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THE ORIGINAL UNDERSTANDING OF THE POLITICAL STATUS OF INDIAN TRIBES

MATTHEW L.M. FLETCHER[†]

INTRODUCTION

Influential and formidable legal minds, including Justice Blackmun,¹ Justice Stevens,² and Judge Kozinski,³ have been among the federal and state court judges confronted with the dynamic and sizeable question of whether Indian law is a question of race law or a question of politics. These judges' responses indicated that they were all but overwhelmed with the question. It is a rare occasion when federal courts are presented with the argument that statutes and regulations that create, for example, federal program preferences for Indian tribes or individual Indians, are unconstitutional under the Fifth or Fourteenth Amendments,⁴ but when they are confronted with

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¹ See *Morton v. Mancari*, 417 U.S. 535, 552–53 (1974) (citing *Simmons v. Eagle Seelatsee*, 244 F. Supp. 808, 814 n.13 (E.D. Wash. 1965), *aff'd*, 384 U.S. 209 (1966)).

Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.

Id.

² See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 244–45 (1995) (Stevens, J., dissenting) (“We should reject a concept of ‘consistency’ that would view the special preferences that the National Government has provided to Native Americans since 1834 as comparable to the official discrimination against African-Americans that was prevalent for much of our history.” (citing *Mancari*, 417 U.S. at 541)).

³ See *Williams v. Babbitt*, 115 F.3d 657, 665 (9th Cir. 1997) (“If Justice Stevens is right about the logical implications of *Adarand*, *Mancari*’s days are numbered.”).

⁴ See, e.g., *United States v. Antelope*, 430 U.S. 641, 642, 647–48 (1977) (Fifth Amendment); *Flynt v. Cal. Gambling Control Comm’n*, 129 Cal. Rptr. 2d 167, 182–83 (Ct. App. 2002) (Fourteenth Amendment); *cf. Rice v. Cayetano*, 528 U.S. 495,

this question, one typical response in denial of the argument is to assert that such an argument could mean the end of Title 25 of the United States Code.⁵ Implicit in this argument is that the judiciary would be stretching its authority and legitimacy by striking down such a vast body of law in one fell swoop.⁶ This response is indicative of how this area of constitutional and Indian law is superficially theorized. Sometimes, judges have no choice but to throw up their hands and resort to fairly weak statements relating to judicial authority.

The answer, unlike the answers to most federal Indian law questions,⁷ is relatively simple to understand. And, like so many Indian law questions, the answer lies in history, going back to the First Congress's statement of Indian policy in the 1790 Trade and Intercourse Act⁸ and the very first major Indian law decision from the Supreme Court, *Johnson v. M'Intosh*.⁹ *Johnson*, for example, constitutionalized the rule that only the federal government could clear title to Indian land through "an exclusive right to extinguish the Indian title of occupancy, either by

517–24 (2000) (Fifteenth Amendment).

⁵ See, e.g., *Mancari*, 417 U.S. at 552.

⁶ See Joseph William Singer, *Reply Double Bind: Indian Nations v. The Supreme Court*, 119 HARV. L. REV. F. 1, 1 (2005), <http://www.harvardlawreview.org/forum/issues/119/dec05/singer.pdf>.

The Court cannot seem to live with Indian nations; those nations do not fit easily into the constitutional structure and their place in the federal system appears obscure and anomalous. Yet the Supreme Court cannot live without them either; much as the Court would like to limit tribal sovereignty, it is neither equipped nor inclined to erase tribal sovereignty entirely. Indian nations are not only mentioned in the Constitution, but are also the subject of an entire Title of the United States Code. Writing Indians out of the Constitution and deleting Title 25 of the U.S. Code would appear to be beyond the legitimate powers of the Court.

Id.; see also David C. Williams, *Sometimes Suspect: A Response to Professor Goldberg-Ambrose*, 39 UCLA L. REV. 191, 210 (1991) ("My hope was that my critique of *Mancari* would stir courts to look for another answer, because otherwise—with *Mancari* gone—all of Title 25 would receive strict scrutiny.").

⁷ See *United States v. Lara*, 541 U.S. 193, 219 (2004) (Thomas, J., concurring) ("Federal Indian policy is, to say the least, schizophrenic. And this confusion continues to infuse federal Indian law and our cases."); *Duro v. Reina*, 495 U.S. 676, 709 (1990) (Brennan, J., dissenting) ("This country has pursued contradictory policies with respect to the Indians."), *superseded by statute*, Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301–03 (2000), as recognized in *Lara*, 542 U.S. at 197–98.

⁸ Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137 (current version at 25 U.S.C. § 177 (2000)).

⁹ 21 U.S. (8 Wheat.) 543 (1823).

purchase or by conquest.”¹⁰ Congress had already exercised its Indian Commerce Clause¹¹ power to ban the states from purchasing or acquiring Indian lands in the Trade and Intercourse Act.¹² In short, every parcel of land divested by Indian tribes and individual Indians to American private and public property owners had to pass through the federal government’s hands.¹³ The question, for purposes of our discussion, about the political status of Indian tribes that the federal government had to answer was this: In what manner will the United States clear Indian title from lands occupied by Indian people? The answer, as the histories of Indian lands dispossession prove conclusively,¹⁴ is through purchase from—or conquest of—*Indian tribes*. The United States could have made a decision to clear Indian title through individual transactions with individual Indians,¹⁵ but chose instead to clear Indian title through political channels. What resulted were the origins of the political status of Indian tribes and their citizens, the Indian people.

This Article will demonstrate that virtually all elements of Indian affairs can be traced to the decision of the United States to recognize Indian tribes as political entities and to make Indian law and policy based on this political status.

Part I briefly describes the problem: Indian law is often assumed to be race law. For the untrained eye, Indian law appears to be a minor subset of the laws about race that often dominate the national legal political dialogue. As a result, observers tend to try to force Indian law into the race law

¹⁰ *Id.* at 587.

¹¹ U.S. CONST. art. I, § 8, cl. 3.

¹² See Act of July 22, 1790, ch. 33, § 1; AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 108 n.* (2005).

¹³ See Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 34–43, 45–46 (1947); Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1, 6–7 (1942).

¹⁴ See generally STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* (2005); ROBERT J. MILLER, *NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY* (2006); LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* (2005).

¹⁵ Compare Eric Kades, *The Dark Side of Efficiency: Johnson v. M’Intosh and the Expropriation of Indian Lands*, 148 U. PA. L. REV. 1065, 1104–07 (2000) (arguing that individual purchases would have been inefficient), with Matthew L.M. Fletcher, *The Iron Cold of the Marshall Trilogy*, 82 N.D. L. REV. 627, 686–93 (2006) (disputing Kades’s theory).

paradigm created by the Constitution and re-created by the Fourteenth Amendment. This is a complete misunderstanding of the relationship of Indian tribes and Indian people to the federal government. Justice Blackmun's footnote 24 in *Morton v. Mancari*—describing federal legislation and rules relating to Indian tribes as a political classification¹⁶—hit upon the proper understanding of Indian law, but offered insufficient guidance for lower courts to follow. Understanding the original meaning of the Indian Commerce Clause and the understanding of the Framers about the character of their relationship to Indian tribes goes a long way toward supporting Justice Blackmun's theory, but few courts undertake that analysis.

Part II articulates the original understanding of the Indian affairs power, derived in part from the Indian Commerce Clause, through evidence contained in the historical record contemporaneous to the ratification of the Constitution. The political status of the tribal-federal relationship dated back to at least the British Proclamation of 1763 and pervaded the Framers' understanding. This Part provides powerful historical proof that the United States always treated Indian affairs as a relationship between the federal government and Indian tribes, not as a race-based relationship involving Indians.

Part III describes the ongoing understanding of American Indian law and policy, traced back to *Johnson v. M'Intosh*,¹⁷ the Fourteenth Amendment and the treatment of Indian people under both the political and racial classifications. Indian law and policy is rife with contradiction and confusion, but there is clear evidence that the overarching original understanding was that the relationship of Indian people to governments is primarily political. The implementation of the rule of *Johnson v. M'Intosh* offers significant proof of this political relationship through Indian treaties, Acts of Congress, and other federal authority.

