THE FIRST FEDERALISTS

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ABSTRACT

One aspect of federalism's values that scholars and the courts have largely ignored is their relevance to tribal governance. As sovereigns within the United States that govern with a measure of de jure autonomy, Indian tribes are important agents of self-rule within the United States' federal system. The tribal exercise of sovereignty, while not part of the constitutional design of federalism in the United States, is nevertheless an example of the principles of federalism in operation.

However, Indian tribes do not receive any accommodation on account of their ability to promote the values of federalism. On the contrary, in dicta that often overshadow the judiciary's formalist doctrinal analyses, courts regularly portray tribal governance as dangerously foreign, destabilizing, and undemocratic. From a federalism standpoint, this criticism is perplexing because diversity, pluralism, innovation, and experimentation are core values that our judiciary and legal profession expressly endorse. The judiciary's dismissive characterization of tribal governance and its segregation of tribes from discussions of federalism's values are also striking, given that federalism existed within tribal governing structures long before it was adopted within the U.S. Constitution. Tribes are the nation's first federalists, and they continue to engage in federalism as members of the U.S. federal system.

By focusing on the intersection of tribal governance, federalism's values, and the judiciary's role in determining the proper allocation of federal, state, and tribal authority, this Article reveals that federalism is not a neutral norm that is equally applied to subnational sovereigns who engage in the act of governance.

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Despite federalism's theoretical support of diversity, pluralism, innovation, and experimentation, in reality, federalism is applied within a bounded and highly policed realm. For those sovereigns within federalism's protected space, diversity and innovation are theoretically promoted. For those sovereigns who exhibit federalism yet who are not part of federalism's constitutional design, governance reflecting authentic cultural diversity is confined and limited to an increasingly narrow sphere. This Article discusses this dynamic and calls for an engagement of federalism's values in judicial review of tribal jurisdictional disputes. This recommendation, if followed, will serve the nation and tribal communities by empowering rather than thwarting the exercise of effective governance.

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I. INTRODUCTION

Imagine the following scenarios, all involving the actions of separate sovereigns located within the borders of the United States:

> (1) A legislative body responsible for enacting laws and making decisions requires direct voting on all matters by all adult citizens of the community,[1]
>
> (2) An intergovernmental council develops policies for watershed management and water-quality protection using the knowledge of citizens whose ancestors have inhabited the region for thousands of years,[2]
>
> (3) A task force designs a novel approach to combatting methamphetamine abuse by creating programs that incorporate the local population's native language, cultural knowledge, practices, and ceremonies,[3]
>
> (4) Two governments with competing jurisdictional claims to parcels within the same territory jointly adopt a comprehensive land use plan that they cooperatively administer,[4] and
>
> (5) An elected leader identifies strategies for streamlining the government's regulatory approval process to maximize the efficiency of oil and gas development.[5]

1. *Tribal Government*, SAN MANUEL BAND OF SERRANO MISSION INDIANS, http://www.sanmanuel-nsn.gov/tribal_works.php.html (last visited June 15, 2014).

2. *Accord*, YUKON RIVER INTER-TRIBAL WATERSHED COUNCIL, http://www.yritwc.org/About-Us/Accord.aspx (last visited June 15, 2014).

3. HARVARD PROJECT ON AM. INDIAN ECON. DEV., HONORING NATIONS: 2006 HONOREE NAVAJO NATION METHAMPHETAMINE TASK FORCE 2–3 (2006), *available at* http://nnidatabase.org/db/attachments/text/honoring_nations/2006_HN_ Navajo_methamphetamine_task_force.pdf.

4. *See* SWINOMISH LAND USE ADVISORY BD., THE SWINOMISH COMPREHENSIVE PLAN: THE OFFICIAL LAND USE COMPREHENSIVE PLAN 10–11 (1996), *available at* http://www.swinomish-nsn.gov/media/5816/swincompplan96.pdf.

5. *Hearing Before a Subcomm. of the H. Comm. on Appropriations*, 112th Cong. 3–4 (2013) (statement of Tex Hall, Chairman, Mandan, Hidatsa & Arikara Nation) (expressing the need for a streamlined, one-stop-shop for oil and gas development on the Fort Berthold Indian Reservation that would eliminate permitting delays and redundancies), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg74609/html/CHRG-112hhrg74609

Nearly any observer would agree that these examples constitute models of good governance. They demonstrate extensive democratic participation by local citizens and responsiveness to local preferences. They deploy local knowledge to craft solutions that fit local circumstances. They exemplify innovation and experimentation. Furthermore, they highlight the potential for enhanced problem solving through intergovernmental cooperation and illustrate how competition for economic development can lead to attempts to make law and government more economically efficient.

Scholars who write about our nation's federal system would likely assert that these kinds of achievements are representative of federalism's benefits. In federal court opinions and scholarship, judges and academics regularly tout the benefits of a national political system predicated upon separate sovereigns.[6] The conventional wisdom maintains that the diffused sovereignty of federalism promotes a wide array of desirable outcomes, including a check against tyranny by one sovereign against another,[7] an ability to bring democratic rule closer to the people,[8] a greater variety of experimentation and innovation,[9] and enhanced problem-solving potential

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6. *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 458 (1991). Writing for the Court in *Gregory v. Ashcroft*, Justice Sandra Day O'Connor stated:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Id.

7. Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341, 380 ("Perhaps the most frequently mentioned function of the federal system is the one it shares to a large extent with the separation of powers, namely, the protection of the citizen against governmental oppression—the 'tyranny' that the Framers were so concerned about.").

8. DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 91–92 (1995) ("[O]ne of the stronger arguments for a decentralized political structure is that, to the extent the electorate is small, and elected representatives are thus more immediately accountable to individuals and their concerns, government is brought closer to the people, and democratic ideals are more fully realized.").

9. *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a

through both intergovernmental cooperation[10] and jurisdictional redundancy.[11]

In addition, the judiciary's desire to protect these desirable outcomes exerts substantial influence in cases involving federal–state conflicts. In the last 20 years, the Supreme Court has dealt states important victories against federal assertions of power and, in many of these cases, the Court has justified its reasoning by alleging its fidelity to promoting federalism's benefits.[12]

Implicit within our nation's commitment to federalism is the belief that while its benefits will accrue to individual states, they will also improve the welfare of the nation as a whole. When states are free to experiment with new policies, such as when Massachusetts implemented health care reforms,[13] evidence of success at the state level can trigger policy changes at

single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); *see also* United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.").

10. *See* David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796, 1799–1800, 1813 (2008) (arguing that the complex problems of environmental regulation require engagement by multiple levels of government).

11. *See* Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 661–62 (1981) (describing the benefits of redundancy); Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1045–46 (1977) (discussing how redundancy in the federal system helps protect important constitutional rights).

12. *See, e.g.*, Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2624 (2013) ("The Voting Rights Act sharply departs from [federalism's] basic principles. . . . States [must] beseech the Federal Government for permission to implement laws that they would otherwise have the right to enact and execute on their own . . . ."); Printz v. United States, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. . . . [S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty."); *Lopez*, 514 U.S. at 567 ("To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would . . . convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.").

13. *See generally* Phil Hirschkorn & Jeff Glor, *Massachusetts' Health Care Plan: 6 Years Later*, CBS EVENING NEWS (June 25, 2012), http://www.cbsnews.com/news/massachusetts-health-care-plan-6-years-later/ (describing the Massachusetts health-

the national level.[14] Relatedly, making autonomous policy choices serves a communicative function. When the states add their voices to a national dialogue, they create new opportunities for intergovernmental negotiation and coordination to respond to conflict.[15] Federalism's protection of local autonomy also reduces the national aggregate harms that can result from centralized national policies that impose one-size-fits-all approaches to complex, context-driven issues.[16] By avoiding the costs that such blunt policies can impose on the nation, and by allowing for local tailoring, federalism potentially improves governance for all.[17] In addition, federalism's empowerment of subnational sovereigns can stimulate broad-based engagement with issues that span the nation and cross jurisdictional boundaries.[18]

Granted, the judiciary does not use the functional approach to evaluating federal–state conflicts as its primary or exclusive mode of analysis. Federalism debates frequently begin as questions of constitutional

care system first implemented in 2006).

14. *See id.* ("The Obama administration cited Massachusetts as a model for the 2010 Affordable Care Act . . . ."); *see also* Mary Ann Chirba-Martin & Andrés Torres, *Universal Health Care in Massachusetts: Setting the Standard for National Reform*, 35 FORDHAM URB. L.J. 409, 445 (2008).

15. *See* Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245, 293 (2001).

16. John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 106 (2004).

> To the extent that local majorities in different states have divergent preferences from each other, a federal system can ensure a higher degree of citizen satisfaction than a unitary polity. If, for example, some state-level majorities prefer a policy of high taxes and high levels of government services while others prefer low taxes and low service levels, they can each be accommodated by their respective state governments. A unitary government with a one-size-fits-all policy will, by contrast, likely leave a larger proportion of the population dissatisfied with the resulting mix of policies. Federalism's accommodation of diverse preferences can ease racial, ethnic, religious, and ideological conflicts by allowing each of the opposing groups to control policy in its own region.

Id. (footnote omitted).

17. *See id.*

18. *See* Kirsten Matoy Carlson, *Jurisdiction and Human Rights Accountability in Indian Country*, 2013 MICH. ST. L. REV. 355, 369–71 (exploring the interplay between tribes, the federal government, and international human rights law).

interpretation, such as the extent of Congress's enumerated Article I powers, and the meaning and force of the Tenth and Eleventh Amendments.[19] Yet constitutional law leaves substantial gray areas for federal–state conflicts, and federalism's functional arguments frequently provide a critical persuasive weight that often tilts the balance in favor of a particular outcome.[20]

One aspect of federalism's values that scholars and the courts largely ignore is their relevance to tribal governance. Each of the scenarios described in the opening paragraph documents an actual example of *tribal* exercise of sovereignty. As sovereigns within the United States that govern with a measure of de jure autonomy, Indian tribes are important agents of self-rule within the United States' federal system. The tribal exercise of sovereignty, while not part of the constitutional design of federalism in the United States, is nevertheless an example of the principles of federalism in operation.

Indian tribes do not receive any special accommodation because of their ability to promote the values of federalism. On the contrary, in dicta that often overshadow the judiciary's formalist doctrinal analyses, the courts regularly portray tribal governance as dangerously foreign, destabilizing, and undemocratic.[21] From a federalism standpoint, this criticism is perplexing because diversity, pluralism, innovation, and experimentation are core values that our judiciary and legal profession expressly endorse. The judiciary's dismissive characterization of tribal

19. For a discussion of the role that statutory interpretation may play in interpreting legislation providing for state implementation of federal laws, see Abbe R. Gluck, Essay, *Instrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534 (2011).

20. United States v. Morrison, 529 U.S. 598, 627 (2000) ("If the allegations here are true, no civilized system of justice could fail to provide . . . a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States."); Alden v. Maine, 527 U.S. 706, 754 (1999) ("In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation."); Printz v. United States, 521 U.S. 898, 935 (1997); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72–73 (1996); United States v. Lopez, 514 U.S. 549, 567 (1995); New York v. United States, 505 U.S. 144, 187–88 (1992).

21. *See* RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE, at xx (2009) (opining that U.S. courts "continu[ously] diminish . . . sovereignty and deny tribal governments' power").

governance and its segregation of tribes from discussions of federalism's values are also striking given that federalism existed within tribal governing structures long before it was adopted within the U.S. Constitution.[22] Tribes are the nation's first federalists, and they continue to engage in federalism as members of the U.S. federal system.

By focusing on the intersection of tribal governance, federalism's values, and the judiciary's role in determining the proper allocation of federal, state, and tribal authority, this Article reveals that federalism is not a neutral norm that is equally applied to subnational sovereigns who engage in the act of governance. Despite federalism's theoretical support of diversity, pluralism, innovation, and experimentation, in reality, federalism is applied within a bounded and highly policed realm. For those sovereigns within federalism's protected space, diversity and innovation are theoretically promoted.[23] For those sovereigns who exhibit federalism, but are not part of federalism's constitutional design, governance reflecting authentic cultural diversity is confined and limited to an increasingly narrow sphere.

This Article unpacks these issues by addressing them in three parts. Part I describes the place of tribes within the federal system. It contrasts a static account of the constitutional design of federalism with an adaptive account that emphasizes the gradual incorporation of tribal governance as asymmetric subnational sovereigns in the federal system. Part II argues for a meaningful consideration of tribal governance in light of federalism's core values. It explores the connection and tension between these values and tribal governance, and it claims that they should have a limited place in deciding jurisdictional disputes. Part III provides an overview of the judiciary's record in deciding tribal jurisdictional disputes. It documents how the courts have failed to recognize the federalism benefits of tribal governance and how the same qualities that federalism seeks to promote have often been denigrated. This Article's conclusion explains that the treatment of tribal governance by the judiciary exposes the limits of federalism, and it recommends how tribes can harness federalism arguments as an additional means of protecting indigenous sovereignty and

22. *See* Donald S. Lutz, *The Iroquois Confederation Constitution: An Analysis*, PUBLIUS, Spring 1998, at 99, 103 (describing the self-rule with shared rule established by the Iroquois Confederation Constitution, which included a centralized Confederation Council).

23. Ironically, the state government beneficiaries of federalism's prescriptions are, on the whole, largely homogenous with similar party politics.

survival.

II. OUR EVOLVING FEDERALISM

The discussion below offers a descriptive account of federalism in the United States. It begins with federalism's constitutional design and then explains why federalism in the United States should be viewed as a complex adaptive system that has incorporated tribes as asymmetric subnational governments.

A descriptive account of federalism is essential to any discussion of the concept because the actual formation, structure, and operation of federalism vary throughout the world.[24] In contemporary world affairs, roughly two-thirds of the world's population lives in a nation structured as a federal regime.[25] Internationally, federalism encompasses a variety of institutional arrangements, some based on the integration of preexisting sovereigns and some based on a division of unified sovereignty.[26] The structure of federalism can also vary from nation to nation, with different forms of representation for the constituent units within the national government,[27] and with symmetric or asymmetric allocations of self-governance powers among a nation's subnational sovereigns.[28]

The diversity of federalism throughout the world helps dispel the

24. A comparative perspective on federal systems of governance serves as a guard against conflating the constitutional design of federalism in the United States with a descriptive account of federalism generally. *See, e.g.*, Douglas Laycock, *Protecting Liberty in a Federal System: The US Experience*, *in* PATTERNS OF REGIONALISM AND FEDERALISM: LESSONS FOR THE UK 119 (Jörg Fedtke & Basil S. Markesinis eds., 2006) ("Every federalism responds to a unique history, and thus every federalism is different from every other.").

25. MALCOLM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE 1 (2008). Other scholars claim that as many as 40 to 80 percent of the world's population lives in federalism regimes. DANIEL J. ELAZAR, FEDERAL SYSTEMS OF THE WORLD: A HANDBOOK OF FEDERAL, CONFEDERAL AND AUTONOMY ARRANGEMENTS, at xv (2d ed. 1994) (80 percent); RONALD L. WATTS, COMPARING FEDERAL SYSTEMS 5 (3d ed. 2008) (40 percent).

26. Nicholas Aroney, *Formation, Representation and Amendment in Federal Constitutions*, 54 AM. J. COMP. L. 277, 319 (2006).

27. *Id.* at 287.

28. Examples of asymmetric federal systems include Belgium, India, Russia, and Spain. WILL KYMLICKA, POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM AND CITIZENSHIP 104 (2001); Wilfried Swenden, *Asymmetric Federalism and Coalition-Making in Belgium*, PUBLIUS, Summer 2002, at 67, 67.

notion that federalism is a uniquely American concept that exists only in the form articulated in the U.S. Constitution. In fact, even within the United States, federalism has had different meanings that have been unique to each era's political struggles and social changes.[29]

Despite the diversity of definitions and interpretations of federalism, conceptual clarity requires an attempt to identify a common basis for the phenomenon of federal systems of governance. Federalism is often described as shared rule with self-rule. In other words, federalism exists when there is a structure of government that includes semiautonomous states in a system with a common central government and when governmental authority is possessed by each level of government.[30] Globally, federalism embraces a continuum of systems in which the balance of power between the centralized state and the regional subnational governments may allocate more or less power to the center or the periphery. An additional broad definition that encompasses these variations is William Riker's statement that "[f]ederalism is a political organization in which the activities of government are divided between regional governments and a central government in such a way that each kind of government has some activities on which it makes final decisions."[31]

While some definitions of federalism emphasize the relationship and allocation of power between the levels of government in a federal system,[32] others focus on the relationship between each government and its citizens.[33] A federal system has been characterized as one in which each government has an independent base of authority and the power to make its own laws and directly apply those laws to its citizens.[34]

29. *See, e.g.*, ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM 203 (2010) (comparing the competing interpretations of federalism represented by the Judiciary Act of 1789 and the Judiciary Act of 1801).

30. DANIEL J. ELAZAR, EXPLORING FEDERALISM 7 (1987); WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 5 (1964); WATTS, *supra* note 25, at 8; K.C. WHEARE, FEDERAL GOVERNMENT 12 (4th ed. 1963).

31. William H. Riker, *Federalism*, *in* GOVERNMENTAL INSTITUTIONS AND PROCESSES 93, 101 (Fred I. Greenstein & Nelson W. Polsby eds., 1975) (emphasis removed).

32. *See id.*

33. *See* ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN 7–8 (2011).

34. *Id.* at 7.

A. *Federalism's Constitutional Design*

The Constitution's text and structure create a multilevel system of governance that explicitly recognizes the exercise of sovereignty by both the federal government and the states. Article I vests Congress with limited, enumerated powers,[35] while the Tenth Amendment provides that all powers not delegated to the federal government nor prohibited to the states are reserved to the states or the people.[36] This system of allocating limited, enumerated powers to the federal government and reserving the remaining rights to the states leaves significant space for ambiguity regarding the limits of Congress's power and the extent to which the states have protected domains of exclusive authority.

The Constitution's Supremacy Clause declares that the Constitution, laws of the United States, and treaties entered into by the federal government are "the supreme Law of the Land."[37] This provision ensures that all constitutionally authorized federal laws take precedence over state laws, and it mandates that all courts comply with this principle.[38]

Article III, Section 2 of the Constitution vests the federal courts with responsibility for policing the Constitution's federalism by conferring federal question and diversity jurisdiction on the judiciary.[39] However, the Eleventh Amendment imposes a significant limitation on this power by affirming that state sovereign immunity shields states against lawsuits brought by citizens of other states or nations.[40] State sovereign immunity is also extended to shield states against suits brought by their own citizens[41] and against suits brought by Indian tribes.[42]

Although tribes did not participate in the Constitutional Convention and are not parties to the Constitution's federal–state compact,[43] the

35. U.S. CONST. art. I.
36. *Id.* amend. X.
37. *Id.* art. VI, cl. 2.
38. *Id.*
39. *Id.* art. III, § 2.
40. *Id.* amend. XI.
41. Hans v. Louisiana, 134 U.S. 1, 15 (1890).
42. Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 782 (1991).
43. *Id.* ("[I]t would be absurd to suggest that the tribes surrendered immunity in a [constitutional] convention to which they were not even parties."); *see also* Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 756 (1998) ("[T]ribes were not at the Constitutional Convention. They were thus not parties to the 'mutuality of . . .

Constitution does in fact recognize tribal sovereignty. The Constitution's text refers to Indians and Indian tribes in three places: the Commerce Clause,[44] the original congressional and tax apportionment clause,[45] and the Fourteenth Amendment's revisions to the apportionment clause.[46] Indian tribes were also considered in relation to the provisions on Congress's war-making powers, the Supremacy Clause (to reaffirm existing treaties and establish them as the supreme law of the land), and the Treaty Clause.[47]

The Commerce Clause reference to Indian tribes, also known as the Indian Commerce Clause, authorizes Congress to regulate commerce "with foreign Nations, and among the several States, and with the Indian Tribes."[48] Here, the principle of *noscitur a sociis* applies.[49] Just as foreign nations and states are recognized as sovereigns, so too are Indian tribes. Chief Justice John Marshall considered the meaning of the Indian Commerce Clause in determining whether the Cherokee Nation ought to be considered the equivalent of a foreign state for purposes of the Supreme Court's original jurisdiction.[50] His opinion introduced the *sui generis* term "domestic dependent nations" for Indian tribes to distinguish the fact that although tribes are a separate and distinct people with the power of self-governance, they are not equivalent to foreign states because they are

concession' that 'makes the States' surrender of immunity from suit by sister States plausible.'" (quoting *Blatchford*, 501 U.S. at 782)); Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 268 (1997).

44. U.S. CONST. art. I, § 8, cl. 3 (authorizing Congress to regulate commerce "with foreign Nations, and among the several States, and with the Indian Tribes").

45. *Id.* art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, *and excluding Indians not taxed*, three fifths of all other Persons." (emphasis added)).

