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Permanent Homelands Through Treaties with the United States: Restoring Faith in the Tribal Nation-U.S. Relationship in Light of the McGirt Decision

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PERMANENT HOMELANDS THROUGH TREATIES WITH THE UNITED STATES: RESTORING FAITH IN THE TRIBAL NATION-U.S. RELATIONSHIP IN LIGHT OF THE *MCGIRT* DECISION

Angelique EagleWoman[†] (*Wambdi A. Was'te Winyan*)[††]

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I. INTRODUCTION

In North America, Indigenous peoples have lived, governed, stewarded, and spiritually connected to places, territories, and homelands since time immemorial.[1] With European invasion in the Western Hemisphere, genocide was perpetrated along the east coast of the continent and spread to other areas. Turtle Island, as it is lovingly called by Indigenous peoples, was given to Native peoples by the Creator.[2] By the late 1400s to 1700s, invaders caused the lands to be a bloody battleground as the Europeans, including the British, Dutch, French, Portuguese, Russian, and Spanish, brought their conflicts over power and territory to this hemisphere.[3] Early on, Tribal Nations engaged in commerce with the newcomers, but soon turned to defending their peoples and lands.[4]

As Europeans targeted the Western Hemisphere for exploitation of natural resources by the fifteenth and sixteenth centuries,[5] the Native peoples in Central America were subjected to enslavement, torture, and complete annihilation as the European Spanish male military seized Native lands and resources that had been stewarded and were intended for future generations of Native societies.[6] The encomienda system established by Spanish colonizers condemned Indigenous peoples to lives of forced labor, every form of abuse and maltreatment, and the attempted destruction of

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ǂǂ My Dakota name is included. This Article is dedicated to the amazing law students I have had the honor to teach throughout my years as a law professor. To those who now represent Tribal Nations, I encourage you to keep holding on to a vision of justice for the generations to come.

[1] *See* Angelique EagleWoman, *Indigenous Historic Trade in the Western Hemisphere*, *in* INDIGENOUS PEOPLES AND INTERNATIONAL TRADE: BUILDING EQUITABLE AND INCLUSIVE INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS, 43, 44–45 (John Borrows & Risa Schwartz eds., 2020) [hereinafter EagleWoman, *Indigenous Historic Trade*].

[2] Joyce Tekahnawiiaks King, *The Value of Water and the Meaning of Water Law for the Native Americans Known as the Haudenosaunee*, 16 CORNELL J.L. & PUB. POL'Y 449, 466 (2007).

[3] Angelique EagleWoman, *Tribal Nation Economics: Rebuilding Commercial Prosperity in Spite of U.S. Trade Restraints—Recommendations for Economic Revitalization in Indian Country*, 44 TULSA L. REV. 383, 388–89 (2008).

[4] *See* ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLES' HISTORY OF THE UNITED STATES 57–59 (2014).

[5] *See generally* JACK WEATHERFORD, INDIAN GIVERS: HOW THE INDIANS OF THE AMERICAS TRANSFORMED THE WORLD (1989).

[6] DUNBAR-ORTIZ, *supra* note 4, at 34, 59; Angelique EagleWoman, *The Ongoing Traumatic Experience of Genocide for American Indians and Alaska Natives in the United States: The Call to Recognize Full Human Rights as Set Forth in the United Nations Declaration on the Rights of Indigenous Peoples*, 3 AM. INDIAN L.J. 424, 426–28 (2015) [hereinafter EagleWoman, *The Ongoing Traumatic Experience of Genocide*].

Indigenous governance, culture, and spiritual ceremonies.[7] To the north, many Tribal Nations were willing to educate, enter peaceful relations, and develop longstanding treaty relationships with the men from British, Dutch, French, and Russian origins.[8] This willingness to trade, interact, and intermarry was viewed as an opportunity to exploit the lands, peoples, and cultures of the Western Hemisphere.[9]

For Tribal Nation leaders, the newcomers were often received with sympathy and allowed in the communal circle with hospitality.[10] A long tradition of alliances, confederacies, and treaty-making had been the norm in the Americas prior to European arrival.[11] The basis of the tribal worldview is kinship and obligations based on the status of relatives in an interdependent living world.[12] In some societies, prophecies foretold of cataclysmic change that would ensue upon the arrival of foreigners, but nothing could fully prepare the tribal governments sustainably managing large territories for the onslaught that occurred in the 1600s and 1700s across North America.[13]

II. DOCTRINE OF DISCOVERY, BRITISH TREATY-MAKING TO U.S. TREATY-MAKING

To justify the invasion and claiming of Indigenous peoples' homelands, Christianity and Roman Catholic church officials supplied doctrine and documentation granting authority to European monarchs to subdue Indigenous peoples, characterized as "pagans," "infidels," and non-Christians, establish authority over trade networks, and gain superior title to their lands.[14] "In fact, the language that English monarchs used in the charters they granted to the American colonists was derived from Pope Alexander VI's *Inter catera* ([1493]), the legal basis for Spanish possession

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[7] EagleWoman, *The Ongoing Traumatic Experience of Genocide*, *supra* note 6, at 426–28.
[8] *See* ROBERT WILLIAMS, LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800, 21–28 (1st ed. 1997).
[9] DUNBAR-ORTIZ, *supra* note 4, at 144.
[10] WILLIAMS, *supra* note 8, at 28.
[11] *Id.* at 32–33.
[12] EagleWoman, *Indigenous Historic Trade*, *supra* note 1, at 48–49.
[13] Stephen A. Colston, *"No Longer Will There Be a Mexico": Omens, Prophecies, and the Conquest of the Aztec Empire*, 9 AM. INDIAN Q. 239-258 (1985). For a recent example of the Black Snake Lakota prophecy and the resistance efforts to the Dakota Access Pipeline see Danielle Delaney*, Under Coyote's Mask: Environmental Law, Indigenous Identity, and #NODAPL*, 24 MICH. J. RACE & L. 299, 300 (2019); Andrew Rome, *The Black Snake on the Periphery: The Dakota Access Pipeline and Tribal Jurisdictional Sovereignty*, 93 N.D. L. REV. 57, 58 (2018).
[14] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.02[1] (Nell Jessup Newton ed. 2012) [hereinafter COHEN'S HANDBOOK].

of the Americas (except Brazil)."[15] The kings of England would assert authority to convert Indigenous peoples to Christianity as justification for invasion, monopolizing trade, and the seizing of Indigenous lands in charters.[16] Thus, Europeans, including British, Portuguese, and Spanish men, claimed superior title and authority by stepping foot on Indigenous lands armed with legal arguments based on the Christian doctrine of discovery.[17] "The Doctrine provided that Europeans automatically acquired property rights in native lands and gained governmental, political, and commercial rights over the indigenous inhabitants without their knowledge or consent."[18]

In the northernmost areas of the continent, British, French, and Dutch men infiltrated Indigenous commerce networks under the guise of partnership and kinship. They built wooden structures and declared themselves permanently established, although under legal principles, their claims were little more than squatters' rights. British, French, and Dutch men often sought Indigenous wives to garner the trust of commercial partners.[19] The abandonment of the Indigenous families that resulted upon the emigration of European women often deprived the first wives from a share in the commercial ventures made possible by those common law marriages.[20] With intermarriage and trade relationships, European officials began to understand certain aspects of Tribal Nations' governance, societal obligations, and territories.[21]

The British monarchy sent men under the authority of its charters to build warehouse structures and enter commercial relationships with promises of kinship and loyalty to Tribal Nations and peoples. Examples of this practice include the charters by King James I for the 1606 Virginia Company and the 1606 Plymouth Company,[22] and by King Charles II for the 1670 Hudson Bay Company.[23] These companies led to the British

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[15] James Muldoon, *Discovery, Grant, Charter, Conquest, or Purchase: John Adams on the Legal Basis for English Possession of North America*, *in* THE MANY LEGALITIES OF EARLY AMERICA, 31 (Christopher L. Tomlins & Bruce H. Mann eds., 2001).
[16] *Id.* at 34–36.
[17] Robert J. Miller, *American Indians, The Doctrine of Discovery, and Manifest Destiny*, 11 WYO. L. REV. 329, 330 (2011).
[18] *Id.*
[19] Bethany Berger, *After Pocahontas: Indian Women and the Law, 1830 to 1934*, 21 AM. INDIAN L. REV. 1, 25–28 (1997).
[20] *See id.* at 5, 26, 42.
[21] Kerry Abrams, *The Hidden Dimensions of Nineteenth Century Immigration Law*, 62 VAND. L. REV. 1353, 1409–13 (2009).
[22] *See* Blake A. Watson, *John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of "University Recognition" of the Doctrine of Discovery*, 36 SETON HALL L. REV. 481, 523-525 (2006).
[23] *See* Robert J. Miller, *The International Law of Colonialism: A Comparative Analysis*, 15 LEWIS & CLARK L. REV. 847, 869–872 (2011).

monarchy chartering colonies by the mid-1600s for permanent settlement in North America.[24] To ensure the longevity of these activities and monopolize certain aspects of trade, the British monarchy sought treaty agreements with Tribal Nation leadership.[25] Over time, land-hungry colonists defied British treaty relationships and began to claim territory from direct conveyances with Tribal Nations or simply by staking claim to tribal lands. French nationalists sought alignment with Tribal Nations against the British to continue their European-based tug-of-war.[26] This led to what is commonly referred to as the "French and Indian War" in North America, or the "Seven Years War" when referring to the conflict originating in Europe.[27]

In the aftermath of the war, King George III recognized the need to maintain boundaries as agreed upon with Tribal Nations.[28] Ironically, historians have referred to the tribal military actions during this time period as Indian "uprisings" rather than as actual wars against the European invaders.[29] To be clear, an uprising is defined as "a usually localized act of popular violence in defiance of usually an established government."[30] More accurately, Tribal Nations were defending their territories and governments against the uprisings of the opportunistic invaders from British and French backgrounds as tribal governments were the established governments in North America in the mid-1700s.

As the intentions of the British and French revealed themselves, Indigenous leaders demanded adherence to official agreements, alliances, and boundaries to ensure long-term peaceful interactions and stability.[31]

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[24] Watson, *supra* note 22, at 527–531.

[25] COHEN'S HANDBOOK, *supra* note 14, § 1.02[1].

[26] Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 424–25 (2003).

[27] *See id.* at 424.

[28] *Id.* at 425.

[29] *See* BERNARD KNOLLENBERG, ORIGIN OF THE AMERICAN REVOLUTION: 1759-1766, 103–04 (1960) (describing the tribal military efforts to expel the British from tribal territories from May 1763 to March 1764).

> Amherst's contribution to provoking the uprising is, however, only part of the story. The other is the failure of the British army, when the long-threatened rebellion at last broke out, to protect the Pennsylvania and Virginia frontiers from the horrors of Indian raids or to carry out Amherst's confident threat of prompt and crushing punishment of any Indians who might dare rebel.

Id.

[30] *Uprising*, MERRIAM-WEBSTER DICTIONARY ONLINE, https://www.merriam-webster.com/dictionary/uprising [https://perma.cc/ZAL4-4RD6].

[31] Michael C. Blumm, *Retracing the Doctrine of Discovery: Aboriginal Title, Tribal Sovereignty, and Their Significance to Treaty-Making and Modern Natural Resources Policy in Indian Country*, 28 VT. L. REV. 713, 722–23 (2004).

With the Royal Proclamation of 1763, issued by King George III of England in the aftermath of defeating French military forces aligned with some Tribal Nations, settlement by British subjects was curtailed west of the Appalachian Mountains in line with prior treaty agreements with Tribal Nations.[32] Relevant text of the Proclamation provided for the removal of British subjects as follows:

> And we do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described. or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.[33]

The Proclamation further denied legal authority or action by any individual seeking to purchase lands, and required information be supplied to government officials if Tribal Nation leaders expressed a willingness to sell their lands.

