The Reparative Return of Treatymaking? Legal Norms, Native Nations, & the United States

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This Article traces the various and conflicting legal norms that have influenced Indigenous Peoples Law over the last 400 years. While this Article builds upon several scholars at the nexus of Indigenous Peoples Law, constitutional law, and international law, it is the first to trace the thread of legal norms that weaves through history to the present. Through a nuanced recounting of legal history and storytelling, a clearer understanding of this field of law emerges that is important in at least two ways. First, conflicting legal norms have had an inordinate impact on the field, exacerbating Native Nation injustices over time. Second, the legal norms of diplomacy and shared sovereignty, which have roots in early western law and philosophy, have withstood the test of time and could provide legible and enforceable reparations to Native Nations.

The Article illustrates how these legal norms have informed the rich history and practice of diplomacy and treatymaking in the pre- and early Republic eras. And they have rightfully influenced the resurgence of the original understanding of the Constitution and the diplomatic relationship between the federal government and Native Nations. The Article concludes by identifying how contemporary international law has continued to have an impact on legal norms in Indigenous Peoples Law and proposes a normative argument: that treatymaking, as the original approach to nation-to-nation relationship building, should be reinstated.

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INTRODUCTION

The inherent sovereignty of Native Nations[1] is the core foundational tenet of "federal Indian law" (Indigenous Peoples Law),[2] but most

[1] I've chosen to use the term Native Nations as the term 'Tribes,' is a European "concept of pancontinental collective identity" that did not exist pre-colonization but is one that arguably has been reclaimed and repurposed in support of Tribal self-determination, Tribal sovereignty, and the Nation-to-Nation relationship by and between Native Nations and the federal government. *See* Elizabeth Reese, *The Other American Law*, 73 STAN. L. REV. 555, 576 (2021).

[2] Because the use of the term "federal Indian law" excludes Alaska Natives and other Indigenous Peoples who do not identify as "Indian" I refer to this field of law as "Indigenous

lawyers' exposure to Native Nations and the law is limited to a case from property class, *Johnson v. M'Intosh*. The case is generally remembered for the premise that the doctrine of discovery legitimized colonization and dispossession of land from Native Nations, and as the story of conquest.[3] How can one reconcile the fact that the foundational doctrine in Indigenous Peoples Law is inherent sovereignty and what most law students are taught is the doctrine of discovery or conquest? The answer to that question is, in part, due to the impact the history of conflicting doctrine, law, and policy has had in developing the legal relationship between Native Nations and the United States. This Article traces the history of these legal norms and shares a series of stories, spanning over 400 years, that illuminate the impact of these norms on Indigenous Peoples Law.

Indigenous Peoples Law is complex by nature. It encompasses the United States' legal interactions with Native Nations as polities and includes constitutional law, principles of international law, treaties, federal statutes, regulations and policies, judicial opinions, Tribal law, covering every subject matter from business law to rights of nature.[4] With so many legal instruments, institutions, and laws, it is no wonder that the field is rife with contradictions. Contributing heavily to this are the plethora of laws enacted during the federal policy eras that preceded the current policy on self-determination: policies of extermination, assimilation, and termination.[5] These historic laws and doctrines arising under them, such as the implicit divestiture doctrine, engender conflicting jurisprudence.[6] As a result of this complexity and conflict of law, this field of law that has

Peoples, Law, and the United States," which I've abbreviated to "Indigenous Peoples Law" in this Article. *See* Reese, *supra* note 1, at 563 (questioning whether the legal field will continue to use the term "federal Indian law" and arguing more generally that the field excludes Tribal law).

[3] Johnson v. M'Intosh, 21 U.S. 543 (1823); *see* Nazune Menka, *Scalia Called Land-Into-Trust Case a 'Laugher*,' INDIANZ.COM (May 29, 2009), https://indianz.com/News/2009/014789.asp [https://perma.cc/96P8-VF5R] (speaking to a room full of college students, many of whom were Indigenous, Justice Scalia claimed all of "Indian" law is based off of being conquered).

[4] *See* 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04 (2024).

[5] *See infra* Subpart II(b).

[6] *See generally* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 81 (1999) (coining the term "common law of colonization" to describe the Court's judicial divestiture of Tribal sovereignty in cases involving Tribal jurisdiction over non-members and cases determining reservation diminishment); *see also* Maggie Blackhawk, *Federal Indian Law as Paradigm within Public Law*, 132 HARV. L. REV. 1787, 1835–47 (2019) (discussing the Court's perpetuation of the common law of colonization via the implicit divestiture of Tribal sovereignty).

been termed "*sui generis*,"[7] "exceptional,"[8]and an area of law with "too much history."[9] By tracing the history of legal norms impacting this field of law, one can begin to see how the conflicting doctrines, such as the doctrines of discovery and inherent sovereignty imported from the *Law of Nations*, had an impact on both the Constitution and early jurisprudence.[10] While the original understanding of the diplomatic or treatymaking relationship between Native Nations and the federal government is founded on this understanding, this Article illustrates how these foundational doctrines and understandings experienced a long period of dormancy where vacillations in federal policies impacted Native Nations in disastrous ways.[11] Accordingly, the questions of how to protect inherent Tribal sovereignty from divestiture by state and federal governments and how to mitigate entrenched colonialism's continued impact on Native Nations have dominated the field of Indigenous Peoples Law for at least two hundred years. These conflicts, which originally arose through international legal norms, were imported into common law and have muddied the waters ever since.

This Article proceeds in three Parts. Part I traces the history of early international law and discusses the legal norms that engendered the doctrine of discovery, inherent sovereignty, and diplomacy. Through the stories of early theologians and western philosophers this Part connects this history to early diplomatic relationships between Native Nations and colonial principalities in the pre-Republic. Part II tells the stories behind how the legal norms in Part I have influenced early United States jurisprudence and provides lesser-known context for those stories. Part III moves into the more contemporary arena and focuses on current legal norms in international law with a focus on the need to address historic harms that have resulted from the conflicting legal norms in Parts I and II. To illustrate these harms, the Article provides specific examples from the Indian Claims Commission (ICC)[12] and recent case law. Part III then concludes by summarizing the normative arguments in the Article and encouraging a return to the principles of diplomacy, self-determination, and Tribal sovereignty. Ultimately, the Article argues for re-establishing

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[7] Morton v. Mancari, 417 U.S. 535, 554 (1974) (providing the legal status of the Bureau of Indian Affairs is *sui generis* in the sense that no other "group of people" are favored due to their quasi-sovereign status as Tribal members).

[8] Philip P. Frickey, *(Native) American Exceptionalism*, 119 HARV. L. REV. 431, 487 (2005).

[9] Gregory Ablavsky, *Too Much History: Castro-Huerta and the Problem of Change in Indian Law*, 2022 SUP. CT. REV. 293 (2023).

[10] *See infra* Part I.

[11] *See infra* Part II.

[12] Indian Claims Commission Act of 1946, Pub. L. No. 726, ch. 959, 60 Stat. 1049 (omitted from 25 U.S.C. § 70 upon termination of Commission on Sept. 30, 1978) [hereinafter ICC Act].

diplomatic nation-to-nation treatymaking relationships with Native Nations.

I. THE LONG HISTORY OF COLONIALISM & INTERNATIONAL LEGAL NORMS

Over the last several decades legal scholars, such as Professor Robert A. Williams, have engaged in robust analyses of legal history to illuminate the international and multicultural jurisgenesis of sacred treatymaking that serves as the foundation of Native Nation relationships with the United States.[13] Such efforts have continued into the present with scholarship exploring Native Nation roles in the legal histories of the pre-Republic era, Revolutionary War, Continental Congress, and Constitution—contributing to a reawakening of more robust understanding of the original foundations of the United States.[14] These original foundations illuminate the prevalence of consensual negotiations by and between Native Nations, colonial principalities, and the early United States federal government.

While Native Nations had varying experiences in the pre-and early-Republic, some of which were not equitable or consensual, drawing upon and focusing on the legal history of diplomacy, consensual negotiations, treatymaking, and sovereignty provides the framework for a path to reparation and justice for Native Nations.[15] These principles of diplomacy continue to be present in domestic Indigenous Peoples Law and modern international law, largely due to Native Nations and Indigenous Peoples consistent, and increasingly fierce, advocacy.[16] This advocacy—to reclaim inherent sovereignty and the right to self-determination—has occurred at both the national and international level.

Indeed, international law has had, and continues to have, an inordinate amount of impact on the jurisgenesis of Indigenous Peoples Law. This connection between international law and Indigenous Peoples Law links historical principles to the present. Historically, laws of the Holy Roman Empire, as codified by the Roman Catholic church through papal bulls, provided a legal rationalization for colonial empire states to seize land and force labor in the 1400s.[17] Western legal norms in international

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[13] *See* ROBERT A. WILLIAMS, LINKING ARMS TOGETHER (1997); ROBERT A. WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1993).

[14] *See infra* Part II.

[15] *See infra* Part II.

[16] *See infra* Part III.

[17] Pope Alexander VI, *Bull "Inter caetera Divinae" Dividing the New Continents and Granting American to Spain* (May 4, 1493), *reprinted in* CHURCH AND STATE THROUGH THE

law have been called by legal scholars "the perfect instruments of empire"[18] that "developed historically to support the forces of colonization and empire that have trampled the capacity of indigenous peoples to determine their own course."[19] But even early western fifteenth century scholars such as Bartolome de las Casas and Franciscus de Victoria recognized versions of modern-day sovereignty and rights of self-determination for Indigenous Peoples.[20] While these principles of self-determination ebbed and flowed with the colonial paradigm of the day, their longevity in customary and domestic law have stood the test of time. Conversely, other early colonial norms, such as the doctrine of discovery and conquest, have not.[21]

In analyzing the legal norms influencing Indigenous Peoples Law over the centuries, I focus on international and domestic legal norms.[22] International law provides a normative framework for reviewing the legitimacy, or lack thereof, of nation state actions. At its base, international law is indicative of societal norms and serves as a moral guidepost. At its zenith, international law provides redress for harms that would otherwise go unaccounted for by nation state actors who violate human rights and international legal instruments. Both are valuable contributions to justice.

A. Contradictions & Western Legal Norms: A Human Right to Colonize in the Name of Christianity

The history of colonization, international law, and the United States is often traced back to the doctrine of discovery when the Roman Catholic church issued its 1455 *Romanus Pontifex* papal bull during Europe's "Age of Discovery."[23] *Romanus Pontifex* settled a dispute between Portugal and Spain over self-proclaimed rights to land and trade routes in Africa and

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CENTURIES (Sidney Z. Ehler & John B. Morrall eds. & trans., 2d ed.1967) [hereinafter *Inter caetera*].

[18] WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT, *supra* note 13, at 59–118.

[19] S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 26 (2d ed. 2004).

[20] *See infra* Subpart I(a).

[21] *See* Press Release, United Nations Office of the High Commissioner for Human Rights, UN Expert Hails Vatican Rejection of 'Doctrine of Discovery,' Urges States to Follow Suit (April 6, 2023), https://www.ohchr.org/en/press-releases/2023/04/un-expert-hails-vatican-rejection-doctrine-discovery-urges-states-follow [https://perma.cc/FD4Z-7HDK] (urging by the UN Special Rapporteur on Indigenous Peoples Rights that all States follow the Vatican's lead in formally repudiating the decree and reviewing all jurisprudence and legislation that relies on it).

[22] While I generally prefer to center Tribal law in discussions about Indigenous Peoples law, for the purposes of this Article I have focused on international law and laws of the United States (including the Constitution, statutes, and common law).

[23] *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 48–54 (7th ed. 2017). Papal bulls were official edicts of the pope and governed the behavior of nation states within the Holy Roman Empire.

granted Portugal "exclusive rights to conquer and trade in an extensive southern region of the continent."[24] Spain and Portugal considered themselves apropos Chrisitan colonial nation states, utilizing the Catholic church as the legal foundation to extend their territoriality beyond the Mediterranean. As the colonization of Africa was legalized by *Romanus Pontifex*, and therefore off-limits,[25] the Spanish Crown wrote drafts of new edicts to ensure the lands and resources Columbus "discovered" west of the Azores were granted to Spain.

In issuing the papal bulls of 1493, Pope Alexander VI legalized, from a western point of view, the right for Spain to colonize what is now known as the Americas.[26] The Spanish bulls also encouraged the "holy and laudable work" of expanding Christian rule over Indigenous Peoples "from the Arctic to the Antarctic Pole."[27] The *Inter caetera Divinae* bull stated: "we [the church] constitute, invest, and depute you . . . with full, free and integral power, authority, and jurisdiction" to "instruct the natives and inhabitants in Christian faith and to imbue them with good morals," and all the "islands and mainlands found or to be found, discovered or to be discovered . . . we concede them . . . this we ordain . . . notwithstanding any Apostolic Bulls, ordinances or other documents to the contrary, confident in Him, from Whom empires, dominions and all possessions proceed . . . ."[28] As long as Christian citizens followed certain natural laws and were doing the work of converting Indigenous Peoples whilst on their colonial endeavors, they were ordained by the pope to take title to the lands. However, should the Indigenous Peoples either not be well suited for Christianity or impede the Spanish in their godly duties of missionization by, for example, not allowing the Spanish to freely travel in their lands, then a just war could be commenced. The doctrine of discovery traces its contemporary roots to the rationales supporting the papal bulls.[29]

The papal bulls thus illustrate how natural law and the origins of international law were intertwined with conquest and colonialism. International law originates, in part, from the Roman Catholic church

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[24] Kim Benita Vera, *From Papal Bull to Racial Rule: Indians of the Americas, Race, and the Foundations of International Law*, 42 CAL. W. INT'L L.J. 453, 455 (2012).

[25] *See Inter caetera*, *supra* note 17, at 153–59 (noting the punishment for interference in other countries right to colonize was excommunication from the Church).

[26] WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT, *supra* note 13, at 80.

[27] *Id.* at 81.

[28] *Inter caetera*, *supra* note 17, at 157–58.

[29] K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field*, 131 YALE L.J. 1062, 1093 (2022).

where theologians or canon lawyers wrote the law. [30] Professor of Theology at the University of Salamanca, Franciscus de Victoria (1480–1546) hosted a series of lectures in 1532 titled *On the Indians Lately Discovered*, the most widely known early application of western legal thought and international law on the colonization of Indigenous Peoples.[31] de Victoria provided three fundamental arguments: (1) Indigenous Peoples possess natural and inherent legal rights as free and rational people; (2) the Catholic church's grant to Spain of title to the Americas did not affect these inherent rights; but (3) the conquest of Indigenous Peoples by a Christian nation could be justified if they violated norms under the *ius gentium*, otherwise known as the law of nations.[32]

These three fundamental principles, including the latter principle, known as the concept of "just war," were perceived to be derived from natural law and applied specifically to Christians. Indigenous Peoples were granted some natural rights deemed inherent to human beings, but as non-Christians, their title to land and other rights could be usurped by Christians.[33] The norms, mentioned in the principle of just war, are related to Christian doctrines of brotherly and neighborly love, but with nefarious corollaries.

For example, the *Inter caetera* papal bull provides, "the native princes [may not] hinder . . . trade" because "it is an apparent rule of the *jus gentium* that foreigners may carry on trade," thus the "Spaniards may lawfully carry on trade among the native Indians, so long as they do no harm to their country[.]"[34] It continues with "Spaniards are the neighbors of the barbarian . . . [the Indians] are bound to love thy neighbors as themselves," therefore "the Indians [are] bound by the law of nature to love the Spaniards . . . [and t]herefore the Indians may not causelessly prevent the Spaniards from making a profit[.]"[35]

De Victoria also justified any taking of property: it "is a universal rule of the law of nations that whatever is captured in war becomes the property of the conqueror."[36] This language should be readily familiar to Indigenous Law scholars because this principle, known as the doctrine of discovery, appears in one of the first cases of the United States Supreme

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[30] ANAYA, *supra* note 19, at 10 (noting how "law merged with theology" and religion figured "prominently as the source of legal authority").

[31] *Id.* at 11.

[32] WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT, *supra* note 13, at 97.

[33] ANAYA, *supra* note 19, at 12.

[34] *Inter caetera*, *supra* note 17, at 152–53 (translating *jus* or *ius gentium* to the law of nations).

[35] *Id.*

[36] FRANCISCUS DE VICTORIA, DE INDIS ET DE IVRE BELLI RELECTIONES 155 (John Pawley Bate trans., 1917).

Court in 1823.[37] The impact of de Victoria's work was contemporaneous; his principles of just war also informed Hugo Grotius' 1625 *On the Law of War and Peace*.[38] Importantly, Grotius recognized the role treaties and customary law have in the foundations of state sovereignty and the preservation of peace. He also took a secularized view of the law of nature, renouncing the spread of Christianity as a just cause for war.[39] Arguably solidifying the perception of Grotius as one of the preeminent creators of modern international law, his contributions were celebrated at the 1899 Hague Peace Conference.[40]

Despite de Victoria's rhetoric rationalizing Spanish plunder of the Americas, both he and Grotius recognized the universal human rights of Indigenous Peoples provided under natural law. Another scholar who recognized these universal human rights is Bartolomé de las Casas, a priest who traveled to Haiti in 1502 and participated in the *encomienda* system of taking Indigenous people as slaves to work the land, until some years later where his writings indicate he had a shift in perspective on the legality and morality of slavery .[41]

De las Casas' *A Short Account of the Destruction of the Indies* describing the gross human rights violations occurring in the name of the Spanish Crown, showcases his support for the rights of Indigenous Peoples under natural law.[42] But his views on violence and the principle of just war differed greatly from de Victoria. De las Casas believed colonization and missionization were the opposite of God's work. He believed the atrocities the Spanish were committing were "contrary to natural, canon, and civil law and [were] deemed wicked and . . . condemned by all such legal codes."[43] His letters requesting the Spanish Crown refuse anyone who sought royal license for such ventures argue: "[t]his Your Royal Highness is a matter on which action is both urgent and necessary if God is to continue to watch over the Crown of Castile and

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[37] Johnson v. M'Intosh, 21 U.S. 543 (1823) (using language such as "conquest gives a title which the Courts of the conqueror cannot deny" among other problematic statements).

