

INDIAN TRIBAL SOVEREIGNTY—CURRENT ISSUES

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INTRODUCTION

*The relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one, and of a complex character.*¹

*There is nothing in the whole compass of our laws so anomalous, so hard to bring within any precise definition, or any logical and scientific arrangement of principles, as the relation in which the Indians stand toward this [United States] government and those of the states.*²

The legal relationship of Indian³ tribes to non-Indian governments in what is now the United States, and the tribes' status as sovereign or quasi-sovereign or semi-sovereign governments, has been a perplexing problem for centuries and remains so. This article seeks to address current concepts of tribal

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¹ United States v. Kagama, 118 U.S. 375, 381 (1886).

² U.S. Attorney General Hugh Swinton Legare (1851).

³ This article uses the term "Indian" to refer to people or groups that are often called American Indians or Native Americans. We do so not out of any disrespect but in recognition of the common use of this term in tribal names and in such things as treatises on Indian law, government agencies such as the Bureau of Indian Affairs, legislation such as the federal Indian Trade and Intercourse Acts and the New York Indian Law, and the Constitution of the United States Article I, Section 2, Clause 3 ("Indians not taxed") and Article I, Section 8, Clause 3 ("regulate Commerce . . . with the Indian Tribes"). Indians who write about tribal issues employ the ubiquitous term "Indian Country" to refer "informally to all Indian reservations." See, e.g., R. Saunooke, *Tribal Justice: The Case for Strengthening Inherent Sovereignty*, 47 JUDGES JOURNAL 14, 14 (2008). "Indian Country Today" is the name of the leading nationwide pro-tribal publication owned and funded by the Oneida Indian Nation of New York.

sovereignty as articulated by the Supreme Court of the United States and by tribal advocates who vehemently disagree with the high court's rulings.⁴ We seek to examine how these varying views on tribal sovereignty give rise to jurisdictional conflicts in the real world, especially in the State of New York where significant disputes have been litigated in recent times. Our goal is to provide the reader with an understanding of the nature and extent of the jurisdictional conflicts that are in the courts now and where conflicts may arise in the future, not just in New York but wherever tribes seek to exercise claimed sovereign rights.⁵

I. A PRIMER ON INDIAN TRIBAL SOVEREIGNTY

The history of the relation of Indian tribes to the early settlers in North America, English colonies, the confederal government, the states under the Articles of Confederation, and ultimately the United States of America and the states of the Union under the Constitution, is long, nuanced, and multi-faceted. The interactions occurred on political, legal, and cultural levels. Relations developed between and among Indian tribes and the many non-Indian communities and individuals they encountered. The non-Indians at any given time might represent the European colonial government or the domestic national government. White traders and

⁴ See, e.g., Steve Russell, *An Indian Brown v. Board of Education*, INDIAN COUNTRY TODAY, January 11, 2008, (identifying the most offensive "immoral Indian law cases" decided by the Supreme Court and placing them in "Hall of Shame.").

⁵ As of December 2011, there were 565 federally recognized tribes residing on 55 million acres of land. See *What We Do*, U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, <http://bia.gov/WhatWeDo/index.htm> (last visited Jan. 8, 2012). These tribes are located in 35 states as follows: AL (1); AK (226); AZ (20); CA (104); CO (2); CT (2); FL (2); ID (4); IA (1); KS (4); LA (4); ME (4); MA (2); MI (12); MN (6); MS (1); MO (1); MT (7); NE (4); NV (17); NM (21); NY (8); NC (1); ND (4); OK (38); OR (9); RI (1); SC (1); SD (8); TX (3); UT (5); WA (29); WI (11); WY (2). See *Tribal Leaders Directory 2011*, U.S. DEP'T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, <http://bia.gov/idc/groups/xois/documents/text/idc002652.pdf> (last visited Jan. 8, 2012). In addition to these federally recognized tribes, a number of tribes exist that have achieved recognition only at the state level. This includes one tribe in New York, the Poospatuck (also known as the Unkechaug), which is state-recognized but not federally recognized to date. See *State Recognized Indian Tribes*, NATIONAL CONGRESS OF AMERICAN INDIANS, <http://www.ncai.org/State-Recognized-Indian-Tribes.285.0.html> (last visited Jan. 8, 2012). In 2010, the Shinnecock Indian Nation on Long Island, previously a state-only recognized tribe, obtained federal recognition. Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 75 Fed. Reg. 66124 (Oct. 27, 2010). According to the 2010 census, about 1% of Americans (2,932,248 out of a total population of 308,745,538) are identified as "American Indian and Alaska Native." *Profile of General Population and Housing Characteristics: 2010*, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_DP_DPDP1&prodType=table (last visited Jan. 8, 2012).

missionaries frequently initiated the contacts. These interactions often led not only to economic, political, and cultural engagement, but also to open conflict, including raids, massacres, and reprisals. In the Declaration of Independence, the founding fathers referred to Indians as the “merciless Indian savage.”⁶ Upon achieving independence from Britain, the founders appreciated the serious threat to their fledging government presented by independent tribes who controlled strategic locations between British-occupied areas and the newly-formed United States.⁷ Even without British provocateurs fomenting unrest, the threat of Indian wars remained a recurring feature of American political life well into the 19th century.⁸ Indians were vilified in the press and popular culture; references to them as “savages” persisted for generations. The judges who were called upon to address the “Indian problem” were not immune to these cultural forces; contemporaneous judicial opinions reflect the prevailing racist attitudes and language.⁹ A detailed treatment of this history is beyond the scope of this article. Rather, we offer a “primer” focused on Indian tribal sovereignty law, documenting its development over the past two centuries, to enable readers to put current jurisdictional conflicts in context.

⁶ The Declaration of Independence (July 4, 1776) denounced the “merciless Indian Savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes and conditions.” One scholar, Frank Hutchins, calls this language “menacing and inaccurate”—a “reckless censure.” FRANCIS G. HUTCHINS, *TRIBES AND THE AMERICAN CONSTITUTION* 6 (2000). Hutchins recounts the role of the Six Nations in the American Revolution and details the contributions of one Mohawk who became a Lt. Colonel in the United States Army serving under General Washington. *Id.* at 7–15.

⁷ HUTCHINS, *supra* note 6, at 23. But as Hutchins notes, given the huge disparity in population—three million white settlers and 500,000 black slaves within the thirteen original colonies pressing westward against a total Indian population of 200,000—the outcome was not truly in doubt.

⁸ The “Indian Wars” in the West during the 1860s and 1870s involved substantial bloodshed on both sides. *See generally*, PAUL ANDREW HUTTON, PHIL SHERIDAN AND HIS ARMY (1985). Abraham Lincoln’s Second Annual Message to Congress, December 1, 1862, drew attention to Indian attacks on white settlements in Kansas and Minnesota. JAMES D. RICHARDSON, *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS*, Vol. VI, 132 (1899). By the 1880s, Indian raids on white settlements had all but ended. *See HUTTON supra*, at 331, 345. The racist expression “The only good Indian is a dead Indian” dates back to the Indian Wars and was either first voiced by General Sheridan who led the U.S. Army against the Indian uprisings, or James Cavanaugh a member of Congress. *Id.* at 180.

⁹ *See generally*, ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON, THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* 47–83 (2005) (devoting three chapters to race and supreme court rulings).

A. Historical Development

1. Pre-Constitution

The first Western civilization explorers and settlers in North America found indigenous people living here.¹⁰ These indigenous people and their families, communities, or tribes were sovereign in the sense that they were not subject to external control or the exercise of power by European or other nations from which these explorers or settlers came. There were, however, numerous Indian groups in North America; and the relationships between and among these indigenous groups were marked variously by friendship, coexistence, competition, conflict, and conquest. At times, some Indian groups were under the control or power of other groups of Indians.¹¹ As European settlement increased, competition and conflict between Indians and non-Indians increased. Eventually, a treaty system evolved by which the Indians and non-Indians negotiated agreements of mutual compromise at first, although as Indian power declined and the numbers of non-Indians and the power of the United States increased, the United States' and the

¹⁰ As documented in "The Island at the Center of the World," an examination of the history of English and Dutch settlements of a "certain island named Manathane" (Manhattan), the early settlers found their match in the indigenous people inhabiting the area: "The Indians were as skilled, as duplicitous, as capable of theological rumination and technological cunning, as smart and as pig-headed, and as curious and as cruel as the Europeans who met them." RUSSELL SHORTO, *THE ISLAND AT THE CENTER OF THE WORLD* 51 (2004).

¹¹ Little scholarship appears to exist on Indian-on-Indian subjugation and subordination before westerners arrived. For example, a recent article prepared by a Native American resource center offered a general overview of intertribal warfare before the arrival of non-Indians, noting "tribes fought against each other for security, revenge, honor, pride and the capture of booty," listing five resources for further reading. See *American Heritage Month, History and Commemoration*, ABC-CLIO, <http://www.historyandtheheadlines.abc-clio.com/ContentPages/ContentPage.aspx?entryId=1171775¤tSection=1161468&productid=5>. A professor of economics at Florida State University prepared a scholarly article examining, through the lens of economics, intertribal warfare on the Great Plains. See Bruce L. Benson, *Intertribal Conflicts on the Great Plains: Cultural Versus Economic Explanation, or is There Really a Difference*, INTERNATIONAL SOCIETY FOR NEW INSTITUTIONAL ECONOMICS, www.isnie.org/ISNIE06/Papers06/08.3/benson.doc (copy on file with Albany Law Review). That article identifies wholesale massacres of entire Indian villages by other Indians in the fourteenth century, as well as frequent tribe-on-tribe raids, especially to steal horses. *Id.* at 13, 29. Many in academia appear to embrace the "cartoon-like" representation of Indians as a peaceful, guileless, and defenseless indigenous people. See SHORTO, *supra* note 10, at 50. Pro-tribal advocates have argued that the Indian conception of sovereignty is different from the Western concept. See discussion *infra* note 165. Even if that is an accurate statement, it does not answer the question of whether one tribe subjugating another tribe by military conquest viewed its actions any differently from Western settlers who imposed their sovereignty on indigenous people.

individual states' ability to dictate terms increased.¹²

Many Indian tribes occupied colonial New York but “the Iroquois . . . long [occupied] the most conspicuous position.”¹³ At the height of their military power, about 1660, their warlike expeditions ranged from New England to the Mississippi River and from the St. Lawrence to the Tennessee River.¹⁴ They “reached their culminating point” about 1700 when they “had reared a colossal Indian empire.”¹⁵ Nevertheless, by the end of the 18th century, wars with other Indian tribes and the French, the Revolutionary War, advancing European settlement, and internal divisions took their toll. “When their power and sovereignty finally passed away, it was through the events of peaceful intercourse, gradually progressing to this result, rather than from conquest or forcible subjugation.”¹⁶ The 1783 peace treaty between Great Britain and the United States made no provision for the Iroquois; and, wrote anthropologist Henry Lewis Morgan in the mid-nineteenth century, “[t]his was, in effect, the termination of their political existence. The jurisdiction of the United States was extended over their ancient territories, and from that time forth they became dependent nations.”¹⁷ As events of the late twentieth and early twenty-first century have shown, Morgan’s mid-nineteenth century pronouncement of the demise of the political existence of the New York tribes, and their claims to sovereignty, was premature. But we are getting ahead of our story.

2. Constitution

The Constitution of the United States became effective March 4, 1789. Indians are referred to only twice in the Constitution as originally ratified. Article I, Section 1 vests all legislative powers in Congress. Section 2 provides for the House of Representatives and excludes from the apportionment of Representatives among the

¹² See generally DOROTHY V. JONES, LICENSE FOR EMPIRE, COLONIALISM BY TREATY IN EARLY AMERICA (1982) (discussing Indian-white relations during the colonial period); see also generally COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 26 (2005 ed.) (hereinafter “COHEN 2005”); *Id.* at 1 (Supp. 2009).

¹³ H.L. MORGAN, LEAGUE OF THE IROQUOIS 1 (Carol Publishing Grp. 1996) (1851).

¹⁴ *Id.* at 39.

¹⁵ *Id.* at 15.

¹⁶ *Id.* at 4.

¹⁷ *Id.* at 29. States, especially New York and Georgia, also extended their authority over Indians and their ancient lands. See generally DEBORAH A. ROSEN, AMERICAN INDIANS AND STATE LAW 19–50 (2007) (devoting a chapter to “Tribal Sovereignty and State Jurisdiction”).

several states “Indians not taxed.”¹⁸ Section 8 enumerates the powers of the Congress, and clause 3 authorizes Congress “[t]o regulate Commerce with foreign Nations and among the several States, and with the Indian tribes.”¹⁹ The grant of power to Congress under the “Indian commerce clause” has been construed to give Congress plenary authority over Indian tribes. Referring to this clause in *Cherokee Nation v. Georgia*, Chief Justice John Marshall wrote for the Court that the Constitutional Convention intended “to give the whole power of managing [Indian] affairs to the government.”²⁰ He confirmed in *Worcester v. Georgia* that relations between the United States and the Cherokee Nation specifically were, under the Constitution, “committed exclusively to the government of the union.”²¹ He elaborated that the constitutional “powers of war and peace; of making treaties, and regulating commerce with foreign nations, among the several states, and with the Indian tribes . . . comprehended all that is required for the regulation of our intercourse with the Indians [and] are not limited by any restrictions.”²² The Supreme Court has recently affirmed Congress’ plenary authority over Indians, including the authority to divest the tribes of any attributes of sovereignty.²³

Many scholars, representing diverse viewpoints, reasonably question whether the Framers, by enumerating power over Indian *commerce* intended to give Congress exclusive authority over Indian *affairs* and with it plenary power over Indians and Indian tribes.²⁴

¹⁸ Article 1, Section 2 was changed by Section 2 of the Fourteenth Amendment, but the exclusion of “Indians not taxed” from the apportionment of Representatives among the states was continued.

¹⁹ *United State v. Kagama*, 118 U.S. 375, 378 (1886) (observing that, “[t]he Constitution of the United States is almost silent in regard to the relations of the government which was established by it to the numerous tribes within its borders.”).

