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American Indians and the Constitution: An Argument for Nationhood

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AMERICAN INDIANS AND THE CONSTITUTION: AN ARGUMENT FOR NATIONHOOD*

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The Indian nations[1] of North America were recognized as independent sovereign powers by European monarchs and legal scholars throughout the colonial area.[2] Recognition of this autonomy and of the international nature of the United States-Indian relationship is implicit in both the Constitution and the early history of the nation.[3] The Supreme Court under Chief Justice Marshall articulated this view and denied the legitimacy of the imposition of federal and state power over the affairs of the Indian nations, with the exception of certain limitations on their external sovereign

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1. The term "Indian nation" more accurately describes the political status of American Indian peoples than the term "tribe." Because judicial opinions often use the term "tribe," however, it will be used occasionally in this article for the sake of clarity. Masculine pronouns used herein should be read to refer to both men and women.

2. *See generally* F. JENNINGS, THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST 15-31 (1975); F. P. PRUCHA, THE INDIANS IN AMERICAN SOCIETY 29-32 (1985); Comment, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV., 507, 511-14 (1987); F. de Victoria, *De Indis et de Jure Belli Relectiones (Reflections On the Indians and On the Law of War)* (E. Nys ed. & J. Bate trans. 1917) (J. Simon rev. ed. 1696), in CLASSICS OF INTERNATIONAL LAW (J. Scott ed. 1917). Victoria is considered to be the founder of international law and his theories formed the basic framework of the relationship between the Indian peoples and the colonists of the New World, as reflected in documents as various as a 1537 Papal Bull and the 1787 Northwest Ordinance. *See* Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L. REV. 1, 11-12, 17 (1942).

3. "The absence of a general power over Indian affairs in the Constitution is not surprising . . . [since] the framers regarded Indian tribes as sovereign nations." Newton, *Federal Power over Indians; Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 200 (1984). *See also id.* at 237-38; F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS, 140-42 (1962); AMERICAN INDIAN POLICY REVIEW COMMISSION [AIPRC], TASK FORCE ONE: TRUST RESPONSIBILITIES AND THE FEDERAL-INDIAN RELATIONSHIP, INCLUDING TREATY REVIEW, FINAL REPORT 53 (Comm. Print 1976) (relationship between Indian nations and the United States is "deeply rooted in international law"). *See generally* Comment, *supra* note 2, at 513-22.

rights to enter into treaties with European powers or to freely alienate their lands without the consent of the United States.[4]

Today, however, the federal government exercises far-reaching power over the lives of Indians and the internal affairs of Indian nations.[5] Though in some respects bounded by the Bill of Rights,[6] this broad exercise of federal power has reduced the Indian nations to a status variously described as that of a special interest group,[7] a judicially-protected minority,[8] or "some new kind of federal municipalit[y]."[9] While the federal government often claims to

4. "Chief Justice Marshall had recognized only two limitations [on Indian sovereignty]: the tribes could not convey their land to anyone other than the United States, and the tribes could not treat with foreign powers." Canby, *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 8 (1987). *See, e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Comment, *supra* note 2, at 514-22 (discussing *Johnson, Cherokee Nation* and *Worcester*); Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 BUFFALO L. REV. 637 (1978) (same). The limitations on the Indians rights' to treat with European nations and to freely alienate their lands were imposed as political measures aimed at ensuring the peaceful and orderly settlement of the frontier, the ability to establish clear title to settled lands and to prevent foreign influence and provocation. *See* Newton, *supra* note 3, at 208 n. 69. Except for the discussions of the proper spheres of federal versus state power, these seminal Marshall Court cases did not involve constitutional questions but rather the domestic ramifications of inter-sovereign political arrangements. *See generally* Comment, *supra* note 2.

5. *See, e.g.*, Barsh, *Is There Any Indian "Law" Left? A Review of the Supreme Court's 1982 Term*, 59 WASH. L. REV. 863, 893 (1984).

6. As citizens, Indians are ostensibly protected by the Bill of Rights to the same extent as other Americans. *See* Goodluck v. Apache County, 417 F. Supp. 13 (D. Ariz. 1975) (three judge court), *aff'd without opinion sub nom* Apache County v. United States, 429 U.S. 876 (1976). While certain Indian rights, such as the right to vote, have been judicially enforced, *see, e.g., id.*, other rights, such as the right to just compensation under the fifth amendment for the taking of property, have not been nearly as well protected. *See, e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

7. *See* R. BARSH & J. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 243-44 (1980) (discussing the "ethnic Indian movement"); *id.* at 219 (discussing Indian lobbying).

8. This approach is advocated in Newton, *supra* note 3, at 245-46, and in *The Supreme Court, 1984 Term-Leading Cases*, 99 HARV. L. REV. 120, 264 n.80 (1985).

9. Indian Law Resource Center, *The Supreme Court: New Cause for Alarm*, in RETHINKING INDIAN LAW 73, 74 (1982); *see* Colliflower v. Garland, 342 F.2d 369, 378-79 (9th Cir. 1965) (Fort Belknap Tribal courts are "arms of the federal government"); *see also* Settler v. Yakima Tribal Court, 419 F.2d 486, 489 (9th Cir. 1969), *cert. denied*, 398 U.S. 903 (1970) (same analysis of Yakima Tribal Courts). *But see* United States v. Wheeler, 435 U.S. 313 (1978) (no double jeopardy in prosecution by both tribal and state courts).

act in furtherance of Indian "self-determination,"[10] both it and the governments of the states[11] continue to expand their jurisdiction and power over Indian peoples. This article examines the legal doctrines used to justify federal power over Indian nations and challenges their legitimacy and constitutionality.

I. Modern Plenary Power

A recognized axiom of United States' jurisprudence with regard to the Indian nations is that the federal government is said to hold "plenary power" over the Indian nations.[12] In delineating the scope of this plenary power, the Supreme Court has in recent years stated that Indian tribal autonomy exists "only at the sufferance of Congress and is subject to complete defeasance"[13] and that Congress holds " 'paramount power over the property of the Indians.' "[14] The United States ostensibly recognizes the Indian

10. *See, e.g.*, Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450a (1982) ("Congress hereby recognizes the obligation . . . to respond to the strong expression of the Indian people for self-determination . . ."); President Reagan's Statement on Indian Policy, PUB. PAPERS OF RONALD REAGAN 96, 96 (Jan. 24, 1983) ("Our policy is to reaffirm dealing with Indian Tribes on a government-to-government basis and to pursue the policy of self-government for Indian Tribes"); Iowa Mutual Ins. Co. v. LaPlante, 107 S. Ct. 971, 975 (1987) ("[The Supreme Court has] repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government."). *See generally* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 180-206 (1982 ed.) (discussing era of "self-determination" in United States Indian law, 1961 to present).

11. On the expansion of state power over the Indian nations, which is not directly addressed in this article, see Comment, *supra* note 2, at 556-86; Canby, *supra* note 4.

12. "[T]he power of the Federal Government over the Indian tribes is plenary." National Farmers Union Ins. Co. v. Crow Tribe of Indians, 471 U.S. 845, 851 (1985); *see also* COHEN, *supra* note 10, at 207; Newton, *supra* note 3, at 199-236.

13. United States v. Wheeler, 435 U.S. 313, 323 (1978); *see also* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) ("Congress has plenary authority to limit, modify, or eliminate the powers of local self-government which the tribes otherwise possess."); Powers of Indian Tribes, 55 Interior Dec. 14 (Oct. 25, 1934), reprinted in I Opinions of the Solicitor 445, 451.

