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RETIRING THE “DEADLIEST ENEMIES” MODEL OF TRIBAL-STATE RELATIONS

Matthew L.M. Fletcher*

[Indian communities] owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies.

—Justice Miller, *United States v. Kagama*¹

At the same time, because their means of subsistence had fallen prey to westward expansion, reservation Indians were almost entirely dependent upon the federal government for food, clothing, and protection, and were often ‘dead[ly] enemies’ of the States.

—John G. Roberts et al., Brief for Petitioner, *Alaska v. Native Village of Venetie Tribal Government*²

I. INTRODUCTION

The “deadliest enemies” motif is the foundation of the current model of tribal-state relations, or what I will call the “deadliest enemies model” of tribal-state relations.³ It derives from an age-old, intergenerational enmity between the people of Indian communities and the non-Indians who live on or near Indian Country. This model of relations arose out of the often violent conflict over limited resources between Indians and non-Indians during the westward migration of the American nation in the 19th and early 20th centuries. Justice Miller used this language in *United States v. Kagama* as a means to offer a policy justification for the extension of federal criminal jurisdiction over Indians in Indian Country.⁴ In this context, because Indians were so weakened and

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1. 118 U.S. 375, 384 (1886).

2. Br. for Petr. at 4, *Alaska v. Native Village of Venetie Tribal Govt.*, 522 U.S. 520 (1998) (brackets in original) (quoting *Kagama*, 118 U.S. at 384).

3. As Sam Deloria noted at the 2007 FBA conference, “trust” is no more relevant in this context than it is when tribes enter into commercial agreements with banks or in any arms-length negotiation.

4. 118 U.S. at 384 (“The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell.”) (upholding the constitutionality of the Major Crimes Act, Act of Congress, March 3, 1885, § 9). See generally Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. Rev. 779 (2006).

dependent on the federal government—and because the local non-Indians and the states were so overwhelmingly hostile to tribal interests—federal legislation to extend federal criminal jurisdiction into Indian Country was necessary to protect tribal communities. Now-Chief Justice Roberts, representing the State of Alaska in a case in the late 1990s, utilized the same phrasing in asserting that Indians on the continental United States were just as deadly to the states and their citizens.⁵ This model of mutual animosity forms the backbone of tribal-state relations to this day. In general, state laws and regulations do not have effect inside of Indian Country absent Congressional authorization.⁶

But American Indian law is transforming. The political relationship between the United States and Indian tribes remains,⁷ but a new and more dynamic relationship between *states* and Indian tribes is growing. States and Indian tribes are beginning to smooth over the rough edges of federal Indian law—jurisdictional confusion, historical animosity between states and Indian tribes, competition between sovereigns for tax revenue, economic development opportunities, and regulatory authority—through cooperative agreements.⁸ In effect, a new political relationship is springing up all over the nation between states, local units of government, and Indian tribes. One template for these new arrangements is the Class III compacting process created in the Indian Gaming Regulatory Act.⁹ As a result of the relative success of the cooperation between gaming tribes and states, tribal-state cooperation and agreement is growing.¹⁰ Many states now recognize Indian tribes as *de facto* political sovereigns, often in the form of a statement of policy whereby the state agrees to engage Indian tribes in a government-to-government relationship mirroring federal policy. The tribal-federal political relationship remains, but more and more tribal-state political relationships form every year, requiring an alternative legal theory authorizing federal and state legislation toward Indian tribes. The federal common law still offers a threat to these new relationships by keeping the authority of tribes and states to interact in a legal gray area.¹¹

This Essay argues two points. First, Indian tribes and states must move away from the “deadliest enemies” model of tribal-state relations. Second, state action that involves

5. See Br. for Petr. at 4, *Native Village of Venetie Tribal Govt.*, 522 U.S. 520 (quoting *Kagama*, 118 U.S. at 384).

6. *Cohen's Handbook of Federal Indian Law* § 6.01[2], 501 (Lexis 2005) [hereinafter *Cohen's Handbook*] (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)).

7. See generally *Cohen's Handbook*, *supra* n. 6, at §§ 5.04[3]–[4] (describing the treaty and trust relationship of the United States to Indian tribes); Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 St. John's L. Rev. 153 (2008).

8. See generally Matthew L.M. Fletcher, *Reviving Local Tribal Control in Indian Country*, 53 Fed. Law. 38, 38 (2006).

9. 25 U.S.C. § 2710 (2000).

10. See e.g. John Petoskey, Address, *Intergovernmental Agreements: Exercising the Government-to-Government Relationship* (31st Annual Fed. Bar Assn. Indian Law Conf., Apr. 6–7, 2006) (describing the various intergovernmental agreements executed by the Grand Traverse Band of Ottawa and Chippewa Indians and local units of government); Br. for Non-Federal Appellees at 10–12, *Taxpayers of Mich. against Casinos v. Norton*, 433 F.3d 852 (D.C. Cir. 2006) (noting that the Pokagon Band of Potawatomi Indians used the relationships built through the gaming compact to successfully negotiate cross-deputization agreements with neighboring jurisdictions).

11. See generally Robert N. Clinton, Philip S. Deloria & Robert Gips, Address, *Tribal-State Cooperation and Agreement: Foundational Principles/Legal Basis for Cooperative Agreements* (32nd Annual Fed. Bar Assn. Indian Law Conf., Apr. 20, 2007).

or even favors Indian tribes and Indian people is constitutionally viable under federal common law, so long as it does not discriminate against tribal interests.

