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Law of the Land: The Continuing Legacy of Indian Law's Racist Roots and Its Impact on Native American Land Rights

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LAW OF THE LAND: THE CONTINUING LEGACY OF INDIAN LAW’S RACIST ROOTS AND ITS IMPACT ON NATIVE AMERICAN LAND RIGHTS

ABSTRACT

Throughout American history, inhumane treatment of Native nations has been legalized through treaties, court cases, and legislation. Confiscating Native land, treating Native Americans as second-class citizens, and breaking government promises to Native nations has been justified with racist stereotypes about Native Americans. Although some may believe that such atrocities only occurred in the past, this belief is unfounded. This Note examines the structural racism that supports Federal Indian Law through treaties with Native nations, racist Supreme Court Indian law opinions, and legislation that allowed the seizure of Native land. The lasting legacy of this structural racism is explored through recent examples of Native land rights being denied. Suggestions are then provided for addressing the continuing lack of land rights and environmental justice that Native nations face due to Federal Indian Law’s dark foundation.

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I. INTRODUCTION

Felix S. Cohen once wrote that “Like the miner’s canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall of our democratic faith.”¹ This observation is clear through most areas of Federal Indian Law, but it is especially clear in the context of Native land rights and the fight for environmental justice in Indian Country.² Even before the American Revolution, Native Americans³ faced discrimination from explorers and settlers who were hungry for power and land ownership. As the United States expanded and developed, treaties, legal opinions, and legislation entrenched the fate of Native Americans by using racist stereotypes to justify Native land confiscation and underpin rules and laws.

This is problematic because, as Walter R. Eco-Hawk explains, “Mother Earth is the wellspring of indigenous culture, religion, and economic life. It forms

¹ Felix S. Cohen, *The Erosion of Indian Rights 1950–1953: A Case Study in Bureaucracy*, 62 *YALE L. J.* 348, 390 (1953).

² See STEPHEN L. PEVAR, *THE RIGHTS OF INDIANS AND TRIBES* 20–21 (4th ed. 2012) (defining Indian Country as “all land under the supervision of the U.S. government that has been set aside primarily for the use of [Native Americans],” which “includes all land within an Indian reservation and all lands *outside* a reservation that has been placed under federal superintendence and designated primarily for Indian use”).

³ Outside of quotations, this Note uses “Native Americans” because the National Museum of the American Indian explains that “American Indian, Indian, Native American, or Native are . . . often used interchangeably.” “Native nations” is also used because “Native is often used officially or unofficially to describe indigenous peoples from the United States.” When discussing specific Native nations, that nation’s name is used. See *The Impact of Words and Tips for Using Appropriate Terminology: Am I Using the Right Word?*, NAT’L MUSEUM OF THE AM. INDIAN: NATIVE KNOWLEDGE 360°, <https://americanindian.si.edu/NK360> (last visited Sept. 27, 2022).

the identity of Native Americans as indigenous peoples.”⁴ However, the history of U.S. treatment toward Native Americans complicates adequately accounting for differences between environmental justice claims from Native nations and the claims of other groups.⁵ Past actions taken by the United States against Native Americans still matter today because injustices of the past continue to impact decisions about the land rights of Native nations and activities on and near Native land. Past law and its effects must be considered in the present to achieve environmental justice for Native nations and combat “conceptual disappearance”—the “consignment of Indigenous peoples to a different time rather than space”—in a way that implies that Native nations “cannot exist in the present.”⁶

This Note posits that environmental justice for Native nations can only be truly accomplished through fundamental legal system reform. Unless the structural racism that built Federal Indian Law is addressed, Native nations will not be able to enjoy the land rights that they were promised. To advance this argument, Part II examines the foundation of structural racism toward Native Americans with an emphasis on Native land rights. An understanding of how U.S. law has facilitated Native land dispossession is necessary because this same law continues to restrict land rights of Native nations today. Part III will then focus on the impact of persistent structural racism in Federal Indian Law precedent with recent examples of Native land inequities. Finally, Part IV proposes solutions to address and rectify the effects of over two centuries of racist, outdated, and inaccurate policy by fundamentally reforming the Federal Indian Law system.

II. CONSTRUCTING FEDERAL INDIAN LAW WITH RACISM

As scholar H. J. Ehrlich explained, “Stereotypes about ethnic groups appear as part of the social heritage of society. They are transmitted across generations as a component of the accumulated knowledge of society. They are as true as tradition, and as pervasive as folklore.”⁷ This reflection is especially true of the racist Native American stereotypes found in law advanced by all

⁴ WALTER R. ECHO-HAWK, *IN THE COURTS OF THE CONQUEROR* 55 (2010).

⁵ See Elizabeth Ann Kronk Warner, *Environmental Justice: A Necessary Lens to Effectively View Environmental Threats to Indigenous Survival*, 26 *TRANSNAT’L L. & CONTEMP. PROBS.* 343, 354 (2017) (explaining that Indian Country environmental issues include considerations about tribal sovereignty, the U.S. federal trust responsibility owed to Native nations, international law, and cultural and spiritual connections Native nations have with their land).

⁶ NATSU TAYLOR SAITO, *SETTLER COLONIALISM, RACE, AND THE LAW* 74 (2020); see also *The Impact of Words and Tips for Using Appropriate Terminology*, *supra* note 3 (explaining that “using the past tense reinforces the myth of the ‘Vanishing Indian’ and negates the experiences and the dynamic cultures of Native peoples today”).

⁷ H.J. EHRLICH, *THE SOCIAL PSYCHOLOGY OF PREJUDICE* 35 (1973).

branches of the U.S. government. But these stereotypes are particularly troubling because Native nations constitute political groups, not racial groups.⁸ Nevertheless, racist stereotypes have continually been employed to belittle Native nations and undermine their rights.

Rather than embracing the diversity of Native nations, the Founding Fathers solidified a simplified, racist image of Native Americans in law before the U.S. even won its independence. The Declaration of Independence declares that “merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.”⁹ This “Indian Savage” idea was then supported in America’s first days. Just four days after the American Revolution concluded, George Washington presented a blueprint of America’s first Indian policy to Congress.¹⁰ This plan’s central focus was that Native Americans were “bestial, war-loving savages” to “be dealt with accordingly as a matter of U.S. policy.”¹¹ Washington purported keeping Native Americans “apart from the civilized population . . . behind a boundary line drawn to facilitate the gradual and planned colonial expansion on the country’s western frontier.”¹²

By separating settlers from “the merciless Indian savages,” Congress could take advantage of “a ‘fee simple empire’ of liberty and virtue” that “would flourish in North America.”¹³ Viewing Native nations as “the Savage as the Wolf”¹⁴—a predator threatening prosperity and goodness—justified taking Native land. This idea was then affirmed through countless treaties, court opinions, and pieces of federal legislation. Effects of this law are still felt, and stereotypes continue to be used in legal battles over Native land rights. To

⁸ See *This Land: The Next Battleground*, CROOKED MEDIA (July 15, 2019) (downloaded using Spotify) (clarifying that while “[y]our average person thinks of Native Americans as a racial group, but that’s not how the laws that protect Native rights work” because Native Americans are “actually a political group . . . citizens of nations, not members of a race”).

⁹ THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776).

¹⁰ See ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* 40 (2005) (explaining ideas in Washington’s recommendations “relative to Indian Affairs” in the “Western Country”).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 42. Williams quotes George Washington’s explanation to Congress that:

attempting to drive them out by force of arms out of their country . . . is like driving the Wild Beasts of the Forest which will return as soon as the pursuit is at an end and fall perhaps on those that are left there; when the gradual extension of our settlements will as certainly cause the Savage as the Wolf to retire; both being beasts of prey though they differ in shape.

Id.

achieve lasting change and protect Native land, fundamental legal system reform is needed. But reform cannot be achieved without understanding how Federal Indian Law was created and how structural racism has devastated Native land rights. Therefore, before analyzing recent examples of action for land rights and environmental justice in Indian Country, a snapshot of these three areas of law and their impact is necessary.

A. *Treaties Between the U.S. and Native Nations: How Promises Were Made to Be Broken*

Beginning even before the colonial period, treaties were created with Native nations—and the foundation of Indian law began.¹⁵ Since these agreements were made, disagreements have existed over what the agreements mean, and the federal government has continuously violated its treaty promises. An example of this trend is clear in the Treaty of Fort Stanwix. In 1790, Chiefs from Seneca Nation wrote to George Washington about why land promised to them was being taken without compensation.¹⁶ The Chiefs explained, “You demanded a great Country to be given up to you. It was surrendered to you as the price of peace, and we ought to have peace and possession, of the little Land which you then left us.”¹⁷ Washington responded with assurances that “Here then is the security for the remainder of your lands . . . [t]he general government will never consent to your being defrauded[.] But it will protect you in all your just rights.”¹⁸ However, this guarantee was not upheld. In fact, Washington was deemed the “Towndestroyer”¹⁹ by some Native nations, and one author called the Treaty of Fort Stanwix “the Fort Stanwix Land Lottery and Sweepstakes Treaty.”²⁰ These characterizations are not unique to the treaties of Fort Stanwix.

¹⁵ See Matthew L.M. Fletcher, *The Supreme Court’s Indian Problem*, 59 HASTINGS L.J. 579, 592 (2008) (explaining “[t]he true foundation of federal Indian law includes the treaties executed by Indian tribes and the federal government . . .”).

¹⁶ Letter to George Washington from the Seneca Chiefs (Dec. 1, 1790), in 7 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 7–16 (Jack D. Warren, Jr., ed., 1998).

¹⁷ *Id.* at 5.

¹⁸ Letter from George Washington to the Seneca Chiefs, *supra* note 16, at 146–50.

¹⁹ See Letter to Washington from Seneca Chiefs, *supra* note 16; DAVID HUMPHREYS, LIFE OF GENERAL WASHINGTON 10 (Rosemarie Zagarrì, ed. 2006) (according to Washington’s account, he was also called the “Towntaker” by Native nations).

²⁰ See *1768 Boundary Line Treaty of Fort Stanwix*, NAT’L PARK SERV., <https://www.nps.gov/articles/000/1768-boundary-line-treaty-of-fort-stanwix.htm> (last visited Aug. 20, 2022) (referencing James H. Merrill, *Into the American Woods: Negotiations on the Pennsylvania Frontier* (2000)); See also Ohio Hist. Connection, *Treaty of Fort Stanwix (1784)*, OHIO HIST. CENT., [http://ohiohistorycentral.org/w/Treaty_of_Fort_Stanwix_\(1784\)](http://ohiohistorycentral.org/w/Treaty_of_Fort_Stanwix_(1784)) (last visited Sept. 19, 2022). In addition to the 1768 Treaty of Fort Stanwix, the 1784 Treaty of Fort Stanwix was created after the Treaty of Paris failed to decide what would happen to Native land in areas

Native nations were promised land, money, and protection that never materialized, motivations of treaty parties differed, and the agreements behind treaties were riddled with fraud. Broken treaty promises initiated dispossession of Native land, created a trend of denying justice to Native nations, and continued to perpetuate fights for Native land rights and environmental justice.

Native nations were initially treated as sovereign nations,²¹ but this treatment did not lead to equality. Recognizing sovereignty allowed the United States to make treaties with a myriad of Native nations, and the first treaty signed after the U.S. Constitution came into effect was with Delaware Nation.²² However, this recognition could not change the inequality of treaties between the federal government and Native nations,²³ largely because the government and Native nations viewed governance and land ownership very differently. Native nations were mostly decentralized, self-governing communities, while European nations and the United States had centralized, hierarchical governments.²⁴ Land for Native nations was—and still is—the foundation of their existence.²⁵ Individual families owned rights to certain places, but Native nations “did not have the deeds, titles, surveys, and institutions that proved land ownership.”²⁶ To European nations, “[I]and meant personal independence and economic self-sufficiency.”²⁷ This is evident in the fact that around 1763, treaties began replacing contracts as a way to transfer land from Native nations to other sovereign governments.²⁸ Reliance on treaties as contracts, combined with the

given to the U.S. after the American Revolution. The treaty motivated Anglo-Americans to push Native nations off land and Ohio Country land acquired by the federal government was sold to offset war debt and compensate soldiers.

²¹ See Susan Lope, Note, *Indian Giver: The Illusion of Effective Legal Redress for Native American Land Claims*, 23 SW. U. L. REV. 331, 333–34 (1994) (noting that because European states treated Native American nations as foreign governments and based relations with Native Americans on international law and because the United States Constitution allows the President to enter into treaties with the Native American nations with the Senate’s consent, both Europe and the United States recognized Native American sovereignty).

²² PEVAR, *supra* note 2, at 45 (citing Treaty with the Wiandot, Delaware, Ottawa, Chippewa, Pottawatima, and Sac Nations, Jan. 9, 1789, 7 Stat. 28).

²³ See JILL ST. GERMAIN, *INDIAN TREATY-MAKING POLICY IN THE UNITED STATES AND CANADA, 1867–1877* 59 (2001) (acknowledging that “in an examination of the treaties themselves . . . it can be seen that the diplomatic balance affected by the formal [treaty making] proceedings gave way to a relationship heavily weighted in favor of the white governments involved”).

