THE TIME TRAP: ADDRESSING THE STEREOTYPES THAT UNDERMINE TRIBAL SOVEREIGNTY

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ABSTRACT

History is deeply embedded in federal Indian law. According to jurisprudence, Indians were nonagricultural "savages" prior to 1492. Indians' supposed lack of sophistication played a vital role in foundational cases determining Indian rights and the extent of tribal sovereignty. The process of stare decisis has resulted in repetition of the principles formulated on the belief in Indian simplicity; consequently, historic ideas of Indians continue to impact present-day Indian rights—often for the worse. This is the time trap.

The time trap is the popular belief that Indian cultures were simple, non-commercial, hunter-gatherers prior to European arrival. Encapsulated within this belief is the idea that indigenous cultures are static and erode as they merge with mainstream society. However, this perception is incorrect: the indigenous peoples of North America had complex societies prior to 1492, including agriculture and expansive trade networks. Indian tribes organically incorporated previously unknown items from Europe, such as the horse and gun, into their cultures. This Article asserts that reexamining how society and the law view Indian history is the key to unlocking the time trap.

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> "We're not a museum artifact. Our cultures are dynamic, we accept new technologies, we have evolved over many millennia and that's going to continue into the future."
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> —Manny Jules, former Chief of Kamloops Indian Band[1]

1. Arno Kopecky, *Indigenous Capitalists, from BC to Peru*, TYEE (Jan. 5, 2010), https://thetyee.ca/News/2010/01/05/IndigenousCapitalists/ [https://perma.cc/3QYN-2QKP].

INTRODUCTION

Many people have a hard time with Indians[2] participating in the modern world.[3] Indians' cultural aversion to markets and capitalism is blamed for the poverty that has ensnared Indian country for generations.[4] Images of Indians as non-commercial defenders of nature may be why the protest at Standing Rock captured the world's attention.[5] After all, the world expects Indians to defend their ancestral land from oil corporations.[6] Indeed, Standing Rock was motivated by fears of environmental contamination and galvanized under the battle cry "water is life."[7]

Standing Rock received wide support from Indian country. Among the tribes supporting the protests were the Mandan, Hidatsa, and Arikara Nation,[8] the Southern Ute Indian Tribe,[9] and the Navajo Nation.[10] Each of

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2. This Article uses the term "Indian" rather than "Native American" to denote the indigenous peoples of the United States because it is the proper legal term (*see, e.g.*, 25 U.S.C. § 5304) as well as the preferred term of many Indians. *See, e.g.*, MISSISSIPPI BAND OF CHOCTAW INDIANS, https://www.choctaw.org/ [https://perma.cc/28EJ-DKQ2] (using "Indians" to describe the people of the Choctaw tribe); S. UTE INDIAN TRIBE, https://www.southernute-nsn.gov/ [https://perma.cc/9PZ4-YUJ3] (using "Indians" to describe the people of the Southern Ute Indian Tribe); QUINAULT INDIAN NATION, http://www.quinaultindiannation.com/ [https://perma.cc/A395-VD69] (using "Indians" to describe the people of the Quinault Tribe).

3. Tristan Ahtone, *How Media Did and Did Not Report on Standing Rock,* AL JAZEERA (Dec. 14, 2016), https://www.aljazeera.com/opinions/2016/12/14/how-media-did-and-did-not-report-on-standing-rock [https://perma.cc/Y2QV-BQSC] ("The lesson these stories teach America? Indigenous people are incapable of adjusting to the modern civilisation.").

4. Adam Crepelle, *Tribal Law's Indian Law Problem: How Supreme Court Jurisprudence Undermines the Development of Tribal Law and Tribal Economies*, J. COMMONWEALTH L. (forthcoming 2021) (manuscript at 1–2); *see, e.g.*, John Koppsich, *Why Are Indian Reservations So Poor? A Look at The Bottom 1%*, FORBES (Dec. 13, 2011), https://www.forbes.com/sites/johnkoppisch/2011/12/13/why-are-indian-reservations-so-poor-a-look-at-the-bottom-1/?sh=5775589e3c07 [https://perma.cc/WH45-B7LV] (quoting Bill Yellow Tail, "Capitalism is considered threatening to our identity, our traditions.").

5. Ahtone, *supra* note 3.

6. *Id.* ("When the mainstream media finally showed up en masse, the scene at the Dakota Access Pipeline (DAPL) played out like a revisionist western movie.").

7. Daniel A. Medina, *'Water is Life:' A Look Inside the Dakota Access Pipeline Protesters' Camp*, NBC NEWS (updated Dec. 3, 2016, 11:22 AM), https://www.nbcnews.com/storyline/dakota-pipeline-protests/water-life-look-inside-dakota-access-pipeline-protesters-camp-n691481 [https://perma.cc/9CFE-8XYS].

8. Letter from Mark N. Fox, Tribal Chairman, Mandan, Hidatsa, Arickara Nation, to Dave Archambault, II, Chairman, Standing Rock Sioux Tribe (Aug. 22, 2016), https://gray-arc-content.s3.amazonaws.com/KFYR/Standing%20Rock%20Support%20Letter.pdf [https://perma.cc/G2HE-3UCZ].

these tribes is heavily involved in the extractive industry;[11] in fact, the Southern Ute Indian Tribe owns one of the most successful oil companies in the United States.[12] The oil producing tribes supporting the Standing Rock Sioux were not being hypocritical. For these tribes, the conflict was not even about oil or the environment. Rather, the issue for tribes was the right to determine their own future. Popular tropes about Indians interfere with this fundamental aspect of sovereignty.

The Makah's attempt to exercise its treaty-guaranteed right to whale evinces this point. The Makah have resided on Washington's Olympic Peninsula for ages.[13] Whales are vitally significant to the Makah culture;[14] hence, the Makah secured the right to whale in its treaty with the United States. [15] When overhunting by non-indigenous groups threatened worldwide whale populations, the Makah agreed to cease whaling for the survival of the species.[16] The whale population eventually rebounded, and in 1999,[17] the Makah sought to exercise its treaty right. The general public

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9. Damon Toledo, *Utes Stand with Standing Rock*, S. UTE DRUM (Sept. 30, 2016), https://www.sudrum.com/news/2016/09/30/utes-stand-with-standing-rock/ [https://perma.cc/WUB4-NVH5].

10. Letter from Russell Begaye, President, Navajo Nation & Jonathan M. Nez, President, Navajo Nation, to Dave Archambault, II, Chairman, Standing Rock Sioux Tribe (Aug. 22, 2016), https://www.navajonsn.gov/News%20Releases/OPVP/2016/aug/Standing-Rock-Letter.pdf [https://perma.cc/2WHH-Q4HW].

11. *Chairman Fox at NBVS: Energy-Based MHA Nation Economy Has Taken Severe Hit*, NATIVE BUS. (Jan. 8, 2021), https://www.nativebusinessmag.com/chairman-fox-at-nbvs-energy-based-mha-nation-economy-has-taken-severe-hit/ [https://perma.cc/J66X-2L8F]; *Company History*, NAVAJO PETROL., https://www.nnogc.com/company-history/ [https://perma.cc/6MVA-Z8U6].

12. *Our Purpose*, RED WILLOW PROD. CO., S. UTE INDIAN TRIBE, https://www.rwpc.us/ [https://perma.cc/ZQ4E-WCGF] ("[Red Willow Production, LLC] has grown significantly since inception and is now one of the top 25 largest privately owned oil and gas companies in the US.").

13. *Makah Tribe History and More*, MAKAH TRIBE, https://makah.com/makah-tribal-info/ [https://perma.cc/2R55-Q2NY].

14. *The Makah Whaling Tradition*, MAKAH TRIBE, https://makah.com/makah-tribal-info/whaling/ [https://perma.cc/5QKB-6TYD]; *Description of the USA Aboriginal Subsistence Hunt: Makah Tribe*, INT'L WHALING COMM'N, https://iwc.int/makah-tribe [https://perma.cc/2WM6-7JFW].

15. Treaty with the Makah, Makah Tribe-U.S., art. IV, Jan. 31, 1855, 12 Stat. 939–43.

16. *Makah Tribal Whale Hunt Chronology,* NOAA FISHERIES, https://www.fisheries.noaa.gov/west-coast/makah-tribal-whale-hunt-chronology [https://perma.cc/HC86-YVCZ] ("The Makah Tribe cease whaling after commercial hunting greatly reduces the eastern North Pacific gray whale population.").

17. *The Makah Whaling Tradition*, *supra* note 14.

was outraged.[18] The United States mandated the Makah use modern equipment during its whaling expedition[19] and whaling opponents were particularly upset about this aspect of the hunt.[20] An opponent of Makah whaling asserted, "Wake up in your teepee, put on your buffalo skin, paddle out in your canoe and stick it with a wooden harpoon. Until then, spare us the 'spiritual existence' nonsense."[21]

Despite the United States claiming a policy of tribal self-determination since the 1970s,[22] contemporary federal Indian law continues to operate on stereotypes just as antiquated as the Makah whaling opponents' views.[23] While the "guardian-ward relationship" between the United States and Indian tribes is now referred to as a trust relationship,[24] the premise remains the same—tribes are not competent to govern themselves.[25] Consequently, Indian reservations are burdened by

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18. Eric Wilkinson, *Makah Tribe's Quest to Hunt Another Gray Whale Moves to Court,* KING 5 (updated Nov. 14, 2019, 8:13 PM), https://www.king5.com/article/news/local/makah-indian-tribe-quest-hunt-gray-whale-court/281-86b600dc-0470-42eb-8a32-3634d19fec83 [https://perma.cc/58L2-Y85L] ("The 1999 announcement to hunt the whales again was met with outrage from animal rights groups that battled the tribe with protests on land and at sea.").

19. Robert J. Miller, *Exercising Cultural Self-Determination: The Makah Indian Tribe Goes Whaling*, 25 AM. INDIAN L. REV. 165, 263 (2001) ("The Makah did not want to use a rifle or an explosive grenade/harpoon but the United States required it to ensure the most efficient and rapid death possible and to use a motorized tow boat so as not to lose the whale while towing it.").

20. Danny Westneat, *Whale-Hunt Scolds Are Off Target*, SEATTLE TIMES (updated Mar. 16, 2015, 11:54 AM), https://www.seattletimes.com/seattle-news/whale-hunt-scolds-are-off-target/ [https://perma.cc/7QUY-CN9K] ("What is ceremonial about a 50-cal elephant gun, motor boats, winches, pickup trucks, chain saws and freezers?").

21. *Id.*

22. Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 5301–5423 (2018)); *see also* Special Message to the Congress on Indian Affairs, 1 PUB. PAPERS 564 (July 8, 1970) (explaining the self-determination policy set forward by President Richard Nixon).

23. Adam Crepelle, *Lies, Damn Lies, and Federal Indian Law: The Ethics of Citing Racist Precedent in Contemporary Federal Indian Law*, 44 N.Y.U. REV. L. & SOC. CHANGE 531, 555–58 (2021).

24. *See infra* Part I (detailing the "Origins of Indian Law and Policy").

25. *See, e.g.*, Mary C. Wood, *Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 358 (2013) ("Judges, attorneys, and scholars often describe the trust duty of protection as a principle deriving from a guardian-ward relationship between the federal government and tribes."); *see also* Janice Aitken, *The Trust Doctrine in Federal Indian Law: A Look at Its Development and at How Its Analysis Under Social Contract Theory Might Expand Its Scope*, 18 N. ILL. U. L. REV. 115, 115–16 (1997); Heather Whitney-Williams & Hillary M. Hoffmann, *Fracking in Indian Country: The Federal Trust Relationship, Tribal Sovereignty, and the Beneficial Use of Produced Water*, 32 YALE J. REG. 451, 474 (2015)

dense, complex federal regulations that do not apply anywhere else in the United States.[26] Federal Indian law jurisprudence is no better as the Supreme Court routinely wields outdated views of Indians to whittle away at present-day Indian rights.[27] This is the time trap.

The time trap is the public's perception of the American Indian past. The time trap is not dangerous because history is ignored; rather, the time trap springs from reliance on a false historical narrative. This specially crafted version of the past is a spell cast to dehumanize an entire group of people. Although there is a racial component, the time trap is focused on culture, and no group is deeper in the time trap than Indians. People assume Indian cultures are static—suspended in time while the rest of the world turns.[28] Consequently, Indians face backlash when they break with the popular historical narrative about Indian culture.[29]

However, Indian cultures—like all cultures—were and remain dynamic.[30] Indians seamlessly integrated European items into their cultures.[31] As Cahuilla author Rupert Costo put it, "After all, the Indians were not and are not fools; we are always ready to improve our condition."[32] Other cultures have absorbed countless aspects of indigenous American cultures, from foods to political ideals.[33] Society must recognize

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(explaining tribal sovereignty and the federal government's role under the Federal Trust Relationship).

26. Adam Crepelle, *White Tape and Indian Wards: Removing the Federal Bureaucracy to Empower Tribal Economies and Self Government,* 54 U. MICH. J.L. REFORM 563, 588 (2021) ("The gobs of land regulations that apply nowhere else but Indian country are irrational and serve no legitimate purpose.").

27. Crepelle, *Lies, Damn Lies*, *supra* note 23, at 555–58.

28. Westneat, *supra* note 20 ("They said this insistence by 'outsiders' that they conform to some exotic savage image was a constant irritant in Native life.").

29. *Id.*

30. Adam Crepelle, *The United States First Climate Relocation: Recognition, Relocation, and Indigenous Rights at the Isle de Jean Charles*, 6 BELMONT L. REV. 1, 36 (2018) ("Tribal culture, like all culture, is constantly changing.").

31. Gavin Clarkson, *Tribal Bonds: Statutory Shackles and Regulatory Restraints on Tribal Economic Development,* 85 N.C. L. REV. 1009, 1029–30 (2007) ("Many tribes pride themselves on their ability to adapt: the Navajos developed a thriving weaving industry using wool from sheep brought over by Europeans [and] the Plains Indians incorporated European horses into their culture.").

32. Tim Giago, *Indian Country Can't Forget the Indian Reorganization Act*, INDIANZ (Aug. 8, 2016), https://www.indianz.com/News/2016/08/08/tim-giago-indian-country-cant-forget-the.asp [https://perma.cc/7YMA-9GCT].

33. *See, e.g.*, Jack Weatherford, INDIAN GIVERS: HOW NATIVE AMERICANS TRANSFORMED THE WORLD 65 (2010) ("[European societies were] . . . waiting for their chance to act on the cultural and political stage of the world, but first they needed a consistent supply of nutritious and cheap food to sustain them . . . . This food finally arrived in the somewhat ugly form of the Andean potato.").

Indian cultures' adaptability; otherwise, the United States will forever remain in the colonial time trap. Though this Article focuses on how the time trap impacts present-day Indian rights, the time trap has been just as vital in denying other groups, like the peoples of Africa, their basic humanity.[34]

This Article recognizes that abolishing centuries-old, time-trapped Indian tropes is unlikely to happen overnight. Despite living in the era of "fake news," this Article assumes the truth still matters. The truth combined with the United States' ongoing racial reckoning should equal an opportunity to reevaluate how the United States portrays Indians.[35] Given the federal government's trust relationship with tribes, the United States should lead the charge to challenge Indian caricatures. This should be simple, as most of the legislation and jurisprudence relating to Indians is overtly time-trapped. Moreover, revising the laws governing Indian country is paramount to improving the living conditions of contemporary Indians.

The remainder of this Article proceeds as follows. Part I explores the origins of federal Indian law and policy. Following this, Part II examines the implications of basing contemporary federal Indian law and policy on time-trapped stereotypes. Part III describes how the United States' indigenous inhabitants actually existed before European contact. Next, Part IV discusses how to unlock the time trap.

I. Origins of Indian Law and Policy

Immediately upon "discovery" of the Americas, Europeans began depicting the continents' indigenous inhabitants as unsophisticated peoples who were one with nature—the noble savage.[36] Then, Indians shifted in the

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34. Malcolm X, The Race Problem (Jan. 23, 1963), https://ccnmtl.columbia.edu/projects/mmt/mxp/speeches/mxt21.html [https://perma.cc/394F-P88X]) ("He believes in exactly what he was taught in school. That when he was kidnapped by the white man, he was a savage in the jungle . . . . This is what has been given to him by the American educational system.").

35. John Blake, *The Capitol Insurrection Could Be a Bigger Racial Reckoning than the George Floyd Protests*, CNN (updated Jan. 17, 2021, 10:05 AM), https://www.cnn.com/2021/01/17/us/capitol-riot-racial-justiceblake/index.html [https://perma.cc/QLJ4-N7ED]; Ailsa Chang et al., *Summer of Racial Reckoning*, NPR (Aug. 16, 2020), https://www.npr.org/2020/08/16/902179773/summer-of-racial-reckoning-the-match-lit [https://perma.cc/289D-W279]; *It's a Moment of Racial Reckoning. Is It Also a Moment of Real Change?*, BRANDEIS MAG., https://www.brandeis.edu/magazine/2020/fall/featured-stories/racial-reckoning.html [https://perma.cc/UA7P-C79E].

36. *See, e.g.*, ALEXANDER POPE, AN ESSAY ON MAN 45 (1796) ("Lo, the Poor Indian! Whose untutor'd mind,/Sees God in clouds, or hears him in the wind . . . ."); *see also From "Noble Savage" to "Wretched Indian*," FACING HIST. & OURSELVES,

Euro-American imagination from noble to "the merciless Indian savage" as memorialized in the Declaration of Independence.[37] Indeed, concerns of Indian military prowess helped catalyze efforts to ratify the Constitution.[38] Despite denoting Indians as savages, the United States recognized tribes as distinct sovereigns and memorialized this in the Constitution.[39] Tribes' status as sovereigns was further acknowledged in treaties with the United States;[40] however, the United States assumed Indians would vanish as a natural consequence of Manifest Destiny.[41] This has not yet happened.

Federal Indian law jurisprudence begins in 1823 with the Supreme Court's opinion in *Johnson v. M'Intosh*.[42] The issue in the case was whether Indians owned their land, and the Court held they did not.[43] Although Chief Justice Marshall noted the absurdity of the idea,[44] the Court unanimously held that European arrival in the Americas divested the land's original inhabitants of ownership of the land.[45] In so holding, Chief Justice Marshall

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https://www.facinghistory.org/stolen-lives-indigenous-peoples-canada-and-indian-residential-schools/chapter-2/noble-savage-wretched-indian [https://perma.cc/6CCP-FSZK] ("Europeans called the indigenous people they encountered 'noble savages' . . . . [T]he Noble Savage myth . . . described American Indians as independent beings of stately bearing, brave but honorable warriors and beautiful princesses . . . and creatures of innocence and simplicity living from the bounty of nature.").

37. THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776).

38. Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1058 (2014) ("Knox's invocation of 'murdering savages' to justify a stronger federal government became a common trope in Federalist arguments for ratification.").

39. U.S. CONST., art. I, § 8, cl. 3; U.S. CONST. art. I. § 2, cl. 3.

40. Crepelle, *supra* note 26, at 581–82 ("Tribes entered 'hundreds of treaties' with the United States, and the Founding Fathers denoted treaties as the mechanism for transacting foreign relations in the Constitution.").

41. *See* Letter from George Washington, General, to James Duane, Head of Comm. of Indian Affs. of the Cont'l Cong. (Sept. 7, 1783), NAT'L ARCHIVES, https://founders.archives.gov/documents/Washington/99-01-02-11798 [https://perma.cc/4FSU-4HLY] ("[T]he gradual extension of our Settlements will as certainly cause the Savage as the Wolf to retire . . . . "); *see also* Kathryn E. Fort, *The Vanishing Indian Returns: Tribes Popular Originalism, and the Supreme Court*, 57 ST. LOUIS U. L.J. 297, 300 (2013) ("What has been identified as the 'vanishing Indian' stereotype, promulgated in the early Republic and reaching an apex in the 1820s, continues to fundamentally influence how the Court views tribes."); *see generally Myth of the "Vanishing Indian,"* PLURALISM PROJECT, HARV. U., https://pluralism.org/myth-of-the-vanishing-indian [https://perma.cc/KV7T-P969].

42. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

43. *Id.* at 593–94.

44. *Id.* at 591 ("However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; . . . if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.").

45. *Id.* at 587–88.

relied on the Doctrine of Discovery, which decreed lands inhabited by non-Christian, non-Europeans vacant.[46] Accordingly, Indians' only right to the lands their ancestors had resided upon for ages was occupancy[47]—a right that the United States could lawfully extinguish at its whim.[48] The case underpins all land ownership in the United States to this very day;[49] indeed, the Supreme Court explicitly cited the Doctrine of Discovery to rule against Indian land rights in 2005.[50] *Johnson v. M'Intosh* is also foundational to the legal systems of Canada, Australia, and New Zealand.[51]

The Doctrine of Discovery has devastated Indian rights; nevertheless, the time-trapped imagery used by the *Johnson* Court has proved just as damaging for Indian economic rights. Early in the opinion, the Court noted the "superior genius of Europe" relative to the pitiful moral

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46. *Id.* at 573; *see also* ROBERT A. WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 314 (1990) ("Marshall's historical digressions in *Johnson* thus served to demonstrate that all the colonizing European nations asserted and recognized the exclusive right of the discoverer to appropriate the lands occupied by the American Indians.").