46. *Id.* amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.").

47. Charles F. Wilkinson, *Civil Liberties Guarantees When Indian Tribes Act as Majority Societies: The Case of the Winnebago Retrocession*, 21 CREIGHTON L. REV. 773, 774–75 (1988).

48. U.S. CONST. art. I, § 8, cl. 2.

49. This principle of language interpretation allows a potentially ambiguous term to "be given more precise content by the neighboring words with which it is associated." 73 AM. JUR. 2D *Statutes* § 125 (2012). Essentially, under the doctrine, "a word is known by the company it keeps." Gregory v. Ashcroft, 501 U.S. 452, 465 (1991).

50. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 18 (1831).

located within the jurisdictional limits of the United States.[51]

The Indian Commerce Clause is also the only constitutional text that supplies a normative framework for the relationship between the tribes, the federal government, and the states. Although the Clause does not specifically address the tribal–state relationship, its adoption reflects the Framers' rejection of a parallel provision in the Articles of Confederation that did. The earlier version provided that "Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated."[52] James Madison later observed that the pairing of an "exclusive right and power" in Congress with a right against legislative infringement in the states was "obscure and contradictory."[53] With little debate, the provision was redrafted at the Constitutional Convention to eliminate the states' right against legislative infringement.[54] In its final form, the Indian Commerce Clause explicitly recognizes Congress's authority to regulate commerce with the Indian tribes, and the Clause's silence on states' rights codifies Madison's prescription that the states concede a correlating limit on state sovereignty.[55]

The original congressional apportionment clause and the Fourteenth Amendment also contained language excluding "Indians not taxed" from population counts used to determine direct taxes and the apportionment of

51. *Id.* at 17.

52. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4.

53. THE FEDERALIST NO. 42, at 334 (James Madison) (John C. Hamilton ed., 1892).

54. *See* Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1155 (1995).

55. Madison explained that federal power under the Indian Commerce Clause required a limitation on state sovereignty:

> [H]ow the trade with Indians, though not members of a state, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case, in which the articles of confederation have inconsiderately endeavoured to accomplish impossibilities; to reconcile a partial sovereignty in the union, with complete sovereignty in the states; to subvert a mathematical axiom, by taking away a part, and letting the whole remain.

THE FEDERALIST NO. 42 (James Madison), *supra note* 53, at 334.

members of Congress in the House of Representatives.[56] These references reflect the fact that Indians and Indian tribes were considered outsiders, not members of the polity or "the People" that had formed the Constitution. Furthermore, the discussion of tribes in the context of the War Powers, Supremacy, and Treaty Clauses also reflected the shared understanding that Indian tribes occupied a sovereign plane in their relations with the United States.

While the Constitution *recognizes* tribes as sovereigns, it contains no explicit *protection* of tribal sovereignty.[57] In contrast, within constitutional federalism, the states receive such protection, and they are explicit holders of a variety of other constitutional rights and duties. The Tenth Amendment recognizes that the states or the people retain all powers not delegated to the federal government or otherwise prohibited to the states.[58] Other state rights and duties are found within Article IV,[59] the Supremacy Clause,[60] and the Eleventh and Fourteenth Amendments.[61] The Constitution also provides the states with equal representation in the Senate, ensuring that the states will have a voice in the legislative branch,[62] and it provides for state representation in the Electoral College.[63]

Indian tribes do not participate in this constitutional allocation of rights and responsibilities.[64] To be sure, the field of Indian law is dedicated

56. U.S. CONST. art. I, § 2, cl. 3; *id.* amend. XIV, § 2.

57. *See* Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463, 501 (1979) ("It is well established that Congress, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of the Indian tribes.").

58. U.S. CONST. amend. X.

59. *Id.* art. IV (including the Full Faith and Credit Clause, the Privileges and Immunities Clause, and the Guarantee Clause).

60. *Id.* art. VI, cl. 2.

61. *Id.* amends. X, XIV.

62. *Id.* art. I, § 3, cl. 1.

63. *Id.* art. II, § 1, cl. 2.

64. Two pro-federalism measures which never materialized for tribes deserve mention here. The first is an article in the Treaty of New Echota, which provided the Cherokee Nation with a delegate in the House of Representatives. Jack Blair, Comment, *Demanding a Voice in Our Own Best Interest: A Call for a Delegate of the Cherokee Nation to the United States House of Representatives*, 20 AM. INDIAN L. REV 225, 229 (1995). This provision was later reaffirmed by the Treaty of 1866 following the Civil War, but it has never been enforced. *Id.* at 230–31, 233. The treaty provided:

> The Cherokee nation having already made great progress in civilization and

to articulating a variety of constitutional limits on federal and state authority and subconstitutional norms that protect tribal sovereignty and autonomy. These norms create the conditions for tribal governance within the basic definition of federalism, but they do not formally include tribes within federalism's constitutional design.

B. *Federalism's Gradual Integration of Indian Tribes*

Following ratification of the Constitution, the status of Indian tribes in the United States evolved through several eras of changing federal policies in Indian affairs.[65] Throughout these eras, the relationship of tribes to the federal system shifted from one of reciprocal treaty diplomacy to one of integration through the unilateral, coercive imposition of the federal government.

1. *The Treaty Relationship*

The earliest years of the republic are marked by the federal–tribal treaty relationship. Prior to colonial independence, many tribes had already engaged in nearly two centuries of treaty diplomacy with European and colonial governments.[66] During this period, and continuing through much of the 18th century, "Indian *cooperation* was the prime requisite for European penetration and colonization of the North American

> deeming it important that every proper and laudable inducement should be offered to their people to improve their condition as well as to guard and secure in the most effectual manner the rights guarantied [sic] to them in this treaty, and with a view to illustrate the liberal and enlarged policy of the Government of the United States towards the Indians in their removal beyond the territorial limits of the States, it is stipulated that they shall be entitled to a delegate in the House of Representatives of the United States whenever Congress shall make provision for the same.

Treaty with the Cherokees, U.S.–Cherokee Nation, art. 7, Dec. 29, 1835, 7 Stat. 478, 482. In addition, the federal government initially supported a plan for statehood for the Indian territory in what is now Oklahoma. Tribal support for the plan dissolved, however, as federal plans to appoint the territory's governor and require congressional approval of all state legislation became clear. *See* Benjamin A. Kahn, *A Place Called Home: Native Sovereignty Through Statehood and Political Participation*, 53 NAT. RESOURCES J. 1, 16–18 (2013).

65. *See* Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within "Our Federalism": Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667, 672 (2006).

66. *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.02[1], at 12–15 (Nell Jessup Newton et al. eds., 2012 ed.).

continent."[67] George Washington's administration sought to avoid costly and potentially devastating Indian wars by maintaining diplomatic relationships with tribes based on mutuality and respect.[68]

Between 1787 and 1871, the Senate ratified 372 treaties between tribes and the federal government.[69] The objects of these treaties frequently included the maintenance of peace, regulation of trade, and agreements to cede lands.[70] These treaties are the foundational constitutive documents that give shape to the federal–tribal relationship, and they reflected the understanding that Indian tribes were separate sovereigns with their own distinct polities and territories, capable of engaging in nation-to-nation dealings with the United States.[71] Justice Marshall would later state that

> [t]he constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties.[72]

One of the enduring legacies of the treaties is their embodiment and expression of American Indian normative commitments. Until the start of the 19th century, Indian treaties constituted a set of mutual, reciprocal exchanges founded upon a blending of the diplomatic traditions of Indian treaty negotiators with those of European and colonial officials.[73]

The treaty relationship caused a significant progression in the gradual

67. FRANCIS JENNINGS, THE AMBIGUOUS IROQUOIS EMPIRE 367 (1984).

68. *See* Letter from George Washington, Commander in Chief, Cont'l Army, to James Duane, Chairman, Cong. Comm. to Confer with the Commander in Chief (Sept. 7, 1783), *in* 8 THE WRITINGS OF GEORGE WASHINGTON 477, 484 (Jared Sparks ed., Boston, Russell, Odiorne, and Metcalf 1835).

69. ARLENE HIRSCHFELDER & MARTHA KREIPE DE MONTAÑO, THE NATIVE AMERICAN ALMANAC: A PORTRAIT OF NATIVE AMERICA TODAY 53 (1993).

70. *Id.* at 53–56.

71. *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 66, § 1.03[1], at 23–26; Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 62 (1999).

72. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832), *abrogation recognized by* Nevada v. Hicks, 533 U.S. 353 (2001).

73. *See* ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600–1800, 30–32 (1997).

incorporation of Indian tribes into the federal system. Whereas the Constitution merely recognized tribes as separate sovereigns and viewed them as outsiders to the federal system, the treaties created a web of mutual obligations and rights that would later become doctrines governing the federal–tribal relationship.[74] The common treaty provision in which a tribe accepted the federal government's protection, for example, formed seeds that would eventually develop into the trust doctrine.[75] The commitment to protection, coupled with the implicit corollary of dependence, was later seized by the judiciary as pragmatic justification for its expansive interpretation of congressional plenary power in Indian affairs.[76] As a result, treaty promises that were formed through arm's length negotiations between separate sovereigns later became entrenched doctrines that mediated the permanent relationship between the United States and Indian tribes.

The reservations established by treaties also advanced tribal incorporation because they identified permanent domestic spaces for tribal separatism.[77] These reservations, established as part of the reserved rights of tribes that had ceded portions of their ancestral territory, replaced the indeterminacy of the enforcement of aboriginal title with a limited, but explicitly mapped, territory for Indian self-governance.[78]

2. *The Marshall Trilogy*

State and local greed for Indian resources and open hostility toward

74. *Compare* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 18 (1831) ("At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government."), *with Worcester*, 31 U.S. (6 Pet.) at 559 (recognizing that Congress had sanctioned and ratified existing treaties, creating mutual rights and duties).

75. *See Cherokee Nation*, 30 U.S. (5 Pet.) at 17 ("[Tribes'] relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.").

76. United States v. Kagama, 118 U.S. 375, 384 (1886) ("From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.").

77. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY 14–15 (1987).

78. *See id.*

Indian rights invigorated the federal government's centralized control over managing relations with Indian tribes.[79] At the state and local levels, in which tribes were gaining treaty-based footholds on their territories, the very proposition of Indian rights was utterly rejected.[80] As Professor Robert Williams has observed, "[h]istory teaches Indian peoples that in a federal system of government, the white racial power organized through state governments represents the gravest and most persistent threat to Indian rights and cultural survival on this continent."[81] To strengthen the federal hand in Indian affairs, President George Washington's administration intended to regulate the conduct of frontier settlers and land speculators who sought control over Indian resources.[82] To this end, the first U.S. Congress enacted the Trade and Intercourse Act of 1790.[83] This legislation prohibited the purchase of Indian lands without congressional approval, and it required a federal license for any person conducting trade with the tribes.[84]

The Trade and Intercourse Act of 1790 did not govern disputes that arose from earlier transactions, however. In 1823, Chief Justice Marshall's opinion in *Johnson v. M'Intosh* addressed whether a property interest stemming from a direct purchase of lands from the Illinois and Piankeshaw

79. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 66, § 1.03[1], at 26 ("The overriding goal . . . during the treaty-making period was to obtain Indian lands . . . .").

80. Gerard N. Magliocca, *Preemptive Opinions: The Secret History of* Worcester v. Georgia *and* Dred Scott, 63 U. PITT. L. REV. 487, 523 (2002) (noting that states'-rights advocates "scoffed at the idea that, in addition to federal rights and state rights, there should now be 'Indian rights.'").

81. Robert A. Williams, Jr., *"The People of the States Where They Are Found Are Often Their Deadliest Enemies": The Indian Side of the Story of Indian Rights and Federalism*, 38 ARIZ. L. REV. 981, 987 (1996).

82. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 66, § 1.03[2], at 34–35. To be sure, the motivation for codifying and exercising federal control over Indian trade and land sales was not entirely borne of a benevolent desire to protect the Indians. Centralized control over Indian affairs was also a self-serving policy that would lock in a federal monopsony in tribal land transactions.

83. Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137 (1790).

84. Trade and Intercourse Act of 1790 §§ 1, 4. The statute was reenacted several times until 1834, when a permanent version was adopted. *See* Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729, 730 (codified as amended at 25 U.S.C. § 177 (2012)). The prohibition against purchasing Indian lands without federal approval remains codified in U.S. law. *See* 25 U.S.C. § 177.

Indians in 1773 and 1775 was valid.[85] The original land transactions preceded an 1818 purchase by William M'Intosh from the federal government,[86] which received title to the land by the Treaty of Greenville of 1795.[87] Chief Justice Marshall's opinion applied the "discovery doctrine," resulting in the perpetuation of a fierce legacy of colonial domination that dates back to the Crusades.[88] Marshall described the principle as the following: "[D]iscovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession."[89] Marshall's opinion held that upon discovery, Indian property rights consisted merely of rights of use and occupancy, and the right of alienation of this original Indian title was limited so that sales could only be made to the discovering nation or its successor.[90] Furthermore, the holder of rights of the discovering nation had two means of extinguishing original Indian title: purchase or conquest.[91]

Johnson is just as significant for its underlying false premises as it is for its holding on property rights. Marshall characterized the Indians as "fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness . . . ."[92] Marshall also indicated that the "character and habits" of the Indians offered "some excuse" for the harshness of the law.[93] These words represent the Supreme Court's early commitment to using a racist Indian narrative in support of colonial power and domination.[94] In this early case, Indians were explicitly cast as

85. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 571–72 (1823).

86. *Id.* at 560.

87. A Treaty of Peace, U.S.-Wyandot Tribe et al., art. III, Aug. 3, 1795, 7 Stat. 49, 49–50.

88. *See* Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 256 ("The underlying medievally-derived ideology—that normatively divergent 'savage' peoples could be denied equal rights and status . . . had become an integral part of the fabric of United States law.").

89. *Johnson*, 21 U.S. (8 Wheat.) at 573.

90. *Id.* at 574.

91. *Id.* at 587.

92. *Id.* at 590.

93. *Id.* at 589.

94. *Id.* at 590; *see also* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 590 (1832) (asking a rhetorical question about whether tribes "who have made some advances in

normatively divergent peoples to justify their exclusion from basic natural, human, or constitutional rights.

The strong nationalist policy in Indian affairs led to intense state and local hostilities directed at Native peoples.[95] In Georgia, state officials had long expected the federal government to extinguish Indian title in the state pursuant to an 1802 federal–state compact in which the federal government had agreed that it should do so.[96] But by 1827, not only had the Cherokee Nation resisted removal, it had also adopted a constitution that affirmed the tribe's sovereignty and the exercise of its jurisdiction over the tribe's treaty-stipulated boundaries.[97] In 1828, the Cherokee Nation asserted its jurisdiction by challenging the conviction of George Corn Tassel, a Cherokee tribal citizen who was convicted in state court and sentenced to hang for a murder within the Cherokee territory.[98] The U.S. Supreme Court accepted the appeal and ordered a stay of Corn Tassel's execution.[99] But before the Cherokees could present their oral arguments in favor of tribal jurisdiction, Georgia mooted the case by executing the defendant.[100]

Two days before Georgia executed Corn Tassel, it also passed a series of "Cherokee Codes" in an attempt to drive out the Cherokee Nation and seize its lands in derogation of its rights.[101] This legislation purported to

civilization" are "better neighbours than those who are still in a savage state"), *abrogation recognized by* Nevada v. Hicks, 533 U.S. 353 (2001); Cherokee Nation v. Georgia, 30 U.S. (6 Pet.) 1, 18 (1831) (implying that court redress was a foreign concept to Indians, as they would first resort "to the tomahawk").

95. The laws adopted by Georgia described in this section were similar to laws adopted by Mississippi affecting the Choctaw and Chickasaw tribes, and laws adopted by Alabama affecting the Creeks.

96. Matthew J. Hegreness, Note, *An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges, and Immunities*, 120 YALE L.J. 1820, 1847 (2011).

97. CONSTITUTION OF THE CHEROKEE NATION of 1827, art. I.

98. *See* SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW AND UNITED STATES LAW IN THE NINETEENTH CENTURY 28 (1994).

99. *Id.* at 29.

100. JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 516 (1996). Apart from these facts, "[w]e know little about Corn Tassel and his crime." HARRING, *supra* note 98, at 27–28.

101. The term "Cherokee Codes" was introduced by Professor Magliocca to highlight their similarity with the oppressive Black Codes of the Reconstruction era. Gerard N. Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L.J. 875, 885 n.50 (2003).

annex Cherokee lands to state counties, extend state civil and criminal laws over the Cherokee territory, nullify Cherokee laws, prohibit Cherokee citizens from appearing as witnesses in state courts, and provide for the surveying and eventual lottery of Cherokee lands.[102] Georgia's actions may have been among the most egregious, but they formed part of a broad pattern of attempts in every state to nullify the rights of Indians and Indian tribes under federal law.[103] In an effort to deter sympathizers from living within the Cherokee territory, the state also required that all white males living within the Cherokee Nation take an oath of loyalty to the sovereignty of Georgia and obtain a license.[104]

Just three days after Georgia enacted the Cherokee Codes, the Cherokee Nation initiated *Cherokee Nation v. Georgia* by serving a subpoena on the State of Georgia for another case challenging Georgia's assertion of jurisdiction.[105] This case, however, was a lawsuit filed in the U.S. Supreme Court by the Cherokee Nation itself against the state of Georgia.[106] The claim requested an order restraining Georgia from executing and enforcing its laws within the Cherokee territory,[107] and it sought to invoke the Supreme Court's original jurisdiction over cases between a state and a foreign nation.[108] Georgia, convinced that the Supreme Court lacked jurisdiction, refused to appear for the argument.[109] The Cherokees never obtained judicial review on the merits, however, because they failed to get enough votes finding that they were the equivalent of a foreign nation.[110] Chief Justice Marshall, writing in support of the dismissal but siding with the dissenters on the issue of whether the

102. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 525–28 (1832), *abrogation recognized by* Nevada v. Hicks, 533 U.S. 353 (2001).

103. *See* VINE DELORIA JR. & DAVID E. WILKINS, THE LEGAL UNIVERSE: OBSERVATIONS ON THE FOUNDATIONS OF AMERICAN LAW 133 (2007) ("This practice of arresting and harassing Indians under the color of law but dropping the case, or shifting the charges to unrelated crimes that avoided the federal question, began with the Cherokee but was adopted by nearly all states as a method to nullify federal protections guaranteed to Native individuals.").

104. *See Worcester*, 31 U.S. (6 Pet.) at 523.

105. HARRING, *supra* note 100, at 30.

106. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 15 (1831).

107. *Id.*

108. *Id.* at 15–16; *see* U.S. CONST. art. III, § 2.

109. Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 513 (1969).

110. *See Cherokee Nation*, 30 U.S. (5 Pet.) at 20.

tribe possessed sovereignty, described the Cherokee Nation as a "domestic dependent nation[]" with the following characteristics:

> They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.[111]

Therefore, according to Marshall, Indian tribes possessed sovereignty but they inhabited an inferior place as dependent wards within the U.S. political system.

Faced with a dismissal without any review on the merits, the Cherokee Nation turned to a new conflict to challenge Georgia's laws. Samuel Worcester, a missionary from Vermont living within the Cherokee Nation, was arrested by Georgia officials for failing to take the oath of loyalty to Georgia sovereignty and failing to obtain a license as required by the Cherokee Codes.[112] Worcester was criminally convicted of violating the license requirement and sentenced to four years of hard labor before he appealed to the Supreme Court.[113] With an appeal filed by a white, U.S. citizen petitioner, the Cherokee Nation was finally able to receive Supreme Court review of its challenge to Georgia's jurisdiction.[114] Presidential candidate and former U.S. Attorney General William Wirt, the same attorney who had represented the tribe in *Cherokee Nation*, argued the case.[115]

Chief Justice Marshall's opinion in *Worcester* reviewed the Treaty of Hopewell and the Treaty of Holston and found a recognition of tribal sovereignty:

> This treaty [of Holston], thus explicitly recognizing the national character of the Cherokees, and their right of self government; thus guarantying their lands; assuming the duty of protection, and of course

111. *Id.* at 17.

112. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 537 (1832), *abrogation recognized by* Nevada v. Hicks, 533 U.S. 353 (2001).

113. *Id.* at 540.

114. *See* Burke, *supra* note 109, at 519–20. In fact, Worcester and another colleague specifically rejected pardons just to get the Cherokees another opportunity in Court. ULRICH BONNELL PHILLIPS, GEORGIA AND STATE RIGHTS 80 (1902).

115. *Worcester*, 31 U.S. (6 Pet.) at 534.