²⁴ *Nation to Nation: Treaties Between the United States and American Indian Nations*, NAT’L MUSEUM OF THE AM. INDIAN (Washington D.C.) [hereinafter *Nation to Nation*] (last visited Feb. 6, 2022) (exhibit photographs on file with author).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

American Revolution's outcome, allowed the U.S. to make laws that provided it with an advantage over Native nations and to have control over the land and rights to which Native nations were entitled.²⁹

Most treaties made promises to Native nations that were never intended to be kept and were violated soon after agreements were signed.³⁰ The government engaged in fraudulent practices to acquire land, such as going to other citizens of a Native nation when one citizen would refuse to sign over land.³¹ Some treaties also promised to provide hunting and fishing rights to Native nations, even on land beyond reservations. However, problems with access existed from the beginning—as evidenced in Muscogee lead negotiator Alexander McGillvray's 1785 statement that “[w]e want nothing from you but justice. We want our hunting grounds preserved from encroachments. They have been ours since the beginning of time.”³² And one of the most troubling aspects of the treaties was that Native nations were constantly pushed to new areas the government considered undesirable and then stripped of these lands when resources were discovered there.³³

²⁹ See *Worcester v. Georgia*, 31 U.S. 515, 519 (1832) (declaring that “[t]he words ‘treaty’ and ‘nation’ are words of our own language, selected in our diplomatic and legislative proceedings by ourselves . . .”).

³⁰ *Nation to Nation*, *supra* note 24. Within two years of the 1790 Muscogee Treaty agreement, Georgians and Muscogee Nation were at war again and within 40 years, the Muscogee lost all their land in Georgia and Alabama. *Id.* The ink of an 1832 treaty with the Potawatomi “was barely dry when the government broke its promise” to let the nation “stay on their tiny reservation.” *Id.* This led to more treaties in 1834 and 1836 that ultimately led to the driving of almost 1,000 Potawatomi to Kansas in a journey that was called “the Trail of Death.” *Id.* In Article 8 of the 1835 Treaty of New Echota, the government promised Cherokee Nation that “a sufficient number of steamboats and baggage-wagons [would] be furnished to remove them comfortably.” *Id.* It also promised, “so as not to endanger their health . . . a physician well supplied with medicines shall accompany each detachment of emigrants removed by the Government.” *Id.* However, these promises were not realized when the Cherokee were marched to Oklahoma on the “Trail of Tears.” *Id.* Additionally, the 1851 Horse Creek Treaty with Native nations from the northern plains only prevented war for three years. *Id.* These treaties all still exist, but the U.S. violated them to acquire land and undermine Native nations.

³¹ *Id.* This practice occurred when Potawatomi Chief Menominee refused to sell his land and U.S. sub-agent for Native nations Abel Pepper found three other chiefs to sign. Secretary of War Lewis Cass promised Chief Menominee would not be removed, but Pepper evicted the chief and his people in August 1838 and forced them into detention camps.

³² *Id.*

³³ See Kimbra Cutlip, *In 1868, Two Nations Made a Treaty, and the U.S. Broke It and Plains Indian Tribes are Still Seeking Justice*, SMITHSONIAN MAG. (Nov. 7, 2018), [https://www.smithsonianmag.com/smithsonian-institution/1868-two-nations-made-treaty-us-broke-it-and-plains-indian-tribes-are-still-seeking-justice-180970741/#:~:text=In%201868%2C%20the%20United%20States,west%20of%20the%20Missouri%20River](https://www.smithsonianmag.com/smithsonian-institution/1868-two-nations-made-treaty-us-broke-it-and-plains-indian-tribes-are-still-seeking-justice-180970741/#:~:text=In%201868%2C%20the%20United%20States,west%20of%20the%20Missouri%20River.). The outcome of the Fort Laramie Treaty showcases this phenomenon. The U.S. signed this treaty with the Sioux (Dakota, Lakota, and Nakota) and Arapaho nations in 1868. The

An additional inadequacy of treaties occurred when the United States government acted under treaties that were unratified. This occurred with 18 treaties signed with Native Californians between March 1851 and January 1852³⁴ that were “subsequently buried in the Congressional archives.”³⁵ Three federal commissioners were sent to California to negotiate and keep the Native Americans from a “murderously hostile Anglo population.”³⁶ But negotiations actually led to violence against California’s Native population.³⁷ California was backed by a governor who told his legislature in 1851 “[t]hat a war of extermination will continue . . . until the Indian race becomes extinct must be expected.”³⁸ Motivated by such rhetoric, Anglo-Californians campaigned against the treaties, and the U.S. Senate responded by “put[ting] the treaties under an order of secrecy to conceal the fact that they ever existed.”³⁹ Although these treaties were not ratified, the United States “indeed profited from the . . . treaties as if they had been ratified since it had taken the lands of the California Indians and converted them to its own use.”⁴⁰ California’s Native population finally discovered the treaty promises when the treaties were made public in 1905 and sued for compensation in 1928.⁴¹ Slight compensation was provided when the suit was finally decided in 1944,⁴² but the absence of a ratified treaty allowed Native Americans in California to suffer from unlawful action that could not be effectively challenged in court.⁴³

treaty designated the Black Hills of Wyoming as an “unceded Indian Territory” to be used exclusively by the signing nations. However, after gold was discovered there, “the United States reneged . . . redrawing the boundaries of the treaty, and confining the Sioux people—traditionally nomadic hunters—to a farming lifestyle on the reservation.”

³⁴ *Nation to Nation*, *supra* note 24.

³⁵ VINE DELORIA, JR., *BEHIND THE TRAIL OF BROKEN TREATIES* 49 (1985).

³⁶ *Nation to Nation*, *supra* note 24.

³⁷ *Id.* The treaties provided 11,700 square miles—about one-seventh of California—to Native Americans. After these decisions, however, violence against Native Americans increased and between 1848 and 1880, at least 4,500 California Natives were killed, and some Native Americans fled to military reservations established by the federal government.

³⁸ *Id.*

³⁹ *Id.* Peter Hardeman Burnett served as California’s first governor and opposed all rights for non-white people.

⁴⁰ DELORIA, *supra* note 35, at 40.

⁴¹ *Nation to Nation*, *supra* note 24.

⁴² *Id.* The court only awarded the Native Nations \$5,025,000 for all the land that was lost.

⁴³ DELORIA, *supra* note 35, at 49. As Deloria points out, the California Indians never “received any benefits from their treaties,” which in turn meant they “suffer[ed] from the unlawful actions of the United States.” *Id.* Properly ratifying the treaties “would have clarified” the legal status of Native nations and provided assistance in future lawsuits that “involved the loss of lands described in the unratified treaties.” *Id.*

Inequities from treaties with Native nations have only continued. Usually, when a treaty is made, a mechanism exists to resolve disputes about treaty violations. However, the U.S. failed to provide Native nations this ability. Courts have repeatedly “affirmed their unwillingness to provide meaningful legal remedies; remedies traditionally available to other foreign and domestic nationals whose property had been expropriated by the United States Government.”⁴⁴ Issues “could still be . . . addressed straightforwardly, through negotiation with . . . nations involved,”⁴⁵ but “the state has chosen to ignore its legal obligations in favor of continued repression.”⁴⁶ This contravenes the effectiveness of treaties and the Constitution’s direction that treaties to which the United States is a party “shall be the supreme Law of the Land.”⁴⁷

While it is true that Congress declared through the Indian Appropriation Act of 1871⁴⁸ that the creation of any further treaties with Native nations should cease,⁴⁹ this act did not annul treaties that were previously entered into between the United States and Native nations.⁵⁰ Therefore, these treaties still present obligations for the United States because “[t]reaties are binding agreements between nations” that “have the force of federal legislation.”⁵¹ However, this ability has been denied to Native Americans, and the U.S. has created numerous reasons to encroach upon land that was—according to treaties—meant for Native use and ownership.⁵² In fact, “by 1900, the United States had asserted jurisdiction

⁴⁴ Lope, *supra* note 21, at 346.

⁴⁵ SAITO, *supra* note 6, at 66.

⁴⁶ *Id.*

⁴⁷ U.S. CONST. art. VI, cl. 2.

⁴⁸ Indian Appropriation Act of 1871, 25 U.S.C.A. § 71 (West 2022).

⁴⁹ See ST. GERMAIN, *supra* note 23, at 13. Congress passed the act because of “a consensus . . . that treaties, as a means to deal with [Native nations] had outlived their usefulness” and a “power struggle between the Senate and the House.” *Id.* Questions about whether the Senate could actually make treaties with Native nations “surface[d] as American national power began to assert itself, notably during the presidency of Andrew Jackson.” *Id.* at 14. Questions centered on “attitudes and behavior of the executive branch . . . in carrying out their constitutionally appointed duties”, “competence and status” of Native nations, and “the actual procedures of treaty making on the ground in the West.” *Id.*

⁵⁰ Indian Appropriation Act of 1871, 25 U.S.C.A. § 71 (West 2022) (declaring that “no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired”).

⁵¹ *About Treaties*, U.S. SENATE, <https://www.senate.gov/about/powers-procedures/treaties.htm> (last visited Aug. 20, 2022).

⁵² See Angela R. Riley, *Native Nations and the Constitution: An Inquiry Into “Extra-Constitutionality,”* 130 HARV. L. REV. F. 173, 175 (2017) (examining how there are “internal and external dimensions” to the reconciliation of federal Indian law with larger American jurisprudence and how the U.S. government “has used Indian difference to justify abhorrent acts against Indian tribes and Indian people”).

over some two billion acres of Indigenous territory” and “[h]alf of this area was purchased by treaty or agreement at an average price of less than seventy-five cents per acre”⁵³ And by 1970, the U.S. Department of the Interior was “warning that the United States had never acquired valid title to about one-third of its purported land base.”⁵⁴

Even after countless broken treaty promises, many citizens of Native nations still embrace treaties and their promises. The treaties recognize the existence of Native nations and establish Federal Indian Law—even if treaty terms are not always fully recognized. This is the view held by Haudenosaunee citizens. In the 1794 Treaty of Canandaigua, the Haudenosaunee ceded all claims to Pennsylvania and the Ohio Valley in exchange for the restoration of lands taken by the government and an annual payment of goods.⁵⁵ Over time, the U.S. and New York ate away at the land.⁵⁶ Despite these defied promises, the Haudenosaunee continue to honor their word.

According to scholar John C. Mohawk, the Haudenosaunee continue performing their treaty obligations because the treaty is “a defining document” that created “federal responsibility to guard the rights of Indians against the ambitions and abuses of the states.”⁵⁷ Additionally, in the words of Onondaga Chief Oren Lyons, “We have to, as the treaty says, be friends, and allies, and brothers, to take on those terrible obligations of survival that we face today.”⁵⁸ This commitment to treaties is so strong that one year when the U.S. government offered to send the Haudenosaunee money instead of its annual shipment of bolts of treaty cloth, the Nation declined because “cloth is more significant than money . . . so long as you keep sending this to us, there’s a chance you’ll maybe remember all of the other articles of that treaty.”⁵⁹ Native nations respect the power that treaties provide (or should provide) to them. Just as Cherokee citizen John Ross acknowledges that “[i]n the treaties, we’ve lost a lot,” he also explains that “[i]n the treaties, those territories are still ours.”⁶⁰ Thus, treaties remain important legal instruments to respect, enforce, and follow. To effectively insist that the government uphold its treaty promises, an understanding of how treaty defiance continues to underscore contemporary battles over Native land is necessary.

⁵³ SAITO, *supra* note 6, at 66.

⁵⁴ *Id.*

⁵⁵ *Nation to Nation*, *supra* note 24.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *This Land: Still Bleeding*, CROOKED MEDIA (July 15, 2019) (downloaded using Spotify).

B. “A Title Which the Courts of the Conqueror Cannot Deny”: How the Supreme Court Used its Power to Legalize Stereotypes and Strip the Rights of Native Nations

United States Supreme Court decisions, like treaties, have also often undermined Native American rights and entrenched the mistreatment of Native nations. Many opinions disregard the existence of Native nations and their history, future, and humanity. In fact, “some of the most hostile racial attitudes in 19th century America toward Indians can be found in the Indian rights decisions of the Supreme Court.”⁶¹ As Robert A. Williams, Jr. articulates, “[t]hroughout the 19th century and even well into the 20th century, the justices seemingly couldn’t help themselves from talking about Indians as if they were hostile savages who deserve to disappear from the American cultural landscape . . . even in cases where Indians were directly involved as litigants.”⁶²

To understand how deeply structural racism impacts the fight for Native land rights and environmental justice, the United States Supreme Court cases of the Marshall Trilogy⁶³ must be examined. This trilogy—comprised of *Johnson v. M’Intosh*,⁶⁴ *Cherokee Nation v. Georgia*,⁶⁵ and *Worcester v. Georgia*⁶⁶—legalized using the “doctrine of discovery” to justify Native land dispossession. In fact, “[t]he revered, pundit-like status of the ghost of John Marshall is even more forcefully reflected in the fact that virtually every Indian rights decision of the Supreme Court contains at least one and often numerous citations to the cases of the Marshall Trilogy.”⁶⁷ Thus, the trilogy’s legal principles continue to be incorrectly affirmed and guide the government and companies in their treatment of Native land rights. Understanding the origin and meaning of these principles helps to push against this trend and better understand current Native land rights issues.

