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CONGRESSIONAL POWER AND SOVEREIGNTY IN INDIAN AFFAIRS

Michalyn Steele*

Abstract

The doctrine of inherent tribal sovereignty—that tribes retain aboriginal sovereign governing power over people and territory—is under perpetual assault. Despite two centuries of precedential foundation, the doctrine must be defended afresh with each attack. Opponents of the doctrine of tribal sovereignty express skepticism of the doctrine, suggesting that tribal sovereignty is a nullity because it is not unfettered. Some pay lip service to the doctrine while undermining tribes in their exercise of inherent sovereignty. Underlying many of these legal fights is confusion about both the nature of tribal sovereignty and the justifications for its continuing existence. Under current federal law, tribes are domestic, rather than international sovereigns. Tribes retain significant powers but are subject to the ultimate sovereignty of the United States. The sui generis status of Indian tribes in the American legal landscape generates important and difficult questions: which governing powers do tribes retain and where does the power to answer that question reside in the federal system? How are disputes about the scope of tribal authority to be resolved?

As the debate about what powers tribes may exercise (and over whom) continues into its third century, it is critical to reexamine the origins of the doctrine of inherent tribal sovereignty as a settled principle of federal law and to articulate the principles that ought to guide the development of that principle in the future. Setting the metes and bounds of the doctrine of tribal sovereignty in federal law and policy belongs to the political branches.¹ This Article suggests legal principles that ought to guide the federal political branches in the exercise of the Indian Affairs power and the trust responsibility to address the scope of tribal inherent authority. First, this Article examines the legal roots and branches of the doctrine of inherent tribal sovereignty, demonstrating that the doctrine

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¹ This Article builds on my prior work arguing that the boundaries of inherent tribal sovereignty ought not be resolved as judicial inquiries. Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666 (2016) [hereinafter Steele, *Plenary Power*]; Michalyn Steele, *Comparative Institutional Competency and Sovereignty in Indian Affairs*, 85 U. COLO. L. REV. 759 (2014) [hereinafter Steele, *Comparative Institutional Competency*].

remains a vital principle of federal law. Second, this Article analyzes the nature of contemporary assaults on the doctrine of inherent tribal authority by all three branches of the federal government, states, and private actors. Third, this Article suggests principles that ought to guide Congress in exercising its Indian affairs power to clarify and affirm the bounds of tribal sovereignty in federal law and in carrying out the federal trust responsibility to tribes.

INTRODUCTION

Red Jacket, the great Seneca diplomat and leader, “illustrated the tribe’s frustration with the insatiable encroachment of those seeking Seneca lands during a negotiation with the Holland Land Company’s agent, Joseph Ellicott. The two were seated on a log.”² Every few minutes during their discussion, Red Jacket scooted Ellicott down the log a bit and asked him to “move along” to give him room.³ Ellicott eventually ran out of room on the log and protested that “he could move no further ‘without ending up off the log in the mud.’”⁴ Red Jacket replied that the Seneca “had likewise been crowded and pushed off of their lands bit by bit and had run out of room for further concession.”⁵

It is the same with the doctrine of inherent tribal sovereignty today.⁶ There is evidence of a renewed impulse to diminish the sovereign powers of Indian tribes, bit by bit.⁷ Opponents and skeptics of tribal sovereignty suggest that tribal sovereignty is a nullity because it is not unfettered.⁸ Others oppose the doctrine as applied, challenging each successive effort by tribes to assert authority, sometimes paying lip service to the doctrine while undermining tribes in their particular exercises of inherent authority.⁹ Others suggest that tribes are essentially membership

² Michalyn Steele, *Breaking Faith with the Tribal Sovereignty Doctrine*, 64 FED. LAW. 48, 49 (2017) [hereinafter Steele, *Breaking Faith*].

³ *Id.*

⁴ CHRISTOPHER DENSMORE, RED JACKET: IROQUOIS DIPLOMAT AND ORATOR 91 (1999).

⁵ See Steele, *Breaking Faith*, *supra* note 2, at 49.

⁶ *Id.*

⁷ See, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209–10 (1978); *Duro v. Reina*, 495 U.S. 676, 692 (1990), *superseded by statute*, 25 U.S.C. § 1301(2), *as recognized in United States v. Lara*, 541 U.S. 193 (2004).

⁸ *United States v. Lara*, 541 U.S. at 214–15 (Thomas, J., concurring); see also David P. Weber, *United States v. Lara—Federal Powers Couched in Terms of Sovereignty and a Relaxation of Prior Restraints*, 83 N.D. L. REV. 735, 756 (2007).

⁹ Most recently, the Dollar General Corporation challenged inherent tribal civil jurisdiction over a tort based in part on the theory that tribes lack inherent authority over nonmembers without congressional authorization affirming the power. Brief of Petitioners for Writ of Certiorari at 2, *Dolgenercorp, Inc. v. The Mississippi Band of Choctaw Indians*, 732 F.3d 409, 411 (5th Cir. 2013) (No.2015-SU-000254-82), 2015 WL 5169095. [hereinafter Brief of Petitioners]. Dollar General’s argument was not rooted in any infirmity of the Mississippi Band of Choctaw’s tribal court system or the tribe’s commitment to the

organizations lacking governing jurisdiction and powers over any except their own members or those who expressly consent to tribal jurisdiction.¹⁰

Underlying many of these legal fights is confusion about the nature of tribal sovereignty. Under current federal law, tribes are not international or Westphalian sovereigns, with the power to exercise traditional external sovereignty. Rather, tribes are domestic sovereigns, retaining significant powers but subject to the ultimate sovereignty of the United States.¹¹ This *sui generis* status of tribes in the American legal landscape generates important and difficult questions about the federal separation of powers doctrine and the exercise of the Indian Affairs power. Which sovereign powers do tribes retain? Where does the power to address that question reside in the federal system?

This Article engages those questions and seeks to further the conversation identifying those principles that ought to guide the exercise of the so-called Indian Affairs power of Congress. To the extent there is a federal power to set the metes and bounds of tribal sovereignty in federal law, the power resides in Congress and is a concomitant of the trust responsibility.¹² A primary concern animating this Article is that despite the ostensibly settled nature of the legal status of tribes as

rule of law. Rather, Dollar General contended that tribes generally lack civil authority over nonmembers within tribal territory. *Id.* Dollar General asserted that tribal courts per se present an unfair risk to nonmember litigants. The thrust of Dollar General's argument was that tribes are incompetent sovereigns, not to be trusted with the exercise of sovereign powers over non-Indians. *Id.* At its root, the Dollar General argument is the latest in the longstanding debate over whether the United States ought to trust tribes to exercise the powers of governance over people and territories, or whether tribes are more like voluntary membership organizations, with basic powers of association, but without sovereign powers of governance over any except their own members.

¹⁰ See, e.g., Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 86–89 (1993).

¹¹ *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

¹² Courts are ill-suited to the inquiry and ought to defer to the political branches to resolve these questions. See generally Steele, *Plenary Power*, *supra* note 1 (arguing that judicial inquiry into inherent tribal powers has not produced core principles from which courts might reason to define a tribe's retained authority and that courts should presume retained inherent authority unless Congress explicitly divests a tribe of that authority); Steele, *Comparative Institutional Competency*, *supra* note 1 (examining indicia of comparative institutional competency and concluding that Congress has superior competence to determine inherent tribal authority questions). Courts impermissibly aggrandized the judicial role by divesting tribes of inherent authority without input of the political branches in the modern era. *Id.* at 768. Examining the comparative institutional competencies of the judicial and legislative branches shows that the legislature, rather than the judiciary, is the branch best suited by institutional competencies to address questions of inherent tribal sovereignty in federal law within the tripartite federal system. See *id.* at 779–816. Also, plenary power and political question doctrines embraced in federal law ought to disable federal courts from intruding on the legislature's Indian Affairs power. These doctrines provide additional support for the contention that courts should defer to the political branches on such questions. See Steele, *Plenary Power*, *supra* note 1, at 709.

sovereigns in federal law, tribes are perpetually defending against as-applied assaults on the basic premise of their legitimacy as governments with sovereign powers over people and territory. The assaults on the doctrine of tribal sovereignty are most publicly launched in the courts, but they occur in legislatures as well.¹³

This Article argues in favor of the continuing essential sovereign character of Indian tribes in federal Indian law to rebut the notion that tribes are more like voluntary membership organizations than governments.¹⁴ This Article also outlines specific sovereign powers that ought to comprise the foundational floor—or the inviolable core—of inherent tribal sovereignty in federal Indian law. Finally, this Article suggests normative principles that ought to guide Congress in the exercise of the Indian Affairs power and the congressional trust responsibility to recognize and affirm inherent tribal powers. This Article builds on the arguments that to the extent there is an Indian Affairs power of the United States—a power deemed to be plenary in its scope—that power resides primarily in Congress as the most competent and politically accountable branch.¹⁵ As a result, the actions of Congress and of the political branches should reflect sound policy judgments and clarify tribal authority.

This Article proceeds as follows: Part I examines the roots and branches of the doctrine of inherent tribal sovereignty as a principle of federal law. These legal roots and branches demonstrate that the doctrine of inherent tribal sovereignty, and the sui generis nature of tribes as domestic sovereigns within the United States, remains a vital principle of federal law. This Part demonstrates that longstanding precedent puts tribal sovereignty skeptics on shaky legal ground when they argue for a total departure from centuries of settled precedent to undermine tribal sovereignty. This Part also demonstrates that the doctrine of inherent tribal sovereignty in federal law is well-founded. Part II examines some specific ways in which the tribal sovereignty doctrine is under siege in courts, in Congress, by the executive branch, and in the states. Part III identifies the federal law mechanisms for affirming inherent tribal power and suggests the core, sovereign powers of tribes that Congress ought to provide with statutory recognition establishing a floor of meaningful tribal sovereignty. Part IV sets forth a normative argument outlining principles that ought to guide Congress in the exercise of its broad Indian Affairs power to recognize and affirm the bounds of inherent tribal sovereignty in federal law and in carrying out its trust responsibility to tribes. Such a legislative fix—a proposed Tribal Sovereignty Affirmation Act—would not only help resolve the legal ambiguity which pervades this area of law, but would also properly remove the issue from attempts by the judiciary to wrest control of the federal-tribal relationship from Congress. Congress has arguably abdicated its responsibilities under the Indian Affairs power in failing to act to clarify inherent tribal authority. Part V concludes.

¹³ See, e.g., S. 1948, 115th Cong., 163 CONG. REC. 6359 (2017).

¹⁴ See, e.g., Dussias, *supra* note 10, at 94. The view of tribes as membership organizations is admittedly a minority view. Still, tribal litigants ought to anticipate such arguments and prepare to address them in future litigation.

¹⁵ See, e.g., Steele, *Plenary Power*, *supra* note 1, at 702.

I. THE ROOTS AND BRANCHES OF TRIBAL AUTHORITY

As illustrated in the anecdote about Red Jacket's object lesson diplomacy, the Seneca Nation, like at least 567 federally recognized tribal nations,¹⁶ and others yet unrecognized, survived the persistent and perpetual assaults on their land, culture, language, and sovereignty. Though its territories have been diminished, Seneca identity endures; and to a great extent, Seneca sovereignty endures.¹⁷ Similarly, for so many tribes, though territories and jurisdiction have been assaulted and in some cases diminished, tribal sovereignty endures. This Part examines just what is meant by "inherent tribal sovereignty," how the doctrine originated and has evolved in federal law, and how that concept might be illuminated by the concept of domestic sovereignty borrowed from international relations.

The United States has approached tribal sovereignty through an inconsistent and opportunistic lens. It is a complex and curious legacy. The United States has at times recognized tribes as sovereign entities capable of entering treaties, conveying great tracts of territory, and governing people within their borders.¹⁸ At other times, the United States has seemed to deem the sovereignty of tribes as having exhausted its utility.¹⁹ The United States has sought the termination of tribes as legal and cultural entities and sought to quash tribal identity through forced assimilation.²⁰ The United States has struggled between the impulse to crush tribes and tribalism as enemies of progress and manifest destiny, and the impulse to recognize tribes as governing partners.²¹ The United States has both sought to acquire tribal lands through fraudulent and coercive treaties and has sought to protect tribal interests in land as a trustee.²² The United States has wrestled with how to regard and reconcile coexisting sovereigns within the territory of the United States. The Removal Act purported to induce tribal cooperation to relocate west of the Mississippi River but resulted in the forcible removal and relocation of tribal communities.²³ The General Allotment Act,²⁴ sanctioned a policy of forced assimilation and effected a catastrophic loss of Indian homelands and territory. The Indian Reorganization Act,²⁵ proposing a policy of greater self-government was soon followed by the Termination Era, undertaking to terminate the federal-tribal relationship with

¹⁶ *About Us*, U.S. DEP'T INTERIOR INDIAN AFF., <https://www.bia.gov/about-us> [<https://perma.cc/GN4U-63TQ>] (last visited Mar. 25, 2018).

¹⁷ Robert B. Porter, *The Jurisdictional Relationship Between the Iroquois and New York State: An Analysis of 25 U.S.C. § 232, 223, 27* HARV. J. ON LEGIS. 497, 507–08 (1990).

¹⁸ *See, e.g.*, *Cherokee Nation v. Georgia*, 30 U.S. 1, 1–2 (1831).

¹⁹ *See, e.g.*, H.R. Con. Res. 108, 83rd Cong., 1st Sess., 67 Stat. B132 (1953).