Finally, Part IV applies the original understanding of the tribal-federal relationship in the context of various specific

¹⁶ See *Morton v. Mancari*, 417 U.S. 535, 553 n.24 (1974) ("The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature.").

¹⁷ 21 U.S. (8 Wheat.) 543 (1823).

claims that Indian law is really race law and should be governed by the Fifth and Fourteenth Amendments. This Article concludes by arguing that the superior method of understanding Indian affairs is through a political lens. Treating Indian law as race law is misleading and inaccurate given the existence of overwhelming political, legal, and historical evidence that the foundations of American Indian law are political.

I. THE "INDIAN PROBLEM" AS A PROBLEM OF RACE

Much of federal Indian law is misunderstood and easily misrepresented. While federal Indian law and policy has been on a track parallel to race law and appears to retain many of the same elements, courts and commentators misunderstand this relationship. As a result, they attempt to place Indian law into a cubbyhole in which it doesn't fit—race law. Thus, in debating whether or not to apply strict scrutiny, courts and commentators continue to discuss whether certain statutes that apply only to American Indians should be analyzed under the rubric of Footnote 4 of *United States v. Caroline Products Co.*¹⁸

A. Justice Blackmun's Footnote 24 in *Morton v. Mancari*

Morton v. Mancari arose when a group of non-Indian Bureau of Indian Affairs employees challenged a Bureau regulation that granted preference in employment promotion decisions to qualified American Indians.¹⁹ To be eligible for the preference, a qualified American Indian "must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe."²⁰ The Court held that the preference was not a violation of the Fifth Amendment Due Process Clause, which prohibits invidious discrimination.²¹ First, the Court noted that the preference was not "racial" in character, but instead "an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups."²² The Court analogized the criterion to "the constitutional requirement that a United States Senator, when elected, be 'an Inhabitant of that State for which he shall

¹⁸ 304 U.S. 144, 153 n.4 (1938).

¹⁹ See *Mancari*, 417 U.S. at 539.

²⁰ *Id.* at 553 n.24 (quoting 44 BIAM 335, 3.1 (1972)).

²¹ See *id.* at 553–55.

²² *Id.* at 554.

be chosen,' or that a member of a city council reside within the city governed by the council."²³ The Court focused on the fact that the criterion benefited certain Indians not because of their racial characteristics, but because they were "members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion."²⁴ As such, the Court applied its rational basis test for determining the constitutionality of the practice.²⁵

Footnote 24 of Justice Blackmun's opinion in *Morton v. Mancari* may become the most important footnote in 21st century constitutional litigation involving federal and state statutes relating to Indian tribes and individual Indians. This footnote was the first to articulate a theory suggesting that the strict scrutiny analysis applied to laws specifically pertaining to racial minorities should not apply to federal statutory or regulatory preferences favoring Indians.²⁶ This theory further postulated that federal statutes relating to Indian tribes that are reasonably related to the federal government's trust relationship with Indian tribes and individual Indians are based on classifications addressing the political status of these groups, not their racial characteristics: "The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature."²⁷ Unfortunately, footnote 24 is a superficially theorized aspect of the *Mancari* decision and, arguably, would be mere dictum if the Court had not relied upon this formulation of the political

²³ *Id.* (quoting U.S. CONST. art. I, § 3, cl. 3).

²⁴ *Id.*

²⁵ *See id.*

Furthermore, the preference applies only to employment in the Indian service. The preference does not cover any other Government agency or activity, and we need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations. Here, the preference is reasonably and directly related to a legitimate, nonracially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination.

Id.

²⁶ *Id.* at 553 n.24.

²⁷ *Id.*

relationship between the federal government and Indian tribes and individual Indians in later cases.²⁸

Later Supreme Court decisions have relied upon *Mancari* for the proposition that the Fifth and Fourteenth Amendments do not require courts to apply strict scrutiny to federal and state statutes that apply only to American Indians. These statutes can be divided into statutes that benefit Indian tribes and those that do not. For example, the first case that reached the Court in which a claimant made the strict scrutiny argument was *Fisher v. District Court*.²⁹ That case involved a child custody dispute between Indian parents that had been originally adjudicated in tribal court.³⁰ The foster parents initiated adoption proceedings in Montana state court, to which the mother objected.³¹ The Court held that the tribal court had exclusive jurisdiction and the state court could not adjudicate the child's adoption.³² The foster parents had argued that the denial of access to state courts amounted to discriminatory treatment, but the Court, citing *Mancari* and without significant discussion, rejected the claim.³³

²⁸ See, e.g., *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979) (“[T]he peculiar semisovereign and constitutionally recognized status of Indians justifies special treatment on their behalf . . .”); *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500–01 (1979) (“[T]he unique status of Indian tribes under federal law permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive.” (internal quotation marks omitted)); *United States v. Antelope*, 430 U.S. 641, 645–47 (1977); *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 479–81 (1976) (“[T]hese . . . statutory preferences, which we said were neither ‘invidious’ nor ‘racial’ in character, [are constitutional] [a]s long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians . . .” (internal quotation marks omitted)); *Fisher v. Dist. Court*, 424 U.S. 382, 390–91 (1976) (per curiam); see also *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84–85 (1977) (applying *Mancari* for the proposition that Acts of Congress related to Indian affairs would be held to the rational basis test).

²⁹ 424 U.S. at 382.

³⁰ See *id.* at 383.

³¹ See *id.* at 383–84.

³² See *id.* at 390.

³³ See *id.* at 390–91 (citing *Morton v. Mancari*, 417 U.S. 535, 551–55 (1974)). [E]ven if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.

A year later, in *United States v. Antelope*,³⁴ the Court held that the application of a federal enclave murder statute to tribal members did not constitute race discrimination.³⁵ Two Coeur d'Alene Indians had been convicted of felony murder under federal law for the first degree murder of an Indian woman in Indian Country.³⁶ Had they been classified as non-Indians, they would have been prosecuted under Idaho law, which had no felony murder statute.³⁷ In order to establish first degree murder in Idaho, the prosecutors would have had to prove premeditation and deliberation, which are not elements of felony murder under federal law.³⁸ The Court, per Chief Justice Burger, engaged in slightly more analysis of Indian tribes' unique political relationship with the federal government than it did in the *Fisher* case, but not much more. The Court noted that the Indian Commerce Clause explicitly allows Congress to enact legislation relating to Indians and that the history of federal-tribal relations supported that position.³⁹ Subsequently, three times since *Antelope*, the Court has rejected claims that Indian law had benefited Indians and Indian tribes—twice in the tax arena⁴⁰ and once in the treaty fishing rights arena.⁴¹ None of these cases

³⁴ 430 U.S. 641 (1977).

³⁵ See *id.* at 645-47.

³⁶ See *id.* at 642-43.

³⁷ See *id.* at 644.

³⁸ See *id.*

³⁹ See *id.* at 645.

The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications. Quite the contrary, classifications expressly singling out Indian tribes as subjects of legislation are expressly provided for in the Constitution and supported by the ensuing history of the Federal Government's relations with Indians.

Id. (citing U.S. CONST. art. I, § 8, cl. 3).

⁴⁰ See *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979) (holding that a state statute "within the scope of the authorization of" and "enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians" survives an Equal Protection Clause attack since "Congress, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of the Indian tribes"); *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 479-80 (1976) (refusing to characterize a tax immunity granted by federal law as "invidious discrimination against non-Indians on the basis of race").

⁴¹ See *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979) (stating that treaties providing "fishing rights to Indians that were not also available to non-Indians . . . confer enforceable special benefits on signatory Indian tribes").

analyzed the question further, holding that *Mancari* was dispositive.