> And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians: In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where We have thought proper to allow Settlement[.][34]

Finally, this Royal Proclamation provided that individuals secure licenses to trade with Tribal Nations that were issued by British government officials. Various colonial governments enacted similar regulations for commercial transactions involving Indigenous tradespeople and British subjects.[35] As many colonists were land speculators, they were angered by the restraints imposed on seizing tribal lands.[36]

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[32] COHEN'S HANDBOOK, *supra* note 14, § 1.02[1].
[33] JOHN J. BORROWS & LEONARD I. ROTMAN, ABORIGINAL LEGAL ISSUES: CASES, MATERIALS & COMMENTARY 16 (5th ed. 2018).
[34] *Id.* at 16–17.
[35] COHEN'S HANDBOOK, *supra* note 14, § 1.02[1].
[36] *Id.*

A. *The Treaty of Niagara in 1764*

The next year, the largest gathering of Tribal Nations with British officials occurred, leading to the Treaty of Niagara entered on August 1, 1764.[37] The meeting was viewed as establishing a multinational agreement and implementing the Royal Proclamation of 1763 through assurances of alliance with the British representatives.[38]

> The treaty at Niagara was entered into in July and August of 1764, and was regarded as 'the most widely representative gathering of American Indians ever assembled,' as approximately two thousand chiefs attended the negotiations. There were over twenty-four Nations gathered with 'representative nations as far east as Nova Scotia, and as far west as Mississippi, and as far north as Hudson Bay.' It is also possible that representatives from even further afield participated in the treaty as some records indicate that the Cree and Lakota (Sioux) nations were also present at this event. It is obvious that a substantial number of First Nations people attended the gathering at Niagara. Aboriginal people throughout the Great Lakes and northern, eastern, and western colonial regions had travelled for weeks and months to attend this meeting.[39]

Yet, this historic event is largely left out of the history of North America. This event led to the expectation of good faith by Tribal Nations as they relied on statements and actions from the British officials and colonists present at the meeting. "At this gathering, a nation-to-nation relationship between settler and First Nation peoples was renewed and extended, and the Covenant Chain of Friendship, a multinational alliance in which no member gave up their sovereignty, was affirmed."[40] During the treaty council, in keeping with tribal political culture, the British officials exchanged gifts, wampum, and other items of value to demonstrate good faith within kinship relations.[41]

Following the rule of law, the British officials present at the meeting, under the authority of the King of England, promised to act in good faith towards the Tribal Nations and respect their lands and

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[37] John Borrows, *Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government*, *in* ABORIGINAL AND TREATY RIGHTS IN CANADA: ESSAYS ON LAW, EQUALITY, AND RESPECT FOR DIFFERENCE 155, 161, 169 (Michael Asch ed., 1997).
[38] *Id.*
[39] *Id.* at 163.
[40] *Id.* at 161.
[41] *Id.* at 163.

governments.[42] Within the tribal concept of kinship, both good faith and security in promises were viewed as adhering to a spiritual higher natural law sealed with gift exchanges, words of promise, and ceremonial prayers.[43]

B. British Colonies form the United States of America

Shifting sands once more permeated the foundation for Tribal Nation relations with the Europeans living in villages on Native soil when the British leaders of colonies rejected the authority of the British monarchy. This phase of British warfare has been commonly referred to as the American Revolution by U.S. historians, dated approximately 1775 to 1783.[44] As the rebellion gained traction, Tribal Nations were at times regarded as strategic allies, in some instances lending military forces and reinforcements.[45]

The United States issued a declaration of independence on July 4, 1776.[46] As the newly-formed nation-state, the first treaty it entered into was the Treaty with the Delawares on September 17, 1778.[47] Article II of the Treaty expressed "perpetual peace and friendship . . . through all succeeding generations."[48] In Article III, the Delaware Nation pledged to allow free passage of U.S. troops engaged in warfare with the King of England through Delaware lands, to provide "corn, meat, horses, or whatever may be in their power for the accommodation of such troops," and "such a number of their best and most expert warriors as they can spare."[49]

In return, the Delaware Nation received many promises. The United States pledged "to guarantee to the aforesaid nation of Delawares, and their heirs, all their territorial rights in the fullest and most ample

[42] COHEN'S HANDBOOK, *supra* note 14, § 1.02[1].
[43] *See* WILLIAMS, *supra* note 8, at 125.

> Indians insist on acts of commitment from their treaty partners—signs that human beings, in a world of diversity and conflict, can learn to trust each other. Smoking the pipe of peace, taking hold of a treaty partner by the hand, exchanging hostages, and presenting valuable gifts were just some of the ways human beings could demonstrate steadfast commitment to upholding their treaty relationships.

Id.
[44] *See, e.g.*, KNOLLENBERG, *supra* note 29, at xxi.
[45] *See* COHEN'S HANDBOOK, *supra* note 14, § 1.02[2].
[46] *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776).
[47] Treaty with the Delawares, Delaware-U.S., Sept. 17, 1778, 7 Stat. 13, *reprinted in* 2 INDIAN AFFAIRS: LAWS AND TREATIES 3 (Charles J. Kappler ed., 1904), https://dc.library.okstate.edu/digital/collection/kapplers/id/25854 [https://perma.cc/7NG3-MCCG] [hereinafter KAPPLER'S].
[48] *Id.* at Art. II.
[49] *Id.* at Art. III.

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manner."[50] The Delaware Nation was to invite other Tribal Nations to the confederation under the Treaty, with the Delaware Nation as the head.[51] In terms of political relationships, the United States further promised the Delaware Nation to "have a representation in Congress."[52] It should be noted that these promises were not kept by the United States as the Delaware Nation eventually was scattered by warfare and fought to establish a permanent homeland in what is now Oklahoma.[53]

III. PERMANENT HOMELANDS AND TREATY RELATIONSHIPS

As the former British subjects sought to gain property and establish land rights, treaty relationships were viewed as necessary tools for the expansion of the newly declared nation-state. The first U.S. president, George Washington, viewed treaties as expedient means to dispossess Tribal Nations of their lands, instead of engaging in warfare.[54] This was a far cry from the rule of law when Washington considered treaties with Tribal Nations.

For example, in a letter penned by Washington in 1783, he detailed his views on policy for Indian affairs to James Duane. Washington made clear his lack of principles or adherence to good faith with Tribal Nations.

> At first view, it may seem a little extraneous, when I am called upon to give an opinion upon the terms of a Peace proper to be made with the Indians, that I should go into the formation of New States; but the Settlemt. [sic] of the Western Country and making a Peace with the Indians are so analogous that there can be no definition of the other. For I repeat it, again, and I am clear in my opinion, that policy and occonomy [sic] point very strongly to the expediency of being upon good terms with the Indians, and the propriety of purchasing their Lands in preference to attempting to drive them by force of arms out of their Country; which as we have already experienced is like driving the Wild Beasts of the Forest which will return as soon as the pursuit is at an end and fall perhaps on those left there; when the gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire, both

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[50] *Id.* at Art. VI.
[51] *Id.*
[52] *Id.*
[53] Nekole Alligood, *The History of Delaware Nation*, DELAWARE NATION, https://www.delawarenation-nsn.gov/history/ [https://perma.cc/SW5G-ZRD7].
[54] *See* EagleWoman, *The Ongoing Traumatic Experience*, *supra* note 6, at 431–32.

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> being beasts of prey tho' [sic] they differ in shape. In a word there is nothing to be obtained by an Indian War but the Soil they live on and without that bloodshed and those distresses which helpless Women and Children are made partakers of in all kinds of disputes with them.[55]

From this statement of policy, the man who became the first leader of the United States of America did not intend to uphold the rule of law with Tribal Nations as he viewed tribal peoples as "beasts" and as "savage."[56] These racist views of American Indians as less than human and enemies were hidden in the formal treaty councils where U.S. officials traveled to the seats of tribal governments to enter into legal agreements.[57]

A. U.S. Constitution and Tribal Nations

With the adoption of the U.S Constitution on September 17, 1787, tribal governments and American Indians are mentioned only a few times. Tribal Nations were not parties, nor were they consulted on the document. In Article I, Section 8, the U.S. Congress has the authority "[t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[58] In the original Article I, Section 2, clause 3, a formula for taxation was set forth and contained the language "excluding Indians not taxed."[59] As American Indians were not citizens of the United States, no taxation was assessed, and state representation was tied to taxation.

The role of treaties in the U.S. Constitution is outlined in both the authority of the U.S. President, the U.S. Senate, and the hierarchy of federal law. Under the Presidential Power set forth in Article II, Section 2, the U.S. President has the authority as follows: "He shall have power, by and with the advice and consent of the Senate, to make treaties, provided

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[55] FRANCIS PAUL PRUCHA, DOCUMENTS OF UNITED STATES INDIAN POLICY 2 (2000).

[56] *See id.*

[57] Natsu Taylor Saito, *Race and Decolonization: Whiteness as Property in the American Settler Colonial Project*, 31 HARV. J. RACIAL & ETHNIC JUST. 31, 52 (2015).

> Within their system of property relations, the title they have granted themselves gives the settlers the right to forcibly remove American Indians from lands they have occupied since time immemorial, to slaughter them at will, to imprison them, and to dictate how they will live. By racializing Indians as savage, warlike, nomadic, and without law, the settlers have attempted to reconcile these actions with their self-appointed "civilizing mission" and their "American values" of freedom and democracy.

Id.; Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 ST. JOHN'S L. REV. 153, 166–67 (2008).

[58] U.S. CONST. art. I, § 8, cl. 2.

[59] U.S. CONST. art. I, § 2, cl. 3.

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two thirds of the Senators present concur."[60] Thus, the U.S. Senate serves as further approval for the agreement to enter into a treaty. The Supremacy Clause of the U.S. Constitution in Article VI provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.[61]

These are the key rules of law for treaty-making by the United States.

Between 1778 and 1871, the United States entered into over four hundred treaties with Tribal Nations throughout mid-North America.[62] The early treaties identified the power and strength of Tribal Nations as allies to the United States in its warfare against former kinsmen, the British.[63] Land purchases, called cessions, were the most common provisions of the treaty agreements with Tribal Nations.[64] The United States sought to expand and promised allegiance to Tribal Nations as good faith partners in friendship that was "perpetual."[65]

Under an appropriations act in 1871, the U.S. Congress set forth a change in the policy of the United States on treaty-making with Tribal Nations as follows:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United

[60] U.S. CONST. art. II, § 2.

[61] U.S. CONST. art. VI.

[62] ANGELIQUE EAGLEWOMAN & STACY LEEDS, MASTERING AMERICAN INDIAN LAW 11 (2d ed. 2019).

[63] *See* COHEN'S HANDBOOK, *supra* note 14, at § 1.03[1].

[64] *Id.* at § 1.03[1].

[65] *See* Treaty with the Delawares, Delaware-U.S., Sept. 17, 1778, 7 Stat. 13, *reprinted in* KAPPLER'S, *supra* note 47, at 3 ("Article 2. That a perpetual peace and friendship shall from henceforth take place, and subsist between the contracting parties aforesaid, through all succeeding generations."); Treaty with the Iowa, Sept. 16, 1815, 7 Stat. 136, *reprinted in* KAPPLER'S, *supra* note 47, at 123 ("Article 2. There shall be perpetual peace and friendship between all the citizens of the United States and all the individuals composing the said Iaway [sic] tribe or nation."); Treaty with the Sioux-Sisseton and Wahpeton Bands, Sioux-U.S., July 23, 1851, 10 Stat. 949, *reprinted in* KAPPLER'S, *supra* note 47, at 588 ("Article 1. It is stipulated and solemnly agreed that the peace and friendship now so happily existing between the United States and the aforesaid bands of Indians, shall be perpetual."); Treaty with the Eastern Shoshoni, Eastern Shoshoni-U.S., July 12, 1863, 18 Stat. 685, *reprinted in* KAPPLER'S, *supra* note 47, at 848 ("Article 1. Friendly and amicably [sic] relations are hereby re-established between the bands of the Shoshonee nation, parties hereto, and the United States; and it is declared that a firm and perpetual peace shall be henceforth maintained between the Shoshonee nation and the United States.").

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> States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired. Such treaties, and any Executive orders and Acts of Congress under which the rights of any Indian tribe to fish are secured, shall be construed to prohibit (in addition to any other prohibition) the imposition under any law of a State or political subdivision thereof of any tax on any income derived from the exercise of rights to fish secured by such treaty, Executive order, or Act of Congress if section 7873 of title 26 does not permit a like Federal tax to be imposed on such income.[66]

While this signaled to the U.S. President that future agreements would not be funded by appropriations acts, the impact was to "make agreements with the Indians, but now both houses [of Congress] approved them."[67] These new methods of recognizing reservations and transacting land cessions were "virtually identical to those established by treaties."[68]

There seemed to be multiple mental gymnastics in changing the rule of law regarding treaty/political relationships between Tribal Nations and the United States to the status desired by the United States of total control over tribal lands and peoples.

> Tribal Nations are extra-constitutional, meaning there is no role for tribal governments in the U.S. Constitution, and furthermore, the Tribes have never consented to participate in the U.S. constitutional structure. Without identifying any constitutional foundation, federal courts classify the relationship between Tribes and the U.S. government as political, and affirm that the U.S. Congress has "plenary" authority over Tribes. In the U.S. Constitution, the U.S. Congress has the ability "[t]o regulate Commerce . . . with the Indian tribes" and this one phrase has been stretched into "plenary" authority over Tribal Nations.[69]

This re-characterization and twisting of the law from the U.S. Constitution as applied to American Indians and their governments can be found in all three branches of the United States, from the U.S. Congress to the U.S. Supreme Court to the U.S. Executive. This will be discussed more fully below.

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[66] 25 U.S.C. § 71 (1988).
[67] COHEN'S HANDBOOK, *supra* note 14, § 1.03[9].
[68] *Id.*
[69] Angelique EagleWoman, *Bringing Balance to Mid-North America: Re-Structuring the Sovereign Relationships Between Tribal Nations and the United States*, 41 U. BALT. L. REV. 671, 678 (2012).

