When Congress Forgets: Breaking Through Congress's Failure to Mention Indian Tribes in Federal Employment Laws

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Congress's enactment of the Families First Coronavirus Response Act (FFCRA) on April 1, 2020, is a stark reminder that Indian tribes are often invisible to Congress when it enacts sweeping employment laws. Such invisibility dates as far back as the National Labor Relations Act of 1935 (NLRA). And it persists in a host of other laws, including the Fair Labor Standards Act, the Occupational Safety and Health Act (OSHA), the Family Medical Leave Act, and the Age Discrimination in Employment Act.

Congress should know that whenever it addresses whether to apply its employment laws to the other two sovereigns (the federal and state governments), the "third sovereign" (federally recognized Indian tribes)[1] should be right on its radar. It is a sad commentary on the branch with constitutional "plenary authority" over Indian affairs that Congress so often forgets.

Of course, such congressional silence ultimately breeds litigation when employees of Indian tribes want the remedies of the "silent" federal laws in question. While, absent a waiver, sovereign immunity bars suits by these employees against tribes, it is no bar to lawsuits by federal agencies.

The federal courts have struggled to figure out what to do in the face of such congressional silence. They have been split on the rule for over 35 years, so it is just a matter of time before the Supreme Court decides the question.

This article reviews the emergence of this split and examines the fallacy of one side of it: the rule generated by an infirm decision of the Ninth Circuit that has been uncritically followed by the Second, Sixth, and Seventh Circuits and, because of its infirmity, leads to line drawing on the basis of race. The counter rule, adopted by the Tenth and Eighth Circuits, is true to the fundamental principles of federal Indian law and implicates no such line drawing.

The Continuing Problem: A Few Examples of Congress Forgetting

The FFCRA requires "covered employers" to give paid leave to employees affected in specific ways by the COVID-19 pandemic and provides such employers (other than state and federal governments) with offsetting tax credits. From the face of the FFCRA, it is impossible to discern whether Indian tribes[2] are "covered employers."

FFCRA defines "covered employer" as "any person engaged in commerce or in any industry or activity affecting commerce."[3] This includes a "*private entity* or individual [that] employs fewer than 500 employees" and "a *public agency* or any other entity that is not a private entity or individual [that] employs 1 or more employees."[4] Indian tribes are governments, not private entities.[5] They might be considered public agencies, but the FFCRA adopts the Fair Labor Standards Act definition of "public agency": "the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States ... a State, or a political subdivision of a State; or any interstate governmental agency."[6] Indian tribes do not fit any of these categories.

So as the pandemic unfolded, tribes across the country were left in the dark about whether they should pay employees who take leave for the qualifying COVID-19 events, and if they did, whether they could obtain the tax credits.

The invisibility of Indian tribes in Congress's employment laws is particularly odious when it is clear that Congress intended to exempt sovereign governments from the law but simply forgot to say anything about tribes. Indeed, if Congress intended to exclude governments from the sweep of an employment law but forgot to mention Indian tribes, it hardly seems appropriate to impose the law on tribes: they are simply the overlooked "third sovereign."

The NLRA and OSHA are two such laws: they define "employer" to exclude the federal and state governments but say nothing about Indian tribes.[7]

Although 1) the NLRA is universally understood to govern employers in the private sector, not in the public sector, and 2) the generation of governmental revenues through gaming by Indian tribes is as much a governmental undertaking as is the operation of a lottery by a state government,[8] federal courts have imposed the NLRA upon the gaming operations of Indian tribes because they appear more "commercial" than governmental.[9] Likewise, while OSHA on its face applies to private sector employers, not public sector employers, federal courts have imposed OSHA upon enterprises wholly owned and controlled by Indian tribes to generate revenues and economic development;[10] they would never do the same for an equivalent state enterprise, like a state-owned cement plant.[11]

The Circuit Split

The circuit split on the approach to whether a federal labor/employment law that is silent about its application to Indian tribes arose in the mid-1980s between the Tenth and Ninth Circuits.

In *Donovan v. Navajo Forest Products Industries*,[12] the Tenth Circuit addressed whether OSHA applied to Navajo Forest Products Industries (NFPI), a timber enterprise of the Navajo Nation with 650 employees, including 25 "non-Indian" individuals. The Department of Labor relied on dicta from a 1960 Supreme Court decision, *Fed. Power Comm'n v. Tuscarora Indian Nation,*[13] where the Court said, "it is now well settled ... that a general statute in terms applying to all persons includes Indians and their property interests."

