Contents

Chapter 1

Federal Indian Law Policy: Origins and Legal Development

Article I, section 8, clause 3 of the United States Constitution empowers Congress "[t]o regulate commerce . . . with the Indian tribes." The effect of the Indian Commerce Clause is to make "Indian relations . . . the exclusive province of federal law."[1] For much of the first century of the nation's history, this law-making power was augmented by exercise of presidential treaty-making authority under Article II, section 2. "Indian law" has thus been said to "draw[] principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress."[2] Indian law analysis most appropriately begins with a discussion of the unique legal status of tribes and their members within the American constitutional framework and the evolving approaches used by the judiciary and federal government to recognize and accommodate that status.

I. JUDICIAL FOUNDATIONS OF FEDERAL INDIAN POLICY

A. The Marshall Trilogy

In *Cherokee Nation v. Georgia,*[3] Chief Justice John Marshall articulated a view of Indian tribes' legal status that has largely governed the development of modern Indian law. The issue there was whether the Cherokee Nation was a "foreign state" within the meaning of Article III, section 2 of the Constitution so as to create diversity jurisdiction over a claim against the State of Georgia that certain of its laws served "directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force."[4] Refusing to reach the merits of the tribe's application, Justice Marshall held the Cherokee Nation was not a

[1] *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985).

[2] *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978).

[3] 30 U.S. (5 Pet.) 1 (1831).

[4] *Id.* at 15.

foreign state for jurisdictional purposes.[5] In reaching this conclusion, he first observed that "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence"—a "relation . . . marked by peculiar and cardinal distinctions which exist nowhere else."[6] Chief Justice Marshall then stated:

> 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 at 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. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.[7]

The "anomalous"[8] position of tribes and their members within the federal-state governmental structure established under the Constitution distinguished

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[5] *See* art. III, § 2, cl. 1. Although the issue raised by the tribe—whether state law was preempted from application to its lands—presented a question of federal law, Congress did not extend the subject matter jurisdiction of federal courts to such questions until 1875. Act of March 3, 1875, § 1, 18 Stat. 470.

[6] 30 U.S. (5 Pet.) at 16.

[7] *Id.* at 17–18. One commentator thus has attributed the source of the wardship status of Indians, and the attendant federal responsibility, on the bifurcated nature of the rights to aboriginal tribal lands. Derek C. Haskew, *Federal Consultation With Indian Tribes: The Foundation of the Enlightened Policy Decisions, or Another Badge of Shame?*, 24 Am. Indian L. Rev. 21, 30–31 (2000) ("Indian tribal sovereignty is subservient to United States sovereignty, such that Indians hold their land at the sufferance of the greater sovereign. This sufferance was, in turn, defined in terms of a 'trust,' where the federal government 'trustee' holds legal title to all Indian lands for the benefit and use of the Indian 'beneficiaries'").

[8] *United States v. Kagama*, 118 U.S. 375, 381 (1886); *accord Roff v. Burney*, 168 U.S. 218, 221 (1897).

them from other racial groups and has led to markedly complex legal and policy questions.[9]

The "unquestionable, and, heretofore, unquestioned right [of tribes] to the lands they occupy" referred to in *Cherokee Nation* had been explored eight years earlier in *Johnson v. McIntosh*,[10] where Chief Justice Marshall held invalid a conveyance to private individuals by tribal chiefs of lands occupied by their tribes. Relying on the medieval doctrine of discovery, he reasoned that, though the tribes were "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion[,] . . . their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those that made it."[11] The right to occupy therefore was deemed usufructuary in nature and vested no ownership interest in a tribe that it could alienate.[12] A

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[9] *See generally* Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 Am. U. L. Rev. 1177, 1195 (2002) ("[d]espite its acceptance of racist ideology concerning the colonization of the continent, the Marshall trilogy is credited by foundationalists and pragmatists as the basis for recognizing Indian tribes as pre-constitutional sovereigns, not merely associations of people linked by culture or race"); David E. Wilkins, *A Constitutional Conundrum: The Resilience of Tribal Sovereignty During American Nationalism and Expansion: 1810–1871*, 25 Okla. City U. L. Rev. 87, 90 (2000) (contrasting Indians with African-Americans because "tribes generally do not consider themselves an integral part of the pluralistic mosaic of the American polity" and instead "perceive of themselves not only as pre-constitutional polities, but as continuing extra-constitutional entities"); Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 U.C.L.A. L. Rev. 1615, 1634 (2000) (contrasting the Treaty of Guadalupe Hidalgo, which "contemplated the incorporation of the Mexican citizens who continued to live on the ceded lands into the citizenry of the United States," with Indian treaties, which "contemplated the measured separatism of the Indian nations on discrete reservation land bases, where they would continue to exercise political sovereignty under the guardianship of the United States"); Blake A. Watson, *The Thrust and Parry of Federal Indian Law*, 23 U. Dayton L. Rev. 437, 473 (1998) ("[i]t is the claim of tribal sovereignty—a controversial and muddled blend of territorial authority and the right of self-government—that distinguishes Indians from other ethnic groups in the United States").

[10] 21 U.S. (8 Wheat.) 543 (1823).

[11] *Id.* at 574; *see generally* Felix S. Cohen, *The Spanish Origins of Indian Rights in the Law of the United States*, 31 Geo. L.J. 1 (1942) (discussing the international law foundation for the discovery doctrine and for other common law aspects of American Indian law). The United States' accession to authority over Indian lands within the boundaries of the original thirteen states was from the states themselves, which derived their titles from Great Britain. *Johnson*, 21 U.S. (8 Wheat.) at 584–85; *see also Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810) (Johnson, J., dissenting) ("What, then, practically, is the interest of the states in the soil of the Indians within their boundaries? Unaffected by particular treaties, it is nothing more than what was assumed at the first settlement of the country, to wit, a right of conquest or of purchase, exclusively of all competitors within certain defined limits").

[12] *See, e.g.*, *Oneida Indian Nation v. Oneida County*, 414 U.S. 661, 667 (1974); *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 339 (1945); *see generally* Eric Kades, *The Dark Side of Efficiency: Johnson v. McIntosh and the Expropriation of American Indian Lands*, 148 U. Pa. L. Rev. 1065, 1096 (2000) (contending that *Johnson* left unclear "the precise contours of the Indian title of occupancy" and, most important, "whether [tribes] could refuse to sell" such title).

tribe's aboriginal, or "Indian," title could instead be extinguished only by the United States through conquest or purchase.[13]

Application of the doctrine of discovery in *Johnson* has been subjected to substantial modern debate, but it provided, when read together with *Cherokee Nation*, a straightforward conceptual approach to adjusting the boundaries of federal, state, and tribal jurisdiction in matters wholly unrelated to land transfers.[14] The first use of this approach occurred a year after *Cherokee Nation* in *Worcester v. Georgia*.[15] *Worcester* arose from the state court conviction of a non-Indian minister for residing within the Cherokee Nation without first procuring a state license or taking an oath to defend Georgia's laws and constitution.[16] The minister challenged the state statute upon which his conviction was predicated and, following a lengthy analysis of the doctrine of discovery,[17] pre-Revolution English practice concerning land grants and dealings with tribes,[18] the language of various post-Revolution treaties between the United States and the Cherokee Nation,[19] and the commitment

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[13] *Johnson*, 21 U.S. (8 Wheat.) at 587; *see also Fletcher*, 10 U.S. (6 Cranch) at 141–43 (concluding that Georgia could grant fee title to land occupied by Indians where occupation was intended to be temporary under originally authorizing British proclamation); *see generally* Richard A. Monett, *Governing Private Property in Indian Country: The Double-Edged Sword of the Trust Relationship and Trust Responsibility Arising Out of Early Supreme Court Opinions and the General Allotment Act*, 25 N.M. L. Rev. 35, 49 (1995) (arguing that importance of *Fletcher* in doctrinal development of Indian law is overlooked and that *Fletcher* raised, but did not answer, questions concerning the meaning and application of the discovery doctrine with respect to tribal lands).

[14] Watson, *supra* note 9, at 444–47 (discussing origins of discovery doctrine and academic response to its application in Indian country); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court Indian Law*, 84 Cal. L. Rev. 1573, 1581 (1996) (refusing to join "in the well developed debate over the legitimacy of these original principles" since "[i]t is too late in the day to revisit two centuries of consistently and firmly reiterated precedent or to expect a basic reformation of the historical legal relationship of the United States to Indian tribes"). Commentators have criticized *Johnson* harshly. *E.g.*, Krakoff, *supra* note 9, at 1194–95 ("[t]o arrive at this conclusion [that the federal government had the right to sell Indian lands], Marshall had to employ the harsh Anglo version of the discovery doctrine, thereby implicitly sanctioning the thesis that Indian tribes were 'conquered' merely by the arrival of Christians on their continent"); Kades, *supra* note 12, at 1071, 1109 (characterizing the views of various commentators on *Johnson* and "the process of expropriation" as inconsistent "with even the most basic facts in the legal and historical record," and arguing that *Johnson* "is best explained as one element of a calculated, rational, unemotional effort to obtain Indian lands at the least cost"); and Vine Deloria, Jr., and David E. Wilkins, *Tribes, Treaties and Constitutional Tribulations* 83 (1999) (criticizing Johnson as "incoheren[t]" because "under Marshall's reasoning th[e] deed had to be valid" in view of the fact that "[t]he Indians had transferred their land at public auction under the supervision of the British officers *prior* to the Revolution"); *but see* Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 Ariz. St. L.J. 113, 138 (2002) (contending that *Johnson* ultimately "conceded not only the separate sovereign status of tribes under their own law, it also recognized that the tribes were in no way bound by federal Indian law"—i.e., "[s]ince they had the power to make and enforce their own laws in their own forums, they could sell lands to individuals not authorized by the United States to purchase such lands, but the purchaser's only recourse for protection was to tribal forums under tribal law").

[15] 31 U.S. (6 Pet.) 515 (1832).

[16] *Id.* at 536–41.

[17] *Id.* at 542–44.

[18] *Id.* at 544–49.

[19] *Id.* at 549–57.

under both the Articles of Confederation and the Constitution of Indian affairs to the national government,[20] Chief Justice Marshall found the Georgia law inapplicable by operation of the Supremacy Clause. From this analysis he concluded that the Cherokee Nation was "a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves or in conformity with treaties and with the acts of congress" and that "[t]he whole intercourse between the United States and this nation . . . is vested in the government of the United States."[21]

Three bedrock principles underlie *Worcester* and the earlier decisions: (1) by virtue of aboriginal political and territorial status, Indian tribes possessed certain incidents of preexisting sovereignty; (2) this sovereignty was subject to diminution or elimination by the United States but not by the individual states; and (3) the tribes' limited inherent sovereignty[22] and their corresponding dependency upon the United States for protection imposed on the latter a trust responsibility. While subsequent demographic and statutory changes have introduced a complexity into demarcating lines of state, federal, and tribal power that could not have been anticipated by Chief Justice Marshall,[23] these principles substantially shaped future federal common law decision making in many areas of Indian law.

B. Federal Common Law Application of Marshall Trilogy Principles

Since the Marshall trilogy, federal courts have continued to play a pivotal role in defining the relationships between or among the federal government, states, Indian tribes, and individual Indians. They have carried out

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[20] *Id.* at 558–59.

[21] *Id.* at 561; *see generally* Gloria Valencia-Weber, *Deviations From Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. Pa. J. Const. 405 (2003) (responding to contention that states possess inherent jurisdiction on Indian reservations with particular focus in the 1776–1787 period).

[22] The original view of inherent sovereignty was formulated by Justice Johnson's concurring opinion in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 147 (1810), where he stated that "[a]ll the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves." Nonetheless, modern commentators have disputed whether such sovereignty is, as Justice Johnson suggested, limited to internal governance—i.e., controlling intermember affairs—or extends to all persons within the particular territory set aside for a tribe. *Compare* L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 Colum. L. Rev. 809, 817–18 (1996) (concluding that "[i]mplicit in the Marshall trilogy is that [tribal] sovereignty exists over territory" but that decisions cannot be read to support general authority of tribes over persons other than members), *with* Clinton, *supra* note 14, at 236 (arguing that "implicit in the creation of all Indian country, at least until recently, was the assumption created by the baseline understanding of the tribal federal relationship—that Indian reservations or other areas of Indian country were set aside for exclusive governance by the Indian tribes governing the areas"). The scope of inherent tribal authority affects a broad range of Indian law issues and is analyzed both generally and with reference to particular contexts in other chapters.

[23] *See McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

that function not only by construing and applying treaties and federal statutes but also through formulating substantive federal common law derived from the trilogy's core principles. The courts' decision making not unexpectedly reflects the tension found in the trilogy itself between the sovereign status of tribes existing as of the time of Euro-American settlement and the "actual state of things"[24]—i.e., the imposition of a new and ultimately dominant government resulting from that settlement over territories occupied by tribes. This tension is evidenced most plainly by judicial attempts, on one hand, to recognize the unique sovereign status of tribes and, on the other, to acknowledge Congress's pervasive, or "plenary," power over them. The tension is additionally reflected by the courts' attempts to buffer such power through implication of a trust obligation on the Executive Branch and adoption of special Indian law canons of construction.

1. Tribes' extraconstitutional sovereign status

Cherokee Nation unequivocally recognized Indian tribes as juristic entities separate from either the federal government or the several states.[25] Perhaps most significant is the fact that, as extraconstitutional political bodies, they are not subject to the constraints imposed upon the federal govern-

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[24] *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832); *see Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 591 (1823) ("[h]owever extravagant the pretension of converting the discovery of an uninhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained, if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned").