²⁰ *Cherokee Nation v. Georgia*, 30 U.S. 1, 19 (1831).

²¹ *Worcester v. Georgia*, 31 U.S. 515, 561 (1832).

²² *Id.* at 559.

²³ *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2324 (2011) (June 13, 2011), (collecting cases). Although Justice Thomas joined the majority decision in *Jicarilla* he rejects the Indian Commerce Clause as providing “Congress with plenary power to legislate in the field of Indian Affairs” and “would be willing to revisit the question.” *United States v. Lara*, 541 U.S. 193, 224 (2004) (Thomas, J. concurring). See *infra* Part I.D for a discussion of the development of the common law doctrine of tribal sovereignty.

²⁴ See Ralph Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201 (2007); HUTCHINS, *supra* note 6, at 58–76; Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 AM. IND. L. REV. 57, 72–89 (1991). While united in the view that the Indian Commerce Clause does not support federal plenary power over Indian affairs, these commentators would reach different conclusions about where this leaves Indian tribes in terms of their sovereign authority. Tribal advocates

As the Supreme Court stated recently, “[t]ribal sovereignty, it should be remembered, is sovereignty outside the basic structure of the Constitution.”²⁵ Thus, Congress continues to regulate tribal affairs and the Supreme Court continues to define the nature, extent, and limits of Indian tribal sovereignty.²⁶ The Constitution adds little.²⁷

B. Federal Statutes

Congress has enacted numerous statutes that deal with Indians. The purpose of this section is to highlight some of the most important acts of Congress as they bear on the development of Indian tribal sovereignty under federal law.

1. Indian Trade and Intercourse Acts

Beginning in 1790, a series of acts was adopted to regulate “trade and intercourse” with the Indians.²⁸ The original purpose of these acts has been explained as follows:

Unrest on the frontiers threatened the peace of the young nation, and President Washington and Secretary of War Knox called on Congress to provide legislation to prevent further outrages. Congress replied in July 1790 with the first of a series of laws “to regulate trade and intercourse

contend that freeing tribes from the yoke of federal plenary power would enable them to exercise their full inherent sovereign powers unconstrained by the Constitution, as any other foreign nation. *See Savage, supra*, at 118. On the other hand, states rights’ advocates maintain that under the dual sovereign system created by the Constitution, states would exercise direct jurisdiction over tribes located within state boundaries. At least one tribal advocate has recognized that the Indian Commerce Clause has kept states at bay: “states . . . have been hobbled in their efforts to deal directly with tribes because of the Indian Commerce Clause in the Constitution, which federalized the tribal-federal relationship.” DAVID E. WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE* 4 (1997). Such academic speculation makes little difference inasmuch as the Supreme Court recently and without qualification reaffirmed the Indian Commerce Clause as the source of federal plenary power over Indian affairs. *See Jicarilla Apache Nation*, 131 S. Ct. at 2324.

²⁵ *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 337 (2008) (internal quotation marks omitted) (citing *United States v. Lara*, 541 U.S. 193, 211–14 (2004) (Kennedy, J. concurring)).

²⁶ *See infra*, Parts I.B–C.

²⁷ Under the supremacy clause, Article VI, clause 2, “This Constitution, and Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.” U.S. CONST. art. VI, cl. 2. In 1871, Congress abolished treaty-making with the Indian tribes. 16 Stat. 566 (1871).

²⁸ DOCUMENTS OF UNITED STATES INDIAN POLICY 14 (Francis P. Prucha ed., 3d ed. 2000) [hereinafter Prucha].

with the Indian tribes.” These laws, which were originally designed to implement the treaties and enforce them against obstreperous whites, gradually came to embody the basic features of federal Indian policy.²⁹

These acts were temporary in duration as enacted in 1790, 1793, 1796 and 1799; Congress passed a “permanent” version in 1802, followed by a truly final Indian Trade and Intercourse Act in 1834 (“ITIA”).³⁰ The ITIA addressed a range of subjects. The 1790 version dealt with licensing those who traded with Indian tribes, recalling such licenses for “transgressing” applicable rules and regulations, penalizing trading without a license, requiring sales of Indian lands to be made by public treaty held under the authority of the United States, and punishing offenses by citizens of the United States committed in Indian Territory. The 1790 version has been characterized as giving “a practical and contemporaneous construction to the [Indian commerce clause].”³¹ The ITIA was amended in 1793 to prohibit settlement on Indian lands, license the purchase of Indian horses, authorize the President to provide goods and services to Indian tribes and appoint temporary agents to live among the Indians.³² The 1796 version, among other things, introduced a boundary line between the Indian tribes and the United States which was moved westward in later acts until the 1834 act provided a general definition of “the Indian Country.”³³ Consistent with the original purpose stated above, these acts were intended largely to protect the Indians and Indian tribes from non-Indians and to regulate the conduct of non-Indians; but in regulating non-Indians in their trade and intercourse with Indian tribes, they necessarily regulated Indian tribes and contributed to the development of the concept of tribes as dependent wards of the federal government and not independent sovereigns.

2. Abolition of Treaty Making

In 1871, in a rider to the Indian appropriation bill, Congress

²⁹ *Id.*

³⁰ Act of July 22, 1790, 1 Stat. 137 (1790); Act of March 1, 1793, 1 Stat. 329 (1793); Act of May 19, 1796, 1 Stat. 469 (1796); Act of March 3, 1799, 1 Stat. 743 (1799); Act of March 30, 1802, 2 Stat. 139 (1802); Act of June 30, 1834, 4 Stat. 729 (1834). The 1834 Act is the final codification of the Indian Trade and Intercourse Act.

³¹ F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 69 (U.S. Dep’t of the Interior, 1941), [hereinafter COHEN 1941]. Cohen 1941 is an official publication of the U.S. Department of the Interior; COHEN 2005 is not.

³² Act of March 1, 1793, 1 Stat. 329.

³³ Compare Act of May 19, 1796, 1 Stat. 469, with Act of June 30, 1834, 4 Stat. 729, 729.

outlawed further treaty making with Indian tribes:

Provided, That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided, further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.³⁴

This act of Congress followed a long series of challenges to the treaty system, including objections of the House of Representatives to the concentration of power in the Senate because of its role in treaty-making³⁵ and the inequality of the contracting parties, the Indians on the one hand and the United States on the other.³⁶ As to the latter, “[o]ne strong statement against negotiating treaties with the Indians was made by Commissioner [of Indian Affairs] Ely S. Parker, who was himself a Seneca Indian, in his annual report of 1869”:

Arrangements now, as heretofore, will doubtless be required with tribes desiring to be settled on reservations for the relinquishment of their rights to the lands claimed by them and for assistance in sustaining themselves in a new position, but I am of the opinion that *they should not be of a treaty nature*. It has become a matter of serious import whether the treaty system in use ought longer to be continued. In my judgment it should not. A treaty involves the idea of a compact between two or more sovereign powers, each possessing sufficient authority and force to compel a compliance with the obligations incurred. The Indian tribes of the United States are not sovereign nations, capable of making treaties, as none of them have an organized government of such inherent strength as would secure a faithful obedience of its people in the observance of compacts of this character. They are held to be wards of the government, and the only title the law concedes to them to the lands they occupy or claim is a mere possessory one. But, because treaties have been made with them, generally for the extinguishment of their supposed absolute title to

³⁴ 16 Stat. 544, 566 (1871).

³⁵ Prucha, *supra* note 28, at 135.

³⁶ *Id.* at 133.

land inhabited by them, or over which they roam, they have become falsely impressed with the notion of national independence. It is time that this idea should be dispelled, and the government cease the cruel farce of dealing with its helpless and ignorant wards. . . . [G]reat injury has been done by the government in deluding this people into the belief of their being independent sovereignties, while they were at the same time recognized only as its dependents and wards.³⁷

Justice Thomas views the end of treaty-making with Indians as potentially ending Indian sovereignty.³⁸

3. Major Crimes Act

In 1885, Congress passed the Major Crimes Act giving federal courts jurisdiction over seven major crimes committed by an Indian against another Indian or other person, within or outside of an Indian reservation.³⁹ In doing so, Congress responded to a Supreme Court decision holding that federal courts lacked such jurisdiction in the absence of a specific Act of Congress.⁴⁰ By this Act, Congress exercised its plenary authority over Indian tribes in regard to their members and their reservation lands.⁴¹

4. General Allotment Act (Dawes Act)

The 1887 General Allotment Act (“GAA,” commonly known as the Dawes Act) authorized the President, “whenever in his opinion any [federal] reservation or any part thereof . . . is advantageous for agricultural and grazing purposes,” to allot the lands in an Indian

³⁷ Parker, *Annual Report of the Commissioner of Indian Affairs, December 23, 1869*, in DOCUMENTS OF UNITED STATES INDIAN POLICY 133 (Francis P. Prucha ed, 3d ed. 2000).

³⁸ *United States v. Lara*, 541 U.S. 193, 219 (2004) (Thomas, J., concurring) (“Although the tribes never fit comfortably within the category of foreign nations, the 1871 Act tends to show that the political branches no longer considered tribes to be anything like foreign nations. And it is at least arguable that the United States no longer considered the tribes to be sovereigns.”).

³⁹ See 23 Stat. 362, 385 (1885). The seven major crimes were: murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. *Id.* The Indian Crimes Act of 1976, amended 18 U.S.C. 1153 to extend the number of crimes to fourteen. See 90 Stat. 585–86 (codified as amended at 18 U.S.C. 1153 (2011)).

⁴⁰ See *Keeble v. United States*, 412 U.S. 205, 209–11 (1973) (discussing the congressional reaction to *Ex parte Crow Dog*, 109 U.S. 556 (1883)).

⁴¹ See *id.* Congress granted to the State of New York criminal jurisdiction over Indians on Indian reservations in 1948. Act of July 2, 1948, 25 U.S.C. 232 (2012). It granted New York civil jurisdiction in 1950. Act of September 13, 1950, 25 U.S.C. 233 (2012).

reservation, in severalty, “to any Indian located thereon.”⁴² The GAA, which was mandatory, was not the first provision for the allotment of Indian lands but was consistent with the federal Indian policy at the time of “civilization and assimilation”⁴³ and was a dramatic exercise of federal plenary power at the expense of tribal sovereignty. It also declared Indians who received allotments to be citizens of the United States.⁴⁴ Whatever the motivation for the GAA, the result was that Indian land was reduced from approximately 138 million acres in 1887 to 48 million acres in 1934.⁴⁵

5. Indian Citizenship Act

Congress passed the Indian Citizenship Act in 1924, declaring all Indians born within the territorial limits of the United States who were not yet citizens to be citizens of the United States.⁴⁶ By the 1840s, Indians living in New York State were generally regarded as citizens.⁴⁷ Pursuant to New York State treaties and related real property laws, Indian lands were divided into severalty, thereby providing for individual ownership complete with right of inheritance, as well as to transfer or encumber property. In 1877, it was held that non-tribal New York Indians were entitled to vote.⁴⁸

6. Indian Reorganization Act of 1934 (Wheeler-Howard Act)

The Indian Reorganization Act of 1934 (“IRA”), also known as the Wheeler-Howard Act, was the culmination of the reform movement of the 1920s led by John Collier, who became Commissioner of Indian Affairs in 1933.⁴⁹ The main purposes of the IRA were to reverse the allotment policy and its effects, consolidate Indian lands, and encourage tribes to organize by adopting “an appropriate constitution and bylaws” pursuant to rules and regulations to be adopted by the Secretary of the Interior.⁵⁰ In general, the IRA was intended to help poor and landless (or land-poor) Indians and

⁴² 24 Stat. 388, 388 (1887).

⁴³ COHEN 2005, *supra* note 12, at 77.

⁴⁴ 24 Stat. 388, 390 (1887).

⁴⁵ COHEN 2005, *supra* note 12, at 79.

⁴⁶ Act of June 2, 1924, 43 Stat. 253.

⁴⁷ ROSEN, *supra* note 17, at 36.

⁴⁸ *United States v. Elm*, 1877 U.S. Dist. LEXIS 44 (N.D.N.Y. 1877).

⁴⁹ 48 Stat. 984, 984–88 (1934); Prucha, *supra* note 28, at 223.

⁵⁰ *See* 48 Stat. 984, 987 (1934).

encourage self-government and self-support.⁵¹

7. Indian Civil Rights Act

Titles II–VII of the Civil Rights Act of 1968 have become known as the Indian Civil Rights Act (“ICRA”).⁵² ICRA was prompted by complaints about civil rights violations by Indian tribes. Over the objections of some tribes that it would conflict with tribal traditions and impose unreasonable burdens, Congress passed ICRA to guarantee certain constitutional rights for persons under tribal authority and prohibit Indian tribes from violating most of the rights guaranteed under the U.S. Constitution’s Bill of Rights.⁵³ ICRA has been characterized as “a limited intrusion on tribal sovereignty.”⁵⁴ Tribal advocates consider ICRA to be a “significant intrusion by the federal government into the internal affairs of tribes.”⁵⁵

8. Indian Gaming Regulatory Act

In *California v. Cabazon Band of Mission Indians*, the Supreme Court held that state regulation of Indian bingo “would impermissibly infringe on tribal government.”⁵⁶ In response, in 1988 Congress passed the Indian Gaming Regulatory Act (“IGRA”).⁵⁷ Congress found, among other things, that “existing federal law [did] not provide clear standards or regulations for the conduct of gaming on Indian lands.”⁵⁸ IGRA provided a statutory basis for the operation of gaming by Indian tribes and for the regulation of such gaming. In order for a tribe to engage in Class III gaming (essentially casino gambling), the tribe and the state in which such gaming is to be conducted must enter into a Tribal-State compact governing the conduct of gaming activities, which compact is subject to the approval of the Secretary of the Interior.⁵⁹ Thus,

⁵¹ See 48 Stat. 984, 984–88 (1934).

⁵² See Constitutional Rights of Indians, 25 U.S.C. § 1302 (2012).

