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Sarah Krakoff

University of Colorado Law School

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The Virtues and Vices of Sovereignty

SARAH KRAKOFF*

I. INTRODUCTION

As the title to this symposium suggests, American Indian law is indeed at a crossroads. The paths of American Indian tribal sovereignty are diverging in the following way. The United States Supreme Court, the progenitor of the legal doctrine of tribal sovereignty, appears skeptical of the doctrine's continuing viability. The Court's path is therefore veering away from any strong notion of retained inherent tribal sovereignty. American Indian tribes, the sources and perpetuators of de facto tribal sovereignty, are on a different path. They are more committed than ever to enacting their sovereignty on the ground, as well as promoting and protecting its legal status in the courts and in Congress. Felix Cohen's vision of federal Indian law is alive and well from the tribal perspective, but in trouble with a significant faction of the intended audience for his treatise: the federal courts.

Rather than dwell on the ways in which the Supreme Court is abandoning core principles and doctrines of federal Indian law,¹ I want to take this occasion to explore at a more conceptual level the virtues and vices of sovereignty. Without an understanding of tribal sovereignty's virtues, there is little chance that the Court will deviate from its current path. Equipped with a better sense of what tribal sovereignty means and what it does, perhaps the Court—or at least some members of it—will be less troubled by tribal sovereignty's formalist shortcomings and more disturbed by the dearth of constitutional support for the Court's divestment of tribal sovereign powers.² Even if the Court is not listening (a more than

* Associate Professor, University of Colorado School of Law. I am grateful to Janel Falk and Celene Sheppard for their research assistance.

¹ Other scholars have already dwelled, forcefully and convincingly, on this topic. See generally Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Tribal Authority over Nonmembers*, 109 YALE L.J. 1 (1999) (examining and analyzing the Supreme Court's concept of tribal sovereignty); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice, and Mainstream Values*, 86 MINN. L. REV. 267 (2001) (describing how the Supreme Court has made radical departures from established principles of Indian Law).

² See Philip P. Frickey, *(Native) American Exceptionalism in American Public Law*, 119 HARV. L.

distinct possibility), it is important for the rest of us to understand what we might be losing if tribes lose their legal sovereignty.

Here is the idea that I will sketch out in a preliminary fashion in the following pages. The Court is skeptical of tribal sovereignty for two predominant reasons.³ First, there is a formalist objection to the paradoxical nature of the legal doctrine. Second, the Court exhibits an inchoate sense that tribal sovereignty is little other than the contradictory doctrine that the Court itself has generated. The tempered sovereignty that tribes possess is therefore in need of a defense. The defense herein has a positive and a negative aspect. The positive part of the defense consists first of describing the historical and philosophical pedigree for tempered sovereignty, and then putting forth an argument for tempered sovereignty's virtues. Those virtues include preserving the prerogative of a people to choose a form of government that protects distinct yet evolving cultures.

The negative part will wade into discussions of the powers of another sovereign: the United States. As recent legal and historical events reveal, sovereignty in its absolutist formulation has considerable potential for vice. Moreover, the pedigree for absolute sovereignty is no more sanctified than that for divided sovereignty. Given the virtues of tempered sovereignty and the vices of absolute sovereignty, the Supreme Court might want to reconsider its current path. It is not too late for the Court to step back from the crossroads.

II. THE COURT'S SOVEREIGNTY SKEPTICISM

Two recent cases, *United States v. Lara*⁴ and *City of Sherrill v. Oneida Indian Nation of New York*,⁵ highlight the Court's skepticism toward American Indian tribal sovereignty. As scholars have thoroughly discussed, the Court's recent role in Indian law has been to divest tribes of powers over non-tribal members and to allow increasing state regulation of tribal affairs.⁶ The Indian law canons of construction, first coalesced by Felix Cohen,⁷ have been seldom employed in these cases. Rather than await clear direction from Congress, in most matters the Court now applies

REV. 431, 436 (2005) ("[T]he Court has injected itself into Indian affairs despite having an even more inferior constitutional pedigree than Congress has.").

³ This short Article is part of a larger ongoing project exploring the meanings and functions of sovereignty. See Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109 (2004) (examining how the Navajo Nation has enacted its sovereignty in response to federal law). The next phase will involve both a longer paper on conceptions of sovereignty and a comparative study of how other Indian nations have adapted to federal legal limitations.

⁴ 541 U.S. 193 (2004).

⁵ 544 U.S. ___, 125 S. Ct. 1478 (2005).

⁶ See generally Frickey, *supra* note 1 (discussing divesting tribal sovereignty).

⁷ See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122-23 (1941) (summarizing basic principles of Indian law).

its own balancing tests and categorical rules to determine the doctrinal content of tribal sovereignty.⁸ Underlying these trends are two forms of skepticism about tribal sovereignty's continuing vitality. The first is a formalist concern with the paradox of a sovereignty that is subject to the purported plenary control of another government. The second is more factually based, querying whether tribal sovereignty actually exists out there in the world in any meaningful sense.