[25] *See, e.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191–92 (1989) (tribes are not "states" within the scope of the Interstate Commerce Clause); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) ("[t]ribal reservations are not States"); *Arizona v. California*, 373 U.S. 546, 597 (1963) (equitable apportionment principles, which apply to divisions of water between states, have no relevance to determining a reservation's federal reserved water right since a tribe is not a state); *Cherokee Nation v. Southern Kansas Ry.*, 135 U.S. 641, 653 (1890) ("[t]he proposition that the Cherokee Nation is sovereign in the sense that the United States is sovereign, or in the sense that the several states are sovereign, and that that nation alone can exercise the power of eminent domain within its limits, finds no support in the numerous treaties with the Cherokee Indians, or in the decisions of this court, or in the acts of congress defining the relations of that people with the United States"); *United States v. Kagama*, 118 U.S. 375, 381–82 (1886) ("[Indians] were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, 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"); *see also Ex parte Morgan*, 20 F. 298, 307 (W.D. Ark. 1883) (refusing to deem the Cherokee Nation as a "state or territory" for extradition purposes under federal statutes because "[t]hese Indian tribes have always been considered by every department of the government—legislative, executive, and judicial—as distinct, independent political communities, differing in so many essential particulars from states and territories in the American Union as not to come under the designation of either"); *see generally* Richard A. Monett, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. Tol. L. Rev. 617, 619 (1994) (discussing and comparing "the Union/state and Union/tribe relationships").

ment and the states by the Bill of Rights[26] and maintain broad, largely unreviewable powers over internal tribal matters.[27] They further possess common law immunity from suit for reservation-based transactions absent express congressional abrogation or tribal waiver.[28] The Supreme Court has deemed that immunity applicable to both on- and off-reservation matters, including purely commercial activities.[29] The frequently stated rationale for this immunity is the tribes' status as political entities antedating the Constitution's adoption and protection of their governmental autonomy or assets.[30]

2. Plenary power doctrine

As reflected by the authority to abrogate tribal immunity from suit, however, Congress possesses comprehensive power with respect to Indian affairs. The Supreme Court thus stated in *United States v. Wheeler*,[31] "[t]he sovereignty that the Indian tribes retain is of a unique and limited character[] [and] exists only at the sufferance of Congress and is subject to complete

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[26] *E.g.*, *Duro v. Reina*, 495 U.S. 676, 693 (1990); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *Talton v. Mayes*, 163 U.S. 376, 384 (1896). The Indian Civil Rights Act, Pub. L. No. 90-284, §§ 201–701, 82 Stat. 73, 77–81 (1968) (codified as amended at 25 U.S.C. § 1153 and 25 U.S.C. §§ 1301–1303, 1321–1326, 1331, 1341), has imposed upon tribes certain of the restrictions on state action contained in the Bill of Rights, but relief under that statute is generally limited to habeas corpus proceedings. *Santa Clara Pueblo*, 436 U.S. at 60–62. The Indian Civil Rights Act is discussed in Chapter 7, part II.

[27] *See*, *e.g.*, *Santa Clara Pueblo*, 436 U.S. at 52–53 (determination of tribal membership criteria); *United States v. Wheeler*, 435 U.S. 313 (1978) (tribal prosecution of member for on-reservation crime); *United States v. Quiver*, 241 U.S. 602, 605–06 (1916) (adultery prosecution under federal law barred by Indian-against-Indian exception in predecessor statute to 18 U.S.C. § 1152, since "the relations of the Indians, among themselves—the conduct of one toward the other—is to be controlled by the customs and laws of the tribe, save when Congress expressly or clearly directs otherwise"); *Jones v. Meehan*, 175 U.S. 1, 31–32 (1899) (descent and distribution of tribal member property); *Roff v. Burney*, 168 U.S. 218, 222 (1897) (tribe possessed power to admit non-Indian to membership and to withdraw such membership).

[28] *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) (enforcement of state tax statutes); *Santa Clara Pueblo*, 436 U.S. at 58–59 (claim under the Indian Civil Rights Act relating to membership denial); *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 172–73 (1977) (claim by state to regulate on-reservation exercise of treaty fishing rights); *United States v. United States Fidelity & Guar. Corp.*, 309 U.S. 506, 512–13 (1940) (counterclaim for amounts allegedly owed by tribes in connection with mineral lease). Although the Supreme Court in *Santa Clara Pueblo*, 436 U.S. at 58, referred to tribes as "long . . . recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers," such immunity was first explicitly recognized by the Supreme Court in the 1940 *United States Fidelity* decision. *See generally* William V. Vetter, *Doing Business With Indians and the Three "S"es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 Ariz. L. Rev. 169, 172–85 (1994); Thomas P. McLish, Note, *Tribal Sovereign Immunity: Searching for Sensible Limits*, 88 Colum. L. Rev. 173 (1988); Note, *In Defense of Tribal Sovereignty Immunity*, 95 Harv. L. Rev. 1058 (1982). A detailed discussion of tribal immunity from suit appears in Chapter 7, part I.

[29] *Manufacturing Technologies*, 523 U.S. at 760.

[30] *Id.* at 757–58.

[31] 435 U.S. 313 (1978).

defeasance."[32] This power, as the Court held in the seminal *Lone Wolf v. Hitchcock*,[33] also extends to treaty or statutorily created interests:

> The 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. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians.[34]

Lone Wolf further observed broadly that this power "has always been deemed a political one, not subject to be controlled by the judicial department of the government."[35] The suggestion that disputes concerning the exercise of congressional power over tribal affairs are nonjusticiable has not survived,[36] but no question exists that "Congress' authority over Indian matters is extraordinarily broad, and the role of courts in adjusting relations between and among tribes and their members correspondingly restrained."[37]

It is now settled that this congressional power derives from the Indian Commerce Clause.[38] Congressional authority, most important, is subject to

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[32] *Id.* at 323; see *Board of County Comm'rs v. Seber*, 318 U.S. 705, 718 (1943) ("[I]t is immaterial that respondents are citizens because it is settled that the grant of citizenship to the Indians is not inconsistent with their status as wards whose property is subject to the plenary control of the federal government. . . . It rests with Congress to determine when the guardianship relation shall cease").

[33] 187 U.S. 553 (1903).

[34] *Id.* at 566.

[35] *Id.* at 565.

[36] *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977).

[37] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 71 (1978). It is unsurprising in light of its breadth that, like the discovery doctrine, the plenary power doctrine has been criticized harshly by some commentators. *E.g.*, Deloria, Jr., and Wilkins, *supra* note 14, at 158–59 (arguing that "[t]he superior power of Congress . . . will continue to be the primary and irresponsible factor in the field of Indian affairs" and that "[t]he solution to this problem . . . would be to return tribes to their political status as it existed prior to the prohibition against treaty making in 1871"—i.e., "to secure Indian consent before proceeding with legislation that has an impact on tribal rights").

[38] *E.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs"); *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 501 (1979) ("[i]t is well established that Congress, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereignty of the Indian tribes"); *see generally* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth-Century Origins of Plenary Power Over Foreign Affairs*, 81 Tex. L. Rev. 1, 25–74 (2002) (analyzing series of Supreme Court nineteenth-century decisions subsequent to the Marshall trilogy, and arguing that Court eschewed any constitutionally enumerated basis for regulating Indian affairs in favor of reliance on inherent power arising from tribes' dependent status); Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 Conn. L. Rev. 1055, 1164 (1995) (discussing historical context within which the Indian Commerce Clause developed and arguing that it "initially was used by the federal courts primarily to limit state authority, rather than to validate assertions of national plenary power").

constraint under the Just Compensation[39] and Due Process[40] Clauses of the Fifth Amendment.

Equally important, *Worcester* makes clear that the Indian Commerce Clause power's exercise serves not only to limit the reach of otherwise existing tribal authority but also, by operation of the Supremacy Clause, the reach of state authority.[41] The Supreme Court accordingly remarked in *Seminole Tribe v. Florida*[42] that "[i]f anything, the Indian Commerce Clause accomplishes

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[39] *Compare Babbitt v. Youpee*, 519 U.S. 234 (1997) (finding as an unconstitutional taking a statute that escheated to a tribe certain fractional interests of its members or others in reservation trust lands); *Hodel v. Irving*, 481 U.S. 704 (1987) (same); and *Shoshone Tribe v. United States*, 299 U.S. 476 (1937) (tribe entitled to compensation when another tribe's members were relocated on its treaty-secured lands), *with United States v. Cherokee Nation*, 480 U.S. 700, 707 (1987) ("[t]hese principles [preventing the United States from depriving a tribe of trust lands without compensation] . . . do little to aid respondent's cause, for they do not create property rights where none would otherwise exist but rather presuppose that the United States has interfered with existing tribal property interests"); and *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 354 (1945) (no recovery was available to tribe under special jurisdictional act providing for compensation as to any claims arising under treaty where such treaty did not recognize aboriginal title as to lands opened for homesteading); *see also United States v. Sioux Nation*, 448 U.S. 371, 408–09 (1980) (whether Congress has exercised its authority as trustee where no compensation is required rather than its sovereign power of eminent domain where compensation is required is determined by whether it has made "a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money"). Fifth Amendment–based taking claims are not available with respect to divestiture of aboriginal title rights not recognized by treaty or statute. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 285 (1955).

[40] *Morton v. Mancari*, 417 U.S. 535, 553–55 (1974) (standard for determining whether statute was an appropriate exercise of Indian Commerce Clause authority was whether it was "tied rationally to the fulfillment of Congress's unique obligation toward the Indians"); *accord Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977); *cf. Duro v. Reina*, 495 U.S. 676, 693 (1990) (questioning whether Congress could delegate criminal jurisdiction to tribes over nonmembers, since "[o]ur cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right"). Whether an Indian tribe is a "person" for purposes of the Fifth Amendment or, insofar as state legislation is involved, the Fourteenth Amendment has not been addressed expressly by the Supreme Court. *Three Affiliated Tribes v. Wold Eng'g, P.C.*, 467 U.S. 138, 157–58 (1984) (declining to reach tribe's equal protection claim under Fourteenth Amendment where remand ordered to permit state court to reconstrue state statute in light of appropriate federal law principles); *cf. Inyo County v. Paiute-Shoshone Indians*, 123 S. Ct. 1887 (2003) (tribe not "person" under 42 U.S.C. § 1983 when claiming that execution of search warrant violated sovereign immunity). Where a tribe acts in a representative capacity to vindicate the interests of individual members, "person" status should not be in doubt. *Delaware Tribal Bus. Comm.*, 430 U.S. at 84–85 (rejecting on merits due process claim brought on behalf of individuals by organization with respect to exclusion from statutory distribution to satisfy Court of Indian Claims judgment).

[41] *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 481 n.17 (1976). The Supreme Court does not construe the Indian Commerce Clause as foreclosing state regulation through a dormant component comparable to that recognized under the Interstate Commerce Clause. *See, e.g., Washington v. Confederated Tribes of Colville Indian Reserv.*, 447 U.S. 134, 157 (1980) ("[i]t can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes"); *see generally* Clinton, *supra* note 38, at 1190, 1225 (arguing that earlier Supreme Court cases had reflected a dormant Indian Commerce Clause doctrine that "automatically excluded state authority from Indian country over any matter directly or indirectly affecting Indians" and attributing "the rapid downturn in tribal success rates in cases heard by the Supreme Court" to the doctrine's "demise").

[42] 517 U.S. 44 (1996).

a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause."[43] Congress's authority nonetheless is less pervasive with respect to the states than tribes because of constitutionally grounded limitations; e.g., the Eleventh Amendment precludes prospective relief against them, their agencies, or their officers outside the *Ex parte Young*[44] exception, and certain substantive principles, such as the equal footing doctrine, restrict congressional action with respect to disposition of state lands and regulatory power.[45]

3. *Indian trust doctrine*

Defining the scope of the United States' trust responsibility to Indians has proved an elusive task—with the threshold question whether the trust obligation arises simply by virtue of dependent status or must be founded on positive treaty or statutory provisions.[46] Two Supreme Court opinions, *United States v. Mitchell* (*Mitchell I*)[47] and its 1983 companion case,[48] provide seminal guidance on this question, at least where retroactive relief is at stake. The issue in *Mitchell I* and *II* was whether the federal government could be held liable in damages under the Indian Tucker Act[49] for alleged mismanagement of reservation timber resources on lands allotted pursuant to the General Allotment Act of 1887.[50] In *Mitchell I* the Court of Claims held the Act created a fiduciary duty on the government's part to manage the resources, but the Supreme Court disagreed, finding the statute established "only a limited trust relationship that does not impose any duty upon the Government to manage

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[43] *Id.* at 62.

[44] 209 U.S. 123 (1908).

[45] *See, e.g., Seminole Tribe v. Florida*, 517 U.S. 44, 74 (1996) (prospective relief against state governor precluded by Eleventh Amendment where *Ex parte Young* doctrine unavailable because of specific remedy provided under comprehensive federal statutory scheme); *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997) (quiet-title action claim barred by Eleventh Amendment because relief had effectively retroactive impact); *cf. Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 205 (1999) (where state retained "conservation necessity" authority, "treaty rights are reconcilable with state sovereignty over natural resources [and] statehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries").

[46] *See generally* Reid Peyton Chambers, *Judicial Enforcement of Federal Trust Responsibility to Indians*, 27 Stan. L. Rev. 1213, 1246–47 (1975) (suggesting that "three identifiable basic lines of cases" exist, with the last arguably concluding that federal officials could be enjoined "from actions contrary to their [common law] fiduciary duties to Indians . . . even if [their actions] are not contrary to any treaty, statute, or agreement," but further recognizing that "[i]t is premature to claim that the case law definitively confirms these latter principles, or to announce the existence of a cause of action for breach of trust"); Note, *Rethinking the Trust Doctrine in Federal Indian Law*, 98 Harv. L. Rev. 422, 425 (1984) (criticizing *Cherokee Nation* and *Worcester* as failing to indicate "whether the purpose of the 'trust' was to protect tribal property, to buttress the tribes' political and social structures, to achieve some combination of these, or to do something else entirely").

