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EXECUTIVE PREROGATIVES IN FEDERAL INDIAN JURISPRUDENCE: THE CONSTITUTIONAL LAW OF TRIBAL RECOGNITION

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INTRODUCTION

When is an Indian tribe an Indian tribe? Just as importantly, who may make this decision? Jurisprudentially, such questions are quite significant, since Native American tribal institutions occupy a unique place in American jurisprudence. When an Indian[1] group is declared to be an Indian tribe for purposes of federal law, dramatic legal consequences result: the group receives certain important powers of self-government within a defined territory, the group is brought within the reach of an enormously far-reaching federal supervisory power, and members of that group and the territory they inhabit can be withdrawn from the jurisdiction of the state in which they are located. The federal government's powers over Indian affairs are predicated upon this recognition function.

At present, this recognition function is carried out through an ordinary administrative process authorized by congressional statute. Congress has given the President the power to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs."[2] Pursuant to these provisions, the President, through the Secretary of Interior has promulgated rules to control the federal government's "acknowledg[ment] that certain American Indian groups exist as tribes."[3] Federal acknowledgment "is a prerequisite to the protection, services, and benefits of the federal government available to Indian tribes by virtue of their status as tribes."[4]

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1. This article will use the ancient misnomer "Indian" to refer to Native Americans, both for reasons of convenience and because the use of this term in United States legal contexts—e.g., court holdings and federal legislation—remains as yet unsupplanted by more accurate phrasing.

2. 25 U.S.C. § 9 (1988).

3. 25 C.F.R. § 83.2 (1995).

4. *Id.*

If a group wishes to have itself acknowledged as an Indian "tribe" for purposes of federal Indian law, it must overcome a series of administrative obstacles, beginning with the filing of a letter of intent to achieve tribal status with the Department of the Interior[5] and culminating in a formal petition detailing their claim to such status and marshaling evidence for it.[6] If, after a formal administrative notice-and-comment period,[7] elaborate procedures for hearings and the publication of proposed findings,[8] and formal reconsideration of adverse determinations,[9] the Assistant Secretary of the Interior determines that the group "satisfies all of the [specified] criteria" for tribal status, he or she is obliged to declare the group a tribe.[10]

The standards for tribal acknowledgment, as set out in the relevant federal regulations, require the candidate group to meet seven basic criteria. The group must have been "identified as an American Indian entity on a substantially continuous basis since 1900,"[11] and "[a] predominant portion of the petitioning group [must comprise] a distinct community [that] has existed as a community from historical times until the present."[12] The group must also have "maintained political influence or authority over its members as an autonomous entity from historical times until the present,"[13] must provide the Department of the Interior with a copy of its "governing document" or "a statement describing in full its membership criteria and current governing procedures,"[14] and demonstrate that its "membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity."[15]

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5. *Id.* § 83.4.

6. *Id.* § 83.6(a). The regulations, however, note that evaluation of such petitions "shall take into account historical situations and time periods for which evidence is demonstrably limited or not available. The limitations inherent in demonstrating the historical existence of community and political influence or authority shall also be taken into account." *Id.* § 83.6(e).

7. *Id.* § 89.3.

8. *Id.* § 83.10.

9. *Id.* § 83.10-.11.

10. *Id.* § 83.10(m).

11. *Id.* § 83.7(a). Sub-sections 83.7(a)(1)-(6) list a series of ways in which this identification may have taken place—such as identification as an Indian entity by anthropologists and historians, § 83.7(a)(4), or a course of dealing with a county, parish or other local government on a basis predicated upon the group's Indian identity, § 83.7(a)(3)—any one or combination of which will allow the petitioner group to meet the "identification" criterion of § 83.7(a).

12. *Id.* § 83.7(b); *see also id.* § 83.7(b)(1)-(2) (giving examples of how continuous existence might be shown). For these purposes, incidently, "historical times" means "dating from first sustained contact [of the group] with non-Indians." *See Id.* § 83.1.

13. *Id.* § 83.7(c); *see also id.* § 83.7(c)(1)-(2) (giving examples of ways to show such maintenance of political influence or authority).

14. *Id.* § 83.7(d).

15. *Id.* § 83.7(e). The petitioner group must also provide "an official membership list, separately certified by the group's governing body, of all known current members of the group." *Id.* § 83.7(e)(2). These regulations are poorly drafted. Since "tribe" is defined simply as any Indian community "that the Secretary of the Interior presently acknowledges to exist as an Indian tribe," *id.*, § 83.7(e) might seem to require that the petitioner group consist of persons descended from an Indian community presently recognized by the Department of the Interior. This seemingly restrictive condition may not be rigidly applied in practice. Moreover, because "historical" is defined as "dating from [the] first sustained contact with non-Indians," *id.* § 83.1, the rule might seem even to require candidate groups be descended from those so recognized from the time of the first Indian-European contacts—long before there *was* a Department of the Interior.

Finally, neither the petitioner group nor its members can be "the subject of congressional legislation that has expressly terminated or forbidden" federal relations with that group as an Indian tribe.[16]

The administrative process of Indian acknowledgment is conducted by the executive branch pursuant to a statute enacted by a legislature given the constitutional power "[t]o regulate Commerce . . . with the Indian Tribes."[17] This is the federal government's means of designating the groups that form the focus of its power to regulate Indian affairs. It may be, however, that this process is not the only way tribal acknowledgment can come about.

Despite the legislature's general preeminence in Indian affairs under the so-called Indian Commerce Clause, the federal government's Indian authority is not wholly monopolized by Congress. Rather, the doctrine of tribal sovereignty and the government-to-government character of federal relations with Indian tribes—principles that necessarily underpin the entire corpus of Indian-affairs jurisprudence—suggest also an important role for the executive branch, particularly with respect to matters of tribal recognition. Despite the seeming assumption by generations of courts and commentators that federal power over Indian affairs is left entirely in the hands of Congress, there also exists an important *independent* presidential power. That is, the fundamentally political nature of the federal-Indian relationship implicates the same constitutionally-given executive power involved in the recognition of sovereign governments in foreign relations.

In order to explain the origins of this power and to examine its parameters, this article examines the fundamental doctrines of tribal sovereignty and political relations that underlie federal Indian law, explores the necessary dependence of *all* Indian law upon this doctrine, and outlines the constitutional division of Indian-affairs powers that flows from this understanding. The article concludes that the President possesses a power of tribal recognition (or acknowledgment) entirely independent of legislative enactment. While this conclusion might conceivably lead to judicially-insoluble political conflicts with Congress, it is the inexorable result of the political character of federal-Indian relations.

I. THE BACKDROP OF TRIBAL SOVEREIGNTY

The doctrine of Native American tribal sovereignty has its root in three seminal Supreme Court cases from the early nineteenth century, *Johnson v. M'Intosh*,[18] *Cherokee Nation v. Georgia*,[19] and *Worcester v. Georgia*,[20] all written by Chief Justice John Marshall. Together, these decisions set forth the

16. *Id.* § 83.7(g); *see also id.* § 83.3(e) ("[G]roups which are, or the members of which are, subject to congressional legislation terminating or forbidding the Federal relationship may not be acknowledged under this part.").

17. U.S. CONST. art. I, § 8, cl. 3.

18. 21 U.S. (8 Wheat.) 543 (1823).

19. 30 U.S. (5 Pet.) 1 (1831).

20. 31 U.S. (6 Pet.) 515 (1832).

theoretical groundwork for the entirety of federal Indian law: the doctrine of tribal sovereignty. Only against this backdrop can the importance of government-to-government relations between tribes and the United States be understood, and the centrality of the recognition power in federal Indian law be explained.

A. *Tribal Sovereignty Doctrine*

As recounted by Chief Justice Marshall, Indian sovereignty is largely a story of conquest. Before the coming of Europeans to the eastern shores of North America,[21] the continent was:

> held, occupied, and possessed, in full sovereignty, by various independent tribes or nations of Indians, who were the sovereigns of their respective portions of the territory, and the absolute owners and proprietors of the soil; and who neither acknowledged nor owed any allegiance or obedience to any European sovereign or state whatever.[22]

Chief Justice Marshall recognized that the Indians of North America formed "a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws."[23] These tribes were sovereign nations, even if Europeans might not have recognized them as such.

The arrival of European explorers, traders and settlers on the shores of this "new" continent, however, sharply abridged this original sovereignty. Keen to seize as much as possible of the New World for themselves, but not wishing to become embroiled in endless wars for the adjustment of colonial boundaries, the Europeans arrived at a territorial *modus vivendi* by which "the nation making the discovery [of a particular area received] the sole right of acquiring the soil from the natives"[24] in that area—by any means the "discovering" power found to be appropriate.

> [A]s they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title 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.[25]

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21. Chief Justice Marshall restricted his consideration of Indian sovereignty, in these cases, to those portions of North America claimed at various points by Dutch, English, and French authorities. Of the Native American populations further south, such as the Aztec empire crushed by Cortez, and the Incas conquered by Francisco Pizarro shortly thereafter, the Chief Justice had nothing to say.

22. *Johnson*, 21 U.S. (8 Wheat.) at 545.

23. *Worcester*, 31 U.S. (6 Pet.) at 542-43.

24. *Johnson*, 21 U.S. (8 Wheat.) at 573.

25. *Id.*; *see also Worcester*, 31 U.S. (6 Pet.) at 544 (discussing how "[t]his principle, [was]

The simple act of "discovery," then, was deemed to give "an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."[26]

The roots of this Discovery Doctrine lay solely in the vast power differential between the technologically advanced Europeans and the Indians inhabiting North America. Chief Justice Marshall made no pretense that this was at all a just result. He appears, in fact, to have felt it quite unjust, and may have perceived himself to be steering a middle course more solicitous of Indian interests than many of his white countrymen would have preferred.[27] Indeed, he noted the doctrine was not followed by Europeans venturing elsewhere in the world.[28] This was a doctrine imposed by force with which Marshall seemed deeply uneasy, but it was one which he felt unable, at that late date of 1823, to question.

> However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.[29]

"Conquest," he wrote, "gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be,

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acknowledged by all Europeans, because it was the interest of all to acknowledge it, [and] gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it").

26. *Johnson*, 21 U.S. (8 Wheat.) at 587.

27. *See generally* DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW 78 (3d ed. 1993) ("In concluding that discovery gave the United States the exclusive right to extinguish the original tribal right of possession 'by purchase or conquest,' Marshall avoided the two logical extremes: that discovery erased all Indian title and that Indians had fee title unaffected by discovery."); Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 48 (1948) (noting that two logical extreme positions "produced a cruel dilemma" by offering alternatives of absolute extinguishment and absolute Indian land rights). To insist upon the latter alternative was, even by 1823, practically impossible, but Marshall appears to have felt the former morally impermissible. In 1832, he wrote it would be difficult:

> to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.

Worcester, 31 U.S. (6 Pet.) at 543. To suggest that the "feeble settlements made on the sea coast . . . acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man" and was an "extravagant and absurd idea." *Id.* at 544-45.

28. Justice Johnson, concurring in *Cherokee Nation*, observed, for example:

> When the populous and civilized nations beyond the Cape of Good Hope [i.e., in South Asia and the Orient] were visited [by Europeans], the right of discovery was made the ground of an exclusive right to their trade, and confined to that limit. When the eastern coast of this continent, and especially the part we inhabit, was discovered, finding it occupied by a race of hunters, connected in society by scarcely a semblance of organic government; the right was extended to the absolute appropriation of the territory, the annexation of it to the domain of the discoverer.

Cherokee Nation, 30 U.S. (5 Pet.) at 22 (Johnson, J., concurring).

29. *Johnson*, 21 U.S. (8 Wheat.) at 591-92.

respecting the original justice of the claim which has been successfully asserted."[30] The Discovery Doctrine, therefore, was a rule derived less from the dictates of any abstract justice than from "the actual state of things."[31]

One of the most significant legal effects of this doctrine was to afford European "discoverers" the so-called right of preemption or of extinguishment,[32] allowing them to exclude other European powers,[33] and to appropriate Indian lands.[34] The Indian occupants of these lands retained a usufructuary right of possession and use—"a legal as well as just claim to retain possession of [the soil], and to use it according to their own discretion"[35]—but the tribe possessed no power to dispose of actual title.[36]

> Under the so-called Doctrine of Discovery . . . the discovering nations held fee title to Indian land, subject to the Indians' right of occupancy and use. This distinction between fee title and the Indians' right of occupancy and use, sometimes called Indian title or aboriginal title, gave rise to a corresponding distinction between the rights to affect fee title and Indian title. The right to extinguish Indian title,

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30. *Id.* at 588. Justice Marshall felt bound, he averred, to consider "not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man . . . but those principles also which our own government has adopted in the particular case, and given us as the rule for our decision." *Id.* at 572. Marshall suggested that principles of "humanity" required "as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest." *Id.* at 589. He viewed the ultimate object of Indian policy, however, as the complete assimilation of the Indians:

> When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and hazard to his power.

Id. at 589-90. In such circumstances,

> humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connexions, and united by force to strangers.

