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TRIBAL NATIONS AND ABORTION ACCESS: A PATH FORWARD

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TRIBAL NATIONS AND ABORTION ACCESS: A PATH FORWARD

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I. INTRODUCTION

In the wake of the recent United States Supreme Court decision in *Dobbs v. Jackson Women’s Health Organization*² that overturned *Roe v. Wade* and *Planned Parenthood v. Casey*, both of which had affirmed abortion care as a U.S. constitutional right,³ and subsequent state abortion bans,⁴ dozens of commentators have explored the possibility of an abortion “safe harbor” in Indian country.⁵ One tweet about the safe harbor idea garnered

² *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (June 24, 2022). The *Dobbs* opinion is purportedly based on a history of hostility to abortion in English and American law. *See id.* at 16–25. However, the *Dobbs* Court ignores the fact that abortion was “widely available” in the United States through midwives and herbalists until the mid-nineteenth century, when the medical profession sought to discredit such persons in order to fuel its own prominence. ROBERT F. MEIER & GILBERT GEIS, *VICTIMLESS CRIME? PROSTITUTION, DRUGS, HOMOSEXUALITY, ABORTION* 153 (1997). In a self-serving fashion, such “[d]octors maintained that abortion was morally wrong, but they also insisted that only they could determine when it was necessary.” *Id.* (citation omitted).

³ *Roe v. Wade*, 410 U.S. 113, 153 (1973), *overruled by Dobbs*, No. 19-1392; *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992), *overruled by Dobbs*, No. 19-1392.

⁴ The *Dobbs* decision comes on the heels of states like Oklahoma passing criminal and civil abortion bans. *See* S.B. 612, 2022 Leg., Reg. Sess. (Okla. 2022); S.B. 1503, 2022 Leg., Reg. Sess. (Okla. 2022).

⁵ *See, e.g.*, Allison Herrera, *Will Tribal Land Provide Safe Haven When Oklahoma’s Abortion Ban Goes Into Effect? Experts Say Not Anytime Soon*, KOSU (Apr. 18, 2022), <https://www.kosu.org/health/2022-04-18/will-tribal-land-provide-safe-haven-when-oklahomas-abortion-ban-goes-into-effect-experts-say-not-anytime-soon> [<https://perma.cc/9LZX-FD7Z>]; @TulsaTeresa, TWITTER (Apr. 8, 2022, 2:40 PM), <https://twitter.com/tulsateresa/status/1512515812300627968> [<https://perma.cc/6U3Q-NDK6>]; Gin-

almost 250,000 likes and 44,000 retweets.⁶ Similar narratives cropped up following the effective date of Senate Bill 8 in Texas months earlier.⁷ The notion of an abortion “safe harbor” is not new: in 2006, following the passage of a restrictive abortion law in South Dakota, the then-president of the Oglala Sioux Tribe suggested opening an abortion clinic on her reservation in response.⁸ Some suggest that an abortion clinic on a reservation could strengthen the economy of a Tribal nation through the funds that non-Native people might pay to receive an abortion on Tribal lands.⁹ But the comparison of abortion to casinos or marijuana in this context is unrealistic and, frankly, insulting.

The term “safe harbor” suggests someone is being sheltered, which begs the question: safe harbor for whom? These narratives largely contemplate providing safety from state criminal and civil liability for non-Native people seeking abortion care. This notion of a safe harbor does not consider the complicated legal and practical considerations that Tribes pursuing this strategy would face nor the risks of such a strategy to providers and patients. In reality, the *Dobbs* decision will only further reduce access to abortion care

nie Graham, *Complicated Landscape for Tribal Nations Wanting to Offer Abortion Safe Haven*, TULSA WORLD (May 12, 2022), https://tulsaworld.com/opinion/columnists/ginnie-graham-complicated-landscape-for-tribal-nations-wanting-to-offer-abortion-safe-haven/article_bbb2f0ea-cbf1-11ec-83d0-5fac71339547.html [https://perma.cc/KX9T-ZZ8N]; Daniela Ibarra, *Tribal Jurisdiction Could Create “Safe Haven” for Abortion, But It’s Complicated*, ABC NEWS 7 (May 12, 2022), <https://abc7amarillo.com/news/local/tribal-jurisdiction-could-create-safe-haven-for-abortion-but-its-complicated> [https://perma.cc/FMB4-SCGC]; Kylie Cheung, *Tribal Land Is Suddenly at the Center of the Fight for Abortion Access*, JEZEBEL (May 17, 2022), <https://jezebel.com/tribal-land-is-suddenly-at-the-center-of-the-fight-for-1848937428> [https://perma.cc/W4EE-2PKN]; Harmeet Kaur, *Why Tribal Lands are Unlikely to Become Abortion Sanctuaries*, CNN (June 26, 2022), <https://www.cnn.com/2022/06/26/us/tribal-lands-abortion-safe-havens-roe-cec/index.html> [https://perma.cc/KB8Y-7SUQ]; Ben Adler, *After Roe, Can States Stop Abortions on Native American Lands?*, YAHOO!NEWS (May 19, 2022), <https://news.yahoo.com/after-roe-can-states-stop-abortions-on-native-american-lands-161829808.html> [https://perma.cc/JRB9-UZVK].

⁶ @LakotaMan1, TWITTER (June 21, 2022, 11:51 AM), <https://twitter.com/LakotaMan1/status/1540361998424150017> [https://perma.cc/4QNC-RNM3].

⁷ Mikado, *Texas Abortion Clinics In Native American Reservations?*, DAILY KOS (Sept. 6, 2021), <https://www.dailykos.com/stories/2021/9/6/2050636/-Texas-Abortion-Clinics-In-Native-American-Reservations> [https://perma.cc/J5WM-PJ7F]; *To Avoid the New Law in Texas, Could Abortion’s [sic] Be Performed on Native American Reservations?*, QUORA (2022), <https://www.quora.com/To-avoid-the-new-law-in-Texas-could-abortion-s-be-performed-on-Native-American-reservations> [https://perma.cc/JT9C-ZM7A].

⁸ *Indian Tribe May Open Abortion Clinic on Its Land*, NPR (May 8, 2006), <https://www.npr.org/templates/story/story.php?storyId=5391516> [https://perma.cc/CW4T-UG6P]; Bill Harlan, *Oglala Sioux Tribe Council Bans Abortions, Suspends President*, RAPID CITY J. (May 31, 2006), https://rapidcityjournal.com/news/local/top-stories/ogla-lasioux-tribe-council-bans-abortions-suspends-president/article_936a043a-3f98-5728-9353-2922b6c5b374.html [https://perma.cc/J5JW-WTHK].

⁹ See Cecily Hilleary, *Native Americans Bristle at Suggestions They Offer Abortions on Tribal Land*, VOA (June 30, 2022), <https://www.voanews.com/a/native-americans-bristle-at-suggestions-they-offer-abortions-on-tribal-land-/6639480.html> [https://perma.cc/FMW2-NF29].

in Indian country, given that Indigenous people are already far less likely to receive such care.¹⁰ Separate from providing a safe harbor to non-Natives, Tribes, as sovereign nations, may be in a position to fill a part of the enormous health-care gap by serving *their* citizens and communities. This Article is concerned, first and foremost, with whether and how Tribes can avoid state bans and near-bans in order to provide effective abortion care to their citizens and other community members.

In *Dobbs*, Justice Alito justified the elimination of a constitutionally-protected right to abortion care by extolling legislative bodies as the proper forums to negotiate reproductive care.¹¹ Without being specific about which “legislative bodies” he was referring to, he alluded later in that same paragraph to state legislative bodies.¹² In so doing, the Court evoked the Brandeisian argument that states are “laboratories of democracy” and should be encouraged to experiment.¹³ The Court conjured this frame in *Dobbs*, inviting state legislatures to experiment with abortion restrictions, but also defending against potential critiques by noting that some jurisdictions will likely support abortion care.¹⁴

Like states, Tribes have long been understood as regulatory laboratories.¹⁵ Legal scholars have examined the regulatory innovation of Tribes in the contexts of guns,¹⁶ the environment,¹⁷ peacemaking,¹⁸ marijuana,¹⁹ and

¹⁰ See *infra* Section II.C.

¹¹ *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392, slip op. at 65 (June 24, 2022) (“Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office.”).

¹² *Dobbs*, slip op. at 65–66 (noting that the percentage of women voters in Mississippi is higher than the percentage of women in the state population).

¹³ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

¹⁴ *Dobbs*, slip op. at 4 (Kavanaugh, J., concurring) (“Today’s decision therefore does not prevent the numerous States that readily allow abortion from continuing to readily allow abortion.”).

¹⁵ Katherine Florey, *Making It Work: Tribal Innovation, State Reaction, and the Future of Tribes as Regulatory Laboratories*, 92 WASH. L. REV. 713, 747 (2017) (footnote omitted) (describing Vine Deloria, Jr.’s description of Tribes as “laboratories of the future” in a 1965 statement to a Senate subcommittee).

¹⁶ See Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1729 (2012); Ann Tweedy, *Indian Tribes and Gun Regulation: Should Tribes Exercise Their Sovereign Rights to Enact Gun Bans or Stand-Your-Ground Laws?*, 78 ALB. L. REV. 885, 899–900 (2014).

¹⁷ Elizabeth Ann Kronk Warner, *Tribes as Innovative Environmental “Laboratories”*, 86 U. COLO. L. REV. 789, 792 (2015).

¹⁸ Wenona T. Singel, *The First Federalists*, 62 DRAKE L. REV. 775, 838–39 (2014) (discussing influence of tribal peacemaking outside of Indian country); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, 24 N.M. L. REV. 225, 244–52 (1994) (discussing tribal innovation in models of justice in conflict resolution).

¹⁹ Katherine J. Florey, *Budding Conflicts: Marijuana’s Impact on Unsettled Questions of Tribal-State Relations*, 58 B.C. L. REV. 991, 996 (2017) (examining the friction between Tribes and states regarding conflicting marijuana regulations).

anti-discrimination law,²⁰ among many other subjects. Horizontal federalism doctrines, like the Full Faith and Credit Clause²¹ and principles limiting extraterritorial regulation,²² ensure that the Brandeisian laboratory remains functional among states with differing policies. However, there is simply no comparable federalism model for how states and Tribes should interact within the realm of regulatory experimentation.²³ Moreover, the *Dobbs* opinion does not mention Tribes. Instead, the lack of recognition suggests that Tribes are not on the Court's radar with respect to *Dobbs*'s invitation for abortion experimentation, and may even reflect an uninformed default assumption among some Justices that Tribes will be subjected to whatever restrictions are enacted by their relevant states.

Tribes have numerous reasons to be dissatisfied with the prospect of delegating their regulatory authority regarding reproductive care to the states. Native reproductive care has long been the target of assimilationist and even genocidal policies, and has also been greatly underfunded and neglected, resulting in a population with devastating rates of violence and maternal mortality, and with extremely limited access to abortion care.²⁴ State encroachment and federal disestablishment increasingly threaten Tribal authority. Days after the release of *Dobbs*, the U.S. Supreme Court released *Oklahoma v. Castro-Huerta*, providing a path for states to criminally prosecute non-Native providers when they provide abortion care to Native people.²⁵ These decisions conflict with Tribes' sovereign obligations to their Indigenous citizenry, which include robustly asserting Native reproductive well-being as a human right and zealously defending that right. As one Tribe's legislative body recently stated:

We are, in a word, sovereign. And our people have the right to determine if we carry a pregnancy to term. Native women are more than twice as likely as white women to die from complications of pregnancy and childbirth—we will not allow our women to be denied access to the medical means to safely end a pregnancy.²⁶

This Article outlines the legal realities of providing abortion care in Indian country, particularly in the context of avoiding state prohibitions.

²⁰ Ann E. Tweedy, *Sex Discrimination Under Tribal Law*, 36 WM. MITCHELL L. REV. 392, 440 (2010).

²¹ U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (2018).

²² See, e.g., *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 819–20 (1985).

²³ Florey, *Making It Work*, *supra* note 15, at 717.

²⁴ See Barbara Gurr, *Mothering in the Borderlands: Policing Native American Women's Reproductive Healthcare*, 37 INT'L. J. SOCIO. FAM. 69, 71 (2011).

²⁵ *Oklahoma v. Castro-Huerta*, No. 21-429, slip op. at 24 (June 29, 2022).

²⁶ Suquamish Tribal Council, *Suquamish to Fight for Basic Reproductive Rights*, BAINBRIDGE REV. (Aug. 5, 2022), <https://www.bainbridgereview.com/opinion/suquamish-to-fight-for-basic-reproductive-rights> [<https://perma.cc/YX2W-ECV5>].

Some of these issues were explored by Heidi Guzmán in an excellent student note in 2018.²⁷ Guzmán discusses some of the jurisdictional issues that might arise should a Tribe choose to operate an abortion care facility and makes suggestions regarding the scope of such care.²⁸ We build on Guzmán's work and, in the process, flesh out many of the issues that she touched on and address some that she did not analyze.

Part One explores the historical backdrop for understanding reproductive care and Native people. Part Two explores the contemporary challenges that impede access to reproductive health services on Tribal lands. Part Three outlines the criminal and civil jurisdictional issues that can arise in providing this care, especially with regard to state anti-abortion laws. Part Four describes additional legal and policy considerations that further complicate the concept of an abortion safe harbor in Indian country. We conclude with a path forward, in hopes that, to the extent feasible for discrete Tribes, Tribes will commit to providing a full range of legal reproductive health care in the aftermath of *Dobbs*.

In an area as fraught as abortion rights,²⁹ it is important to be clear about the co-authors' foundational understandings from the outset. We begin with the premise that access to reproductive health care, including abortion care, is a fundamental human right of Indigenous people. The ability to safely end a pregnancy is consistent with many Tribal conceptions of autonomy, privacy, and individual self-determination.³⁰ Even if such tenets are not currently codified in a specific Tribe's laws, a review of Indigenous principles and unwritten common law supports this argument.³¹

This Article also operates from the understanding that neither *Roe v. Wade* nor the *Dobbs* decision is binding on Tribes.³² The *Dobbs* decision

²⁷ Heidi Guzmán, *Roe on the Rez: The Case for Expanding Abortion Access on Tribal Land*, 9 COLUM. J. RACE & L. 95, 113–33 (2019) (discussing whether states can enforce abortion regulations on Indian reservations).

²⁸ *Id.*

²⁹ See, e.g., MEIER & GEIS, *supra* note 2, at 147 (“Questions surrounding abortion arouse strong passions in many people, and the subject has moved from being primarily a concern of criminal law and medical practice to one that occupies center stage in national politics.”).

³⁰ See, e.g., *infra* Sections I, IV.B.

³¹ See *infra* Section IV.B.1.

³² Tribal Nations are pre-constitutional and extra-constitutional, and the U.S. Constitution does not constrain Tribal governmental power. See, e.g., *Talton v. Mayes*, 163 U.S. 376, 384 (1896) (holding that the U.S. Constitution's individual rights protections, which limit the federal government, and later state governments by incorporation, do not apply to Tribes); Steven J. Alagna, *Why Obergefell Should Not Impact American Indian Tribal Marriage Laws*, 93 WASH. U. L. REV. 1577, 1605–06 (2016) (noting that the U.S. Supreme Court's holding that same-sex marriage is a fundamental right protected by the U.S. Constitution does not apply to Tribes, but may nevertheless be a persuasive authority in determining “due process” under the Indian Civil Rights Act); Ann E. Tweedy, *Connecting the Dots Between the Constitution, the Marshall Trilogy, and United States v. Lara: Notes Toward a Blueprint for the Next Legislative Restoration of Tribal Sovereignty*, 42 U. MICH. J. L. REFORM 651, 655–58 (2009) (explaining that “tribal sovereignty is both pre-constitutional and extra-constitutional”).

permits *state* governments to ban or significantly limit access to abortion, but never mentions Tribal governments. Indeed, unless a Supreme Court decision touches directly upon a Tribal interest or Tribal jurisdictional rule as part of a federal question, Tribal Nations are not generally bound by its decisions, and this is particularly clear in the context of the Bill of Rights.³³ For example, Justice Alito's decision cites some anti-abortion sentiments from thirteenth-century English law.³⁴ This history is entirely irrelevant to the history of abortion access in Tribal Nations. The main barrier to abortion for Native people is not *Dobbs*; it is other federal laws and policies that make it logistically difficult (if not impossible) to provide abortion access in Indian country, particularly for Tribal Nations located in states that criminalize the procedure or essentially ban the procedure through restrictive civil regulations. The question of how and if Tribal Nations can avoid state bans is the thrust of this Article.

Finally, this Article recognizes that not all Native people seeking abortion care are women. This Article uses gender-inclusive language when referring to individuals but not when quoting or describing the substance of a source. When referring to the Indigenous people of the United States, this Article uses various terms, including American Indian and Alaska Native, Native, Indian, and Indigenous. Each of these can be appropriate depending on the context.³⁵ This Article capitalizes these terms, as well as capitalizing "Tribe" and "Tribal."³⁶ We focus on the legal issues that face the five hun-

³³ See *Talton*, 163 U.S. at 384.

³⁴ *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op. at 17 (June 24, 2022).

³⁵ See ICT Staff, *Native American vs. Indian*, INDIAN COUNTRY TODAY (Sept. 13, 2018), <https://indiancountrytoday.com/archive/native-american-vs-indian> [<https://perma.cc/5KLK-E9VT>]; NAT'L CONG. OF AM. INDIANS, TRIBAL NATIONS AND THE UNITED STATES: AN INTRODUCTION 11, 24 (2020), https://www.ncai.org/tribalnations/introduction/Indian_Country_101_Updated_February_2019.pdf [<https://perma.cc/2GNZ-CDU2>].

³⁶ GREGORY YOUNGING, ELEMENTS OF INDIGENOUS STYLE: A GUIDE FOR WRITING BY AND ABOUT INDIGENOUS PEOPLES 77 (2018) (stating that "Indigenous style uses capitals where conventional style does not" as "a deliberate decision that redresses mainstream society's history of regarding Indigenous Peoples as having no legitimate national identities; governmental, social, spiritual, or religious institutions; or collective rights"). Many have adopted this practice. See, e.g., Aila Hoss, *Federal Indian Law as a Structural Determinant of Health*, 47(S4) J. L. MED. & ETHICS 34, 34 (2019); *About NIHB*, NAT'L INDIAN HEALTH BD., https://www.nihb.org/about_us/about_us.php [<https://perma.cc/53Q5-C86E>]; *About, TRIBAL EPIDEMIOLOGY CTRS.*, <https://tribalepicenters.org/about/> [<https://perma.cc/WR8N-P5AJ>]. This convention has also been adopted by President Biden's administration. See, e.g., Exec. Order No. 13,995, 86 Fed. Reg. (Jan. 21, 2021). Deviating from conventions in the AMA or the Chicago Manual of Style is also best practice for researchers writing about other historically excluded communities. See *NABJ Statement on Capitalizing Black and Other Racial Identifiers*, NAT'L ASS'N OF BLACK JOURNALISTS (June 2020), <https://www.nabj.org/page/styleguide> [<https://perma.cc/75DS-4ZBK>]; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43(6) STAN. L. REV. 1241, 1244 (1991).

dred and seventy-four federally-recognized Tribes.³⁷ Issues related to state-recognized and other non-federally-recognized Tribes are important but outside the scope of this Article.

II. HISTORICAL BACKDROP FOR REPRODUCTIVE AUTONOMY

Abortion is not a new phenomenon for Indigenous people. Even before the Western concepts of individual rights took hold on this continent, Native people in many Tribal cultures understood (and accepted) that a pregnant person could decide to end their pregnancy without interference from others.³⁸ Such bodily autonomy was generally recognized in robust reproductive care practices based on kinship obligations. As such, abortion was (and is) a legal health-care practice that did not warrant intervention. This Article will not delve into all the specific practices Indigenous communities have used for terminating pregnancies or other reproductive health-care needs.³⁹ However, we must explore the role of colonization on pregnancy

³⁷ U.S. BUREAU OF INDIAN AFFAIRS, INDIAN ENTITIES RECOGNIZED BY AND ELIGIBLE TO RECEIVE SERVICES FROM THE UNITED STATES BUREAU OF INDIAN AFFAIRS, 85 Fed. Reg. 5462 (Jan. 2020); STEPHAN L. PEVAR, THE RIGHTS OF INDIANS AND TRIBES 81 (4th ed. 2012). Other Tribal governments are recognized by states or do not have governmental recognition. See *Federal and State Recognized Tribes*, U.S. BUREAU OF INDIAN AFFAIRS NAT'L CONF. OF STATE LEGISLATURES (Mar. 2020), <http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx> [<https://perma.cc/UB8S-WUHN>].

³⁸ See, e.g., James D. Adams & Cecilia Garcia, *Women's Health Among the Chumash*, 3 EVIDENCE-BASED COMPLEMENT. ALT. MED. 125, 125–31 (2006); KAREN COODY COOPER, CHEROKEE WOMEN IN CHARGE: FEMALE POWER AND LEADERSHIP IN AMERICAN INDIAN NATIONS OF EASTERN NORTH AMERICA 34 (2022); BRIANNA THEOBALD, REPRODUCTION ON THE RESERVATION: PREGNANCY, CHILDBIRTH, AND COLONIALISM IN THE LONG TWENTIETH CENTURY 30 (2019); Patricia C. Albers, *Autonomy and Dependency in the Lives of Dakota Women: A Study in Historical Change*, 17 REV. RADICAL POL. ECON. 109, 120 (1985); M. INEZ HILGER, CHIPPEWA CHILD LIFE AND ITS CULTURAL BACKGROUND 2, 10 (1992); Guzmán, *supra* note 27, at 109; Brianna Theobald, *Settler Colonialism, Native American Motherhood, and the Politics of Terminating Pregnancies*, in TRANSCENDING BORDERS: ABORTION IN THE PAST AND PRESENT 221, 224, 226 (Shannon Stettner et al. eds., 2017); Becca Andrews, *Abortion Has Always Been a Part of America—Even if Alito Won't Admit It*, MOTHER JONES (May 6, 2022), <https://www.motherjones.com/politics/2022/05/alito-opinion-roe-missing-history-abortion/> [<https://perma.cc/7984-LWF9>]; Renee Monchalín, *Novel Coronavirus, Access to Abortion Services, and Bridging Western and Indigenous Knowledges in a Postpandemic World*, 31(1) WOMEN'S HEALTH ISSUES 5, 5–8 (2021); Londa Schiebinger, *Exotic Abortifacients: The Global Politics of Plants in the 18th Century*, 24 ENDEAVOUR 117 (2000); Fay Yarbrough, *Legislating Women's Sexuality: Cherokee Marriage Laws in the Nineteenth Century*, 38 J. SOC. HIST. 385, 388 (2004); KIM ANDERSON, A RECOGNITION OF BEING: RECONSTRUCTING NATIVE WOMANHOOD 88 (2000) (quoting Blood educator Diane Eaglespeaker) (“[I]n the old days they had medicines when a woman had an unwanted pregnancy.”).

³⁹ It is particularly inappropriate to discuss such practices if the practices are intertwined with sensitive cultural or religious ceremonies. See Ethan Plaut, *Tribal-Agency Confidentiality: A Catch-22 for Sacred Site Management?*, 36 ECOLOGY L.Q. 137, 143 (2009) (noting that secrecy is often a basic tenet of Native religions and that many Native

and parenting in order to more fully understand the context of abortion access in Indian country.

Reproductive justice for Native people functions against a backdrop of historical and modern traumas perpetuated by colonization and white supremacy.⁴⁰ Over the centuries, the federal government has made reproductive decisions for Native people without any semblance of consent or consultation. Even today, Native people have limited access to reproductive care of any kind, including access to contraceptives, abortion, prenatal care, comprehensive pregnancy health care, and perinatal and postnatal services.⁴¹

Initial contacts between Native people and colonists produced concerted efforts to influence Native conceptions of marriage and gender roles.⁴² In the early days of conflict between Native people and Europeans or Americans, some military efforts to extinguish Native people focused specifically on killing women because they were capable of reproduction and thus a threat to the settling state.⁴³ Consider the devastating Sand Creek Massacre in 1864, in which around 700 armed U.S. soldiers raided and shot at Cheyenne and Arapaho people living on the Sand Creek Indian Reservation in Colorado.⁴⁴ An estimated two-thirds of the dead were women and children, whose bodies were subsequently mutilated and paraded through Denver.⁴⁵ Colonel John Chivington, who led the massacre at Sand Creek, reportedly said that his policy was to “kill and scalp all, little and big; that nits made lice.”⁴⁶ Native women have also historically been and continue to be targeted for sexual violence, sometimes becoming pregnant as a result.⁴⁷

practitioners fear that disclosure of information to outsiders will result in the abuse and disruption of religious ceremonies).

⁴⁰ See Jael Silliman et al., *Undivided Rights: Women of Color Organize for Reproductive Justice* 111–28 (2d ed. 2016); Gurr, *supra* note 24, at 69–84 (summarizing the government’s historical targeting of Native women’s motherhood, which included labeling of Native family values as deviant and in need of regulation).

⁴¹ Latoya Hill, Samantha Artiga & Usha Ranji, *Racial Disparities in Maternal and Infant Health: Current Status and Efforts to Address Them*, KFF (Nov. 1, 2022), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/racial-disparities-in-maternal-and-infant-health-current-status-and-efforts-to-address-them/> [<https://perma.cc/BMR2-4FJS>]; Madeline Y. Sutton, Mgozi F. Anachebe, Regina Lee & Heather Skanes, *Racial and Ethnic Disparities in Reproductive Health Services and Outcomes, 2020*, 137(2) OBSTETRICS & GYNECOLOGY 225, 225–33 (Feb. 2021); see also *infra* notes 71–73.

⁴² ANNE MARIE PLANE, *Colonial Intimacies: Indian Marriage in Early New England* xi (2000) (“Some hoped to stamp out polygamy and divorce; others hoped to encourage men to take leading roles as heads of household; still others were less interested in Indians’ families than in incorporating Indians into English families as servants.”).

⁴³ See Katie Kane, *Nits Make Lice: Drogheda, Sand Creek, and the Poetics of Colonial Extermination*, 42 CULT. CRIT. 81, 87–88 (1999).

⁴⁴ See Tony Horwitz, *The Horrific Sand Creek Massacre Will Be Forgotten No More*, SMITHSONIAN MAG. (Dec. 2014), <https://www.smithsonianmag.com/history/horrific-sand-creek-massacre-will-be-forgotten-no-more-180953403/> [<https://perma.cc/LFF4-NCYY>].

⁴⁵ *Id.*

⁴⁶ Kane, *supra* note 43, at 81.

⁴⁷ See generally SARAH DEER, *The Beginning and End of Rape: Confronting Sexual Violence in Native America* (3rd ed. 2015) (detailing the long history of sex-

Even after organized killings stopped, Native women were targeted for their role in reproduction and parenting. When the Indian wars became too expensive for the United States at the end of the nineteenth century, a new aggressive, assimilative agenda took hold—the intent being that Native people would abandon their governments, cultures, and spiritual practices to become, essentially, normative white Americans. From 1885 into the 1960s, this plot included the sinister boarding school era, during which the government solicited Christian denominations to create “educational” institutes for Native children where these children were forcibly converted to Christianity, educated in rudimentary, labor-oriented tasks, brutally punished for speaking their Native languages, and generally taught to be ashamed of their identities.⁴⁸ A key component of reproductive and Indigenous justice is the right to raise one’s own children.⁴⁹ The right to parent is an obvious outgrowth of pregnancy and childbirth, but under this system, Native parents had little or no input before the state took their children (often as young as two years old) hundreds or thousands of miles away from home to be re-programmed. These separations caused relationships between Native parents and their children to become detached and strained, and Native parents were left without any protection—or recognition—of their parental rights.⁵⁰

The right to parent in Native communities has also been impaired by long-term poverty and mismanagement of health care by the federal govern-

ual violence, rape, and sex trafficking targeting Native women in North America). See BENJAMIN MADLEY, *AN AMERICAN GENOCIDE: THE UNITED STATES AND THE CALIFORNIA INDIAN CATASTROPHE, 1846–1873*, 32, 56 (2017) (describing Spanish and American colonial violence, including systemic sexual violence, committed against Native women in California); ANDRÉ B. ROSAY, NATIONAL INSTITUTE OF JUSTICE RESEARCH REPORT: VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN: 2010 FINDINGS FROM THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 11–13, 15, 21–23 (May 2016) (examining the prevalence of sexual violence, physical violence by intimate partners, and stalking against Native women and men).

⁴⁸ DAVID WALLACE ADAMS, *EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928* (1995, 2020); KATHRYN E. FORT, *AMERICAN INDIAN CHILDREN AND THE LAW* 8 (2019) (“Training for jobs that didn’t exist left many young adults with an inability to gain employment in the newly industrialized American society. The tribal society that many young adults returned to was unrecognizable due to removal, relocation, and federal policies of allotment. The resulting poverty of American Indian families was used as a justification for removing Native children from their homes.”); DENISE K. LAJIMODIERE, *STRINGING ROSARIES* 7 (2021) (“The history of the American Indian boarding school era is one of the United States’ best kept secrets . . . Boarding schools physically, emotionally, and culturally removed students as young as two years old for a minimum of four and up to [twelve] years away from their family and tribe.”).

⁴⁹ See G.A. Res. 61/295, art. 7(2) (Sept. 13, 2007) (“Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.”).

⁵⁰ See, e.g., BRENDA J. CHILD, *BOARDING SCHOOL SEASONS: AMERICAN INDIAN FAMILIES, 1900–1940* 34 (2000) (detailing letters written by Native parents to school officials); see also ZITKALA-SA, *SCHOOL DAYS OF AN INDIAN GIRL* 191 (1900) (describing alienation between a mother and teenage daughter after the daughter returned from boarding school).

ment. Native people on reservations experienced such high levels of poverty and disease at the turn of the twentieth century that the federal government funded a study to assess life on reservations. The 1928 Meriam Report, named for the report's technical director, Lewis Meriam, documented the inadequacy of education, health care, nutrition, housing, and other systems on reservations.⁵¹ The report detailed numerous instances of inadequate treatment and patients going without treatment for years⁵² and documented the federal government's role in perpetuating these atrocities.⁵³ In describing the difficulties of reproductive care, the Meriam Report demonstrated the federal government's lack of respect for Native women's autonomy in the area of reproductive health and a perception of Native mothers as in need of federal paternalism.⁵⁴ The report documented the lack of health-care access during pregnancies,⁵⁵ but also made racist statements regarding the caregiving of Native mothers, characterizing them as incapable of adequate parenting.⁵⁶

Native parents' rights continued to be trampled upon. The paternalism that fueled the boarding school era transitioned to more implicit but largely

⁵¹ LEWIS MERIAM, *THE PROBLEM OF INDIAN ADMINISTRATION* 3–9, 192, 194, 206 (1928).

⁵² *Id.* at 192, 194, 206–07. The Meriam Report described the limited numbers of medical employees with “specialized preparation,” the absence of doctors, and a high infant mortality rate. *Id.* at 239, 549–50, 557.

⁵³ *Id.* at 8–21.

