would be determining who qualifies as Native American and whether that carries any legal significance, and the second would be that any protections designed to remedy past harms would be open to claims of Equal Protection Clause violations. The alternative to racial designation is political designation on the basis of tribal membership, yet it is the federal government, through the Office of Federal Acknowledgment, that holds the power to grant or deny recognition to a tribal nation.[250] This can be a site of controversy when there are conflicting claims to tribal leadership—for example, among opposing groups within the Cayuga nation.[251] Some Cayugas argue that the current leadership, which has been disenfranchising some citizens, is too consolidated and should be organized in a more traditional way, which was to spread out power.[252] When they appealed to the Bureau of Indian Affairs to intervene, the Bureau told them they should work out their dispute internally.[253]

Conflict is an inevitable part of membership in any group or nation, and one source of conflict may be the question of who gets to be a member. Before the Trail of Tears, some members of the "Five Civilized Tribes," particularly those who enslaved African people, believed

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[248] *Id.*

[249] Code Switch, *So What Exactly Is 'Blood Quantum'?*, NPR (Feb. 9, 2018), https://perma.cc/Y3PS-C6ZW.

[250] *Office of Federal Acknowledgement (OFA)*, U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFS., https://perma.cc/B3C9-PFBZ (last visited May 3, 2023).

[251] Jesse McKinley, *Bulldozing. Kidnapping Claims. Inside a Battle Over a Tribe's Future.*, N.Y. TIMES, https://www.nytimes.com/2023/03/13/nyregion/cayuga-nation-tribe-new-york.html (Mar. 14, 2023) (on file with CUNY Law Review).

[252] *Id.*

[253] *Id.*; Mark Weiner, *Feds Tell Cayuga Indian Nation to Settle Bitter Power Struggle Without U.S. Interference*, SYRACUSE.COM (Feb. 25, 2015, 11:08 PM), https://perma.cc/2DV3-K6W3.

themselves to be of the same social status as white settlers.[254] Nonetheless, most white settlers disagreed; adjacency to whiteness could not protect the "Five Civilized Tribes" from the genocidal threat of colonial expansion.[255] Yet, Cherokee women frequently married white men, and both groups viewed these marriages as strategically advantageous.[256] In 1835, prior to the Trail of Tears, a census of Cherokees living east of the Mississippi River counted 16,542 Cherokee people, 201 of whom had white spouses, along with 1,592 enslaved Black people.[257] Though interracial families clearly formed, these histories have led a larger-than-accurate number of both Black and white Americans to catch "Cherokee great-grandmother" syndrome, the tendency to romanticize one's family history by including a fictional female Cherokee ancestor.[258] A popular component of this myth, particularly among white Southerners, is to remember the Cherokee ancestor as a "princess," though the Cherokee did not observe a social system that would have included a role resembling princess.[259] Sometimes the vague folklore is a conscious lie about Indigenous heritage by, for example, a group of Canadian academics, who have been labeled "pretendian."[260]

The issue with tying rights or benefits to ancestry is that doing so ignores the cultural components of racialized experience, assuming race to be strictly biological. For example, blood quanta were used during allotment to determine how much land a person would be eligible to receive.[261] It can be difficult to tell from data who claims Native American identity and what that means to any given person, in part because "Indian" is recognized as a political designation, and in part because census categories fail to account for nuance (e.g., someone with roots in an Indigenous community in Central America may be listed as Indigenous, Hispanic/Latino, or both).[262] A person with a larger percentage of Native

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[254] Ryan P. Smith, *How Native American Slaveholders Complicate the Trail of Tears Narrative*, SMITHSONIAN MAG. (Mar. 6, 2018), https://perma.cc/2XWY-CNJR.

[255] *Id.*

[256] Gregory D. Smithers, *Why Do So Many Americans Think They Have Cherokee Blood?*, SLATE (Oct. 1, 2015, 5:35 AM), https://perma.cc/5BC8-97FH.

[257] Jerry Clark, *Introduction to* U.S. DEP'T OF THE INTERIOR, OFF. OF INDIAN AFFS., EASTERN CHEROKEE CENSUS ROLLS, 1835-1884 4 (2005), *microformed on* M1773 (Nat'l Archives), https://perma.cc/TNR3-DX7H.

[258] Smithers, *supra* note 256.

[259] *Id.*

[260] Vjosa Isai, *Doubts over Indigenous Identity in Academia Spark 'Pretendian' Claims*, N.Y. TIMES (Oct. 15, 2022), https://perma.cc/KU84-GGDN.

