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States and Their American Indian Citizens

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STATES AND THEIR AMERICAN INDIAN CITIZENS

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Introduction

For the past four decades, Republican control of the White House and Congress has not augured well for Indian country. Conservative administrations are unlikely to support trust land acquisitions, for example.[1] The current administration's informal spokesmen talk openly of privatizing Indian trust and reservation lands, a twenty-first century form of termination.[2] The Obama administration's cooperation with Indian tribes in Indian child welfare litigation and trust land acquisition matters, to name two examples, is threatened, as are national monuments and the environment. There is much for tribal leaders and advocates to be concerned about from the federal government under the current administration.

But Indian nations are timeless entities, and when the federal government is not receptive or is even hostile to tribal interests, modern Indian nations turn elsewhere for potential solutions. Right now, those potential solutions may lie with state legislatures and governments. This article is intended to provide a theoretical framework for tribal advocates seeking to approach state and local governments to discuss cooperation with Indian nations, with a special emphasis on Indian child welfare. While the federal government has a special trust relationship with Indians and Indian nations, Indian people are also citizens and residents of the states in which they live. Thus, states have obligations to Indians as well.

After all, the Fourteenth Amendment obligates states and state actors to guarantee the equal protection of the law to similarly situated persons.[3] But that guarantee too often stops at reservation borders because of deeply

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1. *Land Acquisition Policy: Lookback and Update 7*, BUREAU OF INDIAN AFFAIRS, W. REG'L OFFICE (Nov. 2016), https://nau.edu/uploadedFiles/Offices_and_Committees/Folder_Templates/_Forms/Webb%20NAU%20-%20Land%20Acquisition%20Policy%20-%20November%202016.pdf (asserting that under the second Bush administration, there was "a de facto moratorium for almost five years" barring trust land acquisitions).

2. *See generally* Matthew Fletcher, *A Look at the Next 4 Years in Indian Affairs*, LAW360.COM (Jan. 19, 2017), https://www.law360.com/articles/882778.

3. U.S. CONST. amend. XIV.

misunderstood principles of federal Indian law, such as the notion that states have no responsibility to American Indians due to the federal government's trust responsibility to Indians and tribes. Worse, even where states take action to guarantee equal protection to reservation residents, they are often attacked for creating "special rights" in violation of the Constitution.[4]

This article posits the fairly controversial and novel position that states have obligations to guarantee equal protection to all citizens, including American Indians (and non-Indians) residing in Indian country. In other words, states have an affirmative obligation to ensure that reservation residents, Indian and non-Indian, receive the same services from states that off-reservation residents receive.

States and local governments typically point to the special status of Indian tribes, tribal members, and even nonmember reservation residents as justification for differential treatment. Felix Cohen once brought suit to remedy inaction by Arizona and New Mexico officials, who refused to provide services to Havasupai Indians, denying them the equal protection of the law and leading to eighty-two deaths, on the grounds that Indians were the federal government's sole responsibility.[5] Modern examples abound. The Village of Hobart attempted to impose a restrictive covenant on lands within its jurisdiction in an attempt to prevent the Oneida Indian Tribe of Wisconsin from acquiring trust lands, claiming an injury to the village tax base should Indians acquire the lands.[6] That same village also

4. *Cf.* Gloria Valencia-Weber, *Racial Equality: Old and New Strains and American Indians*, 80 NOTRE DAME L. REV. 333, 346-47 (2004) ("The tribal governance power and immunity from some state laws (e.g., some taxes) results in the American Indians being charged with unjustifiably demanding 'special rights.' However, in the historical law dialog involving American Indians this term has legal content arising from the unique political relationship with the national government. Despite the terms in treaties that bind the United States to tribes in critical matters like land, water, and natural resources, unhappy non-Indians demand that tribal rights be terminated to theoretically equalize everyone."); Jo Carrillo, *Identity as Idiom:* Mashpee *Reconsidered*, 28 IND. L. REV. 511, 512-13 (1995) (describing anti-Indian groups that organize under the theory that Indian rights are invalid "special rights" that should be eliminated).

5. Karen M. Tani, *States' Rights, Welfare Rights, and the "Indian Problem": Negotiating Citizenship and Sovereignty, 1935-1954*, 33 LAW & HIST. REV. 1, 3-4 (2015); *see also* Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 351 & n. 20 (1953) (describing the *Mapatis v. Ewing* (D.D.C. 1948) suit and how it was withdrawn when Arizona agreed to provide services).

6. Matthew L.M. Fletcher, *Baylake Bank v. TCGC & Village of Hobart — Covenant Against Tribal Ownership of Land*, TURTLE TALK (Oct. 6, 2008), https://turtletalk.

unsuccessfully demanded that reservation Indians pay taxes in order to receive services from the county.[7] The County of Manistee's sheriff's office cancelled a cross-deputization agreement with the Little River Band of Ottawa Indians in Michigan.[8] In Fremont County, Wyoming, police refused to respond to calls for assistance by Wind River Indian Reservation police involving non-Indian suspects, claiming lack of jurisdiction.[9] Elsewhere, Indian country communities routinely complain that state and local governments collect taxes on reservation activities without sharing revenues with tribal governments or providing equivalent services to reservation residents.[10] Even tribal advocates often privately agree that such disparate treatment is just a consequence of the preservation of tribal sovereignty. But while these circumstances are common in Indian country, they should be considered Fourteenth Amendment violations.

Additionally, state and local governments that take seriously their obligations to American Indians, are challenged and even attacked for doing too much for Indian people, creating "special rights" for Indians. The State of Minnesota, which enacted a statute implementing and domesticating the federal Indian Child Welfare Act,[11] faces a federal constitutional challenge.[12] The State of Washington, which entered into tax agreements with various tribes, narrowly prevailed against a state constitutional challenge.[13] These "special rights" arguments are the same arguments the Supreme Court has robustly rejected in the treaty rights

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wordpress.com/2008/10/06/baylake-bank-v-tcgc-village-of-hobart-covenant-against-tribal-owner ship-of-land/.

7. Oneida Tribe of Indians of Wis. v. Village of Hobart, 732 F.3d 837 (7th Cir. 2013).

8. Glenn Zaring, *Cross-deputization Concerns in Manistee*, LUDINGTON DAILY NEWS (Mar. 21, 2008), http://www.shorelinemedia.net/ludington_daily_news/archives/cross-deputization-concerns-in-manistee/article_3d3e5391-e421-52a0-ab32-3a5c197ef699.html.

9. Tristan Ahtone, *A Broken System: Why Law and Order Is Faltering on the Rez*, AL JAZEERA (Dec. 19, 2013), http://america.aljazeera.com/articles/2013/12/19/commission-federalgovtisreasonforlittlejusticeinindiancountry.html.