⁵⁴ *Id.* at 557–58 (suggesting that “Indian women could not be expected to know how to care for the health of those dependent upon them or what precautions to take during pregnancy” and identifying them as “sadly lacking in judgment”); see also Bethany R. Berger, *Indian Policy and the Imagined Indian Woman*, 14 *KAN. J.L. & PUB. POL'Y* 103, 103 (2004) (noting that “the federal government and the colonial governments before it had always used the needs of Indian women as an excuse for erosion of Indian sovereignty,” and that these women were “imagined by the colonizers, tailored to their ideas of gender and culture and their needs in justifying the colonial project”).

⁵⁵ See MERIAM, *supra* note 51, at 558 (“On most reservations the majority of deliveries occur without the aid of a doctor or a nurse. The old women who officiate know nothing of sanitary methods, are often needlessly rough, and are helpless in abnormal cases.”).

⁵⁶ *Id.* at 558–59 (finding fault with swaddling techniques and cultural practices for purportedly causing “serious injury” to children’s “normal development,” and speaking critically of Native mothers’ approaches to nursing their infants). More broadly, state intervention into BIPOC families and removal of children due to perceived parenting inadequacies is unfortunately very common. See Dorothy E. Roberts, *The Child Welfare System’s Racial Harm*, 44 *NOMOS* 98, 99–104 (2003); NAT’L INDIAN CHILD WELFARE ASS’N, *SETTING THE RECORD STRAIGHT: THE INDIAN CHILD WELFARE ACT FACT SHEET* (2015) (stating that “AI/AN children are four times more likely to be removed by state child welfare systems than non-Native children even when their families have similar presenting problems”); Cynthia Godsoe, *Just Intervention: Differential Response in Child Protection*, 21 *J.L. & POL’Y* 73, 84 (2012) (noting that child protective services “is widely perceived to be unfair and likely biased on race and class lines”); DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* 273 (2022) (asserting that “[t]ruly valuing Black children would mean dismantling the destructive family-policing system and replacing it with a radically different way of caring for children, supporting families, and imagining safety”).

systemic tendencies to separate Native children from their parents, families, communities, and cultures. The right of Native women to bear and raise children was under constant surveillance and threat from the federal government. For example, between 1958 and 1967, the Bureau of Indian Affairs and the Child Welfare League of America facilitated the Indian Adoption Project.⁵⁷ The Project identified and tagged Native children for adoption, cultivating an adoption market specifically for Native children. Children were removed from Native homes without a semblance of due process and then given to white adoptive families.⁵⁸ Disproportionate removals of Native children have continued after this period.⁵⁹ Native children continue to be not just removed from their parents, but also placed away from their families, communities, and Tribes.⁶⁰ In passing the Indian Child Welfare Act of 1978 (ICWA), the constitutionality of which is currently before the U.S. Supreme Court,⁶¹ Congress acknowledged the harmful child welfare practices that resulted in the inappropriate permanent removal of Native children from their extended families and cultures and implemented federal child welfare standards.⁶² Justifications for abortion-care restrictions that emphasize increased

⁵⁷ Press Release, Bureau of Indian Aff., Indian Adoption Project Increases Momentum (Apr. 18, 1967), <https://www.bia.gov/as-ia/opa/online-press-release/indian-adoption-project-increases-momentum> [https://perma.cc/Y66N-XX9E].

⁵⁸ See, e.g., Indian Child Welfare Act, 25 U.S.C. § 1901(4) (1978) (stating “that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions”).

⁵⁹ See generally NAT’L CTR. FOR JUV. JUST., DISPROPORTIONALITY RATES FOR CHILDREN OF COLOR IN FOSTER CARE DASHBOARD (2010–2020), http://ncjj.org/AFCARS/Disproportionality_Dashboard.asp?selDisplay=2 [https://perma.cc/P9B4-EVPN] (showing that American Indians are disproportionately represented in foster care significantly more than any other race, at over two and a half times their proportional rate in the population).

⁶⁰ *This Land: Grandma Versus The Foster Parents*, CROOKED MEDIA (Aug. 30, 2021), <https://crooked.com/podcast/3-grandma-versus-the-foster-parents/> [https://perma.cc/Y2HA-MZ7B].

⁶¹ *Brackeen v. Halaand*, 994 F.3d 249 (5th Cir. 2021) (en banc), cert. granted, 142 S. Ct. 1205 (Feb. 28, 2022) (No. 21-376); Oral Argument, *Haaland v. Brackeen*, 142 S. Ct. 1205 (Nov. 9, 2022) (No. 21-376). The attack on the ICWA, based on Equal Protection and other grounds, is funded in part by the oil industry in an apparent response to the success of protestors of the Dakota Access Pipeline. Sarah Rose Harper & Jesse Phelps, *Texas, Big Oil Lawyers Target Native Children in a Bid to End Tribal Sovereignty*, LAKOTA PEOPLE’S L. PROJECT (Sept. 17, 2021), <https://lakotalaw.org/news/2021-09-17/icwa-sovereignty> [https://perma.cc/AB42-7STS]. The attack also reflects the adoption industry’s need for children to satisfy prospective adoptive couples. See Alleen Brown, *How a Right-Wing Attack on Protections for Native American Children Could Upend Indian Law*, INTERCEPT (June 17, 2019), <https://theintercept.com/2019/06/17/indian-child-welfare-act-goldwater-institute-legal-battle/> [https://perma.cc/XV25-PYMY] (noting that the adoption industry’s “high demand for adoptable children, driven in part by an evangelical Christian movement that frames adoption as a social cause, has coincided with increased restrictions from foreign countries and fewer U.S. children put up for adoption”).

⁶² See Indian Child Welfare Act, Pub. L. 95-608, 92 Stat. 3069, 25 U.S.C. § 1901–1963 (1978); see also Kathryn E. Fort, *The Indian Child Welfare Act: Preserving Families Is in Children’s Best Interests*, HARV. L. BILL OF HEALTH (May 12, 2022),

adoption of children resulting from unwanted pregnancies⁶³ therefore ring as particularly harmful,⁶⁴ especially as these arguments are coupled with attacks on the constitutionality of the Act.⁶⁵ Indeed, scholars have recognized that ICWA is a crucial tool in the protection of reproductive rights.⁶⁶

During this same period of blatant disregard of Native parents' rights, one common means of controlling Native women's reproductive ability was through coercive sterilization, a practice rooted in paternalistic fears that Native women lacked competence to self-determine their reproductive health and that Native children would likely require expensive federal welfare support.⁶⁷ Such sentiments were pervasive across the federal government and fueled the sterilization programs the government administered against Native people.⁶⁸ Beginning in the 1930s and continuing into the 1970s, reports show systematic sterilization without consent and forced contraception inflicted by government officials in government facilities.⁶⁹ These acts of vio-

<https://blog.petrieflom.law.harvard.edu/2022/05/12/the-indian-child-welfare-act-preserving-families-is-in-childrens-best-interests/#more-30956> [<https://perma.cc/SS8N-ZMXN>].

⁶³ Kimberly McKee, *Flipping the Script: Adoption and Reproductive Justice*, HARV. L. BILL OF HEALTH (May 13, 2022), <https://blog.petrieflom.law.harvard.edu/2022/05/13/flip-the-script-adoption-reproductive-justice/#more-30961> [<https://perma.cc/H9DM-ZMJF>] (discussing how such arguments are a “red herring” and dismiss critiques of adoption).

⁶⁴ See Lauren van Schilfgaarde, *Native Reproductive Justice: Practices and Policies from Relinquishment to Family Preservation*, HARV. L. BILL OF HEALTH (May 12, 2022), <https://blog.petrieflom.law.harvard.edu/2022/05/12/native-reproductive-justice-adoption-relinquishment-family-preservation/> [<https://perma.cc/4LPH-H9R3>] (“But we cannot ignore the historical context of adoption as a tool to empty tribal communities and delete tribal cultures. Nor can we ignore the historical context of the simultaneous deprivation and weaponization of reproductive health care, both of which deny Native women reproductive self-determination.”).

⁶⁵ See, e.g., Oral Argument, *Haaland v. Brackeen*, 142 S. Ct. 1205 (Nov. 9, 2022) (No. 21-376); Roxanna Asgarian, *How a White Evangelical Family Could Dismantle Adoption Protections for Native Children*, VOX (Feb. 20, 2020), <https://www.vox.com/identities/2020/2/20/21131387/indian-child-welfare-act-court-case-foster-care> [<https://perma.cc/6QQB-9RMS>].

⁶⁶ See Neoshia Roemer, *The Future of the Indian Child Welfare Act*, GENDER POL'Y REP. (Nov. 2, 2022), <https://genderpolicyreport.umn.edu/the-future-of-the-indian-child-welfare-act/> [<https://perma.cc/7UXD-KZKZ>].

⁶⁷ See Jane Lawrence, *The Indian Health Service and the Sterilization of Native American Women*, 24 AM. INDIAN Q. 400, 410 (Summer 2000) (stating that the doctors “believed that they were helping society by limiting the number of births in low-income, minority families . . . and assumed that they were enabling the government to cut funding for Medicaid and welfare programs while lessening their own personal tax burden to support the programs”); D. Marie Ralstin-Lewis, *The Continuing Struggle against Genocide: Indigenous Women's Reproductive Rights*, 20 WICAZO SA REV. 71, 86 (2005) (asserting that, through sterilization, the “paternalism and elitism of the U.S. government . . . infiltrated the private, reproductive lives of Native women and threatened to usurp control over their bodies”); see, e.g., MERIAM, *supra* note 51, at 547 (illustrating assumptions that Native women were “poor homemakers” who did not understand or generally practice “proper preparation of food and the care of infants and the sick”).

⁶⁸ See Ralstin-Lewis, *supra* note 67, at 75–77, 89.

⁶⁹ See THEOBALD, REPRODUCTION ON THE RESERVATION, *supra* note 38, at 155–60 (describing the practice of sterilizing Native women at government hospitals after childbirth or unrelated gynecological procedures); U.S. GOV'T ACCOUNTABILITY OFF., HRD-77-3, INVESTIGATIONS OF ALLEGATIONS CONCERNING INDIAN HEALTH SERVICE 3–4

lence demonstrate the same lack of respect for agency and bodily autonomy that abortion prohibitions evince. As late as the 1990s, Native youth on some reservations were targeted for administration of long-acting reversible contraception (LARC) without appropriate counseling, including many who suffered from comorbidities that made LARC a poor choice of contraception.⁷⁰

In short, the reproductive health of Native people in the United States has been under constant attack for centuries, and the problem continues today. The infant and maternal mortality rates of Natives are disastrously and “unrelentingly” high.⁷¹ Maternal mortality rates from 2016 to 2018 among Native women were 31.4 deaths per 100,000 live births, 1.2 times the rate for non-Hispanic white women (25.8).⁷² According to the Centers for Disease Control and Prevention, between 2011 and 2015, Native women had the second-highest rate of pregnancy-related death, with 32.5 deaths per 100,000 women, 2.5 times the rate for non-Hispanic white women.⁷³ These disparities are linked to the failure of the federal government to adequately fund and staff Indian health care.⁷⁴ The United States Commission on Civil Rights has issued two reports concluding that Indian Health Service (IHS) is woefully underfunded.⁷⁵ Even worse, news stories over the last few years suggest that

(1976) (finding that between 1974 and 1976, in just four IHS regions, 3,406 American Indian women were sterilized, with significant “weaknesses” in obtaining consent); WESTINGHOUSE LEARNING CORP., *Family Planning and the American Indian*, in 4 FAM. PLAN. 11–12 (1971) (describing concerns of overpopulation and stress on limited resources to explain IHS’s role in providing family planning services to Native American women); Dr. Connie Uri, *Statement Prepared for the Jackson Hearings*, COSTCO ARCHIVE, UNIV. OF CAL. RIVERSIDE MS 170, Box 34, Folder 034.001.001 (Sept. 16, 1974) (testifying that one of every four women who gave birth at a Claremore, Oklahoma IHS facility had been subsequently sterilized); Lawrence, *supra* note 67, at 410 (noting various findings that IHS “sterilized between 25 and 50 percent of Native American women between 1970 and 1976”).

⁷⁰ Native Am. Women’s Health Educ. Res. Ctr., *Native American Women Uncover Norplant Abuses*, 4(2) MS. MAG. 69, 69 (1993); Ralstin-Lewis, *supra* note 67, at 71–72, 86; SILLIMAN ET AL., *supra* note 40, at 119.

⁷¹ Lucy Truschel & Christina Novoa, *American Indian and Alaska Native Maternal and Infant Mortality: Challenges and Opportunities*, CTR. FOR AM. PROGRESS (July 9, 2018), <https://www.americanprogress.org/article/american-indian-alaska-native-maternal-infant-mortality-challenges-opportunities/> [<https://perma.cc/ZUG8-RZ9Z>].

⁷² U.S. DEP’T OF HEALTH & HUM. SER. OFF. OF MINORITY HEALTH, INFANT MORTALITY AND AMERICAN INDIANS/ALASKA NATIVES (2020), <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=38> [<https://perma.cc/KTV6-WU2Y>].

⁷³ Emily E. Peterson et al., *Vital Signs: Pregnancy-Related Deaths, United States, 2011–2015, and Strategies for Prevention*, 13 STATES, 2013–2017, 68(18) CTRS. FOR DISEASE CONTROL & PREVENTION WKLY. 423, 424 (2019), <https://www.cdc.gov/mmwr/volumes/68/wr/mm6818e1.htm> [<https://perma.cc/85KM-5MR9>].

⁷⁴ Timothy M. Westmoreland & Kathryn R. Watson, *Redeeming Hollow Promises: The Case for Mandatory Spending on Health Care for American Indians and Alaska Natives*, 96 AM. J. PUB. HEALTH 600, 600 (2006).

⁷⁵ U.S. COMM’N ON CIV. RTS., *BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS* 4 (Dec. 20, 2018), <https://www.usccr.gov/reports/2018/broken-promises-continuing-federal-funding-shortfall-native-americans> [<https://perma.cc/8AA8-6NWN>]; U.S. COMM’N ON CIV. RTS., *A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY ix–xii* (2003), <https://www.usccr.gov/files/pubs/na0703/na0204.pdf> [<https://perma.cc/V263-CF8U>]; U.S. GOV’T ACCOUNTABIL-

IHS is providing substandard,⁷⁶ and even dangerous,⁷⁷ care. For example, in 2015, a pregnant Native woman sought help from IHS on the Rosebud reservation when she started experiencing contractions in her thirty-fourth week of pregnancy.⁷⁸ Providers at the facility told her that she was not in labor, and she was sent home with antibiotics for a urinary tract infection. When the woman returned to the facility the same evening with more intense contractions, she was again rebuffed.⁷⁹ Ultimately, she gave birth while sitting on a toilet, and her infant landed on his face on the tile floor of the IHS restroom.⁸⁰ While her child ultimately lived, her civil case against IHS was not resolved until almost seven years later, when she received a settlement of \$150,000. IHS never admitted any liability.⁸¹ The hospital where she gave birth did not even have the staffing to provide adequate labor and delivery services.⁸²

Native people similarly face discrimination when compelled to seek maternal health care outside Tribal lands. In its concluding observations from its 2022 review of the United States, the United Nations Committee on the Elimination of Racial Discrimination expressed concern about the limited availability of culturally sensitive and respectful maternal health care for Indigenous people.⁸³ These concerns are warranted. For example, in 2020, at

ITY OFF., GAO-05-789, INDIAN HEALTH SERVICE: HEALTH CARE SERVICES ARE NOT ALWAYS AVAILABLE TO NATIVE AMERICANS 14 (2005) (concluding that “Native Americans’ access to [health care] services was not always assured”); U.N. Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Tenth to Twelfth Reports of the United States of America*, ¶ 33, U.N. Doc. CERD/C/USA/CO/10-12 (Aug. 30, 2022) [hereinafter CERD Observations] (noting their continued concern at the lack of adequate resources provided to the Indian Health Service and the lack of medical facilities within reasonable distances for Indigenous Peoples).

⁷⁶ See, e.g., Mark Walker, *Fed Up With Deaths, Native Americans Want to Run Their Own Health Care*, N.Y. TIMES (Oct. 15, 2019), <https://www.nytimes.com/2019/10/15/us/politics/native-americans-health-care.html> [<https://perma.cc/VDB5-ZRFH>]; Mary Smith, *Native Americans: A Crisis in Health Equity*, AM. BAR. ASSOC., https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/native-american-crisis-in-health-equity/ [<https://perma.cc/VFK7-HUL9>]; Ross Kenneth Urken, *Poor Cancer Care for Native Americans Might Be a Treaty Violation*, NEWSWEEK (July 19, 2016), <http://www.newsweek.com/2016/07/29/colorectal-cancer-indian-health-services-native-americans-481524.html> [<https://perma.cc/B869-6FRL>].

⁷⁷ See Christopher Weaver & Dan Frosch, *Indian Health Service Repeatedly “Did Nothing” to Stop Pediatrician from Sexually Abusing Patients, Report Finds*, FRONTLINE (Oct. 5, 2021), <https://www.pbs.org/wgbh/frontline/article/indian-health-service-repeatedly-did-nothing-to-stop-pediatrician-from-sexually-abusing-patients-report-finds/> [<https://perma.cc/GFG3-5ZCN>].

⁷⁸ Darsha Nelson, *Rosebud Woman Who Gives Birth on IHS Bathroom Floor Receives Settlement*, NEWSCENTER 1 (June 30, 2022), <https://www.newscenter1.tv/rosebud-woman-who-gives-birth-on-ihs-bathroom-floor-receives-settlement/> [<https://perma.cc/TWF3-FGY8>].

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ CERD Observations, *supra* note 75; see also Lizzie Wade, *COVID-19 Data on Native Americans is “a National Disgrace.” This Scientist Is Fighting To Be Counted*,

the height of the COVID-19 pandemic, an Albuquerque hospital implemented a discriminatory practice of separating reservation-based Native mothers from their newborns to minimize COVID infections because the hospital perceived Native Americans as more likely to transmit the virus.⁸⁴ This harmful and twisted stereotype of Native Americans as vectors of disease has a long history, and sadly still appears to be common.⁸⁵

For Native people, reproductive injustice is also intertwined with domestic and sexual violence. Native people suffer some of the highest sexual assault rates in the world⁸⁶ and have limited access to emergency contraception and abortion. According to a study published by the federal government, over half of Native women will experience sexual assault during their lifetimes.⁸⁷ Another recent study concluded that Native women experience very high rates of reproductive coercion from their partners.⁸⁸ While emergency contraception can help prevent pregnancy after an assault, many Native women say it is still unavailable to them on the reservation, despite clear IHS policy to the contrary.⁸⁹

IHS policy regarding abortion access has been further constricted by federal law. In 1980, the so-called Hyde Amendment took effect, prohibiting the use of federal dollars for most abortion care.⁹⁰ As IHS is a federal agency, the Hyde Amendment dictates that IHS can only provide abortions in very limited circumstances.⁹¹ Native people's bodies are thus still subject to significant federal governmental oversight, surveillance, and interference.

Because of historical and continuing injustices, Native people engage with abortion access in the context of a particularly painful history of denial

SCI. (Sept. 24, 2020), <https://www.science.org/content/article/covid-19-data-native-americans-national-disgrace-scientist-fighting-be-counted> [<https://perma.cc/GW36-RQFX>] (describing discrimination experienced by pregnant Indigenous people when seeking prenatal care).

⁸⁴ Bryant Furlow, *A Hospital's Secret Coronavirus Policy Separated Native American Mothers from Their Newborns*, PROPUBLICA (June 13, 2020), <https://www.propublica.org/article/a-hospitals-secret-coronavirus-policy-separated-native-american-mothers-from-their-newborns> [<https://perma.cc/K22V-VKL8>].

⁸⁵ See Ann E. Tweedy, *The Validity of Tribal Checkpoints in South Dakota to Curb the Spread of Covid-19*, 2021 U. CHI. LEGAL F. 233, 243 & n.54 (2021).

⁸⁶ See ROSAY, *supra* note 47, at 11–13, 15, 21–23 (examining the prevalence of sexual violence against Native women and men).

⁸⁷ *Id.* 56.1% of AI/AN women have experienced sexual violence and, among those women, 96% experienced sexual violence by an interracial perpetrator; 55.5% of AI/AN women have experienced physical violence by an intimate partner, and, among those women, 89% experienced physical violence by an interracial perpetrator; and 48.8% of AI/AN women have been stalked, of which 89% were by interracial perpetrators. *Id.* at 2, 19, 29, 44.

⁸⁸ Elena Giacci et al., *Intimate Partner and Sexual Violence, Reproductive Coercion, and Reproductive Health Among American Indian and Alaska Native Women: A Narrative Interview Study*, 31(1) J. WOMEN'S HEALTH. 13, 15 (2022).

⁸⁹ INDIAN HEALTH SERV., INDIAN HEALTH MANUAL 1-15.1(B), <https://www.ihs.gov/ihtm/> [<https://perma.cc/P9U3-5UPW>] [hereinafter INDIAN HEALTH MANUAL].

⁹⁰ Pub. L. 94-439, § 209, 90 Stat. 1434 (1976).

⁹¹ Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. H, §§ 506–07, 136 Stat. 49, 496.

of the right to parent at all. Mothers and grandmothers still grieve for the children they have lost to the state and for the ability to bear children, which many lost due to forced sterilization.⁹² In the wake of *Dobbs*, then, many questions have been raised about how to rectify these injustices by exploring the role of Tribal sovereignty. While this Article focuses specifically on abortion care and Tribal (and state) jurisdiction, we ultimately envision the development of Tribally-run or Tribally-authorized clinics and facilities where a comprehensive array of reproductive health care is provided.

III. ABORTION CARE IN INDIAN COUNTRY TODAY

This Part first delineates the two main avenues for abortion: in-clinic abortion and medication abortion. Then, this Part provides background on reservation-based health-care providers, laws and policies limiting abortion access in Indian country, the realities of Indigenous access to abortion, and divergent views on abortion among Tribal citizens.

In the United States, abortions can be conducted in a clinic or through medication.⁹³ In-clinic abortions include a variety of procedures that physically remove a pregnancy from a uterus.⁹⁴ They are conducted by health providers in a medical facility.⁹⁵ In-clinic abortions do not require surgery, despite sometimes being referred to as “surgical abortions.”⁹⁶ Medication abortion ends a pregnancy using a combination of two medications, mifepristone and misoprostol.⁹⁷ The former prevents the growth of the pregnancy and the latter removes the pregnancy from the uterus.⁹⁸ The Food and Drug Administration (FDA) requires these medications to be prescribed by a health-care provider, but mifepristone can now be accessed at retail pharmacies with a prescription.⁹⁹ According to 2020 data, fifty-four percent of abor-

⁹² See, e.g., Ruth H. Robertson, *A Call for Native Bodily Autonomy*, ATMOS (July 26, 2022), www.atmos.earth/a-call-for-native-bodily-autonomy-reproductive-justice/ [https://perma.cc/W9UM-X6AA] (describing her experience being sterilized by the Indian Health Service at the age of 21).

⁹³ Attia @Planned Parenthood, *What are the Different Types of Abortion?*, PLANNED PARENTHOOD (Nov. 21, 2019, 9:22 PM) <https://www.plannedparenthood.org/learn/ask-experts/what-are-the-different-types-of-abortion> [https://perma.cc/HR7P-ZF54].

⁹⁴ *In-Clinic Abortion*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/abortion/in-clinic-abortion-procedures> [https://perma.cc/78PC-9RL8].

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *The Abortion Pill*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/abortion/the-abortion-pill> [https://perma.cc/N3D5-UJWT].

⁹⁸ *Id.*

⁹⁹ U.S. FOOD & DRUG ADMIN., RISK EVALUATION AND MITIGATION STRATEGY (REMS): SINGLE SHARED SYSTEM FOR MIFEPRISTONE 200MG (2021), https://www.accessdata.fda.gov/drugsatfda_docs/remis/Mifepristone_2021_05_14_REMS_Full.pdf [https://perma.cc/9LFP-U7VJ]; U.S. FOOD & DRUG ADMIN., FDA APPROVED DRUGS, <https://www.accessdata.fda.gov/scripts/cder/daf/index.cfm?event=coverview.process&ApplNo=019268> [https://perma.cc/B26Y-VRTC]; *Information about Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, U.S. FOOD & DRUG ADMIN. (Jan. 3, 2023), <https://www.fda.gov/drugs/postmarket-drug-safety-information->

tions are conducted using medications.¹⁰⁰ Finally, self-managed abortion refers to an individual attempting to terminate a pregnancy independent of the health-care system. As states ban abortion, more people may self-manage abortion, including by ordering medications and obtaining information online.¹⁰¹ Although the FDA requires a prescription from a health-care provider for medication abortion, the medication path “holds great promise for the future of self-managed abortion care in the United States” as a safe method.¹⁰² However, self-managed abortion and medication abortion are not synonymous. State lawmakers are also increasingly legislating on the use of abortion medications outside health-care settings.¹⁰³

The Supreme Court originally upheld abortion care as a constitutional right in *Roe v. Wade*¹⁰⁴ and *Planned Parenthood v. Casey*.¹⁰⁵ However, *Casey* left room for substantial discretion and flexibility for states to regulate abortions in ways that limit access, including restrictions post-viability and restrictions deemed less than an “undue burden.”¹⁰⁶ These state regulations include the establishment of facility standards and provider licensing and

patients-and-providers/information-about-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation [https://perma.cc/D3AR-KR6B] [hereinafter *Information about Mifepristone*]; Ahmed Aboulenein, *US FDA Allows Abortion Pills to be Sold at Retail Pharmacies*, REUTERS (Jan. 4, 2023), https://www.reuters.com/world/us/us-fda-says-abortion-pills-can-be-sold-retail-pharmacies-new-york-times-reports-2023-01-03/ [https://perma.cc/N64U-L3KY].

¹⁰⁰ Rachel K. Jones et al., *Medication Abortion Now Accounts for More Than Half of All US Abortions*, GUTTMACHER INST. (Feb. 24, 2022), https://www.guttmacher.org/article/2022/02/medication-abortion-now-accounts-more-half-all-us-abortions [https://perma.cc/H46M-DNVR]; see also Jeff Diamant & Besheer Mohamed, *What the Data Says About Abortion in the U.S.*, PEW RSCH. CTR. (June 24, 2022), https://www.pewresearch.org/fact-tank/2022/06/24/what-the-data-says-about-abortion-in-the-u-s-2/ [https://perma.cc/6W8C-MQ53].

¹⁰¹ See Roni Caryn Rabin, *Some Women “Self-Manage” Abortions as Access Recedes*, N.Y. TIMES (Aug. 7, 2022), https://www.nytimes.com/2022/08/07/health/abortion-self-managed-medication.html [https://perma.cc/VPB2-WS4F].

¹⁰² Megan K. Donovan, *Self-Managed Medication Abortion: Expanding the Available Options for U.S. Abortion Care*, GUTTMACHER INST. (Oct. 17, 2018), https://www.guttmacher.org/gpr/2018/10/self-managed-medication-abortion-expanding-available-options-us-abortion-care [https://perma.cc/A25X-N723].

¹⁰³ See Carrie N. Baker, *Self-Managed Abortion Is Medically Very Safe. But Is It Legally Safe?*, MS. MAG. (Apr. 1, 2020), https://msmagazine.com/2020/04/01/self-managed-abortion-is-medically-very-safe-but-is-it-legally-safe/ [https://perma.cc/MG23-J4BE]; Jennifer Gerson, *What Self-Managed Abortion Looks Like Now—and How an End to Roe v. Wade Could Change It*, 19TH (May 13, 2022, 11:45 AM), https://19thnews.org/2022/05/self-managed-abortion-medication-roe/ [https://perma.cc/V3N9-YLAM].

¹⁰⁴ *Roe v. Wade*, 410 U.S. 113, 153 (1973), *overruled by Dobbs v. Jackson Women’s Health Org.*, No. 19-1392.

¹⁰⁵ *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992), *overruled by Dobbs*, No. 19-1392.

¹⁰⁶ *Id.* at 877 (defining an undue burden as a state regulation with “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus”).

privileges.¹⁰⁷ Experts have noted that these laws do not support patient safety but instead seek to create barriers that make providing or securing abortion care medically infeasible, no longer legally permissible under the federal threshold, or impractical.¹⁰⁸ Post-*Dobbs*, states now have even more flexibility, but are potentially limited by federal preemption in other arenas like emergency care under the Emergency Medical Treatment & Labor Act (EMTALA).¹⁰⁹

A. Federal Indian Health System

To better understand the limited access to abortion care in Indian country, this Section first describes the federal Indian health system. It then describes the policy limitations on providing abortions in the federal system before providing data on the inequities in abortion care access that Indigenous people face.

Indian health-care systems consist of a complex network of providers across public and private facilities and across Tribal, state, and federal governments.¹¹⁰ Due to treaty, trust, and statutory obligations, the federal government is required to provide health care to American Indians and Alaska Natives¹¹¹ and thus is the primary funder of health services in Indian country.¹¹² The federal government provides health services under a three-tier system through Indian Health Service (IHS), Tribal 638 facilities, and urban

¹⁰⁷ *Targeted Regulation of Abortion Providers (TRAP) Laws*, GUTTMACHER INST. (Jan. 2020), <https://www.guttmacher.org/evidence-you-can-use/targeted-regulation-abortion-providers-trap-laws> [<https://perma.cc/6MD8-5KTB>].

¹⁰⁸ *See, e.g.*, Rebecca J. Mercier, Mara Buchbinder & Amy Bryant, *TRAP Laws and the Invisible Labor of US Abortion Providers*, CRITICAL PUB. HEALTH 26(1) 77, 77–78 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4999072/> [<https://perma.cc/6WRZ-LLM2>]; *see also* Hannah Haksgaard, *Rural Women and Developments in the Undue Burden Analysis: The Effect of Whole Woman’s Health v. Hellerstedt*, 65 DRAKE L. REV. 663, 683 (2017) (explaining how TRAP laws “purposefully override medical judgment and discretion,” “increase the costs of operating a clinic,” and “disproportionately impact rural women”).

¹⁰⁹ *See* Letter from Xavier Becerra, HHS Secretary, to Health Care Providers (July 11, 2022), <https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf> [<https://perma.cc/QAA7-F45P>].

¹¹⁰ TRIBAL PUB. HEALTH INST., PROJECT FINDINGS REPORT: EXPLORING NEW PATHWAYS TO SUPPORT TRIBAL HEALTH 5 (Jan. 2013), https://redstarintl.org/wp-content/uploads/2018/12/tphi_findings_report.pdf [<https://perma.cc/9TA8-VBUM>].

¹¹¹ *See* 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 22.04 (1) (Nell Jessup Newton ed., 2012); *see, e.g.*, Snyder Act, 25 U.S.C. § 13 (1921) (authorizing the Bureau of Indian Affairs to carry out programs “[f]or relief of distress and conservation of health”); Indian Health Care Improvement Act, 25 U.S.C. § 1601(2)(a) (1976) (declaring that “Federal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government’s historical and unique legal relationship with, and resulting responsibility to, the American Indian people”).

¹¹² U.S. COMM’N ON CIV. RTS., BROKEN PROMISES, *supra* note 75, at 64.