B. *Status of American Indians and Imposition of U.S. Naturalization in 1924*

American Indians formed their own governments as Tribal Nations since time immemorial in the Western Hemisphere. They were not U.S. citizens when the U.S. Constitution was adopted or amended. In the first section of the April 9, 1866, Civil Rights Act, the citizens of the United States were described as "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed."[70] The acknowledgment of American Indians as citizens of Tribal Nations and not the United States continued after the formal adoption of the Fourteenth Amendment in July 1868.[71]

In *Elk v. Wilkins*,[72] the U.S. Supreme Court expressly stated that American Indians had to undergo a naturalization process to become United States citizens.[73] "Since the ratification of the Fourteenth Amendment, Congress has passed several acts for naturalizing Indians of certain tribes, which would have been superfluous if they were, or might become without any action of the government, citizens of the United States."[74] Mr. Elk had been refused the ability to vote in Nebraska elections as an Indian, although he had severed all ties with his tribal government.[75] In denying his right to vote under the Fifteenth Amendment of the U.S. Constitution,[76] the Court stated:

> But the question whether any Indian tribes, or any members thereof, have become so far advanced in civilization, that they should be let out of the state of pupilage, and admitted to the privileges and responsibilities of citizenship, is a question to be decided by the nation

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[70] *See* Civil Rights Act of 1866, 14 Stat. 27–30.

[71] U.S. CONST. amend. XIV, § 1.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

[72] 112 U.S. 94 (1884).

[73] *Id.* at 103.

[74] *Id.* at 104.

[75] *Id.* at 95.

[76] *See* U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

> whose wards they are and whose citizens they seek to become, and not by each Indian for himself.[77]

Thus, the U.S. Constitutional provisions "excluding Indians not taxed" have been interpreted as an acknowledgment that Tribal Nations contained citizens as "Indians" that were outside of the legal status of U.S. citizens.[78] Over time, treaty provisions and federal laws recognized a dual citizenship status for American Indians in federally recognized Tribal Nations.[79] Without the consent of Tribal Nations, the U.S. Congress in 1924 naturalized all American Indians as citizens with passage of the Indian Citizenship Act (commonly called the Snyder Act).[80]

As voting laws are within the authority of state governments, American Indians in some states have been denied the right to vote in state and federal elections up to recent memory, for example, in South Dakota in the 1960s and 1970s.[81] Thus, American Indians have a political status as dual citizens in maintaining reservation lands and tribal governments, including both tribal citizenship and U.S. citizenship.[82]

C. Property Rights of Tribal Nations and the United States Through Treaties

By entering into treaties with Tribal Nations, the United States acquired territory and land title to assert jurisdiction and governance over. Tribal Nations continued to assert governance and jurisdiction over reserved lands known as reservations and cultural/sacred sites both on and off reserved lands.[83] The rule of law was at times adhered to within the U.S. government and courts and at other times completely flouted in favor of legal fictions regarding the legal agreements with tribal governments.[84] With the ambitions of the U.S. to expand and corral resources owned since time immemorial by Indigenous governments, the rule of law was often twisted into justifications for U.S. land grabs.

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[77] *Wilkins*, 112 U.S. at 106–107.
[78] *Id.*
[79] COHEN'S HANDBOOK, *supra* note 14, § 14.01[1].
[80] *See* Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (2012)).
[81] *See* Kaitlyn Schaeffer, *The Need for Federal Legislation to Address Native Voter Suppression*, 43 N.Y.U. L. REV. & SOC. CHANGE 707, 712 (2019); *see also* Kristopher A. Reed, *Back to the Future: How the Holding of* Shelby County v. Holder *Has Been a Reality for South Dakota Native Americans Since 1975*, 62 S.D. L. REV. 143 (2017).
[82] *See* Matthew L. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495, 532 (2020).
[83] *See id.*
[84] *See* Hope A. Babcock, *The Stories We Tell, and Have Told, About Tribal Sovereignty: Legal Fictions at Their Most Pernicious*, 55 VILL. L. REV. 803 (2010).

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1. *U.S. Supreme Court Decisions Mixing Religious/Racial Doctrine with Law*

In the 1800s, the U.S. Supreme Court, in a series of decisions, skewed the property rights of Tribal Nations and diminished the legal status of tribal governments. A set of three decisions, commonly called "the Marshall Trilogy," after U.S. Supreme Court Chief Justice John Marshall, handed down a framework of diminished property and sovereignty rights of tribal governments that remain in place today.[85] In the first decision of *Johnson v. M'Intosh*,[86] the U.S. Supreme Court limited tribal government property rights by incorporating the "doctrine of discovery" into U.S. law.[87]

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.[88]

Embracing the edicts of the papal bulls in enunciating the "doctrine of discovery" to grant Christians superior title to non-Christian lands, the U.S. Supreme Court established the basis for dispossessing Tribal Nations of their property through legal fictions.[89] The opinion provided that Indian tribes lacked full ownership of their lands and instead held occupancy title

[85] *Id.* at 825–30.
[86] 21 U.S. 543 (1823).
[87] *Id.* at 572–73.
[88] *Id.*
[89] *See* Miller, *supra* note 17, at 335–36.

at the whim of the United States government.[90] The United States as the successor to Great Britain acquired superior title to all tribal lands through the "doctrine of discovery."[91] Further, the extinguishment of tribal occupancy title could be accomplished in one of two ways: through purchase or through conquest.[92]

The second and third decisions focused on the treaties between the Cherokee Nation and the United States. In the 1831 decision, *Cherokee Nation v. Georgia*,[93] the Tribal Nation brought suit when the state of Georgia sought to assert its jurisdiction over Cherokee lands and nullify the Cherokee government in their homelands.[94] Unbeknownst to the Cherokee Nation, the United States promised in a subsequent agreement with the state officials of Georgia that once the Cherokee Nation was removed from their homelands, Georgia would have title to those lands.[95] When the United States was slow to violate treaties with the Cherokee Nation, state officials took matters into their own hands by surveying Cherokee lands, asserting criminal jurisdiction over Cherokee citizens, and enforcing an oath of loyalty to Georgia prior to White entry into Cherokee territory.[96]

By reviewing the Indian Commerce Clause in the U.S. Constitution, Chief Justice Marshall opined that Indian tribes were listed separately from foreign nations and, therefore, lacked standing to bring a

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[90] *Johnson*, 21 U.S. at 574.

> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

Id.

[91] *Id.* at 584–85.

[92] *Id.* at 587.

> The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.

Id.

[93] 30 U.S. 1, 1 (1831).

[94] *Id.* at 15.

[95] COHEN'S HANDBOOK, *supra* note 14, § 1.03[4][a].

[96] Neyooxet Greymorning, *The Anglocentric Supremacy of the Marshall Court*, 10 ALB. GOV'T L. REV. 191, 216 (2017).

case into the federal court under Article III, Section 2 of the U.S. Constitution.[97] Marshall created a new term in U.S. law for tribal governments as "domestic dependent nations" and dismissed the action for enforcement of the treaties entered into with the U.S. government.[98] Further, Marshall asserted that the Cherokee Nation, and all Indian tribes, were in a ward/guardian relationship with the United States and in a state of "pupilage."[99] The opinion did not rely on the Supremacy Clause in the U.S. Constitution where treaties are categorized as the supreme law of the land. The rule of law was not adhered to in this opinion as the decision sidestepped the legal obligations of the United States in treaties, forever guaranteeing U.S. recognition of the Cherokee Nation reserved land base.[100]

Next, suit was brought by U.S. citizen and missionary, Samuel Worcester, who entered Cherokee Nation lands under the authority of the U.S. government and the Cherokee leadership but refused to swear loyalty

[97] *Cherokee Nation*, 30 U.S. at 18–19.

[98] *Id.* at 17.

[99] *Id.*

> They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

Id.

[100] *Id.* at 16.

> The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee Nation as a state, and the courts are bound by those acts. A question of much more difficulty remains. Do the Cherokees constitute a foreign state in the sense of the constitution?

Id.

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under state law to Georgia.[101] In *Worcester v. Georgia*,[102] the U.S. Supreme Court could not sidestep the issue of whether Georgia law could override federal law and treaties. In Marshall's decision, there is a recognition of the political and legal relationship between the Cherokee Nation and the U.S. government, as evidenced in treaties.[103] "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union."[104] The holding from this decision established that federal law pre-empted state law in Indian affairs.

These three decisions provided the framework in U.S. law to undermine the rule of law for tribal governments as denying full property ownership rights, denying full sovereign authority, imposing a ward/guardian relationship, and setting up a tug of war between the federal and state governments with the U.S. Supreme Court acting as mediator.[105] This framework has become embedded in U.S. law, with these statements in

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[101] *See* Worcester v. Georgia, 31 U.S. 515, 542 (1832).

> It has been said at the bar, that the acts of the legislature of Georgia seize on the whole Cherokee country, parcel it out among the neighbouring [sic] counties of the state, extend her code over the whole country, abolish its institutions and its laws, and annihilate its political existence. If this be the general effect of the system, let us inquire into the effect of the particular statute and section on which the indictment is founded. It enacts that "all white persons, residing within the limits of the Cherokee nation on the 1st day of March next, or at any time thereafter, without a license or permit from his excellency the governor, or from such agent as his excellency the governor shall authorise [sic] to grant such permit or license, and who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanour [sic], and, upon conviction thereof, shall be punished by confinement to the penitentiary, at hard labour [sic], for a term not less than four years." The eleventh section authorises [sic] the governor, "should he deem it necessary for the protection of the mines, or the enforcement of the laws in force within the Cherokee nation, to raise and organise [sic] a guard" . . . The thirteenth section enacts, "that the said guard or any member of them, shall be, and they are hereby authorised [sic] and empowered to arrest any person legally charged with or detected in a violation of the laws of this state, and to convey, as soon as practicable, the person so arrested, before a justice of the peace, judge of the superior, or justice of interior court of this state, to be dealt with according to law."

Id.

[102] *Id.* at 515.

[103] *Id.* at 555 ("This relation was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master.").

[104] *Id.* at 557.

[105] *See* Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L. J. 579, 596 (2008).

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contravention of the sovereign-to-sovereign relationships with tribal governments continuing to the present day.[106]

The U.S. Supreme Court has developed jurisprudence upholding treaty rights.[107] In doing so, the land title claimed by the U.S. under treaties has been maintained through land cessions by Tribal Nations.[108] As the U.S. Supreme Court has reviewed treaty instruments with Tribal Nations, the Court established the Indian canons of construction to fairly interpret treaty provisions.[109] Treaties were written in English by officials authorized by the United States and often contained legal terminology not easily or effectively translated into tribal languages.[110]

The Indian canons of construction were developed over time and are understood as interpretive tools which can be summarized as follows:

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[106] *See* Milner S. Ball, *John Marshall and Indian Nations in the Beginning and Now*, 33 J. MARSHALL L. REV. 1183, 1193–94 (2000).

> Some years ago, Felix Cohen frankly acknowledged that talk of guardianship legitimates 'congressional legislation that would have been unconstitutional if applied to non-Indians.' So was the moral obligation invoked to extend United States criminal jurisdiction into reservations, to take tribal property in violation of treaties, and to reduce Indian lands under the Dawes Act (allotment) from 138,000,000 acres in 1887 to 48,000,000 by 1934. And so has the trust obligation been invoked as a defense against paying just compensation for taking tribal property. The Court has said that, when Congress acts 'as trustee for the benefit of the Indians, exercising its plenary powers over Indians and their property, as it thinks in their best interests' and 'transmutes the property from land to money, there is no taking' in violation of the Fifth Amendment.

Id.

[107] *See* U.S. v. Winans, 198 U.S. 371, 381 (1905).

> In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them,-a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds, as dealings between private individuals. The reservations were in large areas of territory and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries.

Id.

[108] *See id.*

[109] *See id.* at 380–81.

> And we have said we will construe a treaty with the Indians as 'that unlettered people' understood it, and 'as justice and reason demand, in all cases where power is exerted by the strong over those to whom they owe care and protection,' and counterpoise the inequality 'by the superior justice which looks only to the substance of the right, without regard to technical rules.'

Id.

[110] *See id.*

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"1) treaties are to be construed as the Indians would have understood them, 2) any ambiguities are to be construed in favor of the Indian understanding of the treaty document, and 3) all powers and rights are reserved to a Tribe unless expressly relinquished in a treaty document."[111] Over time, the Indian canons of construction have been applied beyond treaty interpretation to statutes, regulations, executive orders, and agreements intended to benefit American Indians.[112] As interpretive tools, the U.S. Supreme Court has discretion on whether to apply the Indian canons of construction and can circumvent their application by finding no ambiguity requiring interpretation or simply disregarding their application.[113]

2. *Pendulum Swing of U.S. Indian Policy to Recognize or Eliminate Tribal Nations*

Scholars in the field of federal Indian law have likened the shifting policy eras of the U.S. government to a pendulum swinging between contradictory points, the recognition of the legal status of tribal governments, and efforts to eliminate tribal governmental status.[114] The U.S. Indian policy eras are chronologically: (1) Treaty Era of sovereign-to sovereign relationships from 1778 to mid-1800s; (2) Removal Era of the 1800s; (3) Reservation Era of the 1800s; (4) Assimilation/Allotment Era of the late-1800s through 1930s; (5) Indian Self-Government Era of the 1930s through 1940s; (6) Termination of Self-Government Status Era of the 1940s through 1960s; and (7) Indian Self-Determination Era of the late-1960s to the present.[115]

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[111] EAGLEWOMAN & LEEDS, *supra* note 62, at 12.
[112] COHEN'S HANDBOOK, *supra* note 14, § 2.02[1].
[113] *See* Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623, 659 (2011).

