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Integrating the Indian Trust Doctrine into the Constitution

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INTEGRATING THE INDIAN TRUST DOCTRINE INTO THE CONSTITUTION

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The Indian trust doctrine has had a long love-hate relationship with Indian tribes.[1] On one hand, it has been used to sue the executive agencies of the federal government for breach of trust.[2] On the other, it has been used to expand the plenary power of Congress over Indian affairs.[3] While some scholars have argued that the trust doctrine should be used to control the power of Congress,[4] the courts do not seem to be so inclined.[5] Nevertheless, since the landmark decision of *Morton v. Mancari*,[6] the trust doctrine has been used to shield congressional legislation from strict scrutiny when enacting legislation for the benefit of Indians. The Court in *Mancari* held that a law giving Indians preference in employment within the Bureau of Indian Affairs was not a classification based on race but on membership in quasi-sovereign political entities, the Indian tribes. Therefore, the law was not unconstitutional "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians."[7] It has been almost thirty years since *Mancari* was first decided, and the decision is now under attack.[8] In the wake of such attacks, this article re-examines the

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1. Some have said that it has been used on Indian tribes as both a sword and a shield. *See* Ray Torgerson, Student Author, *Sword Wielding and Shield Bearing: An Idealistic Assessment of the Federal Trust Doctrine in American Indian Law*, 2 Tex. Forum Civ. Libs. & Civ. Rights 165 (1996); Blake A. Watson, *The Thrust and Parry of Federal Indian Law*, 23 U. Dayton L. Rev. 437, 450-56 (1998).

2. *See U.S. v. White Mt. Apache Tribe*, 537 U.S. 465 (2003); Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 Stan. L. Rev. 1213 (1975).

3. *See U.S. v. Sandoval*, 231 U.S. 28 (1913); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903); *U.S v. Kagama*, 118 U.S. 375 (1886).

4. *See* Janice Aitken, *The Trust Doctrine in Federal Indian Law: A Look at Its Development and at How Its Analysis under Social Contract Theory Might Expand Its Scope*, 18 N. Ill. U. L. Rev. 115 (1997).

5. *See* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471, 1508-13.

6. 417 U.S. 535 (1974).

7. *Id.* at 555.

8. *See Williams v. Babbitt*, 115 F.3d 657, 663-66 (9th Cir. 1997) (arguing that extending *Mancari* to preferences in employment beyond the Bureau of Indian Affairs would raise serious constitutional questions); *see e.g.* L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 Colum. L. Rev. 702, 711-18 (2001).

legacy of *Mancari* in order to evaluate the role of the trust doctrine in determining the extent of congressional power in Indian Affairs.

The thesis of this article is that the ultimate legacy of *Mancari* was to integrate the trust doctrine into the Indian Commerce Clause of the Constitution. While scholars have argued that the so-called plenary power of Congress, along with federal Indian law, needs to be decolonized[9] or domesticated by importing international law principles,[10] I believe that in constitutionalizing the trust doctrine, the Court has in fact already imposed some constraints on congressional power.[11] The problem is that the Court has not yet fully realized what it has done. This article explains the legal ramifications of the constitutional integration of the trust doctrine. After explaining the thesis through an analysis of the evolution and interrelationship of the plenary power and the trust doctrines in Part I, the article explores the implications of the thesis by examining four distinct issues in Part II. The four issues are: (1) the power of Congress to enact legislation interfering with tribal self-government; (2) the power of Congress to terminate or refuse to recognize legitimate Indian tribes; (3) the power of Congress to reaffirm inherent tribal powers; and (4) the power of Congress to extend the trust relationship to individual Indians. To bring these four issues into focus with current contexts, they will be analyzed through an examination of recent court decisions.

I. THE EVOLUTION OF THE TRUST DOCTRINE AND ITS RELATIONSHIP WITH CONGRESSIONAL PLENARY POWER IN INDIAN AFFAIRS.

In her landmark article on the plenary power of Congress over Indian affairs, Nell Newton wrote that the trust doctrine is "not constitutionally based and thus not enforceable against Congress."[12] In an article making important contributions to a deeper understanding of the trust doctrine, Mary Christina Wood lamented that while the trust doctrine plays an important role as a check on the power of the executive branch, using the trust as a check on the power of Congress has been somewhat of a "retreating mirage."[13] She further decried the association of the trust doctrine with the plenary power doctrine. In this part, I argue that the trust doctrine and the plenary power doctrine are in fact interrelated, but in a positive way, at least from a tribal perspective. My argument is that since *Mancari* and *United States v. Sioux Nation of Indians*,[14] both the plenary power and the trust doctrines have been integrated into the Constitution. Following Dean Newton's thinking, since the doctrine is now constitutionally based, it

9. *See* Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 Ark. L. Rev. 77 (1993) (taking the Constitution at its words and limiting congressional power in Indian affairs to the regulation of commercial affairs with Indian tribes).

10. *See* Philip P. Frickey, *Domesticating Federal Indian Law*, 81 Minn. L. Rev. 31 (1996); Alex Tallchief Skibine, Duro v. Reina *and the Legislation that Overturned It: A Power Play of Constitutional Dimensions*, 66 S. Cal. L. Rev. 767, 795-97 (1993).

11. In last year's Indian law symposium issue of this journal, T. Alexander Aleinikoff intimated as much. *See* T. Alexander Aleinikoff, *Securing Tribal Sovereignty: A Theory for Overturning* Lone Wolf, 38 Tulsa L. Rev. 57, 57-58 (2002) (stating that "the trust doctrine arguably puts a burden on Congress to show that its regulation of the tribes advances tribal interests").

12. Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. Pa. L. Rev. 195, 232-33 (1984).

13. *See* Wood, *supra* n. 5, at 1508-13.

14. 448 U.S. 371 (1980).

should be enforceable against Congress. Thus, while Professor Wood is right that the association between plenary power and the trust doctrine was unfortunate, that was so only because the trust doctrine used to be deployed to aggrandize the power of Congress beyond the Constitution.[15] Under my argument, the trust doctrine is being used to aggrandize the power of Congress within constitutional boundaries; therefore, it can be adequately controlled. Simply put, my argument is that the trust doctrine is now used to enhance the normal power Congress possesses pursuant to the Indian Commerce Clause. However, there is a caveat. This enhanced power can only be used as long as it is consistent with the trust relationship. This does not mean that Congress can never enact legislation detrimental to tribal interests. It only means that when doing so, Congress has to act pursuant to an un-enhanced commerce power. This means that any legislation detrimental to tribes has to have a substantial nexus with commerce.[16]

I am neither the first nor the last scholar to have suggested a constitutional lineage for the trust doctrine.[17] Carole Goldberg made her argument in the context of arguing that even if the classification of "Indian" is not considered racial for the purpose of imposing the strict scrutiny test, Indians should not fear being discriminated against because Congress is prevented from doing so under the trust doctrine.[18] Stuart Minor Benjamin argued that the trust doctrine was derived from the Indian Commerce Clause and concluded that, as a result, the trust relationship could not be extended to Native Hawaiians.[19] According to Professor Benjamin, this follows from the fact that there are no Native Hawaiian Indian tribes and, under the clause, Congress only has the power to regulate commerce with Indian tribes and not with individual Indians unaffiliated with any tribe.[20] While these scholars have asserted that the trust doctrine is derived from the Commerce Clause, they have not put forward comprehensive arguments why this is so. This has allowed other scholars to put forth strong criticisms of that position.[21] The central premise of my re-energized argument is that it is only by integrating the trust doctrine into the Indian commerce power that the Court can conclude that the power of Congress over Indian affairs is derived from the Indian Commerce Clause, while still asserting that such power is "plenary" in that it reaches beyond the regulation of "commerce" with Indian tribes.[22] This article, however, does not agree that the Indian

15. A result Wood correctly attributes to *Kagama*. *See* Wood, *supra* n. 5, at 1502-05.

16. For a comprehensive argument describing what this commercial nexus should be, see Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 Ariz. St. L.J. 113, 254 (2002) and T. Alexander Aleinikoff, *Semblances of Sovereignty: The Constitution, the State, and American Citizenship* 130-32 (Harv. U. Press 2002).

17. *See* Skibine, *supra* n. 10, at 795; Stephen B. Young, *Indian Tribal Sovereignty and American Fiduciary Undertakings*, 8 Whittier L. Rev. 825, 858 (1987).

18. Carole E. Goldberg-Ambrose, *Not "Strictly" Racial: A Response to "Indians as Peoples"*, 39 UCLA L. Rev. 169, 179 n. 54, 180-84 (1991).

19. *See* Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537 (1996).

20. *Id.* at 543-44 n. 28, 545 n. 36, 592 n. 217.

