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## Bringing Congress and Indians Back into Federal Indian Law: The Restatement of the Law of American Indians

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# BRINGING CONGRESS AND INDIANS BACK INTO FEDERAL INDIAN LAW: THE RESTATEMENT OF THE LAW OF AMERICAN INDIANS

Kirsten Matoy Carlson\*

*Abstract:* Congress and Native Nations have renegotiated the federal-tribal relationship in the past fifty years. The courts, however, have failed to keep up with Congress and recognize this modern federal-tribal relationship. As a result, scholars, judges, and practitioners often characterize federal Indian law as incoherent and inconsistent. This Article argues that the Restatement of the Law of American Indians retells federal Indian law to close the gap between statutory and decisional law. It realigns federal Indian law with the modern federal-tribal relationship negotiated between Congress and tribal governments. Consistent with almost a half-century of congressional law and policy, the Restatement clarifies the foundational principles of federal Indian law and provides federal and state courts with guidance on how to interpret statutes related to Native governments and peoples. It provides courts with a vision of federal Indian law that is more coherent, easier to apply, and more reflective of the state of affairs in Indian Country than the decisional law adopted by the Supreme Court in the past fifty years.

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## INTRODUCTION

Federal Indian law underwent a fundamental and dramatic change fifty years ago. Prior to 1970, policymakers had privileged non-Indian voices in the development of federal Indian law for decades to devastating effect.<sup>1</sup> In the late 1960s, Executive Branch officials and members of Congress started listening to tribal governments and American Indian and Alaska Native organizations when making laws impacting Indians and Indian governments.<sup>2</sup> The result was a complete reversal of federal Indian law and policy.<sup>3</sup> President Nixon and then Congress repudiated the Termination Policy, meant to disestablish tribal governments and assimilate tribal citizens, and adopted the Tribal Self-Determination Policy, which promotes tribal sovereignty by transferring control over federal programs to tribal governments.<sup>4</sup> In adopting the Tribal Self-Determination Policy, Congress returned to the foundational principles of

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1. EMMA R. GROSS, CONTEMPORARY FEDERAL POLICY TOWARD AMERICAN INDIANS 77–79 (1989). E. Fletcher McClellan, *The Politics of American Indian Self-Determination, 1958–75: The Indian Self-Determination and Education Assistance Act of 1975*, 22 (Dec. 1988) (Ph.D. dissertation, University of Tennessee) (on file with author).

2. McClellan, *supra* note 1, at 104–11. See GEORGE PIERRE CASTILE, *TO SHOW HEART: NATIVE AMERICAN SELF-DETERMINATION AND FEDERAL INDIAN POLICY, 1960–1975* 12 (1998) (discussing how President Kennedy’s Commission of Indian Affairs Philleo Nash consulted with and listened to tribal governments); GROSS, *supra* note 1, at 79.

3. GROSS, *supra* note 1, at xvi.

4. See *infra* section I.A.

federal Indian law.<sup>5</sup> It embarked on a renegotiation of its ongoing relationship with Native Nations.<sup>6</sup> These efforts have led to a modern federal-tribal relationship that acknowledges the sovereign governmental status of Native Nations and the federal government's duty to protect them.

Many court decisions, however, have not lived up to these changes. Rather, led by the Supreme Court, federal and state courts have frequently diverged from congressional Indian policy and foundational principles of federal Indian law, including their own past precedents.<sup>7</sup> They have ignored the modern federal-tribal relationship forged by tribal governments and Congress over the past five decades and the lived experiences of Native peoples more generally.<sup>8</sup> As a result, federal Indian law has proceeded along two seemingly separate tracks as Congress has continued to affirm and extend tribal sovereignty and participation in lawmaking while the courts often undercut it.<sup>9</sup> This divergence has led to fifty years of inconsistent and incoherent decision making by courts that has left federal Indian law in disarray and far more complicated than it needs to be.<sup>10</sup>

In this Article, I argue that the Restatement of the Law of American Indians retells federal Indian law in a way that allows for the reuniting of these two strains of federal Indian law. The Restatement departs from many commentaries on federal Indian law, which focus on decisional law,<sup>11</sup> by framing federal Indian law as statutory law.<sup>12</sup> It views federal Indian law through the lens of how Congress and Indians have remade the federal-tribal relationship and substantive law over the past fifty years.<sup>13</sup> In short, it brings two major players in the creation of federal Indian law—Congress and tribal governments—back into the picture and reiterates for

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5. See 25 U.S.C. § 450(a).

6. Since its formation, the United States has established legal relationships with American Indians as separate political communities. Carole Goldberg-Ambrose, *Of Native Americans and Tribal Members: The Impact of Law on Indian Group Life*, 28 L. & SOC'Y REV. 1123, 1125–26 (1994). This relationship is often referred to as the federal-tribal relationship.

7. See *infra* section I.B.

8. See *infra* section I.B.

9. See *infra* Part I.

10. See *infra* section I.B.

11. Vine Deloria, Jr., *The Wisdom of Congress and Other Folklore*, 23 OKLA CITY U. L. REV. 261, 271–72 (1998) (“Not only has legal scholarship abandoned or avoided any real examination of Congress in formulating Indian legislation, but most legal scholars working in the field of Indian affairs have virtually no familiarity with the materials.”); see also *infra* section I.B.

12. See *infra* Part II.

13. See *infra* Part II.

courts the central role that they play in making federal Indian law.<sup>14</sup> It then directs courts to follow Congress's lead and act consistently with congressional policy and foundational principles of federal Indian law.<sup>15</sup>

In Part I, I recount how federal Indian law has developed along two separate lines over the past fifty years. Section I.A relies on my previous research to show that since the 1970s, Congress has responded to increased tribal advocacy by adopting a largely consistent policy based on foundational principles of federal Indian law.<sup>16</sup> Scholars have identified the foundational principles of federal Indian law as:

- Tribes are governments with inherent sovereign powers, not delegated or granted by the United States;
- The U.S. Constitution gives Congress full control over Indian affairs—including authority to limit tribal powers;
- The federal government holds responsibilities to Indian tribes and individual Indians known as the trust relationship;
- Indian Nations retain powers unless Congress has expressed clear and plain intent to abrogate them; and
- State governments have no authority to regulate Indian affairs absent express Congressional delegation or grant.<sup>17</sup>

In the past five decades, Congress has renewed its relationship with Native Nations and substantively changed federal Indian law to recognize these foundational principles.<sup>18</sup> Through a network of statutes, Congress has strengthened the inherent governmental authority possessed by tribal governments and the trust relationship between tribal and federal governments.<sup>19</sup> It has also acknowledged its own limited powers to

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14. *See infra* Part II.

15. *See infra* Part II.

16. *See infra* section I.A.

17. Scholars vary in their exact framing of these foundational principles. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 2 (Nell Jessup Newton et al. eds., 2012) [hereinafter COHEN'S HANDBOOK OF FEDERAL INDIAN LAW]; Alex Tallchief Skibine, *Dualism and the Dialogic of Incorporation in Federal Indian Law*, 119 HARV. L. REV. F. 28, 28 (2005); David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 269–73 (2001); RESTATEMENT OF THE L.: THE L. OF AM. INDIANS ch. 1, intro. note (AM. L. INST., Proposed Official Draft 2021).

Almost all scholars rely on the list devised by Felix Cohen in his attempt to summarize federal Indian law cases and statutes for the U.S. Department of the Interior in 1941. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 122–23 (1941). Some add federally protected lands for designated Indian tribes to the list. Goldberg-Ambrose, *supra* note 6; Kirsten Matoy Carlson, *Making Strategic Choices: How and Why Indian Groups Advocated for Federal Recognition from 1977 to 2012*, 51 L. & SOC'Y REV. 930, 932 (2017). Others emphasize tribal governments' loss of external autonomy. *See* Skibine, *supra* note 17.

18. *See infra* section I.A.

19. *See infra* section I.A.

abrogate tribal authority.

This shift has been procedural as well as substantive. Congress has sought to maximize Indian participation in the legislative process leading to a lawmaking process inclusive of Native peoples.<sup>20</sup> The era of Congress and the Executive Branch making laws for Native peoples without Native input has ended. It has been replaced with a process aimed at making laws *with* Native peoples.<sup>21</sup> The inclusion of Native peoples in the lawmaking process has contributed to the substantial changes already mentioned, namely the development of a body of federal statutory law and policy that fosters the foundational principles of federal Indian law.<sup>22</sup>

Section I.B shows that the courts have not kept up with this shift in federal Indian law.<sup>23</sup> In contrast, court decisions have departed from the foundational principles of federal Indian law, congressional policy, and their own past precedents.<sup>24</sup> They have sought to replace Congress as the primary maker of federal Indian law, limited the impact of laws enacted by Congress to further tribal sovereignty, continued to rely on laws repudiated by Congress, and ignored the canons of statutory construction.<sup>25</sup> Some recent Supreme Court opinions can be interpreted as seeking to realign the Court with foundational principles and congressional policy,<sup>26</sup> but fifty years of inconsistent and incoherent decision making by federal and state courts have left court-made federal Indian law in disarray and far more complicated than it needs to be.

Part II argues that the Restatement of American Indian Law reframes federal Indian law so that it reflects the modern federal-tribal relationship

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20. See *infra* section I.A.

21. Vine Deloria, Jr., *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203, 205 (1989).

22. See *infra* section I.A.

23. Matthew L.M. Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121 (2006).

24. See *infra* section I.B.

25. See *infra* Part I.

26. See, e.g., *Nebraska v. Parker*, 577 U.S. 481 (2016) (holding that Congress had never diminished the Omaha reservation); *McGirt v. Oklahoma*, \_\_\_ U.S. \_\_\_, 140 S. Ct. 2452 (2020) (upholding the treaty that created the Muskogee Nation's reservation and finding that Congress had never abrogated it). See also Matthew L.M. Fletcher, *Muskrat Textualism*, 116 NW. U. L. REV. 963, 965 (2022) [hereinafter Fletcher, *Muskrat Textualism*]; Matthew L.M. Fletcher, *Textualism's Gaze*, 25 MICH. J. RACE & L. 111, 112 (2020) [hereinafter Fletcher, *Textualism's Gaze*]; Ann E. Tweedy, *Has Federal Indian Law Finally Arrived at "The Far End of the Trail of Tears"?*, 37 GA. ST. U. L. REV. 739, 739 (2021).

Other recent Supreme Court decisions have expressly departed from foundational principles of federal Indian law and congressional policy, rewriting the Constitution, and ignoring its own precedents. See, e.g., *Oklahoma v. Castro-Huerta*, \_\_\_ U.S. \_\_\_, 142 S. Ct. 2486 (2022) (holding that the state of Oklahoma has concurrent criminal jurisdiction over crimes against Indians in Indian Country). For a discussion of scholars' criticism of *Castro-Huerta*, see *infra* section I.B.

negotiated by tribal governments and Congress over the past fifty years. The modern federal-tribal relationship emphasizes the negotiation of federal Indian law by tribal governments and Congress, recognizes tribal sovereignty, and implements the federal trust relationship with tribal governments and individual Indians.<sup>27</sup> The federal statutory law and policy enacted as a result of this relationship adheres to foundational principles of federal Indian law.<sup>28</sup> The Restatement retells federal Indian law to promote this modern relationship, to reaffirm foundational principles of federal Indian law, and to align the law with congressional policy.<sup>29</sup> The result is a vision of federal Indian law that is more coherent, easier to apply, and more reflective of the state of affairs in Indian Country.

The Restatement then instructs courts to follow this vision of federal Indian law. Consistent with other American Law Institute Restatements, the Restatement of the Law of American Indians is “primarily addressed to courts and aim[s] at clear formulations of common law and its statutory elements, and reflect[s] the law as it presently stands or might appropriately be stated by a court.”<sup>30</sup> As a directive to courts, it seeks to resolve the tensions between statutory and decisional law that currently exist in federal Indian law. The Restatement instructs courts to act consistently with the modern federal-tribal relationship by applying foundational principles of federal Indian law and congressional policy.

## I. THE DIVERGENT PATHS OF FEDERAL INDIAN LAW

This Part describes how federal Indian law has developed along two separate lines over the past fifty years. Section I.A demonstrates how starting in the 1970s, Congress and Native Nations negotiated a modern federal-tribal relationship, largely in response to Indian advocacy. Congress remade federal Indian law and its relationship with tribal governments by returning to its foundational principles and adopting the Tribal Self-Determination Policy.<sup>31</sup> Through advocacy, Native peoples shifted their relationship with Congress and gained a more prominent role in making federal Indian law and policy.<sup>32</sup> Together Congress and tribal governments developed a modern federal-tribal relationship based on

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27. See *infra* section I.A.

28. See *infra* section I.A.

29. See *infra* Part II.

30. *Frequently Asked Questions*, AM. L. INST., <http://ali.org/about-ali/faq/> [<https://perma.cc/3SPE-8MJG>].

31. See *infra* section I.A.

32. See *infra* section I.A.

tribal participation in federal lawmaking that both recognizes tribes are governments with inherent sovereign powers and acknowledges that the federal government holds responsibilities to tribes through the trust relationship.<sup>33</sup> Over time this modern federal-tribal relationship has led Congress to enact statutes that realign federal Indian law with its foundational principles. Section I.B shows how federal courts increasingly created their own version of federal Indian law by departing from foundational principles and congressional policy.

A. *Renegotiating the Federal-Tribal Relationship and Remaking Federal Indian Law: Indian Advocacy and Congress*

Native governments and peoples have continually attempted to influence non-Indigenous governments to craft policies that recognize and protect their tribal sovereignty. During the nineteenth century, Indian Nations used the treaty-making process to retain their existing governmental and property rights.<sup>34</sup> They also petitioned and sent delegates to Washington, D.C., to meet with members of the Executive Branch and Congress.<sup>35</sup> Native Nations continued to petition and send delegations to Washington, D.C., after Congress unilaterally terminated treaty-making in 1871.<sup>36</sup>

Indian involvement in federal policymaking ebbed in the late nineteenth and early twentieth centuries as members of Congress and the Executive Branch privileged the views of the Bureau of Indian Affairs (BIA) and other non-Indians in crafting Indian policy.<sup>37</sup> Indian Nations continued their advocacy despite their lack of political influence. They

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33. Fletcher, *Muskrat Textualism*, *supra* note 26, at 982 (noting the emergence of a new federal-tribal relationship and referring to it as the “trust relationship”).

34. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 17, at 26; INDIAN L. RES. CTR., NATIVE LAND LAW: GENERAL PRINCIPLES OF LAW RELATING TO NATIVE LANDS AND NATURAL RESOURCES 123 (lawyers ed. 2012). For example, Anishinaabek nations in present day Wisconsin and Minnesota negotiated the retention of their hunting, gathering, and fishing rights even when they ceded lands to the United States government. Treaty with the Chippewas, 7 Stat. 536, 537 (1837); *see also* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

35. FREDRICK E. HOXIE, THIS INDIAN COUNTRY: AMERICAN INDIAN ACTIVISTS AND THE AFTER PLACE THEY MADE 70–71 (2013) (documenting Choctaw delegations to Washington, D.C. in the 1820s); W. DALE MASON, INDIAN GAMING: TRIBAL SOVEREIGNTY AND AMERICAN POLITICS 40 (2000); Daniel Carpenter, *On the Emergence of the Administrative Petition: Innovations in Nineteenth-Century Indigenous North America*, in ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW 349, 351–52, 354–56 (Nicholas R. Parrillo ed., 2017).

36. HERMAN VIOLA, DIPLOMATS IN BUCKSKINS: A HISTORY OF INDIAN DELEGATIONS IN WASHINGTON CITY 190–99 (1995). For a discussion of how the United States continued to negotiate with Indian tribes after the end of treaty-making, see Deloria, *supra* note 21, at 210.

37. GROSS, *supra* note 1, at 77, 79; McClellan, *supra* note 1, at 22, 50–53.

faced tremendous obstacles and were unable to prevent Congress from enacting some policies extremely detrimental to tribal sovereignty, including allotment and termination.<sup>38</sup> Even in those bleak times, some Indian Nations persuaded Congress to enact legislation beneficial to them over tremendous opposition.<sup>39</sup> Other tribal governments somehow managed to resist and prevent the passage of legislation terminating their tribal existence or subjecting them to state jurisdiction.<sup>40</sup>

Tribal governments and organizations mobilized against the Termination Policy, which sought to end the federal government's recognition of Indian tribes as governments,<sup>41</sup> and mounted a major campaign against the policy's expansion.<sup>42</sup> The Indian lobby, however, remained weak as Indian Nations had limited financial resources and little experience in federal policymaking.<sup>43</sup> Historically, tribal governments had approached Congress to resolve tribe specific issues,<sup>44</sup> but significant changes were on the horizon.

In the 1950s and 1960s, with the resurgence in Indian identity and the development of pan-tribal organizations, tribal governments started to combine their advocacy efforts and shift their focus to national level

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38. CHARLES WILKINSON, *BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS* 66 (2005) [hereinafter WILKINSON, *BLOOD STRUGGLE*].

The Allotment Policy undermined Indian Nations by dividing up and allotting tribally held land into alienable fee simple properties held by individual Indians and assimilating Indians into mainstream American culture as farmers. Dawes Allotment Act of 1887, ch. 119, 24 Stat. 388 (1887).

The Termination Policy sought to assimilate Indians into mainstream American society by ending a tribal government's relationship with the federal government, liquidating tribal assets, and dissolving the trust status of tribal lands. Termination Act of 1953, H.R. Con. Res. 108, 83rd Cong., 67 Stat. 132 (1953).

For a general discussion of these policies, see generally DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR., MATTHEW L.M. FLETCHER, & KRISTEN A. CARPENTER, *CASES AND MATERIALS ON FEDERAL INDIAN LAW* (7th ed. 2016).

39. For example, Congress returned Blue Lake to the Taos Pueblo in 1972. WILKINSON, *BLOOD STRUGGLE*, *supra* note 38, at 210–17.

40. For example, Indian advocacy prevented the termination of the Flathead reservation in 1954 and the Sioux defeated efforts to extend Public Law 208 to them in 1964. WILKINSON, *BLOOD STRUGGLE*, *supra* note 38, at 123–25.

41. Termination Act of 1953, 67 Stat. 132 (1953).

42. THOMAS W. COWGER, *THE NATIONAL CONGRESS OF AMERICAN INDIANS: THE FOUNDING YEARS* 3 (1999); McClellan, *supra* note 1, at 49, 57–58.

43. The BIA denied tribes the ability to use their own trust funds to finance lobbying visits to Washington well into the late 1940s. CASTILE, *supra* note 2, at xxv. Castile describes the Indian lobby in the 1960s as making modest legislative proposals and not having much clout among members of Congress. *Id.* at 19.

