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THE DARK MATTER OF FEDERAL INDIAN LAW: THE DUTY OF PROTECTION

Matthew L.M. Fletcher

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Matthew L.M. Fletcher*

ABSTRACT

The United States and every federally recognized tribal nation originally entered into a sovereign-to-sovereign relationship highlighted by the duty of protection, an international customary law doctrine in which a larger, stronger sovereign, America in this case, agrees to “protect” the small, weaker sovereign, in this case, tribal nations. America agreed to this in exchange for massive, occasionally unquantifiable amounts of land and resources, as well as the power to control the external sovereign relations of the protected sovereign. The smaller sovereigns received protected reservation lands, hunting and fishing rights, small cash infusions, and the vague promise of protection. What tribal nations have received so far is a pittance compared to the value of their consideration. Justice Gorsuch has noted that tribal nations in Washington gave up millions of acres in exchange for “promises.” Those promises must mean something. I call those promises the dark matter of federal Indian law. The duty of protection owed by the United States to tribal nations is much like dark matter. The agreements that established a sovereign-to-sovereign relationship provided for specific details about that relationship. But most agreements are sparse, leaving open most of the details. That’s the dark matter of Indian law. This Article argues that this duty of protection is law and that the judiciary has an obligation to enforce aspects of the duty of protection as understood by both tribal nations and Congress. The Article begins by describing this duty as understood by tribal nations at the time of the origination of the duty and now. The Article then turns to how Congress and the Department of the Interior understand this duty, at least since the start of the tribal self-determination era in the 1970s, and how the Department of Justice often undermines that understanding. Then, the Article explains that the dark matter of federal Indian law is the duty of protection, that the federal obligations to tribal nations and individual Indians is real, and that the duty of protection is enforceable. Finally, the Article shows how the United Nations Declaration of the Rights of Indigenous Peoples is a useful tool judges can use in adjudicating the scope of the unstated parts of the duty of protection.

INTRODUCTION

In recent years, two Michigan Odawa tribal nations, the Grand Traverse Band of Ottawa and Chippewa Indians (Grand Traverse) and the Little Traverse Bay

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Bands of Odawa Indians (Little Traverse), have attempted to enforce their treaty rights to reservation lands. Both tribes negotiated for reservation lands and other property rights, primarily in treaties ratified in 1836 and 1855,¹ in exchange for the extinguishment of their aboriginal title claims to large swaths of the lower peninsula of what is now the State of Michigan.² The tribes made different strategic moves. Grand Traverse sought an Act of Congress that would allow the tribe to sue the United States for the taking of its property interest in the promised land rights.³ Little Traverse brought a suit against the State of Michigan and local municipal governments for a declaration from the court that the tribe retained governance rights within the lands promised to the tribe as a reservation.⁴ So far, both tribes have failed; the Grand Traverse bill has gone nowhere⁵ and the Little Traverse suit was dismissed.⁶ No one seriously denies the tribes' claims that the United States failed to fulfill its promises, but there seems to be no remedy for either tribe.

The experiences of the Michigan Odawa nations are not unusual. As should be well understood, the United States has fulfilled only a tiny portion of its obligations to Indian people and tribal nations.⁷ Tribal nations regularly sue the United States government to fulfill its obligations to Indian people and Indian tribes, almost always losing those cases.⁸ Tribal nations sue over the underfunding of Indian country law enforcement.⁹ Reservation Indian communities sue over underfunding

1. See Treaty with the Ottawa and Chippewa, art. XIII, Mar. 28, 1836, 7 Stat. 491; Treaty with the Ottawa and Chippewa, art. I, July 31, 1855, 11 Stat. 621 (1855).

2. See MATTHEW L.M. FLETCHER, *THE EAGLE RETURNS: THE LEGAL HISTORY OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS* 22 (2012).

3. H.R. 3133, 114th Cong. (2015) was a bill that would have created a jurisdictional act waiving federal sovereign immunity to allow the Grand Traverse Band to sue the United States in federal court for the taking of promised reservation lands.

4. See *Little Traverse Bay Bands of Odawa Indians v. Whitmer*, 998 F.3d 269, 272 (6th Cir. 2021), cert. denied, 142 S. Ct. 1206 (2022).

5. Patti Brandt Burgess, *Grand Traverse Band Seeks Federal Compensation for Land Grab*, *TRAVERSE CITY RECORD-EAGLE*, (Dec. 10, 2020), https://www.record-eagle.com/news/local_news/grand-traverse-band-seeks-federal-compensation-for-land-grab/article_5272f7ee-396a-11eb-8ece-5bdf7b50dbd6.html.

6. *Little Traverse*, 998 F.3d at 287.

7. See generally, e.g., U.S. DEPT. OF HEALTH, EDUC., AND WELFARE, OFF. OF EDUC., *A BRIEF HISTORY OF THE FEDERAL RESPONSIBILITY TO THE AMERICAN INDIAN* (1980) (education); Michael C. Blumm et al., *The Mirage of Indian Reserved Water Rights and Western Streamflow Restoration in the McCarran Amendment Era: A Promise Unfulfilled*, 36 ENV'T. L. 1157 (2006) (water rights); Virginia Davis, *A Discovery of Sorts: Reexamining the Origins of the Federal Indian Housing Obligation*, 18 Harv. BLACKLETTER L. J. 211 (2002) (housing); Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J.L. REFORM 417 (2013) (environmental consultation).

8. See, e.g., *Gros Ventre Tribe v. United States*, 469 F.3d 801, 812 (9th Cir. 2006) (rejecting claims government breached trust duties to prevent pollution of reservation); *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1481-82 (D.C. Cir. 1995) (rejecting claims that United States Attorney General was required to bring water rights claims on behalf of tribe); *Hopi Tribe v. United States*, 113 Fed. Cl. 43, 44-45 (2013) (rejecting claims for safe and adequate drinking water supply).

9. See Complaint at 6-8, *Fort Belknap Indian Community v. United States*, (D. Mont. filed Oct. 25, 2022) (No. 22-03); First Amended Complaint, at 2, *Oglala Sioux Tribe v. United States* (D.S.D.

of reservation health care.¹⁰ Urban Indian communities sue over the underfunding of urban health care.¹¹ Indians sue over federal Indian education failures.¹² Even when tribes win a suit against the government, the Department of Justice rarely concedes defeat, occasionally asking the judiciary to undo settled precedents that bar the way to a federal victory.¹³ There is almost no limit to the types of suits Indians and tribes could bring in efforts to force the government to meet their duties, but the large majority of them are doomed.¹⁴

This is wrong.

One of the most difficult things for an American citizen to do in law is to successfully sue the United States government. After all, one of the core legal principles of law assumed by the Framers of the United States Constitution was sovereign immunity.¹⁵ Luckily, the Constitution abrogates federal immunity through the habeas right¹⁶ and the Takings Clause.¹⁷

But for American Indian people and tribal nations, it is much more difficult to sue the government. For most of American history, individual American Indians (“Indians not taxed” in the original text of the Constitution¹⁸) were not considered citizens and therefore not counted for purposes of apportionment.¹⁹ Instead, individual Indians were considered legally incompetent²⁰ and under the guardianship of the federal government.²¹ For this reason, the Supreme Court, until recent decades,²² analyzed issues arising from the confiscation of Indian and tribal property by the United States through a lens of guardianship, which grants almost

filed Oct. 4, 2022) (No. 22-5066); Complaint at 2, *Northern Cheyenne Tribe v. United States*, (D. Mont. filed July 19, 2022) (No. 22-75).

10. See Complaint at 19, *Fort Defiance Indian Hospital Board, Inc. v. Becerra*, (D.N.M. filed Feb. 11, 2022) (No. 22-98).

11. See *Hammittee v. Leavitt*, No. 06-11655, 2007 WL 3013267, at *2 (E.D. Mich., Oct. 11, 2007).

12. See *Stephen C. v. Bureau of Indian Education*, No. 21-15097, 2022 WL 808141, at *3 (9th Cir., Mar. 16, 2022).

13. Compare *Scotts Valley Band of Pomo Indians v. United States Dep’t. of the Interior*, No. 19-1544, 2022 WL 4598687, at *27–29 (D.D.C., Sept. 30, 2022) (ruling in favor of tribe by relying on the canons of construing Indian affairs laws), with Motion for Reconsideration under Rule 59(e) at 1, *Scotts Valley Band of Pomo Indians v. United States Dep’t. of the Interior* (D.D.C. filed Oct. 28, 2022) (No. 19-1544) (asking the court to overrule itself in same case).