[38] ANAYA, *supra* note 19, at 12.

[39] *Id.*

[40] Martine Julia Van Ittersum, *Hugo Grotius: The Making of a Founding Father of International Law*, *in* THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 83 (Anne Orford & Florian Hoffmann eds., 2016) (describing the 1899 event as more of a publicity event for American-Dutch relations by the American delegation but recognizing the event may have assisted in the establishment of the Permanent Court of Arbitration that formed the same month and still exists today).

[41] BARTOLOMÉ DE LAS CASAS, A SHORT ACCOUNT OF THE DESTRUCTION OF THE INDIES, at xviii–xxiii (Nigel Griffin trans., 2004).

[42] *Id.*; BARTOLOMÉ DE LAS CASAS, IN DEFENSE OF THE INDIANS (Stafford Poole trans., 1992).

[43] DE LAS CASAS, *supra* note 41, at 6–8.

ensure its future well-being and prosperity, both spiritual and temporal."[44] In 1515, after traveling to Haiti and Cuba, de las Casas informed King Ferdinand of the atrocities happening abroad. He then returned to Haiti and traveled into the Americas writing *Historia de las Indians*.[45]

De las Casas is purported to believe that, under natural law, governments require consent to legitimately rule—because all authority, power, and jurisdiction came from the people themselves.[46] On state sovereignty, he believed only a state could exercise political sovereignty if it was for the common good of the people.[47]

The impact and accuracy of de las Casas's writings are debated, but there is evidence that the Spanish Crown responded to his detailed accounts of what was happening in the Americas. His writings continue to garner a large audience.[48] These principles informed Emmerich de Vattel's 1758 treatise, *The Law of Nations, or The Principles of Natural Law*.[49]

B. *The Law of Nations*: Ideations of Sovereignty & Treatymaking

It wasn't until the emergence of Europe's modern system of states, nearly a century after the end of the Holy Roman Empire and the Peace of Westphalia in 1648, that Emmer de Vattel wrote *The Law of Nations*.[50] Given the relative newness of the system of states in Europe, it is not surprising that de Vattel's treatise focused less on the rights of individuals and more on the "state" as a site of sovereignty. The treatise, "among the most influential legal commentaries in the early Republic,"[51] provided the foundation for the contemporary doctrine of state sovereignty and its attendant rights: exclusive jurisdiction, territorial integrity, and non-intervention in domestic affairs.[52] The rights of a national republic were also codified:

> [S]everal sovereign and independent states may unite themselves together by a perpetual confederacy, without ceasing to be, each individually, a perfect state. They will

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[44] *Id.* at 7–8.

[45] *Id.* at xlii.

[46] Samuel Piccolo, *Indigenous Sovereignty, Common Law, and Natural Law*, 68 AM. J. POL. SCI. 1139, 1147–48 (2023).

[47] *Id.*

[48] *See* G.L. Huxley, *Aristotle, Las Casas, and the American Indians*, 80C PROC. ROYAL IRISH ACAD.: ARCHEOLOGY, CULTURE, HIST., LITERATURE 57, 57 (1980) (providing an account of de las Casas' advocacy in debates on Indigenous Peoples as rational persons with polities as envisioned in Aristotle's Politics Book 7).

[49] EMMER DE VATTEL, THE LAW OF NATIONS 84 (Knud Haakonssen et al. eds., 2012).

[50] ANAYA, *supra* note 19, at 13.

[51] Seth Davis et al., *Persisting Sovereignties*, 170 U. PA. L. REV. 549, 570 (2022).

[52] ANAYA, *supra* note 19, at 15.

> together constitute a federal republic: their joint deliberations will not impact the sovereignty of each member, though they may, in certain respects, put some restraint on the exercise of it, in virtue of voluntary engagements. A person does not cease to be free and independent, when he is obliged to fulfil[l] engagements which he has voluntarily contracted.[53]

De Vattel's ideations of federalism, where states may be "united" with one another without relinquishing their individual sovereignty sounds much like states' rights as they were codified under the Tenth Amendment in the United States Constitution in 1791.[54] Similarly, de Vattel's analogy on free persons indicates a recognition of some natural human rights. This language could also be conceived to dovetail with language in the Tenth Amendment reserving rights not delegated elsewhere to the people at large.[55] The principle of the right to engage in negotiations of consent whereby some sovereignty may be ceded, without limiting other aspects of one's sovereignty, might also be construed to apply to treatymaking.

Equally as important as de Vattel's principles of sovereignty and the rights of a national republic were de Vattel's adoption of a Lockean view of property ownership. According to this view, agriculture or cultivation of the land solidified claims to property, whereas hunter-gatherer uses did not.[56] John Locke, the British philosopher, wrote in 1690 in the *Second Treatise of Government, "Of Property"* that a person who invests their labor in cultivating land entitles them a right in the same.[57] Similarly, in *Of Cultivation of the Soil*, de Vattel is clear that it is the duty of a nation to ensure the land is cultivated to the maximum extent possible.[58] Anything to the contrary is a rationale for exerting eminent domain, even if the land is outside a nation's jurisdiction:[59]

> The sovereign ought to neglect no means of rendering the land under his jurisdiction as well cultivated as possible . . . . Those nations . . . who live only by hunting . . . [an] idle mode of life . . . have therefore no reason to complain, if other nations, more industrious, and too closely confined, come to take possession of a part of

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[53] DE VATTEL, *supra* note 49, at 84.

[54] U.S. CONST. amend. X.

[55] *Id.* ("[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people").

[56] Piccolo, *supra* note 46, at 1143.

[57] JOHN LOCKE, TWO TREATISES OF GOVERNMENT 285–302 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

[58] DE VATTEL, *supra* note 49, at 129–30.

[59] *Id.* at 129–30, 306–7, 310–11.

> those lands. Thus . . . the establishment of many colonies on the continent of North America might . . . be extremely lawful.[60]

Principles of *terra nullius*, manifest destiny, westward expansion, the doctrine of discovery, and Locke's labor theory of property find their roots in the origins of international law. They were wielded as moral rationales by colonists to dispossess Native Nations of their inalienable land rights.[61] However, "[c]ommentary on the law of nations could be cited to both support the recognition of [T]ribal sovereignty and to support the notion that 'Tribes' lacked sovereignty."[62] Both de Victoria and de las Casas's ideologies were grounded in the lionization of Christianity and supported missionizing Indigenous Peoples, but also supported individual human rights, which they viewed as inclusive of Indigenous Peoples. Whether Native Nations, as non-Christians, were perceived as polities capable of engaging in treatymaking is not as important as the inclusion in the *Law of Nations* of treatymaking as a means of cultivating peace between sovereigns.[63] The importance of de Vattel's treatise to early United States jurisprudence has been questioned,[64] but in *Persisting Sovereignties* the authors summarize "the original U.S. law of . . . [T]ribal sovereignty . . . must be understood in light of the law of nations."[65] And it is well settled that the *Law of Nations* was Chief Justice John Marshall's accepted source of law in the *Cherokee Cases*.[66] The impact of British common law on this early era is lesser known.

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[60] *Id.* at 128–30.

[61] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 4, at § 12.01[4][c] (noting opponents of Tribal sovereignty argued against land rights for Native Nations citing principles of *terra nullius* and theories of property by Locke, Grotius, Montesquieu, and Vattel and citing losing argument before the Supreme Court in *Johnson v. M'Intosh*, 21 U.S. 543, 569–570 (1823)); *see also* Park, *supra* note 29, at 1100–20 (providing an in depth examination and critique of the creation of the labor theory of property).

[62] Davis et al., *supra* note 51, at 569.

[63] *See* PAUL G. MCHUGH, ABORIGINAL SOCIETIES AND THE COMMON LAW: A HISTORY OF SOVEREIGNTY, STATUS, AND SELF-DETERMINATION 86 (2004) (listing several writers from 1577-1688 that speak to the British practice of treating with non-Christian powers and arguing Coke's position in Calvin's Case was an anomaly, not the British common law position).

[64] *See* Davis et al., *supra* note 51, at 565–66 (describing traditional narratives placing the origin of state-based sovereignty with the 1648 Peace of Westphalia as erroneous and the result of internal fixation on sovereignty in the 18th and 19th centuries) (citing Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 INT'L ORG. 251, 264–68 (2001)).

[65] *Id.* at 576.

[66] *See infra* Part II.

C. British Colonial Common Law & Conquest

Equally impactful during the early seventeenth to nineteenth centuries was the influence of British common law, which had adopted some principles from the *Law of Nations* on conquest while engaging in its own form of imperialism closer to home in Ireland and further abroad in India, Australia, and New Zealand.[67] British common law supported the colonization of Ireland where Locke's labor theory of property and the principles of just war were weaponized against the Gaels and their customary laws.[68] Around the 1580s Britain sought to colonize Ireland using the Roman model of agrarian colonization which "permitted them to settle colonies on the adjacent mainland because the native population had left their lands wild and uncultivated" but also afforded some modicum of respect for local inhabitants' law and property rights.[69] It was British policy to allow for some customary law to remain and to negotiate pacts with Gaelic clan leaders to acquire lands, and these principles were later applied to British colonists in "America."[70] The British created a colonial land program in 1603, the Plantation of Ulster, whereby Gaelic Catholic land holders were forced off their lands by English and Scottish Protestant settlers.[71] Some Ulster nobles were relying on the possession of vast tracts of land in order to enhance their power and authority against the British Crown and relying on the customary law to retain possession of their lands.[72]

In the *Case of Tanistry*, the Irish Court of the King's Bench addressed whether the British common law of heirs or the Irish *brehon* law of tanistry applied when determining the rightful heir of a parcel of land in Ulster.[73] Deciding that British common law applied, the court determined the *brehon* customary law did not meet common law standards of reasonableness or certainty, and that the common law extinguished any customary law not agreeable to the common law, by way of conquest. The court provided that upholding customary law would be prejudicial to the Crown's profit and prerogative, since the Crown would not be able to

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[67] *See generally* Matthew Birchall, History, *Sovereignty, Capital: Company Colonization in South Australia and New Zealand*, 16 J. GLOB. HIST. 141 (2021)

[68] MCHUGH, *supra* note 63, at 70–74 (2004).

[69] *See id.* at 71 (citing DAVID ARMITAGE, THE IDEOLOGICAL ORIGINS OF THE BRITISH EMPIRE 49–51 (2000)).

[70] *Id.* at 71–72.

[71] Aziz Rahman et al., The Art of Breaking People Down: The British Colonial Model in Irelands and Canada, 49 PEACE RSCH. 2, 15–38 (2017).

[72] *The Case of Tanistry (Le Case de Tanistry)*, 6 AUSTL. INDIGENOUS L. REP. 3, 73 (1608).

[73] *Id.* at 73–81.

escheat the land.[74] The court also draws a distinction between the Crown's "royal monarchy" and a "despotic monarchy of tyranny" providing:

> [U]nder a royal monarchy the subjects are freemen, and have a property in their goods, and a freehold and inheritance in their goods, and a freehold and inheritance in their lands . . . when such a royal monarch, who will govern his subjects by a just and positive law, hath made a new conquest of a realm, although in fact he hath the lordship paramount of all the lands within such realm . . . [and] such conqueror receiveth any of the natives . . . into his protection and avoweth them for his subjects . . . their heirs shall be adjudged in by good title without grant or confirmation of the conqueror, and shall enjoy their lands according to the rules of the law which the conqueror hath allowed or established, if they will submit themselves to it, and hold their lands according to the rules of it, and not otherwise.[75]

These principles legitimating conquest from the *Case of Tanistry*—rule by conquest and limited property rights of the conquered—reappear nearly 200 years later in *Johnson v. M'Intosh*, illustrating the impact British common law from the 17th century through the 19th century had on early American jurisprudence.[76] While there are important distinctions, namely that Justice Marshall eschewed these principles almost immediately in the *Cherokee Cases*,[77] there is a similarity in the tempered tyranny of the British and the adoption of the doctrine of discovery in *M'Intosh*. Just as British common law adopted the law of conquest at the prerogative of the Crown in the *Case of Tanistry*, the common law of conquest would experience a resurgence in the newly formed United States. However, as illustrated in the next section, the principles of diplomacy between nations and treatymaking were arguably more important for at least a century.

D. Pre-Republic Diplomacy: The Muskogee (Creek) & British

Though often connected to the *Law of Nations*, treatymaking between consenting sovereigns, as codified into the Constitution by the United States federal government,[78] was also just as connected to British common law and practice in the early pre-Republic era. The British

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[74] *Id.* at 79–80.
[75] *Id*. at 81.
[76] MCHUGH, *supra* note 63, at 117.
[77] *See infra* notes 161, 169.
[78] U.S. CONST. art. II, §2.

practice of exercising jurisdiction over non-Christians in the colonies was initially based on treaty, protocol, and a relational approach to negotiations.[79] During this period the British Crown licensed merchants and businesses for overseas trade, which provided lawful authority for English citizens to engage in commerce in the name of the Crown.[80] Through this legal avenue, termed "corporate colonialism" by recent scholars, "company" colonies such as Virgina and South Carolina were established.[81] In negotiating with Native Nations, the goals of treatymaking generally focused on obtaining more land and creating alliances to protect the boundaries of the colony from the Spanish, French, or their allied Native Nations.

For example, House of Commons representative James Oglethorpe sought license from the Crown in the 1730s to establish the principality of Georgia within the South Carolina colony, in part to protect the northern colonies against the Spanish colonies in Florida.[82] Oglethorpe also had ideations on providing less fortunate British citizens (from London's debtors' prison) a second chance at life in Georgia.[83] King George II provided the requisite license to a group of trustees for the Georgia principality in 1732.

Oglethorpe, who was named the headman of the new principality, actively sought alliance with representatives from local Muscogee (Creek) Nation townsite leaders shortly after arriving to South Carolina.[84] Sitting down with Tribal leaders for a meeting in Savannah on May 18, 1733, Oglethorpe and eight Muscogee (Creek) Micco (Chiefs) from nearby townsites negotiated what came to be known as the Treaty of Savannah.[85] The treaty encompassed rights to trade goods, criminal jurisdiction,

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[79] MCHUGH *supra* note 63, at 117.

[80] *Id.* at 75. Licensing also provided mercantile legal jurisdiction over English citizens engaged in overseas commerce. *Id.*

[81] Birchall, *supra* note 67, at 141–57.

[82] Robert Johnson, *The Humble Memorial and Representation of the State and Condition of Your Majesty's Province of South-Carolina, from the General Assembly of the said Province*, *in* 1 LIBR. OF CONG., TRACTS AND OTHER PAPERS RELATING PRINCIPALLY TO THE ORIGIN, SETTLEMENT, AND PROGRESS OF THE COLONIES IN NORTH AMERICAN FROM THE DISCOVERY OF THE COUNTRY TO THE YEAR 1776, 31–36 (Peter Force ed., 1836) [hereinafter LOC Colony Papers]. Note the spelling in the text is "micco" and has been preserved but recognizing it is also spelled mēkko in Mvskoke.

[83] *See* JAMES EDWARD OGLETHORPE, PUBLICATIONS OF JAMES EDWARD OGLETHORPE xi (Rodney M. Baine ed. 1994).

[84] References are to the "Creek" in original text; I've updated this to Muscogee (Creek) Nation throughout this Article.

[85] James Oglethorpe, *Gen. Oglethorpe's Conference with the Indians*, *in* LOC Colony Papers, *supra* note 82, at 39–43.

alliances, and the cession of land.[86] The treaty, as recounted by a translator, bears witness to Native Nation concerns: demarking land south of the Savannah river as Muscogee (Creek) land, maintaining peace, and "abatement" for trade goods.[87] A delegation from this meeting eventually traveled to London to finalize and ratify the treaty with the British Crown.[88]

Despite the diplomatic efforts of Oglethorpe with Muscogee (Creek) leaders, tensions between colonists and Native Nations remained, largely due to the preceding Yamasee War in 1715 that destabilized the region, and the continued French and Spanish encroachment from the north and south.[89] South Carolina colonists regularly requested assistance for protection against these encroachments and reported to the British Crown on the successes and challenges of the colonies. Robert Johnson, the British appointed Royal Governor of South Carolina, and his council described the challenges of securing the allyship of the Muscogee (Creek), Cherokee, and Choctaws, to the British Crown in 1734, just one year after Oglethorpe's meeting with the Muscogee (Creek) Nation representatives:

> If a stop were therefore put to that pernicious Trade with the French, the Creek Indians chief dependance would be on this Government, and that of Georgia, to supply them with goods by which means great part of the Choctaws, living next the Creeks, would see the advantage the Creek Indians enjoyed by having British Woollen Manufactures wholly from your Majesty's subjects, and thereby be invited in a short time to enter into a Treaty of Commerce with us . . . will soon lessen the interest of the French with those Indians, and by degrees attach them to that of your Majesty.
>
> The only expedient we can propose to recover and confirm that Nation to your Majesty's interest, is by speedily making them presents to withdraw them from the French

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[86] ALDEN T. VAUGHAN, EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607–1789 (1979).