⁶¹ WILLIAMS, *supra* note 10, at xx.

⁶² *Id.* at xix. Williams goes on to say that in cases that create important precedent for rights concerning Native nations, “it seems . . . the justice writing the opinion couldn’t help but go off on some crazy tangent, calling Indians these backward, ignorant, lawless, warlike, lazy, or drunken savages and claiming they were getting just what they deserved under our Constitution and laws.”

⁶³ *Id.* at 51.

⁶⁴ 21 U.S. 543 (1823).

⁶⁵ 30 U.S. 1 (1831).

⁶⁶ 31 U.S. 515 (1832).

⁶⁷ WILLIAMS, *supra* note 10, at 51.

1. “[D]iscovery Gave an Exclusive Right to Extinguish the Indian Title of Occupancy”⁶⁸: How *Johnson v. M’Intosh* Stripped Native Nations of Land Rights

While the Indian policy embraced by America’s Founding Fathers and the American understanding of treaties with Native nations reflected racist attitudes toward citizens of Native nations, Chief Justice John Marshall enshrined these ideas in Supreme Court opinions. Marshall’s first step to achieving this was his opinion for a unanimous court in *Johnson v. M’Intosh*. He destroyed Native American autonomy and self-determination when he purported that the doctrine of discovery “may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.”⁶⁹ Yet the Court executed anything but justice by rendering *Johnson*. Instead, it “elevate[d] a European colonial-era fantasy of white racial supremacy and dictatorship over entire continents of nonconsenting non-European peoples into a skeletal principle of the U.S. legal system.”⁷⁰

Johnson was riddled in discrimination and mistakes from the start. An opinion regarded as the “most important Indian rights opinion ever issued by any court of law in the United States”⁷¹ in fact did not even include Native Americans as a party.⁷² This case addressed whether Native Americans held title to their land and could convey that title. British law recognized Native Americans as landowners.⁷³ But while there was a practice of individual colonists buying land directly from citizens of Native nations, beginning in 1763, only colonial governments could buy Native American land in the name of the Crown.⁷⁴ Thus, in a dispute over who had received title to the land, the plaintiff argued that the sale to them was legal because Native nations owned the land and could sell it, while the defendant argued that under British law, Native Americans could not sell land.⁷⁵ However, Chief Justice Marshall unnecessarily expanded the case’s scope. By asserting that land sale validity depended on “the power of Indians to give, and of private individuals to receive, a title which can be sustained in the

⁶⁸ *Johnson*, 21 U.S. at 587.

⁶⁹ *Id.* at 592.

⁷⁰ WILLIAMS, *supra* note 10, at 56.

⁷¹ *Id.* at 51.

⁷² *See id.* (explaining that “the legal controversy in *Johnson* was between two non-Indian parties fighting over legal title to the same piece of land, a parcel that had once been occupied by Indians”).

⁷³ ECHO-HAWK, *supra* note 4, at 59.

⁷⁴ *Id.*

⁷⁵ *Id.* at 66.

Courts of this country,”⁷⁶ Marshall transformed his decision “from a narrow inquiry into the legality of a prewar sale under British law into an inquiry into the legality of the postwar preemptive market under American law”⁷⁷

Writing for a unanimous court, Chief Justice Marshall held that under the European “doctrine of discovery,” England had “the exclusive right of the discoverer to appropriate the lands occupied by the Indians” and that the United States adopted this principle when it defeated Britain in the American Revolution.⁷⁸ By adopting this principle, the United States “maintained . . . discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.”⁷⁹ He explained the “general rule” of title by conquest is that conquered people usually “are incorporated with the victorious nation” and “old members of the society mingle with each other” to “make one people.”⁸⁰ Therefore, “[w]here this incorporation is practicable . . . the rights of the conquered to property should remain unimpaired” and “new subjects should be governed as equitably as the old.”⁸¹

However, Marshall asserted that the general English rule regarding incorporation of conquerors and conquered people was “incapable of application”⁸² to Native Americans due to their unique nature. Native Americans were “fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest.”⁸³ Governing Native Americans “was impossible,”⁸⁴ because they were “as high spirited as they were fierce,” and “ready to repel by arms every attempt on their independence.”⁸⁵ It was

⁷⁶ *Johnson v. M’Intosh*, 21 U.S. 543, 572 (1823).

⁷⁷ *ECHO-HAWK*, *supra* note 4, at 72.

⁷⁸ *Johnson*, 21 U.S. at 584. To justify that the United States adopted this discovery principle, Marshall wrote that:

It has never been doubted, that either the United States, or the several States, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it.

Id. at 585.

⁷⁹ *Id.* at 587.

⁸⁰ *Id.* at 589.

⁸¹ *Id.*

⁸² *Id.* at 591.

⁸³ *Id.* at 590.

⁸⁴ *Id.*

⁸⁵ *Id.* By “othering” Native Americans, C.J. Marshall justified why Native nations should not be afforded usual protections for conquered populations. Marshall explained that according to

contended, therefore, that letting these nations keep the land “was to leave the country a wilderness.”⁸⁶ Marshall’s wording is significant because to the United States, land equaled power and a future. Portraying Native Americans as vicious, dangerous, and inept allowed the Supreme Court to succeed with its manifest destiny argument. This was important, according to Willie Jennings of Yale Divinity School, because “from the very beginning . . . [settlers] looked at the land as the world-in-potential that needed development,” and “development was always tied to what can be taken from the land.”⁸⁷

Land development was considered a prerogative granted to white settlers by God himself. As Fred Hoxie explains, “The power of manifest destiny, or expansion, of inevitability of God’s providence helped rally people around not only the idea of Americans as entitled to North America but rallied them around the idea that Indian people were barriers to civilization and barriers to progress.”⁸⁸ Therefore, the Supreme Court needed to remove this barrier. But it is cruelly ironic that in a case about whether or not Native Americans could sell land to people advancing America’s view of “progress,” the Supreme Court held that they could not because giving Native Americans control of what happened to their land would keep the United States from productivity.

However, Chief Justice Marshall did just this and ensured the removal of what was considered a barrier to America’s future in one of the most racist opinions in the country’s history. By painting Native Americans in the light that he did, Marshall effectively made these individuals invisible in the eyes of the court and the country. This action was taken because, as Kevin Gover points out, “[i]t’s important in the Great American mythology to describe the Americas as wilderness, because if it’s wilderness, then there really is no one to dispossess. It was okay to come here and prosper and conveniently forget that there were already people and civilizations in place.”⁸⁹ Thus, while the opinion’s racist characterizations alone make *Johnson* troublesome, it is even more disheartening

public opinion, “the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest.” *Id.* at 589. However, the Court agreed that because Native Americans did not follow the usual rules of European government and land use and ownership, it was impossible to reconcile differences. *Id.* This “otherness” gave the U.S. a reason to take title to Native land and laid the groundwork for wanton oppression in the coming centuries. *Id.*

⁸⁶ *Id.*

⁸⁷ Dustin Dwyer, “We’ve Never Had Justice”: How the Supreme Court Rigged Land Deals Against the Native People, MICH. RADIO (Oct. 16, 2018), <https://www.michiganradio.org/arts-culture/2018-10-16/weve-never-had-justice-how-the-supreme-court-rigged-land-deals-against-native-people>.

⁸⁸ Nat’l Museum of the Am. Indian, *The “Indian Problem,”* YOUTUBE (March 3, 2015), <https://www.youtube.com/watch?v=if-BOZgWZPE>.

⁸⁹ *Id.*

to see how *Johnson* and its language influenced subsequent Supreme Court decisions and other aspects of Federal Indian Law for centuries to come.

2. “The Framers of Our Constitution Had Not the Indian Tribes in View”⁹⁰: How *Cherokee Nation v. Georgia* Denied Native Americans Access to the Courts

Just a few years after *Johnson*, in *Cherokee Nation v. Georgia*, the Supreme Court confronted a motion from Cherokee Nation for an injunction to preclude Georgia’s enforcement of laws meant “directly to annihilate the Cherokees as a political society” and seizure of land “assured to [the Cherokee] by the United States in solemn treaties.”⁹¹ In 1827, Cherokee Nation established its first written constitution, declaring sovereignty over Cherokee land “independent from the United States.”⁹² However, Georgia surrounded Cherokee land, and the state wanted this land.⁹³ Thus, Georgia tried to extend its laws to Cherokee Nation by passing “harassment laws” that told Cherokee citizens what they “could and could not do[] on [their] own land.”⁹⁴

Cherokee Nation argued that Georgia could not legally seize Cherokee land because authority from the Georgia Charter and the “doctrine of discovery” was “at odds with natural law.”⁹⁵ In a 4-2 decision,⁹⁶ the Court declined to hear the case on the merits.⁹⁷ It reasoned that requesting protection from Georgia raised a “political question” that the Supreme Court was unable to decide.⁹⁸ Although federal law and treaties recognized the Cherokee as a state—and thus a dependent nation—the relationship between Native Americans and the United States was like that of a “ward to his guardian.”⁹⁹ To justify this characterization,

⁹⁰ *Cherokee Nation v. Georgia*, 30 U.S. 1, 13 (1831).

⁹¹ *Id.* at 11.

⁹² *This Land: The Treaty*, CROOKED MEDIA (June 24, 2019) (downloaded using Spotify).

⁹³ *Id.*

⁹⁴ *Id.* This led to violence and a “state of undeclared war” when the Georgia militia came onto Cherokee land to enforce the laws and encouraged white settlers to take Cherokee land.

⁹⁵ ECHO-HAWK, *supra* note 4, at 101.

⁹⁶ At this time, the Supreme Court only included six justices. The Court began with six justices in 1790, but Congress changed the number of justices on the Court from as few as five to as many as 10 until the current construction of nine justices was set in 1869. *Supreme Court*, HISTORY (June 24, 2022) <https://www.history.com/topics/us-government/supreme-court-facts>.

⁹⁷ *Cherokee Nation v. Georgia*, 30 U.S.1, 20 (1831) (affirming that “[i]f it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted”).

⁹⁸ *Id.* at 15. (justifying not deciding the merits because injunction would require controlling Georgia’s legislature, which “savours too much of the exercise of political power to be within the proper province of the judicial department”).

⁹⁹ *Id.* at 17.

Marshall again turned to racial stereotypes. He said America's framers did not consider Native Americans "when they opened the courts . . . to controversies between a state or the citizens thereof, and foreign states."¹⁰⁰ This is because when the Constitution was written, "appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe."¹⁰¹ Instead, Native Americans' "appeal was to the tomahawk, or to the government," and therefore, a reason existed for the framers "omitting to enumerate them among the parties who might sue in the courts of the union."¹⁰²

With no ability for judicial relief, Native nations had "to cede their land and sovereignty to land-hungry states or fight for their rights."¹⁰³ This trusteeship-type relationship was indicative of colonialism.¹⁰⁴ It gave a powerful government title to property in a way that could be "easily abused when unchecked by the courts" because it provided a mechanism for the government to "do things to wards of the state that it could never do to its citizens."¹⁰⁵ This is because usually "[a] beneficiary may demand that a trustee 'account' for its management of the trust assets, and the burden is on the trustee to show that it managed the assets appropriately."¹⁰⁶ If a "trustee has misappropriated or mismanaged any of those assets, a court typically orders the trustee to restore them."¹⁰⁷ However, this benefit has not been afforded to Native Americans.

Chief Justice Marshall's *Cherokee Nation* decision added another block to the foundation erected in *Johnson*. Thus, *Cherokee Nation* would not have been possible without *Johnson*.¹⁰⁸ *Cherokee Nation*, with *Johnson*, affirmed that Native nations did not have title to their land and were not true foreign nations. This has complicated the protections Native nations should receive and the relief that could be found in court when Native rights and treaty obligations are violated.

¹⁰⁰ *Id.* at 18.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ ECHO-HAWK, *supra* note 4, at 106.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ MICHAEL LIEDER & JAKE PAGE, WILD JUSTICE 230–31 (1997).

¹⁰⁷ *Id.* at 231.

¹⁰⁸ Compare *Johnson v. M'Intosh*, 21 U.S. 543 (1823) (holding that Indians did not have legal title) with *Cherokee Nation v. Georgia*, 30 U.S. 1, 10 (1831) (holding tribes should be considered "denominated domestic dependent nations" because "[t]hey occupy a territory to which we assert a title independent of their will" and are "in a state of pupilage").