The Tenth Circuit rejected the argument. First, it held that the Navajo treaty provision that the "[o]nly federal personnel authorized to enter the reservation are those specifically so authorized to deal with Indian affairs" precluded application of OSHA to NFPI.[14] Second, it found that the Supreme Court's decision in *Merrion v. Jicarilla Apache Tribe,*[15] confirming the inherent authority of Indian tribes to exclude nonmembers from their reservations and to regulate their activities while they remain, overruled whatever force the *Tuscarora* dicta had.[16] Thus, the Tenth Circuit said that, absent a clear expression of congressional intent, "we shall not permit divestiture of the tribal power to manage reservation lands so as to exclude non-Indians from entering thereon"; OSHA's silence would not do.[17]

Three years later, in *Donovan v. Coeur d'Alene Tribal Farm,*[18] the Ninth Circuit held that OSHA applied to a farm owned and operated by the Coeur d'Alene Tribe, employing 20 workers, some of whom were "non-Indian." The court framed the issue with a presumption of applicability:

> No one doubts that the Tribe has the inherent sovereign right to regulate the health and safety of workers in tribal enterprises. But neither is there any doubt that Congress has the power to modify or extinguish that right .... The issue raised on this appeal is whether ... congressional silence should be taken as an expression of intent to exclude tribal enterprises from the scope of an Act to which they would otherwise be subject.[19]

Because OSHA is silent with respect to Indian tribes, it is hard to understand why the court would say that the Coeur d'Alene Tribal Farm was "subject" to the Act.

In any event, the Ninth Circuit took as its starting point the above-referenced *Tuscarora* dicta advocated by the Department of Labor but did not actually follow it. Instead, it invented three exceptions under a formulation developed by a single Ninth Circuit judge in a concurring opinion in a 1980 criminal case, *United States v. Farris:*[20]

> A federal statute of general applicability that is silent on the issue of applicability to Indian tribes will not apply to them if: (1) the law touches "exclusive rights of self-governance in purely intramural matters"; (2) the application of the law to the tribe would "abrogate rights guaranteed by Indian treaties"; or (3) there is proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations ...." In any of these three situations, Congress must expressly apply a statute to Indians before we will hold that it reaches them.[21]

There was no treaty at stake to invoke the second exception and no legislative history pertinent to the third. Thus, the only possible exception to the presumption of applicability was the first exception. The court said that "the tribal self-government exception is designed to except purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic relations from the general rule that otherwise applicable federal statutes apply to Indian tribes."[22] It then concluded, "[b]ecause the Farm employs non-Indians as well as Indians, and because it is in virtually every respect a normal commercial farming enterprise, we believe that its operation free of federal health and safety regulations is 'neither profoundly intramural ... nor essential to self-government.'"[23]

The Ninth Circuit then made clear that it disagreed with the Tenth Circuit's approach, to the extent that it relied upon *Merrion* and the protection of the Navajo Nation's inherent sovereignty.[24]

For the last 35 years, the Ninth Circuit's *Coeur d'Alene Tribal Farm* formulation has been followed, without close examination, by the Second, Sixth, and Seventh Circuits. The Tenth and the Eighth Circuits have rejected it, instead taking the position that if imposition of a federal employment law of general application to an Indian tribe would impinge upon the tribe's sovereign authority, the law will not apply absent a clear expression of intent by Congress.[25]

Assessing the Split

The Shaky Foundation of the *Coeur d'Alene Tribal Farm* Formulation

Perhaps it is in nature of common law that some rules seem to develop by accident. Or perhaps what has happened here reflects an attitude within the judiciary once attributed to the late Justice Antonin Scalia that, "when it comes to Indian law, most of the time we're just making it up."[26] Either way, that appears to be the case for the *Coeur d'Alene Tribal Farm* formulation. Just to say it in advance: the *Tuscarora* dictum upon which this formulation rests has nothing to do with the application of federal laws *to Indian tribes*; it has to do with the application of federal laws *to individual citizens of Indian tribes*. The same is true with the *Farris* case. This fundamental flaw in the formulation's genesis undermines its legitimacy.