[47] 445 U.S. 535 (1980).

[48] *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*).

[49] 28 U.S.C. § 1505.

[50] Act of Feb. 8, 1887, 24 Stat. 388.

timber resources."[51] The Court drew this conclusion from the Act's text, which indicated that the purpose of the government's maintaining the land in trust was to "to ensure that allottees would be immune from the state taxation" and not "to control the use of the land,"[52] and the historical circumstances surrounding the Act's passage, which indicated that commercial exploitation of timber was not authorized.[53] Three members of the Court nonetheless dissented, arguing that the plain language of the Act created a fiduciary relationship and a right of action under the statute for its breach "follow[ed] naturally."[54] On remand the Court of Claims held other, more modern statutes created the requisite fiduciary relationship, and in *Mitchell II* the Court affirmed.

The *Mitchell II* Court reasoned that those laws and accompanying regulations accorded the Secretary of the Interior a "pervasive role in the sales of timber from Indian lands"[55] and contrasted the Secretary's duties under them with "the bare trust created by the General Allotment Act" because they "clearly g[ave] the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians."[56] While observing further that this statutory and regulatory basis for the requisite fiduciary relationship was "reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people,"[57] the Court relied exclusively on "the statutes and regulations at issue" as establishing the fiduciary relationship for whose breach damages could be recovered.[58]

The standards used for determining when statutes and regulations form an enforceable fiduciary relationship, as opposed to a "bare trust," under *Mitchell I* and *II* attracted academic criticism[59] but nonetheless were reaffirmed two decades later in companion cases reaching opposite conclusions concerning whether an Indian Tucker Act claim for breach-of-trust damages would lie. In *United States v. Navajo Nation*,[60] a tribe alleged that the Secretary of

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[51] 445 U.S. at 542.

[52] *Id.* at 544.

[53] *Id.* at 545.

[54] *Id.* at 550 (White, J., dissenting).

[55] 463 U.S. at 219.

[56] *Id.* at 224.

[57] *Id.* at 225.

[58] *Id.* at 226.

[59] *See generally* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 Utah L. Rev. 1471, 1565 (1994) ("The flesh of any judicial doctrine is formed from standards that provide continuity and predictability across varied circumstances. The Indian trust doctrine has not yet matured to that state"); Note, Kathleen M. O'Sullivan, *What Would John Marshall Say? Does the Federal Trust Responsibility Protect Tribal Gambling Revenue?*, 84 Geo. L.J. 123, 137 (1995) (remarking on the absence of judicially manageable standards in *Mitchell II*); Note, *supra* note 46, at 434 (arguing that judge-determined "contemporary [moral] norms" should govern nature of the trust obligation).

[60] 123 S. Ct. 1079 (2003).

the Interior breached fiduciary obligations under the Indian Mineral Leasing Act of 1938 (IMLA)[61] in approving a long-term coal production contract providing the tribe with a 122 percent royalty. The tribe contended, inter alia, that ex parte communications had taken place between coal lessee representatives and the Secretary and that his actions had resulted in a royalty rate almost one-half of what the tribe would have received but for those actions.[62] In resolving this claim, a six-member majority of the Court drew from the "pathmarking precedents" in *Mitchell I* and *II* a two-step inquiry to determine whether a breach of trust claim was stated:

> [A] Tribe must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties. . . . If that threshold is passed, the court must then determine whether the relevant source of substantive law "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s]."[63]

In this instance, the initial step was not satisfied because "[t]he IMLA and its implementing regulations impose no obligations resembling the detailed fiduciary responsibilities that *Mitchell II* found adequate to support a claim for money damages."[64] The Court instead viewed "the Secretary's involvement in coal leasing under the IMLA [as] more closely resembl[ing] the role provided for the Government by the [General Allotment Act] regarding allotted forest lands" at issue in *Mitchell I*, since his role was simply to approve leases negotiated by tribes.[65] It added that the Secretary's lack of "managerial control over coal leasing" comported with the statute's objective of "enhanc[ing] tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties."[66] The Court continued on to reject the tribe's reliance on the Indian Mineral Development Act of 1982[67] and a specific provision in the IMLA, 25 U.S.C. § 396a, as establishing the necessary fiduciary obligation because neither prescribed "guides or standards circumscribing the Secretary's affirmation of coal mining leases negotiated between a Tribe and a private lessee."[68] The tribe's reliance on the mining company's ex parte contact with the Secretary fared no better because neither the IMLA nor its regulations prohibited the communications

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[61] 25 U.S.C. §§ 396a–396g.

[62] 123 S. Ct. at 1094.

[63] *Id.* at 1091.

[64] *Id.*

[65] *Id.* at 1092.

[66] *Id.*

[67] 25 U.S.C. §§ 2101–2108.

[68] 123 S. Ct. at 1093.

that, the Court observed, "occurred during an administrative appeal process largely unconstrained by formal requirements."[69]

In *United States v. White Mountain Apache Tribe*,[70] a five-member majority concluded that a claim for breach of trust was stated where a tribe claimed $14 million dollars to rehabilitate property that had been placed into trust for the tribe under a 1960 statute that also allowed land to be used by the United States for school purposes.[71] The property contains a former military fort, and the amount sought was intended to restore the property to historic preservation standards.[72] The Court stressed at the outset that, under *Mitchell II*, "a statute creates a right capable of grounding a claim within the waiver of sovereign immunity [in the Indian Tucker Act] if, but only if, it 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained' " and that the "'fair interpretation' rule demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity."[73] Consequently, "[w]hile the premise to a Tucker Act claim will not be 'lightly inferred,' . . . a fair inference will do."[74] The requisite inference existed in the 1960 law because it not only "expressly defines a fiduciary relationship" insofar as it provided that the fort would be held in trust for the tribe by the United States but also "invest[s] the United States with the discretionary authority to make direct use of portions of the trust corpus[;]" i.e., even though the 1960 law did not explicitly "subject the Government to duties of management and conservation" like the statutes in *Mitchell II*, "the fact that the property occupied by the United States is expressly subject to a trust supports a fair inference that an obligation to preserve the property improvements was incumbent on the United States as trustee."[75] This inference was drawn from a nonstatutory source—the common law trust principle that "a fiduciary actually administering property may not allow it to fall into ruin on his watch."[76] As the Court later explained in rejecting the United States' argument that drawing such an inference was improper in the face

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[69] *Id.* at 1095. The dissenting justices pointed to the "legislative history and purposes of IMLA," as "illuminated by the Secretary's historical role in reviewing conveyances of Indian lands," for the existence of "a fiduciary obligation to make a more ambitious assessment of the best interest of the Tribe before signing off." *Id.* at 1096 (Souter, J., dissenting). "[E]ven a reticent formulation of the fiduciary obligation," in their view, "would require the Secretary to withhold approval if he had good reason to doubt that the negotiated rate was within the range of reasonable market rates for the coal in question, or if he had reason to know that the Tribe had been placed under an unfair disadvantage at the negotiating table by his very own acts." *Id.* at 1097.

[70] 123 S. Ct. 1126 (2003).

[71] See Pub. L. No. 86-392, 74 Stat. 8 (1960).

[72] 123 S. Ct. at 1130.

[73] *Id.* at 1132.

[74] *Id.* (citation omitted).

[75] *Id.* at 1133.

[76] *Id.*

of statutory silence with respect to the availability of a damages remedy, under *Mitchell II* "general trust law [is] considered in drawing the inference that Congress intended damages to remedy a breach of obligation" once "a specific duty" has been found imposed on the government by a statute.[77] Two justices joined in the opinion with a separate concurrence, contrasting the case to *Navajo Nation* and observing that "[t]he plenary control the United States exercises under the [1960] Act as sole manager and trustee . . . place this case within *Mitchell II*'s governance."[78] The dissenting justices argued that the majority opinion substituted "a new inquiry, asking whether common-law trust principles permit a 'fair inference' that money damages are available" for a test that focuses on whether the involved statute "'can fairly be *interpreted* as mandating compensation by the Federal Government for the damage sustained.' "[79]

It remains to be seen whether the *Navajo Nation* and *White Mountain Apache* decisions will provide significant guidance to lower federal courts confronted with breach of trust claims seeking retroactive relief. It seems quite probable that courts will follow an analytical pattern similar to that employed by the Supreme Court by comparing the relevant statutes and facts against those at issue in the four seminal decisions.[80] Where, as in the *Mitchell II* and *Navajo Nation* situations, the United States actively "manages or operates Indian lands or resources,"[81] the decision should be relatively straightforward. In other contexts, the issue may be substantially more complex. What is clear is that the trust obligation extends to all federal agencies, not just those primarily concerned with Indian affairs;[82] that Congress retains the discretion to impose on agencies the duty to balance that obligation

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[77] *Id.* at 1135.

[78] *Id.* at 1136–37 (Ginsburg, J., concurring).

[79] *Id.* at 1137 (Thomas, J., dissenting) (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976)).

[80] *See Shoshone Indian Tribe v. United States*, 56 Fed. Cl. 639 (2003) (whether United States breached trust obligation in failing to maximize oil and gas revenue or in failing to collect royalties based upon valuation required by regulations).

[81] *Inter-Tribal Council of Ariz., Inc. v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995).

[82] *See, e.g.*, *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981).

with other, possibly competing interests;[83] that the obligation is owed to all Indians and thus does not "limit [an agency's] discretion to reorder its priorities from serving a subgroup of beneficiaries to serving the broader class of all Indians nationwide;"[84] that an agency's duty to comply with a specific statutory mandate supersedes the trust obligation;[85] and that traditional trust

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[83] *Nevada v. United States*, 463 U.S. 110, 128, 142–43 (1983); *see also Arizona v. California*, 460 U.S. 605, 627–28 (1983) (rejecting claim that prior water right quantification was not final because of claimed conflict of interest on federal government's part); *see generally* Ann C. Juliano, *Conflicted Justice: The Department of Justice's Conflict of Interest in Representing Native American Tribes*, 37 Ga. L. Rev. 1307, 1369, 1374, 1385, 1395 (2003) (arguing that "the 'control' exercised by the federal government over tribal litigation should create a fiduciary duty on the federal government" and that "the common law of trust will aid in fleshing out the obligations of the government," but ultimately recommending establishment of "an independent litigating authority within the federal government" to represent tribal interests and limiting application of mutuality requirement for preclusion purposes to instances where United States has acted in furtherance of Indian interests). More difficult issues arise for federal agencies in determining whether and how to reconcile all interests arguably affected by their decision making. Some commentators suggest that an agency's trust responsibility to tribes must take precedence absent an explicit contrary congressional directive, but that position may not square with *Nevada v. United States,* which indicates that an agency's duty lies in carrying out the overall objectives of the involved legislation. *See generally* Mary Christina Wood, *Fulfilling the Executive's Trust Responsibility Toward the Native Nations on Environmental Issues: A Partial Critique of the Clinton Administration's Promises and Performance*, 25 Envtl. L. 733, 747 (1995) (arguing that, where an irreconcilable conflict exists between tribal property rights and other interests, generally "an agency should prioritize tribal rights because it lacks the authority to abrogate such rights").

[84] *Lincoln v. Vigil*, 508 U.S. 182, 195 (1993); *see also Morton v. Ruiz*, 415 U.S. 199, 237–38 (1974) (while agency had no obligation to provide general assistance to all Indians in the country, administrative policy of denying it to Indians living near their reservation was inconsistent with the federal government's trust obligation, especially in view of representations to Congress that such Indians would receive benefits).