II. THE TRIBAL-FEDERAL POLITICAL RELATIONSHIP

The Constitution deals with Indian tribes in two places. First, the Indian Commerce Clause provides that Congress holds exclusive authority to deal with Indian commerce, preempting state authority in the area.¹² Indians also are mentioned in the "Indians Not Taxed" Clause, whereby Indians who are not citizens cannot be counted for purposes of political apportionment.¹³ The way these two provisions should be understood is to realize that the Founders accepted two different kinds of Indian tribes. The first kind of tribe was located outside the territorial boundaries of the United States. The second kind of tribe was exterminated or abandoned, no longer recognized as a distinct political entity. The Indian Commerce Clause and the "Indians Not Taxed" Clause applied to the first kind of Indian tribes. Indians who could be "taxed" applied to the second kind. Hence, the President continued to negotiate treaties with Indian tribes and Congress enacted the Trade and Intercourse Acts,¹⁴ prohibiting anyone (including states) from interfering in Indian affairs. Assimilated Indians who abandoned their tribal relations could become citizens (in theory).¹⁵

But there was a third kind of tribe that the Founders did not incorporate into the Constitutional structure—and that is the only kind of tribe there is in the modern era—Indian tribes located *within* the exterior boundaries of the United States. There are more than 560 federally recognized tribes located within the United States.¹⁶ Of course, the Founders were aware of these tribes. In some instances, they even promised statehood to them via the treaty process.¹⁷ And in *Worcester v. Georgia*,¹⁸ Chief Justice Marshall

12. *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 62 (1996).

If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes.

Id.; *Co. of Oneida v. Oneida Indian Nation of N.Y. St.*, 470 U.S. 226, 234 (1985); *Carcieri v. Kempthorne*, 497 F.3d 15, 20 (1st Cir. 2007) (en banc); *Cayuga Indian Nation v. Cuomo*, 565 F. Supp. 1297, 1307–08 (W.D.N.Y. 1983); *Mohegan Tribe v. St. of Conn.*, 528 F. Supp. 1359, 1368–69 (D. Conn. 1982) (quoting *Natl. League of Cities v. Usery*, 426 U.S. 833, 852 (1976)); Akhil Reed Amar, *America's Constitution: A Biography* 107–08 (Random House 2005).

13. See generally George Beck, *The Fourteenth Amendment as Related to Tribal Indians: Section I, "Subject to the Jurisdiction Thereof" and Section II, "Excluding Indians Not Taxed"*, 28 *Am. Indian Culture & Research J.* 37, 40 (2004).

14. See generally Francis Paul Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts 1790–1834* (U. Nebraska Press 1962).

15. See *Scott v. Sanford*, 60 U.S. 393, 404 (1865).

But [Indians] may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States; and if an individual should leave his nation or tribe, and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.

Id.

16. See 72 Fed. Reg. 13647, 13648–13652 (Mar. 22, 2007) (Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs).

17. See *Treaty with the Delawares* art. VI, (Sept. 17, 1778), 7 Stat. 13.

proclaimed the Cherokee Nation, located within the State of Georgia, an example of an Indian tribe that was a “distinct, independent political [entity].”¹⁹ Despite these realities, the Constitution cannot be read as incorporating these tribes into the federalism structure. But, despite the Constitution’s infirmities as to these kinds of Indian tribes, these tribes do exist as political sovereigns. In this sense, Indian tribes do stand outside the Constitutional structure, though they are located geographically within the United States. And, in this sense, Indian tribes are a political and legal anomaly, what Justice Kennedy calls “extraconstitutional.”²⁰

Under this constitutional regime, the federal government has taken on certain responsibilities to Indian tribes under the treaty process. The United States is obligated to protect Indian lands from being confiscated by others (including states and local units of government).²¹ The United States is obligated to recognize and preserve tribal hunting, fishing, and other usufructuary rights.²² As a matter of treaty and statutory law, the federal government also has taken on the responsibility to maintain certain trust properties owned by Indian people and Indian tribes and to provide specialized government services to Indian people, including without limitation health, welfare, and education.²³ The United States has taken on the responsibility to restore tribal governments and government structures by supporting tribal government programs and tribal economic development.²⁴ This is a snapshot of the political relationship between Indian tribes and the federal government—the “trust relationship.” It is this trust relationship that serves as a proxy for the incorporation of Indian tribes into the dual-federalism constitutional structure.²⁵

III. THE HISTORICAL EXCLUSION OF STATES

The federal government’s current political relationship to Indian tribes could be characterized as almost an accident of history. One of the very serious problems of the Articles of Confederation was that it did not exclude state interference in Indian affairs.²⁶

18. 31 U.S. 515 (1832).

19. *Id.* at 519.

20. *U.S. v. Lara*, 541 U.S. 193, 213 (2004) (Kennedy, J., concurring).

21. *See e.g.* 25 U.S.C. § 177 (2000).

22. *E.g. U.S. v. Mich.*, 471 F. Supp. 192, 257 (W.D. Mich. 1979); *U.S. v. Wash.*, 384 F. Supp. 312, 401 (W.D. Wash. 1974).

23. *See generally e.g.* 25 U.S.C. §§ 450 to 458bbb-2 (2002) (regulating Indian self-determination and education assistance); 25 U.S.C. §§ 4101–4243 (2000 & Supp. 2002) (regulating Native American housing assistance and self-determination).

24. *See generally e.g.* 25 U.S.C. §§ 461–494 (2000 & Supp. 2002) (regulating protection of Indians and conservation of resources); 25 U.S.C. §§ 2701–2721 (2000) (regulating Indian gaming).

25. *See generally* Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. Toledo L. Rev. 617 (1994); Alex Tallchief Skibine, *Redefining the Status of Indian Tribes within “Our Federalism”*: *Beyond the Dependency Paradigm*, 38 Conn. L. Rev. 667 (2006); Alex Tallchief Skibine, *Dualism and the Dialogic of Incorporation in Federal Indian Law*, 119 Harv. L. Rev. Forum 28 (2005); Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 Tex. Forum Civ. Libs. & Civ. Rights 1 (2003).