Indian health programs.¹¹³ IHS is a federal agency that provides direct services across over a hundred facilities.¹¹⁴ Tribal 638 facilities are Tribally-operated but federally-funded health centers.¹¹⁵ Urban Indian health programs are federally-funded and operated by Urban Indian Organizations, nonprofit organizations designated by the federal government.¹¹⁶ This three-tier system is often referred to as “I/T/U.”¹¹⁷

The Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA) provides the vehicle that created and funds Tribal 638 facilities.¹¹⁸ ISDEAA allows Tribes the option to contract with the federal government to take funds that otherwise would have been funneled to IHS facilities to provide care through Tribally-operated facilities.¹¹⁹ As part of a 638 contract or compact, Tribes outline the programs, services, functions, and activities that they will provide at their facility,¹²⁰ such as diabetes prevention, infectious disease control, or maternal health.¹²¹

Among other legal and moral failings, the federal government has continuously underfunded federal Indian health services.¹²² The Meriam Report, discussed above, documented numerous examples of the lack of health services and inadequate health care provided by the federal government on reservations.¹²³ Over the past ninety years, there have been changes to the federal Indian health-care system, but the care remains inadequate.¹²⁴ In 2018, the U.S. Commission on Civil Rights reiterated that the federal government had inadequately invested in Indian health care, finding that “[t]he efforts of the federal government have been insufficient to meet the promises of providing for the health and wellbeing of tribal citizens, as a vast health disparity exists today between Native Americans and other population groups.”¹²⁵ The Commission’s report concluded that funding for the Indian health-care system was “inequitable and unequal.”¹²⁶ IHS per capita expenditures are only a fraction of per capita health spending nationwide: \$2,834

¹¹³ Aila Hoss & Michelle Castagne, *Public Health Law and American Indians and Alaska Natives*, in *PUBLIC HEALTH LAW: CONCEPTS AND CASE STUDIES* 209, 216–17 (Montrece McNeill Ransom & Laura Magaña Valladares eds., 2022).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Indian Self-Determination and Education Assistance Act, 25 U.S.C. 46 § 5321 (1975) (amended 2020).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ INDIAN HEALTH SERV., PROGRAM, SERVICES, FUNCTIONS, AND ACTIVITIES MANUAL 10, 13, 19 (June 2002), https://www.ihs.gov/sites/selfgovernance/themes/responsive2017/display_objects/documents/2002-PSFA-Manual.pdf [<https://perma.cc/J699-6HH3>].

¹²² See U.S. COMM’N ON CIV. RTS., *BROKEN PROMISES*, *supra* note 75, at 6.

¹²³ See MERIAM, *supra* note 51, at 192, 194, 206.

¹²⁴ See U.S. COMM’N ON CIV. RTS., *BROKEN PROMISES*, *supra* note 75, at 65.

¹²⁵ *Id.*

¹²⁶ *Id.* at 209.

versus \$9,990.¹²⁷ IHS spending levels are substantially lower than other federal programs, including Medicaid, Medicare, and the Veterans Health Administration,¹²⁸ with an additional \$32 billion needed to fully fund IHS based on health-care needs.¹²⁹ Moreover, IHS funding is appropriated on an annual basis and is thus uniquely vulnerable to government shutdowns and sequestrations.¹³⁰

Unsurprisingly, the chronic underfunding of the I/T/U system has resulted in a pervasive health-care provider shortage. In a 2018 report, the Government Accountability Office found that, on average, IHS has a twenty-five percent provider vacancy rate.¹³¹ Importantly, this data was generated based on existing IHS positions in an underfunded system, not a fully-funded system. Inadequate funding and staffing shortages both limit the quality of care.¹³²

Underfunding of Indian health programs is further exacerbated in the context of abortion care due to limitations under federal law. The Hyde Amendment, as discussed earlier, prohibits the use of federal funds for abortion care unless the pregnancy is a result of rape or incest or it endangers the life of the parent.¹³³ The prohibition includes appropriations to IHS,¹³⁴ thus limiting the ability to provide abortion care at not only IHS direct facilities but also federally-funded facilities like Tribal 638s and urban Indian health programs.¹³⁵ The majority of funding for health services in Indian country

¹²⁷ *Id.* at 66.

¹²⁸ See U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-74R, INDIAN HEALTH SERVICE: SPENDING LEVELS AND CHARACTERISTICS OF IHS AND THREE OTHER FEDERAL HEALTH CARE PROGRAMS 5 (2018).

¹²⁹ U.S. COMM'N ON CIV. RTS., BROKEN PROMISES, *supra* note 75, at 67.

¹³⁰ *Id.* at 68; see also ABA House of Delegates, Resolution 115A (2019), <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/115a-annual-2019.pdf> [<https://perma.cc/8R2H-DLBK>] (urging Congress to ensure that health care delivered by IHS is exempt from government shutdowns and federal budget sequestrations and noting the exemptions provided to the Veterans Health Administration).

¹³¹ U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-580, INDIAN HEALTH SERVICE: AGENCY FACES CHALLENGES FILLING PROVIDER VACANCIES 5 (2018).

¹³² See, e.g., *Rosebud Sioux Tribe v. United States*, 9 F.4th 1018, 1025 (8th Cir. 2021) (“The record confirms a history of documented deficiencies in the quality of healthcare provided to members of the Tribe at Rosebud Hospital.”); Christopher Weaver, Dan Frosch & Lisa Schwartz, *The U.S. Gave Troubled Doctors a Second Chance. Patients Paid the Price*, WALL ST. J. (Nov. 22, 2019), <https://www.wsj.com/articles/the-u-s-gave-troubled-doctors-a-second-chance-patients-paid-the-price-11574439222> [<https://perma.cc/2Y9M-85DD>] (“The federal agency, which provides health care to 2.6 million Native Americans, has given second chances to dozens of doctors with trails of medical mistakes and regulatory sanctions.”).

¹³³ Pub. L. 94-439, § 209, 90 Stat. 1434. The Hyde Amendment was upheld by the Supreme Court in *Harris v. McRae*, 448 U.S. 297, 327 (1980). However, there was no briefing nor any mention in oral arguments pertaining to Native women.

¹³⁴ 25 U.S.C.A. § 1676.

¹³⁵ INDIAN HEALTH MANUAL, *supra* note 89, at 3-13.14(B)(1) (quoting 42 C.F.R. § 136.12) (“Federal funds may not be used to provide abortion services either directly or indirectly. For example, IHS funds cannot be used to pay the salary of an individual who performs non-conforming abortions on salaried time, or for the costs incurred at an IHS facility where an abortion is performed. Nor can IHS contract care funds be used to

comes from federal dollars.¹³⁶ Thus, while the Hyde Amendment was not directed at Tribes, it has an outsized impact on Native people.¹³⁷ Until the Hyde Amendment is repealed, IHS cannot fund most abortions.

B. Facility Abortion Policies

This Section exposes the incoherence of implementation policies for the Hyde Amendment's three exceptions within IHS. With little or no guidance, IHS administrators and providers must synthesize three potentially conflicting documents: the Indian Health Manual, Special General Memorandum 96-01, and the most recent and most favorable to patients of the three, the Indian Health Service Circular No. 22-15. The relationship between the first two documents is uncertain, and the third, which purportedly supersedes the approaches to the Hyde Amendment in the first two, may not be widely known or appropriately implemented, as explained below.

Federal law and policy require documentation when IHS or an IHS-funded program provides abortions under one of the three exceptions.¹³⁸ For example, federal regulation requires a certification when an abortion is performed to protect the life of the parent.¹³⁹ Under this requirement, the provider must provide written certification "to the appropriate tribal or other contracting organization, or Service Unit or Area Director, that 'on the basis of [the provider's] professional judgment[,] the life of the mother would be endangered if the fetus were carried to term.'" ¹⁴⁰ The certification must include the name and address of the patient.¹⁴¹ The Indian Health Manual ("IHM"), a reference manual for IHS, states that the "Area/Program Chief Medical Officer in consultation with Area/Program gynecologists is responsible for the development of specific clinical standards for medically indicated abortion services."¹⁴²

The remainder of IHS official abortion policies, especially its policies regarding instances of rape and incest, are fragmented. The IHM lists a specific diagnostic code for abortions, indicating that this care can be provided at IHS.¹⁴³ It also includes "criminal abortion" as a reportable condition.¹⁴⁴ It

reimburse a physician or a facility performing an abortion, for this would constitute indirect support.").

¹³⁶ See INDIAN HEALTH SERV., JUSTIFICATIONS FOR ESTIMATES FOR APPROPRIATIONS COMMITTEES FISCAL YEAR 2023 2 (2022), https://www.ihs.gov/sites/budgetformulation/themes/responsive2017/display_objects/documents/FY2023BudgetJustificaton.pdf [<https://perma.cc/AU9A-7Y83>]; see also Everett R. Rhoades, *American Indians and the Private Health Care Sector*, 176 WEST J. MED. 7, 7 (2002).

¹³⁷ See Shaye Beverly Arnold, *Reproductive Rights Denied: The Hyde Amendment and Access to Abortion for Native American Women Using Indian Health Service Facilities*, 104(10) AM. J. PUB. HEALTH 1892, 1892–93 (2014).

¹³⁸ 42 C.F.R. § 136.53; 42 C.F.R. § 136.54.

¹³⁹ 42 C.F.R. § 136.54.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² INDIAN HEALTH MANUAL, *supra* note 89, at 3-13.14(E)(3).

¹⁴³ *Id.* at 4-3, App. III.

does not define criminal abortion, but some pre-*Roe* literature defines criminal abortion as the unlawful expulsion of a fetus or abortions conducted in violation of state law.¹⁴⁵ The IHM does not have any specific guidance on incest and abortion,¹⁴⁶ but, in the context of rape, it unhelpfully states that, since rape is a crime, a medical examination cannot determine whether a crime has been committed.¹⁴⁷

Special General Memorandum 96-01, issued by the IHS director Dr. Michael Trujillo in 1996, sought to clarify IHS abortion policy to ensure that it aligned with federal statutory law.¹⁴⁸ In the context of the rape and incest policy exception, the memorandum clarifies that IHS authorizes the expenditure of federal funds for an abortion, provided there is signed documentation from a law enforcement agency and a report from the victim within 60 days of the incident, among other criteria.¹⁴⁹ The memorandum further requires that IHS comply with state law regarding the provision of services to minors without parental consent.¹⁵⁰

Notably, the language in the memorandum is more expansive in its exceptions than the language of the IHM. Although the IHM only acknowledges the medical necessity exception,¹⁵¹ the memorandum outlines the additional rape and incest exceptions. The memorandum does state, however, that “[t]he authorization of or performance of abortions under this policy must also be consistent with the relevant sections of the Indian Health Manual, Part 3, Chapter 13, ‘Maternal and Child Health.’”¹⁵² Read together, the policies under the IHM and the memorandum allow for all three of the Hyde Amendment exceptions. Administrative doctrine governing interpretation does not rank the order of preference of nonbinding policies issued by an agency, but a variety of factors might be relevant in the event of a conflict.¹⁵³ Unfortunately, actual incorporation of all three exceptions, which is a predicate for meaningful provision of abortion care to Native patients, re-

¹⁴⁴ *Id.* at 3-3.15(E).

¹⁴⁵ *See, e.g.*, Walter W. Jetter, *Criminal Abortion*, 242 NEW ENG. J. MED. 344, 344 (1950); Russell S. Fisher, *Criminal Abortion*, 42 J. CRIM. L. & CRIMINOLOGY 242, 244 (1951).

¹⁴⁶ The IHM refers to incest in the context of child sex abuse but does not refer to it in the context of abortion. *See* INDIAN HEALTH MANUAL, *supra* note 89, at 3-20.1(F), 3-36.1(F)(4).

¹⁴⁷ *Id.* at 3-13.8(F)(3)(a)(2) (“Rape is a crime, and medical examination cannot conclusively establish the presence or absence of the commission of a crime. It is IHS policy to perform only medically related care and treatment.”).

¹⁴⁸ INDIAN HEALTH SERV., *Special General Memorandum 96-01*, INDIAN HEALTH MANUAL (Aug. 12, 1996), <https://www.ihs.gov/ihs/sgm/1996/sgm-9601/> [<https://perma.cc/B2A2-UE6W>] [hereinafter IHM Memorandum].

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ INDIAN HEALTH MANUAL, *supra* note 89, at 3-13.14(B).

¹⁵² IHM Memorandum, *supra* note 148.

¹⁵³ Factors that could be relevant in determining the weight of subregulatory guidance in the case of a conflict might include the date the policy was issued, the issuing body, the publication venue, the rigor of the policy development process, and the rigor of the analysis in forming its conclusion. *See, e.g.*, *Skidmore v. Swift & Co.*, 323 U.S. 134, 140

quires that an I/T/U administrator be aware of the memorandum and confident in supplementing its guidance with the IHM. Practically, I/T/U administrators are likely far more familiar with the IHM, which they would consult regularly, rather than the single memorandum, which could cause confusion in administering abortions in practice.

Most recently, days after the release of the *Dobbs* decision in June 2022, IHS published a circular that expressly supersedes the IHM and the memorandum.¹⁵⁴ The circular maintains the general structure of the prohibitions of the Hyde Amendment with the three exceptions, but no longer requires law enforcement statements for pregnancies resulting from rape or incest.¹⁵⁵ Instead, it requires a physician to certify “as part of the medical record that the pregnancy is the result of an act of rape or incest.”¹⁵⁶ IHS implemented this policy without sending a “Dear Tribal Leader” letter¹⁵⁷ or engaging in Tribal consultation. Thus, it is unclear how widely known the policy is and what its impact will be.

Unsurprisingly, given combined effects of the Hyde Amendment and piecemeal IHS policies, the limited abortion access related to the Hyde Amendment’s three exceptions varies significantly across I/T/U facilities. In 2002, Native American Women’s Health Education Resource Center conducted a study that found that IHS had performed or funded only twenty-five abortions between 1981 and 2001.¹⁵⁸ More recent data reveals that only seven AI/AN women visited an IHS-funded facility for an abortion nationally from 2002 to 2021.¹⁵⁹ This data is limited to information from thirty-three reporting facilities.¹⁶⁰ Requests for more comprehensive data from IHS

(1944); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2445 (2019).

¹⁵⁴ INDIAN HEALTH SERV., *Use of Indian Health Service Funds for Abortions*, INDIAN HEALTH MANUAL (June 30, 2022), <https://www.ihs.gov/ihtm/circulars/2022/use-of-indian-health-service-funds-for-abortions/> [<https://perma.cc/3ZEX-M7ZR>].

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ “Dear Tribal Leader” letters are used by federal agencies to initiate consultation or notify Tribal governments of issues that impact Tribes and their citizens. *See, e.g., Dear Tribal Leader Letters*, CTRS. FOR DISEASE CONTROL & PREVENTION, [https://www.cdc.gov/tribal/consultation-support/letters.html#:~:text=Dear%20Tribal%20Leader%20Letters%20\(DTLL,other%20critical%20information%20to%20tribes](https://www.cdc.gov/tribal/consultation-support/letters.html#:~:text=Dear%20Tribal%20Leader%20Letters%20(DTLL,other%20critical%20information%20to%20tribes) [<https://perma.cc/AT56-7FJY>] (explaining that “Dear Tribal Leader” letters still “serve as formal written mechanisms to notify tribal leaders from all federally recognized tribes about consultation activities”).

¹⁵⁸ KATI SCHINDLER ET AL., *INDIGENOUS WOMEN’S REPRODUCTIVE RIGHTS: THE INDIAN HEALTH SERVICE AND ITS INCONSISTENT APPLICATION OF THE HYDE AMENDMENT 9* (2002), https://www.prochoice.org/pubs_research/publications/downloads/about_abortion/indigenous_women.pdf [<https://perma.cc/ZTH4-8DVW>].

¹⁵⁹ *See* Brief for Cecilia Fire Thunder, National Indigenous Women’s Resource Center, the Native American Community Board, and Additional Advocacy Organizations and Individuals in Support of Respondents as Amici Curiae at 31, *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (June 24, 2022) (analyzing data pulled from Indian Health Service’s Data Marts).

¹⁶⁰ *Id.*

went unanswered¹⁶¹ until recently, when *Vice* reporter Adreanna Rodriguez received a response to a Freedom of Information Act request from IHS in August 2022.¹⁶² The data indicates that abortion care provided by IHS is sporadic,¹⁶³ and we can only speculate on the reason for such variation across time periods. Variations may relate to changes in administration and leadership rather than changes in policies.¹⁶⁴

There appears to be substantial variability in whether IHS facilities offer abortions and how the Hyde Amendment exceptions are implemented.¹⁶⁵ IHS facilities do not seem to believe that they are mandated to provide such care.¹⁶⁶ In practice, even outside of the abortion context, there is limited access to obstetric and gynecological care within the I/T/U system.¹⁶⁷ The federal restrictions may also have a chilling effect on facility administrators

¹⁶¹ See SCHINDLER ET AL., *supra* note 158, at 6 (describing unsuccessful recent efforts of the Native American Women’s Health Education Resource Center to obtain new data about abortions funded or performed by IHS); Allison Herrera, *Indigenous Women Face Extra Barriers When It Comes to Reproductive Rights*, HIGH COUNTRY NEWS (Feb. 14, 2020), <https://www.hcn.org/issues/52.3/indigenous-affairs-public-health-indigenous-women-face-extra-barriers-when-it-comes-to-reproductive-rights> [<https://perma.cc/N67K-YMZY>] (stating that *High Country News*’s requests under the Freedom of Information Act had gone unanswered).

¹⁶² See Adreanna Rodriguez, *Roe Was Never Enough*, VICE NEWS REP. (Aug. 25, 2022), <https://shows.acast.com/vice-news-reports/episodes/roe-was-never-enough> [<https://perma.cc/B9JJ-C6F6>].

¹⁶³ *Id.*

¹⁶⁴ Rachel Lorenzo, the executive director of Indigenous Women Rising, has suggested that the variations in abortion care across facilities could be attributed to the varying approaches of medical directors at these facilities. See Pauly Denetclaw, *Supreme Court Could Halt Access to Safe Abortions, Indigenous Activists Say*, INDIAN COUNTRY TODAY (May 3, 2022), <https://indiancountrytoday.com/news/supreme-court-could-halt-access-to-safe-abortions-indigenous-activists-say> [<https://perma.cc/5L95-ULKP>] (quoting Rachel Lorenzo) (“[E]very medical director has a different policy that guides their providers when they have a patient who is expressing [that] they want to terminate their pregnancy”); see also Rodriguez, *supra* note 162 (detailing that, based on IHS and self-reported data, only specific IHS-funded facilities, like the facilities in Phoenix and Albuquerque, provided abortion care to pregnant persons).

¹⁶⁵ See Denetclaw, *supra* note 164 (reporting that, in New Mexico and Oklahoma, the Hyde Amendment exceptions are often “not being acknowledged by local Indian Health Service hospitals”); Rodriguez, *supra* note 162.

¹⁶⁶ See Denetclaw, *supra* note 164. But see C. Lewis Borders, *Rape and Incest Abortion Funding Under Medicaid—Can the Federal Government Force Unwilling States to Pick Up the Tab?*, 35 U. LOUISVILLE J. FAM. L. 121, 125–27 (1997) (detailing court decisions finding it mandatory or permissive for states to fund abortion care that fell within exceptions of the Hyde Amendment).

¹⁶⁷ See Usha Ranji, Michelle Long & Alina Salganicoff, *Beyond the Numbers: Access to Reproductive Health Care for Low-Income Women in Five Communities*, KAISER FAM. FOUND. (Nov. 14, 2019), <https://www.kff.org/report-section/beyond-the-numbers-access-to-reproductive-health-care-for-low-income-women-in-five-communities-crow-tribal-reservation-mt/> [<https://perma.cc/NUS9-E4U3>]; Yesenia Amaro & Deepa Bharath, *Uninsured Native Americans Often Lack Needed Prenatal Care*, USC CTR. FOR HEALTH JOURNALISM NEWS COLLABORATIVE (Oct. 3, 2019), <https://centerforhealthjournalism.org/uninsured-native-americans-often-lack-needed-prenatal-care> [<https://perma.cc/VH3T-4YZQ>]; *Healing in Indian Country: Ensuring Access to Quality Health Care, Hearing Before the S. Comm. on Finance*, 112th Cong. 59 (Aug. 8, 2012).

who may not be familiar with or who are uncomfortable implementing the Hyde Amendment exceptions.¹⁶⁸

C. *Indigenous Access to Abortion Care*

Broadly speaking, Native people access reproductive health care less frequently than their white counterparts.¹⁶⁹ Few I/T/U facilities offer abortion care, even in circumstances in which use of federal funding to perform abortions is permissible. IHS's provider shortage extends to the provision of obstetrics and gynecological care, and reports suggest that many Indigenous people have to travel to other towns to receive this care.¹⁷⁰ Indigenous people also have inadequate access to birth control. Native people are regularly denied access to emergency contraception by IHS, with past estimates suggesting that as many as ninety percent of facilities fail to provide this medication.¹⁷¹ This continues to be true, despite a 2015 IHS directive requiring Plan B to be available without a prescription, counseling, or medical intervention.¹⁷²

Geography further complicates access to reproductive health care.¹⁷³ Indigenous people living in rural areas must overcome substantial travel burdens to access such care,¹⁷⁴ and Indigenous persons living on reservations

¹⁶⁸ See Rodriguez, *supra* note 162.

¹⁶⁹ Megan A. Cahn et al., *Use of Sexual Health Services Among American Indian and Alaska Native Women*, 59 WOMEN HEALTH 953, 954 (2019).

¹⁷⁰ See, e.g., Ranji, Long & Salganicoff, *supra* note 167; Amaro & Bharath, *supra* note 167; *Healing in Indian Country*, *supra* note 167, at 59. *But see* Cynthia Miller, *Nation's First Native Birthing Facility Planned in New Mexico*, SANTA FE NEW MEXICAN (Apr. 29, 2018), https://www.santafenewmexican.com/news/health_and_science/nation-s-first-native-birthing-facility-planned-in-new-mexico/article_c225ecc6-9e9f-5874-b369-1199e09ac3a7.html [<https://perma.cc/M76U-6AX7>] (discussing efforts to create a birthing center in Pojoaque, New Mexico to directly serve Native women).

¹⁷¹ Alexa Kolbi-Molinas & Charon Asetoyer, *Native American Women Demand Rightful Access to Emergency Contraception*, ACLU (Mar. 1, 2013), <https://www.aclu.org/blog/reproductive-freedom/birth-control/native-american-women-demand-rightful-access-emergency> [<https://perma.cc/D7MC-2GXU>].

¹⁷² INDIAN HEALTH MANUAL, *supra* note 89, at 1-15.1(B); Allison Herrera, *Long Before Roe v. Wade Was Overturned, Indigenous Women Faced Barriers to Abortion*, KOSU (June 28, 2022), <https://www.kosu.org/health/2022-06-28/long-before-roe-v-wade-was-overturned-indigenous-women-faced-barriers-to-abortion> [<https://perma.cc/LM6W-KT2T>].

¹⁷³ See, e.g., Liza Fuentes & Jenna Jerman, *Distance Traveled to Obtain Clinical Abortion Care in the United States and Reasons for Clinic Choice*, 28(12) J. WOMEN'S HEALTH 1623, 1623–24 (2019) (“Several studies have found that greater distances to abortion facilities are associated with increased burden among patients, including higher associated out-of-pocket costs, greater difficulty getting to the clinic, negative mental health outcomes, higher likelihood of emergency room-based follow-up care, delayed care, and decreased use of abortion services.”) (footnotes omitted).

¹⁷⁴ See, e.g., CTRS. FOR MEDICARE & MEDICAID SERV., IMPROVING ACCESS TO MATERNAL HEALTH CARE IN RURAL COMMUNITIES 9 (2019), <https://www.cms.gov/About-CMS/Agency-Information/OMH/equity-initiatives/rural-health/09032019-Maternal-Health-Care-in-Rural-Communities.pdf> [<https://perma.cc/LE42-RNS7>] (describing the difficulties that rural residents face in accessing reproductive health care).

disproportionately lack access to reliable transportation.¹⁷⁵ Conversely, Indigenous people living in urban areas may not be eligible to receive care at an IHS or Tribal 638 facility and, even if they are, there are very few urban Indian health programs.¹⁷⁶ Travel burdens remain a pervasive issue and can force pregnant people to opt out of seeking an abortion.¹⁷⁷ Restrictive state laws further limit access to abortion care generally,¹⁷⁸ but the burden of these laws is not distributed equally.¹⁷⁹ Indigenous people specifically experience unequal access to abortion care.¹⁸⁰

¹⁷⁵ See, e.g., Maureen Hensley-Quinn & Kelly Shawn, *American Indian Transportation: Issues and Successful Models*, RTAP: RURAL TRANSIT ASSISTANCE PROGRAM OF THE FED. TRANSIT ADMIN. 1, 1 (Fall 2006) (stating that “[m]any tribal members have to depend upon friends and neighbors for rides to medical centers, school and jobs,” while “others are unable to access any transportation and as a result they are unable to manage their health or maintain long-term employment”); Benjamin Boyles et al., *Native American Transit: Current Practices, Needs, and Barriers*, 1956 TRANSP. RSCH. REC. 103, 104 (2006) (noting that “[c]urrently, only 18 of the 562 federally recognized tribes have public transportation systems that receive any form of public monies from FTA’s Section 18 program” and that “[i]mproved mobility allows access to employment, medical treatment, and education”).

¹⁷⁶ Committee on American Indian/Alaska Native Women’s Health & Committee on Health Care for Underserved Women, *Health Care for Urban American Indian and Alaska Native Women*, 515 AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS 2–3 (Jan. 2012), <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2012/01/health-care-for-urban-american-indian-and-alaska-native-women> [<https://perma.cc/P3VX-HHBH>].

¹⁷⁷ See generally Elizabeth A. Pleasants, Alice F. Cartwright & Ushma D. Upadhyay, *Association Between Distance to an Abortion Facility and Abortion or Pregnancy Outcome Among a Prospective Cohort of People Seeking Abortion Online*, JAMA NETWORK OPEN 5(5):e221206 (2022), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2792291> [<https://perma.cc/W7J7-YCUE>] (finding that long distances to abortion facilities is one common barrier to abortion care); Mikaela H. Smith et al., *Abortion Travel Within the United States: An Observational Study of Cross-State Movement to Obtain Abortion Care in 2017*, 10 LANCET (June 1, 2022), [https://www.thelancet.com/journals/lanam/article/PIIS2667-193X\(22\)00031-X/fulltext](https://www.thelancet.com/journals/lanam/article/PIIS2667-193X(22)00031-X/fulltext) [<https://perma.cc/J2H6-6PVT>] (finding that people in states with few abortion facilities and restrictive abortion laws often had to cross state lines to obtain abortion care). See also Lisa Pruitt & Marta R. Venegas, *Urbanormativity, Spatial Privilege, and Judicial Blind Spots in Abortion Law*, 30 BERKELEY J. GENDER, L., & JUST. 76, 78–79 (2015) (“State laws regulating abortion have proliferated dramatically in recent years . . . What is infrequently acknowledged in academic literature and only slightly more often noted in recent media coverage is that these regulations—like many others that states have enacted since [*Casey*—have a dramatic impact on women who live farthest from major metropolitan areas.”).

¹⁷⁸ See, e.g., Nichole Austin & Sam Harper, *Quantifying the Impact of Targeted Regulation of Abortion Provider Laws on US Abortion Rates: A Multi-State Assessment*, 100(5) CONTRACEPTION 374, 374–75 (Nov. 2019); Nichole Austin & Sam Harper, *Assessing the Impact of TRAP Laws on Abortion and Women’s Health in the USA: A Systematic Review*, 44 BMJ SEX REPROD. HEALTH 128, 128–29, 133 (Apr. 2018).

¹⁷⁹ Taida Wolfe & Yana van der Meulen Rodgers, *Abortion During the COVID-19 Pandemic: Racial Disparities and Barriers to Care in the USA*, 19(2) SEXUALITY RSCH. & SOC. POL. 541, 542–43 (2022).

¹⁸⁰ Erik Ortiz, *How Texas Abortion Law is Undermining Native American Women’s Reproductive Justice*, NBC (Sept. 4, 2021), <https://www.nbcnews.com/health/womens-health/how-texas-abortion-law-undermining-native-american-women-s-reproductive-n1278494> [<https://perma.cc/F9EP-TMZA>].

These factors result in significant disparities in access to abortion care for Indigenous people. A 2016 report by the Guttmacher Institute found that abortion patients were thirty-nine percent white, twenty-eight percent black, twenty-five percent Hispanic, and six percent Asian/Pacific Islander.¹⁸¹ American Indians and Alaska Natives were categorized in the “other” category, which made up three percent. 2019 data from the Kaiser Family Foundation, which also categorized American Indians and Alaska Natives in the “other” category, found that seven percent of abortion patients were not white, black, or Hispanic.¹⁸² Notably, the authors were not able to locate data on Indigenous access to in-clinic versus medication abortion.¹⁸³ What is clear is the unique impact federal law and policy has on limiting abortion access for Indigenous people: “[F]or Native women, access to abortion services becomes not a private decision between a woman and her doctor (as intended for women citizens of the United States under *Roe v. Wade*) but rather, a very public negotiation between a Native woman and the Federal government.”¹⁸⁴

Medication abortion raises many of the same issues under the U.S. Supreme Court’s two tests for evaluating assertions of state authority within Indian country, namely the infringement and preemption tests, as the more prototypical surgical abortion. Mifepristone has only been approved by the Food and Drug Administration (FDA) for pregnancies under ten weeks,¹⁸⁵ so it cannot substitute for an in-clinic abortion in all cases. A recent report

¹⁸¹ *U.S. Abortion Patients*, GUTTMACHER INST. (May 9, 2016), https://www.guttmacher.org/infographic/2016/us-abortion-patients?clid=CjwKCAjw_b6WBhAQEiwAp44HyIBKYQwlqKnveTXa7bjiO-eUcI_qA6TUHL3488Be2C5YJxv7QsLQ4AxoC8P0QAvD_BwE [https://perma.cc/9T5C-NZQM].

¹⁸² *Reported Legal Abortions by Race of Women Who Obtained Abortion by the State of Occurrence*, KAISER FAM. FOUND., <https://www.kff.org/womens-health-policy/state-indicator/abortions-by-race/?currentTimeframe=0&selectedDistributions=other&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> [https://perma.cc/N39A-2374] [hereinafter Kaiser Statistics]. Failure to separate out Native Americans in studies and the resulting obfuscation of issues relating to them is a pervasive problem. See, e.g., Rebecca Nagle, *Native Americans Being Left out of US Coronavirus Data and Labelled as ‘Other’*, GUARDIAN (Apr. 24, 2020), <https://www.theguardian.com/us-news/2020/apr/24/us-native-americans-left-out-coronavirus-data> [https://perma.cc/X9SB-AB2S]; Wade, *supra* note 83; Letter from National Native American Bar Association to Center for Women in Law & NALP Foundation (June 26, 2020), <https://www.nativeamericanbar.org/wp-content/uploads/2020/11/NNABA-Letter-Excluding-Natives-from-WOC-Study-Final.pdf> [https://perma.cc/VLF5-GXF6].

¹⁸³ See Kaiser Statistics, *supra* note 182.

¹⁸⁴ Barbara Gurr & Nikki McGary, *Restricted Access: The Intersections of Reproductive Health, Rights, and Policy for Minors and Native American Women*, 11 J. Assoc. RES. MOTHERING 110, 117 (2009).