[261] Kylie Rice*, Blood Quantum and Its Role in Native Identity*, INDIGENOUS FOUND., https://perma.cc/YX93-C2V5 (last visited May 3, 2023).

[262] Mark Trahant*, Indigeneity's Data Dilemma*, SOURCE N.M. (Apr. 17, 2023, 4:05 AM), https://perma.cc/BK5N-MCAQ.

American heritage but who is not actively engaged with a tribal nation may hesitate to self-identify. Alternatively, a person can have a small amount of Native American heritage but be an active and registered member of a tribal nation. Asking why a large portion of both multiracial and single-race American Indians decided not to list a tribal affiliation on their Census 2000 forms, a study posits:

> As the public understanding of "race" becomes more nuanced, and the right to racial self-definition becomes more engrained in American culture, it can be difficult to understand what people intend to communicate when they answer formal or official questions about their race. They may be reporting how they see themselves or how others see them; they may be reporting their most salient heritage or their entire family tree; they may be trying to communicate an identity that does not fit into a listed category; or they may not find the question meaningful at all.[263]

Whether "Indian" is a political or racial classification also affects the status of legislative acts. In the realm of family law, *Haaland v. Brackeen*, is seemingly about the rights of non-Indian parents to adopt Indian children, but it is loaded with issues of tribal sovereignty.[264] In *Brackeen,* the plaintiffs challenged ICWA, the 1978 law that aimed to prevent the long-standing American tradition of harming Indigenous families by removing children to raise them in boarding schools and non-Indian homes.[265] The Brackeens, a non-Indian couple trying to adopt a Navajo child, charged ICWA with racial discrimination against non-Indian parents, while ICWA's defenders argued that "Indian" is a political category rather than a racial one.[266] The Supreme Court decided for Haaland in June 2023, affirming Congress' constitutional (plenary and exclusive) power to "legislate with respect to the Indian tribes."[267]

While an analysis can go only so far in determining the motives of the parties, their attorneys, and the organizations involved in *Brackeen*, the arguments put forth by the Brackeens' attorney, Matthew McGill, echoed those he made in a suit on behalf of a non-Indian-owned gaming company that, if successful, would have undone the Indian Gaming

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[263] Carolyn A. Liebler & Meghan Zacher, *American Indians Without Tribes in the 21st Century*, 36 ETHNIC & RACIAL STUD. 1910 (2013), https://perma.cc/433V-WWKY.

[264] Rebecca Nagle, *The Supreme Court Case That Could Break Native American Sovereignty*, ATLANTIC (Nov. 8, 2022), https://www.theatlantic.com/ideas/archive/2022/11/scotus-native-american-sovereignty-brackeen-v-haaland/672038/ (on file with CUNY Law Review).

[265] *Id.*

[266] *Id.*

[267] Haaland v. Brackeen, 143 S. Ct. 1609, 1627 (2023).

Regulatory Act, which, like ICWA, relies on a political rather than racial understanding of "Indian."[268] Bloomberg Law's Vivia Chen writes that McGill "can't dodge the pile of evidence that undermining American Indian rights appears to be part of a business strategy," and she notes that his firm also represents Chevron and Shell.[269] Though for now ICWA is safe, a Court decision that "Indian" is a racial classification, or that takes power away from the legislature, could have adverse implications for other congressional acts such as the Indian Tribal Energy Development and Self-Determination Act Amendments of 2017, which expands tribal control of natural resources.[270]

Even the Major Crimes Act, upon which the decisions in *McGirt* and *Castro-Huerta* hinged, faced an unsuccessful challenge on equal protection grounds because of its regulation of Indian affairs.[271] The challenge failed because, while the Supreme Court acknowledged there was disparity in federal and Idaho laws, the Court found that "federal regulation of Indian affairs [was] not based upon impermissible classifications. Rather, such regulation [was] rooted in the unique status of Indians as 'a separate people' with their own political institutions."[272] These constitutionally enshrined protections should not be discarded lightly, despite their paternalistic underpinnings, because without them, many rights Native Americans have fought to secure would be in free-fall. Yet the analysis must not end with a political classification framework, which is limited in its ability to imagine the fullest future possible for Native American people.

B. Decolonization, a Framework in Formation

The decolonization framework identifies the source of Indigenous sovereignty as being rooted in peoples' relationship to the land they lived on prior to collective dispossession, rather than through legally codified relationships between tribal nations and the federal government.[273] Although the term "decolonization" has historically referred to

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[268] Vivia Chen, *Why Gibson Dunn's 'Best Interest of the Child' Has a Dark Side*, BLOOMBERG L. (Nov. 11, 2022, 6:00 AM), https://perma.cc/D8CP-35X3.