3. “A Distinct Community”¹⁰⁹: How *Worcester v. Georgia* Unsuccessfully Attempted to Right Wrongs

After seeing how states reacted to *Johnson and Cherokee Nation*, Chief Justice Marshall attempted to turn back the clock in *Worcester v. Georgia*. Some consider *Worcester* a victory for Native nations, but this characterization is not entirely truthful. Racist language did not dominate the opinion, but *Worcester* was still embroiled in racism. The case grew from the indictment of a Vermont minister named Samuel Worcester, who came with missionaries to Cherokee country and refused to leave.¹¹⁰ Worcester and another minister were arrested and charged with violating a Georgia statute that regulated the residence of whites on Native land.¹¹¹ The two ministers were sentenced to four years in prison at hard labor and challenged their charges using the Cherokee’s argument from *Cherokee Nation*.¹¹² But because the rights of white men were affected by Georgia’s harassment laws—not Native Americans—the Court could hear the case. Thus, even when Marshall confronted his past misgivings, racial distinctions still played a role.

Marshall explained that Georgia could not deny Cherokee Nation’s sovereignty or take Cherokee land. Instead of again employing racist language, he characterized Native Americans as “a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws.”¹¹³ He also described the “doctrine of discovery” as “extravagant and absurd.”¹¹⁴ With this ruling, Native nations were recognized as sovereign entities with borders that separated them from U.S. states. But *Worcester* did not end discrimination. It advanced the idea that states have no authority over Native nations because the federal government retains this control.¹¹⁵ This distinction has led to many issues.¹¹⁶ Therefore, the case was not a brilliant tide-changing piece of precedent.

¹⁰⁹ *Worcester v. Georgia*, 31 U.S. 515, 520 (1832).

¹¹⁰ PERCIVAL E. JACKSON, *DISSENT IN THE SUPREME COURT* 39 (1969).

¹¹¹ *Id.* at 39–40.

¹¹² See ECHO-HAWK, *supra* note 4, at 110.

¹¹³ *Worcester*, 31 U.S. at 542–43.

¹¹⁴ *Id.* at 517.

¹¹⁵ *Id.* at 519 (“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.”).

¹¹⁶ See Adam Creppelle, *Lies, Damn Lies, and Federal Indian Law: The Ethics of Citing Racist Precedent in Contemporary Federal Indian Law*, 44 N.Y.U. REV. L. & SOC. CHANGE 529, 549 (2021) (explaining that the reason Native Americans often receive harsher sentences than citizens that are not from Native nations is “largely due to the fact that [Native Americans] are uniquely subject to federal jurisdiction”); Dedrick Asante-Muhammad & Kathy Ramirez, *The Economic*

Yet soon after *Worcester*, Justice Story wrote, “[t]hanks be to God, the Court can wash its hands clean of the inequity of oppressing the Indians and disregarding their rights . . . [t]he Court has done its duty. Let the Nation now do theirs.”¹¹⁷ However, time proved that *Worcester* was not a turning point that led the Court to “wash its hands clean.” Although Marshall showed support for Cherokee Nation in *Worcester*, his decision was too late and did not outweigh *Johnson* and *Cherokee Nation*. The language of those cases provided stereotypical language to be cited for the next two centuries, motivated other government branches to mistreat Native Americans, and created a misguided narrative about how Native Americans fit into America’s landscape.

4. How the “Marshall Trilogy” Lives On

Johnson and its prodigy continue to impact the decisions made by the Supreme Court of the United States. Unlike other racist opinions that have since been overruled or rebuked by the Supreme Court, *Johnson* is still cited by the Court and underlies reasoning in present-day decisions regarding Native American land rights.¹¹⁸ Additionally, some scholars have argued that the *Johnson* opinion’s acceptance of conquest as a reason for why Native nations did not own the title to their land helped foster the idea that Congress has plenary power over Native Americans.¹¹⁹ This power, according to the Supreme Court, derives from Article 1, Section 8 of the U.S. Constitution that provides Congress power “[t]o regulate Commerce with foreign Nations, and among the several

Reality of Native Americans and the Need for Immediate Repair, NAT’L CMTY. REINVESTMENT COAL. (Nov. 26, 2019), <https://ncrc.org/the-economic-reality-of-native-americans-and-the-need-for-immediate-repair/>. This federal jurisdiction also contributes to the reality that “[i]n too many measures, Native Americans have the lowest socio-economic indicators.” In 2018, the Native American unemployment rate was 6.6%, compared to 3.5% for whites. Native Americans have a poverty rate of 25%, which is over three times the poverty rate of whites. Native Americans also have the lowest educational achievement rates compared to other national, racial, and ethnic groups. 14% of Native Americans have a bachelor’s degree or higher.

¹¹⁷ TIM ALAN GARRISON, *THE LEGAL IDEOLOGY OF REMOVAL* 192 (2002) (quoting correspondence from Justice Story to his wife).

¹¹⁸ See ECHO-HAWK, *supra* note 4, at 77 (reasoning that the fate of *Johnson* should be like the fate of cases such as *Dred Scott* for its racist and colonial justifications and ethical violations).

¹¹⁹ See David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403, 411 n.12 (1994) (interpreting *Johnson* as an opinion that “accept[s] conquest and a plenary power arising from conquest”). “Plenary power” was not officially codified by the Supreme Court until *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), but *Johnson* and other 19th century cases set the stage for the Supreme Court to determine that Congress had control of decisions affecting Native Americans.

States, and with the Indian Tribes.”¹²⁰ This section gives Congress “exclusive rights and powers to regulate affairs and trade with Indian tribes,”¹²¹ so “Congress has the same power and authority over Indian affairs as States have over the affairs of their citizens.”¹²² Congress controls Native nations in a way that “essentially keeps the states out of Indian affairs.”¹²³

Plenary power keeps Native Americans from being treated fairly, even since Native Americans were granted U.S. citizenship. One example of this is evident in the 1955 opinion *Tee-Hit-Ton Indians v. United States*,¹²⁴ which allowed land held by an Indian “right of occupancy,” as explained in *Johnson*, to be seized by the government without legal obligation to compensate citizens of Native nations.¹²⁵ That case reinforced the idea that Native rights are always at the will of the federal government, especially when Native land is involved.

The federal government’s will continues to be advanced over the rights of Native nations. In fact, from 1986–2005, the Rehnquist Court ruled against Native nations in 88% of the cases in which they were parties.¹²⁶ And as recently as 2011, the U.S. Supreme Court confirmed in *United States v. Jicarilla Apache Nation*¹²⁷ that “[t]hroughout the history of the Indian trust relationship, [it has] recognized that the organization and management of the trust is a sovereign function subject to the plenary authority of Congress.”¹²⁸ The Court quoted from *Winton v. Amos*¹²⁹ that “Congress has plenary authority over the Indians and all their tribal relations, and *full power to legislate concerning their tribal property*.”¹³⁰ This is troublesome, especially in the context of Native land rights, because government wishes can vary greatly from the wishes of Native nations.

More recently, the Supreme Court did deliver a glimmer of hope in the area of Native American rights in *McGirt v. Oklahoma*.¹³¹ This case held 5-4 that land reserved for the Muscogee (Creek) Nation since the 19th century—which comprises much of eastern Oklahoma—is still considered “Indian country” for

¹²⁰ *U.S. Constitution and Congress*, UNIV. OF ALASKA FAIRBANKS, (citing U.S. CONST. art. 1 § 8) <https://uaf.edu/tribal/academics/112/unit-1/usconstitutionandcongress%20.php> (last visited Aug. 20, 2022).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ 348 U.S. 272 (1955).

¹²⁵ *Id.* at 285.

¹²⁶ ECHO-HAWK, *supra* note 4, at 423.

¹²⁷ 564 U.S. 162 (2011).

¹²⁸ *Id.* at 17.

¹²⁹ 255 U.S. 373 (1921).

¹³⁰ *Id.* at 391 (emphasis added).

¹³¹ 140 S. Ct. 2452 (2020).

Major Crimes Act purposes.¹³² Justice Gorsuch began his majority opinion by writing that “[o]n the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever”¹³³ He explained that the Court faced “whether the land these treaties promised remains an Indian reservation for purposes of federal criminal law.”¹³⁴ He answered that “[b]ecause Congress has not said otherwise, we hold the government to its word.”¹³⁵

Although *McGirt* was “potentially one of the most consequential legal victories for Native Americans in decades,”¹³⁶ the Court was still influenced by *Johnson*. In oral arguments, Justice Kavanaugh centered most of his questions on the makeup of individuals living on the affected land in 1890.¹³⁷ Through his questions, Kavanaugh insinuated that because the “area was majority white in 1890 . . . Congress couldn’t have intended for the tribe to maintain their reservation.”¹³⁸ That argument, in his view, was made stronger “since the area is still majority white.”¹³⁹

Arguments like Kavanaugh’s are fairly common in the court system. In fact, according to Michigan State University law professor and citizen of the Grand Traverse Band of Ottawa and Chippewa Indians, Matthew Fletcher, in federal cases about tribal jurisdiction, “briefs don’t argue the law. . . they just say, ‘come on, how could you possibly let Indian tribes have jurisdiction over the white man?’”¹⁴⁰ And these arguments “win 90% of the time.”¹⁴¹ Even when the Court recognizes Native rights, it still purports racist foundations of Federal Indian Law in oral arguments and dissent. This signals that these arguments can be employed when challenging Native rights—especially land rights that have been taken by treaties, cases, and acts of Congress.

¹³² *Id.* at 2459; See also Jack Healy & Adam Liptak, *Landmark Supreme Court Ruling Affirms Native American Rights in Oklahoma*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/07/09/us/supreme-court-oklahoma-mcgirt-creek-nation.html>.

¹³³ *McGirt*, 140 S. Ct. at 2459.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Healy & Liptak, *supra* note 132.

¹³⁷ *This Land: The Ruling*, CROOKED MEDIA (July 16, 2020) (downloaded using Spotify) (sharing a clip of these words from Justice Kavanaugh during oral argument: “Given the demographics as of 1890, my understanding is that as of 1890, it was already predominantly non-Indian. By 1890, Indian Territory was predominantly white.”).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

C. *Congress Joins the Executive and Judiciary: How Legislation Aided in Dispossession*

Just as treaties and Supreme Court cases harmed Native nations, legislation also harmed Native nations and their land rights. While it is important to analyze how treaties and Supreme Court opinions stripped rights from Native Americans, it also is important to analyze federal legislation that violated Native land rights. Legislation furthered the effects of treaties and cases and explicitly relied on the racist opinions in the Marshall Trilogy. The Indian Removal Act caused the mass removal of Native nations to the west of the Mississippi and incredible land loss. Additional land loss occurred due to the Dawes Act allowing the division of reservations and the sale of “excess” land to settlers. The ramifications of these acts still impact discussions about what rights Native nations have and largely contributed to the socioeconomic struggles that befell Native nations. Thus, understanding how Native nations ended up in their current positions due to legislation is vital.

1. The Indian Removal Act: How Congress Defied *Worcester* and Ran with *Johnson*

In a 1780 letter, Thomas Jefferson expressed that for Native Americans, “the end proposed should be their extermination, or their removal beyond the lakes or Illinois river. The same world will scarcely do for them and us.”¹⁴² This view paved the way for *Johnson* and *Cherokee Nation*. Through those opinions, this view was legally entrenched and so deeply permeated the actions of the executive and legislative branches that Marshall’s destruction could not be undone. Although Jefferson was not alive at the time of its passage, “his thinking influenced the 1830 Indian Removal Act, the most significant federal law ever passed concerning American Indians.”¹⁴³

The Indian Removal Act of 1830¹⁴⁴ was one of “the most notorious, nefarious, and legally legitimate forms of discrimination by the United States

¹⁴² Letter from Thomas Jefferson to George R. Clark (Jan. 1, 1780), in 3 THE PAPERS OF THOMAS JEFFERSON, 258, 259 (Julian P. Boyd, ed., Princeton Univ. Press, 1951); see also *Americans*, NAT’L MUSEUM OF THE AM. INDIAN (Washington D.C.) (last visited Feb. 6, 2022) (explaining that for Jefferson, “acquiring territory was crucial to creating national power”) (photographs of exhibit on file with author).

¹⁴³ *Americans*, *supra* note 142.