The first form of skepticism is most evident in Justice Thomas's concurring opinion in *Lara*, a case which affirms Congress's power to overrule the Court on the scope of American Indian tribal sovereignty. In his concurrence, Justice Thomas asserts that Indian policy is "schizophrenic" and that this "confusion continues to infuse federal Indian law and our cases."⁹ In particular, Justice Thomas cannot reconcile the doctrine of congressional plenary power with the doctrine of retained inherent tribal sovereignty.¹⁰ Sovereignty connotes powers inherent to a government, which is to say powers that derive from the existence of the government itself and not from the consent of any external nation or entity. The Supreme Court's statements that Congress has plenary power to alter and even terminate American Indian tribal sovereignty therefore raise serious questions about either the viability of the plenary power doctrine or of the tribal sovereignty doctrine. According to Justice Thomas, we cannot have it both ways.¹¹

Many scholars would agree. With few exceptions, the scholars who address the plenary power–sovereignty paradox would eliminate or temper the plenary power doctrine.¹² Justice Thomas does not state definitively whether, if it were up to him, he would cure Indian law's schizophrenia consistent with these scholarly opinions, or whether he would attack the other end of the paradox and instead abolish the doctrine of retained inherent tribal sovereignty. There is at least the whiff of a suggestion that he would opt for the latter, or even for both.¹³ Even if Justice Thomas would reconsider plenary power, other justices are unlikely to go along.¹⁴ It is predictable, therefore, that the Court will leave plenary power untouched, but

⁸ See generally Getches, *supra* note 1.

⁹ *Lara*, 541 U.S. at 219 (Thomas, J. concurring).

¹⁰ See *id.* at 214–15.

¹¹ *Id.* at 215.

¹² See Nell Jessup Newton, *Federal Power Over Indian Nations: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 239–40 (1984); see also T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* 126–40 (discussing constitutional limits on the Indian law plenary power doctrine); Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1072 (2004) (suggesting that congressional plenary power exists with respect to some Indian tribes but not others).

¹³ See *Lara*, 541 U.S. at 214–15 (Thomas, J., concurring) (describing both the plenary power doctrine and the doctrine of retained inherent sovereignty as "doubtful").

¹⁴ See *id.* at 200–04 (affirming Congress's "plenary power" over Indian affairs).

will continue to decide cases involving the extent of tribal sovereignty, frequently finding against tribes.

Only Justice Thomas has voiced explicitly the formalist objection to tribal sovereignty.¹⁵ But the plenary power-retained sovereignty paradox that he articulates likely haunts, in an inchoate manner, the thinking of at least some of the other justices. Without either a very strong sense of the restrained role to which the Court should relegate itself, or a level of comfort with the normative value of tribal sovereignty, the formalist shortcomings of tribal sovereignty surely shape the lens through which the Justices view exercises of tribal power.

Indeed, again this past term the Supreme Court nibbled away at the notion of retained inherent tribal sovereignty. In *City of Sherrill*, the Court applied the equitable doctrines of laches, acquiescence and impossibility to defeat the Oneida Indian Nation's assertion of its sovereign immunity from local property taxes.¹⁶ The tribe owned the properties in question in fee simple and had purchased them on the open market. However, the parcels were within the original boundaries of the tribe's reservation,¹⁷ and the Supreme Court had earlier held that the tribe's lands had been taken from them illegally in violation of federal law.¹⁸ The tribe therefore argued that by reacquiring its treaty-guaranteed lands, it united its treaty-based title with present legal title, and the categorical prohibition on state or local taxation of tribal property within tribal territory should apply.¹⁹ As I discuss elsewhere, the Court could not have ruled against the Oneida Indian Nation on the merits without doing serious damage to the Indian law doctrines of reservation diminishment and state taxation of tribal property.²⁰ Instead, the Court avoided the merits and held that the tribe was barred by equitable defenses from asserting its sovereignty.²¹

In *City of Sherrill*, the second form of sovereignty skepticism, which I will call existential skepticism, does all the work. Rather than discuss overtly judicial discomfort with the logic of a sovereignty that is subject to defeasance by another government, the *City of Sherrill* Court implied, through an exceptional application of equitable doctrines,²² that tribal

¹⁵ See *id.* at 215 (Thomas, J., concurring).

¹⁶ *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. ___, 125 S. Ct. 1478, 1494 (2005).

¹⁷ *Id.* at 1488.

¹⁸ *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 232-33 (2005).

¹⁹ *City of Sherrill*, 544 U.S. at ___, 125 S. Ct. at 1488.

²⁰ See Sarah Krakoff, *City of Sherrill v. Oneida Indian Nation of New York: A Regretful Postscript to the Taxation Chapter in Felix S. Cohen's Handbook of Federal Indian Law*, 41 TULSA L. REV. 5, 9-10 (2006).

²¹ *City of Sherrill*, 544 U.S. at ___, 125 S. Ct. at 1483.