44. Tribal petitions to policymakers and delegations to Washington, D.C., are well documented. VIOLA, *supra* note 36, at 22–41.

issues.<sup>45</sup> As a result, pan-tribal organizations, led by the National Congress of the American Indian (NCAI), started taking Native concerns directly to Congress in the 1950s and 1960s.<sup>46</sup>

As my previous research has documented in more detail, tribal advocacy and a receptive White House precipitated a major shift in federal Indian law and policy in the late 1960s and early 1970s.<sup>47</sup> Pressure from tribal governments, the NCAI, and the Red Power movement encouraged the Johnson and Nixon Administrations to repudiate the Termination Policy.<sup>48</sup> President Nixon embraced the self-determination approach in his 1968 presidential campaign and his support stimulated the adoption of this approach as federal Indian policy.<sup>49</sup> By 1970, President Nixon had publicly repudiated the anti-Indian policies of the 1950s and replaced them with the Tribal Self-Determination Policy.<sup>50</sup> Congress lagged behind the President but eventually embraced the new policy of Tribal Self-Determination.<sup>51</sup>

In 1975, Congress formally adopted the policy in the Indian Self-Determination and Education Assistance Act (ISDEAA).<sup>52</sup> Commonly referred to as the Tribal Self-Determination Policy, this policy committed the United States “to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.”<sup>53</sup> A cornerstone of the policy, the ISDEAA was

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45. See Bethany R. Berger, *Williams v. Lee and the Debate Over Indian Equality*, 109 MICH. L. REV. 1463, 1472–73 (2011).

46. COWGER, *supra* note 42, at 108–25 (describing a shift in NCAI policy to fighting termination). See Stephen Cornell, *The New Indian Politics*, 10 WILSON Q. 113, 117–20, 194–95 (1986).

47. Kirsten Matoy Carlson, *Lobbying Against the Odds*, 56 HARV. J. LEGIS. 23, 56–60 (2019).

48. McClellan, *supra* note 1, at 129–49. The rise of American Indian activism in the late 1960s and early 1970s is commonly referred to as the Red Power movement. See generally STEPHEN CORNELL, *THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE* (1988); JOANE NAGEL, *AMERICAN INDIAN ETHIC RENEWAL: RED POWER AND THE RESURGENCE OF IDENTITY AND CULTURE* (1996); WILKINSON, *BLOOD STRUGGLE*, *supra* note 38, at 129. American Indian activists protested KKK rallies in the South, exercised their fishing and hunting rights in the Midwest and Northwest, occupied Alcatraz and Wounded Knee, and caravanned to Washington, D.C. McClellan, *supra* note 1, at 129–49; ROXANNE DUNBAR-ORTIZ, *AN INDIGENOUS PEOPLES’ HISTORY OF THE UNITED STATES 181–90* (2014). Scholars often differentiate this activism from the Civil Rights Movement, which sought political and social inclusion, rather than recognition of tribal sovereignty. WILKINSON, *BLOOD STRUGGLE*, *supra* note 38, at 129; VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO 168–96* (1970).

49. Carlson, *supra* note 47, at 58.

50. GROSS, *supra* note 1, at 34–38. According to Gross, Nixon attributed his positive stance towards American Indians to the influence of his college football coach. *Id.* at 70–71.

51. Carlson, *supra* note 47, at 58.

52. 25 U.S.C. §§ 5301–5423.

53. *Id.* § 5302(b).

to build tribal institutional capacities and economies by transferring control over federal programs to tribal governments.<sup>54</sup> It required the Secretaries of the Interior and Health and Human Services to contract with tribal organizations to operate federal programs for Indians upon the request of any Indian tribe.<sup>55</sup>

The adoption of the Tribal Self-Determination Policy signaled a dramatic shift in the federal government's position on federal Indian law and policy.<sup>56</sup> For the first time since the 1930s, Congress returned to foundational principles of federal Indian law.<sup>57</sup> Consistent with these principles, it promulgated a policy that supported Indian Nations as governments with inherent sovereign powers, not delegated or granted by the United States, and separate from the states; recognized federal responsibilities to Indian tribes through the trust relationship; and invited tribal governmental participation in federal policymaking.<sup>58</sup> Under the ISDEAA, money flowed directly to tribal governments, bypassing the BIA and the states, and enabling Indian Nations to make important decisions regarding their welfare.<sup>59</sup> Many tribal governments, which had begun to administer programs under the Office of Economic Opportunity, embraced the ISDEAA and complained about the BIA's reluctance in implementing it.<sup>60</sup>

Despite some initial resistance, the new perspective on Indian affairs embodied in the Tribal Self-Determination Policy "eventually came to

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54. GROSS, *supra* note 1, at 20–21.

55. Kevin K. Washburn, *Tribal Self-Determination at the Crossroads*, 38 CONN. L. REV. 777, 779 (2006).

56. GROSS, *supra* note 1, at xvi.

57. The Indian Reorganization Act (IRA) enacted in 1934 recognized tribal sovereignty, ended allotment, and created opportunities for tribes to form and operate as tribal governments. DAVID TREUER, *THE HEARTBEAT OF WOUNDED KNEE: NATIVE AMERICA FROM 1890 TO THE PRESENT* 206–09 (2019). Congress has never repealed the IRA. Some scholars see the Tribal Self-Determination Policy as a continuation of the IRA. *See, e.g.*, Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1814 (2019) (linking the collaborative government-to-government relationship envisioned by the IRA to modern laws supporting self-determination).

58. *See* CASTILE, *supra* note 2, at 168–70. Gross documents that policymakers in the 1970s "agreed that self-determination meant self-government for Indian tribes." GROSS, *supra* note 1, at 31 ("Thus, for policymakers involved with Indian affairs during the 1970s, self-determination was the belief that Indian tribes and communities could become economically and politically autonomous by applying their powers of self-government to the pursuit of economic development and self-sufficiency.").

59. Carlson, *supra* note 47, at 60.

60. E. Fletcher McClellan, *Implementation and Policy Reformulation of Title 1 of the Indian Self-Determination and Education Assistance Act of 1975-80*, 6 WICAZO SA REV. 45, 50 (1990). Other tribal governments feared that self-determination was termination by another name. For example, the name of the 1972 NCAI Conference was "Self-Determination or Disguised Termination." Series 1: NCAI Conventions and Mid-year Conferences, 1944–1989, *Box 21 1972*, in RECS. OF THE NAT'L CONG. OF AM. INDIANS, 1933–1990 (2015).

pervade [Congress's] entire approach to Indian affairs.”<sup>61</sup> Throughout the rest of the 1970s and early 1980s, Congress enacted several key bills expanding and enhancing the Tribal Self-Determination Policy.<sup>62</sup> This legislation institutionalized the policy and reinforced the growing capacity of Indian Nations as governments exercising their own authority.<sup>63</sup>

The enactment of the ISDEAA in 1975 also served as a turning point in the federal-tribal relationship as American Indian and Alaska Native Nations and organizations used legislative advocacy to reclaim their role in the federal lawmaking process.<sup>64</sup> Policymakers were finally ready to put the Indian back in Indian law. The ISDEAA reiterates the importance of a tribal role and recognizes:

[T]he obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.<sup>65</sup>

My previous research documents tribal governments' increasing engagement in the legislative process.<sup>66</sup> It tracks the dramatic growth in reported lobbying by Indian Nations and organizations, starting in the late 1970s.<sup>67</sup> It demonstrates how tribal governments and organizations have emerged as central players in the federal lawmaking process, often shaping legislation related to them.<sup>68</sup>

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61. GROSS, *supra* note 1, at 78. *See also* Fletcher, *supra* note 23, at 143 (“[C]ongressional support of tribal self-governance is unwavering”).

62. *See* 25 U.S.C. §§ 1601–1603, 2501–2511, 5301–5423, 3601–3631, 1901–1963; 42 U.S.C. § 1996.

63. The Tribal Self-Determination Policy may have also stimulated American Indian legislative advocacy by helping some Indian nations build their internal capacities to deliver programs and services to their citizens. The stakes Indian nations had in the implementation of these programs and services increased as they gained direct managerial control over them. Tribes, thus, had more incentives both in protecting these programs and in advocating for improvements in them. Moreover, as their internal capacities grew, Indian tribes gained expertise in these areas, making them more knowledgeable about the programs that work in their communities and more able to advocate effectively to policymakers.

Carlson, *supra* note 47, at 56; *see* GROSS, *supra* note 1, at 108–09.

64. Carlson, *supra* note 47, at 56–60.

65. 25 U.S.C. § 5302(a).

66. Carlson, *supra* note 47, at 39–40.

67. *Id.* at 40 (documenting an almost 700% increase in reported lobbying by Indian nations from 1978 to 2012).

68. Kirsten Matoy Carlson, *Lobbying as a Strategy for Tribal Resilience*, 2018 BYU L. REV. 1159, 1177–220 (2018) [hereinafter Carlson, *Lobbying as a Strategy*] (documenting how tribal governments have influenced federal legislation to protect and/or extend tribal sovereignty); Kirsten Matoy Carlson, *Beyond Descriptive Representation: American Indian Opposition to Federal Legislation*, 7

Congress has promoted maximum Indian participation and increasingly renegotiated the federal-tribal relationship to reflect its duty of protection to tribal governments.<sup>69</sup> Shortly after enacting the ISDEAA, Congress created the American Indian Policy Review Commission (AIPRC), which was charged with conducting a “two-year study that was intended to lead to recommendations for broad changes in federal Indian policies.”<sup>70</sup> The AIPRC sought to hear directly from Native people all across Indian Country.<sup>71</sup> Through the AIPRC process, the Senate recognized the value in the political, government-to-government relationship it has with tribal governments and their input in the political process.<sup>72</sup> To institutionalize tribal participation, it established the Senate Committee on Indian Affairs (SCIA).<sup>73</sup> The SCIA provided access to Congress and new opportunities for American Indians to engage in legislative strategies.<sup>74</sup> Members of Congress, especially the chairs of the SCIA and the House Committee on Natural Resources, have also increasingly hired tribal citizens as staffers.<sup>75</sup> These staffers have regularly reached out to and consulted with tribal governments and organizations on major pieces of legislation relating to American Indians and Alaska Natives.<sup>76</sup> In combination, the increase in tribal legislative advocacy, institutionalization of the SCIA, and the outreach to tribal governments by congressional staffers has transformed the federal-tribal relationship, returning it to a dynamic more akin to the negotiation and

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J. RACE, ETHNICITY, & POL. 65, 74–82 (2022) [hereinafter Carlson, *Beyond Descriptive Representation*] (showing how unified tribal opposition undermines the enactment of federal legislation and encourages its amendment).

69. Fletcher, *Muskrat Textualism*, *supra* note 26, at 973 (describing Congress as prioritizing bottom-up thinking and “giving tribes room to propose, adopt, and implement solutions” since the 1970s); Blackhawk, *supra* note 57, at 1814, 1838.

70. ALAN R. PARKER, *PATHWAYS TO INDIGENOUS NATION SOVEREIGNTY: A CHRONICLE OF FEDERAL POLICY DEVELOPMENTS 14–15* (Gordon Henry ed., 2018).

71. *Id.* at 16. In setting up the Commission, Senator Abourezk sought to hire as many Native people as possible and let them be in charge of the investigation. *Id.* at 15. Parker describes this as both revolutionary and effective. *Id.*

72. *Id.* at 14–25, 123–24.

73. *Id.* at 21 (noting that the most important contribution made by the AIPRC was the creation of the Senate Committee on Indian Affairs); *id.* at 31–37 (describing the creation of the Committee).

74. For a discussion of the Senate Committee on Indian Affairs and how it contributed to tribal participation in legislative lawmaking, see Carlson, *supra* note 47, at 61–63.

75. GROSS, *supra* note 1, at 79, 86; PARKER, *supra* note 70, at 34–35. Some of these staffers have included, inter alia: Forrest Gerard (Blackfeet tribal citizen), Patricia Zell (Navajo), Alan Parker (Chippewa Cree Tribal Nation citizen), Frank Ducheneaux (Cheyenne River Sioux Tribal citizen), Alex Skibine (Osage Nation citizen), and Tadd Johnson (Fort Boise Chippewa tribal citizen). More recently, tribal citizens have served in the offices of individual members of Congress.

76. GROSS, *supra* note 1, at 86; PARKER *supra* note 70, at xii, 59–60, 85–90; Carlson, *supra* note 47, at 75.

diplomacy that originally informed treaty making between the two sovereigns.<sup>77</sup>

Tribal advocacy and active participation in the federal legislative process have encouraged Congress to remake federal Indian law over the past five decades based on foundational principles of federal Indian law.<sup>78</sup> In response to tribal advocacy, Congress has reiterated its commitment to recognizing tribal governments as having their own authority by amending the ISDEAA several times since 1975.<sup>79</sup> Congress has promoted tribal authority by resolving issues arising in the ISDEAA's implementation. Congress has expanded contracting to new programs and increased tribal control over program design.<sup>80</sup> For example, the Indian Self-Determination Amendments of 1988 responded to tribal concerns by improving many aspects of the contracting process, including clarifying contract funding levels.<sup>81</sup>

Congress further acknowledged tribal sovereignty in the 1988 Amendments to the ISDEAA by creating a self-governance demonstration program that allowed tribal governments more flexibility in administering Department of the Interior (DOI) and Indian Health Service (IHS) programs through the creation of self-governance compacts.<sup>82</sup> Self-governance compacting provides tribes with input in the design and allocation of funding among the different programs. Tribes negotiate a single annual funding agreement, which sets the terms for the administration of all programs for tribes or Indians administered by the DOI or the IHS.<sup>83</sup> Tribal governments may reallocate funds among

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77. Deloria, *supra* note 21, at 205, 217 (“Building upon the idea that they were dealing with a quasi-sovereign nation, Congress and the executive branch since 1970 have moved toward negotiations as a means of resolving disputes with Indians.”).

78. As my research has repeatedly demonstrated, tribal advocacy has substantively changed federal legislation. Carlson, *Lobbying as a Strategy*, *supra* note 68, at 1159–2018 (demonstrating how tribal advocacy has influenced federal legislation that benefits tribal governments); Carlson, *supra* note 47, at 74–82 (showing how tribal governments and organizations use legislative advocacy to block and/or amend legislation harmful to them).

79. Carlson, *Lobbying as a Strategy*, *supra* note 68, at 1199–219; Geoffrey D. Strommer & Stephen D. Osborne, *The History, Status, and Future of Tribal Self-Governance under the Indian Self-Determination and Education Assistance Act*, 39 AM. INDIAN L. REV. 1, 29–48 (2014); Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251, 1266–69 (1995).

80. For an in-depth discussion of the amendments to the ISDEAA, see Strommer & Osborne, *supra* note 79, at 29–48.

81. *Id.* at 30.

82. Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285 (codified as amended in scattered sections of 25 U.S.C.) (referring to self-governance compacts as “self-determination contracts”).

83. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 17, at 1389–90. Slightly different provisions govern compacting with each agency. *Id.* at 1390.

programs and may redesign or consolidate programs.<sup>84</sup> Congress made the self-governance program permanent for the DOI in 1994<sup>85</sup> and for the IHS in 2000.<sup>86</sup>

The Tribal Self-Determination Policy, however, has come to encompass more than the ISDEAA. The modern federal-tribal relationship has prompted Congress to enact several other major pieces of legislation, which reinforce its commitment to treating Indian tribes as governments, building their institutions and economies, and implementing the trust relationship.<sup>87</sup> For example, Congress has recognized the importance of tribal self-determination in the delivery of healthcare through the Indian Healthcare Improvement Act of 1976,<sup>88</sup> ensured tribal control over the placement of Indian children in the Indian Child Welfare Act of 1978,<sup>89</sup> treated tribal governments like other governments for tax purposes in the Indian Tribal Government Tax Status Act of 1982,<sup>90</sup> and fostered the development of tribal legal systems in the Indian Tribal Justice Act of 1993,<sup>91</sup> the Indian Tribal Justice Technical and Legal Assistance Act of 2000,<sup>92</sup> and the Tribal Law and Order Act of 2010.<sup>93</sup> Consistent with foundational principles of federal Indian law, these statutes acknowledge that tribes are governments with inherent sovereign powers.

In addition to elevating the foundational principles of tribal sovereignty, Congress has strengthened the importance of the trust relationship as a foundational principle of federal Indian law. Congress has enacted numerous statutes based on and enforcing the trust relationship, including, *inter alia*: the National Indian Forest Resources

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84. *Id.*

85. Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, 108 Stat. 4250 (codified as amended at 25 U.S.C. §§ 5301–5368).

86. Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, 114 Stat. 711 (codified as amended at 25 U.S.C. §§ 5381–5399).

87. Wilkins and Stark list 23 bills enacted between 1975 and 2010 as major congressional law affecting Indians. DAVID E. WILKINS & HEIDI K. STARK, *AMERICAN INDIAN POLITICS AND THE AMERICAN POLITICAL SYSTEM* 267–69 (3d ed. 2011). Castile identifies several additional statutes that implement the Self-Determination Policy. *See* CASTILE, *supra* note 2, at 30, 90–92.

88. Indian Healthcare Improvement Act of 1976, 25 U.S.C. §§ 1601–1603.

89. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended at 25 U.S.C. §§ 1901–1963).

90. Indian Tribal Government Tax Status Act of 1982, Pub. L. No. 97-473, 96 Stat. 2605 (codified as amended at 26 U.S.C. § 7871).

91. Indian Tribal Justice Act of 1993, Pub. L. No. 103-176, 107 Stat. 2004 (codified as amended at 25 U.S.C. §§ 3601–3631).

92. Indian Tribal Justice Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559, 114 Stat. 2778 (codified as amended at 25 U.S.C. §§ 3651–3682).

93. Tribal Law and Order Act of 2010, Pub. L. No. 111-211, 124 Stat. 2258.

Management Act,<sup>94</sup> which recognizes the trust responsibility of the United States toward Indian forest lands; the American Indian Agricultural Resource Management Act,<sup>95</sup> which acknowledges the United States trust responsibility toward Indian trust lands and natural resources; the American Indian Trust Fund Management Reform Act,<sup>96</sup> which reforms trust management policies and their implementation by the Secretary of the Interior and Bureau of Land Management; the Native American Housing Assistance and Self-Determination Act,<sup>97</sup> which recognizes a trust responsibility for the protection and preservation of tribes, including to provide adequate housing for tribal citizens; the Indian Child Welfare Act,<sup>98</sup> which recognizes the protection of Indian children as part of the federal trust responsibility; and the Tribal Self-Governance Act,<sup>99</sup> which acknowledges the federal trust responsibility to tribes and individual Indians. In these and other statutes, Congress has also recognized a general duty to protect and provide for American Indians (sometimes referred to as a general trust relationship). These statutes include, *inter alia*: No Child Left Behind;<sup>100</sup> the Indian Alcohol and Substance Abuse Prevention and Treatment Act;<sup>101</sup> the Tribally Controlled Schools Act;<sup>102</sup> the Tribal Law and Order Act;<sup>103</sup> and the Native American Graves Protection and Repatriation Act.<sup>104</sup>

Further evidence of Congress's return to foundational principles of federal Indian law emerges in the reluctance with which Congress enacts legislation that limits tribal authority. Under foundational principles of federal Indian law, Congress retains plenary power, including the power to limit tribal authority.<sup>105</sup> Congress, however, has increasingly chosen not

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94. 25 U.S.C. § 3120.

