

## NOTE

# WHY LACK OF TRIBAL SELF-DETERMINATION RIGHTS PROMOTE THE NATIVE AMERICAN AND ALASKA NATIVE POVERTY CRISIS AND WHY THESE RIGHTS SHOULD BE EXPANDED

*Katlin Bowers, Tribal Citizen of Cherokee Nation*

### I. TERMINOLOGY

There are a variety of terms to describe the Indigenous peoples of the United States of America. These terms represent the citizens and tribal members of the 574 federally recognized tribes that are located in the United States.<sup>1</sup> In order to accurately describe these sovereign, tribal governments and respect terminology preferences of Native communities, I will be using the terms ‘tribal governments’ and ‘tribal nations.’

When describing members who are both enrolled and not enrolled in tribal nations located within mainland United States, I will use the term, ‘Native Americans.’ As for Indigenous peoples who are members of a tribe located in the state of Alaska, I will use the term, ‘Alaska Natives’ and ‘First Alaskans.’ When describing both Native Americans and Alaska Natives collectively, I will use the terms ‘Indigenous peoples’ and ‘Natives.’

### II. INTRODUCTION

Native Americans and Alaska Natives have the highest poverty rate among all minority groups in the United States. According to 2018 U.S. Census Data, the national poverty rate for Natives is at 25.4%, while the White population has a national poverty rate of 10.1%, the Black population poverty rate is 20.8%, and the Hispanic population is 17.6%.<sup>2</sup> There are numerous causes for this disparity, however, one substantial reason is lack of self-determination by tribes to implement policies, programs, and establish businesses under the U.S. federal government. This is based on

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<sup>1</sup> *Demographics*, NAT'L CONG. OF AM. INDIANS (last modified Nov. 10, 2021), <https://www.ncai.org/policy-issues/education-health-human-services/education>.

<sup>2</sup> *The Population of Poverty USA*, POVERTYUSA.ORG (last modified Oct. 10, 2021), <https://www.povertyusa.org/facts>.

the theory that the current self-determination policies regarding tribal nations are not enough to solve this crisis.<sup>3</sup>

In this Note, I will analyze and explain why the Native American and Alaska Native poverty rate remains constant amongst tribal nations despite an increase in the implementation of tribal and federal policies and programs created to address the crisis. I will make the argument that a substantial cause that promotes this crisis is lack of self-determination by tribes to implement policies, programs, and establish businesses under the U.S. federal government. I will demonstrate by analyzing the historical developments of the tribal right of self-determination and how development of the current federal self-determination policy, the Indian Self-Determination and Education Assistance Act, impacted it. However, I will further argue that the Indian Self-Determination and Education Assistance Act is not enough to solve the poverty crisis and that many of the U.S. Supreme Court's previous Native American law decisions are harmful to tribal self-determination rights. Finally, I will recommend that a solution for decreasing the poverty rate for the federal government is to expand self-determination rights for tribal nations under the Indian Self-Determination and Education Assistance Act. I will also advocate that the U.S. Supreme Court should overturn harmful precedent and affirm the rights of tribal governments in all aspects of self-determination.

### III. BACKGROUND

#### *a. Native American and Alaska Native Poverty*

There are 2.9 million Native Americans and Alaska Natives and 574 federally recognized tribes in the United States.<sup>4</sup> This diversity of tribal nations leads to myriad reasons for the Native American and Alaska Native poverty crisis, which include both contemporary and historical causes rooted in colonization of the Americas 500 years ago. These reasons include policies passed and implemented by the U.S. government, historical trauma, disparity in educational resources, and lack of tribal self-determination rights.

First, the implementation of policies by the federal government during the nineteenth century which forcibly removed Indigenous peoples from their traditional homelands, such as the Indian Removal Act of

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<sup>3</sup> OFFICE OF THE PRESIDENT, FACT SHEET BIDEN-HARRIS ADMINISTRATION ANNOUNCES NEW ACTIONS TO SUPPORT INDIAN COUNTRY AND NATIVE COMMUNITIES AHEAD OF THE ADMINISTRATION'S SECOND TRIBAL NATIONS SUMMIT (Nov. 30, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/11/30/fact-sheet-biden-harris-administration-announces-new-actions-to-support-indian-country-and-native-communities-ahead-of-the-administrations-second-tribal-nations-summit/>.

<sup>4</sup> NATIONAL CONGRESS OF AMERICAN INDIANS, *supra* note 1.

1830, is a significant reason for the crisis of Native poverty.<sup>5</sup> Under this legislation, many Natives were forced to move and live in isolated areas with poor quality of land and agriculture, which greatly limited economic development opportunities.<sup>6</sup> This was later exacerbated by the Dawes Act of 1887, which split tribal-owned lands into 160-acre parcels for appointed heads of Native households and provided unappointed parcels to white colonists.<sup>7</sup> Many of the Native parcels of land were so unsustainable that many Indigenous peoples were forced to sell their claims, continuing their displacement.<sup>8</sup>

Another reason for the poverty crisis amongst Natives is the impact of historical trauma on tribal communities. It is theorized that “some Native Americans are experiencing historical loss symptoms as a result of the cross-generational transmission of trauma from historical losses (e.g., loss of population, land, and culture).”<sup>9</sup> Historical loss symptoms, such as depression, substance dependence, diabetes, dysfunctional parenting, and unemployment, all cause and perpetuate poverty and are typically intergenerational.<sup>10</sup>

A third reason for the Indigenous poverty rate is the disparities and lack of access to educational resources for Native children. The education of Native children is vital for employment and to equip the next generation to run their tribal governments.<sup>11</sup> However, in states with the highest Indigenous populations, less than 50 percent of Native youth graduate from high school.<sup>12</sup> This is due to the geographic isolation of many tribal communities<sup>13</sup> and lack of trust in the American education system due to the federal boarding school era<sup>14</sup> implemented from 1824

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<sup>5</sup> James J. Davis et al., *American Indian Poverty in the Contemporary United States*, 31 SOCIO. F. 5, 6 (2016).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 7.

<sup>8</sup> *Id.*

<sup>9</sup> Kathleen Brown-Rice, *Examining the Theory of Historical Trauma Among Native Americans*, 3 THE PRO. COUNS. 117, 117 (2013).