[85] *DOI v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 15–16 (2001) (refusing to "read an 'Indian trust' exception into [the Freedom of Information Act]" since "[t]here is simply no support for the exemption in the statutory text, which we have elsewhere insisted be read strictly in order to serve FOIA's mandate of broad disclosure, which was obviously expected and intended to affect Government operations"); *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 479–80 (9th Cir. 2000) (compliance with the National Environmental Policy Act with respect to impact of proposed project on tribe's reserved treaty rights satisfied trust obligation); *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998) (construing *Mitchell II* and prior circuit precedent to stand for the proposition that "although the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes"); *cf. Spirit Lake Tribe v. North Dakota*, 262 F.3d 732, 745 (8th Cir. 2001) (rule based on trust doctrine that "an Indian plaintiff has a reduced responsibility to discover adverse government conduct" has no application where Quiet Title Act claim involved, since the Act's waiver of sovereign immunity must be strictly construed); *Bay View, Inc. v. United States*, 278 F.3d 1259, 1265 (Fed. Cir. 2001) (rejecting breach of trust claim predicated on the Alaska Native Claims Settlement Act since, inter alia, "'[t]he text and history of the ANCSA make clear that Congress sought to avoid creating any fiduciary relationship between the United States and any Native organization'"); *see generally* Shannon Taylor Waldron, Note, *Trust in the Balance: The Interplay of FOIA's Exemption 5, Agency-Tribal Consultative Mandates, and the Trust Responsibility*, 26 Vt. L. Rev. 149, 189 (2001) (contending that Supreme Court's *Klamath Water Users* decision is "somewhat justifiable according to a cursory understanding of the FOIA principles of disclosure" but "ignores the principles of the trust relationship and flatly forfeits Indian law for the sake of administrative law").

principles govern the nature of the obligation owed and remedies for its breach.[86]

Aside from providing a basis for possible monetary recovery, the trust obligation has an important place in assessing the propriety of administrative action[87] where prospective relief is sought.[88] So, for example, the Supreme Court relied upon it in *Morton v. Mancari*[89] to justify hiring preferences under section 12 of the Indian Reorganization Act[90] and in *Wilson v. Omaha Indian Tribe*[91] to determine whether use of state law to resolve an accretion dispute was appropriate. Courts also have considered it in passing

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[86] *Mitchell II*, 463 U.S. at 226; *United States v. Mason*, 412 U.S. 391, 398–99 (1973); *see Cobell v. Norton*, 240 F.3d 1081, 1108 (D.C. Cir. 2001) (rejecting contention that district court lacked authority to order accounting after finding breach of trust obligation; "[b]ecause the agencies involved delayed performance of their legal obligations, the court was justified in fashioning equitable relief that would ensure the vindication of plaintiffs' rights"); *LeBeau v. United States*, 215 F. Supp. 2d 1046, 1060 (D.S.D. 2002) (Indian Tucker Act jurisdiction existed over claim that Secretary of the Interior unreasonably delayed in distribution of judgment fund and where delay allowed Congress to amend settlement statute to reduce plaintiff group's share of proceeds; "[o]ne of the fundamental obligations of a trustee required to distribute the trust property is to 'proceed with expedition to wind up the trust and distribute the estate'"); *see generally* Rodina Cave, Comment, *Simplifying the Indian Trust Responsibility*, 32 Ariz. L.J. 1399, 1421 (2000) (arguing that "[t]he availability of causes of action for breach of common law trust is in step with tribal self-determination, as well as with the tribes' movement toward economic self-sufficiency"); Eugenia Allison Phipps, Note, *Feds 200, Indians 0: The Burden of Proof in the Federal/Indian Fiduciary Relationship*, 53 Vand. L. Rev. 1637, 1682–83 (2000) (arguing that "courts should shift the burden establishing . . . [the] statutory and control-based dominance necessary to justify the imposition of common law fiduciary obligations from the plaintiff Indian to the defendant government in breach of duty claims").

[87] As is implicit in the plenary power doctrine, Congress itself is not subject to any legally enforceable trust obligation. *See Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 259 F. Supp. 2d 783, 792 (W.D. Wis. 2003) (rejecting claim that actionable breach of trust claim could be based on adoption of statute).

[88] Where injunctive or declaratory relief is requested, subject matter jurisdiction exists under the Administrative Procedure Act, 5 U.S.C. § 702, to the extent a claim is directed to final agency action, and the jurisdictional prerequisites of the Indian Tucker Act are therefore absent. Averting to this distinction, one court of appeals has stated that the fact "[t]hat plaintiffs rely upon common law trust principles in pursuit of their claim is immaterial, as here they seek specific relief other than money damages, and federal courts have jurisdiction to hear such claims under the APA." *Cobell v. Norton*, 240 F.3d 1081, 1094–95 (D.C. Cir. 2001); *see also Lac Courte Oreilles Band*, 259 F. Supp. 2d at 791 (§ 702 jurisdiction unavailable where challenge is legislative, not agency, action). Although the Supreme Court has not addressed the issue directly, it appears, as the *Cobell* decision indicates, that a specific statutory or regulatory duty need not be shown to establish entitlement to purely prospective relief. *See generally* Wood, *supra* note 59, at 1522 (arguing that *Mitchell* requirements limited to Indian Tucker Act claims and that "[f]ederal district courts, on the other hand, have broad authority to hear federal common law claims and to grant equitable and declaratory relief for such claims"); Nell Jessup Newton, *Enforcing the Federal-Indian Trust Relationship After Mitchell*, 31 Cath. U. L. Rev. 635, 681 (1982) ("*Mitchell* is not a precedent when equitable relief is sought").

[89] 417 U.S. 535 (1974).

[90] 25 U.S.C. § 472.

[91] 442 U.S. 653, 673–74 (1979).

on the reasonableness of an agency's interpretation or execution of a statute.[92] The trust obligation additionally has been enlisted as one rationale for the special canons of construction applicable to treaties and statutes affecting Indians.[93]

4. Indian canons of construction

The Indian canons of construction derive from the disadvantage labored under by tribes in treaty making and agreement making with the Executive Branch. As the Supreme Court stated in *Jones v. Meehan:*[94]

> In construing any treaty between the United States and an Indian tribe, it must always . . . be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.[95]

Implicit in this explanation for the canons was the principle that, given the guardian-ward relationship, the Executive Branch's actions should be viewed

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[92] *Compare Parravano v. Babbitt*, 70 F.3d 539, 546 (9th Cir. 1995) (relying on trust obligation to buttress conclusion that agency properly issued emergency regulations to protect off-reservation fishing rights), *with Woods Petroleum Corp. v. DOI*, 47 F.3d 1032 (10th Cir. 1995) (agency acted arbitrarily in disapproving communization agreement under 25 U.S.C. § 396 for the sole purpose of causing a valid oil and gas lease to expire and thereby allow Indian lessees to enter into more lucrative leases with essentially identical communization agreement); *see also Loudner v. United States*, 108 F.3d 896, 902 (8th Cir. 1997) (failure to give adequate notice of application deadline for claiming portion of trust corpus constituted breach of trust obligation that prevented limitation statute from running); *see generally* Haskew, *supra* note 7, at 64 (arguing that, in view of the United States' trust responsibility, "the APA's arbitrary and capricious standard is far too high a standard to meet in order to be able to challenge federal action[,]" and that "'arbitrary, capricious, or an abuse of discretion' is a standard that neglects to correct many behaviors that would be considered a breach of a strict fiduciary duty").

[93] *See, e.g.*, *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) ("[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians").

[94] 175 U.S. 1 (1899).

[95] *Id.* at 10–11; *see Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) ("[A]n examination of the historical record provides insight into how the parties to the Treaty understood the terms of the agreement. This insight is especially helpful to the extent that it sheds light on how the Chippewa . . . understood the agreement because we interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them").

when possible as having been taken with the trust obligation arising from such relationship in mind.[96]

The practical effect of the canons is to resolve ambiguities or "doubtful expressions" in the affected Indians' favor.[97] They thus have been used to imply the existence of reserved water rights[98] and hunting and fishing rights.[99] The canons further counsel against diminution of existing tribal rights ordinarily being inferred from statutes without express provision for such modification.[100] They have been extended to resolve ambiguities in statutes or executive orders intended to benefit Indians.[101]

The canons nonetheless do not constitute "a license to disregard clear expressions of tribal and congressional intent."[102] They also "are not manda-

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[96] *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943) (1902 agreement was "to be construed, so far as possible, in the sense which the Indians understood it, and 'in a spirit which generously recognizes the full obligation of this nation to protect the interest of a dependent people' "); *see generally* Watson, *supra* note 9, at 458 ("[t]he presence of a trust relationship between the United States and the Indian tribes, which enabled the Supreme Court to justify the assertion of plenary power over Indians, likewise supports the application of the value-laden Indian canons as an ameliorating force when ambiguities arise regarding the assertion of federal authority"). Some commentators have suggested other grounds for the canons. *E.g.*, Philip P. Frickey, *Marshalling Past and Present Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381 (1993) (arguing that the Marshall trilogy established canons of construction animated by desire to maintain sovereign-to-sovereign relationship).

[97] E.*g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 194 n.5 (1999); *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 642 (1970).

[98] *Winters v. United States*, 207 U.S. 564, 575–77 (1908) (construing statute embodying agreement with tribe).

[99] *United States v. Dion*, 476 U.S. 734, 738 (1986) ("As a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress. . . . These rights need not be expressly mentioned in the treaty").

[100] *E.g.*, *Rice v. Rehner*, 463 U.S. 713, 719–20 (1983) ("[w]hen we determine that tradition has recognized a sovereign immunity in favor of the Indians in some respect, then we usually are reluctant to infer that Congress has authorized the assertion of state authority in that respect 'except where Congress has expressly provided that State laws shall apply[]' "); *Menominee Tribe v. United States*, 391 U.S. 404, 412–13 (1968) (refusing to imply abrogation of treaty-based hunting and fishing rights upon termination of tribal trust status); *see generally* Phillip P. Frickey, *Domesticating Federal Indian Law*, 81 Minn. L. Rev. 31, 72–73 (1996) (arguing that canons of construction dictate that Congress invades Indian rights only by expressly so stating).

[101] *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985) (refusing to find waiver of tribal immunity against state taxation on the basis of the presumption against implied repeals, observing that "the standard principles of statutory construction do not have their usual force in cases involving Indian law"); *Parravano v. Babbitt*, 70 F.3d 539, 544 (9th Cir. 1995) ("[t]he rule of construction applicable to executive orders creating reservations is the same as that governing the interpretation of Indian treaties"); *Rumsey Indian Rancheria v. Wilson*, 64 F.3d 1250, 1257 (9th Cir. 1995) ("statutes benefitting Native Americans generally are construed liberally in their favor"), *amended*, 99 F.3d 321 (9th Cir. 1996); *see generally* David M. Blurton, *Canons of Construction, Stare Decisis and Dependent Indian Communities: A Test of Judicial Integrity*, 16 Alaska L. Rev. 37, 46 (1999) ("The development of the canons of construction . . . began in the context of interpreting treaties, reflecting a policy of recognizing the tribes' disadvantage in negotiating treaties with the United States. The application of these canons to federal statutes dealing with Indian rights was a natural evolution, as federal statutes, ratifying executive agreements with tribes, replaced treaties as the primary means of dealing with tribes").

[102] *DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975); *accord South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 506 (1986); *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 766–70 (1985); *see also Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943) ("[b]ut even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties").

tory rules" but instead "guides that 'need not be conclusive.'"[103] The Supreme Court accordingly has rejected the notion that, where different canons counsel different results, "the pro-Indian canon is inevitably the stronger—particularly where the interpretation of a congressional statute rather than an Indian treaty is at issue."[104] It explained further that "[t]his Court's earlier cases are too individualized, involving too many kinds of legal circumstances, to warrant any such assessment about the two canons' relative strength."[105] Resort to legislative history or surrounding circumstances to clarify ambiguous provisions is appropriate to resolve the propriety of applying the Indian canons in a particular controversy.[106] Lower federal courts are divided over whether administrative interpretations of ambiguous statutes otherwise entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[107] control over the canons.[108] The Indian canons, finally, may not be used to disadvantage the interests of one tribe or group of Indians in favor of another.[109]

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[103] *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001).

[104] *Id.* at 95.

[105] *Id.*

[106] *Id.* at 94; *see also Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 n.17 (1978). In *Chickasaw Nation*, the issue was whether a federal tax applied to tribal gaming revenue, and the competing canons were the presumption against implication of an exemption from such a tax unless clearly expressed and the notion that statutes should be construed favorably to tribes. In finding application of the latter unjustified, the Court relied in part on its analysis of legislative history that reflected deletion of language that the tribe argued should be implied. 534 U.S. at 91–93. Subsequent to *Chickasaw Nation*, the Ninth Circuit Court of Appeals addressed the question of how to resolve a claimed exemption from application of two federal vehicle-related taxes, which admittedly contained no exemptions for Indians, in light of a treaty provision that provided tribal members "'free access'" from their reservation "'to the nearest public highway'" and "'the right in common with citizens of the United States[] to travel upon all public highways.'" *Ramsey v. United States*, 302 F.3d 1074, 1076–77 (9th Cir. 2002). It reasoned that, in such an instance, express "exemptive language" first must be found and that then the provision should be construed favorably to the affected Indians to resolve any ambiguity over its application to the federal taxes at issue. *Id.* at 1079. The court emphasized that "[o]nly if [the express exemptive] language exists, do we consider whether it could be 'reasonably construed' to support the claimed exemption." *Id.* at 1079. Applying this analytical approach, it deemed the "free access" and "in common" provision not to constitute the requisitely express "exemptive language." *Id.* at 1080. The court distinguished a prior decision, *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998), where the same treaty provision had been invoked successfully to preempt state highway-related taxes, on the ground that, with respect to a state tax, "unlike the federal standard, there is no requirement to find express exemptive language before employing the canon of construction favoring Indians." *Ramsey*, 302 F.3d at 1079.

[107] 467 U.S. 837 (1984).

[108] *Compare Williams v. Babbitt*, 115 F.3d 657, 663 (9th Cir. 1997) (applying *Chevron* analysis), *with Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461–62 (10th Cir. 1997) (deference not required); and *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 58–59 (D.C. Cir. 1991) (same); *see Navajo Nation v. DHHS*, 325 F.3d 1133, 1136 n.4 (9th Cir. 2003) (noting but not reaching issue).

[109] *E.g.*, *Confederated Tribes of Chehalis Indian Reserv. v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996); *cf. Solomon v. Interior Reg'l Hous. Auth.*, 313 F.3d 1194, 1205 (9th Cir. 2002) (B. Fletcher, J., dissenting) (Indian canon requiring favorable construction "does not provide a ready answer when, as here, Indian interests fall on both sides of the issue").

Although the canons' formal reach is limited to statutes specifically concerned with Indians,[110] one particularly nettlesome issue directly influenced by them is the status of tribes and Indians under statutes of general applicability. The rule, as stated by the Supreme Court, is that such statutes apply to tribes and their members no differently than they apply to other entities or individuals.[111] However, lower federal courts have recognized the possibility of an exception to this presumptive rule where the statute contains no express provision for such application and where "(1) the law touches 'exclusive rights of self-governance in purely intramural matters[,]' (2) the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties[,]' or (3) there is proof 'by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations.' "[112] Substantial litigation has occurred with respect to these exceptions, with a variety of results.[113] It is unclear how these exceptions, excluding the

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[110] *E.g.*, *Hoonah Indian Ass'n v. Morrison*, 170 F.3d 1223, 1229 (9th Cir. 1999) (Alaska National Interest Lands Conservation Act is not subject to special canons of construction since it was adopted to protect subsistence uses by both Native and non-Native rural Alaskans; "[t]hat the legislation may benefit Natives more than others does not make it Indian legislation").

