

Placing a Limiting Principle on Federal Monetary Influence of Tribes

Cody McBride*

American Indian tribes are strange sovereigns. Though subject to the ultimate sovereignty of the United States in many ways, tribes retain powers that have not been explicitly divested by federal statute or treaty, or implicitly divested by restraints of tribes' protectorate relationship with the United States. Defining tribal membership is one undivested power, and the federal government, including the Supreme Court, has recognized that particular power's importance to tribes. Even so, this power, as well as others currently nondivested, appear to be subject to congressional influence should Congress choose to act.

In fact, Congress has chosen to act, and it uses many methods to do so. One such method, monetary influence, is particularly problematic. Because of its historical policy towards Indians, the United States is responsible for tribes and tribal peoples' reliance on federal services and programs. Moreover, unlimited monetary influence makes it harder for tribes to plan to escape this reliance, and defunding of federal services and programs negatively impact tribal members in ways unrelated to the underlying dispute. When federal influence is necessary, there are better methods for Congress to use. With these things in mind, Congress should not seek to influence tribes through defunding or threats thereof. This is especially true for tribal decisions regarding fundamental, nondivested powers. Yet monetary influence of fundamental, nondivested powers happens.

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* Clerk at United States District Court for the Eastern District of Arkansas; J.D., University of California, Berkeley, School of Law, 2013; B.A., Arkansas Tech University, 2010. Special thanks to Scott Williams and Curtis Berkey for their wise advice and constant encouragement throughout the writing process. I also am grateful for the hard work and thoughtful suggestions of the *California Law Review* editors. As always, thanks to my wife, Krisanya, for her unwavering support.

A striking example of monetary influence is the federal government's withholding of funding from and threat to sever its government-to-government relationship with the Cherokee Nation until the Nation reinstated as tribal members the Cherokee Freedmen. The Freedmen are descendants of Cherokee-owned slaves who were granted Cherokee citizenship in the Treaty of 1866. A 2007 amendment to the Cherokee Constitution purported to revoke Freedmen citizenship.

Given the complicated relationship between tribes and the federal government, a limiting principle is needed to incentivize Congress to use other methods. Existing legal doctrines are insufficient, so the search must turn elsewhere. Federalism provides a compelling principle in an analogous situation: federal monetary influence of states. The induce-compel principle limits Congress to using funds to "induce" state actions that have some relationship to those funds; Congress cannot "compel" actions. I propose that the induce-compel principle be applied to congressional monetary influence of tribes. Though arguably mild, the principle has teeth, as it likely would have prevented congressional defunding of the Cherokee Nation and certainly would have prevented severance of the Nation's government-to-government relationship with the United States. More importantly, adoption of such a principle would give tribes more true sovereignty.

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INTRODUCTION

The Cherokee Nation’s 2011 principle chief election was contentious and controversial, not because of its candidates or substance, but because of who was not allowed to vote. Mere days before the election, the Cherokee Supreme Court approved a change in the Nation’s membership requirements that disenrolled and disenfranchised thousands of Cherokee Freedmen—the descendants of Cherokee-owned slaves who were granted Cherokee citizenship in the Treaty of 1866. In response, Congress introduced multiple bills threatening the Cherokee Nation’s federal funding and government-to-government relationship with the United States. Whether its position was right or wrong,¹ Congress influenced the Nation’s membership decision through financial coercion. After Congress froze the Nation’s federal housing funds, the Nation temporarily settled with the Freedmen, who were reinstated as members in time for a special runoff election.

This paper focuses on one of the many interesting and important questions² raised by the 2011 Cherokee election and its aftermath: What should be the extent of the federal government’s monetary influence of tribal decisions through defunding or threats thereof? To establish the background necessary to answer this question, Part I briefly looks at general principles of tribal sovereignty, particularly the fundamental, nondivested tribal power to define tribal membership.

Part II examines the federal government’s power to influence tribal decisions and lists common legislative and executive methods the government uses to exercise that power. It then explores in more detail a particular method: the federal government’s monetary influence on tribes. To do so, Part II studies the recent developments of the Cherokee Freedmen controversy, during which

1. This question has been analyzed extensively elsewhere, through tribal and federal courts, academic studies, and the court of public opinion, both on a local and national scale. While I may make a few judgments throughout this Comment and cite the opinions of others, an extended analysis of Freedmen citizenship in the Cherokee Nation is beyond this Comment’s scope and would distract from its purpose.

2. For example, who is or should be considered an American Indian for tribal membership purposes? More specifically, do the Freedmen have a sufficient claim? These questions have been analyzed extensively elsewhere and are beyond the scope of this Comment, so I only mention them here.

the federal government used defunding and threats thereof to influence the Cherokee Nation's actions.

Part III explains why a limiting principle should be placed on Congress's monetary influence of tribes. It then searches existing legal doctrines and analogous situations for such a limiting principle. Ultimately, I conclude that the limiting principle that best fits and is most easily transferable to the tribal context is one that guides the federal-state relationship: the induce-compel principle. This principle distinguishes between federal uses of funds "to induce" and "to compel" and only allows the former. In part because the underlying rationale behind this limiting principle applies with even more force to tribes than to states, Congress is more likely to accept and apply this principle to itself. Though not the only way, adoption by Congress is the most likely means through which a limiting principle will be put in place. Even if the induce-compel principle and its resulting protection is mild, the symbolic weight of congressional recognition that tribes should be free to make their own sovereign decisions without federal monetary compulsion will be an impactful step toward true tribal sovereignty.

I.

TRIBAL SOVEREIGNTY AND THE TRIBAL POWER TO DEFINE MEMBERSHIP

Tribal sovereignty is embodied and recognized in the U.S. Constitution, treaties between tribes and the United States or colonial powers, Supreme Court jurisprudence, and congressional legislation.³ American Indian tribes are "strange sovereigns."⁴ Unlike foreign governments, Indian tribes are in many ways subject to the ultimate sovereignty of the federal government,⁵ which nonetheless has a duty to protect their interests under the trust doctrine.⁶ The trust doctrine, which evolved from early tribal treaties, statutes, and Supreme Court opinions, provides that the federal government and Indian tribes share a "trust or special relationship."⁷ Yet as "domestic dependent nations,"⁸ a term used by Chief Justice John Marshall to label the "unique and paradoxical constructions" that are Indian tribes,⁹ tribes do not share the status or rights of

3. Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 822–27 (2007).

4. Nell Jessup Newton, *Federal Power over Indians: Its Source, Scope, and Limitations*, 132 U. PA. L. REV. 195, 197 (1984).

5. *Id.*

6. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04[3][a] (Nell Jessup Newton ed., 2012 ed.) (tracing the development of the doctrine) [hereinafter COHEN'S HANDBOOK].

7. *Id.*

8. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 2 (1831).

9. Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1110 (2004) ("Sovereignty ordinarily entails powers of self-protection for which a nation-state requires no positive legal authority, as well as the right of a state to exercise power freely within its territory. American case law, however, has limited tribal governmental

states, and tribes or tribal members are not subject to state laws within reservation boundaries without congressional consent.¹⁰

Instead, Indian tribes are independent sovereign nations whose existence predates the Constitution.¹¹ As such, tribal governmental powers are inherent powers of limited sovereignty.¹² Known as the “reserved rights” doctrine, this principle means tribes retain all powers that have not been divested by federal statute, treaty, implicit restraints of their protectorate relationship with the United States, or inconsistency with their dependent status.¹³

Within this framework, courts have explicitly recognized several fundamental tribal powers that have not been wholly divested. Some of the most important of these fundamental powers include the power to establish a government;¹⁴ the police power;¹⁵ the power to administer justice;¹⁶ the power to exclude persons from the reservation;¹⁷ the power to raise revenue through

authority to domestic and internal matters, and has declared that even these powers are subject to defeasance by Congress.”)

10. See *Williams v. Lee*, 358 U.S. 217, 219 (1959).

11. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832); Krakoff, *supra* note 9, at 1117 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978)).

12. See, e.g., *United States v. Winans*, 198 U.S. 371, 381 (1905) (implying that tribal government powers are inherent by describing a treaty as “not a grant of rights to the Indians, but a grant of right from them—a reservation of those not granted”); *Worcester*, 31 U.S. (6 Pet.) at 559–60 (stating that “[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial” and “possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent”).

13. CHARLES WILKINSON, *INDIAN TRIBES AS SOVEREIGN GOVERNMENTS* 32 (2004); see *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (“Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.”); *Winans*, 198 U.S. at 381.

14. “[T]ribes may adopt whatever form of government best suits their own practical, cultural, or religious needs.” WILKINSON, *supra* note 13, at 33 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62–63 (1978); *Pueblo of Santa Rosa v. Fall*, 273 U.S. 315 (1927)). However, despite the broad power to choose the form, there may be practical benefits to basing it off the United States’ system. For example, under the Tribal Law and Order Act, tribes that adopt certain judicial procedures are given broader criminal jurisdiction. See Tribal Law & Order Act, Pub. L. No. 111-211 (allowing tribal prosecution of non-Indians for crimes carrying sentences of more than one year only when certain procedural conditions are met, such as provisions for a legally trained and licensed defense attorney paid by the tribe, a legally trained judge, published codes, and recorded proceedings).

15. See, e.g., *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (describing the power to regulate land use on reservations through zoning); *Jones v. Meehan*, 175 U.S. 1 (1899) (discussing the power to prescribe the manner of descent and distribution of trust or restrict Indian property inheritances).

16. See, e.g., *Wheeler*, 435 U.S. 313 (holding that the Navajo Tribe retained sovereign power to punish tribal offenders because this power had never been given up explicitly or implicitly); *Ex parte Crow Dog*, 109 U.S. 556 (1883) (holding that a tribe had jurisdiction over the murder of one American Indian by another). Congress and the Supreme Court have limited this power, however. See, e.g., Indian Civil Rights Act, 25 U.S.C. §§ 1301–41 (2012) (limiting fines to \$5,000 and imprisonment to one year); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) (denying tribes’ criminal jurisdiction as applied to non-Indians).

17. *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476 (9th Cir. 1985). This too has limits. See generally *United States v. White Mountain Apache Tribe*, 784 F.2d 917 (9th Cir. 1986)

taxation;¹⁸ the power to charter business organizations;¹⁹ the power of sovereign immunity;²⁰ and, most important for the following sections, the power to define membership.²¹

Tribes have taken varied approaches in setting membership requirements.²² Though tribes may do so through written law, treaty, intertribal agreement, or by custom, most tribes have defined their membership through constitutional or tribal law.²³ “Today, virtually all tribes require some measure of tribal descent to enroll,” often determined by tracing descent from a particular census roll of a tribe or a certain blood quantum—that is, a requisite degree of Indian blood.²⁴ For example, the Wampanoag Tribe of Gay Head (Aquinnah) requires descent from a person listed on the tribe’s 1870 census roll,²⁵ while the Grand Traverse Band of Ottawa and Chippewa require one-fourth Indian blood, of which one eighth must be Michigan Chippewa or Ottawa blood.²⁶ The Chitimacha Tribe of Louisiana required one-sixteenth Chitimacha Indian blood²⁷ before amending their constitution in 2010 to require only tribal descent.²⁸

Membership is critical in part because it affects and provides rights and benefits within the tribe. “Membership determines, among other things, an individual’s right to vote in tribal elections, to hold office, to receive tribal resource rights such as grazing and residence privileges on tribal lands, and to

(stating that federal officials providing services to tribes or members must be given access); *United States v. Montana*, 604 F.2d 1162, 1167–69 (9th Cir. 1979), *rev’d on other grounds*, 450 U.S. 544 (1981) (finding that non-members who hold valid federal patents to fee lands cannot be denied access); COHEN’S HANDBOOK, *supra* note 6, § 4.01[2][e].

18. *See* *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985) (recognizing tribal power to impose mineral extraction or severance taxes); *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (recognizing tribal power to impose sales taxes); *Morris v. Hitchcock*, 194 U.S. 384 (1904) (recognizing tribal power to impose property taxes); *Barta v. Oglala Sioux Tribe*, 259 F.2d 553 (8th Cir. 1958) (recognizing tribal power to impose license and use fees).

19. *WILKINSON*, *supra* note 13, at 36.

20. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998). Either Congress can abrogate sovereign immunity or the tribe may waive it. *Id.* at 754.

21. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

22. *See* Bethany R. Berger, *Race, Descent, and Tribal Citizenship*, 4 CALIF. L. REV. CIRCUIT 23, 28 (2013); Kathryn R.L. Rand & Steven A. Light, *Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL’Y & L. 381, 412 (1997) (“Generally, tribes use one or more of the following methods for determining membership: (1) blood quantum; (2) descendancy; (3) patrilineage; and (4) matrilineage.”).

23. Nicole J. Laughlin, *Identity Crisis: An Examination of Federal Infringement on Tribal Autonomy to Determine Membership*, 30 HAMLINE L. REV. 97, 100 (2007).

24. Berger, *supra* note 22, at 28 & nn.31–33; *see* Laughlin, *supra* note 23.

25. CONST. OF THE WAMPANOAG TRIBE OF GAY HEAD (AQUINNAH) art. II, § 2.

26. CONST. OF THE GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS art. II, § 1.

27. CONST. AND BY-LAWS OF THE CHITIMACHA TRIBE OF LA. art. III (amended 2010).

28. CONST. AND BY-LAWS OF THE CHITIMACHA TRIBE OF LA. art. III.

participate in distribution of per capita payments when they occur.”²⁹ Likewise, federal benefits that require a finding of Indian status often depend on membership.³⁰

Passage of the Indian Gaming Rights Act (IGRA) and the explosion of tribal gaming created another benefit for many tribes and their members. IGRA allows tribes to regulate certain gaming activity.³¹ Some tribes use gaming revenue to make per capita payments to their members, creating an incentive for tribes to limit or reduce membership.³² Several tribes have acted on that incentive, launching disputes that show the importance of tribal gaming; with billions of dollars at stake,³³ such disputes have garnered national attention³⁴ and launched lawsuits.³⁵

Beyond its importance in the determination of rights, the tribal power to define membership is at the core of a tribe’s identity. As the district court judge in *Santa Clara Pueblo v. Martinez* put it:

[Membership policies] are no more or less than a mechanism of social, and to an extent psychological and cultural, self-definition. The importance of this to Santa Clara or to any other Indian tribe cannot be overstressed. In deciding who is and who is not a member, the Pueblo decides what it is that makes its members unique, what distinguishes a Santa Clara Indian from everyone else in the United States. If its ability to do this is limited or restricted by an external authority, then a new definition of what it is to be a Santa Claran is imposed, and the culture of Santa Clara is inevitably changed.³⁶

To take the power to determine membership away from a tribe would be to take the tribe’s best tool to define and protect its own identity and culture.

29. WILKINSON, *supra* note 13, at 33–34.

30. *Id.*

31. Rand & Light, *supra* note 22, at 400.

32. *Id.* at 418, 421.

