
THE SOVEREIGN SELF-PRESERVATION DOCTRINE IN ENVIRONMENTAL LAW

Federal, state, and tribal sovereignties comingle in our “compound republic of America.”¹ Imagine that one of these sovereigns, or its citizens, threatens the health or safety of its neighbor. How may the jeopardized neighbor protect itself?

The law has an answer to this question — well, four answers. The Supreme Court has developed four separate doctrines governing such external threats, one per variation of the scenario: State v. State,² State v. Tribe,³ Tribe v. State,⁴ and Federal v. State.⁵ These doctrines have one big thing in common: all of them create legal mechanisms that shield a sovereign from hazards emanating from a neighboring jurisdiction. But, dismayingly, these doctrines do not always agree on important details. Will any threat do or only serious ones, and how serious — perhaps strictly catastrophic? Is risk to property enough or must the danger be something else, such as a health crisis or the extinction of a species? How must the threat be proved? And in response, may the threatened sovereign directly regulate beyond its borders or must it go to federal court seeking relief? The Court’s four doctrines give varying answers to these questions, or else no answer at all.

Why have four conflicting doctrines when you can have one coherent rule? This Note proposes such a rule, naming it the sovereign self-preservation doctrine. Stated simply, the sovereign self-preservation doctrine recognizes a judicially enforced right of a sovereign to protect itself from serious and demonstrable harm. In a sense, this doctrine already exists because it underlies the Court’s prevailing legal frameworks in cases of intersovereign threats. Four distinct lines of cases grapple with the same basic problem and arrive at kindred solutions. But the courts and commentators have yet to appreciate that these four lines of cases are groping toward a single idea, the doctrine of sovereign self-preservation. This Note unearths that underlying doctrine and explains why the Court should merge its splintered tests into one handy rule.

¹ THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 2003).

² See, e.g., *Illinois v. City of Milwaukee*, 406 U.S. 91, 103–05 (1972) (describing the federal common law of interstate pollution).

³ See, e.g., *Puyallup Tribe v. Dep’t of Game of Wash. (Puyallup I)*, 391 U.S. 392, 398–400 (1968) (describing the conservation necessity doctrine).

⁴ See *Montana v. United States*, 450 U.S. 544, 566 (1981) (recognizing inherent tribal sovereign authority to regulate when threatened).

⁵ See *Camfield v. United States*, 167 U.S. 518, 525–26 (1897) (recognizing congressional authority to protect federal land with extraterritorial regulation).

Environmental law is the focus of this Note, but the proposed doctrine of sovereign self-preservation cuts deeper. For example, current law allows Indian tribes to regulate “conduct [that] threatens . . . the economic security . . . of the tribe.”⁶ A general doctrine of sovereign self-preservation would naturally encompass all manner of threats to a sovereign’s security. However, because the typical cases concern environmental issues and because one must start somewhere, this Note starts in environmental law.

Part I lays out the four lines of cases that govern domestic intersovereign threats, demonstrating that each of these doctrines is best understood as protecting sovereignty. Part II highlights the deficiencies of the current patchwork of doctrines. Part III proposes the sovereign self-preservation doctrine as a unified theory and argues that this doctrine should govern cases of domestic intersovereign threats. Part IV raises and responds to several potential counterarguments.

I. THE CURRENT PATCHWORK — FOUR LINES OF CASES

A. *State v. State* — *Interstate Public Nuisance*

Illinois did something marvelous at the end of the nineteenth century. It reversed the flow of the Chicago River. Instead of flowing into Lake Michigan, the river now meandered southward into the Mississippi and deposited its “poisonous filth” close to St. Louis.⁷ Flipping the river was a feat of engineering, to which Missouri responded with a feat of lawyering. Until the twentieth century, the Court had refused to allow states to litigate their sovereign interests (as opposed to ordinary common law claims) in federal court.⁸ But then the Court began to convert sovereign interests into judicially cognizable claims.⁹ The case that inaugurated this shift was *Missouri v. Illinois (Missouri I)*,¹⁰ in which Missouri sought to restrain Illinois from dumping Chicago’s typhoid-brewing sewage into the river.¹¹

⁶ *Montana*, 450 U.S. at 566; see also, e.g., *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892, 905 (9th Cir. 2019) (holding that the tribe had authority to regulate against major economic fraud by a non-Indian because the fraudulent conduct “threatened the Tribe’s very subsistence”).

⁷ *Missouri v. Illinois (Missouri II)*, 200 U.S. 496, 517 (1906); cf. JON C. TEAFORD, *THE UNHERALDED TRIUMPH: CITY GOVERNMENT IN AMERICA, 1870–1900*, at 217 (1984) (“The achievements of government in Chicago at times rivaled the feats of the Old Testament God.”).

⁸ See Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 392–93 (1995). The exception to this rule was boundary disputes between states, but even those cases were conceptualized as turning on ordinary property law rather than sovereignty principles. See *id.* at 415–16.

⁹ See *id.* at 446–55; see also Robert V. Percival, *The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance*, 55 ALA. L. REV. 717, 769–70 (2004).

¹⁰ 180 U.S. 208 (1901).

¹¹ *Id.* at 241.

The Court held that the suit may proceed, reasoning that the Court's original jurisdiction was meant to deal with affronts to sovereignty — where “the health and comfort of the inhabitants of a State are threatened”¹² — that might otherwise lead to war:

If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy and that remedy, we think, is found in the constitutional provisions [for the Court's original jurisdiction].¹³

The Court began to fashion equitable rules for resolving such tussles under its original jurisdiction.¹⁴ In other words, the Court devised a “federal common law” of public nuisance to protect the sovereign interests of states where Congress had not spoken.¹⁵ The law of federal public nuisance was formulated before the Court abolished general federal common law in *Erie Railroad Co. v. Tompkins*.¹⁶ Dicta in a 1971 opinion indicated that the federal common law of interstate pollution did not survive *Erie*.¹⁷ But a year later, in *Illinois v. City of Milwaukee (Milwaukee I)*,¹⁸ the Court expressly held that, with respect to “air and water in their ambient or interstate aspects, there is a federal common law.”¹⁹

B. *State v. Tribe — Conservation Necessity*

The doctrine of conservation necessity holds that, even when tribes have secured hunting and fishing rights through federal treaties, states may “impose reasonable and necessary nondiscriminatory regulations . . . in the interest of conservation.”²⁰ The Court applied the conservation necessity doctrine in a series of cases arising from Washington's attempts to regulate the Puyallup Tribe's fishing of salmon and steelhead trout, despite the fact that a federal treaty guaranteed the tribe the right to fish.²¹

¹² *Id.*

¹³ *Id.*

¹⁴ In *Missouri II*, Justice Holmes's opinion for the Court set a high bar for a successful public nuisance claim between sovereigns, requiring that “the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side.” 200 U.S. 496, 521 (1906). Missouri ultimately could not meet this standard and the case was dismissed. *Id.* at 526.

¹⁵ See *Illinois v. City of Milwaukee*, 406 U.S. 91, 103–05 (1972).

¹⁶ 304 U.S. 64, 78 (1938).

¹⁷ See *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498 n.3 (1971).

¹⁸ 406 U.S. 91 (1972).

¹⁹ *Id.* at 103.

²⁰ *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 205 (1999).

