SUPREME COURT OF THE UNITED STATES

No. 17–387

UPPER SKAGIT INDIAN TRIBE, PETITIONER *v.* SHARLINE LUNDGREN, ET VIR

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

[May 21, 2018]

JUSTICE GORSUCH delivered the opinion of the Court.

Lower courts disagree about the significance of our decision in *County of Yakima* v. *Confederated Tribes and Bands of Yakima Nation*, 502 U. S. 251 (1992). Some think it means Indian tribes lack sovereign immunity in *in rem* lawsuits like this one; others don't read it that way at all.* We granted certiorari to set things straight. 583 U. S. ___ (2017).

Ancestors of the Upper Skagit Tribe lived for centuries along the Skagit River in northwestern Washington State. But as settlers moved across the Cascades and into the region, the federal government sought to make room for them by displacing native tribes. In the treaty that followed with representatives of the Skagit people and others, the tribes agreed to "cede, relinquish, and convey"

* Compare 187 Wash. 2d 857, 865–869, 389 P. 3d 569, 573–574 (2017) (case below); *Cass County Joint Water Resource Dist.* v. *1.43 Acres of Land in Highland Twp.*, 2002 ND 83, 643 N. W. 2d 685, 691–693 (2002) (conforming to the Washington Supreme Court's interpretation of *Yakima*), with *Hamaatsa, Inc.* v. *Pueblo of San Felipe*, 2017–NMSC–007, 388 P. 3d 977, 986 (2016) (disagreeing); *Cayuga Indian Nation of N. Y.* v. *Seneca County*, 761 F. 3d 218, 221 (CA2 2014) (same).

their lands to the United States in return for $150,000 and other promises. Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927; see *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U. S. 658, 676 (1979); *United States* v. *Washington*, 384 F. Supp. 312, 333 (WD Wash. 1974).

Today's dispute stems from the Upper Skagit Tribe's efforts to recover a portion of the land it lost. In 1981, the federal government set aside a small reservation for the Tribe. 46 Fed. Reg. 46681. More recently, the Tribe has sought to purchase additional tracts in market transactions. In 2013, the Tribe bought roughly 40 acres where, it says, tribal members who died of smallpox are buried. The Tribe bought the property with an eye to asking the federal government to take the land into trust and add it to the existing reservation next door. See 25 U. S. C. §5108; 25 CFR §151.4 (2013). Toward that end, the Tribe commissioned a survey of the plot so it could confirm the property's boundaries. But then a question arose.

The problem was a barbed wire fence. The fence runs some 1,300 feet along the boundary separating the Tribe's land from land owned by its neighbors, Sharline and Ray Lundgren. The survey convinced the Tribe that the fence is in the wrong place, leaving about an acre of its land on the Lundgrens' side. So the Tribe informed its new neighbors that it intended to tear down the fence; clearcut the intervening acre; and build a new fence in the right spot.

In response, the Lundgrens filed this quiet title action in Washington state court. Invoking the doctrines of adverse possession and mutual acquiescence, the Lundgrens offered evidence showing that the fence has stood in the same place for years, that they have treated the disputed acre as their own, and that the previous owner of the Tribe's tract long ago accepted the Lundrens' claim to the land lying on their side of the fence. For its part, the Tribe asserted sovereign immunity from the suit. It relied upon

the many decisions of this Court recognizing the sovereign authority of Native American tribes and their right to "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Michigan* v. *Bay Mills Indian Community*, 572 U. S. ___, ___ (2014) (slip op., at 5) (internal quotation marks omitted).

Ultimately, the Supreme Court of Washington rejected the Tribe's claim of immunity and ruled for the Lundgrens. The court reasoned that sovereign immunity does not apply to cases where a judge "exercis[es] in rem jurisdiction" to quiet title in a parcel of land owned by a Tribe, but only to cases where a judge seeks to exercise *in personam* jurisdiction over the Tribe itself. 187 Wash. 2d 857, 867, 389 P. 3d 569, 573 (2017). In coming to this conclusion, the court relied in part on our decision in *Yakima*. Like some courts before it, the Washington Supreme Court read *Yakima* as distinguishing *in rem* from *in personam* lawsuits and "establish[ing] the principle that . . . courts have subject matter jurisdiction over in rem proceedings in certain situations where claims of sovereign immunity are asserted." 187 Wash. 2d, at 868, 389 P. 3d, at 574.

That was error. *Yakima* did not address the scope of tribal sovereign immunity. Instead, it involved only a much more prosaic question of statutory interpretation concerning the Indian General Allotment Act of 1887. See 24 Stat. 388.

Some background helps dispel the misunderstanding. The General Allotment Act represented part of Congress's late Nineteenth Century Indian policy: "to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *Yakima*, *supra,* at 254; *In re Heff*, 197 U. S. 488, 499 (1905). It authorized the President to allot parcels of reservation land to individual tribal members. The law then directed the United States to hold the allotted parcel

in trust for some years, and afterwards issue a fee patent to the allottee. 24 Stat. 389. Section 6 of the Act, as amended, provided that once a fee patent issued, "each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside" and "all restrictions as to sale, incumbrance, or taxation of said land shall be removed." 25 U. S. C. §349.