Fed. Power Comm'n v. Tuscarora Indian Nation[27] involved a challenge by the Tuscarora Indian Nation ("the Nation") to the flooding of 1,000 acres of land owned by the Nation in fee simple for a hydroelectric project in upstate New York. The Nation argued

that it should escape the Federal Power Act's authorization for eminent domain over "the lands or property of others necessary to the construction, maintenance, or operation of" the project in light of the Supreme Court's 1884 decision in *Elk v. Wilkins*.[28] In *Wilkins,* the Court held that an individual tribal citizen did not have the right to vote. In 1884, tribal citizens were not citizens of the United States, and the *Wilkins* Court rejected the individual's asserted voting right, stating a rule at the time that "[g]eneral acts of congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them."[29] In 1960, of course, tribal citizens could also be citizens of the United States. Thus, the *Tuscarora* Court responded with dicta: "[h]owever that may have been," the Court said, "it is now well settled by many decisions of this Court that a general statute in terms applying to all persons includes Indians and their property interests."[30]

As noted above, *Farris* was a criminal case involving the application of federal criminal laws to individual tribal citizens. They argued that they could not be prosecuted under the Organized Crime Control Act, 18 U.S.C. § 1955, for running illegal gambling operations through Indian country. In his concurring opinion, Judge Choy never mentioned *Tuscarora*. He simply responded to the individuals' assertion "that § 1955 does not apply to them," stating "federal laws generally applicable throughout the United States apply with equal force to Indians on reservations" and citing cases holding that various criminal statutes apply to individual tribal citizens.[31] Then, Judge Choy wrote that "there seem to be three exceptions to [the rule that federal laws generally apply with equal force to Indians on reservations]."[32]

> First, reservation Indians may well have exclusive rights of self-governance in purely intramural matters .... Second, it is presumed that Congress does not intend to abrogate rights guaranteed by Indian treaties when it passes general laws .... Finally, if appellants could prove by legislative history or some other means that Congress intended § 1955 not to apply to Indians on their reservations, we would give effect to that intent.[33]

Judge Choy was not joined in these musings by then Judge Anthony Kennedy or by Judge James Browning, the other two judges on the three-judge panel.

But the important point is that, just like the *Tuscarora* dictum, these musings emerge in a case involving the application of general federal laws to *individuals, not to Indian tribes or their sovereign instrumentalities.* This is of no small import. The imposition of federal or state law (those of the other two sovereigns) upon an Indian tribe (the third sovereign) immediately implicates the sovereign interests of the latter; it is an assertion of outside authority upon a sovereign government.

The Fundamentals

Fundamental principles of federal Indian law concerning the nature of tribal sovereignty inform this problem.

First, absent a clear expression of intent by Congress, the Supreme Court will not infer that Congress's acts abrogate or diminish (a) an established attribute of inherent tribal sovereignty (the retained governmental powers of tribes),[34] (b) a right confirmed by a treaty,[35] or (c) the boundaries of an established reservation.[36] The conservation of these powers, rights, and boundaries are critical to the stability of Indian tribes as functioning tribal governments.

Second, within their territories, Indian tribes have inherent sovereign authority to govern employment relations involving their own tribal citizens as well as those involving the tribe itself or arms of the tribe. That power is the same whether the employees are tribal citizens or nontribal citizens.[37] Indeed, when a nontribal citizen enters an Indian reservation or trust lands for employment, the tribe retains power to regulate the terms and conditions upon which that individual remains.[38] The leading treatise in the field describes this power as "intimately tied to a tribe's ability to protect the integrity and order of its territory and the welfare of its members, it is an internal matter over which the tribes retain sovereignty."[39] Even on fee lands owned by a nontribal member within the exterior boundaries of an Indian reservation, tribes retain inherent power to regulate contractual relationships between nontribal citizens and the tribe,[40] and an employment relationship is just that.[41]

Third, given Congress's constitutional plenary authority over Indian affairs, adjustments to address any perceived injustices involving the employment relations that Indian tribes have inherent sovereign authority to govern must be left to Congress.[42]

Given these fundamentals, the flaws of the *Coeur d'Alene Tribal Farm* formulation are clear. The imposition of silent federal employment laws upon Indian tribes abrogates their sovereign authority over employment relations within their territories without the requisite evidence of clear congressional intent. And this is so whether the employment involves tribal members or nontribal members. It is not up to the judiciary to fill any gaps left by Congress. Any abrogation of tribal sovereignty is up to Congress, and its silence will not suffice.