> These extra-judicial applications of the Justices' personal values pervade Indian law jurisprudence and undercut the legitimacy of the Indian canons. When tribes wield a 'civilizing' power-such as furthering economic interests or acting as a private landowner-or when it fits with the view of Indians as the guardians of nature who live off of the land, the tribes are much more likely to prevail under the canons. If, however, tribes assert their rights as governmental entities against non-Indians, the Court views this power as having been implicitly divested.

Id.
[114] Vine Deloria Jr., *Reserving to Themselves: Treaties and the Powers of Indian Tribes*, 38 ARIZ. L. REV. 963, 979 (1996).
[115] EAGLEWOMAN & LEEDS, *supra* note 62, at 10–22.

Government-to-Government Relations	Disregard of Tribal Nation Status
Treaty Era (sovereign-to-sovereign) 1778 to Mid-1800s	
	Removal Era 1800s
Reservation Era 1800s	
	Assimilation/Allotment Era Late 1800s to Early 1900s
Indian Self-Government Era 1930s to 1940s	
	Termination of Tribal Government Status Era 1940s to 1960s
Indian Self-Determination Era Late 1960s to Present	

Figure 1. *Depicting the U.S. government's oscillation between recognition of tribal governments as sovereign and annihilation of tribal sovereignty in setting U.S. governmental Indian policy.*

The foundational relationship for Tribal Nations with the United States is the sovereign-to-sovereign relationship. In exercising sovereign authority to enter into treaties and other agreements with the United States, the Tribal Nations did not relinquish their status as tribal governments, capable of all the characteristics of nation-states as understood in the international political community.[116]

> Of course, the choice made by an Indian Nation to accept the protection of the United States, or any other more powerful sovereign, does nothing to diminish the capacity of the Indian Nation to enter into, and fulfill, agreements with other sovereigns. Likewise, the choice of the United States to change its method of ratification of its contracts or agreements with Indian Nations in no way diminishes the capacity of Indian Nations to enter into international agreements. Long after the end of the classical "treaty

[116] *See* G. William Rice, *Teaching Decolonization: Reacquisition of Indian Lands Within and Without the Box—An Essay*, 82 N. D. L. REV. 811, 823–24 (2006) ("As late as 1832, Indian Nations satisfied the four conditions for recognition as a State that would be codified by the International community in the Convention on Rights and Duties of States signed at Montevideo a little over one hundred years later on December 26, 1933.").

> period," Indian Nations continued to make agreements with the United States, and this practice has continued to the present day.[117]

As political relationships are formed through an understanding of both sides of the political relationship, the perspectives and expectations of Tribal Nations for the U.S. government to conform and demonstrate a commitment to the rule of law has not wavered. Although subsequent eras of U.S. Indian policy can be classified as expressions of bad faith and coercion, the foundational relationship and the permanent neighbor status of the U.S. with Tribal Nations requires a full understanding of both sides of the political relationship.[118]

As Figure 1 (above) illustrates, U.S. Indian policy is often hard to categorize; for instance, two different points on the pendulum are identified in the 1800s, the Removal Era and the Reservation Era. On the one hand, the Indian Removal Act of 1830 was passed to coerce all Tribal Nations east of the Mississippi River to remove to lands west and relinquish their homelands through treaties or military action.[119] On the other hand, reservations were recognized as seats for tribal governance and within the legal jurisdiction of tribal law and order.[120]

The lowest point in U.S. Indian policy for American Indians was the Assimilation/Allotment Era, where the U.S. government kidnapped children for so-called civilization training at mandatory military and religious-run boarding schools,[121] and it determined that certain reservations were open to allotment, parceling out tribal government-owned lands to individual tribal citizens.[122] The General Allotment Act was the violation of treaty-reserved lands under tribal land law,[123] as the U.S. Congress authorized the executive branch to declare a reservation open for allotment. Early allotment acts called for tribal consent, but as the U.S. Supreme Court espoused the "plenary authority" of the U.S. Congress, tribal consent was not an impediment.[124] The impact of the allotment policy was devastating to Tribal Nations.

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[117] *Id.* at 827.

[118] *See* Morton v. Mancari, 417 U.S. 535, n.24 (1974) (describing an employment preference in the U.S. Bureau of Indian affairs for Indians as a "political" preference as applying to members of federally recognized tribes).

[119] Pub. L. No. 21-148, 4 Stat. 411; COHEN'S HANDBOOK, *supra* note 14, § 103[4][a].

[120] *See Ex Parte Crow Dog*, 109 U.S. 556, 572 (1883) (upholding tribal laws on reservations for acts committed by tribal members against tribal members as outside of the authority of the courts of the United States).

[121] *See* Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47, 50–55 (2008).

[122] *See* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 7–15 (1995).

[123] 25 U.S.C. § 331 (1887) (repealed 2000).

[124] *See* Rice, *supra* note 116, at 835.

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> As a result of the General Allotment Act and federal policy of allotment, Indian land holdings plunged from 138 million acres in 1887 to 48 million acres by 1934. Fractionation of Indian interests as individual allotments were inherited by the decedents of the allottees pursuant to state inheritance laws resulted in tracts of land that were unusable by the owners. Colonialist treatment of Indian Nations and their territories became ingrained into the "normal" relationship between the federal government and the Indian Nations.[125]

Consequently, the political relationships between Tribal Nations and the United States were at their lowest points, with the United States seeking, by every means of force, the opening of reservations in violation of treaties and agreements.[126] The consequences of the allotment acts and policy will be discussed at greater length more fully below.

Under the Indian Reorganization Act of 1934,[127] the allotment policy was finally ended in the first section,[128] with the law promoting consolidation and adding to the land base of reservations and tribal communities.[129] This ushered in what is labeled as the Indian Self-Government Era of U.S. Indian policy.[130] Companion legislation was passed as the Oklahoma Indian Welfare Act of 1936,[131] and the Alaska Reorganization Act of 1938 for Alaska Natives.[132] Although some Tribal Nations had operated under tribal constitutions, the policy push of the Bureau of Indian Affairs (BIA) was for the adoption of pre-drafted constitutions with bylaws by the majority of Tribes.[133]

Yet again, during the Termination Era of U.S. Indian policy, the U.S. Supreme Court persevered with the dispossession of land in the decision of *Tee-hit-Ton Indians v. United States*.[134] The Tee-Hit-Ton Clan of the Tlingit Band of Alaskan Natives sued the United States under the Fifth Amendment Takings Clause of the U.S. Constitution for compensation of timber harvested from the lands they held since time

[125] *Id.*
[126] *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 565–66 (1903) (stating the "plenary authority" of Congress to abrogate Indian treaties to open reservation lands to allotment).
[127] 25 U.S.C. § 5101 et seq. (originally 25 U.S.C. § 461 et seq.).
[128] *Id.*
[129] COHEN'S HANDBOOK, *supra* note 14, § 1.05.
[130] EAGLEWOMAN & LEEDS, *supra* note 62, at 19–20.
[131] 25 U.S.C. § 5201 et seq. (originally 25 U.S.C. § 501 et seq.).
[132] Alaska Reorganization Act of 1938, 49 Stat. 1250 (1936).
[133] COHEN'S HANDBOOK, *supra* note 14, § 4.04[3][a][1].
[134] 348 U.S. 272 (1955).

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immemorial.[135] The U.S. Supreme Court held that federal recognition must occur prior to any taking for compensation over the land rights of Indians.[136]

> This leaves unimpaired the rule derived from *Johnson v. McIntosh*, 8 wheat. 543, that the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment. This is true not because an Indian or an Indian tribe has no standing to sue, or because the United States has not consented to be sued for the taking of original Indian title, but because Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law.[137]

The decision included derogatory language about Tribal Nations as follows:

> Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food, and trinkets, it was not a sale, but the conquerors' will that deprived them of their land.[138]

As a result of this decision, Tribal Nations do not have compensable land rights unless a federal law or instrument documents those land rights. This decision "has been criticized for misinterpreting precedent and violating fundamental human rights and constitutional norms of equality."[139] Once more, the rule of law was not applied even-handedly for tribal government land rights when seeking compensation from the U.S. Government.

As the pendulum swung to recognition of tribal governments, the Indian Self-Determination Era allowed for tribal governments to contract with the BIA to deliver social programs, law enforcement services, health care operations, and other treaty-guaranteed federal responsibilities. Tribal governments were also able to charter tribally-run schools from the BIA and Bureau of Indian Education[140] with the enactment of the federal Indian Self-Determination and Education Act of 1975.[141]

IV. UNEVEN APPLICATION OF THE RULE OF LAW BY THE U.S. SUPREME COURT IN RESERVATION LAND DECISIONS

[135] *Id.* at 276.
[136] *Id.* at 291.
[137] *Id.* at 284–85.
[138] *Id.* at 289–290.
[139] COHEN'S HANDBOOK, *supra* note 14, § 15.09[1][d].
[140] 25 C.F.R. § 32.3.
[141] 25 U.S.C. § 5301 et seq. (originally 25 U.S.C. § 450).

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The term "Indian Country" is a legal term of art that has been defined in the criminal statutes of the United States since 1948.[142] Under federal law, Indian Country is comprised of three types of tribal lands: "a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent," "b) all dependent Indian communities," and "c) all Indian allotments."[143] During the Termination Era, state governments challenged the reservation status of tribal lands by asserting that federal allotment statutes inferred the diminishment or disestablishment of reservations.[144] A number of these types of cases have arisen as tribal members challenged state jurisdiction over criminal prosecutions as invalid within existing reservations.[145]

A. Application of the Indian Country Statute and Upholding Reservation Status

In the first challenge of this type, the U.S. Supreme Court reviewed federal laws and found that the state of Washington could not find an express act of Congress to alter the reservation boundaries of the Colville Indian Reservation.[146] The Court held that allotments, as understood as the "issuance of any patent," did not impact the reservation boundaries of the Colville Indian Reservation, referencing the 1948 Indian Country statute.[147]

The next case involved the state of Oregon seeking the U.S. Supreme Court to find that the Klamath River Reservation was disestablished when a treaty fishermen sought the return of his nets from state wardens.[148] In *Mattz v. Arnett*,[149] the Court reviewed federal laws and, specifically, the 1892 allotment statute for the reservation.

> In view of the discretionary nature of this presidential power, Congress occasionally enacted special legislation in order to assure that a particular reservation was in fact opened to allotment. The 1892 Act was but one example of this. Its allotment provisions, which do not differ materially from those of the General Allotment Act of 1887, and which in fact refer to the earlier Act, do not, alone, recite or even suggest that Congress intended thereby to terminate the Klamath River Reservation. See *Seymour v. Superintendent*, 368 U.S. 351, 357-358 (1962).

[142] 18 U.S.C. § 1151 (1948).
[143] *Id.*
[144] *See infra* Section III.B.
[145] *See infra* Part IV.
[146] Seymour v. Superintendent of Washington State Penitentiary, 368 U.S. 351 (1962).
[147] *Id.* at 357–58.
[148] *See* Mattz v. Arnett, 412 U.S. 481 (1973).
[149] *Id.* at 482.

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> Rather, allotment under the 1892 Act is completely consistent with continued reservation status.[150]

Reviewing other prior decisions, the Court approvingly cited to the 1909 decision in *United States v. Celestine*,[151] upholding federal prosecution within the Tulalip Reservation subsequent to allotment of the reservation.[152] In the *Celestine* decision, the Court set forth the principle: "when Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress."[153]

In *Mattz*, the Court adhered to the legal principle that "[a] congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history."[154] The Court refused to infer termination of reservation status without express language from Congress, which was not present in the case, and concluded there was no intent to terminate the reservation status, highlighting several federal laws referring specifically to the reservation post-allotment.[155]

B. The Attack of South Dakota and Utah Leading to U.S. Supreme Court Decisions

In a series of cases involving the state of South Dakota, legal arguments were made asserting allotment statutes as tools for diminishing or disestablishing the reservations of the traditional tribal peoples, the Oceti Sakowin (the Seven Council Fires, also known as the Dakota/Lakota/Nakota or Sioux Tribes).[156] The Seven Council Fires are: the Mdewakantonwan, Sissetonwan, Wahpetonwan, Wahpekute, Ihanktonwan, Ihanktonwanna, and Titonwan.[157] "The first four speak the Dakota dialect and are referred to as a group as the Isanti (Knife) people. The Ihanktonwan are now commonly known as the Yankton and speak the Nakota dialect along with the Little Yankton or Ihanktonwanna. The Titonwan or Teton speak the Lakota dialect."[158] In South Dakota, there are nine Indian reservations, and all are the homelands of the Oceti Sakowin.