¹⁴⁴ Act of May 28, 1830, ch. 148, 4 Stat. 411, (1830). The full title is “AN ACT to provide for an exchange of lands with the Indians residing in any of the states or territories, and for their removal west of the river Mississippi.” *Id.* The “exchange of lands” language is important because this suggested “that land transactions would be voluntary.” This “does not reflect the intense pressure” Native Americans would face to “‘exchange’ their ancestral homelands.” *Americans*, *supra* note 142.

against Native Americans.”¹⁴⁵ Its effects were so horrendous; it has been characterized as “one of the Native American genocides.”¹⁴⁶ The Act’s language¹⁴⁷ is a nod to *Johnson* because it furthered the idea “that the United States has the power to extinguish the property rights of Native Americans and buil[t] on it and enshrine[d] it in a congressional act.”¹⁴⁸ In fact, after the Supreme Court decided *Worcester*, President Andrew Jackson reportedly said, “John Marshall has made his decision, now let him enforce it.”¹⁴⁹ Jackson did not enforce *Worcester* because *Johnson* was almost ten years old and southern states “had already lined up under the green light given in *Cherokee Nation*.”¹⁵⁰ The Act furthered this action by granting the right to exchange and remove Native land.¹⁵¹

What makes this act especially heinous is that the Cherokee “had signed numerous treaties with the United States protecting their right to remain on their lands.”¹⁵² However, “‘the Cherokee’s unmistakable aptitude for civilization’ . . . undermined the settlers’ justification for seizing coveted lands,” which “was particularly provocative because it ‘signified *permanence*.’”¹⁵³ Therefore, legislation was needed to obliterate this permanence that threatened government land acquisition. The Act was disastrous. Before the Act, 17,000 Cherokee lived in Georgia.¹⁵⁴ But of the 15,000 Cherokee “forcibly removed” to Oklahoma through the Trail of Tears, 8,000 died.¹⁵⁵

¹⁴⁵ Omar Rana, Note, *Similar Trails: A Comparison of the Legalized Discrimination of Indigenous Communities Paralleling the Rohingya of Myanmar and the Native Americans of the United States*, 20 RUTGERS RACE & L. REV. 175, 190 (2019).

¹⁴⁶ *Id.* (explaining that the Act led to the “Trail of Tears,” which “removed the Cherokee Native Americans from Georgia to Oklahoma, resulting in a journey that costs at least fifteen thousand deaths”).

¹⁴⁷ See Act of May 28, 1830, 4 Stat. at 411–12. The first clause reads: “Be it enacted . . . [t]hat it shall and may be lawful for the President of the United States to cause so much of any territory belonging to the United States, west of the river Mississippi, . . . and to which the Indian title has been extinguished, as he may judge necessary, to be divided into a suitable number of districts, for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there”

¹⁴⁸ Rana, *supra* note 145, at 198.

¹⁴⁹ ECHO-HAWK, *supra* note 4, at 110.

¹⁵⁰ *Id.*

¹⁵¹ Rana, *supra* note 145, at 198.

¹⁵² SAITO, *supra* note 6, at 68.

¹⁵³ *Id.*

¹⁵⁴ Rana, *supra* note 145, at 199.

¹⁵⁵ *Id.*

2. Hungry for More Land: How Allotment Carved Up the Reservations

Despite the Indian Removal Act's massive destruction, Native nations were supposed to be able to remain on reservations to which they were forcibly relocated. However, this promise was not realized. After treaty violations, cases that confiscated land rights, and an act requiring the removal of Native Americans, Congress then passed The Dawes Act in 1887¹⁵⁶ to make allotment of reservations legal. The government divided reservation land into pieces so that rather than the whole Native nation owning the whole reservation, individual citizens of the nation owned different sections.¹⁵⁷ Surplus land was then sold to white settlers.¹⁵⁸ However, government officials often caved to the wishes of white individuals who wanted land, and it became common to allot land that could not sustain farming and set Native Americans up to fail as farmers and stock raisers.¹⁵⁹ Officials decided "it was more important to exploit the Indians' land, mineral, and timber resources quickly and to satisfy white land hunger than to fulfill their trust responsibility by helping Indians to become independent, self-supporting farmers."¹⁶⁰

Thus, while Native Americans were presented with land, the plan to hopefully make Native Americans more productive members of society did not come to fruition. A large part of why this occurred was the manner in which the land was divided and distributed. Not only were nefarious means employed to undercut Native Americans,¹⁶¹ but the land that Native Americans received was

¹⁵⁶ Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified at 25 U.S.C.A. §§ 331–333) (West 2022) (repealed 1934); *see also This Land: The Land Grab*, CROOKED MEDIA (July 1, 2019) (downloaded using Spotify) (explaining that Senator Henry Dawes—the Act's namesake—was a champion for assimilation and created the Allotment Act because he was convinced Native Americans were poor because they owned land communally and he wanted to cure a lack of greed among Native Americans to help them "become self-interested capitalists").

¹⁵⁷ *See* JANET A. McDONNELL, *THE DISPOSSESSION OF THE AMERICAN INDIAN* 2 (1991). Under the Dawes Act, the president could allot reservation land to individual Native Americans based on the following criteria: 160 acres for family heads; 80 acres to each individual person older than eighteen and orphan under eighteen; and 40 acres to individuals under eighteen. After the land was distributed in this manner and opened up, the government could purchase land that was left over and sell it to homesteaders.

¹⁵⁸ *Id.* at 6.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *See This Land: The Land Grab*, *supra* note 156 (pointing out that the government assigned land that couldn't be cared for because it was so far away it would take days to travel to; that there was an industry of stealing land from orphans or killing parents in order to create orphans to steal from; and that squatters would stay on land that was too far away to be cared for by the assignee until rights passed to the squatters).

usually not suitable for the purposes for which the land was intended.¹⁶² The government purposefully kept Native Americans from receiving land that was more valuable for its mineral resources than farming.¹⁶³ Additionally, the Dawes Act did not provide for agricultural education or farming equipment.¹⁶⁴ Rather than making Native nations prosperous farmers, it actually made them more dependent on the federal government.¹⁶⁵ However, Native American land rights “were often violated because Indian Office officials administered the leasing policy badly and ignored their trust responsibility.”¹⁶⁶ This poor execution, combined with the fact that the plan separated Native Americans from their livelihoods and previous ways of survival, led some Native Americans to sell their land after the trust period because they had no means of supporting themselves and had nothing to sell.¹⁶⁷ One of the most disheartening aspects of allotment, however, was that if a citizen of a Native nation was deemed “competent,” the Secretary of the Interior could take the land out of trust, and the land became taxable.¹⁶⁸ The Secretary could take such action with or without the allottee’s knowledge and even if it violated the allottee’s wishes.¹⁶⁹ This trend led to many Native Americans losing land because parcels were sold in tax foreclosure auctions after individuals owed taxes on land they thought was in trust and could not pay.¹⁷⁰

Allotment greatly threatened the ability for Native nations to be recognized and protect their land. This is seen in how allotment played out through its expansive use on the Muscogee (Creek) reservation in Oklahoma.¹⁷¹ Any time a Muscogee citizen sold their land, it stopped being Indian Country.¹⁷² Today, if the land is owned by the family of the original Muscogee owner, Oklahoma considers it Indian land. However, if the piece of land has been sold

¹⁶² *Land Tenure History*, INDIAN LAND TENURE FOUND., <https://iltf.org/land-issues/history/> (last visited Sept. 27, 2022) (clarifying that productive land was “surplus to Indian needs” and sold to white settlers or business interests).

¹⁶³ MCDONNELL, *supra* note 157, at 10 (explaining that initially, the Indian Office would not let Native Americans “select tracts with mineral deposits or timber for their allotments” because these parcels of land “went into the public domain to be reserved for exploitation by whites”).

¹⁶⁴ *Land Tenure History*, *supra* note 162.

¹⁶⁵ *Id.* (explaining that under the Act, Native allottees were considered “incompetent” to handle their land affairs, so the U.S. government held land in trust for Native Americans to use but not sell without government approval).

¹⁶⁶ MCDONNELL, *supra* note 157, at 60.

¹⁶⁷ *Land Tenure History*, *supra* note 162.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *This Land: The Case*, CROOKED MEDIA (June 3, 2019) (downloaded using Spotify).

¹⁷² *Id.*

or no longer belongs to the family of the original Muscogee owner, it is no longer Indian land.¹⁷³ One attorney described this process as “highway robbery” in which the government was “robbing these people with fountain pens and not bows and arrows and guns like they had done originally.”¹⁷⁴

Allotting Native land ended in 1934 with the Indian Reorganization Act’s¹⁷⁵ passage¹⁷⁶ because this land transfer plan was a “dismal failure,”¹⁷⁷ but effects of allotment were not fixed on over 100 reservations where allotment occurred.¹⁷⁸ The Dawes Act led Native nations to lose two thirds—or 90 million acres—of land.¹⁷⁹ Allotment left areas of land initially granted to Native nations looking like checkerboards, with only “scattered pieces” of the whole still belonging to Native citizens.¹⁸⁰ This is because the Indian Reorganization Act did not prevent land from passing out of trust when a non-Indian heir received the land or the allotment owner petitioned the secretary to terminate the trust status of the allotment.¹⁸¹ Therefore, although Native nations can create zoning regulations on reservations,¹⁸² allotment’s aftermath often keeps such regulations

¹⁷³ *Id.* This distinction was paramount in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020). The initial case heard by the Supreme Court leading up to *McGirt* was *Carpenter v. Murphy*, *sub nom.* *Sharp v. Murphy*, 591 U.S. ___, 140 S. Ct. 2412 (2020). Muscogee (Creek) citizen Patrick Murphy was convicted in Oklahoma state court for murdering Muscogee citizen George Jacobs. Murphy argued the state court could not sentence him to death because Jacobs was murdered on Indian land. Although that land was sold during allotment, descendants of the original allottee still owned the land’s mineral rights. If the land still had its allotment character and could still be considered Indian Country, Oklahoma would not have jurisdiction over Murphy. Using this reasoning, it was argued that all of Muscogee Nation’s reservation was still Indian Country because it was never dissolved by Congress. *See also This Land: The Ruling*, *supra* note 137. The Court decided *McGirt v. Oklahoma* because it presented the same legal issue as *Carpenter* but allowed all justices to participate. Justice Gorsuch would have had to recuse himself from *Carpenter* because he was involved with the case at the Tenth Circuit Court of Appeals.

¹⁷⁴ *This Land: The Case*, *supra* note 171. Scott Braden worked at the Oklahoma Federal Public Defender’s Office when Murphy started his appeal.

¹⁷⁵ Indian Reorganization Act (IRA) of June 18, 1934, ch. 576, 48 Stat. 984 (1934) (codified as amended in scattered sections of 25 U.S.C.A.) (West 2022) (also known as the Wheeler-Howard Act).

¹⁷⁶ *Land Tenure History*, *supra* note 162.

¹⁷⁷ ECHO-HAWK, *supra* note 4, at 162.

¹⁷⁸ *This Land: The Land Grab*, *supra* note 156.

¹⁷⁹ *Id.*

¹⁸⁰ *This Land: The Case*, *supra* note 171.

¹⁸¹ *Land Tenure History*, *supra* note 162.

¹⁸² The Supreme Court has been greatly divided on how Native nations can create zoning regulations. *See Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (releasing a decision showing a divided court with multiple opinions); *see also* Linda Greenhouse, *Court Splits Over Tribal Control of Land*, N.Y. TIMES, (June 30, 1989), <https://www.nytimes.com/1989/06/30/us/court-splits-over-tribal-control-of->

from having enforcement power, since on many reservations “the vast majority of land is owned by non-reservation members.”¹⁸³ This reality complicates the ability Native nations have to protect their land and enforce the rights they are supposed to have. Thus, Congress—through the forces of removal and allotment—integrated racist and untrue ideas that had already been advanced by the executive and judicial branches to devastate the land holdings of Native nations, caused socioeconomic destruction, and began a trend of inhumane treatment that persists for Native Americans today.

D. How the Law Has Made a Lasting Impact

Throughout the eighteenth and much of the nineteenth centuries, U.S. courts “generally applied a strong presumption that private litigants could use treaties to press their claims in court.”¹⁸⁴ While Native nations have had some success with litigating treaty rights, they have not always been afforded such a presumption in federal court. A large part of the reason Native Americans did not benefit from the same presumption was the outcome of cases like *Johnson* and *Cherokee Nation* and their impact on other areas of Federal Indian Law. Native Americans were confined to a middle category where they were never fully American nor fully foreign. In *Cherokee Nation*, Chief Justice Marshall wrote the Constitution “does not comprehend Indian tribes in the general term ‘foreign nations;’ not . . . because a tribe may not be a nation, but because it is not foreign to the United States.”¹⁸⁵ While treaties should serve as a way to recognize the sovereign power of Native nations, the middle space that Native nations occupy can also keep these nations from the recognition they should receive. Native nations would have more autonomy if they had been recognized as foreign groups and provided with the same protections as foreign states. If Native nations had “been able to maintain a semblance of international status, a

land.html?auth=login-google1tap&login=google1tap (explaining that the Court ruled “in a splintered decision that the extent of tribal control over development within reservation boundaries should be defined by how much development had already occurred”).

¹⁸³ See Roberts A. Fairbanks, *Native American Sovereignty and Treaty Rights: Are They Historical Illusions?*, 20 AM. INDIAN L. REV. 141, 142 (1996). Out of 677,000 acres of Leech Lake Reservation in north central Minnesota, only about 30,000 acres are owned by a Native American. Out of nearly 10,000 individuals on the reservation, only about 3,700 are members of the Leech Lake Band of Ojibwe. See also Greenhouse, *supra* note 182 (explaining that while a Native nation can veto development proposals by non-Native members in reservation areas that are “preserved almost exclusively for tribal use, with little private ownership of land,” in areas that have been extensively developed and where most land is owned by non-Native members, “zoning regulations of the outside civil government may prevail”).

¹⁸⁴ Oona A. Hathaway, Sabria McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT’L L. 51, 53 (2012).