²⁰ *Id.*; *see also* Indian General Allotment Act, 25 U.S.C. § 331 et seq.

²¹ *See, e.g.*, Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 135–37 (2006) [hereinafter Fletcher, *The Supreme Court*].

²² *See, e.g., id.* at 135–39, 151–52.

²³ Act of May 18, 1830, ch. 148, 4 Stat. 411 (1830).

²⁴ Act of Feb. 8, 1887, ch. 119, 24 Stat. 288 (repealed 2000).

²⁵ Act of June 18, 1934, 25 U.S.C.A. §§ 5101–5129 (Westlaw through Pub. L. No. 115-51).

numerous tribes. Currently, the United States endorses a policy of tribal self-determination, recognizing tribal sovereignty and the right of tribal self-government.

In an 1803 letter from President Thomas Jefferson to William Henry Harrison, governor of the Indiana territory, Jefferson wrote of the precarious position of the Indian tribes in relation to the United States, and of the dilemma he saw presented by the presence of the tribes to the United States: “we presume that our strength [and] their weakness is now so visible that they must see we have only to shut our hand to crush them” and that “motives of pure humanity” were behind the continuing sufferance of tribal existence.²⁶ Given the oscillating American impulses in the history of federal Indian policy, with policies designed to “pulverize[] . . . the tribal mass”²⁷ and policies designed to encourage tribal self-determination, it is something of a legal and historical wonder that the United States continues a government-to-government relationship with 567 federally recognized Indian tribes into the twenty-first century. One clear lesson of the history of tribes in the United States is the resilient and determined nature of tribal identity and cohesion in the face of these assaults. The tribes are not going anywhere. Instead, many tribal members and their leaders operate on the principle articulated in the Iroquois Constitution, as well as in other indigenous traditions: that each generation, especially its leaders, is responsible for the consequences of their actions and choices on future generations.²⁸ The recent fight on behalf of tribal resources and rights symbolized by the fight against the Dakota Access Pipeline exemplifies the resilience—even resurgence—of tribal identity within the American polity. Rooted in this long history of resilience, tribes look to the future.

Because the bedrock principle of tribal sovereignty is under perpetual assault, it is worth examining the roots and branches of the doctrine to understand the history and scope of the doctrine. The doctrine of tribal sovereignty in federal law “posits a legal pluralism that recognizes tribes as subordinate in certain ways to the . . . United States, but self-governing to a large extent.”²⁹ Throughout the history of the United States and continuing to the present day, there have been questions as to the parameters of inherent tribal powers and how such questions should be resolved. Ideally, the political branches should work in concert with tribes as these questions arise and the courts should defer to those arrangements.

The doctrine of tribal sovereignty is best understood as encompassing domestic sovereignty, or in other words, a continuum of sovereign powers of self-government.

²⁶ Letter from Thomas Jefferson to William Henry Harrison (Feb. 27, 1803), *Founders Online*, NAT. ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-39-02-0500> [<https://perma.cc/G9RQ-3ZQM>] (last visited Mar. 25, 2018).

²⁷ DAVID H. GETCHES ET AL., *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 216 (7th ed. 2017) (“President Theodore Roosevelt once aptly described the General Allotment Act as ‘a mighty pulverizing engine to break up the tribal mass.’”).

²⁸ See, e.g., Gerald Murphy, *Const. of the Iroquois Nations: The Great Binding Law, Gayanashagowa*, MODERN HISTORY SOURCEBOOK: THE CONST. OF THE IROQUOIS CONFEDERACY (Fordham Univ.), <https://sourcebooks.fordham.edu/mod/iroquois.asp> [<https://perma.cc/6V2H-9GY5>].

²⁹ See Steele, *Breaking Faith*, *supra* note 2, at 50.

In federal law, tribes do not have all the “external” powers of an international sovereign, but they retain significant inherent powers that have never been extinguished.³⁰ A diminished sovereignty is not an extinguished sovereignty.³¹ And limited sovereignty does not render tribal sovereignty itself a nullity.³²

The term domestic sovereignty refers to “the organization of authority within a given state and its effectiveness.”³³ Tribes can exercise domestic sovereignty without posing any threat to the international or Westphalian sovereignty of the United States.³⁴ As Professor Krasner wrote, “[p]olitics can be organized in many different ways without raising any issues for either international legal or Westphalian sovereignty.”³⁵

In his treatise *Sovereignty*, Robert Jackson describes the “power, authority, [and] responsibility” aspects of sovereignty in ways that may illuminate the discussion of the doctrine of tribal sovereignty.³⁶ Although Jackson is working to define international sovereigns, these principles may be similarly instructive in understanding domestic sovereigns. “Power and authority are closely related ideas,” he writes.³⁷ “Authority commands, power executes.”³⁸ Professor Jackson asserts that “[a]uthority is categorical: either/or, yes or no, green light or red light.”³⁹ Authority is distinguishable under this formulation from power in that “[p]ower is not categorical; it is relative, a matter of degree, of more or less.”⁴⁰ In this sense, authority is like an on-off switch and power is like a dimmer switch.

The sovereign authority, or right to govern asserted by tribes, is acknowledged under federal law to be aboriginal.⁴¹ That means it does not derive from the

³⁰ *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2030 (2014).

³¹ See Steele, *Breaking Faith*, *supra* note 2, at 50.

³² Stephen D. Krasner, *Pervasive Not Perverse: Semi-Sovereigns as the Global Norm*, 30 CORNELL INT’L L.J. 651, 652 (1997) (“[I]n some sense, almost all of the states of the world have been semi-sovereigns. Rarely have states enjoyed full autonomy. Any member state of the European Union is now a semi-sovereign, for the decisions of a supra-national judicial body, the European Court of Justice, have supremacy and direct effect.”) [hereinafter Krasner, *Pervasive Not Perverse*].

³³ Stephen D. Krasner, *Problematic Sovereignty*, in PROBLEMATIC SOVEREIGNTY: CONTESTED RULES AND POLITICAL POSSIBILITIES 1, 7 (Stephen D. Krasner ed., 2001) [hereinafter Krasner, *Problematic Sovereignty*]. Professor Krasner’s discussion of sovereignty points to four common usages of the term *sovereignty*: domestic sovereignty (public authority within a state and power to exert effective control), interdependence sovereignty (control of cross-border movements), international legal sovereignty (legal recognition of nation-states), and Westphalian sovereignty (power to exclude external actors from the polity’s affairs). *Id.* at 5–7.

³⁴ *Id.* at 7.

³⁵ STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 11 (1999).

³⁶ ROBERT JACKSON, SOVEREIGNTY: THE EVOLUTION OF AN IDEA 14–19 (2007).

³⁷ *Id.* at 14.

³⁸ *Id.*

³⁹ *Id.* at 15

⁴⁰ *Id.*

⁴¹ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

Constitution, is not necessarily constrained by the Constitution, and predates the Constitution.⁴² Although tribal sovereignty is enshrined as principle of federal law, tribal sovereignty is not a delegation of federal authority.⁴³ Rather, federal law recognizes the aboriginal authority of tribes to self-government.⁴⁴ Using Professor Jackson's yes-or-no formulation, tribal authority exists.⁴⁵ If one conceives of authority as either a green light or a red light, tribal *authority* is a green light, meaning it exists and has not been extinguished.⁴⁶ The people of the tribes recognize the governing authority of the tribes, and the United States has recognized the continuing vitality of that authority.⁴⁷ But as discussed below, the *powers* of tribes, the "capability and capacity"⁴⁸ of tribes to exercise or execute its authority is relative. As Krasner might put it in the international law context, tribes have authority but not control in some areas.⁴⁹

The status of tribes as sovereigns possessed of governing power over people and territory is endorsed in the Constitution, treaties, statutes, executive orders, and Supreme Court decisions. To suggest the doctrine of tribal sovereignty is now a nullity requires the abandonment not only of centuries of precedent claiming respect under the principles of *stare decisis*, but of other fundamental principles of the rule of law, under which the United States asserts authority and holds resources.

The doctrine is not without its skeptics. In the 2004 case of *United States v. Lara*, Justice Thomas cited Black's Law Dictionary in a concurring opinion upholding Congress' recognition of inherent tribal criminal jurisdiction over all Indians.⁵⁰ He argued that, unlike tribes, sovereigns are those entities vested with "independent and supreme authority" and that tribal sovereignty may therefore be "a nullity."⁵¹ As a result, Justice Thomas looked askance at the tribal sovereignty doctrine, arguing "the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously."⁵² Through this limited lens, sovereignty is an all-or-nothing proposition.

The doctrine of tribal sovereignty in federal Indian law, however, draws upon a different conception of sovereignty than the narrow definition offered by Black's Law Dictionary and partakes more of the conception of sovereignty described by Krasner. Justice Thomas used the narrow dictionary definition to illustrate what he saw as inconsistencies in the premises of federal Indian law. However, tribal sovereignty is not the all-or-nothing on-off switch described by Justice Thomas; rather, tribal sovereignty in federal Indian law is more like a dimmer switch

⁴² *Id.*

⁴³ *United States v. Wheeler*, 435 U.S. 313, 323 (1978).

⁴⁴ *Id.*

⁴⁵ That is not to say that tribes have the international sovereignty that Jackson discusses.

⁴⁶ *See, e.g., Santa Clara Pueblo*, 436 U.S. at 56.

⁴⁷ *Id.*

⁴⁸ JACKSON, *supra* note 36, at 15.

⁴⁹ *See* Krasner, *Problematic Sovereignty*, *supra* note 33, at 7.

⁵⁰ *United States v. Lara*, 541 U.S. 193, 218 (2004) (Thomas, J., concurring).

⁵¹ *Id.* at 215, 218; *see also* Weber, *supra* note 8, at 756.

⁵² *Lara*, 541 U.S. at 215.

involving a spectrum of powers. This imperfect metaphor begs the question of who then moves the switch up or down, setting the “metes and bounds” of tribal sovereignty. That is the essential question to which this series of articles responds. The courts are most decidedly the wrong branch to perform this function.⁵³ To the extent the United States adjusts the metes and bounds of tribal sovereignty, it is the politically accountable legislative branch that ought to make those determinations in the exercise of its Indian affairs power.⁵⁴

Some powers of sovereignty have been extinguished by the United States through treaties, legislation, or judicial fiat, while some powers remain.⁵⁵ The difficulty for tribes, courts, states, litigants, and policymakers is figuring out which powers endure and which have been extinguished. The United States does not recognize tribes as independent sovereigns in the sense of international nation-states, possessed of the characteristics of external sovereignty. Rather, under federal law, tribal sovereignty is an aboriginal power of self-governance, i.e., governance over both people and territory, though subject to the sovereignty of the United States.⁵⁶ The boundaries of tribal sovereignty are subject to revision by the dominant sovereign of the federal government.⁵⁷ *Lara* implicitly affirmed this “dimmer switch” conception of tribal sovereignty. *Lara* also affirmed that Congress has the power to set the policy recognizing inherent tribal powers within federal law, even where the Supreme Court had acted to diminish tribal power.⁵⁸

Despite the asserted power of Congress to guide federal law and policy in inherent tribal authority, tribes do not exercise the powers of self-government pursuant to a delegation from the United States.⁵⁹ Rather, the United States recognizes and affirms, in law and policy, the *inherent* governing authority of tribes as stemming from an *aboriginal sovereignty* that has never been extinguished.⁶⁰

The issue of what we mean by tribal sovereignty is not one of mere semantics. There are serious consequences for how we define, conceptualize, and justify tribal sovereignty. Those consequences flow to the federal-tribal relationship, for tribal governments seeking to exercise governmental authority, and for individuals, both Indian and non-Indian, who come within the governing reach of tribes. The consequences are legal and moral; domestic and international. The will of the United States to respect tribal sovereignty and principles of self-determination is amplified in law and policy around the world in other nations’ treatment of indigenous

⁵³ See generally Steele, *Comparative Institutional Competency*, *supra* note 1 (examining indicia of comparative institutional competency and concluding that Congress, rather than the courts, has superior competence to determine the metes and bounds of tribal sovereignty).

⁵⁴ *Id.* at 800–04.

⁵⁵ *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 435 (1989).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *United States v. Lara*, 541 U.S. 193, 200 (2004).

⁵⁹ *Id.* at 198.

⁶⁰ See, e.g., *Brendale*, 492 U.S. at 435.

peoples.⁶¹ Respect for the rights of indigenous peoples is increasingly regarded as a critical measure of respect for human rights.⁶²

Tribal sovereignty is not a doctrine of federal law developed by tribes as a challenge to the sovereignty of the United States that must be quelled.⁶³ Nor has the doctrine been imposed upon the United States against its laws and will.⁶⁴ Rather, the recognition of tribal sovereignty by the United States is a product of the rule of law, by which the United States has claimed its power over the peoples and the territories of the nation.⁶⁵ As the European powers did before them, the United States recognized the Indian tribes to be political sovereigns with whom they could negotiate treaties.⁶⁶ In fact, they needed it to be so. As a matter of law and necessity, the tribes were recognized as capable of conveying title and negotiating peace, as well as governing people and territory.⁶⁷

Having reaped the benefit and attendant wealth of this legal framework embraced by the United States for its own ends and in its own interests, the United States should not abandon the principle when tribes assert the rights of sovereignty and self-government that have been critical elements of the legal relationship until now.⁶⁸

The doctrine of tribal sovereignty as a principle of federal law finds its roots deep in the legal soil predating America's founding.⁶⁹ "From the first European contacts with the indigenous people of North America," a tension existed "between the inclination to see the indigenous inhabitants as less-than-human savages and the need for competent, even sovereign, partners with whom land cession and peace

⁶¹ See, e.g., *Mabo v. Queensland* [No. 2], 175 CLR 1, at ¶ 75 (1992) (Austral.) (High Court of Australia relying on the juristic foundations of native title in the United States and Canada to assert that tribal title is not extinguished without clearly expressed legislative intent; citing *Lipan Apache Tribe v. United States*, 180 Ct. Cl. 487 (1967) and *United States v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941)); *Te Weehi v. Reg'l Fisheries Officer*, [1986] 1 NZLR 680 (NZHC) at 691 (N.Z.) (High Court of New Zealand citing *Lipan* to assert that customary native rights may only be extinguished through specific legislation clearly abrogating that right); *Simon v. The Queen*, [1985] 2 S.C.R. 387, para. 38 (Can.) (Canadian Supreme Court citing *Santa Fe Pacific* in finding that the extinguishment of treaties should not be "lightly implied").