²¹ See *Puyallup Tribe, Inc. v. Dep't of Game of Wash. (Puyallup III)*, 433 U.S. 165, 178 (1977) (extending state regulation to on-reservation tribal fishing); *Dep't of Game of Wash. v. Puyallup*

In 1968, Justice Douglas's opinion for a unanimous Court held that "the 'right' to fish outside the reservation" did not defeat "[t]he overriding police power of the State, expressed in nondiscriminatory measures for conserving fish resources."²² Five years later, Justice Douglas wrote once again for a unanimous Court: "The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets."²³ The Court's *Puyallup* opinions soon drew sharp criticism from some in the Washington legal community who argued, among other lines of attack, that any state power to abridge a federal treaty right violates the blackletter law of federal supremacy.²⁴ Justice Gorsuch channeled these critiques when, in a recent oral argument, he flatly declared of the state's asserted right to regulate treaty-hunting for conservation purposes: "I don't know where it comes from."²⁵

The doctrine of conservation necessity is best justified on state sovereignty grounds: either as a prosovereign canon of treaty interpretation or as an affirmative limit on the reach of the treaty power, deriving from the state's sovereign rights to its own resources.²⁶ The state sovereignty rationale permeates the Supreme Court's conservation necessity cases.

Tribe (*Puyallup II*), 414 U.S. 44, 48–49 (1973) (forbidding state regulation from discriminating against tribal fishing); *Puyallup I*, 391 U.S. 392, 399 (1968) (recognizing right of state to regulate tribal fishing off reservation).

²² *Puyallup I*, 391 U.S. at 399.

²³ *Puyallup II*, 414 U.S. at 49.

²⁴ See *United States v. Washington*, 384 F. Supp. 312, 334–39 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975); Ralph W. Johnson, *The States Versus Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 WASH. L. REV. 207, 208 (1972) ("No valid basis for the existence of such state power can be found.").

²⁵ Transcript of Oral Argument at 32, *Herrera v. Wyoming*, 139 S. Ct. 1686 (2019) (No. 17-532).

²⁶ A competing theory of the conservation necessity doctrine would treat it as a proconservation canon of treaty interpretation. On this account, it is reasonable to extend the conservation necessity doctrine to conflicts between *federal* conservation statutes and Indian treaty rights, a position adopted by the Ninth Circuit and the federal government. See *Anderson v. Evans*, 371 F.3d 475, 497–501, 497 n.22 (9th Cir. 2004); Application of the Endangered Species Act to Native Americans with Treaty Hunting and Fishing Rights, 87 Interior Dec. 525, 527 (1980) (opining that "the Endangered Species Act is in complete harmony with the exercise of treaty hunting and fishing rights by Indians because those rights do not include the right to take endangered or threatened species"); Reply Brief for the United States at 6, *United States v. Dion*, 476 U.S. 734 (1986) (No. 85-246). But if conservation necessity has anything to do with state sovereignty, there would be little sense in transposing it onto the federal context. That's because the Constitution does not assign the federal government broad environmental caretaking authority, which falls within the states' police powers. See *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001); *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976); RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 35–36 (2004). Conservation interests typically implicate federal sovereignty to a lesser degree than they do that of the states, at least absent special circumstances. Cf. *Missouri v. Holland*, 252 U.S. 416, 435 (1920). And in any event, the federal government does not need a doctrine of conservation necessity since Congress may abrogate any treaty right if it so chooses. See *United States v. Dion*, 476 U.S. 734, 738 (1986).

Puyallup I rested upon “[t]he overriding police power of the State.”²⁷ The earliest of its “forerunner” cases,²⁸ *New York ex rel. Kennedy v. Becker*,²⁹ held that the Seneca Tribe’s asserted right to hunt and fish free of state regulation, in accordance with the 1797 Treaty of Big Tree, amounted to “derogation of the sovereignty of the State.”³⁰ And more recently the Court pointed to the conservation necessity doctrine as ensuring that “treaty rights are reconcilable with state sovereignty over natural resources.”³¹ Conservation necessity is the Court’s instrument for negotiating clashes between the states and tribes (buoyed by federal treaties) over the consumption and preservation of resources.

C. *Federal v. State — Protecting Federal Property and Territories*

The Constitution grants Congress “Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”³² In *United States v. Alford*,³³ the Court, speaking through Justice Holmes, held that “Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests.”³⁴ And in *Camfield v. United States*,³⁵ the Court upheld a federal statute forbidding the enclosure of federal lands as applied to private property owners who had built a fence on adjoining private land, explaining that “[t]he general Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case.”³⁶ The fence-builders had “ingenious[ly]” built it “a few inches inside” their property line, so a typical neighboring property owner could not have forced them to take

²⁷ 391 U.S. at 399.

²⁸ *Id.* (“Another forerunner of *Tulee* was *Kennedy v. Becker* . . .”).

²⁹ 241 U.S. 556 (1916).

³⁰ *Id.* at 560, 562; cf. Jesse Lempel, *Conservation Necessity and the Supreme Court’s Historical Blunder*, HARV. ENVTL. L. REV. BLOG (Nov. 7, 2019), <https://harvardelr.com/2019/11/07/conservation-necessity-and-the-supreme-courts-historical-blunder/> [https://perma.cc/7D3W-UNK4] (criticizing *Kennedy*’s “mythical version of history [that] obscures a calculated policy of environmental aggression against Native tribes” and observing that the federal government relies upon the same historical error in extending the conservation necessity doctrine to federal statutes).

³¹ *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 205 (1999).

³² U.S. CONST. art. IV, § 3, cl. 2. The Court will alternately call this the “Territory Clause” or the “Property Clause,” depending on whether the case deals with federal property or a territory. See, e.g., *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1868 (2016) (citing “Territory Clause”); *Kleppe v. New Mexico*, 426 U.S. 529, 535 (1976) (citing “Property Clause”); see also Allan Erbsen, *Constitutional Spaces*, 85 MINN. L. REV. 1168, 1224–32 (2011).

³³ 274 U.S. 264 (1927).

³⁴ *Id.* at 267.

³⁵ 167 U.S. 518 (1897).

³⁶ *Id.* at 525.

it down.³⁷ But the federal government is not only a “proprietor[]”; it is also a “sovereign over the property belonging to it.”³⁸

There are two basic understandings of the self-protective principle embodied in *Camfield* and *Alford*. The first is to zero in on the text of the Property Clause. As the Court put it in *Kleppe v. New Mexico*,³⁹ “[t]he question under the Property Clause is whether [an Act of Congress] can be sustained as a ‘needful’ regulation ‘respecting’ the public lands.”⁴⁰ These are capacious words, causing the Court to remark that “the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved.”⁴¹ Lower courts and scholars have tried to cash out this “penumbra of the Property Clause”⁴² in various ways. Some have pushed for a sweeping Commerce-Clause-like authority, reading the Property Clause for all it’s worth.⁴³ Others have found limits on the Property Clause in the word “respecting” — which implies “a nexus between the rule or regulation and the federal property being protected.”⁴⁴ Still others have reasoned that federalism principles forbid stretching the self-protective authority granted by the Property Clause beyond “nuisance-like conduct” like that in *Camfield* and *Alford*.⁴⁵ All of these approaches, following the *Kleppe* Court, seek to resolve uncertainties through the best reading of the Property Clause.

But a better view is that the *Camfield/Alford* self-protective power is grounded in sovereignty. Clarity is not to be found in the Property Clause or general notions of federalism, but rather in the kindred lines of cases addressing intersovereign threats.⁴⁶ It is significant that, despite

³⁷ *Id.* at 524–25.

³⁸ *Light v. United States*, 220 U.S. 523, 537 (1911); *see also Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976) (“In short, Congress exercises the powers both of a proprietor and of a legislature over the public domain.”).

³⁹ 426 U.S. 529.

⁴⁰ *Id.* at 536.

⁴¹ *Id.* at 539.

⁴² Allison H. Eid, *The Property Clause and New Federalism*, 75 U. COLO. L. REV. 1241, 1246 (2004).

⁴³ *See* Dale D. Goble, *The Property Clause: As If Biodiversity Mattered*, 75 U. COLO. L. REV. 1195, 1215–18, 1234–35 (2004).

⁴⁴ Peter A. Appel, *The Power of Congress “Without Limitation”: The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 83 (2001); *see also Minnesota v. Block*, 660 F.2d 1240, 1249 n.18 (8th Cir. 1981) (“Congress must demonstrate a nexus between the regulated conduct and the federal land, establishing that the regulations are necessary to protect federal property.”).