> pledging the faith of the United States for that protection; has been frequently renewed, and is now in full force.[116]

Marshall concluded that the treaties, as well as the Trade and Intercourse Act, recognized tribes as "distinct, independent political communities, retaining their original natural rights,"[117] "in which the laws of Georgia can have no force."[118]

The doctrines of the Marshall Trilogy provided a significant push toward tribal integration into the U.S. political system. By denying tribes full property rights and vesting exclusive rights of purchase in the federal government,[119] the discovery doctrine repositioned Indians from outsiders engaged in the mutual exchange of treaty commitments to insiders with a legal personality defined by the United States. Furthermore, the doctrine established a legalized process for the massive dispossession of lands and resources on terms that would be most beneficial to the federal government.[120] The discovery doctrine, then, domesticated Indian lands and resources, priming them for transfer to federal hands by eliminating the potential for competition from international, state, or other private purchasers.[121]

Marshall concluded that the domestic character of Indians and Indian lands and the exercise of federal authority over Indians did not extinguish Indian sovereignty.[122] Tribes, therefore, were deemed "domestic dependent nations" with powers of self-government.[123] Furthermore, the treaty and inherent rights of tribes effectively shielded them from state authority.[124] This final conclusion confirmed that although federal Indian law doctrine viewed tribes as domestic, dependent, and divested of full original property rights, it also held that tribes remained in possession of their original sovereignty and continued to be autonomous agents of self-rule within their lands beyond the reach of the states.[125]

116. *Id.* at 556.
117. *Id.* at 559.
118. *Id.* at 561.
119. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573–74 (1823).
120. *See id.*
121. *See id.* at 573–77.
122. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831).
123. *Id.* at 17.
124. *See id.* at 16.
125. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832), *abrogation recognized by* Nevada v. Hicks, 533 U.S. 353 (2001).

Within six years of *Worcester*, the fundamental weakness of the opinion's affirmation of tribal sovereignty was cruelly illustrated when the Cherokee Nation was forcibly removed to the Indian Territory on the Trail of Tears.[126] Although *Worcester* affirmed a measure of autonomy and protection from state hostilities, that shield proved ineffective when state interests held control over federal policies in Indian affairs.[127] The fervently states'-rights Jackson administration used the federal power in Indian affairs affirmed in the Marshall Trilogy as an opening to proceed with Georgia's Indian ethnic cleansing campaign.[128] In 1830, President Jackson signed the Indian Removal Act and authorized the negotiation of the Treaty of New Echota.[129] The treaty incorporated a fraudulently obtained consent to removal.[130] In 1838, the War Department[131] finally oversaw the Cherokee's forced removal on the Trail of Tears, resulting in the deaths of 4,000 Cherokee citizens.[132]

3. *Plenary Power in Indian Affairs*

During the latter half of the 19th and early 20th centuries, the incorporation of Indian tribes proceeded under the increasingly powerful thumb of federal plenary power in Indian affairs. A key moment in this transition was the termination of the treaty negotiation process. In 1871, Congress adopted legislation declaring that "hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or

126. *See* GRANT FOREMAN, INDIAN REMOVAL: THE EMIGRATION OF THE FIVE CIVILIZED TRIBES OF INDIANS 21, 273–78 (1932).

127. *See id.*; *Worcester*, 31 U.S. (6 Pet.) at 594 (M'Lean, J., concurring).

128. *See* FOREMAN, *supra* note 126, at 21, 270.

129. Ethan Davis, *An Administrative Trail of Tears: Indian Removal*, 50 AM. J. LEGAL HIST. 49, 52 (2008); *see* Indian Removal Act, ch. 148, 4 Stat. 411 (1830).

130. ANGIE DEBO, AND STILL THE WATERS RUN 5 (1940).

131. At least one scholar has identified the War Department's administration of Indian removal during the 1830s as the true birth of the administrative state, long before the creation of the Interstate Commerce Commission in 1887. *See* Davis, *supra* note 129, at 49. Others argue that the administrative state existed throughout the 19th century and even in the late 18th century to implement and manage federal control in Indian affairs. STEPHEN J. ROCKWELL, INDIAN AFFAIRS AND THE ADMINISTRATIVE STATE IN THE NINETEENTH CENTURY 3–4 (2010).

132. GARY EVAN MOULTON, JOHN ROSS, CHEROKEE CHIEF 177, 187 (1975). *But see* Russell Thornton, *Cherokee Population Losses During the Trail of Tears: A New Perspective and a New Estimate*, 31 ETHNOHISTORY 289, 298 (1984) (estimating that as many as 8,000 Cherokee citizens may have lost their lives due to their forced removal).

recognized as an independent nation, tribe, or power with whom the United States may contract by treaty."[133] The Indian Appropriations Act of 1871 affirmed that it did not impair existing treaty obligations,[134] and its constitutionality is doubtful,[135] but it represented an important shift in the domestication of Indian tribes and federal Indian law. Going forward, tribes no longer participated in diplomatic treaty negotiations and were subject to the unilateral decisionmaking of Congress.

In the 1886 case *United States v. Kagama*, the Supreme Court dramatically expanded its recognition of Congress's authority to legislate in Indian affairs.[136] The case involved a challenge to Congress's authority to enact the Major Crimes Act, which granted jurisdiction to the federal courts over major crimes committed by Indians on reservation lands.[137] Observing that enactment of criminal legislation exceeded the textual limitation of the Constitution's Indian Commerce Clause, the Court concluded that congressional plenary power in Indian affairs sprang not from the Constitution but from the federal government's duty of protection owed to Indian tribes.[138] Furthermore, in emphasizing the guardian–ward relationship,[139] the opinion portrays Indian tribes as weak, helpless, and dependent on the United States due to their history of dealings with the federal government[140] and due to the threat of annihilation presented by residents of the states.[141]

In the 1903 case *Lone Wolf v. Hitchcock*, the Supreme Court endorsed the exercise of congressional plenary power when that power was unilaterally used to abrogate an Indian treaty by forcibly dividing

133. Indian Appropriations Act of 1871, ch. 120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (2012)).

134. *Id.*

135. David P. Currie, *Indian Treaties*, 10 GREEN BAG 2D 445, 451 (2007).

136. United States v. Kagama, 118 U.S. 375, 384–85 (1886).

137. Indian Major Crimes Act of 1885, ch. 341, § 9, 23 Stat. 385 (1885) (codified as amended at 18 U.S.C. § 1153 (2012)); *see Kagama*, 118 U.S. at 376.

138. *Kagama*, 118 U.S. at 383–84 ("These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States . . . . From their very weakness and helplessness . . . there arises the duty of protection, and with it the power.").

139. *Id.* at 383–84.

140. *Id.* at 384.

141. *Id.* ("They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.").

reservation lands to be held as homesteads by individual tribal members.[142] The 1867 Medicine Lodge Treaty had ceded Kiowa lands and confined the tribe to a reservation for their "absolute and undisturbed use and occupation."[143] The treaty also provided that the United States "solemnly agree[d] that no persons except those herein authorized . . . shall ever be permitted to pass over, settle upon, or reside in the territory."[144] Furthermore, the treaty stated that no additional cession of lands would be valid "unless executed and signed by at least three-fourths of all the adult male Indians" living on the reservation.[145] In response to mounting demand for Indian lands from frontier settlers, the federal government's Jerome Commission fraudulently obtained Kiowa approval to allot their reservation to individual tribal members.[146] The terms of the allotment presented to Congress were different than those discussed with Kiowa representatives, and the required three-fourths consent was never obtained.[147]

In its review of the Kiowas' challenge to the forced allotment, the Supreme Court pronounced that "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."[148] Furthermore, the Court stated that the exercise of that plenary authority includes

> [t]he power . . . to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the

142. *See* Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903).

143. Treaty with the Kiowas and Comanches, U.S.–Kiowa and Comanche Tribes of Indians, art. II, Oct. 21, 1867, 15 Stat. 581, 582.

144. *Id.*

145. *Id.* art. XII, at 585.

146. Ann Laquer Estin, Lone Wolf v. Hitchcock*: The Long Shadow*, *in* THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880S, 215, 222–24 (Sandra L. Cadwalader & Vine Deloria, Jr. eds., 1980).

147. *See id.* at 225–26.

148. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903). The Supreme Court later abrogated this portion of the opinion, holding that the exercise of congressional plenary power was a nonjusticiable political question. *See* Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 83–84 (1977).

> country and the Indians themselves, that it should do so.[149]

The Court supported its reasoning by citing the unilateral power of Congress to abrogate international treaties, but it included no recognition of the unique duty of protection and corresponding trust doctrine that shaped the federal–tribal colonial relationship.[150]

The Supreme Court's expansive interpretation of plenary power, its decree that the power included the right to abrogate Indian treaties unilaterally, and its conclusion that the exercise of plenary power was immune from judicial review further consolidated federal control in Indian affairs and eviscerated the diplomacy and mutuality of the early treaty relationship. By the end of the 19th century, Indian tribes no longer possessed an external status in which tribes participated in defining their relationship with the United States through treaty negotiations.[151] The genesis of plenary power in Indian affairs entrenched tribes within a space where they were subject to direct rule by the federal government.[152] For many Indians, this space paired a denial of citizenship with the imposition of Congress's legislative authority.[153]

The practical consequence of the further concentration of federal power in Indian affairs was evident by the increased rate of Indian dispossession and overt attempts at forced assimilation. The Indian Appropriations Act of 1871 ushered in later legislation such as the General Allotment Act of 1887 that directed the wide-scale allotment of Indian lands and the sale of surplus lands to white settlers.[154] By 1934, more than 86 million acres[155]—more than two-thirds of the tribal land base prior to allotment—had been lost through disposition to non-Indians.[156] The

149. *Lone Wolf*, 187 U.S. at 566.

150. *See id.*

151. *See* Indian Appropriations Act of 1871, ch. 120, 16 Stat. 544, 566.

152. *See* Zachary S. Price, *Dividing Sovereignty in Tribal and Territorial Criminal Jurisdiction*, 113 COLUM. L. REV. 657, 670–71 (2013).

153. *See id.* (noting Indian tribes are "subject to unusually broad federal authority"); Elk v. Wilkins, 112 U.S. 94, 102 (1884) (holding Indians are not citizens under the Constitution).

154. General Allotment (Dawes) Act of 1887, ch. 119, §§ 1, 5, 24 Stat. 388, 390.

155. Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 142 (1977).

156. *See, e.g.*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 66, § 1.04, at 74.

massive transfer of individual allotments to white ownership was completed through a variety of means, including fraud, abuse of child guardianship proceedings, and murder.[157] The dispossession of Indian lands also occurred simultaneously with the wholesale removal of Indian children from their families; during the latter quarter of the 19th century, federal appropriations for Indian boarding schools grew dramatically year after year,[158] as Captain Richard Pratt implemented a program to "kill the Indian . . . to save the man."[159] The legal incorporation of Indian tribes was complete, though the incorporation at this point primarily served to subject tribes to federal plenary control, shield federal authority from judicial accountability, and facilitate the transfer of Indian lands and resources to federal and settler control. *Worcester*'s doctrine of tribal self-governance and autonomy from state interference proved to be of little practical consequence when the federal government directly promoted the interests of states and local actors seeking title to Indian lands.

Despite the oppressively assimilative exercise of congressional plenary power during the periods of removal and allotment, doctrinal recognition of inherent sovereignty persisted. In *Kagama*, for example, the Court reiterated its recognition of tribal inherent sovereignty and autonomy within the same breath that it articulated the expansive plenary power in Indian affairs. The Court declared that Indian tribes, though not regarded as states or foreign nations, are nevertheless regarded "as having a semi-independent position . . . as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided."[160]

Ten years later, the Supreme Court affirmed in *Talton v. Mayes* that

157. WILLIAM T. HAGAN, AMERICAN INDIANS 115–16 (4th ed. 2013) (describing tactics such as white real estate agents encouraging Indians to lease their interests to white farmers; non-Indians preparing wills in which Indians would devise their interests to them; the abuse of guardianship proceedings by non-Indians to obtain control over children's allotments; and even bombing sleeping children to acquire control over Indian property interests).

158. FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880–1920, at 60 (1984).

159. *See* Raymond Cross, *American Indian Education: The Terror of History and the Nation's Debt to the Indian People*, 21 U. ARK. LITTLE ROCK L. REV. 941, 944 (1999).

160. United States v. Kagama, 118 U.S. 375, 381–82 (1886). *But see id.* at 383–84 (articulating expansive plenary power).

Indian tribes exercised powers of self-government that "are not operated upon by the Fifth Amendment, which . . . had for its sole object to control the powers conferred by the Constitution on the National Government."[161] In *Talton*, the Supreme Court again applied *Worcester*'s principle that tribes retained their "original natural rights" as "distinct, independent political communities"[162]—and also applied *Cherokee Nation*'s principle that tribes are "capable of managing [their] own affairs and governing [themselves]."[163] Thus, congressional plenary power in Indian affairs did not destroy the inherent character of Indian tribes. Furthermore, *Talton* highlights the unique place of Indian tribes within the U.S. political system as sites where subnational sovereignty and autonomy reside subject to congressional plenary power, yet free of the constitutional prohibitions that restrict the federal government.[164] Later, in *United States v. Wheeler*, the Supreme Court would apply this principle of inherent tribal sovereignty again, holding that because tribes and the federal government are "separate sovereigns," the Double Jeopardy Clause does not bar a federal prosecution that follows a tribal criminal trial.[165]

The persistent recognition of tribes as separate sovereigns with the power to govern themselves also marks an important distinction regarding the exercise of plenary power in Indian affairs. Although the federal government pursued a policy of assimilating Indians during this period, it did not move to fully absorb tribes within one homogenous body politic. Although not universally true, many tribes continued their separate existence without being forced into extinction and subsumed under exclusive federal and state jurisdiction.[166] That they suffered immeasurably as a result of federal policies in Indian affairs is beyond doubt, but they also survived as polities with independent political self-determination. The combination of plenary power in Indian affairs with inherent tribal sovereignty brought tribes within federalism's requirement of shared rule with self-rule.

Near the end of this chapter of repressive assimilation of Indian

161. Talton v. Mayes, 163 U.S. 376, 384 (1896).

162. *Id.* at 383 (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832)).

163. *Id.* (quoting Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831)).

164. *See id.* at 384.

165. United States v. Wheeler, 435 U.S. 313, 329–30 (1978).

166. *See, e.g.*, Laurence M. Hauptman, Seneca Nation of Indians v. Christy*: A Background Study*, 46 BUFF. L. REV. 947, 954 (1998).

peoples, Congress enacted the Snyder Act, also known as the Citizenship to Indians Act of 1924.[167] Although many Indians obtained citizenship prior to this date through a variety of legal mechanisms,[168] approximately one-third did not until the Act's passage.[169] The Act effectively conferred citizenship on all Indians, although many were still denied the rights to vote, attend school, or sit on juries.[170] To clarify that the continued trust status of Indian allotments was not affected by the Act, the statute also clarified that the conferral of citizenship did not impair any Indian property rights.[171]

Just as the assertion of federal power in Indian affairs created a backlash during the *Cherokee* cases, federal conferral of Indian citizenship also created a backlash in some states. In 1925, the year after the Snyder Act passed, Alaska passed the Alaska Literacy Act in an effort to restrict Alaska Natives' access to the polls.[172] Some states acknowledged federal citizenship but continued to deny Indians state citizenship.[173]

167. Citizenship to Indians Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (codified as amended at 18 U.S.C. § 1401(b) (2012)).

168. Prior to 1924, many Indians attained citizenship by a variety of means, including in accordance with treaty terms, under section 6 of the General Allotment Act, through receipt of a patent in fee simple under the Burke Act of 1906, through military service, or under the provisions of special legislation applicable to Indians in specific territories or enrolled in specific tribes. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 68, § 14.01[3], at 928–29. The Fourteenth Amendment's conferral of citizenship on "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof" was held inapplicable to Indians. U.S. CONST. amend. XIV, § 1; Elk v. Wilkins, 112 U.S. 94, 102 (1884).

169. Daniel McCool, *Indian Voting*, *in* AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 105, 107 (Vine Deloria, Jr. ed., 1985).

170. Dalia Tsuk, *The New Deal Origins of American Legal Pluralism*, 19 FLA. ST. U. L. REV. 189, 205 (2001).

171. Citizenship to Indians Act of 1924, § 1.

172. Terrence M. Cole, *Jim Crow in Alaska: The Passage of the Alaska Equal Rights Act of 1945*, 23 W. HIST. Q. 429, 433 (1992) (citing Stephen W. Haycox, *William Paul, Sr., and the Alaska Voters' Literacy Act of 1925*, ALASKA HIST. 2, 17–35 (1986)).

173. Indians did not have citizenship in Arizona or New Mexico until 1948 and they lacked citizenship in Utah until 1957. *See* Montoya v. Bolack, 372 P.2d 387, 390, 394 (N.M. 1962) (referencing a 1948 unreported federal district court case, *Trujillo v. Garley*, that first gave Indians the right to vote in that state); Allen v. Merrell, 353 U.S. 932, 932 (1957) (dismissing an appeal from the Utah Supreme Court because the parties stipulated the issue was moot); McCool, *supra* note 169, at 108 (noting the issue was moot because Utah's legislature had granted Indian suffrage). *Compare* Porter v. Hall, 271 P. 411, 419 (Ariz. 1928) (concluding that Indians were "under guardianship"

Ultimately, as barriers to the polls were removed, citizenship further incorporated Indians into the U.S. polity, offering long-awaited rights for those who had fought discrimination[174] but imposing an unwanted status vehemently resisted by others.[175] During the early 20th century, U.S. citizenship was considered incompatible with membership in a tribe.[176] But by 1916, the Supreme Court overruled this notion by holding that citizenship was "not incompatible with tribal existence or continued guardianship, and so may be conferred without completely emancipating the Indians or placing them beyond the reach of congressional regulations adopted for their protection."[177] A result of U.S. citizenship is the strengthening of Indian American political voices and corresponding increases in the responsiveness and accountability of elected officials to their tribal constituents.[178]

and therefore ineligible to vote under the state constitution), *with* Harrison v. Laveen, 196 P.2d 456, 463 (Ariz. 1948) (overruling *Porter*).

174. FRED PAUL, THEN FIGHT FOR IT! 41–44 (2003) (documenting the efforts of Alaska Natives who demanded the right to vote in southeast Alaska).

175. Clinton Rickard, leader of the Tuscaroras, reportedly stated that "[t]he Citizenship Act did pass in 1924 despite our strong opposition. By its provisions all Indians were automatically made United States citizens whether they wanted to be so or not. This was a violation of our sovereignty. Our citizenship was in our own nations." FIGHTING TUSCARORA: THE AUTOBIOGRAPHY OF CHIEF CLINTON RICKARD 53 (Barbara Graymont ed., 1973).

176. *In re* Heff, 197 U.S. 488, 493–94 (1905) (holding that a federal statute prohibiting the disbursement of alcohol to members of Native American tribes cannot reach to a Native American who is a citizen of the United States), *overruled by* United States v. Nice, 241 U.S. 591 (1916).

177. *Nice*, 241 U.S. at 598 (footnote omitted).

178. However, in most cases, tribal member populations are too small and geographically dispersed to exert real political influence. Indians comprise more than 10 percent of the population in only three states: Alaska, Oklahoma, and New Mexico. In most states, Indians comprise less than 2 percent of the population. *See generally Voting Age Population by Citizenship and Race (CVAP)*, U.S. CENSUS BUREAU, http://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html (click "CSV" or "SAS" under "2008–2012 American Community Survey 5 year estimates" then open "State" spreadsheet) (last updated Mar. 12, 2014). Despite their small numbers, the Indian vote played a potentially decisive role in two high-profile cases involving the election of Senator Tim Johnson of South Dakota in 2002 and the ouster of Senator Slade Gordon of Washington in 2000. Daniel Kraker, *Tribes Turn Out to Vote*, HIGH COUNTRY NEWS, Aug. 16, 2004, http://www.hcn.org/issues/280/14932.

4. *Indian Reorganization*

In 1928, Lewis Meriam submitted his commissioned report, "The Problem of Indian Administration," to the Secretary of the Interior.[179] The report documented the results of allotment: the economic basis of the Indians' traditional way of life had been destroyed, and an overwhelming majority of Indians were living in grinding poverty.[180] The policy of allotment had forced Indians to adapt to an agrarian way of life on land unsuited for such use, and it broke up the tribal land mass and the social fabric of Indian communal life.[181] Furthermore, the breakup of tribal landholdings and communal life had devastated tribal governance structures and traditional institutions.[182] The 847-page report helped turn the tide from the pro-assimilative focus of federal Indian policy to the pro-sovereignty focus of the mid-1930s to mid-1940s.[183]

Within the Department of the Interior, John Collier and Felix Cohen collaborated on changing the morally bankrupt policies that had decimated Indian communities.[184] While Collier served as Commissioner of Indian Affairs and Cohen as Associate Solicitor, the two collaborated to draft new legislation that would profoundly change Indian policy.[185] By 1934, Congress enacted their work product, the Wheeler–Howard Act, also known as the Indian Reorganization Act (IRA).[186]

The IRA formally repudiated the policy of allotment and indefinitely extended the trust status preventing the further alienation of Indian lands.[187] Section 16 of the IRA also promoted Indian self-governance by affirming the federal government's recognition of the right of tribes to

179. LEWIS MERIAM, INST. FOR GOV'T RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION (1928) [hereinafter MERIAM REPORT], *available at* http://www.narf.org/nill/resources/meriam.htm.