47. *Johnson*, 21 U.S. at 585 ("It has never been doubted, that . . . the United States . . . had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it."); *id.* at 574 ("[T]he different nations of Europe . . . asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants . . . convey a title to the grantees, subject only to the Indian right of occupancy.").

48. *Id.* at 587 ("They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest . . . .").

49. Kenneth H. Bobroff, *Indian Law in Property:* Johnson v. M'Intosh *and Beyond*, 37 TULSA L. REV. 521, 521 (2001) [hereinafter Bobroff, *Indian Law in Property*] ("Johnson v. M'Intosh, is at the root of title for most real property in the United States."); Eric Kades, *The Dark Side of Efficiency:* Johnson v. M'Intosh *and the Expropriation of American Indian Lands*, 148 U. PENN. L. REV. 1065, 1096 (2000) ("Marshall, then, created a rather strange two-tiered land tenure system: Indian title of occupancy applied before American purchase or conquest, and the common law of the several states applied after."); Carol M. Rose, *Left Brain, Right Brain and History in the New Law and Economics of Property*, 79 OR. L. REV. 479, 485 (2000).

50. *See* City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 203 n.1 (2005) (noting the "doctrine of discovery" divested Indians of title to their land and transferred their title to "the discovering European nation").

51. William D. Wallace, *M'Intosh to Mabo: Sovereignty, Challenges to Sovereignty and Reassertion of Sovereign Interests*, 5 CHI.-KENT J. INT'L & COMP. L. (2005) (surveying multiple settler-states that have followed a similar framework to *Johnson v. M'Intosh* for the foundations of their land tenure systems); Blake A. Watson, *The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand*, 34 SEATTLE U. L. REV. 507, 508–09 (2011).

and intellectual capacity of the Indians.[52] Similarly, the Court stated Indian character, or lack thereof, justified stripping Indians of land ownership rights.[53] The line best capturing the image of Americans versus Indians during the period reads: "We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits."[54] That is, Indians were trapped in the hunter-gatherer state of society as their "subsistence was chiefly drawn from the forest."[55] The opinion depicted Indians as "fierce savages"[56] and "heathens."[57] Hence, the Court concluded the Indians' primitive nature prohibited their peaceful coexistence with whites.[58]

Based upon Indians' supposed inability to exist next to whites,[59] Congress enacted the Indian Removal Act in 1830.[60] The Act inspired

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52. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 572–73 (1823) ("Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency.").

53. *Id.* at 589 ("Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.").

54. *Id.* at 588.

55. *Id.* at 590 ("But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest.").

56. *Id.* ("But the tribes of Indians inhabiting this country were fierce savages . . . .").

57. *Id.* at 576–77 ("Thus asserting a right to take possession, notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery.").

58. *Id.* at 590 ("[T]o govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence."); *id.* ("The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix . . . .").

59. THOMAS L. M'KENNEY, OFF. OF INDIAN AFFS., DEP'T OF WAR, ANN. RPT. FOR 1829 FROM THE BUREAU OF INDIAN AFFS. 187–88 (1829) ("Every day's observation shews [*sic*] that the near association of the white and red man is destructive of the latter. The history of our country, throughout every quarter, teems with evidence establishing the truth of this assertion, and points to the necessity of removal."); *Andrew Jackson, Fifth Annual Message, Dec. 3, 1833,* AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/fifth-annual-message-2 [https://perma.cc/AD8M-9T74] ("[The Indian tribes] have neither the intelligence, the industry, the moral habits, nor the desire of improvement which are essential to any favorable change in their condition . . . and without appreciating the causes of their inferiority or seeking to control them, they must necessarily yield to the force of circumstances and ere long disappear.").

Georgia's attempt "to annihilate the Cherokees as a political society" and forced the Supreme Court to address the political status of Indian tribes in the 1831 case *Cherokee Nation v. Georgia*.[61] If the Cherokee constituted a foreign nation, the Cherokee were entitled to bring an original action against Georgia before the United States Supreme Court.[62] Sans foreign nation status, the Cherokee had no legal recourse against Georgia.[63] Chief Justice Marshall admitted the argument for treating the Cherokee as a foreign nation was compelling.[64] Nonetheless, Justice Marshall authored the Court's lead opinion denying the Cherokee status as a foreign sovereign.[65] Chief Justice Marshall's opinion decreed the Cherokee, and by implication every other tribe, a "domestic dependent nation," meaning the Cherokee's "relation to the United States resembles that of a ward to his guardian."[66] Today, Indian tribes are still regarded as "domestic dependent nations."[67] Furthermore, the present-day trust relationship between tribes and the federal government was conceived in this case.[68]

Time-trapped visions of Indians were essential to Chief Justice Marshall denying Indian tribes rights as bona fide nations. For example, Chief Justice Marshall began by explaining that the superiority of Europe led to the natural erosion of Indian lands and that the United States has kindly left the Indians enough land "necessary to their comfortable subsistence."[69] Chief Justice Marshall stated that no Founding Father

60. Indian Removal Act of 1830, ch. 148, 4 Stat. 411 (repealed 1980).

61. 30 U.S. (5 Pet.) 1, 15 (1831).

62. *Id.*

63. *See id.* at 16.

64. *Id.*

65. *Id.* at 15.

66. *Id.* at 17.

67. *See* Genskow v. Prevost, No. 19-C-1474, 2020 U.S. Dist. LEXIS 59860, at *4 (E.D. Wis. Apr. 6, 2020) ("[T]he starting point is the principle that 'Indian tribes are domestic dependent nations that exercise inherent sovereign authority.'"); Hwal'Bay Ba: J Enters., Inc. v. Jantzen, 458 P.3d 102, 106 (Ariz. 2020) ("Indian tribes, as 'domestic dependent nations,' are immune from lawsuits in state and federal courts . . . ."); Mendoza v. Isleta Resort & Casino, 2020-NMSC-006, ¶ 17, 460 P.3d 467, 472 (noting that Indian tribes are "domestic dependent nations").

68. Memorandum from Hilary C. Tompkins, Solic., U.S. Dep't of Interior., to Sally Jewell, Sec'y, U.S. Dep't of Interior. 3 (Jan. 18, 2017), https://www.doi.gov/sites/doi.gov/files/uploads/m-37045.pdf [https://perma.cc/SKT8-6Q4P] ("The Court defined this relationship as that of a 'ward to his guardian,' and recognized tribes as 'domestic dependent *nations*,' thus establishing what we currently understand as the federal government's trust relationship with and obligations towards Indian tribes.").

69. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 11 (1831).

believed an Indian tribe could file suit when the Constitution was drafted.[70] Moreover, Chief Justice Marshall claimed no Indian probably ever imagined filing suit when the Constitution was ratified because "[t]heir appeal was to the tomahawk."[71] Despite effectively denying the Cherokee nation rights, Chief Justice Marshall admitted his opinion produced a flagrant injustice.[72]

The two other prevailing opinions in the case were even more laden with time-trapped imagery and evinced no discomfort in trampling Indian rights. Justices William Johnson Jr. and Henry Baldwin both emphasized Indians being hunters rather than civilized peoples.[73] Both also referred to Indians as fierce, warlike savages rather than rational human beings.[74] Justice Johnson emphasized Indian society's lowly state, declaring, "I cannot but think that there are strong reasons for doubting the applicability of the epithet state, to a people so low in the grade of organized society as our Indian tribes most generally are."[75] Justice Johnson further averred it would be preposterous to consider "every petty kraal of Indians, designating themselves a tribe or nation, and having a few hundred acres of land to hunt on exclusively" as a legitimate nation for purposes of Article III jurisdiction.[76]

A year later, the Court was forced to address Georgia's assault on the Cherokee Nation.[77] This time, however, the Court was able to adjudicate the merits because the plaintiffs were white missionaries who provided the Court with jurisdiction.[78] Famously, the Court in *Worcester v. Georgia* held

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70. *Id.* at 18 ("These considerations go far to support the opinion, that the framers of our constitution had not the Indian tribes in view, when they opened the courts of the union to controversies between a state or the citizens thereof, and foreign states.").

71. *Id*.

72. *Id.* at 15 ("If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined.").

73. *Id.* at 23 (Johnson, J., dissenting) ("Certainly this is the language of concession on our part, not theirs; and when the full bearing and effect of those words, 'for their hunting grounds,' is considered, it is difficult to think that they were then regarded as a state, or even intended to be so regarded."); *id.* at 38 (Baldwin, J., concurring) ("[T]he Indians acknowledge their dependent character; hold the lands they occupy as an allotment of hunting grounds.").

74. *Id.* at 48 (Baldwin, J., concurring) ("The Indians were considered as tribes of fierce savages; a people with whom it was impossible to mix, and who could not be governed as a distinct society."); *id.* at 23 (Johnson, J., dissenting) ("Independently of the general influence of humanity, these people were restless, warlike, and signally cruel in their irruptions during the revolution.").

75. *Id.* at 21.

76. *Id.* at 25.

77. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1831).

78. Rennard Strickland, *The Tribal Struggle for Indian Sovereignty: The Story of the* Cherokee Cases, *in* INDIAN LAW STORIES 61, 74 (Carole E. Goldberg et al. eds., 2011) ("The

that "the laws of Georgia can have no force" within the Cherokee Nation absent the permission of the Cherokee Nation or Congress.[79] This passage is usually presented as a victory for Indian tribes,[80] but it was not. The Court held state and tribal sovereignty are both subordinate to the federal government.[81] In any event, President Andrew Jackson refused to honor the decision,[82] precipitating the Trail of Tears.[83]

Although *Worcester* is often presented as a victory for tribes, the case is filled with time-trapped pictures of Indians. The Court acknowledged that the Americas were populated by self-governing nations long before European arrival;[84] nonetheless, Chief Justice Marshall again noted the greater intellect of Europeans compared to the Indians, "a people who had made small progress in agriculture or manufactures, and whose

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arguments in *Worcester v. Georgia* began on February 20, 1832, with Wirt setting forth the jurisdictional basis of this suit between a state and a citizen of another state. The court raised no question of jurisdiction and moved directly to the merits of the case.").

79. *Worcester*, 31 U.S. at 561; Alison Burton, *What About the Children? Extending Tribal Criminal Jurisdiction to Crimes Against Children*, 52 HARV. C.R.-C.L. REV. 193, 198 (2017) ("However, the Court went on to hold that tribal sovereignty only has force against state governments and that tribes are subject to federal laws.").

80. Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1640 n.55 (1998) ("Although *Worcester* is cited as a victory for tribal jurisdiction, the primary issue in *Worcester* was federalism, not tribal sovereignty.").

81. *Worcester,* 31 U.S. at 561.

82. Tim Alan Garrison, *Worcester v. Georgia (1832)*, NEW GA. ENCYC. (Feb. 20, 2018), https://www.georgiaencyclopedia.org/articles/government-politics/worcester-vgeorgia-1832 [https://perma.cc/CMV7-B9WN] ("Georgia ignored the Supreme Court's ruling, refused to release the missionaries, and continued to press the federal government to remove the Cherokees. President Jackson did not enforce the decision against the state and instead called on the Cherokees to relocate or fall under Georgia's jurisdiction."); *Worcester v. Georgia*, ENCYC. BRITANNICA (last updated Feb. 24, 2021), https://www.britannica.com/topic/Worcester-v-Georgia [https://perma.cc/Z4X7-F2PB] ("Pres. Andrew Jackson declined to enforce the Supreme Court's decision, thus allowing states to enact further legislation damaging to the tribes.").

83. *See* Ellen Holmes Pearson, *A Trail of 4,000 Tears*, BREWMINATE, https://brewminate.com/a-trail-of-4000-tears/ [https://perma.cc/L3C6-MPQH] ("It is estimated that of the approximately 16,000 Cherokees who were removed between 1836 and 1839, about 4,000 perished."); *The Trail of Tears*, PBS, https://www.pbs.org/wgbh/aia/part4/4h1567.html [https://perma.cc/M4PY-ER78] ("Over 4,000 out of 15,000 of the Cherokees died."); *The Trail of Tears—The Indian Removals*, U.S. HIST., http://www.ushistory.org/us/24f.asp [https://perma.cc/JSY8-SKPS].

84. *Worcester,* 31 U.S. at 542 ("America, separated from Europe by a wide ocean, 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.").

general employment was war, hunting, and fishing."[85] Chief Justice Marshall again posed the question whether European "agriculturists and manufacturers" must respect rights of Indians, who were "hunters and fishermen."[86] Likewise, Chief Justice Marshall described treaty-guaranteed Indian lands as "hunting grounds" because hunting was "the principal occupation of the Indians, and their land was more used for that purpose than for any other."[87] Chief Justice Marshall again asserted the Indians were "[f]ierce and warlike in their character," which made them militarily powerful and prized allies of Europe.[88]

Justice John McLean weaponized the same time-trapped imagery in his concurrence. According to Justice McLean, Indian tribes "exist in the hunter state."[89] The hunter state required the Indians "to roam, in the pursuit of game," and this hunter state cannot coexist with civilized society.[90] Hence, Indian lands were nothing but "hunting ground."[91] Justice McLean claimed Indians were not ruled by laws; rather, "the Indians govern by the rifle and the tomahawk."[92] As a result, Justice McLean described Indians as "savage people,"[93] "uncivilized people,"[94] and "children of the wilderness."[95]

By the 1850s, most "children of the wilderness" were placed on reservations. Reservations were designed to bring Indians out of the state of nature and into civilization.[96] Indians attempted to adapt to their new environments,[97] but Indians' status as wards meant they had no freedom.[98]

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85. *Id.* at 543.
86. *Id.*
87. *Id.* at 553.
88. *Id.* at 546.
89. *Id.* at 579.
90. *Id.*
91. *Id.* at 585.
92. *Id.* at 590.
93. *Id.* at 582.
94. *Id.*
95. *Id.* at 588.
96. United States v. Clapox, 35 F. 575, 577 (D. Or. 1888) ("In fact, the reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.").
97. Kenneth H. Bobroff, *Retelling Allotment: Indian Property Rights and the Myth of Common Ownership*, 54 VAND. L. REV. 1559, 1594 (2001) [hereinafter Bobroff, *Retelling Allotment*] ("Even after resettlement or confinement to reservations, many Indians continued to create or modify private property systems to meet their new circumstances."); Jeffrey Ostler, *"The Last Buffalo Hunt" And Beyond Plains Sioux Economic Strategies in the Early Reservation Period*, 21 GREAT PLAINS Q. 115, 120 (2001) ("Peter

Indians' lowly state resulted in ambiguity over their legal status as "people" until 1879.[99] Thus, the Fourteenth Amendment bypassed granting citizenship to Indians.[100] To acquire citizenship, Indians had to prove their competence, and Indians could do this by establishing they were less than half Indian blood.[101] Acquiring citizenship also required Indians to swear "from this day forward to live the life of the white man."[102]

The United States went to great lengths to ensure Indian culture—an obstacle to living the life of the white man—was eradicated. The Bureau of Indian Affairs ("BIA") created Courts of Indian Offenses for the express purpose of punishing Indian traditions.[103] Congress enacted the Major Crimes Act in 1885 to supplant traditional tribal justice systems.[104] Although the Supreme Court admitted there was no constitutional authority, the Court upheld codes governing Indian behavior because "[t]hese Indian tribes are the wards of the nation."[105] The United States also created boarding schools for Indian children.[106] The point of the boarding schools was not to educate Indian children in reading, writing, and

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Iverson has pointed out that it was fairly easy for Indian people in North America who were familiar with horses and hunting to adapt to cattle ranching.").

98. *See* Benjamin Jewell, *Lakota Struggles for Cultural Survival: History, Health, and Reservation Life*, 21 NEB. ANTHROPOLOGIST 129, 130 (2006) ("Reservations are a means to restrict, deny, or alter freedoms to a group of people . . . .").

99. United States *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695, 700 (D. Neb. 1879) ("The reasoning advanced in support of my views, leads me to conclude: 1. That an Indian is a 'person' within the meaning of the laws of the United States . . . .").

100. Elk v. Wilkins, 112 U.S. 94, 103 (1884) ("Such Indians, then, not being citizens by birth, can only become citizens in the second way mentioned in the Fourteenth Amendment, by being 'naturalized in the United States,' by or under some treaty or statute.").

101. Crepelle, *supra* note 26, at 587.

102. *Last Arrow Ceremony*, JARED FARMER (Oct. 16, 2016), https://jaredfarmer.net/curios/last-arrow-ceremony [https://perma.cc/9F93-SQB8].

103. Courts of Indian Offenses are now known as CFR Courts. Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction,* 46 ARIZ. ST. L.J. 779, 805 (2014) [hereinafter Fletcher, *A Unifying Theory*] (stating that CFR courts were designed to stamp out tribal culture and governing systems); B.J. Jones, *Role of Indian Tribal Courts in the Justice System*, *in* NATIVE AMERICAN TOPIC-SPECIFIC MONOGRAPH PROJECT 1, 4–5 (Ctr. on Child Abuse and Neglect ed., 2000); *1883: Courts of Indian Offenses Established*, NATIVE VOICES, https://www.nlm.nih.gov/nativevoices/ timeline/364.html [https://perma.cc/B4YW-JNKH] (noting CFR courts were designed to prosecute practitioners of traditional Indian ways and convert Indians to Christianity).

104. Major Crimes Act of 1885, ch. 341, § 9, 23 Stat. 385 (codified as amended at 18 U.S.C. § 1153 (2018)).

105. United States v. Kagama, 118 U.S. 375, 383 (1886) (emphasis omitted).

106. ANDREA SMITH, U.N. PERMANENT F. ON INDIGENOUS ISSUES, INDIGENOUS PEOPLES & BOARDING SCHOOLS: A COMPARATIVE STUDY 3 (2009), https://www.un.org/esa/socdev/unpfii/documents/IPS_Boarding_Schools.pdf [https://perma.cc/E3EP-X8NK].

arithmetic; rather, boarding schools were designed to impose Christianity and white ways upon Indian children.[107] In the words of Captain Richard Pratt, boarding schools were supposed to "[k]ill the Indian in him, and save the man."[108]

The General Allotment Act of 1887 ("GAA")[109] was Congress' most ardent effort to obliterate Indian culture. The GAA allotted treaty-guaranteed reservations into 160-acre parcels for each Indian head of household.[110] Lands remaining after Indians received their allotments were opened to white settlers because white neighbors were expected to catalyze the destruction of tribal cultures.[111] The parcels were placed in trust for twenty-five years.[112] At the period's end, Indians were supposed to be private property-owning, self-supporting United States citizens.[113] Tribes challenged allotment as a violation of their treaty rights; however, the Supreme Court ruled "Congress possessed a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests . . . ."[114] The guardian's policies had left Indians with ninety

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107. *Id.* at 4–5.

108. Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, *in* AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN" 1880–1900, at 260–61 (Francis Paul Prucha, ed., 1973); KATE THEIMER, "VERY CORRECT IDEA OF OUR SCHOOL": A PHOTOGRAPHIC HISTORY OF THE CARLISLE INDIAN INDUSTRIAL SCHOOL 11 (2018) ("The mission of the Carlisle Indian Industrial School was cultural genocide."); VOX, *How the US Stole Thousands of Native American Children*, YOUTUBE (Oct. 14, 2019), https://www.youtube.com/watch?v=UGqWRyBCHhw [https://perma.cc/G77P-BAJT] ("What started there at the Carlisle Indian Industrial School was nothing short of genocide disguised as American education.").

109. General Allotment Act of Feb. 8, 1887, Pub. L. No. 49–105, ch. 119, 24 Stat. 388, *repealed by* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106–462, 114 Stat. 1991 (codified as amended at 25 U.S.C. §§ 2201–2221 (2018)).

110. Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, and History*, 49 IDAHO L. REV. 519, 521 (2013).

111. *See* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 335–36 (1998) ("Within a generation or two, it was thought, the tribes would dissolve, their reservations would disappear, and individual Indians would be absorbed into the larger community of white settlers."); DeCouteau v. Dist. Cty. Ct. of the Tenth Jud. Dist., 420 U.S. 425, 462 (1975) (Douglas, J., dissenting) ("The purpose was not to alter or change the reservation but to lure white settlers onto the reservation whose habits of work and leanings toward education would invigorate life on the reservation."); Mattz v. Arnett, 412 U.S. 481, 496 (1973) ("Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways.").

