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Navajo Statehood: From Domestic Dependent Nation to 51st State

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Ezra Rosser, *Navajo Statehood: From Domestic Dependent Nation to 51st State*, 101 *Oregon Law Review* 307 (2023).

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Navajo Statehood: From Domestic Dependent Nation to 51st State

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The Supreme Court's recent holding in Oklahoma v. Castro-Huerta that "Indian country is part of the State, not separate from the State" is a reminder of tribal sovereignty's precarious foundation under U.S. law. The Court's holding not only broke with longstanding precedent regarding the relationship between tribes and states, but it is also incompatible with the lived experience of those living in the Navajo Nation. The Navajo Nation, not the states and not the federal government, has primary responsibility for governing an area roughly the size of West Virginia. Yet most maps of the United States demarcate only state boundaries, obscuring the existence of Indian nations as the third type of sovereign operating within the borders of the United States.

The inability or unwillingness of the U.S. Supreme Court, and to some extent all other non-Indian governance institutions at the state and federal level, to take tribal sovereignty seriously forces a question: Should the Navajo Nation pursue statehood? Such a question may seem far-fetched or merely an academic thought experiment, but there is historical precedent for contemplating the idea that an Indian nation might form a state. Moreover, journalists, academics, and politicians have floated the possibility that the Navajo Nation already meets many of the attributes required to form a new state. So, although the idea of the Navajo Nation becoming the fifty-first state of the Union seems far-fetched, considering the possibility provides a way to better understand both statehood and the hard choices Indian nations must make.

INTRODUCTION

The U.S. Supreme Court's 2022 *Oklahoma v. Castro-Huerta* decision dramatically departs from prior precedent regarding the

relationship between Indian nations and state governments.¹ For nearly two hundred years, the guiding principle, laid down in *Worcester v. Georgia*,² was that when it came to Indian-state relations, “the State enjoyed no lawful right to govern the territory of [Indian nations].”³ In part because, as explained in *United States v. Kagama* in 1886, “the people of the [S]tates where they are found are often their deadliest enemies,”⁴ Indian tribes often had to be protected from states. The federal government had the exclusive responsibility under the Constitution of dealing with Indian nations, leaving tribes “otherwise free to govern their internal affairs without state interference.”⁵ Unfortunately for both tribes and the rule of law, Justice Kavanaugh, writing for the majority in *Oklahoma v. Castro-Huerta*, cobbled together a weak hodgepodge of historical evidence to support the problematic general principle that “the Constitution allows a State to exercise jurisdiction in Indian country. Indian country is part of the State, not separate from the State.”⁶ It is too early to know the full ramifications of the Court’s deeply problematic decision⁷ or the extent to which states will respond to the holding by aggressively asserting their newfound authority over Indian land. It is possible that the rhetorical bark of *Castro-Huerta* will outstrip its bite and that the case will be treated more as a blip than as a turning point. It is too soon to know for sure. But irrespective of this one case, if Indian nations are to defend their people and their sovereignty against state overreach, they arguably will need to be both proactive and creative in their approach.

The U.S. Supreme Court’s elevation of states over sovereign Indian nations invites the question of whether tribes would be better positioned vis-à-vis non-Indian government powers by being states

¹ *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022).

² *Worcester v. Georgia*, 31 U.S. 515 (1832).

³ *Castro-Huerta*, 142 S. Ct. at 2505 (Gorsuch, J., dissenting).

⁴ *United States v. Kagama*, 118 U.S. 375, 384 (1886).

⁵ *Castro-Huerta*, 142 S. Ct. at 2506 (Gorsuch, J., dissenting).

⁶ *Id.* at 2493; *see also id.* at 2511 (Gorsuch, J., dissenting) (calling out the Court’s flawed historical reasoning).

⁷ *See, e.g., NARF/NCIA Joint Statement on SCOTUS Ruling on Castro-Huerta v. Oklahoma*, NATIVE AM. RTS. FUND (July 7, 2022), <https://www.narf.org/castro-huerta-v-oklahoma-scotus-ruling/> [<https://perma.cc/B765-ZDWH>]; Elizabeth Hidalgo Reese, *Conquest in the Courts*, THE NATION (July 6, 2022), <https://www.thenation.com/article/society/supreme-court-castro-huerta/> [<https://perma.cc/83WN-3V6F>]; Gregory Ablavsky & Elizabeth Hidalgo Reese, *The Supreme Court Strikes Again – This Time at Tribal Sovereignty*, WASH. POST: OPINIONS (July 1, 2022, 7:00 AM), <https://www.washingtonpost.com/opinions/2022/07/01/castro-huerta-oklahoma-supreme-court-tribal-sovereignty/> [<https://perma.cc/32PW-EWFG>].

than continuing to operate under their current status as independent, albeit “domestic dependent,” nations.⁸ The possibility that Indian tribes might be incorporated into the United States through statehood is not a novel idea. The 1778 U.S. treaty with the Delawares included a provision that provided for a state comprised of a Delaware-led confederation of tribes.⁹ In 1905, the so-called Five Civilized Tribes¹⁰ (Cherokee, Choctaw, Chickasaw, Seminole, and Creek) promulgated the creation of a “State of Sequoyah” in what is now eastern Oklahoma.¹¹ Sequoyah was not to be; “the push for statehood failed, largely as a result of partisan politics. Congress feared admitting a state dominated, not by ‘alien[s],’ but by Democrats.”¹² Though the Indian statehood question is not new, it is arguably more urgent than it was prior to the Court’s holding in *Castro-Huerta*.

Among the 574 federally recognized tribes, the Navajo Nation is arguably best positioned to make a push for statehood. The Navajo reservation spans much of northern Arizona, northwestern New Mexico, and a smaller part of southern Utah. Comparable in size to West Virginia or Ireland, the Navajo Nation’s land mass, population, and government structure supports the idea that it could credibly

⁸ The characterization of tribes as “domestic dependent nations” first appeared in *Cherokee Nation v. Georgia*, 30 U.S. 1, 2 (1831), and remains a fairly accurate description of tribal sovereignty to this day. For an insightful account of the complications associated with such nested sovereignty for one particular tribe, the Navajo Nation, see Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109 (2004).

⁹ Gregory Ablavsky, *Sovereign Metaphors in Indian Law*, 80 MONT. L. REV. 11, 21 (2019) (“The very first Indian treaty that the United States entered, the 1778 treaty with the Delawares, contained a provision suggesting that the Delawares should gather other ‘friend[ly]’ tribes and then ‘join the present confederation, and to form a state whereof the Delaware nation shall be the head, and have a representation in Congress.’”) (quoting Treaty with the Delawares, Sept. 17, 1778, Del.-U.S., 7 Stat. 13, 14).

¹⁰ See DAVID E. WILKINS & HEIDI KIIWETINEPINESIIK STARK, *AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM* 65 (Traci Crowell et al. eds., 4th ed. 2017).

¹¹ See Ablavsky, *supra* note 9, at 23 (“Faced with the prospect that they would become a minority in a white-dominated state, some leaders of the Five Civilized Tribes pushed to create their own separate state, Sequoyah, from the eastern portion of the territory. Although similar to the prior century’s proposal for an Indian state, Sequoyah would be Native only in its demographics: like every other state, Sequoyah’s borders, jurisdiction, and citizenship would be defined by territory, not Indian status. In shedding any aspect of the structures and protections of Indian law, Sequoyah represented the ultimate triumph of the statehood model for Indian country, embraced largely out of desperation as one of the only viable avenues to preserve Native autonomy.”).

¹² *Id.*

become the fifty-first state of the Union.¹³ As reported in *Indian Country Today*, occupying the murky space between speculation and action, “[t]he idea of a state of Navajo, or state of Dinétah, has surfaced from time to time.”¹⁴ For decades, journalists, academics, and politicians have floated the possibility of the Navajo Nation becoming a state.¹⁵ The impetus behind this Article was a question presented by a current Navajo Nation presidential candidate regarding the wisdom of pursuing Navajo statehood. As non-Indians, we must acknowledge that the choice on whether to attempt to move from the current sovereignty/Indian nation structure to a state-based relationship belongs not to us but to the Navajo people. The hope is that this Article’s exploration of the political and process challenges associated with statehood helps illuminate the difficulties of such a pursuit.

This Article focuses on the legal demands of Navajo or Dinétah statehood. The legal significance of statehood and the procedural pathways that have led to statehood historically are presented in Part I. Dinétah statehood, including an overview of the current structure of the Navajo Nation government and the federal law surrounding tribal sovereignty, is the focus of Part II. Connecting statehood generally and Dinétah statehood, Part III covers the procedural steps and hurdles facing any effort to establish a recognized Dinétah state as the country’s 51st state. Finally, Part IV considers the arguments for and against statehood—from a perspective that is biased toward supporting what is best for the tribe—as a means of furthering Diné independence and strength. Though we tentatively conclude that statehood is unlikely and that the pursuit of statehood is of questionable wisdom for Diné in light

¹³ The Navajo Nation spans 27,000 square miles of land, and the population of the Navajo Nation surpassed that of the Cherokee Nation in 2021. See Simon Romero, *Navajo Nation Becomes Largest Tribe in U.S. After Pandemic Enrollment Surge*, N.Y. TIMES (May 21, 2021), <https://www.nytimes.com/2021/05/21/us/navajo-chokeee-population.html> [<https://perma.cc/2NTQ-GNZZ>]; *Navajo Nation*, INDIAN HEALTH SERV., <https://www.ihs.gov/navajo/navajonation/> [<https://perma.cc/EU7M-JWX8>]. The structure of the Navajo Nation government is discussed at length in subsequent Parts of this Article.

¹⁴ Mark Trahan, *The Case for Dinétah*, INDIAN COUNTRY TODAY (Oct. 12, 2020), <https://indiancountrytoday.com/news/the-case-for-dinetah> [<https://perma.cc/G2PG-RTRE>].

¹⁵ See, e.g., Larry R. Stucki, *The Case Against Population Control: The Probable Creation of the First American Indian State*, 30 HUM. ORG. 393 (1971); Theodore Wyckoff, *The Navajo Nation Tomorrow—51st State, Commonwealth, or . . . ?*, 5 AM. INDIAN L. REV. 267 (1977); Associated Press, *State Status for Navajo Land? Talk Gets Serious*, DESERET NEWS (Jan. 6, 1996, 11:00 PM), <https://www.deseret.com/1996/1/7/19217830/state-status-for-navajo-land-talk-gets-serious> [<https://perma.cc/F76S-7MF4>]; Nathan Lefthand, Letter to the Editor, *Make Navajo Nation 51st State*, NAVAJO-HOPI OBSERVER (Feb. 12, 2013, 11:29 AM), <https://www.nhnews.com/news/2013/feb/12/letter-make-navajo-nation-51st-state/> [<https://perma.cc/5PU6-KY9F>]; Trahan, *supra* note 14.

of what would be lost through statehood, our conclusion should not be understood as acceptance of the status quo. Indian nations, including the Navajo Nation, deserve more when it comes to respect for their independence and for their ability to govern than is currently the norm. Whether in terms of state denials of tribal sovereignty or the U.S. Supreme Court's recent efforts to diminish the independence of Indian nations, non-Indian governments continue to treat indigenous peoples as undeserving of the sort of meaningful sovereignty enjoyed by state and federal governments. Regardless of whether the Navajo Nation decides to pursue statehood, the status quo, marked by the Supreme Court's unilateral denial of tribal sovereignty, is untenable and violates the right of Indian nations to self-determination.

Before proceeding further, it is worth pausing briefly to discuss terminology. In the Navajo language, "Diné" means "the people." Throughout this Article, we use both "Diné" and the anglicized name for the tribe, "Navajo," to refer to the tribe and to citizens of the Navajo Nation. We also use the term "Indian" throughout the Article both because the relevant body of law within the U.S. system is known as Federal Indian Law and because the word is commonly used by Native and non-Indian speakers alike. The term "Navajo Nation" refers to the current sovereign government. At times that government can be considered the voice of Navajo people as well, though in some circumstances it is important to distinguish the government (the Navajo Nation) from the people represented by that government (Diné). Finally, in order to lessen the burden on readers, we had to settle on what the name of a new state formed out of the Navajo Nation would be; for the purpose of this Article, we decided to call it "Dinéyah," a Diné word that refers to the Navajo homeland and would likely be in strong contention as the name of any future Navajo state. But we take no position on what the state should be called in practice as that—and many of the other decisions that would need to be made—would be a choice for those who might seek to establish Navajo statehood.

I

REQUIREMENTS OF STATEHOOD

Before exploring whether Diné politicians and tribal members should push for statehood, it is worth taking a step back to consider the meaning of statehood within the structure of the United States. Enlightenment ideas of social contract, popular sovereignty, inherent individual rights, *imperium in imperio*, and the primacy of private property ownership informed early Anglo-American theories of state

creation.¹⁶ Social, political, geographic, economic, religious, and nonpecuniary sentiments and grievances expressed in the American Revolution were integrated with innovative aspects of federalism, such as divisible sovereignty and mutual recognition, to further refine and constitutionalize the statehood concept.¹⁷ Not surprisingly, customary and normative historical practice for the admission of new states into the United States of America has varied over time.¹⁸ As a result, there exist multiple pathways toward statehood, with core foundational documents providing the textual framework.¹⁹ The minimum requirement for the admission of a new state is the same as for the creation of a federal statute: a simple majority in the House and Senate followed by presidential approval.²⁰ Yet, although the establishment of a new state is simple in theory, in practice states followed varied paths toward recognition of their status.

What does it mean to be a state? According to the 1868 U.S. Supreme Court decision in *Texas v. White*:

A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined

¹⁶ See JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 152 (Betty Radice & Robert Baldick eds., Maurice Cranston trans., Penguin Books 1968) (1762) (discussing individual rights); *Imperium in imperio*, MERRIAM-WEBSTER'S DICTIONARY, <https://www.merriam-webster.com/dictionary/imperium%20in%20imperio> [https://perma.cc/K8DL-SS6R] (defining imperium in imperio as “[A] government, power, or sovereignty within a government, power, or sovereignty”); JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* §§ 95, 124, 149 (1690) (discussing the social contract, popular sovereignty, and property); Peter S. Onuf, *From Colony to Territory: Changing Concepts of Statehood in Revolutionary America*, 97 POL. SCI. Q. 447, 448 (1982) (discussing state creation).

¹⁷ See generally CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* 1–19 (Dover 2004) (1952); BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION: FIFTIETH ANNIVERSARY EDITION* 1–159 (Belknap Press of Harvard Univ. Press 2017) (1967); Ablavsky, *supra* note 9, at 20 (“If foreign nations were the first sovereign to which tribes could be compared, the American Revolution and the constitutional entrenchment of federalism created another: states.”); U.S. CONST. art. IV, § 1.

¹⁸ See R. SAM GARRETT, CONG. RESEARCH SERV., IF11792 VER. 4, *STATEHOOD PROCESS AND POLITICAL STATUS OF U.S. TERRITORIES: BRIEF POLICY BACKGROUND* 1–2 (Updated Jul. 29, 2022); Luis R. Dávila-Colón, *Equal Citizenship, Self-Determination, and the U.S. Statehood Process: A Constitutional and Historical Analysis*, 13 CASE W. RES. J. INT’L L. 315, 357–58 (1981); see also Edmund C. Burnett, *The Name “United States of America,”* 31 AM. HIST. REV. 79 (1925) (“The name United States of America appears to have been used for the first time in the Declaration of Independence. At least no earlier instance of its use in that precise form has been found.”).

¹⁹ GARRETT, *supra* note 18, at 1–2.