²² See Krakoff, *supra* note 20, at 12-17 (describing the misapplication of laches to the Oneida Indian Nation's claims).

sovereignty can simply wither with the passage of time.²³ In the second paragraph of the majority opinion, Justice Ginsburg twice referred to tribal matters as “ancient,” once in reference to New York’s purchase of tribal lands, and again referring to the tribe’s sovereignty itself.²⁴ The Court’s language paints a picture of a tribe that passively let go of its land and sovereign identity and emerged yesterday to start buying property and otherwise make a mess of things in upper New York state. The history of the Oneida Indian Nation’s land claims tells an entirely different story: one of resistance, federal abdication of responsibility, and state belligerence.²⁵ The Court’s misrepresentation of this history is best explained by the Court’s view of tribal sovereignty as a flimsy construct, existing largely by force of the Court’s own tolerance for this doctrinal relic. This view is captured in the Court’s description of the Oneida Indian Nation’s sovereignty as “embers . . . that long ago grew cold.”²⁶

The Court’s twin skepticisms call for a response. Tempered sovereignty is just as defensible as a matter of historical and theoretical pedigree than absolute sovereignty. Furthermore, the imperfect, or as Professor Frickey has put it, “exceptional” doctrine of American Indian tribal sovereignty²⁷ protects values about which we care deeply as a nation. Tempered sovereignty’s virtues stand in contrast to absolute sovereignty’s vices, and the Court should therefore be reluctant both to snuff out the former and acquiesce in the latter.

III. THE VIRTUES OF TEMPERED SOVEREIGNTY

A. *Tempered Sovereignty’s Pedigree: Divisible and Popular Sovereignty*

Underlying the formalist and existential skepticisms about tribal sovereignty is the concern that partial sovereignty is no sovereignty at all.²⁸ Early theories of sovereignty as well as recent developments around the globe provide a different view. Regarding the historical pedigree, Michael Lind has argued that the proper conception of sovereignty is not as a fixed quantity, but rather as a divisible bundle of powers.²⁹ According to Lind, “divisible sovereignty” has deep historical roots. Absolutist notions of

²³ *Id.* at 6.

²⁴ *City of Sherrill*, 544 U.S. at ___, 125 S. Ct. at 1483.

²⁵ See generally Krakoff, *supra* note 20 (discussing troubled history of the Oneida Nation’s relationship with the federal government); see also Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605 (2006).

²⁶ *City of Sherrill*, 544 U.S. at ___, 125 S. Ct. at 1490.

²⁷ See Frickey, *supra* note 2, at 437–43 (describing the exceptional foundations of federal Indian law).

²⁸ See *supra* Part II.

²⁹ See Michael Lind, *Compounded and Divided: Toward a Synthesis of Popular Sovereignty and Divisible Sovereignty* 3, 21 (unpublished manuscript, on file with the *Connecticut Law Review*).

sovereignty have unfortunately displaced this more accurate and constructive conception of how a government may consent to disbursing some of its powers.³⁰ Lind goes so far as to describe indivisible—or absolute—sovereignty as “an intellectual dead end.”³¹ In addition, Lind discusses sources of sovereignty, arguing that popular sovereignty (the idea of a people coming together to choose a form of government) is the most democratic source.³²

Divisible and popular sovereignty are salient in the American Indian nation context. The notion of sovereignty as a divisible bundle of powers is at the core of federal Indian law’s persistent formulation of retained tribal powers. From the time that Justice John Marshall first declared that Indian tribes were best conceptualized as “domestic dependent nations,” retaining attributes of sovereignty in terms of internal domestic matters but ceding power over foreign affairs,³³ the Court has consistently recognized that Indian tribes retained any inherent powers not inconsistent with their non-foreign-nation status.³⁴

Yet some might object that Indian nations did not consent to disburse all of the powers that they have lost, and that, therefore, divisible sovereignty fails to rescue tribes from their sovereignty paradox. I will not address this objection in depth here. To keep the divisible sovereignty concept alive, it is sufficient to note three sources in support of the argument that the federal government’s unilateral divestments of tribal powers rest on questionable legal foundations. First, numerous treaties and treaty substitutes promise tribes a persistent measure of self-governance, and set out the consensual terms for the cession of tribal powers.³⁵ Judicial canons of interpretation applied to Indian treaties reinforce this view, construing treaties as reserving any tribal rights not explicitly ceded.³⁶ Second, scholars have argued that the Constitution does not authorize unilateral divestment of tribal powers, and that Congress has exceeded its legal authority when it has extinguished aspects of tribal sovereignty without tribal consent.³⁷ Third, the Constitution

³⁰ *Id.* at 5 (describing the ways in which even the Westphalian system of sovereignty, often held up as the model of “juridically equal sovereign states,” in fact accepted “both the idea of divisible sovereignty and the idea of states with varying degrees of independence”).

³¹ *Id.* at 3.

³² *Id.* at 9, 12.

³³ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

³⁴ *See, e.g., United States v. Wheeler*, 435 U.S. 313, 322 (1978) (holding that tribes have retained inherent power to impose criminal punishment on tribal members).