⁴⁵ *See* Eid, *supra* note 42, at 1258.

⁴⁶ *Cf.* Joseph L. Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239, 254 n.77 (1976) (“[A] self-limiting rationale for the use of the property clause to regulate peripheral private uses could be drawn from an analogy to the Court’s evolution of a federal common law of nuisance in cases involving interstate pollution.”).

the *Kleppe* Court's assertion to the contrary,⁴⁷ neither *Camfield* nor *Alford* so much as mentioned the Property Clause.⁴⁸ Moreover, the Court has a long history of vacillating between two readings of this Clause, one that regards the text as the font of authority and another that sees the provision as merely confirming an inherent sovereign right.⁴⁹

Against this backdrop, the failure of the *Camfield* and *Alford* Courts to invoke the Property Clause suggests that those cases relied directly on a rationale of sovereign self-preservation unfiltered through constitutional language. Grounding the federal property self-protective rule in sovereignty rather than the Property Clause may be consequential, since the Property Clause is generally understood as reflecting ordinary principles of property law and not sovereign interests.⁵⁰ But even if *Camfield*'s power does hang upon the Property Clause itself, the Court's analogy to state police power affirms that *Camfield* is about governance and sovereignty rather than simple property rights.⁵¹

D. *Tribe v. State* — Inherent Tribal Sovereignty

In *Montana v. United States*,⁵² the Court adopted “the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.”⁵³ Thus, the tribe had no authority to regulate hunting and fishing of nonmembers on land within the reservation that was owned by non-Indians in fee simple.⁵⁴ Nevertheless, the Court articulated two exceptions — known as the *Montana* exceptions — to this rule. The first exception is regulation of nonmembers who enter into a consensual relationship with the tribe.⁵⁵

⁴⁷ *Kleppe v. New Mexico*, 426 U.S. 529, 538 (1976) (“*Camfield* holds that the Property Clause is broad enough to permit federal regulation of fences built on private land adjoining public land when the regulation is for the protection of the federal property.”).

⁴⁸ See *Stupak-Thrall v. United States*, 70 F.3d 881, 885 (6th Cir. 1995) (“[N]either *Camfield* nor *Alford* refers explicitly to the Property Clause — in fact, they cite no constitutional provision whatsoever to support the authority of Congress . . .”), *aff’d by an equally divided court*, 89 F.3d 1269 (6th Cir. 1996) (en banc).

⁴⁹ See *Kansas v. Colorado*, 206 U.S. 46, 89 (1907); *Downes v. Bidwell*, 182 U.S. 244, 290 & n.2 (1901) (White, J., concurring); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 442–43 (1857); *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 542–43 (1828); *Sere v. Pitot*, 10 U.S. (6 Cranch) 332, 336–37 (1810) (“The power of governing and of legislating for a territory is the inevitable consequence of the right to acquire and to hold territory. Could this position be contested, the constitution of the United States [includes the Property Clause].”).

⁵⁰ See LAZARUS, *supra* note 26, at 36, 178–89.

⁵¹ Indeed, the authority given to Congress by the Property Clause may implicate sovereignty. See, e.g., *Kleppe*, 426 U.S. at 539–40 (“It is the Property Clause . . . that provides the basis for governing the Territories of the United States.”).

⁵² 450 U.S. 544 (1981).

⁵³ *Id.* at 565.

⁵⁴ *Id.* at 547, 566–67.

⁵⁵ *Id.* at 565.

The second exception, which is more important for present purposes, recognized the tribe's "inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."⁵⁶ This second exception is plainly grounded in respect for tribal sovereignty.⁵⁷

II. THE DEFICIENCIES OF THE CURRENT LEGAL FRAMEWORK

What is wrong with the prevailing legal landscape governing inter-sovereign threats? Lots. The first flaw is that none of the doctrines is clear. "[N]o specific legal norms have been generated" regarding interstate pollution.⁵⁸ The conservation necessity doctrine's "standards are notoriously vague."⁵⁹ The "extraterritorial penumbra around the Property Clause" is up in the air.⁶⁰ And the *Montana* exceptions, especially the inherent sovereignty one, are plagued by "rationales that remain inchoate."⁶¹ Some of these dark spots will be explored in detail below. For now, it is enough to say that the Court's existing doctrines are more slab than statue.

Second, the prevailing intersovereign threat doctrines are inconsistent. Everywhere you look — whether at the severity of the threat, the type of harm threatened, the standard of proof, or the remedy — the doctrines disagree. This breeds an unjustifiable disparity. There is no good reason to give one domestic sovereign more protective rights than another. Under the law of nations, all sovereigns are equal.⁶² According to the Supreme Court, this is not merely a law-of-nations principle but a constitutional one, applicable to the several states.⁶³ Whether or not this is correct, an intuitive sense of fairness is enough to set a baseline of equality in how each sovereign may protect itself. A status quo in which the doctrinal tests vary with the parties violates this equality.

⁵⁶ *Id.* at 566.

⁵⁷ See *Strate v. A-1 Contractors*, 520 U.S. 438, 459 (1997) (describing the second *Montana* exception as ensuring "the right of reservation Indians to make their own laws and be ruled by them" (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959))).

⁵⁸ Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 DUKE L.J. 931, 934 (1997).

⁵⁹ Johnson, *supra* note 24, at 207–08.

⁶⁰ Eid, *supra* note 42, at 1247; see *id.* at 1259.

⁶¹ Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187, 1224 (2010); see *id.* at 1231.

⁶² See U.N. Charter art. 2, ¶ 1 ("The Organization is based on the principle of the sovereign equality of all its Members."); *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 137 (1812) (recognizing the "perfect equality and absolute independence of sovereigns"). See generally EDWIN DEWITT DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* 100–52 (1920).

⁶³ See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2621–24 (2013); Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1091 (2016). But see Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1212 (2016).

Third, there are some scenarios for which the Court has no doctrine to apply. For example, how may a state or tribe protect itself from threats emanating from a federal entity? Lower courts have tried to shoehorn such cases into existing doctrinal frameworks, such as a public nuisance claim⁶⁴ or the second *Montana* exception.⁶⁵ But the Supreme Court has not created any law governing the rights of a state or tribe to thwart federal threats.

To expose the deficiencies of the existing doctrines, it is helpful to compare them side by side and element by element. This comparison will reveal that these doctrines either lack definite standards or create standards that clash with those of the other doctrines. What follows is a brief drive-by of several points of divergence along a handful of axes: (1) the severity of the threat; (2) the nature of the threat; (3) the standard of proof; and (4) the available remedies.

A. *The Severity of the Threat*

How severe must the threat be to justify a response? The Court has given different answers to this question in each of the four doctrines.

1. *Federal Public Nuisance*. — The Court has not detailed the elements of the federal public nuisance claim.⁶⁶ Rather, it has unhelpfully described its interstate pollution cases as “appl[ying] principles of common law tempered by a respect for the sovereignty of the States.”⁶⁷ Looking for clarity, some circuits have turned to the Restatement’s broad definition of the classic public nuisance tort — “an unreasonable interference with a right common to the general public”⁶⁸ — and applied it to federal law.⁶⁹ However, the Seventh Circuit distilled a different test from the Court’s pre-*Erie* cases, requiring “significant threat of injury to some cognizable interest.”⁷⁰ Indeed, in *Missouri II* the Court

⁶⁴ See *Michigan v. U.S. Army Corps of Eng’rs*, 758 F.3d 892, 900–01 (7th Cir. 2014) (“Whether such harm is caused by a state or federal entity bears little relevance to the doctrine’s purpose, which is to protect the endangered right.” *Id.* at 901.).