21. *See* L. Scott Gould, *Tough Love for Tribes: Rethinking Sovereignty after* Atkinson *and* Hicks, 37 New Eng. L. Rev. 669 (2003); Gould, *supra* n. 8; David Williams, *Sometimes Suspect: A Response to Professor Goldberg-Ambrose*, 39 UCLA L. Rev. 191, 201-03 (1991).

22. In *Cotton Petroleum Corp. v. New Mexico*, for instance, the Court stated that the "central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian Affairs." 490 U.S. 163, 192 (1989).

Commerce Clause gives Congress a truly "plenary"—meaning "absolute"—power over Indian affairs. Instead, it argues that the integration of the trust doctrine into the commerce power somewhat augmented that power beyond what a literal reading of the Commerce Clause would normally suggest. In other words, there is a symbiotic relationship between an expanded Indian commerce power and the trust doctrine.

Besides determining how the trust doctrine came to be integrated into the Constitution and what this means for congressional power, there are two other related important questions. First, are there any standards that allow the Court to determine when Congress is acting pursuant to its role as trustee and when it is not? Second, are there any meaningful limits to Congress's power under a regular commerce power unenhanced by the trust doctrine? Professor Wood has already convincingly put forth an answer to the first of these questions, suggesting that any such legislation has to protect tribal territories, protect tribal self-government, promote economic self-sufficiency, or promote cultural preservation.[23] As to the second question, Professor Clinton has recently written a comprehensive article delineating the power of Congress under the Indian Commerce Clause.[24] Therefore, this article will primarily address itself to the question of how the trust doctrine was integrated into the Constitution and what such integration means for congressional power over Indian affairs.

A. From John Marshall to Kagama*: The Origin and Subsequent Perversion of the Trust Doctrine.*

Professor Wood has argued that the creation of the trust emerged from the huge loss of land the tribes suffered at the hands of the European colonial powers and the United States.[25] She also made a persuasive argument that John Marshall never understood the trust doctrine as enlarging the power of Congress over Indian tribes.[26] Terming Marshall's version the "sovereign trust" branch of the doctrine, she contrasted it with the "guardian-ward" branch, which she traced to the 1886 Supreme Court decision in *United States v. Kagama.* According to Wood, under the "sovereign trust" branch, the trust doctrine only aggrandized the power of Congress in order to protect the sovereignty of the Indian nations. While Wood is correct in asserting that Chief Justice Marshall never conceived of the trust doctrine as enlarging congressional power, this does not mean that he believed the power of Congress in Indian affairs was not plenary. Thus, Marshall is the one who actually described the relationship between the United States and the tribes as akin to that of a ward to a guardian.[27] Furthermore, in describing the status of Indian tribes as "domestic dependent nations,"[28] he analogized the relationship to that of a vassal to his lord.[29] Marshall derived the status of the tribes from the course of dealings between England and the tribes, the law of nations under which Indian tribes

23. *See* Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 Utah L. Rev. 109, 132.

24. *See* Clinton, *supra* n. 16.

25. *See* Wood, *supra* n. 5, at 1495-96.

26. *Id.* at 1498-1501.

27. *Cherokee Nation v. Ga.*, 30 U.S. 1, 17 (1831).

28. *Id.*

29. *Worcester v. Ga.*, 31 U.S. 515, 561 (1832).

were subjected to the doctrine of discovery, and the fact that England and later the United States had signed treaties with the Indian tribes.[30] Under such treaties, the tribes acknowledged that they were under the protection of the United States, and they ceded millions of acres of land to the United States. In *Cherokee Nation v. Georgia*, Marshall imported all of this context to hold that Indian tribes were neither states nor foreign nations under the Constitution, and therefore could not file an original suit in the Supreme Court.[31] However, as noted by Philip Frickey, this did not prevent John Marshall from believing that Congress already had some sort of plenary power over Indian affairs.[32]

While I concur with Professor Frickey's assessment, I have argued elsewhere that Justice Marshall conceived of the guardian-ward relationship in the *Cherokee* cases as an antidote to the power he had awarded Congress in *Johnson v. M'Intosh*,[33] where he took the position that Indian tribes were subject to the doctrine of discovery.[34] In other words, Marshall acknowledged that the doctrine of discovery allowed Congress plenary authority in that it could decide to "conquer" the territories of the Indian nations. However, he also believed that while at peace, the Indian nations were owed a duty of protection. So, in effect, while Professor Wood is partially correct that the creation of the trust had something to do with the huge land transfers which took place between the tribes and the United States, the ultimate creation of the trust arose from the fact that "Indian tribes"—the political entities existing in America before the coming of the European powers—were subject to the doctrine of discovery. The type of "plenary power" existing under the doctrine of discovery was the power to acquire the territory of the tribes by purchase or conquest. Marshall acknowledged that the United States could have conquered the tribes and assimilated the tribal members into the general population.[35] That course of action, however, had not been taken. Instead, Indian tribes had become domestic dependent nations under the protection of the United States.

The case most widely acknowledged as creating Congress's plenary power, not only over Indian affairs but also over the affairs of the Indians, is *Kagama*. Although the case is confusing and has been understood by some as relying exclusively on the trust relationship to give Congress some extra-constitutional power, the opinion does not mention the trust in connection with allowing Congress to interfere with the internal affairs of tribes.[36] The trust is only mentioned in that part of the opinion which explains

30. For a summary of John Marshall's view, see Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381 (1993) and Alex Tallchief Skibine, *Reconciling Federal and State Power inside Indian Reservations with the Right of Tribal Self-Government and the Process of Self-Determination*, 1995 Utah L. Rev. 1105, 1119-24.

31. 30 U.S. at 20.

32. Frickey, *supra* n. 10, at 59, 60, 68-69 (noting that both Marshall and the *Kagama* Court believed that the power of Congress over Indian Affairs was "inherent" from the structure of the Constitution).

33. 21 U.S. 543 (1823).

34. *Id.* at 568-71; *see* Skibine, *supra* n. 30, at 1119-24.

35. *See Worcester*, 31 U.S. at 552-53.

36. Nor does the decision use the term "plenary" in connection with describing congressional power over Indian tribes. *See* Stacy L. Leeds, *The More Things Stay the Same: Waiting on Indian Law's* Brown v. Board of Education, 38 Tulsa L. Rev. 73, 77 (2002).

why the legislation at issue was not a violation of state sovereignty.[37] In other words, the Court held that the existence of a trust relationship justified congressional power to preempt state jurisdiction even though the regulation had nothing to do with commerce. Viewed that way, that conception of the trust is even consistent with Marshall's notion of a trust enlarging the power of Congress to protect Indian tribes from outside forces.

As first explained by Dean Newton, the *Kagama* Court's real justification for allowing Congress to interfere with internal aspects of tribal sovereignty seems to be the concept that every sovereign has an inherent power to control its territory.[38] Other scholars concurred. Professor Frickey has argued that in *Kagama*, the Court did not derive the plenary power of Congress from the trust doctrine but from some inherent sovereign power the United States has to control aliens both coming into and, in the case of Indians, already "in" the country.[39] So, in effect, it is the fact that the United States is the ultimate owner of the country where the Indians are now residing that creates this power.[40] Ultimately, the *Kagama* Court relied on the doctrine of discovery to justify congressional power. This is why *Kagama* should no longer be good law to justify congressional plenary power. Whether it is the power to conquer, wage war, or assert power as a colonizer, that power should have disappeared after Indian tribes became incorporated into the territory of the United States and tribal members became United States citizens.

Perhaps realizing the ultimate correctness of that argument, the Court after *Kagama* moved away from relying on any "inherent power" and instead adopted the trust doctrine as the primary extra-constitutional grant of power to Congress to control Indian affairs. Thus, in *Sandoval*, the Court was able to assert:

> Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders . . . .[41]

While I agree with Professor Wood and others that *Kagama* is generally considered to have used the trust to enlarge congressional power over Indian tribes by focusing on the need to protect the Indians from themselves,[42] I think that what eventually came to distinguish the guardian-ward branch of the doctrine from Marshall's "sovereign trust" version is its emphasis on protecting individual Indians. These individuals needed protection for two reasons. First, the allotment policy's ultimate goal was to separate individual Indians from their tribes by allotting tribal lands to individual

37. The issue in *Kagama* was whether Congress could enact legislation extending federal criminal jurisdiction over Indians committing major crimes inside Indian reservations (*Act of Mar. 3, 1885*, 23 Stat. 362 (1885) (codified at 18 U.S.C. § 1153 (2000))). *See* 118 U.S. at 375-76.

38. Newton, *supra* n. 12, at 213-16.

39. *See* Frickey, *supra* n. 10, at 68-69.