⁵³ 25 U.S.C. § 1302 (2012); see COHEN 2005, *supra* note 12, at 951–59. It should be noted that 25 U.S.C. § 1303 provides that the “privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.” 25 U.S.C. § 1303 (2012).

⁵⁴ COHEN 2005, *supra* note 12, at 956.

⁵⁵ Saunooke, *supra* note 3, at 20.

⁵⁶ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221–22 (1987).

⁵⁷ Indian Gaming Regulatory Act, 29 U.S.C. §§ 2701–2721 (2012).

⁵⁸ *Id.* § 2701.

⁵⁹ *Id.* § 2710 (d).

the states as well as the federal government have a role in the regulation of tribal gaming on Indian lands.

9. Recent Congressional statements of Indian policy

Consistent with the shift in federal policy, starting in the 1970s, to support tribal self-determination, federal statutes now include such findings as: “a government-to-government relationship between the United States and each Indian tribe;” “the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government;” “Congress, through statutes, treaties, and the exercise of administrative authorities, has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes;” “Indian tribes possess the inherent authority to establish their own form of government;”⁶⁰ “the tribal right of self-government flows from the inherent sovereignty of Indian tribes and nations;” “the United States recognizes a special government-to-government relationship with Indian tribes, including the right of the tribes to self-governance, as reflected in the Constitution, treaties, Federal statutes, and the course of dealings of the United States with Indian tribes;”⁶¹ “the Constitution, as interpreted by Federal case law, invests Congress with plenary authority over Indian Affairs;” “ancillary to that authority, the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes;”⁶² “Indian tribes are sovereign entities and are responsible for exercising governmental authority over Indian lands;” “enhancing tribal court systems and improving access to those systems serves the dual Federal goals of tribal political self-determination and economic self-sufficiency.”⁶³

The findings in these and other recent Acts of Congress reflect current federal Indian policy but not the law developed in the courts.

⁶⁰ Indian Tribal Justice Support Act, 25 U.S.C. §§ 3601–3631 (2012).

⁶¹ Indian Self-Determination Act of 1994, Pub. L. No. 103-413, 108 Stat. 4250, 4270–77 (1994).

⁶² Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791–92 (1994).

⁶³ Indian Tribal Justice Technical and Legal Assistance Act of 2000, 25 U.S.C. § 3651 (2012).

10. Recent executive branch statements of Indian policy

Also reflecting modern (post-1970s) federal policy to encourage tribal self-determination, the Obama administration has adopted a pro-tribal “consultation” policy that applies to all federal agencies delivering services to Indians.⁶⁴ Pursuant to this policy, the federal government refers to tribes as “sovereign nations” and describes the relationship between each tribe and the federal agency as a “government-to-government” relationship.⁶⁵ The executive branch’s tribal consultation policy addresses only the administrative interaction between federal agencies and tribes. It does not alter the legal test that courts apply when jurisdictional disputes arise between states and tribes.

Before reviewing the federal common law decisions defining Indian tribal sovereignty, we briefly examine New York’s efforts to directly regulate by statute the affairs of Indians living in New York.

C. New York’s Indian Law

New York State’s relationship with its Indians is very different from state-tribal relationships elsewhere. From the early days of the Republic, New York “regulated Indians within its borders.”⁶⁶ New York’s legislative efforts fell into five areas:

- (1) Indians’ right to sell, and whites’ right to purchase Indian

⁶⁴ Tribal Consultation, 74 Fed. Reg. 57881 (November 5, 2009). The policy provides in part as follows:

The United States has a unique legal and political relationship with Indian tribal governments, established through and confirmed by the Constitution of the United States, treaties, statutes, executive orders, and judicial decisions. In recognition of that special relationship, pursuant to Executive Order 13175 of November 6, 2008, executive departments and agencies are charged with engaging in regular and meaningful consultation with tribal officials in the development of Federal policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes.

Id. The Department of the Interior’s announcement of the new tribal consultation policy referred to it as a “comprehensive initiative” that “reflects President Obama’s commitment to strengthening the government-to-government relationship between the United States and tribal nations, and recognizing their fundamental right to self-governance.” Press Release, Dep’t of the Interior, New Framework Provides Greater Role for Indian Tribes in Federal Decisions Affecting Indian Country (December 1, 2011) (quoting Secretary of the Interior Ken Salazar), <http://www.doi.gov/news/pressreleases/Secretary-Salazar-Assistant-Secretary-Echo-Hawk-Launch-Comprehensive-Tribal-Consultation-Policy.cfm>.

⁶⁵ See, e.g., Tribal Consultation, *supra* note 64, at 57881.

⁶⁶ ROSEN, *supra* note 17, at 34; see Robert B. Porter, *Legalizing, Decolonizing and Modernizing New York State’s Indian Law*, 63 ALB. L. REV. 125, 126–30 (1999).

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lands;

(2) Indians' right to enter into contracts or participate in litigation;

(3) Tribal government structure;

(4) Taxation of tribally owned lands; and

(5) Marriage, divorce and inheritance.⁶⁷

The State entered into a series of treaties with New York Indians in the first half of the 19th Century in keeping with state and federal policies seeking to acquire Indian lands for white settlers and remove Indians to the Indian Country west of the Mississippi.⁶⁸ In this way New York State proceeded to develop a full-bodied Indian Law that remains on the books today.

John R.T. Reeves, an attorney in the Indian Affairs Office who prepared the "Reeves Report"⁶⁹ and later became Chief Counsel for that Office, reported in 1923 on the "existing situation with respect to the New York Indians":

New York being one of the thirteen original colonies title to the land in the Indian reservations there is not in the United States. Under the doctrine of "States rights" so strongly prevalent shortly after the Revolutionary War it was generally assumed and understood that the State had complete and exclusive jurisdiction to deal with the Indians within her borders. . . . Administrative officers of the Federal Government have never seriously questioned the right of the State so to do. . . . Administrative officers, of course, are guided largely if not entirely by appropriate legislation, and particularly by appropriations for carrying on given activities. In the absence of these this Department has not and could not well assume active jurisdiction or control over the affairs of the New York Indians even though technically a superior sovereignty and jurisdiction might rest with the Federal Government.⁷⁰

Indian Commissioner John Collier, who was a strong advocate for tribal self-determination, acknowledged in 1938 New York's long-standing regulation of its Indians:

⁶⁷ ROSEN, *supra* note 17, at 34–36; Porter, *supra* note 66, at 126–30.

⁶⁸ Porter, *supra* note 66, at 136–37.

⁶⁹ The Reeves Report is the leading contemporaneous report on New York Indians, submitted to Congress by the Secretary of the Interior on January 22, 1915. See H.R. Doc. No. 1590, 63rd Cong., 3d sess. (1915).

⁷⁰ Report of John R.T. Reeves to the Sec. of the Interior (Nov. 8, 1923) (copy on file with authors).

Rightly or wrongly, from an early day, the State has exercised considerable jurisdiction over these Indians and has more or less satisfactorily performed the sovereign functions usually exercised by the Federal Government in behalf of the Indians, particularly along the lines of education, construction of public highways through the reservations, looking after their health, sanitation, indigent relief, etc., all at considerable expense to the State. . . . A change in the status of these Indians can be brought about in two ways only: (a) voluntary action on the part of the Indians, such as agreeing to adopt the Indian Reorganization Act of June 18, 1934, or (b) legislation by Congress under its plenary authority over the Indians.⁷¹

Commissioner Collier also acknowledged that New York State was paying \$500,000 per year to provide services to its Indians whereas the “Government contributes directly very little.”⁷² Collier commented that “[t]he guardianship of the Federal Government over these Indians is a shadowy, uncertain one and has never been clearly defined by legislation or by litigation.”⁷³ A contemporaneous report prepared by the American Association on Indian Affairs observed that New York Indians, while “like all other Indians in the United States, are theoretically wards of the federal government,

⁷¹ See Letter from Collier, Indian Commissioner, to Oliver LaFarge, President of the American Association of Indian Affairs (Feb. 19, 1938) (copy on file with authors). The absence of authorizing federal legislation was noted by Commissioner Collier’s predecessor, Charles H. Burke, who wrote to Congressman Andrew Hickey on March 29, 1924, stating that “[i]n the absence of legislation this Department has not and could not well assume active jurisdiction or control over the affairs of the New York Indians, although technically a superior sovereignty and jurisdiction might rest in the Federal Government.” Letter from Charles H. Burke, Indian commissioner, to Andrew Hickey, United States Congressman (Mar. 29, 1924) (copy on file with authors). A Department of Interior report entitled “A Study of Tribal Government of the St. Regis Indians (Mohawk Tribe) of the State of New York,” dated July 31, 1942, further observes that:

[F]or a century and a half the State of New York has, by virtue of default on the part of the Federal government, considerably monopolized the administration of tribes in that State. The assumed jurisdiction, largely based on New York’s doctrine of “State’s Rights,” has never been widely challenged by the Federal government and has considerable sanction in the scores of treaties between New York State and the Indian tribes. Also, New York, as one of the thirteen original colonies, took title to Indian lands, and it was generally regarded that jurisdiction over the Indians was included. New York State has carried on numerous activities of social welfare while the Federal government has remained aloof.

DEP’T OF THE INTERIOR, A STUDY OF TRIBAL GOVERNMENT OF THE ST. REGIS INDIANS (MOHAWK TRIBE) OF THE STATE OF NEW YORK (1942) (copy on file with authors).

⁷² Letter from Collier, Indian Commissioner, to Ickes, Sec. of the Interior, (May 31, 1939) (copy on file with authors).

⁷³ *Id.*

they are actually under the care of New York State. This status continues to be jealously guarded both by the state officials immediately concerned, and also by many of the Indians themselves.”⁷⁴

The Supreme Court in *United States ex rel. Kennedy v. Tyler*, addressed New York State’s intervention in the tribal governance for the Senecas, which had petitioned the State of New York in 1849 to establish a tribal organization following a period of discord and disorganization.⁷⁵ The court made the following observation about the significance of that intervention:

As early as 1849 the state of New York, at the earnest request of the Indians themselves, had assumed jurisdiction over them and their lands and possessions within the state; that to that end state laws had been enacted for their civil government and the regulation of their internal affairs; that the peacemakers’ courts on the several reservations were created by state law; and that the courts of the state had uniformly held that the power of the state in respect of these matters had never been doubted or questioned, and such sovereignty as the Indians may have formerly possessed had been merged and lost in the sovereignty of the state, under which they must look for protection of life and property. In the absence of congressional action, the District Court concluded that these state laws and decisions, by long acquiescence on the part of the Indians, had become rules of property within the state and were controlling.⁷⁶

⁷⁴ ANNE R. COLEMAN, AMERICAN ASS’N ON INDIAN AFFAIRS, INC., THE NEW YORK INDIANS (1939) (copy on file with authors). A report by the Joint Legislative Committee on Indian Affairs, dated February 25, 1944, noted that state and federal roles in the administration of Indian affairs had “been reversed” in New York: “[h]ere the State has been active while the Federal government pursued a general policy of passive non-interference.” LEG. DOC. NO. 50 (1944) (copy on file with authors).

⁷⁵ See *United States ex rel. Kennedy v. Tyler*, 269 U.S. 13 (1925).

⁷⁶ *Id.* at 16. The Supreme Court did not express any disagreement with the district court’s analysis and dismissed the habeas petition on exhaustion grounds. *Id.* at 17–18. In more recent years, New York Indian policy, much like federal policy has moved towards recognizing tribal self-determination, pursuant to which the State has adopted tribal consultation policies to govern the administrative relationship between the State’s agencies and Indian tribes. See, e.g., *CP-42 / Contact, Cooperation, and Consultation with Indian Nations*, N.Y. DEPARTMENT OF ENVIRONMENTAL CONSERVATION, DEC POLICY (March 27, 2009), www.dec.ny.gov/docs/permits_ej_operations_pdf/cp42.pdf (last visited Jan 21, 2012); *Native American Services*, N.Y. OFFICE OF CHILDREN AND FAMILY SERVICES, <http://www.ocfs.state.ny.us/main/nas/> (last visited Jan. 7, 2012). Again, these policies do not change the legal test that courts apply to determine the limits on tribal sovereignty. Moreover, because these policies are politically-driven and not legally-based, consultation policies can generate conflicts as tribes, encouraged by language in the policy declaring them

D. Common Law

Below we extract from the “intricate web of judicially made Indian law”⁷⁷ the core principles regarding tribal sovereignty.

1. Seminal View of Tribes as “Domestic Dependent Nations” and “Wards” of the Federal Government

Chief Justice Marshall, writing for the Supreme Court in *Cherokee Nation v. Georgia*, denominated Indian tribes as “domestic dependent nations.”⁷⁸ That conception of tribal sovereign status remains valid although it has provided limited guidance for determining the boundaries of Indian tribal sovereignty. The question in *Cherokee Nation v. Georgia* was whether the Cherokee Nation was a foreign state as the term was used in the Constitution for purposes of invoking the Court’s jurisdiction under Article III (controversies involving foreign states).⁷⁹ The Court concluded it was not, and so could not maintain an action in the courts of the United States.⁸⁰ In considering the legal status of Indian tribes and their relation to the United States, Marshall observed, “[t]he condition of the Indians to the United States is perhaps unlike that of any other two people in existence. . . . [T]he relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.”⁸¹ The Chief Justice noted that the Cherokee “look to our government for protection.”⁸² He concluded that they were domestic dependent nations, “in a state of pupilage,” and that their relation to the United States “resembles that of a ward to his guardian.”⁸³

As the Chief Justice further observed in *Cherokee Nation*, because Indian tribes are “completely under the sovereignty and dominion of the United States . . . any attempt [by foreign nations] to acquire their lands, or to form a political connexion [sic] with them would be considered by all an invasion of our territory, and an act of hostility.”⁸⁴

“nations” who enjoy a “government-to-government” relationship with state and federal governments, act beyond the judicially-imposed limits on tribal sovereignty.

⁷⁷ *Oliphant v. Suquamish Indian Tribe*, 433 U.S. 191, 206 (1978).

⁷⁸ *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

⁷⁹ *Id.* at 15–17.