¹⁸⁵ See Spencer Kimball, *Women in States that Ban Abortion will Still Be Able to Get Abortion Pills Online from Overseas*, CNBC (June 27, 2022), <https://www.cnbc.com/2022/06/27/women-in-states-that-ban-abortion-will-still-be-able-to-get-abortion-pills-online-from-overseas.html> [https://perma.cc/6NR4-NC9P].

indicated that mifepristone is not available at IHS facilities, with only one exception.¹⁸⁶

D. Views of Abortion Across Indian Country

Indigenous communities are diverse in their history, cultural practices, religious beliefs, and politics. Abortion is one of the most contentious political issues of our time, and Tribal communities are not immune from this polarizing debate. While Native people in certain regions overwhelmingly vote for Democrats (who are more likely to support abortion rights),¹⁸⁷ many have more complicated views on abortion, often rooted in generational trauma about the long histories of child removal and forced sterilization and/or socially conservative Christian beliefs.¹⁸⁸

However, research demonstrates that many Native people today support access to abortion care.¹⁸⁹ A 2020 study conducted by Southwest Women's Law Center, Latino Decisions, and Forward Together found that eighty-nine percent of Native Americans in New Mexico "believe that Native American women and families deserve to make their own health-care decisions without government interference."¹⁹⁰ The study also found that seventy-two percent of survey participants believed that "I can hold my own moral views about abortion and still trust a woman and her family to make this decision for themselves."¹⁹¹ A 2019 survey found that over fifty percent of Native Americans believe that abortion should be legal.¹⁹²

Native people and organizations have also been leading advocates for access to reproductive health care. The Suquamish Tribal Council recently published an op-ed affirming that abortion is a basic human right and that

¹⁸⁶ Katherine Glaser & Jennifer Whitehair, *Missing Mifepristone at Tribal Health Facilities Serving Native Americans*, 104 *CONTRACEPTION* 36, 37 (2021), <https://doi.org/10.1016/j.contraception.2021.03.027> [<https://perma.cc/927M-L2KN>].

¹⁸⁷ Anna V. Smith, *How Indigenous Voters Swung the 2020 Election*, *HIGH COUNTRY NEWS* (Nov. 6, 2020), <https://www.hcn.org/articles/indigenous-affairs-how-indigenous-voters-swing-the-2020-election> [<https://perma.cc/K2L7-MM8B>]; see also *Public Opinion on Abortion*, *PEW RSCH. CTR.* (May 17, 2022), <https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/> [<https://perma.cc/KHC2-Q43J>] (finding that Democrats were more likely to support legal abortions).

¹⁸⁸ For an example of a Tribe attempting to bar abortion on its reservation pre-*Dobbs*, see *North Dakota American Indian Tribe Approves Abortion Ban, Measure Might Not Stand*, *NAT'L P'SHP FOR WOMEN & FAMS.* (Oct. 29, 2008), http://npwf.convio.net/site/News2?abbr=daily2_&page=NewsArticle&id=13906 [<https://perma.cc/GX54-PPMW>].

¹⁸⁹ One of the most recent surveys by Pew did not capture data on American Indians and Alaska Natives. See *Public Opinion on Abortion*, *supra* note 187.

¹⁹⁰ FORWARD TOGETHER, *THE ROAD TO REPRODUCTIVE JUSTICE: NATIVE AMERICANS IN NEW MEXICO* (2020), <https://forwardtogether.org/tools/the-road-to-reproductive-justice-native-americans-in-new-mexico/> [<https://perma.cc/UGW9-WPMS>].

¹⁹¹ *Id.*

¹⁹² *The State of Abortion and Contraception Attitudes in All 50 States*, *PUB. RELIGION RSCH. INST.* (Aug. 13, 2019), <https://www.prii.org/research/legal-in-most-cases-the-impact-of-the-abortion-debate-in-2019-america/> [<https://perma.cc/EXF5-MTN8>].

their citizens should have a right to determine whether or not to carry a pregnancy.¹⁹³ In 2006, Cecelia Fire Thunder, then-President of the Oglala Sioux Tribe, made a public statement suggesting the Tribe should open an abortion clinic in response to the passage of a restrictive abortion law in South Dakota.¹⁹⁴ Her statements were deemed so controversial that she was impeached by the Oglala Tribal Council,¹⁹⁵ and the Tribal Council subsequently passed an abortion ban.¹⁹⁶ Since leaving office, Fire Thunder has been an advocate for women's rights and was named *amici curiae* in a brief supporting the respondents in the *Dobbs* case.¹⁹⁷ Organizations like Indigenous Women Rising¹⁹⁸ and Native American Women's Health Education Resource Center¹⁹⁹ have been vocal advocates for Indigenous reproductive autonomy and have sought to mobilize resources to facilitate abortion access in light of state prohibitions post-*Dobbs*. For example, in July 2022, Indigenous Women Rising exhausted its allotted abortion fund in just three weeks²⁰⁰ and noted a surge in both abortion fund applications and related costs since the passage of Texas's S.B. 8 six-week abortion ban.²⁰¹

Support for reproductive health access does not necessarily translate to a commitment to a Tribal abortion safe harbor.²⁰² Despite the overwhelming volume of media attention,²⁰³ no Tribe has publicly committed to considering providing those services. A Michigan Tribe has been cited as exploring the issue,²⁰⁴ but no public information on the Tribe is available. The City of

¹⁹³ Suquamish Tribal Council, *supra* note 26.

¹⁹⁴ *See All Things Considered: Indian Tribe May Open Abortion Clinic on Its Land*, NPR (May 8, 2006), <https://www.npr.org/templates/story/story.php?storyId=5391516> [<https://perma.cc/AA2R-4WLJ>].

¹⁹⁵ Carly Thomsen, *The Politics of Narrative, Narrative as Politic: Rethinking Reproductive Justice Frameworks through the South Dakota Abortion Story*, 27(2) FEMINIST FORMATIONS 1, 7 (Summer 2015).

¹⁹⁶ Harlan, *supra* note 8.

¹⁹⁷ Brief for Cecilia Fire Thunder, *supra* note 159. In addition to the main signatories, the amicus brief included thirty-one organizational signatories and 325 individual signatories.

¹⁹⁸ *Abortion Fund*, INDIGENOUS WOMEN RISING, <https://www.iwri.org/abortion-fund> [<https://perma.cc/752N-QDP2>].

¹⁹⁹ *See* Ortiz, *supra* note 180.

²⁰⁰ *See* Emily Hofstaedter, *Abortion Was Already Inaccessible On Reservation Land. Dobbs Made Things Worse*, MOTHER JONES (Aug. 12, 2022), <https://www.motherjones.com/politics/2022/08/abortion-dobbs-tribal-land/> [<https://perma.cc/BHS9-BGX5>].

²⁰¹ Kate Nelson, *Inside the Nation's Only Abortion Fund For Native Americans*, ELLE (Sept. 1, 2022), <https://www.elle.com/culture/career-politics/a41032856/indigenous-women-rising-abortion/> [<https://perma.cc/3VSB-T3PK>].

²⁰² Arielle Zions, *Tribes Show Little Interest in Offering Abortions on Reservations Despite Speculation They Could*, KAISER HEALTH NEWS (June 23, 2022), <https://khn.org/news/article/native-american-abortion-clinics-access-tribal-land/> [<https://perma.cc/JKZ9-4CFE>].

²⁰³ *See* Herrera, *supra* note 5; @TulsaTeresa, *supra* note 5; Graham, *supra* note 5; Ibarra, *supra* note 5.

²⁰⁴ *Supreme Court Decisions and Indian Country*, NATIVE AM. CALLING (June 29, 2022), <https://podcasts.apple.com/us/podcast/wednesday-june-29-2022-supreme-court-decisions-and/id926965977?i=1000568155978> [<https://perma.cc/QLT6-8LH8>].

Tucson made a statement that it hoped to establish a Tribal abortion clinic without consulting with any Tribes, leading to a retraction from the City.²⁰⁵ The Chickasaw Nation governor chastised Oklahoma Governor Stitt for making “irresponsible” statements regarding Tribal abortion safe harbors.²⁰⁶ As detailed in the following Section, Tribal regulatory authority is constantly under threat, forcing Tribes to decide if and how they will vocalize dissent or otherwise enforce their rights, given that doing so will potentially invite litigation that challenges their already-diminished authority.²⁰⁷

IV. NAVIGATING JURISDICTION IN INDIAN COUNTRY

The landscape for both criminal and civil jurisdiction on Tribal lands is complex, and abortion laws implicate both areas. Moreover, there is no ready model for how states and Tribes should negotiate regulatory differences.²⁰⁸ To avoid application of a state abortion care restriction on Tribal lands, a Tribe must possess sufficient authority to implement their own solutions, while states must simultaneously be sufficiently limited in their ability to encroach on Tribal territorial authority.

In the wake of *Dobbs*, a flurry of state laws has been proposed and passed (or in some cases, reinstated), many of which impose draconian restrictions on abortion. At the time of the publication of this Article, laws have been enacted to ban abortion after twelve weeks (enacted in three states), proposals to ban all or most abortions (enacted in nine states), and abortion bans based on fetal personhood (enacted in one state).²⁰⁹ Even before the *Dobbs* decision, Oklahoma passed a law that went so far as to

²⁰⁵ Erica Stapleton, *Tribal Lands Unlikely to Become ‘Safe Havens’ for Abortion Clinics*, 12 NEWS (June 27, 2022), <https://www.12news.com/article/news/local/arizona/arizona-tribal-lands-unlikely-to-become-safe-havens-for-abortion-clinics/75-97aabb40-6985-4387-be4f-2966771f5624> [<https://perma.cc/RZT2-W9YS>].

²⁰⁶ Nick Camper, *Cherokee Nation: Governor’s Claim of ‘Abortion On-Demand’ on Tribal Lands is ‘Irresponsible’*, KFOR (May 16, 2022), <https://kfor.com/news/oklahoma-legislature/chickasaw-nation-governors-claim-of-abortion-on-demand-on-tribal-lands-is-irresponsible/> [<https://perma.cc/4N8R-KWGL>].

²⁰⁷ See, e.g., *The Tribal Supreme Court Project*, NATIVE AM. RTS. FUND, <https://sct.narf.org/> [<https://perma.cc/5R7Q-TAJ5>]. Formed in the wake of two devastating losses in the U.S. Supreme Court in the 2000 term, the Tribal Supreme Court Project is an inter-tribal coalition that develops litigation strategies and coordinates tribal legal resources, which sometimes means dissuading the advancement of a case in fear of further blows to Tribal sovereignty. Tribes have always faced opposition to their sovereignty, but this hostility has grown more prominent in Oklahoma after the *McGirt* holding. See, e.g., Nancy Marie Spears, *Oklahoma, Tribes Clash Over Jurisdiction After Supreme Court’s McGirt Decision*, CRONKITE NEWS (Mar. 11, 2022), <https://cronkitenews.azpbs.org/2022/03/11/oklahoma-tribes-clash-over-jurisdiction-supreme-courts-mcgirt-decision/> [<https://perma.cc/2VFD-VFYE>].

²⁰⁸ See Florey, *Making It Work*, *supra* note 15, at 717–18.

²⁰⁹ *State Legislation Tracker: Major Developments in Sexual & Reproductive Health*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy> [<https://perma.cc/5M8W-AMWU>].

make it a felony for a doctor to perform an abortion in most cases.²¹⁰ Other states have proposed and begun to pass laws codifying abortion rights, including bills to expand private insurance companies' duty to provide coverage (enacted in six states) and repeals of abortion restrictions (enacted in two states).²¹¹ Connecticut's new law attempts to insulate those who travel to Connecticut for an abortion from liability in their state of residence by prohibiting disclosures relating to provision of reproductive health services and denying enforcement of subpoenas relating to receipt of such services.²¹² Similarly, Washington's governor undertook executive action to protect abortion patients and providers by directing law enforcement to not cooperate in other states' investigations of abortion services provided in Washington,²¹³ and many other states have adopted similar measures.²¹⁴ Depending on the law at issue, Tribal governments may not be able to preclude the application of such state abortion prohibitions over all classes of persons within their Tribal lands.

The legal boundaries between Tribes and the United States have ebbed and flowed over the course of their histories, impacting the sovereign features of each. The Marshall Trilogy,²¹⁵ a series of early-nineteenth-century U.S. Supreme Court cases, established the initial legal contours of Tribal sovereignty within the settler colonial framework that was initially established by the British Empire and later embraced by the United States.²¹⁶ Within these three cases, Tribal sovereignty was demoted from foreign na-

²¹⁰ Joe Hernandez, *Oklahoma Governor Signs a Bill to Criminalize Most Abortions*, NPR (Apr. 12, 2022), <https://www.npr.org/2022/04/06/1091291881/oklahoma-abortion-bill-ban-roe-v-wade> [<https://perma.cc/U6RA-R3AN>].

²¹¹ *State Legislation Tracker*, *supra* note 209.

²¹² Raised B. 5414, Feb. Sess., 2022 (Conn. 2022).

²¹³ See GOVERNOR JAY INSLEE, DIRECTIVE OF THE GOVERNOR 22-12 (June 30, 2022), [https://www.governor.wa.gov/sites/default/files/directive/22-12%20-%20Prohibiting%20assistance%20with%20interstate%20abortion%20investigations%20\(tmp\).pdf?utm_medium=email&utm_source=govdelivery](https://www.governor.wa.gov/sites/default/files/directive/22-12%20-%20Prohibiting%20assistance%20with%20interstate%20abortion%20investigations%20(tmp).pdf?utm_medium=email&utm_source=govdelivery) [<https://perma.cc/D2ZJ-UQZW>].

²¹⁴ See, e.g., Jennifer McDermott, Geoff Mulvihill & Hannah Schoenbaum, *States Move to Protect Abortion from Prosecutions Elsewhere*, AP NEWS (July 6, 2022), <https://apnews.com/article/abortion-us-supreme-court-health-maine-north-carolina-9406a561971aa57640123034155b50df> [<https://perma.cc/VN2K-9TQY>]; Mitch Smith & Ava Sasaki, *Michigan, California and Vermont Affirm Abortion Rights in Ballot Proposals*, N.Y. TIMES (Nov. 10, 2022), <https://www.nytimes.com/2022/11/09/us/abortion-rights-ballot-proposals.html> [<https://perma.cc/D2R2-L7P8>].

²¹⁵ The "Marshall Trilogy," named after then-Chief Justice John Marshall, references *Johnson v. M'Intosh*, 21 U.S. (7 Wheat.) 543, 567–70 (1823) (holding that aboriginal title is inalienable while fee simple title originates only in European nations due to the doctrine of discovery), *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17–20 (1831) (holding that the U.S. Supreme Court lacked Article III jurisdiction because, while the Cherokee Nation is recognized as a domestic dependent nation, it is not properly considered a foreign nation), and *Worcester v. Georgia*, 31 U.S. 515, 593–95 (1832) (holding that Tribes, while encompassed within the United States and under federal authority, remain distinct, independent political communities in which state law has no force).

²¹⁶ See generally WALTER R. ECHO-HAWK, IN THE COURTS OF THE CONQUEROR: THE 10 WORST INDIAN LAW CASES EVER DECIDED (2010) (discussing ten legal cases that turned antiquated legal doctrines from the colonial era into bedrock American legal principles); see also ROBERT WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL

tion status to sovereigns wholly encompassed within the United States.²¹⁷ Nevertheless, in *Worcester v. Georgia*, the Court characterized Tribes as “distinct political communities, having territorial boundaries, within which their authority is exclusive.”²¹⁸ In this view of Tribal sovereignty, Tribes exist wholly within the United States, but the boundary of Tribal lands marks the end of state law and the beginning of Tribal law.²¹⁹ This view of autonomous, self-determining territorial sovereigns comports with Justice Alito’s vision in *Dobbs* of leaving reproductive rights for legislators to determine.²²⁰

Unfortunately, this view of Tribal territorial self-governance has been significantly diminished, particularly through a series of damning U.S. Supreme Court cases starting in the 1970s that introduced the doctrine of implicit divestiture.²²¹ Tribal jurisdiction is now scrutinized and increasingly found to no longer exist vis-à-vis nonmembers in specific substantive areas.²²² Thus, the extent to which a Tribe might seek to enforce its laws to protect abortion care, including to the exclusion and contradiction of the state in which their Tribal lands are situated, is extremely limited, complex, and a far cry from the exclusive territorial sovereignty envisioned by Justice Marshall.²²³ Jurisdictional authority in “Indian country,”²²⁴ the legal term of art for Tribal lands, differs depending on whether the purported authority is considered criminal or civil.²²⁵ It further depends on whether the relevant state possesses concurrent state jurisdiction, and additional legal issues may arise that are specific to the type of regulation.²²⁶

THOUGHT (1990) (describing how European notions surrounding the legality of colonization influenced U.S. doctrine and principles of legal discourse).

²¹⁷ *Cherokee Nation*, 30 U.S. at 17–20 (holding that the Cherokee Nation is a domestic dependent nation but is not properly considered a foreign nation).

²¹⁸ *Worcester*, 31 U.S. at 557.

²¹⁹ *Id.* at 561.

²²⁰ *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392, slip op. at 65 (June 24, 2022) (“Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office.”). Note, however, that Justice Alito likely intended “legislative bodies” to refer exclusively to states, and did not intend that local governments, or worse, Tribes, would legislate around state governments.

²²¹ See generally John P. LaVelle, *Implicit Divestiture Reconsidered: Outtakes from the Cohen’s Handbook Cutting Room Floor*, 38 CONN. L. REV. 731 (2006) (tracing the development of the implicit divestiture doctrine, beginning with the 1978 case, *Oliphant v. Suquamish Indian Tribe*).

²²² See *infra* Section III.A.1.

²²³ See, e.g., *Oklahoma v. Castro-Huerta*, No. 21-429, slip op. at 21 (June 29, 2022) (“[T]his Court long ago made clear that *Worcester* rested on a mistaken understanding of the relationship between Indian country and the States,” and that the principles in *Worcester* have “yielded to closer analysis.”) (citation omitted).

²²⁴ Indian country is defined as “all land within the limits of any Indian reservation under the jurisdiction of the United States Government,” as well as “all dependent Indian communities within the borders of the United States” and “all Indian allotments, the Indian titles to which have not been extinguished.” 18 U.S.C. § 1151.

²²⁵ See *infra* Sections III.A.1, III.B.1.

²²⁶ See *infra* Sections III.A.2, III.B.2.

The remainder of this Part will examine criminal and civil jurisdiction respectively. Each Section will examine the contours of that jurisdiction generally, referencing foundational Indian law concepts and histories, and will then apply those principles specifically to abortion. Federal Indian law distinguishes between criminal and civil jurisdiction, requiring distinct analysis of each.²²⁷ Moreover, the existence of one sovereign's jurisdiction does not necessarily implicate the concurrent existence of another sovereign's—thus requiring distinct analyses for Tribal, state, and federal criminal and civil jurisdiction in Indian country.²²⁸ The complexity and uncertainty of jurisdiction in Indian country impacts a menagerie of issues, from economic development to water rights. It is also increasingly apparent that this jurisdictional maze compromises reproductive rights.

A. *Criminal Jurisdiction to Provide Decriminalized Tribal Abortion Safe Harbor*

Akin to the recognition of Tribal authority under *Worcester*, Tribes historically exercised full territorial criminal jurisdiction over all persons for all offenses.²²⁹ As time went on, however, federal laws providing for federal jurisdiction over certain classes of persons caused some officials to question continuing Tribal jurisdiction over those same persons, and differing treaty provisions created some variability among Tribes as to jurisdiction over outsiders.²³⁰ Without federal interference, Tribal law would be the only relevant point of inquiry for ascertaining the legality of abortion on Tribal lands. But today, Indian country criminal jurisdiction is frequently characterized as a complex maze.²³¹ Among other negative outcomes,²³² the criminal jurisdic-

²²⁷ 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 111, at § 7.01, § 9.01.

²²⁸ *Id.*

²²⁹ *See Duro v. Reina*, 495 U.S. 676, 685 (1990) (“A basic attribute of full territorial sovereignty is the power to enforce laws against all who come within the sovereign’s territory, whether citizens or aliens. *Oliphant* recognized that the Tribes can no longer be described as sovereigns in this sense.”); *Buster v. Wright*, 135 F. 947, 958 (8th Cir. 1905) (finding that non-Native business owners were required to pay Creek Nation’s permit tax despite the fact that they operated on non-Tribal land within the reservation).

²³⁰ *See Kevin K. Washburn, Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 795 (2006) (noting that increased dependence on federal goods and services has produced more reliance on federal concurrent jurisdiction, although Tribal criminal justice systems have continued).

²³¹ *See Robert N. Clinton, Criminal Jurisdiction Over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 575 (1976).

²³² Some anti-Tribal entities have intentionally exploited the jurisdictional landscape of Indian country to undermine Tribal sovereignty. For example, after the decision in *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the State of Oklahoma and its allies pushed a public relations campaign to characterize the resulting jurisdictional landscape as “chaos.” *See The Ed. Bd., More McGirt Mayhem in Oklahoma*, WALL ST. J. (Feb. 21, 2022), <https://www.wsj.com/articles/mcgirt-decision-oklahoma-native-american-reservation-jurisdiction-muscogee-creek-hughes-county-crime-racial-injustice-systemic-racism-11644772881> [<https://perma.cc/WE28-MWH6>]. Parties may agree about the extent to

tion maze is notoriously ineffective²³³ and is compounding a gender-based violence crisis.²³⁴

1. *Tribal Criminal Jurisdiction*

In 1881, states gained a foothold when the Supreme Court granted them the right to try crimes committed on reservations by non-Indians against non-Indians.²³⁵ Tribes still retained jurisdiction over Indians and, although it is not clear how widely it was exercised, over non-Indians who committed offenses against Indians.²³⁶ The Indian Civil Rights Act of 1968, in addition to incorporating Bill of Rights-like requirements onto Tribal governments, imposed a severe sentencing limitation on all Tribes.²³⁷ The sentencing limitation, a one-year limitation on imprisonment regardless of the offense and with some exceptions, has effectively demoted all Tribal courts to misdemeanor courts.²³⁸ As a result of 1950s termination-era policies, Tribal court

which the jurisdictional maze results in chaos, but are likely to disagree as to the extent Tribal sovereignty should give way to expanded state jurisdiction.

²³³ INDIAN L. & ORD. COMM'N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES viii (2013) (“The extraordinary waste of governmental resources resulting from the so-called Indian country ‘jurisdictional maze’ can be shocking, as is the cost in human lives.”). Members of the executive branch seem to recognize its ineffectiveness. *See* Memorandum from the Deputy Att’y Gen. Lisa Monaco to the Dir., Bureau of Alcohol, Tobacco, Firearms & Explosives, Adm’r, Drug Enf’t Admin., Dir., Fed. Bureau of Investigation, Dir., U.S. Marshals Serv., Dir., Exec. Off. for U.S. Att’ys, and U.S. Att’ys, Promoting Public Safety in Indian Country 5 (July 13, 2022) (calling for updated public safety protocols to ensure successful multijurisdictional investigations and prosecutions in Indian country).

²³⁴ Amnesty Int’l, *The Never-Ending Maze: Continued Failure to Protect Indigenous Women from Sexual Violence in the USA*, AMR 51/5484/2022, at 209 (2022) (finding that the jurisdictional maze “undermines tribal authority and allows perpetrators of violence against [American Indian and Alaska Native] women to evade justice”).

²³⁵ *See* *United States v. McBratney*, 104 U.S. 621, 624 (1881); *Draper v. United States*, 164 U.S. 240, 243 (1896).

²³⁶ *See* *McBratney*, 104 U.S. at 624; *Draper*, 164 U.S. at 243; *United States v. Wheeler*, 435 U.S. 313, 318, 322–23 (1978) (acknowledging a Tribe’s “sovereign power to punish tribal offenders,” while subject to congressional “defeatance,” remains among those “inherent powers of a limited sovereignty which has never been extinguished”); *see also* ROBERT ANDERSON ET AL., *AMERICAN INDIAN LAW: CASES & COMMENTARY* 542–43 (4th ed. 2020) (describing how, in the 1950s, Tribes began to repeal previous restrictions on their courts’ jurisdiction that had mirrored restrictions in the jurisdiction of Courts of Indian Offenses).

²³⁷ The Indian Civil Rights Act of 1968 (ICRA), which originally limited Tribal sentencing authority to “imprisonment for a term of six months or a fine of \$500 or both,” was amended in 1986 to expand Tribal sentencing authority to “a term of 1 year and a fine of \$5,000, or both.” 25 U.S.C. § 1302(a)(7)(B) (amended 1986). The Tribal Law and Order Act of 2010 further amended ICRA by providing for enhanced Tribal sentencing authority of “3 years for any 1 offense, or a fine greater than \$5,000 but not to exceed \$15,000, or both,” but only for Tribes that “opt-in” by providing additional due process and other protections. 25 U.S.C. § 1302(c) (amended 1986); Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 111-124 Stat. 2258 (2010).

²³⁸ While Tribes can exercise enhanced sentencing authority of up to three years under the Tribal Law and Order Act, only about thirty-two Tribal courts have done so. *See* STEVEN W. PERRY, MICHAEL B. FIELD & AMY D. LAUGER, *BUREAU OF JUSTICE STATIS-*

development was discouraged and stunted in many jurisdictions, particularly within Public Law 280 jurisdictions, in which states were delegated concurrent criminal jurisdiction with Tribes in lieu of the federal government.²³⁹

In 1978, the U.S. Supreme Court further restricted Tribal jurisdiction by holding that Tribes lack criminal jurisdiction over non-Indians for any offense against any person, including offenses committed against Indians.²⁴⁰ The Court reasoned that such Tribal jurisdiction is “inconsistent with their status” as “conquered and dependent” nations.²⁴¹ It was not until 2013 that Congress responded to this decision by sparingly re-recognizing some Tribal criminal jurisdiction over non-Indians.²⁴² But this re-recognition of inherent Tribal authority is only over narrow subjects related to domestic and sexual violence and child violence, and it is only granted if Tribes satisfy certain enumerated (and economically costly) conditions.²⁴³ Largely because of the expense, only thirty-one Tribes are currently exercising this “special tribal criminal jurisdiction” over non-Indians.²⁴⁴ However, despite these procedural, jurisdictional, and substantive barriers, hundreds of Tribes operate robust and comprehensive criminal justice systems.²⁴⁵ These Tribal courts ensure

TICS, OFF. OF JUST. PROGRAMS, U.S. DEP'T JUSTICE, TRIBAL COURTS IN THE U.S., 2014 — STATISTICAL TABLES 9 (2021).

²³⁹ CAROLE GOLDBERG-AMBROSE, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280 (1997); Jacqueline P. Hand & David C. Koelsch, *Shared Experiences, Divergent Outcomes: American Indian and Immigrant Victims of Domestic Violence*, 25 WIS. J. L. GENDER & SOC'Y 185, 198 (2010) (“The enactment of Public Law 280 has had the naive consequence of discouraging the development of tribal legal institutions, including courts and police forces despite the fact that it did not inhibit tribal jurisdiction over Indians.”).

²⁴⁰ See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 196 (1978).

²⁴¹ *Id.*

²⁴² See The Violence Against Women Reauthorization Act, 25 U.S.C. § 1304 (2013) (recognizing powers of self-government to include the inherent power to exercise criminal jurisdiction over any person, Indian or non-Indian, for domestic violence, dating violence, and the violation of a protection order, but only if the participating Tribe provides the enumerated additional due process and other protections); The Violence Against Women Reauthorization Act of 2022, Pub. L. No. 117-103, 136 Stat., Sec. 804 (Mar. 15, 2022) (expanding recognition of tribal criminal jurisdiction over all persons for assault of tribal justice personnel, child violence, dating violence, domestic violence, obstruction of justice, sexual violence, sex trafficking, stalking, and violation of a protection order).

²⁴³ See 25 U.S.C. § 1304 (recognizing “special tribal criminal jurisdiction” over non-Indian offenders only for nine enumerated offenses, and only if the “participating tribe” provides additional due process and other protections, including defense counsel paid for by the Tribe and a jury that includes non-Indians); NT'L CONGRESS OF AM. INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION FIVE-YEAR REPORT 2 (2018) (noting that exercise of this jurisdiction is prohibitively expensive for some tribes).

²⁴⁴ *Currently Implementing Tribes*, NT'L CONGRESS OF AM. INDIANS (May 2022), <https://www.ncai.org/tribal-vawa/get-started/currently-implementing-Tribes> [<https://perma.cc/6XX7-TZL6>]; NT'L CONGRESS OF AM. INDIANS, *supra* note 243 (noting that a lack of resources is a primary reason reported by Tribes for not implementing VAWA 2013's special domestic violence criminal jurisdiction).

²⁴⁵ PERRY, FIELD & LAUGER, *supra* note 238, at 6 (noting that, in 2014, seventy-eight percent of Tribal courts exercised criminal jurisdiction).

that Tribes provide a local response to criminality in their communities, including the authority to self-determine what behavior is criminalized.²⁴⁶

2. *Federal and State Concurrent Criminal Jurisdiction*

Under federal law, Tribes may or may not possess authority to criminally regulate abortion care within their Tribal territory, but even if they possess such criminal authority, they may have to share that authority concurrently with another sovereign.²⁴⁷ Depending on the jurisdiction, Tribes may share criminal jurisdiction concurrently with the states or federal government for many of the cases they hear. Because Tribes are separate sovereigns from the states and federal government, pursuant to the dual sovereignty doctrine, multiple sovereigns with concurrent jurisdiction can simultaneously prosecute an offense without violating double jeopardy.²⁴⁸ As described below, the exercise of criminal jurisdiction depends on the Indian or non-Indian status of the parties involved, which has significant impacts on the Indian country safe harbor analysis.

In 1817, the federal government provided itself with concurrent criminal jurisdiction in Indian country, which extends to crimes committed by non-Indians against an Indian victim, and to crimes committed by an Indian against a non-Indian victim, and to “major crimes” committed by Indians.²⁴⁹ Concurrent federal jurisdiction as applied in Indian country has been widely criticized as inadequate.²⁵⁰ Native advocates have relentlessly organized, both in helping to raise awareness of the Missing and Murdered Indigenous Persons crisis, and in contributing to the passage of Title IX of the Violence Against Women Act reauthorizations, the Tribal Law and Order Act of 2010, the Not Invisible Act of 2019, and Savanna’s Act of 2020.²⁵¹

²⁴⁶ See, e.g., Washburn, *supra* note 230, at 834 (noting that “through criminal laws, the community defines what it values and what it abhors”).

²⁴⁷ There are some situations in which a Tribe would have exclusive criminal jurisdiction. For example, in the case of an Indian-on-Indian crime committed in a non-Public Law 280 state that did not qualify as a Major Crime, a Tribe would have exclusive jurisdiction. See ANDERSON ET AL., *supra* note 236, at 273 (explaining the contours of jurisdiction under the Indian Country Crimes Act and the Major Crimes Act).

²⁴⁸ See *United States v. Wheeler*, 435 U. S. 313, 229–30 (1978); *Puerto Rico v. Sánchez Valle*, 579 U.S. 59, 69–70 (2016); *Denezpi v. United States*, No. 20-7622, slip. op. at 4–6 (June 13, 2022).

²⁴⁹ General Crimes Act, 18 U.S.C. § 1152; Major Crimes Act, 18 U.S.C. § 1153(a) (providing an enumeration of covered “major” crimes committed by an Indian to include murder, manslaughter, kidnapping, maiming, sexual abuse, incest, felony assault, assault against a child, felony child abuse or neglect, arson, burglary, robbery, and felony theft).