40. The *Kagama* Court stated, "But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States . . . ." 118 U.S. at 379. "The right to govern may be the inevitable consequence of the right to acquire Territory." *Id.* at 380.

41. 231 U.S. at 45-46.

42. *See e.g.* Wood, *supra* n. 5, at 1502-04.

tribal members, thus undermining the tribal land base while integrating the individual Indians into the larger society.[43] Second, because they were said to be from an inferior race and an uncivilized culture,[44] they needed at first to be supervised by federal governmental officials. Of course, these racist notions soon became unacceptable to justify "plenary" power over Indians or their tribes; and, as noted by Dean Newton, even before *Mancari*, the Court had eventually come to view the power of Congress as not plenary.[45]

B. Morton v. Mancari *and the Constitutionalization of the Trust Doctrine*

Mancari, nevertheless, did represent a turning point. The issue there was whether a law giving preference in employment within the Bureau of Indian Affairs to members of Indian tribes denied the equal protection of the law to non-Indians. After stating that "[r]esolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes,"[46] the Court asserted that "[t]he plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself."[47] The Court then concluded that "[a]s long as the special treatment [of Indians] can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."[48]

What I am suggesting here is that the *Mancari* Court integrated the trust doctrine into the Constitution. Thus, before *Mancari*, both the plenary power and the trust doctrine were creations of the federal common law. *Mancari* specifically stated that although the plenary power was initially a product of treaties and the trust doctrine, congressional power over Indian affairs was now thought to be derived from the Indian Commerce power.[49] Since the treaty power is no longer relevant and the power of Congress is now solely derived from the Commerce Clause, can it still be plenary in the sense of being absolute? The answer is no. If it was truly plenary, the Court should have just stopped after its statement about plenary power and declared the preference valid. But it did not do this. Instead, it went out of its way to first find that the classification of "Indian" was not a racial classification but one based on political membership in an Indian tribe.[50] One would think that if the classification of Indian is not racial, the rational basis test should automatically apply. However, the Court, in yet another surprising turn, came up with a "rationally tied to the trust relationship" test, a test which can be described as "rational basis plus." Next, the Court had to decide whether the

43. For a comprehensive overview of the allotment era, see Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. St. L.J. 1 (1995).

44. *See U.S. v. Clapox*, 35 F. 575, 577-78 (D. Or. 1888).

45. Newton, *supra* n. 12, at 230-31.

46. *Mancari*, 417 U.S. at 551.

47. *Id.* at 551-52.

48. *Id.* at 555.

49. *Id.* at 552.

50. *Id.* at 553-54.

special treatment was rationally tied to the trust relationship and held that it was because it promoted the non-racial goal of protecting tribal self-government.[51]

There are many criticisms one can level at *Mancari*. First, as some scholars have argued, the statement that the classification of Indians is not based on race is suspect.[52] Second, as many students in my federal Indian law class argue every time I teach the case, why would encouraging Indians to join a federal agency with a colonial and paternalistic reputation have anything to do with promoting tribal self-government?[53] The Court's need to rely on such findings lead me to the following conclusions. First, Congress's power is no longer absolute since it is now derived from the Commerce Clause. Second, the classification of "Indian" is not racial only when it is tied to the trust relationship. This means that it is not always "not racial." Third, promoting the federal career of individual Indians is not, in and of itself, rationally tied to the trust relationship. It is only tied to the trust when it promotes tribal self-government. This means that there are limits to what is and what is not "rationally tied to the trust relationship."

If the power of Congress is no longer absolute, what are its limits? Does this mean that, as some have argued, any congressional action towards Indians have to be tied to "commerce"?[54] The overall conclusion I get from *Mancari* is that the trust doctrine is somehow playing a role in both expanding and limiting the power of Congress under the Commerce Clause. Congress can go beyond the normal definition of commerce but only when it is acting pursuant to the trust. In other words, it is as if the Court had expanded the definition of "commerce" under the Commerce Clause as encompassing congressional action rationally tied to the trust. The next question is whether there are any limitations to what can be viewed as rationally tied to the trust. In *Mancari*, the special treatment of Indians had to be related to the promotion of tribal self-government.

Mancari's ambiguities were next tested in *United States v. Antelope*.[55] In that case, a federal criminal law imposed federal jurisdiction on certain crimes committed by tribal members. The problem was that if the same crime had been committed by a non-Indian, that individual would have been subjected to state jurisdiction, which would not have punished the offender as severely as federal law would. The convicted tribal member argued that this amounted to invidious racial discrimination. The tribal member also argued that *Mancari* was inapplicable because that case dealt with laws benefiting Indians, while the law under which he was prosecuted was detrimental to Indians. The Court disagreed. After first stating that "classifications expressly singling out Indian tribes as subject of legislation are expressly provided for in the Constitution,"[56] the Court stated:

> [T]he principles reaffirmed in *Mancari* . . . point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications. Rather,

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51. *Mancari*, 417 U.S. at 554.

52. *See* Gould, *supra* n. 8.

53. As one of my students asked, "Why would placing a Hopi in charge of the BIA Navajo regional office promote Navajo Tribal self-government?"

54. *See* Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 Stan. L. Rev. 979 (1981).

55. 430 U.S. 641 (1977).

56. *Id.* at 645.

> such regulation is rooted in the unique status of Indians as "a separate people" with their own political institutions. Federal regulations of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a "'racial' group consisting of 'Indians' . . . ."[57]

In other words, the Court in *Antelope* indicated that when the issue is governance of Indian tribes inside Indian country, the separate treatment of tribal members can never be a racial classification because the Constitution itself "expressly singles out" Indian tribes for special treatment. Although the *Antelope* Court summarily concluded that "Congress has undoubted constitutional power to prescribe a criminal code applicable in Indian country,"[58] this cannot mean that Congress has "absolute" power to enact anything it wants under the guise of such governance. Congress could not, for instance, enact a law requiring Indians to sit in the back of the proverbial bus even when the bus is being operated inside an Indian reservation.

The Court followed its *Mancari* decision with two other significant cases, *Delaware Tribal Business Committee v. Weeks*[59] and *United States v. Sioux Nation*. While *Weeks* is noteworthy for containing language overturning the political question doctrine as relating to Indian affairs first enunciated in *Lone Wolf v. Hitchcock*,[60] *Sioux Nation* made clear that the principle enunciated in *Weeks* went beyond cases alleging violations of the Equal Protection Clause. The Court in *Sioux Nation* had to decide whether the taking of the Black Hills from the Sioux by the United States was done pursuant to the trust relationship or pursuant to Congress's power of eminent domain.[61] If done pursuant to the former, the Sioux were not owed just compensation within the meaning of the Fifth Amendment.[62] Otherwise they were. While the *Sioux Nation* Court acknowledged that Congress can act beyond normal constitutional restrictions if acting as a trustee for the tribes, it also held that when Congress is not acting as a trustee, such legislation should be subject to constitutional restrictions.[63]

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57. *Id.* at 646 (quoting *Mancari*, 417 U.S. at 553 n. 24).

58. *Id.* at 648.

59. 430 U.S. 73 (1977).

60. The *Weeks* Court stated that "the power of Congress 'has always been deemed a political one,' . . . [but this] has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment." *Id.* at 84 (quoting *Lone Wolf*, 187 U.S. at 565). For a perceptive analysis of the *Lone Wolf* decision and its ongoing legacy, see Joseph William Singer, Lone Wolf, *or How to Take Property by Calling It a "Mere Change in the Form of Investment"*, 38 Tulsa L. Rev. 37 (2002).

61. *See* 448 U.S. at 389-90.

62. This part of the decision has been severely criticized. *See* Nell Jessup Newton, *The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the* Sioux Nation *Rule*, 61 Or. L. Rev. 245 (1982); Singer, *supra* n. 60, at 38.

63. As the Court put it:

> It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary powers over the Indians and their property, as it thinks is in their best interests, and (2) exercise its sovereign power of eminent domain, taking the Indians' property within the meaning of the Fifth Amendment to the Constitution. In any given situation in which Congress has acted with regard to Indian people, it must have acted either in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time.

448 U.S. at 408 (quoting *Three Affiliated Tribes of the Ft. Berthold Reservation v. U.S.*, 390 F.2d 686, 691 (Ct. Cl. 1968)) (internal quotations omitted).

The argument proposed in this article is that such reasoning should apply to limit what Congress can do under the Commerce Clause. In other words, the Court in *Sioux Nation* and *Mancari* held that if Congress was not acting as a trustee for the tribes, the Fifth Amendment would apply to congressional action so that both the Takings Clause and the strict scrutiny test would become applicable. This article suggests that when Congress is not acting as a trustee for the tribes, the "plenary" (meaning "enhanced") form of the Indian Commerce Clause disappears, and Congress can only act within the ordinary reach of the Commerce Clause. This means that congressional action must somehow be tied to "commerce" with the Indian tribes.