180. *Id.* at 6.

181. *See id.* at 6–8.

182. ELMER R. RUSCO, A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE INDIAN REORGANIZATION ACT 56–57 (2000).

183. Ironically, however, the report itself recommended greater resources for Indian education and for the eventual assimilation of Indians, rather than greater support for tribal self-governance. MERIAM REPORT, *supra* note 179, at 21.

184. *See* RUSCO, *supra* note 182, at 192–96.

185. *See id.* at 195–96.

186. Indian Reorganization Act, Pub. L. No. 70-383, 48 Stat. 984 (1934) (codified at 25 U.S.C. §§ 461–479 (2012)).

187. *Id.* §§ 1–2.

organize for their common welfare and adopt tribal constitutions.[188] The Department of the Interior's efforts to assist tribes with drafting constitutions was flawed and assimilative because federal officials circulated a model constitution and a constitution "outline" that was ill-suited to tribal governance.[189] Others have reported that Interior officials circulated a model corporate charter in place of constitutional provisions.[190] Nevertheless, the IRA constituted an important shift away from the policies of assimilation and allotment toward greater respect and support for inherent tribal sovereignty.

In October of 1934, the Solicitor of the Interior also issued an opinion on the "Powers of Indian Tribes."[191] This opinion, likely authored by Cohen, offered the Solicitor's interpretation of Section 16 of the IRA's reference to "powers vested in any Indian tribe or tribal council by existing law."[192] The opinion described a nonexhaustive set of broad-ranging powers of local self-government.[193] The opinion also incorporated the "most basic principle of all Indian law" that "those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished."[194]

By the close of Cohen's tenure in the Office of the Solicitor of the Department of the Interior in 1948, federal policies had experienced dramatic changes in Indian affairs. The tremendous loss of the Indian land base had been stanched, the IRA had supported a resurgence of institution building within tribal governments, and Cohen had completed a massive synthesis and summary of Indian law in the form of the *Handbook of Federal Indian Law*.[195] The *Handbook*, in turn, increased the coherence of Indian law and emphasized reserved rights and tribal powers of self-government within a regime that recognized a broad federal plenary power

188. *Id.* § 16.

189. *See* David E. Wilkins, *Introduction* to FELIX S. COHEN, ON THE DRAFTING OF TRIBAL CONSTITUTIONS, at xi, xxii (David E. Wilkins ed., 2007).

190. *Id.* at xxiii.

191. Nathan R. Margold, Powers of Indian Tribes, 55 Decisions of the Dep't of the Interior. 14, 17 (1934).

192. *Id.* at 17–18; *see* Indian Reorganization Act § 16 (internal quotation marks omitted).

193. Margold, *supra* note 191, at 30–65.

194. *Id.* at 19 (emphasis removed).

195. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 68.

in Indian affairs but tempered it with subconstitutional norms that mediated its harshness.[196]

In federalism terms, the Indian reorganization era produced greater standing for tribes as functional constituent sovereigns within the United States. The "shared rule" force of plenary power remained regnant, while the "self-rule" aspect of federalism underwent a resurgence through the IRA's support for institution-building and greater respect for self-governance. In addition, the legal norms articulated by Cohen in the *Handbook* and adopted by the Solicitor of the Interior provided firmer entrenchment for tribal autonomy.

5. *Termination*

By the late 1940s, several factors coalesced leading to the shift from the Indian New Deal era to the mid-20th century policy of termination of Indian tribes. These factors included increasing exasperation with the expensive and corrupt administrative machinery in Indian affairs, a desire to "emancipate" Indians from their dependence on the federal government, persistent demand for greater ownership and control of Indian lands and resources, and the departures of Collier and Cohen from federal office.[197]

The termination era was formally introduced in 1953 with House Concurrent Resolution 108, a general policy statement that resolved that "at the earliest possible time," all of several tribes located in certain specified states and several additional tribes located in other states "should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians."[198] The policy was followed by 14 separate statutes that initiated the termination of 109 tribes, affecting about three percent of the nation's population of Indians enrolled in federally recognized tribes.[199] Termination statutes were then followed by plans that detailed how land would be transferred from restricted trust status to freely alienable, privately owned land.[200] For the affected tribes,

196. *See id.* §§ 4.01[2][a], 5.02[1], at 213, 391.

197. *See* Wilkinson & Biggs, *supra* note 155, at 145–49. Collier resigned in 1945. S. LYMAN TYLER, A HISTORY OF INDIAN POLICY 147 (1973). Cohen died in 1953. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 66, at viii.

198. H.R. Con. Res. 108, 83d Cong., 67 Stat. 132 (1953).

199. Wilkinson & Biggs, *supra* note 155, at 151.

200. *Id.* at 151–52.

termination ultimately ended the unique federal–tribal relationship, transferred many of the duties and powers in Indian affairs from the federal government to the states, and exposed tribal members to the neglect and discriminatory treatment of the states.[201]

In *Menominee Tribe of Indians v. United States*, the Supreme Court examined whether the termination act adopted for the Menominee Tribe abrogated the tribe's treaty rights to hunt and fish.[202] The Court concluded that the termination act's silence as to treaty rights implied that no abrogation had occurred, stating, "We decline to construe the Termination Act as a back-handed way of abrogating the hunting and fishing rights of these Indians. While the power to abrogate those rights exists[,] 'the intention to abrogate or modify a treaty is not to be lightly imputed to Congress.'"[203] The *Menominee* decision provides a powerful illustration of the Court's traditional role in mediating congressional plenary power in Indian affairs. Even in the midst of Congress's darkest hour in federal–tribal relations, legislation purporting to terminate federal supervision over Indians was interpreted by the Court with attention to the clear and explicit intentions of Congress.[204] Without a clear statement of intent to abrogate tribal rights, including treaty rights, those rights would persevere.

Public Law 83-280 (PL 280) constituted another legislative tool of assimilation during the termination era. Enacted in 1953, it transferred partial civil and complete criminal jurisdiction over reservation Indians to five consenting states and any others that agreed to participate.[205] At first, this transfer of jurisdiction to the states proceeded regardless of tribal consent or resistance.[206] It did not involve any change in the restricted-trust status of Indian lands or any transfer of ownership of those lands.[207] In

201. *Id.* at 152.

202. Menominee Tribe of Indians v. United States, 391 U.S. 404, 408 (1968).

203. *Id.* at 412–13 (citation omitted) (quoting Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd., 291 U.S. 138, 160 (1934)).

204. *Id.* at 413.

205. Act of Aug. 15, 1953, Pub L. No. 83-280, §§ 2, 7, 67 Stat. 588, 588–90 (codified as amended in scattered sections of 18 & 28 U.S.C. (2012)).

206. *See id.* § 7; *see also* Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 538 (1975). The statute was later amended in 1968 to require Indian consent for future assertions of state jurisdiction. *See* Indian Civil Rights Act of 1968, Pub. L. No. 90-284, § 401, 82 Stat. 73, 78–79 (codified as amended at 25 U.S.C. § 1321 (2012)).

207. Act of Aug. 15, 1953, §§ 2(b), 4(b).

Bryan v. Itasca County, the Supreme Court affirmed that PL 280's transfer of jurisdiction to the states did not include civil regulatory authority over Indians and their lands.[208] As a result, the states lacked the power to tax Indians and their on-reservation property.[209] The state courts did possess jurisdiction to adjudicate civil causes of action arising on the reservation involving tribal members, however, and state criminal laws applied to reservations in full force.[210]

In 1955, the Supreme Court also decided *Tee-Hit-Ton Indians v. United States*, one of its most devastating Indian-law decisions. In that case, the Court concluded that the Tee-Hit-Ton Band of Tlingit Indians was not entitled to just compensation under the Fifth Amendment when the federal government contracted for the sale of timber resources on lands that the Tee-Hit-Ton had traditionally occupied.[211] The Tee-Hit-Tons held original Indian title to these lands within the area of the Tongass National Forest.[212] Under the discovery doctrine, the Tee-Hit-Tons held the right to use and occupy the land.[213] In authorizing the sale of timber located on this territory, Congress had specified that its resolution neither recognized nor denied the validity of indigenous possessory rights to the land,[214] and it required that all sales' proceeds be held in a special account until indigenous land rights could be determined.[215] The Supreme Court, in an opinion by Justice Stanley Reed, found that original Indian title could lawfully be taken without any right to compensation under the Fifth Amendment.[216] The Court concluded it was "well settled" that upon discovery, Indians remained on the land only with the "permission from the whites to occupy" their land.[217] To justify this outright denial of a core constitutional right to property, Justice Reed offered a narrative of the conquest of North America's "savages":

> Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that,

208. Bryan v. Itasca Cnty., 426 U.S. 373, 390 (1976).
209. *Id.*
210. *Id.* at 385–86.
211. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 288–91 (1955).
212. *Id.* at 276.
213. *Id.* at 279.
214. *Id.* at 276.
215. *Id.*
216. *Id.* at 284–85.
217. *Id.* at 279.

> even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.[218]

Thus, *Tee-Hit-Ton* represents the continuing capacity of the judiciary during the termination era to deny fundamental property rights for Indians.

The policies of the termination era demonstrate that congressional plenary power includes the power to completely deny the recognition of tribal sovereignty and eliminate the legal barriers to protect tribal autonomy from state authority. In addition to the power to terminate and abrogate, plenary power may also explicitly authorize state authority within Indian country. Furthermore, as *Tee-Hit-Ton* demonstrates, when plenary power is used to expropriate Indian lands and resources, Congress has no legally recognized obligation to provide just compensation under the Fifth Amendment for the taking.[219]

Despite the termination era's destructive assertion of federal power in Indian affairs, tribal sovereignty and treaty rights demonstrated a critical capacity to persevere. On the ground, this persistence is reflected in the rise of coordinated activism by tribal leaders to protect tribal powers and oppose termination policies.[220] In the courts, this persistence is best represented by *Williams v. Lee*. In that case, the Supreme Court held that the Arizona courts lacked jurisdiction to hear a civil claim filed by a non-Indian retailer against a Navajo couple to collect for goods sold to the couple on the reservation for credit.[221] The Court acknowledged that Congress had the power to authorize state jurisdiction over such matters, as it had for some states under PL 280.[222] But in the absence of any clear expression of Congress's intent to allow state jurisdiction over Indian defendants, the Court held that the Navajo Nation court system had exclusive jurisdiction over the claim.[223] The Court also announced the general rule that "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation

218. *Id.* at 289–90.

219. *Id.* at 288–89.

220. STEPHEN CORNELL, THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE 124–25 (1988); THOMAS W. COWGER, THE NATIONAL CONGRESS OF AMERICAN INDIANS: THE FOUNDING YEARS 3–4 (1999).

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

222. *Id.* at 220–21.

223. *Id.* at 222.

Indians to make their own laws and be ruled by them."[224] Later, the Supreme Court also affirmed in *Menominee* that Indian treaty rights are retained unless explicitly abrogated by Congress.[225] Similarly, *Bryan* again illustrated that congressional authorization of state authority within Indian country must be clear and explicit and will not be implied.[226]

From a federalism standpoint, the termination era underscores the fundamental weakness of existing legal safeguards for tribal autonomy. Unlike the states, tribal sovereignty lacks explicit constitutional entrenchment and is correspondingly much more vulnerable to legal change.

6. *Self-Determination*

On July 8, 1970, President Richard Nixon delivered his famous message to Congress formally repudiating the termination policy and endorsing self-determination for tribal governments. The first two paragraphs of the message stated:

> The first Americans—the Indians—are the most deprived and most isolated minority group in our nation. On virtually every scale of measurement—employment, income, education, health—the condition of the Indian people ranks at the bottom.
>
> This condition is the heritage of centuries of injustice. . . . Even the Federal programs which are intended to meet their needs have frequently proven to be ineffective and demeaning.[227]

The message pronounced that "[t]he time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."[228] The message went on to state that the policy of termination was wrong, both because it abrogated the treaty commitments of the United States toward tribes and because it was economically and socially disastrous for the affected

224. *Id.* at 220.

225. Menominee Tribe of Indians v. United States, 391 U.S. 404, 412–13 (1968).

226. *See* Bryan v. Itasca Cnty., 426 U.S. 373, 390 (1976).

227. RICHARD NIXON, PROPOSED RECOMMENDATIONS RELATING TO THE AMERICAN INDIANS—MESSAGE FROM THE PRESIDENT, H.R. DOC. NO. 91-363, 116 CONG. REC. 23258 (1970).

228. *Id.*

tribes.[229] The message added that "[s]elf-determination among the Indian people can and must be encouraged without the threat of eventual termination."[230]

The legislature responded by enacting several statutes that affirmed Indian self-determination. In 1973, Congress restored the federal recognition of the Menominee Tribe.[231] In later years, Congress passed more than a dozen restoration acts for other tribes that had been terminated.[232] Congress also enacted several statutes that promoted tribal self-determination,[233] including the Indian Self-Determination and Education Assistance Act of 1975, which provides for the transfer of federal programs and services to tribal governments for tribal administration.[234]

Beginning in 1988, Congress also authorized a tribal self-governance demonstration project modeled after a block-grant approach to state program administration.[235] The program was reauthorized and expanded in 1994[236] and made permanent in 2000.[237] Participating tribes are eligible to

229. *Id.*

230. *Id.*

231. Menominee Restoration Act, Pub. L. No. 93-197, § 3, 87 Stat. 770 (1973) (codified at 25 U.S.C. § 903 (2012)).

232. *See* Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RESOURCES J. 318, 338–39 (2006).

233. *See, e.g.*, Indian Financing Act of 1974, Pub. L. No. 93-262, § 2, 88 Stat. 77, 77 (codified at 25 U.S.C. § 1451); Tribally Controlled Community College Assistance Act of 1978, Pub. L. No. 95-471, § 101, 92 Stat. 1325, 1325 (codified at 25 U.S.C. § 1901); Indian Mineral Development Act of 1982, Pub. L. No. 97-382, § 3, 96 Stat. 1938, 1938 (codified at 25 U.S.C. § 2102); Indian Tribal Government Tax Status Act of 1982, Pub. L. No. 97-473, § 202, 96 Stat. 2607, 2608 (codified as amended at 26 U.S.C. § 7871); Indian Gaming Regulatory Act, Pub. L. 100-497, §§ 2–3, 102 Stat. 2467, 2467 (1988) (codified at 25 U.S.C. §§ 2701–2702); Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, § 3, 104 Stat. 3048, 3050–51 (1990) (codified as amended at 25 U.S.C. § 3002); National Indian Forest Resources Management Act, Pub. L. No. 101-630, §§ 302–303, 104 Stat. 4532, 4532–33 (1990); Indian Tribal Energy Development and Self-Determination Act of 2005, Pub. L. No. 109-58, § 502, 119 Stat. 763, 763–68 (codified at 25 U.S.C. § 3502).

234. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, § 3(b), 88 Stat. 2203, 2204 (1975) (codified as amended at 25 U.S.C. § 450a(b)).

235. *See* Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, § 209, 102 Stat. 2285, 2296.

236. Tribal Self-Governance Act of 1994, Pub. L. No. 103-413, § 402, 108 Stat. 4272 (codified at 25 U.S.C. § 458bb).

exercise broad flexibility over the transferred resources, including the power to redesign and consolidate programs and services to meet local needs and the power to reallocate funds between them.[238]

In the area of criminal law, Congress has also enacted legislation to strengthen tribal governance. The Tribal Law and Order Act of 2010 (TLOA), for example, amends the Indian Civil Rights Act (ICRA) to acknowledge tribal court authority to impose sentences of up to three years if certain protections are offered by the tribal court.[239] The Act also promotes increased cooperation and information sharing between tribal, state, and federal law enforcement agencies,[240] and it requires regular collection of data regarding Indian country crimes.[241] In 2013, Congress also adopted legislation recognizing the inherent power of tribes to exercise criminal jurisdiction over non-Indians who commit acts of domestic violence, dating violence, or violate a protection order in Indian country.[242] This legislation, included within the reauthorization of the Violence Against Women Act, also requires that tribes provide free indigent defense counsel for offenders, law-trained and licensed judges, published criminal laws, and a jury selected from a pool that includes a fair cross section of the community.[243]

While many acts of Congress in the self-determination era have aimed to promote tribal independence and autonomy, some have imposed individual-rights protections on tribal governments. The cornerstone of the effort to assimilate tribes to Western norms of individual-rights protection is the ICRA of 1968. This Act imposes several Bill of Rights-like protections on Indian tribes, including the right to due process and equal

237. *See* Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, §§ 2(4)–(6), 3(1), 114 Stat. 711, 711–12.

238. 25 U.S.C. § 458aaa-5(e).

239. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, § 234, 124 Stat. 2261, 2279–82 (codified at 25 U.S.C. § 1302). Prior to the passage of the Act, the Indian Civil Rights Act acknowledged tribal court authority to impose sentences of up to one year. 25 U.S.C. § 1302(7) (2006). TLOA authorizes sentences of up to three years if the tribal court provides defendants with an indigent defense attorney at the tribe's expense, provides a law-trained and licensed judge, and publishes the tribe's criminal laws. *Id.* § 1302(b)–(c) (2012).

240. Tribal Law and Order Act of 2010, § 222 (codified at 25 U.S.C. § 2815).

241. *Id.* § 212 (codified at 25 U.S.C. § 2809(a)(2), (4)).

242. Violence Against Women Reauthorization Act of 2013, Pub L. No. 113-4, § 904, 127 Stat. 54, 120–23 (codified at 25 U.S.C. § 1304).

243. *Id.* § 904(d).

protection of tribal laws; freedom of religion, speech, the press, and assembly; freedom from unreasonable search and seizure, double jeopardy, self-incrimination, and takings without just compensation; and several special procedural rights for criminal defendants, such as the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to confront witnesses, to subpoena witnesses, and to obtain assistance of counsel.[244] The ICRA does not incorporate all constitutional protections. It does not guarantee a republican form of government or protect freedom from establishment of religion, nor does it protect the right to receive free assistance of counsel for indigent criminal defendants or the right to receive a jury trial in civil cases.[245] These omissions reflect an intentional choice by Congress to accommodate tribal sovereignty and cultural distinctiveness and to avoid costly resource commitments the tribes could not afford.[246]

Although the ICRA's imposition of civil rights protections constitutes a heavy-handed application of congressional plenary power, the statute also promotes tribal independence in its application, interpretation, and enforcement. In *Santa Clara Pueblo v. Martinez*, the Supreme Court noted that "[i]n addition to its objective of strengthening the position of individual tribal members vis-à-vis the tribe [by enacting the ICRA], Congress also intended to promote the well-established federal 'policy of furthering Indian self-government.'"[247] To further this congressional policy, the Court refused to infer that the ICRA created an implied federal cause of action for enforcement of the Act's provisions beyond the Act's specific authorization of federal habeas review.[248] The Court concluded that federal review for all claims under the Act "plainly would be at odds with . . . protecting tribal self-government," because it would "undermine the authority of tribal forums" and "impose serious financial burdens" on tribal governments.[249] The Court also emphasized that tribal forums are not

244. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, § 202, 82 Stat. 73, 77–78 (codified as amended at 25 U.S.C. § 1302).

245. In addition, the ICRA does not prohibit tribes from abridging the privileges and immunities of citizens, and it does not require a grand jury indictment prior to the initiation of criminal prosecutions. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 63 n.14 (1978); *see also* WILKINSON, *supra* note 77, at 216 n.136 (noting the lack of privileges and immunities in the ICRA).

246. *Martinez*, 436 U.S. at 62–64.

247. *Id.* at 62 (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)).

248. *Id.* at 64.

249. *Id.*

only available to hear ICRA claims,[250] but they are also in a superior position to evaluate the claims in light of tribal tradition and custom.[251]

The congressional policy of tribal self-determination has bolstered the role of tribes as integral participants in the nation's federal system. The rise of federal–tribal self-determination contracts and self-governance compacts has triggered a revolution in tribal government administration. As programs and services have devolved from federal to tribal control, tribes have begun to exercise greater discretion and authority over their affairs and resources. And as tribal capacities are developed in areas tied to federal devolution, they create generalizable forms of expertise that can be translated to support governance across a wider range of policy issues.[252]

Congressional support of tribal law enforcement has also injected tribal governments with a powerful stimulant. The TLOA, for example, supports a variety of programs for the development of tribal justice systems. The combination of the TLOA and the Violence Against Women Reauthorization Act creates new incentives for the continued development of tribal courts and law enforcement capacities. As a result of these statutes, in the next five years there will likely be significant growth in the availability of public defenders in Indian country. This influx is likely to trigger important changes in criminal procedure law applied in tribal courts. Furthermore, tribal courts are likely to become more familiar to local non-Indian communities as they strive to meet the Violence Against Women Reauthorization Act's new jury pool requirements for prosecutions of non-Indians under the statute's domestic violence criminal jurisdiction provisions.

