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Bankrupting Tribes: An Examination of Tribal Sovereign Immunity as Reparation in the Context of Section 106(A)

Joshua Santangelo

BANKRUPTING TRIBES: AN EXAMINATION OF TRIBAL SOVEREIGN IMMUNITY AS REPARATION IN THE CONTEXT OF SECTION 106(A)

ABSTRACT

This Comment concerns section 106(a) of the Bankruptcy Code, which abrogates sovereign immunity of "a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government." A circuit split exists as to whether this section applies to Native Nations. The Sixth Circuit interpreted this section to maintain sovereign immunity for Native Nations in the Code, while the Ninth Circuit interpreted it to abrogate tribal sovereign immunity. This Comment argues that the Sixth Circuit's interpretation of section 106(a) is the correct interpretation because of the unique relationship between Native Nations and the federal government. This Comment first reviews the history between the federal government and Native Nations to explore this unique relationship and to establish a reparative legislative history. It then compares tribal immunity to other forms of sovereign immunity in order to establish Native sovereign immunity as unique and to demonstrate congressional intent to exclude Native Nations from section 106(a). Finally, it argues that tribal sovereign immunity should be maintained in the context of the Code because the renewed sovereign status of Native Nations and the privileges associated with that sovereign status are reparations efforts and therefore deserve significant weight in any calculus that considers the weakening of sovereign privileges.

INTRODUCTION

The relationship between the United States federal government and Native Nations is one most emblematized by its uniqueness. "The United States is the only country in the world to recognize the inherent sovereignty of Native Nations within its borders and to recognize the ability of Native Nations to regulate and govern reservation lands."[1] The legal relationship that they share is considered *sui generis* in public law.[2] The unique relationship between the federal government and Native Nations has informed the doctrines around which tribal governments legally interact with the state and federal governments of the United States, including the doctrine of tribal immunity.[3] Tribal immunity is separate and unique from both the sovereign immunity employed by states within the legal framework of the United States and by foreign nations within the context of legal proceedings in the United States.[4] This means that tribal immunity can defend a tribe from suit in contexts where state sovereign immunity would not protect a state.[5] One such context is the application of sovereign immunity under section 106(a) of the Bankruptcy Code.

Section 106(a) states that "notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with regard to the following . . . ."[6] To understand whose sovereign immunity is abrogated by this section, one must consult the definitions section of the Code. This section defines the term "governmental unit" as "[the] United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency or instrumentality of the United States (but not a United States trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government."[7]

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[1] Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1789, 1796 (2019).

[2] *Sui generis*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Of its own kind or class; unique or peculiar"); *see* Blackhawk, *supra* note 1, at 1863.

[3] Tribal immunity is the sovereign immunity given to Native Nations. The unique name assigned to this form of sovereign immunity further exemplifies that it is separate and apart from other forms of sovereign within the United States jurisprudence. *See In re* Greektown Holdings LLC, 917 F.3d 451, 465–66 (6th Cir. 2019); Cherokee Nation v. Georgia, 30 U.S. 1, 16 (1831) (arguing that "the condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence.").

[4] *See In re Greektown Holdings*, 917 F.3d at 465–66; Blatchford v. Native Village of Noatak, 501 U.S. 775, 786 (1991). *Compare* Seminole Tribe v. Florida, 517 U.S. 44, 59 (1996) (stating that tribal immunity may be abrogated wherever Congress sees fit), *with* U.S. CONST. amend. 11.

[5] *See In re Greektown Holdings*, 917 F.3d at 465–66.

[6] 11 U.S.C. § 106(a) (2019).

[7] *Id.* § 101(27).

Only two federal circuit courts have considered the issue of the treatment of tribal immunity in the context of section 106(a), and these courts reached markedly different conclusions.[8] In the more recent case, *Buchwald Capital Advisors, LLC*, the Sixth Circuit held that section 101(27) of the Code did not explicitly mention tribal governments as "governmental units" whose sovereign immunity was abrogated.[9] The Court determined that the tribe retained its sovereign immunity and that it did not waive this right in adversary proceedings simply by filing a bankruptcy petition.[10] Accordingly, the case was dismissed.[11]

Conversely, in *Krystal Energy Company*, the Ninth Circuit held that section 106(a) explicitly revoked tribal sovereign immunity for matters within the Code because tribes were "domestic governments" and therefore fell under the umbrella of "governmental units" as defined by section 101(27).[12] The circuit split on this issue has yet to be clarified by the Supreme Court.[13] Without clarification the issue lacks national uniformity, which makes it difficult for both Native Nations and their creditors to make decisions about how to approach bankruptcy.

While only two federal circuit courts have considered this issue, recent case law from lower federal courts around the treatment of tribal immunity in the context of section 106(a) demonstrates a modern trend towards maintaining tribal immunity. In *In re Whitaker*, the Eighth Circuit Bankruptcy Appellate Panel affirmed the bankruptcy court's decision to maintain sovereign immunity for both the Lower Sioux Indian Community and its subsidiary, Dakota Finance Corporation.[14] The Lower Sioux Indian Community and the Dakota Finance Corporation owed debtors in a bankruptcy case tribal revenue payments in accordance with the Indian Gaming Regulatory Act.[15] The trustee of the bankruptcy estate sought to garnish the revenues of the tribe and its subsidiary for the benefit of the estate and its creditors.[16] The court held that the trustee was prevented from doing so because the sovereign immunity of the Lower Sioux

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[8] *Compare* Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1056–58 (9th Cir. 2004), *with In re Greektown Holdings*, 917 F.3d at 462.

[9] *In re Greektown Holdings*, 917 F.3d at 462.

[10] *Id.*

[11] *Id.*

[12] *Krystal Energy Co.*, 357 F.3d at 1057.

[13] *Compare id.*, *with In re Greektown Holdings*, 917 F.3d at 462.

[14] *In re* Whitaker, 474 B.R. 687, 689 (B.A.P. 8th Cir. 2012).

[15] *Id.*

[16] *Id.*

Indian Community was not abrogated by section 106(a) and that this sovereign immunity extended to the tribe's subsidiary.[17]

Similarly, in *Subranni*, the bankruptcy court for the District of New Jersey held that a newspaper organized under the Navajo Nation Corporation Code could assert the privilege of sovereign immunity against a bankruptcy trustee who sought to recover preferential transfers made to the newspaper.[18] The court held that section 106(a) did not include the Navajo Nation within the list of governmental units whose sovereign immunity was abrogated.[19] Cases decided within the last ten years by lower courts favor the preservation of tribal immunity in the context of the Code. This modern trend weighs in favor of the interpretation of section 106(a) that is advocated in this Comment.

The modern trend of maintaining tribal immunity within the context of the Code is the correct interpretation of section 106(a) because precedent, congressional intent, and the historical relationship between the federal government and Native Nations favor it. The courts who have ruled this way focus on the language of section 101(27) and canons of statutory construction for support.[20] Occasionally these courts will turn to congressional intent in the context of the Indian Reorganization Act to justify their holding.[21] While these are legitimate arguments, they lack a comprehensive understanding of the complexities of the relationship between Native Nations and the federal government and how this history informs the doctrine of tribal immunity. Neither side of the debate comprehensively discusses the history of violence against Native Nations and the trend in federal Indian law towards righting those injustices. By failing to consider the full history, these courts weaken the doctrine of tribal immunity because they fail to qualify it as a form of reparations that encourages fairness and justice in the law.

Courts should hold that tribes retain sovereign immunity under section 106(a) of the Code. The language of the statute and the history between the United States government and Native Nations do not indicate an intention by Congress to abrogate tribes' sovereign immunity; additionally, Congress explicitly expressed an intention to encourage the political and economic growth of Native Nations, and tribal immunity can operate as a form of reparations for

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17 *Id.* at 694–97.

18 Subranni v. Navajo Times Publ'g Co., 568 B.R. 616, 624 (Bankr. D.N.J. 2016).

19 *Id.*

20 *See, e.g.*, *id.* at 616; *In re* Whitaker, 474 B.R. 687 (B.A.P. 8th Cir. 2012); *In re* Greektown Holdings, LLC, 917 F.3d 451 (6th Cir. 2019).

21 *See In re Whitaker*, 474 B.R. at 689.

atrocities committed against Native populations. For purposes of this Comment, "reparations" is defined with a three-prong test: "recognizing and accepting responsibility for historic injustice; repairing present-day damage traceable to past injustice; and building productive group relationships."[22] This perspective on the law is correct because it is supported by precedent and legal argument and because it promotes justice by propelling Native Nations towards economic prosperity.

To reach this conclusion, this Comment will first focus on the history of federal Indian law, the establishment of tribal immunity, and how tribal immunity compares to other forms of sovereign immunity. Second, it will explore the application of tribal immunity to section 106(a) and address fundamental misunderstandings of tribal immunity. Finally, it will focus on the maintenance of tribal sovereign immunity within the Code as a form of reparations and will confront the effects this may have on the future of bankruptcy in the United States.

I. THE BIRTH OF FEDERAL INDIAN LAW AND THE ESTABLISHMENT OF TRIBAL IMMUNITY

This Section will confront the history of the United States government's interaction with Native Nations. It will emphasize the sovereign status of Native peoples and how that sovereignty was slowly weakened by the federal government. Finally, it will review the history of tribal sovereign immunity and begin to compare it to other forms of sovereign immunity recognized by the federal government in order to establish it as unique.

A. Tribal Immunity: A History

1. Establishing a Nation Amid the "Indian Threat"

Tribal sovereign immunity was not accidental, but rather was an evolution of common law over years of interactions with the five "civilized" Native Nations[23] that the United States recognized as sovereign and independent.[24] The

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[22] Eric K. Yamamoto, Sandra Hye Yun Kim & Abigail M. Holdin, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 31 (2007).

[23] William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587, 1627 (2013) (stating that the United States recognized the Chickasaw, Muscogee, Choctaw, Cherokee and Seminole nations as civilized due to governmental structures that were relatively congruous to those of Western nations at the time).

[24] *Id.* at 1622.

recognition of the sovereignty of Native Nations was a trend within the federal government since its inception. Tribal sovereignty predates the formation of the United States; Native Nations were viewed as autonomous by European colonial powers prior to the American revolution.[25] Colonies from England, France and Spain respected the independence of tribal governments in economic markets and political treaties.[26] The British Crown bought titles to lands from tribes, inherently recognizing the tribes' right to ownership over that land.[27] British recognition was central to colonial efforts to secure control over southeast trade, which was quickly becoming a booming market.[28] Even after the United States won its independence, political treaties securing trade in the area were pervasive as the new nation grappled with the French, Spanish and British presence in the area for economic dominance.[29]

The freshly independent nation established the Articles of Confederation as its guiding document, but the document's articulations of powers around relationships with Native Nations were ambiguous.[30] Although the Articles gave the federal government the power to create treaties with Indian tribes, there were few institutions in place to compel compliance.[31] The federal government depended on appeals to the states to observe the provisions of treaties that it had signed with these tribes, but states denied the legitimacy of these treaties and the legitimacy of the federal government's power to create them.[32] These ambiguous definitions, as well as inadequate executive power, led to broken treaties and unauthorized wars with Native Nations and served as a major factor in the decision to hold a Constitutional Committee in order to draft a more articulate and powerful national document.[33]

At the Constitutional Convention, two attitudes towards the Native populations emerged: a paternalistic view supported by Madison[34] and a

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[25] Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661, 683 (2002).