There has been an incremental evolution in the Court's thinking on congressional plenary power and how it interacts with the Indian trust doctrine. The Court in *Mancari* integrated the trust doctrine into the Constitution. This integration allowed the Court to take a broad view of the Indian commerce power and conclude that the power of Congress was still "plenary." What I am arguing here is that to be consistent with its own thinking in *Mancari* and *Sioux Nation*, the Court should acknowledge that since the trust doctrine is what enlarges the power of Congress under the Indian commerce power, the power is commensurably reduced when Congress is not acting as a trustee.

II. APPLICATION OF THE TRUST INTEGRATION DOCTRINE TO CURRENT ISSUES.

A. The Power of Congress to Interfere with Tribal Self-Government.

In *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States*,[64] the Band argued that a provision in the Indian Gaming Regulatory Act (IGRA)[65] requiring a state governor to concur with the Secretary of the Interior before land could be taken in trust for the Band for gaming purposes was a breach of trust because it was not rationally related to the trust relationship.[66] The Band seemed to rely on a previous case in which a federal district court held that IGRA did not amount to a breach of trust, but at least considered the argument.[67]

Describing the argument as a non-constitutional one, Chief Judge Crabb dismissed the claim, holding that IGRA was not enacted pursuant to the trust relationship and that the *Mancari* "rationally related to the trust" test had so far only been applied to constitutional claims.[68] Chief Judge Crabb was wrong in terming the claim a non-constitutional one. She is right that so far the *Mancari* test has only been used to gauge the legitimacy of acts of Congress when the allegation was that constitutional rights were at stake, but, as explained in the previous section, the claim here should have been that if Congress did not act pursuant to the trust relationship when it enacted IGRA, its power should have been constrained by other provisions of the Constitution. The thesis of this article is that it is only through the trust doctrine that the Indian commerce power is

64. 259 F. Supp. 2d 783 (W.D. Wis. 2003).
65. Pub. L. No. 100-497, 102 Stat. 2467 (1988).
66. 259 F. Supp. 2d at 786; *see* 25 U.S.C. § 2719(b)(1)(A) (2000).
67. *See Lac Courte Oreilles*, 259 F. Supp. 2d at 792-93; *Red Lake Band of Chippewa Indians v. Swimmer*, 740 F. Supp. 9, 12-13 (D.D.C. 1990).
68. *Lac Courte Oreilles*, 259 F. Supp. 2d at 792.

expanded beyond its strictly "commerce" aspect. The constitutional question in *Lac Courte Oreilles*, therefore, should have been whether some sections in IGRA that were not enacted pursuant to the trust relationship were unconstitutional in that they went beyond the regulation of commerce. Of course, in the end, this argument may not have helped the Lac Courte Oreilles Band since, even if enacted pursuant to its regular commerce power, most of IGRA would still be constitutional since it obviously regulates commerce with Indian tribes. To be sure, that was the case for the section the Band was attacking, which regulated the acquisition of trust land outside Indian reservations for gaming purposes.

The recent Supreme Court decision in *United States v. Navajo Nation*[69] raises somewhat related concerns. In that case, the Navajo Nation was arguing that it had a breach of trust case against the United States under the Tucker Act because the Secretary of the Interior had breached his trust duties when he approved a coal lease between the Navajo Nation and Peabody Coal, a non-Indian energy corporation.[70] The Court held that the Navajo Nation did not have a breach of trust case under the Tucker Act because Congress had not provided any specific trust duties for the Secretary to undertake.[71] Although the Navajos were arguing that the Secretary's approval of the lease constituted such a duty, the Court must have concluded that the approval power given to the Secretary had not been enacted pursuant to the trust relationship.[72] Under this article's thesis, if not given pursuant to the trust, Congress can only have the power to give such approval authority if authorized to do so under an Indian commerce power un-enhanced by the trust doctrine. Thus the question becomes: is the Secretary's approval of a coal lease between a non-Indian corporation and the Navajo Nation related to "commerce with the Indian tribes"? While the Secretary's approval power in this case is arguably

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69. 537 U.S. 488 (2003).

70. *Id.* at 493.

71. *Id.* at 511-14. The outcome in *Navajo Nation* was controlled by the two *Mitchell* decisions: *United States v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*") and *United States v. Mitchell*, 463 U.S. 206 (1983) ("*Mitchell II*"). As explained by the Court in *Navajo Nation*:

> To state a claim cognizable under the Indian Tucker Act, *Mitchell I* and *Mitchell II* thus instruct, a tribe must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties. If that threshold is passed, the court must then determine whether the relevant source of substantive law "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s]."

537 U.S. at 506 (quoting *Mitchell II*, 463 U.S. at 219) (citations omitted). According to the Court, the difference between *Mitchell I* and *Mitchell II* was that the statutes invoked in *Mitchell I* "created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources," *id.* at 504 (quoting *Mitchell I*, 445 U.S. at 542) (internal quotations omitted), whereas "[i]n *Mitchell II*, [the Court] held that a network of other statutes and regulations did impose judicially enforceable fiduciary duties upon the United States in its management of forested allotted lands." *Id.* at 504-05.

72. Thus, Justice Ginsburg, author of the *Navajo Nation* opinion, stated in *United States v. White Mountain Apache Tribe* issued the same day as *Navajo Nation*:

> The coal-leasing provisions of the IMLA and its allied regulations, *Navajo* explains, lacked the characteristics that typify a genuine trust relationship: Those provisions assigned the Secretary of the Interior no managerial role over coal leasing; they did not even establish the 'limited trust relationship' that existed under the law at issue in *Mitchell I*.

537 U.S. at 480-81 (Ginsburg & Breyer, JJ., concurring).

related to commerce, Indian tribes should nevertheless reevaluate all the various approval requirements given to the Secretary when, as in the *Navajo Nation* case, the approval power was apparently not given pursuant to the trust relationship.

Even if related to commerce, tribes should question the ultimate purpose of these non-trust related approval requirements. In the case of the Navajos and their coal lease, for instance, if the approval power was not enacted pursuant to the trust, why was the Secretary given such authority? Was it to make sure the non-Indian energy corporations got the best possible deal when signing leases with Indian tribes? If not related to the trust, the purposes behind such approval requirements may be so obscure and bizarre that they may be lacking any rational basis whatsoever.[73] As such, they could become suspect on due process grounds since they impose a burden on tribal property interests.

B. Congress as the Terminator: Can the Trustee End the Relationship?

One of the perennial judicial statements associated with any reaffirmation of congressional plenary power is the customary quasi-genocidal canard that Congress can terminate the trust relationship with individual tribes at will.[74] In this section I suggest that any "plenary" authority to terminate the relationship has no constitutional foundation and is derived solely from the former power to annihilate tribes by war or conquest. As such, it is a remnant of a now defunct version of plenary power. Judicial statements recognizing such power have their origins in the early 1900s, when *Lone Wolf*'s political question doctrine was still good law,[75] *Kagama*'s trust doctrine was perceived to be the source of an extra-constitutional plenary power,[76] and the trust relationship was thought to be necessary to protect Indians not because they were members of dependent sovereigns but because they belonged to an inferior race.[77] No one can seriously argue that these principles are still in effect today to justify such a congressional prerogative. Inasmuch as this article has argued that both the power of Congress and the trust doctrine have now been integrated in the Constitution, Congress should no longer be able to terminate the trust relationship at will unless a tribe no longer exists or such termination is found to be for the benefit of the tribe. I can only conceive of two scenarios where this

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73. The Court, in *Navajo Nation*, acknowledged that the Indian Mineral Leasing Act

> was designed "to provide Indian tribes with a profitable source of revenue." [*Cotton Petroleum*, 490 U.S. at 179.] But Congress had as a concrete objective in that regard the removal of certain impediments that had applied particularly to mineral leases on Indian land. *See Cotton [Petroleum]*, 490 U.S., at 179 ("Congress was . . . concerned . . . with matters such as the unavailability of extralateral mineral rights on Indian land.") . . . .

537 U.S. at 511-12 n. 16.

74. Perhaps the earliest statement to that effect was made in *Sandoval*, where the Court, referring to the Pueblos in New Mexico, stated, "[T]he questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts." 231 U.S. at 46.

75. *See Lone Wolf*, 187 U.S. at 565 ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.").

76. *Supra* nn. 36-40 and accompanying text.

77. *See Clapox*, 35 F. at 577 (stating that an Indian reservation is "in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man").

might be the case: (1) the tribe has consented, or (2) the termination of the relationship means that the tribe is no longer a dependent sovereign subject of the doctrine of discovery, but has become a fully independent nation. The following two cases highlight problems arising when termination or lack of recognition of Indian tribes is treated as a political question and shielded from judicial review.

