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Treaties as a Tool for Native American Land Reparations

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TREATIES AS A TOOL FOR NATIVE AMERICAN LAND REPARATIONS

Hannah Friedle

“THE ONLY COMPENSATION FOR LAND IS LAND.”¹

Hundreds of treaties signed. Hundreds of treaties broken. The juvenile United States grew in size as independent Native nations ceded their territory through treaties. Thirsting for more land, the United States broke its promises and continued its manifest destiny westward. And what of tribes’ treaty rights to land? Some Native nations received financial compensation for treaty violations. But money is crumbs to many whose traditional homelands are still colonized.

Tribes are entitled to the land promised to them under treaties— instruments supposedly carrying the force of federal law. Land reparations are a partial resolution to address land theft. It is one apparatus to strengthen tribal sovereignty.

This comment provides an inventory of where the federal government may strengthen existing treaty rights to land *or* increase the acreage of indigenous-held land. Each of the recommendations is a proxy to bolster land reparations for Native Americans.

Part I briefly summarizes how the federal government seized land from indigenous tribes and has yet to meaningfully remedy this harm. Part II explores congressional and judicial areas that should be modified to support land reparations. Part III describes treaty rights litigation and explains these cases’ broader impact on land reparations. Part IV explains how treaties can buttress administrative fee-to-trust land acquisitions. Part V discusses examples of how, if adopted into domestic legislation, international legal frameworks provide a structure for land reparations.

Northwestern University and Northwestern Pritzker School of Law occupy the traditional land of the Council of the Three Fires: the Ojibwe, Odawa, and Potawatomi tribes. Other tribes impacted by the colonization of Chicago include the Ho’Chunk, Miami, Menominee, Otoe, Missouriia,

¹ Sam Levin, *This Is All Stolen Land’: Native Americans Want More Than California’s Apology*, THE GUARDIAN (Jun. 21, 2019), <https://www.theguardian.com/us-news/2019/jun/20/california-native-americans-governor-apology-reparations>.

Iowas, Meskwaki, Sauk, Wea, Piankashaw, Kickapoo, and Illini Confederacy.

Members of 157 indigenous nations live in Chicago today, which remains the largest population of Native Americans in the Midwest. “The City of Chicago would not exist” if not for the 1795 Treaty of Greenville, 1816 Treaty of St. Louis, 1821 Treaty of Chicago, and the 1833 Treaty of Chicago.²

I encourage every reader: understand the story of the land you occupy. Learn whose traditional homelands you live on. Learn whether an indigenous tribe has treaty rights to, or on, the land you occupy.

² Geoffrey Baer, *An Exploration of Native American History in Chicago With Geoffrey Baer*, WTTW (Nov. 29, 2021), <https://interactive.wttw.com/playlist/2021/11/29/native-american-history-geoffrey-baer>; *Land Acknowledgement*, NW. UNIV., <https://www.northwestern.edu/native-american-and-indigenous-peoples/about/Land%20Acknowledgement.html> (last visited Feb. 24, 2023); *A History of Hyde Park: Pre-1833*, HYDE PARK HIST. SOC'Y, <https://www.hydeparkhistory.org/pre1833-history> (last visited Feb. 24, 2023).

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INTRODUCTION

Land is sacred to indigenous peoples.³ “It is the focal point of indigenous identity, religious and cultural beliefs.”⁴ Extrinsicly, land secures cultural integrity, self-determination, and self-sufficiency through hunting, fishing, ranching, accessing natural resources, clean water, and suitable housing.⁵ Intrinsicly, land holds value beyond the colonizer’s perspective.⁶

Take Mount Rushmore. Two million people per year visit four Presidents carved into stone, a sight celebrated as “a symbol of freedom and hope for people from all cultures and backgrounds.”⁷ The sculpture sits on indigenous land guaranteed to member tribes of the Great Sioux Nation by treaty—later illegally taken by the same party who signed the treaty, the United States.⁸

Mount Rushmore is carved into a holy mountain that the Lakota Sioux⁹ called “Tunkasila Sakpe,” the Six Grandfathers.¹⁰ It is engulfed by the Black Hills—sacred to the Great Sioux Nation.¹¹ In Oglala Lakota¹²

³ This article uses the terms “Indigenous American,” “Native,” “Native American,” and “American Indian” interchangeably while recognizing that Indigenous Americans have individual preferences for how they want to be addressed. Frequently, Native peoples prefer to be called by their specific tribal name. *Teaching & Learning about Native Americans*, SMITHSONIAN NAT’L MUSEUM OF THE AM. INDIAN, <https://americanindian.si.edu/nk360/faq/did-you-know> (last visited Oct. 21, 2022). Since this article encompasses Indigenous Americans across the United States mainland, it mostly uses the overarching terms listed above and uses specific tribal names when possible.

⁴ Valentina Vadi et al., *Global v. Local: The Protection of Indigenous Heritage in International Economic Law*, in *INDIGENOUS RIGHTS: CHANGES AND CHALLENGES FOR THE 21ST CENTURY* 88 (Sarah Sargent & Jo Samanta eds., 2016).

⁵ Meghan T. McCauley, *Empowering Change: Building the Case for International Indigenous Land Rights in the United States*, 41 *ARIZ. ST. L. J.* 1167, 1176 (2009).

⁶ Sammy Matsaw et al., *Cultural Linguistics and Treaty Language: A Modernized Approach to Interpreting Treaty Language to Capture the Tribe’s Understanding*, 50 *ENV’T. L.* 415, 416 (2020) (“We are connected to all things. Being connected to all things runs amiss in a Euro-context.”).

⁷ *History & Culture*, NAT’L PARK SERV., <https://www.nps.gov/moru/learn/historyculture/index.htm> (last visited Oct. 21, 2022).

⁸ *See infra* Part I.

⁹ The Lakota Sioux are a major subgroup of the Sioux Nation. *Sioux*, DOMINICAN UNIV. NATIVE AM. & RELIGIOUS STUD., <https://research.dom.edu/NativeAmericanStudies/sioux> (last visited Oct. 21, 2022).

¹⁰ Annette McGivney, *The Battle for Mount Rushmore: ‘It Should Be Turned Into Something Like the Holocaust Museum’*, *THE GUARDIAN* (July 3, 2021), <https://www.theguardian.com/environment/2021/jul/03/mount-rushmore-south-dakota-indigenous-americans>.

¹¹ *Native Americans and Mount Rushmore*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/rushmore-sioux/> (last visited Oct. 21, 2022).

¹² The Oglala Lakota Nation is a subdivision of the Lakota Nation. *Sioux*, *ENCYCLOPEDIA BRITANNICA* (May 2, 2023), <https://www.britannica.com/topic/Sioux>.

cosmology, the ancestors descended from sky spirits,¹³ and the Black Hills contain natural features that correspond with these constellations,¹⁴ a “terrestrial mirror of the heavens.”¹⁵ The land itself is sacred. Lakota Sioux must conduct certain ceremonies in the Black Hills,¹⁶ so “[n]o, we aren’t talking about dirt protected by ‘No Trespassing’ signs.”¹⁷

After years of war between the Sioux Nation and the United States military, the Fort Laramie Treaty of 1851 set aside the Black Hills “for the absolute and undisturbed use” of the Sioux Nation.¹⁸ From 1774 to 1871, indigenous tribes¹⁹ negotiated a total of 368 treaties with the United States.²⁰ These treaties were violated; the Fort Laramie Treaty was no exception. It only took six years for the Sioux Nation’s right to “absolute and undisturbed use” of the Black Hills to yield to gold prospectors.²¹ It took fifty-three more years to memorialize the broken Fort Laramie Treaty with dynamite, drills, and the faces of four U.S. Presidents.²²

Land reparations, to be clear, are merely a tool to access tribal sovereignty and justice. “Reparations are, therefore, a limited category of response to harm,”²³ and are “one part of the *process* of restoring justice for . . . land theft.”²⁴ Land restitution is not a solution in itself—especially if

¹³ Justine Epstein, *Indigenous Religious Traditions*, COLO. COLL. (Nov. 2012), <https://sites.coloradocollege.edu/indigenoustraditions/sacred-lands/the-black-hills-the-stories-of-the-sacred/>.

¹⁴ *Id.*

¹⁵ Ruth Hopkins, *Reclaiming the Sacred Black Hills*, INDIAN COUNTRY TODAY (Sep. 12, 2018), <https://indiancountrytoday.com/archive/reclaiming-the-sacred-black-hills>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Fort Laramie Treaty of 1868, art. II, Apr. 29, 1868, 15 Stat. 635.

¹⁹ This article uses the terms “tribes,” “bands,” and “nations” interchangeably. Further, this article does not represent the official views of any particular Native tribe or individual. Like any political, racial, or ethnic group, opinions range broadly. One must keep in mind throughout the reparations process the importance of each individual Native voice to be heard and that different tribes will seek different remedies.

²⁰ Sarah Pruitt, *Broken Treaties With Native American Tribes: Timeline*, HISTORY (Nov. 10, 2020), <https://www.history.com/news/native-american-broken-treaties>; See also *Historical Background*, NAT’L ARCHIVES, <https://www.archives.gov/research/native-americans/treaties> (last visited Oct. 21, 2022).

²¹ See *Treaty of Fort Laramie (1868)*, NAT’L ARCHIVES, <https://www.archives.gov/milestone-documents/fort-laramie-treaty> (last visited Oct. 21, 2022) (“[I]n 1874 Gen. George A. Custer led an expedition into the Black Hills, accompanied by miners who were seeking gold. Once gold was found in the Black Hills, miners were soon moving onto the Sioux hunting grounds[.]”).

²² See *Timeline*, NAT’L PARK SERV., <https://www.nps.gov/moru/learn/historyculture/timeline.htm> (last visited Oct. 21, 2022) (Explaining that the carving of Mount Rushmore commenced on 1927).

²³ Naomi Roht-Arriaza, *Reparations and Development*, in *LAW IN TRANSITION* 189, 191 (Ruth Buchanan & Peer Zumbansen eds., 2014).

²⁴ Nikki Pieratos & Krystal Two Bulls, *Land Back: A Necessary Act of Reparations*, NONPROFIT QUARTERLY (Oct. 11, 2021), <https://nonprofitquarterly.org/land-back-a-necessary-act-of-reparations/> (emphasis added).

indigenous tribes lack sovereignty over the returned land.²⁵ Still, “[r]eturning our land is the first step towards reparations.”²⁶

This article explores land reparations²⁷ for federally recognized Indian title²⁸ through the lens of treaty violations. Using treaties as tools, there are multiple potential routes for land reparations in the United States. First, Congress can pass a comprehensive land reparations statute using its plenary power. Second, treaties could bind the Secretary of Interior’s discretion over whether to place land into trust for indigenous tribes. Third, treaty rights can be honored using international standards for indigenous land rights if adopted into United States domestic law.

This article intentionally focuses on actions Congress could take instead of how federal courts could aid in land reparations. Previously, the United States Supreme Court and lower federal courts have recognized treaty rights, upheld treaty rights, and even awarded compensation for treaty violations.²⁹ After the 2021–2022 Supreme Court term, however, it seems doubtful the Court will continue with this trend.³⁰ In 2023, the Supreme Court may obstruct treaty rights by introducing new limits on Congress’s power to pass land reparations legislation.³¹

Part I of this article provides an abridged overview on how the federal government seized land from indigenous tribes and followed up with inadequate remedial action. Part II explores congressional and judicial areas that should be bolstered to support land reparations. Part III introduces background principles of indigenous treaty rights, describes

²⁵ See Randall Akee, *Sovereignty and Improved Economic Outcomes for American Indians: Building on the Gains Made Since 1990*, WASH. CTR. FOR EQUITABLE GROWTH (Jan. 14, 2021), <https://equitablegrowth.org/sovereignty-and-improved-economic-outcomes-for-american-indians-building-on-the-gains-made-since-1990/>. Tribal sovereignty in other areas, including gaming and natural resources, is additionally important to improve the economic conditions of Native Americans residing on reservations. *Id.*

²⁶ McGivney, *supra* note 10. Krystal Two Bulls, the speaker of this quote, is Oglala Lakota and Northern Cheyenne. *Id.* She is the director of the NDN Collective’s Land Back Campaign. *Id.*

²⁷ Land reparations are restitution or compensation to lands traditionally owned or occupied which have been confiscated without free, prior, and informed consent. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, art. 28 (Oct. 2, 2007).

²⁸ Recognized Indian Title includes land rights where Congress has expressed its clear and manifest intent recognize tribal property rights. *Underwriting Manual: TX 9.08 Indian Titles*, STEWART 9.08.2, <https://www.virtualunderwriter.com/en/underwriting-manuals/2013-5/UMTX00000044.html> (last visited May 10, 2022). Recognized title includes property rights recognized in treaties.

²⁹ *E.g.*, *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980); *United States v. Washington*, 853 F.3d 946 (9th Cir. 2017), *aff’d* *Washington v. United States*, 138 S. Ct. 1832 (2018); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019); *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Oneida Nation v. Village of Hobart*, 968 F.3d 664, 668 (7th Cir. 2020).

³⁰ See *infra* p. 14 and note 101; Section III(c).

³¹ *Id.*

instances where federal courts have upheld or declined to uphold treaty rights, and explains courts' broader impact on land reparations. Part IV explains how treaties can buttress administrative fee-to-trust land acquisitions. Part V discusses examples of how, if adopted into domestic legislation, international legal frameworks provide a structure for land reparations.

I. WHAT WAS LOST AND INADEQUATELY RESTORED: THE ALLOTMENT ERA

The allotment era (1887–1994)³² is one example of how tribes lost large portions of their traditional land.³³ Before the allotment era, the federal government signed treaties with tribes, occasionally establishing reservations.³⁴ Allotment broke up large tribal reservations into smaller parcels of land, which were typically allotted to indigenous heads of households.³⁵ Residual “surplus” land was placed on the open market.³⁶ Allotment served multiple goals, including making tracts of land available for white settlement, boosting struggling tribal economies,³⁷ and “civilizing” Native Americans by encouraging them to own and farm property individually rather than communally.³⁸

The Dawes Act of 1887³⁹ powered allotment by authorizing the President to transfer portions of Indian Country⁴⁰ to individual Indigenous Americans without tribal consent.⁴¹ The Secretary of the Interior could then transfer “excess” lands—lands they determined tribes did not need—to

³² *The Allotment and Assimilation Era (1887-1934)*, HOWARD UNIV. SCH. OF L. LIBR., <https://library.law.howard.edu/civilrightshistory/indigenous/allotment> (last visited Oct. 21, 2022).

³³ Another harm done to tribes includes the Termination Era of the 1950s, when Congress weakened tribal self-governance not by taking land, but by acting to terminate the federal trust relationship between tribes and the United States. *Id.* For a personal account of how the self-supporting Menominee Tribe was economically devastated by the Termination Era, see Ada Deer, *In the 1960s, the US Decided My Tribe Was No Longer a Nation: Ada Deer on Her Mother's Fight for Menominee Sovereignty*, LITERARY HUB (Oct. 30, 2019), <https://lithub.com/in-the-1960s-the-us-decided-my-tribe-was-no-longer-a-nation/>.

³⁴ MATTHEW L.M. FLETCHER, *PRINCIPLES OF FEDERAL INDIAN LAW* 9 (2017).

³⁵ MATTHEW L.M. FLETCHER, *FEDERAL INDIAN LAW* 9 (2016).

³⁶ *Id.*

³⁷ WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 21-22 (5th ed. 2009).

³⁸ MATTHEW L.M. FLETCHER, *PRINCIPLES OF FEDERAL INDIAN LAW* 11 (2017).

³⁹ Also known as the General Allotment Act. *Dawes Act (1887)*, NAT'L ARCHIVES, <https://www.archives.gov/milestone-documents/dawes-act> (last visited Oct. 21, 2022).

