THE REPORTS OF MY DEATH ARE GREATLY EXAGGERATED: THE CONTINUED VITALITY OF *WORCESTER V. GEORGIA*

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I. INTRODUCTION

Sovereign governments, like the people that form them, are imperfect. All have some level of corruption, privileging, and bias. Some, unfortunately, are despotic or rapidly moving in that direction. Most, however, strive to form a "more perfect union," whereby they maintain their political integrity and economic security so as to improve the health and welfare of their citizens.[1] As Professor Ezra Rosser so eloquently tells it, this latter story is the story of the Navajo Nation.[2] I appreciate that Professor Rosser does not hide the Nation's imperfections but instead highlights them as an integral part of nation-building.[3] Nation-building is messy and sometimes evolving governments take steps backward, but Rosser's work demonstrates that if you examine the whole arc of the Navajo Nation's political history, it becomes clear that the work of nation-building is done best by the Navajo Nation, free from outside interference.

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1. U.S. CONST. pmbl.

2. *See* EZRA ROSSER, A NATION WITHIN: NAVAJO LAND AND ECONOMIC DEVELOPMENT (2021).

3. *Id*. at 3-4.

Rosser's work also demonstrates that the Navajo Nation is unique in how successful it has been in protecting the scope of its sovereignty.[4] Like all American Indian tribes, the Navajo Nation finds itself within "the geographical limits of the United States," which means—according to the United States Supreme Court—that the "soil and the people within these limits are under the political control of the Government of the United States."[5] However, although the colonization of the United States did operate to circumscribe tribal sovereignty, it did not extinguish it. The Supreme Court defined the scope of the circumscription in a series of cases that has come to be known as the Marshall Trilogy.[6] That trilogy culminated in *Worcester v. Georgia*, which makes up the foundation of the sovereign government-to-government relationship between tribes, states, and the United States that is still observed today.

Worcester established three broad principles in this arena. First, although discovery limited the tribes' external sovereignty to enter governmental relations with other European nations or sell their lands to whomever they pleased, the tribes otherwise "had always been considered as distinct, independent political communities, retaining all their original natural rights."[7] Second, pursuant to the United States Constitution, the states ceded to the federal government the exclusive right to control "the regulation of our intercourse with the Indians."[8] That cession was a broad one, including "the powers of war and peace; of making treaties, and of regulating commerce with . . . *the Indian tribes*."[9] Third, "[t]he treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states."[10] As a result, the Court concluded that tribal nations are "distinct communit[ies] occupying [their] own territory," in which the laws of the states can have no force.[11]

Not surprisingly, states have bristled at the significant limitations that *Worcester* places on their power. Thus, in the nearly two hundred years since it was decided, states have invested substantial energy toward undermining

4. *Id.*

5. United States v. Kagama, 118 U.S. 375, 379 (1886).

6. The trilogy is composed of Johnson v. M'Intosh, 21 U.S. 543 (1823); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); and Worcester v. Georgia, 31 U.S. 515 (1832).

7. *Worcester*, 31 U.S. at 559. The Court holding in *Worcester* seems to have been a purposeful limitation on its holding from *Johnson v. M'Intosh* wherein it held that colonization "necessarily . . . impaired," the natural rights of the tribes. *See M'Intosh*, 21 U.S. at 574.

8. *Worcester*, 31 U.S. at 559.

9. *Id.*

10. *Id.* at 557.

11. *Id.* at 561.

the breadth of that decision.[12] Over that time, although the Court "modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized," the Court had largely rebuffed attempts to limit the scope of its holding in *Worcester*.[13] More recently, however, the states have been more successful at chipping away at the high wall the *Worcester* Court had placed around Indian country. That effort landed a huge blow in the recent Supreme Court decision, *Oklahoma v. Castro-Huerta*, wherein the Court plucked from the obscure case, *Organized Village of Kake v. Egan*, the dicta that *Worcester* "has yielded to closer analysis."[14]

Rumors abound among the academy, legal practitioners, and the judiciary about the death of *Worcester*. Undoubtedly, states' rights and anti-sovereignty advocates will continue to emphasize these dicta to undermine what is, by all accounts, a foundational part of our constitutional canon. The misunderstanding is compounded by those that fail to take the time necessary to appreciate the rich nuance of Chief Justice John Marshall's decision, or in the subtle ways the Court has since modified its holding in *Worcester*.[15] However, the importance of this case, which is integral to our entire system of federal Indian law, to major components of our constitutional system, as well as to our claim as leader in the human rights arena, mandates that we proceed with caution and demand *precision* in its treatment. We cannot presume the abrogation of such a significant case based on veiled rhetoric that stitches together *dicta* built upon *dicta*. Instead, we should acknowledge