In *Kahawaiolaa v. Norton*,[78] a district court upheld the Secretary of Interior's decision to prevent a Native Hawaiian group from petitioning the BIA for acknowledgment as an Indian tribe.[79] The argument of the Native Hawaiians was that Congress had delegated the responsibility for acknowledging tribes to the Secretary under Title 25 United States Code Section 2, and that the Secretary denied Native Hawaiians the equal protection of the law when she prevented them from applying for recognition.[80] Although the petitioners in *Kahawaiolaa* were not actually challenging any acts of Congress—they were challenging a decision by the Secretary to exclude them from the federal acknowledgment process—the judge in the case somehow decided to treat the case as one where the Secretary's decision to refuse to consider the application of the Hawaiian group had been directed by Congress.[81] As such, the court held that this congressional action was a political decision not reviewable by the judicial branch under the political question doctrine.[82]

Although not crystal clear from the opinion, properly conceptualized, the case was really about deciding whether the BIA had misconstrued its authority when it took the position that Congress had "precluded" agency consideration of any and all petitions from Hawaiian groups. While pretending not to decide the issue,[83] the court clearly implied that the agency had properly construed its authority since it found that "the challenged regulations do no more than effectuate congressional policy with respect to Native Hawaiians in the sense that Congress has not, as of yet, decided to enter a government-to-government relationship."[84] The problem with this statement is that the same thing could have been said for all the other recently acknowledged tribes. Obviously, Congress has not yet decided whether to treat Native Hawaiians as a tribe. If

78. 222 F. Supp. 2d 1213 (D. Haw. 2002).

79. *Id.* at 1223; *see* 25 C.F.R. § 83.3(a) (1998) (restricting application "to those American Indian groups indigenous to the continental United States"). For a recent analysis of the BIA recognition process, see Mark D. Myers, Student Author, *Federal Recognition of Indian Tribes in the United States*, 12 Stan. L. & Policy Rev. 271 (2001).

80. *Kahawaiolaa*, 222 F. Supp. 2d at 1217-19; *see* 25 U.S.C. § 2. Section 2, first enacted in 1832, states, "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations." Although the Supreme Court has not used the non-delegation doctrine to strike an act of Congress since the 1930s, *see e.g. Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457 (2001), the sheer breadth of § 2 is unusual, even in an age of broad delegation. It seems to be the mother of all delegation.

Even though it may have been constitutional at a time when the President was signing treaties with Indian tribes and "Indian affairs" had a status similar to foreign affairs, the statute should be vulnerable on non-delegation grounds after the integration of Indian tribes into the United States political system and the acquisition of U.S. citizenship by tribal members.

81. *Kahawaiolaa*, 222 F. Supp. 2d at 1219.

82. *Id.*

83. Thus the court stated, "[T]he Court finds that Plaintiffs' case raises a nonjusticiable political question because their challenge to the regulations surrounding tribal recognition involves matters that have been constitutionally committed to the other branches . . . ." *Id.*

84. *Id.* at 1220-21.

it had decided either way, the group would not be petitioning the BIA for recognition. The court totally misunderstood the role of the recognition process when it stated that "the regulations that Plaintiffs challenge only pertain to those groups with whom Congress has established government-to-government relations."[85] Exactly the opposite is true. A group with whom Congress had established a government-to-government relationship would never bother petitioning for acknowledgment. It would not need to. Acknowledgment is only necessary to Indian tribes that are currently lacking an official government-to-government relationship with the United States.

The court's true reasoning therefore seems to hinge on the fact that unlike all the other petitioning tribes, the lack of recognition of Native Hawaiians as a tribe comes from an intentional decision by Congress "not to decide" the status of Native Hawaiians as a tribe. I believe that it was a mistake for the court to derive from this "decision not to decide" a congressional decision to prevent the BIA from considering such a petition for recognition as a tribe. If Congress had in fact intended to preclude Native Hawaiians from filing a petition, that decision perhaps could have been viewed as a political question. But Congress did no such thing. The case is therefore not about a political "decision" by Congress; it is really about whether Congress intended to preclude judicial review of the Secretary's decision to prevent Native Hawaiians from applying for recognition, even if such preclusion amounted to racial discrimination. As such, the issue is clearly subject to judicial review. The court should have first focused on whether Congress intended to preclude judicial review of a constitutional issue. If the answer was yes, the court should have next decided whether Congress can constitutionally preclude such review because it amounts to delegating to an agency a power Congress does not have: the power to deny certain individuals or groups their constitutional rights. This is one of the most contentious questions in the field of administrative law.[86] Perhaps here lies the true reason why the court decided not to confront this issue and hide behind the political question doctrine.

In doing so, the court avoided one contentious issue but ended up raising another: whether a congressional decision to terminate recognition or even refuse to recognize a legitimate entity as an Indian tribe should really be shielded from judicial review by the political question doctrine. This use of the political question doctrine in the field of federal Indian law is puzzling since the use of the doctrine to shield congressional action in Indian affairs from judicial review of constitutional questions was repudiated when the Supreme Court, in *Weeks*, overruled that part of *Lone Wolf* in 1977.[87]

Surely a congressional decision to recognize a group as an Indian tribe must have some limits. For instance, what if Congress recognized as an Indian tribe a group of people claiming to be descendants of a Viking tribe and created a reservation for this tribe? I do not believe that a court would refuse, on account of the political question doctrine, to hear a complaint filed by a state that had lost some jurisdiction and a

85. *Id.* at 1220.

86. *See e.g. Webster v. Doe*, 486 U.S. 592 (1988).

87. *Weeks*, 430 U.S. at 83-84 ("[T]he power of Congress 'has always been deemed a political one', . . . [but this] has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment." (quoting *Lone Wolf*, 187 U.S. at 565) (citations omitted)).

substantial amount of tax revenue as a result of the creation of such reservation.[88] The Supreme Court seemed to agree in *Sandoval*, where it stated:

> Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.[89]

But if recognition is no longer a political question, would the same thing be true if Congress, on a whim, enacted a law to no longer recognize an Indian tribe or, as in the case of the Native Hawaiians, prevented the executive branch from recognizing them?

It seems that courts shielding such executive or legislative decisions from judicial review by way of the political question doctrine amounts to granting the United States, as the trustee, the power to commit a form of non-violent "political" genocide on some of its beneficiaries. Although the Court of Claims has stated that "[t]he Termination Act did not abolish the tribe or its membership. It merely terminated Federal supervision over and responsibility for the property and members of the tribe,"[90] and the Seventh Circuit recently added that the survival of a tribe "in some sovereign capacity after the Termination Act is an un-controversial proposition,"[91] any recognized sovereign capacity would seem to only exist in a relationship between a state or other Indian tribes and not the United States—unless, of course, the United States would allow Indian tribes to carry on international relations on a nation-to-nation basis with foreign nations. But because this is not about to happen, the use of the political question doctrine in such termination cases can only be justified as an extension of the right of conquest.[92] It should no longer be legitimate.[93] A recent opinion by Judge Posner containing dicta supporting the use of the doctrine in such cases highlights the falsity of the premise.

In *Miami Nation of Indians of Indiana, Inc. v. United States Department of the Interior*,[94] Judge Posner remarked that the decision to recognize a tribe is usually a political question, and he gave two examples to illustrate his point.[95] First, he relied on *Luther v. Borden*,[96] a case where the Supreme Court refused to recognize which of two

88. Although this hypothetical is unlikely to arise since, if anything, Congress has usually been reluctant to grant tribal status, the relatively recent recognition of the Mashantucket Pequot tribe has raised such issues. *See* 25 U.S.C. § 1758; Jeff Benedict, *Without Reservation: How a Controversial Indian Tribe Rose to Power and Built the World's Largest Casino* (HarperCollins 2001) (arguing that the Mashantucket Pequots would have never been able to meet the criteria for tribal recognition established by the Bureau of Acknowledgment and Research had they filed a petition for recognition instead of obtaining recognition directly from the Congress).

89. 231 U.S. at 46.

90. *Menominee Tribe of Indians v. U.S.*, 388 F.2d 998, 1000 (Ct. Cl. 1967) (emphasis omitted).

91. *U.S. v. Long*, 324 F.3d 475, 481 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 151 (2003).

92. The right to "conquer" Indian tribes is derived from the doctrine of discovery. For a critical look at the doctrine, see Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 Wis. L. Rev. 219, 252-58.

93. *See* Myers, *supra* n. 79, at 276 ("There is no legitimate foundation for denying Indian identification to any tribe or community.").

94. 255 F.3d 342 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002).

95. *Id.* at 346-47.