[111] *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960) (a "general statute applying to all persons includes Indians and their property interests").

[112] *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985) (holding Occupational Health and Safety Act applicable to tribally owned commercial enterprise).

[113] *Compare Grey Poplars Inc. v. One Million Three Hundred Seventy-One Thousand One Hundred (1,371,100) Assorted Brands of Cigarettes*, 282 F.3d 1175, 1177 (9th Cir. 2002) (applying Contraband Cigarette Trafficking Act to transactions by tribally license business); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174 (2d Cir. 1996) (following *Coeur d'Alene Tribal Farm* and holding tribally owned construction company subject to Occupational Safety and Health Act); *United States v. Baker*, 63 F.3d 1478, 1484–85 (9th Cir. 1995) (Contraband Cigarette Trafficking Act applicable to on-reservation activities of Indians); *Public Serv. Co. v. Shoshone-Bannock Tribes*, 30 F.3d 1203 (9th Cir. 1994) (inherent tribal authority to regulate shipment of spent nuclear fuel rods divested by operation of Hazardous Materials Transportation Act); *Lazore v. Commissioner*, 11 F.3d 1180, 1187 (3d Cir. 1993) (treaty provision granting "free use and enjoyment" of lands did not exempt tribal members generally from federal income tax liability although such provision "might be sufficient to support an exemption from a tax on income derived directly from the land"); *United States v. Funmaker*, 10 F.3d 1327 (7th Cir. 1993) (18 U.S.C. §§ 844(i) and 924(c) applicable to on-reservation conduct by Indian); *Lumber Indus. Pension Fund v. Warm Springs Forest Prods. Indus.*, 939 F.2d 683 (9th Cir. 1991) (Employment Retirement Income Security Act (ERISA) applicable to tribal sawmill operation); *USDOL v. Occupational Safety and Health Comm'n*, 935 F.2d 182 (9th Cir. 1991) (Occupational Safety and Health Act applicable to tribal sawmill operation); *Smart v. State Farm Ins. Co.*, 868 F.2d 929 (7th Cir. 1989) (ERISA applicable to tribally operated health center); *Atlantic States Legal Found. v. Salt River Pima-Maricopa Indian Cmty.*, 827 F. Supp. 608 (D. Ariz. 1993) (tribe subject to suit under Resource Conservation and Recovery Act); and *United States v. Brown*, 824 F. Supp. 124 (S.D. Ohio 1993) (holding summons provision of Internal Revenue Code applicable to tribal member), *with NLRB v. Pueblo of San Juan*, 276 F.3d 1186 (10th Cir. 2002) (*en banc*) (section 8(a)(3) of Labor Management Act, 29 U.S.C. § 158(a)(3), did not prohibit tribe from adopting "right to work" ordinance prohibiting union security agreements between labor organizations and employers doing business on tribal lands); *Taylor v. Alabama Intertribal Council Title IV J.T.P.A.*, 261 F.3d 1032, 1035 (11th Cir. 2001) (*per curiam*) (intertribal council not subject to 42 U.S.C. § 1981 with respect to alleged employment discrimination, since tribes are excluded from "employer" status under Title VII of Civil Rights Act and "it would be wholly illogical to allow plaintiffs to circumvent the Title VII bar against race discrimination claims based on a tribe's Indian preference program by allowing a plaintiff to style his claim as [a] § 1981 suit"); *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1080 (9th Cir. 2001) (finding Age Discrimination in Employment Act inapplicable to claim by tribal member against housing agency that "functions as an arm of the tribal government and in a governmental role"); *Reich v. Great Lakes*

second, which might require recourse to implied repeal principles, can be reconciled with *Tuscarora* and the settled rule of construction that gives unambiguous statutory language its natural effect.[114] Finally, even if a federal statute does apply to tribes, their immunity from suit by nonfederal parties remains absent explicit congressional abrogation, and enforcement efforts therefore are dependent upon existence of either an *Ex parte Young*–like exception[115] for relief against tribal officers in their official capacity or personal liability.[116]

II. EVOLUTION OF FEDERAL INDIAN POLICY: CONGRESS AND THE EXECUTIVE BRANCH

Federal Indian policy has not proceeded in a linear progression toward a specific goal. It has been marked instead by shifts in both the result desired and the means to achieve that result. The development of such policy will

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Indian Fish and Wildlife Comm'n, 4 F.3d 490, 493–96 (7th Cir. 1993) (implying exemption for tribal game wardens from overtime compensation requirements under Fair Labor Standards Act); and *EEOC v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246 (8th Cir. 1993) (Age Discrimination in Employment Act inapplicable to claim by tribal member against tribal corporation with respect to reservation employment); *cf. NLRB v. Chapa De Indian Health Program*, 316 F.3d 995, 998–99 (9th Cir. 2003) (applying *Coeur d'Alene Tribal Farm* standards to determine that NLRB did not plainly lack jurisdiction over tribal organization with respect to unfair labor practice charges filed against it as employer); *see generally* Alex Tallchief Skibine, *Applicability of Federal Laws of General Application to Indian Tribes and Reservation Indians*, 25 U.C. Davis L. Rev. 85, 139 (1991) (criticizing presumptive applicability arising under *Tuscarora* and *Coeur d'Alene Tribal Farm* approaches and suggesting a test that "would infer congressional intent to apply general federal laws from the existence of an overriding national interest in applying the law to reservation Indians"). One court of appeals, moreover, has limited the reach of *Tuscarora* to "property rights." *Pueblo of San Juan*, 276 F.3d at 1199 (*Tuscarora* inapplicable when determining whether section 8(a)(3) of the Labor Management Relations Act, 29 U.S.C. § 158(a)(3), restricts tribe's authority to adopt ordinance prohibiting union security agreements; "[t]he *Tuscarora* Court's remarks concerning statutes of general applicability were made in the context of property rights, and do not constitute a holding as to tribal sovereign authority to govern").

[114] *See Passamoaquoddy Tribe v. Maine*, 75 F.3d 784, 789 (1st Cir. 1996) (even though Indian Gaming Regulatory Act is a statute of general applicability, it has no application to Indian gaming in Maine where a land claim settlement act "contains a savings clause warning pointedly that a specific reference or similarly clear expression of legislative intent will be required to alter the status quo").

[115] *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991).

[116] *See Florida Paraplegic Ass'n v. Miccosukee Tribe*, 166 F.3d 1126, 1132 (11th Cir. 1999) (although tribes are subject to Title III of the Americans with Disabilities Act as a statute of general applicability, "the absence of *any* reference to Indian tribes in the . . . statute stands out as a stark omission of any attempt by Congress to declare tribes subject to private suit for violating the ADA's public accommodation requirements[,]" and thus tribes are not amenable to such suit); *In re National Cattle Cong.*, 247 B.R. 259, 265–67 (Bankr. N.D. Iowa 2000) (although tribes are subject to Bankruptcy Code as an act of general applicability, Congress has not abrogated their immunity from suit under 11 U.S.C. § 106); *but cf. Taylor v. Alabama Intertribal Council Title IV J.T.P.A.*, 261 F.3d 1032, 1036 (11th Cir. 2001) (*per curiam*) (*Ex parte Young* relief not available against board members of intertribal council in their personal capacities for alleged violation of 42 U.S.C. § 1981, where council itself is not subject to statute and "is the real party in interest[,]" because all relief effectively would run against it); *see generally* Lisa R. Hasday, Note, *Tribal Immunity and Access for the Disabled*, 109 Yale L.J. 1199, 1200 (2000) (discussing *Florida Paraplegic*, and suggesting that "the *Miccosukee* plaintiffs might have circumvented the obstacle of tribal sovereign immunity if they had sued tribal members rather than the Miccosukee Tribe as a whole").

be discussed with reference to three periods dominated by diverse statutory schemes: the Trade and Intercourse Acts period between 1789 and 1887, the General Allotment Act period between 1887 and 1934, and the Indian Reorganization Act period between 1934 and the present. These divisions, while helpful in identifying generally accepted trends in congressional and Executive Branch policy, cannot be viewed in isolation from each another, since they blend one into the next and since only when the periods are taken in the aggregate can one understand how the current jurisdictional relationship between the federal government, the states, and the tribes has developed and how far such relationship has evolved from that portrayed by Chief Justice Marshall in *Worcester*.

A. The Trade and Intercourse Acts Period: 1789 to 1887

Among the topics addressed by the first Congress was commerce with Indian tribes, and the Trade and Intercourse Act of 1790 reflected an intent, which has never changed, to occupy the area of Indian affairs with federal law.[117] The 1790 Act prohibited trade with tribes unless pursuant to a federal license,[118] precluded tribes or tribal members from selling their lands unless such transaction was "made and duly executed at some public treaty[] held under the authority of the United States[,]"[119] and authorized federal prosecution for crimes committed by non-Indians against "peaceable and friendly" Indians in "any town, settlement or territory belonging to any nation or tribe of Indians[.]"[120] This act was replaced in 1793 by a more detailed statute, which, while containing the substantive elements of the earlier law, also provided a fine for settling or surveying for settlement lands belonging to a tribe and forbade the purchase of any horse in Indian territory, whether from an Indian or a non-Indian, without a license.[121] The 1793 Act further contained an appropriation to defray the cost of employing agents and to furnish tribes with goods, money, domestic animals, or implements of husbandry for the purpose of promoting "civilization among the friendly Indian tribes" and securing their continued friendship.[122]

The 1793 Act was superseded by a 1796 law that defined the boundaries of then-existing Indian country but allowed them to be modified by

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[117] Act of July 22, 1790, 1 Stat. 137.

[118] *Id.* § 1, 1 Stat. at 137.

[119] *Id.* § 4, 1 Stat. at 138; *see also Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 231–32 (1985) (discussing the prohibition in the early Trade and Intercourse Acts against alienation of Indian land).

[120] Act of July 22, 1790, §§ 5, 6, 1 Stat. 137, 138.

[121] Act of March 1, 1793, 1 Stat. 329.

[122] *Id.* § 9, 1 Stat. at 331. Earlier appropriations related to Indian affairs had been made in 1789 and 1791. Act of Aug. 20, 1789, § 1, 1 Stat. 54; Act of Sept. 11, 1789, § 1, 1 Stat. 67, 68; Act of Dec. 23, 1791, § 4, 1 Stat. 226, 228.

treaty.[123] New provisions in the 1796 Act included a mechanism to compensate citizens for Indian depredations or crimes committed outside Indian country.[124] The 1796 Act was replaced three years later by a comparably worded statute,[125] which in turn was superseded in 1802.[126] With several minor amendments or supplementations,[127] the 1802 Act remained in effect until 1834.

The Act of June 30, 1834,[128] represented the single most important measure of Indian-related legislation during the Trade and Intercourse Acts period.[129] It defined the then-scope of Indian country;[130] required the licensing of persons desiring to trade with Indians in Indian country;[131] prohibited alienation of lands by tribes "unless the same be made by treaty or convention

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[123] Act of May 19, 1796, 1 Stat. 469.

[124] *Id.* § 14, 1 Stat. at 472. The procedure involved making "application to the nation or tribe, to which such Indian or Indians shall belong, for satisfaction" and, should no satisfaction be forthcoming within 18 months, referring the matter to the President for further action. This provision was carried forward in later Trade and Intercourse Acts, although the period for making satisfaction was reduced to "a reasonable time, not exceeding 12 months[.]" Act of March 30, 1802, § 14, 2 Stat. 139, 141–43; Act of June 30, 1834, § 17, 4 Stat. 729, 731–32. As variously amended, this provision is codified at 25 U.S.C. § 229.

[125] Act of March 3, 1799, 1 Stat. 743.

[126] Act of March 30, 1802, 2 Stat. 139; *see generally* 1 Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* 89–93 (1984) (discussing historical circumstances attendant to adoption of the Trade and Intercourse Acts between 1790 and 1802).

[127] *E.g.*, Act of Apr. 29, 1816, 3 Stat. 332; Act of March 3, 1817, 3 Stat. 383.

[128] 4 Stat. 729.

[129] Felix Cohen described June 30, 1834, as "perhaps the most significant date in the history of Indian legislation." Felix S. Cohen, *Handbook of Federal Indian Law* 73 (1942). He attributed such significance not only to the Trade and Intercourse Act but also to a statute establishing the Department of Indian Affairs adopted on that date. *See* Act of June 30, 1834, 4 Stat. 735.

[130] Act of June 30, 1834, § 1, 4 Stat. 729 ("that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river and not within any state to which the Indian title has not been extinguished"). This statutory definition of Indian country remained in effect for 40 years until omitted in an 1874 statutory recodification. *Donnelly v. United States*, 228 U.S. 243, 268–69 (1913). The term remained statutorily undefined until enactment of 18 U.S.C. § 1151 in 1948, which defines Indian country for criminal jurisdiction purposes in a substantially different manner than the 1834 statute. Although various provisions of the 1834 Act made reference to Indian country, other sections utilized differing descriptions for their substantive coverage. *E.g.*, Act of June 30, 1834, § 9, 4 Stat. 729, 730 (prohibiting introduction of horses, mules, and cattle onto "any land belonging to any Indian or Indian tribe" without tribal consent); *id.* § 11, 4 Stat. at 730 (prohibiting settlement on "Indian lands belonging, secured, or granted by treaty with the United States to any Indian tribe"); *id.* § 12, 4 Stat. at 730 (prohibiting the purchase, grant, lease, or other conveyance of lands by a tribe); *id.* §§ 13–15, 4 Stat. at 731 (prohibiting oral or written communications designed to induce breach of treaties or the peace, prohibiting the conveying of communications from a foreign power, and prohibiting attempts to alienate the confidence of any Indian from the United States government).

