THE TERMS OF THEIR DEAL: REVITALIZING THE TREATY RIGHT TO LIMIT STATE JURISDICTION IN INDIAN COUNTRY

by
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"But today and to its credit, the Court holds the parties to the terms of their deal. It is the least we can do." Justice Neil Gorsuch, *Washington State Department of Licensing v. Cougar Den.*

For over 200 years, the "whole course of judicial decision" in the United States has recognized that American Indian tribes possess inherent sovereignty to govern their lands and people. Federal recognition of that sovereignty was memorialized in countless treaties, congressionally ratified agreements, and executive orders setting aside reservations throughout the United States. Throughout that same period, and with only minimal exception, the judiciary faithfully applied those treaties to protect tribal property rights, recognize tribal sovereignty, and bar states from imposing jurisdiction within Indian Country.

The jurisprudence in this arena has shifted, however, over the past few decades. Although the Supreme Court continues to faithfully apply its longstanding treaty analysis to protect tribal property rights, it has moved away from using that same analysis when evaluating tribal sovereignty and the scope of state jurisdiction in Indian Country. Instead, as demonstrated by its recent decision

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The Author acknowledges that he lives and makes his living in the aboriginal homeland of the Nimi'ipuu (Nez Perce) and Schitsu'umsh (Coeur d'Alene) peoples and that the University of Idaho is situated within the boundaries of the Nez Perce Tribe's unceded 1855 Reservation. These Tribal Nations are distinct, sovereign, legal, and political entities with their own powers of self-governance and self-determination. Honor the treaties; "[g]reat nations, like great men, should keep their word." F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

in Oklahoma v. Castro-Huerta, the Court has articulated a preemption test that is determined by judicial balancing of the tribal, federal, and state interests in the subject matter the state seeks to regulate. The approach has long been criticized for allowing courts to usurp the legislative power of Congress to make policy in federal Indian law in order to "reach outcomes consistent with their own notions of how much tribal autonomy there ought to be." The purpose of this Article is to establish that this so-called balancing test has no basis in the foundational principles of federal Indian law. Instead, the broad sweep of the field demonstrates that tribal freedom from state jurisdiction within Indian Country should proceed as a treaty right analysis.

Of course, not all reservations were set aside by treaty. Nonetheless, the Supreme Court has been clear that it has "drawn no fundamental interpretive distinction between reservations established by statute or executive order and those protected by treaty." Accordingly, this Article uses the term "treaty" to broadly encompass all sovereign government-to-government agreements between the United States and tribes, as well as executive orders setting aside reservations. The Court's treaty analysis requires courts to determine whether the treaty at issue preempts state law within the reservation. In making that determination, courts must interpret the treaty consistent with background principles of tribal sovereignty, which necessitates that ambiguities be resolved in favor of the tribe and that any sovereignty not expressly ceded has been retained. Applying these principles, the Supreme Court has repeatedly found that the treaty right to a "permanent home" implicitly included the right for tribes to "govern themselves, free from state interference." Once established, a treaty right may only be taken away by Congress. Once again, however, there remains a strong presumption against the abrogation of tribal sovereignty. Thus, the Court has consistently required that there be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."

This Article seeks to demonstrate that the Court's treaty-based analysis of tribal sovereignty should be applied by the judiciary moving forward. It is preferable not only because it is more consistent with foundation principles of federal Indian law but also bedrock constitutional principles as well as basic 21st century domestic and international norms related to the treatment of indigenous peoples and self-determination.

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INTRODUCTION

Since the inception of the United States, the unique body of common law that has become known as federal Indian law has oscillated wildly between the two poles of self-determination and colonialism.[1] More recently, that pendulum has looked more like a whipsaw, as two factions of the Supreme Court have jockeyed for supremacy over the future of the Indian law canon. Thus, just two years after the Court's decision in *McGirt v. Oklahoma*,[2] which was hailed as "one of the most significant and impactful Indian law decisions the Supreme Court has rendered at least in the past century,"[3] and one that was firmly rooted in foundational self-determination principals of federal Indian law,[4] the Court lurched suddenly and dramatically back toward a policy of colonialism with its decision in *Oklahoma v. Castro-Huerta*.[5]

From the beginning, *Castro-Huerta* was a familiar but traumatic case for the Cherokee Nation. Once again, it stood on the sidelines while an outsider—Victor Manuel Castro-Huerta—carelessly wielded the Nation's sovereignty, as well as the

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[1] Maggie Blackhawk, *Federal Indian Law as Paradigm within Public Law*, 132 HARV. L. REV. 1787, 1808 (2019). These two approaches have been mirrored in federal policy. Professor Blackhawk described them as "diplomacy" and "conquest." *Id.* at 1807–09. Professor Gregory Ablavsky suggested that the debate at the Constitutional Convention involved "two contrasting strains of constitutional thinking about relations between Indians, the national government, and the states—one that stressed paternalism, the other that embraced militarism." Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1002 (2014). Regardless of the specific words used to describe them, both seem to agree that "[i]t was the battle between these two viewpoints that laid the foundations of our constitutional law across a range of areas." Blackhawk, *supra*, at 1807–08.

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

[3] Robert J. Miller, Opinion, *The Most Significant Indian Law Decision in a Century*, REGUL. REV. (Mar. 18, 2021), https://www.theregreview.org/2021/03/18/miller-significant-indian-law-decision-century/.

[4] *See generally* Dylan R. Hedden-Nicely & Stacy L. Leeds, *A Familiar Crossroads:* McGirt v. Oklahoma *and the Future of the Federal Indian Law Canon*, 51 N.M. L. REV. 300 (2021).

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

unique status of its lands, as a shield to try to avoid being punished for what was, by all accounts, a heinous crime. Matters were made even worse for the Cherokee Nation because in this case, the victim was one of their citizens but, because of Supreme Court precedent, they were powerless to punish Castro-Huerta because he was a non-Indian.[6] Instead, the state of Oklahoma stepped in, convicting and sentencing Castro-Huerta to 35 years in prison.[7] However, after the Court's decision in *McGirt v. Oklahoma*, the Oklahoma Court of Criminal Appeals held that Oklahoma state courts were without jurisdiction to try Castro-Huerta because the federal General Crimes Act provides for exclusive criminal jurisdiction over crimes committed by non-Indians against Indians in Indian Country.[8] Oklahoma appealed to the U.S. Supreme Court and argued, among other things, that it should have concurrent jurisdiction over these types of crimes. The Supreme Court agreed, concluding that the state of Oklahoma was free to assume criminal jurisdiction over crimes committed by non-Indians against Indian victims within the Cherokee Nation Reservation.[9]

The Court's decision in *Castro-Huerta* fits into an important shift in the colonization of Indian Country in the United States. From the 18th through the early 20th centuries, the Court focused on providing the legal justification for the *federal* colonization of the United States, culminating in the Court's declaration that "these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States . . . ."[10] Having substantially completed that campaign by the early 20th century, the Court has largely shifted its focus to whether the individual states may impose their laws within Indian Country. With its sweeping (albeit rhetorical) dicta that "Indian country is part of the State, not separate from the State," *Castro-Huerta* would seem to be one more brick in the Supreme Court's colonialist agenda that it began over two centuries ago.[11]

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[6] *Id.* at 2501.

[7] *Id.* at 2491.

[8] *Id.* at 2492.

[9] *Id.* at 2504.

[10] United States v. Kagama, 118 U.S. 375, 379 (1886).

[11] *Castro-Huerta*, 142 S. Ct. at 2493. Ironically, a pillar of the Court's reasoning for extending *federal* jurisdiction over Indian Country in *Kagama* was its recognition that states and their citizens "are often [the tribes'] deadliest enemies." The Court's observation was not hyperbolic nor is it ancient history. As Justice Gorsuch details in his dissent in *Castro-Huerta*, in Oklahoma alone, "settlers embarked on elaborate schemes to deprive Indians of their lands, rents, and mineral rights [and] Oklahoma's courts . . . sometimes sanctioned the "legalized robbery" of these Native American[s] "through the probate courts." *Id.* at 2523 (Gorsuch, J., dissenting) (quoting ANGIE DEBO, AND STILL THE WATERS RUN: THE BETRAYAL OF THE FIVE CIVILIZED TRIBES 182 (4th ed. 1991)). Later into the 20th century non-Indians engaged in extensive fraud, and even murder, in order to take possession of Indian lands and oil headrights. DAVID GRANN,

Undoubtedly, there is much to critique about the majority opinion in *Castro-Huerta*. The decision, which the dissent criticized as "policy argument through and through," is puzzling from the wing of the justices that fancy themselves "textualists" and "originalists."[12] Similarly, the majority's analysis of the constitutional balance of power within Indian Country between the United States and states is problematic from both a legal and historical perspective.[13] Along that vein, the Court revived the equal footing doctrine as a basis for state authority within Indian Country, despite its own consistent repudiation of that doctrine over the past 100 years and as recently as 2019.[14] Finally, in order to buttress its decision, the Court seemed eager to adopt Oklahoma's unsubstantiated facts about the contemporary situation in Oklahoma,[15] as well as Oklahoma's "bizarro" version of 19th century jurisprudence.[16]

Although each of these criticisms warrants full investigation, this Article focuses on the Court's treatment of the analytical framework for determining the scope of

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KILLERS OF THE FLOWER MOON: THE OSAGE MURDERS AND THE BIRTH OF THE FBI (2017). More recently still, state courts across the country have provided judicial sanction to the "wholesale displacement of Indian children from their families by State and private child welfare agencies at rates far disproportionate to those of non-Indian families." Brief of Amici Curiae National Congress of American Indians, Association of American Indian Affairs, and National Indian Child Welfare Association at 1, Nat'l Council for Adoption Bldg. Ariz. Fams. v. Jewell, Case No. 15CV00675 (E.D. Va. 2015), *in* DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR., MATTHEW L.M. FLETCHER & KRISTEN A. CARPENTER, CASES AND MATERIALS ON FEDERAL INDIAN LAW 687 (7th ed. 2017). These are but a few examples of recent history, and they pale in comparison to the genocidal warfare taking place on the frontier during the United States's nascent years. DAVID E. STANNARD, AMERICAN HOLOCAUST: THE CONQUEST OF THE NEW WORLD 97–148 (6th ed. 1992); ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLES' HISTORY OF THE UNITED STATES 62–87 (2014).

[12] *Castro-Huerta*, 142 S. Ct. at 2524 (Gorsuch, J. dissenting); *see also* M. Alexander Pearl, *Originalism and Indians*, 93 TULANE L. REV. 269 (2018).

[13] *See, e.g.*, Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 467 (1993).

[14] *See* discussion *infra* Part II.

[15] For example, as the dissent points out, "[t]o support its thesis, the Court cites the State's unsubstantiated 'estimat[e]' that *McGirt* has forced it to 'transfer prosecutorial responsibility for more than 18,000 cases per year . . ." *Castro-Huerta*, 142 S. Ct. at 2524. However, recent investigation demonstrates that "this number seems to have come out of nowhere [and] Oklahoma doesn't provide any source for it." Rebecca Nagle & Allison Herrera, *Where Is Oklahoma Getting Its Numbers From in Its Supreme Court Case?*, ATLANTIC (Apr. 26, 2022), https://www.theatlantic.com/ideas/archive/2022/04/scotus-oklahoma-castro-huerta-inaccurate-prosecution-data/629674/. More importantly, that same investigation revealed that once you factor in the *increase* in federal and tribal prosecution, there had been less than 1,000 fewer prosecutions in Oklahoma in 2021 versus 2019 "and some of that may be more the result of the pandemic than any problem specific to Oklahoma and the reservations." *Id.*

[16] Gregory Ablavsky, *Oklahoma's Bizarro Nineteenth Century*, *in* Castro-Huerta, STAN. L. SCH. BLOGS: LEGAL AGGREGATE (Apr. 26, 2022), https://law.stanford.edu/2022/04/26/oklahomas-bizarro-nineteenth-century-in-castro-huerta/.

state jurisdiction in Indian Country more broadly. Although familiar, the Court's articulation of that framework is entirely out of sync with both the recent trend in Supreme Court jurisprudence, as well as the "whole course of judicial decision" in this arena.[17] Instead, since the foundational case *Worcester v. Georgia*, the Supreme Court has recognized that federal Indian law is rooted in a unique mix of *tribal sovereignty* over Indian Country as well as *federal primacy* over Indian relations, which are intertwined through the countless treaties, congressionally ratified agreements, and executive orders setting aside reservations throughout the United States.[18] Over the nearly 200 years since *Worcester*, the judiciary has faithfully applied those treaties to protect tribal property rights, honor tribal sovereignty, and bar states from imposing jurisdiction within Indian Country.[19]

In 1980, the U.S. Supreme Court decided *White Mountain Apache Tribe v. Bracker*, which has become the modern lodestar for courts investigating the scope of state authority over non-Indians within Indian reservations.[20] Consistent with its foundational rules of federal Indian law, the Court highlighted there are:

> two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members. First, the exercise of such authority may be pre-empted by federal law. Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them."[21]

The Court was careful to note that these two bases are closely interrelated. Nonetheless, litigants, lower courts, and even the Supreme Court itself has largely ignored the second basis in favor of its preemption analysis, which has since become the analysis of choice for the courts as they determine the scope of state authority over non-Indians in Indian Country.[22] That preemption analysis, according to the Court, calls for "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law."[23] However, the

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[17] *See, e.g.*, Michigan v. Bay Mills Indian Cmty., 572 U.S. 782 (2014); Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000 (2019); Herrera v. Wyoming, 139 S. Ct. 1686 (2019); McGirt v. Oklahoma, 140 S. Ct. 2452, 2476–77 (2020); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.02[1], at 222–23 (Nell Jessup Newton ed., 2012) [hereinafter COHEN].

[18] Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[19] Frickey, *supra* note 13, at 418 n.158.

[20] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980).

[21] *Id.* (citations omitted) (quoting Williams v. Lee, 538 U.S. 217, 220 (1959)).

[22] *See id.*; *see, e.g.*, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 330–44 (1983); Ramah Navaho Sch. Bd. v. Bureau of Revenue, 458 U.S. 832, 843 (1982); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 221 (1987); Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685 (1965).

[23] *Bracker*, 448 U.S. at 145.

Court was careful to point out that "[t]he unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of pre-emption that have emerged in other areas of the law."[24] Instead, the Court found that state authority over non-Indians must be examined consistent with "the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence."[25]

The decades leading up to *Bracker* marked the zenith of the Supreme Court's application of foundational principles of federal Indian law in the 20th century.[26] By the time of *Bracker*, however, the Court had already embarked on a different, more subjective, approach.[27] Perhaps caught in the dragnet of the conservative wing of the Court's effort to rebalance *state and federal power*,[28] tribes have increasingly found the original documents outlining their sovereign government-to-government arrangement with the United States shunted to the side.[29] At the same time, the

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[24] *Id.* at 143.

[25] *Id.* at 144–45.

[26] *See generally* Hedden-Nicely & Leeds, *supra* note 4; David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CALIF. L. REV. 1573 (1996).

[27] *See* Getches, *supra* note 26.

[28] *See* Frickey, *supra* note 13, at 422 ("[W]hatever the motivating rationale, the Court has simultaneously deflated the power of the Indian law canon and privileged other values, in particular federalism."). Professor Philip Frickey speculated that "[t]he canon has little bite because it seems so blatantly normative—'you should help those poor Indians'—and normative in a fuzzy, liberal direction at that . . . Its patently value-laden nature renders it easily trumped by federalism principles." *See id.* at 424. He goes on to note that "[t]his problem is aggravated by the fact that the tribes' usual opponents in Rehnquist Court cases have been the states, and that, for the current Court, federalism is a public-law value of extreme importance." *Id.* at 425 n.180. Once again, Frickey has proven prophetic. For example, in a recent Western District of Washington opinion *Tulalip Tribes v. Washington*, which addressed whether the state of Washington could tax Tulalip Reservation sales to non-Indians, the court failed to analyze the 1855 Treaty of Point Elliott—in fact, the court's opinion does not mention the word "treaty" at all. Instead, the court reasoned that "[i]n the absence of an extensive federal regulatory scheme governing the activity being taxed, Supreme Court and Ninth Circuit precedent has all but closed the door on preemption . . . ." Tulalip Tribes v. Washington, 349 F. Supp. 3d 1046, 1063 (W.D. Wash. 2018); *see also* Adam Crepelle, *Taxes, Theft, and Indian Tribes: Seeking an Equitable Solution to State Taxation of Indian Country Commerce*, 122 W. VA. L. REV. 999, 1015 (2020).

[29] Instead, the Court began to increasingly privilege the examination of Indian statutes and regulations of general applicability rather than the organic documents dealing with the specific reservation when addressing the scope of state jurisdiction in Indian Country. Frickey, *supra* note 13, at 421 ("[M]any federal Indian law decisions, especially those dealing with developments since the mid-nineteenth century, turn not on treaty language, but on the text of seemingly more mundane instruments of law such as statutes, executive orders, and federal regulations."). Professor Matthew Fletcher has coined this type of analysis "canary textualism," which is to say a sort of judicial work where "judges view Indians and Indian tribes as passive recipients of federal

Court began to emphasize a revision to its own legal history, arguing that "[l]ong ago the Court departed from Mr. Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries."[30] Consistent with this subjectivist view, the Court's "particularized inquiry" moved away from an analysis of the "language of the relevant federal treaties and statutes," and mutated into a balancing test of state, federal, and tribal interests that allows the courts to "reach outcomes consistent with their own notions of how much tribal autonomy there ought to be."[31]

The Supreme Court's opinion in *Castro-Huerta*—the opinion of the "textualist" and "originalist" wing of the Court—is subjectivism run amok.[32] After it concluded that no federal law categorically barred the state's jurisdiction within the Cherokee Nation, the majority shifted to what it referred to as the "*Bracker* balancing test," which allowed the Court to weigh the various tribal, federal, and state interests at play in the case and come to a determination about whether the state law should be preempted.[33] The approach, which the dissent reproached as "policy argument through and through," provided the majority with a legal justification to reach its preferred outcome: more jurisdiction for the state of Oklahoma and just a little more *power* wrestled from the federal government and shoved over to the states' side of the ledger.[34]

While weighing those interests, the majority simply ignored the myriad treaties the Cherokee Nation had with the United States. In fact, it failed to even mention those treaties beyond the ominously truncated refrain that they had been "supplanted" by Oklahoma's entering the Union in 1907.[35] Instead, the Court focused almost exclusively on the balance of *state and federal* interests at play, concluding that the Cherokee Nation *had no interest* because it could not enforce its criminal laws against Castro-Huerta.[36] From this obscured vantage, the majority could see

law and policy, with little or no input in the process." Matthew L.M. Fletcher, *Muskrat Textualism*, 116 N.W. L. REV. 963, 974–75 (2022).

[30] *Bracker*, 448 U.S. at 141 (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832)).

[31] Getches, *supra* note 26, at 1628; *see also* Fletcher, *supra* note, 29 at 1028 ("[E]ach time a big Indian law case reaches the Supreme Court, the Justices think about just how much tribal power is too much. Canary textualists seemingly worry about the consequences of their decisions on non-Indian interests. There seems to be an enormous fear that tribal governance will profoundly 'destabilize . . . vast swathes' of America.").

[32] *See generally* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022).

[33] *Id.* at 2501.

[34] *Id.* at 2524 (Gorsuch, J., dissenting).

[35] *See infra* Part II.

[36] *Castro-Huerta*, 142 S. Ct. at 2501. In reaching that conclusion, the Court stated:

> [A] state prosecution of a crime committed by a non-Indian against an Indian would not deprive the tribe of any of its prosecutorial authority. That is because, with exceptions not invoked here, Indian tribes lack criminal jurisdiction to prosecute crimes committed by non-

no conflict between state and federal jurisdiction upon which preemption could be based. Indeed, the majority found it inconceivable that the United States would object to *more* criminal jurisdiction to protect tribal victims.[37] At no point did the majority grapple with the true conflict—how Oklahoma's imposition of jurisdiction might infringe upon the sovereignty of the Cherokee Nation as promised by the United States in the 1835 Treaty of New Echota.[38]

Castro-Huerta demonstrates just how unmoored the tribal preemption analysis has come from the Court's original intent in *Bracker* as well as its foundational principles when addressing questions of federal Indian law. Although the Supreme Court continues to faithfully apply its longstanding treaty analysis to protect tribal property rights,[39] it has moved away from using that same analysis when evaluating the scope of state jurisdiction in Indian Country. However, as Justice Neil Gorsuch says in dissent: "*Bracker* never purported to claim for this Court the raw power to 'balance' away tribal sovereignty in favor of state criminal jurisdiction . . . let alone ordain a wholly different set of jurisdictional rules than Congress already has."[40]

Instead, the "particularized inquiry" called for under *Bracker* is, in the first instance, the same treaty analysis the Court applies to tribal property rights. And, although not all reservations were set aside by treaty, the Supreme Court has been clear that it has "drawn no fundamental interpretive distinction between reservations established by statute or executive order and those protected by treaty."[41] Accordingly, this Article includes within the term "treaty analysis" the Court's consideration of

> Indians such as Castro-Huerta, even when non-Indians commit crimes against Indians in Indian country.