Id. at 589. Even here, however, he added an ominous note, suggesting that the American Indians had been too warlike for this to work properly—with the result that humane governance was too often "incapable of application to a people under such circumstances" and recourse had to be had to relations "better adapted to the actual state of things." *Id.* at 591.

31. *Worcester*, 31 U.S. (6 Pet.) at 543. "The title by conquest is acquired and maintained by force. The conqueror prescribes its limits." *Johnson*, 21 U.S. (8 Wheat.) at 589.

32. Oneida Nation v. New York, 860 F.2d 1145, 1150 (2d Cir. 1988), *cert. denied*, 493 U.S. 871 (1989).

33. *Johnson*, 21 U.S. (8 Wheat.) at 573.

34. Interestingly, in *Worcester*, Justice M'Lean's concurrence advocated the position that Europeans had a right under "[t]he law of nature, which is paramount to all other laws" to take possession of land necessary for agricultural survival "without negotiation or purchase from the native Indians" inhabiting it. *See Worchester*, 31 U.S. (6 Pet.) at 579 (M'Lean, J., concurring).

35. *Johnson*, 21 U.S. (8 Wheat.) at 574; *see also* Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667 (1974) (establishing that although Indians did not hold title to land, they nevertheless possessed a recognized right of occupancy which could be extinguished only by the federal government); Northwestern Bands of Shoshone Indians v. United States, 324 U.S. 335, 339 (1945) (explaining that Indians possessed a quasi right of occupancy termed "Indian title").

36. *See* CONFERENCE OF WESTERN ATTORNEY GENERALS, AMERICAN INDIAN LAW DESKBOOK 3 (Julie Wrend & Clay Smith eds., 1993) [hereinafter DESKBOOK] ("The right to occupy was therefore deemed usufructuary in nature and vested no ownership interest in a tribe that the tribe could alienate.").

> sometimes called a right of extinguishment, was held by the sovereign—Great Britain in the period prior to the American Revolution. . . . Since the adoption of the Constitution, there has been broad agreement that the right of extinguishment belongs to the national government.[37]

Lacking the power "to dispose of the soil at their own will, to whomsoever they pleased,"[38] the Indians' "discovery" by Europeans ceded to those Europeans the claim "to the complete ultimate title [of land], charged with [a] right of possession, and to the exclusive power of acquiring that right."[39]

The powers of the discovering sovereign were not only exclusive *vis-à-vis* every other European power,[40] but were also lodged exclusively in the United States government itself, rather than its constituent states. This left these states no power over the Indians except that which might be exercised with federal consent. An Indian tribe was:

> a distinct community occupying its own territory, with boundaries accurately described, in which the laws of [a state] can have no force, and which the citizens of [that state] have no right to enter, but with the assent of the [Indians] themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this [Indian] nation, is, by our constitution and laws, vested in the government of the United States.[41]

The discoverer's rights possessed by the British Crown had passed directly to the federal authorities with the treaty that ended the Revolutionary War in 1781.[42]

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37. *Oneida*, 860 F.2d at 1150 (citations omitted).

38. *Johnson*, 21 U.S. (8 Wheat.) at 574.

39. *Id.* at 603.

40. "Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them." *Id.* at 573.

41. *Worcester*, 31 U.S. (6 Pet.) at 561. This case arose out of an attempt by the state of Georgia to completely dissolve the Cherokee tribal government and absorb tribal lands into the ordinary jurisdiction and control of state authorities. State laws in 1829 and 1830 banned all tribal acts of legislation and judicial proceedings, prohibited whites from residing in Indian areas without a permit from the state (a license which required the swearing of an oath of loyalty to Georgia), divided the Cherokee lands among five Georgia counties, and extended state laws to cover all Cherokee affairs within the state's boundaries. The case arose out of the prosecution of Worcester, a missionary from Vermont, and several others for living in Cherokee country without the requisite license. *Id.* at 525-28.

42. *Johnson*, 21 U.S. (8 Wheat.) at 584; *see also Worcester*, 31 U.S. (6 Pet.) at 544 (stating that "[t]he United States succeeded to all the claims of Great Britain, both territorial and political"); *id.* at 557 (observing that treaties with Indians provide that "the Indian territory [was] completely separated from that of the states; and . . . that all intercourse with them shall be carried on exclusively by the government of the union").

Since then no legal transfer of Indian title is possible unless the United States itself has been party to the proceeding. *See, e.g.*, *Oneida*, 414 U.S. at 670 (holding that "[t]he rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States"); United States v. Candelaria, 271 U.S. 432, 443 (1926) (explaining that as wards of the federal government, Indians "hold their lands subject to the restriction that [their lands] cannot be alienated" without the consent of the federal government); *see also* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 245 (1985) (noting that the Nonintercourse Act of 1793 "merely codified the principle that a sovereign act was required to extin-

The theory of Indian sovereignty underlies the unique relationship between the tribes and the United States government, one "unlike that of any other two people[s] in existence . . . [and] marked by peculiar and cardinal distinctions which exist no where else."[43] As Justice Marshall famously phrased it in *Cherokee Nation*:

> Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated *domestic dependent nations*. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.[44]

Indian tribes were considered neither states of the union nor "foreign" powers within the meaning of the United States Constitution, but an odd hybrid of the two, born of Justice Marshall's attempt to square "the actual state of things"[45] with the dictates of legal principle.

The status of Indian tribes as both "distinct, independent political communities . . . [and] 'a people distinct from others'"[46] gave them a unique constitutional status. As "quasi-sovereign nations," the federal constitution "applies to Indian nations only to the extent it expressly binds them or is made binding on them by treaty or Act of Congress."[47] "As separate sovereigns pre-existing

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guish aboriginal title and thus that a conveyance without the sovereign's consent was void *ab initio*"); *Oneida*, 860 F.2d at 1159 (quoting PROCEEDINGS OF THE COMMISSIONERS OF INDIAN AFFAIRS 166 n.1 (Hough ed., 1861) and 3 THE WRITINGS OF THOMAS JEFFERSON 19 (Andrew A. Lipscomb & Albert E. Bergh eds., 1903) to demonstrate George Washington and Thomas Jefferson's understanding of this principle). Nor, it was held, could Indian tribes be "removed" from existing reservations to locations further west—a process that occurred repeatedly as areas of white settlement expanded—except by federal authority. Fellows v. Blacksmith, 60 U.S. (19 How.) 366, 371 (1856).

As *Worcester* showed, state criminal laws could not reach within a tribal reservation absent an express congressional enactment to the contrary. *Worchester*, 31 U.S. (6 Pet.) at 561. However, "Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973). Nor did states have the power, for example, to tax Indian reservation lands or income derived from activity thereupon. *See* McClanahan v. State Tax Comm'n, 411 U.S. 164, 165 (1973).

43. *Cherokee Nation*, 30 U.S. (5 Pet.) at 15.

44. *Id.* at 17 (emphasis added). In *Cherokee Nation*, the issue before the Supreme Court was whether the Cherokees should be considered a "foreign nation" for purposes of federal diversity jurisdiction. *Id.* at 20; *see* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."). The tribe did not, for some reason, assert federal question jurisdiction under the United States Constitution which states "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." *See Cherokee Nation*, 30 U.S. (5 Pet.) at 20; *see also* DESKBOOK, *supra* note 36, at 2 n.5.

45. *See supra* text accompanying note 31.

46. *Worcester*, 31 U.S. (6 Pet.) at 559.

47. Groundhog v. Keeler, 442 F.2d 674, 678 (10th Cir. 1971) (footnotes omitted); *see also*

the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."[48]

> As extraconstitutional political bodies, [tribes] are not subject to the constraints imposed upon the federal government and the states by the Bill of Rights, and maintain broad powers over internal tribal matters. They further possess common-law immunity from suit for reservation-based transactions absent express congressional or tribal consent or implied waiver.[49]

Since 1968, the tribes have indeed been made subject to much of the federal Bill of Rights.[50] However, this was only by express congressional enactment, and these guarantees are not at all coextensive with those which operate against the federal government in the original Bill of Rights[51] and against the states by virtue of the provisions of the Fourteenth Amendment.[52] The Equal Protection Clause of the Indian Civil Rights Act (ICRA)[53] is narrower than its federal constitutional analogue[54] because it seeks to balance the right of individuals to be free from discrimination against the interest of the tribe itself in self-government.[55]

Trans-Canada Enters. v. Muckleshoot Indian Tribe, 634 F.2d 474, 476-77 (9th Cir. 1980) (stating that "[c]onstitutional guarantees . . . are not applicable to the exercise of governmental powers by an Indian tribe except to the extent that [these guarantees] are made explicitly binding by the Constitution or are imposed by Congress"); Tom v. Sutton, 533 F.2d 1101, 1102-03 (9th Cir. 1976) (citing several decisions "finding the Constitution inapplicable to Indian tribes, Indian courts and Indians on the reservation").

48. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

49. DESKBOOK, *supra* note 36, at 5 (footnotes omitted). As the Supreme Court explained in *Santa Clara Pueblo*, Indian tribes were immune to suit without their consent absent "congressional authorization"—which could only be accomplished with clear and unambiguous statutory intent. *Santa Clara Pueblo*, 436 U.S. at 58.

50. This was accomplished by the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-1341 (1988 & Supp. V 1993), which provided that "[n]o Indian tribe in exercising the powers of self-government" shall: (1) make any law abridging the freedom of religion, speech, press or assembly; (2) conduct unreasonable searches or make unreasonable seizures; (3) subject persons to double jeopardy; (4) compel witness or defendant self-incrimination; (5) take private property without providing just compensation; (6) deny defendants speedy and public trials or the ability to exercise their right to counsel or their right to be informed of charges levied against them; (7) require excessive bail; (8) deny equal protection or due process; (9) adopt any bill of attainder or *ex post facto* law; or (10) deny a jury, of at least six persons, to any defendant accused of an offense punishable by imprisonment who requests a jury trial. 25 U.S.C. § 1302 (1988).

51. U.S. CONST. amends. I-X.

52. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.").

53. 25 U.S.C. § 1302(8) (1988).

54. *See* Wounded Head v. Tribal Council of the Oglala Sioux Tribe, 507 F.2d 1079, 1082 (8th Cir. 1975).

55. Justice Thurgood Marshall, writing for the Court, explicitly noted this tension, concluding that the ICRA had not adopted the full federal Bill of Rights in order to accommodate "the unique political, cultural, and economic needs of tribal governments." *Santa Clara Pueblo*, 436 U.S. at 62-63. He adopted the district court's original finding that sex discrimination in tribal membership rules that reinforced "traditional values of patriarchy"—the Pueblo had adopted a rule which denied tribal membership to the children of tribal women and non-members—"were basic

The practical impact of Chief Justice Marshall's tribal sovereignty doctrine has changed somewhat over time, as federal laws have intruded increasingly upon areas of tribal self-government which had been left to the Indians.[56] The jurisprudential wall Marshall constructed between state law and tribal self-government in *Worcester v. Georgia*[57] has also been undermined. Today, the ability of a state to extend its jurisdiction over Indian affairs is judged according to the extent to which this would "undermine the authority of the tribal courts over Reservation affairs and hence . . . infringe on the right of the Indians to govern themselves."[58]

> The conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester v. Georgia* has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government. The upshot has been the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law.[59]

Nevertheless, while the contours of tribal sovereignty have been modified by the exercise of federal power, the doctrine still serves as the core of federal Indian law, and the foundation of everything that makes it distinctive and distinguishes the legal status of Indians from that of all other persons within the reach of the United States Constitution. It is the centrality of this doctrine that ultimately leads us to the importance of the recognition power in Indian affairs.

B. *The Trust Responsibility*

The peculiarities of tribal status under federal Indian law go beyond merely the "sovereign" character of tribal political authority. It has long been recognized that the legacy of discovery and conquest imposes a duty upon the United States deriving from the "paternal superintendence of the government" over Indian tribes,[60] a trust responsibility which Chief Justice Marshall

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to the tribe's survival as a cultural and economic entity." *Id.* at 53-54.

56. *See* Indian Civil Rights Act, 25 U.S.C. § 1302 (1988) (extending certain provisions of the Bill of Rights to tribal governments); Major Crimes Act, 18 U.S.C. § 1153 (1994) (extending federal criminal jurisdiction to encompass "[a]ny Indian who commits against the person or property of another Indian or other person" any of a number of specified federal crimes).

57. 31 U.S. (6 Pet.) 515, 557 (1832) (recognizing that "[t]he treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union"); *see also supra* text accompanying note 41.

58. Williams v. Lee, 358 U.S. 217, 223 (1959).

59. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973) (citations omitted); *see also* Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Comm'n, 588 F.2d 75, 77 (4th Cir. 1978) (holding that "[q]uestions of conflicting tribal-state jurisdiction are no longer resolved by automatic application of the tribal sovereignty doctrine enunciated by Mr. Chief Justice Marshall in *Worcester v. Georgia*, and most controversies are settled by reliance on federal preemption principles") (citation omitted), *cert. dismissed*, 446 U.S. 960 (1980).