The Court had not seriously analyzed the *Mancari* holding since its inception until a case involving an unusual question pertaining to Native Hawaiians, *Rice v. Cayetano*.⁴² Hawaii had created a board of trustees to handle two trust funds that administered programs for two classes of Native Hawaiians—one race-based and one based on ancestry dating back to 1778.⁴³ A statewide election in which all Hawaiians could vote chose the board, but only people who met the ancestry requirements could serve on it.⁴⁴ The Court struck down the voting rules on the basis that they were prohibited by the Fifteenth Amendment.⁴⁵ The State argued that the voting rules should be constitutional under *Mancari*,⁴⁶ but the Court rejected this argument for several reasons. First, Native Hawaiians did not have the same political relationship to the United States that mainland American Indian tribes did.⁴⁷ Second, the Court held that even if Native Hawaiians maintained the same political relationship as did Indian tribes, Congress could not authorize a statewide voting scheme of that sort under the Fifteenth Amendment.⁴⁸ The Court added that congressional approval of tribal elections that exclude non-members did not implicate the Fifteenth Amendment because:

⁴² 528 U.S. 495 (2000).

⁴³ *See id.* at 498–99.

⁴⁴ *See id.* at 499.

⁴⁵ *See id.* at 511–17.

⁴⁶ *See id.* at 518.

⁴⁷ *See id.*

[I]t would be necessary to conclude that Congress, in reciting the purposes for the transfer of lands to the State—and in other enactments such as the Hawaiian Homes Commission Act and the Joint Resolution of 1993—has determined that native Hawaiians have a status like that of Indians in organized tribes, and that it may, and has, delegated to the State a broad authority to preserve that status. These propositions would raise questions of considerable moment and difficulty. It is a matter of some dispute, for instance, whether Congress may treat the native Hawaiians as it does the Indian tribes.

Id.

⁴⁸ *See id.* at 519 (“The State’s argument fails for a more basic reason. Even were we to take the substantial step of finding authority in Congress, delegated to the State, to treat Hawaiians or native Hawaiians as tribes, Congress may not authorize a State to create a voting scheme of this sort.”).

If a non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a quasi sovereign. The OHA elections, by contrast, are the affair of the State of Hawaii. OHA is a state agency, established by the State Constitution, responsible for the administration of state laws and obligations.⁴⁹

As such, *Mancari* offered Native Hawaiians no assistance.

Thus, the Supreme Court has never taken an occasion since *Antelope* to fully theorize the political relationship between Indian tribes and the federal government. The historical legal record reveals, however, that the original understanding of Indian law and policy always has been based on this political relationship, race rhetoric aside.

B. *The Rise of Strict Scrutiny in Federal Indian Law*

One serious and important aspect of the modern "Indian problem" derives from the weakening of the special political relationship between the federal government and Indian tribes. In recent years, the Supreme Court, leading constitutional scholars, and policymakers have begun to doubt the validity—or at least the expansiveness⁵⁰—of the *Morton v. Mancari* formulation of "political status."⁵¹ Opponents of treaty rights and legislation benefiting Indians and Indian tribes suggest that these "Indian preferences" are nothing more than race discrimination, disguised in the form of preferences and set asides.⁵² Statutes and other agreements intended to benefit

⁴⁹ *Id.* at 520.

⁵⁰ See, e.g., *id.*; Jessica Lynn Clark, AFGE v. United States: *The D.C. Circuit's Preferential Treatment of the Native American Preference in Government Contract Awards*, 34 PUB. CONT. L.J. 379, 384–86 (2005) (asserting that the only basis for permitting employment preferences for Indians over non-Indians in *Mancari* was the "unique legal status of Indian tribes").

⁵¹ See, e.g., *Williams v. Babbitt*, 115 F.3d 657, 665 (9th Cir. 1997); *Tafoya v. City of Albuquerque*, 751 F. Supp. 1527, 1531 (D.N.M. 1990); *Malabed v. N. Slope Borough*, 70 P.3d 416, 420 (Alaska 2003); *In re Santos Y.*, 110 Cal. Rptr. 2d 1, 38–39 (Ct. App. 2001); L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809, 813, 855, 859–60 (1996); David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 792–98, 800–01, 804 (1991).

⁵² See, e.g., George Bush, Memorandum of Disapproval for the Indian Preference Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1831, 1831 (Nov. 16, 1990); Brian Stockes, *Congressional Legislation Targets Indian Preferences in Federal Contracts*, INDIAN COUNTRY TODAY, Oct. 30, 2000, <http://www.indiancountry.com/content.cfm?id=571> ("Statutory provisions granting special rights to Indians with

individual Indians and Indian tribes, such as the Indian Child Welfare Act⁵³ and the Indian Gaming Regulatory Act,⁵⁴ and Indian treaties⁵⁵ and intergovernmental agreements between tribes and states and local governments,⁵⁶ have all come under additional criticism and challenge under the theory that Indian law really is race law controlled by the regime of strict scrutiny. While some courts suggest in dicta that Indian affairs statutes and “preferences” could withstand strict scrutiny,⁵⁷ no court has undertaken that analysis.

In large part, the courts have rejected the application of strict scrutiny to Indian laws and regulations, but these courts have had serious doubts about that outcome. For example, the Supreme Court’s 1977 decision in *United States v. Antelope* also did not find a violation of the equal protection clause,⁵⁸ but left open significant questions about the future application of strict scrutiny, which have never been answered.⁵⁹ These questions are becoming more and more important as states have begun to ban affirmative action programs on the basis of race,⁶⁰ which

respect to employment, contracting, or any other official interaction with an agency of the United States are racial preference laws,’ said Rep. Weldon. ‘Such Indian racial preference laws should be repealed.’”); *cf.* Scott D. Danahy, *License to Discriminate: The Application of Sovereign Immunity to Employment Discrimination Claims Brought by Non-Native American Employees of Tribally Owned Businesses*, 25 FLA. ST. U. L. REV. 679, 688–90 (1998).

⁵³ 25 U.S.C. § 1901 (2000); *see also In re Santos Y.*, 110 Cal. Rptr. 2d 1, 39–40 (Ct. App. 2001).

⁵⁴ 25 U.S.C. § 2701 (2000); *see also Flynt v. Cal. Gambling Control Comm’n*, 129 Cal. Rptr. 2d 167, 170 (Ct. App. 2002).

⁵⁵ *See generally* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n, 443 U.S. 658 (1979); Carole E. Goldberg, *American Indians and “Preferential” Treatment*, 49 UCLA L. REV. 943, 943 (2002). For more information about the history of Indian treaties, see FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* (1994).

⁵⁶ *See Lamplot v. Heineman*, No. 4:06CV3075, 2006 WL 3454837, at *2 (D. Neb. Nov. 29, 2006). For more information about intergovernmental agreements, *see generally* COMM’N ON TRIBAL-STATE RELATIONS, *AM. INDIAN LAW CTR., INC., HANDBOOK ON STATE-TRIBAL RELATIONS* (1983); COMM’N ON TRIBAL-STATE RELATIONS, *AM. INDIAN LAW CTR., INC., STATE-TRIBAL AGREEMENTS: A COMPREHENSIVE STUDY* (1981); *AMERICAN INDIAN LAW DESKBOOK: CONFERENCE OF WESTERN ATTORNEYS GENERAL 500–31* (Clay Smith & Hardy Myers eds., 3d ed. 2004).

⁵⁷ *E.g.*, *Williams v. Babbitt*, 115 F.3d 657, 666 n.8 (9th Cir. 1997).

⁵⁸ 430 U.S. 641, 644 (1977).

⁵⁹ *See id.* at 649 n.11.

⁶⁰ *See* Brief for American Indian Law Students Association, Inc. and American Indian Lawyers Association, Inc. as Amici Curiae Supporting Respondents at 8–11 & app., *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (No. 73-235); *see also* Tamar

might affect the admission of American Indians into public colleges and graduate schools.

II. THE ORIGINAL UNDERSTANDING OF THE STATUS OF INDIAN TRIBES

The acts of the Framers of the Constitution and acts of Congress in the early decades of the American Republic should leave no doubt that the original understanding was that the federal government maintained a distinctly political relationship with Indian tribes.