33. *Id.* at 402 (“Indian gaming annually creates billions of dollars in new income for Indians and, more tangibly, contributes to ‘rising pride and can-doism’ on reservations. For some tribes, gaming has increased the standard of living markedly.”). Of course, not every tribe has a casino and not every Indian is rich; even tribes with casinos do not necessarily make per capita payments. See Dwanna L. Robertson, *The Myth of Indian Casino Riches*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM (June 23, 2012), <http://indiancountrytodaymedianetwork.com/2012/06/23/myth-indian-casino-riches>.

34. See, e.g., James Dao, *In California, Indian Tribes with Casino Money Case Off Members*, N.Y. TIMES, Dec. 12, 2011, http://www.nytimes.com/2011/12/13/us/california-indian-tribes-eject-thousands-of-members.html?pagewanted=all&_r=0; Michael Martinez, *Indians Decry Banishment by their Tribes*, CHI. TRIB., Jan. 14, 2006, http://articles.chicagotribune.com/2006-01-14/news/0601140134_1_tribal-casino-american-indians-gaming-profits. See generally Rand & Light, *supra* note 22, at 422–24.

35. See, e.g., *Smith v. Babbitt*, 100 F.3d 556, 559 (8th Cir. 1996); *Ross v. Flandreau Santee Sioux Tribe*, 809 F. Supp. 738, 741 (D.S.D. 1992). See generally Rand & Light, *supra* note 22, at 419–21.

36. *Martinez v. Santa Clara Pueblo*, 402 F. Supp. 5, 15 (D.N.M. 1975).

With that said, contact with European powers and their successors already has changed tribal identity and culture by influencing the notions and concepts tribes employ to determine membership. The use of blood quantum to determine membership largely stems from the federal government's practice of compiling lists or rolls of Indians based on blood in the late 1800s.³⁷ Historically, Indians were more likely to rely on the concept of kinship, which could include not only blood relations but those people recruited into "kinship networks through naturalization, adoption, marriage, and alliance. Identity encompassed inner qualities that were made manifest through social action and cultural belief."³⁸ Of course, the mechanics of kinship varied among tribes depending on need,³⁹ but American Indians generally did not share the English preoccupation with bloodlines.⁴⁰ Only increased relations with the federal government made bloodlines important. Federal influence not only still exists but has intensified, and many tribes—including the Cherokee Nation—focus on bloodlines today. The tribal power to determine membership protects American Indians from intensified federal influence, and the failure to protect that power would lead to a further loss of tribal identity and culture.

Given the power's importance, the Supreme Court has understandably protected tribes' sovereign ability to determine their own membership by reserving the power for tribes when possible. Through the Indian Civil Rights Act (ICRA), tribes were subjected to equal protection and due process protections that closely tracked the federal constitutional provisions.⁴¹ In *Santa Clara Pueblo*, however, the Court held that, beyond habeas corpus petitions, ICRA did not allow federal judicial review of potential ICRA violations because Congress did not explicitly grant such review in the Act.⁴² Specifically, federal courts could not review the Santa Clara Pueblo's policy of extending membership to children of male members who marry outside the tribe but not to children of female members who do the same, even though the policy clearly violated ICRA's equal protection clause.⁴³ Instead, the Court held that Congress intended tribal forums to enforce ICRA's provisions.⁴⁴ The

37. See Laughlin, *supra* note 23, at 101–02.

38. *Id.* at 101 (quoting Raymond D. Fogelson, *Perspectives on Native American Identity*, in *STUDYING NATIVE AMERICA: PROBLEMS AND PROSPECTS* 40, 45 (Russell Thornton ed., 1998)).

39. *Id.* at 101–02; see Raymond J. DeMallie, *Kinship: The Foundation for Native American Society*, in *STUDYING NATIVE AMERICA: PROBLEMS AND PROSPECTS* 306, 331 (Russell Thornton ed., 1998) (explaining that Lakota buffalo hunters' kinship network tended to be inclusive due to their nomadic nature: "Membership in bands was by choice; by residing in a particular band, individuals could decide to count themselves as members of it. Children were considered to belong to the band of the father or mother, but residence, rather than descent, seems to have been the operative category.").

40. See Laughlin, *supra* note 23, at 102 (explaining that the English believed that English Anglo-Saxon bloodlines were superior and should be kept separate from the perceived inferior blood of the American Indians they encountered).

41. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62–63 (1978).

42. *Id.* at 71.

43. *Id.* at 51–52.

44. See *id.* at 65.

Court recognized that membership decisions are particularly connected to tribal sovereignty and that Santa Clarans are best positioned to define “Santa Claran.”⁴⁵ The Supreme Court’s holding does not limit Congress’s ability to divest, however.⁴⁶ It is unlikely that the *Santa Clara Pueblo* Court would have reached the same conclusion had Congress chosen to clearly authorize judicial review in ICRA instead of leaving authorization ambiguous.⁴⁷

Moreover, lower federal courts have interpreted *Santa Clara Pueblo*’s limit to their jurisdiction narrowly. For example, the Second Circuit held that *Santa Clara Pueblo* did not limit its jurisdiction under ICRA in the context of banishment orders.⁴⁸ To make this holding, the court determined that banishment constitutes a “sufficiently severe restraint on liberty” that permits invocation of habeas corpus jurisdiction such that, under ICRA, a banishment order can be challenged in federal court.⁴⁹ Commentators have explained, however, that the Second Circuit’s decision seems to contradict *Santa Clara Pueblo*: “Banishment is closely tied to tribal membership because the punishment suggests that the banished individual is no longer part of the tribe.”⁵⁰

Regardless, *Santa Clara Pueblo* can be read as the Supreme Court’s statement that fundamental tribal powers should not be subject to federal influence absent clear congressional divestiture. In reality, however, the federal government can and does exert a substantial amount of pressure on tribal exercises of nondivested fundamental powers, including the power to determine membership.⁵¹ I will explore specific examples in the next Section.

II.

FEDERAL INFLUENCE OF TRIBES

This Part first frames the federal government’s power to influence tribal decisions, lists some common legislative and executive methods the government uses to exercise that power, and defines the limits on that power. It then explores in depth one particular method—monetary influence—by

45. *See id.* at 72 n.32.

46. *See* *United States v. Wadena*, 152 F.3d 831, 845 (8th Cir. 1998) (“There is *nothing* in the language of *Santa Clara* to indicate that the rights under the ICRA are nonexistent or in any way invalid. Instead, *Santa Clara* dealt with how those rights may be enforced, and concluded they could not be enforced through a *private* right of action, in a *civil* lawsuit.”) (emphasis in original).

47. *See* WILKINSON, *supra* note 13, at 47 (“Congress plainly has authority to protect the rights of tribal members who may have grievances against the tribe by allowing federal courts to hear these intratribal disputes. . . . In granting any additional federal oversight of tribal courts and legislatures, however, Congress must intrude further on tribal sovereignty and it has not yet chosen to do so.”).

48. *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 874, 901 (2d Cir. 1996).

49. *Id.*

50. Laughlin, *supra* note 23, at 120 (quoting Brendan Ludwick, *The Scope of Federal Authority Over Tribal Membership Disputes and the Problem of Disenrollment*, FED. LAW., Oct. 2004, at 39).

51. *See generally* Laughlin, *supra* note 23.

analyzing the powers underlying monetary influence, as well as Congress's and the executive branch's recent application of monetary influence to the Cherokee Nation. Later Sections go on to explain why and how federal monetary influence of tribes should be limited.

I distinguish between, explain, and compare legislative and executive power in this Section to show how only executive methods have enforceable limits in place. Existing executive limits illuminate the need for congressional limits and provide guidance on how to do so. Executive limits also must be considered in determining whether other limits should be adopted for the executive branch, though I conclude that it is not necessary or at least less important than imposing congressional limits.

A. Congress's Power to Influence Tribes

Congress holds special authority over American Indian affairs under the Indian Commerce Clause of the Constitution,⁵² which allows the national legislature "[t]o regulate commerce . . . with the Indian Tribes."⁵³ As part of Congress's "plenary power," congressional authority over Indians is "broad but not unlimited."⁵⁴

In theory, the trust doctrine procedurally and constitutionally limits Congress's plenary power over Indians. It essentially requires a determination that the protection of Indians will be served whenever Congress exercises its authority over Indians.⁵⁵ Congress has a duty to protect and care for tribes that have established the necessary relationship with the United States. And while Congress can alter treaty rights unilaterally or act adversely to Indians' interests in exercising a constitutional authority distinct from its authority over Indians, it must "set out its intent to do so in 'clear,' 'plain,' or 'manifest' terms in the statutory language or legislative history."⁵⁶ However, if Congress determines that a statute is an appropriate protection of Indians, reviewing

52. See *United States v. Lara*, 541 U.S. 193, 200 (2004); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."). But see *United States v. Kagama*, 118 U.S. 375, 383 (1886) (holding that plenary power lay with Congress based on a tribal wardship theory).

53. U.S. CONST. art. I, § 8, cl. 3; see *McClanahan v. Ariz. State Tax Comm'n*, 441 U.S. 164, 172 n.7 (1973). Congress also shares another principle foundation of power in Indian affairs with the executive. The Treaty Clause allows the President to negotiate treaties subject to ratification by the Senate. U.S. CONST. art. II, § 2, cl. 2. Congress, though, is primarily responsible for carrying out the obligations of the treaties and enacting statutes to implement them. See COHEN'S HANDBOOK, *supra* note 6, §§ 1.03[1], 5.01[2]. In 1871, however, Congress stopped treaties with Indian tribes. Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71 (2012)).

54. *Lara*, 541 U.S. at 200; WILKINSON, *supra* note 13, at 52.

55. WILKINSON, *supra* note 13, at 56.

56. *Id.* (citing *United States v. Dion*, 476 U.S. 734 (1986); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977)).

courts are unlikely to second-guess it.⁵⁷ In fact, “[c]hallenges to legislative actions based on the trust relationship alone” have never succeeded.⁵⁸ Thus, these theoretical limitations have no real power to limit congressional action.

Naturally, plenary power has its critics. Robert T. Coulter, for example, argues that plenary power is actually extraconstitutional authority and that congressional power over Indians based solely on plenary power should be reexamined.⁵⁹ According to Coulter, plenary power is extraconstitutional because Congress is limited to enumerated powers and thus can only exercise those powers listed in the Constitution, which does not explicitly list plenary power.⁶⁰ Courts have rooted plenary power in the Indian Commerce Clause, but only by inexplicably giving that clause a much more expansive reading than the similarly worded Interstate and Foreign Commerce Clauses.⁶¹ Others have pointed out that there is no federal Supremacy Clause for tribes, as there is for states, which counsels against broad plenary power.⁶² As a specific example of plenary power’s overreach, Coulter claims that courts have no constitutional basis to review “the broad denial to Indian nations and Indian individuals of land-related rights all others have” on a mere rational basis standard, instead of the normal strict scrutiny standard for race-based legislation.⁶³ Coulter contends that, by doing so, courts deny equal protection under the law.⁶⁴ Other scholars have made similar text-based arguments.⁶⁵

Along with text-based arguments, scholars have argued that the Founders originally intended a much narrower federal power. According to Mark Savage, “[T]he Founders regarded Indians as distinct nations to be dealt with diplomatically and at arm’s length.”⁶⁶ Thus, the Founders believed that treaties

57. See *Morton v. Mancari*, 417 U.S. 535, 555 (1974) (“As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed.”).

58. COHEN’S HANDBOOK, *supra* note 6, §§ 5.04[3][bb].

59. ROBERT T. COULTER, *NATIVE LAND LAW* § 4:10, 6:4 (2012).

60. *Id.* § 6:8.

61. *Id.*; Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1150 (2003) (“[T]he courts act as if there are three commerce clauses. In so doing, the courts rarely comment on how the Commerce Clause might yield such different readings. They certainly do not pause long enough to adequately justify the differences.”).

62. See Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 116–18 (2002).

63. COULTER, *supra* note 59, § 6:4.

64. *Id.*

65. See, e.g., Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 43 (1996) (stating that the “text of the Constitution lacks much of a hint of any plenary power”); Steven Paul McSloy, *Back to the Future: Native American Sovereignty in the 21st Century*, 20 N.Y.U. REV. L. & SOC. CHANGE 217, 253 (1993) (“There is no power in the Constitution that permits Congress to legislate over Indian nations.”).

66. Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1080 (2004) (describing Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 AM. INDIAN L. REV. 57, 72–76 (1991)).

would govern the sovereign-to-sovereign relationship⁶⁷ and sought to “guarantee[] the Indian tribes legal and political autonomy as sovereigns exempt from federal and state control over their internal affairs.”⁶⁸

Lastly, Saikrishna Prakash has argued that both text-based and original intent views miss the mark because they treat Indian tribes as if they are all similarly situated.⁶⁹ In Prakash’s view, Congress’s plenary power over a tribe should depend on its treaties with that tribe and the tribe’s location, whether it be in the territory of the United States, on U.S. property, or on private property within a state—things that will vary from tribe to tribe.⁷⁰ Of course, courts have yet to adopt any of these anti-plenary power arguments, and it seems unlikely that the current Supreme Court will do so.⁷¹

As discussed above, while the Supreme Court in *Santa Clara Pueblo* may have suggested that fundamental tribal powers should not be subject to federal influence without clear congressional divestiture, such a suggestion does not limit Congress’s power to divest when it does so clearly.⁷² Consistent with that reading of *Santa Clara Pueblo*, Congress has enacted many statutes directly or indirectly influencing tribes’ power to determine membership. Two such statutes are the IGRA, which created an economic incentive for gaming tribes to limit or reduce their membership, and the ICRA, which gave tribal forums a duty to enforce certain protections potentially affecting tribal membership determinations.

Many other statutes have influenced the tribal power to determine membership. For example, the General Allotment Act of 1877 broke up reservations by giving individual Indians a certain number of acres of reservation land to be held in trust for a period of twenty-five years.⁷³ The ultimate goal was assimilation. Though the Act did not contain specific references to blood quantum, to ensure that the parcels were correctly dispersed, it created enrollment commissions that compiled rolls of tribal membership, with the ultimate membership determination left up to the

67. See McSloy, *supra* note 65, at 269; see also Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201 (2007).

68. Robert N. Clinton, Book Review, 47 U. CHI. L. REV. 846, 851 (1980).

69. Prakash, *supra* note 66, at 1080–81.

70. *Id.* at 1107–10.

71. See Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1178 (2001) (stating that of the twenty-nine Supreme Court cases involving federal Indian law questions between 1991 and 2001, twenty-three were decided against tribes or tribal litigants, many in unanimous opinions); Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391, 391 (2008) (“There is no question that in the last thirty years, the Supreme Court has presided over an unprecedented assault on the sovereignty of Indian tribes.”).

72. See *supra* Part I.

73. Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. STATE L.J. 1, 10 (1995) (“During that time [twenty-five years], the allottee was expected to assimilate to agriculture, to Christianity, and to citizenship.”).

commission.⁷⁴ This method of deciding tribal identity was controversial and flawed.⁷⁵ Even so, today many people are still bound to a commission's determination of their ancestors' identity because their tribes' membership requirements, as well as the other rights to which membership grants access, are tied to the commission's rolls.