[269] *Id.*

[270] *See Senate Passes Hoeven Bill to Streamline Tribal Energy Development*, U.S. SENATE COMM. ON INDIAN AFFS. (Nov. 30, 2017), https://perma.cc/P5WG-AQF4.

[271] *See generally* United States v. Antelope, 430 U.S. 641 (1977). In *Antelope*, the respondents argued that they were denied equal protection because they were Indians charged with felony murder under federal law, which would not have applied to non-Indians in state court because the State of Idaho did not recognize the doctrine at the time. *Id.* at 643.

[272] *Id.* at 646.

[273] *See* Christine DeLucia et al., *Histories of Indigenous Sovereignty in Action: What Is It and Why Does It Matter?*, ORG. OF AM. HISTORIANS, https://perma.cc/NK2C-JYXT (last visited May 3, 2023).

colonized people seizing political independence,[274] colonization as a global project justified by notions of cultural supremacy has taken many forms, and likewise decolonization may have different meanings based on the context of how colonization unfolded (or is unfolding) in a particular place. Scholars have sought to classify types of colonialism, with some breaking down at least twelve distinct types;[275] two main types that seem to emerge frequently are settler colonialism (dispossession of an Indigenous population in order to seize their land) and exploitation colonialism (where the colonial goal is to control the people, land, and resources, but not necessarily to expel the people, because the colonial power "needs" their labor).[276] The difference between these two forms of colonialism is that while exploitation colonialism may have a conceivable end if the colonized rise up against the colonizer, settler colonialism exists on the premise that it is a progressive and irreversible process.[277] Settler colonialism is uniquely "resistant to decolonisation" and, as a result, "tells a story of either total victory or total failure."[278]

Despite these obstacles, there is a growing movement to work with the concept of decolonization and parse its meanings. The popular phrase "Decolonize Your Mind" is for some a call to reflect on one's social conditioning and the ways colonization has influenced it.[279] But the concept has been watered down: There are t-shirts bearing the slogan (available for sale on Amazon);[280] a Hungarian psychedelic band has taken the name "Decolonize Your Mind Society";[281] and how-to-decolonize-your-mind guides cluttering the internet include advice like "Don't be a man-splainer."[282] Compare these definitions with the idea that a decolonial future may necessitate social and ecological collapse of

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[274] *See Decolonization*, UNITED NATIONS, https://perma.cc/4NZF-5JZT (last visited May 3, 2023).

[275] *See* Nancy Shoemaker, *A Typology of Colonialism*, PERSPECTIVES ON HISTORY (Oct. 1, 2015), https://perma.cc/X38Y-KJ4E.

[276] Robert Longley, *What Is Colonialism? Definition and Examples*, THOUGHTCO. (Feb. 16, 2021), https://perma.cc/QNG4-ELDS.

[277] *See* Lorenzo Veracini, *Settler Colonialism and Decolonisation*, 6 BORDERLANDS E-JOURNAL, Oct. 2007, https://perma.cc/N96F-KBBQ.

[278] *Id.*

[279] *How to Decolonize Your Mind*, SUSIE FISHLEDER (July 15, 2022), https://perma.cc/U8HS-F3HN.

[280] *Decolonize Your Mind Shirt Tee Top*, AMAZON, https://perma.cc/8V4Z-9VHW (last visited May 5, 2023).

[281] Decolonize Your Mind Society, *A Courteous Invitation to an Uninhabited Anabatic Prism*, BANDCAMP, https://perma.cc/63YW-Y9KJ (last visited May 3, 2023).

[282] Tari Ngangura, *How to Decolonize Your Mind*, GOETHE-INSTITUT, https://perma.cc/5RBN-A3QY (last visited May 3, 2023).

the systems upholding the current capitalist order.[283] Many other usages fall along the axes between superficiality, appropriation, vagueness, good intentions, and nihilism. This may not be all bad—that so many people want to claim the word "decolonization" for their own interpretation is testament to its power and resonance.