²⁰ Matthew Glassman, *Beyond the Balance Rule: Congress, Statehood, and Slavery, 1850–1859*, in *CONGRESS AND THE CRISIS OF THE 1850S* 80, 92–93 (Paul Finkelman & Donald R. Kennon eds., 2012).

boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such states, under a common constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and states which compose it one people and one country.²¹

The Court defined three essentialities of statehood: a free people, defined borders, and a government. The U.S. Constitution requires state governments to be of a “republican form.”²² The Court noted in *Texas v. White* that such a requirement includes the further requirements of a “written constitution” and “consent of the governed.”²³

Statehood itself is a loaded term. According to the Declaration of Independence, the “People” possess a “necessary” intrinsic right to form “Free and Independent States.”²⁴ The fundamental rights put forth in Section 1 of the Fourteenth Amendment may provide an additional basis for statehood claims by inference.²⁵ The granting of fundamental rights frames the transformation of a geographically bounded political community into a U.S. state as an irreversible action.²⁶ Once granted, the prerogatives of “life, liberty, or property,” “due process,” and “equal protection of the laws” indefeasibly vest.²⁷ But statehood is not just about recognition of rights; it also is coupled with important limiting principles detailed in the U.S. Constitution.²⁸

According to the U.S. Constitution’s Admission to the Union Clause, Congress is the primary institutional mover when it comes to statehood. The clause provides:

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more

²¹ *Texas v. White*, 74 U.S. 700, 721 (1868).

²² U.S. CONST. art. IV, § 4.

²³ *White*, 74 U.S. at 721 (“[A] government sanctioned and limited by a written constitution, and established by the consent of the governed.”).

²⁴ *Declaration of Independence: A Transcription*, U.S. NAT’L ARCHIVES & RECS. ADMIN., <https://www.archives.gov/founding-docs/declaration-transcript> [<https://perma.cc/U65T-5RSJ>].

²⁵ Dávila-Colón, *supra* note 18, at 369–70.

²⁶ Matt Glassman, *The Procedures for Adding States to the Union*, LEGIS. PROC. (Oct. 23, 2020), <https://www.legislativeprocedure.com/blog/2020/10/23/the-procedures-for-adding-states-to-the-union> [<https://perma.cc/S4DF-SAE9>] (“Creating a new state is arguably the only irreversible process in the entire Constitution.”).

²⁷ U.S. CONST. amend. XIV, § 1.

²⁸ See generally Dávila-Colón, *supra* note 18.

States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.²⁹

As can be seen above, the Admissions Clause unambiguously vests the power to create new states in Congress, with the sole limiting principle being that new states created from or within existing states require the “Consent of the Legislatures” of the affected states.³⁰ As the Clause makes clear, congressional recognition is an essential prerequisite for a new state’s creation.³¹ The Constitution’s Property or Territorial Clause, which vests the creation and authority over territories “belonging to the United States” in Congress, serves to underscore Congress’ power when it comes to statehood.³² An interval of territorial government can function as a sort of statehood apprenticeship—although prior territorial status is not a formal prerequisite for statehood.³³

²⁹ U.S. CONST. art. IV, § 3, cl. 1.

³⁰ See Eric Biber & Thomas B. Colby, *The Admissions Clause*, NAT’L CONST. CTR., <https://constitutioncenter.org/the-constitution/articles/article-iv/clauses/46> [<https://perma.cc/J8PP-Z3U7>] (“This Clause affords Congress the power to admit new states. Most of the discussion at the Constitutional Convention focused on the latter, limiting, portion of the Clause—providing that new states can be carved out of or formed from existing states only with the consent of those existing states. Some Convention delegates objected to this provision on the ground that, because several of the existing large states laid claims to vast swathes of western territories and other lands, those states would never consent to form new states in those territories, and thus the large states would only become larger and more powerful over time. But the prevailing sentiment at the Convention was that a political society cannot be split apart against its will.”). Interestingly, depending on how the first sentence of the Admissions clause had been construed in the context of the so-called series qualifier canon, it is possible that any proposal to create a new state within the borders of an existing state might have been deemed unconstitutional. See *Facebook v. Deguid*, 141 S. Ct. 1163, 1173–74 (2021) (Alito, J., concurring) (discussing the series qualifier canon). If “no new State shall be formed or erected within the Jurisdiction of any other State;” was interpreted to express a stand-alone proscription rather than a condition modified by the consent requirement located after the second semicolon, it seems a state within a state arrangement would violate the Admissions Clause. However, in light of the actual histories of state partitioning actions, such as when Massachusetts consented to the creation of Maine in 1820, this possible alternative construction would seem to have been de facto foreclosed. See Biber & Colby, *supra*; *About Maine: History*, ME. SEC’Y OF STATE, <https://www.maine.gov/sos/kids/about/history#statehood> [<https://perma.cc/3XUD-C5Z3>].

³¹ See Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. OF LEGAL HIST. 119, 125–28 (2004).

³² U.S. CONST. art. IV, § 3, cl. 2.

³³ Biber & Colby, *supra* note 30 (“New states have generally been admitted after a period of territorial government, during which Congress and the President have broad authority pursuant to the Property Clause, also in Article IV, Section 3. An Act of Congress established the territorial government, often giving greater self-government (e.g., in the form of an elected territorial legislature) as the territory’s population increased over time. Some

Congress enjoys wide discretion in its gatekeeping role, and state enabling acts are almost always expressly conditional.³⁴ The substantive and procedural prerequisites a prospective state might be required to meet can be significant in magnitude and number.³⁵ Notably, the Constitution's Guarantee Clause requires that each new state must feature a "Republican Form of Government,"³⁶ and areas seeking statehood accordingly must submit—within the constraints of state sovereignty and federalism—to "impressive federal control over the internal arrangements of the states."³⁷ Even with these conditions and requirements that prospective states yield considerable authority to the federal government, the Constitution's Tenth Amendment³⁸ ensures that the authority over statehood admission vested in Congress³⁹ is properly expressed within the context of popular sovereignty and the consent of the governed within the prospective state's territory.⁴⁰

states, however, such as California and Texas, have been admitted without ever being territories.").

³⁴ See *id.*

³⁵ See, e.g., *id.* ("Often in the Enabling Act, Congress specified a range of conditions that the proposed state had to meet in order for admission to occur. These conditions varied widely across time and states. For example, some states were precluded from allowing polygamy or slavery, and some states were forced to practice religious toleration or to afford civil jury trial rights. Once the proposed state constitution was drafted, it was sent to Congress, which then decided whether to pass an additional act or resolution admitting the state.").

³⁶ U.S. CONST. art. IV, § 4. Madison defined the term "republic" in Federalist 10 and distinguished it from "pure democracy." THE FEDERALIST NO. 10, at 46 (James Madison) (George W. Carey & James McClellan eds., 2001). Madison further defined the essentiality of both popular sovereignty and popular representation character of the term "republic" in Federalist 39. *Id.* at 194–95.

³⁷ Charles O. Lerche, Jr., *The Guarantee of a Republican Form of Government and the Admission of New States*, 11 J. POL. 578, 578 (1949); see also *id.* at 601–02 (discussing the difficulty of defining "republican form of government"); Dávila-Colón, *supra* note 18, at 324–25 (highlighting the requirements related to ensuring states have a republican form of governance imposed on states as part of the statehood process).

³⁸ U.S. CONST. amend. X.

³⁹ See Glassman, *supra* note 20, at 92–93 ("[The Admissions Clause] gives almost no guidelines as to how expansion should happen; it directs only that Congress shall be responsible for it.").

⁴⁰ See Dávila-Colón, *supra* note 18, at 318 ("Although the power to admit new states into the Union has been expressly delegated to Congress, it is also true that the concomitant power to erect and create new states has been expressly reserved to the people by the language of the Tenth Amendment of the Federal Constitution. Hence, the creation of a State depends exclusively upon the will of the people. Congress does not have the power to compel the people of a given territory to come into the Union as a State, for to do so would be to violate the most basic constitutional principles of liberty and self-determination, along with the very nature of American republicanism.").

Whereas the Constitution established the dominant role of Congress when it comes to the statehood process, the Ordinance of 1784—and subsequently the Northwest Ordinance of 1787—outlined the first set of principles and prerequisites for the territorial admission of new states.⁴¹ The Ordinance offered Anglo-American settler colonialist political communities a mode of expression for postrevolutionary notions of state sovereignty.⁴² The Ordinance also provided the necessary framework to rationalize western expansion in the context of the narrow scope of the statehood succession theories that had justified the incorporation of the original thirteen colonies.⁴³

The Ordinance described six essentialities of statehood.⁴⁴ First, well-defined borders: Article 5 of Section 14 prescribed that prospective state boundaries must be “fixed and established.”⁴⁵ Second, a program for proto-state governance via a tripartite republican form: the Ordinance featured a congressionally appointed, term-limited “governor” who “shall reside in the district,” serve as “commander in chief of the militia,” and perform executive functions such as appointing “magistrates and other civil officers.”⁴⁶ The judiciary was to be made up of “three judges, any two of whom to form a court.”⁴⁷ And the legislative branch or “general assembly” was to be comprised of elected representatives “from their counties or townships.”⁴⁸ Third, representation in Congress: prospective territorial states were afforded

⁴¹ See Biber, *supra* note 31, at 134 (discussing the statehood requirements provided for by the Northwest Ordinances); *Northwest Ordinance (1787)*, U.S. NAT’L ARCHIVES & RECS. ADMIN., <https://www.archives.gov/milestone-documents/northwest-ordinance> [<https://perma.cc/P9WK-YYNS>] [hereinafter *Northwest Ordinance*] (connecting the Northwest Ordinance and the Ordinance of 1784 and detailing the statehood provisions of the Northwest Ordinance); *Primary Documents in American History: Northwest Ordinance*, LIBR. OF CONG.: VIRTUAL SERVS. DIGIT. REFERENCE SECTION, <https://www.loc.gov/rr/program/bib/ourdocs/northwest.html> [<https://perma.cc/Q2YL-UL8S>] (noting that the Northwest Ordinance is “[c]onsidered one of the most important legislative acts of the Confederation Congress” and that it “protected civil liberties and outlawed slavery in the new territories”).

⁴² See Onuf, *supra* note 16, at 450 (arguing that state boundaries provided a limited space for recognition of sovereignty but in a form that was binding rather than reversible).

⁴³ See *id.* at 448 (“Like their colonial predecessors, the new states were to be part of a larger community and, therefore, subordinate to a higher authority.”).

⁴⁴ See generally PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE 44–66 (1987) (describing the political debates on the prospect of adding new states to the union and leading up to the Northwest Ordinance).

⁴⁵ *Northwest Ordinance*, *supra* note 41, § 14, art. 5.

⁴⁶ *Id.* §§ 3, 6–7.

⁴⁷ *Id.* § 4.

⁴⁸ *Id.* § 9.

the privilege “by joint ballot [of the territorial general assembly], to elect a delegate to Congress, who shall have a seat in Congress, with a right of debating but not voting.”⁴⁹ Fourth, a draft state constitution: once a threshold population of 60,000 inhabitants was reached,⁵⁰ the territory “shall be at liberty to form a permanent constitution and State government: Provided, the constitution and government so to be formed, shall be republican, and in conformity to the principles contained in these articles.”⁵¹ Fifth, statehood required a demonstrated commitment to principles analogous to those enshrined in the Bill of Rights.⁵² Lastly, a conditional mechanism for admission into the Union: Once the prerequisites of firm geographic borders, republican governance, representation in Congress, and a commitment to the protection of fundamental individual rights were credibly demonstrated, a territory could then formally request admission into the Union “on an equal footing with the original States.”⁵³ With these terms, the Northwest Ordinance served as a form of a “compact” or conditional promise by Congress to territorial inhabitants for eventual statehood.⁵⁴

It was through the Northwest Ordinance that the concept of “conditional” acceptance of states by Congress was introduced.⁵⁵ The practice of expressly requiring prospective states to meet specific prerequisites prior to admission has been followed by Congress in nearly all subsequent statehood admissions.⁵⁶ These conditions are

⁴⁹ *Id.* § 12.

⁵⁰ See Biber, *supra* note 31, at 127–28. Notably, Congress dropped the minimum population threshold and similar Northwest Ordinance requirements “[b]y the time Michigan was admitted in the 1830s.” *Id.* at 135.

⁵¹ *Northwest Ordinance*, *supra* note 41, § 14, art. 5.

⁵² These included protection of modes “of worship or religious sentiments,” “benefits of the writ of habeas corpus, and of the trial by jury,” bail and other “judicial proceedings according to the course of the common law,” “proportionate representation of the people in the legislature,” “no cruel or unusual punishments,” and “just preservation of rights and property.” *Id.* § 14, arts. 1–2; *cf.* U.S. CONST. amends. I–X. “Slavery” and “involuntary servitude” was proscribed, albeit with exceptions for both felony servitude and fugitive slave reclamation with conveyance to “the person claiming his or her labor or service.” *Northwest Ordinance*, *supra* note 41, § 14, art. 6.

⁵³ *Id.* § 13.

⁵⁴ *Id.* § 14. See GREGORY ABLAVSKY, *FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES* 5 (2021) (“Territories were states-in-waiting, to be admitted to the union once they reached sixty thousand free inhabitants. Until then, the Constitution and the Northwest Ordinance placed the territories and their non-Native residents under sole federal control.”). See generally ONUF, *supra* note 44, at 67–87.

⁵⁵ See Biber, *supra* note 31, at 132–35.

⁵⁶ *Id.* at 120.

usually articulated in each prospective state's congressional enabling act.⁵⁷ Although a threshold population number is no longer important, conditions reflecting congressional "concerns over the development of a [new state's] loyal population and government that can be easily assimilated into the United States federal system" have featured prominently.⁵⁸ Conditions for statehood in state enabling acts are generally tailored to the political community seeking admission. The spectrum of real or perceived concerns raised by Congress have ranged from fear of a community's traits or behaviors that might run counter to U.S. national interests, to competing notions of what constitutes the proper republican form, to reservation of federal lands and waterways, to the imposition and requirements of taxation schemes and provisions, and to brazen legislative expressions of unabashed racial animus.⁵⁹

In addition to the structure of statehood conditions and limitations connected with language in the U.S. Constitution and the Northwest Ordinance, the U.S. Supreme Court's doctrine also recognizes two independent principles associated with statehood. First, the Equal Footing Doctrine seeks to ensure a degree of parity between new states and existing states.⁶⁰ The constitutional import of the Northwest Ordinance's term "equal footing"⁶¹ was first construed in 1845 by the Supreme Court in *Pollard's Lessee v. Hagan*.⁶² The doctrine was further developed in 1911 in *Coyle v. Smith*,⁶³ and almost every state's congressional admission or enabling act has included a promise of this "equal footing."⁶⁴ The "equal footing" afforded new states refers to the extent of state sovereignty relative to other states and to the federal government.⁶⁵ The promise does not extend to "economic, geographic, or ecological conditions that nonetheless may give some states more resources than other states."⁶⁶

The second principle of statehood that the U.S. Supreme Court has recognized is that statehood is permanent. This principle of permanence,

⁵⁷ *Id.* at 127–28.

⁵⁸ *Id.* at 194.

⁵⁹ *See generally id.* at 119, 163–65, 200–07.

⁶⁰ Biber & Colby, *supra* note 30.

⁶¹ *Northwest Ordinance*, *supra* note 41, § 13. For an argument that the Northwest Ordinance has constitutional import, see Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929 (1995).

⁶² *Pollard's Lessee v. Hagan*, 44 U.S. 212, 222–24, 228–29 (1845).

⁶³ *Coyle v. Smith*, 221 U.S. 559 (1911).

⁶⁴ Biber & Colby, *supra* note 30.