14. United States v. Sioux Nation of Indians, 448 U.S. 371, 408 (1980) (quoting Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903)). The Court has held, however, that " '[t]he power of Congress over Indian affairs may be of a plenary nature; but it is not absolute.' " Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 84 (1977) (quoting United States v. Alcea Bank of Tillamooks, 329 U.S. 40, 54 (1946) (plurality)). For expanded discussions of the development and scope of federal plenary power, see Comment, *supra* note 2, at 522-35 and Newton, *supra* note 3.

nations as possessing " 'inherent powers of a limited sovereignty which has never been extinguished,' "[15] but holds that "[b]y specific treaty provision [the Indians] yielded up [certain] sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others."[16] This article argues that the plenary power doctrine lacks constitutional support and violates the inherent sovereignty of Indian nations, and thus that the United States may hold power over an Indian nation only where the Indian nation has specifically "yielded up" such power.[17] In the final analysis, the Indian nations' inherent and historical status as wholly outside the United States federal system precludes the assertion of power over them other than by their express consent.[18]

A cardinal principle of constitutional law is that Congress cannot exercise power not specifically or implicitly enumerated in the Constitution.[19] Only in 1974 in *Morton v. Mancari*,[20] however, did the Supreme Court attempt to ground congressional plenary power over Indians in the Constitution. The *Mancari* Court stated that plenary power is "drawn both explicitly and implicitly from the Constitution itself"[21] and thereby affirmed the necessity of

15. United States v. Wheeler, 435 U.S. 313, 322 (1978) (quoting F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945) (original emphasis omitted). *See also* Talton v. Mayes, 163 U.S. 376, 384 (1896).

16. *Wheeler*, 435 U.S. at 323.

17. In 1866 the Supreme Court reached the same conclusion, writing that the Indians' "situation . . . can only be changed by treaty stipulation, or a voluntary abandonment of their tribal organization." The Kansas Indians, 72 U.S. (6 Wall.) 737, 757 (1866).

18. This article presupposes peaceful, non-military interaction between the Indian nations and the United States. Certainly this has not always been the case, and the idea of conquest has often been used as a justification for United States power. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 588-89 (1823); Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289-90 (1955). *But see* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 545 (1832). However, the illegitimacy of conquest as a rationale for the exertion of political control, see Clinebell & Thomson, *Sovereignty and Self-Determination: The Rights of Native Americans under International Law*, 27 BUFFALO L. REV. 669, 687-92 (1978), and the contemporary mootness of the idea of conquest together render it irrelevant as either a justification of the past or an option for the future.

19. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. *See* Kansas v. Colorado, 206 U.S. 46, 88 (1907); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-2 (2d ed. 1988).

20. 417 U.S. 535 (1974).

21. 417 U.S. at 551-52; *see also* Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 83 (1977) (plenary power is "rooted in the Constitution").

and commanded an inquiry into the constitutional sources of that power. Previously, the Court had not required a constitutional basis for upholding federal plenary power.[22]

Because of this new-found need for constitutional legitimacy, the Supreme Court has increasingly sought, albeit in hindsight, to establish a constitutional basis for congressional plenary power over Indians[23] in order to provide a foundation other than historical circumstance or inherent power for its exercise. As a result, the

22. *See* Newton, *supra* note 3, at 214 ("Acknowledging that no existing constitutional provision granted Congress [the] right to govern Indian affairs, the [Supreme] Court found [such power] to be inherent [in the federal government]") (discussing United States v. Kagama, 118 U.S. 375 (1886)); Comment, *supra* note 2, at 528-29 (same). *See also* Lone Wolf v. Hitchcock, 187 U.S. 553, 565-68 (1903). Felix Cohen had written in his famous *Handbook* that it might be "captious to point out that there is excellent authority for the view that Congress has no constitutional power over Indians except what is conferred by the commerce clause and other clauses of [the] Constitution." F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 90 (1942), *quoted in* Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 59 n.280 (1987).

The Court's holding in *Kagama*, which forms the cornerstone of the "plenary power" doctrine and which best exemplifies the doctrine's basis in a theory of inherent powers, its historical contingency, and its profound racism and paternalism, deserves quotation in full:

> These Indian tribes *are* wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. . . . From their very weakness and helplessness, . . . there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.
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> . . . .
>
> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it has never existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

118 U.S. at 383-84 (emphasis in original). For further discussion of *Kagama*, see Comment, *supra* note 2, at 526-29.

The *Mancari* Court noted the argument made in *Kagama* that federal power over Indians was based solely on their status as "helpless" and "dependent," but held that this was merely a statement of the "special relationship" between Indians and the United States and not a source of federal power. *Mancari*, 417 U.S. at 552. Thus, it can be fairly stated that:

> In modern times, the Supreme Court has apparently repudiated both the ethnocentric overtones of the doctrine of plenary power and the doctrine itself, at least as far as the doctrine suggests it has an extra-constitutional source or is a power unlimited by other constitutional provisions.

Newton, *supra* note 3, at 228. *See also id.* at 228-36; F. COHEN, *supra* note 10, at 219.

23. *See* Newton, *supra* note 3, at 230-31.

Court has stated that "it is now generally recognized that [federal power over Indian affairs] derives from federal responsibility for regulating commerce with the Indian tribes and from treaty making."[24] This article argues that although both the Indian commerce clause[25] and the treaty power[26] confer power upon the federal government, they do so in specific and limited ways, and they cannot support, either alone or together, the doctrine of plenary power and the massive structure of federal Indian law and legislation.

While the Court has held that Congress' ostensible plenary power is constitutionally founded upon treaties and the commerce clause, there is a third alleged source of federal power which acts by way of negation of Indian sovereignty. This is the concept of "implicit divestiture,"[27] which has its genesis in the Marshall Court cases divesting certain external sovereign powers of the Indian na-

24. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973); *see also* F. Cohen, *supra* note 10, at 211. The Court has occasionally relied on other constitutional provisions as bases for plenary power. The supremacy clause, U.S. Const. art. VI, cl. 2, has been cited for this purpose, see Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 481 n.17 (1976); F. COHEN, *supra* note 10, at 211, despite the fact that the clause confers no independent power of its own upon the national government. The war powers, U.S. CONST. art. I, § 8, cls. 1-16, which "underlay much of the federal exercise of authority over Indians during the early history of the Republic," F. Cohen, *supra* note 10, at 210, cannot provide a constitutional source of federal plenary power outside the context of hostilities or military occupation, and therefore are no longer applicable to Indians. *See also id.* at 210 nn.20-21 (discussing various other constitutional provisions at times tenuously relied upon by the Court).

A longstanding obstacle to coherent constitutional analysis of the federal government's exercise of power over Indian nations had been the judiciary's frequent invocation of the "political question" doctrine with regard to Indian affairs. *See, e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281 (1955); Lone Wolf v. Hitchock, 187 U.S. 553, 565 (1903); United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1846). The application of the political question doctrine to Indian affairs was finally repudiated in Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977), and in United States v. Sioux Nation of Indians, 448 U.S. 371, 413 (1980).

25. The Indian commerce clause is contained in U.S. CONST. art. I, § 8, cl. 3: "Congress shall have the power . . . to regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes."

26. The treaty power is found at U.S. CONST. art. II, § 2, cl. 2: "[The Executive] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." The supremacy clause provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." *Id.* art. VI, cl. 2.

27. United States v. Wheeler, 435 U.S. 313, 326 (1978). *See also* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208-10 (1978). A fourth alleged source of federal power, the "trust relationship," see *infra* note 115, is discussed at length in Section II of this Article.

tions by virtue of their status as "domestic dependent nations"[28] and which has been asserted in recent decades as a rationale for limiting the Indian nations' ability to exercise jurisdictional and regulatory power over their territory, over non-Indians, and with regard to the states.[29] The 1978 case of *Oliphant v. Suquamish Indian Tribe*[30] represented "the first time in 150 years [that] there was an expansion of the list of tribal powers held to be inconsistent with the status of the tribes as domestic dependent nations."[31] The Court in *Oliphant* held that the United States' interest in protecting the "personal liberty"[32] of its non-Indian citizens meant that in "submitting to the over-riding sovereignty of the United States, Indian tribes necessarily give up their power to [exercise criminal jurisdiction over] non-Indian citizens of the United States except in a manner acceptable to Congress."[33] More recent cases have extended the divestiture concept from dealing with such fundamental questions of inter-sovereign relations as criminal jurisdiction and foreign alliances to holding that certain civil jurisdictional and regulatory powers have been implicitly withdrawn[34] and even that the Indian nations may be divested of power in any area where there is a "lack of a tradition of self-government."[35]

As with the Marshall Court cases, however, these decisions were not decided as matters of constitutional law but instead represent judicial pronouncements upon inter-sovereign political relationships. The most fundamental problem with the implicit divestiture doctrine is that it represents an ad hoc judicial withdrawal of In-

28. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17-18. *See also* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574, 603-05; *supra*, note 4.