Finally, Congress's policy of promoting self-determination has also included protection for tribal autonomy from external interference. As *Martinez* indicated, tribal courts are the exclusive forum for the vindication of most claims that arise under the ICRA.[253] Unless a petitioner is detained and eligible to file a habeas petition, all ICRA claims are adjudicated by tribal courts.[254] Thus, the *Martinez* Court remained faithful to the original principle that the judiciary must mediate the harshness of congressional

250. *Id.* at 65.

251. *Id.* at 71.

252. LAURA E. EVANS, POWER FROM POWERLESSNESS: TRIBAL GOVERNMENTS, INSTITUTIONAL NICHES, AND AMERICAN FEDERALISM 201–02 (2011).

253. *Martinez*, 436 U.S. at 65.

254. *See id.* at 58, 65.

plenary power by requiring a clear statement of Congress's intent before legislation is interpreted to diminish tribal prerogatives.[255] In addition to affirming that the ICRA did not create an implied federal cause of action, *Martinez* also recognized that tribal governments enjoy sovereign immunity, and such immunity can only be waived by the tribe or Congress's unequivocal expression.[256]

Ultimately, the cumulative result of Congress's legislation during the self-determination era and the Supreme Court's interpretation of the ICRA is that tribes have assumed an integral role in the federal system. Tribal governments satisfy the most crucial aspects of federalism: they possess their own sovereignty within a broader national system that includes centralized federal authority, they make their own laws and engage in practical governance in distinctive ways, and they possess a degree of autonomy from external interference.

III. THE FUNCTIONAL ACCOUNT OF TRIBAL FEDERALISM

A. *The Case for Federalism's Values*

In any federal system, conflict over the scope and content of each sovereign's authority is inevitable, so the judiciary often plays a crucial interpretive role. Debates about federalism that involve tensions between federal and state rights frequently begin as questions of constitutional interpretation, such as the extent of Congress's enumerated Article I powers, the meaning and force of the Tenth and Eleventh Amendments,[257] and the structure that these provisions implicitly establish. In addition, federalism disputes often require an examination of history and precedent. Yet constitutional law, history, and precedent still frequently leave substantial gray areas for conflicts. Within these spaces, theories about the values and purposes of federalism frequently provide a critical persuasive weight that often tilts the balance in favor of a particular outcome.[258] These

255. *Id.* at 64, 72.

256. *Id.* at 58–59.

257. For a discussion of the role that statutory interpretation may play in interpreting legislation providing for state implementation of federal laws, see Gluck, *supra* note 19.

258. United States v. Morrison, 529 U.S. 598, 627 (2000) ("If the allegations here are true, no civilized system of justice could fail to provide . . . a remedy for the conduct of respondent Morrison. But under our federal system that remedy must be provided by the Commonwealth of Virginia, and not by the United States."); Alden v.

theories are especially relevant to judicial decisionmaking when they reflect the values that the federal system was originally intended to promote.[259] Furthermore, the values and purposes of federalism are relevant to judicial review to the extent that judges subjectively find these values to be compelling and worthy of promotion in society.[260]

When questions regarding the scope and limits of tribal authority require evaluation, a different set of considerations generally apply. The Constitution's silence on the source, nature, or limits of tribal sovereignty offer little direct exposition on tribal powers. Instead, the Indian Commerce Clause, the Supremacy Clause, and the Treaty Clause provide a normative platform that supports a framework for tribal powers.[261] Other relevant sources include the content of treaty rights, congressional legislation, history, and judicially created doctrine that combines the Court's prudential commitments with past precedents on tribal sovereignty and jurisdiction.[262] To a significant extent, tribal jurisdictional questions involve very little guidance from positive law, leaving tremendous room for ambiguity.[263]

Within the spaces created by this ambiguity, theories about the values and purposes of federalism are almost never applied to tribal jurisdictional disputes. Instead, tribal governance is usually framed as an archaic right whose recognition must be balanced against the costs the courts presume it imposes on society.[264] Tribal governance, unlike state governance, is almost

Maine, 527 U.S. 706, 754 (1999) ("In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation."); Printz v. United States, 521 U.S. 898, 935 (1997); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72–73 (1996); United States v. Lopez, 514 U.S. 549, 567 (1995); New York v. United States, 505 U.S. 144, 187–88 (1992).

259. *See* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991); *see also* ANTHONY J. BELLIA JR., FEDERALISM 208 (2011).

260. *See New York*, 505 U.S. at 211 (Stevens, J., concurring in part and dissenting in part) (eschewing the idea that federalism values mandate a particular government structure); *see also* BELLIA, *supra* note 259, at 208.

261. *See* Frank Pommersheim, *Tribal-State Relations: Hope for the Future?*, 36 S.D. L. REV. 239, 240 (1991).

262. *See id.* at 241–42.

263. *Id.* at 251.

264. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 156 (1980) ("The principle of tribal self-government . . . seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other.").

never viewed as a benefit that improves society's welfare by unlocking federalism's potential.

My proposal for a functional evaluation of tribal governance in light of federalism's values is likely to meet resistance from all corners. From the states'-rights perspective, tribes are probably considered inappropriate beneficiaries of the accommodations that often extend to the states. Unlike states, tribes are not parties to the compact that formed the Union, and they did not gain a constitutional guarantee of their rights as the states did. Furthermore, the values of federalism are properly understood as rooted in the aims of the Founders, and the tribes were never part of the Founders' federalism design.

While these claims have validity, they do not succeed in keeping functional federalism arguments beyond the tribes' reach. Tribes may be outsiders to the constitutional compact, but the Constitution does not forbid their federalism or mandate their exclusion. As my argument in Part I establishes, tribal governance constitutes a form of federalism, and it has become integrated into U.S. federalism through the system's gradual evolution. In fact, the progressive entrenchment of tribal federalism frequently proceeded in response to maneuvers that were made to promote effective governance. Tribal federalism, then, has its own history and origins, and much of that origin story involves federalism's values.

While states'-rights proponents are likely to grumble, tribal advocates are also likely to pause at this proposal. Tribal sovereignty is exceptional, and comparisons between tribes and states are frequently treacherous endeavors that risk sacrificing what is unique and essential to tribal sovereignty.[265] Furthermore, federalism's values are frequently perceived as opportunistic rhetoric in support of specific substantive ends.[266] Tribal governments can never win on the playing field of federalism, where the

265. *See* Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433, 437–43 (2005); Carole Goldberg, *Critique by Comparison in Federal Indian Law*, 82 N.D. L. REV. 719, 733–34 (2006).

266. Lynn A. Baker & Sanford Levinson, *Twenty-Year Legacy of* South Dakota v. Dole*:* Dole *Dialogue*, 52 S.D. L. REV. 468, 487 (2007) ("[O]pportunistic embrace of federalism when it is convenient to attaining one's substantive ends is quite different from a more general commitment to federalism, where one would have to take the quite-often bitter with the only-sometimes sweet."); Elizabeth Weeks Leonard, *Rhetorical Federalism: The Value of State-Based Dissent to Federal Health Reform*, 39 HOFSTRA. L. REV. 111, 125–27 (2010) (describing examples of "opportunistic" federalism).

goalposts for states' rights are always located downhill. Finally, functional arguments in favor of tribal governance may be dangerous if they elevate Western notions of good governance over indigenous principles[267] or if they displace treaty and inherent sovereignty claims or human rights claims based on the moral obligations of the United States toward its colonized indigenous peoples. Functional federalism arguments should not be used if they unfairly penalize tribal governments, which, weakened by centuries of policies designed to remove, acculturate, and assimilate them, are unable to pass muster in tests for effective governance that are likely to reflect Western ideals.

Each of these concerns is valid and worthy of thorough engagement. I assert that tribes do not need to sacrifice the distinctiveness of their rights and powers to participate in debates about federalism's values. The claim that tribes participate in federalism does not require assumptions about tribal and state equivalence. Tribal federalism, due to its history of integration into the federal system and due to the character of tribal sovereignty, is unique and distinct from the position of states within the federal system. Accordingly, tribal use of functional arguments about federalism's values should not displace arguments based on treaty rights, inherent sovereignty, or commitments to respecting the human rights of native peoples. The rights of indigenous peoples to continued respect for their self-determination or their cultures, languages, lands, and resources should not depend on functional assessments of tribal governance.

Instead, federalism's values may be most useful at the tipping point of tribal jurisdictional claims. In the gray areas in which tribal de facto sovereignty frequently fails to cross over into de jure recognition, such as where tribes exercise jurisdiction over nonmembers, federalism's values are most relevant. Furthermore, when state assertions of authority in Indian country hinge on a balancing of interests, courts should consider whether the state jurisdiction will interfere or promote effective governance.

B. *Core Values of Federalism*

The exercise of Article III power has allowed the federal courts to play a central role as the interpreters of the Constitution's federalism design. This engagement by the judiciary takes the constitutional text and structure as a starting point and looks to history and the Framers' intent to

267. Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1060–61 (2007).

determine the purposes undergirding constitutional federalism. These factors then create a framework for filling in the interstices of the Constitution with compatible principles and doctrines.

One complicating factor in the attempt to describe the values and purposes of federalism is the fact that this topic is rife with controversy. Just as the very existence of federalism in the United States is subject to challenge,[268] so is each of the values that jurists and scholars have identified as key aspects of federalism. Furthermore, throughout the nation's history, several different interpretations of the federal system and its primary values and purposes have gained predominance, only to eventually yield in the face of alternative visions based on newly ascendant governance ideals and practices.[269]

The purpose of this Article is not to provide a legal history of federalism interpretation in the United States but to map out several of the most significant values and purposes that have been used to decide questions about the proper allocation of federal and state powers.

Professor Erin Ryan has summarized the many values promoted by federalism by grouping them into four separate clusters that each attend to good governance:

> (1) [T]he maintenance of checks and balances that safeguard individuals against tyranny; (2) the promotion of accountable and participatory democratic government; . . . (3) the socially valuable benefits associated with local autonomy, especially diversity, innovation, and interjurisdictional competition . . . ; [and] (4) the pragmatic problem-solving premise of federalism, by which the federal system enables the development and exchange of unique regulatory capacity to cope with interjurisdictional problems.[270]

These values are frequently cited in discussions about federalism within the courts, the academy, and the halls of the nation's lawmaking bodies.

1. *Checks and Balances*

One of the most commonly cited benefits of a federal structure of governance is the ability of the subnational sovereign to protect against

268. FEELEY & RUBIN, *supra* note 25, at 115–23.

269. *See* RYAN, *supra* note 33, at 68–104 (tracing the Supreme Court's use of different federalism theories throughout history).

270. *Id.* at 38.

government abuse and overreach caused by the national sovereign, or vice versa. According to Alexander Hamilton, the separate sovereigns within the federal system would be able to prevent their counterparts from establishing a tyranny.[271] For James Madison, the division of power into distinct governments was crucial because it provided the people with a "double security" against the abuse of their rights.[272]

In *Gregory v. Ashcroft*, the Supreme Court considered the importance of the checks-and-balances value of federalism when it reviewed the lawfulness of the Missouri Constitution's mandatory retirement provision:

> Perhaps the principal benefit of the federalist system is a check on abuses of government power. "The constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties." Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.[273]

In 2011, Justice Anthony Kennedy also invoked the checks-and-balances value of federalism in *Bond v. United States*.[274] Kennedy's discussion emphasized that another aspect of the checks-and-balances value is the ability of one sovereign to provide an alternative forum for policymaking if barriers prevent individuals from using the institutions of the other sovereign within the federal system.[275] This aspect of checks and balances is also referred to as the "regulatory backstop" function of federalism.[276] Justice Kennedy wrote that federalism "allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central

271. THE FEDERALIST NO. 28 (Alexander Hamilton), *supra* note 53, at 228.

272. THE FEDERALIST NO. 51 (James Madison), *supra* note 53, at 400.

273. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (citations omitted) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)) (internal quotation marks omitted).

274. Bond v. United States, 131 S. Ct. 2355, 2364 (2011).

275. *See id.*

276. RYAN, *supra* note 33, at 42.

power."[277]

2. *Democratic Participation and Accountability*

In *Gregory*, Justice Sandra Day O'Connor emphasized that federalism "increases opportunity for citizen involvement in democratic processes."[278] Since the United States was founded, federalism has been characterized as promoting effective governance by ensuring that elected representatives operate in spheres that are close to the people.[279] Madison recognized the benefits of democratic participation in local governance in his papers when he observed that "within a small sphere, this voice [of the people] could be most easily collected, and the public affairs most accurately managed."[280] Brutus, an antifederalist who published essays during the founding, argued that "[t]he confidence which the people have in their rulers, in a free republic, arises from their knowing them, from their being responsible to them for their conduct, and from the power they have of displacing them when they misbehave."[281] Brutus viewed the national government as incapable of inspiring this confidence because of the remoteness of the seat of governance from the communities of most citizens.[282]

Federalism is also linked to the value of democratic participation because many believe that it promotes civic engagement. If governance is local, then citizens are more likely to be willing to engage in public debate and act to promote the public good, even at the expense of individual self-interest.[283] Governance at the national level, in contrast, is frequently

277. *Bond*, 131 S. Ct. at 2364.

278. *Gregory*, 501 U.S. at 458.

279. *See* LACROIX, *supra* note 29, at 156–58 (discussing early debates about centralized legislative power and the idea that states should have independent powers to address local issues); RYAN, *supra* note 33, at 44; SHAPIRO, *supra* note 8; Brenna Findley, *Practical Observations on Politics and the Constitution*, 61 DRAKE L. REV. 1085, 1091–92 (2013).

280. Letter from James Madison, Va. Delegate to the Constitutional Convention, to Thomas Jefferson, U.S. Minister to France (Oct. 24, 1787), *in* 5 THE WRITINGS OF JAMES MADISON 17, 29 (Gaillard Hunt ed., 1904).

281. HERBERT J. STORING, 2 THE COMPLETE ANTI-FEDERALIST 370–71 (1981).

282. *Id.* at 371 ("The consequence will be, they will have no confidence in their legislature, suspect them of ambitious views, be jealous of every measure they adopt, and will not support the laws they pass.").

283. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54

characterized as too remote to foster a similar high level of engagement.[284]

The Supreme Court has also invoked the value of democratic accountability in its Tenth Amendment anticommandeering cases. In *New York v. United States*, Justice O'Connor justified overturning the Low-Level Radioactive Waste Policy Amendments Act of 1985 on the grounds that it unlawfully commandeered state legislative authority.[285] O'Connor wrote, "[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."[286] She explained that "where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."[287] Similarly, in the anticommandeering case of *Printz v. United States*, Justice Antonin Scalia emphasized that "[t]he Constitution . . . contemplates that a State's government will represent and remain accountable to its own citizens."[288] Although democratic accountability is widely accepted as an important value of federalism,[289] the anticommandeering cases have been frequently criticized for relying on the unproven premise that citizens are unable to keep track of the level of government responsible for policy decisions felt at the local level.[290]

3. *Local Autonomy*

A major advantage of a federal system is the capacity of subnational sovereigns to respond to local preferences and conditions. The writings of the founding generation reflect on this benefit. For example, Richard

U. CHI. L. REV. 1484, 1510 (1987) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1983)).

284. *See, e.g.*, *id.* ("The federal government is too distant and its compass too vast to permit extensive participation by ordinary citizens . . . ."); Findley, *supra* note 279, at 1091–92.

285. New York v. United States, 505 U.S. 144, 188 (1992).

286. *Id.* at 168.

287. *Id.* at 169.

288. Printz v. United States, 521 U.S. 898, 920 (1997).

289. *See, e.g.*, RYAN, *supra* note 33, at 44; SHAPIRO, *supra* note 8; Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?* 111 HARV. L. REV. 2180, 2201 (1998).

290. *See, e.g.*, RYAN, *supra* note 33, at 46–47; H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 877 (1999).

Henry Lee, who published essays as "the Federal Farmer," noted that "one government and general legislation alone, can never extend equal benefits to all parts of the United States: Different laws, customs, and opinions exist in the different states, which by a uniform system of laws would be unreasonably invaded."[291] In a letter to Lee, Samuel Adams also noted the near impossibility for one national government to generate laws for persons "living in Climates so remote and whose 'Habits & particular Interests' are and probably always will be so different."[292]

Federalism's capacity to promote local autonomy has also received praise from scholars. For example, while national governance imposes a uniform rule on the whole that ignores local preferences, governance by subnational sovereigns allows for greater tailoring of policies to match local circumstances and tastes.[293] Several scholars have also emphasized the economic efficiency of empowering local governments to match regional differences.[294] Economist George Stigler acknowledged that "a good political system adapts itself to the differing circumstances and mores of different localities."[295] Other scholars have documented substantial cost savings that can flow from allowing local governance to tailor policies and administration to fit local needs.[296]

Local autonomy also creates opportunities for greater experimentation and innovation. As Justice Louis Brandeis famously observed, "It is one of the happy incidents of the federal system that a

291. STORING, *supra* note 281, at 230.

292. Letter from Samuel Adams to Richard Henry Lee (Dec. 3, 1787), *in* 4 THE WRITINGS OF SAMUEL ADAMS 324 (Harry Alonzo Cushing ed., 1907).

293. *See, e.g.*, Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 775 (1995); Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555, 558–59 (1994).

294. *See* LeBoeuf, *supra* note 293, at 558–59 nn.10–11 (compiling sources examining the economic arguments in favor of local governance in a federal system).

295. George Stigler, *Tenable Range of Functions of Local Government*, *in* JOINT ECONOMIC COMMITTEE, 85th CONG., 1st SESS., FEDERAL EXPENDITURE POLICY FOR ECONOMIC GROWTH AND STABILITY: PAPERS SUBMITTED BY PANELISTS APPEARING BEFORE THE SUBCOMMITTEE ON FISCAL POLICY 213 (Comm. Print 1957).

296. Martha Derthick, *American Federalism: Madison's Middle Ground in the 1980s*, 47 PUB. ADMIN. REV. 66, 70 (1987); *see* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 135–40 (1962) (using individualized economic cost–benefit analysis to explore hypothetical democratic decisionmaking).

single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[297] Whereas national governance is often criticized for stifling choice,[298] local governance allows regional subunits of the nation to develop new methods of solving social problems, delivering social services, or administering public resources.[299] Local governments may be motivated to innovate in response to local preferences and conditions, or they may be motivated to compete for economic development or a mobile citizenry capable of relocating to jurisdictions that offer a superior environment for managing a business or raising a family.[300] When new policies are implemented on a piecemeal, regional basis, the effects can be evaluated and improvements implemented without the broader risks of rolling out a massive new policy on a national basis.[301] Furthermore, local experimentation allows jurisdictions to adopt proven policies adopted elsewhere, leading to the diffusion of successful government policies and practices.[302]

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

298. *See, e.g.*, McConnell, *supra* note 283, at 1498; Philip J. Weiser, Federal *Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1702 (2001) ("The absence of a federal standard . . . can help ensure that the regulatory regime does not 'lock in' a suboptimal standard.").

299. *See* LeBoeuf, *supra* note 293, at 561–62.

300. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956); *see also* Calabresi, *supra* note 293, at 775–77. In Tiebout's model of fiscal federalism, citizens "vote with their feet" by moving to jurisdictions that provide desirable packages of public goods. RYAN, *supra* note 33, at 53; *see* Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 468 (2002) ("[T]he theory of interstate competition asserts that states actively compete with each other to attract new citizens, who can improve their lot through the power of 'exit' rights. Conversely, states also strive to ensure that current residents will not depart for greener pastures offered by competitors." (footnote omitted)). The Tiebout model of fiscal federalism has been criticized for its assumption that citizens are well-informed and free to move between jurisdictions. *See* RYAN, *supra* note 35, at 54. It has also been criticized for assuming that citizens choose to live in certain communities over others in response to public goods and taxes, as many individuals may be more influenced by other factors such as family ties or cultural connections to certain areas. *See, e.g.*, *id.*; Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 387–88 (1997).

301. *See* RYAN, *supra* note 35, at 56.

302. *See, e.g.*, LeBoeuf, *supra* note 293, at 562–63; G. Alan Tarr, *Laboratories of Democracy? Brandeis, Federalism, and Scientific Management*, PUBLIUS, Winter 2001, at 37, 42.

4. *Problem-Solving Capacity*

In his defense of the Constitution's federal system, James Madison reminded his cohorts that "the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object."[303] Madison's statement urged his audience to recall that the aim of designing a system of governance was not to protect state (or federal) sovereignty for sovereignty's sake, but to identify a structure that would provide the best opportunity for solving policy issues and protecting the public welfare.