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[150] *Id.* at 497.
[151] 215 U.S. 278 (1909).
[152] *Id.*
[153] *Id.* at 285.
[154] Mattz v. Arnett, 412 U.S. 481, 505 (1973).
[155] *Id.* at 504–05.
[156] *See* Angelique EagleWoman, *Re-Establishing the Sisseton-Wahpeton Oyate's Reservation Boundaries: Building a Legal Rationale from Current International Law*, 29 AM. INDIAN L. REV. 239, 240 (2005) [hereinafter EagleWoman, *Re-Establishing the Sisseton-Wahpeton Oyate's Reservation Boundaries*].
[157] *Id.*
[158] *Id.*

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Three major cases will be more fully explored as demonstrating the attack of South Dakota to undo treaty-established reservations.

In the midst of aggressive assertions by South Dakota to alter reservation boundaries, the state of Utah also engaged in litigation against the Uintah Indian Reservation. This U.S. Supreme Court decision and the resulting factors will be analyzed as well.

V. THE ATTACK ON THE SISSETON-WAHPETON LAKE TRAVERSE RESERVATION IN NORTH AND SOUTH DAKOTA

In the 1975 U.S. Supreme Court decision, *DeCoteau v. District County Court*,[159] the Court reviewed conflicting opinions by the Eighth Circuit and the South Dakota Supreme Court on the issue of whether the 1867 treaty-established reservation boundaries remained intact post- an allotment act of 1891.[160] The Eighth Circuit, in light of *Mattz* and *Seymour*, held that the Lake Traverse Reservation boundaries remained as established by the 1867 Treaty between the Sisseton-Wahpeton Sioux Tribe and the United States.[161] The Eighth Circuit decision stated "Congress established the Lake Traverse reservation as a 'permanent' reservation in 1867. Since that time Congress has not through clear expression or by innuendo shown an intention to disestablish."[162] That federal decision resulted from a lawsuit on behalf of tribal members charged and convicted within South Dakota, who challenged state jurisdiction within the Lake Traverse Reservation.[163] In contrast, the South Dakota Supreme Court held in a case seeking the termination of parental rights of a tribal member, Cheryl DeCoteau, for her two sons, that the Lake Traverse Reservation was disestablished by the allotment act of 1891 with only scattered allotments remaining under federal jurisdiction.[164]

It is worth noting that the Sisseton-Wahpeton Sioux Tribe was not a party to the *DeCoteau* case and did not file an amicus brief to the U.S. Supreme Court. In the mid-to-late 1970s, the Tribe was struggling to maintain economic viability, and it is likely that tribal leadership did not anticipate the devastating outcome of the U.S. Supreme Court decision.[165]

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[159] 420 U.S. 425 (1975).

[160] *Id.* at 430–31.

[161] United States ex. rel. Feather v. Erickson, 489 F.2d 99, 101–02 (8th Cir. 1973).

[162] *Id.* at 102.

[163] *Id.* at 100.

[164] DeCoteau v. District County Court, 420 U.S. 425, 428–30 (1975).

[165] *See* Angelique EagleWoman, *U.S.-Dakota War of 1862: Wintertime for the Sisseton-Wahpeton Oyate: Over One Hundred Fifty Years of Human Rights Violations by the United States and the Need for a Reconciliation Involving International Indigenous Human Rights Norms*, 39 WM. MITCHELL L. REV. 486, 524–27 (2013) (detailing the poverty conditions for the Sisseton-Wahpeton Sioux Tribe as persistent).

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In the 6-3 decision, the majority of the U.S. Supreme Court conducted its analysis by first reviewing the demographics within the reservation boundaries as 30,000 non-Indians and 3,000 tribal members.[166] This was a sharp departure from the legal standard of reviewing whether Congress has expressly changed a reservation's status. Next, the Court discussed how much of the land base remained in trust status as fifteen percent in the 1970s.[167]

In reviewing the history of the 1891 allotment act, the Court drew on local officials' accounts. This included accounts from those who pressured tribal leadership to open the reservation, and a heavily excerpted, unattributed newspaper article titled, "A Big Pow Wow. A Council at Big Brule to Urge the Opening of the Sisseton Reservation," dated May 22, 1889, published on the front page of the Minneapolis Tribune,[168] and allegedly summarized comments from various tribal leaders.[169] These extraneous sources of perspectives did not fall within the legal principle of whether Congress had expressly terminated the status of the reservation, and yet, the Court held that very result.

While acknowledging that the tribal government under its 1966 Constitution stated its jurisdiction based on the 1867 treaty reservation, the Court held this inconclusive in finding that the reservation had been disestablished long ago without the Tribe's knowledge.[170] The majority appeared to follow the rationale that because the 1891 allotment act did not explicitly state the reservation existed, then Congress must have intended that it did not.[171] Using this reasoning flips the standard for altering a reservation and was unjustly followed in the *DeCoteau* decision, ostensibly allowing the state of South Dakota an authority not authorized by Congress. In sum, the *DeCoteau* Court majority "discovered disestablishment in the factors constituting the 'surrounding circumstances and legislative history,'"[172] which departed significantly from the clear expression to terminate by Congress.[173]

In dissent, Justice Douglas argued that the relevant actions all occurred within Indian Country as defined by federal law and that the Court's majority decision would "tear[] the reservation asunder."[174] In reviewing the language of the allotment act, he stated, "[t]here is not a word

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[166] *DeCoteau*, 420 U.S. at 428.
[167] *Id.*
[168] *See A Large Pow Wow: A Council at Big Brule to Urge the Opening of the Sisseton Reservation*, MINNEAPOLIS TRIB., May 22, 1889, at 1.
[169] *DeCoteau*, 420 U.S. at 433–34.
[170] *Id.* at 443–44.
[171] *Id.* at 445–47.
[172] Royster, *supra* note 122, at 32.
[173] Mattz v. Arnett, 412 U.S. 481, 505 (1973).
[174] *DeCoteau*, 420 U.S. at 464. (Douglas, J., dissenting).

to suggest that the boundaries of the reservation were altered."[175] Further, the dissent focused on the hardship that would be caused by the majority's ruling in the resulting checkerboard jurisdiction and the aggressive tactics of the state.[176]

> Checkerboard jurisdiction cripples the United States in fulfilling its fiduciary responsibilities of guardianship and protection of Indians. It is the end of tribal authority for it introduces such an element of uncertainty as to what agency has jurisdiction as to make modest tribal leaders abdicate and aggressive ones undertake the losing battle against superior state authority.[177]

Legal scholars have criticized the decision as failing to uphold the rule of law.[178] A legal hornbook highlighted that the dissent was cognizant that the dispute arose in state court because of "South Dakota's aggressive assertion of jurisdiction over Indian children."[179] Other legal scholars criticized the Court's departure from the explicit language of the allotment act and the failure to properly apply the Indian canons of construction to discern the Tribe's understanding of the allotment act in reaching the end of the spectrum result of disestablishment.[180]

Contrary to the majority's ruling, the U.S. Congress has not disestablished the Sisseton-Wahpeton Lake Traverse Reservation. This is evident from federal law enacted after the 1975 *DeCoteau* decision. In 1984, the U.S. Congress enacted the Lake Traverse Indian Reservation Land Consolidation Act to increase the amount of tribally-owned lands within the reservation boundaries.[181] This action refutes the holding of the majority in the *DeCoteau* Court and demonstrates the ongoing recognition of the 1867 treaty-established reservation and the congressional intent to fortify the reservation.

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[175] *Id.* at 461 (Douglas, J., dissenting).
[176] *Id.* at 467 (Douglas, J., dissenting).
[177] *Id.*
[178] *See* EagleWoman, *Re-Establishing the Sisseton-Wahpeton Oyate's Reservation Boundaries*, *supra* note 156, at 261 (characterizing the decision as "a wrongful taking of land and resources from indigenous peoples.") (citation omitted). *See also*, Alex Tallchief Skibine, *Teaching Indian Law in an Anti-Tribal Era*, 82 N.D. L. REV. 777, 780 (2006).
[179] *See* MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW § 72, at 300 (2016).
[180] *Id.* at § 72, at 301.
[181] *See* Trade and Tariff Act of 1984, Pub. L. No. 98-513, 98 Stat. 2411, 2411 (1984) ("[T]he provisions of this Act shall govern the right to inherit trust or restricted land located within such States and within the original exterior boundaries of the Lake Traverse Indian Reservation . . . as described in article III of the Treaty of February 19, 1867 (15 Stat. 505)."). Note that the preamble to the law states: "Pertaining to the inheritance of trust or restricted land on the Lake Traverse Indian Reservation, North Dakota and South Dakota, and for other purposes." *Id.*

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With the tribal government absent from the decision, the opportunity to rectify the poorly supported *DeCoteau* decision in federal courts may still exist. The record before the U.S. Supreme Court was not fully developed, and the legal standard was not credibly applied. In an uninterrupted timeline, the U.S. Congress has expressly included the Sisseton-Wahpeton Lake Traverse Reservation in federal law,[182] congressional hearings,[183] and reports.[184] Likewise, the executive branch,[185] and federal agencies, acknowledge the Lake Traverse Reservation to the present day.[186] Through the persistent federal acknowledgment of the

[182] *See id.*

[183] *See, e.g.*, S. REP. NO. 100-577, at 29 (1988).

> Section 217 corrects an error of the Bureau of Indian Affairs with respect to first year funding for the Tiospa Zina Indian School at the Sisseton-Wahpeton Reservation in South Dakota. Through an appellate process in the BIA, it has been determined that the school should have received start-up costs as a new contract school in fiscal year 1987. The amendment directs payment from the appropriation from which the school should have received its funds.

Id.; *see also* S. REP. NO. 116-206, at 3 (2020).

> On October 25, 2017, the Committee held a legislative hearing on the bill. At this hearing, the Honorable R. Trent Shores, U.S. Attorney for the Northern District of Oklahoma, U.S. Department of Justice, testified in support of the goals of S. 1942. The Honorable Dave Flute, Chairman, Sisseton Wahpeton Oyate of the Lake Traverse Reservation, and Ms. Carmen O'Leary, Director, Native Women's Society of the Great Plains, both testified in support of S. 1942.

Id.

[184] *See* 163 CONG. REC. S3797-110 (2017) ("The story of the Sisseton and Wahpeton bands is one of movement of the Native people that made their home on the Lake Traverse Reservation, where they still celebrate today."); *see also* S. REP. NO. 115-220 (2018).

> On October 25, 2017, the Committee held a legislative hearing on S. 1870. At the October 25th hearing, officials from the Departments of the Interior and Justice testified in favor of the bill. The three remaining witnesses on the panel–Dave Flute, Chairman, Sisseton Wahpeton Oyate of the Lake Traverse Reservation; Joel Boyd, Colville Business Councilman, Confederated Tribes of the Colville Reservation; and Carmen O'Leary, Director, Native Women's Society of the Great Plains–also testified in support of the bill.

Id.

[185] *See* Press Release, White House, President Obama Signs South Dakota Disaster Declaration (May 13, 2011) (providing "Federal funding is available to State and eligible local governments . . . as well as those portions of the Cheyenne River Indian Reservation, Sisseton-Wahpeton Indian Reservation, and Standing Rock Indian Reservation that lie within these counties.").

[186] *See Tribes Served by the Great Plains Region*, U.S. DEP'T OF THE INTERIOR INDIAN AFF., https://www.bia.gov/regional-offices/great-plains/tribes-served [https://perma.cc/J8UM-2N7C]; *Interior Signs Cooperative Agreement with Sisseton-Wahpeton Oyate as Next Step in Land Buy-Back Program: Sisseton-Wahpeton Oyate of Lake Traverse Reservation in North & South Dakota Join Latest Step in Nation-to-Nation Cooperation to Strengthen*

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reservation in the many years after the *DeCoteau* decision, the majority's holding that Congress had inferred termination of the reservation boundaries through an allotment act would appear to be erroneous.[187]

A. *The Attack on the Rosebud Sioux Tribe Reservation in South Dakota*

In the 1977 decision, *Rosebud Sioux Tribe v. Kneip*,[188] the Rosebud Sioux Tribe filed suit for a declaratory action in federal court providing that three congressional acts did not alter their reservation boundaries.[189] In another 6-3 decision, the U.S. Supreme Court held that the Rosebud Sioux Reservation was diminished,[190] although the congressional record relied upon was sparse at best. The majority cobbled together reasoning to infer congressional intent from three separate acts of Congress. "Applying these principles to the facts of this case, we conclude that the Acts of 1904, 1907, and 1910 did clearly evidence congressional intent to diminish the boundaries of the Rosebud Sioux Reservation."[191] Because the majority's rationale required piecing together these three separate laws, the holding should be viewed as suspect under the rule of law and not conforming to the legal standard requiring a clear congressional expression to alter the reservation boundaries. In dissent, Justice Marshall took issue with the majority's interpretation of the three-land cession and allotment acts.