96. 48 U.S. 1 (1849).

governments was the legitimate government of Rhode Island.[97] Second, he asserted that "if the residents of what was once the Kingdom of the Two Sicilies asked a federal court to recognize it as an independent nation, the court would invoke *Luther v. Borden* and tell them to take up the matter with the State Department."[98] These two situations, however, are not similar to recognizing the existence of an Indian tribe. In the Rhode Island case, the issue was the legitimacy of a state government, not the very existence of the state of Rhode Island. This is more similar to a case where the BIA refused to recognize the legitimacy of a given tribal government, which is a different issue than refusing to acknowledge the existence of a tribe. In the Two Sicilies case, the United States is not recognizing the existence of an independent Kingdom because it has already acknowledged that the government of Italy is the legitimate sovereign over the former Kingdom. Even if a case involving the recognition of Italy as a sovereign entity is a political question, what sets such a case apart is that it involves relations with "foreign" states with whom the United States does not have a trust relationship. Because Indian tribes are no longer foreign nations but domestic dependent nations with whom the United States has a trust relationship, Congress, as a trustee, should no longer be able to ignore some of its beneficiaries.

This article has argued that the power of Congress over Indian affairs is derived from the Indian commerce power enhanced by a constitutionally integrated trust doctrine. While Congress can refuse to recognize the legitimacy of a tribal government, it should not be able to ignore the existence of a legitimate Indian tribe. If Congress does not act as a trustee, according to the thesis of this article, Congress is limited to regulating commerce with Indian tribes. Failure to recognize a legitimate tribe, or terminating an existing tribe, is not part of commerce, no matter how broadly defined. Because the Constitution acknowledges that there are such political entities as Indian tribes, Congress cannot pretend that there never were any tribes. Congress could have decided to abolish the tribes by conquest and kill all the tribal members through war. Because neither "conquest" nor "war" is a legitimate tool for a government to use against its own citizens, Congress can no more "terminate" tribes than it can "exterminate" tribal members. It can determine that an entity is no longer a tribe or never was a tribe, but that finding should not be shielded from judicial review by the political question doctrine. Courts have as much expertise as Congress or the BIA in determining whether an entity qualifies as a legitimate Indian tribe for the purposes of the Indian Commerce Clause.

C. The Power of Congress to Reaffirm Inherent Tribal Powers.

Another recent case highlighting the relationship between the trust doctrine and plenary power is *United States v. Lara*.[99] The issue there was whether Congress could reaffirm the inherent power of Indian tribes to prosecute non-member Indians after the

97. *Miami Nation*, 255 F.3d at 347.
98. *Id.*
99. 324 F.3d 635 (8th Cir. 2003) (en banc), *cert. granted*, 124 S. Ct. 46 (2003).

Supreme Court, in *Duro v. Reina*,[100] held that tribes had been implicitly divested of such power.[101]

The majority of the Eighth Circuit determined that the so-called "*Duro* Fix" legislation could not be a reaffirmation of inherent tribal power, but instead had to be a delegation of congressional authority to the tribe.[102] The majority of the court held that Congress could not reaffirm such power because *Duro* was not a decision based on federal common law. Instead, it concluded that "the distinction between a tribe's inherent and delegated powers is of constitutional magnitude and therefore is a matter ultimately entrusted to the Supreme Court. . . . Once the federal sovereign divests a tribe of a particular power . . . it may only be restored by delegation of Congress's power."[103] Except for quoting language from a previous opinion,[104] the Eighth Circuit's opinion is almost completely denuded of any further explanation supporting its assertion.[105] The court did assert that while Congress might have been able to reaffirm such inherent tribal power when its power was derived from the trust doctrine, it could no longer do so now that "Congress's broad authority over Indian affairs derives from and is limited by the Constitution."[106] Thus, the *Lara* court concluded that "[i]n exercising its commerce power, Congress may not 'override a constitutional decision by simply rewriting the history upon which it is based.'"[107]

In Part I of this article, I have argued that both the plenary power of Congress and the trust doctrine have been integrated into the Indian Commerce Clause. The question worth exploring here is whether the conclusions reached in Part I of this article somehow support the position reached by the *Lara* majority. The dissenting opinion in *Lara* took strong exception to the argument that because the power of Congress was now said to be located in the Constitution, Congress could not restore inherent sovereignty to the tribe. Thus the dissent stated:

> The source of Congress's plenary power is in any case beside the point: Regardless of its source, it is well settled that Congress's power is plenary. It is a non sequitur to intimate that because the source of the plenary power *may* have changed from a "non-

100. 495 U.S. 676 (1990).

101. 324 F.3d at 638. Congress reaffirmed this inherent tribal power when it amended the definition of tribal self-government contained in the Indian Civil Rights Act, 25 U.S.C. § 1301(2), to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."

102. *Lara*, 324 F.3d at 639-40. In so holding, the Eighth Circuit reached the opposite conclusion as the one adopted by the Ninth Circuit in *United States v. Enas*, 255 F.3d 662 (9th Cir. 2001) (en banc), *cert. denied*, 534 U.S. 1115 (2002). For a discussion of *Enas*, see Alex Tallchief Skibine, *Making Sense out of* Nevada v. Hicks: *A Reinterpretation*, 14 St. Thomas L. Rev. 347, 362-68 (2001).

103. *Lara*, 324 F.3d at 639.

104. *See U.S. v. Weaselhead*, 156 F.3d 818 (8th Cir. 1998), *aff'd by an evenly divided court*, 165 F.3d 1209 (8th Cir. 1999) (en banc).

105. In *Weaselhead*, after stating that "a legislative enactment purporting to recast history in a manner that alters the Supreme Court's stated understanding of the organizing principles by which the Indian tribes were incorporated into our constitutional system of government," 156 F.3d at 823, the Eighth Circuit held that "ascertainment of first principles regarding the position of Indian tribes within our constitutional structure of government is a matter ultimately entrusted to the Court and thus beyond the scope of Congress's authority to alter retroactively by legislative fiat." *Id.* at 824.

106. *Lara*, 324 F.3d at 639.

107. *Id.* at 640 (quoting *Enas*, 255 F.3d at 675).

constitutional" to a constitutional source, Congress's ability to legislate is somehow circumscribed.[108]

Although, as explained in Part I, one of the purposes of this article is to demonstrate the falsity of the part of that statement asserting that congressional power is still plenary, I believe that the result reached by the dissent is nevertheless correct. In other words, one can take a diminished view of plenary power and still conclude that Congress has the authority to reaffirm inherent tribal powers even the Supreme Court has held that such powers are implicitly divested.

Ultimately, the question in *Lara* comes down to determining whether *Duro* was a constitutional decision. It seems that *Duro* can only be seen as a constitutional decision if there is something in the Constitution that "divests" tribes of inherent sovereignty. Although not sufficiently fleshed out by the *Lara* majority, properly understood, its position must be that it is the very description of aboriginal nations as "Indian tribes" within the Constitution that divests them of full sovereignty because such term implies a trust relationship subjecting tribes to the plenary power of Congress pursuant to the Indian Commerce Clause. As such, tribes can no longer exercise certain inherent powers without being authorized to do so by Congress, and this authorization can only come through delegation once such powers have been held to have been divested by the Supreme Court.

My argument—that the Court has abandoned the notion of an extra-constitutional plenary power but has justified an expanded notion of congressional power pursuant to the Indian commerce power by integrating the trust doctrine into the Constitution—does not address itself to any implicit limitations on inherent tribal powers. The Constitution no more divests than vests inherent sovereign powers on Indian tribes.[109] As stated by the *Lara* dissent in answering the majority's argument, "Even if the mere existence of the Indian commerce clause somehow restricted the powers that tribes inherently possess, moreover, inherent tribal sovereignty would still be a matter of federal common law."[110] To prove this point, the dissent drew an analogy to the court striking a state law as being in violation of the Dormant Commerce Clause. Congress can, by legislation, authorize the state to re-enact the stricken legislation without such new state action being undertaken pursuant to a "delegation" of federal authority.[111] Similarly, Congress can authorize the tribes to re-assume the exercise of a judicially pre-empted inherent power.

The inherent limitations on tribal power, therefore, do not come from the status of tribes within the Constitution, but from being described by the Court as domestic dependent nations having a trust relationship with the United States. At the center of this debate are the reasons for "domestic dependent status." The question is: why were the tribes downgraded from full international sovereigns to domestic dependent nations?

108. *Id.* at 645 (Arnold, Bowman, Murphy & Smith, JJ., dissenting).

109. Although as I have argued elsewhere, by recognizing the existence of political entities known as Indian tribes and vesting in Congress the power to regulate commerce with them, the Constitution implicitly recognizes that these entities must have some measure of self-government. *See* Alex Tallchief Skibine, *The Dialogic of Federalism in Federal Indian Law and the Rehnquist Court: The Need for Coherence and Integration*, 8 Tex. Forum Civ. Libs. & Civ. Rights 1 (2003).