29. *See, e.g.*, *Oliphant*; Montana v. United States, 450 U.S. 544 (1981); Rice v. Rehner, 463 U.S. 713 (1983). "In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *Wheeler*, 435 U.S. at 323.

30. 435 U.S. 191 (1978).

31. Canby, *supra* note 4, at 8.

32. *Oliphant*, 435 U.S. at 210.

33. *Id.* For criticism of the Court's holding, *see* Canby, *supra* note 4, at 8-9; Comment, *supra* note 2, at 567-68.

34. *See, e.g.*, Montana v. United States, 450 U.S. 544, 563-67 (1981) (tribe implicitly divested of power to regulate hunting and fishing). "[The] exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id.* at 564.

35. Rice v. Rehner, 463 U.S. 713, 731 (1983). *See also id.* at 718-20. *But see* Barsh, *supra* note 5, at 876.

dian sovereignty[36] without any principled preconception of that sovereignty, without reference to international law and without reference to the doctrine of retained rights.[37] What is required is that the Supreme Court recognize that in the absence of a treaty surrendering rights to the United States, Indian nations retain all their sovereign power, particularly with regard to internal matters of regulation and jurisdiction.[38] Some Indian nations may have voluntarily surrendered certain of their sovereign powers without formal treaties, but such questions should be determined by reference to declared and customary[39] international law. Divestiture is not problematic to the extent that it is an overt political matter handled pursuant to the treaty power or under international law, but the implicit and judicial aspects of the implicit divestiture doctrine do not comport with the inherent and ostensibly recognized sovereignty of the Indian nations. Fundamental questions concerning jurisdiction, regulation and other sovereign powers should be handled through treaty negotiations, and not through one-sided, open-ended judicial "activism in which [the] Court should not indulge."[40] Making "implicit divestiture" explicit would properly place the idea of delegated or surrendered powers back under the aegis of the treaty power, which along with Congress' power to regulate commerce are the only judicially recognized and decidedly limited constitutional authorizations of United States action with regard to the Indian nations.

36. *See* Comment, *Tribal Sovereignty and the Supreme Court's 1977-1978 Term*, 4 B.Y.U. L. REV. 911, 927 n.83, 935 (1978).

37. Under the doctrine of retained rights, Indian treaties are held to be " 'a grant of rights from [the Indians and] a reservation of those not granted.' " *Wheeler*, 435 U.S. at 327 n.24 (quoting United States v. Winans, 198 U.S. 371, 381 (1905)). *See also supra* note 17.

38. *See, e.g.*, the terse, one-paragraph dissent in *Oliphant*, which held that

> the 'power to perserve order on the reservation . . . is a *sine qua non* of the sovereignty that the Suquamish originally possessed.' . . . In the absence of affirmative withdrawal by treaty or statute, I am of the view that Indian tribes enjoy as a necessary aspect of their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation.

Oliphant, 435 U.S. at 212 (Marshall, J., dissenting) (quoting the lower court's decision in Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976)).

39. *See* A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971).

40. *Rice*, 463 U.S. at 744 (Blackmun, J., dissenting). One commentator argues that "implicit divestiture is a judicial analogue of the 'plenary power' doctrine: not only Congress, but the courts as well may invoke national policy to extinguish tribal rights." Barsh, *supra* note 5, at 870. *See also* Canby, *supra* note 4, at 16.

A. The Indian Commerce Clause

Chief Justice Marshall made clear in 1832 in *Worcester v. Georgia*[41] that the Indian commerce clause was primarily a function of the Framers' desire to vest exclusive power over Indian trade in Congress and not the states.[42] In 1886 the Supreme Court, though upholding broad federal power over Indians on other dubious grounds, reaffirmed this idea and denied that the clause provided any basis for the exercise of power over Indian nations.[43] While the commerce clause was therefore not seen as granting the power to regulate the internal affairs of the Indian nations for nearly a century after the Framing, it has nonetheless emerged as a justification for federal plenary power through a gradual series of cases in modern times.[44] It is, however, "a long, twisted path indeed from the Framers' decision to give Congress the exclusive power to regulate commerce and other relations *with* the Indian tribes to the modern assertion of plenary power *over* them."[45] The Court's recent reliance on the Indian commerce clause seems to be a manifestation of its need to find constitutional support for the exercise of federal power over Indians to replace the racial and paternalistic notions which previously were held to support such power.[46] The jurisprudence of the commerce clause,

41. 31 U.S. (6 Pet.) 515 (1832).

42. *Id.* at 561. *See* Pelcyger, *Justices and Indians: Back to Basics*, 62 OR. L. REV. 29, 35-39 (1983). Given the Framers' debates over the division of state and federal authority regarding Indian affairs and the final result in favor of exclusive federal power, see Comment, *supra* note 2, at notes 24, 59 and accompanying text, the separate enumeration of "Indian tribes" in the commerce clause, as distinct from foreign nations, is probably most accurately seen as specifically including the Indian nations within the reach of federal foreign relations powers. The term "foreign nations" does not intuitively include Indian nations, and thus the omission of a separate mention of the Indian tribes might have left open the possibility of state exercise of power over them. Marshall, however, interpreted the separate enumeration of Indians as recognizing a third category of "domestic dependent nations," which were nonetheless recognized as sovereign and with whom the federal government held exclusive authority to regulate commercial relations. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

43. *See* United States v. Kagama, 118 U.S. 375, 378-79 (1886); *see also Worcester*, 31 U.S. (6 Pet.) at 592 (McLean, J., concurring).

44. *See, e.g.*, United States v. Sandoval, 231 U.S. 28, 45 (1913) (upholding liquor prohibition in Indian country); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685, 691 n.18 (1965) (State tax on Indian trader preempted); United States v. John, 437 U.S. 634, 652-53 (1978) (State jurisdiction over Indian country preempted).

45. Clinton, Book Review, 47 U. CHI. L. REV. 846, 859 (1980).

46. *See supra* notes 20-23 and accompanying text.

however, does not support its use as a justification for upholding federal plenary power.

In the modern era, the power of Congress over the states pursuant to the interstate commerce clause, like federal power over Indians, has been greatly expanded, to the extent that congressional power within the federal system is now virtually unlimited.[47] An examination of the principles underlying the development of modern interstate commerce clause jurisprudence, however, shows that the broad construction of federal power under the interstate commerce clause is inapplicable to the Indian commerce clause because of the Indian nations' lack of political process protections. An expansive reading of the Indian commerce clause as granting power over Indian nations is therefore inappropriate.

James Madison argued in the Federalist Papers that although there were no enumerated limitations on the powers of Congress over the states pursuant to the commerce clause, the distribution of powers in the federal system imposed constraints on its unbridled exercise.[48] Specifically, Madison argued that the local character and constituency of each member of Congress,[49] the structure of elections for the Presidency[50] and for the Senate,[51] and the states' control over voting eligibility for representation in the House of Representatives[52] all served to constrain federal power and prevent the federal government from encroaching upon the rights of the states.[53]

47. *See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981) ("congressional finding that a regulated activity affects interstate commerce" requires only that "any rational basis for such a finding" exists); Wickard v. Filburn, 317 U.S. 111, 124 (1942) ("no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress."). *See generally* A. Cox, The Court and the Constitution 166, 170-73 (1987).