[26] Wood, *supra* note 23, at 1624.

[27] Seielstad, *supra* note 25, at 684.

[28] Wood, *supra* note 23, at 1624.

[29] Wood, *supra* note 23, at 1625–26.

[30] Blackhawk, *supra* note 1, 1807.

[31] *See* Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1018 (2014).

[32] *Id. at* 1037.

[33] *Id.* at 1036–37.

[34] *Id.* at 1045 (quoting 32 JOURNALS OF THE CONTINENTAL CONGRESS, 1744–1789, at 340–41 (John C. Fitzpatrick ed., 1933) ("The utmost good faith should always be observed towards the Indians, their lands and property shall bever be taken from them without their consent; and, in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress . . . .")).

militaristic approach to Indian affairs supported by Hamilton.[35] The Constitution was not gaining the support among states that it needed, so in the interest of expediency, the Hamiltonian view was adopted. The Federalist rhetoric around Native populations painted them as a "savage threat" that a strong, centralized federal government with a funded military would be able to combat.[36] This rhetoric and imagery was important to secure ratification from the Southern States, specifically Georgia.[37]

Although the Constitutional Congress denigrated tribal communities to secure popularity for a powerful federal government, it also recognized Native Nations as separate and sovereign from the United States.[38] Native populations are hardly mentioned in the U.S. Constitution, but when they are, it is clear that they hold a unique position in relation to the federal government. The Constitution empowers Congress to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes[,]"[39] clearly distinguishing tribal nations from both states and foreign nations.[40]

The Federalist rhetoric around Native Nations was militaristic, but after a federal government was established, the Washington administration chose to treaty with surrounding tribes.[41] The peaceful approach to relationships with Native Nations was not appreciated by the Southern States, who felt that they had been tricked into signing the Constitution with false promises of a federally waged war against Indian tribes.[42] However, the newly ratified Constitution vocalized that Indian affairs were a federal issue, and the Washington administration acted in accordance. The administration turned to international law for resolution of issues between the newly formed United States and Native Nations. The use of international law principles shows that the United States government considered Native Nations to be sovereign and distinct from the United States.[43]

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35 *Id.* at 1007.

36 *Id.* at 1007–08.

37 *Id.*

38 Blackhawk, *supra* note 1, at 1808; *see* U.S. CONST. art. I, §8.

39 U.S. CONST. art. I, §8.

40 *See* Cherokee Nation v. Georgia, 30 U.S. 1, 18 (1831).

41 Ablavsky, *supra* note 31, at 1073.

42 Ablavsky, *supra* note 31, at 1073.

43 Blackhawk, *supra* note 1, at 1809 ("The Washington Administration recognized Native Nations as 'foreign nations, not as the subjects of any particular state' and in possession of 'full, undivided and independent sovereignty as long as they chose to keep it, and that this might be forever.'"); *see* Sarah W. Conkright, Comment, *The "Better Reading" of Section 17 of the Indian Reorganization Act: A Rejection of Automatic Waiver of Tribal Immunity in Memphis Biofuels*, 60 CATH. U. L. REV. 1175, 1179 (2011) (discussing how the founders' use of treaties with Native Nations implies elements of sovereignty for those tribes).

The early recognition of the sovereignty of Native Nations lends credence to the doctrine of tribal immunity because all forms of sovereign immunity are direct results of the sovereign status of any governmental structure.[44] The sovereignty of Native peoples existed before the creation of an independent American nation. Recognition of this reality demonstrates that the doctrine of tribal immunity is not an accidental or recently constructed concept as some courts have argued.[45] Rather, it is tied to the sovereignty of the Native peoples, and that sovereignty has existed since the birth of the American nation.

2. Manifest Destiny and the Push Westward

While the Washington administration held a relative respect for the autonomy of Native Nations, this attitude did not last. As the push west began, "issues of Indian policy and Indian removal received more attention in the nation's periodicals than did issues of tariffs and the Bank of the United States."[46] The Congressional Committee on Indian Affairs released a statement that Native Nations were the aggressors in colonial wars and that, as such, they should atone for those wars by giving their land to the United States.[47]

While federal attitudes towards Native peoples began to change, so too did the political activities of Native Nations. In 1826, the Choctaws passed their first Constitution and in 1829, the Chickasaw adopted a code of written laws to improve administration and in response to a growing public judiciary.[48] In fact, by the early 1830s, the Cherokee nation had "a bicameral legislature, a judicial system with various districts and appeals courts, and a national police force."[49] The tribes had a highly organized and advanced governmental structure, contrary to the "savage" hunter-gatherer depiction so often expressed in United States history and media. Native Nations decided to change their governmental structure in response to the growing presence of the United States and to establish Native authority over the lands they held. The Southern States perceived these changes as threats to their power and, as such, wanted aggressive action to be taken.[50]

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[44] *See In re* Greene, 980 F.2d 590, 596 (9th Cir. 1992).

[45] Wood, *supra* note 23, at 1589 (citations omitted).

[46] Blackhawk, *supra* note 1, at 1795 (quoting Mary Hershberger, *Mobilizing Women, Anticipating Abolition: The Struggle Against Indian Removal in the 1830s*, 86 J. AM. HISTORIANS 15, 17 (1999)).

[47] Ablavsky, *supra* note 31, at 1017–18.

[48] Wood, *supra* note 23, at 1627–28.

[49] Wood, *supra* note 23, at 1630.

[50] Wood, *supra* note 23, at 1627–28.

The decisions from the three cases that made up the Marshall trilogy supported this ethos.[51] These three cases are recognized as the beginning of Federal Indian Law in the United States.[52] They provided justification for Westward expansion that the federal government used to rationalize a system of structural violence against native populations.[53] Rather than justifying federal violence through the Constitutional powers granted to the executive powers of the federal government, the Marshall trilogy justified it through a court-sanctioned doctrine of discovery, a concept of national power inherent to the notion of establishing American sovereignty.[54] The Supreme Court justified violent actions against native populations based on this ethnocentric view that European nations could claim native lands because they discovered and utilized them, while the native populations lived as hunter-gatherers, never truly establishing a respectable society.[55] This doctrine seems to justify Andrew Jackson's Trail of Tears, the robbing of Native children from their families for placement in assimilation schools, and other models of structural violence aimed at destabilizing and destroying Native culture.

The Marshall trilogy dehumanized Native Nations, and the holdings were used to justify the taking of Native lands, but these cases still acknowledged a level of tribal sovereignty—an important factor in the future formulation of sovereign privileges.[56] In *Worcester v. Georgia*, the Supreme Court reinforced that states did not have jurisdiction over Native Nations, and in his opinion, Marshall stated that the Cherokee Nation was "a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves."[57]

Jurisdiction over Native Nations belonged exclusively to the federal government, and in *Cherokee Nation v. Georgia*, Marshall acknowledged the unique relationship between the tribal governments and the United States.[58] He wrote "the condition of the Indians in relation to the United States is perhaps

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[51] Johnson v. M'Intosh, 21 U.S. 543 (1823); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1832).

[52] *See Cherokee Nation*, 30 U.S. at 17–18.

[53] *See id.* 15–18.

[54] Blackhawk, *supra* note 1, at 1818.

[55] *See* Blackhawk, *supra* note 1, at 1818; *see also* Wood, *supra* note 23, at 1627–28 (discussing how this view of Native Nations is incorrect; governmental structures of many of the largest Native tribes were actually very complex).

[56] *See Cherokee Nation*, 30 U.S. at 16–17.

[57] Worcester v. Georgia, 31 U.S. 515, 560–61 (1832).

[58] *Cherokee Nation*, 30 U.S. at 16–18.

unlike that of any other two people in existence."[59] It was well established at the time that "the Constitution neither speaks of [tribal nations] as states or foreign states, but as just what they were, Indian Tribes."[60] Marshall recognized the Cherokee Nation "as a state, as a distinct political society," and noted that "[t]he acts of our government plainly recognize the Cherokee nation as a state, and the courts are bound by those acts."[61] He also commented that the Cherokee Nation was not foreign to the United States:[62]

> [Native Nations] are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connexion [*sic*] with them, would be considered by all as an invasion of our territory, and an act of hostility.[63]

In these opinions, Marshall recognized Native tribes as neither states nor foreign governments, but as a unique blend that was domestic to the United States, but separate and sovereign from it. The *sui generis* relationship between the federal government and Native Nations demonstrates that it may be possible for Congress to pass legislation in section 106(a) that abrogates sovereign immunity for all governments except those of Native Nations.

It is important to note that all three cases in the Marshall trilogy revolved around the Cherokee Nation. The Supreme Court saw the Cherokee Nation as more civilized than other tribes,[64] primarily due to its bicameral legislature and established judicial system.[65] In addition to a governmental structure that appealed to Western society, at the time of the decision, the Cherokee Nation had a literacy rate higher than that of the states that surrounded it and published a newspaper in both English and Cherokee that was read internationally.[66] These markers made the Cherokee Nation more respectable to the federal government, and the Supreme Court was willing to grant the nation the title of sovereign—a title that would influence the development of the rest of federal Indian law. It is also important to recognize the complexity and authority of Native governments because it informs the concept of reparations. Reparations for the destruction of these societies ought not simply support Native people; rather, they should strive

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59 *Id.* at 16.
60 *Id.* at 27 (Johnson, J., dissenting).
61 Wood, *supra* note 23, 1629–30.
62 *Cherokee Nation*, 30 U.S. at 17, 19.
63 *Id.* at 17–18.
64 Wood, *supra* note 23, at 1630.
65 Ablavsky, *supra* note 31, at 1036–37.
66 Wood, *supra* note 23, at 1630.

to return those societies to the same power that they held before the systematic violence that the federal government perpetrated against them.