⁴⁰ Indian Country is a legal term referring to “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory . . . and (c) all Indian allotments, the Indian titles to which have not been extinguished.” 18 U.S.C. § 1151.

⁴¹ WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 37 (5th ed. 2009).

non-Indians for the purpose of non-Indian settlement.⁴² These actions often violated express treaty provisions, like the right to reservation land.⁴³

The Act's purpose was purportedly to *protect* indigenous property rights as white settlers increasingly claimed cheap, formerly indigenous land on a first-come first-served basis in land rushes and land runs.⁴⁴ But colonialist messaging in the Act revealed surreptitious purposes. Allotment was intended to encourage farming and assimilate indigenous peoples into American colonial society by enveloping them into the capitalist framework of private property.⁴⁵ Assimilation was the goal. The United States destroyed social cohesion within tribes and conveniently freed up land that the President could confiscate and redistribute.⁴⁶

The Act's ramifications confirmed its self-serving goals. Indigenous Americans' allotted parcels, intended for farming, were on unsuitable desert or near-desert land.⁴⁷ Land adjacent to streams, the best for irrigation, was often deemed "in excess of Indian needs."⁴⁸ The Act did not furnish Indigenous Americans with the necessary tools for farming. It failed to provide stipends to cover the initial expenses of self-sufficient farming—tools, animals, and seed.⁴⁹

Further, the Act created a complex inheritance structure. Allotted parcels were held in trust by the federal government for twenty-five years, or until the allottee was deemed "competent" enough to own it in fee

⁴² *Id.* at 23.

⁴³ See MATTHEW L.M. FLETCHER, *PRINCIPLES OF FEDERAL INDIAN LAW* 10 (2017) (explaining one example of these treaty violations where the United States, through allotment, violated the Treaty of Medicine Lodge). For example, the Treaty of the Medicine Lodge, Oct. 21, 1867, 15 Stat. 581, was one of three treaties that defined reservation boundaries for the Kiowa, Comanche, Plains Apache, Arapaho, and Cheyenne. Jacki Thompson Rand, *Medicine Lodge Treaty*, THE ENCYCLOPEDIA OF OKLAHOMA HIST. & CULTURE, <https://www.okhistory.org/publications/enc/entry.php?entry=ME005> (last visited Feb. 20, 2023). In *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), the leaders of the Kiowa, Comanche, and Apache tribes sued the United States, alleging that allotment violated the Treaty of the Medicine Lodge. MATTHEW L.M. FLETCHER, *PRINCIPLES OF FEDERAL INDIAN LAW* 10 (2017).

⁴⁴ *Dawes Act*, *supra* note 39. See, e.g., *The Oklahoma Land Rush Begins*, HISTORY, <https://www.history.com/this-day-in-history/the-oklahoma-land-rush-begins> (last visited Oct. 21, 2022) (in the Oklahoma Land Run of 1889, white settlers began acquiring Indian Territory lands once they realized it could be valuable in light of improved agricultural and ranching techniques.)

⁴⁵ See Khan Academy, *The Dawes Act*, <https://www.khanacademy.org/humanities/us-history/the-gilded-age/american-west/a/the-dawes-act> (last visited Jan. 17, 2020) ("The objective of the Dawes Act was to assimilate Native Americans into mainstream US society by annihilating their cultural and social traditions.")

⁴⁶ *Id.*

⁴⁷ *Dawes Act*, *supra* note 39.

⁴⁸ SARA U. MAILLACHERUVU, *THE HISTORICAL DETERMINANTS OF FOOD INSECURITY IN NATIVE COMMUNITIES* 8 (2022).

⁴⁹ See *id.*

simple.⁵⁰ The Dawes Act mandated this scheme—incomplete land privatization subject to trusteeship—purportedly to improve Native Americans’ income and *reduce* indigenous land loss by restricting transfers to non-Natives.⁵¹ It had the opposite effect.

The Act decimated indigenous-held land. Indigenous land decreased from 138 million acres in 1887 to 48 million acres in 1934,⁵² and its inheritance framework left behind a checkerboard of splintered land ownership on reservations.⁵³ As generations passed, descendants’ land ownership grew in complexity. Descendants could only receive a fractional share of one allotted parcel, or several thousand heirs could have an undivided interest in one parcel.⁵⁴ Many tribes today have insufficient land for housing and self-government; some have no land base at all.⁵⁵

Although it is difficult to determine what the course of history would have been without this historic injustice, there is nonetheless a strong connection between past injustices like the allotment era and present harm suffered by indigenous communities.⁵⁶ Indigenous peoples have not only “suffered injustices in the past, but [] they *still* suffer from injustice.”⁵⁷ For example, many tribes struggle economically because their current land bases—often in rural areas far from historic lands—do not support economic development.⁵⁸ With deficient infrastructure, even basic needs like water, sanitation, and telecommunications remain unmet.⁵⁹ The Dawes Act was supposed to help indigenous peoples become self-sufficient farmers, yet it is partially responsible for modern indigenous food insecurity.⁶⁰ One study shows that partially-privatized land allotments

⁵⁰ Bryan Leonard et al., *Poverty from Incomplete Property Rights: Evidence from American Indian Reservations*, U. WIS. manuscript 5 (Jan. 2018) https://extranet.sioe.org/uploads/sioe2018/leonard_parker_anderson.pdf.

⁵¹ *See id.*

⁵² Canby, *supra* note 37, at 23.

⁵³ *Native American Ownership and Governance of Natural Resources*, U.S. DEP’T OF LAB., NAT. RES. REVENUE DATA, <https://revenue.data.doi.gov/how-revenue-works/native-american-ownership-governance/> (last visited Oct. 21, 2022).

⁵⁴ *Id.*; MATTHEW L.M. FLETCHER, *FEDERAL INDIAN LAW* 10-11 (2016).

⁵⁵ U.S. COMM. ON CIV. RTS., *BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS* 161 (2018).

⁵⁶ *Id.* at 59-60.

⁵⁷ JEFF SPINNER-HALEV, *ENDURING INJUSTICE* 58 (2012).

⁵⁸ U.S. COMM. ON CIV. RTS., *BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS* 161, 165 (2018).

⁵⁹ *Id.* at 165.

⁶⁰ Maillacheruvu, *supra* note 48.

reduced Native American per capita income.⁶¹ Conversely, reservations that were not allotted have achieved greater economic success.⁶²

The historic and ongoing oppression of Native Americans makes reacquiring land even more important to achieving self-determination. When a nation's way of life is "thwarted or made impossible by the structure of the dominant culture," as it is for indigenous peoples in the United States, securing a separate land base is important not just for economic reasons, but for maintaining cultural identity.⁶³ Because of past and present injustices, land reparations for Native Americans are necessary and critical.

A. *Inadequate Federal Remedies*

All three branches of the federal government have some power to remedy the harm perpetrated against indigenous peoples. All three have yet to do so in a meaningful capacity.

Congress has the greatest power to enact land reparations. In an initial attempt to do so, the Indian Claims Commission Act of 1946 allowed tribes to bring claims against the United States, though it lacked any acknowledgement of harm and limited relief to monetary compensation.⁶⁴ Three decades later, the Alaska Native Claims Settlement Act (ANCSA) promised Alaska Natives 40 million acres and \$962.5 million to establish corporations to promote the well-being of Alaska Natives.⁶⁵ Critics classify the statute as a vehicle for assimilation.⁶⁶ ANCSA created successful and profitable Native corporations mirroring the Western corporate model, and Alaska Native corporations hold a majority share of the state's top performing companies.⁶⁷ Still, ANCSA's Western prioritization of profitability disaccords with preserving Native land and culture. For

⁶¹ Leonard et al., *supra* note 50, at 35.

⁶² *Id.*

⁶³ Elizabeth A. Pearce, *Self-Determination for Native Americans: Land Rights and the Utility of Domestic and International Law*, 22 COLUM. HUM. RTS. L. REV. 361, 363 (1991).

⁶⁴ FEDERICO LENZERINI, REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 257 (2008). The ICC's inability to grant land is the reason why relief in *Sioux Nation* was limited to monetary damages. *Id.*

⁶⁵ Paul Ongtooguk, *ANCSA at 40: Where Are We and Where Are We Going?*, ANCHORAGE DAILY NEWS (June 29, 2016), <https://www.adn.com/commentary/article/anca-40-where-are-we-and-where-are-we-going/2012/03/17/>.

⁶⁶ *Id.*

⁶⁷ Joaqlin Estus, *Alaska Native Corporations Dominate List of State's Top Businesses*, INDIAN COUNTRY TODAY (Oct. 4, 2020), <https://indiancountrytoday.com/news/alaska-native-corporations-dominate-list-of-states-top-businesses>.

example, Native Alaskan corporations have sold off over 700,000 acres of original ANCSA land.⁶⁸

Congress may also help indigenous peoples increase their land base by approving tribal settlements with states. The Maine Indian Claims Settlement Act gave some tribes \$54.5 million to purchase 300,000 acres and income from a \$27 million trust fund to use for other purposes.⁶⁹ While these tribes gained land and money, they lost something, too. The settlement ceded tribal sovereignty over all tribal land in Maine by subjecting the land to state law, state civil jurisdiction, and state criminal jurisdiction, with few exceptions.⁷⁰ Even as the tribes reacquired land, ceding their sovereignty to Maine “[left] tribal rights in the hands of the very neighbors who might be least inclined to respect them.”⁷¹ Sovereignty cession is a common condition to many of these settlements and regrettably undermines a tribe’s right to self-governance even as its land base grows.⁷²

A second branch of government, the federal courts, has not delivered the relief tribes really want: land. In *Sioux Nation of Indians v. United States*, the Supreme Court held that the United States, in violation of the Fort Laramie Treaty, effected an unconstitutional Fifth Amendment taking of land without just compensation.⁷³ The government owed the Sioux \$17.1 million plus accrued interest from 1877.⁷⁴ The Sioux Nation did not want money. They wanted the sacred Black Hills back, the land guaranteed under the Fort Laramie Treaty.⁷⁵ The tribe never accepted the damages award, now worth over \$1 billion, and continues to fight for its land.⁷⁶

The Executive Branch also carries the power to expand indigenous acreage. Secretary Debra (Deb) Haaland, the Biden Administration’s

⁶⁸ Ongtooguk, *supra* note 65.

⁶⁹ Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, 94 Stat. 1785.; Russel Lawrence Barsh, *Indian Land Claims Policy in the United States*, 58 N. DAKOTA L. REV. 7, 64 (1982). The Secretary of the Interior manages these funds and supervises the purchase, development, and use of reacquired land; the tribe does not enjoy full freedom to manage their own settlement. *Id.*

⁷⁰ This settlement applied to both federal trust land and land owned by Native Americans in fee simple. Nicole Friederichs et al., THE DRAFTING AND ENACTMENT OF THE MAINE INDIAN CLAIMS SETTLEMENT ACT REPORT ON RESEARCH FINDINGS AND INITIAL OBSERVATIONS 27 (2017).

⁷¹ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2462 (2020).

⁷² Lenzerini, *supra* note 64, at 260. *See, e.g.*, Connecticut Indian Land Claims Settlement Act of 1983: 25 U.S.C. §§ 1751–1760; Florida Indian (Seminole) Land Claims Settlement, 25 U.S.C. § 1772; Washington Indian (Puyallup) Land Claims Settlement, 25 U.S.C. § 1773.

⁷³ 448 U.S. 371, 423-24 (1980).

⁷⁴ *Id.* at 390.

⁷⁵ *Sioux Forgo \$1B, Continue Fight to Reclaim Black Hills*, INDIAN COUNTRY TODAY (Sep. 13, 2018), <https://indiancountrytoday.com/archive/sioux-forgo-1b-continue-fight-to-reclaim-black-hills>.

⁷⁶ *Id.*

Secretary of the Interior,⁷⁷ transferred nearly 19,000 acres of federal land to tribes in Montana.⁷⁸ Sixteen federal agencies under the Biden Administration formally committed to consult with federally recognized tribes and respect tribal treaty rights.⁷⁹ The Obama Administration created the Bears Ears National Monument at the request of, and with input from, Indigenous Americans.⁸⁰ However, executive action is subject to rollback as administrations change. The Trump Administration reduced Bears Ears National Monument by eighty-five percent in 2019⁸¹ and President Biden expanded it again in 2021.⁸² The swinging pendulum of adjacent presidential administrations is emblematic of the fickle instability over whether—and how much—the colonizer of Native Americans will inflict harm. Although some remedial action has been taken by the federal government, more robust land reparations are necessary.

II. REFRAMING CONGRESS'S PLENARY POWER TO PASS LAND REPARATIONS LEGISLATION

The federal legislature underutilizes its potential to support tribal sovereignty. Using its plenary power over Indian affairs,⁸³ Congress may pass a comprehensive land reparations statute. This section evaluates the origins of federal plenary power, its limits, and how it can be improved. Congress's plenary power is, consistent with its name, a powerful tool that could be strengthened as a vehicle for land reparations if it is reframed to remove any basis in white supremacy, to modify its atextual, astructural origins, and to ensure that Congress acts in favor of tribal interests under its federal trust responsibility.

⁷⁷ Secretary Deb Haaland is the first Native American to serve as the Secretary of the Interior. *U.S. Secretary of the Interior Secretary Deb Haaland*, U.S. DEP'T OF THE INTERIOR, <https://www.doi.gov/secretary-deb-haaland> (last visited May 11, 2023).

⁷⁸ *Interior Transfers National Bison Range Lands in Trust for the Confederated Salish and Kootenai Tribes*, U.S. DEP'T OF THE INTERIOR (June 23, 2021), <https://www.doi.gov/pressreleases/interior-transfers-national-bison-range-lands-trust-confederated-salish-and-kootenai>.

⁷⁹ *Interior Department, Federal Partners Commit to Protect Tribal Treaty Rights*, U.S. DEP'T OF THE INTERIOR (Nov. 15, 2021), <https://www.doi.gov/pressreleases/interior-department-federal-partners-commit-protect-tribal-treaty-rights>.

⁸⁰ Joe Fox et al., *What Remains of Bears Ears*, WASH. POST (Apr. 2, 2019), <https://www.washingtonpost.com/graphics/2019/national/bears-ears/>.

⁸¹ *Id.*

⁸² Proclamation No. 10285, 86 Fed. Reg. 57321 (Oct. 15, 2021); *see also* Proclamation No. 10286, 86 Fed. Reg. 57335 (Oct. 15, 2021) (where President Biden simultaneously enlarged the borders of the Grand Staircase-Escalante National Monument).

⁸³ *United States v. Kagama*, 118 U.S. 375 (1886); *see also* David E. Wilkins, *The U.S. Supreme Court's Explication of "Federal Plenary Power:" An Analysis of Case Law Affecting Tribal Sovereignty*, AM. IND. Q. 349, 352 (1994) (most commentators agree plenary power over Indian affairs comes from *United States v. Kagama*, though the term 'plenary' is absent from the case).

A. Plenary Power: An Overview

There are four theories concerning the origins of Congress's plenary power to manage Indian affairs. The first two point to textual provisions in the U.S. Constitution that grant Congress this authority: Article I's Indian Commerce Clause⁸⁴ and Article II's Treaty Clause.⁸⁵ The third theory espouses that the federal government acquired plenary authority by entering into treaties with tribes.⁸⁶ The fourth theory embraces pre-constitutional power over tribes, vested in the federal government as a matter of constitutional pragmatism.⁸⁷ The constitutional pragmatism theory dominates Supreme Court jurisprudence.