95. *Id.* § 3742.

96. *Id.* § 4041.

97. *Id.* § 4101.

98. *Id.* § 1901.

99. *Id.* § 5366.

100. 20 U.S.C. § 7401 (“It is the policy of the United States to fulfill the Federal Government’s unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children.”).

101. 25 U.S.C. § 2401(1)–(2) (acknowledging that the trust responsibility includes an obligation to assist tribes in meeting the health and social needs of their members).

102. *Id.* § 2501(b) (declaring Congress’s commitment to fulfilling the federal trust responsibility to Indian people for the education of their children).

103. Tribal Law and Order Act, Pub. L. No. 111-211, § 202(a), 124 Stat. 2258, 2262–63 (2010) (codified as amended at 25 U.S.C. §§ 2801–2815) (finding that Congress has trust obligations to provide for the public safety of Indian Country).

104. 25 U.S.C. § 3010 (1990) (recognizing the general trust relationship between tribes and the federal government).

105. *See supra* Part I.

to diminish tribal authority.<sup>106</sup> Congress has not terminated a single tribal government in the past fifty years. Nor has Congress enacted any pan-tribal bills proposing to strip tribal governments of jurisdiction or sovereign immunity.<sup>107</sup> Some members of Congress continue to introduce these bills, but Congress does not hold hearings on the majority of proposed bills that include provisions that would strip tribal jurisdiction or limit tribal authority.<sup>108</sup>

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106. Some scholars doubt whether Congress has ever truly been in a position to exercise unlimited powers over tribal governments. Deloria, *supra* note 21, at 210.

107. *See, e.g.*, Native Americans Equal Opportunity Act, H.R. 13329, 95th Cong. (1978) (abrogating Indian treaties, breaking up communal assets, and terminating special services guaranteed to Indians); Ancient Indian Land Claims Settlement Act of 1982, H.R. 5494, 97th Cong. (1982) (extinguishing Indians claims to lands and/or natural resources within the States of New York and South Carolina); H.R. 3034, 100th Cong. (1987) (abrogating off-reservation, usufructuary rights of Indian tribes to hunt, fish, and gather in the State of Wisconsin); Indian Civil Rights Act Amendments of 1998, S. 2747, 100th Cong. (1988) (granting jurisdiction over Indian Civil Rights Act claims to federal courts and waiving tribal sovereign immunity); H.R. 2058, 101st Cong. (1989) (abrogating off-reservation, usufructuary rights of Indian tribes to hunt, fish, and gather in the State of Wisconsin); H.R. 1448, 104th Cong. (1995) (amending the Indian Child Welfare Act of 1978 to require that determinations regarding status as an Indian child and as a member of an Indian tribe be prospective from the date of birth of the child and of tribal membership of the member, and for other purposes); Indian Civil Rights Enforcement Act, S. 2298, 105th Cong. (1998) (granting jurisdiction over Indian Civil Rights Act claims to federal courts and waiving tribal sovereign immunity); American Indian Equal Justice Act, S. 1691, 105th Cong. (1998) (extending federal and state jurisdiction over specified civil claims in Indian Country); Tribal Environmental Accountability Act, S. 2301, 105th Cong. (1998) (waiving tribal sovereign immunity); American Indian Contract Enforcement Act, S. 2299, 105th Cong. (1998) (giving federal courts jurisdiction over tribal claims and waiving tribal sovereign immunity); American Indian Tort Liability Insurance Act, S. 2302, 105th Cong. (1998) (giving federal courts jurisdiction over tort claims against tribes and waiving tribal sovereign immunity); Fair Indian Gaming Act, H.R. 334, 105th Cong. (1998) (amending the Indian Gaming Regulatory Act to shift the burden of proof from a state to an Indian tribe in a compact negotiation-related action initiated by a tribe); Emergency Supplemental Appropriations Act for Fiscal Year 1999, S. 544, 106th Cong. (1999) (preventing Secretary of Interior from promulgating regulations allowing for tribal gaming without a state-tribal compact); Tobacco Smuggling Eradication Act of 1999, H.R. 2503, 106th Cong. (1999) (adding labeling requirements to tobacco products sold on Indian reservations); H.R. 2761, 111th Cong. (2009) (severing United States' government relations with the Cherokee Nation of Oklahoma until such time as the Cherokee Nation of Oklahoma restores full tribal citizenship to the Cherokee Freedmen disenfranchised in the March 3, 2007, Cherokee Nation vote and fulfills all its treaty obligations with the Government of the United States, and for other purposes); S. 1948, 115th Cong. (2017) (abrogating the sovereign immunity of Indian tribes as a defense in inter partes review of patents); H.R. 4637, 117th Cong. (2021) (severing United States Government relations with the Creek Nation of Oklahoma until such time as the Creek Nation of Oklahoma restores full tribal citizenship to the Creek Freedmen disenfranchised in the October 6, 1979, Creek Nation vote and fulfills all its treaty obligations with the Government of the United States, and for other purposes).

108. The few bills that include limits on tribal authority that do receive hearings are often tribe-specific bills that have the support of the tribal government to be affected by the bill. For examples of water rights settlements in which Congress has limited tribal rights, see Salt River Pima-Maricopa Water Rights Settlement Act of 1988, Pub. L. No. 100-512, 102 Stat. 2549 (waiving tribal sovereign immunity when United States has certain claims against the Community); Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub. L. No. 108-34, 117 Stat. 782 (extinguishing tribal and allottees'

Moreover, Congress rarely enacts legislation over the unified opposition of tribal governments.<sup>109</sup> Tribal governments and organizations have successfully prevented Congress from enacting legislation harmful to Indian Country.<sup>110</sup> My research shows that Congress enacted less than 1% of all Indian-related bills with unified Indian opposition in the 97th, 100th, 103th, 106th, and 109th Congresses.<sup>111</sup> More frequently, when Indians opposed a bill, Congress amended the bill to satisfy at least some of the Indian opponents' concerns.<sup>112</sup> In short, Congress enacts very few bills with unified Indian opposition and is much more likely to enact bills that Indians oppose if a committee amends the bill in response to Indian opposition.

This reluctance on the part of Congress to limit tribal authority or enact legislation in the face of tribal opposition is significant for two reasons. First, it demonstrates that Congress takes the abrogation of tribal powers very seriously. Second, the high rate of amendment for bills opposed by Indians indicates that Congress wants tribes to play an active role in lawmaking. Congress is no longer interested in the passive application of federal law to Indians. The modern federal-tribal relationship is about making federal law with Indians, not for them.<sup>113</sup>

Not only has Congress been reluctant to limit tribal authority, but it has recently been more inclined to restore inherent tribal authority. As detailed in the next section, Congress has repeatedly enacted legislation that recognizes the inherent sovereignty of tribal governments, often as a way of correcting Supreme Court decisions that diminish tribal sovereignty.<sup>114</sup>

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water rights and limiting their ability to bring claims); Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064, (White Mountain Apache and Crow Tribe Water Rights Settlements) (limiting tribal water rights and claims); Bill Williams River Water Rights Settlement Act of 2014, Pub. L. No. 113-223, 128 Stat. 2096, (Hualapai Tribe) (limiting ability of a tribe to transfer water rights). For a discussion of federal recognition bills that propose to limit tribal jurisdiction and/or authority, see Kirsten Matoy Carlson, *Congress, Tribal Recognition, and Legislative-Administrative Multiplicity*, 91 IND. L.J. 955, 985-91 (2016).

109. Carlson, *Beyond Descriptive Representation*, *supra* note 68, at 74 (finding that Congress enacted less than 1% of federal bills related to Indians that American Indians uniformly testified against in the 97th, 100th, 103rd, 106th, and 109th Congresses).

110. *Id.* at 74-76 (finding a significant statistical relationship between unified Indian opposition to a bill and the bill's enactment).

111. *Id.* at 74.

112. *Id.* at 77 (finding that Congress amended 50% of the bills that Indian opponents sought to change to satisfy at least some of the concerns Indians raised).

113. Deloria, *supra* note 21, at 217-18; Fletcher, *Muskrat Textualism*, *supra* note 26, at 973; Blackhawk, *supra* note 57, at 1838.

114. *See infra* section I.B.

Largely in response to tribal advocacy, Congress and tribal governments have relied on foundational principles of federal Indian law to remake the federal-tribal relationship and federal Indian law through a series of statutes. The result has been the crafting of a statutory framework informed by the lived experiences of tribal leaders and their people. Statutes, however, are read, interpreted, and implemented by judges and agencies. As section I.B demonstrates, courts have not always read federal Indian law statutes in ways that honor Congress's policy choices or foundational principles of federal Indian law.

*B. Not Keeping Up with Federal Indian Law and Policy: Courts in an Era of Tribal Self-Determination*

In stark contrast to congressional efforts to recognize tribal sovereignty, federal and state courts have increasingly departed from their own precedents and decided cases at odds with current congressional law and policy. The data on federal courts is indicative. Federal courts were never consistent protectors of Native rights, but their decisions started trending against American Indian litigants in the late 1970s.<sup>115</sup> By the mid-1980s, American Indians were accumulating losses in the Supreme Court.<sup>116</sup> Less than a decade later, tribal governments were losing over 75% of the cases heard by the Supreme Court.<sup>117</sup>

At the apex of the U.S. Court System, the Supreme Court's behavior guides that of federal and state courts. As many of my federal Indian law colleagues have detailed elsewhere, the Supreme Court has diverged from foundational Indian law principles and congressional policy as it has increasingly found against Indian interests.<sup>118</sup> The Supreme Court has

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115. See, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978) (holding that tribes have no criminal authority over non-Indians in Indian Country); *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 478–83 (1976) (allowing states to tax cigarette purchases by Indians to non-Indians on reservation lands).

116. Getches, *supra* note 17, at 273–74.

117. *Id.* The success rate for Native interests has improved in recent years. See Bethany Berger, *Hope for Indian Tribes in the U.S. Supreme Court?* *Menominee, Nebraska v. Parker*, Bryant, Dollar General . . . and Beyond, 2017 U. ILL. L. REV. 1901 (2017); Alexander Tallchief Skibine, *The Supreme Court's Last 30 Years of Federal Indian Law: Looking for Equilibrium or Supremacy?*, 8 COLUM. J. RACE & L. 277 (2018). However, tribal governments still experience devastating losses. See, e.g., *Oklahoma v. Castro-Huerta*, \_\_\_ U.S. \_\_\_, 142 S. Ct. 2486 (2022) (holding that the state of Oklahoma has concurrent criminal jurisdiction over non-Indians in Indian Country).

118. Or as Professor Fletcher more succinctly puts it, "Indian law commentators have long argued that the Supreme Court's federal Indian law jurisprudence is illegitimate." Fletcher, *Muskrat Textualism*, *supra* note 26, at 1026. A vast literature has developed criticizing the Supreme Court for departing from foundational Indian law principles and congressional policy. See, e.g., *id.* at 974–86 (arguing that the Supreme Court has used Canary textualism to depart from foundational principles

“veered away from the foundations of Indian law.”<sup>119</sup> It has ignored its own precedents favorable to tribal rights and abandoned its earlier approach of relying on Congress “to decide clearly the bounds of Indian sovereignty.”<sup>120</sup> The Court has not deferred to Congress as required by the foundational principles of federal Indian law. Instead, it has refused to acknowledge Congress’s constitutionally mandated power over Indian affairs. The Court has relied on laws repudiated by Congress, limited the impact of laws enacted by Congress to further tribal sovereignty, and cast aside the canons of statutory construction, choosing to invoke them only when desired.<sup>121</sup> It has tried to remake federal Indian law on terms much

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and congressional policy); Fletcher, *supra* note 23, at 128 (explaining that the Supreme Court should but often chooses not to follow congressional policy); Getches, *supra* note 17, at 273–91 (documenting the Supreme Court’s shift away from foundational principles of federal Indian law during the Rehnquist era); Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433, 436, 443–71 (2005) (arguing that the Supreme Court “has been engaged in aggressive institutional and doctrinal revisionism, essentially displacing Congress as the federal agency with front-line responsibility for federal Indian policy”); Skibine, *supra* note 17, at 28 (maintaining that the Court has systematically limited tribal sovereignty while increasing state authority in Indian Country); Sarah Krakoff, *The Renaissance of Tribal Sovereignty, the Negative Doctrinal Feedback Loop, and the Rise of a New Exceptionalism*, 119 HARV. L. REV. F. 47, 47 (2005) (explaining that the Court has departed from doctrinal and interpretive norms to reject tribal sovereignty); Joseph William Singer, *The Role of Jurisdiction in the Quest for Sovereignty: Canons of Conquest: The Supreme Court’s Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 643 (2003) (“Over the last twenty years, the Supreme Court has led a massive assault on tribal sovereignty.”); Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 ARIZ. ST. L.J. 439, 439 (1999) (“[R]ecent developments in Indian law, particularly at the United States Supreme Court, threaten [a] well understood and precarious balance with a new, almost vicious, historical amnesia and doctrinal incoherence.”).

119. Getches, *supra* note 17, at 273–74 (“Indeed, the Court has forsaken not only those foundational cases, but it has ignored most of the intervening 150 years of decisions, including nearly all of its approximately eighty modern decisions.”). For example, a mere three years after Congress enacted the Tribal Self-Determination Policy, the Court stripped Indian nations of their inherent criminal authority to prosecute non-Indian offenders in *Oliphant*. 435 U.S. at 205–06. In *Oliphant*, the Court departed from its previous practice of deferring to Congress in Indian affairs and introduced a new doctrine, called implicit divestiture, which allowed the Court to divest tribal powers that it deemed inconsistent with the tribe’s status as a domestic dependent nation. *Id.* at 206, 208. Prior to the *Oliphant* decision, the Supreme Court had held that only Congress has plenary power over Indian affairs and can determine the sovereign rights of Indian nations. The Court in *Oliphant* seemed to be allocating plenary power to itself.

120. Getches, *supra* note 17, at 276.

121. See, e.g., Alexander Tallchief Skibine, *Textualism and the Indian Canons of Statutory Construction*, 55 U. MICH. J. L. REFORM 267 (2021) (documenting that the Supreme Court has failed to apply the Indian canon of the statutory construction multiple times since 1987); Richard B. Collins, *Never Consented to Their Prejudice: In Honor of David Getches*, 84 U. COLO. L. REV. 1, 45–49 (2013) (recounting how the Supreme Court inconsistently applies the Indian law canons of statutory construction); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1620 (1996) (noting that the courts have retreated from their use of the Indian law canons of statutory construction); David C. Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian*

less favorable to tribal governments and peoples by developing a “common law of colonialism.”<sup>122</sup>

Under a common law of colonialism, courts have abandoned the presumptions mandated by the foundational principles and their own precedents. Instead of asking whether Congress explicitly acted to deprive tribal governments of their authority, the Supreme Court has asked a new question: whether the tribal governments’ exercise of power is “inconsistent with their status.”<sup>123</sup> This change in the question asked has enabled courts to read congressional silence as undermining tribal sovereignty or worse, to replace congressional affirmations of tribal authority with their own contrary assessments of tribal authority.<sup>124</sup> Similarly, the Supreme Court has departed from the presumption that states cannot exercise authority in Indian Country without express congressional authority.<sup>125</sup> Instead of asking whether Congress explicitly

*Law*, 80 VA. L. REV. 403, 403–04 (1994) (noting that courts inconsistently apply the Indian canons of construction in cases); Samuel E. Ennis, *Implicit Divestiture and the Supreme Court’s (Re)Construction of the Indian Canons*, 35 VT. L. REV. 623, 650–87 (2011) (describing how the Supreme Court has departed from the canons when tribal rights would impede on state sovereignty).

Some justices have purported to defer to Congress by relying on laws and policies repudiated by Congress. Getches, *supra*, at 1620 (“[S]ome Justices, recognizing that definitions of tribal sovereignty should be tied to some congressional action or policy, have begun looking to nineteenth-century policies of allotment and assimilation as the benchmark for defining appropriate limits on Indian autonomy.”).

Others have rewritten statutes to limit tribal authority. Collins, *supra*, at 53 (explaining that the Court rewrote the Indian Country Crimes Act in *Duro*).

122. Getches, *supra* note 17, at 276 (“[T]he present Supreme Court is shunning its own legal traditions and creating new rules that conform to its perceptions of current realities, instead of staying its hand and forcing the political branches to deliberate the difficult choices.”); Frickey, *supra* note 118, at 452–60.

123. *Oliphant*, 435 U.S. at 208. For a discussion of how *Oliphant* departed from the foundational principles of federal Indian law, see for example Sarah Krakoff, *Mark the Plumber v. Tribal Empire, or Non-Indian Anxiety v. Tribal Sovereignty?: The Story of Oliphant v. Suquamish Indian Tribe*, in FED. INDIAN L. STORIES 276–83 (Carole Goldberg et al. eds., 2011).

124. For a thorough discussion of how the Supreme Court did this in *Oliphant* and other cases, see Fletcher, *Muskrat Textualism*, *supra* note 26, at 986–99.