Even after the Western expansion pushed the tribes out of their lands in the Southeast, the five tribes negotiated treaties with the United States that guaranteed fee simple ownership of the new lands in the West and continued recognition of tribal authority and sovereignty over those lands.[67] After being forced to move to the West, the Native Nations that already wrote Constitutions amended them, and those that had not written Constitutions formulated them.[68] This governmental structure is why the United States recognized these tribes as "civilized," and this recognition influenced the tribal sovereign immunity doctrine.[69]

The Marshall trilogy also reinforced that issues between native tribes and any part of the United States were the exclusive jurisdiction of the federal government and he began to define that relationship. In *Worcester v. Georgia*, Marshall held that Georgia's effort to assert jurisdiction over the Cherokee Nation was invalid,[70] thus reinforcing that only the federal government and the federal court system had jurisdiction over claims in which Native populations were a party. Marshall's view of the relationship between the federal government and Native Nations was that tribes were "domestic dependent nations" because "they are in a state of pupilage . . . their relation to the United States resembles that of a ward to his guardian."[71]

3. The Trust Doctrine and the Indian Reorganization Act

The understanding of the federal government as a guardian of Native Nations developed into a legal doctrine known as the "trust doctrine"—a policy that incorporated the concept of the United States federal government as a fiduciary over Native Nations.[72] As a fiduciary, there was a limit on the plenary power of the federal government when it came to legislation involving Indian tribes.[73] In making decisions about Native Nations, the federal government had a responsibility: it could not create a new law that involved Native Nations if that law would have negative impacts upon those nations.[74] While this doctrine does

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67 Wood, *supra* note 23, at 1631–32.
68 Wood, *supra* note 23, at 1631–32.
69 Wood, *supra* note 23, at 1632–33.
70 Blackhawk, *supra* note 1, at 1822.
71 Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).
72 Blackhawk, *supra* note 1, at 1825.
73 Blackhawk, *supra* note 1, at 1825.
74 Blackhawk, *supra* note 1, at 1825.

not exist formally, its influence is apparent through the way the federal government interacts with Native Nations.[75]

The fiduciary nature of the relationship of the federal government to Native Nations morphed in 1934 with the introduction of the Indian Reorganization Act ("IRA").[76] This act relinquished the federal government's fiduciary role over Native Nations in favor of granting these nations the authority to regulate themselves and interact with other domestic governments through the federal court system.[77] President Franklin D. Roosevelt sought to mend relationships between the federal government and Native Nations, and under his tenure, the Indian Reorganization Act was passed.[78] The IRA recognized and facilitated the power of Native Nations to self-govern and reinforced the doctrine of inherent tribal sovereignty.[79]

> [T]he IRA provided formal federal recognition for each Native Nation to organize and, by majority vote, form institutions to self-govern. The Act offered the Native Nations the opportunity to ratify a written constitution, which the United States would recognize as governing within each Nation's territory, and to form a separate corporate charter in order to foster economic development and manage natural resources.[80]

Part of the IRA's effort to foster economic development in Native Nations is that it gave tribes the ability to incorporate; they could create corporations under the name of the tribe for the purpose of conducting business transactions with nontribal companies.[81] Incorporation under the charters of section 17 of the IRA creates a business that is owned by the tribe but that operates distinct from the Native Nation with which it is associated.[82] Some courts have held these two organizations, the tribe and the tribal corporation, are legally distinct.[83] However, many courts—including the Sixth Circuit—have found that tribal immunity extends to tribal corporations in certain contexts.[84]

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75 Blackhawk, *supra* note 1, at 1802; *see* OFF. OF NAT. RES. REVENUE, ORIGINS OF THE TRUST DOCTRINE: THE RELATIONSHIP BETWEEN THE FEDERAL GOVERNMENT AND INDIAN TRIBES (2012) (discussing the Trust Doctrine, the principles that undergird the doctrine, and discussing legal sources—including federal case law—applying the Trust Doctrine to the relationship between the federal government and Native Nations.).

76 Indian Reorganization Act, Pub. L. No. 383, 48 Stat. 984 (1934).

77 Blackhawk, *supra* note 1, at 1813.

78 Conkright, *supra* note 43, at 1182.

79 Blackhawk, *supra* note 1, at 1813.

80 Blackhawk, *supra* note 1, at 1813 (citations omitted).

81 Conkright, *supra* note 43, at 1177.

82 Conkright, *supra* note 43, at 1183–84.

83 Conkright, *supra* note 43, at 1184.

84 Conkright, *supra* note 43, at 1192; *see* Memphis Biofuels, L.L.C. v. Chickasaw Nation Indus., Inc.,

The passage of the IRA created a new way to evaluate Congressional interactions with Native Nations because it demonstrated that Congress desired to "promote the goal of Indian self-government, including its overriding goal of encouraging tribal self-sufficiency and economic development."[85] The legislative history of the IRA supports the concept that it was meant to be a radical reformation in the way that the federal government interacted with tribal governments. The House Committee on Indian Affairs described the act as a tool "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism."[86] This statement indicates that Congress meant the IRA to be a form of reparative legislation. The formulation of Native Nation sovereignty as reparation means that all privileges associated with that sovereignty would also be significant reparative efforts, chief among them tribal immunity.

The expression of this congressional desire is hailed by many as one of the greatest achievements between the United States and tribal relations. Maggie Blackhawk in her article, *Federal Indian Law as Paradigm Within Public Law*, argues that "the national government has best protected Native peoples by bestowing power, not rights, through the recognition of inherent tribal sovereignty."[87] The IRA is still considered to be the single most important piece of legislation to affect Native American tribes.[88] The ability of Native Nations to self-govern allowed them to organize and build resources around efforts that are central to tribal identity, and they "have begun language revitalization efforts, established highly successful business enterprises, fortified traditional forms of governance, and have become the 'laboratories of democracy' to which the federalism of the United States aspires."[89]

B. Sovereign Immunity as Right of Sovereignty

The IRA allowed tribes to establish their own systems of governance, and unlike state governments, these systems recognized tribes as "separate sovereigns, tribal governments [that] are 'extraconstitutional' or not bound by the specific text of the Constitution. However, tribal governments are not 'extraconstitutional,' in the sense that the U.S. Constitution has no relevance to

585 F.3d 917, 918 (6th Cir. 2009); GNS, Inc. v. Winnebago Tribe of Neb., 866 F. Supp. 1185, 1188–89 (N.D. Iowa 1994).

85 *In re* Greene, 980 F.2d 590, 596 (9th Cir. 1992) (internal quotations omitted).

86 Conkright, *supra* note 43, at 1182–83 (quoting H.R. REP. NO. 73-1804, at 6 (1934)).

87 Blackhawk, *supra* note 1, at 1798.

88 Conkright, *supra* note 43, at 1182.

89 Blackhawk, *supra* note 1, 1862–63.

them or no effect on them."[90] It is well established that although Native Nations exist in a space outside the scope of United States federalism, Congress still has the authority to abrogate tribal immunity. However, absent a congressional act, tribes maintain existing sovereign powers and "possess those aspects of sovereignty not withdrawn by treaty, statute, or by implication as a result of their dependent status."[91] American case law has repeatedly accepted and reinforced the concept of Indian tribes as "domestic dependent nations" that exercise "inherent sovereign authority."[92]

The first Supreme Court case to involve tribal immunity was *Parks v. Ross* in 1850, in which the court held that Mr. Ross, as chief of the Cherokee Nation, could not be held personally liable for debts that he owed due to the Cherokee Nation's status as a sovereign state.[93] In its decision, the Court stated that "an agent who contracts in the name of his principal is not liable to a suit on such contract; much less a public officer, acting for his government."[94] Although tribal immunity was not explicitly expressed in this opinion, the Court held that a tribal leader could not be sued because of his governmental position in a sovereign state.

In 1919, the Supreme Court expressly articulated the concept of tribal immunity for the first time in *Turner v. United States*, in which, the Court held that due to its status as a sovereign state, the Creek Nation had immunity from suit for damages to property that the tribe had leased.[95] The Court likened the Creek Nation to the Cherokee since it was also a "distinct political community" deserving of the rights of sovereignty.[96] The governmental structures enacted by the five tribes gave them legitimacy in the eyes of the federal government, and guaranteed rights to sovereign privileges including tribal immunity. These early judicial decisions recognized immunity for officials in Native governmental positions, thereby recognizing their sovereignty, even as federal policies aimed at robbing them of their land and autonomy. The doctrine of tribal immunity is now considered to be settled law.[97]

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[90] Blackhawk, *supra* note 1, at 1808.

[91] Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 805 (2014) (quoting United States v. Wheeler, 435 U.S. 313, 323 (1978)).

[92] *Bay Mills Indian Cmty*., 572 U.S. at 788; Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 509, (1991) (quoting Cherokee Nation v. Georgia, 30 U.S. 1, 5 (1831)).

[93] Wood, *supra* note 23, at 1640–41.

[94] Wood, *supra* note 23, at 1641.

[95] Conkright, *supra* note 43, at 1180.

[96] Wood, *supra* note 23, at 1650.

[97] *Bay Mills Indian Cmty*., 572 U.S. at 798.

Even though Native Nations are considered to be dependent nations within the United States, they retain powers associated with their sovereignty.[98] One such power is the assertion of sovereign immunity, which "is not an affirmative act of the tribe . . . [but] is, instead, a claim of status arising from sovereignty itself."[99] Early cases in the United States that formulated the outline of tribal immunity justified it both because the sovereign status of tribes guaranteed immunity and because sovereign immunity protects the sovereign government's treasury.[100] In 1895, the Eighth Circuit upheld the decision of a territorial court that dismissed a suit against the Choctaw Nation.[101] The court justified the ruling by stating that Congress had never conferred jurisdiction to the court for an action against a tribal nation, and that absent such a statement, the Choctaw could not be sued without permission due to their sovereignty and the fact that permission of such suits filed by individuals would inevitably impoverish it.[102]

The passage of the IRA further supported the two justifications for a doctrine of tribal immunity. It recognized the sovereignty of Native Nations by vastly expanding the legislative power of those Nations to self-govern, and it explicitly articulated a congressional desire for tribal economic independence. After the passage of the IRA and the establishment of tribal systems of governance, "[t]ribal governments deal[t] directly with state and federal governments through compacts and agreements and [were able to] represent the collective needs of their citizens both in courts and before the Congress and the executive."[103] As unique sovereigns that were able to represent themselves in legal proceedings, interact with other domestic governments, and write their own Constitutions, there was strong evidence that Native Nations should be granted the same privileges that are granted to other sovereigns within United States jurisprudence.[104]

The sovereign immunity of Native tribes has continued to be upheld by Congress despite multiple opportunities to repeal or weaken it.[105] In 1998, the Supreme Court had the opportunity to review the doctrine of tribal immunity in

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98 *In re* Greene, 980 F.2d 590, 600 (9th Cir. 1992).

99 *Id.* at 595.

100 Wood, *supra* note 23, at 1590.

101 Seielstad, *supra* note 25, at 689.

102 Seielstad, *supra* note 25, at 690–91.

103 Blackhawk, *supra* note 1, at 1862.

104 The sovereignty of tribal lands was recently affirmed in *McGirt*, in which the Supreme Court held that crimes committed on tribal lands could not be prosecuted by the state in which those tribal lands existed. The Court articulated that states in these scenarios lacked jurisdictional authority and that tribal lands were still under the jurisdiction of the tribe. McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

105 Seielstad, *supra* note 25, at 665.

Kiowa Tribes, and after conversation about why the doctrine of tribal immunity should be doubted, and perhaps repealed, the Court ultimately deferred to Congress and upheld the tribe's sovereign immunity privilege.[106] At the time that *Kiowa Tribes* was before the Court, Congress was reviewing possible changes to the tribal immunity doctrine.[107] Despite the Court's criticisms in *Kiowa Tribes*, Congress denied the opportunity to operationally change tribal sovereign immunity, and the bill on the subject enacted in 2000 had no real substantive impact on the doctrine.[108] There is clear congressional intent to maintain tribal sovereign immunity. This also favors a pro-tribal immunity interpretation of section 106(a) of the Code.