In short, the Tenth and Eighth Circuits have it right.

Racial Distinctions Implicit in the *Coeur d'Alene Tribal Farm* Formulation

Perhaps because it is divorced from fundamental principles of federal Indian law, the *Coeur d'Alene Tribal Farm* formulation leads to the drawing of lines on the basis of race.

Recall that under this formulation there is an exception to the presumption of applicability (derived from the *Tuscarora* dictum) if the silent federal employment law "touches upon exclusive rights of self-governance in purely intramural matters." This invariably leads courts to consider whether a given tribal employment setting involves the employment of tribal members only or the employment of an appreciable number of "non-Indians." If an Indian tribe employs "non-Indians," the logic goes, application of the silent law in question will not affect "purely intramural matters"; so the exception cannot operate, and the silent federal law applies.[43]

These same courts often overlook the Supreme Court decisions that confirm the sovereign authority of Indian tribes to govern their employment relations with nontribal citizens; they wrongly posit notions like "non-Indians are not subject to tribal jurisdiction"[44] or that "limitations on tribal authority are particularly acute where non-Indians are concerned."[45]

The bizarre result is that the "protections" perceived to be available to employees under these silent federal laws in the tribal employment setting operate when "non-Indians" proliferate the workforce, but not if the workforce is made up only of "Indians." The rule purports to protect a category of employees on the basis of their race, as "non-Indians." The truth of the matter is that Indian tribes should, and readily do, judge for themselves what laws to

adopt to protect their workforces.[46] Thus, the *Coeur d'Alene Tribal Farm* "exception," preventing the application of silent federal laws when "purely intramural matters" are at stake, also plays right into a defunct stereotype: that Indian tribes cannot be trusted to treat "non-Indians" fairly.

Until Congress acts with clarity, Indian tribes retain their inherent sovereign authority over employment relations within their territories, free from abrogation by federal agencies. When and if the matter reaches the Supreme Court, the *Coeur d'Alene Tribal Farm* formulation should be rejected, and the standard embraced by the Tenth and Eighth Circuits should prevail. ⊙

Endnotes

[1]*See* Justice Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1, 1 (1997).

[2]The term "Indian tribe" as used in this article encompasses federally recognized Indian tribes and "arms of tribes," enterprises imbued with tribal sovereign immunity that tribes own and control to generate government revenues. *See Allen v. Gold Country Casino*, 464 F.3d 1044, 1046-47 (9th Cir. 2006).

[3]29 C.F.R. § 826.10(a)(i)(A). The inclusion of the broad term "person" in the statutory definition hardly encompasses Indian tribes because "in common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989).

[4]29 C.F.R. § 826.10(a)(i)(A)(2).

[5]*Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014).

[6]29 C.F.R. § 826.10(a).

[7]*See* 29 U.S.C. §§ 152, 652.

[8]"[T]ribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases 'may be the only means by which a tribe can raise revenues.'" *Bay Mills Indian Cmty*., 572 U.S. at 810 (Sotomayer, J., concurring) (quoting Catherine T. Struve, *Tribal Immunity and Tribal Courts*, 36 Ariz. St. L.J. 137, 169 (2004)). No doubt similarly situated state entities would be exempt from the NLRA and subject only to a state's public sector labor laws. *Cf. N.Y. City Off-Track Betting Corp. v. Local 2021, Am. Fed'n of State, Cnty. & Mun. Emps.*, 416 N.Y.S.2d 974 (N.Y. Sup. Ct. 1979) (finding that off-track betting facility operated to generate state revenues and thus governed by state's public-sector labor laws); Mass. Gen. Laws ch. 150E, §§ 1-3 (2020) (demonstrating state lottery subject to state's public-sector labor laws).

[9]*See Pauma v. NLRB*, 888 F.3d 1066, 1077 (9th Cir. 2018); *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306 (D.C. Cir. 2007). *But see NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 556-563 (6th Cir. 2015) (McKeague, J., dissenting) (stating that absent evidence of congressional intent to the contrary, the NLRB's restrictions on Little River Band of Ottawa Indians interfere with tribal sovereignty); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (en banc) (rejecting challenge to Pueblo's right to work law as applied to lumber mill owned by non-tribal entity within the Pueblo).