Id. Of course, the Court failed to mention that the only reason the tribes lack that jurisdiction is because the Supreme Court itself has so ruled. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978) (holding, based on an incomplete historical analysis, that tribal courts do not have criminal jurisdiction over non-Indians). Hence, the Cherokee Nation, and indeed all tribes, are "weak, powerless, and ultimately inferior to the [state and federal] forces that could save them" and their members from non-Indian criminal perpetrators. Fletcher, *supra* note 29, at 966.

37 *Castro-Huerta*, 142 S. Ct. at 2501. In coming to this conclusion, the Court ignored the robust body of evidence that the existence of state jurisdiction has not been a silver bullet for victim safety in Indian Country, and that the confusion created by overlapping state and federal jurisdiction exacerbates the public safety crisis in Indian Country. *See* INDIAN L. & ORD. COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES 107–09 (2013).

38 *Compare Castro-Huerta*, 142 S. Ct. at 2501, *with* Treaty with the Cherokees, Cherokee-U.S., art. 5, Dec. 29, 1835, 7 Stat. 478, 481.

39 *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000 (2019); Herrera v. Wyoming, 139 S. Ct. 1686 (2019); McGirt v. Oklahoma, 140 S. Ct. 2452, 2461 (2020).

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

41 Frickey, *supra* note 13, at 422; *see also* COHEN, *supra* note 17, § 2.02[1], at 114–15. Notably, *Bracker* itself addressed the scope of state jurisdiction within the White Mountain Apache Reservation, which was set aside by executive order. *Bracker*, 448 U.S. at 138 n.1.

all sovereign government-to-government agreements between the United States and tribes, as well as executive orders setting aside reservations. That analysis requires courts to examine "the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence."[42] Importantly, although the Supreme Court has used the balancing test on a few occasions, it has never endorsed it as *the test* for determining state jurisdiction questions over non-Indians in Indian Country, nor has it overruled any of the many cases that have analyzed state jurisdiction using foundational treaty interpretation principles. Thus, courts should be free to continue to address state jurisdictional questions using the Court's well-trod treaty analysis.

Although each tribe and their treaty are unique, the very core of any agreement between the United States and the tribes was to set aside a homeland for the tribe. These agreements were not mere real estate transactions and, as Justice Gorsuch wrote, "[t]heir reservations are not glorified private campgrounds."[43] Instead, as the 1835 Treaty with the Cherokee Nation lays bare, the underlying purpose of these agreements was to establish a homeland "without the territorial limits of the state sovereignties" wherein the tribes could "establish and enjoy a government of their choice and perpetuate such a state of society as may be most consonant with their views, habits and condition[s] . . . ."[44]

From that starting place, the imposition of state jurisdiction within a tribal homeland would constitute an erosion of a tribal treaty right that should be analyzed under the Supreme Court's treaty abrogation analysis. That analysis dictates that only Congress, not the judiciary, may engage in any "interest-balancing" that may abrogate tribal treaty rights.[45] Therefore, state authority should only be allowed if Congress has authorized the state authority being sought. And, that authorization should be made expressly by Congress or, at the very least, there must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."[46]

The purpose of this Article is to demonstrate that the *Bracker* Court never intended for its test to disintegrate into a balancing test. Instead, although its language is opaque, the Court was engaging in a very familiar treaty-based analysis that is more consistent with the entire body of federal Indian law. The Article begins by exploring the full legal history of state jurisdiction in Indian Country, from start to present, to demonstrate just how divorced the current "balancing" test is from the

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[42] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144–45 (1980).

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

[44] Treaty with the Cherokees, *supra* note 38, 7 Stat. at 478.

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

[46] United States v. Dion, 476 U.S. 734, 740 (1986).

"whole course of judicial decision" in this arena.[47] It then takes a close look at *Castro-Huerta* and concludes that although the case is certainly troubling, it does not alter how courts ought to address state law in Indian Country moving forward. It then explains *why* a balancing test for determining state jurisdiction in Indian Country is problematic. Finally, it concludes by suggesting how courts could proceed with a better analysis; one that is more consistent with the full body of federal Indian law and that respects and honors tribal self-determination, as well as the United States's treaty and trust obligations to the tribes.

I. HISTORICAL DEVELOPMENT OF STATE JURISDICTION IN INDIAN COUNTRY

A. Foundational Cases Yield Foundational Principles

It is delightfully ironic that the state of Georgia, which in the early 1800s was hellbent on destroying tribal sovereignty in the southeastern United States, will be forever linked to the case that forms the bedrock of federal Indian law.[48] Certainly, that was not part of the plan when it passed a series of draconian laws that purported to extend into the Cherokee Nation and were designed to extinguish the Cherokees as a body politic and force its citizens to remove west of the Mississippi.[49] But that is exactly what happened when, pursuant to those laws, Georgia arrested and charged a series of missionaries, including Samuel Worcester and Elizur Butler, that were proselytizing within the Cherokee Nation under the authority of a federal license.[50]

Eventually, Worcester and Butler's case made its way to the Supreme Court, which was asked to determine whether the state of Georgia had jurisdiction within the Cherokee Nation. Chief Justice John Marshall did not mince words, finding that the Cherokee Nation remained a place where "the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of

[47] COHEN, *supra* note 17, § 4.02[1], at 222–23.

[48] Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

[49] Rennard Strickland, *The Tribal Struggle for Indian Sovereignty: The Story of the* Cherokee Cases, *in* INDIAN LAW STORIES 61, 65 (Carole E. Goldberg, Kevin K. Washburn & Philip P. Frickey eds., 2010) ("These new Georgia laws declared the Cherokee lands to be 'Cherokee County' within the state of Georgia, and designated this as 'surplus' land to be opened to Georgia citizens for settlement by lottery. Indians were denied the right to appear in court under this legislation, and non-Indians living within this Cherokee area were required to obtain a permit from officials of the state of Georgia.").

[50] *Id.* at 73. For a full legal history of events leading up to *Worcester v. Georgia*, see JOHN EHLE, TRAIL OF TEARS: THE RISE AND FALL OF THE CHEROKEE NATION 246–47 (1988); GREGORY D. SMITHERS, THE CHEROKEE DIASPORA: AN INDIGENOUS HISTORY OF MIGRATION, RESETTLEMENT, AND IDENTITY 106 (2015).

[C]ongress."[51]

Chief Justice Marshall found two separate but interrelated bases for invalidating the Georgia laws. First, his decision was based upon "[t]he rights, [and] political existence . . ." of the Cherokee Nation itself.[52] Second, he analyzed Georgia's jurisdiction within the Cherokee Nation in light of "the controlling power of the constitution and laws of the United States" over Indian affairs.[53]

As to the first, Chief Justice Marshall began with the baseline proposition that before the coming of Europeans, "America . . . was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws."[54] "The very term 'nation,'" according to Justice Marshall, "so generally applied to them, means 'a people distinct from others.'"[55] As a result, the tribal nations "had always been considered as distinct, independent political communities, retaining all their original natural rights . . . ."[56]

Admittedly, the Court had already acknowledged that the coming of Europeans "necessarily . . . impaired," the natural rights of the tribes.[57] Indeed, citing to the doctrine of discovery, Chief Justice Marshall had already ruled that tribal external sovereignty to treat with foreign nations other than the United States had been extinguished and "their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that [European] discovery gave exclusive title to those who made it."[58] Nonetheless, Chief Justice Marshall clarified in *Worcester* that the scope of the doctrine of discovery was extremely narrow, finding that "[t]he extravagant and absurd idea, that the feeble settlements made on the sea coast . . . acquired legitimate power . . . to govern the [tribes] . . . did not enter the mind of any man."[59] Instead, the power bestowed upon the King of Great Britain by the doctrine of discovery was limited to the power to "purchase[] . . . lands when they were willing to sell, at a price [the tribes] were

[51] *Worcester*, 31 U.S. at 561.

[52] *Id.* at 536.

[53] *Id.*

[54] *Id.* at 542–43.

[55] *Id.* at 559.

[56] *Id.*

[57] Johnson's Lessee v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823).

[58] *Id.* Notwithstanding Chief Justice Marshall's grand assertion of "the universal recognition of these principles," as a matter of fact, tribal nations routinely entered into sovereign government-to-government relations with other European nations throughout the colonial period and the early history of the United States. *See generally* GREGORY ABLAVSKY, FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES (2021).

[59] *Worcester*, 31 U.S. at 544–45.

willing to take; but [Britain] never coerced a surrender of them."[60] More importantly, the Chief Justice could find "no example . . . of any attempt on the part of the crown to interfere with the internal affairs of the Indians [except] to keep out the agents of foreign powers . . . ."[61]

The United States acquired this same limited power when it stepped into the shoes of Great Britain and acquired sovereignty over the former British colonies.[62] Additionally, on a more practical level, the Chief Justice acknowledged that the nascent United States—which had just come out of the revolutionary war, was strapped with debt, and had a tenuous hold on its own sovereignty—was in no position to unilaterally impose *any* conditions on the tribes. At the time, there was a relative balance of military power, which caused Indian wars to be extremely risky and costly.[63] Consequently, "[t]he early journals of [C]ongress exhibit[ed] a most anxious desire to conciliate the Indian nations," and that "'the securing and preserving the friendship of the Indian nations [was] a subject of utmost moment . . . .'"[64]

That friendship was memorialized through treaties, an instrument reserved exclusively for agreements between sovereigns.[65] According to Chief Justice Marshall,

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[60] *Id.* at 517.

[61] *Id.* at 547; *see also* Blackhawk, *supra* note 1, at 1822 ("Beyond the power to exclude other European states, the doctrine of discovery provided no guidance. The Court reflected on the fact that no sovereign had, under the doctrine of discovery, intruded into the internal affairs or questioned the sovereignty of Native Nations.").

[62] *M'Intosh*, 21 U.S. at 584 ("[N]either the declaration of independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great Britain was before entitled.").

[63] For example, according to Greg Ablavsky, a single "surgical" expedition into the Northwest Territory "spawned a bitter, costly, multiyear conflict that cost at least $5 million—nearly half the federal budget during this period." ABLAVSKY, *supra* note 58, at 149. Both Ablavsky and Blackhawk argue forcefully that a primary cause for these wars was non-Indians aggressively appropriating Indian lands guaranteed by treaty. *See generally id.* Thus, contrary to the Supreme Court's assertions in *Castro-Huerta* that "crimes committed by non-Indians against Indians in Indian country did not previously matter all that much," the legal history of the early United States demonstrates that non-Indian depredations in Indian Country was of utmost concern to the nascent U.S. Government, so much so, in fact, that it was a primary cause for the calls for a stronger national government that led to the creation of the U.S. Constitution. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2499 (2022); Ablavsky, *supra* note 1, at 1006.

[64] *Worcester*, 31 U.S. at 549 (quoting 1 JOURNALS OF THE AMERICAN CONGRESS: FROM 1774 TO 1788 113 (1823)).

[65] *Id.* at 559–60 ("The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth. They are applied in the same sense to all."); *see also* Blackhawk, *supra* note 1, at 1810 (discussing the ubiquitous nature of tribal treaty making in the early United States).

those treaties *confirmed* the tribes' unique sovereign status, subject only to those aspects of their sovereignty they willingly surrendered. As such, he looked to the specific treaties between the United States and the Cherokee Nation, not to find a grant of sovereign authority to the Nation, but to determine whether the Nation had ceded away any of its natural rights. Chief Justice Marshall gave scant weight to language purporting to "give" the Cherokees peace and protection, asking the following rhetorical questions:

> When the United States gave peace, did they not also receive it? Were not both parties desirous of it? If we consult the history of the day, does it not inform us that the United States were at least as anxious to obtain it as the Cherokees? . . . [D]id the Cherokees come to the seat of the American government to solicit peace; or, did the American commissioners go to them to obtain it?[66]

Similarly, he dismissed the idea that the Cherokee Nation had ceded its sovereignty by agreeing to come under "the protection of the United States."[67] Chief Justice Marshall pointed out the law of Nations had long recognized that "[a] weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state."[68] Indeed, "[p]rotection does not imply the destruction of the protected . . . a weaker power does not surrender its independence—its right to self government, by associating with a stronger, and taking its protection."[69]

He likewise paid little mind to the federal promise to "allot" to the Cherokees land for a hunting ground, concluding that "it [is not] reasonable to suppose, that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish the word 'allotted' from the words 'marked out.'"[70] He concluded that tribal negotiators likely did "not understand the term employed, as indicating that, instead of granting, they were receiving lands." Chief Justice Marshall refused to give effect to this apparent misunderstanding finding instead that the term "allot" must be "taken in the sense in which it was most obviously used."[71] He then went beyond the text and relied on the circumstances surrounding the treaty, which illuminated that "[t]he actual subject of [the] contract was the dividing line between the two nations . . . in fact, they were ceding lands to the United States, and describing the extent of their cession. . . ."[72]

[66] *Worcester*, 31 U.S. at 551.
[67] *Id.* at 555.
[68] *Id.* at 561.
[69] *Id.* at 552, 561.
[70] *Id.* at 552.
[71] *Id.* at 553.
[72] *Id.* at 552–53.

Finally, the Court addressed Article IX of the Treaty of Hopewell, which granted that "the United States . . . shall have the . . . right of . . . managing all [the Cherokee Nation's] affairs. . . ."[73] Despite its sweeping language, Chief Justice Marshall concluded that "[t]o construe the expression . . . into a surrender of self-government, would be, we think, a perversion of their necessary meaning . . ."[74] Instead, the Court concluded the purpose of Article IX was to limit the Cherokee Nation's right to trade with other countries or to sell land to anyone other than the United States.[75] The Court found it "inconceivable that [the Cherokees] could have supposed themselves, by a phrase thus slipped into an article, on another . . . subject, to have divested themselves of the right of self-government. . . ."[76] The Court found that "[h]ad such a result been intended, it would have been openly avowed."[77]

Chief Justice Marshall's analysis established the foundations of what would become the reserved rights doctrine and the Indian canons of construction. First, he made clear that, as the Court would later put it, "the treaty was not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted."[78] Further, when interpreting these treaties, Chief Justice Marshall was careful to highlight that we must look beyond the text and explore the circumstances surrounding each individual agreement in order to understand the mutual intent of both the United States and the tribe. These rules have been applied by the Supreme Court so many times they have ripened into canons:

> The Indian law canons of construction require that treaties, agreements, statutes, and executive orders be liberally construed in favor of the Indians and that all ambiguities are to be resolved in their favor. In addition, treaties and agreements are to be construed as the Indians would have understood them, and tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous.[79]

Ultimately, the Court upheld its prior ruling that the Cherokee Nation, like all tribes, "have been uniformly treated as a state from the settlement of our country."[80] From this, the Court concluded that with the single exception that discovery "excluded [the tribes] from intercourse with any other European potentate than the first discoverer," it did nothing to affect the tribal right to remain "distinct, independent political communities, retaining all their original natural rights. . . ."[81] It likewise reaffirmed the United States's recognition of the tribes' sovereign status by

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[73] *Id.* at 553 (emphasis omitted).

[74] *Id.* at 553–54.

[75] *Id.* at 554.

[76] *Id.*

[77] *Id.*

[78] United States v. Winans, 198 U.S. 371, 381 (1905).

[79] COHEN, *supra* note 17, § 4.02[2], at 224.

[80] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).

[81] *Worcester*, 31 U.S. at 559.

entering into treaty relations with them and, save those aspects of the tribes' sovereignty they willingly ceded, tribal internal sovereignty remained completely intact. As a result, the Court concluded, "[t]he 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."[82]

The question remained, however, of whether that treaty relationship was a "rightful exercise of [federal] power, or is it usurpation [of state power]?"[83] From this question Chief Justice Marshall announced federal preemption of state authority in Indian Country as a second, co-equal, basis for invalidating the Georgia laws. He began with the proposition that the states *never* had authority over Indian affairs.[84] Instead, "this power, in its utmost extent, was admitted to reside in the crown."[85] Then, after the successful conclusion of the Revolutionary War, "[C]ongress assumed the management of Indian affairs; first in the name of these United Colonies; and, afterwards, in the name of the United States."[86]

Chief Justice Marshall admitted that some "ambiguous phrases" in the Articles of Confederation could indicate some modicum of state authority over Indian affairs. Although Chief Justice Marshall refused to "assent to [this construction]," he ultimately concluded that "[t]he correct exposition of this article is rendered unnecessary by the adoption of our existing constitution."[87] The Constitution vested in Congress "the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and *with the Indian tribes*."[88] The Court found the intersection of these three powers "comprehend all that is required for the regulation of our intercourse with the Indian[s] [and] [t]hey are not limited by any restrictions on their free actions."[89] That regulation was *exclusive*, admitting of absolutely no authority for the individual states within Indian Country.

Ultimately, it was the interrelationship of these two bases for invalidating the

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[82] *Id.* at 557.

[83] *Id.* at 558.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.* at 559.

[88] *Id.* In his comprehensive history of the framer's debates regarding Indian tribes during the Constitutional Convention, Professor Gregory Ablavsky concludes that in addition to the Commerce Clause, Indian affairs was pervasive throughout the debates on the Supremacy Clause, the Treaty Clause, as well as the Property clause that "provided exclusive federal power over western territories." Ablavsky, *supra* note 1, at 1007. It was the combination of these constitutional provisions, as well as the Washington Administration's course of dealings during the United States's first years that resulted in exclusive federal authority over Indian affairs. *See* Ablavsky, *supra* note 1, at 1039–45, 1050–76.

[89] *Worcester*, 31 U.S. at 559.

Georgia laws—that the Cherokee Nation's own sovereignty repelled Georgia's imposition combined with the exclusive federal power within Indian Country—that caused the Nation's arguments to carry the day. Put simply:

> The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.[90]

The executive reaction to the Supreme Court's decision in *Worcester v. Georgia* is well documented.[91] Although there is some question as to whether President Andrew Jackson uttered his famous quip that "John Marshall has made his decision; now let him enforce it," there is little question that "Jackson probably held such thoughts."[92] What we know for sure is that Jackson was the primary architect of the Indian Removal Act and did nothing to relieve the local pressure being brought to bear on the Cherokee Nation and other tribes to remove west of the Mississippi.[93] Eventually, a small but powerful contingent of Cherokees did relent, signing the Treaty of New Echota, which precipitated the Cherokee Trail of Tears.[94]

B. Allotment Era Cases

Although cold comfort for the Cherokee Nation, *Worcester v. Georgia* was an unmitigated triumph for Indian Country more broadly, and remains the foundational case related to tribal sovereignty and self-determination. Nonetheless, its influence has ebbed and flowed over the past two centuries. Even as it was being written, federal executive policy related to tribes was beginning to shift away from acknowledging tribes as sovereigns and towards their treatment as "wards" of the federal government.

Unfortunately, Chief Justice Marshall provided judicial sanction to this policy a year prior to *Worcester* when writing the Court's opinion in *Cherokee Nation v. Georgia*.[95] There, Justice Marshall once again began by acknowledging that the tribes were treated as states:

> The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, [and] of

[90] *Id.* at 561.

[91] *See* EHLE, *supra* note 50, at 245–47; SMITHERS, *supra* note 50, at 107; Strickland, *supra* note 49, at 75–79.

[92] GETCHES, *supra* note 11, at 147; SMITHERS, *supra* note 50, at 108.

[93] EHLE, *supra* note 50, at 246–47; SMITHERS, *supra* note 50, at 106.

[94] SMITHERS, *supra* note 50, at 208.

