

RESTATEMENT AS AADIZOOKAAN

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INTRODUCTION

One of the most beloved origin stories of the Anishinaabeg is the story of the earth diver.¹ Early in the history of the world, the entirety of Anishinaabewaki was flooded. Only Nanaboozhoo and a small number of creatures survived, barely, standing on the tip of the tallest tree on the top of the tallest hill. Nanaboozhoo asked the remaining creatures to dive to the bottom and bring him back some earth. He would use his supernatural powers on the earth to recreate land. He just needed some earth. One by one, the greatest swimmers dove down. Amik, the beaver. Maang, the loon. Mikinaak, the snapping turtle. One by one they dove down, searching for earth. But each failed. They drowned and floated back to the surface, lifeless. Finally, the smallest and weakest swimmer, Wazhashk, the muskrat, tried. No one expected the muskrat to succeed. After a long time, the lifeless muskrat floated to the surface exactly as expected. But when Nanaboozhoo inspected the creature, he saw a tiny bit of earth in the muskrat's paw. Nanaboozhoo placed the tiny bit of earth (and the carcasses of the failed earth divers) on the shell of the snapping turtle. Nanaboozhoo used his powers to create an island, the island upon which we still reside, Michilimackinac, or Turtle Island.

The earth diver story is what Anishinaabe people call an aadizookaan, or sacred story.² An aadizookaan can be a story of history or a story of legend. It explains where the Anishinaabeg come from, who they are, what

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1. MICHAEL ANGEL, PRESERVING THE SACRED: HISTORICAL PERSPECTIVES ON THE OJIBWA MIDEWIWIN 18 (2016); 2 Gabe-Bines "Forever Flying Bird": Teachings from Paul Peter Buffalo 6–15 (Timothy G. Roufs ed., 2019).

2. ANGEL, *supra* note 1, at 3–4; Kekek Jason Stark, *Anishinaabe Inaakonigewin: Principles for the Intergenerational Preservation of Mino-Bimaadiziwin*, 82 MONT. L. REV. 293, 297–98 (2021).

their purposes are, what their behaviors should be, and so on. These stories are also lawgivers. Aadizookaanag contain the origins of Anishinaabe government and public ordering, private dispute resolution, and broadest philosophies. Aadizookaanag are timeless. The details of the stories might shift subtly, or even dramatically, with each teller, but the underlying lessons never do. These stories survived centuries of an Anishinaabe apocalypse. They are an oral tradition, told in their entirety only in the winter, and often told in secret. It is fair to say that the Anishinaabeg would have faded away into nothingness without the aadizookaanag. The aadizookaanag changed as conditions changed; the stories addressing the needs of the Anishinaabeg during wars with the Haudenosaunee nations in the seventeenth century and the stories about modern American settler colonialism differ dramatically. Every day, there are more stories, more lessons, and more histories captured in new aadizookaanag, but deepest underlying philosophies remain extant and substantial.

As the lead reporter of the American Law Institute's Restatement of the Law of American Indians, I now conceptualize the Indian law Restatement project as an aadizookaan. Perhaps it is a kind of blasphemy to label a written record of the law used throughout American history to dispossess Indigenous peoples of their lands, cultures, languages, and children as a sacred story. I am in complete agreement that the law contained in the Restatement originated in philosophies that are antithetical to everything that the Anishinaabeg (and likely most Indigenous peoples) understand about the universe. But it is the law of the relationship between Indigenous peoples in the United States and their state and federal governments; Indigenous peoples are, after all this time, now citizens of the United States. And anyone taking even a shallow dive into Anishinaabe aadizookaanag will observe incredible, disturbing blasphemy; we need to know what *not* to do, after all.

The goal of this Essay for the *Wisconsin Law Review's* Symposium on the Restatement of the Law of American Indians is to develop a framework on the durability of this Restatement. The aadizookaanag are unusually durable in terms of their transmission of underlying, foundational lessons, but the stories change all the time. The earth diver story explores and describes the critically important connection between the Anishinaabeg and the creatures of Anishinaabewaki, but only at a very broad level of generality. How the Anishinaabe tribal government in the twenty-first century translates those principles into modern decision-making requires new analysis, new stories. Additionally, old aadizookaanag may fade into irrelevance, even disrepute, as times and conditions change.