125. *Oklahoma v. Castro-Huerta*, \_\_\_ U.S. \_\_\_, 142 S. Ct. 2486 (2022). A full analysis of the Supreme Court’s decision in *Castro-Huerta* is beyond the scope of this article. Many scholars and tribal leaders have condemned the majority opinion as contrary to the U.S. Constitution, see Derrick Beetso, *SCOTUS’ Decision in Oklahoma v. Castro-Huerta Departs Wildly from U.S. Constitution*, INDIANZ.COM (July 7, 2022), <https://www.indianz.com/News/2022/07/07/derrick-beetso-justices-ignore-the-u-s-constitution-when-it-comes-to-indian-country/> [https://perma.cc/EQ4H-DRSE]; Matthew L.M. Fletcher, *In 5-4 Ruling, Court Dramatically Expands the Power of the States to Prosecute Crimes on Reservations*, SCOTUSBLOG (June 30, 2022), <https://www.scotusblog.com/2022/06/in-5-4-ruling-court-dramatically-expands-the-power-of-states-to-prosecute-crimes-on-reservations/> [https://perma.cc/XS3S-9W6X]; foundational principles of federal Indian law, see Gregory Ablavsky & Elizabeth Reese, *The Supreme Court Strikes Again – This Time at Tribal Sovereignty*, WASH. POST (July 1, 2022),

authorized state authority in Indian Country, the Supreme Court has asked: has Congress preempted state authority in Indian Country?<sup>126</sup> The Court has effectively reversed the presumption, suggesting that Congress has to act to limit state authority in Indian Country.<sup>127</sup> By abandoning the presumptions that Congress has to take clear and express action to limit tribal sovereignty or to grant state authority in Indian Country, the Supreme Court has increasingly placed the burden on tribal governments and Native organizations to convince Congress to clarify its position on Indian affairs in legislation.<sup>128</sup>

As other federal Indian law scholars have shown, the impact of the Supreme Court's departures from foundational principles of federal Indian law has been devastating for Native governments and peoples.<sup>129</sup> The Supreme Court has, inter alia, stripped tribal governments of their criminal jurisdiction over non-Indians<sup>130</sup> and non-member Indians,<sup>131</sup> extensively limited tribal civil adjudicatory jurisdiction over non-Indians,<sup>132</sup> permitted state taxation on Indian lands,<sup>133</sup> allowed state criminal jurisdiction over crimes against Indians in Indian Country;<sup>134</sup> and refused to recognize some tribal water rights.<sup>135</sup>

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<https://www.washingtonpost.com/opinions/2022/07/01/castro-huerta-oklahoma-supreme-court-tribal-sovereignty/> [<https://perma.cc/AU78-M4QK>]; Elizabeth Hidalgo Reese, *Conquest in the Courts*, THE NATION (July 6, 2022), <https://www.thenation.com/article/society/supreme-court-castro-huerta/> [<https://perma.cc/PL7E-7WJ5>]; Beetso, *supra*; Fletcher, *supra*; prior court precedents, see Ablavsky & Reese, *supra*; Reese, *supra*; treaties with the tribal governments, see Chuck Hoskin, Jr., *U.S. Supreme Court Breaks Sacred Vow to Oklahoma Tribal Nations*, INDIANZ.COM (July 5, 2022), <https://www.indianz.com/News/2022/07/05/chuck-hoskin-chokeee-nation-betrayed-by-u-s-supreme-court/> [<https://perma.cc/D3WX-6TY7>]; and congressional policy, see Fletcher, *supra*.

126. *Castro-Huerta*, 142 S. Ct. at 2494.

127. The Supreme Court ignores almost 200 years of precedent in reframing the question this way. See Fletcher, *supra* note 125; Nick Martin, *The Supreme Court's Attack on Tribal Sovereignty, Explained*, HIGH COUNTRY NEWS (July 1, 2022), <https://www.kosu.org/local-news/2022-07-05/the-supreme-courts-attack-on-tribal-sovereignty-explained> [<https://perma.cc/H4T2-W8SU>]; Beetso, *supra* note 125; Ablavsky & Reese, *supra* note 125; Reese, *supra* note 125.

128. Frickey, *supra* note 118, at 483 (noting how, in the past, tribal success in the courts placed the legislative burden on tribal opponents, so that tribes were in the easier position of trying to defeat reactive legislation rather than seeking legislation on their own behalf).

129. Getches, *supra* note 17, at 277–78; Frickey, *supra* note 118, at 458; Krakoff, *supra* note 118, at 47.

130. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 195 (1978).

131. *Duro v. Reina*, 495 U.S. 676, 688 (1990).

132. *Nevada v. Hicks*, 533 U.S. 353, 363–70 (2001); *Strate v. A-1 Contractors*, 520 U.S. 438, 442 (1997); *Montana v. United States*, 450 U.S. 544, 565–67 (1981).

133. *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 478–83 (1976).

134. *Oklahoma v. Castro-Huerta*, \_\_\_ U.S. \_\_\_, 142 S. Ct. 2486 (2022).

135. See *Colo. River Dist. v. United States*, 424 U.S. 800, 809–13, 820–21 (1976); *Montana*, 450

The Court's recent jurisprudence departs from foundational principles by discounting modern tribal governments in favor of biased and outright racist attitudes towards Native governments and peoples.<sup>136</sup> Modern tribal governments, *inter alia*, operate tribal health clinics, offering traditional and Western-style medical care to tribal citizens and community members; monitor environmental quality standards and manage natural resources on tribal lands; teach tribal children in their native languages; and exercise jurisdiction over child welfare cases, disputes between members, and misdemeanor crimes.<sup>137</sup> Many tribal governments contribute to the economic development and sustainability in their regions; some extensively employ both tribal citizens and non-tribal

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U.S. at 565–67; *Nevada v. United States*, 463 U.S. 110, 113 (1983); *Arizona v. San Carlos Apache*, 463 U.S. 545, 570–71 (1983); *see also* Lloyd Burton, *The American Indian Water Rights Dilemma: Historical Perspective and Dispute-Settling Policy Recommendations*, 7 UCLA J. ENVTL. L. & POL'Y 1, 39 (1987) (noting that in 1987 Indian nations had lost five of the last six water rights cases brought before the U.S. Supreme Court).

136. Fletcher, *Textualism's Gaze*, *supra* note 26, at 133 (listing some of the derogatory and racist language used in Supreme Court opinions). As Professor Fletcher laments, negative portrayals of Indian people persist in recent Supreme Court decisions. *Id.* (“One would like to think that a modern, more enlightened Supreme Court would no longer characterize Indian people with dour derision and mockery as a matter of course, but the Court’s framing of the ‘Indian-ness’ of the Cherokee father and daughter in *Adoptive Couple v. Baby Girl* proves that hope wrong.”). For an even longer list of derogatory statements made by the Supreme Court when talking about Indian tribes and peoples, see Fletcher, *Muskrat Textualism*, *supra* note 26, at 981–82.

The recent majority opinion in *Oklahoma v. Castro-Huerta* continues this practice of relying on negative portrayals of Native Nations. *See generally* *Castro-Huerta*, 142 S. Ct. 2486. The majority largely accepts the state of Oklahoma’s unverified claims that the Court’s prior decision in *Oklahoma v. McGirt* has led to chaos in law enforcement in Oklahoma. *Id.*; *see also* Kelsey Vlamis, *Oklahoma Spent Millions on a Legal and PR Campaign to Paint Reservations as ‘Lawless Dystopias’ and Persuade the Supreme Court to Weaken Tribal Sovereignty, Experts Say*, BUS. INSIDER (July 4, 2022), <https://www.businessinsider.com/oklahoma-tribal-land-as-lawless-dystopias-for-scotus-sovereignty-experts-2022-7> [<https://perma.cc/H7VW-HT84>]; Beetso, *supra* note 125. As Gorsuch pointed out in his dissent, the majority decided to rely on the state’s questionable numbers despite considerable evidence to the contrary. *See* Rebecca Nagle & Allison Herrera, *Where Is Oklahoma Getting Its Numbers From in Its Supreme Court Case?*, ATLANTIC (Apr. 26, 2022), <https://www.theatlantic.com/ideas/archive/2022/04/scotus-oklahoma-castro-huerta-inaccurate-prosecution-data/629674/> [<https://perma.cc/TUX2-RPNV>]; Curtis Killman, *Most Released Due to McGirt Have Been Charged Either Federally or Tribally*, *Tulsa World Analysis Finds*, TULSA WORLD (Feb. 20, 2022), [https://tulsaworld.com/news/local/crime-and-courts/most-released-due-to-mcgrirt-have-been-charged-either-federally-or-tribally-tulsa-world-analysis/article\\_96e94b7e-6f30-11ec-992c-9f9ace817196.html](https://tulsaworld.com/news/local/crime-and-courts/most-released-due-to-mcgrirt-have-been-charged-either-federally-or-tribally-tulsa-world-analysis/article_96e94b7e-6f30-11ec-992c-9f9ace817196.html) [<https://perma.cc/HV2S-TGQM>]; Kirsten Matoy Carlson, *Oklahoma State Officials Resist Supreme Court Ruling Affirming Tribal Authority over American Indian Country*, CONVERSATION (Apr. 8, 2022), <https://theconversation.com/oklahoma-state-officials-resist-supreme-court-ruling-affirming-tribal-authority-over-american-indian-country-175726> [<https://perma.cc/8HX8-WRXB>].

137. *See generally* REBUILDING NATIVE NATIONS STRATEGIES FOR GOVERNANCE AND DEVELOPMENT (Miriam Jorgensen ed., 2007); THE HARVARD PROJECT ON AM. INDIAN ECON. DEV., THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION (2008).

citizens.<sup>138</sup> Moreover, tribal governments often govern more effectively than the neighboring state and local governments.<sup>139</sup> To cite a few examples, tribal governments have enacted more stringent environmental regulations to protect water and air quality than surrounding states,<sup>140</sup> kept families intact through reunification programs unmatched in state child welfare systems,<sup>141</sup> and bolstered their law enforcement departments to ensure public safety.<sup>142</sup> During the COVID-19 pandemic, tribal governments provided vaccines to Natives and non-Natives long before states did.<sup>143</sup> As discussed previously, Congress has acknowledged the success of tribal governments by increasingly enacting statutes to foster tribal authority, whereas the Court has refused to follow Congress's lead.<sup>144</sup> Contrary to congressional policy,<sup>145</sup> the Court has sought to limit tribal power while increasing the powers of state governments in Indian Country.<sup>146</sup> As a result, the Court's decisions often undermine tribal governance and economic development rather than encourage it.<sup>147</sup>

In departing from foundational principles, the Court has adopted

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138. Mark Trahan, *Tribes Are Large Employers & Those Employees Make the Best Customers*, INDIAN COUNTRY TODAY (Feb. 13, 2014), <https://indiancountrytoday.com/archive/tribes-are-large-employers-those-employees-make-the-best-customers> [https://perma.cc/RM2V-ZYQA].

139. Matthew L.M. Fletcher, *Indian Tribes Are Governing Well. It's the States that Are Failing*, WASH. MONTHLY (Sept. 30, 2021), <https://washingtonmonthly.com/2021/09/30/indian-tribes-are-governing-well-its-the-states-that-are-failing/> [https://perma.cc/65RJ-KXWH].

140. *Id.*; Elizabeth Ann Kronk Warner, *Tribes as Innovative Environmental "Laboratories,"* 86 COLO. L. REV. 789 (2015) (documenting tribal governments setting and enforcing their own environmental standards).

141. Fletcher, *supra* note 139.

142. *Id.*; Carlson, *supra* note 136.

143. *See, e.g.*, David Lee, *Chickasaw Nation Offers Free Vaccines to All Oklahomans, Beating State Officials*, COURTHOUSE NEWS SERV. (Mar. 13, 2021), <https://www.courthousenews.com/chickasaw-nation-offers-free-vaccines-to-all-oklahomans-beating-state-officials/> [https://perma.cc/72QS-73PU] (documenting the Chickasaw Nation's provision of vaccines to all Oklahomans). The Harvard Project on American Indian Economic Development recognizes tribal governments for excellence in providing programs and services to their communities. *Honoring Nations*, THE HARVARD PROJECT ON AM. INDIAN ECON. DEV., <https://hpaied.org/honoring-nations> [https://perma.cc/5NPD-GKNM]. More examples of good tribal governance can be found in their annual reports honoring Native Nations. *See, e.g.*, THE HARVARD PROJECT ON AM. INDIAN ECON. DEV., HONORING NATIONS 2018 REPORT (2018), [https://hwpi.harvard.edu/files/hpaied/files/hn18\\_report\\_final\\_0.pdf?m=1639579085](https://hwpi.harvard.edu/files/hpaied/files/hn18_report_final_0.pdf?m=1639579085) [https://perma.cc/9MSY-LYCL] (highlighting tribal governmental awardees for good governance in 2018).

144. Singer, *supra* note 118, at 643; Getches, *supra* note 17, at 277–78.

145. *See infra* section II.B.1.

146. Singer, *supra* note 118, at 643.

147. Jacob T. Levy, *Three Perversities of Indian Law*, 12 TEX. REV. L. & POL. 329 (2008).

policies that do not reflect realities in Indian Country.<sup>148</sup> Their decisions frequently create highly unworkable situations because they do not reflect the state of affairs in Indian Country.<sup>149</sup> For example, Professor Getches detailed how the Court's splitting of zoning authority between the tribal government and the county on the Yakama Indian Reservation undercut regulatory efforts by both.<sup>150</sup> The Court's diminishment of tribal authority over non-Indians and limitations on tribal taxation shows that the Court does not understand or respect the role of tribal governments and how they provide invaluable services to Natives and non-Natives in their local communities.

The Court's departure from foundational principles and congressional policy has affected other institutions as well. It has led to confusion on the ground as state, local, and tribal officials struggle to understand and apply complicated jurisdictional rules.<sup>151</sup> As a result, it can undermine good governance, especially public safety in Indian Country.<sup>152</sup> Moreover, the Court's divergence from foundational principles and congressional policy has left lower federal and state courts confused about when to defer to congressional policies and statutes and how to apply the canons of statutory construction.<sup>153</sup> The Court's decisions have added a layer of

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148. Krakoff, *supra* note 118, at 47 (“The Supreme Court’s vision of tribal sovereignty is sharply at odds with the facts of tribal sovereignty on the ground.”); Frickey, *supra* note 118, at 458 (explaining how the Court’s decision in *Oliphant* did not reflect realities on the ground in Indian Country in immunizing nonmembers from tribal authority); Getches, *supra* note 17, at 277–78 (noting that the Court’s decisions in *Brendale* and *Strate* created policies problematic for both governments and individuals in Indian Country). Other scholars have criticized the Supreme Court for its lack of knowledge about tribal governments, Indian people, and Indian Country. See, e.g., Fletcher, *Textualism’s Gaze*, *supra* note 26, at 145 (noting belief among tribal advocates that Supreme Court judges do not respect tribal governments or know about how their decisions affect Native peoples); Fletcher, *Muskrat Textualism*, *supra* note 26, at 1027 (explaining how the questions asked by Justices at oral arguments reveal how little they know about tribal governments and their citizens).

149. Fletcher, *Muskrat Textualism*, *supra* note 26, at 976. Professor Fletcher argues that the Supreme Court is more concerned with what it thinks the state of affairs ought to be in Indian Country rather than what it is.

150. Getches, *supra* note 17, at 277–78. Getches also notes the problems caused by the Court’s decision in *Strate v. A-1 Contractors*, which held that non-Indian plaintiffs could not bring personal jury actions for accidents occurring on a right-of-way for a state highway within the reservation. 550 U.S. 438 (1997); *id.* at 278. Similar unworkable situations have arisen from the Court’s limits on tribal criminal and civil jurisdiction. For a detailed discussion of the problems created by the Court’s stripping tribal governments of criminal jurisdiction over non-Indians, see AMNESTY INT’L, MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA (2006); Kirsten Matoy Carlson, *Jurisdiction and Human Rights Accountability in Indian Country*, 2013 MICH. ST. L. REV. 355 (2013).

151. Getches, *supra* note 17, at 277–78.

152. AMNESTY INT’L, *supra* note 150, at 28.

153. Getches, *supra* note 121, at 1612–14; Fletcher, *Textualism’s Gaze*, *supra* note 26, at 130 (noting confusion in the lower courts).

inconsistency and unpredictability, making federal Indian law confusing and hard to navigate, especially for judges, who tend to be unfamiliar with Native communities and the history of federal-tribal relations.<sup>154</sup>

Tribal advocates, federal Indian law scholars, and even Congress have attempted to redirect the Supreme Court as it has departed from foundational principles of federal Indian law and congressional policy.<sup>155</sup> Congress, often in response to tribal advocacy, has attempted to correct the Supreme Court by enacting legislative overrides, or statutes meant to overturn Supreme Court precedents.<sup>156</sup> Tribal advocates' success in persuading Congress to reverse, at least in part, two major Supreme Court

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154. Getches, *supra* note 17, at 275. See also Alex Tallchief Skibine, *The Court's Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country*, 36 TULSA L.J. 267, 267 (2000) (“[T]he Supreme Court’s current jurisprudence in the field of federal Indian law has mystified both academics and practitioners.”); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 4–5 (1999) (“Given the lack of guidance in positive law, the complexity of the issues, and the tangled normative questions surrounding the colonial displacement of indigenous peoples to construct a constitutional democracy, it is also not surprising that the resulting decisional law is as incoherent as it is complicated.”); Pommersheim, *Coyote Paradox*, *supra* note 118, at 439; Yuanchung Lee, *Rediscovering the Constitutional Lineage of Federal Indian Law*, 27 N.M. L. REV. 273, 275 (1997) (“Contemporary confusion in Indian law results from a failure to recognize Indian law’s close familial ties to constitutional doctrines that lie at the core of the Supreme Court’s concerns during the last century.”); Steven Paul McSloy, *Back to the Future: Native American Sovereignty in the 21st Century*, 20 N.Y.U. REV. L. & SOC. CHANGE 217, 218 (1993) (“No area of American law is more distinct, anomalous, or confused than that relating to Native Americans.”); Frank Pommersheim, *Tribal Court Jurisprudence: A Snapshot from the Field*, 21 VT. L. REV. 7, 38–39 (1996) (“One need only read a sampling of recent United States Supreme Court Indian law opinions . . . to realize that the nation’s high court has slipped into doctrinal incoherence.”); Laurie Reynolds, “Jurisdiction” in *Federal Indian Law: Confusion, Contradiction, and Supreme Court Precedent*, 27 N.M. L. REV. 359, 360 (1997) (“For lower courts trying to decipher the implications of these pronouncements on tribal jurisdiction, the Court’s conflicting signals have created confusion and uncertainty.”); Brad Jolly, Comment, *The Indian Gaming Regulatory Act: The Unwavering Policy of Termination Continues*, 29 ARIZ. ST. L.J. 273, 278 (1997) (“Over the past century, the legal fiction of federal Indian law has matured into a grotesque creature capable of inflicting instant disorientation, bewilderment, and nausea.”); Ray Torgerson, Note, *Sword Wielding and Shield Bearing: An Idealistic Assessment of the Federal Trust Doctrine in American Indian Law*, 2 TEX. F. ON C.L. & C.R. 165, 178 (1996) (“Most academics and courts agree that the area of Indian law is fraught with vacillation and incoherence.”). See generally Curtis G. Berkey, *Recent Supreme Court Decisions Bring New Confusion to the Law of Indian Sovereignty*, in RETHINKING INDIAN LAW 77 (National Lawyers Guild Committee on Native American Indian Struggles ed., 1982).