The Supreme Court established Congress's plenary power over indigenous affairs in *United States v. Kagama*, reasoning that this power exists because Native Americans live within the geographical boundaries of the United States.⁸⁸ Later, in *Lone Wolf v. Hitchcock*,⁸⁹ the Court held that Congress could unilaterally alter or abrogate treaty rights with or without tribal consent.⁹⁰ *Lone Wolf* created a presumption of broad deference to Congress.⁹¹ Scholars agree that the plenary power doctrine as established in *Kagama* and *Lone Wolf* is not sourced from the U.S. Constitution, though later efforts by the Supreme Court have attempted to backfill using the Indian Commerce Clause and Treaty Clause.⁹²

Lone Wolf's broad deference to Congress under its plenary power is a double-edged sword. On the one hand, it gives Congress the power to abrogate a treaty and harm tribal treaty rights, but on the other hand, it gives Congress the power to pass corrective measures like the Indian Child Welfare Act (ICWA)⁹³ and provide federal funding for tribes. Furthermore, plenary power as interpreted by *Lone Wolf* creates the danger of judicial avoidance. For example, if judges or Justices find that Congress unilaterally abrogated a treaty, plenary power gives the judiciary an excuse to not even recognize, let alone provide a remedy for, violated treaty rights.⁹⁴ Despite *Lone Wolf*'s deference to Congress's plenary power,

⁸⁴ U.S. CONST. art. I, § 8, cl. 3; MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW 43 (2016).

⁸⁵ U.S. CONST. art. II, § 2, cl. 2; *United States v. Lara*, 541 U.S. 193, 200-01 (2004).

⁸⁶ MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW 43 (2016).

⁸⁷ *Id.* at 44.

⁸⁸ 118 U.S. 375, 379 (1886).

⁸⁹ 187 U.S. 553 (1903).

⁹⁰ *Id.* at 565–66.

⁹¹ *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903).

⁹² *See, e.g., Lara*, 541 U.S. at 200-01 (2004).

⁹³ 25 U.S.C. §§1901–1963. Under “Congressional findings,” the Act recognized that “Congress has plenary power over Indian affairs.” §1901(1).

⁹⁴ *See McGirt v. Oklahoma*, 140 S. Ct. at 2482-2502 (2020) (Roberts, C. J. dissenting).

federal courts have grown comfortable scrutinizing federal legislation. Part IV explores how recent and upcoming Supreme Court decisions could limit Congress's plenary power and ability to pass comprehensive land reparations legislation.

B. Reframing Congress's Plenary Power

Congress's plenary power is the best route for Indigenous Americans to receive land reparations. However, plenary power jurisprudence is not rooted in an effective constitutional hook and relies on *stare decisis* to survive. Relying on *stare decisis* is hazardous after the Supreme Court's assault on of longstanding precedent during the 2021–2022 term.⁹⁵ If comprehensive federal reparations legislation were passed, the current Court could strike it down by determining that Congress overstepped its authority by legislating beyond its plenary power.⁹⁶ Plenary power has a better chance of surviving if it is grounded in valid constitutional principles, not racist and historically inaccurate justifications.

1. Normative Jurisprudential Concerns

Early plenary power jurisprudence is marked with white supremacy. Modern federal Indian law stands on this history. To address historical and ongoing racism perpetuated by the judiciary, and to ensure modern federal Indian law is based in more than a *stare decisis* of white supremacy, plenary power must be reframed.

When the Court first explicitly recognized Congress's plenary power, it looked to the dependent ward-guardian relationship established in *Cherokee Nation* as the probable source.⁹⁷ In *Cherokee Nation*, the Court faced the question of whether tribes were separate, sovereign entities under the Constitution.⁹⁸ Chief Justice Marshall declared that tribes were “domestic dependent nations” reliant on their “great father” for protection:

⁹⁵ Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (abandoning the *Lemon* test); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (overruling *Roe* and *Casey*); see generally Oral Argument, *Dobbs v. Jackson Women's Health Org.* (2021), (No. 19-1392), <https://www.oyez.org/cases/2021/19-1392> (general discussion of *stare decisis*); Oral Argument, *Ysleta del Sur Pueblo v. Texas* (2022), (No. 20-493), <https://www.oyez.org/cases/2021/20-493> (several Justices questioned the origin and applicability of the Indian Canon of Construction); Kiel Brennan-Marquez, *Aggregate Stare Decisis*, 97 IND. L. J. 571 (2022).

⁹⁶ See *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (Thomas, J., concurring) (Justice Thomas's narrow read of the Indian Commerce Clause as limited to trade and economic activity may limit comprehensive reparations legislation); see also *Brackeen v. Bernhardt*, No. 18-11479 (5th Cir. 2019), *petition for cert. granted* *Brackeen v. Haaland*, No. 21-380 (U.S. 2022) (the Court granted certiorari to review ICWA, possibly indicating it will rule parts of ICWA to be unconstitutional).

⁹⁷ *Kagama*, 118 U.S. at 384 (1886).

⁹⁸ *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

the President of the United States.⁹⁹ *Lone Wolf* echoes a foundational and racist Indian Law principle that “Indian tribes *are* the wards of the nation . . . dependent on the United States . . . [f]rom their very weakness and helplessness,” without recognizing that the colonizer’s actions created this dependency.¹⁰⁰ This characterization of dependency and weakness was an inaccurate historical depiction of the powerful Native nations of the 1790s¹⁰¹ and has been repeatedly invoked to undermine Indian sovereignty ever since.¹⁰² Normatively, one should be skeptical of the guardian-ward jurisprudence and tribes would be better served by minimizing the power of historically inaccurate precedent rooted in white supremacy and colonialism.

Tribes’ “dependent” status is also based on a questionable depiction of history. “Unbridled, unchecked federal power over Indians has not always been with us.”¹⁰³ During the United States’ juvenility, tribes were sovereign entities *and* were recognized as such on an international level. In the 1780s and 90s, the law of nations entered saliency in the United States as the new country engaged with questions of sovereignty during the constitutional debates.¹⁰⁴ Federal officials routinely spoke of customary law and the law of nations when referring to the government’s relationship with Native nations.¹⁰⁵ There was “widespread agreement” among the federal government that international law should govern relations between Natives and the United States, suggesting an understanding that Native nations are sovereign.¹⁰⁶

It is thus illogical to originate the federal government’s plenary power in pre-constitutional power. Prior to 1787, the government quite simply lacked power over the sovereign Native nations it negotiated with and

⁹⁹ *Id.* at 17.

¹⁰⁰ *Lone Wolf*, 187 U.S. at 567 (emphasis in original). The Court cited a passage from *Beecher v. Weherby*, 95 U.S. 517 (1877), to lend support for Congress plenary authority over Native Americans. *Id.* at 565. Within this quoted passage, Native Americans are referred to as “an ignorant and dependent race.” *Id.*, quoting *Beecher*, 95 U.S. 517 at 525.

¹⁰¹ Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L. J. 1012, 1080 (2015).

¹⁰² See, e.g., Adam Creppelle, *The Time Trap: Addressing the Stereotypes that Undermine Tribal Sovereignty*, 190 COLUM. HUM. RTS. L. REV. 189, 193 (2021) (the guardian-ward relationship has reinforced the idea that tribes cannot govern themselves, leading to reservations being burdened by dense federal regulations that apply nowhere else in the United States).

¹⁰³ Ablavsky, *supra* note 101, at 1084.

¹⁰⁴ *Id.* at 1059-60.

¹⁰⁵ *Id.* at 1060.

¹⁰⁶ *Id.*

fought against.¹⁰⁷ The U.S. Constitution itself further provides textual support that tribes are separate sovereigns. Both Article I and the Fourteenth Amendment include “Indians not taxed” as a textual recognition of separateness.¹⁰⁸ Even if tribal sovereignty were more akin to that of a domestic state than a foreign nation, unbridled federal plenary power over tribes would still be unjustified given that the federal government has never had unbridled plenary power over states.

The both racist and historically inaccurate conception that plenary power’s origins are rooted in pre-constitutional power should be reframed using a better source: the U.S. Constitution.

2. *The Constitutional Hook for Plenary Power*

Congress’s plenary power should be based in the Indian Commerce Clause, supplemented by the Treaty Clause. When plenary power was established, the Court considered, but rejected, the Indian Commerce Clause as its source.¹⁰⁹ Some Supreme Court case law has backfilled the extra-constitutional origin of the plenary power doctrine by invoking the Indian Commerce Clause as Congress’s source of power to “legislate in the field of Indian affairs.”¹¹⁰

In an attempt to address or rectify its extra-constitutional origins, Justice Thomas argues that plenary power comes from and is constrained by the Indian Commerce Clause.¹¹¹ In *Adoptive Couple v. Baby Girl*, he narrowly read the Indian Commerce Clause as limited to trade and economic activity, similar to the narrow definition of “commerce” under the Interstate Commerce Clause.¹¹²

While Justice Thomas is correct that congressional plenary power requires constitutional authority, and that the Indian Commerce Clause is a valid choice, Indian Law scholars take a different approach than Thomas. They argue that the Indian and Interstate Commerce Clauses adopt distinct meanings of “commerce” because discussions during ratification indicated that no one interpreted the Indian Commerce Clause to be equivalent to the

¹⁰⁷ *Id.* at 1020 (“The diplomatic and military powers claimed by the federal government against the states did not imply that Natives were under U.S. jurisdiction; as in foreign relations, the question was which sovereign had the authority to negotiate, or fight, with Indians.”).

¹⁰⁸ U.S. CONST. art. I § 2; U.S. CONST. amend. XIV, § 2; Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L. J. 113, 147 (2002).

¹⁰⁹ *Kagama*, 118 U.S. at 378-79.

¹¹⁰ *Lara*, 541 U.S. at 200 (2004), quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); see also, e.g., *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of N. M.*, 458 U.S. 832, 837 (1982).

¹¹¹ *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (Thomas, J., concurring).

¹¹² 570 U.S. at 659 (Thomas, J., concurring) (citing *United States v. Lopez*, 514 U.S. 549, 585 (1995)).

Interstate or Foreign Commerce Clauses, and vice versa.¹¹³ Furthermore, the historical understanding of “commerce among Indians” had a broader meaning than what Justice Thomas describes.¹¹⁴ “Commerce” meant more than economic transactions and sometimes denoted tribal exchange of religious ideas.¹¹⁵ “Trade” described not only commercial transactions, but also political and diplomatic interactions between federal officials and Native nations.¹¹⁶ The “original public meaning” of Indian commerce, *even* commerce which was limited to selling, buying, and bartering, was interpreted as relating to cross-cultural diplomacy rather than strictly economic activity.¹¹⁷ Therefore, the Indian Commerce Clause gives Congress broad authority to pass legislation in a variety of Indian Law contexts.

The Treaty Clause has been cited as supplementing the Indian Commerce Clause to support plenary power. The Treaty Clause cannot support plenary power on its own, since it does not directly authorize Congress to act legislatively, instead authorizing the President “to make Treaties.”¹¹⁸ *Missouri v. Holland*¹¹⁹ explains how treaties may authorize additional congressional power to act in ways it normally cannot, but such power is limited to matters “of the sharpest exigency for the national well-being.”¹²⁰ The Treaty Clause authorizes supplemental power to Congress only in national emergencies, which is left to the Court’s interpretation and thus could be narrowly interpreted.

Thus, the Indian Commerce Clause is the best source of Congress’s plenary power over Native American affairs. It provides this authority without needing to sustain racist and inaccurate case law describing Native Nations as “dependent,” “weak[,] and helpless[.]”¹²¹ Plenary power is vital to Congress’s ability to pass expansive land reparations legislation. If plenary power is rooted in the Indian Commerce Clause, paired with a

¹¹³ Ablavsky, *supra* note 101, at 1012.

¹¹⁴ *Id.* at 1028.

¹¹⁵ *Id.* at 1029. Ablavsky furthermore points out the irony in Justice Thomas’s argument in *Adoptive Child* that “commerce” cannot reach the “noneconomic activity such as the adoption of children” when during the time of constitutional ratification, enslaved and/or captured Native children were adopted by European Americans, and vice versa with European children adopted by Native Americans. *Id.* at 1031.

¹¹⁶ *Id.* at 1030.

¹¹⁷ *Id.* at 1032.

¹¹⁸ U.S. CONST. art. II, § 2, cl. 2; *Lara*, 541 U.S. at 201 (2004).

¹¹⁹ 252 U.S. 416 (1920).

¹²⁰ *Missouri v. Holland*, 252 U.S. 416, 433 (1920). This same language was quoted in a more recent 2004 Supreme Court case, yet the “sharpest exigency” language was left out. *Lara*, 541 U.S. at 201 (2004).

¹²¹ *Lone Wolf*, 187 U.S. at 567.

historically accurate and expansive view of “commerce,” the current Supreme Court is more likely to allow federal land reparations legislation to move forward.

3. *Plenary Power and the Federal Trust Responsibility*

Plenary power does not exist in a vacuum; the foundational doctrine of the federal trust responsibility co-exists with broad plenary power and necessarily limits Congress, requiring it to act in favor of tribal interests.

The United States is bound by the federal Indian trust responsibility, a legal obligation stating that the federal government is “more than a mere contracting party” who makes treaties with tribes.¹²² The United States is a trustee; it “has charged itself with moral obligations of the highest responsibility and trust” towards tribes.¹²³ The federal government acts as a legal trustee for the land and water rights of Native Americans and has a legal obligation to protect indigenous tribes, peoples, lands, resources, and recognized rights.¹²⁴ As a result, indigenous land is typically owned by the federal government and held in trust for tribes or individual Native Americans.¹²⁵

This trust responsibility stems partially from international legal principles, discussed in *Worcester v. Georgia*,¹²⁶ which require the United States to protect tribes.¹²⁷ The “stronger” sovereign—the United States—assumed this duty of protection when it assumed authority over the “weaker” sovereign—tribes.¹²⁸ Alternatively, or supplementally, the federal trust responsibility exists because the United States assumed this duty of

¹²² *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942).

¹²³ *Id.*, at 297.

¹²⁴ U.S. DEP’T OF THE INTERIOR, REAFFIRMATION OF THE FEDERAL TRUST RESPONSIBILITY TO FEDERALLY RECOGNIZED INDIAN TRIBES AND INDIVIDUAL INDIAN BENEFICIARIES, Order No. 3335, at 1 (Aug. 20, 2014).

¹²⁵ 25 U.S.C. § 5102 (2022); *see also* 25 C.F.R. § 152.1(d) (2022). Allowing tribes the option to own land outright is normatively and practically important for tribal sovereignty, but is beyond the scope of this article. There are many issues with tribal land being in trust instead of fee simple—beyond the obvious alienability and normative issues—which conflict with tribal self-determination. Trust land impedes tribal economic development. Adam Creppelle, *The Time Trap: Addressing the Stereotypes that Undermine Tribal Sovereignty*, 190 COLUM. HUM. RTS. L. REV. 189, 211 (2021). Examples include the inability to obtain a mortgage on tribal land without federal approval and complex and time-consuming regulatory burdens in obtaining federal permission on Indian trust land, which drives away oil companies and limits a tribe’s ability to profit from their land’s natural resources. *Id.* at 212-14. Yet, tribes would not enjoy sovereignty with fee simple land, as they would be subject to state and local taxation. *See Benefits of Trust Land Acquisition (Fee to Trust)*, U.S. DEP’T OF THE INTERIOR INDIAN AFF., <https://www.bia.gov/service/trust-land-acquisition/benefits-trust-land-acquisition> (last visited Jan. 17, 2023). At every turn, tribes are not treated as independent sovereigns.

¹²⁶ 31 U.S. 515, 561 (1932).

¹²⁷ MATTHEW L.M. FLETCHER, *FEDERAL INDIAN LAW* 175 (2016).