12. *See, e.g.*, Williams v. Lee, 358 U.S. 217 (1959); *see also* Organized Vill. of Kake v. Egan, 369 U.S. 60 (1962) (*Kake*); Warren Trading Post Co. v. Ariz. Tax Comm'n, 380 U.S. 685 (1965); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973); Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973); Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv., 425 U.S. 463 (1976); Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463 (1979); Washington v. Confederated Tribes of the Colville Indian Rsrv., 447 U.S. 134 (1980); Cent. Mach. Co. v. Ariz. State Tax Comm'n, 448 U.S. 160 (1980); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); United States v. McBratney, 104 U.S. 621 (1882); Ramah Navajo Sch. Bd. v. Bureau of Revenue, 458 U.S. 832 (1982); Rice v. Rehner, 463 U.S. 713 (1983); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); Tulalip Tribes v. Washington, 349 F. Supp. 3d 1046 (W.D. Wash. 2018); Dylan R. Hedden-Nicely, *The Terms of Their Deal: Revitalizing the Treaty Right to Limit State Jurisdiction in Indian Country*, 27 LEWIS & CLARK L. REV. (forthcoming 2023); Adam Crepelle, *Taxes, Theft, and Indian Tribes: Seeking an Equitable Solution to State Taxation of Indian Country Commerce*, 122 W. VA. L. REV. 999 (2020).

13. *Williams*, 358 U.S. at 219.

14. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2493 (2022) (quoting *Kake*, 369 U.S. at 72 (1962)) (the *Kake* Court did not explain what its import was, nor could it do so without tipping its hat to the fact that it was taking the statement completely out of context. As a result, everyone is left guessing as to what the Court thinks it means. This paper seeks to clarify what the Court meant when it originally made this statement in *Kake*).

15. *See* cases cited *supra* note 12.

the broad scope of *Worcester*'s original holding and carefully examine where and how the Supreme Court has since circumscribed its breadth.

Much scholarly attention has been devoted to the rules established in *Worcester*, as well as the case's importance in American jurisprudence.[16] Rather than add to that discussion, this paper focuses on the Court's Indian law jurisprudence around the time it decided *Kake*, which will provide a clearer picture of how the Court has treated *Worcester* in the modern era, and how it has been limited. That analysis leads to the inescapable conclusion that although the Court has abandoned *Worcester*'s categorical prohibition on state jurisdiction in Indian country, "the broad principles of that decision came to be accepted as law."[17] Accordingly, until the Court "openly avow[s]" its intent to overrule *Worcester*, we must remain faithful to its narrow authorization of state power in Indian country, as well as its broad recognition of tribal sovereignty and federal primacy over the relationship with tribal nations.[18]

II. CASTRO-HUERTA'S TREATMENT OF WORCESTER

Castro-Huerta addressed the narrow question of whether the State of Oklahoma had criminal jurisdiction over a non-Indian perpetrator who committed a crime against an Indian victim within the Cherokee Nation Reservation.[19] The Court concluded that Oklahoma had that jurisdiction after failing to find a federal law that expressly preempted state jurisdiction and concluding that the balance of state, tribal, and federal interests favored Oklahoma's assumption of jurisdiction.[20]

In order to get its desired result, the majority seemed compelled to establish that states had at least some authority within Indian reservations. The precedent readily acknowledges this already, with Justice Thurgood Marshall remarking in the 1980 case, *White Mountain Apache v. Bracker*, that "[l]ong ago the Court departed from Mr. Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries."[21]

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16. *See, e.g.*, Rennard Strickland, *The Tribal Struggle for Indian Sovereignty: The Story of the Cherokee Cases*, *in* INDIAN LAW STORIES 61-80 (Carole Golderg et. al. eds., 2010); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787 (2019); Hedden-Nicely, *supra* note 12.

17. *Williams*, 358 U.S. at 219.

18. *Worcester*, 31 U.S. at 554.

19. *Castro-Huerta*, 142 S. Ct. at 2491.

20. *Id.* at 2496-2501. There will undoubtedly be much scholarly criticism of the majority's reasoning underlying *both* of these conclusions. For a critique of its use of the so-called *Bracker* "balancing test," see Hedden-Nicely, *supra* note12, at 31-35.

21. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980).

Indeed, *Bracker* serves as the basis for the Court's ill-conceived balancing test that ultimately carried the day for Oklahoma.[22] Thus, the Court did not need to erode *Worcester* any further than it already had to achieve its end. Nonetheless, the Court chose to elevate its *dicta* in *Kake*, twice announcing that the "'general notion drawn from Chief Justice Marshall's opinion in *Worcester* v. *Georgia*' 'has yielded to closer analysis.'"[23]

Unlike Justice Marshall's conclusion in *Bracker*, the majority's reasoning in *Castro-Huerta* seems to contain no limiting principle, leading many to speculate as to its scope.[24] Indeed, taken out of context, which anti-sovereignty activists will undoubtedly do, it could be read as a total abrogation of *Worcester*. However, before diving into the cases underlying the Court's cryptic remark, it is important to identify *precisely* what the Court was actually saying in *Castro-Huerta*.