³⁵ *See* CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 14 (1987).

³⁶ *See* COHEN’S *HANDBOOK OF FEDERAL INDIAN LAW* § 2.02[1] (Nell Jessup Newton et al. eds., 2005 ed.) (“[T]reaties and agreements are to be construed as the Indians would have understood them, and tribal property rights and sovereignty are preserved unless Congress’s intent to the contrary is clear and unambiguous.”) (citations omitted).

³⁷ *See generally* Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 *ARIZ. ST. L.J.* 113 (2002) (critiquing the constitutional underpinnings of the plenary power doctrine and

provides even less textual authority for unilateral judicial divestment of tribal powers.³⁸ While the premise that all unilateral incursions into tribal sovereignty are extra-legal warrants further investigation, each of these arguments provides sufficient heft to the notion to accept initially that divisible sovereignty applies in the Indian nation context.

In terms of popular sovereignty, there are several strands of support for the idea that tribal people are the ultimate source of their forms of government. Notwithstanding the Supreme Court's recent implicit divestiture spree, the Court has consistently affirmed the core tribal sovereign prerogative to determine the forms of tribal self-government and, crucially connected to this, the criteria for tribal membership.³⁹ Despite all the other intermeddling in tribal affairs, the notion that tribal people can and should choose for themselves how to construct their governments has remained undisturbed.⁴⁰

In addition, prominent tribal members have strongly expressed the view that tribal people are the source of tribal sovereignty. Raymond Etcitty, legislative counsel to the Navajo Nation Tribal Council, put it this way: "The fundamental principle is that the government comes from the people. The government can't be done away with [by the Supreme Court or any other federal branch] because the people have formed it. The Constitution never took away Indian self-governance; that governance flows from the people."⁴¹

In a similar vein, Levon Henry, executive director of DNA-Peoples Legal Services and former attorney general for the Navajo Nation, gave the following response to a query about the meaning of tribal sovereignty:

Ask 100 people you'll get 100 different answers. . . . I don't think I could ever define it. It's more of an experience than anything. The experience of being on any reservation, taking into account the tribe's culture, traditional practices, religion, how they see themselves. . . . I was talking to my uncle who is an educator . . . he was talking about the Navajo language and teaching it to young students, "You have to get yourself in a frame of mind where you are looking at something and you have to describe an object, what does it do, what is its

arguing that Congress is only authorized to engage in truly bilateral decision-making with Indian tribes); see also Newton, *supra* note 12 (providing historical review of origins of plenary power doctrine).

³⁸ See Frickey, *supra* note 2, at 479–80.

³⁹ See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) (holding that the Indian Civil Rights Act does not authorize federal review of tribal criteria for membership).

⁴⁰ Cf. *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 198 (1985) (holding that the source of the Navajo tribe's power to tax was its retained inherent power and that the tribe's decision not to organize its government under the Indian Reorganization Act had no negative impact on its sovereign powers).

⁴¹ Krakoff, *supra* note 3, at 1163 (quoting a telephone interview with Raymond C. Etcitty, Navajo Nation Legislative Counsel on July 7, 2003).

purpose, not just what is its label. Only when you are in that frame of mind can you understand the language.” It’s the same thing here—only when you have experienced it can you describe what it is—for you. You just can’t label it. It has to be experienced.⁴²

Mr. Henry’s nuanced answer reflects a larger sense that exists throughout Indian country that tribal sovereignty is intimately connected to each tribal member’s experience of political, cultural and personal identity.⁴³ From this sense, it is not a great leap to conclude that tribal members perceive that they are indeed the ultimate source of their tribal government’s sovereignty.

The divisible and popular sovereignty concepts illuminate the ongoing vitality of American Indian tribal sovereignty. To be sure, there is more work to be done to situate these concepts fully and convincingly in the American Indian context. But there is enough here, including the significant notion that absolutist conceptions of sovereignty are an intellectual dead end, to counter the formalist concern that incomplete sovereignty is a hopeless oxymoron.

B. *The Functions of Tempered Sovereignty*

Addressing the existential form of skepticism requires moving beyond the historical and theoretical pedigree. Abstractions, particularly in defense of entities as theoretical as “sovereigns,” rarely, if ever, stand up in the policy world against more pragmatic concerns. And Indian tribes today face an array of powerful policy opponents, including corporate gaming interests, states, non-Indian property and business owners, municipalities in need of water, and so on.⁴⁴ Certainly for the skeptical members of the Court, something more concrete is required.

Here is my hypothesis: The overriding function of tribal sovereignty is that it constitutes and provides a protective shell around tribal life and culture. Sovereignty is the necessary buffer that allows distinct, unique, and endemic cultures to survive.⁴⁵ They survive not by remaining static—if that were the goal, then museums could substitute for Indian tribes—but

⁴² Interview with Levon Henry, Executive Director of DNA-Peoples Legal Services in Window Rock, Ariz. (Dec. 10, 2003) (on file with the *Connecticut Law Review*).