110. 324 F.3d at 645 (Arnold, Bowman, Murphy & Smith, JJ., dissenting).

111. *Id.*

The dissent's argument is that although John Marshall, in *Cherokee Nation,* used the juxtaposition of Indian tribes, foreign nations, and states in the Commerce Clause to confirm that Indian tribes were neither states nor foreign nations, this juxtaposition within the constitutional text said nothing about the inherent powers of Indian tribes. Thus, the dissent argued that the status of tribes was initially derived from the application of the doctrine of discovery to the tribes.[112] Under the doctrine, "discovery gave title [to all Indian lands] to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession."[113] The doctrine, therefore, gave the discovering nation the exclusive right to acquire tribal territories either by purchase or conquest. The doctrine, however, has its roots in international, not constitutional, law.[114]

In effect, Congress, in the "*Duro* Fix," did not tell the Court that Indian tribes were not dependent domestic nations. It only stated that, contrary to the Court's view, this domestic dependent status and the existence of a trust relationship no longer implied that tribes were divested of the inherent power to prosecute non-member Indians. This conclusion must have been based on an unstated congressional finding that such tribal jurisdiction was no longer in conflict with the overriding sovereign interests of the United States.

D. Can the Trust Relationship Be Extended to Individual Indians?

Questions concerning whether the trust can be extended to individual Indians have been raised in two interrelated contexts. The first one is whether Congress can use its Indian commerce power to regulate individual Indians who are unaffiliated with any Indian tribes. The second one is whether Congress can extend its commerce power to confer preferences or disadvantages upon members of federally recognized Indian tribes in a non-tribal context.

Issues surrounding the first question are well illustrated by the difference between Justice Stevens's dissent and Justice Kennedy's majority opinion in *Rice v. Cayetano.*[115] First, Justice Kennedy held that the State of Hawaii's qualification for an election to select trustees to the Office of Hawaiian Affairs that restricted voting to Native Hawaiians was based on race because "[a]ncestry can be a proxy for race. It is that proxy here."[116] Second, the majority held that even if the Native Hawaiians were a tribe, "Congress may not authorize a State to create a voting scheme of this sort,"[117] because the election was not a tribal election for tribal office, but a state election for a state

112. *Id.* at 642 ("Chief Justice Marshall justified federal power over Indian tribes in terms of the right of discovery, a euphemism for the right of conquest.").

113. *M'Intosh,* 21 U.S. at 573.

114. *Lara,* 324 F.3d at 643 (Arnold, Bowman, Murphy & Smith, JJ., dissenting). Earlier, the dissent relied on Professor Frickey's argument that "the Supreme Court in the Marshall trilogy embraced pre-constitutional notions of the colonial process, rooted in the law of nations, involving both inherent tribal sovereignty and a colonial prerogative vested exclusively in the central government." *Id.* at 642 (quoting Frickey, *supra* n. 10, at 57) (internal quotations omitted).

115. 528 U.S. 495 (2000).

116. *Id.* at 514.

117. *Id.* at 519.

office.[118] As such, the voting restrictions were in violation of the Fifteenth Amendment.[119]

Justice Stevens, in dissent, summarized the majority as having held that the voting scheme was unconstitutional first because

> Congress' trust-based power is confined to dealings with tribes, not with individuals, and no tribe or indigenous sovereign entity is found among the native Hawaiians. Second, the elections are "elections of the State," not of a tribe, and upholding this law would be "to permit a State, by racial classification, to fence out whole classes of citizens . . . ."[120]

Stevens's summary of the majority's rationale implies that had the majority found that Native Hawaiians constituted an Indian tribe, it would not have held that ancestry was a proxy for race in this case. Stevens believed, however, that the majority took the wrong approach because the question of whether a tribe existed or not should have been irrelevant. The important issue was the existence of a trust relationship, and, according to Stevens, Congress can have a trust relationship with individuals even if there is no tribe.[121] Thus, he believed that a trust relationship had been created with the Native Hawaiian people because

> [t]he descendants of the native Hawaiians share with the descendants of the Native Americans on the mainland or in the Aleutian Islands not only a history of subjugation at the hands of colonial forces, but also a purposefully created and specialized "guardian-ward" relationship with the Government of the United States.[122]

Long before *Rice* was even filed or argued before the Supreme Court, Professor Benjamin predicted the result of such a case when he suggested that since the trust relationship was derived from the Indian Commerce Clause and since the clause is written in terms of allowing Congress to regulate commerce with "Indian tribes," the clause could not justify special treatment for Native Hawaiians in the absence of a Native Hawaiian Indian tribe.[123] In other words, according to Professor Benjamin, the trust relationship is with Indian tribes, not individual Indians. The thesis proposed in this article supports the part of Professor Benjamin's argument that the trust doctrine cannot extend to individual Indians not associated with a tribe. Thus, since both the power of Congress and the trust doctrine have been integrated into the Constitution and are now considered derived from the Indian Commerce Clause, it follows that Congress can only extend the trust relationship in connection with regulating commerce with Indian tribes.

This should not be taken as an indication that I agree with Professor Benjamin's ultimate premise that there is no Native Hawaiian Indian tribe. However, because I do not believe that the trust relationship can be extended to individual Indians unaffiliated with tribes, I would have slightly altered Justice Stevens's argument in *Rice* by adding that while the United States does not currently recognize any tribal government

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118. *Id.*

119. *Id.* at 524.

120. *Rice*, 528 U.S. at 534 (Stevens & Ginsburg, JJ., dissenting) (quoting *id.* at 522 (majority)) (citation omitted).

121. *Id.* at 535.

122. *Id.* at 534.

123. Benjamin, *supra* n. 19.

representing all Native Hawaiians, that fact alone does not mean that the Native Hawaiians are not an Indian tribe for the purpose of coming under the congressional Indian commerce power.[124] Simply put, the very reason that Native Hawaiians do not have a Native Hawaiian government is that the United States destroyed it.[125] Although the United States stopped recognizing the national Hawaiian leadership, this does not mean that Congress stopped looking at Native Hawaiians as a conquered people. There are many instances throughout history where the United States actively sought to capture, kill, or otherwise destroy tribal leaders and tribal governments.[126] The fact that the United States was successful in many of these instances does not mean that those suddenly leaderless tribes ceased to be recognized as Indian tribes. What makes a tribe an "Indian" tribe for the purpose of the trust relationship and the Indian Commerce Clause is that the tribe has been subjected to the doctrine of discovery, which brings about a trust relationship with the United States. As late as 1955, the Alaskan Indians, in the notorious *Tee-Hit-Ton v. United States*[127] case, were held to come under the doctrine of discovery. This meant that the United States could take their property without giving them just compensation.[128] There is no doubt in my mind that faced with a similar claim from a Native Hawaiian group, the *Tee-Hit-Ton* Court would have held that such group also came under the doctrine of discovery and should not be compensated.

The next issue concerns the power of Congress to enact special legislation for members of federally recognized Indian tribes outside a tribal context. The recent case of *American Federation of Government Employees, AFL-CIO v. United States*[129] brought this issue sharply into focus. The plaintiffs in *American Federation* alleged that a program granting a special exemption to Native American-owned firms doing business with the Air Force constituted a violation of the Equal Protection Clause.[130] The issue was whether such special treatment should be subject to strict scrutiny because it amounted to discrimination based on race.[131] The D.C. Circuit agreed that to the extent the exemption was given to Native American-owned firms or even firms owned by tribal members, it would raise serious constitutional concerns.[132] The court therefore decided to treat the case as one giving preference only to tribally owned businesses. As such, the court held that the classification was not based on race but was made on political

124. *See Jt. Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 376-77 (1st Cir. 1975) (holding that the Indian Trade and Non-Intercourse Act was applicable to any tribe, even those not officially recognized by the federal government).

125. Thus the majority stated that "with the active assistance of John Stevens, the United States Minister to Hawaii, acting with United States Armed Forces, replaced the monarchy with a provisional government." *Rice*, 528 U.S. at 505.

126. For instance, in 1900, the Bureau of Indian Affairs dismissed the government of the Osage Tribe and suspended the Osage tribal constitution. *See Logan v. Andrus*, 457 F. Supp. 1318 (N.D. Okla. 1978). Other tribes have been similarly treated. *See Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976) (doing essentially the same thing to the Creek Nation); *see generally* John Tebbel & Keith Jennison, *The American Indian Wars* (Bonanza Bks. 1960).

127. 348 U.S. 272 (1955).

128. *Id.* at 290-91.

129. 330 F.3d 513 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 957 (2003).

130. *Id.* at 516-17.

