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EMPOWERMENT THROUGH INCORPORATION? THE TROUBLE WITH AGREEMENT MAKING AND TRIBAL SOVEREIGNTY

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In this paper, I consider the ability of formal, institutionalized agreements between tribes and non-federal polities, i.e., states and local governments, to strengthen and secure tribal sovereignty. I argue that agreement making is a form of incorporation that is fundamentally at odds with standard definitions of tribal sovereignty, moving tribes away from their distinctive status as extraconstitutional political entities and into sub-units of the federal polity. This paper is largely a theoretical enterprise and draws on theories of federalism and tribal sovereignty, presenting the advantages and challenges of further incorporation of tribes into the U.S. federal matrix.

I do not conclude that agreement making ought to be abandoned in light of its discord with tribal sovereignty. Rather, agreement making reflects the needs of tribes in exercising self-governance and, therefore, ought to be supported by seeking additional protections from the nation-state, even if this means recasting central tenets of tribal sovereignty. Specifically, I argue that tribes need additional structural support to ensure that in the context of agreement-making 1) parties occupy a more equal position at the bargaining table; 2) enforcement and compliance is agreed upon and ensured; and 3) the federal judiciary, Congress, and Executive cannot unilaterally upend agreements.

Tribes are more likely to be disadvantaged in the process of agreement negotiations, from both an institutional and a political perspective; aside from the reserved rights of states as established in the 10th Amendment to the Constitution, states have recourse by applying political pressure to congressional persons and legislators (local governments can pressure state legislators as well). Moreover, inconsistent Supreme Court rulings leave available the possibility that Congress can act to extend

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1. It is worth noting, too, that the Supreme Court has emphasized on several occasions that there are important ways in which tribes are not like states. For example, in White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980), the Court put forth that “[t]ribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other,” as quoted in Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192-93 (1989). This does not assist in clarifying the parameters of tribal self-governance deemed legitimate by the Court, and, indeed, these remain ambiguous. Instead, this shows how the Court insists there are distinctions between States and tribes that prevent the wholesale application of State recognized rights and preemptions to tribal governments, without filling in what those distinctions are or ought to be.
state authority over Indian tribes under the implicit divestiture doctrine. This is important insofar as the Supreme Court may determine that agreement making in general (or at least particular agreements) is outside the scope of tribal authority in light of its dependent status.

Without strengthening these elements, agreement making may encourage and contribute to a debased form of federalism where tribes are continually put in vulnerable positions and made subject to the demands of non-tribal entities. In its worst form, this type of incorporation could support the arbitrary interference of federal, state, and local entities in tribal affairs, whereas the current condition largely supports the arbitrary interference of federal actors. In short, federalism may offer significant opportunities for tribal self-governance, but it must be structured in ways that secure, protect, and advance tribal self-determination more generally. Moreover, if tribes intend to continue building institutional linkages with non-federal governments, then the concept of tribal sovereignty ought to be self-consciously amended to reflect this shift toward incorporation and away from the claim of extraconstitutional status. This is no doubt a controversial and problematic change to our understanding of tribal sovereignty, and I will discuss it further at the conclusion of this paper.

TRIBAL SOVEREIGNTY AND FEDERALISM: A THEORETICAL TENSION

U.S. federalism is often referenced as a poster child of success when discussing contemporary forms of democratic governance. States gave over particular, articulated self-governance rights to the central nation-state, with the expectation that all other rights not prescribed in the Constitution would be retained within their individual spheres of authority. Those elements of state sovereignty granted to the central nation were essential for simultaneously fostering a functional central governing authority that could act without interference from states (e.g., the business of issuing of coinage) and establishing expectations between states and the central government (e.g., full faith and credit; reserved rights). The only consideration given tribes within this context was in establishing relations as exclusive with the federal government in the Commerce Clause and, less directly, in reference to Indians not taxed, and, lastly, by inference in the Treaty Clause.

This particular federal framework is symmetrical insofar as the relationships between the states and the central government do not vary depending on which state is under consideration. Moreover, states are bound by the parameters set by the Constitution and its subsequent interpretation in the federal court system. Both conceptually and constitutionally, it is a significant leap to consider tribes as sub-units of the U.S. federal system. Tribes are extraconstitutional entities, treated only for the purpose of recognizing this fact. The relations between tribes and states, on one hand, and those with the federal government on the other, are each unique in their foundation.

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2. See Skibine’s discussion of implicit divestiture as the reasoning that tribal incorporation under the U.S. federal system is predicated on their dependency status — not sovereign, independent status. Therefore, activities deemed beyond the scope of those necessary for internal self-governance are no longer within the purview of the tribe. Alexander Tallchief Skibine, Redefining the Status of Indian Tribes Within “Our Federalism”: Beyond the Dependency Paradigm, 38 CONN. L. REV. 667, 678 (2006).
and development. Federal Indian law may be generally applicable to all federally recognized tribes, but the imbalance in the political and economic power between tribes, states, and the federal government has also resulted in asymmetry of authority, with greater powers being held by states in relation to their position with the federal government. Squaring these most basic elements of our constitutional order with my assertion that tribes are incrementally incorporating themselves as sub-units into the system by way of agreement making (MOAs, MOUs, etc.), participation in larger political processes (party politics, political donations, etc.) is difficult to reconcile.

The concept of tribal sovereignty fits very uncomfortably within the federalism framework. But just what do we mean when we refer to tribes as sovereign entities? This question must be addressed first in order to understand how federal incorporation can match, if at all, with the self-governance goals of tribes. Unfortunately, the concept of tribal sovereignty has suffered greatly from its reliance on and adaptation to a Western notion of sovereignty, particularly that of nation-state sovereignty. This has resulted in tribal and legal scholars professing a notion of tribal sovereignty that is, at best, a romanticized vision of tribes as autonomous, self-governing entities that ought to work hard to recapture as much of a nation-state kind of sovereignty as possible to secure self-governance and self-determination. In this section, I will discuss the limits to the Westphalian notion of sovereignty for tribes and suggest that Felix Cohen’s notion of tribal sovereignty does not offer the best operating principle for tribes to achieve self-governance and self-determination.3

Our contemporary understanding of nation-state sovereignty took form through the Treaty of Westphalia in 1648 and was shaped through subsequent developments in international law and governance. The Treaty established and set into operation clear principles to govern the relationships between warring groups.4 Particularly, the Treaty recognized states to be the ultimate and final authority within their spheres of governance (as demarcated through territorial control) and created procedures for engagement between people based on the goal of mutual amity and related self-interest.5 Moreover, the Westphalian notion of sovereignty was embedded with the principle of noninterference, wherein nations agreed not to interfere in the affairs of other nations. Later developments and disputes surrounding statehood often focused on the criteria new groups must meet to function as states within the international community.