⁶² See G.A. Res. 61/295, Declaration on the Rights of Indigenous People, at pmb1. (Sept. 13, 2007), available at <http://www.refworld.org/docid/471355a82.html> [<https://perma.cc/3CLW-9ZDU>]; G.A. Res. 15/73 (Jul. 19, 2010) at ¶¶ 18, 30, 36, 40–41, 64, 83–86; U.N. Doc. A/HRC/9/9 (Aug. 11, 2008).

⁶³ See Steele, *Breaking Faith*, *supra* note 2, at 50.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See, e.g., *Johnson v. M'Intosh*, 21 U.S. 543, 567–68 (1823).

⁶⁷ *Id.*; see also Steele, *Breaking Faith*, *supra* note 2, at 50.

⁶⁸ *Id.*

⁶⁹ *Id.*; see FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 9–22 (Nell Jessup Newton et al. eds., 2012). See generally ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1992) (tracing the history and rights of indigenous tribes throughout the New World).

treaties could be negotiated.⁷⁰ Early legal theorists on the subject found justification for forceful conquest and colonization in the racist natural law principle that “the West’s religion, civilization, and knowledge are superior to the religions, civilizations, and knowledge of non-Western peoples.”⁷¹ The insatiable appetite of the colonizers for land and resources found in the doctrine of discovery a legal fig leaf for treating the tribal inhabitants as both inconvenient impediments to boundless greed and convenient treaty partners.⁷² As preeminent legal historian Professor Robert Williams has observed, “law . . . [was] the West’s most vital and effective instrument of empire during its genocidal conquest and colonization of the non-Western peoples of the New World, the American Indians.”⁷³

The “doctrine of discovery,” rooted in European notions of “natural law and papal edicts, provided the organizing legal principle for the European powers to lay claim to lands and resources in the New World, including the exclusive right to deal with its inhabitants.”⁷⁴ The British availed themselves of this doctrine to treat with the Indian tribes in forming military alliances, negotiating peace, and extinguishing aboriginal title to lands in North America.⁷⁵ In *Johnson v. M’Intosh*, Chief Justice Marshall was presented with the question of whether the United States would invoke the doctrine of discovery as security for the rights and interests in lands formerly held by the British.⁷⁶ To answer the inquiry, Marshall embraced the foundation of the doctrine of discovery, notwithstanding how “extravagant the pretension of converting the discovery of an inhabited country into conquest may appear.”⁷⁷

While the rights of Indians to use and occupancy of the lands were purported to be legally protected by the doctrine of discovery, the nations of Europe “asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives.”⁷⁸ In completing his embrace of the doctrine, Marshall did admit a legally cognizable interest of the native peoples in the land and in their own self-government, finding “a legal as well as just claim to retain possession of [land], and to use it according to their own discretion; but their rights to complete

⁷⁰ See Steele, *Breaking Faith*, *supra* note 2, at 50.

⁷¹ *Id.*; WILLIAMS, *supra* note 69, at 6; COHEN, *supra* note 69, at 8–9 (“[T]hirteenth century Pope Innocent IV, posited a papal right to authorize the use of force against non-Christian peoples when necessary to punish violations of the law of nature derived from Christian doctrines.”).

⁷² See, e.g., *Johnson v. M’Intosh*, 21 U.S. 543, 567–68 (1823) (discussing defendants’ arguments and Native American treaty powers existing at the time).

⁷³ WILLIAMS, *supra* note 69, at 6.

⁷⁴ See Steele, *Breaking Faith*, *supra* note 2, at 51.

⁷⁵ *Johnson*, 21 U.S. at 567–68.

⁷⁶ *Id.* at 572. *Johnson* involved a dispute between non-Indian parties who both claimed to have acquired deed from the Indian inhabitants. Marshall framed the inquiry as “the power of Indians to give, and of private individuals to receive, a title which can be sustained in the Courts of this country.” *Id.*

⁷⁷ *Id.* at 591; see Steele, *Breaking Faith*, *supra* note 2, at 51.

⁷⁸ *Johnson*, 21 U.S. at 574.

sovereignty, as independent nations, were necessarily diminished.”⁷⁹ Even in Marshall’s view of tribes as diminished sovereigns, he noted that some core of sovereignty, specifically, the right of self-government, remained in the tribes even after the United States embraced the doctrine of discovery and the narrative of conquest.⁸⁰

The United States, however, is not bound to perpetuate the moral extravagance of the doctrine of discovery in setting the current boundaries of federal Indian policy. It may not be within the will or capacity of the United States to return tribes to their original homelands, but it is within the power of the United States—and indeed, the trust responsibility may demand—to protect tribes in exercising the right of self-government.⁸¹ While courts have not been consistent in supporting such rights, Congress can exercise its authority to clarify federal law to more meaningfully facilitate tribal self-governance.

Part of what animates the current effort to erode or to undermine tribal sovereignty may be an alternate vision of tribes as essentially private, voluntary organizations rather than sovereign, governmental organizations.⁸² As Professor Philip P. Frickey argued, the analogy of tribes to private membership organizations, as the Supreme Court attempted to do in *Duro v. Reina*,⁸³ cannot withstand scrutiny.⁸⁴ For one thing, tribes have long since been recognized as possessing criminal jurisdiction to try, punish, and incarcerate tribal members.⁸⁵ As Professor Frickey observed, “it is completely unclear why a tribe—if analogized to a private association rather than a sovereign—is allowed to incarcerate a member . . .” much less a nonmember.⁸⁶

The notion of tribes as private, voluntary organizations flies in the face of Supreme Court precedent holding that tribes are sovereign in character. In *United States v. Mazurie*,⁸⁷ the Supreme Court rejected the characterization of tribes as essentially voluntary organizations.⁸⁸ The Court examined whether Congress could delegate authority to tribes to regulate the distribution of alcoholic beverages, including to non-Indians, in Indian country.⁸⁹ Below, the Tenth Circuit reasoned that Congress could not delegate this power over non-Indians to the tribe, which it characterized as “an association of citizens” exercising “governmental authority or

⁷⁹ *Id.*

⁸⁰ *Id.*; see also Steele, *Breaking Faith*, *supra* note 2, at 51.

⁸¹ See, e.g., 25 U.S.C. § 3701 (1993) (the Federal Government “has a trust responsibility to protect, conserve, utilize, and manage Indian . . . lands consistent with its fiduciary obligation and its unique relationship with Indian tribes”).

⁸² See, e.g., Steele, *Breaking Faith*, *supra* note 2, at 50–51.

⁸³ 495 U.S. 676 (1990).

⁸⁴ Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 479 (2005).

⁸⁵ COHEN, *supra* note 69, at 216–19.

⁸⁶ Frickey, *supra* note 84, at 479.

⁸⁷ 419 U.S. 544 (1975).

⁸⁸ *Id.* at 545–46.

⁸⁹ *Id.* at 550.

sovereignty over other citizens who do not belong . . . [to] the tribal organization.”⁹⁰ The tribes, the Tenth Circuit decided, were “in no way comparable to a city, county, or special district under state laws[,]” and had only the authority “as landowners[] over individuals who are excluded as members.”⁹¹ The Tenth Circuit therefore invalidated the congressional delegation of authority to the tribe at issue because “Congress cannot delegate its authority to a private, voluntary organization.”⁹²

However, the Supreme Court rejected the Tenth Circuit’s reasoning. The Court held that “Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory,” and are “a good deal more than [the] ‘private, voluntary organizations’” the Tenth Circuit had found them to be.⁹³ *Mazurie* is still good law, although the principle receives more glancing citation than effective embrace in some quarters. But to abandon or upend the core principle of inherent tribal sovereignty would require a dramatic departure from precedent. Still, Congress ought to codify and reaffirm in positive law that the powers of tribes are much more—in theory and in fact—than the powers of private association inherent to voluntary membership organizations.

From the beginning of the United States’ legal relationship with the Indian tribes, there has been an acknowledgement of a vital sovereignty that, while diminished, endures. The next Part examines some recent, ongoing assaults on the longstanding doctrine of tribal sovereignty.

II. ASSAULTS ON TRIBAL SOVEREIGNTY

It is now axiomatic to say that modern Supreme Court jurisprudence has evinced a skepticism of, if not hostility to, the doctrine of tribal sovereignty.⁹⁴ The Supreme Court has moved to curtail both criminal and civil jurisdiction, and to diminish both regulatory and adjudicatory authority.⁹⁵ But the assaults on tribal sovereignty are not limited to the courts. The source and scope of tribal sovereign powers over people and territory continue to be the subject of litigation, legislation, and debate.⁹⁶

There are several reasons motivating opponents of tribal sovereignty both in litigation and legislation. First, there are those who fundamentally dispute the legitimacy of tribes as governments with power over any nonmembers as a matter

⁹⁰ *Id.* at 556 (quoting *United States v. Mazurie*, 487 F.2d 14, 19 (10th Cir. 1973)).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

⁹⁴ *See, e.g.*, David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1576 (1996) (calling the Supreme Court’s approach to Indian sovereignty a “rudderless exercise in judicial subjectivism”).

⁹⁵ *See generally* Fletcher, *The Supreme Court*, *supra* note 21 (reviewing a series of Supreme Court decisions regarding tribal sovereignty).

⁹⁶ *See* Steele, *Breaking Faith*, *supra* note 2 at 49–50.

of legal principle and see attempts by tribes to exercise such power as illegitimate.⁹⁷ There are also those who have concern that tribes may be incompetent in the exercise of sovereign powers, or may operate in ways that are foreign to American legal norms.⁹⁸ Some have a fundamental mistrust or ignorance of tribal institutions.⁹⁹ For others, the decision to oppose tribal jurisdiction may be purely self-interested as a litigation tactic working to delay litigation or seek a more favorable forum.¹⁰⁰ As more non-Indians live and work on tribal reservations, are employed by tribally-owned businesses, and do business with tribes and tribal members, the scope of tribal authority over people and territory becomes a more urgent question. Similarly, as tribes continue to assert their rights to diminishing resources such as clean water and healthy fish in an era of climate change, these disputes over the rights of tribes to govern people and territory will continue.

The following sections offer a few brief examples of the ways in which the courts, Congress, the executive branch, states, and private actors have sought to undermine or limit the doctrine of tribal sovereignty.

A. Tribal Sovereignty in the Courts

Assaults on tribal sovereignty in the courts come primarily in the context of challenges to tribal authority over non-Indians in the territories of the tribes. On one hand, the Supreme Court routinely invokes its longstanding precedent that tribes are “a good deal more than ‘private, voluntary organizations’”¹⁰¹ and that tribes are domestic dependent nations whose sovereignty has been diminished, but never extinguished.¹⁰² On the other hand, the Supreme Court has extinguished tribal criminal jurisdiction and diminished both the civil regulatory and adjudicatory authority of tribes.¹⁰³ Tribal, private, and state litigants are left to argue about particular assertions of tribal authority case by case. Despite the assertion that tribes are more than private, voluntary associations, it is not clear to what degree, if at all, the courts will uphold inherent tribal authority over non-Indians. Tribes have been challenged even in the exercise of those rights that private organizations enjoy, such as the right to determine citizenship or membership.¹⁰⁴ Even were tribes analogous

⁹⁷ See Matthew L.M. Fletcher, *Sawnawgezewog: “The Indian Problem” and the Lost Art of Survival*, 28 AM. INDIAN L. REV. 35, 63 (2003) (citing the Chief Judge of the Washington Supreme Court in *Anderson v. O’Brien*, 524 P.2d 390, 399 (Wash. 1974) (Hale, C.J., dissenting), calling the idea of tribal sovereignty a “manifest absurdity”).

⁹⁸ See, e.g., Brief of Petitioners, *supra* note 9, at 20–23.

⁹⁹ *Id.*

¹⁰⁰ *Cf.* Corp. of the Pres. of the Church of Jesus Christ of Latter-Day Saints v. RJ, 221 F. Supp. 3d 1317, 1321–25 (D. Utah 2016) (Defendant moved to remove initial decision of tribal court jurisdiction from the tribal court without exhausting tribal remedies).

¹⁰¹ *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

¹⁰² *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978) (citing *Johnson v. M’Intosh*, 21 U.S. 543, 574 (1823)).

¹⁰³ See Fletcher, *The Supreme Court*, *supra* note 21, at 135–37.