⁴³ See Krakoff, *supra* note 3, at 1153–56 (describing the process through which Navajos gain recognition of their inherent rights from the federal government).

⁴⁴ See, e.g., Jan Golab, *The Festering Problem of Indian “Sovereignty”*, THE AMERICAN ENTERPRISE ONLINE, Sept. 2004, http://www.taemag.com/issues/articlesID.18147/article_detail.asp (asserting that tribal sovereignty is just a cover for corrupt gaming enterprises and that the tribes should back off and submit to state regulation or be subject to congressional legislation terminating sovereignty).

⁴⁵ See Carole Goldberg-Ambrose, *Not “Strictly” Racial: A Response to “Indians as Peoples”*, 39 UCLA L. REV. 169, 184 (1991) (“Very simply, if Indians do not have a protected land base and some substantial measure of self-determination, Indian culture will fade and ultimately disappear.”).

by evolving in the way that all cultures do, and sometimes even into peoples that seem not to fit any of our romantic notions of what is "Indian."⁴⁶ Crucial to survival of the culture is the survival of the governing structures that also evolve; the enactment of tribal sovereignty is itself an expression of tribal culture.⁴⁷ The fate of tribal political structures and cultures is intertwined. To put it bluntly, without sovereign American Indian tribes, there would be no American Indians.⁴⁸ This would be a huge, devastating, tragic loss to us as a country. This hypothesis is not provable scientifically, but the following threads are an attempt to win over skeptical readers.

1. *The Historical Thread*

The history of federal Indian policies towards tribes shows that Indian people have fared the worst when the federal government has tried to eliminate tribes. The most extreme example is the allotment and assimilation period, the policies of which predominated from the 1850s through the early 20th century.⁴⁹ During allotment and assimilation, the federal government embarked on several simultaneous programs that were designed, collectively, to eliminate the separate political and cultural existence of tribes.⁵⁰ These programs included carving up Indian land-holdings and requiring individual Indian ownership, as well as the sale of any "surplus" lands to non-Indians. The result of the land policies was a net loss of approximately 90 million acres of tribal land and complicated land ownership patterns that haunt federal Indian law and complicate tribal governance to this day.⁵¹ Another priority during this period was to remove Indian children from their homes and educate them in predominately Christian boarding schools, where Native language and culture was prohibited.⁵² Other policies discouraging the practice of Native religions even on reservations complemented the boarding school goals.⁵³

⁴⁶ Some of the East Coast tribes that have been able to revive themselves through gaming are often subject to the criticism that they hardly look or seem to be Indian.

⁴⁷ See Krakoff, *supra* note 3, at 1195 ("[R]eacting to federal legal definitions of sovereignty can itself become a forum for the enactment of tribal sovereignty.").

⁴⁸ See Goldberg-Ambrose, *supra* note 45, at 184.

⁴⁹ See Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 9 (1995) (summarizing philosophy and practices of the allotment era).

⁵⁰ *Id.*; see also VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 8–12 (1983) (discussing allotment policies).

⁵¹ See generally DELORIA & LYTLE, *supra* note 50, at 8–12 (discussing allotment policies beginning with President Arthur in 1881 through the early 20th century).

⁵² Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 776–805 (1997) (describing educational and other policies that enlisted religious organizations to assimilate American Indians).

⁵³ Allison M. Dussias, *Waging War with Words: Native Americans' Continuing Struggle Against the Suppression of Their Languages*, 60 OHIO ST. L.J. 901, 905–21 (1999) (describing programs aimed at eliminating Native language and culture).

On their own terms, the Allotment policies were strikingly unsuccessful. American Indians did not transform instantly into successful farmers and market participants. Many were defrauded and lost their land-holdings, and many were faced with inhospitable soil and climate, rendering the utopian agrarian vision an unattainable joke.⁵⁴ Likewise, the effort to eradicate Indian culture left a legacy of broken family structures that to this day creates serious social problems in Indian country. The federal government acknowledged these failures in the Meriam Report,⁵⁵ and on the basis of the Report's findings, embarked on a swift reversal of its policies eliminating tribes, opting instead for the revival of tribal governments as the way to restore economic health as well as cultural integrity to Indian people.

Similarly, as Charles Wilkinson eloquently describes, the termination era of the 1950s, in which the federal government set out to end the federal-tribal relationship with a number of tribes, had devastating effects on the morale and well-being of tribal peoples.⁵⁶ "Every terminated tribe floundered. . . . They made no measurable improvements. Most found themselves poorer, bereft of health care, and suffering a painful psychological loss of community, homeland and self-identify."⁵⁷ Without a land-base or a government to call their own, many tribal members left their reservation homes. Many others were deliberately relocated under the auspices of the termination era's urban relocation program.⁵⁸ At the ebb of this brief but harrowing policy period, Indian people became all the more committed to ensuring that their sovereignty would be restored. They saw it as the key to addressing the myriad economic and social problems that were eating away at their ability to remain distinct peoples.⁵⁹

Much more can and should be added to this thread. However, for my purposes here, this brief review of allotment and termination is sufficient to demonstrate the plausibility of the hypothesis that Indian peoples and cultures have been at the highest risk of extinction when their separate political status has been targeted for destruction.⁶⁰

2. *The Economic Development Thread*

Consistent with the harsh lessons from history, research today reveals

⁵⁴ DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 170-73 (5th ed. 2005) (quoting official documents reporting Indian land loss and other allotment failures).