A. *Racial Rhetoric in Early Indian Law and Policy*

American Indian law and policy relating to Indian people often has been driven by racial animus and race-based paternalism—sometimes in the same breath.⁶¹ Long before there was an American Republic, European governments implicitly justified oft-harsh Indian policies on the basis that Indian people were biologically and spiritually inferior.⁶² Moreover, it is clear that Euro-American people viewed Indian people with a racial, cultural, and religious bias. Early American policymakers placed Indian people in a category similar in some respects to African slaves.⁶³

Race rhetoric permeated early Indian law and policy. The English believed that “displacement of savagery by civilization was both inevitable and proper.”⁶⁴ President George Washington famously described Indian people in animalistic terms when he created “the Savage as the Wolf” metaphor.⁶⁵ Chief Justice

Lewin, *Colleges Regroup After Voters Ban Race Preferences*, N.Y. TIMES, Jan. 26, 2007, at 1.

⁶¹ See generally Bethany R. Berger, “Power Over This Unfortunate Race”: Race, Politics, and Indian Law in United States v. Rogers, 45 WM. & MARY L. REV. 1957 (2004); Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1950–52 (2000).

⁶² See generally ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: DISCOURSES OF CONQUEST* (1990).

⁶³ See George Beck, *The Fourteenth Amendment as Related to Tribal Indians: Section I, “Subject to the Jurisdiction Thereof” and Section II, “Excluding Indians Not Taxed,”* 28 AM. INDIAN CULTURE & RES. J. 37, 40 (2004) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 528 (1866) (remarks of Mr. Davis)).

⁶⁴ Walter A. McDougall, *The Colonial Origins of American Identity*, 49 ORBIS: J. WORLD AFF. 7, 14 (2005).

⁶⁵ ROBERT A. WILLIAMS, JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* 39–45 (2005).

Marshall engaged in this kind of racial rhetoric when he wrote in a private letter to Justice Story, “[t]he Indians were a fierce and dangerous enemy whose love of war made them sometimes the aggressors, whose numbers and habits made them formidable, and whose cruel system of warfare seemed to justify every endeavor to remove them to a distance from civilized settlements.”⁶⁶ Thus, the allegedly “savage” character of Indian peoples permeated the political discussion about American Indian affairs in the early decades of the Republic. The fear of Indian tribes organizing as political entities hovered as a cloud over the Founders for decades. Of course, while their concerns derived from racial animus and misunderstanding, their policy and legal choices offered a response to the political status of Indian tribes, not the racial characteristics of Indian people.

B. *The Original Understanding of the Founders*

The statements of the Founders—during the times of both the Articles of Confederation and the Constitution—made clear that the United States would deal with Indian affairs through *Indian tribes* and not through individual Indians. Even in the letter where President Washington made his racialized comments about Indian “savages,” he recommended that American Indian law and policy focus on treaty-making and even, perhaps, granting statehood to Indian tribes in western lands.⁶⁷

The Continental Congress engaged its authority under Article IX of the Articles of Confederation with the presumption that Indian affairs involved a political relationship with Indian tribes.⁶⁸ The report of a special committee headed by James

President Washington’s September 7, 1783 letter to James Duane containing the “savage wolf” metaphor is reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY 1, 1–2 (Francis Paul Prucha ed., 2d ed. 1990) [hereinafter DOCUMENTS].

⁶⁶ RICHARD C. BROWN, *ILLUSTRIOUS AMERICANS: JOHN MARSHALL* 213 (1968) (quoting 1828 letter from Chief Justice Marshall to Justice Story).

⁶⁷ See Letter from Washington to Duane, reprinted in DOCUMENTS, *supra* note 65, at 1 (arguing that the United States should “draw a veil over what is past and establish a boundary line between them and us beyond which we will endeavor to restrain our People from Hunting or Settling, . . . but for the purposes of Trading, *Treating*, or other business unexceptionable in its nature”) (emphasis deleted and added); *id.* at 2 (“At first view, it may seem a little extraneous, when I am called upon to give an opinion upon the terms of Peace proper to be made with the Indians, that I should go into the formation of New States . . .”).

⁶⁸ Article IX provided:

Duane to the Continental Congress in October 1783 described the Indian wars of the west as having an important policy impact—it found that it would be far better to reach peace treaties with the Indian tribes than to suppress them through force.⁶⁹ The Duane Committee Report argued that the tribes that were successfully defeated in battle might then turn to the British in Canada.⁷⁰ Alexander Hamilton's Federalist No. 24 included a worry that Indian tribes would become more allied with the British: "The savage tribes on our Western frontier ought to be regarded as our natural enemies, [Britain's] natural allies, because they have most to fear from us, and most to hope from them."⁷¹ In fact, during the early days of the Revolutionary War, the Continental Congress recognized that several important military sites—Detroit, Niagara, Michillimackinac, and Pensacola, for example—could be reached only with the consent of the local tribes, requiring the united colonies to attempt to treat them as "allies."⁷²

In 1786, the Continental Congress enacted the "Ordinance for the Regulation of Indian Affairs," which began with a recognition that the United States will be dealing with Indian tribes: "[T]he safety and tranquillity of the frontiers of the

The United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State, within its own limits, be not infringed or violated

U.S. ARTICLES OF CONFEDERATION art. IX, § 4.

⁶⁹ See 25 JOURNALS OF THE CONTINENTAL CONGRESS 681 (Gaillard Hunt ed., Gov't Printing Office 1922) (1783) (describing the report of the Committee of Indian Affairs, stating "[t]hat it is represented, and the committee believe with truth, that although the hostile tribes of Indians in the . . . northern and middle departments, are seriously disposed to a pacification, yet they are not in a temper to relinquish their territorial claims, without further struggles" (footnote omitted)).

⁷⁰ See *id.* at 681–82.

[E]ven if all the northern and western tribes of Indians inhabiting the territories of the United States could be totally expelled, the policy of reducing them to such an extremity is deemed to be questionable; for in such an event it is obvious that they would find a welcome reception from the British government in Canada, which by so great an accession of strength would become formidable in case of any future rupture, and in peace, by keeping alive the resentment of the Indians for the loss of their country, would secure to its own subjects the entire benefit of the fur trade.

Id.

⁷¹ THE FEDERALIST NO. 24, at 161 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁷² WALTER H. MOHR, FEDERAL INDIAN RELATIONS 1774–1788, at 37–38 (1933).

United States, do in some measure, depend on the maintaining a good correspondence between their citizens and the several nations of Indians in Amity with them”⁷³ The Ordinance divided the Indian department into northern and southern districts, with each district having authority to deal with the Indian tribes within its district.⁷⁴ It is worth noting for purposes of this Article that the Continental Congress banned trade and intercourse by Americans citizens, not only with individual Indians, but with *Indian tribes*.⁷⁵ Moreover, the Ordinance, consistent with the Article IX proviso protecting states’ rights, references “any nation or tribe of Indians.”⁷⁶

The states, purporting to execute their authority protected in the Article IX proviso, also engaged in Indian affairs with the intention of creating a political relationship with Indian tribes by entering into treaties with local tribes.⁷⁷ The states’ involvement in Indian affairs interfered with the federal-tribal political relationship.⁷⁸ The committee investigating these concerns

⁷³ 31 JOURNALS OF THE CONTINENTAL CONGRESS 490, 493 (John C. Fitzpatrick ed., Gov’t Printing Office 1934) (1786) (quoting the Aug. 7, 1786 Ordinance for the Regulation of Indian Affairs).

⁷⁴ See *id.* at 491.

⁷⁵ See *id.* at 491–92.

[N]one but citizens of the United States, shall be suffered to reside among the Indian nations, or be allowed to trade with any nation of Indians, within the territory of the United States. That no person, citizen or other, under the penalty of five hundred dollars, shall reside among or trade with any Indian or Indian nation, within the territory of the United States, without a license for that purpose

Id.