60. *Worcester*, 31 U.S. (6 Pet.) at 588 (M'Lean, J., concurring); *see also* Red Fox v. Red

likened to the relationship between a guardian and a ward.[61] The relationship between the sovereign power of the United States and the sovereign power of each Indian tribe was said to be "that of a nation claiming and receiving the protection of one more powerful" against "lawless and injurious intrusions," rather than "that of individuals abandoning their national character, and submitting as subjects to the laws of a master."[62] In the somewhat condescending phrasing that characterizes so much of federal Indian jurisprudence, the Supreme Court has declared that:

> 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 . . . .[63]

Deriving in part from express treaty provisions[64] and in part, apparently from the dictates of "humanity,"[65] the federal government has been deemed to have "assum[ed] the duty of protection, and . . . pledg[ed] the faith of the United States for that protection."[66]

This trust responsibility places some limitations upon the federal government's ability to exercise its power as discoverer, conqueror, and guardian to regulate Indian affairs. The courts have imposed certain procedural constraints upon the exercise of federal Indian powers in the form of canons of construction governing the interpretation of treaties with Indians:[67] "[A]mbiguous expressions must be resolved in favor of the Indian parties concerned; Indian treaties must be interpreted as the Indians themselves would have understood them; and Indian treaties must be liberally construed in favor of the Indians."[68] Similar canons of construction operate in non-treaty contexts,

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Fox, 564 F.2d 361, 365 (9th Cir. 1977) (describing "[t]he relationship between the federal government and the American Indian" as that of a "guardian and his ward, thereby placing the Indian in a peculiar and protected status") (citing United States v. Kabinto, 456 F.2d 1087 (9th Cir.), *cert. denied*, 409 U.S. 842 (1972)).

61. *See supra* text accompanying note 44; *cf. supra* note 30.

62. *Worcester*, 31 U.S. (6 Pet.) at 555. Chief Justice Marshall declared that the United States government had inherited the relationship the British Crown had enjoyed with the Indian tribes—one which bound the tribes to it "as a dependent ally, claiming the protection of a powerful friend and neighbour, and receiving the advantages of that protection." *Id.* at 552.

63. United States v. Sandoval, 231 U.S. 28, 45-46 (1913).

64. *See, e.g., Worcester*, 31 U.S. (6 Pet.) at 555 (noting that British and United States treaties with the Cherokees have assigned the Crown and the federal government, respectively, the duty of protector of Indian interests).

65. *See supra* note 30.

66. *Worcester*, 31 U.S. (6 Pet.) at 556.

67. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 221-25 (Rennard Strickland et al. eds., 1982) (discussing canons of construction as procedural obstacles to federal Indian power).

68. Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows upon the Earth"—How Long a Time Is That?*, 63 CAL. L. REV. 601, 617 (1975) (footnotes omitted); *see also Oneida*, 470 U.S. at 247-48 (holding that "it is well established that treaties should be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit") (citations omitted).

such as Indian affairs legislation, for example, where the intent of Congress to extinguish Indian title or to abrogate treaty rights must be plain and unambiguous.[69]

The courts have suggested that "[s]ubstantive limit[s] on [the federal government's Indian affairs] power . . . do exist by virtue of the just compensation provision of the Fifth Amendment."[70] Though the Supreme Court has declared Congress to "possess[] a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests,"[71] this power has also been found "not [to] extend so far as to enable the government 'to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation.'"[72] Courts assessing allegations of a federal "taking" of tribal land, for example, have tried to distinguish between congressional assertion of its eminent domain powers and the legislature's exercise of its trusteeship power over Indian property. A Fifth Amendment violation may therefore be found where "a thoroughgoing and impartial examination of the historical record"[73] reveals that Congress has not made "a good faith effort to give the Indians the full value of the land [in] . . . transmut[ing] the property from land to money . . . [in order to effect a] substitution of assets or change of form . . . [while acting in the] traditional function of a trustee."[74] As the Supreme Court declared, "[t]he power of Congress over Indian affairs may be of a plenary nature; but it is not absolute."[75]

These canons of treaty construction date back to the seminal trilogy of Indian cases decided by the Supreme Court during Chief Justice Marshall's tenure. In *Worcester*, for example, Marshall argued that it would be wrong to hold fine distinctions in treaty language against Indians "who could not write, and most probably could not read, [and] who certainly were not critical judges of our language." *Worchester*, 31 U.S. (6 Pet.) at 552. Justice M'Lean discussed how

> [t]he language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.

Id. at 582 (M'Lean, J., concurring). Such canons have received endorsement from the Court ever since, and have become an accepted part of federal Indian jurisprudence. *See* McClanahan v. State Tax Comm'n, 411 U.S. 164, 174 (1973); Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970); *see also* Choctaw Nation v. United States, 318 U.S. 423, 431-32 (1943); Tulee v. Washington, 315 U.S. 681, 684-85 (1942); United States v. Shoshone Tribe, 304 U.S. 111, 116 (1938); Carpenter v. Shaw, 280 U.S. 363, 367 (1930); Starr v. Long Jim, 227 U.S. 613, 622-23 (1913); Winters v. United States, 207 U.S. 564, 576-77 (1908).

69. *See Oneida*, 470 U.S. at 247-48 (declaring that "'[a]bsent explicit statutory language,' this Court accordingly has refused to find that Congress has abrogated Indian treaty rights" and explaining the requirement of "plain and unambiguous" title extinguishment) (citation omitted).

70. DESKBOOK, *supra* note 36, at 7 (footnote omitted).

71. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).

72. Shoshone Tribe v. United States, 299 U.S. 476, 497 (1937) (quoting United States v. Creek Nation, 295 U.S. 103, 110 (1935)). This idea also has antecedents in the seminal early Indian case law. *See, e.g., Worcester*, 31 U.S. (6 Pet.) at 588 (M'Lean, J., concurring) (stating that "[n]either Georgia, nor the United States . . . contemplated that force should be used in the extinguishment of the Indian title; nor that it should be procured on terms that are not reasonable").

73. United States v. Sioux Nation, 448 U.S. 371, 416 (1980).

74. Three Affiliated Tribes v. United States, 390 F.2d 686, 691 (Ct. Cl. 1968) (quoted by *Sioux Nation*, 448 U.S. at 409).

75. Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 84 (1977) (quoting United States v. Alcea Band of Tillamooks, 329 U.S. 40 (1946) (plurality opinion)).

The Court has suggested, further, that there might be some limit on Congress's ability to enact legislation controlling Indian affairs such that legislation "beyond what is reasonably essential to [the tribes'] protection" will be disallowed.[76] Legislative decisions regarding what is in the best interest of Indians will ordinarily not be second-guessed, but they may be questioned if "the special treatment [cannot] be tied rationally to the fulfillment of Congress's unique obligation toward the Indians."[77] Thus, this "tied rationally" standard suggests that the government's trust responsibility toward the tribes places some substantive limit on federal authorities' otherwise plenary power to regulate Indian affairs.[78]

Apart from the Fifth Amendment obligation to give just compensation for tribal lands appropriated by legislative fiat,[79] it is not entirely clear what this theoretical substantive limit actually means. Traditionally, "[p]lenary authority over the tribal relations . . . has been exercised by Congress . . . and [this] power has always been deemed a political one, not subject to be controlled by the judicial department of the government."[80] Although it is presumed Congress will exercise its powers in good faith,[81] this old view held that in the event of congressional bad faith, relief had to be "sought by an appeal to that body . . . and not to the courts."[82] The "tied rationally" standard would indeed seem to represent a modification of this doctrine, but although the executive branch "has sometimes been subjected to . . . enforcement of its trust responsibilities" in the administration of Indian affairs entrusted to it by Congress,[83] courts have been extremely reluctant actually to impose the fiduciary duties of which they have sometimes spoken.[84] This led one commentator to conclude, for example, that "[i]n the case of Congress, then, the duty is essentially a moral or political obligation."[85] Moreover, even if invoked, the more modern "tied rationally" standard seems to mean no more than the "rational basis test" of ordinary equal protection jurisprudence: a test conspicuous for the ease with which enactments survive its scrutiny.[86]

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76. Perrin v. United States, 232 U.S. 478, 486 (1914).

77. Morton v. Mancari, 417 U.S. 535, 555 (1974); *see also Delaware Tribal*, 430 U.S. at 85 (using the "tied rationally" standard of review for special treatment).

78. COHEN, *supra* note 67, at 221. As the Supreme Court has said, after all, the protective relationship of the federal government with the Indian tribes "necessarily implies" a duty to encourage "among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize among [the Indians]," tribal "self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs." *Ex parte* Crow Dog, 109 U.S. 556, 568 (1883).

79. *See supra* text accompanying notes 72-74.

80. *Lone Wolf*, 187 U.S. at 565.

81. *Id.* at 566.

82. *Sioux Nation*, 448 U.S. at 414 (discussing the *Lone Wolf* doctrine).

83. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 33 (1981).

84. *Id.* ("While it has been stated on several occasions that Congress owes a fiduciary duty to the tribes, no court has ever enforced such a duty.").

85. *Id.*

86. *See, e.g.*, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 532-33 (2d ed. 1991) (noting that statutes subjected to rational basis review "are usually upheld"); *id.* at 538 ("[T]he judicial application of the rationality test has generally . . . led to validation of statutory classifica-

Nevertheless, it is at least theoretically true that the federal government's trust or guardian relationship with the Indian tribes imposes some substantive limit upon the plenary power of federal law to regulate Indian affairs. Even less well understood is how the underlying foundational doctrine of tribal sovereignty ensures that the extent to which the exercise of *any* federal Indian powers must be predicated upon the existence of a government-to-government relationship between the United States and a recognized Indian tribe.

C. *The Importance of Intergovernmental Relations*

It has long been accepted as a fundamental component of Equal Protection Clause jurisprudence that most statutory racial classifications are strongly suspect and must therefore be subjected to the most rigid constitutional scrutiny,[87] a test which leaves laws stricken in its wake with the same frequency that rational basis analysis upholds them.[88] Since it is not just race-specific classifications disadvantaging a particular racial group that are to some degree suspect but *all* race-based classifications, federal Indian law flirts with race-specific legislation at its peril. The Supreme Court's recent decision in *Adarand Constructors, Inc. v. Pena*[89] makes clear that all laws based on race are now subject to "strict" scrutiny. Though the Court has emphasized that strict scrutiny under the Equal Protection Clause need not invariably be fatal to a race-based classification,[90] equal protection challenges to Indian-classificatory statutes would present grave challenges. It would be difficult to demonstrate that all, or even most, of the vast corpus of federal Indian law is sufficiently narrowly-tailored to meet strict scrutiny standards.

It has so far been possible to avoid such equal protection concerns in Indian law by pointing to the "political" character of Indian identity within the venerable tradition of tribal sovereignty.[91] Indeed, this is what the Supreme Court did in *Morton v. Mancari*,[92] when faced with a challenge to a series of employment preferences for Indians, adopted by the Bureau for Indian Affairs. Justice Blackmun, writing for the Court, found this preference to be permissi-

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tions.").

87. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 216 (1944) (holding that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny"). Even laws which merely have a "disparate impact" upon a particular racial group may be challenged. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (permitting *prima facie* case of employment discrimination to be shown by statistical evidence that employment practice had a disproportionately adverse impact upon particular racial group irrespective of discriminatory intent). In recent years, however, the Supreme Court has required an increasingly detailed "factual predicate" in order to substantiate allegations of discriminatory impact. *See, e.g.*, Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 651-52 (1989) (finding statistical evidence alone insufficient to establish a prima facie case of disparate impact).

88. In fact, *Korematsu* "is frequently said to mark the last occasion on which the Supreme Court has upheld a race-specific statute disadvantaging a racial minority." STONE ET AL., *supra* note 86, at 572.

89. 115 S. Ct. 2097 (1995).

90. *Adarand*, 115 S. Ct. at 2117.

91. *See* Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1263-67 (1994).

92. 417 U.S. 535 (1974).

ble in part because the designation of "Indian" was a political classification rather than a dangerously suspect racial one: "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."[93] Thus, "[t]he status of Indian tribes as quasi-independent entities . . . has allowed Indian case law to escape both constitutional 'strict scrutiny' and many of the conceptual ambiguities" that result from the problematic objective character of racial identity.[94]

The distinctive character of Indian law derives from this political dimension, from the fact that the federal-tribal relationship has for the better part of two centuries been considered a relationship between sovereigns. Indeed, our present body of Indian law would not make sense if viewed through a solely racial prism, and would be neither doctrinally justifiable nor constitutionally sustainable.

A principled adherence to the "domestic dependent nation" theory of Indian jurisprudence would thus appear to be vital to federal Indian law. Given the extent to which federal Indian legislation and case law throughout this country's history have been built upon stereotyped and often racist notions of indelibly "Indian" characteristics,[95] a real effort to apply the Supreme Court's previous intermediate scrutiny standard for race classifications[96] would

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93. *Mancari*, 417 U.S. at 553 n.24. The Bureau of Indian Affairs (BIA) preference was also found to be properly within Congress's power to regulate Indian affairs and appropriately related to the legislative intent "to promote economic and political self-determination for the Indian." *Id.* at 543 n.15.