¹²⁸ *Id.*

protection for indigenous tribes and peoples by signing numerous treaties agreeing to guarantee “protection.”¹²⁹

In the nineteenth and twentieth centuries, the federal trust relationship was akin to the guardian-ward relationship of *Cherokee Nation*¹³⁰ and was based in white supremacy. In the late twentieth century, the Supreme Court and the Department of the Interior (Interior) moved away from the guardianship model and closer to the common law trust doctrine.¹³¹ The trust relationship evolved as the federal government increasingly recognized tribal self-determination and how tribal governments are in the best position to meet the needs of Native Americans.¹³² Now, the relationship between the United States and tribes is referred to as a general trust relationship, authorizing and obligating the federal government to protect tribal property rights, provide government services, and enhance tribal self-governance.¹³³

The federal trust responsibility impacts both treaty interpretation and Congress’s plenary power. For treaties, the federal government’s obligations under the federal trust relationship—even under the archaic guardian-ward relationship—weigh in favor of robust treaty interpretation. Courts should uphold tribal treaty rights to land with *even more* rigor than treaties with international sovereigns.¹³⁴ As for Congress’s plenary power, the federal trust obligation restricts Congress to act in tribal interests. Congress must act in *favor* of tribes, not against them. Congress has both the power and obligation as a fiduciary to pass reparations legislation benefitting tribes.

Congress has the power to enact a comprehensive land reparations statute under their plenary power that should simultaneously be constrained to benefit tribes.

¹²⁹ For numerous treaties which include language of protective obligations, see MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW 177 (2016).

¹³⁰ *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831); MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW 178 (2016).

¹³¹ See MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW 181 (2016); see U.S. DEP’T OF THE INTERIOR, REAFFIRMATION OF THE FEDERAL TRUST RESPONSIBILITY TO FEDERALLY RECOGNIZED INDIAN TRIBES AND INDIVIDUAL INDIAN BENEFICIARIES, Order No. 3335, at 2 (Aug. 20, 2014).

¹³² U.S. DEP’T OF THE INTERIOR, REAFFIRMATION OF THE FEDERAL TRUST RESPONSIBILITY TO FEDERALLY RECOGNIZED INDIAN TRIBES AND INDIVIDUAL INDIAN BENEFICIARIES, Order No. 3335, at 1 (Aug. 20, 2014).

¹³³ MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW 180-81 (2016).

¹³⁴ Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1227 (1975).

III. THE JUDICIARY AND INDIGENOUS TREATY RIGHTS

The rich history of indigenous treaty violations dates back to 1782,¹³⁵ and tribes have been seeking redress in courts since 1881.¹³⁶ This section details the background legal principles underscoring this litigation: unconscionability, the Indian Canons of Construction (Canons), the Equal Footing Doctrine, and the clear statement rule. It then describes instances when federal courts have robustly upheld treaty rights and barriers to this litigation moving forward. Litigation over treaty violations is a disfavored vehicle to reacquire land since federal courts will not award land restitution as a remedy.¹³⁷ Nonetheless, it is a route many tribes have been forced to take.

A. Background Principles

Background legal principles color the landscape of indigenous treaty rights. First, while many treaties between Native American tribes and the United States include the right to occupy land, the right to a reservation, or usufructuary rights,¹³⁸ and these treaties can be a tool for land reparations, they are limited to their current language even if the treaty is unconscionable. The political question doctrine bars tribes from arguing that a treaty signed with the United States government is unconscionable, fraudulent, or signed under duress, since the content of treaties is a nonjusticiable political decision.¹³⁹ Therefore, treaties can only be utilized in their current form.¹⁴⁰

Some treaties were negotiated fairly; others were not. The United States pressured tribes to cede land, sometimes using sneaky or fraudulent methods like bribes, whiskey, intimidation, and divide-and-conquer tactics.¹⁴¹ As Red Cloud recounted regarding the Fort Laramie Treaty, “men came out and brought papers. We could not read them and they did not tell

¹³⁵ Pruitt, *supra* note 20 (the first “official peace treaty” between the United States and a Native nation failed to guarantee peace when militiamen killed nearly a hundred Lenape women and children in 1782.)

¹³⁶ Thomas Le Duc, *The Work of the Indian Claims Commission Under the Act of 1946*, 26 PAC. HIST. REV. 1, 1-2 (1957).

¹³⁷ See, e.g., *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

¹³⁸ *Indian Treaty Rights*, MILWAUKEE PUB. MUSEUM, <https://www.mpm.edu/content/wirp/ICW-09> (last visited May 10, 2022).

¹³⁹ See 16 C.J.S. Constitutional Law § 402 (2023).

¹⁴⁰ Under the political question doctrine, federal courts are divested of jurisdiction on issues that are entrusted solely to other branches of government, not the judiciary. *Marbury v. Madison*, 5 U.S. 137, 170 (1803) (“Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”).

¹⁴¹ COLIN G. CALLOWAY, *PEN AND INK WITCHCRAFT: TREATIES AND TREATY MAKING IN AMERICAN INDIAN HISTORY* 119 (1st ed. 2013).

us truly what was in them.”¹⁴² Negotiators for the federal government avoided fully explaining the treaties in an effort to avoid saying anything that could deter a tribe, nation, or band from signing the treaty.¹⁴³ Notwithstanding any unconscionability, treaties can only be used as a tool for land reparations in their current form.

Second, the Indian Canon of Construction supports treaty rights litigation by directing courts to read treaties as the tribal signatories would have understood them and to resolve ambiguities in favor of tribal interests. Additional principles of Indian treaty interpretation also direct courts to construe the treaties liberally and to look beyond the written word to determine treaties’ meanings.¹⁴⁴

The Indian Canons of Construction exist at least partially because of the unconscionability of treaties that contained unfair language for the signatory tribes and favorable language for the colonizers. When creating the Canon in *Worcester v. Georgia*, the Court emphasized how the Cherokee chiefs likely could not fully understand the treaty at issue due to improwiciency in English. The Court reasoned that “the Cherokee chiefs were not very critical judges of the [treaty’s] language,” so “[t]he language used in treaties with the Indians should *never* be construed to their prejudice.”¹⁴⁵

The Canons are also “rooted in the unique trust relationship between the United States and the Indians.”¹⁴⁶ If the United States is tasked with the fiduciary duty to protect indigenous tribes, the treaties it signs with tribes should be construed as protecting tribal interests instead of undermining them.

Under the Canons, courts may also look beyond a treaty’s language and consider its negotiations and history.¹⁴⁷ The text of a treaty must be construed as Native American signatories would have understood it at the time.¹⁴⁸ Furthermore, treaties are grants of rights *from* Natives, not *to* Natives, meaning rights not given up or taken via federal legislation are reserved for Native Americans.¹⁴⁹ However, the Supreme Court Justices’

¹⁴² *Id.* at 226-27.

¹⁴³ *Id.* at 227.

¹⁴⁴ *A Bad Man is Hard to Find*, 127 HARV. L. REV. 2521, 2535 (2014).

¹⁴⁵ *Worcester v. Georgia*, 31 U.S. 515, 551, 582 (1832) (emphasis added).

¹⁴⁶ *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

¹⁴⁷ *United States v. Winans*, 198 U.S. 371 (1905); *Worcester v. Georgia*, 31 U.S. 515 (1832).

¹⁴⁸ *Herrera v. Wyoming*, 139 S. Ct. 1686, 1702-03 (2019).

¹⁴⁹ *United States v. Winans*, 198 U.S. 371 (1905).

questions about these Canons in *Ysleta del Sur Pueblo v. Texas*¹⁵⁰ may indicate that the Court will weaken the Canon’s strength in the future.¹⁵¹

Third, the Equal Footing Doctrine states that every state admitted after 1798 must enter on equal footing with the thirteen states already in the Union.¹⁵² When a new state geographically overlaps with treaty-protected indigenous land, the Equal Footing Doctrine does not displace treaty rights absent a clear statement from Congress.¹⁵³ A recent Supreme Court case, however, indicates the opposite—that the Doctrine itself weakens indigenous treaties.¹⁵⁴

Finally, the clear statement rule states that treaties can only be abrogated by a clear and explicit statement from Congress¹⁵⁵—a high bar—because under the U.S. Constitution, “all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land.”¹⁵⁶ Treaties between a Native American tribe and the United States that were signed during the Articles of Confederation onwards are enforceable as federal law under the Supremacy Clause.¹⁵⁷ The clear statement rule requires Congress to speak clearly and explicitly when abrogating treaties¹⁵⁸ because “[a]lthough Congress has plenary authority over tribes, courts will not lightly assume that Congress in fact intends to

¹⁵⁰ 142 S. Ct. 1929 (2022).

¹⁵¹ See Oral Argument at 47:58, *Ysleta del Sur Pueblo v. Texas* (2022), (No. 20-493), <https://www.oyez.org/cases/2021/20-493> (Justice Alito: “You refer to the Indian canon . . . Now some [substantive canons], like the Rule of Lenity, have a long history. What do you think is the basis for this Indian canon?”). See also *id.* at 52:47 (Justice Kagan: “I’ve been thinking a good deal about what these substantive canons of interpretation are . . . It’s not just the Indian canon . . . how do we reconcile our views of all these different kinds of canons? Maybe we should just toss them all out . . .”); *id.* at 57:33 (Justice Barrett, who has written about the origin of substantive Indian Canons of Construction, perhaps feigned confusion when she asked, “Was [the canon’s] debut in *Bryan*? . . . So it’s like a sub-Indian canon canon?”) For Justice Barrett’s scholarship on these canons, see Amy C. Barrett, *Substantive Canons and Faithful Agency*, 90 B. U. L. REV. 109, 151-52 (2010).

¹⁵² *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2503 (2022); *Pollard v. Hagan*, 44 U.S. 212, 228-29 (1845).

¹⁵³ *Minnesota v. Mille Lacs*, 526 U.S. 172 (1999).

¹⁵⁴ See *infra* pp. 41-42.

¹⁵⁵ *United States v. Dion*, 247 U.S. 734, 738-39 (1986). See also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978) (the clear statement rule is articulated by the Supreme Court as “a proper respect both for tribal sovereignty itself and for the plenary authority of Congress . . . caution[ing] that we tread lightly in the absence of clear indications of legislative intent”).

¹⁵⁶ U.S. CONST. art. VI, § 2; see also *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (self-executing treaties are the supreme law of the land and on the same footing as federal statutes).

¹⁵⁷ *Alliance to Save the Mattaponi v. Virginia Dep’t of Env’t Quality*, 621 S.E.2d 78, 94 (2005). As the supreme law of the land, treaties have occasionally been found to “provide rights of action for equitable relief against non-contracting parties” when relief is essential to ensure compliance with a treaty. *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 512 (2005).

¹⁵⁸ *Dion*, 247 U.S. at 738-39.

undermine Indian self-government.”¹⁵⁹ Even if the Indian Canons of Construction are weakened by the current Supreme Court,¹⁶⁰ the clear statement rule’s high bar for abrogation supports tribal treaty rights to land.

B. Where Courts Have Recognized Treaty Rights

Treaty rights have prevailed in a wide variety of contexts. The following examples serve as either direct or proximate support for treaty rights to land prevailing absent a clear statement from Congress. In these examples, courts held that there was *not* a clear statement from Congress abrogating the treaty rights at issue.

First, usufructuary rights persisted in *Minnesota v. Mille Lacs Band of Chippewa Indians* even after the United States issued an executive removing Native Americans from their land.¹⁶¹ In *Herrera v. Wyoming*, indigenous off-reservation hunting rights persisted despite the state’s argument that federal regulation of forests, state hunting laws, mining, and logging all constituted evidence of “occup[ation]” within the meaning of the treaty (when the treaty specified that “occupation” would extinguish hunting rights).¹⁶² Fishing and hunting rights again prevailed in *Menominee Tribe v. United States*, even when Congress passed a comprehensive Termination Act intended to disband the tribe’s government.¹⁶³ In *United States v. Washington*, the Ninth Circuit issued an injunction against the State of Washington for interfering with salmon spawning and migration because it violated indigenous fishing rights.¹⁶⁴ More recently, the Seventh Circuit held in *Oneida Nation v. Village of Hobart* that the treaty right to a reservation was not diminished by the allotment era.¹⁶⁵ As of 2019, a state’s admission to the Union and the Equal Footing Doctrine do not extinguish treaty rights¹⁶⁶—although the Supreme Court walked back this principle in 2022.¹⁶⁷

Courts should continue to hold the clear statement rule to a high standard and require explicit statutory language of Congress’s intent to

¹⁵⁹ *Michigan v. Bay Mills Indian Community*, 572 U.S. 2024, 2032 (2014).

¹⁶⁰ See Oral Argument, *Ysleta del Sur Pueblo v. Texas* (2022), (No. 20-493) (several Justices questioned the origin and applicability of the Indian Canon of Construction, indicating it may be weakened in the future).

¹⁶¹ 526 U.S. 172, 188-193 (1999).

¹⁶² 139 S. Ct. 1686 (2019).

¹⁶³ 391 U.S. 404 (1968).

¹⁶⁴ 853 F.3d 946 (2017), *aff’d* by *Washington v. United States*, 138 S. Ct. 1832 (2018).

¹⁶⁵ 968 F.3d 664, 668 (7th Cir. 2020).

¹⁶⁶ *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019); see also *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

¹⁶⁷ See *infra* Part III.

modify the *exact* right in question.¹⁶⁸ This is especially appropriate because courts have recognized a presumption against federal statutes modifying or abrogating Indian treaty rights.¹⁶⁹ Previously, the Court's interpretation of the clear statement rule in the above cases and in *McGirt v. Oklahoma*¹⁷⁰ provided robust protections for indigenous treaties. Recently, however, the Supreme Court has changed course and eroded treaty protections.

C. *McGirt & Castro-Huerta's Impact on Treaty Rights and Land Reparations*

Two recent doctrinal shifts have impacted tribal treaty rights. The cases *McGirt v. Oklahoma* and *Oklahoma v. Castro-Huerta* considered the Muscogee Creek Nation's treaty rights. Specifically, the cases discussed whether the Creek Nation's treaty right to a reservation persists and whether the state of Oklahoma can exercise criminal jurisdiction over the reservation lands. Although these cases were about criminal jurisdiction, they have a broader impact regarding whether states can lawfully ignore treaty rights to land.

In *McGirt v. Oklahoma*, an Oklahoma state court convicted a member of the Seminole Nation of three sexual offenses against another member of the Seminole Nation.¹⁷¹ These crimes took place in a Tulsa suburb¹⁷² within the Muscogee (Creek) Nation reservation boundaries.¹⁷³ Defendant Jimcy McGirt argued that he should have been re-tried in federal court because the state of Oklahoma lacked criminal jurisdiction over him.¹⁷⁴ He alleged that the Major Crimes Act¹⁷⁵ apports criminal jurisdiction to the federal government—not the states—over any crime involving an Indian victim or perpetrator or occurring within “Indian Country,” including Indian reservations.¹⁷⁶

McGirt won. The Court held Oklahoma lacked criminal jurisdiction over McGirt because he committed his crimes in Indian Country.¹⁷⁷ The Creek Nation reservation was established in 1833 by a treaty signed

¹⁶⁸ *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 228 F. Supp. 3d 1171 (W.D. Wash. 2017), *aff'd* by *Swinomish Indian Tribal Cmty. v. BNSF Ry. Co.*, 951 F.3d 1142 (9th Cir. 2020).

¹⁶⁹ *E.g.*, *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490 (7th Cir. 1993).

¹⁷⁰ 140 S. Ct. 2452 (2020).

¹⁷¹ *Id.* at 2456.

¹⁷² Brief of Respondent at 1, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526).

¹⁷³ *McGirt*, 140 S. Ct. at 2460.

¹⁷⁴ *Id.*

¹⁷⁵ 18 U.S.C. § 1153.

¹⁷⁶ *McGirt*, 140 S. Ct. at 2459.