⁷⁶ *Id.* at 493.

[I]n all cases where transactions with any nation or tribe of Indians shall become necessary to the purposes of this ordinance, which cannot be done without interfering with the legislative rights of a State, the Superintendent in whose district the same shall happen, shall act in conjunction with the authority of such State.

Id.

⁷⁷ See 33 JOURNALS OF THE CONTINENTAL CONGRESS 457 (Roscoe R. Hill ed., Gov’t Printing Office 1936) (1787) (“Georgia has proceeded to treat with the Creeks concerning peace, lands, and the objects, usually the principal ones in almost every treaty with the Indians.”).

⁷⁸ See *id.* at 455.

[T]he said papers referred to them state, first, that certain encroachments are made on the lands of the Creek and Cherokee nations, by the people of Georgia and North Carolina. secondly, that there is no regular trade between our citizens and the Indian Nations in that department, by which those nations can obtain a certain supply of goods, arms, &c. that those nations wish to have connections with the United States only[,] that their

recommended that Congress be ready to use military force against itinerant tribes.⁷⁹ The July 18, 1788 Report of Henry Knox on White Outrages acknowledged that "he conceives it of the highest importance to the peace of the frontiers that all the [I]ndian tribes should rely with security on the treaties they have made . . . with the United States."⁸⁰ As John Jay wrote in Federalist No. 3, "[n]ot a single Indian war has yet been produced by aggressions of the present federal government, feeble as it is; but there are several instances of Indian hostilities having been provoked by the improper conduct of individual States."⁸¹ As a result, Hamilton argued in Federalist No. 25 that the danger from nations such as "Britain, Spain, and . . . the Indian nations . . . is therefore common [to the entire United States]."⁸²

James Madison's Federalist No. 42 provided the clearest statement of disapproval of Article IX of the Articles of Confederation, where the proviso (preserving the rights of state legislatures) rendered the intent of the provision (to make Indian affairs an exclusively federal question) all but irrelevant:

The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not

necessities . . . however, are such, that if they cannot be regularly supplied by our traders

Id.

⁷⁹ See *id.* at 456 (recommending "that Congress resolve, they are bound to draw forth a sufficient number of the forces of the Union to punish any nation or tribe of Indians that shall attempt to make war on either of the United States, by attacking or killing any of their citizens").

⁸⁰ The full quotation is as follows:

Your Secretary begs leave to observe that he is utterly at a loss to devise any other mode of correcting effectually the evils specified than the one herein proposed. That he conceives it of the highest importance to the peace of the frontiers that all the indian tribes should rely with security on the treaties they have made or shall make with the United States. That unless this shall be the case the powerful tribes of the Creeks Choctaws and Chickesaws will be able to keep the frontiers of the southern states constantly embroiled with hostilities, and that all the other tribes will have good grounds not only according to their own opinions but according to the impartial judgements of the civilized part of the human race for waging perpetual war against the citizens of the United States.

34 JOURNALS OF THE CONTINENTAL CONGRESS 342, 344 (Roscoe R. Hill ed., Gov't Printing Office 1937) (1788-89).

⁸¹ THE FEDERALIST NO. 3, at 44 (John Jay) (Clinton Rossiter ed., 1961).

⁸² THE FEDERALIST NO. 25, at 163 (Alexander Hamilton).

members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled; and has been a question of frequent perplexity and contention in the federal councils. *And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible.* This is not the only case in which the articles of confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the union, with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain.⁸³

Again, Federalist No. 42, which includes the most extensive discussion of the problem of Indian affairs in the Federalist Papers, discusses the question of Indian affairs in the context of dealings with Indian tribes. Most importantly, Madison presaged the holding in *Worcester v. Georgia*⁸⁴—that the laws of a state can have “no force” in Indian Country⁸⁵—by describing as “incomprehensible” the authority of states to legislate in Indian affairs where Indian nations have their own inherent authority to govern themselves.⁸⁶

While the Indian affairs of the United States, as leading Revolutionary War historian Max Farrand put it, “were in a condition far from satisfactory,”⁸⁷ and “the Indian policy was characterized by a greater uncertainty than had prevailed before

⁸³ THE FEDERALIST NO. 42, at 269 (James Madison) (emphasis added).

⁸⁴ 31 U.S. (6 Pet.) 515 (1832).

⁸⁵ *Id.* at 561.

⁸⁶ THE FEDERALIST NO. 42, at 269 (James Madison); see also Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1164 (1995).

Finally, the framers' determination to protect the sovereignty of the Indian tribes as peoples separate from the states was evident in their enumeration among the states and foreign nations in the Commerce Clause and in the apportionment formula which excluded Indians not taxed. The Convention thus wholly abandoned any notion that tribal Indians were members of the state in which they resided, a point made by both Madison and Yates. Since Indian sovereignty and national power were also asserted during the Articles, perhaps the most important marginal contribution of the Indian Commerce Clause was to limit state authority.

Id.

⁸⁷ Max Farrand, *The Indian Boundary Line*, 10 AM. HIST. REV. 782, 789 (1905).

1760,"⁸⁸ the focus of Indian affairs remained the political relationship between Indian tribes and the federal government.

C. *The Trade and Intercourse Acts (and Indian Treaties)*

The Constitution's grant of authority to Congress of exclusive authority (as against the states) to regulate commerce with the Indian tribes provides the strongest support for the notion that the Framers intended to deal with Indian affairs on a government-to-government basis,⁸⁹ regardless of racial rhetoric. One of the first statutes enacted by the First Congress regulated trade and intercourse with the Indian tribes,⁹⁰ following in large part the model set by Britain in the Proclamation of 1763.⁹¹ The Act stated: "[N]o person shall be permitted to carry on any trade or intercourse with the *Indian tribes* . . ."⁹² The Act was temporary, lasting three years, as were subsequent Acts maintaining the same basic policy, until the 1834 Act made the general principles permanent.⁹³

The Trade and Intercourse Acts provided a clear statement of congressional policy for the United States to follow in the early decades of the Republic. The Executive branch continued engaging in treaty-making with Indian tribes, as opposed to seeking opportunities to purchase lands from individual Indian landholders.⁹⁴ In the Old Northwest, for example, the United States engaged Indian tribes on a political level in a very serious manner, concerned that the British influence over these tribes would injure the national interest.⁹⁵ In the South, the federal government engaged in formal diplomacy and military

⁸⁸ *Id.*

⁸⁹ U.S. CONST. art. I, § 8, cl. 3.

⁹⁰ Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137 (current version at 25 U.S.C. § 177 (2000)).

⁹¹ See Robert N. Clinton, *The Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict over the Management of Indian Affairs*, 69 B.U. L. REV. 329, 329-30 (1989).

⁹² Act of July 22, 1790, ch. 33, § 1 (emphasis added).

⁹³ See 25 U.S.C. § 177 (2000).

⁹⁴ See Farrand, *supra* note 87, at 790 (referencing the 1795 Treaty of Greenville and several other treaties Congress ratified in the early years of the Constitution).

⁹⁵ See W. Sheridan Warrick, *The American Indian Policy in the Upper Northwest Following the War of 1812*, 3 ETHNOHISTORY 109, 109 (1956) ("After the War the situation changed radically. The tribes assumed added importance in the minds of public officials, and as a consequence an impressive campaign was begun to bring the Indians firmly under national control.")

management in that region's Indian affairs, again emphasizing the focus on Indian tribes as political entities.⁹⁶ For their part, the Indian tribes also understood the federal-tribal relationship to be political, as scholars recognize that tribal leaders saw that treaty-making was necessary to "remedy[] the instability in their foreign relations caused by unreliable local and international treaty partners."⁹⁷ Cherokee tribal leaders, for example, "labored to realize Cherokee goals from a mental framework that comported with their understanding of international kinship."⁹⁸

The policy behind the Trade and Intercourse Acts was, in part, to seek the alliance and cooperation of Indian tribes through the expansion of trade. President Washington's Fifth Message to Congress emphasized this purpose: "[T]he establishment of commerce with the Indian nations [o]n behalf of the United States is most likely to conciliate their attachment. But it ought to be conducted without fraud, without extortion . . ."⁹⁹ President Jefferson also recognized the importance of dealing with Indian tribes by recommending continued trade and also advocating assimilation-related programs.¹⁰⁰ Privately, Jefferson wished for Indians to assimilate, but recognized that if they resisted assimilation or further dispossession of their lands, then they would have to be dealt with as Indian nations.¹⁰¹

Treaty-making with Indian tribes commenced even before the states ratified the Articles of Confederation and continued on

⁹⁶ See R.S. Cotteril, *Federal Indian Management in the South 1789-1825*, 20 MISS. VALLEY HIST. REV. 333, 333 (1933).