26. James Madison, *The Federalist No. 42*, in *The Federalist* 279, 284 (Jacob F. Cooke ed., Wesleyan U. Press 1961).

The regulation of commerce with the Indian tribes is very properly unfettered from two limitations

The Framers of the Constitution wanted to correct that defect by excluding states (and individuals) from dealing with Indian tribes and Indian people.²⁷ While in hindsight the Indian Commerce Clause appears to fail in this regard (given its plain language),²⁸ it is clear that the Founders understood the Clause and the structure of the Constitution as a whole to strip states and individuals of the authority to deal in Indian affairs.²⁹ The first Congress' enactment of the Trade and Intercourse Acts, prohibiting all forms of trade and interaction between Indians and others without federal consent, is strong evidence of the intent to keep states away from Indian tribes.³⁰

Much of the early history of federal Indian law and policy is framed by the designation of states as the "deadliest enemies" of Indians and Indian tribes. States and their constituents were in a never-ending quest to take Indian lands and resources and, in some circumstances, to eliminate Indians and Indian tribes.³¹ The State of Georgia's legal and political assault on the Cherokee Nation in the 1820s and 1830s is indicative of the strength of vicious political will used by states attempting to rid themselves of the "Indian Problem."³² The eastern states continued to acquire Indian lands long after the congressional ban and began to pay the legal price almost two centuries later.³³ Other states and local units of government, with the acquiescence and sometimes assistance of

in the articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled; and has been a question of frequent perplexity and contention in the Federal Councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible.

Id.

27. See *Seminole Tribe of Fla.*, 517 U.S. at 62.

If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes.

Id.

28. See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101, 146 (2001); Saikrishna Prakash, *Against Tribal Fungibility*, 89 Cornell L. Rev. 1069, 1087–90 (2004); see also Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 Ark. L. Rev. 1149, 1167 (2003) ("One might expect that the Indian commerce subpart would be read in a similar manner as its counterparts."); *id.* at 1168 (noting that the Court's Indian Commerce Clause jurisprudence has only been established by "judicial fiat"); *Cf. Lara*, 541 U.S. at 215, 224 (Thomas, J., concurring) (citing *U.S. v. Morrison*, 529 U.S. 598 (2000); *U.S. v. Lopez*, 514 U.S. 549 (1995); *id.* at 584–93 (Thomas, J., concurring)).

29. See Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 *Ariz. St. L.J.* 113, 118–34 (2002) [hereinafter Clinton, *No Federal*]; Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 *Conn. L. Rev.* 1055, 1059–63 (1994).

30. See 25 U.S.C. § 177.

31. See generally Andrea Smith, *Conquest: Sexual Violence and American Indian Genocide* 36 (South End Press 2005) ("Carl Schurz, a former Commissioner on Indian Affairs, concluded that Native peoples had 'this stern alternative: extermination or civilization.'").

32. See Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 *N.D. L. Rev.* 627, 639–47 (2006) (describing the circumstances leading to *Cherokee Nation v. Ga.*, 30 U.S. 1 (1831) and *Worcester*, 31 U.S. 515, the so-called "Cherokee cases").

33. See generally e.g. Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§ 1701–1716 (2000 & Supp. 2002); Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721–1724 (2000 & Supp. 2002); Connecticut Indian Land Claims Settlement Act, 25 U.S.C. §§ 1751–1760 (2000); *Co. of Oneida*, 470 U.S. 226.

federal officials, took every action conceivable to force Indian people to leave.³⁴ The disputes between tribes and states—and more specifically, tribes and state citizens—could be deadly in a literal sense. State and local governments on or near Indian Country have long histories of using apparent legal authority and simple force to dispossess Indian people of land and property.³⁵ On numerous occasions, the use of simple force has exploded into the use of deadly force—in short, the mass murder of Indian people in states like Massachusetts, Colorado, and California.³⁶ In the early half of the 20th century, states continued to utilize their taxing and police powers to exploit Indians and Indian tribes.³⁷

Until recent years, tribal and state interests competed in a vigorous (and often vicious) zero-sum game of civil regulation, taxation, and criminal jurisdiction. The states, having the benefit of constitutional sanction, have tended to have the upper hand in most instances,³⁸ but the federal judiciary has recognized enough exclusive federal and tribal authority in Indian Country to create a common law presumption (however weak) that state laws have no force in Indian Country.³⁹ Some states continue to pursue these kinds of legal and political warfare with Indian tribes.⁴⁰

The notion that states and tribes and their peoples are deadly enemies originates from an assumption held by the Framers of the Constitution. It appears the Framers believed several things about Indian affairs, some of which indicated a tenuous grasp of

34. See generally Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Belknap Press 2005).

35. E.g. Wenona T. Singel & Matthew L.M. Fletcher, *Power, Authority, and Tribal Property*, 41 *Tulsa L. Rev.* 21, 24–28 (2005) (describing the so-called “Burt Lake Burnout,” the destruction of an Indian village in northern Michigan).

36. See *Eyewitnesses to the Indian Wars 1865–1890* xxi–xxii (Peter Cozzens ed., Stackpole Bks. 2005); Keith Jennison & John Tebbel, *The American Indian Wars* 24 (Phoenix Press 2001); Jake Page, *In the Hands of the Great Spirit: The 20,000 Year History of American Indians 277–78* (Free Press 2003).

37. E.g. James A. Clifton et al., *People of the Three Fires: The Ottawa, Potawatomi and Ojibway of Michigan* 34 (Michigan Indian Press 1986); James M. McClurken, *A Visual Culture History of the Little Traverse Bay Bands of Odawa Gah-Baeh-Jhagwah-Buk: The Way it Happened* 79 (Michigan St. U. Museum 1991) (describing the policy of Emmett County, Michigan, officials in taxing Odawa Indians until they lost their lands).

38. See generally Frank Pommersheim, *Constitutional Shadows: The Missing Narrative in Indian Law*, 80 *N.D. L. Rev.* 743 (2004).

39. E.g. *Williams v. Lee*, 358 U.S. 217, 221–22 (1959).

40. See e.g. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 131 (2005) (Ginsburg & Kennedy, JJ., dissenting).

In sum, the Nation operates the Nation Station in order to provide a service for patrons at its casino without, in any way, seeking to attract bargain hunters on the lookout for cheap gas. Kansas’ collection of its tax on fuel destined for the Nation Station will effectively nullify the Nation’s tax, which funds critical reservation road-building programs, endeavors not aided by state funds. I resist that unbalanced judgment.