Within the present system of federal tribal "acknowledgment" pursuant to administrative regulation, tribal membership largely follows *Mancari* and defines a tribe member as:

> an individual who meets the membership requirements of the tribe as set forth in its governing document or, absent such a document, has been recognized as a member collectively by those persons comprising the tribal governing body, and has consistently maintained tribal relations with the tribe or is listed on the tribal rolls of that tribe as a member, if such rolls are kept.

25 C.F.R. § 83.1 (1995).

94. Ford, *supra* note 91, at 1265.

95. *See, e.g.*, United States v. Candelaria, 271 U.S. 432, 441-42 (1926) (upholding congressional intent to designate Pueblo Indians a "tribe" because "[a]lthough sedentary, industrious, and disposed to peace, they are Indians in race, customs, and domestic government, always have lived in isolated communities, and are a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races"); United States v. Sandoval, 231 U.S. 28, 47 (1913) (describing federal guardianship role over Indians as being rooted in their "isolated and communal life, primitive customs and limited civilization").

96. Before *Adarand*, a plurality of the Supreme Court had for some years felt that the standard for review of race classification under the Equal Protection Clause was that of "strict scrutiny" even for benign classifications. *See* Wygant v. Board of Educ., 476 U.S. 267 (1986); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). For a time, however, the Court appeared to endorse a two-tiered scheme of equal protection review—with state and local race classifications reviewed "strictly" and Congressional enactments viewed with only "intermediate" scrutiny. In Metro Broadcasting, Inc. v. Federal Communications Comm'n, 497 U.S. 547, 548 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995), for example, a majority of the Court held that "[b]enign race-conscious measures mandated by Congress" were permissible if "they serve important governmental objectives." State and local classifications were permissible, however, only if they could survive strict scrutiny. *See Croson*, 488 U.S. at 520.

undoubtedly prove unsettling.

In the wake of *Adarand*, the "political" status of Indian classifications may be the only component capable of sustaining much of Indian law in the face of post-*Adarand* equal protection challenges.[97] Ultimately, the basic doctrines of federal Indian jurisprudence suggest that the *sole* basis of Indian law must be a political one: the case law gives no intelligible support for, and the underlying principles of tribal sovereignty do not permit, a federal-Indian relationship based upon anything other than a political foundation.

D. *The Centrality of Tribal Recognition*

1. The Problematic Nature of Non-Political Indian Status

Ethnologically speaking, the "real" existence of a distinct "tribe" seems to be neither a necessary nor a sufficient condition of legally-recognized "tribal" status. Federal policy toward the recognition of Indian tribes has been by no means consistent with "real" ethnological principles: Congress has frequently consolidated previously distinct groups into a single tribe for recognition purposes, or has divided an individual tribe into two or more groups, recognizing each in turn as a "different" Indian "nation."[98] Congress has also occasionally "terminated" tribes' federal recognition,[99] in some cases only to "restore" it thereafter,[100] and has given the Secretary of the Interior the authority[101] to adjust tribal membership rolls at his own discretion.[102]

As one commentator has observed, "[i]t is apparent that the question of whether a tribe has been recognized is resolved without reference to the factual, ethnological characteristics, at the time of decision, of the Indian group

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97. Justice Stevens, dissenting in *Adarand*, apparently recognized the dangers strict scrutiny posed to Indian law. *See Adarand*, 115 S. Ct. at 2120 (Stevens, J., dissenting).

98. *See* COHEN, *supra* note 67, at 6 (giving examples of such "consolidations" and divisions).

99. In 1953, hoping to bring about the gradual cultural assimilation of American Indians, Congress adopted a policy of seeking the progressive "termination" of many Indian groups' "tribal" status. *See, e.g.*, H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953) (enacted). Such statutory "termination" was to end these groups' special relationship with the federal government, and subject Indians and Indian lands to state jurisdiction. Between 1954 and 1964, 14 acts were passed in this respect, leading to the revocation of federally-recognized tribal status for 109 Indian tribes and bands, prominent among them the Klamath of Oregon and the Menominee of Wisconsin. All in all, between 1955 and 1970, termination affected 3.2% of all federally-recognized Indians and a similar proportion of Indian trust land. This congressional termination policy was abandoned in the late 1960s. *See generally* CANBY, *supra* note 83, at 25-28, 50; *and* DESKBOOK, *supra* note 36, at 24-25, 34.

100. The Menominee, for example, were restored to federally-recognized "tribal" status by Pub. L. No. 93-197, 87 Stat. 770 (1973) (codified at 25 U.S.C. §§ 903-903f (1988)). Many statutory "terminations" were ultimately repealed, but as of 1993 some 40 Indian groups have not had their status restored. DESKBOOK, *supra* note 36, at 34.

101. *See* 43 U.S.C. § 1457 (1988) (giving the Secretary of the Interior the power of "supervision of public business relating to . . . Indians").

102. *See, e.g.*, Stookey v. Wilbur, 58 F.2d 522, 523 (D.C. Cir. 1932) (upholding the power of the Secretary to correct membership rolls for "fraud" by refusing to enroll children and grandchildren of member/non-member marriages into Gros Ventre tribe); United States *ex rel.* West v. Hitchcock, 205 U.S. 80, 85 (1907) (permitting Secretary of the Interior to disallow involvement in Indian land transaction of white man accepted through marriage into Wichita tribe on grounds that man was not really tribal member).

involved."[103] To suppose, in such an environment, that Chief Justice Marshall's doctrine of tribal sovereignty invariably connects contemporary federally-recognized tribal governments by some historical umbilical cord to the actual pre-discovery "independent tribes or nations of Indians, who were the sovereigns of their respective portions of the territory, and the absolute owners and proprietors of the soil"[104] is to strain credulity. The only defensible principled approach to tribal recognition is to acknowledge that there is no such clear principle: the matter is indeed a political one, quite resistant to jurisprudential assessment.

The courts have, from time to time, hinted that there might be some substantive limit upon federal authority to recognize groups of Indians as tribal political "sovereigns" capable of existing in the sort of intergovernmental relationship with the United States that lies at the core of Indian law. As long ago as 1832, Justice M'Lean, concurring in *Worcester v. Georgia*, asked "is there no end to the exercise of this [recognition] power over Indians within the limits of a state, by the general government?"[105] According to Justice M'Lean the limit of this principle was that "in its nature, it must be limited by circumstances."[106]

> If a tribe of Indians shall become so degraded or reduced in numbers, as to lose the power of self-government, the protection of the local [state] law, of necessity, must be extended over them. The point at which this exercise of power by a state would be proper, need not now be considered: if indeed it be a judicial question.[107]

Just over 80 years later, the Supreme Court in *United States v. Sandoval*[108] suggested, in dicta, that this might indeed be "a judicial question." In finding that the Pueblo Indians of New Mexico could be regulated as an Indian tribe pursuant to the enabling legislation which authorized New Mexico's entry into the Union, the Court did not stop upon finding a sort of *de facto* federal recognition resulting from the Pueblos' treatment by the President and Congress as "dependent communities entitled to [United States] aid and protection, like other Indian tribes."[109] Rather, the Court undertook an independent examination into the "Indian-ness" of the Pueblo groups: "[C]onsidering their Indian lineage," and their "isolated and communal life, primitive customs and limited civilization, this assertion of guardianship over them cannot be said to be arbitrary but must be regarded as both authorized and controlling."[110]

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103. L.R. Weatherhead, *What Is an "Indian Tribe"?—The Question of Tribal Existence*, 8 AM. INDIAN L. REV. 1, 8 (1980).
104. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 545 (1823).
105. *Worchester*, 31 U.S. (6 Pet.) 515, 593 (1832) (M'Lean, J., concurring).
106. *Id.*
107. *Id.*
108. 231 U.S. 28 (1913).
109. *Sandoval*, 231 U.S. at 47.
110. *Id.*

The *Sandoval* Court apparently claimed for itself the authority and ability to review the tribal-recognition determinations made by the political branches. Though conceding to federal authorities a general right to determine matters of tribal recognition, it added that:

> it is not meant by this that Congress may bring a community or body of people within the range of [the Indian affairs] 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.[111]

Federal recognition of groups not "distinctly Indian" in the judgment of the Court, therefore, might be rejected. This odd and arguably racist[112] theme was obliquely endorsed a half-century later, when *Sandoval* was discussed as an example of the Supreme Court's flexible "political question" jurisprudence in *Baker v. Carr*.[113] "Able to discern what is 'distinctly Indian,'" wrote Justice William Brennan in *Baker*, "the courts will strike down any heedless extension of that label. They will not stand impotent before an obvious instance of a manifestly unauthorized exercise of power."[114] Perhaps not surprisingly, given the stereotyped cognitive baggage carried by the pregnant *dictum* in the *Sandoval* decision, the Court has never attempted further to explain this "arbitrariness" standard.[115] In fact, "there is no case in which a congressional judgment or enactment [regarding tribal recognition] has been overturned on the basis of [these] limitations."[116] Nevertheless, *Sandoval* lurks ambiguously behind the otherwise political core of Indian recognition law.

2. Ambiguities of Recognition

The statutes and case law on the import of formal political recognition of Indian tribal status is remarkably varied. Even though, in theory, the special relationship between the federal government and the Indian tribes depends entirely upon recognized status, the courts have declared that even statutory termination does not always end all of the federal relationship. Terminated

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111. *Id.* at 46.

112. *See supra* text accompanying note 110. Twelve years after *Sandoval*, in United States v. Candelaria, 271 U.S. 432 (1926), the Supreme Court reiterated its power to decide what was "distinctly Indian," stating, again of the Pueblos:

> While there is no express reference in the [federal statute at issue] to Pueblo Indians, we think it must be taken as including them. They are plainly within its spirit, and, in our opinion, fairly within it words, 'any tribe of Indians.' Although sedentary, industrious, and disposed to peace, they are Indians in race, customs, and domestic government, always have lived in isolated communities, and are a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races.

Id. at 441-42.

113. 369 U.S. 186 (1962).

114. *Baker*, 369 U.S. at 216-17 (citation omitted).

115. *See* COHEN, *supra* note 67, at 5.

116. Weatherhead, *supra* note 103, at 4.

tribes may, for example, sometimes retain the capacity collectively to contract, receive grants, exercise traditional hunting and fishing rights, and sue in court.[117] The canons of construction peculiar to federal Indian jurisprudence[118] appear somewhat to limit the impact of most termination statutes: a congressional enactment *can* completely end all tribal rights,[119] but only if it is "clear and specific" in this respect.[120]

As to which groups may be considered Indian tribes under the law of the United States, the courts have seldom limited the exercise of federal Indian affairs powers to the formally recognized tribal status of Indian groups. Where formal recognition has not been forthcoming, courts have tried to develop factual standards for judging tribal existence: "The absence of federal recognition . . . is not dispositive where no contrary statutory requirement exists, and in such situations courts have developed broad criteria to make determinations of tribal status."[121] "[W]hile Congress' power to regulate commerce with the Indian tribes includes authority to decide when and to what extent it shall recognize a particular Indian community as a dependent tribe under its guardianship, Congress is not prevented from legislating as to tribes generally . . . ."[122] The Supreme Court, for example, has professed to understand the

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117. COHEN, *supra* note 67, at 19. The "terminated" Klamath tribe, for example, was found still to possess hunting, fishing, and trapping rights on their ancestral lands, Kimball v. Callahan, 590 F.2d 768, 775 (9th Cir. 1979), while the Menominee were found to retain beneficial and equitable interests in certain properties, Menominee Tribe v. United States, 388 F.2d 998, 1001 (Ct. Cl. 1967).

118. *See supra* text accompanying notes 67-69.

119. It has long been accepted that "[i]t rests with Congress to determine the time and extent of emancipation" from the guardianship status of federal-tribal relations. United States v. Waller, 243 U.S. 452, 459 (1917); *see also* Winton v. Amos, 255 U.S. 373, 392 (1921) (holding that "[t]he guardianship [over Indians] arises from their condition of tutelage or dependency; and it rests with Congress to determine when the relationship shall cease"). Even *United States v. Sandoval*, which first suggested the idea of an "arbitrariness" limit upon the federal tribal-recognition power, admitted that it was the prerogative of Congress to decide when Indian tutelage had come to an end. United States v. Sandoval, 231 U.S. 28, 46 (1913); *see also supra* text accompanying note 110.

120. Catawba Indian Tribe v. South Carolina, 718 F.2d 1291, 1297 (4th Cir. 1983) (quoting COHEN, *supra* note 67, at 815); *see also id.* at 1298-99 (noting that treaty-given rights of occupancy persist until clearly abrogated by Congress); Menominee Tribe v. United States, 388 F.2d 998, 1000 (Ct. Cl. 1967) (suggesting that tribe might have lost standing to sue had not termination act contemplated that tribe would continue to remain in existence for such purposes); COHEN, *supra* note 67, at 19 ("[A] terminated tribe retains all 'sovereign authority' not inconsistent with a termination act . . . .").