¹⁸⁵ 30 U.S. 1, 14 (1831).

violation of their treaty would have been an act of war.”¹⁸⁶ But this did not occur, and “with the emphasis on their domestic status, tribes suffered greatly from the arbitrary actions of state governments, which continually violated their treaties with impunity.”¹⁸⁷

The trustee system’s inequity was noted by Kevin Gover, former Assistant Secretary for Indian Affairs. He characterized the trust doctrine as “a stifling, paternalistic, and ultimately ineffective system of managing Indian property.”¹⁸⁸ This fact is affirmed through the amount of time and money Native nations have spent on litigation.¹⁸⁹ Additionally, although the United States was supposed to act as a trustee for Native nations, funds management ended with Native nations being in a no better or even worse position than before a deal was entered into with the U.S.¹⁹⁰ Because of such misgivings, Gover was correct when he opined that “[t]he trust responsibility has served as the source of federal authority to wreak all manner of harm on tribal communities.”¹⁹¹

Stripping Native Americans of title rights placed them in an easily abused position. Although Native Americans were eventually granted U.S. citizenship in 1924,¹⁹² enough damage had already been caused by multiple forms of law throughout the 19th century. Stolen land could not be given back, treaty violations were never properly addressed, and cases and legislation that preceded citizenship led Native nations to be misunderstood and disrespected.

¹⁸⁶ DELORIA, *supra* note 35, at 51.

¹⁸⁷ *Id.* (explaining that state courts violated treaties by “insist[ing] that they either found no violation of the treaty or that the treaty had become inoperative with the passage of time”).

¹⁸⁸ PEVAR, *supra* note 2, at 43 (citing Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RES. J. 317, 318 (2006)).

¹⁸⁹ *See* DELORIA, *supra* note 35. From 1962 to 1972, Native nations spent \$40 million litigating to try and force the government to fulfill treaty obligations. If these funds had not been spent on legal battles, they could have “generat[ed] substantial improvements in the conditions under which Indians lived.” *Id.* Legal battles over treaty obligations are still being waged today and still using money that could improve reservation conditions.

¹⁹⁰ *See* LIEDER, *supra* note 106, at 238–39. The Blackfoot Nation experienced this trend. When appropriations from an 1855 treaty between the Blackfeet and United States government ended in the 1860s, the Blackfeet “were no better off financially than they had been when the treaty was negotiated.” After several attempts at different means of support failed, the Blackfeet ceded land. The government was supposed to pay \$4.3 million over ten years for 17.5 million acres, which provided only twenty-five cents per acre. In its trustee role, the U.S. was supposed to use that money to “help the Indians become self-supporting.” However, funds ran out during the 1890s, and “the Indians were no closer to self-sufficiency.”

¹⁹¹ *Id.*

¹⁹² Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (1924) (authorizing the Secretary of the Interior to issue certificates of citizenship to all non-citizen Indians born within the territorial limits of the United States).

III. “A NEW FORM OF NORTH AMERICAN COLONIALISM”¹⁹³: THE BROKEN SYSTEM CONTINUES

The pattern of racist, dismissive policy through the 18th and 19th centuries has left Native voices largely out of the narrative of Federal Indian Law. In fact, Chief Justice Marshall wrote in *Johnson v. M’Intosh* that “[t]he measure of property acquired by occupancy is determined, according to the law of nature, by the extent of men’s wants, and their capacity of using it to supply them.”¹⁹⁴ However, this determination is based on the white man’s wants—not the wants and needs of Native nations. After decades of case law and legislation that undermined Native American rights, it is no surprise that Native nations continue to fight for land and environmental justice for their communities. This situation is also made more ironic because lands Native Americans were pushed to “were not known to be resource-rich at the time reservation lands were allotted to tribes,” and “in many cases, seemingly the least inhabitable lands were designated for reservations.”¹⁹⁵ But in fact, many reservations hold great wealth in oil, minerals, timber, and other natural resources.¹⁹⁶

Greed for these resources and the history of how Native nations have been treated converge to put Native Americans “at greater risk for victimization by technological/human-caused disasters.”¹⁹⁷ Thus, “in the intersection of socioeconomic status and race,” Native nations “are especially vulnerable to contaminating conditions that compromise health and well-being.”¹⁹⁸ This is true with the three projects discussed below. These projects exemplify how the structural racism explored in Part II paved the way for modern day discrimination and denial of Native land rights.

A. *The Worst Radioactive Spill in U.S. History . . . That Has Never Been*

¹⁹³ Carol A. Markstrom & Parry H. Charley, *Psychological Effects of Technological/Human-Caused Environmental Disasters: Examination of the Navajo People and Uranium*, in *THE NAVAJO PEOPLE AND URANIUM MINING* 103 (Doug Brugge, Timothy Benally & Esther Yazzie-Lewis eds., 2006) (quoting Ward Churchill & Winona LaDuke, *Native North America: The Political Economy of Radioactive Colonialism*, in *THE STATE OF NATIVE AMERICA* 241–66 (M. Annette Jaimes, ed., 1992)).

¹⁹⁴ 21 U.S. 543, 569 (1823).

¹⁹⁵ Markstrom & Charley, *supra* note 193, at 103.

¹⁹⁶ See *This Land: The Next Battleground*, *supra* note 8 (explaining that in 2009, the Council of Energy Resource Tribes estimated energy resources on Native land were worth about \$1.5 trillion because reservations hold an estimated 20% of U.S. oil and gas reserves, half of all uranium reserves, and one third of coal west of the Mississippi).

¹⁹⁷ Markstrom & Charley, *supra* note 193, at 89–90.

¹⁹⁸ *Id.*

Cleaned Up

A history of taking advantage of the Native Americans stretched into the mid 20th century when plans to explore atomic warfare came to the Navajo Nation in Church Rock, New Mexico.¹⁹⁹ In the 1950s, a uranium boom occurred in the southwest United States due to the nuclear arms race, and Navajo Nation—the largest Native American territory in the country—was right in the middle of the boom.²⁰⁰ The U.S. government hired private mining companies that leased Navajo land without fair compensation in order to build uranium mines.²⁰¹ In fact, over 700 uranium mines were established on Navajo land.²⁰² Although Navajo Nation was not compensated fairly, the Navajo government let companies in because the mines offered the chance for economic growth and job prospects for Navajo citizens.²⁰³

Possible prosperity from the mines came at a grim price. Mining jobs for Navajo citizens were often on the frontlines to build mines and blast, dig, and transport uranium ore.²⁰⁴ Meanwhile, Navajo workers reported that mine bosses were often white and that foremen were not in the mines as often as Navajo laborers.²⁰⁵ This distinction is important because by this time, the importance of protecting miners from radioactivity was well documented.²⁰⁶ Studies conducted as early as 1929 revealed dangers of radioactive material and the United States Department of the Interior Bureau of Mines had created reports about the importance of protection against radioactivity in uranium mines.²⁰⁷ However, Navajo workers had no knowledge of these dangers and were not given appropriate protective gear.²⁰⁸ In fact, “the Navajo language had no word for radiation, few Navajos spoke English, and few had formal education. Thus, the Navajo population was isolated from the general flow of knowledge about radiation and its hazards by geography, language, and literacy level”²⁰⁹

¹⁹⁹ Ranjani Chakraborty & Melissa Hirsch, *The Biggest Radioactive Spill in US History Never Ended: How the US Poisoned Navajo Nation*, VOX MEDIA (Oct. 13, 2020, 1:40 PM), <https://www.vox.com/21514587/navajo-nation-new-mexico-radioactive-uranium-spill>.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Doug Brugge & Rob Goble, *A Documentary History of Uranium Mining and the Navajo People*, in *THE NAVAJO PEOPLE AND URANIUM MINING*, *supra* note 193, at 29.

²⁰⁶ Chakraborty & Hirsch, *supra* note 199.

²⁰⁷ *Id.*

²⁰⁸ *Id.*; *see also* Brugge, *supra* note 205, at 30.

²⁰⁹ Brugge, *supra* note 205, at 30.

While companies profited off resources on Navajo land, “[v]irtually all of the Navajo miners . . . were not educated about the hazards of uranium mining and were not provided with productive equipment or ventilation.”²¹⁰ The effects of this lack of protection and the presence of mines on reservation land were seen quickly when cases of lung cancer were diagnosed in miners and Church Rock residents alike beginning in the 1960s.²¹¹ In addition to differing treatment along racial lines, many Navajo say the U.S. government’s failure to educate the Navajo about the harmful effects of radiation violated the Treaty of 1868 between Navajo Nation and the U.S. government that assigned the Bureau of Indian Affairs to care for Navajo economic, education, and health services.²¹²

Damage only increased on July 16, 1979, when the dam of a tailings pond used to hold several hundred million gallons of radioactive material from one of two mining operations around Redwater Pond Road broke and let over 1,000 tons of wastewater into a Rio Grande tributary known as the Rio Puerco.²¹³ While one government report completed after the spill showed radioactivity levels in the Puerco at over one thousand times what is allowed in drinking water, local newspapers assured that the spill “present[ed] no immediate health hazard.”²¹⁴ Many in the community said they were not told to not use the river until days after the spill.²¹⁵ And this failure came after the mining company had knowledge of the dam’s insecurity for some time.²¹⁶ Failures from the company and federal agencies continued after the spill, when only one percent of solid radioactive waste was cleaned up within three months of the dam breaking.²¹⁷

This response was the opposite of the U.S. government’s response to the Three Mile Island reactor’s partial meltdown in Pennsylvania just five months

²¹⁰ *Id.*

²¹¹ Chakraborty & Hirsch, *supra* note 199. These diagnoses were especially troublesome and connected to mining operations because, prior to the mines, there had not been cases of lung cancer among Navajo citizens. *Id.*

²¹² Brugge, *supra* note 205, at 30. The Navajo consider this assignment “a special trust relationship” with “particular responsibilities, including safeguarding the health of the Navajo people.” Despite this fact, problems with Navajo healthcare have abounded. For example, from the 1800s through the 1940s, such healthcare “focused more on eliminating the role of native healers, or medicine men, than on curing widespread infectious disease.” Uranium-mining-related disease simply “arose in a context of other public-health failures” that disregarded Navajo citizens and aimed to destroy Navajo cultural traditions.

²¹³ Chakraborty & Hirsch, *supra* note 199.

²¹⁴ *Id.* (including a newspaper article from September 2, 1979 edition of the *Austin American Statesman*).

²¹⁵ *Id.*

²¹⁶ *Id.* (explaining that a 1978 Army Corp of Engineers Report acknowledged that the company had identified cracks in the dam and that the company also knew the dam did not have appropriate protective measures).

²¹⁷ *Id.*

before the Church Rock spill. After the events in Pennsylvania in March 1979, President Jimmy Carter visited, people were warned to stay out of the area, and cleanup ensued immediately.²¹⁸ The plant paid the majority white neighborhood near the reactor \$25 million.²¹⁹ This dwarfed the \$525,000 out-of-court settlement in Church Rock—where three times more radiation was released than in Pennsylvania.²²⁰

While cleanup at Three Mile Island took over 12 years and cost approximately \$973 million,²²¹ proper cleanup has never taken place in Church Rock. Hundreds of abandoned uranium mines and four inactive uranium mills in Navajo Nation “continued to degrade the local environment—contaminating soil, plant life, and water, as well as the livestock that depend on clean food and water sources.”²²² One resident explained that uranium ore was piled beside the road and never taken care of, showing “[t]hey thought of us Navajo people as nothing.”²²³ The Environmental Protection Agency (EPA) insists cleanup is occurring,²²⁴ but Navajo citizens tell a different story. In fact, the EPA has proposed to Church Rock residents that they move to the nearby city of Gallup.²²⁵ But this would require citizens to live outside of Navajo Nation and adjust to a new life. In the eyes of Navajo citizen Esther Yazzie-Lewis, this proposal is “like the Trail of Tears . . . like the long walk. Indian people are being removed and Indian people are being uprooted . . . to me, that’s genocide.”²²⁶ Thus, the U.S. government and companies do not treat Native land differently than they did in the 19th century. In fact, the term “radioactive colonialism” has been used to describe “a new form of North American colonialism directed toward technologically oriented resource extraction on Indian reservations.”²²⁷ While technology has changed, the impact of *Johnson* and other law lives on.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *The TMI-2 Cleanup: Challenging and Successful*, AM. NUCLEAR SOC’Y (July 11, 2012, 10:46 AM), <https://ans.org/pi/resources/sptopics/tmi/cleanup.php>. Cleanup was so extensive, the National Society of Professional Engineers said in February 1991 the project was a top U.S. engineering achievement during 1990.

²²² Markstrom & Charley, *supra* note 193, at 95.

²²³ *Id.*; see also Chakraborty & Hirsch, *supra* note 199 (quoting Navajo citizen Edith Hood as saying, “Over here . . . we’re . . . treated like a third world. It’s not cleaned up . . . it’s been here 40 years”).

²²⁴ *Northeast Church Rock Mine*, EPA, <https://www.epa.gov/navajo-nation-uranium-cleanup/northeast-church-rock-mine> (last updated Sept. 19, 2022).