More recently, debates in political theory have centered on the principle of noninterference as a defining aspect of nation-state sovereignty. Particularly, sovereignty has been assailed for its imperviousness to the grievances and claims of externally and internally located individuals and groups. By fact of its sovereign status and as a consequence of the principle of noninterference, nations do not have obligations to outsiders. They can effectively deny the interrelated nature of relationships that exist throughout the world, and subsequently, they can shirk the obligations and claims, violating, ignoring, or being indifferent to all sorts of injustice. Put another way, a claim

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5. Id.
by a group for sovereignty is also a claim to be free from moral and legal obligations in their relationships with externally located individuals and groups.

Does this description of sovereignty adequately describe the status of tribal governments? The answer is unequivocally "no." Tribes are neither de jure recognized as sovereign entities since they lack standing as such in the international community, which is comprised of states, nor are they fully empowered de facto sovereigns as the extent of their coercive power is significantly limited and trumped by U.S. laws and powers. Moreover, the extent of tribal internal and external authority has been significantly upended due to the complex political relationships and the conditions tribes have faced in the preceding centuries. In the following sections, I will first articulate the general deficiencies and nuances of the contemporary notion of tribal sovereignty by identifying paradoxes in federal Indian law, which erode any chance that a Westphalian notion of sovereignty is attainable for tribes. I also will demonstrate how Felix Cohen’s concept of sovereignty greatly limits the ability of tribes to engage non-federal actors for the purposes of daily governance and offer alternatives to his vision.6

Legal debates over the degree to which tribes can or should function as autonomous, self-determining peoples go as far back as the first moments of tribal contact with European nations,7 though much of the basis for contemporary Indian law was established during the founding of the United States through the decisions of Chief Justice John Marshall. The Supreme Court became a central figure in deciding, and later in making, Indian law largely on the basis of constitutional provisions that mention Indians a total of three times.8 Two of the three make reference to tribes’ positions outside of the taxation system,9 and the third reference to Indians is found in the Commerce Clause. The Commerce Clause grants Congress the power to “regulate [c]ommerce with foreign [n]ations, and among the several [s]tates, and with the Indian [t]ribes.”10

The U.S. Constitution also empowers the President to make treaties with the consent of the Senate.11 These general powers of the federal government served as the basis upon which the Supreme Court entertained questions about the relationship between Indians and states. The U.S. Chief Justice John Marshall (C.J. from 1810-1835) constructed the earliest decisions of the Court in Indian law and sought to strengthen national unity, as well as to establish the authority of the Court as sovereign.12 The first central Indian law question Marshall entertained was regarding who, states or the federal

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7. See id. at 50-53.
8. This is not a defense of the Court’s right to “make” Indian law or support for the idea that any legal basis exists for such law making decisions. See David E. Wilkins, American Indian Sovereignty and The U.S. Supreme Court: The Masking of Justice, at viii-xi (1997), and Phillip P. Frickey, A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers, 109 Yale L.J. 1, 6-8 (1999), for analyses on the changing role of the Court in Indian jurisprudence.
government, could enter relations with tribes.\textsuperscript{13}

The questions of law in early Indian cases often involved attempts by state governments to exercise their authorities and powers over Indian lands and peoples. For instance, in two of the cases in the Marshall trilogy, \textit{Worcester v. Georgia}\textsuperscript{14} and \textit{Cherokee Nation v. Georgia},\textsuperscript{15} the state sought to usurp tribal land and divide it amongst the state’s counties for the purpose of extracting gold and other natural resources. By interpreting treaty provisions made by the federal government with the Cherokee, C.J. Marshall declared state authority over the tribe void in \textit{Worcester}.\textsuperscript{16} Through his trilogy of cases in the early 1800s, Marshall recognized tribal peoples as having an original claim to sovereign status and rights of self-government.\textsuperscript{17}

However, Marshall is also responsible for constructing the first shades of diminishment of tribal sovereignty by appealing to “the actual state of things,”\textsuperscript{18} or, in other words, by accepting particular theoretical constructs of conquest and discovery that excluded tribes from the same “rights” as European sovereigns.\textsuperscript{19} Marshall argued that the process of treaty making clearly indicated that first, European nations and, second, the U.S., understood tribes to be sovereigns equal to themselves for the purpose of legal (land) transactions. Marshall wrote of this relationship in his opinion in \textit{Worcester v. Georgia}:

\begin{quote}
From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed [sic] by the United States.\textsuperscript{20}
\end{quote}

Marshall constructed an interpretation of treaties that created a relationship of dominance by the federal government over tribes. He determined that tribes were neither states nor foreign governments in \textit{Cherokee Nation v. Georgia},\textsuperscript{21} despite the treaty-making relationship that recognized each as holding sovereign powers. Rather, the fact of their location within the territorial body of the United States placed tribes under

\begin{itemize}
\item \textsuperscript{13} Levy also discusses prior congressional attempts at unifying federal authority over Indian affairs. He states that in addition to constitutional provisions, the Federal Trade and Intercourse Act of 1790 forbade the purchase of Indian land by states without federal approval. Jacob T. Levy, \textit{Indians in Madison’s Constitutional Order, in JAMES MADISON AND THE FUTURE OF LIMITED GOVERNMENT} 121, 125 (John Samples ed., 2002).
\item \textsuperscript{14} \textit{Worcester v. Georgia}, 31 U.S. (6 Pet.) 515 (1832).
\item \textsuperscript{15} \textit{Cherokee Nation v. Georgia}, 30 U.S. (5 Pet.) 1 (1831).
\item \textsuperscript{16} \textit{Worcester}, 31 U.S. at 561.
\item \textsuperscript{17} See id.; \textit{Cherokee Nation}, 30 U.S. 1; Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).
\item \textsuperscript{18} \textit{Worcester}, 31 U.S. at 543.
\item \textsuperscript{19} Through the doctrine of discovery, European nations recognized each other’s right to portions of the Americas that each claimed to have “discovered” independent of one another. \textit{McIntosh}, 21 U.S. 543. Tribes were recognized as holding a right of occupancy but were denied a property interest in land. \textit{Id.} at 574. Marshall decided the status of Indian title in \textit{Johnson v. McIntosh}.
\item \textsuperscript{20} \textit{Worcester}, 31 U.S. at 556-57.
\item \textsuperscript{21} \textit{Cherokee Nation}, 30 U.S. 1.
\end{itemize}
jurisdictional limits of the federal government. Moreover, treaties placed tribes under the protection of the federal government and extinguished the right of tribes to conduct external affairs. Essentially, tribes had become “domestic dependent nations.”

Importantly, Marshall’s decisions recognized the right of tribes to maintain their internal self-governance. Lands were set aside for this purpose, and during Marshall’s tenure, it was generally presumed that tribes would maintain a separate existence as distinct peoples. Aside from limits on external relations, the only rights of self-governance Marshall curtailed were those that were explicitly voided through treaties or by Congress; tribes retained all other self-governance rights. The Court continued to adhere to Marshall’s Indian law principles for sometime after his reign. Acts of Congress in the late 1800s, however, initiated a shift in how the Court understood the boundaries of Indian self-governance and would subsequently make decisions detrimental to tribes.