121. DESKBOOK, *supra* note 36, at 32-33 (footnote omitted); *see generally* Weatherhead, *supra* note 103, at 10-14.

122. Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 377 (1st Cir. 1975) (footnote and citations omitted). Examples of a "general" Indian enactment include the Indian Trade and Nonintercourse Act, 25 U.S.C. § 177 (1988), and the Snydar Act, 22 U.S.C. § 13, 42 Stat. 208 (1988) (giving certain benefits to "the Indians throughout the United States"), which the Department of the Interior has interpreted to allow the Bureau of Indian Affairs to provide services to Indians of any degree, whether or not members of a recognized tribe. *See* Weatherhead, *supra* note 103, at 4. It should be noted, however, that courts have found claims by individual Indians under the Indian Trade and Nonintercourse Act to be impermissible. *See, e.g.*, Epps v. Andrus, 611 F.2d 915, 918 (1st Cir. 1979) (per curiam) (rejecting claims by individual descendants of the Chappaquiddick tribe because "plaintiffs are not suing as a tribe [and] have failed to allege tribal status").

word "tribe" to mean no more than "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory,"[123] and courts have on occasion allowed Indian legislation to apply to "a bona fide tribe not otherwise federally recognized."[124]

For federal purposes, therefore, "[t]he term tribe has no universal legal definition," and "the question of tribal existence . . . [may] depend in part on the context and purposes for which the term is used."[125] As a result,

> tribes cannot be neatly divided into "recognized" and "nonrecognized" tribes for all purposes; rather, a tribe may "exist" for some purposes but not for others. . . . The legal principles developed under one statutory scheme often cannot be transferred to other situations because of the peculiar context in which the original principles were developed.[126]

These standards have produced a complex, and often confusing body of case law of Indian tribal status.

Does the variety of statutory provisions and case law regarding tribal recognition mean that federal Indian jurisprudence has abandoned its animating principles of tribal sovereignty and the political character of federal-Indian relations? If the courts were ready to attempt to develop a *Sandoval*-style law of genuine Indian identity, and if congressional Indian legislation really could reach Indians irrespective of tribal recognition, it might represent a significant departure from Indian law's political core. As the discussion above suggests, our legislature and courts have flirted with such an approach, particularly with respect to the Indian racial status of individual persons.

The Indian Reorganization Act of 1934, for example, defined "Indian" to include not only members of recognized tribes but also "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation," and even "all other persons of one-half or more Indian blood."[127] In 1938, the Seventh Circuit found that the percentage of Indian blood of a *habeas corpus* petitioner and "his racial status in fact as an Indian" gave federal jurisdiction despite that individual's lack of tribal membership.[128] The Supreme Court has noted that "enrollment in an official tribe has not been held to be an absolute requirement for federal [Indian] jurisdiction."[129]

Such suggestions of a court's ability to determine the "real" racial identity of an individual claimant, or of a statute's ability to define it in a

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123. Montoya v. United States, 180 U.S. 261, 266 (1901).
124. *Passamaquoddy Tribe*, 528 F.2d at 377.
125. COHEN, *supra* note 67, at 3.
126. *Id.* at 7.
127. 25 U.S.C. § 479 (1988).
128. *Ex parte* Pero, 99 F.2d 28, 31 (7th Cir. 1938), *cert. denied*, 306 U.S. 643 (1939).
129. DESKBOOK, *supra* note 36, at 30 (citing United States v. Antelope, 430 U.S. 641, 647 n.7 (1977)); *see also* United States v. John, 437 U.S. 634, 649-50 (1978) (recognizing that § 19 of the Indian Reorganization Act, 25 U.S.C. § 479 (1988), does not necessarily require tribal enrollment for "Indian" status).

comprehensive way, are conceptually quite problematic in their own right,[130] and are entirely inconsistent with the principles of tribal sovereignty represented by the line of cases proceeding from *Johnson v. M'Intosh*[131] through *Morton v. Mancari*.[132] Real flirtations with such a constitutionally "suspect" racial essentialism cannot be reconciled with the principle that "the [federal] power over Indians reaches only Indian tribes or tribal Indians"[133] since as "[t]he Indian tribe is the fundamental unit of Indian Law, in its absence there is no occasion for the law to operate."[134]

3. Returning to Political Recognition

At least some of the varied case law on tribal recognition, however, may perhaps be understood in ways which make it less problematic. If tribal sovereignty is to remain the foundation of federal Indian jurisprudence, the courts must insist that "Congress may not favor a group of individual Indians with special legislation unless that group is found to constitute an Indian tribe for purposes of federal Indian law."[135] With respect to findings of the Indian "tribal" status of Indian groups not formally recognized as such,[136] much of this case law may amount less to a rejection of the recognition power than a judicial willingness to accept "a course of dealing with the tribe as a political entity"[137] as a form of *de facto* federal recognition. Thus, for example, courts have found Indian "tribes" to exist for federal Indian law purposes where the political branches of government, even in the absence of formal tribal designation, have dealt with Indian groups *as if they were* such tribes.[138] Reading such cases as examples of *de facto* federal recognition rather than as assessments of "real" racial or ethnological identity keeps federal Indian law faithful

130. *See* Ford, *supra* note 91, at 1239-40, 1280-85.

131. 21 U.S. (8 Wheat.) 543 (1823).

132. 417 U.S. 535 (1974); *see* DESKBOOK, *supra* note 36, at 30 ("Although *Mancari* and related decisions could be construed as requiring an opposite result, lower federal and state courts have traditionally not required actual tribal membership, in the absence of a statutory directive, as a condition of Indian status.").

133. Weatherhead, *supra* note 103, at 3.

134. CANBY, *supra* note 83, at 3; *see also* COHEN, *supra* note 67, at 1 ("Indian law is founded in the political relationship between the United States and Indian tribes. In most instances, the rights and obligations of individual Indians peculiar to Indian law derive from their status as members or descendants of an Indian tribe, not solely from their race.") (footnote omitted).

135. Weatherhead, *supra* note 103, at 3.

136. *See supra* text accompanying notes 120-25.

137. CANBY, *supra* note 83, at 4.

138. *See, e.g.*, United States v. John, 437 U.S. 634 (1978) (effectively reversing the holding of United States v. Mississippi Tax Comm'n, 505 F.2d 633 (5th Cir. 1974), that Choctaw Indians were not a tribe by finding long history of Choctaw relations with federal government as if group were tribe); United States v. Sandoval, 231 U.S. 28 (1913) (allowing Pueblo Indians to be considered Indian "tribe" by virtue of congressional provision in New Mexico statehood enabling legislation that group's lands be considered Indian Country for purposes of federal ban on liquor sales to Indians); Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 377-78 (1st Cir. 1975) (finding Passamaquoddies to be Indian tribe because group had long been dealt with as if it were and "[n]o one in th[e] proceeding ha[d] challenged the Tribe's identity as a tribe").

to its animating philosophy of tribal sovereignty, and allows it to avoid the treacherous constitutional shoals of racial classification.

Fortunately, federal recognition policy is becoming more consistent on this score. In its more recent pieces of Indian legislation, Congress has avoided the use of any definition of tribe, preferring instead to tie statutory provisions to the acknowledgment of tribal status by the Secretary of the Interior[139]—with "tribe" being defined in the legislation only as a group recognized as eligible due to its status as an Indian tribe.[140] Today, tribal recognition is "treated more fully as a conferral of a legal status" than was the case in previous eras.[141] Perhaps, therefore, federal Indian law is returning to the principles of tribal sovereignty and political relationships that lie at its core, make it coherent, and help it to avoid the quagmires of equal protection analysis.

4. Recognition and the Architecture of Federal Indian Power

Recognition by the political branches of government, either express or implied, continues to lie at the center of federal Indian law, forming the exclusive basis by which this peculiar body of American jurisprudence may be invoked. This understanding of the recognition power has significant consequences. There may well be substantive limits upon what the federal government may do in its regulation of Indian affairs. For example, Indian lands may not be taken by the United States government without the provision of just compensation pursuant to the Fifth Amendment of the United States Constitution.[142] The trust responsibility attached to the government's role as guardian of the Indian tribes and protector of their interests may also entail some substantive limits upon federal authority to regulate Indian affairs at discretion.[143]

Yet there would seem to be no check upon the ability of the political branches of the United States government to *recognize*, or to de-recognize, Indian tribes.[144] If a tribe's status as a "sovereign" power with the ability to exist in a government-to-government relationship with the United States is fundamentally a political status, then the federal power of tribal recognition must, as with the recognition power of the President in foreign affairs,[145]

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139. *See supra* text accompanying notes 3-16.

140. *See* Weatherhead, *supra* note 103, at 1, 8, 14-15 (giving examples of such legislation).

141. *Id.* at 17.

142. *See supra* text accompanying notes 72-74.

143. *See supra* text accompanying notes 75-78.

144. *Cf.* The Maret, 145 F.2d 431, 442 (3d Cir. 1944) (noting the power of federal government to refuse recognition to foreign sovereigns).

145. *See, e.g.*, Jones v. United States, 137 U.S. 202, 212 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government."). In Guaranty Trust Co. v. United States, 304 U.S. 126 (1938), the Court held:

> What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government. Objections to its determination as well as to the underlying policy are to be addressed to it and not to the courts. Its action in recognizing a foreign

remain a political status not subject to judicial review. This was recognized more than a century ago by the Supreme Court which stated that

> it is the rule of this [C]ourt to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them [certain] Indians are recognized as a tribe, this court must do the same. If they are a tribe of Indians, then, by the Constitution of the United States, they are placed, for certain purposes, within the control of the laws of Congress.[146]

While courts may be able to place limits upon the *exercise* of federal power over the affairs of Indian tribes, the initial decision of federal authorities as to the recognition of Indian tribes, a powerful antecedent power, is a non-justiciable political matter.

This result is entirely consistent with the scope of the recognition power as the Supreme Court has understood it in the context of federal dealings with *foreign* sovereigns. As Justice Brennan stated in the seminal political question decision of *Baker v. Carr:*

> While recognition of foreign governments so strongly defies judicial treatment that without executive recognition a foreign state has been called "a republic of whose existence we know nothing," and the judiciary ordinarily follows the executive as to which nation has sovereignty over disputed territory, once sovereignty over an area is politically determined and declared, courts may examine the resulting status and decide independently whether a statute applies to that area.[147]

The politically constrained power of the government to recognize Indian tribes is also consistent with the discretion of the political branches of the federal government to make and unmake treaties not only with foreign sovereigns,[148]

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government and in receiving [that government's] diplomatic representatives is conclusive on all domestic courts, which are bound to accept that determination . . . .

Id. at 137-38; *see also* Williams v. Suffolk Ins. Co., 38 U.S. (13 Pet.) 415, 419 (1839) (noting that insistence by the United States government that the Falkland Islands are not Argentine "is binding . . . on [the Circuit] Court, as to whom the sovereignty of those islands belongs"); United States v. Klintock, 18 U.S. (5 Wheat.) 144, 149 (1820) (referring to non-recognized "Mexican Republic" as "a republic of whose existence we know nothing"); United States v. Palmer, 16 U.S. (3 Wheat.) 610, 634 (1818) (declaring that recognition questions "are generally rather [more] political than legal in their character" and "belong more properly" to political branches); KMW Int'l v. Chase Manhattan Bank, 606 F.2d 10, 16-17 (2d Cir. 1979) (stating that "[a]lthough there has been a change of government in Iran, the United States has "recognized the present government" so as to give governmental agency power to enforce its rights in U.S. courts).

146. United States v. Holliday, 70 U.S. 407, 419 (1865). The Court in *Holliday* had been faced with a dispute arising out of an 1862 statute prohibiting the sale of liquor to any Indians under the supervision of a federal Indian agent. The act was found permissible on the grounds that it did indeed regulate commerce "with the Indian tribes" as allowed by the Constitution. *See id.* at 417.

147. Baker v. Carr, 369 U.S. 186, 212 (1962) (footnotes omitted).

148. *See, e.g., Baker*, 369 U.S. at 212 (declaring that where government action purports to have ended international agreement, "a court will not ordinarily inquire whether a treaty has been terminated, since on that question 'governmental action . . . must be regarded as of controlling

but also with Indians,[149] and to refuse recognition to foreign governments[150] and terminate the federal-tribal relationship.[151]

Given, therefore, that the federal government's power of tribal recognition is so powerful and so potentially unconstrained, it becomes quite important to determine who may constitutionally exercise it.

II. THE CONSTITUTIONAL DIVISION OF INDIAN AFFAIRS POWERS

The Indian Commerce Clause of the United States Constitution provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[152] It has generally been interpreted to give Congress plenary power to regulate Indian affairs.[153] This power, which replicates a similar but somewhat more specific allocation of authority that existed under the Articles of Confederation,[154] is extraordinarily broad and includes the power to "limit, modify or eliminate the powers of local self-government which the tribes otherwise possess."[155] The treaty-making power vested in the President and the

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importance'"); Doe v. Braden, 57 U.S. (16 How.) 635, 657 (1853) (declaring that presidential acceptance of facial validity of Spanish legal position in 1821 treaty could not be second-guessed by judiciary).

149. Federal power to abrogate Indian treaties is both "political" and nonjusticiable. Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84 (1977). The Court declared that while

> [u]nquestionably a treaty [with Indians] may be modified or abrogated by an act of Congress . . . the power to make and unmake is essentially political and not judicial, and the presumption is wholly inadmissible that Congress sought in this instance to submit the good faith of its own action or the action of the government to judicial decision . . . .