⁹⁷ Cynthia Cumfer, *Local Origins of National Indian Policy: Cherokee and Tennessean Ideas About Sovereignty and Nationhood, 1790-1811*, 23 J. EARLY REPUBLIC 21, 29 (2003).

⁹⁸ *Id.*

⁹⁹ President Washington on Government Trading Houses (Dec. 3, 1793), reprinted in DOCUMENTS, *supra* note 65, at 16, 16.

¹⁰⁰ See President Jefferson on Indian Trading Houses (Jan. 18, 1803), reprinted in DOCUMENTS, *supra* note 65, at 21, 21-22.

¹⁰¹ See Letter from President Jefferson to William Henry Harrison (Feb. 27, 1803), reprinted in DOCUMENTS, *supra* note 65, at 22, 22-23.

In this way our settlements will gradually circumscribe and approach the Indians, and they will in time either incorporate with us as citizens of the United States, or remove beyond the Mississippi . . . Should any tribe be foolhardy enough to take up the hatchet at any time, the seizing the whole country of that tribe, and driving them across the Mississippi, as the only condition of the peace, would be an example to others, and a furtherance of our final consolidation . . ."

Id.

until 1871. The first Indian treaty, the Treaty of Fort Pitt, was a treaty of defensive alliance between two foreign nations.¹⁰² Federal-tribal relations all but exclusively took the form of treaties during the first century of American history¹⁰³ until ended by an Act of Congress of dubious constitutionality.¹⁰⁴

The original understanding of the Framers played out exactly as they had anticipated, as a Senate committee investigating the application of the Fourteenth Amendment to Indian people concluded in 1870: "Whenever we have dealt with them, it has been in their collective capacity as a state, and not with their individual members"¹⁰⁵

III. THE CONTINUING UNDERSTANDING OF THE POLITICAL STATUS OF INDIAN TRIBES

In the decades after the ratification of the Constitution, the federal government continued to engage in Indian affairs by dealing solely with Indian tribes and not individual Indians. The Executive branch and the Senate negotiated and ratified hundreds of treaties with Indian tribes, many of which continue to serve as the organic documents of the political relationship between the federal government and the tribal signatories. Congress enacted innumerable statutes relating to Indian affairs, continuing its focus on Indian tribes. And, as the next section shows, the Supreme Court followed suit by recognizing the political status of Indian tribes in its early Indian law decisions, especially the very first major Indian law case, *Johnson v. M'Intosh*.¹⁰⁶

¹⁰² See Treaty of Fort Pitt with the Delaware Nation, Sept. 17, 1778, 7 Stat. 13; see also VINE DELORIA, JR. & RAYMOND J. DEMALIE, 1 DOCUMENTS OF AMERICAN INDIAN DIPLOMACY: TREATIES, AGREEMENTS, AND CONVENTIONS, 1775-1979, at 12-13, 15-81 (1999) (listing and describing twelve treaties during the Revolutionary War period).

¹⁰³ See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.03 (Nell Jessup Newton et al. eds., 2005).

¹⁰⁴ See *United States v. Lara*, 541 U.S. 193, 218 (2004) (Thomas, J., concurring in judgment); George William Rice, *Indian Rights: 25 U.S.C. § 71: The End of Indian Sovereignty or a Self-Limitation of Contractual Ability?*, 5 AM. INDIAN L. REV. 239, 246 (1977).

¹⁰⁵ S. REP. NO. 41-268, at 10 (1870).

¹⁰⁶ 21 U.S. (8 Wheat.) 543 (1823).

A. *Johnson v. M'Intosh*

Johnson v. M'Intosh established the ground rules in federal constitutional common law relating to Indian affairs. Congress had already established federal Indian policy in the Trade and Intercourse Acts, but the Court in *Johnson* was called upon to decide whether to apply that policy in a series of land transactions that occurred prior to the Founding. *Johnson* involved the sale of the same parcel of land in Illinois by the same Indian tribe to two different buyers, one in 1773 and one in 1775.¹⁰⁷ The *Johnson* Court invalidated the first sale on the grounds that Indian tribes have had their sovereign authority to alienate their property divested by the Doctrine of Discovery without the consent of the sovereign.¹⁰⁸ The Court approved of the second sale because it was transacted in accordance with the authority of the sovereign.¹⁰⁹ Considering the precedents of the 1763 Proclamation and the Trade and Intercourse Acts, the Supreme Court's decision in *Johnson* was unremarkable. The Court merely followed the guideposts established by the Framers and Congress decades earlier in the Constitution and the Trade and Intercourse Acts. For the purposes of the present argument, two separate Supreme Court holdings established a common law record of the permanent political status of Indian tribes.

The Court identified two means of extinguishing Indian title—conquest and purchase. First, the Court held that the Indian interest in lands (“Indian title”) could be alienated via conquest—that is, the conquest by the United States of one or more Indian *tribes* occupying the land in question.¹¹⁰ The Court did not couch the conquest route to extinguishment in the language of running off individual Indians or removing individual Indians. Conquest necessarily implies conflict between sovereignties. Had the Court decided that *Indians*, as opposed to tribes, were occupying land owned by the United States, then one would have to believe that the Court would have

¹⁰⁷ See *id.* at 571–72. Of course, that fundamental fact pattern probably was not the truth of the matter, as the parties engaged in a particularly virulent form of self-dealing in order to force the Court to reach its questions, as Professor Robertson proved with his extensive historical accounting of the case. See generally ROBERTSON, *supra* note 14, at 3–76.

¹⁰⁸ See *Johnson*, 21 U.S. at 587–89.

¹⁰⁹ See *id.*

¹¹⁰ See *id.* at 587.

couched this avenue to extinguishment in terms of trespass, not conquest.

Second, the Court held that Indian title could be extinguished through purchase.¹¹¹ Once again, the Court couched this avenue to extinguishment in terms of the sovereign-to-sovereign negotiation inherent in treaty-making.¹¹² The Court—and all other significant Indian affairs policymakers—believed that the federal government should deal with Indian tribes and the leaders who had the capacity to bind the *tribe*. Purchasing Indian title interests from individual Indians would be all but impossible, whereas under Westphalian rules of international sovereignty,¹¹³ the United States could rely upon the representations of authority from recognized Indian tribal leaders. Recall Chief Justice Marshall's letter to Justice Story where he recalled the fear of the early Americans that the tribes would combine to push the nascent Republic into the Atlantic Ocean.¹¹⁴ No one feared that individual Indians or Indian families would rise up—they feared Indian *nations*. For example, the major event leading to the British Proclamation of 1763 was the confederation of several Indian nations by the Ottawa *ogema* Pontiac against the British forts in the Great Lakes region.¹¹⁵ While ultimately unsuccessful, Pontiac created the theoretical framework for a political and military strategy to defeat Euro-American nations on the continent. *Johnson* rubber-stamped an American policy that recognized the potential threat to the United States from Indian nations. History shows that the British and then-American policy of treaty-making with Indian nations would continue for decades after 1823, ending in the superficial manner of Congress's ban on Indian treaty-making.¹¹⁶

¹¹¹ *See id.*

¹¹² *See id.* at 598.