> Since congressional intent must be unambiguous before we can conclude that Congress terminated part of an Indian reservation, the absence of any express provision to this effect in the Rosebud Acts strongly militates against the interpretation the Court places on those Acts. But I need not rely on congressional silence alone eloquent as it may be to reject the Court's interpretation. For both the text of

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Tribal Sovereignty, U.S. DEP'T OF THE INTERIOR INDIAN AFF., https://www.bia.gov/as-ia/opa/online-press-release/interior-signs-cooperative-agreement-sisseton-wahpeton-oyate-next [https://perma.cc/69WP-9VDY].

[187] *See* DeCoteau v. District County Court, 420 U.S. 425, 461 (Douglas, J., dissenting).

> The Treaty of Feb. 19, 1867, granted these Indians a permanent reservation with defined boundaries and the right to make their own laws and be governed by them subject to federal supervision, 15 Stat. 505, as amended. No more is asked here; and it must be conceded that the jurisdictional acts took place within the contours of that reservation.

Id.

[188] Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).

[189] *Id.* at 586.

[190] *Id.* at 614–15.

[191] *Id.* at 587.

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> the Acts and the circumstances surrounding their enactment affirmatively point to the opposite conclusion.[192]

In addition, Justice Marshall argued for the proper application of the Indian canons of construction to resolve ambiguities in statutes to be resolved for the benefit of Indians.[193] This decision seems to be a particularly egregious violation of the rule of law where the Rosebud Sioux Tribe sought a declaratory judgment in federal court to counter the aggressiveness of the state of South Dakota to gain access to reservation lands.

B. The Failed Attack on the Cheyenne River Sioux Reservation in South Dakota

In 1979, Cheyenne River Sioux tribal member, John Bartlett, was charged and convicted in South Dakota state court. Following the exhaustion of state remedies, he filed a writ of habeas corpus to federal court challenging state criminal jurisdiction on the Cheyenne River Sioux Reservation.[194] The state of South Dakota contended that an allotment act of 1908 had diminished the reservation boundaries and that state jurisdiction followed on the relevant portion of land for the criminal prosecution.[195]

In *Solem v. Bartlett*,[196] Justice Thurgood Marshall delivered the unanimous opinion by setting out the legal analysis for review of reservation status by synthesizing prior decisions on the "statutory language used to open the Indian lands" with events surrounding and to lesser extent occurring after the act "to decipher Congress's intentions."[197] In addition, Justice Marshall signaled approval for a pragmatic approach in finding *de facto* diminishment when lands were opened and "non-Indian settlers flooded into the opened portion of a reservation."[198]

In reviewing the 1908 allotment act, the Court noted that there was no express language to change the existing reservation boundaries.[199] Addressing the argument by South Dakota that the 1908 act included language referring to the return of lands to the "public domain" and a reference to the unallotted lands of the reservation "thus diminished," the Court held that these few phrases were not enough to demonstrate congressional intent to diminish the reservation.[200] The Court referred to

[192] *Id.* at 620–21 (Marshall, J., dissenting).
[193] *Id.* at 617 (Marshall, J., dissenting).
[194] Bartlett v. Solem, 691 F.2d 420, 420 (8th Cir. 1982).
[195] *Id.* at 420–21.
[196] 465 U.S. 463 (1984).
[197] *Id.* at 470–71.
[198] *Id.*
[199] *See id.* at 474.
[200] Solem v. Bartlett, 465 U.S. 463, 475–76 (1984).

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inconsistency in the understandings of the effect of the 1908 act and concluded that the record provided no help to either side.[201] As for demographics in the opened areas of the reservation, the record provided that tribal members took allotments in those areas, and the attempt to bring in non-Indian settlers failed.[202]

While the result in *Solem* led to the uninterrupted recognition of the Cheyenne River Sioux Reservation, the Court's willingness to delve into extraneous factors to bolster its interpretation of the 1908 allotment act would prove onerous to the defense of other reservations. The result of this decision was to thwart the attempt by South Dakota to assert criminal jurisdiction over the allotted portion of the Cheyenne River Sioux Reservation,[203] but this did not curtail the state's efforts to attack other reservations.

C. The Attack on the Uintah Indian Reservation in Utah

When the Supreme Court of Utah found diminishment of the Uintah Indian Reservation, the U.S. Supreme Court continued a similar line of reasoning in the 1994 *Hagen v. Utah* decision.[204] The Uintah Indian Reservation was established by Congress in 1864 after an Executive Order set aside lands in the Utah Territory for the Ute Indian Tribe.[205] In the 7-2 majority decision authored by Justice Sandra Day O'Connor, the *Hagen* Court clarified the U.S. Supreme Court jurisprudence on carving down reservation lands by sharpening the following three factors which had been introduced earlier by the *DeCoteau* and *Solem* Courts.[206]

> In determining whether a reservation has been diminished, '[o]ur precedents in the area have established a fairly clean analytical structure,' directing us to look to three factors. [1] The most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands. [2] We have also considered the historical context surrounding the passage of the surplus land Acts, although we have been careful to distinguish between evidence of

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[201] *Id.* at 478–79.
[202] *Id.* at 480.
[203] *See id.* at 481.
[204] 510 U.S. 399, 421–22 (1994).
[205] *Id.* at 402.
[206] *Id.* at 410–11. *See also Bartlett*, 465 U.S. at 463, 466–72 (employing demographics to a portion of the Cheyenne River Sioux Reservation allotted by federal law and rejecting the argument that the allotment should be construed to diminish the reservation boundaries); Nebraska v. Parker, 136 S.Ct. 1072, 1081–82 (2016) (finding that changing demographics was the least compelling factor in determining that an allotment act of 1882 did not diminish the Omaha Indian Reservation).

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> the contemporaneous understanding of the particular Act and matters occurring subsequent to the Act's passage. [3] Finally, '[o]n a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation.'[207]

These so-called factors stray from the legal standard of whether Congress explicitly altered a reservation's boundaries.[208]

The Court selected language from a 1902 allotment act plan that required the consent of the Ute Indian Tribe and contained language on restoring any unallotted lands to the "public domain" to be sold.[209] Reading the 1902 language into the actual law that opened the reservation to allotment in 1905, which omitted the restoration language,[210] the majority held, in agreement with the state of Utah, that both acts read together had demonstrated an intent by Congress to diminish the reservation.[211] The Ute Indian Tribe had persistently withheld consent to allotment as President Theodore Roosevelt ordered allotment to occur under the 1905 allotment

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[207] *Hagen*, 510 U.S. at 410–11 (internal citations omitted, numbering added for clarity).

[208] *See, e.g.*, Mattz v. Arnett, 412 U.S. 481, 505 (1973).

[209] *Hagen*, 510 U.S. at 412.

[210] *See* Lauren Natasha Soll, *The Only Good Reservation is a Diminished Reservation?*, 41 FED. B. NEWS & J. 544, 547 (1994).

> [T]he Court discounted the language and surrounding circumstances of the only act actually implemented--the Act of March 3, 1905--and instead reached back to the Act of May 27, 1902 to find the restoration language upon which it ultimately relied to make its conclusion. Citing *Rosebud*, the Court insisted that the 1905 Act was merely an amendment of the 1902 Act and, therefore, the language of the earlier act necessarily carried forward. In so doing, however, the Court not only disregarded the rule requiring that all ambiguities must be resolved in favor of the Indians but also ignored evidence that the circumstances surrounding the 1905 Act were materially different from those attending the 1902 Act. For example, the legislature had intentionally erased the restoration language of the earlier statutes and instead employed the term "opening" throughout the 1905 Act. Though it concededly is impossible from the evidence to discern the reason for the erasure, as the dissenting justices admonished the majority, all doubts should have been resolved in the favor of the Ute Indian Tribe.

Id.

[211] *Id.* at 415–16 ("The 1905 Act did not repeat these essential features of the opening, because they were already spelled out in the 1902 Act. The two statutes—as well as those that came in between—must therefore be read together.").

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act.[212] The twisted reasoning of the Court then applied the three factors weighing against the Tribe's defense of its reservation homelands.[213]

In regard to demographics, the Court provided a rather pointed concern for non-Indians over Indians. "This 'jurisdictional history,' as well as the current population situation in the Uintah Valley, demonstrates a practical acknowledgment that the Reservation was diminished; a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area."[214]

In dissent, Justice Blackmun first repeated a quote from another dissent on the failure of the Court to uphold the treaty rights of Tribal Nations.

> "Great nations, like great men, should keep their word," FPC v. Tuscarora Indian Nation, 362 U.S. 99, 142, 80 S.Ct. 543, 567, 4 L.Ed.2d 584 (1960) (Black, J., dissenting), and we do not lightly find that Congress has broken its solemn promises to Indian tribes.[215]

Returning to the legal standard for the alteration of Indian reservation boundaries, Justice Blackmun set forth the legal standard as requiring express language from Congress and requiring the application of the Indian canon of construction that ambiguities in statutes be resolved for the benefit of the Indians.[216] Further, the dissent noted that the majority misapplied the latter in favor of the state in its interpretation of the surplus land act of 1905.[217]

From the *Hagen* Court, Justice O'Connor ushered in a complete divergence from the rule of law to allow the U.S. Supreme Court to consider factors that cannot weigh in favor of Tribes.[218] The first factor is the statutory

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[212] *See* EagleWoman, *The Ongoing Traumatic Experience of Genocide*, *supra* note 6, at 436–38.

> Theodore Roosevelt served as United States President from 1901 to 1909, one of the worst United States Indian policy eras, referred to as the allotment and assimilation era. This era is where social experimentation was perpetuated on American Indian children and tribal lands forcibly taken in violation of treaties signed with the United States.

Id.

[213] *Hagen*, 510 U.S. at 412–22.

[214] *Id.* at 421.

[215] *Id.* at 422 (Blackmun, J., dissenting).

[216] *Id.* at 422–24 (Blackmun, J., dissenting).

[217] *Id.* at 424 (Blackmun, J., dissenting).

[218] *See* Royster, *supra* note 122, at 41; Richard L. Barnes, *A Woman of the West, But Not the Tribes: Justice Sandra Day O'Connor and the State-Tribal Relationship*, 58 LOY. L. REV. 39, 95 (2012).

> By using the public domain gambit, Justice O'Connor conflated the use of the land with the question of who should govern it. It was the

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language, but as noted by the dissent and precedent, interpretation of treaties, statutes, and other U.S. derived law applied to tribal governments, ambiguities are to be resolved in favor of the Indians.[219] The second factor on the "contemporaneous understanding" of these allotment and surplus acts is informed from non-Indians' writings, newspaper articles, and other opinion pieces, which will favor dispossession of tribal lands.[220] The third factor can, but rarely, weighs in favor of Tribal Nations as the Court reviews the demographics of who settled onto the open lands, as common sense would provide that Indians usually do not re-settle on their own lands.[221]

D. The Attack on the Yankton Sioux Reservation in South Dakota

When the Yankton Sioux Tribe sought a declaratory judgment in federal court on the basis that its reservation boundaries were unaltered by a 1894 allotment act, the lawsuit resulted in a contrary decision by the U.S. Supreme Court in *South Dakota v. Yankton Sioux Tribe*.[222] Justice O'Connor delivered the unanimous opinion for the Court in finding diminishment occurred more than one hundred years prior to the lawsuit.[223] The impetus for the lawsuit was the attempt by South Dakota to locate a waste dump with a subpar clay lining within the tribal reservation boundaries near Lake Andes.[224]

> Secretary of the Interior, acting in violation of the will of the Tribe and perhaps Congress, who opened the reservation for settlement and created the conditions that made it seem less like Indian Country.

Id.

[219] *See* FLETCHER, *supra* note 179, at 307.

[220] *See* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573, 1654 (1996).

> Bedrock principles of Indian law, applied continuously from the nation's founding until recently, left Indian country largely to tribal governance, except to the extent that Congress expressly extended federal or state jurisdiction or limited tribal powers. Supreme Court decisions have begun to depart from these foundation principles. Those decisions have been based essentially on the Justices' subjective judgments about how they ought to allocate sovereign authority over non-Indians in Indian country in order to avoid cultural clashes. This subjectivist approach has now attracted the majority of the present Court away from the weight of precedent in Indian law.

Id.

[221] *See* Charlene Koski, *The Legacy of* Solem v. Bartlett*: How Courts Have Used Demographics to Bypass Congress and Erode the Basic Principles of Indian Law*, 84 WASH. L. REV. 723, 750 (2009).

[222] 522 U.S. 329, 329, 358 (1998).

[223] *Id.* at 358.

[224] *Id.* at 341.