⁶⁵ See, e.g., *Cheromiah v. United States*, 55 F. Supp. 2d 1295, 1305 (D.N.M. 1999).

⁶⁶ The federal common law of interstate pollution was truncated, first by the rise of interstate compacts covering areas of potential conflict and later by pervasive federal environmental legislation that largely displaced federal common law on the subject. See *Merrill*, *supra* note 58, at 945–47. See generally *Percival*, *supra* note 9.

⁶⁷ *Arkansas v. Oklahoma*, 503 U.S. 91, 98 (1992); see also *Milwaukee I*, 406 U.S. 91, 107 (1972) (“There are no fixed rules that govern . . .”).

⁶⁸ RESTATEMENT (SECOND) OF TORTS § 821B(1) (AM. LAW INST. 1979).

⁶⁹ See, e.g., *U.S. Army Corps of Eng’rs*, 758 F.3d at 900; *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 855 (9th Cir. 2012); *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 350–52 (2d Cir. 2009), *rev’d on other grounds*, 564 U.S. 410 (2011); *Nat’l Sea Clammers Ass’n v. City of New York*, 616 F.2d 1222, 1234 (3d Cir. 1980), *rev’d on other grounds sub nom. Middlesex Cty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1 (1981).

⁷⁰ *Milwaukee II*, 451 U.S. 304, 349 (1981) (Blackmun, J., dissenting) (quoting *Illinois v. City of Milwaukee*, 599 F.2d 151, 165 (7th Cir. 1979)).

required that the threat be “of serious magnitude,” which sets a relatively high bar.⁷¹

2. *Conservation Necessity.* — The Supreme Court has explained that conservation necessity requires a state to “demonstrate that its regulation is a reasonable and necessary conservation measure, *and* that its application to the Indians is necessary in the interest of conservation.”⁷² The word “necessary” is famously and frustratingly elastic.⁷³ Predictably, then, lower courts have set forth divergent tests. Some courts have adopted a least-restrictive alternative inquiry, requiring a state to show that it cannot achieve the necessary conservation goals with nontribal regulation or with tribal self-regulation,⁷⁴ while other courts reject this test.⁷⁵

3. *Protecting Federal Property.* — *Kleppe* stands for the proposition that the plenary power of Congress over federal property includes the authority to protect wildlife on its property.⁷⁶ But the Court declined “to determine the extent, if any, to which the Property Clause empowers Congress to protect animals on private lands,” although it did hint that Congress may not wield this authority in defense of a trivial interest — say, to protect “every wild horse or burro that at any time sets foot upon federal land.”⁷⁷ *Camfield* referred to what is “necessary for the protection of the public” measured by “the exigencies of the particular case,”⁷⁸ while *Alford* spoke of “imperil[ing] the publicly owned forests.”⁷⁹ It is difficult to discern any precise parameters for how serious the threat must be to invoke *Camfield*’s extraterritorial power, though there is some suggestion that it must be “necessary” to protect a nontrivial federal interest.

⁷¹ *Missouri II*, 200 U.S. 496, 521 (1906); *see also* *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 422 (2011) (“Nor have we ever held that a State may sue to abate any and all manner of pollution originating outside its borders.”).

⁷² *Antoine v. Washington*, 420 U.S. 194, 207 (1975) (citations omitted).

⁷³ *Cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414 (1819) (“The word ‘necessary’ . . . has not a fixed character peculiar to itself. . . . A thing may be necessary, very necessary, absolutely or indispensably necessary.”).

⁷⁴ *See, e.g., Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. Wisconsin*, 769 F.3d 543, 546 (7th Cir. 2014); *United States v. Oregon*, 769 F.2d 1410, 1416 (9th Cir. 1985); *United States v. Michigan*, 653 F.2d 277, 279 (6th Cir. 1981); *see also* *United States v. Washington*, 759 F.2d 1353, 1366–67 (9th Cir. 1985) (Nelson, J., concurring in part and dissenting in part) (describing the conservation necessity cases as “unusual exceptions to the general rule of non-interference” that allow a state to “exercise a slight degree of regulatory power,” which is “permitted only to preserve the fish from extinction”).

⁷⁵ *See* *Confederated Tribes of the Colville Reservation v. Anderson*, 903 F. Supp. 2d 1187, 1198 (E.D. Wash. 2011).

⁷⁶ *Kleppe v. New Mexico*, 426 U.S. 529, 540–41, 546 (1976).

⁷⁷ *Id.* at 546.

⁷⁸ *Camfield v. United States*, 167 U.S. 518, 525 (1897).

⁷⁹ *United States v. Alford*, 274 U.S. 264, 267 (1927).

4. *Tribal Self-Protection.* — In the years since *Montana*, the Court has not given much shape to the contours of the second exception.⁸⁰ However, it has suggested that the exception is very limited. According to the Court's latest comments, nothing short of impending "catastrophic consequences" will justify tribal regulation of nonmembers on fee lands.⁸¹ On this view, tribal sovereignty is so diminished that a tribe can protect nothing more than its bare existence. The tribe must absorb every blow but the last one.

Several lower courts, especially the Ninth Circuit, see things differently. They seem to read the second *Montana* exception as allowing much greater slack for tribal self-defense. Shortly after *Montana* came down, the Ninth Circuit somewhat amazingly described the two exceptions as "broad categories in which . . . Indian tribes retain their sovereign powers."⁸² That case held, under *Montana*'s second exception, that "the Tribe retains inherent sovereign power to impose its building, health, and safety regulations" over a grocery store on non-Indian fee land within the reservation⁸³ — though the grocery hardly threatened catastrophe. In a similar vein and more recently, the Eighth Circuit has taken the position that, at least when regulating on Indian land, "[c]onduct reasonably likely to result in violence on tribal lands sufficiently threatens tribal health and welfare to justify tribal regulation."⁸⁴ Courts have also found tribal jurisdiction to be justified in cases of severe economic fraud or trespass,⁸⁵ medical malpractice in a

⁸⁰ See Krakoff, *supra* note 61, at 1231 ("Lower federal courts have less guidance with respect to *Montana*'s direct effects exception than its consensual relationship exception.").

⁸¹ *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 341 (2008) (quoting COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.02[3][c][i], at n.75 (Nell Jessup Newton ed., 2012)).

⁸² *Cardin v. De La Cruz*, 671 F.2d 363, 366 (9th Cir. 1982) (emphasis added).

⁸³ See *id.* at 364, 366.

⁸⁴ *Attorney's Process & Investigation Servs., Inc. v. Sac & Fox Tribe of Miss. in Iowa*, 609 F.3d 927, 939 (8th Cir. 2010) (citing *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 593 (9th Cir. 1983)). That case involved a rather extreme scenario of an armed, violent invasion of crucial tribal facilities that would satisfy almost anyone's definition of *Montana*'s second exception. See *id.* But the court's rule would seem to go much further than that, as evidenced by its approving citation to a Ninth Circuit case finding tribal authority under *Montana*'s second exception to regulate repossession of vehicles on tribal land. See *id.*

⁸⁵ See, e.g., *Knighton v. Cedarville Rancheria of N. Paiute Indians*, 922 F.3d 892, 905 (9th Cir. 2019) (holding that a former tribal administrator accused of extensive breaches of fiduciary duties that "threatened the Tribe's very existence" was subject to tribal jurisdiction under *Montana*'s second exception); *Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 819 (9th Cir. 2011) (per curiam) (holding that a non-Indian was subject to tribal jurisdiction under *Montana*'s second exception given that his "unlawful occupancy and use of tribal land not only deprived the [tribe] of its power to govern and regulate its own land, but also of its right to manage and control an asset capable of producing significant income").

federally run facility on Indian land,⁸⁶ and confrontations between tribal officers and non-Indians.⁸⁷ But these applications are controversial.⁸⁸

B. Nature of the Harm Threatened

What kind of harm justifies a self-protective response?