²⁵⁰ INDIAN L. & ORD. COMM’N, A ROADMAP FOR MAKING NATIVE AMERICA SAFER V (2013) (describing the system of concurrent federal jurisdiction as “complex,” “expensive,” and incapable of “provid[ing] the criminal justice services that Native communities expect and deserve”).

²⁵¹ See Paula S. Julian, *Family Violence Prevention and Services Act (FVPSA) Saves Native Women’s Lives*, 19(3) RESTORATION MAG. 4 (Oct. 2022) (“Indigenous women’s voices have provided the political will for social change reflected in the amendments made to VAWA from 2000–2022, the passage of the Tribal Law and Order Act . . . , the

States also exercise significant criminal jurisdiction in Indian country. Federal plenary power over Indian affairs has generally prevented state law from encroaching on reservations.²⁵² Yet, states have exclusive jurisdiction over offenses committed by non-Indians against non-Indian victims.²⁵³ In 1953, Congress transferred federal concurrent jurisdiction to six mandatory states through Public Law 280, with the option for expansion in other states.²⁵⁴ A few other states enjoy concurrent jurisdiction in Indian country, comparable to Public Law 280, pursuant to state-specific legislation.²⁵⁵ Public Law 280, and other state-specific statutes that confer state concurrent criminal jurisdiction in Indian country,²⁵⁶ presume that concurrent state criminal jurisdiction does not otherwise exist. However, in June 2022, the U.S. Supreme Court upended this presumption in *Oklahoma v. Castro-Huerta*.²⁵⁷ *Castro-Huerta* held that states were never divested of their concurrent criminal jurisdiction over non-Indians in Indian country, including for crimes committed against Indians.²⁵⁸

Not Invisible Act[.] and Savanna's Act . . . , and changes in laws, policies, and social norms at the state and international levels.”)

²⁵² See FRANCIS PAUL PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS 1790–1834* 140–41 (1962); *Worcester v. Georgia*, 31 U.S. 515, 520 (1832) (“The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves, or in conformity with treaties and with the acts of Congress.”); *Williams v. Lee*, 358 U.S. 217, 223 (1959) (“There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs, and hence would infringe on the right of the Indians to govern themselves.”). *But see Oklahoma v. Castro-Huerta*, No. 21-429, slip op. at 24 (June 29, 2022) (overturning *Worcester* and *Lee* to recognize concurrent state jurisdiction over non-Indian defendants who commit crimes against Indian victims).

²⁵³ *United States v. McBratney*, 104 U.S. 621, 624 (1881); *Draper v. United States*, 164 U.S. 240, 243 (1896).

²⁵⁴ Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as 18 U.S.C. § 1162 & 28 U.S.C. § 1360). The six mandatory states included California, Minnesota (with the exception of the Red Lake Indian reservation), Nebraska, Oregon (with the exception of the Warm Springs reservation), Wisconsin (with the exception of the Menominee reservation, which was subsequently terminated though later re-recognized), and later Alaska.

²⁵⁵ See, e.g., Act of July 2, 1948, 62 Stat. 1224 (codified at 25 U.S.C. § 232) (confering on the State of New York criminal jurisdiction on all reservations in the state), Pub. L. No. 96-420, § 6, 94 Stat. 1785 (1980) (confering state civil and criminal jurisdiction on the State of Maine over Tribes other than Passamaquoddy and Penobscot), Pub. L. No. 103-377, § 6, 108 Stat. 3505 (1994) (confering on the State of Connecticut criminal jurisdiction over Mohegan Nation), and Pub. L. No. 100-95, § 9, 101 Stat. 709 (1987) (confering on the State of Massachusetts civil and criminal jurisdiction over Tribes).

²⁵⁶ See, e.g., Pub. L. No. 96-420, § 6, 94 Stat. 1785 (1980) (state civil and criminal jurisdiction under Maine Indian Claims Settlement Act over tribes other than Passamaquoddy and Penobscot), Pub. L. No. 103-377, § 6, 108 Stat. 3505 (1994) (state criminal jurisdiction under Mohegan Nation (Connecticut) Land Claims Settlement Act), and Pub. L. No. 100-95, § 9, 101 Stat. 709 (1987) (state and local civil and criminal jurisdiction under Massachusetts Indian Land Claims Settlement Act).

²⁵⁷ *Castro-Huerta*, slip op. at 24.

²⁵⁸ *Id.* at 22.

Prior to *Castro-Huerta*, Tribes and states, in both Public Law 280 and non-Public Law 280 jurisdictions, had negotiated extensive jurisdictional cooperative agreements.²⁵⁹ But as of June 2022, due to *Castro-Huerta*, all states likely have concurrent criminal jurisdiction over non-Indians within Indian country; the case may therefore extend state criminal prohibitions of abortion care to non-Indians throughout Indian country. The timing of the *Castro-Huerta* decision, issued within a week of *Dobbs*, thus may indicate an intent to provide, for the first time, a clear path for states to criminalize non-Native providers when they provide abortion care to Native people, although it is presently unclear to what extent states, other than Oklahoma, will actually avail themselves of this concurrent jurisdiction.²⁶⁰ Nevertheless, the ominous combination of *Dobbs* and *Castro-Huerta* further detracts from the ability of Tribes to provide reproductive health care that is self-determined.

Castro-Huerta extends recognition of state criminal jurisdiction in Indian country over non-Indians to crimes with both non-Indian and Indian victims, but what if abortion is considered a victimless crime?²⁶¹ Some states have increasingly advocated for fetal personhood, a characterization which, if accepted by a court, would take abortion out of the realm of victimless crimes.²⁶² The Supreme Court has not yet ruled on whether the state would

²⁵⁹ See Matthew L. M. Fletcher, *Retiring the 'Deadliest Enemies' Model of Tribal-State Relations*, 43 TULSA L. REV. 73, 82 (2007) (“By the 1980s, many Indian Tribes and states began to realize that the future of tribal-state relations would be negotiation and agreement. Many states now authorize the negotiation and execution of cooperative agreements with Indian Tribes.”); see, e.g., *State, Turtle Mountain Band Enter Cooperative Agreement*, STATE OF N.D. CTS. (May 5, 2022), <https://www.ndcourts.gov/news/north-dakota/legal-news/general-news/state-turtle-mountain-band-enter-cooperative-agreement> [<https://perma.cc/H54A-J7MD>] (describing agreement between Tribe and state to facilitate treatment and resources for delinquent youth). For an extensive list of Tribal-state cooperative agreements, see *Cooperative Agreements*, WALKING ON COMMON GROUND, <http://www.walkingoncommonground.org/state.cfm?state=&topic=16> [<https://perma.cc/LE5K-GVLP>].

²⁶⁰ Because the State of Oklahoma initiated the *Castro-Huerta* litigation and made many other attempts to assert state jurisdiction within Indian country, the authors presume that Oklahoma will seek to exercise the state concurrent authority recognized in *Castro-Huerta*. See, e.g., Adam Kemp, *Oklahoma Wants the Supreme Court to Pull Back Part of Its Historic Ruling on Native Rights*, PBS NEWS HOUR (Apr. 27, 2022), <https://www.pbs.org/newshour/nation/the-supreme-court-expanded-tribal-authority-across-oklahoma-now-the-state-wants-to-scale-it-back> [<https://perma.cc/EH32-VJ8M>]. A more conciliatory tone was struck by South Dakota officials in a recent news article, although many questions remain. Jason Harward, *Uncertainty, Fear Surrounds Supreme Court Decision's Possible Impact on Tribal Sovereignty*, MITCHELL REP. (July 8, 2022), <https://www.mitchellrepublic.com/news/south-dakota/uncertainty-fear-surrounds-supreme-court-decisions-possible-impact-on-tribal-sovereignty> [<https://perma.cc/6MK9-F49C>].

²⁶¹ See, e.g., Deborah Zalesne, *Sexual Harassment Law in the United States and South Africa: Facilitating the Transition from Legal Standards to Social Norms*, 25 HARV. WOMEN'S L.J. 143, 189 (2002) (citing abortion as a “[t]ypical example[]” of a victimless crime); MEIER & GEIS, *supra* note 2, at 147.

²⁶² See, e.g., Kassie McClung & Brianna Bailey, *She Was Charged with Manslaughter After a Miscarriage. Cases Like Hers are Becoming More Common in Oklahoma*, FRONTIER (Jan. 7, 2022), <https://www.readfrontier.org/stories/she-was-charged-with-manslaughter-after-a-miscarriage-cases-like-hers-are-becoming-more-common-in-oklahoma/> [<https://perma.cc/6UVN-74EW>] (describing the prosecution of a nineteen-year old mem-

have concurrent jurisdiction over a non-Indian committing a victimless crime on a reservation.²⁶³ State courts have taken the position that they have such jurisdiction under *United States v. McBratney*, which holds that states have jurisdiction over non-Indians on non-Indian crimes that occur on-reservation.²⁶⁴ But, in a case where “the conduct of the non-Indian has an impact on Indians or Indian interests,” the federal government should have jurisdiction rather than the state.²⁶⁵ Moreover, personhood of a fetus would require a determination of the Indian status of the fetus for purposes of criminal jurisdiction, a question which implicates numerous additional complications regarding the administration of Tribal enrollment requirements,²⁶⁶ not to mention questions regarding Indian status for criminal jurisdiction purposes more broadly.²⁶⁷ *Castro-Huerta* leaves a gray area. Seemingly, the important Tribal interests implicated in this context should bar state jurisdiction over a

ber of Wichita and Affiliate Tribes for methamphetamine use while pregnant); Sharon Bernstein, *Georgia Anti-Abortion Law Allows Tax Deductions for Fetuses*, REUTERS (Aug. 2, 2022), <https://www.reuters.com/world/us/georgia-anti-abortion-law-allows-tax-deductions-fetuses-2022-08-02/> [<https://perma.cc/3WW8-684U>]; Emily Baker-White & Sarah Emerson, *Facebook Gave Nebraska Cops A Teen’s DMs So they Could Prosecute Her for Having An Abortion*, FORBES (Aug. 8, 2022), <https://www.forbes.com/sites/emilybaker-white/2022/08/08/facebook-abortion-teen-dms/?sh=7978faa3579c> [<https://perma.cc/7KKW-F7UH>] (describing the charging of a Nebraskan seventeen-year-old and her mother for allegedly concealing the death of another person after law enforcement received a tip that she had miscarried at twenty-three weeks of pregnancy and secretly buried the fetus with her mother’s help). In *Dobbs*, the Court rejected the notion that a fetus has no rights, instead finding that “[n]othing in the Constitution or in our Nation’s legal traditions authorizes the Court to adopt that ‘theory of life.’” *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392, slip op. at 38–39 (June 24, 2022).

²⁶³ 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 111, at § 9.03(1). *Castro-Huerta* held that states possess concurrent criminal jurisdiction over non-Indians in Indian country, but only for crimes committed against Indians (in the case of crimes against non-Indians, state jurisdiction would be exclusive rather than concurrent). *Oklahoma v. Castro-Huerta*, No. 21-429, slip op. at 24 (June 29, 2022).

²⁶⁴ *United States v. McBratney*, 104 U.S. 621, 624 (1881).

²⁶⁵ 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 111, at § 9.03(1).

²⁶⁶ Consider, for example, the potential impact of fetal personhood on tribal membership. Tribes define membership and membership eligibility in a variety of ways. Many membership eligibility criteria require a certain percentage of Native heritage, necessitating familiarity with the heritage of both biological parents. Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 446–47 (2002). Yet, many enrollment processes do not authorize enrollment until birth or a certain time frame thereafter, thereby potentially undercutting the “Indianness” of a fetus in an overly legal sense. *See, e.g.*, CONSTITUTION & BY-LAWS FOR THE BIG VALLEY BAND OF POMO INDIANS, Jan. 15, 1936, art. II, §1 (stating that membership consists of “all children born to any member of the band who is a resident of the Rancheria at the time of the birth”). Meanwhile, some tribes are currently considering the modification of their enrollment criteria to authorize automatic enrollment akin to natural born citizenship for purposes of better accommodating the provisions of the Indian Child Welfare Act, which applies to children that are either a member of an Indian tribe, or are eligible for membership in an Indian tribe. 25 U.S.C. § 1903(4). Fetal personhood and tribal enrollment likely impact an unknown number of collateral legal consequences that Tribes have only begun to explore.

²⁶⁷ For criminal jurisdiction purposes, Indian status is not solely dependent on enrollment and also encompasses non-enrolled persons with Indian blood and some indicia of Tribal affiliation, such as participating in cultural activities or receiving Tribal benefits.

non-Native provider performing an abortion in a Tribally-run clinic that predominantly serves Native patients. On the other hand, the unruly logic of *Castro-Huerta* may suggest that the current Court is postured to further extend state jurisdiction over non-Indians for victimless crimes, ignoring Tribal interests in its quest to elevate state interests.

Similarly, the question of whether the federal government would have criminal jurisdiction over a Native provider or patient is uncertain. In 1916, the Supreme Court ruled against the existence of federal jurisdiction in the context of victimless crimes committed by Native Americans, holding instead that such crimes were subject to exclusive Tribal jurisdiction.²⁶⁸ More recently, lower federal courts have held in favor of federal jurisdiction.²⁶⁹ Federal policy supporting Tribal self-determination, statutory construction, and prior Supreme Court precedent all support a rejection of federal jurisdiction in these circumstances.²⁷⁰ Nevertheless, how a court would rule is uncertain.

Due to *McBratney*, a non-Indian providing abortion care to a non-Indian patient in violation of a state criminal prohibition will likely be subject to state prosecution, even if the care was provided in Indian country.²⁷¹ Depending on the structure of the state law at issue, Native abortion-care providers and patients may also fall under state criminal prohibitions in P.L. 280 and comparable state concurrent jurisdiction statutes that provide concurrent jurisdiction over Indian defendants if the reservation is located in a state that is covered by such a statute.²⁷² For non-P.L. 280 Tribes, depending on whether a criminal prohibition is framed to include a crime victim, or targets the Native abortion care provider and/or Native abortion care patient as the perpetrator, the Tribe and/or the federal government will have authority, likely concurrently, thereby offering a small sovereign slice of relief from oppressive state criminal prohibitions and an actual opportunity for self-governance.²⁷³ However, Tribes should remain cautious even in the face of con-

ANDERSON ET AL., *supra* note 236, at 322–24. It is not clear how such a test could be applied to a fetus.

²⁶⁸ *United States v. Quiver*, 241 U.S. 602, 605 (1916).

²⁶⁹ 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 111, at § 9.02(1)(c)(iii).

²⁷⁰ *See id.*

²⁷¹ *United States v. McBratney*, 104 U.S. 621, 624 (1881).

²⁷² Note that *Castro-Huerta* extended state concurrent criminal jurisdiction in Indian country over all non-Indian defendants. The Court, however, left open the possibility that concurrent state jurisdiction over Indian defendants may be plausible under a preemption analysis. *Oklahoma v. Castro-Huerta*, No. 21-429, slip op. at 22 (June 29, 2022). However, this intimation of an open question as to state concurrent jurisdiction over Indian defendants conflicts with earlier statements made by the Court. *See, e.g., Solem v. Bartlett*, 465 U.S. 463, 465 n.2 (1984) (explaining the limits of state jurisdiction within Indian country, particularly with respect to Indian perpetrators); *Rice v. Olson*, 324 U.S. 786, 789 (1945) (noting that the “policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history”).

²⁷³ *See, e.g., Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164, 1169–71 (8th Cir. 1990) (invalidating South Dakota’s partial assumption of criminal jurisdiction over reservations within the state because it failed to comply with the purposes of Public Law 280

current federal jurisdiction, as future federal prosecutions could import state criminal abortion laws under the Assimilative Crimes Act.²⁷⁴

Despite clear limitations on the ability to provide a decriminalized Tribal safe harbor for non-Indian providers and patients, a Tribe may nevertheless be well-served to issue a strong Tribal decriminalization declaration. Tribes can still offer relief from criminal sanctions to Natives. As detailed below, a strong statement of Tribal interests can also serve to bolster Tribal interests in both preemption and infringement analyses regarding the potential applicability of state civil abortion regulations.

For purposes of jurisdictional applicability in Indian country, particularly in P. L. 280 states, it matters whether a prohibition is structured as predominantly criminal or civil, which can require significant litigation to determine.²⁷⁵ Thus, although some abortion-care restrictions provide criminal penalties for violations, these laws may nevertheless be determined to be fundamentally regulatory in nature, and thus would not be considered “criminal” for purposes of Indian country jurisdiction.²⁷⁶

B. Civil Jurisdiction

Currently, most state abortion restrictions are structured under a civil regulatory framework. These regulations heavily restrict abortion care, but ultimately permit abortions in limited circumstances, such as in the first six or fifteen weeks of pregnancy, or, in some states, these laws are only enforceable through private lawsuits, such as in Texas²⁷⁷ and Oklahoma.²⁷⁸ This Section will walk through the civil jurisdiction analysis for the application of Tribal law and state law in Indian country, and then it will apply that analysis to the regulation of abortion care. Whereas criminal jurisdictional analysis

and contravened an amendment to Public Law 280 requiring Tribal consent as a predicate to such assumptions of criminal jurisdiction).

²⁷⁴ 18 U.S.C. § 13(a).

²⁷⁵ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207–10 (1987) (distinguishing between criminal laws that are “prohibitory” and laws that are “regulatory”); COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 111, at § 6.04(3)(b)(ii) (noting that state courts have struggled to distinguish between prohibitory and regulatory laws). This framework raises the question as to whether the prohibitory vs. regulatory dichotomy should be extended outside of P.L. 280 states, because it seems counterintuitive that a non-P.L. 280 state might have broader authority to prosecute a criminal offense that is part of a civil regulatory scheme than a state would have in a P.L. 280 state. Given the intended breadth of P.L. 280 in the criminal context, see, for example, Dorothy Alther, *An Introduction into Public Law 280*, CAL. INDIAN LEGAL SERV. (Sept. 14, 2020), <https://www.calindian.org/an-introduction-into-public-law-280/> [https://perma.cc/D7TJ-GJ5B] (contrasting the broad grant of criminal jurisdiction in the statute with the more limited grant of state civil jurisdiction), it appears that the distinction between prohibitory and regulatory should also limit state jurisdiction outside of the P.L. 280 context.

²⁷⁶ *Cabazon*, 480 U.S. at 212 (reasoning that California’s restriction of bingo, even though framed as criminal, was actually regulatory because California permitted many forms of gambling under state law, including a state-sponsored lottery).

²⁷⁷ S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021).

²⁷⁸ H.B. 4327, 58th Leg., 2nd Reg. Sess. (Okla. 2021).

tends to be largely statutory, civil jurisdiction is based on common law and tends to be far more opaque—involving a variety of balancing tests that, despite a growing body of case law, are often fact-specific and unpredictable. States attempting to enforce civil abortion laws in Indian country, particularly in the absence of any federal laws that unequivocally preempt them, would thus need to navigate a complicated line of tax and regulatory cases.

1. *Tribal Civil Jurisdiction*

a. *The Montana Test*

To provide access to abortion care within Indian country, Tribes must possess regulatory authority to permit such care. While Tribes are presumed to possess civil regulatory authority over Tribal members within Indian country, federal courts have been leery to recognize Tribal power over nonmembers “beyond what is necessary to protect tribal self-government or to control internal relations.”²⁷⁹ Under the test from *Montana v. United States*,²⁸⁰ Tribes are only able to regulate the conduct of nonmembers on certain types of lands within Indian country²⁸¹ if (1) the nonmembers enter a consensual relationship with the Tribe or its members, such as through a contract; or (2) the conduct threatens the political integrity, economic security, or the health or welfare of the Tribe, which becomes an impossibly high standard in many cases.²⁸² On Tribally-owned or Tribal-member-owned lands within Indian country, Tribes should have civil jurisdiction over nonmember activities regardless of the *Montana* exceptions, although the issue is not free from doubt.²⁸³ Therefore, a Tribe seeking to operate an abortion clinic would

²⁷⁹ *Montana v. United States*, 450 U.S. 544, 564 (1981).

²⁸⁰ *Id.* at 557.

²⁸¹ For purposes of criminal jurisdiction, “Indian country” is statutorily defined, *see* 18 U.S.C. § 1151, but it is not a land ownership status and is distinguishable from Tribal property holdings. Tribal land status includes trust land (land owned by the federal government for the benefit of tribes), restricted fee land (land owned by the Tribe or Indian with a restriction against alienation), and fee or fee simple land (freely alienable land owned by the Tribe or Tribal members). Note that a federal Indian reservation is land reserved for a Tribe, and can include trust, restricted fee, and/or fee lands (owned by the Tribe, Tribal members, or nonmembers). MARIEL J. MURRAY, CONG. RSCH. SERV., R46647, TRIBAL LAND AND OWNERSHIP STATUSES: OVERVIEW AND SELECTED ISSUES FOR CONGRESS 8–18 (2021).

²⁸² The Court’s recent decision in *United States v. Cooley* is one example of the Court holding the requirements of *Montana*’s second exception to be met. *United States v. Cooley*, 141 S. Ct. 1638, 1639 (2021). While *Cooley* is puzzling in its unprecedented application of the *Montana* exceptions in the criminal context, the decision remains an important affirmation of the continuing vitality of *Montana*’s second exception. *See, e.g., Tweedy, The Validity of Tribal Checkpoints*, *supra* note 85, at 255.

²⁸³ *See, e.g., Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 408, 430 (1989) (in which the U.S. Supreme Court could not reach consensus as to how to apply *Montana*). *Montana* and its progeny only apply on non-Indian-owned fee lands, thus leaving nonmember activities on Tribally-owned lands subject to Tribal jurisdiction. *See, e.g., Tweedy, The Validity of Tribal Checkpoints*, *supra* note 85, at 252 n.109 & 258. However, in *Nevada v. Hicks*, the Court suggested that the test applied

have the strongest jurisdictional argument on Tribal trust land or on Tribally-owned fee land; locating a clinic on such land maximizes the possibility of not having to meet the *Montana* requirements.

A Tribe's regulation of a nonmember health-care provider *should* be permissible under the second *Montana* prong because meaningful, self-determined reproductive health care is necessary for the health and welfare of a Tribe. This argument is particularly persuasive considering the devastating historical deprivation of reproductive health care to Native people. In light of how narrowly courts interpret the second exception,²⁸⁴ this reasoning may be held to fall short if the Tribe is also seeking to regulate nonmembers seeking abortion health care, particularly non-Indians, even if they have been life-long residents within Indian country, are employed by the Tribe, or have spouses and/or children who are Tribal members.²⁸⁵

However, the first *Montana* prong is likely enough to recognize civil jurisdiction in the Tribe over nonmembers. To establish Tribal civil regulatory jurisdiction, a Tribe seeking to ensure reproductive health-care access can enter into a contract with the provider in which the provider acknowledges and consents to Tribal jurisdiction while rendering services within Indian country. Similarly, a Tribe could enter into a contract with the patient in which they consent to Tribal jurisdiction. Certainly, it would be advisable for the Tribe to enter into contracts with both nonmember patients and nonmember providers under which they consent to Tribal jurisdiction, but, even without such a contract, it is possible that the patient and provider could be held to have impliedly consented to Tribal jurisdiction by seeking health services at a Tribal clinic (in the case of the patient), or by being employed by or providing contractual services at the clinic (in the case of the provider).²⁸⁶ Nonetheless, a Tribe would be well-advised to enter into written contracts to make nonmembers' consent to Tribal regulatory and adjudicatory jurisdiction explicit.

more broadly. 533 U.S. 353, 358 (2001). But, in that same case, the Court stated that its decision was limited to the peculiar facts at issue in that case. *Id.* at n.2 (“Our holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law. We leave open the question of tribal-court jurisdiction over non-member defendants in general.”).

²⁸⁴ See, e.g., *Brendale*, 492 U.S. at 430 (where zoning in one area of the reservation that included substantial nonmember land ownership was found to not implicate Tribal sovereignty or self-governance); *Strate v. A-1 Contractors*, 520 U.S. 438, 457–58 (1997) (where reckless driving was not enough to trigger the direct effects exception); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 657 (2001) (where taxation was insufficient to meet the direct effects exception).

²⁸⁵ Consider that, within the criminal sphere, Tribes have sought criminal jurisdiction to protect non-Indians within their territory from crimes committed by other non-Indians, but are barred from doing so, except for under a recently enacted exception that provides jurisdiction over non-Indians who commit obstruction of justice or who assault tribal justice personnel. Consolidated Appropriations Act, Pub. L. 117-103, 136 Stat. 901 (2022).

²⁸⁶ See, e.g., *Smith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1136 (9th Cir. 2006) (en banc) (holding that a nonmember consented to tribal jurisdiction by bringing a claim in tribal court).

b. The Right to Exclude

On Tribally-owned lands, Tribes also possess the power to exclude, which offers a potentially creative jurisdictional hook to supplement *Montana*.²⁸⁷ The power to exclude has been held to be an inherent sovereign power, tied to the Tribe's ability to protect the integrity of its territory and the welfare of its members.²⁸⁸ Some treaties reiterate this exclusionary power, often characterized as the power to exclude intruders.²⁸⁹ The power to exclude is distinct from a Tribe's general jurisdictional authority, recognized in the *Montana* exceptions.²⁹⁰ The power to exclude nonmembers has been held to include the lesser power to *regulate* them.²⁹¹ Hence, in *Merrion v. Jicarilla Apache Tribe*, the Court upheld the Tribe's power to impose a severance tax on a non-Indian corporation as a derivative of the Tribe's power to exclude.²⁹²

In *Montana*, the Court expressly dismissed the power to exclude as a source of the Crow's regulatory authority, reasoning that exclusion authority can only extend to land on which the Tribe exercises "absolute and undisturbed use and occupation."²⁹³ Therefore, exclusion power likely exists only on Tribally owned land. Distressingly, in *Nevada v. Hicks*, the Court extended the *Montana* presumption against Tribal civil jurisdiction to Tribal trust land, holding that the Fallon Paiute-Shoshone Tribes lacked jurisdiction over state law enforcement officers executing a state search warrant.²⁹⁴ In effect, the Tribe was held to have lost its right to exclude in instances involv-

²⁸⁷ See, e.g., *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982) (noting that the power to exclude nonmembers could entail "the lesser power to place conditions on entry, on continued presence, or on reservation conduct"); *Cooley*, 141 S. Ct. at 1644 (describing the power to exclude as inclusive of the right to regulate nonmember conduct on public roads); see also Katherine Florey, *Toward Tribal Regulatory Sovereignty in the Wake of the Covid-19 Pandemic*, 63 ARIZ. L. REV. 399, 406 (2021) (explaining that the power to exclude includes "actions such as subjecting incoming visitors to border checkpoints"); Tweedy, *The Validity of Tribal Checkpoints*, *supra* note 85, at 258 (stating that the power to exclude may, in some instances, allow Tribes to claim civil jurisdiction over nonmembers "irrespective of *Montana*").

²⁸⁸ See *Worcester v. Georgia*, 31 U.S. 515, 561 (1832) (noting that persons were allowed to enter Cherokee land only "with the assent of the Cherokees themselves").

²⁸⁹ See, e.g., Treaty with the Wyandot, etc., 1785, art. 5, Jan. 21, 1785, 7 Stat. 16; Treaty with the Cherokee, 1785, art. 5, Nov. 28, 1785, 7 Stat. 18; Treaty with the Creeks, 1790, art. 6, Aug. 7, 1790, 7 Stat. 35; Treaty with the Navaho, 1868, art. 2, June 1, 1868, 15 Stat. 667; Treaty with the Crows, 1868, art. 2, May 7, 1868, 15 Stat. 649. *But see* Alex Tallchief Skibine, *The Tribal Right to Exclude Others from Indian-Owned Lands*, 45 AM. INDIAN L. REV. 261, 286–294 (2021) (arguing that the treaty right to exclude is distinct from the inherent Tribal power to exclude).

²⁹⁰ See *Cooley*, 141 S. Ct. at 1644 (citing *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 425 (1989)) (stating that Tribes have "inherent sovereignty independent of [the] authority arising from their power to exclude").

²⁹¹ *Merrion*, 455 U.S. at 144.

²⁹² *Id.* at 152.

²⁹³ *Montana v. United States*, 450 U.S. 544, 559 (1981).

²⁹⁴ *Nevada v. Hicks*, 533 U.S. 353, 364 (2001).

ing strong state law enforcement interests.²⁹⁵ However, more recently, in *United States v. Cooley*, the Court favorably referred to the right to exclude.²⁹⁶

Despite being recognized as a core Tribal power, the power to exclude has received only marginal attention.²⁹⁷ There is essentially no guidance for determining what state interests are sufficient to overcome a Tribe's right to exclude. In light of *New Mexico v. Mescalero Apache Tribe*,²⁹⁸ there is reason for optimism. Tribes could potentially argue their exclusion power includes the power to exclude conflicting state regulation, especially when the Tribe seeks to protect the reproductive welfare of its members through abortion care that the state restricts.²⁹⁹ However, in light of *Hicks*, especially to the extent a state has criminalized abortion, a court may find that the state has sufficiently strong law enforcement interests that overcome the Tribe's exclusion power.³⁰⁰ The "balancing" of Tribal and state interests is more squarely addressed below in the Article's discussion of preemption and infringement tests, but it is important to note that exclusion power offers a potential additional source of Tribal authority.

2. *State Regulation and the Preemption and Infringement Tests*

If a Tribe is located within a state that has enacted strict civil restrictions on abortion, and that Tribe decides to offer abortion services or permit an abortion provider to operate within its reservation,³⁰¹ the federal Indian law test for preemption of state law³⁰² would govern whether the state's abortion laws could be applied to patients or providers. A related test as to whether the application of state law would infringe on Tribal self-government may also be applied.³⁰³ In instances where a preemption test would already bar state jurisdiction over a Tribal member having an abortion in an

²⁹⁵ See Skibine, *supra* note 289, at 264 (suggesting that the *Hicks* court determined whether the Tribe had "lost the right to exclude" by examining the "importance of the state's interests inside the reservation").

²⁹⁶ *United States v. Cooley*, 141 S. Ct. 1638, 1642 (2021) (listing the power to exclude as a permissible exercise of Indian sovereign authority).

²⁹⁷ *But see* Judith V. Royster, *Revisiting Montana: Indian Treaty Rights and Tribal Authority over Nonmembers on Trust Lands*, 57 ARIZ. L. REV. 889, 923–25 (2015); Skibine, *supra* note 289, at 294–95.

²⁹⁸ 462 U.S. 324 (1983).

²⁹⁹ See *Mescalero Apache Tribe*, 462 U.S. at 333, 339 (rejecting state regulation, in part, because "[c]oncurrent state jurisdiction would supplant this [Tribal] regulatory scheme with an inconsistent dual system").

³⁰⁰ See *Hicks*, 533 U.S. at 362 (holding that states "may regulate the activities even of tribe members on tribal land" if "state interests outside the reservation are implicated").

³⁰¹ The term "reservation" is used throughout this Section for ease of reference; however, the same analysis would apply to other types of Indian country, like Indian allotments and dependent Indian communities, that are also included in 25 U.S.C. § 1151.

³⁰² See 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 111, at § 6.03(1).