Native Nations' sovereign status grants them the privilege of tribal immunity. "Immunity from suit has been recognized by the courts of this country as integral to the sovereignty and self-governance of Indian tribes."[109] Due to the *sui generis* relationship between Native peoples and the federal government of the United States, the shape of that immunity is unique.[110]

One of the unique aspects of tribal immunity is the influence of federal Indian law. Federal Indian law has influenced the formation of tribal immunity because the trust doctrine still remains active in aspects within tribal immunity. The trust doctrine guaranteed that while acting on behalf of Native Nations, the federal government maintained a fiduciary role and always made decisions in the best interests of those nations.[111] The dependent relationship formed by the trust doctrine ensured that tribal powers, such as sovereign immunity, were only divested by the tribe's dependent status in cases where "the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government . . . ."[112] The federal government may not abrogate tribal immunity unless allowing tribes to retain their immunity is against the best interests of the federal government because, absent such federal interests, an abrogation of tribal immunity would not be in the best interests of Native Nations.[113]

In addition, the trust doctrine, in tandem with the goals of encouraging tribal self-sufficiency and economic development set forward by the IRA, created a

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106 Kiowa Tribe v. Mfg. Techs., 523 U.S. 751 (1998).

107 Seielstad, *supra* note 25, at 665.

108 Seielstad, *supra* note 25, at 666.

109 Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1056 (9th Cir. 2004).

110 *See* Blackhawk, *supra* note 1, at 1808 (stating that the relationship between Native Nations and the United States federal government is "unlike that of any other two people in existence").

111 Blackhawk, *supra* note 1, at 1825.

112 *In re* Greene, 980 F.2d 590, 594–95 (9th Cir. 1992).

113 *Id.* at 595.

canon in federal Indian law that required that all ambiguity in statutes be resolved in favor of Native Nations.[114] This "doctrine rests on a core principle . . . of federal Indian law: that the national government is obligated to support Native Nations and Native sovereignty in order to mitigate its status as colonizer and to preserve its status as a constitutional democracy."[115]

The trust doctrine binds the executive and legislative branches to make and enforce laws that do not damage native populations, but the judicial branch is noticeably absent from much of modern federal Indian law. The Marshall trilogy granted the executive branch the power to take Native lands, which was later used to justify the kidnapping of native children and forced assimilation of native populations.[116] The courts refused to hear many of the cases that stemmed from these human rights violations, and instead allowed federal Indian law to be run by the executive and legislative branches.[117] In 1871, Congress announced a change in policy in which federal Indian relations would become a legislative regime as opposed to one run by diplomacy.[118]

The Supreme Court held that Congress had the plenary power to determine the boundaries of tribal relationships with states and the federal government, effectively green-lighting a regime in which federal policy surrounding Native Nations was determined unilaterally by the legislative branch.[119] For this reason, much of federal Indian Law exists outside of the courts.[120] The judicial system's tradition of extraditing themselves from issues between the federal government and Native Nations continues today. In *Michigan v. Bay Mills Indian Community*, the Court stated that "a fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty."[121] The Court consistently defers to Congress about whether tribal immunity is abrogated in any given situation and to abrogate a tribe's sovereign immunity, "Congress must 'unequivocally' express that purpose"[122] because "Congress has consistently reiterated its approval of the immunity doctrine."[123] Due to Congress's consistent support of the doctrine of sovereign immunity and

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114 Blackhawk, *supra* note 1, at 1842.

115 Blackhawk, *supra* note 1, at 1842.

116 Blackhawk, *supra* note 1, at 1796–97.

117 *See* Blackhawk, *supra* note 1, at 1796–97 (arguing that public law debates over distribution of legislative and executive power do not reflect colonial American history).

118 Seielstad, *supra* note 25, at 686.

119 Seielstad, *supra* note 25, at 686; *see* Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

120 Blackhawk, *supra* note 1, at 1799.

121 Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 782 (2014).

122 *Id.* at 790.

123 Okla. Tax Comm'n v. Citizen Bank Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991).

the judiciary's lack of presence in the realm of federal Indian law, courts often assume that Congress is aware of the way that the Court has interpreted tribal immunity and that an absence of an intention to alter tribal immunity is equivalent to an endorsement of its continued power.[124]

II. SOVEREIGN IMMUNITY: A COMPARATIVE ANALYSIS

This Section will explore the application of tribal immunity to bankruptcy law by explaining and rejecting the analysis of the court in *Krystal Energy Company*. This Section will then distinguish tribal immunity from state sovereign immunity and foreign sovereign immunity in order to establish that a statute may exist that abrogates state and foreign sovereign immunity and leaves tribal immunity intact.

A. Application to Bankruptcy Law

The abrogation of certain sovereign immunities in section 106 of the Code was a major change in the common law around those forms of sovereign immunity. This change was justified by the power of the Code and the law surrounding it. It was argued that the Bankruptcy Clause provided this level of power because of its history in the Constitution; the Bankruptcy Clause was incorporated into the Constitution with little debate.[125] The grant of bankruptcy power to the federal government was agreed upon at the Constitutional Convention and was seen as necessary in order to ensure an economically functioning nation.[126] Prior to the Bankruptcy Clause's introduction, injustices were prevalent because states were failing to honor one another's bankruptcy discharge orders.[127] A state would discharge a debtor's obligations, only for that debtor to be arrested and imprisoned in a different state.[128] This failure to grant full faith to the litigatory proceedings between states threatened the unity of the federal government. The Bankruptcy Clause was introduced to make this issue a federal one and ensure economic stability.[129] The states signed onto the Constitution knowing that the power to enact bankruptcy legislation carried with

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124 *See* Kiowa Tribe v. Mfg. Techs., 523 U.S. 751, 758 (1998).

125 Charles Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 13 (1995).

126 Cent. Va. Cmty. College v. Katz, 546 U.S. 356, 368 (2006).

127 *Id.* at 377.

128 *Id.*

129 *Id.*

it the power to subordinate state sovereignty around that bankruptcy legislation.[130]

In the 1930s, the Court continued to reaffirm the expansive scope of the bankruptcy power, and only struck down bankruptcy legislation in cases where the bankruptcy power had to yield to other constitutional demands.[131] While the Eleventh Amendment may seem like precisely the kind of constitutional demand that the bankruptcy power would yield to, this is not the case.[132] Sovereign immunity protects a government from in personam liability; it is a protection of a governmental structure's integrity, not of a governmental structure's property.[133] Bankruptcy is a proceeding in rem; people file for bankruptcy in order to have the in personam liability of debtors dismissed, and the debt levied only against property that they may own.[134] For this reason, bankruptcy proceedings may be filed against a governmental structure without destroying its sovereign immunity.[135]

Allowing a federal government to establish personal jurisdiction over a state would be considered an indignity to the sovereignty of that state.[136] However, sovereign immunity does not bar federal jurisdiction over in rem proceedings in which the state is involved.[137] Proceedings in bankruptcy may abrogate state sovereign immunity because a bankruptcy court's jurisdiction is completely in rem; it only deals with the estate.[138] The Court may adjudicate discharge claims and others without asserting personal jurisdiction over a state.[139]

Adversary proceedings are treated similarly; they are considered to be part of the original bankruptcy case and are therefore still within the in rem jurisdiction of a federal bankruptcy court.[140] Outside of adversary proceedings, any proceeding that is a result of the filing of the petition is "merely ancillary to the Bankruptcy Court's exercise of its *in rem* jurisdiction . . . [and does not] implicate state sovereign immunity."[141]

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130 *Id.*
131 *See* Tabb, *supra* note 125, at 45 (describing incidences where post-Depression cases were struck down).
132 *Cent. Va. Cmty. College*, 546 U.S. at 374.
133 *Id.* at 362.
134 *Id.*
135 *Id.*
136 Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 453 (2004).
137 *See id.* at 446–47.
138 *Cent. Va. Cmty. College*, 546 U.S. at 362.
139 *Tenn. Student Assistance Corp.*, 541 U.S. at 453.
140 *Id.* at 451–52.
141 *Cent. Va. Cmty. College*, 546 U.S. at 371.

Due to the in rem nature of bankruptcy proceedings, the federal government was able to abrogate the sovereign immunity of various governmental structures through the addition to section 106 to the Code. This section states that "notwithstanding assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section . . . ."[142]

There is no doubt that this section of the Code abrogates sovereign immunity for states, commonwealths and foreign states, as these governmental structures are explicitly enumerated within the definition of "governmental unit." However, Native Nations are not enumerated, and a circuit split exists as to whether the language of section 106 abrogates sovereign immunity for Tribal governments within bankruptcy proceedings.[143]

The argument put forward by *Krystal Energy Company* is that the term "other foreign or domestic government" includes Native Nations.[144] The Ninth Circuit stated that Tribes are governmental structures and are within the United States, thereby making them domestic governments whose immunity Congress intended to abrogate as an "other foreign or domestic government."[145] To support this claim, the court compared section 106(a) of the Code to the Age Discrimination Act.[146] The court discusses *Kimel*, in which the Supreme Court stated that Congress listed "states" as a "public agency" whose sovereign immunity was abrogated within the context of suits for employee backpay after unjust termination.[147] The Supreme Court held the law did not require each individual state to be listed because each such state is subsumed under the umbrella term of "states."[148] The abrogation did not need to explicitly name an individual state for its immunity to be curtailed, it only needed to demonstrate that the legislature explicitly *intended* for that immunity to be abrogated.[149] The Ninth Circuit analogizes that tribes are referenced as domestic dependent nations within legal precedent and so the phrase "all foreign and domestic governments" includes Tribal government because it is a catch all for all governmental

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142 11 U.S.C. § 106(a) (2019).

143 *Compare* Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055 (9th Cir. 2004), *with In re* Greektown Holdings, LLC, 917 F.3d 451 (6th Cir. 2019).

144 *Krystal Energy Co*., 357 F.3d at 1056–58.

145 *Id.*

146 *Id.* at 1058–59.

147 *Id.* at 1058 (citing Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000)).

148 *See id.* at 1058–59 (citing *Kimel*, 528 U.S. at 73).

149 *Id.* at 1057, 1061 (citing *Kimel*, 528 U.S. at 73).

structures.[150] Therefore, there is explicit Congressional intent that tribal immunity be abrogated within the context of section 106.[151]

The logic expressed by the *Krystal Energy Company* court is flawed in multiple regards. Firstly, the argument that Native Nations are subsumed under the umbrella of "domestic governments" in the same way that the Court in *Kimel* mentions "states" would include Alabama, Alaska, or other states is false logic. The term "states" inherently includes all of the fifty states because statehood is fundamental to each individual state's identity. Alabama is a land mass defined by its borders and local governments, but it is equally self-defined by its statehood and its relationship to the federal government. Alabama is equally defined by its position on a map as it is by its Congressional representation in the Senate and the House of Representatives; its statehood is inexorably tied to its governmental identity. The same is not true of Native Nations and the term "domestic governments." Native Nations are not bound by the specific text of the Constitution, even though they are affected by it and by the legislation of the federal government.[152] Black's Law Dictionary defines "domestic" as "[o]f, relating to, or involving one's own country," or "[o]f, relating to, or involving one's own jurisdiction."[153] Native Nations are domestic to the United States federal government in that they are physically within the nation and they are subject to federal jurisdiction. However, Native Nations do not participate in the federal governmental structure and they are not bound entirely by the Constitution in the same way that state governments and traditional domestic governments are tied to the Constitution.[154] Native Nations do not self-define as domestic governments underneath the United States federal government in the same way that a state like Alabama would self-define by its statehood.[155] The analogy used by the *Krystal Energy Company* court is weak and tenuous.