⁸⁰ *Id.* at 20.

⁸¹ *Id.* at 16.

⁸² *Id.* at 17.

⁸³ *Id.*

⁸⁴ *Id.* at 17–18.

Marshall further commented that the Indians “occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases.”⁸⁵ And although the Court had decided in 1823 that Indian tribes did not have the power to dispose of their lands,⁸⁶ the 1831 opinion in *Cherokee Nation* recognized that the Cherokee had been “treated as a state from the settlement of our country” and that “acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts.”⁸⁷ The Court further acknowledged that the Cherokee Nation had some rights, including “an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government.”⁸⁸

Marshall went further in recognizing the rights of the Cherokee Nation in his 1832 opinion in *Worcester v. Georgia*.⁸⁹ While reinforcing that, “[t]he Indian nations were, from their situation, necessarily dependent on [the United States] . . . for their protection from lawless and injurious intrusions into their country.”⁹⁰ Marshall proceeded to draw on

the settled doctrine of the law of nations . . . that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government and ceasing to be a state.⁹¹

Nevertheless, the references in *Cherokee Nation* and *Worcester* to

⁸⁵ *Id.*

⁸⁶ *Johnson v. McIntosh*, 21 U.S. 543, 603–05 (1823).

⁸⁷ *Cherokee Nation*, 30 U.S. at 16.

⁸⁸ *Id.* at 17. In *Worcester v. Georgia*, Marshall also discussed the principle generally referred to as the “doctrine of discovery” which, in order

to avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their rights as between themselves. . . . It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on the denial of the right of the possessor to sell. . . . This was the exclusive right of purchasing such lands as the natives were willing to sell.

Worcester v. Georgia, 31 U.S. 515, 543–45 (1832); see also *McIntosh*, 21 U.S. at 572–92 (providing an extensive discussion of the doctrine of discovery).

⁸⁹ *Worcester v. Georgia*, 31 U.S. 515 (1832).

⁹⁰ *Id.* at 551–52.

⁹¹ *Id.* at 560–51.

the Indian commerce, war power, and treaty clauses, support Congress' plenary power over Indian affairs (as further developed in later decisions), the exercise of which necessarily diminishes Indian tribal sovereignty.⁹²

The Supreme Court's decision in *United States v. Kagama*,⁹³ contrasted the limited nature of tribal sovereignty to the sovereignty possessed by the States and foreign nations:

They were and always have been regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people with the power of regulating their internal and social relations, and so far not brought under the laws of the Union or the State within whose limits they reside.⁹⁴

In finding the State of California had jurisdiction under the Major Crimes Act of 1885 to conduct a murder trial involving two Indian assailants and an Indian victim, where the crime occurred on the reservation, the Court in *Kagama* found no authorization in the Indian Commerce Clause.⁹⁵ Instead, the Court observed the Indian defendants were "within the geographical limits of the United States [and] [t]he soil and people within these limits are under the political control of the government of the United States, or of the States of the union."⁹⁶ The Court stressed that the dual sovereigns under the Constitution exercised overriding sovereignty with respect to the tribe that properly subjected the Indian defendants to the criminal jurisdiction of the federal government and the state in which the crime occurred.⁹⁷ The high court found a sufficient legal foundation for the Major Crimes Act in the fact that the federal government had established the reservation and was in a guardian-ward relationship with the tribe.⁹⁸

⁹² For a thoughtful argument that Marshall's tribal opinions should be revisited and reinterpreted see generally chapter nine of HUTCHINS, *supra* note 6. Another critical discussion of Marshall's tribal opinions, particularly *Johnson v. McIntosh*, is found in WILKINS, *supra* note 24, at 27–35. See also J. Norgren, *The Cherokee Nation Cases of the 1830s*, 1994 J. SUPREME COURT HIST. 65, 65–82 (1994).

⁹³ *United States v. Kagama*, 118 U.S. 375 (1886).

⁹⁴ *Id.* at 381.

⁹⁵ *Id.* at 378–79.

⁹⁶ *Id.* at 379.

⁹⁷ *Id.* at 379–80.

⁹⁸ *Id.* at 381, 383. According to one tribal advocate, *Kagama* "reduced indigenous sovereignty almost to a nullity." Peter d'Errico, *Sovereignty: A Brief History in the Context of U.S. Indian law*, PETER D'ERRICO'S LAW PAGE, <http://www.umass.edu/legal/derrico/sovereignty.html> (last visited Jan. 7, 2012).

A hundred years after *Kagama*, the Supreme Court addressed related jurisdictional issues in *Oliphant v. Suquamish Indian Tribe*, a case involving crimes committed by non-Indians while on the reservation.⁹⁹ Mark David Oliphant, a non-Indian, was arrested by tribal authorities during a public festival on the Suquamish reservation.¹⁰⁰ He was charged with assaulting a tribal officer and resisting arrest.¹⁰¹ In an unrelated incident, another non-Indian, Daniel B. Belgrade, was arrested by tribal authorities following a high-speed chase that ended when Belgrade plowed his car into a tribal police vehicle.¹⁰² Belgrade was charged with recklessly endangering another person and damaging tribal property.¹⁰³ Both Oliphant and Belgrade applied for a writ of habeas corpus in the local federal district court arguing that the tribal court does not have criminal jurisdiction over non-Indians.¹⁰⁴

The Supreme Court sided with the non-Indian defendants.¹⁰⁵ The Supreme Court considered a number of factors, including “the commonly shared presumption of Congress, the Executive branch and lower federal courts” that “Indian tribal laws are enforceable against Indians only, not against non-Indians.”¹⁰⁶ But the decision is expressly and directly rooted in the “overriding sovereignty of the federal government.”¹⁰⁷ The court reasoned that “by submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power try non-Indian citizens of the United States except in a manner acceptable to Congress.”¹⁰⁸ “Such an exercise of jurisdiction over non-Indians of the United States would belie the tribes’ forfeiture of full sovereignty in return for the protection of the United States.”¹⁰⁹ The high court emphasized that the Indian tribes are “fully subordinated to the sovereignty of the United States”¹¹⁰ and “completely under the sovereignty and dominion of the United States.”¹¹¹

The Double Jeopardy clause of the Fifth Amendment was the

⁹⁹ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 194 (1978).

¹⁰⁰ *Id.* at 193.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 193–94.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 210–12.

¹⁰⁶ *Id.* at 206.

¹⁰⁷ *Id.* at 207–11.

¹⁰⁸ *Id.* at 210.

¹⁰⁹ *Id.* at 211.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 209 (quoting *Cherokee Nation v. Georgia*, 30 U.S. 1, 17–19 (1831)).

backdrop for another modern tribal sovereignty decision by the Supreme Court, *United States v. Wheeler*.¹¹² The defendant, an enrolled member of the Navajo tribe, had been prosecuted in tribal court for contributing to the delinquency of a minor, an underage Navajo female, with the events occurring on the reservation.¹¹³ The defendant was subsequently indicted in federal court under the Major Crimes Act for statutory rape.¹¹⁴ The defendant challenged the federal prosecution as violating the Double Jeopardy clause.¹¹⁵ The issue to be decided was whether the Navajo tribe was a separate sovereign from the federal government for purposes of the Fifth Amendment, or as, the defendant argued, was merely an arm of the federal government.¹¹⁶ The Supreme Court concluded that the Navajo tribe and federal government were separate and distinct sovereigns and that the tribe retained its inherent sovereignty to prosecute its members for criminal acts occurring on the reservation.¹¹⁷ Accordingly, the defendant was not subjected to improper successive prosecutions.¹¹⁸

In reaching its conclusion, the Supreme Court revisited its tribal sovereignty jurisprudence and reaffirmed the “unique and limited character” of tribal sovereign authority:

It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members. Although physically within the territory of the United States and subject to ultimate federal control, they nonetheless remain “a separate people, with the power of regulating their internal and social relations.” Their right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions.

The powers of Indian tribes are, in general, “inherent powers of a limited sovereignty which has never been extinguished.” Before the coming of the Europeans, the tribes were self-governing sovereign political communities. Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions

¹¹² *United States v. Wheeler*, 435 U.S. 313 (1978).

¹¹³ *Id.*

¹¹⁴ *Id.* at 314–15.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 315–16.

¹¹⁷ *Id.* at 321–22, 327.

¹¹⁸ *Id.* at 331–32.

of those laws.

Indian tribes are, of course, no longer “possessed of the full attributes of sovereignty.” Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others.

But our cases recognize that the Indian tribes have not given up their full sovereignty. We have recently said that: “Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory [They] are a good deal more than ‘private, voluntary organizations.’ *The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance.* But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.”¹¹⁹

The Supreme Court recently reaffirmed the plenary power that Congress exercises over tribes and the correspondingly limited sovereignty left to tribes.¹²⁰ Tribes have been described as “quasi-sovereign entities,”¹²¹ “semi-independent”¹²² and “semi-autonomous.”¹²³

¹¹⁹ *Wheeler*, 435 U.S. at 322–23 (emphasis added, citations and internal quotation marks omitted).

¹²⁰ *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2324 (2011) (June 13, 2011); see also *Wheeler*, 435 U.S. at 319 (“Congress has plenary authority to legislate for the Indians in all matters, including their form of government.”); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 313, 319 (1978) (“The United States retains plenary authority to divest tribes of any attributes of sovereignty.”).

¹²¹ *Morton v. Mancari*, 417 U.S. 535, 544 (1974).

¹²² *White Mountain Apache v. Bracker*, 448 U.S. 136, 142 (1980) (“[T]he tribes have retained a *semi-independent* position . . . not as States, not as nations, not as possessed of full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they reside.”).

¹²³ *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of NM*, 458 U.S. 832 (1982) (noting the “the semi-autonomous status of Indian tribes”).

2. Tribes' Limited Sovereign Authority Over Lands and Its Members

Tribes possess “attributes of sovereignty over both their members and their territory,”¹²⁴ and included in that sovereignty is “the power [to regulate] their internal and social relations.”¹²⁵ Tribes possess sovereign power to “prescribe conduct of tribal members; to “exclude nonmembers entirely” from the reservation, and to “make their own laws and be ruled by them.”¹²⁶

3. Justice Thomas Questions Tribal Sovereignty

Tribal “quasi-sovereignty” exists only at the pleasure of Congress, which has the power to restrict or eliminate Indian sovereignty as it sees fit. Tribal sovereignty thus is remarkably limited and very unlike the plenary power exercised by true sovereigns such as the several states or foreign nations. Indeed, given the heavily circumscribed nature of Indian sovereignty, Justice Thomas in *United States v. Lara*, questioned whether Indian sovereignty is doctrinally sound and worth continued recognition.¹²⁷ To the extent Indian sovereignty exists, it has, in its domestic, dependent and diminished form, no analogs.

4. Recent Questions About Doctrine of Tribal Sovereign Immunity From Suit

Numerous members of the high court have openly questioned the continuing vitality of the doctrine of tribal immunity from suit. In *Kiowa Tribe v. Mfg. Techs.*,¹²⁸ which recognized the doctrine, the majority noted its questionable foundation: “we note that it developed almost by accident. The doctrine is said by some of our own opinions to rest on the Court’s opinion in *Turner v. United States*. Though *Turner* is indeed cited as authority for the

¹²⁴ *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) (quoting *United States v. Mazurie*, 419 U.S. 544, 557 (1975)).

¹²⁵ *United States v. Kagama*, 118 U.S. 275, 281–82 (1886).

¹²⁶ *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (internal quotations omitted).

¹²⁷ *United States v. Lara*, 541 U.S. 193, 219 (2004) (Thomas, J., concurring). Specifically, Justice Thomas noted that “[i]t is quite arguably the essence of sovereignty not to exist merely at the whim of an external government.” *Id.* at 218. He further observed that tribes “are not part of this constitutional order, and their sovereignty is not guaranteed by it.” *Id.* at 219.

¹²⁸ *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751 (1998).

immunity, examination shows it simply does not stand for that proposition.”¹²⁹ Justice Kennedy, writing for the Court, acknowledged “there were reasons to doubt the wisdom of the doctrine,” including the fact that “tribal immunity extends beyond what is needed to safeguard tribal self-governance.”¹³⁰ But Justice Kennedy concluded Congress was the proper body to abrogate tribal immunity based on such policy considerations.¹³¹ Even if tribal immunity from suit remains part of federal Indian law, “because of the peculiar ‘quasi-sovereign’ status of the Indian tribes, the Tribe’s immunity is not congruent with that which the Federal Government, or the States, enjoy.”¹³²

5. State Sovereignty Distinguished from Tribal Sovereignty

When tribes seek to exercise sovereign authority over lands that are within the regulatory jurisdiction of a State, a direct and unavoidable jurisdictional conflict results. This is because any exercise of tribal sovereignty over the lands is, by definition, in derogation of the state’s rights.¹³³ The respective claims to sovereign authority must be viewed through the legal framework provided by the Constitution, federal statutes and federal common law.¹³⁴ As set out above, these laws render tribes domestic dependent nations under the complete and overriding sovereignty of the federal government and, as such, able to exercise only limited powers over their lands and people. In contrast, states are endowed

¹²⁹ *Id.* at 756 (citing *Turner v. United States*, 248 U.S. 354 (1919)); *see also* *Puyallup Tribe, Inc. v. Dep’t of Game of Wash.*, 433 U.S. 165, 178–79 (1977) (Blackmun, J., concurring) (“I join the Court’s opinion. I entertain doubts, however, about the continuing vitality in this day of the doctrine of tribal immunity as it was enunciated in *United States v. United States Fidelity & Guaranty Co.* . . . I am of the view that that doctrine may well merit re-examination in an appropriate case.”).

¹³⁰ *Kiowa Tribe*, 523 U.S. at 758–60.

¹³¹ *Id.* at 758.

¹³² *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 891–92 (1986).

¹³³ Tribal advocates contend states are improperly intruding on Indian territory. *See* Porter, *supra* note 66, at 125. (“As a result of having territory within a state that the state cannot control, there has long been conflict between the states and the Indian nations, usually revolving around state efforts to exert authority within the Indian territory.”). This begs the question: “Whose territory is it?” Is it “Turtle Island” as tribal advocates claim in declaring indigenous tribal sovereignty over all of North America, or is it the United States as the dominant non-Indian society and laws recognize?