Law is the same. Restatements are intended to be durable and persuasive, supported by the great weight of authority, but not permanent. There are provisions in the Indian law Restatement I believe are truly timeless, while the law restated in some sections is likely to change a great

deal over the next few decades. I choose four sections in the Restatement and match each with one of the four directions sacred to the Anishinaabeg. The youngest direction, Waabanong, the east, is the most likely to change.³ The next youngest, Zhaawanong, the south, is older, but still subject to change.⁴ Niingaabii'anong, the west, is still older, wiser, less likely to change, but also very dark in its philosophies.⁵ Kiiwedionong, the north, is the oldest, wisest, and most durable, yet distant.⁶ A Restatement section includes blackletter law, law that is well-settled and indisputable.⁷ The reporters' notes that accompany the blackletter law constitute the legal support for that statement of law. The stronger the legal support, the more durable the black letter.

In the east, I choose one of the plainest, easiest-to-estate principles of federal Indian law, the bar on tribal criminal jurisdiction over non-Indians. In the south, I choose the law interpreting the federal waivers of immunity allowing tribes to sue the United States for money damages. In the west, I choose the darkest, yet perhaps the most foundational, principles, the plenary authority of Congress in Indian affairs. For the north, I choose tribal powers, the oldest and most durable of all of the principles in the Restatement.

I. WAABANONG

The Supreme Court's decision in *Oliphant v. Suquamish Indian Tribe*,⁸ which held that Indian tribes do not possess the power to prosecute non-Indian lawbreakers absent congressional consent,⁹ is a classic bright-line rule that was very easy to restate. Section 73 of the Restatement provides, "Indian tribes possess the power to enforce their criminal laws against tribal members within and without Indian country. Indian tribes also possess the power to enforce their criminal laws against other persons within Indian country, so long as that power is recognized and affirmed by federal statute."¹⁰

Note that we wrote the black letter in terms of the affirmative powers tribes *do* possess rather than the powers they do not possess. The power to prosecute is an inherent power of Indian tribes.¹¹ The general rule, which

3. See PHIL LANE, JR., JUDIE BOPP, MICHAL BOPP, LEE BROWN & ELDERS, *THE SACRED TREE: REFLECTIONS ON NATIVE AMERICAN SPIRITUALITY* 42–47 (1984).

4. See *id.* at 48–52.

5. See *id.* at 53–61.

6. See *id.* at 62–71.

7. *Restatement*, BLACK'S LAW DICTIONARY (11th ed. 2019).

8. 435 U.S. 191 (1978).

9. *Id.* at 208.

10. RESTATEMENT OF THE L. OF AM. INDIANS § 73 (AM. L. INST., Proposed Final Draft 2021) [hereinafter *RESTATEMENT L. AM. INDIANS*].

11. *United States v. Wheeler*, 435 U.S. 313, 322–30 (1978).

the Court applied in a separate case a few days after its *Oliphant* decision, is that Indian tribes retain their inherent powers unless divested by an act of Congress or by consent of the tribe.¹² The *Oliphant* Court chose not to apply the general rule, reasoning that Indian tribes never possessed this inherent power.¹³

The *Oliphant* decision is a rare bright-line rule in Indian law, but from the time it was issued it has been subject to more criticism than probably any other Indian law decision.¹⁴ The Court accepted review despite having no useful precedents on point.¹⁵ As a case of first impression, the Court relied on Interior solicitor's opinions that had been withdrawn,¹⁶ legislative history from a bill that Congress never enacted,¹⁷ and dicta,¹⁸ to list a few examples. I have written numerous critiques of the decision myself, most recently in *Muskrat Textualism*, where I reviewed Justice Powell's papers and found the Court's clerks privately admitted there was no evidence that Congress ever stripped tribes of the power to prosecute non-Indians.¹⁹ Because of that lack of evidence needed to show the divestiture of an inherent tribal power, Justice Rehnquist's chambers made the decision to avoid that rule altogether in a classic outcome-oriented decision.²⁰ It appears the majority could not accept the possibility that Indian judges and juries would be prosecuting non-Indians for their crimes.

For the Anishinaabeg, the eastern direction, waabanong, represents infancy. The new light of the day arises in the east. Early childhood is a time of acquiring knowledge and beginning the journey toward wisdom and dignity. Creatures representative of the east include waawaabiganoojinh, the mouse, and migizi, the eagle. These creatures

12. *Id.* at 322–23; *see also* RESTATEMENT L. AM. INDIANS, *supra* note 10, § 15 cmt. a (“Although the United States has plenary authority over tribes, see §§ 7–9, courts will not lightly assume that Congress in fact intends to restrict Indian self-government. The legislative intent to abrogate tribal authority must be clear.”).