112. Pommersheim, *supra* note 110, at 521.

113. WILLIAM CANBY JR., INDIAN LAW IN A NUTSHELL 25 (7th ed. 2019).

114. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).

million[115] fewer acres of land and in awful straits.[116] In 1928, an official government report concluded: "An overwhelming majority of the Indians are poor, even extremely poor . . . ."[117]

The United States took tribal wardship in a different direction in the 1930s.[118] The Indian Reorganization Act ("IRA")[119] was intended to promote tribal self-government and economic development.[120] The IRA's hallmark was ending allotment and placing Indian lands in perpetual trust status.[121] Trust status prevented the erosion of tribal land bases,[122] but

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115. S. REP. NO. 112–66, at 4 (2012) ("The federal allotment policy resulted in the loss of over 100 million acres of tribal homelands."); CANBY, *supra* note 115, at 26; *Land Tenure Issues*, INDIAN LAND TENURE FOUND., https://iltf.org/land-issues/issues/ [https://perma.cc/4P8Q-CW29]; *General Allotment Act*, AM. EXPERIENCE, PBS, https://www.pbs.org/wgbh/americanexperience/features/1900-allotment-act/ [https://perma.cc/DY2G-3KPF].

116. *South Dakota*, 522 U.S. at 339–40 (1998) ("Although formally repudiated with the passage of the Indian Reorganization Act in 1934 . . . the policy favoring assimilation of Indian tribes through the allotment of reservation land left behind a lasting legacy."); Hodel v. Irving, 481 U.S. 704, 707 (1987) ("The failure of the allotment program became even clearer as successive generations came to hold the allotted lands."); Morton v. Mancari, 417 U.S. 535, 553 (1974) ("The overly paternalistic approach of [the IRA] had proved both exploitative and destructive of Indian interests.").

117. LEWIS MERIAM, INST. FOR GOV'T RES., THE PROBLEM OF INDIAN ADMINISTRATION 3 (1928).

118. *The Indian Reorganization Act—75 Years Later: Renewing Our Commitment to Restore Tribal Homelands and Promote Self-Determination: Hearing Before the Subcomm. on Indian Affs.*, 112th Cong. 1 (2011) [hereinafter *75 Years Later*] (statement of Hon. Daniel K. Akaka, U.S. Sen. from Hawaii) ("When Congress enacted the Indian Reorganization Act in 1934, its intent was very clear. Congress intended to end Federal policies of termination and allotment and begin an era of empowering tribes by restoring their homelands and encouraging self-determination."); *id.* at 5 (prepared statement of Frederick E. Hoxie, Swanlund Chair, History Professor, Univ. of Ill.); *Tribal Self-Government and the Indian Reorganization Act of 1934,* 70 MICH. L. REV. 955, 955 (1972) ("A major reversal of governmental policy and approach toward Indian affairs was effectuated by the IRA."); The Indian Reorganization Act, ROOSEVELT INST. FOR AM. STUD., https://www.roosevelt.nl/indian-reorganization-act [https://perma.cc/CK77-42GA] (describing the history of the IRA).

119. Indian Reorganization Act of 1934, Pub. L. No. 73–383, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 5101–5144 (2018)).

120. *Id.* §§ 10, 16–17; Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973) ("The intent and purpose of the Reorganization Act was 'to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.'"); CANBY, *supra* note 113, at 28–29; Adam Crepelle, *Decolonizing Reservation Economies: Returning to Private Enterprise and Trade*, 12 J. BUS. ENTREPRENEURSHIP & L. 413, 438 (2019) [hereinafter Crepelle, *Decolonizing*]; *Tribal Self-Government*, *supra* note 118, at 972 ("The IRA reaffirmed the principles of tribal self-government.").

121. Indian Reorganization Act of 1934, Pub. L. No. 73-383, §§ 2–3, 48 Stat. 984–85 (codified as amended at 25 U.S.C. §§ 5102–03 (2018)).

trust status placed the Secretary of the Interior in charge of all activities on tribal lands.[123] Granting the Secretary of the Interior near complete control over tribal affairs was and is antithetical to promoting tribal self-governance. In a similar vein, the United States deemed traditional tribal governments unfit for modern life. Accordingly, the BIA compelled tribes to adopt western-style governance systems.[124] These paternalistic policies[125] were inspired by visions of Indians idyllically existing in a state of nature.[126] Like previous Indian policies that were "well-intentioned," the IRA assumed tribal institutions were incapable of organically adapting to the contemporary world. The IRA remains the statutory core of contemporary federal Indian law.[127]

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122. Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 ALB. GOV'T L. REV. 1, 34 (2017) (noting trust land continues to exist partly because most Indian nations want it to since the restraint on alienation preserves tribal land).

123. CANBY, *supra* note 113, at 28 (explaining tribal self-government existed at the whim of the Secretary of the Interior); Adam Crepelle & Walter E. Block, *Property Rights and Freedom: The Keys to Improving Life in Indian Country*, 23 WASH. & LEE J. CIV. RTS. & SOC. JUST. 315, 324 (2017) [hereinafter Crepelle & Block, *Property Rights*] ("The [IRA] . . . did relatively little to improve tribal sovereignty because the Secretary of the Interior was granted power over virtually all tribal activities.").

124. C. Blue Clark, *How Bad It Really Was Before World War II: Sovereignty,* 23 OKLA. CITY U. L. REV. 175, 187 (1998) ("Throughout the decade, the BIA arbitrarily set up tribal governing councils and their constitutions."); Crepelle, *Decolonizing*, *supra* note 120, at 439 ("The constitutions that Tribes were encouraged to adopt were replicas of the United States Constitution; hence, the IRA tribal constitutions did not reflect traditional indigenous governance systems.").

125. STEPHEN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 11 (4th ed. 2012) ("The IRA has been criticized as paternalistic, because tribes were not consulted in its development; ethnocentric, because it promoted a system of government inconsistent with traditional Indian values; and also as insufficient, because tribes remained subject to substantial federal control."); *'It Set the Indian Aside as a Problem' A Sioux Attorney Criticizes the Indian Reorganization Act*, HIST. MATTERS, http://historymatters.gmu.edu/d/76/ [https://perma.cc/SM7Y-7KAJ].

126. *See, e.g.*, *John Collier (1884-1968)*, LIVING NEW DEAL, https://livingnewdeal.org/glossary/john-collier-1884-1968/ [https://perma.cc/TA62-94QF] ("John Collier was the U.S. Commissioner of Indian Affairs from 1933 to 1945. In this position he 'hacked away at Government policy that called for "civilizing" the Indian. He tried instead, to re-awaken interest in Indian art and music, folklore and custom.'"); *"We Took Away Their Best Land, Broke Treaties:" John Collier Promises to Reform Indian Policy*, HIST. MATTERS, http://historymatters.gmu.edu/d/5058/ [https://perma.cc/V6HW-RHNX] ("The Indian still has much to learn in adjusting himself to the strains of competition amid an acquisitive society; but he long ago learned how to contend with the stresses of nature.").

127. S. REP. NO. 112–66, at 7 (2012) ("These principles are the foundation for federal Indian policy in the modern era of tribal self-determination."); *75 Years Later*,

The IRA was short-lived as the United States' Indian policy shifted from promoting tribal self-governance—albeit through paternalistic means—towards the outright elimination of tribes during the late 1940s.[128] In fact, the express purpose of the era was to "end their [the Indians'] status as wards of the United States."[129] Accordingly, Congress enacted legislation terminating over one hundred tribes during this period.[130] Congress also passed the Indian Relocation Act, which bussed Indians from their rural reservations to large metropolitan areas.[131] Tribal institutions were undermined by federal legislation authorizing states to assert their criminal laws and civil adjudicatory authority upon Indian country.[132] These assaults on tribal sovereignty were an attempt to assimilate Indians and do away with the trust relationship.[133] Termination policies caused countless

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supra note 118, at 1 ("Since 1934, the IRA has stood as the bedrock of Federal Indian Policy.").

128. LAURIE ARNOLD, BARTERING WITH THE BONES OF THEIR DEAD: THE COLVILLE CONFEDERATED TRIBES AND TERMINATION, at ix (2012) [hereinafter ARNOLD, BARTERING] ("[T]ermination was considered the tool that would finally end U.S. involvement with and commitments to Indians."); DONALD L. FIXICO, TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945–1960, at 15–16 (1986) [hereinafter FIXICO, TERMINATION] ("[G]overnment officials concluded that many Indians had been and were assimilating into mainstream society . . . . [A]nd were ready for trust removal.").

129. H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953).

130. ARNOLD, BARTERING, *supra* note 128, at XI ("More than 100 tribes were terminated between 1953 and 1961 . . . ."); FIXICO, TERMINATION, *supra* note 128, at 183 ("Between 1945 and 1960 the government processed 109 cases of termination affecting 1,369,000 acres of Indian land . . . ."); Adam Crepelle, *Standing Rock in the Swamp: Oil, the Environment, and the United Houma Nation's Struggle for Federal Recognition*, 64 LOY. L. REV. 141, 150–51 (2018) [hereinafter Crepelle, *Standing Rock in the Swamp*] ("During this abysmal era, the federal government terminated its relationship with over 100 tribes.").

131. Indian Relocation Act of 1956, Pub. L. No. 84–959, 70 Stat. 986; Crepelle, *Standing Rock in the Swamp*, *supra* note 130, at 151 ("Moreover, the termination era's Urban Indian Relocation Program bussed Indians from their rural reservations to major cities, making Indians more visible to the American mainstream."); *1925-Indian Relocation*, SAVAGES & SCOUNDRELS, http://savagesandscoundrels.org/flashpoints-conflicts/1952-indian-relocation/ [https://perma.cc/G58B-B83Q] ("Typically, a reservation Indian was given a one-way bus or train ticket to a distant urban center, usually a West Coast city, and told to check in with the local office of the BIA in order to land a job, find lodging, and to start a new life.").

132. Act of August 15, 1953, Pub. L. No. 83–280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162; 28 U.S.C. § 1360; 25 U.S.C. §§ 1321–1326 (2018)).

133. Robert A. Williams Jr., *The Algebra of Federal Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 221 (1986) ("Many Indians, however, doubted the sincerity of efforts to 'Americanize' them by terminating their federally recognized status as sovereign, self-defining peoples."); Donald Lee Fixico, Termination and Relocation: Federal Indian Policy in the 1950s, at v (1980) (Ph.D. dissertation, University of Oklahoma), https://shareok.org/handle/11244/4767 [https://perma.cc/7YH7-824F].

Indians immense hardship.[134] Unsurprisingly, efforts to do away with tribes were unpopular with Indians,[135] though some Indians appreciated termination's liberation from the shackles of BIA oversight.[136]

The Civil Rights Movement hit full steam in the 1960s, and society's attitude towards Indians slowly began to change.[137] In 1970, President Nixon ushered in a paradigm shift in federal Indian policy.[138] During his second year in office, Nixon gave a Special Message on Indian Affairs.[139] The speech noted that even well-intentioned federal policies "have frequently proved to be ineffective and demeaning."[140] Accordingly, Nixon's answer to Indian socioeconomic ills was tribal self-determination.[141] Congress officially embraced tribal self-determination as its Indian policy in 1975.[142] The United States' legislative and executive branches have followed this

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134. Matthew Atkinson, *Red Tape: How American Laws Ensnare Native American Lands, Resources, and People*, 23 OKLA. CITY U. L. REV. 379, 407 (1998) ("Indians languished in poverty on what had once been reservations; those who relocated languished in poverty in urban slums."); Adam Crepelle, *Arbitrary Process: The Struggle for Federal Recognition of Louisiana's Indian Tribes*, 64 PARISHES (Winter 2016) [hereinafter Crepelle, *Arbitrary Process*], https://64parishes.org/arbitraryprocess?utm_source=LEH+Newsletter+January+2017&utm_campaign=January+2017&utm_medium=email [https://perma.cc/885N-AKSA] ("Relocated Indians were promised good paying jobs and housing, but like so many of the government's commitments to the Indians, the promise went unkept."); *American Indian Relocation*, NATIVE AM. NETROOTS (May 14, 2010), https://nativeamericannetroots.net/diary/496 [https://perma.cc/F23Q-LPF7] ("When they arrived in the city, Indians found no help, no training, no housing, and no good-paying jobs.").

135. DAVID GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 233 (7th ed. 2017).

136. *Id.*

137. *See, e.g.*, Exec. Order No. 11,399, 33 Fed. Reg. 4,245 (Mar. 6, 1968) (establishing the National Council on Indian Opportunity for the development and benefit of the Indian population); Special Message to the Congress on the Problems of the American Indian: "The Forgotten American," 1 PUB. PAPERS 335, 337 (Mar. 6, 1968) ("Indians must have a voice in making the plans and decisions in programs which are important to their daily life."); Letter from John F. Kennedy, Senator, U.S., to Oliver La Farge, President, Ass'n of Am. Indian Affs. (Oct. 28, 1960) (describing his position towards American Indians).

138. Special Message to the Congress on Indian Affairs, 1 PUB. PAPERS 564–67 (July 8, 1970) (President Richard Nixon's 1970 speech imploring Congress to reject forced termination and proposing recommendations for specific action).

139. *Id.*

140. *Id.* at 565.

141. *Id.* at 566 ("Self-determination among the Indian people can and must be encouraged without the threat of eventual termination.").

142. Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93–638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 5301–5423).

policy to varying degrees ever since.[143] Self-determination has resulted in tremendous socioeconomic improvement for tribes, but tribes are still a long way from being able to determine their own future.

II. Self-Determination Policy While the Law Remains Trapped in Time

Despite adopting self-determination as its Indian policy, the United States still treats Indians as a time-trapped people.[144] The United States has enacted several laws aimed at promoting tribal sovereignty, but expanded sovereignty requires federal approval.[145] Having to seek federal permission

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143. *See, e.g.*, Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000) (ordering agencies to respect Indian tribal sovereignty and consult with tribes when implementing policies that have tribal implications); Statement on Signing the Indian Self-Determination Assistance Act Amendments of 1988, 2 PUB. PAPERS 1284–85 (Oct. 5, 1988) ("This Act will assist in furthering Administration efforts to transfer the development and operation of programs from the Federal Government to Indian tribes."); Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, 1 PUB. PAPERS 662–63 (June 14, 1991) ("[T]ribal governments may choose to assume the administration of numerous Federal programs . . . . [A]n Office of Self-Governance has been . . . given the responsibility of working with tribes to craft creative ways of transferring decision-making powers over tribal government functions . . . to tribal governments."); Statement on Signing the Executive Order on Consultation and Coordination with Indian Tribal Governments, 3 PUB. PAPERS 2487–88 (Nov. 6, 2000) ("I issued a memorandum directing all Federal agencies to consult with Indian tribes before making decisions on matters affecting American Indian and Alaska Native peoples."); Memorandum on Government-to-Government Relationship with Tribal Governments, 2 PUB. PAPERS 2177 (Sep. 23, 2004) (instructing executive departments and agencies to consult tribes and consider effects on tribes before taking actions that affect tribal governments); EXEC. OFF. PRESIDENT, 2016 WHITE HOUSE TRIBAL NATIONS CONFERENCE PROGRESS REPORT, A RENEWED ERA OF FEDERAL-TRIBAL RELATIONS (2017), https://obamawhitehouse.archives.gov/sites/default/files/docs/whncaa_report.pdf [https://perma.cc/439W-2QWH] (reporting improvements in relationship with tribes under Obama Administration); Alysa Landry, *Jimmy Carter: Signed ICWA into Law*, INDIAN COUNTRY TODAY (Sept. 12, 2017), https://newsmaven.io/indiancountrytoday/archive/jimmy-carter-signed-icwainto-law-GtsQUN5tRkG1iNzMVHJP8g/ [https://perma.cc/X4HS-9FDQ] ("During his presidential campaign in 1976, Carter's staff reached out to the National Congress of American Indians and the National Tribal Chairmen's Association. Carter met briefly with some leaders and his staff drafted a position paper that endorsed Indian self-determination policy, already in force.").

144. Statement on Indian Policy, 1 PUB. PAPERS 96 (Jan. 24, 1983) ("However, since 1975 there has been more rhetoric than action. Instead of fostering and encouraging self-government, federal policies have by and large inhibited the political and economic development of the tribes.").

145. *See, e.g.*, 25 U.S.C. § 2102(a) (requiring federal approval for tribes to enter into agreements regarding mineral resources in which they own an interest); 40 C.F.R. § 131.8(a)(4) (2018) (requiring federal determination that a tribe is capable of carrying out an effective water quality standards program before approving a tribal application

is the antithesis of sovereignty.[146] Indeed, a federal approval requirement implies tribes are not competent to manage their own affairs. Moreover, laws that should have been repealed two centuries ago continue to infringe upon Indian economic rights. Federal Indian law jurisprudence is often even worse because stare decisis results in repetition of rotten, racist representations of Indians. Indians will remain trapped in time until the jurisprudential story changes. This Part explores how time-trapped notions from 200-plus years ago continue to permeate federal Indian law and policy.

A. Time-Trapped Rules and Regulations

Laws and regulations based on the false notion of Indians being unable to engage in business permeate federal Indian law. Indian trader laws are a prime example of the time trap. These laws became part of the United States Code in 1790[147] because Indians were believed to be too incompetent to trade with white people.[148] Indian trader laws require non-Indians seeking to do business in Indian country to first obtain a federal Indian trader license.[149] The process is time consuming and inefficient;[150]

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for such a program); 33 U.S.C. § 1377(e)(3) (authorizing treatment of an Indian tribe as a State for the purposes of water pollution prevention programs only with federal determination that the tribe is capable of carrying out such a program); *see also* Tribal Law and Order Act of 2010, Pub. L. No. 111–211, §§ 231, 233–234(b), 124 Stat. 2258, 2272–80 (requiring tribal police training programs to conform to federal standards, requiring federal permission for tribal law enforcement to access national criminal information databases, subjecting tribal courts to due process limitations except in cases where defendant has been prosecuted for a comparable offense in a U.S. jurisdiction); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113–4, § 904, 127 Stat. 54 (subjecting tribes that exercise criminal jurisdiction over non-Indians in domestic violence cases to due process limitations).

146. 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.").

147. An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, 1 Stat. 137 (1790) (codified as amended at 25 U.S.C. §§ 177, 261–264).

148. Cent. Mach. Co. v. Ariz. Tax Comm'n, 448 U.S. 160, 163 (1980) ("In 1790, Congress passed a statute regulating the licensing of Indian traders. Act of July 22, 1790, ch. 33, 1 Stat. 137. Ever since that time, the Federal Government has comprehensively regulated trade with Indians to prevent 'fraud and imposition' upon them."); Ewert v. Bluejacket, 259 U.S. 129, 136 (1922) ("The purpose of the section clearly is to protect the inexperienced, dependent and improvident Indians from the avarice and cunning of unscrupulous men in official position . . . ."); United States v. Hutto, 256 U.S. 524, 528 (1921) (describing the purpose of Indian trader laws as "to protect the Indians from their own improvidence . . . .").

149. 25 U.S.C. § 264; 25 C.F.R. § 140.3 (2020).

however, failure to obtain the license subjects a business to forfeiture of its entire inventory.[151] Indian trader laws also prevent Indian tribes from selling their land—even land tribes have purchased on the private real estate market—without the federal government's permission.[152] These provisions exist to protect Indians, but in reality, these laws impede tribal economic development.[153]

Trust land is another time-trapped impediment to tribal economic development. Trust is the most common land tenure in Indian country.[154] Trust land has its origins in *Johnson v. M'Intosh*[155] and Indians' alleged incompetency.[156] Nonetheless, Indian lands are now held in trust pursuant

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150. Crepelle, *White Tape*, *supra* note 26, at 578 (listing the steps required for obtaining an Indian trader license).

151. 25 U.S.C. § 264; 25 C.F.R. § 140.3 (2020).

152. 25 U.S.C. § 177; Mark A. Jarboe & Daniel B. Watts, *Can Indian Tribes Sell or Encumber Their Fee Lands Without Federal Approval?*, 0 AM. INDIAN L.J. 10, 24 (2012) (describing the legislative history of these provisions).

153. Adam Crepelle, *How Federal Indian Law Prevents Reservation Private Sector Development*, 23 U. PENN. J. BUS. 683, 721–24 (2021) [hereinafter Crepelle, *How Federal Indian Law Prevents*]; Crepelle, *White Tape*, *supra* note 26, at 589 ("The federal restrictions on trust land incapacitate tribal economies and frustrate tribal self-governance.").

154. CTR. FOR INDIAN CNTY. DEV., FED. RESERVE BANK OF MINNEAPOLIS, TRIBAL LEADERS HANDBOOK ON HOMEOWNERSHIP 79 (Patrice H. Kunesh ed., 2018), https://www.minneapolisfed.org/~/media/files/community/indiancountry/resources-education/cicd-tribal-leaders-handbook-on-homeownership.pdf?la=en [https://perma.cc/TQ9G-XHAH].

155. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 576–77 (1823) ("Thus asserting a right to take possession, notwithstanding the occupancy of the natives, who were heathens, and, at the same time, admitting the prior title of any Christian people who may have made a previous discovery."); *see* James Warren, *A Victory for Native Americans?*, ATLANTIC (June 7, 2010), https://www.theatlantic.com/national/archive/2010/06/a-victory-for-nativeamericans/57769/ [https://perma.cc/6YX2-C9YE] ("The Indians were given beneficial ownership but the government managed the land, believing Indians couldn't handle their affairs."); UNITED S. & E. TRIBES, INC., MODERNIZING THE TRUST: REDEFINING THE UNITED STATES-TRIBAL GOVERNMENT-TO-GOVERNMENT RELATIONSHIP AND ADVANCING TRUST ASSET REFORM 1 (2015), https://www.usetinc.org/wp-content/uploads/2019/02/2.E-General-Trust-Modernization-Principles-FINAL-10_15_15-1.pdf [https://perma.cc/2NGS-MFFK] ("The current trust model is broken and based on faulty and antiquated assumptions from the 19th Century that Indian people were incompetent to handle their own affairs and that Indian Tribes were anachronistic and would gradually disappear.").

156. Nichols v. Rysavy, 809 F.2d 1317, 1322 (8th Cir. 1987) ("To all able-bodied adult Indians of less than one-half Indian blood; there will be given as far as may be under the law full and complete control of all their property."); *id.* ("Patents in fee shall be issued to all adult Indians of one-half or more Indian blood who may, after careful investigation, be found competent, provided, that where deemed advisable patents in fee shall be withheld for not to exceed 40 acres as a home."); Crepelle, *supra* note 26, at 588

to federal statute.[157] The federal government owns trust land, and the tribe or an individual Indian is the beneficiary of the trust.[158] Placing Indian lands in perpetual trust status was intended to counter the devastating effects of the GAA[159] and succeeded in preventing the further erosion of tribal land bases.[160] Ironically, although tribal sovereignty is at its apex on trust land,[161] trust land is widely considered a major obstacle to Indian country economic development.[162]

Since the federal government owns trust land, Indians cannot obtain a mortgage on their land without federal approval.[163] This functionally denies Indians the ability to use *their land* as capital.[164] Trust land can only be utilized through a lease.[165] However, obtaining a lease on

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("Trust land came into existence because Indians were deemed racially inferior and consequently incompetent to own their land.").

157. 25 U.S.C. § 5102 (2020).

158. 25 C.F.R. § 152.1(d) (2020).

159. *75 Years Later*, *supra* note 118, at 5 ("Objective One: Stopping Allotment and the Individualization of Tribal Resources").

160. Singer, *supra* note 122, at 34 ("[Trust land] continues to exist in part because most Indian nations want it to continue to exist. They support it because the restraint on alienation preserves the tribal land base.").

161. *A Path Forward: Trust Modernization and Reform for Indian Lands: Hearing Before the S. Comm. on Indian Affs.*, 114th Cong. 8 (2015) (statement of Hon. Kevin Washburn, Assistant Sec'y, Indian Affs., U.S. Dep't of Interior) ("Tribes are sovereign governments and trust lands are a primary locus of tribal authority.").

162. Narayana Kocherlakota, President, Fed. Res. Bank of Minneapolis, Speech at Growing Economies in Indian Country: A National Summit: What's Different about Economic Development in Indian Country? (May 1, 2012), https://www.minneapolisfed.org/speeches/2012/whats-different-about-economic-development-in-indian-country [https://perma.cc/ZKR4-SLQN] ("[M]any of the participants in last year's conferences raised concerns about the trust system. They pointed out that it also makes it hard to conduct some basic business transactions, such as using trust land to collateralize business loans or home mortgages."); Lance Morgan, *Ending the Curse of Trust*, INDIAN COUNTRY TODAY (Mar. 23, 2005) [hereinafter Morgan, *Curse*], https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/15%20-%20Ho-Chunk%20Inc.pdf [https://perma.cc/9469-7LD4] ("[Trust land] also serves as the single largest impediment to Indian country's economic growth and tribal sovereignty."); Naomi Schaefer Riley, *One Way to Help Native Americans: Property Rights*, THE ATLANTIC (July 30, 2016) [hereinafter Riley, *Property Rights*], https://www.theatlantic.com/politics/archive/2016/07/native-americansproperty-rights/492941/ [https://perma.cc/X5DC-UDKG] ("And no one can get a mortgage because the property on the reservation is held in trust by the federal government . . . .").

163. 25 U.S.C. § 5135; 25 C.F.R. § 152.34.

164. Indian Community Economic Enhancement Act of 2020, Pub. L. No. 116-261, § 2(8)(A), 134 Stat. 3306.

165. Bureau of Indian Affs., Dep't of Interior, PROCEDURAL HANDBOOK: LEASING AND PERMITTING 2 (2006), https://www.bia.gov/sites/bia.gov/files/assets/public/raca/handbook/pdf/Procedural-HB-Leasing-and-Permitting_Chapter-1-General-

trust land is a complex and time consuming federally controlled process.[166] Congress enacted the Helping Expedite and Advance Responsible Tribal Home Ownership Act of 2012 ("HEARTH Act") to accelerate trust land leases by allowing tribes to approve leases of their land.[167] Despite the noble intent, the HEARTH Act operates on the supposition that tribes are incompetent to lease their land because tribes are not free to implement their own land leasing regulations.[168] Instead, the HEARTH Act requires tribes to duplicate the BIA's regulations.[169]

Oil production on tribal land epitomizes the paternalistic effects of the trust relationship. Many tribes have significant oil, as well as other minerals, on their land.[170] Oil production on Indian lands cannot begin without the BIA approval;[171] however, the BIA is short staffed.[172] Plus, many BIA employees are not qualified to regulate oil and gas production.[173] As a

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Information_OIMT.pdf [https://perma.cc/4VZY-3U4H] ("While there is no statutory requirement that Indian lands held in trust . . . be leased, the Secretary of the Interior has a fiduciary obligation to 'protect and preserve Indian trust assets from loss, damage, unlawful alienation, waste, and depletion,' and to make decisions . . . that are in the best interest of the Indian landowner.").

166. Crepelle, *White Tape*, *supra* note 26, at 575–76.

167. 25 U.S.C. § 415(h); Jodi Gillette, *Strengthening Tribal Communities Through the HEARTH Act*, WHITE HOUSE BLOG (July 30, 2012, 1:54 PM), https://obamawhitehouse.archives.gov/blog/2012/07/30/strengthening-tribal-communities-through-hearth-act [https://perma.cc/B4YD-5NLQ].

168. 25 U.S.C. § 415(h)(3)(B)(i); Josephine Foo, THE HEARTH ACT OF 2012 AND THE NAVAJO LEASING ACT OF 2000: FINANCIAL AND SELF-DETERMINATION ISSUES, A.B.A.: ENV'T ENERGY & RES. (Jan. 3, 2019), https://www.americanbar.org/groups/environment_energy_resources/publications/nar/20190103-the-hearth-act-of-2012/ [https://perma.cc/CL64-CESW] ("However, the HEARTH Act does not simply hand over tribal trust land lease approvals to tribes to administer as they will.") [hereinafter Foo].

169. 25 U.S.C. § 415(h)(3)(B)(i); Foo, *supra* note 168 ("HEARTH Act opt-in tribes are essentially required to adopt and maintain federal long-term Indian trust land management lease types, terms, and general processes as well as federal environmental protection priorities, rather than being able to freely devise land use processes pursuant to tribal priorities.").

170. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-502, INDIAN ENERGY DEVELOPMENT: POOR MANAGEMENT BY BIA HAS HINDERED ENERGY DEVELOPMENT ON INDIAN LANDS 1 (2015), https://www.gao.gov/assets/gao-15-502.pdf [https://perma.cc/Z293-YZMB] ("Indian tribes and tribal members, collectively, are the third largest owner of domestic mineral resources, including oil, gas, and coal.").

171. *Id.* at 14–16.

172. OFF. OF INSPECTOR GEN., U.S. DEP'T OF INTERIOR, OIL AND GAS LEASING IN INDIAN COUNTRY: AN OPPORTUNITY FOR ECONOMIC DEVELOPMENT 2 (2012), https://www.doioig.gov/sites/default/files/2021-migration/CR-EV-BIA-0001-2011Public.pdf [https://perma.cc/FL8X-RMJQ] ("The Bureau also has relatively few employees with education and work experience specific to oil and gas.") [hereinafter OFF. OF INSPECTOR GEN.].

173. *Id.*

result, obtaining federal permission to drill for oil on a reservation takes forty-nine steps,[174] and completing this bureaucratic gauntlet can take over three years.[175] In contrast, beginning oil production on state land takes four permitting steps[176] and can begin in three months.[177] Furthermore, the permit processing fee is over $10,000 on tribal lands,[178] compared to approximately $100 in some states.[179]

These regulations are inspired by the trust relationship and drive oil companies away from Indian country.[180] Hence, oil companies expressed grave concerns about the regulatory issues that may arise from the Supreme Court's recognition of the Creek Reservation.[181] Private oil companies believing this is one thing, but a problem exists when tribes find oil production easier outside of Indian country. The Southern Ute Indian

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174. Shawn E. Regan & Terry L. Anderson, *The Energy Wealth of Indian Nations*, 3 LA. ST. U. J. ENERGY L. & RES. 195, 208 (2014) ("On Indian lands, companies must go through four federal agencies and forty-nine regulatory or administrative steps to acquire a permit to drill, compared with only four steps when drilling off of reservation.").

175. *Indian Energy Development: Hearing Before the S. Comm. on Indian Affs.*, 110th Cong. 8 (2008) (statement of Hon. Marcus D. Wells, Jr., Chairman, Three Affiliated Tribes of the Fort Berthold Indian Reservation) ("[T]he IMDAs [modified oil and gas leases] took over three years to receive formal secretarial approval . . . ."); Bureau of Indian Affs., U.S. Dep't of Interior, Transcript of Tribal Consultation, Identifying Economic Priorities in Indian Country 5 (Aug. 17, 2017), https://www.bia.gov/sites/bia_prod.opengov.ibmcloud.com/files/assets/asia/raca/pdf/081717.Albuquerque%20NM%20Transcript_Indian%20Traders%2025%20CFR%20140.pdf [https://perma.cc/CJ39-PYDS] ("When they're drilling off reservation, it takes them about four months to get all the permitting process off reservation. On reservation, it takes 31 months for no other reason than it's our fault.").

176. Regan & Anderson, *supra* note 174, at 208.

177. MAURA GROGAN ET AL., REVENUE WATCH INST., NATIVE AMERICAN LANDS AND NATURAL RESOURCE DEVELOPMENT 20 n.31 (2011), https://resourcegovernance.org/sites/default/files/RWI_Native_American_Lands_2011.pdf [https://perma.cc/2MHE-3U4K] ("Congressional testimony consistently notes that it can take several years or more to get all the approvals needed to begin drilling for oil on Indian lands, while the same process usually takes only a few months on nearby private land.").

178. Instructional Memorandum from Bureau of Land Mgmt., Statutorily Required Increase in Filing Fee for Processing Applications for Permit to Drill (APDs) in Fiscal Year (FY) 2021, (Sept. 24, 2020), https://www.blm.gov/policy/im-2020-033 [https://perma.cc/A2FJ-94BX].

179. *See, e.g.*, MONT. CODE ANN. § 82-11-134 (2019) (authorizing oil or gas well permit fees that range from $25–$150 in Montana).

180. OFF. OF INSPECTOR GEN., *supra* note 172, at 4 ("[T]he oil and gas industry generally considers Indian leases to be their lowest priority, preferring to lease private, state, and federally owned lands first.").

181. *See, e.g.*, Brief of Okla. Indep. Petrol. Ass'n as Amicus Curiae in Support of Petitioner, Murphy v. Royal, 875 F.3d 896 (10th Cir. 2017), *aff'd sub nom*. Sharp v. Murphy, 140 S. Ct. 2412, 2412 (2020).

Tribe's experience evinces this point.[182] The Southern Ute Indian Tribe can begin oil production faster and cheaper in the Gulf of Mexico than on its own Colorado-based reservation.[183] In fact, slow-moving federal bureaucracy caused significant delays on a Southern Ute energy project costing the tribe over ninety-five million dollars in lost revenues.[184] Several other tribes have missed major economic development opportunities in the oil and gas industry due to slow-moving, inept, and enigmatic federal bureaucracy.[185]

The time trap extends into how Indians should make their living. Indians are supposed to be non-commercial and artistic. Ernest Sickey, former chairman of the Coushatta Tribe of Louisiana, played upon this stereotype by handing out baskets instead of business cards to help prove the Coushatta were a real tribe.[186] In fact, the Indian artisan ideal is codified in the federal Indian Arts and Crafts Act,[187] which protects the market for Indian arts and crafts from non-Indian posers.[188] Yet nothing happens when

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182. The Southern Ute Indian Tribe has a very successful oil company, Red Willow Production Company. *See* RED WILLOW PROD. CO., *supra* note 12, at [if applicable].

183. Terry L. Anderson & Adam Crepelle, *Broken Treaties with Native Americans Not Fixed by Supreme Court Ruling*, THE HILL (July 16, 2020, 4:30 PM), https://thehill.com/opinion/civil-rights/507688-broken-treaties-with-native-americans-not-fixed-by-supreme-court-ruling [https://perma.cc/G6LS-VCER] ("Due to federal red tape, it is easier for the tribe to drill 10,000 feet below the Gulf of Mexico than on its own land.").

184. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 170, at 0 ("Lost revenue: According to a tribal official, BIA's review of some of its energy-related documents took as long as 8 years. In the meantime, the tribe estimates it lost more than $95 million in revenues it could have earned from tribal permitting fees, oil and gas severance taxes, and royalties.").

185. *The GAO Report on Indian Energy Development: Poor Management by BIA Has Hindered Development on Indian Lands: Hearing Before the S. Comm. on Indian Affs.*, 114th Cong. 26 (2015) (statement of Hon. Grant Stafne, Councilman, Fort Peck Assiniboine and Sioux Tribes) ("It is simply unacceptable to my tribe that agency shortcomings have resulted in missed development opportunities for tribes, lost revenues and jeopardization of otherwise viable energy projects."); *S. 2132, Indian Tribal Energy Development and Self-Determination Act Amendments of 2014: Hearing Before the S. Comm. on Indian Affs.,* 113th Cong. 2 (2014) (statement of Hon. Jon Tester, U.S. Sen. from Mont.) ("Instead, tribes have often claimed that development opportunities have been lost, specifically because of delays caused by the Federal Government to carry out its trust responsibility.").

186. DENISE E. BATES, BASKET DIPLOMACY: LEADERSHIP, ALLIANCE-BUILDING, AND RESILIENCE AMONG THE COUSHATTA TRIBE OF LOUISIANA, 1884–1984, at 135–37 (Lincoln: Univ. of Neb. Press ed., 2020).

187. Indian Arts and Crafts Act of 1990, Pub. L. No. 101-644, 104 Stat. 4662 (codified as amended at 25 U.S.C. §§ 305–310; 18 U.S.C. § 1159).

188. 25 U.S.C. § 305d.

Indian status is fraudulently claimed in other sectors.[189] In the same vein, federal law recognizes marine mammals are integral to many tribal cultures.[190] Accordingly, federal law permits Indians to hunt these animals for "subsistence purposes"[191] or to create "authentic native articles of handicrafts and clothing," which under the statute means in the manner western society believes Indians would have operated long ago.[192] Indians are also allowed to import marine mammal products as part of a "cultural exchange,"[193] meaning basically any non-commercial activity.[194] These laws assume Indians are noble savages who value art over industry.

Stereotypes of Indians likely contribute to the resistance tribes face when they attempt to engage in contemporary economic activities. Illustrating this point, the Indian Gaming Regulatory Act of 1988 allows tribes to freely engage in "traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations."[195] However, tribes must obtain state and federal approval prior to engaging in modern forms of gaming.[196] This signals tribal sovereignty is greater over time-trapped activities than modern activities. The same rationale extends to tribal governance as Congress has limited

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189. *See, e.g.*, Adam Elmahrek & Paul Pringle, *Claiming to Be Cherokee, Contractors with White Ancestry Got $300 Million*, L.A. TIMES (June 26, 2019, 4:00 AM), https://www.latimes.com/local/lanow/la-na-cherokee-minority-contracts-20190626-story.html (on file with the *Columbia Human Rights Law Review*) ("Since 2000, the federal government and authorities in 18 states, including California, have awarded more than $300 million under minority contracting programs to companies whose owners made unsubstantiated claims of being Native American, a Los Angeles Times investigation found."); Adam Elmahrek & Paul Pringle, *Two Tribes Aren't Recognized Federally. Yet Members Won $500 Million in Minority Contracts*, L.A. TIMES (Dec. 31, 2019, 5:54 PM), https://www.latimes.com/california/story/2019-12-31/native-american-tribes-alabama-minority-contracts (on file with the *Columbia Human Rights Law Review*) ("The ability of company owners with questionable Native American identity to obtain more than half a billion dollars in taxpayer funded minority-business contracts reflects a nationwide failure by agencies overseeing programs set up decades ago to help socially and economically disadvantaged minority groups.").

190. Marine Mammal Protection Act, Pub. L. No. 92-522, § 101(b), 86 Stat. 1027, 1031 (1972) (codified as amended at 16 U.S.C. §§ 1371–1389).

191. 16 U.S.C. § 1371(b)(1).

192. 16 U.S.C. § 1371(b)(2) ("For the purposes of this subsection, the term 'authentic native articles of handicrafts and clothing' means items composed wholly or in some significant respect of natural materials, and which are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of . . . mass copying devices . . . .").

193. 16 U.S.C. § 1371(6)(A)(ii).

194. 16 U.S.C. § 1371(6)(B)(ii).

195. 25 U.S.C. § 2703(6); 25 U.S.C. § 2710(a)(1).

196. 25 U.S.C. § 2710(b).

tribal government tax-exempt bonds to "essential government function[s],"[197] meaning activities governments traditionally perform.[198] Neither state nor local government tax-exempt bonds face this limitation;[199] thus, tribes remain trapped by the past while other governments are allowed to innovate.

B. Time-Trapped Judicial Interpretations

The judicial branch has played an integral role in defining and upholding the trust relationship.[200] Invoking the trust relationship, courts seek to interpret treaties as Indians would have understood them.[201] Likewise, the trust relationship requires courts to construe statutory ambiguities in favor of Indians.[202] Due to these canons, the judicial branch was long regarded as the protector of tribal sovereignty.[203] This began to change during the 1970s, ironically, when the executive and legislative branches embraced tribal self-determination.[204] As a result, the Supreme Court has largely abandoned the beneficial aspects of the trust,[205] all the

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197. 26 U.S.C. § 7871(b).

198. 26 U.S.C. § 7871(e).

199. Gavin Clarkson, *Tribal Bondage: Statutory Shackles and Regulatory Restraints on Tribal Economic Development* 8 (Univ. Mich L. Sch., L. & Econ. Working Papers Archive: 2003-2009, Art. 63, 2006), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1064&context=law_econ_archive [https://perma.cc/A4RH-4FCG].

200. United States v. White Mountain Apache Tribe, 537 U.S. 465, 474 n.3 (2003) ("We have recognized a general trust relationship since 1831.").

201. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 200 (1999) ("We have held that Indian treaties are to be interpreted liberally in favor of the Indians."); Cnty. of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985); Tulee v. Washington, 315 U.S. 681, 684–85 (1942).

202. Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit . . . ."); Cnty. of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985) ("[I]t is well established that treaties should be construed liberally in favor of the Indians. . . . The Court has applied similar canons of construction in nontreaty matters.").

203. N. Bruce Duthu, *The New Indian Wars: Tribal Sovereignty, The Courts and Judicial Violence,* 2015 FRENCH J. AM. STUD. 78, 81 (2015) ("In contrast to its present posture toward the tribal nations, the Supreme Court historically was often the sole branch of the federal government that behaved in a way that respected, in some significant measure, the rights and interests of Native peoples and their governments.").

204. Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 5301–5423).

205. Kevin K. Washburn, *What the Future Holds: The Changing Landscape of Federal Indian Policy*, 130 HARV. L. REV. F. 200, 221 (2017) ("These Supreme Court decisions suggest that the trust responsibility to Indian tribes has narrowed . . . as tribal self-governance has taken hold. Today, the trust responsibility is legally enforceable

while relying on time-trapped jurisprudence to the detriment of tribal sovereignty and economic development.[206]

When interpreting the tribal trust relationship, courts often refer to common law trust principles.[207] Nevertheless, the federal-tribal trust is not a run-of-the-mill trust relationship because it is rooted in the guardian-ward relationship.[208] A trustee's duties "are more intensive than the duties of some other fiduciaries;"[209] accordingly, tribes must establish that the federal government asserted complete control over an asset in order for the tribe to recover for breach of trust.[210] For example, the trust-inspired Indian Mineral Leasing Act[211] forbids coal mining in Indian country until the Secretary of the Interior approves a lease between a tribe and the mining

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through a suit for damages in only a narrow range of circumstances and perhaps not at all when the tribe is . . . self-govern[ing].").