THE LIMITS OF SELF-GOVERNANCE: PLENARY POWER IN INDIAN COUNTRY

For Marshall and other interpreters of tribal-federal-state relationships, treaties served as an important tool for understanding and defining the contours of these relationships. In their earliest stages, treaty-making between tribes and European powers recognized a symbiotic relationship between nations and served as a mechanism for their mutual recognition of self-governance. They outlined ways in which tribes and non-tribal governments should navigate shared interests, including land, resources, and military protection. As tribal military strength weakened, however, treaties began to serve the more sinister function of domination over Indians for the benefit of reaping land and resources for the aggressor, providing tribes with a measure and guarantee of protection against foreign invaders. Treaties with the federal government also recognized the vulnerability of tribes to the aggressions of state governments and, as a result, stipulated their commitment to the protection of tribes from the aggressions of the states.

It was the U.S. Supreme Court that would again and again bear the responsibility for adjudicating claims regarding treaty-rights and other Indian matters and grievances. Into the late 19th century, the Court continued to distinguish between the spheres of state

22. Id. at 17.
23. Id.
24. In Worcester, Marshall stated,
The Cherokee nation, then, is a distinct community occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokee themselves, or in conformity with treaties, and with the acts of congress.

25. “Indian Country” is codified at 18 U.S.C. § 1151 (2006) (defining “Indian Country” as: “(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”).
26. See COHEN, supra note 3, at 64-65.
27. See id. at 66.
28. See id. at 67-68.
and tribal political authority but shifted Marshall’s emphasis from an inherent, limited notion of tribal sovereignty, where tribes exercised rights retained prior to contact, to one wherein tribal dependency on the federal government was the defining characteristic of the tribal polity and rights exercised by tribes were only those granted by Congress. Tribal self-governance, then, could be amended however the federal government saw fit for the purpose and benefit of the tribe. Moreover, such decisions by the federal government, the Court determined, were not subject to Court review as Congress’ right to engage tribes was itself a political act. Tribes could not legally question the intent of congressional actions that affected tribal powers of self-governance. Congress’ responsibility and duty to protect tribes was unassailable, containing no substantive definition and no procedural recourse for tribes.

This transformation from rights retained to rights granted was first articulated by Justice Miller in 1886 out of what may have seemed as a necessity: state governments posed a significant threat to tribes. In the case of U.S. v. Kagama, Justice Miller wrote the following:

They [Indian Tribes] owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power.29

The duty of protection cited in Kagama, not fully articulated in Miller’s opinion, took shape in subsequent decisions of the Court. Tribes were considered to be in need of protection from the federal government not only from state intrusions, but from themselves as well and for their benefit. Additional Court decisions, including Lone Wolf v. Hitchcock30 and United States v. Sandoval,31 marked the transition of tribes from domestic dependent nations, still holding those rights not explicitly abrogated to a condition of complete legal subjugation to federal authority as embodied in Congress. The Court expanded the parameters of congressional power over Indians in Lone Wolf first by supporting Congress’ abrogation of treaties under any and all conditions. Recognizing that treaties are essentially political agreements, the Court rendered itself irrelevant and incapable of judging whether Congress was violating its duty of protection to Indians when abrogating treaty rights.

In Sandoval, Justice Van Devanter indicated that Indians were “essentially a simple, uninformed, and inferior people,”32 thereby necessitating their protection through the use and application of federal expenditures — a justification provided in lieu of reserved or treaty stipulated rights. Because “the United States [i]s a superior and civilized nation”33 with the obligation to protect Indians, Van Devanter reasoned that the

30. See Lone Wolf, 187 U.S. 533.
32. Id. at 39.
33. Id. at 46.
“true interests of the Indian” could only be decided by Congress, not the courts. This notion of the “guardianship” responsibility of Congress was essentially unlimited in scope, both in Sandoval and Lone Wolf.

Importantly, in tracing the origins and rationale behind Congress’ plenary power, scholars and practitioners of federal Indian law have come to the conclusion that certain aspects of plenary power are defensible and worth keeping, while other aspects are less defensible and ought to be abandoned. Particularly, David E. Wilkins finds that the preemptive and exclusive aspects of plenary power are often used to protect tribes from the encroachment of states when states seek to “make jurisdictional inroads” in tribal affairs and territories. He deems these as “constitutionally permissible” functions of the concept, which suggests that retaining federal plenary power in these ways might be beneficial for tribes as it serves a “needed” purpose. On the other hand, in so far as plenary power is construed as enabling Congress to exercise its powers in Indian affairs without the advice and consent of tribes and particularly if it results in an infringement of tribal authorities and self-governance, then it is not permissible and in violation of the extraconstitutional standing of tribes.

While I agree with Wilkins that Congress can occasionally exercise its plenary power to the advantage and protection of tribes, there are no actual limits or barriers to Congress’ doing so for their benefit. In fact, I concede Corntassel and Witmer’s point that Congress is more likely to act on behalf of its non-Indian constituents under the current framework, as I will discuss shortly. Rather than carving out acceptable domains for the exercise of Congressional plenary power, it may be possible that tribal agreement making and engagement with states puts additional obstacles in Congress’ way by linking the fate and relationships of tribes with other governments. In other words, the stronger the institutional and political relationship between tribes and non-federal governments, the weaker the plenary authority of Congress to act in Indian affairs will be. I do not take the plenary authority of Congress to be justifiable under any conditions, but I do recognize it as a political-turned-legal reality that tribes must attempt to curtail in order to exercise self-governance.

Tribal sovereignty is, for our purposes here, first and foremost a legal concept. The most often cited depiction of tribal sovereignty was put forward by Felix S. Cohen, now recognized as “the father” of Indian law, and published in his work for the Solicitor’s Office in the Department of the Interior, Handbook of Federal Indian Law. 34

34. Id.
36. Id. at 362.
37. See DAVID E. WILKINS, AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM 48 (2002). Increasingly, some scholars argue that tribal sovereignty is also a concept imbued with “unique cultural and spiritual dimensions” which make it substantially different from state or federal connotations of sovereignty. Id. For example, Wilkins defines tribal sovereignty as “the intangible and dynamic cultural force inherent in a given indigenous community, empowering that body toward the sustaining and enhancement of political, economic, and cultural integrity. It undergirds the way tribal governments relate to their own citizens, to non-Indian residents, to local governments, to the state government, to the federal government, to the corporate world, and to the global community.” Id. (emphasis omitted). I will not take issue here with this definition other than to suggest that cultural and spiritual dimensions of tribes cannot be fully realized without proper protections for self-governance and self-determination.
Specifically, Cohen emphasized the inherent and extra-constitutional nature of tribal sovereignty:

Those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty.38

Cohen’s definition was instrumental when he crafted it as he was seeking to establish grounds for the resurrection of federal support and acknowledgment of tribal peoples as separate governing entities. The result was significant for tribes, marking a move by the federal government from its assimilationist policies of the late 19th century and into the constitutional governance models of the early 20th century. Tribes, in large part due to Cohen’s support, were recognized as retaining inherent self-governance rights, which could be reconstituted through the Indian Reorganization Act of 1934. Cohen’s concept of tribal sovereignty did not directly address the role of Congress in administering Indian affairs, and instead, successfully created a protected legal status for tribes that at once acknowledged their subjugated position in the U.S. (e.g. “limited” sovereigns). At the same time, it reinforced the inherent powers of the tribes that existed, at least until Congress limited them. This pronouncement on tribal sovereignty suggests that tribes retain all powers not otherwise delegated to the federal government, or contrary explicit Congressional action, and it is the closest thing on the federal Indian law books that emulates a “Tenth Amendment” (reserved rights) doctrine for tribes.