13. *See Oliphant*, 435 U.S. at 212.

14. *E.g.*, Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal: Oliphant v. Suquamish Indian Tribe and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979); Ezekiel J.N. Fletcher, *Trapped in the Spring of 1978: The Continuing Impact of the Supreme Court's Decisions in Oliphant, Wheeler, and Martinez*, FED. LAW., Mar./Apr. 2008, at 36; Jeff Larson, Note, *Oliphant v. Suquamish Indian Tribe: A Jurisdictional Quagmire*, 24 S.D. L. REV. 217 (1979); Kelly Gaines Stoner & Lauren van Schilfgaarde, *Addressing the Oliphant in the Room: Domestic Violence and the Safety of American Indian and Alaska Native Children in Indian Country*, 22 WIDENER L. REV. 239 (2016); Alex Tallchief, *Oliphant – The Aftermath*, 5 AM. INDIAN J. 17 (1979).

15. *See Oliphant*, 435 U.S. at 199–201.

16. *Id.* at 199–201, 201 n.11.

17. *Id.* at 201–02.

18. *Id.* at 204.

19. Matthew L.M. Fletcher, *Muskrat Textualism*, 116 NW. U. L. REV. 963, 986–99, 990 n.168 (2022).

20. *See Oliphant*, 435 U.S. 191.

represent humility and dignity, respectively. Of the blackletter rules, *Oliphant* is of the most recent vintage. It is unmoored from the default interpretative rules of federal Indian law. It relies on ancient statements of federal officials soaked in racial animus. But *Oliphant* did force Indian tribes to modernize their justice systems (or, from the perspective of some, to conform to American principles of criminal justice) if they wanted their courts to be respected. In recent years, Congress has taken initial steps to undo *Oliphant*, authorizing tribes that meet certain criteria to prosecute non-Indians for dating and relationship violence.²¹ Tribes are adapting. Recently, the Supreme Court affirmed the inherent power of Indian tribes to hold and detain non-Indian lawbreakers²² and recognized tribal court criminal convictions for purposes of a federal domestic violence repeat offender law.²³ *Oliphant* is blackletter law, but the rule is subject to repeated modification.

II. ZHAAWANONG

By virtue of a federal waiver of sovereign immunity, individual Indians and Indian tribes can sue the federal government for money damages, usually arising from breaches of trust by the government. The Tucker Acts allow Indians and tribes to sue the United States for money damages.²⁴ Section 10 of the Restatement provides,

Indian tribes may bring suit against the United States for claims arising under the Constitution, laws, or treaties of the United States, or Executive orders of the President, or for claims that “otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band, or group.”²⁵

This section is a distillation of the two relevant acts of Congress, one of which is quoted in part.²⁶ Much of Indian law is statutory, but where a statute is ambiguous, or where there is room for judicial interpretation, we restated the law in light of those interpretations. Here, the Supreme Court has applied an interpretive overlay on the two acts of Congress, requiring tribes to prove additional factors in order to allow suits for money damages to proceed.²⁷ We included that test in the section as comment b:

21. 25 U.S.C. § 1304.

22. *United States v. Cooley*, 141 S. Ct. 1638, 1646 (2021).

23. *United States v. Bryant*, 136 S. Ct. 1954, 1966 (2016).

24. 28 U.S.C. §§ 1491, 1505.

25. RESTATEMENT L. AM. INDIANS, *supra* note 10, § 10 (quoting 28 U.S.C. § 1505).

26. 28 U.S.C. § 1505.

27. *United States v. Navajo Nation*, 556 U.S. 287, 290–91 (2009); *United States v. Mitchell*, 445 U.S. 535, 540–46 (1980).