Id.; Br. for Respt. at 2, *Wagnon*, 546 U.S. 95.

The state tax thus interferes directly with a core attribute of *tribal* sovereignty—the Tribe’s power to impose a fuel tax to finance the construction and maintenance of reservation roads and bridges. The State’s studied ignorance of the Tribe’s sovereign interest in taxation to support its infrastructure is ironic at best, as the power to tax is the very attribute of its own sovereignty that the State purports to vindicate. Despite the State’s contentions, this case is not about economic advantage, but about how to accommodate the competing interests of two legitimate sovereigns. The State’s solution is to deny the Tribe’s interest in its entirety.

Id. (emphasis in original).

reality. *First*, the Framers likely assumed that Indian tribes and, to a lesser extent, Indian people were not long for North America.⁴¹ The disappearance of Indian tribes and people was both hoped for and legislated for by the United States Congress for over 150 years.⁴² Of course, it did not happen. *Second*, the Framers assumed that the States would attempt to control Indian tribes and people as a means of taking those resources controlled by tribal interests.⁴³ At the time of the Founding, the first point of order for most state governments was to acquire and control the resources to the west, that is, Indian Country.⁴⁴ *Third*, over all the proceedings at the Constitutional Convention and even into the first few decades of the United States under the Constitution, the leaders of the United States feared the unification, organization, and potential hostility of Indian tribal militaries that, if it came to pass, would be a true threat to the nascent American government.⁴⁵ And, even without an Indian military alliance, the Framers assumed that Indian tribes and people were, on average, brutal, savage killers, feared by the American populace.⁴⁶ *Fourth*, the Framers assumed that the means to best push back the Indian presence in the continent was through trade and agriculture, not military force.⁴⁷ *Finally*, the Framers assumed that the federal government must have control of Indian affairs in order to limit tribal-state relations that would both create violent conflict and eliminate a potential source of federal revenue and political power in the early Republic.⁴⁸ The First Congress' Trade and Intercourse Act and its subsequent versions personify the understanding of the Framers and the earliest American leaders that the

41. See Matthew L.M. Fletcher, *Preconstitutional Federal Power*, 82 Tulane L. Rev. 510, 556–60 (2007); see also Steven Paul McSloy, *Back to the Future: Native American Sovereignty in the 21st Century*, 20 N.Y.U. Rev. L. & Soc. Change 217, 280 (2003); Arthur S. Miller, *Myth and Reality in American Constitutionalism*, 63 Tex. L. Rev. 181, 201 (1984) ("The founders wrote that 'all men are created equal,' but they did not believe their own rhetoric; they were the same men who began the systematic genocide of native Americans . . .").

42. See generally Christine Bolt, *American Indian Policy and Reform: Case Studies of the Campaign to Assimilate the American Indians* (Unwin Hyman 1987).

43. See Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. Pa. J. Const. L. 405, 447–53 (2003).

44. See Fletcher, *supra* n. 41, at 550–53.

45. *Id.* at 545–50.

46. See Andrew McFarland Davis, *The Employment of Indian Auxiliaries in the American War*, 2 English Historical Rev. 709, 722–26 (1887).

47. See Thomas Jefferson, *President Jefferson on the Indian Trading Houses*, in *Documents of United States Indian Policy* 21, 21–23 (Francis Paul Prucha ed., 3d ed., U. Nebraska Press 2000); Robert W. McCluggage, *The Senate and Indian Land Titles, 1800-1825*, 1 W. Historical Q. 415, 415–16 (1970) (quoting *The Writings of Thomas Jefferson*).

48. Cf. *Johnson v. McIntosh*, 21 U.S. 543, 586 (1823).

The States, having within their chartered limits different portions of territory covered by Indians, ceded that territory, generally, to the United States, on conditions expressed in their deeds of cession, which demonstrate the opinion, that they ceded the soil as well as jurisdiction, and that in doing so, they granted a productive fund to the government of the Union. The lands in controversy lay within the chartered limits of Virginia, and were ceded with the whole country northwest of the river Ohio. This grant contained reservations and stipulations, which could only be made by the owners of the soil; and concluded with a stipulation, that "all the lands in the ceded territory, not reserved, should be considered as a common fund, for the use and benefit of such of the United States as have become, or shall become, members of the confederation," &c. "according to their usual respective proportions in the general charge and expenditure, and shall be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatsoever."

Id. (emphasis added).

federal government would deal with Indian tribes and people, first, as trade partners and, second, as military threats.⁴⁹ The states and their citizens would be required to follow the lead of the United States.

And this state of affairs is exactly the state of affairs that exists between Indian tribes, the United States, and the states in the modern era. But consider that most of the five major assumptions made by the Framers in 1787 and beyond have not aged well. Indian tribes and Indian people are as strong and capable as they ever have been since shortly after Contact. States no longer possess the stated desire or policy of acquiring as a means of expansion the land and property of persons or entities outside of their borders. Indian tribes and Indian people no longer possess military might or the interest in physically fighting American citizens. In fact, Indian people *are* American citizens.⁵⁰ As such, the potential for literal violence between the states and the tribes is relatively low. The lone assumption of the five that retains a significant value is the assumption that the best way to deal with Indian tribes is through trade. However, though much of federal Indian policy does focus on economic development,⁵¹ much more of modern federal Indian policy is focused (properly) on the development of Indian tribes as viable and stable political entities.⁵² The United States is no longer *actively* seeking to assimilate Indian people through the erosion of their governments and cultures as a matter of national policy. That policy already failed.

Given the incorrectness of the Framers' assumptions about Indian affairs, the "deadliest enemies" model of tribal-state relations makes no sense. And, like large portions of the rest of the Constitution, the Constitution's treatment of Indian tribes and Indian people has not aged very well at all. The Framers' original intent as it relates to Indian tribes is so far removed from modern reality that it would be laughable if the history connecting the Framers to the modern world were not so tragic and horrifying.