10. Kelly S. Croman & Jonathan B. Taylor, *Why Beggar Thy Indian Neighbor? The Case for Tribal Primacy in Taxation in Indian Country*, JOINT OCCASIONAL PAPERS ON NATIVE AFFS. (May 4, 2016), http://nni.arizona.edu/application/files/8914/6254/9090/2016_Croman_why_beggar_thy_Indian_neighbor.pdf.

11. Minnesota Indian Family Preservation Act (MIFPA), MINN. STAT. §§ 260.751 to 260.835 (1985).

12. Doe v. Piper, No. 15-cv-02639, 2017 WL 3381820, at *1 (D. Minn., Aug. 4, 2017) (dismissing claim for mootness, but asserting there were "interesting and unclear questions of constitutional law").

13. Auto. United Trades Org. v. State, 357 P.3d 615 (Wash. 2015).

context,[14] but they recur again and again. As we will see, these so-called "special rights" are not only allowable under the Fourteenth Amendment, states are *required* to guarantee them in order to ensure all state citizens are equally protected by the law.

Part I of this article surveys the legal history of American Indian citizenship. American Indians began as noncitizens of the United States, excluded by the Constitution from citizenship as "Indians not taxed."

Part II details the principal argument of this article, that the Fourteenth Amendment further requires states to guarantee equal protection to persons both on—and off—reservation, Indians and non-Indians alike. American Indians, as the Supreme Court recognizes, are American citizens. As citizens, they are entitled to the same protections of law offered by states to off-reservation citizens. States and state actors that decline to guarantee that protection are in violation of the Fourteenth Amendment.

There are two ways that adopting this theory would have an immediate impact on Indian country. First, states that have enacted statutes to implement the federal trust obligations to Indian education and child welfare would be fully authorized to do so under the Constitution. Second, states and localities that enter into intergovernmental cooperative agreements with Indian tribes would no longer be concerned with claims that those agreements are void without congressional approval. Instead, this article argues that states and localities are obligated to do so in order to guarantee equal protection to similarly situated citizens on and off reservation.

I. From Deadly Enemies to Citizens: A Brief Legal History of American Indian Citizenship

Before Congress extended citizenship to all American Indians by statute in 1924, and for decades later in some jurisdictions, American Indian citizenship and accompanying voting rights usually were governed by a hodgepodge of common law doctrines. States assessed whether potential

14. *E.g.*, Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 673 at n.20 (1979) ("The Washington Supreme Court held that the treaties would violate equal protection principles if they provided fishing rights to Indians that were not also available to non-Indians. The simplest answer to this argument is that this Court has already held that these treaties confer enforceable special benefits on signatory Indian tribes . . . and has repeatedly held that the peculiar semi-sovereign and constitutionally recognized status of Indians justifies special treatment on their behalf when rationally related to the Government's 'unique obligation toward the Indians.'") (citations omitted).

Indian citizens and voters were civilized, loyal, and competent using a variety of factors. Indians claiming citizenship might have to show they abandoned tribal relations, or abandoned treaty rights claims, or prove loyalty to a given state or to the United States. Indians might have to show they were competent under state law. Indians who were still considered under the guardianship of the federal government might be barred. Even after 1924, some states continued to assess whether Indians could vote in state elections under these rubrics. This practice continued as late as 1962.

A. "Indians Not Taxed" and the Constitution

As this subpart will show, the broad duty of protection to American Indians and Indian tribes assumed by the federal government initially did not extend to state governments. The duty of protection arose from the treaty-based relationship between the federal government and Indian tribes. In addition, the Constitution reflected the federal government's plenary and exclusive authority. And Congress vigorously asserted its Indian affairs powers derived from the Indian Commerce Clause, the Treaty Power, the Supremacy Clause, and other constitutional provisions. States, which as colonies and then under the Articles of Confederation, were left out of the matrix with the ratification of the Constitution.

It is well established that the Constitution vested the federal government with plenary and exclusive authority over Indian affairs.[15] The stark failures of the Articles of Confederation laid the groundwork for federal supremacy in this area, as Madison detailed in Federalist No. 42.[16] The Indian Commerce Clause broadly authorized Congress to take the lead on legislative authority over all aspects of federal, state, and tribal affairs.[17] The Treaty Power, and the Indian treaties that arose from the invocation of

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15. *E.g.*, United States v. Lara, 541 U.S. 193, 200 (2004) ("[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'") (quoting Washington v. Confederated Bands & Tribes of Yakima Nation, 439 U.S. 463, 470-71 (1979); Negonsott v. Samuels, 507 U.S. 99, 103 (1993)).

16. THE FEDERALIST NO. 42 (James Madison) ("The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits.").

17. Cotton Petroleum v. New Mexico, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs . . . .") (citations omitted).

this power, further vested powers in the United States, as well as cemented tribal sovereignty in the new American constitutional system.[18] Other constitutional provisions—the Supremacy Clause, the Necessary and Proper Clause, and the Property and Territory Clause—rounded out federal authority.[19] In the fabled Marshall Trilogy, the Supreme Court confirmed the federal government's plenary and exclusive powers.[20] The Court has repeatedly reaffirmed federal plenary power since those foundational cases.[21] At times, the Court has even stated that federal power over Indian affairs is a preconstitutional power that survived the ratification of the Constitution.[22]

The Marshall Trilogy was the Supreme Court's articulation of the substance of what is now known as the federal trust relationship. In *Worcester v. Georgia*,[23] the Court held that the United States had undertaken a duty of protection through the treaty making process, and was enabled to so do by the Constitution.[24] The duty of protection derives from Indian tribes agreeing to come under the authority of the superior sovereign,

18. United States v. Lara, 541 U.S. 193, 201 (2004) ("The treaty power does not literally authorize Congress to act legislatively, for it is an Article II power authorizing the President, not Congress, 'to make Treaties.' . . . But, as Justice Holmes pointed out, treaties made pursuant to that power can authorize Congress to deal with "matters" with which otherwise 'Congress could not deal.' Missouri v. Holland, 252 U.S. 416, 433 . . . (1920) . . . . And for much of the Nation's history, treaties, and legislation made pursuant to those treaties, governed relations between the Federal Government and the Indian tribes.").

19. Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PENN. L. REV. 195, 199 (1984).

20. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). *See generally* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 30-42 (2002).

21. CONFERENCE OF W. ATTORNEYS GEN., AMERICAN INDIAN LAW DESKBOOK § 1.4 (May 2016 update) [hereinafter AMERICAN INDIAN LAW DESKBOOK].

22. United States v. Lara, 541 U.S. 193, 201 (2004) ("Congress' legislative authority would rest in part, not upon 'affirmative grants of the Constitution,' but upon 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.'") (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-322 (1936)).

23. 31 U.S. (6 Pet.) 515.