The plaintiff must identify a specific right- or duty-creating statute, regulation, or other fundamental document, and allege a breach by the government of the duties under that legal authority. When a tribal or individual plaintiff brings suit for money damages, the court must then inquire whether the source of substantive law can fairly be interpreted as mandating compensation by the federal government for the damages sustained.²⁸

Section 10 was the most difficult area of law to restate in the entire project. We originally attempted to use the Supreme Court's gloss on the federal statutes as the black letter.²⁹ The Court was not content to allow Indians and tribes to bring claims for money damages merely because Congress waived immunity; Indians and tribes must show as a threshold matter that the alleged damages arose from a federal statute that "can fairly be interpreted as mandating compensation by the federal government for the damages sustained."³⁰ The "fairly . . . interpreted" language appeared in a non-tribal claim under the Tucker Act from the 1970s, *United States v. Testan*.³¹ The Court's articulation of the test, which we attempted to faithfully reproduce as black letter, allows for a great deal of interpretation. For example, the phrase "can fairly be interpreted as mandating compensation"³² is a critically important principle that can mean virtually anything. "Fairly" is not a particularly meaningful modifier; one observer's fairness might not be another's.

Importing this ambiguous language from Tucker Act claims brought by non-Indians and non-tribal sovereigns against the federal government into *tribal* claims is a problem. Under default rules of interpretation in federal Indian law, courts must construe ambiguous Indian-affairs statutes enacted to benefit Indians or tribes to the benefit of the tribal sovereign.³³ Ambiguous Supreme Court precedents? Seemingly not so, as the Court

28. RESTATEMENT L. AM. INDIANS, *supra* note 10, § 10 cmt. b.

29. RESTATEMENT (THIRD) OF THE L. OF AM. INDIANS § 10 (AM. L. INST., Council Draft No. 2, 2014) ("Suits by Indians and Tribes against the United States for money damages are cognizable if the plaintiff meets a two-part test: First, the Indians or tribe must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties. That threshold showing must be based on specific rights-creating or duty-imposing statutory or regulatory prescriptions that establish specific fiduciary or other duties. Second, if that threshold is passed, the plaintiff must further show that the relevant source of substantive law that is the basis for the claim can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties the governing law imposes.").

30. *Id.*

31. *United States v. Testan*, 424 U.S. 392, 400 (1976) (quoting *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)).

32. *Eastport*, 372 F.2d at 1009.

33. RESTATEMENT L. AM. INDIANS, *supra* note 10, § 8.

usually has ruled against Indian and tribal claims since the Court started applying the “fairly . . . interpreted” standard.³⁴ Scholarly criticism of this line of cases is robust.³⁵

Section 10’s black letter could not have included the “fairly . . . interpreted” language because the phrase is so ambiguous as to be devoid of useful meaning. Could the Indian Mineral Leasing Act’s requirement that all Indian mineral leases be approved by the secretary of the interior “fairly” be interpreted to mean the government is liable for money damages when a bad lease is approved? Yes, said a lower court.³⁶ No, said the Supreme Court.³⁷ Could the General Allotment Act’s reference to a federal trust duty “fairly” be interpreted to mean the government is liable for money damages for waste and spoliation of reservation resources? Yes, said a lower court.³⁸ No, said the Supreme Court.³⁹ We tried to resolve the problem of ambiguity in the Court’s precedents by distilling and quoting the statutory language. Perhaps the act of doing so impliedly questions the Supreme Court’s imposition of an additional gloss on the statutory language. Perhaps not.

The durability of section 10’s black letter, rooted in the Tucker Act, is likely to be strong. The Supreme Court has long shown a commitment to the immunity of the federal, state, and tribal governments rooted in the structure of the Constitution, if not the text.⁴⁰ But the Court’s gloss on the Tucker Act is only a few decades old and susceptible to change. Zhaawanong, the south, is the direction that represents young adulthood, a time when the Anishinaabeg test their individual strength and will. It is

34. Compare *United States v. Navajo Nation*, 556 U.S. 287 (2009) (reversing breach of trust award), and *United States v. Navajo Nation*, 537 U.S. 488 (2003) (same), and *United States v. Mitchell*, 445 U.S. 535 (1980) (same), with *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) (affirming breach of trust award), and *United States v. Mitchell*, 463 U.S. 206 (1983) (same). Note that in each of these, the Court granted certiorari to review a lower court award favoring a tribe or tribal member but never reviewed a case in which a tribe or tribal member lost below, suggesting that there is an agenda to strictly review Indian and tribal claims.