Secondly, the court in *Krystal Energy Company* was incorrect to find that Congress intended to abrogate tribal immunity within the text of section 106. It is well established that to abrogate tribal immunity, either congressional legislation must demonstrate intent to abrogate tribal immunity through an explicit, unequivocal expression of congressional intent, or a tribe must waive the right to maintain tribal immunity.[156] The court in *Krystal Energy Company*

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150 *Id.* at 1059.

151 *Id.* at 1057, 1059.

152 Blackhawk, *supra* note 1, at 1808.

153 *Domestic,* BLACK'S LAW DICTIONARY (11th ed. 2019).

154 Blackhawk, *supra* note 1, at 1808.

155 *Id.*

156 *See* Kiowa Tribe v. Mfg. Techs., 523 U.S. 751, 760 (1998); C & L Enters. v. Citizen Band Potawatomi

claimed that section 106 demonstrated a clear congressional intent to abrogate tribal immunity, however the history of tribal immunity as explored earlier in this Comment, as well as case law, demonstrate the opposite.[157]

There is no Congressional intent to abrogate tribal immunity in section 106. The court in *Krystal Energy Company* states that Native Nations are included in the definition of governmental structures as defined by section 101(27), but

> the Supreme Court has referred to Indian tribes as 'sovereigns,' 'nations,' and even 'distinct, independent political communities, retaining their original natural rights,' [and] the trustees cite no case in which the Supreme Court has referred to an Indian tribe as a 'government' of any sort . . . If the Supreme Court considered an Indian tribe to be a 'government,' it would not go to such great lengths to avoid saying so.[158]

Arguendo, even if a Native Nation is considered to be a "governmental unit," the argument still flounders because the question at issue in terms of the abrogation of tribal immunity is not whether Tribal governments are governmental structures that fit into the umbrella of "governmental units" as defined under the Code, but rather whether Congress explicitly and unequivocally intended to abrogate tribal sovereign immunity when it wrote that definition.[159] It did not.

"Explicit, unequivocal expression of congressional intent"[160] implies that there can be no doubt as to the intention of Congress in drafting the legislation.[161] In the matter of the abrogation of tribal immunity by section 106, courts have come out on both sides of the issue, demonstrating that there is nothing "unequivocal" about the potential abrogation.[162] Additionally, there is precedent that a piece of legislation does not abrogate tribal immunity unless it explicitly mentions Native Nations in text of the law.[163] In *In re Whitaker,* the court stated that "where the language of a federal statute does not include "Indian tribes" in definitions of parties subject to suit or does not specifically assert jurisdiction over "Indian tribes," courts find the statute insufficient to express an unequivocal

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Indian Tribe of Okla., 532 U.S. 411, 416 (2001).

157 *See Krystal Energy Co*., 357 F.3d at 1058–59.

158 *In re* Whitaker, 474 B.R. 687, 695 (B.A.P. 8th Cir. 2012).

159 *See In re* Greektown Holdings, LLC, 917 F.3d 451, 459 (6th Cir. 2019).

160 *Id.* at 456.

161 *Id.* at 457.

162 *Id.*

163 *See In re Whitaker*, 474 B.R. at 691.

congressional abrogation of tribal sovereign immunity."[164] Therefore, a statute such as section 106 that abrogates sovereign immunity for "domestic units" should not be interpreted to abrogate sovereign immunity for Tribal governments.[165] Congress did not specifically name Tribal governments within section 101(27), despite naming every other sovereign specifically. Accordingly, the sensible inference is that Congress intended to exclude tribes from this definition as exemplified in the Constitutional interpretive canon that the specific inclusion of one thing or series of things, implicitly implies the exclusion of another.[166] For these reasons, there is no congressional demonstration of an intent to abrogate the sovereign immunity of Native Nations in the text of section 106.

Further, there is no waiver of tribal immunity implicit in section 106. Sovereign immunity may be waived through certain actions around a claim, such as filing a counterclaim or selecting a certain forum.[167] In the same way, certain arguments assert that filing for bankruptcy ought to waive sovereign immunity for the person or governmental unit who filed the bankruptcy petition.[168] However, the sovereign immunity of Native Nations is different than the sovereign immunity given to other governmental units. The application of these rules to tribal immunity is different from the sovereign immunities of other governmental units.

Just as the abrogation of Native Nation sovereign immunity by Congress must be explicit and unequivocal, tribal waiver of immunity must also be express; Native Nations may not waive their sovereign immunity by implication.[169] A tribal waiver of sovereign immunity "must be clear and unequivocal."[170] This is different than a waiver of tribal immunity from a state. A state can implicitly waive its sovereign immunity through certain actions around a claim such as removal of cases that have been filed against them.[171] Tribes that do the same do not waive their tribal immunity.[172] Similarly, states that file a bankruptcy petition waive state sovereign immunity as to the adversary

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164 *Id.*

165 *Id.* at 695.

166 *In re Greektown Holdings*, 917 F.3d at 462.

167 *See* Okla. Tax Comm'n v. Citizen Bank Potawatomi Indian Tribe, 498 U.S. 505, 509 (1991); Tatneft v. Ukraine, 301 F. Supp. 3d 175, 192 (D.D.C. 2018).

168 11 U.S.C. § 101(41) (2019) (person "includes individual, partnership and incorporation, but does not include a governmental unit . . . .").

169 *In re Greektown Holdings*, 917 F.3d at 465–66.

170 *In re* Mayes, 294 B.R. 145, 156 (BAP 10th Cir. 2003).

171 *In re Greektown Holdings*, 917 F.3d 465–66.

172 *Id.*

proceedings later filed as a result of that bankruptcy petition, but the same is not necessarily true of other sovereigns such as Native Nations.[173] The only established implicit waiver of tribal immunity occurs when Native Nations, or corporations formed underneath those nations, sign contracts that include arbitration clauses.[174]

This distinction between arbitration clauses in settled contracts and actions around litigation makes good sense. Removal and filing of counterclaims are affirmative actions, yet they do not inherently require Native Nations to confront the possibility of suit against them, and thus they do not fulfill the requirement of clear waiver of immunity within that affirmative action.[175] Comparatively, arbitration clauses in contracts do require confrontation with the possibility of future suits, and thus the affirmative action of signing the contract with full knowledge of the clauses therein constitutes a clear and unequivocal waiver of tribal immunity.[176] Filing for bankruptcy is more similar to a removal or a counterclaim than it is to the signing of a contract; it is an affirmative action, but it does not mandate that the person or governmental unit that files the petition confronts the possibility of future suit within the text of the petition.

It may be argued that section 106 is comparable to an arbitration clause in that it states that sovereign immunity will be abrogated and thus gives Native Nations fair warning and forces them to confront the possibility of future suit. But this argument is weak because, as discussed, there is nothing unequivocal about section 106's abrogation of tribal immunity.[177] The circuit split on this issue demonstrates that the abrogation is not "unequivocal."[178] Native Nations filing for bankruptcy do not implicitly waive their privilege of sovereign immunity.

The language of section 106 does not demonstrate express congressional intent to abrogate tribal sovereign immunity and filing a bankruptcy petition does not qualify as a waiver of a Native Nation's sovereign immunity. As such, Native Nation sovereign immunity should be maintained within the context of the Code. From a layman's perspective, it may seem that stripping the privilege of sovereign immunity from some governmental structures and maintaining it for others is fundamentally unfair. However, treating sovereign immunities for

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173 *Id.* at 466.

174 *See* C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 420 (2001).

175 *See id.*

176 *See id.*

177 *See In re Greektown Holdings*, 917 F.3d at 457.

178 *Compare id.* at 467, *with* Krystal Energy Co. v. Navajo Nation, 357 F.3d 1055, 1060 (9th Cir. 2004).

different governmental structures with an uneven hand actually supports concepts of fairness because of the practical differences in sovereign immunity as applied through the lens of American jurisprudence to various governmental structures. An examination of the differences of tribal immunity compared to state and foreign sovereign immunity will further illuminate this fact.

B. Tribal Immunity vs. State and Foreign Sovereign Immunity

There are significant differences between the United States jurisprudential view of tribal immunity compared to the sovereign immunity offered to state and foreign governments. This Section will highlight these differences to demonstrate that a statute can abrogate sovereign immunity for certain governmental entities while securing sovereign immunity for Native Nations.

The difference between tribal immunity and state sovereign immunity begins at the creation of the United States nation. The need for explicit language when it comes to tribal immunity exists because states willingly surrendered immunity from suits brought by other states when they signed on to a federal Constitution.[179] Tribes never ceded this privilege because they never agreed to be governed by the federal government; they were forced into this relationship through violence. Thus, the immunity is highly guarded and requires an express statement of congressional intention to abrogate it.[180] The abrogation of sovereign immunity for foreign nations may also be implied absent explicit language because these nations are were not violently forced into being governed by the federal government.

While courts have stated that nothing short of express congressional intention will abrogate tribal immunity, the same is not true for the sovereign immunity of states nor that of foreign nations. Part of the rationale behind the very strict requirement of an unequivocal expression of congressional intent is the fact that Native Nations never agreed to exist under the rule of the federal government.[181] Requirements for the abrogation of state sovereign immunity are not as strictly read; the judiciary will make presumptions of congressional intention to abrogate state sovereign immunity, and do not require an explicit statement of abrogation.

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179 Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 789–90 (2014).
180 *See id.*
181 *See id.*

The Supreme Court has held that if a state moves to remove a case to federal court, that state has effectively waived its sovereign immunity.[182] Similarly, section 1605(a)(1) of title 28 states that the sovereign immunity of foreign nations may be abrogated by explicit or implied withdrawal of such a privilege.[183] A foreign nation may abrogate its sovereign immunity by either agreeing to a clause to arbitrate in the United States, or by agreeing to arbitrate in a nation that signed the New York Arbitration Convention.[184] In *Tatneft*, Ukraine signed a contract in which both parties agreed to arbitrate any disagreements in France as part of Tatneft's contract for stock in the oil company Ukrtatnafta.[185] The court ruled that because the parties agreed to arbitrate in France, and because France signed the New York Arbitration Convention, thereby allowing arbitrations in France to find forum in the United States, the Ukraine should have foreseen a forum in the United States, and had waived its sovereign immunity by implication.[186]

In comparison to the state waiver of the sovereign immunity by motion for removal, a tribe that moves for removal does not waive its immunity through implication in the same way; rather the waiver must be explicit.[187] States may also waive their right to sovereign immunity by filing a counterclaim against a claimant, while Native Nations do not waive sovereign immunity from actions that could not otherwise be brought against it simply by filing a counterclaim.[188] In comparison to the foreign nation waiver of sovereign immunity by arbitration clause, the case law as to the effect of an arbitration clause on a Native Nation is mixed. In *C & L Enterprises*, the Supreme Court held that a consent to arbitration clause was an explicit waiver of tribal immunity.[189]

However, four years later in *Big Valley Band of Pomo Indians.*, the Court of Appeals of California held that an arbitration clause in a contract between an Indian tribe and its employees did not waive tribal immunity because although it did specify forums of jurisdiction, it did not explicitly consent to arbitration.[190] This was distinguished from *C & L Enterprises* because the arbitration clause

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182 *In re Greektown Holdings*, 917 F.3d at 465–66.