THE TRUST RELATIONSHIP AS THE FOUNDATION OF ARBITRARY INTERFERENCE

Wilkins and Lomawaima recognize that tribes face challenges to their status as sovereign entities, particularly in their relationships with state, local, and federal governments in his numerous writings on the subject.39 These “contest[s] over sovereignty” have characterized much of the legal and political history of tribal intergovernmental relationships and have resulted in significant reductions in the governing authority of tribes.40 Moreover, years of court rulings have established two important conceptual modifications on tribal exercise of sovereignty: plenary power and the trust doctrine. That congressional plenary power over Indian affairs is sourced in a misguided 19th century understanding of Indians as culturally “immature” wards and protectorates of the United States has in no way reduced the fact of Congress’ power.41

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40. Id. at 5.
Surely, tribes would do away with this type of arbitrary interference in their internal affairs if they could. But given the framework within which tribes must operate, plenary power is a defining structural constraint that hangs over every aspect of tribal self-governance. Plenary power does the bulk of the work that makes tribal sovereignty fluid and unstable. On the other hand, tribes often appeal to the “trust relationship” as both a legal and moral claim against the federal government. This concept is intended to acknowledge the exclusive and extraconstitutional status of tribes, the consequent attenuated powers of tribes’ sovereignty post-contact, and to provide a basis for tribal claims against the United States. Trust-based claims; however, are a complex tie that binds tribes to the United States in ways that may not be best suited for encouraging tribal self-governance and self-determination.

The trust doctrine is a general, relatively undefined principle of Indian law, and it is sourced in moral judgments about the relationship and obligation of the United States towards Indian tribes. Initially articulated by Justice Marshall in the Cherokee Cases, the trust doctrine thus conceived did not carry with it the likeness of more conventional trustee relationships that presume the eventual transfer of property or money being held to the recipient. In other words, Marshall’s concept of the trust relationship between tribes and the federal government did not include an end point or even the eventual termination of the relationship; the trust was presumed to be ongoing. Tribes would always be the weaker bodies in need of federal protection, and this status would not change.

But changes in the social, economic, and political status of some tribes have forced questions regarding the federal government’s trust obligation to tribes. The ambiguous and unprescribed character of the doctrine, in addition to its inconsistent and incoherent usage in court decisions, has fostered questions about the parameters and need for the trust relationship when tribes demonstrate increased autonomy and self-sufficiency. Indeed, tribes are often concerned that protections and guarantees received and based on the trust relationship might disappear if they are perceived by non-tribal governments as being too self-sufficient and independent. By incorporating Wilkins’ concerns, we also see that such claims may be weakened further by the perception that tribes are no longer distinct enough from other Americans — culturally or politically.

Indian law scholars have identified two divergent interpretations of the trust doctrine, each with distinct implications for tribal autonomy and self-governance. The first of these interpretations does not anticipate eternal tribal pupilage as Marshall’s concept suggests. Rather, the scope of federal obligations to tribes was defined in terms of the racial inferiority of Indians during the end of the 19th and throughout the first half of the 20th century. Judicial interpretations of the trust doctrine acknowledged the inferiority of tribes and broadened the powers of Congress to legislate in Indian affairs however it saw fit. The consequent congressional policies of assimilation and

44. Id. at 427.
acculturation sought to break the political ties and responsibilities between tribes and the federal government. Importantly, the policies that resulted from the racial inferiority and immaturity thesis did not result in increased tribal self-governance or authority, but sought instead its total eradication.

The second interpretation of the trust doctrine used by the courts likewise does not envision a time when tribes would be capable of managing their own affairs. Instead of resulting in the termination of the federal trust relationship, this interpretation results in the perpetual pupilage of tribes. The “control” thesis is not tied to theories of culture or race, but to the fact of federal supervision and control over tribal land and mineral resources. In a post-hoc justification for federal control, the Court provides the circular logic that control over resources creates a duty with regard to such resources, and that this duty is also what justifies control over them. The control thesis, it appears, is theorized independent of tribal capacity for management. The Court does not justify the authority of the federal government to manage Indian resources on the basis that tribes cannot do it themselves, but rather on the basis that the federal government is already doing it.

Neither interpretation of the trust doctrine leaves much room for tribal self-governance and self-determination. Under both interpretations, tribes and tribal affairs are the objects of federal scrutiny and unfettered intervention, though for different reasons. Nonetheless, many tribal leaders and federal Indian law scholars have relied on the concept for calling into question the failings of the federal government in fulfilling responsibilities to tribes. The concept is used to appeal both legally and normatively that the trust relationship ought to legally bind the federal government to perform certain responsibilities (especially those articulated in treaties) and that fulfillment of such duties is a moral commitment on behalf of the United States. This “high obligation” contends and competes with other obligations and considerations in the court context, and “little has been done to explicate the enforceable duties of the trustee.” The trust doctrine emphasizes the protection of tribes by the federal government as a moral and legal duty, that the United States “act with the utmost integrity” and in a “moral manner” in exercising its duties prescribed by treaty as well as in its future dealings with tribes. And to a certain and exacting extent, federal courts have narrowly identified cases in which federal agencies have violated their fiduciary duties to act as trustees for Indian tribes.

Most relevantly for our purposes here, the trust responsibilities of the federal government are thought to be “mandated” by virtue of the extraconstitutional status of tribes. Because tribes are not a part of the U.S. federal matrix, they stand in a precarious position to both the federal and state governments. Trust responsibilities are sourced in treaties and internationally recognized legal documents that establish protections for

46. Rethinking the Trust Doctrine in Federal Indian Law, supra note 43, at 428.
48. WILKINS, supra note 37, at 45.
Indians and which would otherwise not be available, in part because tribes do not fall under the U.S. Constitution.\textsuperscript{50} If the trust responsibility is both a way of categorizing tribal-specific treaty rights and a way of protecting the tribal-federal relationship as such, then it would seem clear enough that treaty abrogation would violate the trust responsibility. But in fact, the Court’s interpretation of Congress’ plenary power trumps any treaty-based claims, at least in so far as they have the best intentions of the Indians at heart. That the U.S. Supreme Court is the arbiter of such decisions is itself evidence that tribes do not maintain a comprehensive status as extraconstitutional polities.

Tribes have ample reason to be concerned about how the federal government exercises its fiduciary duties. Numerous examples exist of the federal mismanagement of tribal resources, though perhaps none has received as much public attention as the Cobell case.\textsuperscript{51} Since 1887, the federal government took charge of the legal title to millions of acres of Indian land, which were subsequently to be managed for the benefit of Indian people.\textsuperscript{52} Significant mismanagement of monies occurred in the handling of individual Indian leases; this fact there is no disagreement on.\textsuperscript{53} How to resolve the problem forces the moral and legal obligation of the federal agency in question (the Bureau of Indian Affairs) to be quantified monetarily. On this point, neither party seems to agree on what constitutes proper compensation.