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

> being responsible in their political character . . . . 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.[96]

But, according to the Court, they were neither a state of the Union nor a "foreign" state.[97] Instead, they were something else; a "domestic dependent nation," that "are in a state of pupilage. Their relation to the United States resembles that of a *ward* to his guardian."[98]

Although, Chief Justice Marshall and the Supreme Court clarified just one year later in *Worcester* that this "dependent" status did nothing to affect tribal internal sovereignty, federal rhetoric quickly shifted to the notion that tribes were helpless wards under the complete control of their federal overlords.[99] By the end of the 19th century the Supreme Court began to provide legal sanction to the *de facto* approach by the federal executive. As a result, cases involving state jurisdictional incursions into Indian Country were analyzed under principles of federal preemption rather than tribal sovereignty.

For example, in 1882 the Territory of Idaho levied a tax on the Utah & Northern Railway Company, which owned a right-of-way that ran through the Fort Hall Reservation.[100] The railroad filed suit, citing to the 1868 Treaty of Fort Bridger.[101] Although the Fort Bridger Treaty was the legal basis for the railroad's argument, the Court failed to consider whether that treaty memorialized any sort of sovereign status for the Shoshone-Bannock Tribes that would serve as a barrier to state jurisdiction. Instead, its analysis focused on the federal power to protect its tribal wards. The Court began by acknowledging that "[t]o uphold [state] jurisdiction in all cases and to the fullest extent would undoubtedly interfere with the enforcement of the treaty stipulations, and might thus defeat provisions designed for the security of the Indians."[102] But, since the extent of the federal interest in the treaty was limited to that necessary to protect their tribal wards, the Court concluded that "[t]he authority of the Territory may rightfully extend to all matters not interfering with that protection."[103] Accordingly, the court found the tax valid because "it is not necessary to insist upon [exclusive federal] jurisdiction for the Indians to enjoy the full benefit

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[96] *Id.* at 16.

[97] *Id.* at 27.

[98] *Id.* at 17 (emphasis added).

[99] GETCHES, *supra* note 11, at 167–205; *see also* Blackhawk, *supra* note 1, at 1812 (recounting that "[s]ince [1871], the political branches have departed from the formal treaty process. For the latter years of the nineteenth century, this generally meant unilateral lawmaking by Congress and the Executive, and the oppressive imposition of policies upon Native Nations without any collaboration or consent").

[100] Utah & N. Ry. Co. v. Fisher, 116 U.S. 28, 28–29 (1885).

[101] *Id.* at 29.

[102] *Id.* at 31.

[103] *Id.*

of the stipulations for their protection."[104]

The Court's focus on the federal right to protect their wards proved to be quite the slippery slope that allowed for all sorts of state mischief. Indeed, as *Fisher* demonstrates, the imposition of state authority may not necessarily have any sort of practical effect on the tribal lifeway, and thus does not trigger the federal duty of "protection." For example, the Court found that an Oklahoma territorial tax on cattle owned by non-Indians that were being grazed on the Osage and Kaw Reservations was valid because "it is obvious that [the tax] is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians . . . ."[105] And, although it crept into the criminal realm, the Court sanctioned state jurisdiction over crimes involving only non-Indians because, among other reasons, that authority was consistent with the protection of the tribes and their members.[106]

Federal colonization of Indian Country hit rock bottom with the Court's decision in *Lone Wolf v. Hitchcock*, wherein the Court claimed the federal right to unilaterally abrogate treaties it had made with tribes.[107] Because of the tribal status as wards of the government, the Court concluded that "it was never doubted that the *power* to abrogate [treaties] existed in Congress . . . particularly if consistent with perfect good faith towards the Indians."[108] However, the Court refused to dig into Congress's motivations, determining that "[w]e must presume that Congress acted in perfect good faith in the dealings with the Indians . . . and that the legislative branch of the government exercised its best judgment in the premises."[109]

In fact, the Court went beyond simply presuming Congressional good faith, concluding that "from the beginning," Congressional power over Indian affairs has been plenary.[110] Resultantly, Indian affairs, according to the Court, was a political question "not subject to be controlled by the judicial department of the government."[111] Hence, because "Congress possessed full power in the matter, the judiciary cannot question . . . the motives which prompted . . . this legislation."[112] And with that, the Supreme Court ceded its role in protecting tribal rights, and would largely remain outside the arena for the next 50 years.

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[104] *Id.*

[105] Thomas v. Gay, 169 U.S. 264, 273 (1898).

[106] *See* Williams v. Lee, 358 U.S. 217, 219–20 (1959) ("[T]his Court has modified these principles in cases . . . where the rights of the Indians would not be jeopardized . . . . [As a result,] state courts have been allowed to try non-Indians who committed crimes against each other on a reservation."); *see also* United States v. McBratney, 104 U.S. 621 (1881); Draper v. United States, 164 U.S. 240 (1896); New York *ex rel.* Ray v. Martin, 326 U.S. 496 (1946).

[107] Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903).

[108] *Id.*

[109] *Id.* at 568.

[110] *Id.* at 565.

[111] *Id.*

[112] *Id.* at 568.

After *Lone Wolf* there was no question that Congress has the power to unilaterally abrogate tribal treaty rights. However, the Court would later narrow the rule significantly, finding that although Congressional power is absolute, the Court will not find such abrogation unless Congress's intent is "clear and explicit."[113] As a result, "[a]bsent explicit statutory language, [the Court has] been extremely reluctant to find congressional abrogation of treaty rights."[114] Ultimately, then, "[w]hat is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."[115]

Despite the destructive nature of federal policy during the allotment era that was sanctioned in *Lone Wolf*, the basic principles announced by the Court in *Worcester* remained good law. The result is an articulation of sovereignty that is wholly unique to American Indian tribes and exists nowhere else in the world. These "foundational principles" of federal Indian law have been summed to mean the following:

> (1) [A]n Indian tribe possesses, in the first instance, all the inherent powers of any sovereign state; (2) a tribe's presence within the territorial boundaries of the United States subjects the tribe to federal legislative power and precludes the exercise of external powers of sovereignty of the tribe . . . but does not by itself affect the internal sovereignty of the tribe; and (3) inherent tribal powers are subject to qualification by treaties and by express legislation of Congress, but except as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.[116]

C. *Returning to Foundational Principles: The Navajo Trilogy*—Lee*,* Warren*, and* McClanahan

Lone Wolf marked the climax of the Supreme Court's complicity in the federal

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[113] United States v. Dion, 476 U.S. 734, 738 (1986) (quoting Fong Yue Ting v. United States, 149 U.S. 698, 720 (1983)).

[114] Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979).

[115] *Dion*, 476 U.S. at 739–40.

[116] COHEN, *supra* note 17, § 4.02[1], at 223. The Late Professor Philip Frickey summed the doctrine this way:

> [P]rior to the Columbian contact, the Cherokee possessed complete sovereignty, and that when discovery transformed the tribe into a "domestic dependent nation[]" (to use the language of *Cherokee Nation*), the Cherokee retained all control over their "internal affairs," including their lands. Thus, if in 1832 the Cherokee no longer had that power, it must have been the result of either a unilateral act by the greater sovereign, the United States, such as a federal statute that proclaimed that tribal sovereignty was terminated, or a bilateral act, such as a treaty with the United States in which the tribe abandoned its sovereignty.

Frickey, *supra* note 13, at 397 (quoting Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831)).

colonial experiment. Armed with *Lone Wolf*, the *de facto* power the federal government had been wielding for decades became *de jure*, with predictably disastrous results for tribal governmental power. Congress passed laws regarding all aspects of reservation life and authorized the executive to take total control over the internal affairs of tribal governments. Because they offered the opportunity to siphon away treaty-guaranteed annuities, Indian office superintendencies became a plum position in the days when the federal civil service was used to reward the allies of whoever won the presidency. Consequently, the position attracted many that would become "reservation czars" who used their power to steal even the most basic necessities for the lives of their tribal wards.[117] At the same time, *Lone Wolf* paved the way for Congress to unilaterally allot reservation lands—often over the vehement and largely unanimous objection of tribal people—and make "surplus" land available to non-Indians.[118] It was the final federal land grab, yielding the loss of nearly 100 million of the tribes' remaining 138 million acres.[119] Later, federal officials would acknowledge that the true aim of allotment was to ensure the "total landlessness for the Indians [by] the third generation of each allotted tribe."[120]

The tribes themselves were largely powerless to stop this "orgy of plunder and exploitation [that was] unparalleled in American history."[121] With their traditional power structure largely destroyed, the federal government often recognized puppet councils that were firmly under the thumb of the Indian Department and powerless to do anything but provide a legal gloss to federal decisions.[122] Undoubtedly, passage of the 1934 Indian Reorganization Act, which ended allotment and recognized tribal self-governance, provided critical relief.[123] However, the respite was short-lived, with Congress launching into the termination era by 1953.[124] Throughout these periods, the Supreme Court remained largely absent from Indian affairs. By the end of allotment, and certainly by the end of the termination era, the federal government's colonization of the United States, both physically and legally, was complete.

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[117] 78 CONG. REC. 11125 (1934) (statements of Sen. Patrick McCarran and Sen. Burton Wheeler); *see also* Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV 955, 966 (1972).

[118] *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903); *The Purposes and Operation of the Wheeler-Howard Indian Rights Bill*: *Hearings on H.R. 7902 Before the S. & H. Comm. on Indian Affs.*, 73d Cong. 17 (1934) (statement of John Collier, Commissioner of Indian Affairs).

[119] *The Purposes and Operation of the Wheeler-Howard Indian Rights Bill*: *Hearings on H.R. 7902 Before the S. & H. Comm. on Indian Affs.*, 73d Cong. 17 (1934) (statement of John Collier, Commissioner of Indian Affairs).

[120] *Id.*

[121] DEBO, *supra* note 11, at 91.

[122] *See Tribal Self-Government*, *supra* note 117, at 966.

[123] Indian Reorganization Act (IRA) of June 18, 1934, ch. 575, 48 Stat. 984 (1934).

[124] H.R. Con. Res. 108, 83rd Cong., 67 Stat. B132 (1953) (enacted).

Although the United States had little remaining to colonize, the individual states saw much left undone. Largely left out of the colonization project of the 19th century, states looked jealously upon Indian reservations and their resources, and they were incredulous of the wide swaths of territory within their borders over which they had no control. Thus, by the middle of the 20th century, the states began their own *legal* colonization campaign, slowly seeking to extend their laws into Indian Country.[125] Things came to a head when a Navajo man named Paul Williams was unable to pay off an $81 debt he owed to an Indian trader named Hugh Lee.[126]

Lee went to Arizona state court, seeking a writ of attachment to seize $940 worth of sheep owned by the Williams family.[127] Williams fought the writ, arguing that the state court lacked jurisdiction over a suit with an Indian defendant that took place within the Navajo Reservation. The state court disagreed, ordering the county sheriff to go onto the Reservation to seize Williams's herd.[128] Eventually, the case made its way to the U.S. Supreme Court.[129]

Williams v. Lee is remarkable not only for its holding, but also because of the Court's reasoning for coming to that holding. For the first time in the 20th century, the Court's analysis did not begin from the premise that Indian tribes are "wards" of the federal government that required pupilage and protection. Instead, the decision was rooted in the foundational principles the Court first announced in *Worcester v. Georgia*, finding that "[d]espite bitter criticism and the defiance of Georgia which refused to obey this Court's mandate in *Worcester*, the broad principles of that decision came to be accepted as law."[130] The core of those foundational principles—the recognition that the tribal right to be free from state interference stems from the tribes' status as sovereigns—would take center stage in *Williams v. Lee*.[131]

Those principles recognized the Navajo Nation's sovereignty, which was memorialized in the 1868 Treaty with the Navajos.[132] Therefore, the Arizona state court's jurisdiction over Paul Williams turned on a treaty analysis to determine whether that jurisdiction could be exerted consistent with tribal sovereignty. The Court noted that "this treaty 'set apart' for 'their permanent home' a portion of what

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[125] *See generally* DEBO, *supra* note 11; CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS (2005); VINE DELORIA JR., CUSTER DIED FOR YOUR SINS 54–77 (1988).

[126] Williams v. Lee, 358 U.S. 217, 217–18 (1959). For a complete history of this fascinating case, see Bethany R. Berger, *Sheep, Sovereignty, and the Supreme Court: The Story of* Williams v. Lee, *in* INDIAN LAW STORIES, *supra* note 49, at 359, 369; *see also* EZRA ROSSER, A NATION WITHIN: NAVAJO LAND AND ECONOMIC DEVELOPMENT 53–54 (2021).

[127] BERGER, *supra* note 126, at 370.

[128] *Id.*

[129] *Williams*, 358 U.S. 218.

[130] *Id.* at 219.

[131] *Id.* at 220.

[132] *Id.* at 221.

had been their native country . . . . Implicit in those treaty terms . . . was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed."[133]

Consistent with its prior holdings, the Navajo's sovereignty remained subject to the overarching authority of the United States.[134] However, as in *Worcester*, that federal authority served as a secondary bar to state jurisdiction, allowing it only where a "Federal Act has given state courts jurisdiction over such controversies."[135] Nonetheless, to the *Lee* Court, the true measuring stick remained tribal sovereignty; in the absence of affirmative Congressional authorization, "the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[136]

Notice, the rule announced is not the categorical bar laid out in *Worcester*, but is instead a softened approach necessitated by the Court's allotment era cases. Nonetheless, the Court read the exceptions called for in those old cases quite narrowly, holding that it had modified *Worcester* only "in cases where essential tribal relations were not involved *and* where the rights of Indians would not be jeopardized."[137] It proceeded to describe the two situations where the Court has allowed for state jurisdiction: suits where tribal members were plaintiffs, and criminal cases involving only non-Indians. The Court found jurisdiction over the former was appropriate because, far from infringing on tribal rights, it simply opened another forum wherein tribal members could vindicate their rights, if they should choose to do so.[138] Likewise, the Court recognized state criminal jurisdiction over crimes involving only non-Indians because such cases by outsiders affected neither internal tribal relations nor the rights of tribal members.[139] Short of these limited exceptions, however, the foundational principles laid out in *Worcester* remained inviolate.

The Court concluded that the general rule, and not the exceptions, applied to Paul Williams's case. To the Court, the Navajo Nation's sovereignty spanned both its membership and its territory, recognizing broad "authority of Indian governments over their reservations."[140] That broad assumption of sovereignty was recognized by the United States and guaranteed in the 1868 treaty with the Navajo Nation.[141] Because Hugh Lee "was on the Reservation and the transaction with [Paul Williams] took place there," any state interference with the tribal court's jurisdiction

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133 *Id.* at 221–22 (quoting Treaty Between the United States of America and the Navajo Tribe of Indians, Navajo-U.S., arts. II, XIII, June 1, 1868, 15 Stat. 667, 668, 671).

134 *Id.* at 221.

135 *Id.* at 222.

136 *Id.* at 220.

137 *Id.* at 219 (emphasis added).

138 *Id.*

139 *Id.*

140 *Id.* at 223.

141 *Id.* at 221.

over the transaction would "undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves."[142] The Court concluded that "[i]f this power is to be taken away from them, it is for Congress to do it."[143]

Williams v. Lee has been hailed as the first in a line of cases where the Court returned to the foundational principles it first announced in *Worcester*.[144] Even within this line of cases the Court's decision in *Lee* stands apart as one that is firmly rooted in inherent tribal sovereignty, reaffirming that tribes—as "distinct, independent political communities, retaining all their original natural rights," are inherently buffered from unwanted assertions of state sovereignty.[145] The approach has essentially remained dormant, however, since applied by the Court in 1959. Instead, modern Supreme Court jurisprudence regarding state jurisdiction in Indian Country has focused on the other basis laid out in *Worcester* for invalidating state control: "the controlling power of the constitution and laws of the United States . . ." over Indian affairs.[146]

It is unclear why this became the prevailing doctrine related to state jurisdiction, but it seems to have initially been driven by the litigants themselves rather than the court. It was first applied in the modern era in *Warren Trading Post v. Arizona Tax Commission*, which did not involve a tribe or its members.[147] Instead, the case involved a non-Indian that had been licensed by the United States to trade with members of the Navajo Nation.[148] Warren's trading post was in Kayenta, Arizona, within the Navajo Nation, where he primarily sold goods to tribal members.[149] Nonetheless, the state of Arizona attempted to levy a two-percent gross proceeds tax on the trading post.[150] Warren sued the state, arguing, among other things, that the tax was "inconsistent with the comprehensive congressional plan, enacted under authority of [the Indian Commerce Clause], to regulate Indian trade and traders and

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[142] *Id.* at 223.

[143] *Id.* (citing Lone Wolf v. Hitchcock, 187 U.S. 553, 546–66 (1903)).

[144] *See generally* WILKINSON, *supra* note 125, at 244–48 (2005). *See also* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 59 (1987); GETCHES, *supra* note 26, at 1577–86.

[145] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

[146] *Id.* at 536.

[147] Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685 (1965); *see* Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, ABA (Oct. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol--40--no--1--tribal-sovereignty/short_history_of_indian_law/; James L. Huemoeller, *Indian Law—State Jurisdiction on Indian Reservation,* Moe v. Confederated Salish and Kootenai Tribes, 13.3 LAND & WATER L. REV. 1036, 1039 (1978).

[148] *Warren Trading Post*, 380 U.S. at 690–91.

[149] Oral Argument at 1:37, Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685 (1965), https://www.oyez.org/cases/1964/115.

[150] *Warren Trading Post*, 380 U.S. at 685.

to have Indian tribes on reservations govern themselves."[151]

Warren's attorney based his argument at least partially on the notion "that there resides in the Indian tribes a degree of . . . internal sovereignty which can be impinged upon by the states only upon specific authorization of the Congress."[152] Nonetheless, the overwhelming thrust of the parties' arguments, which invariably focused on the scope of *federal versus state power* demonstrated just how uncomfortable the parties were with an argument rooted in tribal sovereignty. Instead, Warren's lawyer anchored his arguments in the notion that federal control over Indian affairs was a necessary expedient for the *protection* of tribes that were, after all, wards of the United States.[153]

Warren Trading Post, like *Williams v. Lee* before it, was authored by Justice Hugo Black. However, Justice Black largely did not rely on the reasoning from *Lee* and hold that the tax was inconsistent with the Navajo Nation's inherent sovereignty within their territory. Instead, perhaps taking his cue from the litigants, Justice Black focused on the power of the United States, holding that "this state tax cannot be imposed consistently with federal statutes applicable to the Indians on the Navajo Reservation."[154]

Nonetheless, just like in *Lee*, the basis for invalidating the Arizona tax in *Warren Trading Post* was the Treaty with the Navajos: "[t]he Navajo Reservation was set apart as a 'permanent home' for the Navajos in a treaty made with the 'Navajo nation or tribe of Indians' on June 1, 1868."[155] Justice Black then made a rule of broad applicability, holding that the right to a "permanent home" was well understood "from the very first days of our government" to include the right of the tribes to "govern themselves, free from state interference."[156] And, quoting back to *Worcester*, Justice Black reaffirmed that the treaties memorialized this independence from the states, holding that "[t]he 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."[157] According to Justice Black, it was these federal laws, the treaties that recognized and memorialized tribal sovereignty and independence, that caused state laws to be preempted within an Indian reservation.

It was only then that Justice Black looked to other federal laws and regulations

[151] *Id.* at 686.

[152] Oral Argument, *supra* note 149, at 6:48.

[153] *Id.*

[154] *Warren Trading Post*, 380 U.S. at 686.

[155] *Id.* (quoting Treaty Between the United States of America and the Navajo Tribe of Indians, *supra* note 133, at 667, 671).

[156] *Id.* at 686–87 (citing Treaty Between the United States of America and the Navajo Tribe of Indians, *supra* note 133, at 667).