14. See *Rodina Cave, Simplifying the Indian Trust Responsibility*, 32 ARIZ. ST. L.J. 1399, 1399 (2000) (“Although the common law of trust is well established, it has not been consistently applied in the context of the trust relationship between the federal government and Indian tribes.”).

15. See THE FEDERALIST NO. 81, at 5 (Alexander Hamilton) (J. & A. McLean ed., 1788) (“It is inherent in the nature of sovereignty not to be amenable to the suit of an individual WITHOUT ITS CONSENT. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.”) (emphasis in original).

16. U.S. CONST. art. I, § 9, cl. 2.

17. U.S. CONST. amend. V.

18. U.S. CONST. art. I, § 2, cl. 3, repealed by U.S. CONST. amend XIV.

19. See U.S. CONST. amend. XIV, § 2 (“excluding Indians not taxed”); *Elk v. Wilkins*, 112 U.S. 94, 99 (1884).

20. Cf. *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883) (describing Indians as “savage” and unable “to understand” American law, while white Americans were the “superiors” of Indians).

21. *United States v. Kagama*, 118 U.S. 375 (1886).

22. *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

unassailable deference to the guardian.²³ Even today, in the face of the few precedents acknowledging a federal duty, the United States Department of Justice insists there is no such duty.²⁴

It never should have been this way.

The United States and every federally recognized tribal nation originally entered into a sovereign-to-sovereign relationship highlighted by the duty of protection, a doctrine under international customary law in which a larger, stronger sovereign agrees to “protect” the small, weaker sovereign.²⁵ The larger sovereign agrees to this duty of protection, in the American case anyway, in exchange for massive, occasionally unquantifiable amounts of land and resources, as well as the power to control the external sovereign relations of the protected sovereign.²⁶ The smaller sovereigns, in this case, tribal nations, typically received protected reservation lands, hunting and fishing rights, small cash infusions, and the vague promise of protection.²⁷

What tribal nations have received so far in exchange for their lands, resources, and sovereignty is a pittance compared to the value of that consideration. Justice Gorsuch noted in a recent case that tribal nations in Washington gave up millions of acres in exchange for “promises.”²⁸ Those promises must mean something.

I call those promises the dark matter of federal Indian law.

Dark matter (and dark energy), as I understand it, constitutes 95 percent of the total universe.²⁹ It does not interact with light or other matter, and so our scientists cannot observe it.³⁰ Scientists know it is there because it does interact with gravity, and scientists can see its effects on observable matter.³¹

23. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

24. See generally Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, *We Need Protection from Our Protectors: The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENV'T. & ADMIN. L. 397, 431–33 (2017) (noting examples where federal lawyers were sanctioned for disclaiming federal duties to Indians or tribes).

25. See Seth Davis, Eric Biber, & Elena Kempf, *Persisting Sovereignties*, 170 U. Pa. L. Rev. 549, 624–26 (2022).

26. Donald L. Fixico, *Documenting Indigenous Dispossession: A Major Data Synthesis Maps Tribal Displacements*, 374 SCI. 536 (2021).

27. See, e.g., *Worcester v. Georgia*, 31 U.S. 515, 552 (1832) (“The consequence was, that their supplies were derived chiefly from that nation, and their trade confined to it. Goods, indispensable to their comfort, in the shape of presents, were received from the same hand. What was of still more importance, the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder.”).

28. *Wash. State Dep’t of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1021 (2019) (Gorsuch, J., concurring in the judgment) (“Really, this case just tells an old and familiar story. The State of Washington includes millions of acres that the Yakamas ceded to the United States under significant pressure. In return, the government supplied a handful of modest promises. The State is now dissatisfied with the consequences of one of those promises. It is a new day, and now it wants more. But today and to its credit, the Court holds the parties to the terms of their deal. It is the least we can do.”).

29. Joe Lindsey, *Filling the Void: What Is Dark Matter?*, POPULAR MECHANICS. (Mar. 23, 2022), <https://www.popularmechanics.com/space/deep-space/a27560790/what-is-dark-matter/>.

30. *Id.*

31. *Id.*

The duty of protection owed by the United States to tribal nations is much like dark matter. The duty of protection was left undefined in Indian treaties. Yes, the treaties and other agreements that established a sovereign-to-sovereign relationship did provide for specific details about that relationship, most famously hunting and fishing rights³² or criminal jurisdiction.³³ But most treaties and agreements are sparse, leaving open most of the details about that relationship. That is the dark matter of Indian law.

The standard tale told about the federal-tribal relationship incorrectly holds that Congress fills in those gaps as it sees fit. That narrative, supplied by federal actors throughout American history (that is, Congress, the executive branch, and the judiciary), was usually told in the language of guardianship and plenary power, and more recently in the language of trusteeship. Tribal agency in this supposedly sovereign-to-sovereign relationship was almost always ignored and belittled.

In recent decades, with the rise of the federal policy favoring tribal self-determination, that narrative is changing to some extent as a political matter. Congress and the Department of the Interior tend to take tribal agency seriously. But as a matter of law, and how law is applied by federal actors like the judiciary and the Department of Justice, nothing has changed. For these actors, the tribal understanding of the tribal-federal relationship and the duty of protection is fundamentally irrelevant. Legal scholars have long complained of the bitter irony that the judiciary undermines federal Indian affairs policy at will, just as tribal nations have begun to successfully assert political power in Congress and governmental capabilities at home.³⁴

This is not what tribal nations negotiated for when they agreed to give up their lands, resources, and aspects of their sovereign prerogatives.

This Article argues that the duty of protection between tribal nations and the federal government is law and that the judiciary has an obligation to enforce aspects of the duty of protection as understood by both tribal nations and Congress. The Article begins by describing the duty of protection as understood by tribal nations at the time of the origination of the duty and now. The Article then turns to how Congress and the Department of the Interior understands the duty of protection, at least since the start of the tribal self-determination era in the 1970s, and how the Department of Justice often undermines that understanding. Then, the Article explains that the dark matter of federal Indian law is the duty of protection, that the federal obligations to tribal nations and individual Indians is real, and that the duty of protection is enforceable. Finally, the Article shows how the United

32. *E.g.*, Treaty of Washington, art. XIII, Mar. 28, 1836, 7 Stat. 491 (1836) (“The Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement.”).

33. *E.g.*, Treaty of Fort Laramie, art. I, Apr. 29, 1868, 15 Stat. 635 (1868) (“If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent, and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.”).

34. *E.g.*, Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391 (2008).

Nations Declaration of the Rights of Indigenous Peoples is a useful tool judges can use in adjudicating the scope of the unstated parts of the duty of protection.

I. THE ORIGINAL UNDERSTANDING OF THE DUTY OF PROTECTION

In 1836, the Michigan Odawa nations executed a treaty with the United States that required the cession of Odawa lands in the lower peninsula of Michigan to the federal government, which constituted about one-third of that area.³⁵ In exchange, the Odawa nations seemingly received very little. They negotiated for permanent reservations, but the Senate unilaterally struck that provision during its ratification session.³⁶ They asked for compensation. Well, yes, they got that, but only about 12½–13 cents an acre, little enough that a federal judge declared that “the Indians were cheated out of their land.”³⁷ On the other side of this transaction, the value of the lands and resources acquired by the United States is unfathomably massive.³⁸

So, what did the Michigan Odawa tribal nations get?

First, the tribes received federal acknowledgment as sovereigns. The very fact that the federal government entered into a treaty with these tribal nations centuries ago ensures today that the Michigan Odawa nations are sovereigns as understood in the United States Constitution.³⁹ That promise did not last long, however, as the Department of the Interior “administratively terminated” the Michigan Odawa tribal nations for over a century.⁴⁰

More importantly, the tribes received the federal government’s promise of the duty of protection, also known as the trust responsibility. Every federally acknowledged Indian tribe enjoys the duty of protection, at least on paper.

The duty of protection is a label used to describe critical aspects of the federal-tribal, sovereign-to-sovereign relationship. The earliest federal Indian law decisions of the Supreme Court relied on the status of tribal nations under a duty of protection in holding that tribal nations are, in fact, nations and possess inherent powers.⁴¹ In *Worcester v. Georgia*, the Court pointed to the British Proclamation of 1763, where the Crown reserved “under our sovereignty, protection, and dominion,” the lands of tribal nations.⁴² The Court found that the United States had also taken tribal nations under its protection as well.⁴³

35. Fletcher, *supra* note 2, at ix–x.

36. *Id.* at 27–28.

37. *United States v. Michigan*, 471 F. Supp. 192, 226 (W.D. Mich. 1979).

38. Cf. Robert H. Keller, *An Economic History of Indian Treaties in the Great Lakes Region*, 4 AM. INDIAN J. 2, 7–17 (1978) (offering qualified values of the lands and resources acquired by the United States in Great Lakes treaties).