¹¹³ *See* Ann-Marie Slaughter & William Burke-White, *The Future of International Law Is Domestic (or, the European Way of Law)*, 47 HARV. INT'L L.J. 327, 328 (2006) ("Formally, Westphalian sovereignty is the right to be left alone, to exclude, to be free from any external meddling or interference. But it is also the right to be recognized as an autonomous agent . . . capable of . . . entering into . . . agreements.").

¹¹⁴ *See supra* note 66 and accompanying text.

¹¹⁵ *See* ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* 236–39 (1990); D'Arcy McNickle, *Indian and European: Indian-White Relations from Discovery to 1887*, 311 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 6 (1957).

¹¹⁶ *See* *United States v. Lara*, 541 U.S. 193, 201 (2004); Philip P. Frickey,

The outcomes reached by the Marshall Court recognized the distinctly political character of tribal-federal relationships. Chief Justice Marshall's lead opinion in *Cherokee Nation v. Georgia*, holding that Indian tribes retain status as "state[s],"¹¹⁷ flatly rejected the arguments of Justice Johnson that Indian tribes were mere "petty kraal[s]" of savages undeserving of such status.¹¹⁸ While the opinions in the Marshall Trilogy referred to Indian people and nations as existing in a savage state,¹¹⁹ prone to massacring helpless non-Indians,¹²⁰ the holdings of the cases constitute clear statements that Indian tribes were viable political entities. *Worcester v. Georgia* recognized that Indian treaties were within the meaning of treaties as understood in the Supremacy Clause, rendering any state laws that interfered with their operation as having "no force."¹²¹

Johnson, the original and perhaps most important Indian law Supreme Court decision, thus established the political status of Indian tribes, a status that withstood history and changes in American Indian policy. The Framers, followed by Congress and

(*Native*) American Exceptionalism in *Federal Public Law*, 119 HARV. L. REV. 431, 474 (2005); Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations*, 38 CONN. L. REV. 605, 627 (2006).

¹¹⁷ 30 U.S. (5 Pet.) 1, 16 (1831) (Marshall, C.J.).

¹¹⁸ *Id.* at 25 (Johnson, J., concurring) ("Must every petty kraal of Indians, designating themselves a tribe or nation, and having a few hundred acres of land to hunt on exclusively, be recognized as a state?").

¹¹⁹ Johnson stated in his concurrence:

But I think it very clear that the constitution neither speaks of them as states or foreign states, but as just what they were, Indian tribes; an anomaly unknown to the books that treat of states, and which the law of nations would regard as nothing more than wandering hordes, held together only by ties of blood and habit, and having neither laws or government, beyond what is required in a savage state.

Id. at 27–28; see also *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 590 (1823).

¹²⁰ See *Johnson*, 21 U.S. at 590.

The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred.

Id.; see also SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 540 (1965) ("They lived only for the day, recognized no rights of property, robbed or killed anyone if they thought they could get away with it, inflicted cruelty without a qualm, and endured torture without flinching."), quoted in *United States v. Sioux Nation*, 448 U.S. 371, 437 (1980) (Rehnquist, J., dissenting).

¹²¹ See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

then the Court, could have refused to recognize Indian tribes as "nations" or "states," but instead did recognize their national sovereignty, albeit in a manner limited by the Doctrine of Discovery and through consent in various treaties. Whether they did so for convenience or because of political reality is irrelevant. American Indian law and policy would look remarkably different if the earliest American policymakers had chosen another route.

B. The Fourteenth Amendment and "Indians Not Taxed"

One of the major changes to American constitutional law—the enactment of the Fourteenth Amendment—resulted from the constitutional crises created by the Civil War. The Fourteenth Amendment, it is argued, altered the tribal-federal relationship, changing that relationship from one of politics to one of race,¹²² but the original understanding of the Fourteenth Amendment belies that assumption. Historians conclude that the Fourteenth Amendment was "defined to mean that *tribal* Indians are not taxable as long as they remain subject to the jurisdiction of their tribe in any degree and hold tribal allegiance in any degree."¹²³ As such, the Fourteenth Amendment—and its continuation of the original understanding of the "Indians Not Taxed" Clause of the Constitution—completes the circle by extending the political relationship of the federal government and Indian tribes to the citizens of the tribes.

Prior to the adoption of the Fourteenth Amendment, Congress debated the Civil Rights Act of 1866.¹²⁴ From these debates and from the text of the Act, it is clear that Congress maintained its understanding that Indian tribes had a political relationship with the federal government.¹²⁵ From the opening debates, Senator Trumbull asserted that "[o]ur dealings with the Indians are with them as foreigners, as separate nations. We deal with them by treaty and not by law . . ."¹²⁶ Senator Doolittle, in discussing the "Indians Not Taxed" Clause of the Constitution, explained:

Indians not taxed were excluded because they were not regarded as a portion of the population of the United States.

¹²² See *supra* Part I.

¹²³ Beck, *supra* note 63, at 37.

¹²⁴ 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981–82 (2000)).

¹²⁵ See generally Beck, *supra* note 63, at 37–43.

¹²⁶ *Id.* at 38 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 498 (1866)).

They are subject to the tribes to which they belong, and those tribes are always spoken of in the Constitution as if they were independent nations, to some extent, existing in our midst but not constituting a part of our population, and with whom we make treaties.¹²⁷

Thus, Congress's continuing presumption was that Indian affairs involved the political relationship of the federal government to Indian tribes. Indian people were not American citizens—and could not be—because of their own political relationship with their own Indian tribes. And, because they had no *personal* political relationship with the United States or the several states, the relationship of Indian people to the United States was purely political in the sense that it existed through their membership with Indian tribes that maintained a political relationship with the federal government.

The debates in Congress over the Fourteenth Amendment and Indian tribes, while sparse, make clear that Congress intended the Amendment to not include Indian people as citizens because of their political relationship to Indian tribes. Senator Howard objected to the inclusion of the “Indians Not Taxed” clause in Section 1 of the Amendment because it was unnecessary:

I hope that amendment [adding said clause] to the amendment will not be adopted. Indians born within the limits of the United States and who maintain their tribal relations are not in the sense of this amendment born subject to the jurisdiction of the United States. They are regarded, and always have been in our legislation and jurisprudence, as being quasi-foreign nations.¹²⁸

And Congress, scholars argue, did not include this provision in Section 1 “because the phrase ‘subject to the jurisdiction thereof’ was adequate to exclude Indians in a tribal relation from citizenship.”¹²⁹

¹²⁷ *Id.* at 41 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 571 (1866)).

¹²⁸ *Id.* at 44 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 2890 (1866)).

¹²⁹ *Id.* at 47 (footnote omitted); *see also* S. REP. NO. 41-268, at 9 (1870).

In the opinion of your committee, the Constitution and the treaties, acts of Congress . . . all speak the same language upon this subject, and all point to the conclusion that the Indians, in tribal condition, have never been subject to the jurisdiction of the United States in the sense in which the term *jurisdiction* is employed in the fourteenth amendment to the Constitution.

S. REP. NO. 41-268, at 9.

The Supreme Court's view of the political relationship in the latter half of the 19th century and into the mid-part of the 20th century followed a slightly different track, but with the same continuing understanding.

C. *The Political Question Doctrine in Early Federal Indian Law*

While the Supreme Court played racial politics in cases such as *United States v. Rogers*,¹³⁰ in all but a very few other cases, the Court adopted a rigorous policy of applying the political question doctrine to cases involving Indian tribes and Indian people. While the Court did decide cases in which a specific Act of Congress required the Court to adjudicate an Indian law case, the list of cases in which the Court relied upon the political question doctrine to sidestep Indian law questions is remarkable.¹³¹

¹³⁰ 45 U.S. (4 How.) 567 (1846).