⁶⁵ *Id.*

⁶⁶ *Id.*

defended by arms and sealed by the Union's defeat of the Confederacy in the Civil War, has been affirmed by the Supreme Court:

“[W]ithout the States in union, there could be no such political body as the United States.” Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union composed of indestructible States.⁶⁷

Further, “[c]reating a new state is arguably the only irreversible process in the entire Constitution.”⁶⁸

The framework provided by the U.S. Constitution, the Northwest Ordinance, and the Supreme Court's doctrine establishes the formal statehood requirements but does not proscribe a single rigid path toward statehood. As the next Part shows, statehood often is the end point of a long and twisting journey for those seeking full inclusion in the Union.

Just because statehood is possible does not mean it is easy. An array of racial, ethnic, economic, cultural, religious, political, social, linguistic, geographic, and historical factors; complex sovereignty considerations; and prodigious structural encumbrances make the creation of any new American state a Herculean—and potentially Sisyphean—undertaking. Superficially, statehood is straightforward: Congress passes a federal law pursuant to the Admissions to the Union Clause and the Territories Clause of the U.S. Constitution.⁶⁹ But reaching the question of formal recognition through a congressional act is, in practice, the culmination of a resolute process that credibly demonstrates a prospective state's organization as a geographically bounded discrete political community acceptable to Congress.⁷⁰

Setting aside the mechanism that established the original thirteen colonies as the United States of America, there are at least five ways to create an American state.⁷¹ Different elements of these approaches have been combined or featured more or less prominently in the

⁶⁷ *Texas v. White*, 74 U.S. 700, 725 (1868) (quoting *Lane Cnty. v. Oregon*, 74 U.S. 71, 76 (1868)).

⁶⁸ Glassman, *supra* note 26.

⁶⁹ U.S. CONST. art. IV, § 3, cl. 1–2; *see also* Glassman, *supra* note 26.

⁷⁰ *See* Glassman, *supra* note 26; Biber, *supra* note 31, at 135 (“[A]dmission to the Union was contingent upon the adoption of a government and a society acceptable to Congress.”).

⁷¹ GARRETT, *supra* note 18, at 2.

histories of the thirty-seven states incorporated into the Union since the founding.⁷² Moreover, these approaches are neither mutually exclusive nor require that the essential elements be performed in one regimented sequence or formalist fashion.⁷³

One pathway to statehood is the presentation to Congress of a territory, or partial territory,⁷⁴ already bounded and organized as a political community. Typical of this approach are the Northwest Territory states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and part of Minnesota and the “Southwest Territory” that became Tennessee.⁷⁵ The so-called Tennessee Plan is illustrative in that it demonstrates the key essentialities of the Northwest Ordinance and outlines a roadmap to territorial statehood containing all the necessary elements of the process.⁷⁶ These are: “[1] drafting a state constitution; [2] electing state officers; [3] organizing a state-like territorial government; [4] sending an elected ‘congressional’ delegation to Washington to lobby for statehood; and [5] Congress passing legislation admitting the territory as a state.”⁷⁷ This approach was the roadmap for Alaska, and it is the prevailing theory promulgated by proponents for the admission of the District of Columbia as a U.S. state.⁷⁸

A second, less common pathway to statehood is for an existing bounded independent republic to be annexed, as in the case of Texas.⁷⁹ Yet a third approach is for a new state to be formed from an existing state, as was the case for Vermont, Kentucky, Maine, and, more controversially, West Virginia.⁸⁰ Since the Navajo Nation is located

⁷² *Id.*

⁷³ *Id.*; Biber, *supra* note 31, at 125–26.

⁷⁴ Glassman, *supra* note 26 (“Congress has added 37 states to the original Union. Of those 37 acts, nineteen were the admission of an entire territory, already bounded and recognized as a political community. Ten were the partial admission of a territory. Some territories became a state, and the residual portion of the territory was reorganized as a new community.”).

⁷⁵ See generally Samuel C. Williams, *The Admission of Tennessee into the Union*, 4 TENN. HIST. Q. 291, 291–319 (1945); Duffey, *supra* note 61, at 929–30 n.6.

⁷⁶ See GARRETT, *supra* note 18, at 2.

⁷⁷ *Id.*

⁷⁸ See *Path to Statehood*, THE GOV’T OF THE D.C., <https://statehood.dc.gov/page/path-statehood> [<https://perma.cc/TG7L-3FUJ>].

⁷⁹ Jean Carefoot, *Narrative History of Texas Annexation*, TEX. STATE LIBR. AND ARCHIVES COMM’N (Aug. 24, 2011), <https://www.tsl.texas.gov/ref/abouttx/annexation/index.html> [<https://perma.cc/9BV7-XZBD>].

⁸⁰ Biber & Colby, *supra* note 30; *The Heritage Guide to the Constitution*, THE HERITAGE FOUND., <https://www.heritage.org/constitution/#/articles/4/essays/125/admissions-clause> [<https://perma.cc/6QF6-77C3>].

within the current borders of three states, this approach is particularly relevant for Navajo statehood proposals. As a fourth option, a state can organize itself politically and develop a constitution *de novo* without first procuring express congressional support.⁸¹ Examples include Idaho, Wyoming, and to some degree California.⁸² Finally, a state can be created out of unorganized federal land by Congress via a single federal law, as was the case of California.⁸³

Though there are guideposts along the way, in terms of legal requirements and histories of successful statehood processes, a federal Indian reservation successfully becoming a U.S. state would be unprecedented in American history. As Part II shows, statehood status for the Navajo Nation would effect a seismic transformation in the structural nature of the relationship between the United States and both Diné and Indian Nations writ large.⁸⁴

II NAVAJO STATEHOOD

Practical considerations aside, there exists no U.S. state or federal structural authority that expressly precludes an Indian nation from becoming a state through one of the above mechanisms. Federalism, “with its concept of divisible sovereignty,” offers a workable theoretical construct and analogical basis for the Navajo Nation to become the State of Dinétah.⁸⁵ The same is true of Navajo law, for although statehood would involve a comprehensive reorganization of Diné political structure, it is within the tribe’s power to make such changes. This Part first examines the current state of Federal Indian Law, then the structure of the Navajo Nation’s government, and finally the impact Dinétah statehood would have on neighboring governments.

⁸¹ Biber, *supra* note 31, at 128 n.25.

⁸² AMY BRIDGES, *DEMOCRATIC BEGINNINGS: FOUNDING THE WESTERN STATES* 27 (2015).

⁸³ *Id.*; see *Historical Highlights: The Admission of California into the Union*, HISTORY, ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/Historical-Highlights/1800-1850/The-admission-of-California-into-the-Union/> [https://perma.cc/E3QX-7EPV].

⁸⁴ See Ablavsky, *supra* note 9, at 22 (quoting John Quincy Adams on how any proposed Indian statehood would “totally . . . change the relations of the Indian tribes to this country”).

⁸⁵ *Id.* at 20.

A. Federal Indian Law

Indians are referenced three times in the U.S. Constitution: the Indian Commerce Clause and the two Indian and Taxation Clauses.⁸⁶ The most significant of these is the Indian Commerce Clause: “The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁸⁷ This clause has been controversially construed to support the linked ideas that control over Indian affairs rests solely with the federal government and that the federal government has plenary power over tribes.⁸⁸ The other Indian clause in the Constitution and a corresponding passage from the Fourteenth Amendment exclude “Indians not taxed” from proportional representation in Congress and the apportionment of direct federal taxation.⁸⁹ Proportional representation in Congress is now theoretically, if not in actuality,⁹⁰ afforded to all Indians as a function of U.S. citizenship due to either some tribe-specific federal action or accommodation or pursuant to the Indian Citizenship Act of 1924.⁹¹ Moreover, while not always subject to state tax, members of federally recognized Indian tribes are subject to federal income tax, employment tax, and the Internal Revenue

⁸⁶ Robert J. Miller, *American Indian Influence on the United States Constitution and Its Framers*, 18 AM. INDIAN L. REV. 133, 150 (1993). The Northwest Ordinance tackles Indian nations more directly, though it is unclear the importance of the Ordinance’s claimed benevolence: “The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and, in their property, rights, and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity, shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them.” *Northwest Ordinance*, *supra* note 41, § 14, art. 3.

⁸⁷ U.S. CONST. art. I, § 8, cls. 1, 3.

⁸⁸ *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 60 (1996); *see also* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015) (exploring the Indian Commerce Clause place of Indian nations in the constitution).

⁸⁹ U.S. CONST. art. I, § 2; *id.* amend. XIV, § 2.

⁹⁰ *See* SHADIE KHUBBA ET AL., U.S. CENSUS BUREAU, U.S. DEPT. OF COMMERCE, NATIONAL CENSUS COVERAGE ESTIMATES FOR PEOPLE IN THE UNITED STATES BY DEMOGRAPHIC CHARACTERISTICS: 2020 POST-ENUMERATION SURVEY ESTIMATION REPORT 7 (2002), <https://www2.census.gov/programs-surveys/decennial/coverage-measurement/pes/national-census-coverage-estimates-by-demographic-characteristics.pdf> [<https://perma.cc/UV3Y-D43B>] (“We estimated undercounts for the Black or African American, American Indian or Alaska Native, Some Other Race, and Hispanic or Latino populations. Overcounts were estimated for White, Non-Hispanic White Alone, and Asian populations.”).

⁹¹ The Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253. *See generally* WILKINS & STARK, *supra* note 10, at 64–65.

Code.⁹² The relative inattention to Indian relations in the Constitution is deeply problematic in that the Constitutional vacuum arguably contributes to the wild swings observable in the Supreme Court's treatment of tribal sovereignty, as can be seen in the striking contrast between *Oklahoma v. Castro-Huerta* in 2022 and *McGirt v. Oklahoma* in 2020.⁹³ Scholars have proposed everything from a Constitutional Indian relations amendment to grounding relations with Indian nations in international law as partial solutions.⁹⁴

Outside the Constitution, the foundational text in the relationship between Diné and the United States is the 1868 Treaty of Bosque Redondo.⁹⁵ Ever since the first Indian law cases, the interpretation of treaty language has been central to understanding and clarifying the powers and rights held by particular tribes.⁹⁶ Following a scorched earth campaign, Diné were forcibly removed from their homeland and relocated to a distant reservation whose land proved incapable of supporting the tribe. After a four-year internment, Diné leaders and General William Tecumseh Sherman, acting on behalf of the United States, negotiated a treaty that allowed Diné to return to their homeland. Though the treaty both affirmed and greatly attenuated Diné tribal sovereignty, compared to internment, it was a significant victory for

⁹² INTERNAL REVENUE SERV., U.S. DEPT. TREASURY, PUB. NO. 5424, INCOME TAX GUIDE FOR NATIVE AMERICAN INDIVIDUALS AND SOLE PROPRIETORS 1 (2020), <https://www.irs.gov/pub/irs-pdf/p5424.pdf> [<https://perma.cc/9C9R-X8NR>].

⁹³ Compare *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), with *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022). As Justice Thomas wrote in his concurrence in *Lara*, “Federal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse federal Indian law and our cases.” *United States v. Lara*, 541 U.S. 193, 219 (2004) (Thomas, J., concurring); see also Blake A. Watson, *The Thrust and Parry of Federal Indian Law*, 23 U. DAYTON L. REV. 437, 439 (1998) (noting that “leading scholars have consistently remarked on the distressing degree to which the Court’s statements and holdings may be counterpoised”).

⁹⁴ See, e.g., FRANK POMMERSHEIM, *BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION* (2009) (arguing for a constitutional amendment); Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples’ Survival in the World*, 1990 DUKE L.J. 660 (1990) (advocating a turn to international human rights law).

⁹⁵ Treaty Between the United States of America and the Navajo Tribe of Indians, Navajo Nation-U.S., June 1, 1868, 15 Stat. 667.

⁹⁶ For more on Indian treaties and their interpretation, see, for example, FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* (1994); ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600–1800* (Routledge 1999) (1997); VINE DELORIA JR. & DAVID E. WILKINS, *TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS* (1999).

the tribe and set forth the terms of the relationship going forward.⁹⁷ Nevertheless, while it is true that “all Treaties made . . . shall be the supreme Law of the Land” under the Constitution,⁹⁸ the Treaty of Bosque Redondo would not be a barrier to Diné statehood. Congress has the power to repeal an existing treaty of the United States by a subsequent federal act under the “last-in-time principle.”⁹⁹ Congress could write a state enabling act for Diné statehood that would simultaneously repeal the 1868 treaty.¹⁰⁰

Moving from the current limited sovereignty-based structure of governance to a state-based relationship with non-Indian governments would dramatically change the legal and political landscape shaping and proscribing Diné governance. The classic formulation of the powers of Indian nations comes from the first edition of Felix Cohen’s *Handbook of Federal Indian Law*: “From the earliest years of the Republic the Indian tribes have been recognized as ‘distinct, independent, political communities,’ and, as such, qualified to exercise powers of self-government, not by virtue of any delegation of powers from the Federal Government, but rather by reason of their original tribal sovereignty.”¹⁰¹ Cohen’s description of the inherent sovereignty of tribes—a sovereignty that predated the establishment of the United States—was a synthesis of existing statutory and case law.

Cohen’s description of the nature of tribal sovereignty relied heavily on the first three major Indian law cases, the so-called Marshall trilogy, decided by the first Chief Justice of the United States, John Marshall. The first of those cases, *Johnson v. McIntosh* (1823), established that property rights acquired from the federal government trump rights acquired by individuals directly from Indian tribes.¹⁰² The next two cases came out of the ultimately unsuccessful effort of the Cherokee

⁹⁷ Jennifer Nez Denetdale, *Naal Tsoos Sani: The Navajo Treaty of 1868, Nation-Building, and Self-Determination*, in *NATION TO NATION: TREATIES BETWEEN THE UNITED STATES & AMERICAN INDIAN NATIONS* 126 (Suzan Shown Harjo ed., 2014).

⁹⁸ U.S. CONST. art. IV, cl. 2.

⁹⁹ *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 460 (1899); see also Ablavsky, *supra* note 9, at 16 (“Beginning with *Cherokee Tobacco* in 1870 and culminating with *Lone Wolf v. Hitchcock* in 1903, the Court affirmed that, with respect to congressional authority, Indian treaties were to be regarded no differently than treaties with foreign nations. Both, the Court concluded, were subject to abrogation by statute under the last-in-time principle.”). Perhaps unsurprisingly, the power to abrogate a U.S.-Indian treaty is unilateral and nonreciprocal, with Indian nations not enjoying the same flexibility as the U.S. government. *Id.* at 16–17.

¹⁰⁰ See *La Abra Silver Mining Co.*, 175 U.S. at 460.

¹⁰¹ FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 122 (1941).

¹⁰² *Johnson v. M’Intosh*, 21 U.S. 543 (1823).

Nation to have non-Indian governments, both the State of Georgia and the federal government, live up to the promises contained in treaties between the Cherokee Nation and the United States. The second case in the Marshall trilogy, *Cherokee Nation v. Georgia* (1831), asked whether the Cherokee tribe was a state or a foreign nation.¹⁰³ Rejecting the idea that they were either, Marshall characterized the Cherokee tribe as a “domestic dependent nation,” and, as such, was foreclosed from seeking a remedy for Georgia’s violations of its sovereignty in federal court.¹⁰⁴ The final case in the Marshall trilogy, *Worcester v. Georgia* (1832), held that the relationship between Indians and non-Indian governments is primarily a tribal-federal relationship and not a tribal-state one.¹⁰⁵ The decision recognized that, within the constraints of *Johnson v. McIntosh* and *Cherokee Nation v. Georgia*, Indian Nations, despite being less powerful than the United States, did not “cease to be sovereign and independent states.”¹⁰⁶

Though Indian policy has varied over the country’s history, sometimes flip-flopping dramatically between supporting tribal independence and seeking to have tribal members assimilate into the larger society, tribal sovereignty has endured.¹⁰⁷ Notwithstanding the significant policy oscillations, Justice Gorsuch accurately observed in the first page of his critique of the majority’s ahistorical decision in *Oklahoma v. Castro-Huerta* that *Worcester v. Georgia* “established a foundational rule that would persist for over 200 years: Native American Tribes retain their sovereignty unless and until Congress ordains otherwise.”¹⁰⁸ As the next Section will show, although tribes are limited in many ways (for example, they are not supposed to engage in foreign relations with other nation-states in the same way that the United States can), the Navajo Nation’s retained sovereignty is more than sufficient to support a tripartite, multilayered, and administratively complex tribal government. Federal Indian Law limits and shapes the relationship between Indian nations and their non-Indian counterparts, but it does not block a Diné-led effort to pursue statehood should that be the desire of the tribe.