¹⁰⁴ Eric Reitman, *An Argument for the Partial Abrogation of Federally Recognized*

to private organizations, the rights exercised by voluntary organizations ought to constitute the absolute floor for determining those powers retained by tribal sovereigns, including the power to say who your members or citizens are.

Even in the cases where tribal interests prevail, the concurring and dissenting opinions are ever more boldly dismissive of the doctrine of tribal sovereignty and hint at a willingness to abandon the longstanding doctrine altogether.¹⁰⁵ Justice Thomas' concurrence in *Lara* is but one voice in the dialogue regarding the future of federal tribal relations and how (and by whom) that trajectory will be determined. Tribal sovereignty skeptics cite the "ideology of legal centralism, and the overriding institutional supremacy of the nation-state"¹⁰⁶ as justification for minimizing the powers of tribal sovereigns and limiting those powers to internal self-government akin to private membership organizations.¹⁰⁷ Reflecting this skepticism, Justice Kennedy suggested in *Lara* that any inherent powers of tribes should be limited to the relations among its own members, and suggested that recognizing a broader governing authority, especially over non-Indians, would raise constitutional concerns.¹⁰⁸

In the recent case of *Dollar General*,¹⁰⁹ regarding the scope of inherent civil adjudicatory authority, the Supreme Court tied 4–4, thus affirming the Fifth Circuit's decision to uphold tribal adjudicatory jurisdiction over non-Indians operating on trust land.¹¹⁰ The case involved a civil claim for an alleged sexual assault against a tribal member by an employee of Dollar General, which operated on the Mississippi Choctaw Reservation pursuant to an agreement with the Tribe.¹¹¹ Dollar General argued that as a nonmember of the Tribe, it should not be subject to civil jurisdiction in tribal court.¹¹² In the December 2015 oral argument for the case, Justice Kennedy challenged tribal courts as "nonconstitutional entities" and suggested that they might only have jurisdiction over non-Indians who expressly consent to such jurisdiction.¹¹³ Advocates for the Mississippi Choctaw and the U.S. Solicitor General repeatedly asserted that the claim to sovereign adjudicatory authority was not conditioned upon express consent, primarily because tribal courts are the instruments of tribal sovereigns rather than private dispute resolution entities—like

Indian Tribes' Sovereign Power over Membership, 92 VA. L. REV. 793, 848–50 (2006).

¹⁰⁵ See *United States v. Lara*, 541 U.S. 193, 215–219, 228–30 (Thomas, J., concurring; Souter, J., dissenting) (2004).

¹⁰⁶ N. BRUCE DUTHU, *SHADOW NATIONS: TRIBAL SOVEREIGNTY AND THE LIMITS OF LEGAL PLURALISM* 3 (2013).

¹⁰⁷ *Id.* at 1–3.

¹⁰⁸ *Lara*, 541 U.S. at 211–12 (Kennedy, J., concurring).

¹⁰⁹ *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016).

¹¹⁰ *Id.* at 2159.

¹¹¹ *Dolgenercorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 169 (5th Cir. 2014).

¹¹² Brief of Petitioners, *supra* note 9, at 20–23.

¹¹³ Transcript of Oral Argument at 35, 43, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (No. 13-1496), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/13-1496_p8k0.pdf [<https://perma.cc/L2YH-W3ZQ>].

the American Arbitration Association.¹¹⁴ While questions and hypotheticals asked during oral argument are certainly not authoritative, the exchange illustrates that some jurists may view tribes as analogous to private, voluntary organizations with power only over their own members, except where a party gives express consent to tribal jurisdiction.¹¹⁵

In *Evans v. Shoshone-Bannock Land Use Policy Commission*,¹¹⁶ the Ninth Circuit rejected the assertion of tribal civil regulatory authority over construction within the reservation of the Shoshone-Bannock Tribes of the Fort Hall Reservation.¹¹⁷ A non-Indian sought to build a single-family dwelling on non-Indian owned fee land within the reservation.¹¹⁸ The Tribes asserted regulatory and adjudicatory jurisdiction to enforce tribal regulation at the site because the Tribes identified risks of groundwater contamination, improper disposal of construction debris, and risks of fire associated with the construction project.¹¹⁹ The Ninth Circuit found that because the risks identified by the tribe did not present “catastrophic risks” to the health, safety, and welfare of the tribe, the tribe did not have jurisdiction over the construction project or the dispute it engendered.¹²⁰ Looking to Supreme Court precedent, the Ninth Circuit interpreted *Montana v. United States* as requiring a tribe to demonstrate a catastrophic threat to its existence or resources before tribal jurisdiction may obtain authority over activities within the reservation involving non-Indians on non-Indian owned fee land.¹²¹ In the case, the Tribes’ identification of threats to groundwater and risk of fire were inadequately “existential” to satisfy the court’s expansion of the *Montana* test for civil regulatory jurisdiction over non-Indians.¹²²

While *Dollar General* presented an opportunity for the Supreme Court to clarify the precedent upon which *Evans* and other decisions rest, the tie vote in the Court leaves the circuits to continue to struggle with the scope of tribal jurisdiction.

B. Tribal Sovereignty in Congress

Congress has repeatedly affirmed its endorsement of the doctrine of inherent tribal sovereignty in legislation pertaining to tribes.¹²³ Still, many members of Congress have expressed concerns and skepticism when weighing particular applications of the doctrine.

This mistrust of tribal governing authority became most apparent during the debate on the special domestic violence provisions for tribes enacted in the

¹¹⁴ *Id.* at 38–39, 46, 57.

¹¹⁵ *Id.*; see also Brief of Petitioners, *supra* note 9, at 20–23.

¹¹⁶ 736 F.3d 1298 (9th Cir. 2013).

¹¹⁷ See *id.* at 1306.

¹¹⁸ *Id.* at 1300–01.

¹¹⁹ *Id.* at 1305.

¹²⁰ *Id.* at 1306.

¹²¹ *Id.*

¹²² *Id.*

¹²³ See, e.g., 25 U.S.C. §§ 1301–04 (2017).

reauthorization of Violence Against Women Act (“VAWA”).¹²⁴ The special domestic violence provisions recognized and affirmed the inherent tribal authority to prosecute crimes of domestic violence committed by all persons, not just by Indians, against members of a tribe.¹²⁵ The tribes are required by the legislation to assure due process and meet standards of tribal court operation prescribed by Congress and the Department of Justice.¹²⁶ Still, many members of Congress adamantly opposed this affirmation of tribal authority. Senator Charles Grassley (R-IA) and others in Congress expressed concern that tribal courts were not capable of providing a fair trial to non-Indian defendants.¹²⁷ In opposing the provisions affirming inherent tribal jurisdiction, Senator Grassley took specific issue with the mechanism of congressional affirmance of inherent tribal authority. Senator Grassley said:

I believe in tribal self-government. But as we meet here today, there is no inherent power of tribes to do anything of the sort the bill says. Self-government is not government over “all persons”—including non-Indians. Because tribes lack this power, it’s untrue to say that Congress can recognize and affirm it.¹²⁸

Congressional opposition to tribal jurisdiction arises in the context of Indian gaming as well.¹²⁹ Members of Congress advocate the interests of states and localities, who frequently oppose the designation of tribal land as trust land because trust land is lost to their tax rolls and because state and local control over the activities on the land, particularly gaming, is diminished.¹³⁰

On October 5, 2017, Senator Claire McCaskill introduced a “bill to abrogate the sovereign immunity of Indian tribes as a defense in inter partes review of patents.”¹³¹ The bill would exercise the plenary power of Congress to waive tribal sovereign immunity when it expressly acts to do so.¹³² The introduction of the bill

¹²⁴ 159 CONG. REC. S571, 571–586 (daily ed. Feb. 11, 2013) (debating the Coburn Amendment seeking to strip the tribal jurisdiction amendments from the Senate bill reauthorizing the Violence Against Women Act).

¹²⁵ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 104–07, Tit. IX, 127 Stat. 54, 126 (2013).

¹²⁶ *Id.*

¹²⁷ Prepared Statement of Senator Charles Grassley, *Consideration of the Violence Against Women Act* (Feb. 2, 2012), www.grassley.senate.gov/news/news-releases/consideration-violence-against-women-act [<https://perma.cc/RUG7-LNEB>].

¹²⁸ *Id.*

¹²⁹ *See, e.g.*, 152 CONG. REC. S11686, S11686–87 (daily ed. Dec. 08, 2006) (statement of Sen. McCain).

¹³⁰ Lisa W. Foderaro, *A Connecticut Tribe Fights for Recognition, and a Piece of the Casino Industry*, N.Y. TIMES (June 27, 2016), www.nytimes.com/2016/06/28/nyregion/schaghticoke-tribe-connecticut-fights-for-piece-of-casino-industry.html?_r=0 [<https://perma.cc/8R22-HT73>].

¹³¹ S. 1948, 115th Cong. (2017–2018).

¹³² *Id.*

illustrates that Congress is aware of and interested in the exercise of tribal authority and can, when it chooses, act to extinguish the exercise of tribal authority for federal law purposes.

Because Congress can, and does, act in contravention of tribal authority, tribes should be given the benefit of the doubt where Congress remains silent. In *Santa Clara Pueblo v. Martinez*,¹³³ the Supreme Court determined that the Indian Civil Rights Act had not expressly waived tribal sovereign immunity from suit.¹³⁴ The Supreme Court held that Congress could waive tribal immunity as an exercise of its plenary power, but Congress must do so expressly; tribal sovereign immunity may not be waived by implication.¹³⁵

C. Tribal Sovereignty in the Executive Branch

The policy of the United States articulated in both statute and in executive orders is to promote tribal self-determination and to pursue a government-to-government relationship between the federal government and the tribes.¹³⁶ The Departments of Interior, Health and Human Services, and Justice have taken steps over the last several decades to acknowledge and honor the government-to-government relationship and the tribal trust responsibility, with fluctuating degrees of success depending on the inclinations and resource priorities of the White House.¹³⁷

However, there is a disparity between the general view of tribal self-determination that seems to animate the tribal relations of the Departments of Interior, Health and Human Services, Justice, and other federal agencies, such as the National Labor Relations Board (“NLRB”), the IRS, and the Army Corps of Engineers. As a result, respect for tribal sovereignty by the executive branch is a mixed bag.

Beginning in 2004, the NLRB asserted jurisdiction pursuant to the National Labor Relations Act (“NLRA”) over tribes as employers for economic activities of tribes on tribal lands.¹³⁸ One recent example is the case of the Little River Band of Ottawa Indians, which operates a casino on tribal trust land in Michigan.¹³⁹ The tribe

¹³³ 436 U.S. 49 (1978).

¹³⁴ *Id.* at 58–60.

¹³⁵ *Id.*

¹³⁶ *See, e.g.*, Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq.*

¹³⁷ *See, e.g.*, DEPT. OF JUSTICE, TRIBAL CONSULTATION ON DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, FISCAL YEAR 2018 AND 2019 TRIBAL FUNDING POLICY (2017), <https://www.justice.gov/tribal/page/file/1028441/download> [<https://perma.cc/3A5W-U5MR>].

¹³⁸ Melissa Greenberg, *The National Labor Relations Act and Tribal Sovereignty: An Explainer*, ONLABOR (May 20, 2016), <https://onlabor.org/2016/05/20/the-national-labor-relations-act-and-tribal-sovereignty-an-explainer/> [<https://perma.cc/YNH8-J4EB>].

¹³⁹ Nat'l Labor Relations Bd. v. Little River Band of Ottawa Indians Tribal Gov't, 788 F.3d 537, 540 (6th Cir. 2015).

enacted an employment practices code which the NLRB determined violated the NLRA provisions on collective bargaining.¹⁴⁰ The tribe challenged the jurisdiction of the NLRB as violating tribal sovereignty.¹⁴¹ The Sixth Circuit upheld the NLRB's jurisdiction and the Supreme Court recently denied the tribe's petition for certiorari review.¹⁴²

Similarly, tribes and the IRS have engaged in a longstanding dispute about the role of the IRS and the rights of tribes as sovereigns.¹⁴³ In a statement to Congress summarizing the dispute in 2012, the National Congress of American Indians ("NCAI") noted that in 2005, the IRS began an aggressive policy of auditing Indian tribes and by 2012 had audited 77 percent of tribes in the lower forty-eight states, and 100 percent of tribes with any significant revenue.¹⁴⁴ NCAI argued that the targeting of tribal governments for audit was discriminatory when compared to the tribal audit rate to the much lower rate of audits of state and local governments.¹⁴⁵ NCAI also outlined the ways the IRS had undermined tribal tax exempt bond efforts and had targeted tribal health and education programs for scrutiny.¹⁴⁶

Most recently, tribes opposing the construction of the Dakota Access Pipeline have charged the Army Corps of Engineers with disrespecting tribal treaty rights, failing to adequately protect sensitive tribal cultural sites, refusing to ensure the required federal consultation with tribes on projects that affect tribal interests, and ignoring the significant concerns of the tribes regarding the Pipeline's threat to tribal water resources.¹⁴⁷

D. Tribal Sovereignty and the States

States have traditionally been viewed as hostile to tribal power.¹⁴⁸ In some ways states may view tribal jurisdiction as a challenge or diminishment of state prerogatives or authority. As tribes and states have fostered cooperative relationships and as tribes have asserted greater economic and political influence in

¹⁴⁰ *Id.* at 540–41.