¹⁷⁷ *See id.*

between the Creek Nation and the federal government.¹⁷⁸ An additional treaty in 1856 guaranteed that none of Creek reservation land “would ever be embraced or included within, or annexed to, any Territory or State.”¹⁷⁹ The Creek reservation remained in 2020 because Congress had not abrogated this treaty through a clear statement. The *McGirt* majority recognized that despite Congress besieging the Creek Nation through allotment, congressional removal of tribal courts, and other blows to sovereignty, the Creek reservation survived because Congress had not disestablished it with a clear statement.¹⁸⁰

McGirt reiterated that the states have no place in Indian Country for three reasons. One, the Constitution entrusts Congress with regulating commerce with Native Americans.¹⁸¹ Two, under the Constitution’s supremacy clause, states cannot violate or modify treaties signed between the federal government and Native tribes.¹⁸² Three, giving states authority over Indian Country would imprudently jeopardize tribal sovereignty; “[i]t would [] leave tribal rights in the hands of the very neighbors who might be least inclined to respect them.”¹⁸³

The case was a forceful reminder that states must respect tribal sovereignty. *McGirt* fits neatly into the legal framework introduced in Constitutional Law and Federal Courts courses: federal treaties, under the supremacy clause, are the supreme law of the land.¹⁸⁴ It also aligned with longstanding Indian Law jurisprudence: Congress, not the states, possesses the power to regulate Indian affairs.¹⁸⁵

McGirt offered hope that tribes could maximize their sovereignty through litigation. As discussed, treaty violation litigation has often been an insufficient vehicle for re-possessing lost land, but post-*McGirt*, there was hope that treaties would be upheld and could be used to achieve recognition of tribal land rights.¹⁸⁶ Litigation over treaty rights has often been met with arguments that a state’s reliance interests, *res judicata*, procedural bars,

¹⁷⁸ *Id.* at 2461.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 2463, 2465-66, 2482. “Once a federal reservation is established, only Congress can diminish or disestablish it. Doing so requires a clear expression of congressional intent.” *Id.* at 2456.

¹⁸¹ *Id.* at 2462.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Ware v. Hylton*, 3 U.S. 199, 236 (1796).

¹⁸⁵ *E.g.*, *United States v. Wheeler*, 435 U.S. 313, 319 (1978); FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 6.01 (2019) (“Congress’s plenary authority over Indian affairs and the tradition of tribal autonomy in Indian country combine to preempt the operation of state law.”).

¹⁸⁶ *E.g.*, David Moore & Michalyn Steele, *Revitalizing Tribal Sovereignty in Treaty-making*, 96 N.Y.U. L. REV. 137, 188-89 (2022) (*McGirt* recognizes the ongoing vitality of federal-Indian treaties, endorses the viability of federal-Indian treaty-making, and strengthens claims to tribal sovereignty).

states of repose, and laches should bar tribal treaty rights.¹⁸⁷ Oklahoma itself advanced such arguments in *McGirt*.¹⁸⁸ The Supreme Court recognized Oklahoma’s concern regarding reliance interests, but ultimately characterized these arguments as “misplaced,” noting how the state and tribes have been successful partners in the past on a variety of regulatory matters.¹⁸⁹ Reliance interests should not automatically place the thumb on the scale against protecting tribal treaty rights.¹⁹⁰ In a powerful conclusion, Justice Gorsuch wrote:

[M]any of the arguments before us today follow a sadly familiar pattern. Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye. We reject that thinking. If Congress wishes to withdraw its promises, it must say so. Unlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law.¹⁹¹

The United States promised tribes certain guarantees in treaties: reserved land, water, hunting, fishing, and sovereignty. *McGirt* offered hope that these treaty rights could still be upheld by courts even when a state asserts that “the price of keeping [promises] has become too great.”¹⁹² However, just two years later, *Castro-Huerta* extinguished this hope as the Court essentially abandoned *McGirt*.¹⁹³

Justice Barrett replaced Justice Ginsburg and joined the majority for 2022’s *Oklahoma v. Castro-Huerta*. *Castro-Huerta* and *McGirt* are analogous. In *Castro-Huerta*, a criminal defendant convicted in Oklahoma state court argued that Oklahoma lacked criminal jurisdiction over him because his crimes occurred in Indian Country. His argument mirrored Jimcy McGirt’s; he claimed the federal government had exclusive jurisdiction over him—and all—non-Indians for crimes committed against Indians in Indian Country.

Victor Manuel Castro-Huerta committed crimes within the historical area of the Cherokee Nation, geographically designated by treaties.¹⁹⁴ The Oklahoma Criminal Court of Appeals held that since *McGirt* governed, Oklahoma lacked criminal jurisdiction over Castro-Huerta for crimes committed on Cherokee land.¹⁹⁵ This was an example of a post-*McGirt*

¹⁸⁷ See *McGirt*, 140 S. Ct. at 2481.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 2482.

¹⁹² *Id.*

¹⁹³ *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022).

¹⁹⁴ *Castro-Huerta v. State*, Ok. Crim. App. 1, 3 (2021).

¹⁹⁵ *Id.* at 2.

court respecting the geographical boundaries of treaties signed by a tribe and the United States. Although limited in scope to criminal jurisdiction, this application of *McGirt* made a powerful statement: despite Oklahoma's encroachment, the geographical boundaries of the treaty are legally acknowledged, and this land is recognized as Indian Country.

Oklahoma petitioned the Supreme Court for review of this decision and brazenly urged the Court to overrule *McGirt*.¹⁹⁶ Although the Supreme Court did not grant review of this specific question,¹⁹⁷ that is essentially what *Castro-Huerta* did.

Under *Castro-Huerta*, states have concurrent criminal jurisdiction in Indian Country over crimes by non-Indians against Indians unless preempted by federal law.¹⁹⁸ This "inherent" concurrent jurisdiction has apparently existed since "the latter half of the 1800s"¹⁹⁹ despite 190 years of case law to the contrary²⁰⁰ and three federal statutes expanding *federal* criminal jurisdiction in Indian Country.²⁰¹ Public Law 280, a federal statute granting certain states criminal jurisdiction over offenses committed by or against Native Americans on reservations, was apparently never necessary. As Justice Gorsuch authored in dissent, Congress must have been "hopelessly misguided" enacting Public Law 280 since the states furtively had inherent concurrent criminal jurisdiction all along.²⁰² The Court also held that Public Law 280 does not preempt Oklahoma's concurrent criminal jurisdiction,²⁰³ despite the federal law only granting state criminal jurisdiction over Indian Country if *authorized* to do so under the statute. "But exactly when and how did this [jurisdictional] change happen? The Court never explains."²⁰⁴

Castro-Huerta may have upended tribal treaty rights to the detriment of land reparations, but it is deeply flawed. First, the *Castro-Huerta* majority erroneously relies on the Equal Footing Doctrine to extinguish

¹⁹⁶ Petition for a Writ of Certiorari at 17, *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022) (No. 21-429); Reply Brief for the Petitioner on Petition for a Writ of Certiorari at 5, *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022) (No. 21-429).

¹⁹⁷ See Petition for Writ of Certiorari, *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022) (No. 21-429) (the Supreme Court granted review of Question 1 but not Question 2, which was whether to overrule *McGirt v. Oklahoma*).

¹⁹⁸ *Oklahoma v. Castro-Huerta*, 142 S. Ct. at 2491 (2022).

¹⁹⁹ *Id.* at 2495, 2503.

²⁰⁰ *E.g.*, *Worcester v. Georgia*, 31 U.S. 515 (1832).

²⁰¹ Public Law 280, 67 Stat. 588; Major Crimes Act, 18 U.S.C. § 1153; General Crimes Act, 18 U.S.C. § 1152.

²⁰² *Castro-Huerta*, 142 S. Ct. at 2518 (Gorsuch, J., dissenting).

²⁰³ *Id.* at 2500.

²⁰⁴ *Id.* at 2520 (Gorsuch, J., dissenting).

treaty rights. The majority claims that Oklahoma’s Enabling Act,²⁰⁵ by virtue of its existence, repeals any treaty “that is inconsistent with the State’s exercise of criminal jurisdiction throughout the whole of the territory within its limits . . . unless the enabling act says otherwise by express words.”²⁰⁶ The majority does so in direct conflict with prior precedent without explanation, justification, or reconciliation.

The Court relies on *Draper v. United States*²⁰⁷ and *United States v. McBratney*,²⁰⁸ two cases from the late 1800s that largely rested on the Equal Footing Doctrine. The majority uses the doctrine to simultaneously extinguish tribal treaty rights and grant Oklahoma inherent criminal jurisdiction over Indian Country.²⁰⁹ Without explicit mention of the Equal Footing Doctrine, the Court cites to the foundational Equal Footing Doctrine case *Pollard’s Lessee v. Hagan*²¹⁰ and lets the reader make the inference.

Perhaps the majority chose not to mention the Equal Footing Doctrine because their reliance on the Doctrine should be foreclosed by intervening precedent holding the exact opposite: the Equal Footing Doctrine *does not* extinguish pre-statehood tribal treaty rights. In 1999, *Minnesota v. Mille Lacs Band of Chippewa Indians*²¹¹ pronounced that the Equal Footing Doctrine did not give states the power to abrogate tribal sovereignty because pre-statehood treaty rights are not impliedly terminated at statehood.²¹² In 2019, *Herrera v. Wyoming* reiterated *Mille Lacs*’s rule.²¹³ It formally overruled *Ward v. Race Horse*,²¹⁴ an 1896 case that held tribal treaty rights were displaced upon statehood under the Equal Footing Doctrine—a holding similar to *Castro-Huerta*. The majority in *Castro-Huerta* simply acts as though *Minnesota v. Mille Lacs* and *Herrera v. Wyoming* do not exist. It mentions neither case and cherry-picks *stare decisis* by reaching back to 1882²¹⁵ and 1896²¹⁶ to breathe new life into old

²⁰⁵ Enabling Acts are how Congress admits new states into the Union. 72 Am. Jur. States, Etc. § 16; U.S. CONST. art. IV § 3, cl. 1 (“New States may be admitted by the Congress into this Union”).

²⁰⁶ *Castro-Huerta*, 142 S. Ct. at 2503 (internal quotation marks omitted).

²⁰⁷ 164 U.S. 240 (1896).

²⁰⁸ 104 U.S. 621 (1882).

²⁰⁹ *Castro-Huerta*, 142 S. Ct. at 2494.

²¹⁰ 44 U.S. 212 (1845).

²¹¹ *Minnesota v. Mille Lacs Band of Chippewa Indians et al.*, 526 U.S. 172 (1999).

²¹² *Id.* at 207.

²¹³ *Herrera v. Wyoming*, 139 S. Ct. 1686, 1697 (2019) (“To avoid any future confusion, we make clear today that *Race Horse* is repudiated to the extent it held that treaty rights can be impliedly extinguished at statehood”).

²¹⁴ 163 U.S. 504, 514 (1896).

²¹⁵ *United States v. McBratney*, 104 U.S. 621 (1881).

²¹⁶ *Draper v. United States*, 164 U.S. 240 (1896).

Indian Law cases—old cases that relied on white supremacy to justify legal conclusions.

Second, the Oklahoma Enabling Act’s text indicates Congress’s intent to preserve tribal treaty rights as a condition to Oklahoma entering the Union. The majority not only fails to engage with the nuanced reality that state borders were built over tribal land but goes even further by ignoring the plain text of a federal statute. Congress created several requirements for Oklahoma’s state constitution:

[N]othing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by *treaties*, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed.²¹⁷

Under *Castro-Huerta*, statehood displaces pre-existing treaty rights *even if* Congress expressly intends the opposite. Recall that Enabling Acts are federal legislation, yet the Court conveniently renders Congress powerless to protect Native Americans through its own legislation. This is one example of the Court transferring some of Congress’s power to the states and may foreshadow the Court’s willingness to do so again in the future.

Third, *Castro-Huerta* directly conflicts with the well-established Clear Statement Rule and flips the Rule on its head. Recall that Congress may only abrogate a tribe’s treaty with the United States if it expressly says so, with a clear statement. *Castro-Huerta* now dictates that when a state enters the Union, Congress may only *save* a tribal treaty from abrogation if it expressly says so in the state’s Enabling Act. Before *Castro-Huerta*, a high standard was required to abrogate tribal treaties rights; now, pre-statehood treaty rights that are “inconsistent” with a state’s “inherent” sovereignty could be abrogated unless expressly saved.²¹⁸ The old presumption of protection under the Clear Statement Rule now yields to a presumption of abrogation.

²¹⁷ Oklahoma Enabling Act, ch. 3335, 34 Stat. 267 (1906) (emphasis added).

²¹⁸ See *Castro-Huerta*, 142 S. Ct. at 2503 (“As this Court has previously concluded, ‘admission of a State into the Union’ ‘necessarily repeals the provisions of any prior statute, or of any existing treaty’ that is inconsistent with the State’s exercise of criminal jurisdiction ‘throughout the whole of the territory within its limits,’ including Indian country, unless the enabling act says otherwise ‘by express words.’”).

Fourth, despite all five of the Justices in the majority being self-proclaimed originalists or pragmatic originalists,²¹⁹ these Justices fail to practice what they preach. The majority weakens the seminal 1832 case *Worcester v. Georgia*, where the Court, under Chief Justice Marshall, held that Georgia could not criminally regulate the Cherokee's lands.²²⁰ *Worcester* has been a crucially foundational Federal Indian Law case for 190 years.²²¹ It is cited in the opening chapters of Federal Indian Law treatises.²²² Despite *Worcester's* importance, the Court spends one page abrogating it and does not explain its reasoning for doing so.²²³ It simply cited six “grab bag”²²⁴ cases—only “six decisions out of the galaxy” of Federal Indian Law—to abrogate *Worcester*.²²⁵ The Court ruled that the foundational *Worcester* background rule of tribal sovereignty had been abandoned “[s]ince the latter half of the 1800s”²²⁶ with no further justification or explanation. It ignored the Framers’ intent to revoke the carveout for state power over Tribes that previously existed under the Articles of Confederation.²²⁷ It ignored a mountain of history.²²⁸

The biggest hypocrisy is *Castro-Huerta's* placement among other 2021-2022 term cases heralding original meaning, historical analysis, and other originalist arguments.²²⁹ *Castro-Huerta* fails to discuss Chief Justice Marshall’s historical analysis in *Worcester* and fails to rebut Justice Gorsuch’s dissenting historical discussion.²³⁰ Perhaps it abandons originalism here because, as with much of Federal Indian Law, an

²¹⁹ Illan Wurman, *What is Originalism? Did it Underpin the Supreme Court’s Ruling on Abortion and Guns? Debunking the Myths*, THE CONVERSATION (July 8, 2022, 8:17 AM), <https://theconversation.com/what-is-originalism-did-it-underpin-the-supreme-courts-ruling-on-abortion-and-guns-debunking-the-myths-186440>.

²²⁰ 31 U.S. 515 (1832).

²²¹ Justice Gorsuch’s dissent in *Castro-Huerta* incorrectly characterizes *Worcester* as “over 200 years” old. *Castro-Huerta*, 142 S. Ct. at 2505 (Gorsuch, J., dissenting). *Worcester* was 190 years old when *Castro-Huerta* was decided.

²²² E.g., FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 1.03; Canby, *supra* note 37, at 18.

²²³ *Castro-Huerta*, 142 S. Ct. at 2493-94.

²²⁴ *Id.* at 2520 (Gorsuch, J., dissenting).

²²⁵ *Id.* (Gorsuch, J., dissenting). Within this “grab bag,” the Court twice cited *dicta* of *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), to undermine *Worcester's* central holding. Dylan Hedden-Nicely, *The Reports of My Death Are Greatly Exaggerated: The Continued Vitality of Worcester v. Georgia*, 51 S.W. U. L. REV. 2 (forthcoming 2023) (manuscript at 3).

²²⁶ *Castro-Huerta*, 142 S. Ct. at 2493.

²²⁷ *Id.* at 2506 (Gorsuch, J., dissenting).