Recall that, as articulated in *Worcester*, the ban on state jurisdiction within Indian country was *categorical*, yielding to no exceptions.[25] Furthermore, *Worcester* stated that Indian lands were "distinct communit[ies] occupying [their] own territory."[26] Although *Castro-Huerta* did not argue it, the majority seemed unusually concerned that this language seemed to indicate that "the Federal Government sometimes treated Indian country as [physically] separate from state territory."[27] Thus, the Court reached back to *dicta* from *Kake* to conclude that "the Court has consistently and explicitly held that Indian reservations are 'part of the surrounding State.'"[28] Importantly, *Castro-Huerta* does *not* claim to abrogate *Worcester* beyond this. The Court did *not* move to overrule or even erode the mountain of precedent establishing that Congress has plenary authority over Indian relations and that federal law may preempt state law.[29] Furthermore, the Court said nothing about the general metes and bounds of tribal sovereignty, nor did the Court limit the power of a treaty to preempt state law within Indian country.

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22. *Bracker*, 448 U.S. at 144-46.

23. *Castro-Huerta*, 142 S. Ct. at 2493, 2502 (quoting Organized Vill. of Kake v. Egan, 369 U.S. 60, 72 (1962)).

24. Matthew L.M. Fletcher, *In 5-4 Ruling, Court Dramatically Expands the Power of States to Prosecute Crimes on Reservations*, SCOTUSBLOG (Jun. 29, 2022, 12:35 PM), https://www.scotusblog.com/2022/06/in-5-4-ruling-court-dramatically-expands-the-power-of-states-to-prosecute-crimes-on-reservations/ [https://perma.cc/TBB7-EZ6T].

25. Worcester v. Georgia, 31 U.S. 515 (1832).

26. *Id.* at 561.

27. *Castro-Huerta*, 142 S. Ct. at 2493.

28. *Id.* The *Kake* Court actually said that "it was said that a reservation was in many cases a part of the surrounding State or Territory." *Kake*, 369 U.S. at 72.

29. *Castro-Huerta*, 142 S. Ct. at 2493 (noting that states may take jurisdiction within Indian country "except as forbidden by federal law").

Ultimately, *Kake* was the single reed upon which the majority could grasp for its bare conclusion that "as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country."[30] However, as Justice Neil Gorsuch points out in his dissent, the Court's holding actually rests on a balancing of state, tribal, and federal interests, which "makes anything it does say about the 'inherent' rights of states to try cases within Indian country dicta through and through."[31] Further, and more to the point here, *Kake* simply does not support *any* abrogation of *Worcester* beyond its simple proposition that "the *Worcester*-era understanding of Indian country as separate from the State was abandoned later in the 1800s."[32]

III. EXPLORING *CASTRO-HUERTA*'S HALF-BAKED APPLICATION OF *KAKE*

As Justice Gorsuch remarked in his dissent in *Castro-Huerta*, the majority seemed to view *Kake* as "some magic bullet" that impliedly unwound nearly 200 years of precedent, largely affirming *Worcester*.[33] However, upon "closer analysis," it is clear that *Kake* is not nearly so broad. Instead, that case was born out of the incredibly unique circumstances that existed in Alaska at the time of its statehood.[34] Because it was so remote, there had not been the same level of significant non-Indian pressure to acquire Native lands in Alaska when compared to the continental United States. As a result, the federal government had never entered into any agreements for land cessions with Alaska Natives and had established just nine reservations within the territory that later became Alaska.[35] That meant that the United States had never extinguished the aboriginal title that the Alaska Natives held over the entirety of the State, which called into question the State's jurisdiction over the land.

As soon as it gained statehood, Alaska began to test the bounds of its newly acquired jurisdiction by working to enforce its anti-fish-trap conservation law against a number of Alaska Native tribes, including the Organized Village of Kake and the Angoon Community (hereinafter collectively referred to as "Kake"), as well as the Metlakatla Indian Community.[36] For their part, the indigenous people that made up these Native communities had been subsisting by hunting and fishing since time

30. *Id.*
31. *Id.* at 2526-27 n.19 (Gorsuch, J., dissenting).
32. *Id.* at 2497.
33. *Id.* at 2520.
34. CHARLES F. WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 231-40 (2005).
35. *Id.* at 231.
36. Organized Vill. of Kake v. Egan, 369 U.S. 60, 62 (1962).

