Update

Richotte's Federal Indian Law and Policy: An Introduction, 1st ed.

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Introduction

In the four years since the original publication of the textbook the Supreme Court has handed down a few noteworthy cases that have significantly altered the legal landscape for Native America. In an effort to maintain the continuing relevancy of the textbook, I offer this Update for instructors. It will chronicle a number of cases in the order in which they would appear were they to be included in the main body of the textbook. Each case is noted by its title and followed by the year it was decided and the chapter in which it would fit.

This Update will be concise and will concentrate on noteworthy cases and significant developments in the doctrine. It is not meant to be a comprehensive addendum or revision of any of the specific chapters, nor will it offer quite the same level of context and exposition that is found in the main body of the textbook. Rather, it will be a to-the-point description of the pertinent cases and changes in the law. While it will include some excerpts from the cases themselves, the cases that are excerpted will generally be shorter than those found in the main body of the textbook and will focus on the doctrine developed in the case. Not every case will be excerpted for reasons explained in this Update.

Even in this truncated form, it may be useful to assign this Update to your students. However, I if you do assign it I suggest that you also find easily accessible additional materials (newspaper/website articles, scholarly works, podcasts, etc.) to give students the type of greater context that the main body of the textbook would otherwise provide. Pertinent and useful

secondary materials are not difficult to find for any of these cases. I suggest starting with the Turtle Talk and SCOTUS Blog websites if you are looking for more specialized commentary, however most major media outlets have devoted a surprising amount of coverage to many of these cases as well. If you are a bit more adventurous, media savvy, and unfazed by salty language you might even consult the This Land podcast for compelling breakdowns on the *McGirt* and *Brackeen* cases as well as individual episodes of the 5-4 podcast on *Castro-Huerta* and *Adoptive Couple v. Baby Girl*.

I hope that this Update is useful. As always, I am happy to communicate with you, answer any questions, offer any further advice, or accept any feedback. Please reach out to me at richotte@email.unc.edu. Thank you for using the textbook and consulting this Update.

Denezpi v. United States, 2022 (Chapter 12 – Indians and the U.S. Constitution)

In *Denezpi*, the Supreme Court ruled that a conviction in the Court of Indian Offenses, or CFR (Court of Federal Regulations) court, did not invoke the Double Jeopardy Clause of the U.S. Constitution and, thus, did not bar a subsequent prosecution in federal court. As described in Chapter 12, the Double Jeopardy Clause of the U.S. Constitution bars the federal government and state governments "from engaging in a second or subsequent criminal prosecution for a particular incident." In short, *Denezpi* stands for the proposition that a prosecution in a CFR court does not bar a federal prosecution for the same incident.

Put bluntly, *Denezpi* is the more complicated cousin of the *Wheeler* case found in Chapter 12 and is less well suited to the purposes of this textbook. Both cases assert that tribal prosecutions are not federal in nature and thus do not invoke Double Jeopardy for subsequent federal prosecutions (*Denezpi* does so over a vigorous dissent from Justice Gorsuch). *Denezpi* would be a terrific case to demonstrate how the legacy of Allotment Era policies and practices continue to haunt Native America and American law to this day; however, there are several cases in the main textbook that accomplish this same goal. In addition, (as Justice Barrett's majority opinion notes) there are very few CFR courts left and this case does not advance the law far enough from the basic holding in *Wheeler* to warrant an excerpt in this Update. That being noted, if you are in or near a part of Native America that continues to employ a CFR court, it may be worth studying (or at least addressing) *Denezpi*.

Arizona v. Navajo Nation, 2023 (Chapter 14 – Trust Responsibility and/or Chapter 26 – Natural Resources)

This case perhaps most naturally fits in Chapter 14 Trust Responsibility but can also comfortably work within Chapter 26 – Natural Resources. In either chapter, the case demonstrates the difficulties tribal nations face in holding the federal government to its promises.

Arizona v. Navajo Nation

143 S. Ct. 1804, 599 U.S. 555 (2023)

Justice Kavanaugh delivered the opinion of the Court.

* * *

The question in this suit concerns "reserved water rights"—a shorthand for the water rights implicitly reserved to accomplish the purpose of the reservation. The Navajos' claim is not that the United States has *interfered* with their water access. Instead, the Navajos contend that the treaty requires the United States to *take affirmative steps* to secure water for the Navajos—for example, by assessing the Tribe's water needs, developing a plan to secure the needed water, and potentially building pipelines, pumps, wells, or other water infrastructure—either to facilitate better access to water on the reservation or to transport off-reservation water onto the reservation. In light of the treaty's text and history, we conclude that the treaty does not require the United States to take those affirmative steps. And it is not the Judiciary's role to rewrite and update this 155-year-old treaty. Rather, Congress and the President may enact—and often have

enacted—laws to assist the citizens of the western United States, including the Navajos, with their water needs.

* * *

Much of the western United States is arid. Water has long been scarce, and the problem is getting worse. From 2000 through 2022, the region faced the driest 23-year period in more than a century and one of the driest periods in the last 1,200 years. And the situation is expected to grow more severe in future years. So even though the Navajo Reservation encompasses numerous water sources and the Tribe has the right to use needed water from those sources, the Navajos face the same water scarcity problem that many in the western United States face.

Over the decades, the Federal Government has taken various steps to assist the people in the western States with their water needs. The Solicitor General explains that, for the Navajo Tribe in particular, the Federal Government has secured hundreds of thousands of acre-feet of water and authorized billions of dollars for water infrastructure on the Navajo Reservation.

In the Navajos' view, however, those efforts did not fully satisfy the United States's obligations…. The Navajos therefore sued the U. S. Department of the Interior, the Bureau of Indian Affairs, and other federal parties. As relevant here, the Navajos asserted a breach-of-trust claim arising out of the 1868 treaty and sought to "compel the Federal Defendants to determine the water required to meet the needs" of the Navajos in Arizona and to "devise a plan to meet those needs."…

According to the Navajos, the United States must do more than simply not *interfere* with the reserved water rights. The Tribe argues that the United States also must *take affirmative steps* to secure water for the Tribe— including by assessing the Tribe's water needs, developing

a plan to secure the needed water, and potentially building pipelines, pumps, wells, or other water infrastructure.

The Tribe asserts a breach-of-trust claim. To maintain such a claim here, the Tribe must establish, among other things, that the text of a treaty, statute, or regulation imposed certain duties on the United States. The Federal Government owes judicially enforceable duties to a tribe "only to the extent it expressly accepts those responsibilities." Whether the Government has expressly accepted such obligations "must train on specific rights-creating or duty-imposing" language in a treaty, statute, or regulation. That requirement follows from separation of powers principles. As this Court recognized in *Jicarilla*, Congress and the President exercise the "sovereign function" of organizing and managing "the Indian trust relationship." So the federal courts in turn must adhere to the text of the relevant law—here, the treaty.