<sup>10</sup> *Id.* at 123.

<sup>11</sup> *Education*, NAT. CONG. OF AM. INDIANS, <https://www.ncai.org/policy-issues/education-health-human-services/education> (last modified Nov. 10, 2021).

<sup>12</sup> *Id.*

<sup>13</sup> Susan C. Faircloth, *The Education of American Indian Students*, 44 AM. EDUCATOR (Winter 2021), [https://www.aft.org/ae/winter2020-2021/faircloth\\_sb1](https://www.aft.org/ae/winter2020-2021/faircloth_sb1).

<sup>14</sup> Susan C. Faircloth & John W. Tippeconnic III, *The Dropout/Graduation Crisis among American Indian and Alaska Native Students: Failure to Respond Places the Future of Native Peoples at Risk*, THE CIV. RIGHTS PROJECT/PROYECTO DERECHOS CIVILES AT UCLA 1, 31 (Jan. 2010), <https://www.civilrightsproject.ucla.edu/research/k-12-education/school-dropouts/the-dropout-graduation-crisis-among-american-indian-and-alaska-native-students-failure-to-respond-places-the-future-of-native-peoples-at-risk>.

to the early 1990s.<sup>15</sup> However, “more Natives have gone to high school and college than ever before and nearly 1 in 5 reservations offer an elementary school and high school education.”<sup>16</sup> This is because many tribal nations over the past few decades have increased their investments in education and are motivating their children to stay in school.<sup>17</sup> Despite this increase in educational initiatives and resources, the Native poverty crisis remains stagnant.<sup>18</sup>

The three causes discussed above are all reasons why the Native American and Alaska Native poverty crisis remains stagnant.<sup>19</sup> However, Institute for Policy Research sociologist Beth Redbird argues that there is a fourth cause, which is typically overlooked. She theorizes that a significant cause of Native poverty is the lack of tribal self-determination rights due to federal policy and law in the United States.<sup>20</sup>

### *b. Tribal Self-Determination*

The right to tribal self-determination includes the ability of Indigenous people to encourage cultural renewal, develop reservations, control the education of their tribal members, self-govern, and have equal involvement and control in federal government decisions that concern policies and programs.<sup>21</sup> This right provides that tribes have a government-to-government relationship with the U.S. federal government, rather than assuming the roles of a dependent subject.<sup>22</sup> However, to fully understand the right of tribal self-determination and its influence in solving the poverty crisis in tribal communities, the historical context must be analyzed.

Prior to the colonization of the Americas, tribes upheld and operated independent governments and thriving trade systems.<sup>23</sup> Indigenous peoples and early colonists later formed an understanding that tribes were

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<sup>15</sup> Alexia Fernández Campbell, *How America's Past Shapes Native Americans' Present*, THE ATLANTIC (Oct. 12, 2016), <https://www.theatlantic.com/business/archive/2016/10/native-americans-minneapolis/503441/>.

<sup>16</sup> *What Drives Native American Poverty?*, INST. FOR POL'Y RSCH. AT NW. (Feb. 24, 2020), <https://www.ipr.northwestern.edu/news/2020/redbird-what-drives-native-american-poverty.html>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Stephen Cornell & Joseph P. Kalt, *American Indian Self-Determination: The Political Economy of a Successful Policy*, 3 (Harv. Kennedy Sch. of Gov't, Working Paper RWP10-043, 2010).

<sup>22</sup> *Id.*

<sup>23</sup> See George D. Strommer & Kirke Kickingbird, *Tribal Sovereignty*, 40 HUM. RTS. MAG. (2014), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/2014\\_vol\\_40/vol--40--no--1--tribal-sovereignty/introduction/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol--40--no--1--tribal-sovereignty/introduction/).

distinct nations that would self-govern.<sup>24</sup> However, in 1789<sup>25</sup> the U.S. Constitution took legal effect granting Congress the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes” under the so-called Indian Commerce Clause.<sup>26</sup> While the Constitution indicates that tribal nations are analogous to foreign countries and U.S. states, the Supreme Court interpreted the Clause to mean Congress has plenary power over tribes.<sup>27</sup> In other words, the federal government’s role was interpreted as a trustee to tribes and not a government-to-government relationship.<sup>28</sup> As a result, the federal government controls the financial assets and natural resources of tribal nations, which are held on behalf of Indigenous peoples and their tribes.<sup>29</sup> This trust obligation creates a responsibility of the U.S. government to promote economic development on tribal lands through regulations and programs.<sup>30</sup>

Following the signing of the Constitution, the federal government subjected tribal nations to “uniform, one-size-fits-all policies and micro-administration by federal agencies and agents.”<sup>31</sup> One of these federal agencies was the Bureau of Indian Affairs (“BIA”), established in 1824 by Congress.<sup>32</sup> This agency was created to allocate funding to implement programs and address specific issues in tribal communities without tribal permission.<sup>33</sup> The BIA was run by all non-natives and was granted complete control over tribal governments by Congress. When the agency did consult with representatives of tribes, these individuals did not typically have the best interests of tribal members in mind.<sup>34</sup> This trustee relationship between the BIA and tribal governments failed to satisfy the needs of Native Americans and prevented tribes from being self-sufficient, leading to a lack of socio-economic well-being for tribes.<sup>35</sup> This was the relationship of tribes and the federal government for over a hundred

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<sup>24</sup> Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 6 (2015).

<sup>25</sup> *The day the Constitution was ratified*, NAT’L CONST. CTR. (Jun. 21, 2022), <https://constitutioncenter.org/blog/the-day-the-constitution-was-ratified>.

<sup>26</sup> U.S. CONST. art. I, § 8.

<sup>27</sup> Strommer & Kickingbird, *supra* note 23; Strommer & Osborne, *supra* note 24, at 7.

<sup>28</sup> Cornell & Kalt, *supra* note 21, at 17.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 11.

<sup>32</sup> *Bureau of Indian Affairs (BIA)*, U.S. DEP’T INTERIOR, <https://www.bia.gov/bia> (last visited Feb.15, 2023).

<sup>33</sup> See Cornell & Kalt, *supra* note 21, at 11-12.