24. *Id.* at 556.

the United States.[25] As the *Worcester* Court made clear, the duty of protection lets alone internal tribal affairs as tribes delegate much of the external authority to the federal government.[26]

Importantly, the federal government pursued a robust form of what Charles Wilkinson would later term "measured separatism,"[27] which loosely means keeping Indian tribes apart physically and legally from the rest of America. This period was a robust form of measured separatism because Congress, from its first legislative foray, barred Americans from entering Indian country without federal authorization.[28] Some states, most notably Georgia, sought to take control of Indian reservation lands and resources.[29] The federal government largely opposed state interventions in Indian country in order to secure federal control over Indian lands and resources, but also to forestall conflicts between Indians and American citizens.[30] Still, throughout the nineteenth century, state efforts to assert control over Indian country, ostensibly barred by the Supremacy Clause, went hand-in-hand with federal efforts to colonize Indian lands and resources.[31]

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25. *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.").

26. *Id.* at 556-57 ("From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States.").

27. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 14 (1987).

28. 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, without a license for that purpose under the hand and seal of the superintendent of the department, or of such other person as the President of the United States shall appoint for that purpose . . . .").

29. Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN L. REV. 500, 503 (1969).

30. Letter from George Washington to James Duane (Sept. 7, 1783), *excerpted in* DAVID H. GETCHES ET AL., CASES AND MATERIALS IN FEDERAL INDIAN LAW 99-100 (7th ed. 2017).

31. Deborah A. Rosen, *Colonization Through Law: The Judicial Defense of State Indian Legislation, 1790-1880*, 46 AM. J. LEGAL HIST. 26, 54 (2004) ("The [federal government's] expectation and the plan that, wherever Indians lived in land coveted by whites, the Indians

What was then clear was that Indians were not Americans. Critical to the framing was exclusion of Indian people from the constitutional polity through the "Indians Not Taxed" Clause,[32] which was included in the apportionment portion of the Constitution. Indians were not "free Persons," nor were they slaves; that is, "all other Persons." Indians born within the United States were not automatically American citizens, they were foreigners. In fact, as the first congressional definition of "Indian country" made clear, most Indian tribes and Indians were located outside American borders.[33] Their nations were Indian tribes, with which the United States had a special relationship, a treaty relationship.[34] Presumably, however, Indians could become American citizens by an act of Congress and, possibly, transform into what one could call "Indians Taxed." Chief Justice Taney's notorious *Dred Scott* opinion parsed out this analysis, contradistinguishing the hated and denigrated Indians from the even more hated and denigrated black slaves.[35] There, the Supreme Court contrasted American Indians with African-Americans, concluding that Indians could theoretically obtain citizenship and voting rights through an act of Congress,[36] but that African-Americans could not.[37] Of course, Chief

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would either move out of the way or assimilate into American culture and society. By successfully asserting their authority to regulate Indians in a range of between 1790 and 1880, the states furthered that plan. They pressured Indians to leave their lands, and they increasingly exerted various degrees of rule over the Indians in order to further the colonization.").

32. U.S. CONST. art. I, § 2, ¶ 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.").

33. Act of June 30, 1834, ch. 161, § 1, 4 Stat. 729, 729 ("That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana or the territory of Arkansas, and also that part of the United States east of the Mississippi river not within any state, to which the Indian title has not been extinguished, for the purposes of this act, be taken and be deemed to be the Indian country.").

34. *See generally* ROBERT A. WILLIAMS, LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800 (1997); FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY (1994).

35. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). *See generally* Frederick E. Hoxie, *What Was Taney Thinking? American Indian Citizenship in the Era of Dred Scott*, 82 CHI.-KENT L. REV. 329 (2007).

36. *Scott*, 60 U.S. at 420.

37. *Id.* at 417 ("And this power granted to Congress to establish an uniform rule of naturalization is, by the well understood meaning of the word, confined to persons born in a

Justice Taney stated it was not advisable in his opinion to grant American Indians—who he believed were less than human—citizenship and voting rights.[38]

A few states granted citizenship to certain Indians under state law, creating a distinction between federal and state citizenship for American Indians.[39] These states usually required Indian people seeking state citizenship to prove that they were "civilized," or had "abandoned" their tribal relations by declaring loyalty to the state or the United States, relinquishing their treaty rights, paying state taxes, adopting the habits and customs of white men, or some combination of all of these factors.[40] For example, under Minnesota's Constitution, Indians could become citizens entitled to vote in state elections if they adopted the "language, customs, and habits of civilization in order to vote."[41] Citing *Dred Scott*, the

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foreign country, under a foreign Government. It is not a power to raise to the rank of a citizen anyone born in the United States who, from birth or parentage, by the laws of the country, belongs to an inferior and subordinate class.").

38. *Id.* at 420 ("Congress might, as we before said, have authorized the naturalization of Indians because they were aliens and foreigners. But, in their then untutored and savage state, no one would have thought of admitting them as citizens in a civilized community. And, moreover, the atrocities they had but recently committed, when they were the allies of Great Britain in the Revolutionary war, were yet fresh in the recollection of the people of the United States, and they were even then guarding themselves against the threatened renewal of Indian hostilities. No one supposed then that any Indian would ask for, or was capable of enjoying, the privileges of an American citizen, and the word white was not used with any particular reference to them.").

39. DEBORAH A. ROSEN, AMERICAN INDIANS AND STATE LAW: SOVEREIGNTY, RACE, AND CITIZENSHIP, 1790-1880 (2007).

40. *E.g.*, United States v. Elm, 25 F. Cas. 1006, 1007 (N.D. N.Y. 1877) ("If defendant's tribe continued to maintain its tribal integrity, and he continued to recognize his tribal relations, his status as a citizen would not be affected by the fourteenth amendment; but such is not his case. His tribe has ceased to maintain its tribal integrity, and he has abandoned his tribal relations, as will hereafter appear . . . ."); Anderson v. Mathews, 163 P. 902, 906 (Cal. 1917) ("Neither the members of the group nor, so far as known, the members of the tribe, were subject to, or owed allegiance to, any government, except that of the United States and the state of California, and, prior to 1848, that of Mexico."); Bd. of Comm'rs of Miami County v. Godfrey, 60 N.E. 177, 180 (Ind. App. 1901) ("So long as he remained an Indian, he was under the control of the United States as an Indian. But he voluntarily does what the law says makes him a citizen. This change of his tribal condition into individual citizenship was primarily his own voluntary act. He cannot be both an Indian, properly so called, and a citizen.").