[87] Oglethorpe, *Gen. Oglethorpe's Conference with the Indians*, *in* LOC Colony Papers, *supra* note 82, at 39–43. There is also mention of "recal[ling] the Yamasees; that they may be buried amongst their ancestors, and that they may see their graves before they die and then our nation shall be restored to its ten (10) towns." *Id.*

[88] Steven J. Peach, *Creek Indian Globetrotter: Tomochichi's Trans-Atlantic Quest for Traditional Power in the Colonial Southeast*, 60 ETHNOHISTORY 605 (2013) (discussing the preceding events and the delegation to London, and questioning Tomochichi's self-ordained leadership of the Creek Confederacy).

[89] Eric Hinderaker, *Diplomacy Between Britons and Native Americans, c.1600–1830*, *in* BRITAIN'S OCEANIC EMPIRE: ATLANTIC AND INDIAN OCEAN WORLDS, c.1550–1850, at 233–35 (2012).

> alliance, and by building some forts among them your Majesty may be put in such a situation, that on the first notice of hostilities with the French, your Majesty may be able at once to reduce the Albama Fort, and we may then stand against the French and their Indians, which, if not timely prepared for before a War breaks out, we have too much reason to fear we may be soon over-run by the united strength of the French, the Creeks and Choctaws, with many other Nations of their Indians Allies.[90]

The insecurity and precarious nature of South Carolina as a colony is evident in Governor Johnson's letter, as is the need to ally with Native Nations. As this example illustrates, Native Nations were faced with not only protecting their own citizens, lands, and cultural institutions, they were engaging in a multi-national diplomatic battle while doing so. The need for diplomacy peaked during treatymaking and negotiations for "trade,"[91] then plummeted when treaties failed to govern behavior between, or outside of, jurisdictions. The reality of the early pre-Republic era is that many colonial governments sought negotiated consent from Native Nations through treatymaking. Such treatymaking found its roots in the *Law of Nations* as an exertion of polities seeking to protect their sovereignty.

Native Nations engaged in these negotiations of consent through what Williams calls multicultural jurisgenesis.[92] At the Treaty of Savannah, eight Muscogee (Creek) Micco presented Oglethorpe eight deer skins, one from each represented township, and in return Oglethorpe gifted several items.[93] This legitimated the treaty as one of reciprocity and was an integral part of the cultural exchange of treatymaking. The language of sacred treaties, where "recurring metaphors . . . [were] part of a North American Indigenous language of law and peace."[94] A 1710 Iroquois

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[90] Johnson, *The Humble Memorial and Representation of the State and Condition of Your Majesty's Province of South-Carolina, from the General Assembly of the said Province*, *in* LOC Colony Papers, supra note 82, at 239.

[91] For an in-depth analysis of what "trade" generally meant in the early federal republic, see Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1028–1032 (2015).

[92] WILLIAMS, LINKING ARMS TOGETHER, *supra* note 13, at 28.

[93] Oglethorpe, *Gen. Oglethorpe's Conference with the Indians*, *in* LOC Colony Papers, *supra* note 82, at 41.

[94] WILLIAMS, LINKING ARMS TOGETHER, *supra* note 13, at 36.

delegation[95] and a 1730 Cherokee[96] delegation also made diplomatic visits to the British Crown. During the Muscogee (Creek) visit to the British Crown, Tomochichi presented a gift of eagle feathers to King George, saying:

> These are the Feathers of the Eagle, which is the swiftest of Birds, and who flieth all round our Nations. These Feathers are a Sign of Peace in our Land, and have been carried from Town to Town there; and we have brought them over to leave with you, O Great King, as a sign of everlasting peace.[97]

In many ways these visits, which were the first transatlantic visits for diplomacy by Native Nations, cemented the foundations of the nation-to-nation treatymaking relationship. In *We the (Native) People*, the authors term the legal norms, principles, and practices that governed pre-revolutionary relationships between Native Nations and colonial empire states a "diplomatic constitution."[98] Both Native Nations and colonial European nation-states benefited from these initial diplomatic treaties. Native Nations sought certainty in a time where both encroachment on unceded lands and disruptions to Native lifeways were increasing, while colonial European nation-states clamored for territorial integrity. These mutually beneficial relationships did not last long as shifting power dynamics upset this once diplomatic balance.

II. LEGAL NORMS & EARLY U.S. JURISPRUDENCE

The legal norms of conquest, diplomacy, sovereignty, and treatymaking, among others, informed early United States jurisprudence. For example, treaties formed based on the nation-to-nation relationship and negotiated consent began to dissolve amidst the tensions simmering between the French and British colonies, which erupted into the Seven Years War in 1754.[99] As these countries anticipated, and as evidenced in

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[95] NED BLACKHAWK, THE REDISCOVERY OF AMERICA: NATIVE PEOPLES AND THE UNMAKING OF U.S. HISTORY 78 (2023) (explaining that the portraits of four "Mohawk Kings" (Iroquois leaders) from the diplomatic mission were commissioned in London nearly a century after the 1701 Great Peace of Montreal).

[96] Hinderaker, *supra* note 89, at 239.

[97] WILLIAMS, LINKING ARMS TOGETHER, *supra* note 13, at 79–81 (quoting *Tomochici's Audience with King George II and Queen Carolina*, *in* ALDEN T. VAUGHAN, EARLY AMERICAN. INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789, at 21 (1979)).

[98] Gregory Ablavsky & Tanner Allread, *We the (Native) People?: How Indigenous Peoples Debated the Constitution*, 123 COLUM. L. REV. 243, 249–250 (2023).

[99] Hinderaker, *supra* note 89, at 241; *see* Ablavsky & Allread, *supra* note 98, at 313 (discussing the federal government's history of seeking consent from Native Nations).

South Carolina Governor Johnson's letter to King George,[100] Native Nation allyship proved to be hugely important.[101] With the assistance of Native Nations, such as the Six Nations Confederacy, the Delawares, and the Cherokee,[102] British colonists successfully diminished French colonial power in the Ohio Valley. The Royal Proclamation of 1763 issued by the British Crown after the Seven Years War restricted actions by the British colonies and instituted borders.[103]

Notably, the Proclamation restricted trade with Native Nations to those licensed as government officials and retained the sole authority to purchase land from Native Nations for the Crown.[104] These restrictions were also provided in the early colonial charters from the Crown to its citizens: only those who were licensed by the Crown might trade with Native Nations, and the right to engage in treading with Native Nations on land cessions was reserved to Crown representatives and subject to Crown ratification.[105] Again, these are principles of sovereigns engaging with sovereigns; only the Crown was entitled to, and recognized as, holding the power to engage in trade and negotiations for land with Native Nations. Treatymaking was the standard way to negotiate with a sovereign as provided in the *Law of Nations*. After the Seven Years War, diplomacy between Native Nations and colonists faltered.[106] The Proclamation's attempt at law-and-order spurned the opposite, and discontent over the Crown's restriction on land and trade spread rapidly.[107] This discontent played a significant role leading into the Revolutionary War. Indeed, the concerns of colonists that led to the first shots fired against British officers in 1765 centered around the renewal of trade and diplomacy by the Crown with Native Nations.[108]

Throughout the early-Republic era, it is evident from imperial nation-state and colonist interactions with Native Nations that land played a central role.[109] Through the end of the Revolutionary War, there were competing interests in Native Nation's rights both to land and to sell land. The British Crown claimed a preemptory right in the Proclamation of

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[100] *See* LOC Colony Papers, *supra* note 85.

[101] Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L. J. 999, 1019 (2014).

[102] Paul Kelton, *The British and Indian War: Cherokee Power and the Fate of Empire in North America*, 69 WM. & MARY Q. 763, 764 (2012).

[103] Marc Egnal, *Proclamation of 1763*, *in* THE OXFORD COMPANION TO UNITED STATES HISTORY (2004).

[104] Ablavsky, *Beyond the Indian Commerce Clause*, *supra* note 91, at 1069–1070.

[105] *Id.* at 1070.

[106] BLACKHAWK, *supra* note 95, at 147.

[107] Ablavsky & Allread, *supra* note 98, at 261.

[108] BLACKHAWK, *supra* note 95, at 142.

[109] MCHUGH, *supra* note 63, at 118.

1763; in response, Virginia and the other "landed colonies" chartered under the Crown claimed autonomy of their own, and frontier land speculators who "cared for neither the Crown's nor the landed colonies pretensions [and] claimed that under natural law . . . Indians themselves . . . could sell land to whomever they wished."[110] These issues were debated in the Continental Congress,[111] front and center in the Revolutionary War,[112] and eventually brought to the United States Supreme Court.[113]

A. The Marshall Trilogy and Legal Norms

The series of cases legal scholars have termed the "Marshall Trilogy,"[114]—which came before the Supreme Court between 1823 to 1832—are widely recognized as incorporating "the seeds of the entire catalog of the current doctrine" of Indigenous Peoples Law.[115] This includes debates over: plenary power, state rights, the Indian canons of construction, implicit divestiture, the trust relationship, Tribal sovereignty, and the nature of the political nation-to-nation relationship.[116]

1. Johnson v. M'Intosh: Federal (Un)Common Law of Conquest

The first case, *Johnson v. M'Intosh*, adopted the legal norms of "just war" and conquest from the *Law of Nations*, or what is now regularly referred to as the doctrine of discovery, into federal common law.[117] Despite the case being taught regularly in property and Indigenous Peoples Law, the doctrine of discovery has not stood the test of time and has indeed become uncommon.[118] Not surprisingly, and not unlike the *Case of Tanistry*, *M'Intosh* centers around land ownership. In *M'Intosh*, the parties

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[110] WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT, *supra* note 13, at 287.

[111] *Id.* at 288; GREGORY ABLAVSKY, FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES 1 (2019).

[112] BLACKHAWK, *supra* note 95, at 142–44.

[113] *See* Johnson v. M'Intosh, 21 U.S. 543, 588 (1823).

[114] Named after Chief Justice John Marshall who presided over the Court from 1801–1835.

[115] Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 628–629 (2006).

[116] Id.

[117] 21 U.S. at 562; *see* Robert J. Miller, *The Doctrine of Discovery: The International Law of Colonialism*, 5 INDIGENOUS PEOPLES' J. L., CULTURE & RESISTANCE 35, 38 (2019) (tracing the doctrine of discovery's journey from the Holy Roman Empire to international law and then to *M'Intosh*).

[118] *See* United Nations Office of the High Commissioner for Human Rights, *supra* note 21 ("The UN expert noted that [land deprivation legalized by the Doctrine of Discovery] was one of the root causes of the intergenerational trauma suffered by Indigenous Peoples").

were successors in interest in the Illinois-Wabash Company's land titles.[119] These titles were originally purchased from Native Nations in 1775 by William Murry and Louis Vivant, who bought the lands in direct contravention to the Royal Proclamation of 1763, which restricted the buying of land to traders licensed by the Crown.[120]

When purchasing lands located in what was then considered to be the royally chartered colony of Virginia, land companies run by British citizens needed to finalize their claims and sought a workaround to the Royal Proclamation.[121] Many of these land speculators carried with them a falsified copy of the "Camden-Yorke opinion" which purported to provide British citizens the right to acquire title to Indian land directly from "Indian Princes or Governments" without royal approval or license.[122] However, the lands in question were west of the line of demarcation that was contained in the Royal Proclamation and were transferred to the new federal government by Virginia in 1783.[123] The companies had never succeeded in finalizing their claim before the land, from the perspective of the new federal government and its courts, became a part of the United States.

To make the final determination whether the land title in question was valid, Chief Justice Marshall reiterated what had been the practice of the British for at least 200 years: land could only be purchased from Native Nations by the colonial nation state in power. This principle was evident in the British colonial charters—and it had been the foremost cause of the Revolutionary War for its inclusion in the Royal Proclamation[124]—which reiterated that only authorized government representatives could purchase land from Native Nations.[125] As the British supposedly lost that title after the Revolutionary War, and with Virgina being a state of the new union,

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[119] *See* WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT, *supra* note 13, at 288–289.

[120] *Id.* at 276–77, 288.

[121] LINDSAY GORDON ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS 14 (2005).

[122] WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT, *supra* note 13, at 277 (describing how the American Camden-Yorke opinion omitted the term "Mogul" omitted and any other reference cabining the decision to the continent of India); ROBERTSON, *supra* note 121 (accord).

[123] Johnson v. M'Intosh, 21 U.S. 543, 559–60 (1823).

[124] BLACKHAWK, *supra* note 95, at 142 (2023.); *see also* THE DECLARATION OF INDEPENDENCE para. 7 (U.S. 1776) ("He has endeavoured to prevent the population of these States . . . raising the conditions of new Appropriations of Lands.").

[125] MCHUGH, *supra* note 63, at 117, 143–49 (providing a historical account of how the Royal Proclamation of 1763, the Northwest Ordinance of 1787, and the Trade and Intercourse Act of 1790 were connected to John Marshall's determinations in the Marshall Trilogy).

there was only one natural conclusion: the power to engage in the commerce of land with Native Nations now resided with the United States.

Reminiscent of the principle pronounced by British Royal Monarchy from the *Case of Tanistry*, Justice Marshall acknowledged in *M'Intosh*, some limited Tribal rights of occupancy while appearing to divest Native Nations of their inherent sovereignty:

> The power now possessed by the government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never been questioned in our Courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with, and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognise the absolute title of the crown, subject only to the Indian right of occupancy, and recognise the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.[126]

The case illustrates the import and continuity the British imperial system, and British common law, had upon the legal norms and systems of the United States. Justice Marshall adopts the doctrine of discovery to ensure title to land is absolute and to provide the legal certainty necessary to prevent further war.[127] The legal certainty argument Marshall uses to rationalize absolute title being held by the conqueror is the same argument presented by the court in the *Case of Tanistry* that overruled customary Gaelic law in favor of British common law.[128]

The *M'Intosh* opinion also focuses on the history of international law and the right of a Christian nation state to gain rights to lands via discovery, as well as the history of the American imperial colonial charters from Britain, Spain, France, and Holland.[129] Professor Joseph Singer has posited, and I agree, that the case has less import regarding Native Nation

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[126] *M'Intosh*, 21 U.S. at 587–88.

[127] Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481, 490–93 (1994).

[128] *See The Case of Tanistry (Le Case de Tanistry)*, 6 AUSTL. INDIGENOUS L. REP. 3, 73 (1608).

[129] *M'Intosh*, 21 U.S. at 574–87.

rights to sell land than to the fledgling Republic's need to quell conflicting land titles.[130]

The perception of the opinion as wholly adopting the doctrine of discovery into the common law of the United States had immediate impact. Georgia saw *M'Intosh* as an opportunity to argue the state was the legitimate successor of the Crown, and therefore they held a title superior to any title held by a Native Nation.[131] When Georgia ceded its western land claims to the United States in 1802, the U.S. made an unobtainable promise to extinguish Indian title to the land.[132] Georgian discussions on removing Native Nations by force, fueled by land disputes, began to gain traction. The prescient Cherokee Nation Council, seeking to become more legible in the eyes of the new federal and state governments, called a constitutional convention and adopted the first Cherokee Constitution just as the Georgia legislature enacted a bill claiming jurisdiction over Cherokee lands.[133] Georgia's law set the stage for the Court to determine whether state law had jurisdiction in Indian Country.

2. The Cherokee Cases: Federal Common Law of Tribal Sovereignty

In *Cherokee Nation v. Georgia* the Cherokee Nation filed suit against the State of Georgia to enjoin the execution or enforcement of the state's new laws.[134] Citing the history of treatymaking by and between the Cherokee Nation and the United States, the Cherokee Nation claimed the right to non-interference in their rights to self-govern:[135]

> [T]reaties are the supreme law of the land; and all judges are bound thereby: of the declaration in the constitution, that no state shall pass any law impairing the obligation of contracts: and avers that all the treaties referred to are contracts of the highest character and of the most solemn obligation. It asserts that the constitutional provision, that congress shall have power to regulate commerce with the Indian tribes, is a power which from its nature is exclusive; and consequently forbids all interference by any one of the states. [136]

By deciding the matter was a non-justiciable political question and that the Cherokee Nation was not a "foreign state" who could bring a case

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[130] Singer, *supra* note 127, at 490.
[131] ROBERTSON, *supra* note 121, at 119.
[132] *Id.* at 119.
[133] *Id.* at 122.
[134] Cherokee Nation v. Georgia, 30 U.S. 1, 15 (1831).
[135] *Id.* at 5.
[136] *Id.* at 6–7.

under Article III of the Constitution, Justice Marshall held that Native Nations are "domestic dependent nations" whose relationship is "marked by peculiar and cardinal distinctions which exist nowhere else."[137] In addition to the constitutional arguments, the Cherokee Nation employed *Law of Nations* arguments centering the right of sovereignty, self-governance, and territorial integrity that were common at the time. The case also illustrates the "perils of Native invocation of the law of nations" and while "Vattel had not written for indigenous peoples . . . he and his predecessors had . . . provided them raw materials for a powerful legal argument."[138] As with many principles of law, arguments can cut both ways.