206. *See generally*, ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA (2005) [hereinafter WILLIAMS, LOADED WEAPON] (arguing that Supreme Court jurisprudence has always been tainted by negative Indian stereotypes); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 Ariz. St. L.J. 113, 163 (2002) ("Indeed, this section demonstrates how the so-called federal Indian plenary power doctrine under which Congress claims complete, virtually unlimited, legislative control over any matter involving Indians, including the very continued existence of the Indian tribes, merely constitutes a racist American relic of 'white man's burden' arguments employed to justify American colonialism."); Crepelle, *Lies, Damn Lies*, *supra* note 23, at 553–56 (describing how the Court and practitioners alike continuously cite archaic, prejudiced precedents).

207. United States v. Jicarilla Apache Nation, 564 U.S. 162, 206 (2011) (Sotomayor, J., dissenting) ("Under our governing precedents, common-law trust principles play an important role in defining the Government's fiduciary duties where, as here, the statutory scheme establishes a conventional fiduciary relationship."); United States v. White Mountain Apache Tribe, 537 U.S. 465, 475–76 (2003); United States v. Mitchell, 463 U.S. 206, 226 (1983).

208. *Jicarilla Apache Nation*, 564 U.S. at 177 ("Over the years, we have described the federal relationship with the Indian tribes using various formulations. [They] have been called 'domestic dependent nations,' under the 'tutelage' of the United States, and subject to 'the exercise of the Government's guardianship over . . . their affairs.' These concepts do not necessarily correspond to a common-law trust relationship.") (internal citations omitted).

209. *White Mountain Apache Tribe*, 537 U.S. at 483 n.1 (Thomas, J., dissenting).

210. *See id.* at 467 ("As to the property subject to the Government's actual use, then, the United States has not merely exercised daily supervision but has enjoyed daily occupation, and so has obtained control at least as plenary as its authority over the timber in *Mitchell II*."); United States v. Mitchell, 463 U.S. 206, 225 (1983) ("Moreover, a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians.").

211. Indian Mineral Leasing Act of 1938, Pub. L. No. 75-506, ch. 198, 52 Stat. 347 (codified as amended at 25 U.S.C §§ 396(a)–396(g)).

company.[212] Secretary of the Interior Donald Hodel seemed set to increase the Navajo Nation's return on coal leases in 1985.[213] However, Secretary Hodel altered his decision on the coal lease after a private meeting with the representatives of Peabody Coal.[214] The Supreme Court acknowledged the duplicitous nature of the Secretary's behavior but determined no breach of trust occurred because no specific statute was violated.[215] The Supreme Court has even held the United States does not have to share information with tribes that would be relevant to establishing a breach of trust.[216]

Despite abandoning the protective aspects of the trust relationship, the Court has weaponized the trust's time-trapped imagery to diminish tribal jurisdiction. This is epitomized by the Supreme Court's opinion in *Oliphant v. Suquamish Indian Tribe.*[217] The case arose from Mark Oliphant assaulting a tribal cop then arguing the tribe lacked jurisdiction to prosecute him because he was not an Indian.[218] The district court and Ninth Circuit rejected this contention, but the Supreme Court sided with Oliphant.[219] The Court admitted the Suquamish had never surrendered authority to prosecute non-Indians;[220] thus, the canons should have resulted in a decision for the tribes.[221] Instead, the Court wielded the stereotypes embedded in the Marshall Trilogy and other antiquated cases

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212. United States v. Navajo Nation, 537 U.S. 488, 507 (2003) ("The IMLA simply requires Secretarial approval before coal mining leases negotiated between Tribes and third parties become effective . . . .").

213. *Id.* at 496 ("He thereafter appeared ready to reject Peabody's appeal. By June 1985, both Peabody and the Tribe anticipated that an announcement favorable to the Tribe was imminent.") (internal citation omitted).

214. *Id.* at 497–500.

215. *Id.* at 514 ("However one might appraise the Secretary's intervention in this case, we have no warrant from any relevant statute or regulation to conclude that his conduct implicated a duty enforceable in an action for damages under the Indian Tucker Act."); *see also* United States v. Navajo Nation, 556 U.S. 287, 292 (2009) ("In particular, the Tribe alleged that the Secretary, following upon improper *ex parte* contacts with Peabody, had delayed action on Peabody's administrative appeal in order to pressure the economically desperate Tribe to return to the bargaining table.").

216. United States v. Jicarilla Apache Nation, 564 U.S. 162, 179–80 (2011).

217. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

218. *Id.* at 194.

219. *Id.* at 194–95.

220. *Id.* at 208 ("By themselves, these treaty provisions would probably not be sufficient to remove criminal jurisdiction over non-Indians if the Tribe otherwise retained such jurisdiction.").

221. In addition to the canons requiring ambiguities be construed in favor of Indians, tribes are presumed to retain all powers they have not explicitly relinquished. *See, e.g.*, United States v. Winans, 198 U.S. 371, 381 (1905) ("[T]he treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.").

to rule against tribal criminal jurisdiction over non-Indians.[222] The Court explicitly declared contemporary Indian law should remain governed by the federal government's perceptions of Indians during the 1700 and 1800s.[223] In fact, the Court cited a statement from an 1891 case declaring tribal jurisdiction extends only so far "as was thought to be consistent with the safety of the white population with which they may have come in contact."[224] The Court even block quoted—while conveniently omitting the flamingly racist language—a passage from the 1883 case of *Ex parte Crow Dog* claiming Indians and whites are too inherently different to be judged under the other's laws. [225] Although the Supreme Court admitted contemporary tribal courts present little danger to non-Indian rights,[226] it made clear its conclusion that tribes lack criminal jurisdiction over non-Indians is trapped in time by stating this conclusion "would have been obvious a century ago."[227]

Oliphant has been widely critiqued for its factual errors and racist reasoning;[228] nonetheless, *Oliphant's* time-trapped reasoning was extended to civil cases three years later in *Montana v. United States*.[229] The case involved the Crow Tribe's authority to regulate non-Indian hunting and fishing on fee lands located within the tribe's reservation.[230] Ruling against the tribe, the Court asserted the Crow were a simple, nomadic people "dependent chiefly on buffalo."[231] The Court's assessment of Crow history is subject to serious dispute, as noted by the dissent.[232] Actual dietary practices of the Crow Tribe notwithstanding, the Supreme Court abides by

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222. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 207–211 (1978).

223. *Id.* at 206 ("These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them.").

224. *Id.* at 204.

225. *Id.* at 210–11.

226. *Id.* at 211–12.

227. *Id.* at 210.

228. WILLIAMS, LOADED WEAPON, *supra* note 206, at 97–113; Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609, 610 (1979) ("A close examination of the Court's opinion reveals a carelessness with history, logic, precedent, and statutory construction that is not ordinarily acceptable from so august a tribunal."); Crepelle, *Lies, Damn Lies*, *supra* note 23, at 556–67 (delving into the many flaws in *Oliphant*).

229. Montana v. United States, 450 U.S. 544, 549 (1981).

230. *Id.* at 547.

231. *Id.* at 556.

232. *Id.* at 570 (Blackmun, J., dissenting) ("The factual premise upon which the Court bases its conclusion is open to serious question: while the District Court found . . . that the Crow ate fish . . . as a substitute for meat in time of scarcity.").

Montana and has even described it as "the pathmarking case concerning tribal civil authority over nonmembers."[233]

Under *Montana*, tribes can assert civil jurisdiction over non-Indians on fee lands within a reservation only if the non-Indian has entered a consensual relationship with the tribe or non-Indian behavior poses a threat to the general welfare of the tribe.[234] The *Montana* jurisdictional bases seem to cover a wide breadth of conduct;[235] alas, the exceptions almost never apply.[236] Only two Supreme Court decisions have recognized tribal civil jurisdiction under *Montana* and both relied on time-trapped reasoning.[237] While upholding tribal civil jurisdiction over non-Indians, Justice Stevens held tribes can zone reservation land that is undeveloped and "pristine" but not land that has been commercially developed.[238] Justice Blackmun agreed with Justice Stevens' holding but strongly disavowed Justice Stevens' "stereotyped and almost patronizing view of Indians and reservation life."[239] Justice Blackmun noted views like Justice Stevens' prevent tribal economic growth.[240] However, this time-trapped image of Indians as one with the wilderness is still used as a sword against tribes engaging in contemporary commerce.[241] At the conclusion of its 2021 term,

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233. Strate v. A-1 Contractors, 520 U.S. 438, 445 (1997).

234. *Montana*, 450 U.S. at 565.

235. Crepelle, *How Federal Indian Law Prevents*, *supra* note 153, at 707–10.

236. Dolgencorp, Inc., v. Mississippi Band of Choctaw Indians, 732 F.3d 409, 419 (5th Cir. 2013) (Smith, J., dissenting) ("The majority's alarming and unprecedented holding far outpaces the Supreme Court, which has never upheld Indian jurisdiction over a nonmember defendant."). However, the Supreme Court split 4-4 affirming the Fifth Circuit decision recognizing the Mississippi Band of Choctaw Indian tribal court had jurisdiction over Dollar General, a non-Indian corporation. Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians, 136 S. Ct. 2159, 2159 (2016).

237. Plains Com. Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 333 (2008) ("The exception is Brendale v. Confederated Tribes and Bands of Yakima Nation . . . .").

238. Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 445 (1989) (Stevens, J., plurality opinion) ("Although the Tribe has asserted that it has the authority to regulate land use in the three incorporated towns, it has never attempted to do so. In 'sharp contrast to the pristine, wilderness-like character of the "Closed Area,"' the open area is marked by 'residential and commercial developmen[t].'").

239. *Brendale*, 492 U.S. at 464–65 (Blackmun, J., dissenting).

240. *Id.* at 465 ("In my view, even under Justice Stevens' analysis, it must not be the case that tribes can retain the 'essential character' of their reservations (necessary to the exercise of zoning authority), . . . only if they forgo economic development and maintain those reservations according to a single . . . view of what is characteristically 'Indian' today.").

241. Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 757–58 (1998) ("The rationale, it must be said, can be challenged as inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities."); Adam Crepelle, *Legal Issues in Tribal E-Commerce*, AM. U. BUS. L. REV. (forthcoming 2021) (manuscript at 28) [hereinafter Crepelle, *E-Commerce*].

the Supreme Court affirmed tribes' authority to detain non-Indian criminals for violations of state and federal law—but not tribal law.[242] This line of reasoning assumes tribal law is inherently incompatible with contemporary American notions of justice.

Furthermore, determining whether land qualifies as Indian country is a time-trapped endeavor. Indian country's boundaries are often unclear due to the federal government's attempt to assimilate Indians by engulfing them in a sea of white settlers via allotment of tribal lands.[243] The architects of allotment believed Indian tribes were—and should be—a thing of the past.[244] Although the Supreme Court has acknowledged allotment's "guiding philosophy has been repudiated," the high Court insists on abiding by the spirit of allotment.[245] The Court's clinging to a repudiated past means Indians will be forever haunted by the ghosts of allotment;[246] moreover, the jurisprudence results in bizarre statutory constructions that prevent tribes from maintaining their land.[247]

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242. United States v. Cooley, 141 S. Ct. 1638, 1644–45 (2021) ("Saylor's search and detention, however, do not subsequently subject Cooley to tribal law, but rather only to state and federal laws that apply whether an individual is outside a reservation or on a state or federal highway within it.").

243. *See* Solem v. Bartlett, 465 U.S. 463, 467 (1984) (explaining the effects of surplus land acts); *see also* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 335–36 (1998) (discussing the 1887 Dawes Act); United States v. Mitchell, 445 U.S. 535, 546 n.5 (1980) (finding that the General Allotment Act does not establish the United States bears fiduciary responsibility for management of forests located on lands allotted to Indians under that Act); Mattz v. Arnett, 412 U.S. 481, 496 (1973) ("Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways.").

244. *Solem*, 465 U.S. at 468 ("Consistent with prevailing wisdom, Members of Congress voting on the surplus land Acts believed to a man that within a short time—within a generation at most—the Indian tribes would enter traditional American society and the reservation system would cease to exist.").

245. *South Dakota*, 522 U.S. at 357; *see also* Montana v. United States, 450 U.S. 544, 599 n.9 (1980) ("The policy of allotment and sale of surplus reservation land was, of course, repudiated in 1934 by the Indian Reorganization Act . . . . But what is relevant in this case is the effect of the land alienation occasioned by that policy . . . .").

246. Judith Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 73 (1995) ("Thus, if the Court were willing, it could recognize and affirm the territorial sovereignty of the tribes without doing violence to non-Indian rights. But the Court has chosen instead to further the legacy of allotment.").

247. *See* Carcieri v. Salazar, 555 U.S. 379, 397 (2009) (holding that under the Indian Reorganization Act, the Secretary of the Interior was only empowered to take land into trust for Indian tribes that were under federal jurisdiction when the IRA was enacted); *see also Carcieri Crisis: Hearing Before the S. Comm. on Indian Affs.*, 112th Cong. (2013) (statement of Larry Echo Hawk, Assistant Sec'y of Indian Affs.) ("Without a clear reaffirmation of the secretary's trust acquisition authority, a number of tribes will be

The time trap is on full display in reservation diminishment cases. The Court's inquiry into whether legislation diminished Indian country naturally looks at the language of the particular statute in question to determine if land remains part of a reservation;[248] however, the Court also looks to whether the area has retained its "Indian character."[249] As the number of non-Indians in an area increases, the land can magically cease to be Indian country.[250] This is a particularly troublesome inquiry as it reanimates the "vanishing Indian theory."[251] Moreover, Indians are approximately 1% of the United States population due to centuries of genocidal[252] and ethnocidal policies,[253] so this factor is almost certain to

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delayed in their efforts to restore their homelands: Lands that will be used for cultural purposes, housing, education, health care and economic development.").

248. *Solem*, 465 U.S. at 470 ("The most probative evidence of congressional intent is the statutory language used to open the Indian lands.").

249. *Id.* at 471 ("Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that de facto, if not de jure, diminishment may have occurred."); *see* Nebraska v. Parker, 577 U.S. 481, 493 (2016) (discussing evidence in a diminishment analysis).

250. *South Dakota*, 522 U.S. at 356 ("Every surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation . . . .").

251. Robert N. Clinton, *Redressing the Legacy of Conquest: A Vison Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 79 (1993) ("Since the late eighteenth and early nineteenth centuries, non-Indian America . . . has asserted its cultural superiority by both assuming and asserting that Indians either must assimilate or blend into the American 'melting-pot' and perish as a distinctive people or must gradually die off as their culture and skills fail to cope with the changes imposed . . . by . . . an allegedly superior white civilization."); Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004, 2029 (2007) ("U.S. Indian policy helped cultivate an ideology of the vanishing Indian . . . . [T]he ideology of the vanishing Indian was part of the justification for the actual and often brutal attempts by the federal government to make the Indian vanish . . . .").

252. *See, e.g.*, Brianna Theobald, *A 1970 Law Led to the Mass Sterilization of Native American Women. That History Still Matters*, TIME (last updated Nov. 28, 2019), https://time.com/5737080/native-american-sterilization-history/ [https://perma.cc/2BLM-SMVP] ("Over the six-year period that had followed the passage of the Family Planning Services and Population Research Act of 1970, physicians sterilized perhaps 25% of Native American women of childbearing age, and there is evidence suggesting that the numbers were actually even higher."); *1976: Government Admits Unauthorized Sterilization of Indian Women*, NATIVE VOICES, (last visited June 7, 2020) https://www.nlm.nih.gov/nativevoices/timeline/543.html [https://perma.cc/8XLH-GFDZ] ("A study by the U.S. General Accounting Office finds that 4 of the 12 Indian Health Service regions sterilized 3,406 American Indian women without their permission between 1973 and 1976. The GAO finds that 36 women under age 21 were sterilized during this period . . . ."); *see also* Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 407–08 (2003) ("Post-contact epidemics decimated the

swing against tribes. Another unsettling element of using white settlement of reservations to determine if land retains its "Indian character" is that non-Indians were less likely to move onto low quality land.[254] Thus, land's retention of "Indian character" essentially means non-Indians did not want the land.

Oklahoma played the time-trap card vigorously in its 2020 Supreme Court brief against honoring the Creek Nation's treaty guaranteed reservation borders. Oklahoma largely ceded no act of Congress had ever clearly terminated the Creek Reservation, claiming instead the reservation

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indigenous people lacking resistance to measles, smallpox, influenza, and other diseases introduced to the Western hemisphere, '[t]he most lethal pathogen Europeans introduced to Native Americans, in terms of the total number of casualties, was smallpox . . . .'"); *id.* at 408 ("Military officers, traders, and settlers advocated the use of smallpox blankets when inconvenienced by tribes who insisted on possessing and exercising authority over their lands."); Daniel D. Polsby & Don B. Kates, Jr., *Of Holocausts and Gun Control*, 75 WASH. U. L. Q. 1237, 1262–63 (1997) ("In the last century, various Indian massacres, such as the 'battles' of Washita and Sand Creek, were publicly celebrated as glorious feats of arms.").

253. *See, e.g.*, Indian Removal Act of 1830, ch. 148, 4 Stat. 411; Indian Relocation Act of 1956, Pub. L. No. 84-959, 70 Stat. 986 (1956); *see* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989) ("Studies undertaken by the Association on American Indian Affairs in 1969 and 1974, and presented in the Senate hearings, showed that 25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions."); Leah Litman & Matthew L.M. Fletcher, *The Necessity of the Indian Child Welfare Act*, THE ATLANTIC (Jan. 20, 2020), https://www.theatlantic.com/ideas/archive/2020/01/fifth-circuit-icwa/605167/ [https://perma.cc/7SB3-23K9] ("ICWA was passed in 1978, in an effort to put an end to the long history of states forcibly placing Native children with white families or sending Native children to abusive boarding schools."); *Indian Adoption Project*, THE ADOPTION HISTORY PROJECT, https://pages.uoregon.edu/adoption/topics/IAP.html [https://perma.cc/R4UP-PXGZ] (describing the Indian Adoption Project, which was administered by the Child Welfare League of America and funded by a federal contract from the Bureau of Indian Affairs and the U.S. Children's Bureau); *see also* Ranjani Chakraborty, *How the US Stole Thousands of Native American Children*, at 2:31–2:50 YOUTUBE (Oct. 14, 2019), https://www.youtube.com/watch?v=UGqWRyBCHhw [https://perma.cc/G77P-BAJT] ("What started there at the Carlisle Indian Industrial School was nothing short of genocide disguised as American education."); Larry EchoHawk & Tessa Meyer Santiago, *What Indian Tribes Can Do to Combat Child Sexual Abuse*, 4 TRIBAL L.J. 1, 4 (2003) ("This family breakdown is partially due to the federal government's long lasting policy of placing Indian children in boarding schools where parental modeling was non-existent and was in fact replaced by newly learned dysfunctional behaviors such as sexual abuse and physical punishment.").

254. Solem v. Bartlett, 465 U.S. 463, 480 (1984) ("Few homesteaders perfected claims on the lands, due perhaps in part to the price of the land but probably more importantly to the fact that the opened area was much less fertile than the lands in southern South Dakota opened by other surplus land Acts.").

was diminished through "death by a thousand cuts."[255] Thus, Oklahoma emphasized the land's absence of "Indian character." Oklahoma asserted Indian lands cannot be home to industries like "aerospace, healthcare, technology, manufacturing, and transportation."[256] In fact, Oklahoma simply pasted an image of the Tulsa skyline in its brief to contend that skyscrapers could not possibly exist on reservation lands.[257] Oklahoma also pointed out over 90% of the current inhabitants of the lands guaranteed to the Creek are non-Indians.[258] Ultimately, five Justices rejected this line of reasoning and held the Creek Reservation remains intact.[259]

III. How Things Really Were

Federal Indian law and policy remain steeped in history.[260] Contemporary lawyers and policymakers frequently cite court decisions and treaties from more than a century ago.[261] In referencing these documents, the racism is impossible to miss,[262] but seldom are the factual statements in court cases questioned. Rather, the factual depictions are usually blindly accepted.[263] To this day, most people believe all Indians were simple, egalitarian, hunter-gatherers prior to European contact.[264] Nothing could be further from the truth.

Although the jurisprudence insists Indians were hunter-gatherers, Indians were adroit farmers and consumed primarily plant-based diets before 1492.[265] Indeed, Indians had a thorough understanding of plant

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255. Brief for Petitioner at 52, Murphy v. Royal, 875 F.3d 896, 903 (10th Cir. 2017), *aff'd sub nom*. Sharp v. Murphy, 140 S. Ct. 2412 (2020).