41. Willard Hughes Rollings, *Citizenship and Suffrage: The Native American Struggle for Civil Rights in the West, 1830-1965*, 5 NEV. L.J. 126, 135 (2004); *see also In re* Liquor

Minnesota Supreme Court in 1917 noted that Indians "still cling to some of the customs and habits of their race, and are governed in their relation with each other by their peculiar tribal rules and practices, subject, in a certain sense, to the advice and supervision of the federal authorities."[42] Acting Indian, living in Indian country, and federal superintendency were factors that barred citizenship under Minnesota law.[43] These notions would merge with the federal interpretation of the "Indians Not Taxed" Clause, and would also permeate Indian law and policy throughout the rest of the nineteenth century and much of the twentieth century.

B. The Fourteenth Amendment and the "Deadliest Enemies"

After the Civil War, the United States adopted the Fourteenth Amendment granting citizenship to all persons born within the United States. But now, many, if not most, Indian tribes and American Indians were located within the borders of the United States. Once again, however, the government excluded "Indians not taxed."[44] In *Elk v. Wilkins*,[45] the Court held that American Indians born in Indian country may not acquire citizenship upon their birth under the Fourteenth Amendment. American Indians could only acquire citizenship through an act of Congress. The distinction between federal and state citizenship, supposedly eliminated for all Americans after the Reconstruction Amendments, remained in place for American Indians.

In 1870, the Senate Committee on the Judiciary issued a report that concluded the Fourteenth Amendment did not affect the legal status of American Indians.[46] In the opinion of the report authors, the status of American Indians remained unchanged from the founding of the Republic

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Election in Beltrami County, 163 N.W. 988, 989 (Minn. 1917) ("2. Persons of mixed white and Indian blood, who have adopted the customs and habits of civilization. 3. Persons of Indian blood . . . who have adopted the language, customs and habits of civilization, after an examination before any district court of the state, in such manner as may be provided by law, and shall have been pronounced by said court capable of enjoying the rights of citizenship within the state.'").

42. *Id.* at 989.

43. Rollings, *supra* note 41, at 135.

44. U.S. CONST. amend. XIV § 2 ("Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.").

45. 112 U.S. 94 (1884).

46. S. REP. NO. 41-268 (1870).

through the Reconstruction period.[47] At that time, it appears the dominant legal theory was that the United States had no authority to interfere with the internal relations of Indian tribes. The report concluded that because of the treaty relationship between tribes and the federal government, "Congress has never regarded the Indian tribes as subject to the municipal jurisdiction of the United States."[48] The report also assumed, in a statement that incorrectly ignores that treaty rights are vested property interests protected under the Fifth Amendment, that American citizenship would deprive Indians of their treaty rights.[49] The report even asserted that if Congress tried to assert powers over internal tribal governance, those laws would be declared "unconstitutional and void."[50] In short, as the Judiciary Committee concluded, "*The Indians were excluded because they were not citizens*."[51]

The Supreme Court largely held fast to that theory of limited federal jurisdiction over the internal affairs of Indian tribes in *Ex parte Crow Dog*,[52] holding that then-current federal statutes and treaties did not provide for federal criminal jurisdiction over Indian-on-Indian crimes in Indian country.[53] However, the Court did conclude that Congress had authority to assert jurisdiction over internal tribal affairs, so long as there existed "a clear expression of the intention of Congress" to do so.[54] Congress exploited that opening in enacting the Major Crimes Act in 1885.[55] The Supreme Court confirmed the Major Crimes Act as a valid exercise of the federal government's duty of protection in *United States v. Kagama*.[56]

Importantly, while Congress moved toward breaking down the barriers between the United States and the internal affairs of Indian tribes, the Supreme Court preserved the wall between Indian tribes and state authority. The Court described the federal government's authority as critical to protecting Indians from their "deadliest enemies," states and their citizens:

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47. *Id.* at 1.
48. *Id.* at 9.
49. *Id.* at 1.
50. *Id.* at 9.
51. *Id.* at 10.
52. 109 U.S. 556 (1883).
53. *Id.* at 572.
54. *Id.*
55. Act of Mar. 3, 1885, ch. 341, 23 Stat. 385 (codified as amended at 18 U.S.C. § 1153).
56. 118 U.S. 375 (1886).

"Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies."[57]

As the power of Congress expanded in the 1880s, trending toward true plenary power, effective state power declined.[58] It was during this period that the federal government oversaw or acquiesced to the monumental raiding of American Indian tribal resources—lands, timber, food sources, oil, gas, minerals, coal, gold, and so on—by private and occasionally public interests. American history usually celebrates this history as the closing of the frontier, but American Indians see this period very differently.

The latter half of the nineteenth and first half of the twentieth centuries, loosely speaking, were the height of the assimilation movement of American law and policy.[59] The United States undertook a program of mandatory education of American Indian students, forcing Indian children to move to boarding schools operated by federal officials or religious institutions.[60] These boarding schools commonly acted to undermine tribal cultures by banning utterances of Indigenous languages and cultural practices, and harshly punishing even mild infractions. Coupled with the severe living conditions, which led to an untold number of deaths of Indian children around the United States,[61] the schools often prevented Indian children from seeing their families and friends ever again.[62]

C. Citizenship

By the turn of the twentieth century, nearly all Indian tribes and American Indians were located inside the borders of the United States,

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57. *Id.* at 383-84.

58. Rosen, *supra* note 31, at 54 ("After about 1880, the federal government began taking a more active role in extending direct rule over Indians, no longer leaving that effort primarily to the states. Post-1880 federal policies aimed at breaking up the tribes absorbing individual Indians into American society.").

59. The next Part details other aspects of assimilation, which involved the breakdown of the legal separation of Indians and Indian tribes from American citizens and states.

60. *See generally* DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875-1928 (1995); BRENDA J. CHILD, BOARDING SCHOOL SEASONS: AMERICAN INDIAN FAMILIES, 1900-1940 (1998).

61. ADAMS, *supra* note 60, at 124-35; CHILD, *supra* note 60, at 55-58.

62. *E.g.*, Matthew L.M. Fletcher, *The Indian Child Welfare Act: Implications for American Indian and Alaska Native Children, Families, and Communities*, *in* AMERICAN INDIAN AND ALASKA NATIVE CHILDREN AND MENTAL HEALTH 269, 275-77 (Michelle C. Sarche et al. eds., 2011) (describing the story of Bob Kewaygoshkum, former chair of the Grand Traverse Band, who was taken to an Indian boarding school in third grade and never saw his family again).

often on reservations. In scattered pieces of legislation, most notably the 1887 General Allotment Act, Congress did extend citizenship to Indians that became "civilized" or abandoned tribal relations.[63] By 1924, approximately half of American Indians had acquired citizenship through the allotment process or by another statute.[64] After thousands of non-citizen Indians fought and died in World War I, Congress broadly extended federal citizenship to all American Indians born in the United States.[65] It would take several more decades, but eventually all state governments recognized that American Indians were state citizens, too, eliminating the distinction between federal and state citizenship.