¹⁴¹ *Id.*

¹⁴² *Little River Band of Ottawa Indians Tribal Gov't v. Nat'l Labor Relations Bd.*, 136 S. Ct. 2508 (2016) (denying cert.).

¹⁴³ NAT'L CONGRESS OF AMERICAN INDIANS, TESTIMONY OF THE NATIONAL CONGRESS OF AMERICAN INDIANS ON THE SENATE COMMITTEE ON INDIAN AFFAIRS' OVERSIGHT HEARING: "NEW TAX BURDENS ON TRIBAL SELF-DETERMINATION" (2012) http://www.ncai.org/NCAI_Senate_Committee_on_Indian_Affairs_Testimony_-_June_15_2012.pdf [<https://perma.cc/D966-FUTY>].

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 255 F. Supp. 3d 101, 115 (D.D.C. 2017).

¹⁴⁸ *See, e.g., United States v. Kagama*, 118 U.S. 375, 384 (1886) ("[Tribes] 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.").

their states and localities, many states have come to support and even defend tribal sovereign authority.¹⁴⁹ But there are still many examples of states whose legislatures and executive officers raise significant challenges to tribal sovereignty and seek to curtail the exercise of tribal power.

One striking example is the longstanding litigation between the Ute Indian Tribe and the state and several counties of Utah.¹⁵⁰ In the 1970s, the Ute Tribe alleged that the state of Utah and local counties were “unlawfully trying to displace tribal authority on tribal lands.”¹⁵¹ The Tenth Circuit’s most recent decision in the case said a 1985 decision in the case should have ended the dispute but that “state officials chose to disregard the binding effect of the Tenth Circuit decision in order to attempt to relitigate the boundary dispute in a friendlier forum.”¹⁵² The State proceeded to prosecute tribal members for conduct on tribal land, which the court found “the State had no business doing.”¹⁵³ In 2015, the Tenth Circuit instructed the district court to preliminarily enjoin the prosecutions at issue in the case and to dismiss the counties’ counterclaims against the tribe as violating the tribes’ immunity.¹⁵⁴ The Tenth Circuit recounted the extensive record of the state’s and counties’ hostilities to the jurisdiction and legitimacy of the Ute tribe.¹⁵⁵ One argument singled out for rebuke by the court was asserted by one of the local counties involved: Wasatch County.¹⁵⁶ Wasatch County argued that the “[t]ribe may not exercise authority over any lands in Utah because (in part) the State was once ‘a separate, independent nation, the State of Deseret’ . . . that didn’t recognize Indian lands or tribal authority.”¹⁵⁷ The Tenth Circuit dismissed this argument as ignoring the United States Constitution and its grant of authority to the federal government in Indian affairs.¹⁵⁸

E. Tribal Sovereignty and Private Actors

Private litigants who find themselves subject to tribal jurisdiction almost reflexively challenge the jurisdiction of the tribe, whether it be a tax, a civil suit, or other regulation. In the context of tribal courts, federal common law requires exhaustion of tribal court remedies before the federal courts will step in.¹⁵⁹ At a

¹⁴⁹ See, e.g., Matthew L.M. Fletcher et al., *Indian Country Law Enforcement and Cooperative Public Safety Agreements*, 89 MICH. B. J. 42, 42 (2010).

¹⁵⁰ *Ute Indian Tribe of the Uintah & Ouray Reservation v. Utah*, 790 F.3d 1000, 1003–04 (10th Cir. 2015) (detailing the long and drawn out history of the litigation).

¹⁵¹ *Id.* at 1003.

¹⁵² *Id.* (quoting the United States’ Memorandum in Support of the Ute Indian Tribe’s Motion for Injunctive Relief).

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1012–13.

¹⁵⁵ *Id.* at 1003–05.

¹⁵⁶ *Id.* at 1006–07.

¹⁵⁷ *Id.* at 1006.

¹⁵⁸ *Id.*

¹⁵⁹ *Nat’l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856–57 (1985)

minimum, this has meant that tribal courts must be permitted to address the question of whether they have jurisdiction in the first instance, but it also leaves tribes frequently litigating their own legitimacy as a forum.¹⁶⁰

The Supreme Court's recent per curiam, 4–4 decision in *Dollar General* affirmed the decision of the Fifth Circuit upholding tribal civil jurisdiction over the employer of the perpetrator of an alleged sexual assault against a tribal member in the Dollar General store by a manager in the company.¹⁶¹ Dollar General contested the civil jurisdiction of the Tribe's court because it said the tribal court could not be trusted to provide due process to nontribal members.¹⁶² Dollar General also argued that civil adjudicatory jurisdiction could not obtain over non-Indian litigants without the express consent of the non-Indian.¹⁶³ Although Dollar General operated a store on the Reservation pursuant to an agreement with the Tribe, and that agreement included a provision that disputes should be resolved in tribal court, Dollar General argued that the agreement did not constitute consent to a tort suit of the nature at issue in the case, and was limited to disputes between Dollar General and the Tribe arising from the agreement itself.¹⁶⁴ The Fifth Circuit applied Supreme Court precedent governing tribal civil jurisdiction over non-Indians to find that Dollar General had, by doing business on tribal trust land pursuant to an economic agreement with the Tribe, at least constructively consented to tribal court jurisdiction over disputes involving the operation of the store.¹⁶⁵

III. THE SOVEREIGN POWERS OF TRIBES

As outlined in the previous Parts, the tribal sovereignty doctrine in federal law is a product of the rule of law by which the United States has asserted power over the peoples and the territories of the nation. Tribes are not legal creations of the United States and do not derive their sovereignty from the United States.¹⁶⁶ Instead, tribal sovereignty is aboriginal.¹⁶⁷ But federal law recognizes and affirms the exercise of domestic sovereignty by tribes within the international boundaries of the United States.¹⁶⁸ As such, federal law addresses itself to the question of which

("[E]xamination [of jurisdiction] should be conducted in the first instance in the Tribal Court itself.").

¹⁶⁰ *Id.*; see also Laurie Reynolds, "Jurisdiction" in *Federal Indian Law: Confusion, Contradiction, and Supreme Court Precedent*, 27 N.M. L. REV. 359, 380 (1997) ("[T]he exhaustion doctrine is frequently reduced to a meaningless exercise.").

¹⁶¹ *Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016).

¹⁶² See, e.g., Brief of Petitioners, *supra* note 9, at 20–23.

¹⁶³ *Id.* at 19–20.

¹⁶⁴ *Id.* at 16–18.

¹⁶⁵ *Dolgenercorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167, 173–74 (5th Cir. 2014).

¹⁶⁶ See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

¹⁶⁷ *Id.* at 55.

¹⁶⁸ See, e.g., *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2030 (2014); Steele, *Breaking Faith*, *supra* note 2, at 50; see also *supra* Part I.

sovereign rights and powers the United States recognizes and affirms in tribes, and which powers the United States asserts have been relinquished, divested, or extinguished.¹⁶⁹

This Part first examines the mechanisms in federal law for recognizing and affirming—or extinguishing—the inherent sovereign powers of tribes as an exercise of the Indian Affairs power, and second, discusses the categories of powers that form the basis of inherent tribal sovereign power in federal Indian law.¹⁷⁰ Part IV builds upon this foundation to argue that the United States, as trustee for the tribes, has a duty to enact legislation recognizing and affirming inherent tribal powers in federal law rather than leaving this area of federal law to ad hoc judicial whims. Part IV also identifies the principles that ought to guide Congress in this exercise of the Indian Affairs power and in carrying out its trust responsibility to tribes and to Indian people.

There is risk and perhaps folly in assembling any list of tribal powers. Sovereign powers are not susceptible of tidy categorization. Any such discussion will surely be both over- and under-inclusive. However, this Part articulates the ways that inherent tribal powers have been manifest and affirmed in the federal legal landscape so as to better examine where the law of tribal sovereignty must be augmented and clarified.

In the case of *Native American Church of North America v. Navajo Tribal Council*,¹⁷¹ the Tenth Circuit embraced the emerging principles and presumptions about tribal sovereignty. The Court wrote:

[J]udicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possesses, in the first instance, all the powers of any sovereign state. (2) Conquest renders the tribe subject to *legislative* power of the United States and . . . terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does not by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government. (3) These powers are subject to qualification by treaties and by express legislation of Congress, but, save as thus *expressly qualified*, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of government.¹⁷²

Against the background fundamental presumption that tribes have retained aboriginal authority, there are specific governing powers that federal law has identified as retained or divested.¹⁷³ The mechanisms of federal law setting the metes

¹⁶⁹ See *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

¹⁷⁰ Krasner, *Pervasive Not Perverse*, *supra* note 32, at 654.

¹⁷¹ 272 F.2d 131, 133–34 (10th Cir. 1959).

¹⁷² MATTHEW L.M. FLETCHER, *FEDERAL INDIAN LAW* 242 (Hornbook Series 2016), citing *Native Am. Church of N. Am. v. Navajo Tribal Council*, 272 F.2d at 133–34 (quoting FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 122 (1941 ed.)).

¹⁷³ See COHEN, *supra* note 69, at 212–19 (discussing tribal power to determine the form

and bounds of tribal sovereignty include: treaties, in which tribes have both retained and relinquished inherent rights; statutes, in which the United States has explicitly recognized and affirmed the inherent sovereign powers of tribes; and judicial decision, in which the courts have asserted a power to determine inherent tribal powers have been implicitly divested.¹⁷⁴ Tribes themselves also assert inherent powers that have not been endorsed as principles of federal law, but that are exercised by tribes in governing people and territory.¹⁷⁵ The lack of certainty and predictability for tribal powers that may be subject to divestiture by judicial fiat or that may be exercised by tribes but perpetually challenged by litigants, suggest a need for legislative intervention clarifying the federal law of tribal sovereignty.

In the case of the federally-recognized tribes, the United States has diminished by degrees (and tribes have relinquished or been compelled to relinquish by treaty) some control over aboriginal authority.¹⁷⁶ Where tribes have not relinquished power through treaty, Congress asserts a primary power—or even a plenary power—over the boundaries of tribal sovereignty in federal law.¹⁷⁷ Congress has broad power over Indian affairs stemming from the Indian commerce clause of the Constitution, the treaties and course of dealings between the United States and tribes.¹⁷⁸ Courts have not limited the exercise of congressional legislative power in the realm of Indian affairs to the regulation of “commerce” but have acknowledged a broad and exclusive federal authority to deal with and legislate regarding Indian tribes.¹⁷⁹ Some have suggested that the plenary power over Indian affairs is a “concomitant[] of nationality” inherent in the sovereignty of an international nation-state.¹⁸⁰

A central paradox of Federal Indian law is that Congress has asserted the Indian Affairs power, which it deems to be plenary, to regulate tribes and justifies the assertion of this broad power in part because it has taken upon itself a responsibility as the trustee of tribes.¹⁸¹ In assuming such broad power, Congress has also been charged with a fiduciary responsibility, or a relationship of trust, in dealing with the

of tribal government, determine membership, to legislate and tax, to administer justice, to exclude from tribal territory, etc.); *see also* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 212 (1978) (holding that tribes had been divested by implication of inherent power to try non-Indians).

¹⁷⁴ *See, e.g.,* *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 435 (1989); *see also* COHEN, *supra* note 69, at 221–36.

¹⁷⁵ *See, e.g.,* *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 159 (1982) (discussing efforts of tribe to tax mining activities and to exclude nonmembers from the territory).

¹⁷⁶ *See* COHEN, *supra* note 69, at 221–22.

¹⁷⁷ *See* *United States v. Lara*, 541 U.S. 193, 200 (2004); *see also* Steele, *Plenary Power*, *supra* note 1, at 702.

¹⁷⁸ *Lara*, 541 U.S. at 200–02.

¹⁷⁹ *Id.* at 200. *But see id.* at 215 (Thomas, J., concurring) (disagreeing with the Court’s analysis of the Indian Commerce Clause as a broad grant of legislative authority).

¹⁸⁰ *Id.* at 201. The power of Congress over Indian affairs is plenary, but not absolute. *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977).

¹⁸¹ *See* Steele, *Plenary Power*, *supra* note 1, at 670; *see also* *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566–67 (1903).

tribes.¹⁸² As the Supreme Court held in *Lone Wolf v. Hitchcock*,¹⁸³ the United States has assumed a trust responsibility to and for Indian tribes, and with it broad regulatory power over tribes.¹⁸⁴ In other words, the Indian affairs power derives in large part from the federal trust responsibility. This suggests that if the United States abandons the trust responsibility, it will forfeit plenary power over tribes. To the extent the federal government undertakes to manage the resources of tribes, it must do so “for the benefit” of the tribes and is presumed, at least at law, to act in good faith on behalf of the tribes.¹⁸⁵ However, Congress has taken a broad and dangerous view of what might constitute the best interests of tribes. During what is known as the “Termination Era,” Congress sought to extinguish the legal relationship between several tribes and the federal government, seeking to compel assimilation and uproot tribal identity.¹⁸⁶

Professor Richard H. Steinberg observes a distinction between “legal” and “behavioral” sovereignty.¹⁸⁷ Professor Steinberg argues that just because a sovereign has legal authority does not mean that there are not external factors which may constrain that authority.¹⁸⁸ Steinberg writes, “[a]s Stephen Krasner and Robert Jackson have each suggested, not all states are able to exercise all the rights suggested by the legal definition, and some states are unable to exercise any of them.”¹⁸⁹ As in the international sovereignty context, tribes have domestic sovereignty and governing authority, if not the full panoply of powers (or “control” in Krasner’s parlance) of an international sovereign.