What makes this a problem for modern tribal-state relations is that the federal common law that arose from the Constitution's limited treatment of Indian tribes and Indian people has deviated from both the intent of the Framers and from the modern, on-the-ground realities of Indian affairs. The Supreme Court 19th century view that Indian tribes would soon disappear was replaced by a more enlightened, mid-20th century view articulated in the original *Handbook of Federal Indian Law* that tribal sovereignty was constitutionally viable and legitimate.⁵³ But in order to marry the two deviating courses

49. See Cohen's *Handbook*, *supra* n. 6, at 37–41.

50. See Pub. L. No. 68-175, ch. 233, 43 Stat. 253, 253 (1924); see generally Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 Harv. Blackltr. L.J. 107 (1999).

51. See e.g. 25 U.S.C. § 477 (2000) (authorizing Indian tribes to form federal corporations for economic development purposes); *id.* at §§ 2701–2721 (Indian Gaming Regulatory Act).

52. See e.g. *id.* at § 476 (2000 & Supp. 2002) (authorizing Indian tribes to form constitutional governments); Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 Neb. L. Rev. 121, 141–44 (2006). Cf. generally Wenona T. Singel, *Labor Relations and Tribal Self-Governance*, 80 N.D. L. Rev. 691, 719–25 (2004) (describing Congressional intent in enacting the Indian Reorganization Act, 25 U.S.C. §§ 461–479).

53. See Felix S. Cohen, *Handbook of Federal Indian Law* 122 (1942).

Perhaps the most basic principle of federal Indian law . . . is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but are inherent powers of a limited sovereignty which has never been extinguished.

(and to protect emerging but vulnerable tribal governments), Felix Cohen had to highlight a bright-line rule that tribes and states could not mix.⁵⁴ This position had a great deal of Constitutional weight behind it. The legislative history of the Indian Commerce Clause, with its origins in the failed, miserable policy of the Articles of Confederation, indicates with a significant clarity that the federal government would drive Indian affairs to the exclusion of the states.⁵⁵ Not even the Tenth Amendment could restore state authority in Indian affairs.⁵⁶ Chief Justice Marshall's articulation of this rule in *Worcester v. Georgia*—that state law can have no force in Indian Country⁵⁷—was a simple articulation of that original understanding.

And by the later decades of the 20th century, much of the explicit animus of states toward Indians and Indian tribes has receded. American Indian law has stabilized the relations between the states and Indian tribes, the federal government does just enough to protect Indian tribes from state intervention, and there simply is not much more Indian land and resources to acquire.⁵⁸ Modern American Indian law is more a legal and political contest between Indian tribes and states over what is left—and what is left often has links to Indian gaming. Tribes and states compete for jurisdictional, taxation, and regulatory authority, with the old foundational principles of federal Indian law as a "backdrop."⁵⁹ Some of these disputes can be ferocious, but few of them lead to violence.⁶⁰ In the modern era, it no longer appears to be the goal or policy of state governments to eliminate Indian tribes and Indian people. The "Indian Problem" is now political and legal.

IV. THE NEW TRIBAL-STATE POLITICAL RELATIONSHIP

Spurred by developments in national Indian policy and a few Supreme Court decisions,⁶¹ states and tribes began to talk in earnest in the 1990s. There had been a few cooperative agreements between Indian tribes and states as far back as the 1970s (and perhaps earlier),⁶² but these agreements were few and subject to changing political winds, not to mention the old animus between the parties. A sort of legal stalemate ensued in the 1990s between Indian tribes and states. A shorthand way to describe the

Id. (emphasis in original).

54. *Id.* at 121 ("In matters involving only Indians on an Indian reservation, the state has no jurisdiction in the absence of specific legislation by Congress.") (emphasis removed).

55. See also Clinton, *No Federal*, *supra* n. 29, at 130–32.

56. See *Co. of Oneida*, 470 U.S. at 234.

57. 31 U.S. at 540.

58. *But cf.* Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites: Asserting a Place for Indians as Non-Owners*, 52 UCLA L. Rev. 1061, 1135–38 (2005).

59. *White Mt. Apache Tribe v. Backer*, 448 U.S. 136, 143 (1980) ("[T]raditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop' against which vague or ambiguous federal enactments must always be measured.") (citation omitted).

60. See Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. Rev. 759, 799–800 (2004).

61. *E.g. Okla. Tax Commn. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991).

62. See *Br. for Amici Curiae Natl. Intertribal Tax Alliance et al.* at 12 n. 8, *Wagnon*, 546 U.S. 95; Matthew L.M. Fletcher, *The Power to Tax, the Power to Destroy, and the Michigan Tribal-State Agreements*, 82 U. Det. Mercy L. Rev. 1, 4 n. 26 (listing tax agreements dating back to 1970).

equation was that the tribes had casino gaming,⁶³ treaty rights,⁶⁴ and all but exclusive authority over tribal members in Indian Country,⁶⁵ while the states had enough common law authority over nonmembers inside of Indian Country to interfere with tribal affairs.⁶⁶ While in the 1960s and 1970s, Indian affairs litigation involved the question of whether Indian tribes would survive as political entities in the United States (a question answered roundly in the affirmative),⁶⁷ in the 1980s and 1990s, Indian affairs litigation involved jurisdictional limits and smaller and smaller amounts of money.⁶⁸ The costs of litigation began to overwhelm the stakes. In such circumstances, negotiation is the proper tool.

The foundational principle that excludes states from Indian affairs is no longer necessary, nor is it viable. The political and social circumstances justifying exclusive federal authority in Indian affairs have changed. States and their subdivisions (in general) no longer act to destroy Indian tribes. And the federal government, in a slow but deliberate fashion, is getting out of the Indian business.⁶⁹ Congress delegates more and more of its exclusive Indian affairs authority to tribes and, to a lesser extent, states. Two important modern statutes, the Indian Child Welfare Act⁷⁰ and the Indian Gaming Regulatory Act,⁷¹ authorize and even mandate cooperation between Indian tribes and states.