¹⁰³ *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

¹⁰⁴ *Id.* at 2.

¹⁰⁵ *Worcester v. Georgia*, 31 U.S. 515 (1832).

¹⁰⁶ *Id.* at 520.

¹⁰⁷ For a brief history of these policy changes, see, for example, Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 871–91 (2016).

¹⁰⁸ *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2505 (2022) (Gorsuch, J., dissenting).

B. Navajo Nation Government and Law

The Navajo Nation administers “one of the most complex” governments of any federally acknowledged American Indian tribe.¹⁰⁹ Following a reorganization of the Navajo Nation government in 1989 in the wake of a corruption scandal, the Navajo Nation government took on a Westernized tripartite structure.¹¹⁰ The current Navajo Nation government builds upon the tribe’s long history of self-sufficiency and resilience.¹¹¹ While not immune to internal conflict over fundamental questions such as appropriate economic development policies, how tribal sovereignty should properly be expressed, or fundamentally what it means to be Diné,¹¹² the Navajo Nation generally represents itself in a unified manner vis-à-vis its government-to-government relationships with neighboring states, other tribes, and the federal government.¹¹³

In its present form, the Navajo Nation can credibly demonstrate all but one of the *Texas v. White* constitutional criteria for U.S. statehood.¹¹⁴ The Nation manifests a political community of free people with a bounded land base, a representative government based upon popular sovereignty, term-limited elective leadership, and structural protections of individual fundamental rights.¹¹⁵ However,

¹⁰⁹ David Wilkins, *Governance Within the Navajo Nation: Have Democratic Traditions Taken Hold?*, WICAZO SA REV., Spring 2002, at 91, 93.

¹¹⁰ *Id.* at 111–13 (summarizing the changes that were made as part of the 1989 government reformation effort).

¹¹¹ See generally Lloyd L. Lee, *Reclaiming Indigenous Intellectual, Political, and Geographic Space: A Path for Navajo Nationhood*, 32 AM. INDIAN Q. 96 (2008).

¹¹² See generally NAVAJO SOVEREIGNTY: UNDERSTANDINGS AND VISIONS OF THE DINÉ PEOPLE (Lloyd L. Lee ed., 2017); JENNIFER NEZ DENETDALE, RECLAIMING DINÉ HISTORY: THE LEGACIES OF NAVAJO CHIEF MANUELITO AND JUANITA (2007); EZRA ROSSER, A NATION WITHIN: NAVAJO LAND AND ECONOMIC DEVELOPMENT 127–40, 183–206 (2021).

¹¹³ Wilkins, *supra* note 109, at 93–94 (“The nation, unlike some other tribal governments, generally approaches the negotiating table with a politically united front, although the events surrounding Peter MacDonald’s last days in office in the late 1980s threatened that relative political homogeneity for a brief but intense period of time. This is not meant to imply that Navajo citizens are always in agreement with the legislative, executive, or judicial decisions of their policy makers, but rather points out that the intense intratribal conflicts that have recently hampered the self-determination efforts of tribes like the Cherokee of Oklahoma, the Tohono O’odham of southern Arizona, the Lumbee of North Carolina, and others, are not a major or persistent problem for the Navajos. In a sense, the political cohesiveness of the Navajo people can be viewed positively. It means that the Navajo Nation Council is the recognized voice of all Navajos Generally, political divisiveness does not threaten the integrity of Navajo national government.”)

¹¹⁴ *Texas v. White*, 74 U.S. 700, 721 (1868).

¹¹⁵ 1 N.N.C. §§ 1–9 (2010).

the Navajo Nation Government does not function under a written formal constitution—a key ingredient of the “republican form” required of an American state.¹¹⁶ Instead, the Navajo Nation government was established and is administered pursuant to the Navajo Nation Code and Navajo Fundamental Law.¹¹⁷

Though there is no Navajo constitution, lack of a constitution does not mean that the Navajo Nation operates unmoored from structural authority. The British government similarly operates without a constitution. The Navajo Nation Code, Title 1 is comprised of the Navajo Nation Bill of Rights, which provides for robust protection of the fundamental individual rights of Navajo members.¹¹⁸ The substantive and procedural individual rights enumerated in Title 1 probably exceed the minimum thresholds set forth in the Northwest Ordinance¹¹⁹ and indeed are substantially similar to those described in the first ten amendments to the U.S. Constitution. Notably, additional important U.S. statutory authorities relevant to civil rights, such as 42 U.S.C. §§ 1983, 1984, are also directly incorporated into the law of the Navajo Nation through the Navajo Nation Code.¹²⁰

Looking more broadly at Diné governance, in 2002 the Navajo Nation Council passed a resolution, *Diné Bi Beehaz’áanii Bitsé Siléi—The Foundation of the Diné, Diné Law, and Diné Government*, that acknowledged the preeminent place of Navajo Fundamental Law.¹²¹ Characterized by one scholar as providing “a superstructure for *Diné* law” or as a set of “guiding principles,” Navajo Fundamental Law anchors Navajo law in Diné traditional law, rights, relations, natural law, and common law.¹²² For non-Indians, it can be hard to understand what is meant by fundamental law, but the same is true for nonlawyers trying to understand the weight of precedent, what authorities are

¹¹⁶ U.S. CONST. art. IV, § 4; *White*, 74 U.S. at 721.

¹¹⁷ *The Navajo Nation Code*, NAVAJO NATION COUNCIL, <https://www.navajonationcouncil.org/code/> [<https://perma.cc/838T-2XFP>].

¹¹⁸ 1 N.N.C. §§ 1–9 (2010).

¹¹⁹ See *Northwest Ordinance*, *supra* note 41, § 14, arts. 2, 6.

¹²⁰ See Navajo Nation Bill of Rights, 1 N.N.C. ch. 1 (2010) (“United States Code Civil action for deprivation of rights, 42 U.S.C. §§ 1983, 1984. Equal rights under the law, 42 U.S.C. § 1981. Federal civil rights law regarding public accommodations, facilities, education and programs, employment and voting, 42 U.S.C. § 2000a *et seq.* Offenses, prosecutions and proceedings in vindication of rights, 42 U.S.C. §§ 1985–1991. Organization of Indian tribes, constitution and bylaws, 25 U.S.C. § 476.”).

¹²¹ Kenneth Bobroff, *Diné Bi Beenahaz’áanii: Codifying Indigenous Customary Law in the 21st Century*, TRIBAL L.J. (2004), <https://digitalrepository.unm.edu/tlj/vol15/iss1/2/> [<https://perma.cc/2AHR-HMKU>].

¹²² *Id.* at 4–5.

binding versus merely persuasive, and the reach of the federal Constitution when it comes to matters of state law. One way to understand Navajo Fundamental Law is as a legal tool designed to ensure that longstanding Diné values remain connected with Diné governance.¹²³

The Navajo Nation Code sets forth a three-branch system with separation of powers and a system of checks and balances analogous to the U.S. Federal Government and those of the fifty existing states.¹²⁴

1. Executive Branch

Under the Navajo Nation Code, the President and Vice President of the Navajo Nation are elected by popular vote. Each serves a four-year term and is limited to two terms.¹²⁵ Navajo Nation executive branch agencies are generally known as “divisions.” Most of these are cabinet level positions and include the Divisions of Community Development, Economic Development, Finance, General Services, Health, Human Resources, Natural Resources, Public Safety, Social Services, and Transportation; the two “departments” are the Department of Diné Education and the Department of Justice.¹²⁶ Title 7, section 201(B), of the Navajo Nation Code establishes a judiciary composed of “the District Courts [of general jurisdiction], the Supreme Court of the Navajo Nation, and such other Courts as may be created by the Navajo Nation Council.”¹²⁷

2. Judicial Branch

The Navajo Nation is currently divided into ten judicial districts, each containing both a district and family court.¹²⁸ Annexed to each

¹²³ For more on Navajo Fundamental Law, see Lloyd L. Lee, *The Fundamental Laws: Codification for Decolonization?*, 2 DECOLONIZATION: INDIGENEITY, EDUC. & SOC’Y, no. 2, 2013, at 117; RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIAL SELF-GOVERNANCE (2009).

¹²⁴ 2 N.N.C. (2010); 7 N.N.C. (2010).

¹²⁵ 2 N.N.C. §§ 1002–1003 (2010).

¹²⁶ *Yá’át’ééh: The Official Site of the Navajo Nation*, NAVAJO NSN, <https://www.navajo-nnsn.gov> [<https://perma.cc/G5DN-E58N>].

¹²⁷ 7 N.N.C. § 201(B) (2010); see AUSTIN, *supra* note 123, at 32. Elsewhere, the Code details a family trial court system that exclusively adjudicates domestic matters. 7 N.N.C. § 253(B) (2010).

¹²⁸ AUSTIN, *supra* note 123, at 32. Section 201(C) of the Navajo Nation Code further authorizes the Judiciary Committee of the Navajo Council to create, amend, or abolish “such additional Judicial Branch divisions, departments, offices or programs that further the purposes of the Courts.” 7 N.N.C. § 201(C) (2010).

district are Hozhooji Naat'aanii,¹²⁹ peacemaking courts, which provide valuable means of alternative dispute resolution “to arrive at consensual solutions to disputes” through arbitration and mediation techniques congruent with “Navajo customs, traditions, and traditional procedures.”¹³⁰ District court judges are selected by the President from a list curated by the Judiciary Committee of the Navajo Nation Council, and, pending successful completion of a two-year probationary period and subsequent legislative approval, sit for life.¹³¹ Being a district court judge is not an easy task given the diverse sources of law—tribal, state, and federal statutory, common, and regulatory—that relate to matters that appear before Navajo courts, but the Navajo Nation Code outlines and prioritizes these areas of law.¹³² The family courts of the Navajo Nation maintain “original exclusive jurisdiction over all cases involving domestic relations, probate, adoption, paternity, custody, child support, guardianship, mental health commitments, mental and/or physical incompetence, name changes, and all matters arising under the Navajo Nation Children’s Code.”¹³³

The Navajo Nation Supreme Court serves as the appeals court “of last resort” for both final judgments of trial courts and all legislatively delegated administrative decision-making pursuant to executive agency rulemaking and adjudicative procedures.¹³⁴ The Navajo Nation Supreme Court consists of one Chief Justice and two Associate Justices,¹³⁵ appointed by the President of the Navajo Nation “with

¹²⁹ For an overview of peacemaker courts, see Philmer Blumhouse & James Zion, *Hozhooji Naat'aanii: The Navajo Justice and Harmony Ceremony*, in *NATIVE AMERICANS, CRIME, AND JUSTICE* 181, 181–91 (Marianne O. Nielsen & Robert A. Silverman eds., Routledge 2019) (1996).

¹³⁰ AUSTIN, *supra* note 123, at 32.

¹³¹ 7 N.N.C. § 355(A)–355(B) (2010).

¹³² *Id.* § 204(A)–(D) (prioritizing Navajo fundamental law, statutory law, and regulations, and afterward looking to federal law and then to state law). The Navajo District Court system has original jurisdiction over all criminal offenses, *id.* § 253(A)(1), outlined in the Navajo Nation Criminal Code, 17 N.N.C. §§ 101–2737 (2010), perpetrated within the territorial jurisdiction, 7 N.N.C. § 254 (2010), of the Navajo Nation, or between Navajos outside the Nation. AUSTIN, *supra* note 123, at 33. Additionally, district courts can hear “[a]ll civil actions in which the defendant: (1) is a resident of Navajo Indian Country; or (2) has caused an action or injury to occur within the territorial jurisdiction of the Navajo Nation.” 7 N.N.C. § 253(A)(2) (2010). A third “catch-all” category of cases includes all other “[m]iscellaneous” matters appealing to “Navajo Nation statutory law, Diné bi beenahaz’áanii, and Navajo Nation Treaties with the United States of America or other governments” and “causes of action recognized in law, including general principles of American law applicable to courts of general jurisdiction.” *Id.* § 253(A)(3).

¹³³ 7 N.N.C. § 253(B) (2010).

¹³⁴ 7 N.N.C. § 302 (2010).

¹³⁵ *Id.* § 301(A).

confirmation by the Navajo Nation Council from among those applicants recommended by the Judiciary Committee of the Navajo Nation Council.”¹³⁶ Following (1) an initial two-year probationary period, (2) successful completion of judicial training, and (3) a satisfactory performance evaluation from both the President and the Judiciary Committee of the Navajo Nation Council,¹³⁷ Navajo Nation Supreme Court justices enjoy a permanent lifetime appointment based on “good behavior.”¹³⁸

3. Legislative Branch

The Navajo Nation Council is the governing body of the Navajo Nation.¹³⁹ The Council represents all 110 municipal chapters and is comprised of twenty-four delegates popularly elected from one of twenty-four respective electoral districts.¹⁴⁰ Previously an eighty-eight-member legislative body, the smaller twenty-four delegate size was reached, but not without controversy, pursuant to a popular initiative approved by a majority of Navajo voters in 2009 and codified as an amendment to Title 2 of the Code in 2011.¹⁴¹ The council is generally in session for legislative meetings four times each year.¹⁴² Quorum requires that a simple majority of delegates be present to properly convene or proceed with any legislative activity.¹⁴³ The council is empowered to administer all nondelegated (reserved) powers and supervise all delegated powers on behalf of the Nation.¹⁴⁴ Council delegates serve four-year terms and must be registered Navajo Nation

¹³⁶ *Id.* § 355(A).

¹³⁷ *Id.* § 355(E).

¹³⁸ *Id.* § 355(B), 355(E).

¹³⁹ 2 N.N.C. §§ 101–102 (2010).

¹⁴⁰ *Legislative Branch*, NAVAJO NATION OFF. OF LEGIS. SERVS., <https://www.nnols.org/about-us/legislative-branch/> [<https://perma.cc/CZ5F-ZKV4>].

¹⁴¹ Resolution of the Navajo Nation Council, 22d Navajo Nation Council § 2, cl.1 (2011). For more on the reduction in size of the Council and the controversy surrounding that change, see Ezra Rosser, *Displacing the Judiciary: Customary Law and the Threat of a Defensive Tribal Council: A Book Review of Raymond D. Austin, Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance (2009)*, 34 AM. INDIAN L. REV. 379, 391–400 (2010). See also Bill Donovan, *Survey Shows Majority Want Larger Council*, NAVAJO TIMES (Aug. 17, 2017), <https://navajotimes.com/rezpolitics/survey-shows-majority-want-larger-council/> [<https://perma.cc/5RU9-G6X2>] (highlighting continued disagreement among Diné regarding the proper size of the Council).

¹⁴² 2 N.N.C. § 162(A) (2010).

¹⁴³ *Id.* § 169(A)–(B).