[157] *Id.* at 688 (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832)).

as a means to backfill his conclusion that the Navajo Treaty preempted state jurisdiction to tax Warren. He noted that since "the very first volume of the federal statutes," Congress exercised "sweeping and dominant control over persons who wished to trade with Indians and Indian tribes."[158] Pursuant to that jurisdiction, the United States has promulgated "comprehensive federal regulation of Indian traders [which] has continued from that day to this."[159] From this, the Court concluded that "[t]hese apparently all-inclusive regulations and the statutes authorizing them would seem in themselves *sufficient* to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders."[160]

But, although "sufficient" to demonstrate Congressional intent, the regulations themselves were never meant to be necessary for preemption of state law to occur. Instead, the regulations were merely evidence of the general government's intent to "treat [the tribes] as nations, respect their rights, and manifest a firm purpose to afford that protection which *treaties* stipulate."[161] The Court recognized that "[s]imilar provisions were found in other early treaties," and the United States had undertaken to pass laws and regulations in order to effectuate the obligations it had broadly undertaken on behalf of tribes from around the Country.[162] Nonetheless, the Court's ultimate holding was that the state tax was preempted because it could not be reconciled with the federal "treaty obligations" the United States had undertaken with the Navajo Nation.[163] Chief among these obligations was the federal promise that the Navajo would be "left [on the Reservation] largely free to run the reservation and its affairs without state control."[164] Accordingly, the 1868 Treaty with the Navajo had caused state taxing authority to be preempted within the Navajo Nation.[165]

The Court completed its trilogy of cases reaffirming the bounds of state jurisdiction in Indian Country with the landmark decision *McClanahan v. Arizona Tax Commission*.[166] Like *Lee* and *Warren Trading Post* before it, *McClanahan* originated on the Navajo Reservation, where the Arizona Tax Commission had been causing income tax to be withheld from the pay of Navajo Nation members that resided on the Navajo Nation and earned their income within the reservation.[167] Rosalind McClanahan sued the state of Arizona after it withheld $16.20 from her wages

[158] *Id.* at 687–88.
[159] *Id.* at 688.
[160] *Id.* at 690 (emphasis added).
[161] *Id.* at 688 (quoting *Worcester*, 31 U.S. at 556–57) (emphasis added).
[162] *Id.* at 687, n.4.
[163] *Id.* at 690.
[164] *Id.*
[165] *Id.* at 686, 691.
[166] McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973).
[167] *Id.* at 165.

earned on the Reservation and the case made its way to the Supreme Court.[168]

Writing for a unanimous Court, Justice Thurgood Marshall reaffirmed that "[t]he beginning of our analysis must be with the treaty which the United States Government entered with the Navajo Nation in 1868."[169] Justice Marshall readily acknowledged that "[t]he treaty nowhere explicitly states that the Navajos were to be free from state law or exempt from state taxes."[170] Such an observation was equally true regarding the state adjudicatory jurisdiction at issue in *Lee*, as well as the taxing authority at issue in *Warren Trading Post*. Those cases took for granted that tribal sovereignty, as memorialized in the 1868 Treaty, nonetheless precluded state jurisdiction because it "contemplate[d] the Indian territory as completely separated from that of the states; and provide[d] that all intercourse with them shall be carried on exclusively by the government of the union."[171] The unanimous decision in *McClanahan* did nothing to change this nearly categorical bar to state jurisdiction. Just the opposite, Justice Thurgood Marshall was careful to point out that "[t]he principles governing resolution of this question are not new." [172] Instead, Justice Marshall's analysis was dedicated to explaining *why* the 1868 Treaty, and treaties more broadly, effected a general bar to state jurisdictional incursions into Indian Country.

He began with the maxim that "the document is not to be read as an ordinary contract."[173] Instead, the treaty must be read consistent with the Indian canons of construction, which required the treaty be interpreted as the Navajo Nation would have understood it, with ambiguities resolved in favor of the tribe.[174] As the Court would later put it, these canons require "we look beyond the written words to the larger context that frames the Treaty."[175]

Although the history of the 1868 Treaty, its negotiations, and the history of

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168 *Id.* at 165–66.

169 *Id.* at 173–74.

170 *Id.* at 174.

171 *Warren Trading Post*, 380 U.S. at 688 (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832).

172 *McClanahan*, 411 U.S. at 168.

173 *Id.* at 174.

174 *Id.* The Court likewise engaged in a brief analysis for *why* the canons are appropriate in this case. Justice Marshall recognized that the 1868 Treaty was not a contract "agreed upon by parties dealing at arm's length with equal bargaining positions." *Id.* Instead, at the time of the 1868 Treaty "the Navajos were an exiled people, forced by the United States to live crowded together on a small piece of land [far away to the] east of the area they had occupied before the coming of the white man." *Id.* The Court found that "[i]t is circumstances such as these," where the United States held an unconscionable level of bargaining power, that the Court would apply the "general rule" that "[d]oubtful expressions are to be resolved in favor of the [tribal nations]." *Id.* (quoting Carpenter v. Shaw, 280 U.S. 363, 367 (1930)) (alteration in original) (internal quotations omitted).

175 Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999).

the Navajo Nation is undoubtedly unique, the broader context of the United States and the tribal understanding regarding state jurisdiction is not. Instead, it was negotiated with the universal understanding that there existed a "deeply rooted" policy within the United States "of leaving Indians free from state jurisdiction and control."[176] Once again, the Court's lodestar was *Worcester*, from which the Court reaffirmed the broad acceptance during the treaty-making era that "[t]he whole intercourse between the United States and this nation[,] is, by our Constitution and laws, vested in the government of the United States."[177] Equally important, the 1868 Treaty—and indeed, all treaties—were negotiated with the understanding that "from the very first days of our Government . . . the Indians [had] largely . . . govern[ed] themselves, free from state interference."[178]

When viewed through this lens, the 1868 Treaty promise that the Navajo Reservation would be set aside as "their permanent home" was clear:

> When this canon of construction is taken together with the tradition of Indian independence described above, it cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision.[179]

In other words, just as the Court had already found in *Lee*, "[i]mplicit in those treaty terms . . . was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed."[180]

D. *The Modern Rule:* Bracker*'s Particularized Inquiry*

The Navajo Trilogy marked the pinnacle of what Professor Charles Wilkinson and the late Dean David Getches referred to as the "modern era" of federal Indian law.[181] Nonetheless, as judge and Native American law scholar William Canby has pointed out, "*McClanahan* contained the seeds of enormous change."[182] The appointment of William Rehnquist to the Court marked the beginning of a long backslide for the Court's Indian law jurisprudence into a subjectivist era wherein the justices would "reach outcomes consistent with their own notions of how much

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[176] *McClanahan*, 411 U.S. at 168. (quoting Rice v. Olson, 324 U.S. 786, 789 (1945)).

[177] *Id.* at 169 (alteration in original) (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832)).

[178] *Id.* at 170.

[179] *Id.* at 174–75.

[180] Williams v. Lee, 358 U.S. 217, 221–22 (1959).

[181] Getches, *supra* note 26, at 1574.

[182] William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 7 (1987).

tribal autonomy there ought to be."[183] This subjectivist wing of the Court took advantage of the fact that the Court already had a well-defined preemption analysis that it had long been applying to conflicts between state and federal laws.[184] That traditional preemption analysis usually begins with the presumption that "the state does have the power to apply its law unless preempted."[185] Despite Justice Thurgood Marshall's admonitions that "[t]he unique historical origins of tribal sovereignty make it generally unhelpful to apply . . . those standards of pre-emption that have emerged in other areas of the law," the Court nonetheless began to use those broader principles to uphold the states' effort to effect the legal colonization of Indian Country.[186]

The backslide began in *Moe v. Confederated Salish and Kootenai Tribes* where the Court upheld a Montana tax levied on the sale of cigarettes to non-Indians within the Flathead Reservation, as well as a state requirement that reservation retailers collect the tax on behalf of Montana.[187] Interestingly, the Court began by citing to *McClanahan* to reaffirm that the Montana tax could not be lawfully imposed on tribal members because "such taxation is not permissible absent Congressional intent."[188] As the Late Dean David Getches has pointed out,

> McClanahan's facts involved only Indians, but the Court charted an approach for cases concerning non-Indians as well. The discussion of precedent suggests that if the issue had been application of the Arizona income tax to a non-Indian working on the reservation, the Court would also have begun its analysis by examining treaties and statutes that arguably might apply.[189]

This is not the approach the Court took in *Moe*. Instead, the Court dwelled on the notion that "it is the non-Indian consumer or user who saves the tax and reaps the benefit of the tax exemption."[190] The Court went on to apply a half-hearted preemption analysis, beginning and ending its work with the conclusory statement that the Court could "see nothing in this burden which . . . runs afoul of any congressional enactment dealing with the affairs of reservation Indians."[191] Notice this turns the preemption analysis from *Warren Trading Post* and *McClanahan* on its head. In those cases, because of the important sovereign interests that tribes have in their lands, as well as the "deeply rooted" federal policy of leaving tribes free from

[183] Hedden-Nicely & Leeds, *supra* note 4, at 305 (quoting Getches, *supra* note 26, at 1628).

[184] *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 5.2 (6th ed. 2019).

[185] Canby, *supra* note 182, at 7.

[186] White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

[187] Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 464–65 (1976).

[188] *Id.* at 476 (quoting Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973)).

[189] Getches, *supra* note 26, at 1591.

[190] *Moe*, 425 U.S. at 481–82.

[191] *Id.* at 483 (citations omitted).

state control, the Court presumed the state tax invalid unless expressly authorized by Congress.[192] In contrast, in *Moe*, the court seemed to presume the tax to be valid unless the tribe could point to an "evident congressional purpose of ensuring that no burden shall be imposed upon . . . Indians on reservations."[193]

As David Getches put it, "*Moe's* decision on non-Indian taxation seemed to create only a narrow and distinguishable exception rooted in the technical language of state law."[194] However, it proved to be the crack in the door the subjectivist wing of the Court needed to begin eroding the Court's foundational principles for the benefit of state jurisdiction. Those justices threw the door open in *Washington v. Confederated Tribes of the Colville Reservation*, which upheld a Washington tax on tribal cigarette sales to non-Indians on the Yakama, Lummi, Colville, and Makah Reservations.[195] The lower court had distinguished *Moe* by finding that the Washington tax sufficiently affected tribal interests so that it was "pre-empted by the tribal taxing ordinances and constituted an impermissible interference with tribal self-government."[196]

In reversing, Justice White once again flipped the script on the preemption analysis. As with *Moe*, the Court failed to presume the tax invalid in the absence of Congressional authorization. Instead, consistent with its usual preemption analysis in the non-Indian law context, the Court required affirmative evidence that Congress intended to preempt the state tax. Despite the analysis in *Lee*, *Warren Trading Post*, and *McClanahan*, all of which began with the Navajo Treaty, the Court in *Colville* largely ignored the treaties of the Lummi, Makah, and Yakima, as well as the executive orders and congressionally ratified agreements that set aside the Colville Reservation. The Court likewise ignored Congress's self-determination policy to support tribal economic development. To the Court, it was inconceivable that such policy would go so far as to *disadvantage non-Indian businesses* by allowing tribes to place "discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing customers from surrounding areas."[197] The Court concluded that "[w]e do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere."[198]

White Mountain Apache Tribe v. Bracker marks Justice Marshall's attempt to

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192 McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 168 (1973).

193 *Moe*, 425 U.S. at 482.

194 Getches, *supra* note 26, at 1601.

195 Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 135 (1980).

196 *Id.* at 140.

197 *Id.* at 155.

198 *Id.*

"steer doctrine back on track using foundation principles."[199] The case involved an Arizona motor carrier license tax as well as a fuel tax that was imposed on Pinetop Logging Company, a non-Indian logging company that was engaged in logging operations exclusively on the Fort Apache Reservation.[200] Pinetop paid the taxes under protest and then filed suit, with the case eventually finding its way to the Supreme Court.

Through *Moe* and *Colville*, the subjectivist wing had introduced the notion that the scope of state jurisdiction was somehow different when non-Indians were involved. However, despite Pinetop's non-tribal status, the Court began its analysis with a broad restatement that *McClanahan* "can be a sufficient basis for holding state law inapplicable to activity *undertaken on the reservation or* by tribal members."[201] Indeed, the Court acknowledged that it has "repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly significant to the pre-emption inquiry . . . . ' The cases in this Court have consistently guarded the authority of Indian government over their reservations.'"[202]

Next, Justice Marshall reminded everyone that *Lee* remained good law, finding "two independent but related" primary barriers to state regulatory authority over tribal members: "[f]irst, the exercise of such authority may be pre-empted by federal law . . . . Second, it may unlawfully infringe "on the right of reservation Indians to make their own laws and be ruled by them.'"[203] Justice Marshall reemphasized the approach he took in *McClanahan* where he worked to weave these two "independent but related barriers" together into a single coherent doctrine. That doctrine recognized that "either [barrier], standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members."[204] More important for our discussion here, they are also interrelated because they form a feedback loop wherein the preemption analysis must always be informed by our "traditional notions of Indian self-government [that] are so ingrained in our jurisprudence."[205]

Justice Marshall concluded that the preemption analysis required a "particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law."[206] However, the "particularized inquiry" that

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199 Getches, *supra* note 26, at 1631.

200 White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 138–40 (1980).

201 *Id.* at 143 (emphasis added).

202 *Id.* at 151 (quoting United States v. Mazurie, 419 U.S. 544, 558 (1975)).

203 *Id.* at 142 (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).

204 *Id.* at 143.

205 *Id.*

206 *Id.* at 145.

Justice Marshall had in mind was a *treaty* analysis that requires the court to "examine[] the language of the relevant federal treaties and statutes" consistent with "[t]he tradition of Indian sovereignty over the reservation and tribal members"[207] The Court concluded that "[t]he unique historical origins of tribal sovereignty make it generally unhelpful to apply . . . those standards of pre-emption that have emerged in other areas."[208] Instead, consistent with the Navajo Trilogy, Justice Marshall concluded that, in the first instance, the Court should apply traditional treaty construction principles. Thus, the Court reaffirmed that "[w]e have . . . rejected the proposition that in order to find a particular state law to have been pre-empted . . . an express congressional statement to that effect is required."[209] Just the opposite, he applied the well-trod canons of construction that "[a]mbiguities in federal law [be] construed generously in order to comport with these traditional notions of sovereignty" [210] Likewise, just as it had done in each of *Lee*, *Warren Trading Post*, and *McClanahan*, the Court found that the treaty analysis must be read consistently with "the federal interest of encouraging tribal independence."[211] It is these factors, according to Justice Marshall, that must be used to "inform [the 'particularized inquiry' of] whether the exercise of state authority has been pre-empted by operation of federal law."[212]

The Fort Apache Reservation was set aside by executive order on November 9, 1871.[213] Although that order was silent as to the scope of state and tribal jurisdiction within the Fort Apache homeland, when viewed through the canons and traditional notions of tribal sovereignty, there seems little doubt that implicit in the terms of the executive order "was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed."[214] Unfortunately, however, Justice Marshall was unable to come to that conclusion because no one had made the argument.[215] Instead, the Arizona Court of Appeals seemed to believe that jurisdiction on the Fort Apache Reservation was somehow different because "[t]he White Mountain Apache Tribe has no treaty relationship with the United States, its reservation having been created by executive

207 *Id.* at 144.

208 *Id.* at 143.

209 *Id.* at 144.

210 *Id.* at 143–44.

211 *Id.* at 144.

212 *Id.* at 143.

213 Exec. Order of Nov. 9, 1871, *reprinted in* 1 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 812 (1904); *see also* Brief for Petitioners at 7 n.5, White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1979) (No. 78-1177).

214 Williams v. Lee, 358 U.S. 217, 221–22 (1959).

215 *See generally* Brief for Respondents, White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1979) (No. 78-1177).

order."[216] Neither the Tribe nor the United States challenged this erroneous legal position on appeal to the Supreme Court.[217] Instead, both parties focused on the pervasive nature of federal supervision over the managing, harvesting, transporting, and milling of tribal timber.[218]

Because Justice Marshall had before him scant evidence or argument regarding the preclusive effect of the executive order setting aside the Fort Apache Reservation, he was forced to fall back on the evidence the tribal and federal litigants had brought to bear. As in *Warren Trading Post*, that meant the Court had to look to other federal laws and regulations as a means to backfill his conclusion that state jurisdiction to tax Pinetop had been preempted. As a result, like the litigants themselves, the Court's opinion in *Bracker* focused on the "comprehensive" nature of the "Federal Government's regulation of the harvesting of Indian timber."[219] However, also like *Warren Trading Post*, while these "apparently all-inclusive regulations and the statutes authorizing them would seem in themselves *sufficient* to show that Congress" intended to preempt state law, nothing in Justice Marshall's opinion indicates that such a showing is *necessary* for a court to find that Congress intended to preempt the field.[220] Just the opposite, despite the evidence in the record, Justice Marshall went to great lengths to reaffirm the central role that treaty analysis plays in the preemption arena.

Justice Marshall's "particularized inquiry" likewise required the Court to give "weight" to "any applicable regulatory interests of the state."[221] However, as David Getches observed, the Court's opinion in *Bracker* does not support an "Indian law preemption analysis [that] collect[s] ingredients for *ad hoc* judicial balancing."[222] Indeed, the decision does not allow for courts to consider "any regulatory interest" but instead "any *applicable* regulatory interest of the State." [223] It then cites back to

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216 White Mountain Apache Tribe v. Bracker, 585 P.2d 891, 894 (Ariz. Ct. App. 1978).

217 *See* COHEN, *supra* note 17, § 2.02[1]–[2], at 113–18.

218 *See generally* Brief for Petitioners, White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1979) (No. 78-1177); Brief the United States as Amicus Curiae, White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (Nov. 27, 1979) (No. 78-1177). The *only mention* either of these parties made about the executive order was by the White Mountain Apache Tribe, which argued that "[a] distinctive application of federal preemption flows from tribal sovereignty, the federally protected right of tribal self-government, a right which is rarely stated in the express language of the treaties and executive orders but which is fundamental to the tradition of federal Indian policy."

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

220 Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685, 690 (1965).

221 *Bracker*, 448 U.S. at 144.

222 Getches, *supra* note 26, at 1626. David Getches went so far as to note that at best, arguments that Justice Marshall was calling for a balancing test "reflects a misunderstanding of the cases cited. At worst, it is disingenuous." *Id.*

223 *Bracker*, 448 U.S. at 144.

McClanahan, which in turn cites to *Lee* for an explanation of what types of state regulatory interests apply.[224] For its part, *Lee*'s accommodation of state law in Indian Country was extremely narrow, limited to only those situations "where essential tribal relations were not involved and where the rights of Indians would not be jeopardized."[225] In other words, the only "applicable" regulations that should be given any "weight" in the *Bracker* analysis are those that are necessary to protect state interests "up to the point where tribal self-government would be affected."[226] Succinctly summed up by Professor Philip Frickey, "even a modern-day dilution of *Worcester* still suggests that states should have no role in Indian country unless significant non-Indian interests are involved and *no* legitimate tribal interest is present."[227]

This is exactly the tact Justice Marshall took in analyzing the state of Arizona's "interest" in *Bracker*. First, he identified the State's interest, which he characterized as "a general desire to raise revenue."[228] He criticized that assertion because he was "unable to discern a responsibility or service that justifies the assertion of taxes imposed for on-reservation operations."[229] However, the Court did not proceed to balance that state interest—no matter how minimal—against the interests of the Tribe and federal government in this case. Instead, the Court found that "the proposed exercise of state authority is *impermissible*" because the taxes imposed on Pinetop interfered with tribal self-government and interfered with federal policy supporting tribal self-determination.[230]

E. The Subjectivist Era and the Disintegration of Bracker *into a Balancing Test*

The Court's decision in *Bracker* seemed to reorient the Court away from its misguided decisions in *Moe* and *Colville* and toward one that was rooted in foundational principles of federal Indian law. For example, contemporaneously to *Bracker* the Court invalidated a state tax imposed on a non-Indian business for the sale of tractors to the Gila River Indian Tribe because of the federal policy to leave the Tribe "largely free to run the reservation and its affairs without state control."[231] Just two years later, the Supreme Court invalidated a state tax of the construction of a tribal school on the Navajo Reservation based on the federal "concern with the education of Indian children [that] can be traced back to the first treaties between

[224] *Id.*

[225] Williams v. Lee, 358 U.S. 217, 219 (1959).

[226] McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 179 (1973).

[227] Frickey, *supra* note 13, at 437.

[228] *Bracker*, 448 U.S. at 150.

[229] *Id.*

[230] *Id.* at 151 (emphasis added).