39. See U.S. CONST. art. I, § 8, cl. 3 (delegating powers to Congress to regulate commerce between the states, with foreign nations, and with Indian tribes).

40. Matthew L.M. Fletcher, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. REV. 487, 502–05 (2006).

41. *Worcester v. Georgia*, 31 U.S. 515, 519 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1, 34 (1831).

42. *Worcester*, 31 U.S. at 548.

43. See *id.* at 551 (referencing the third article of the Cherokee treaty).

The *Worcester* Court offered a pithy definition of the duty of protection as understood by the British, a definition that included guarantees of material goods and literal protection from violence and trespass:

The consequence was, that their supplies were derived chiefly from that nation, and their trade confined to it. Goods, indispensable to their comfort, in the shape of presents, were received from the same hand. What was of still more importance, the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder.⁴⁴

The Court added, again pithily, that tribal nations expected a lot from the European sovereign protectorate:

The Indians perceived in this protection only what was beneficial to themselves—an engagement to punish aggressions on them. It involved, practically, no claim to their lands, no dominion over their persons. It merely bound the nation to the British crown, as a dependent ally, claiming the protection of a powerful friend and neighbour, and receiving the advantages of that protection, without involving a surrender of their national character.⁴⁵

Ultimately, however, the Court agreed with the expansive expectations of the tribal nations, finding that tribal nations remained sovereign entities even under the duty of protection:

They receive the Cherokee nation into their favor and protection. The Cherokees acknowledge themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected. The manner in which this stipulation was understood by the American government, is explained by the language and acts of our first president.⁴⁶

The *Worcester* Court acknowledged that the duty of protection should be understood in the context of international customary law:

[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self government, by associating with a

44. *Id.* at 552; *see also id.* at 555 (“The Indian nations were, from their situation, necessarily dependent on some foreign potentate for the supply of their essential wants, and for their protection from lawless and injurious intrusions into their country. That power was naturally termed their protector.”); *id.* at 556 (“This treaty, thus explicitly recognizing the national character of the Cherokees, and their right of self-government; thus guarantying their lands; assuming the duty of protection, and of course pledging the faith of the United States for that protection; has been frequently renewed, and is now in full force.”); *Cherokee Nation*, 30 U.S. at 17–18 (Marshall, C.J.) (“They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.”).

45. *Worcester*, 31 U.S. at 517–18.

46. *Id.* at 518; *see also id.* at 555 (“This relation was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master.”).

stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. "Tributary and feudatory states, says Vattel, "do not thereby cease to be sovereign and independent states, so long as self government and sovereign and independent authority are left in the administration of the state." At the present day, more than one state may be considered as holding its right of self government under the guarantee and protection of one or more allies.⁴⁷

In *Cherokee Nation*, Justice Thompson's separate writing explained that international customary law recognized that a weaker state may place itself under the protection of a more powerful state without losing internal sovereignty, and that such an arrangement was relatively common:

We ought, therefore, to reckon in the number of sovereigns those states that have bound themselves to another more powerful, although by an unequal alliance. The conditions of these unequal alliances may be infinitely varied; but whatever they are, provided the inferior ally reserves to itself the sovereignty or the right to govern its own body, it ought to be considered an independent state. Consequently, a weak state, that, in order to provide for its safety, places itself under the protection of a more powerful one, without stripping itself of the right of government and sovereignty, does not cease on this account to be placed among the sovereigns who acknowledge no other power. Tributary and feudatory states do not thereby cease to be sovereign and independent states, so long as self-government, and sovereign and independent authority is left in the administration of the state.⁴⁸

According to Justice Thompson, even a violently conquered nation placed under the duty of protection retained its internal sovereignty:

They have never been, by conquest, reduced to the situation of subjects to any conqueror, and thereby lost their separate national existence, and the rights of self-government, and become subject to the laws of the conqueror. When ever wars have taken place, they have been followed by regular treaties of peace, containing stipulations on each side according to existing circumstances; the Indian nation always preserving its distinct and separate national character. And notwithstanding we do not recognize the right of the Indians to transfer the absolute title of their lands to any other than ourselves; the right of occupancy is still admitted to remain in them, accompanied with the right of self-government, according to their own usages and customs; and with the competency to act in a national capacity, although placed under the protection of the whites, and owing a qualified subjection so far as is requisite for public safety. But the principle is universally admitted, that this occupancy belongs to them as matter of right, and not by mere indulgence. They cannot be disturbed in the enjoyment of it, or deprived of it, without their free consent; or unless a just and necessary war should sanction their disposition.⁴⁹

47. *Id.* at 520 .

48. *Cherokee Nation*, 30 U.S. at 53 (Thompson, J., concurring and dissenting) (citing Vattel, c.1, pg 16, 17).

49. *Id.* at 54–55 (Thompson, J., concurring and dissenting).

Professors Davis, Biber, and Kempf expanded this history to include the narrative of the 1815 Treaty of Ghent, where the United States agreed to continue to deal with tribal nations as sovereigns capable of exercising a treaty power.⁵⁰

II. THE CURRENT UNDERSTANDING OF THE DUTY OF PROTECTION

The Michigan Odawa tribal nations that agreed to come under the federal government's duty of protection did not enjoy that protection for most of the history of the Odawa-federal relationship. Administrative termination, violent and corrupt land dispossession, and the theft of children, language, and culture is proof that the Michigan Odawa suffered horribly through the actions and omissions of the so-called protector.

The 1970s saw a dramatic shift in federal Indian affairs policy, away from paternalism and guardianship and toward self-determination.⁵¹ In the 1980s and 1990s, the United States reaffirmed its commitments to Michigan Odawa tribal nations.⁵² The federal-tribal relationship is now described in terms of the metaphor of a trust relationship rather than a guardianship.

Congress and tribal nations are now closer than ever to realizing how the duty of protection should be negotiated. Every year, federal agencies and tribal governments negotiate annual funding agreements under self-determination and self-governance statutes through which reservation lands and peoples are governed.⁵³ But, at times, the Department of Justice (DOJ) and the Supreme Court lag behind in this modern understanding.

A. Congress and the Department of the Interior

It is well established that since the 1970s, Congress has adopted a policy of supporting tribal self-determination.⁵⁴ In the Indian Self-Determination and Education Assistance Act of 1975, Congress declared its commitment to self-determination:

The Congress declares its commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments,

50. Davis, Biber, & Kempf, *supra* note 25 at 605–06.

51. See MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW § 3.12, at 103 (2016).

52. Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act, Pub. L. No. 103–324, § 4, 108 Stat. 2156, 2157–58 (1994) (reaffirming the acknowledgement of Little Traverse); 45 Fed. Reg. 18322 (March 25, 1980) (acknowledging Grand Traverse).

53. See generally 25 C.F.R. §§ 900.1–256 (2023) (self-determination contracts); §§ 1000.1–465 (2023) (self-governance annual funding agreements).

54. See, e.g., generally Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 140–43 (2006).

capable of administering quality programs and developing the economies of their respective communities.⁵⁵

In virtually every piece of Indian affairs legislation enacted since that time, Congress has explicitly stated its commitment to the trust responsibility. Examples include the Indian Child Welfare Act of 1978, where Congress “[r]ecogniz[ed] the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people”;⁵⁶ and the Indian Trust Asset Reform Act of 2016, where Congress “reaffirm[ed] that the responsibility of the United States to Indian tribes includes a duty to promote tribal self-determination regarding governmental authority and economic development.”⁵⁷ In the more recent statute, Congress explicitly stated its understanding that those trust obligations are enforceable: “the foregoing historic Federal-tribal relations and understandings have benefitted the people of the United States as a whole for centuries and have established enduring and *enforceable* Federal obligations to which the national honor has been committed.”⁵⁸

The Department of the Interior (Interior), which houses the Bureaus of Indian Affairs and Indian Education (BIA and BIE, respectively), usually honors the duty of protection. It perhaps bears mentioning that most employees of these agencies, are tribal members, a result of Congress’s commitment made way back in 1934 to Indian preference in employment.⁵⁹

Federal agencies were somewhat slow to comply with and implement Congress’s turn to tribal self-determination, but in recent decades, led by the Bureau of Indian Affairs, federal agencies have largely embraced that national policy. Consider, for example, the reluctance of the Secretary of the Interior to promulgate regulations following the enactment of the Indian Child Welfare Act (ICWA), which explicitly authorized and instructed the agency to do so.⁶⁰ Instead, Interior set forth a non-binding guidance document.⁶¹ Decades later, that agency reluctance seems to have been lifted. For example, consider the regulations implementing the American Indian Trust Fund Management Reform Act.⁶² Those regulations provide that tribal prerogatives on the management of trust funds would control: “We will give tribes as much responsibility as they desire for the management of their tribal funds that we currently hold in trust.”⁶³ Interior finally promulgated ICWA regulations in 2016.⁶⁴

55. 25 U.S.C. § 5302(b).