¹⁴⁴ *Id.* § 102(B)–(C).

members at least twenty-five years of age.¹⁴⁵ Delegates, like state legislators or U.S. congressional members “hold considerable power as their vote directly affects the approval or denial of law, changing or removal of law, policy, funding requests, spending bills and even business agreements.”¹⁴⁶

The council is a unicameral body; however, the Naabik’iyáti’ Committee functions as a de facto upper house in a manner in many ways analogous to the U.S. Senate. The Naabik’iyáti’ Committee is the “final stop” for all proposed legislation¹⁴⁷ and is vested with a long list of enumerated powers that include the ability to confirm all appointments to boards and commissions, set the agenda and procedural rules for council sessions, and perform oversight over a large domain of both legislative branch and Navajo Nation governmental functions.¹⁴⁸ Following successful transit out of a standing committee and subsequent approval and placement on the agenda by the Naabik’iyáti’ Committee, passage of a proposed Navajo statute requires approval by a majority vote of council delegates.¹⁴⁹ Presidential signature is required for enactment of any law, and there exist both presidential veto and legislative override procedures.¹⁵⁰

Although there are differences between the formal structure of the Navajo Nation and that of state governments, those differences are relatively small. The Navajo Nation’s tripartite system and the division of responsibilities between the executive, judicial, and legislative branches closely parallel the workings of non-Indian governments. Put differently, though statehood might require some changes to the Navajo Nation’s governance structure in order to get approval by Congress, the

¹⁴⁵ *Id.* §§ 105, 103.

¹⁴⁶ *Legislative Branch: Council Delegates*, NAVAJO NATION OFF. OF LEGIS. SERVS., <https://www.nnols.org/about-us/legislative-branch/> [<https://perma.cc/YQS4-QVLL>]. A council speaker is elected by and from council members to preside over the council’s legislative and administrative activities for two-year terms at a time. 2 N.N.C. §§ 282(A)–(C), 285(B) (2010). The Speaker’s powers and duties are significant, involving everything from placing delegates on standing committees to working with the Naabik’iyáti’ Committee to set the legislative agenda. *See id.* §§ 163, 181, 285(A)–(B). The Navajo Nation Council’s legislative process is robust and multilayered: legislative work product generally originates via a standing committee and subcommittee system, with additional joint committees created as appropriate. *See id.* §§ 164, 164(A), 186, 187.

¹⁴⁷ *Legislative Branch: Council Delegates*, *supra* note 146.

¹⁴⁸ *See* DAVID E. WILKINS, *THE NAVAJO POLITICAL EXPERIENCE* 126 (Rowman & Littlefield 4th ed. 2013) (1999).

¹⁴⁹ *See* 2 N.N.C. §§ 164(A)(1)–(7), 169 (2010).

¹⁵⁰ *Id.* § 1005(C)(10)–(11).

tribe is well positioned to make those changes in light of its existing structure.

C. Neighboring Governments

Dinéah statehood would face significant pushback from nearby state and tribal governments. The Hopi Nation is contained entirely within the Navajo Nation, so Dinéah statehood would undoubtedly have consequences for the Hopi Nation. Additionally, the Navajo Nation is located within the established boundaries of Arizona, New Mexico, and Utah. A future Navajo state would share borders with those states and with Colorado. Thus, Dinéah statehood is unlikely to proceed without some understanding between these governments and the Navajo Nation.

1. Hopi Nation

One of the more significant roadblocks that proponents of a Dinéah state might face is the physical location of the Hopi Nation, entirely bounded as it is by the Navajo Nation. In part because of their proximity and overlapping claims to land, the Hopi Nation—situated in Arizona, within the western portion of the Navajo reservation—and the Navajo Nation have a long history of land disputes involving Arizona, the U.S. government, and the two tribes.¹⁵¹ These conflicts involve everything from boundary disputes and water rights to cultural differences related to land use.¹⁵² Outside interest in coal resources in the area contributed to these conflicts, but so too did population imbalances and unclear boundaries separating Navajo and Hopi lands.¹⁵³ Not surprisingly, even though the relationship is fraught with misunderstanding and disagreement, both the Navajo Nation and the Hopi Nation have administrative and statutory mechanisms for managing the government-to-government relationship with the other sovereign nation.¹⁵⁴ It is worth noting that the Hopi Nation Constitution and

¹⁵¹ See generally Wilkins, *supra* note 109, at 115–18; see also Navajo-Hopi Land Dispute Settlement Act of 1996, Pub. L. No. 104–301, 110 Stat. 3649.

¹⁵² For more on Hopi/Navajo land disputes, see DAVID M. BRUGGE, *THE NAVAJO-HOPI LAND DISPUTE: AN AMERICAN TRAGEDY* (1994); BITTER WATER: DINÉ ORAL HISTORIES OF THE NAVAJO-HOPI LAND DISPUTE (Malcolm D. Benally ed. & trans., 2011).

¹⁵³ Paula Giese, *Navajo – Hopi Long Land Dispute*, BEADED LIZARD BOOKS AND PHOTOGRAPHY (Mar. 20, 1997), <http://www.kstrom.net/isk/maps/az/navhopi.html#buttons> [<https://perma.cc/48T7-57MH>].

¹⁵⁴ See 2 N.N.C. § 851 (2010) (establishing the Navajo-Hopi Land Commission); HOPI NATION CONST. art. I (describing the authority of the Hopi Tribal Council and including relations with the Navajo Tribe as within such authority).

Bylaws do include amendment procedures that could be deployed to formally recognize Navajo statehood were the Hopi so inclined.¹⁵⁵

2. *Arizona, New Mexico, and Utah*

The three border states of Arizona, New Mexico, and Utah each have territorial and taxation claim disclaimer clauses in their constitutional and statutory regimes that were subsequently also incorporated into the Navajo Nation Code verbatim.¹⁵⁶ The territorial disclaimer clause from the Arizona state constitution is representative of the three:

The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.¹⁵⁷

Territorial disclaimer clauses in the state constitutions are coupled with taxation disclaimer clauses that similarly carve out Indian land from land subject to state taxation.¹⁵⁸

For the states of Arizona, New Mexico, and Utah to meet the “consent” requirements of the Acceptance Clause of the U.S. Constitution,¹⁵⁹ each state would need to (1) formally recognize and consent to Navajo statehood and (2) redefine their state borders to permanently reduce the respective sizes of their own states in cooperation with the Navajo Nation, the adjoining states, and the U.S. Congress. Doing so would require sufficient popular support to trigger and successfully execute state constitutional amendment ratification mechanisms. Additionally, Arizona, New Mexico, and Utah each have a boundary clause in their state constitutions that would necessarily need to be amended to accommodate a new Navajo state.¹⁶⁰ In the case

¹⁵⁵ HOPI NATION CONST. art. X.

¹⁵⁶ State Constitutional Disclaimer Clauses, N.N.C. app., pt. 4 (1910); ARIZ. CONST. art. XX., paras. 4, 5 (Act of June 20, 1910, ch. 310, 36 Stat. 569); N.M. CONST. art. XXI, § 2 (Act of June 20, 1910, ch. 310, 36 Stat. 558); UTAH CONST. art. III, para. 2 (Act of July 16, 1894, ch. 138, 28 Stat. 108).

¹⁵⁷ ARIZ. CONST. art. XX, para. 4.

¹⁵⁸ See, e.g., ARIZ. CONST. art. XX, para. 5.

¹⁵⁹ U.S. CONST. art. IV, § 3, cl. 1.

¹⁶⁰ See ARIZ. CONST. art. I, § 1 (setting forth Arizona’s boundaries); UTAH CONST. art. II, § 1 (setting forth Utah’s boundaries); N.M. CONST. art. I (setting forth New Mexico’s boundaries).

of Arizona, boundary alterations are mentioned separately and in a manner that suggests legislative action alone may be sufficient in the context of U.S. Congressional approval.¹⁶¹ But, because a proposed Navajo statehood has implications far beyond mere state boundary adjustments, it is probable that the state constitutions of all three contiguous states would require formal amendment.¹⁶² Each state's constitution further recognizes, in various ways, the additional requirement of approval of any proposed amendment by the U.S. Congress affecting the state's "compact with the United States."¹⁶³ Redefining state borders to accommodate the admission of Dinéah as the fifty-first state would reasonably seem to meet that criteria.

Obviously, the successful execution of state constitutional amendments recognizing Navajo statehood would effect a disruptive and transformational "trickle down" impact upon the statutory regimes of Arizona, New Mexico, and Utah. Because the new Navajo state would rest on "equal footing" with all others,¹⁶⁴ broad areas of state law would require reconstruction to accommodate this fundamental change in the nature of the relationships between these sovereignties. Any asserted civil and criminal jurisdiction over the region by the states based upon state versus tribal rather than state versus state parties would be relinquished forever. The number and nature of ongoing or in-process public and private adjudications of state "rights, actions, suits, proceedings, contracts, claims, or demands"¹⁶⁵ between these affected sovereigns that would be immediately mooted, frustrated, or made impracticable is difficult to estimate. Provisions to terminate, rescind, modify, or change privy party names and carry forward intact the presumably thousands of Navajo-U.S., Navajo-New Mexico, Navajo-Utah, Navajo-Arizona, and Navajo-Hopi private and public contractual obligations would need to be proposed, developed, and agreed upon. Accordingly, it is likely that any draft Navajo proto-state constitution (and resulting amendments to the Arizona, New Mexico, and Utah state constitutions) would need to contain clauses designed to

¹⁶¹ ARIZ. CONST. art. I, § 2.

¹⁶² For more on the formal requirements of amending the constitutions of these three states, see ARIZ. CONST. art. XXI, § 1; N.M. CONST. art. XIX, § 1; UTAH CONST. art. XXIII, § 1.

¹⁶³ See, e.g., N.M. CONST. art. XIX, § 4.

¹⁶⁴ *Pollard's Lessee v. Hagan*, 44 U.S. 212, 224 (1845).

¹⁶⁵ ARIZ. CONST. art. XXII, § 1.

address the challenges that Arizona, New Mexico, and Utah themselves faced when transitioning from territories to states.¹⁶⁶

III

PROCEDURAL PATHWAY TO DINÉTAH STATEHOOD

The Navajo Nation in its present form already demonstrates many elements of a U.S. state. Furthermore, if Diné prioritize statehood recognition as a policy goal, it is not impossible that Navajo Nation could someday credibly position itself to meet the remaining prerequisites. As previously discussed, pursuant to the requirements of *Texas v. White* and the Northwest Ordinance, a U.S. state must be (1) a political community of free people; (2) territorially bounded with “fixed and established”¹⁶⁷ borders; and (3) “organized under a government”¹⁶⁸ in tripartite “republican form”¹⁶⁹ based upon the “consent of the governed,”¹⁷⁰ with representation in Congress, and limited by a written constitution that incorporates the Bill of Rights.¹⁷¹ In that context, a procedural program for the Navajo Nation to become the fifty-first U.S. state is discernable by inference. The specific order in which the steps are executed is less important than demonstrating that all the essential milestones have actually or constructively been met.¹⁷²

Under a modified Tennessee Plan, the proposed State of Dinétah would demonstrate its free political community status, define the proposed borders, demonstrate intent via popular vote or plebiscite, draft and ratify a constitution, and obtain formal consent for admission from the states of Arizona, New Mexico, Utah, and probably the Hopi Nation. The proposed state constitution must express an unambiguous commitment to the supreme federal authority of the U.S. Constitution, the Bill of Rights, and to an elective, representative, and republican

¹⁶⁶ See, e.g., ARIZ. CONST. art. XXII, § 1 (“Existing rights, actions, suits, proceedings, contracts, claims, or demands; process. . . . No rights, actions, suits, proceedings, contracts, claims, or demands, existing at the time of the admission of this State into the Union, shall be affected by a change in the form of government, from Territorial to State, but all shall continue as if no change had taken place; and all process which may have been issued under the authority of the Territory of Arizona, previous to its admission into the Union, shall be as valid as if issued in the name of the State.”).

¹⁶⁷ *Northwest Ordinance*, *supra* note 41, § 14, art. 5.

¹⁶⁸ *Texas v. White*, 74 U.S. 700, 721 (1868).

¹⁶⁹ U.S. CONST. art. IV, § 4.

¹⁷⁰ *White*, 74 U.S. at 721.

¹⁷¹ See *supra* Part I.

¹⁷² Biber, *supra* note 31, at 125–26.

form of government. In exchange, the constitutional text would memorialize the new state's rights to full and fair elected representation in Congress, unmitigated standing on "equal footing"¹⁷³ with all other states, and all other features of unattenuated U.S. statehood in perpetuity.

With this approach, the Navajo Nation could initiate this process without an enabling act. The Nation would simply make its case for recognition by demonstrating that the essential elements of statehood are already met. The Navajo Nation could then seek the introduction of a formal statehood bill in Congress. Support of sitting members of Congress would be required—ideally a coalition of representatives and senators from Arizona, New Mexico, and Utah. It is likely that Congressional acceptance would be framed in terms of a set of conditions the Navajo Nation must meet before an enabling act could be proposed. Upon compliance, a Dinétah statehood enabling act must then be introduced and successfully navigated through the legislative process. If that bill is passed in the House and Senate and signed by the President, then Dinétah would irrevocably become a U.S. state.

A. Establish as a "Free Political Community"

A significant sticking point when it comes to any proposed State of Dinétah would be the definition and likely expansion of the categories of eligible state citizens. Most non-Indians tend to think of Indians as a racial group, but tribal membership is in fact a political classification.¹⁷⁴ Ethnologically, a tribe "may be defined as a group of Indigenous people connected by biology or blood, kinship, cultural and spiritual values, language, political authority, and a territorial land

¹⁷³ *Northwest Ordinance*, *supra* note 41, § 13.

¹⁷⁴ As the Supreme Court explained in a case involving Indian employment preferences at the Bureau of Indian Affairs, "The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature." *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974). For a scholarly defense of the political status of tribes, see Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491 (2017); Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 WASH. L. REV. 1041 (2012); see also Bethany R. Berger, *Race, Descent, and Tribal Citizenship*, 4 CAL. L. REV. CIR. 23 (2013) (discussing the relationship between tribal citizen descent requirements, race, and political status); Gregory Ablavsky, "With the Indian Tribes": *Race, Citizenship, and Original Constitutional Meanings*, 70 STAN. L. REV. 1025 (2018) (providing a history of how non-Indians considered "Indians" and "tribes" in both racial and political terms).

base.”¹⁷⁵ But what matters legally is citizenship—just as this is the normal dividing line between those who can vote in national elections or not. Diné are Indians from both an ethnological and political-legal perspective.¹⁷⁶ Though there are proposals to either move to a lineal descent model or to make the blood line more inclusive, the Navajo Nation currently maintains a one-quarter blood quantum requirement.¹⁷⁷ Every member of the Navajo Nation is both a U.S. citizen¹⁷⁸ and a citizen of the state in which they reside.¹⁷⁹ Separate Diné political identity enjoys longstanding recognition by both state and federal governments. In light of the foregoing discussion of the structural content and procedural workings of the Navajo Nation government and its relationship to the population it serves, the notion that the Diné are a “political community” is reasonably self-evident.

Working within the existing tribal-sovereignty model, the Navajo Nation retains the right to exclude outsiders and to differ from the rest of the country when it comes to certain individual rights. Statehood likely would sharply limit the tribe’s right to exclude and diminish the ability of the tribe to create a political community that differs from that found in other states. At present, Indian nations have not been subject to the full reach of the Bill of Rights, and the U.S. Supreme Court continues to struggle to find a durable solution to the challenge of individual rights versus the collective rights of Indian nations.¹⁸⁰ As

¹⁷⁵ WILKINS & STARK, *supra* note 10, at 23 (bold text omitted).

¹⁷⁶ *See id.* at 23–24.

¹⁷⁷ Paul Spruhan, *The Origins, Current Status, and Future Prospects of Blood Quantum as the Definition of Membership in the Navajo Nation*, 8 TRIBAL L.J. 1, 1–2 (2008). Blood quantum refers to the amount of Indian blood any particular individual has and is used by some, but not all, tribes to determine who is eligible for tribal membership. Someone with one-quarter Navajo blood, for example, has one grandparent who was Diné and three non-Indian grandparents. For detailed discussion of both blood quantum generally and Navajo-specific issues related to blood quantum, see Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1 (2006); Paul Spruhan, *The Origins, Current Status, and Future Prospects of Blood Quantum as the Definition of Membership in the Navajo Nation*, 8 TRIBAL L.J. 1 (2008).