256. *Id.* at 15.

257. *Id.* at 3.

258. *Id.* at 15.

259. McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020) ("Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law. To hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right.").

260. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 13–14 (2009).

261. Crepelle, *Lies*, *Damn Lies*, *supra* note 23, at 555.

262. *Id.* at pt. III, VI.

263. *Id.* at 559, 569.

264. *See generally* Crepelle, *Lies*, *Damn Lies*, *supra* note 23.

265. WEATHERFORD, *supra* note 33, at 122 ("Indians hunted these animals and they traded the meat and fat, but this was only a minor part of the Indian's diet except in the few areas where farming was not practical."); Crepelle, *Decolonizing*, *supra* note 120, at 416 ("Also contrary to popular belief, most Indians subsistence was not chiefly drawn from the forest; rather, most tribes sustained themselves primarily through agriculture.").

genetics that enabled them to create an incredible array of crops.[266] Indians created corn from wild grasses.[267] Corn has been so thoroughly engineered that it cannot grow without human intervention.[268] Indigenous plant breeding was a result of Indian farmers carefully selecting each seed they planted. As a result, Indians were able to produce diversity within a single species of plant with comparative advantages for different circumstances.[269] For example, Indians would grow particular species of "wild" rice in different lakes and ponds.[270] Indians also developed agricultural techniques to maximize crop production, such as growing corn, beans, and squash together.[271]

Agricultural tribes recognized private property rights in land. Indians possessed property rights to the land they farmed,[272] and some tribes used stones to denote the borders of an individual's farmland.[273] Individual Indians also privately owned the irrigation systems they dug to water their crops as well as the storehouses they built for their harvest.[274] In addition to farmland, Indians owned other land improvements,[275]

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266. WEATHERFORD, *supra* note 33, at 114 ("Without question the Indians were the world's greatest plant breeders . . . .").

267. Larry Hilaire, *Corn: An American Native*, 22 SPANNING THE GAP (2000), http://npshistory.com/publications/dewa/spanning-the-gap/v22-1-2.pdf [https://perma.cc/W7BF-UEE2] ("Native Americans probably bred the first corn from wild grasses, and crossed high-yielding plants to make hybrids"); *Native American History of Corn*, NATIVETECH (1994), http://www.nativetech.org/cornhusk/cornhusk.html [https://perma.cc/YBV9-XGJ5] ("Over a period of thousands of years, Native Americans purposefully transformed maize through special cultivation techniques.").

268. WEATHERFORD, *supra* note 33, at 110 ("Consequently, corn never grows wild; it can survive only under human care.").

269. *Id.* at 109.

270. *Id.* at 99–100.

271. *Id.* at 107.

272. Bobroff, *Indian Law in Property*, *supra* note 49, at 534 ("Like many native societies in the Americas, Indians in early New England recognized exclusive rights in land."); Crepelle & Block, *Property Rights*, *supra* note 123, at 337 ("Individual Amerindians had possessory rights to specific plots of land and were free to cultivate their property as they saw fit.").

273. Eric Alston et al., *The Chronic Uncertainty of American Indian Property Rights*, 17 J. INST. ECON. 473, 479 (2021).

274. Crepelle, *Decolonizing*, *supra* note 120, at 418 ("Rights to land improvements, such as storehouses for crops and access to irrigation systems, were held individually.").

275. Crepelle & Block, *Property Rights*, *supra* note 123, at 337 ("Many tribes issued fishing rights; thus, individuals and families of Indians owned specific fishing sites.").

including fishing platforms[276] and clam gardens.[277] Since the property rights belonged to the individual, Indians could also sell and rent their land.[278] Tribes even recognized trespass actions.[279] Nomadic, non-agricultural tribes also recognized individual property rights in land that had been cultivated.[280]

The majority of tribes were not nomadic but lived in permanent towns.[281] Some tribes were "semi-nomadic," meaning they would change locations based upon seasonal events,[282] much like modern-day New Englanders migrating to Arizona in the winter.[283] Some of these indigenous establishments, like Cahokia near present-day St. Louis, Missouri, were much larger than the major European cities of their day.[284] In addition to substantial populations, Indians built massive structures like Monks Mound

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276. Robert J. Miller, *Sovereign Resilience: Reviving Private-Sector Economic Institutions in Indian Country*, 2018 BYU L. REV. 1331, 1344 (2019) [hereinafter Miller, *Sovereign Resilience*] ("Columbia River salmon fishing sites of man-made wooden platforms or well-located rocks were individually and family-owned properties that were passed down by established inheritance principles.").

277. Terry Anderson & Dominic Parker, *Un-American Reservations*, PROP. & ENV'T RSCH. CTR. (Feb. 24, 2011), https://www.perc.org/2011/02/24/un-american-reservations/ [https://perma.cc/M9DG-KHS8] ("They also had property rights to "clam gardens" created by removing rocks on sandy beaches to make more room for clams.").

278. Bruce L. Benson, *An Evolutionary Contractarian View of Primitive Law: The Institutions and Incentives Arising Under Customary Indian Law*, 5 REV. OF AUSTRIAN ECON. 41, 51 (1991) [hereinafter Benson, *Primitive Law*] ("However, he could sell a temporary right of use to a second party if he wished."); Crepelle & Block, *Property Rights*, *supra* note 123, at 338 (describing various Amerindian private property regimes).

279. Benson, *Primitive Law*, *supra* note 278, at 53–54 (discussing a feud over use of privately beachfront property among the Yurok).

280. Bobroff, *Retelling Allotment*, *supra* note 97, at 1573 ("Societies whose members ranged over vast territories were the least likely to recognize property rights in land, although even these tribes recognized property rights in cultivated lands.").

281. Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 767–68 (2001) [hereinafter Miller, *Economic Development*] ("At the time of contact with Europeans, the majority of Indians lived permanently or semi-permanently in small towns and villages and primarily supported themselves through farming . . . . [I]n the eleventh through the thirteenth centuries, some American Indian towns were larger and controlled by more sophisticated societies than European countries possessed . . . .").

282. ROBERT J. MILLER, RESERVATION "CAPITALISM": ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 12 (2013) ("Even tribal groups that might be considered nomadic followed "seasonal rounds" in which they moved to identical locations year after year to utilize their food sources.").

283. *See generally*, Kevin E. McHugh & Robert C. Mings, *On the Road Again: Seasonal Migration to a Sunbelt Metropolis*, 12 URB. GEOGRAPHY 1 (1991) (explaining that seasonal migration to the sunbelt has emerged in America using Arizona as a case study).

284. Owen Jarus, *Cahokia: North America's First City*, LIVESCIENCE (Jan. 12, 2018), https://www.livescience.com/22737-cahokia.html [https://perma.cc/U7UY-SM3H].

at Cahokia which was bigger than the Great Pyramids of Egypt. In fact, Pueblo Bonito, built by the Chacoan society circa 1000 CE, was the largest apartment building in the world until 1882.[285] These immense cities were inhabited by people born in the area but also immigrants from distant regions.[286] Immigrants, and sometimes entire tribes, could acquire citizenship in their new homeland.[287] Thus, a high percentage of the Americas' indigenous inhabitants were multilingual.[288]

Considerable population centers were possible because tribes had highly efficient economic systems. While tribes produced food surpluses,[289] commerce consisted of much more than victuals. Indians traded manufactured goods, like pottery and weapons,[290] as well as commodities such as salt.[291] Goods were obtained through barter but also purchased using indigenous currencies including wampum, dentalia shells, turquoise,[292] and feathers.[293] Centralized populations allowed individual

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285. John W. Ragsdale, Jr., *The Rise and Fall of the Chacoan State*, 64 UMKC L. REV. 485, 495 (1996) ("The impressive number of contiguous rooms and floors in these great houses prompted the observation by Neil Judd, an archeological pioneer at Chaco, that Pueblo Bonito was the largest apartment building in the world until a larger one, the Spanish Flats, was built in New York in 1882.").

286. Jarus, *supra* note 284 ("Recent research shows that many of the people who lived at Cahokia were immigrants who came from across the Midwest, possibly traveling from as far away as the Great Lakes and Gulf Coast, a study of their teeth shows.").

287. WEATHERFORD, *supra* note 33, at 177–78; Crepelle, *Standing Rock in the Swamp*, *supra* note 130, at 166 (describing how Indian tribes are nations, not just racial groups); *Iroquois*, ENCYCLOPEDIA.COM (updated Apr. 7, 2021), https://www.encyclopedia.com/history/united-states-and-canada/north-american-indigenous-peoples/iroquoian [https://perma.cc/8F4S-RA75] ("By that time, the Iroquois had absorbed many native refugees, both individually and as whole nations.").

288. Crepelle, *Standing Rock in the Swamp*, *supra* note 130, at 172 ("The Houma certainly would have spoken Mobilian as well as Choctaw, Chickasaw, and other languages used by tribes throughout the southeastern United States.").

289. Crepelle & Block, *Property Rights*, *supra* note 123, at 316 ("Indeed, American Indians had surpluses of food as they produced enough in four months to feed themselves for a year.").

290. WEATHERFORD, *supra* note 32, at 298.

291. *Historic Importance of Salt*, LA. DEP'T OF CULTURE, RECREATION, & TOURISM, ARCHAEOLOGY, https://www.peachstatearchaeologicalsociety.org/index.php/31-primitive-skills/434-salt-usage-by-native-americans-in-the-southeast [https://perma.cc/H7KT-D9FT] ("Similarly, when [the Spanish explorer Hernando DeSoto] was among the Capaha in the Lower Mississippi Valley, he met some Indian merchants who were traveling throughout the various provinces selling salt and other merchandise.").

292. Miller, *Sovereign Resilience*, *supra* note 276, at 1354.

293. Saba Naseem, *The Evolution of Money, from Feathers to Credit Cards*, SMITHSONIAN MAG. (July 15, 2015), https://www.smithsonianmag.com/smithsonian-institution/evolution-money-feathers-credit-cards-180955602/

Indians to specialize in occupations,[294] including physicians who were highly compensated for their services.[295] In fact, some entire tribes specialized in the manufacture of particular items.[296] Some tribes and individuals earned their livelihoods solely by acting as middlemen in commercial exchanges.[297]

Indigenous legal and governance institutions made cities with thriving economies possible. Tribes had a variety of governance structures, including theocracies,[298] monarchies,[299] and confederacies.[300] Regardless of

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[https://perma.cc/8AGE-DJUJ] ("It was illegal to kill the bird, but its feathers were once used as currency, usually to purchase gold.").

294. Crepelle, *Decolonizing*, *supra* note 120, at 422 ("Individual Indians would specialize in their fields of work including horse training, manufacturing, and medicine.").

295. JOHN REED SWANTON, INDIAN TRIBES OF THE LOWER MISSISSIPPI VALLEY AND ADJACENT COAST OF THE GULF OF MEXICO 179 (2011) [hereinafter SWANTON, INDIAN TRIBES] (quoting a French historian Charlevoix, "The jugglers or doctors of the Natchez pretty much resemble those of Canada, and treat their patients much after the same manner. They are well paid when the patient recovers; but if he happens to die it often costs them their lives."); Ray Baldwin Lewis, *The Medicine Man, Navajo Culture*, NAVAJO TOURISM DEP'T, https://www.discovernavajo.com/navajo-culture.aspx [https://perma.cc/DZU3-3DUW] ("The medicine man is well paid for his services.").

296. GEORGE T. HUNT, THE WARS OF THE IROQUOIS: A STUDY IN INTERTRIBAL TRADE RELATIONS 18 (1978) [hereinafter HUNT, THE WARS OF THE IROQUOIS] ("There were evidently tribes who did nothing but manufacture even in that early day . . . ."); JOHN C. EWERS, THE INDIAN TRADE OF THE UPPER MISSOURI BEFORE LEWIS AND CLARK: AN INTERPRETATION 435 (1954) [hereinafter EWERS, INDIAN TRADE], https://archives.yvl.org/handle/20.500.11867/15073 [https://perma.cc/MU7W-WBTT] ("The aboriginal pattern of trade must have had the effect of intensifying the labors of the nomads and the horticulturalists in their own specialties.").

297. Miller, *Sovereign Resilience*, *supra* note 276, at 1354 ("Many Indians and tribal governments also understood the economic value of gaining monopolies, controlling trade routes, and becoming the middlemen in commercial transactions."); EWERS, INDIAN TRADE, *supra* note 295, at 440 (noting Indians acquired items solely for the purpose of trading them).

298. Florence M. Hawley, *Pueblo Social Organization as a Lead to Pueblo History,* 29 AM. ANTHROPOLOGIST 504, 508 (1937) ("The Pueblos, accustomed to a religious government, obliged the Spaniards as best they could by retaining their own native system for actual government and by acquiring a set of secular officers to deal with outsiders and to act as an executive arm of the religious group."); David E. Sahr, *Native American Governments in Today's Curriculum*, NAT'L COUNCIL FOR SOC. STUD., http://www.socialstudies.org/sites/default/files/publications/se/6106/610601.html [https://perma.cc/EA9P-ZM8G] ("Pueblo society was (and is) a theocracy in the truest sense of the word, with no separation of religion from government.").

299. *Natchez People*, BRITANNICA, https://www.britannica.com/topic/Natchez-people (Apr. 19, 2007) (on file with the *Columbia Human Rights Law Review*) ("The heads of villages also claimed descent from the Sun, and the monarch was referred to as the Great Sun.").

300. *Powhatan, North American Indian Confederacy,* BRITANNICA (Mar. 29, 2007), https://www.britannica.com/topic/Powhatan-North-American-Indian-confederacy (on

the governance structure, Indians typically enjoyed a high degree of "personal liberty," [301] particularly compared to their European counterparts.[302] Consequently, individual rights were usually enforced through private actions. Tribes enforced contracts [303] and protected personal property rights.[304] Respect for individual commercial rights enabled Indians to offer warranties on goods,[305] purchase items on credit, and charge interest.[306]

Indigenous legal institutions facilitated long-distance commerce between distant Indian nations.[307] There were no pack animals in the Americas prior to European contact, so all land-based trade was done on foot.[308] Tribes developed road networks to facilitate trade,[309] and many of

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file with the *Columbia Human Rights Law Review*); *Iroquois Confederacy*, BRITANNICA, https://www.britannica.com/topic/Iroquois-Confederacy (on file with the *Columbia Human Rights Law Review*).

301. WEATHERFORD, *supra* note 33, at 157 ("The most consistent theme in the descriptions penned about the New World was amazement at the Indians' personal liberty . . . ."); Crepelle, *Standing Rock in the Swamp*, *supra* note 130, at 169–70 (noting that many tribes had "consensus-based governments").

302. WEATHERFORD, *supra* note 33, at 157–64.

303. Bruce L. Benson, *Enforcement of Private Property Rights in Primitive Societies: Law Without Government*, 9 J. LIBERTARIAN STUD. 1, 12 (1989) ("In the process, the arrangements may have been improved upon and become more formal (contractual) and effective."); Crepelle, *Decolonizing*, *supra* note 120, at 419 ("Tribes also developed laws to facilitate commerce that among other things, enabled individuals to purchase items on credit."); Ragsdale, *supra* note 285, at 542 ("The legal tools chosen and employed by the sovereign Chacoan state included, inferentially, a form of promissory exchange or contract.").

304. Benson, *Primitive Law*, *supra* note 278, at 50 ("If someone used a canoe without permission, or in some way misused or harmed the canoe, the owner could collect damages."); Crepelle, *Decolonizing*, *supra* note 120, at 422 (giving examples about the economic activities of Indians); Robert H. Lowie, *Incorporeal Property in Primitive Society*, 37 YALE L.J. 551, 555 (1928) ("First of all, the buyers obtained the right to perform a specific dance . . . .").

305. Miller, *Sovereign Resilience*, *supra* note 276, at 1353–54 ("Some Indians even gave guarantees on goods.").

306. *Id.* at 1354 ("Some native peoples extended credit, engaged in lending currencies and goods, and charged interest on these loans.").

307. Justice Emeritus Raymond Austin, Navajo Nation Sup. Ct., *"All Roads Lead to Chaco Canyon" Conference* (Mar. 23, 2018), https://www.team-osa.com/all-roads-lead-to-chaco-canyon [https://perma.cc/RK7D-VHYG] ("And so it becomes clear that at Chaco Canyon, the ancestors knew how to do international trade and those transactions were governed by a rule of law called relationships.").

308. Miller, *Economic Development*, *supra* note 281, at 788 ("In fact, the dog was the only pack animal Indians had until Spanish horses spread across North America."); Tom Magnuson, *Trails and Trading Routes*, NCPEDIA (Jan. 1, 2007) [hereinafter Magnuson, *Trails and Trading Routes*], https://www.ncpedia.org/history/colonial/trade-routes [https://perma.cc/8NRP-Q4SN] ("Men, women, boys, and girls all served as porters,

these paths serve as the course for the United States' present highway system.[310] Without any beasts of burden, Indians relied extensively on waterways for trade.[311] Indians developed a variety of boats that were well-suited for the Americas' waterways,[312] and some indigenous watercraft could carry several tons of goods to markets.[313] Moreover, tribes dug canals to further expedite travel and trade.[314]

Trade in the pre-contact Americas was often a distant affair.[315] Quinoa from the Southeastern United States was traded all the way up to Canada,[316] and copper from Lake Superior flowed south to Florida.[317] Shells

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because the Indians around the South did not have draft animals like horses or mules."); *Native Americans, Prehistoric, Woodland, Economy, Trade,* ILL. ST. MUSEUM, http://www.museum.state.il.us/muslink/nat_amer/pre/htmls/w_trade.html [https://perma.cc/7DP6-8CL6] (Sept. 26, 2021) ("Like their ancestors, Woodland people walked everywhere they went, except for trips along streams and rivers when they may have used dugout canoes.").

309. Blake De Pastino, *Ceremonial 'Axis' Road Discovered in Heart of Ancient City of Cahokia*, W. DIGS (last updated Dec. 31, 2015), http://westerndigs.org/ceremonial-axis-road-discovered-in-heart-of-ancient-city-of-cahokia/ [https://perma.cc/W99U-YYCV] ("The road, dubbed the Rattlesnake Causeway, is an elevated embankment about 18 meters wide that stretches from Cahokia's Grand Plaza south through the center of the city . . . ."); Magnuson, *Trails and Trading Routes*, *supra* note 308 ("Long before Europeans showed up, American Indians maintained extensive networks of trading paths."); *Trade Routes in the Americas Before Columbus, in* TRADE IN THE AGE OF DISCOVERY 166–67, HIST. HAVEN [hereinafter *Trade Routes*], http://www.historyhaven.com/documents/trade_americas.pdf [https://perma.cc/7DLS-9STN].

310. WEATHERFORD, *supra* note 33, at 247.

311. *Trade Routes*, *supra* note 309 ("The Mississippi, Amazon and other major rivers served as important arteries for commerce and cultural exchange.").

312. WEATHERFORD, *supra* note 33, at 237–39.

313. *See id.* at 238 ("The Mayas hauled trading goods in their canoes up and down the coast of the Yucatan and Central America, and around the Gulf of Mexico possibly as far north as the Mississippi River").

314. Christopher B. Rodning, *Water Travel and Mississippian Settlement at Bottle Creek*, *in* BOTTLE CREEK: A PENSACOLA CULTURE SITE IN SOUTH ALABAMA 194, 198 (Ian W. Brown ed., 2003) ("Many of these native canals demonstrate considerable engineering expertise in planning and maintenance.").

315. Michael E. Smith, *Trading Patterns, Ancient American*, *in* BERKSHIRE ENCYCLOPEDIA OF WORLD HISTORY 2533, 2534 (2d ed. 2010), http://www.public.asu.edu/~mesmith9/1-CompleteSet/MES-10-TradeEncyc.pdf [https://perma.cc/WH3C-TFV8] ("Obsidian found at sites in eastern North America and marine shell ornaments at sites far inland show trade over long distances.").

316. Jason Daley, *3000-Year-Old Quinoa Found in Ontario*, SMITHSONIAN MAG. (Jan. 23, 2019), https://www.smithsonianmag.com/smart-news/3000-year-old-quinoa-found-ontario-180971330/ [https://perma.cc/42A4-HQNH].