56. *Id.* § 1901.

57. *Id.* § 5602.

58. *Id.* § 5601(5) (emphasis added).

59. Indian Preference Laws Applicable to Bureau of Indian Affairs and Indian Health Service Positions, 25 U.S.C. § 5117.

60. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 302, 92 Stat. 3069, 3077 (1978) (codified at 25 U.S.C. § 1952).

61. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67584 (Nov. 26, 1979).

62. 25 C.F.R. §§ 1200.1–.44. *See generally* 25 U.S.C. §§ 4001–4061.

63. 25 C.F.R. § 1200.3(a).

64. Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38777, 38778 (June 14, 2016) (codified at 25 C.F.R. § 23).

However, federal agencies often find themselves in a conflict of interest with tribal nations' interests. After all, tribal nations occasionally sue the United States. The Interior Department once possessed the power to review all attorney contracts with tribal nations, effectively granting a veto on the tribal power to retain counsel, especially when a tribe wished to sue its protector.⁶⁵ That power no longer exists, but the conflict of interest remains.

Enter, the Department of Justice.

B. Department of Justice

The Department of Justice (DOJ) is the worst exploiter and manipulator of the duty of protection in the federal government. As my co-author Daniel Rey-Bear and I documented a few years back, the DOJ rejects many of the most salient obligations imposed upon the United States under the duty of protection.⁶⁶ For example, the United States and tribal nations often find themselves in conflict over the scope of the trust duties of the federal government to tribes and individual Indians, a classic conflict of interest scenario.⁶⁷ In the 1970s, the federal government acknowledged this conflict and implemented a process of splitting the briefs of the government, with the Interior Department and the Justice Department filing separate briefs.⁶⁸ DOJ now asserts, successfully, that there is no conflict of interest or, that if any exists, the conflict is excused.⁶⁹

More importantly, DOJ's litigation position in Indian trust cases is that there is no enforceable federal fiduciary duty to tribes or Indians unless Congress explicitly states that there is such a specific fiduciary duty where the government holds Indian or tribal assets in trust.⁷⁰ In sum, where federal and tribal interests are not aligned, DOJ refuses to accept and implement its duty of protection to tribes.⁷¹ Recent Interior Department officials tasked with implementing the federal government's duty of protection to tribes have expressed enormous frustration with the Justice Department's override of the Interior Department's serious efforts to treat tribal nations in good faith.⁷²

65. 25 U.S.C. § 476(e) (2012) (current version at 25 U.S.C. § 5123(e)), *amended by* Indian Tribal Economic Development and Contract Encouragement Act of 2000, Pub. L. No. 106-179, § 3, 114 Stat. 46, 47 (striking "the choice of counsel and fixing of fees to be subject to the approval of the Secretary"). *See generally* Jill E. Martin, *An Attorney of One's Choosing: Regulating Indian-Attorney Contracts in the 1950s*, 21 W. LEGAL HIST. 165, 166-70 (2008) (describing federal powers over attorney contracts until the 1950s). In the 1950s, the federal government routinely abused this power. *See* Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 355-56 (1953).

66. *See generally* Daniel I. Rey-Bear & Matthew L. Fletcher, *We Need Protection from Our Protectors: The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENV'T. & ADMIN. L. 397, 425-41 (2017) (detailing the abuses of the Department of Justice).

67. *See, e.g.*, *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165-66 (2011); *Nevada v. United States*, 463 U.S. 110, 128 (1983); *Arizona v. California*, 460 U.S. 605, 614-15 (1983).

68. Rey-Bear & Fletcher, *supra* note 67, at 427-28.

69. *Id.* at 428-29.

70. *Id.* at 432.

71. *Id.* at 438-39.

72. *E.g.*, Venus Prince, *Insights from In-House and Interior: Top 10 Lessons From My 10 Years of Experience*, THE FED. LAW., 28, 31 (2016).

DOJ could not do this alone. It has an enabler—the Supreme Court.

C. *The Supreme Court*

The largest barrier to the implementation of the duty of protection is the United States Supreme Court. The critiques of the Supreme Court's Indian law jurisprudence of the last fifty years are legion,⁷³ but two themes are relevant to this Article. First, the Court is often skeptical of its own well-settled Indian law precedents that strongly favor tribal interests. Second, the Court defers extensively to the Department of Justice on questions of the scope of the duty of protection, contrary to the stated policies of Congress and the preferences of the Interior Department.

On the first point, federal Indian law is a very easy body of law to understand if one properly accepts the duty of protection as the guidepost for the field. Tribal nations agreed to come under the federal duty of protection in every treaty, every sovereign-to-sovereign agreement. The duty of protection owed by the United States to tribal nations forms the basis for much of federal Indian law. The Constitution, which federalized Indian affairs and delegated enormous powers to Congress, is structured as it is because of the duty of protection. Because of the intensely federal character of the field, Indian affairs is akin to the foreign affairs and war powers. As a function of the separation of powers between co-equal branches of federal government, the judiciary is obligated to defer to the policy preferences in this field as articulated by Congress and implemented by the executive branch. And until recent years, the Court did so defer, usually to the detriment of tribal interests.⁷⁴

The default interpretative rules that form the key methodology of judicial interpretation of Indian treaties and Indian affairs statutes also derive from the duty of protection. Long ago, the Supreme Court adopted default interpretive rules to ensure that the judiciary would not second-guess the policy decisions made by Congress. Those interpretative rules, somewhat incorrectly, are often referred to as the “Indian canons of construction.”⁷⁵ Indian treaties are to be construed to the benefit of tribal parties.⁷⁶ Indian affairs statutes enacted to benefit tribal parties are similarly to be construed to the benefit of tribal interests.⁷⁷ Additionally, the Supreme Court adopted clear expression rules requiring courts to find a clear

73. E.g., PETER P. D'ERRICO, *FEDERAL ANTI-INDIAN LAW: THE LEGAL ENTRAPMENT OF INDIGENOUS PEOPLES* 35–69 (2022); DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, *UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW* 69–93 (Kathy Lewis ed., 2001); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 267 (2001); Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391, 391–92 (2007).

74. E.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”).

75. E.g., Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623, 624–25 (2011).

76. RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 6 (AM. L. INST. 2022).

77. *Id.* § 8.

expression of Congress's intent to alter treaty terms,⁷⁸ reservation boundaries,⁷⁹ inherent tribal powers,⁸⁰ taxation immunities,⁸¹ and tribal sovereign immunity.⁸²

Unfortunately for tribal interests, the Supreme Court regularly disregards these rules, interfering with Congressional policies favoring tribal interests. In the 1960s and 1970s, Congress turned to a policy of tribal self-determination. In 1975, Congress established a process under the Indian Self-Determination and Education Assistance Act to devolve federal Indian affairs powers to tribal governments.⁸³ In the Indian Civil Rights Act of 1968, Congress had already established minimum constitutional baselines for tribal governments to follow in exercising jurisdiction over individuals, Indians, and non-Indians.⁸⁴ The Court followed that by stripping tribes of the power to prosecute non-Indian criminals in 1978⁸⁵ and severely limiting tribal power to regulate nonmembers in 1981.⁸⁶ The following several decades have continued that trend. The Court has undermined tribal access to justice by adopting equitable defenses available to states and counties whenever they allege "disruption"⁸⁷; undermined tribal justice systems by asserting that tribal justice "differ[s] from traditional American courts"⁸⁸; and unilaterally granted states the power to prosecute non-Indians for crimes committed in Indian country.⁸⁹

At virtually every turn, the Supreme Court seemingly looks for a reason to rule against tribal interests, often guided by the Department of Justice in its quest. It appears that the Court's perspective on tribal interests is skewed, that somehow Indians and tribes possess more legal entitlements than they should, and that Indians and tribes are owed nothing from the United States. It also appears that the Department of Justice chooses, more often than not, to treat tribal interests as a competitor to federal interests.

A fuller understanding of the duty of protection should disabuse the Supreme Court and the Department of Justice of these notions. The federal government's obligations to tribal nations and individual Indians will likely never be completely fulfilled. In large part, of course, this is due to the failure of the United States to manage its obligations in a fair and just manner. Moreover, most American leaders, policymakers, and other citizens likely believe the obligations of the United States to tribal nations have already been fulfilled. They are wrong. The duty of protection is an ongoing obligation that does not self-terminate. This section summarizes the scope of the duty of protection.