Regardless of the outcome, however, the federal government and tribes have sought to develop ways to prevent such mismanagement from occurring in the future. One possibility, advanced on the part of the federal government, is to pass the responsibility for lease management over to tribes. While consistent with Congress’ policy of self-determination, tribes and individual Indians are leery of inheriting the management of their own assets because such a move by the federal government appears to be an attempt to “get out” of the “Indian business” and wash its hands clean of its trust obligation.\textsuperscript{54} Tribes are set against any attempt by the federal government to minimize or relinquish responsibilities for managing assets and resources.

With a similar intent, a number of the nation’s wealthiest tribes continue to apply for and receive federal monies for the development of tribal programs. Receiving grants ensures that the trust relationship remains “active” with the federal government and that ties between the two are not significantly weakened; at a minimum, a working relationship remains. There is a fear on the part of tribes that the federal government will narrow its view as to what it sees as its obligations and responsibilities based on the services it is providing them at any given time, particularly because such obligations are poorly spelled out and rarely explicitly acknowledged. An underlying implication is that if tribes become self-sufficient in providing their own services and are increasingly economically autonomous, then the unique federal-tribal relationship will cease to exist.

\textsuperscript{50} Wilkins, supra note 37, at 45.
\textsuperscript{51} See Cobell v. Salazar, 573 F.3d 808 (D.C. Cir. 2009).
\textsuperscript{52} See General Allotment Act of 1887, ch. 119, 24 Stat. 388 (1887).
\textsuperscript{53} This assumes, of course, that trust accrues not just between tribes and the federal government but also between individual Indians and the federal government by virtue of their membership in a tribe.
\textsuperscript{54} But to what extent did Marshall’s conception of trust extend into the internal affairs of Indians? Would the groundwork he laid for the federal government’s protection and guardianship of tribes imagine a scenario wherein the federal government was charged with the management of tribal resources for the benefit of the tribes?
as will tribes’ position as extraconstitutional political entities. The only other moment in recent history that bears a similar story wherein the relationship between tribes and the federal government was peeled back was during the termination era, at which time some tribes ceased to exist for the purposes of the federal government. That is clearly not a risk that tribes are willing to take.

But federal obligations and responsibilities to tribes should not be dependent on the extent of tribal dependency. Moreover, the trust relationship is not the only format that obligations and responsibilities ought to take, particularly since the relationship brings with it a position of domination for the federal government over tribes, even more than it brings with it a protection. It is clearly antithetical to the pursuit of self-governance and self-determination that tribes continue to seek out opportunities for dependency. Under this characterization of the trust relationship, its greatest strength and potential for tribes is that which has been secured through court cases (namely, review of agency actions). However, a shift in focus to alternative mechanisms and the development of enforceable agreements is also clearly in order.

IN SUM

What defines the contours of tribal sovereignty today are aspects unique to tribes by virtue of their historical relationships and political conditions with the U.S. Charles Wilkinson remarks on the fluidity of sovereignty when he writes,

Somewhat astonishingly, just sixteen days after deciding Oliphant [holding that Indian tribes lacked inherent criminal jurisdiction over non-Indians] the Court rendered an endorsement of the tribal sovereignty doctrine in such ringing terms that the existence of the doctrine, so uncertain just a few days before, now seemed irrevocably to be established as part of the nation’s constitution and political system (referencing U.S. v. Wheeler, 435 U.S. 313 (1978), wherein the Supreme Court ruled that prosecutions of Indians in federal and tribal court do not violate the 5th Amendment’s prohibition of double jeopardy). 55

Wilkinson’s reference illustrates just how vulnerable dimensions of tribal sovereignty are to Supreme Court interpretations of Congress’ intent and the status of tribes as extraconstitutional entities. Plenary power, as the overriding principle determining the extent of tribal authorities, and the trust doctrine do not protect the rights of tribal polities to pursue self-governance and self-determination. Rather, they provide the seeds of instability in Indian affairs that ultimately undermine these rights and ought to be constrained in any reconstruction of tribal sovereignty. Tribes must secure mechanisms for ensuring their self-governance rights and foster self-determination for the future.

The twin goals of self-governance and self-determination may best be achieved through exercising rights and authorities structured by governance processes and institutional building, particularly through intergovernmental relationships with non-

55. Wilkinson, supra note 47, at 61.
If tribes increasingly act in their capacity to build intergovernmental relations with states, then the conceptual and practical pressures put on both the U.S. federal system and tribal sovereignty will not hold. There is little to suggest that tribes will or should slow in building these relationships, but the implications for both concept and practice should be explicitly considered.

**AGREEMENTS AS A FORM OF FEDERAL INCORPORATION**

There exist a wide variety of institutionalized relationships between tribal and non-tribal governments for the purposes of pursuing cooperative, regionally based activities. These agreements usually take the form of memoranda of understanding ("MOU") and memoranda of agreement ("MOA") between individual tribes and individual states, which address issue-specific concerns, such as the distribution and use of waterways shared by communities or taxation concerns. In several instances, congressional legislation has forced tribes and states to develop agreements, either by clear mandate or by logical effect. I will discuss the significance of agreement making for expanding tribal self-governance and draw on examples of contemporary tribal-state relations. I identify both the potential of agreements for helping structure relations and principles between tribes and states, as well as the inherent limitations of agreement making for fostering tribal self-determination under present conditions.

While only some agreements made between tribes and states are the direct result of congressional legislation, the vast majority of agreements are not, and instead, developed largely in the absence of federal guidance and oversight. For non-federally commandeered agreements, there is no approval or even filing requirement for tribes within the Bureau of Indian Affairs or other federal agencies. In fact, some scholars suggest these relationships have taken place in direct defiance of federal policy and Supreme Court decisions such as *Kagama* and its progeny. In short, changes since *Kagama* in state government orientation toward tribes has created political and legal opportunities for these governments to work together and address overlapping issues and responsibilities.

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56. The Indian Gaming Regulatory Act ("IGRA") of 1988, Pub. L. No. 100-497, 102 Stat. 2467, is one of the few examples of federally-mandated agreements between tribes and states. Under IGRA, tribes that wish to pursue class III (high stakes gaming) must enter into compact negotiations with the governor of the state in which the gaming will occur (some tribal reservations cross multiple state-lines). The compact must then be approved by the state legislature before implementation and filed with the National Indian Gaming Commission (an independent federal regulatory commission housed within the Department of the Interior). On the other hand, legislation extending certain state jurisdiction over tribes within their boundaries (Pub. L. 83-280, 67 Stat. 588 (1953)) created not a mandate for agreement-making, but the possibility of it. Particular states found that entering into law enforcement agreements with particular tribes enabled the two polities to navigate the highly contentious question of who holds civil and criminal jurisdiction within reservation communities. *Public Law 280 remains one of the most detrimental examples of Congressional plenary power in Indian affairs, and the emergence of agreement-making shouldn't necessarily be interpreted as a positive step, considering the conditions. However, this is an example of how tribes, states, and localities have interacted with one another to find common ground and in the absence of a mandate by the federal government. See Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 Conn. L. Rev. 697, 728-29 (2006).*

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Moreover, the era of federal devolution of powers has, as articulated in the first chapter, resulted in the recognition and support of latent tribal power and authorities. Self-governance for tribes has subsequently brought states and localities into increasing instances of conflict and interaction.