In his conclusion, Justice Marshall stipulates the Court may reach the merits of the matter if the "proper parties" raise the question of whether Georgia's laws are constitutional.[139] Despite the case not reaching the merits on the constitutionality of Georgia's laws, *Cherokee Nation v. Georgia* has been citied continuously for its recognition of a Native Nation's inherent Tribal sovereignty, especially as to reserved powers of self-government, and the federal government's duty of protection to Native Nations.[140] These doctrines—inherent Tribal sovereignty, reserved powers of self-government, and the duty of protection—were adopted into the federal common law and have been consistently reaffirmed.[141]

The following year, a state citizen brought *Worcester v. State of Georgia* to the Court.[142] Samuel Worcester was a Vermont state citizen and missionary living in within the bounds of the Cherokee reservation in violation of the Georgia law requiring a state license for citizens to live in Cherokee territory. Worcester, relying upon the Indian Commerce Clause, treaty supremacy, and an authorization by the U.S. President, claimed Geogia state law had no jurisdiction. In holding the several Georgia laws limiting Cherokee self-government unconstitutional, Chief Justice Marshall invokes the language of the *Law of Nations*, providing that Native Nations may receive guarantees and protection from allies while

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[137] *Id.* at 16 (noting that Justice Thompson wrote a valuable dissent relying on the Constitution and the *Law of Nations* to reach the reasonable conclusion that the Cherokee Nation, for purposes of jurisdiction, should be considered a foreign state).

[138] Gregory Ablavsky, *Species of Sovereignty: Native Nationhood, the United States, and International Law*, 1783-1795, 106 J. AM. HIST. 591, 612 (2019).

[139] *Cherokee Nation*, 30 U.S. at 20 ("[t]he mere question of right might perhaps be decided by this court in a proper case with the proper parties").

[140] *Id.* at 2 (providing that Native Nation "relations to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father.").

[141] *See* Haaland v. Brackeen, 599 U.S. 1628; United States v. Wheeler, 435 U.S. 313 (1978).

[142] Worcester v. Georgia, 31 U.S. 515 (1832).

also retaining powers of self-government.[143] Going further, Justice Marshall reiterates the political nature of the relationship between Native Nations and the United States:

> The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union. The Indian nations had always been considered as distinct, independent *political* communities, retaining their original *natural rights*, as the undisputed possessors of the soil, *from time immemorial*; with the *single exception* of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term 'nation,' so generally applied to them, means '*a people distinct from others*.' The *constitution*, by declaring treaties already made, as well as those to be made, to be the *supreme law* of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making treaties. The words *'treaty'* and *'nation'* are words of our own language, selected in our *diplomatic* and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other *nations* of the earth. They are applied to all in the same sense.[144]

Through Justice Marshall's reliance on the Constitution, he recognizes both that the federal government's trust relationship with Native Nations is to the exclusion of the several states and treatymaking as the supreme law of the land. Justice Marshall relies upon natural law arguments in support of Tribal sovereignty over land and relies upon both the *Law of Nations* and the reciprocal extradition clauses to recognize Native Nations as polities.[145] He recognizes the duty of protection (or trust

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[143] *Id.* at 561 ("'Tributary and feudatory states,' says Vattel, 'do not thereby cease to be sovereign and independent states, so long as self government and sovereign and independent authority are left in the administration of the state.'").

[144] *Id.* at 519 (emphasis added).

[145] *Id.* at 518 (recognizing the sixth and seventh articles of the Treaty stipulate for the punishment of the citizens of either country, who may commit offences on or against the citizens

relationship) the federal government has to Native Nations and brings the Indian canons of construction to life when interpreting Article 8 of the Treaty of Hopewell.[146] In *Persisting Sovereignties,* the authors provide an in-depth analysis of Vattel's maxims on treaty interpretation to conclude that under the *Law of Nations,* when interpreting treaties, "we ought, in cases of doubt, to extend what leads to equality and restrict what destroys it . . . ."[147] Indeed, where the treaty provisions in the case were clear, Justice Marshall did not turn to rules of interpretation; he did so only when a treaty provision was ambiguous and then, took the entire treaty, its purpose, and the understanding of the parties into due consideration.[148] Thus, what is now referred to as the Indian canons of construction emerged not wholly from the pen of Justice Marshall, but from historical practice and *Law of Nations* principles of treaty interpretation.

Through the *Cherokee Cases* the early Supreme Court returns to the *Law of Nations* principles of sovereignty, diplomacy, and treatymaking. Making a clear distinction from the rule of conquest in *Johnson v. M'Intosh* and the *Case of Tanistry,* Justice Marshall reiterates that neither the United States, nor the Crown before the emergence of the United States, had the right to "interfere with the internal affairs of the Indians."[149]

The Marshall trilogy continues to impact Native Nation sovereignty as the cases created the foundations of Congressional plenary power, state authority in Indian Country, the Indian canon of construction, implicit divestiture, the trust doctrine, and the political status of Native Nations.[150] With the federal government wielding plenary power, the federal policy toward Indian affairs carries an extraordinary amount of importance.[151] This is illustrated by the several eras of extremely harmful policies in this country, including forced assimilation and removal,[152] termination,[153] and

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of the other and determining the only inference to be drawn from them is, that the United States considered the Cherokees as a nation).

[146] *Id.* at 518–19 (holding "[t]o construe the expression 'managing all their affairs,' into a surrender of self government . . . would be inconsistent with the spirit of this and of all subsequent treaties . . . . It would convert a treaty of peace covertly into an act annihilating the political existence of one of the parties").

[147] Davis et al., *supra* note 51, at 584 (citing DE VATTEL *supra* note 49, at bk. II § 309).

[148] *Id.* at 585.

[149] *Worcester,* 31 U.S. at 517.

[150] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 4, at § 5.07.

[151] Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121 (2006) (detailing the historic impact legislative and executive policy has had in federal Indian law).

[152] *Id.* at 136.

[153] *See* H.R. Con. Res. 108, 83d Cong., 67 Stat. B132 (1953).

reorganization,[154] all before finally arriving to the current policy era focused on self-determination[155] and government-to-government relationship building.[156]

B. Disastrous Federal Law & Policy

Despite *Worcester* supporting Native Nations rights to self-governance and recognizing them as legible polities, the Cherokee Nation and Native Nations with treaties east of the Mississippi were not vindicated. President Andrew Jackson had been campaigning for removal well before his election in 1828 and had finally garnered enough support to narrowly pass the Indian Removal Act in Congress in 1830 (Removal Act).[157] The Removal Act enabled the President "to cause so much of any territory belonging to the United States, west of the river Mississippi . . . for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside and, remove there . . . ."[158]

The Supreme Court was in a period of crisis and "tension between the diplomatic and colonial views arrived at the door of the judiciary during the debates around removal . . . ."[159] The Removal Act placed power over Indian Affairs with the executive branch, rather than as a shared power between Congress and the executive as was the case with treatymaking.[160] The Removal Act utilized the language of promises and land "exchanges," but the reality was that removal often occurred by force.[161] Over time, the United States settled into coercive tactics by entering into over 370 treaties with Native Nations during the Treaty Era, "representing the cession, if not confiscation, of millions of acres" of Indigenous ancestral lands.[162] Federal soldiers and state militias forced

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[154] Indian Reorganization Act of 1934, 48 Stat. 904, *amended by* Pub. L. No. 109-221 (2006); 25 U.S.C. §§ 461–494a.

[155] *See* Carole Goldberg, *President Nixon's Indian Law Legacy: A Counterstory*, 63 UCLA L. REV. 1506 (2016) (describing how the era of self-determination was constrained by President Nixon's appointments to the Supreme Court).

[156] *See* Exec. Off. of the President, Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Jan. 26, 2021).

[157] CAROLE E. GOLDBERG ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 20–21 (6th ed. 2010).

[158] Indian Removal Act of 1830, ch. 148, 4 Stat. 411, 412 (May 28, 1830) (providing the President may assure the tribe or nation that the U.S. will forever secure and guaranty the exchanged lands but that the lands shall revert to the U.S. if the "Indians become extinct").

[159] Blackhawk, *supra* note 6, at 1819.

[160] *Id.* at 1820.

[161] *Id.* at 1820, 1823.

[162] Stephanie H. Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 HARV. L. REV. 1294, 1311 (2021).

Cherokee citizens from their territory into Oklahoma Territory down what we now call the Trail of Tears from 1838 to 1839.[163]

The removal policy forced thousands of Indigenous Peoples west of the Mississippi. This resort to violence was a turning point in Indian affairs. The reservation system, created as an assimilation tactic in 1848 and implemented by the federal government's War Department, aimed to force Native Nations into an agrarian lifestyle.[164] Then, in 1871, treatymaking came to an unceremonious end due to a Congressional power struggle between the House of Representatives and the Senate over control of Indian affairs.[165] Fed up with paying the bill for Indian Affairs without any say over substantive matters, the House of Representatives added a rider to an appropriations bill: "[n]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."[166]

This appropriations rider ended the nearly 100-year-old practice of treatymaking between the federal government and Native Nations, as well as the even older practice of negotiated consent between sovereigns. Native Nations, the United States, and certainly the colonies all relied on international law and treatymaking to maintain peace and diplomacy until those relationships diminished and power dynamics shifted. Treatymaking in practice had been waning for some time and was part of a larger shift that Professor Paul G. McHugh calls the "Empire of Uniformity," where imperial nation-states shifted from recognizing Tribal sovereignty to a form of more positivist absolutism.[167] This rise of legal positivism and plenary power enabled Congress and an unchecked Executive Branch to wield violence against Native Nations through the written word. Historically, Indigenous law scholars have viewed the plenary power doctrine—that Congress has expansive, virtually unlimited authority to regulate Tribes—as a tool that fosters and formalizes the legal oppression of Native Nations by an unchecked federal government.[168] Once the United States institutionalized its government and states sought exclusive power over their perceived territories, Native Nations became the "Indian

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[163] Blackhawk, *supra* note 6, at 1823.

[164] *Id.* at 1830.

[165] Indian Appropriations Act of 1871, 16 Stat. 544, 566 (1871) (codified as "Future treaties with Indian tribes" in 25 U.S.C. § 71).

[166] *Id.*

[167] MCHUGH, *supra* note 63, at 129.

[168] *See* Matthew L. M. Fletcher, *Restatement as Aadizookaan*, 2022 WIS. L. REV. 199, 204–06 (describing issues with plenary power and recommending the doctrine be tightly tethered to the federal government's duty of protection).

problem" for wanting to retain their cultural, legal, social, and religious ways of life.[169]

The view of Native Nations as a problem to be remedied led to a wide variety of deprivations. Wielding its plenary power, Congress enacted the Dawes General Allotment Act of 1887[170] to break up communal land holdings and parcel off "surplus" to settlers, which reduced Indigenous land holdings by at least 100 million acres.[171] The Major Crimes Act removed Tribal criminal jurisdiction over non-Indians in Indian Country.[172] *Lone Wolf v. Hitchcock* upheld a Congressional power to unilaterally abrogate treaties without the consent of Native Nations.[173] Indigenous children were removed from their communities and families and forced to attend boarding schools under the regulation of the Bureau of Indian Affairs (BIA).[174] Cultural and religious practices were also restricted by BIA.[175] Ancestral remains across the country were unearthed from their burial places and stored in boxes in museums and universities in the name of salvage anthropology.[176] Given this history, the survivance of Indigenous Peoples and Native Nations in what is now known as the United States is what is truly exceptional. As Native Nations sought to regain self-governance for over 100 years with varied success, it is not surprising that their advocacy eventually went international.

Because the conflicts between absolute plenary power and the inherent sovereignty of Native Nations often lead to a divestment of inherent Tribal sovereignty in courts, legal scholarship is often centered around seeking a permanent remedy. For example, Native Nations, Indigenous Peoples, and legal scholars advocate for the retention of inherent Tribal sovereignty, including rebuilding Native Nation cultural and institutional structures by lobbying Congress and advocating in the

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[169] H. R. DOC. NO. 81-129, at 63 (1949) (recommending integrating "the Indians into the rest of the population as the best solution of 'the Indian Problem.'").

[170] Ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.).

[171] Barclay & Steele, *supra* note 162, at 1312.

[172] *See* Indian Appropriations Act of 1885, Pub. L. No. 48-341, 48 Stat. 362, 385 (1885) (codified at 18 U.S.C. §1153). This first enactment initially deprived Tribes of jurisdiction, with its scope being updated in the 1948 Major Crimes Act. Major Crimes Act, Pub. L. No. 80-772, 62 Stat. 683, 758 (1948).

[173] Lone Wolf v. Hitchcock, 187 U.S. 553, 560 (1903).

[174] *See* OFF. OF THE ASSISTANT SEC'Y—INDIAN AFFS., U.S. DEP'T OF THE INTERIOR, FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT (2022).

[175] *See, e.g.*, S.J. Res. 102, 95th Cong. (1978) (noting that traditional American Indian ceremonies were banned).

[176] *See* WALTER ECHO-HAWK, IN THE COURTS OF THE CONQUEROR 237–72 (2010).

courts.[177] Legal scholars often contribute to such advocacy by writing about, for example, how to remedy the lack of recognition of Indigenous Peoples' rights to sacred sites,[178] constrain the doctrine of federal plenary power,[179] and limit the Supreme Court's implicit divestiture of inherent Tribal sovereignty.[180]

In the contemporary domestic arena, Native Nations have successfully wielded this advocacy by engaging in what Professor Maggie Blackhawk calls "collaborative lawmaking" or "legislative constitutionalism."[181] Blackhawk argues power between Native Nations and the federal government continues to be redistributed as a result of these lawmaking efforts.[182] Rather than focusing on a rights-based framework, she focuses on how Native Nations have mitigated colonialism's negative effects, through "legislative constitutionalism."[183]

This type of reparative lawmaking, stemming from Indigenous advocacy, could also be referred to as "statutory treatymaking" because Congress became the main forum for engaging with (or regulating depending on the era) Native Nations after the unilateral ending of treatymaking.[184] Through statutory treatymaking, Native Nations have wielded their inherent Tribal sovereignty to increase their power to self-govern—including advocating for reparative laws like the Indian Child Welfare Act (ICWA),[185] the American Indian Religious Freedom Act

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[177] *See generally* REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT (Miriam Jorgensen ed., 2007) (providing an analysis on the approach to rebuilding Native Nations in the self-determination era).

[178] *See* Barclay & Steele, *supra* note 162, at 1295 (providing that Native Nations have been "repeatedly thwarted by the federal government in their efforts to vindicate [the] practice of their religion.").

[179] *See* Seth Davis, *American Colonialism and Constitutional Redemption*, 105 CALIF. L. REV. 1751, 1780–88 (2017) (describing how colonialism is tied to plenary power which authorizes Congress to limit self-determination).

[180] *See* Maggie Blackhawk, *On Power & Indian Country*, *in* WOMEN & LAW, 1836–39 (2020) (describing how Native Nations leverage legal channels to mitigate the effects of colonialism such as the Supreme Court's implicit divestiture in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)).

[181] Maggie Blackhawk, *Legislative Constitutionalism and Federal Indian Law*, 132 YALE L. REV. 2205, 2271 (2023).

[182] *Id.*

[183] *See id.* at 2274.

[184] *See* David Moore & Michalyn Steele, *Revitalizing Tribal Sovereignty in Treatymaking*, 97 N.Y.U. L. REV. 137, 156–157 (2022) (treatymaking was terminated in by Congress in 1871 legislation has essentially replaced treatymaking. Such legislation, in the self-determination era, has been the most successful avenue for mitigating colonialism's impact on Native Nations).

[185] *See* Nazune Menka & Laura Spitz, *Using Vulnerability Theory to Reconceive the Relationships Between the Native Nations, the United States, and the States*, *in* LAW, VULNERABILITY, AND THE RESPONSIVE STATE: BEYOND EQUALITY AND LIBERTY 243, 255–58 (Martha Fineman & Laura Spitz eds., 2024) (discussing ICWA being enacted in 1978 as

(AIRFA),[186] the Indian Self Determination and Education Assistance Act (ISDA),[187] and the Native American Graves Protection and Repatriation Act (NAGPRA).[188]

However, statutory treatymaking is an onerous and resource intensive process. It requires incessant lobbying, comment writing, and the exertion of human and financial resources, which Native Nations have access to at varying levels. By taking the legislative constitutionalism or statutory treatymaking arguments a step further, I argue a return of the consensual negotiations exhibited in the pre- and early-Republic eras that were based on principles enumerated under the *Law of Nations*[189]—including legal norms of diplomacy and sovereignty—could lead to the development of a true nation-to-nation relationship that returns greater power of self-determination to Native Nations. Such a return to treatymaking is supported by the current era federal policy, by international legal norms, and could serve as a powerful complement to statutory treatymaking.

Furthermore, calls for substantive reparations for Native Nations continue despite the federal government's attempt, to settle with finality, Native Nation claims against the United States government by creating the Indian Claims Commission (ICC).[190] For example, Vine Deloria, Jr.'s *Behind the Trail of Broken Treaties*, echoed the national American Indian Movement's call for a reinstatement of treatymaking.[191] Legal scholars have also recently questioned the constitutionality of Congress ending treatymaking.[192] Twenty years ago Professor Philip Frickey called for "a commitment to renewed treatymaking, whether of the Article II variety or by agreements ratified through bicameralism and presentment," saying that treatymaking "would be a major step toward greater normative, doctrinal, and practical legitimacy."[193]

More recently, due to the unprecedented advocacy by Native Nations and Indigenous organizations, movements such as Standing Rock

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remedial legislation to address previous federal and state assimilationist policies and practices of removal that resulted in an in the separation of Indian children from their families).