Consistent with Madison's plea, Professor Erwin Chemerinsky has called for a focus on federalism as a means to enhance the nation's problem-solving potential at each layer of government:

> [F]ederalism should not be a highly formalistic doctrine used to limit the ability of government to deal with important problems. Instead, federalism should be reconceived as a functional analysis of how to best equip each level of government with the authority that it needs to respond to the serious problems facing American society.[304]

One approach to using federalism to further problem solving is the principle of subsidiarity.[305] Subsidiarity instructs that we should always prefer governance by the lowest level of government with the capacity to solve a social problem.[306] Although "subsidiarity" is a term more frequently associated with the European Union than the United States,[307] the concept

303. THE FEDERALIST NO. 45 (James Madison), *supra* note 56, at 359.

304. ERWIN CHEMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY 4 (2008).

305. Several scholars state that federalism has been explicitly connected to the principle of subsidiarity for nearly 500 years. Albert Breton et al., *Decentralization and Subsidiarity: Toward a Theoretical Reconciliation*, 19 U. PA. J. INT'L ECON. L. 21, 21 n.2 (1998).

306. *See* Findley, *supra* note 279, at 1092 ("[D]ecisions should default to the lowest level possible . . . .").

307. *See, e.g.*, Treaty on European Union and Final Act, art. 3b, Feb. 7, 1992, O.J. (C 191) 1 (1992). Article 3b provides the following requirement of subsidiarity:

> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of

has been described as "the guiding principle of federalism in the United States."[308]

In many cases, the problem-solving potential of government is enhanced through interjurisdictional cooperation rather than purely local or federal governance.[309] Since the 1930s, several models of federalism have reflected the need for intergovernmental dependence in order to respond to systemic, crosscutting issues. Cooperative federalism, for example, was first hailed as a critical conceptual break from the dual federalism model of separate, independent spheres that the Supreme Court had traditionally endorsed.[310] Rather than emphasizing federal and state sovereignty as existing within segregated, demarcated spheres, cooperative federalism emphasized the partnership and joint action potential of the federal–state relationship.[311] Although more coercive forms of cooperative federalism have fallen into disfavor,[312] cooperative federalism continues to be

> the proposed action, be better achieved by the Community.
>
> Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

Id. (internal quotation marks omitted).

308. David P. Currie, *Subsidiarity*, 1 GREEN BAG 2D 359, 359 (1998); *see also* Kyle Duncan, *Subsidiarity and Religious Establishments in the United States Constitution*, 52 VILL. L. REV. 67, 95–96 (2007).

309. *See* Daniel J. Elazar, *Cooperative Federalism*, *in* COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM 65, 65–69 (Daphne A. Kenyon & John Kincaid eds., 1991).

310. For cases demonstrating this view, see, for example, Ableman v. Booth, 62 U.S. (21 How.) 506, 516 (1858) ("[T]he powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres."); M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) ("Th[e federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends . . . found it necessary to urge."); Chisholm v. Georgia, 2 U.S. (2 Dallas) 419, 435 (1793) ("The *United States* are sovereign as to all the powers of Government actually surrendered: Each State in the *Union* is sovereign as to all the powers reserved."), *superseded by constitutional amendment*, U.S. CONST. amend. XI.

311. Elazar, *supra* note 309, at 73–74.

312. *See, e.g.*, Unfunded Mandates Reform Act of 1995, § 2(2), 2 U.S.C. §§ 1532–1538 (2012). *But see* Paul Posner, *The Politics of Coercive Federalism in the Bush Era*, 37 PUBLIUS 390, 408 (2007) ("Federal actions constituting coercive federalism, including mandates, continue to be a major feature of our system . . . .").

employed as the most appropriate model of regulatory oversight in many fields. In environmental law, for example, cooperative federalism has been characterized as "an enduring, organizing concept," allowing for federal establishment of national pollution-control standards and environmental regulatory programs with state implementation and enforcement.[313]

In more recent years, several scholars brought renewed focus to federalism's problem-solving capacity using interdependent governance. These theoretical perspectives refer to federalism as dynamic,[314] polyphonic,[315] dialogic,[316] empowering,[317] and interactive,[318] and they call attention to the advantages of shared and overlapping multilevel governance.

Chemerinsky situates effective government as the ultimate aim of federalism, and he notes that federalism accomplishes this objective in large part by its opportunity for redundancy. He writes:

> A key advantage of having multiple levels of government is the availability of alternative actors to solve important problems. If the federal government fails to act, state and local government action is still possible. If states fail to deal with an issue, federal or local action is possible. In other words, a tremendous advantage of federalism is its redundancy—multiple levels of government over the same territory and population, each with the ability to act. From this perspective, federalism needs to be reconceptualized as being primarily about empowering varying levels of government and much less about limiting government.[319]

Chemerinsky notes that sometimes an all-hands-on-deck approach to

313. Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 187 (2005).

314. Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 176 (2006).

315. ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 92 (2009).

316. Powell, *supra* note 15, at 250.

317. Erwin Chemerinsky, *Federalism Not as Limits, But as Empowerment*, 45 U. KAN. L. REV. 1219, 1221 (1997) ("[F]ederalism should be considered as a way of empowering multiple levels of government to deal with social problems and not, as it traditionally has been used, as limits on government power.").

318. Robert A. Schapiro, *Justice Stevens's Theory of Interactive Federalism*, 74 FORDHAM L. REV. 2133, 2135 (2006).

319. Chemerinsky, *supra* note 317, at 1234 (footnote omitted).

multilevel governance is required to effectively address social problems.[320] Environmental protection is one such area, because local governments are most likely to have knowledge of relevant conditions and resources, while the federal government is in the best position to identify externalities and avoid a regulatory race to the bottom.[321] At other times, each level of government must be empowered to act in the event that the other levels of government fail to respond to a pressing need.[322]

Robert Schapiro also documents the important role of redundancy in intersystemic adjudication. He writes that "[t]he redundancy of state and federal court systems provides a significant advantage of judicial federalism in the United States. If one system fails in its promise to protect rights, the other remains ready to intervene."[323] In addition, Professor Catherine Powell augments the case for interactive governance by describing the social benefits that flow from allowing multiple layers of government to translate and incorporate fundamental norms such as human rights.[324] Powell explains that this form of dialogic federalism allows for greater participation, including opportunities for wider deliberation, debate, and learning, and it consequently produces a thicker, more complex understanding of the law.[325]

C. *Tribal Governance*

Every day throughout the country, Indian tribes are solving social problems by engaging in the diligent, persistent work of governance. The effects of this work generate benefits that extend well beyond tribal communities to include surrounding regions and the rest of the country as a whole. This fact may seem remarkable, given that American Indians experience the highest rate of poverty of any race group in the United States,[326] and their communities have suffered a long legacy of brutal

320. *Id.*
321. *See id.*
322. *Id.* at 1235.
323. SCHAPIRO, *supra* note 315, at 122 (footnote omitted).
324. Powell, *supra* note 15, at 254.
325. *See id.*
326. SUZANNE MACARTNEY ET AL., U.S. CENSUS BUREAU, POVERTY RATES FOR SELECTED DETAILED RACE AND HISPANIC GROUPS BY STATE AND PLACE: 2007–2011, at 1–2 (2013). Between 2007–2011, the poverty rate for individuals identifying as American Indian or Alaska Native alone was 27 percent. This figure is almost twice the national poverty rate of 14.3 percent. *Id.*

federal policies aimed at their elimination. Professor Laura Evans observes that

> with a few notable exceptions as of late, tribal officials often plan and execute their political strategies from dilapidated office buildings, on meager budgets, amidst populations that struggle against the ravages of shockingly low incomes, inadequate housing, and poor health. . . . And yet, we find examples of tribal governments advocating for and winning new courses of action by nearby governments.[327]

Evans documents the fact that many resource-constrained tribal governments have found sustained success developing their policies and expertise and influencing other governments along the way.[328] In fact, examples abound throughout Indian country that illustrate how tribes engage in effective governance and promote the core values that undergird federalism.

1. *Checks and Balances*

Indian tribes have long relied on their governing institutions as a critical defense against actual tyranny. Beginning with the founding of the United States and continuing through much of the nation's history, the states and their inhabitants have engaged in open and frequently bloody conflicts with Indian tribes.[329] Centralized federal power in Indian affairs through the Indian Commerce Clause in the Constitution and the Trade and Intercourse Act arose from the federalists' early recognition of state demand for Indian lands and resources. [330]

The events that led to the Cherokee cases of the Marshall Trilogy also demonstrate fierce state willingness to engage in acts of tyranny and abuse toward tribes. Georgia's peremptory hanging of Corn Tassel, its passage of the Cherokee Codes, and its attempt to drive out the Cherokee from their homeland were extreme acts of violence and hostility toward the Indians.[331] In *Worcester*, Marshall responded by affirming Indian treaty rights and rights of self-government as a check against state abuse.[332] By affirming the

327. EVANS, *supra* note 252, at 4.

328. *See id.* at 158–59.

329. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 68, § 1.03[2]–[4], at 30–55 (chronicling early battles and conflicts).

330. *See id.* §§ 1.02[3], 1.03[2], at 22–23, 35–36.

331. *See supra* notes 98-104 and accompanying text.

332. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559, 561 (1832), *abrogation*

tribe's retained inherent sovereignty and the exclusion of state jurisdiction, the opinion established a legal safeguard against Georgia's tyrannical use of state power.

During the 20th century, Congress continued to be mindful of the potential for state abuse of power in relations with tribes. In the area of child welfare, Congress specifically strengthened tribal self-governance to help Indian communities address a long history of widespread removal of children from Indian families by state social services. The Indian Child Welfare Act of 1978 (ICWA), for example, affirms that tribal courts have exclusive jurisdiction over all child custody proceedings involving Indian children domiciled in Indian country.[333] The ICWA also affirms that tribal courts have presumptive but concurrent jurisdiction over all other Indian child custody cases, and it incorporates additional procedural protections to minimize the potential for continued state abuse.[334]

In response to the continuing child welfare crisis, tribal courts around the country are strengthening their capacity to exercise jurisdiction over child welfare matters.[335] However, not all tribes have this capacity. One such example is the Houlton Band of Maliseet Indians.[336] The Maliseet received federal recognition in 1980, and its powers of self-government were restricted under the terms of the Maine Indian Claims Settlement Act.[337] The tribe used institution-building and other forms of governance to address the state's historic lack of compliance with the ICWA.[338] Prior to the Houlton Band's actions, the state ignored the ICWA's requirements, and until the late 1990s, state child protective services had conducted

recognized by Nevada v. Hicks, 533 U.S. 353 (2001).

333. Indian Child Welfare Act of 1978, 25 U.S.C. § 1911(a) (2012).

334. *Id.* § 1911(b). Additional procedural protections include a tribe's right to intervene in state court proceedings and a requirement that each state give full faith and credit to tribal acts, records, and proceedings involving child custody. *Id.* § 1911(c)–(d).

335. *See* Lorie M. Graham, *"The Past Never Vanishes": A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 50–51 (1998).

336. The Maliseet Nation are "river people" who live alongside the St. John River and its tributaries in Maine and New Brunswick. Information about the Nation can be found at *About Us*, HOULTON BAND OF MALISEET INDIANS, http://www.maliseets.com/index.htm (last visited June 15, 2014).

337. *See* Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1725(a), 1727(e).

338. *See* HARVARD PROJECT ON AM. INDIAN ECON. DEV., *supra* note 3, at 1–2.

continual surveillance of Maliseet families.[339] As a result of the state's actions, at least 16 percent of all Maliseet children lived in out-of-home placements in 1999.[340] To address this abuse, the Maliseet formed a Department of Indian Child Welfare Services, adopted strict regulations governing child welfare matters, and formed an intergovernmental collaboration with the State of Maine.[341] The tribe's effort gained the state's respect and triggered important changes in state practices.[342] By 2006, the percentage of Maliseet children placed outside the home had been cut in half.[343]

In a matter that continues to develop, several South Dakota tribes are responding to alleged state abuses in child welfare proceedings.[344] In March 2013, the Oglala Sioux Tribe, the Rosebud Sioux Tribe, and the American Civil Liberties Union filed a class action lawsuit against the State of South Dakota demanding compliance with the ICWA.[345] The complaint alleges that the State of South Dakota removes scores of Indian children from their homes based on insufficient evidence and in perfunctory and inadequate hearings in violation of the ICWA.[346] Since the case was filed, nine South Dakota tribes collaborated to create an independent, tribal foster care program using direct federal funding.[347]

2. *Democratic Participation and Accountability*

In many cases, tribal governance affords extensive opportunities for democratic participation that eclipse opportunities in state and federal governments. Tribal communities are engaged in direct, local government administration, but their work extends far beyond the municipal governance in many of their neighboring jurisdictions.

339. *Id.*

340. *Id.* at 3.

341. *Id.* at 1.

342. *Id.* at 2.

343. *Id.* at 3.

344. *See* Class Action Complaint for Declaratory and Injunctive Relief at 2–3, Oglala Sioux Tribe v. Van Hunnik, Civ. No. 13-5020 (D.S.D. Mar. 21, 2013), 2013 WL 1178660.

345. *Id.* at 38–39.

346. *Id.* at 3.

347. *South Dakota Tribal Leaders Seek Federal Foster Care Help*, RAPID CITY J. (Nov. 11, 2013), http://www.rapidcityjournal.com/news/local/south-dakota-tribal-leaders-seek-federal-foster-care-help/article_8562cb15-4d3e-52da-8546-16c76a53e952.html.

As separate sovereigns, tribes exercise independent control over developing the essential constitutive aspects of their governments. Many tribal communities, for example, have engaged in lengthy and detailed negotiation over adopting or amending tribal constitutions.[348] These deliberations require deep engagement by the entire community in the most basic yet fundamental issues of governance, such as the definition of membership,[349] the structure of government, separation of powers, the lawmaking powers of the legislature, and the development of a judiciary or other forum for deciding disputes.[350] In many cases, tribal communities have created unique interpretations of the function and significance of these aspects of governance, indicating that the community has participated in translating legal norms into cultural terms that reflect indigenous perspectives.[351]

Independent tribal sovereignty also means that tribes are engaged in administering complex governmental structures, laws, and programs. In some cases, members of tribal communities also participate in general councils in which the entire adult membership of the tribe deliberates and decides all important matters.[352]

Tribal communities must also navigate intergovernmental relations with multiple levels of government. In contrast to non-Indian local governments, tribes manage direct relationships with local, state, and

348. *See generally* Eric Lemont, *Developing Effective Processes of American Indian Constitutional and Governmental Reform: Lessons from the Cherokee Nation of Oklahoma, Hualapai Nation, Navajo Nation, and Northern Cheyenne Tribe*, 26 AM. INDIAN L. REV. 147 (2002) (discussing the large-scale governmental and constitutional reforms of the four nations).

349. *See generally* KIRSTY GOVER, TRIBAL CONSTITUTIONALISM: STATES, TRIBES, AND THE GOVERNANCE OF MEMBERSHIP 108–34 (2010) (analyzing the varying definitions and criteria used to determine membership).

350. GERALD VIZENOR & JILL DOERFLER, THE WHITE EARTH NATION: RATIFICATION OF A NATIVE DEMOCRATIC CONSTITUTION 28 (2012); *see* Eric D. Lemont, *Introduction*, AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 1, 2 (Eric D. Lemont ed., 2006); COHEN, *supra* note 189, at 28–32, 55–75.

351. *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, 492–98 (2000). *See generally* THE INDIAN CIVIL RIGHTS ACT AT FORTY (Kristen A. Carpenter et al., eds. 2012) (including chapters on tribal interpretations of equal protection, due process, and freedom of speech and religion).

352. *See, e.g.*, Stands Over Bull v. Bureau of Indian Affairs, 442 F. Supp. 360, 369 (D. Mont. 1977).

federal officers and agencies. Tribes also participate in extensive intertribal relations,[353] and many tribal communities participate directly before international bodies that play a role in protecting indigenous rights.[354] These opportunities for intergovernmental engagement create an enhanced version of civic engagement in tribal communities.

The channels for civic engagement in tribal governance provide critical opportunities to influence policy that are largely absent at the state and federal level. Tribal members comprise a small fraction of the electorate in the federal government and nearly all states.[355] Their small numbers result in very limited opportunities to wield power and experience the responsibility that accompanies being in the majority. As a result, tribal preferences and positions are more likely to be marginalized by dissenters, and the perception of futility is more likely to cause withdrawal from political life.[356] In addition, the power to govern provides individuals with important experience with the need to compromise, negotiate, and take stock of the potentially oppressive impact that one's preferences can have on minorities. Each of these experiences is critical for developing true "civic virtue" in society. Finally, when tribal communities are empowered to use their own processes for civic engagement to decide matters, their positions can be translated to laws and institutions, putting their perspectives on a stronger footing to enrich the nation's political dialogue.

While tribal members enjoy rich opportunities for civic engagement, tribal governance has been accused of leaving no space for democratic participation by nonmembers.[357] The exercise of jurisdiction over these

353. *See* Steven J. Gunn, *Compacts, Confederacies, and Comity: Intertribal Enforcement of Tribal Court Orders*, 34 N.M. L. Rev. 297, 325–34 (2004) (identifying several examples).

354. *See generally* Robert T. Coulter, *Using International Human Rights Mechanisms to Promote and Protect Rights of Indian Nations and Tribes in the United States: An Overview*, 31 AM. INDIAN L. REV. 573 (2007).

355. *See* 2012 American Community Survey, *ACS Demographic and Housing Estimates*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_12_1YR_DP05&prodType=table (last visited June 15, 2014).

356. *See* McCool, *supra* note 169, at 129 (noting tribal votes can affect elections significantly, but only "if two conditions are met"—the race is close and the tribal members vote as a bloc).

357. *See* United States v. Lara, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring) (noting that "[t]he Constitution is based on a theory of original, and continuing, consent of the governed" and that tribal criminal jurisdiction over a

nonmembers is frequently called the "democracy deficit."[358] Many scholars have discounted the democracy deficit by analogizing tribal jurisdiction over nonmembers to state jurisdiction over nonresidents who visit the state.[359] Yet, an important distinction exists when tribes assert jurisdiction over nonmembers who reside within Indian country.

Unlike the freedom individuals enjoy to establish residency in a new state and acquire state citizenship, nonmembers who live within Indian country acquire no citizenship rights in the tribe.[360] This issue requires more extensive room for engagement than this Article provides. However, several ameliorating factors require consideration.

First, federal and state governance also reflect a democracy deficit due to the development of the common law by unelected judges,[361] the increasing amount of decisionmaking that is shunted to government bureaucrats rather than elected officials,[362] and the disenfranchisement of citizens who are unable to overcome voting laws that restrict access to the polls.[363] The deficit exists in many areas of society, and tribal governance

nonmember Indian contradicts that principle); Duro v. Reina, 495 U.S. 676, 679, 694 (1990) (noting that a nonmember Indian criminal defendant who appealed a tribal court's assertion of jurisdiction over him was not eligible for membership in the tribe that attempted to prosecute him and was therefore unable to vote in tribal elections, hold tribal office, or serve on tribal juries), *superseded by statute*, Act of Oct. 28, 1991, Pub. L. No. 102-137, § 1, 105 Stat. 646.

358. T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 115 (2002); *accord* Matthew L.M. Fletcher, *Tribal Membership and Indian Nationhood*, 37 AM. INDIAN L. REV. 1, 11 (2012–2013).

359. *See, e.g.*, ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM: CASES AND MATERIALS 566 (rev. 4th ed. 2003); Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 HOUS. L. REV. 701, 712–13 (2006).

360. ALEINIKOFF, *supra* note 358, at 116.

361. *Cf.* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 103 (2006).

362. DANIEL A. FARBER ET AL., CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 1107–08 (3d ed. 2003) (arguing that elected officials frequently delegate powers of standard creation to agencies); Michael P. Vandenbergh, *An Alternative to Ready, Fire, Aim: A New Framework to Link Environmental Targets in Environmental Law*, 85 KY. L.J. 803, 849–50 (1997).

363. *See* Jamin Raskin, *A Right-to-Vote Amendment for the U.S. Constitution: Confronting America's Structural Democracy Deficit*, 3 ELECTION L.J. 559, 564–70 (2004).

represents just one place along the continuum of this issue.