183 28 U.S.C.A. § 1605(a)(1) (West).

184 Tatneft v. Ukraine, 301 F. Supp. 3d 175, 192 (D.D.C. 2018).

185 *Id.*

186 *Contracting States*, NEW YORK ARBITRATION CONVENTION, http://www.newyorkconvention.org/countries (last visited Jan. 14, 2019) (demonstrating that France agreed to allowing all arbitration agreed upon in France may also be arbitrated in the United States of America); *see Tatneft*, 301 F. Supp. 3d at 192.

187 *In re* Greektown Holdings, LLC, 917 F.3d 451, 465–66 (6th Cir. 2019).

188 Okla. Tax Comm'n v. Citizen Bank Potawatomi Indian Tribe, 498 U.S. 505, 509–10 (1991).

189 C & L Enters. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411, 423 (2001).

190 Big Valley of Pomo Indians v. Superior Court, 133 Cal. App. 4th 1185, 1191 (Cal. Ct. App. 2006).

only required the arbitration of suits and the enforcement of arbitration awards; it did not include a consent to arbitration.[191] Therefore, while all forum specific arbitration clauses will act as waivers of sovereign immunity for foreign nations, at least in certain jurisdictions, only arbitration clauses that consent to arbitration—explicitly and voluntarily abrogating sovereign immunity—will operate as waivers to tribal immunity.[192] This is one way that the sovereign immunity afforded to Native Nations has a different shape than sovereign immunity granted to state governments and foreign national governments.

The sovereign immunities of foreign nations and of Native Nations are similar in that both may be abrogated by a congressional act, however the immunity of Native Nations is inherently different because Native Nations are domestic to the United States.[193] The subject of tribal immunity is much more pertinent than that of sovereign immunity of foreign nations because Native Nations may only interact economically within the United States; they are forbidden from engaging in trade relationships with foreign nations.[194] If a foreign nation would like to avoid a congressional statute abrogating its sovereign immunity, it has the option of engaging in trade with other nations. Native Nations do not have this ability.[195] They may only trade with other governments that exist inside of the physical borders of the United States, and so they are unable to avoid congressional statutes that abrogate their tribal immunity. The congressional abrogation of tribal immunity affects the economic welfare of Native Nations far more than congressional abrogation of sovereign immunity affects the economic welfare of foreign nations. For these reasons, Congress treats the sovereign immunities of foreign nations and Native Nations differently. This is why it makes sense that a statute could abrogate sovereign immunity for a foreign nation without abrogating sovereign immunity for Native Nations.

Tribes exist without distinction for where tribal activities occurred.[196] A tribe may claim immunity for activities that occurred both inside and outside of tribal lands.[197] In *Michigan v. Bay Mills Indian Cmty.*, the state of Michigan attempted to sue an Indian tribe that purchased land outside of the tribe's reservation and attempted to build a casino upon it because it violated the Indian Gaming

191 *Id.*
192 *See id.*
193 *See* Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014).
194 U.S. CONST. art. I § 8.
195 *Id.*
196 Kiowa Tribe v. Mfg. Techs., 523 U.S. 751, 754 (1998).
197 *Id.*

Regulatory Act of 1988.[198] The Supreme Court held that Michigan could not sue the tribe because its sovereign immunity was not abrogated simply because the casino existed outside of reservation property.[199] The Court held that this result was correct because comity would not exist in the relationship between states and tribes if states were allowed to sue tribes for commerce activity on state lands but Tribes were not permitted to sue states for commerce activity on Tribal lands.[200]

Tribal immunity is more difficult to abrogate, but that does not mean that it is inherently "stronger" than the immunity afforded to states. Congress's plenary power allows it to abrogate tribal sovereign immunity wherever it sees fit because it is a common law doctrine.[201] In comparison, because state sovereign immunity is maintained by the Eleventh Amendment, it may not be abrogated in lawsuits brought by individuals outside of Fourteenth Amendment contexts.[202] Although tribal immunity must be abrogated through an explicit statement of congressional intent, it may be abrogated within any context. Comparatively, state sovereign immunity may be abrogated through implication, but it can only be done in select contexts.

Additionally, state governments may abrogate one another's sovereign immunity in ways that Native Nations cannot.[203] States surrender immunity against particular litigants in two cases: suits by sister states and suits by the United States.[204] One way that states may abrogate another state's sovereign immunity is that a state may open its courts to a private citizen's lawsuit against another state without the other state's consent.[205] In such a case, the Constitution only permits the state adjudicating the case to award damages against the state that is involved in the litigation that are equal to what it would award if its own government were involved in that same litigation.[206] To allow an adjudicatory state to award anything more would evince a "policy of hostility."[207] By allowing states to only make judgments against other states that it would allow against itself, the court ensures that comity continues to exist between states.

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198 *Bay Mills Indian Cmty*., 572 U.S. at 813.
199 *Id.*
200 *Id.* at 808.
201 Seminole Tribe v. Florida, 517 U.S. 44, 59 (1996).
202 *See id.*
203 *See* Blatchford v. Native Village of Noatak, 501 U.S. 775, 782 (1991).
204 *Id.*
205 *See* Franchise Tax Bd. v. Hyatt, 136 U.S. 1277, 1279 (2016).
206 *See id.* at 1280.
207 *See id*.

For example, in *Franchise Tax Board v. Hyatt*, the plaintiff sought to sue the state of California in the courts of Nevada for abusive audit and investigation practices.[208] California courts did not allow such suits against the state by private citizens and barred such litigation, but Nevada courts would allow such a suit to be litigated against the Nevada government.[209] Thus, Nevada was allowed jurisdiction over California so long as the damages awarded were no greater than those that would be awarded if Hyatt were suing the Nevada government for the same charge.[210] While states enjoy this degree of adjudicatory power over one another, Native Nations do not have this same power. A Native Nation may not abrogate a state's sovereign immunity, even if in doing so, the Native Nation is acting in full comity and treating that state the way that the Nation would treat its own government in an identical situation.

States may abrogate one another's sovereign immunity, but Native Nations, in spite of their recognition as domestic entities, do not have this same privilege. Tribes have argued that while the federal government maintained a paternalistic fiduciary or trustee relationship with tribes, it had the ability to sue states on behalf of those tribes, thereby abrogating the state's sovereign immunity by filing the claim. Therefore, when the federal government took a step away from that paternalistic role, section 1362 of title 28 delegated the authority of the federal government to sue on a tribe's behalf back to the tribe.[211] Accordingly, a lawsuit put forward against a state by a Native Nation should abrogate that state's sovereign immunity.[212] However, in *Blatchford*, the Supreme Court dismissed this argument.[213] It held that sovereign exemption cannot be delegated in such a way, and did not allow the Native village to sue the state of Alaska because Alaska could assert a defense of sovereign immunity.[214] The Noatak Nation had no way to pursue damages incurred as a result of Alaska's breach of contract.

States also have a level of non-reciprocal authority over Native Nations that fall within the borders of any given state. The Indian Gaming Regulatory Act of 1988 grants states a power over tribes that they would not otherwise have; a

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208 *Id.*

209 *See id.*

210 *Id.*

211 28 U.S.C.A. § 1362 (West) ("The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."); Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 783 (1991).

212 *See Blatchford*, 501 U.S. at 783.

213 *See id.* at 786.

214 *See id.*

measure of authority over gaming that takes place on Indian lands.[215] Under this statute, a state has the right to regulate gambling occurring on Native land and has exclusive authority to approve the grant of gambling licenses to new institutions within state borders, even if it falls within the physical limits of a Native Nation.[216]

While the Act granted states the power to control gambling on Native lands, it also required states to take on responsibilities around that gambling, including requiring state efforts to expediate the grant licenses and to be proactive in regulatory duties.[217] Cases soon arose where state governments failed to uphold their responsibilities and follow the guidelines that the Indian Gaming Regulatory Act had laid out, but when Native Nations filed injunctive litigation to pressure state governments to follow through on these responsibilities, the suits were dismissed under the doctrine of state sovereign immunity.[218] Courts consistently decided that even though tribal power was abrogated and Native Nations depended on state governments to run major sources of income for tribal communities within Native territories, litigation to hold states to their commitments was prevented from moving forward.[219] The tribe had to follow the regulatory laws around gambling that were laid out by the state, but could not sue the state when it failed to meet its responsibilities around those same laws.[220]

A state's power to encroach upon the sovereignty of Native Nations does not stop with the Indian Gaming Regulatory Act of 1988 because of the large degree of power that states hold over Native Nations comes from taxation law. Native governments do have certain powers of taxation. They may tax their own citizens on sales of products to other Native citizens within Native lands.[221] This is a very narrow sliver of economic exchanges that are available for taxation. In comparison, the state has the authority to collect taxes on sales within tribal lands to non-Native populations, to collect taxes on sales between citizens of Native Nations that occur outside of tribal lands, and to collect income taxes on Native citizens who live outside of tribal lands.[222]

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215 Seminole Tribe v. Florida, 517 U.S. 44, 58 (1996).
216 *See id.*
217 25 U.S.C.A. § 2701 (West).
218 *See Seminole Tribe*, 517 U.S. at 73.
219 *See id.* at 58.
220 *See id.*
221 Okla. Tax Comm'n v. Citizen Bank Potawatomi Indian Tribe, 498 U.S. 505, 513 (1991).
222 *Id.*

Taxation is a major economic factor for any governmental structure and allows governments to create revenue necessary to function and provide services to its citizens. Allowing states to collect the vast majority of taxes that revolve around the exchange of goods on Native lands effectively prevents Native Nations from taxing sales within their own lands, because this double taxation would stymie economic growth.[223] Native Nations could try to tax these exchanges twice but that would encourage buyers and sellers to move exchanges outside of Native lands and would further harm Native economies. Additionally, the risk of having to pay double taxes on certain goods would discourage companies from creating new businesses on Native lands.[224] States therefore hold massive economic powers over Native Nations that fall within their borders, without any sense of comity. Native Nations can exert no such power over the state in which it is located.

This power dynamic between states and Native Nations is relevant in an analysis of sovereign immunity because the doctrine of sovereign immunity is derived from the sovereignty of a governmental structure.[225] Therefore, the way that the sovereign immunities of two distinct governmental bodies interact expresses something about their right to sovereignty. The litigatory interactions between states and Native Nations and the differences of the sovereign immunity afforded to a state versus the sovereign immunity afforded to a Native government clearly demonstrates that a state's sovereign identity and a Native Nation's sovereign identity are distinct from one another.