<sup>34</sup> Valerie Lambert, *The Big Black Box of Indian Country: The Bureau of Indian Affairs and the Federal-Indian Relationship*, 40, AM. INDIAN Q. 333, 335 (2016).

<sup>35</sup> Cornell & Kalt, *supra* note 21, at 17.

years,<sup>36</sup> until Congress began to draw back on this approach and took steps to promote self-determination policies.

In 1934, Congress passed one of the first tribal self-determination pieces of legislation, the Indian Reorganization Act (IRA).<sup>37</sup> The IRA was an allotment policy that addressed the erosion of tribal lands and sought to revitalize tribal governments' power over their lands.<sup>38</sup> However, this initiative was later harmed due to the passage and implementation of Termination Era policies during the 1950s.<sup>39</sup> This Era was comprised of three policies: the BIA Relocation Program, House Concurrent Resolution 108 (HCR 108), and Public Law 280 (P.L. 280), which all aimed to terminate a number of federal obligations to tribes.<sup>40</sup> These federal policies terminated the federal recognition of over 100 tribes in order for the U.S. to remove their land from trust.<sup>41</sup> Additionally, they subjected all tribal lands to state criminal and aspects of civil jurisdiction and forcibly relocated Native Americans and Alaska Natives to urban cities.<sup>42</sup> Despite these harmful policies, Congress once again began to recognize tribal self-determination rights through legislation.<sup>43</sup>

In 1964, Congress passed the Economic Opportunity Act, which addressed poverty in America through empowering those suffering to control their own affairs.<sup>44</sup> Regarding Indigenous peoples, this Act enabled tribal governments to directly receive federal funds without needing approval for certain tribal programs, businesses, and initiatives.<sup>45</sup> This was the first time the U.S. government recognized tribal nations "on an equal basis with other political subdivisions."<sup>46</sup>

While the federal government continued to recognized tribal self-determination rights, U.S. President Richard Nixon made a statement in 1970 which asserted that federal agencies, such as the BIA, had significantly harmed and failed Indigenous peoples.<sup>47</sup> During this time, proponents of the American Indian Movement and Native activists demanded that the U.S. government enact legislation upholding the self-determina-

<sup>36</sup> *Id.*

<sup>37</sup> Strommer & Kickingbird, *supra* note 23.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Termination Era, the 1950s, Public Law 280*, UNIV. ALASKA FAIRBANKS, <https://uaf.edu/tribal/academics/112/unit-2/terminationeratethe1950spubliclaw280.php> (last visited Feb. 15, 2023).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Strommer & Kickingbird, *supra* note 23.

<sup>44</sup> Cornell & Kalt, *supra* note 21, at 18.

<sup>45</sup> *See id.*

<sup>46</sup> David Wilma, *Economic Opportunity Act, which enables tribes to receive federal funds directly, becomes law on August 20, 1964*, HISTORYLINK.ORG (Nov. 10, 2004), <https://www.historylink.org/File/7090>.

<sup>47</sup> *See* Strommer & Kickingbird, *supra* note 23.

tion rights of tribal governments.<sup>48</sup> Motivated by President Nixon's statement and Native rights activism, Congress drafted and passed the Indian Self-Determination and Education Assistance Act in 1975.<sup>49</sup>

*c. The Indian Self-Determination and Education Assistance Act*

The Indian Self-Determination and Education Assistance Act (ISDEAA) was enacted to establish a legislative framework for tribes to assume responsibility and pay for programs that would otherwise be provided only by the federal government.<sup>50</sup> Congress rejected its previous paternalistic approach and asserted that tribes have the authority to promote tribal economies, build governmental infrastructures, provide law and order, manage tribal natural and cultural resources, meet their members' health and educational requirements, and execute vital governmental responsibilities as a result of this Act.<sup>51</sup> The aim of the ISDEAA was to assist tribal nations in developing their own governmental systems and local economies.<sup>52</sup> This framework allowed tribes to plan and direct the implementation of "contractible programs, functions, services, and activities (PFSAs) within the U.S. Department of the Interior (DOI)."<sup>53</sup>

Since its enactment, the ISDEAA has been amended three times: in 1988, 1994, and 2000. The Act now consists of four sections: Title I, a self-determination contracting program within the BIA and Indian Health Services (IHS); Title II, education assistance programs; Title III, a permanent self-governance program within the DOI for both BIA and non-BIA programs; and Title V, a permanent self-governance program within the Department of Health and Human Services (DHHS)<sup>54</sup>

When the ISDEAA was first passed in 1975, only Title I and II were enacted.<sup>55</sup> Under Title I, tribal nations are provided with essential mechanisms to build their governmental capacities which serve the needs of their members while developing leadership skills and administrative capacity through contracting with the BIA and IHS.<sup>56</sup> Essentially, tribal governments have the power to request or not request that the Secretary of the Interior contract with tribal organizations to provide federal gov-

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<sup>48</sup> See *id.*

<sup>49</sup> See *id.*

<sup>50</sup> See Indian Self-Determination and Education Assistance Act Amendments, 61 Fed. Reg. 32482 (proposed June 24, 1996) (to be codified at 25 C.F.R.pt. 900).

<sup>51</sup> *Id.*

<sup>52</sup> Strommer & Osborne, *supra* note 24, at 4-5.

<sup>53</sup> *Public Law 93-638 Program (Indian Self-Determination and Tribal Self-Governance)*, BUREAU OF RECLAMATION (Dec. 7, 2020), <https://www.usbr.gov/native/programs/93-638program.html>.