American Indian citizenship under state law after 1924 was, perhaps, more complicated than under federal law. For many courts, Indian citizenship meant the extension of state criminal and regulatory jurisdiction over Indian off-reservation activities.[66] In *People v. Chosa*,[67] for example, decided six years after the citizenship act, the Michigan Supreme Court held that Indians who had become citizens had necessarily abandoned their off-reservation treaty rights and could be prosecuted under state law.[68] Forty years later, the Michigan Supreme Court would reverse *Chosa* to hold that Indian people retained treaty rights absent congressional abrogation.[69]

Other state courts, however, would hold that the United States retained its "guardianship" over American Indian trust and reservation property.[70] The Supreme Court of Idaho, for example, rejected a Fourteenth Amendment constitutional challenge to a ban on liquor sales to Indians,

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63. Act of Feb. 8, 1887, ch. 119, § 6, 24 Stat. 388, 390.

64. Rollings, *supra* note 41, at 134.

65. Indian Citizenship Act of 1924, ch. 232, 43 Stat. 253, (codified as amended at 8 U.S.C. § 1401 (2012)). *see also* GRANTING CITIZENSHIP TO CERTAIN INDIANS, S. REP. NO. 66-122, at 1 (1919) (noting 10,000 of 33,000 eligible Indians served in the armed forces during World War I).

66. *E.g.*, State v. Big Sheep, 243 P. 1067 (Mont. 1926) (criminal jurisdiction); Red Hawk v. Joines, 278 P. 572 (Or. 1929) (action in replevin).

67. 233 N.W. 205 (Mich. 1930).

68. *Id.* at 207 ("When one becomes a citizen of the United States, he casts off both the rights and obligations of his former nationality and takes on those which pertain to other citizens of the country.").

69. People v. Jondreau, 185 N.W.2d 375, 380 (Mich. 1971) ("[T]he foundations upon which *Chosa* rested have not stood the test of time.").

70. *E.g.*, *In re* Long's Estate, 249 P.2d 103 (Okla. 1952) (barring probate of Indian trust property).

holding that Indians were a group of people "genetic[ally]" inclined to be harmed by liquor.[71]

Some states, such as Michigan, authorized Indians to vote even before the Reconstruction but imposed vague obligations on Indians based on the "civilized" character of an Indian, whether the Indian was a ward of the federal government, or whether the Indian had renounced tribal status or treaty rights. By the early twentieth century, the remaining states that resisted allowing Indians to vote concluded that reservation Indians were not residents of the state in which the reservation was located.[72] In 1962, New Mexico became the last state to recognize voting rights for American Indians when its supreme court held that Navajo Nation members are entitled to vote in state elections,[73] rejecting the residence claim. Several counties in areas of high American Indian population and land ownership remain covered by the Voting Rights Act and subject to suit.[74]

Ultimately, American Indians retained both the rights of American citizenship *and* the trust relationship with the United States.[75] The duty of protection, first guaranteed by treaties and later formalized through federal acknowledgment of tribal sovereignty, survives into the modern era. American Indian law and policy is usually considered uniquely federal.[76]

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71. State v. Rovick, 277 P.2d 566, 569 (Idaho 1959) ("It is unnecessary to review the genetics or to indulge in a scientific analysis or discussion of anthropogeny to discover the reasons for the interdictions. Suffice to say that the historic background of laws prohibiting sale of intoxicants to Indians is well recognized and must now be considered as firmly established.").

72. *E.g.*, Allen v. Merrell, 305 P.2d 490 (Utah 1956) (rejecting Indian voting rights claim because he was not a resident of non-reservation lands), *vacated*, 353 U.S. 932 (1957); Porter v. Hall, 271 P. 411 (Ariz. 1928) (same). *Contra* Harrison v. Laveen, 196 P.2d 456 (Ariz. 1948) (holding reservation Indians were residents).

73. Montoya v. Bolack, 372 P.2d 387 (N.M. 1962).

74. *See generally* LAUGHLIN MCDONALD, AMERICAN INDIANS AND THE FIGHT FOR EQUAL VOTING RIGHTS (2010); Jeanette Wolfley, *You Gotta Fight for the Right to Vote: Enfranchising Native American Voters*, 18 U. PA. J. CONST. L. 265 (2015).

75. Tani, *supra* note 5, at 3 ("Under the terms of this arrangement, reservation Indians were entitled to the benefits of state citizenship but remained outside the state's jurisdiction in other regards, thereby retaining a key marker of sovereignty.").

76. *See generally* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1023-24 (2015) ("Received wisdom in both doctrine and scholarship has long held that the federal government enjoys exclusive power over Indian affairs, displacing state authority. Though the argument has a textual hook in the Indian Commerce Clause, this conventional wisdom – which I will call the nationalist account – ultimately rests on precedent and practice.") (footnote omitted).

The United States accepted from its inception a duty of protection to American Indians and Indian tribes, a duty now referred to in law and politics as the trust relationship.[77] Throughout much of American history, the federal government jealously guarded its exclusive power to deal with Indian tribes from states and foreign nations.[78] The Supreme Court, early on, even held that state law has "no force" in Indian country.[79]

About 150 years later, though, the Supreme Court referred to that early formulation of state and tribal relations derisively as a "platonic notion" that no longer controlled its analysis.[80] Instead, tribal sovereignty formed a "backdrop" in determining state powers in Indian country and over American Indians.[81] The Court bluntly stated, "*Indians today are American citizens*. They have the right to vote, to use state courts, and they receive some state services."[82] From that moment, if not before, the Court's understanding of state powers in relation to Indian country, Indian tribes, and reservation activities changed, allowing greater state interventions in Indian law and policy. This shift is often lamented as an unjustified move

77. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556 (1832) ("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.") (emphasis added).

78. *See generally* FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834 (1962) (detailing the early decades of federal Indian law and policy).

79. *Worcester*, 31 U.S. at 561 ("The Cherokee Nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which *the laws of Georgia can have no force*, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves, or in conformity with treaties and with the acts of Congress. The whole intercourse between the United States and this Nation, is, by our Constitution and laws, vested in the Government of the United States.") (emphasis added).

80. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 (1973) ("The modern cases thus tend to *avoid reliance on platonic notions of Indian sovereignty* and to look instead to the applicable treaties and statutes which define the limits of state power.") (emphasis added).

81. *Id.* ("The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because *it provides a backdrop* against which the applicable treaties and federal statutes must be read. It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government.") (emphasis added).

82. *Id.* at 172-73 (footnotes omitted) (emphasis added).

from foundational principles of federal Indian law.[83] Commentators, including myself, argue that states should have less authority over Indian country, reasoning that Indian tribal governance is undercut by states and their political subdivisions in a variety of ways. These critiques are not necessarily wrong, but neither is the Supreme Court. What changed from the "platonic" old days of total separation of American Indians from state law to the modern era is that by the end of 1924 all American Indians born in the United States were American citizens.