²²⁸ *Id.* at 2505-07 (Gorsuch, J., dissenting).

²²⁹ E.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022); *New York Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022).

²³⁰ See *Castro-Huerta*, 142 S. Ct. at 2505-07 (Gorsuch, J., dissenting).

originalist analysis true to history at the time of constitutional ratification is more likely to bolster tribal sovereignty with respect to states instead of endorsing state encroachment into tribal sovereignty.²³¹

Castro-Huerta may have broad implications for tribal sovereignty. It may be a sign that the Supreme Court, in a 180-degree turn from *McGirt*, will not uphold tribal treaty rights in the future. It may be a sign that the Supreme Court is scrapping cases like *Worcester* and endorsing states' exercise of full control over Native American tribes. It may be a sign that the Court will transfer Congress's plenary power over Indian affairs to the states. Conversely, *Castro-Huerta* may only impact criminal jurisdiction. It may only destroy certain treaty rights for tribes within Oklahoma. It may be a blip on the radar if future courts decline to extend its reasoning to new circumstances. *Castro-Huerta*'s impact on land reparations is detailed below.

First, where does *McGirt* stand after *Castro-Huerta*? The Supreme Court did not explicitly overrule *McGirt*, nor did it take up the question of whether to review *McGirt*'s validity on certiorari. Although the Court did not explicitly review *McGirt*'s precedent vitality, the Supreme Court dramatically weakened its central holding that Oklahoma lacks criminal jurisdiction over crimes within the Creek Nation reservation. Now that Oklahoma has inherent concurrent criminal jurisdiction over all Indian Country within its geographical borders, the Court has functionally overruled *McGirt*.

Second, where does *Worcester* stand after *Castro-Huerta*? *Worcester* erected the foundations of tribal sovereignty in Federal Indian Law. It laid the first brick when the Court said state law has no force in the Cherokee Nation because it "is a distinct community occupying its own territory."²³² Although *Worcester*'s robust dual-sovereignty has been picked away by intervening case law,²³³ none went so far as *Castro-Huerta*, altogether abrogating the case.

If *Worcester* is weakened, all aspects of tribal sovereignty are weakened. States have another arrow in their quiver of arguments against tribal sovereignty: a citation to *Castro-Huerta*. Further, when the Court abrogated *Worcester* in *Castro-Huerta*, three of the six "grab bag" cases it

²³¹ See Gregory Ablavsky, *Smashing Precedents and Making Up Facts*, STRICT SCRUTINY 18:36-18:50 (July 4, 2022) ". . . the great problem that originalists in Federal Indian Law face is that if you were truly originalist in Federal Indian Law, you support a robust vision of tribal sovereignty, and you support a [] very limited scope for state authority."

²³² *Worcester v. Georgia*, 31 U.S. at 561.

²³³ *Nevada v. Hicks*, 533 U. S. 353, 361-62 (2001), citing *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980).

used were not about criminal jurisdiction. Rather, these cases centered around tort law²³⁴ and civil jurisdiction.²³⁵ This suggests that the Court's holding extends further than the question on appeal—a state's criminal jurisdiction in Indian Country—and could be interpreted in the future to modify to civil jurisdiction in Indian Country.

Alternatively, *Worcester* may be alive and well—only modified, not abrogated. Professor Dylan Hedden-Nicely argues that *Worcester*'s central holding remains intact: *Worcester* still affirms the federal government's plenary power over Native Americans and prohibits state action that would infringe on Native Americans' right to self-government in Indian Country.²³⁶ Hedden-Nicely argues that none of the “grab bag” cases used by *Castro-Huerta* were powerful enough to abrogate *Worcester* because the Court only used *dicta* when citing to each case—“stich[ing] together *dicta* built upon *dicta*.”²³⁷ None of the “grab bag” cases contain broad enough holdings to displace a case as foundational as *Worcester*.²³⁸ One of these cases, *Williams v. Lee*, reiterated *Worcester*'s central holding.²³⁹ Thus, *Worcester*'s narrow authorization of state authority in Indian Country, and broad authorization of federal power in Indian Country, may still be valid in the wake of *Castro-Huerta*.

The third way *Castro-Huerta* could undermine land reparations is by devaluing pre-statehood treaties. *Castro-Huerta* embraced the Equal Footing Doctrine's displacement of tribal sovereignty over criminal jurisdiction. Does the Equal Footing Doctrine broadly displace *all* treaty rights, including the physical borders of a tribe's territory or reservation?

The pre-statehood treaty at issue in *Castro-Huerta* was the Treaty of New Echota.²⁴⁰ A number of other treaties are similarly situated and similarly at risk. This is not an insignificant number. The United States

²³⁴ *Nevada v. Hicks*, 533 U. S. at 361 (“[T]he Indians’ right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation’s border.”).

²³⁵ *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930); *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251, 257–58 (1992) (“This Court’s more recent cases have recognized the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands.”).

²³⁶ Hedden-Nicely, *supra* note 225, at 12.

²³⁷ *Id.* at 2.

²³⁸ *See id.* For example, *Organized Village of Kake v. Egan* concerned incredibly unique circumstances and had a narrow holding. *Id.* at 4-5.

²³⁹ *Id.* at 7-8.

²⁴⁰ Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478.

ceased treaty-making with Native American tribes in 1871,²⁴¹ before thirteen western states entered the Union.²⁴² Treaties from western tribes, among others, could be in jeopardy.

Castro-Huerta's logic may be interpreted in the future to displace *all* treaty rights, not just the right to sovereignty over criminal jurisdiction. The language "Indian country is part of a [s]tate's territory" wholly divests treaties' geographical boundaries.²⁴³ The Treaty of New Echota broadly guaranteed that "the lands ceded to the Cherokee nation . . . shall, in no future time without their consent, be included within the *territorial* limits or *jurisdiction* of any State or Territory."²⁴⁴ The treaty also guaranteed a "permanent home" for the Cherokee "without the *territorial* limits of the State sovereignties."²⁴⁵ To be clear, *Castro-Huerta* negated only the treaty right to sovereignty over criminal jurisdiction.²⁴⁶ But nothing is stopping the Court from going further and displacing the Cherokee's treaty right to reservation land.

Oklahoma has already encroached into Cherokee territory, but in the wake of *Castro-Huerta*, the Cherokee could find its territorial boundaries—as guaranteed in the Treaty of New Echota—completely eradicated. If the Supreme Court extends *Castro-Huerta*'s logic to all treaty provisions, not just jurisdictional ones, pre-statehood treaties lose all potential power as instruments for land reparations. For example, the Sioux Nation's monetary damages award for illegally taken land would not be possible.²⁴⁷

Castro-Huerta provides plenty of ammunition to displace treaty land rights. The Court discusses how Indian Country territory is *necessarily* within—not separate from—Oklahoma's territorial boundaries. "Oklahoma's territory includes Indian Country. In the early Republic, the Federal Government sometimes treated Indian Country as separate from

²⁴¹ *Does the United States Still Make Treaties with Indian Tribes?*, U.S. DEP'T OF THE INTERIOR INDIAN AFF., <https://www.bia.gov/faqs/does-united-states-still-make-treaties-indian-tribes> (last visited Dec. 30, 2022).

²⁴² See Samuel Shipley, *List of U.S. States' Dates of Admission to the Union*, ENCYCLOPEDIA BRITANNICA (Aug. 15, 2018), <https://www.britannica.com/topic/list-of-U-S-states-by-date-of-admission-to-the-Union-2130026>.

²⁴³ *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2494 (2022).

²⁴⁴ Treaty with the Cherokee, art. V, Dec. 29, 1835, 7 Stat. 478 (emphasis added).

²⁴⁵ *Id.* at pmbl.

²⁴⁶ *Castro-Huerta*, 142 S. Ct. at 2503 (the Court specified that the treaty's guarantee of sovereignty over criminal jurisdiction was repealed because it was "inconsistent with [Oklahoma's] exercise of criminal jurisdiction.").

²⁴⁷ *United States v. Sioux Nation*, 448 U.S. 371, 387 (1980). Under *Castro-Huerta*'s logic, Montana's statehood would supersede all rights guaranteed under the Fort Laramie Treaty since the Treaty was ratified in 1869 and Montana entered the Union twenty years later.

state territory. But that view has long since been abandoned.”²⁴⁸ “Indian country is part of a [s]tate’s territory.”²⁴⁹ After *Worcester* was “abandoned”²⁵⁰ in the late 1800s, “Indian country in each [s]tate became part of that [s]tate’s territory.”²⁵¹ “To be clear, the Court today holds that Indian Country within a [s]tate’s territory is part of a State, not separate from a State.”²⁵²

Alternatively, *Castro-Huerta* might not spell disaster for treaty rights to land. One could argue *Castro-Huerta*’s language purporting to displace pre-statehood treaty rights was merely *dicta*. Justice Gorsuch describes the majority’s discussion as *dicta*, claiming their holding is the result of “a case-specific ‘balancing test’” instead a powerful statement of a state’s inherent criminal jurisdiction in Indian Country.²⁵³

A fourth way *Castro-Huerta* may undermine land reparations will become clear if—and when—Congress passes legislation regarding tribal land reparations. Ingredients of *Castro-Huerta*’s holding, if interpreted broadly, could become an impediment to Congress’s plenary power in Native American affairs.

Castro-Huerta could be indicative of the Court trending away from exclusive federal authority to regulate Indian Affairs and toward inherent state authority to regulate Indian Affairs. *Castro-Huerta*’s grant of “inherent state prosecutorial authority in Indian Country”²⁵⁴ could broadly expand other state authority into Indian Country and be used to block federal legislation as either an unconstitutional encroachment into states or an unconstitutional exercise of Congress’s power. Granting states “inherent” power over an area of law—even when its power is concurrent with the federal government—might open the door for future federalism and anti-commandeering arguments.

Further, recall how the *Castro-Huerta* majority held that federal statute Public Law 280 did not preempt Oklahoma’s criminal jurisdiction over Indian Country, even though Public Law 280 only grants state criminal jurisdiction over Indian Country if a state is authorized to do so under the statute. The majority’s preemption analysis may indicate the Court’s plan to limit Congress’s plenary power over Native Americans.

²⁴⁸ *Castro-Huerta*, 142 S. Ct. at 2489 (internal citations omitted).

²⁴⁹ *Id.* at 2494.

²⁵⁰ *Id.* at 2497.

²⁵¹ *Id.*

²⁵² *Id.* at 2504.

²⁵³ *Id.* at 2515 n.14 (Gorsuch, J., dissenting) (“So, once more, the Court’s discussion of the Oklahoma Enabling Act turns out to be *dicta* future litigants are free to correct. Much correction is warranted.”).

²⁵⁴ *Id.* at 2499 (emphasis added).

The Court has limited Congress's plenary power before. In *Sioux Nation*, the court narrowed Congress's broad power under *Lone Wolf* by concluding it was not entitled to deference with Fifth Amendment takings cases.²⁵⁵ *Brackeen v. Haaland* may take this limitation a step further.

In 2022, the Supreme Court granted certiorari in *Brackeen v. Haaland* to determine whether the ICWA is unconstitutional.²⁵⁶ Congress passed ICWA in 1978 to correct the crisis of Indian children being removed from their families and placed with non-Indian foster and adoptive homes.²⁵⁷ Congress explicitly enacted ICWA under its Article I plenary power over Indian affairs, citing the Indian Commerce Clause.²⁵⁸ One of the questions presented in *Brackeen* is whether ICWA exceeds Congress's Article I authority—specifically, whether the “arena of child placement” is in the “virtually exclusive province of the States,” not the federal government.²⁵⁹ If the Court strikes down ICWA on these grounds, it would essentially seize Congress's power and transfer it to itself and to the states. *Brackeen* would be extremely destructive for land reparations.

The majority's reasoning in *Castro-Huerta* contains broad language with seemingly “no limiting principle, leading many to speculate as to its scope.”²⁶⁰ *Castro-Huerta* could be used as a steppingstone for the Court to slice a hole into Congress's plenary power in *Brackeen*, or it could turn out to be an inconsequential blip on the Federal Indian Law radar. Only time will tell how expansively or narrowly the Supreme Court and lower courts will interpret *Castro-Huerta*.

Indigenous treaty rights, as interpreted by the federal judiciary, are in flux. Litigation has always been an imperfect vehicle for tribes, and only time will tell if it remains a viable route to obtain recognition of land rights.

IV. USING TREATIES IN FEE-TO-TRUST LAND DETERMINATIONS

Since Native Americans have not received adequate land reparations from Congress, and are not likely to receive assistance from an increasingly hostile judiciary, some tribes have resorted to purchasing land on the open

²⁵⁵ *United States v. Sioux Nation*, 448 U.S. 371, 412-14 (1980). The Court stated that Congress's “power to control and manage [is] not absolute . . . it [is] subject to limitations inhering in . . . a guardianship and to pertinent constitutional restrictions.” *Id.*, quoting *United States v. Creek Nation*, 295 U.S. 103 at 109-10 (1935).

²⁵⁶ *Brackeen v. Bernhardt*, No. 18-11479 (5th Cir. 2019), Petition for Cert. Granted, *Brackeen v. Haaland*, No. 21-380 (U.S. Feb. 28, 2022).

²⁵⁷ 25 U.S.C. § 1901(4).

²⁵⁸ *Id.* at § 1901(1).

²⁵⁹ Petition for Cert. Granted, *Brackeen v. Haaland*, No. 21-380 (U.S. Feb. 28, 2022).

²⁶⁰ Hedden-Nicely, *supra* note 225.

market to increase their land base.²⁶¹ Tribes who purchase land and own it in fee simple can petition the Secretary of the Interior to put this land into trust for the tribe, who is the beneficiary in this federal trust relationship. Having land in trust instead of fee title can aid with tribal sovereignty by, for example, shielding tribes from state and local taxation and land use laws.²⁶² While this method is not technically land reparations, treaties could be increasingly used as a tool for strengthening tribes' ability to reacquire land if Congress makes treaties a mandatory consideration in the Secretary's decision to place this purchased land into trust.²⁶³

The Indian Reorganization Act of 1934 (IRA)²⁶⁴ was enacted to end the allotment era and begin restoring tribal homelands.²⁶⁵ To further this goal, the IRA authorized the Secretary of the Interior to place both reservation and non-reservation land into trust for tribes.²⁶⁶ The Secretary, in conjunction with the Bureau of Indian Affairs (BIA), has discretion

²⁶¹ Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, and History*, 49 Idaho L. Rev. 519, 535-540 (2013) (listing examples of fee-to-trust transactions and legal challenges).

²⁶² 25 U.S.C. § 5108 ("Title to any lands or rights acquired pursuant to this Act . . . shall be exempt from State and local taxation"); *Benefits of Trust Land Acquisition (Fee to Trust)*, *supra* note 125.

²⁶³ Although it is beyond the scope of this article, treaties could also be used to compel the federal government to provide more educational funding for indigenous children. Indigenous leaders often negotiated for the education of their children to be included in treaties, and over 110 treaties stipulate that the federal government is required to provide an education to the signatory tribes. MATTHEW L.M. FLETCHER, *FEDERAL INDIAN LAW* 188 (2016). The Supreme Court has recognized that the federal government assumed an obligation to provide these educational services. *Id.* One could argue the treaties mandate that when Congress provides federal funding for education for non-indigenous children, it must distribute an equal amount of this funding to indigenous children.

²⁶⁴ 25 U.S.C. §§ 461 et seq.

²⁶⁵ *The Indian Reorganization Act—75 Years Later: Renewing Our Commitment to Restore Tribal Homelands and Promote Self-Determination: Hearing Before the Committee on Indian Affairs Before the United States Senate*, 112th Cong. 1 (2011) (statement of Hon. Daniel K. Akaka, U.S. Senator from Hawaii).