78. *Id.* § 5, cmt. e.

79. *Id.* § 3, cmt. k.

80. *Id.* § 15, cmt. a.

81. *Id.* § 32, cmt. b.

82. *Id.* § 25, cmt. b.

83. 25 U.S.C. §§ 5301, 5321–5332, 5301.

84. 25 U.S.C. §§ 1301–1341.

85. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

86. *See Montana v. United States*, 450 U.S. 544, 561–62, 566 (1981).

87. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 216–17, 216 n.10 (2005).

88. *See Plains Com. Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008).

89. *See Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2491 (2022).

III. THE DUTY OF PROTECTION AS DARK MATTER

The Michigan Odawa nations initially sold the interests in their homelands in the 1836 Treaty of Washington.⁹⁰ The United States paid the tribes about twelve cents an acre, an unconscionable amount.⁹¹ After litigation with the federal government in the Indian Claims Commission that began in 1948 and concluded in 1971,⁹² Congress finally appropriated funds to pay damages to the 1836 tribes in the Michigan Indian Land Claims Settlement Act of 1997.⁹³ But as Indian Claims Commission judgments denied tribal nations interest on their awards from the original sale,⁹⁴ even the 1997 award was a small percentage of the actual value of those lands. The tribes ultimately received about \$74 million (after post-judgment interest accrued) for the sale of about twelve million acres,⁹⁵ a little more than six dollars per acre.

Anishinaabewaki is far more valuable than six dollars an acre.

These tribal nations did receive additional valuable consideration for the sale of their lands, primarily rights to hunt, fish, and gather on ceded lands until those lands were “required for settlement.”⁹⁶ Little Traverse also negotiated for 50,000 acres and Grand Traverse negotiated for 20,000 acres.⁹⁷ The United States never properly implemented or protected the land rights provided for in the treaty, the subject of the Grand Traverse bill, and the Little Traverse suit.

But the tribes did negotiate for something incredibly valuable, at least on paper—the duty of protection.⁹⁸ By entering into the Treaty of Washington with the ogemaag (leaders or speakers) of the Grand Traverse and Little Traverse tribal nations, the United States acknowledged their sovereignty under the Treaty Power of the Constitution.⁹⁹ As was settled law then and now, a federally acknowledged Indian tribe is under the protection of the United States.¹⁰⁰ No foreign nation, state government, or private party may engage in intercourse with tribal nations under

90. See Treaty with the Ottawas, etc., arts. 1, 2, May 27, 1836, 7 Stat. 491.

91. *United States v. Michigan*, 471 F. Supp. 192, 226 (W.D. Mich. 1979).

92. The Indian Claims Commission awarded \$10.3 million to the tribes. See *Judgment Funds of the Ottawa and Chippewa Indians of Michigan: Hearing on H.R. 1604 Before the Senate Committee on Indian Affairs*, 105th Cong. 27 (1997) [hereinafter *Judgment Funds of the Ottawa and Chippewa Indians of Michigan*] (statement of Rep. Kildee).

93. See Michigan Indian Land Claims Settlement Act, Pub. L. No. 105-143 §§ 102, 104, 111 Stat. 2652 (1997).

94. Howard M. Freidman, *Interest on Indian Claims: Judicial Protection of the Fisc*, 5 VAL. U. L. REV. 26, 46–47 (1970).

95. See *Judgment Funds of the Ottawa and Chippewa Indians of Michigan*, *supra* note 93.

96. Treaty with the Ottawas, etc., *supra* note 91, at art. 13.

97. *Id.* art. 2.

98. It is likely that the Michigan Odawa tribal nations agreed to come under the protection of the United States as early as 1795, when the Michigan tribal Odawa nations, along with several other tribes, signed on to the 1795 Treaty of Greenville. Treaty of Greenville art. 5, Aug. 3, 1795, 7 Stat. 49. Article 5 of that treaty detailed several aspects of the duty of protection. *Id.* The Michigan Odawa tribal nations would eventually abrogate that relationship by entering the War of 1812 on the side of the British. See Fletcher, *supra* note 2, at 38.

99. U.S. CONST. art. II, § 2, cl. 2.

100. See, e.g., *Worcester v. Georgia*, 31 U.S. 515, 552 (1832).

the protection of the federal government without the consent of Congress.¹⁰¹ As the Supreme Court acknowledged in 1832, the duty of protection broadly includes federal control over Indian commerce and literal protection of Indians and tribes from violence and theft.¹⁰²

Additional aspects of the federal government's duties to the Michigan Odawa nations are peppered throughout the treaty. Article 2 provides a land base.¹⁰³ Article 4 provides for education; agricultural, fishing, and other economic opportunities; and health care.¹⁰⁴ Article 5 covers tribal debts.¹⁰⁵ Article 6, provisions for "half breeds," impliedly recognizes the tribal power to determine membership or citizenship criteria.¹⁰⁶ Article 7 provides for additional economic opportunities, as well as continuing contributions and assistance from the federal government.¹⁰⁷ Article 8 gives the tribes an option to select lands southwest of the Missouri River for a permanent homeland,¹⁰⁸ an option the tribes never elected to invoke.¹⁰⁹

In short, Grand Traverse and Little Traverse negotiated for the full panoply of rights, privileges, and entitlements due to them under the duty of protection.

Unfortunately, the federal government administratively terminated Grand Traverse and Little Traverse a few decades later. For more than a century, the tribes received virtually nothing from the United States under the duty of protection. The Grand Traverse land based dwindled to a mere twelve acres from a promised 20,000.¹¹⁰ Little Traverse fared no better in preserving their land base.¹¹¹ The federal government sent tribal children to boarding schools, primarily to Holy Childhood in Harbor Springs¹¹² and Mt. Pleasant Indian Industrial Boarding School.¹¹³ The government refused tribal efforts to reorganize under the Indian Reorganization Act of 1934.¹¹⁴ The government's urban relocation project of the

101. 25 U.S.C. § 177, 4 Stat. 729, § 2 (June 30, 1834) ("No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution."), codified at 25 U.S.C. § 177.

102. *Worcester*, 31 U.S. at 552.

103. Treaty of Washington, art. 2, Mar. 28, 1836, 7 Stat. 491.

104. *Id.* art. 4.

105. *Id.* art. 5.

106. *Id.* art. 6.

107. *Id.* art. 7.

108. *Id.* art. 8.

109. See Fletcher, *supra* note 2, at 36–37.

110. *Id.* at 49, 167. The 1855 treaty signed by both tribes allotted up to 87,000 acres to Grand Traverse, but very little of that reserved area went to tribal members. *Id.* at 49.

111. *Pokagon Band of Potawatomi Indians Act and the Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act: Hearing before the Senate Committee on Indian Affairs, United States Senate*, S. Hrg. 103–543, at 280–82 (Feb. 10, 1994) [hereinafter *Pokagon Band of Potawatomi Indians Act, etc. Hearing*] (Statement of James M. McClurken).

112. BILL DUNLOP, *THE INDIANS OF HUNGRY HOLLOW* 131–40 (Univ. of Michigan Press, 2004).

113. Sarah L. Surface-Evans, *A Landscape of Assimilation and Resistance: The Mount Pleasant Indian Industrial Boarding School*, 20 INTL. J. OF HISTORICAL HIST. ARCHAEOLOGY 574 (2016).

114. Fletcher, *supra* note 2, at 106 (discussing Grand Traverse); *Pokagon Band of Potawatomi Indians Act, etc. Hearing, supra* note 112, at 285–89 (Statement of James M. McClurken) (discussing Little Traverse).

mid-twentieth century pushed Little Traverse and Grand Traverse members to locations like Grand Rapids¹¹⁵ and Detroit.¹¹⁶

However, once the Michigan Odawa tribes received federal acknowledgment or reaffirmation, the federal government began, slowly, to implement its duty of protection to the tribes. The first steps involved the United States taking land into trust for the benefit of the tribes, allowing for economic development opportunities and a home base from which the tribes could provide governmental services.¹¹⁷ The tribal governments have come from literally nothing to becoming important regional and national players. For example, the tribes work to implement and enforce cultural resources protections;¹¹⁸ the tribes co-manage the fisheries within their ceded territory with federal and state agencies;¹¹⁹ and both tribes' tribal court systems are nationally recognized success stories.¹²⁰ The tribal governments do much more; a quick perusal of their monthly newsletters, *Odawa Trails* and the *GTB News*, offers an overview of the wide panoply of governmental and cultural services provided by the tribes.¹²¹

The federal government's role in this business of tribal governance is important but limited. The federal statutes enabling tribal self-determination place tribal governments in the role of serving as federal government contractors hired to provide services to their own people.¹²² Under this system, Congress appropriates funds and sets minimum baseline rules for the expenditure of those funds.¹²³ The amount Congress appropriates is set by national political actors with an analysis unmoored from the actual obligations owed by the federal government to tribal nations. As one would expect, the annual appropriation is dramatically lower than the actual needs of Indian country.¹²⁴ This budget shortfall of billions of dollars

115. Melanie Shell-Weiss, *Good Intentions: Grappling with Legacies of Conflict and Distrust Surrounding a Native American Oral History Project One Generation Later*, 46 ORAL HIST. REV. 104, 107 (2019).