Self-governance has raised new debates and conflicts over criminal and civil jurisdiction, taxation, and regulatory authorities within the external boundaries of reservation communities, as well as questions regarding over whom those authorities extend (tribal member/non-tribal member). While rarely marked by violent uprisings, these conflicts can result in a zero-sum approach by states and tribes to address these issues, each declaring their activities immune to the concerns and objections of other externally located polities. Tribes and states are creating institutions aimed at mitigating and mediating potential disputes, attempting to procure mutually beneficial agreements and sharing responsibilities when they agree to come together on an identified issue. Importantly, these relationships are starting at the ground — where the need for cooperation and resolution is clearest — and may take shape in the form of advisory councils to and within state governments or as independent bodies outside of both tribal and state governments. National organizations of both states and tribes have identified the value of these agreements in the exercise of daily governance and have, subsequently, created model agreements and recommendations for how to proceed in agreement-making for their relative constituencies. These arrangements are largely constructed out of necessity to address matters of day-to-day self-governance.

NEGOTIATING GEOGRAPHIES AND JURISDICTIONS: TWO CASES

In the section that follows, I will sketch out two cases from Indian Country where local-level agreement making is taking place. The first brief profile is perhaps the most straightforward and, at first glance, commonplace: a development issue arises between a tribe and the local county. To the best of my knowledge, no tribal government currently has an advisory position or panel afforded to a state for its internal governance debates, whereas states have advisory commissions and panels that include tribal representatives.

The National Congress of American Indians posts agreements on their website with the intention that they be used by others as needed. These agreements are submitted by tribes and appear under the general headings of law enforcement, human services, and taxation, and include a range of authorities, from narrowly construed agreements to govern the execution of warrants by state officials on tribal lands, to more broadly construed agreements that provide the parameters for exercising concurrent policing by states and tribes on tribal land. See Tribal Governance, NAT’L CONGRESS AM. INDIANS, http://www.ncai.org/Tribal-Governance.27.0.html (last visited Aug. 2010). The National Conference of State Legislators, on the other hand, participates in a State-Tribal Initiative, helps resolve and raise conflicts between tribes and states through dialogue and NCFL’s Native American Caucus (of state legislators), and publishes reports on Indian-related state legislation and books on models of cooperation for tribal-state governance. See State-Tribal, NATIONAL CONFERENCE OF STATE LEGISLATORS, http://www.ncsl.org/Default.aspx?TabJD=756&tabs=951,70,390#390 (last visited Aug. 2010). Noticeably absent, however, are activities involving the National Association of Counties (NACo).

Common is perhaps too gross a term to use in this context. Little systematic research on tribal-state agreements — let alone tribal-county level agreements — exists at this time. Three useful works that inform my assessment are THE TRIBES AND THE STATES: GEOGRAPHIES OF INTERGOVERNMENTAL INTERACTION (Brad A. Bays & Erin Hogan Fouberg eds., 2002), JEFFREY S. ASHLEY & SECODY J. HUBBARD, NEGOTIATED SOVEREIGNTY: WORKING TO IMPROVE TRIBAL-STATE RELATIONS (2004), and Erich Steinman, American Federalism and Intergovernmental Innovation in State-Tribal Relations, 34 PUBLIUS: THE J. OF FEDERALISM 2012 613.
raised in the county-proposed development and they successfully — without much 
fanfare — come to a formal agreement about land and jurisdiction. At least superficially, 
this can be deemed an example of a positive working relationship between tribal and 
county government. The second profile is of the challenges a tribe faces in gaining 
acceptance to their regional association of governments in order to influence 
transportation policy that affects the reservation community. The tribe has been, to this 
date, unsuccessful in breaking the barriers it faces to become a voting member of the 
association. This is, clearly, a profile of a breakdown in negotiating governance and the 
types of dynamics that can frustrate and stonewall a tribe when dealing with local 
governments. Together, these two portraits demonstrate a bit of variety in the processes 
and challenges underlying intergovernmental agreement making and begin to shed light, 
for my purposes here, on how tribal political activities may be shaping the future of how 
we conceptualize tribal sovereignty.

_Tulalip, Washington_

Reservation communities across the United States are coming into increasing 
contact and interaction with non-Native communities. Many reservations already have 
complex patterns of land ownership, creating a patchwork or “checkerboarded” map with 
an overlapping and confusing maze of jurisdictional responsibilities for tribes, the 
federal, state, and local governments. Individual Indians and non-Indians may own land 
within the boundaries of a reservation, and both tribal governments and individual 
Indians may have land held in trust for them by the Bureau of Indian Affairs_62_. 
Compounding this already challenging governance problem, increasing economic power 
by tribes, along with expanding non-Indian communities that lie outside of reservation 
boundaries, have created planning and development conflicts.

In Washington state, for example, in the mid-1990s the tribal government for the 
Tulalip Indian Reservation developed a comprehensive land use plan that sought, in large 
part, to set protective zones for the tribe’s watershed and coastal areas. At around the 
same time, Snohomish County developed its own plan for development on land within 
and surrounding the reservation. This plan was a part of a larger attempt by the state to 
monitor growth and accommodate increasing housing demands in the metropolitan 
regions of the state. The county’s plan and the tribal development plan were in conflict 
with one another, with far greater development envisioned by the county.63

Importantly, there are three Washington state legislators who are also tribal 
members and who participate in the Native American Caucus of the National Conference 
of State Legislators (“NCSL”).64 State representative John McCoy is the chair of the
NCSL Native American Caucus, a recognized and respected (albeit non-elected) tribal leader who lives in Tulalip, and represents Snohomish County where Tulalip is located. Moreover, McCoy takes advantage of Washington State’s distinctively unrestrictive policies on conflicts of interest; McCoy is able to represent both the tribe and the state without running afoul of ethics regulations. Suffice it to say, the tribe enjoys the distinct advantage of having a seasoned politician as a tribal member, lobbyist, and elected State representative.

Aside from resolving the obvious questions of jurisdictional authority in implementing and administering either of the plans, the county and tribe had to first establish a functional and working relationship to resolve the plans’ most contentious and troubling conflicts. Over a three year period, tribal leaders and county officials met to address the land use issues and arrive at agreements that would best protect and ensure progress for both parties. On the tribes’ account, they successfully managed to stave off future, unexpected encroachments by non-Indians, protect their land base, and construct a working relationship with the county. While the endurance and fortitude of this relationship will be measured by time, it is evident that the process of federalization is underway in this context. What is unique and which makes this situation difficult to replicate in other contexts is the presence of a senior state elected official who also serves as an important leader in tribal politics. This factor likely facilitated the tribe and county coming together to negotiate their intergovernmental agreement by providing incentives for county cooperation.