35. See, e.g., Raymond Cross, *The Federal Trust Duty in an Age of Self-Determination: An Epitaph for a Dying Doctrine?*, 39 TULSA L. REV. 369 (2003); Rebecca Tsosie, *The Conflict Between the “Public Trust” and the “Indian Trust” Doctrines: Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271 (2003); see also Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, “*We Need Protection from Our Protectors*”: *The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENV’T & ADMIN. L. 397 (2017) (criticizing the federal government’s positions on the federal trust duty to Indians and tribes).

36. *Navajo Nation v. United States*, 263 F.3d 1325 (Fed. Cir. 2001), *rev’d*, 537 U.S. 488 (2003).

37. *United States v. Navajo Nation*, 537 U.S. 488 (2003).

38. *Mitchell v. United States*, 591 F.2d 1300 (Ct. Cl. 1979), *rev’d*, 445 U.S. 535 (1980).

39. *United States v. Mitchell*, 445 U.S. 535 (1980).

40. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 58 (1978).

also a time when the Anishinaabeg learn to control their emotions. The creatures linked to Zhaawanong are the mishibizhii, or lynx, and miskwaabiimizh, the red willow tree. They represent focused concentration and resilience. They are great teachers. If the goal of any Restatement of law is to clarify the law, to whittle away ambiguities, then perhaps section 10 has the best chance to do so over the long term by elevating the statute over the judicial gloss.

III. NIINGAABII'ANONG

Federal powers in Indian affairs have long been considered plenary and exclusive. Federal plenary power is one of the foundational principles of federal Indian law. Section 7 of the Restatement provides,

Congress possesses broad authority to legislate in respect to Indian tribes and individual Indians. Sources 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).⁴¹

The black letter details the textual and structural sources of congressional power contained in the Constitution, which is substantial. 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.⁴² The Supreme Court has recognized federal plenary power since the very first Indian law cases, the Marshall Trilogy.⁴³

Despite the venerability of the federal plenary power, it is a hotly contested principle. Scholars point out that congressional acts that do great harm to Indians and tribes are virtually unreviewable.⁴⁴ Others complain

41. RESTATEMENT L. AM. INDIANS, *supra* note 10, § 7.

42. Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137.

43. *Johnson v. Mc'Intosh*, 21 U.S. (8 Wheat.) 543, 568–69 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560–61 (1832).

44. See, e.g., Frank Pommersheim, *At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty*, 55 S.D. L. REV. 48 (2010); Michalyn Steele, *Plenary*

that the scope of federal power—over tribes themselves, for example—is too broad.⁴⁵ Still others contest the basis for federal power in Indian affairs.⁴⁶ Justice Thomas is a noted critic of Congress’s powers.⁴⁷ Other scholars defend federal plenary power, counseling the courts to require Congress to comply with its duty of protection to Indians⁴⁸ (described as the “general trust relationship” in the Restatement).⁴⁹

Federal plenary power is the source of all federal statutes designed to remedy the harms perpetrated on Indians and Indian tribes, most of them enacted in the last half century or so.⁵⁰ But it is also the source of great maladies inflicted on Indians and tribes, most of them enacted before the 1970s.⁵¹ The Supreme Court roundly rejected Indian and tribal challenges to plenary power during the period before the 1970s.⁵² But now that Congress has turned toward tribal self-determination, there are non-Indian challenges to plenary power; the Court seems to be taking these challenges far more seriously.⁵³

Niingaabii’anong, the west, is for the Anishinaabeg the time of middle adulthood. This is a time of great reflection and maturity. The west is the direction of the sunset, representing endings and darkness. It is a time of personal sacrifice and commitment. Federal plenary power as embodied in section 7 must be analyzed with care and consideration. Viewed superficially, federal Indian affairs power is either good or bad. One could accuse Congress of racism, either for harming or privileging Indians and tribes on the basis of race. Or one could accuse Congress of tyranny, assuming too much power at the expense of individual or states’ rights. This is the darkness. But all of this misses the point. Plenary power does not mean absolute power; it means the power needed to fulfill a particular purpose.⁵⁴ That purpose is the fulfillment of the federal trust

Power, Political Questions, and Sovereignty in Indian Affairs, 63 UCLA L. REV. 666 (2016).

45. See, e.g., Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002).

46. See, e.g., Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069 (2004).

47. See generally Taylor Ledford, Comment, *Foundations of Sand: Justice Thomas’s Critique of the Indian Plenary Power Doctrine*, 43 AM. INDIAN L. REV. 167 (2019).