116. EDMUND JEFFERSON DANZINGER, JR., SURVIVAL AND REGENERATION: DETROIT'S AMERICAN INDIAN COMMUNITY 21 (Wayne State Univ. Press, 1991).

117. Fletcher, *supra* note 2, at 163.

118. Eric Hemenway, *Trials and Tribulations in a Tribal NAGPRA Program*, 33 MUSEUM ANTHROPOLOGY 172 (2010).

119. J. Marty Holtgren & Nancy A. Auer, *Re-envisioning State and Tribal Collaboration in Fishery Assessment and Restoration*, 41 FISHERIES 244, 246 (2016).

120. HARVARD PROJECT ON AM. INDIAN ECON. DEV., HONORING NATIONS: 1999 HONOREE, TRIBAL COURT, GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA 1 (1999); Allie Greenleaf Maldonado & Frederick Mulhouser, "*Baby Steps*": *How Two Northern Michigan Courts Built an Enduring Partnership That Sets up Children to Succeed*, in MICHIGAN JUDICIARY'S SUCCESS STORIES: HOW TRIBAL, STATE, AND FEDERAL ARE COLLABORATING TO BENEFIT MICHIGAN FAMILIES, at 12–15 (2017).

121. ODAWA TRAILS, <https://tbbodawa-nsn.gov/departments/communications-department/odawa-trails/> [<https://perma.cc/TC2C-SZF6>]; GTB NEWS, https://www.gtbindians.org/gtb_news.asp [<https://perma.cc/4UPX-MFBP>].

122. *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 634 (2005).

123. Brief for the National Congress of American Indians as Amicus Curiae Supporting the Cherokee Nation and Shoshone-Paiute Tribes at 4–7, *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005), 2004 WL 1412971.

124. U.S. COMM'N ON C.R., A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY IX (July 2003); U.S. COMM'N ON C.R., BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS 5–6 (Dec. 2018).

annually is but one portion of the failure of the United States to fulfill its duty of protection.

Simply because Congress appropriates funds annually does not mean the duty is fulfilled. The United States did not unilaterally enter into treaties and other agreements with tribal nations. The proposal advanced by Rep. Deb Haaland and Sen. Elizabeth Warren during Sen. Warren's 2020 presidential campaign appeared to use a reasonable approximation of the funding needs of Indian country.¹²⁵ When it is merely the lack of political will that prevents Congress from fully funding tribal governmental services, it follows that the United States cannot unilaterally choose to comply with only a portion of its duty.

The rest of the federal government similarly owes a duty of protection to tribal nations. And, once again, those other branches of the government only partially fulfill those duties while falling significantly short. Presidential administrations going back to President Clinton have ordered the executive branch to consult with tribal nations on major issues impacting Indians and tribes, but stop short of providing an enforceable legal remedy in the event an agency fails.¹²⁶ One bill, the RESPECT Act, would make federal consultation with tribes legally binding,¹²⁷ but that bill has not been enacted. Federal consultation with tribal nations is in most instances intermittent and incomplete.¹²⁸ The errors of the Department of Justice have already been noted.

One supposes the federal judiciary has no specific duty of protection, given that Article III courts are not policymakers. Still, as noted above, the Supreme Court long ago adopted default interpretative rules on Indian treaties and Indian affairs statutes that would largely fulfill the duty of protection. One would hope the judiciary would comply with its own precedents, though in the case of the High Court, compliance occurs at an underwhelming rate.¹²⁹

There is so much more to the federal government's duty of protection to tribal nations than we can see. Underfunding of tribal governments, weak compliance with tribal consultation, and judicial non-compliance with precedents favoring tribal interests are merely some of the federal government's failures to meet its duty of protection.

Luckily, there is a path forward.

125. Deb Haaland & Elizabeth Warren, Legislative Proposal for Honoring Promises to Native Nations Act, <https://www.warren.senate.gov/imo/media/doc/Legislative%20proposal%20-%20208.15.2019.pdf> [https://perma.cc/9FTL-7XTC].

126. Monte Mills & Martin Nie, *Bridges to a New Era: A Report on the Past, Present, and Potential Future of Tribal Co-Management on Federal Public Lands*, 44 PUB. LAND & RES. L. REV. 49, 92–93 (2021).

127. H.R. 3587, 117th Cong. §101 (2021).

128. Aila Hoss, *Securing Tribal Consultation to Support Tribal Health Sovereignty*, 14 NE. U. L. REV. 155, 176–78 (2022).

129. Richard B. Collins, *Never Construed to Their Prejudice: In Honor of David Getches*, 84 U. COLO. L. REV. 1, 44–56 (2013).

IV. THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES AS A SOURCE OF COMMON LAW

The federal government continues to acutely owe the Michigan Odawa tribal nations, but the United States continues to fail to meet those duties. Among other matters, the Grand Traverse Band of Ottawa and Chippewa Indians and Little Traverse Bay Bands of Odawa Indians are entitled to lands guaranteed to them in nineteenth century treaties, or entitled to just compensation for the loss of those lands—lands over which the tribes would exercise governmental powers. In both instances, the Department of Justice has done nothing to assist the tribes in recovering their lands.¹³⁰

This is wrong.

This part argues that international customary law forms the basis of the federal common law that permeates federal Indian law. While federal statutes and Indian treaties form the governing basis for the federal-tribal relationship, federal common law should fill in the many gaps. Given the tradition of international customary law forming the basis for federal Indian common law, it follows that the current understanding of international customary law is relevant. The current understanding of international customary law in the area of Indigenous rights is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Federal courts can and should look to UNDRIP as a source of federal common law in assessing claims made by tribal nations.

A. Judicial Interpretation of Duty of Protection

The duty of protection, as originally understood by the United States, was a creature of international customary law.¹³¹ In the eighteenth century, Congress legislated in light of the duty of protection, as understood through international law, *and continues to do so* in the twenty-first century.¹³² The Supreme Court acknowledged and expanded upon that understanding throughout the nineteenth century as a matter of federal common law.¹³³ Even today, when the concept of federal common law is contested and likely disfavored by the judiciary, federal Indian law is infused with federal common law.¹³⁴

Consider the Trade and Intercourse Acts, the first federal statutes generally applicable to Indian affairs matters, enacted by Congress from 1790 through

130. *Cf.* 28 U.S.C. §§ 2415(a), (b) (establishing time frames for land claims suits brought by the United States on behalf of tribal nations).

131. RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 4, cmt. a (AM. L. INST. 2022).

132. *E.g.*, No Child Left Behind Act, 20 U.S.C. § 7401 (“It is the policy of the United States to fulfill the Federal Government’s unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children.”).

133. RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 4, cmt. A, Reporters’ Notes (discussing *Worcester v. Georgia*, 31 U.S. 515 (1832)).

134. *E.g.*, *Mille Lacs Band of Ojibwe v. County of Mille Lacs, Minnesota*, 508 F. Supp. 3d 486, 504 (D. Minn. 2020) (“Federal courts have often treated the scope of a tribe’s inherent sovereign authority as a matter of federal common law.”) (citation omitted).

1834.¹³⁵ In general, those laws prohibit any person, government, or other entity from engaging in “intercourse” with “Indian tribes.”¹³⁶ These statutes, it is well understood, preempted the field of Indian affairs in favor of Congress and the federal government in general.¹³⁷ What did Congress mean when it invoked “intercourse”? What are “Indian tribes”? Congress offered no definitions of either term in the statutory text. Professor Gregory Ablavsky delivered two important articles delving into the definitions of both, but as an ethical and professional historian, he noted that the historical record is inconclusive as to the full and complete definition of either term.¹³⁸

What gave Congress such immense power to preempt an entire field of law without even offering definitions of the subject matter or the entities affected? The Constitution delegated power to Congress to regulate “[c]ommerce . . . with Indian tribes,”¹³⁹ and enact treaties with Indian tribes,¹⁴⁰ and made treaties and federal statutes the supreme law of the land.¹⁴¹ But even those terms are undefined in the Constitution. Where did the judiciary look when confronted with challenges to Congressional power and to the scope of the Trade and Intercourse Acts?