[231] Cent. Mach. Co. v. Ariz. State Tax Comm'n, 448 U.S. 160, 164 (1980) (quoting Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685, 690 (1965) (internal quotations omitted).

the United States and the Navajo Tribe."[232] Finally, in 1983, the Supreme Court rebuffed New Mexico's attempts to control hunting and fishing on the Mescalero Apache Reservation because it interfered with "the sovereignty retained by the Tribe under the Treaty of 1852 [which] includes its right to regulate the use of its resources by members as well as nonmembers."[233]

Despite these tribal successes, the winds of change were once again blowing. Justice Rehnquist argued in dissent in *Bracker* that before the court can find preemption it must conclude that there exists a "pervasive scheme of federal regulation *and* . . . there [is] no governmental interest on the State's part in imposing such a burden."[234] Justice Stewart critiqued the majority decision in *Central Machinery* for its failure to follow the "settled teaching of the Court's decision . . . that *every* relevant state interest is to be given weight."[235] On the other side of the ledger, the subjectivist wing worked to minimize the role that tribal sovereignty played in the analysis while simultaneously demanding evidence of a "'pervasive' regulatory scheme" on the part of the federal government.[236] In *Ramah*, Justice Rehnquist ridiculed the Navajo Nation's economic development arguments as a mere "economic burden" that did not affect tribal sovereignty and therefore was not relevant to the preemption analysis.[237] Instead, Justice Rehnquist sought to apply the plain vanilla preemption analysis that is applied in other areas of the law; he would require not only a "'pervasive' regulatory scheme," but also demonstration from the tribe that such scheme specifically interfered with the state jurisdiction at issue before he would find preemption appropriate.[238]

Before long, the subjectivist wing of the Court that had been in the dissent grew into the majority. Ironically, *Bracker*'s collapse into a balancing test largely began with the Court's 1987 decision *California v. Cabazon Band of Mission Indians*, a case famous for its holding that the California State regulatory authority over gaming had been preempted by federal law.[239] However, the decision was specious, at least in so far as the rule it distilled from *Bracker*: "State jurisdiction is pre-empted if it interferes or is incompatible with federal and tribal interests reflected in federal law, *unless* the state interest at stake are sufficient to justify the assertion of state authority."[240] To its credit, the Court reaffirmed its rulings from the Navajo trilogy, as well as *Bracker* itself, finding that "[t]he inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government,

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[232] Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832, 839 (1982).

[233] New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 337 (1983).

[234] *Bracker*, 448 U.S. at 157 (Rehnquist, J., dissenting) (emphasis added).

[235] *Cent. Mach. Co.*, 448 U.S. at 170 (Stewart, J., dissenting) (emphasis added).

[236] *See, e.g.*, *Ramah*, 458 U.S. at 852 (Rehnquist, J., dissenting).

[237] *Id.* at 855 (Rehnquist, J., dissenting).

[238] *See generally id.* at 848 (Rehnquist, J., dissenting).

[239] California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

[240] *Id.* at 216 (emphasis added).

including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."[241] The Court acknowledged that these goals made up an "important federal interest [that] were reaffirmed by the President's 1983 Statement on Indian Policy," and that the government "has sought to implement these policies by promoting tribal bingo enterprises."[242]

Under *Bracker*, that would have been the end of the analysis because, under the facts of the case, California had no "applicable" interest to which the Court should afford weight. Recall that *Bracker* mandated that the State's interests could only be considered to the extent that they did not interfere with "essential tribal relations [or] where the rights of Indians would not be jeopardized."[243] The Court readily acknowledged the central role that gaming played to "tribal self-sufficiency and economic development."[244] As a result, under *Bracker*, the State's interest in limiting tribal gaming should have been afforded no "weight," but instead should have been found to be "impermissible."[245] Contrary to its precedent, however, the Court proceeded to consider the State's interest in regulating the gaming activity, which it articulated as "preventing the infiltration of the tribal games by organized crime."[246] Although the Court ultimately rejected California's argument due to a lack of evidence, it nonetheless acknowledged it was "surely a legitimate concern" of the State, thereby giving it some weight in its analysis.[247] The pandora's box of a balancing test had been opened, even if by just a crack.

The *Bracker* "balancing" test as we understand it today was first articulated by a majority of the Court in an obscure 1994 case *Department of Taxation & Finance v. Milhelm Attea & Bros*.[248] The case represented the culmination of a protracted battle wherein tribal retailers were attempting to insulate themselves from efforts by the state of New York to tax them. Frustrated, New York passed a law that prohibited wholesalers from selling to tribal retailers tax-exempt cigarettes beyond the estimated "probable demand" necessary to serve all "tax-exempt Indian consumers" within each New York reservation.[249] Concurrently, the law imposed a series of burdensome requirements on tribal wholesalers, whose sales were subject to approval by the State and who were required to submit to a series of record-keeping and reporting requirements.[250] Tribal retailers were required to hold a valid state tax exemption certificate and were allotted "coupons" from the State that allowed them

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[241] *Id.*

[242] *Id.* at 217.

[243] Williams v. Lee, 358 U.S. 217, 219 (1959).

[244] *Cabazon*, 480 U.S. at 216.

[245] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980) (emphasis added).

[246] *Cabazon*, 480 U.S. at 220.

[247] *Id.* at 221.

[248] Dep't of Tax'n v. Milhelm Attea & Bros., 512 U.S. 61 (1994).

[249] *Id.* at 66 (quoting N.Y. COMP. CODES. R. & REGS. tit. 20 § 336.7(d)(1).

[250] *Id.* (citing N.Y. COMP. CODES. R. & REGS. tit. 20 § 336.7(d)(2).

to purchase tax-exempt cigarettes from wholesalers.[251] They were also required to sell the cigarettes only to purchasers who could provide a "certificate of Individual Indian exemption."[252] The wholesalers sued, arguing that the law was preempted by the Indian trader statutes.[253]

Although it purported to rely on *McClanahan* and *Bracker*, the Court's decision is unmoored from those cases. Based on its rulings in *Moe*, *Colville*, and others, it began that analysis with the conclusion that the "'*balance* of state, federal, and tribal interests' . . . in this area thus leaves more room for state regulation than in others."[254] In so doing, the Court turned the tables once again, this time by focusing nearly its entire analysis on what tribal activity meant for the state rather than how a state regulation might affect tribal sovereignty. In fact, the court expressly refused to consider whether the multitude of treaties between the United States and Seneca Nation operated to preempt the taxes imposed by the State because the argument "differs markedly from [the Tribe's] position and . . . was not addressed by the Court of Appeals."[255] It likewise refused to "assess for all purposes each feature of New York's tax enforcement scheme that might affect tribal self-government or federal authority over Indian affairs."[256] Instead, the Court concluded that its precedent has "decided that States may impose on reservation retailers minimal burdens reasonably tailored to" achieve state goals and prerogatives.[257]

This led to a diametrically opposite result than would be called for under *Bracker*. That case would have required the Court to completely ignore the State's claimed interest ("preventing fraudulent transactions") because their means of accomplishing that interest—passing discriminatory laws that limited the sale of cigarettes and imposing draconian reporting requirements on tribal wholesalers—interfered with tribal commerce, which is an "essential tribal relation[]," a right held by [individual] Indians, and remains under the exclusive authority of the United States pursuant to the Indian Commerce Clause.[258] Instead, the Court placed the burden on the tribes to "show[] that the recordkeeping requirements imposed on tribal retailers were 'not reasonably necessary as a means of preventing fraudulent transactions.'"[259]

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[251] *Id.* (quoting N.Y. COMP. CODES. R. & REGS. tit. 20 § 336.6(e)(2).

[252] *Id.* at 67–68.

[253] *Id.* at 61.

[254] *Id.* at 69 (quoting Rice v. Rehner, 463 U.S. 713, 720 (1983)).

[255] *Id.* at 77 n.11.

[256] *Id.* at 70.

[257] *Id.* at 73 (citing *Rice* 463 U.S. at 720, 731–33). As Dean Getches observed "[t]he decision effectively sanctioned state regulation of commerce with Indian tribes, a matter historically and constitutionally reserved to Congress." Getches, *supra* note 26, at 1630.

[258] Williams v. Lee, 358 U.S. 217, 219 (1959).

[259] *Milhelm*, 512 U.S. at 72 (quoting Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155 (1980)).

The Court once again addressed the balancing test the following year in *Oklahoma Tax Commission v. Chickasaw Nation*, a case involving the questions of whether Oklahoma could (1) impose a motor fuels excise tax on fuel sold by Chickasaw Nation retail stores on tribal trust land; and (2) impose an income tax on members of the Chickasaw Nation who are employed by the Tribe but who reside in the State outside Indian Country.[260] Oklahoma argued the following:

> [A]n approach "balancing the state and tribal interests" is in order . . . . Oklahoma concludes, tax immunity should be disallowed here because "the state interest supporting the levy is *compelling,* . . . the tribal interest is *insubstantial,* and . . . the state tax would have no effect on 'tribal governance and self-determination.'"[261]

Without citing or analyzing *Bracker*, the path-making case in the arena, the Court announced that "[w]e have balanced federal, state, and tribal interests in diverse contexts, notably, in assessing state regulation that does not involve taxation, . . . and state attempts to compel Indians to collect and remit taxes actually imposed on non-Indians."[262] From this the Court concluded:

> [I]f the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy, . . . and may place on a tribe or tribal members "minimal burdens" in collecting the toll.[263]

Thus, *Bracker* did not apply because *Chickasaw* only dealt with the taxation of tribal members and companies, making the Court's articulation of the balancing test mere *dicta*. To its credit, the Court instead engaged in an analysis to determine whether the 1832 Treaty of Dancing Rabbit Creek[264] preempted the state income tax that was imposed on tribal members that earned their income on-reservation but lived outside of Indian Country. In so doing, the Court acknowledged that "treaties

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[260] Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 452–53 (1995). The Court took for granted that these tribal members lived outside Indian Country based on the false assumption that the Chickasaw Reservation has been disestablished. That misunderstanding has since been corrected. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2474 (2020); Bosse v. Oklahoma, 499 P.3d 771, 774 (Okla. Crim. App. 2021).

[261] *Chickasaw Nation*, 515 U.S. at 456 (quoting Brief for Petitioner at 17, 22, *Chickasaw Nation*, 515 U.S. 450 (No. 94-771)).

[262] *Id.* at 458 (citing California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216–17 (1987)) (citations omitted); Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 483 (1976).

[263] *Chickasaw Nation*, 515 U.S. at 459 (citing Washington v. Confederated Tribes of the Colville Indian Rsrv., 447 U.S. 134, 151 (1980)); *Milhelm*, 512 U.S. at 73.

[264] A Treaty of Perpetual Friendship, Cession and Limits, Chocktow-U.S., art. IV, Sept. 15, 1830, 7 Stat. 333, 333–34.

should be construed liberally in favor of the Indians."[265] Nonetheless, the Court found that the Tribe's argument foundered on the "clear geographic limit [of] the Treaty. By its terms, the Treaty applies only to persons and property 'within [the Nation's] limits.'"[266] The Tribe could point to no federal law that preempted the state's taxing authority and "[n]otably, the Tribe [did] not assert[] . . . that the State's tax infringes on tribal self-governance."[267] All that was left, then, was the "well-established principle of interstate and international taxation—namely, that a jurisdiction, such as Oklahoma, may tax all the income of its residents, even income earned outside the taxing jurisdiction."[268]

By 2005 the Supreme Court was openly referring to the "*Bracker* interest-balancing test," concluding that it had "formulated the balancing test to address the 'difficult questio[n]' that arises when 'a State asserts authority over the conduct of non-Indians engaging in activity *on the reservation.*'"[269] However, once again, the case arose in the context of an *off-reservation* tax on a tribal entity.[270] Therefore, once again the Court's discussion of *Bracker* and how its rule ought to be applied is *dicta*. All of this adds up to exactly *one* case—*Milhelm*—that expressly applied *Bracker* as a balancing test and, even then, it only did so because the parties had failed to timely raise its treaty-based arguments.

This was the status of the law when Oklahoma raised *Bracker* in *Castro-Huerta* as a means through which it could assert *criminal* jurisdiction over crimes involving non-Indian perpetrators and Indian victims within the Cherokee Nation.

II. A "CLOSER ANALYSIS" OF *CASTRO-HUERTA*

At the Supreme Court, Castro-Huerta argued that the General Crimes Act served as a categorical bar to state jurisdiction over crimes in Indian Country that involved a non-Indian perpetrator and an Indian victim (and vice versa).[271] He had good reason to be optimistic; indeed, the law had seemingly been settled for over 100 years.[272] Nonetheless, the Court concluded that the text of the General Crimes Act did not provide for exclusive federal jurisdiction, which served as the first domino that caused the rest of Castro-Huerta's arguments to fall.[273] The Court similarly

[265] *Chickasaw Nation*, 515 U.S. at 465 (citing County of Oneida v. Oneida Indian Nation of N.Y., 470 U.S. 226, 247 (1985)).

[266] *Id.* at 466.

[267] *Id.* at 464.

[268] *Id.* at 463.

[269] Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 113 (2005) (quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980)).

[270] *Id.* at 106.

[271] Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2494 (2022).

[272] *See* COHEN, *supra* note 17, § 9.02[1][c][ii], at 740–41.

[273] *See Castro-Huerta*, 142 S. Ct. at 2499.

dismissed Castro-Huerta's arguments rooted in Public Law 280, which he argued demonstrated Congressional understanding that states were without criminal jurisdiction unless authorized by Congress.[274] The Court dismissed this as unpersuasive, concluding that "Public Law 280 affirmatively grants certain States broad jurisdiction . . . [it] does not preempt any preexisting or otherwise lawfully assumed jurisdiction that States possess . . . ."[275]

Having found no federal law that expressly and categorically barred state criminal jurisdiction, the Court proceeded to do something unprecedented: apply to this criminal case "what has been referred to as the *Bracker* balancing test," which had thus far only existed in the Court's state *civil* jurisdiction jurisprudence.[276] For such a monumental change in its jurisprudence, the Court spent scant time actually explaining how the rule was to work, stating merely that "[u]nder the *Bracker* balancing test, the Court considers tribal interests, federal interests, and state interests."[277]

Like its explanation of the rule itself, the Court's analysis of *Bracker*'s application to *Castro-Huerta*'s facts was meager, extending to just over 500 words total.[278] First, the majority found Oklahoma's jurisdiction would not infringe on the sovereignty of the Cherokee Nation because "with exceptions not invoked here, Indian tribes lack criminal jurisdiction to prosecute crimes committed by non-Indians such as Castro-Huerta." Likewise, the majority opined that tribal self-government is only threatened when a state court attempts to take jurisdiction over a case involving an Indian defendant.[279] Since the case at bar involved only "the State and the *non-Indian* defendant," the court found any assertion that it infringed on tribal self-government to be "problematic."[280] Second, the Court limited the federal interest in the case to the protection of Indian victims. From that cramped vantage, the majority could not see why the United States objected to state jurisdiction. After all, according to the majority, "[s]tate prosecution would supplement federal authority, not supplant federal authority."[281] In contrast, the majority concluded that "the State has a strong sovereign interest in ensuring public safety and criminal justice within its territory, and in protecting all crime victims."[282] Based on these factors alone, the majority concluded that state criminal jurisdiction over non-Indian crimes against Indian victims was not preempted under federal law.[283]

The majority's analysis was buttressed by two interrelated lines of reasoning,

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274 *Id.* at 2499–2500.

275 *Id.* at 2499.

276 *Id.* at 2500.

277 *Id.* at 2501.

278 *Id.* at 2500–02.

279 *Id.* at 2501.

280 *Id.* (emphasis added) (citations omitted).

281 *Id.*

282 *Id.* at 2501–02. *But see supra* note 36.

283 *Id.* at 2504–05.

each of which seem tectonic at first glance. First, the majority concluded that the portion of *Worcester v. Georgia* that found the Cherokee Nation to be "a distinct community occupying its own territory," to have "yielded to closer analysis."[284] Second, along the same line, the majority dismissed the Cherokee's 1835 Treaty, which promised the Cherokee Nation would remain "without the territorial limits of the state sovereignties" as having been "supplanted" by the 1906 Oklahoma Enabling Act.[285] The majority's language is both sweeping and hyperbolic, suggesting a scope that is well beyond what is necessary for the Court's holding. Indeed, although *dicta*, the majority's rhetoric remains concerning precisely because it seems to contain no limiting principle. However, courts should remain vigilant and give *Castro-Huerta* a "close[] analysis," to ensure its reasoning does not creep beyond what is necessary to effectuate its holding.

As an initial matter, it seems advisable to carefully consider the wisdom of undermining *Worcester*, which after all, makes up a vital part of our constitutional canon.[286] As we know, the case was written by Chief Justice John Marshall, who was responsible for establishing much of the constitutional framework for the United States, including, notably, *Marbury v. Madison*,[287] as well as *McCulloch v. Maryland*.[288] Scholars have long observed the strong parallels between Chief Justice Marshall's analytical framework in *Worcester* and these other foundational components of the canon.[289] Indeed, as Professor Frickey noted, "Chief Justice Marshall approached . . . *Worcester* in the same way he undertook the interpretation of the federal Constitution itself."[290] These similarities advise caution before undercutting *Worcester*, which very well could have far-reaching and unintended corrosive consequences elsewhere in our constitutional doctrine.

Turning directly to *Castro-Huerta*, the quote used by the Court suggesting *Worcester* as having "yielded to closer analysis" comes from *Village of Kake v. Egan*, a relatively obscure case the Court decided between *Williams v. Lee* and *Warren Trading Post*.[291] At issue was whether the state of Alaska could enforce its anti-fish-trap conservation law against tribal members that were fishing outside of any reservation. Although the Court found for the state, much of its decision was rooted in

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[284] *Id.* at 2493 (first quoting Worcester v. Georgia, 31 U.S. 515, 561 (1832); and then quoting Org. Vill. of Kake v. Egan, 396 U.S. 60, 72 (1961)).

[285] Treaty with the Cherokees, *supra* note 38, 7 Stat. at 478; *Castro-Huerta*, 142 S. Ct. at 2503.

[286] *See generally* Blackhawk, *supra* note 1 (demonstrating the pivotal role that federal Indian law played in the development of public law more broadly).

[287] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[288] McCulloch v. Maryland, 17 U.S. 316 (4 Wheat.) 316 (1819).

[289] Frickey, *supra* note 13, at 411.

[290] *Id.* at 409.

[291] Organized Village of Kake v. Egan, 369 U.S. 60, 72 (1962).

(1) the fact that the conduct was off-reservation; and (2) the unique history surrounding Alaska statehood.[292] Nonetheless, the Court cited to *Fisher*[293] to say (once again, in *dicta*) that "it was said that a reservation was in many cases a part of the surrounding State or Territory, and subject to its jurisdiction except as forbidden by federal law."[294] However, *Fisher* is precisely the same case the Court relied on in *Williams v. Lee* when it laid out its rule regarding state jurisdiction in Indian Country: "[e]ssentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[295] Indeed, later in *Kake*, the Court reiterated the precise holding in *Williams v. Lee* that "state laws may be applied . . . *unless* such application would interfere with reservation self-government or impair a right granted or reserved by federal law."[296] Thus, far from overruling *Worcester*, *Kake* simply leads us back to *Williams v. Lee*, which unanimously acknowledged *Worcester* as "one of [Chief Justice Marshall's] most courageous and eloquent opinions," and one whose "broad principles . . . came to be accepted as law."[297]

Notably, Justice Black, author of *Williams v. Lee*, signed on with the majority in *Kake*. It seems highly unlikely that after such a glowing reaffirmation of *Worcester* he would have signed its death warrant just five years later. The conclusion becomes even more suspect when you consider he wrote *Warren Trading Post* less than a year after *Kake*. There, the Court once again reaffirmed *Worcester*, quoting it at length:

> Chief Justice Marshall recognized in *Worcester v. Georgia*:
>
> > "From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate."
>
> He went on to say that:
>
> > "The treaties and laws of the United States *contemplate the Indian territory as completely separated from that of the states*; and provide that all

[292] *Id.* at 64–67.

[293] *See supra* Section I.B.

[294] *Organized Village of Kake*, 396 U.S. at 72 (citing Utah & N. Ry. Co. v. Fisher, 116 U.S. 28, 31 (1885)).

[295] Williams v. Lee, 358 U.S. 217, 220 (1959) (citing *Fisher*, 116 U.S. at 28).

[296] *Organized Village of Kake*, 396 U.S. at 75 (emphasis added); *Williams*, 358 U.S. at 223.