1. *Federal Public Nuisance.* — The Court has not defined the type of harm that might give rise to a federal public nuisance claim, and the kinds of injuries that fall under public nuisance are infamously broad.⁸⁹ However, in *Missouri I* the Court seemed to understand this claim as warranted when “the health and comfort of the inhabitants of a State are threatened” to the point where a sovereign would be tempted to go to war.⁹⁰ This would likely restrict the federal public nuisance claim to environmental or public health threats, although severe economic injuries are conceivably included as well.

2. *Conservation Necessity.* — The Court has applied the conservation necessity doctrine exclusively to conservation regulations, and has occasionally implied that conservation is the only legitimate justification for regulation of Indian treaty rights.⁹¹ However, lower courts have allowed states to regulate treaty fishing and hunting for public health and safety, too.⁹² The United States has likewise taken that position in

⁸⁶ See *Harvey v. United States*, No. 08CV107, 2009 WL 10698378, at *8 (D.N.M. Sept. 29, 2009); *Williams v. United States*, No. CIV. 99CV17-T, 1999 WL 33320440, at *1, *3-4 (W.D.N.C. Oct. 15, 1999); *Cheromiah v. United States*, 55 F. Supp. 2d 1295, 1305 (D.N.M. 1999).

⁸⁷ See *Stanko v. Oglala Sioux Tribe*, 916 F.3d 694, 696, 700 (8th Cir. 2019) (“Whether tribal officers violated the civil rights of a non-Indian traveling on the reservation unquestionably has a direct effect on the political integrity and welfare of the Tribe.” *Id.* at 700.).

⁸⁸ See, e.g., *id.* at 700 (Gruender, J., concurring in part and concurring in the judgment) (worrying that “the court’s statement that the second *Montana* exception ‘unquestionably’ applies risks undermining Supreme Court precedent limiting its scope” (citations omitted)); *Window Rock Unified Sch. Dist. v. Reeves*, 861 F.3d 894, 912-14 (9th Cir. 2017) (Christen, J., dissenting) (citing criticism of the Ninth Circuit’s expansive view of *Montana*’s second exception); *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 180 n.8 (5th Cir. 2014) (Smith, J., dissenting) (same), *aff’d by an equally divided Court sub nom. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (mem.) (per curiam).

⁸⁹ See WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 549 (1941) (“There is perhaps no more impenetrable jungle than that which surrounds the word ‘nuisance.’”); *id.* at 552 (“A public or common nuisance . . . is a species of catch-all criminal offense . . . which may include anything from the obstruction of a highway to a public gaming-house or indecent exposure.” (footnote omitted)).

⁹⁰ *Missouri I*, 180 U.S. 208, 241 (1901).

⁹¹ See, e.g., *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 682 (1979) (“[T]reaty fishermen are immune from all regulation save that required for conservation.” (footnote omitted)).

⁹² See, e.g., *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wis. v. Wisconsin*, 769 F.3d 543, 545-46 (7th Cir. 2014) (“State jurisdiction over Indians is limited but includes the right to take measures necessary to protect public safety”); *Confederated Tribes of the Colville Reservation v. Anderson*, 903 F. Supp. 2d 1187, 1195-99 (E.D. Wash. 2011) (upholding state authority to regulate tribal hunting to protect public health and safety); *State v. Matthews*, 635 N.W.2d 601, 604-11 (Wis. Ct. App. 2001) (same).

an amicus brief before the Court.⁹³ The Justices themselves duked this question out in dicta last Term, with a four-Justice dissent maintaining that conservation necessity is only for conservation⁹⁴ in response to the suggestion of a three-Justice plurality opinion (written by Justice Breyer) that the state may “regulate to prevent danger to health or safety occasioned by a tribe member’s exercise of treaty rights.”⁹⁵

3. *Protecting Federal Property.* — It is unclear what kind of injuries justify an extraterritorial federal response. Lower court decisions tend to give Congress a very wide berth, applying the extraterritorial authority to any interference with the land’s purpose.⁹⁶ Although *Kleppe* recognized that Congress may protect the wildlife that roams on federal lands, protecting the “wilderness character” of a national park⁹⁷ or scenic views on its trails⁹⁸ is a leap beyond that. The Court has not spoken on the issue. However, because the Court derives this authority from the Property Clause, it is likely that mere property loss would justify extraterritorial regulation.

4. *Tribal Self-Protection.* — *Montana* allowed tribes to defend against threats to “the political integrity, the economic security, or the health or welfare of the tribe.”⁹⁹ This is a broad list that would seem to encompass almost any kind of threat, provided it is severe enough.

C. Standard of Proof

The Court is, once again, all over the map in determining the standard of proof for the various sovereignty-protection doctrines.

1. *Federal Public Nuisance.* — Beginning with *Missouri II*, the Court has required that federal public nuisance claims be “clearly and

⁹³ Brief for the United States at 2, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (No. 97-1337) (conceding the legitimacy of “state regulation as may be ‘necessary in the interest of conservation’ or *public health and safety*” (quoting *Antoine v. Washington*, 420 U.S. 194, 207 (1975)) (emphasis added)).

⁹⁴ See *Wash. State Dep’t of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1025 (2019) (Roberts, C.J., dissenting).

⁹⁵ *Id.* at 1015 (plurality opinion).

⁹⁶ See, e.g., *Minnesota v. Block*, 660 F.2d 1240, 1249–50 (8th Cir. 1981) (holding, in the context of a motorboat ban in a federal wilderness area, that “Congress may regulate conduct off federal land that interferes with the designated purpose of that land”).

⁹⁷ See *Stupak-Thrall v. United States*, 70 F.3d 881, 886 (6th Cir. 1995) (“The protection of wilderness character is a valid objective under the Property Clause This at a minimum is what the Property Clause allows — regulation to protect not only the government’s own riparian interest in the lake, but also its interest in the surrounding national wilderness.”), *aff’d by an equally divided court*, 89 F.3d 1269 (6th Cir. 2016) (en banc).

⁹⁸ See James J. Vinch, *The Telecommunications Act of 1996 and Viewshed Protection for the National Scenic Trails*, 15 J. LAND USE & ENVTL. L. 93, 130 (1999) (arguing that “encroachments to scenic and aesthetic values that interfere with the trail experience may be regulated by the [National Park Service] under the Property Clause”).

⁹⁹ *Montana v. United States*, 450 U.S. 544, 566 (1981).

fully proved.”¹⁰⁰ The Court subsequently associated this requirement with a “clear and convincing” standard.¹⁰¹ Although this test was formulated when the Court was deciding such questions under its original jurisdiction, this test is probably still operative for federal public nuisance claims in all federal courts.

2. *Conservation Necessity.* — The Court has left open the question whether a state may regulate protected tribal hunting or fishing “without . . . demonstrating a compelling need’ in the interest of conservation.”¹⁰² The state must provide at least some factual basis for its assertion of necessity, or the Court will strike down the state’s regulation as in *Antoine* itself.¹⁰³ But there is little guidance as to what kind of showing is demanded. In fact, some lower courts will deem a state’s conservation regulation presumptively “necessary” whenever the tribal law has a similar rule.¹⁰⁴

3. *Protecting Federal Property.* — Lower courts tend to perform a kind of rational basis review for extraterritorial regulation under the Property Clause.¹⁰⁵ The *Kleppe* Court dismissed as irrelevant New Mexico’s assertions that wild horses and burros were not actually in danger and therefore needed no protection, explaining that the Court would not “reweigh the evidence and substitute [its] judgment for that of Congress.”¹⁰⁶ But *Kleppe* itself dealt only with regulation on federal property, while extraterritorial regulation might be subject to a more exacting standard of proof.

4. *Tribal Self-Protection.* — The Court has not explained what standard of proof a tribe must meet in order to invoke its regulatory authority under the second *Montana* exception, although a plurality opinion has stated that the menacing conduct’s “impact must be demonstrably serious.”¹⁰⁷

¹⁰⁰ *Missouri II*, 200 U.S. 496, 521 (1906).