In the Tribe's view, the 1868 treaty imposed a duty on the United States to take affirmative steps to secure water for the Navajos. With respect, the Tribe is incorrect. The 1868 treaty "set apart" a reservation for the "use and occupation of the Navajo tribe." But it contained no "rights-creating or duty-imposing" language that imposed a duty on the United States to take affirmative steps to secure water for the Tribe.

Notably, the 1868 treaty did impose a number of specific duties on the United States…

But the treaty said nothing about any affirmative duty for the United States to secure water. And as this Court has stated, "Indian treaties cannot be rewritten or expanded beyond their clear terms." So it is here.

* * *

Justice Thomas, concurring.

I join the Court's opinion in full, but write separately to highlight an additional and troubling aspect of this suit. For decades, this Court has referred to "a general trust relationship between the United States and the Indian people."

* * *

The influence of the "trust relationship" idea on these doctrinal areas is troubling, as the trust relationship appears to lack any real support in or constitutional system. The text of the Constitution (which mentions Indians only in the contexts of commerce and apportionment) is completely silent on any such trust relationship. … In short, the idea of a generic trust relationship with all tribes – to say nothing of legally enforceable fiduciary duties – seems to lack a historical or constitutional basis.

* * *

Justice Gorsuch, with whom Justice Sotomayor, Justice Kagan, and Justice Jackson join, dissenting.

Today, the Court rejects a request the Navajo Nation never made. This case is not about compelling the federal government to take "*affirmative steps* to secure water for the Navajos." Respectfully, the relief the Tribe seeks is far more modest. Everyone agrees the Navajo received enforceable water rights by treaty. Everyone agrees the United States holds some of those water rights in trust on the Tribe's behalf. And everyone agrees the extent of those rights has never been assessed. Adding those pieces together, the Navajo have a simple ask: They want the United States to identify the water rights it holds for them. And if the United States has misappropriated the Navajo's water rights, the Tribe asks it to formulate a plan to stop doing so prospectively. Because there is nothing remarkable about any of this, I would affirm the Ninth Circuit's judgment and allow the Navajo's case to proceed.

* * *

The United States acknowledges that it holds certain water rights "in trust" for the Navajo. It does not dispute that it exercises considerable control over the disposition of water from the Colorado River. And it concedes that the Navajo's water rights "may … include some portion of the mainstream of the Colorado." But instead of resolving what the Navajo's water rights might be, the United States has sometimes resisted efforts to answer that question.

* * *

With a view of this history, the proper outcome of today's case follows directly. The Treaty of 1868 promises the Navajo a "permanent home." That promise – read in conjunction with other provisions in the Treaty, the history surrounding its enactment, and background principles of Indian law – secures for the Navajo some measure of water rights. Yet even today the extent of those water rights remains unadjudicated and therefore unknown. What is known is that the United States holds some of the Tribe's water rights in trust. And it exercises control over many possible sources of water in which the Tribe may have rights, including the mainstream of the Colorado River. Accordingly, the government owes the Tribe a duty to manage the water it holds for the Tribe in a legally responsible manner. In this lawsuit, the Navajo ask the United States to fulfil part of that duty by assessing what water rights it holds for them. The government owes the Tribe at least that much.

* * *

Whether concerning the trust responsibility or natural resources, this case demonstrates the high bar that tribes face in provoking the federal government to action. It is also worth considering how both the majority and dissent describe the problem. Whereas Justice Brett

Kavanaugh emphasizes what the federal government has already done, Justice Neil Gorsuch emphasizes what the federal government has yet to do. Does either context fully illuminate the problem at hand? Furthermore, it is another opportunity to connect to other parts of the textbook. Most specifically the canons of construction detailed in Chapter 11. Is this an appropriate case for the canons? Why don't they play a more prominent role?

It is also worth noting that this excerpt is very minimal and, while the case as a whole is a setback for the Navajo, it may not be the final word on the issue. Others, including Gorsuch in the dissent, have noted other potential avenues that might lead the Navajo to their desired result. Nonetheless, the case is yet another marker defining the scope of the trust responsibility to the narrow confines of what the United States has affirmatively taken on as understood by the Supreme Court.

McGirt v. Oklahoma, 2002 (Chapter 16 – Diminishment)

Before proceeding it is important to note that this section of the Update can replace the *Sharp v. Murphy* section at the end of Chapter 16. *Sharp v. Murphy* essentially became *McGirt* for a couple of key reasons. The Supreme Court kept delaying a decision in *Sharp v. Murphy* with most observers believing that the Court was deadlocked with four justices deciding for tribal interests and four against tribal interests. The recently appointed Justice Neil Gorsuch recused himself from the case because he had taken part in a previous iteration of the litigation when he was serving as a 10th Circuit judge. When *McGirt* arrived at the Supreme Court, with its similar fact pattern and legal question to *Sharp v. Murphy*, the justices were able to move forward with Gorsuch as the likely deciding vote.

McGirt was probably the most publicized and anticipated case in the history of this body of law. It was the subject of numerous media accounts, including the first season of the well regarded This Land podcast. In short, Jimcy McGirt was convicted of a serious sexual offence in state court. McGirt challenged the conviction on the grounds that the crime was committed on reservation land, thus the state did not have jurisdiction to prosecute the crime. The case was probably the most publicized and anticipated case in the history of this body of law because the outcome of the case had the potential to affect almost all the Eastern half of Oklahoma – although it must also be noted that the decision was highly unlikely to affect the day-to-day life of any non-Natives in the disputed territory at all.

Doctrinally, McGirt is a diminishment case. It is the next step in the evolution of the series of cases in Chapter 16. In essence, all diminishment cases ask two questions: 1) What standard should be used to determine if a reservation has been diminished? and 2) Has the reservation been diminished under this standard? As you read this truncated excerpt ask yourself

how the majority opinion answers these questions. Which of the two questions is the dissent most concerned with? Why does the dissent describe the disputed territory in demographic detail? How would the dissent's approach affect the outcome of the case? Which opinion, the majority or the dissent, offers the sounder method for determining these types of cases?

McGirt v. Oklahoma

591 U.S. ___, 140 S. Ct. 2452 (2020)

Justice Gorsuch delivered the opinion of the Court.

* * *

The key question Mr. McGirt faces [is did] he commit his crimes in Indian Country? …

* * *

To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress. …

Under our Constitution, States have no authority to reduce federal reservations lying within their borders. Just imagine if they did. …

Likewise, courts have no proper role in the adjustment of reservation borders. … So it's no matter how many other promises to a tribe the federal government has already broken, if Congress wishes to break the promise of a reservation, it must say so.

* * *

Chief Justice Roberts, dissenting.

… Today, the Court holds that Oklahoma lacked jurisdiction to prosecute McGirt – on the improbable ground that, unbeknownst to anyone for the past century, a huge swathe of Oklahoma is actually a Creek Indian reservation, … The rediscovered reservations encompass the entire eastern half of the State – 19 million acres that are home to 1.8 million people, only 10%-15% of whom are Indians.