¹⁷⁸ The Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253. For a critique of the imposition of citizenship on Indians, see Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107 (1999).

¹⁷⁹ U.S. CONST. amend. XIV, § 1, cl. 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

¹⁸⁰ *See generally* Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799 (2007). *See also* ICRA Reconsidered: *New Interpretations of Familiar Rights*, 129 HARV. L. REV. 1709 (2016) (detailing the history of the Indian Civil Rights Act, the ways

U.S. citizens, tribal members are entitled to the full protections afforded by the Bill of Rights, the Fourteenth Amendment's Due Process and Equal Protections clauses, their respective state constitutional analogues, federal and state civil rights and election law, and the like. But such individual protections can run afoul of the rights of sovereign Indian nations to set their own laws.¹⁸¹

We will return to these concerns in Part IV when discussing the arguments for and against statehood, but they are important even in the process leading up to statehood. Only Diné can vote in Navajo Nation elections, but in order to establish a “free political community,” nonmember residents would likely also have to be given the opportunity to participate in the process preceding statehood and in governance following it. According to the National Congress of American Indians, the U.S. Census 2020 revealed only 4,606 of the 165,158 people living on tribal lands in the Navajo region—or 2.8% of the total—are non-Indians.¹⁸² From a practical standpoint, therefore, nontribal members will not be the determinative community when it comes to deciding whether to pursue statehood. But they likely will need to be included in order to meet the “free political community” requirement.

B. Define the Borders

Territorial claims beyond the current boundaries of the Navajo Indian Reservation would not likely be politically acceptable to Congress, much less to the States of Arizona, New Mexico, and Utah. Indeed, the formal consent of Colorado would also be required if proponents of a proposed Navajo state were, for example, to assert as proto-state borders those of the original, precolonialist, ancestral Dinétah homelands. Therefore, it is likely that the starting point of

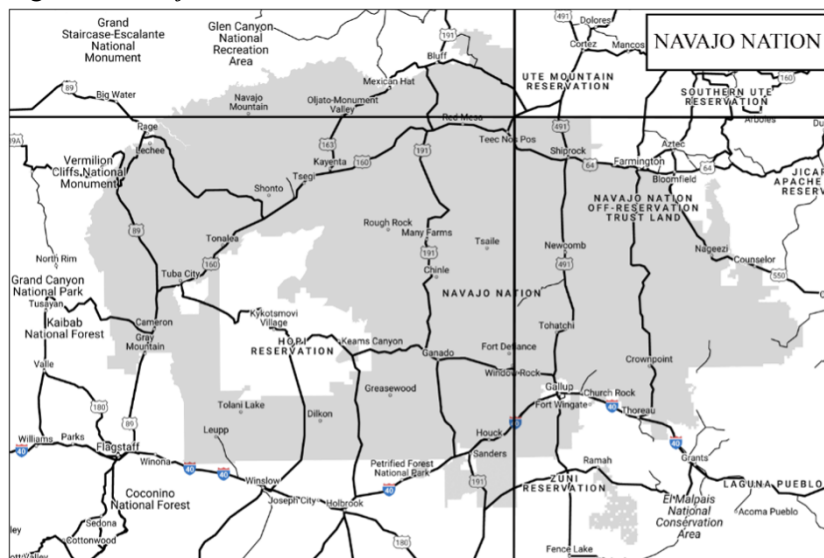
rights under ICRA differ from protections under the Bill of Rights, and the nature of ICRA enforcement).

¹⁸¹ See U.S. CONST. amends. I–X; *id.* amend. XIV, § 1, cls. 3–4; ARIZ. CONST. art. II §§ 1–37 (Arizona’s “Declaration of Rights”); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 2000); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971–74).

¹⁸² POL’Y RSCH. CTR., NAT’L CONG. OF AM. INDIANS, 2020 CENSUS RESULTS: NCAI NAVAJO REGION TRIBAL LAND DATA 4 (Research Policy Update 2021), https://www.ncai.org/policy-research-center/research-data/prc-publications/2020_Census_NCAI_Region_Navajo_Summary_9_14_2021_FINAL.pdf [<https://perma.cc/N4FW-AR8D>].

negotiations would be the current administrative boundary of the Navajo Nation government (see Figure 1).¹⁸³

Figure 1. *Navajo Nation Boundaries*¹⁸⁴



1. Noncontiguous, Off-Reservation Trust Land

One of the challenges related to Dinéyah statehood is the fact that not all Navajo land currently is contiguous. That is not an insurmountable barrier, but it arguably complicates the question of what land would be part of the new state. There are U.S. states with parts of their territory oddly disconnected from the main land mass—most famously Michigan’s Upper Peninsula but also the bottom portion of the peninsula between Chesapeake Bay and Delaware Bay that is part of Virginia (despite it being administratively more convenient to Maryland). But most of the examples of divided state territory involve separation by water, not islands of trust land surrounded by state land. Resolving the status of the Navajo Nation’s satellite communities, such

¹⁸³ For a sample U.S. government map depicting the boundaries of the Navajo Nation, see Bureau of Reclamation, U.S. Dept. Interior, & Ten Tribes P’ship, *Chapter 5 – Assessment of Current Tribal Water Use and Projected Future Water Development: Navajo Nation*, in BUREAU OF RECLAMATION, COLORADO RIVER BASIN TEN TRIBES PARTNERSHIP TRIBAL WATER STUDY: STUDY REPORT 5.5-2 (2018), <https://www.usbr.gov/lc/region/programs/crbstudy/tws/docs/Ch.%205.5%20Navajo%20Current-Future%20Water%20Use%202012-13-2018.pdf> [<https://perma.cc/TE2V-V8YK>].

¹⁸⁴ ROSSER, *supra* note 112, at xiv.

as the Ramah, Alamo, and To'Hajiilee regions, would be challenging because of their physical separation from the tribe's main land mass.¹⁸⁵

One option is to maintain the present status of Ramah, Alamo, and To'Hajiilee as Indian reservation trust lands going forward. Navajo statehood means the Window Rock-based Navajo Nation government would be wound down and a new state government founded in its stead. Presumably a significant number of "on-reservation" Navajo tribal members would become citizens and residents of the new state, but the Ramah, Alamo, and To'Hajiilee Navajos could remain citizens of New Mexico. Accordingly, these communities would be politically and, perhaps to some degree, tribally "orphaned" in the process. The transformation of the primary Navajo territorial land base into a U.S. state therefore suggests that these small Navajo communities would need to reorganize their mechanisms of governance to accommodate these new realities, mostly likely in the form of a new, smaller Navajo Nation government.

A second option is to convert these territories into fee simple, private land in New Mexico, presumably owned by local Navajos either as individuals or as incorporated collectives similar to the 501(c)(3) nonprofit corporate units accomplished by many Native Alaskan communities.¹⁸⁶ This would require the consent of Congress pursuant to the Property Clause,¹⁸⁷ and perhaps the State of New Mexico, presumably as part of the larger Navajo state-enabling legislative plan.

Theoretically, a third option is for these territories to become noncontiguous sections of the new Navajo state. However, no current U.S. state, or part of a state, simultaneously exists entirely within the

¹⁸⁵ For more on these communities, see *Land Base Formation Timeline: Ramah Navajo 1957, Alamo 1968, To'Hajiilee (Canoncito) 1925*, DINÉ NIHI KÉYAH PROJECT, <https://dinelanduse.org/history/> [<https://perma.cc/Q5HZ-5W92>] [hereinafter DINÉ NIHI KÉYAH PROJECT]. The Navajo Times, as part of its coverage of every chapter, published two books that introduce readers to the different chapters. See NAVAJO TIMES, EXPLORING THE NAVAJO NATION CHAPTER BY CHAPTER: ALAMO-NASCHITTI (2017); NAVAJO TIMES, EXPLORING THE NAVAJO NATION CHAPTER BY CHAPTER: NAZLINI-WIDE RUINS (2017).

¹⁸⁶ Dep't of Com., Cmty, & Econ. Dev., See *Contacts - ANCSA Regional Non-Profit Organizations*, THE GREAT STATE OF ALASKA, <https://www.commerce.alaska.gov/web/dcra/AKNativeLanguagePreservationAdvisoryCouncil/SuggestedLinks/ANCSARegionalNon-ProfitsOrganizations.aspx> [<https://perma.cc/4GLV-6YYE>]; *Alaska Native Corporations*, NAT'L CONG. OF AM. INDIANS, <https://www.ncai.org/tribal-directory/alaska-native-corporations> [<https://perma.cc/8CB6-VM8T>].

¹⁸⁷ U.S. CONST. art. IV, § 3, cl. 2.

borders of another U.S. state.¹⁸⁸ It seems unlikely that achieving that unprecedented outcome would be politically feasible or that the U.S. Congress or the state of New Mexico would reasonably consent to such an arrangement. Furthermore, the challenge of meaningfully administering state governance over noncontiguous, home-state lands completely contained within the territorial borders of another U.S. state would be extraordinary, if not prohibitive.¹⁸⁹

2. *Eastern Checkerboard Parcels*

Though the Navajo Nation was spared the massive loss of land and extreme land fragmentation visited upon other tribes as a result of the 1887 Dawes General Allotment Act debacle, Diné were not. Presently, there is a “checkerboard of tribal or individual trust and fee land” comprised of “210,100 acres of [approximately 4,000] individual Indian allotments across 17 Navajo Nation Chapters” in the Eastern Navajo Agency.¹⁹⁰ It is likely that all this land would be subsumed within the borders of the newly created state. Existing fee simple private ownership interests would probably remain with the current owners and titled in the new state’s filing system, perhaps by operation of law.

3. *Noncontiguous, Off-Reservation Private Lands*

The Navajo Nation government presently “owns or has grazing rights to about 1.5 million acres of ranch land off the reservation which are private lands for which the tribe pays state property taxes.”¹⁹¹ The

¹⁸⁸ Nat’l Geospatial Program, *The National Map*, U.S. GEOLOGICAL SURVEY, <https://www.usgs.gov/programs/national-geospatial-program/national-map> [<https://perma.cc/QVU8-C4GD>].

¹⁸⁹ See generally JONATHAN M. FISK, INTERGOVERNMENTAL RELATIONS STATE AND LOCAL CHALLENGES IN THE TWENTY-FIRST CENTURY 31–48 (2022) (describing existing challenges to cooperation between state and local governments in contiguous states).

¹⁹⁰ DINÉ NIHI KÉYAH PROJECT, *supra* note 185 (see the “Eastern Checkerboard 1887–1934” subheading).

¹⁹¹ See *id.* (“After the federal government began recommending that the Tribe lease ranch lands off reservation to accommodate growing livestock herds, in 1954 the Navajo Nation enacted tribal land acquisition processes, amended in 2016. Between 1957 and 65, the Tribe purchased 8 ranches. The Navajo Nation now owns or has grazing rights to about 1.5 million acres of ranch land off the reservation which are private lands for which the tribe pays state property taxes. Navajo ranchers may lease the ranches for use only and are not allowed to live on them. Funds for land purchases are generated through the Navajo Nation’s Land Acquisition Trust Fund established in 1993. Each year, the Nation invests two percent of its annual revenues to the trust fund to acquire properties to expand the Nation’s land base.”); see also Cindy Yurth, *Tribal Ranches: Too Much or Not Enough?*, NAVAJO TIMES

private ownership status of these off-reservation tribal ranches could be maintained, but likely not by the newly created state's government. This is because it is altogether improbable, constitutionally and otherwise, that one U.S. state can legally buy, sell, or own parcels of another state's land¹⁹² and certainly impossible without congressional consent.¹⁹³ Accordingly, the Navajo Nation Government, as fee owners, would need to sell or otherwise transfer ownership of these tracts to either (1) individual or corporate private entities, (2) the States of Arizona and New Mexico in which they are respectively located, (3) the federal government, or (4) whatever smaller version of the Navajo Nation remains following the transition to statehood by the larger part.

C. Demonstrate Statehood Intent

The Navajo Nation must demonstrate some form of credible evidence that there is popular support for—and consent to—statehood recognition among its members and future state citizens. Presumably this would take the form of a Navajo Reservation-wide referendum or plebiscite reflecting at least majority (ideally supermajority) support for U.S. statehood. The Navajo Code suggests that in addition to demonstrating majority popular consent among the general population, it is possible that a majority of individual chapters must also consent.¹⁹⁴ Procedurally, the Navajo Nation government would likely be the party responsible for organizing and administering a reservation-wide statehood referendum. Alternatively, perhaps a traditional Diné assembly known as a Naachid could be called, and a means of popular consent could be developed and executed via that mechanism.¹⁹⁵ Regardless, the vocal support and advocacy by widely respected tribal leaders, Naat'áanii, would be essential to any push for Navajo statehood.¹⁹⁶

(Aug. 29, 2019), <https://navajotimes.com/biz/tribal-ranches-too-much-or-not-enough/> [<https://perma.cc/3DDH-ZX34>] (discussing tribal ranch programs and sites).

¹⁹² Joseph Blocher, *Selling State Borders*, 162 PA. L. REV. 241, 247–49 (2014).

¹⁹³ U.S. CONST. art. IV, § 3, cl. 2.

¹⁹⁴ 26 N.N.C. § 1(E) (2010).

¹⁹⁵ For more on the Naachid, see AUSTIN, *supra* note 123, at 11–12.

¹⁹⁶ See Lloyd Lance Lee, “Must fluently speak and understand Navajo and read and write English”: *Navajo Leadership in a Language Shift World*, 28 INDIGENOUS POL’Y J. 1, 1 (2017) (“The Navajo (Diné) word *naat’áanii* identifies Navajo men and women who are planners, orators, and community leaders. If you translate the word into the English language, it roughly means orator, speaking to and for the people. The word also refers to leader yet the depth of this word and context is more specific and honored. Navajo people

Such a vote would be contentious both within and without the plebiscite electorate for numerous reasons. First, statehood means the abandonment of all tribal sovereignty claims forever, a proposition that might well prove fundamentally unacceptable to many Diné. Second, as introduced earlier, any such referendum would require not only the participation of registered Navajo Nation tribal members but also any nontribal residents and fee owners within the proposed borders of the new state. Finally, the large number of Diné who live off the reservation present an additional challenge, for any vote regarding the future of the tribe that did not allow their participation would be controversial even though the electorate following statehood would necessarily be tied to residency. The competing interests and priorities of the various coalitions involved would make reaching a clear decision on statehood among reservation residents quite challenging.

D. Establish Proto-State Government

Whether in preparation for, in parallel with, or pursuant to a successful demonstration of popular support for statehood, the Navajo government must formally resolve to pursue statehood and oversee the drafting of the proposed state's constitution. This process could take many forms, but it would necessarily involve some version of the following interdependent and interrelated actions and events: reorganization of the political structure, development of a constitution, petition for statehood, and ratification of the new constitution.

1. Reorganize the Navajo Nation Government as a State Government

Deciding on a name for the new state and locating its capital city is a logical and comparatively straightforward first step. The structural changes required next would be fundamentally transformational. Proponents would need to develop proposals to move from the current tribal government structure into the structure expected of state governments. Presumably, chapters could be reorganized as state counties with local and municipal governments reorganized in the manner of typical U.S. state county seats. Alternatively, some or all the current officials could form a transitional government and conditionally remain in place unless and until they achieve statehood recognition. Upon acceptance, the formal reorganization would then be

use *naat'áanii* when referring to chairmen, presidents, council delegates, and chapter officials. While the word itself does not designate an individual a *naat'áanii*, the word is acknowledged as a distinct title.”); AUSTIN, *supra* note 123, at 205.

executed and officers seated via elections and appointments using the new state's constitutionally defined process.