The Supreme Court took international customary law and applied it as federal common law. When confronted with a question about the extent of Congressional powers’ preemptive effect on the field of Indian trade and intercourse, the Court delivered a narrative (riddled with self-serving historical inaccuracies¹⁴²) that delved deep into international customary law.¹⁴³ From this narrative, the Court concluded that Congress possessed *enormous* power to manage Indian affairs:

The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and *gave also a right to such a*

135. See generally FRANCIS PAUL PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790–1834* (1962) (surveying the history of the trade and intercourse acts).

136. See, e.g., An Act to Regulate Trade and Intercourse With the Indian Tribes, ch. 33, § 1, 1 Stat. 137, 137 (1790) (“[N]o person shall be permitted to carry on any trade or intercourse with the Indian tribes.”); An Act to Regulate Trade and Intercourse With the Indian Tribes, ch. 19, § 1, 1 Stat. 329, 329 (1793) (same).

137. RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 77, cmt. a (“The United States implicitly incorporated the doctrine in the Constitution and the Indian Trade and Intercourse Acts of 1790-1834, which federalized Indian affairs to the exclusion of all others.”).

138. Gregory Ablavsky, *“With the Indian Tribes”: Race, Citizenship, and Original Constitutional Meanings*, 70 STAN. L. REV. 1025, 1057–58 (2018) (analyzing the meaning of “Indian tribes” in the Constitution); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L. J. 1012, 1028–29 (2015) (analyzing, among other things, the meanings of “commerce” and “intercourse” in Indian affairs).

139. U.S. CONST. art. I, § 8, cl. 3.

140. U.S. CONST. art. II, § 2, cl. 2.

141. U.S. CONST. art. VI, cl. 2.

142. See LINDSAY G. ROBERTSON, *CONQUEST BY LAW* 122–31 (2005).

143. *Johnson v. M’Intosh*, 21 U.S. 543, 572–88 (1823).

*degree of sovereignty, as the circumstances of the people would allow them to exercise.*¹⁴⁴

When confronted with a challenge by the states to the exclusivity of Congressional power in Indian affairs, the Court again invoked international customary law. Specifically, the Court explained how the law of nations dealt with the duty of protection doctrine:

The actual state of things at the time, and all history since, explain these charters; and the king of Great Britain, at the treaty of peace, could cede only what belonged to his crown. These newly asserted titles can derive no aid from the articles so often repeated in Indian treaties, extending to them, first, the protection of Great Britain, and afterwards that of the United States. These articles are associated with others, recognising their title to self-government. The very fact of repeated treaties with them recognises it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. “*Tributary and feudatory states,*” says Vattel, “*do not thereby cease to be sovereign and independent states, so long as self-government and sovereign and independent authority are left in the administration of the state.*” At the present day, more than one state may be considered as holding its right of self-government under the guarantee and protection of one or more allies.¹⁴⁵

The duty of protection, the Court concluded, acknowledged the inherent sovereignty of the protected domestic nation and authorized the federal government to literally protect tribal nations from the depredations of state governments.¹⁴⁶

Centuries later, international customary law continues to inform the scope of Congressional powers in light of state interests under the duty of protection, albeit usually in dissent. In *Oklahoma v. Castro-Huerta*, a case where the Supreme Court held that states may prosecute non-Indian criminals in Indian country,¹⁴⁷ Justice Gorsuch invoked the same history and international customs invoked by the Marshall Court in arguing for the inherent sovereignty of tribal nations and the limited powers of states in Indian affairs:

As colonists settled coastal areas near Cherokee territory, the Tribe proved a valuable trading partner—and a military threat. Recognizing this, Great Britain signed a treaty with the Cherokee in 1730. As was true of “tributary” and “feudatory states” in Europe, the Cherokee did not cease to be “sovereign and independent” under this arrangement, but retained the right to govern their internal affairs. Meanwhile, under British law the crown possessed “centraliz[ed]” authority over diplomacy with Tribes to the exclusion of colonial governments.¹⁴⁸

144. *Id.* at 587 (emphasis added).

145. *Worcester v. Georgia*, 31 U.S. 515, 560–61 (1832) (emphasis added).

146. *Id.* at 561.

147. *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2491 (2022).

148. *Id.* at 2505 (Gorsuch, J., dissenting) (citations omitted).

Justice Gorsuch invoked Emer de Vattel's treatise again at a critical moment in the dissent where he argued fervently that tribal nations possess the power to prosecute criminals who perpetrate crimes against tribal citizens:

Tribes are not private organizations within state boundaries. Their reservations are not glorified private campgrounds. Tribes are sovereigns. And the preemption rule applicable to them is exactly the opposite of the normal rule. Tribal sovereignty means that the criminal laws of the States "can have no force" on tribal members within tribal bounds unless and until Congress clearly ordains otherwise. After all, the power to punish crimes by or against one's own citizens within one's own territory to the exclusion of other authorities is and has always been among the most essential attributes of sovereignty.¹⁴⁹

It bears noting that Justice Gorsuch is a cornerstone of one of the most conservative judicial blocs in the history of the Supreme Court.¹⁵⁰

Even today, Congress leaves open for the judiciary to interpret critically important terms as a matter of federal common law. For example, Congress has never defined "Indian" in its Indian country criminal jurisdiction statutes.¹⁵¹ The judiciary hems and haws on this point,¹⁵² but the judiciary has provided a definition in the case law.¹⁵³ Perhaps a better example is how the judiciary has adopted and applied theories of tribal sovereign immunity beyond the bare text of the Constitution, creating a space for Congress to legislate within the scope of those its precedents.¹⁵⁴ In a recent tribal immunity case, the Court's majority pointed to a federal statute that relied on the existence of tribal immunity (again, acknowledged by the Supreme Court as a matter of federal common law) to justify the rejection of a plea to abrogate tribal immunity.¹⁵⁵ Perhaps the best examples are the default interpretative rules that the Court acknowledged and applied over the centuries.

All of this is to say that international customary law *and* federal common law are both present in and critical to the interpretation of modern federal Indian law. One can and should suppose that when the Supreme Court goes wrong in its Indian law decisions, it is likely that the Court is imposing its own policy preferences over those of Congress and tribal nations. That is not the Court's role, to be sure. So, what to do about it?

149. *Id.* at 2511 (Gorsuch, J., dissenting) (citations omitted).

150. See Laura Bronner & Elena Mejia, *The Supreme Court's Conservative Supermajority Is Just Beginning to Flex Its Muscles*, FIVETHIRTYEIGHT (July 2, 2021), <https://fivethirtyeight.com/features/the-supreme-courts-conservative-supermajority-is-just-beginning-to-flex-its-muscles/>.

151. *E.g.*, 18 U.S.C. §§ 1152–1153.

152. Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495, 502–03 (2020).

153. RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 69 (AM. L. INST. 2022).

154. *E.g.*, *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.* 523 U.S. 751, 758–59 (1998) (noting that "Congress has acted against the background of [Supreme Court] decisions" regarding tribal immunity even while "the Court has taken the lead in drawings [its] bounds").

155. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798–803 (2014).

B. The Relevance of the United Nations Declaration on the Rights of Indigenous Peoples

When the Supreme Court was dealing with Indian affairs in its infancy, the Court had the benefit of a respected treatise on international customary law as well as a historical record of those customs in the absence of international consensus on these questions.¹⁵⁶ Now, after centuries of silence from the international community on the rights of Indigenous peoples, there again is international consensus on many of the key issues involving the governance of Indigenous lands and peoples. Once again, the judiciary has a benchbook of sorts to which it can turn when federal Indian law is ambiguous or silent.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is just over fifteen years old.¹⁵⁷ Infamously, the United States, along with other prominent settler colonial nations, originally voted against the Declaration.¹⁵⁸ Eventually, in 2011, the United States announced its support.¹⁵⁹ The Department of State accompanied the announcement of support with a lengthy memorandum.¹⁶⁰

In the United States, commentators debate whether international customary law is federal common law. Some argue that it is,¹⁶¹ some that it is not.¹⁶² In federal Indian law, that debate is irrelevant. International customary law is federal Indian law.