48. The Federalist Nos. 45 & 46 (J. Madison) (C. Rossiter ed. 1961).

49. The Federalist No. 46, *supra* note 48, at 296 ("[a] local spirit will infallibly prevail . . . in the members of Congress").

50. The Federalist No. 45, *supra* note 48, at 291. The Electoral College, both a restriction on the popular vote and a forum for state interests, is established in U.S. Const. art. II § 1, cl. 2-3.

51. The Federalist No. 45, *supra* note 48, at 291. The Constitution originally provided for the indirect election of Senator by the state legislatures. U.S. Const. art. I, § 3, cl. 1. Article V forbids the divestment of a state's senatorial representation, even by constitutional amendment, without its consent.

52. The Federalist No. 45, *supra* note 48, at 291; U.S. Const. art. I § 2.

53. "The powers delegated by the proposed Constitution to the federal government are few and defined." The Federalist No. 45, *supra* note 48, at 292.

Though several of these restraints are no longer viable,[54] the constituency of congressional delegations has been widely expanded through the implementation of universal suffrage,[55] allowing for greater accountability to local interests in the federal government. Because these structural aspects of the national political system act as a check to protect state interests,[56] the Supreme Court has declined to impose any limits on congressional power pursuant to the interstate commerce clause against claims by the states of infringement of their rights within the federal system.[57]

Indian nations, however, do not enjoy any of the political process protections available to the states. The Supreme Court's rationale for permitting unlimited federal power under the interstate commerce clause is therefore inapplicable to the Indian commerce clause.[58] The constitutional provision that "Indians not taxed" (meaning all Indians except for the few that had completely assimilated and become citizens and taxpayers) were not to be

54. The indirect election of Senators was repealed in 1913. U.S. CONST. amend. XVII. The President and Vice-President are now elected together, U.S. CONST. amend. XII, from national political parties. Finally, the Electoral College, while still a partial restraint on direct popular election for the Presidency, has ceased to be a viable forum for state debate. *See* A. PAUL, THE CONSERVATIVE CRISIS AND THE RULE OF LAW 234 (1976 reprint).

55. *See* U.S. CONST. amend. XV (right to vote "shall not be denied or abridged on account of race"); *id.*, amend. XIX (female suffrage); *id.*, amend. XXIV (poll taxes prohibited); *id.*, amend. XVI (18 year old suffrage); Reynolds v. Sims, 377 U.S. 533, 554-61 (1964) (Constitution protects the suffrage of all qualified voters).

56. *See, e.g.*, Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954); J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 171-259 (1980). Both authors make this Madisonian argument as the basis for asserting, to different degrees, that judicial review of state challenges to federal acts made pursuant to Congress' enumerated powers is inappropriate, since the states should look to the national political process for a remedy.

57. *See* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). "State sovereign interests are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.* at 552. *See also* United States v. Darby, 312 U.S. 100, 124 (1941) (tenth amendment is merely a "truism"); Field, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985). Conversely, the Court has limited federal power over individuals who do not enjoy the same procedural protections. *See* United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938) ("prejudice against discrete and insular minorities may . . . curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and [thus] may call for a correspondingly more searching judicial inquiry"). *See generally* J.H. ELY, DEMOCRACY AND DISTRUST 73-183 (1980).

58. A similar argument is found in Ball, *supra* note 22, at 47 n.202, 50 n.219, 67-70.

counted by the census in determining legislative apportionment deliberately excluded Indians from the federal system.[59] Reenactment of this provision in 1867 by the fourteenth amendment[60] illustrated the continuation of this policy. In *Elk v. Wilkins*,[61] an 1884 decision denying Indians the right to vote, the Supreme Court relied on this "not taxed" language to find that Indians were not subject to the jurisdiction of the United States,[62] stating further that Indians "owed immediate allegiance to their several tribes, and were not part of the people of the United States."[63] Indians were thus neither United States citizens nor citizens of the states within which they might otherwise have been claimed to reside.

It might be argued that Indians are protected by the political process because as citizens they are now able to vote.[64] However,

59. U.S. CONST. art. I, § 2, cl. 3. ("Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers, which shall be determined by . . . the whole Number of free persons . . . and excluding Indians not taxes"). *See* Newton, *supra* note 3, at 238-39.

60. U.S. CONST. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed").

61. 112 U.S. 94 (1884).

62. *See id.* at 99-103.

63. *Id.* at 99; *see also* McKay v. Campbell, 16 F. Cas. 161, 166-67 (D. Ore. 1871) (No. 8,840). In 1870 the Senate Judiciary Committee also decided that Indians were not subject to the United States' jurisdiction under the fourteenth amendment. S. Rep. No. 268, 41st Cong., 3d Sess. 9-10 (1870). *See also generally* L. BARSH & J. HENDERSON, *supra* note 7, at 62-74. However, the thirteenth amendment ("[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction," U.S. CONST. amend. XIII, § 1), was held applicable to Alaskan Indians in *In re Sah Quah*, 31 F. Supp. 327 (D. Alaska 1886), cited with approval in Metlakatla Indian Community v. Egan, 369 U.S. 45, 51 (1962). In 1934 *Sah Quah* was cited by the Bureau of Indian Affairs for the proposition that "those provisions of the Federal Constitution which are completely general in scope, such as the Thirteenth Amendment, apply to members of Indian tribes as well as to all other inhabitants of the nation." *Powers of Indian Tribes*, 55 Interior Dec. 14 (Oct. 25, 1934), reprinted in I OPINIONS OF THE SOLICITOR 445, 451; *see also* F. COHEN, *supra* note 10, at 665 nn.21-22; *The Civil Rights Cases*, 109 U.S. 3, 20, 33 (1883). The modern reconciliation of these conflicting jurisdictional interpretations has been the expansion of fourteenth amendment protections to Indians through the grant of citizenship. *See, e.g.*, Goodluck v. Apache County, 417 F. Supp. 13 (D. Ariz. 1975) (three judge court), *aff'd without opinion sub nom* Apache County v. United States, 429 U.S. 876 (1976).

64. Indians formally received the right to vote when they gained citizenship, which was granted to certain Indians under the General Allotment Act of 1887, §§ 5, 6, 24 Stat. 388, 389-90, and generally in 1924. Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified

citizenship and suffrage protect only individual rights, which Indians theoretically enjoy equally with other American citizens. Indian nations as nations, however, do not possess the political process protections enjoyed by the states as states.[65] Election districts cut across tribal and reservation lines,[66] and there are no Indian delegations to Congress (and none, more importantly, to the Senate).[67] Since Indian nations as political entities are powerless within the American political system, the use of the Indian commerce clause as a means of justifying federal power over them is illegitimate, and the analogy to the federal government's power over interstate commerce used to support such an extension is inapposite. The only power which the Indian commerce clause legitimately confers upon the federal government concerns the regulation of "commerce." This power should be interpreted narrowly in the Indian context, as it had been in early Supreme Court and federal cases[68] and by Congress,[69] all of which strictly limited

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as amended at 8 U.S.C. § 1401(b) (1982)). However, the reality of suffrage often did not arrive until later. *See, e.g.*, Porter v. Hall, 34 Ariz. 308, 271 P. 411 (1928), *overruled*, Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456 (1948); *Allen v. Merrel*, 6 Utah 2d. 32, 305 P.2d 490, *vacated as moot*, 353 U.S. 932 (1956).

65. *See* Newton, *supra* note 3, at 236-37. The Supreme Court has not taken up this idea. Justice Stevens stated in 1987 that it is an "anomalous suggestion that the sovereignty of an Indian tribe is in some respects greater than that of [a] State." Iowa Mutual Ins. Co. v. La Plante, 107 S. Ct. 971, 980 (1987) (Stevens, J., concurring in part and dissenting in part).

66. *See* F. COHEN, *supra* note 10, at 646 n.6. *But see* Klahr v. Williams, 339 F. Supp. 922, 927 (D. Ariz. 1972), *enforcing* Ely v. Klahr, 403 U.S. 108 (1971).