¹³¹ *E.g.*, *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 281 (1955); *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 46 (1946) (plurality opinion); *Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 339 (1945); *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 623-24 (1943) (Murphy, J., dissenting); *Bd. of Comm'rs of Creek County v. Seber*, 318 U.S. 705, 718 (1943); *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 347 (1941); *Sisseton & Wahpeton Bands of Sioux Indians v. United States*, 277 U.S. 424, 436 (1928); *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 485 (1924); *Johnson v. Gearlds*, 234 U.S. 422, 446-47 (1914); *Perrin v. United States*, 232 U.S. 478, 482-84 (1914); *United States v. Sandoval*, 231 U.S. 28, 45-47 (1913); *Tiger v. W. Inv. Co.*, 221 U.S. 286, 315 (1911); *Dick v. United States*, 208 U.S. 340, 357 (1908); *In re Heff*, 197 U.S. 488, 498-99 (1905), *overruled by United States v. Nice*, 241 U.S. 591 (1916); *United States v. Rickert*, 188 U.S. 432, 443, 445 (1903); *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903); *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 308 (1902); *Minnesota v. Hitchcock*, 185 U.S. 373, 393 (1902); *Barker v. Harvey*, 181 U.S. 481, 487 (1901); *United States v. Choctaw Nation*, 179 U.S. 494, 532-36 (1900); *Stephens v. Cherokee Nation*, 174 U.S. 445, 483-84 (1899); *Thomas v. Gay*, 169 U.S. 264, 271 (1898); *United States v. Sandoval*, 167 U.S. 278, 293 (1897); *United States v. City of Santa Fe*, 165 U.S. 675, 714 (1897); *Stoneroad v. Stoneroad*, 158 U.S. 240, 248, 251-52 (1895); *United States v. Old Settlers*, 148 U.S. 427, 467-68 (1893); *Boyd v. Nebraska*, 143 U.S. 135, 162 (1892); *United States v. Kagama*, 118 U.S. 375, 383 (1886); *Beecher v. Weatherby*, 95 U.S. 517, 525 (1877); *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 197 (1876); *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 247 (1872); *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1870); *Wilson v. Wall*, 73 U.S. (6 Wall.) 83, 89 (1867); *In re Kan. Indians*, 72 U.S. (5 Wall.) 737, 756 (1866); *License Tax Cases*, 72 U.S. (5 Wall.) 462, 469 (1866); *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865); *New York ex rel. Cutler v. Dibble*, 62 U.S. (20 How.) 366, 371 (1858); *Marsh v. Brooks*, 49 U.S. (8 How.) 223, 228 (1850); *United States v. Rogers*, 45 U.S. (4 How.) 567, 572 (1846); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 740 (1835); *cf. Heckman v. United States*, 224 U.S. 413, 437 (1912) (holding that the United States may sue to recover tribal property from states); *Del.*

The Court's decision in *United States v. Holliday*,¹³² involving a member of the Saginaw Chippewa Tribe in Michigan, is a good example. In this case, the Court announced that the federal recognition of an Indian tribe is a political question that only Congress or the Executive branch could decide,¹³³ a rule that prevails today.¹³⁴ As a result of this rule, the interpretation and even constitutionality of federal statutes that apply to members of federally recognized Indian tribes was treated as a political question until the last few decades. This robust denial of finding a justiciable question exemplifies the Supreme Court's understanding that relations between the United States and Indian people are political.

In short, the Court's jurisprudence during this time amounted to this: If an Indian, a tribe, or anyone else objected to the constitutionality of a federal Indian affairs statute or to a discretionary decision of the Executive branch in exercising its Indian affairs authority, the Court would treat those questions as nonjusticiable on the order of questioning congressional or Executive branch foreign affairs decisions.

IV. APPLYING THE ORIGINAL UNDERSTANDING TO MODERN INDIAN AFFAIRS

Originalism often suffers from a lack of specificity in its analysis. In other words, the Framers often did not have a common understanding of the meaning of many constitutional provisions, including, for example, the Due Process Clause.¹³⁵ Or, in some instances, the historical record is void or too diffuse to allow courts or commentators to reach a consensus as to the original understanding of the meaning of other constitutional provisions. Sometimes, however, even where the historical record appears sparse, there is a clear indication of the original

Indians v. Cherokee Nation, 193 U.S. 127, 144 (1904) (holding that dispute between Indian tribes is tribal political question not subject to federal court review); *Boff v. Burney*, 168 U.S. 218, 222 (1897) (holding that a tribal membership dispute is a tribal political question).

¹³² 70 U.S. (3 Wall.) 407, 409 (1865).

¹³³ See *id.* at 419.

¹³⁴ See, e.g., *Miami Nation of Indians of Ind., Inc. v. U.S. Dep't of Interior*, 255 F.3d 342 (7th Cir. 2001).

¹³⁵ See Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 31 (1997).

understanding of the meaning of certain constitutional provisions in narrow circumstances.

Thus, from the preceding arguments, one must reach the inescapable conclusion that the relationship between Indian tribes and the federal government is political in character and that federal law relating to Indian tribes does not implicate either the Fifth Amendment or the Fourteenth Amendment Due Process Clauses or the Equal Protection Clause. In the very beginning, the United States had the option to handle Indian affairs as a government-to-subject relationship or a government-to-government relationship. The Trade and Intercourse Acts and *Johnson v. M'Intosh* provide clear evidence of the federal government's choice—it chose to deal with Indian tribes, not individual Indians. In short, Indian law is not race law and courts are remiss if they apply race law principles to Indian law cases.

This Article was intended, in part, to provide the historical and theoretical bases for Justice Blackmun's footnote 24 in *Morton v. Mancari*.¹³⁶ The historical record for the period encompassing, at the very least, 1763 through the Articles of Confederation, the Constitution, and even the ratification of the Fourteenth Amendment, provides remarkably unambiguous support for the proposition that the original understanding of the Framers was that Indian affairs must be dealt with in the context of tribal political relationships with the federal government.

When a federal court is confronted with a statute or other law that derives from the congressional authority to regulate Indian commerce or from the federal trust relationship with Indian tribes and Indian people, courts may now draw upon a concise survey of the historical record contemporaneous to the framing of the Constitution and the Fourteenth Amendment to reach the plain conclusion that the Court's race law jurisprudence cannot and should not apply to Indian affairs legislation. These questions may arise more and more given the ongoing national controversy over affirmative action and other disputes.

There are, of course, a pair of "open questions." First, can the states expand upon the political relationship between the

¹³⁶ 417 U.S. 535, 553 n.24 (1974).

federal government and Indian tribes by enacting their own Indian affairs legislation without congressional approval? This Article will not address this question, but proposes the following thesis in response:

The political relationship between the United States and Indian tribes remains as powerful as ever, but a new and more dynamic relationship between *states* and Indian tribes is growing. States and Indian tribes are beginning to smooth over the rough edges of federal Indian law—jurisdictional confusion, historical animosity between states and Indian tribes, competition between sovereigns for tax revenue, economic development opportunities, and regulatory authority—through cooperative agreements. In effect, a new political relationship is springing up all over the nation between states, local units of government, and Indian tribes.

Second, is tribal membership that is dependent on blood quantum and ancestry a proxy for race-based classifications? This Article does not purport to answer this question, either, but offers the following thesis in response:

The “Indian Problem” cannot be one of race because the means for determining “who is an Indian”—tribal membership criteria and federal or state definitions of “Indianness”—are both overinclusive and underinclusive of race. Race is overinclusive because many thousands of Indian people are not members of Indian tribes because they do not meet tribal membership criteria. Moreover, federal and state definitions of “Indianness” are written or construed narrowly, excluding additional Indians in order to keep government expenditures as low as possible. Race is underinclusive because many non-Indian people are members of Indian tribes while many others qualify for tribal, federal, and state government Indian programs despite their lack of Indian racial characteristics such as blood quantum.

In conclusion, this Article attempts to put to rest the concern that Title 25 of the United States Code is somehow under a threat from the Supreme Court’s race law jurisprudence under the Fifth and Fourteenth Amendments. Justice Blackmun’s footnote 24 in *Mancari* reached the correct conclusion, but did not provide sufficient historical support. This Article offers a clear pattern of historical evidence that the original understanding of the Indian affairs power under the Constitution is political in character, not racial.