The sovereign immunity of Native Nations, both theoretically and practically, is separate and apart from the sovereign immunity of state governments within the United States. This distinction is necessary when it comes to discussions of fairness in the law. Because there is no real "fairness" in the comparison of state and tribal sovereign immunity, it makes good sense that a congressional act could abrogate sovereign immunity for a state while maintaining sovereign immunity for Native Nations. In fact, because the precedential jurisprudence allows states to impede upon tribal immunity in ways that are not reciprocal, concepts of fairness should be encouraged by making tribal immunity more difficult to abrogate than state sovereign immunity.

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223 *See* Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 811 (2014).

224 *Id.* at 810.

225 *See In re* Greene, 980 F.2d 590, 596 (9th Cir. 1992).

III. THE FUTURE: REPARATIONS, REPERCUSSIONS AND THE EXPRESSIVE POWER OF THE LAW

Fairness in the law is such a dynamic concept because many sociologists believe that people's trust in the law, and the fact that the people are willing to bend to the will of the law and recognize it as a legitimate construct, is partially based on the concept that the law is just.[226] Concepts of fairness are so inherent to United States concepts of justice that the Fourteenth Amendment includes the Due Process clause to ensure both procedural and structural fundamental fairness in the application of the law to United States citizens.[227] Fairness is quintessential to our understanding of justice. However, this concept of fairness is not fully fleshed out in many of the court opinions around tribal immunity and its application to section 106 of the Code because, though they consider the law around tribal immunity, they fail to consider the history. In failing to consider the history, courts fail to consider the fairness of a carve out for Native Nations as an equalizer to encourage the economic development of Native communities.

The final Section of this paper will explore this brand of fairness. It will consider tribal immunity as a continuation of the reparation begun by the Indian Reorganization Act, and it will discuss the importance of these conversations to the expressive power of the law and how this affects the future of tribal immunity in the context of 106 of the Code.

A. Tribal Immunity as Reparation

Reparations movements in the United States are defined by the Black reparation movement. These movements have existed for as long as civil rights.[228] However, reparations as a concept has had waves of popularity, with the fourth wave occurring rather recently.[229] This new wave is considerably different than past iterations of the argument. Former concepts of reparations were based upon economic funding for individuals. Built upon a civil rights conceptualization of racial politics, they focused on access to the courts as the harbinger of justice, and reparations were sought in the form of claims filed against the families of former white landowners.[230] Black Americans filed

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[226] *See* Richard H. McAdams, *The Expressive Power of Adjudication*, 2005 U. ILL. L. REV. 1043, 1045 (2005).

[227] *See* Lassiter v. Dep't of Soc. Serv. of Durham Cty., N.C., 452 U.S. 18, 24 (1981).

[228] *See* Adjoa A. Aiyetoro & Adrienne D. Davis, *Historic and Modern Social Movements for Reparations: The National Coalition of Blacks for Reparations in America and Its Antecedents*, 16 TEX. WESLEYAN L. REV. 687, 694–96 (2010).

[229] *See* Yamamoto, Kim & Holdin, *supra* note 22, at 1–2.

[230] Yamamoto, Kim & Holdin, *supra* note 22, at 23.

claims that relied mostly on tort and quantum meruit contract law to seek economic justice for the labor of their ancestors and for the emotional damages caused by the legacy of slavery.[231] The issue with the conceptualization of reparations as a demand for compensation from a realpolitik perspective was that it was easy to attack from multiple perspectives.[232] Defense lawyers attacked it on legal grounds, challenging statutes of limitations and standing while conservative scholars attacked it from an academic perspective, questioning whether wealthy Black citizens ought to receive financial compensation.[233] In addition to academic attacks, there was a general skepticism from the white public who felt that they should not be forced to pay for the sins of their ancestors.[234] Additionally, this form of reparations failed to consider the emotional toll that slavery had on Black communities. While it asked for emotional damages, it did nothing to remedy by way of therapeutic catharsis, the emotional toll of centuries of violence.[235]

In 2006, the Seventh Circuit ended federal access to the individual-claim form of reparations in *In re African American Slave Descendants Litigation*.[236] Judge Posner affirmed the lower court's holding that the plaintiffs had no standing to pursue their tort and unjust enrichment claims because "[i]t would be impossible by the methods of litigation to connect the defendants' alleged misconduct with the financial and emotional harm that the plaintiffs claim to have suffered as a result of that conduct" and because the "causal chain is too long and has too many weak links for a court to be able to find that the defendants' conduct harmed the plaintiffs at all."[237]

Following this loss, reparations started to move in a new direction that focused on three major aspects of repair: "recognizing and accepting responsibility for historic injustice; repairing present-day damage traceable to past injustice; and building productive group relationships."[238] These new wave conceptualizations of reparations focus on history as a healing point; it does not ignore or excuse the past, but nor does it seek vengeance.[239] Rather, it focuses

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231 *See* Yamamoto, Kim & Holdin, *supra* note 22, at 23.

232 *See* Yamamoto, Kim & Holdin, *supra* note 22, at 23.

233 Yamamoto, Kim & Holdin, *supra* note 22, at 23–24.

234 Yamamoto, Kim & Holdin, *supra* note 22, at 23–24.

235 Yamamoto, Kim & Holdin, *supra* note 22, at 39–40.

236 Yamamoto, Kim & Holdin, *supra* note 22, at 25.

237 Yamamoto, Kim & Holdin, *supra* note 22, at 25 (quoting *In re* African-American Slave Descendants Litig., 471 F.3d 754 (7th Cir. 2006)) (alteration in original).

238 Yamamoto, Kim & Holdin, *supra* note 22, at 31.

239 Yamamoto, Kim & Holdin, *supra* note 22, at 46 (quoting DONALD W. SHRIVER, JR., AN ETHIC FOR ENEMIES: FORGIVENESS IN POLITICS (1995)).

on restoring political and economic power to disenfranchised communities to allow them to discuss their pain and move away from it through community bonding.[240] Economic healing has always been the basis for Black reparation; from the earliest days of reparation theory, the movement was seen as a way to financially heal Black citizens that had been economically disenfranchised by slavery, and to use this currency for broader Black empowerment within the United States social sphere.[241] However, the focus on community building as an address to the emotional effects of slavery is a relatively new advent.[242]

This focus on community building is supported by successful reparations movements around the world. Perhaps one of the most successful reparations movement, the reparations of the politically oppressed class during Pinochet-rule in Chile, followed such a structure.[243] The government addressed victims of the dictatorial regime directly with "pensions, social services, educational benefits, public recognition, monuments, sites of memory, and health assistance" and encouraged open public discussion of the injustices as a way for citizens to become more involved with the democratic process.[244] These public funded economic resources for disenfranchised communities encouraged community growth and healing. A similar community bonding aspect was a part of the reparation efforts in both post-Apartheid South Africa and Rwanda.[245]

Like all of these movements, Native Nations are also deserving of reparations due to the history of oppression and systematic violence that the United States government has committed against them, from the breaking of peace treaties during manifest destiny to the robbing and assimilation of Native children.[246] The Black reparations movement in the United States and successful reparations movements internationally are relevant because they inform what a reparations movement for Native peoples should look like. Through this lens, we can understand that a history of reparations already exists for Native peoples.

Reparation efforts for Native people are arguably more successful than have been reparations efforts for Black Americans. The Indian Reorganization Act recognized and facilitated the power of Native Nations to self-govern and reinforced the doctrine of inherent tribal sovereignty.[247] It granted Native

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240 Yamamoto, Kim & Holdin, *supra* note 22, at 33–34, 45.
241 *See* Aiyetoro & Davis, *supra* note 228, at 719.
242 *See* Yamamoto, Kim & Holdin, *supra* note 22, at 31.
243 Yamamoto, Kim & Holdin, *supra* note 22, at 65.
244 *See* Yamamoto, Kim & Holdin, *supra* note 22, at 65.
245 *See* Yamamoto, Kim & Holdin, *supra* note 22, at 66–68.
246 *See* Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831); Blackhawk, *supra* note 1, at 1818.
247 Blackhawk, *supra* note 1, at 1813.

Nations a limited power of self-determination. In doing so, it intended to confer to Native Nations the ability to grow economically in order to build community; deal with the emotional repercussions of occupation, genocide, and assimilation; and thrive independently from the federal government.[248]

Congress also passed the Indian Child Welfare Act of 1978 to "promote the stability and security of Indian Tribes and families."[249] This Act was designed against the backdrop of the United States government taking Native children, putting them into orphanages and assimilation camps and pushing through hasty adoptions.[250] The Act made it much more difficult for termination of parental rights in Native populations and gave Native communities preference in cases of adoption.[251]

Both of these Congressional Acts confronted the three major goals of the modern Black reparation movement: "recognizing and accepting responsibility for historic injustice; repairing present-day damage traceable to past injustice; and building productive group relationships."[252] The Indian Reorganization Act recognized and accepted responsibility for the occupation and exploitation of Native people and the Indian Child Welfare Act recognized and accepted responsibility for a history of stealing Native children away from their families in an effort to destroy Native culture.[253] The Indian Reorganization Act tries to repair past injustice by promoting economic growth and political self-determination in Native Nations, and the Indian Child Welfare Act tries to repair injustice by ensuring that Native Nations can keep their children and continue developing their culture.[254] Both Acts build productive group relationships by allowing Native communities to grow, become more self-sufficient, and build separate from the intervention of the federal government. In this way, these Congressional Acts constructed around Native populations have been the most effective form of reparations in the history of the United States.

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[248] *See* Blackhawk, *supra* note 1, at 1813; *In re* Greene, 980 F.2d 590, 596 (9th Cir. 1992); Conkright, *supra* note 43, at 1182–83.

[249] CYNTHIA R. MABRY & LISA KELLY, ADOPTION LAW: THEORY, POLICY AND PRACTICE 10 (William S. Hein & Co., 2d ed. 2010).

[250] *Id.* at 274.

[251] *Id.*

[252] Yamamoto, Kim & Holdin, *supra* note 22, at 31.

[253] *See* Blackhawk, *supra* note 1, at 1813; *In re Greene*, 980 F.2d at 596; Conkright, *supra* note 43, at 1182–83; MABRY & KELLY, *supra* note 249, at 274.

[254] *See* Blackhawk, *supra* note 1, at 1813; *In re Greene*, 980 F.2d at 596; Conkright, *supra* note 43, at 1182–83; MABRY & KELLY, *supra* note 249, at 274.

The history of the sovereignty of Native Nations as an instrument of reparations to Native people demonstrates that the benefits of that sovereignty, chiefly that of sovereign immunity, ought to be considered carefully, and should be consciously preserved. The Supreme Court understood this when it stated that the abrogation of tribal immunity required express congressional intent to do so, thereby differentiating it from other forms of sovereign immunity recognized by the federal court system.[255] However, in these opinions, the court failed to comprehensively explain the historical lens that grants tribal immunity such credence. This history must be understood and reflected upon to appreciate the importance of tribal immunity to Native Nations, and within the context of our society. Not only does the preservation of this doctrine promote economic growth within tribal lands, but it also makes a statement about the importance of atoning for the trauma imposed upon Native populations.