[186] *See* Barclay & Steele, *supra* note 162, at 1317–20 (describing how AIRFA has "soaring language," but how the Supreme Court in *Lyng v. Northwest Indian Cemetery Ass'n*, 485 U.S. 439 (1988) interpreted the law to contain no enforceable rights of action).

[187] Pub. L. No. 93-638, § 2, 88 Stat. 2203 (1975).

[188] ECHO-HAWK, *supra* note 176, at 255–57 (describing the concerted efforts of the Native American community to enact NAGPRA).

[189] DE VATTEL, *supra* note 49.

[190] *See infra* Part III.

[191] VINE DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE (Univ. of Tex. Press 1985).

[192] Moore & Steele, *supra* note 184.

[193] Frickey, *supra* note 8, at 489.

NoDAPL and LandBack have called for the increased protection of Indigenous land, water, and lifeways, as well as the return of Indigenous lands to Indigenous stewardship.[194] These recent movements, along with others, have renewed calls for dismantling institutional systems of oppression and inequality and redressing historical injustices in what is now known as United States. The country's original sins—colonialism and slavery—continue to limit our ability as a nation state to "secure the blessings of liberty" and to "establish justice" for all.[195]

I argue that the legal norms of treatymaking and the international law on reparations provide guidance towards a deeper, more adequate, vision of justice for Native Nations.[196] By facilitating negotiations by and between Native Nations and the federal government, remedies can be tailored on a case-by-case basis and codified in newly negotiated treaties. Such treaties could be utilized to negotiate for LandBack and other reparative mechanisms specific to each Native Nation's contemporary situation. I support my argument by illustrating how, when the Court returns to the legal norms of diplomacy, sovereignty, and consensual negotiations, we see a more coherent vision of the Constitution and the original nation-to-nation relationship between the federal government and Native Nations.

III. THE PITFALLS OF THE PAST & PROMISES FOR THE FUTURE

Contemporary international law continues to have substantial impact on Indigenous Peoples Law. When the law lags in embodying the will of the people, as it often has in Indigenous Peoples Law, it catalyzes social movements. The international Indigenous movement and the American Indian Movement, modeled after and inspired by the Civil Rights Movements in the 1960s, both played a significant role in shifting

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[194] *See* Mary Kathryn Nagle, *Environmental Justice and Tribal Sovereignty: Lessons from Standing Rock*, 127 YALE L.J. F. 667, 667–668 (2018) ("The protests at Standing Rock represent the latest iteration of longstanding tribal dissent against an environmental law framework that has long overlooked [Tribal Nations'] interests."); James Stevenson Ramsey, *Interrogating Dominion: On Political Theology and Summary Process Eviction in Connecticut*, 136 HARV. L. REV. F. 288, 315 (2023) (noting that the premise for, and central demands of, the LandBack movement are reclamation and justice); Michelle Bryan, *The Power of Reciprocity: How the Confederated Salish & Kootenai Water Compact Illuminates A Path Toward Natural Resources Reconciliation*, 25 WATER L. REV. 227, 232 (2022) (arguing the LandBack Movement "is one manifestation" of the call for "reconciliation of past injustices including land loss and a diminished ability to engage in cultural practices and apply customary laws related to natural resources").

[195] U.S. CONST. pmbl.

[196] *See infra* Subpart III(b).

federal Indian affairs policy from assimilation to self-determination.[197] The international Indigenous movement ultimately led to the creation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which protects the *collective* rights of Indigenous Peoples to "freely determine their political status and freely pursue their economic, social, and cultural development."[198] Professors Kristen Carpenter and Angela Riley call the international movement for Indigenous Peoples rights a "jurisgenerative moment" where Tribal, national, and international governments and institutions engage in dynamic, mutually reinforcing, and multilevel lawmaking.[199] Similarly, at the national level, the federal policy shift to self-determination,[200] and the statutes enacted in furtherance of it, have had significant positive impacts for Native Nations.

The obligation for a nation state to ensure respect for and implement international human rights law flows from treaties to which a state is party, customary international law, and domestic law of each state.[201] So for example, while UNDRIP has not yet been enacted by Congress in the United States, as it increasingly becomes adopted into positive law and is recognized internationally, its principles become more legible.[202] Despite

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[197] *See* LINDA TUHIWAI SMITH, DECOLONIZING METHODOLOGIES RESEARCH AND INDIGENOUS PEOPLES 112–14 (3d. ed. 2021) (describing the international mobilization of Indigenous Peoples); *see also* DELORIA, JR., *supra* note 191, at 24–41.

[198] G.A. Res. 61/295, The United Nations Declaration on the Rights of Indigenous Peoples, Art. 3 (Sept. 13, 2007) [hereinafter UNDRIP].

[199] Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 178 (2014); *see supra* note 93 and accompanying text.

[200] *See* S. LYMAN TYLER, A HISTORY OF INDIAN POLICY 200–14 (1973) (documenting the history of the federal policy on Indian affairs up to the inception the self-determination era).

[201] G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, § I.2 (Mar. 21, 2006).

[202] *See generally* UNIV. OF COLO. L. SCH. & THE NATIVE AM. RTS. FUND, *Joint Project to Implement the United Nations Declaration on the Rights of Indigenous Peoples in the United States Tribal Implementation Toolkit*, 11-13 (2020) (providing that the Cherokee Nation, the Seminole Nation of Oklahoma, the Gila River Indian Community, the Pit River Tribe of California, the Muscogee (Creek) Nation, and the Navajo Nation have adopted resolutions or otherwise codified UNDRIP into Tribal law); CAN. DEP'T OF JUST., *UN Act Action Plan* (June 2023), https://www.justice.gc.ca/eng/declaration/ap-pa/ah/pdf/unda-action-plan-digital-eng.pdf [https://perma.cc/84RS-CMP3]; TE PUNI KŌKIRI (MINISTRY OF MĀORI DEVELOPMENT), *UN Declaration on the Rights of Indigenous Peoples*, https://www.tpk.govt.nz/en/a-matou-whakaarotau/te-ao-maori/un-declaration-on-the-rights-of-indigenous-peoples [https://perma.cc/3563-MERW]; Working Group of the Memorandum of Understanding Regarding Interagency Coordination And Collaboration for the Protection of Tribal Treaty and Reserved Rights, Best Practices for Identifying and Protecting Tribal Treaty Rights, Reserved Rights, and Other Similar Rights in Federal Regulatory Actions and Federal Decision-Making, 9 (Nov. 30, 2022) (noting the Obama administration's statement in "support" of UNDRIP); Advisory Council on Historic Preservation, Section 106 and The U.N. Declaration on The Rights of Indigenous Peoples: General Information and Guidance (April 30, 2018). These various domestic and

the frequent lack of enforceability that causes some hesitancy at using international law as a framework for legislative or judicial change, I argue that the force of international law which once served to justify colonial endeavors via the doctrine of discovery now lends itself to redressing those same injustices via the doctrines of reparations and self-determination.

A. UNDRIP

Legal norms, whether presented through federal policy on Indian Affairs or as natural law in the *Law of Nations*, continue to have an inordinate amount of impact on the jurisgenesis of Indigenous Peoples Law. I illustrated some examples of the impact through a brief review of early Supreme Court jurisprudence in the previous section. Native Nations have responded to vacillations of federal law and policy that shift from respecting Tribal sovereignty to divesting it with limited success. They pursue stable relationships with the federal government through various mechanisms, including advocating for legislation,[203] enacting Tribal law,[204] and seeking redress in international fora.[205] While domestic advocacy has at times faltered in recent memory, Indigenous advocacy at the international level has flourished, contributing to an increase in the recognition of the *collective* rights of Indigenous Peoples to "freely determine their political status and freely pursue their economic, social, and cultural development."[206] These recent changes demonstrate that Indigenous Peoples Law is experiencing a "jurisgenerative moment" hundreds of years in the making.[207]

The international jurisgeneration by Indigenous Peoples began as early as 1923, when Native Nations sought redress from international organizations.[208] Haudenosaunee Cayuga Chief Deskaheh traveled to Geneva to present the case of Canada's violation of the Haudenosaunee Cayuga Nation's sovereignty to the League of Nations.[209] While the League refused him a formal audience, his off-site speech was well

international uses serve as affirmations of the centrality of UNDRIP principles in modern democracies' relationship with Tribal sovereigns.

[203] *See, e.g.*, Blackhawk, *supra* note 6, at 1862–67.

[204] *See generally* Angela R. Riley, *The Ascension of Indigenous Cultural Property Law*, 121 MICH. L. REV. 75, 83–84 (2022); Christine Zuni Cruz, Tribal Law as Indigenous Social Reality and Separate Consciousness [Re]Incorporating Customs and Traditions into Tribal Law, 1 TRIBAL L.J. 1, 5–11 (2001) (describing how traditional law may be oral, dynamic, or static but contains the values, beliefs, and worldviews of a peoples).

[205] *See generally* Carpenter & Riley, *supra* note 199.

[206] *See* UNDRIP, *supra* note 198, at Art. 3.

[207] Carpenter & Riley, *supra* note 199.

[208] Wenona T. Singel, *New Directions for International Law and Indigenous Peoples*, 45 IDAHO L. REV. 509 (2009).

[209] *Id.*

attended and brought international attention to the human rights issues Indigenous Peoples face in settler colonial nation states.[210] The international law community did not respond immediately to recognizing the specific issues colonialism and imperialism were placing on Indigenous Peoples. But early efforts like Chief Deskaheh's "set in motion a series of developments that slowly advanced the recognition of indigenous peoples rights in international law" and led to both increased advocacy at international fora and institutional response.[211]

Like the League of Nations, the United Nations (UN) officially formed as a response to the need to establish a general international organization to maintain "peace and security" after a world war.[212] Although the UN's charter supported the rights of all peoples to self-determination and professed ideas associated with decolonization[213] as stated goals of the entity, Indigenous Peoples continued to face structural hurdles when seeking to address the UN.[214] It wasn't until 1977 that Indigenous Peoples were able to meaningfully participate, and nearly 200 Indigenous representatives traveled to Geneva for the occasion.[215] The participants developed the Draft Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere.[216] Then, in response to a 1982 UN report,[217] the UN established a Working Group on Indigenous Populations, which drafted the first version of what ultimately became UNDRIP.[218] In 2007, after nearly three decades of

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[210] *See Iroquois Chief Asks League Recognition; Deskaheh of Ontario Says King George III. Treated With Six Nations as Independent*, N. Y. TIMES (Dec. 23, 1923), at E3. (showing the international impact of the visit to Geneva, the article cites the Paris Associated Press as the source).

[211] Carpenter & Riley, *supra* note 199, at 186 (quoting Singel, *supra* note 208, at 510) (providing that as early as 1949 the UN General Assembly began to study "aboriginal populations . . . to improve their condition and foster more efficient use of their resources").

[212] UNITED NATIONS, *Predecessor: The League of Nations*, UN.ORG (2025), https://www.un.org/en/about-us/history-of-the-un/predecessor [https://perma.cc/J69T-HWTH]. The League of Nations, the UN's predecessor, which had formed after World War I in 1919, transferred its assets to the U.N. in 1946. *Id.*

[213] *E.g.*, G.A. Res. 1514 (XV), Declaration on the Granting of Independence to Colonial Countries and Peoples (Dec. 14, 1960) (declaring in the Resolution's preamble: "*Mindful* of the determination proclaimed by the peoples of the world in the Charter of the United Nations to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women" and "recognizing that the peoples of the world ardently desire the end of colonialization in all its manifestations").

[214] Sharon H. Venne, *The Road to the United Nations and Rights of Indigenous Peoples*, 20 GRIFFITH L. REV. 557, 560 (2011).

[215] *Id.* at 563.

[216] *Id.*

[217] Singel, *supra* note 208, at 198–200 (discussing the Martinez-Cabo Report).

[218] *See* Carpenter & Riley, *supra* note 199, at 189–92 (providing a detailed timeline of the working groups who contributed to the final UNDRIP).

intense negotiations between Indigenous Peoples and the Working Group, the UN General Assembly adopted the resolution.[219]

Generally viewed, UNDRIP sets forth principles such as the right to self-determination not just for individuals—but for Peoples—and recognizes their inherent collective and communal rights. It has become one of the most well-known declarations of international law for its precedent-setting inclusivity of Indigenous worldviews. While UNDRIP has been criticized for, among other things, protecting a settler-colonial nation-state's territorial integrity,[220] it is widely praised the right for Indigenous Peoples to "freely determine their political status and freely pursue their economic, social, and cultural development" has been useful in setting the bar for legal norms in Indigenous Peoples Law.[221] This recognition of Indigenous and Tribal law in UNDRIP is due to the advocacy and inclusion of Indigenous Peoples in the drafting of the document itself.[222]

B. Failed Reparations to Native Nations: The Indian Claims Commission

In determining what legal norms apply to principles of redress, the international law of reparations provides a normative framework under which to analyze the United States' historic attempts at redress. UNDRIP mentions redress six times, providing that states "shall" provide redress through effective mechanisms for theft of cultural and intellectual property, the unconsented development of their lands, the unconsented use and occupation of their traditional territories, and the deprivation of their subsistence ways of life.[223]

Even before UNDRIP was adopted, the UN General Assembly adopted Resolution 60/147, a Reparations Resolution that outlined the requirements for reparations for "gross human rights violations of international law of human rights" in 2006.[224] Reparations generally refers

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[219] UNDRIP, *supra* note 198.

[220] Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 FLA. A & M U. L. REV. 1, 86, 98 (2014) (recognizing UNDRIP was "watered down" by the United States, Canada, Australia, and New Zealand and has been criticized for failing to enable a dialogue on co-existing sovereignties).

[221] *See* UNDRIP, *supra* note 198, at Art. 3.

[222] *See* Carpenter & Riley, *supra* note 194, at 189–92 (providing a detailed timeline of the working groups who contributed to the final UNDRIP).

[223] UNDRIP, *supra* note 198, at Art. 8.2 (providing that a nation-state should seek effective mechanisms for prevention of and redress for actions that sought to assimilate, dispossess, and forcibly remove and relocate Indigenous Peoples).

[224] G.A. Res. 60/147, *supra* note 201; *see* Roger-Claude Liwanga, *The Meaning of Gross Violation of Human Rights: A Focus on International Tribunals' Decisions over the DRC Conflicts*, 44 DENVER J. INT'L L. & POL'Y 67, at (2015) (providing no binding documents have

to the various means by which a nation-state may repair the consequences of its breach of international law, and can refer to either the action of reparations, the process for achieving reparations, or both.[225] Reparations for human rights violations cover breaches of international law for historic injustices, such as slavery, colonialism, discrimination of minorities, and wartime violations such as internment camps and theft of cultural property.[226] The Reparations Resolution outlines the five requirements for reparations under international law, including "restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition."[227]

Restitution aims to restore the community to their "original situation" and includes "restoration of liberty, enjoyment of human rights, identity, family life and citizenship, and a return to one's place of residence, and return of property."[228] Compensation is to be "provided for any economically assessable damage" and must be "proportional to the gravity of the violation."[229] Examples include "physical or mental harm," "moral damage," and "[c]osts required for legal or expert assistance, medicine and medical services, and psychological and social services.[230] Guarantees of non-repetition "should include," but is not limited to, measures such as "[s]trengthening the independence of the judiciary" and "[r]eviewing and reforming laws" that contribute to violations.[231] Under the Resolution, Member States have a duty to prevent and investigate violations of such international laws, an obligation to incorporate norms of international human rights law into current state legal systems, and to ensure effective procedural access to justice and remedies.[232] The United States has engaged in limited attempts to provide redress or reparations to Native Nations for historic human rights violations. Many of the historic violations are ongoing as illustrated by the story of the Indian Claims Commission (ICC) and the Great Sioux Nation.

The ICC is the most salient attempt at reparations for Native Nations from the federal government.[233] It is widely considered to have been a

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defined the term gross and different international bodies use "serious" "grave" "gross" "massive" or "flagrant" interchangeably).

[225] DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 7 (2nd ed. 2005).

[226] *Id.* at 429–64.

[227] G.A. Res. 60/147, *supra* note 201, ¶ 18.

[228] *Id.* at ¶ 19.

[229] *Id.* at ¶ 20.

[230] *Id.*

[231] *Id.* at ¶ 23.

[232] *Id.* at Art. II.

[233] *See* Kevin K. Washburn, *Facilitating Tribal Co-Management of Federal Public Lands*, 2022 WIS. L. REV. 263, 283 (2022) (noting the failure of reparations in the United States to Native Nations, especially regarding the loss of land); Sarah Krakoff & Kristen Carpenter, *Repairing Reparations in the American Indian Nation Context*, at 257 *in* REPARATIONS FOR

failure as far as reparations are concerned.[234] The ICC was created by Congress in the 1946 ICC Act to consolidate claims by Native Nations into a central place and to create a final claim process.[235] Notably the creation of the ICC Act overlaps with the federal policy era of termination.[236] In 1928 the "Problems of Indian Administration" report (also known as the Meriam Report) documented the continuing injustices perpetuated by the federal government against Native Nation's and their dissatisfaction with federal law and policy, including long wait times for claims to be heard and the indecipherable tangle of legal procedure to bring a claim in the first instance.[237] The Meriam Report recommended a special commission for claims without a jurisdictional act and Congress responded by introducing bills to create a claim process for Native Nations.[238] Over the next decade and a half, several bills to create a special court or a commission were unsuccessful in becoming law. It wasn't until public sentiment on Indigenous issues shifted post-World War II—and Chairman of the Indian Affairs Committee Henry M. Jackson became tired of "being harassed constantly" over routine claims—that the ICC was enacted.[239] As Chairman Jackson, the bill's sponsor stated, "we require all Indian tribes to present their claims within 5 years or forever hold their

INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES (2008) (noting the ICC as one of the broader attempts at reparations, but also discussing ICWA and individual Tribal claims as reparative).