¹³⁴ Tribal advocates make reference to Haudenosaunee law as a source for understanding the scope of tribal sovereign authority. Porter, *supra* note 66, at 129 n.30, 130. But indigenous legal principles cannot expand the limits on tribal sovereignty imposed by statute by the United States Congress or imposed by judicial decision of the Supreme Court of the United States.

with a complete and fulsome form of sovereignty, able to exercise all powers reserved to the States under the Constitution.¹³⁵ The nature and extent of State sovereignty was addressed by the Supreme Court in *Alden v. Maine*.¹³⁶ The high court, after examining the text of the Constitution and the context of its ratification, concluded that:

The federal system established by our Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status. . . . Second, even as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of "the concept of a central government that would act upon and through the States" in favor of "a system in which the State and Federal Governments would exercise concurrent authority over the people—who were, in Hamilton's words, 'the only proper objects of government.'" . . . The States thus retain "a residuary and inviolable sovereignty." They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.¹³⁷

In addressing the States' sovereign immunity from suit, which the Supreme Court recognized to be a "fundamental aspect" of sovereignty, the high court again looked to the powers held by the States before the Constitution was ratified:

The Eleventh Amendment makes explicit reference to the States' immunity from suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." We have, as a result, sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity." The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as

¹³⁵ See *Parker v. Brown*, 317 U.S. 341, 359–60 (1943) ("The governments of the states are sovereign within their territory save only as they are subject to the prohibitions of the Constitution or as their action in some measure conflicts with powers delegated to the National Government, or with Congressional legislation enacted in the exercise of those powers.").

¹³⁶ *Alden v. Maine*, 527 U.S. 706, 712–14 (1999).

¹³⁷ *Id.* at 714.

the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.¹³⁸

Justice Thomas contrasted the sovereignty of the fifty States that is hard-wired into the Constitution with the highly-restricted quasi-sovereignty exercised by tribes. In doing so, Justice Thomas questioned whether a sovereign that is dependent upon another sovereign is still a sovereign.¹³⁹

6. Sherrill 2005 and 2010

The contours of tribal sovereignty and immunity from suit were recently examined (and re-examined) in a series of decisions involving the Oneida Indian Nation of New York ("OIN") and the City of Sherrill, Madison County and Oneida County, which exercised taxing and regulatory authority over the lands in question.¹⁴⁰ The OIN purchased various parcels on the open market starting in the 1990s, taking title in fee simple.¹⁴¹ The land had been owned by non-Indians, and taxed and regulated by the counties for 150 years or more.¹⁴² The OIN nonetheless unilaterally asserted sovereignty over lands that it purchased on the open market contending that the lands fell within the borders of its ancient historic reservation in central New York.¹⁴³ When the OIN, based on the tribe's claim to tribal sovereignty over the land, refused to pay taxes, the local taxing authorities commenced tax

¹³⁸ *Id.* at 712–13. Section 5 of the Fourteenth Amendment, however, does grant Congress the authority to abrogate the States' sovereign immunity with respect to certain legislation (e.g. Americans with Disabilities Act). *See generally* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (establishing that congress can abrogate Eleventh Amendment Immunity).

¹³⁹ *See Alden*, 527 U.S. at 750–54; *see also* Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 340 (2008) ("The sovereign authority of Indian tribes is limited in ways state and federal authority is not.").

¹⁴⁰ *City of Sherrill, New York v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 202, 211–12 (2005); *Oneida Indian Nation of N.Y. v. Madison County*, 605 F.3d 149 (2d Cir. 2010), *vacated by* *Madison County v. Oneida Indian Nation of N.Y.*, 131 S. Ct. 704 (2011) (per curiam).

¹⁴¹ *Sherrill*, 544 U.S. at 202.

¹⁴² *Id.*

¹⁴³ *Id.*

foreclosure proceedings to collect the unpaid taxes, just as they would with any other delinquent taxpayer.¹⁴⁴ The dispute reached the Supreme Court in 2005, with the high court rejecting the tribe's claim to sovereign authority over the lands in question, finding the tribe's "embers of sovereignty" had "long grown cold."¹⁴⁵ Notwithstanding the Supreme Court's decision in *Sherrill*, OIN refused to pay taxes due to the counties and argued that the Supreme Court had decided only that the lands were subject to taxation, but had not ruled that the remedies of foreclosure and eviction were available.¹⁴⁶ In doing so, the OIN advanced an argument for tribal sovereign immunity from suit that would give tribes greater immunity from suit than the immunity possessed by states and foreign nations, rendering them "super-sovereigns" under the law.¹⁴⁷ The district court accepted without question OIN's claim to immunity from county tax enforcement methods; the Second Circuit acknowledged the absurdity of a rule of law that would give the counties the right to lawfully impose taxes but no right to collect the taxes if the tribe unlawfully refuses to pay.¹⁴⁸ Nevertheless, the Second Circuit felt constrained by Supreme Court precedent to reach that nonsensical result.¹⁴⁹ The counties successfully petitioned the Supreme Court for a writ of certiorari.¹⁵⁰ The OIN in response, and apparently fearing the high court would not only reverse the Second Circuit but would further restrict tribal sovereignty in the process, quickly passed a tribal ordinance purporting to waive its sovereign immunity from tax enforcement proceedings.¹⁵¹ The Supreme Court responded by vacating the Second Circuit's decision and remanding the case for further proceedings on other issues.¹⁵²

II. MODERN TRIBAL PERSPECTIVE ON INDIAN SOVEREIGNTY

Native American advocates today reject any limitation on Indian sovereignty,¹⁵³ and claim tribes enjoy by treaty a "Nation to Nation"

¹⁴⁴ *Id.* at 211–12; *Madison County*, 605 F.3d at 154–55.

¹⁴⁵ *Sherrill*, 544 U.S. at 214.

¹⁴⁶ *Madison County*, 605 F.3d at 151.

¹⁴⁷ The tribal arguments in favor of such expansive sovereign immunity from suit are discussed in Section II(A), *infra*, at 130–31.

¹⁴⁸ *Id.* at 163–64.

¹⁴⁹ *Id.*

¹⁵⁰ *Madison County v. Oneida Indian Nation of N.Y.*, 131 S.Ct. 459 (2010).

¹⁵¹ *Madison County v. Oneida Indian Nation of N.Y.*, 131 S.Ct. 704 (2011).

¹⁵² *Id.*

¹⁵³ *E.g.*, Steve Newcomb, *No Plenary Power Over Indian Nations*, INDIAN COUNTRY TODAY,

relationship with the United States.¹⁵⁴ They place themselves on equal footing with the federal government and foreign nations.¹⁵⁵ In doing so, tribal advocates seek to replace the constitutional framework of dual federal-state sovereigns with a tripartite relationship that creates two co-equal (federal and tribal) sovereigns and one inferior sovereign (state).¹⁵⁶ These tribal advocates reject the controlling Supreme Court decisions that denominate tribes “domestic,” (i.e., part of the United States and its dominant culture) “dependent,” (i.e., lacking independence from the United States and protected by the United States as a “guardian” protects its “ward”) and “nation” (with the lower case “n” reflecting the limited conception of sovereignty).

In decrying the *Sherrill* decision, tribal advocates dismiss the Supreme Court of the United States as just another court “of the colonizers” where “justice is never on our side.”¹⁵⁷ They defiantly

November 14, 2011, http://indiancountrytodaymedianetwork.com/ict_sbc/no-plenary-power-over-indian-nations [hereinafter “Newcomb, *No Plenary Power*”] (advocating for “free exercise” of inherent tribal sovereignty and arguing that U.S. Constitution provides Congress with no authority to regulate Indian affairs); Steve Newcomb, *‘Canada’ and ‘United States’ are in Turtle Island*, INDIAN COUNTRY TODAY, September 30, 2011, http://indiancountrytodaymedianetwork.com/ict_sbc/canada-and-the-united-states-are-in-turtle-island [hereinafter *Turtle Island*] (arguing that Indian tribes, as the indigenous original occupiers of North America (“Turtle Island”), have a superior claim to sovereignty over the lands currently denominated the United States and Canada and occupied predominately by non-Indians).

¹⁵⁴ *E.g.*, Newcomb, *No Plenary Power*, *supra* note 153 (advocating for “free exercise” of inherent tribal sovereignty and arguing that U.S. Constitution provides Congress with no authority to regulate Indian affairs).

¹⁵⁵ *E.g.*, *Turtle Island*, *supra* note 152; Peter d’Errico, *Knowledge is Power: Plenary Power is False*, INDIAN COUNTRY TODAY, November 21, 2011, http://indiancountrytodaymedianetwork.com/ict_sbc/knowledge-is-power-plenary-power-is-false (hereinafter “d’Errico, *Knowledge is Power*”) (advocating for recognition of the original free and independent existence of Native Nations and treatment “as equals in the global international community of nations.”); Porter, *supra* note 66, at 182 (“Haudenosaunee are sovereigns of equal stature that just so happen to be located within the State’s borders”); *id.* at 183 (advocating for a “decolonized government –to-government relationship” between the State of New York and the Haudenosaunee “in conformance with Haudenosaunee law”).

¹⁵⁶ *See* Porter, *supra* note 66, at 183–84 (arguing Federal and Haudenosaunee law limit New York’s ability to legislate in area of Indian affairs).

¹⁵⁷ Carrie E. Garrow, *Indians Shut Out of the Courts of the Colonizers*, SYRACUSE POST STANDARD, November 17, 2011, http://blog.syracuse.com/opinion/2011/11/indians_shut_out_of_the_courts.html. One tribal attorney called the *Sherrill* decision “racist” because “it applies only to Indians” and that the decision “is like *Plessey v. Ferguson*.” Diana Louise Carter, *Law scholars decry recent decisions over land claims*, DEMOCRAT & CHRONICLE, November 19, 2011, at 5B. Such comments ignore the racial preference exhibited by Bureau of Indian Affairs (“BIA”) in hiring, the BIA’s singular mission to assist Indians, whom it consider its clients, thereby providing a dedicated agency to help Indians with federal tax dollars—benefits that no other racial/ethnic group enjoys in this country. No other racial group is blessed with lucrative and monopolistic casino rights (or other lucrative economic opportunities) as part of an affirmative action. And only Indians benefit from land

argue that “after 234 years of broken treaties and confiscated property, the Nations are still here. The battle is not over.”¹⁵⁸ The questions that come to mind are how, when and where will these future battles be waged.

A. *Equal Status to Federal Government / Greater Status than States and Foreign Nations*

The notion of co-equal sovereignty between the federal government and Indian tribes is demonstrably incorrect as a matter of history and federal Indian law. Some tribal advocates stray even farther from the controlling legal conception of tribes as domestic dependent nations, and attribute to Indian tribes sovereign rights and powers greater than those exercised by any State with respect to sister states, and greater than any foreign nation enjoys with respect to the United States—a kind of “super-sovereignty.” For example, when the State of Georgia owns real property located in the State of Tennessee, Georgia holds the property just as any other landowner, with no greater or lesser rights. The land is within the sovereign control, governance, taxing, and regulatory authority of Tennessee, and as such is subject to state regulatory laws and

into trust acquisitions under the Indian Reorganization Act. Indians are uniquely positioned in this country and uniquely treated by Congress, the Executive Branch, and the courts. It should come as no surprise then that a laches rule that is tied directly to Indian history in this country, and the long passage of time between the alleged wrongs and current tribal claims—measured in centuries—gives rise to some unique rules that are specific to that setting. Such uniqueness does not make them “racist.” For a broad attack on the legal foundation for the Congress’s plenary power over Indian tribes, see Savage, *supra* note 24, 115–16. For an attack on New York State’s Indian Law “as rooted in colonialism and paternalism of the eighteenth and nineteenth centuries,” see Porter, *supra* note 66, at 130.

¹⁵⁸ Garrow, *supra* note 156. Another tribal advocate assured, “[t]his is not over even if the courts are closed to us. It may not be our generation that achieves justice, but someone will.” Carter, *supra* note 156. This type emotional rhetoric reflects some native advocates’ deeply held distrust of the Supreme Court and lower federal courts. As another tribal advocate correctly points out, “there is not even one Native American on the federal bench in any Article III court.” Saunooke, *supra* note 3, at 22. He complains that the lack of diversity undermines “Native Americans’ confidence in courts as dispensers of equal justice.” *Id.* Such arguments imply a lack of familiarity with the Oneidas’ history before the Indian Claims Commission, where Oneidas obtained a favorable decision imposing liability on the federal government (*see* Oneida Nation of New York v. United States, 43 Ind. Cl. 373, 407 (1978) and with the tribe’s subsequent decision to abandon that claim for damages in order to pursue in federal court much broader and more disruptive remedies, including the eviction of 20,000 current landowners and the return of historic reservation lands. The Oneidas rejected a \$500 million settlement offer in that now-dismissed land claim litigation, showing that they had access to the courts and an opportunity to receive meaningful relief but chose an overly aggressive path that proved unsuccessful. *See* David W. Chen, *Battle Over Iroquois Land Claims Escalates*, NY TIMES, May 16, 2000, <http://www.nytimes.com/2000/05/16/nyregion/battle-over-iroquois-land-claims-escalates.html?pagewanted=all&src=pm>.

taxation.¹⁵⁹ If Georgia refused to pay the taxes due and owing, Tennessee could foreclose and evict for nonpayment of taxes.¹⁶⁰ And even in the rarified world of consular properties owned by foreign nations, such as the Chinese consulate in New York City, the Foreign Sovereign Immunities Act restricts what China and other full-fledged foreign independent nations can do with non-movable physical property. In the case of the Chinese consulate in New York City, the federal government, New York State, and New York City, each exercising sovereign power granted by constitution or statute, can tax and regulate the consular property, subject to certain narrow exceptions.¹⁶¹ If the lawfully imposed taxes are not paid, the taxing authorities would be able to collect the unpaid amounts through tax foreclosure—over the Chinese government’s assertion of plenary sovereign authority.¹⁶² In recent litigation, the Oneida Indian Nation argued that tribal sovereign immunity barred Madison County and Oneida County from collecting real property taxes imposed on certain parcels owned by the tribe and located in those counties, even though the Supreme Court ruled the lands were subject to state and local taxation, and even though no other sovereign (state or foreign nation) would be able to assert such immunity to enforcement.¹⁶³ All such re-conceptions or reformulations of Indian sovereignty, which seek to equip tribes with a kind of “super sovereignty” enjoyed by no other sovereigns, rest on a view of tribal sovereignty that is grossly at odds with the Supreme Court’s Indian jurisprudence and have no foundation in federal law regarding sovereign immunity from suit.