Similarly, the Indian Reorganization Act of 1934 (IRA), passed in response to the widely recognized failure of the General Allotment Act, represented the beginnings of the federal government's shift from assimilation to tribal sovereignty.⁷⁶ Though the IRA gave tribes the power to adopt their own constitutions and construct their own membership requirements, the federal government retained the ability to veto any tribal membership scheme it found undesirable.⁷⁷ The IRA also provided a federal definition of the term *Indian*,⁷⁸ essentially retaining Congress's control over who could be considered for membership, even while ostensibly supporting sovereignty.

Federal influence is not limited to congressional acts, as the next Section's exploration of the consequences of the IRA proves.

B. The Executive Branch's Power to Influence Tribes

Today, Congress has passed most of the federal trust responsibility to executive agencies. Although historically the Department of the Interior (DOI) and Department of Justice (DOJ) shouldered most of this responsibility, with the rise of modern federal American Indian programs, many different agencies and departments now have a role in Indian affairs.⁷⁹ Importantly, unlike

74. See Laughlin, *supra* note 23, at 104.

75. See *id.*; Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437, 457 (2002) ("Unfortunately, these federally mandated lists are sometimes inadequate and incomplete, excluding some people with deep and continuous tribal connections, whose ancestors failed to show up for the sign-ups because their traditional beliefs counseled nonparticipation or for other culturally-based reasons.").

76. See Laughlin, *supra* note 23, at 106.

77. *Id.* at 107.

78. Section 19 of the IRA defined three categories of Indians:

The first class, described as the "Membership Class," includes "all persons of Indian descent who are members of any recognized Indian tribe" and is defined without regard to blood quantum. The second class, described as the "Descendant Class," includes "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation" and is defined without regard to either blood quantum or tribal membership. The third class, described as the "Unaffiliated One-Half Blood Class," includes "all other persons of one-half or more Indian blood" and thus offers eligibility for benefits to those who are not tribal members or residents on the reservation.

Margo S. Brownell, *Who is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275, 285–86 (2001).

79. WILKINSON, *supra* note 13, at 57. The DOJ "historically has litigated many court cases on behalf of Indian tribes and individuals." *Id.* Within the DOI, this includes agencies such as the National Park Service, Bureau of Land Management, United States Fish & Wildlife Service (endangered species protection), Bureau of Reclamation (water policy), United States Geological Survey (mineral leasing), and, of course, the Bureau of Indian Affairs. Outside the DOI, the

Congress the trust responsibility is judicially enforceable against federal officials that manage it. As a result, those agencies must also comply with the duties that the trust responsibility imposes.⁸⁰

The trust responsibility imposes several duties that significantly constrain the power of executive officials, in stark contrast to Congress's plenary power.⁸¹ For example, executive officials must meet "obligations of the highest responsibility and trust" under "the most exacting fiduciary standards,"⁸² and are bound "by every moral and equitable consideration to discharge [the] trust with good faith and fairness."⁸³ Courts have inconsistently⁸⁴ recognized and enforced agency duties regarding federal executive management of tribal "trust funds, mineral resources, timber, and water."⁸⁵ Still, the trust responsibility clearly is judicially enforceable against executive officials.

The trust responsibility also imposes a duty of loyalty on federal agencies, as the interests of the beneficiary must be paramount. Federal agencies cannot subordinate Indian interests to other public purposes when a conflict between them arises, unless Congress clearly authorizes it.⁸⁶ This theoretically should prevent federal agencies from attempting to influence tribal decisions by defunding tribes or threatening to do so without congressional approval. However, where Congress so authorizes, perhaps by obligating an agency to represent a conflicting interest, the government's responsibility to Indian tribes

Department of Education, Department of Health and Human Services, National Marine Fisheries Service, Department of Agriculture, Department of Housing and Urban Development, and others have parts to play. *Id.*

80. *See, e.g.*, *White v. Califano*, 581 F.2d 697, 698 (8th Cir. 1978); *Eric v. U.S. Sec'y of Dep't of Hous. & Urban Dev.*, 464 F. Supp. 44, 48–50 (D. Alaska 1978).

81. *See* COHEN'S HANDBOOK, *supra* note 6, § 5.04[3][a].

82. *Seminole Nation v. United States*, 316 U.S. 286, 296, 297 (1942).

83. *United States v. Payne*, 264 U.S. 446, 448 (1924).

84. *Id.* (citing *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) (applying strict trust obligations to federal management of historic fort on White Mountain Apache Reservation); *United States v. Navajo Nation*, 537 U.S. 488 (2003) (denying recovery to Navajo Nation when federal officials withheld critical information regarding management of tribal mineral resources)).

85. *WILKINSON*, *supra* note 13, at 58 (citing *United States v. Mitchell*, 463 U.S. 206 (1983) (duty to manage forest resources properly on allotted lands); *Navajo Tribe v. United States*, 364 F.2d 320 (Cl. Ct. 1996) (duty to manage mineral resources properly); *Menominee Tribe v. United States*, 101 Ct. Cl. 10 (1944) (duty to make trust property productive)).

86. *Id.* (citing *United States v. Winnebago Tribe*, 542 F.2d 1002 (8th Cir. 1976) (overturning taking by eminent domain of tribal lands granted by treaty because there was no express congressional authorization); *United States v. S. Pac. Trans. Co.*, 543 F.2d 676 (9th Cir. 1976) (holding that the Secretary of the Interior's approval of maps showing railroad right-of-way through Indian land did not grant right-of-way because it was not congressionally approved). *But see* *Seneca Nation of Indians v. United States*, 338 F.2d 55 (2d Cir. 1964) (holding that the Secretary of the Army could condemn Indian land for construction of a water reservoir without Congress specifically and expressly authorizing it because Congress had delegated authority to do so), *cert. denied*, 380 U.S. 952 (1965); *Seneca Nation of Indians v. Brucher*, 262 F.2d 27 (D.C. Cir. 1958), *cert. denied*, 360 U.S. 909 (1959) (holding that the Secretary of the Army could condemn Indian land for construction of a water reservoir because Congress had indicated an intention to authorize the taking despite it violating a treaty with the tribe)).

is not necessarily compromised by an agency fulfilling its statutory obligation contrary to tribal interests, at least not where the tribe fails to show actual harm.⁸⁷

Despite these limitations, the executive branch has exerted its fair share of influence on tribal membership determinations, sometimes without clear authorization from Congress. For example, though lacking express authority to do so, the Bureau of Indian Affairs (BIA) quickly used the IRA to implement policies that further compromised tribes' power to determine their own membership. The BIA outlined membership provisions for tribes to follow based on the IRA's definition of *Indian*, rationalizing that the definition "expressed a 'definite' Congressional policy 'to limit the application of Indian benefits [under the Act] to those who are Indians by virtue of actual tribal affiliation or by virtue of possessing one-half degree or more of Indian blood.'"⁸⁸ The BIA's goals included limiting automatic tribal membership to children born to tribal members and those reasonably expected to participate in the tribe.⁸⁹ This goal resulted in the BIA recommending membership provisions such as "requirements that both parents be tribal members, that the parents reside within the reservation, or that the children have a minimum blood quantum."⁹⁰ These membership provisions were signed by the Commissioner of Indian Affairs and distributed to tribes by the Secretary of the Interior, who urged tribes to implement them.⁹¹ Many tribes did so and continue to use them to determine membership today.⁹² Perhaps unsurprisingly, the BIA has a heavy hand in determining which individuals possess the requisite quantum of Indian blood for federal purposes, a determination that tribes often accept for their own purposes.⁹³ In effect, the BIA has become the "gatekeeper for individuals seeking to prove their blood quantum to be eligible for tribal enrollment."⁹⁴

87. *Nevada v. United States*, 463 U.S. 110, 143 (1983) ("[W]here Congress has imposed upon the United States, in addition to its duty to represent Indian tribes, a duty to obtain water rights for reclamation projects, and has even authorized the inclusion of reservation lands within a project, the analogy of a faithless private fiduciary cannot be controlling."); *cf. Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252 (D.D.C. 1972) (striking down a regulation allowing diversion of water for a federal reclamation project because it adversely affected a downstream lake on an Indian reservation, doing actual harm to Indian interests in violation of the trust responsibility).

88. Goldberg, *supra* note 75, at 446–47.

89. See Laughlin, *supra* note 23, at 116.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 117; see *Davis v. United States*, 192 F.3d 951, 956 (10th Cir. 1999) ("Certificates of Degree of Indian Blood ("CDIBs") are issued by the BIA and are the BIA's certification that an individual possesses a specific quantum of Indian blood. A CDIB entitles the holder to participate in some government assistance programs. Additionally, the Tribe will accept a CDIB card as proof that an applicant . . . meets the Eligibility Requirement.").

94. Laughlin, *supra* note 23, at 117.

C. Monetary Influence of Tribes

1. Scope of the Federal Powers to Fund and Defund Tribes

Generally, both Congress and the Executive have broad power, without many limits, to fund or defund federal services and programs for American Indian tribes. The Snyder Act of 1921 authorizes the federal government, particularly the BIA, under the supervision of the Secretary of the Interior, to fund and provide services to tribes “as Congress may from time to time appropriate, for the benefit, care, and assistance of Indians throughout the United States.”⁹⁵ Such services include education, health care, law enforcement, economic development, and “general and incidental expenses in connection with the administration of Indian affairs.”⁹⁶ Many government services are based on the Snyder Act’s broad delegation of authority, though specific statutes may also give federal agencies a basis on which to disperse congressionally appropriated funds.⁹⁷

Today, many departments and independent agencies—including the BIA, the Environmental Protection Agency (EPA), and the Departments of Health and Human Services, Education, Justice, and Housing and Urban Development (HUD)—play important roles in the provision of federal services and programs to Indian tribes and people.⁹⁸ Moreover, tribes increasingly play a much larger role in the initiation and administration of federal services.⁹⁹ Accordingly, federal agencies are required to deal and consult with tribes in a government-to-government relationship under various statutes and executive orders.¹⁰⁰ But defining *consultation* can be tricky,¹⁰¹ and the numerous statutes requiring consultation are largely unenforceable in courts.¹⁰² As a result, despite

95. 25 U.S.C. § 13 (2012).

96. *Id.*

97. COHEN’S HANDBOOK, *supra* note 6, § 22.01[1].

98. *See generally id.*

99. *See generally id.* (“Today, Indian tribes are running their own schools, colleges, hospitals, child welfare systems, and myriad other programs formerly administered by states or the federal government.”).

100. *See, e.g.*, Indian Self-Determination Act and Education Assistance Act, 25 U.S.C. §§ 450–458ddd-2 (2006); Education Amendments of 1978, 25 U.S.C. § 2011(a) (2006); Archaeological Resources Protection Act of 1979, 16 U.S.C. § 470ii (2006); Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §§ 3002(c)(2), 3005(a)(3) (2006); National Historic Preservation Act, Pub. L. No. 102-575, § 4006(a), 106 Stat. 4600, 4757 (1992); Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000) (President William J. Clinton) (requiring consultation and coordination with tribal governments); Tribal Consultation, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57,881 (Nov. 5, 2009) (President Barack H. Obama) (ordering agencies to submit plans and reports on implementation of consultation requirements). *See generally* Colette Routel & Jeffrey Hoth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. L. J. REFORM 417 (2013).

101. *See* Routel & Hoth, *supra* note 100, at 437.

102. *Id.* at 448–53. Tribes have, however, brought a few successful lawsuits. *Id.* at 437 (citing *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 709–10 (8th Cir. 1979); *Lower Brule Sioux*

consultation requirements, federal agencies often fail to communicate effectively with tribes.¹⁰³ Accordingly, federal grants requiring consultation for allocation are often misallocated, depriving tribes of vital resources.¹⁰⁴

Even more problematic, Congress—and, with the approval of Congress, executive officials—can legally take federal funds from tribes, seemingly without cause, based on Congress’s plenary power. Still, there is a powerful moral obligation for Congress to provide services to Indians.¹⁰⁵ As President Richard Nixon put it, the federal government has a duty “to provide community services such as health, education, and public safety” to Indians.¹⁰⁶ This moral duty arises from specific promises in treaties and federal agreements, the trust relationship, the historical pattern of providing services, and expressions of the obligation in federal statutes.¹⁰⁷ Although statutes regarding federal services for Indians are “probably not legally enforceable against Congress itself,” courts generally read them broadly “to find a general responsibility to provide services” that is enforceable against federal agencies.¹⁰⁸

Because federal agencies have an enforceable responsibility to provide services to tribes, courts have limited agency-defunding actions that were not congressionally approved. Generally, agency decisions that result in the denial of “adequate service” violate federal trust obligations.¹⁰⁹ To meet this adequate service standard, the agency must ensure a meaningful level of service is provided.¹¹⁰ In the funding context, agencies violate their federal trust

Tribe v. Deer, 911 F. Supp. 395, 402 (D.S.D. 1995)). Routel and Hoth propose congressional legislation to make such consultation requirements judicially enforceable. *Id.* at 466–69.

103. *Id.* at 445–46.

104. See Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251, 1263 (1995).

105. COHEN’S HANDBOOK, *supra* note 6, § 22.01[3].

106. Richard M. Nixon, *Special Message on Indian Affairs (July 8, 1970)*, in DOCUMENTS OF UNITED STATES INDIAN POLICY 256, 257 (Francis Paul Prucha ed., 3d ed. 2000).

107. *Id.*

108. COHEN’S HANDBOOK, *supra* note 6, § 22.01[3] (citing *McNabb v. Bowen*, 829 F.2d 787, 792 (9th Cir. 1987) (trust responsibility to provide health care); *Navajo Nation v. Hodel*, 645 F. Supp. 825, 827 (D. Ariz. 1986) (Indian Child Welfare Act and Snyder Act created trust relationship between tribes and United States with respect to statute); *Eric v. U.S. Sec’y of Dep’t of Hous. & Urban Dev.*, 464 F. Supp. 44, 48–50 (D. Alaska 1978) (Bartlett Act creates trust responsibility to provide housing to Alaska Natives)).

109. See, e.g., *Morton v. Ruiz*, 415 U.S. 199, 236 (1974) (holding termination of general assistance to American Indians near reservations “inconsistent with ‘the distinctive obligation of trust incumbent upon the Government’”); *McNabb v. Bowen*, 829 F.2d 787, 793–94 (9th Cir. 1987) (holding the Indian Health Service (IHS) denial of medical care due to the “alternate resource” rule violated the trust responsibility); *Wilson v. Watt*, 703 F.2d 395 (9th Cir. 1983) (enjoining the BIA from terminating general assistance to Alaska Natives without comparable state program in place).