³⁰³ *Id.* at § 6.03(2)(a).

on-reservation clinic, the infringement test would be unnecessary, particularly if the provider was also a Tribal member.

A state generally could not civilly regulate the Tribe itself or any of its citizens who either served as abortion providers or accessed medical care. However, the question of whether a state can regulate nonmember medical abortion-care providers or nonmember abortion-care patients on the reservation is, at best, fraught with uncertainty.³⁰⁴ As Professor Katherine Florey has commented in another context, “[i]n the strange world of Indian country jurisdiction, both tribal and state powers are uncertain, potentially conflicting, and predicated largely on tribal membership (or lack of it) rather than tribal territorial borders.”³⁰⁵

a. State Attempts to Civilly Regulate a Tribe and Its Citizens

From a Tribal sovereignty perspective, there is one small bright spot: if a state attempts to civilly regulate a Tribe or a Tribe’s citizens in relation to abortion services provided on-reservation, its regulatory efforts would almost certainly be struck down.³⁰⁶ For example, if a state attempts to close a Tribally-run clinic on a reservation by imposing state civil laws on the Tribe itself, it is almost certain that such an attempt would be rejected under current precedent.³⁰⁷ A state would similarly lack jurisdiction over providers and patients who were citizens of the Tribe on whose reservation the clinic was operating.

There is a limited exception to this rule—in the taxation context, a state may impose limited administrative burdens on a Tribal or Tribal member-owned business to demonstrate compliance with a state regulation that applies to the business’s nonmember customers, unless that state regulation is

³⁰⁴ See Florey, *Budding Conflicts*, *supra* note 19, at 1002 (noting that the preemption “balancing test is highly context-specific, often hinging on the degree to which the Tribe has added value to the product or service being sold”); see also 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 111, at § 6.03(1)(a) (discussing the general bar against state regulation of Tribes or tribal members within Indian country). If the Supreme Court’s recent decision in *Castro-Huerta* is any indication, the current Court may be likely to favor state jurisdiction and would probably be unlikely to take the time to carefully apply its own, fact-based preemption analysis. See *Oklahoma v. Castro-Huerta*, No. 21-429, slip op. at 5 (June 29, 2022) (finding that a state generally “has jurisdiction over all of its territory, including Indian country”).

³⁰⁵ Florey, *Budding Conflicts*, *supra* note 19, at 994.

³⁰⁶ See *Okla. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) (noting that, unless a Tribe cedes jurisdiction or a federal statute permits jurisdiction, “a State is without power to tax reservation lands and reservation Indians”).

³⁰⁷ See 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 111, at § 6.03(1)(a); see also *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980) (explaining that “[w]hen on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State’s regulatory interest is likely to be minimal, and the federal interest in encouraging tribal self-government is at its strongest”). As discussed in Section III.A.2 of this Article, under current precedent, a state’s attempt to criminally prosecute a Tribe or Tribal member on an abortion-related matter would also likely be struck down absent a federal law authorizing state assumption of criminal jurisdiction.

preempted.³⁰⁸ This administrative burden exception could conceivably be extended to the abortion context if abortions are provided at a Tribally-owned or Tribal-member-owned facility to non-Tribal citizens. For instance, if an on-reservation facility offered abortion care to non-Tribal citizens in a state with a restrictive abortion law, the state could attempt to demand lists of all non-Tribal members to whom the clinic provides abortions.³⁰⁹ However, these sorts of administrative burdens have so far been deemed permissible only in the taxation context,³¹⁰ and it seems unlikely that a court would extend the exception to the abortion context.³¹¹ A Tribally-run clinic or a Tribal-member-owned clinic on Tribal lands would probably not be subject to regulation by the state in which the reservation was located, although the question is not free from doubt.

b. State Attempts to Regulate Nonmembers

As the analysis above indicates, a Tribally-owned and operated abortion clinic employing only Tribal member staff and serving only Tribal member patients would almost certainly be beyond the reach of state regulation. Unfortunately, any deviation from this framework would, at a minimum, create uncertainties as to the applicability of state regulation to non-Tribal members. For the purposes of a preemption analysis, the Court has tended to view Indians who are not members of the specific Tribe at issue and non-Indians commensurately.³¹² Given that nonmember Indians play an important role on most, if not all, Indian reservations,³¹³ and that non-Indians are often em-

³⁰⁸ See 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 111, at § 6.03(1)(b); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 159 (1980).

³⁰⁹ See, e.g., *Colville*, 447 U.S. at 159–60 (upholding requirement for on-reservation smoke shop operators to keep detailed records of both taxable transactions involving non-Tribal members and nontaxable transactions with Tribal members).

³¹⁰ The Court hinted at a possible extension of the doctrine in *Nevada v. Hicks*, 533 U.S. 353, 362 (2001), but that case is distinguishable because it involved alleged off-reservation crimes. Although the Court purportedly limited its decision to the unusual facts at issue in the case, *id.* at 358 n.2, it did speak in broad terms, *id.* at 262 (“When, however, state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land, as exemplified by our decision in *Confederated Tribes*,” where “[w]e held that the State could require the Tribes to collect [a cigarette] tax from nonmembers, and could ‘impose at least minimal burdens on the Indian retailer to aid in enforcing and collecting the tax.’”).

³¹¹ Such an extension would also raise myriad privacy concerns that are beyond the scope of this Article. *But see Baker-White & Emerson*, *supra* note 262 (describing the indictment of a Nebraskan seventeen-year-old and her mother after seeking abortion care for allegedly removing, concealing, or abandoning a dead human body and concealing the death of another person after law enforcement searched her Facebook messages). The attempt to prosecute the Nebraska teen and her mother may be the harbinger of more frequent and virulent attacks on privacy in the abortion context.

³¹² See *Colville*, 447 U.S. at 161 (finding that for “most practical purposes,” nonmember Indians on a reservation “stand on the same footing as non-Indians”).

³¹³ See Matthew L. M. Fletcher, *United States v. Lara: Affirmation of Tribal Criminal Jurisdiction over Nonmember American Indians*, 83 MICH. B.J. 24, 25 (July 2004)

ployed by and/or residents of Indian reservations,³¹⁴ it is highly likely that some of the staff and patients at a Tribally-run clinic would be nonmembers or non-Indians. Tribal members, nonmember Indians, and non-Indians may also travel from outside the reservation to receive services, and the clinic itself could be owned or operated by a nonmember Indian or a non-Indian.

When a state attempts to civilly regulate nonmembers on a reservation, federal courts primarily employ a preemption test to evaluate the validity of the state's assertion of authority, although an infringement test may also be used.³¹⁵ In the recent, rather perfunctory decision in *Oklahoma v. Castro-Huerta*, the Court injected the preemption and infringement tests into its criminal jurisdiction analysis, and then appeared to combine the two tests.³¹⁶ It is not yet known whether the Court will follow this reformulation in other cases. Importantly, *Castro-Huerta* is about criminal jurisdiction, and it thus should not apply beyond that context, especially given its unexplained deviation from basic federal Indian law principles.³¹⁷

When the state attempts to assert authority over nonmembers of a Tribe, the preemption analysis consists of a balancing test, known as the *Bracker*

("Nonmember American Indians play a significant role in the daily life of any American-Indian community.").

³¹⁴ See Matthew L. M. Fletcher, *Tribal Employment Separation: Tribal Law Enigma, Tribal Governance Paradox, and Tribal Court Conundrum*, 38 U. MICH. J.L. REFORM 273, 286 (2005) ("Indian Tribes . . . employ increasing numbers of non-Tribal Members," and "[m]any of these non-Tribal Members are Indians from other Indian Tribes who have married into the community or who have become part of the community in some other way.") (citations omitted); FOREST SERV., U.S. DEPT. OF AGRIC., FS-600, FOREST SERVICE NATIONAL RESOURCE GUIDE TO AMERICAN INDIAN AND ALASKA NATIVE RELATIONS, app. at D-4 (Apr. 1997) ("A few reservations are 100 percent occupied by Indians, and others are almost entirely occupied by non-Indians.").

³¹⁵ See Richard D. Pomp, *The Unfulfilled Promise of the Indian Commerce Clause and State Taxation*, 63 TAX L. 897, 1131 (2010) (recognizing that the "preemption analysis has come to overshadow the *Williams v. Lee* infringement test, the second of Marshall's two barriers to 'the assertion of state regulatory authority over tribal reservations and its members'") (citation omitted); see also 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 111, at § 6.03(2)(a) (explaining both tests).

³¹⁶ See *Oklahoma v. Castro-Huerta*, No. 21-429, slip op. at 5 (June 29, 2022).

³¹⁷ Under basic federal Indian law principles, "[t]he first question to ask in determining jurisdiction . . . is where the relevant activity occurred, in 'Indian Country' or not." ANDERSON ET AL., *supra* note 236, at 273. "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." *Id.* (quoting *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 n.1 (1998)). *Castro-Huerta* does not follow these principles. See Elizabeth Hidalgo Reese, *Conquest in the Courts: Without Having to Sign a Treaty or Fight a War, a 5-4 Majority Handed the States Presumptive Power over Indian Lands*, NATION (July 6, 2022), <https://www.thenation.com/article/society/supreme-court-castro-huerta/> [https://perma.cc/9MPN-HVW3] ("The [*Castro-Huerta*] opinion is unmoored from the key cases of federal Indian law and divorced from the realities of American history."). So radical is the deviation in *Castro-Huerta* from the basic principle of plenary federal authority and limited state authority over Indian affairs that it could be said that *Castro-Huerta* jettisons us back to the incoherent dual allocation of authority over Indian affairs to both state and federal governments that we saw in the Articles of Confederation. See ANDERSON ET AL., *supra* note 236, at 30–31 (discussing Article IX of the Articles of Confederation and the reasons for its replacement with a stronger statement of federal authority in the Commerce Clause).

test, under which the Court has held that “state jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and Tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.”³¹⁸ Because this preemption test, which is broader than the preemption analysis outside of the context of federal Indian law,³¹⁹ consists of a “particularized inquiry,”³²⁰ the balancing test is “highly context-specific,” resulting in a considerable degree of unpredictability and the necessity of “case-by-case analysis.”³²¹ As a result, it is impossible to make a blanket statement about whether a state could assert regulatory authority over a nonmember patient, owner or operator of a health-care clinic, or doctor or other medical professional. Nonetheless, aspects of the context of reproductive rights may make a nonmember’s effort to avoid state authority an uphill battle, not the least of which is the current Supreme Court’s hostility to reproductive rights.³²² The *Bracker* preemption test can weigh an array of competing interests and considerations. The following four Subsections examine various potential interests that could enter a *Bracker* balancing analysis in regard to the provision of on-reservation abortion care, including state interests, the funding of health care, the persons subject to regulation, and treaty rights.

i. *The Bracker Balancing Test: State Interests*

The *Bracker* balancing test weighs state interests against both federal interests and Tribal interests reflected in federal law. States that have imposed draconian anti-abortion restrictions are likely to assert strong interests related to preventing abortion. For example, Texas, which has one of the more notorious laws limiting abortion rights,³²³ claims the basis of its law is “compelling interests from the outset of a woman’s pregnancy in protecting the health of the woman and the life of the unborn child.”³²⁴ While it may be hard for a state like Texas to convince a court that its paternalistic law, which

³¹⁸ *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983) (citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980)).

³¹⁹ 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 111, at § 6.03(2)(a). *But see Castro-Huerta*, slip op. at 18 (referring to the preemption analysis in the Indian law context as an “ordinary preemption analysis”).

³²⁰ *Bracker*, 448 U.S. 136, 145 (1980).

³²¹ Florey, *Budding Conflicts*, *supra* note 19, at 1002–03.

³²² *Id.* (“[S]ome have argued that the varying results [of the preemption balancing test] have as much to do with the degree to which the Court approves the underlying activity . . . than with objective differences such as the degree of federal support or the impact of tribal facilities on surrounding state areas.”). The opinion in *Dobbs* demonstrates that the majority of current Supreme Court justices are hostile to reproductive rights.

³²³ See, e.g., Adam Edelman, ‘Insidious,’ ‘Draconian,’ ‘Cruel’: New Texas Abortion Law Empowers Vigilantism, Experts Say, NBC News (July 24, 2021), <https://www.nbcnews.com/politics/politics-news/insidious-draconian-cruel-new-texas-abortion-law-empowers-vigilantism-experts-n1274642> [<https://perma.cc/2SSP-A5XB>].

³²⁴ Tex. Health & Safety Code § 171.202(3) (2003).

thwarts a person's reproductive choices and their ability to pursue their dreams and plan their futures, is driven by concerns for the health of pregnant people,³²⁵ the asserted concern for the "life of the unborn child" will undoubtedly be harder for a court to discount, particularly in the wake of the reversal of *Roe v. Wade* and the *Dobbs* Court's solicitude for "fetal life."³²⁶ Thus, prior Indian country preemption cases, in which the state's asserted interests were considered to be flimsy or unconvincing by the Court, would likely not be determinative in the abortion-care context.³²⁷

ii. *The Bracker Balancing Test: Funding of Health Care*

With strong state interests on one side, the notoriously fact-specific *Bracker* balancing test³²⁸ then examines any countervailing federal interests and Tribal interests reflected in federal law. Because of this fact-specific quality, federal interests and Tribal interests reflected in federal law will likely vary from Tribe to Tribe, but could include such arguments as the need

³²⁵ *But see* *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op. at 42 (June 24, 2022) (identifying "the protection of maternal health and safety" as a legitimate interest that a state may use to justify abortion restrictions). In contrast to the paternalistic suggestion in *Dobbs* that abortion poses a health danger to women, it does not appear that abortions generally cause mental health problems for those that choose to undergo them. *See* Brenda Major et al., *Abortion & Mental Health: Evaluating the Evidence*, 64 AM. PSYCH. 863, 885 (Dec. 2009) ("[T]he majority of adult women who terminate a pregnancy do not experience mental health problems."). As might be expected, some of those who have abortions—for example, those with a history of mental health problems—appear to be at higher risk for experiencing negative emotions following abortions. *Id.* at 882. Additionally, clinic picketing by anti-abortion protestors was associated with short-term negative emotions among those who underwent abortions. *Id.* Moreover, for those who perceived that their decision to have an abortion would be stigmatized, "feelings of stigmatization led . . . to engag[ing] in coping strategies that were associated with poorer adjustment over time." *Id.*

³²⁶ *Dobbs*, slip op. at 17, 23 (cataloging historical laws relating to abortion and intimating a concern for the lives of fetuses similar to that which Texas professes, as well as suggesting approval of the idea of criminalizing abortion). Similar to the Major et al. study, Rocca and her colleagues found that "[o]ver the five years after having an abortion, the intensity of negative and positive emotions about the abortion declined, particularly over the first year, with relief predominating at all times" and that "[t]he overwhelming majority of women felt that the abortion was the right decision for them at all times." Corinne H. Rocca et al., *Emotions and Decision Rightness Over Five Years Following an Abortion: An Examination of Decision Difficulty and Abortion Stigma*, 248 SOC. SCI. & MED. 1, 8 (2020).

³²⁷ *See, e.g.,* *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336 (1983) ("[A] State seeking to impose a tax on a transaction between a Tribe and nonmembers must point to more than its general interest in raising revenues."); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 220–21 (1987) ("To the extent that the State seeks to prevent any and all bingo games from being played on tribal lands while permitting regulated, off-reservation games, this asserted interest is irrelevant, and the state and county laws are preempted."); *cf. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL* 172–73 (7th ed., 2020) ("In theory at least, . . . [the preemption] formula permits a state law that serves an extremely important state interest to interfere even with tribal self-government.").

³²⁸ *See, e.g.,* Florey, *Budding Conflicts*, *supra* note 19, at 1002–03.

for culturally-relevant reproductive care.³²⁹ In evaluating a Tribe's preemption claim, the Court often discusses whether a Tribe is adding value to the good or service provided, rather than simply attempting to achieve an exemption from a state tax or other state law by selling goods more cheaply than would be available outside of the reservation or, less commonly, by selling goods or services that would be proscribed by state law if sold elsewhere.³³⁰ Added value bolsters a Tribe's chances of succeeding in a preemption analysis. Tribes could meet this requirement in a variety of ways. For example, a Tribe with sufficient resources could create a very comfortable welcoming clinic, or a Tribe could integrate cultural practices into the services. However, the abortion context is different from the gaming context, in that gaming has proven to have strong potential for economic development. This is unlikely to be true for abortion care, especially considering that such an abortion-care facility may not be designed to draw significant non-Tribal traffic. Nonetheless, creating a very comfortable or culturally-rooted facility is likely to prove helpful to Tribes that do want to open an abortion clinic and that can afford to structure it in that way.

The federal elephant in the room, however, is the Hyde Amendment, which provides that no federal funds, including IHS funds, may be used "to provide abortions to Native American women except when pregnancy results from rape or incest, or when the life of the pregnant woman is endangered by carrying the pregnancy to term."³³¹ An appropriations statute that has been amended several times since it was first enacted in 1976, the Hyde Amendment has been interpreted by several courts to require states, in the face of a conflicting state law, to fund abortions when the pregnancy resulted from rape or incest.³³²

While the Hyde Amendment has had devastating effects for Native women,³³³ there are three reasons that its weight in a *Bracker* preemption analy-

³²⁹ See, e.g., Barbara Gurr, *The Failures and Possibilities of a Human Rights Approach to Secure Native American Women's Reproductive Justice*, 7 SOCIETIES WITHOUT BORDERS 1, 17 (2012) (recognizing that the care that Native rape victims receive in non-IHS facilities "may not be culturally appropriate"); see also S.D. ADVISORY COMM. TO U.S. COMM'N ON CIV. RTS., MATERNAL MORTALITY AND HEALTH DISPARITIES OF AMERICAN INDIAN WOMEN IN SOUTH DAKOTA 9–10 (July 2021) (summarizing and discussing evidence in the maternal health-care context "that health care providers, institutions and practices do not reflect the values of American Indian women" and that Native women "can feel stigmatized, stereotyped, and dismissed by the current medical system, which can deter them from seeking maternal health services"); Wade, *supra* note 83 (relating Abigail Echohawk's experience of being stigmatized for being Native when she sought prenatal care at a Seattle hospital).

³³⁰ See, e.g., *Cabazon*, 480 U.S. at 219–20.

³³¹ Rebecca Hart, *No Exceptions Made: Sexual Assault Against Native American Women and the Denial of Reproductive Healthcare Services*, 25 WIS. J.L. GENDER & SOC'Y 209, 214 (2010).

³³² Borders, *supra* note 166, at 127–38.

³³³ See Micalca Simpson, *The Marshall Factor: How Forced Sterilization of Native American Women Birthed Generational Reproductive Injustice*, 49 S.U. L. REV. 65, 86 (2021); accord Gurr, *supra* note 24, at 74–78 (documenting the lack of availability of emergency contraception and other forms of contraception for many Native women and

sis may well be limited. First, absent clear expression of intent to the contrary, appropriations statutes do not ordinarily create substantive law.³³⁴ In light of this rule, it may be inappropriate to interpret the amendment as evidencing federal disapproval of abortion,³³⁵ particularly in regards to Tribal interests for which the federal government owes a trust responsibility, especially given that courts must use the Indian canons of construction to defer to Tribal interests in the face of statutory ambiguities. Second, the Hyde Amendment is not specifically directed at IHS, although IHS funding is encompassed within it. At most, it expresses a generalized policy rather than one that speaks to the context of the federal government's responsibilities to Tribes. Third, given that the Hyde Amendment has been interpreted in some cases to *require* state funding of abortions (specifically when the pregnancy is caused by rape or sexual assault), to the extent it is properly seen as a substantive law, it would seem to be one that is mixed with respect to the restriction of abortion. Thus, depending on how a court interprets the Hyde Amendment, it should not be given much, if any, weight in a *Bracker* pre-emption analysis.

Hyde Amendment aside, there are many other sources of federal law and policy that recognize the federal government's responsibility to provide health care for Native Americans and that recognize a Tribe's right to self-determination as to how those health-care services will be provided. Because reproductive health care is an integral part of health care in general, these general laws support Tribes' entitlement to health care and Tribes' right to determine which services will be provided, as well as to provide their own health care as would be required, in light of the Hyde Amendment, in the case of abortion services. Some of these laws and policies are Tribe-specific and some are more general.

For example, in 1921, the Snyder Act recognized a general federal duty in its appropriation of funds "for the benefit, care, and assistance of the Indians throughout the United States for the . . . relief of distress and conser-

arguing that this lack of availability has caused a disproportionate number of Native women on reservations to seek permanent solutions); *see also* Arnold, *supra* note 137, at 1892–93 (explaining that the Hyde Amendment "discriminates against women who often need abortion services the most," including Native American women).

³³⁴ Borders, *supra* note 166, at 125 (noting that appropriation bills "are normally not substantive federal law"); *see also Appropriations Bill Includes Amendment Changing Some Adjusters' Overtime Status*, 21 No. 4 FLSA EMP. EXEMPTION NEWSL. 6 (Feb. 2016) (explaining that, in order to create substantive law through an appropriations act, courts have held that Congress must be clear about its intentions).

³³⁵ This ambiguity regarding federal policy in the abortion context is in sharp contrast with examples of clear federal policy in other contexts. For example, in *Moapa Band of Paiute Indians v. U.S. Dep't of Interior*, the court reviewed the Secretary of Interior's determination that prostitution as a means of economic development violated federal policy. 747 F.2d 563, 566–67 (9th Cir. 1984). The court ultimately concluded that the Immigration and Nationality Act's provision that a person could be deported for managing or being connected with the management of a house of prostitution demonstrated a clear federal policy against prostitution. *Id.* (discussing Immigration and Nationality Act, 8 U.S.C. § 1251(a)(12) (1976)).

vation of health.”³³⁶ With more forceful language, the Indian Health Care Improvement Act (IHCIA) of 1977, which created the IHS, recognizes “providing the highest possible health status to Indians” and “provid[ing] existing Indian health services with all resources necessary to effect that policy” as part of the federal government’s “special trust responsibilities and legal obligation to the American Indian people[.]”³³⁷ This general language should be interpreted as inclusive of reproductive health. No exceptions are carved out of the language and carving out such a large area that predominantly affects women would be unethical to say the least, notwithstanding the Supreme Court’s insistence that burdening reproductive rights should not be considered invidious discrimination against women.³³⁸ Thus, these statutes evince a broad, general federal responsibility for protecting Native Americans’ health and this federal responsibility weighs against allowing state regulation of health services provided on reservations generally. For many Tribes, treaties also recognize such federal responsibilities, promising “physicians, medical supplies, and even hospitals.”³³⁹

The Indian Self-Determination and Education Assistance Act (ISDEAA) provides that Tribes may take over administration of federally-funded health services on their reservations, and thus the Act acknowledges the importance of Tribal leadership decision-making as to provision of health care.³⁴⁰ One study suggests that health care tends to improve on a reservation when a Tribe takes over administration of it.³⁴¹ The Congressional findings for the ISDEAA recognize the need for Tribes to have a “full opportunity to develop leadership skills crucial to the realization of self-government” and the need for Tribes to have “an effective voice in the planning and implementation of programs for the benefit of Indians.”³⁴²

Federal policy documents also recognize the importance of Tribal self-government in the health-care context. For example, a 2021 Presidential Memorandum acknowledges:

³³⁶ 25 U.S.C. § 13 (1921); *see also* Brayden Jack Parker, “Cornerstone Upon Which Rest All Others”: Utilizing Canons of Statutory Interpretation to Confirm an Enforceable Trust Duty for Native American Health Care, 90 GEO. WASH. L. REV. 237, 248 (2022) (quoting Snyder Act, 25 U.S.C. § 13 (1921)).

³³⁷ 25 U.S.C. § 1602 (1977). While the IHCIA expired in 2000, it was “re-enacted with improvements and made permanent in 2010 as part of the Patient Protection and Affordable Care Act (ACA).” 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 22.04(1) (Nell Jessup Newton ed., 2019).

³³⁸ *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392, slip op. at 10–11 (June 24, 2022).

³³⁹ 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 111, at § 22.04(1); Parker, *supra* note 336, at 247 (quoting the 1868 Fort Laramie Treaty’s requirement that the States “furnish annually to the Indians [a] physician”).

³⁴⁰ *See* 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 337, at §§ 22.02(1), 22.04(4).

³⁴¹ *Id.* at § 22.04(4).

³⁴² *See* 25 U.S.C. § 5301(a)(1) (2018).

The United States has made solemn promises to Tribal Nations for more than two centuries. Honoring those commitments is particularly vital now, as our Nation faces crises related to health, the economy, racial justice, and climate change—all of which disproportionately harm Native Americans. History demonstrates that we best serve Native American people when Tribal governments are empowered to lead their communities, and when Federal officials speak with and listen to Tribal leaders in formulating Federal policy that affects Tribal Nations.³⁴³

In addition, an earlier Executive Order states:

To honor treaties and recognize Tribes' inherent sovereignty and right to self-government under U.S. law, it is the policy of the United States to promote the development of prosperous and resilient tribal communities, including by:

. . .

(b) supporting greater access to, and control over, nutrition and healthcare, including special efforts to confront historic health disparities and chronic diseases[.]³⁴⁴

Based on the ISDEAA, the Presidential Memorandum of January 26, 2021, and Executive Order No. 13,647, there is considerable federal support for Tribally-directed health care, and this support, if coupled with a strong expression of Tribal interests in offering abortion services, serves as a significant enunciation of Tribal interests reflected in federal law. Tribes whose ordinances must be approved by the Department of the Interior and who enact ordinances providing for abortion services may have a stronger argument for preemption.³⁴⁵ Coupled with the general federal responsibility for providing health care on reservations, a court could well determine that state regulation of nonmember patients or providers is preempted. On the other hand, it is possible that a court could view the Hyde Amendment as undercutting federal interests in favor of comprehensive health care that would include abortion care and other reproductive health care and might therefore hold that state regulation is not preempted, at least as to some nonmembers. If interested Tribes could obtain support from the Executive Branch, including federal agencies, to provide abortion services, this could strengthen their preemption arguments.³⁴⁶

³⁴³ Presidential Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7,491 (Jan. 26, 2021).

³⁴⁴ Exec. Order No. 13,647, 78 Fed. Reg. 39,539 (June 26, 2013).

³⁴⁵ See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 218 (1987).

³⁴⁶ *Id.* at 218–19.

iii. *The Bracker Balancing Test: Persons Subject to Regulation*

Given that the Indian law preemption test is very context-specific, much may depend on whom the state is attempting to regulate. Surrounding states may attempt to prosecute or hold civilly liable an on-reservation abortion-care medical provider, as well as revoke their medical or health-care license. Additionally, such states may ultimately attempt to hold the patient who receives an abortion liable or prosecute them.³⁴⁷ The state would likely have a stronger argument to regulate a state-resident patient rather than someone who traveled from another state to the on-reservation clinic.³⁴⁸ Similarly, the state likely has a stronger regulatory interest with respect to non-member medical providers. The state licensing of physicians and other providers provides an additional avenue for state regulation.

The ISDEAA allows providers licensed in any state to be exempt from the licensing requirements of the state in which the Tribal health facility is located.³⁴⁹ However, this exemption only applies to the provision of health care operating within the scope of the 638 contract,³⁵⁰ namely the programs, services, functions, and activities outlined in the agreement and likely subject to the federal funding limitations under the Hyde Amendment. Non-member doctors at Tribal health facilities operating outside of a 638 contract will be subject to Tribal law, but may additionally be subject to state jurisdiction under the preemption-balancing test described above. If a court allows state enforcement of its licensing laws, this could, in effect, keep any physicians from providing abortion care in practice.³⁵¹

A Tribe may evade some state regulation through use of telehealth services. Because the FDA allows patients to receive abortion medication through telehealth services, but requires the provider to be certified by the FDA, under current law, patients must utilize United States-based provid-

³⁴⁷ See, e.g., Sam Levin, *She Was Jailed For Losing a Pregnancy. Her Nightmare Could Become More Common*, GUARDIAN (June 4, 2022), <https://www.theguardian.com/us-news/2022/jun/03/california-stillborn-prosecution-roe-v-wade> [<https://perma.cc/G4LK-6JG3>] (describing the case of a woman who was charged and jailed for sixteen months in California following a stillbirth that authorities suspected to be related to drug use). Pre-*Roe*, there was at least one prosecution of a woman for having an abortion in the United States. See MEIER & GEIS, *supra* note 2, at 154.

³⁴⁸ Cf., e.g., *Schultz v. Boy Scouts of America, Inc.*, 480 N.E.2d 679, 686–87 (N.Y. 1985) (allowing state regulation based on state residence in the context of conflict of laws).

³⁴⁹ 25 U.S.C. § 1621t (2018).

³⁵⁰ *Id.*

³⁵¹ For example, Oklahoma, home to thirty-seven Tribal nations, only allows physicians to provide abortion care. Under Oklahoma's medical licensing laws, unprofessional or unethical conduct subjects a provider to discipline. Oklahoma defines unprofessional conduct to include the "commission of any act which is a violation of the criminal laws of any state when such act is connected with the physician's practice of medicine," and the state does not need a "complaint, indictment or confession of a criminal violation" to enforce this provision. OKLA. STAT. tit. 59, §509(9) (2022).

ers.³⁵² FDA approval would be a plus in the preemption argument, indicating strong federal interests, particularly if the FDA or other federal agencies express stronger support for obtaining the medication through telehealth services in the future.³⁵³ At the same time, with respect to nonmembers, including nonmember patients and nonmember providers, the lack of a physical Tribal clinic and on-reservation Tribal services could weaken the portion of the preemption test that considers whether there is a Tribally-added value to a good or service. A Tribe may be able to ameliorate this by providing medical services, such as monitoring for complications, in conjunction with the provision of the pills through a telehealth provider.³⁵⁴

IHS allows for service to a broader category of persons beyond enrolled members,³⁵⁵ and so there may be a strong preemption argument for exemption from state abortion restrictions beyond just Tribal members. Moreover, Tribes engaged in providing medical care through self-determination contracts are empowered to provide medical care to persons who would be ineligible under IHS guidelines provided that they take a number of factors into account.³⁵⁶ It is important to recognize that these broader eligibility provisions would have to be used by analogy because, based on the Hyde Amendment, the IHS cannot provide abortion services outside of two narrow situations, and a Tribe engaged in providing federally-funded medical care would be subject to the same restrictions. Outside of abortion care, the IHS provides services to those who are of Indian descent and members of their communities, as well as to the children and legal wards of such persons.³⁵⁷ The IHS will additionally provide care to ineligible persons in cases of emergency and to persons who are pregnant with the fetus of an eligible person.³⁵⁸ A Tribe providing abortions through an on-reservation clinic may be able to use these provisions by analogy to strengthen a preemption argument with

³⁵² *Mifeprex (Mifepristone) Information*, U.S. FOOD & DRUG ADMIN. (Dec. 16, 2021), <https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/mifeprex-mifepristone-information> [<https://perma.cc/R8FC-RUY9>]. *But see* Kimball, *supra* note 185 (suggesting that while U.S. providers could face legal consequences for mailing mifepristone into states that have banned it, international providers “face little legal risk from state laws” in the United States and some will continue to mail mifepristone to patients nationwide).

³⁵³ *See* Kimball, *supra* note 185 (“President Biden, the DOJ and the Health and Human Services Department on Friday indicated that they will take action to expand access to the pill within the U.S., though it’s not yet clear how they will do that.”).