Without congressional clarification, courts wrestle with the attempt to distinguish between those tribal powers that have been extinguished and those that endure.¹⁹⁰ They seek to make a distinction between tribal powers over external relations and internal relations.¹⁹¹ The problem is figuring out what makes a power external and what makes it internal. It is not clear which tribal powers fall into which categories, or why for example, criminal jurisdiction (i.e., the power to administer justice within a tribe’s territory) is an external power, or civil regulations (also within tribal boundaries) might be characterized as governing external relations.¹⁹²

¹⁸² See, e.g., 25 U.S.C. § 3701.

¹⁸³ 187 U.S. 553 (1903).

¹⁸⁴ *Lone Wolf*, 187 U.S. at 566.

¹⁸⁵ *Id.*

¹⁸⁶ Gabriel S. Galanda & Ryan D. Dreveskracht, *Curing the Tribal Disenrollment Epidemic: In Search of a Remedy*, 57 ARIZ. L. REV. 383, 403–04 (2015).

¹⁸⁷ Richard H. Steinberg, *Who Is Sovereign?*, 40 STAN. J. INT’L LAW 329, 330–33 (2004).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 332.

¹⁹⁰ See, e.g., *Oliphant v. Suquamish Indian Tribe et al.*, 435 U.S. 191, 208 (1978); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 159 (1982).

¹⁹¹ See Alex Tallchief Skibine, *Tribal Sovereign Interests Beyond the Reservation Borders*, 12 LEWIS & CLARK L. REV. 1003, 1010 (2008) (discussing the Court’s effort to define the powers of tribal self-government as “purely intramural matters”).

¹⁹² *Id.*

Still, some powers are clearly external: tribes may not enter treaties with nations other than the United States, nor may they transfer interests in land to a sovereign other than the United States.¹⁹³ Tribes cannot legitimately enact a statute that infringes on the sovereignty of the United States or of the states, by say, purporting to regulate commerce, provide for the national defense, or offer courts of general jurisdiction for matters not arising on the territory.¹⁹⁴

The following sections outline the three umbrella categories of jurisdiction that pertain to tribes as sovereigns: criminal jurisdiction, civil regulatory jurisdiction, and civil adjudicatory jurisdiction.

A. Criminal Jurisdiction

While there is broad debate on the margins, Congress has “recognized and affirmed” certain powers as the “inherent power[s] of Indian tribes” in statute.¹⁹⁵ The power of Congress to recognize and affirm the inherent powers of Indian tribes was upheld in *Lara* as a legitimate exercise of congressional authority under the Indian commerce clause, the treaty clause, and the plenary power doctrine.¹⁹⁶ These textual and preconstitutional powers of the United States to deal with indigenous people, collectively the Indian Affairs power, seems to be a “concomitant[] of nationality.”¹⁹⁷

One of the primary characteristics setting tribes apart as sovereign entities clearly distinguishable from membership organizations is the power of criminal prosecution.¹⁹⁸ While membership organizations have the power to expel from membership or perhaps, like HOAs, levy fines or encumber property interests, only governments exercising criminal jurisdiction have the power to punish criminal offenders by depriving them of their liberty after due process.¹⁹⁹ Although the limits of this tribal sovereign power continue to be widely debated, the fundamental principle remains that tribes possess the power of criminal jurisdiction, distinguishing tribes from voluntary organizations.²⁰⁰

¹⁹³ Steele, *Comparative Institutional Competency*, *supra* note 1, at 785–814.

¹⁹⁴ *Id.*

¹⁹⁵ 25 U.S.C. § 1301 (2018).

¹⁹⁶ *United States v. Lara*, 541 U.S. 193, 200 (2004).

¹⁹⁷ *Id.* at 201.

¹⁹⁸ COHEN, *supra* note 69, at 218–19.

¹⁹⁹ See generally Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144 (2003) (distinguishing the acts of “private governments” from “state action”); see *id.* at 164–65 (private organizations do not have the power of criminal sanction over their members).

²⁰⁰ COHEN, *supra* note 69, at 218–19.

The United States has altered the bounds of tribal criminal jurisdiction in numerous ways in the past. In 1953, as part of the prevailing policy of the United States seeking to terminate the federal-tribal relationship, the United States enacted statutes to remove criminal jurisdiction from tribes within the borders of six states: California, Minnesota, Nebraska, Oregon, Wisconsin, and (upon statehood) Alaska.²⁰¹

In 1978, the Supreme Court held in *Oliphant v. Suquamish Indian Tribe*²⁰² that all tribes had been implicitly divested of criminal jurisdiction over non-Indians and retained criminal jurisdiction only over their own tribal members.²⁰³ In 1990, the Supreme Court in *Duro v. Reina*, extended the holding of *Oliphant* by stripping tribes of criminal jurisdiction over nonmember Indians.²⁰⁴ Congress amended the Indian Civil Rights Act in response to the holding in *Duro* to clarify that tribal criminal jurisdiction extends to all Indians, and is not limited to members of the tribe exercising jurisdiction.²⁰⁵ This so-called “Duro fix” specifically recognized and affirmed the inherent power of tribes to exercise criminal jurisdiction over Indians.²⁰⁶ Tribes do not exercise federal delegated power in enforcing criminal laws, but rather, exercise their own inherent authority.²⁰⁷ This means, for example, that prosecution of an individual for the same crime by a tribe and by the federal government does not violate double jeopardy.²⁰⁸ In 2004, the Supreme Court upheld the “Duro fix” in *Lara*, finding that Congress had the authority to adjust the boundaries of inherent tribal power pursuant to the Indian affairs power and the plenary power doctrine.²⁰⁹

While these pronouncements from Congress and the courts have altered the boundaries of tribal criminal jurisdiction, moving the dimmer switch up and down, none have supported a view that criminal jurisdiction is not a tribal power. Indeed, there are very good reasons for upholding and enhancing the criminal jurisdiction of tribes. Public safety and civic order require clear lines of responsibility and an accountable governing authority to enforce duly passed laws.²¹⁰ Tribes occupy and govern territory, in some cases, very large areas.²¹¹ Some tribes have cooperative relationships with states and localities for public safety and law enforcement.²¹²

²⁰¹ 18 U.S.C. § 1162 (2018); 25 U.S.C. §§ 1321–1326 (2018).

²⁰² 435 U.S. 191 (1978).

²⁰³ *Id.* at 208–09.

²⁰⁴ *Duro*, 495 U.S. at 692.

²⁰⁵ 25 U.S.C. § 1301(2) (2018).

²⁰⁶ *Id.*

²⁰⁷ *United States v. Wheeler*, 435 U.S. 313, 322–24 (1978).

²⁰⁸ *Id.* at 330–31.

²⁰⁹ *United States v. Lara*, 541 U.S. 193, 200 (2004).

²¹⁰ See Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 876 (2015).

²¹¹ See Angela R. Riley, *Indians and Guns*, 100 GEO. L.J. 1675, 1723 (2012); Dean B. Suagee, *The Cultural Heritage of American Indian Tribes and the Preservation of Biological Diversity*, 31 ARIZ. ST. L.J. 483, 491 (1999).

²¹² See generally Matthew L.M. Fletcher et al., *Indian Country Law Enforcement and*

As policymakers debate the appropriate boundaries of tribal criminal jurisdiction, the theories of criminal jurisdiction outlined by Rollin Perkins may be helpful.²¹³ Perkins identifies four foundations of criminal jurisdiction: territorial jurisdiction, Roman jurisdiction, injured forum, and cosmopolitan jurisdiction.²¹⁴ He writes that “[t]he territorial theory takes the position that criminal jurisdiction depends upon the place of perpetration,” or in other words, the territory where the crime takes place, determines the jurisdiction of the offense.²¹⁵ Under the Roman theory, it is the perpetrator instead of the place that determines jurisdiction.²¹⁶ This is the theory that appears to currently govern criminal jurisdiction in tribal territory in the United States.

While the location of the crime is a crucial piece of the tribal criminal jurisdictional puzzle, it is only part of the jurisdictional inquiry.²¹⁷ If the perpetrator is non-Indian, the tribe is deprived of criminal jurisdiction, with narrow exceptions, under the current legal scheme.²¹⁸

Tribes exercise criminal jurisdiction for crimes arising in Indian country committed by an Indian, with some exceptions.²¹⁹ The Indian Civil Rights Act “recognize[s]” and “affirm[s]” the inherent sovereign power “to exercise criminal jurisdiction over all Indians.”²²⁰ Congress affirmed inherent tribal criminal jurisdiction over “all Indians” and the Supreme Court upheld the enactment of Congress.²²¹ Significantly, Congress chose to enact what is called the “Duro fix” by recognizing and affirming the inherent criminal jurisdiction of tribes over all

Cooperative Public Safety Agreements, 89 MICH. B.J. 42, 43–45 (2010).

²¹³ Rollin M. Perkins, *The Territorial Principle in Criminal Law*, 22 HASTINGS L.J. 1155, 1155 (1971); *but see* Addie C. Rolnick, *Recentering Tribal Criminal Jurisdiction*, 63 UCLA L. REV. 1638, 1677 (2016) (arguing that tribes may be entitled to extraterritorial jurisdiction in some cases).

²¹⁴ Perkins, *supra* note 213, at 1155.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *See A Roadmap for Making Native America Safer: Report to the President and Congress of the United States*, Chapter 1, Jurisdiction: Bringing Clarity Out of Chaos, TRIBAL LAW AND ORDER COMMISSION (2013), [https://www.aisc.ucla.edu/iloc/report/\[https://perma.cc/YNH8-J4EB\]](https://www.aisc.ucla.edu/iloc/report/[https://perma.cc/YNH8-J4EB]). “The Indian Law and Order Commission has concluded that criminal jurisdiction in Indian country is an indefensible maze of complex, conflicting, and illogical commands, layered in over decades via congressional policies and court decisions, and without the consent of Tribal nations.” *Id.* at 19.

²¹⁸ *See, e.g.*, 25 U.S.C. §§ 1301–04 (2018); The Violence Against Women Act (VAWA) Reauthorization, 25 U.S.C.A. § 1304 (2013). The VAWA tribal jurisdiction amendments, enacted in 2014, revised this principle to extend tribal criminal jurisdiction to perpetrators of domestic violence who are in a domestic relationship with a tribal member so long as the tribe complies with certain procedural due process requirements in the prosecution. *Id.*

²¹⁹ 25 U.S.C. §§ 1301–04 (2018).

²²⁰ 25 U.S.C. § 1301(2) (2018).

²²¹ *United States v. Lara*, 541 U.S. 193, 200 (2004).

Indians, but left the *Oliphant* holding intact.²²² The Duro fix, upheld by *Lara*, means that Congress has the power to recognize and affirm inherent tribal jurisdiction, even after the Court has ruled against such jurisdiction.²²³

Congress has not enacted an “Oliphant fix” per se but did modify the blanket rule of *Oliphant* in conjunction with the reauthorization VAWA.²²⁴ In response to a crisis of unprosecuted domestic violence by non-Indians against Indians on tribal territory, Congress enacted the special domestic violence provisions codified at 25 U.S.C. § 1304.²²⁵ This legislation explicitly recognized and affirmed special domestic violence criminal jurisdiction “over all persons” for participating tribes, concurrent with the jurisdiction of the United States, of a state, or both.²²⁶

This expanded jurisdiction permits tribal institutions to offer appropriate process to defendants while protecting the safety of the tribal community where jurisdiction obtains.²²⁷ Where jurisdiction does not obtain over most crimes by non-Indians, tribes are left with uncertainty about whether offenders will face justice and tribal communities are left largely unprotected.²²⁸

B. Civil Regulatory Jurisdiction

Tribes seek to exercise regulatory authority to enact conservation codes, economic development and employment codes, housing codes, drug policies, taxes and fees, and even speed limits.²²⁹ Because Congress has not addressed the matter, courts have identified several inherent regulatory powers retained by tribes.²³⁰ The regulatory powers include the power to: determine the form of tribal government, determine membership, legislate and tax, administer justice, exclude persons from tribal territory, and some degree of power over nontribal members on tribal territory. Together these powers form a minimum contingent of inherent tribal regulatory power. Courts have categorized these as the powers of internal governance.²³¹

²²² 25 U.S.C. § 1301(2) (2018).

²²³ *Lara*, 541 U.S. at 200.

²²⁴ The Violence Against Women Act (VAWA) Reauthorization, 25 U.S.C. § 1304 (2013) (tribal jurisdiction over crimes of domestic violence).

²²⁵ See Angela R. Riley, *Crime and Governance in Indian Country*, 63 UCLA L. REV. 1564, 1569–71 (2016).

²²⁶ 25 U.S.C. § 1304 (2018).

²²⁷ *Id.*

²²⁸ See Riley, *supra* note 225, at 1630–32.

²²⁹ See, e.g., Joseph William Singer, *The Indian States of America: Parallel Universes and Overlapping Sovereignty*, 38 AM. INDIAN L. REV. 1, 12 (2014).

²³⁰ See COHEN, *supra* note 69, at 212–19 (discussing tribal power to determine the form of tribal government, determine membership, to legislate and tax, to administer justice, to exclude from tribal territory, etc.).

²³¹ See *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 425–26 (1989).