By the 1980s, many Indian tribes and states began to realize that the future of tribal-state relations would be negotiation and agreement.⁷² Many states now authorize the negotiation and execution of cooperative agreements with Indian tribes.⁷³ Arizona authorizes the Arizona State Boxing Commission to enter into intergovernmental agreements with Indian tribes to provide for the regulation of boxing in Indian Country;⁷⁴ California authorizes agreements to create economic development opportunities with Indian tribes;⁷⁵ Minnesota authorizes the creation of tribal-state law enforcement cooperative agreements;⁷⁶ and Nebraska authorizes its governor to

63. See Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721; *Cal. v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

64. See *Wash. v. Wash. St. Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658 (1979); *U.S. v. Winans*, 198 U.S. 371 (1905); *U.S. v. Mich.*, 471 F. Supp. 192.

65. See *Williams*, 358 U.S. 217.

66. See *Nev. v. Hicks*, 533 U.S. 353 (2001); *Cotton Petroleum Corp. v. N.M.*, 490 U.S. 163 (1989).

67. E.g. *Menominee Tribe of Indians v. U.S.*, 391 U.S. 404 (1968).

68. E.g. *Okla. Tax Commn. v. Sac & Fox Nation*, 508 U.S. 114 (1993); *S.D. v. Bourland*, 508 U.S. 679 (1993); *Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505; *Kerr-Mcgee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985); *N.M. v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Wash. v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980).

69. Cf. generally U.S. Commn. on Civ. Rights, *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* (July 2003) (available at http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1b/60/21.pdf).

70. 25 U.S.C. §§ 1901–1963 (2000).

71. *Id.* at §§ 2701–2721.

72. See generally U.S. Commn. on Tribal-State Relations, *State-Tribal Agreements: A Comprehensive Study* (American Indian Law Center May 1981).

73. For broad surveys of these agreements, see *American Indian Law Deskbook: Conference of Western Attorneys General* ch. 14, 500–31 (Clay Smith ed., 3rd. ed. 2004); *Cohen's Handbook*, *supra* n. 6, at § 6.05.

74. *Ariz. Rev. Stat. Ann.* § 5-224(f) (West 2002).

75. *Cal. Govt. Code Ann.* § 11019.8(a) (West 2005).

76. *Minn. Stat. Ann.* § 626.93(4) (West 2006).

negotiate and execute tax agreements with Indian tribes located within the state.⁷⁷ States such as Michigan, Montana, Oregon, and Wyoming authorized the government to enter into all kinds of intergovernmental cooperative agreements with Indian tribes.⁷⁸ Most states now recognize Indian tribes as legitimate governments by including them in uniform codes and other regulatory statutes. Examples include Alabama's Uniform Electronic Transactions Act⁷⁹ and Utah's Native American Grave Protection and Repatriation Act,⁸⁰ although there are many others.

Perhaps most important to purposes of this Article, many states now require their agencies to deal with Indian tribes on a "government to government" basis. These states include Colorado, Michigan, Montana, New Mexico, North Carolina, Oklahoma, Oregon, Washington, and Wisconsin.⁸¹ Other states have administrative rules or attorney general opinions recognizing the federal-tribal relationship and act accordingly, for example, New Jersey and Nevada.⁸²

Not all states choose to negotiate in good faith with Indian tribes over taxes or jurisdiction or anything at all. Even some states that have authorized or instructed local units of government to negotiate with Indian tribes have not acted in good faith. And, of course, many Indian tribes continue to be reluctant to engage their neighbors in this manner.

V. IS THERE A CONSTITUTIONAL INFIRMITY TO STATE-TRIBAL POLITICAL RELATIONSHIPS?

Assuming tribal-state relations continue to develop (and it is most likely they will and in more ways than any one commentator can anticipate), one problem remains—federal Indian law. One of the foundational principles of federal Indian law as articulated in the original and most influential *Handbook of Federal Indian Law* is that the states and the tribes may not mix without the express authority of Congress.⁸³ This is the legal doctrine underlying the "deadliest enemies" model of tribal-state relations. This model takes the form of various federal statutes and their implementing regulations, some treaty provisions, and federal common law, as discussed above.

The remnants of ancient federal Indian policy still codified in several places in the United States Code imply that tribes and states have little or no authority to execute

77. See Neb. Rev. Stat. § 66-741(1) (2004).

78. Mich. Comp. Laws Ann. § 124.502(e) (West 1999); Mont. Code Ann. §§ 18-11-101 to 18-11-112 (2005); Or. Rev. Stat. § 190.110(3) (2005); Wyo. Stat. Ann. §§ 16-1-103 to 16-1-110 (2007); Mich. Op. Atty. Gen. No. 7134, Mich. Register 10-2003 (June 15, 2003).

79. Ala. Code § 8-1A-2(16) (Lexis 2006).

80. Utah Code Ann. §§ 9-9-401 to 9-9-406 (Lexis 2000).

81. Colo. Rev. Stat. Ann. § 24-44-101 (West 2006); Mont. Code Ann. § 90-11-101(8) (2005); N.M. Stat. Ann. § 6-28-1(E) (Lexis 2006); N.C. Gen. Stat. § 71A-8 (Lexis 2005); Okla. Stat. Ann. tit. 68 § 500.63(A)(4) (recognizing "sovereign power" of Indian tribes); Or. Rev. Stat. § 182.162 to 182.168 (2005); Wash. Admin. Code § 458-20-192(1)(d) (2007); Mich. Exec. Directive No. 2004-5(II) (May 12, 2004); Or. Exec. Order No. EO-96-30 (May 22, 1996) (available at <http://www.oregon.gov/LCD/docs/govtogov/eo96-30.pdf>); Wis. Exec. Order No. 39 (Feb. 27, 2004) (available at http://www.ncai.org/ncai/resource/agreements/wi_sovereignty_executive_order.pdf).