317. HUNT, THE WARS OF THE IROQUOIS, *supra* note 296, at 17 ("Fontaneda found copper, probably from Lake Superior, in Florida.").

and shark teeth from the Pacific Ocean were traded in modern Missouri.[318] Central American cacao beans reached present-day Santa Fe, New Mexico.[319] The Inuit in Alaska and Siberia exchanged goods with tribes along Washington's coast.[320] The Huron routinely canoed over a thousand miles from Huronia in order to trade.[321] Frequent commerce between culturally unrelated distant peoples inspired tribes to develop trade languages.[322]

Trade served many purposes in the early Americas. Some Indians aspired to amass wealth.[323] A surplus of resources enabled an individual to use her time for leisure or however else she pleased.[324] Social norms mandated people distribute their excess resources to those in need, and this enabled a system of reciprocal giving.[325] Reciprocity also played a role in trade; thus, Indians used trade as a form of diplomacy.[326] Furthermore,

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318. *Intertribal Trade*, TRAILTRIBES.ORG, https://trailtribes.org/knife river/intertribal-trade.htm [https://perma.cc/XWY2-QCJJ] (Sept. 26, 2021) ("As early as A.D. 350, Dentalium shells from the Pacific Ocean found their way to a Caddoan village on the Missouri, known to archaeologists as the Swift Bird Site."); Laura Kozuch, *Greater Cahokia Archaeology: 21st Century Inquiries into Ancient America*, UNIV. ILL. http://www.cahokia.illinois.edu/investigators/kozuch.html [https://perma.cc/8BYZ-HT3U]. (Sept. 26, 2021).

319. Wynne Parry, *Sweet Trading: Chocolate May Have Linked Prehistoric Civilizations*, LIVESCIENCE (Apr. 1, 2011), https://www.livescience.com/13533-prehistoric-chocolate-trade-cacao-chaco-canyon-puebloans.html [https://perma.cc/83D4-XVD9].

320. Jay Miller, *Alaskan Tlingit and Tsimshian*, AM. INDIANS PAC. NW. COLLECTION, U. WASH. LIBR., https://content.lib.washington.edu/aipnw/miller1.html [https://perma.cc/L75M-D745] ("More exotic items, like copper and special woods, were even traded from Eskimos (Inuit) in Siberia and Alaska, who received dentalia (tusk shell) from Vancouver Island in exchange.").

321. HUNT, THE WARS OF THE IROQUOIS, *supra* note 296, at 61 ("The Huron expeditions to this country, more than a thousand miles from Huronia, were so regular that priests in Huronia used them for a postal service, the letter being delivered to Three Rivers from the north.").

322. Crepelle, *Decolonizing*, *supra* note 120, at 418 ("Tribes developed trade languages in order to enable exchange with diverse peoples.").

323. Crepelle & Block, *Property Rights*, *supra* note 123, at 339 ("Individual Indians hoped to excel financially.").

324. *Id.* at 340 ("An Amerindian's riches could be used for leisure or to generate more wealth.").

325. E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS 300 (2006); Adam Crepelle, *The Tribal Per Capita Payment Conundrum: Governance, Culture, and Incentives*, 56 GONZ. L. REV. 483, 508 (2021).

326. *Indigenous Trade: The Northeast*, ENCYCLOPEDIA.COM, https://www.encyclopedia.com/history/news-wires-white-papers-and-books/indigenous-trade-northeast (last updated Mar. 14, 2021) [https://perma.cc/3QD6-LL9R] ("The diplomatic nature of trade and its basis in the Indians' system of reciprocal social relations powerfully shaped the way it was conducted.").

wealth enabled charitable endeavors and was used to acquire status through ceremonies like potlatches.[327]

When Europeans arrived, Indians were happy to trade.[328] Indeed, Indians eagerly embraced European goods.[329] For example, some tribes had become so accustomed to hunting with firearms that they completely lost the capacity to produce bows and arrows by the early 1700s.[330] Acquisition of the horse transformed many tribes such as the Comanche, who became master horse breeders[331] and mounted warriors.[332] The Comanche exploited their equestrian abilities to acquire extreme wealth.[333] Sheep brought by the Spanish became a staple of Navajo culture.[334] The Creek rapidly adopted European foods and technologies.[335] Tribes even modified their legal regimes and economies to account for heightened resource depletion brought about by the new markets of Europe.[336] The Cherokee,

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327. Crepelle & Block, *Property Rights*, *supra* note 123, at 341 ("Tribal potlatches were elaborate ceremonies where an individual would give away all his wealth.").

328. Crepelle, *Tribal Law's Indian Law Problem*, *supra* note 4 (manuscript at 6) ("Tribes well understood market forces, so tribes had no difficulty trading with newly arrived Europeans.").

329. Crepelle, *Decolonizing*, *supra* note 120, at 421 ("Tribes embraced the opportunity to trade with Europeans, and the ability to obtain European wares was a primary reason that tribes allowed the fledging European outposts to exist.").

330. DAVID J. SILVERMAN, THUNDERSTICKS: FIREARMS AND THE VIOLENT TRANSFORMATION OF NATIVE AMERICA 9 (2016) ("It only took a generation or two before Indians claimed that their young people had become so accustomed to hunting with these weapons, and so out of practice at using and manufacturing bows and arrows, that they would starve without ammunition and gunsmithing services."); Donald E. Worcester & Thomas F. Schliz, *The Spread of Firearms Among the Indians on the Anglo-French Frontiers*, 8 AM. INDIAN Q. 103, 112–13 (1984) ("The northern Crees soon came to rely on English firearms so completely that by 1716 they had entirely abandoned the use of bows and arrows.").

331. S.C. GWYNNE, EMPIRE OF THE SUMMER MOON: QUANAH PARKER AND THE RISE AND FALL OF THE COMANCHES, THE MOST POWERFUL INDIAN TRIBE IN AMERICAN HISTORY 33 (2011) ("The Comanches, as it turned out, were geniuses at anything to do with horses: breeding, breaking, selling, and riding.").

332. *Id.* at 32 ("Colonel Richard Dodge, whose expedition made early contact with Comanches, believed them to be the finest light cavalry in the world . . . .").

333. *Id.* ("It was not uncommon for a Comanche warrior to have one hundred to two hundred mounts, or for a chief to have fifteen hundred. (A Sioux chief might have forty horses, by comparison).").

334. Hal Cannon, *Sacred Sheep Revive Navajo Tradition, for Now*, NPR (June 13, 2010), https://www.npr.org/templates/story/story.php?storyId=127797442 [https://perma.cc/9HVQ-U75T].

335. WEATHERFORD, *supra* note 33, at 155.

336. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 352–53 (1967); Miller, *Economic Development*, *supra* note 281, at 771 ("Other tribes that became heavily involved in the European fur trade also developed individual private property rights in valuable rivers and streams to control overharvesting.").

subject of two foundational Indian law cases, "had been a farming people for more than a thousand years;"[337] however, Cherokee increased their hunting efforts specifically in response to European market demands.[338]

Europeans and American settlers well knew Indians owned land, farmed, and lived in well-governed societies. In 1643, Roger Williams wrote of Indians owning and selling land.[339] French settlers of what would become the state of Louisiana noted the Houma males seldom hunted because of their exceedingly productive agriculture in 1700.[340] Concerned about Haudenosaunee military might during the Revolutionary War, General George Washington stated, "It will be essential to ruin their crops now in the ground and prevent their planting more."[341] This order would be ludicrous if Washington did not believe the Indians were agricultural. President Thomas Jefferson knew of the Great Mounds at Cahokia.[342] Chief Justice John Marshall knew Indians were not wandering nomads either.[343] Americans chose to ignore the truth about Indians because it would have eliminated the "justification" for usurping Indian rights.[344]

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337. *The Cherokee Prior to the Trail of Tears*, NATIVE AM. NETROOTS (Apr. 13, 2010), http://nativeamericannetroots.net/diary/470 [https://perma.cc/82ZM-6W4B].

338. Lee Sultzman, *Cherokee History, Part One*, TOLATSGA.ORG (revised Feb. 28, 1996), http://www.tolatsga.org/Cherokee1.html [https://perma.cc/NP6U-DEKA] ("A treaty with South Carolina followed in 1684 beginning a steady trade in deerskins and Indian slaves. Although contact was limited initially to white traders, important changes began to occur within the Cherokee as a result. Leadership shifted from priest to warrior, and warriors became hunters for profit.").

339. ROGER WILLIAMS, A KEY INTO THE LANGUAGE OF AMERICA, OR, AN HELP TO THE LANGUAGE OF THE NATIVES IN THAT PART OF AMERICA CALLED NEW-ENGLAND 93 (1643).

340. SWANTON, INDIAN TRIBES, *supra* note 295, at 289 (quoting the journal of Gravier discussing the Houma: "As they are satisfied with their squashes and their corn, of which they have an abundance, they are indolent and hardly ever hunt.").

341. *US Presidents–Hanadagá•yas,* ONONDAGA NATION PEOPLE OF THE HILLS, https://www.onondaganation.org/history/us-presidents-hanadagayas/ [https://perma.cc/8BFK-F5T3].

342. Glenn Hodges, *America's Forgotten City: Cahokia*, NAT'L GEOGRAPHIC (July 2014), http://www.mrtredinnick.com/uploads/7/2/1/5/7215292/reading_2.1_-_americas_forgotten_city_-_cahokia.pdf [https://perma.cc/YM65-2WRX] ("He [Henry Brackenridge, lawyer and amateur historian] complained of this in a letter to his friend former President Thomas Jefferson, and with friends in such high places, word of Cahokia did eventually get around.").

343. Crepelle & Block, *Property Rights*, *supra* note 123, at 336 ("For example, Chief Justice John Marshall justified the confiscation of Indian land by asserting they were nomadic and nonagricultural in *Johnson v. M'Intosh* despite the fact that he knew Indians were farmers.").

344. Hodges, *supra* note 342 ("[The] Indian Removal Act of 1830, which ordered the relocation of eastern Indians to land west of the Mississippi, was premised on the idea that Indians were nomadic savages who couldn't make good use of land anyway. Evidence of an ancient Indian city . . . would have mucked up the story line.").

IV. Unlocking the Time Trap

Tribes have had their rights circumscribed by fallacious stereotypes for centuries. The trust relationship is rooted in the belief that tribes are non-commercial savages too incompetent to manage their own affairs.[345] Thus, tribes were considered wards when the trust was formed.[346] As a result, tribes have been subjected to unparalleled control by their federal guardian.[347] However, the ward premise implies tribes would eventually be able to take care of themselves.[348] For thousands of years, tribes were self-sufficient. Early European nations and the United States recognized this by entering treaties with tribes. The time has arrived to revisit the foundations and meaning of the trust relationship.

Tribes have been pushing for an overhaul of the trust relationship for years.[349] Tribes want to be freed from the byzantine federal regulations that only apply to Indian country.[350] Promoting tribal self-government is well within the parameters of Congress' trust relationship with tribes;[351] moreover, tribal self-determination has been a tremendously successful federal policy.[352] Further empowering tribes is necessary if tribes are to shape their own cultures and build their economies.[353] Transforming the trust relationship also requires courts to revisit Indian history and the assumptions underpinning federal Indian law jurisprudence.

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345. Crepelle, *Lies, Damn Lies*, *supra* note 23, at 548.

346. *Id*.

347. Felix Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy,* 62 YALE L.J. 348, 352 (1953) ("But these rights are limited, in practice, by more than 2200 regulations now in force issued by the Commissioner of Indian Affairs.").

348. Cherokee Nation. v. United States, 21 Cl. Ct. 565, 573 (1990).

349. Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, *We Need Protection from Our Protectors: The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENVTL. & ADMIN. L. 397, 451 (2017) ("In particular, many in Indian country have long urged that Congress should enact legislation to reform and modernize the federal trust responsibility.").

350. Crepelle, *How Federal Indian Law Prevents*, *supra* note 153, at 36.

351. *See* Tribal Self-Governance Act of 1994, H. R. 3508, 103d Cong. (1994) (amending the Indian Self-Determination and Education Assistance Act to enable the Secretary of Interior to negotiate and enter into annual written funding agreements with participating tribal governments.); Rey-Bear & Fletcher, *supra* note 349, at 410 ("Moreover, Congress has recognized that there is no conflict between the federal trust responsibility and tribal self-determination.").

352. Joseph Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self Rule* 1 (Native Issues Res. Symp., Harv. U., Working Paper No. RWP04-016, 2004).

353. Jeremy R. Fitzpatrick, *The Competent Ward*, 28 AM. INDIAN L. REV. 189, 195 (2003) ("The trust doctrine must be transformed in order for tribes to preserve their culture and provide resources to their members.").

A. Legislating a New Trust

To roll back the wardship-inspired laws and regulations that fetter tribal self-governance, Congress should enact legislation affirming tribes' right to govern themselves—a trust modernization. Most of the laws impeding tribal self-government are predicated on outright racist ideals, so they are of questionable constitutionality.[354] Additionally, the plenary power Congress purports to assert over Indian tribes because of their status as wards is highly suspect.[355] The federal government is one of limited, enumerated powers.[356] Yet the federal government micromanages the daily lives of the original Americans.[357] States, by contrast, have the Tenth Amendment to protect them from extreme federal oversight.[358] Tribes deserve the same.

Empowering tribal self-government occurs by ending the trust-based restrictions on tribal land and economies. However, ending the trust status of land does not mean privatizing tribal lands.[359] Ending the trust status should lock tribal lands perpetually under tribal jurisdiction; hence, tribes would be able to sell their land to a non-Indian without losing control

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354. Crepelle, *White Tape*, *supra* note 26, at 583–84.

355. United States v. Bryant, 136 S. Ct. 1954, 1968 (2016) (Thomas, J., concurring) ("Over a century later, *Kagama* endures as the foundation of this [plenary power] doctrine, and the Court has searched in vain for any valid constitutional justification for this unfettered power."); Adoptive Couple v. Baby Girl, 570 U.S. 637, 659 (2013) (Thomas, J., concurring) (same); United States v. Lara, 541 U.S. 193, 215 (2004) (Thomas, J., concurring) ("I cannot agree with the Court . . . that the Constitution grants to Congress plenary power to calibrate the 'metes and bounds of tribal sovereignty.'"); *see also* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1020–21 (2015) ("Early Americans . . . espoused legal theories similar to, but importantly distinct from, modern Indian law doctrines of exclusive and plenary federal power . . . . 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.").

356. THE FEDERALIST NO. 84 (Alexander Hamilton).

357. PEVAR, *supra* note 125, at 3 ("No other ethnic group is so heavily regulated."); Crepelle, *How Federal Indian Law Prevents*, *supra* note 153, at 721 ("[N]umerous federal regulations apply in Indian country that exist nowhere else in the United States."); Riley, *Property Rights*, *supra* note 162 ("We are the highest regulated race in the world.").

358. Although the Tenth Amendment presupposes a clear line between State and federal governance, federal authority since the New Deal has seemingly evolved into an overriding police power. *See* United States v. Lopez, 514 U.S. 549, 567–68 (1995) (admitting that Supreme Court precedents have sometimes blurred the "distinction between what is truly national and what is truly local.").

359. *See* Valerie Volcovici, *Trump Advisors Aim to Privatize Oil-Rich Indian Reservations,* REUTERS (Dec. 5, 2016, 3:23 AM), https://www.reuters.com/article/us-usa-trump-tribes-insight/trump-advisors-aim-to-privatize-oil-rich-indian-reservations-idUSKBN13U1B1 [https://perma.cc/CC68-3RCF] (regarding a proposal to privatize some Native American reservations).

of the land.[360] This preserves tribal land bases, so ending the trust does not mean allotment part two.[361] Additionally, trust land has been identified as a major obstacle to capital access in Indian country, which prevents private sector development.[362] This system allows Indians and tribes to use their land to access capital while maintaining sovereignty over the land.[363] Tribes should also be liberated from the complex federal regulations that only apply to Indian country. It is the tribes' land. The tribes should be able to control it.

Revising the trust relationship will leave the federal government with two roles in Indian country. One is funding Indian country. For years, the federal government has failed to allocate sufficient funds to Indian country, and this has created a severe infrastructure deficit.[364] Receiving

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360. Angelique EagleWoman (Wambdi A. WasteWin), *Tribal Nations and Tribalist Economics: The Historical and Contemporary Impacts of Intergenerational Material Poverty and Cultural Wealth Within the United States*, 49 WASHBURN L.J. 805, 823–24 (2010) ("Non-tribal members purchasing or leasing land within tribal jurisdictions would be able do so with the acknowledgement that the land will continue to be permanently subject to tribal law and regulation."); Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RES. J. 317, 363 (2006) ("Tribes should have the option of alienating land without thereby losing their authority over it. There are good reasons that Tribes might choose to alienate . . . ."); Jessica A. Shoemaker, *Complexity's Shadow: American Indian Property, Sovereignty, and the Future*, 115 MICH. L. REV. 487, 489 (2017) ("Characteristically, real property jurisdiction is territorial—meaning the law of the place where the property is located governs. If an Iowan purchases real property in Colorado, there is no question that Colorado governs that real property ownership.").

361. Singer, *supra* note 122, at 34 (noting tribes support trust land because it preserves tribal land bases).

362. Crepelle, *Decolonizing*, *supra* note 120, at 443.

363. Crepelle, *White Tape*, *supra* note 26, at 599; Morgan, *Curse*, *supra* note 162.

364. U.S. COMM'N ON C.R., BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS 169 (2018), https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf [https://perma.cc/ZZ74-AR9Z] ("[D]ue to impassible roads and a lack of public transportation options, Native Americans encounter issues traveling to and from a job, traveling to school, accessing health care and emergency services, and even accessing the ballot box, all of which create barriers to economic development and growth in Indian Country."); DEMOCRATIC STAFF OF THE H. COMM. ON NAT. RES., WATER DELAYED IS WATER DENIED: HOW CONGRESS HAS BLOCKED ACCESS TO WATER FOR NATIVE FAMILIES 1 (2016), http://blackfeetnation.com/wp-content/uploads/2016/10/House-NRC-Water-Report-Minority-10-10-16.pdf [https://perma.cc/S3U3-5L6N] ("According to data from the Indian Health Service (IHS), nearly half (48%) of all homes on tribal land lack access to adequate drinking water, sewage, or solid waste disposal facilities."); Seth Tupper, *Where Water Is Life, Many on the Pine Ridge Reservation Go Thirsty*, HIGH COUNTRY NEWS (May 27, 2019), https://www.hcn.org/articles/tribal-affairs-where-water-is-life-those-on-the-pine-ridge-reservation-go-thirsty [https://perma.cc/28PK-39LE] ("Historically, a dearth of water and related infrastructure have contributed to persistent poverty on the reservations.").

federal funds should not diminish tribal sovereignty any more than federal funds reduce state sovereignty or the sovereignty of foreign nations. Besides, the tribes negotiated for federal funds, and the United States acquiesced to the payments as the price of tribal lands in hundreds of treaties.[365] The financial assets that the United States currently holds on behalf of tribes should be transferred to tribes.[366] As Justice Hugo Black explained, "Great nations, like great men, should keep their word."[367]

The other federal duty is keeping states out of tribal affairs. States relinquished virtually all influence over Indian affairs in the Constitution.[368] Jurisprudence long ago set forth a clear rule that states had no power inside the borders of a reservation.[369] Over time, this principle has eroded.[370] Now, states regularly assert jurisdiction in Indian country, including assessing taxes on Indian country commerce despite providing no services to tribes.[371] The federal government must forbid states from infringing upon tribal sovereignty. Thus, the legislative reform of the trust should revert back to the original principle that state sovereignty ends where the

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365. Crepelle, *Decolonizing*, *supra* note 120, at 428–31.

366. *See We Excel, Native America Prospers*, BUREAU OF TR. FUNDS ADMIN., U.S. DEP'T OF INTERIOR, https://www.doi.gov/ost [https://perma.cc/963V-HYTR] ("We . . . have more than $5 billion under active day-to-day management and investment on behalf of Tribes and individuals.").

367. Fed. Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

368. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 62 (1996) ("If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause . . . . [T]he States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes."); United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 194 (1876) ("Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes, ---a power as broad and as free from restrictions as that to regulate commerce with foreign nations."); *id.* ("Accordingly, treaties have been made and laws passed separating Indian territory from that of the States, and providing that intercourse and trade with the Indians should be carried on solely under the authority of the United States."); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832).

369. *Worcester*, 31 U.S. at 520 ("[T]he laws of Georgia can have no force . . . but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.").

370. Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 257 (1992) ("The 'platonic notions of Indian sovereignty' that guided Chief Justice Marshall have, over time, lost their independent sway.").

371. *See* Adam Crepelle, *Taxes, Theft, and Indian Tribes: Seeking an Equitable Solution to State Taxation of Indian Country Commerce*, 122 W. VA. L. REV. 999, 1013 (2020) ("Ceding that QCV and Tulalip provide all essential services at QCV, the court stated Washington and Snohomish County also *assert* they provide services to QCV patrons.").

reservation begins. This helps simplify Indian country's regulatory and jurisdictional scheme, producing a healthier economic environment.[372]

Tribes have long histories of effective self-government.[373] Recognizing tribes' inherent right "to make their own laws and be ruled by them"[374] enables tribes to function as laboratories of democracy.[375] This furthers the constitutional principle of federalism;[376] federalism also happens to be an indigenous ideal.[377] When tribes are allowed the opportunity to self-govern, the evidence unequivocally shows tribes outperform the feds.[378] Tribal institutions sometimes even outperform state institutions.[379] Treating tribes as equal governments creates opportunities

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372. Crepelle, *How Federal Indian Law Prevents*, *supra* note 153, 730–38.

373. Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 6 (2014).

374. Williams v. Lee, 358 U.S. 217, 220 (1959).

375. *See* Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n, 576 U.S. 787, 817 (2015) ("'This Court has 'long recognized the role of the States as laboratories for devising solutions to difficult legal problems.'" (quoting Oregon v. ICE, 555 U.S. 160, 171 (2009))); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

376. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 150 (1996) (Souter, J., dissenting) ("For the adoption of the Constitution made them members of a novel federal system that sought to balance the States' exercise of some sovereign prerogatives delegated from their own people with the principle of a limited but centralizing federal supremacy.").

377. WEATHERFORD, *supra* note 33, at 177 ("The Indians invented [federalism] even though the United States patented it.").

378. Washburn, *supra* note 205 ("As tribal governmental powers have increased and tribes have entered contracts to perform more federal functions, tribal governments have proven more institutionally competent than the federal government in serving Indian people.").

379. *See, e.g.*, McCoy v. Salish Kootenai Coll., 334 F. Supp. 3d 1116, 1121 (D. Mont. 2018), *aff'd* 785 F. App'x. 414 (9th Cir. 2019) ("The College is the Tribes' sole tribal college, is accredited by the Northwest Accreditation Commission (NWCCU), and is recognized as a 'tribally controlled college' by the federal government."); Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Policy That Works* 12 (Harv. Kennedy Sch., Fac. Res., Working Paper No.10-043, 2010) (explaining how constitutional and judicial reform by the Citizen Potawatomi Nation in Oklahoma resulted in attracting "tens of millions of dollars of capital to the Nation's business enterprises and induced a neighboring non-Indian township to opt into the Potawatomi system and out of the State of Oklahoma system for its municipal court services."); QWULOOLT ESTUARY, A PROJECT OF THE TULALIP TRIBES, RESTORING 400 ACRES OF TIDAL MARSH IN THE SNOHOMISH RIVER DELTA 3, https://www.qwuloolt.org/Content/Documents/Qwuloolt-Estuary-Brochure.pdf [https://perma.cc/P9JA-YT5B] ("The Tulalip Tribes is leading the restoration of 400 acres of the Snohomish River

for productive partnerships between tribes and states[380]—partnerships that can benefit everyone.[381]

This level of self-government has not been available to tribes in over a century. Accordingly, tribes may be leery of jumping into this system, so tribes should have the opportunity to maintain the status quo or opt for a revised trust. A trust that treats tribes as actual governments and permits tribes to naturally adapt to social changes. A trust that recognizes tribal governments are not suspended in time but fully capable of functioning in the modern world.

B. Revisit Federal Indian Law Jurisprudence

Federal Indian law is largely judge-made,[382] and the common law was designed to evolve.[383] The common law's malleability helps foster a legal environment fertile for societal and economic innovation.[384] Similarly, the common law's pliability makes century-old precedent relevant to

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Delta."); Jen Rose Smith, *What One Court Case Could Mean for Tribal Sovereignty: A Conversation with Rebecca Nagle*, EDGE EFFECTS (updated Nov. 5, 2019), https://edgeeffects.net/rebecca-nagle/ [https://perma.cc/DGZ7-WTCA] (describing how the Muscogee (Creek) Nation stepped in to save "two hospitals and an outpatient rehabilitation facility . . . because they wanted not only their tribal citizens but also the non-Native residents in that area to still have access to an emergency room and rehabilitation services.").

380. Crepelle, *E-Commerce*, *supra* note 241 (manuscript at 41–42).

381. McGirt v. Oklahoma, 140 S. Ct. 2452, 2481 (2020) ("With the passage of time, Oklahoma and its Tribes have proven they can work successfully together as partners. Already, the State has negotiated hundreds of intergovernmental agreements with tribes, including many with the Creek.").

382. L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 810 (1996) (noting the major principles of federal Indian law are judge made).

383. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 471–72 (1826) (noting the common law is "not the product of the wisdom of some one man, or society of men, in any one age; but of the wisdom, counsel, experience, and observation, of many ages of wise and observing men"); ROBBINS COLLECTION, BERKELEY L., THE COMMON LAW AND CIVIL LAW TRADITIONS 1 (2018), https://www.law.berkeley.edu/wp-content/uploads/2017/11/CommonLawCivilLawTraditions.pdf [https://perma.cc/8G8G-B3GY] ("The precedents to be applied in the decision of each new case are determined by the presiding judge. As a result, judges have an enormous role in shaping American and British law.").

384. NADIA E. NEDZEL, THE RULE OF LAW, ECONOMIC DEVELOPMENT, AND CORPORATE GOVERNANCE: NEW THINKING IN POLITICAL ECONOMY 178–80 (2020); Jason Higbee & Frank A. Schmid, *Rule of Law and Economic Growth*, ECON. SYNOPSES (Aug. 2, 2004), https://files.stlouisfed.org/files/htdocs/publications/es/04/ES0419.pdf [https://perma.cc/42QQ-QU6D].

twenty-first century legal disputes.[385] Precedent is valuable because it provides litigants and society as a whole with a high degree of certainty as to their rights.[386] While centuries-old stereotypes have become thoroughly enmeshed in federal Indian law jurisprudence through the process of stare decisis,[387] revisiting federal Indian law should not be too much of a hassle. The precedent is patently racist; plus, the facts upon which the precedent relies are often overtly incorrect.[388] Moreover, the Supreme Court has long been willing to overturn precedent when new facts have come to light.[389] In a legal system premised upon discovering the truth,[390] Indians deserve to have their rights decided on reality rather than time-trapped tropes.

The judiciary recognizes that tribal rights are capable of evolving in some instances. Tribal fishing rights would be useless without modern fishing equipment;[391] thus, the Supreme Court has recognized tribal rights to fish with modern methods.[392] The Supreme Court uses modern methods to assess the quantity of water available to tribes[393] and holds tribes are

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385. Seo v. State, 109 N.E.3d 418, 440 (Ind. Ct. App. 2018) ("[T]he principles embodied in the Bill of Rights by our Founding Fathers are timeless . . . . [W]e apply these founding principles to modern technology and conclude that compelling Seo to unlock her iPhone . . . is constitutionally prohibited by the Fifth Amendment because doing so is a testimonial act."); *see* JEFFREY ROSEN ET AL., CONSTITUTION 3.0: FREEDOM AND TECHNOLOGICAL CHANGE 3 (Jeffrey Rosen & Benjamin Wittes, eds., 2011) ("To protect the same amount of privacy that the framers of the Fourth and Fifth Amendments intended to protect, [Justice] Brandeis concluded, it had become necessary to translate those amendments into the twentieth century . . . .").

386. BRANDON J. MURRILL, CONG. RSCH. SERV., THE SUPREME COURT'S OVERRULING OF CONSTITUTIONAL PRECEDENT 6–7 (2018).

387. Crepelle, *Lies, Damn Lies*, *supra* note 23, at 542–43, 555.

388. *Id.* at 556–58.

389. Murrill, *supra* note 386, at 6 ("During the tenure of Chief Justice John Marshall . . . , the Supreme Court combined a strong preference for adhering to precedent with a 'limited notion of error correction' when precedents had been eroded by subsequent decisions, were 'premised on an incomplete factual record,' or were clearly in error."); *see, e.g.*, Lawrence v. Texas, 539 U.S. 558, 573–78 (2003) (overruling prior precedent on the grounds that new facts, and facts disregarded by the original precedent's majority, undermine the prior precedent's "premise . . . that the claim put forward was insubstantial in our Western civilization.").

390. Crepelle, *Lies, Damn Lies*, *supra* note 23, at 576.

391. WILKINSON, *supra* note 258, at 73 ("[M]odern gear is a necessity if the tribes are to obtain the amount of fish to which they are entitled under court-ordered apportionment.").

392. Puyallup Tribe v. Dep't of Game, 391 U.S. 392, 398 (1968) ("But the Treaty is silent as to the mode or modes of fishing that are guaranteed.").

393. WILKINSON, *supra* note 260, at 71.

free to use their water rights as they see fit.[394] In 2001, the Arizona Supreme Court went a step further stating, "Just as the nation's economy has evolved, nothing should prevent tribes from diversifying their economies if they so choose and are reasonably able to do so."[395] More recently, an arbitrator determined that tribes should be able to use technology to increase the revenue generated by their casinos,[396] and a federal court certified this award.[397] The judiciary's affirmation of tribal rights adapting with the times is consistent with the reality that cultures change over time.[398]

In order to escape the jurisprudential time trap, courts must revisit the factual assertions in Indian law precedent. For example, *Oliphant* is problematic for its not-so-subtle racism,[399] but also for its factual misstatements such as, "The effort by Indian tribal courts to exercise criminal jurisdiction over non-Indians, however, is a relatively new phenomenon. And where the effort has been made in the past, it has been held that the jurisdiction did not exist."[400] This statement has been used to diminish tribal jurisdiction, but the statement is not true. Tribes long asserted jurisdiction over all people on their lands;[401] indeed, this is one of

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394. Arizona v. California, 439 U.S. 419, 422 (1979) ("[A] quantity of water necessary to supply consumptive use . . . shall not constitute a restriction of the usage of them to irrigation or other agricultural application.").

395. *In re* General Adjudication of All Rights to Use Water in the Gila River Sys. & Source, 35 P.3d 68, 77 (Ariz. 2001).

396. Arbitration Award at 15, Iowa Tribe of Oklahoma v. Oklahoma, No. 5:15-cv-01379-R (W.D. Okla. Nov. 24, 2015), https://www.indianz.com/IndianGaming/2017/05/23/iowatribearbitration.pdf [https://perma.cc/79FM-EFNZ] ("Congress intended that tribes should and could by that Act [IGRA] take every opportunity to use and take advantage of modern technology to promote participation among players and thereby increase tribal revenues for their people. The Internet is a modern technology that does precisely that.").

397. Iowa Tribe of Oklahoma v. Oklahoma, No. 5:15-CV-01379-R, 2016 WL 1562976, at *3 (W.D. Okla. Apr. 18, 2016).

398. WILKINSON, *supra* note 260, at 73.

399. *See supra* Part II B.

400. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 196–97 (1978) ("The effort to exercise . . . few Indian tribes maintained any semblance of a formal court system.").

401. CANBY, *supra* note 113, at 161 ("In colonial days, the Indian territory was entirely the province of tribes, and they had jurisdiction in fact and theory over all persons and subjects present there."); G.D. Crawford, *Looking Again at Tribal Jurisdiction: "Unwarranted Intrusions on Their Personal Liberty"*, 76 MARQ. L. REV. 401, 420 (1993) (noting that tribes could exercise criminal jurisdiction over non-Indians prior to the Supreme Court's decision in Oliphant).

the essential elements of sovereignty.[402] Hence, the United States expressly acknowledged tribal jurisdiction over non-Indians in multiple treaties.[403] The United States even turned over white people to tribal courts for criminal prosecution through the mid-1800s.[404] This means that tribal sovereignty has been curtailed based on an outright falsehood. Facts should be relevant to interpreting tribal rights.

The Supreme Court's 2019 *Cougar Den*[405] opinion reveals how the time trap can impact judges' decisions in a case. In *Cougar Den*, the Court addressed whether the Yakama's treaty "forbids the State of Washington to impose that tax upon fuel importers who are members of the Yakama Nation."[406] Five Justices ruled in favor of the Yakama's interpretation. These Justices noted the well-established rule—treaties should be interpreted as the Indians understood them.[407] Justice Gorsuch made clear that this is not a consequence of Indians' unique status, but a standard practice of contract interpretation.[408] The Yakama's understanding of the words in the treaty is important because they did not speak English, the language used to memorialize the treaty.[409] Discerning the Yakama's conception of the treaty

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402. *Sovereignty*, LEGAL INFO. INST. CORNELL L. SCH., https://www.law.cornell.edu/wex/sovereignty [https://perma.cc/KP95-WVQ5].

403. *See, e.g.*, Treaty with the Chickasaw, Chickasaw Nation-U.S., art. IV, Jan. 10 1786, 7 Stat. 24, 25 ("If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the lands hereby allotted to the Chickasaws to live and hunt on, such person shall forfeit the protection of the United States of America, and the Chickasaws may punish him or not as they please."); Treaty with the Creeks, Creek Nation-U.S., art. VI, Aug. 7, 1790, 7 Stat. 35, 36 (same for Creeks); Treaty with the Cherokee, Cherokee Nation-U.S., art. VIII, July 2, 1791, 7 Stat. 39, 40 (same for Cherokee).

404. Paul Spruhan, *'Indians, in a Jurisdictional Sense': Tribal Citizenship and Other Forms of Non-Indian Consent to Tribal Criminal Jurisdiction*, 1 AM. INDIAN L.J. 79, 79 (2017) (noting Jacob West, a white man, was sentenced to hang by a Cherokee court, and the federal court refused to grant West habeas corpus in 1844); J. Matthew Martin, *The Nature and Extent of the Exercise of Criminal Jurisdiction by the Cherokee Supreme Court: 1823-18-35*, 32 N.C. CENT. L. REV. 27, 59–60 (2009) (describing the Cherokee Supreme Court's hearing cases involving white American defendants).

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

406. *Id.* at 1006.

407. *Id.* at 1011 ("[E]ach time it has stressed that the language of the treaty should be understood as bearing the meaning that the Yakamas understood it to have in 1855."); *id.* at 1019 (Gorsuch, J., concurring) ("Our job in this case is to interpret the treaty as the Yakamas originally understood it in 1855—not in light of new lawyerly glosses conjured up for litigation a continent away and more than 150 years after the fact".).

408. *Id.* at 1016 (Gorsuch, J., concurring) ("After all, the United States drew up this contract, and we normally construe any ambiguities against the drafter who enjoys the power of the pen.").

409. *Id.* at 1012 ("The parties memorialized the treaty in English, a language that the Yakamas could neither read nor write."); *id.* at 1016 (Gorsuch, J., concurring)

was a simple matter of turning to history, and these Justices noted the unquestioned historical significance of trade to the Yakama.[410] Justice Breyer even acknowledged, "Indeed, the Yakamas formed part of a great trading network that stretched from the Indian tribes on the Northwest coast of North America to the plains tribes to the east."[411] These Justices determined the United States was keenly aware of the Yakama's intent to preserve the tribe's right to continue freely traveling to markets.[412] Therefore, recognizing Indians as people with a history of trade and commerce played a role in affirming the Yakama's present-day treaty rights.

On the other hand, the dissenters fell into the time trap. Chief Justice Roberts' dissent, joined by Justices Thomas, Alito, and Kavanaugh, only cursorily engaged with history: "[T]he record shows only that the Yakamas wanted to ensure they could continue to travel to the places where they traded."[413] In a separate dissent, Justice Kavanaugh, joined by Justice Thomas, noted the federal government's historical prohibitions on Indians leaving reservations.[414] Thus, Justice Kavanaugh concluded the treaty only assured the Yakama could leave the reservation.[415] Following this rationale, Justice Kavanaugh said, "The treaty's 'in common with' language—both at the time the treaty was signed and now—means what it

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("During the negotiations 'English words were translated into Chinook jargon . . . although that was not the primary language' of the Tribe. After the parties reached agreement, the U.S. negotiators wrote the treaty in English—a language that the Yakamas couldn't read or write.").

410. Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1017 (2019) (Gorsuch, J., concurring) ("[T]ravel for purposes of trade was so important to [the Yakamas] 'way of life that they could not have performed and functioned as a distinct culture' without [extensive travel]. Everyone then understood that the treaty would protect the Yakamas' preexisting right to take goods to and from market freely throughout its traditional trading area."); *id.* at 1017 ("Everyone understood that the treaty would protect the Yakamas' preexisting right to take goods to and from market freely throughout their traditional trading area.").

411. *Id.* at 1013.

412. *Id.* ("The United States' representatives at the treaty negotiations well understood these facts, including the importance of travel and trade to the Yakamas."); *id*. at 1017–18 ("[T]he U.S. representatives' 'statements regarding the Yakama's use of the public highways to take their goods to market clearly and without ambiguity promised the Yakamas the use of public highways without restriction for future trading endeavors.'").

413. *Id.* at 1024 (Roberts, J., dissenting).

414. *Id.* at 1027 (Kavanaugh, J., dissenting) ("[T]he Federal Government sometimes required tribal members to seek permission before leaving their reservations or even prohibited tribal members from leaving their reservations altogether.").

415. *Id.*

says: the right for Yakama tribal members to travel on public highways on equal terms with other U.S. citizens."[416]

While Justice Kavanaugh stated that the treaty "means what it says,"[417] Justice Kavanaugh failed to mention that the treaty did not "mean what it says" to the United States, which quickly dishonored the plain English meaning of the treaty.[418] Moreover, Justice Kavanaugh gave no consideration to the language barrier between the Yakama and the English text. By failing to account for the Yakama language, Justice Kavanaugh ignored what travel and trade meant to the Yakama culture as well as the actual consequences of his interpretation. Justice Kavanaugh's rendition transformed a term the Yakama fought to obtain into a meaningless phrase.[419] Had the dissenters engaged Yakama history, the Yakama's understanding of the treaty would have been pellucid.

CONCLUSION

Lewis Carroll's Red Queen knew, "[I]t takes all the running you can do, to keep in the same place. If you want to go get somewhere else, you must run at least twice as fast as that!"[420] Likewise, cultures evolve as the world changes.[421] Cultures routinely adopt new means to fulfill their needs,

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416. *Id.*

417. *Id.* at 1026–27.

418. *See also* Solem v. Bartlett, 465 U.S. 463, 466–67 (1984) (explaining that the purpose of allotment was to open reservation lands to non-Indians); *compare* Treaty with the Yakama, Yakama Nation-U.S., art. II, June 9, 1855, 12 Stat 951 ("[N]or shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent."), *with Yakama Indian Nation*, NW. PORTLAND AREA INDIAN HEALTH BD., https://www.npaihb.org/member-tribes/yakama-indian-nation/ [https://perma.cc/65SS-EM8K] (noting the Yakama Reservation was allotted).

419. Wash. State Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1012 (2019) ("Construing the treaty as giving the Yakamas only antidiscrimination rights, rights that any inhabitant of the territory would have, would amount to 'an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more.'" (citation omitted)); *id.* at 1018 (Gorsuch, J., concurring) ("But the record shows that the consideration the Yakamas supplied was worth far more than an abject promise they would not be made prisoners on their reservation.").

420. LEWIS CARROLL, THROUGH THE LOOKING-GLASS, ch. II (2020) (ebook), http://www.gutenberg.org/files/12/12-0.txt [https://perma.cc/MZ9P-Q5P8].

421. Crepelle, *Arbitrary Process*, *supra* note 134 ("Indian culture has always been diverse and evolving."); CONCORDIA & CHI. BRIDGE & IRON CO., THE RESETTLEMENT OF ISLE DE JEAN CHARLES: REPORT ON DATA GATHERING AND ENGAGEMENT PHASE 17 (2016), http://isledejeancharles.la.gov/sites/default/files/public/IDJC_Phase1_Final.pdf [https://perma.cc/E48Y-F6LC] (noting that the recent innovation of raised homes has "taken on cultural significance"); Giago, *supra* note 32; *Cultural Anthropology &*

and tribal cultures are no different.[422] While there are certainly significant differences between Navajo and New Yorkers, Navajo and New Yorkers at their core both have the same fundamental human needs.[423] Tribal governments need the same freedom to evolve as other United States' governments are afforded. Contemporary tribal leaders must be able to solve contemporary tribal problems on their own terms,[424] and the law must allow them to do so. Federal Indian law must recognize tribes as self-governing nations with histories of adapting to new circumstances. Failure to acknowledge tribes' ability to adapt will keep tribes forever trapped in time.

Linguistics, HUMBOLDT ST. U., https://anthropology.humboldt.edu/cultural-anthropology-linguistics [https://perma.cc/KF9R-P283] ("Like language, human cultures are dynamic, constantly changing in response to the environment, the people, and other cultures.").

422. Clarkson, *supra* note 31, at 1029.

423. John W. Ragsdale, Jr., *Anasazi Jurisprudence*, 22 AM. INDIAN L. REV. 393, 398 (1998) ("People are people, and they have the same needs to feed, clothe, and shelter themselves; their societies may differ in organization but essentially they exist to ensure the security, health, and well-being of the citizens.").

424. Gary Davis, *Amid Coronavirus Hard Times, US Government Must Honor Its Commitments to Native Americans,* USA TODAY (last updated Apr. 10, 2020), https://www.usatoday.com/story/opinion/2020/04/10/coronavirus-pandemic-government-must-honor-tribal-commitments-column/5123854002/ [https://perma.cc/QJM4-CLB8] ("It is our leaders' responsibility to develop a modern, diversified portfolio of business that insulates our tribal economies from future risks like pandemics.").