48. See, e.g., Michael Doran, *The Equal-Protection Challenge to Federal Indian Law*, 6 U. PA. J.L. & PUB. AFFS. 1 (2020).

49. RESTATEMENT L. AM. INDIANS, *supra* note 10, § 4.

50. See Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495, 507–08 (2020).

51. See *id.* at 507.

52. See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *United States v. Kagama*, 118 U.S. 375 (1886).

53. See, e.g., *United States v. Lara*, 541 U.S. 193, 199–207 (2004).

54. Thanks again to Sam Deloria for providing me this insight years ago.

responsibility, also known as the duty of protection, to Indians and tribes.⁵⁵ That purpose originates in the treaty relationship between Indian tribes and the United States and now extends to every federally acknowledged tribe.⁵⁶ This is the commitment.

Section 7's restatement of federal plenary power, understood properly in terms of the duty of protection, is a durable provision. It is a manifestation of an ongoing relationship between Indian tribes and the United States. As such, it cannot be assessed without reference to the other part of that relationship: Indian tribes.

IV. KIIWEDINONG

Indian tribes possess inherent powers that all governments possess, absent divestiture through agreement or abrogation by Congress. Indian tribes are timeless entities that predate the establishment of the United States. Section 13(a) of the Restatement provides,

Indian tribes are domestic nations, not arms of the federal government. Tribal sovereignty predates the formation of the United States. Tribal authority is inherent, not granted by the federal government to Indian tribes. Inherent tribal authority is based on territorial sovereignty or tribal membership or citizenship. Nonmembers may also consent to tribal jurisdiction.⁵⁷

Federally acknowledged Indian tribes maintain a trust relationship with the United States. Originally, the Supreme Court referred to that relationship as a duty of protection.⁵⁸ Comment a to section 13 states,

International law provides the original analytical basis for federal law's conception of tribal governmental authority. Indian tribes began as nations with a full complement of sovereign authority. Through a variety of treaties, federal statutes, and executive orders, the United States assumed a duty of protection over Indian tribes. In the modern era, the duty of protection is characterized as the general federal trust relationship between the United States and Indian tribes.⁵⁹

55. *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974); RESTATEMENT L. AM. INDIANS, *supra* note 10, § 4 cmt. a.

56. RESTATEMENT L. AM. INDIANS, *supra* note 10, § 4 cmt. a.

57. *Id.* § 13(a).

58. *E.g., Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551–56, 560–61 (1832).

59. RESTATEMENT L. AM. INDIANS, *supra* note 10, § 13 cmt. a.

The text and structure of the Constitution reflect that Indian tribes are sovereign entities by including them in the Commerce Clause alongside foreign nations and states.⁶⁰

The Restatement details several aspects of inherent tribal powers. Drawing from Felix Cohen's 1934 memorandum on the Powers of Indian Tribes,⁶¹ we listed several powers that have been subject to interpretation.⁶² This list is not exhaustive but reflects that these powers have been contested at some point and found by federal and state courts to be extant, even if modified in some instances. We chose not to delve much into the laws of Indian tribes, or tribal law, because the diversity of laws for the now-574 federally recognized tribes was far too broad for our federal Indian law Restatement to assess. Also keep in mind that state and federal courts analyze inherent power as though governmental power is hegemony, which means that the Restatement also speaks about tribal powers. This is a bit of a misnomer for tribal government.⁶³ Anishinaabe tribal leaders and judges I know best do not describe what tribal governments do as hegemony, but rather as a moral and cultural obligation to much more than their own citizens—to Anishinaabewaki, the world of the Anishinaabeg.⁶⁴

60. U.S. CONST. art. I, § 8, cl. 3.

61. Powers of Indian Tribes, 55 Interior Dec. 14 (1934).

62. *E.g.*, RESTATEMENT L. AM. INDIANS, *supra* note 10, §§ 17–25, 27.

63. *Cf.* G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples art. 7, § 2 (Sept. 13, 2007) (“Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples . . .”); *see generally* Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 196, 221–33 (2014) (describing tribal human rights protections).