immemorial and at the time of the litigation were entirely dependent on salmon fishing for their survival.[37] Accordingly, they intended to maintain that way of life notwithstanding Alaska's statehood. The Department of the Interior supported these communities, going so far as purchasing canneries for the villages and issuing permits for tribal members to erect fish traps in navigable waterways near their homes.[38] Nonetheless, the State moved to stop the tribal fishing, even seizing fish traps and arresting several tribal members including the President of the Kake Village Council.[39] In response, Kake, as well as the Metlakatla Indian Community brought suit against Alaska seeking a declaration that they had the right to continue to fish free from the State's jurisdiction.[40]

Critical for our discussion here, the Supreme Court split the Village of Kake's suit from the one brought by the Metlakatla Indian Community because—although they continued to hold aboriginal title to their lands—the Kake was not located within an Indian reservation.[41] In contrast, the Metlakatla Indian Community is located within the Annette Islands Indian Reservation, which was set aside by Congress in 1891 for the Community.[42] The difference would prove dispositive.

The United States argued that its regulations authorizing the Metlakatla fish traps preempted Alaska state law prohibiting the same.[43] Importantly, the United States did not rely on the 1891 Act setting aside the Annette Islands Reserve as the basis for those regulations. Instead, it relied upon the Alaska Statehood Act, which maintained in the United States "absolute jurisdiction and control" of Indian "property, (including fishing rights),"[44] as well as the White Act,[45] which had authorized the Secretary of Interior to control the time, place, and manner of fishing throughout Alaska until the State could develop a comprehensive regulatory scheme.[46] The Court rejected both of these federal laws, finding the White Act inapplicable and concluding that the Alaska Statehood Act's declaration of "absolute

37. *Id.* at 61.

38. *Id.*

39. *Id.* at 62.

40. *Id.*; Metlakatla Indian Cmty.v. Egan, 369 U.S. 45, 50 (1962).

41. *Kake*, 369 U.S. at 62.

42. *Metlakatla Indian Cmty.*, 369 U.S. at 46.

43. *Kake*, 369 U.S. at 64.

44. Alaska Statehood Act, Pub. L. No. 85-508, § 4, 72 Stat. 339, 339 (1958); *see also Kake*, 369 U.S. at 62-63.

45. White Act of 1924, ch. 272, 43 Stat. 464 (omitted from 48 U.S.C. §§ 221-228 (1958) as obsolete upon admission of Alaska into the Union).

46. *Kake*, 369 U.S. at 62; *Metlakatla Indian Cmty.*, 369 U.S. at 49.

jurisdiction and control" over Indian fishing rights did not necessarily require that jurisdiction be exclusive of the State.[47]

Instead, for the Court, it was the 1891 Act that set aside the Annette Islands as an Indian reservation that was dispositive.[48] That Act provided that:

> [T]he body of lands known as Annette Islands . . . is hereby, set apart as a reservation for the use of the Metlakahtla [*sic*] Indians . . . to be held and used by them in common, under such rules and regulations . . . as may [be] prescribed . . . by the Secretary of the Interior.[49]

Notice that the 1891 Act provides neither "absolute" nor "exclusive" jurisdiction by the Secretary of the Interior. Nonetheless, the Court found that the language used to set aside the Annette Reservation was "substantially the same as used in numerous other statutory reservations."[50] Thus, consistent with its precedent in *Worcester* that federal law preempts state authority within Indian country, the Court simply presumed that "the [1891] statute clearly preserves federal authority over the reservation."[51] It then remanded the case back to the Department of the Interior to promulgate rules consistent with the authority vested by Congress in the 1891 Act.[52] Far from limiting *Worcester*, the Court in *Metlakatla* implicitly but certainly upheld *Worcester*'s general rule that the United States retains broad authority within Indian country, up to and including the exclusion of the states.[53]

It was against this backdrop that the Court turned its attention to *Kake*, which was driven by the fact that although they continued to hold aboriginal title to their lands, "neither Kake nor Angoon has been provided with a reservation."[54] Therefore, the Court's rules from *Worcester* regarding the interrelationship of state, tribal, and federal power within Indian country simply did not apply. Just the opposite, as the Court observed: it had "never held that States lack power to regulate the exercise of aboriginal Indian rights, such as claimed here, or of those based on occupancy."[55] Compounding Kake's problems, the Court concluded that "[i]t has never been doubted that States [have jurisdiction over] Indians, even reservation Indians, outside of Indian country."[56] Accordingly, the Court began from the presumption that

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47. *Metlakatla Indian Cmty.*, 369 U.S. at 55-59.
48. *Id.* at 57-59.
49. Act of March 3, 1891, ch. 561, § 15, 26 Stat. 1095, 1101.
50. *Metlakatla Indian Cmty.*, 369 U.S. at 52.
51. *Id.* at 59.
52. *Id.*
53. *Id.* at 58-59.
54. Organized Vill. of Kake v. Egan, 369 U.S. 60, 62 (1962).
55. *Id.* at 76.
56. *Id.* at 75.