82. Nev. Admin. Code § 702.300(2)–(3) (2007); N.J. Admin. Code 10:110-1A.1 (2007) ("Indian tribe").

83. See Cohen, *supra* n. 53, at 121 ("In matters involving only Indians on an Indian reservation, the state has no jurisdiction in the absence of specific legislation by Congress.")

intergovernmental agreements. The Trade and Intercourse Act as amended and finally granted permanence by Congress in 1834 may stand as an implied political barrier to tribal-state relations.⁸⁴ Other provisions limiting tribal authority to alienate or mortgage lands or refusing to recognize external tribal sovereignty tend to imply a lack of tribal authority to execute intergovernmental agreements with states.⁸⁵ However, another critical Indian law statute, known as Section 81, has been amended in recent years to create additional (and perhaps sufficient) capacity for tribes to negotiate and execute a wide variety of agreements, even agreements that allow for the collateralization of Indian trust lands for a limited period of years.⁸⁶

In addition to statutory implications, the federal common law recognizes barriers to tribal-state cooperation as well. The Supreme Court's decision in *Kennerly v. District Court*⁸⁷ held that tribes could not divest themselves of the *entirety* of their jurisdiction to states without the express consent of Congress.⁸⁸ In the case of modern intergovernmental agreements, Indian tribes are not conceding jurisdiction over their entire territories to states—they are settling questions of jurisdictional dispute with the states by creating certainty through agreement where federal Indian law offers nothing more than gray areas.⁸⁹ In the case of the Michigan tribal-state tax agreements, the signatory tribes actually *extended* their jurisdiction outside of the reservation boundaries to include benefits for tribal members living in Traverse City,⁹⁰ Charlevoix,⁹¹ or St. Joseph.⁹² Moreover, a closer understanding of *Kennerly's* context confirms that its underlying basis of the opinion was a concern that states were continuing to take

84. See 25 U.S.C. § 177.

85. Prior to 2000, for example, 25 U.S.C. § 81 read:

No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States . . .

Id.

86. See Indian Tribal Economic Development and Contracts Encouragement Act of 2000, Pub. L. 106-179, § 2, 114 Stat. 46, 46 (2000).

87. 400 U.S. 423 (1971) (per curiam).

88. See *id.* at 428–30 (citing 25 U.S.C. § 1326 (1964 ed., Supp. V)).

89. *E.g.* Fletcher, *supra* n. 62, at 19–20.

90. See *Tax Agreement between the Grand Traverse Band of Ottawa and Chippewa Indians and the State of Michigan* app. A (May 27, 2004) (available at http://www.michigan.gov/documents/GTBTaxAgreement_96417_7.pdf); see also *Grand Traverse Band of Ottawa and Chippewa Indians: Traverse City—Tax Agreement Map* (available at http://www.gtb.nsn.us/pdf_files/tax%20maps/traverse_city.pdf).

91. See *Tax Agreement between the Little Traverse Bay Bands of Odawa Indians and the State of Michigan* app. A (Dec. 20, 2002) (available at http://www.michigan.gov/documents/LTBB_Agreement_58762_7.pdf); see also *Little Traverse Bay Bands of Odawa Indians: LTBB Tax Agreement Area Map* (available at http://www.ltbodawa.org/Departments/GIS/pdf/ltrbb_tax_agreement.pdf); cf. Hotel Room Tax, Waganakising Odawa Tribal Code § 7.701–7.705 (2007) (available at http://www.ltbodawa-nsn.gov/ltrbb_V_2/TribalCode/Tribal%20Code.pdf).

92. See *Tax Agreement between the Pokagon Band of Potawatomi Indians and the State of Michigan* app. A (Dec. 20, 2002) (available at http://www.michigan.gov/documents/PokagonBandTaxAgreement_85485_7.pdf); see also *Pokagon Band of Potawatomi Indians: Tribal Tax Revenue & Adminstr. Code* (2003) (available at <http://www.pokagon.com/codes/TaxRevAdminCode071130.pdf>).

advantage of tribes, with the consent of tribal councils.⁹³

Easily the most cogent articulation of the reasons why tribal-state agreement could be invalid absent congressional action *as a constitutional matter* is contained in Professor Bob Clinton's recent article, *Comity & Colonialism: The Federal Courts' Frustration of Tribal↔Federal Cooperation*.⁹⁴ Professor Clinton's constitutional warnings focus on the following issues:

- "[T]he Indian commerce clause of Article III, Section 8, Clause 3 of the United States Constitution was clearly and demonstrably intended to eliminate any claims of state authority to negotiate with Indian tribes or to manage Indian affairs, even for tribes located within the borders of that state";⁹⁵
- "While not directly applicable, the interstate compact clause of Article I, Section 10 the United States Constitution provides an instructive analogy. While the plain language of that clause prohibits a state from 'enter[ing] into any Agreement or Compact with another State,' the judicial interpretations of the clause generally have limited its force to agreements which affect the sovereignty, jurisdiction, territorial integrity, or borders of the state";⁹⁶
- "[S]tates would totally lack authority to negotiate issues commonly found in most Indian gaming compacts without the authority afforded them by the Indian Gaming Regulatory Agreement."⁹⁷

These are serious concerns not to be taken lightly, but they make and rely upon the same assumptions about Indian affairs that the Founders did. As a result, these concerns can be assuaged with a reconsideration of what federal Indian law means in the modern era.