* * *

None of this is warranted. … The Court reaches the opposite conclusion only by disregarding the "well settled" approach required by our precedents.

* * *

… Our "touchstone" is congressional "purpose" or "intent." To "decipher Congress' intention" in this specialized area, we are instructed to consider three categories of evidence: the relevant Acts passed by Congress; the contemporaneous understanding of those Acts and the historical context surrounding their passage; and the subsequent understanding of the status of the reservation and the pattern of settlement there.

* * *

… No one here contends that any individual congressional action or piece of evidence, standing alone, disestablished the Creek reservation. Rather, Oklahoma contends that all of the relevant Acts of Congress together, viewed in light of contemporaneous and subsequent contextual evidence, demonstrate Congress's intent to disestablish the reservation.

* * *

As noted above, *McGirt* is the next stage in the evolution of diminishment cases. Chapter 16 begins with *Solem v. Bartlett* and its "fairly clean analytical structure" (which Chief Justice

Roberts articulates in his dissent in *McGirt*). In *Nebraska v. Parker* (also in Chapter 16) Justice Thomas focuses on Congressional legislation – the first of the three factors articulated in *Solem* – calling the rest of the "fairly clean analytical structure" into question without dismissing it entirely. Gorsuch's majority opinion in *McGirt* finishes what Thomas started in *Parker*, focusing exclusively on Congressional legislation to the exclusion of the rest of the "fairly clean analytical structure." As the law stands under *McGirt*, Congressional legislation appears to be the sole determinant in diminishment cases.

Oklahoma v. Castro-Huerta, 2022 (Chapter 18 – Criminal Jurisdiction)

Fittingly, this case comes directly after *McGirt* in this Update because it is direct response to *McGirt*. Additionally, although it has received less traditional media and social media attention than *McGirt* – in keeping with the many profound ironies in this body of law – it has much more impact for not only tribal nations but for non-Native individuals as well.

Despite the loss in *McGirt*, the state of Oklahoma continued to press forward in its efforts to exercise state criminal jurisdiction in the territory recognized as Indian Country after the *McGirt* decision. Sensing an opportunity after Amy Coney Barrett replaced Ruth Bader Ginsburg on the Supreme Court, Oklahoma began efforts to ask the Supreme Court to overturn the ruling in *McGirt*. The Supreme Court decided to entertain Oklahoma's pleas for reconsideration in *Castro-Huerta*.

In order to understand the decision in *Castro-Huerta*, it is absolutely critical to know the ruling and legacy of *Oliphant v. Suquamish Indian Tribe*, which is discussed extensively in Chapter 18. Two main takeaways from *Oliphant* help to decipher *Castro-Huerta*. The first is that the Supreme Court racialized jurisdiction in Indian Country in *Oliphant* – put another way, jurisdiction in Indian Country is determined by the race of the perpetrator and victim, which is otherwise not a consideration anywhere else in the United States. The second is that the Supreme Court began aggressively defining the scope of tribal jurisdiction and sovereignty in *Oliphant* in a way that it had not done before.

Victor Manuel Castro-Huerta, a non-Native (and, as the majority opinion points out, a non-U.S. citizen) was convicted in Oklahoma state court of child neglect concerning his Native stepdaughter. The facts of the case are horrific and very much tug at the heart strings: The stepdaughter who has cerebral palsy and is legally blind was five at the time of Castro-Huerta's

arrest and weighed only nineteen pounds. Castro-Huerta appealed his state court conviction, arguing that the state did not have jurisdiction as the crime was committed on territory recognized as Indian Country in the wake of *McGirt*. It is important to note that a victory for Castro-Huerta would not have absolved him of any punishment. Justice Kavanaugh's majority opinion notes (in a portion that is not excerpted) that the federal government indicted Castro-Huerta which resulted in Castro-Huerta accepting a plea deal of seven years in prison and deportation thereafter. However, further seeking to tug at the heartstrings, Kavanaugh makes note of the disparity between the federal sentence and state sentence that Castro-Huerta was facing: Castro-Huerta was sentenced to thirty-five years in prison in his state court conviction.

A few key jurisdictional rules for Indian Country (established in the wake of *Oliphant*) that were in place before *Castro-Huerta* remain so thereafter. Before continuing it is vital to note that these general rules do have exceptions – please consult the main body of the textbook for further elucidation. For the most part, tribal nations and the federal government have jurisdiction over crimes committed by Native individuals; states do not (unless it is a Public Law 280 state). For the most part tribal nations do not have jurisdiction over crimes committed by non-Natives (as a result of *Oliphant*); the federal government has jurisdiction when the victim is Native and the state has jurisdiction when the victim is non-Native.

While all parties agreed that the federal government has jurisdiction over crimes when the perpetrator is non-Native and the victim is Native, the question in *Castro-Huerta* was whether state also has jurisdiction over those crimes – put another way, does the state have concurrent jurisdiction with the federal government in those circumstances? Prior to this case it was widely understood that states did not have jurisdiction under these circumstances – the federal government had exclusive jurisdiction. Nonetheless, the new composition of the Supreme

Court offered Oklahoma an opportunity to challenge that understanding. As you read this truncated excerpt ask yourself where both the majority opinion and the dissent begin their analysis. How does this affect the outcome of the case? What claims do both the majority opinion and the dissent make about the Constitution? Why is this important? Which is most persuasive? What is the jurisdictional rule in the wake of this case?

Oklahoma v. Castro-Huerta

597 U.S. ___, 142 S. Ct. 2486 (2022)

Justice Kavanaugh delivered the opinion of the Court.

* * *

\ To begin with, the Constitution allows a State to exercise jurisdiction in Indian country. Indian country is part of the State, not separate from the State. To be sure, under this Court's precedents, federal law may preempt that state jurisdiction in certain circumstances. But otherwise, as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country. …

…

… [T]he "general notion drawn from Chief Justice Marshall's opinion in *Worcester v. Georgia*" "has yielded to closer analysis." "By 1880 the Court no longer viewed reservations as distinct nations." Since the latter half of the 1800s, the Court has consistently and explicitly held that Indian reservations are "part of the surrounding State" and subject to the State's jurisdiction "except as forbidden by federal law."

…

In accord with that overarching jurisdictional principle dating back to the 1800s, States have jurisdiction to prosecute crimes committed in Indian country unless preempted.

* * *

The central question that we must decide, therefore, is whether the State's authority to prosecute crimes committed by non-Indians against Indians in Indian country has been preempted.

Under the Court's precedents … a State's jurisdiction in Indian country may be preempted (i) by federal law under ordinary principles of federal preemption, or (ii) when the exercise of state jurisdiction would unlawfully infringe on tribal self government.