state jurisdiction applied to the fish traps at Kake and then examined both the White Act and the Alaska Statehood Act to determine whether those laws preempted the State's authority to regulate off-reservation tribal fishing.[57] Of course, it had already found those laws did *not* preempt state authority, which led the Court to ultimately conclude that the state anti-fish-trap law was valid as applied against the Village of Kake.[58]

Hence, when read together, the holdings of *Metlakatla* and *Kake* are well-aligned with the Court's precedent in *Worcester*. The Court impliedly but faithfully applied *Worcester*'s principles in *Metlakatla* when dealing with the scope of state authority within an Indian reservation.[59] Conversely, since *Worcester*'s rules only apply within Indian country, the Court largely presumed the validity of state jurisdiction in *Kake*, which dealt with villages that were located outside of any reservation. Clearly then, the Court did not need to limit *Worcester* to come to its holding in *Kake*, making its later analysis of that case "dicta through and through."[60] Nonetheless, the Court did go on to make the point that federal policy had changed since its decision in *Worcester*. However, the Court stressed that much of that "closer analysis" had not been done by the judiciary but by *Congress*, which had acted to allow for *some* limited state jurisdiction within Indian country.[61] In contrast, the Court found that "[d]ecisions of this Court are few as to the power of the States when not granted Congressional authority to regulate matters affecting Indians."[62] The Court then distilled the rule from those few cases to the maxim that application of state jurisdiction remains impermissible if "such application would interfere with reservation self-government or impair a right granted or reserved by federal law."[63] For its part, that rule was already well known, having originated on the Navajo Nation in the foundational case *Williams v. Lee*.[64]

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57. *Id.* at 62-63.

58. *Id.*; *Metlakatla Indian Cmty.*, 369 U.S. at 53-59.

59. *Metlakatla Indian Cmty.*, 369 U.S. at 58-59.

60. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2526-27 & n.19 (2022) (Gorsuch, J., dissenting).

61. *Kake*, 369 U.S. at 72-74. That observation is, of course, entirely consistent with core tenants of federal Indian law, wherein the Court has long recognized the legislative branch has having plenary authority to shape federal Indian law and policy. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.02[1] (Nell Jessup Newton ed., 2012). But equally true is that "except as thus expressly qualified [by Congress], full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government." *Id.* § 4.02[1].

62. *Kake*, 369 U.S. at 75.

63. *Id.*

64. Williams v. Lee, 358 U.S. 217, 222-23 (1959).

IV. THE COURT'S "CLOSER ANALYSIS" OF *WORCESTER* IN *WILLIAMS*

As Professor Rosser explains, *Williams* is not only a fundamental federal Indian law case but also serves as part of the legal foundation for modern Navajo sovereignty.[65] *Williams*, along with two other Supreme Court cases—*Warren Trading Post v. Arizona Tax Commission*[66] and *Arizona Tax Commission v. McClanahan*[67]—have significantly buffered the Navajo Nation from intrusions by states, which has played an outsized role in providing the space necessary for the Nation to develop its governmental institutions and economy. More to the point for our discussion here, however, *Williams* is noteworthy because the Court that decided it was composed of the exact same justices that decided *Kake* just a few years later.[68] Hence, the two cases can reasonably be read *in pari materia*, which is important because *Williams* had much to say about the continued vitality of *Worcester*.

Williams addressed the question of whether an Arizona state court could take jurisdiction over a simple breach of contract claim that involved a non-Indian plaintiff and an Indian defendant.[69] To answer this question, the Court's starting place was *Worcester*, which it praised as one of Chief Justice Marshall's "most courageous and eloquent opinions."[70] The Court then reiterated *Worcester*'s holding that:

> The Cherokee nation . . . is a distinct community, occupying its own territory . . . 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.[71]

Far from abrogating *Worcester*, the Court unanimously held that "[d]espite bitter criticism and . . . defiance . . . the broad principles of that decision came to be accepted as law."[72]

Nonetheless, the Court was careful to point out that the rule from *Worcester* had not *entirely* survived into the modern era. Although the Court acknowledged that "[o]riginally the Indian tribes were separate nations

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65. ROSSER, *supra* note 2, at 53-54.
66. Warren Trading Post v. Ariz. Tax Comm'n, 380 U.S. 685, 691-92 (1965).
67. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 181 (1973).
68. *See Williams*, 358 U.S. 217; Organized Vill. of Kake v. Egan, 369 U.S. 60 (1962).
69. *Williams*, 358 U.S. at 218.
70. *Id.* at 219.
71. *Id.* (quoting Worcester v. Georgia, 31 U.S. 515, 561 (1832)).
72. *Id.* at 219.