64. For example, the preamble of the Constitution of the Waganakising Odawa (Little Traverse Bay Bands of Odawa Indians) reads,

IN THE WAYS OF OUR ANCESTORS, to perpetuate our way of life for future generations, we the Little Traverse Bay Bands of Odawa Indians, called in our own language the WAGANAKISING ODAWAK, a sovereign, self-governing people who follow the Anishinaabe Traditions, Heritage, and Cultural Values, set forth within this Constitution the foundation of our governance. This Constitution is solemnly pledged to respect the individuality of all our members and their spiritual beliefs and practices, while recognizing the importance of preserving a strong, unified Tribal identity in accordance with our Anishinaabe Heritage. We will work together in a constructive, cooperative spirit to preserve and protect our lands, resources and Treaty Rights, and the right to an education and a decent standard of living for all our people. In keeping faith with our Ancestors, we shall preserve our Heritage while adapting to the present world around us.

WAGANAKISING ODAWA CONST. pmb.; *see also* POKAGON BAND OF POTAWATOMI INDIANS CONST. pmb. (“We do, therefore, ordain this Constitution for the Pokagon Band of Potawatomi Indians in order to organize for our common good, to govern ourselves under our own laws, to maintain and foster our tribal culture, to protect our homeland, to conserve and develop our natural resources, and to establish the framework for governing the

The Restatement also links federal power over Indian affairs to the inherent sovereign powers of Indian tribes.⁶⁵ Federal Indian affairs powers are muted or even nonexistent absent tribal sovereignty. If there is no acknowledged tribal sovereign, then there is probably no federal power. Federal power certainly arises from the Constitution, but it also arises from a sort of delegation of power by tribes to the United States through the process of coming under the protection of the federal government.⁶⁶ In short, tribal power is a prerequisite to federal power.

It is easy to forget that Indian tribes truly are timeless. Their powers are not dependent on the federal government. The Supreme Court could issue an opinion next year that purports to abrogate an aspect of tribal powers, but all that opinion does is abrogate the federal government's recognition of those tribal powers. Those tribal powers continue to exist, sometimes in the face of direct Supreme Court precedent. Consider, for example, that Indian tribes exercise significant regulatory powers over hundreds of thousands of nonmembers around the country⁶⁷—directly in the face of statements by the Supreme Court that tribal power over nonmembers is the exception, not the rule.⁶⁸ On the ground, nonmembers consent *all the time*. Tribal courts assert jurisdiction over nonconsenting nonmembers, too.⁶⁹ Very rarely is that jurisdiction challenged at all, let alone successfully.⁷⁰ Indian tribes, on occasion, assert criminal jurisdiction

Pokagon Band of Potawatomi Indians.”); Stark, *supra* note 2, at 325–36 (describing how tribal judges implement Anishinaabe philosophies).

65. RESTATEMENT L. AM. INDIANS, *supra* note 10, § 4.

66. *Id.* § 7(e).

67. Matthew L.M. Fletcher & Leah K. Jurss, *Tribal Jurisdiction—A Historical Bargain*, 76 MD. L. REV. 593, 594–95 (2017).

68. *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 330 (2008).

69. *E.g.*, *Cabazon Band of Mission Indians v. Lexington Ins. Co.*, No. CBMI 2020-0103 (Cabazon Rsrv. Ct. App. Nov. 12, 2021) (adjudicatory and regulatory jurisdiction); *In re Kern*, No. 2014-2331-CV-CV (Grand Traverse Band of Ottawa & Chippewa Indians Jud. Comm’n June 27, 2014); *Lake of the Torches Econ. Dev. Corp. v. Saybrook Tax Exempt Inv., LLC*, No. 13 CV 115 (Lac du Flambeau Band of Lake Superior Chippewa Indians Ct. Aug. 27, 2013).

Federal court cases include *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 200–01 (1985) (taxation); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 330 (1983) (regulatory jurisdiction); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140 (1982) (taxation); *Washington v. Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. 134, 152–54 (1980) (same); *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892, 904 (9th Cir. 2019) (adjudicatory and regulatory jurisdiction); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 811–19 (9th Cir. 2011) (same).