¹⁵⁹ See *Georgia v. City of Chattanooga, Tennessee*, 264 U.S. 472, 482–83 (1924) (affirming Tennessee’s right to exercise eminent domain over lands within its borders even though parcel was owned by State of Georgia). The Federal Sovereign Immunities Act (“FSIA”) contains a specific exception to the sovereign immunity enjoyed by foreign nations where the dispute concerns immovable property located in the United States. 28 U.S.C. § 1605(a)(4). The FSIA codified existing law in this country while also tracking a bedrock principle of international law that “a foreign state is not immune from the jurisdiction of another state with respect to claims . . . to immovable property in the state of the forum.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 4551(c) (1987).

¹⁶⁰ *City of Chattanooga, Tennessee*, 264 U.S. at 482–83.

¹⁶¹ See *Permanent Mission of India to the U.N. v. City of New York*, 551 U.S. 193, 199–201 (2007) (holding immovable property exception permitted city to impose real property tax on portion of India’s consular offices located in Manhattan).

¹⁶² See *id.* at 202.

¹⁶³ *Oneida Indian Nation of N.Y. v. Madison County*, 605 F.3d 149 (2d Cir. 2010), *vacated by Madison County v. Oneida Indian Nation of N.Y.*, 131 S. Ct. 704 (2011) (per curiam).

B. Turtle Island and Other “Crazy” Ideas

Some radical thinkers in Indian Country offer jarring and defiant messages regarding the current legal framework imposed by the dominant culture. The advocates support an alternate view of tribal sovereignty.¹⁶⁴ For example, one tribal advocate insists that the colonizers’ creation of “Canada” and the “United States” are illegitimate “political constructs” on what Native Americans call “Turtle Island” (i.e., North America).¹⁶⁵ This same tribal advocate contends that “international law is . . . an outgrowth of imperialism, and thus was conceived and operates on the basis of a structure of domination and subordination.”¹⁶⁶ This leaves the dominant government and society as legally and morally illegitimate, and tribes as the rightful occupants of Turtle Island who can resume

¹⁶⁴ Tribal advocates contend that white conceptions and constructs of “sovereignty” do not mesh with Indian notions of autonomy and governance. See Savage, *supra* note 24, at 88 ns.123–24 (arguing that sovereignty based on land does not fit Native Americans’ concept of sovereignty). David E. Wilkins writes that “tribal sovereignty entails a cultural/spiritual dimension” including a concept of “balance and harmony between various communities, and between the tribe and the land.” WILKINS, *supra* note 24, at 20. Debora A. Rosen argues that the European–American legal concept of “sovereignty” “did not capture the Indian standpoint [and] became a vehicle for erasing from white discourse the original Indian perception of how to govern their societies and how to structure their relationship to whites.” ROSEN, *supra* note 17, at 21. Even with these purported differences between whites and Indians, it was clear that “when whites used the term ‘tribal sovereignty’ in the early Republic . . . they most often were presuming a form of limited Indian sovereignty, not full land exclusive sovereignty.” *Id.* at 22.

¹⁶⁵ *Turtle Island*, *supra* note 153. Similar viewpoints have been expressed by tribal advocates during the Fourth Annual Haudenosaunee Conference entitled “New York State: Conflict, Colonization, Coexistence” at Syracuse Law School, November 2–3, 2007. There, Robert Porter, then on the faculty of Syracuse Law School and now President of the Seneca Nation of Indians, said the “settler class” temporarily (still) occupies New York; and that “there is no post-colonial period—the settlers are still here.” *4th Haudenosaunee Video 2*, SYRACUSE UNIVERSITY COLLEGE OF LAW, <http://www.law.syr.edu/academics/center-and-institutes/indigenous-law-governance-citizenship/Past-Events/4-haudenosaunee/h4-2.aspx>. Historian Lawrence Hauptman referred to New York as an “artificial creation.” *4th Haudenosaunee Video 1*, SYRACUSE UNIVERSITY COLLEGE OF LAW, <http://www.law.syr.edu/academics/center-and-institutes/indigenous-law-governance-citizenship/Past-Events/4-haudenosaunee/h4-1.aspx>. The Haudenosaunee embrace the “long view” and are “taught to think seven generations ahead.” *Nation-Building 101*, INDIAN COUNTRY TODAY, October 19, 2011, at 29. Radical tribal advocates at the Haudenosaunee conference and elsewhere view the white dominant society as temporary “colonizers” or “settlers” who should leave. See Dina Gilio-Whitaker, *Occupy Wall Street Stirs Up Radical Ideas in Indian Country*, INDIAN COUNTRY TODAY, December 13, 2011, <http://indiancountrytodaymedianetwork.com/2011/12/13/occupy-wall-street-stirs-up-radical-ideas-in-indian-country-67100> (reporting on suggestions by Native bloggers and activists that OWS should “rethink the idea of occupation altogether” and focus instead on “decolonizing” America).

¹⁶⁶ Steve Newcomb, *Government an Expression of Domination*, INDIAN COUNTRY TODAY, September 10, 2011, http://indiancountrytodaymedianetwork.com/ict_sbc/government-an-expression-of-domination.

exercising their inherent sovereignty over North America. While this advocate acknowledges his idea “seems mad”¹⁶⁷ and openly questions whether there is anything that can be done to overcome the present circumstances (“what then shall we do?”),¹⁶⁸ such radical advocacy incites tribes to flex their tribal powers in the hope of gaining by unilateral action what the courts have not granted. Unfortunately, this advocacy includes condoning or encouraging Indians to engage in violent protests when states exercise lawful sovereign authority within Indian country, as specifically authorized by state and federal courts, and when the state activity is purely economic in character and Indians face no risk of physical harm from the state activity.¹⁶⁹

Some tribal advocates have proposed creating a 51st state that would be home to all tribes and all Indians seeking to maintain tribal relations.¹⁷⁰ This provocative vision of a separate state raises fundamental questions about the status of Indians in this country and what it means to be a citizen of this country. Would non-Indians be allowed to live in the state? Would other racial or ethnic groups in the United States have equal standing to establish their own racially and ethnically homogenous colonies? For example, how would we feel about an all Hispanic “South Florida” or “South California?” How about an all African-American “New Michigan?” Of course, the “balkanization” of the United States based on race or ethnicity would take the country in a direction one hundred and eighty degrees from a melting pot.

C. *Expanding Tribal Sovereignty Through The Courts*

Even though a reasonable reading of the Indian Commerce Clause would deprive the federal government of plenary power over

¹⁶⁷ *Turtle Island*, *supra* note 153.

¹⁶⁸ Savage, *supra* note 24, at 115, 117.

¹⁶⁹ See, e.g., Porter, *supra* note 66, at 128 n.18, 132, 162 (describing violent Indian protests in 1997 in opposition to state efforts “to force Indian businesses to collect state sales taxes from non-Indians who purchase goods within Haudenosaunee territory” and praising “willingness of the Haudenosaunee to fight aggressively against the State’s collection efforts”); Thomas Kaplan, *Highway Fight Widens Gulf Between State and Seneca Nation*, N.Y. TIMES, August 16, 2011, <http://www.nytimes.com/2011/08/17/nyregion/thruway-intensifies-dispute-between-seneca-nation-and-new-york-state.html?pagewanted=all> (quoting Robert Porter as saying “It could be cigarettes today; it was beaver pelts 300 years ago. What we have to defend is the principle: that the State of New York has no authority to reach into our nation.”).

¹⁷⁰ See, e.g., Mark Charles, *A 51st State for Native Americans*, INDIANZ.COM, <http://64.38.12.138/News/2009/012550.asp> (last visited Jan. 7, 2012) (proposing the creation of a “virtual Native American state”).

all Indian affairs,¹⁷¹ the Supreme Court has shown no interest in overruling its precedent that Congress possesses such complete, overriding power over Indian tribes. Indeed, the high court recently fully and without qualification endorsed that position. Even so, at least one tribal advocate (a non-lawyer) encouraged lawyers representing tribes to use the Indian Commerce Clause research and argument “to challenge exercises of state and federal power over Native Americans and their lands and thus to accomplish the ends of self-determination and self-government.”¹⁷² Tribal lawyers do not often challenge the plenary power of Congress but rather seek to expand tribal sovereign authority at the expense of state and local governments. Under the old adage, “the best defense is a good offense,” tribal advocates representing the Oneida Indian Nation of New York (“OIN”) crafted an argument that imbued the OIN with a kind of “super sovereignty” enjoyed by no other sovereign.¹⁷³

D. Expanding Tribal Sovereignty by Statute

Tribal advocates have vowed to seek “national legislation to prevent any further contravention of and disrespect of Native American territorial and personal sovereignty.”¹⁷⁴ In New York State, one tribal advocate has taken direct aim at repealing the state’s Indian Law, to eliminate all restrictions on tribal sovereignty.¹⁷⁵ In doing so, the tribal advocate embraces what he calls “Federal Indian Control Law,” including the legal principles laid down by the Supreme Court in resolving state-tribal conflicts. If the state law is neither authorized by Congress nor preempted by federal law, the Supreme Court requires courts to weigh the state’s need to exercise jurisdiction against the potential infringement of tribal sovereignty.¹⁷⁶

¹⁷¹ See Savage, *supra* note 24, at 115–16.

¹⁷² *Id.* at 118.

¹⁷³ See Oneida Indian Nation of N.Y. v. Madison County, 605 F.3d 149 (2d Cir. 2010) vacated by Madison County v. Oneida Indian Nation of N.Y., 131 S. Ct. 704 (2011) (per curiam). This expansive view of tribal sovereign immunity from suit is not supported by federal Indian law jurisprudence. See discussion in Section II(a) *supra*.

¹⁷⁴ Savage, *supra* note 24, at 118. This advocate did not describe the nature of the proposed legislation. Recently, Congress has taken up bills to amend Public Law 280 which gives states criminal jurisdiction over offenses committed on reservations, and also gives states certain civil jurisdiction over Indians. A proposed amendment in 2011 would make the state jurisdiction non-exclusive, permitting tribal criminal courts. See, e.g., S. 797, 111th Cong. (2009).

¹⁷⁵ Porter, *supra* note 66, at 123.

¹⁷⁶ *Id.* at 145; see New York v. Dibble, 62 U.S. 366, 371 (1859) (holding valid a New York

E. Expanding Tribal Sovereignty Through the United Nations

On December 16, 2010 President Obama announced at the White House Tribal Nations Conference that the United States was “lending its support” to the United Nations declaration on the Rights of Indigenous People, but clarified that it did not support certain provisions within it.¹⁷⁷ Among the controversial provisions that would prevent any administration from fully signing on to the U.N. Declaration is Article 26 which provides in part as follows: “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”¹⁷⁸

Tribal advocates were buoyed by the President’s public support for the U.N. Declaration at the White House conference but deeply disappointed when the administration made clear that its support was conditional and did not extend to certain provisions like Article 26.¹⁷⁹ Tribes can be expected to continue pushing for more complete support from Washington for the U.N. Declaration, while making direct appeals to the international community, and indigenous people everywhere, to alter U.S. domestic policy and recognize robust indigenous sovereignty.¹⁸⁰

III. THE PREVAILING LIMITATIONS ON TRIBAL SOVEREIGNTY

Unless tribes succeed in fundamentally altering the limited nature of the sovereignty they are deemed to legally possess, they will continue to operate as quasi-sovereigns that exercise meaningful sovereign power with respect to their lands and their people, but not much beyond that. In fact, tribal sovereignty is limited even within the reservation inasmuch as “tribes do not, as a general matter, possess authority over non-Indians who come

statute because it did not conflict with any act of Congress or provision of the Constitution).

¹⁷⁷ Caren Bohan, *Obama backs U.N. Indigenous rights declaration*, REUTERS, Dec. 16, 2010, <http://www.reuters.com/article/2010/12/16/us-obama-tribes-idUSTRE6BF4QJ20101216>.

¹⁷⁸ Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/L.67 (Sept. 13, 2007), at 5, http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

¹⁷⁹ See Glenn Morris, *Still Lying After All these Years*, INDIAN COUNTRY TODAY, Feb. 15, 2011, http://indiancountrytodaymedianetwork.com/ict_sbc/still-lying-after-all-these-years.

¹⁸⁰ One example of Indian “nation building” with an international outlook is a partnership between the Navajo Nation and the Oneida Nation of New York. *Nation-Building 101*, *supra* note 165, at 28–29 (discussing that tribes intend to pursue “strategic partnerships with indigenous nations not only within the U.S. but with the rest of the world”).

within their borders.”¹⁸¹ Thus, tribal leaders’ claims to full-fledged government-to-government sovereignty are not supported by historical reality or the existing legal framework. As a result, they are forced to make self-contradictory statements about tribal sovereignty, such as the following:

Tribal governments still need—perhaps more than ever—the federal government’s protection from state designs on their land, businesses, and status as self-governing people . . . These officials need to begin to understand and respect Indian nations’ standing as independent sovereign entities.¹⁸²

IV. CURRENT ISSUES IN STATE-TRIBAL JURISDICTIONAL FRICTION

A. *Property Issues*

1. Real Property Taxes

As a general rule, state and local governments may not tax lands within Indian reservations.¹⁸³ Such lands may be subject to ad valorem taxes if Congress has authorized such taxation in “unmistakably clear” terms.¹⁸⁴ The Supreme Court’s recent decision in *City of Sherrill v. Oneida Indian Nation of New York*¹⁸⁵ addressed whether “parcels of land . . . once contained within the Oneidas’ 300,000-acre reservation . . . last possessed by the Oneidas as a tribal entity in 1805” were subject to city real property taxes after the Oneidas purchased fee title in 1997 and 1998.¹⁸⁶ The Oneidas argued that the parcels were not subject to real property taxes “on the ground that [their] acquisition of fee title to discrete parcels of historic reservation land revived the Oneidas’ ancient sovereignty piecemeal over each parcel.”¹⁸⁷ The Supreme Court noted that non-

¹⁸¹ *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. 316, 328 (2008).