<sup>54</sup> Strommer & Kickingbird, *supra* note 23.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

ernment's services and programs specifically for Indigenous peoples.<sup>57</sup> If a tribe makes a request, it may propose its content and a preferred procedure for its implementation that meets federal contracting laws and regulations.<sup>58</sup> However, the Secretary of the Interior can reject the contract request.<sup>59</sup> If the request is approved, then the DHHS and DOI carry out any program and related funding for the tribe.<sup>60</sup> This mechanism for tribal government maintains a balance between federal government oversight and tribal self-determination rights.<sup>61</sup>

Under Title II, tribes were permitted to contract with the Secretary of the Interior to assist local schools that were funded by the BIA to educate their tribal members.<sup>62</sup> Tribes were permitted to contract for the operation of the schools and propose an education plan.<sup>63</sup> However, this education plan had to be approved by the Secretary of the Interior.<sup>64</sup> Today, tribal governments have taken direct control of 70 percent of formerly funded BIA schools through Title II contracting.<sup>65</sup>

In 1988, Title I was expanded by an amendment which created Title III.<sup>66</sup> This was in response to the ultimate power that the federal government and its agencies had in granting contracting requests and implementing them properly according to the contracting tribe's specifications.<sup>67</sup> Title III created a Self-Governance Demonstration Project which allowed tribal governments to not meet federal contracting laws and regulations that did not expressly apply to tribes if they requested self-determination contracts.<sup>68</sup> This addition allowed tribes to re-allocate funds and design programs that met the specific needs of their communities.<sup>69</sup>

In 1994, the ISDEAA was once again amended by Congress and Title IV was added to create a tribal self-governance program within the DOI which expanded a contracting tribe's ability to design programs and negotiate PFSAs.<sup>70</sup> Specifically, Title IV authorized tribal governments to negotiate funding agreements with the DOI for PFSAs administered

<sup>57</sup> Indian Self-Determination and Education Assistance, 25 U.S.C § 46.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Strommer & Kickingbird, *supra* note 23.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Indian Self-Determination and Education Assistance, 25 U.S.C § 46.

<sup>64</sup> *Id.*

<sup>65</sup> Strommer & Kickingbird, *supra* note 23.

<sup>66</sup> *Id.*

<sup>67</sup> Strommer & Osborne, *supra* note 24, at 22.

<sup>68</sup> Strommer & Kickingbird, *supra* note 23.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*



by the BIA.<sup>71</sup> Additionally, tribes were permitted to contract for funding agreements with all agencies within the DOI. These agencies are the Bureau of Indian Education (BIE), Bureau of Land Management (BLM), Bureau of Ocean Energy Management (BOEM), Bureau of Reclamation (Reclamation), Bureau of Safety and Environmental Enforcement (BSEE), National Park Service (NPS), Office of Surface Mining Reclamation and Enforcement (OSMRE), U.S. Fish and Wildlife Service (FWS), and U.S. Geological Survey (USGS).<sup>72</sup> However, for a tribe to enter into such an agreement with an agency that is not the BIA, it is required that these agreements be for the transfer of programs with which the tribal nation has a “historical, cultural, or geographic connection.”<sup>73</sup>

In 2000, Title III was removed and replaced with two more Titles, Title V and VI.<sup>74</sup> Title V upheld the ability of tribes to have self-governance and created a self-governance program called, the Tribal Self-Governance Program within the DHHS, which oversees IHS.<sup>75</sup> Under this program, tribal governments can either allow the IHS to allocate funds towards health services from tribes or tribes themselves can elect to receive funding for IHS programs and manage it according to their specific needs.<sup>76</sup> Tribal nations that select the latter can manage, control, and delegate PSFAs and negotiate with IHS to do so.<sup>77</sup> Under this, tribal governments would be able to negotiate compacts with IHS.<sup>78</sup> Title VI permitted “a study of future inclusion of non-IHS agencies in the DHHS Tribal Self-Governance Program.”<sup>79</sup> The study later established in 2003 that it would be possible to extend the self-governance program throughout other agencies of the DOI, but this policy was never enacted.<sup>80</sup>

Since the enactment of the ISDEAA, there has been some success in the contracting and compacting of tribal governments which is evident through data. Before the ISDEAA was implemented, tribes had control of and administered only 1.5 percent of BIA initiatives and programs. Additionally, tribal governments had control over only 2.4 percent of

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<sup>71</sup> *Testimony of James Cason, Associate Deputy Secretary U.S. Department of the Interior, Before the Senate Committee on Indian Affairs Oversight Hearing on Tribal Self-Governance*, 110th Cong., (2008) (statement of James Cason, Associate Deputy Secretary U.S. Department of the Interior).

<sup>72</sup> Mark K. DeSantis, *U.S. Department of the Interior: An Overview: R45480*, CONG. RSCH. SERV. (Jan. 31, 2019).

<sup>73</sup> Strommer & Kickingbird, *supra* note 23.

<sup>74</sup> *Id.*

<sup>75</sup> *Testimony of James Cason, supra* note 71.

<sup>76</sup> See Pub. L. 105–277, div. A, §101(e) [title II]

<sup>77</sup> *About Us*, INDIAN HEALTH SERVICE: THE FEDERAL HEALTH PROGRAM FOR AMERICAN INDIANS AND ALASKA NATIVES (last modified Nov. 20, 2021), <https://www.ihs.gov/selfgovernance/aboutus/>.

<sup>78</sup> *Testimony of James Cason, supra* note 71.

<sup>79</sup> Strommer & Kickingbird, *supra* note 23.

<sup>80</sup> *Id.*

IHS resources and programs.<sup>81</sup> As of 2015, IHS now provides tribal nations \$2.5 billion annually to tribal governments and hospitals through both Title I and V contracting.<sup>82</sup> Additionally, the DHHS Tribal Self-Governance Program continues to grow and be utilized by tribal nations. When the ISDEAA was in its first two decades of implementation, only seven tribes participated in the program resulting in only \$27.1 million in funding.<sup>83</sup> However, as of 2016, the program now provides \$435 million to 266 tribal governments with 118 negotiated funding agreements.<sup>84</sup>

The implementation of the ISDEAA and its results have been influential on other beneficial pieces of legislation crafted by Congress. These policies include: the Native American Housing Assistance and Self-Determination Act (NAHASDA), the Homeless Emergency Assistance and Rapid Transition to Housing Act, the Indian Mineral Development Act (IMDA), and the Indian Tribal Energy Development and Self-Determination Act.<sup>85</sup> These federal policies emphasize and uphold tribal self-determination rights and the sovereignty of tribal nations.<sup>86</sup>