67. Such delegations were often proposed in early Indian treaties. *See* Comment, *supra* 2, at note 21 and accompanying text. For a more recent proposal, *see* R. BARSH & J. HENDERSON, *supra* note 7, at 281-82. The District of Columbia, Puerto Rico, Guam, the Virgin Islands and American Samoa all send representatives to Congress who exercise all the privileges of membership except voting. *See* 2 U.S.C. § 25a (1982), implementing U.S. CONST. amend. XXIII (District of Columbia); 48 U.S.C. § 891(b) (1982) (Puerto Rico) 48 U.S.C. § 1711 (1982) (Guam and the Virgin Islands); 48 U.S.C. § 1731 (1982) (American Samoa).

68. *See* United States v. Kagama, 118 U.S. 375, 378-79 (1886); United States v. Bailey, 24 F. Cas. 937, 939 (C.C.D. Tenn. 1834) (No. 14,495); United States v. Sa-Coo-Da-Cot (Yellow Sun), 27 F. Cas. 923, 925 (C.C.D. Neb. 1870) (No. 16,212) (dictum) and cases cited therein; Clinton, *supra* note 45, at 859; Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 996-1001 (1981).

69. In an 1834 Report of the Committee Regulating the Indian Department, it was stated that "Congress expressly reserves the power . . . to legislate over the Indian country, so far as the Constitution requires them to do, viz. *for the regulation of commerce with the Indian tribes*". H.R. Rep. No. 474, 23d Cong., 1st Sess. 14 (1834) (emphasis added).

federal power concerning Indian affairs to the regulation of commercial intercourse. Significantly, in *United States v. Kagama*,[70] the case which provided the foundation for the broad modern doctrine of plenary power, the Supreme Court explicitly denied the use of the Indian commerce clause as a basis for federal power,[71] rendering the clause "superfluous as a source of power over the Indian tribes."[72]

Since the Indian nations are neither included in nor protected by the national political process, it is the foreign commerce clause, and not the interstate commerce clause, which provides the best suggestion as to the proper reach of the Indian commerce clause. By analogy to Congress' constitutional power over foreign commerce, the broadest constitutional interpretation of the Indian commerce clause would allow federal control only over commercial interaction between United States citizens and Indians, and would grant no power over the internal affairs of Indian nations.[73] The exercise of federal power under this reading of the Indian commerce clause would resemble the familiar border and customs enforcement standards of international trade.[74] As in international relations, United States jurisdiction could not reach into Indian territory beyond the limits of power granted to the United States by the Indian nations through the treaty-making process.[75]

70. 118 U.S. 375 (1886). *See supra* note 22.

71. 118 U.S. at 378-79.

72. THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. Doc. No. 82, 92d Cong., 2d Sess. 282 (1973). A supplement to this document notes the Court's later contrary position regarding the Indian commerce clause. *Id.*, S. Doc. No. 26, 96th Cong., 1st Sess. S22 (1978 Supp.) (discussing McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973)).

73. This was the interpretation of the clause in early American history. *See, e.g.*, the Trade and Intercourse Acts of 1790, 1 Stat. 136, of 1793, 1 Stat. 329, and of 1796, 1 Stat. 469 (presuming to regulate only American conduct). *See also* F. Cohen, *supra* note 10, at 212-13 nn.1-8 and accompanying text; F. Prucha, *supra* note 3, at 45-50.

74. This position was advocated by Justice McLean, both on the Supreme Court bench, *see* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 592 (McLean, J., concurring), and while riding circuit, *see* United States v. Cisna, 25 F. Cas. 422 (D. Ohio 1835) (No. 14,795). At the extreme, this power would permit the prohibition of commerce. *See* Regan v. Wald, 468 U.S. 222 (1984); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). Whether such exercise would be consistent with the Indians' rights as citizens seems doubtful, since such restrictions would probably violate modern equal protection standards. Since Indians are citizens, singling them out of commerce prohibitions would be a facially invalid action. However, any inconsistency would only serve to limit congressional power in deference to the Indians' rights. The problematic situation of Indian American citizenship is discussed in Section III of this Article.

75. *See* R. BARSH & J. HENDERSON, *supra* note 7, at 59 n.35 and accompanying text; Ball, *supra* note 22, at 47 n.202.

B. The Treaty Power

The power of the United States to conclude treaties with the Indians has been used as a justification for federal plenary authority over Indian affairs in and of itself, in addition to and beyond the specific terms of actual treaties.[76] A prima facie argument against such a contention is that since the United States formally ended Indian treaty-making in 1871,[77] the treaty power can no longer confer power over the Indian nations on the federal government, even if it once could.[78] Despite this argument, the use of the treaty power as a constitutional foundation for plenary power must be addressed. Many Indian treaties made prior to 1871 remain in force and provide sources of federal authority and responsibility,[79] and any consent-based model of United States-Indian relations would require, if not formally denominated treaties, agreements so similar that the limits of United States power concerning them need to be explored. This section argues that neither the mere existence of the United States' power to make treaties with Indian nations nor the terms of an actual treaty can confer unenumerated powers on the federal government or authorize intrusions into internal Indian affairs unless such intrusions and power are specifically delegated to the United States and permitted by an Indian nation in a fairly negotiated treaty.

Historically, treaty-making was the dominant method of relation between the United States and Indian nations,[80] and most

76. "The Treaty Clause has been a principal foundation for federal power over Indian affairs." F. COHEN, *supra* note 10, at 207. *See, e.g.*, McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973); Board of County Comm'rs v. Seber, 318 U.S. 705, 715 (1943).

77. Appropriations Act of March 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (1982)). *See infra* notes 88-91 and accompanying text.

78. *See* F. COHEN, *supra* note 10, at 208; Rice, The Position of the American Indian in the Law of the United States, 16 COMP. LEGIS. & INT'L L. (3d. ser.) 78, 83 (1934) (In passing the 1871 Act Congress "struck down or admitted to be false the chief constitutional basis of [federal] power [over Indians]"). The Supreme Court has held that "[t]he change in no way affected Congress' plenary powers to *legislate* on problems of Indians," Antoine v. Washington, 420 U.S. 194, 203 (1975) (emphasis in original), but did not refer to the treaty power or to any other constitutional provision as the source of this legislative power, simply holding that the Court's own cases upheld such a reading. *See id.* at 203-04.

79. *See* 25 U.S.C. § 71 (1982). A major recent case premised upon treaty rights was United States v. Sioux Nation of Indians, 448 U.S. 371 (1980), in which the Sioux Nation recovered $105,000,000 for taking of their land in contravention of a treaty.

80. By 1871, the United States had entered into over 400 treaties with Indian nations. *See* Institute for the Development of Indian Law, A Chronological List of Treaties and

legislation concerning Indians was passed in order to carry out the United States' treaty obligations.[81] Indian treaties were drafted and concluded according to international legal standards and were considered by the United States to be agreements between independent sovereigns.[82] A treaty by an Indian nation granting concessions to the United States was seen as a delegation of sovereign power, and all rights and powers not expressly delegated were held to be "reserved" by the Indian nation.[83] As with foreign treaties, Indian treaties were negotiated by the Executive and ratified by the Senate.[84] Indian treaties were, however, interpreted differently than international treaties by United States courts. Based on "an acknowledgment of the [Indians'] unequal bargaining position,"[85] treaty provisions were given the construction most sympathetic to the Indian parties.[86] Despite these canons of construction, however, Congress has always held unquestioned power under both international and United States law to abrogate treaties, whether Indian or otherwise.[87]

Agreements Made by Indian Tribes with the United States (1973). Marks v. United States, 161 U.S. 297, 302 (1896), puts the number at 666.

81. *See* Rice, *Indian Rights: 25 U.S.C. § 71: The End of Indian Sovereignty or a Self-Limitation of Contractual Ability?*, 5 AM. INDIAN L. REV. 239, 239 (1977); F. Prucha, *supra* note 3, at 45.