[297] *Williams*, 358 U.S. at 219. In fact, the Court in *Williams* quoted *Worcester* that "[t]he Cherokee nation . . . is a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter . . . "—*the very language* that was supposedly overruled in *Kake*. *Id.*

The very next sentence is: "Despite bitter criticism and the defiance of Georgia which refused to obey this Court's mandate in *Worcester* the broad principles of that decision came to be accepted as law." *Id.* (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832)).

> intercourse with them shall be carried on exclusively by the government of the union."[298]

And so, *Kake* really tells us nothing new. Yes, states may sometimes take jurisdiction in Indian Country, but only "in cases where essential tribal relations were not involved and where the rights of the Indians would not be jeopardized."[299] Certainly, it could not withstand the weight placed upon it to support much beyond this.

Equally troubling (at first, at least) is the *Castro-Huerta* majority's *dicta* that the Cherokee Nation's treaty had been supplanted by Oklahoma statehood. Without more analysis, this conclusion could lead to at least two inferences. The broadest interpretation of the Court's words is that the Court intended to resurrect the equal footing doctrine for the notion that treaty rights are implicitly abrogated by the creation of a new state. A more modest interpretation, however, was that the Court was simply observing that because Oklahoma statehood was mutually exclusive to the continued treaty promise that the Cherokee Nation would remain "without the territorial limits of the State," that portion of the treaty (and that portion only) was necessarily abrogated.[300]

There is much to lend itself to the second, more modest interpretation. Foremost, the broader interpretation would upend essentially all of federal Indian law, impliedly abrogating every treaty and agreement in existence today and annihilating the political existence of American Indian tribes. As Chief Justice Marshall put it, "[h]ad such a result been intended, it would have been openly avowed."[301]

The point becomes sharper when you consider that the Court has directly and repeatedly repudiated the equal footing doctrine's application to Indian rights for over 100 years, finding:

> The elements of this contention and the answer to it are expressed in *Shively* v. *Bowlby* . . . . The power of the United States, while it held the country as a Territory, to create rights which would be binding on the States was also announced, opposing the dicta scattered through the cases, which seemed to assert a contrary view.[302]

Just a few years later, the Court reaffirmed that "[t]he *power* of the Government

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[298] Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685, 688 (1965) (quoting *Worcester*, 35 U.S. at 557) (citations omitted) (emphasis added).

[299] *Williams*, 358 U.S. at 219.

[300] Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2503 (2022); Treaty with the Cherokees, *supra* note 38, 7 Stat. at 478.

[301] *Worcester*, 31 U.S. at 554.

[302] United States v. Winans, 198 U.S. 371, 383 (1905). The Court also directly confronted and rebuffed Oklahoma's equal footing argument in *McGirt*, which had argued that Congress had abrogated the Muscogee-Creek Treaty in a series of statutes culminating with Oklahoma statehood. McGirt v. Oklahoma, 140 S. Ct. 2452, 2462–74 (2020).

to reserve [rights] and exempt them from . . . the state laws is not denied, and could not be."[303]

That unbroken line of cases has proceeded to the present, with the Court directly repudiating the equal footing doctrine in the 2019 treaty rights case *Herrera v. Wyoming*.[304] That case relied on the 1999 case *Minnesota v. Mille Lacs*, which denied that the equal footing doctrine automatically abrogates tribal treaty rights beyond what is necessary to ensure new states "are admitted to the Union with the same attributes of sovereignty . . . as the original 13 States."[305] At first, this may seem to be a softening of the Court's earlier precedent, until one remembers that the original 13 states had ceded to Congress "the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and *with the Indian tribes*."[306] The combination of these powers has ripened into the congressional plenary authority over Indian relations that we recognize today.[307] Thus, the original states did not enjoy the inherent sovereign right to impose their authority within Indian Country, meaning that new states do not need this power to enter the Union on equal footing.

Indeed, this principle was reaffirmed in *McGirt* itself, when the Court recognized that "there is only one place we may look" to determine whether a treaty has

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[303] Winters v. United States, 207 U.S. 564, 577 (1908) (emphasis added) (citing United States v. Rio Grande Ditch & Irrigation Co., 174 U.S. 690, 702 (1899); United States v. Winans, 198 U.S. 371 (1905)).

[304] Herrera v. Wyoming, 139 S. Ct. 1686, 1695 (2019).

[305] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 203 (1999).

[306] *Worcester*, 31 U.S. at 559; *see also* Blackhawk, *supra* note 1, at 1817 (noting that "concentration of national power over Indian lands . . . meant that the national government governed Indian lands within the borders of a state. All new states had admission to the Union conditioned upon recognition of federal power over Indian Country").

[307] *See, e.g.*, United States v. Lara, 541 U.S. 193, 200 (2004) ("[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'" (quoting Washington v. Confederated Bands & Tribes of Yakima Nation, 439 U.S. 463, 470–71 (1979))); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 62 (1996) ("[T]he States . . . have been divested of virtually all authority over Indian commerce and Indian tribes."); *see also* COHEN, *supra* note 17. Professor Gregory Ablavsky has observed that "[r]ecent revisionist scholarship has challenged the conventional view . . . . Though some of this scholarship has argued for expanded tribal autonomy, other scholars have claimed that this argument supports expanded state authority over Indian affairs." Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L. REV. 1012, 1024 (2015) [hereinafter *Beyond the Indian Commerce Clause*]. Ablavsky argues that it is wrong to rely on such "a narrow set of sources, principally the records of the Constitutional Convention and the ratification debates." *Id.* at 1018. Instead, he argues that, in addition to the constitutional text and history, "early federal and state practice, in broader public discussions [as well as] . . . diplomatic discussions with other sovereigns," are particularly relevant for determining the Indian Commerce Clause. *Id.* at 1018. That history bolsters the conventional view that the federal government enjoys exclusive authority over Indian affairs. *Id.* at 1019.

been abrogated: "acts of Congress."[308] The *McGirt* Court's decision is directly in line with *Herrera* and *Mille Lacs*, both of which reaffirmed that "[i]n lieu of adopting the equal-footing analysis, the Court instead [has drawn] on numerous decisions issued [in the 20th century] to explain that Congress 'must clearly express' any intent to abrogate Indian treaty rights."[309] In other words, the 19th century view that a state's admission to the union automatically abrogates tribal treaty rights truly has "yielded to closer analysis."[310]

The majority in *Castro-Huerta* did not claim to overrule any of this multitude of precedents, and it seems unlikely that it would have been willing to reset the course of the entire field without a passing mention.[311] Importantly, the more modest interpretation of the Court's statement falls into line with the principles laid out by *Herrera* and its ancestor cases. The history underlying Oklahoma statehood demonstrates that, despite its promise that the Cherokee Nation would remain "without the territorial limits of the state," Congress did in fact make the Nation's reservation part of the state of Oklahoma.[312] But the Oklahoma Enabling Act says nothing that would indicate Congressional intent to abrogate tribal treaties beyond what was necessary to physically unify Oklahoma and Indian Territories. Just the opposite, the Act expressly required Oklahoma to disclaim "all right and title in or to . . . all lands lying within [the State's] limits owned or held by any Indian, tribe, or nation. . . ."[313] Therefore, any extrapolation by the Court that statehood caused the abrogation of any other terms of the Cherokee Nation's 1835 treaty would amount to judicial fiat, something the Court had refused to do in *McGirt* dealing with nearly the same history as *Castro-Huerta*. Indeed, although concluded in the context of the specific treaty provision regarding the continued existence of a reservation, the Court expressly disclaimed any right to infer a treaty had been abrogated,

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[308] McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020). The Court also reiterated that states have no power to "nullify the promises made in the name of the United States. That would be at odds with the Constitution, . . . [and] leave tribal rights in the hands of the very neighbors who might be least inclined to respect them." *Id.*

[309] *Herrera*, 139 S. Ct. at 1696 (quoting *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 202); United States v. Dion, 476 U.S. 734, 738–40 (1986); Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 690 (1979); *see also* Menominee Tribe of Indians v. United States, 391 U.S. 404, 411–13 (1968).

[310] Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2493 (2022).

[311] *See* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1711 (2013) (arguing that one function of *stare decisis* is that "placing the burden of justification on those justices who would reverse disciplines jurisprudential disagreements lest it become too disruptive. A new majority cannot impose its vision with only votes. It must defend its approach to the Constitution and be sure enough of that approach to warrant unsettling reliance interests").

[312] *See* DEBO, *supra* note 11, at 126–80.

[313] Oklahoma Enabling Act, ch. 3335, 34 Stat. 267, 270 (1906).

concluding instead that "saving the political branches the embarrassment of disestablishing a [treaty right] is not one of [the Court's] constitutionally assigned prerogatives."[314]

Thus, Courts should resist the temptation to extend treaty abrogation beyond the "crystal-clear" intent of Congress.[315] In the case of the 1835 Cherokee Treaty, that may mean that Congress broke its promise that the Cherokee Nation will remain a homeland "without the territorial limits of the state" but it does not follow that Congress *also* intended to revoke its promise that the Cherokee Nation could "establish and enjoy a government of their choice and perpetuate such a State of society as may be most consonant with their views, habits and condition[s] . . . ."[316] In order for that promise to remain inviolate courts must interpret the State's authority within the Cherokee Nation as narrowly as possible. Yes, treaties that promise reservations will remain outside the boundaries of a state are partially broken when they are made part of a state. But, no, that does not change the jurisdictional calculus from the Supreme Court's rules related to state jurisdiction in Indian Country. That calculus brings us right back around to *Bracker* and the cases that *Bracker* rests upon.

III. A "PARTICULARIZED" CRITIQUE OF THE *BRACKER* "BALANCING" TEST

The tortured and often contradictory precedent regarding state jurisdiction in Indian Country has caused significant confusion for both states and tribes.[317] The subjectivist design of the so-called "balancing" test has opened the door for activist judges to "reach outcomes consistent with their own notions of how much tribal autonomy there ought to be."[318] The Supreme Court's opinion in *Oklahoma v. Castro-Huerta* is a textbook example of this subjectivist approach, wherein the court ignored the longstanding historic presumption *against* state authority in Indian Country.[319] Instead, in what Justice Gorsuch described as "a category error," the majority proceeded under the "premise that Oklahoma possesses 'inherent' sovereign power to prosecute crimes on tribal reservations until and unless Congress 'preempt[s]' that authority."[320] Just as troubling, the Court completely failed to an-

[314] McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020).

[315] Frickey, *supra* note 13, at 412.

[316] Treaty with the Cherokees, *supra* note 38, 7 Stat. at 478.

[317] Professor Ablavsky has observed that "recent denunciations of Indian law as 'incoherent' and 'schizophrenic' stem from a failure to understand its history." *Beyond the Indian Commerce Clause*, *supra* note 306, at 1021.

[318] Hedden-Nicely & Leeds, *supra* note 4, at 305; *see also* Getches, *supra* note 26, at 1628.

[319] *See supra* Section I.D.

[320] Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2511 (2022).

alyze the 1835 Treaty of New Echota that set aside the Cherokee Nation Reservation; in fact, except as mentioned previously, the majority's opinion fails to use the word "treaty" at all. Instead, the Court viewed the case strictly as a contest between the state of Oklahoma and the United States, with the Cherokee Nation standing to the side "as passive recipients of federal [and state] law and policy, with little or no input in the process."[321]

Indeed, *Castro-Huerta*, along with most contemporary cases, entirely ignore inherent tribal sovereignty as an independent barrier to state jurisdiction. Undoubtedly, *Lee*'s infringement test has gone out of vogue since Justice Marshall decided to dismiss it in *McClanahan* as a "platonic notion[] of Indian sovereignty."[322] However, the Court in *Bracker* was careful to point out that it remained good law that "standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members."[323] What is more, *Lee*'s infringement test has several advantages that the preemption analysis does not provide. For one, whether correct or not, preemption invites a searching inquiry into the "particular treaties and statutes that apply, and upon the particular state and tribal interests asserted in the situation in question."[324] In contrast, the infringement test was a bright line rule: states could not exert jurisdiction within Indian Country if it interfered with tribal sovereignty. [325] As Judge Canby once put it: "Chief Justice [John] Marshall's rule that the laws of Georgia could have no force in Indian country may have been a platonic notion, but it was a clear principle with predictable results."[326]

More importantly, tribal sovereignty is distinctly *tribal*; it provides tribes with the space to assert that a state law is invalid because it interferes with their right to "make their own laws and be governed by them."[327] By ceding the field on the infringement test, the touchstone ceases to be *tribal policy* and refocuses it on the policy of the federal government, which we know has shifted wildly over time. On a more granular level, federal policy is often out of sync with tribal values. Under the current approach, tribes are powerless to prevent state jurisdictional incursions if they cannot point to a "pervasive" federal policy that preempts the state action, no matter how badly it interferes with their sovereignty. The result is an ironic perversion of tribal self-determination, forcing tribes to once again be subservient to, and rely exclusively on, the "platonic notion[s]" of the federal government and its policy in order to keep the states out of their reservations.[328]

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[321] Fletcher, *supra* note 29, at 974–75.

[322] McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 (1973).

[323] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980).

[324] Canby, *supra* note 182, at 7.

[325] *Id.*

[326] *Id.*

[327] *Id.* (quoting Williams v. Lee, 358 U.S. 217, 219 (1959)).

[328] McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 (1973).

More to the point for our discussion here, through its adoption of a "balancing test," the Court has failed to remain faithful to the preemption analysis *Bracker* calls for, which has given the judiciary at all levels license to "reach outcomes consistent with their own notions of how much tribal autonomy there ought to be."[329] The approach is anathema to both textualist and originalist judicial philosophy. Indeed, scholars have long demonstrated that the original understanding of the interrelationship between federalism and federal Indian law is consistent with the foundational doctrine outlined in *Worcester* and applied across the "whole course of judicial decision."[330] Consistent with that original intent, the late Dean Getches argued that textualism ought to demand courts "adhere to the foundational Indian law cases and, absent clear textual treatment in congressional legislation, resist the temptation to fill in gaps or introduce the judge's own preferences to redefine the historic political arrangement between tribes and the United States."[331]

Although courts, including the *Castro-Huerta* Court, couch their countervailing presumptions and subjectivist approach in federalism, the result is actually the perpetuation of colonialism. It is no matter that the colonization is being done by the states instead of the federal government; unquestionably, when a state seeks to extend its laws into Indian Country that is an effort to exert political and economic domination by one sovereign over another—the textbook definition of colonialism.[332] Confrontation with this fact *should* force the judiciary to reckon with its implications. As Professor Frickey points out, "[i]n a country that prides itself on following the rule of law, the justifications for colonization . . . do not go down easily in the late twentieth century."[333] More broadly, the judiciary's jurisprudence is actively undermining the United States's position as an international leader in human rights by causing it to fall behind international norms on indigenous rights.[334] Those norms have been memorialized in the United Nations Declaration on the

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[329] Getches, *supra* note 26, at 1628.

[330] *See, e.g.*, COHEN, *supra* note 17, § 4.02[1], at 222–23; *see also* Ablavsky, *supra* note 307, at 1021 ("The legal positions of early Americans suggested a more limited role for states and a more modest scope of federal power over Indian nations than present law provides."); Frickey, *supra* note 13, at 385 ("[T]he interpretive legacy of John Marshall better resonates with the fundamental normative and institutional problems of federal Indian law today than does the current Court's considerably more grudging approach.").

[331] David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 301 (2001).

[332] Ronald J. Horvath, *A Definition of Colonialism*, 13 CURRENT ANTHROPOLOGY 45, 46 (1972).

[333] Frickey, *supra* note 13, at 383.

[334] *See generally* S. JAMES ANAYA, INDIGENOUS PEOPLE IN INTERNATIONAL LAW (2004); Rebecca Tsosie, *Reconceptualizing Tribal Rights: Can Self-Determination be Actualized Within the U.S. Constitutional Structure?*, 15 LEWIS & CLARK L. REV. 923 (2011); Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173 (2014).

Rights of Indigenous Peoples, which includes the right to maintain internal self-governance,[335] as well as ownership over their lands[336] so that they can maintain "their distinct political, legal, economic, social and cultural institutions."[337] The Declaration has been accepted by all countries of the United Nations, including the United States.[338] Clearly then, the Court is actively moving away from both domestic and international norms on anticolonization in the 21st century and the fact that it is difficult to "undo by law what had already occurred in fact," brings the risk of *further* perpetuating colonialism into even sharper focus.[339] Thus, if the judiciary of the United States is actually committed to pushing colonialism into the anticanon[340] then:

> [T]he spirit of the structural, constitutive approach would force judges to do the hard work . . . to challenge rather than to accept blindly assumptions rooted in colonialism, of which there are many today; to interpret documents of positive law flexibly in order to promote the ongoing sovereign-to-sovereign relationship of the tribe and the federal government; to keep the judiciary out of the business of imposing new forms of colonialism; and to refuse to relieve Congress of the responsibility to determine expressly whether future exercises of colonialism should occur.[341]

Undoubtedly, Justice Thurgood Marshall's somewhat cryptic decision in *Bracker* is at least partially responsible for the confusion the subjectivist wing of the Court has since sown. Indeed, statements indicating that courts must engage in a "particularized inquiry," where tribal sovereignty is a mere "backdrop" and "weight" should be given to "applicable regulatory interests of the state," readily lend themselves to arguments that the Court was envisioning a balancing test.[342] It is unclear

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335 G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples, art. 4 (Sept. 13, 2007).

336 *Id.* art. 26.

337 *Id.* art. 5.

338 *Id.*; U.N. GAOR, 61st Sess.., 107th plen. mtg. at 19, U.N. Doc. A/61/PV.107 (Sept. 13, 2007) (adopting the declaration by a majority of 143 states with four votes against including Australia, Canada, New Zealand, and the United States, and 11 abstentions); *United Nations Declaration on the Rights of Indigenous Peoples*, UNITED NATIONS, https://social.desa.un.org/issues/indigenous-peoples/united-nations-declaration-on-the-rights-of-indigenous-peoples (last visited May 19, 2023) (explaining that since the declaration's original passage, the four countries that voted against have since pledged their support); *see also* Carpenter & Riley, *supra* note 334, at 192.

339 Frickey, *supra* note 13, at 386.

340 *See* Blackhawk, *supra* note 1, at 1805 (arguing that "[a]t minimum," colonialism "should takes [its] place within the anticanon . . . banishing them from our law").

341 Frickey, *supra* note 13, at 428; *see also* Blackhawk, *supra* note 1, at 1810 (observing that "recognition of inherent tribal sovereignty . . . . has helped mitigate the realities of American colonialism.").

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

why Justice Marshall chose to use this language in his opinion in *Bracker*. Some have speculated that it was "an attempt to win over members of the Court who wanted greater freedom to shape outcomes."[343] Certainly, it has allowed for the mischief that has occurred in recent years, allowing courts to "synthesize the Court's recent Indian law jurisprudence into a test that 'balances' the interests of the state, federal government, and tribal governments."[344]

Much of the confusion can also be attributed to the fact that there already exists a well-established preemption analysis that exists outside of Indian Country,[345] which includes the "assumption . . . that the state does have the power to apply its law unless preempted."[346] And, although Justice Marshall cautioned that it is "generally unhelpful to apply . . . those standards of pre-emption that have emerged in other areas of the law," courts have nonetheless applied these broader principles, even where they conflict directly with the foundational principles of federal Indian law.[347] Most recently, this occurred in *Castro-Huerta*, where the majority concluded, citing to no precedent addressing Indian lands, that "a State is generally 'entitled to the sovereignty and jurisdiction over all the territory within her limits.'"[348] When courts start from a presumption of state authority, they often ignore the organic documents creating the reservation and instead comb through federal statutes and regulations to try to find a silver bullet that expressly demonstrates that Congress intended to preempt the state law in question.[349]

This is not the test that was brought forth by the Navajo trilogy, *Bracker*, or the rest of the Court's precedent on state authority in Indian Country. Instead, the preemption analysis called for by the Court in Indian Country begins with a presumption that state law is invalid unless expressly authorized by Congress.[350] Therefore, the burden is on the states in Indian Country to point to "express authority conferred upon the State by act of Congress."[351] Professor Philip Frickey termed

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343 Getches, *supra* note 26, at 1627–28.

344 *Id.* at 1626.

345 *See generally* CHEMERINSKY, *supra* note 184, at § 5.2; Frickey, *supra* note 13, at 425 n.180 (arguing that "federal Indian law at the dawn of the Rehnquist Court contained a good deal of confusion caused, at least in part, by analogies to other, more familiar areas of law . . . and by a failure to distinguish the dictum of *Cherokee Nation* from the holding of *Worcester*").