The rub in the constitutional argument is this: "protect[ion of] federal supremacy in the negotiation of Indian agreements affecting sovereignty. . . ."⁹⁸ But this begs the question of what federal interests are at stake when a tribe and a state enter into an agreement on jurisdiction or other question involving sovereignty. Recall that the federal government's interests in 1789 were substantial (national security, national revenue sources, and so on), but those interests have faded in this context. Remember further that the plain text of the Indian Commerce Clause does not preclude tribal-state agreements—and neither does any federal statute expressly prohibit these agreements. The only way, then, that tribal-state intergovernmental agreements would be struck down as violative of the Constitution would be as a matter of common law.⁹⁹ In other words,

93. See *Kennerly*, 400 U.S. at 429 n. 5. Sen. Ervin of North Carolina, the principal author and sponsor of the Indian Civil Rights Act, from which 25 U.S.C. § 1326 derived, was motivated in large part to assimilate Indian people through the imposition of federal civil rights laws on Indian Country. Angela R. Riley, *Tribal Sovereignty and Illiberalism*, 95 Cal. L. Rev. 799, 809 (2007).

94. Robert N. Clinton, *Comity & Colonialism: The Federal Courts' Frustration of Tribal↔Federal Cooperation*, 36 *Ariz. St. L.J.* 1, 22–23 n. 54 (2004). I have already offered a short lawyerly response to Professor Clinton's powerful argument. Fletcher, *supra* n. 60, at 772–73 n. 88. This Essay offers a somewhat more theoretical response, however.

95. Clinton, *supra* n. 94, at 22 n. 54.

96. *Id.*; see also *id.* (citing *U.S. Steel Corp. v. Multistate Tax Commn.*, 434 U.S. 452 (1978); *Va. v. Tenn.*, 148 U.S. 503 (1893)).

97. Clinton, *supra* n. 94, at 23 n. 54.

98. *Id.*

99. There have been two recent cases in which someone challenged a tribal-state tax agreement, but neither decision reached the constitutional question. See *Lamplot v. Heineman*, 2006 WL 3454837 (D. Neb. Nov. 29,

the very same case that articulated the “deadliest enemies” model of tribal-state relations in the first instance—*United States v. Kagama*¹⁰⁰—would be the centerpiece of the common law assault on the authority of states (and to a lesser extent, tribes) to enter into these agreements. *Kagama*’s view of Indian tribes and the trust relationship between tribes and the United States is no longer the reality of Indian affairs, if it ever was. Indian tribes are heading in a direction toward self-governance, with their remaining “dependence” on the federal government being more and more confined to international relations and security from foreign threats.

A far better view—one that will replace the current form of the trust relationship—is to view states as a legitimate player in Indian affairs. So long as the federal-tribal political relationship is not interrupted or affected in a negative manner, what harm does it do to legitimize tribal-state agreements? Relationships between states and tribes are no longer based in violence and genocidal racism. Like any arms-length transaction between commercial partners or sovereigns, modern state and tribal parties will use the legal process to enforce rights and duties. Tribal-state agreements are exercises of sovereignty—and nothing in the Constitution should preclude them.

VI. CONCLUSION

As co-chair of the 2006 Federal Bar Association’s Annual Indian Law Conference, I drafted a summary of the goals of that year’s conference (with the assistance of Allie Greenleaf Maldonado, Gabe Galanda, and Cheryl Fairbanks, the other co-chairs), a conference we titled, “Active Sovereignty in the 21st Century.” These words are very appropriate in concluding this brief Essay:

Tribal leaders and advocates have long known, understood, and even memorized Felix Cohen’s classic statement of tribal sovereignty appearing on page 122 of the original *Handbook of Federal Indian Law*. The powers vested in Indian tribes are inherent powers of a limited sovereignty that has never been extinguished. In the early years of the 21st century, after years of struggle to prevent further extinguishment of those powers, it is time to move away from focusing on the “limits” of sovereignty and examine how Indian tribes can activate those inherent, but often latent, powers that will expand and solidify tribal sovereignty. Indians and Indian tribes live and learn in the real world, on the ground, and in daily interactions with Indians and non-Indian community members; federal, state, and local governments and government officials; and Indian and non-Indians businesses.

This conference invites tribal leaders and advocates to look inward and to strengthen the core inherent sovereignty. We believe that a strong inner foundation will help build a greater capacity to face opposition.¹⁰¹

The title of that conference derived from Justice Breyer’s recent book, *Active*

2006); *Matheson v. Gregoire*, 161 P.3d 186 (Wash. App. 2007).

100. 118 U.S. 375.

101. *Active Sovereignty in the 21st Century: The 31st Annual Indian Law Conference*, 53 Fed. Law. 34, 34–35 (2006).

Sovereignty.¹⁰² In his well-considered view, "The concept of active liberty . . . refers to a sharing of a nation's sovereign authority among its people. *Sovereignty involves the legitimacy of a governmental action.*"¹⁰³ In a recent speech, Justice Breyer noted that "the story of the American legal system needs to be told and retold . . . because it 'floats on the sea of public acceptance.'"¹⁰⁴

All of these disparate quotations can be boiled down to the conclusion of this short Essay as follows: Tribal sovereignty, like any governmental sovereignty, is not automatically legitimate. Indian people have long fought for the right to govern themselves as much as possible. And now that self-governance is a realistic possibility, Indian people must now face another fight—legitimacy. Each time a state or local government agrees to negotiate with an Indian tribe and then to execute a binding agreement with an Indian tribe, that non-Indian government is recognizing the legitimacy of the tribal government. Intergovernmental negotiation and agreement is an expression of "active sovereignty"—and a means of earning governmental legitimacy. Tribes now face questions from skeptical Supreme Court Justices¹⁰⁵ and others about the legitimacy and future viability of tribal government. Retiring the "deadliest enemies" model of tribal-state relations would be a powerful step in the right direction.

102. See Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (Alfred A. Knopf 2005).

103. *Id.* at 15 (emphasis added).

104. Tony Mauro, *Aging ABA Strives to Remain Relevant*, *Legal Times* 12 (Aug. 20, 2007) (quoting Justice Breyer).

105. See Matthew L.M. Fletcher, *The Supreme Court's Legal Culture War against Tribal Law*, 2 *Intercultural Hum. Rights L. Rev.* 93, 104-14 (2007).