But the scope of inherent tribal civil jurisdiction, both regulatory and adjudicatory, is uncertain. Inherent tribal civil jurisdiction has not been addressed by Congress and has been thoroughly muddled by the courts.²³²

Tribes have broad civil jurisdiction over their own members.²³³ The inherent tribal authority to promulgate civil regulations in Indian country to protect tribal resources, promote economic development, and provide for the health, education, and welfare of people living in the territory is a vital tenet of tribal sovereignty.²³⁴ Tribes seek to manage scarce resources and interests in land and water.²³⁵ Tribal regulatory authority can both promote economic development and protect the long term conservation of tribal resources. The activities of all people on the tribal territory, both Indian and non-Indian, implicate these priorities.

Whether tribes may exercise civil regulatory jurisdiction over non-Indians is more difficult. Tribal regulatory authority over non-Indians on non-Indian fee lands seems to have been broadly extinguished in *Montana* and subsequent cases applying it, with two exceptions: when non-Indian conduct threatens the health, safety, and welfare of a tribe, or when the non-Indian has consensual relations and dealings with a tribe sufficient to subject him or her to tribal jurisdiction.²³⁶ As illustrated by the *Dollar General* case, courts seem to be casting around for principled applications of the rule and as a result, confusion abounds.²³⁷ Tribes have some degree of regulatory authority even over non-Indians within their territory.²³⁸ However, how much jurisdiction and over whom is a question the cases do not answer with any clarity. Scholars have criticized these exercises by courts as “riddled with doctrinal inconsistency.”²³⁹ As discussed below in Part IV, it is vital that Congress clarify, in close consultation with the tribes, the scope of civil regulatory authority.

C. Civil Adjudicatory Jurisdiction

The power to regulate is in many ways impotent without the power to enforce regulations. Meaningful enforcement requires due process, and for most sovereigns, that means an adjudicatory process. Federal courts that have considered the question have held that inherent tribal adjudicatory authority over non-Indians extends no

²³² See, e.g., *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 172–74 (5th Cir. 2014) (discussing application of the *Montana* test for inherent civil regulatory jurisdiction).

²³³ *Williams v. Lee*, 358 U.S. 217, 220 (1959).

²³⁴ See *Montana v. United States*, 450 U.S. 544, 565–66 (1981).

²³⁵ See Suagee, *supra* note 211, at 487–88, 518.

²³⁶ *Montana*, 450 U.S. at 565–66.

²³⁷ See COHEN, *supra* note 69.

²³⁸ *Montana*, 450 U.S. at 565–66.

²³⁹ Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of Lone Wolf*, 38 TULSA L. REV. 5, 9 (2002).

further than inherent regulatory authority, but have declined to say whether the two are coextensive.²⁴⁰

Tribes have the power to set up courts and to outline the scope of that court's authority, to enforce tribal law and regulations, and to provide redress for injuries arising on the tribal territory, just as every other governing authority.²⁴¹ However, tribal courts have been assailed by challenges from litigants, like *Dollar General*, skeptical of the competence and independence of the tribal fora.²⁴² *Dollar General* argued that tribes are incompetent sovereigns for adjudicating tort disputes involving non-Indians.²⁴³ No case demonstrates the need for legislative affirmation of the inherent sovereign adjudicatory authority so clearly as *Dollar General*. A divided eight-member Supreme Court underscores the division among jurists and emphasizes the need for careful, principled policymaking consideration by the legislature.

Part IV proposes the broad outlines and suggests guiding principles for such a comprehensive legislative consideration of the metes and bounds of tribal sovereign power in federal law.

IV. PROPOSED PRINCIPLES FOR A TRIBAL SOVEREIGNTY AFFIRMATION ACT

This Part seeks to provide a basic framework to launch a conversation among tribal leaders, scholars, and policymakers regarding how to enhance the clarity of the law of inherent sovereign tribal power. Such clarity would provide a more stable landscape for tribes seeking to exercise that power, citizens subject to that power, courts tasked with interpreting the law, and federal actors charged with carrying out the federal trust responsibility. Tribes, courts, legislatures, states, and private actors all face questions regarding the scope of tribal powers in many contexts. The plenary power and political question doctrines as currently construed ought to compel restraint from the courts in altering the boundaries of inherent tribal sovereignty.²⁴⁴ These doctrines also mean that as federal law now stands, the political branches are empowered to shape federal law's recognition or diminution of tribal authority and that the judiciary ought to defer to the political branches.²⁴⁵

The inherent sovereign powers of tribes ought to only be diminished, if at all, through the consent and participation of the tribes themselves rather than imposed upon the tribes by the unilateral action of the United States. The United States and

²⁴⁰ See *Nevada v. Hicks*, 533 U.S. 353, 367 (2001) (“[A] tribe’s inherent adjudicative jurisdiction over nonmembers is at most only as broad as its legislative jurisdiction.”).

²⁴¹ See, e.g., B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457, 470–75 (1998) (outlining the history and emergence of tribal courts).

²⁴² See Brief of Petitioners, *supra* note 9, at 20–23.

²⁴³ *Id.*

²⁴⁴ See generally Steele, *Plenary Power*, *supra* note 1 (discussing setting the metes and bounds of the doctrine of tribal sovereignty in federal law and policy belongs to the political branches).

²⁴⁵ *Id.*

tribes could negotiate bilateral agreements, like treaties, ratified by both tribal and federal sovereigns to agree to allocations of power over people and territory that are particularized to the interests and capacities of the tribes. Such a process would demonstrate respect for the basic dignity of tribal governments and provide a model for addressing the human rights of indigenous peoples to be self-governing and to provide for public safety within their territories.

While the prospect of bilateral negotiations may be unlikely, the tribes are growing in political influence and participation.²⁴⁶ Congress has consulted with tribes to enact several provisions recognizing and affirming inherent tribal sovereignty.²⁴⁷ However, these have been too few and too narrow. The confusion created by the courts demands clarification of this area of federal law by Congress. There is a clear need for Congress to work in close consultation with tribes to enact legislation to recognize and affirm the broad panoply of inherent tribal authority: a broad Tribal Sovereignty Affirmation Act.

The following sections propose three foundational principles that ought to guide the political branches in the exercise of this aspect of the Indian Affairs power. First, tribal sovereignty affirmation legislation should expand upon the policy of tribal self-determination that was initiated in the 1960s and has been a broad success. Second, tribal sovereignty affirmation legislation should empower tribes within a tripartite system through embracing principles of comity and full faith and credit. Third, tribal sovereignty affirmation legislation should fulfill the federal trust responsibility to Indian tribes by not only shoring up the legal foundation for tribal sovereignty, but by providing adequate resources in fulfillment of treaty and trust obligations. Finally, federal legislation recognizing specific inherent tribal powers should provide respect and consideration for tribal legal and cultural traditions.

A. Building upon the Foundation of Tribal Self-Determination

Tribes created the Indian Self-Determination legislative agenda, enacted beginning in the 1970s, which has proven to be a great tool of economic growth and self-government.²⁴⁸ Although the federal commitment to adequately support these programs with resources has been inconsistent, tribes have taken great strides even with limited and inconsistent resources.²⁴⁹ The federal government has ample evidence to deem the forty-year experiment in the principle of empowering tribes to carry out governmental programs and services, stepping into the shoes of the federal

²⁴⁶ Kirsten Matoy Carlson, *Congress and Indians*, 86 U. COLO. L. REV. 77, 81 (2015).

²⁴⁷ See, e.g., 25 U.S.C. §§ 1301–04.

²⁴⁸ See Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance Under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 19, 74 (2014).

²⁴⁹ *Id.*

government, a resounding success. An expansion of the doctrine of tribal self-government finds ample support in the implementation of the self-determination and self-government laws to date.²⁵⁰ But these laws are inadequate and ripe for expansion.²⁵¹

The current structure of the self-determination laws permits tribes to contract or compact to carry out federal programs and services, and recognizes that tribes very ably manage and leverage those resources.²⁵² But tribes are not mere instrumentalities of federal trust and treaty obligations.²⁵³ Tribes must be recognized and affirmed in the exercise of their inherent sovereign authority.

If sovereignty means anything, it is the power of self-governance. And sovereign self-governance must include power to make and enforce laws binding people within the sovereign's territory.²⁵⁴ The next phase of tribal self-determination and self-governance in federal law requires that the United States provide legislative clarity recognizing and affirming that tribes have broad inherent powers to govern their own people and territories. Tribes have been circumscribed in their ability to regulate and adjudicate disputes in their territories, and in their economic development, because litigants perpetually challenge assertions of tribal authority and seek to use the courts to diminish tribal governance.

1. Congress Should Create an Express Presumption of Inherent Tribal Sovereignty

When the Supreme Court created the doctrine of implicit divestiture, it opened the door to a series of subjective, case-by-case inquiries into each exercise of tribal power against a changing rubric of judicially-created standards.²⁵⁵ Both tribes and their adversaries face deep uncertainty about which tests a court might employ or which factors a court might weigh in considering whether a specific power has been implicitly extinguished.²⁵⁶ A real "Oliphant fix" would not only affirm inherent criminal jurisdiction, it would repeal the implicit divestiture doctrine and establish a presumption of inherent jurisdiction where Congress has not acted to divest tribal jurisdiction. Congress has repeatedly affirmed the doctrine of tribal sovereignty in general terms and has specifically recognized and affirmed inherent authority in particular situations.²⁵⁷

Congress should act to overrule the implicit divestiture doctrine by affirming a presumption in favor of tribal jurisdiction where such power has not been expressly extinguished. Courts have employed a presumption in favor of tribal authority where

²⁵⁰ See Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 781 (2006).

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* at 781–93.

²⁵⁴ *Id.* at 785–86.

²⁵⁵ See Fletcher, *The Supreme Court*, *supra* note 21, at 157–60.

²⁵⁶ See Steele, *Comparative Institutional Competency*, *supra* note 1, at 779–816.

²⁵⁷ See, e.g., 25 U.S.C. §§ 1301–04.

Congress has not expressly waived tribal sovereign immunity, for example, the immunity is presumed to endure.²⁵⁸ Similarly, where Congress has not made its intention to abrogate a treaty provision clear, courts are reluctant to find the treaty abrogated by implication.²⁵⁹ But courts seem to depart from this pattern of presumption where the scope of inherent tribal authority is at issue.²⁶⁰

Courts should employ a similar presumption in favor of inherent jurisdiction in the absence of express evidence of Congress' intent to divest tribes of a particular power. Congress has the power to make the presumption express and to reclaim its primary role to wield the Indian Affairs power and set federal Indian law and policy.²⁶¹ In the absence of such congressional clarification, where Congress has been silent as to the exercise of tribal authority involved, the presumption should lie with the tribe's jurisdiction and the burden of proving that the power has been extinguished should fall on the litigant challenging the tribal power.

Litigants challenging tribal power should be required to bring forth clear and convincing evidence that a tribe's power has been extinguished, rather than requiring tribes to prove by reference to history, treaty, and custom that they have a power to exercise jurisdiction. Because of the malleable standards of the implicit divestiture inquiry, tribes are vulnerable to inexact judicial determinations finding their powers impliedly divested by congressional silence.²⁶²

Congress should provide clear guidance to courts that when construing statutes and treaties for the effect they have on tribal power, courts should require a clear statement of congressional intent to abrogate tribal sovereign authority, or presume that Congress has not acted to extinguish the tribal power. Congress is capable of extinguishing tribal powers that it finds incompatible with the exercise of federal jurisdiction.²⁶³ The most recent proposal by Senator McCaskill to eliminate the defense of tribal sovereign immunity in certain patent cases illustrates the willingness of Congress to seek to expressly extinguish tribal powers when they wish to do so.²⁶⁴

2. Congress Should Clarify the Montana Rule of Civil Regulatory Jurisdiction

Congress should bring clarity to the federal court-made tangle of the scope of tribes' civil regulatory authority over people and territory. Courts have been inconsistent in their application of the rule announced in *Montana*²⁶⁵ that tribes had

²⁵⁸ See *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2039 (2014).

²⁵⁹ *United States v. Dion*, 476 U.S. 734, 739 (1986) (describing that courts are "extremely reluctant to find congressional abrogation of treaty rights . . . in the absence of explicit" statutory language).

²⁶⁰ See, e.g., *Oliphant v. Suquamish Indian Tribe et al.*, 435 U.S. 191, 204 (1978).

²⁶¹ See *Carlson*, *supra* note 246, at 152–53.

²⁶² See, e.g., *Oliphant*, 435 U.S. at 204.

²⁶³ See *Carlson*, *supra* note 246, at 152–53.

²⁶⁴ See, e.g., 163 CONG. REC. S6359.

²⁶⁵ See *Montana v. United States*, 450 U.S. 544, 565–66 (1981); see also *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074 (9th Cir. 1990); *Chilkat Indian Village v. Johnson*,

been implicitly divested of the power to regulate the activities of non-Indians on non-Indian owned fee land within the reservation with two (narrow) exceptions. The consensual relations exception and the threatening conduct exception.²⁶⁶ The Court wrote in *Montana*:

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.²⁶⁷

But as noted above, courts have had trouble finding circumstances that they deem to meet the exceptions. Congress could spare tribes, litigants, and courts from the perpetual search for judicially manageable standards in this area by recognizing and affirming inherent regulatory authority over members and nonmembers within tribal territory.

Tribes ought to be able to regulate all activities within the territorial boundaries of their reservations.²⁶⁸ Regulations are ineffective if only implemented in piecemeal fashion. The United States addresses many environmental and economic threats on the national level to achieve important governmental objectives.²⁶⁹ Leaving tribes with swaths of regulatory holes deprives tribes of the ability to meet their objectives in providing for environmental and other regulation.