[234] *See* Hannah Friedle, *Treaties as a Tool for Native American Land Reparations*, 21 NW. J. HUM RTS. 239, 248–49 (2023) (noting the ICC was limited to monetary compensation and unsatisfactory to the Sioux Nation who wanted the sacred Black Hills and not money); *see also* Thomas E. Luebben, *The United States Indian Claims Commission: A Remedy for Ancient Wrongs, A Source of New Wrongs*, *in* REDRESSING INJUSTICES THROUGH MASS CLAIMS PROCESSES: INNOVATIVE RESPONSES TO UNIQUE CHALLENGES 151, 170–75 (Int'l Bureau of the Permanent Ct. of Arb. ed., 2006); Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 830 (1992); H. D. ROSENTHAL, THEIR DAY IN COURT: A HISTORY OF THE INDIAN CLAIMS COMMISSION 49–50 (1990); John T. Vance, *The Congressional Mandate and the Indian Claims Commission*, 45 N.D. L. REV. 325, 335 (1969).

[235] ICC Act, *supra* note 12.

[236] Kristen A. Carpenter, *Living the Sacred: Indigenous Peoples and Religious Freedom, Defend the Sacred: Native American Religious Freedom Beyond the First Amendment*, 134 HARV. L. REV. 2103, 2133 (2021) (reviewing); Francis Moul, *William McKinley Holt and the Indian Claims Commission*, 16 GREAT PLAINS Q. 169, 171 (1993).

[237] Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 467 (1994) (describing the 'special jurisdictional acts' the Court of Claims construed so narrowly Native Nations rarely were successful with their claims); John T. Vance, *The Congressional Mandate and the Indian Claims Commission*, 45 N.D. L. REV. 325, 327 (1969).

[238] U.S. Indian Claims Comm'n, 95th Cong., 2d sess. U.S. Indian Claims Commission Final Report (1978) [hereinafter ICC Final Report].

[239] Krakoff & Carpenter, *supra* note 233, at 257 (describing the post war impact on the creation of the ICC); Jessup Newton, *supra* note 237 (describing the United States' "horror at the treatment of racial and ethnic minorities" and Hitler's invocation of the U.S.' treatment of Indigenous Peoples as justification for invading Poland and Czechoslovakia).

peace."[240] The Congressional mandate was clear: claims filed with the ICC would be final.

The ICC Act established a commission to hear and determine five types of claims. The list of eligible claims is the most generous part of the legislation, including claims under the Constitution, arising from treaties, sounding in tort, of contract or treaty revision for fraud or duress, for takings of land, and those based on "fair and honorable dealings that are not recognized by any existing rule of law or equity."[241] The ICC Act fails the restitution requirement under international law on reparations by focusing solely on monetary compensation for a host of injustices committed in the name of colonization, including loss of land, life, and family; forced cultural assimilation; and explicit and implicit divestitures of Tribal sovereignty by federal and state courts.[242] Illustrative of the disingenuousness of the ICC Act serving as reparations, successful claims were subject to deduction of "payments [and] offsets," lawyers' fees, and potentially "all money or property given to or funds expended . . . to claimant." [243] Congress excluded deducting costs "for the removal of the claimant from one place to another at the request of the United States[,]" i.e., the costs the federal government expended during forced removal.[244] Lawyer fees were capped at ten percent of the amount recovered in a case.[245] Claims were also limited temporally; any claims not submitted within a five-year period from the date of the ICC Act's approval were barred.[246] Once a final judgment was reached, further claims or demands against the United States were forever barred.[247]

The ICC Act did not contain a section on damages, but courts construed it "as limiting the available relief 'to that which is compensable in money.'"[248] Because the ICC was limited to monetary compensation, it

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[240] Vance, *The Congressional Mandate and the Indian Claims Commission*, *supra* note 237, at 330.

[241] ICC Act, *supra* note 12, at § 2.

[242] *Compare* G.A. Res. 60/147, *supra* note 201, at Art. IX (establishing broad parameters of appropriate restitution), *with* Navajo Tribe of Indians v. New Mexico, 809 F.2d 1455, 1461 (10th Cir. 1987) ("According to one sub-committee report, the ICCA reflected a congressional policy that 'Tribes with valid claims would be paid in money. No lands would be returned to a tribe.'") (citation omitted).

[243] ICC Act, *supra* note 12, at § 2. Limiting the claims to financial compensation and then reducing those claims by amounts the federal government had previously expended during the eras of removal and assimilation are hardly measures that could be viewed as restorative.

[244] *Id.*

[245] *Id.* at § 15.

[246] *Id.* at § 12.

[247] *Id.* at § 22(b).

[248] Navajo Tribe of Indians 809 F.2d at 1461 (quoting Osage Nation of Indians v. United States, 1 Ind. Cl. Comm. 54, 65 (1948), *rev'd on other grounds*, 97 F. Supp 381 (1951)).

did not provide redress for the loss of one's place of residence or return of property. In recognition of its own failures to achieve finality of Indian claims, the ICC Act was extended five times to adjudicate over 600 claims, many of which were appealed for decades.[249]

In a now-infamous set of cases,[250] the Great Sioux Nations[251] sued under one of the special jurisdiction acts in 1920 alleging a taking of Paha Sapa or He Sapa, known in English as the Black Hills, which had been promised to be "set apart for the absolute and undisturbed use and occupation" of them in the 1868 Treaty of Fort Laramie.[252] A government commission presented Congress with an "agreement" where, in exchange for subsistence rations, the Great Sioux Nations would relinquish rights to both He Sapa and hunting.[253] The "agreement" did not meet the legally required proportion of consent by the eligible population, but Congress had codified the "agreement" into law in 1877, nonetheless.[254] The court of claims held they didn't have jurisdiction under the 1920 Act to "question whether the compensation afforded the Sioux in the 1877 Act was an adequate price for the Black Hills, and that the Sioux' claim was a moral one not protected by the Just Compensation Clause."[255] The Great Sioux Nations next sought justice under the ICC Act.[256] The ICC court held the 1877 Act qualified as a taking and the claim met the requirements under the "fair and honorable dealings that are not recognized by any existing rule of law or equity" prong.[257] The court held the Great Sioux Nations were entitled to $17.5 million for He Sapa and gold taken by trespassers, but not interest accrued.[258] Through further court rulings, under a new 1978 special jurisdiction act granting *de novo* review of ICC

[249] ICC FINAL REPORT, *supra* note 238, at 12.

[250] *See* LAKOTA NATION VS. UNITED STATES (IFC Films 2022) (documenting the taking of the He Sapa (Black Hills)).

[251] See John P. LaVelle, *Rescuing Paha Sapa: Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation*, 5 GREAT PLAINS NAT. RES. J. 40, 42 n.10 (2001) (using the term Great Sioux Nation for the Tribes who are successors to the Treaty of Fort Laramie including the Cheyenne River, Crow Creek, Lower Brule, Oglala, Rosebud, Standing Rock, Santee, and Fort Peck Sioux Tribes).

[252] United States v. Sioux Nation of Indians, 448 U.S. 371, 374 (1980). There are two different names for the 'Black Hills'—He Sapa and Paha Sapa—in the Lakota language, but I use He Sapa as that seems to be more commonly used now.

[253] *Id.* at 381.

[254] *Id.* at 381–82.

[255] *Id.* at 384.

[256] *Id.* at 371.

[257] *Id.*

[258] *Id.* at 388 (noting that the Indian Claims Court initially barred the claim due to *res judicata*, so the merits of the taking were not fully affirmed until 1980).

decisions, the Nation was awarded interest in the amount of $17.1 million, which the Court affirmed.[259]

In a 1986 hearing before the Senate Indian Affairs Committee, International Indian Treaty Council Executive Director and citizen of the Oglala Lakota Nation, William Means stated:

> [F]irst of all, the courts [in *Sioux Nation*] identified the thief of the Black Hills in 1877 as the U.S. Congress. The second thing the court did was allow the thief to keep what he had stolen. The third thing the court did was allow the thief to determine the value of the land. The fourth thing they did was allow the thief to impose or attempt to impose that monetary judgment upon our people in exchange for the land.[260]

By only recognizing monetary compensation, the ICC illustrates the cultural dissonance between western value systems and Indigenous ways of life.[261] In a "legendary refusal"[262] the Sioux rejected the courts "'remedy' of monetary compensation for the unconstitutional taking of the sacred Black Hills."[263] The money continues to be held in trust by the government.[264] Under the international law of reparations, restitution requires the return of property whenever possible.[265] He Sapa is now the "Black Hills National Forest" and is managed by the U.S. Forest Service, which is overseen by the U.S. Department of Agriculture.[266] It certainly is possible and would be reparative to return He Sapa to the Great Sioux Nation. For many Indigenous Peoples, there is a duty to protect ancestral homelands which is connected to the rights and responsibilities of

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[259] *Id.* at 390.

[260] LaVelle, *supra* note 251, at 65 (quoting Sioux Nation Black Hills Act, S. 1453, 99th Cong. § 3(5)-(6) (1985), *reprinted in Sioux Nation Black Hills Act: Hearing on S. 1453 Before the Select Comm. on Indian Affs.*, U.S. Senate, 99th Cong., S. HRG. 99-844, at 7–8 (1986)).

[261] For example, the "Lakota name 'He Sapa'—meaning 'black ridge'" is a descriptor of the land's visual impact. *See* Nick Estes, *The Battle for the Black Hills*, HIGH COUNTRY NEWS (Jan. 01, 2021), https://www.hcn.org/issues/53-1/indigenous-affairs-social-justice-the-battle-for-the-black-hills [https://perma.cc/RB3C-99SU]. He Sapa "is a place of origin for dozens of Native peoples and a revered landscape for more than 50 others," with "[t]he land's most recent, and perhaps longest-serving, stewards—the Oceti Sakowin, the Dakota, Nakota and Lakota people—hold[ing] the mountains central to their cosmos." *Id.*

[262] Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1642 (2000).

[263] LaVelle, *supra* note 251, at 65.

[264] Krakoff & Carpenter, *supra* note 233, at 257.

[265] G.A. Res. 60/147, *supra* note 201, at ¶ 19.

[266] *See* Press Release, Standing Rock Sioux Tribe, Eight Oceti Sakowin Leaders Sign Memorandum of Understanding with the USDA, Forest Service Rocky Mountain Region Black Hills National Forest (Aug. 26, 2024) https://www.standingrock.org/wp-content/uploads/2024/08/Black-Hills-National-Forest-MOU-01-SRST-08.26.24-2.pdf [https://perma.cc/85FX-HZPE].

communities. The Lakota have similar views in regard to He Sapa, and the Sioux community continues to call for its return.[267] The recent LandBack movement has been catalyzed in part by organizations such as the NDN Collective, whose campaign calls for the closure of Mount Rushmore and the return of public land in the Black Hills.[268]

In reviewing the ICC's history, scholars have called for a "deep moral accounting, one which seeks not compensation but some minimum restitution; not resolution of financial matters, but reconciliation; not closure of past debts, but an openness for future contracts; not a formal judgment recorded by a court, but an overall sense of justice done in negotiations."[269] ICC historian H.D. Rosenthal posits that for the ICC to have succeeded "it would have had to involve the Indians directly in its formulation and operation."[270]

As Dean Kevin Washburn has provided, because the United States' past efforts at reparation have largely failed, it remains the perspective of many Native Nations that lands were stolen, and substantial injustices have never been adequately addressed.[271] Evidence of this dissatisfaction made national news in 1972 when the BIA headquarters was occupied for a week by Indigenous activists who had traveled across the country on a campaign titled the "Trail of Broken Treaties."[272] The campaign arose for many reasons, not the least of which were widespread violence against Indigenous Peoples across the country and broad dissatisfaction with federal Indian policy more generally.[273] Their Twenty-Point Position Paper centered heavily on treaties, self-determination, and the federal government's relationship with Native Nations.[274] Notably, the first two points requested the "restoration of constitutional treaty-making authority" and the establishment of a "treaty commission to make new treaties."[275]

Renowned Lakota scholar Vine Deloria, Jr. wrote *Behind the Trail of Broken Treaties* on this movement to "demonstrate that the proposal to

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[267] *See* Estes, *supra* note 261.

[268] *LandBack Campaign*, NDN COLLECTIVE, https://ndncollective.org/campaigns [https://perma.cc/69ZB-FKQF].

[269] LEON SHASKOLSKY SHELEFF, THE FUTURE OF TRADITION: CUSTOMARY LAW, COMMON LAW AND LEGAL PLURALISM 426 (2013).

[270] ROSENTHAL, *supra* note 234, at 246.

[271] Washburn, *supra* note 233, at 283.

[272] DELORIA, JR., *supra* note 191, at 46.

[273] *Id.*

[274] *Id.* at 48–53; *Twenty-Point Position Paper*, AM. INDIAN MOVEMENT ARCHIVE http://www.aimovement.org/archives [https://perma.cc/BT3B-B758].

[275] *Twenty-Point Position Paper*, AM. INDIAN MOVEMENT ARCHIVE http://www.aimovement.org/archives [https://perma.cc/BT3B-B758].

reopen the treaty-making procedure . . . is one which would place the United States in the forefront of civilized nations in its treatment of aboriginal people of the continent."[276] Deloria discusses the history of the federal relationship with Native Nations, including the doctrine of discovery, the rise of Indian activism, and maps a future vision for reinstating treatymaking. While I do not agree with some of the more nuanced aspects of his argument, I do agree with his central vision that through the reinstatement of treatymaking, "the rights and responsibilities of both parties, the Tribe and the United States, would be clearly defined."[277] This nation-to-nation renegotiation has been lacking in the relationship between Native Nations and the federal government. Without renewing treatymaking, Native Nations have been forced to continue exerting enormous resources lobbying Congress as a substitute. In the meantime, they remain bound by either century-old treaties or statutes that may or may not be construed to their benefit in a court of law.[278]

C. Can Treatymaking Provide Redress?

The fierce advocacy of Native Nations to engage in statutory treatymaking and usher in the self-determination era has resulted in the enactment of restorative measures in furtherance of Tribal self-determination. However, Native Nations continue to experience injustice in federal courts despite the federal government's recognition of: (1) its trust responsibility—or duty of protection—to Native Nations, (2) the Constitution's recognition of Tribal sovereignty, and (3) the existence of a nation-to-nation relationship. Might a return to treatymaking provide some semblance of more permanent redress?

1. Remedying the Conflicting Doctrine Issue

In *McGirt v. Oklahoma*, the Supreme Court affirmed that treaties are the supreme law of the land,[279] but the Court's jurisprudence on treaty interpretation is inconsistent at best.[280] This inconsistency is not surprising. Recall the wide vacillations of Indian policy from the federal government—diplomacy, removal, termination, assimilation, and the present self-determination. In each of these eras, Congress enacted statutes codifying these policies, e.g., the Indian Removal Act; the termination of

[276] DELORIA, JR., *supra* note 191, at x.

[277] *Id.* at 255.

[278] Krakoff & Carpenter, *supra* note 233, at 265 (calling the efforts of Native Nations to restore their lands, cultures, and languages "American Indian Self-Help Reparations").

[279] *See* McGirt v. Oklahoma, 591 U.S. 894 (2020); Herrera v. Wyoming, 587 U.S. 329 (2019); Wash. State Dep't of Licensing v. Cougar Den, Inc., 586 U.S. 347 (2019).

[280] *See* Haaland v. Brackeen, 599 U.S. 255 (2023).

treatymaking by Congress in 1871; the Dawes Allotment Act of 1887; laws terminating the federal government's nation-to-nation relationship with Native Nations; and, later, laws restoring that relationship. Granted, laws such as the ICWA and the NAGPRA are both reflections of the self-determination era and the result of growing Native Nation capacity to lobby Congress. But assimilative laws—such as the Major Crimes Act of 1885 at issue in *McGirt*—remain law.[281] The impact of these vacillations in policy and their attendant statutes on the field of Indigenous Peoples Law is exacerbated by judicial holdings on these statutes.[282] Professor Greg Ablavsky aptly described the judicial gloss on policy vacillations as simply creating "too much history" when it comes to case precedent in the field of Indigenous Peoples Law.[283]

Through a return to treatymaking, we might see a deeper, more adequate vision of justice for Native Nations. For example, in the 2020 landmark case *McGirt v. Oklahoma*,[284] the Supreme Court indicated it was ready to forgo impracticality arguments and uphold the federal government's sacred treaty obligations to Native Nations.[285] The *McGirt* majority engaged in a textualist analysis in an opinion authored by Justice Gorsuch, to determine that Congress had not disestablished the Muscogee (Creek) Reservation.[286] When viewing *McGirt* through a textualist lens, it might seem straightforward, but Justice Roberts' dissent, joined by Justices Alito, Kavanaugh, and Thomas, argues otherwise. They argue the

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[281] *See McGirt*, 591 U.S. 894 (2020).