Humboldt and Hoopa, California

The Hoopa Tribe in northern California has, for the better part of two decades, made a substantial effort to attain membership in the Humboldt County Association of Governments (“HCAOG”). The Tribe’s primary goal is to participate and vote in discussions related to transportation, funding, and distribution that HCAOG receives from the state and federal governments. At present, tribal governments are not allowed to become members of HCAOG, while incorporated cities and the Humboldt County government have representatives in the organization and are voting members. A recent vote on the question of Hoopa’s membership (January 2007) reflected a 4-4 split amongst the members with no rule in place to break tie votes.

At stake are millions of dollars in transportation funding that are split between the seven member cities and the county each year. The Hoopa tribal community is not an incorporated city but holds the status of a public agency. The California State Legislature conferred this status in 1987 in an effort to explicitly make the tribe eligible for membership under HCAOG’s bylaws. However, at nearly every session of HCAOG

65. See, e.g., Angela Galloway, Lawmakers Use Public Office to Help Private Interest: State’s Rules on Conflicts of Interest Fuzzy at Best, SEATTLE POST-INTELLIGENCER, January 8, 2004, www.seattlepi.com/local/article/Lawmakers-use-public-office-to-help-private-1134155.php. According to the paper, McCoy lobbies the state legislature on behalf of the tribe (particularly in the area of economic development enterprises and taxation on the reservation), and sits on the House Commerce Committee for the State. Other legislators represent municipalities and special districts from other parts of Washington, as well.

since 2005, the Board of Directors has been presented with the question of the tribe’s membership that, thus far, has resulted in tie-votes and technicalities, thereby preventing a final decision on the matter.

The case for Hoopa’s inclusion as a member on HCAOG goes something like this: HCAOG is the regional planning organization in Humboldt County. Mayors from each of the incorporated cities sit on the Board of Directors, along with the President of the Board of Supervisors for the County, and together they make final determinations on how state and federal funding are to be spent in the region. Hoopa is a checkerboard reservation of close to 88,000 acres in the northeast corner of Humboldt County, with over twenty-six hundred Indian and non-Indian residents, is surrounded by non-tribal communities and cities, and is only accessible via Highways 299 and 96.67 Economic development on the reservation is limited, and most employment comes in the form of seasonal work (tourism industry, logging, and fishing). The majority of non-seasonal employment is found outside of the reservation, 120 miles away in the city of Arcata, California. Roads and safety matters take particular concern for the tribe, if only, because of the vast amount of driving residents must do to get to and from jobs.

The Tribe seeks participation in HCAOG in order to have a voice in how funding is distributed for projects across the county. Their resident population is more than double that of some HCAOG member cities (Blue Lake has close to eleven hundred, and Trinidad has a mere three hundred and eleven people, for instance), and they have more roads and highways to care for in their reservation boundaries than some members. When the Tribe first sought inclusion to HCAOG, they went to their state legislator who advocated on their behalf in the legislature to receive status as a public agency, which they received. HCAOG rebuffed the tribe even with their newly established status.

While Hoopa has successfully garnered some support for their inclusion in HCAOG, recent debates in HCAOG meetings on the matter reflect concerns about 1) the inclusion of tribes other than Hoopa (opening the flood gates) and 2) tribal sovereignty. HCAOG members are worried that the seven other tribes in the Humboldt region will also seek membership, thereby potentially making drastic changes to the current status quo and reshaping the organization (not to mention the potential impact on funding distributions!). In fact, since 1987 several additional tribes have expressed their intent to join HCAOG, should they be able to. None have, at this point, become members, and since 2005 the association has revised its membership criteria to limit which incorporated cities and public agencies can become members based on population, land base, and other factors, such as requiring a limited waiver of sovereign immunity for tribes.68

Several vocal opponents to Hoopa’s inclusion cite the tribe’s status as a federally recognized tribe as a reason for rejecting their inclusion in the organization. Tribes are


68. Shelly Baldy, Hoopa Continues to get scraps from HCAOG Table, 13 NATINIXWE, No. 5, Jan. 31, 2007 (copy on file with author). According to the Joint Powers Agreement (“JPA”) governing HCAOG, only public agencies (and a representative from the Humboldt County Board of Supervisors) can sit on the Board. Hoopa became a public agency in 1987, via state legislation, and has helped develop the current operating criteria for the JPA, which includes a limited waiver of tribal sovereign immunity.
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subject to different organizing principles and are distinct political entities, separate from local cities and counties. These “differences” have resulted in the concern that tribes will be able to buy the support and votes of other HCAOG members. Donations from some tribes to candidates in local non-tribal elections have only further inflamed this concern. At issue is the extent to which tribes can be, and are subject to, other state and federal laws that guide what local municipalities can and cannot do.

Moreover, tribes are themselves reticent about becoming subject to such laws. The Chairman of Hoopa argues for the inclusion of the tribe in HCAOG on the basis that the tribe ought to be considered as an equal to other governments for the purposes of the organization. Additionally, the Chairman argues that tribes are fundamentally distinct from other governments and are therefore subject to an entirely separate body of law. The tribe is unwilling to voluntarily relinquish its rights to donate, for instance, money to political candidates, as this is viewed as an infringement on the tribe’s sovereignty.69

In an attempt to appease the tribes in the region, HCAOG brought the tribes on board as members of the technical advisory committee for the organization. On this committee, they are able to participate in discussions and make recommendations to the organization, though they have no vote on the Board of Directors. Most problematically, the tribes’ positions on the advisory committee relegate the tribes narrowly by making them information providers, but lack voting power in the governing decisions HCAOG makes.

In this case, it seems that the Tribe has gone to great lengths to ensure they have a seat at the table: they sought and received recognition as a public agency, they agreed to provide a limited waiver of sovereign immunity, and agreed to be bound by state-made law (namely, the Brown Act, an open meeting law).70 Their substantive interests clearly overlap with the dealings of HCAOG and the long-term vision for their community rests, in part, on their ability to participate in important regional decision-making processes such as these. Through any interpretation of federal Indian law, however, there is little Hoopa can do to ensure it is included in regional non-tribal activities, save federal mandate (and, likely, local and state ruffled feathers).

LIMITS AND BENEFITS OF AGREEMENT-MAKING

In general, tribal-state or tribal-county agreements are structurally unsupported: they exist on an ad-hoc basis when both parties agree to come to the table regarding an issue that, more than likely, has the potential for negatively impacting both stakeholders. At best, the MOAs and MOUs establish the proper protocol and principles to follow on the specific issue they are detailed. The most permanent connections between tribes and states established through MOAs and MOUs are points of contact and the formation of “sister” agencies or equivalents in each government. These points of contact can provide for information sharing between tribes, individual Indians, interested non-Indians, and

69. Leo Sears, Looking for a Level Playing Field, TIMES-STANDARD, Feb. 16, 2007, www.times-standard.com/cgi_5242018. Note: The “level playing field” is actually a quote from the HCAOG representative most opposed to tribal inclusion in the organization. His belief is that non-tribal governments are put at a disadvantage because tribes can continue to make financial contributions and be exempt from other laws governing the local governments in HCAOG.