If Congress shares courts' concerns about tribes regulating the activities of nonmembers on non-Indian owned fee lands, Congress could set forth specific legislative language offering notice to non-Indians living within the boundaries of tribal territories of the reach of tribal authority. Congress could also establish limitations on tribal regulatory authority over non-Indians that balance the need for tribes to effectively protect, through regulation, non-Indian consensual relationships with the tribe and its members and non-Indian threats and effects on the political integrity, economic security, health, or welfare of the tribe.

B. Respecting Tribal Sovereigns in the Tripartite American System

Scholars have recognized that the American political system has long embraced a kind of "trifederalism," with sovereign powers residing and sometimes

870 F.2d 1469 (9th Cir. 1989).

²⁶⁶ *Montana*, 450 U.S. at 565–66.

²⁶⁷ *Id.* (citations omitted).

²⁶⁸ See Washburn, *supra* note 250, at 781.

²⁶⁹ See, e.g., Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 N.W.U. L. REV. 579, 582–83 (2008).

overlapping in each of the federal, state, and tribal governments.²⁷⁰ The United States has acknowledged the sovereignty of tribes in express language in statute and treaty, in court decision, and in its course of dealings with tribes.²⁷¹ The United States also relies upon tribes to provide for public safety in Indian country.²⁷² But Congress has not enacted a comprehensive statute to enshrine the status of tribes in ways that adequately recognize the dignity of tribal sovereigns as partner governments in federalism's allocation of power. Tribal governments have key roles to play in public safety in large swaths of the nation, in coordinated and comprehensive homeland security concerns, in effective disaster response, and in resource management and protection regimes.²⁷³

A Tribal Sovereignty Affirmation Act should set federal policy recognizing the role of tribes as governing partners and remove the strictures that encumber tribes in carrying out their public safety responsibilities. First, to enhance public safety for all persons in Indian country, Congress should affirm the inherent criminal jurisdiction of tribal governments over all persons within tribal territory. Second, to enhance coordination and cooperation between federal, state, and tribal partners, Congress should enact a policy of comity by recognizing and affirming tribal civil adjudicatory jurisdiction for disputes arising in Indian country, and by ensuring greater cooperation with tribes as coordinate governments in carrying out national policy.

1. Congress Should Recognize and Affirm Inherent Criminal Jurisdiction

Tribes have great responsibility to protect public safety within their territory.²⁷⁴ These responsibilities often include law enforcement, first response to emergencies, and enforcing tribal criminal law for Indian defendants and domestic violence offenders.²⁷⁵ However, tribes operate at a significant disadvantage in carrying out these responsibilities because of the complex jurisdictional framework.²⁷⁶ Since *Oliphant*, tribes do not have criminal jurisdiction over non-Indians in general, but Congress has made some adjustments to the inherent criminal jurisdiction

²⁷⁰ Carol Tebben, *An American Trifederalism Based upon the Constitutional Status of Tribal Nations*, 5 U. PA. J. CONST. L. 318, 319 (2003).

²⁷¹ See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. 1, 1–2 (1831); see also *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) (affirming that tribes are “domestic dependent nations” that exercise “inherent sovereign authority.”).

²⁷² In 2010, Congress enacted the Tribal Law and Order Act (“TLOA”) “to increase coordination and communication among Federal, State, tribal, and local law enforcement agencies.” Pub. L. No. 111-211, tit. II, 124 Stat. 2258, 2261-301 at § 202(b)(2)–(3) [hereinafter TLOA].

²⁷³ *Id.*

²⁷⁴ TLOA, *supra* note 272, at § 202(a).

²⁷⁵ *Id.*

²⁷⁶ Lindsay Cutler, *Tribal Sovereignty, Tribal Court Legitimacy, and Public Defense*, 63 UCLA L. REV. 1752, 1768 (2016).

recognized and affirmed by statute.²⁷⁷ These adjustments include the recognition and affirmation of inherent criminal jurisdiction over crimes of domestic violence against tribal members in the 2013 reauthorization of VAWA.²⁷⁸ But these adjustments have been sporadic and piecemeal, mostly in response to court decisions rather than as part of a thoughtful federal Indian policy.

Congress should undertake a thoughtful policy recognizing and affirming much broader inherent tribal criminal jurisdiction. As with each of the proposed provisions of a Tribal Sovereignty Affirmation Act, Congress will have to make significant policy choices, in consultation with tribes, to determine the scope of persons and crimes subject to tribal criminal jurisdiction. Congress has acted to adjust the boundaries of recognized tribal criminal jurisdiction before, not just in VAWA and the “Duro fix,” but also in statutes like the Major Crimes Act²⁷⁹ and the Indian Country Crimes Act.²⁸⁰ The Major Crimes Act, depriving tribes of criminal jurisdiction over major crimes by Indians was upheld as an exercise of congressional Indian affairs power.²⁸¹ But the Major Crimes Act reflects an antiquated view of tribal justice and the capacity of tribal governments. The lack of a cohesive policy that incorporates the tremendous capacity of tribes serves neither the general commitment to public safety nor the priorities of the tribes to act as effective governments within their territories.

2. Congress Should Enact a Policy of Federal-Tribal Comity

In addition to public safety, tribes have responsibility for protecting homeland security—even some borders—in cooperation with federal and state governments.²⁸² Tribes also manage vast natural resources and contribute significantly to regional economies.²⁸³ Congress should ensure the role of tribes as governing partners by recognizing tribes as critical co-sovereigns. This recognition should require meaningful consultation with tribes and opportunities for tribes to access resources and exercise governing authority in concert with the relevant federal and state authorities.

One aspect of this proposal would provide for full faith and credit for the decisions of tribal courts, honoring tribal warrants and recognizing the judgments of tribal courts. It may also take the form of codifying the common law tribal exhaustion doctrine, requiring litigants to exhaust tribal remedies before appealing

²⁷⁷ *Id.*

²⁷⁸ See VAWA, *supra* note 125.

²⁷⁹ 18 U.S.C. § 1153 (2018).

²⁸⁰ 18 U.S.C. § 1152 (2018).

²⁸¹ *United States v. Kagama*, 118 U.S. 375, 384–85 (1886).

²⁸² Tribal Government Amendments to the Homeland Security Act of 2002, S. 477, 109th Cong. § 2(a)(5)(A) (2005).

²⁸³ See NAT'L CONGRESS OF AM. INDIANS, SECURING OUR FUTURES 8 (2013), http://www.ncai.org/attachments/PolicyPaper_CUFUHjKqlcEhGLtpcwrDyiUgrDgqOFUWmxMiRzAFFaxJWsCZDSK_Securing%20Our%20Futures%20Final.pdf [<https://perma.cc/J7CH-VEBQ>].

to federal courts (with a habeas corpus exception) and allowing the tribal courts to pass upon their own jurisdiction in the first instance.

This comity should also codify the tribal sovereign immunity doctrine. As with other sovereigns, tribes are immune from suit unless the tribe or Congress has specifically waived immunity.²⁸⁴ This aspect of tribal sovereignty allows tribes to be free from unwarranted harassment, but provides for the tribe to exercise accountability through waiver and agreement.²⁸⁵ Tribes have subjected themselves to accountability for torts and civil rights violations in accord with tribal customs through tribal law or through negotiated agreements.²⁸⁶ While the power of tribal sovereign immunity has been recognized in the courts, it has also been criticized as being founded on “but a slender reed” of questionable precedent.²⁸⁷ Congress has been deemed to have the power to waive tribal sovereign immunity, which implies the power to affirm tribal sovereign immunity as well.²⁸⁸ Congress can remove this question of federal Indian law and policy from the courts by setting forth a clear statutory protection for the doctrine of tribal sovereign immunity. This would protect economic development and demonstrate respect for tribal governments as competent institutions capable of the responsible management of their immunity from suit.

C. *Fulfill Treaty and Trust Obligations*

The United States has taken upon itself solemn legal and moral obligations to tribes both in treaty and in its course of dealings, giving rise to the federal-tribal trust relationship.²⁸⁹ While this relationship has been characterized as like a guardian’s relationship to his ward,²⁹⁰ the time has come to acknowledge tribes less as ward and more as partner. The plenary power over Indian affairs has been asserted by the federal government in many times in ways that are harmful to tribes. However, Congress can and should use this broad power in combination with the trust responsibility, to affirm tribal authority to exercise essential tribal powers and to protect tribes from the judicial overreach that has diminished tribal jurisdiction.

The affirmation of tribal power alone, however, is incomplete. Tribes must have access to adequate resources to carry out their sovereign responsibilities and prerogatives. Some of those resources may come from an investment by the United States in tribal economic development, in part through affirming the powers of tribes. Other resources may come from the ongoing treaty obligations of the United States for programs and services to Indian tribes.

²⁸⁴ See *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014).

²⁸⁵ *Id.* at 2028.

²⁸⁶ See Amelia A. Fogelman, *Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver for Tribal Businesses*, 79 VA. L. REV. 1345, 1347–50 (1993) (observing that Tribes and tribal businesses have issued waivers of their immunity to facilitate contracts).

²⁸⁷ *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 757 (1998).

²⁸⁸ *Id.* at 754.

²⁸⁹ See, e.g., Steele, *Plenary Power*, *supra* note 1, at 702.

²⁹⁰ *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

Another critical aspect of the trust responsibility of the federal government is to ensure meaningful consultation with Indian tribes on projects and issues affecting tribal interests.²⁹¹ Congress should affirm tribes' status as key stakeholders in environmental, homeland security, public safety, energy, education, health, and other national concerns and enact requirements for meaningful consultation with tribes. As the recent Dakota Access Pipeline controversy demonstrated, current tribal consultation requirements are inadequate and unenforceable.²⁹² The United Nations Declaration on the Rights of Indigenous Peoples, to which the United States is a signatory, includes a right to consultation as a fundamental right of indigenous nations.²⁹³

D. Respect Tribal Legal and Cultural Tradition

Finally, a Tribal Sovereignty Affirmation Act should not require tribes to disavow tribal legal traditions, cultural norms, or customs to have sovereign powers be recognized and affirmed by the United States. Just as the laws and justice systems of the states vary in standards, statutes, consistency, and design, so tribal justice systems need not mimic western systems to be just, legitimate, or to respect the rule of law. The United States tolerates a wide variety in the laws and systems of the fifty states, even lauding such variety as proof of democracy's wisdom, experimenting in laboratories.²⁹⁴

The recognition and affirmation of inherent tribal sovereignty should anticipate and welcome the incorporation of tribal traditional principles of justice and due process under the rule of law.

²⁹¹ See Michael Eitner, *Meaningful Consultation with Tribal Governments: A Uniform Standard to Guarantee that Federal Agencies Properly Consider Their Concerns*, 85 U. COLO. L. REV. 867, 874–75, 886–89 (2014) (identifying the principles that ought to guide development of meaningful consultation with Indian tribes).

²⁹² See, e.g., Letter from Senator Maria Cantwell, Senator Tom Udall, and Senator Jon Tester to President Donald Trump (February 1, 2017) available at [https://www.cantwell.senate.gov/imo/media/doc/2017.02.01%20to%20White%20House%20\(Trump\),%20Dakota%20Access%20Pipeline%20process.pdf](https://www.cantwell.senate.gov/imo/media/doc/2017.02.01%20to%20White%20House%20(Trump),%20Dakota%20Access%20Pipeline%20process.pdf) [<https://perma.cc/E4P7-G3PX>].

²⁹³ G.A. Res 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007), available at <http://unhcr.org/refworld/docid/471355a82.html> [<https://perma.cc/3CLW-9ZDU>]; see also ANNOUNCEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION OF THE RIGHTS OF INDIGENOUS PEOPLES (Jan. 12, 2011) available at <https://2009-2017.state.gov/documents/organization/154782.pdf> [<https://perma.cc/9EK4-LY29>].

²⁹⁴ See *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. . . . It is one of the happy incidents of the federal system that a 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.”).

CONCLUSION

Whatever the wisdom, extravagance, or folly of the plenary power doctrine's origins, federal law has long asserted a plenary power in Congress over Indian Affairs. Federal law holds that with that tremendous power comes a significant responsibility; a trust responsibility. Congress is the trustee obliged to act in the best interests of the tribes. While plenary power has often been misused by the federal government to impose unwanted policy upon tribes or to unilaterally abrogate treaties, it has also been neglected when tribes have needed the protection that is within the power of Congress to offer.

Courts have commandeered a policymaking role in setting the boundaries of inherent tribal sovereignty. Tribes, as Red Jacket suggested, have been diminished, bit by bit, through the creation of doctrines such as the implicit divestiture doctrine or the application of unmanageable standards like the internal-external powers test. Congress has too rarely exercised its power and its attendant duty to provide clear guidance to the courts, tribes, citizens, and litigants about the scope of inherent sovereign powers the United States will recognize. Congress has the power both to limit and to affirm tribal sovereignty.

Rather than allowing courts or other political pressures to push tribes toward a null or hollow sovereignty, Congress should exercise the broad Indian Affairs power in close consultation with the tribes and guided by sound principles to recognize and affirm meaningful tribal sovereign powers. Congress should help clarify the field by enacting legislation to more fully codify the organizing principle of the core of tribal sovereign powers: a future of self-governing tribal sovereigns as vibrant partners in the tripartite American system of governance and justice.