What a decolonization consciousness does seem to require is an understanding that colonization is ongoing and not a mere relic of past centuries.[284] It also means going beyond the social justice goal of inclusion to recognize that, as uncomfortable as it may be for non-Indigenous inhabitants of the land, for decolonization to be meaningful, it must involve material redistribution.[285] Anything short of that is a form of mental gymnastics, a move to settler innocence, with the effect of assuaging non-Indigenous guilt or shame while avoiding meaningful action.[286] While land is the obvious medium for this material redistribution, there are others as well, for example through recent efforts to build Native American data sovereignty[287] and return stolen Native American art from galleries.[288] Working within the colonizer's legal system, attorneys have the opportunity to use existing legal doctrines to support specific decolonization efforts, for example, by defending Native American activists who use direct action tactics to secure their land from the extractive industry's incursion.[289]

Nikki Sanchez, an Indigenous media maker and environmental educator,[290] in a speech about decolonization, quotes a prophecy from her own Mayan ancestry: that, for the first time in human history, "the eyes of the serpent can see through the eyes of the eagle," meaning that "the eyes of the North and the eyes of the South can actually see through one another's eyes and begin to work together and understand each other's

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[283] *See Preparing for the End of the World as We Know It*, GESTURING TOWARDS DECOLONIAL FUTURES, https://perma.cc/64XR-PEJK (last visited May 3, 2023).

[284] Kyle Powys Whyte, *White Allies, Let's Be Honest About Decolonization*, YES! MAG. (Apr. 3, 2018), https://perma.cc/G2QX-6PCX.

[285] Eve Tuck & K. Wayne Yang, *Decolonization Is Not a Metaphor*, DECOLONIZATION: INDIGENEITY, EDUC. & SOC'Y, 2012, at 1, 21.

[286] *Id.* at 16-17.

[287] *Native Data Sovereignty: A Summary*, NATIVE LAND INFO. SYS., https://perma.cc/RBP6-TVAA (last visited May 5, 2023) (explaining that Native communities can take control of the data collected by the U.S. government on their lands and about their members and hold these institutions accountable).

[288] *Protecting National Treasures: Stolen Artifacts Returned to Native American Tribes*, U.S. DEP'T OF JUST., FED. BUREAU OF INVESTIGATION (Oct. 1, 2003), https://archives.fbi.gov/archives/news/stories/2003/october (on file with CUNY Law Review).

[289] *See generally Our Legal Work*, WATER PROTECTOR LEGAL COLLECTIVE, https://perma.cc/9UPB-4D86 (last visited May 5, 2023).

[290] *About Nikki*, DECOLONIZE TOGETHER, https://perma.cc/UX4J-EX83 (last visited May 5, 2023).

worldviews," and that "whether we like it or not, colonization is a messy and shameful history that connects us all."[291] Modern technology and in particular social media has given us access to one another's eyes, but our bodies still bear the weight of history unequally. Reconciling the gap between knowledge and action is the challenge of this era. How do we go from land acknowledgements to reparations? The decolonization framework offers a starting place, and the ability to see the law's potential to achieve a more liberatory purpose.

VI. CONCLUSION

The law has long been an accomplice to genocide, dispossession, and ecological devastation. Nothing, no amount of fear, greed, ignorance, or delusion, can justify it. Each generation has included people who have realized this. Whether by spreading knowledge, by confronting colonial forces with direct action, or by using the law to expose hypocrisy and express demands, Native American people have never stopped resisting.

LaDonna Brave Bull Allard died in 2021 at the age of 64.[292] In 2018, she spoke at the United Nation's Permanent Forum on Indigenous Issues about her long struggle to oppose the Dakota Access Pipeline. Across the table sat Michelle Cook, founder of Divest Invest Protect. The two had been working together, and Ms. Cook addressed Ms. Brave Bull Allard and said:

> We have no other choice but to act; we must act. We have no other choice. And I'm very thankful for the opportunity and for the invitation, to stand with you, because it changed my life for the better. And so I'm so thankful for your invitation, and I would not change my choices, and I have no regrets, and I'm thankful to stand with you, Ms. LaDonna Brave Bull Allard. And we will have justice, and we will have truth, and we're not going to give up. On each other, on this land, or [on] all the Indigenous peoples all over the world. And I love you so much, and I'm sorry—I'm sorry that this happened.[293]

People from all over the world had come to New York to the United Nations building, crowded into a too-small room, and we were listening.[294]

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[291] TEDx Talks, *Decolonization is for Everyone: Nikki Sanchez*, YOUTUBE, at 09:12, (Mar. 12, 2019), https://www.youtube.com/watch?v=QP9x1NnCWNY&t=10s.

[292] Chavez & Pember, *supra* note 5.

[293] Allard Video, *supra* note 1.

[294] Author's recollection.