In reparations, "the stakes are high and include both healing for those still hurting and progress for America's communities marked by misunderstanding, mistrust, and division [as well as] the healing of the nation itself."[256] In a period in United States history that is punctuated by distrust and division, the healing process of reparations is more relevant than ever. Additionally, reparations push the United States to confront a past of human rights violations that it has never fully come to terms with.[257] Given the United States' position as the "center of democracy" it needs to confront its past to be an example of what a democratic political system can offer a society.[258] United States acknowledgement of its human rights violations domestically could begin to transform this image and could perhaps echo internationally.[259] Society's trust in a system of law itself is at stake in the dialogue about reparations and economic justice.[260]

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[255] Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 790 (2014).

[256] *See* Yamamoto, Kim & Holdin, *supra* note 22, at 1–2.

[257] Yamamoto, Kim & Holdin, *supra* note 22, at 70–72.

[258] *See* Yamamoto, Kim & Holdin, *supra* note 22, at 70–72.

[259] Although the United States touts itself as a major player in ensuring international human rights, its policies demonstrate something different. "The Bush administration's hostility toward international agreements on the environment, nuclear testing, human rights, and the International Criminal Court, as well as its near-unilateral prosecution of the Iraq war, initially fueled [international] skepticism." *See* Yamamoto, Kim & Holdin, *supra* note 22, at 70–72. The United States did little to assuage these international fears by committing human rights violations in its Guantanamo Bay and Abu Ghraib prisons and by embracing torture as a form of "interrogation." *See* Yamamoto, Kim & Holdin, *supra* note 22, at 70–72. The negative international perception of the United States' human rights policy continued with Obama's policy of drone strikes in Libya and most recently with Trump's use of detention centers as a deterrent to undocumented immigration and the assassination of Irani general, Qasem Soleimani.

[260] Aiyetoro & Davis, *supra* note 228, at 690.

The continuance of a strong tribal immunity doctrine is important because it is a perpetuation of the reparation efforts that have been legislatively enacted on behalf of Native Nations. Weakening the doctrine of tribal immunity by abrogating it in the context of section 106 of the Code is dangerous because it impedes reparations efforts and makes a strong statement about the United States' concepts of justice for groups that the federal government has oppressed in the past.

B. The Expressive Power of the Law

The power of law is not only that it is informed by the society in which it exists, but also that, conversely, it can influence society by communicating information that "can change beliefs and thereby change behavior."[261] Apart from simple sanctions, the law has power to influence the behavior of individuals.[262] Therefore, the law surrounding the tribal immunity makes a direct statement as to the way that the federal government considers Native Nations.

The Indian Reorganization Act and the Indian Child Welfare Act, among others, recognized the sovereignty of Native Nations by granting them the power to create Constitutions, incorporate businesses and reclaim tribal citizens.[263] These laws returned to a recognition of Native peoples as autonomous and apart from the federal government of the United States, an understanding that existed from the very beginning of colonial settlement in North America.[264] The recognition of the sovereignty of Native governments strengthened the doctrine of tribal immunity because sovereign immunity is borne out of any given government's sovereign status.[265] The law's consideration and continued respect for the doctrine of tribal immunity expresses regard for Native Nations as sovereign governments, but also makes a statement about a renewed atonement for the prior treatment of these nations. As the federal relationship with Native Nations changed, and governmental autonomy was handed back to Native peoples as a form of economic reparation, the importance of tribal immunity increased. Autonomy for Native Nations was a renewed commitment to recognizing the sovereignty of those Nations, and so the privileges of that sovereignty became part of a legislative reparation framework.

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261 Richard H. McAdams, *Reply to Commentators*, 42 LAW & SOC. INQUIRY 76, 80 (2017).

262 *Id.*

263 *See* MABRY & KELLY, *supra* note 249, at 274; *In re* Greene, 980 F.2d 590, 596 (9th Cir. 1992); Conkright, *supra* note 43, at 1182–83.

264 *See* Wood, *supra* note 23, at 1622; Seielstad, *supra* note 25, at 683.

265 *See In re Greene*, 980 F.2d at 596.

Native Nations were robbed of their sovereignty and forced into a paternalistic association with the federal government. The renewal of Native government's sovereign status and high regard for tribal immunity is a statement about an effort on the part of the federal government to repair its relationship with Native peoples. Damaging or weakening this doctrine would be a statement that reparations to Native populations have been completed. The statistics on poverty, alcoholism and drug abuse on tribal lands demonstrates that such a statement would be ill-advised. Tribal immunity is one of the few tools that Native Nations have to encourage economic security for their communities. It should be maintained not only because legislative history and court doctrines around tribal immunity heavily favor its maintenance, but also because it operates to express continued commitment by the federal government to repair Native economies and communities.

The reparative nature of tribal immunity justifies the respect that it is given in the law because it creates a sense of fairness that is integral to a society's respect and admiration for the law. This is especially true in the case of traditionally disenfranchised communities. Traditionally disenfranchised communities may inherently distrust the operation of law because of the way that it is manipulated against them. In these scenarios, fairness is an important consideration because the principle of fairness enhances a given community's well-being in feeling that the law is a just system that the community can prosper under.[266]

Fairness is a tricky concept because it changes depending on who is consulted. For example, in a contract between a Native Nation and a non-Native business, two distinct opinions of fairness are present. The Native Nation is likely to say that the maintenance of its tribal immunity in its dealings with the non-Native business is fair as a source of reparations for years of trauma incurred by the federal government. The non-Native business will likely argue that a revocation of tribal immunity would be fair so that both parties have the same risk of lawsuit if they fail to uphold their end of the contract. In such a situation, which opinion is inherently fairer? Because of the policy of tribal immunity as reparations and welfare for Native people, the former interpretation is inherently fairer. It is inherently better policy for the nation because "whenever a notion of fairness leads one to choose a different rule from that favored under welfare economics, everyone is necessarily worse off as a result."[267] By promoting the success of a traditionally socially disenfranchised group through the law, the law

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[266] *See* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 982 (2001).

[267] *See id.* at 1012.

becomes inherently fairer by creating a more even playing field and therefore a greater sense of equality for all of those that it applies to. Conserving tribal immunity is therefore good policy in that it expresses a fairer version of the law by promoting native success.

Understanding tribal immunity as a reparative action is also good policy under the remedial purpose canon. The remedial purpose canon states that statutes should be more liberally construed when the statute has a remedial purpose.[268] For example, in *International Brotherhood of Painters & Allied Trades Union*, a union sued an employer for failure to contribute to its employees' pension plans, contrary to collective bargaining agreement that it had engaged in with the union.[269] The court found in favor of the union and depended, in part, on a liberal reading of ERISA's remedial purpose to protect employees in order to reach this decision.[270] Given that the statutes—chiefly, the Indian Reorganization Act—that grant sovereignty and sovereign immunity to Native Nations are a reparative effort on behalf of Congress, all subsequent readings of law involving those reparative efforts should be read liberally in favor of the preservation of Native sovereignty and the privileges associated with it.

The law also expresses social norms in that it creates focal points from which parties may contract.[271] That is to say that the law gives parties a variety of central points from which to begin contracting and creating deals. These focal points resolve immediate disputes and address future issues by giving parties a place to begin which serves as a benefit to both parties.[272] There is concern that allowing tribal immunity within the context of section 106 of the Code will be unfair for creditors of Native corporations because they will meet the unforeseen consequence of being unable to collect if the Native Nation defaults in bankruptcy payments. However, by defining the focal point from which parties begin to contract, there is no risk of this, because any creditor who engages in business with Native Nations will understand that the Nation may be able to claim tribal immunity in any future bankruptcy proceeding and should plan accordingly. This consideration should be included in any future contracting, and liens may be attached accordingly to make contracts more appealing. Once

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[268] *See* SEC v. CM Joiner Leasing Corp., 320 U.S. 344, 353 (1943); Niagara Mohawk Power Co. v. Chevron USA, Inc., 596 F.3d 112, 132 (2d Cir. 2010).

[269] Int'l Brotherhood of Painters & Allied Trades Union v. George A. Kracher Inc., 856 F.2d 1546 (D.C. Cir. 1988).

[270] *Id.*

[271] McAdams, *supra* note 261, at 80.

[272] McAdams, *supra* note 226, at 1049.

the reality of tribal immunity is known, contracts with Native Nations will shift accordingly to center around this new defined focal point.

There is concern that Native Nations may manipulate this advantage to the disadvantage of less knowledgeable businesses. This is a possibility. However, there is a doctrine in criminal law that is applicable here: ignorance of the law is no excuse. Contracting parties that engage in high stakes contracts should take the time to understand the focal points from which their contracting begins. Inevitably, "there is always a risk that those who wield power will use that power to subordinate," but this does not mean that power should not be granted in the first place.[273] All power carries with it the potential for corruption, but the granting of a strong and solid tribal immunity doctrine to Native Nations embraces concepts of fairness and justice.

CONCLUSION

Tribal immunity should not be abrogated in the context of section 106(a) of the Code because the precedent around the revocation of tribal immunity demands either a clear and unequivocal abrogation from Congress or a clear intent to abrogate immunity from the Native Nation itself. Neither is present in this case.

Many cases surrounding this issue have made these same legal arguments. However, these arguments falter because they do not discuss and reflect upon the history of tribal immunity and the reasons that it exists. In failing to do so, they inherently weaken the doctrine. A discussion and reflection upon how and why tribal immunity exists and why it is distinct from state sovereign immunity is necessary because it demonstrates that the decision to maintain tribal immunity in the context of the Code is in line with historical congressional intent, and therefore continues to reinforce the power of tribal immunity. Tribal immunity has been weakened in recent history by erasing the history of how it came to be, and in doing so, painting tribal immunity as something that was created without cause and that can be destroyed without cause.

Tribal immunity should not be abrogated in section 106 of the Code because the legal precedent dictates that this would be a mistake and the history of the relationship between Native Nations and the federal government demonstrates that the federal government intended the renewal of Native sovereignty as a form of reparations. Federal laws surrounding Native Nations demonstrate that

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[273] Blackhawk, *supra* note 1, at 1871.

Congress continually intends to encourage the economic growth of Native societies by granting them autonomy that gives them economic privileges, chiefly the privilege of sovereign immunity. Allowing the abrogation of tribal immunity in section 106(a) would go against the established relationship that the federal government currently has with Native peoples and would send a negative message about the way that the United States treats disenfranchised communities within its own borders.

The Supreme Court should grant certiorari to hear this case and should clarify within the decision that tribal immunity should be maintained within bankruptcy hearings; that section 106 of the Code does not abrogate sovereign immunity for Native Nations.

JOSHUA SANTANGELO*

* Notes and Comments Editor, *Emory Bankruptcy Developments Journal* (Vol. 37); J.D. Candidate, Emory University School of Law (2021); B.S. in Spanish and Latin American Studies, St. Mary's College of Maryland. Thank you to Professor Fred Smith for serving as my faculty advisor and for guiding my organization of this comment. Thanks to the staff and editors of the *Emory Bankruptcy Developments Journal* for helping me to hone my ideas and for preparing this comment for publication. Thank you to my family and friends for their constant support and for giving me the confidence to pursue my goals. Thank you specifically to my mother and father, Sallie and Doug Santangelo, for giving me the historical education that I did not receive in school.