346 Canby, *supra* note 182, at 7.

347 *Bracker*, 448 U.S. at 143.

348 Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2493 (2022) (quoting Pollard v. Hagan, 44 U.S. (3 How.) 212, 228 (1845)).

349 *See, e.g.*, Moe v. Confederated Salish & Kootenai Tribes of the Flathead Rsrv., 425 U.S. 463, 481 (1976); Washington v. Confederated Tribes of the Colville Indian Rsrv., 447 U.S. 134 (1980). Worse still, the Court has sometimes seemed to use the analysis to try to affirmatively search out a way to *imply* Congressional *support* for the state taxes. *See, e.g.*, Dep't of Tax'n v. Milhelm Attea & Bros., 512 U.S. 61, 64 (1994).

350 *See* McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 175 n.13 (1973).

351 *Id.* at 171 (quoting DEP'T OF INTERIOR, FEDERAL INDIAN LAW 845 (1958)).

this the "clear statement rule of interpretation"; that is, the presumption against the erosion of tribal sovereignty and, conversely, the growth of state sovereignty within Indian Country unless Congress has spoken in "crystal-clear text."[352]

As Frickey observed, this presumption was developed by Chief Justice John Marshall in tandem with similar clear-statement rules in other areas of constitutional doctrine such as federalism and separation of powers.[353] Thus, like *Worcester* more generally, it seems unwise to tinker with the scope of these presumptions lest it lead to unintended consequences elsewhere.[354] More importantly, the presumption remains inviolate because, like the three branches that are implicated by separation of powers and the state–federal balance struck by federalism, dealings between tribes and the United States forms an *ongoing* relationship between *sovereigns*. The "clear-statement" presumption helps to maintain this relationship by refusing to presume that one of these sovereigns abrogated its obligations unless it was "openly avowed."[355] In this way, the clear statement rule helps to maintain the international norms necessary for the legitimacy of the sovereigns.[356]

Likewise, although cases such as *Warren Trading Post* and *Bracker* found that some level of general federal statutes and regulation were "in themselves sufficient" to show Congressional intent to preempt the state laws, nowhere in the Court's analysis did it indicate that those laws and regulations were necessary.[357] The approach is flawed because it forces tribes to rely on statutes and regulations to establish a "pervasive [federal] regulatory scheme," which is in tension with tribal self-government. Indeed, under this approach, tribes are forced to demonstrate that the federal government, not the tribes, have taken the matter "so fully in hand that no room remains for state law . . . ."[358] Instead, those cases called for a treaty analysis rooted in *tribal sovereignty*, with outside federal laws and regulations used to backfill that analysis with evidence of the general government's policy to "treat [the tribes] as nations, respect their rights, and manifest a firm purpose to afford that protection which *treaties* stipulate."[359]

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352 Frickey, *supra* note 13, at 412, 417.

353 *Id.* at 412–13.

354 *See supra* Part II.

355 Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 554 (1832).

356 Ablavsky, *supra* note 1, at 1058–59 (citing David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932, 1015–61 (2010) (observing that "'[t]he fundamental purpose of the Federal Constitution was to create a nation-state that the European powers would recognize, in the practical and legal sense, as a 'civilized state' worthy of equal respect in the international community,' which required adherence to international norms.")).

357 Cent. Mach. Co. v. Ariz. State Tax Comm'n, 448 U.S. 160, 163 (1980).

358 Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685, 690 (1965).

359 *Warren Trading Post*, 380 U.S. at 688 (1965) (quoting *Worcester*, 31 U.S. at 557) (emphasis added).

Along a similar line, recent cases have misperceived how much "weight" state interests are entitled to under the *Bracker* preemption analysis. Some cases, such as *Castro-Huerta*, have gone so far as to flip the burdens here as well, analyzing how tribal activity affects the state, not how state regulation affects self-determination.[360] However, *Bracker* does not support an "Indian law preemption analysis [that] collect[s] ingredients for *ad hoc* judicial balancing."[361] On a practical level, the balancing test incentivizes states to move toward *de facto* abrogation by slowly "encroach[ing] on the tribal boundaries or legal rights Congress provided."[362] And with each step the states take, their "interests" grow until "with enough time and patience, [they] nullify the promises made in the name of the United States."[363] The Court has been clear that such an arrangement "would be at odds with the Constitution, which entrusts Congress with the authority to regulate commerce with Native Americans, and directs that federal treaties and statutes are the 'supreme Law of the Land.'"[364]

Instead, the Court concluded that it would give weight only to "*applicable* regulatory interest[s] of the State."[365] The Court defined what interests are "applicable" in *Lee*, limiting it to "suits by Indians against outsiders in state courts . . . . [a]nd state courts have been allowed to try non-Indians who committed crimes against each other on a reservation."[366] In other words, the accommodation of state law in Indian Country was extremely narrow, limited to only those situations where "significant non-Indian interests are involved and *no* legitimate tribal interest is present to counterbalance them."[367] However, *no* state interest, regardless of its force, would be recognized if it were to affect "essential tribal relations [or] where the rights of Indians would . . . be jeopardized."[368] Put simply, the only "applicable" state law that should be given any "weight" in the *Bracker* analysis are those that are necessary to protect state interests "up to the point where tribal self-government would be affected."[369]

On a more fundamental level, the modern "balancing" test is inconsistent with foundational principles of federal Indian law. Most importantly here, those principles hold that "an Indian tribe possesses, in the first instance, all the inherent powers of any sovereign state."[370] And, although "a tribe's presence within the territorial

[360] *See, e.g.*, Dep't of Tax'n v. Milhelm Attea & Bros., 512 U.S. 61, 73 (1994).

[361] Getches, *supra* note 26, at 1626.

[362] McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020).

[363] *Id.*

[364] *Id.* (first quoting U.S. CONST. art. I, § 8; and then quoting *id.* art. VI).

[365] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980).

[366] Williams v. Lee, 358 U.S. 217, 219–20 (1959).

[367] Frickey, *supra* note 13, at 437 (emphasis added).

[368] *Williams*, 358 U.S. at 219.

[369] McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 179 (1973).

[370] COHEN, *supra* note 17, § 4.01[1][a], at 222; *see also* Getches, *supra* note 26, at 1574.

boundaries of the United States . . . precludes the exercise of external powers of sovereignty of the tribe . . . [it] does not by itself affect the internal sovereignty of the tribe."[371] A paramount characteristic of that suite of sovereign rights includes the right to "defend itself from encroachment by another political unit."[372] Although that external sovereignty has been extinguished in the sense that tribal nations are bound to the United States, the Court has never pointed to a legal basis for the unilateral imposition of *state* power within Indian Country.[373] Just the opposite, freedom from state authority was confirmed and memorialized in the countless treaties, congressionally ratified agreements, executive orders, and other organic documents that set aside each Indian reservation in the United States. Those documents need not expressly prohibit state jurisdiction; the Supreme Court has been careful to point out that those agreements were "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."[374] Silence means that the tribe *retained* its right to be free from jurisdictional incursions by neighboring states, and the United States agreed to protect that right.

Unquestionably, federal law prescribes that "inherent tribal powers are subject to qualification," but "except as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government."[375] Furthermore, those limitations can only come through "treaties [or] by express legislation of *Congress*."[376] Indeed, the Court has long recognized the plenary authority of *Congress* in the arena of Indian affairs.[377] However, by engaging in a "balancing" analysis, the judiciary steps into the shoes of Congress and makes policy about the appropriate balance of power within Indian Country. This presents a significant separation of powers problem because, again, it is *Congress*, not the courts that are vested with making policy decisions generally, and Indian affairs specifically. Thus, if any entity is to engage in an "interest-balancing" test—a political question—that entity must be Congress. By substituting its own judgment about how the balance of interests between states and tribes ought to come out, the Court has invaded the province of the legislative branch and usurped its constitutionally vested power.

These principles were faithfully followed throughout the Navajo trilogy, which repeatedly found that the "permanent home" the Navajo Nation set aside in the 1868 Treaty implicitly included the right of the Navajos to "govern themselves, free

[371] COHEN, *supra* note 17, § 4.01[1][a], at 222; *see also* Getches, *supra* note 26, at 1574.

[372] Hurst Hannum, *Sovereignty and Its Relevance to Native Americans in the Twenty-First Century*, 23 AM. INDIAN. L. REV. 487, 488 (1998).

[373] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

[374] United States v. Winans, 198 U.S. 371, 381 (1905).

[375] Getches, *supra* note 26, at 1574; *see also* COHEN, *supra* note 17, § 4.01[1][a], at 222.

[376] Getches, *supra* note 26, at 1574; *see also* COHEN, *supra* note 17, § 4.01[1][a], at 222.

[377] *See generally* Lone Wolf v. Hitchcock, 187 U.S. 553, 686–87 (1903).

from state interference."[378] However, since then, the Court has moved away from analyzing the "important backdrop" that is tribal sovereignty and has gone so far as to avoid analyzing the applicable treaties altogether.[379]

Given the legal, normative, and even moral flaws of the so-called *Bracker* "balancing test," its stickiness within the federal Indian law bench and bar is remarkable. Nonetheless, in actuality, the balancing test has been applied scant few times in Supreme Court cases where it was necessary to the Court's holding. On the other side of the ledger are foundational cases such as *Williams v. Lee*, *Warren Trading Post*, *McClanahan*, and even *Bracker itself*, all of which lead to the inexorable conclusion that "*Bracker* never purported to claim for this Court the raw power to 'balance' away tribal sovereignty in favor of [the] state . . . let alone ordain a wholly different set of jurisdictional rules than Congress already has."[380] Instead, *Bracker* and the cases it relies on demonstrate that the question of state jurisdiction in Indian Country should be resolved as a treaty analysis.

IV. RETURNING TO FIRST PRINCIPLES: REVITALIZING THE TREATY RIGHT TO LIMIT STATE JURISDICTION IN INDIAN COUNTRY

As originally contemplated, *Bracker*'s preemption test is a *treaty* analysis, which is broadly applicable to not only treaties, but also congressionally ratified agreements, executive orders, and other organic documents setting aside reservations.[381] That treaty analysis has the advantage of being clear, well understood, and broadly applicable. Equally important, it recognizes the proper division of power in this arena between Congress and the courts. Finally, it eliminates much of the paternalism that comes with the Court's emphasis of unilateral federal statutes and regulations that tribes had little hand in fashioning. Instead, it focuses on the intent of not only the United States, but also the tribes, in determining the sovereign jurisdictional scope of the reservation.

Treating state jurisdiction as a treaty analysis has the advantage of integrating *Bracker*'s progeny with the broader precedent related to tribal treaty rights, which

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[378] Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685, 686–87 (1965) (citing Treaty Between the United States of America and the Navajo Tribe of Indians, *supra* note 133, at 667, 671).

[379] *See, e.g.*, Moe v. Confederated Salish & Kootenai Tribes of the Flathead Rsrv., 425 U.S. 463, 477 (1976); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 156 (1980); Dep't of Tax'n v. Milhelm Attea & Bros., 512 U.S. 61, 77 n.11 (1994).

[380] Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2521 (2022) (Gorsuch, J., dissenting).

[381] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144–45 (1980); COHEN, *supra* note 17, § 2.02[1], at 115 n.6, n.8 (providing citations to support that courts analyze executive orders and congressionally ratified agreements in a manner similar to treaties); Frickey, *supra* note 13, at 422 ("[T]he Court has drawn no fundamental interpretive distinction between reservations established by statute or executive order and those protected by treaty.").

has experienced a resurgence at the Supreme Court over the past few years.[382] For preemption, a treaty analysis asks whether the organic document in question operated to block the assertion of state jurisdiction within the reservation. The heart of that question is the mutual intent of the tribe and United States—whether those parties *intended* the reservation to be a haven free from state jurisdiction. Sometimes the answer is clear on the face of the document. For example, the 1835 Treaty with the Cherokee Nation called for the establishment of a Cherokee homeland "without the territorial limits of the State *sovereignties*" wherein the tribes could "establish and enjoy a government of their choice and perpetuate such a state of society as may be most consonant with their views, habits and condition[s]."[383]

More often however, the text is unclear. Like the 1868 Treaty with the Navajo, many simply set apart a "permanent home" for the tribe.[384] Others set apart an area for the "absolute and undisturbed use and occupation" or for the "exclusive use" of the tribe while others still promise tribes a land base to be used "for Indian purposes" or for lands to be held "as Indian lands are held."[385] Many, particularly executive

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[382] *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000 (2019); Herrera v. Wyoming, 139 S. Ct. 1686 (2019); McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

[383] Treaty with the Cherokees, *supra* note 38, 7 Stat. at 478 (emphasis added); *see also* A Treaty of Perpetual Friendship, *supra* note 264, at 333–34 (guaranteeing to the Choctaw "the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation"); Treaty with the Creeks, Creek-U.S., art. XIV, Mar. 24, 1832, 7 Stat. 366, 368 (promising that no "State or Territory ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves"); Treaty Between the United States of America and the Sissiton and Warpeton Bands of Dakota or Sioux Indians, Sisseton and Wahpeton-U.S., art. X, Feb. 19, 1867, 15 Stat. 505, 510 (reserving the right of "[t]he chiefs and headmen located upon either of the reservations set apart for said bands . . . to adopt such rules, regulations, or laws for the security of life and property, the advancement of civilization, and the agricultural prosperity of the members of said bands").

[384] *See, e.g.*, Treaty with the Chippewas, Chippewa-U.S., art. II, Feb. 22, 1855, 10 Stat. 1165, 1166 (setting aside "a sufficient quantity of land for the permanent homes of the said Indians"); Treaty Between the United States of America and the Eastern Band of Shoshonees and the Bannack Tribe of Indians, art. IV, July 3, 1868, 15 Stat. 673, 674 (promise that the tribes "will make said reservations their permanent home"); Treaty Between the United States of America and the Navajo Tribe of Indians, *supra* note 133, at 667, 671; Act of Mar. 3, 1891, 26 Stat. 989, 1028 (Indian Department appropriations) (guaranteeing to the Coeur d'Alene Tribe that "the Coeur d'Alene Reservation shall be held forever as Indian land and as homes for the Coeur d'Alene Indians").

[385] *See, e.g.*, Treaty of Medicine Creek, Nisqualli-U.S., art II, Dec. 26, 1854, 10. Stat. 1132, 1132–33 (guaranteeing a reservation for the Tribe's "exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe"); Treaty with the Nez Perces, Nez Perce-U.S., Jun. 11, 1855, art. II, 12 Stat. 957, 958 (guaranteeing a reservation "exclusive use and benefit of said tribe as an Indian reservation"); Treaty with the Flatheads, Kootenay and Upper Pend d' Oreilles Indians, art. II, Jun. 11, 1855, 12 Stat. 975, 976 (guaranteeing a

orders setting aside most of the reservations in the late 18th century, simply set aside a "reservation," with no mention of the rights that go along with it.[386]

From this it is clear that most organic documents remain ambiguous as to the scope of state jurisdiction within Indian Country. From *Worcester* through *Warren Trading Post*, the Court addressed this ambiguity by applying what Professor Frickey termed the "clear-statement" rule that silence resulted in the retention of sovereignty because it could only be lost when ceded through treaty or abrogated by Congress

reservation "exclusive use and benefit of said confederated tribes as an Indian reservation"); Point Elliot Treaty, art. II, Jan. 22, 1855, 12 Stat. 927, 928 (guaranteeing a reservation for the Tribe's "exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe"); Treaty with the Makah Tribe, Makah Tribe-U.S., art II, Jan. 31, 1855, 12 Stat. 939, 939 (guaranteeing a reservation for the Tribe's "exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribe"); Treaty Between the United States and the Qui-nai-elt and Quil-leh-ute Indians, art. II, May 12, 1854, 12 Stat. 971, 971 (guaranteeing a reservation for the Tribe's "exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe"); Treaty Between the United States of America and the S'Klallam Indians, S'Klallam.-U.S., art. II, Jan. 26, 1855, 12 Stat. 933, 934 (guaranteeing a reservation for the Tribe's "exclusive use; nor shall any white man be permitted to reside upon the same without permission of the tribe"); Treaty with the Sioux Indians, art. II, Apr. 29, 1868 15 Stat. 635, 636 (promising the reservation shall be "set apart for the absolute and undisturbed use and occupation of the Indians"); Treaty with the Ute Indians, art. II, Mar. 2, 1868, 15 Stat. 619, 619 (promising the reservation shall be "set apart for the absolute and undisturbed use and occupation of the Indians"); Treaty Between the United States of America and the Navajo Tribe of Indians, *supra* note 133, at 667, 668 (promising the reservation shall be "set apart for the use and occupation of the Indians"); Treaty with the Oneidas, Oneida-U.S., art. 2, Feb. 3, 1868, 7 Stat. 566, 566 (guaranteeing a reservation "to be held as other Indian lands are held"); Treaty with the Menomonee Indians, Menomonee-U.S., art. 2, May 13, 1854, 10 Stat. 1064, 1065 (guaranteeing a reservation "to be held as Indian lands are held").

[386] Contract Entered into, Under the Sanction of the United States of America, Between Robert Morris and the Seneka Nation of Indians, Seneca-U.S., Sep. 15, 1797, 7 Stat. 601, app. I, at 602 (exempting tracts of land from a sale to the United States as well as preserving "the privilege of fishing and hunting" on land sold); Treaty with the Ottawa and Chippewa, art. II, Mar. 28, 1836, 7 Stat. 491, 491; Treaty with the Ottawas, Chippewas, and Pottawatamies, art. 2, Aug. 29, 1821, 7 Stat 218, 219; Exec. Order of Nov. 9, 1855, *reprinted in* KAPPLER, *supra* note 213 at 890–91 (Siletz Reservation); Exec. Order of June 30, 1857, *reprinted in* KAPPLER, *supra* note 213 at 886 (Grande Ronde Reservation); Exec. Order of Jan. 20, 1857, *reprinted in* KAPPLER, *supra* note 213 at 919–20 (Muckleshoot Reservation); Exec. Order of Oct. 3, 1861, *reprinted in* KAPPLER, *supra* note 213 at 900 (Uintah and Ouray Reservation); Exec. Order of Jan. 9, 1873, *reprinted in* KAPPLER, *supra* note 213 at 830–31 (Tule River Reservation); Treaty Between the United States of America and the Sissiton and Warpeton Bands of Dakota or Sioux Indians, Sioux-U.S., art. III, Feb. 19, 1867, 15 Stat. 505, 506; Exec. Order of Nov. 10, 1914, *reprinted in* 4 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 1013 (1929) (Cold Springs Rancheria); Exec. Order of July 22, 1915, *reprinted in* 4 KAPPLER, *supra*, at 1016 (1929) (Benton Paiute Rancheria).

in "crystal-clear text."[387] Hence, the Court engaged in very little analysis of the Navajo treaty in either *Lee* or *Warren Trading Post*, simply applying it and concluding that "[i]mplicit in those treaty terms . . . was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed."[388] Although Frickey provides forceful arguments on the preferability of this analysis, by the time it got to *Bracker* the Court had begun to require a more "particularized" analysis that more closely examined the language of the relevant treaties.[389]

Nonetheless, the Court cautioned that such an analysis must remain conscious of the "broad policies that underlie [the treaties] and the notions of sovereignty that have developed from historical traditions of tribal independence."[390] Hence, the Court "look[s] beyond the written words to the larger context that frames the Treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'"[391] This is a "particularized inquiry" that requires the court to take evidence regarding the specific history surrounding the tribe in question, as well as the circumstances surrounding the negotiation of the tribe's reservation.[392] The first inquiry requires the bringing together of an interdisciplinary team of tribal elders and experts, as well as historians and anthropologists to establish the tribe's lifeway as it existed since time immemorial.[393] That historical context will

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[387] Frickey, *supra* note 13, at 412, 417.

[388] Williams v. Lee, 358 U.S. 217, 221–22 (1959).

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

[390] *Id.* at 144.

[391] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999) (quoting Choctaw Nation of Indians v. United States, 318 U. S. 423, 432 (1943)).