¹⁰¹ See *New York v. New Jersey*, 256 U.S. 296, 309 (1921); Merrill, *supra* note 58, at 945.

¹⁰² *Antoine v. Washington*, 420 U.S. 194, 207 (1975) (quoting Brief for the United States as Amicus Curiae at 16, *Antoine*, 420 U.S. 194 (No. 73-717)).

¹⁰³ See *id.* at 212 (Douglas, J., concurring) (“The record in this case is devoid of any findings as to conservation needs or conservation methods.”).

¹⁰⁴ See *United States v. Williams*, 898 F.2d 727, 729–30 (9th Cir. 1990) (holding that, in the context of the Lacey Act, “there is no need for a hearing on the issue of conservation necessity if the tribe itself has enacted similar, valid laws,” *id.* at 730); *State v. McCormack*, 812 P.2d 483, 485 (Wash. 1991) (applying *Williams* to state conservation regulation).

¹⁰⁵ See, e.g., *Minnesota v. Block*, 660 F.2d 1240, 1250 (8th Cir. 1981) (“[I]f Congress enacted the motorized use restrictions to protect the fundamental purpose for which the [federal wilderness area] had been reserved, and if the restrictions in [the statute] reasonably relate to that end, we must conclude that Congress acted within its constitutional prerogative.” (emphasis added)).

¹⁰⁶ See *Kleppe v. New Mexico*, 426 U.S. 529, 541 n.10 (1976).

¹⁰⁷ *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 431 (1989) (plurality opinion) (emphasis added).

D. Available Remedies

In three out of the four intersovereign threat scenarios for which the Court has developed doctrine — State v. Tribe, Federal v. State, and Tribe v. State — the threatened sovereign may regulate in response. Thus, a state may regulate tribal hunting or fishing to protect its natural resources, the federal government may regulate inside a state (and displace contrary state law) to protect federal property, and a tribe may regulate nonmembers to protect its sovereignty.

However, when it comes to State v. State conflicts, the federal common law of public nuisance is strictly a judicial remedy.¹⁰⁸ States are constitutionally barred from legislating extraterritorially.¹⁰⁹ While this limit on extraterritorial legislation is now usually tied to the dormant commerce clause,¹¹⁰ it is better understood as “one of those foundational principles of our federalism which we infer from the structure of the Constitution as a whole.”¹¹¹ But this makes interstate conflicts the outlier among the various battles over sovereign interests, since a state threatened by another state cannot respond with regulation. The sole recourse is federal court.

III. THE SOVEREIGN SELF-PRESERVATION DOCTRINE

The current legal framework for resolving domestic intersovereign threats is flawed. A better approach, this Note proposes, is to merge the existing legal tests into a single rule: the sovereign self-preservation doctrine. Before explaining why this doctrine should exist and exploring its ramifications, it is helpful just to lay it on the table. What follows is a quick sketch of the sovereign self-preservation doctrine’s basic contours. The general aim of this proposal is to enable sovereigns to fend off serious threats, but go no further. Translating that aim into judicial tests yields a composite doctrine, moving along the four axes discussed above.

Start with the question of severity. Under the proposed doctrine, the threatened harm must be serious enough to warrant judicial imposition upon another sovereign, but there’s no need for a looming catastrophe. With respect to the nature of the threat, all perils to public safety, health, or natural resources can fairly be said to threaten sovereignty. This

¹⁰⁸ Historically, anyone damaged by a public nuisance had the right to abate the nuisance by force. See, e.g., *In re Debs*, 158 U.S. 564, 582 (1895). But abatement by force has gone out of fashion. See Thomas W. Merrill, *Is Public Nuisance a Tort?*, 4 J. TORT L. NO. 2, 2011, at 1, 12–13.

¹⁰⁹ See, e.g., *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989).

¹¹⁰ See *id.*; cf. Recent Case, *Association for Accessible Medicines v. Frosh*, 887 F.3d 664 (4th Cir. 2018), 132 HARV. L. REV. 1748, 1755 (2019) (describing precedent on extraterritoriality as “increasingly confusing”).

¹¹¹ Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1885 (1987).

category sweeps beyond conservation but probably does not include mere property damage or ordinary economic loss, unless that financial hit would shake the sovereign's economic foundations. On the standard of proof, the claim of threat must rest on actual facts established by at least a preponderance of the evidence — a bare allegation or even a reasonable fear of harm will likely not justify projecting authority into another sovereign's jurisdiction.

Finally, and in a big shift from the current legal framework, direct regulation will no longer be an option. The doctrine runs through the courts. Federal judges cannot authorize a state or tribal legislature to regulate beyond its jurisdiction.¹¹² Nor may Congress invoke the Property Clause to legislate outside federal territorial bounds; the so-called penumbra of the Property Clause is an illusion, because *Camfield* and *Alford* are better conceived as sovereign self-preservation protoholdings. Instead of extraterritorial regulation, the remedy available under the sovereign self-preservation doctrine would be an order of abatement issued by a federal court.

One might wonder where federal courts would get the power to make law in this way, assuming that Congress does not enact the sovereign self-preservation doctrine in a statute. The doctrine draws inspiration from the law of nations, which grants every sovereign the right of self-preservation.¹¹³ But, given that the threats are wholly domestic, federal courts should not directly apply the law of nations to such disputes. Rather, the courts should recognize the sovereign self-preservation doctrine as a matter of federal common law.¹¹⁴

¹¹² Of course, this does not address what the proper limits of that jurisdiction are. For example, one might adopt the proposition that tribes cannot directly regulate outside their jurisdiction while also arguing that non-Indians on tribal reservations fall *within* tribal jurisdiction. On the question of tribal regulatory authority beyond its jurisdiction, compare *Wisconsin v. EPA*, 266 F.3d 741, 748–49 (7th Cir. 2001) (extending *Montana's* second exception to off-reservation activity that significantly affects the reservation), with *DolgenCorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 176 n.7 (5th Cir. 2014), *aff'd by an equally divided Court sub nom. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (mem.), which stated that “[a]lthough the Supreme Court has never explicitly held that Indian tribes lack inherent authority to regulate nonmember conduct that takes place outside their reservations, this is at least strongly implied.”

¹¹³ See, e.g., EMER DE VATTEL, *THE LAW OF NATIONS*, bk. I, ch. II, § 18, at 88 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund 2008) (1758) (“Since then a nation is obliged to preserve itself, it has a right to every thing necessary for its preservation.”); U.N. Charter art. 51 (recognizing “the inherent right of individual or collective self-defence”); cf. U.S. CONST. pmbl. (explaining the Constitution’s purpose, in part, “to . . . provide for the common defence”).

¹¹⁴ For examples of the Court borrowing principles of international law to adjudicate disputes among the states, see Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1329–30 (1996), and Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 508–09 (2006). A quirk of history has made the law flow in the other direction, too, in that the customary international law of transboundary pollution is founded upon the Court’s early twentieth-century jurisprudence on interstate pollution. See Merrill, *supra* note 58, at 947–54.