II. The Broad State Duty to Protect American Indians and Reservation Residents

American Indians are citizens. States and their subdivisions that invoke federal Indian law principles, such as jurisdictional limitations as justification for refusal to provide services or to negotiate with tribes, are in violation of their duties to their citizens under the Constitution. States and their subdivisions that invoke the problems of regulatory disruption as justification for their failures are also in violation of their duties. Comparing these reticent governments to governments that have reached agreement with Indian tribes is the proper baseline for determining whether state actors are treating similarly situated peoples the same.

In the exercise of its trust relationship with Indians and Indian tribes, the United States has legislated extensively in a wide variety of governance areas, including without limitation health care, public safely, education, and Indian child welfare. Federal legislation in the areas of education and Indian child welfare goes a long way toward expressly authorizing similar state laws and initiatives toward meeting America's trust duty to Indian children. State legislation, such as state Indian child welfare and public education enactments, are thus fully authorized by the Constitution.

A. The Present-Day Understanding of Tribal-State Relations

In general, Congress has the power to regulate state interactions with Indian tribes. Numerous federal laws authorize states to engage with tribes. Among the most prominent of such laws is the Indian Gaming Regulatory Act, which requires tribes to negotiate with states in order to conduct casino-style gaming.[84] Additionally, state courts are obligated to grant full

83. *See generally* DEWI IOAN BALL, THE EROSION OF TRIBAL POWER: THE SUPREME COURT'S SILENT REVOLUTION (2016).

84. 25 U.S.C. § 2710(d) (2012).

faith and credit to tribal court personal protection orders.[85] Most broadly, Congress obligated six states to assume criminal jurisdiction and a limited form of civil jurisdiction over Indian country within those states' boundaries.[86] In addition, the Indian Child Welfare Act authorizes states to enter into cooperative agreements with Indian tribes.[87]

The Constitution's guarantee of equal protection for all persons under the Fifth and Fourteenth Amendments has an anomalous application in Indian country. First, the Constitution itself, by its own terms, is inapplicable to tribal governments.[88] Congress responded in 1968 by enacting the Indian Civil Rights Act to guarantee equal protection to persons under tribal jurisdiction.[89] Second, most federal Indian affairs legislation, almost by definition, includes a specter of racial classifications; Indian tribes are, after all, made up of Indian people.[90] However, federal legislation enacted consistent with the federal government's trust relationship with Indians and Indian tribes does not implicate the equal protection guarantee.[91]

Federal classifications rationally related to the federal trust relationship with Indians and Indian tribes are valid under the Fifth Amendment's equal protection component.[92] For example, the Supreme Court has upheld Indian preference programs in employment at the Bureau of Indian Affairs under this theory.[93] The Court has also upheld the principle of exclusive tribal

85. 18 U.S.C. § 2265(a) (2012).

86. Act of Aug. 15, 1953 (Public Law 280), Pub. L. No. 83–280, § 2, 67 Stat. 588, 588-89 (codified in relevant part at 18 U.S.C. § 1162 (2012)); *see also* 28 U.S.C. § 1360(a) (2012) (parallel civil provision).

87. 25 U.S.C. § 1919(a) (2012) ("States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.").

88. Talton v. Mayes, 163 U.S. 376 (1896).

89. Current version at 25 U.S.C. §§ 1301-1304 (2012).

90. Morton v. Mancari, 417 U.S. 535, 552–53 (1974) ("Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations.").

91. *Morton*, 417 U.S. 535.

92. RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 9 & cmt. a (AM. LAW. INST., Tentative Draft, Apr. 22, 2015).

93. *Morton*, 417 U.S. 535.

jurisdiction over the domestic affairs of reservation Indians.[94] The Court upheld the federalization of Indian country criminal jurisdiction, which subjects American Indians to different criminal laws than non-Indian co-defendants committing the same crimes.[95]

Federal legislation "singl[ing] out" American Indians to their benefit, or to their detriment,[96] does not implicate the equal protection component of the Fifth Amendment in the same manner as legislation otherwise creating racial, ethnic, or ancestry-based classifications, which is subjected to strict scrutiny review by the judiciary. Instead, federal Indian affairs legislation is justified by the federal trust relationship with Indians and tribes. That relationship originally derived from the over 400 treaties legally and constitutionally that have been formed. The federal government's acknowledgment of Indian tribes as entities capable of entering into treaties binding the United States separated Indians and tribes out as a unique political group—analogous in some ways to veterans and diplomats. Even tribes that do not have a treaty relationship may create a political relationship with the United States through the administrative acknowledgment process or through an act of Congress. This political relationship is one that Indian people negotiated for and often paid for with their lives and their resources. Federal Indian affairs legislation is based on that political relationship, not the racial background of Indian people.

The Fourteenth Amendment applies to states in relation to American Indians just as it does to all other citizens. States may not discriminate against American Indians except when such discrimination is narrowly tailored to a compelling state interest.[97] The only wrinkle is that states may also enact legislation that benefits American Indians where authorized to do so by federal statute or court order, or where the state legislation is enacted in accordance with the federal trust relationship with Indians and tribes. It is settled that state laws that implement the federal government's obligations under the trust relationship do not violate the Fourteenth Amendment.[98] For example, in *Washington v. Washington State Commercial Passenger*

94. Fisher v. Dist. Court of Sixteen Judicial Dist. of Mont. in & for Rosebud Cty., 424 U.S. 382 (1976).

95. United States v. Antelope, 430 U.S. 641 (1977).

96. *Morton*, 417 U.S. at 552–53.

97. *See generally* Shira Kieval, Note, *Discerning Discrimination in State Treatment of American Indians Going Beyond Reservation Boundaries*, 109 COLUM. L. REV. 94 (2009).

98. RESTATEMENT OF THE LAW OF AMERICAN INDIANS § 9 & cmt. a (AM. LAW. INST., Tentative Draft, Apr. 22, 2015).

Fishing Vessel Ass'n,[99] the Supreme Court held that the State's regulations implementing its obligations under various American Indian treaties did not violate the Fourteenth Amendment.[100]

States are obligated to guarantee equal protection to all persons within their jurisdiction, and that guarantee extends to persons in Indian country who are, after all, citizens. First, though states do not have a direct trust relationship with Indians and Indian tribes like the federal government, states routinely legislate or take action consistent with the federal government's trust obligations. In those instances, state action does not violate the Fourteenth Amendment. Second, states may discriminate against Indians or tribes by, for example, privileging one Indian tribe or another. States also may not take action that discriminates against Indians because of their racial or ancestral status.