[131] Act of June 30, 1834, §§ 2–4; 4 Stat. 729–30. Between 1795 and 1822, the United States government operated trading houses, or "factories," throughout Indian country to deal with tribal members. *See*, *e.g.*, Act of March 3, 1795, 1 Stat. 443; Act of March 3, 1821, 3 Stat. 641; *see generally* 1 Prucha, *supra* note 126, at 115–34 (discussing the government trading house era). Private traders, however, continued to do business within Indian country and, while modified since 1834, federal law still requires trader licensure. 25 U.S.C. §§ 261–264; 25 C.F.R. § 140; *see Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685, 688–90 (1965) (tracing development of Indian trader legislation).

entered into pursuant to the constitution[;]"[132] provided remedies for the theft or destruction by Indians and non-Indians of one another's property;[133] and made unlawful the introduction of liquor into Indian country or establishing distilleries there.[134] The 1834 Act, finally, provided that "so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States[] shall be in force in the Indian country" but excluded from such application "crimes committed by one Indian against the person or property of another Indian."[135]

The importance of the various Trade and Intercourse Acts, aside from their substantive provisions, lay in Congress's unmistakable objective of exercising plenary control over Indian affairs. In large measure, this control was manifested through restricting access by non-Indians to Indian country and thereby insulating tribes from unwarranted outside contact. Complementing such approach was the Act of May 28, 1830,[136] which authorized the President to effect removal of tribes residing east of the Mississippi River to United States territories west of the river.[137] Removal was deemed necessary because of the increasing pressure by Euro-Americans upon, principally, tribal lands in the south and southeast and because of increasingly bitter federal-

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[132] Act of June 30, 1834, § 12, 4 Stat. 729, 730. This fundamental element of the Trade and Intercourse Acts has been carried forward with no substantive change into present law. *See* 25 U.S.C. § 177; *Oneida Indian Nation v. Oneida County*, 414 U.S. 661, 668 n.4 (1974).

[133] Act of June 30, 1834, §§ 16, 17, 4 Stat. 729, 731–32.

[134] *Id.* §§ 20, 21, 4 Stat. at 732–33. Earlier restrictions on liquor trafficking in Indian country had been adopted in 1802, 1822, and 1832. Act of March 30, 1802, § 21, 2 Stat. 139, 146; Act of May 6, 1822, § 2, 3 Stat. 682; Act of July 9, 1832, § 4, 4 Stat. 564. Section 21 of the 1834 Act, which proscribed establishing distilleries in Indian country, now appears at 25 U.S.C. § 251. Section 20, which contained the prohibition against introduction of liquor into Indian country, has been modified variously, with present criminal provisions codified in 18 U.S.C. §§ 1154–1156 and 1161. *See Rice v. Rehner*, 463 U.S. 713, 722 (1983) (observing that "Congress imposed complete prohibition [on Indian country liquor transactions] by 1832, and these prohibitions are still in effect subject to suspension conditioned on compliance with state law and tribal ordinances"); *see generally* Cohen, *supra* note 129, at 352–54 (discussing historical development of liquor trafficking prohibitions).

[135] Act of June 30, 1834, § 25, 4 Stat. 733. Section 25 was derived from the Act of March 3, 1817, 3 Stat. 383. The 1834 provision was modified in 1854 to exempt from its application either Indians who had been punished "by the local law of the tribe" or situations where, by treaty, exclusive tribal jurisdiction over the offense was recognized. Act of March 27, 1854, § 3, 10 Stat. 269, 270. The 1854 Act has been codified at 18 U.S.C. § 1152 with no substantive change. Section 19 of the 1834 Act also required "superintendents, agents, and sub-agents[] to endeavor to procure the arrest and trial of all Indians accused of committing any crime, offence, or misdemeanor, and all other persons who may have committed crimes or offenses within any state or territory, and have fled into Indian country, either by demanding the same of the chiefs of the proper tribe, or by such other means as the President may authorize[.]" 4 Stat. 729, 732. This procedure remained in effect until repealed by the Act of May 21, 1934, 48 Stat. 787.

[136] Act of May 28, 1830, 4 Stat. 411.

[137] Removal was effected technically by an exchange of lands occupied by the tribes pursuant to treaties with the United States in return for lands west of the Mississippi. *Id.* § 2, 4 Stat. 412; *see generally* Francis Paul Prucha, *American Indian Treaties* 168–82 (1994) (discussing removal treaties entered into with southern tribes).

state jurisdiction conflicts related to Indian lands.[138] Congressional policy, therefore, was dominated by a desire to segregate tribes from interaction with non-Indian society except under tightly regulated circumstances.

Although Congress had ultimate responsibility for establishing Indian policy during the Trade and Intercourse Acts period, the Executive Branch played an equally important role through treaty making and day-to-day administrative functions. Between 1778 and 1868, over 350 treaties eventually ratified by the Senate were entered into by the President.[139] These treaties, taken as a whole, dealt with a broad spectrum of issues, such as defining reservation boundaries, providing on- and off-reservation hunting and fishing rights, authorizing the allotment of reservation lands to individual tribal members, and guaranteeing provision of governmental services or annuities.[140] Even after termination of presidential treaty-making authority, Congress routinely approved agreements negotiated by the Executive Branch with tribes,[141] and executive orders were utilized between 1855 and 1919, inter alia, to withhold land from public sale for potential use as reservations or actually to create reservations.[142] Treaty-secured rights can be legislatively abrogated,[143] but they nonetheless formed, and still do form, an important component of federal Indian law.

The Trade and Intercourse Acts period, in sum, faithfully reflected Chief Justice Marshall's basic conception of Indian tribes as semiautonomous entities that, while retaining a large measure of control over internal matters, were separated territorially and politically from other American society. The

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[138] 1 Prucha, *supra* note 126, at 195–200. The removal policy was not limited to southern tribes. *Id.* at 243–66 (discussing removal efforts with respect to tribes in areas now encompassed within Illinois, Indiana, Michigan, Missouri, Ohio, and Wisconsin); *see also* Prucha, *supra* note 137, at 183–207.

[139] 2 Charles J. Kappler, *Indian Affairs, Laws and Treaties* (1904) (collecting treaties); Prucha, *supra* note 137, at 446–500 (using Kappler and other sources to identify 367 ratified treaties); *see generally* Siegfried Wiessner, *American Indian Treaties and Modern Indian Law*, 7 St. Thomas L. Rev. 567, 569–80 (1995) (discussing treaty period). There were additionally numerous other agreements that were not ratified formally. Prucha, *supra* note 137, at 517–19. The President's treaty-making power was terminated by the Act of March 3, 1871, 16 Stat. 544 (codified at 25 U.S.C. § 71).

[140] *See generally* Cohen, *supra* note 129, at 38–46 (analyzing treaty provisions under various categories, including the tribe's international status, dependence upon the United States, commercial relations, criminal and civil jurisdiction, and control of tribal affairs).

[141] *See* Prucha, *supra* note 137, at 506–16 (listing 73 such agreements incorporated into statutes between 1874 and 1913).

[142] *See Executive Orders Relating to Indian Reservations* (1975). The President's implied authority to create executive order reservations was terminated in 1919. Act of June 30, 1919, § 27, 41 Stat. 3, 34 (codified at 43 U.S.C. § 150); *see Sioux Tribe v. United States*, 316 U.S. 317, 324–25 (1942).

[143] *E.g.*, *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903); *see generally* Charles F. Wilkinson and 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, 623–34 (1975) (discussing judicial tests used in determining treaty-abrogation issues).

territorial separation manifested itself most graphically in the very concept of Indian country, the removal policy, and the creation of a reservation system.[144]

Perhaps less graphic but similarly telling with respect to the politically segregated nature of tribes and their members was the 1884 decision in *Elk v. Wilkins*.[145] There the Supreme Court denied a claim premised on the recently enacted Fourteenth Amendment by an Indian who, despite having severed tribal relations, was denied the right to vote in a municipal election. The Court observed that

> [t]he Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states [but] . . . 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.[146]

It then reasoned that

> [t]he alien and dependent condition of the members of the Indian tribes could not be put off at their own will without the action or assent of the United States . . . [and] [t]hey were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe, or such members of it as chose to remain behind on the removal of the tribe westward, to be citizens, or authorizing individuals of particular tribes to become citizens on application to a court of the United States for naturalization and satisfactory proof of fitness for civilized life[.][147]

The Court concluded that "Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes, (an alien though dependent power,) although in a geographical sense born in the United States," were no more encompassed within the phrase "born in the United States and subject to the jurisdiction thereof," as used in

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[144] The reservation policy reached its fullest expression in the post–Civil War years as Euro-American settlement spread west of the Mississippi River to lands once occupied only by tribes. *See* 1 Prucha, *supra* note 126, at 563–66. By 1880, 113 reservations were created in states lying wholly west of the Mississippi, including preexisting pueblos. *Id.* at 578–79. The seeds of this policy had been planted earlier by treaties setting aside lands for exclusive tribal occupancy and the removal policy. Congress also considered in 1834, but did not adopt, several bills that would have created an "Indian state." *Id.* at 302–09.

[145] 112 U.S. 94 (1884).

[146] *Id.* at 99–100.

[147] *Id.* at 100.

section 1 of the Fourteenth Amendment "than the children of subjects of any foreign government born within the domain of that government."[148]

Nevertheless, an underlying purpose of the reservation policy was the creation of an environment within which individual tribal members could acquire the "arts of civilization" and thereby integrate themselves into non-Indian society—a result seen by many persons influential in Indian policy formulation as inconsistent with maintenance of tribal allegiance.[149] Almost 100 years after the first Trade and Intercourse Act, Congress moved to effect that transformation through the allotment of communally held reservation lands to individual member ownership.[150]

B. The General Allotment Act Period: 1887 to 1934

Individual treaties had provided for the allotment[151] of reservation or other lands to tribal members,[152] but the General Allotment Act of 1887[153] was the first statute of general application to authorize individual allotments. The General Allotment Act applied to all reservations and allowed the President, "whenever in his opinion any reservation or any part thereof . . . is advantageous for agricultural and grazing purposes," to allot specified quantities of

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[148] *Id.* at 102. Justice Harlan, joined by Justice Woods, dissented on the basis that the involved Indian had severed his tribal relations, arguing that "[a] careful examination of all that was said by senators and representatives, pending the consideration by congress of the fourteenth amendment, justifies us in saying that every one who participated in the debates, whether for or against the amendment, believed that, in the form in which it was approved by congress, it granted, and was intended to grant, national citizenship to every person of the Indian race in this country who was unconnected with any tribe, and who resided, in good faith, outside of Indian reservations and within one of the states or territories of the Union." *Id.* at 118 (Harlan, J., dissenting). Thus, even the dissenters did not question the notion that section 1 of the Fourteenth Amendment did not include within the phrase "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof" individuals who maintained tribal relations. *See generally* 2 Prucha, *supra* note 126, at 682–83 (discussing the legislative history associated with the adoption of the Fourteenth Amendment and the status of Indians under the amendment). Elk's and similarly situated Indians' claims to citizenship predicated on severing tribal ties, leaving Indian country, and taking up a "civilized" life would be vindicated several years later by Congress. *See* Act of Feb. 8, 1887, § 6, 24 Stat. 388, 390.

[149] *See* 2 Prucha, *supra* note 126, at 621–26.

[150] *Id.* at 659.

[151] *See Affiliated Ute Citizens v. United States*, 406 U.S. 128, 142 (1972) ("Allotment is a term of art in Indian law. . . . It means a selection of specific land awarded to an individual allottee from a common holding") (citation omitted).

[152] Cohen, *supra* note 129, at 63–64 (discussing allotment provisions in treaties negotiated between 1854 and 1861). Several removal-related treaties authorized allotment to individual members of lands ceded under their provisions. *E.g.*, Treaty with Creek Tribe, March 24, 1832, arts. II, V, 7 Stat. 366; Treaty with Cherokee Tribe, Dec. 29, 1835, art. 12, 7 Stat. 478, 483–84.

[153] Act of Feb. 8, 1887, 24 Stat. 388.

reservation land to tribal members.[154] Upon approval of an allotment, a patent was to issue

> declar[ing] that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.[155]

Section 6 further granted citizenship to allottees upon issuance of trust patents and to any Indian "who has voluntarily taken up . . . his residence separate and apart from any tribe of Indians . . . and has adopted the habits of civilized life[.]"[156]

The 1887 Act was amended in two respects that had a deleterious effect on accomplishing its underlying goal of promoting agrarian pursuits by tribal members. First, the Secretary of the Interior was given the power in 1891 to lease allotted lands whenever, "by reason of age or other disability, any allottee . . . can not personally and with benefit to himself occupy or

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[154] *Id.* § 1, 24 Stat. at 388. Section 4 of the statute extended rights to Indians not residing on reservations to settle upon unappropriated public lands and to make application, with payment of required fees to be made by the United States, for the issuance of patents under the same conditions as Indians residing on reservations. 24 Stat. at 389. Section 8 excluded from the Act's coverage various tribes, including those in what would become the state of Oklahoma. *Id.* at 391. Several of the excluded tribes were later included within the law's coverage. Act of March 2, 1889, § 1, 25 Stat. 1013 (codified at 25 U.S.C. § 340).