For a discussion of federal judges and the difficulties many face in adjudicating federal Indian law cases, see Kirsten Matoy Carlson, *In Memoriam: Judge Murphy’s Indian Law Legacy*, 103 MINN. L. REV. 38, 38–41 (2018).

155. See, e.g., Fletcher, *supra* note 23, at 123 (arguing that the Supreme Court should follow congressional policy). Some scholars have criticized Congress for not doing enough to curb the Court or keep up with the growing field of federal Indian law.

156. For a discussion of how tribal advocates have sought legislative overrides of Supreme Court decisions, see Carlson, *supra* note 68, at 1185–95.

decisions limiting tribal criminal jurisdiction—*Duro* and *Oliphant*<sup>157</sup>—illustrates how Congress has acted to correct detrimental federal Indian law policies made by the Supreme Court.<sup>158</sup>

Congress acted swiftly to reverse the Court's decision in *Duro*. In *Duro*, the Court created a jurisdictional gap in Indian Country by holding that no government (state, tribal, or federal) had the authority to prosecute non-member Indians for crimes in Indian Country.<sup>159</sup> Congress remedied this situation by enacting legislation restoring inherent tribal authority.<sup>160</sup> In enacting the *Duro* legislation, Congress chose not to delegate power to the tribes (as it had in the past), but returned to foundational principles of federal Indian law by recognizing and restoring tribal governments' inherent authority over non-member Indians.<sup>161</sup> In doing so, Congress made it harder for the Supreme Court to overturn the statute. This strategy worked. Congress successfully redirected the Supreme Court, which upheld the constitutionality of the *Duro* legislation in *United States v.*

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157. In *Oliphant v. Suquamish Indian Tribe*, the Supreme Court undercut tribal sovereignty by stripping tribal governments of criminal jurisdiction over non-Indians. 435 U.S. 191 (1978). The Court extended this limitation on tribal criminal jurisdiction in *Duro v. Reina* by holding that Indian nations did not have criminal jurisdiction over non-member Indians. 495 U.S. 676, 679 (1990).

158. Scholars have documented the efforts made by tribal advocates to enact legislation overturning *Duro v. Reina*. See, e.g., Bethany R. Berger, *United States v. Lara as a Story of Native Agency*, 40 TULSA L. REV. 5, 11–13 (2004) (describing tribal advocacy leading up to the enactment of the *Duro* Fix); Nell Jessup Newton, *Permanent Legislation to Correct Duro v. Reina*, 17 AM. INDIAN L. REV. 109, 110 (1992) (recounting the role tribal governments and advocates played in the enactment of the *Duro* Fix). See also Carlson, *supra* note 47, at 65–69. For a discussion of the tribal advocacy leading to the partial *Oliphant* reversal in the Violence Against Women Act of 2013, see Carlson, *Lobbying as Tribal Resilience*, *supra* note 68, at 1187–95.

Congress has enacted several other statutes in an attempt to redirect the Supreme Court. For example, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA) in response to the Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). The Court then limited RFRA's application to state and local governments in *City of Boerne v. Flores*, 521 U.S. 507 (1997). In response to *City of Boerne*, Congress passed the Religious Land Use and Institutionalized Persons Act of 2000. For more information on RFRA, see *The Religious Freedom Restoration Act: A Primer*, CONG. RSCH. SERV. (2020), <https://crsreports.congress.gov/product/pdf/IF/IF11490> (last visited Aug. 25, 2022).

Congress's reversal of Supreme Court decisions has extended to tribe-specific as well as pan-tribal legislation. For example, the Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians turned to Congress after the Supreme Court allowed a non-Indian individual to challenge the Secretary of the Interior's acquisition of 147 acres in trust for the tribe. *Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak*, 567 U.S. 209 (2012). Congress enacted the Gun Lake Trust Land Reaffirmation Act, which affirmed the trust acquisition and removed the matter from federal court jurisdiction. Act of Sept. 26, 2014, Pub. L. No. 113-179, 128 Stat. 1913 (2014). The Supreme Court upheld the statute in *Patchak v. Zinke*, \_\_\_ U.S. \_\_\_, 138 S. Ct. 897 (2018).

159. *Duro v. Reina*, 495 U.S. 676, 679 (1990).

160. Carlson, *supra* note 47, at 65–66.

161. *Id.*

*Lara*.<sup>162</sup> Congress adopted a similar approach when it enacted a partial *Oliphant* reversal in the 2013 Violence Against Women Act Reauthorization Act.<sup>163</sup> The Act included a section restoring the inherent power of tribal governments to exercise criminal jurisdiction over all persons committing four specific intimate partner-related crimes in Indian Country.<sup>164</sup> In 2022, Congress recognized the inherent authority of tribal governments to exercise criminal jurisdiction over six additional crimes when committed by non-Indians.<sup>165</sup> Congress's expansion of its recognition of tribal governments' inherent power of criminal jurisdiction at a time when the Court tends to limit tribal authority exemplifies the Court's divergence from congressional policy and foundational principles of federal Indian law.

## II. THE RESTATEMENT OF THE LAW OF AMERICAN INDIANS: RECONCILING AND RECENTERING FEDERAL INDIAN LAW

The Restatement of the Law of American Indians retells federal Indian law in a way that allows for the closing of the gap between statutory and decisional law. More than twenty years ago, Professor Getches wrote, "Absent a judicial rediscovery of Indian law, Congress will have to legislate to correct the Court's misadventures."<sup>166</sup> The Restatement seeks to avoid the need for constant congressional correction and instead invites the Court to enter the modern Indian law era in a way that respects its proper role in the separation of powers. This Part shows how the Restatement on the Law of American Indians reflects how Congress and tribal governments have remade the federal-tribal relationship and directs courts to act consistent with congressional policy and foundational principles of federal Indian law. First, this Part explains how the Restatement provides the courts with an opportunity to self-correct rather than wait for Congress to redirect them. Second, it shows how the Restatement directs courts to follow foundational principles of federal

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

163. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).

164. *Id.* at § 904 (acknowledging inherent tribal criminal jurisdiction over domestic violence, dating violence, and criminal violations of a qualifying protection order). *See also* 25 U.S.C. § 1304.

165. *See* NAT'L CONG. OF AM. INDIANS, VAWA 2022: SPECIAL TRIBAL CRIMINAL JURISDICTION, [https://res.cloudinary.com/ncai/image/upload/v1649443190/Website%20General/STCJ-Overview\\_xkgtef.pdf](https://res.cloudinary.com/ncai/image/upload/v1649443190/Website%20General/STCJ-Overview_xkgtef.pdf) [<https://perma.cc/66PK-48JH>] (extending recognition of inherent tribal criminal jurisdiction to child violence, sexual violence, stalking, sex trafficking, obstruction of justice, and assaults of tribal justice personnel); *see also* 25 U.S.C. § 1304.

166. Getches, *supra* note 17, at 269.

Indian law, which emphasize Congress's primacy in Indian affairs, the trust relationship, the upholding of tribal sovereignty unless Congress has spoken to the contrary, and the absence of state authority in Indian Country without express congressional authorization. Third, it demonstrates how the Restatement reflects the federal-tribal relationship forged by Congress and tribal governments by providing courts with specific guidance on interpreting federal statutes in accordance with congressional policy.

A. *A Restatement to Clarify Federal Indian Law for the Courts*

The Restatement of the Law of American Indians presents an opportunity for clarification in this often-confused area of the law. Restatements are projects undertaken by the American Law Institute (ALI), a research and advocacy group of judges, scholars, and lawyers, that seeks “to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.”<sup>167</sup> Restatement projects are created through a collaborative process that relies on multi-layered drafting, review and comment processes, and, ultimately, a vote by the entire membership of the ALI.<sup>168</sup>

The significance of the ALI drafting a Restatement of the Law of American Indians is twofold. First, in undertaking the project, the ALI has elevated federal Indian law, often marginalized within American legal circles,<sup>169</sup> and signaled the importance of the subject matter to courts and

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167. *How It Works*, AM. L. INST., <https://www.ali.org/about-ali/how-institute-works/> [<https://perma.cc/2UM9-EACH>].

168. For a description of the process of Restatement drafting, see Norman L. Greene, *The American Law Institute: A Selective Perspective on the Restatement Process*, 62 HOW. L.J. 511, 519–20 (2019) (describing the extensive vetting and public scrutiny that occurs during the drafting of a Restatement). See also RESTATEMENT OF THE L.: THE L. OF AM. INDIANS, *Restatements (excerpt of the Revised Style Manual approved by the ALI Council in January 2015)*, Nature of a Restatement, at ix (AM. L. INST., Proposed Official Draft 2021) (describing the four elements in the ALI process of drafting a Restatement).

169. See, e.g., Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 383 (1993) (arguing that “[f]ederal Indian law does not deserve its image as a tiny backwater of law. . . .”). For decades, scholars have argued that federal Indian law should be given more prominence within American law. See Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 7 (1991); Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 ALB. GOV'T L. REV. 1, 5 (2017); Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 701–02 (1989); Blackhawk, *supra* note 57, at 1863–64.

the legal community more generally.<sup>170</sup> Judges, scholars, and practitioners generally view the ALI positively.<sup>171</sup> ALI products, including Restatements, “have played a significant role in the American legal landscape.”<sup>172</sup> Courts are not bound to follow a Restatement under rules of stare decisis, but many judges give great weight to Restatements.<sup>173</sup> Because of the prestige of the ALI and its projects, the creation of the Restatement of the Law of American Indians has the potential to influence the development of federal Indian law over time.<sup>174</sup>

Second, the choice of a Restatement indicates that the ALI sought to

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170. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS, *Forward*, at xix (AM. L. INST., Proposed Official Draft 2021) (“The subject matter of this Restatement predates the birth of our nation. Some of the most important early decisions of the Supreme Court of the United States, including ones authored by Chief Justice John Marshall, deal with the Law of American Indians. And tribes, along with the federal government and the states, are one of the three categories of sovereigns in the United States. Yet, for its first nine decades the Institute devoted little attention to this area, which is of both great intellectual and practical importance.”).

171. See Greene, *supra* note 168, at 514; Kristin David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423, 436 (2004) [hereinafter *Lessons*] (noting that the American Law Institute is held in high esteem); Lawrence J. Latto, *The Restatement of the Law Governing Lawyers: A View from the Trenches*, 26 HOFSTRA L. REV. 697, 698 (1998); Herbert P. Wilkins, *Symposium on the American Law Institute: Process, Partisanship, and the Restatements of Law*, 26 HOFSTRA L. REV. 567, 567 (1998) (“The American Law Institute has been a major force in the sound development of American law.”).

The ALI’s generally favorable reputation has not made it immune from serious critiques of its Restatement projects. Jack Van Doren, *A Restatement of Jurisprudence: Why Not?*, 44 GONZ. L. REV. 159, 163–67 (2008–2009); Shyamkrishna Balganesh & Peter S. Menell, *Restatements of Statutory Law: The Curious Case of the Restatement of Copyright*, 44 COLUM. J.L. & ARTS 285, 285 (2021); Adams, *supra*, at 438–39. For more general critiques of the ALI, see Alex Elson, *The Case for an In-Depth Study of the American Law Institute*, 23 LAW & SOC. INQUIRY 625 (1998); Kristen David Adams, *The American Law Institute: Justice Cardozo’s Ministry of Justice?*, 32 S. ILL. U. L.J. 173 (2007) [hereinafter *Ministry*].

172. Balganesh & Menell, *supra* note 171, at 286.

173. Greene, *supra* note 168, at 512; Adams, *supra* note 171, at 436 (“Because of the high level of respect that the American Law Institute has earned, the Restatements’ taking a certain position is likely to influence the development of the law.”); Wilkins, *supra* note 171, at 569 (“Although no one has to follow the Institute’s lead, many lawyers have urged, and many judges have ruled on reflection, that principles of law that the Institute has developed should be accepted.”).

174. Commentators have attributed the weight given to ALI Restatements to the prestige of the ALI and its collaborative, scholarly process for drafting Restatements. See, e.g., Matthew L.M. Fletcher, *The Restatement of the Law for American Indians: The Process and Why It Matters*, 80 MONT. L. REV. 1, 3 (2019) (“The Restatement is supposed to be law so encased in concrete that it cannot be disturbed, so uncontroversial that no one in their right mind would disagree or argue that it is incorrect. It is the consensus of the vast majority, the great weight of the majority.”). The ALI explains, “Restatements scan an entire legal field and render it intelligible by a precise use of legal terms to which a body reasonably representative of the legal profession, The American Law Institute, has ultimately agreed.” RESTATEMENT OF THE L.: THE L. OF AM. INDIANS, *Restatements (excerpt of the Revised Style Manual approved by the ALI Council in January 2015)*, at ix (AM. L. INST., Proposed Official Draft 2021). It continues to state that the authority of a Restatement derives “from its competence in drafting precise and internally consistent articulations of the law.” *Id.* at x.

clarify the law for courts. Restatements are primarily aimed at courts and reflect the law as it currently stands or might appropriately be stated by a court.<sup>175</sup> In contrast to a Restatement, the ALI could have drafted a model code to provide legislatures with recommendations for statutory language or principles to guide legislatures, administrative agencies, or private actors about the best practices for either private or public institutions.<sup>176</sup> Instead the ALI chose to restate the law and directed its Restatement at courts and practitioners rather than legislatures and governmental agencies.<sup>177</sup> This selection of a Restatement as the tool for clarifying federal Indian law suggests some acknowledgement of the need to provide courts with intelligible principles in this area.<sup>178</sup>

Consistent with ALI's approach to Restatements generally, the Restatement of the Law of American Indians seeks to reformulate the law to make it "clearer and more coherent" without transforming it too much.<sup>179</sup> It does this by retelling federal Indian law in a manner consistent with the reframing of the federal-tribal relationship by Congress and tribal governments in the past fifty years. In doing so, it presents courts with an opportunity to realign the common law to make it more consistent with statutory federal Indian law and more reflective of the lived experiences of Native governments and peoples. In other words, it reminds courts of the two most important negotiators of federal Indian law—Congress and Indians—and invites them to make decisions consistent with these two important parties' view of the federal-tribal relationship. The interpretative choices made in the Restatement direct courts to act consistently with congressional policy and return to foundational principles of federal Indian law in their decision making.

### B. *The Restatement Urges Courts to Return to Foundational Indian Law Principles*

Consistent with how Congress and tribal governments have remade the

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175. A.L.I., *supra* note 30. For a discussion of the ongoing debate over whether the ALI's purpose in making Restatements is to describe or reform the law, see for example Jeanne C. Fromer & Jessica Silbey, *Retelling Copyright: The Contributions of the Restatement of Copyright Law*, 44 COLUM. J. L. & ARTS 341, 345–49 (2021). Van Doren, *supra* note 171, at 162–65.

176. A.L.I., *supra* note 30; Fromer & Silbey, *supra* note 175, at 349 (explaining that model codes provide "explicit recommendations for statutory language or guiding principles for statutory enactments").

177. Fromer & Silbey, *supra* note 175, at 348–49.

178. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS, *Restatements (excerpt of the Revised Style Manual approved by the ALI Council in January 2015)*, at ix (AM. L. INST., Proposed Official Draft 2021) ("For the most part Restatements thus assume a body of shared doctrine enabling courts to render their judgments in a consistent and reasonably predictable manner.").

179. *Id.*

federal-tribal relationship, the Restatement of the Law of American Indians emphasizes the need for courts to return to the foundational principles of federal Indian law. The Reporter's Introduction to Chapter 1 on the Federal-Tribal relationship identifies the foundational principles of federal Indian law as:

First, Congress's authority over Indian affairs is plenary and exclusive. As a concomitant principle, the federal government holds responsibilities to Indian tribes and individual Indians known as the trust relationship.

Second, the sovereign authority of Indian tribes is inherent, and is not delegated or granted by the United States, but can be limited or restricted by Congress. An important concomitant principle is that courts will not lightly assume that Congress in fact intends to undermine Indian self-government.

Third, state governments have no authority to regulate Indian affairs absent express Congressional delegation or grant.<sup>180</sup>

This section demonstrates how the Restatement retells federal Indian law in accordance with the modern federal-tribal relationship by reiterating the foundational Indian law principles.

*1. Congress Has Plenary Authority Over Indian Affairs as Guided by the Federal Trust Relationship*

The Restatement returns to the foundational principles of federal Indian law by reiterating the primacy of Congress as the maker of federal Indian law.<sup>181</sup> In contrast to court decisions, which have downplayed the role of Congress, departed from congressional policy, and inconsistently applied the Indian law canons of statutory construction,<sup>182</sup> section 7 of the Restatement describes "Congressional Authority" as Congress's "broad authority to legislate in respect to Indian tribes and individual Indians."<sup>183</sup>

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180. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS, ch. 1, at 2 (AM. L. INST., Proposed Official Draft 2021).

181. Matthew L.M. Fletcher, *Restatement as Aadizookaan*, 2022 WIS. L. REV. 197, 204 (2022) ("Federal plenary power is one of the foundational principles of federal Indian law.").

182. See *supra* section I.B.

183. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 7 (AM. L. INST., Proposed Official Draft 2021). Section 7 continues,

[s]ources of Congressional authority include without limitation: (a) The Indian Commerce Clause; (b) Treaties with Indian tribes made in accordance with the Treaty Power, which empowers Congress to enact federal legislation necessary to implement certain treaty terms (see §§ 5, 6); (c) The Territory and Property Clause, which empowers Congress to regulate lands owned or supervised within Indian country; (d) The Necessary and Proper Clause; and (e) The general trust relationship between the United States and Indian tribes and their members (see § 4).

*Id.*

The language in section 7 recognizes Congress's constitutional authority over Indian affairs, and thus, emphasizes Congress's role in crafting the federal-tribal relationship. An implicit corollary of this principle is that courts are to defer to Congress rather than make federal Indian law.<sup>184</sup>

The comments to section 7 summarize the nature of congressional power and synthesize the evolution of congressional authority over time. The retelling of this story is important because it emphasizes the dynamic nature of the federal-tribal relationship.<sup>185</sup> The Restatement frames that relationship, like Congress has, as political, participatory, and based upon explicit recognition of tribal sovereignty and the trust relationship.<sup>186</sup>

Scholars, judges, and legal practitioners have long debated Congress's plenary power over Indian affairs<sup>187</sup> but, unlike the Restatement, they frequently do not consider it in terms of the modern federal-tribal relationship.<sup>188</sup> The language of and comments to section 7 contextualize plenary power by placing it squarely within the contours of the modern federal-tribal relationship. Courts cannot appropriately apply federal Indian law, including section 7, without an accurate understanding of how Congress has framed the federal-tribal relationship with tribal

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184. Fletcher, *supra* note 23, at 127; Frickey, *supra* note 118, at 459–60; Getches, *supra* note 17, at 273.