[392] *Id.*; *see also* United States v. Winans, 198 U.S. 371, 381 (1905) ("How the treaty in question was understood may be gathered from the circumstances. The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed."); Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 680 (1979) (quoting the above from *Winans*); Herrera v. Wyoming, 139 S. Ct. 1686, 1701–03 (2019) (examining the circumstances surrounding the 1868 Treaty of Fort Laramie to determine the Crow Tribe's understanding of the term "unoccupied"); Colville Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir. 1981) (citing *Winans*, 198 U.S. at 381) ("To identify the purposes for which the Colville Reservation was created, we consider the document and circumstances surrounding its creation, and the history of the Indians for whom it was created. We also consider their need to maintain themselves under changed circumstances."); United States v. Idaho, 95 F. Supp. 2d 1094 (D. Idaho 1998) (engaging in an exhaustive analysis regarding the creation of the Coeur d'Alene Reservation to determine whether it included the reservation of submerged lands underlying Coeur d'Alene Lake).

[393] *See, e.g.*, United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974); *Idaho*, 95 F. Supp. 2d at 1099–1102. Although that analysis may not demonstrate that the tribe understood itself to be exerting the European-style version of "sovereignty" that we recognize today,

color heavily the Tribe's intent as it entered into negotiations with the United States. That intent, as well as the intent of the United States is likewise more fully understood through an analysis of any instructions received by federal negotiators, negotiation minutes, correspondence regarding negotiations, congressional debate regarding the agreement, and other historical documents that may be available.[394] All of this evidence then goes to the overarching question of whether the tribe and the United States intended for the treaty to preempt state law.

Invariably, much of the available circumstantial evidence surrounding the creation of these reservations comes from the records produced by the United States. Likewise, because many tribal leaders did not speak English during this era, much of the words attributed to tribal leadership are more likely to be non-Indian translations.[395] As a result, these documents often fail to perfectly memorialize tribal intent but instead document what federal officials wished the tribal intent to be. Further still, these negotiations were rarely done at arm's length. Instead, they were conducted under duress and in the face of incalculable pressure by the full force of the U.S. Government, often at gunpoint.[396] The power of the pen is considerable in these cases, but it comes with significant responsibilities. The Supreme Court has honored those responsibilities through the development of the canons, which it applied faithfully to the early cases regarding state jurisdiction in Indian Country.[397] Canons exist in many subfields within the law, many of which are inconsistently or ineffectively applied. However, the Court's fidelity to the canons in the Indian law context has been "potent" and "fundamental to federal Indian law and essential to the trust relationship."[398]

In this case, the canons sit atop the broader historical development of the "Indian sovereignty doctrine," which "provides a backdrop against which the applicable

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undoubtedly it would yield evidence that the tribe and its members had a lifeway that it expected it would be able to continue free from outside interference.

394 *Mille Lacs Band of Chippewa Indians*, 526 U.S. at 196–99.

395 The classic example of this comes from *United States v. Washington*, where Judge George Boldt pointed out that:

> The treaties were written in English, a language unknown to most of the tribal representatives, and translated for the Indians by an interpreter in the service of the United States using Chinook Jargon, which was also unknown to some tribal representatives. Having only about three hundred words in its vocabulary, the Jargon was capable of conveying only rudimentary concepts, but not the sophisticated or implied meaning of treaty provisions about which highly learned jurists and scholars differ.

Washington, 384 F. Supp. at 330.

396 COHEN, *supra* note 17, § 2.02[1]–[2], at 113–19.

397 *See, e.g.*, McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 173 (1973); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141–42 (1980).

398 Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 PUB. LAND L. REV. 1, 7, 7 n.47 (1995); COHEN, *supra* note 17, § 4.02[1], at 222–23.

treaties and federal statutes must be read."[399] American Indian tribes "have been uniformly treated as [sovereign] state[s] from the settlement of our country."[400] All branches of the federal government recognized that part of the sovereignty retained by the tribes was the right to be free from state interference.[401] The policy was codified in countless non-intercourse acts throughout the 18th century, the most recent of which remains in force today.[402] For their part, it is fair to say that tribes broadly understood their right to continue their way of life to be inviolate.[403] Although some may have agreed to come under the "protection" of the United States, that protection did not result in the "stripping . . . of the right of government, and ceasing to be a state."[404] Just the opposite, the primary protection tribes often sought was *from the individual states and their citizens*, to which at the time they "[t]hey owe[d] no allegiance . . . and receive[d] from them no protection."[405] In fact, empowering state jurisdiction within Indian Country "would . . . leave tribal rights in the hands of the very neighbors who might be least inclined to respect them."[406] Unquestionably, the scope of tribal sovereignty vis-à-vis the federal government has shifted over time. However, one thing has remained relatively constant: the mutual goal of the U.S. Congress and tribes to keep states out of the reservations.

Importantly, the Court, in *Washington State Department of Licensing v. Cougar Den*, has recently applied these principles to find that a Washington State tax on motor fuel that is imported into the state via a public highway by members of the Yakama Nation was preempted by the 1855 Treaty between the United States and Yakama Nation.[407] Article III of that treaty included the reserved "right, in common with citizens of the United States, to travel upon all public highways."[408] Accord-

[399] *McClanahan*, 411 U.S. at 172.

[400] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).

[401] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

[402] 25 U.S.C. § 177 (2018).

[403] For example, in 1872, a Coeur d'Alene leader named Quin-a-mons-a said in a council with U.S. federal negotiators "[w]e our people do not want the President to make laws for us. We have our own laws, they are good enough for us and we want to live by them." *See* Supt. of Indian Affairs, Washington Territory, to Commissioner of Indian Affairs, December 15, 1872, Letters Received, Washington Superintendency, Microfilm, M 234, Roll 912, RG 75, National Archives. Later, in 1877 Chief Joseph of the Nez Perce said:

> Let me be a free man—free to travel, free to stop, free to work, free to trade where I choose, free to choose my own teachers, free to follow the religion of my fathers, free to think and talk and act for myself—and I will obey every law, or submit to the penalty.

GREAT SPEECHES BY NATIVE AMERICANS 165 (Bob Blaisdell ed. 2000).

[404] *Worcester*, 31 U.S. at 561

[405] United States v. Kagama, 118 U.S. 375, 383–84 (1886).

[406] McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020).

[407] Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1006 (2019).

[408] *Id.* at 1007 (quoting Treaty with the Yakamas, art. III, June 9, 1855, 12 Stat. 951, 953).

ingly, whether the Washington tax was preempted turned on the scope of this Article III right, which, by its terms, included no express provision preempting state taxation. In a decision written by Justice Breyer that harkened back to the modern-era decisions penned by Justice Thurgood Marshall, the Court concluded that the Washington tax was preempted. To arrive at this decision, the Court "look[ed] beyond the written words [of Article III] to the history of the treaty, the negotiations, and the practical construction adopted by the parties."[409] The Court then examined the language of Article III, as well as the circumstance surrounding its creation, through the lens of the canons of construction, reaffirming that "the language of the treaty should be understood as bearing the meaning that the Yakamas understood it to have in 1855."[410] Taken together, the Court concluded that "to impose a tax upon traveling with certain goods burdens that travel. And the right to travel on the public highways without such burdens is, as we have said, just what the treaty protects. Therefore, our precedents tell us that the tax must be pre-empted."[411]

Newly appointed Justice Neil Gorsuch, in an opinion joined by Justice Ruth Bader Ginsburg, specially concurred in the decision.[412] Although at first blush, the opinions seem strikingly similar, the Gorsuch concurrence is noteworthy for its expansive application of the canons. Gorsuch acknowledged "[t]o some modern ears, the right to travel in common with others might seem merely a right to use the roads subject to the same taxes and regulations as everyone else."[413] However, this case would not turn on a modern interpretation of the treaty. Instead, Justice Gorsuch reaffirmed "we *must* 'give effect to the terms as the Indians themselves would have understood them.'"[414] Looking through this lens, Gorsuch concluded that the Department of Licensing's narrow interpretation of Article III "is not how the Yakamas understood the treaty's terms."[415] Rather, based upon uncontroverted linguistic evidence Justice Gorsuch found that "[t]o the Yakamas, the phrase 'in common with' . . . implie[d] that the Indian and non-Indian use [of the roads] [would] be joint but [did] not imply that the Indian use [would] be in any way restricted."[416] From this, Gorsuch concluded that Article III is best interpreted as reserving a

[409] *Id.* at 1012 (quoting Water Splash, Inc. v. Menon, 137 S. Ct. 1504, 1511 (2017)).

[410] *Id.* at 1011.

[411] *Id.* at 1013.

[412] *Id.* at 1016 (Gorsuch, J. concurring).

[413] *Id.*

[414] *Id.* (emphasis added) (quoting Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196 (1999)).

[415] *Id.* at 1016.

[416] *Id.* at 1016–17 ("[t]o" and "[of the roads]" are author's alterations, all other alterations in original) (quoting Yakama Indian Nation v. Flores, 955 F. Supp. 1229, 1265 (E.D. Wash. 1997)).

"preexisting right to take goods to and from market freely throughout their traditional trading area."[417] Justice Gorsuch's concurrence will likely be remembered best, however, for its conclusion:

> Really, this case just tells an old and familiar story. The State of Washington includes millions of acres that the Yakamas ceded to the United States under significant pressure. In return, the government supplied a handful of modest promises. The State is now dissatisfied with the consequences of one of those promises. It is a new day, and now it wants more. But today and to its credit, the Court holds the parties to the terms of their deal. It is the least we can do.[418]

The Court's analysis in *Cougar Den* is precisely the "particularized inquiry" that Justice Marshall called for in *Bracker*. Both involved the integration of the canons and federal policy supporting tribal sovereignty with the particular treaty or other organic document involved in the case.[419] Through this lens, just as the "right to travel in common" includes the right to be free from state taxation while traveling, so too does the right to a "permanent home" include the right of the tribes to "govern themselves, free from state interference."[420] Indeed, scholars and tribal leaders agree that "the most basic claim put forward by American Indians [is] the claim to be free from assimilative forces and to make and be governed by their own laws."[421] Given the legal history in this arena and, given that agreements were "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted," the starting presumption when faced with silence in a treaty should be that the tribe *reserved* their right to be free from state jurisdiction.[422] The conclusion becomes all the stronger with a faithful application of the canons, which requires interpretation of the agreement as the tribe would have understood it and that silence "[be] construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence."[423]

Unquestionably, the inquiry also includes an examination of other federal laws

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[417] *Id.* at 1017.

[418] *Id.* at 1021.

[419] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144–45 (1980).

[420] Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685, 686–87 (1965) (citing Treaty Between the United States of America and the Navajo Tribe of Indians, *supra* note 133, at 667, 671).

[421] Frickey, *supra* note 13, at 424; *see also* Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 ARIZ. ST. L.J. 75, 75 (2002) ("As I see it, 'sovereignty' as applied to Indigenous nations simply means freedom, the freedom of a people to choose what their future will be.").

[422] United States v. Winans, 198 U.S. 371, 381 (1905).

[423] *Bracker*, 448 U.S. at 144 (citing McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 174–75, 175 n.13 (1973)).

and regulations involving tribes that apply to subject matter the state seeks to regulate.[424] At this stage of the inquiry a "pervasive regulatory scheme" can be sufficient to demonstrate federal intent to preempt state law.[425] However, contrary to its sister preemption analysis that applies in the non-Indian context, the precedent related to preemption in Indian Country has never *required* such a scheme. Instead, as in *Warren Trading Post*, examination of those statutes and regulations is meant to confirm a general congressional policy to act "in compliance with its treaty obligations."[426] Far from the searching inquiry courts have lately undergone, the Supreme Court has used it to *broadly* confirm that "since the signing of the . . . treat[ies], Congress has consistently acted upon the assumption that the States lacked jurisdiction over [Indians] living on the reservation."[427] Accordingly, unlike preemption in the non-Indian context, which begins with a presumption in favor of state authority in the absence of a pervasive federal preemption scheme, a court addressing state authority in Indian Country should begin with a strong presumption *against* state jurisdiction "except as authorized by Acts of Congress or by valid regulations promulgated under those Acts."[428]

Once the inherent sovereign right to be free from state jurisdiction is reserved by treaty, that right may only be abrogated by Congress.[429] Indeed, as recently as 2020 the Court reaffirmed that to determine whether a treaty has been abrogated "there is only one place we may look: the Acts of Congress."[430] The Court went on to find that "[t]his Court long ago held that the Legislature wields significant constitutional authority when it comes to tribal relations . . . . But that power, this Court has cautioned, belongs to Congress alone."[431] This is precisely why the *Bracker* test cannot be a "balancing" test—it would vest in the *Courts* the authority to abrogate treaty rights by determining that a state's interests outweigh countervailing treaty obligations. That balance is a *political* question that must reside in Congress, and we should strive to find a reading of *Bracker* that avoids this constitutional conundrum.

Instead, the Court should analyze assertions of state jurisdiction in Indian

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424 *Warren Trading Post*, 380 U.S. at 688–90; *McClanahan*, 411 U.S. at 174–77; *Bracker*, 448 U.S. at 145–50.

425 *Bracker*, 448 U.S. at 151 n.15; *Warren Trading Post*, 380 U.S. at 688–90.

426 *Warren Trading Post*, 380 U.S. at 690.

427 *McClanahan*, 411 U.S. at 175.

428 *Warren Trading Post*, 380 U.S. at 691.

429 Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.").

430 McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (2020).

431 *Id.*

Country under its treaty abrogation rubric, which begins with the maxim that "Indian treaty rights are too fundamental to be easily cast aside."[432] At the outset, we must remember that the Court has acknowledged that certain "applicable regulatory interests of the state" should be given "weight."[433] However, the Court was equally careful to point out that those interests are limited to only those that do not interfere with "essential tribal relations [or] where the rights of Indians would not be jeopardized."[434] If the state action does interfere then the state action is "impermissible" unless Congress has said otherwise.[435] That analysis proceeds by asking whether Congress has abrogated the treaty in question by allowing for the jurisdiction asserted. That is a tough row to hoe. Although the Court has acknowledged Congress's "authority to breach its own promises and treaties[,]" it has cautioned that it will not "lightly infer such a breach once Congress has established a reservation."[436]

The canons once again play a heavy role during this phase of the analysis. Admittedly, these canons have recently been more regularly applied in the face of assertions of abrogation of treaty subsistence rights and sovereign immunity.[437] However, as Professor Alexander Tallchief Skibine recently pointed out, "[t]here are no normative reasons to treat abrogation of sovereign immunity differently than other statutory interference with tribal sovereignty."[438] Accordingly, courts may not determine that Congress has abrogated the tribal right to be free from state jurisdiction in "a backhanded way."[439] Instead, because "[a]bsent explicit statutory language, [the Court has] been extremely reluctant to find congressional abrogation of treaty rights,"[440] the intention to abrogate a treaty by authorizing state jurisdiction must be "clear and plain."[441] Justice Thurgood Marshall once again took responsibility

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432 United States v. Dion, 476 U.S. 734, 739 (1986).

433 White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 144 (1980) (citing McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 171 (1973)).

434 Williams v. Lee, 358 U.S. 217, 219 (1959).

435 Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 140 (1980).

436 McGirt v. Oklahoma, 140 S. Ct. 2452, 2462 (citing Solem v. Bartlett, 465 U.S. 463, 470 (1984)); *see also* Menominee Tribe of Indians v. United States, 391 U.S. 404, 412–13 (1968) ("[T]he intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." (quoting *Pigeon River Co v. Cox Co.*, 291 U.S. 138, 160 (1934))).

437 Alexander Tallchief Skibine, *Textualism and the Indian Canons of Statutory Construction*, 55 MICH. J. L. REFORM 267 (2022); *see also, e.g.*, United States v. Winans, 198 U.S. 371 (1905); Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658, 680 (1979); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); Herrera v. Wyoming, 139 S. Ct. 1686, 1701–03 (2019); Michigan v. Bay Mills Indian Cmty., 572 U.S. 782 (2014).

438 Skibine, *supra* note 437, at 267.

439 *Menominee Tribe*, 391 U.S. at 412.

440 *Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. at 690.

441 United States v. Dion, 476 U.S. 734, 738 (1986) (citing COHEN, *supra* note 17, § 4.02[1], at 223); United States v. Santa Fe Pac. R. Co., 314 U. S. 339, 353 (1941)).

for synthesizing the myriad rule statements the Court has adopted in this arena, concluding that "[w]hat is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."[442]

The principles from *Dion* apply with equal force to the question of state jurisdiction in Indian Country. This is precisely the approach the Court took in the Navajo trilogy. First, it relied on the holding from *Lee*, which found the 1868 Navajo Treaty included the right to be free from state jurisdiction: "[T]his treaty 'set apart' for 'their permanent home' a portion of what had been their native country . . . Implicit in these treaty terms . . . was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed."[443]

Later, in *Warren Trading Post*, Justice Black acknowledged that the Navajo's "permanent home" was well understood "from the very first days of our government" to include the right of the tribes to "govern themselves, free from state interference."[444] The Court then proceeded to analyze whether that treaty right had ever been abrogated through "Acts of Congress or by valid regulations promulgated under those Acts."[445] Viewing that subsequent legislation through the canons, as well as the federal policy of supporting tribal sovereignty, the Court found that, far from abrogation, "it cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajos and the exclusion of non-Navajos from the prescribed area was meant to establish the lands as within the exclusive sovereignty of the Navajos under general federal supervision."[446]

This is the test—a treaty analysis—that is contemplated in *Bracker*. It is the only approach that remains consistent with the constitutionally mandated balance of powers between tribes, states, and the United States. Moreover, it is necessary to maintain congressional supremacy over Indian policy. Finally, and most importantly, it is the only way for the United States to stem the slow but steady creep of colonialism by remaining faithful to its treaty promises to the tribes that they would be able to determine their own destiny and continue their way of life free from outside interference.

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[442] *Dion*, 476 U.S. at 739–40.

[443] Williams v. Lee, 358 U.S. 217, 221–22 (1959) (citing Treaty Between the United States of America and the Navajo Tribe of Indians, *supra* note 133, at 667, 671).

[444] Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685, 686–87 (1965) (citing Treaty Between the United States of America and the Navajo Tribe of Indians, *supra* note 133, at 667, 671).

[445] *Id.* at 691.

[446] McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 174–75 (1973).

CONCLUSION

Students of federal Indian law invariably seek to understand how we can reverse the colonization of the United States. The question is a good one; indeed, decolonization and self-determination are ostensibly the policy of both the United States and the international community.[447] Before long, however, most founder on the difficulty of the problem in the 21st century. Certainly, our 400-plus year colonial experiment has led to tribal and non-Indian communities being so inextricably intertwined that it seems impossible to "undo by law what had already occurred in fact."[448] However, the moral imperative of the question necessitates that we all grapple with its complexity.

The point at which the thought experiment ends and the call to action begins is situated in the decolonization of the homelands that tribes have reserved for themselves. It seems fair to suggest that most indigenous people in this country do not expect or even desire a return to conditions as they existed in 1491. What they do expect is that the terms of the deal their ancestors brokered with the United States be honored. Hence, the most meaningful step that we can collectively take toward reconciliation with tribal nations and people would be to *demand* that all branches and levels of government uphold in the broadest possible sense the commitments the United States made on behalf of its people. Although it may not always be easy or convenient, it remains "the least that we can do."[449]

Honoring the treaties does not end with the protection of tribal property rights. Indeed, tribal sovereignty is a treaty right that was recognized every time the United States entered into a sovereign government-to-government agreement with a tribal nation. This was the original and foundational understanding of federal Indian law, and the one that pervaded the Supreme Court's precedent until very recently. Tribal sovereignty includes not only the right to govern tribal people and lands but also the right to be free of the slow drip of colonization that results each time a state asserts its authority in Indian Country. Hence, if the Court seeks to remain true to the founders' original intent related to Indian relations, the foundations of constitutional and federal Indian law, and to maintain the United States's moral leadership in the world, it should abandon any pretense that state jurisdiction in Indian Country should be weighed through a subjectivist balancing test. Instead, the framework most aligned with the "whole course of judicial decision," is one that reaffirms that state law is preempted whenever it interferes with the tribal sovereignty the United States promised to recognize each time it entered into a treaty with an Indigenous nation.

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[447] *See* Special Message to the Congress on Indian Affairs, 1 PUB. PAPERS 564 (Jul. 8, 1970); 25 U.S.C. § 5301–02 (1975); G.A. Res. 61/295, *supra* note 335.

[448] Frickey, *supra* note 13, at 386.

[449] Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1021 (2019).