110. See, e.g., *Meyers ex rel. Meyers v. Bd. of Educ.*, 905 F. Supp. 1544, 1555 (D. Utah 1995) (suggesting that locating schools too far away for students to attend may violate the trust obligation); *Eric v. U.S. Sec’y of Dep’t of Hous. & Urban Dev.*, 464 F. Supp. 44 (D. Alaska 1978) (suggesting that providing shoddy or unsafe housing may violate the trust obligation).

obligation when they fail to distribute funds in reasonably equitable ways.¹¹¹ Of course, federal agencies must also comply with the Administrative Procedure Act (APA), and, in fact, the trust doctrine may enlarge an agency's obligations beyond its standard administrative law duties.¹¹² Specifically, an agency action that would normally pass the APA's "arbitrary or capricious" standard may be struck down if the agency does not meet its trust responsibility.¹¹³

Again, however, based on the Supreme Court's development of Congress's plenary power, none of these limitations apply to Congress or agency-defunding actions that have congressional approval. Thus, Congress can seemingly defund tribes for any reason without being subject to judicial review, even to influence nondivested, fundamental tribal powers. Such was the case in the Cherokee Freedmen controversy.

2. *Case Study: Monetary Influence of the Cherokee Nation*

During recent developments in the decades-long and ongoing Cherokee Freedmen controversy, the federal government threatened to and eventually did cut off substantial funds to the Cherokee Nation in an effort to influence the exercise of the tribe's fundamental, nondivested power to define its membership. More specifically, the federal government sought to influence and reverse the Nation's decision to expel the Cherokee Freedmen from its membership.

a. *Historical and Procedural Background*

The Cherokee Freedmen controversy is rooted in the Civil War. The Treaty of 1866 ended the Civil War for the Cherokee Nation by repealing its "pretended treaty" with the Confederacy and bringing conditional peace and amnesty to the tribe.¹¹⁴ In respect to the Cherokee Freedmen controversy, the most important condition of the Treaty of 1866 was that "all freedmen [and] free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees."¹¹⁵

111. See *Morton v. Ruiz*, 415 U.S. 199, 230–31 (1974) (while the Secretary of the Interior might have "power to create reasonable classifications and eligibility requirements" to allocate limited funds, the criteria must be rational, proper, and consistent); *Rincon Band of Mission Indians v. Harris*, 618 F.2d 569, 572 (9th Cir. 1980) (invalidating the IHS's distribution method that consistently deprived California Indians of adequate funds).

112. *Morton v. Ruiz* suggested that the trust doctrine might require the BIA to use rulemaking instead of adjudication when reallocating tribal funding, despite the general administrative law principle that agencies have discretion to decide the form of decision, absent an act of Congress. See 415 U.S. 199, 235 (1974). However, *Lincoln v. Vigil* held the opposite, limiting *Ruiz* to situations in which the BIA failed to follow its own regulations mandating rulemaking. See 508 U.S. 182, 195–99 (1993).

113. COHEN'S HANDBOOK, *supra* note 6, § 5.05[3][c].

114. Treaty with the Cherokee art. I–II, July 19, 1866, 14 Stat. 799 [hereinafter Treaty of 1866].

115. *Id.* art. IX.

To distribute resources and assimilate the Nation into American society after the Civil War, the United States used censuses to document the number of Cherokee citizens, both Native and Freedmen.¹¹⁶ One set of such censuses that began in the 1890s, known as the Dawes Rolls, deemed Freedmen ancestors not to be ethnic Cherokees, despite many of them identifying with Cherokee culture and counting among the five thousand survivors of the seventeen thousand people forcibly removed from Georgia on the 1838 “Trail of Tears.”¹¹⁷ Instead, the United States separated residents of the Cherokee reservation into three separate rolls: “Cherokees by blood,” “Cherokee Freedmen,” and “intermarried whites.”¹¹⁸ But the rolls were wildly inaccurate,¹¹⁹ and it is unclear how many people with Cherokee blood were listed on the non-blood rolls simply due to their African American appearance.¹²⁰

Despite the Treaty of 1866, after more than a century of disputes between the Cherokee Nation, the Freedmen, and the United States regarding the Freedmen’s status within the Nation, the Nation systematically disenfranchised the Freedmen through legislation in the 1980s that required members to show through documentation an ancestor on the Dawes Roll of ethnic Cherokees.¹²¹ Between 2003 and 2006, the Freedmen filed several lawsuits seeking to challenge their disenfranchisement.¹²²

In 2006, the Cherokee Nation Supreme Court reversed the Nation’s course by ruling that the Freedmen were Cherokee citizens and thus allowed to

116. Jessica Jones, *Cherokee by Blood and the Freedmen Debate: The Conflict of Minority Group Rights in a Liberal State*, 22 NAT’L BLACK L.J. 1, 14 (2009).

117. See Frank Morris, *Cherokee Tribe Faces Decision on Freedmen*, NPR.ORG (Feb. 21, 2007, 6:00 AM), <http://www.npr.org/templates/story/story.php?storyId=7513849>; John Strelau, *Black Cherokees Exercise Hard-Won Right to Vote*, CNN (Oct. 10, 2011, 2:42 PM), <http://www.cnn.com/2011/10/19/opinion/strelau-chokeee-vote>.

118. See ARIELA JULIE GROSS, WHAT BLOOD WON’T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA 153 (2008). There was also a category for “adopted Shawnees and Delawares,” *id.*, which the Cherokee had agreed to adopt. See CONST. OF THE CHEROKEE NATION OF OKLA. art. III (1975); *Allen v. Cherokee Nation Tribal Council*, No. JAT-04-09, at 5 (Cherokee 2006).

119. See GROSS, *supra* note 118, at 153–58; Laughlin, *supra* note 23, at 105 (explaining that, in addition to the subjective review employed by the federal government to make membership determinations when establishing the rolls, “the accuracy of the rolls was further compromised by the refusal of many full-blooded Indians to participate in the process. The concept of individual property ownership directly conflicted with the widespread cultural belief that land should be shared communally. As a result, [e]ven when faced with an enrollment officer asking them to sign an enrollment card’ many Indians would not submit to the process. The consequence of such a refusal was the omission of that individual from their tribe’s roll.” (alteration in original) (quoting Carla D. Pratt, *Tribes & Tribulations: Beyond Sovereign Immunity and Toward Reparation and Reconciliation for the Estelusti*, 11 WASH. & LEE RACE & ETHNIC ANC. L.J. 61, 99–100 (2005))).

120. See *Allen*, No. JAT-04-09, at 8 n.7 (“[I]f some of the Cherokee Freedmen were mixed with Cherokee, there is no way to confirm it on the Dawes rolls. It is inconceivable that not a single . . . Cherokee Freedmen . . . had any Cherokee blood, yet that is what the Dawes rolls suggests.”); GROSS, *supra* note 118, at 153–58 (describing inaccuracies in the U.S. government’s roll-making process).

121. Jones, *supra* note 116, at 17.

122. *Id.*

enroll in the Cherokee Nation and vote in its elections.¹²³ According to the Court, the Nation's exclusion of the Freedmen was unconstitutional because the Freedmen were listed as members in the enforceable Treaty of 1866 and the subsequent Dawes Rolls, and because the 1975 Cherokee Constitution did not exclude them or require a certain blood quantum for tribal membership.¹²⁴

In 2007, Cherokee citizens responded to the Court's decision by passing a constitutional referendum that amended the Cherokee Constitution to limit citizenship to those with at least one ancestor on the Dawes Roll of ethnic Cherokees.¹²⁵ The 2007 referendum disenfranchised nearly three thousand Cherokee Freedmen.¹²⁶

The Freedmen challenged the constitutional referendum in Cherokee court. In 2007, a Cherokee district court issued an injunction keeping the Freedmen in the tribe until litigation was finalized.¹²⁷ Almost four years later, on August 21, 2011, the Cherokee Nation Supreme Court ruled that the Cherokee people had the sovereign right to amend the Cherokee Constitution and to set citizenship requirements.¹²⁸ Specifically, the Court focused on Article XV of the Cherokee Constitution, in which the people of the Cherokee

123. *Allen*, No. JAT-04-09.

124. *Id.*

125. Stremlau, *supra* note 117. Following the 2007 referendum, Jodie Fishinghawk, one of the key drivers of the movement to expel the Freedmen, explained her position: "It's an Indian thing, we do not want non-Indians in the tribe, our Indian blood is what binds us together." Morris, *supra* note 117. She noted that nearly all Indian nations require their citizens to document direct ancestors in the tribe and that setting conditions of citizenship is fundamental to the Nation's sovereignty. *Id.*; see Berger, *supra* note 22, at 28 n.31–33 (listing the many varied approaches that tribes have taken in setting membership requirements). As to the method of achieving her goal, she said, "It's a democratic process, people are allowed to vote [on the referendum]. . . . And I don't see any problem with it." Morris, *supra* note 117. Chad Smith, principal chief at the time, also responded to the referendum: "[The voters'] voice is clear as to who should be citizens of the Cherokee Nation. . . . No one else has the right to make that determination. It was a right of self-government, affirmed in 23 treaties with Great Britain and the United States and paid dearly with 4,000 lives on the trail of tears." Sheila K. Stogsdill, *Cherokee Nation Votes to Remove Descendants of Freedmen*, NEWSOK (Mar. 3, 2007), <http://newsok.com/cherokee-nation-votes-to-remove-descendants-of-freedmen/article/3021663/?page=2>.

One critic of the 2007 referendum, Marilyn Vann, president of the Descendants of Freedmen of the Five Civilized Tribes Association, alluded to the Freedmen's history as part of the Nation by arguing that "the Cherokee tribe has always been a diverse nation, not a race." Morris, *supra* note 117. This is why Congress, viewing the Nation as being comprised of more than one race, recognized the Freedmen as members of the Nation under the Treaty of 1866 despite insisting on listing the Freedmen ancestors separately in the Dawes Rolls. Treaty of 1866, *supra* note 114, art. IX. This is in stark contrast to the Seminole Freedmen, who Congress thought were so "mixed that separate rolls would not make sense." See GROSS, *supra* note 118, at 153. Ignoring Congress, U.S. officials made a separate Seminole Freedmen roll anyway. *Id.*

126. Stremlau, *supra* note 117. Only 8,700 of 56,000 registered voters cast ballots. *Id.* The Cherokee Nation numbers about 300,000 in total, making it the second largest American Indian tribe next to the Navajo Nation. *Id.*

127. See *Nash v. Cherokee Nation Registrar*, No. CV-07-40 (Cherokee D. Ct. 2011), *rev'd*, *Cherokee Nation Registrar v. Nash*, No. SC-2011-02 (Cherokee 2011).

128. *Cherokee Nation Registrar v. Nash*, No. SC-2011-02 (Cherokee 2011).

Nation reserved the right to propose laws and amendments to the Constitution.¹²⁹ Further, the Court held that the Treaty of 1866 did not prevent Freedmen disenfranchisement because treaties are merely contracts between independent nations and thus do not create privately enforceable rights; instead, offended nations must enforce the contract.¹³⁰ The Court's ruling not only removed the district court's injunction but also prevented the Freedmen from voting in the September 24, 2011 special election that was meant to resolve the too-close-to-call general election of June 24, 2011. The Freedmen continue to fight in the U.S. District Court for the District of Columbia.¹³¹

b. Defunding and Threats Thereof

In response to the 2007 referendum disenfranchising the Freedmen and the Cherokee Nation Supreme Court's 2011 decision upholding the referendum, the United States threatened to and eventually did withhold Cherokee funding unless the Nation took certain actions. The federal government's attempt to influence the Nation's handling of the Cherokee Freedmen controversy was ultimately successful, with the Nation giving in and taking action to avoid defunding.

The federal government's most extreme threat of potential defunding was an unsuccessful House bill that threatened to deny the Nation federal funding unless it reversed its disenfranchisement of the Freedmen. In fact, the bill, introduced by former U.S. Representative Diane Watson, went so far as to sever U.S. government relations with the Nation until it "restore[d] full tribal citizenship to the Cherokee Freedmen" and "fulfill[ed] all its treaty obligations" with the United States.¹³² Representative Watson calculated that severing relations would have revoked roughly \$300 million a year in taxpayer

129. *Id.* at 7; see *Allen v. Cherokee Nation Tribal Council*, No. JAT-04-09, at 3 (Cherokee 2006) (suggesting that Cherokee people have the right to make citizenship determinations through constitutional amendment, but that they had not yet done so).

130. *Cherokee Nation Registrar v. Nash*, No. SC-2011-02, at 8–9.

131. The issues are pending in a case originally filed by the Freedmen in 2003. *Complaint, Vann v. U.S. DOI*, No. 1:03-cv-01711 (D.D.C. Aug. 11, 2003); see *Vann v. Kempthorne*, 467 F. Supp. 2d 56 (D.D.C. 2006), *rev'd*, 534 F.3d 741 (D.C. Cir. 2008); *Vann v. Salazar*, 883 F. Supp. 2d 44 (D.D.C. 2011), *rev'd*, *Vann v. U.S. DOI*, 701 F.3d 927 (D.C. Cir. 2012). However, the 2003 Freedmen case has been stayed pending resolution of summary judgment motions in a case filed by the Cherokee Nation in 2009. *Complaint, Cherokee Nation v. Nash*, No. 1:13-cv-01313-TFH (D.D.C. Feb. 3, 2009); *Cherokee Nation and Principal Chief Baker's Motion for Partial Summary Judgment, Cherokee Nation v. Nash*, No. 1:13-cv-01313-TFH (D.D.C. Nov. 29, 2013); *The Department of Interior's Motion for Summary Judgment, Cherokee Nation v. Nash*, No. 1:13-cv-01313-TFH (D.D.C. Jan. 1, 2014); *Cherokee Freedmen's Cross-Motion for Summary Judgment, Cherokee Nation v. Nash*, No. 1:13-cv-01313-TFH (D.D.C. Jan. 31, 2014). Another case, filed in the Northern District of Oklahoma, was transferred to the District Court of D.C. *Complaint, Cherokee Nation v. Nash*, No. 4:11-cv-00648-TCK-TLW (N.D. Okla. Feb. 3, 2009); *Order on Motion to Transfer, Cherokee Nation v. Nash*, No. 4:11-cv-00648-TCK-TLW (N.D. Okla. Aug. 19, 2013).

132. H.R. 2824, 110th Cong. (2007).

dollars and another \$300 million from a federal gaming franchise.¹³³ The bill died in committee when first introduced in 2007 and again when reintroduced in 2009.¹³⁴

In a less intrusive but still substantial action, in September 2008 Congress adopted a provision to the Native American Housing and Self-Determination Act of 2007 (NAHASDA). This Act required the Nation to keep the Freedmen in the tribe until the end of litigation regarding the 2007 Cherokee District Court's injunction to receive authorized funds from HUD.¹³⁵ This ensured that courts, not the political majority, would have the final say.¹³⁶

However, whether Congress intended tribal or federal courts to resolve the controversy was ambiguous. In 2011, after the Cherokee Supreme Court approved the 2007 referendum's exclusion of the Freedmen, the Nation argued that it had complied with the NAHASDA provision because tribal litigation had ended, and thus attempted to proceed with the Freedmen's disenfranchisement. With federal litigation still pending, HUD disagreed that the Nation had complied with the provision and "suspended" \$33 million of housing funds that the Nation had attempted to draw from its account on August 31, 2011.¹³⁷ HUD Secretary Jereon Brown sought "additional guidance" from the parties involved on the "unclear" provision, but added that funding could be restored "once the issue is resolved."¹³⁸

Adding to the explicit monetary influence were more vague warnings. On September 9, 2011, Assistant Secretary for Indian Affairs Larry Echo Hawk made it clear in a letter to the then-acting Principal Chief Joe Crittenden that the BIA "had never approved the constitutional amendment removing the Freedmen and would consider the 2011 Cherokee election unconstitutional if the Freedmen were prevented from voting."¹³⁹ After explaining that the DOI had "carefully reviewed" and "respectfully disagree[d]" with the Cherokee Supreme Court's decision, Echo Hawk warned the tribe to "consider carefully

133. *Id.* In 2011, tribal officials estimated that the tribe would have revoked 78 percent of its \$400 million-plus annual budget by severing relations. Teddye Snell, *Feds Issue Warning to Cherokees*, TAHLEQUAH DAILY PRESS (Sept. 14, 2011, 6:01 PM), http://www.tahlequahdaily.com/news/local_news/article_aefbf598-eb8c-50a9-8fa8-2a3ecf9fd23f.html.