²²⁵ Chakraborty & Hirsch, *supra* note 199.

²²⁶ *Id.*

²²⁷ Markstrom & Charley, *supra* note 193, at 103 (quoting Churchill, *supra* note 193).

B. Not Too Dangerous for the Reservations: Fighting the Dakota Access and Line 3 Pipelines

Pipelines are another type of natural resource technology widely used on Native land to the detriment of Native nations. While pipelines threaten reservation land, they also threaten land near the reservation where Native nations have the right to natural resources through hunting, fishing, and gathering on federally and privately owned land.²²⁸ Two pipelines that have exposed flaws in the way federal agencies and local governments interact with Native nations and those who protest the projects that would violate government promises are the Dakota Access and Line 3 pipelines. Both projects show how past laws and decisions about Native nations continue to haunt present-day Native land rights.

The Dakota Access pipeline displayed a lack of effective consultation with Native Americans and effective consideration of Native American rights. This lacking effort from the U.S. government and federal agencies brought water protectors and other protestors together on the Standing Rock Sioux Reservation to protest the expansion of the pipeline.²²⁹ The proposed pipeline did not cross existing reservation land, but the construction would be within a half mile of the reservation, threaten water that is imperative for the Sioux, and pose danger to Sioux cultural, religious, and spiritual sites near the pipeline path.²³⁰

In addition to the pipeline's threats, government approval of the project echoes 19th and 20th century treatment of Native nations.²³¹ In 2016, Sioux Nation moved for an emergency injunction to halt construction because of possible harm to cultural sites that was overlooked during the pipeline's approval.²³² The U.S. District Court for the District of Columbia denied the motion.²³³ The court determined Sioux citizens were unlikely to "suffer irreparable harm" from pipeline construction.²³⁴ The case was appealed and the injunction again denied by the D.C. Circuit.²³⁵ However, at the end of 2016, the Army Corps of Engineers announced it would not grant an easement needed for

²²⁸ Elizabeth Kronk Warner, Kathy Lynn & Kyle Whyte, *Changing Consultation*, 54 U.C. DAVIS L. REV. 1127, 1134 (2020).

²²⁹ *Id.* at 1166.

²³⁰ *Id.* at 1167.

²³¹ *Id.* at 1169 (explaining that "federal approval of the Dakota Access Pipeline offers another example in a long history of the federal government acting to the detriment of Indigenous people").

²³² *Id.*

²³³ *Id.* The court held that the Corps completed their duty.

²³⁴ *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 205 F. Supp. 3d 4, 26–27 (D.D.C. 2016).

²³⁵ Warner, Lynn & Whyte, *supra* note 228, at 1171.

the Dakota Access Pipeline to cross Lake Oahe.²³⁶ But this decision did not last long, because on January 24, 2017, President Trump released a memorandum to “review and approve in an expedited manner . . . requests for approvals to construct and operate” the pipeline.²³⁷ The Sioux submitted another claim in 2016, alleging that the Environmental Assessment prepared for the pipeline did not comply with the National Environmental Policy Act.²³⁸ Many arguments of the claim were rejected, but the court agreed that the Corps “failed to adequately consider the impacts of an oil spill on Standing Rock’s fishing and hunting rights and on environmental justice, and . . . it did not sufficiently weigh the degree to which the pipeline’s effects [were] likely to be highly controversial”²³⁹

The pipeline continues to face challenges,²⁴⁰ but it has been allowed to operate during many review processes and assessments. This is frustrating because companies and federal agencies have not adequately considered the project’s impact on Native nations and Native land. Native nations were also disregarded when the pipeline was deemed to be too dangerous for other populations. As James Grijalva explains, the Environmental Assessment did not “confront the health and cultural impacts of contaminating the Reservation’s largest water body and its shorelines” and “instead re-emphasized the pipeline’s off-Reservation location” and “the very low likelihood of spills.”²⁴¹ However, this low likelihood was enough to reject the originally planned route north of the state capital of Bismarck—which has a population that is over 90% White.²⁴² The Army Corps of Engineers deemed the original route “would endanger the municipal water supply of a ‘high consequence area.’”²⁴³ Thus, once again, Native Americans were burdened by a project that was deemed too harmful for

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 255 F. Supp. 3d 101, 111 (D.D.C. 2017).

²³⁹ *Id.* at 147.

²⁴⁰ See Lawrence Hurley, *Dakota Access Pipeline Suffers U.S. Supreme Court Setback*, REUTERS, (Feb. 22, 2022, 11:02 AM), <https://www.reuters.com/business/energy/us-supreme-court-turns-away-dakota-pipeline-operators-appeal-2022-02-22/>. The United States Supreme Court rejected a case from pipeline operator Energy Transfer LP that sought to avoid an additional environmental review mandated by Judge Boasberg in *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, No. 16-1534, 2020 WL 3634426, at *1 (D.D.C. July 6, 2020).

²⁴¹ James M. Grijalva, *Resistance, Resilience and Reconciliation: Indigenous Human Rights to Environmental Protection in a Fossil Fuel Frenzy*, JURIST (Apr. 11, 2017, 3:43 PM), <https://www.jurist.org/commentary/2017/04/resistance-resilience-and-reconciliation-indigenous-human-rights-to-environmental-protection-in-a-frenzy/#>.

²⁴² SAITO, *supra* note 6, at 75.

²⁴³ *Id.*

a predominantly white population, an act that Reverend Jesse Jackson called “the ripest case of environmental racism [he had] seen in a long time.”²⁴⁴

As the Dakota Access Pipeline fight continues, Native Americans in Fond du Lac, Minnesota have been fighting against the extension of the Line 3 pipeline. Line 3 is constructed by Canadian company Enbridge from Canada’s oil sands region to Lake Superior’s western tip near the Minnesota-Wisconsin border.²⁴⁵ The current project would replace the existing Line 3 that was built in the 1960s.²⁴⁶ Native nations are opposed to the project because it will threaten hunting, fishing, and gathering rights on land beyond reservation lines that were recognized through treaties with the U.S. government.²⁴⁷ These concerns are not unfounded. Enbridge projects have been responsible for over 800 spills in the last 15 years.²⁴⁸ Additionally, the biggest inland oil spill in U.S. history occurred from the existing Line 3 in 1991 near Grand Rapids, Minnesota.²⁴⁹

The new Line 3 pipeline threatens to further the “structural racism” toward Native American communities.²⁵⁰ The Environmental Impact Statement for the project says its impacts “would be an additional health stressor on tribal communities that already face overwhelming health disparities and inequities.”²⁵¹ This disparity and inequity can be seen through statistics that show how Native Americans face high rates of suicide, persistent poverty, and major drug epidemics, which have been “linked . . . directly to historic trauma, the history of colonization, and negative impacts of megaprojects.”²⁵² In fact, the Amherst H. Wilder Foundation from St. Paul, Minnesota, reported that “evidence strongly suggests that social and economic conditions and

²⁴⁴ *Id.*

²⁴⁵ *The Line 3 Oil Pipeline Project: What You Need to Know*, MINN. PUB. RADIO (July 16, 2021, 11:17 AM), <https://www.mprnews.org/story/2021/07/16/the-line-3-oil-pipeline-project-what-you-need-to-know>.

²⁴⁶ *Id.*

²⁴⁷ *Line 3: Tara Houska, Winona LaDuke, Ahnacole Chapman, and Switchboard Trainers Network v. County of Hubbard, Corwin Aukes, and Mark Lohmeier*, EARTHRIGHTS INT’L, <https://earthrights.org/case/line-3-cases/?gclid=Cj0KCQiAhf2MBhDNARIsAKXU5GQ07xnK8zirIDIljgD2Cu7tOxmBgS3mZnO9EKfU5iYhaKAvghiFW9YaAu78> (last visited Sept. 27, 2022). The Anishinaabe signed treaties with the U.S. in the mid-1800s. It exchanged for promises of money, schooling, goods, and the right to hunt, fish, and gather and harvest wild rice on ceded land. These treaty rights still exist and are threatened by pipeline hazards.

²⁴⁸ *Issues: Spill Impacts*, STOP LINE 3, <https://www.stopline3.org/issues/#spill> (last visited Sept. 27, 2022).

²⁴⁹ *The Line 3 Oil Pipeline Project: What You Need to Know*, *supra* note 245.

²⁵⁰ *Issues: Spill Impacts*, *supra* note 248.

²⁵¹ *Id.*

²⁵² *Id.*

structural racism contribute significantly to the relatively poor health outcomes of the American Indian population in Minnesota.”²⁵³ With these ideas in mind, permitting Line 3 to be built is—in the words of novelist and Turtle Mountain Band of Chippewa member Louise Erdrich—a “breathtaking betrayal” in which “Minnesota’s pollution control and public utility agencies refused to take the future of our lakes into account, or to consider treaty rights.”²⁵⁴

Along with disregard for treaty rights and environmental impact, Enbridge and local law enforcement have worked to target Line 3 protestors severely. Enbridge has paid Minnesota police over \$2 million to enforce laws that target protestors.²⁵⁵ The company paid for officer training, police surveillance, wages, overtime, benefits, meals, hotels, and equipment.²⁵⁶ Lauren Regan, executive director and senior attorney at the Civil Liberties Defense Center, says that protestors have also faced harsh charges, even though their actions “have been nonviolent and fairly run-of-the-mill acts of civil disobedience.”²⁵⁷ She said the state has been “getting real creative in sticking felonies to people that we would not expect otherwise to have felonies.”²⁵⁸ This treatment has been criticized, because as Red Lake Nation citizen Simone Senogles explained, “You wish [the police] were actually there to protect and serve us, and not to protect and serve a pipeline and a company.”²⁵⁹ She said this police behavior is “the antithesis of democracy.”²⁶⁰

Both of these pipeline projects show not only a disregard for Native nations, but also an inability to provide clear policy when approving projects. The government and agencies alike have been swayed by companies—just as the hunger for land from white settlers swayed the Executive, Court, and Congress. These projects make it is easy to see that more work must be done to ensure that

²⁵³ *Id.* The Amherst H. Wilder Foundation defines structural racism as “the normalization of historical, cultural, institutional and interpersonal dynamics that routinely advantage white people while producing cumulative and chronic adverse outcomes for people of color and American Indians.”

²⁵⁴ Louise Erdrich, Opinion, *Not Just Another Pipeline*, N.Y. TIMES (Dec. 28, 2020), <https://www.nytimes.com/2020/12/28/opinion/minnesota-line-3-enbridge-pipeline.html>.

²⁵⁵ Kaylana Mueller-Hsia, *How an Oil Company Pays Police to Target Pipeline Protestors*, BRENNAN CTR. FOR JUST. (Oct. 7, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/how-oil-company-pays-police-target-pipeline-protesters>.

²⁵⁶ Hilary Beaumont, *Revealed: Pipeline Company Paid Minnesota Police for Arresting and Surveilling Protestors*, GUARDIAN (Oct. 5, 2021, 7:00 AM), <https://www.theguardian.com/uk-news/2021/oct/05/line-3-pipeline-enbridge-paid-police-arrest-protesters>.

²⁵⁷ Kristi Marohn, *Criminal Cases Against Line 3 Protestors Clog Court System*, U.S. NEWS & WORLD REP., (Oct. 4, 2021), <https://www.usnews.com/news/best-states/minnesota/articles/2021-10-04/criminal-cases-against-line-3-protesters-clog-court-system>.

²⁵⁸ *Id.*

²⁵⁹ Beaumont, *supra* note 256.

²⁶⁰ *Id.*

Native Americans can be more involved in what happens on their land and that projects do not adversely impact Native land rights that should be protected by treaties or other law.²⁶¹

IV. DISMANTLING THE RACISM THAT BUILT FEDERAL INDIAN LAW

As scholar Dorothy E. Roberts wondered, “How do we rectify a system that so brilliantly serves its intended purpose?”²⁶² It would be easy to conclude that not much can change after over 200 years of denied rights because as Joseph Singer explained, “‘the law continues to confer—and withhold—property rights in a way that provides less protection’ for American Indian nations than non-Indian individuals or entities.”²⁶³ But simply accepting unjust laws will only contribute to the continued denial of Native land rights. More must be done to rid the law of its racist foundation, raise awareness about the law and its impact, and hold the government to the promises it made.

A. Revisit *Johnson v. M’Intosh*

To truly reform Federal Indian Law, the Supreme Court must revisit *Johnson v. M’Intosh*. Such action is imperative because Native American “rights will never be justly protected by any legal system or any civil society that continues to talk about [them] as if they are uncivilized, unsophisticated, and lawless savages.”²⁶⁴ Although American law has changed greatly since the country’s founding, the same cannot truly be said about law concerning Native Americans. This is a problem because “an independent judiciary must provide a legal bulwark against encroachments upon Native peoples.”²⁶⁵ Issues arise “[w]hen they fail to do so,” because “the tyranny of the majority can do great harm, even in a democratic form of government.”²⁶⁶ But history shows a trend of the Supreme Court failing to serve as this necessary legal bulwark.