The list above of successes of the ISDEAA appears to be significant; however, in the scope of all 574 federally recognized tribes across the United States, the results have not been as successful as they could be. For example, the IHS provides \$2.5 billion to tribes, yet IHS is in fact a “\$6 billion health agency primarily responsible for serving roughly 2.5 million American Indians and Alaska Natives, more than a quarter of whom are uninsured.”<sup>87</sup> Additionally, while there are 244 federally recognized tribes that participate in the IHS Tribal Self-Governance, that is only 42% of tribes participating within the United States.<sup>88</sup>

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Federal programs influenced by the ISDEAA have expanded tribal self-determination rights by providing that tribes can determine certain requirements on how to allocate certain federal funds to their members. Strommer & Osborne, *supra* note 24, at 4. For example, NAHASDA provides funding to tribes for housing and tribes determine their own housing requirements for their members in deciding whether to rent or sell to those with low incomes. See *Native American Housing Assistance and Self-Determination Act (NAHASDA)*, WASHINGTONLAWHELP.ORG, <https://www.washingtonlawhelp.org/resource/native-american-housing-assistance-and-self-determination-act-nahasda> (last visited Sep. 6, 2023). Additionally, IMDA asserts that tribes that are owners of natural resources on their lands can develop their minerals in any manner. See *Tribal Mineral Development Options*, DEPT. OF THE INTERIOR (last visited Sep. 6, 2023). <https://www.bia.gov/sites/default/files/dup/assets/as-ia/ieed/bia/pdf/idc1-032939.pdf>.

<sup>87</sup> Adam Cancryn, *Exclusive: Emergency coronavirus funds for American Indian health stalled*, POLITICO (Oct. 20 2021), <https://www.politico.com/news/2020/03/20/coronavirus-american-indian-health-138724>.

<sup>88</sup> See *Tribal Nations with Self Governance Compact*, SELF-GOVERNANCE COMMUNICATION AND EDUCATION TRIBAL CONSORTIUM, <https://www.tribalselfgov.org/resources/partici>

In addition, there are a number of Congressional Acts that have been implemented based on development and implementation of the ISDEAA. However, the effectiveness and progress of these acts in tribal communities has declined significantly. For example, the Native American Housing Assistance and Self Determination Act appropriations have remained the same amount for 20 years, despite tribes being unable to meet their local demand for housing while attempting to “build a ladder towards wealth through homeownership.”<sup>89</sup>

Notwithstanding the successes of the ISDEAA and advances in combatting the Native American and Alaska Native poverty crisis, the rate of poverty remains high compared to other racial groups in the United States.<sup>90</sup> Federal intervention and oversight continue to have a small impact on Indigenous peoples’ economic well-being. This crisis remains due to failures of the Indian Self-Determination and Education Assistance Act and harmful precedent upheld by the U.S. Supreme Court regarding self-determination rights of tribal nations.

#### IV. TRIBAL SELF-DETERMINATION FAILURES

##### a. *The Indian Self-Determination and Education Assistance Act*

The aim of the Indian Self-Determination and Education Assistance Act to uphold the self-determination rights of tribal governments has yet to be achieved due to four significant failures of the Act. The first three problems are: the limited ability and nature of Title IV, the contradicting legislative and legal interpretations of the ISDEAA regarding tribal self-governance and its narrow implementation by the DOI and DHHS, and the limited opportunities to expand self-governance beyond the DOI and DHHS federal agencies.<sup>91</sup> The final failure of the ISDEAA is the resistance of federal agencies to provide sufficient funds to cover the full contract support costs of tribal nations.<sup>92</sup>

First, since the 1994 amendment of the ISDEAA, Title IV has not been amended or modified by contracting tribes.<sup>93</sup> In 2000, it was deter-

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pating-tribes/#:~:text=more%20than%20370%20Tribal%20nations,Service%20through%20Self%20Governance%20compacts (last visited Apr. 13 2023); *see also* 87 Fed. Reg. 4636 (number of federally recognized tribes).

<sup>89</sup> Evelyn Immonen, *25 Years of the Native American Housing and Self Determination Act*, ENTERPRISE (Oct. 21 2021), <https://www.enterprisecommunity.org/blog/25-years-native-american-housing-and-self-determination-act>.

<sup>90</sup> *See generally* Ronald Trosper, *Changing Numbers, Changing Needs: American Indian Demography and Public Health*, 8 NATIONAL RESEARCH COUNCIL (US) COMMITTEE ON POPULATION (1996); *see also* 1.6. Individuals, Families, and Children in Poverty, NATIONAL CENTER FOR EDUCATION STATISTICS, [https://nces.ed.gov/pubs2008/nativetrends/ind\\_1\\_6.asp](https://nces.ed.gov/pubs2008/nativetrends/ind_1_6.asp) (last visited Sep. 6, 2023); *see also* *The Population of Poverty USA*, *supra* note 2.

<sup>91</sup> Strommer & Osborne, *supra* note 24, at 49.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 61.

mined by Congress that Title IV would be harmful to tribes who contracted for non-BIA programs.<sup>94</sup> Specifically, Title IV only allows mandatory compacting where Indigenous peoples are considered exclusive beneficiaries of the federal government.<sup>95</sup> However, tribes wanted to expand this to include mandatory compacting programs where Natives are significant beneficiaries.<sup>96</sup> If not amended, Title IV provides bureaus under the DOI more negotiating leverage and discretion for mandatory compacting than tribal governments.<sup>97</sup>

Additionally, there has been a history of resistance by non-BIA agencies under the DOI that reject any amendments to Title IV because these opposing agencies are against an amendment to include more mandatory non-BIA programs with tribal governments.<sup>98</sup> However, this is necessary for tribes to obtain because these communities need protection against the resistance of non-BIA bureaus, which are difficult for tribes to contract with.<sup>99</sup>

Second, the balance between tribal self-determination rights and control and oversight of the federal government is an ever-occurring problem since the enactment of the ISDEAA in 1975. This has been especially evident based on the resistance of the DOI and DHHS in the implementation of the Tribal Self-Governance Program by interpreting self-governance policies as narrowly as possible and applying them as such.<sup>100</sup> This is further complicated by different courts' interpretations of the ISDEAA.