2. *Draft a State Constitution*

The Navajo Nation government presently does not operate under a formal constitution. Therefore, the nation must establish a state constitutional drafting process and produce a document that complies with the required elements of statehood and is acceptable to Congress. This would likely be led by a constitutional committee in the Navajo Council established, staffed, and appropriately resourced specifically for that purpose. Alternatively, the draft constitution could originate via a group outside the government. As outlined above, the draft state constitution must guarantee a tripartite government in republican form that submits to the supremacy of the U.S. Constitution and the Bill of Rights. Obviously, the committee will have fifty other state constitutions available to it as guidance documents.

The Navajo Code and the Navajo Bill of Rights are important sources of constitutional and state law language that can be modified as necessary to conform to the U.S. Bill of Rights and federal law.¹⁹⁷ A constitution would have to establish mechanisms for electing or appointing initial and subsequent state officers, meet any express or implied conditional requirements for statehood outlined by Congress specific to its acceptance, and specify amendment processes.

3. *Petition for Statehood and Ratify the Draft Constitution*

Navigating a formal petition for statehood and a draft constitution through the legislative process would formalize statehood intent and legitimize the process.¹⁹⁸ Furthermore, if combined with the successful execution of a reservation-wide plebiscite, passing the petition and draft constitution as Navajo law would credibly demonstrate to Congress that widespread support for U.S. statehood is manifest.

¹⁹⁷ See, e.g., Navajo Nation Bill of Rights, 1 N.N.C. ch. 1 (2010) (“Civil action for deprivation of rights, 42 U.S.C. §§ 1983, 1984. Equal rights under the law, 42 U.S.C. § 1981. Federal civil rights law regarding public accommodations, facilities, education and programs, employment and voting, 42 U.S.C. § 2000a *et seq.* Offenses, prosecutions and proceedings in vindication of rights, 42 U.S.C. §§ 1985–1991. Organization of Indian tribes, constitution and bylaws, 25 U.S.C. § 5123.”).

¹⁹⁸ See OFF. OF LEGIS. SERVS., NAVAJO NATION LEGISLATIVE PROCESS (2014), https://www.nnols.org/wp-content/uploads/2021/02/10MAR2014_NN_Legislative_Process_Document_FINAL.pdf [<https://perma.cc/FSW7-Y8NB>] (providing an overview of the Navajo Nation's legislative process).

The major steps of the Navajo legislative process in this context are (1) the petitioners draft the language of legislation—here, a petition for statehood and a proposed state constitution; (2) the Office of Legislative Services (OLS) intake and review the draft; (3) the Speaker reviews the draft; (4) OLS disseminates the draft on digital platforms; (5) the public provides comment on the draft; (6) the OLS Director reviews the public comments; (7) OLS refers the draft to the relevant Standing Committees; and (8) OLS refers the draft to the Navajo Nation Council for a floor vote and final passage.¹⁹⁹ Signature by the Navajo President would in turn formalize the statehood petition and elevate the proposed state constitution to the status of Navajo law. Subsequent legal challenges promulgated by political opponents to statehood within the electorate and from beyond the reservation would probably be inevitable.

E. Obtain Consent from Neighboring Governments

As discussed above, Dinétah statehood would have numerous consequences for both the Hopi Nation and the nearby States of Arizona, New Mexico, and Utah. The state governments would need to provide consent, but the requirements associated with the Hopi Nation are less clear.

1. Hopi Nation

Because the structurally relevant parties to the creation of a Navajo state in U.S. Constitutional terms are limited to (1) the Navajo Nation, (2) the U.S. federal government, (3) Arizona, (4) New Mexico, and (5) Utah, the Hopi Nation could not “veto” or otherwise block acceptance if the five privy sovereigns were all in agreement to proceed. Politically and practically, however, there exist long-standing treaties, numerous public and private contracts, and other significant agreements, understandings, and relationships between the Hopis and these other sovereigns. Furthermore, Hopis are U.S. citizens with the right to vote in both Arizona state and U.S. federal elections. In that context, it is probable that affirmative consent of the Hopi Nation and popular support among the Hopi people would represent an important element of any Navajo statehood program. The mechanism for expressing such consent would logically seem to be modifying the

¹⁹⁹ *Id.* at 3.

Hopi Nation Constitution and Bylaws to support and recognize Navajo statehood through its established amendment procedures.²⁰⁰

2. Arizona, New Mexico, and Utah

Before a Navajo state is possible, the “Consent of the Legislatures of the States concerned” requirement of the Admissions Clause must be met.²⁰¹ As discussed previously, “Consent of the Legislatures” practically also means formal amendments to the state constitutions of Arizona, New Mexico, and Utah. Again, this process would originate in one of the two state houses via a special commission or pursuant to a formal state constitutional convention for each of the three states. Each respective state legislature would then pass a proposed state constitutional amendment via a simple majority or two-thirds majority of both houses, depending on the state involved. The amendment would then be submitted to a statewide referendum and then ratified into the constitution based upon a majority electorate vote.

It is probable that the above procedure would reflect the culmination of a long and contentious political process. A wide variety and large magnitude of disputes, conditions, and concessions among the public and private interests affected would need to have been successfully adjudicated and resolved. No doubt border issues would feature prominently. Redefinition and clarification of all preexisting Navajo-state contractual rights, duties, and obligations would be particularly contentious. Access rights to water, land, electricity, oil, natural gas, key coal, uranium, minerals, and other shared essential rights and resources would need to be rebalanced in the context of a state rather than an Indian reservation on “equal footing” with not only Arizona, Utah, and New Mexico but also the other forty-seven states.

F. U.S. Congress for Eventual Recognition

Recognition by the U.S. Congress is the most fundamental structural requirement for statehood. Congressional acceptance is constitutionally mandated pursuant to the Admissions Clause, and, as such, it is the primary goal and culminating event of the entire process. The effort required to persuade Congress to recognize the fifty-first State of Dinétah would necessarily be massive in scope, sustained over a long time, and well resourced. A critical mass of committed advocates would need to effectively organize themselves toward the shared

²⁰⁰ HOPI NATION CONST. art. X.

²⁰¹ U.S. CONST. art. IV, § 3, cl. 1.

mission of achieving congressional acceptance for Dinétah. The ideal effort would be inclusive of all stakeholders and affected parties.

Beyond the constitutionally required commitment to a republican form of government and a clear demonstration of a majority electoral mandate in favor of statehood via plebiscite, the gravamen of the case this coalition must make to Congress in a unified, coherent, and effective manner is that the proposed state is credibly prepared to function effectively and durably as a U.S. state. Specifically, Congress must be convinced that the new state has the necessary resources, population demographics, tax base, institutional infrastructure, and procedural apparatus to durably provide effective state governance, deliver goods and services—and importantly—meet its duties and obligations as a U.S. state to fund its fair proportion of the costs of the federal government and support national interests generally. The goal of this multi-stakeholder initiative would be to define the tasks to be completed and to negotiate the preconditions necessary to clear a legislative pathway for the introduction, drafting, and passage of a formal Navajo state enabling act.

The proposed Navajo state would need to then credibly comply with the elements of the agreed-upon process and meet all express and implied conditions by Congress so that an enabling act can be introduced and recognition formally pursued. Congress would certainly require conditions comprising issues such as submission to the supremacy of the U.S. Constitution and the Bill of Rights, adherence to a republican form of state governance with fidelity to the principles of democracy, the permanent abandonment of all future claims of tribal sovereignty; termination of all U.S.-Navajo treaties and associated federal obligations and tribal benefits, a firm commitment to the funding of its share of the cost of the federal government in perpetuity, and removal of all non-Navajo exclusionary language in terms of individual citizenship, corporate commercial activity, outside investment, and status within the new state. Based upon prior statehood admissions, other possible conditions might include an English language requirement, establishment of a state national guard or militia, constraints on Navajo-specific religious and traditional public educational content, and a larger bicameral legislature with term-limited rather than lifetime seats.

Once the final state constitutional text is agreed upon and all congressional conditions are actually or constructively met, a Navajo state enabling act can be finalized and introduced. As with any statute, the act would need to be successfully navigated through committee,

pass a bare majority in both the House and Senate, and be signed by the President. The Navajo Nation and its claims to tribal sovereignty would be gone forever, and the fifty-first sovereign state of the United States would be born.²⁰²

IV

SHOULD THE NAVAJO NATION PURSUE STATEHOOD?

So far, this Article has focused on what statehood means, what Navajo statehood would mean, and the procedural steps involved in statehood. What has yet to be tackled is whether the Navajo Nation should pursue statehood. Are the advantages of statehood worth the costs? Diné are best positioned to answer these questions, but this Part unpacks the stakes—in terms of sovereignty, funding, and relative status—associated with statehood. Our conclusion, that statehood is not worth it, is necessarily tentative. Even an unsuccessful push for statehood could serve to remind non-Indians generally and politicians specifically of the continued existence of tribes and of the validity of Indian demands to be treated fairly and with respect.

It is hard to overstate the impact of statehood on tribal sovereignty, on Navajo relations with neighboring states, and on Navajo relations with the federal government. In this Part, we explore the arguments in favor of statehood first and then the arguments in opposition. It is beyond the scope of this Article to explore every argument fully, but what follows provides a foundation for future debates on the statehood question should such a possibility be actively considered.

A. Arguments in Favor of Navajo Statehood

The power and reach of tribal sovereignty are highly contested; statehood arguably offers a way for tribes to find more solid ground. While serving on the U.S. Supreme Court, Justice Sandra Day O'Connor wrote, "Today, in the United States, we have three types of sovereign entities—the Federal government, the States, and the Indian tribes."²⁰³ That understanding of tribal sovereignty is far removed from the 2022 majority opinion in *Oklahoma v. Castro-Huerta* that "Indian

²⁰² As discussed in Part IV, *infra*, the loss of tribal sovereignty is itself a significant loss. See *Native American Church v. Navajo Tribal Council*, 272 F.2d 131, 134 (1959) ("[Indian tribes] have a status higher than that of states. They are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States.").

²⁰³ Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 1 (1997).

country is part of the State, not separate from the State. . . . as a matter of state sovereignty, a State has jurisdiction over all its territory, including Indian country.”²⁰⁴ Even if one disagrees strongly with Justice Kavanaugh’s dismissive views of tribal sovereignty, statehood offers a form of sovereignty that is easier for non-Indians, including members of the U.S. Supreme Court, to understand and respect.

If Indian nations are part of the states that surround them, it could be advantageous for a tribe to break free from surrounding states by becoming a separate state. Unlike Indian nations, the U.S. Constitution has a lot to say about the position of states in relation to each other and to the federal government. Such grounding arguably provides more textual support for state independence and sovereign authority within the territory of a state compared to the more amorphous and less firmly established support within the U.S. system for tribal sovereignty. Confident that there would be little popular blowback, Justice Kavanaugh may be able to write separate tribal sovereignty out of existence in an opinion, but he likely could not do the same when it comes to recognition of state sovereignty.

Navigating the complexities of tribal, state, and federal jurisdiction over Indian country is difficult for all parties involved. The U.S. Supreme Court’s general reluctance to recognize the rights of Indian nations to govern non-Indians and its hostility toward tribal authority means confusion abounds on everything from the reach of criminal law to matters of civil regulation.²⁰⁵ In contrast, state authority is decidedly territorial; generally, if something happens within a state’s borders, outside Indian country or federal enclaves, the state has jurisdiction. Statehood would dramatically simplify questions of jurisdiction: the State of Dinétah would have the same control and jurisdiction over

²⁰⁴ *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2493 (2022).

²⁰⁵ With its recent decision in *Castro-Huerta*, the Court only added to the confusion. A brief overview of criminal jurisdiction in Indian country prior to *McGirt* and *Castro-Huerta* can be found in Alex Tallchief Skibine, *Indians, Race, and Criminal Jurisdiction in Indian Country*, 10 ALB. GOV’T L. REV. 49, 51–53 (2017). For more on the confusing state of Indian law and the dangers of false efforts to bring order, see Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433 (2005); see also Matthew L.M. Fletcher, *Commentary on “Confusion” and “Complexity” in Indian Law*, TURTLE TALK BLOG (May 2, 2011), <https://turtletalk.blog/2011/05/02/commentary-on-confusion-and-complexity-in-indian-law/> [<https://perma.cc/EY5K-TNMF>] (arguing that Courts use the field’s complexity to undermine tribal interests and that the field is not as confusing as is often claimed by scholars and courts).

matters within the borders of the new state and would not have to worry about intrusions by officials working for other states.²⁰⁶

Statehood could also be fiscally rewarding for a future Diné state government relative to the Navajo Nation status quo. Tribes take the lead on a whole range of programs, and federal funds targeting states often provide avenues for Indian nations to access such support. However, not all state-level programs that enjoy federal fiscal support have tribal equivalents. Statehood would likely open the door to additional federal funding meant to incentivize states to adopt federally supported programs. To take an extreme example, Diné National Guard would likely take the place of the Arizona, New Mexico, and Utah National Guards when it comes to defending the State of Diné. Some of the money to support the newly created Diné National Guard would have to come from the State of Diné, but the State of Diné would also receive some of the federal military funding, which currently flows to neighboring states. A defining characteristic of the self-determination era has been the ability of tribes to take over programs serving Indian country that previously had been administered by federal agencies. Statehood would complete the process, essentially requiring that the new State of Diné assume the responsibility for all aspects of state governance, including for matters that at present remain under the purview of government agencies in surrounding states.

Statehood would allow Diné to escape some of the racism and hostility directed toward them by neighboring states and communities. Though the Snyder Act of 1924 declared that all Indians were U.S. citizens, it took decades for Navajos to be allowed to vote.²⁰⁷ It was not until 1948 that the Arizona Supreme Court invalidated a provision of the Arizona Constitution that prevented Indians from voting.²⁰⁸ It was not until 1957 that Utah guaranteed Indians the right to vote.²⁰⁹ Mistreatment of Diné by neighboring non-Indian communities is a long-standing problem. Prior to the Long Walk and internment at

²⁰⁶ Currently, the Navajo Nation is subject to and is unable to use its authority to protect tribal members from such intrusions. See *Nevada v. Hicks*, 533 U.S. 353 (2001).

²⁰⁷ See generally Dana Hedgpeth, *'Jim Crow, Indian Style': How Native Americans Were Denied the Right to Vote for Decades*, WASH. POST (Nov. 1, 2020, 7:00 AM), <https://www.washingtonpost.com/history/2020/11/01/native-americans-right-to-vote-history/> [https://perma.cc/WT88-8C74]; DANIEL MCCOOL ET AL., NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE (2007); Willard Hughes Rollings, *Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West, 1830–1965*, 5 NEV. L.J. 126 (2004).

²⁰⁸ *Harrison v. Laveen*, 196 P.2d 456 (Ariz. 1948).

²⁰⁹ Rollings, *supra* note 207, at 139.

Bosque Redondo, Diné, especially young girls, were captured in raids and kept as slaves by non-Indian families.²¹⁰ Later, border towns such as Gallup, New Mexico, Flagstaff, Arizona, and Farmington, New Mexico became notorious for their mistreatment, including violence, directed against Diné visitors. In 1974, “the bodies of three Navajo men were found in separate locations in the rugged canyon country near Farmington, their bodies severely beaten, tortured, and burned.”²¹¹ The perpetrators: three white high school students.²¹² The New Mexico Advisory Committee to the United States Commission on Civil Rights observed in its report about Navajos and non-Indians in Farmington that “the parameters for relationships between these two groups is oppressively unequal.”²¹³ The violence, as well as other forms of mistreatment, facing Diné in these off-reservation communities has not gone away.²¹⁴ Statehood would not solve the problem, but it would be a way of responding to such racism.