The fact that *Johnson* remains good law also diverges from the Supreme Court’s history of addressing prejudicial precedent. In 1954, the Supreme Court

²⁶¹ For a deeper discussion of the history of federal consultation with Native nations and an examination of how meaningful consultation might occur, see Michael C. Blumm & Lizzy Pennock, *Tribal Consultation: Toward Meaningful Collaboration with the Federal Government*, 33 COLO. ENV’T L. J. 1 (2022).

²⁶² SAITO, *supra* note 6, at 1.

²⁶³ *Id.* at 77.

²⁶⁴ WILLIAMS, *supra* note 10, at xxviii.

²⁶⁵ ECHO-HAWK, *supra* note 4, at 116.

²⁶⁶ *Id.*

overruled *Plessy v. Ferguson*²⁶⁷ in *Brown v. Board of Education*²⁶⁸ and held that separate but equal “has no place” in America.²⁶⁹ And as recently as 2018, the Supreme Court took the same approach and used the same language in overruling *Korematsu v. United States*²⁷⁰ in *Trump v. Hawaii*.²⁷¹ In the majority opinion, Chief Justice Roberts wrote that “*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—”has no place in law under the Constitution.”²⁷² Therefore, the Court has recognized in the past when racist opinions need to be addressed. Some believe that *Johnson* should be overturned altogether.²⁷³ Others, however, argue that *Johnson* should remain the law and be analyzed in more than one way.²⁷⁴ At the very least, the Supreme Court should acknowledge the opinion’s language and address how the

²⁶⁷ 163 U.S. 537 (1896).

²⁶⁸ 347 U.S. 483 (1954).

²⁶⁹ *Id.* at 495.

²⁷⁰ 323 U.S. 214 (1944); see also Charlie Savage, *Korematsu, Notorious Supreme Court Ruling on Japanese Internment, Is Finally Tossed Out*, N.Y. TIMES, (June 26, 2018), <https://www.nytimes.com/2018/06/26/us/korematsu-supreme-court-ruling.html>. This decision that upheld the legality of putting Japanese Americans in internment camps during World War II had “long stood out as a stain that [was] almost universally recognized as a shameful mistake.” Despite this fact, the case remained law “because no case gave justices a good opportunity to overrule it.”

²⁷¹ 138 S. Ct. 2392 (2018).

²⁷² *Id.* at 2423. Although this language is encouraging, this overruling of racist precedent did occur in another case cloaked in racism and stereotypes. *Trump v. Hawaii* upheld President Trump’s travel ban for individuals from several predominantly Muslim countries; see also Savage, *supra* note 270. The context of this overruling was concerning for many practitioners and scholars. Among these individuals, Hiroshi Motomura, a UCLA law professor who writes and researches about immigration, explained that “Overruling *Korematsu* the way the court did . . . reduces the overruling to symbolism that is so bare . . . given the parts of the reasoning behind *Korematsu* that live on in today’s decision: a willingness to paint with a broad brush by nationality, race or religion by claiming national security grounds.” *Id.*

²⁷³ See ECHO-HAWK, *supra* note 4, at 439–40 (explaining that “it is necessary for the Supreme Court to voluntarily [overturn *Johnson*] in a proper case so the justices can confront the dark side of the law and purge the Court” because the “doctrines of discovery and conquest were espoused . . . to dispossess and subjugate American Indian tribes . . . and continue to undermine their governments, property, and well-being today”).

²⁷⁴ See Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 ALB. GOV’T L. REV. 1 (2017). Singer argues that despite its stereotypes and language, *Johnson* is actually a critique of conquest, and thus should stay the law because “[i]f a case is unlikely to be overruled and it can be read to support the interests of an oppressed group, then reading it as unrelentingly hostile to that group’s interest throws a potential weapon away.” *Id.* at 4. Singer acknowledges that it would be “injustice” to “act in ignorance of the ways land titles originated in the United States,” and explains that unless the United States recognizes the “principle of first possession,” the country will be “condemned to continue to engage in dispossession.” *Id.* at 40, 48.

doctrine of conquest should not remain a part of this country's law. While a case with the requisite facts would be necessary for the Court to take such action, it could be possible that current issues surrounding natural resource projects could offer these facts. *Johnson* said that Native Americans do not have the ability to sell land to others, but projects such as mining for natural resources and constructing natural gas pipelines present issues related to Native land rights that were promised for the rest of time. Therefore, taking resources from Native land presents issues related to how Native nations should be better involved and compensated.

McGirt's momentum could also help further such an argument. But *McGirt*'s influence does not guarantee a win. This is because the recognition of reservation land in *McGirt* occurred in the context of criminal law. Despite Justice Gorsuch's artistic language at the beginning of the majority opinion, he makes it clear that "the land . . . remains an Indian reservation for purposes of federal criminal law."²⁷⁵ Therefore, this recognition does not give land back or provide Native nations a say over what happens on Native land. "However, the recognition of Native land in *McGirt* is a stable foundation for an argument to overturn or at least revisit *Johnson*."

B. Increase Awareness Among the Legal Community

Although revisiting racist opinions is the best way to address the stereotypes supporting Federal Indian Law, individuals at all levels of the legal system must address the history of injustice and acknowledge the ways this injustice is being perpetuated in the present. This effort is imperative because "[d]enial allows us to completely discount the impossibility of injustice."²⁷⁶ Even while these opinions remain on the books, attention can be directed toward increasing awareness about the principles that these opinions stand for. If the legal community recognizes the substance and context of these cases, perhaps reliance on them will dwindle. Two ways this can occur is by making distinctions in footnotes when racist Indian law is cited and by better educating the legal community about the damage that continued reliance on these opinions causes.

Using footnotes to draw attention to racist opinions is gaining traction and could be applied to cases about the rights of Native nations. Currently, efforts are underway to fight racial bias by identifying and pointing out when modern cases cite opinions that involve enslaved people.²⁷⁷ Michigan State University

²⁷⁵ *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020) (emphasis added).

²⁷⁶ SAITO, *supra* note 6, at 66.

²⁷⁷ See Justin Wm. Moyer, *Fighting Racial Bias With An Unlikely Weapon: Footnotes*, WASH. POST (Jan. 18, 2022, 9:00 AM), https://www.washingtonpost.com/lifestyle/magazine/fighting-racial-bias-with-an-unlikely-weapon-footnotes/2022/01/14/e85696c2-432c-11ec-9ea7-3eb2406a2e24_story.html.

professor and legal historian Justin Simard serves as Director of the Citing Slavery Project.²⁷⁸ This project presents a database of “slaves cases and the modern cases that continue to cite them as precedent.”²⁷⁹ Simard has also worked with Bluebook editors to create rules about how to cite slave cases.²⁸⁰ Starting with the 2021 edition, Bluebook rule 10.7.1(d) requires a certain parenthetical to identify cases involving slavery.²⁸¹ When a party in a case was enslaved, an “(enslaved party)” parenthetical is required, and for cases that discuss enslaved people as the subject of a property or other legal dispute who are not parties, a parenthetical of “(enslaved person at issue)” should be used.²⁸² Although this change is small, it is not meaningless. Some critics of this parenthetical rule argue that the change will only impact lawyers and that even this group of people will eventually become used to the parentheticals and overlook them.²⁸³ However, as Julie Graves Krishnaswami—Yale Law School’s head of research instruction—explains, “[a]uthority is important,” and “[n]aming in citation is linked to how a discourse is shaped, how a field is shaped, and how one was placed in the hierarchy.”²⁸⁴ Therefore, even if some individuals would come to overlook the parentheticals, the citations could still impact the way cases are viewed and the way those cases influence the opinions in which they are cited.

Current Federal Indian Law discourse can also possibly be changed by implementing a similar practice for early cases involving Native Americans and their rights. This could raise awareness of the stereotypes and paternalistic language inherent in Indian Law’s foundation and increase support for the Supreme Court to overrule *Johnson*’s reliance on such language and stereotypes like it has with racist precedent in recent years. Using this rule may help to change the trend of using outdated concepts that further damages Native Americans and also illuminate inconsistencies in American property law. This is important because as retired attorney Harold Henderson says, “[k]nowledge is empowering.”²⁸⁵ Parentheticals are small, but like Henderson explains, “If we get researchers working—if we get academics pressing the issue and following

²⁷⁸ *Id.*

²⁷⁹ See *Court Cases*, CITING SLAVERY PROJECT, https://www.citing-slavery.org/court_cases (last visited Mar. 21, 2022).

²⁸⁰ Moyer, *supra* note 277.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.* (quoting University of Chicago law professor Will Baude’s concern that “[i]f we get used to seeing ‘slavery yada, yada, yada’ every time . . . that’s a harm”).

²⁸⁴ *Id.*

²⁸⁵ *Id.*

up on it, giving input and guidance—the next generation will be much better informed.”²⁸⁶

Law schools can also improve the overall knowledge about these cases by providing information to law students—the individuals who are most likely to interact with these opinions in their careers. *Johnson* “isn’t some obscure case.”²⁸⁷ Rather, it’s “foundational in the U.S. legal system,” and “[m]ost law schools teach it to all their students in the first year.”²⁸⁸ While law schools inform students of the case’s existence by teaching it, some individuals feel that this is not enough.²⁸⁹ According to Wenona Singel, “in many ways,” learning about *Johnson* is “almost like gaslighting.”²⁹⁰ She explains that especially when discovering this case in a first year class like Property, students are “learning about . . . certain rights that are associated with property rights—the right of possession, the right to exclude, the right to transfer,” while knowing that because of *Johnson*, “all along . . . these rights have not been respected, and were not enforced for your own ancestors.”²⁹¹ Therefore, when law schools teach *Johnson*—and even other cases from the Marshall Trilogy or later Supreme Court opinions that cite *Johnson*—they should discuss the opinion’s hypocrisy, its position in the American system of property rights, and its impact on Native nations.

C. Acknowledge and Honor Treaties

The United States government can also move forward after centuries of violations against Native nations by acknowledging past treaty violations.²⁹² In November 1972, the Trail of Broken Treaties caravan proposed such action with its “Twenty Points” solution to address challenges facing the Native American community.²⁹³ The fourth point in the document asked for a commission to review treaty violations of the past and present and for procedures to be set up to review chronic treaty violations by both the states and the federal

²⁸⁶ *Id.*

²⁸⁷ Dwyer, *supra* note 87.

²⁸⁸ *Id.*

²⁸⁹ *Id.* (quoting Harvard graduate, professor, and associate director of Michigan State University’s Indigenous Law and Policy Center, Wenona Singel, as explaining that she learned about *Johnson* as a 1L student and that after reading the opinion, “you move on . . . [a]nd there’s no further discussion of the wrong that this perpetuates . . . the flawed reasoning . . . [the] fundamentally misinformed and racist presumptions that our property legal system is based upon”).

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² See DELORIA, *supra* note 35, at 48–49.

²⁹³ *Id.* at vii.

government.”²⁹⁴ Although this suggestion was not embraced in the 1970s, it could and should be proposed once again.

While the government cannot restore land that was taken, it can comply with obligations it promised to shoulder centuries ago and ensure that what land is left is protected as it should have been years ago. But apologies alone will not fully account for existing land damage. Native nations must be more involved in decisions about how their land and the areas surrounding this land are used. This includes involvement in the approval process for natural resource projects and studies that determine the environmental, economic, and social impacts that large-scale projects will have on citizens of Native nations. Additionally, when studies express possible dangers for Native nations, the government, administrative agencies, and courts should heed these warnings. Involving Native nations in discussions and decisions about how Native land is used will keep Native nations from being confined to wards of the U.S. and let them be understood and heard.

V. CONCLUSION

To properly honor the rights of Native nations, Federal Indian Law’s creation and implementation must be re-examined. This reexamination shows how Indian Law was not created in a vacuum and how the treatment of Native nations conflicts with American ideals. As Cherokee Nation citizen Rebecca Nagle said, “We’re used to thinking about the history of the United States as a story of progress, that our country has continued to strive closer and closer to its founding promise: justice and liberty for all.”²⁹⁵ However, the treatment of Native nations shows that such a “narrative is hard to square with Native history.”²⁹⁶ Nagle’s observation that the Cherokee Nation “had more land, more rights, and more autonomy in 1890 than it does today”²⁹⁷ displays the disastrous effects of building Federal Indian Law on misguided stereotypes and the “doctrine of discovery.”

Although the path of destruction from treaties, cases, and legislation—especially since *Johnson*—is clear, acting as if this destruction remains in the past will not address prevailing issues. This is because “if real Indians exist(ed) only in the past, nothing needs to be done in the present” and “when Indigenous peoples’ ‘defeat is irretrievably located in the past, their activism in the present is [rendered] illegitimate.’”²⁹⁸ Therefore, we must look at how Federal Indian

²⁹⁴ *Id.* at 48–49.

²⁹⁵ *This Land: Still Bleeding*, *supra* note 60.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ SAITO, *supra* note 6, at 74.

Law was shaped, address how these forces from the past are still at work almost a quarter through the 21st century, and work to reform the racist foundations of Federal Indian Law.

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