⁵⁵ See generally INST. FOR GOV'T RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION, at 1-55 (Johnson Reprint Corp. 1971) (1928) (the Meriam Report).

⁵⁶ See CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 81-82 (2005) (describing effects of termination).

⁵⁷ *Id.* at 81.

⁵⁸ *Id.*

⁵⁹ *Id.* at 184-89 (recounting Menominee efforts to restore tribal status).

⁶⁰ See Goldberg-Ambrose, *supra* note 45, at 184 (coming to similar conclusions relying on effects of the termination era).

that tribal sovereignty is a necessary element of tribal economic development.⁶¹ Researchers at the Udall Center for Studies in Public Policy and the Harvard Project on American Indian Economic Development have concluded, after extensive empirical study of tribal economic development, that “tribal control over tribal affairs is the *only* policy that works for economic development.”⁶²

Consistent with the Udall Center’s conclusion, my own research reveals the ways in which federal judicial decisions limiting tribal regulatory and taxing powers inhibit a tribal government’s ability to provide employment opportunities, consumer protection, and engage in non-extractive forms of revenue generation.⁶³ If these trends continue, Indian nations will be increasingly unable to engage in economic activities involving non-tribal members without ceding the ability to ensure that tribal norms and values are reflected in the policies regulating these activities. Judicial skepticism about tribal sovereignty may therefore become a self-fulfilling prophecy.

3. *Weaving the Threads*

The historical and economic development threads support a working conclusion that healthy tribal governments, exercising sovereign powers without excessive bureaucratic oversight from the federal government, are best able to meet the unique needs of their people. Legal sovereignty promotes healthy tribal economies that in turn provide space for the protection and evolution of ancient, yet still vibrant, cultures. The values reflected in perpetuating these cultures are those that are dear to the norms of our nation: embracing tradition, celebrating differences, fortifying family, and allowing religion. Coming to terms with a legal sovereignty that nurtures these values for American Indian nations would be a healthy reconciliation of our colonial inheritance.

It is worth tolerating tempered sovereignty’s purported formalist shortcomings to reach this reconciliation, particularly given the conceptual grounding provided by divisible and popular sovereignty. If it is even possible, let alone probable, that I am right about the connection between American Indian nation political sovereignty and the survival of distinct American Indian cultures and communities, then at a minimum the federal

⁶¹ See Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Impairing the Chances for Economic Development on American Indian Reservations*, in *WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT* 1, 14–15 (Stephen Cornell & Joseph P. Kalt eds., 1992) (“[I]n our research two factors more than any others distinguish successful tribes from unsuccessful ones: *de facto* sovereignty and effective institutions of self-governance.”).

⁶² Stephen Cornell & Jonathan Taylor, *Sovereignty, Devolution, and the Future of Tribal-State Relations* 4 (June 26, 2000) (paper presented at the Nat’l Cong. of Am. Indians Mid-Year Session), available at <http://www.udallcenter.arizona.edu/nativenations/pubs/tribal%20state%relations.pdf>.

⁶³ See Krakoff, *supra* note 3, at 1168–80 (describing effects of tax cases); *id.* at 1156–62 (describing effects of regulatory decisions).

government, and in particular the judicial branch, should consider adopting a precautionary principle when it comes to snuffing out tribal sovereign powers, opting to live with a little formalist indigestion rather than risk threatening a people's survival.

IV. THE VICES OF ABSOLUTE SOVEREIGNTY

A. *The Fallacy of Absolute Sovereignty's Pedigree*

In his defense of divisible sovereignty, Michael Lind is highly critical of formulations of sovereignty that insist that it must be "absolute" or "indivisible."⁶⁴ According to Lind, "[i]f the theory of divisible sovereignty compares sovereignty to a bundle of sticks, which can be assigned to different authorities, the theory of unitary sovereignty treats sovereignty as a fluid measure, like a quart or a gallon. If you pour out some sovereignty, you have less than a full measure."⁶⁵

The all-or-nothing conception of sovereignty is inconsistent with historical practice, even during the supposed heyday of absolutist formulations of sovereignty in 17th-century Europe. "The 'Westphalian system,' from the Peace of Westphalia in 1648 up until the 20th century, was one that accepted both the idea of divisible sovereignty and the idea of states with varying degrees of independence."⁶⁶ Furthermore, the absolutist formulation obscures the ability to distinguish between actual instances of coerced diminishment of state power and consensual delegation of attributes of those powers.⁶⁷ As discussed above, there is work to be done regarding the extent to which Indian nations have consented to delegate aspects of their sovereignty.⁶⁸ Jettisoning the absolutist formulation will allow such questions to be addressed, whereas clinging to indivisible sovereignty will lead us to the formalist dead end with which Justice Thomas was concerned in his *Lara* concurrence.⁶⁹

B. *The Functions of Absolute Sovereignty: Executive Power and the New Normal*

And what are the functions of absolutist formulations of sovereignty? As it happens, we need look no further than current and recent activities by the Executive Branch of our government for some examples. In the wake of the terrorist attacks of September 11, 2001, the Executive Branch, with

⁶⁴ See Lind, *supra* note 29, at 3–4.