185. THE HARVARD PROJECT ON AM. INDIAN ECON. DEV., THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION 53 (2008).

186. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 7 cmt. a. (AM. L. INST., Proposed Official Draft 2021).

187. See Milner S. Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RSCH. J. 1, 12 (1987); Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 196 (1984); Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1079, 1087–90 (2004); INDIAN L. RES. CTR., NATIVE LAND LAW 154–55 (Laws. ed. 2012); VINE DELORIA, JR. & DAVID E. WILKINS, TRIBES, TREATIES, AND CONSTITUTIONAL TRIBUNATIONS 79 (1999); Robert Laurence, *Learning to Live With the Plenary Power of Congress Over the Indian Nations: An Essay in Reaction to Professor Williams' Algebra*, 30 ARIZ. L. REV. 413, 418–28 (1988); Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence's Learning to Live with the Plenary Power of Congress over the Indian Nations*, 30 ARIZ. L. REV. 439, 441 (1988); Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 AM. INDIAN L. REV. 57, 59 (1991); Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1164–66 (1995); Frank Pommersheim, *At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty*, 55 S.D. L. REV. 48, 52–53 (2010); Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666, 669–73 (2016).

188. *But see* Fletcher, *Muskrat Textualism*, *supra* note 26, at 980 (“In the modern era, congressional plenary power is tempered by the rising political and economic power of Indian tribes.”); Deloria, *supra* note 21, at 218 (“If we have moved from negotiating treaties in 1778, through periods of oppressive unilateral actions by the federal government, to the present posture of adopting negotiated settlements once again, then federal Indian law is something entirely different than we have previously imagined.”).

governments.<sup>189</sup>

The language and comments of section 7 reflect the ongoing relationship between tribal governments and Congress and how they have remade it in the past fifty years. With the development of the Tribal Self-Determination Policy, Congress has recognized its political relationship with tribal governments and the importance of tribal participation in federal lawmaking.<sup>190</sup> As discussed in section I.A, increased tribal participation has led to substantive changes in Indian-related statutes, which increasingly align with foundational principles of federal Indian law.<sup>191</sup>

The text of section 7 reflects the evolution of the federal-tribal relationship by acknowledging the foundational principle that Congress plays a primary role in Indian affairs. Congress has increasingly owned and exercised this role. It has renewed its relationship with tribal governments by inviting them to participate in federal lawmaking and enacting statutes to govern the relationship.<sup>192</sup> Federal Indian law has become a law of statutes with members of Congress introducing 7,714 bills relating to Indians from 1975 to 2012, and enacting 974 of them.<sup>193</sup> During this time period, Congress enacted twice as many Indian-related bills it did bills generally.<sup>194</sup> A shift in the substance of federal statutes governing the federal-tribal relationship has accompanied the increased attention that Congress has devoted to Indian affairs. As detailed in section I.A, many Indian-related statutes incorporate the foundational principles of federal Indian law.<sup>195</sup>

The Restatement shows how the context of the federal-tribal relationship helps to clarify the troubling question of the scope of Congress's plenary power over Indian affairs.<sup>196</sup> As comment a to section 7 states, "Congress also has authority to recognize and regulate

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189. Understanding plenary power, as embodied in section 7, requires in-depth knowledge of the federal-tribal relationship as it develops between Congress and tribal governments. It is this relationship that informs Congress in its exercise of its constitutional power over Indian affairs. Fletcher, *supra* note 181, at 204; Deloria, *supra* note 21, at 205, 218.

190. *See supra* section I.A.

191. *See supra* section I.A.

192. *See supra* section I.A.

193. Kirsten Matoy Carlson, *Congress and Indians*, 86 U. COLO. L. REV. 77, 112–16 (2015).

194. *Id.* at 115–16.

195. *See supra* section I.A.

196. *See, e.g.*, Williams, *supra* note 187, at 445–49 (arguing that the plenary power doctrine gives the United States unfettered power over Indians); Laurence, *supra* note 187, at 422–28 (arguing that plenary power is limited and counterbalanced by tribal sovereignty).

inherent tribal authority.”<sup>197</sup> Comment b then acknowledges that historically Congress has wielded its plenary power both to protect and to harm tribal governments and their peoples.<sup>198</sup> The vast scope of Congress’s plenary power seems daunting until it is situated within the federal-tribal relationship.

Consistent with the foundational principles and section 7 of the Restatement, Congress’s actions and inactions indicate that it takes its constitutional role as the institution with primary but limited authority over Indian affairs seriously. Consider first what Congress has not done in the past fifty years. It has not terminated a tribal government recognized by the United States. Nor has Congress enacted legislation that would in general strip tribal governments of jurisdiction, authority, or sovereign immunity.<sup>199</sup> In the few instances in which Congress has limited the authority of specific tribal governments, it appears to have sought tribal input first.<sup>200</sup> This engagement, along with the extremely low rate of

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197. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 7 cmt. a (AM. L. INST., Proposed Official Draft 2021).

198. *Id.* § 7 cmt. b.

199. *See supra* section I.A. Congress has considered several bills that would limit tribal jurisdiction, authority, or sovereign immunity of tribal governments, but it has chosen not to enact any of them. Congress has come close to waiving tribal sovereign immunity, but then changed its mind. For example, the Indian Self-Determination and Educational Assistance Act of 1975, Pub. L. No. 93-638, as originally enacted, required tribes to obtain liability insurance, which contained a provision that the insurance carrier would waive the defense of tribal sovereign immunity in suits related to the contract. *Id.* § 103. These provisions were amended by the ISDEAA Amendments of 1988, Pub. L. No. 100-472, which provided that “tort claims against tribes, tribal organizations, Indian contractors, and their employees . . . be considered claims against the United States and covered to the full extent of the [Federal Tort Claims Act].” COHEN’S HANDBOOK ON FEDERAL INDIAN LAW, *supra* note 17, at 1391. The amendments retained the insurance requirements (but required the Secretary of the Interior rather than the tribe to obtain the insurance) and the provisions mandating that insurance carriers waive the defense of tribal sovereign immunity in suits under the contracts.

Another statute, the Indian Tribal Economic Development and Contract Encouragement Act, Pub. L. No. 106-179 (2000), does not expressly waive tribal sovereign immunity but mandates that contracts with Indian tribes requiring federal approval include provisions either disclosing or waiving immunity. Congress considered other options, including waiving tribal sovereign immunity, S. Rep. No. 106-150, at 11–12 (1999), but ultimately Congress chose not to enact such a waiver.

200. Congress has occasionally limited the tribal jurisdiction, authority or sovereign immunity of a specific tribe, usually with the consent of the tribal government. For example, Congress has waived tribal sovereign immunity in several water rights settlement acts, presumably with the consent of the tribe as the tribal government had to consent to the water rights settlement agreement. *See, e.g.*, Salt River Pima-Maricopa Water Rights Settlement Act, Pub. L. No. 100-512 (1988) (waiving tribal sovereign immunity when United States has certain claims against the Community); Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub. L. No. 108-34 (waiving tribal sovereign immunity in specified litigation); Claims Resolution Act of 2010, Pub. L. No. 111-291 (White Mountain Apache and Crow Tribe Water Rights Settlements) (waiving sovereign immunity of the tribe and United States in lawsuits arising from the agreement); Bill Williams River Water Rights Settlement Act of 2014, Pub. L. No. 113-223 (Hualapi Tribe) (waiving tribal sovereign immunity for claims arising

enactment of bills uniformly opposed by tribal governments and organizations,<sup>201</sup> suggests that Congress now views tribal participation in federal lawmaking as essential.<sup>202</sup> My recent research confirms this. It demonstrates that Congress responds to tribal opposition by either refusing to enact the bill or amending it to satisfy at least some of the tribal concerns.<sup>203</sup> Based on these findings, it seems unlikely that Congress would enact legislation restricting a tribal government's authority without its consent.<sup>204</sup> If so, tribal participation may serve as a serious constraint on congressional plenary power.<sup>205</sup>

Now consider what Congress has done: it has remade federal Indian law in the past fifty years to align with foundational principles of federal Indian law. In addition to enacting legislation recognizing tribal autonomy and implementing the trust relationship,<sup>206</sup> Congress has extended federal recognition to more tribes than any other branch of the federal government since 1978.<sup>207</sup> In extending federal recognition to these Native Nations, it has renewed its political relationship with and acknowledged its trust obligations to them. Congress has also repeatedly restored inherent tribal authority after the Supreme Court diminished it.<sup>208</sup> These actions and

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from the agreement). Congress has also limited tribal jurisdiction and/or authority in legislation extending federal recognition to a specific tribe. Carlson, *supra* note 108, at 985–91 (documenting how Congress has limited tribal criminal and/or civil jurisdiction, fishing and hunting rights, and authority to conduct gaming in federal recognition).

201. Carlson, *Beyond Descriptive Representation*, *supra* note 68, at 74.

202. The high rates of testimony by tribal governments and Indian organizations at hearings on Indian related bills also lends support to the conclusion that members of Congress place a premium on tribal participation in federal lawmaking because Committee Chairs often invite witnesses to testify. *Id.* at 72 (noting that tribal governments and organizations testified at 50% of the hearings held on Indian related legislation).

203. Carlson, *Beyond Descriptive Representation*, *supra* note 68, at 82.

204. My findings confirm Vine Deloria, Jr.'s description of the modern federal-tribal relationship as one of negotiation. Deloria, *supra* note 21, at 205, 218. He explained, "Negotiation allows people to give and take, and they do not agree unless they feel they have done their very best to represent their case." *Id.* at 218.

205. I am not the first to suggest that tribal political power may cabin congressional plenary power. As early as 1987, Professor Wilkinson suggested that Congress could not enact legislation opposed by tribal governments. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 192–93 n.151 (1987); WILKINSON, BLOOD STRUGGLE, *supra* note 38, at 267. Other scholars have also made this claim. Washburn, *supra* note 55, at 781; Berger, *supra* note 158, at 17. Professor Deloria made a more subtle argument that tribal political power could limit congressional power by suggesting that historical conditions have prevented Congress from acting as freely as broad formulations of the plenary power doctrine might indicate. Deloria, *supra* note 21, at 210. More recently, Professor Fletcher has indicated that the political power of tribes could curtail plenary power. Fletcher, *Muskrat Textualism*, *supra* note 26, at 980.

206. *See supra* section I.A.

207. Carlson, *supra* note 108, at 957, 971–85.

208. *See supra* section I.B.

inactions show that Congress takes its constitutional role as the institution with primary authority over Indian affairs seriously. These actions and inactions also suggest that Congress does not abrogate tribal authority frequently or lightly as it may undercut the federal-tribal relationship it has negotiated with tribes.

Further, as the comments to section 7 reflect, Congress knows its powers are limited. As the comments to section 7 explain, both the trust relationship<sup>209</sup> and the Constitution<sup>210</sup> cabin congressional power. These comments might seem naïve given that Congress has historically enacted policies intended to destroy tribal governments and diminish tribal land bases.<sup>211</sup> These limits, however, serve as meaningful constraints when they are considered in the context of the federal-tribal relationship. Congress has taken its trust obligations to tribal governments seriously in crafting legislation.<sup>212</sup> Despite court-created restrictions on the ability of tribal governments to recover from the U.S. government for breach of trust claims,<sup>213</sup> Congress has repeatedly acknowledged and frequently implemented its trust obligations to tribal governments over the past fifty years.<sup>214</sup> It has recognized the trust relationship in statutes governing, inter alia, child welfare, housing, health care, and resource management.<sup>215</sup> Congress appears to see its power as limited by its obligations under the trust relationship to protect Indians.<sup>216</sup>

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209. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 7 cmt. a (AM. L. INST., Proposed Official Draft 2021) (“Congress also retains plenary authority to legislate in light of the federal trust responsibility to Indian tribes and individual Indians.”); *id.* § 7 cmt. d (“The general trust relationship may independently constitute a source of authority for Congress to act in respect to Indian affairs. See section 4. When Congress does act in accordance with the general trust relationship, courts note that Congress’s authority is effectively enhanced.”).

210. *Id.* § 7 cmt. f (Fifth Amendment limitation).

211. For a discussion of these policies, see generally DAVID H. GETCHES, CHARLES F. WILKINSON, ROBERT A. WILLIAMS, JR., & MATTHEW L.M. FLETCHER, *CASES AND MATERIALS ON FEDERAL INDIAN LAW* (6th ed. 2011).

212. *See supra* section I.A.

213. *See* *United States v. Navajo Nation*, 556 U.S. 287 (2009); *United States v. Navajo Nation*, 537 U.S. 488 (2003); *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003).

214. For a discussion of how Congress has acknowledged and implemented its general trust relationship through statutes, see *supra* section I.A. The enactment of these statutes suggests that the trust relationship may carry more weight politically than legally.

215. *Id.*

216. Fletcher, *supra* note 181, at 205–06 (“Plenary power does not mean absolute power, it means the power needed to fulfill a particular purpose. That purpose is the fulfillment of the federal trust responsibility, also known as the duty of protection, to Indians and tribes. That purpose originates in the treaty relationship between Indian tribes and the United States, and now extends to every federally acknowledged tribe. This is the commitment.”).

Other sections of the Restatement reiterate Congress’s vision of the trust relationship as central to

In accordance with this modern federal-tribal relationship, the Restatement returns federal Indian law to foundational principles of Indian law by recognizing the primacy of Congress in Indian affairs. When considered in light of the federal-tribal relationship, the Restatement reflects what Congress is doing, namely exercising its power by recognizing tribal sovereignty and its duty of protection to tribal governments and Indian peoples.<sup>217</sup>

2. *Indian Tribes Retain Inherent Sovereign Authority Unless Congress Has Expressed Clear and Plain Intent to Undermine Indian Self-Government*

Several sections of the Restatement reiterate the foundational principle of federal Indian law that tribal governments retain inherent sovereign authority unless Congress has expressed clear and plain intent otherwise. This foundational principle includes two parts: the first affirms that tribal governments retain inherent sovereign authority while the second

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the federal-tribal relationship and a limit on congressional plenary power. Section 4 of the Restatement states, “The United States recognizes a general trust relationship between the United States and Indian tribes and their members arising from a government-to-government relationship with preexisting sovereigns.” RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 4 cmt. a (AM. L. INST., Proposed Official Draft 2021). Comment a to section 4 sets out the origins of the trust relationship as a duty of protection arising from treaties and federal statutes. *Id.* (“The trust relationship was first exemplified during the treaty-making process, when the United States either explicitly or implicitly agreed to protect individual Indians and Indian tribes in exchange for title to what would become the vast public domain. The federal trust relationship further arises from a series of federal statutes reserving plenary control over Indian affairs in Congress and the executive branch, regulating the disposition and control of Indian lands, and providing for law and order in Indian country.”). The trust relationship not only stems from federal legislation but also, as Congress itself acknowledges, serves as the basis for much of its Indian affairs legislation. *Id.* (“The general trust relationship serves as a source of legal authority for the vast network of Indian-affairs statutes that frame federal-tribal affairs.”). The comments to section 4 reflect the network of statutes enacted by Congress in the past fifty years to meet its obligations under the trust relationship to safeguard the property rights of tribal governments and individual Indians, to preserve tribal self-government, and to provide government services. *Id.* § 4 cmts. c, d, e.

Discussed further in section II.B, section 9 also reinforces the trust relationship by providing courts with guidance about how to interpret statutes passed in accord with the trust responsibility. Restatement of the Law of American Indians section 9(a) states,

If tied rationally to the fulfillment of the United States’ trust relationship with Indians and Indian tribes, see § 4, federal laws that treat Indians or Indian tribes differently from other individuals or groups create political, not racial classifications and are not subject to strict scrutiny under the equal-protection component of the Fifth Amendment.

*Id.* § 9(a). Consistent with the foundational principle of congressional plenary power and the modern federal-tribal relationship, section 9 instructs courts to give deference to statutes enacted to further the general trust relationship. In doing so, it emphasizes the modern federal-tribal relationship fostered by Congress and tribal governments and the trust relationship as the guiding principle in the statutory interpretation of federal statutes applicable to tribal governments and individual Indians.

217. Fletcher, *supra* note 181, at 205–06.

establishes the clear statement rule that tribal sovereignty can only be undermined by an express, clear, and plain statement by Congress.<sup>218</sup>

The Restatement reiterates the first part of the foundational principle in three ways. First, it includes an entire chapter, chapter 2 on tribal authority, which spells out the inherent authority retained by tribal governments and affirms the first part of this foundational principle.<sup>219</sup> A full analysis of chapter 2 is beyond this scope of this article. Its very inclusion in the Restatement confirms the importance of retained tribal authority.

Second, section 5 on Treaties with Indian Tribes affirms the reserved rights doctrine, which states that tribes retain any rights not ceded under a specific treaty.<sup>220</sup> Section 5 states that under their treaties with the United States, tribal governments retain any rights not ceded to the United States, abrogated by federal legislation, or altered by an amendment to the treaty made by treaty signatories.<sup>221</sup> Congress has frequently recognized the retained rights of tribes in federal statutes.<sup>222</sup> It has even refused to abrogate treaty rights in terminating tribes<sup>223</sup> and allotting tribal land.<sup>224</sup>

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218. Clear statement rules are canons of statutory interpretation that compel an outcome unless Congress has clearly stated otherwise. WILLIAM J. ESKRIDGE, JAMES J. BRUDNEY, JOSH CHAFETZ, PHILLIP P. FRICKEY, & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION AND REGULATION* 651 (6th ed. 2020). For a discussion of clear statement rules in federal Indian law, see Fletcher, *Muskrat Textualism*, *supra* note 26, at 980 (“The clear statement rules are default rules designed to allow Congress to run Indian affairs without interference from states, private interests, and even the judiciary.”).

219. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 4 ch. 2 (AM. L. INST., Proposed Official Draft 2021).

220. *United States v. Winans*, 198 U.S. 371 (1905).

221. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 5 (AM. L. INST., Proposed Official Draft 2021) (“(a) Indian treaties made under the authority of the United States are part of the supreme law of the land. (b) Indian treaties constitute reservations of rights by Indian tribes, not a grant of rights to Indian tribes. (c) Indian treaty rights and related federal obligations continue in force until and unless federal legislation abrogates the rights and obligations (see section 15), or the treaty signatories agree to amend the treaty. (d) State laws and regulations conflicting with Indian treaty provisions are invalid, unless authorized by federal legislation. (e) Indian treaties with States made after 1790 are invalid, unless authorized by federal legislation.”). *See also id.* § 5 cmt. c, Reserved-rights doctrine (“Rights expressly articulated in Indian treaties are reservations of inherent governmental rights of Indian tribes and individual rights of individual Indians. Rights not addressed by Indian treaty provisions are presumptively reserved; courts should interpret silence in the treaty in light of the reserved-rights doctrine.”).