134. H.R. 2761, 111th Cong. (2009).

135. Native American Housing Assistance and Self-Determination Reauthorization Act of 2008, Pub. L. No. 110-411, 122 Stat. 4319 (2008).

136. *Boren's Amendment Allows Tribal Court Review of Cherokee Freedmen Issue*, SEQUOYAH COUNTY TIMES (Sept. 10, 2007, 12:00 AM), http://www.sequoyahcountytimes.com/archives/article_f4035874-89ba-5799-89c7-998aaa0db99f.html. The initial proposal would have stripped the Nation of its HUD funding effective immediately without regard to pending litigation. *Id.*

137. Will Chavez, *Federal Housing Funds for Cherokee Nation are 'Suspended' Over Freedmen Issue*, CHEROKEE PHOENIX (Sept. 7, 2011 1:37 PM), <http://www.cherokeephoenix.org/Article/Index/5481>.

138. *Id.*

139. Circe Sturm, *Race, Sovereignty, and Civil Rights: Understanding the Cherokee Freedmen Controversy*, 29 CULTURAL ANTHROPOLOGY 575, 591 (2014), available at http://www.culanth.org/articles/751-race-sovereignty-and-civil-rights-understanding#bck_ca293A07_bib024.

the Nation's next steps in proceeding with an election that does not comply with federal law," specifically the Treaty of 1866.¹⁴⁰

Facing mounting federal pressure, including the loss of a substantial amount of federal funding, the tribe caved to federal demands and agreed to temporarily reinstate the Freedmen as citizens until the federal court could reach a final judicial decision. On September 14, 2011, Diane Hammons, the Cherokee attorney general, asked the Cherokee Supreme Court to withdraw its ruling in a one-page court filing.¹⁴¹ Six days later, on September 20, 2011, the Nation, Freedmen, and federal government officially agreed on an order in U.S. district court to reinstate voting rights and citizenship to the Freedmen until a final decision was made in federal court.¹⁴²

Although a vocal opponent of the federal interference, acting Principal Chief Crittenden supported the decision: "I believe the [Cherokee] nation should do what is best for its people especially since federal HUD money is currently frozen."¹⁴³ On October 27, 2011, after the Freedmen were allowed to vote in the special election of September 24, 2011, HUD released the Nation's housing funds, which had grown to \$37.1 million since HUD first put a hold on them.¹⁴⁴ Naturally, HUD reserved the right to reassess its decision if it ever again deemed the tribe in violation of the NAHASDA provision.¹⁴⁵

III.

PLACING A LIMITING PRINCIPLE ON FEDERAL MONETARY INFLUENCE OF TRIBES

Having discussed the federal government's power and common methods to influence tribes, this Section first explains why there should be a limit on Congress's monetary influence of tribes and responds to potential

140. Larry Echo Hawk, *Letter from Echo Hawk Regarding Cherokee Freedmen, Upcoming Election*, NATIVE AMERICAN TIMES (Sept. 12, 2011, 2:44 PM), <http://www.nativetimes.com/index.php/news/tribal/6005-letter-from-echo-hawk-regarding-chokeee-freedmen-upcoming-election>.

141. Steve Olafson, *Cherokee Tribe Retreats from Effort to Oust Some Members*, REUTERS (Sept. 15, 2011, 2:26 PM), <http://www.reuters.com/article/2011/09/15/us-usa-chokeees-idUSTRE78E5IX20110915>.

142. Molly O'Toole, *Cherokee Tribe Reaches Agreement to Reinstate 2,800 "Freedmen,"* REUTERS (Sept. 20, 2011, 9:05 PM), <http://www.reuters.com/article/2011/09/21/us-chokeee-freedmen-idUSTRE78K08D20110921>. The Cherokee Supreme Court found the agreement in district court unconstitutional, but dismissed former Principal Chief Chad Smith's appeal to the election results because "irrespective of the Freedmen vote . . . the special election of the Cherokee Nation to elect a principal chief can be determined with mathematical certainty." Lenzy Krehbiel-Burton, *Bill John Baker Sworn in as Cherokee Chief*, TULSA WORLD (Oct. 20, 2011, 12:00 AM; updated Apr. 15, 2014, 8:39 AM), http://www.tulsaworld.com/archives/baker-sworn-in-as-principal-chief/article_9b7271ed-54ac-5414-8dc4-9e6f38947104.html. Bill John Baker was sworn in as Principal Chief on October 19, 2011. *Id.*

143. Olafson, *supra* note 141.

144. Jim Myers, *\$37 Million in Cherokee HUD Funds to be Released*, TULSA WORLD (Oct. 29, 2011, 12:00 AM), http://www.tulsaworld.com/news/government/million-in-chokeee-hud-funds-to-be-released/article_473946ea-43e6-5fc6-9a76-7a63871d32a7.html.

145. Myers, *supra* note 144.

counterarguments. It then searches for a limiting principle by looking at existing legal doctrines that may cover the tribal context and analogous situations where Congress's power to influence monetarily is already limited.

A. The Need for a Limiting Principle

1. Arguments for a Limiting Principle

A limiting principle is needed for the seemingly unlimited congressional power to defund tribes. Though Congress's power should not be entirely curtailed, the power should not allow Congress to influence decisions in matters unrelated to the federal funding being withheld, particularly those unrelated matters involve a tribe's use of fundamental, nondivested powers. Because federal agencies' power to defund tribes without congressional approval is already somewhat limited, as previously discussed in Part II.C.1., I focus my argument on a limiting principle for Congress.

There are at least four arguments in favor of a limiting principle. First, American Indian tribes and people strongly rely on federal services and programs,¹⁴⁶ making congressional funding threats particularly troublesome. Importantly, the United States' historic Indian policy is largely culpable for tribes' current vulnerability. The United States took away the tribes' traditional methods of livelihood through policies of relocation, assimilation, and termination, forcing many to live in remote areas where their survival depends on federal assistance.¹⁴⁷

Western contact in general, and the United States' Indian policy in particular, generated tribes' need for federal assistance. Because of initial Western contact, "Indian peoples needed Western medicine to address foreign diseases; instruction in English, reading and writing; and financial and employment assistance to address the loss of land and game for hunting."¹⁴⁸ Moreover, the United States did not just donate federal services to Indians for free; instead, the United States exchanged them for "cessions of lands and rights, and to achieve distinctly federal purposes," such as "civilizing" and

146. As the National Congress of American Indians has explained, "For many tribes, a majority of tribal governmental services is financed by federal sources. Tribes lack the tax base and lack parity in tax authority to raise revenue to deliver services." NAT'L CONG. OF AM. INDIANS, A CALL TO HONOR THE PROMISES TO TRIBAL NATIONS IN THE FEDERAL BUDGET (2013), available at http://www.ncai.org/attachments/policypaper_dpuihesmoxsdxkinihytyplkfogplgzgtrkxgjioecjnzcealpe_2013.04.22_ncai_federal_budget_and_indian_country_final.pdf.

147. As the Nation explained in a brochure responding to Representative Watson's bill, "[t]he Cherokee Nation receives federal funding to provide vital services to individuals with low-income, children, elderly, disabled or needy Indians in rural northeastern Oklahoma, one of the lowest income areas in all the United States." CHEROKEE NATION, IF CHEROKEE FUNDING IS CUT, WHO WILL FEEL THE PAIN? 7 (2007), available at <http://s34353.gridserver.com/uploaded/pdfs/CNB-bro.pdf>.

148. COHEN'S HANDBOOK, *supra* note 6, § 22.01[1].

“assimilating” Indians.¹⁴⁹ At the same time, the United States moved tribes to unfamiliar and often unproductive lands, ensuring tribes’ continued reliance on federal assistance.¹⁵⁰ As stated above, the United States is largely responsible for tribes being dependent on the federal assistance for which tribes bargained. With this responsibility in mind, taking away that assistance, or using it to influence internal tribal decisions, is morally problematic.

Second, without a limiting principle, Congress can defund any tribe at any time, creating a constant state of uncertainty.¹⁵¹ Such uncertainty confines tribes’ ability to plan and allocate resources for their own public services, as they never know when or which federal programs will be defunded. The status quo of having no limiting principle in place effectively helps to keep tribes reliant on federal services and programs.¹⁵² Adopting a limiting principle, therefore, will benefit the federal government as well as tribes by making tribes more likely to become self-sufficient.

Third, if and when the United States may arguably be morally obligated to influence tribal decisions, there are more appropriate methods of doing so than through monetary influence. Plenary power, though problematic, likely is here to stay,¹⁵³ and Congress may use it to influence tribal membership decisions through direct legislation that avoids the pitfalls of monetary influence.¹⁵⁴ There is no need to jeopardize tribal funding, on which many tribes and tribal members rely, and hinder tribal self-sufficiency. If federal interest in a tribal membership determination is important enough for federal intervention, such intervention should be made outright, not indirectly by withholding funds

149. *Id.*; see *supra* note 146, NAT’L CONG. OF AM. INDIANS, at 1 (“In exchange for land, the United States agreed to protect tribal treaty rights, lands, and resources, including provision of certain services for American Indian and Alaska Native tribes and villages, which is known as the federal Indian trust responsibility.”); FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 324–28 (1984).

150. See generally COHEN’S HANDBOOK, *supra* note 6, § 1.03.

151. The National Congress of American Indians adopted a resolution calling Representative Watson’s attempt to cut the government-to-government relationship with and all funding to the Cherokee Nation “an alarming, inappropriate and unacceptable overreach [that] undermines sovereign tribal governments.” Nat’l Cong. of Am. Indians Res. #DEN-07-071, 2007 Gen. Assemb., Reg. Sess. (NCAI 2007) [hereinafter NACI Res.], available at http://www.ncai.org/attachments/Resolution_pXitMPKIKSjEYBanQUOBMTPrgrDBqxVAjXOGearzWOXIJDvAVxTt_DEN-07-071_final.pdf (emphasis added); see NAT’L CONG. OF AM. INDIANS, *supra* note 146, at 1 (“Indiscriminate cuts sacrifice not only these trust obligations, it also thwarts the ability of tribes to promote economic growth, or plan for the future of Native children and coming generations.”). Miller also expressed these concerns, calling the NAHASDA provision allowing HUD to freeze Cherokee Nation funds a “bad precedent that would allow Congress to take punitive action ‘on a whim’ when it disagrees with an action taken by a tribe.” Jim Myers, *Vote Strips Housing Funds*, TULSA WORLD (Sept. 7, 2007, 12:00 AM; updated Sept. 21, 2013, 1:55 PM), http://www.tulsaworld.com/archives/vote-strips-housing-funds/article_766281ad-6a69-5800-8fa4-f10e7d4111e5.html.

152. This is not to say that all tribes are dependent on the federal government for survival. Prakash, *supra* note 66, at 1117–18.

153. See *supra* Part II.A.

154. See *supra* Part II.A.

likely unrelated to that determination and disproportionately harmful to vulnerable tribal members.¹⁵⁵

Fourth, while federal deprivations of funding occur often and are always detrimental to those deprived, only tribal deprivations lack a limiting principle. As I discuss in more detail below, in scenarios outside the tribal context, the Due Process Clause might require some type of hearing or procedure for individuals deprived of funding when the deprivation is serious enough. Similarly, states are protected from federal deprivations of funding through the induce-compel principle. The existence of limits in similar situations illustrates the wisdom of adopting a limiting principle in the context of tribal defunding.

As with any complex issue, however, opposing arguments exist.¹⁵⁶ I next outline and respond to potential arguments against a limiting principle.

2. *Responses to Arguments Against a Limiting Principle*

Here I identify and respond to two potential arguments against a limiting principle. First, opponents of a limiting principle may argue that because funds are coming from the federal government, it should be able to withhold tribal funding at will. To this, I respond that the United States' obligations mandate a limiting principle anyway. Second, opponents may argue that a limiting principle may interfere with obtaining a "fair" outcome. To this, I respond that sovereignty inherently includes the power to make mistakes, and this power should be extended to tribes.

The first and perhaps most persuasive argument for absolute federal power to defund tribes is the source of funds in question: federal taxpayers. Since federal taxpayer money is at stake, it might seem intuitive that the United States has some say in how it is spent—particularly when it is being spent by entities acting contrary to fundamental American values, such as equal protection. Representative Watson expressed this view by introducing legislation to cut off U.S. relations with the Cherokee Nation: "[B]lack descendants obviously will not be able to receive federal assistance from the Cherokee Nation in the form of health, education, and housing assistance. I do not believe that your or my taxpayer dollars should go to any group that practices discrimination. First and foremost, it is against the law."¹⁵⁷

155. See CHEROKEE NATION, *supra* note 147, at 7 (explaining that cutting funding from the Cherokee Nation would "hurt Oklahomans of all races by terminating essential services for the poorest of the poor").

156. See generally Eric Reitman, Note, *An Argument for the Partial Abrogation of Federally Recognized Indian Tribes' Sovereign Power over Membership*, 92 VA. L. REV. 793 (2006).

157. Diane Watson, *Jim Crow in Indian Country*, HUFFINGTON POST (May 25, 2011, 12:15 PM), http://www.huffingtonpost.com/rep-diane-watson/jim-crow-in-indian-countr_b_69927.html.

A seemingly comparable situation is U.S. aid to foreign countries.¹⁵⁸ In that context, most, if not all, people would agree that the United States has the right to condition its aid by directing countries to take or refrain from certain actions. Representative Watson implicitly pointed to this right as well: “I respect the Cherokee Nation of Oklahoma as a sovereign entity. But no sovereign nation, particularly one within the confines of the United States, should be given a free pass to exercise its sovereign rights to expel its citizens on the basis of ethnicity, class, or race.”¹⁵⁹

On further inspection, however, tribal aid and foreign aid differ in important ways. One distinguishing feature is the trust doctrine. As discussed above and in Part II, under the trust doctrine, Congress has a moral obligation, and under certain circumstances federal agencies may have a legal obligation, to provide federal funding and protect tribal interests. The trust doctrine and its corresponding obligations stem from the United States’ own historic Indian policy and the fact that tribes bargained for the federal services and programs they now receive.¹⁶⁰ The United States has no such trust relationship with any foreign countries.