[282] *See, e.g.*, *McGirt*, 591 U.S. 894 (2020); *cf.* Oklahoma v. Castro-Huerta, 597 U.S. 629 (2022) (interpreting the General Crimes Act as not preempting state jurisdiction and finding that the federal government and state of Oklahoma have concurrent jurisdiction to prosecute crimes committed by non-Indians in Indian Country). *Castro-Huerta* backtracked significantly on *McGirt* a mere two years later, despite both cases interpreting the same, century-old law.

[283] Ablavsky, *Too Much History: Castro-Huerta and the Problem of Change in Indian Law*, *supra* note 9, at 293–350.

[284] *McGirt*, 591 U.S. 894 (holding the eastern half of Oklahoma remains "Indian Country" for purposes of the 1885 Major Crimes Act, which grants the federal government exclusive jurisdiction over crimes committed by non-Indians against Indians in Indian Country).

[285] *See, e.g.*, City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197, 202, 219 (2005) (holding the Oneida Nation liable to City of Sherill for property taxes on its fee land located within the boundaries of the reservation because, *inter alia*, the Court didn't want to "disrupt[] the governance of central New York's counties and towns" and "the impracticability of returning to Indian control land that generations earlier passed into numerous private hands"); *see also* Sarah Krakoff, City of Sherrill v. Oneida Indian Nation of New York: *A Regretful Postscript to the Taxation Chapter in Cohen's Handbook of Federal Indian Law*, 41 TULSA L. REV. 5 (2005) (arguing the only unifying theme in recent Indigenous Peoples Law cases was the Court's indifference or hostility toward Native Nations).

[286] *McGirt*, 591 U.S. at 897–98, 904 (holding only Congress can disestablish a reservation and must "clearly express its intent to do so, 'commonly with an explicit reference to cession or other language evidencing the present and total surrender of all tribal interests'" (quoting Nebraska v. Parker, 577 U.S. 481)).

reservation was legally disestablished through a "century of practice," and the application of a "contemporaneous understanding" of a "relentless series of statutes leading up to Oklahoma statehood."[287] Consideration of practice and contemporary understanding of historical laws are hardly the tools of a strict textualist. What anchors Justice Gorsuch's majority opinion to principles of Indigenous Peoples Law is the weight and consideration he gives to treaty supremacy and treaty text—which in *McGirt* promised a permanent home to the Muscogee (Creek) free from the intrusion of state law.[288]

This treaty text guaranteeing a permanent home for the Creek, coupled with reliance on the principle announced in *Worcester v. Georgia* reserving matters of Indian affairs exclusively to the federal government and not to the states, prevented Oklahoma from prosecuting Major Crimes Act cases.[289] Despite the holding in *McGirt*, the state of Oklahoma was not rebuffed and continues to seek ways to reclaim jurisdiction, criminal or otherwise.[290] In *Oklahoma v. Castro-Huerta*, the Court abrogated the *Worcester* principle of excluding state criminal jurisdiction over non-Indian offenses in Indian Country.[291] This back and forth to determine whether Tribal, federal, or state jurisdiction applies is a power struggle with no apparent end in sight.

McGirt was applauded as one of the most important cases in over 100 years, and *Haaland v. Brackeen* has been heralded as a monumental win for Indian Country.[292] Even so, when it comes to cases in Indigenous Peoples Law, the Court continues to engage in "subjective jurisprudence,"

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[287] *Id.* at 943–50.

[288] *See id.* at 897 ("On the far end of the Trail of Tears was a promise . . . 'Creek country west of the Mississippi shall be solemnly guarantied to the Creek Indians'" as a "'permanent home to the whole Creek nation,' located in what is now Oklahoma."). Moreover, the government "promised that '[no] State or Territory [shall] ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves.'" *Id.* (quoting Treaty with the Creeks, arts. I, XIV, Mar. 24, 1832, 7 Stat. 366, 368); *see also McGirt v. Oklahoma*, 134 HARV. L. REV. 600, 600 (2020) (finding the Court relied on a textualist methodology, rejected extratextual sources in its statutory interpretation, and reaffirmed that only Congress may disestablish a reservation).

[289] *Id.* at 931.

[290] *See* Sean Murphy, *New Oklahoma AG Asks SCOTUS to Overturn Major Tribal Ruling*, ASSOCIATED PRESS (Aug. 6, 2021), https://apnews.com/article/us-supreme-court-71024b2146f41d63ccad14ac06ea36f9 [https://perma.cc/3CJY-6KAT].

[291] Ablavsky, Too Much History: Castro-Huerta and the Problem of Change in Indian Law, supra note 9, at 295.

[292] 599 U.S. 255 (2023). *See, e.g.*, *Indian Child Welfare Act (ICWA) (*Haaland v. Brackeen*)*, NATIVE AM. RTS FUND (2025), https://narf.org/cases/brackeen-v-bernhardt [https://perma.cc/HX57-3A36] ("The court's decision affirmed the constitutionality of ICWA, recognizing the unique political status of tribal nations and upholding the federal law that is so critical to safeguarding Indian child welfare. It was a resounding victory for the law and those who fought to protect it.").

leaving open the possibility that future attacks on Tribal sovereignty might be successful.[293] Indeed, the state of Oklahoma waged a campaign to limit the *McGirt* holding and was successful in *Castro-Huerta*.[294] And *Haaland v. Brackeen* did not address the question of whether the ICWA is racially discriminatory and unconstitutional under the Equal Protection Clause,[295] leaving ICWA vulnerable to continued litigation. In *Arizona v. Navajo Nation*, the Supreme Court again illustrated this issue of subjective jurisprudence.[296] In that case, the Court failed to uphold treaty responsibilities to the Navajo Nation, ignoring long held principles of Indigenous Peoples Law, including the Indian canon, because the right to an accounting of water held in trust was not explicitly stated in the treaty text.[297]

2. Treaty Interpretation

The Navajo Nation has sought definitive answers from the United States government regarding its water rights, including the amount of water the United States holds in trust for the Nation, for several decades.[298] In *Navajo Nation,* the Nation asked the Court to determine whether "the United States has a treaty-based duty to assess the Navajo Nation's water needs and develop a plan to meet them."[299] The Nation's treaties establish the purpose of the reservation to be "a permanent home" to "use and occup[y]" for "farming" and "purposes of cultivation."[300] It is well-settled precedent under the *Winters* doctrine that where the federal government establishes a reservation of land for a Native Nation, "the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation."[301] Such implied and reserved water rights, under *Winters*, apply to Native Nation lands held in

[293] Ablavsky, *Too Much History: Castro-Huerta and the Problem of Change in Indian Law*, *supra* note 9, at 298.

[294] Oklahoma v. Castro-Huerta, 597 U.S. 629 (2022).

[295] *See Brackeen*, 599 U.S. at 333 (Kavanaugh, J., concurring) (noting that the question of whether the ICWA is constitutional under the Equal Protection Clause is still outstanding).

[296] Arizona v. Navajo Nation, 599 U.S. 555 (2023).

[297] *Id.* at 565.

[298] *See generally* Brief for Amici Curiae Lawrence J. Macdonnel et al., Arizona v. Navajo Nation, 599 U.S. 555 (2023) (Nos. 21-1484, 22-51) (describing the history of water claims and the Colorado River including the history of the Navajo Nation's lack of quantified water rights and lack of access to adequate water from the Colorado River's Lower Basin in Arizona despite clear needs for such rights and access).

[299] Brief for the Navajo Nation at 5, *Navajo Nation*, 599 U.S. 555 (Nos. 21-1484, 22-51).

[300] *Navajo Nation*, 599 U.S. at 560.

[301] *E.g.*, Cappeart v. United States, 426 U.S. 128, 138 (1976) (citing, *inter alia*, Winters v. United States, 207 U.S. 564 (1908)).

trust by the federal government, such as the Navajo Nation Reservation.[302] It is also well-settled precedent that when interpreting both statutes and treaties, the Indian canons of construction require a Court to broadly "construe[] [ambiguous treaty language] in favor [of], not against, tribal rights."[303] These same principles of interpretation were applied to an agreement governing implied reserved water rights in *Winters* where a reservation was established via statute.[304] The 1868 Treaty codified both the trust responsibility's duty of protection to the Nation and the Indian canon on construing ambiguous language in favor of the Native Nation. The 1868 Treaty provides:

> [The T]ribe was lawfully placed under the exclusive jurisdiction and *protection* of the Government of the said United States, and that they are now, and will forever remain, under the aforesaid jurisdiction and *protection . . . . [T]his treaty is to receive a liberal construction*, at all times and in all places, to the end that the said Navajo Indians shall not be held responsible for the conduct of others, and that the *Government of the United States shall so legislate and act as to secure the permanent prosperity and happiness* of said Indians.[305]

The Navajo Nation argued the United States has a duty under their treaties with the United States to assess how much water it holds in trust for the Tribe, and to develop a plan to ensure that the water held in trust is protected from misappropriation going forward.[306] In comparison, the United States framed the issue as whether the federal government owes the Navajo Nation an "affirmative, judicially enforceable fiduciary duty" to assess and address the Navajo Nation's need for water from particular sources, in the absence of any substantive source of law that expressly establishes such a duty.[307]

The Supreme Court's majority opinion adopts the federal government's framing of the issue determining that the United States has no "affirmative duty" under the treaties to assess the amount of water it

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[302] *See id.* ("The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.").

[303] Brief for the Navajo Nation at 28, *Navajo Nation*, 599 U.S. 555 (Nos. 21-1484, 22-51) (quoting *McGirt*, 591 U.S. at 916).

[304] *Winters*, 207 U.S. at 576 ("By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians.").

[305] Treaty Between the United States of America and the Navajo Tribe of Indians arts. I, XI, Sept. 9, 1849, 9 Stat. 974 (emphasis added) [hereinafter 1849 Treaty].

[306] Brief for the Navajo Nation at 36–38, *Navajo Nation*, 599 U.S. 555 (Nos. 21-1484, 22-51).

[307] Brief for the Federal Parties at I, *Navajo Nation*, 599 U.S. 555 (No. 21-1484).

holds in trust for the Navajo Nation.[308] In so holding, the majority requires there must be specific treaty language enumerating the duty to assess the water assets it holds in trust.[309] The Court determines this *despite* the *Winters* doctrine,[310] the well-settled precedents of the federal trust responsibility to Native Nation, and the Indian canons.[311] This is the type of "subjective jurisprudence in Indian law" that Ablavsky discusses in *Too Much History*.[312] The "translation," where the Court attempts to "make sense of older legal principles within a new jurisprudential frame . . . makes the Court's decisions in this area especially prone to misreading and selective citation . . . ."[313]

Illustrative of this translation and subjective jurisprudence, the *Navajo Nation* Court relies heavily on a case where a Native Nation sought to access documents related to mismanagement of trust assets from the federal government that were covered by attorney-client privilege under a fiduciary exception.[314] The Court determined in *Jicarilla* that a common law trust was only formed once a federal law imposes fiduciary obligations on the federal government, but the case is distinguishable from *Navajo Nation* because no treaty was at issue.[315] With the problem of too much history in Indigenous Peoples Law, the Court can, and often has, subjectively chosen which case precedent it would like to apply. This is problematic not only for consistency and reliability of the law, but also for achieving reparations or just outcomes for Native Nations. Indigenous Law scholars, when faced with the fact pattern in *Navajo Nation* would immediately resolve the issue using the principles of treaty supremacy, the Indian canons, the trust responsibility,[316] the *Winters* doctrine on reserved

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[308] *Navajo Nation*, 599 U.S. at 565.

[309] *Id.* at 572 (Thomas, J., concurring) ("The Court's opinion today represents a step in the same direction, making clear that tribes' legal claims against the Government must be based on specific provisions of positive law").

[310] *See supra* note 304 and accompanying text.

[311] *See supra* notes 146–49 and accompanying text.

[312] Ablavsky, *Too Much History: Castro-Huerta and the Problem of Change in Indian Law*, *supra* note 9, at 299.

[313] *Id.* at 300.

[314] *Navajo Nation*, 599 U.S. at 594 (citing United States v. Jicarilla Apache Nation, 564 U.S. 162, 162 (2011) (explaining that a trustee who obtains legal advice related to trust administration is precluded from asserting the attorney-client privilege against trust beneficiaries)).

[315] *See Navajo Nation*, 599 U.S. at 594 (Gorsuch, J., dissenting) ("Having mistaken the nature of the Navajo's complaint, the Court proceeds next to analyze it under the wrong legal framework. Citing cases like [*Jicarilla*] . . . the Court tries to hammer a square peg . . . through a round hole.").

[316] Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942) ("[I]n carrying out its treaty obligations . . . the Government is something more than a mere contracting party. Under a humane and self-imposed policy . . . , it has charged itself with moral obligations of the highest

water rights, and the right to enforce a treaty under 25 U.S.C. § 1362 (the general statutory right of action for Native Nations).[317]

Recognizing the refusal of the Court's majority to rely upon the well-settled use of precedent, i.e. *stare decisis*, to decide enforceable treaty rights in Indigenous Peoples Law, Justice Gorsuch attempts to provide the Court's conservative Justices with an option to recognize the Navajo Nation's treaty rights under legal doctrine not specific to Native Nations—trust law.[318] The dissent attempts to convince the Court both requirements for establishing a trustee-trustor relationship are present in *Navajo Nation* by citing a treatise on trust law for the principle that a "'fiduciary relationship [is] sufficient to support an action for an accounting' whenever the fiduciary exercises 'discretion over trust' assets."[319] The federal government acts as the fiduciary for Native Nations with respect to the Tribal waters it manages (which the government itself acknowledged exists between it and the Navajo Nation),[320] and the federal government "exercises pervasive control" over the water at issue (the Colorado River and its tributaries in the Upper and Lower Basins).[321] Basic fiduciary duties include both management and accounting of assets held in trust; the Nation should have been able to at least achieve an accounting of the trust assets. Unfortunately, the majority refused to recognize both well-settled precedent and simple trust law to find in favor of the Navajo Nation, instead citing inapposite case law to find in favor of the United States federal government.[322]

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responsibility and trust. Its conduct . . . should therefore be judged by the most exacting fiduciary standards.").

[317] 25 U.S.C. § 1362 ("[D]istrict courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."); *see* Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 472 (1976) ("Looking to the legislative history of §1362 . . . , we find an indication of a congressional purpose to open the federal courts to the kind of claims which could have been brought by the United States as trustee, but for whatever reason were not so brought.").

[318] *Navajo Nation*, 599 U.S. at 595–96 (Gorsuch, J., dissenting) ("the Navajo advance . . . a treaty-based claim bottomed on Winters that all agree the United States could bring in its capacity as a trustee . . . . [C]laims for equitable relief in federal district court operate under a distinct framework than claims for money damages.").

[319] *Navajo Nation*, 599 U.S. at 589–90 (Gorsuch, J., dissenting) (quoting GEORGE BOGERT ET AL., LAW OF TRUST & TRUSTEES 201 (3d ed. 2010)).

[320] *Id.* at 581 (Gorsuch, J., dissenting).

[321] *Id.* at 592 (Gorsuch, J., dissenting).

[322] *See* U.S. v. Jicarilla Apache Nation, 564 U.S. 162, 165–66 (2011) ("[t]he trust obligations of the United States to the Indian tribes are established and governed by *statute* rather than the common law, and in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law") (emphasis added).

Professors Eskridge, Slocum, and Tobia state in *Textualism's Defining Moment*, that "the Court's textualists frequently disagree—not merely about *how* to apply text-based interpretive principles to resolve hard cases but also about *what* the relevant rules are."[323] In speaking about treaties and textualism, the authors echo the theme of too much history in "majority and dissenting opinions [in *Oklahoma v. Castro Huerta*]," which "overlapped only occasionally, as each looked at almost two centuries of laws and treaties and picked out their friends."[324] When textualists are sparring over two entirely different versions of history, there is too much of it. These continual textualist disagreements, however, should not apply to the interpretation of treaties, which are special contractual agreements of the highest order between the equal sovereigns of Native Nations and the United States.[325]

The Court's majority opinion is problematic in many ways,[326] but perhaps most disturbing are the refusals to recognize the Indian canon of treaty interpretation and the federal government's trust responsibility as a "moral obligation [] of the highest responsibility and trust . . . [that] should therefore be judged by the most exacting fiduciary standards."[327] Not only does the Court upend *stare decisis*, it compounds the issue of too much history in Indigenous Peoples Law yet again. Without recognizing the power differential between the treaty parties, the Court portrays the relationship as an equitable one that doesn't require acknowledgement of, or the need for, the Indian canons.[328]

Consideration of extratextual factors is often used to find against Native Nations, but rarely for Native Nations.[329] Ablavsky says these extratextual factors, which lend themselves to "bad" and "[g]ood history" decisions by the Court, leading to dramatic swings in Indigenous Peoples

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[323] William N. Eskridge et al., *Textualism's Defining Moment*, 123 COLUM. L. REV. 1611, 1616 (2023).

[324] *Id.* at 1629.

[325] Cherokee Nation v. Georgia., 30 U.S. 1, 15 (1831) (affirming that treaties with the Cherokee Nation are solemn treaties containing solemn guarantees); *see supra* notes 146–149.

[326] The Court's opinion flattens the history by asserting the land was "won" by the United States in the Mexican-American War and that the Navajo Nation and the federal government periodically waged war upon one another, consigning decades of conflict to a mere four sentences. *Navajo Nation*, 599 U.S. at 558. The dissent adds more context, specifically recognizing the importance of the federal government forcibly relocating of the Navajo Nation now referred to as "the Long Walk." *Id.* at 577–78 (Gorsuch, J., dissenting).