United States v. Old Settlers, 148 U.S. 427, 468 (1893); *see also* United States v. Sioux Nation, 448 U.S. 371, 411 n.27 (1980) (citing cases in accord); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 594 (1977); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 30 (1831) (Johnson, J., dissenting) (noting that "as between sovereigns, breaches of treaty [are] not breaches of contract cognizable in a court of justice. . . . [F]or their political acts states [are] not amenable to tribunals of justice."); *cf.* Fellows v. Blacksmith, 60 U.S. (19 How.) 366, 372 (1856) (refusing to second-guess propriety of Indian treaty since "the treaty, after [being] executed and ratified by the proper authorities of the Government, becomes the supreme law of the land, and the courts can no more go behind it for the purpose of annulling its effect and operation, than they can behind an act of Congress"). The Court stated in a later case, however, that

> [t]he power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so.

Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903).

150. *See, e.g.*, The Maret, 145 F.2d 431, 442 (3d Cir. 1944) ("A policy of nonrecognition when demonstrated by the Executive must be deemed to be as affirmative and positive in effect as a policy of recognition.").

151. *See, e.g.*, Winton v. Amos, 255 U.S. 373, 391-92 (1921); United States v. Waller, 243 U.S. 452, 459-60 (1917); United States v. Sandoval, 231 U.S. 28, 46 (1913). As we have seen, termination of the federal-tribal "special relationship" is constrained merely by a "clear statement" rule that requires congressional intent to be express. *See supra* text accompanying notes 118-19.

152. U.S. CONST. art. I, § 8.

153. *See, e.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989).

154. *See* U.S. ARTS. OF CONFED., art. IX, cl. 4 (giving Congress "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"), *superseded by* U.S. CONST.

155. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

advisory role granted to the Senate[156] is also commonly discussed as a principal component of the federal government's constitutional authority over Indian affairs.

Curiously, no commentators have identified the independent *presidential* prerogative of tribal recognition visible in the Constitution's allocation of Indian authority. In addressing the constitutional bases of the federal government's Indian affairs powers, Felix Cohen's *Handbook of Federal Indian Law*[157]—"[t]he authoritative commentary" on United States Indian law[158]—only discusses the Indian Commerce Clause, the treaty power,[159] the Property Clause,[160] Congress's power to regulate the terms of a new state's accession,[161] and such "Congressional powers of lesser importance

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156. U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur . . . .").

157. COHEN, *supra* note 67.

158. Catawba Indian Tribe v. South Carolina, 718 F.2d 1291, 1297 (4th Cir. 1983).

159. U.S. CONST. art. II, § 2, cl. 2. Interestingly, the Second Circuit in *Oneida* believed that under the Articles of Confederation, "Congress's power to make Indian treaties" derived not from the ordinary confederal treaty power but from the Articles' analogue to the modern-day Indian Commerce Clause. *See Oneida*, 860 F.2d at 1155. This, the court concluded, was apparent from the fact that Indian treaties such as the Treaty of Fort Stanwix became effective upon signature and were not submitted for formal ratification pursuant to U.S. ARTS. OF CONFED., art. IX, cl. 6 (barring United States from entering into "any treaties or alliances . . . unless nine States assent to the same"). *Oneida*, 860 F.2d at 1154. Under such a system, therefore, the Indian treaty power presumably derived not from the government's ordinary (foreign affairs) treaty-negotiation authority but simply by delegation from the legislature's general power to "manag[e] all affairs with the Indians." U.S. ARTS. OF CONFED., art. IX, cl. 4.

This constitutional connection between the Indian treaty power and the Indian Commerce Clause did not survive the adoption of the Constitution in 1787: with the establishment of an executive presidency, the power to make treaties—both with Indians and with foreign powers—moved to that branch. *See* DESKBOOK, *supra* note 36, at 1 ("For much of the first century of the Nation's history, this [congressional] lawmaking power [in Indian affairs] was augmented by exercise of presidential treaty-making authority under Article II, section 2 [of the Constitution]."); *see also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978) (noting that "Indian law" has "draw[n] principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress". One case noted that

> being within the territorial limits of the United States, [Indian tribes] were not, strictly speaking foreign states; but they were alien nations, distinct political communities, with whom the United States might and habitually did deal . . . either *through treaties made by the President and Senate*, or through acts of Congress in the ordinary forms of legislation.

Elk v. Wilkins, 112 U.S. 94, 99 (1884) (emphasis added).

By 1868, over 400 treaties had been made under presidential authority and ratified by the Senate pursuant to U.S. CONST. art. II, § 2, cl. 2. *See* DESKBOOK, *supra* note 36, at 13 (citing 2 C. KAPPLER, INDIAN AFFAIRS—LAWS AND TREATIES (1904) (collecting treaties between United States and Indian tribes)). Indeed, even after Congress's ostensible "termination of Presidential treaty-making authority, Congress routinely approved agreements negotiated by the Executive Branch with tribes . . . ." DESKBOOK, *supra* note 36, at 13.

160. U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .").

161. *Id.* art. IV, § 3, cl.1 (providing that "[n]ew States may be admitted by the Congress into this Union").

involved in Indian legislation"[162] as the power to establish post roads,[163] to enact a uniform rule of naturalization,[164] and to set up judicial tribunals inferior to the Supreme Court.[165] Despite its obvious importance for Indian affairs in a legal system founded upon doctrines of tribal sovereignty and government-to-government relations, Cohen never says anything about constitutional allocation of the vital recognition power.[166]

The possibility of some independent constitutional authority for the President in Indian affairs has not been entirely overlooked.[167] But no attention has been focused upon the recognition power itself, despite the Constitution's clear assignment to the President of the power not only to make treaties, but to "appoint Ambassadors" to other sovereign powers with the Senate's consent[168] and to "receive Ambassadors and other public Ministers" therefrom entirely at his own discretion.[169] Indeed, though it explicitly analogizes the federal power to recognize tribal sovereignty to the "recognition of foreign governments and to other issues of international relations,"[170] Cohen's authoritative *Handbook* attributes the power of tribal recognition to the "Indian" portion of the Commerce Clause itself.[171]

This article contends that such a view is mistaken, and that there *is* an independent presidential power of tribal recognition in the Constitution's allocation of Indian powers. The Indian Commerce Clause does not constitute an exclusive vesting of authority over all Indian matters to the Congress. Rather, as has been long recognized with respect to the power to make treaties with Indian tribes, Indian affairs are within the realm of executive and legislative powers in which responsibility is to some degree shared. The Constitution's allocation of powers between the two political branches of government, and its commitment of the general recognition power to the President, serves both to reserve that power to the executive in matters of foreign relations and to guarantee his authority to recognize or de-recognize the sovereignty of a tribal "domestic dependent nation."

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162. COHEN, *supra* note 67, at 210 n.21.

163. U.S. CONST. art. I, § 8, cl. 7.

164. *Id.* art. I, § 8, cl. 4.

165. *Id.* art. I, § 8, cl. 9; *see also id.* art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

166. *See* COHEN, *supra* note 67, at 207-12.

167. In 1871 Congress passed a statute, 25 U.S.C. § 71 (1988), which purported to bar any further treaty-derived federal recognition of Indian tribes' sovereign status. William Canby has noted that while it is questionable that Congress could limit the constitutional treaty-making power of the President, the statute did effectively end the making of Indian treaties by serving as notice that none would thereafter be ratified. Reservations established after 1871 were accordingly created either by statue or, until Congress ended the practice in 1919, by executive order. CANBY, *supra* note 83, at 17-18.

168. U.S. CONST. art. II, § 2, cl. 2.

169. *Id.* art. II, § 3.

170. COHEN, *supra* note 67, at 3.

171. *Id.* (discussing how "[s]uch determinations are incident to the Indian Commerce Clause of the Constitution"). The *Handbook* goes no further than to suggest that *either* "Congress or the Executive [may find] that a tribe exists." *Id.*

A. *Congressional Power over Indians*

The powers of the Congress over Indian affairs derive primarily from the Commerce Clause authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[172] With this phrasing, the Constitution carefully describes this "Commerce Power" as having three distinct forms: the power to regulate foreign commerce, the power to regulate interstate commerce, and the power to regulate Indian commerce. It is important to understand that these three realms of congressional authority are not equivalent in scope.

1. Interstate Commerce

The legislature's power over interstate commerce is the broadest of the three. As any student of constitutional law knows, the Supreme Court has given the Commerce Clause an increasingly expansive interpretation over the years. Beginning as a comparatively modest mandate to regulate commercial intercourse "which concerns more States than one,"[173] the clause became, early in the present century, a bitterly-contested means by which the Court, for a time, tried to rein-in the creation of the expansive modern administrative state.[174] In more recent times, the Commerce Clause has been held to permit an ever-increasing scope for congressional regulation.[175] Though the Supreme

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172. U.S. CONST. art. I, § 8, cl. 3.

173. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 3 (1824).

174. *See, e.g.*, United States v. E.C. Knight Co., 156 U.S. 1 (1895) (finding no congressional power to regulate "manufacturing" under antitrust law provisions of Sherman Act because merely making product in particular state does not itself bear a "direct relation" to interstate commerce); Houston, E. & W. Tx. Ry. v. United States, 234 U.S. 342, 351 (1914) (allowing Interstate Commerce Commission to regulate railroad rates on intrastate route because matter "ha[d] such a close and substantial relation to interstate traffic that the control is essential or appropriate to the . . . maintenance of conditions under which interstate commerce may be conducted upon fair terms"); Hammer v. Dagenhart, 247 U.S. 251, 271-72 (1918) (striking down anti-child-labor law on grounds that act did not "regulate transportation among the States" but rather aimed to "standardize the ages at which children may be employed" while "the goods shipped are of themselves harmless"); Stafford v. Wallace, 258 U.S. 495, 516 (1922) (allowing regulation of stockyards because they were "but a throat through which the current [of interstate commerce] flows, and the transactions which occur therein are only incident to this current"); Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925) (allowing regulation of coal mining on grounds that while "[t]he acts of the persons involved [in labor unrest] were local in character, but the intent was to restrain interstate commerce and the means employed were calculated to carry that intent into effect"); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 543 (1935) (rejecting regulation of poultry slaughterhouses since "[n]either the slaughtering nor the sales by defendants were transactions in interstate commerce").

175. *See, e.g.*, N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41 (1937) (upholding labor legislation in steel industry on grounds denial of employee rights to organize unions threatens industrial peace and that "the stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce"); United States v. Darby, 312 U.S. 100 (1941) (permitting Congress to bar interstate shipments of goods produced by substandard labor practices); Perez v. United States, 402 U.S. 146, 154 (1971) (upholding legislation prohibiting "extortionate credit transactions" by deferring to purported congressional finding that such activities help fuel organized crime activity and thus "affect interstate commerce").

Most famously, perhaps, it has even been invoked in support of federal legislation banning racial discrimination by privately-owned motels and restaurants—on the grounds that their clientele included some interstate travelers. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379

Court's recent decision in *United States v. Lopez*[176] demonstrates that the power to regulate "Commerce . . . among the several States" is not unlimited, it is clearly enormously broad, giving the legislature sweeping authority in matters pertaining to domestic relations.

2. Foreign Commerce

In foreign affairs, by contrast, the Constitution affords the President considerable power, assigning him not only the role of Commander-in-Chief,[177] but also the power to negotiate treaties (though their entry into effect requires Senatorial approval),[178] to appoint United States ambassadors and other ministers (also with Senatorial approval),[179] and to receive ambassadors from other governments.[180] Congress is hardly powerless in this equation, possessing the power to regulate commerce with foreign nations,[181] establish uniform rules of naturalization,[182] define and punish crimes on the high seas and against international law,[183] declare war,[184] and raise and maintain the country's military forces.[185]

Nevertheless, the Supreme Court made it clear in *United States v. Curtiss-Wright Export Corp.*[186] that the conduct of foreign relations is fundamentally the prerogative of the Chief Executive. The federal government succeeded directly to the plenary foreign affairs powers of the British Crown, and the President is the embodiment of that power under our present constitutional system.[187]

U.S. 241 (1964) (upholding anti-discrimination provisions of Title II of the Civil Rights Act of 1964 because the motel "serve[d] interstate travelers"); Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (upholding Title II provisions because restaurant "either serves or offers to serve interstate travelers or serves food a substantial portion of which has moved in interstate commerce").

176. 115 S. Ct. 1624 (1995).

177. U.S. CONST. art. II, § 2, cl. 1.

178. *Id.* art. II, § 2, cl. 2.

179. *Id.*

180. *Id.* art. II, § 3.

181. *Id.* art. I, § 8, cl. 3.

182. *Id.* art. I, § 8, cl. 4.

183. *Id.* art. I, § 8, cl. 10.

184. *Id.* art. I, § 8, cl. 11.

185. *Id.* art. I, § 8, cls. 12-16.

186. 299 U.S. 304 (1936).