222. *See supra* section I.A.

223. *See, e.g.*, Menominee Termination Act of 1954, Pub. L. No. 83-399, 68 Stat. 250, 25 U.S.C. §§ 891–902 (1970), *repealed by* 87 Stat. 770 (1973) (terminating the governmental status of the Menominee Tribe); *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968) (recognizing the hunting and fishing rights of the Menominee even after the United States government ceased to recognize their governmental status).

224. *See, e.g.*, Creek Allotment Agreement, ch. 676, Pub. L. No. 56-676, 31 Stat. 861 (1901)

Third, as the previous discussion shows, congressional recognition that tribal governments retain inherent sovereign authority is implied in section 7. Congress has recognized tribal sovereignty as an essential aspect of its modern relationship with tribal governments. Congress has invited the participation of tribal governments in the lawmaking process because it recognizes them as separate sovereigns.<sup>225</sup> The legislative actions taken by Congress demonstrate its commitment to recognizing tribal sovereignty. In the past fifty years, it has acknowledged, reacknowledged, or restored thirty-eight tribal governments, restored inherent tribal authority over some criminals, and enacted and implemented legislation recognizing tribal authority in housing, health care, education, economic development, and many other areas.<sup>226</sup>

The second part of this foundational principle sets out the clear statement rule that tribal sovereignty is retained unless and until Congress expressly and with clear and plain intent says otherwise.<sup>227</sup> The Restatement incorporates this clear statement rule in section 5 on treaties with Indian tribes, section 7 on congressional authority, and section 15 on federal statutory regulation of tribal authority. All three sections recognize that Congress has the authority to limit tribal authority.<sup>228</sup> The comments to section 5 and section 15 clarify the conditions under which Congress can limit tribal authority. Comment e to section 5 limits congressional power by stating that “[c]ongressional intent to abrogate Indian treaty provisions must be clear and unambiguous.”<sup>229</sup> Similarly, comment a to section 15 explains, “The legislative intent to abrogate tribal authority must be clear.”<sup>230</sup> The canons of treaty and statutory construction in

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(allotting lands of the Muskogee Creek Nation); Act of May 27, 1908, ch. 199 § 1, Pub. L. No. 60-140, 35 Stat. 312 (allotting lands of the Five Civilized Tribes of Oklahoma); *McGirt v. Oklahoma*, \_\_ U.S. \_\_, 140 S. Ct. 2452 (2020) (finding that allotment did not abrogate treaty rights of the Muskogee Creek Nation).

225. See GROSS, *supra* note 1, at 79, 86.

226. See *supra* section I.A.

227. As section I.B documents, courts have strayed from this foundational principle through the doctrine of implicit divestiture.

228. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 7 (AM. L. INST., Proposed Official Draft 2021) (recognizing the broad scope of congressional authority in Indian affairs); *id.* § 5 cmt. d (Abrogation or partial abrogation by Congress) (“Congress retains authority to abrogate Indian treaty provisions through ordinary legislation, subject to applicable constitutional restrictions.”); *id.* § 15 (“The United States has legislative authority to regulate tribal government authority.”).

The reiteration of this clear statement rule in multiple sections of the Restatement suggests that courts should treat it as a “super-strong clear statement rule[],” which may only be overcome by extremely clear statutory text. ESKRIDGE, ET AL., *supra* note 218, at 651.

229. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 5 cmt. e (AM. L. INST., Proposed Official Draft 2021).

230. *Id.* § 15 cmt. a.

section 6 and section 8 also support the clear statement rule by suggesting that courts should read treaties and statutes liberally and to the benefit of Indian tribes.<sup>231</sup> The liberal construction of treaties and statutes prohibits courts from finding incursions on tribal sovereignty in cases where the intent to limit tribal authority was not unequivocal, plain and clear. As section I.A shows, the incorporation of this clear statement rule into the Restatement is consistent with current congressional practice.<sup>232</sup> In the past fifty years, Congress has regularly refused to enact legislation that would undermine tribal sovereignty and rarely enacted legislation over unified tribal opposition even if the proposed legislation would not limit tribal authority.

### 3. *State Governments Lack Authority over Indian Affairs Absent Express Congressional Delegation or Grant*

The other side of the foundational principle of congressional plenary power embodied in section 7 is the foundational principle that states lack authority over Indian affairs absent an express congressional delegation or grant.<sup>233</sup> This foundational principle has two parts. First, it recognizes the lack of authority over Indian affairs left to state governments in the U.S. Constitution.<sup>234</sup> Second, it reiterates the clear statement rule that Congress can only limit tribal authority through a clear and plain intent to

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231. *Id.* § 6 (Canons of Construction of Indian Treaties) (“A treaty must be liberally interpreted in favor of the relevant Indian tribes to give effect to the purpose of the treaty. Ordinary rules of construction do not apply. Courts apply the following canons of construction: (a) Doubtful or ambiguous expressions in a treaty must be resolved in favor of the relevant Indian tribes. (b) An Indian treaty must be construed as the Indians understood it at the time of the treaty negotiation. (c) An Indian treaty must be construed by reference to surrounding circumstances and history.”); *id.* § 8 (Canon of Construction of Indian-Affairs Statutes) (“Federal legislation addressing Indian affairs must be construed liberally in favor of the Indians, with ambiguous provisions interpreted to the benefit of Indians and Indian tribes.”).

232. *See supra* section I.A.

233. Fletcher, *supra* note 181, at 204 (“The First Congress preempted whatever remained in the field in the Trade and Intercourse Act of 1790, barring all interactions with Indians and tribes absent federal consent.”). Other sections of the Restatement reinforce the foundational principle that states lack authority over Indian absent an express congressional action to the contrary; *see, e.g.*, RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 5(d) (AM. L. INST., Proposed Official Draft 2021) (“State laws and regulations conflicting with Indian treaty provisions are invalid, unless authorized by federal legislation.”); *id.* § 5(e) (“Indian treaties with States made after 1790 are invalid, unless authorized by federal legislation.”).

The United States Supreme Court has recently questioned this foundational principle in *Oklahoma v. Castro-Huerta*, \_\_\_ U.S. \_\_\_, 142 S. Ct. 2486 (2022).

234. *See* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012 (2015) [hereinafter Ablavsky, *Beyond the Indian Commerce Clause*]; Clinton, *supra* note 187, at 1064–1064; Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999 (2014); MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW 4 (2016); COHEN’S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 17, at 94.

do so by clarifying that Congress has to expressly grant authority over Indian affairs for state governments to exercise any authority over Indian affairs.<sup>235</sup>

The Restatement reiterates this foundational principle in section 7. Comment g to section 7 emphasizes the general understanding, shared historically and presently by scholars, judges, members of Congress, and tribal governments, that the Indian Commerce Clause vested Indian affairs authority in Congress to the exclusion of the states.<sup>236</sup> This comment, as well as the history detailed in the Reporters' Notes, reflects congressional practice as Congress has generally refused to vest any reserved authority to the states since the time of the framing of the U.S. Constitution.<sup>237</sup> Comment g then clarifies that the Tenth Amendment's reservation of authority to the states does not change this because little to no residual Indian affairs authority is left under the Constitution.<sup>238</sup>

Consistent with the Restatement, Congress has continued to limit state authority in Indian Country absent a clear statement otherwise in crafting

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235. *See, e.g.*, *Worcester v. Georgia*, 31 U.S. 515, 518–19 (1832) (holding that the laws of the state of Georgia had no force in the Cherokee Nation because the U.S. Constitution and treaties gave all authority over Indian affairs to the federal government); *Williams v. Lee*, 358 U.S. 217, 223 (1959) (holding that Arizona courts could not exercise civil jurisdiction over a dispute between a non-Indian and tribal citizens that rose on the Navajo Nation reservation); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996) (stating that the Indian Commerce Clause precludes almost all state authority over Indian affairs); *McGirt v. Oklahoma*, \_\_\_ U.S. \_\_\_, 140 S. Ct. 2452, 2478 (2020) (holding that Oklahoma did not have criminal jurisdiction over Indians in eastern Oklahoma because Congress had never disestablished the Creek Reservation).

The reiteration of this clear statement rule in multiple sections of the Restatement, *see, e.g.*, RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 5(d) (AM. L. INST., Proposed Official Draft 2021) (“State laws and regulations conflicting with Indian treaty provisions are invalid, unless authorized by federal legislation.”); *id.* § 5(e) (“Indian treaties with States made after 1790 are invalid, unless authorized by federal legislation.”) suggests that courts should treat it as a “super-strong clear statement rule[,]” which may only be overcome by extremely clear statutory text. ESKRIDGE, ET AL., *supra* note 218, at 651.

236. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 7 cmt. g (AM. L. INST., Proposed Official Draft 2021) (“The original public understanding of the Indian Commerce Clause was that it vested Congress with Indian-affairs power to the exclusion of the states.”); *see also id.* § 7 Reporters' Notes, at 120 (“There does not appear to be any state authority remaining in the field of Indian affairs . . .”); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. L.J. 113, 149 (2003); Ablavsky, *Beyond the Indian Commerce Clause*, *supra* note 234, at 1012.

237. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 7 Reporters' Notes, at 110–11, 120 (AM. L. INST., Proposed Official Draft 2021).

238. *Id.* § 7 cmt. g. Justice Kavanaugh appears to suggest otherwise in *Castro-Huerta* but aside from citing to the Tenth Amendment, he provides no support or rationale for the idea that the Tenth Amendment reserved Indian affairs powers to the states. *Oklahoma v. Castro-Huerta*, \_\_\_ U.S. \_\_\_, 142 S. Ct. 2486 (2022). Scholars have extensively reviewed the historical documents to show that the Founders intended for the U.S. Constitution to give exclusive authority over Indian affairs to Congress. *See* Clinton, *supra* note 236, at 149; Ablavsky, *Beyond the Indian Commerce Clause*, *supra* note 234, at 1012; Savage, *supra* note 187, at 62.

its contemporary government-to-government relationship with tribal governments. Congress has expressly granted some states authority in Indian Country, most notably under Public Law 280 and some tribe specific statutes.<sup>239</sup> In response to tribal advocacy, Congress has retreated from this approach in the past fifty years.<sup>240</sup> It enacted the Indian Civil Rights Act of 1968, which amended Public Law 280, making it so that states could not assume criminal jurisdiction over Indian tribes without tribal consent.<sup>241</sup> No state has assumed jurisdiction under Public Law 280 since then.<sup>242</sup> Rather, the frequency with which Congress grants states authority in Indian Country appears to have decreased in the past fifty years.<sup>243</sup>

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239. Pub. L. No. 83-280 (1953) (granting five states criminal and civil authority over Indian Country within their states and authorizing additional states to assume jurisdiction); *see also* Carole Goldberg, *Tribal Jurisdictional Status Analysis*, TRIBAL CT. CLEARINGHOUSE, <http://www.tribal-institute.org/lists/tjsa.htm> [<https://perma.cc/64KD-2ZCU>] (listing which states have authority to exercise jurisdiction in Indian Country).

Scholars, practitioners and tribal leaders have largely condemned Pub. L. 280 as unworkable because it creates a confusing and underfunded jurisdictional scheme in Indian Country. *See* Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority over Indian Country Granted by Public Law 280*, 87 WASH. L. REV. 915, 937–45 (2012); M. Brent Leonard, *Returning Washington P.L. 280 Jurisdiction to Its Original Consent-Based Grounds*, 47 GONZ. L. REV. 663, 693–01 (2011–2012); Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1635–36 (1998); Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535, 538, 544–63 (1975). At least one empirical study has found that Pub. L. 280 does not improve public safety in Indian Country. Carole Goldberg & Duane Champagne, *Is Public Law 280 Fit for the Twenty-First Century? Some Data at Last*, 38 CONN. L. REV. 697, 711–26 (2006).

For a discussion of federal statutes recognizing tribal governments and also granting states criminal or civil authority over tribal lands and communities, *see* Carlson, *supra* note 108, at 988–91. Many of the bills granting jurisdiction to states are not enacted. *Id.* at 990.

240. PARKER, *supra* note 70, at 3–5 (noting that tribal advocacy led to the amendments to Pub. L. 280 in the Indian Civil Rights Act of 1968).

241. 25 U.S.C. §§ 1321–1322. It also allowed for state governments to ask Congress to rescind their authority over Indian affairs. *Id.* § 1323.

242. Instead, states have sought to retrocede or give back jurisdiction in Indian Country. Anderson, *supra* note 239, at 951–56; Carole Goldberg & Duane Champagne, *Searching for an Exit: The Indian Civil Rights Act and Public Law 280*, in *THE INDIAN CIVIL RIGHTS ACT AT FORTY* 247, 247 (Carpenter et al. eds., 2012).

243. Bills introduced in Congress to limit tribal jurisdiction in the past fifty years would have granted jurisdiction to federal courts rather than state courts. *See, e.g.*, Indian Civil Rights Act Amendments of 1988, S. 2474, 100th Cong. (granting federal court jurisdiction over claims under the Indian Civil Rights Act and waiving tribal sovereign immunity in these cases); Indian Civil Rights Act Amendments of 1989, S. 517, 101st Cong. (1989) (granting federal court jurisdiction over and waiving tribal sovereign immunity in claims under the Indian Civil Rights Act); Indian Civil Rights Enforcement Act, S. 2298, 105th Cong. (1998) (extending federal court jurisdiction over and waiving tribal sovereign immunity in cases brought under the Indian Civil Rights Act); American Indian Contract Enforcement Act, S. 2299, 105th Cong. (1998) (granting federal district courts' jurisdiction over any civil action or claim against an Indian tribe for liquidated or unliquidated damages for cases

Examples abound of Congress refusing to extend state authority into Indian Country in recent proposed bills.<sup>244</sup> Bills proposing that Congress grant authority to states are occasionally introduced, but Congress has not enacted any of them. In contrast, my previous research shows that the inclusion of grants of state jurisdiction in bills extending federal recognition to Native Nations has declined in the past fifty years.<sup>245</sup> Similarly, Congress rejected proposed bills that would have granted states the authority to regulate gaming in Indian Country.<sup>246</sup> Congress's refusal to grant states authority in Indian Country confirms its commitment to this foundational principle.

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The Restatement seeks to realign decisional law with statutory law by directing courts to follow Congress's lead and return to the foundational principles of federal Indian law. The foundational principles provide simple instructions to courts: (1) follow Congress's lead because the Constitution gives Congress primary authority over Indian affairs; (2) defer to Congress when Congress has clearly spoken unless it has violated the Constitution or the trust relationship and adopt a wait-to-see approach when Congress is silent or has not spoken clearly and unequivocally; and (3) deny state authority over Indian affairs unless Congress has expressly granted specific authority to the state. These instructions add clarity to federal Indian law and make it easy for judges

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not sounding in tort that involved any contract made by a tribe's governing body or on behalf of a tribe and waiving tribal immunity as necessary to enforce the Act); American Indian Equal Justice Act, S. 1691, 105th Cong. (1998) (granting jurisdiction over tort actions to state and federal courts and subjecting tribes to the same liability standards as private individuals or corporations).

244. Carlson, *supra* note 108, at 990 (discussing how Congress has not enacted most bills granting jurisdiction to the state); Franklin Ducheneaux, *The Indian Gaming Regulatory Act: Background and Legislative History*, 42 ARIZ. ST. L.J. 99, 142–52 (2010) (discussing the multiple proposed bills that would have allowed the states to regulate Indian gaming).

245. Carlson, *supra* note 108, at 990.

246. Ducheneaux, *supra* note 244, at 142–52 (discussing the multiple proposed bills to regulate Indian gaming). The Indian Gaming Regulatory Act includes states in the tribal gaming compacting process but does not grant them any authority over tribal gaming. Pub. L. No. 100-497 (1988), 25 U.S.C. § 2701 et seq.

Some scholars have argued that the Indian Gaming Regulatory Act (IGRA) led to an era of forced federalism because the Act mandated that tribal governments compact with states to operate class III gaming operations. JEFF CORNTASSEL & RICHARD C. WITMER II, FORCED FEDERALISM: CONTEMPORARY CHALLENGES TO INDIGENOUS NATIONHOOD 5 (2008). They argue that the dramatic increase in intergovernmental agreements or compacts between state and tribal governments after IGRA indicates a shift towards more state involvement in Indian affairs. *Id.* at 107–33. IGRA may have contributed to a change in the state-tribal relationship, but this is not because Congress has altered the federal-tribal relationship by granting state governments more authority in Indian affairs.

to apply.<sup>247</sup> And as recent congressional history has shown, Congress can always step back in if things go badly.<sup>248</sup>

C. *The Restatement Guides Court Interpretations by Clarifying that Indian Law is Statutory Law*

The Restatement reflects the federal-tribal relationship as negotiated by tribal governments and Congress in the modern era by reiterating the role of statutory law in federal Indian law and providing guidance to courts about how to interpret Indian-related statutes. First, the Restatement guides courts by identifying the relevant statutory texts to be applied in Indian law cases by area of law. Second, it explicitly instructs courts as to the canons of statutory construction that apply to federal statutes relating to American Indians.

1. *What to Interpret: Courts Must Identify the Relevant Statutory Texts*

The Restatement makes clear that federal Indian law is statutory law.<sup>249</sup> Statutes are texts to be read, interpreted, and implemented by judges and agencies. In the statutory context, the legislature is treated as the author of the text and judges and agencies give meanings to the “legislature’s policy choices as embodied in the statutory text and structure.”<sup>250</sup>

The divergence in federal Indian law between statutory law and judge-made law has led judges, courts, and commentators to frequently describe it as incoherent. This incoherence means that judges often struggle with the first step in legal interpretation, namely identifying the sources of law relevant to the issues they have to address.<sup>251</sup> Judges have to decide which

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247. Fletcher, *Muskrat Textualism*, *supra* note 26, at 972 (“Canonical and ancient interpretive rules adopted and applied by the judiciary itself, such as the canons of construction of Indian treaties and statutes and the clear statement rules, should make Indian law less complicated for judges.”).

248. *See supra* section I.B; *see also* Fletcher, *Muskrat Textualism*, *supra* note 26, at 973 (noting that Congress can step back in and has lots of tools for regulating Indian affairs).

249. *See supra* section I.A; Carlson, *supra* note 193, at 115–16, 133–37 (documenting the disproportionate amount of federal legislation governing Indian tribes and peoples when compared to federal legislation generally as well as other specialized areas of law over which Congress has constitutional authority); Fletcher, *Muskrat Textualism*, *supra* note 26, at 1026 (“Federal Indian law is primarily statutory, with hundreds of treaties and thousands of federal statutes and the regulations that interpret and implement those statutes.”); Deloria, *supra* note 21, at 207 (describing the 4,300 statutes that Nathan Margold relied on in drafting the 1942 Handbook on Federal Indian Law).