³⁵⁴ *See id.* (discussing potential complications from self-managed abortions).

³⁵⁵ 42 C.F.R. § 136.12 (“Services will be made available . . . to persons of Indian descent . . . [as well as] to a non-Indian woman pregnant with an eligible Indian’s child but only during the period of her pregnancy through postpartum (generally about 6 weeks after delivery) . . . [and] to non-Indian members of an eligible Indian’s household if the medical officer in charge determines that this is necessary to control acute infectious disease or a public health hazard.”).

³⁵⁶ 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 111, at § 22.04(2)(b). Note that such provision of federally-funded services will still be subject to the restrictions of the Hyde Amendment.

³⁵⁷ *Id.*

³⁵⁸ *Id.*

respect to patients who are unenrolled Tribal descendants as well as those who are the children or legal wards of enrolled members or descendants and to pregnant nonmembers who are partnered with Tribal members. Tribes may further broaden provision of such services to ineligible spouses of eligible persons and to others if the Secretary and Tribe agree that the provision of services to eligible persons will not be diminished, and a Tribe administering its own federally-funded program may, as noted above, decide to extend services to an even broader class of persons.³⁵⁹ Tribes who have elected to provide services to a broader class of persons, either based on an agreement with IHS or through their own federally-funded program, will have a substantial argument that Tribal interests reflected in federal law support preemption of state regulation with respect to such patients. Serving a broader class of persons based on connections to the Tribe through descendency or family relations would strongly accord with the values of those Tribes who view descendency and community membership as important Tribal connections.³⁶⁰

The Tribe may have governmental interests in serving off-reservation Tribal members and non-Tribal members—for example, those who are partnered with Tribal members, are children of Tribal members, or who are otherwise part of Tribal families. There is a strong (though untested) argument that state regulation of the on-reservation provision of abortion to Tribal members who travel to the reservation to receive an abortion should be viewed to infringe Tribal self-government.³⁶¹ Additionally, there is a weighty preemption argument supporting the need to provide care to nonmembers who are connected with the Tribe, for example, by marriage, particularly for those groups whom the Tribe already serves via federally-funded but Tribally-administered care or to whom the IHS clinic on the reservation provides care. Tribes may have important interests in serving others as well, such as, for example, non-Native reservation residents who are not part of Tribal families. However, the further removed the patients are from the Tribe, the lower the chance that a preemption argument with respect to that group of patients would succeed. Thus, Tribes will need to weigh how much risk of state regulation of patients it is willing to incur.³⁶²

³⁵⁹ *Id.*

³⁶⁰ *See, e.g.,* Rina Swentzell, *Testimony of A Santa Clara Woman*, 1 KAN. J.L. & PUB. POL'Y 97, 99–100 (2004) (arguing that descendants who cannot formally enroll at Santa Clara Pueblo can still be effectively members of the tribal community); *Means v. District Court of Chinle Judicial District*, 7 Navajo Rep. 383, 451 (Navajo 1999) (stating that, rather than being a non-member Indian, “[t]he petitioner belongs to the classification *hadane* [i.e., in-law] and not that of nonmember Indian. One can be of any race or ethnicity to assume tribal relations with Navajos.”), *aff'd* 432 F.3d 924 (9th Cir. 2005).

³⁶¹ *See infra* Section III.B.2.C.

³⁶² Although current state laws generally do not target women who have abortions for prosecution, law enforcement nonetheless has targeted such women in some instances and referred for prosecution. *See* Kimball, *supra* note 185. Moreover, it seems likely that state laws will gradually become more draconian as abortion restrictions prove difficult to enforce. As noted above, we already see states considering and attempting to pass laws

In summary, then, Tribally-run clinics providing abortions *may* more successfully be able to argue preemption for some classes of patients than for physicians and medical providers. The scope of patients who could be served will likely depend on who has been defined as eligible for the services of the applicable IHS or Tribally-run but federally-funded medical clinic. Preemption with respect to medical providers is more uncertain and will likely depend on the licensure and ethical rules in the states in which they are licensed. For example, states like California and Connecticut that wish to protect abortion rights may also try to protect their licensed physicians and other medical providers who perform abortions on reservations that are located outside of state boundaries. However, the Supreme Court's unprecedented and poorly reasoned decision in *Oklahoma v. Castro-Huerta* will foreclose such an approach for non-Native doctors and other non-Native medical providers who would face criminal liability under the laws of the state in which the Tribe's Indian country is located.³⁶³ It is possible that a civil preemption argument could be successful for providers licensed in states that are protective of reproductive rights who are performing abortions on reservations in other states, where the state in which the reservation is located imposes civil sanctions rather than criminal liability on providers. Given the high stakes, it may be advisable for a Tribe opening its own clinic to employ Tribal member doctors and other medical providers if at all possible.

iv. *The Bracker Balancing Test: Treaty Rights*

Tribes who have treaties with the federal government that contain provisions regarding health care may fare better in a preemption analysis. The Eighth Circuit recently upheld the Rosebud Sioux Tribe's claim that the Fort Laramie Treaty, which provides for the federal allocation of a physician to the Tribe, recognized "a trust duty to provide 'competent physician-led

restricting pregnant women's right to travel. Louis Jacobson, *Can States Punish Women for Traveling Out of State to Get an Abortion?*, POYNTER (July 6, 2022), <https://www.poynter.org/fact-checking/2022/can-states-punish-women-for-traveling-out-of-state-to-get-an-abortion/> [<https://perma.cc/K3Q7-XA8W>] (discussing potential state attempts to extra-territorially penalize out-of-state abortions, including a pending Missouri bill that would be enforced through civil lawsuits). This approach is reminiscent of long-abandoned dehumanizing laws like the Fugitive Slave Clause, U.S. CONST. art. IV, § 2, cl. 3, and laws and policies forbidding Native Americans from leaving reservations, *see, e.g.*, ANDERSON ET AL., *supra* note 236, at 78–79 (alluding to confinement of Native Americans on reservations during the Reservation Period in the mid-1800s through the late 1800s). The move to deny pregnant women the right to travel contemplates a serious incursion on their constitutional rights, and it can only be assumed that attempts at even harsher measures are likely to follow. The recent charging of a Nebraska teen for an illegal abortion may unfortunately just be the tip of the iceberg. *See Baker-White & Emerson, supra* note 262.

³⁶³ *Oklahoma v. Castro-Huerta*, No. 21-429, slip op. at 24 (June 29, 2022).

health care.’”³⁶⁴ Competent care includes reproductive care. In fact, the federal government spent great effort and expense to medicalize birth among Native people.³⁶⁵ While Western medicine may not have considered abortion care an integral part of reproductive care at the time a given treaty was negotiated, standards of medical care are universally understood to evolve. For example, modern-day physicians no longer use leeches even though they were popular treatment when many treaties were brokered.³⁶⁶ Just as Tribes with treaty-fishing rights may take advantage of evolving technologies to exercise those rights,³⁶⁷ provision of health care to Tribes must be consonant with current standards.³⁶⁸

A treaty Tribe could sue to require the federal government to fund abortion care for those eligible for federally-funded, on-reservation medical care because the Hyde Amendment speaks to funding mechanisms rather than serving as a prohibition on providing care. Moreover, the standards for a federal statute to abrogate a treaty are stringent,³⁶⁹ and it is quite clear that the Hyde Amendment, which was not directed at Native peoples at all, would not meet them. As an alternative to a possible suit to enforce a treaty (or in addition), a Tribe opening and funding its own clinic may also be able to rely on treaty provisions to bolster the claim that on-reservation health care is a matter between the Tribe and the federal government and that the state has no role to play.

In conclusion, there is a possibility of a successful preemption claim for a Tribally-run clinic, at least with respect to some categories of patients. Whether a medical provider could avoid civil repercussions from the state relating to their licensure is unclear, although the greatest potential would appear to be in situations where the state in which the reservation is located has only civil sanctions and the provider is licensed in a state that supports

³⁶⁴ Parker, *supra* note 336, at 250–51; see *Rosebud Sioux Tribe v. United States*, 9 F.4th 1018, 1026 (8th Cir. 2021).

³⁶⁵ See THEOBALD, REPRODUCTION ON THE RESERVATION, *supra* note 38, at 55–62.

³⁶⁶ See Jessica Martucci, *Medicinal Leeches and Where to Find Them: The Rise, Fall, and Resurrection of the Humble Leech*, SCI. HIST. INST. (Mar. 24, 2020), <https://www.sciencehistory.org/distillations/medicinal-leeches-and-where-to-find-them#:~:text=from%20the%20late%2D18th%20century,millions%20of%20leeches%20each%20year> [<https://perma.cc/4YJL-QXKE>] (discussing the popularity of medical leeching from “the late-18th century through the 19th century”).

³⁶⁷ I COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 111, at § 22.04(2)(b).

³⁶⁸ Indian Health Care Improvement Act, Pub. L. No. 94-437, 90 Stat. 1400 (codified as amended at 25 U.S.C. § 1601) (stating that a major national goal was to “permit the health status of Indians to be raised to the highest possible level”).

³⁶⁹ See, e.g., *United States v. Dion*, 476 U.S. 734, 739–40 (1986) (holding that abrogation of a treaty by Congress requires clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.”); accord *United States v. Skeet*, No. 21-CR-00591 MV, 2022 WL 3701593, at *11 (D.N.M. Aug. 26, 2022) (holding that the Migratory Bird Treaty Act did not abrogate the Navajo treaty because the Act’s legislative history “reveals that Congress *never* specifically considered Native treaty rights” and there similarly is no mention of treaty rights in the statute itself).

abortion rights. Nonetheless, the most robust argument for preemption involves the employment of Tribal member medical providers.

c. *The Infringement Test*

The infringement test is separate from the preemption analysis,³⁷⁰ although *Castro-Huerta* seems to have combined them.³⁷¹ The infringement test questions whether the state law will infringe on reservation Indians' right to make their own laws and be ruled by them.³⁷² The importance of the infringement test has decreased over time, likely because the Court has come to define Tribal self-government more narrowly.³⁷³ Given that the preemption test would already bar state jurisdiction over a Tribal member having an abortion in an on-reservation clinic, the infringement test would appear to be unnecessary in that circumstance, particularly if the provider was also a Tribal member.³⁷⁴ Indeed, the Supreme Court has held that the infringement test is only applicable when state regulation of Indians includes some non-Indian involvement.³⁷⁵

Given this restriction, the infringement test has the most force in the abortion context where patients receiving abortions, while not actually Tribal members, are connected with the Tribe. For example, if the patient is a non-Tribal member who is a spouse, romantic partner, or child of a Tribal member, the infringement test could be helpful. In these circumstances, infringement should be considered an independent bar to state jurisdiction and therefore should reinforce the protection afforded under the preemption test. This is because issues that bear on family planning and childbearing have been recognized as extremely important to Tribal self-government.³⁷⁶ Congressional recognition of inherent Tribal jurisdiction over domestic partners

³⁷⁰ See CANBY, *supra* note 327, at 116–17.

³⁷¹ *Oklahoma v. Castro-Huerta*, No. 21-429, slip op. at 18 (June 29, 2022).

³⁷² *Williams v. Lee*, 358 U.S. 217, 220 (1959) (“Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.”).

³⁷³ CANBY, *supra* note 327, at 101.

³⁷⁴ See *supra* note 307 (citing 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 111, at § 6.03(1)(a)).

³⁷⁵ CANBY, *supra* note 327, at 114 (citing *McClanahan v. Arizona Tax Comm’n*, 411 U.S. 164 (1973)).

³⁷⁶ See, e.g., 25 U.S.C. § 1901(3) (recognizing that “there is no resource that is more vital to the continued existence and integrity of Indian Tribes than their children”). Additionally, the *Dobbs* Court’s concern about preserving a state’s ability to protect “fetal life,” *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392, slip op. at 23 (June 24, 2022), should ensure the benefit of preserving Tribes’ ability to weigh these interests when potential Tribal member and Tribal descendant children are at issue, in light of the ICWA’s recognition of the importance of Indian children to Indian Tribes. Even if a fetus, once born, would not be eligible for Tribal membership because of a lower than necessary blood quantum, there is the possibility of a Tribe changing its enrollment rules to be more inclusive. As scholars such as Neoshia Roemer have recognized, “[b]y instituting safeguards on Indian parents’ rights, ICWA has been a tool in the fight for reproductive justice for American Indians.” Roemer, *supra* note 66.

and romantic partners of Tribal members in some circumstances also supports the idea that state regulation of the on-reservation abortions of such persons would infringe Tribal self-government.³⁷⁷

Additionally, where patients are Tribal members or otherwise closely connected to the Tribe, the infringement test could be used to obviate the state regulation of medical providers, due to the integral role Tribal authority over family law issues plays in Tribal self-government.³⁷⁸ Regarding medical providers, an infringement argument is strongest when the patient is a Tribal member, or the fetus was a potential Tribal member.³⁷⁹ Nonetheless, as with issues of jurisdiction on reservations generally, there is much uncertainty about whether such arguments would succeed.³⁸⁰

The infringement test could also play a role if a state attempted to preclude a Tribal member who lived off-reservation and was a state resident from obtaining an on-reservation abortion.³⁸¹ While the infringement test has not, to the authors' knowledge, been explicitly applied in this context, case law supports Tribal authority in some circumstances to regulate members' off-reservation conduct based on their membership.³⁸² Abortion is an area of law where Tribal authority should be paramount. Moreover, because conflicting state and Tribal laws regarding abortion cannot realistically be applied to the same person,³⁸³ state regulatory jurisdiction in such circumstances should give way to Tribal jurisdiction.

³⁷⁷ See 25 U.S.C. § 1304 (2014) (regarding Tribal criminal jurisdiction over non-Indians for domestic violence, dating violence, and violations of protection orders).

³⁷⁸ See, e.g., *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) (defining "tribal self-government" to include "purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations"); COQUILLE TRIBAL CODE § 740.010 (2008) (describing the Tribe's marriage and domestic partnership code, which applies when at least one party is a Tribal citizen, as "deal[ing] with purely intramural relationships among persons who are recognized members of the Tribe's community").

³⁷⁹ See *supra* note 312 and 313 and accompanying text. This conclusion is also supported by the federal government's egregious historical practice of involuntarily sterilizing Native women, a history which underscores the need for recognition of Native women's sovereignty over their own bodies, rather than allowing further coercive regulation by state and federal governments. See, e.g., Genesis M. Agosto, *Involuntary Sterilization of Native American Women in the United States: A Legal Approach*, 100 NEB. L. REV. 995, 995–97 (2022).

³⁸⁰ Florey, *Budding Conflicts*, *supra* note 19, at 994.

³⁸¹ Cf. Jacobson, *supra* note 362 (discussing potential state attempts to extra-territorially penalize out-of-state abortions, including a pending Missouri bill that would be enforced through civil lawsuits).

³⁸² See, e.g., *Kelsey v. Pope*, 809 F.3d 849, 850 (6th Cir. 2016) (holding that the "tribe had inherent authority to prosecute tribal member for offense substantially affecting tribal self-governance interests, even when such offenses took place outside of Indian country"); *John v. Baker*, 982 P.2d 738, 743 (Alaska 1999) (holding that "the sovereign adjudicatory authority of Native tribes exists outside the confines of Indian country" and that Tribes "possess the inherent sovereign power to adjudicate child custody disputes between tribal members in their own courts").

³⁸³ See *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 339 (1983) (recognizing that the application of conflicting state and Tribal hunting and fishing laws to the same individual would create "an inconsistent dual system").

Enacting strong Tribal code provisions supporting abortion, including medication abortion, and tying the Tribe's authority over reproductive health to self-government³⁸⁴ would strengthen the Tribe's infringement arguments and could thereby help insulate the patient and provider from state regulation. Particularly for Tribal member patients and others who are closely connected to the Tribe, strong Tribal codes would evidence the Tribe's interest in regulating those patients' reproductive health. Allowing state regulation of Tribal citizens, whether in relation to accessing Tribally-sanctioned in-clinic abortion care or to ingesting FDA-approved drugs within Indian country in consonance with Tribal law, would infringe on the rights of reservation Indians to make their own laws and be ruled by them.

Whether a Tribe operating an abortion clinic could protect patients and providers from state civil liability under the preemption or infringement tests is very uncertain. Limiting patients to those who receive other medical services from the Tribe or IHS likely creates the strongest arguments for avoiding state regulation of patients. Whether state regulation of medical providers could be avoided is even more uncertain. The licensing laws of the state in which such providers are licensed and the abortion laws of the state in which the applicable reservation is located will be integral parts of such an analysis.

V. A TRIBAL ROADMAP FOR BODILY AUTONOMY AND ABORTION CARE

Tribal sovereignty is a right and an obligation. Tribes often face difficult questions about how to balance the need to advance and codify internal policy objectives with concerns about external perceptions, including those of other governments, and whether those perceptions will lead to backlash.³⁸⁵ Tribes are particularly vulnerable to backlash, which could come from courts, state and federal legislatures, and executive agencies.³⁸⁶ Additionally, in light of jurisdictional uncertainties and overlap, Tribes often work very

³⁸⁴ In the same-sex marriage context, some tribes enacting marriage ordinances allowing for same-sex marriage before the United States Supreme Court had upheld same-sex marriage took care to define their marriage ordinances as pertaining to "purely intramural matters," apparently in an attempt to protect them from legal challenges. See Ann E. Tweedy, *Tribal Laws & Same-Sex Marriage: Theory, Process, and Content*, 46 COLUM. HUM. RTS. L. REV. 104, 113–15 (2015) (citing and discussing Suquamish Tribal Code tit. 9, § 9.1.1 (2011) and Coquille Indian Tribal Code § 740.010 (2008)).

³⁸⁵ See, e.g., Tweedy, *Indian Tribes and Gun Regulation*, *supra* note 16, at 902–04; Ann E. Tweedy, *Tribes, Firearm Regulation, and the Public Square*, 55 U.C. DAVIS L. REV. 2625, 2656–57 n.135 (2022); Florey, *Budding Conflicts*, *supra* note 19, at 1009–10 (describing likelihood of tribal-state friction and its negative effects in the marijuana policy context).

³⁸⁶ See, e.g., ANDERSON ET AL., *supra* note 236, at 978; Tweedy, *Tribes, Firearm Regulation, and the Public Square*, *supra* note 385, at 2637; Edward D. Gehres III, Note, *Visions of the Ghost Dance: Native American Empowerment and the Neo-Colonial Impulse*, 17 J.L. & POL. 135, 149–50 (2001).

hard to forge strong intergovernmental relationships,³⁸⁷ which could be difficult in the abortion context.

Yet reproductive health care for Tribal members and others has become increasingly crucial in light of widespread state restrictions and outright bans on abortion.³⁸⁸ There is an urgent need for culturally appropriate care.³⁸⁹ The continuing epidemic of sexual assault against Native women also makes access to abortion critical for Native women who wish to access it.³⁹⁰ Even if a Tribe does not find it feasible or desirable to directly support or provide abortion services, a Tribe may have a variety of important reasons to adopt constitutional provisions or enact legislation relating to the reproductive rights of individuals within the Tribe's jurisdiction, including in order to assert the Tribe's sovereignty.³⁹¹

This Part will provide guidance for situations where a Tribe, in the exercise of its sovereignty, explores one or all of the following avenues: (1) a Tribally-supported abortion service; (2) Tribal legislation to enunciate public policy on issues of bodily autonomy; (3) regulation of medication abortion; and (4) regulation of private abortion providers within Tribal territory.

A Tribe will need autonomous, non-federal funding so long as the Hyde Amendment is still in place. A Tribe will need to demonstrate support for abortion care through comprehensive legal protections, either by constitution or statute, to ensure a right to abortion. It will also need to establish a comprehensive health-care code that contemplates licensing, health privacy, liability, and culturally literate care and support services. A Tribe will need to consider whether it will administer or manage the health facility that provides the care or support an independent entity to do so. The former option may provide more protections in the event that a state sought to impose its abortion prohibition. The Tribe must additionally consider the likelihood of anti-abortion protests and prepare for provider and patient safety.

³⁸⁷ See Matthew L. M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 124–25 n.14 (2006) (listing examples of tribal-state intergovernmental agreements); see also Florey, *Budding Conflicts*, *supra* note 19, at 1010–11 (noting possibility of intergovernmental agreements in marijuana context); Tweedy, *Indian Tribes and Gun Regulation*, *supra* note 16, at 903 (discussing possibility of cross-deputization in gun regulation context).

³⁸⁸ See Zoe Manzanetti, *Abortion Map 2022: U.S. State Laws After Overturning Roe*, GOVERNING (July 20, 2022), <https://www.governing.com/now/abortion-map-2022-state-laws-after-overturning-roe> [<https://perma.cc/L464-SDQT>].

³⁸⁹ See S.D. ADVISORY COMM. TO U.S. COMM'N ON CIV. RTS., *supra* note 329, at 52 (discussing the importance of culturally appropriate care for Native women in the birthing context).

³⁹⁰ See NAT'L CONG. OF AM. INDIANS POL'Y RSCH. CTR., RESEARCH POLICY UPDATE: VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN 1–2 (2018), https://www.ncai.org/policy-research-center/research-data/prc-publications/VAWA_Data_Brief_FINAL_2_1_2018.pdf [<https://perma.cc/Q8X2-LPS7>].

³⁹¹ Cf. Florey, *Budding Conflicts*, *supra* note 19, at 995 (“Although tribal council members saw the [marijuana resort] venture as potentially profitable, they also supported it as an assertion of tribal power and autonomy.”).

One thing is clear: money alone cannot solve the complex issues Tribes now face as they address, or choose not to address, access to abortion care. Each of the four options listed above will be contingent on Tribe-specific legal and political circumstances that are unique to each community. There is no one-size-fits-all model for a Tribal reproductive rights strategy. Courageous leadership, exceptional lawyering, and thoughtful planning will be required at every decision point, particularly given the high stakes involved.

This Part first discusses constitutional amendments and statutory law. It next offers considerations for a Tribal judiciary. It concludes by discussing the practical issues of financing, tort liability, and anti-abortion protests and violence.

A. The Role of Tribal Legislation and Constitutional Provisions

Tribes considering opening clinics or providing other types of support for abortion care should enact strong Tribal code provisions supporting a right to reproductive health and tying the protection of such rights to Tribal self-government. Constitutional pronouncements or legislative enactments may fall anywhere on the continuum, from statements of public policy supporting bodily autonomy to other definitional pronouncements on personhood and on when rights of Tribal citizenship/membership³⁹² arise, whether at the natural birth of a baby or at some time in fetal development. Many areas of pre-existing³⁹³ Tribal codes are ripe for development on these issues. Health and welfare code provisions should address health-care privacy rights for individuals to make decisions with their health-care providers without government intervention with respect to either party. Such a provision would serve as a jurisdictional marker that, while it might be criminalized by the surrounding state, such a decision is neither subject to criminal sanctions nor civil liabilities inside the Tribe's jurisdiction. Such clarity within Tribal law, at least as it pertains to Tribal citizens, could prove helpful in limiting state law infringement on Tribal legislative determinations.

Some Tribal nations have existing statutory provisions that align with the principle of a fundamental right to privacy. For example, the Navajo Nation Bill of Rights includes the following language:

(1) The enumeration herein of certain rights, shall not be construed to deny or disparage others retained by the people . . .

³⁹² Tribal membership is a core power of self-government, long held to be within the exclusive purview of the Tribe. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978). Tribes may use the terms "membership" or "citizenship," which carry the same weight for purposes of tribal sovereignty.

³⁹³ Tribes derive their inherent sovereign powers, in part, from their immemorial, pre-constitutional exercise of that sovereignty. As a recognition of the customs, traditions, and other laws that Tribes have long practiced, many of which have been lost, and many of which are being re-recognized, we note that Tribal codes reflect both novel as well as revived Tribal values.

(3) Life, liberty, and the pursuit of happiness are recognized as fundamental individual rights of all human beings. Equality of rights under the law shall not be denied or abridged by the Navajo Nation on account of sex nor shall any person within its jurisdiction be denied equal protection in accordance with the laws of the Navajo Nation, nor be deprived of life, liberty or property, without due process of law.³⁹⁴

According to the Navajo Nation Supreme Court, “Navajo law has self-imposed limitations upon the legislative and executive branches, and it recognizes basic and enforceable Navajo human rights.”³⁹⁵

Legislation and Tribal Council Resolutions are also mechanisms for the Tribe to codify cultural norms, particularly when those norms differ from the surrounding state laws. For instance, a Tribe with a strong matrilineal culture could formally adopt a policy statement that sets forth how that translates into individual rights of women in today’s society. We suggest the following language:

Whereas, this Tribe has been a matrilineal society since time immemorial; and
 Whereas, no individual or government can make laws that infringe on the rights of woman and her bodily autonomy.
 Be it resolved that the Tribe hereby recognizes the right of all women to make all reproductive decisions for herself without the intrusion of any government.
 Be it further resolved that the Tribe will not recognize the application of any criminal law or civil penalty as to a woman’s exercise of her reproductive decisions.”

Resolutions might also consider domesticating international law with statements such as:

Whereas, the United Nations has adopted the United Nations Declaration of Rights of Indigenous Peoples (UNDRIP) as a framework of minimum standards for the survival, dignity and well-being of Indigenous peoples including the human rights and fundamental freedoms of Indigenous people and Indigenous Nations governments.
 Whereas, the UNDRIP recognizes this Tribe’s right to self-determination (Article 3) and right to autonomy and self-governance (Article 4).”
 Whereas, the UNDRIP recognizes this Tribe’s right and the rights of Native individuals ‘not to be subjected to forced assimilation or destruction of their culture’ (Article 8) and the right to practice and

³⁹⁴ NAVAJO NATION CODE ANN. tit. 1, §§ 1, 3 (2014).

³⁹⁵ Bennett v. Navajo Bd. of Election Supervisors, 6 Navajo Rep. 319, 323 (1990).

revitalize cultural traditions, including the right to maintain and protect their lifeways.

Be it resolved, that subject to the Tribe's laws and international law, no foreign government or Tribal entity shall extend criminal laws or civil sanctions as to a women's right to bodily autonomy.

Going beyond policy statements or codifying customary law on issues of bodily autonomy, Tribes should consider providing for express individual rights through legislation and/or constitutional amendments to protect Tribal citizens from outside intrusion. As discussed above, a lack of on-point Tribal law may lead to harmful findings in infringement or preemption cases, or even the import of state laws in future federal prosecutions of Native persons under the Assimilative Crimes Act. Conceivably, a Tribal court could rely on imported state law in the absence of Tribal law pertaining to reproductive rights as well.

Tribes should consider embedding the following express rights for Tribal citizens and others within the Tribe's jurisdiction either by legislation or constitutional provisions: (1) right to privacy that includes health-care decisions and reproductive decisions; (2) a stand-alone right to health care; and (3) a stand-alone right to reproductive freedom. A Tribal Nation could amend its constitution as necessary to ensure that pregnancy termination is recognized as a fundamental right under Tribal law. Several Tribal nations already have constitutional provisions that invoke a fundamental right to privacy. For example, the Gila River Constitution states, "No person shall be disturbed in his *private* affairs, or his home invaded, without authority of law."³⁹⁶ The Constitution of the Village of Bill Moore's Slough, in Alaska, contains ample language upon which a Tribal court could rely to support a fundamental right to abortion:

A) The Bill Moore's Slough Elders Council shall pass no laws jeopardizing certain freedoms and rights deemed to be given our people by our people's creator.

Amongst these freedoms and rights are:

- A. The freedom to government by and for the people.
- B. The right to speak one's Conscience.
- C. The right to an education relevant to one's way of life.
- D. *Freedom from want, hunger, pain and fear.*
- E. *The right to liberty.*
- F. The right to be Yupik.

³⁹⁶ CONSTITUTION & BYLAWS OF THE GILA RIVER INDIAN COMMUNITY, ARIZONA, art. IV, § 4 (1960) (emphasis added).

- G. All rights guaranteed by Federal law including but not limited to Title II of the Indian Civil Rights Act of 1968.³⁹⁷

Even with the statutory or constitutional protections outlined above, Tribal courts will have a role in interpreting the scope of these protections, as discussed below.

B. Tribal Jurisprudence

Tribes have numerous sources of law to consider in their jurisprudence. Tribal constitutions, code, resolutions, and customary law are all binding to various degrees. Tribes can, and frequently do, borrow from federal statutes and case law, state statutes and case law, other Tribal statutes and case law, as well as international norms. Yet while federal and state law can be persuasive in many instances, Tribal judiciaries should reflect on their choice of law hierarchies to fully consider the extent to which *Roe*, *Dobbs*, international law, and customary law impacts their legal analyses regarding fundamental reproductive rights under Tribal law. Tribal legislatures provide for many different hierarchies and procedures in their choice-of-law provisions, which may be located in their constitutions³⁹⁸ or in their codes.³⁹⁹

³⁹⁷ LAND POLICY & CONSTITUTION OF THE PEOPLE OF BILL MOORE'S SLOUGH, art. II (1988) (emphasis added).

³⁹⁸ See, e.g., CONSTITUTION OF THE SIPAYIK MEMBERS OF THE PASSAMAQUODDY TRIBE, art. VIII, § 1(c) (2003) (authorizing the tribal court to resolve civil disputes “to the extent consistent with applicable tribal laws, ordinances, customs, and usages, as well as applicable provisions of federal Indian law . . . in accordance with any corresponding provisions of the applicable civil laws and remedies of the State of Maine”).

³⁹⁹ See, e.g., PUEBLO DE SAN ILDEFONSO CODE, § 1.1.3.010 (1984) (“This Code shall be interpreted pursuant to the traditions and customs of the San Ildefonso Tribe . . . If none such exists, then the Court may use applicable federal and state case law and statutory law, adopting those principles and procedures not in conflict with the laws, customs and traditions of the Pueblo of San Ildefonso.”); WHITE EARTH BAND OF CHIPPEWA JUDICIAL CODE, ch. VII, § 6 (2021) (“In the event the Court follows tribal custom or traditional law, such law, tradition or custom shall be reduced to writing with a historical justification therefore,” and if there is not applicable Tribal law, “the court may apply statutes, regulations and case law of any tribe or the federal government or of any state.”); LITTLE RIVER BAND OF OTTAWA INDIANS TRIBAL CODE, ch. 300, tit. 01, art. IX § 9.02 (2018) (“Any matters not covered by the laws or regulations of the Little River Band of Ottawa, or by applicable federal laws or regulations, may be decided by the Courts according to the laws of the State of Michigan.”); BAY MILLS TRIBAL COURT CODE ch. IV, § 401A (“In all civil actions, the Tribal Court shall apply the applicable laws of the United States, any authorized regulations of the Department of the Interior which may be applicable, any ordinance of the Bay Mills Indian Community, and any custom of the Chippewa Tribe not prohibited by the laws of the United States.”); MATCH-E-BE-NASH-SHE-WISH BAND OF POTAWATOMI INDIANS JUDICIAL ORDINANCE, ch. VII, § 6(a) (2012) (“In all civil actions the Tribal Court shall apply this Ordinance, all amendments thereto, all tribal laws enacted hereafter and all customs and usages of the Tribe.”).