Additionally, the intuitive fairness of allowing the United States to ensure its money is not used for unpalatable means is mitigated where the United States threatens to withhold funding from services or programs unrelated to those means. Representative Watson’s bill to sever the Nation’s government-to-government relationship with the United States and stop all federal assistance certainly would have affected unrelated services and programs. Moreover, Congress’s NAHASDA provision likely did affect unrelated services and programs, unless funds for all services and programs used by members are considered related to membership disputes. If the federal government must intervene in tribal decisions, doing so through direct use of plenary power, instead of threatening withholding of federal funding, would

158. Another potential analogy—and one that I will make in detail below—is federal funding to states. In contrast to aid to foreign countries, there are limits on how the federal government can use funding to influence states.

159. Watson, *supra* note 157. Never mind that the majority of foreign sovereigns attach citizenship to descent, effectively doing the same thing albeit without bestowing citizenship first. See Polly J. Price, *Natural Law and Birthright Citizenship in Calvin’s Case* (1608), 9 YALE J.L. & HUMAN. 73, 73, 77 (1997). Representative Watson’s point remains: in the United States such actions are seen as improper, and the U.S. government should not be providing funding to sovereigns acting contrary to the United States’ morals or ideals.

160. The National Congress of American Indians stressed this history in opposition to federal defunding of the Cherokee Nation. See NACI Res., *supra* note 151, at 1, 2 (opposing legislation terminating the government-to-government relationship of federally recognized Indian tribes and nations or “diminish[ing], limit[ing] or reduc[ing] funding of the United States to Indian tribes and nations” “in order to preserve for ourselves and our descendants . . . rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States”).

ensure that federal government intervention has an effect related to the underlying dispute.¹⁶¹

A second argument for an unrestrained defunding power is that the federal government only seeks the “fair” outcome and thus will only interfere in extreme situations where a tribal action is clearly “wrong.” To root this argument in the Cherokee Freedmen controversy, Representative Watson’s bill required the Nation to take what she and the bill’s supporters saw as the clearly “right” action or face total defunding and severance of its government-to-government relationship with the United States. The National Congress of American Indians (NCAI) characterized Representative Watson’s bill as an “alarming, inappropriate and unacceptable overreach [that] undermines sovereign tribal governments” and “threaten[s] the right of all Indian tribes to determine, and thus preserve, our distinctively Indian identities.”¹⁶²

The NCAI’s response can be broken into two distinct arguments. First, defining the concept of “mistake” can be problematic. Outside what some people might consider absolute and inherent rights and wrongs, mistakes generally are subjective. Who should determine whether a tribe has made a mistake and by what standard should tribal decisions be judged? Beyond absolute rights and wrongs—regardless of the category in which the Cherokee Nation’s decision belongs—the federal government seems to be in a poor position to review tribal decisions because it often lacks the requisite knowledge to make that determination. A tribe, the only expert on its own historical, cultural, and religious morals and ideals, would be in a better position to judge the appropriateness of its actions for its people. Moreover, as sovereign nations separate and distinct from the United States, tribes should be given the opportunity to make those judgments. Thus, if the situation did not involve an absolute and inherent right or wrong, the NAHASDA provision and HUD’s decision that the provision applied to federal litigation took the decision on the Cherokee Freedmen controversy from the appropriate decision maker.

Second, even if an objective mistake resulting in an absolute and inherent wrong has occurred, the question becomes whether the federal government has the right to demand that mistake’s repair, particularly through defunding. Accordingly, all but the most substantial tribal mistakes should be allowed without interference in order to preserve tribal sovereignty. And again, when interference is necessary, there are better methods of doing so than monetary influence. After all, sovereignty seems to innately contain the power to make mistakes. Without the power to make mistakes, a sovereign only possesses the

161. See *CHEROKEE NATION*, *supra* note 147, at 1 (“Even if Congress disagrees with the Cherokee people about who the true citizens of the Cherokee Nation should be, the remedies being considered do nothing to solve the perceived problem and serve only to harm the poorest, oldest and neediest Cherokees.”). See generally Thomas G. Weiss, *Sanctions as a Foreign Policy Tool: Weighing Humanitarian Impulses*, 36 *J. PEACE RES.* 499 (1999) (discussing the impact of international economic sanctions on civilians and targeted regimes).

162. NCAI Res., *supra* note 151, at 1.

authority to make right choices—for tribes a term often defined and determined by an outside entity, the United States. If this were true, tribes would only have the power to choose the method by which to go down a predetermined path. For the Cherokee, that predetermined path, as could have been determined by Representative Watson's bill or perhaps will be determined by a federal court, might be a Nation unrecognizable to the Cherokee and inconsistent with its traditional tribal definition. Straying from the path could bring threats or actual defunding, potentially removing the financial ability to function as a separate sovereign altogether. This is not sovereignty.

Robert B. Porter, in his analysis of the meaning of indigenous sovereignty, hints at both of these points:

From the perspective of the Indigenous nations, the fact that the view of Indigenous nation sovereignty held by the colonists “outside the moat” is seen as oppressive, unilateral, and illegitimate, matters not. Colonizing peoples, as peoples, are entitled to their own views on the subject. What they should not be allowed to do is prevent the ability of Indigenous peoples from embracing their own conceptions of their own sovereignty.¹⁶³

A system where the federal government has the final say on the substantive fairness of tribal thinking, whether it be membership determinations or the concept of tribal sovereignty, leads to assimilation—a policy long since abandoned by the federal government.¹⁶⁴ Tribes would have no choice but to conform to U.S. morals, ideals, and notions of fairness.

At first glance, international politics may appear to refute these points. After all, foreign nations are often forced by other countries to make certain decisions or take certain actions without questioning their sovereignty. For example, international organizations, such as the United Nations and the World Trade Organization, may put financial or even military pressure on governments perceived to be behaving badly.¹⁶⁵ In stark contrast to the tribal context, however, such organizations are policing their own voluntary members, who have voting rights in those organizations. The United States, on the other hand, is an entity entirely distinct from tribes. Though tribal members are also citizens of the United States and thus may vote for elected officials that shape United States' Indian policy, they are a minority often outvoted by the non-Indian majority with little actual control over how that policy is implemented. Similarly, tribes themselves have no vote and little influence over United States' Indian policy.

Another distinguishing factor between the tribal and international contexts is that, when a certain tribal decision is such an affront to objective fairness that

163. Robert B. Porter, *The Meaning of Indigenous Nation Sovereignty*, 34 ARIZ. ST. L.J. 75, 101 (2002).

164. See generally COHEN'S HANDBOOK, *supra* note 6, §§ 1.04, 1.07.

165. See Weiss, *supra* note 161, at 499.

the United States must step in, a direct approach through plenary power is available and less likely to impact tribal members in unrelated ways. Conversely, in the international context, monetary influence may be the only alternative to armed conflict, as plenary power is not available.¹⁶⁶ Thus, international defunding or threats thereof are much more necessary and attractive than tribal defunding, especially given the United States' moral obligation to provide for tribes and protect tribal interests.

B. *The Search for a Limiting Principle*

Assuming that the federal government should not have the ability to influence tribal decisions through threats of withholding federal funding, the question becomes where to draw the line. This Section searches for a limiting principle to place on Congress. I start with potential legal challenges to congressional influence that could be brought under existing legal doctrines. Finding them all unlikely to be successful in court, this Section next looks at two potentially analogous contexts, federalism and separation of powers, from which limiting principles could be borrowed. I conclude that the best limiting principle to adopt, and the principle most likely to be adopted, is the induce-compel principle as found in the federalism context and explained by the Supreme Court in *South Dakota v. Dole*.¹⁶⁷ An alternative though less attractive limiting principle to adopt is the no monetary influence principle as found in the separation of powers context and explained by the D.C. Circuit in *District of Columbia Federation of Civic Associations v. Volpe*¹⁶⁸ and *Sierra Club v. Costle*.¹⁶⁹

1. *Unenforceable Limiting Principles Under Existing Legal Doctrines*

When facing congressional defunding or threats thereof, tribes could bring several legal challenges under existing law, though all are likely to fail. Even so, showing that any existing legal challenge would be insufficient clarifies the need to adopt a new, enforceable limiting principle. The legal challenges that seem most suited to this scenario are claims for breach of the trust doctrine, breach of contract, taking of property without just compensation, and the denial of due process.

a. *Trust Doctrine*

As seen above in Part II.C.1, courts have limited federal agencies' authority to defund tribes without congressional approval. Agencies must provide a meaningful level of service and distribute funds in a reasonably

166. See generally Weiss, *supra* note 161.

167. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

168. *D.C. Fed'n of Civic Ass'ns. v. Volpe*, 459 F.2d 1231, 1236 (D.C. Cir. 1971).

169. *Sierra Club v. Costle*, 657 F.2d 298, 409 (D.C. Cir. 1981).

equitable way, and the trust doctrine can enhance agencies' other APA duties by requiring a heightened standard of review for alleged failures to meet trust responsibilities. As also explained above, however, the trust doctrine is inapplicable in situations involving congressional or congressionally approved agency defunding.

b. Breach of Contract

A tribe may argue that it entered into an implied contract for federal programs and services when it relinquished its traditional land and rights and submitted to federal authority. As explained in Part III, the United States did not freely donate federal services but instead gave them in exchange for treaties that allowed it to relocate American Indians to reservations and eventually subject tribes to allotment, assimilation, and termination policies.¹⁷⁰

Normal contract principles would govern tribal contract claims. Contracts can either be implied-in-fact or implied-in-law. Implied-in-fact contracts are created “[i]f the promises of the parties can be inferred from their acts or conduct, or from words that are not explicitly words of agreement.”¹⁷¹ Implied-in-law contracts exist “where one party is required to compensate another for a benefit conferred in order to avoid unjust enrichment, rather than because there has been an actual or implied-in-fact promise to pay for the benefit.”¹⁷² Theoretically, the exchange of tribal land and rights for reservations and federal assistance could be placed within either doctrine. A court could infer from a treaty or the history of a particular federal-tribal relationship that promises were made, creating an implied-in-fact contract. Alternatively, a court could find that a tribe’s relinquishment of its land and rights constitutes a benefit for which the United States must pay, specifically in the form of providing federal assistance.

Courts are unlikely to accept this contract theory, however. To accept the theory, a court would have to circumvent the judiciary’s longstanding deferment to Congress on its exercise of plenary power. Even if a court is willing to not defer, the contract theory may not be the ideal means to intervene in Congress’s plenary power, as it would open up the federal judiciary to hundreds of century-old tribal claims.¹⁷³ Instead, courts likely would apply the doctrines of acquiescence or laches to prevent major upheaval of the existing legal framework.¹⁷⁴ Further, a court might find that the trust doctrine, despite being unenforceable against Congress, sufficiently fulfills the function that a

170. WILKINSON, *supra* note 13, at 8–9.

171. MELVIN A. EISENBERG, GILBERT LAW SUMMARIES: CONTRACTS § 156 (2002).

172. *Id.* § 157.

173. *Cf. Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) (refusing to allow Oneida land purchases to revive tribal sovereignty over that land because the tribe had waited too long and the disruption to the reasonable reliability of non-Indian landowners would be too severe).

174. *Cf. id.* at 199.

contract claim normally would—a duty to protect and care for tribes that have established the necessary relationship with the United States—so that intervention is not necessary. Yet as detailed in Parts I and II, the trust relationship fails to protect even fundamental, nondivested tribal decisions from federal influence because it is not enforceable against Congress.

c. Just Compensation

Tribes may bring a taking of private property without just compensation claim. Based on the Fifth Amendment of the United States Constitution, a just compensation claim may be brought when private property is taken for public use without just compensation.¹⁷⁵

Again, however, courts would likely reject a tribe's just compensation claim based on the federal government's withholding of federal funds. The Supreme Court generally reads the Fifth Amendment's Just Compensation Clause to apply only when the "property" taken is "a specific interest in physical or intellectual property,"¹⁷⁶ not when it is a "taking" of money. Otherwise, federal tax laws would be suspect, as just compensation (a dollar-for-dollar amount) might have to be returned to a taxpayer.¹⁷⁷ While individual justices have occasionally advocated straying from such a reading,¹⁷⁸ the Court is unlikely to do so in the context of federal defunding of tribes because the facts are so far from the paradigm takings case of "public occupation of real property."¹⁷⁹ Instead, it appears that the Due Process Clause, not the Just Compensation Clause, was meant to protect against these types of deprivations; however, for other reasons, it does not.

d. Due Process

Despite the Due Process Clause's seeming applicability, courts also likely would reject a due process claim against federal defunding of tribal programs or services. Federal money is given to tribes to disperse, but tribal governments

175. U.S. CONST. amend. V.

176. *E. Enters. v. Apfel*, 524 U.S. 498, 541, 554 (1998) (Breyer, J., dissenting) (writing for a four-justice minority that was joined by Justice Kennedy in finding that Takings Clause was inapplicable where there was not "a specific property right or interest" at stake).

177. See Robert Brauneis, *Eastern Enterprises, Phillips, Money, and the Limited Role of the Just Compensation Clause in Protecting Property "in its Larger and Juster Meaning"*, 51 ALA. L. REV. 937, 944-45 (2000) ("[T]axation was thought to be a practice wholly outside the Just Compensation Clause."). Even where the facts are within the paradigm takings case, Congress enjoys qualified immunity against Indian takings claims such that Congress must merely make a "good faith effort" to provide the fair value of taken Indian land. Raymond Cross, *Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-first Century*, 40 ARIZ. L. REV. 425, 497 (1998) (citing *United States v. Sioux Nation of Indians*, 448 U.S. 371, 416-17 (1980)).

178. See *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) (Souter, J., dissenting) (finding that a law requiring attorneys to place their clients' funds in an account that generated interest income to fund legal services for low-income persons was potentially a "taking of the client's property").

179. Brauneis, *supra* note 177, at 942.

do not receive due process protections, as these governments are neither subject to the Constitution nor qualify as “persons” under the Due Process Clause.¹⁸⁰ Thus, as U.S. citizens, it would be up to tribal members to bring a due process claim.

At first glance, an individual tribal member would appear to have a valid procedural due process claim. “Procedural due process, as the phrase implies, refers to the procedures that the government must follow before it deprives a person of life, liberty, or property.”¹⁸¹ The Supreme Court, in *Mathews v. Eldridge*, provided three elements to evaluate in deciding what procedure the Due Process Clause requires: the private interest at stake, the government’s interest, and the risk that the procedures used will lead to erroneous decisions.¹⁸² In *Goldberg v. Kelly*, the Court held that due process required qualified recipients of welfare to be given a pretermination hearing.¹⁸³ The Court held that the crucial factor was that, because “welfare provides the means to obtain essential food, clothing, housing, and medical care,” “termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits.”¹⁸⁴

Generally, application of the *Eldridge* factors and *Goldberg* to tribal defunding might allow a court to find a denial of procedural due process for tribal members. As discussed above in Part III.A.1, a tribal member’s interest in federal funding is great, as many strongly rely on federal services and programs. *Goldberg*’s recognition of the importance of welfare benefits to individuals also might apply to certain services and programs given to tribal members. Further, the risk that the procedures used will lead to erroneous decisions is high because defunding decisions are based solely on Congress’s political will and the effect of tribal defunding on individual tribal members is unrelated to the underlying dispute. For example, a Cherokee Nation member’s loss of HUD services or programs, which could have happened if HUD withheld federal funding until the Nation ran out of replacement funds, would not directly relate to the Cherokee Freedmen controversy and thus appears erroneous. Moreover, Congress appears to have given HUD the authority to withhold Cherokee Nation funds solely based on HUD’s reading of the statute’s obligations without a requirement for any procedure. Even if the United States’ interest is high in certain defunding situations, a court may find

180. U.S. CONST. amend. V; see *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008) (“Tribal sovereignty, it should be remembered, is a ‘sovereignty outside the basic structure of the Constitution.’ The Bill of Rights does not apply to Indian tribes.” (citations omitted)).

181. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 7.1 (3d ed. 2006).

182. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 27 (1981) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

183. *Goldberg v. Kelly*, 397 U.S. 254, 264 (1971).

184. *Id.*

a tribal member's loss of federal services or programs to be a denial of due process on the basis of the other two factors.

Regardless, an individual tribal member's procedural due process claim probably would fail, as he or she likely would not have the direct property rights that are necessary for such a claim.¹⁸⁵ Third party interests in deprivations of property are only considered when the person or entity actually deprived—in this case the tribe—brings the claim, which is an impossibility here.¹⁸⁶

An individual tribal member's substantive due process claim would have its own hurdles. "Substantive due process . . . asks whether the government has an adequate reason for taking away a person's life, liberty, or property."¹⁸⁷ The Supreme Court has held that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on the party complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way."¹⁸⁸ Thus, it appears that courts would employ a form of the easily met rational basis test to consider whether tribal defunding violated substantive due process. While tribal defunding legislation may be unwise and have effects unrelated to the underlying reason for the legislation, a court likely would not consider the legislation arbitrary and irrational such that the presumption of constitutionality is overcome.

2. *Potential Limiting Principles to Adopt*

As discussed above, to address the problem of Congress's influence over tribal determinations, a limiting principle is needed. Existing legal doctrines do not appear to provide a judicially enforceable constraint on Congress's monetary influence of tribes, so a new limiting principle must be adopted. I give two suggestions explained in detail below. First, the induce-compel principle, as found in the federalism context, distinguishes between inducing state action and compelling state action, and only allows the former. Federal monetary influence may not cross the line into compulsion. Second, the no monetary influence principle, as found in the separation of powers context, provides that members of Congress cannot threaten withholding of an

185. See *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 784, 790 (1980) (dismissing claim challenging government's decertification of nursing home because it was brought by residents who had no property interest in receiving Medicaid from a particular facility, rather than by the home itself).

186. See *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 263 (1987) (considering fired employee's interest in not being discharged in holding that the U.S. government violated motor carrier's procedural due process rights in ordering it to temporarily reinstate employees).

187. CHEMERINSKY, *supra* note 181, § 7.1.

188. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976)).

executive agency's funds so that the agency or executive official actually uses irrelevant considerations to make a decision.

A hurdle for both of these limiting principles is the difficulty of implementation. Either principle could be implemented in one of three ways: (1) Congress could impose the limiting principle on itself; (2) the Supreme Court could alter the nature of plenary power; or (3) the Constitution could be amended. The Supreme Court is unlikely to change course by limiting Congress's plenary power,¹⁸⁹ and a constitutional amendment seems even less likely.¹⁹⁰ The most likely option, therefore, is congressional implementation.

Intuitively, Congress may seem unlikely to limit its own power, but it has done so before and might be willing to do so here. Specifically, Congress has limited its power by delegating it to executive agencies for a number of reasons: avoidance of responsibility for controversial decisions, lack of expertise in an area, lack of congressional resources (time and energy), or lack of congressional consensus on how to proceed.¹⁹¹ Each of these considerations is likely present in tribal defunding controversies.¹⁹² Similarly, Congress often delegates power to states in the interests of federalism, the rationale of which is applicable to tribes.

Further, although it may be tempting to suggest extending the existing legal doctrines discussed above to make them judicially enforceable against Congress, Congress is less likely to do so than adopting the limiting principles discussed below. Making the trust doctrine enforceable against Congress or providing judicially enforceable due process rights to tribes would have unknowable effects and go far beyond a remedy tailored to address the specific problem of Congress's monetary influence of tribes.

Regardless, before implementation can be seriously considered, a viable limiting principle must be found. Below I argue that the induce-compel principle's easily transferable rationale makes it preferable, both as a policy matter and because Congress may be more easily convinced to enact it.

189. *See supra* note 71.

190. *See* U.S. CONST. art. V.

191. *See generally* DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS 8, 10 (1999) (explaining that Congress delegates to avoid blame and because it has limited expertise, time, and resources to reach a consensus); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 9 (1993) (explaining that Congress delegates to avoid blame and for convenience and efficiency, though taking the ultimate position that delegation should be avoided).

192. Tribal defunding itself is controversial, and any underlying cause leading Congress to defund a tribe likely would be as well. Tribes also have more expertise in tribal matters. Of course, Congress's limited time and resources and lack of consensus apply with equal force to tribal defunding as any other issue.

a. *Federalism's Induce-Compel Principle*

The first potential limiting principle to adopt is the induce-compel principle. In this Section, I define the induce-compel principle and trace its development through case law, explain how the underlying rationale of the principle is applicable to the tribal context, and apply the principle to the facts of the Cherokee Freedmen controversy.

The induce-compel principle is a limit to the federal government's monetary influence of states and distinguishes between inducing state action and compelling state action. Only the former is allowed. However, the distinction between induce and compel is somewhat murky. In *South Dakota v. Dole*, which originated the distinction, the Supreme Court approved a federal statute that awarded federal highway funds to states on the condition that they create a twenty-one-year-old drinking age.¹⁹³ The Court found this condition, a threatened loss of 5 percent of the state's obtainable allotment of federal highway funds, to be a "relatively mild encouragement" and not "so coercive as to pass the point at which pressure turns into compulsion."¹⁹⁴ Beyond this, the *Dole* Court failed to provide clear definitions of *inducement*, *coercion*, or *compulsion*, and a subsequent Ninth Circuit case law interpreted the protection as quite minimal.¹⁹⁵ Even so, the Court at least recognized that at some point financial pressure becomes compulsion and, if nothing else, acknowledged that such compulsion is unwelcome.

Recently, in *National Federation of Independent Business v. Sebelius*, the Court made clear that the induce-compel principle has teeth. The Court found that Congress's condition that "[a] State that opts out of the Affordable Care Act's expansion in health care coverage thus stands to lose" all of its Medicaid funding, which accounts for over 20 percent of the average state's total budget, is "much more than 'relatively mild encouragement'—it is a gun to the head."¹⁹⁶ The Court further stated that such a condition—"the threatened loss of over 10 percent of a State's overall budget"—"is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion."¹⁹⁷

The "conditional grant standard," which was upheld in separate cases as a limit to Congress's spending power, clarifies the meaning of "induce." Article I, Section 8, of the Constitution states that "Congress shall have Power . . . to provide for the . . . general Welfare of the United States." Under this provision,

193. *South Dakota v. Dole*, 483 U.S. 203, 203 (1987).

194. *Id.* at 211.

195. *See Nevada v. Skinner*, 884 F.2d 445, 454 (9th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990) (upholding provisions of the Federal Aid Highway Act that required 95 percent of federal highway funds to be withheld from states that did not post a fifty-five-mile-per-hour maximum speed limit).

196. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2604–05 (2012) (quoting *Dole*, 483 U.S. at 211).

197. *Id.* at 2605.

Congress may spend in any way it believes would serve the general welfare, so long as it does not violate another constitutional provision.¹⁹⁸ Of course, serving the general welfare may include granting money to state or local governments. Under the conditional grant standard, Congress may place conditions on grants to state or local governments if the conditions are expressly stated¹⁹⁹ and have some relationship to the purpose of the spending program.²⁰⁰ Because such conditional grants have been upheld, they must be inducing and not compelling state action under the induce-compel principle.

Federalism, the term used to describe the division of power between state and federal governments,²⁰¹ is the primary underlying rationale of the induce-compel principle. Federalism itself has three justifications²⁰² that are easily applicable to the division of power between the federal government and tribes, making the argument for adoption of the induce-compel principle in the tribal context persuasive.

First, the vertical division of power between the federal government and states lessens the chance of federal tyranny, as it restricts the authority of the federal government. Both the Framers and later commentators viewed federal oppression as much more ominous than state or local authoritarianism.²⁰³ Like states, division of power between the federal government and tribes can reduce the risk of federal tyranny. In fact, common sense suggests that the risk of federal tyranny is much higher for tribes than states, as the federal government and states largely share the same culture and history. The history of the federal-tribal relationship provides many reminders of past federal tyranny. For the Cherokee, the Trail of Tears is a well-known example,²⁰⁴ and other tribal

198. *United States v. Butler*, 297 U.S. 1, 65–66; (1936); *see Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937) (upholding unemployment compensation provisions of the Social Security Act); *Helvering v. Davis*, 301 U.S. 619 (1937) (upholding old age pension program provisions of the Social Security Act).

199. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 2 (1987) (holding that “if Congress intends to impose a condition on the grant of federal moneys it must do so unambiguously” so that states will know the consequences of choosing to take federal funds).

200. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

201. *See* U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); U.S. CONST. art. VI (“Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land.”)

202. *See generally* CHEMERINSKY, *supra* note 181, § 3.9.

203. *See, e.g.*, THE FEDERALIST No. 32 (Alexander Hamilton) (“[T]he utility and necessity of local administrations for local purposes . . . would be a complete barrier against oppressive use of such [national] power.”); Andrew Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341, 388 (1985) (“Should the federal government ever be captured by an authoritarian movement or assert itself as a special cohesive interest, the resulting oppression would almost certainly be much more severe and durable than that of which any state could be capable.”).

204. *See generally* WILLIAM G. MCLOUGHLIN, AFTER THE TRAIL OF TEARS: THE CHEROKEES’ STRUGGLE FOR SOVEREIGNTY, 1839–1880 (1993); Russell Thornton, *Cherokee Population Losses During the Trail of Tears: A New Perspective and a New Estimate*, 31 ETHNOHISTORY 289 (1984).

relocations occurred throughout the United States' expansion.²⁰⁵ Likewise, tribes may view the eras of allotment,²⁰⁶ assimilation,²⁰⁷ and termination²⁰⁸—during which the United States' declared purpose was to eliminate tribes as distinct political entities—as periods of amplified federal tyranny.

Second, federalism enhances democratic rule by protecting a level of government that is closer and more responsive to the people because of the small area governed.²⁰⁹ Like states, tribes govern smaller areas, are closer to the people, and can better respond to their needs and concerns. Moreover, tribes are particularly suited to serve tribal members' needs and concerns. The cultural and historical differences between American Indians and the American majority make political differences more likely, and minimizing federal interference allows tribes to respond to their people accordingly. Conversely, the U.S. government, which must serve a much larger and more diverse population, would be less likely to hear or help an isolated Native minority.²¹⁰

Third, states act as laboratories for “new social, economic, and political ideas.”²¹¹ As Justice Brandeis first declared, “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”²¹² For several reasons, tribes make even better laboratories for new social, economic, and political ideas. Tribes are much more likely to enact different ideas because their traditional government structures and political customs do not share the same background as the federal government and states (which, unlike tribes, were formed based on the ideas of English and other European colonizers) or even other tribes. Indian

205. See generally Mary E. Young, *Indian Removal and Land Allotment: The Civilized Tribes and Jacksonian Justice*, 64 AM. HIST. REV. 31 (1958).

206. See generally Royster, *supra* note 73.

207. See generally FREDERICK E. HOXIE, *A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880–1920* (1984).

208. See generally Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139 (1977).

209. See, e.g., DAVID SHAPIRO, *FEDERALISM: A DIALOGUE* 91–92 (1995) (“[T]o the extent that the electorate is small, and elected representatives are thus more immediately accountable to individuals and their concerns, government is brought closer to the people and democratic ideals are more fully realized.”); Rapaczynski, *supra* note 203, at 402 (“[T]he dominant view is that the optimum size of a political body than can afford significant citizen participation is nowhere near the size of the modern nation state or even of its main provincial subdivisions.”).

210. Cody McBride, *Making Pollution Inefficient Through Empowerment*, 39 *ECOLOGY L.Q.* 405, 432–35 (2012) (discussing specific instances of environmental harm to tribes and tribal members caused by overreliance on a distant and unresponsive federal government to address environmental hazards, including pollution resulting from uranium mining in the Navajo Nation).

211. *Fed. Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742, 787 (1982) (O’Connor, J., dissenting); see also *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 567–68 & n.13 (1985) (Powell, J., dissenting) (“The Court does not explain how leaving the States virtually at the mercy of the Federal Government, without recourse to judicial review, will enhance their opportunities to experiment and serve as ‘laboratories.’”).

212. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

and Anglo worldviews on law and justice are largely inconsistent.²¹³ Accordingly, many different types of indigenous justice systems exist, including “talking circles, restorative justice processes, and consensus-building practices,” many of which differ significantly from U.S. and even other tribal models.²¹⁴

Further, unconstrained by the Constitution, tribes have more legal freedom to experiment with these different systems than states. Due process requirements, for example, may prevent the existence of state or federal court systems where anyone can speak, a jury is not used, or the decision maker has prior knowledge of the dispute or converses privately with the parties—all of which have been used in tribal resolution systems.²¹⁵ First Amendment freedom of religion standards may also inhibit a state’s attempt to imitate the many theocratically based tribal governments or the successful and popular Navajo Peacemaker courts, which “incorporate[] the Navajo world view about the interconnectedness of the extraordinary (the sacred) and the ordinary (the secular) within [their] processes.”²¹⁶ Further, the Guarantee Clause of Article IV limits a state’s choice of its system of government,²¹⁷ and the Equal Protection Clause likely would invalidate many traditional gender-based tribal systems that preference women over men.²¹⁸ While the ICRA does place some of these limitations on tribal governments, only tribal courts have jurisdiction to enforce them.²¹⁹ For these reasons, tribes have much more willingness and freedom to experiment and should be given the opportunity to do so without federal influence.

Apparently recognizing that the justifications for federalism apply in the tribal context, the law already treats tribes as states in many circumstances, which makes the proposed treatment of tribes as states, by adopting the induce-compel principle, more persuasive. For example, since 1984 the Environmental Protection Agency (EPA) has recognized tribes “as the primary parties” for environmental regulation protecting Indian Country,²²⁰ and most federal

213. Riley, *supra* note 3, at 839–40. For example, tribal tradition encourages “complete candor” as to the facts and “testifying against oneself” while opposing jury trials and the adversarial process. *Id.* at 839–41.

214. *Id.* at 840–41.

215. *Id.* at 842.

216. *Id.* at 842, 844–47.