²⁶⁶ 25 U.S.C. §5108. This section is colloquially dubbed "Section 5." See CONGRESSIONAL RESEARCH SERVICE, *BIA'S NEW TAKE ON TAKING LAND INTO TRUST FOR INDIANS*, 1 (May 6, 2020). The Fee-to-Trust process entails the following steps: first, a tribe completes a fee-to-trust application and sends it to its regional Bureau of Indian Affairs (BIA) office; next, the BIA follows 25 C.F.R. § 151 criteria and BIA procedures to decide whether to take fee land into trust. *Trust Land Acquisition*, U.S. DEP'T OF THE INTERIOR, <https://www.doi.gov/ocl/trust-land-acquisition> (last visited Dec. 30, 2022). For land intended for gaming, state and local governments receive the opportunity to comment on the application. *Id.* The BIA also conducts an environmental analysis based on the intended use of the property. *Id.* <https://crsreports.congress.gov/product/pdf/LSB/LSB10460>. The Fee-to-Trust process entails the following steps: first, a tribe completes a fee-to-trust application and sends it to its regional Bureau of Indian Affairs (BIA) office; next, the BIA follows 25 C.F.R. § 151 criteria and BIA procedures to decide whether to take fee land into trust. *Comparing Trust Land Acquisition with the Intent of the 73rd Congress in Section 5 of the Indian Reorganization Act: Hearing Before the H. Subcommittee on Indian, Insular and Alaska Native Affairs* (July 13, 2017) available at <https://www.doi.gov/ocl/trust-land-acquisition> (last visited Dec. 30, 2022). For land intended for gaming, state and local governments receive the opportunity to comment on the application. *Id.* The BIA also conducts an environmental analysis based on the intended use of the property. *Id.*

regarding whether or not to place purchased fee land into trust, but *must* do so when directed to by Congress.²⁶⁷ The Supreme Court endorsed this fee-to-trust process as a “proper avenue for [tribes] to reestablish sovereign authority over territory.”²⁶⁸ The fee-to-trust process is now a route for tribes seeking to regain lost land or generally increase their land base, often through purchasing land on the open market. Although tribes should not have to pay for lost land, especially treaty land, tribes with few other alternatives resort to this method. Some tribes purchase land using settlement funds given to them by Congress.²⁶⁹

Fee-to-trust has limited power for indigenous land reparations. First, unless tribes receive federal grants of money to reacquire lost land, this process is not technically reparative. Second, the process is only available to richer tribes who can afford to purchase land on the open market—unless a tribe receives federal funds earmarked for purchasing land. The fee-to-trust process itself is lengthy and expensive, requiring tribes to retain attorneys for years.²⁷⁰ Third, only tribes who were federally recognized in 1934 may utilize this process, thereby excluding tribes who have only recently gained recognition.²⁷¹ Finally, tribes seeking land in now-densely populated areas, such as the Northeastern tribes, have less capability to take advantage of this process because the Secretary of the Interior is less willing to put land into trust in populous metropolitan areas.

A. Improving the Fee-to-Trust Process

Although the current process has limited value for land reparations, it has helped some tribes increase their land base. This imperfect process could be improved by constraining the Secretary of the Interior’s discretion to decide whether to place fee land into trust. Further, the Secretary of the Interior should be bound by treaties when a tribe repurchases lost land that was guaranteed under a treaty. Instead, under the current status quo, the Secretary may deny fee-to-trust applications or let applications sit for years

²⁶⁷ U.S. DEP’T OF THE INTERIOR INDIAN AFF., ACQUISITION OF TITLE TO LAND HELD IN FEE OR RESTRICTED FEE STATUS (FEE-TO-TRUST HANDBOOK) Jun. 28, 2016, at 4-5. The Secretary is also required to place land into trust when directed to do so by a court order. *Id.* at 5.

²⁶⁸ *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 221 (2005).

²⁶⁹ *See, e.g.*, Michigan Indian Land Claims Settlement Act, Publ L. 105-143 (1997).

²⁷⁰ *See generally Tribal Lands & Lands into Trust*, AKIN GUMP, <https://www.akingump.com/en/experience/practices/american-indian/issues-governing-tribal-lands-and-lands-into-trust.html> (last visited Jan. 17, 2023).

²⁷¹ *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009).

regardless of applicable treaty language.²⁷² This discretion has consequences for tribes.

1. Constrain the Secretary of the Interior's Discretion

Tribes are well-positioned to decide whether their fee land should be taken into trust. The following example illustrates why Congress should vest indigenous tribes with this discretion instead of the Secretary of the Interior.

In *Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*,²⁷³ the Secretary of the Interior's broad discretion obstructed the Sault Tribe of Chippewa Indians' fee-to-trust efforts. Congress allocated settlement funds to the Tribe under the Michigan Indian Land Claims Settlement Act (Settlement Act),²⁷⁴ authorizing the tribe to use the fund for "enhancement of tribal landholdings."²⁷⁵ The Tribe ultimately sued the Secretary for effectively diminishing their statutory right to expand their land base.²⁷⁶

Congress passed the Settlement Act to remedy two unconscionable treaties. The Chippewa and Ottawa Nations signed treaties in 1836 and 1855 agreeing to cede 12 million acres of land to the Federal Government in exchange for approximately \$0.15 an acre.²⁷⁷ A century later, the Indian Claims Commission found this agreement to be unconscionable and determined the tribes should have been compensated \$0.90 an acre.²⁷⁸ Congress settled this claim with \$10 million and the Settlement Act—a framework to distribute these funds.²⁷⁹ Congress gave the Sault Tribe the

²⁷² See, e.g., Brief of Plaintiff-Appellee at 4-5, *Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, (No. 20-5123) (2022) (for three years, the Interior refused to make a decision on the Sault Tribe's land-into-trust application). The Department of the Interior is not always a barrier to tribal sovereignty in land-to-trust issues. See, e.g., *Stand Up for Cal! v. Dep't of Interior*, 315 F. Supp. 3d 289 (D.D.C. 2018) (the Interior acquired land in trust for the Wilton Rancheria Tribe of California for the purposes of building a casino and prevailed when private landowners challenged the acquisition).

²⁷³ 442 F. Supp. 3d 53, 77 (2020), *rev'd*, 25 F.4th 12 (2022).

²⁷⁴ Pub. L. No. 105-143 (1997). The Settlement Act was not codified in the United States Code. Statutes like the Michigan Act, which address only particular tribes, are special provisions not codified in the United States Code. See generally 25 U.S.C. ch. 19 codification note (explaining that provisions "relating to settlement of the land claims of certain Indian tribes[] [were] omitted from the Code as being of special and not general application").

²⁷⁵ §107(a)(3) (emphasis added).

²⁷⁶ *Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, 442 F. Supp. 3d 53, 74 (2020), *rev'd*, 25 F.4th 12 (2022).

²⁷⁷ *To Provide for the Division, Use, and Distribution of Judgment Funds of the Ottawa and Chippewa Indians of Michigan Pursuant to Dockets Numbered 18-E, 58, 364, and 18-R Before the Indian Claims Commission: Hearing on H.R. 1604 Before the S. Comm. on Indian Aff.*, 105th Cong. 27 (1998) (statement of Hon. Dale Kildee, U.S. Rep. from Mich.).

²⁷⁸ *Id.*

²⁷⁹ *Id.*

right to use the funds “for improvements on tribal land or the consolidation and enhancement of tribal landholdings through purchase or exchange.”²⁸⁰

The Sault Tribe purchased land near Detroit, physically disconnected from its existing trust lands, but where many of its members live.²⁸¹ The Tribe aimed to increase their land base and open lucrative gaming operations near the metropolitan area.²⁸² The Tribe’s existing trust lands in the “sparsely populated Upper Peninsula of Michigan [were] unable to support significant economic development and thus [were] inadequate to meet the basic needs of the Tribe’s members for employment, housing, health care, and social services.”²⁸³ It is no accident the Sault Tribe is “acutely land-starved;” in the 1800s “the United States coerced the Tribe’s ancestors into relinquishing most of their lands.”²⁸⁴ When the Tribe attempted to reacquire this land and put it into trust, the Secretary refused to do so.²⁸⁵ He determined the acquisition would not enhance tribal lands because it was not geographically proximate to land already owned by the Tribe in Upper Michigan.²⁸⁶ The Tribe sued, seeking to compel the Department of the Interior to take this land into trust.²⁸⁷

The district court sided with the Sault Tribe. It held the Tribe had discretion to put the land into trust—not the Secretary of the Interior—so long as the Tribe’s requests comported with the plain language of the Settlement Act.²⁸⁸ The Tribe initially prevailed in their argument that increasing their land base comports with the Settlement Act’s plain language. The court held “enhancing” tribal lands under § 108 broadly includes “an increase in *size* . . . and any number of other quantitative and qualitative attributes.”²⁸⁹ *More* tribal land necessarily *enhances* tribal lands.²⁹⁰

The D.C. Circuit reversed.²⁹¹ It narrowly read “enhancement” as limited to improvements to “*existing* tribal lands,” not “acquir[ing] a

²⁸⁰ §107(a)(3).

²⁸¹ Final Brief for Plaintiff-Appellee, Sault Ste. Marie Tribe of Chippewa Indians v. Vega, (Nos. 20-5127, 20-5123, 20-5125, 20-5128) 2021 WL 662198 (C.A.D.C.), at *2.

²⁸² *Id.* at *13.

²⁸³ *Id.* at *7.

²⁸⁴ *Id.* at *6-7.

²⁸⁵ *Id.* at *2-3.

²⁸⁶ *Id.*

²⁸⁷ *Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, 442 F. Supp. 3d 53, 57 (2020), *rev’d*, 25 F.4th 12 (2022).

²⁸⁸ *Id.* at 74.

²⁸⁹ *Id.* (emphasis added).

²⁹⁰ *Id.* at 63, 73.

²⁹¹ *Sault Ste. Marie Tribe of Chippewa Indians v. Haaland*, 25 F.4th 12, 15 (D.C. Cir. 2022).

separate parcel of land.”²⁹² The court determined this acquisition of land near Detroit had “no connection to increasing the quality or value of existing tribal lands”²⁹³ and could not be sustained under their narrow construction of the statute. The D.C. Circuit departed from the district court’s common sense reasoning that “‘enhancement of tribal lands’ unambiguously includes any land acquisition that increases the Tribe’s total landholdings.”²⁹⁴ It also eroded tribal sovereignty by granting the Secretary of the Interior wide discretion to deny putting purchased land into trust, stating that the Secretary may decide whether the Tribe purchased the land for a proper purpose.²⁹⁵ The D.C. Circuit sidestepped the Indian Canon of Construction, which would have tipped statutory interpretation in favor of the Sault Tribe’s interests.²⁹⁶ The D.C. Circuit’s narrow reading of “enhancement” and accedence to the Secretary of the Interior is one example of how tribes struggle to expand their land base and boost their economy even when Congress gives them the right to do so.

One way to remedy this issue is for Congress to constrain the Secretary of the Interior’s discretion to take fee land into trust, especially when Congress provides funds and a statutory framework designed to *help* tribes improve their landholdings. This may be achieved by including language in the Settlement Act instructing the Secretary to give greater deference to a tribe’s decision to convert fee land—purchased with congressional funding—into trust land. In remedial legislation for indigenous peoples, Congress should be mindful of closing loopholes instead of creating them.

2. *Require the Secretary of the Interior to Consider Treaties*

Congress and courts may further constrain the Secretary’s discretion by requiring that they consider treaties when making fee-to-trust determinations. Like with the Indian Canons of Construction, the Secretary should only be allowed to use treaties for a tribe’s *benefit*, not as pretext to deny placing fee land into trust. The Secretary’s broad discretion to ignore treaties impairs efforts to restore indigenous land.

For example, the federally recognized Cayuga Nation recently sued the Secretary of the Interior for sitting on its application to put land into trust for fifteen years.²⁹⁷ The Cayuga has been reacquiring—through open-

²⁹² *Id.* at 23 (emphasis added).

²⁹³ *Id.* at 24.

²⁹⁴ *Id.* at 73.

²⁹⁵ *Id.* at 7.

²⁹⁶ *See id.* at n.7.

²⁹⁷ Complaint at 1, *Cayuga Nation v. United States*, No. 20-1581 (D.D.C. July 16, 2022). The litigation is still pending.

market purchases—reservation land guaranteed to them under the Treaty of Canandaigua and lost through illegal acts.²⁹⁸ Their application to take 129 acres into trust—land that is within the tribes’ historic reservation—has been suspended indefinitely.²⁹⁹ This suspension was more than a mere inconvenience. The Nation is unable to pursue lucrative gaming opportunities, fully exercise its sovereignty, access federal programs, and be free from local taxation.³⁰⁰ Keeping the trust application current has cost the Nation hundreds of thousands of dollars.³⁰¹

The Cayuga Nation sued the Secretary of the Interior for violating their trust responsibilities by making the Nation wait unreasonably long for a final decision while incurring costs in the interim.³⁰² The litigation remains pending.³⁰³

The Cayuga’s stalled trust application for land *guaranteed* under the Treaty of Canandaigua³⁰⁴ is unacceptable. The Department of the Interior should be required to consider treaties with fee-to-trust decisions. When a tribe has a treaty right to land and is re-purchasing land within its treaty boundary, there should be a rebuttable presumption that this re-purchased land will “increase the quality” of existing tribal land. This presumption would make it easier to place this land into trust and more difficult for the Secretary to deny putting land into trust for tribes.

All three branches of the federal government have the power to elevate treaties as mandatory considerations in the fee-to-trust process. First, the Department of the Interior could do so under amended Land Acquisition Regulations. The Biden Administration’s Department of the Interior requested tribal input on amending the fee-to-trust process.³⁰⁵ If restoring indigenous homelands is truly “a top priority for the Department,”³⁰⁶ it should give the highest deference to tribes seeking to put land into trust that is guaranteed under treaties. The Department’s Land

²⁹⁸ Treaty with the Six Nations, art. II, Nov. 11, 1794, 7 Stat. 44; Complaint at 3, *Cayuga Nation v. United States*, No. 20-1581 (D.D.C. July 16, 2022).

²⁹⁹ Complaint at 3, 7, *Cayuga Nation v. United States* No. 20-1581 (D.D.C. July 16, 2022).

³⁰⁰ *Id.* at 8-10.

³⁰¹ *Id.* at 10-12.

³⁰² *Id.* at 11.

³⁰³ See *Cayuga Nation v. United States*, No. 1:20-cv-01581-ABJ (D.D.C. Jan. 26, 2023).

³⁰⁴ Complaint at 3, *Cayuga Nation v. United States*, No. 20-1581 (D.D.C. July 16, 2022).

³⁰⁵ 25 *CFR Part 151 (Land Acquisition) and 25 CFR Part 293 (Class III Tribal State Gaming Compact Process)*, U.S. DEP’T INTERIOR INDIAN AFFS., <https://www.bia.gov/tribal-consultation/25-cfr-part-151-land-acquisition-and-25-cfr-part-293-class-iii-tribal-state> (last visited Dec. 30, 2022).

³⁰⁶ *Id.*

Acquisition Regulations should require the Secretary to be bound by treaties when doing so would increase a tribe's land base.³⁰⁷

Second, courts could elevate treaties by simply applying existing law. Treaties carry the same force as federal legislation under the Constitution's Supremacy Clause and *should* bind the administrative state under the separation of powers doctrine. The Secretary of the Interior must follow the law—complying with treaties is part of this mandate. When tribes sue the Department of the Interior to challenge its inaction or denial of a fee-to-trust application for land within their historical treaty rights, courts should create a presumption in favor of tribes.