82. *See* Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979). F. PRUCHA, *supra* note 3, at 142; R. BARSH & J. HENDERSON, *supra* note 7, at 33; *see also* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 548 (1832).

83. "[An Indian] treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." United States v. Winans, 198 U.S. 371, 381 (1905), *quoted with approval,* in United States v. Wheeler, 435 U.S. 313, 327 n.24 (1978).

84. *See* U.S. CONST. art. II, § 2, cl. 2.

85. F. COHEN, *supra* note 10, at 222 (citing Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979)).

86. *See* Antoine v. Washington, 420 U.S. 194, 199-200 (1975) ("The canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not be be construed to their prejudice"); *see also* Choctaw Nation v. Oklahoma, 397 U.S. 620, 631 (1970) (treaties are to be interpreted as the Indians understood them); *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. at 675-76. *See generally* Wilkinson & 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 CALIF. L. REV. 601, 623-34 (1975). Federal statutes concerning Indians are also interpreted sympathetically. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 62-65 (1978) (implication of private cause of action from federal statute denied because it would conflict with policy of tribal self-government).

87. Under the international "last in time" rule, the most recent act of a nation, either legislatively or by treaty, abrogates any prior inconsistent statutes or treaties. *See The Chinese Exclusion Case* (Chae Chan Ping v. United States), 130 U.S. 581 (1889); L. Tribe,

The only conceptual peculiarity about Indian treaty-making as compared with foreign treaty-making is the 1871 Act mentioned above, which purported to end treaty-making between the United States and the Indian tribes. The Act grew out of a political power struggle between the House of Representatives and Senate over control of United States Indian policy. In 1871, the House, constitutionally excluded from the treaty-making process, refused to appropriate money for the fulfillment of treaty obligations unless it received a greater role in formulating Indian policy.[88] As a compromise designed to enable the House to participate, Congress passed a rider to an Indian appropriations act prohibiting the United States from further recognizing any Indian nation as capable of making a treaty, though it did provide that existing treaties would remain intact.[89] The conduct of Indian policy, therefore, would henceforth have to be accomplished legislatively, rather than by treaty, and thus allowed the House a role in formulating Indian policy. The negotiation of "Indian agreements," differing from treaties only in that they were ratified by majority vote of both Houses of Congress, continued as before,[90] but the agreements were considered legislation, not treaties. Thus, while contractual

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supra note 19, § 4-5 at 226. On the abrogation of Indian treaties, *see* United States v. Dion, 476 U.S. 734, 738-40 (1986); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903); Wilkinson and Volkman, *supra* note 86; Townsend, *Congressional Abrogation of Indian Treaties: Reevaluation and Reform*, 98 YALE L. J. 793 (1989).

88. *See* Antoine v. Washington, 420 U.S. 194, 202 (1974); Rice, *supra* note 81 at notes 23-28 and accompanying text; L. Barsh & J. Henderson, *supra* note 7 at 67-69.

89. "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; *provided further* that nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe."

Appropriations Act of March 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (1982)); *see Antoine*, 420 U.S. at 201-04; Rice, *supra* note 81. It could be argued that the 1871 Act nullified the Indians' power to treat with the United States. However, the 1871 Act was a restraint on the executive branch and on the Senate, and not on the Indian nations. While the Act for all practical purposes ended the treaty-making power of the Indians, it formally only forbade the United States from *recognizing* Indian tribes, and thus was only "a self-limitation of contractual ability." *See* Rice, *supra* note 81, at 243.

90. *See American Indian Lawyer Training Program*, MANUAL OF INDIAN LAW J-4 (3d ed. 1977); *see also* Rice, *supra* note 81, at 247; L. BARSH & J. HENDERSON, *supra* note 7, at 64 n.40.

relations between Indian nations and the United States did not cease, the 1871 Act did assert that Congress, and not the Executive, now held primary authority for the conduct of Indian affairs.[91]

This is not to say, however, that the fundamentally treaty-based relationship between the Indians and the United States continued unchanged. The arrogation by Congress of the President's power to negotiate and conclude treaties embodied in the 1871 Act, while practically only effecting a shift in the balance of power between the House on one hand and the Senate and the President on the other, had a significant effect on the relationship between the United States and the Indian nations. Though it did not seem to have been directly contemplated at the time, the shift from treaties to legislation seems to have given Congress the impression that it could legislate over the Indians at will, and thus gave rise to what has been known as the "plenary power era," a decades-long period of expansive congressional legislation aimed at assimilating Indians, breaking up tribes and acquiring Indian lands.[92] As Barsh and Henderson note,

> The most serious consequence of the [1871] compromise amendment was never openly addressed. Treaties, like contracts, are unenforceable except against those agreeing specifically and expressly to be bound by them. Legislation, however, is presumed to be legitimate when enacted, and enforceable against all persons within the power of the legislature. Consent is neither

91. The 1871 Act arguably violated the separation of powers doctrine, for it eliminated the constitutionally enumerated power of the Executive to conclude treaties by legislative act, rather than by constitutional amendment. *See* Rice, *supra* note 81, at 246; L. BARSH & J. HENDERSON, *supra* note 7, at 68, 70. The Constitution also specifically grants to the Executive the power to recognize foreign officials. U.S. CONST. art. II, § 3. Thus, the Act potentially contravened not only the Executive's treaty-making powers under *id.*, § 2, but also its prerogative of recognition under *id.* § 3. Supporters of the 1871 Act argued that they were only defining the term "foreign nation" as used in the Constitution. R. BARSH & J. HENDERSON, *supra* note 7, at 68. By this, however, Congress was arrogating to itself the power to interpret the meaning of a term in the Constitution, an act which is normally considered to be within the province of the judiciary, and thus there is a further potential separation of powers violation. *See id.* While the Supreme Court has discussed the Act several times, it has never questioned its constitutionality. *Id.* at 70 n.47. Instead the Court has held that it "meant no more . . . than that after 1871 relations with Indians would be governed by Acts of Congress and not by treaty." Antoine v. Washington, 420 U.S. 194, 203 (1974). *See also* Rice, *supra* note 81, at 246. On the separation of powers doctrine generally, *see* INS v. Chadha, 462 U.S. 919 (1983).

92. *See* Comment, *supra* note 2, at 529-35.

specific nor express, but general and implied in the right to vote.[93]

While this change in the balance of power between the Indians and the federal government, this shift from "negotiation with" to "legislation over," was more pronounced at the time of the Act's passage due to the Indians' lack of the franchise, the modern extension of citizenship and the franchise to Indians has not operated to restore the *status quo ante* of a consensual, treaty-based relationship. Instead, it has simply assimilated the Indians into a political process in which they are a numerical minority unable to vindicate or protect their group rights to sovereignty or property. The concept of consent has in fact been completely emasculated, since there is no requirement that an Indian "agreement" be an agreement at all; Congress has assumed, and the Supreme Court upheld, a congressional "plenary power" to legislate over the Indians as it pleases. Indians need not be involved at all, except as the subjects of the legislation. Likewise, the executive branch, the representative of the United States in its relations with other sovereign entities, need not be involved as negotiator, drafter, or in any other capacity; the President is needed only to sign the final bill, and even in the case of a veto she may be overridden.

The treaty power, though viewed after 1871 as involving both Houses of Congress, has in modern times been cited as a source of constitutional federal power over Indians in and of itself.[94] The argument that the treaty power standing alone can confer power over Indians, however, is specious, and proceeds solely from the anomalous legal and political situation of the Indians. The treaty power by itself certainly conveys no power to the United States over citizens of other countries with which the United States treats. The fact that it has been cited as a source of federal power over Indians has been the result of the judiciary's need and attempt to legitimate and "constitutionalize" the power the United States has gained over the Indian nations through centuries of military, political and economic exercises of force.[95] The only serious con-

93. L. BARSH & J. HENDERSON, *supra* note 7, at 68-69.

94. *See supra* note 76.