And *why* should the courts do that? The answer is partly about smoothing over potholes in today's legal landscape and partly about what it means to be sovereign in our federal system. First the potholes. A sovereign self-preservation doctrine would bring simplicity and harmony to the convoluted regime now governing domestic threats to sovereigns. Neater legal tests, in turn, make the law more stable, predictable, and fair. Moreover, if sovereign self-preservation were recognized as a doctrine of its own, it would lie ready for courts to apply when confronted with a case of sovereign self-preservation for which current law gives no definite solution, such as when a federal agency places a state in jeopardy.¹¹⁵

The more profound reason why a federal common law doctrine of sovereign self-preservation ought to exist touches upon the role of federal common law as policing sovereignty. Some introductory words are in order. A "new" federal common law developed in *Erie*'s aftermath,¹¹⁶ but this body of judge-made federal law has been continually in search of a justification.¹¹⁷ The majority view is that the authority of federal courts to make law is justified only in a few narrow "enclaves,"¹¹⁸ with the federal common law rule being at least "traceable to some identifiable constitutional or statutory source."¹¹⁹ It is not always so obvious how this tracing is achievable. Take the law of federal public nuisance. In the pre-*Erie* days, the Court explained that it had to create law in order to protect states in their "capacity of *quasi*-sovereign[s]."¹²⁰ The Court approvingly cited these cases when it reaffirmed the federal common law of public nuisance in 1972,¹²¹ adding that it resorted to federal law because of "the need for a uniform rule of decision" and because the "controversy touches basic interests of federalism."¹²² One salient lesson of federal public nuisance law is that protecting the sovereignty of the states is an aspect of our federalism that falls within the enclaves of federal common law.¹²³

¹¹⁵ See, e.g., *United States v. Bd. of Cty. Comm'rs of Otero*, 843 F.3d 1208 (10th Cir. 2016); *Michigan v. U.S. Army Corps of Eng'rs*, 758 F.3d 892 (7th Cir. 2014).

¹¹⁶ See Henry J. Friendly, *In Praise of Erie — and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 421 (1964).

¹¹⁷ See RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 645–52 (7th ed. 2015) (describing competing views of federal common law).

¹¹⁸ See Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1065–66 (1967).

¹¹⁹ FALLON, *supra* note 117, at 649.

¹²⁰ *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907).

¹²¹ See *Milwaukee I*, 406 U.S. 91, 104–07 (1972).

¹²² *Id.* at 105 n.6; see also *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 421 (2011).

¹²³ Cf. Clark, *supra* note 114, at 1328 (understanding "the federal common law of interstate relations as rules of decision necessary to implement and maintain the constitutional equality of the states"). The federal judiciary's concern for state sovereignty, expressed in federal common law,

It is not only state sovereignty that inspires the federal judiciary into making law. Concern for federal sovereignty does the trick as well.¹²⁴ And the Court has conceptualized even its tribal sovereignty decisions as federal common law.¹²⁵ In this light, federal common law emerges as a crucial — and probably the best — mechanism for the judiciary to properly balance the multiple sovereignties in our federal system. The alternatives to federal common lawmaking in sovereignty skirmishes are to decide them on constitutional grounds or to do nothing. The Court's Tenth Amendment jurisprudence has wavered between these options in shielding states from federal incursions on their sovereignty.¹²⁶ Likewise, scholars have debated whether the Court should cede its role in deciding matters of Indian tribal sovereignty to Congress¹²⁷ or, conversely, whether the Court should constitutionalize tribal sovereignty “under a third sphere of sovereignty within our constitutional system,”¹²⁸ sometimes called “trifederalism.”¹²⁹ But neither of these poles is especially attractive: judicial abdication risks one sovereign trampling another and constitutionalizing intersovereign feuds places vast unchecked power in the hands of unelected judges.

The wisest course is the middle one of federal common law, where federal judges are on the front lines of intersovereign quarrels but Congress retains the ultimate authority to overrule the courts. With this approach, the doctrine of sovereign self-preservation is an excellent

may be analogous to the Court's “special solicitude” for states by relaxing federal standing requirements. See *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007); *id.* at 518 (citing *Tennessee Copper*, 206 U.S. at 237, for the proposition “that States are not normal litigants for the purposes of invoking federal jurisdiction”). To be sure, there is something paradoxical about championing the sovereignty of states with *federal* judicial power — are states sovereigns or vassals? See Jessica Bulman-Pozen, *Federalism All the Way Up: State Standing and “The New Process Federalism”*, 105 CALIF. L. REV. 1739, 1747 (2017) (“The Court's purported reliance on state sovereignty in *Massachusetts*, for example, was in fact a reliance on its absence.”). This indignity is mitigated somewhat by a federal rule, like the sovereign self-preservation doctrine, that deals with all sovereigns equally.

¹²⁴ See *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964)) (recognizing federal common law where “a federal rule of decision is ‘necessary to protect uniquely federal interests’”).

¹²⁵ See *United States v. Lara*, 541 U.S. 193, 207 (2004).

¹²⁶ Compare *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985) (“[T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the ‘States as States’ is one of process rather than one of result.”), with *New York v. United States*, 505 U.S. 144, 175–77 (1992) (holding that the federal government could not commandeer state governments for federal purposes).

¹²⁷ See Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1, 81–82 (1999).

¹²⁸ See Alex Tallchief Skibine, *Constitutionalism, Federal Common Law, and the Inherent Powers of Indian Tribes*, 39 AM. INDIAN L. REV. 77, 80 (2014).

¹²⁹ See Carol Tebben, *An American Trifederalism Based upon the Constitutional Status of Tribal Nations*, 5 U. PA. J. CONST. L. 318, 318–19 (2003); see also Hope Babcock, *A Possible Solution to the Problem of Diminishing Tribal Sovereignty*, 90 N.D. L. REV. 13, 25–26 (2014).

candidate for a federal common law rule. Such a doctrine would appropriately balance the rights of each sovereign in the federal system on an equal basis.

An intriguing recent case out of the Tenth Circuit illustrates the need for a doctrine of sovereign self-preservation. In *United States v. Board of County Commissioners of Otero*,¹³⁰ New Mexico tried to impose “emergency” fire regulations on federal property following a string of “major fires originating on federal land within the state.”¹³¹ The New Mexico law authorized local officials to clear trees on federal land without obtaining permission from the Forest Service — in violation of a federal regulation requiring Forest Service approval before its trees are cut.¹³² Otero County, three-quarters of which is federal land, adopted a plan to remove trees in the Lincoln National Forest.¹³³ The Forest Service refused to approve the plan, but the county pressed ahead anyway.¹³⁴ Otero’s rambunctious sheriff reportedly threatened to arrest federal officials on kidnapping charges if they tried to stop Otero tree-cutters.¹³⁵

The United States sued New Mexico and Otero County to block the plan, arguing that the Property Clause grants Congress plenary power over federal lands and thus the federal regulations preempted contrary state law.¹³⁶ For their part, New Mexico and Otero County went with the doomed argument that the Tenth Amendment affirmatively limited the authority of the federal government over national forests within the state.¹³⁷ The federal government won easily in both the district court and the Tenth Circuit, since binding precedent foreclosed the argument that the Tenth Amendment overrides federal regulations of its own property.¹³⁸

Otero likely would have come out differently if the sovereign self-preservation doctrine had been available to the parties and courts. *Otero* reached the courts as a constitutional clash between the rights of two sovereigns, namely the state and federal governments. The federal government had the edge there.¹³⁹ But a federal common law approach would have allowed the courts to balance more sensitively the rights

¹³⁰ 843 F.3d 1208 (10th Cir. 2016).

¹³¹ *Id.* at 1209.

¹³² *Id.* at 1209–11.

¹³³ *Id.* at 1210–11.

¹³⁴ *Id.* at 1211.

¹³⁵ See *United States v. Bd. of Cty. Comm’rs of Otero*, 184 F. Supp. 3d 1097, 1104 (D.N.M. 2015).

¹³⁶ *Otero*, 843 F.3d at 1211.

¹³⁷ *Id.* at 1211–12.

¹³⁸ *Id.* at 1212, 1215.

¹³⁹ Cf. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (“The Federal Government holds a decided advantage in this delicate balance [between federal and state power]: the Supremacy Clause.”).

and needs of each sovereign.¹⁴⁰ Under the sovereign self-preservation doctrine, New Mexico would likely have had a mechanism to defend its citizens from the federal infernos.