⁶⁵ *Id.* at 4.

⁶⁶ *Id.* at 5.

⁶⁷ *Id.* at 4.

⁶⁸ See discussion *supra* Part III.A.

⁶⁹ See *United States v. Lara*, 541 U.S. 193, 215–25 (2004) (Thomas, J., concurring).

the assistance of its lawyers, has argued for sweeping and often unreviewable exercises of power. Arguments concerning the authorization of torture,⁷⁰ extra-judicial surveillance,⁷¹ and detention of citizens and non-citizens have all been grounded in the necessity of such powers.⁷² While few would argue that a strong executive is not required during times of war or other national emergencies, the indeterminate nature of the current state of emergency, both in scope and time frame, has created a great deal of unease with the Executive Branch's claims.⁷³ That the theme of executive power, rather than abortion rights, dominated the first day of Justice Alito's Supreme Court nomination hearings provides some indication of the country's concerns along these lines.⁷⁴

Professor Sandy Levinson has succinctly articulated the most incisive account of a legitimate basis for concern.⁷⁵ As in the tribal sovereignty context, it is easy to become distracted by objections grounded in the current legal framework: "How can they do that? It's not authorized by the Constitution," or more sophisticated versions of this argument. As Professor Levinson argues, however, it is not enough to argue from *within* our constitutional framework. Clever constitutional arguments can, and have been, made in support of the President having absolute powers in each of the areas mentioned above (i.e., surveillance, torture, detention of citizens and non-citizens).⁷⁶

Rather, what is most disturbing about the Administration's arguments

⁷⁰ See, e.g., Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), reprinted in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 172, 172–73 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter *THE TORTURE PAPERS*] (describing how certain acts may be cruel, inhuman, or degrading and still not be considered torture, and that prosecution under 18 U.S.C. § 2340A "would represent an unconstitutional infringement of the President's authority to conduct war").

⁷¹ See, e.g., James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1, available at LEXIS, News Library, NYT File (reporting the Bush administration thought it necessary to issue a 2002 presidential order authorizing the National Security Agency to monitor international calls and e-mail messages of people within the United States, without judicial warrants).

⁷² See, e.g., Military Order of November 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001) (mandating the detention of non-U.S. citizens subject to the order).

⁷³ See, e.g., David Luban, *Eight Fallacies About Liberty and Security*, in *HUMAN RIGHTS IN THE 'WAR ON TERROR'* 242, 255 (Richard Ashby Wilson ed., 2005) (warning that with respect to the Bush administration's claims, "civil liberties and human rights exist only at the sufferance of the American president, who can unilaterally reduce or suspend them based on factual declarations of military exigency that demand deferential review by the rest of the government").

⁷⁴ Adam Liptak, *A Quick Focus on the Powers of a President*, N.Y. TIMES, Jan. 10, 2006, at A1, available at LEXIS, News Library, NYT File.

⁷⁵ See Sanford Levinson, *Constitutional Norms in a State of Permanent Emergency*, 40 GA. L. REV. (forthcoming 2006) (unpublished manuscript at 44–48, on file with the *Connecticut Law Review*) [hereinafter Levinson, *Constitutional Norms*]; Sanford Levinson, *Torture in Iraq and the Rule of Law in America*, 133 DAEDALUS 5, 5–9 (2004) [hereinafter Levinson, *Torture in Iraq*].

⁷⁶ See Levinson, *Torture in Iraq*, *supra* note 75, at 9.

is the extent to which they alter, seemingly permanently, the backdrop against which sweeping executive powers are measured. Extra-constitutional exercises in moments of emergency, as Professor Levinson describes, are not unheard of. President Lincoln famously ignored the Constitution in order to save it.⁷⁷ We tend to rationalize such arrogations of absolute sovereignty post-hoc, resting securely in a world in which the rule of law has been restored and the executive has been put back in its checked and balanced place.

What is different about today's "state of emergency" is that it too, according to the Executive Branch's arguments, is subject to the sole determination of the executive.⁷⁸ Professor Levinson notes that this conception of the sovereign is very close, if not identical to, that of Carl Schmitt, "the leading German philosopher of law during the Nazi period."⁷⁹ What is required, and what the Executive Branch has done, is to redefine "normal"; in short, to declare a permanent state of emergency that puts the executive beyond review of the other branches of government:

"A normal situation has to be created, and sovereign is he who definitively decides whether this normal state actually obtains. All law is 'situation law.' The sovereign creates and guarantees the situation as a whole in its totality. He has the monopoly on this ultimate decision."⁸⁰

The new "normal" of an ongoing and unceasing state of emergency, resulting in claims of truly absolute sovereignty, risks upending the rule of law in practice, not just on paper.⁸¹ The virtues of tempered sovereignty, when combined with the functions that divided sovereignty serves, present a much more compelling vision of government.