¹⁸² Ray Halbritter, *Improving tribal-state relationships*, INDIANZ.COM, (December 16, 2009), <http://64.38.12.138/News/2009/017806.asp>. Peter d’Errico, a tribal advocate and member of the faculty of the University of Massachusetts, observed that “the contradictions embodied in the concept of “dependent sovereignty . . . produce conflict and confusion in federal Indian law.” d’Errico, *supra* note 98.

¹⁸³ *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 110 (1998) (citations omitted).

¹⁸⁴ *County of Yakima v. Confederated Tribes & Bands of Yakima Nation*, 502 U.S. 251, 259 (1992).

¹⁸⁵ *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005).

¹⁸⁶ *Id.* at 202.

¹⁸⁷ *Id.*

Indians have owned, developed, and governed the area for generations, that it has long had a distinctly non-Indian character, that New York State and its counties and towns have constantly exercised regulatory authority over it, and that the redress sought by the tribe would disrupt the governance of those counties and towns.¹⁸⁸ Based on these factors and the tribe's long delay in seeking judicial relief against parties other than the United States, the Court held "that the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue"¹⁸⁹ and that "standards of federal Indian law and federal equity practice [including the doctrines of laches, acquiescence, and impossibility] preclude the Tribe from rekindling embers of sovereignty that long ago grew cold."¹⁹⁰

Notwithstanding the Supreme Court's decision in *Sherrill*, the Oneidas continued to refuse to pay the delinquent property taxes on similar parcels they had purchased in Madison and Oneida Counties.¹⁹¹ In response to the counties' foreclosure proceeding, the Oneidas sought injunctions in the district court.¹⁹² In due course, the district court enjoined each county from foreclosing on four grounds: (1) under the Non-intercourse Act, the Oneidas' properties are inalienable and therefore the counties cannot take title by foreclosure; (2) the tribe is immune from suit to collect unpaid property taxes; (3) the notices of foreclosure violated due process; and (4) the Second Circuit's 2003 finding in *Sherrill* that the historic Oneida reservation was not disestablished was not abrogated by the Supreme Court's 2005 decision in *Sherrill*, and New York State law exempts reservation land from taxation.¹⁹³

The Second Circuit affirmed on the single ground that "the foreclosure actions are barred by the [Oneidas'] sovereign immunity from suit."¹⁹⁴

The Supreme Court of the United States granted certiorari on two questions:

1. Whether tribal sovereign immunity from suit, to the

¹⁸⁸ *Id.* at 216.

¹⁸⁹ *Id.* at 202–03.

¹⁹⁰ *Id.* at 214, 221.

¹⁹¹ *Oneida Indian Nation of N.Y. v. Madison County*, 605 F.3d 149, 154–55 (2d Cir. 2010).

¹⁹² *Id.*

¹⁹³ *Oneida Indian Nation of N.Y. v. Madison County*, 401 F. Supp. 2d 219, 232 (N.D.N.Y. 2005); *see also* *Oneida Indian Nation v. Oneida County*, 432 F. Supp. 2d 285, 292 (N.D.N.Y. 2006). *aff'd in part, rev'd in part, vacated in part* by *Oneida Indian Nation of N.Y. v. Madison County*, 665 F.3d 408 (2d Cir. 2011) (petition for reh'g en banc pending).

¹⁹⁴ *Madison County*, 605 F.3d at 149.

extent it should continue to be recognized, bars taxing authorities from foreclosing to collect lawfully imposed property taxes; and

2. Whether the ancient Oneida reservation in New York has been disestablished or diminished.¹⁹⁵

Three days before the Counties' merits brief was filed, the Oneidas' counsel notified the Supreme Court that the Oneida Indian Nation had "passed a tribal declaration and ordinance waiving its sovereign immunity to enforcement of real property taxation through foreclosure by state, county and local governments within and throughout the United States."¹⁹⁶ In a *per curiam* decision dated January 10, 2011, the Supreme Court vacated the judgment of the Second Circuit and remanded the case to the Second Circuit "to address, in the first instance, whether to revisit its ruling on sovereign immunity in light of" this development.¹⁹⁷ The Second Circuit elected not to re-visit the sovereign immunity question (accepting the tribe's waiver of its immunity) and proceeded to vacate the district court's injunctions. In doing so, the Second Circuit rejected the other grounds advanced by the tribe in support of the injunctions, with the result that state court actions will now proceed.

The second issue on which the Supreme Court granted certiorari in the *Madison County* case was whether the ancient Oneida reservation in New York has been disestablished or diminished.¹⁹⁸ Although the *Sherrill* decision held that the Oneidas could not exercise sovereignty, in whole or in part, over the lands they had recently purchased within their "historic reservation," the Supreme Court in *Sherrill* said it did not need to decide "whether, contrary to the Second Circuit's determination, the 1838 Treaty of Buffalo Creek disestablished the Oneidas' Reservation."¹⁹⁹ Based on this statement, the district court in the *Madison County* and *Oneida County* cases held that the Oneida reservation in New York is "not disestablished" and that the parcels are, therefore, exempt from real property taxation under state law as lands within an "Indian reservation."²⁰⁰ Although the Second Circuit affirmed the district

¹⁹⁵ Petition for Writ of Certiorari, *Madison County*, 131 S. Ct. 704 (2011) (No. 10-72).

¹⁹⁶ *Madison County*, 131 S. Ct. at 704.

¹⁹⁷ *Id.*

¹⁹⁸ Petition for Writ of Certiorari, *Madison County*, 131 S. Ct. 704 (2011) (No. 10-72).

¹⁹⁹ *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 202, 216 (2005).

²⁰⁰ *Oneida Indian Nation of N.Y. v. Madison County*, 401 F. Supp. 2d 219, 232 (N.D.N.Y. 2005); *Oneida Indian Nation v. Oneida County*, 432 F. Supp. 2d 285, 290, 292 (N.D.N.Y. 2006).

court solely on tribal sovereign immunity from suit, it expressly adhered to the 2003 panel decision in *Sherrill* that the reservation was not disestablished.²⁰¹ The Supreme Court found this issue to be cert-worthy, and it is now back before the Second Circuit on remand.²⁰²

Issues of reservation disestablishment or diminishment²⁰³ have arisen and been litigated around the country.²⁰⁴ Since Indian tribal sovereignty relates to tribes' sovereign lands, resolution of claims concerning the current legal status of ancient historic reservations is a focal point for litigation. Resolution of such claims is critical to determining the extent of tribal sovereignty in its geographic aspect.

2. Land Use/Environmental

As indicated above, Indian tribal sovereignty relates to tribes' sovereign lands. Therefore, in considering the extent to which an Indian tribe may have jurisdiction or authority over land use and regulation, a fundamental question is whether lands are "Indian country." The term "Indian country" is defined for purposes of criminal law in 18 U.S.C. section 1151:

Except as otherwise provided in sections 1154 and 1156 of this Title, the term "Indian country" as used in this chapter means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . (b) all dependent Indian communities within the borders of the United States . . . and (c) all Indian allotments, the

²⁰¹ *Oneida Indian Nation of N.Y. v. Madison County*, 605 F.3d 149, 158 n.6 (2d Cir. 2010).

²⁰² *Madison County*, 131 S. Ct. at 704; *Oneida Indian Nation of N.Y. v. Madison County*, 665 F.3d 408 (2d Cir. 2011) (petition for reh'g en banc pending). The Second Circuit required the OIN to submit a brief, to which the Counties and State of New York replied. A resolution in favor of the Counties would remove a cloud that hangs over central New York created by the fact that the OIN continues to assert various rights based on their "not disestablished" historic reservation even though it has no physical manifestation and the OIN exercises no sovereignty within its boundaries except for a certain 32 acre parcel in the City of Oneida, Madison County.

²⁰³ "Although the terms 'diminished' and 'disestablished' have been used interchangeably at times, disestablishment generally refers to the relatively rare elimination of a reservation while diminishment commonly refers to the reduction in size of a reservation." *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1017 (8th Cir. 1999).

²⁰⁴ *See, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (South Dakota); *DeCoteau v. Dist. Cnty. Court for the Tenth Judicial Dist.*, 420 U.S. 425 (1975) (South Dakota); *Pittsburg & Midway Coal Mining Com. v. Yazzie*, 909 F.2d 1387 (10th Cir. 1990) (New Mexico); *Hagen v. Utah*, 510 U.S. 399 (1994) (Utah); *Solem v. Bartlett*, 465 U.S. 463 (1984) (South Dakota); *Wisconsin v. Stockbridge-Munsee Comty.*, 366 F. Supp. 2d 698 (E.D. Wis. 2004) (Wisconsin).

Indian titles to which have not been extinguished.²⁰⁵

Although by its terms, this definition applies only to crimes, “the Supreme Court has employed it to determine the geographical reach of state and tribal jurisdiction.”²⁰⁶ Whether land held in trust by the United States on behalf of individual Indians or Indian tribes has the status of Indian country is controversial and subject to dispute, even though trust lands are exempt from state and local property taxation.²⁰⁷

Even in Indian country, states may exercise some jurisdiction.²⁰⁸ The Supreme Court has observed that:

[T]he Indians’ right to make their own laws and be governed by them does not exclude all state regulatory jurisdiction on the reservation. State sovereignty does not end at a reservation’s border. Though tribes are often referred to as sovereign entities, it was long ago that the Court departed from Chief Justice Marshall’s view that the laws of [a State] can have no force within reservation boundaries. It is now clear, an Indian reservation is considered part of the territory of the State.²⁰⁹

A full discussion of tribal land rights presents difficult and complicated questions beyond the scope of this article.²¹⁰ Tribal rights may depend on the nature and source of title—whether aboriginal title (or “Indian title”) or title derived from treaties, statutes, executive orders, or actions by prior sovereigns. As noted above, questions may arise as to whether a reservation has been disestablished or diminished. A substantial body of law has developed regarding such discrete issues as conflicting claims to the beds of navigable waters; the leasing of land and natural resources on Indian land; and preservation of Indian graves, cultural items, and sacred sites. Where these tribal rights are implicated or in issue, the extent of tribal rights and sovereignty has been developed by acts of Congress in the exercise of its plenary authority and trust responsibility, by the Department of the Interior in promulgating regulations, and by the federal courts in cases arising under the

²⁰⁵ 18 U.S.C. § 1151 (2012).

²⁰⁶ CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK 69 (4th ed. 2008) (citations omitted) [hereinafter CWAG].

²⁰⁷ *Id.* at 74–78. Similar issues might be raised in regard to land taken into restricted fee status (land owned in fee by a tribe but restricted against alienation).

²⁰⁸ *Nevada v. Hicks*, 533 U.S. 353, 361–62 (2001).

²⁰⁹ *Id.* (internal citations and quotation marks omitted).

²¹⁰ See generally CWAG, *supra* note 206, at 84–142 (devoting a chapter to “Indian Land and Property: Title and Use”).

Constitution, laws, or treaties of the United States.

Environmental regulation represents another complex area subject to jurisdictional disputes between Indian tribes and surrounding non-Indian communities. Tribes may have inherent or delegated authority to legislate regarding environmental protection on their sovereign lands. Federal environmental laws apply in Indian country and federal agencies have authority to implement them. And there may be certain circumstances in which state regulations apply in Indian country although Congress may preempt state laws by explicitly stating its intention to do so. If Congress has not expressly preempted state laws, a court may undertake a preemption analysis and, with respect to Indian country,

must engage in “a particularized inquiry into the nature of the state, federal, and tribal interests at stake.” In such a case, “[s]tate jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.”²¹¹

Jurisdictional conflicts over land use and environmental regulation may arise in the context of horizontal drilling for natural gas and high-volume hydraulic fracturing (sometimes referred to as hydrofracking) in the Marcellus Shale in New York State. “The Marcellus Shale is a black shale formation extending deep underground from Ohio and West Virginia northeast into Pennsylvania and southern New York.”²¹² “Geologists estimate that the entire Marcellus Shale formation may contain up to 489 trillion cubic feet of natural gas throughout its entire extent. . . . [although i]t is not yet known how much gas will be commercially recoverable from the Marcellus in New York.”²¹³ There is great concern across much of New York State about possibly significant adverse environmental and community impacts as a result of hydrofracking.²¹⁴ The NYS DEC has issued a Generic

²¹¹ *Id.* at 434 (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333–34 (1983) and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980)). For detailed discussions of environmental regulation in Indian country, see chapter ten of COHEN (2005), *supra* note 12, and chapter ten of CWAG, *supra* note 206.

²¹² *Marcellus Shale*, NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, <http://www.dec.ny.gov/energy/46288.html> (last visited Jan. 10, 2012) [hereinafter DEC Statement].

²¹³ *Id.*

²¹⁴ See, e.g., Steve Orr, *Fracking: Bane or boon? A look into industry's presence in Pa.*,

Environmental Impact Statement and a Supplemental Generic Environmental Impact Statement to provide a comprehensive review of the potential environmental impacts of hydrofracking in New York and how these impacts might be mitigated, and to assess issues unique to this activity.²¹⁵ Public hearings have been held across the state and substantial public comments have been received.²¹⁶

Assuming (as is likely) that there is natural gas in Marcellus Shale under Indian lands in New York, an Indian tribe could decide that it wants to lease drilling rights to an energy and land management company as part of its economic development. As with other tribal economic development initiatives (see immediately below) tribes might be able to increase the number of wells and their share of the revenue from each well by marketing their lands as tax-free and regulation-free havens. Should that occur, state, federal, and tribal interests (as well as impacted local government and neighboring landowner interests) would be at stake; and, unless preempted by federal law or resolved by agreement, conflicting interests would need to be balanced and rights determined by the courts.