70. The Ralph M. Brown Act, CAL. GOV’T CODE § 54950 (West 2010).
state government agencies. A person may need to know information regarding the law governing tribal-state relations in their area or a tribe may need to figure out which state office should be contacted to address a particular issue. These points of contact can serve as conduits and breeding grounds for potential agreement-making by being well-positioned to identify sources of conflict and misunderstanding between tribes and states.

Some states have offices whose purpose is to serve as a liaison with tribes, while other states have standing committees on Indian affairs within their legislatures. The majority of institutional support for state-tribal relations at the state level occurs within the office of the governor, where diplomatic — but not legislative — authority resides. Native people running for non-tribal office are attempting to fill this void by seeking election in state legislatures and county boards, as will be discussed in the next chapter. The benefit for tribes, in the best case scenario, is like that of the Tulalip: a native legislator serving “double duty” can help bring the parties to the table for negotiations. That is not; however, what their elected role is, and few states are likely to be as liberal as Washington on this point. Depending on their seniority, they may not have much influence at all. Suffice it to say, there is no way — as we see in the case of Hoopa — to force regional governing authorities to include tribes as relevant parties absent federal action (which itself will be contingent on political factors that may prevent their involvement).

Ultimately, the absence of strong federal policy to support intergovernmental relations between states and tribes, or tribes and local-governments, may threaten their sustainability and continued development. Several acts of Congress, including the Indian Gaming and Regulatory Act, the Indian Child Welfare Act, and the Adam Walsh Act, explicitly mandate tribes and states to work together and, to varying degrees, identify the parameters those relationships must work within, and who in the federal government both parties must report to (i.e. Indian Gaming and Regulatory Commission, the Bureau of Indian Affairs, Department of Justice, and so on). The overriding assumption is that absent this mandate, tribes and states would not work together regardless of their mutually shared interest in the issue at hand.

The federal policy of self-determination ought to incorporate tribal polities as relevant public agencies and authorities for participation in local and regional governance. On the one hand, forcing tribes and non-tribal governments to the table may result in additional discord. However, the relationships that can be built through mutual negotiation and recognition will help protect tribes in the long run as they may find the hands of the federal government become tied. They will be less likely to pass legislation with a zero-sum outcome (tribal vs. state) because the futures of tribal, state, and local interests will have become entangled and contingent on one another in institutional structures and daily governance. As it stands, ad-hoc agreement-making can help build these relationships, but it does not guarantee longevity and can actually strain them depending on the circumstances and conditions.71

71. Goldberg & Champagne, supra note 56, at 728-29 (“Even where cooperative agreements prove, on balance, beneficial to tribes, it may be difficult to sustain them if state funding falters, liability issues strain relations, or mutual fear or mistrust make them politically controversial.”). The authors are speaking about law enforcement agreements devised in response to federal legislation.
Formal agreements are one way in which tribes and non-federal governments are recognizing their overlapping interests and concerns, but they can also serve as mere arrangements of necessity. Tribes are more likely to be disadvantaged in the negotiations, from both an institutional and a political perspective. Aside from the absence of reserved rights held by the states, states have recourse by applying political pressure to congressional persons and legislators (local governments can pressure state legislators, as well). Moreover, inconsistent Supreme Court rulings leave available the possibility that Congress can act to extend state authority over Indian tribes under the implicit divestiture doctrine. This is important because the Supreme Court may determine agreement-making (or at least particular agreements) in general is outside the scope of tribal authority in light of its dependent status.

In the interim, before any such decision of the Court is brought to bear on tribal and non-tribal agreements (if it ever comes to pass), tribes ought to continue participating in these agreements and not just because they may advantage the specific needs of a tribe, but also because the linkages they make in terms of positioning tribes as federal sub-units can be solidified only over time. Moreover, agreements serve democratic and legitimating functions in so far as they build public and political accountability between polities and in the eyes of constituencies. Particularly in the case of regional boards and commissions, tribal participation can provide an avenue for engaging in dialogue and provoking public justifications that can mitigate racist motivations of non-Indians. Public justification to a non-Indian audience is clearly not one of the objectives tribes have in engaging non-tribal governments. However, states and localities are, and will be, responsive to their constituencies. Tribes cannot ignore this and, therefore, will occasionally be forced into the non-Indian public sphere when navigating these relationships.

For this reason, agreements — and tribes as constituent members of those agreements — need additional structural support to ensure that: 1) parties occupy an equal position at the bargaining table, 2) enforcement and compliance with agreements is assured, and 3) the federal judiciary, Congress, or Executive Branch cannot unilaterally upend agreements. The absence of an equal position at the table means the conditions of dominance exacted by states and the federal government will continue and, in the worst cases, may even be formally adopted as the foundation for relationships between tribes and states, with the possibility of bringing the bargaining position of all tribes down to that of the lowest positioned tribe. While there are no quick fixes for leveling the field between tribes and states, there are legal protections that can be put in place to ensure tribes receive greater protection and recognition as government entities. This requires strengthening, not abandoning, the position of tribes as political subunits of the U.S.

72. See cases cited and discussion supra note 1.
73. See Skibine, supra note 2, at 678. Examples of things the court has deemed beyond the scope necessary of self-governance include 1) the regulation of hunting and fishing by non-members within the boundaries of the reservation on land held in fee (Montana v. United States, 450 U.S. 544 (1981)) and 2) the extension of tribal government taxes over businesses operated on non-Indian fee land within the reservation boundaries (Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001). Skibine, supra note 2, at 680-81.
74. See, for example, the ripple effect of negotiating gaming compacts in California where the state effectively negotiates with the weakest positioned tribe to extract the highest percentage from the tribe’s gaming revenues, and then attempts to bring all other tribes into agreements under the same terms.
On the second point, even when tribes and states or counties develop an agreement, the absence of enforcement or the presence of non-compliance may threaten the agreement and undermine already tenuous relationships between polities. This is exacerbated for tribes when considered in light of the first point that tribes often occupy the more disadvantageous position in the relationship. Third, in so far as agreements remain unrecognized in the eyes of federal actors, they may suffer from federal inaction or action. Without federal protection, non-compliance on the part of states or local governments can threaten agreements. On the other hand, federal entities can adjudicate, make law and policy, or interpret agreements as being inconsistent with the federal vision of what tribal governments are and the associated scope of authorities. Because this vision differs across time and actors, it would be a difficult feat for those engaged in agreement-making to construct agreements consistent with federal demands. In short, while agreements may be one step in the direction of formal subunit status and hold great potential for improving relationships amongst non-federal political bodies, they remain in need of larger institutional and structural security for their longevity and health. Moreover, they must be recognized as tools for the improvement of daily self-governance and should not be confused with the internal processes of self-determination of tribes, which are not subject to negotiations with external actors even if those actors are implicated in them.