In cases where a governmental agency denies a tribal nation's contract request, the ISDEAA clearly states that, "the Secretary shall have the burden of proof to establish by clearly demonstrating the validity of the grounds for suspending, withholding, or delaying payment of funds."<sup>101</sup> Despite this, in *Aleutian Pribilof Islands Ass'n v. Kempthorne*, the United States District Court for the District of Columbia found that if a tribe is denied a contract request and believes the denial to be baseless, the tribe is required to show that the agency's decision is "arbitrary, capricious . . . or . . . not in accordance with law."<sup>102</sup> This standard places a significant and challenging burden on a tribal government, while the ISDEAA emphasizes the heavy burden required for a governmental

<sup>94</sup> *Id.* at 63.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 57.

<sup>101</sup> Contract Funding and Indirect Costs, 25 U.S.C. § 5325(l)(2).

<sup>102</sup> *Aleutian Pribilof Islands Ass'n v. Kempthorne*, 537 F.Supp.2d (D.D.C. 2008).

agency.<sup>103</sup> These contradicting standards make tribal governments apprehensive to contract with agencies due to the controlling nature when the ISDEAA upholds a tribe's right to self-determine.<sup>104</sup> Agencies that contract with tribal nations under the ISDEAA continue to challenge the broad nature of tribal self-governance and self-determination through both legislation and the legal system.<sup>105</sup>

Third, under the ISDEAA, tribal nations are restricted to only contract with federal bureaus under the DOI, and in specific circumstances, with IHS under DHHS.<sup>106</sup> The Act was first created to address the most immediate problems in Indigenous communities, and Congress focused its attention on health services, education, and businesses.<sup>107</sup> However, the failure of the ISDEAA is that these contracting agencies are available to tribes to address the results of the poverty crisis, but not the core causes of poverty in tribal communities, such as historical trauma and land dispossession.<sup>108</sup> Instead of addressing the reason for the harms committed against Indigenous communities, the ISDEAA provides simply monetary compensation.<sup>109</sup> However, “[j]ustice is not a one-size-fits-all commodity and the potential suitability of compensatory remedies to the harms absorbed by any particular group is not dispositive of. . . the question of whether reparations are appropriate for other claimant groups.”<sup>110</sup>

Fourth, according to the ISDEAA, “[t]here shall be added. . . contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management.”<sup>111</sup> If this provision is not met by Congress, this results in tribal governments allocating funds used to implement beneficial programs in order to meet compliance and management standards.<sup>112</sup> Thus, the quality of programs provided to tribal members decreases and if it occurs often, less tribal nations will be interested in contracting with the agencies for services.<sup>113</sup> This problem has been occurring since the enactment of the ISDEAA. Specifically, representatives of the BIA and IHS continue to reject and seek to modify the ISDEAA in order to not

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<sup>103</sup> Strommer & Osborne, *supra* note 24, at 60.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 67.

<sup>107</sup> *Id.*

<sup>108</sup> Indian Self-Determination and Education Assistance, 25 U.S.C § 46.

<sup>109</sup> *Id.*

<sup>110</sup> William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, AB-ORIGINAL POLICY RESEARCH CONSORTIUM INTERNATIONAL, 28 (2004).

<sup>111</sup> Contract Funding and Indirect Costs, 25 U.S.C. § 5325(j)-(l)(2).

<sup>112</sup> Strommer & Osborne, *supra* note 24, at 50.

<sup>113</sup> *Id.*

fully fund the contract support costs (CSC) in order for tribes to contract for programs with both agencies.<sup>114</sup>

CSC are reasonable costs that are necessary to ensure the compliance and proper management of activities when a tribe is acting as a contractor under the ISDEAA.<sup>115</sup> However, there have been numerous times when federal agencies have refused to pay for CSC. For example, during the year 2010, the BIA paid only 75.17 percent of all tribes CSC needs and IHS paid on average 81.5 percent of tribal CSC.<sup>116</sup> To meet unpaid CSC costs, tribal governments would have to divert their own funds to administer federal programs, which leads to numerous lost economic opportunities.<sup>117</sup> Additionally, the lack of payments is unfair compared to other, non-Native government contractors, as they are typically provided funds by government agencies to cover the full CSC.<sup>118</sup>

To address this issue, Congress modified the ISDEAA to state that government agencies must pay the full CSC for contracting tribal governments in 2018.<sup>119</sup> Despite this, federal agencies, including those outside the DOI, continue to take legal positions against paying full CSC for tribes and requesting that legislation allowing recovery of the full payment to be reformed.<sup>120</sup> This failure of the ISDEAA leaves tribal governments at constant risk that they may have to pay CSC using funds specifically for programs aimed at fighting poverty in their community.<sup>121</sup>

#### *b. U.S. Supreme Court Precedent*

Since the creation of the U.S. Supreme Court, the Court has made numerous Native American law decisions, including rulings regarding the status and boundaries of tribal self-determination rights, which are very influential on tribal nations today. These cases include both those before the passage of the ISDEAA and those interpreting the Act.<sup>122</sup> However, because there is little to no constitutional text on Native Amer-

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 51.

<sup>118</sup> *Id.*

<sup>119</sup> Contract Funding and Indirect Costs, 25 U.S.C. § 5325(j)-(l)(2).

<sup>120</sup> Jasmin Jackson, *Northern Arapaho Asks 10th Circ. To Reverse \$1.5M Gov't Win*, LAW360 (Nov. 5, 2021), <https://www.law360.com/articles/1438278/northern-arapaho-asks-10th-circ-to-reverse-1-5m-gov-t-win>.

<sup>121</sup> *Proposal to Enact Permanent Mandatory Appropriations for Contract Support Costs under ISDEAA (AANC-14-003)* NAT'L. AM. INDIAN CONG. (2014), [https://www.ncai.org/attachments/Resolution\\_vGzKFpucTeRARoJhfHNMSNECGSzHAjOptecaPQhaqwdWWqqVYSt\\_ANC-14-003.pdf](https://www.ncai.org/attachments/Resolution_vGzKFpucTeRARoJhfHNMSNECGSzHAjOptecaPQhaqwdWWqqVYSt_ANC-14-003.pdf).