217. U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in the Union a Republican Form of Government. . .”).

218. U.S. CONST. amend. XIV; Riley, *supra* note 3, at 843–44 (“Gender-based systems of governance . . . are also vulnerable to destruction via ICRA’s expansion [because of ICRA’s equal protection provision].”).

219. *See supra* Part I.

220. WILLIAM D. RUCKELSHAUS, U.S. EPA, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS 2 (1984), available at www.epa.gov/tp/pdf/indian-policy-84.pdf.

environmental statutes treat tribes like states.²²¹ Essentially, federal environmental statutes treat tribes as states to promote tribal self-determination,²²² which in turn fosters efficiency, sound environmental management, and environmental justice.²²³ Treating tribes as states may also help protect tribal cultural resources and Indian communities.²²⁴

Limiting Congress's defunding power through an induce-compel principle will achieve many of the same goals as treating tribes as states in the environmental context. For example, the principle would make it easier for tribes to make decisions free from federal government pressure, enhancing efficiency, sound management, and tribal self-determination, the official goals of the United States' Indian policy since the 1960s.²²⁵ The principle also would lessen uncertainty, which, as discussed above in Part III.A.1., contributes to tribes' continued reliance on federal services and programs.

As shown by application of the induce-compel principle to the Cherokee Freedmen controversy, the principle likely will affect federal monetary influence of tribes. The principle would have barred Representative Watson's proposal, had it passed, to sever all funding of and U.S. relations with the

221. See, e.g., Clean Air Act, 42 U.S.C. § 7474(c) (2012) (authorizing only tribes to redesignate reservation air quality); Clean Water Act, 33 U.S.C. § 1377(e) (2012) (allowing tribes to apply for treatment as a state in order to administer provisions of the Act); Hazardous Materials Transportation Act, 49 U.S.C. § 5101 *et seq.* (2012) (automatically placing tribes and states in substantially identical positions); Nuclear Waste Policy Act of 1983, 42 U.S.C. § 10101 *et seq.* (2012) (automatically placing tribes and states in substantially identical positions). When a tribe does not have primacy, the EPA will administer environmental programs in its territory just as it does for states without primacy. 40 C.F.R. § 123.1(h) (2014) (Clean Water Act programs); *id.* § 271.1(h) (Resource Conservation and Recovery Act hazardous waste programs).

222. See *Wash. Dep't of Ecology v. EPA*, 752 F.2d 1465, 1469–71 (9th Cir. 1985) (finding the EPA's construction consistent with federal policy of self-determination).

223. See *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, Exec. Order 12,898, § 6-606, 59 Fed. Reg. 7629, 7632 (1994) (mentioning federal Indian programs while calling on all federal agencies to work toward environmental justice); Judith V. Royster, *Oil and Water in the Indian Country*, 37 NAT. RESOURCES J. 457, 464 (1997) (the "EPA has consistently taken the position that reservations must be treated as single administrative units."). *But see* McBride, *supra* note 210, at 431 ("Native tribes have a unique role in federal environmental law, but that role does not always allow adequate protection of the environment upon which they depend.").

224. See *City of Albuquerque v. Browner*, 97 F.3d 415, 427–28 (10th Cir. 1996) (water quality standards set by the Isleta Pueblo protected "primary contact ceremonial use" of the river). See generally Winona LaDuke, *Traditional Ecological Knowledge and Environmental Futures*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 127 (1994); Catherine A. O'Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples*, 19 STAN. ENVTL. L.J. 3 (2000); Jana L. Walker et al., *A Closer Look at Environmental Injustice in Indian Country*, 1 SEATTLE J. SOC. JUSTICE 379 (2002).

225. See Nixon, *supra* note 106, at 257 ("It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decision.").

Cherokee Nation, and lessened the pressure felt by the Nation to conform to the federal government's will.

Though harder to predict given the unclear distinction between inducing and compelling, a court likely would have found that the induce-compel principle bars HUD's congressionally authorized hold on the Nation's HUD account. Based on *Dole*, the percentage of funds withheld is important and should be calculated based solely on the type of funds being withheld, not the total amount of federal funding.²²⁶ In categorizing the withholding as mere inducement, the Supreme Court considered that the federal government had withheld 5 percent of the state's federal *transportation* funds, not total funds.²²⁷ Here, just as the Affordable Care Act conditioned *all* Medicaid funds on states' expanding health care coverage in *Sebelius*,²²⁸ HUD withheld \$37.1 million, or 100 percent, of the Nation's HUD funds. The amount withheld also equaled 8 percent of the \$300 million in total estimated federal funding to Cherokees from federal taxpayers in 2007. Thus, the federal government withheld a higher percentage of the Nation's *total* federal funds—8 percent—than it withheld of only the state's *transportation* funds in *Dole*—5 percent,²²⁹ and the total federal funds withheld from the Nation approached the 10 percent emphasized in *Sebelius*.²³⁰ HUD's congressionally authorized defunding also appears to violate the conditional grant standard, making it even more likely HUD's actions go beyond inducement and into compulsion territory. The condition was neither expressly stated, as Congress did not clarify whether the NAHASDA provision required the Nation to keep the Freedmen in the tribe until the end of federal litigation, nor directly related to the category of funding.²³¹

b. Separation of Power's No Monetary Influence Principle

The second potential limiting principle to adopt is the no monetary influence principle. This section follows the same formula as the last: I define the no monetary influence principle before examining the underlying rationale of the principle. Although I find the rationale of this principle less applicable to the tribal context than the induce-compel principle—and consequently the argument for its adoption less persuasive—I still apply the principle to the facts of the Cherokee Freedmen controversy to test its effectiveness.

226. See *South Dakota v. Dole*, 483 U.S. 203, 211 (1987).

227. *Id.*

228. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2604–05 (2012).

229. See *Dole*, 483 U.S. at 211.

230. See *Sebelius*, 132 S. Ct. at 2604–05 (noting that states that chose to opt out of the Affordable Care Act's expansion of health care coverage “stand[] to lose not merely ‘a relatively small percentage’ of its existing Medicaid funding, but *all* of it,” which accounts for over 10 percent of the average state's total budget, amounting to a “gun to the head” (quoting *Dole*, 438 U.S. at 211)).

231. See *Dole*, 483 U.S. at 207; *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1987).

The no monetary influence principle is a limit on congressional monetary influence of agencies and executive officials who often feel great pressure to accommodate the wishes of the House and Senate appropriations committees and their individual members. Essentially, the no monetary influence principle, which was developed by the D.C. Circuit, provides that members of Congress cannot threaten to withhold an executive agency's funds such that the agency actually uses irrelevant considerations to make a decision.

Only once, however, has a circuit court held that pressure from a congressional committee went too far. In *District of Columbia Federation of Civic Associations v. Volpe*, the House Appropriations Subcommittee threatened to withhold funds for the construction of the D.C. subway unless the Secretary of Transportation approved an unrelated bridge for inclusion in the federal highway system.²³² The D.C. Circuit held that the Secretary could not make the decision in whole or in part on the basis of congressional pressure; instead, the Secretary of Transportation must provide an explanation relying on relevant considerations.²³³

Subsequent cases have largely distinguished *D.C. Federation*. In *Sierra Club v. Costle*, for example, the D.C. Circuit ruled that the Senate majority leader could communicate to the EPA his strong views in favor of adopting a Clean Air Act rule that would have minimal impact on the coal industry.²³⁴ Despite the senator's potential to influence the EPA's adoption of the rule, no evidence existed that the senator made threats to withhold EPA funds on irrelevant grounds or that the EPA had been influenced by the senator's pressure.²³⁵ Further, the EPA adequately explained other relevant reasons for adopting the rule.²³⁶ The *Costle* court held that congressional pressure on agencies is only problematic if (1) "the content of the pressure upon the [executive agency or official] is designed to force him to decide upon factors not made relevant by Congress in the applicable statute" and (2) the agency or executive official's decision is actually affected by extraneous pressure.²³⁷ As long as the agency or official offers an adequate and independent basis for a decision, courts are likely to excuse congressional attempts to pressure agencies.

The primary underlying rationale of *D.C. Federation* and *Costle* is the separation of powers doctrine. Under a formalist perspective, the function of

232. D.C. Fed'n of Civic Ass'ns. v. Volpe, 459 F.2d 1231, 1236 (D.C. Cir. 1971).

233. *Id.* at 1248–49.

234. *Sierra Club v. Costle*, 657 F.2d 298, 409 (D.C. Cir. 1981).

235. *Id.*; *Aera Energy LLC v. Salazar*, 642 F.3d 212, 220 (D.C. Cir. 2011) ("[P]olitical pressure invalidates agency action only when it shapes, in whole or in part, the judgment of the ultimate agency decisionmaker.").

236. *Costle*, 657 F.2d at 409; *see Aera Energy LLC*, 642 F.3d at 220 ("[E]ven where political considerations have tainted agency action, we have consistently given the agency an opportunity to issue a new, untainted decision.").

237. *Costle*, 657 F.2d at 409.

the executive branch is solely to carry out the laws enacted by the legislative branch,²³⁸ and the function of the legislative branch is solely to enact laws.²³⁹ Each branch, along with the judiciary, is given powers to check the others, creating a balance of power within the federal government. Protecting this balance of power is the justification for enforcing the separation of powers. This balance is upset when Congress applies “extraneous pressure” by threatening to withhold unrelated monies from executive agencies and officials because Congress is placing itself in the executive’s role of choosing how and when to enforce the laws that it created.²⁴⁰

Unlike federalism, however, the underlying justification for the separation of powers doctrine does not quite translate to the tribal context. The Framers did not consider tribes to be part of the federal government,²⁴¹ as evidenced by the Indian Commerce Clause, and thus did not consider their presence when constructing the system of checks and balances within the Constitution. Although the federal government may be able to check the actions of tribes, it is highly unlikely that tribes could provide an adequate check on Congress or the executive. Even if tribes could provide an adequate check on Congress or the executive, allowing such a check potentially would upset the delicate balance envisioned and in place since the Founding, as it might tip the scale in favor of one branch or the other. Thus, tribes should not be treated as part of the balance.

Moreover, any doctrine that brought tribes closer to the DOI likely would be met with hostility in Indian Country and the federal government.²⁴² As discussed above, federal Indian policy has been one of self-determination since the 1960s. Modern congressional acts have continued this originally tribally driven trend.²⁴³

238. U.S. CONST. art. II, § 1, cl. 1 (Executive Vesting Clause); U.S. CONST. art. II, § 3 (Take Care Clause).

239. U.S. CONST. art. I, § 1 (Legislative Vesting Clause).

240. *See* D.C. Fed’n of Civic Ass’ns. v. Volpe, 459 F.2d 1231, 1246 (D.C. Cir. 1971).

241. *See supra* Part II.A.1. In fact, at the time of the Founding, American Indians were not even citizens of the United States. *See* Indian Citizenship Act of 1924.

242. *See generally* Johnson & Hamilton, *supra* note 104.

243. *See, e.g.*, Indian Child Welfare Act of 1978, 25 U.S.C. § 1902 (2012) (“[I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.”); American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (2012) (“[I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.”); Indian Gaming Regulatory Act, 25 U.S.C. § 2702 (2012) (“The purpose of this chapter is . . . to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.”).

Despite my reservations, because the no monetary influence principle could be adopted under an unforeseen rationale other than the separation of powers doctrine, it should be tested by application only. However, application of the principle to the Cherokee Freedmen controversy further illuminates the difficulty of applying it to the tribal context.

Again, whether the no monetary influence principle bars congressional monetary influence depends on whether (1) “the content of the pressure upon the [executive agency or official] is designed to force him to decide upon factors not made relevant by Congress in the applicable statute” and whether (2) the agency or executive official’s decision is actually affected by extraneous pressure.²⁴⁴ Because HUD’s congressionally authorized withholding of the Cherokee Nation’s funds clearly influenced the Nation’s ultimate decision, the outcome under the no monetary influence principle hinges on whether the federal pressure was designed to force the tribe to decide the underlying dispute upon irrelevant factors.

Unlike in the separation of powers context, where relevant factors are presumably made clear by the federal statute authorizing the agency’s or official’s actions, it is difficult to decide how courts would determine relevant factors in the tribal context, where tribal actions do not need congressional authority. Courts could apply the no monetary influence principle by assuming relevant factors include anything except the potential loss of federal funding unrelated to the underlying dispute. Assuming this approach, as discussed above, HUD’s congressionally authorized withholding of the Cherokee Nation’s funds likely would not be considered directly related to the Nation’s disenfranchisement of the Freedmen. While the Nation’s decision to exclude the Freedmen affected the distribution of the funds to the Freedmen, the Nation’s decision was not prefaced on the goal of changing federal funding distribution, and HUD’s withholding affected many individual members whether or not they voted to disenfranchise the Freedmen.

Thus, under at least one approach to the application of the no monetary influence principle, Congress’s extraneous pressure may not have been allowed. Again, though, the rationale behind the principle does not translate well to the tribal context, and the principle cannot be easily applied. For these reasons, the induce-compel principle would be the better choice.

CONCLUSION

The federal government has broad power and many methods by which to influence tribal decisions, even those decisions that are considered fundamental to tribal sovereignty and have not been divested. One of the more enticing methods is monetary influence through defunding of tribes or threats thereof, as evidenced by the Cherokee Freedmen controversy. While the correctness of the

244. See *Sierra Club v. Costle*, 657 F.2d 298, 409 (D.C. Cir. 1981).

Cherokee Nation's treatment of the Freedmen can and should be legitimately questioned, clear moral and policy reasons exist as to why the federal government should not have unlimited power to influence monetarily tribal actions, including those of the Nation. For example, the United States is responsible for creating tribal reliance on federal assistance, and the lack of a limiting principle makes it harder for tribes to plan for their own self-sufficiency or to escape their reliance. Defunding of federal services and programs also negatively impacts tribal members in ways often unrelated to the underlying dispute. Accordingly, when tribes take actions so clearly wrong that the federal government must intervene, there are better ways to do so. To incentivize other methods of federal influence, a limiting principle on the federal government's monetary influence of tribes is needed.

The induce-compel principle is certainly not perfect,²⁴⁵ but it would provide a sufficient limit to the federal government's monetary influence of tribes. More importantly, the principle is modest enough that Congress might conceivably prescribe it onto itself. Otherwise, either the Supreme Court will need to make a decision or the Constitution will need to be amended. Congress certainly should adopt the induce-compel principle, as it would advance the underlying rationale of federalism, which applies with even stronger force to the tribal context. As seen in reference to the Cherokee Freedmen controversy, the induce-compel principle would have an effect. Specifically, it likely would have prevented Congress from withholding the Cherokee Nation's funds pending resolution of litigation involving the Freedmen. More importantly, congressional adoption of the principle would plant the idea that Congress should not have unbridled power over tribal decisions, especially exercises of fundamental, nondivested powers. Adoption would give tribes more sovereignty.

245. See, e.g., Lynn A. Baker, *Conditional Federal Spending and States' Rights*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 104 (2001) (criticizing the induce-compel principle and advocating for a more normative theory that would invalidate "offers of federal funds to the states that, if accepted, would regulate them in ways that Congress could not directly mandate").