[327] Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942).

[328] 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02 (2024) (treaties and agreements are to be construed as the Indians would have understood them); *see also Contra proferentem*, BLACK'S LAW DICTIONARY (12th ed. 2024) ("The doctrine that, in the interpretation of documents, ambiguities are to be construed unfavorably to the drafter.").

[329] Ablavsky, *Too Much History: Castro-Huerta and the Problem of Change in Indian Law*, *supra* note 9, at 297–99 (describing the Court's inconsistency in ruling for Native Nations).

Law.[330] Additionally, if the Court is not willing to follow over 200 years of *stare decisis* in Indigenous Peoples Law to utilize the Indian canons of interpretation or to recognize the federal government's trust responsibility, the ability of Native Nations to achieve justice in the highest court of law in the United States remains precarious.

The *Navajo Nation* majority also focused on the role of the judiciary and separation of powers. The Court, through its reliance on separation of powers, reaffirms the majority's adherence to new textualism[331] by holding "it is not the Judiciary's role to rewrite and update this 155-year-old treaty,"[332] and "[u]nder the Constitution's separation of powers, Congress and the President may update the law to meet modern policy priorities and needs."[333] If new textualism continues to reject consideration of legislative history,[334] or in this case, treaty history, Native Nations will have to be even more diligent about statutory treatymaking. But the *Navajo Nation* Court also goes further by ignoring the explicit text of the Treaty codifying the Indian canon: the "treaty is to receive a liberal construction."[335] Ignoring such language reifies the issues raised by Eskridge and Ablavsky on the failures of textualism and too much history, illustrating my argument that conflicting doctrine exacerbates the failures of the legal justice system for Native Nations.

Arizona v. Navajo Nation illuminates both the issue of too much history in Indigenous Peoples Law as well as the need for a return to treatymaking. Whether reinstating treatymaking will remedy such inconsistency can only be answered through practice. But what treatymaking could provide is a return to consensual negotiation on a nation-to-nation basis and prevent reliance on interpretation of century old treaty language. If the only remedy for the Nation to vindicate its rights is to update their 155-year-old treaty to include a right to an accounting of water assets held in trust—a responsibility of the Executive and Congress—then Native Nations deserve a revitalized treatymaking regime.[336] But updating the treaty would also require removing the

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[330] *Id.* at 298.

[331] Eskridge et al., *supra* note 323, at 1691 (arguing an "essential assumption" of new textualism is that under the separation of powers "Congress drafts [legislation] carefully and should be accountable for the text it adopts").

[332] Arizona v. Navajo Nation, 599 U.S. 555, 559 (2023).

[333] *Id.* at 566.

[334] *See* Eskridge et al., *supra* note 323, at 1612 ("new textualism rejected the view that interpretation should seek 'legislative intent,' often identified via consideration of legislative history").

[335] 1849 Treaty, *supra* note 305, at XI.

[336] *Navajo Nation*, 599 U.S. at 559.

statutory hurdle of the congressional act that ended treatymaking with Native Nations in 1871.[337]

3. Congressional Termination of Treatymaking in 1871

Congress unilaterally ended treatymaking by statute in 1871. The 1871 Act provided "[n]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . . ."[338] The Act conflicts with the federal government's nation-to-nation relationship with Native Nations and should be repealed. Professors David Moore and Michalyn Steele argue the act was an unconstitutional intrusion into both inherent Tribal sovereignty and the power of the Executive branch.[339] Through an analysis of the Executive Branch's U.S. foreign relations power and recent case law, the authors question whether Congress had the power to end treatymaking.[340] Recognizing the first 100 years of federal-Indian relations most closely reflect the original constitutional understanding, Moore and Steele argue reinstating treatymaking would reduce piecemeal litigation, more fully support Tribal self-determination, and reinstate the United States as an international leader in human rights.[341]

Regardless of whether Congress usurped its power with the 1871 Act, should Native Nations be interested in furthering the idea of reinstating treatymaking, they must lobby for its repeal. As provided under UNDRIP, any law or policy impacting Indigenous Peoples and Native Nations should be done in collaboration with Native Nations,[342] and only Native Nations can decide whether reinstating treatymaking is in their best interest. The United States' approach to Native Nations has never been fully collaborative, even in the self-determination era. A return to treatymaking, with an emphasis on UNDRIP reparative principles, could remedy this historical wrong.

CONCLUSION

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[337] Indian Appropriations Act of 1871, 16. Stat. 544, 566 (1871) (codified as "Future treaties with Indian tribes" in 25 U.S.C. § 71).

[338] *Id.*

[339] Moore & Steele, *supra* note 184, at 160–61 (arguing the Treaty Clause, Indian Commerce Clause, and separation of powers recognize the inherent Tribal sovereignty of Native Nations and power of the Executive Branch to engage in treatymaking).

[340] *Id.* at 166–167.

[341] *Id.* at 190–191.

[342] UNDRIP, *supra* note 198, at Art.19.

The history of legal norms in Indigenous Peoples Law illustrates how important and foundational the principles of diplomacy and sovereignty are to the federal government's relationship with Native nations. During the Biden and Obama administrations, it appeared as though a new era in the field of Indigenous Peoples Law was being ushered in, one of nation-to-nation relationship building.[343] The Biden administration ushered in a more robust nation-to-nation federal policy era through historic policy initiatives and it seemed that the return of treatymaking was becoming increasingly possible.[344]As with any change in administration, policies may shift, but Native Nations should still be able to engage in diplomatic relationship building with any administration..[345]

Reinstating treatymaking and developing a true nation-to-nation relationship that recognizes and restores powers of self-determination and self-governance to Native Nations would recognize and honor the history of the founding of this country. Such a reinstatement would also meet the stringent requirements of the international law of reparations. Of the five international law of reparations requirements, restitution is arguably the most reparative as it aims to restore Native Nations' liberty, identity, family life, and property or place of residence.[346] While returning the ancestral homelands of Native Nations *may* be unobtainable in a broad

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[343] *See, e.g.,* Exec. Off. of the President, Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (Jan. 26, 2021).

[344] *Fact Sheet: Building a New Era of Nation-to-Nation Engagement*, WHITE HOUSE (Nov. 15, 2021), https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2021/11/15/fact-sheet-building-a-new-era-of-nation-to-nation-engagement [https://perma.cc/XXB3-BNSV] ("The Administration's work is rooted in the President's respect for the unique Nation-to-Nation relationship, commitment to the country's trust and treaty responsibilities, and desire to strengthen Tribal sovereignty and advance Tribal self-determination."); *see also* NAT'L CONG. OF AM. INDIANS, TRIBAL NATIONS AND THE UNITED STATES: AN INTRODUCTION 46 n.5 (2020) ("There is currently a debate among tribes, policymakers, and legal scholars about a 'new period' in the relationship among tribes and other American governments and how to define it, however NCAI opted to identify this period as Nation-to-Nation to describe the significant progress of tribes in self-determination and self-governance . . . .").

[345] I wrote this Article while the Biden administration was in the White House and notes that it remains to be seen how the second term of a Trump administration will approach working with Native Nations. Although if the Department of Justice's argument in *State of Washington v. Trump* is any indication of the current administration's approach, caution is required. *See* Opposition to Motion for a Temporary Restraining Order at 12–13, No. 2:25-cv-00127 (W.D. Wash. Jan. 22, 2025), ECF No. 36; *see* Matthew L.M. Fletcher, *Materials in the Challenge to the Birthright Citizenship Executive Order [and Commentary]*, TURTLE TALK (Jan. 24, 2025), https://turtletalk.blog/2025/01/24/materials-in-the-challenge-to-the-birthright-citizenship-executive-order-and-commentary [https://perma.cc/GF9W-7NLU] (noting DOJ's citation of *Elk v. Wilkins*, 112 U.S. 94 (1884)—a case that questions whether Native Nation citizens are also citizens of the U.S.—for the proposition that birthright citizenship is not a constitutional right indicates that "nothing is sacred in this government").

[346] G.A. Res. 60/147, *supra* note 201, at ¶ 19.

manner, this should not prevent the discussion and negotiation of returning specific sites integral to Native Nation identity and wellbeing that remain under federal jurisdiction.

For example, the Confederated Salish and Kootenai Tribes (CSKT) attempted to engage in co-management of the National Bison Range with the United States Fish and Wildlife Service for several years under the Tribal Self Governance Act of 1994, or Title IV of ISDA.[347] After decades of advocacy and building Tribal capacity to manage the Range, CKST successfully lobbied for legislation to transfer the Range into trust.[348] There are several other recent examples of Native Nations regaining management of ancestral lands or land back outright.[349] Treatymaking would allow for LandBack negotiations to occur on a broader scale by institutionalizing the right for Native Nations to engage directly with the Executive Branch to determine which public lands might be available for restitution. This would streamline the process for the return of those lands or for providing access or management opportunities. The state of California recently directed its departments to assess surplus land holdings and "to work cooperatively with California tribes that are interested in acquiring natural lands in excess of State needs," including by "prioritizing tribal purchase or transfer of land."[350] The federal government could, and should, take a similar approach to identifying ancestral lands for return—in collaboration with Native Nations.[351]

Treatymaking provides an opportunity to work through historic and contemporaneous injustices on a case-by-case basis and decide what remedies and restitution most adequately provide reparation for each

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[347] Robin Saha & Jennifer Hill-Hart, *Federal-Tribal Comanagement of the National Bison Range: The Challenge of Advancing Indigenous Rights Through Collaborative Natural Resource Management in Montana*, *in* MAPPING INDIGENOUS PRESENCE 143 (2015).

[348] *See* Press Release, U.S. Dep't of the Interior, Interior Transfers National Bison Range Lands in Trust for the Confederated Salish and Kootenai Tribes (June 23, 2021), https://www.doi.gov/pressreleases/interior-transfers-national-bison-range-lands-trust-confederated-salish-and-kootenai [https://perma.cc/J3QE-FWEW].

[349] *See, e.g.*, Off. of the Solicitor, U.S. Dep't of the Interior, Current Land, Water, And Wildlife Authorities That Can Support Tribal Stewardship And Co-Stewardship Final Report (2022); Sec'y of the Interior Deb Haaland, Sec'y of Agric. Thomas J. Vilsack, & Sec'y of Com. Gina Raimondo, Order No. 3403, *Joint Secretarial Order 3403 on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters* (2022).

[350] Statement of Administrative Policy, *Native American Ancestral Lands*, OFF. OF THE GOVERNOR OF CAL. (Sept. 25, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/09/9.25.20-Native-Ancestral-Lands-Policy.pdf [https://perma.cc/VLG3-Y3GZ].

[351] I note that some land programs have occurred, for example as part of the restitution or settlement agreement under the *Cobell v. Salazar* Agreement. *See* U.S. DEP'T OF THE INTERIOR, LAND BUY-BACK PROGRAM FOR TRIBAL NATIONS (2023), https://www.doi.gov/sites/default/files/doi-lbb.pdf [https://perma.cc/K2JR-BGSZ]. Congress has also recently proposed the GSA Disposal Process Tribal Parity Act of 2024, S. 3564, 118th Cong. (2024), which would add Native Nations to the list of entities that may receive federal surplus property.

Native Nation. Shifting the relationship from one of regulation back to one of diplomacy, sovereignty, and consensual negotiations provides an opportunity to update existing treaties,[352] and to negotiate first-time treaties for Native Nations that have not been afforded the opportunity to engage in treatymaking due to engaging with the federal government after treatymaking ended. By updating treaties with contemporary expectations for both Native Nations and the United States, we might alleviate the subjective jurisprudence of the Supreme Court that we see repeated even in the modern self-determination era.

The nation-to-nation relationship with federal agencies has continuously grown more substantive, increasingly embodying the principles of diplomacy and treatymaking.[353] Notably, the State Department and Department of Homeland Security have been engaging with Native Nations under the Western Hemisphere Travel Initiative to accept Tribal citizenship identification at land and seaports.[354] To date, several Native Nations have engaged in memorandums of agreements with Customs and Border Protection to develop enhanced Tribal ID cards acceptable to establish identity and citizenship when entering the U.S. from land and sea ports.[355] But an increase in collaboration and partnership in governance between Native Nations and federal agencies need not stop there.

Treatymaking could reset the nation-to-nation relationship and occur as part of the annual White House Tribal Nations Summit, or BIA could be realigned to become a Department of Native Nation Diplomacy. We might see a resurgence of sacred treatymaking where mutual respect, diplomacy, and friendship are renewed. I am not arguing that treatymaking would resolve all the issues in Indigenous Peoples Law, but at the very

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[352] *See* Moore & Steele, *supra* note 184, at 157–59 (describing two "relational models" of governance by the federal government with Native Nations: one of sovereignty, where consensual negotiation occurred and one of pupilage where Native Nations were objects of regulation under the plenary power model).

[353] *See* Working Grp. of the Memo of Understanding Regarding Interagency Coordination And Collaboration for the Protection of Tribal Treaty and Reserved Rts., Best Practices for Identifying and Protecting Tribal Treaty Rights, Reserved Rights, and Other Similar Rights in Federal Regulatory Actions and Federal Decision-Making 9 (2022), https://www.doi.gov/sites/doi.gov/files/interagency-mou-protecting-tribal-treaty-and-reserved-rights-11-15-2021.pdf [https://perma.cc/4QAB-F2PJ] (noting the Obama administration's "support" of UNDRIP and citing Article 37 in support of Indigenous Peoples' right to the recognition, observance, and enforcement of treaties, agreements, and other constructive arrangements concluded with States or their successors).

[354] Designation of an Approved Native American Tribal Card Issued by the Kickapoo Traditional Tribe of Texas as an Acceptable Document to Denote Identity and Citizenship, 87 Fed. Reg. 37870, 37879–80 (June 24, 2022).

[355] *Id.* at 37880.

least treatymaking deserves to be reinstated as part of the attempt to repair the relationship by and between Native Nations and the United States.

To this point, Canada's treatymaking with First Nations continues, and they have recently renewed efforts at reconciliation with First Nations.[356] Even so, criticisms continue, especially regarding land development and other concessions made during treatymaking.[357] Addressing Canada's efforts at contemporary treatymaking is beyond the scope of this Article, but it is important to recognize Canada's recognition of treatymaking as reparative. Accordingly, treatymaking is about consensual negotiations, respect, and sovereignty. Above all, treatymaking is an ongoing process. While the end of treatymaking in 1871 shifted lawmaking in Indian Affairs largely to Congress, the rebuilding of Native Nations and the return of a more robust nation-to-nation relationship should shift this power back to Native Nations and the Executive Branch.[358]

When the Supreme Court supports the nation-to-nation relationship by upholding treaty rights and by providing deference to well established Indigenous Peoples Law principles in support of inherent Tribal sovereignty, it is supporting not *an* original understanding but *the* original understanding of the Constitution.[359] As legal scholars have repeatedly and increasingly illustrated, the American Revolution, the Continental Congress, and the Constitutional Convention all occurred with Native Nation involvement or were directly impacted by Native Nation issues.[360] Furthermore, by supporting the original understanding in its jurisprudence, the Supreme Court can provide predictable, consistent, objective, and

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[356] Canada Dep't of Justice, Respecting the Government of Canada's Relationship with Indigenous Peoples (2018), https://www.justice.gc.ca/eng/csj-sjc/principles.pdf [https://perma.cc/7C86-E5RL].

[357] *Treaties with Indigenous Peoples in Canada*, CANADIAN ENCYCLOPEDIA, https://www.thecanadianencyclopedia.ca/en/article/aboriginal-treaties [https://perma.cc/V7ED-BPE6] (Sept. 11, 2017).

[358] I recognize that shifting power toward the Executive Branch may be detrimental depending upon the policies of a particular administration. I anticipate developing a separate Article that addresses the practicalities of reinstating treatymaking, including risk mitigation measures such as requiring consent of both governments or limiting opportunities to engage in treatymaking to alternative federal executive administrations.

[359] It has long been debated whether originalism it is an appropriate method of constitutional interpretation. *See* Michael L. Smith, *Is Originalism Bullshit*?, 24 LEWIS & CLARK L. REV. 779, 839 (arguing that originalism can lead to false interpretations depending upon the "the type of actor involved, and how that actor's institutional goals, ethical and professional standards, and level of knowledge and expertise relate to the originalist inquiry."); *cf.* Davis et al., *supra* note 51, at 575–76 (arguing the original meaning of the Indian Commerce Clause and Supremacy Clause support the inherent Tribal sovereignty of Native Nations).

[360] *See supra* Part II.

neutral legal holdings that in turn support greater respect for inherent Tribal sovereignty.

I have endeavored to illustrate, through legal and historical storytelling, how international legal norms of diplomacy, sovereignty, and consensual negotiation have stood the test of time. I argue that these principles should inform all federal government relationships with Native Nations, but especially the relationship with the Executive Branch. Such a renewal would support Native Nations negotiating treaties with the federal government to determine the most appropriate remedies for specific harms experienced, including the loss of land, on a case-by-case basis. Reliance upon statutory schemes, despite increased statutory treatymaking and entering the self-determination era, has not prevented the Supreme Court from making "bad history" decisions in the field of Indigenous Peoples Law.[361] Accordingly, returning to the principles of diplomacy, sovereignty, and consensual negotiation via treatymaking may alleviate many of these conflicts and establish more complete reparative justice for Native Nations.

[361] Ablavsky, *Too Much History: Castro-Huerta and the Problem of Change in Indian Law*, supra note 9, at 298.