<sup>122</sup> *See generally* Yellen v. Confederated Tribes of the Chehalis Reservation, 141 S. Ct. 2434 (2021); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973).

ican law, the Court has few legal authorities to rely on.<sup>123</sup> This leads to the issue of justices having extreme latitude in deciding tribal self-determination rights cases according to their preference, creating harmful precedent for tribal governments.<sup>124</sup>

In multiple cases, the Supreme Court has used the idea of tribal self-determination to decide against the interests of Indigenous peoples. This typically has been by stressing the importance of the federal government's trust obligation to tribal nations in keeping their interests.<sup>125</sup> One of these most pivotal cases is *United States v. Navajo Nation*.

In *Navajo Nation*, the Navajo Nation was a party to a coal lease for reservation land rented by a coal mining company.<sup>126</sup> The tribe requested that the Secretary of the Interior approve an increase in royalty rate for the lease.<sup>127</sup> After finding out that the Secretary had been meeting with the coal company, Navajo Nation sued the federal government for breach of fiduciary duty for \$600 million.<sup>128</sup> However, the Supreme Court excused the conduct of the Secretary in order to "wipe out a \$600 million judgment against the federal government."<sup>129</sup> The Court dismissed the trust obligation that the Secretary owed to the tribe and instead upheld that the U.S. government has the ultimate power over tribes.<sup>130</sup> Because of this judicial decision-making power, the self-determination rights of tribes were further diminished.

In *United States v. Jicarilla Apache Nation*, the Jicarilla Apache Nation had an agreement with the Secretary of the Interior where proceeds made from the natural resources on their land would be held in a trust account for the tribe.<sup>131</sup> The tribe later sued the Secretary for money mismanagement and during discovery, the government refused to produce previous communications about the trust.<sup>132</sup> The Court held for the federal government, asserting that the government did not have to disclose communications to the tribe about trust duties.<sup>133</sup> This established that because the trust obligation was governed by statute, that the government can act under its own sovereign interest when executing federal

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<sup>123</sup> Matthew L. M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 124 (2006).

<sup>124</sup> *Id.*

<sup>125</sup> Geoff Strommer & Kirke Kickingbird, *Indian Self-Determination: Four Decades of Extraordinary Success*, 40 HUM. RTS. 1, 6 (2015).

<sup>126</sup> *United States v. Navajo Nation*, 537 U.S. 488, 493 (2003).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> Strommer & Kickingbird, *supra* note 123, at 6.

<sup>130</sup> *Navajo Nation*, 537 U.S. at 507-08

<sup>131</sup> *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

law.<sup>134</sup> Thus, the government was acting under its own sovereign interest when it denied the tribe communications regarding the tribe's trust account.

In *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, the U.S. government held in trust Kiowa reservation lands.<sup>135</sup> A member of the tribe's business committee purchased stock of a corporation by signing a promissory note in the tribe's name, however, the tribe later defaulted.<sup>136</sup> The tribe was later sued by the corporation in state court, but the Supreme Court ruled in favor of the Kiowa Tribe of Oklahoma.<sup>137</sup> It asserted that tribes have sovereign immunity from all civil suits based on contracts issues whether the contract was made within or outside tribal lands.<sup>138</sup> However, the Court noted that this right of sovereign immunity from contract cases outside tribal courts was not inherent for tribal nations and that Congress could enact a statute that revoked the immunity.<sup>139</sup>

Finally, in *United States v. Wheeler*, a tribal member of the Navajo Nation, Wheeler, was prosecuted and found guilty by his tribal court.<sup>140</sup> Later, Wheeler was prosecuted by the federal government for a different charge based on the same incident.<sup>141</sup> The Supreme Court ruled that both tribes and the United State government had the sovereign right to punish Indigenous peoples and that prosecuting them twice would not violate the Double Jeopardy Clause.<sup>142</sup> The Supreme Court based their ruling on the concept that:

"The sovereignty that the Indian tribes. . . exists only at the sufferance of Congress, and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." <sup>143</sup>

Here, the Court emphasized that the paternalistic approach of the U.S. government during the nineteenth and most of the twentieth century towards tribes. Additionally, it reminded the federal government of the dependent status of tribal nations could be changed through a statute enacted by Congress.

<sup>134</sup> *Id.* at 184-85.

<sup>135</sup> *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 753 (1998).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 751-52.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 757-58.

<sup>140</sup> *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

<sup>141</sup> *Id.* at 315.

<sup>142</sup> *Id.* at 329-30.

<sup>143</sup> *Id.* at 323.



## V. SOLUTIONS TO UPHOLD TRIBAL SELF-DETERMINATION RIGHTS

### a. *Expansion of the Indian Self-Determination and Education Assistance Act*

In order to solve the many failures of the Indian Self-Determination and Education Assistance Act and uphold the self-determination rights of tribal governments, the ISDEAA must be amended and expanded. The amended Act would enforce and uphold a trust obligation relationship between the United States and federally recognized tribal nations. There are four solutions to the ISDEAA that could achieve this.

First, Title IV must be amended by Congress to meet the specifications of Title V and allow tribes to contract for non-BIA programs. This would reduce resistance by non-BIA agencies when contracting under the DOI that reject any amendments to Title IV. This would greatly simplify self-governance for tribes by creating a relatively uniform legal regime for both agencies. Tribes should be permitted to create and design their own sustainable, self-determined economies and social programs. If contracting was expanded beyond only exclusive tribal beneficiaries, tribes would have more autonomy to fit their needs and to avoid the problem of a “one-size-fits-all” approach which historically has fallen short in meeting the needs of tribal communities and addressing poverty.

The Indian Self-Determination and Education Assistance Act should empower tribes to develop capable governing institutions and tribal businesses based on their traditional systems. In an analysis by Stephen Cornell and Joseph P. Kalt, both found that the best employment outcomes were typically found in tribes with strong leadership.<sup>144</sup> This was in the form of a parliamentary tribal council, and Cornell and Kalt found that this model of governance usually yielded better results than a general council.<sup>145</sup> Unsurprisingly, the authors found that for local governance to work best it should be based on tribal cultural traditions, rather than on a federal model arbitrarily imposed.<sup>146</sup> This was found to be successful according to a study by the Economic Policy Institute.<sup>147</sup> The study examined the employment rates of tribal members living on or close to reservations or other tribal lands over a two-year period.<sup>148</sup> The top two tribes with the highest employment rates were the Tlingit & Haida with a 75.8 percent employment rate, and Cherokee Nation with a

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<sup>144</sup> Cornell & Kalt, *supra* note 21, at 38.