within what is now the United States," it took for granted that tribal lands sometimes were located within states.[73] And over time, the Court had allowed for state jurisdiction within Indian country "where essential tribal relations were not involved and where the rights of Indians would not be jeopardized."[74] However, beyond this *narrow* exception, the Court was crystal clear that "the basic policy of *Worcester* has remained."[75]

Importantly, the *Williams* Court pointed to precisely the same case—*Utah & Northern Railway v. Fisher*—it cited in *Kake* when it said that "Chief Justice Marshall's opinion in *Worcester v. Georgia* . . . has yielded to closer analysis."[76] That case, which dates to 1885, originated when the Utah & N. Railway sought to avoid payment of a tax levied on property it held within the Fort Hall Reservation, which was reserved for the "absolute and undisturbed use and occupation" of the Shoshone-Bannock Tribes in the 1868 Fort Bridger Treaty.[77] Pursuant to that promise, the railway claimed that "the Indian reservation is excluded from the limits of Idaho . . . or that it is necessarily excepted from [Idaho's] jurisdiction . . . by [the Treaty of Fort Bridger]."[78]

The Court rejected both arguments.[79] However, interestingly, contrary to *Castro-Huerta*, the Court in *Utah & N. Railway* did *not* "consistently [or] explicitly" conclude that Indian reservations are *categorically* "'part of the surrounding State' and subject to the State's jurisdiction 'except as forbidden by federal law.'"[80] Instead, the Court found that the Fort Hall Reservation was within the geographical boundaries of the territory of Idaho based upon the specific facts present in that case, namely that the Idaho territory was created *before* the Reservation and the 1868 Treaty gave no indication that the parties intended to physically remove Fort Hall from the boundaries of the territory.[81] Thus, the Supreme Court's statement in *Kake* that "it was said that a reservation was *in many cases* a part of the surrounding State or Territory," seems to more accurately describe its precedent than the categorical statement made by the majority in *Castro-Huerta*.[82]

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73. *Id.* at 218.
74. *Id.* at 219.
75. *Id.*
76. *Compare id.* at 220, *with* Organized Vill. of Kake v. Egan, 369 U.S. 60, 72 (1962).
77. Utah & N. Ry. Co. v. Fisher, 116 U.S. 28, 29 (1885) (citing Treaty with the Eastern Band Shoshonees and the Bannock tribe, Shoshonee-U.S., art. 2, July 3, 1868, 15 Stat. 673 [hereinafter Treaty of Fort Bridger]).
78. *Utah & N. Ry. Co.*, 116 U.S. at 29.
79. *Id.*
80. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2493 (2022).
81. *Utah & N. Ry. Co.*, 116 U.S. at 29-30.
82. Organized Vill. of Kake v. Egan, 369 U.S. 60, 72 (1962) (emphasis added).

Similarly, the territory's jurisdiction to impose a tax on the railway was a function of the unique facts in the case. Specifically, the Shoshone-Bannock Tribes had entered into an agreement with the United States to allow the railway to be run through the Reservation.[83] That agreement, according to the Court, caused "the land upon which the railroad and other property of the [Railway] are situated [to be] . . . withdrawn from the reservation."[84] At the very least, the Court drew from the consent given by the Tribes their acknowledgment that none of their "just rights . . . under the treaty can be impaired by taxing the road and property used in operating it."[85] However, the Court readily acknowledged that state jurisdiction would be impermissible if it were to "interfere with the enforcement of the treaty stipulations [or] defeat [treaty] provisions designed for the security of the Indians."[86] It is from this that the *Williams* Court distilled its famous rule statement that "[e]ssentially, 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."[87]

The *Williams* Court looked to the 1868 Treaty with the Navajos to determine the scope of the Nation's sovereign right to be free from state court jurisdiction.[88] As the Court observed, "this treaty 'set apart' for 'their permanent home' a portion of what had been their native country, and provided that no one, except [the] United States . . . was to enter the reserved area."[89] From this simple language, the Court concluded that:

> Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in *Worcester v. State of Georgia*, was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed.[90]

Hence, *any* assertion of state power within the Navajo Nation, no matter how compelling, would be invalid if it interfered with the internal affairs of the Nation or the rights of its citizens. The Court found that interference in *Williams* because "[t]here can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs."[91] Therefore, the state's assertion of jurisdiction was