* * *

Castro-Huerta points to two federal laws that, in his view, preempt Oklahoma's authority to prosecute crimes committed by non-Indians against Indians in Indian country. [The General Crimes Act and Public Law 280]. Neither statute preempts preexisting or otherwise lawfully assumed state authority to prosecute crimes committed by non-Indians against Indians in Indian country.

* * *

Applying what has been referred to as the *Bracker* balancing test, this Court has recognized that even when federal law does not preempt state jurisdiction under ordinary preemption analysis, preemption may still occur if the exercise of state jurisdiction would unlawfully infringe upon tribal self-government. Under the *Bracker* balancing test, the Court considers tribal interests, federal interests, and state interests.

Here, *Bracker* does not bar the State from prosecuting crimes committed by non-Indians against Indians in Indian country.

* * *

As a corollary to its argument that Indian country is inherently separate from States, the dissent contends that Congress must affirmatively authorize States to exercise jurisdiction in Indian country, even jurisdiction to prosecute crimes committed by non-Indians. But under the Constitution and this Court's precedents, the default is that States may exercise criminal jurisdiction within their territory. States do not need a permission slip from Congress to exercise their sovereign authority. In other words, the default is that States have criminal jurisdiction in Indian country unless that jurisdiction is *preempted*. In the dissent's view, by contrast, the default is that States do *not* have criminal jurisdiction in Indian country unless Congress specifically *provides* it. The dissent's view is inconsistent with the Constitution's structure, the States' inherent sovereignty, and the Court's precedents.

* * *

Justice Gorsuch, dissenting.

* * *

Where this Court once stood firm, today it wilts. … Where our predecessors refused to participate in one State's unlawful power grab at the expense of the Cherokee, today's Court accedes to another's. Respectfully, I dissent.

* * *

When the framers convened to draft a new Constitution, this problem was among those they sought to resolve. To that end, they gave the federal government "broad general powers" over Indian affairs. The Constitution afforded Congress authority to make war and negotiate

treaties with the Tribes. It barred States from doing either of these things. And the Constitution granted Congress the power to "regulate Commerce … with the Indian Tribes." Nor did the Constitution replicate the Articles' carveout for state power over Tribes within their borders.

* * *

Today the Court rules for Oklahoma. In doing so, the Court announces that, when it comes to crimes by non-Indians against tribal members within tribal reservations, Oklahoma may "exercise jurisdiction." … Truly, a more ahistorical and mistaken statement of Indian law would be hard to fathom.

The source of the Court's error is foundational. …

… Tribes are not private organizations within state boundaries. Their reservations are not glorified private campgrounds. Tribes are sovereigns.

* * *

The Court's suggestion that Oklahoma enjoys "inherent" authority to try crimes against Native Americans within the Cherokee Reservation makes a mockery of all of Congress's work from 1834 to 1968. …

Through it all, the Court makes no effort to grapple with the backdrop rule of tribal sovereignty. The Court proceeds oblivious to the rule that only a clear act of Congress may impose constraints on tribal sovereignty.

* * *

Against all this evidence, what is the Court's reply? It acknowledges that, at the Nation's founding, tribal sovereignty precluded States from prosecuting crimes on tribal lands by or against tribal members without congressional authorization. But the Court suggests this traditional "notion" flipped 180 degrees sometime in "the latter half of the 1800s." Since then,

the Court says, Oklahoma has enjoyed the "inherent" power to try at least crimes by non-Indians against tribal members on tribal reservations until and unless Congress preempts state authority.

But exactly when and how did this change happen? The Court never explains. …

* * *

… To determine whether tribal sovereignty displaces state authority … the Court resorts to a "*Bracker* balancing" test. Applying that test, the Court concludes that Oklahoma's interests in this case outweigh those of the Cherokee. All this, too, is mistaken root and branch.

…

…Congress has *already* "balanced" competing tribal, state, and federal interests – and its balance demands tribal consent.

* * *

There is even more evidence cutting against the Court's dystopian tale. According to a recent United States Attorney in Oklahoma, "the sky isn't falling" and "partnerships between tribal law enforcement and state law enforcement" are strong. …

* * *

As is likely obvious, *Castro-Huerta* is an important case. While its full influence is not yet completely developed or understood, at the very least it significantly blunts the victory in *McGirt* for Oklahoma tribal nations and portends an unsatisfying future for Indian Country. For the purposes of this Update, it is important to understand the law that emerges from this case. In short, Justice Kavanaugh's majority opinion starts from the proposition that states have the inherent authority to criminally prosecute non-Native perpetrators on tribal lands within their borders. Consequently, any criminal defendant objecting to this jurisdiction must either point to a

federal law that divests the state of this inherent jurisdiction or demonstrate that the state is divested of jurisdiction under a "*Bracker* balancing test" (*Bracker* is found on page 428 in the main textbook in the Taxes chapter). Since, according to Kavanaugh, there is no federal law that divests Oklahoma from jurisdiction and the *Bracker* balancing test falls in favor of the state then Oklahoma does have the authority to try Castro-Huerta even though the crime took place within the boundaries of a reservation.

The fundamental difference between Kavanaugh's majority opinion and Justice Gorsuch's dissent is the basic assertion on which to start the analysis. Whereas Kavanaugh assumes that the state has jurisdiction under these circumstances Gorsuch assumes the opposite. Put simply, Kavanaugh assumes that Oklahoma **does have** jurisdiction and looks for reasons that the state has been divested of this authority; Gorsuch assumes that Oklahoma **does not have** jurisdiction and looks for reasons the state has been granted this authority. Much of Gorsuch's dissent (as is clear even in this truncated excerpt) is spent refuting the majority's basic assumption.

There is much more to say about this potentially deeply influential case and undoubtedly plenty more will be said in the years to come. For the purposes of this Update will suffice to make a few final points. For those seeking the most obvious bright spot for tribal nations (on an otherwise bleak landscape), the Supreme Court did not overrule *McGirt* as Oklahoma had sought. Nonetheless, the ruling is a significant incursion of state authority into tribal lands in a way that had not been sanctioned before. Moreover, this case is the most recent in a growing list that follow in the footsteps of *Oliphant*. Like *Oliphant*, *Castro-Huerta* perpetuates a race-based understanding of jurisdiction, diminishes tribal autonomy over tribal lands, and stitches together unauthoritative sources and questionable assumptions to reach its conclusion (which the dissent

rigorously points out). In addition, *Castro-Huerta* is another example of the Supreme Court aggressively defining the scope of jurisdiction in Indian Country in a way that it had not done before *Oliphant*.