B. Ending the Refusal to Guarantee Services – Intergovernmental Agreements

States have an affirmative obligation to ensure that reservation residents receive the protection of the law equal to off-reservation residents. Naturally, this will be a controversial claim. Indian tribes are jealous of their governance authority in Indian country, and only in careful, measured steps invite outside sovereigns into their homelands. States and local governments are too eager to stay out of Indian country, the government of which has traditionally been an unfunded and fraught with the potential for federal preemption. Still, state authority has penetrated Indian country in several dramatic ways. For example, nonmember activities are fully taxable by state and local governments, absent federal preemption-a rare occurrence.[101] Public Law 280-type states already have significant civil and criminal jurisdiction over on-reservation activities. More importantly, American Indians and other reservation residents are American citizens, entitled to the equal protection of the laws. States, and even some tribes, may argue that the jurisdictional boundaries and tribal sovereignty excuse states from their equal protection obligations, but that excuse is unfounded.

American Indians, even those who reside exclusively in Indian country, are American citizens.[102] Reservation Indians, as the Supreme Court once

99. 443 U.S. 658 (1979).

100. *Id.* at 673 n.20.

101. *E.g.*, Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005); Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1999).

102. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172-73 (1973).

routinely called them,[103] have numerous obligations to state governments. They pay state income taxes for off-reservation income.[104] They pay state sales and use taxes for off-reservation purchases. They comply with motor vehicle registration requirements. They vote in state and local elections. They serve on state court juries. Nonmember reservation residents and entities also have duties to states. States may tax the on-reservation business activities of all nonmembers.[105] States may regulate on-reservation activities of nonmembers, so long as the state regulation is not preempted by federal law.[106]

Congress also has authorized much state action in Indian country. The most obvious and broad authorization is Public Law 280 and similar statutes.[107] These statutes authorize states to assert criminal jurisdiction over Indian country, foreclosing federal criminal jurisdiction. These statutes also authorize state courts to assert jurisdiction over civil disputes that arise in Indian country. Because of historical land purchases and allotment by the federal government, much original reservation land is now owned or controlled by states, counties, or nonmember individuals and entities.[108] States have significant civil jurisdiction over those nonmember-owned lands (criminal jurisdiction is still governed by the "Indian country" analysis).[109]

Application of state law in Indian country is often haphazard. At times, the assertion of state power is onerous and even abusive. For example,

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103. *E.g.*, Williams v. Lee, 358 U.S. 217, 220 (1959) ("Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."); *see also* Dep't of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc., 512 U.S. 61, 64 (1994) ("On-reservation cigarette sales to persons other than reservation Indians, however, are legitimately subject to state taxation."); Halbert v. United States, 283 U.S. 753, 761 (1931) ("These Indians are not the usual reservation Indians.").

104. *E.g.*, Fond du Lac Band of Lac Superior Band of Chippewa Indians v. Frans, 649 F.3d 849 (8th Cir. 2011).

105. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).

106. *E.g.*, Montana v. United States, 450 U.S. 544 (1981) (authorizing state to regulate on-reservation hunting and fishing); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) (holding state regulation of on-reservation hunting and fishing on Indian lands was preempted).

107. Pub. L. No. 83–280 (Public Law 280), Aug. 15, 1953, 67 Stat. 588 (codified in relevant part as amended at 18 U.S.C. § 1162 (2012) and 28 U.S.C. § 1360 (2012)); *see also* MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW § 7.5 (2016).

108. *See generally* Judith Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

109. *E.g.*, Montana v. United States, 450 U.S. 544 (1981).

especially before the enactment of the Indian Child Welfare Act in 1978, state agencies routinely entered Indian country to remove Indian children from their reservation homes.[110] During the allotment era, states and local governments vigorously asserted the power to tax Indian allotments, forcing Indians all too frequently to forfeit their lands to tax foreclosures, even where the state taxes were unlawful.[111] At other times, states and local governments do not enforce criminal laws, even where authorized to do so, in Indian country.[112] It is well established that many areas in Indian country are dramatically underserved. Larger Indian reservations suffer from a severe lack of law enforcement officers to patrol their vast territories. Many reservations have limited access to clean water, electricity, and other basic necessities of modern life.

Many of the Indian country governance problems ravaging reservation residents could be solved quickly by acknowledging that states have an obligation under the Fourteenth Amendment to ensure that all American citizens, even those in Indian country, are entitled to the equal protection of the laws. It should be well established that states and localities may not simply deny services to reservation Indians because they have a more difficult time collecting taxes from those citizens.[113]

That same principle should apply to intergovernmental relations. For example, the Sheriff of Manistee's refusal to negotiate in good faith a public safety agreement with the Little River Band of Ottawa Indians could be an equal protection violation. Assuming the tribe also negotiated in good faith, the Sheriff's refusal could mean that reservation residents, Indian and non-Indian, may be exposed to injury where no one responds to an emergency call. The violation comes in where reservation residents face greater exposure to injury resulting for poor emergency response than

110. *See generally* FLETCHER, *supra* note 107, § 8.8.

111. *See generally id.* § 3.6.

112. United States v. Bryant, 136 S. Ct. 1954, 1960 (2016) ("Even when capable of exercising jurisdiction, however, States have not devoted their limited criminal justice resources to crimes committed in Indian country.").

113. *E.g.*, Thompson v. State of New York, 487 F. Supp. 212, 227 (N.D. N.Y. 1979) ("Generally, a policy decision affects the governmental operations of the municipality. Plaintiffs allege that they were denied police and fire protection because they are Indians, relatives of Indians or residents of the Oneida Indian Reservation. If true, this represents a deliberate policy intended to deny plaintiffs the services of the city and county because of plaintiffs' race or relationship to a race. Consequently, the Court believes that plaintiffs are entitled to present evidence to support their claim under Section 1983 against defendants County of Madison, and City of Oneida.").

similarly situated persons near the reservation. In the case of Manistee County, Michigan, where there is a past history of campaigning against cooperation with the local tribe in several sheriff's races, the obligation to negotiate in good faith may be violated by this kind of animus toward Indian people.[114]

In recent years, these high stakes lawsuits, occasionally initiated by tribes themselves, have reached comprehensive settlements. The Saginaw Chippewa Indian Tribe reached settlement with the State of Michigan and several local governments over a wide variety of issues ranging from criminal jurisdiction, taxation, environmental regulation, concluding an extremely high stakes lawsuit that could have eradicated portions of the tribe's treaty rights.[115] In short, these agreements are really quite viable. The only bar to agreements is state and local politics, and politics is no reason to deny and bar government services to reservation residents.