Third, Congress should make the fee-to-trust land acquisition process more effective. Congress should first revise the IRA to expand its coverage to tribes that were federally recognized after 1934 so that more tribes can take advantage of the fee-to-trust process. Congress should additionally pass a statute announcing that treaties are mandatory considerations for the Secretary's fee-to-trust decisions. This statute would make federal courts more comfortable taking treaties into consideration in lawsuits where the Secretary has denied or delayed putting land into trust.

Although the fee-to-trust process is an insufficient method to achieve land reparations, if modified it could be a more powerful avenue to increase indigenous trust land.

V. TREATY RIGHTS SHOULD BE HONORED INDEPENDENT OF U.S. DOMESTIC LAW

As discussed, numerous barriers exist in U.S. domestic law that prevent tribes from robustly asserting their treaty rights to land. However, international law mandates that treaty rights between indigenous peoples and the United States be honored.

Congress should act in this area in two ways. First, Congress should incorporate treaties into federal legislation, emulating how New Zealand courts use the Treaty of Waitangi in statutory interpretation. Second, Congress could incorporate the United Nations Declaration of Rights of Indigenous Peoples (UNDRIP)³⁰⁸ into its domestic law, as Canada has already done. UNDRIP provides a framework for how to resolve land claims. If the UNDRIP were incorporated into domestic law, Native Americans could potentially receive land restitution for treaty violations instead of monetary compensation.

³⁰⁷ See 25 C.F.R. § 151.

³⁰⁸ See generally G.A. Res. 61/295, *supra* note 27.

A. New Zealand & the Waitangi Tribunal

Like the United States, New Zealand shares a similar history of treaties ceding indigenous land to the colonizing power, though in New Zealand this occurred largely through one major treaty—the Waitangi Treaty of 1840—compared to hundreds in the United States.³⁰⁹ Since 1975, New Zealand has adopted a more robust reparative scheme in the form of the Waitangi Tribunal. The Tribunal exists to remedy over a hundred years of government violations of the Waitangi Treaty.³¹⁰ Although rights conferred by the Treaty of Waitangi cannot be *enforced* in New Zealand courts unless they have been incorporated into legislation, courts still use the Treaty of Waitangi as an interpretive aid.³¹¹ This method could be adopted by U.S. courts.

Since 1987, New Zealand courts have used the Treaty of Waitangi to interpret statutes even where it has not been incorporated into legislation.³¹² The Treaty is an extrinsic aid for “legislation which impinges upon [the Treaty’s] principles . . . when it is proper, in accordance with principles of statutory interpretation, to [] resort to extrinsic material.”³¹³ Where the Treaty has been incorporated into legislation, it commands more influence because courts may consider its “direct legal effect.”³¹⁴ The Treaty is also a mandatory consideration in administrative law.³¹⁵ For instance, since the Treaty protects the Māori language, administrative allocation of English and Māori radio frequencies must consider the Treaty when deciding the proper quota.³¹⁶

The United States could adopt similar methods to use treaties as extrinsic interpretive aids. In addition to the Indian Canon of Construction, courts could use individual treaties to aid in federal statutory interpretation. If Congress intends a federal statute to impact Native nations, treaties between the Nation(s) and the federal government should be used to interpret the federal statute. Like in New Zealand, courts could use either

³⁰⁹ Tribes and the federal government executed over four hundred ratified treaties, two hundred of which remain in force today. MATTHEW L.M. FLETCHER, *FEDERAL INDIAN LAW* 213 (2016).

³¹⁰ Lenzerini, *supra* note 64, at 544. The tribunal takes a broad approach to treaties, focusing on their “spirit” and the surrounding circumstances. *Id.*

³¹¹ *Haoni Te Heuheu Tukino v. Aotea Māori Trust Board*, [1941] AC 308 (PC); *Treaty of Waitangi*, N.Z. MINISTRY JUST. (last updated Mar. 27, 2023), <https://www.justice.govt.nz/about/learn-about-the-justice-system/how-the-justice-system-works/the-basis-for-all-law/treaty-of-waitangi/>.

³¹² Lenzerini, *supra* note 64, at 545. The Māori are provided more protection when statutes directly incorporate principles of the treaty. *Id.* at 547.

³¹³ *Huakina Development Trust v. Waikato Valley Authority*, [1987] 2 NZLR 188, 210 (HC).

³¹⁴ Edward Willis, *Legal Recognition of Rights Derived from the Treaty of Waitangi*, 8 N.Z. J. PUB. & INT’L L. 217, 233 (2010).

³¹⁵ *Id.*

³¹⁶ *Attorney-General v. New Zealand Māori Council* [1991] 2 NZLR 129, 136-41 (CA).

the individual treaty provisions *or* the “spirit” of the treaty as canons of construction. This method is currently dependent on U.S. courts finding ambiguity in federal statutes, yet could tip the scale in favor of tribes who have seen their treaty rights largely ignored for over a century.

Courts would be more willing to use treaties as interpretive aids if Congress speaks on the matter. New Zealand courts describe the Waitangi treaty as “essential to the foundation of New Zealand” and “part of the fabric of New Zealand society.”³¹⁷ Congress could make a similar statement—that tribal treaties are relevant to federal statutes impacting Native Americans or are important to the foundation of the United States. U.S. courts could point to such a statement as evidence that Congress intends treaties to be incorporated into federal legislation since federal statutes stand beside a rich history of indigenous treaties. Such a statement would simply confirm reality. The juvenile United States was culturally and physically shaped by its interactions with sovereign nations: the War of 1812; the Mexican-American war and subsequent land acquisition from Mexico; land acquisition from Spain; the Louisiana Purchase from France; and of course, all the land taken by force, war, and diplomacy from indigenous nations.³¹⁸

B. United Nations Declaration on the Rights of Indigenous Peoples

UNDRIP³¹⁹ recognizes the need to promote indigenous rights to land and guarantees the right to redress for dispossession of traditional lands taken without free, prior, and informed consent.³²⁰ When UNDRIP was adopted in 2007,³²¹ it was initially opposed by just four countries: Australia, Canada, New Zealand, and the United States.³²² Although these countries were initially concerned about UNDRIP’s endorsement of the right to self-determination,³²³ all four countries now support the Declaration.³²⁴

³¹⁷ *Huakina Development Trust v. Waikato Valley Authority*, [1987] 2 NZLR 188, 210 (HC).

³¹⁸ *Territorial Gains by the U.S.*, NAT’L GEOGRAPHIC, <https://education.nationalgeographic.org/resource/territorial-gains> (last visited Jan. 17, 2023); *U.S. Military Actions and Wars, 1775-1994*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/us-military-actions-and-wars-1775-1994/> (last visited Jan. 17, 2023).

³¹⁹ G.A. Res. 61/295, *supra* note 27.

³²⁰ *Id.* at art. 28.

³²¹ *Id.* at pmbl.

³²² *United Nations Declaration on the Rights of Indigenous Peoples*, U.N. DEP’T ECON. & SOC. AFFS., <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> (last visited Dec. 30, 2022).

³²³ Andrew Erueti, *Reparations for Indigenous Peoples in Canada, New Zealand, and Australia*, 101, 108 in *HANDBOOK OF INDIGENOUS PEOPLES’ RIGHTS* (Corrine Lennox & Damien Short eds. 2016).

³²⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 322.

UNDRIP is the most robust international instrument for indigenous rights.³²⁵ UNDRIP's relevant protections include the right to the recognition, observance, and enforcement of treaties,³²⁶ the right to self-determination,³²⁷ and the right to redress for lands, territories, and resources taken without free, prior, and informed consent.³²⁸

Article 28 of UNDRIP provides indigenous peoples with the right to redress for lost land. Under this article, compensation for land claims *must* be viewed as acceptable to indigenous groups.³²⁹ In other words, returning land is the most preferred remedy and monetary compensation is the least preferred.³³⁰ The International Law Association (ILA) dubs this article “[t]he most important provision dealing with reparation” because it emphasizes land restitution as a form of redress.³³¹ This is a powerful alternative to the United States judiciary’s practice of awarding monetary compensation in lieu of land.³³² Article 28 further provides that when restitution is not “practicable,” it must be replaced by compensation that is *perceived* as “just, fair, and equitable.”³³³ The ILA interprets that perception of “just and fair” and “equitable” to be from the perspective of indigenous communities.³³⁴ This provision could have powerful consequences for indigenous groups, such as the Sioux Nation, which rejected monetary compensation as inadequate redress.³³⁵

Furthermore, requiring land reparations to be perceived as “just, fair, and equitable” could impact finality and preclusion law in United States courts. For example, tribes who received payment from the Indian Claims Commission—an agency tasked with hearing treaty violation claims³³⁶—

³²⁵ Erueti, *supra* note 323, at 107.

³²⁶ G.A. Res. 61/295, *supra* note 27, art. 37(1).

³²⁷ *Id.* at art. 3.

³²⁸ *Id.* at art. 28(1).

³²⁹ Sarah Sargent, *Rights and Reparations: An Assessment of the UNDRIP's Contribution to American Indian Land Claims*, in *INDIGENOUS RIGHTS: CHANGES AND CHALLENGES FOR THE 21ST CENTURY* 88, 110 (Sarah Sargent & Jo Samanta eds., 2016).

³³⁰ G.A. Res. 61/295, *supra* note 27, art. 28.

³³¹ Int'l Law Ass'n, *The Hague Conference: Interim Report on Rights of Indigenous Peoples* 41 (2010), <https://ila.vettoreweb.com/Storage/Download.aspx?DbStorageId=1244&StorageFileGuid=07e8e371-4ea0-445e-bca0-9af38fcc7d6e> [hereinafter *Hague Conference Report*].

³³² *See, e.g.*, Hopkins, *supra* note 15.

³³³ G.A. Res. 61/295, *supra* note 27, art. 28.

³³⁴ *Hague Conference Report*, *supra* note 331, at 41.

³³⁵ McGivney, *supra* note 10.

³³⁶ *See* Press Release, U.S. Dep't of the Interior Indian Affairs, Indian Claims Commission Granted More Than \$45 Million During 1969 (Apr. 6, 1970), <https://www.bia.gov/node/9303/printable/pdf>.

are often claim precluded from litigating treaty rights.³³⁷ Under UNDRIP, if a tribe views monetary compensation as inadequate, judges can exercise their discretion with policy-driven preclusion law and decline to bar future land claims.³³⁸

UNDRIP is the most comprehensive and powerful international rights instrument for indigenous peoples,³³⁹ but it lacks force as applied to Native Americans. UNDRIP is too vague regarding where the proper forum for land claims is and whether treaties are subject to domestic or international law.³⁴⁰ It fails to specify whether indigenous land and/or treaty claims should be brought in domestic or international fora, and whether such claims are a matter of domestic or international law.³⁴¹ Scholars criticize UNDRIP's lack of clarity about whether Native American land claims that arise through treaties should proceed under domestic or international jurisdiction—the final version of UNDRIP is silent on the issue.³⁴²

Although international fora are theoretically available to tribes, UNDRIP's silence fails to provide guidance on choice of law, jurisdictional, and venue issues, making it unclear how available an international forum is for Native American land claims.³⁴³ Few tribes litigate claims in both domestic and international fora.³⁴⁴ The international and regional American courts could be effective routes for tribal land claims because they are much more critical of American Indian legal doctrines than United States courts.³⁴⁵ However, due to UNDRIP's lack of specificity on the matter, it is unclear how much international access or international relief UNDRIP provides for Native Americans pursuing land claims unless UNDRIP is incorporated into U.S. domestic law.

Canada incorporated UNDRIP into its domestic law, and despite these unanswered questions, the United States should follow its lead. Canada is a former British Crown nation with a similar indigenous and colonialist history as the United States. Indigenous peoples in Canada surrendered 80–

³³⁷ Michelle Smith & Janet C. Neuman, *Keeping Indian Claims Commission Decisions in Their Place: Assessing the Preclusive Effect of ICC Decisions in Litigation Over Off-Reservation Treaty Fishing Rights*, 31 U. HAWAII L. REV. 475, 475-76 (2009).

³³⁸ Sargent, *supra* note 329.

³³⁹ Erueti, *supra* note 323, at 110.

³⁴⁰ Sargent, *supra* note 329, at 108-09.

³⁴¹ *Id.*

³⁴² *Id.* at 108.

³⁴³ *Id.* at 109.

³⁴⁴ The Western Shoshone is one of these tribes; they received a favorable outcome before the Inter-American Commission of Human Rights and the Convention for Elimination of All Racial Discrimination. Sargent, *supra* note 329, at 100, 104-05.

³⁴⁵ Sargent, *supra* note 329, at 109.

90% of their original territories in agreements, similar to the history of tribal treaties in the United States.³⁴⁶ Like all federally recognized tribes in the United States, First Nations have their land held in trust by Canada.³⁴⁷ Regaining traditional territories is of the utmost importance to tribes across Canada,³⁴⁸ and much of this work is done through legislation.³⁴⁹

Canada has recently engaged in more reconciliation and reparative efforts for its indigenous populations, including enacting UNDRIP into Canadian law.³⁵⁰ UNDRIP aids in interpretation of Canadian law and requires “all measures necessary” to ensure Canadian law is consistent with the Declaration.³⁵¹ Canada also requires a federal action plan including consultation and cooperation with indigenous peoples to achieve UNDRIP’s objectives.³⁵² After receiving input from indigenous communities, Canada is currently drafting their federal action plan with projected completion in 2023.³⁵³

For UNDRIP to wield meaningful power to support land reparations in the United States, Congress should mirror Canada and domestically implement the Declaration, giving it the force of U.S. domestic law. If Congress implements this pre-existing framework, Native Americans will have greater legal support for reacquiring lost land.

CONCLUSION

This article ends with uncertainty. The Supreme Court is currently shifting Federal Indian Law jurisprudence, and only time will tell whether it buttresses or wrecks Congress’s ability to provide land reparations to Indigenous Americans. This article discussed how treaties can be a tool for tribes in their pursuit of land reparations and ways that Congress can strengthen treaties’ effectiveness. Some of the methods explored fall short of full land restitution, but one must keep in mind that land restitution is the paramount goal for indigenous land reparations, especially when advocating for lesser forms of reparations. As the Sioux Nation elucidated, money is not a comparable substitute for land.

³⁴⁶ Lenzerini, *supra* note 64, at 287.

³⁴⁷ *See id.* at 306.

³⁴⁸ *Id.* at 286.

³⁴⁹ *Id.* at 291–92.

³⁵⁰ Sander Duncanson et al., *Federal UNDRIP Bill Becomes Law*, OSLER (Jun. 22, 2021), <https://www.osler.com/en/resources/regulations/2021/federal-undrip-bill-becomes-law>.

³⁵¹ *United Nations Declaration on the Rights of Indigenous Peoples Act*, DEP’T OF JUST. CAN. (Dec. 10, 2021), <https://www.justice.gc.ca/eng/declaration/about-apropos.html>.

³⁵² *Id.*

³⁵³ *Next Steps*, DEP’T OF JUST. CAN. (MAY 5, 2022), <https://www.justice.gc.ca/eng/declaration/engagement/index.html>.

Another important caveat: “[f]or Native peoples, the discussion about reparations is not an intellectual exercise. It is a discussion for how the past, present, and future are cojoined and interdependent.”³⁵⁴ This article joins the flurry of intellectual exercises about Indigenous Americans across law school journals. It provides just a sliver of suggestions within the narrow legal framework Native Americans must navigate to claim what has been taken from them. Such a framework should not be so narrow; such navigation should not be riddled with legal hurdles.

The United States was built on stolen land. This is a past, present, and future injustice. Congress, local governments, federal courts, the Secretary of the Interior, and states owe it to tribes and Native peoples to remove legal hurdles and restore their land.

³⁵⁴ Rebecca Tsosie, *Acknowledging the Past to Heal the Future: The Role of Reparations for Native Nations*, in *REPARATIONS: INTERDISCIPLINARY INQUIRIES* 43 (Jon Miller & Rahul Kumar eds., 2007).