Like anything created by humans, UNDRIP is an incomplete and flawed document, but it is law. Where treaties, federal statutes, regulations, or other applicable law is silent or ambiguous, UNDRIP can and does assist the judiciary in resolving disputes as a source of federal common law. The executive branch, as of 2011, has unambiguously approved of UNDRIP. Congress has had more than fifteen years to reject it and done no such thing (nor, to be fair, has it enacted legislation to implement it in full or in part). Several tribal nations have explicitly approved of UNDRIP.¹⁶³

UNDRIP, as a source of federal Indian law that appears to bear the support of at least the executive branch and tribal nations, as well as the silent acquiescence of Congress, is an incredibly valuable tool for the federal judiciary. The Supreme

156. Davis, Biber & Kempf, *supra* note 25, at 570 (citing Emer de Vattel, *Law of Nations* (1758)).

157. G.A. Res. 61/295, at 1 (Sept. 13, 2007) [hereinafter UNDRIP].

158. *United States Votes Against Adoption of UN Declaration on Indigenous Peoples*, 101 AM. J. INT'L L. 884, 884 (John R. Crook ed., 2007).

159. Press Release, Off. of the Special Rep. for Glob. Intergovernmental Affs., U.S. Dep't of State, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples (Jan. 12, 2011), <https://2009-2017.state.gov/s/srgia/154553.htm>.

160. *Id.*

161. *E.g.*, RESTATEMENT (Third) OF FOREIGN RELS. LAW L. § 111(1) (AM. L. INST. 1987).

162. *E.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997).

163. *E.g.*, Muscogee (Creek) Nation Resolution TR-16-149 (Sept. 24, 2016), <https://creekdistrictcourt.com/wp-content/uploads/2019/08/TR16-149.pdf> [<https://perma.cc/LJ3R-LHPZ>]; Pawnee Nation of Oklahoma Resolution 21-52 (May 12, 2022), http://www.narf.org/nill/codes/pawneecode/drip_2022.pdf [<https://perma.cc/9NH7-9FFK>]; Pit River Tribe Resolution 12-03-05 (Mar. 29, 2012), <https://un-declaration.narf.org/pit-river-tribe-implementation-of-the-un-declaration/> [<https://perma.cc/7G9X-LWHK>].

Court, already facing an intense and historic crisis of public confidence in its legitimacy, would be well served to turn over its musings about good policy in Indian country to a legitimate source of authority.

Where could UNDRIP be helpful?

Key aspects of UNDRIP and the State Department memorandum announcing federal support for UNDRIP include without limitation:

Tribal Autonomy

Article 4 of UNDRIP provides support for tribal autonomy in the exercise of its governing powers. This Article states, “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”¹⁶⁴ Early in its memorandum accompanying the announcement of support, the Department of State pointed directly to this provision, articulating strong support for tribal autonomy:

[T]ribal self-determination has enabled tribal governments to establish, develop, and enhance tribal institutions and infrastructure ranging from those addressing the health, education, and welfare of their communities to those such as tribal courts, fire protection, and law enforcement. The clear lesson is that empowering tribes to deal with the challenges they face and that taking advantage of the available opportunities will result in tribal communities that thrive.¹⁶⁵

Since the United States announced its support of UNDRIP, the Supreme Court has decided several cases that could have been informed by this principle as federal common law. In *Dollar General v. Mississippi Band of Choctaw Indians*, a case decided in favor of tribal interests by a mere 4-4 tie vote, the Court affirmed a lower court decision without opinion, allowing tribal court jurisdiction over a tort claim against a nonmember business arising on tribal lands.¹⁶⁶

Child Welfare

Article 7 of UNDRIP provides support for federal legislation designed to prevent the break-up of American Indian families, an ongoing problem in the United States:

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person. 2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.¹⁶⁷

164. UNDRIP, *supra* note 158, at art. 4.

165. Press Release, *supra* note 160, at 3.

166. *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 579 U.S. 545, 546 (2016), *aff'g*, *Dollar Gen. Corp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014).

167. UNDRIP, *supra* note 158, at art. 7.

The Supreme Court in 2013 decided a case in which it narrowly interpreted the Indian Child Welfare Act (ICWA)¹⁶⁸ to be inapplicable to a situation where a tribal citizen, who was an active-duty service member, allegedly texted his consent to the adoption of his biological child, an action prohibited by ICWA.¹⁶⁹

Currently pending before the Supreme Court is a facial challenge to the constitutionality of the Indian Child Welfare Act.¹⁷⁰

Lands and Resources

Article 26 of UNDRIP broadly supports tribal efforts to preserve, protect, and utilize natural resources:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.¹⁷¹

The State Department memorandum expends a great deal of effort to support these propositions:

The United States recognizes that some of the most grievous acts committed by the United States and many other States against indigenous peoples were with regard to their lands, territories, and natural resources. For this reason, the United States has taken many steps to ensure the protection of Native American lands and natural resources, and to provide redress where appropriate. It is also for this reason that the United States stresses the importance of the lands, territories, resources and redress provisions of the Declaration in calling on all States to recognize the rights of indigenous peoples to their lands, territories, and natural resources. Consistent with its understanding of the intention of the States that negotiated and adopted the Declaration, the United States understands these provisions to call for the existence of national laws and mechanisms for the full legal recognition of the lands, territories, and natural resources indigenous peoples currently possess by reason of traditional ownership, occupation, or use as well as those that they have otherwise acquired. The Declaration further calls upon States to recognize, as appropriate, additional interests of indigenous peoples in traditional lands, territories, and natural resources. Consistent with that understanding, the United States intends to continue to work so that the laws and mechanisms it has put in place to recognize existing, and accommodate the acquisition of additional, land, territory, and natural resource rights under U.S. law

168. 25 U.S.C. § 1901.

169. *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 641, 643 (2013). See generally Matthew L.M. Fletcher & Kathryn E. Fort, *Intimate Choice and Autonomy: Adoptive Couple v. Baby Girl*, in *CRITICAL RACE JUDGMENTS* 452, 452 (Bennett Capers et al., eds. 2022).

170. *Brackeen v. Haaland*, 994 F.3d 249 (5th Cir. 2021), cert. granted, 142 S. Ct. 1205 (2022) (No. 21-380) (argued Nov. 9, 2022).

171. UNDRIP, *supra* note 158, at art. 26.

function properly and to facilitate, as appropriate, access by indigenous peoples to the traditional lands, territories and natural resources in which they have an interest.¹⁷²

Currently pending before the Supreme Court is a matter directly related to this issue. In *Arizona v. Navajo Nation*, the Court will decide whether the federal government owes a duty to the tribe to protect the tribe's unqualified water rights.¹⁷³ This case involves whether the federal government's duty of protection to tribal nations is enforceable against the United States. UNDRIP's statement in support of the access of Indigenous peoples to their lands and resources would seem to be incredibly important. The way American law so far has worked, to reject the notion that the duty of protection is enforceable, runs against the tribal interest here—but it should not. And if it does, the Court will simply be elevating its own policy preferences (and the position of the Department of Justice against the tribe's interests) over the law.

UNDRIP says a lot more, but these three areas are on the cutting edge.

CONCLUSION

Consider the efforts of the Michigan Odawa tribal nations. These tribal nations are treaty tribes that suffered the indignity and abject torment of federal corruption, incompetence, and discrimination—not to forget administrative termination—for a century or more. These tribal nations are owed a right to the lands promised them in the nineteenth century or at least compensation for their loss.¹⁷⁴ At the very least, Congress could authorize these tribal nations to sue the federal government for the takings of their lands. UNDRIP's Article 28 would guarantee a right of redress for that taking in the event that Congress fails to act.¹⁷⁵

Imagine one of the tribes sued the United States in federal court for failure to take action. The Department of Justice would raise any number of defenses—federal sovereign immunity, nonjusticiability under the political question doctrine, and so on. But the same federal judiciary that allows individuals to sue state officials for violations of federal law¹⁷⁶ and allows individuals to sue federal officials for violations of federal law¹⁷⁷ could easily invoke UNDRIP as federal common law and reject those defenses. After all, there are at least two places in the Constitution where the federal judiciary is always open to effectuate federal rights—the Writ of Habeas Corpus¹⁷⁸ and the Takings Clause.¹⁷⁹

Judiciary, it's time to act.

172. Press Release, *supra* note 160, at 6.

173. *Arizona v. Navajo Nation*, 26 F.4th 794 (9th Cir. 2021), *cert. granted*, 143 S. Ct. 398 (2022) (No. 21-1484).

174. Treaty with the Ottawa and Chippewa, art. II, Mar. 28, 1836, 7 Stat. 491.

175. UNDRIP, *supra* note 158, at art. 28.

176. *Ex parte Young*, 209 U.S. 123, 155–56 (1908).

177. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 389 (1971).

178. U.S. CONST. art. I, § 9.

179. U.S. CONST. amend. V.