In 1934, Congress reversed course. It enacted the Indian Reorganization Act, 48 Stat. 984, to restore "the principles of tribal self-determination and self-governance" that prevailed before the General Allotment Act. *Yakima*, 502 U. S., at 255. "Congress halted further allotments and extended indefinitely the existing periods of trust applicable to" parcels that were not yet fee patented. *Ibid.*; see 25 U. S. C. §§461–462. But the Legislature made no attempt to withdraw lands already conveyed to private persons through fee patents (and by now sometimes conveyed to non-Indians). As a result, Indian reservations today sometimes contain two kinds of land intermixed in a kind of checkerboard pattern: trust land held by the United States and fee-patented land held by private parties. See *Yakima, supra*, at 256.

Yakima concerned the tax consequences of this checkerboard. Recall that the amended version of §6 of the General Allotment Act rendered allottees and their fee-patented land subject to state regulations and taxes. 25 U. S. C. §349. Despite that, in *Moe* v. *Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U. S. 463 (1976), this Court held that §6 could no longer be read as allowing States to impose *in personam* taxes (like those on cigarette sales) on transactions between Indians on fee-patented land within a reservation. *Id.,* at 479–481. Among other things, the Court pointed to the impracticality of using the ownership of a particular parcel within a reservation to determine the law governing transactions

taking place upon it. See *id.,* at 478–479. Despite *Moe* and some years later, this Court in *Yakima* reached a different conclusion with respect to *in rem* state taxes. The Court held that allowing States to collect property taxes on fee-patented land within reservations was still allowed by §6. *Yakima*, *supra,* at 265. Unlike the *in personam* taxes condemned in *Moe*, the Court held that imposing *in rem* taxes only on the fee-patented squares of the checkerboard was "not impracticable" because property tax assessors make "parcel-by-parcel determinations" about property tax liability all the time. *Yakima*, *supra,* at 265. In short, *Yakima* sought only to interpret a relic of a statute in light of a distinguishable precedent; it resolved nothing about the law of sovereign immunity.

Commendably, the Lundgrens acknowledged all this at oral argument. Tr. of Oral Arg. 36. Instead of seeking to defend the Washington Supreme Court's reliance on *Yakima*, they now ask us to affirm their judgment on an entirely distinct alternative ground. At common law, they say, sovereigns enjoyed no immunity from actions involving immovable property located in the territory of another sovereign. As our cases have put it, "[a] prince, by acquiring private property in a foreign country, . . . may be considered as so far laying down the prince, and assuming the character of a private individual." *Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 145 (1812). Relying on this line of reasoning, the Lundgrens argue, the Tribe cannot assert sovereign immunity because this suit relates to immovable property located in the State of Washington that the Tribe purchased in the "the character of a private individual."

The Tribe and the federal government disagree. They note that immunity doctrines lifted from other contexts do not always neatly apply to Indian tribes. See *Kiowa Tribe of Okla.* v. *Manufacturing Technologies, Inc.*, 523 U. S. 751, 756 (1998) ("[T]he immunity possessed by Indian tribes is not coextensive with that of the States"). And

since the founding, they say, the political branches rather than judges have held primary responsibility for determining when foreign sovereigns may be sued for their activities in this country. *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U. S. 480, 486 (1983); *Ex parte Peru*, 318 U. S. 578, 588 (1943).

We leave it to the Washington Supreme Court to address these arguments in the first instance. Although we have discretion to affirm on any ground supported by the law and the record that will not expand the relief granted below, *Thigpen* v. *Roberts*, 468 U. S. 27, 30 (1984), in this case we think restraint is the best use of discretion. Determining the limits on the sovereign immunity held by Indian tribes is a grave question; the answer will affect all tribes, not just the one before us; and the alternative argument for affirmance did not emerge until late in this case. In fact, it appeared only when the United States filed an *amicus* brief in this case—after briefing on certiorari, after the Tribe filed its opening brief, and after the Tribe's other *amici* had their say. This Court has often declined to take a "first view" of questions that make their appearance in this posture, and we think that course the wise one today. *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005).

The dissent is displeased with our decision on this score, but a contradiction lies at the heart of its critique. First, the dissent assures us that the immovable property exception applies with irresistible force—nothing more than a matter of "hornbook law." *Post,* at 3–10 (opinion of THOMAS, J.). But then, the dissent claims that allowing the Washington Supreme Court to address that exception is a "grave" decision that "casts uncertainty" over the law and leaves lower courts with insufficient "guidance." *Post,* at 3, 13–14. Both cannot be true. If the immovable property exception presents such an easy question, then it's hard to see what terrible things could happen if we allow

the Washington Supreme Court to answer it. Surely our state court colleagues are no less versed than we in "hornbook law," and we are confident they can and will faithfully apply it. And what if, instead, the question turns out to be more complicated than the dissent promises? In that case the virtues of inviting full adversarial testing will have proved themselves once again. Either way, we remain sanguine about the consequences.

The dissent's other objection to a remand rests on a belief that the immovable property exception was the source of "the disagreement that led us to take this case." *Post,* at 1. But this too is mistaken. As we've explained, the courts below and the certiorari-stage briefs before us said precisely nothing on the subject. Nor do we understand how the dissent might think otherwise—for its essential premise is that *no* disagreement exists, or is even possible, about the exception's scope. The source of confusion in the lower courts that led to our review was the one about *Yakima*, see *supra*, at 1, n., and we have dispelled it. That is work enough for the day. We vacate the judgment and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.