250. Fromer & Silbey, *supra* note 175, at 355.

251. For example, scholars have extensively criticized the Supreme Court’s decision in *Oliphant*, which relied on several questionable legal sources. Krakoff, *supra* note 123, at 280–81 (“Essentially, the Court looked to congressional history, treaties, and statutes and, finding nothing definitive,

texts are relevant to the issues.<sup>252</sup> As Professor Fletcher has argued, the identification of the relevant text is especially important in federal Indian law because courts often get it wrong.<sup>253</sup> Even when judges get it right, they do not always follow the text in Indian law cases.<sup>254</sup> Further, when more than one text exists, courts often do not know how to interpret them, especially if they may conflict.<sup>255</sup> Courts cannot give effect to foundational principles or congressional policy if they cannot identify the relevant law to apply, which is often federal legislation. The Restatement addresses these problems by reminding courts that federal Indian law is statutory law to be interpreted through the lens of the modern federal-tribal relationship crafted by Congress and tribal governments. It does this by clarifying the statutes that are the relevant texts for courts to interpret in many areas of Indian law.

Section 7 directs courts to follow Congress when it has spoken. The Restatement's sections reiterate this directive to courts by identifying the appropriate, applicable statute to follow.<sup>256</sup> These sections often track the language of the relevant statute, and the comments synthesize the existing decisional law on them.

Consider some of the sections in chapter 1 on the Federal-Tribal Relationship as examples. Section 1 defines an Indian by referring to statutory law.<sup>257</sup> It provides a general definition of 'Indian' for the purposes of federal law but then recognizes that the term may be defined

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nonetheless concluded that Congress and the Executive Branch have assumed that Indian tribes lack inherent powers to prosecute non-Indians."); Fletcher, *Muskrat Textualism*, *supra* note 26, at 987–96; Fletcher, *Textualism's Gaze*, *supra* note 26, at 123–24 ("Ultimately, the Court concluded that while none of the texts were dispositive, the texts collectively evidenced an assumption by all branches of the federal government, and Indian tribes, too, that tribes never possessed the power to prosecute non-Indians."). For other critiques of the *Oliphant* decision, see DAVID E. WILKINS, *AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT: THE MASKING OF JUSTICE* 198–213 (1997); ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* 87, 97–115, 139–43 (2005).

252. Anya Bernstein, *Before Interpretation*, 84 U. CHI. L. REV. 567, 568 (2017); Fletcher, *Textualism's Gaze*, *supra* note 26, at 119, 135.

253. Fletcher, *Textualism's Gaze*, *supra* note 26, at 119, 135.

254. *Id.* at 119 ("[O]ne difficulty with federal Indian law is that too frequently the Court declines to engage with a relevant text or downplays the significance of the text in favor of a common-law-style analysis.").

255. *Id.* ("Another difficulty is that the relevant texts may conflict, creating multiple interpretations that a Scalian textualist would label reasonable, leaving the judges to vote based on their political views.").

256. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS §§ 1, 3, 10, 38–45, 61–67 (AM. L. INST., Proposed Official Draft 2021).

257. *Id.* § 1 ("For purposes of federal law, an 'Indian' is a member or citizen of a federally recognized tribe (see § 2(a)), unless that term is defined differently in accordance with a specific federal statute for the purpose of applying that statute.").

differently in specific federal statutes. It explicitly advises courts to follow federal statutes. Section 3, which defines Indian Country, is even more explicit in its instruction to courts; it both tracks the statutory language in 18 U.S.C. § 1151 and cites the statute as its source.<sup>258</sup> Similarly, section 10 on breach of trust claims follows the statutory language in 28 U.S.C. § 1505 and 28 U.S.C. § 1491.<sup>259</sup>

The Restatement's emphasis on statutes as the source of federal Indian law and identification of the relevant statutes courts should apply in Indian law cases extends beyond the first chapter on federal-tribal relationships. Examples of other statutes identified as the relevant textual sources of federal Indian law include, *inter alia*, the Indian Civil Rights Act mentioned explicitly in section 16 on the Constitutional Rights of Persons Under Tribal Jurisdiction;<sup>260</sup> the Indian Child Welfare Act referred to extensively in chapter 3, subchapter 2;<sup>261</sup> the Indian Gaming Regulatory Act cited in chapter 4, subchapter 3;<sup>262</sup> Public Law 280 referred to in

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258. *Id.* § 3.

259. *Id.* § 10.

260. *Id.* § 16 (“The primary sources of law constraining tribal government authority with respect to the rights of individuals under tribal jurisdiction are tribal law and the Indian Civil Rights Act. Absent a federal statute authorizing enforcement of federal law against tribal authority, tribal law governs or constrains the exercise of tribal governmental authority. The federal constitutional constraints on governmental authority set forth in the Bill of Rights and the Fourteenth Amendment do not apply to or constrain tribal governments.”).

261. *Id.* §§ 38–45. More specifically, section 38 reiterates the statutory language in 25 U.S.C. § 1903, section 42 tracks the language in 25 U.S.C. § 1911(c), and section 43 relies on 25 U.S.C. § 1911(a), 25 U.S.C. § 1918-1919, and 25 C.F.R. § 23.110.

The references to these statutes demonstrate how the Restatement attempts to redirect courts so that they act more in line with the modern federal-tribal relationship. Many of these statutes are the product of the relationship renegotiated between Congress and tribal governments. The Indian Child Welfare Act is a prime example of how tribal governments renegotiated their relationship with Congress. Advocacy by tribal governments and the Association of American Indian Affairs led to the enactment of the Indian Child Welfare Act. *See, e.g.,* Claire Palmiste, *From the Indian Adoption Project to the Indian Child Welfare Act: The Resistance of Native American Communities*, 22 *INDIGENOUS POL’Y J.* 1 (2011), <http://indigenouspolicy.org/index.php/ipj/issue/view/10> [<https://perma.cc/986N-F45C>] (examining the social and political context leading to the enactment of the Indian Child Welfare Act); Christie Renick, *The Nation’s First Family Separation Policy*, *THE IMPRINT YOUTH AND FAM. NEWS* (Oct. 9, 2018, 05:05 AM), <https://imprintnews.org/child-welfare-2/nations-first-family-separation-policy-indian-child-welfare-act/32431> [<https://perma.cc/N9NC-JYK2>] (documenting the role of Bertram Hirsch and the Association of the American Indian in the movement to enact the Indian Child Welfare Act); PARKER, *supra* note 70, at 39–44 (recounting the development of the Indian Child Welfare Act).

262. *RESTATEMENT OF THE L.: THE L. OF AM. INDIANS* §§ 61, 63–66 (AM. L. INST., Proposed Official Draft 2021) (Section 61, titled “Indian Lands,” refers to 25 U.S.C. § 2703(4); section 63, titled “Class II Gaming,” refers to 25 U.S.C. §§ 2703(7), 2710; section 64, titled “Class III Gaming,” refers to 25 U.S.C. § 2710(d); section 65, titled “Management Contracts,” refers to 25 U.S.C. §§ 2710(d)(9), 2711; and section 66, titled “After-Acquired Lands,” refers to 25 U.S.C. § 2719(a)–(b)). Other sections refer to the Indian Gaming Regulatory Act as well. *See, e.g., id.* § 60, “Federal Approval of Contracts with Indian Tribes” (citing 25 U.S.C. §§ 81, 85, 177, 392, 396(a), 415, 2102).

section 34; and the Major Crimes Act, Indian Country Crimes Act, and the Assimilative Crimes Act relied on in chapter 5 on Indian Country Criminal Jurisdiction.<sup>263</sup>

The heavy reliance on statutes in multiple sections in the Restatement shows the primacy of statutory language as a source of federal Indian law and directs courts to follow that language. By identifying the relevant statutory provisions, the Restatement realigns federal Indian law with foundational Indian law principles and congressional policy and addresses one of the major criticisms of federal Indian law decisions, namely that courts selectively choose the texts they interpret and that these choices lead to the results the judges want. Thus, to borrow from Professor Fletcher, what the Restatement seeks to do is draw the interpreter's gaze to the relevant text.<sup>264</sup>

## 2. *Courts Must Interpret Federal Indian Statutes Through the Lens of the Modern Federal-Tribal Relationship*

The Restatement does more than identify the relevant statutory laws for courts to interpret. It also guides courts on how to interpret those statutes. Sections 8 and 9 instruct courts to adhere to foundational principles of federal Indian law by viewing legislation through the lens of the modern federal-tribal relationship negotiated by tribal governments and Congress. Thus, it directs courts to interpret statutes consistently with the modern federal-tribal relationship and Congress's views on it.<sup>265</sup>

Section 8 clarifies the canon of construction to be applied to Indian affairs statutes.<sup>266</sup> It states, “[f]ederal legislation addressing Indian affairs must be construed liberally in favor of the Indians, with ambiguous provisions interpreted to the benefit of Indians and Indian tribes.”<sup>267</sup> The directive to construe statutory language liberally ensures that courts recognize the trust relationship at the heart of the modern federal-tribal relationship. Comment a makes this point explicitly when it states,

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263. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS §§ 68–70 (AM. L. INST., Proposed Official Draft 2021) (“Indian Country,” “Indian Status,” and “Scope of Federal Criminal Jurisdiction in Indian Country,” respectively).

264. Fletcher, *Textualism’s Gaze*, *supra* note 26, at 145 (“But what texts matters most is dependent on what draws the interpreter’s gaze.”).

265. I am not arguing that the Restatement suggests that courts follow a particular theory of statutory interpretation in federal Indian law cases. Professor Fletcher cogently argues that courts can craft a textualist theory of statutory interpretation that will reflect foundational principles of federal Indian law and congressional policy. See Fletcher, *Muskrat Textualism*, *supra* note 26, at 999–1011.

266. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 8 (AM. L. INST., Proposed Official Draft 2021).

267. *Id.* For a discussion of how courts have applied this canon, see Skibine, *supra* note 121, at 3–4, 15–21.

“[s]ince Congress legislates in Indian affairs from the position of its trust relationship with Indian tribes and individual Indians, courts assume that Congress intends its enactments to benefit tribal and individual Indian interests.”<sup>268</sup> Comment a recognizes that federal legislation related to Indians differs from other kinds of federal legislation and, thus, merits distinct treatment by courts. As section I.A shows, Congress enacts Indian-related legislation to fulfill its trust obligations to tribes, including its duty to protect tribal governance and homelands, and seeks tribal participation in crafting these laws.<sup>269</sup> Most other legislation does not either govern a relationship or emerge out of negotiations between two sovereigns.<sup>270</sup> The interpretation of Indian-related statutes should reflect these differences, which is why the Restatement directs courts to apply the canon rather than ordinary rules of statutory interpretation.<sup>271</sup>

Section 8 further reflects the modern federal-tribal relationship in guiding courts to construe language liberally and to the benefit of Indians and Indian tribes. Through this language, section 8 opens the door for courts to take tribal perspectives into account when interpreting federal statutes applicable to them.<sup>272</sup> Such advice might seem questionable in other contexts,<sup>273</sup> but it is consistent with a modern federal-tribal relationship premised on maximum tribal participation in federal

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268. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 8 cmt. a (AM. L. INST., Proposed Official Draft 2021).

269. See *supra* section I.A.

270. The exception would be statutes dealing with intergovernmental affairs. Like other intergovernmental lobbies, tribal governments and pan-tribal organizations often seek “jurisdictionally based benefits from the federal government.” John P. Pelissero & Robert E. England, *State and Local Government’s Washington “Reps”—Lobbying Strategies and President Reagan’s New Federalism*, 19 STATE & LOC. GOV’T REV. 68, 69 (1987).

271. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 8 cmt. a (AM. L. INST., Proposed Official Draft 2021) (“Ordinary rules of statutory interpretation do not apply, and courts interpret ambiguous provisions in federal statutes to the benefit of the Indians.”).

272. For a similar argument, see Fletcher, *Textualism’s Gaze*, *supra* note 26, at 139 (arguing that courts like Congress should take tribal perspectives into account).

273. Political commentators and the media often represent organized interests as having undue political influence. This commentary reflects concerns about bias within interest group mobilization and how it may skew the lawmaking process. See generally MATT GROSSMANN, THE NOT-SO-SPECIAL INTERESTS: INTEREST GROUPS, PUBLIC REPRESENTATION, AND AMERICAN GOVERNANCE (2012); FRANK R. BAUMGARTNER, JEFFREY M. BERRY, MARIE HOJNACKI, DAVID C. KIMBALL, & BETH L. LEECH, LOBBYING AND POLICY CHANGE: WHO WINS, WHO LOSES, AND WHY (2009). These concerns raise questions about what role the perspectives of organized interests should play in the lawmaking process and how much deference courts should give to their views. ESKRIDGE, ET AL., *supra* note 219, at 751 (noting skepticism that committee reports could be tainted by lobbyists and lawyers maneuvering to persuade congressional staffers to include language helpful to their clients in the report). These concerns, however, may be misplaced when it comes to Native peoples, who have a distinct governmental relationship with the United States and have often been excluded from lawmaking processes.

lawmaking. It also reflects current congressional practice and policy, which encourages lawmaking with rather than for tribes.<sup>274</sup>

Section 9 builds on section 8 and gives further instructions to courts about interpreting statutes in federal Indian law.<sup>275</sup> It is not stated as a canon of statutory construction, but it provides courts with guidance about how to interpret statutes enacted in accord with the trust responsibility. Section 9 instructs courts to give deference to statutes enacted under the trust responsibility because they are based on the federal government's longstanding political relationship with tribal governments and their citizens rather than a racial classification of Indians.<sup>276</sup>

This instruction in section 9 further reflects the modern federal-tribal relationship, which is built on a congressional commitment to acknowledge tribal sovereignty and uphold the trust relationship. Tribal sovereignty, including the recognition of tribes as separate sovereign governments by the federal government, distinguishes Indians from other

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274. See *supra* section I.A. The canons of statutory construction in section 8 are also consistent with the view that state and local governments should and do have more access to federal lawmakers and a distinct role in federal lawmaking when compared to other organized interests. See Pelissero & England, *supra* note 270, at 69; ANNE MARIE CAMMISA, GOVERNMENTS AS INTEREST GROUPS: INTERGOVERNMENTAL LOBBYING AND THE FEDERAL SYSTEM 126 (1995).

275. RESTATEMENT OF THE L.: THE L. OF AM. INDIANS § 9(a) (AM. L. INST., Proposed Official Draft 2021) (“If tied rationally to the fulfillment of the United States’ trust relationship with Indians and Indian tribes, see § 4, federal laws that treat Indians or Indian tribes differently from other individuals or groups create political, not racial, classifications and are not subject to strict scrutiny under the equal-protection component of the Fifth Amendment.”).

Interestingly, sections 8 and 9 define the legislation they apply to differently. Section 8 mentions “[f]ederal legislation addressing Indian affairs,” *id.* § 8, while section 9 applies to statutes “tied rationally to the fulfillment of the United States’ trust relationship with Indians and Indian tribes,” *id.* § 9. Neither the comments nor the reporters’ notes appear to explain the difference in terms or whether this difference in language is meant to distinguish the applicability of the two sections. Reading both sections through the lens of the modern federal-tribal relationship suggests that both should be read broadly by courts to apply whenever interpreting a federal statute in relation to American Indians and Alaska Natives.

276. An extensive literature exists on categorizing American Indians politically, racially, or both. See Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CAL. L. REV. 495 (2020); Gregory Ablavsky, “*With the Indian Tribes: Race, Citizenship, and Original Constitutional Meanings*,” 70 STAN. L. REV. 1025 (2018); Sarah Krakoff, *They Were Here First: American Indian Tribes, Race, and the Constitutional Minimum*, 69 STAN. L. REV. 491 (2017); Matthew L.M. Fletcher, *Race and American Indian Tribal Nationhood*, 11 WYO. L. REV. 295 (2011); Matthew L.M. Fletcher, *Tribal Membership and Indian Nationhood*, 37 AM. INDIAN L. REV. 1 (2012); Addie Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958 (2011); Bethany Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591 (2009); Carol Goldberg, *American Indians and “Preferential Treatment”*, 49 UCLA L. REV. 943 (2001); David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759 (1991); P.S. Deloria & Robert Laurence, *What’s an Indian? A Conversation about Law School Admissions, Indian Tribal Sovereignty and Affirmative Action*, 44 ARK. L. REV. 1107 (1991); Carol Goldberg-Ambrose, *Not Strictly Racial: A Response to Indians as Peoples*, 39 UCLA L. REV. 169 (1991).

groups in the United States.<sup>277</sup> Congress has repeatedly acknowledged this in federal statutes and in its practice of inviting tribal governmental participation in lawmaking.<sup>278</sup> Section 9 directs courts to follow the modern federal-tribal relationship in the way that it frames the appropriate question for courts to consider in interpreting these statutes. The question for courts to ask in reviewing legislation is: Is the legislation enacted in furtherance of the trust relationship between the United States and tribal governments? This framing of the inquiry reflects the modern federal-tribal relationship. Courts should defer to Congress as the lead institution in Indian affairs and base their decisions on how Congress has negotiated its government-to-government relationship with Native Nations.

## CONCLUSION

Over the past fifty years, federal Indian law has developed along two divergent paths. In response to tribal advocacy, Congress renewed its government-to-government relationship with tribal governments, acknowledging inherent tribal sovereignty and the United States' trust obligations to Native peoples. As a result, Congress has engaged tribal governments in the lawmaking process. Together they have crafted a network of statutes based on foundational principles of Indian law and reflective of tribal governments' growing capacities to serve their communities. In contrast, courts have departed from foundational principles of Indian law and congressional policy, often to the detriment of the modern federal-tribal relationship committed to by both tribal governments and Congress.

The Restatement of the Law of American Indians provides an opportunity to reconcile these two conflicting visions of Indian law. It relies on how tribal governments and Congress have reworked the federal-tribal relationship, congressional policy, and statutory law to restate federal Indian law. In short, it brings two major players in the creation of federal Indian law—Congress and tribal governments—back into the picture and reiterates for courts the central role that they play in making federal Indian law. The Restatement directs courts to follow foundational principles and congressional policy. As a result, it provides courts with a vision of federal Indian law that is more coherent, easier to apply, and more reflective of the state of affairs in Indian Country than the decisional law adopted by the Supreme Court in the past fifty years.

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277. See VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS: AN INDIAN MANIFESTO* (1969).

278. See *supra* section I.A.