[10]*See, e.g., Menominee Tribal Enters. v. Solis*, 601 F.3d 669 (7th Cir. 2010); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985). *But see Scalia v. Red Lake Nation Fisheries, Inc.*, 982 F.3d 533 (8th Cir. 2020) (finding tribe's reservation fishing enterprise was not subject to OSHA); *Donovan v. Navajo Forest Prods. Indus.*, 692 F.2d 709 (10th Cir. 1982) (holding tribe's reservation timber enterprise was not subject to OSHA).

[11]*Cf. Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980) (discussing importance of state-owned cement plant for economic development).

[12]692 F.2d 709 (10th Cir. 1982).

[13]362 U.S. 99 (1960).

[14]692 F.2d at 711-12.

[15]455 U.S. 130 (1982).

[16]692 F.2d at 713.

[17]*Id.* at 714.

[18]751 F.2d 1113 (9th Cir. 1985).

[19]*Id.* at 1115.

[20]624 F.2d 890 (9th Cir.1980), *superseded by statute*, Indian Gaming Regulatory Act of 1988, Pub. L. No. 100-497, 102 Stat. 2467, *as recognized in United States v. E.C. Invs., Inc.*, 77 F.3d 327 (9th Cir. 1996).

[21]*Coeur d'Alene Tribal Farm*, 751 F.2d at 1116 (quoting *Farris*, 624 F.2d at 893-94).

[22]*Id.*

[23]*Id.* .

[24]*Id.* at 1117, n.3.

[25]*See Scalia v. Red Lake Nation Fisheries, Inc.*, 982 F.3d 533, 535 (8th Cir. 2020); *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1284 (10th Cir. 2010).

[26]*See* Matthew L.M. Fletcher, *Montana Native Law Student Recall* Babbitt v. Youpee *and Meeting Justice Scalia*, Turtle Talk (Feb. 18, 2016) https://turtletalk.blog/2016/02/18/montana -native-law-student-recalls-babbitt-v-youpee-and-meeting-justice-scalia/.

[27]362 U.S. 99 (1960).

[28]*Id.* at 115-16 (quoting Federal Power Act, 16 U.S.C. § 796(2); and citing *Elk v. Wilkins,* 112 U.S. 94 (1884)).

[29]112 U.S. at 100.

[30]362 U.S. at 116.

[31]624 F.2d at 893.

[32]*Id.*

[33]*Id.*

[34]*See Bay Mills Indian Cmty*, 572 U.S. at 790.

[35]*See United States v. Dion*, 476 U.S. 734, 738 (1986).

[36]*See McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

[37]*See Bay Mills Indian Community*, 572 U.S. at 788-790 ("[U]nless and 'until Congress acts, the tribes retain' their historic sovereign authority") (citing *United States v. Wheeler*, 435 U.S. 313, 323 (1978)). *See generally* Restatement of Law of American Indians § 20, cmt. C (Am. L. Inst., Tentative Draft No. 2, 2018) ("[T]ribes retain authority over members or citizens"); *Id.* at § 34 ("Indian tribes retain authority to regulate the conduct of nonmembers on Indian lands, except when a federal statute divests an Indian tribe of that authority or when tribal authority conflicts with an overriding national interest").

[38]*See Merrion*, 455 U.S. at 144-45.

[39]Cohen's Handbook of Federal Indian Law § 4.01[2][e] at 221 (Nell Jessup Newton et al. eds., 2012).

[40]*Montana v. United States*, 450 U.S. 544, 565-66 (1981).

[41]*See Knighton v. Cedarville Rancheria of Northern Paiute Indians*, 918 F.3d 660, 673 (9th Cir. 2019).

[42]*See, e.g., Bay Mills Indian Cmty.*, 572 U.S. at 803 (examining the

principle that Congress, not the Court, holds responsibility for the abrogation of tribal sovereignty); *Williams v. Lee*, 358 U.S. 217, 223 (1959) (clarifying that only Congress can grant state court authority that would infringe upon the inherent sovereignty retained by Indian tribes to adjudicate claims arising within their reservations).

[43]*See, e.g.*, *Little River Band of Ottawa Indians*, 788 F.3d at 543-544; *Mashantucket Sand & Gravel*, 95 F.3d at 180; *Coeur d'Alene Tribal Farm*, 751 F.2d at 1116.