United States v. Cooley, 2021 (Chapter 19 – Civil Jurisdiction)

This case is another step along the path that was first blazed by the *Montana* decision (and the two *Montana* exceptions that come from that case) that begins Chapter 19. In brief, a tribal police officer stopped on a highway that ran through the reservation to aid a vehicle that was pulled over on the side of the road. After approaching the vehicle, the tribal police officer saw two automatic weapons in the car, ordered the driver – a non-Native person – out of the vehicle and searched the driver, and, in returning to the vehicle, also saw methamphetamines in the vehicle. At his trial, the criminal defendant sought to suppress the evidence discovered by the tribal police officer under the theory that the tribal police officer did not have jurisdiction under the circumstances (because the criminal defendant was non-Native). The question in *Cooley* was essentially whether the tribal police officer had the authority to detain and search a non-Native on a public highway that ran through the reservation.

At first blush, this might seem more like a criminal law than a civil law case. However, the tribal officer did not arrest the suspect, nor did the tribal nation prosecute the suspect in tribal court. This is a civil case because the tribal police officer merely held the suspect in custody until the suspect could be turned over to other governmental authorities with jurisdiction.

United States v. Cooley

593 U.S. ___, 141 S. Ct. 1638 (2021)

Justice Breyer delivered the opinion of the Court.

The question presented is whether an Indian tribe's police officer has authority to detain temporarily and to search a non-Indian on a public right-of-way that runs through an Indian reservation. …

We have previously noted that a tribe retains inherent sovereign authority to address "conduct [that] threatens or has some direct effect on … the health or welfare of the tribe." We believe this statement of law governs here. And we hold the tribal officer possesses the authority at issue.

* * *

… [In *Montana*] [w]e set forth two important exceptions. …

The second exception … fits the present case, almost like a glove. The phrase speaks of the protection of the "health or welfare of the tribe." To deny a tribal police officer authority to search and detain for a reasonable time any person he or she believes may commit or has committed a crime would make it difficult for tribes to protect themselves against ongoing threats. …

We have subsequently repeated *Montana*'s proposition and exceptions in several cases involving a tribe's jurisdiction over the activities of non-Indians within the reservation. In doing so we have reserved a tribe's inherent sovereign authority to engage in policing of the kind before us. …

* * *

Similarly, we recognized … that "[w]here jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities." The authority to search a non-Indian prior to transport is ancillary to

this authority that we have already recognized. Indeed, several state courts and other federal courts have held that tribal officers possess the authority at issue here.

* * *

In response, [the criminal defendant] cautions against "inappropriately expand[ing] the second *Montana* exception." … Given the close fit between the second exception and the circumstances here, we do not believe the warnings can control the outcome.

* * *

Cooley is the Supreme Court's first full-fledged assertion of tribal authority under the *Montana* test. However, it is in question whether this decision will be a sea change. Certainly it is a victory for tribal interests, yet the scope is fairly narrow. The Supreme Court did not recognize any jurisdiction to try a non-Native in its courts under these circumstances, only to search and detain such persons until they can be turned over to other governmental authorities with jurisdiction. That Breyer's opinion states that the circumstances of this case fit the second *Montana* exception "almost like a glove" (as well as an unquoted Alito concurrence) suggests that, at least at present, the Supreme Court has found its limit for the second *Montana* exception.

Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 2023 (Chapter 21 – Sovereign Immunity)

Chapter 21 ends with Justice Elana Kagan stating in *Bay Mills* that Congress "must 'unequivocally' express" a waiver of tribal sovereign immunity. *Lac Du Flambeau* seems to loosen that concept while also further exposing the Supreme Court's ideological divides concerning sovereign immunity.

Lac Du Flambeau v. Coughlin

599 U.S. 255 (2023)

Justice Jackson delivered the opinion of the Court.

The Bankruptcy Code expressly abrogates the sovereign immunity of "governmental unit[s]" for specified purposes. The question presented in this case is whether that express abrogation extends to federally recognized Indian tribes. Under our precedents, we will not find an abrogation of tribal sovereign immunity unless Congress has conveyed its intent to abrogate in unequivocal terms. That is a high bar. But for reasons explained below, we find it has been satisfied here.

* * *

To "abrogate sovereign immunity," Congress "must make its intent . . . 'unmistakably clear in the language of the statute.'" This well-settled rule applies to federally recognized tribes no less than other defendants with sovereign immunity. We have held that tribes possess the "common-law immunity from suit traditionally enjoyed by sovereign powers." Our cases have

thus repeatedly emphasized that tribal sovereign immunity, absent a clear statement of congressional intent to the contrary, is the "baseline position."

This clear-statement rule is a demanding standard. If "there is a plausible interpretation of the statute" that preserves sovereign immunity, Congress has not unambiguously expressed the requisite intent.

The rule is not a magic-words requirement, however. To abrogate sovereign immunity unambiguously, "Congress need not state its intent in any particular way." Nor need Congress "make its clear statement in a single [statutory] section." The clear-statement question is simply whether, upon applying "traditional" tools of statutory interpretation, Congress's abrogation of tribal sovereign immunity is "clearly discernable" from the statute itself.

We conclude that the Bankruptcy Code unequivocally abrogates the sovereign immunity of any and every government that possesses the power to assert such immunity. Federally recognized tribes undeniably fit that description; therefore, the Code's abrogation provision plainly applies to them as well.

* * *

JUSTICE THOMAS, concurring in the judgment.

As I have explained, to the extent that tribes possess sovereign immunity at all, that immunity does not extend to "suits arising out of a tribe's commercial activities conducted beyond its territory." Because respondent's stay-enforcement motion arose from petitioners' off-reservation commercial conduct, petitioners lack sovereign immunity regardless of the Bankruptcy Code's abrogation provision. I therefore concur in the Court's judgment.

* * *

Justice Gorsuch, dissenting.

Until today, there was "not one example in all of history where [this] Court ha[d] found that Congress intended to abrogate tribal sovereign immunity *without* expressly mentioning Indian tribes somewhere in the statute." No longer. The Court reads the phrase "other foreign or domestic government," as synonymous with "any and every government," – all for the purpose of holding that §106(a) of the Bankruptcy Code abrogates tribal sovereign immunity. It is a plausible interpretation. But plausible is not the standard our tribal immunity jurisprudence demands. Before holding that Congress has vitiated tribal immunity, the Legislature must "unequivocally express" its intent to achieve that result.

Respectfully, I do not think the language here does the trick. The phrase "other foreign or domestic government" could mean what the Court suggests: every government, everywhere. But it could also mean what it says: every "other foreign … government"; every "other … domestic government." And properly understood, Tribes are neither of those things. Instead, the Constitution's text – and two centuries of history and precedent – establish that Tribes enjoy a unique status in our law. Because this reading of the statute is itself (at worst) a plausible one, I would hold that the Bankruptcy Code flunks this Court's clear statement rule and reverse.

* * *

Perhaps the easiest way to understand (and teach) this case is to do two things. The first is to compare it to *Bay Mills*. In that case, the Court was exacting in its requirements for finding a waiver of sovereign immunity, leading to a unique result. In *Lac Du Flambeau* the Court seems to retreat, at least ever so slightly, from the standard in *Bay Mills*. Why? It is because the result in *Bay Mills* might strike an outside party as strange or odd? What reasonable explanation might there be for the differing results in the two cases?