83. *Utah & N. Ry. Co.*, 116 U.S. at 32.
84. *Id.*
85. *Id.* at 31-32.
86. *Id.* at 31.
87. Williams v. Lee, 358 U.S. 217, 220 (1959) (citing *Utah & N. Ry. Co.*, 116 U.S. 28).
88. *Id.* at 221-23.
89. *Id.* at 221 (quoting Treaty with the Navaho, Navaho-U.S., art. 2, June 1, 1868, 15 Stat. 667).
90. *Id.* at 221-22.
91. *Id.* at 223.

invalid because it "would infringe on the right of the Indians to govern themselves."[92]

The Court's "closer analysis" of *Worcester* becomes yet even clearer in another foundational case that originated on the Navajo Nation: *Warren Trading Post*.[93] Decided just three years after *Kake*, the Court was once again composed almost entirely of the same justices as the Court that decided both *Williams* and *Kake*, having lost only Justice Felix Frankfurter and gained Justice Arthur Goldberg.[94] Nonetheless, *Warren Trading Post* was once again a unanimous decision, implying that the Court undoubtedly considered its ruling to be consistent with both *Williams* as well as *Kake*.[95] Equally probative, *Warren Trading Post* was written by Justice Hugo Black, author of *Williams*.[96] Between the two cases, Justice Black had also signed on with the majority decision in *Kake,* indicating that his view of that decision was consistent with the unanimous holdings in both *Williams* and *Warren Trading Post*.[97] As a result, *Warren Trading Post* remains an important data point to discern what the Court meant when it said that *Worcester* had "yielded to closer analysis."

Warren Trading Post dealt with the question of whether the State of Arizona could tax a non-Native Indian trader that conducted its business on the Navajo Reservation.[98] Although the opinion focuses less on inherent tribal sovereignty and more on federal primacy over Indian relations, Justice Black nonetheless began his analysis at the same place: *Worcester*. In so doing, he made *no mention* that would indicate that he intended to walk back the holding of *Williams* that "the broad principles of [*Worcester*] came to be accepted as law."[99] Just the opposite, *Warren Trading Post* is once again a full-throated reaffirmation of *Worcester*, with the Court observing that "[l]ong before" the creation of the Navajo Nation "the Federal Government had been permitting the Indians largely to govern themselves, free from state interference."[100] However, unlike *Williams*, which focused on inherent tribal sovereignty as a bar to state jurisdiction, Justice Black focused in *Warren Trading Post* on the portions of *Worcester* that addressed federal primacy as a bar to state authority in Indian Country.[101] In so doing, he quoted

92. *Id.*
93. Warren Trading Post Co. v. Ariz. State Tax Comm'n, 380 U.S. 685 (1965).
94. *See id.*
95. *See id.*
96. *Id.* at 685.
97. *See* Organized Vill. of Kake v. Egan, 369 U.S. 60, 75-76 (1962).
98. *Warren Trading Post Co.*, 380 U.S. at 685-86.
99. Williams v. Lee, 358 U.S. 217, 219 (1959).
100. *Warren Trading Post Co.*, 380 U.S. at 686-87.
101. *Id.* at 688, 691.

approvingly the very language the *Castro-Huerta* Court alleges to have "yielded to closer analysis,"[102] reiterating that *Worcester* held that "[t]he treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union."[103] To be sure, the Court did not walk away from its holding in *Williams* that it had "modified" *Worcester*'s categorical prohibition on state jurisdiction within Indian country. However, it did double down on its holding that federal *permission* for states to be in Indian country was to be strictly construed and would only be tolerated insofar as it did not interfere with federal law and policy, as well as federal treaty obligations to the tribes. To support this conclusion, the Court once again reached back to *Worcester*, reaffirming that "[f]rom 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."[104] Specifically related to the Navajo, the general federal policy was codified by the legislative branch when it ratified the 1868 Treaty with the Navajo, which, as Justice Black once again pointed out, caused "[t]he Navajo Reservation [to be] set apart as a 'permanent home' for the Navajos."[105] Since then, the Court declared, "Congress has . . . left the [Navajos] largely free to run the reservation and its affairs without state control, a policy which has *automatically* relieved Arizona of all burdens for carrying on those same responsibilities."[106] Thus, we can see from *Warren Trading Post* that, far from "yielding" to anything, the Supreme Court has remained steadfast in its protection of federal primacy over Indian affairs within Indian country.

V. CONCLUSION

As recounted by Professor Rosser, the result of *Williams*, *Warren Trading Post*, and a later decision by the Supreme Court, *Arizona Tax Commission*, is that the Navajo Nation has enjoyed a degree of sovereignty that is unique in Indian country.[107] Without question, their governmental

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102. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2493 (2022).

103. *Warren Trading Post Co.*, 380 U.S. at 688 (quoting Worcester v. Georgia, 31 U.S. 515, 557 (1832)).

104. *Id.* (quoting *Worcester*, 31 U.S. at 556-57).

105. *Id.* at 686.