70. In recent years, nonmembers challenging tribal jurisdiction as far as the Supreme Court tend to be pretty bad actors—for example, polluters, *FMC Corp. v. Shoshone-Bannock Tribes*, 942 F.3d 916 (9th Cir. 2019), *cert. denied*, 141 S. Ct. 1046 (2021), and employers of alleged sex offenders, *Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016), *aff’g by an equally divided court Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014).

over non-Indians even where Congress has not explicitly authorized tribal jurisdiction.⁷¹ The wide majority of scholars agree that the exercise of tribal powers over persons within tribal territories is unexceptional compared to state and federal powers; it's just different.⁷²

The Anishinaabeg think of Kiiwedining, the north, as a time of winter, of snow, which reminds them of the white hair of the elders. The north represents a time of deep wisdom. The gifts of the north, in significant respects, are very lawyerly: thinking, synthesizing, problem-solving, analyzing, imagining, calculating, organizing, criticizing, remembering, and interpreting. The north also represents detachment, the ability to calmly see the past, present, and future. This is also a lawyerly trait. The ultimate goal is balance. Here, I will invoke mino-bimaadiziwin.⁷³

Mino-bimaadiziwin is an Anishinaabe principle that does not translate well literally into English or figuratively into American law. It is an expression of tradition, culture, and language and for many forms a basis for what one might call Anishinaabe natural law. Literally (sort of), the phrase means to live life the right way. Figuratively (for purposes of this Essay), the phrase is a requirement that humans search for balance and harmony in the world in which we live.

Mino-bimaadiziwin does not appear in the Restatement text, but it runs like a current through the tribal powers provisions. Tribal nations, any careful observer will notice, seem to be playing a different game compared to state and federal governments. The Restatement reflects the tremendous tribal capacity for good governance.⁷⁴ Most tribes govern with an eye toward the future, with an eye toward harmony, with what my friend and colleague Dr. Nick Reo refers to as inawendiwin, or relational accountability.⁷⁵ As Michael Doran reminded me recently, state and

71. E.g., *E. Band of Cherokee Indians v. Martinez*, 15 Am. Tribal Law 45 (E. Band of Cherokee Indians Sup. Ct. 2018); *E. Band of Cherokee Indians v. Torres*, No. CR 03-1443; CR 03-1529; CR 03-1530; CR 03-1531; CR 03-1819, 2005 N.C. Cherokee Sup. Ct. LEXIS 6, (Cherokee Sup. Ct. of N.C. Apr. 12, 2005); cf. *Port Gamble S'Klallam Tribe v. Hjert*, 10 NICS App. 60 (Port Gamble S'Klallam Tribal Ct. App. 2011) (rejecting the purported consent of a non-Indian to tribal criminal jurisdiction, though stating that the tribe could exercise that power if properly implemented).

72. See, e.g., Michael Doran, *Redefining Tribal Sovereignty for the Era of Fundamental Rights*, 95 IND. L.J. 87, 111 (2020).

73. Leo I. Brisbois, *Nine Days in June: Shaping Our Future, Valuing Our Past*, BENCH & BAR MINN., Mar. 2010, at 6; Gloria Valencia-Weber, Rina Swentzell & Eva Petoskey, *40 Years of the Indian Civil Rights Act: Indigenous Women's Reflections*, in THE INDIAN CIVIL RIGHTS ACT AT FORTY 39, 47–48 (Kristen A. Carpenter, Matthew L. M. Fletcher & Angela R. Riley eds., 2012); Stark, *supra* note 2, at 303–05.

74. E.g., Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049 (2007); Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555 (2021).

75. Nicholas J. Reo, *Inawendiwin and Relational Accountability in Anishnaabeg Studies: The Crux of the Biscuit*, J. ETHNOBIOLOGY, Mar. 2019, at 65.

federal courts are continually vigilant in protecting fundamental individual rights.⁷⁶ The Restatement reflects that vigilance. For much of American history, federal Indian law designed to destroy Indian tribes, not to protect Indian or tribal fundamental rights.⁷⁷ Ultimately, federal Indian law is an assertion of hegemony over Indians and tribes. But tribal nations are still here, asserting treaty rights, building robust economies, and protecting the welfare of tribal citizens. Indian tribes are not threats. They are not hegemonic. And they will be around a lot longer than most Americans think.

CONCLUSION

In *Muskrat Textualism*, I used the story of the earth diver as a frame for an interpretative methodology that should help to govern judicial discretion in federal Indian law. I compared Indian tribes to the muskrat, entities that few people believe can make much of a positive impact. But Indian tribes continue to surprise everyone. Like the muskrat, our Restatement project was the little project that could. We jumped in the deep end with a completely blank computer screen and came back with a pawful of dirt. Let's hope the Restatement can be used to build a world in that good way.

76. Doran, *supra* note 72, at 95–98.

77. See Ethan Davis, *An Administrative Trail of Tears: Indian Removal*, 50 AM. J. LEGAL HIST. 49 (2008).