B. Regulated Business

The Seneca Nation of Indians is reaching out to local governments and business leaders to promote regional economic planning, and in the process is touting the Nation's reservation as a haven from burdensome state regulations, able to provide a competitive advantage to businesses that locate there. The ability of tribes to attract businesses based on a favorable tax regime and relaxed or non-existent tribal regulations could be a boon to the tribe's economic development. But the pro-business-friendly environment on reservations has negative consequences for neighboring businesses (and the communities they serve) because

DEMOCRAT AND CHRONICLE, Dec. 18, 2011, [http://www.democratandchronicle.com/article/20111218/NEWS01/112180344/Fracking-Bane-boon-look-into-industry-s-presence-Pa-\(examining the experience with hydrofracking in northern Pennsylvania as holding valuable lessons for New York\)](http://www.democratandchronicle.com/article/20111218/NEWS01/112180344/Fracking-Bane-boon-look-into-industry-s-presence-Pa-(examining%20the%20experience%20with%20hydrofracking%20in%20northern%20Pennsylvania%20as%20holding%20valuable%20lessons%20for%20New%20York).). Comments on DEC's proposed hydrofracking rules doubled from 20,800 in January 9, 2012 to an estimated 40,000 by the close of the response period at midnight January 11. John Campbell, *Want to read 40,000 fracking letters?*, DEMOCRAT AND CHRONICLE, Jan.15, 2012, <http://www.democratandchronicle.com/article/20120115/BUSINESS/201150322/Want-read-40-000-fracking-letters-> (last visited Jan. 8, 2012).

²¹⁵ DEC Statement, *supra* note 212.

²¹⁶ *Id.*

the off-reservation businesses do not enjoy those same benefits and thus are at a competitive disadvantage. For example, “tribal” gas stations and convenience stores that refuse to collect and remit sales and excise taxes on tobacco, gasoline, and other products enjoy a great competitive advantage over businesses that comply with the tax laws. Moreover, the relaxed regulatory environment on reservations may become a haven for illegal business. This already is the case with “pay-day lenders” who charge usurious interest rates, typically to the working poor who live from paycheck to paycheck. These internet lenders were sued by state regulators only to resurface on Indian reservations. The pay-day lenders argue that “the sovereign status of the tribal lands offers them immunity from state payday loan regulation such as interest rate restrictions.”²¹⁷ This unwelcome business scenario could be repeated in other contexts including illegal vice-based activities or businesses that are not per se illegal but are operated illegally. State and local regulators may have to look to Congress to pass federal legislation to stop such noxious reservation-based business practices.

One real world example of unfair competition between tribally-owned and non-Indian business comes from the East Shore of Oneida Lake in Madison County, New York. There, a small supermarket owned by a local businessman opened in 2004 after cleaning up the site in compliance with environmental regulations, obtaining permits and zoning approvals, and subsequently paying property taxes and remitting sales taxes.²¹⁸ One year later, the Oneida Indian Nation opened a megastore, including grocery store offerings, on an adjacent lot without complying with any state or local regulation, obtaining any permits, or doing any environmental cleanup.²¹⁹ The megastore pays and remits no taxes.²²⁰ Unable to compete, the local business, Sunshine Market, has since closed and

²¹⁷ See Joe Mont, *Tribal-Land Payday Loans Spark Reservations*, THE STREET, July 6, 2011, <http://www.thestreet.com/story/11174918/3/tribal-land-payday-loans-spark-reservations.html>; Matt Volz, *Tribe's Lending Business Booming*, ONEIDA DISPATCH, December 27, 2011 (indicating that the Chippewa Cree tribe alone issued 121,000 loans in 2011 at a “whopping 360 percent” interest rate).

²¹⁸ Letter from S. John Campanie, Madison County Attorney, to Franklin Keel, Regional Director of the Eastern Regional Office of the Bureau of Indian Affairs (Feb. 28, 2006), <http://www.madisoncounty.org/motf/MadCoSJCoin.htm> (documenting this and other case studies of unfair competition as part of Madison County's comments on the Oneida Indian Nation's 2005 application to have in excess of 17,000 acres of land taken into trust).

²¹⁹ *Id.*

²²⁰ *Id.*

its property is for sale.²²¹

C. Sales and Excise Taxes

Indian tribes in New York and other states have long resisted the imposition of state sales and excise taxes on products they sell on their reservations, especially highly taxed products such as tobacco products, gasoline, and other petroleum products.²²² Absent Congressional authorization, “[s]tates are categorically barred from placing the legal incidence of an excise tax on a tribe or on tribal members for sales made inside Indian country.”²²³ However, it is well established that states have the authority to tax on-reservation sales of cigarettes (and other products) to non-members of the tribe if the incidence of the tax falls on the customer.²²⁴

A detailed discussion of New York’s attempts to enforce taxes imposed on tribal sales of cigarettes to non-members is beyond the scope of this article and may be found in recent decisions of New York and federal courts.²²⁵ Of particular note, in 2010, New York

²²¹ Tribes that are flush with untaxed casino revenue have a ready supply of working capital to invest in non-gambling enterprises. Such tribes can and do give away rooms and meals to attract more gamblers, distorting the economic playing field in the local food and hospitality industries and deterring non-Indian investors. See Scott Scanlon, *Casino Expansion Plan a Threat to Businesses, Professor Warns*, BUFFALONEWS.COM (August 29, 2011), <http://www.buffalonews.com/city/communities/downtown/article535384.ece>, (last visited January 21, 2012) (“His economic theory when it comes to urban Indian casinos boils down to this: It’s hard to compete with free.”). More broadly, untaxed revenue from tribal casinos can be used to heavily subsidize any type of non-gambling enterprise producing the same kind of uneven playing field and deterrent effect on non-Indian investment across the full spectrum of economic activity.

²²² Although some tribes have alleged that the imposition of sales and excise taxes on reservation sales to non-Indians violates their treaty rights, they have assiduously avoided submitting those arguments to the courts for a ruling, perhaps in recognition that they are not likely to prevail. The operative language of the treaties is limited. See 1794 Treaty of Canandaigua, 7 Stat. 44, 45 (1794) (“[T]he United States shall never claim the [lands reserved to the Oneida, Onondaga and Cayuga Nations in their treaties with the state of New York] nor disturb them . . . in the free use and enjoyment thereof.”); 1842 Treaty with the Senecas, 7 Stat. 586, 590 (1842), Article Ninth (“[P]arties agree to solicit the influence of the Government of the United States to protect such of the lands of the Seneca Indians, within the State of New York, as may from time to time remain in their possession from all taxes, and assessments for roads, highways or any other purpose.”).

²²³ *Wagon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101–02 (2005).

²²⁴ *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 512 (1991) (citing *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) and *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980)). New York State’s authority to tax on-reservation cigarette sales to non-members of the tribes was upheld in *Dep’t of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 64 (1994).

²²⁵ See *Cayuga Indian Nation v. Gould*, 14 N.Y.3d 614, 622–29 (2010), *cert. denied* 131 S.

revoked its “forebearance policy,” amended the Tax Law, and adopted regulations to implement the tax on reservation sales.²²⁶ In response to New York’s stepped-up efforts to collect these taxes, various New York tribes commenced litigation in state and federal courts.²²⁷ Eventually these disputes came before the Second Circuit which, in the context of appeals from the grant or denial of preliminary injunctions, discussed the merits of the issues at length. The court found that “[a]t this pre-enforcement stage, Plaintiffs [the tribes] have not demonstrated that they are likely to prevail on their claim that the amended tax law infringes tribal sovereignty or unduly burdens tribal retailers.”²²⁸

In *Oneida Nation*, the Second Circuit reviewed the applicable law of Indian tribal sovereignty and the tribes’ rights to govern their members and their sovereign territories, including the right of Indian tribes and their members to be exempt from state taxation within those territories.²²⁹ But, the court recognized, “[t]he situation is different . . . when a state seeks to tax non-members who engage in economic transactions on Indian reservations.”²³⁰ Balancing state and tribal interests, the court recognized that non-Indian purchasers seek to evade state cigarette taxes by buying from reservation sellers and the tribes are essentially marketing a tax exemption to them.²³¹ “In recognition of the foregoing, the Supreme Court has stated that ‘principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, [do not] authorize Indian tribes . . . to market an exemption from state taxation to persons who would normally do their business elsewhere.’”²³² The court explained that the reason for this is that “[s]tates have a valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on reservations; that interest outweighs tribes’ modest interest in offering a tax exemption to customers who would ordinarily shop elsewhere.”²³³

Ct. 353 (2010); *Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154, 158–62 (2d Cir. 2011).

²²⁶ *Oneida Nation of N.Y.*, 645 F.3d at 158–62.

²²⁷ *Id.* at 157, 163; *Seneca Nation of Indians v. State of New York*, 31 Misc. 3d 1242A, 2011 N.Y. Misc. LEXIS 2867 (N.Y. Sup. Ct., June 8, 2011) (related proceeding).

²²⁸ *Oneida Nation of N.Y.*, 645 F.3d at 175.

²²⁹ *Id.* at 164–65.

²³⁰ *Id.* at 165.

²³¹ *Id.* at 165 (citing *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 145, 155 (1980)).

²³² *Id.* (citing *Colville Reservation*, 447 U.S. at 155).

²³³ *Oneida Nation of N.Y.*, 645 F.3d at 165 (citing *Dep’t of Taxation & Fin. of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994)).

Although the state has authority to impose taxes on reservation sales of cigarettes to non-members of the tribe, under *Potawatomi*, “[s]uits against Indian tribes [to collect the taxes] are . . . barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.”²³⁴ Therefore, New York has amended its tax law and adopted regulations to enable it to collect these taxes by precollection of the tax and dual allocation mechanisms (the coupon and prior approval systems).²³⁵ The Second Circuit’s *Oneida Nation* decision includes a detailed discussion of the statutory and regulatory scheme.²³⁶ Some tribes and tribal members are now manufacturing their own cigarettes and have publicly taken the position that New York’s authority to tax sales to non-members does not extend to cigarettes manufactured by Indians on Indian lands.²³⁷ The tribes’ decision to take the production in house should not alter the legal analysis. The taxable event remains the same in either case: the tax-free sale to a non-member of an item on which the buyer would pay taxes if purchased off the reservation. The State’s interest in capturing that sales tax remains the same. The tribes’ claim to tax immunity for such “home-grown” products finds no support in the existing law.

Likewise, the Six Nations have argued without a basis in law that they enjoy a right to engage in “intertribal commerce” throughout the United States and Canada, free of any state tax and regulation for Native-manufactured goods.²³⁸ The Six Nations have also argued for a related immunity that would attach to shipments between reservations belonging to members of the Six Nations.²³⁹ But as soon as a tribe ships goods to another reservation (whether within or outside a confederation like the Six Nations) and the product leaves the reservation, it is in off-reservation interstate commerce and subject to state taxation and regulation. This conclusion follows from a bedrock principle of federal Indian law that, absent federal law to the contrary, tribal commerce “beyond

²³⁴ *Okla. Tax Comm’n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991).

²³⁵ *Oneida Nation of N.Y.*, 645 F.3d at 160–62.

²³⁶ *Id.* at 166–74. Other ways states could collect such taxes include seizing unstamped cigarettes off the reservation, assessing wholesalers who supplied unstamped cigarettes to tribal stores, entering into agreements with tribes for the collection of the taxes or possibly suing individual agents or officers of the tribes. *Potawatomi*, 498 U.S. at 514.

²³⁷ See Dan Herbeck, *Home-grown solution to tax problem*, BUFFALO NEWS, May 19, 2011, <http://www.buffalonews.com/city/article426766.ece>.

²³⁸ See, e.g., Brief of Plaintiff Appellee Seneca Nation of Indians, *Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154, 174 (2011), 2011 WL 286276.

²³⁹ *Id.*

reservation boundaries” is almost always “subject to non-discriminatory state law otherwise applicable to all citizens of the state.”²⁴⁰ Proving the point, a federal district court recently rejected a claim of tribal sovereignty over Native American cigarettes being shipped from one reservation to another.²⁴¹ Tribes and their members are not “super citizens’ who [can] trade in a traditionally regulated substance free from all but self-imposed regulations.”²⁴²

CONCLUSION

Disputes between sovereigns raise important political, legal, and cultural issues. The concept of Indian tribal sovereignty is anomalous, complex, and evolving. Legislators, judges, and the public who wish to understand modern-day assertions of tribal sovereignty should study the legal framework established by the Supreme Court of the United States and legislation enacted by the United States Congress. It is that legal framework that defines and limits assertions of tribal sovereignty. Tribes may unilaterally try to exercise authority beyond recognized legal limitations on Indian tribal sovereignty, relying instead on a general concept of an “independent sovereign nation.” And tribal advocates will continue to bristle at the substantial limitations on tribal sovereign authority imposed by “the colonizers” law. But that law recognizes the historical reality and practical complexity of relations between Indian tribes and the dominant non-Indian culture and people, including federal, state, and local governments. When jurisdictional disputes arise over Indian tribal sovereignty in the 21st century, the courts must continue to adjudicate them within the framework of the Constitution and law of the United States.

²⁴⁰ *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973) (citations omitted).

²⁴¹ *See Muscogee (Creek) Nation v. Henry*, No. CIV 10-019-JHP, 2010 WL 1078438, at *3 (E.D. Okla. March 18, 2010) (“Just as China or New York State may not decree that their products are immune from [state] taxation when those goods enter [Oklahoma], neither may a Native American tribe claim such special treatment.”).

²⁴² *Rice v. Rehner*, 463 U.S. 713, 734 (1983). *See also* *Okla. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 466 (1995) (tribes do not have “supersovereign authority to interfere with another jurisdiction’s sovereign right to tax . . . within that jurisdiction’s limits”).