95. *See supra* notes 20-23 and accompanying text. For a description of the change in the conception of Indian treaties from "formal instruments [which] bespoke relations between equal sovereign political entities" to "instruments of American paternalism," see F. P. Prucha, *supra* note 2, at 15-19.

stitutional question which exists is whether the terms of a treaty can convey, either explicitly or implicitly, unenumerated powers upon the federal government.

The traditional understanding of the treaty power has been that while its reach is broad and undefined, it remains subject to constitutional constraints.[96] The Supreme Court did not consider the precise constitutional restraints upon the treaty power until the 1920 case of *Missouri v. Holland*,[97] an action brought by the State of Missouri challenging the constitutionality of a federal statute enacted to fulfill the provisions of an international agreement. In dictum, Justice Holmes argued that the United States government held certain powers inherently as a sovereign, beyond the explicit grants found in the Constitution, stating it was "not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found."[98] The Court found the statute to be constitutional and thus recognized a federal power pursuant to the treaty clause which existed outside of Congress' constitutionally enumerated powers.

The question of unenumerated congressional power pursuant to the treaty power was next considered in the 1957 case of *Reid v. Covert*.[99] In that case, a four-Justice plurality seemed to contradict Holmes' dictum, holding that "[i]t would be manifestly contrary to the objectives of those who created the Constitution, . . . to construe [the supremacy clause] as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions."[100] Justice Harlan, concurring in the result, provided the fifth vote on this point, writing

96. *See* Geofroy v. Riggs, 133 U.S. 258, 267 (1890). In the Indian context, The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 620-21, held that "[i]t need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument."

97. 252 U.S. 416 (1920).

98. *Id.* at 433 (quoting Andrews v. Andrews, 188 U.S. 14, 33 (1903)). A similar inherent power argument was made by the *Kagama* Court. *See* Comment, *supra* note 2, at 528-29; *see also* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) (executive power in foreign affairs is inherent). Holmes added that it was "obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could." *Missouri*, 252 U.S. at 433.

99. 354 U.S. 1 (1957). The case and its companions concerned with the applicability of the Bill of Rights to American military trials in foreign countries.

100. *Id.* at 17 (plurality) (citation omitted).

that "[t]o say that the validity of [a] statute may be rested upon the inherent 'sovereign powers' of this country [is] no more than begging the question."[101] However, since the result in *Reid* was based on the protections afforded to individuals by the Bill of Rights, the *Missouri v. Holland* dictum that a state cannot present a justiciable claim that a treaty violates the Constitution is apparently good law,[102] and was in fact adopted by the *Reid* plurality.[103] There is thus a dichotomy; the federal government cannot rest an exercise of its power solely on the terms of a treaty where such exercise contravenes the rights of United States citizens, but a state cannot present a justiciable claim that an exercise of federal power pursuant to a treaty contravenes its rights with the federal system. The latter holding barring state claims is premised on the protections afforded to the states in the national political process.[104]

Under the *Reid* holding, therefore, Indians as citizens are ostensibly protected by the Bill of Rights from the exercise of extra-constitutional power by Congress pursuant to a treaty or the treaty power.[105] The question that remains is whether federal plenary power over Indian nations as nations can be justified on the basis of treaties or the treaty power.

As with the commerce clause, the lack of participation by Indians in the American political process[106] renders illegitimate

101. *Id.* at 66 (Harlan, J., concurring in the result). Lower federal courts have followed the plurality's holding. *See, e.g.*, Holmes v. Laird, 459 F.2d 1211, 1217 (D.C. Cir. 1972); Powell v. Zuckert, 366 F.2d 634, 640 (D.C. Cir. 1966); Soucheray v. Corps of Eng'rs., 483 F. Supp. 352, 357 (W.D. Wis. 1979). The reluctance of a majority of the Court to join the plurality's holding is perhaps due to the fact that the case concerned military court martials, and thus implicated Congress' power "[t]o make Rules for the Government and Regulation of the land and naval forces," U.S. CONST. art. I, § 8, cl. 14. Both concurrences dealt with this clause at length. *See* 354 U.S. at 41-64 (Frankfurter, J., concurring in the result); *id.* at 65-78 (Harlan, J., concurring in the result).

102. *See, e.g.*, Zschernig v. Miller, 389 U.S. 429 (1968); De Tenorio v. McGowan, 510 F.2d 92 (5th Cir. 1975).

103. "To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier." Reid v. Covert, 354 U.S. at 18 (plurality) (citing United States v. Darby, 312 U.S. 100, 124-25 (1941)).

104. *See id.*; *supra* notes 56-57 and accompanying text.

105. There is thus a question as to whether the exercise by the United States of its right to abrogate treaties can be found to be unconstitutional where the abrogation operates in contravention of Indians' rights as citizens. Some protection has been afforded Indians with regard to treaty-protected property. *See, e.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 278 n.9. (1955).

106. *See supra* notes 58-67 and accompanying text.

any exercise of extraconstitutional power over them pursuant to the treaty clause. While under the *Missouri* holding states may have no justiciable claim for redress of such exercise, the Indian nations' existence outside the federal system precludes the use of such a nonjusticiability defense by the United States. It is thus unconstitutional for the United States to imply any unenumerated power from the text of a treaty[107] or to exercise any power over an Indian nation pursuant to a treaty or the treaty clause which was not granted by the Indian nation in treaty negotiations. The latter idea is completely consistent with the stated rule of construction that all rights not expressly delegated by an Indian treaty are "reserved" by the Indian nation.[108] In addition, the use of sympathetic canons of construction for Indian treaties by the United States courts further demonstrates the moral and constitutional command that neither Indian treaties themselves nor the United States power to make them are to be construed as creating federal power to the Indians' detriment.

Since the treaty clause cannot provide a source of extraconstitutional federal power over Indians, the only legitimate federal actions regarding Indians under the clause in the absence of a specific provision in a treaty delegating Indian power and permission to the United States would be actions taken pursuant to one of the federal government's other enumerated powers, such as the appropriations power.[109] For example, the federal government would have the power to appropriate moneys pursuant to a treaty agreement, but not to exercise unenumerated powers.

Congress' enumerated powers to conclude treaties with Indians and to regulate commerce between citizens and Indians thus serve only to grant to the federal government the authority necessary to implement the United States' inter-sovereign relationship with the Indians, as opposed to allowing such power to be exercised by the states. Like the conduct of foreign affairs, the conduct of Indian relations is thus a matter of federalism, of power as divided between the federal and state governments, and is not a

107. While an argument could be made that the "necessary and proper" clause, U.S. CONST., art. I, § 8, cl. 18, might grant the United States power to fulfill the terms of a treaty, *cf.* McCulloch v. Maryland 17 U.S. (4 Wheat.) 316 (1819), such a reading would contravene the doctrine of enumerated powers and in the Indians' case would be unchecked by the political process. The argument should thus be rejected in the Indian context.

108. *See supra* notes 37 & 83.

109. U.S. CONST. art. I, § 8, cl. I.

question of power over Indian nations. Federal power over Indians can extend only as far as an Indian nation's delegation of specific powers to the federal government in a freely and fairly negotiated treaty.[110] The interaction between each Indian nation and the United States should thus be similar to foreign relations, with each party possessing its own goals, policies, history and record of dealings.[111] Indian affairs should, therefore, be conducted in a manner analogous to the State Department's relationships with foreign nations, rather than as a function of the United States' power over its "interior."[112]

II. The Trust Relationship

In the absence of any constitutionally sound basis for the broad doctrine of federal plenary power over Indian nations, the only permissible assertions of federal authority regarding Indians are the regulation of commercial intercourse,[113] treaties, and constitutionally sound statutes passed to fulfill treaty provisions or to regulate commerce.[114] Limiting the exercise of federal power to constitutionally enumerated powers would recreate the historical consent-based treaty relationship between the United States and

110. *See* R. BARSH & J. HENDERSON, *supra* note 7, at 59 ("Beyond specific grants of tribal jurisdiction by treaty, Congress is limited to the regulation of 'commerce' "). Many treaties included such delegations. *See* Comment, *Federal Plenary Power after Weeks and Sioux Nation*, 131 U. PA. L. REV. 235, 245 n.58 and accompanying text (1982). Whether they were freely and fairly negotiated is another question. Before its recent repudiation, *see supra* note 24 and accompanying text, the political question doctrine made it difficult to question the fairness of treaty negotiations. *See e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

111. This would be a return to the original conception of American-Indian relations held by the Framers. "The early dominance of the Treaty Clause as a source of federal authority illustrates that—at least during the first century of America's national existence—Indian affairs were more an aspect of military and foreign policy than a subject of domestic or municipal law." F. Cohen, *supra* note 10, at 208 (footnotes omitted); *see Comment, supra* note 2, at 514 nn.26-27 and accompanying text.