[44]*Menominee Tribal Enters.*, 601 F.3d at 670; *Merrion*, 455 U.S. at 144-45; *Montana,* 450 U.S. at 565-66.

[45]*Mashantucket Sand & Gravel*, 95 F.3d at 180; *see also Little River Band of Ottawa Indians Tribal Government,* 788 F.3d at 546 (describing tribal power over non-members as being at the "periphery" of "inherent tribal sovereignty"); *Merrion,* 455 U.S. at 144-45; *Montana,* 450 U.S. at 565-66.

[46]*See, e.g.*, Jamestown S'Klallam Tribe Tribal Code, tit. 3 Labor Code, https://jamestowntribe.org/wp-content/uploads/2018/05/Title_03_Labor_Code_9_12_14.pdf (last visited Jan. 31, 2021); Mashantucket Pequot Tribal Nation Employment Rights Code, tit. 31, http://www.mptnlaw.com/laws/Single/TITLE%2031%20MASHANTUCKET%20EMPLOYMENT % 20RIGHTS%20LAW%20(MERO).pdf (last visited Jan. 31, 2021); Little River Band of Ottawa Indians Fair Employment Practices Code, Ordinance #05-600-03 (July 28, 2010), www.lrboi-nsn.gov/images/docs/council/docs/ordinances/Title 600-03.pdf (lrboi-nsn.gov) (last visited Jan. 31, 2021).

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Ch. 4 (1748). ("Liberty is a right of doing whatever laws permit, and if a citizen could do what they forbid he would be no longer possessed of liberty, because all his fellow-citizens would have the same power.") The term "trias politica" or "separation of powers" was coined by Charles-Louis de Secondat, baron de La Brède et de Montesquieu, the 18th century French social and political philosopher. His treatise on political theory and jurisprudence, more than twenty years in the making, is one of the great works in the history of political thought, inspiring both the Declaration of the Rights of Man and of the Citizen in France and the U.S. Constitution.

[4]Montesquieu declared that there is no greater tyranny than that which is perpetrated under the shield of the law and in the name of justice. It was avowedly for the public good that Socrates was put to death, that the Puritans were driven from England, and that French revolutionaries sent thousands to the guillotine. The fact that a people rule through self-government is certainly no guarantee that liberty will prevail. The citizens of Greek and Roman republics possessed public rights, but no individual rights in the modern sense. The U.S. Bill of Rights was intended as a limitation of the "sovereignty of the people" and their representative government in favor of the liberty of *all* the people.

[5]Montesquieu, *supra* note 3.

[6]These two aspects of liberty may be referred to by multiple names, including "Liberty of the Will" or philosophical liberty versus civil liberty or social liberty, the latter concerning the limits of power that are exercised by society (i.e. government) over the individual in order to achieve societal security. Note that extremes in either form of these two aspects of liberty naturally lead to anarchy or totalitarianism, respectfully, and abate true liberty.

[7]John Adams, *Thoughts on Government* 1 (1776). https://www.nps.gov/inde/upload/Thoughts-on-Government-John-Adams-2.pdf ("[A]s the divine science of politics is the science of social happiness, and the blessings of society depend entirely on the constitutions of government, which are generally institutions that last for many generations, there can be no employment more agreeable to a benevolent mind than a research after the best.") Montesquieu believed that a nation having political liberty as the direct end of its constitution, if its principles were sound, would achieve liberty in its highest perfection. Montesquieu, *supra* note 3, at Book XI, Ch. 5.

[8]John Adams, *Letter to Count de Sarsfield* (Feb. 3, 1786), https://founders.archives.gov/documents/Adams/99-01-02-0493.

[9]*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[10]Thomas Jefferson, *Letter to George Hay* (June 20, 1807), http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jefl180.php.

[11]Thomas Jefferson, *Letter to James Madison (Jan. 22,* 1797) https://www.loc.gov/resource/mtj1.020_1107_1108/?sp=1&st=text (emphasis added).

[12]The Federalist No. 71 (Alexander Hamilton).

[13]The Federalist No. 78 (Alexander Hamilton).

[14]George Washington, *Farewell Address* (1796) https://www.ourdocuments.gov/doc.php?flash=false&doc=15&page=transcript (emphasis added).

[15]*Id.*

[16]Montesquieu, *supra* note 3, at Book XI, Ch. 20.

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