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Justice O'Connor applied the sharpened test announced in *Hagen* and proceeded to find language of cession,[225] which the Court interpreted as an intent towards diminishment, although the purpose of allotment acts was for Congress to buy reservation land to open those purchased lands to settlers within the reservations.[226] The Yankton Sioux Tribe asserted that the 1894 act included a savings clause that should be read to uphold the terms of the 1858 treaty-established reservation.[227] "Article XVIII of the agreement, a saving clause, stated that nothing in its terms 'shall be construed to abrogate the [1858] treaty' and that 'all provisions of the said treaty . . . shall be in full force and effect, the same as though this agreement had not been made.'"[228] The Court failed to apply the Indian canons of construction in favor of the Indians and instead accepted the argument of South Dakota that the savings clause should not be so literally interpreted.[229]

To add insult to injury, the Court drew upon the record from a Council meeting between the starving Yankton Sioux and government commissioners as focused on "many references to the Government's failure to fulfill earlier promises" and no reference to the 1858 reservation boundaries.[230] Reciting more statements from government officials' reports, the Court concluded that the "contemporaneous understanding" of the 1894 allotment act was to diminish the reservation.[231] As for demographics, the presence of mostly non-Indians with a few Indian allotments was considered by the Court as a diminishment factor.[232] The Court also approved of the aggressiveness of South Dakota in asserting "virtually unchallenged" jurisdiction over the open area of the reservation as evidencing diminishment.[233]

In holding the Yankton Sioux Reservation diminished,[234] the U.S. Supreme Court unanimously betrayed the rule of law in favor of factors

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[225] *Id.* at 344–45.
[226] *Id.* at 356.
[227] *Id.* at 345.
[228] *Id.* at 339.
[229] *Id.* at 345–346.
[230] *Id.* at 347.
[231] *Id.* at 354–55.
[232] *Id.* at 356–57. *See* James M. Grijalva, Robert Laurence, Alex Tallchief Skibine, Frank Pommersheim & N. Bruce Duthu, *Diminishment of Indian Reservations: Legislative or Judicial Fiat?*, 71 N.D. L. REV. 415, 417–18 (1995). "Any test that starts by saying that it is looking for 'clear' indications of congressional intent and then lists as a factor in determining the clear intent the present day demographics of the reservation cannot legitimately talk in terms of clear indications of congressional intent." *Id.* at 417 (comment by Alexander Skibine).
[233] *Yankton Sioux Tribe*, 522 U.S. at 357.
[234] *Id.* at 358.

weighing against Tribal Nations due to the constant pressure to dispossess Indians of their homelands.[235]

Thus, four of the above highlighted cases demonstrate the unceasing attack of South Dakota to gain approval by the highest federal court in the United States to disrupt and destroy the reservation status of the Sioux Tribal Nations. Similarly, the above analysis includes a highlighted case involving an attack by the state of Utah, which proved to be successful for the state as well in the U.S. Supreme Court. Abandoning the rule of law in reservation boundary jurisprudence, the U.S. Supreme Court committed an injustice to the plain language of the Supremacy Clause in the U.S. Constitution that "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."[236]

VI. THE RULE OF LAW IN THE 2020 *MCGIRT V. OKLAHOMA* DECISION

With the history of twisting the legal standard to find diminishment intentions in allotment acts, rather than diminishment "clear expressions," the treaties between Tribal Nations and the United States appeared to find little protection or enforcement in the U.S. Supreme Court regarding the permanent homeland status of reservations. When a challenge to state criminal jurisdiction arose in Oklahoma on the grounds that the alleged conduct occurred on the Muscogee (Creek) Nation Reservation, the outcome was uncertain as the state of Oklahoma had perniciously denied the existence of any reservations, with the limited exception of the Osage Reservation.[237]

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[235] *See* Judith V. Royster, *Decontextualizing Federal Indian Law: The Supreme Court's 1997–98 Term*, 34 TULSA L.J. 329, 346 (1998).

> The *Yankton Sioux* decision is thus an example of the decontextualization of Indian law. The Court took an arguably reasonable rule from its prior cases—an "almost insurmountable presumption" of diminishment if the tribe ceded the surplus lands for a sum certain—and applied it despite a savings clause that explicitly preserved "all provisions" of the 1858 treaty which established the reservation boundaries. If that safeguarding of the reservation borders is not sufficient to overcome the presumption, then the Court has in effect created an irrebuttable presumption of diminishment which it will apply regardless of context.

See id. at 340.

[236] U.S. CONST. art. VI.

[237] *See* Kirke Kickingbird, *"Way Down Yonder in the Indian Nations, Rode My Pony Cross the Reservation!" From "Oklahoma Hills" By Woody Guthrie*, 29 TULSA L.J. 303, 320 (1993).

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A. *The Ruling on the Treaties and Federal Statutes Regarding the Creek Nation*

On July 9, 2020, the U.S. Supreme Court handed down a long-awaited decision on the status of the Muscogee (Creek) Reservation in Oklahoma. Justice Gorsuch delivered the 5-4 decision in *McGirt v. Oklahoma*.[238] Justice Gorsuch's opinion opened by acknowledging the traumatic history of the Muscogee Creek Nation in securing a permanent homeland:

> On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever. In exchange for ceding "all their land, East of the Mississippi river," the U.S. government agreed by treaty that "[t]he Creek country west of the Mississippi shall be solemnly guarantied to the Creek Indians." Treaty With the Creeks, Arts. I, XIV, Mar. 24, 1832, 7 Stat. 366, 368 (1832 Treaty).[239]

Next, the opinion explained that Jimcy McGirt, a member of the Seminole Nation of Oklahoma, challenged state criminal jurisdiction by asserting his alleged criminal conduct occurred on the Creek Reservation implicating the federal Major Crimes Act,[240] which is operative within Indian Country.[241]

In establishing the framework for the primacy of the role of Congress in U.S. Indian policy, the majority opinion drew upon the regulation of commerce by Congress under the U.S. Constitution's Commerce Clause and cited to the U.S. Constitution's Supremacy Clause denoting "federal treaties and statutes are the 'supreme Law of the Land.'"[242]

> Misinformed but conventional wisdom tells us that Oklahoma has no reservations except the Osage Reservation. This same font of wisdom tells us that contrary to the status of federally recognized tribes in other states, the state of Oklahoma has jurisdiction over tribal members and tribal and trust lands in Oklahoma. This broadcasting of conventional wisdom about the status of Indian government versus state authority continues despite the fact that federal court decisions for nearly two decades have not confirmed the misconception that tribal governments in Oklahoma have a status different from other tribes in the United States.

Id. at 303–04.

[238] 140 S. Ct. 2452, 2459 (2020). Justice Gorsuch was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.
[239] *Id.*
[240] *Id.*; 18 U.S.C. § 1153(a).
[241] 18 U.S.C. § 1151.
[242] *McGirt*, 140 S. Ct. at 2462.

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Citing to the *Solem* decision, *McGirt* established that the legal standard for review of the reservation's status must adhere to congressional authority as "[o]nly Congress can divest a reservation of its land and diminish its boundaries."[243]

In addressing the argument by the state of Oklahoma that the Creek Reservation did not survive allotment, the majority opinion in *McGirt* rejected the argument by first referencing the federal definition of Indian Country as "all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent."[244] This definition in federal law demonstrated that Congress intended allotment to allow for non-Indian settlement within reservation boundaries.[245] In reviewing the statutory language of both the 1901 Creek Allotment Act and the 1908 Act, the Court found that over time the arrangement between the Creek Nation and Congress was adjusted with shifting policies from assimilation to encouragement for the Creek Nation to adopt a tribal constitution and bylaws in 1936.[246] Regarding the history of enactments by the U.S. Congress and the tribal government operations, the Court concluded that "in all this history there simply arrived no moment when any Act of Congress dissolved the Creek Tribe or disestablished its reservation."[247]

The Court rejected language from previous decisions of asserted steps in the analysis on the status of a reservation, in contravention of argument by Oklahoma that the steps of contemporary understanding and current demographics were required.[248] Categorizing this argument as "mistaken," the Court explained that "[t]here is no need to consult extratextual sources when the meaning of a statute's terms is clear."[249] Further, Justice Gorsuch, speaking for the majority, reasoned that where a statute does not provide for disestablishment, then there is no purpose in looking to other types of evidence on the matter.[250]

In turn, the Court rejected the substitution of stories for statutes offered by Oklahoma to assert jurisdiction on the open areas of the

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[243] *Id.*
[244] *Id.* at 2464.
[245] *Id.*
[246] *Id.* at 2466–67. *See infra* Section III.C.2.
[247] *McGirt*, 140 S. Ct. at 2468.
[248] *Id.*

> Oklahoma even classifies and categorizes how we should approach the question of disestablishment into three "steps." It reads *Solem* as requiring us to examine the laws passed by Congress at the first step, contemporary events at the second, and even later events and demographics at the third. On the State's account, we have so far finished only the first step; two more await.

Id.
[249] *Id.* at 2469.
[250] *Id.* at 2469–70.

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reservation.[251] First, Oklahoma argued a longstanding practice of prosecuting Indians within the Creek Reservation and erroneously claimed an exemption to the Major Crimes Act.[252] Second, the state made arguments for the Court to take into consideration comments during the Allotment Era by tribal leadership that the reservation was under threat of disestablishment and incorrect comments by government officials that the state had criminal jurisdiction.[253] "Finally, Oklahoma points to the speedy and persistent movement of white settlers onto Creek lands throughout the late nineteenth and early twentieth centuries. But this history proves no more helpful in discerning statutory meaning."[254]

In the face of the arguments by Oklahoma, the Court did not waver from the rule of law and the legal standard requiring an express act of Congress to disestablish the Creek Reservation, which had not occurred.

> If anything, the persistent if unspoken message here seems to be that we should be taken by the "practical advantages" of ignoring the written law. How much easier it would be, after all, to let the State proceed as it has always assumed it might. But just imagine what it would mean to indulge that path. A State exercises jurisdiction over Native Americans with such persistence that the practice seems normal. Indian landowners lose their titles by fraud or otherwise in sufficient volume that no one remembers whose land it once was. All this continues for long enough that a reservation that was once beyond doubt becomes questionable, and then even farfetched. Sprinkle in a few predictions here, some contestable commentary there, and the job is done, a reservation is disestablished. None of these moves would be permitted in any other area of statutory interpretation, and there is no reason why they should be permitted here. That would be the rule of the strong, not the rule of law.[255]

With a clear statement that the Court adhered to the rule of law in determining the status of reservations, the majority opinion in *McGirt* put to rest the reasoning asserted in prior litigation by state governments seeking the demise of reservation status by inserting extratextual sources as having weight with statutory interpretation.

Oklahoma further argued that, in the alternative, Congress never established a reservation for the Muscogee Creek Nation,

[251] *Id.* at 2470.
[252] *Id.* at 2470–72.
[253] *Id.* at 2472–73.
[254] *Id.* at 2473.
[255] *Id.* at 2474.

rather the fee title received by the Tribe was not reservation land.[256] The state also pushed the theory that the Indian lands should be considered dependent Indian communities under the Indian Country statute, rather than a reservation.[257] In response, the majority opinion rebuffed the theory that the Creek Nation's fee title was less secure when the Tribe had sought fee title as protection of the land in negotiating the provisions of the 1833 Treaty with the United States.[258]

In the final section of the opinion, Justice Gorsuch discredited the fears presented by the state and the dissent that the Court's opinion "could unsettle an untold number of convictions and frustrate the State's ability to prosecute crimes in the future."[259] Because of criminal law procedure in both state and federal courts, the majority opinion reassured the state and the dissent that their fears were "speculative" and that harsher sentencing in federal courts may not be a risk that some would opt for.[260]

Regardless of the consequences for criminal prosecution or the other fears espoused, the Court articulated that "the magnitude of a legal wrong is no reason to perpetuate it."[261] As the dissent and the state asserted drastic consequences for civil and regulatory matters, the Court countered that "Oklahoma and its Tribes have proven that they can work together as partners" and mentioned the many intergovernmental agreements active with the Creek Nation.[262]

In the final words of the decision, the following was expressed on the long overdue justice in the case before the Court: "Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right."[263]

B. Dissenting to Disavow Reservation Status

Two dissenting opinions were filed in the case. In the first dissenting opinion, Chief Justice John Roberts was joined with Justices Alito, Kavanaugh, and Thomas. The second dissenting opinion was filed alone by

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[256] *Id.* at 2474–76.
[257] *Id.*
[258] *Id.* at 2475. The Court further rejected arguments by Oklahoma that the Major Crimes Act did not apply in the state and state criminal jurisdiction was necessary for minor crimes between Indians outside the purview of that law because Congress had once abolished tribal courts. *Id.* at 2476–78.
[259] *Id.* at 2479.
[260] *Id.*
[261] *Id.* at 2480.
[262] *Id.* at 2480–81.
[263] *Id.* at 2482.