Statehood would also come close to guaranteeing Diné representation in Congress. Since every state is entitled to two seats in the U.S. Senate and to one seat in the U.S. House, the State of Dinétah would enjoy outsized influence (just like current sparsely populated states already enjoy) in Washington. Though Native Americans have previously served in Congress and the Cherokee Nation has a thus far dormant treaty-based right to a Congressional delegate,²¹⁵ it remains the case that Indians often feel that Washington overlooks or does not

²¹⁰ See ROSSER, *supra* note 112, at 25.

²¹¹ N.M. ADVISORY COMM. TO THE U.S. COMM’N ON CIV. RTS., *THE FARMINGTON REPORT: A CONFLICT OF CULTURES* 1 (1975).

²¹² For more on the crime and the aftermath, see RODNEY BARKER, *THE BROKEN CIRCLE: A TRUE STORY OF MURDER AND MAGIC IN INDIAN COUNTRY* (1992).

²¹³ N.M. ADVISORY COMM. TO THE U.S. COMM’N ON CIV. RTS., *supra* note 211, at 89.

²¹⁴ See Dan Frosch, *In Shadow of 70’s Racism, Recent Violence Stirs Rage*, N.Y. TIMES (Sept. 17, 2006), <https://www.nytimes.com/2006/09/17/us/17navajo.html> [<https://perma.cc/9QHG-AWRW>] (describing a beating of a Navajo man by three white men); NAVAJO NATION HUM. RTS. COMM’N, *ASSESSING RACE RELATIONS BETWEEN NAVAJOS AND NON-NAVAJOS 2008–2009: A REVIEW OF BORDER TOWN RACE RELATIONS* (2010) (presenting finding from public hearings on border town discrimination); NICK ESTES ET AL., *RED NATION RISING: FROM BORDERTOWN VIOLENCE TO NATIVE LIBERATION* (2021) (investigating border town violence).

²¹⁵ See CONG. RSCH. SERV., R47190, *LEGAL AND PROCEDURAL ISSUES RELATED TO SEATING A CHEROKEE NATION DELEGATE IN THE HOUSE OF REPRESENTATIVES* (2022), <https://crsreports.congress.gov/product/pdf/R/R47190> (last visited Apr. 13, 2023); Ezra Rosser, *The Nature of Representation: The Cherokee Right to a Congressional Delegate*, 15 B.U. PUB. INT. L.J. 91 (2005).

understand their issues.²¹⁶ Permanent representation in the U.S. Congress could help elevate Native, and specifically Navajo, concerns. The U.S. Capitol is full of Indians, with artwork showing moments of contact, treaty signings, and multiple depictions of Pocahontas,²¹⁷ but representation tied to Navajo statehood would help show that Indians continue to exist and merit attention by policymakers.

Although a contentious issue to even raise, statehood could lead to increased economic growth and higher incomes for (Navajo and non-Navajo) families living within the borders of the reservation. Many of the barriers to tribal economic development—including the trust status of land, questions about the reach of legal protections within reservations, and investor discomfort with government practices—would likely either fall away or be sharply reduced. Many of the changes likely to accompany statehood, especially the conversion of land from trust land to fee land and the opening up of the area to non-Indian settlement, would likely be bad for Diné and for the Navajo Nation overall, but they could spur economic growth. The next Section discusses the negative aspects of such changes in detail, but it is worth acknowledging the importance of economic growth and the connection between statehood and economic growth. Though we raise the economic growth argument tentatively and more to acknowledge its force than to emphasize it, we do believe that economic growth matters and must be a factor in any debate about Navajo statehood.

The strongest argument in favor of statehood is arguably that the Navajo Nation already feels like a space separate and apart from any of the surrounding states. Though such a feeling is perhaps incapable of concrete proof, it can nevertheless be true. There are reservations in the United States that can be hard to distinguish from surrounding off-reservation communities, places where, because of the nature of their development or their size, one can pass through reservation land without necessarily being fully aware of it. That is simply not true of most of the Navajo Nation. Outside checkerboard areas, the Navajo Reservation feels different. The houses are different, the land use patterns are different, the people are overwhelmingly Navajo, and the

²¹⁶ But see Kirsten Matoy Carlson, *Congress and Indians*, 86 U. COLO. L. REV. 77 (2015) (showing a high enactment rate for bills affecting Indians and discussing congressional policymaking); Kirsten Matoy Carlson, *Lobbying as a Strategy for Tribal Resilience*, 2018 BYU L. REV. 1159 (2018) (highlighting the effectiveness of tribal lobbying since the 1970s).

²¹⁷ For a listing of the artwork that features Native Americans in the U.S. Capitol, see *Native Americans in Art*, ARCHITECT OF THE CAPITOL, <https://www.aoc.gov/explore-capitol-campus/art/native-americans> [<https://perma.cc/UN3A-UY3S>].

language spoken is often different. Federal administrative agencies already interact with the Navajo Nation as separate from neighboring states; the U.S. Environmental Protection Agency tellingly calls its relationship with tribes: “treatment as a state.”²¹⁸ As any Diné who has had to go to an appointment in Flagstaff knows, the Navajo Nation does not even follow the same time zone as Arizona. For many people living on the reservation, identification with Arizona, New Mexico, or Utah is muted, and instead, home is the Navajo Nation or, informally, the rez. Statehood would reflect the reality that, contrary to Justice Kavanaugh’s (mis)understanding of Indian country, the Navajo Nation is separate in practice from the states that surround it.

B. Arguments Against Navajo Statehood

Although there are certain, discrete advantages to Navajo statehood, in order to become a state, Diné would be required to give up important rights. Perhaps most significantly, after becoming a state, the tribe would lose its right to distinguish between tribal members and nonmembers when it comes to issues like who can participate in the state government and who is allowed to own land within the state. Perhaps the most amazing aspect about the Navajo Nation today is that it exists and that it continues to provide tribal members a degree of “measured separatism” from the surrounding non-Indian society.²¹⁹ The reservation offers Diné a place to be Diné: a place where almost everyone is Diné and where the community continues to reflect Diné values. Though there are challenges, especially when it comes to governance and economic development, Diné lifeways remain the norm within the Navajo Nation despite centuries of external efforts to conquer and to pressure the tribe to fit non-Indian expectations. Fundamentally, statehood is a move toward assimilation and would require that Diné abandon what remains of their unique right to control what happens within the reservation.

Currently, only Diné have the right to vote when it comes to choosing the leaders of the Navajo Nation. Non-Indians who live on the reservation do not have such a right. But statehood would undoubtedly change that. The U.S. Supreme Court invalidated a voting

²¹⁸ *Tribes Approved for Treatment as a State (TAS)*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/tribal/tribes-approved-treatment-state-tas> [<https://perma.cc/52PU-HUB2>].

²¹⁹ CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 14, 16 (1987) (emphasizing the importance of “measured separatism”). For more on the significance of “measured separatism” within the U.S. constitutional order, see Riley, *supra* note 180.

regime in Hawaii in which only “Hawaiians” and “Native Hawaiians” could vote on who would serve on the board of the Office of Hawaiian Affairs, an agency focused on serving Native Hawaiians.²²⁰ State of Dinétah elections would have to be open to all residents, regardless of race or tribal status. And the same would be true of all manner of political participation and state employment. There are, of course, some examples of tribes partly opening themselves to non-Indian involvement in tribal governance, but they are the exception, not the rule.²²¹ None of this is to say that non-Indians in the Navajo Nation today cannot find meaningful ways to participate in tribal governance, whether through employment or service, but statehood would throw open the doors and, likely, block the State of Dinétah from openly prioritizing Diné constituents.

The biggest change associated with statehood would be the opening up of the reservation to non-Indian settlement. While in theory statehood could be disentangled from questions of land tenure, almost undoubtedly Congress would require that all or at least a large percentage of trust land be converted to land capable of ownership, most likely in the form of fee simple absolute. A closely related prerequisite would be that the state’s real estate market be open to all, free from discrimination based on race or tribal membership. The conversion of trust land into privately held land, the creation of a land market, and the probable imposition of property taxes to pay for the state government would together open up the reservation and have significant and potentially disastrous consequences for Diné as a people.

One of the most remarkable aspects of Diné history is that at a time when most tribes were losing land because of allotment, from 1871 to 1928, the Navajo reservation increased in size through successive land transfers. Allotment involved the conversion of reservation land into individually owned parcels, the goal of which was to convert

²²⁰ Rice v. Cayetano, 528 U.S. 495 (2000).

²²¹ To exercise enhanced authority over non-Indians under the Violence Against Women Act, tribes have to include non-Indians in the jury pool. *VAWA 2013’s Special Domestic Violence Criminal Jurisdiction (SDVCJ)*, NAT’L CONG. OF AM. INDIANS, https://www.ncai.org/tribal-vawa/overview/VAWA_Information_-_Technical_Assistance_Resources_Guide_Updated_November_11_2018.pdf [<https://perma.cc/DK2N-DLMD>]. And under the Navajo Nation Preference in Employment Act, non-Indians married to Diné enjoy a status, Hadane, that receives limited employment advantages compared to non-Indians who are not married into the tribe or to members of other tribes. Paul Spruhan, *Tribal Labor and Employment Law: The Evolution of the Navajo Preference in Employment Act*, ARIZ. ATT’Y, July/Aug. 2022, at 44.

Indians into yeoman farmers. After accounting for allotments to Indian families within each reservation, so-called surplus land was sold off to non-Indians. As Professor Judith Royster's work shows, the legacy of allotment includes both reservation areas marked by checkerboarding—places with a mix of tenure types and of Indian and non-Indian ownership that makes jurisdiction complicated—and fragmentation of ownership interests tied to the splitting of interests through inheritance.²²² By the time it ended, the allotment policy had resulted in tribes losing 90 million acres out of the 138 million acres they had held at the time, roughly two-thirds of their land base.²²³

Not surprisingly, allotment provides the prism through which proposals to privatize reservations are viewed. Privatization is not without its champions: journalists and scholars observe that reservations often have less economic development than neighboring off-reservation communities and conclude that the trust status of land is holding tribes back.²²⁴ That said, most Indian law scholars reject privatization for reasons Professor Robert Miller explains:

[I]f these commentators are really arguing for the full application of individual private rights at the expense of tribal communal land ownership as the end-all be-all solution for reservation economic issues then . . . that would only lead Indian nations and reservation communities down a slippery slope they have encountered before. . . . [T]hese ideas are unworkable because they will be rejected out of hand by most Indian nations and Indian peoples as being counter to their experiences with American policies and especially with the Allotment era. Indian nations will also consider them as counter to the essence of their traditional economic institutions, land ownership regimes, and cultures because the ideas ignore their history of successful communal land ownership, management, and use over many centuries.²²⁵

Professors Angela Riley and Kristen Carpenter similarly highlight “the potentially dire consequences privatization poses to tribal

²²² See Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. STATE L.J. 1 (1995); see also Jessica A. Shoemaker, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 WIS. L. REV. 729 (2003) (discussing the fractionation problem); Kristen A. Carpenter & Angela R. Riley, *Privatizing the Reservation?*, 71 STAN. L. REV. 791, 818 (2019) (same).

²²³ Jessica A. Shoemaker, *No Sticks in My Bundle: Rethinking the Indian Land Tenure Problem*, 63 U. KAN. L. REV. 383, 410 (2014).

²²⁴ See, e.g., NAOMI SCHAEFER RILEY, *THE NEW TRAIL OF TEARS: HOW WASHINGTON IS DESTROYING AMERICAN INDIANS* (2016).

²²⁵ Robert J. Miller, *Sovereign Resilience: Reviving Private-Sector Economic Institutions in Indian Country*, 2018 BYU L. REV. 1331, 1387–88 (2018).

sovereignty.”²²⁶ Connected but not equivalent to impacts on tribal sovereignty, Riley and Carpenter also warn that privatization might “be highly destructive to Indian communities.”²²⁷

To be fair to advocates of privatization, tribes could theoretically create limited land markets that would avoid some of the harms likely associated with full-bore privatization. They could create the conditions for land markets around population centers, for example, while leaving intact traditional grazing or customary rights-based systems in more rural areas.²²⁸ Or Indian nations could give tribal members an alienable interest in land but limit the class of buyers and sellers to other members of the tribe. It is beyond the scope of this Article to explore all the ways governance of trust land by the federal government and by Indian nations might be improved, nor is such an exploration necessary for our purposes. The sort of massive land privatization that Congress would likely require as a condition of statehood would make allotment seem tame by comparison. Any form of land privatization in connection with statehood that approached the allotment policy would make it impossible for Diné to continue to achieve the “measured separatism” that underlies the continued vitality of distinct Diné lifeways within the Navajo Nation.²²⁹ The biggest argument against Navajo statehood is that it would be possible only if the tribe itself embraced a modern version of allotment. Statehood would cost Diné their right to create spaces where Diné lifeways are the norm and where the outsiders are non-Indians. A future State of Dinétah would have to guarantee non-Indians an equal right to political participation, services, and land. Put differently, statehood would mark the death of tribal sovereignty and of what remains of Diné independence.

CONCLUSION

Though this Article covered what statehood means, the structure of the Navajo Nation government, the path toward Navajo statehood, and the arguments for and against statehood, the question of whether the Navajo Nation should pursue statehood belongs to Navajos and the

²²⁶ Carpenter & Riley, *supra* note 222, at 804.

²²⁷ *Id.* at 877.

²²⁸ See ROSSER, *supra* note 112, at 127–61 (rejecting privatization and discussing ways the Navajo Nation can reclaim authority over its land).

²²⁹ See Carpenter & Riley, *supra* note 222, at 840 (“Collective tribal life requires a stable and secure—and ideally, contiguous—land base where Indians can live together as a tribal community.”).

Navajo Nation. There are costs and benefits associated with even an unsuccessful pursuit of statehood, much less a successful effort. As the nearly three million people living in Puerto Rico, seven hundred thousand living in Washington, D.C., and thousands more across the other U.S. territories know, the question of statehood is complicated, and it is hard to become a state. Although history offers some support for the idea of an Indian state, the idea that a tribe could form a state carved out of land seen by most Americans as part of the existing states of Arizona, New Mexico, and Utah would likely lead to anti-Indian attacks marked by mainstream society's sense that Indians were already conquered. If a push for statehood made the State of Diné look like a real possibility, Indians across the country, not only Diné, would likely experience an increase in racist expressions of anti-Indian sentiment.²³⁰ On the other hand, if the possibility of a predominantly Indian state forced the country to confront the continued existence and demands of Indian nations, even an unsuccessful push for statehood could force the United States to do more to support tribal communities still struggling under past and present colonial practices.

This Article was inspired by a seemingly simple question: should the Navajo Nation become a state? There is no simple answer. Our conclusion is that statehood is not in the best interests of the tribe, based on the harms that would flow from having to open up the reservation as a condition of statehood. But this conclusion is necessarily a tentative one. Not only should our final position be heavily discounted because we are non-Indians, but the current indifference of the U.S. Supreme Court—as exemplified in the recent *Oklahoma v. Castro-Huerta* decision—to fundamental principles of Indian law, in addition to the Court's elevation of states over Indian nations, shows that there are dark clouds on the horizon for those who care (as we do) about tribal sovereignty and about the Navajo Nation. In light of the tremendous external threats they have faced throughout their history, Diné have done an almost unbelievably good job making choices about how to sustain their society. We are confident that Diné as a people will make a prudent decision as to whether the Navajo Nation should seek to become the 51st U.S. state.

²³⁰ Additionally, Navajo statehood likely would be opposed, openly or discreetly, by a subset of other Indian nations and tribal members, perhaps especially Hopis, concerned about Navajos amassing too much power and threatening their own interests.