[155] Act of Feb. 8, 1887, § 5, 24 Stat. 388, 389. The 25-year trust period was subject to extension at the President's discretion. *Id.* The trust relationship established under section 5 was quite limited in scope, since its purposes were "to prevent alienation of the land and to ensure that allottees would be immune from state taxation." *United States v. Mitchell* (*Mitchell I*), 445 U.S. 535, 544 (1980). An allottee was otherwise expected to "occupy the land as a homestead for his personal use in agriculture or grazing" like any other small agriculturalist. *Id.* at 543.

[156] 24 Stat. 390. This section read in its entirety:

> That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

improve his allotment or any part thereof[.]"[157] As a result of the leasing practices authorized by the amendment, "many Indians came to look upon the lands as a source of revenue from the labor of a tenant, not as a homestead to be worked personally by an independent small farmer."[158] Second, section 6 was substantially modified in 1906 both to address *In re Heff*,[159] where the Supreme Court held inapplicable the federal prohibition against selling alcohol to Indians since the recipient was an allottee who had become a citizen by virtue of such section and therefore emancipated from federal protection, and to grant greater secretarial discretion in the issuance of fee patents.[160] As amended, section 6 provides in part that, "[a]t the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, . . . then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside" and that "the Secretary of the Interior may, in his discretion, . . . whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said lands shall be removed and said lands shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent[.]"[161] The 1906 Act left unaffected the entitlement to citizenship for Indians who had voluntarily taken up residence apart from their tribes and adopted the habits of civilized life. Although the 1906 amendment technically delayed the granting of citizenship status, the administrative authority to shorten the 25-year trust period was eventually used to issue fee patents to many allottees substantially in advance of the trust period's ordinary expiration under guidelines that determined individual competency largely on the basis of Indian blood quantum.[162] Much of the fee-patented allottee land thereafter quickly passed into non-Indian ownership.

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[157] Act of Feb. 28, 1891, § 3, 26 Stat. 794, 795; *see generally* Reid Peyton Chambers and Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 Stan. L. Rev. 1061, 1071–74 (1974) (tracing statutory and administrative history of leasing practices with respect to restricted allotments).

[158] 2 Prucha, *supra* note 126, at 673.

[159] 197 U.S. 488 (1905).

[160] *See* S. Rep. No. 1998, 59th Cong., 1st Sess. (1906).

[161] Act of May 8, 1906, 34 Stat. 182 (codified in part at 25 U.S.C. § 349); *see United States v. Celestine*, 215 U.S. 278, 291 (1909) (1906 amendment suggested "that Congress in granting full rights of citizenship to Indians [upon issuance of a trust patent], believed that it had been hasty"); *cf. County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 264 (1992) (1906 amendments allowed the Secretary to issue fee patents prior to the end of the 25-year trust period without subjecting the Indian owner to "*plenary* state jurisdiction" but, when read in *pari materia* with section 5, made clear that the land subject to the fee patent became liable for state taxes).

[162] 2 Prucha, *supra* note 126, at 879–88. These patents, often referred to as "forced-fee patents," have been the subject of substantial litigation. *E.g.*, *Bordeaux v. Hunt*, 621 F. Supp. 637 (D.S.D. 1985) (holding actions to set aside forced-fee patents barred by statute of limitation and by inability to join the United States as a defendant), *aff'd*, 809 F.2d 1317 (8th Cir. 1987).

An additional component of the 1887 Act was authorization for the Secretary of the Interior, upon completion of the allotment process or "sooner if in the opinion of the President it shall be for the best interests of [the] tribe," to negotiate with the tribe for the sale of the unallotted, or "surplus," reservation lands that then could be opened for homesteading by settlers.[163] In 1904 Congress began simply declaring, without tribal consent, surplus lands available for homesteading and retaining the proceeds from the sales for the affected tribe's benefit.[164] Forty-four of the 118 reservations in which allotments were made were eventually opened for homesteading by nonmembers.[165]

Had the only purpose of the General Allotment Act been to diminish tribal ownership of reservation lands, it would have been considered quite effective. Ownership was reduced from 138 million acres in 1887 to approximately 34 million acres in 1934.[166] However, "[t]he objects of [the allotment] policy were to end tribal land ownership and to substitute private ownership, on the view that private ownership by individual Indians would better advance their assimilation as self-supporting members of our society and relieve the Federal Government of the need to continue supervision of Indian affairs."[167] The second of these objects was clearly not achieved since, of the over 40 millions acres allotted, only 17.6 million remained in allottee or allottee-heir ownership by 1934, while another 60 million acres of tribal lands were disposed of as surplus.[168] In total, more than 60 percent of the 1887 tribal land base had passed into nonmember ownership by 1934.[169] The assumption in section 6 of the Act, moreover, that property ownership, and therefore citizenship, would automatically terminate the need for the special trust relationship between the allottee and the federal government[170] was rejected explicitly in *United States v. Nice*[171] and implicitly in other deci-

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[163] Act of Feb. 8, 1887, § 5, 24 Stat. 388, 389–90 (codified as amended at 25 U.S.C. § 348).

[164] 2 Prucha, *supra* note 126, at 867–69.

[165] *Id.* at 896.

[166] *Id.*

[167] *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650 n.1 (1976).

[168] 2 Prucha, *supra* note 126, at 896.

[169] *Id.*

[170] *See In re Heff*, 197 U.S. 488, 509 (1905) (section 6 of the 1887 Act meant that, "when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of, and requires him to be subject to, the laws, both civil and criminal, of the state, it places him outside the reach of police regulations on the part of Congress; that the emancipation from Federal control, thus created, cannot be set aside at the instance of the government without the consent of the individual Indian and the state"); Sol. Op. M-36184 (Feb. 15, 1958) ("the sponsors of [the General Allotment Act] assumed that the allotment of the Indians in severalty[] would be but the prelude to the termination of their tribal relations and the liquidation of Federal supervision over them").

[171] 241 U.S. 591, 601 (1916).

sions finding the presence of citizenship consistent with continued wardship status.[172] The decisional erosion of this assumption was legislatively ratified by the Act of June 2, 1924,[173] which granted citizenship to all Indians irrespective of their continuing tribal or wardship status.

Consequently, by the end of the General Allotment Act period a radical transformation of practical and legal interests had occurred on Indian reservations. The allotment policy, aimed at eliminating the need for tribal existence and for the guardian-ward trust relationship,[174] not only failed to gain that objective but also introduced into formerly isolated Indian enclaves, at the federal government's invitation, large numbers of nonmembers who looked to the states or their political subdivisions for local governance. The granting of citizenship to all Indians additionally served to complicate the jurisdictional relationship among the states, federal government, and tribes since, contrary to expectations early in the era, such status did not automatically sever tribal relations, relieve the member of wardship status, and subject him to the same rights enjoyed by and obligations imposed upon other citizens. In short, the neatly divided governmental spheres described by Chief Justice Marshall in *Worcester* now overlapped in ways that he could not have foreseen. The complexity of this tripartite governmental relationship would only increase as Congress has attempted to revitalize tribal structures during the Indian Reorganization Act period.

C. The Indian Reorganization Act and Subsequent Legislation: 1934 to the Present

The Indian Reorganization Act of 1934 (IRA)[175] was intended to reverse the General Allotment Act's policy of weakening, if not wholly destroying,

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[172] *E.g.*, *Winton v. Amos*, 255 U.S. 373, 391–92 (1921) ("It is thoroughly established that Congress has plenary authority over the Indians and all their tribal relations, and full power to legislate concerning their tribal property. The guardianship arises from their condition of tutelage or dependency; and it rests with Congress to determine when the relationship shall cease; the mere grant of citizenship not being sufficient to terminate it"); *United States v. Waller*, 243 U.S. 452, 459–60 (1917) ("The tribal Indians are wards of the government, and as such under its guardianship. It rests with Congress to determine the time and extent of emancipation. Conferring citizenship is not inconsistent with the continuation of such guardianship, for it has been held that even after the Indians had been made citizens, the relation of guardian and ward for some purposes may continue"); *Tiger v. Western Inv. Co.*, 221 U.S. 286, 316 (1911) ("[c]onceding that Marchie Tiger, by the act conferring citizenship, obtained a status which gave him certain civil and political rights, inhering in the privileges and immunities of such citizenship, . . . he was still a ward of the nation so far as the alienation of those lands was concerned, and a member of the existing Creek Nation"); *see generally* N. D. Houghton, *The Legal Status of Indian Suffrage in the United States*, 19 Cal. L. Rev. 507, 515 (1931) ("[i]t appears to be clearly established . . . that the condition frequently designated by the courts as 'guardianship' of the national government over the Indian remains unimpaired by the grant of citizenship so far, at least, as the guardianship relates to the power of Congress over the lands and property of such citizen Indian").

[173] 43 Stat. 253 (codified at 8 U.S.C. § 1401(b)).

[174] *Montana v. United States*, 450 U.S. 544, 559 n.9 (1981).

[175] Act of June 18, 1934, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–479).

the status of tribes as self-governing entities. Sections 1 and 2 of the IRA prohibited further allotment of reservation lands and extended indefinitely existing trust periods as to allotments for which fee patents had not issued.[176] The Secretary of the Interior was further authorized to restore to tribal ownership any remaining surplus reservation lands except those located within a federal reclamation project[177] and to reacquire "through purchase, relinquishment, gift, exchange or assignment" interests in real property within or without reservations for the purpose of providing land for Indians.[178] Tribes were given the power to adopt constitutions and bylaws that would become effective upon ratification by membership vote and approval by the Secretary.[179] Aside from authority conferred by existing law and certain specific powers, a constitution could vest within the affected tribe, including the right to select counsel subject to secretarial approval, the right to prevent the sale, lease, or other disposition of tribal property, and the right to negotiate with federal, state, and local governments. Tribes were further permitted, after a favorable membership vote, to request issuance of a charter of incorporation from the Secretary, which could contain the power to acquire real and personal property and "such further powers as may be incidental to the conduct of corporate business," but not the power "to sell, mortgage, or lease for a period exceeding ten years any of the land included within the limits of the reservation."[180] Reservations were allowed to exclude themselves from IRA coverage if a majority of the resident Indians so elected in a referendum held no later than one year after the statute's enactment.[181] Two hundred

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[176] *Id.* §§ 1, 2, 48 Stat. at 984 (codified at 25 U.S.C. §§ 461, 462). The authority to issue fee patents or other interests in lands was later given in the Act of May 14, 1949, 62 Stat. 236 (codified at 25 U.S.C. § 483). *Cf. Black Hills Institute v. United States*, 812 F. Supp. 1015, 1021 (D.S.D.) (paleontological fossil constitutes interest in land), *aff'd*, 12 F.3d 737 (8th Cir. 1993).

[177] IRA § 3, 48 Stat. at 984 (codified as amended at 25 U.S.C. § 463).

[178] *Id.* § 5, 48 Stat. at 985 (codified at 25 U.S.C. § 465). The lands so acquired, if outside a reservation, could be used to create new reservations or expand existing ones. *Id.* § 7, 48 Stat. at 986 (codified at 25 U.S.C. § 467).

[179] *Id.* § 16, 48 Stat. at 987 (codified as amended at 25 U.S.C. § 476). 1988 amendments to 25 U.S.C. § 476 substantially modified the secretarial approval process, making constitutions or amendments thereto effective 45 days after the associated election unless disapproved by the Secretary. Pub. L. No. 100-581, § 101, 102 Stat. 2938 (1988); *see King v. Norton*, 160 F. Supp. 2d 755, 762 (E.D. Mich. 2001) ("Congress has delegated to the Secretary . . . certain duties in the regulation of tribal governments, including the power to call and oversee tribal elections in which tribal constitutions are to be adopted or amended"). The Secretary is also required under the 1988 modification to review the proposed constitution or amendment prior to the election and notify the tribe in writing whether the proposal is contrary to applicable law. *See generally* Timothy W. Joranko and Mark C. Van Norman, *Indian Self-Determination at Bay: Secretarial Authority to Disapprove Tribal Constitutional Amendments*, 29 Gonz. L. Rev. 81 (1993/94) (arguing for repeal of secretarial authority to disapprove tribal constitutional amendments).

[180] IRA § 17, 48 Stat. 984, 988 (codified as amended at 25 U.S.C. § 477).

[181] *Id.* § 8, 48 Stat. 984, 988 (codified at 25 U.S.C. § 478); *see* Sol. Op. M-27810 (Dec. 13, 1934) (discussing in part eligibility requirements for voting in IRA-coverage elections). The period for holding the election was extended to two years by the Act of June 15, 1935, 49 Stat. 378.

fifty-eight elections were conducted, with 181 tribes opting for and 77 opting against coverage; 14 other tribes failed to hold elections and therefore were deemed covered.[182] Approximately 60 percent of the then-Indian population was included under IRA coverage, with the Navajo Tribe accounting for 52 percent of those not covered.[183]

The IRA's enduring significance lies as much in the policy change it embodied as in its actual provisions.[184] Reorganization under section 16 likely did not form a basis for expansion of those powers already existing inherently in tribes,[185] and the issuance of new allotments had been largely discontinued by administrative order even prior to the IRA's passage.[186] On at least a theoretical level, however, the statute sought to replace the direct supervision of tribes and their members by the federal government with increased reliance on tribal governance—i.e., "to disentangle the tribes from the official bureaucracy"[187] —and, by such disengagement, to lay a foundation "for inclusion of tribes in the state jurisdictional system, on the order of

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[182] 2 Prucha, *supra* note 126, at 964–65.