The second is to articulate the perspectives expressed by each justice. Justice Ketanji Brown Jackson seems to be regarding tribal nations as part of a list of other governmental bodies without any further consideration whereas Justice Neil Gorsuch seems to believe that tribal nations require or necessitate extra consideration. Which perspective is best? Why? How should we interpret these general statutes as they apply to Native America? Furthermore, Justice Clarence Thomas once again expresses skepticism with the concept of tribal sovereign immunity that he (and assuredly others) has with the concept. Does he have a point?

Haaland v. Brackeen, 2023 (Chapter 23 – Indian Child Welfare Act)

Haaland v. Brackeen was one of four consolidated cases that questions the constitutionality of the Indian Child Welfare Act. In short, *Brackeen* was about two things: on its surface, it is a case about the constitutionality of a piece of federal legislation. Put another way, does Congress have the authority to pass a particular law? If the Constitution grants Congress the authority to pass such a law, then yes; if not, then no. More deeply, these cases are relatively minor pieces in a bigger contest about how to understand the law. The family and states who are challenging the constitutionality of ICWA are supported by those on the right who are looking to claim that ICWA is raced-based legislation. Defenders of ICWA argue that the statute recognizes tribal nations as political entities and is critical to preserve tribal families and sovereignty.

This case began when a 5th Circuit federal court declared ICWA unconstitutional. After a series of maneuvers the 5th Circuit Court of Appeals mostly upheld the constitutionality of ICWA while finding portions of the statute that required states to act as unconstitutional. The Supreme Court upheld the totality of ICWA. This was, in many respects, a clear victory for Indian Country. Yet, there are many aspects of the case that can make for a useful classroom discussion.

Haaland v. Brackeen

599 U.S. 255 (2023)

Justice Barrett delivered the opinion of the Court.

This case is about children who are among the most vulnerable: those in the child welfare system. In the usual course, state courts apply state law when placing children in foster or adoptive homes. But when the child is an Indian, a federal statute – the Indian Child Welfare Act – governs. Among other things, this law requires a state court to place an Indian child with an Indian caretaker, if one is available. That is so even if the child is already living with a non-Indian family and the state court thinks it in the child's best interest to stay there.

Before us, a birth mother, foster and adoptive parents, and the State of Texas challenge the Act on multiple constitutional grounds. They argue that it exceeds federal authority, infringes state sovereignty, and discriminates on the basis of race. The United States, joined by several Indian Tribes, defends the law. The issues are complicated… But the bottom line is that we reject all of petitioners' challenges to the statute…

In 1978, Congress enacted the Indian Child Welfare Act (ICWA) out of concern that "an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies."…

The Act thus aims to keep Indian children connected to Indian families…

* * *

We begin with petitioners' claim that ICWA exceeds Congress's power under Article I. In a long line of cases, we have characterized Congress's power to legislate with respect to the Indian tribes as "'plenary and exclusive.'"…

To be clear, however, "plenary" does not mean "free-floating." A power unmoored from the Constitution would lack both justification and limits. So like the rest of its legislative powers, Congress's authority to regulate Indians must derive from the Constitution, not the atmosphere. Our precedent traces that power to multiple sources.

The Indian Commerce Clause authorizes Congress "[t]o regulate Commerce . . . with the Indian Tribes." We have interpreted the Indian Commerce Clause to reach not only trade, but certain "Indian affairs" too… While under the Interstate Commerce Clause, States retain "some authority" over trade, we have explained that "virtually all authority over Indian commerce and Indian tribes" lies with the Federal Government.

The Treaty Clause—which provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties"—provides a second source of power over Indian affairs… We have asserted that "treaties made pursuant to that power can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal.'"

We have also noted that principles inherent in the Constitution's structure empower Congress to act in the field of Indian affairs… With this in mind, we have posited that Congress's legislative authority might rest in part on "the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that this Court has described as 'necessary concomitants of nationality.'"

Finally, the "trust relationship between the United States and the Indian people" informs the exercise of legislative power. As we have explained, the Federal Government has "'charged itself with moral obligations of the highest responsibility and trust'" toward Indian tribes…

In sum, Congress's power to legislate with respect to Indians is well established and broad. Consistent with that breadth, we have not doubted Congress's ability to legislate across a wide range of areas…

Admittedly, our precedent is unwieldy, because it rarely ties a challenged statute to a specific source of constitutional authority. That makes it difficult to categorize cases and even harder to discern the limits on Congress's power. Still, we have never wavered in our insistence

that Congress's Indian affairs power "'is not absolute.'"… Thus, we reiterate that Congress's authority to legislate with respect to Indians is not unbounded. It is plenary within its sphere, but even a sizeable sphere has borders.

Petitioners contend that ICWA exceeds Congress's power. Their principal theory … is that ICWA treads on the States' authority over family law. Domestic relations have traditionally been governed by state law; thus, federal power over Indians stops where state power over the family begins. Or so the argument goes.

It is true that Congress lacks a general power over domestic relations, and, as a result, responsibility for regulating marriage and child custody remains primarily with the States. But the Constitution does not erect a firewall around family law. On the contrary, when Congress validly legislates pursuant to its Article I powers, we "ha[ve] not hesitated" to find conflicting state family law preempted, "[n]otwithstanding the limited application of federal law in the field of domestic relations generally."…

Petitioners are trying to turn a general observation (that Congress's Article I powers rarely touch state family law) into a constitutional carveout (that family law is wholly exempt from federal regulation). That argument is a nonstarter…

* * *

Justice Gorsuch, with whom Justice Sotomayor and Justice Jackson join as to Parts I and III, concurring.

In affirming the constitutionality of the Indian Child Welfare Act (ICWA), the Court safeguards the ability of tribal members to raise their children free from interference by state authorities and other outside parties. In the process, the Court also goes a long way toward restoring the original balance between federal, state, and tribal powers the Constitution

envisioned. ...To appreciate fully the significance of today's decision requires an understanding of the long line of policies that drove Congress to adopt ICWA. And to appreciate why that law surely comports with the Constitution requires a bird's-eye view of how our founding document mediates between competing federal, state, and tribal claims of sovereignty.

The Indian Child Welfare Act did not emerge from a vacuum. It came as a direct response to the mass removal of Indian children from their families during the 1950s, 1960s, and 1970s by state officials and private parties. That practice, in turn, was only the latest iteration of a much older policy of removing Indian children from their families—one initially spearheaded by federal officials with the aid of their state counterparts nearly 150 years ago. In all its many forms, the dissolution of the Indian family has had devastating effects on children and parents alike. It has also presented an existential threat to the continued vitality of Tribes – something many federal and state officials over the years saw as a feature, not as a flaw. This is the story of ICWA.