1. *Tribal Common Law*

The reasoning of *Roe v. Wade* was predicated on the right to *privacy*, through an analysis of a “penumbra” of rights enshrined in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the U.S. Constitution, ultimately resting on the Fourteenth Amendment right to due process.⁴⁰⁰ While the term “privacy” does not appear in the Constitution, the birth control cases⁴⁰¹ and *Roe* were largely based on these principles. Because the right to privacy was considered a “fundamental right,” the *Roe* court determined that due process required a finding of a compelling state interest to justify laws prohibiting abortion.⁴⁰²

However, privacy as a fundamental right was, and is, understood as Tribal common law without requiring a constitutional analysis, or even a constitution at all. For example, Navajo jurists note, “The maxim which expresses Navajo individuality and freedom is, ‘It’s up to him.’ Navajos believe in a greater degree of freedom than the Western concept of individuality, but individuality is still exercised in the context of the well-being of the group.”⁴⁰³ While this principle has not been fully codified,

. . . [T]he right to privacy under Navajo common law was asserted in an opinion of the solicitor to the Navajo Nation Supreme Court to support the opinion’s conclusion that random alcohol testing as a condition of parole or probation was illegal. The opinion cited Associate Justice Homer Bluehouse as “a recognized expert on Navajo traditional law” for the proposition that all persons, including criminals, were traditionally accorded at least a minimal right to privacy under Navajo common law. The right to privacy of parolees and probationers, the opinion found, could not be unreasonably infringed upon.⁴⁰⁴

This same principle of autonomy is found in other cultures: “[A]mong Pueblo groups like the Hopi and Zuni, adults are ultimately free to act as they see fit and are not to be judged by other humans for their actions . . . In Hopi, this respect for individual freedom is expressed by the phrase ‘*Pi um*

⁴⁰⁰ *Roe v. Wade*, 410 U.S. 113, 152–54 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392.

⁴⁰¹ *Id.* at 152–53 (listing cases implicating a right to privacy).

⁴⁰² *Id.* at 155–56.

⁴⁰³ James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT’L & COMPAR. L. REV. 55, 77 (1997).

⁴⁰⁴ Daniel L. Lowery, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969-1992*, 18 AM. INDIAN L. REV. 379, 427 (1993).

pi' — ‘Really, it’s [up to] you.’”⁴⁰⁵ Rights to privacy have also been articulated in cases regarding family law and criminal laws.⁴⁰⁶

2. *Indian Civil Rights Act*

In 1968, Congress passed the Indian Civil Rights Act (ICRA), which requires Tribal nations to abide by some of the Anglo-American language enshrined in the Bill of Rights of the federal Constitution.⁴⁰⁷ While representing an intrusion into Tribal self-government, ICRA may provide another avenue for Tribal judges to support the fundamental principles of bodily autonomy and privacy identified in *Roe*.⁴⁰⁸

ICRA is not an exact replica of the Bill of Rights, but it includes many of the provisions relied upon in *Roe*. The ICRA right to equal protection mirrors the last clause of the Fourteenth Amendment: “No Indian Tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.”⁴⁰⁹ ICRA also includes language that corresponds to the “penumbra” of rights identified in *Roe*, including language found in the First, Fourth, and Fifth Amendments.⁴¹⁰ While there is no Ninth Amendment language in ICRA, several Tribal nations have codified such language into their own Tribal constitutions.⁴¹¹

ICRA creates an opportunity for Tribal support for reproductive rights because “[n]any tribal courts have held that Tribes have greater flexibility in applying principles of due process as found in ICRA than do state and federal courts in applying principles of due process found in state and fed-

⁴⁰⁵ JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 244 (2nd ed. 2010).

⁴⁰⁶ See, e.g., In regard to the Welfare of C.W., No. TUL-CiJ-2/96-472 at *121 (Tulalip Tribal Court of Appeals, Sept. 9, 1996) (finding that the biological mother had a “fundamental liberty and privacy interest in care and custody of [her] children”) (citation omitted). Generally, “provisions of the Constitution of the United States have no application to Indian nations or their governments,” *Groundhog v. Keeler*, 442 F.2d 674, 681 (10th Cir. 1971), but ICRA language parallels the language in the Fourth Amendment, *Southern Ute Tribe v. Pena*, No. 17-APP-160 at *12–13 (Southern Ute Tribal Court of Appeals, Mar. 26, 2018) (finding police search not justified by Tribe’s probable cause standard by comparing ICRA language to that of the Fourth Amendment).

⁴⁰⁷ Indian Civil Rights Act, 25 U.S.C. §§ 1301–1304 (1968).

⁴⁰⁸ See Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 *FORDHAM L. REV.* 479, 483 (2000) (noting that “each tribe’s courts are empowered to provide their own interpretations of ‘due process,’ ‘equal protection,’ ‘search and seizure,’ and the like, without review from federal courts,” which results in “due process mean[ing] one thing in Manhattan, another in the 25,000 square miles of Navajo land, and yet something else on the Winnebago reservation”).

⁴⁰⁹ 25 U.S.C. § 1302(a).

⁴¹⁰ *Id.*

⁴¹¹ See, e.g., Tweedy, *Indian Tribes and Gun Regulation*, *supra* note 16, at 902–04; Tweedy, *Tribes, Firearm Regulation, and the Public Square*, *supra* note 385, at 2637, 2656–57 n.135; Florey, *Budding Conflicts*, *supra* note 19, at 1009–10; ANDERSON ET AL., *supra* note 236, at 978; Gehres, *supra* note 386, at 149–50.

eral constitutions.⁴¹² The U.S. Supreme Court has also supported the right of Tribal nations to interpret ICRA on their own terms.⁴¹³ Thus, ICRA may provide an opportunity for Tribal courts to identify a *Roe*-like fundamental right to privacy through their own interpretations of ICRA's terms, despite the new interpretation of federal abortion rights in *Dobbs*. Moreover, Tribal courts could consider protecting abortion rights through the equal protection language of the Fourteenth Amendment, which Ruth Bader Ginsburg (before joining the U.S. Supreme Court) had argued would be a more solid foundation for abortion rights.⁴¹⁴ Tribal courts without ready access to relevant Tribal common law, Tribal constitutional law, or Tribal statutory law could therefore interpret one or more of the rights in ICRA, such as due process and equal protection, in accord with the Tribe's custom and tradition to recognize a fundamental right to reproductive autonomy.

3. *International Law*

Abortion rights are human rights, increasingly supported under international law.⁴¹⁵ Reproductive justice specifically prioritizes reproductive rights for marginalized women, including their practical capacity to meaningfully access reproductive care.⁴¹⁶ The 1994 International Conference on Population and Development produced guiding principles that focused on gender equality and "the empowerment of women."⁴¹⁷ A year later, the Fourth World Conference on Women brought further attention to women's rights and reproductive rights, for the first time referring to abortion explicitly.⁴¹⁸

⁴¹² Robert J. McCarthy, *Civil Rights in Tribal Courts: The Indian Bill of Rights at Thirty Years*, 34 IDAHO L. REV. 465, 496 (1998).

⁴¹³ See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62–72 (1978); see also Tweedy, *Tribes, Firearm Regulation, and the Public Square*, *supra* note 384, at 148–50 (explaining that "tribes are not required under federal law to interpret the rights included in the ICRA in the same ways as the corresponding constitutional rights are interpreted" and that, "to preserve tribal sovereignty and tribal cultures, tribes are empowered to interpret the rights based on their own cultures and traditions").

⁴¹⁴ See generally Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985) (critiquing the decision in *Roe* for declining to discuss sex equality considerations).

⁴¹⁵ Rachel Rebouché, *Reproducing Rights: The Intersection of Reproductive Justice and Human Rights*, 7 U.C. IRVINE L. REV. 579, 581, 603–08 (2017) (examining the intersection of the abortion rights movement and international law, but also noting the potential limitations of human rights to sufficiently respond to deep inequalities of income and socioeconomic status in the delivery of health care).

⁴¹⁶ *Id.* at 580.

⁴¹⁷ INT'L CONF. ON POPULATION & DEV., REPORT OF THE INTERNATIONAL CONFERENCE ON POPULATION AND DEVELOPMENT, at 12, U.N. DOC. A/CONF.171/13/REV.1, U.N. Sales No. 95.XIII.18 (1994) ("Advancing gender equality and equity and the empowerment of women, and the elimination of all kinds of violence against women, and ensuring women's ability to control their own fertility, are cornerstones of population and development-related programmes.").

⁴¹⁸ Rebouché, *supra* note 415, at 583.

The 1979 Committee on the Elimination of Discrimination against Women Convention (CEDAW Convention) is a near-universal treaty with 189 States as parties, and it is the only human rights treaty to mention family planning.⁴¹⁹ Following the *Dobbs* decision, the U.N. Women's Rights Committee urged the United States to adhere to the CEDAW Convention, which the United States signed in 1980 but never ratified.⁴²⁰ In its plea, the Committee interpreted the CEDAW Convention as supportive of reproductive autonomy. Specifically, Article 12 includes the right to bodily autonomy, encompassing reproductive freedom.⁴²¹ Additionally, Article 16(e) protects women's rights to decide freely on the number and spacing of their children, and to have access to the information, education, and means to exercise these rights.⁴²²

As international law has embraced reproductive rights, it has also uplifted Indigenous rights. International law, therefore, offers a robust source of persuasive authority that highlights the importance of bodily autonomy and the importance of the collective in protecting that autonomy. Tribal nations may choose to rely on international law, namely the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration), which uplifts Indigenous rights as human rights.⁴²³ International instruments, including both the CEDAW Convention and the Declaration, promote bodily integrity and the right to life as protective of reproductive liberties.⁴²⁴ Particularly in light of colonial policies, like forced sterilization, aimed at the restriction of Indigenous reproduction, these international instruments call for the right of Indigenous people to reproductive liberty. Consider the following Declaration provisions:

- Article 7: "Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person."⁴²⁵

⁴¹⁹ Convention on the Elimination of Discrimination against Women art. 12, Sept. 3, 1981, 1249 U.N.T.S. 13 ("State Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.").

⁴²⁰ Press Release, U.N. Committee on the Elimination of Discrimination against Women, Access to Safe and Legal Abortion: Urgent Call for United States to Adhere to Women's Rights Convention (July 1, 2022), www.ohchr.org/en/statements/2022/07/access-safe-and-legal-abortion-urgent-call-united-states-adhere-womens-rights [https://perma.cc/78BV-7FUP]. The Committee notes that, due to the United States' failure to ratify the instrument, they are one of only seven countries that are not parties to the CEDAW Convention, joined by Iran, Palau, Somalia, Sudan, Tonga, and the Holy See. *Id.*

⁴²¹ 1249 U.N.T.S. 13, *supra* 419, at art. 12.

⁴²² *Id.* at art. 16(e).

⁴²³ G.A. Res. 61/295, *supra* note 49, at annex.

⁴²⁴ International instruments have interpreted the phrase "right to life" in terms of bodily autonomy, security, and dignity, while some U.S. groups use the same phrase to advocate for abortion restrictions, including within a fetal personhood framework. International law scrutinizes abortion regulations that violate the right to life of a pregnant person. U.N. Human Rights Committee, General Comment No. 36, ¶¶ 2, 8 CCPR/C/CG/36 (Sept. 3, 2019).

⁴²⁵ G.A. Res. 61/295, *supra* note 49, art. 7.

- Article 21: “Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including . . . health . . . States shall take effective measures . . . [with] [p]articular attention . . . to the rights of . . . women.”⁴²⁶
- Article 22: “[I]ndigenous women and children [shall] enjoy the full protection and guarantees against all forms of violence and discrimination.”⁴²⁷
- Article 24: “1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices . . . Indigenous individuals also have the right to access, without any discrimination, to all social and health services. 2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.”⁴²⁸
- Article 44: “All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.”⁴²⁹

The United States expressed its support for the Declaration in 2010, and a number of Tribal nations have done the same.⁴³⁰ Provisions of the Declaration could be relied upon by a Tribal nation to establish a right to abortion as a matter of Tribal law. The Muscogee Nation has adopted the Declaration in its entirety.⁴³¹ Tribal incorporation of the provisions in the Declaration also supports sovereignty more generally, including the rights of Indigenous Peoples to self-determination, which further encompasses the rights to maintain their own institutions, their own cultures, and their own laws, customs, and traditions.⁴³²

In October 2022, the CEDAW Convention issued General Recommendation No. 39 on the rights of Indigenous women and girls.⁴³³ The General

⁴²⁶ *Id.* at art. 21.

⁴²⁷ *Id.* at art. 22.

⁴²⁸ *Id.* at art. 24.

⁴²⁹ *Id.* at art. 44.

⁴³⁰ See Remarks by the President at the White House Tribal Nations Conference, 2010 DAILY COMP. PRES. DOC. (Dec. 16, 2010); U.S. Dep’t of State, *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples: Initiatives to Promote the Government-to-Government Relationship and Improve the Lives of Indigenous Peoples* (Jan. 12, 2011), <https://2009-2017.state.gov/s/srgia/154553.htm> [<https://perma.cc/4CCK-Z44P>]; see also TRIBAL IMPLEMENTATION TOOLKIT, PROJECT TO IMPLEMENT THE U.N. DECLARATION ON RTS. OF INDIGENOUS PEOPLES (2021), <https://un-declaration.narf.org/wp-content/uploads/Tribal-Implementation-Toolkit-Digital-Edition.pdf> [<https://perma.cc/S3TN-KAXZ>] (naming Tribes that have endorsed, wholly adopted, or otherwise implemented specific subject provisions of the Declaration).

⁴³¹ TRIBAL IMPLEMENTATION TOOLKIT, *supra* note 430, at 15.

⁴³² *Id.* at 14.

⁴³³ Convention on the Elimination of All Forms of Discrimination against Women, General Recommendation No. 39 (2022) on the Rights of Indigenous Women and Girls, CEDAW/C/GC/39 (Oct. 26, 2022).

Recommendation provides guidance to nation states on the implementation of CEDAW specifically in relation to the rights of Indigenous women and girls, recognizing the confluence of human rights and Indigenous rights, including the need to understand both the individual and collective dimension.⁴³⁴ The guidance specifically recommends that nation states ensure Indigenous women and girls receive reproductive health services, including abortion services.⁴³⁵ Notably, in regards to health care, the guidance also recommends that health services respect the free, prior, and informed consent of Indigenous people; that it be delivered through a gender and intercultural perspective; that it include steps to prevent gender-based violence and discrimination; and that Indigenous “health systems, ancestral knowledge, practices, sciences, and technologies” are ensured.⁴³⁶

C. Infrastructure Considerations

1. In-Clinic Abortion Services

If a Tribe is willing to offer abortion services, but limits them to services offered by Tribal member medical providers to on-reservation Tribal members, a Tribe could likely succeed in a preemption analysis and avoid civil regulation by the state of patients and medical providers. As long as the Tribe is not located in a Public Law 280 state, it could likely also avoid state criminal regulation. Logistically, such an exclusive clinic would likely be available only to very large Tribes that can justify (and fund) the institutional expense to service their members. Tribes located in states where state criminal laws are broadly applicable on reservations under Public Law 280 or a similar federal law must analyze whether any criminal sanctions in a state abortion law are part of a civil regulatory or criminal prohibitory scheme to determine if the criminal sanctions would apply to Natives in such circumstances.⁴³⁷ Uncertainties arise if the Tribal clinic employs medical providers who are licensed in anti-abortion states or if the state of a nonmember patient’s domicile attempts to enforce its abortion restrictions extra-territorially.⁴³⁸

⁴³⁴ *Id.* at ¶ 17.

⁴³⁵ *Id.* at ¶ 52.

⁴³⁶ *Id.*

⁴³⁷ *See, e.g.,* California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207–10; *see also* Ysleta del Sur Pueblo v. Texas, No. 20-493 (June 15, 2022) (applying *Cabazon*’s regulatory and prohibitory distinction).

⁴³⁸ *See, e.g.,* Jacobson, *supra* note 362 (discussing potential state attempts to extra-territorially penalize out-of-state abortions, including a pending Missouri bill that would be enforced through civil lawsuits); *see* Kimball, *supra* note 185; David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. (forthcoming 2023).

2. *In-Clinic Abortion Services to Non-Tribal Members*

The Tribe may also seek to serve off-reservation Tribal members and non-Tribal members—for example, those who are partnered with Tribal members, are children of Tribal members, or who are otherwise a part of Tribal families. Given the preemption and infringement analyses, Tribes will need to weigh the risk they are incurring as to state regulation of patients. Since the patients would potentially be the ones regulated and facing penalties, rather than the Tribe itself, the Tribe could conceivably take the position that any patients who take advantage of abortion services assume their own risks.⁴³⁹ On the other hand, some Tribes may be hesitant to provide health-care services to those who face potentially severe legal consequences for receiving them.

3. *Medication Abortion*

In general, a Tribe may find it more feasible to support medication abortion services rather than in-clinic abortions. Medication abortion is accomplished through ingestion of pills containing the drugs mifepristone and misoprostol.⁴⁴⁰ Tribes wishing to support medication abortions would not necessarily need to establish clinics and hire providers. A Tribe can provide support for Tribal members and those closely connected to the Tribe who seek abortion medication through telehealth services, particularly since the FDA's recent announcement that mifepristone can now be accessed at retail pharmacies.⁴⁴¹ While abortion pills can also be obtained by mail from other countries, to do so violates FDA rules and poses risks that the medicine may be other than what it purports to be.⁴⁴² Because the FDA allows patients to receive abortion medication through telehealth services but requires the provider to be certified by the FDA, under current law, patients must utilize United States-based providers.⁴⁴³ To support telehealth access to medication

⁴³⁹ Although current state laws generally do not target women who have abortions for prosecution, such women have nonetheless been targeted by law enforcement in some instances and referred for prosecution. See Kimball, *supra* note 185; Ava Sasani, *Are Abortion Medications Delivered by Mail Illegal?*, N.Y. TIMES (June 24, 2022), <https://www.nytimes.com/article/medical-abortion-mifepristone-misoprostol-illegal.html> [<https://perma.cc/42A3-9AJQ>]. Moreover, it seems likely that state laws will gradually become more draconian as abortion restrictions prove difficult to enforce. As noted above, we already see states considering and attempting to pass laws restricting pregnant women's right to travel. Jacobson, *supra* note 362. The move to deny pregnant women the right to travel contemplates a serious incursion on their constitutional rights, and it can only be assumed that attempts at even harsher measures are likely to follow.

⁴⁴⁰ See *supra* notes 98–104.

⁴⁴¹ See, e.g., Kimball, *supra* note 185 (describing potential legal issues relating to seeking abortion medications by mail); Sasani, *supra* note 440 (same); *Information about Mifepristone*, *supra* note 99.

⁴⁴² See Kimball, *supra* note 185.

⁴⁴³ See *Mifeprex (Mifepristone) Information*, *supra* note 352; Kimball, *supra* note 185.

abortion, a Tribe should enact a Tribal code authorizing those persons under its jurisdiction to receive abortion medication through telehealth services and proactively authorize abortion under Tribal law, strengthening preemption and infringement arguments and helping to insulate the patient and provider from state regulation. However, because the medical provider must be licensed, they will still face threats of state regulation, including attempts to revoke their license, particularly if they are licensed in an anti-abortion state. Additionally, states may ultimately attempt to hold the person who receives an abortion liable or prosecute them.⁴⁴⁴

4. *Health-Care Administration*

Tribal member medical providers are the safest choice in regard to preemption and infringement analyses. However, few Tribes enjoy a sufficiently robust pipeline of trained Tribal members to satisfy all of their employment needs.⁴⁴⁵ Therefore, hiring nonmember providers is likely necessary to provide abortion care for many Tribes. Yet, surrounding states that restrict abortion are likely to target such providers for civil or criminal liability, or revocation of their medical license or other health-care license.⁴⁴⁶ As explained above, the Tribe has a stronger infringement argument in cases where the patient is a Tribal member or otherwise closely related to the Tribe, even if the provider was a nonmember.

Tribal 638 facilities operating within their 638 contract are also covered within the scope of the Federal Tort Claims Act.⁴⁴⁷ Under this law, the federal government agrees to be sued directly for malpractice that occurred under the scope of employment.⁴⁴⁸ Thus, I/T/U providers do not need to maintain malpractice insurance.⁴⁴⁹ However, for abortion care that falls outside the construct of a 638 facility, Tribal providers will no longer have the benefit of protection from the Act and could be directly exposed to tort liability. This could serve as an opening for the application of state law. Tribes can be protected from tort liability through the doctrine of sovereign

⁴⁴⁴ See S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021); see also Levin, *supra* note 350 (describing a California case in which a woman was charged for a stillbirth suspected to have been caused by drug abuse and was jailed for sixteen months before the charges against her were dismissed). Pre-*Roe*, there was at least one prosecution of a woman for having an abortion in the United States. See MEIER & GEIS, *supra* note 2, at 154.

⁴⁴⁵ See, e.g., Fletcher, *Tribal Employment Separation*, *supra* note 314, at 286 (noting that Tribes “employ increasing numbers of non-Tribal members”).

⁴⁴⁶ See, e.g., Kimball, *supra* note 185 (noting that if a telehealth provider in a state where abortion is legal serves a patient in a state where abortion is illegal, that provider could be subject to criminal prosecution by the patient’s state and potential revocation of his or her license).

⁴⁴⁷ 25 U.S.C. § 5321(d) (1975) (amended 2020); 25 U.S.C. § 458aaa-15.

⁴⁴⁸ *Id.*

⁴⁴⁹ Memorandum from Richard D. Olson, M.D., M.P.H., Acting Director, Off. of Clinical & Preventive Serv., Indian Health Serv., on FTCA Coverage Compared to Malpractice Insurance (June 3, 2018), <https://www.ihs.gov/riskmanagement/resources/memo01/> [<https://perma.cc/J3GA-2CQJ>].

immunity; however, this protection extends to Tribes as governments and individual Tribal leaders and staff may remain exposed.⁴⁵⁰ Some research shows that access to malpractice insurance can be a barrier to providing abortion care.⁴⁵¹

A comprehensive abortion-care code could also support the implementation of a Tribe's abortion program as well as support Tribal interests in a jurisdictional conflict. The Swinomish Tribe, in establishing a dental health provider code,⁴⁵² offers one of the few examples of a Tribe regulating in health-care licensing and liability to expand health services for its citizens while insulating itself from state jurisdiction. The code was passed when the Tribe sought to improve dental care access by establishing a dental health aide education and licensing program. The state of Washington did not recognize dental health aid in its health-care licensing code at the time. To establish the program, which was outside the scope of their ISDEAA contract, it established a comprehensive licensing and liability code.⁴⁵³ A comprehensive abortion code should also include health data privacy protections to ensure that patient information is secure and protected.⁴⁵⁴

In the context of ensuring a Tribal regulatory authority over providers, the *Montana* analysis, discussed above, would apply. A Tribe would be advised to enter into contracts with both nonmember health-care providers and nonmember patients that make consent to Tribal regulatory and adjudicatory jurisdiction explicit.

⁴⁵⁰ *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 760 (1998) (holding Tribes enjoy sovereign immunity from civil suits on contracts, including for contracts made off-reservation); *Ex parte Young*, 209 U.S. 123, 160 (1908) (holding that while sovereign immunity protects the sovereign, officials may be sued in their individual capacity for injunctive relief).

⁴⁵¹ Christine E. Dehlendorf & Kevin Grumbach, *Medical Liability Insurance as a Barrier to the Provision of Abortion Services in Family Medicine*, 98(10) AM. J. PUB. HEALTH 1770, 1770–73 (2008).

⁴⁵² SWINOMISH INDIAN TRIBAL COMMUNITY DENTAL HEALTH PROVIDER LICENSING & STANDARDS CODE § 15-11, https://narf.org/nill/codes/swinomishcode/15_11.pdf [<https://perma.cc/R7M4-NEF8>].

⁴⁵³ Geoffrey D. Strommer, Starla K. Roels & Caroline P. Mayhew, *Tribal Sovereign Authority and Self-Regulation of Health Care Services: The Legal Framework and the Swinomish Tribe's Dental Health Program*, 21(2) J. HEALTH CARE L. & POL'Y 115, 153 (2019).

⁴⁵⁴ Sandhya Raman & Gopal Ratnam, *Data privacy, abortion limits set to collide post-Roe*, ROLL CALL (July 20, 2022), <https://rollcall.com/2022/07/20/data-privacy-abortion-limits-set-to-collide-post-roe/> [<https://perma.cc/FU8H-X7J3>]; see also Stephanie Russo Carroll et al., *Indigenous Data in the COVID-19 Pandemic: Straddling Erasure, Terrorism, and Sovereignty*, SOC. SCI. RSCH. COUNCIL: ITEMS (June 11, 2020), <https://items.ssrc.org/covid-19-and-the-social-sciencesK/disaster-studies/indigenous-data-in-the-covid-19-pandemic-straddling-erasure-terrorism-and-sovereignty/> [<https://perma.cc/37R3-EBEA>] (describing the importance of Tribal data ownership and sovereignty).

5. *Financing*

The Hyde Amendment prohibits the use of federal funds for abortion care unless the pregnancy is a result of rape or incest, or if the pregnancy endangers the life of the pregnant person. The prohibition includes appropriations to IHS, thus limiting the ability to provide abortion care at not only IHS direct facilities but also IHS funded facilities like Tribal 638s and urban Indian health programs. This lack of access to abortion care is compounded when the majority of funding for health services in Indian country comes from federal dollars.

Tribal leaders should advocate for a full repeal of the Hyde Amendment and for increased funding for reproductive health within the I/T/U system more broadly. Until then, Tribes will have to navigate this prohibition. Given that Tribes do not have the same tax base as other governments, Tribes would likely need to rely heavily on other Tribal funds, like any successful business enterprises, to fund abortion care.⁴⁵⁵ There is precedent for this among states. State health programs are also bound by the Hyde Amendment. There are states that cover abortion care as part of their Medicaid programs by relying exclusively on non-federal funding to do so.⁴⁵⁶ Sixteen states currently provide such coverage.⁴⁵⁷

6. *Self-Managed Abortion*

For centuries, Native women have self-managed abortions through the use of traditional plant knowledge and by other means. In the immediate post-*Dobbs* world, they will largely remain free to do so without criminal prosecution absent the Tribe criminalizing such behavior where these actions take place inside “Indian country,” so long as Congress has not expressly extended state criminal jurisdiction into that particular Tribe’s territory such as through Public Law 280 and the Kansas Act.

In the present political environment, it is unlikely that any U.S. Attorney would bring murder or other criminal charges under the federal Major Crimes Act as there is no federal statute that defines life at the time of conception or provides other fetal personhood definitions. This is an area ripe for Tribal legislative clarification if a Tribe recognizes that life (and Tribal citizenship) begins at birth. Just as the federal government defers to Tribal

⁴⁵⁵ Guzmán, *supra* note 27, at 133; *see also* Tweedy, *The Validity of Tribal Checkpoints*, *supra* note 85, at 268 (explaining how the Supreme Court’s limitations on tribal taxing authority affect tribal governments and how these limitations force Tribes to rely on economic development to fund governmental services).

⁴⁵⁶ Alina Salganicoff, Laurie Sobel & Amrutha Ramaswamy, *The Hyde Amendment and Coverage for Abortion Services*, KAISER FAM. FOUND. (Mar. 5, 2021), <https://www.kff.org/womens-health-policy/issue-brief/the-hyde-amendment-and-coverage-for-abortion-services/> [<https://perma.cc/GY3T-Z32S>].

⁴⁵⁷ *Id.*

law on questions such as the imposition of the death penalty in federal prosecutions and the definition of extended family under the Indian Child Welfare Act, Tribal law would likely be a point of deference on these types of considerations.

Native individuals living outside of Indian country will be subject to all state laws. For the Native individuals within Public Law 280 states and in Kansas, where Congress legislatively extended state criminal laws into Indian country, individuals will be subject to the same criminal jurisdiction as everyone within the state, provided that the relevant abortion law is properly construed as criminal prohibitory.

Any post-*Dobbs* Congressional agenda should expressly reserve the right of Tribes to make these definitional decisions for their local community. This type of local legislative and regulatory control is consistent with the *Dobbs* majority.

7. *Community Safety*

Tribes providing abortion services sadly are likely to become targets to radical anti-abortion individuals and organizations. Recent data has found that abortion providers experience increased rates of stalking, assault, and battery, among other violent and disruptive behavior.⁴⁵⁸ Rates of violence have recently increased.⁴⁵⁹ Anti-abortion protests often target health-care facilities, putting both patients and providers in situations that detract from the provision of health care, at a minimum, and which can lead to violence. Tribes must ensure that their patients, providers, and communities are safe. In light of this violence, Tribes might evaluate their protest laws, protest management capacity, and Tribal exclusion laws and policies.

VI. CONCLUSION

In this Article, we have sought to identify the legal barriers to Tribally self-determined reproductive care, which can and must include abortion. For Tribal Nations, this is both a post-*Dobbs* and post-*Castro-Huerta* moment. Whereas the decision in *Dobbs* has no substantive legal impact on Tribal powers, the national fallout relating to its ramifications highlights the precarious state of abortion access for Native people. Native people already lacked meaningful access to abortion. *Dobbs* will make it worse. But as desperate non-Indian calls for a *Dobbs* remedy imprudently looked to Tribes for a potential abortion safe harbor, *Castro-Huerta* was thrashing the Tribal sovereignty they sought to co-opt. *Castro-Huerta* injects concurrent state crimi-

⁴⁵⁸ 2021 *Violence and Disruption Statistics*, NAT'L ABORTION FOUND. 2 (2022), https://5aa1b2xfmfh2e2mk03kk8rsx-wpengine.netdna-ssl.com/wp-content/uploads/2021_NAF_VD_Stats_Final.pdf [<https://perma.cc/7VBK-27W3>].

⁴⁵⁹ *Id.*

nal jurisdiction over non-Indians into Indian country, defeating any hypothetical attempts for Tribes to offer an abortion safe harbor broadly to any and all non-Indians seeking to avoid criminal prohibitions. Its dubious reasoning invites further state intrusion, and minimizes the existence and importance of Tribal powers and Tribal self-determination. To the extent that Tribes can offer abortion care on Tribal lands, it will be fraught. In the meantime, reader, you can help foster respect for Tribal sovereignty that Tribes and Indigenous individuals deserve. In light of Congress's plenary power over Indian Affairs, Congress can remedy many of the Court's incursions on Tribal sovereignty, and you can support legislative efforts to provide such remedies. At some point in the future, Tribes that wish to do so may indeed be able to offer safe harbors to members and non-members alike from odious state laws.

Yet, as dire as the legal barriers may be right now, we argue that all is not lost, so long as Tribes proactively approach this issue. This is certainly true within preemption and infringement analyses. But it has also been true long before contact. Sovereignty is inherent to Tribes because it derives from Tribal people and the obligations Tribes owe to them. Native people have a right to enjoy reliable, safe, culturally relevant, comprehensive, holistic, self-determined reproductive care, including abortion care. This is reflected in international law's recognition of Indigenous rights, but it is also reflected in Tribal fundamental laws and values. The federal government resists recognizing Tribal sovereignty, and despite their own legal obligations to Tribes, when in doubt, they default to a premise of diminished Tribal powers. Tribes must therefore show the way. Far from a theoretical exercise, the health and safety of Native people is very much at stake. Tribes: declare reproductive rights a Tribal value and obligation. Stand with your Native people and exercise Tribal sovereignty to protect Tribal sovereignty.