<sup>145</sup> *Id.* at 27.

<sup>146</sup> *Id.* at 11.

<sup>147</sup> Algernon Austin, *Native Americans and Jobs: The Challenge and the Promise*, ECON. POL'Y INST. 1, 21 (2013).

<sup>148</sup> *Id.*

72.9 percent employment rate.<sup>149</sup> Cherokee Nation's main tribally owned holding company, Cherokee Nation Businesses, prioritizes Cherokee traditions and customs in the workplace and preserves local culture when developing their economy.<sup>150</sup> Additionally, the Tlingit & Haida established the Central Council of the Tlingit and Haida Indian Tribes of Alaska, their tribal government which recognizes traditional clans and villages.<sup>151</sup>

Second, there must no longer be contradictory standards of interpretation and application of the Indian Self-Determination and Education Assistance Act. In order to accomplish this, there should be a reduction in federal decision-making when tribes request to contract and propose a procedure of implementation. These changes would prevent contradictions in the interpretation of the Act and enforce strict procedures that must be followed by bureaus and agencies. This will place a heavier burden on the federal government to show why they are rejecting a requested contract by the tribe and the contracting tribe will have more power and control in negotiating the contract. The self-determination and self-governance rights of tribal governments will be upheld and there will be less room for non-BIA agencies to resist such efforts.

Third, the Indian Self-Determination and Education Assistance Act should be expanded to include that tribal governments can contract with the Department of Transportation (DOT), the Department of Justice (DOJ), and the Department of Agriculture (DOA). The addition of these three federal departments would allow tribes to address the root of the poverty crisis instead of simply the issue itself. For example, if DOJ were added to the IDSEAA, then tribal governments could work with the department to extend their criminal jurisdiction and prosecute non-natives.<sup>152</sup> This would help reduce crime and promote community well-being, which could possibly encourage a better economy.<sup>153</sup> Fourth and finally, the CSC must be enforced to be fully funded by federal agencies, specifically by the BIA and IHS. The IDSEAA must be upheld in order to prevent tribal governments from taking on CSC and further motivating them not to contract.

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<sup>149</sup> *Id.* at 19.

<sup>150</sup> See *Cultural and Economic Impact*, CHEROKEE NATION BUSINESSES, <https://cherokeeanationbusinesses.com/cultural-economic-development> (last visited Sep. 6, 2023).

<sup>151</sup> CONST. OF THE CENTRAL COUNCIL OF THE TLINGIT AND HAIDA INDIAN TRIBES OF ALASKA, Preamble

<sup>152</sup> See Part IV.

<sup>153</sup> See Kevin Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 790, 848-853 (2006).

*b. Overturn U.S. Supreme Court Precedent*

In order to promote self-determination rights for tribal nations and uphold them as inherent sovereign rights, the U.S. Supreme Court must overturn harmful previous decisions. Based on judicial precedent, Congress has ultimate control over tribal governments and can possibly elect to not reauthorize the Indian Self-Determination and Education Assistance Act. If that took place, it would entail the elimination of self-determination rights for tribes and Indigenous peoples. This disregards tribal sovereignty recognized in the U.S. Constitution asserting that the U.S. has a government-to-government relationship with tribes.<sup>154</sup>

In recent years, there have been a number of Supreme Court rulings that have either acknowledged or upheld the self-determination and sovereignty rights of tribal nations.<sup>155</sup> However, there have been Supreme Court cases which have eroded tribal sovereignty rights as well.<sup>156</sup> In order for there to be consistent recognition of tribal sovereignty and self-determination rights, there would have to be an ideological shift amongst the majority of justices of the current Supreme Court.

## VI. CONCLUSION

Native American and Alaska Native communities throughout the United States are suffering from the poverty crisis more than any other racial group.<sup>157</sup> Additionally, this crisis has only become more severe due to the COVID-19 pandemic and changing economic conditions depending on the location of the tribe.<sup>158</sup> As data emerge, it is clear that tribal nations and their members have suffered economically.<sup>159</sup> Thus, how can the poverty crisis for Indigenous peoples be addressed and solved?

One important solution to this crisis is for the federal government to promote uphold and permit the self-determination rights of tribal nations. This can be accomplished through expanding and amending the Indian Self-Determination and Education Assistance Act and overturning harmful Supreme Court precedent. These initiatives may incentivize more tribes to contract with programs under the ISDEAA and allow Indige-

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<sup>154</sup> U.S. CONST. art. I, § 8.

<sup>155</sup> See *Haaland v. Brakeen*, No. 21–376 S. Ct. (2023); *Yellen v. Confederated Tribes of the Chehalis Reservation*, 141 S. Ct. 2434 (2021); *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

<sup>156</sup> See *Oklahoma v. Castro-Huerta*, 597 S. Ct. (2022); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin* No. 22–227 S. Ct. (2023).

<sup>157</sup> See *The Population of Poverty USA*, *supra* note 2.

<sup>158</sup> Sahir Doshi, et al., *The Covid-19 Response in Indian Country*, CTR. FOR AM. PROGRESS (Jun 18, 2020), <https://www.americanprogress.org/article/covid-19-response-indian-country/>.

<sup>159</sup> *Id.*

nous leaders to properly direct investments into building their communities' economies.<sup>160</sup>

Socio-economic improvement among Indigenous peoples comes not from a paternalistic approach of funding control by the federal government, but rather through greater self-determination by tribes in determining the distribution of funds.<sup>161</sup> While centrally designed programs can provide vital resources and expertise, ultimately it is the people themselves who know best what their communities need in order to develop institutions of governance. They are themselves best placed to build sustainable economies and social programs that work for the people they are to help.

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<sup>160</sup> See Patricia Kunesh, *The Power of Self-Determination in Building Sustainable Economies in Indian Country*, ECON. POL'Y INST. 1, 5-6 (2022).

<sup>161</sup> *Id.*