* * *

This history leads us to the question at the heart of today's cases: Did Congress lack the constitutional authority to enact ICWA, as Texas and the private plaintiffs contend? In truth, that is not one question, but many. What authorities do the Tribes possess under our Constitution? What power does Congress have with respect to tribal relations? What does that mean for States? And how do those principles apply in a context like adoption, which involves competing claims of federal, state, *and* tribal authority?

Answering these questions requires a full view of the Indian-law bargain struck in our Constitution. Under the terms of that bargain, Indian Tribes remain independent sovereigns with the exclusive power to manage their internal matters. As a corollary of that sovereignty, States

have virtually no role to play when it comes to Indian affairs. To preserve this equilibrium between Tribes and States, the Constitution vests in the federal government a set of potent (but limited and enumerated) powers. In particular, the Indian Commerce Clause gives Congress a robust (but not plenary) power to regulate the ways in which non-Indians may interact with Indians. To understand each of those pieces – and how they fit together – is to understand why the Indian Child Welfare Act must survive today's legal challenge.

* * *

JUSTICE THOMAS, dissenting.

These cases concern the Federal Government's attempt to regulate child-welfare proceedings in state courts. That should raise alarm bells. Our Federal "[G]overnment is acknowledged by all to be one of enumerated powers," having only those powers that the Constitution confers expressly or by necessary implication. All other powers (like family or criminal law) generally remain with the States. The Federal Government thus lacks a general police power to regulate state family law.

However, in the Indian Child Welfare Act (ICWA), Congress ignored the normal limits on the Federal Government's power and prescribed rules to regulate state child custody proceedings in one circumstance: when the child involved happens to be an Indian. As the majority acknowledges, ICWA often overrides state family law by dictating that state courts place Indian children with Indian caretakers even if doing so is not in the child's best interest. It imposes heightened standards before removing Indian children from unsafe environments. And it allows tribes to unilaterally enroll Indian children and then intervene in their custody proceedings.

In the normal course, we would say that the Federal Government has no authority to enact any of this. Yet the majority declines to hold that ICWA is unconstitutional, reasoning that the petitioners before us have not borne their burden of showing how Congress exceeded its powers. This gets things backwards. When Congress has so clearly intruded upon a longstanding domain of exclusive state powers, we must ask not whether a constitutional provision prohibits that intrusion, but whether a constitutional provision authorizes it.

The majority and respondents gesture to a smorgasbord of constitutional hooks to support ICWA; not one of them works. First, the Indian Commerce Clause is about commerce, not children. Second, the Treaty Clause does no work because ICWA is not based on any treaty. Third, the foreign-affairs powers (what the majority terms "structural principles") inherent in the Federal Government have no application to regulating the domestic child custody proceedings of U. S. citizens living within the jurisdiction of States.

I would go no further. But, as the majority notes, the Court's precedents have repeatedly referred to a "plenary power" that Congress possesses over Indian affairs, as well as a general "trust" relationship with the Indians. I have searched in vain for any constitutional basis for such a plenary power, which appears to have been born of loose language and judicial *ipse dixit*. And, even taking the Court's precedents as given, there is no reason to extend this "plenary power" to the situation before us today: regulating state-court child custody proceedings of U. S. citizens, who may never have even set foot on Indian lands, merely because the child involved happens to be an Indian.

* * *

The Constitution's text and the foregoing history point to a set of discrete, enumerated powers applicable to Indian tribes – just as in any other context. Although our cases have at

times suggested a broader power with respect to Indians, there is no evidence for such a free-floating authority anywhere in the text or original understanding of the Constitution.

* * *

JUSTICE ALITO, dissenting.

The first line in the Court's opinion identifies what is most important about these cases: they are "about children who are among the most vulnerable." But after that opening nod, the Court loses sight of this overriding concern and decides one question after another in a way that disserves the rights and interests of these children and their parents, as well as our Constitution's division of federal and state authority.

Decisions about child custody, foster care, and adoption are core state functions. The paramount concern in these cases has long been the "best interests" of the children involved. But in many cases, provisions of the Indian Child Welfare Act (ICWA) compel actions that conflict with this fundamental state policy, subordinating what family-court judges—and often biological parents—determine to be in the best interest of a child to what Congress believed is in the best interest of a tribe.

* * *

We need not map the outer bounds of Congress's Indian affairs authority to hold that the challenged provisions of ICWA lie outside it. We need only acknowledge that even so-called plenary powers cannot override foundational constitutional constraints. By attempting to control state judicial proceedings in a field long-recognized to be the virtually exclusive province of the States, ICWA violates the fundamental structure of our constitutional order.

In reaching this conclusion, I do not question the proposition that Congress has broad power to regulate Indian affairs. We have "consistently described" Congress's "powers to

legislate in respect to Indian tribes" as "'plenary and exclusive.'" Reflecting this understanding, we have sanctioned a wide range of enactments that bear on Indian tribes and their members, sometimes (regrettably) without tracing the source of Congress's authority to a particular enumerated power. Nor do I dispute the notion that Congress has undertaken responsibilities that have been roughly analogized to those of a trustee. In exercising its constitutionally-granted powers, the Federal Government, "following 'a humane and self imposed policy,'" has committed itself to "'moral obligations of the highest responsibility and trust'" to the Indian people.

Nevertheless, we have repeatedly cautioned that Congress's Indian affairs power is not unbounded. And while we have articulated few limits, we have acknowledged what should be one obvious constraint: Congress's authority to regulate Indian affairs is limited by other "pertinent constitutional restrictions" that circumscribe the legislative power.

* * *

Brackeen certainly has a place in the ICWA chapter for obvious reasons. But it might most comfortably fit as a corollary to Chapters 6 and 7 as it is really about the scope of federal authority in Indian Country. In short, like chapters 6 and 7, the dominant question is about plenary power and its source(s). The majority and concurrence find the source of federal plenary power over Native America in the U.S. Constitution. The dissents argue that there is no grant of federal plenary power over Native America in the Constitution (Thomas) and/or that it is constrained in this case by other constitutional limitations on the federal government (Alito).

I will admit that I am somewhat biased as my current book project – under review with an academic press as of this writing – is about plenary power and its supposed sources.

Nonetheless, this case opens up the possibility for a number of complex classroom questions about plenary power. At its most simplistic, is plenary power a good or a bad thing? The textbook, particularly chapters 6 and 7, demonstrate its breadth and destructiveness. However, as *Brackeen* makes clear, it is also the basis for ICWA. So what do we make of this massive, essentially unlimited authority when it is put to positive ends for Indian Country? Can we live with plenary power when it does good things, as it has with ICWA and similar legislation during the Self-Determination Era, or does the ever-present threat of its destructive force make it too dangerous to embrace? Do we need the "good" version of plenary power to mitigate the "bad" exercises of this authority? What alternatives, if any, might there be? Furthermore, do we buy the majority and concurrence's argument that plenary power is constitutionally rooted or are the dissents more convincing? How might this change our opinion of plenary power (are we comfortable sanctioning a federal authority if we do not believe that it is truly rooted in the U.S. Constitution?)?