187. *Curtiss-Wright*, 299 U.S. at 316-17. As the Supreme Court has observed:

> since the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but obviously were transmitted to the United States from some other source. During the Colonial period, those powers were possessed exclusively by and were entirely under the control of the [British] Crown. . . . As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America . . . .
>
> . . . Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union.

Id.; *see also id.* at 317 (quoting Rufus King at Constitutional Convention, *in* 5 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 212 (Jonathan Elliot ed., New York, Burt Franklin 1888) [hereinafter ELLIOT'S DEBATES].

> [T]he very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . does not require as a basis for its exercise an act of Congress [though] of course, like every other governmental power, [it] must be exercised in subordination to the applicable provisions of the Constitution.[188]

Not only is the federal power over foreign relations different in origin and character than the power over domestic affairs, but congressional "participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate, and manifold problems, the President alone has the power to speak or listen as a representative of the nation."[189]

The jurisprudential architecture of the foreign affairs power is therefore quite different from the power over domestic affairs. As a result, the congressional authority to "regulate Commerce with foreign Nations" is necessarily a narrower grant of power than that afforded to "regulate Commerce . . . among the several States." In the former, the legislature's discretion to set federal policy at its discretion is much more powerfully qualified by the independent authority of the executive than is the case in the domestic arena. Based on the Court's holding in *Curtiss-Wright*, it would appear that in foreign relations, Congress's authority is limited to those matters specifically assigned to the legislature by the Constitution—in contrast to the powers of the Executive Branch, for which the specific Constitutional enumerations are merely illustrative.

Where the interstate provisions of the Commerce Clause provide an expansive power of oversight and regulation in domestic affairs, therefore, the power to regulate commerce with foreign nations seems rather narrowly to mean only actual "commerce," that is, it confers the power to pass legislation relating to United States commercial trading relations with other countries.[190]

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188. *Id.* at 320. Moreover, the Court suggested because of its extra-constitutional derivation, the foreign affairs power is not in principle limited to the powers allocated amongst the branches of government by our Constitution. *Id.* "The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs." *Id.* at 315-16.

> [T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.

Id. at 318.

189. *Id.* at 319.

190. For example, Congress has assumed a supervisory role over trade agreements with foreign powers. The North American Free Trade Agreement (NAFTA) and the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) negotiations, for example, were negotiated by the President pursuant to 19 U.S.C. § 2902 (1988 & Supp. V 1992), which authorized him to enter into agreements to reduce tariff barriers, *id.* § 2902(a)(1)(A), agreements to reduce non-tariff barriers, *id.* § 2902(b)(1), and bilateral agreements to reduce both tariff and non-tariff barriers, *id.* § 2902(c)(1). Under these provisions, moreover, before the President could sign agreements relating to non-tariff barriers, he was required to consult with the various congressional committees

With respect to broader questions of United States policy in the international arena, *Curtiss-Wright* makes clear that it is the President who enjoys the upper hand.[191]

3. Indian Commerce: Neither Fish nor Fowl

The distinct separation of the enumerated legislative powers of the Commerce Clause marks the power to regulate Commerce with the Indian Tribes a distinct category, consisting neither of relations with "foreign Nations" nor of domestic affairs regulable by virtue of being related to interstate commerce.[192] As Chief Justice Marshall's "domestic dependent nations" formulation[193] suggests, this is entirely consistent with the principles of tribal sovereignty underlying federal Indian law. Indian tribes are not states for purposes of the Interstate Commerce Clause,[194] and indeed are clearly not states at all.[195] Nor, are Indian tribes *foreign* states within the meaning of the Constitution.[196] Even though separate sovereigns, they are "admitted to compose a

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charged with the oversight of federal policies likely to be affected by such international arrangements. *Id.* § 2902(d)(1). The GATT's Uruguay Round fell under the provisions of §2902 (b)(1), while NAFTA began as a bilateral agreement with Canada pursuant to § 2902(c)(1) and was subsequently extended, through bilateral negotiations, to Mexico (thus apparently keeping it within § 2902(c)(1)).

191. This is not to say, however, that the legislature's role has been insignificant, since by the exercise of its enumerated constitutional powers it can still influence the conduct of foreign relations in significant ways. The congressional power over the purse strings of the federal government, for example, can be considerable. It has thus been said that:

> Congress in making appropriations has the power and authority not only to designate the purpose of appropriation, but also the terms and conditions under which the executive department . . . may expend such appropriations. . . . [This matter is] solely in the hands of Congress and it is the plain and explicit duty of the executive branch . . . to comply with the same.

Spaulding v. Douglas Aircraft, Co., 60 F. Supp. 985, 988 (S.D. Cal. 1945), *aff'd*, 154 F.2d 419 (9th Cir. 1946). Congress has thus "often used its defense appropriations power to control national security policy, particularly since World War II." STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 107 (1990). This power of conditional appropriations may itself not be without limit. *See, e.g.*, 41 OP. ATT'Y GEN. 507 (1960) (arguing that appropriations power cannot be exercised to invalidate direct constitutional commitment of power to other branches); 41 OP. ATT'Y GEN. 230 (1955) (same); 4 OP. OFF. LEGAL COUNSEL 731 (1980) (same). Nevertheless, it has, for example, proven significant in precipitating the "Iran-Contra" scandal by banning the expenditure of federal funds "for the purpose . . . of supporting . . . military or paramilitary operations in Nicaragua," Dept. of Defense Appropriations Act 1985, Pub. L. No. 98-473, § 8066, 98 Stat. 1935 (1984) (the "Boland Amendment"), and in providing an important legislative means of pressuring the President to abandon overseas military operations. *See generally* Christopher A. Ford, *War Powers As We Live Them: Congressional-Executive Bargaining Under the Shadow of the War Powers Resolution*, 11 J.L. & POL. 609, 633, 692, 699 (1995).

192. U.S. CONST. art. I, § 8, cl. 3; *see also* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) ("The extensive case law that has developed under the Interstate Commerce Clause . . . is premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause.").

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

194. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 191-92 (1989).

195. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980); *see, e.g.*, *Cotton Petroleum*, 490 U.S. at 191-93 (finding that tribes are not "states" for purposes of tax apportionment); Wounded Head v. Oglala Sioux Tribe, 507 F.2d 1079, 1081 (8th Cir. 1975) (citing Barta v. Oglala Sioux Tribe, 259 F.2d 553, 556 (8th Cir. 1958)).

196. *Cherokee Nation*, 30 U.S. (5 Pet.) at 18; *see generally Oneida*, 860 F.2d at 1154 (tracing status of Indian tribes under Articles of Confederation and United States Constitution).

part of the United States, [and in United States dealings with foreign powers] are considered as within the jurisdictional limits of the United States."[197]

Indian tribes are thus neither international fish nor domestic fowl. The Indians "sustain a peculiar relation to the United States"[198] which is unique.

> They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the state within whose limits they resided.[199]

Although the Supreme Court has used similar language in describing Indian tribal sovereignty as that used to describe sovereignty in the international arena,[200] it is clear that the two categories are not the same.[201] As

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197. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17. The Indian tribes, Chief Justice Marshall continued, are "so completely under the sovereignty and dominion of the United States, that any attempt [by foreign powers] to acquire their lands, or to form a political connection with them, would be considered . . . an act of hostility." *Id.* at 17-18.

Under international law, "[a]n entity is not a state unless it has competence, within its own constitutional system, to conduct international relations with other states, as well as the political, technical, and financial capabilities to do so." 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 cmt. e (1990) [hereinafter RESTATEMENT (THIRD)]; *cf.* MacKenzie v. Hare, 239 U.S. 299, 311 (1915) (noting that United States government "is invested with all the attributes of sovereignty. As it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries."). In this respect, ironically, the various states of the Union might be considered to be *closer* to the status of a state under international law than are the Indian tribes: while tribes' foreign relations are conducted exclusively through the federal government, states enjoy the ability to reach agreements with foreign sovereigns as long as these arrangements to not "encroach . . . upon the full and free exercise of federal authority." Virginia v. Tennessee, 148 U.S. 503, 520 (1893). States are, however, barred from making actual treaties with foreign powers, U.S. CONST. art. I, § 10, or from "otherwise engag[ing] in or intrud[ing] upon foreign relations to any substantial extent." RESTATEMENT (THIRD), *supra*, § 201 cmt. g.

198. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 581 (1832) (M'Lean, J., concurring). M'Lean went on to note:

> In the executive, legislative, and judicial branches of our government, we have admitted, by the most solemn sanctions, the existence of the Indians as a separate and distinct people, and as being vested with rights which constitute them a state, or separate community—not a foreign, but a domestic community—not as belonging to the confederacy, but as existing within it, and, of necessity, bearing to it a peculiar relation.

Id. at 583.

199. United States v. Kagama, 118 U.S. 375, 381-82 (1886).

200. The *Worchester* Court described Indian sovereignty by citing the international law writings of Vattel to the effect that

> [a] weak state . . . may place itself under the protection of one more powerful, without stripping itself of the right of government . . . [and that] [t]ributary and feudatory states . . . "do not thereby cease to be sovereign and independent states, so long as self government and sovereign and independent authority are left in the administration of the state."

Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832); *see also* RESTATEMENT (THIRD), *supra* note 197, § 201 cmt. e ("An entity that has the capacity to conduct foreign relations does not cease to be a state because it voluntarily turns over to another state control of its foreign relations, as in the 'protectorates' of the period of colonialism, the case of Liechtenstein, or the 'associated states' of today."). Similarly, Chief Justice Marshall observed in *Worcester* that

"extraconstitutional political bodies"[202] existing in a intergovernmental relationship with the United States, yet falling within United States jurisdiction and a sweeping federal regulative power, Indian tribes exist as a distinct legal category, between the foreign and domestic paradigms of legislative power.

The status of Indian tribes as a third category subject to congressional commerce authority has significant implications. Chief Justice Marshall, for example, wrote in *Cherokee Nation*, that "[t]he objects, to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian tribes. When forming this article, the [Constitutional] convention considered them as entirely distinct."[203]

This is true not solely with respect to the nature of Indian sovereignty, but with respect to the powers of Congress itself. This long-understood constitutional distinction between the three realms of interstate, foreign, and Indian affairs underscores the conclusion that the legislature has different degrees of power in each of these areas.[204] Being neither clearly in the realm of foreign relations nor in that of domestic affairs, Indian affairs have a constitutional division of power all their own—and one which admits some *independent* role for the executive branch.

B. *The Distribution of Constitutional Power over Indian Affairs*

Under the scheme articulated by the Court in *Curtiss-Wright*, the doctrinal groundings of Indian tribal sovereignty would suggest a federal allocation of powers more analagous to that of foreign relations, rather than that of domestic affairs. For domestic matters, the "primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states."[205] As

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> [t]he words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

Worcester, 31 U.S. (6 Pet.) at 559-60.

201. Justice Thompson, dissenting in *Cherokee Nation*, resisted this distinction. *See Cherokee Nation*, 30 U.S. (5 Pet.) at 52-53 (Thompson, J., dissenting). As Justice Johnson discussed, European law encompassed an array of sovereign and "demi-sovereign" states, but a Cherokee state, "if it be a state, is still a grade below them all: for not to be able to alienate without permission of the remainder-man or lord, places them in a state of feudal dependence." *Id.* at 26-27 (Johnson, J., concurring).

202. DESKBOOK, *supra* note 36, at 1162.

203. *Cherokee Nation*, 30 U.S. (5 Pet.) at 18.

204. Indeed, Justice M'Lean, concurring in *Worcester*, 31 U.S. (6 Pet.) at 592, suggested that the commerce power of Congress with respect to the Indian tribes might be more limited even than the legislature's power over *foreign* commerce. While "[i]t is the same power, and is conferred in the same words, that has often been exercised in regulating trade with foreign countries," he wrote, it was nonetheless true that "[i]n the regulation of commerce with the Indians, Congress has exercised a more limited power than has been exercised in reference to foreign countries." *Id.*

205. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316 (1936) (emphasis in original).

Chief Justice Marshall made clear in *Worcester*, the power of the British Crown, as discoverer and conqueror of the Indian nations, passed directly to the United States as a whole—as in Justice Black's *Curtiss-Wright* opinion, which described how the authority to conduct foreign relations passed to the United States upon American independence.[206]

While this theory underscores federal Indian-affairs supremacy vis-à-vis the states,[207] the mere fact that the power over Indian affairs was transmitted from the British Crown to the federal government may not tell us everything we need to know about the allocation of Indian powers *within* the federal system. Precisely because an Indian tribe is not as foreign a sovereign as is, say, France, the direct acquisition of authority from the Crown does not necessarily imply the same overarching presidential power to "speak or listen as a representative of the [United States]"[208] in Indian affairs as it does in foreign relations. To find the presidential supremacy of *Curtiss-Wright* implicit in Indian affairs would be inconsistent with the distinction that has been drawn between *Curtiss-Wright* and *Youngstown Sheet & Tube Company v. Sawyer*,[209] in which President Harry Truman's seizure of the nation's steel mills in order to prevent the disruption of armaments production by labor unrest during the Korean War was found unconstitutional because the President's action in *Youngstown* had a "profound and demonstrable domestic impact" while the powers at issue in *Curtiss-Wright* had effects "entirely external" to the United States.[210] The recognition of an Indian tribe and the adoption of federal legislation regulating Indian affairs, which has the effect under prevailing tribal sovereignty principles of carving a federal enclave out of the reach of most state law and regulatory powers,[211] certainly does not have effects solely external to the United States.[212]

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206. *Compare* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 544 (1832) *and* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 584 (1823) *with* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316-17 (1936). At least one court has suggested that the system established by the Articles of Confederation might perhaps have "redistributed some of these powers to the states." *Oneida*, 860 F.2d at 1161 n.10; *cf.* U.S. ARTS. OF CONFED., art. IX, cl. 4 (giving Congress "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*") (emphasis added). During the Confederal period the states appear to have had at least some ability to purchase Indian land without federal approval. *Oneida*, 860 F.2d at 1160-61 ("We conclude that the . . . power of Congress to manage Indian Affairs [under the Articles of Confederation], as limited by the Legislative Rights Proviso, did not preclude New York from making . . . purchases of Oneida [tribal] land within its borders.").