106. *Id.* at 690 (emphasis added).

107. *See* ROSSER, *supra* note 2, at 53-54; *see also* Williams v. Lee, 358 U.S. 217, 221-23 (1959); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 174-75 (1973); *Warren Trading Post Co.*, 380 U.S. at 690-92.

institutions, as well as their people, have been victimized by disastrous federal policies that have consistently interfered with their internal affairs, health and welfare, and economic stability.[108] However, these cases have largely kept the *states* out of the Navajo Nation. That space, along with the modern Congressional policy of self-determination, has provided the Navajo Nation with the room necessary to develop its own brand of government that, although not perfect, works diligently and effectively for the betterment of the Navajo people.[109]

Tribal governments around the country are doing much of the same, with many providing governmental services—to tribal members and non-Indians alike—that states either cannot or will not provide to their citizens.[110] The key to ensuring the continuation of this good work, work that many throughout the country depend, is to fulfill the promises the United States has made to these people and then simply get out of the way. The judiciary plays an outsized role in this effort, and the single most important step it can take toward that end is to apply *Worcester* and its progeny *precisely*, considering closely the ways in which it has been revised and the ways in which it remains unchanged.

Taken together, *Williams*, *Metlakatla*, *Kake*, and *Warren Trading Post* are clear. Has *Worcester* been modified? Yes. Has it been abrogated? Absolutely not. In fact, the Court in *Williams*—the case upon which *Kake* is based—unabashedly reaffirmed *Worcester* as one of Chief Justice Marshall's "most courageous and eloquent opinions."[111] Yes, the Court in *Kake* acknowledged that since *Worcester*, it had recognized that some reservations are "*in many cases* part of the surrounding State or Territory."[112] And, yes, as a result, the Court has "departed" from *Worcester's* categorical rule that "the laws of [a State] can have no force" within reservation boundaries,[113] but only "in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized."[114] That is the extent of the "closer analysis" alluded to in *Kake*. Beyond that, the "broad principles" of *Worcester* remain the law the United States.[115]

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108. *See* ROSSER, *supra* note 2, at 36-70.

109. *See id.* at 3, 8.

110. *See* Matthew L.M. Fletcher, *Indian Tribes Are Governing Well. It's the States That Are Failing*, WASH. MONTHLY (Sept. 30, 2021), https://washingtonmonthly.com/2021/09/30/indian-tribes-are-governing-well-its-the-states-that-are-failing/ [https://perma.cc/YXW6-MUX2].

111. *Williams*, 358 U.S. at 219.

112. Organized Vill. of Kake v. Egan, 369 U.S. 60, 72 (1962) (emphasis added).

113. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980).

114. *Williams*, 358 U.S. at 219.

115. *Id.*

That includes *Worcester*'s holding that the federal government has plenary authority over the management of the government-to-government relationship with Indian tribes pursuant to "the controlling power of the constitution and laws of the United States" over Indian affairs.[116] It also includes *Worcester*'s broad recognition that although the colonization of the United States "excluded [the tribes] from intercourse with any other European potentate than the first discoverer," it did nothing to affect the tribal right to remain "distinct independent political communities, retaining their original natural rights."[117] These "two independent but related barriers to the assertion of state regulatory authority" are intertwined through the countless treaties, agreements, and executive orders the United States has entered into recognizing Indian reservations as the tribal "permanent homeland."[118] And, of course, the Supreme Court's Indian canons of construction demand that promise be interpreted broadly and as the tribes would have understood it.[119] Ultimately then, any assertion of state power that "would infringe on the right of the Indians to govern themselves" within their own homeland remains invalid.[120] As the Court said in 1959 regarding Arizona's assertion of jurisdiction within the Navajo Nation, the United States has long "guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868 and has done so ever since. If this power is to be taken away from them, it is for Congress to do it."[121]

This, I hope, will be the legacy of Rosser's *A Nation Within*. His work demonstrates so clearly that zealous adherence to these foundational principles of federal Indian law—principles as old as our republic—are the *only* way forward if we are to reverse course on American colonization and move towards achieving the tribal self-determination we promised in countless agreements that guaranteed each tribe a permanent homeland. We must honor and protect these principles as "[i]t is the least we can do."[122]

116. Worcester v. Georgia, 31 U.S. 515, 521 (1832); *see also* United States v. Lara, 541 U.S. 193, 202-03 (2004); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 61, § 5.02[1].

117. *Worcester*, 31 U.S. at 559.

118. People v. McCovey, 685 P.2d 687, 691 (Cal. 1984).

119. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 61, § 2.02[1].

120. Williams v. Lee, 358 U.S. 217, 223 (1959).

121. *Id.*

122. Wash. Dep't of Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1021 (2019) (Gorsuch, J., concurring).