Second, federal and state governance over tribes represents a significant countervailing democracy deficit. Indian tribes never consented to their incorporation within the United States, and they never consented to the Constitution or congressional plenary power in Indian affairs.[364] Because many lacked citizenship until the Citizenship Act of 1924, many tribal citizens also lacked the right to vote in elections throughout much of Congress's history of passing legislation to remove and assimilate tribes.[365] Similarly, tribes have not consented to the exercise of state jurisdiction within their boundaries, and state elected officials have no political incentive to be accountable to small populations of tribal citizens.[366]

Third, tribal communities can mitigate the effects of the democracy deficit by respecting democratic values such as due process, transparency, and equal protection in the formation and enforcement of law.[367]

Fourth, tribal communities can address the democracy deficit by disaggregating the rights that are typically bundled with citizenship and allowing nonmembers to participate in forms of governance that relate to tribal jurisdiction over them.[368]

3. *Local Autonomy*

Federalism has long been celebrated for its capacity to protect diversity.[369] In *Gregory*, the Supreme Court noted that federalism "assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous [sic] society."[370] In addition, scholars have credited federalism with easing conflicts along racial, ethnic, and ideological lines by allowing individual groups to enjoy the freedom to exercise decisionmaking power in regional subunits of the nation.[371] When culturally diverse groups

364. *See* Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 756 (1998).

365. *See* McCool, *supra* note 169, at 106–07.

366. Richard B. Collins, *Never Construed to Their Prejudice: In Honor of David Getches*, 84 U. COLO. L. REV. 1, 25–28 (2013).

367. *See* Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 (2012).

368. *See generally* Cristina M. Rodríguez, *Noncitizen Voting and the Extraconstitutional Construction of the Polity*, 8 INT'L J. CONST. L. 30, 30–31 (2010).

369. Somin, *supra* note 300, at 464.

370. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

371. Somin, *supra* note 300, at 465; *see also* DONALD L. HOROWITZ, ETHNIC GROUPS IN CONFLICT 601–28 (1985) (discussing how innovations in federalism,

exercise authority in smaller subnational sovereigns, they also contribute to the nation's pluralism, allowing ideological differences to be channeled into distinct policies and creating a richer national dialogue as a result.[372]

Whereas state-level governance has trended toward increasing homogeneity due to the diffusion of minority interests and the ubiquity of modern consumer culture,[373] tribal governance represents authentic pluralism. The 566 federally recognized tribes in the United States[374] represent approximately 175 living languages[375] and tremendous cultural and religious distinctiveness as well. This cultural diversity supports a wide variety of institutional and policy diversity within tribal governance.[376] Furthermore, many tribes are committed to responding to the history of federal policies aimed at forced assimilation by revitalizing tribal customary law and developing their legal systems to reflect traditional teachings and values.[377] In addition to the cultural and social incentives for tribal governance and cultural alignment, tribes also have economic incentives. Professors Joe Kalt and Stephen Cornell have documented that the odds of success for tribal development increase when there is a "cultural match" between the culture of a tribe and the formal institutions of governance.[378]

Tribal governance also produces a variety of innovations that command national recognition and emulation. Harvard University's Ash

regional autonomy, and electoral systems have had an impact on ethnic conflict).

372. *See* A.E. Dick Howard, Garcia *and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 GA. L. REV. 789, 795 (1985).

373. Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite* United States v. Lopez, 94 MICH. L. REV. 554, 558 (1995). *See generally* SCHAPIRO, *supra* note 315, at 16–30.

374. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 78 Fed. Reg. 26384 (May 6, 2013), *available at* http://www.bia.gov/cs/groups/xofa/documents/text/idc1-022514.pdf.

375. Allison M. Dussias, *Indigenous Languages Under Siege: The Native American Experience*, 3 INTERCULTURAL HUM. RTS. L. REV. 5, 6–7 (2008).

376. *See* Duane Champagne, *Remaking Tribal Constitutions*, *in* AMERICAN INDIAN CONSTITUTIONAL REFORM AND THE REBUILDING OF NATIVE NATIONS 12 (Eric D. Lemont ed., 2006); Lorie M. Graham, *An Interdisciplinary Approach to American Indian Economic Development*, 80 N.D. L. REV. 597, 610–11 (2004).

377. *See* AUSTIN, *supra* note 21, at xix.

378. Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, *in* WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT 16–18 (Stephen Cornell & Joseph P. Kalt eds., 1992).

Center for Democratic Governance and Innovation identifies government programs that demonstrate excellence on the basis of four criteria: novelty, effectiveness, significance, and transferability to other jurisdictions.[379] Fifty-one tribal programs have been recognized since the creation of the award in 1986,[380] representing a sizable proportion of the program's total number of more than 300 awardees.[381] One example is the Yukon River Inter-Tribal Watershed Council in Fairbanks, Alaska. The Yukon River Council brings together 70 tribes and First Nations in the United States and Canada to protect the Yukon River watershed.[382] In 2013, the Ash Center commended the council for "navigating complex jurisdictional challenges, historical conflict, and diverse partnerships with government agencies, private industries, research institutions, and communities."[383]

Former Attorney General Janet Reno and Justice O'Connor also identified tribal governing institutions as sources of innovation that may benefit non-Indian jurisdictions. Both Reno[384] and O'Connor[385] focused on the potential use of tribal peacemaking techniques and their general principles in state and federal legal systems. Justice O'Connor observed that "[t]he Indian tribal courts' development of further methods of dispute resolution will provide a model from which the Federal and State courts can benefit as they seek to encompass alternatives to the Anglo-American adversarial model."[386] The Center for Court Innovation has responded to

379. *Innovations in American Government Awards Selection Criteria*, ASH CENTER FOR DEMOCRATIC GOVERNANCE & INNOVATION, http://www.ash.harvard.edu/ash/Home/Programs/Innovations-in-Government/Awards/SelectionCriteria.

380. *Award Winners from Tribal Governments*, ASH CENTER FOR DEMOCRATIC GOVERNANCE & INNOVATION, *available at* http://www.innovations.harvard.edu/award_landing.html?year=&dloc=&iloc=Tribal+Governments&top=&viwAwards=View+Awards (last visited June 15, 2014).

381. *About Us*, ASH CENTER FOR DEMOCRATIC GOVERNANCE & INNOVATION, www.innovations.harvard.edu/about-us.html (last visited June 15, 2014).

382. *About Us*, YUKON RIVER INTER-TRIBAL WATERSHED COUNCIL, http://www.yritwc.org/About-Us/About-Us.aspx (last visited June 15, 2014).

383. Press Release, Ash Center, Top 25 Programs: In Detail (May 1, 2013), *available at* http://www.ash.harvard.edu/Home/News-Events/Press-Releases/Innovations/Top-25-Innovations-in-Government-Announced2/Top-25-Programs.

384. *See* Carole E. Goldberg, *Overextended Borrowing: Tribal Peacemaking Applied in Non-Indian Disputes*, 72 WASH. L. REV. 1003, 1006 (1997) (reproducing remarks Reno made at an Indian Crime Forum in 1997).

385. Sandra Day O'Connor, Remarks, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 6 (1997).

386. *Id. But see* Goldberg, *supra* note 384, at 1019 (suggesting it is difficult "to

the interest in exploring tribal justice system innovations and their potential for export into other jurisdictions by forming a project called the Tribal Justice Exchange.[387] The project highlights and shares information about the "best practices developed in Indian Country that could help strengthen public safety initiatives elsewhere in the United States."[388] Several non-Indian jurisdictions have already adapted Indian peacemaking and related principles of restorative justice with remarkable success.[389]

An additional critical aspect of federalism's local autonomy value is the freedom of subnational sovereigns to tailor local policies to match local conditions. In Indian affairs, the Department of the Interior's Bureau of Indian Affairs (BIA) has long been criticized as the poster child for the ineffectiveness and inefficiency of centralized national control.[390] Federal policymakers from the Indian New Deal era and the New Federalism era of the latter 20th century supported empowering Indian control and governance as an antidote to federal mismanagement, paternalism, and wastefulness.[391]

Tribal governance and response to social problems has allowed Native leaders to apply their knowledge of local context to produce policies

graft [tribal dispute resolution mechanisms] onto the secular, heterogeneous, individualistic non-Indian justice system").

387. *Tribal Justice*, CENTER FOR COURT INNOVATION, http://www.courtinnovation.org/topic/tribal-justice (last visited June 15, 2014).

388. *Training & Technical Assistance: Center for Court Innovation*, U.S. DEP'T OF JUST., http://www.justice.gov/tribal/tta-cci.html (last visited June 15, 2014).

389. Since adapting peacemaking to county needs for juvenile offenders and child neglect and abuse cases, Yellow Medicine County, Minnesota, has experienced "a 91 percent reduction in out-of-home placement expenses." CTR. FOR COURT INNOVATION, WIDENING THE CIRCLE: CAN PEACEMAKING WORK OUTSIDE OF TRIBAL COMMUNITIES? 11 (2012), *available at* http://www.courtinnovation.org/sites/default/files/documents/Widening_Circle.pdf. *See generally* YELLOW MEDICINE COUNTY CIRCLE SENTENCING PROGRAM HANDBOOK (2013), *available at* http://www.co.ym.mn.gov/vertical/sites/%7B9E2CF57F-0FF6-475F-BE0EE5C421454DDB%7D/uploads/HANDBOOKcircle_setence.pdf.

390. *See, e.g.*, Larry A. DiMatteo & Michael J. Meagher, *Broken Promises: The Failure of the 1920's Native American Irrigation and Assimilation Policies*, 19 U. HAW. L. REV. 1, 36 (1997); Matthew L.M. Fletcher, *Looking to the East: The Stories of Modern Indian People and the Development of Tribal Law*, 5 SEATTLE J. FOR SOC. JUST. 1, 14 (2006) (calling BIA oversight a "bureaucratic nightmare").

391. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 66, at vii–viii (describing Felix Cohen as "a leading advocate of tribal self-government"); *id.* § 1.07 (tracing the era of self-determination and self-government starting in the 1960s).

that are often more successful than centralized management under federal control. Tribal government responses to climate change powerfully illustrate this point. Tribal communities have profound knowledge about the lands and resources of their territories. In many cases, tribal communities have occupied their present territories for thousands of years, and indigenous knowledge about the environment is passed on from generation to generation.[392] This deep familiarity creates a repository of local expertise that informs tribal policies and the work of government institutions. In addition, many tribal communities are located in environmentally sensitive areas that are the first to experience, record, and communicate the impacts of global climate change.

The Swinomish Tribe in Washington is one example of how tribes have taken a national leadership role in response to climate change. In 2007, the tribe adopted a Climate Change Proclamation that directed the tribal government and its departments "[t]o undertake efforts as possible to determine the potential local effects of climate change . . . including effects and projected impacts on the local environment, forestry resources, agriculture, fish and wildlife, water resources, and shorelines, as well as critical infrastructure and public health."[393] The proclamation also directed the tribal government to develop appropriate policies and strategies for addressing these impacts, including measures that would reduce the tribe's contribution to the causes of climate change.[394] In 2008, the tribe began a two-year project to identify both climate change impacts and appropriate responses; in 2009 it released an impact report, and in 2010 it completed a climate-change action plan.[395] The tribe is currently in the process of implementing the various measures identified in its action plan, including

392. *See* Nicholas J. Reo, Editorial, *The Importance of Belief Systems in Traditional Ecological Knowledge Initiatives*, 2 INT'L INDIGENOUS POL'Y J., no. 4, 2011, art. 8, at 1, *available at* http://ir.lib.uwo.ca/iipj/vol2/iss4/8.

393. *Proclamation of the Swinomish Indian Senate on a Swinomish Climate Change Initiative*, SWINOMISH INDIAN SENATE (Oct. 2, 2007), http://www.swinomish-nsn.gov/climate_change/Docs/Swinomish%20Climate%20Change%20Proclamation.pdf.

394. *Id.*

395. Terri Hansen, *8 Tribes That Are Way Ahead of the Climate-Adaptation Curve*, INDIAN COUNTRY TODAY MEDIA NETWORK (Oct. 15, 2013), http://indiancountrytodaymedianetwork.com/2013/10/15/8-tribes-are-way-ahead-climate-adaptation-curve-151763. For the 2010 plan, see generally SWINOMISH INDIAN TRIBAL CMTY., SWINOMISH CLIMATE CHANGE INITIATIVE CLIMATE ADAPTATION ACTION PLAN (2010), *available at* http://www.swinomish.org/climate_change/Docs/SITC_CC_AdaptationActionPlan_complete.pdf.

the adoption of new tribal codes, the establishment of coastal protection measures, the assessment of community health impacts, and an evaluation of climate-change-induced wildfire risks and available responses.[396]

4. *Problem-Solving Capacity*

Tribal governance also demonstrates the problem-solving capacity that federalism values. Tribal governance embodies the principle of subsidiarity, which counsels deference to the most local unit of government with the capacity to respond to social problems.[397] When tribal self-governance and autonomy were strengthened during the eras of the Indian New Deal and Indian self-determination, federal policymakers were strongly influenced by this principle. Collier and Cohen supported tribal governance as a superior alternative to the wastefulness and mismanagement of past federal approaches to Indian affairs.[398] Similarly, President Nixon and his aides professed commitment to Indian self-determination as part of a national effort to limit the "bureaucratic monstrosity" of ineffective federal centralized power and return power to the people.[399]

Tribal initiatives that establish intergovernmental cooperation also demonstrate federalism's value of pragmatic problem solving. Several scholars have documented the need for tribal participation in intergovernmental agreements.[400] Due to gaps in tribal jurisdiction and the need to pool expertise and resources to respond to difficult social problems, tribal governments are intimately familiar with the critical role of intergovernmental cooperation. Intergovernmental agreements between

396. Hansen, *supra* note 395.

397. *See* Currie, *supra* note 308, at 359.

398. *See supra* notes 184–186 and accompanying text.

399. *See* RICHARD NIXON, PROPOSED RECOMMENDATIONS RELATING TO THE AMERICAN INDIANS—MESSAGE FROM THE PRESIDENT, H. DOC. NO. 91-363, 116 CONG. REC. 23258 (1970) (announcing national repudiation of the termination policy and supporting Indian self-determination); Richard Nixon, President of the United States, Address to the Nation on Domestic Programs (Aug. 8, 1969), *available at* http://www.presidency.ucsb.edu/ws/?pid=2191 (announcing New Federalism as a means of limiting federal government waste and returning power to the people).

400. *See, e.g.*, David H. Getches, *Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding Self-Government*, 1 REV. CONST. STUD. 120 (1993); Pommersheim, *supra* note 261, at 264–67; Note, *Intergovernmental Compacts in Native American Law: Models for Expanded Usage*, 112 HARV. L. REV. 922 (1999).

tribes and other tribal, local, state, and federal governments exist in nearly every area of governance, including environmental protection, natural resources management, law enforcement, criminal justice, child welfare, taxation, and land use planning.[401]

Tribal participation in intergovernmental agreements represents what some scholars have termed "picket fence" federalism, in which the horizontal slats of a fence represent federal, state, tribal, and local governments and the vertical posts represent clusters of agency expertise on specific issues.[402] Many have observed that the intergovernmental approach to problem solving represents the most important area of growth for government innovation.[403]

The intergovernmental problem-solving capacity of cooperative federalism is also reflected by the role tribes play as primary regulators under federal environmental statutes. Just as states exercise primary regulatory authority under federal environmental laws, so too do tribes. Federal statutes such as the Clean Water Act,[404] the Clean Air Act,[405] and the Safe Drinking Water Act[406] explicitly recognize the potential for tribal primacy when specific conditions are met.

Tribal governments also serve the important role of offering redundant means of protecting rights, promulgating policy, and serving the public within Indian communities.[407] This "double security" is crucial,

401. *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 66, § 6.05, at 589; Tassie Hanna et al., *The Commission on State-Tribal Relations: Enduring Lessons in the Modern State-Tribal Relationship*, 47 TULSA L. REV. 553, 557 (2012).

402. Gluck, *supra* note 19, at 570–71; *See* Roderick M. Hills, Jr., *The Eleventh Amendment as Curb on Bureaucratic Power*, 53 STAN. L. REV. 1225, 1227 (2001) (describing picket fence federalism as a structure in which "state and federal agency experts within the same specialty—the 'posts' in the 'fence'—often share more in common with each other than they do with the level of government by which they are employed"); *see also* DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 51–54 (3d ed. 1984) (discussing federal–state cooperation in particular discrete areas); MORTON GRODZINS, THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES 75–80 (1966).

403. *See, e.g.*, Adelman & Engel, *supra* note 10, at 1798–99; Gluck, *supra* note 19, at 620.

404. Clean Water Act § 506, 33 U.S.C. § 1377 (2012).

405. Clean Air Act § 107, 42 U.S.C. § 7601(d) (2012).

406. Safe Drinking Water Act § 302, 42 U.S.C. § 300j-11 (2012).

407. *Cf.* Chemerinsky, *supra* note 317, at 1234.

particularly because federal and state governments frequently fail to maintain public infrastructure and support government services within Indian country when they share overlapping jurisdiction.[408] For example, on many Indian reservations, states fail to allocate sufficient funds to maintain public infrastructure such as schools, roads, water supply, and sewage systems.[409] Whether due to benign neglect or intentional discrimination, this failure is best addressed when tribal governments are empowered to raise funds, regulate, and administer the needs of tribal communities.

Tribal courts also further the federalism value of redundancy by offering forums for adjudicating claims that arise within Indian country. State courts with jurisdiction over disputes involving nonmembers on the reservation may be located far from the parties, may present procedural or substantive barriers to litigation, may be ignorant of relevant tribal customs and practices, or may be tinged with bias as a result of years of animosity and hostility toward Indians. In each of these circumstances, tribal courts offer an important double security to ensure access to justice.

The Supreme Court has observed that "the Federal Government has consistently encouraged [tribal court] development."[410] Recent examples of congressional legislation that have supported tribal court development include the Indian Tribal Justice Act[411] and the Indian Tribal Justice Technical and Legal Assistance Act.[412] In enacting the Indian Tribal Justice Act, Congress acknowledged that "tribal justice systems are an essential part of tribal governments and serve as important forums for ensuring public health and safety and the political integrity of tribal governments."[413] As a result of the commitment of tribal leaders and congressional support, tribal courts have greatly expanded their capacities throughout the nation.

408. *See* DUANE CHAMPAGNE & CAROLE GOLDBERG, CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280, at 73–81, 135 (2012) (describing inadequate state law enforcement services within Indian country).

409. *See* Brief for Amici Curiae National Intertribal Tax Alliance et al. at 13, Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95 (2005) (No. 04-631) (discussing the public-infrastructure deficit within the Navajo Nation and using roads as one example).

410. Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 14–15 (1987).

411. Indian Tribal Justice Act, Pub. L. No. 103-176, 107 Stat. 2004 (1993) (codified at 25 U.S.C. §§ 3601–3631).

412. Indian Tribal Justice Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559, 114 Stat. 2778 (codified at 25 U.S.C. §§ 3651–3682).

413. Indian Tribal Justice Act § 2(5).

IV. THE ROLE OF THE COURTS

The Supreme Court rarely recognizes tribal contributions to effective governance within the nation's federal system. Frequently, the characteristics of governance that are celebrated as promoting federalism's values in the federal–state context are neglected or even portrayed as disadvantages in the tribal context. This trend has coincided with a series of Supreme Court opinions since 1978 that have narrowly construed tribal jurisdiction over nonmembers and that have permitted increasing state authority within Indian country. The following section traces the Court's modern role in deciding tribal jurisdiction disputes. It begins with the implicit divestiture doctrine in *Oliphant v. Suquamish Indian Tribe*[414] and explores the *Montana v. United States* test—for tribal civil jurisdiction over nonmembers[415]—and its progeny.[416] These cases are presented as an introduction to the Supreme Court's widespread practice of denigrating or neglecting federalism's values in the tribal context. Additional examples exist in other doctrinal contexts, including in the Indian preemption cases that address state authority within Indian country, but a comprehensive discussion of this topic is beyond the space available for this Article.[417]

The following discussion highlights the many instances in which the Supreme Court has denigrated or ignored the ways in which tribal governance promotes federalism's values within the context of the implicit divestiture doctrine.

A. *Criminal Jurisdiction in Indian Country*

The Supreme Court introduced the implicit divestiture doctrine in *Oliphant* when it concluded that tribal governments lack criminal jurisdiction over nonmembers on the reservation.[418] This outcome abrogated the earlier foundational principle emphasized in Cohen's *Handbook* and in Solicitor Nathan Margold's opinion that tribal powers remain extant unless they are diminished by treaty or an act of Congress.[419]

414. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978).

415. *See* Montana v. United States, 450 U.S. 544, 565–66 (1981).

416. *See generally* Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391, 397–409 (2007–2008) (presenting an overview of cases since *Oliphant* and *Montana*, and criticizing the doctrine that developed).

417. For an overview of Indian preemption, see generally *id.* at 416–20.

418. *See Oliphant*, 435 U.S. at 208.