It is also worth asking who each side identifies as the victims in this case. Who does each side claim to be serving under their analysis? What underlying assumptions seem to fuel these perspectives? For example, the dissents state that the best interests of the children are central to their analysis. What might this say about the dissenters' perspective about the tribal courts and nations that are tasked with administering to Native children under ICWA?

Finally, there is still the question of how to understand this body of law more broadly. Is it politically oriented or racially oriented? The parties arguing that ICWA was a racially oriented piece of legislation lost completely but found some sympathy with two dissenting justices. To what extent is the argument that legislation that specifically targets tribal nations and peoples

racially based still alive? To what extend does one's perception on how to understand such legislation depend on how one understands the basis of plenary power?

In some ways, *Brackeen* is ill-suited to the ICWA chapter because the heart of the case has little to do with the statute itself.[1] Even so, it allows a class to understand the statute by engaging with the materials in the chapter and to think about the larger implications of the statute by engaging with this case.

[1] To this end, one strategy might be to assign this as the first case of the semester and to return to it periodically as you consult other materials in the textbook. This might allow an instructor to demonstrate how the law has developed, how the past continues to inform the present in this area of law, and how there would seem to be few if any easy answers to the legal (and otherwise) legacy of colonialism.

Ysleta del Sur Pueblo v. Texas, 2022 (Chapter 24 – Indian Gaming Regulatory Act)

Ysleta is a case with a relatively unique fact pattern that fits best into the structure of the main textbook in Chapter 24. In short, after a long struggle with both the federal government and the state of Texas (in which the tribal nation is located), the Ysleta del Sur Pueblo gained full federal recognition through Congressional legislation in 1987 – referred to in the opinion as the Restoration Act. Tribal gaming was on the mind of many during the passage of the Restoration Act as *Cabazon* – which is detailed in Chapter 24 – was decided about six months prior to the Restoration Act and the Indian Gaming Regulatory Act was about a year away from being passed. Consequently, the Restoration Act notes both that, "All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation" and also "Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." Ysleta wanted to engage in bingo on the reservation, which is regulated but not prohibited by Texas law. The question for the Court was whether the Restoration Act authorized Texas to exercise its regulation of bingo on Ysleta land.

Put bluntly, (similarly to *Denezpi* above) *Ysleta* is the more complicated cousin of the *Cabazon* case found in Chapter 24 and is less well suited to the purposes of this textbook. Superficially, both cases are remarkably parallel (as Justice Gorsuch's majority opinion notes) in that they concern state efforts to regulate tribal bingo enterprises and both are concerned with the criminal/prohibitory vs civil/regulatory structure outlined in *Cabazon*. The key difference is the Restoration Act at the heart of *Ysleta*. Tribal sovereignty (as practiced through gaming operations) was at the heart of *Cabazon*; *Ysleta*, on the other hand, is much more about statutory interpretation. The Court in *Ysleta* was focused on the text of the Restoration Act (whether it authorized Texas to fully impose its law on tribal land or if it merely imposed the same

criminal/civil structure found in *Cabazon*) as opposed to tribal sovereignty, IGRA, or any other issue that is directly pertinent to tribal gaming. Consequently, *Ysleta* does not advance the law far enough to warrant an excerpt in this Update. That being noted, if you are in or near a part of Native America that was recognized through Congressional legislation and that is or wants to be engaged in gaming, it may be worth studying (or at least addressing) *Ysleta*.

Yellen v. Chehalis Reservation, 2022 (Chapter 28 – Diversity in Indian Country)

This case is a testament to the significant diversity in Indian Country that Chapter 28 describes as well as the ambiguity that continues to surround Native peoples in Alaska after the passage of the Alaska Native Claims Settlement Act (ANCSA). In short, the question of the case is whether tribal corporations established under ANCSA can access federal funds for COVID relief set aside for "Indian tribes."

Yellen v. Confederated Tribes of the Chehalis Reservation

594 U.S. ___, 141 S. Ct. 2432 (2021)

Justice Sotomayor delivered the opinion of the Court.

* * *

This is not the first time the Court has addressed the unique circumstances of Alaska and its indigenous population. The "simple truth" reflected in those prior cases is that "Alaska is often the exception, not the rule."

* * *

[The Alaska Native Claims Settlement Act] officially dispensed with the idea of recreating in Alaska the system of reservations that prevailed in the lower 48 States. It extinguished Alaska Natives' claims to land and hunting rights and revoked all but one of Alaska's existing reservations. In exchange, "Congress authorized the transfer of $962.5 million in state and federal funds and approximately 44 million acres of Alaska land to state-chartered

private business corporations that were to be formed pursuant to" ANCSA. These corporations are called ANCs.

* * *

In 1975, four years after ANCSA's enactment, Congress passed ISDA. …

Despite the express inclusion of ANC's in the definition of "Indian tribe" [in ISDA], a question arose … whether the "recognized-as-eligible clause" [in ISDA] limits the definition to "federally recognized tribes" only. A federally recognized tribe is one that has entered into "a government-to-government relationship [with] the United States." … As private companies incorporated under state law, ANCs have never been "recognized" by the United States in this sovereign political sense.

* * *

… The primary question for the Court, then, is whether ANCs satisfy ISDA's definition of "Indian tribe."

* * *

ANC's, of course, are "established pursuant to" ANCSA…. They are thereby "recognized as eligible" for ANCSA's benefits. The trickier question is whether eligibility for the benefits of ANCSA counts as eligibility for "the special programs and services provided by the United States to Indians because of their status as Indians."

It does. Contrary to the dissent's view, ANSCA is readily described as a special program provided by the United States to "Indians" (in this case, Alaska Natives).

* * *

Under the plain meaning of ISDA, ANCs are Indian tribes, regardless of whether they are also federally recognized tribes. … ANCs are *sui generis* entities created by federal statute and

granted an enormous amount of special federal benefits as part of a legislative experiment tailored to the unique circumstances of Alaska and recreated nowhere else.

* * *

As with many of the cases in the textbook, it can be easy to lose the forest from the trees. Both the majority opinion and the dissent (which is not quoted in this truncated excerpt) engage in highly technical readings of federal statutes which are obviously important but are also likely to confuse rather than to clarify for a typical reader. The more important point to take out of this excerpt is that the status of Alaskan Native peoples, lands, and structures established by ANCSA are different than what one finds in the lower 48 states and those statuses remain confusing and out of step for those unfamiliar with this history and law (and even to those with some general familiarity with federal Indian law). This is evident in the *Vinetie* case in the main text of Chapter 28 and is further explicated in this excerpt. The end result in this case is that six justices found that ANCs are Indian tribes for the purposes of a specific federal statute. However, three justices ruled against the ANCs and questions abound on how to regard ANCs in federal Indian law.