131. *See id.* at 521.

132. *Id.* at 519-20.

grounds.[133] The applicable test, therefore, was *Mancari*'s "rationally related to the trust relationship" test, and the court was able to find the special exemption constitutional because it was related to the non-racial goal of fostering tribal economic development.[134]

The court acknowledged that the preference given there extended beyond *Mancari*'s confines in that it was not limited to programs solely benefiting Indians or Indian reservations.[135] At the same time, the court noted that the preference was also narrower than the one in *Mancari* since it was only given to tribally owned firms. The court was therefore able to conclude that "[t]he critical consideration is Congress' power to regulate commerce 'with the Indian tribes.' While Congress may use this power to regulate tribal members, regulation of commerce with tribes is at the heart of the Clause, particularly when the tribal commerce is with the federal government . . . ."[136]

The case squarely raised the issue of how far the reach of *Mancari* can be extended to transform what would otherwise be classifications based on race to ones made along political lines. The issue is important because without *Mancari*, such classifications would be subject to the strict scrutiny test instead of the rationally related to the trust relationship test.[137] Although one could take the broad view and argue that *Mancari* is applicable whenever the government enacts a law for the benefit of Indians—because if it is to their "benefit," it must have been enacted pursuant to the trust relationship—that answer is too facile and circuitous. In other words, it ignores that Congress's power to use the trust doctrine to boost its regular commerce power may be limited.

Notions that *Mancari*'s reach may have some inherent limitations were first proposed by David Williams, who argued that the strict scrutiny test should apply to all laws treating Indians differently unless such laws were enacted to protect Indians as "separate peoples" living inside Indian reservations.[138] In effect, Professor Williams argued that if the legislation was not enacted for these purposes, the Fifth and Fourteenth Amendments trumped the Indian Commerce Clause. Professor Goldberg responded that even though Indians were thought not to come under these amendments at the time of their adoption because Indians were not yet United States citizens considered to be under the political jurisdiction of the federal government,[139] Indians certainly are citizens now, and the Court is therefore not about to adopt Williams's thesis.[140] According to Goldberg, a much simpler and cleaner argument for allowing Congress to treat Indians differently is that Indian tribes were singled out for special treatment in the Commerce Clause. Since the very mention of "Indian tribes" in the Constitution has racial

133. *Id.* at 521.

134. *Am. Fedn.*, 330 F.3d at 522-23.

135. *Id.* at 521.

136. *Id.* (citation omitted).

137. *See* Wayne R. Farnsworth, Student Author, *Bureau of Indian Affairs Hiring Preferences after* Adarand Constructors, Inc. v. Pena, 1996 BYU L. Rev. 503; Frank Shockey, *"Invidious" American Indian Tribal Sovereignty*: Morton v. Mancari Contra Adarand Constructors, Inc., v. Pena, Rice v. Cayetano, *and Other Recent Cases*, 25 Am. Indian L. Rev. 275 (2000-2001).

138. David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. Rev. 759 (1991).

139. *See Elk v. Wilkins*, 112 U.S. 94, 109 (1884).

140. Goldberg-Ambrose, *supra* n. 18.

connotations,[141] it implicitly allows Congress to treat Indians differently without such legislation being attacked as racial discrimination under the Fifth or Fourteenth Amendments.[142] Professor Williams countered Professor Goldberg's theory by arguing that it goes too far in that it would also allow Congress to enact laws that are detrimental to Indians.[143] Although Professor Goldberg had argued that the trust relationship imposed some limits on Congress's ability to enact laws discriminating against Indians, Williams asserted that history has shown that courts have not been disposed to use the trust relationship to impose constraints on congressional power.[144]

In her last effort to date on this issue, Professor Goldberg acknowledged that her Commerce Clause argument was vulnerable to arguments such as those raised by Professor Benjamin that the Commerce Clause only purports to authorize Congress to regulate Indian tribes and not individual Indians.[145] However, she countered that as long as legislation benefiting individual Indians had a nexus with tribal interests, it should still be evaluated pursuant to *Mancari*'s "rationally related" test.[146] I believe that Professor Goldberg's argument that the Indian commerce power can extend to individual Indians as long as there is a congressionally identified nexus to a tribal interest adequately cures any potential problems.

Under the argument developed in this article, however, this would mean that laws that regulate individual Indians in matters *unconnected* to tribal self-government, economic development, or cultural protection should be subjected to strict scrutiny[147] since the special treatment of Indians would become a racial classification under the Fifth and Fourteenth Amendments of the Constitution. Thus, certain laws that have historically treated individual Indians differently should now be re-evaluated under strict scrutiny. This should be the case for many of the liquor laws that prohibited the selling of liquor to Indians. The question to ask here is not whether such laws were enacted for the benefit of individual Indians, but whether they were enacted pursuant to the trust relationship. In other words, are those laws connected to a tribal interest in that they were enacted in order to promote tribal self-government, tribal economic self-

141. There is no question that the term "Indian tribes" has racial connotations. After all, the political entities populating this country before the arrival of the white man were neither "Indian" nor "tribes." For sure, the term "Indian" has a racial connotation. It was used in conjunction with the word "tribes" to encompass all pre-existing political entities whose members were predominantly of the "Indian" race. The term "tribe" has ethnological connotations in that, unlike all the citizens in a state, all the members of a tribe are considered descended from common ancestors. "Tribes" also denotes an earlier form of organized society, perhaps implying a pre-civilized status in that, etymologically speaking, a tribe can be viewed as a political organization preceding the creation of a "state," which can be conceived as a consolidation of many tribes.

142. This argument had also been proposed by Professor Clinton in an earlier article. *See* Clinton, *supra* n. 54, at 980-82.

143. *See* Williams, *supra* n. 21, at 202-04.

144. Other scholars have agreed. *See* Gould, *supra* n. 8, at 713-17 (citing *Fisher v. Dist. Ct.*, 424 U.S. 382 (1976); *Antelope*, 430 U.S. 641; and *Weeks*, 430 U.S. 73, as cases where use of the lesser degree of scrutiny hurt Indian interests).

145. *See* Benjamin, *supra* n. 19; Carole Goldberg, *American Indians and "Preferential" Treatment*, 49 UCLA L. Rev. 943, 968-69 (2002).

146. Goldberg, *supra* n. 145, at 971 ("I suggest that the Indian Commerce Clause response requires the application of a criterion for 'Indianness,' and a nexus between benefiting individual Indians and benefiting a tribe.").

147. For further discussion, see Wood, *supra* note 23 and accompanying text (enumerating the attributes of tribal sovereignty protected under the trust relationship).

sufficiency, or tribal cultural preservation? To the extent that such laws preempted tribal choice on this issue, I do not think they were enacted to protect tribal self-government.[148]

Under my argument, this would mean that such laws could be valid only if they withstood the strict scrutiny test. Even if they did, they would only be valid if Congress could have enacted such laws under a regular version of its commerce power. While I have no doubt that, under its regular Indian commerce power, Congress could enact laws prohibiting the introduction of liquor for resale purposes inside Indian country, it would not have been able to prohibit the sale of liquor to individual Indians outside Indian reservations unless such prohibition was also applicable to everyone else. Similarly, it could not have prohibited the drinking of liquor by Indians inside Indian reservations or the making of liquor within Indian country for local consumption.

III. CONCLUSION

Initially derived from the doctrine of discovery, the plenary power of Congress over Indian tribes was first believed to come from the inherent right of the ultimate sovereign to govern everything within its geographical boundaries. By the early 1900s, the source of the plenary power had migrated to the trust doctrine and was thought to be extra-constitutional. Finally, in the 1970s, the source was identified as the Constitution's Indian Commerce Clause.[149] Yet, when it comes to the "plenary" aspect of the power, it seems that the more things change the more they stay the same. The power is still "plenary." This article has argued that this thinking shows that the Court wants to "have its cake and eat it, too," when, in fact, they cannot have it both ways.

The Supreme Court has acknowledged that because the source of congressional power is now thought to be derived from the Constitution, Congress can no longer deny Indians their individual constitutional rights. This article has argued that the same reasoning should apply to the rights of tribes to self-government. While the tribes' right to self-government is not a constitutional right, the power of Congress to interfere with such rights beyond the regulation of commerce should be confined to what is necessary to carry out the trust relationship or, in other words, to protect what one scholar has termed the "attributes of native sovereignty."[150]

148. For a comprehensive treatment of the liquor laws and support for this statement, see Robert J. Miller & Maril Hazlett, *The "Drunken Indian": Myth Distilled into Reality through Federal Indian Alcohol Policy*, 28 Ariz. St. L.J. 223 (1996).

149. Also mentioned was the treaty power, but this power has not been used since 1871.

150. *See* Wood, *supra* n. 23.