419. Nathan R. Margold, Powers of Indian Tribes, 55 Interior Dec. 14, 65

The Suquamish Indian Tribe had not entered into a treaty relinquishing its criminal jurisdiction over nonmembers, and Congress had not enacted any law imposing a limit.[420] But Justice William Rehnquist, writing for the Court, justified the lack of jurisdiction by relying upon the idea of implicit divestiture: "[T]he tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. . . . Indian tribes are [also] prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers '*inconsistent with their status*.'"[421] Rehnquist also emphasized that tribal incorporation into the political system corresponds to a diminishment in tribal powers. The opinion stated, "Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty."[422] According to Rehnquist, the United States has long "manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty."[423]

In his analysis, Justice Rehnquist invoked the reasoning of *Ex parte Crow Dog*,[424] which rejected federal criminal jurisdiction over Indians on the reservation prior to the enactment of the Major Crimes Act.[425] The *Crow Dog* opinion decried the unfairness of subjecting tribal citizens to federal criminal laws, which were cast as emanating from another "race [and] tradition" and imposing "the restraints of an external and unknown code."[426] By analogizing *Oliphant* to *Crow Dog*, Justice Rehnquist cast tribal criminal jurisdiction over non-Indians as similarly unfair because of their connection to another "race [and] tradition" and because of their

(1934). ("[U]nder Section 16 of the Wheeler-Howard Act, the 'powers vested in any Indian tribe or tribal council by existing law', are those powers of local self-government which have never been terminated by law or waived by treaty." (citation omitted)); *see* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 66, § 4.01[1][a], at 207–08.

420. *See Oliphant*, 435 U.S. at 208.

421. *Id.* (quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976)).

422. *Id.* at 209.

423. *Id.* at 210.

424. *Id.*

425. *Ex parte* Crow Dog, 109 U.S. 556, 572 (1883), *superseded by statute*, Indian Major Crimes Act, ch. 341, 23 Stat. 362 (1885).

426. *Id.* at 571.

"unknown" nature.[427] Thereby, from the Supreme Court's perspective, tribal jurisdiction must be construed narrowly to avoid subjecting non-Indians to tribal foreignness and cultural distinctiveness.

The Court's denigration of tribal difference as unfair and unknowable contrasts sharply with federalism's values, which promote diversity and local autonomy to enact laws that differ from the national norm. Rather than celebrate the Suquamish Tribe for enriching the nation's pluralism through the establishment and enforcement of its own criminal justice system, the Court reacts in an extreme fashion by introducing the implicit divestiture doctrine and altering a foundational principle of Indian law.

Since *Oliphant*, the implicit divestiture doctrine has provided grounds for decisions limiting tribal civil as well as criminal jurisdiction over nonmembers.[428]

The Supreme Court's decisions on tribal criminal jurisdiction also triggered an extended tug of war between the judicial and legislative branches. In a 1990 case, *Duro v. Reina*, the Supreme Court concluded that *Oliphant*'s rule also covered crimes committed by nonmember Indians.[429] Writing for the Court, Justice Kennedy also called attention to the potential dangerousness of tribal difference. He noted,

> The special nature of the tribunals at issue makes a focus on consent and the protections of citizenship most appropriate. While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often "subordinate to the political branches of tribal governments," and their legal methods may depend on "unspoken practices and norms."[430]

Thus, while federalism is rooted in the belief that a primary goal of the structure of government in the United States is to allow distinct customs and local usages to flourish within subnational sovereigns, distinctiveness in the tribal context is a priori harmful. Justice Kennedy's

427. *Oliphant*, 435 U.S. at 211.

428. *See* Montana v. United States, 450 U.S. 544, 565–66 (1981) (deciding a tribe had implicitly divested its civil regulatory jurisdiction for hunting and fishing).

429. Duro v. Reina, 495 U.S. 676, 685 (1990), *superseded by statute*, Act of Oct. 28, 1991, Pub. L. No. 102-137, § 1, 105 Stat. 646.

430. *Id.* at 693 (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 334–335 (1982 ed.)).

opinion does not describe any specific tribal custom, usage, or norm that supports his cautionary approach to tribal difference. Instead, he tellingly posits difference as a vague, nonspecific concept that is dangerous on its face.

In addition to neglecting the values of diversity, cultural pluralism, and local autonomy to respond to local differences, the *Oliphant* and *Duro* opinions neglect the crucial problem-solving value of federalism. Federalism promotes effective problem solving, in part, by providing an extra layer of governance that stands ready to protect society's welfare. In cases like *Oliphant* and *Duro*, tribal criminal jurisdiction over non-Indians and nonmember Indians is essential to protecting reservation communities against criminal behavior. The combined effect of the *Oliphant* decision, the Indian Country Crimes Act,[431] and the Assimilative Crimes Act[432] was to place non-Indians who commit crimes against Indian victims under exclusive federal jurisdiction. Furthermore, a high rate of federal prosecutorial declination has contributed to an environment in which crimes such as sexual assaults against Native women frequently occur without any response.[433]

Within the same year that the *Duro* decision was issued, Congress responded by enacting legislation clarifying that tribal powers of self-government specifically include "the inherent power of Indian tribes . . . to exercise criminal jurisdiction over all Indians."[434] Doubts regarding Congress's authority to ratchet up its recognition of tribal sovereign powers beyond the Supreme Court's interpretation were resolved in 2004, when the Supreme Court affirmed the lawfulness of the *Duro* fix in *United States v. Lara*.[435] In its opinion, the Court held that Congress possessed "the constitutional power to relax restrictions that the political branches have, over time, placed on the exercise of a tribe's inherent legal authority."[436]

431. Indian Country Crimes Act, 18 U.S.C. § 1152 (2012).

432. Assimilative Crimes Act, 18 U.S.C. § 13(a) (2012).

433. *See* AMNESTY INT'L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA 42 (2007), *available at* http://www.amnestyusa.org/pdfs/MazeOfInjustice.pdf.

434. Act of Nov. 5, 1990, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1856, 1892–93 (codified at 25 U.S.C. § 1301(2)).

435. United States v. Lara, 541 U.S. 193, 200 (2004).

436. *Id.* at 196.

B. *Civil Jurisdiction in Indian Country*

In *Montana*, the Supreme Court extended the implicit divestiture doctrine to the civil context.[437] The case involved the Crow Nation's attempt to regulate hunting and fishing by nonmembers on non-Indian owned fee lands within the reservation.[438] In its opinion, the Court announced that "the principles on which [*Oliphant*] relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."[439] The Court acknowledged, however, that earlier precedents had affirmed tribal civil jurisdiction over nonmembers in a variety of cases. It reconciled these cases with *Montana*'s general proposition by characterizing them as limited exceptions to the rule:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[440]

The Court concluded that the Crow Nation's regulation failed to fit under either exception to the general prohibition.[441] The non-Indian hunters to whom the law applied had not entered into any agreements with the tribe or its members.[442] The Court also concluded that their activity did not threaten the tribe's political integrity, economic security, health, or welfare because it found no evidence that the non-Indian's hunting and fishing on fee lands would "imperil the subsistence or welfare of the Tribe."[443]

Justice Potter Stewart's opinion in *Montana* also flies in the face of

437. Montana v. United States, 450 U.S. 544, 565–66 (1981).
438. *Id.* at 547.
439. *Id.* at 565.
440. *Id.* at 565–66 (citations omitted).
441. *Id.* at 566.
442. *Id.*
443. *Id.*

the values of federalism. Justice Stewart, for example, noted,

> Any argument that [the Crow Nation hunting and fishing regulation] is necessary to Crow tribal self-government is refuted by the findings of the District Court that the State of Montana has traditionally exercised "near exclusive" jurisdiction over hunting and fishing on fee lands within the reservation, and that the parties to this case had accommodated themselves to the state regulation.[444]

Federalism's values recognize that subnational sovereignty provides a necessary check against power exercised by another sovereign. Frequently, this check is beneficial as a regulatory backstop when citizens are unable to influence policy within another layer of government.[445] Rather than accept the futility of their political influence given their minority status, citizens within regional subunits of the nation can influence policy at a more local level within the federal system. In *Montana*, the citizens of the Crow Nation sought to do just that.[446] Yet the Supreme Court neglected to acknowledge the Crow Nation's lack of influence within state politics and its profound interest in crafting hunting and fishing regulations on its own reservation.

Since 1981, the Supreme Court has applied the *Montana* test in a number of circumstances, and in each case it has struck down tribal civil jurisdiction over nonmembers. In *Strate v. A-1 Contractors*, the Court extended the *Montana* test to a case involving the assertion of tribal adjudicatory jurisdiction to hear a personal injury action involving nonmember defendants involved in a car accident on a state right-of-way across a reservation.[447] Writing for a unanimous Court, Justice Ruth Bader Ginsburg announced that "[a]s to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."[448] The Court concluded that the facts of the case did not fall under either of *Montana*'s two exceptions.[449] In finding that the second exception did not apply, Ginsburg noted that the exception's reference to conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe" must be interpreted

444. *Id.* at 564 n.13.
445. *See* RYAN, *supra* note 33, at 42.
446. *See Montana*, 450 U.S. at 548–49.
447. Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997).
448. *Id.* at 453.
449. *Id.* at 459.

narrowly.[450] Otherwise, she noted that "the exception would severely shrink the rule."[451] In light of this principle, Ginsburg cautioned that the second exception must be interpreted consistently with *Montana*'s instruction that a tribe's inherent power does not reach "beyond what is necessary to protect tribal self-government or to control internal relations."[452]

Once again, the Supreme Court demonstrated a willingness to sacrifice the effective governance potential of federalism when tribal governance is involved. In *Strate*, Justice Ginsburg ignored the problem-solving value of redundancies within a federal system. These redundancies provide individuals with judicial forums that may be more readily available for the vindication of rights than the forums of another layer of government.[453] In *Strate*, the tribal court offered a valuable opportunity for the resolution of the petitioner's claim because it was closer to the affected community, it was more familiar with the usages and customs of the area, and it was accessible to the parties. However, Justice Ginsburg concluded that tribal court jurisdiction was not "necessary to protect tribal self-government" because the state courts were available to hear the petitioner's claim.[454]

In *Nevada v. Hicks*, state game wardens caused property damage to a tribe member's home on tribal land while executing a search warrant to investigate an off-reservation crime, and the tribal member sued the state game wardens in tribal court.[455] To evaluate whether the tribal court had jurisdiction over the lawsuit, the Court considered whether the exercise of tribal power was "necessary to protect tribal self-government or to control internal relations."[456] The Court's analysis, however, focused not on the

450. *Id.* at 457–58 (quoting *Montana*, 450 U.S. at 566) (internal quotation marks omitted).

451. *Id.* at 458.

452. *Id.* at 459 (quoting *Montana*, 450 U.S. at 564) (internal quotation mark omitted).

453. *See* Cover, *supra* note 11, at 661–62.

454. *Strate*, 520 U.S. at 459 (quoting *Montana*, 450 U.S. at 564).

455. Nevada v. Hicks, 533 U.S. 353, 356 (2001). The tribal member originally sued the State of Nevada and the state game wardens in both their official and individual capacities, but he voluntarily dismissed the state and official-capacity claims against them, leaving only the claims against the wardens in their individual capacities. *Id.* at 357.

456. *Id.* at 359 (quoting *Montana*, 450 U.S. at 564–65) (internal quotation marks omitted).

need for the tribe to protect its citizens from unlawful searches and seizures, but on the interest of the state in executing a search warrant for an off-reservation crime.[457] The Court devoted several pages to explaining the nature of the state's interest in the case, as though a high state interest was incompatible with tribal jurisdiction over the case.[458] It ultimately concluded that the tribal-court lacked jurisdiction because "[t]he State's interest in execution of process is considerable, and even when it relates to Indian-fee lands it no more impairs the tribe's self-government than federal enforcement of federal law impairs state government."[459]

In the more recent decision of *Plains Commerce Bank v. Long Family Land & Cattle Co.*, the Supreme Court again denied tribal court jurisdiction over a civil lawsuit involving Indian plaintiffs and a non-Indian defendant.[460] The Longs, an Indian couple residing on the Cheyenne River Sioux Indian Reservation, sued a non-Indian bank.[461] In this case, the Court expanded *Montana* yet again to support a new general rule that tribes lack the power to regulate the sale of non-Indian fee land within a reservation.[462] The lawsuit alleged a breach of contract claim and a claim that the bank had discriminated against them by offering them loan terms that were less favorable than terms offered to other non-Indian individuals.[463] The tribal court held a jury trial, and the jury found that the bank was liable on several counts for acting unlawfully.[464] Consequently, it awarded the Longs a judgment of $750,000.[465] In a supplemental opinion, the tribal court also awarded the Longs an option to purchase a portion of the lands that they had originally occupied and that the bank had subsequently sold to other buyers.[466] In its review of the bank's challenge of tribal court jurisdiction, the Court applied *Montana*, but it noted that, with the exception of *Brendale v. Confederated Tribes and Bands of Yakima Nation*, *Montana*'s exceptions are limited to tribal regulation of non-Indian

457. *Id.* at 363–64.
458. *See id.* at 361–64.
459. *Id.* at 364.
460. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 320 (2008).
461. *Id.* at 320.
462. *Id.* at 335–36.
463. *Id.* at 322.
464. *Id.* at 322–23.
465. *Id.* at 323.
466. *Id.*

activities on Indian land.[467] Furthermore, the Supreme Court distinguished *Brendale* as a decision that allowed tribal regulation of the *uses* of non-Indian fee land within the closed portion of the reservation, while the tribal court in the Long case had attempted to regulate the *sale* of land.[468] The Court also characterized the tribe as having no interest in regulating the sale of non-Indian fee land, because

> [a]ny direct harm to its political integrity that the tribe sustains as a result of fee land sale is sustained at the point the land passes from Indian to non-Indian hands. . . . Once the land has been sold in fee simple to non-Indians and passed beyond the tribe's immediate control, the mere resale of that land works no additional intrusion on tribal relations or self-government. Resale, by itself, causes no additional damage.[469]

The opinion, then, constitutes a new general presumption that the sale of on-reservation, non-Indian fee land can never satisfy *Montana*'s second exception.

The *Long* case represents yet another example of the Supreme Court contradicting basic values of federalism in the tribal context. Once again, the Court emphasized that tribal cultural differences constitute a sound basis for questioning the legitimacy of tribal jurisdiction over nonmembers who do business with tribal citizens.[470] The Court cautioned that the discrimination claim "arose 'directly from Lakota tradition as embedded in Cheyenne River Sioux tradition and custom,' including the Lakota 'sense of justice, fair play, and decency to others.'"[471] Once again, the praise the Supreme Court offers diversity and pluralism in the context of state governance is consistently withheld in the context of tribal custom and tradition. The *Long* decision also emphasized its view that the second exception to the *Montana* test constitutes an extremely high threshold that will bar tribal-court jurisdiction over nonmembers in most cases.[472] Although the second exception is phrased as coming into play whenever nonmember conduct threatens "the political integrity, economic security,

467. *Id.* at 333 (citing Brendale v. Confederated Tribes & Bands of Yakima Nation, 492 U.S. 408 (1989)).

468. *Id.* at 333–34.

469. *Id.* at 336.

470. *See id.* at 335–36.

471. *Id.* at 338 (citation omitted).

472. *Id.* at 341.

or the health or welfare of [a] tribe,"[473] the *Long* Court explained that the nonmember conduct must do more than just injure the tribe to trigger tribal jurisdiction. Instead, it must "imperil the subsistence"[474] of the tribal community or "be necessary to avert catastrophic consequences."[475] By integrating these requirements into its recitation of *Montana*'s second exception, the Court demonstrates its reasoning is completely at odds with federalism's view that subnational governance should be empowered to promote effective governance.

V. CONCLUSION

From a variety of angles, tribal governance embodies the values of federalism to an even greater degree than states. Tribal governance permits extensive public participation and engagement with the process of lawmaking and government administration. The innovations of tribal governmental institutions often produce successful outcomes that state and local non-Indian governments clamor to replicate. As traditional inhabitants of territories with deep physical, cultural, and spiritual connections to specific lands and resources,[476] tribal citizens possess a unique capacity to tailor local solutions to fit local needs.[477] Furthermore,

473. Montana v. United States, 450 U.S. 544, 566 (1981).

474. *Long*, 554 U.S. at 341 (quoting *Montana*, 450 U.S. at 566) (internal quotation marks omitted).

475. *Id.* (quoting FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 4.02[3][c], at 232 n.220 (2005 ed.)) (internal quotation marks omitted).

476. *See, e.g.*, *Declaration of Indian Purpose*, AM. INDIAN CHI. CONF. 16 (1961).

> [I]n our day, each remaining acre is a promise that we will still be here tomorrow. Were we paid a thousand times the market value of our lost holdings, still the payment would not suffice. Money never mothered the Indian people, as the land has mothered them, nor have any people become more closely attached to the land, religiously and traditionally.

Id.

477. Indeed, Native people within the United States have suffered profound dispossession, loss, and hardship as a result of the federal imposition of one-size-fits-all policies on their communities. The political branches have long recognized this harmful dynamic and have supported tribal self-governance as a result. *See, e.g.*, Tribal Self-Governance Act of 1994 § 402, 25 U.S.C. §§ 458bb (2012); Indian Self-Determination and Education Assistance Act Amendments of 1988 § 102, 25 U.S.C. § 450a(b) (establishing "a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning,

many Native nations are eager to promote economic development, and they compete for business through the use of competitive tax, licensing, or other regimes to promote growth.[478] Finally, tribal governance embodies the single most important characteristic of federalism that distinguishes it from mere decentralization. That characteristic is the expression of authentic cultural, political, and social difference through the act of legally protected, autonomous self-governance.[479]

In addition, just as state autonomy can promote the welfare of the

conduct, and administration of those programs and services"); Indian Financing Act of 1974 § 2, 25 U.S.C. § 1451 (calling for tribes to "fully exercise responsibility for the utilization and management of their own resources"); Indian Mineral Development Act of 1982 § 2(b), 25 U.S.C. § 2103(b) (furthering the policy of self-determination and attempting to help tribes maximize the financial return they receive for mineral resource development); Indian Tribal Energy Development and Self-Determination Act of 2005, 25 U.S.C. §§ 3502(a); RICHARD NIXON, PROPOSED RECOMMENDATIONS RELATING TO THE AMERICAN INDIANS—MESSAGE FROM THE PRESIDENT, H. DOC. NO. 91-363, 116 CONG. REC. 23258 (1970) (calling on Congress to repudiate the termination policy and support tribes in managing their own affairs).

478. *See, e.g.*, HOOPA VALLEY TRIBAL CODE § 50.105 (2005), *available at* http://www.hoopa-nsn.gov/sites/default/files/documents/Title50_BusinessPolicy062098.pdf.

> 50.105 Employment in Lieu of Tax Policy.
>
> (a) It is the policy of the Tribe to facilitate and enhance job stability, career opportunities and use of inherent Tribal powers to create and maintain a sound business environment within the Tribe's jurisdiction. Consistent with these goals, it is the policy of the Tribe to promote the least restrictive and most cost effective business environment within which a business environment can be promoted. As part of this policy, the Tribe hereby establishes an "employment in lieu of tax" policy for businesses operating pursuant to the authority prescribe[d] in the Tribal Comprehensive Business Codes.
>
> (b) The policy contained in 50.105(a) is intended to stimulate and promote local employment and business opportunities. While it is anticipated that local business development will generate the need to improve services, facilities and infrastructure to support business and employment opportunities, consistent with the policy of employment in lieu of tax, the Tribal Council will conduct direct and open discussions with businesses within the Tribe's jurisdiction to address community and governmental infrastructure needs and will strive to develop alternative methods for addressing infrastructure needs in lieu of imposing taxes on businesses.

Id.

479. *See supra* Part III.B.3.

nation as a whole, so can tribal autonomy elevate the broader society's welfare. Tribal self-governance is capable of several extraterritorial benefits: innovations can spur policy shifts that improve governance in other jurisdictions, tribal governance can avoid the costs of crude one-size-fits-all laws by ensuring that policies are designed with subtle attention to context, and tribal lawmaking and implementation can remedy vexing problems that other jurisdictions cannot address on their own.

Yet, despite the ways in which tribal governance is inextricably linked to effective governance, the Supreme Court nearly always neglects this relationship. Instead, the Court frames tribal governance as dangerously divergent, disruptive, and unnecessary. In doing so, the Court paradoxically stymies effective governance and creates unnecessary barriers to the promotion of federalism's values.

A better path would acknowledge that Indian tribes are important members of the nation's federal system. United States federalism, through incorporation of tribes as sovereigns that participate in self-rule with shared rule, is an adaptive, complex system in which tribes exist with asymmetrical status. Tribal governments are not the equivalent of states, but they exhibit the characteristics of federalism, and their exercise of jurisdiction should be interpreted as an example of federalism's values in operation.

In light of the connection between tribal governance and federalism's values, the judiciary should engage in functional assessments of tribal capacity to promote federalism's values when it reviews cases in ambiguous areas when tribes assert jurisdiction over nonmembers. This form of analysis recognizes that determinations based on competing rights frequently fail to offer satisfying resolution of disputes. An analysis based on practical reasoning, involving an assessment of tribes' potential to offer effective governance, gives tribes respect for their contributions to society and promotes the welfare of everyone.[480]

480. *See* Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1216–30 (1990).