IV. COUNTERARGUMENTS

The proposed doctrine of sovereign self-preservation is likely to meet several objections, each of which deserves consideration and a response. First, it is arguable that several doctrines are in fact better than just one, since they allow courts to tailor the law to the unique features of each sovereign conflict. For example, perhaps tribes should have to meet an elevated threshold of harm before protective measures are warranted.¹⁴¹ Conversely, it may be good and proper that the federal government has a very slight burden before legislating to protect federal lands. After all, the sovereignties of the states, tribes, and federal government are different in some important ways. It makes sense, the argument goes, that the law would take these differences into account.

This argument ultimately falters for two reasons. The first problem is that it flouts the principle of equal sovereignty.¹⁴² To be sure, true equality of sovereigns is impossible since the federal government stands supreme in our constitutional order. The final word on matters of federal common law rests with Congress. But just as surely, that supreme legislative responsibility does not imply that Congress *should* fashion rules that favor the health and welfare of federal territories over those of the states and tribes. Fairness, respect, and the wisdom to forestall resentments all suggest a default rule of equal sovereignty. To the extent that we are committed to that equality, there must be a very good reason to deviate from equal treatment and create disparate standards among the various sovereigns. No compelling reasons stand out, and merely recounting differences between the sovereigns does not add up to a justification for unequal treatment.

But even if we are not so committed to the principle of equal sovereignty as a matter of theory, there is a more practical reason to harmonize the standards into a single uniform rule. The Court originally conceived of its interstate pollution jurisprudence as “the

¹⁴⁰ The Tenth Circuit declined to address a federal public nuisance argument by an amicus. *See Otero*, 843 F.3d at 1215. But that argument turned on the open question of whether federal agencies may be sued under federal public nuisance law. *Cf. Michigan v. U.S. Army Corps of Eng'rs*, 758 F.3d 892, 900–01 (7th Cir. 2014) (holding that federal public nuisance claims may be brought against federal agency actions).

¹⁴¹ *Cf. Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 175 n.6 (5th Cir. 2014) (“[The dissent’s] highly restrictive interpretation appears to be largely driven by the concern that subjecting non-members to the jurisdiction of tribal courts will violate their due process rights, a concern we find to be exaggerated.”).

¹⁴² *See supra* p. 628.

alternative to force.”¹⁴³ That rationale applies to all sovereigns. Tribes and the federal government might also resort to force in the absence of judicial recourse, and a legal solution is clearly preferable to violence.¹⁴⁴ The events in *Otero*, for example, could have developed into “a potentially dangerous confrontation” between local and federal officials.¹⁴⁵ Providing uniform legal rules in cases of intersovereign conflicts is the best path toward reducing tensions and promoting judicial resolution.

A second potential objection runs along similar lines but focuses on the longstanding status of Indian tribes as “domestic dependent nations,”¹⁴⁶ whose sovereignty is “of a unique and limited character.”¹⁴⁷ On those premises, perhaps tribal sovereignty should not be protected to the same degree, nor with the same doctrine, as that of the federal and state governments. But this argument is less a challenge to the sovereign self-preservation doctrine than to proposals to make tribal sovereignty “a third sphere of sovereignty within our constitutional system.”¹⁴⁸ Adopting a doctrine of sovereign self-preservation as federal common law sidesteps this objection by maintaining the ultimate constitutional limitations of tribal sovereignty, while still combating “the vast erosion of tribal sovereignty.”¹⁴⁹

A final objection questions why sovereigns are entitled to special protection under this proposed doctrine. After all, self-protection is an individual right, too. On a basic level, the conception of a state as monopolizing legitimate violence implies that civil and criminal law must protect individuals from intolerable aggressions.¹⁵⁰ And ordinary property law, for instance, is thought to manifest “sovereign power,”¹⁵¹ which muddies any deep distinction between sovereign and individual rights. The Tenth Circuit in *Otero* felt the need to suggest in a footnote that, in a case of immediate fire emergency, local officials (and presumably regular citizens) might well have recourse to an individual right of self-defense.¹⁵² Why should a special doctrine protecting sovereignty exist on top of that?

¹⁴³ *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907).

¹⁴⁴ *Cf. In re Debs*, 158 U.S. 564, 582 (1895) (“Is the army the only instrument by which rights of the public can be enforced and the peace of the nation preserved? Grant that any public nuisance may be forcibly abated . . . this right . . . does [not] destroy the right of appeal in an orderly way to the courts for a judicial determination . . .”).

¹⁴⁵ *See United States v. Bd. of Cty. Comm’rs of Otero*, 184 F. Supp. 3d 1097, 1105 (D.N.M. 2015).

¹⁴⁶ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

¹⁴⁷ *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

¹⁴⁸ *See Skibine*, *supra* note 128, at 80.

¹⁴⁹ *Frickey*, *supra* note 127, at 7.

¹⁵⁰ *See MAX WEBER ON LAW IN ECONOMY AND SOCIETY* 346–47 (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 3d prtg. 1969) (1954).

¹⁵¹ *See Morris R. Cohen, Property and Sovereignty*, 13 *CORNELL L.Q.* 8, 29 (1927).

¹⁵² *See United States v. Bd. of Cty. Comm’rs of Otero*, 843 F.3d 1208, 1215 n.3 (10th Cir. 2016).

The answer returns us to the function of federal common law in negotiating the friction among sovereigns. Our federalism, by its nature, incorporates multiple and overlapping sovereignties — primarily state and federal, but also tribal. As discussed above, one purpose of federal common law is to guard these sovereigns from one another.¹⁵³ In this respect, the law treats these sovereigns *as sovereigns* in order to maintain the federal balance — a concern that is absent from an individual-centered approach to self-protection.¹⁵⁴ Even if some combination of constitutional rights, federal statutes, and state law were up to the task of protecting each and every individual, which is anyway a dubious proposition,¹⁵⁵ a federal common law doctrine of sovereign self-preservation would still be necessary to keep the federal system humming.

CONCLUSION

This Note makes a first pass at a doctrine of sovereign self-preservation. This doctrine is best conceived as federal common law fashioned to protect the sovereignty of states, tribes, and the federal government from threats emanating from other jurisdictions. The sovereign self-preservation doctrine has not yet been identified, but it is not entirely new either. In four parallel lines of cases, the Supreme Court has allowed sovereigns to fend off threats coming from outside their jurisdictions. But these doctrines conflict with one another and lack precision on their own. A single doctrine of sovereign self-preservation would give judges clearer law to apply and give sovereigns — and their citizens — greater protection from outside harms.

¹⁵³ Cf. Henry P. Monaghan, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 14 (1975) (“[I]t is a basic presumption of the Constitution that the state courts may be too parochial to administer fairly disputes in which important state interests are at issue.”).

¹⁵⁴ Cf. *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237–38 (1907) (“The States by entering the Union did not sink to the position of private owners subject to one system of private law. This court has not quite the same freedom to balance the harm . . . that it would have in deciding between two subjects of a single political power.”).

¹⁵⁵ See, e.g., *Juliana v. United States*, 217 F. Supp. 3d 1224, 1252 (D. Or. 2016) (permitting suit to proceed on claims that the federal government failed “to use [its] statutory and regulatory authority to reduce greenhouse gas emissions”); Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 5 (2014) (“Congress has not passed a major environmental statute in nearly a quarter-century, nor has it produced more than incremental reforms to federal energy legislation during that time . . .”); Henry J. Friendly, *The Gap in Lawmaking — Judges Who Can’t and Legislators Who Won’t*, 63 COLUM. L. REV. 787, 792 (1963) (“What I do lament is that the legislator has diminished the role of the judge by occupying vast fields and then has failed to keep them ploughed.”); cf. *D’Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 470 (1942) (Jackson, J., concurring) (“Were we bereft of the common law, our federal system would be impotent. This follows from the recognized futility of attempting all-complete statutory codes, and is apparent from the terms of the Constitution itself.”).