⁷⁷ See Levinson, *Constitutional Norms*, *supra* note 75 (manuscript at 17–18).

⁷⁸ See Memorandum from John C. Yoo, Deputy Assistant U.S. Attorney General, to Timothy Flanigan, Deputy Counsel to the President (Sept. 25, 2001), *reprinted in* THE TORTURE PAPERS, *supra* note 70, at 3, 3–9 (arguing that the President has complete discretion in exercising the Commander-in-Chief power, and the "centralization of authority in the President alone is particularly crucial in matters of national defense, war, and foreign policy"); Christopher S. Kelley, *Rethinking Presidential Power—The Unitary Executive and the George W. Bush Presidency* (Apr. 7–10, 2005) (paper prepared for the 63d Annual Meeting of the Midwest Political Science Assoc.), at 23–26, *available at* <http://www.users.muohio.edu/kelleycs/paper.pdf> (outlining the views of Bush administration officials in support of unitary executive power).

⁷⁹ Levinson, *Torture in Iraq*, *supra* note 75, at 7.

⁸⁰ *Id.* at 9 (quoting Carl Schmitt); *see also* Address Before a Joint Session of Congress on the United States Response to the Terrorist Attacks of September 11, 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GEORGE W. BUSH 1141–42 (Sept. 20, 2001) (remarking that the war on terror "will not end until every terrorist group of global reach has been found, stopped, and defeated," and that "Americans should not expect one battle but a lengthy campaign, unlike any other we have ever seen").

⁸¹ See Levinson, *Constitutional Norms*, *supra* note 75 (manuscript at 39–41).

V. CONCLUSION

Sovereignty need not be absolute in order to exist. Sovereignty, in modest forms, can protect values of cultural identity, individual rights, and economic security. Sovereignty, in robust form, can become the justification for unrestrained acts of aggression and cruelty. In addition, a sovereignty that is subject to review by other branches of government, and even other governments, is no more fictional as a theoretical matter than a sovereignty that bows to no other. In a world where France, Italy, and all of the other nations in the European Union have ceded absolute sovereignty in exchange for a range of benefits flowing from centralized monetary policy and law,⁸² and where the United States and other World Trade Organization member nations cede their legal authority in exchange for free trade,⁸³ incomplete sovereignty for Indian nations should not seem so strange. Furthermore, in a world where claims of absolute sovereignty justify morally questionable positions such as the unreviewable authorization of torture, tempered sovereignty offers a normatively more appealing interpretation of governmental powers.

Tribal sovereignty is defensible on conceptual, historical, moral, and functional grounds. At the conceptual level, the notion of a divided sovereignty is one that goes back to the very first discussions of national sovereignty and is complemented by the idea of the people as the source of that sovereignty (popular sovereignty). Tribal people certainly see themselves as the source of their government's sovereignty, and they also conceptualize the cession of attributes of sovereign governmental power as a matter that is theirs to decide. In terms of history and morality, the received legal framework perpetuates Indian nation sovereignty, in part because tribes never consented to its extinguishment, and abrogation of that principle by the judicial branch would be a stunning exercise in jurisprudential behavior. This is particularly so because of tribal sovereignty's function of perpetuating ancient yet living cultures.

In short, tempered sovereignty, in the American Indian tribal context, has a good deal to recommend itself. The Supreme Court's dual skepticisms, formalist and existentialist, should be set aside. By contrast, absolute sovereignty, taken to its logical conclusion, should make us all quite nervous, in any context. Is it too fanciful to imagine that our federal courts

⁸² See ANTONIO ESTELLA, *THE EU PRINCIPLE OF SUBSIDIARITY AND ITS CRITIQUE* 17 (2002) ("[T]he adoption of legally binding acts and the ECJ doctrines of direct effect and, above all, supremacy, produce a visible and direct impact on Member States' sovereignty."); ALEX WARLEIGH, *DEMOCRACY AND THE EUROPEAN UNION* 62 (2003) (indicating that "accession to the Union has altered the member states' sovereignty in both practical and conceptual terms").

⁸³ See, e.g., ROMAN GRYNBERG ET AL., *PAYING THE PRICE FOR JOINING THE WTO: A COMPARATIVE ASSESSMENT OF SERVICES SECTOR COMMITMENTS BY WTO MEMBERS AND ACCEDING COUNTRIES 4-6* (2002) (describing how acceding governments must comply with terms imposed by the WTO).

might consider the virtues of tempered sovereignty compared to the vices of absolute sovereignty, and begin exercising less judicial review over American Indian nations and more over the Executive Branch of the federal government?