207. *See, e.g.*, *Oneida*, 470 U.S. at 234 (declaring that Indian relations are "the exclusive province of federal law").

208. *Curtiss-Wright*, 299 U.S. at 319.

209. 343 U.S. 579 (1952).

210. *See, e.g.*, Goldwater v. Carter, 444 U.S. 996, 1004-05 (1979) (Rehnquist, J., concurring, joined by Burger, C.J., Stewart, and Stevens, JJ.).

211. *See supra* text accompanying notes 56-59.

212. The only court to address such a question said, with respect to the Articles of Confederation rather than with our present Constitution, that it had

> considerable doubt whether the "international powers" discussed in *Curtiss-Wright* included any authority with respect to Indians. The whole tenor of the [Supreme] Court's discussion concerns international relations, the very matters that during the Confederation were the subject of the powers enumerated in Article IX(1) [of the Articles of Con-

How, then, *does* the Constitution divide the power to regulate Indian affairs? Despite the implicit assumptions of courts and commentators that the Indian Commerce Clause and the treaty power constitute the entirety of federal power over Indian affairs,[213] this article contends that by virtue of the status of Indian relations as neither a fully domestic nor a fully international realm of federal power, there exists at least some independent *executive* authority over Indian affairs. Moreover, the necessarily political nature of federal relations with the Indian tribes means that an independent presidential recognition power must be part of that authority.

1. Congressional Power over Recognized Tribes

The constitutional distribution of federal power over Indian affairs, though admitting a role for both the legislature and the executive, probably favors Congress. Because of the significant domestic impact of Indian affairs legislation, both upon the Indians[214] and upon the states in which they live, it is reasonable to suppose that the full bundle of executive privileges of *Curtiss-Wright* does not adhere to the President in Indian affairs. Indeed, the courts have invariably interpreted the Indian Commerce Clause as giving Congress vast power over tribal affairs extending even to involuntary tribal dissolution,[215] with the result that its parameters may be considered well established. Indeed, the Constitution expressly mentions authority over Indian affairs only once, in the Indian Commerce Clause. As the only direct textual commitment of Indian powers in the Constitution, this provision suggests the Framers' intent to give Congress the dominant role in regulating relations with the Indian tribes.[216] (Nor, it should be added, do most of the explicitly presi-

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federation], which did not include Indian affairs. We recognize, however, that Indian affairs do not fall neatly into the category of either international or domestic matters, and it is surely arguable that on matters concerning war and peace with the Indians, the national government did possess the inherent powers that *Curtiss-Wright* ascribed to the national government in the realm of traditionally "international" matters.

Oneida, 860 F.2d at 1161.

213. *See supra* text accompanying notes 158-66.

214. Indians born within the United States have been U.S. citizens since 1924. *See* 8 U.S.C. § 1401(a)(2) (1988).

215. *See, e.g., supra* text accompanying notes 119-20.

216. On the other hand, at least some things may be beyond the reach of congressional power under the Indian Commerce Clause. *See, e.g.*, Seminole Tribe v. Florida, 11 F.3d 1016, 1026-28 (11th Cir. 1994) (finding Indian Commerce Clause to give no power to abrogate state Eleventh Amendment immunity). *But see* Ponca Tribe v. Oklahoma, 37 F.3d 1422, 1432 (10th Cir. 1994) (finding congressional power under Indian Commerce Clause to abrogate Eleventh Amendment immunity).

The drafters of the Articles of Confederation, it appears, believed the central government's authority to deal with the Indians, including its power to make treaties with the tribes, derived from the Indian Commerce Clause's confederal antecedent, Article IX, cl. 4 of the Articles of Confederation. *Oneida*, 860 F.2d at 1155 (discussing the intent of drafters of Articles). As early as 1775, the Continental Congress had taken Indian affairs as its direct responsibility, dividing Indian Country into three departments and appointing commissioners for each department who were to supervise treaty negotiations, disbursements of the Congress's money, and the carrying-out of the Congress's Indian policies. *See, e.g., Worcester*, 31 U.S. (6 Pet.) at 573 (M'Lean, J., concurring) (recounting the history of federal Indian policy).

Prior to the drafting and ratification of the United States Constitution, debates raged as to the extent that certain states should cede their western land claims to the central government.

dential powers potentially relevant to Indian relations bear much relevance to Twentieth Century issues of Indian policy: Congress has not ratified an Indian treaty since 1871,[217] and it has happily been a century or so since federal relations with the Indian tribes implicated the President's powers as Commander-in-Chief.) Thus the courts and commentators are correct that the federal power over "Indian" affairs is lodged primarily in the Congress.[218]

2. Recognition as a Trigger for "Indian" Commerce

The flaw in the traditional legislative-supremacy view of the constitutional distribution of power, however, is that it ignores the constitution's clear designation of the President as the constitutional actor empowered to recognize sovereign governments with which the United States will have political relations.[219] In one sense this might be said not to constitute a power over Indian affairs, because it entails no power to regulate the lives of Indian tribes recognized by the federal government. Nevertheless, the recognition power is a vital aspect of federal Indian law because under the longstanding doctrines of tribal sovereignty and intergovernmental relations, it is by federal recognition that the legal system determines whose affairs are "Indian affairs" in the first place. This recognition power belongs to the executive branch.

C. *Disputes over Recognition*

Just as the Constitution expressly commits federal power over Indian affairs only to the legislature, it commits the power to recognize a fellow political sovereign only to the President. Is the power of Indian recognition, then, an *exclusively* executive power? The structure of the Constitution suggests that it should be: the power to designate the sovereign political communities with which the United States may have relations is given to one branch, and the power to regulate relations with certain such designated units, Indian tribes, to another.[220]

Virginia, in particular, had refused to agree to such a cession unless the Continental Congress were to nullify pre-Revolutionary purchases of land from the Indians by various speculating companies. Finally, in 1784, Congress accepted Virginia's terms, a compromise effectively endorsed by the Constitutional Convention in 1787.

> With little debate, the convention's new constitution for the nation vested exclusive authority in Congress to regulate trade and commerce and to make treaties with Indian tribes. This was a far simpler and clearer declaration of legislative authority over Indian tribes than the superseded Articles of Confederation contained.

GETCHES ET AL., *supra* note 27, at 70-71; *but see supra* note 167 (noting that treaty-negotiating power of President, though of little practical import in absence of congressional ratification, is also relevant to Indian affairs under the United States Constitution).

217. *See supra* note 167.

218. *See supra* text accompanying notes 158-66.

219. The recognition power derives from the express textual commitment to the President of the power to "appoint Ambassadors" with Senatorial approval, U.S. CONST. art. II, § 2, cl. 2, and to "receive Ambassadors and other public Ministers" from other sovereign powers, *id.* art. II, § 3. The latter power does not contain any requirement of Senatorial approval.

220. *See* United States v. Belmont, 301 U.S. 324, 330 (1937) (noting that with respect to recognition of foreign sovereigns, "the Executive [has] authority to speak as the sole organ of [the

However, the courts have not seemed to agree with this position. Judges have long upheld the power of Congress to terminate the federal-tribal relationship,[221] and there have been no constitutional challenges to the existing statutory acknowledgment procedures as an unlawful restriction upon the constitutional powers of the President. Until the courts clarify their position, it appears as if the recognition and de-recognition power is possessed concurrently by the legislature and the executive.

What if the two branches disagree on whether or not to extend political recognition to an Indian tribe? The courts have on occasion "order[ed] the executive branch of the federal government to honor tribal status for a particular purpose when that is deemed to have been the intent of Congress."[222] But if the independent recognition power of the executive branch has not hitherto been understood, the issue has yet really to be posed. The present regulatory scheme of Indian tribal acknowledgment denies administrative recognition by the Secretary of the Interior to any group "subject [to] congressional legislation that has expressly terminated or forbidden the Federal relationship."[223] Yet this recognition scheme is one established pursuant to the Secretary's statutory authority under 25 U.S.C. § 9 (1988); it is not one derived from the executive's independent constitutional power to recognize foreign sovereigns. Of *course* this position prohibits conflict with prior congressional enactments. But if the President possesses an independent recognition power, he might be able to recognize even a group so proscribed by the legislature. What would happen if the issue, thus cast, were presented to a court?

One possibility is that the political character of tribal recognition would necessarily make such a dispute an nonjusticiable political question. As the Supreme Court defined it in *Baker v. Carr*, "[t]he nonjusticiability of a political question is primarily a function of the separation of powers."[224]

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially

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national] government"); RESTATEMENT (THIRD), *supra* note 197, § 204 ("Under the Constitution of the United States, the President has exclusive authority to recognize or not to recognize a foreign state or government, and to maintain or not to maintain diplomatic relations with a foreign government."); *see also* United States v. Pink, 315 U.S. 203, 230 (1942) (upholding power of President to settle claims of U.S. citizens as incident to recognition power since "[n]o such obstacle can be placed in the way of rehabilitation of relations between this country and another nation"). Tribal governments, of course, are not genuinely foreign governments, but the power to recognize a fellow political sovereign certainly seems to be quite centralized. Indeed, the President appears also to have the power unilaterally to terminate a formal treaty. *Cf.* Goldwater v. Carter, 444 U.S. 996 (1979) (refusing to consider challenge to President's ability to terminate treaty with Taiwan by recognizing People's Republic of China). RESTATEMENT (THIRD) provides that

> [t]ermination of a treaty by the President is not 'repeal' of a 'law'; it is an international act terminating an international legal obligation. Terminating the international legal obligation will also terminate the status of the treaty as domestic law, but that is an incidental consequence when an international legal obligation lapses for any reason.

RESTATEMENT (THIRD), *supra* note 197, § 339 rptr's note 1.

221. *See supra* text accompanying notes 119, 149, & 151.

222. CANBY, *supra* note 83, at 5.

223. 25 C.F.R. § 83.7(g); *see also id.* § 83.3(e) (similar phrasing).

224. Baker v. Carr, 369 U.S. 186, 210 (1962).

> discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[225]

It may be true, as Justice Jackson noted in his *Youngstown* concurrence, that "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[226] Nevertheless, the "textually demonstrable constitutional commitment"[227] of the recognition power to the President, not to mention the explicitly political character of *all* federal Indian relations—which has been affirmed and reaffirmed by the courts—would seem to bring an executive-legislative dispute over recognition within the ambit of the *Baker* holding.[228]

CONCLUSION

Since the possibility of an independent presidential recognition power has not yet been identified, the nonjusticiability of legislative-executive disputes over recognition is, perhaps, an unsatisfying conclusion. Both the presidential recognition power and the resistance to judicial determination of disputes relating thereto, however, are consequences that flow directly from the doctrine of tribal sovereignty that lies at the root of federal Indian law. Federal Indian law must ground itself exclusively in the political character of federal-Indian relations if it is to avoid a battery of equal protection challenges and a whole host of uncomfortable conceptual problems.

The political character of governmental relations with the tribes—the courts' insistence that tribes are indeed sovereign powers in some meaningful sense—may point to a new understanding of the constitutional division of power with respect to Indian affairs. This character suggests a presidential power to recognize or de-recognize tribal governments, and that disputes with Congress over such matters may well be immunized from judicial review.

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225. *Id.* at 217.

226. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

227. *Baker*, 369 U.S. at 217.

228. As long as tribal recognition is seen as a power exercised by the executive pursuant to statute, it will remain possible to challenge recognition decisions on grounds, for example, that they failed to comport with the procedural requirements of the Administrative Procedure Act and conventional due process analysis. *See, e.g.*, Greene v. Babbitt, No. 93-37010, 1995 U.S. App. LEXIS 23370, at **17-19, 21-25 (9th Cir. Aug. 22, 1995) (requiring hearing procedures under APA before permitting change in tribal recognition eligibility standards).

The extent to which this new understanding may unsettle federal Indian policy, and produce inter-branch conflicts over Indian affairs, remains to be seen. Absent a presidential inclination to challenge the will of the Congress over a matter of tribal recognition or termination, no problems need arise. Nevertheless, if the doctrines of tribal sovereignty and intergovernmental relations are taken seriously, we may sooner or later have to come to terms with the constitutional implications of our principles.