Justice Thomas, raising a procedural issue under state law.[264] Both dissents reached the conclusion that the Creek Reservation did not survive Oklahoma statehood.[265]

In the dissent led by Chief Justice Roberts, he took issue with the majority's determination that the statutory interpretation did not require resorting to extraneous sources as had been done in prior Court decisions.

> Under those precedents, we determine whether Congress intended to disestablish a reservation by examining the relevant Acts of Congress and "all the [surrounding] circumstances," including the "contemporaneous and subsequent understanding of the status of the reservation." Yet, the Court declines to consider such understandings here, preferring to examine only individual statutes in isolation.[266]

Reviewing the extratextual record, the Roberts dissent found probative newspaper commentary by tribal leaders,[267] the lifting of certain restrictions by Congress on Creek lands,[268] assertion of state criminal jurisdiction,[269] and the "settled understanding" of precedents.[270] This dissenting opinion may be summed up in the following line from the opinion: "In addition to their words, the contemporaneous actions of Oklahoma, the Creek, and the United States in criminal matters confirm their shared understanding that Congress did not intend a reservation to persist."[271]

C. *Return to the Rule of Law in Federal Jurisprudence on Reservation Status*

For far too long, the U.S. Supreme Court indulged in bringing the worst of the Assimilation/Allotment Era policies into the analysis for contemporary recognition of reservation status. By engaging in extratextual factors that were unlikely to weigh in favor of continued reservation status, the decisions prior to the *McGirt* Court strayed from the rule of law and statutory interpretation norms applied for every other area of law.[272] To

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[264] *Id.* at 2502 (Thomas, J., dissenting). In his dissenting opinion, Justice Thomas raised the procedural issue of whether the Court should have taken up the case on the question of federal criminal jurisdiction when state law barred the issue on appeal as not raised in the state trial court. *Id.* at 2503.
[265] *Id.* at 2502–03.
[266] *Id.* at 2482 (Roberts, J., dissenting).
[267] *Id.* at 2496.
[268] *Id.* at 2498.
[269] *Id.* at 2499.
[270] *Id.* at 2502.
[271] *Id.* at 2496.
[272] *Id.* at 2474 (majority opinion).

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determine reservation status, the legal standard is "[t]he first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries."[273] This standard requires a straightforward statutory interpretation which the U.S. Supreme Court and all courts regularly engage in to determine the meaning of legislated laws.

In the field of federal Indian law, the U.S. Supreme Court has directed the use of Indian canons of construction to fairly interpret treaties, statutes, and regulations issued for the benefit of Indians. Through the decisions on reservation status, the Court has rarely adhered to the use of the Indian canons of construction to interpret ambiguities as the Indians would have understood the language of treaties and allotment acts.[274] A constant criticism has been the interpretation of the Court-supplied factor on "contemporaneous understandings" to override the Indian perspective with writings from non-Indian sources supporting dispossession of Indian lands.[275]

The third factor focusing on demographics was announced by Justice Thurgood Marshall in the unanimous *Solem* decision where the opened areas of the Cheyenne River Sioux Reservation led to tribal members moving into those areas and staying in those areas. This was not the usual scenario upon the opening of reservation lands under pressure from White local and national figures to encourage White homesteading and entry into reservation territories.[276] When the demographics analysis was applied in the *Hagen* and *Yankton* Courts, the destruction of reservation status was bolstered by noting the number of non-Indians in the opened areas. A demographics factor is patently unfair as the U.S. has waged a

[273] Solem v. Bartlett, 465 U.S. 463, 470 (1984).
[274] *See* Getches, *supra* note 220, at 1621–22.
[275] *See* Ann E. Tweedy, *Unjustifiable Expectations: Laying to Rest the Ghosts of Allotment-Era Settlers*, 36 SEATTLE U. L. REV. 129, 131 (2012).

> While the Supreme Court routinely relies on the "justifiable expectations" of non-Indian purchasers to support rulings that are adverse to tribes, the Court never uses historical sources to unearth the true substance of these expectations, nor does it explain why they were justifiable. These presumed expectations thus form a significant part of the Supreme Court's justification for impeding tribes from effectively governing their own reservations, and the Court's use of these expectations helps to maintain an atmosphere of lawlessness on reservations.

Id.
[276] *See* Saito, *supra* note 57, at 44.

> Using this rationale, the Court upheld the 1887 Allotment Act, which converted collectively held Indian lands into individual allotments and allowed "surplus" land to be transferred to White settlers, despite the fact that the law violated the due process clause of the Fifth Amendment as well as the explicit terms of an 1867 treaty.

Id.

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genocidal campaign against American Indian populations over centuries in sometimes overt methods,[277] and other times indirect actions putting the Native population at risk.[278] By requiring American Indians to populate every portion of a reservation to keep reservation status, the U.S. is holding tribal peoples to a standard found in the religious doctrine of discovery, in so far as actual possession consummated recognized title.[279] This is a perversion of reservation status as negotiated to reserve permanent homelands for the future generations of tribal peoples.

The insertion of allotment acts to analyze the present-day status of reservation boundaries has been a ploy of dispossession and a violation of the rule of law.[280] In the Court decisions in this line up to *McGirt*, there has been an attempt to convince tribal leaders that their reservations had been permanently altered eighty to one hundred years prior without any express language by Congress.[281] With the *McGirt* decision's enunciation of the rule of law, rather than "the rule of the strong,"[282] the legal norms for Tribal Nations and the United States have been placed back on the right path and brought the Court's jurisprudence into the Indian Self-Determination Era of U.S. Indian policy.

VII. CONCLUSION: TO RESTORE FAITH IN THE TRIBAL NATIONS-U.S. RELATIONSHIP AS PERMANENT NEIGHBORS

A majority of the treaties entered into by the U.S. with Tribal Nations in the late 1700s and 1800s contained the promise of perpetual "peace and friendship."[283] This promise should necessitate recognition of full human rights, the application of the rule of law to Tribal Nation claims, and fairness in court decisions.[284]

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[277] *See* DUNBAR-ORTIZ, *supra* note 4, at 96–102.

[278] *See* EagleWoman, *The Ongoing Traumatic Experience of Genocide*, *supra* note 6, at 439–47.

[279] *See* Miller, *supra* note 17, at 333.

[280] *See* Royster, *supra* note 122, at 6–7.

[281] *See* Dean B. Suagee, *A Human Rights-Based Environmental Remedy for the Legacy of the Allotment Era in Indian Country*, 29 NAT. RES. & ENV'T 3, 6 (2014).

> Tribal nations continue to live with the detrimental legacy of the allotment era. The judicially imposed limits on the scope of inherent tribal sovereignty are an impediment to the exercise of the "on-going" aspect of the right to self-determination. The effects of allotment policy can thus be said to constitute a "continuing violation" in international law.

Id.

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

[283] *See, e.g.*, Kirke Kickingbird, *What's Past is Prologue: The Status and Contemporary Relevance of American Indian Treaties*, 7 ST. THOMAS L. REV. 603, 610–11 (1995).

[284] The UN Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. GAOR, 61st Sess., 107th plen. mtg., U.N. Doc. A/RES/61/295 (Sept. 13, 2007), is a

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There is a permanent neighbor relationship between Tribal Nations and the U.S.; Tribal Nations will not abandon their current homelands and reservation.[285] The U.S. does not intend to cease to exist in mid-North America. Thus, the time to reconcile the past and provide a way forward utilizing the rule of law and diplomacy is called for. The U.S. is a settler-nation state and in honoring the treaty relationships with Tribal Nations, also asserts legitimacy in securing land title for U.S. citizens under commonly understood legal principles.[286]

For tribal peoples, the impact of leadership decisions and actions are reviewed for the next seven generations.[287] There is an understanding that contemporary leadership has a responsibility to do the work now to provide for the children yet to come. Stewarding and protecting the tribal homelands is one core responsibility to those future generations.[288] Enforcing treaty rights and seeking redress for the violation of treaty rights are based in these concepts as well.[289]

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touchstone for the full human rights that should be accorded in the relationships between Tribal Nations and the United States. Robert T. Coulter, *The Law of Self-Determination and the United Nations Declaration on the Rights of Indigenous Peoples*, 15 UCLA J. INT'L L. & FOREIGN AFF. 1, 27 (2010).

> In the United States, the right of self-determination in the Declaration would extend and strengthen self-determination, but it will not create any great change. The principal effect is likely to be to discourage the restriction or denial of the right by the federal government. In *Santa Clara Pueblo v. Martinez*, Justice Marshall asserted that Congress could alter or eliminate Indian nations' powers of self-government. The UN Declaration has created or will create a rule of customary international law that the United States cannot exercise such a power to deprive Indian nations of their right of self-determination or self-government.

Id.

[285] *Id.*

[286] Tweedy, *supra* note 275, at 187.

> This information suggests that non-Indians who purchased lands on reservations in many cases did not have justifiable expectations that they would take their land free and clear of any continuing tribal interest. This is because knowledge of such injustice conflicts with the ordinary meaning of justifiable expectations, and knowledge of an unjust taking should be interpreted to constitute notice that tribes may have some continuing interest in the lands.

Id.

[287] Graham, *supra* note 121, at 47 (quoting The Great Law of the Haudenosaunee as "[i]n each deliberation, we must consider the impact of our decisions on the next seven generations.").

[288] Cris Stainbrook, *Indian Lands—Passing Our Most Treasured Asset to Future Generations*, MESSAGE RUNNER, https://iltf.org/wp-content/uploads/2016/11/Message-Runner-2-lowres.pdf [https://perma.cc/45RJ-TZZA].

[289] Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1619 (2000).

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Another key responsibility lies in public education.[290] As the permanent homelands for both Tribal Nations and the United States were established by treaties, executive orders, congressional land recognition acts and settlement acts, this basic foundation for the lands within the U.S. should be taught at all levels of education.[291] The lands comprising Turtle Island are the sacred homelands of many Tribal Nations.[292] More land acknowledgments are being incorporated into mainstream U.S. educational institutions and other entities.[293] "An Indigenous land acknowledgment involves making a statement recognizing the traditional territories of the Indigenous peoples who have lived on the land before the arrival of settlers."[294] With a greater sense of the importance of the rule of law, the

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> Native Americans have consistently employed the discourse of treaty rights to gain recognition for the land and resource rights that have been wrongfully appropriated from them, to assert sovereign rights, and to compel the federal government to carry through on its trust obligations. Although treaty rights are commonly understood as political rights, they also have fundamental importance to the cultural survival of Native American people. Thus, in many ways, the discourse of treaty rights for Native Americans is responsive to international human rights law, which speaks to the obligation of national governments to ensure the cultural survival of distinctive ethnic groups.

Id.

[290] *See* EagleWoman, *The Ongoing Traumatic Experience of Genocide*, *supra* note 6, at 424.

> In the relationships between Tribal Nations and the United States, myth and storytelling have been and continue to be powerful tools in perpetuating the subjugation of and human rights violations against American Indians in judicial decisions, American history textbooks, and the mainstream media. The dehumanization of American Indians is a tradition that stems from the founding of the United States.

Id.

[291] Cynthia Ford, *Integrating Indian Law into a Traditional Civil Procedure Course*, 46 SYRACUSE L. REV. 1243 (1996); Samantha A. Moppett, *Acknowledging America's First Sovereign: Incorporating Tribal Justice Systems into the Legal Research and Writing Curriculum*, 35 OKLA. CITY U. L. REV. 267, 268–70 (2010).

> Nevertheless, the majority of law students are graduating from law school with little, if any, knowledge of this third sovereign—Indian tribes. Rather, American Indian tribal governments and tribal justice systems are completely omitted from most first-year curriculums. By failing to expose students to the tribal justice systems, law schools are not adequately preparing students to practice in today's legal arena. In addition, the failure to acknowledge the third sovereign entity marginalizes an entire culture. Indeed, Indians have been described as the 'unknown minority.'

Id.

[292] *See* King, *supra* note 2, at 466 (explaining the Haudenosaunee Creation Story of Turtle Island).

[293] Monika Batra Kashyap, *Unsettling Immigration Laws: Settler Colonialism and the U.S. Immigration Legal System*, 46 FORDHAM URB. L.J. 548, 575–77 (2019).

[294] *Id.* at 575.

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homelands of the Tribal Nations and the United States may one day be home to peoples of perpetual peace of friendship on both sides of the treaties. The ruling in *McGirt v. Oklahoma* was one step closer to that promise.[295]

[295] *See* Kolby KickingWoman, *Supreme Court Ruling 'Reaffirmed' Sovereignty*, INDIAN COUNTRY TODAY (July 9, 2020), https://indiancountrytoday.com/news/supreme-court-ruling-reaffirmed-sovereignty-4KQXSMEtlUW4lpBGSw6pzA [https://perma.cc/G3ZT-LNRZ]. "'Many folks are in tears,' said [Jonodev] Chaudhuri, ambassador of the tribal nation. 'Despite a history of many broken promises, as is true with many tribal nations, the citizens feel uplifted that for once the United States is being held to its promises.'" *Id.*

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