[183] Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 Mich. L. Rev. 955, 972 (1972). Section 13 of the IRA, 48 Stat. 984, 986–87 (codified as amended at 25 U.S.C. § 473), excluded Oklahoma Indian tribes from coverage under many of the statute's provisions, including those relating to adoption of tribal constitutions and tribal incorporation. These tribes were subsequently extended the right to elect coverage under most provisions of the statute. Act of June 26, 1936, § 3, 49 Stat. 1967 (codified at 25 U.S.C. § 503). Alaskan natives also were excluded initially from coverage under several provisions but were later included. Act of May 1, 1936, § 1, 49 Stat. 1250 (codified at 25 U.S.C. § 473a).

[184] The IRA, as initially introduced, was far more sweeping legislation than the bill finally enacted. *See* Bradley B. Furber, *Two Promises, Two Propositions: The Wheeler-Howard Act as a Reconciliation of the Indian Law Civil War*, 14 U. Puget Sound L. Rev. 211, 240–52 (1991); Comment, *supra* note 183, at 961–69. The original bill contained four titles dealing with self-government, education, Indian lands, and tribal courts. H.R. 7902, 73d Cong., 2d Sess. (1934); S. 2755, 73d Cong., 2d Sess. (1934). The education and tribal court titles were eventually deleted in their entirety, while the tribal self-government and Indian lands titles were substantially modified in the final legislation. S. 3645, 73d Cong., 2d Sess. (1934). Among the most significant provisions of the initial legislation were those granting the Secretary authority to issue self-government charters to Indian communities with quite broad powers, including the power "[t]o promulgate and enforce ordinances and regulations for functions hereafter specified, and any other functions customarily exercised by local governments[,]" to establish tribal courts with civil and criminal jurisdiction over "cases arising under the ordinances of the community," and, "as a Federal agency, to condemn and take title to any lands or properties[.]" H.R. 7902, title I, § 4(a), (d), (f). The Secretary's discretion to grant those and other powers, with their attendant impact on nonmember reservation residents and existing state governmental structures, was viewed unfavorably, and the entire charter concept discarded except to the limited extent charters of incorporation are available under section 17 of the IRA. *See* Furber, *supra*, at 244–52.

[185] *See* Cohen, *supra* note 129, at 129–30 ("the [IRA] had little or no effect upon the substantive powers of tribal self-government vested in various Indian tribes"); Comment, *supra* note 183, at 972 ("the IRA apparently added nothing in terms of specific substantive powers"); *see also* 55 I.D. 14 (1934) (construing the section 16 clause "powers vested in any Indian tribe or tribal council by existing law").

[186] 2 Prucha, *supra* note 126, at 951. Indeed, Cohen disclaimed any intent in his treatise to provide "a detailed study" of the allotment process, "[s]ince allotments had been discontinued under the mandate of [the IRA], and under a policy preceding this enactment which applies even to tribes not under the act[.]" Cohen, *supra* note 129, at 217.

[187] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 153 (1973).

municipalities or county governments."[188] The IRA's skeletal framework therefore would depend necessarily upon a broad range of extrinsic circumstances, most obviously additional substantive and funding legislation, for meaningful implementation. Despite that need, 19 years would pass before the next significant legislative initiative occurred, and that initiative was not the kind IRA proponents would have supported.[189]

In August 1953 a resolution and three statutes were adopted manifesting Congress's desire to remove the federal government from its preeminent role in Indian country. House Concurrent Resolution 108 thus declared it

> to be the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the States of California, Florida, New York, and Texas, and all of the following named Indian tribes and individual members thereof, should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians: The Flathead Tribe of Montana, the Klamath Tribe of Oregon, the Menominee Tribe of Wisconsin, the Potawatomi Tribe of Kansas and Nebraska, and those members of the Chippewa Tribe who are on the Turtle Mountain Reservation, North Dakota.[190]

The Secretary of the Interior was further directed to "examine all existing legislation dealing with such Indians, and treaties between the Government of the United States and each such tribe, and report to Congress at the earliest practicable date, but not later than January 1, 1954, his recommendations for such legislation as, in his judgment, may be necessary to accomplish the purposes of this resolution." Two weeks later Congress enacted Public Law 280,[191] which mandatorily transferred civil and criminal adjudicatory jurisdiction over Indian country matters to five states and authorized other states, at their discretion, to assume such jurisdiction. House Concurrent Resolution 108 had also stated in its whereas provisions the need, "as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States," and that objective, while general in nature, was implemented immediately by modification of liquor restrictions that had discriminated against Indians[192] and in repeal of a prohibi-

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[188] Charles F. Wilkinson and Eric R. Biggs, *The Evolution of the Termination Policy*, 5 Am. Indian L. Rev. 139, 145 (1977).

[189] *Cf.* Felix S. Cohen, *The Erosion of Indian Rights, 1950–53: A Case Study in Bureaucracy*, 62 Yale L.J. 348 (1953) (detailed attack on Bureau of Indian Affairs policy during the early 1950s).

[190] H.R. Con. Res. 108, 67 Stat. B132 (1953).

[191] Act of August 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321–1325, and 28 U.S.C. § 1360). Analysis of Public Law 280's operation in criminal and civil contexts appears in Chapter 4, part I.C.1 and Chapter 6, part III.B.

[192] Act of August 15, 1953, Pub. L. No. 83-277, 67 Stat. 586 (1953) (codified as amended at 18 U.S.C. § 1161); *see* S. Rep. No. 722, 83d Cong., 1st Sess., *reprinted in* 1953 U.S.C.C.A.N. 2399.

tion against the purchase or pledge by Indians of articles used in hunting, implements of husbandry, cooking utensils and clothing, and the sale of arms and ammunition in country occupied by hostile or uncivilized Indians.[193]

Between 1954 and 1962, 14 acts were passed requiring development of plans for terminating the federally recognized status of approximately 109 tribes and bands.[194] The actual terminations occurred between 1955 and 1970 and affected approximately 3.2 percent of all federally recognized Indians and a similar percentage of Indian trust land.[195] Even as most of the termination plans were being developed, various members of Congress and the Department of the Interior began questioning the concurrent resolution's approach, and the termination policy was implicitly discarded by the early 1970s—as reflected most vividly in the restoration of the Menominee Tribe to recognized status.[196]

Public Law 280 was amended under the Indian Civil Rights Act of 1968 (ICRA)[197] to require a favorable tribal member vote as a condition precedent to further extensions of adjudicatory jurisdiction by nonmandatory states over Indian country.[198] However, recognizing that tribes were not constrained by the federal Constitution in their decision making[199] but were nonetheless autonomous political entities with inherent authority over, most importantly, internal matters involving their members, Congress additionally included within the ICRA provisions aimed at preventing abuses of such authority. Those provisions are embodied in three sections, with the first containing several definitions,[200] the second containing the statute's substantive protection,[201] and the third stating that "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe."[202] The Supreme Court held in *Santa Clara Pueblo v. Martinez*[203] that the habeas corpus remedy was

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[193] Pub. L. No. 83-281, 67 Stat. 590 (1953); *see* S. Rep. No. 793, 83d Cong., 1st Sess., *reprinted in* 1953 U.S.C.C.A.N. 2414.

[194] Wilkinson and Biggs, *supra* note 188, at 151.

[195] *Id.*; *see also* 2 Prucha, *supra* note 126, at 1058–59.

[196] Pub. L. No. 93-197, 87 Stat. 770 (1973) (codified at 25 U.S.C. §§ 903–903f); see 2 Prucha, *supra* note 126, at 1112–15, 1135–38.

[197] Pub. L. No. 90-284, §§ 201–701, 82 Stat. 73, 77–81 (1968) (codified as amended at 25 U.S.C. § 1153 and 25 U.S.C. §§ 1301–1303, 1321–1326, 1331, 1341); *see* S. Rep. No. 721, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 1837, 1863–65.

[198] Pub. L. No. 90-284, § 406, 82 Stat. 73, 80 (1968) (codified at 25 U.S.C. § 1326); *see Kennerly v. District Court*, 400 U.S. 423 (1971) (*per curiam*). The 1968 amendments also allowed states to retrocede jurisdiction, upon the United States' acceptance, of jurisdiction mandated under or assumed voluntarily pursuant to Public Law 280, Pub. L. No. 90-284, § 403, 82 Stat. 73, 79 (1968) (codified at 25 U.S.C. § 1323).

[199] *See supra* note 26 and accompanying text.

[200] Pub. L. No. 90-284, § 201, 82 Stat. 73, 77 (1968) (codified as amended at 25 U.S.C. § 1301).

[201] *Id.* § 202, 82 Stat. at 73, 77–78 (codified as amended at 25 U.S.C. § 1302).

[202] *Id.* § 203, 82 Stat. at 78 (codified at 25 U.S.C. § 1303).

[203] 436 U.S. 49 (1978).

the exclusive means of challenging in federal court an alleged violation of the statute's substantive provisions—a holding that restricts its enforceability outside of available tribal remedies to situations where actual or constructive custody by a tribal official is involved. The ICRA's effect on tribal autonomy is thus limited.[204]

Three other statutes, finally, relate particularly to the IRA's policy of encouraging the development, or protecting the integrity, of tribal autonomy. The Indian Self-Determination and Education Assistance Act of 1975 (ISDEAA),[205] as substantially amended in 1988,[206] requires the Secretaries of Health and Human Services and the Interior, upon request by tribal resolution, to contract with tribes for the purpose of providing services that, but for such contracts, would be provided by the federal government pursuant to authority under specified statutes unless, within 60 days of the tribal proposal's receipt, the affected Secretary concludes that

> (A) the service to be rendered to the Indian beneficiaries of the particular program or function to be contracted will not be satisfactory;
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> (B) adequate protection of trust resources is not assured;
>
> (C) the proposed project or function to be contracted for cannot be properly completed or maintained by the proposed contract;
>
> (D) the amount of funds proposed under the contract is in excess of the applicable funding level for the contract, as determined under [25 U.S.C. § 450j-1(a)]; or
>
> (E) the program, function, service, or activity (or portion thereof) that is the subject of the proposal is beyond the scope of programs, functions, services, or activities covered under [25 U.S.C. § 450f(a)(1)] because the proposal includes activities that cannot lawfully be carried out by the contractor.[207]

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[204] A detailed discussion of the ICRA appears in Chapter 7, part II.

[205] Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified in relevant part as amended at 25 U.S.C. §§ 450–450n).

[206] Pub. L. No. 100-472, 102 Stat. 2285 (1988).

[207] Pub. L. No. 100-472, § 201(a)(2), 102 Stat. 2285, 2288 (1988) (codified at 25 U.S.C. § 450f(a)(2)). Under section 314 of Public Law No. 101-512, 104 Stat. 1915, 1959–60 (1990), "an Indian tribe, tribal organization or Indian contractor is deemed . . . to be part of the Bureau of Indian Affairs in the Department of Interior or the Indian Health Service in the Department of Health and Human Services while carrying out any . . . contract or agreement [under the ISDEAA and certain other specified statutes] and its employees are deemed employees of the Bureau or Service while acting within the scope of their employment in carrying out the contract or agreement[.]" Tort claims related to performance of the contracts therefore are deemed made against the United States, are defended by the Department of Justice, and are subject to the provisions of the Federal Tort Claims Act. *Id.*; *see FGS Constructors, Inc. v. Carlow*, 64 F.3d 1230, 1234 (8th Cir. 1995) (the 1988 amendment constituted acknowledgment by Congress "that tribal governments, when carrying out self-determination contracts, were performing a federal function and that a unique legal trust relationship existed between the tribal government and the federal government in these agreements"); *cf. Demontiney v. United States*, 255 F.3d 801, 813–14 (9th Cir. 2001) (rejecting claim that tribal immunity from suit for alleged breach of contract abrogated under ISDEAA, since complainant had not entered into a self-determination contract with tribe and since § 450f(c) limits abrogation to suits "arising under contracts authorized by this subchapter").

The Secretaries are further authorized to issue grants to tribes for various purposes including strengthening tribal government and a tribe's ability to enter into self-determination contracts.[208] The Indian Child Welfare Act of 1978[209] limits the power of state courts to adjudicate child custody proceedings involving Indian children, while the Indian Gaming Regulatory Act of 1988[210] authorizes certain kinds of gambling on Indian lands only if pursuant to state-tribal compacts. That the latter two statutes are specifically concerned with allocating, or providing mechanisms for allocating, jurisdiction between states and tribes represents the ever-increasing complexity of the legal relationship among the federal government, states, and tribes flowing from the common law origins of *Worcester* and subsequent congressional and executive actions.[211]

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[208] 25 U.S.C. § 450h. The Indian Financing Act of 1974, Pub. L. No. 93-262, 88 Stat. 77 (codified as amended at 25 U.S.C. §§ 1451–1544), additionally provides a revolving loan fund, a loan guaranty and insurance fund, and an Indian business grant program to encourage economic development by Indians or Indian organizations. *See* H. R. Rep. No. 907, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 2873. The ISDEAA has been amended, inter alia, to authorize the Secretary of the Interior to negotiate tribal self-governance programs with tribes without regard for BIA involvement and to allow tribes to enter into funding arrangements with other federal agencies. Pub. L. No. 103-413, 108 Stat. 4270 (1994) (codified as amended at 25 U.S.C. §§ 458aa–458hh); *see generally* Todd M. Johnson and James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 Conn. L. Rev. 1251, 1262–78 (1995) (discussing development of current self-governance legislation).

[209] Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901–1963). The operation of this statute is discussed in Chapter 13.

[210] Pub. L. No. 100-497, 102 Stat. 2467 (codified at 18 U.S.C. § 1166 and 25 U.S.C. §§ 2701–2721). The operation of this statute is discussed in Chapter 12.

[211] *See also* Chapter 10 (discussing role of tribal governments under various federal environmental statutes).