C. Normalizing State Laws Implementing the Duty to Protect Indian Children – State Indian Child Welfare and Public Education Legislation

State laws consistent with the federal duty to protect Indians and Indian tribes are constitutionally valid. Perhaps the most historically deep and critical trust obligation the United States recognizes is Indian child welfare.[116] The long history of using Indian children as hostages in Indian wars, imposing forced education in boarding schools, and taking Indian children from their homes to be adopted into non-Indian families compelled the United States to enact the Indian Child Welfare Act in 1978.[117]

The Indian Child Welfare Act is a federal mandate to state courts and agencies, partners in more than a century of interventions in Indian families. State courts must transfer Indian child welfare matters to tribal courts if the Indian child is domiciled in Indian country, and must transfer

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114. In the recent race for sheriff of Manistee County, for example, the Democratic party candidate promised to meet with the tribe, while the Republican party candidate made no such promise. Allison Scarbrough, *Undersheriff vs. Lieutenant in Sheriff Race*, MANISTEE COUNTY PRESS (Nov. 6, 2016), http://www.manisteecountypress.com/2016/11/06/undersheriff-vs-lieutenant-in-sheriff-race. This alone might not constitute animus, but may be evidence of animus.

115. Matthew L.M. Fletcher, *Tribal Disruption and Federalism*, 76 MONT. L. REV. 97, 103-08 (2015).

116. *See generally* Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 94 NEB. L. REV. 885 (2017).

117. Indian Child Welfare Act of 1978, Pub. L. No. 95–608, § 2, 92 Stat. 3069, 3069 (codified at 25 U.S.C. §§ 1901-1963 (2012)).

all cases to tribal courts absent good cause to the contrary.[118] The Act also requires state courts to guarantee due process to Indian parents, including the right to counsel.[119] There are requirements for the burden of proof, placement preferences, active efforts, and other protections[120] that have led the leading child welfare organizations to label the Act the "gold standard" in child welfare protection.[121]

Eight states—five of which voted for Republicans in the last national election—have adopted legislation to implement the Indian Child Welfare Act.[122] These statutes codify the Act as state law, filling in gaps in the federal legislation and providing clear guidance to state judges where the Act is ambiguous. These statutes occasionally provide even greater protections to families and children than offered under their federal counterpart.

States enacting these laws are authorized to do so under the Fourteenth Amendment. Historically, every state government participated in the removal of Indian children from their families and homes in and near Indian country. Congress attempted to turn over its trust obligation to educate Indian children to the states through the Johnson-O'Malley Act.[123] The Executive branch introduced urban relocation and the Indian Adoption Project, which moved Indian people en masse out of Indian country to non-Indian communities where they were strangers.[124] During this period, Indian people living in their homelands had their lives disrupted as the states assumed jurisdiction over Indian people who were strangers to their new communities. State officials imposed their own education and child welfare public policies on Indian people, often bringing about tragic and highly discriminatory consequences.[125]

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118. 25 U.S.C. § 1911.

119. *Id.* § 1913.

120. *Id.* §§ 1913, 1915.

121. AMERICAN INDIAN LAW DESKBOOK, *supra* note 21, § 13:1; Brief of Casey Family Programs at 2, Adoptive Couple v. Baby Girl, 133 S. Ct. 1552 (2014) (No. 12-399), 2013 WL 1279468.

122. Kathryn E. Fort, *ICWA Appellate Project*, TURTLE TALK, https://turtletalk.wordpress.com/icwa/ (last visited Sept. 24, 2017).

123. Act of Apr. 16, 1934 (Johnson-O'Malley Act), Pub. L. No. 73-167, 48 Stat. 596.

124. MARGARET D. JACOBS, A GENERATION REMOVED: THE FOSTERING & ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD 6-7, 15-16 (2014).

125. Marian Bussey & Nancy M. Lucero, *Re-examining Child Welfare's Response to ICWA: Collaborating with Community-Based Agencies to Reduce Disparities for American Indian/Alaska Native Children*, 35 CHILD. & YOUTH SERVS. REV. 394, 396 (2013) ("Long-

Ensuring that history is not repeated cannot be considered the creation of "special rights." If anything, state statutes implementing the Indian Child Welfare Act are long overdue in dealing with the aftermath of decades of state interventions into Indian homes and families, let alone those interventions that continue to this day, often with tragic results.[126]

Conclusion

State governments and their non-Indian constituents, once considered the "deadliest enemies" of Indians and Indian tribes, are now critically important players in federal Indian law and policy. Most states, however, have yet to catch up to their obligations to their American Indian citizens. It is well established that cooperation between Indian tribes and state and local governments benefits reservation governance, specifically Indian children.[127] By definition, negotiation and cooperation eliminate the inefficiency of jurisdictional conflict. The jurisdictional bars to providing government services to Indian people have no place in modern governance.

Recent Republican administrations tend to undervalue tribal interests. As of this writing, little is known of the current administration given the continuous scandal-ridden confusion. However, for Indian country, it is apparent that the primary national policy is extraction of natural resources,[128] voter suppression,[129] and perhaps even the undoing of the Indian Reorganization Act.[130] Issues that tribal interests bring to the current

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used approaches in child welfare stressing individualism, independence, confidentiality, and authority through formal education often are in direct conflict with traditional Native values.").

126. *E.g.*, Oglala Sioux Tribe v. Van Hunnik, 100 F. Supp. 3d 749 (D.S.D. 2015) (detailing denials of Indian parents' due process by state officials and state judges).

127. ATTORNEY GENERAL'S ADVISORY COMM. ON AM. INDIAN/ALASKA NATIVE CHILDREN EXPOSED TO VIOLENCE, ENDING VIOLENCE SO CHILDREN CAN THRIVE 63-64 (2014), https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2015/03/23/ending_violence_so_children_can_thrive.pdf.

128. *See generally* Matthew Fletcher, *New Divisions in Indian Country Over Energy Justice*, LAW360.COM (May 2, 2017), https://www.law360.com/nativeamerican/articles/918997/new-divisions-in-indian-country-over-energy-justice.

129. Matthew L.M. Fletcher, *Political Lies and the Future of Voting Rights*, TURTLE TALK (Jan. 27, 2017), https://turtletalk.wordpress.com/2017/01/27/political-lies-and-the-future-of-voting-rights/.

130. Hearing Memorandum from Majority Staff to All Subcommittee on Oversight and Investigations Members, Concerning the Oversight Hearing Entitled "Examining Impacts of

administration are unlikely to move forward unless they are about resources extraction and voter suppression.

It is time for tribal advocates to continue to develop tribal-state relations. In some states, like Michigan, there are numerous pathways to addressing jurisdictional issues over government services, for example. In other states, not so much. This article is designed to provide for tribal advocates a theoretical framework for developing tribal-state agreements, and even perhaps to force recalcitrant states and local governments to bargain.

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Federal Natural Resources Laws Gone Astray" (May 22, 2017), https://naturalresources.house.gov/uploadedfiles/hearing_memo_--_ov_hrg_on_05.24.17.pdf.