112. Responsibility within the federal government for dealing with Indians has been handled by the Department of the Interior since 1849. Act of March 3, 1849, ch. 108, § 5, 9 Stat. 395, 395 (current version at 25 U.S.C. § 1 (1982)). Prior to that, it was handled by the War Department. Act of August 7, 1789, ch. 7, § 1, 1 Stat. 49, 50.

113. *See supra* notes 58-75 and accompanying text.

114. *See supra* notes 95-112 and accompanying text. Constitutionally sound statutes would be those that concern only matters internal to the United States in regard to fulfilling its treaty obligations. Such statutes could exercise power over Indians only if a treaty had delegated such power from an Indian nation to the United States.

Indian nations as independent, self-determining powers, with the only limitations on the Indian nations being those imposed upon their external sovereignty as a necessary and negotiated result of their geographical and political relationship with the United States. An important aspect of such a relationship, and also of present United States-Indian relations, is what is known as the "trust responsibility."

A trust relationship is said to exist between the United States and the Indians pursuant to treaties, statutes and Supreme Court cases from which arise responsibility and power on the part of the United States. Though the trust responsibility is often interpreted as itself creating extraconstitutional federal power over the Indians,[115] a properly reconceived trust relationship based solely upon fair treaties and administered according to strict fiduciary principles of private trust law would be both constitutional and protective of Indian property and sovereignty. This section begins by analyzing the development of the trust doctrine and its current contours. It then considers the relationship of the trust responsibility to the exercise of federal power, and proposes a theory of the trust doctrine which is consistent with both the federal government's limited constitutional powers regarding Indians and with the inherent sovereignty of Indian nations.

A. The Nature and Source of the Trust Responsibility

The conception of Indians as wards or trust beneficiaries began with Chief Justice Marshall's statement in 1831 in *Cherokee Nation v. Georgia*[116] that the relation of the Indian nations to the United states "resembles that of a ward to his guardian."[117] Marshall

115. *See* Board of County Comm'rs v. Seber, 318 U.S. 705, 715 (1943); United States v. Kagama, 118 U.S. 375, 384 (1886); F. Cohen, *supra* note 10, at 220 (the trust relationship has been held to be a "separate and distinct basis for congressional power over Indians"); Newton, *supra* note 3, at 232 (source of plenary power is the guardian-ward relationship); Note, Rethinking the Trust Doctrine in Federal Indian Law, 98 HARV. L. REV. 422, 436 n.71 (1984) ("plenary power derives from the trust doctrine") *But see* F. Cohen, *supra* note 10, at 220 n.31 ("[t]he trust responsibility has not been cited as an independent source of congressional power since United States v. Candelaria, 271 U.S. 432 (1926)").

116. 30 U.S. (5 Pet.) 1 (1831).

117. *Id.* at 17. Earlier assertion of guardianship over the Indians can be seen in F. de Victoria, *supra* note 2, at 128 ("by defect of their nature they need to be ruled and governed by others just as sons need to be subject to their parents," relying on Aristotle, The Politics, bk. I).

did not, however, indicate the source of the United States' guardianship, nor its exact nature.[118] The Court's explicit recognition of the powers of autonomy and self-government possessed by the Indians,[119] however, has been said to mean that "[i]n calling Indians wards of the nation, Marshall's intention was not to limit the tribes' autonomy, but to affirm the United States' duty to protect it."[120] It has also been argued that Marshall viewed the guardianship as being founded upon treaties of friendship and protection.[121]

The guardian-ward concept was further developed in 1886 in *United States v. Kagama*.[122] There, the Supreme Court "recast the Marshallian guardianship, treating it as a source of federal power in addition to and apart from the express power in the Constitution to regulate commerce with the Indian tribes."[123] The Court stated specifically that federal power over Indians arose from the fact that "[t]hese Indian tribes *are* wards of the nation. . . . They are communities *dependent* on the United States . . . From their very weakness and helplessness, . . . there arises the duty of protection, and with it the power."[124]

Kagama and other plenary power era cases[125] used the Indians' status as "dependent wards" to justify broad powers assumed by the federal government over Indians, though this was "frankly acknowledged to be extraconstitutional."[126] The duty of protection implied in a guardianship was seen as only a moral duty,[127]

118. Note, *supra* note 115, at 424-25.

119. *See* 30 U.S. (5 Pet.) at 16-17; Comment, *supra* note 2, at 518-19.

120. Note, *supra*, note 115, at 434-35 (footnote omitted). Certainly history has not seen this principle upheld in practice.

121. *See* Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213, 1219 (1975) *see also id.* at 1220-21, 1246. In his position as Assistant Solicitor for Indian Affairs, Chambers in 1974 concluded that "the trust responsibility is basically derived from treaties with and statutes concerning the various Indians tribes, and (after the treaty making power was limited by Congress in 1871) from later executive orders and agreements with Indian tribes." Quoted in AIPRC, *supra* note 3, at 50-51.

122. 118 U.S. 375, 384 (1886).

123. Chambers, *supra* note 121, at 1223. Chambers notes, however, that this is a possible reading of Marshall's *Cherokee Nation* opinion. *See id.* at 1220-21.

124. *Kagama*, 118 U.S. at 383-84 (emphasis in original).

125. *See, e.g.*, Williams v. Johnson, 239 U.S. 414 (1915); Tiger v. Western Inv. Co., 221 U.S. 286 (1910).

126. Newton, *supra* note 3, at 207.

127. *See*, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903); Beecher v. Wetherby, 95 U.S. 517, 525 (1877); Chambers, *supra* note 121, at 1227.

and not as one which had any legal significance or enforceability. Moreover, it was and has continued to be held that "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,"[128] and further that "[i]t rests with Congress to determine when the guardianship shall cease."[129] Unlike civil guardianship or custody cases, Indians cannot demonstrate their individual competency and regain their rights and property from the United States, their "trustee."[130] Incompetency "is presumed from membership in an Indian tribe."[131]

More recently, however, the courts and the Congress have attempted to reconnect the trust responsibility to treaties and federal statutes, rather than to a perceived racial or dependent status of the Indians, and have begun to recognize legally enforceable obligations against the United States.[132] In *United States v. Creek Nation*,[133] one of the first cases to limit federal plenary power, the Supreme Court held that allowing the government to confiscate Indian lands recognized by treaty without paying just compensation " 'would not be an exercise of guardianship, but an act of confiscation.' "[134] In the case of federal actions not implicating treaties, the Court has found the trust responsibility to arise in the form of an implied cause of action. In *United States v. Mitchell (Mitchell II)*,[135] the Court held that " 'where the Federal Government takes on or has control or supervision over tribal monies

128. Board of County Comm'rs v. Seber, 318 U.S. 705, 718 (1943). *See also* Tiger v. Western Inv. Co., 221 U.S. 286, 310-16 (1911).

129. *Seber*, 318 U.S. at 718. *See also* United States v. Ramsey, 271 U.S. 467, 469 (1926). On the 1950s policy of "terminating" the federal-Indian relationship, see Comment, *supra* note 2, at 533-34.

130. " '. . . the Indian ward never attains his majority . . . . generation after generation the Indian lives and dies a ward.' " F. P. Prucha, *supra* note 2, at 25 (quoting Report of the Commissioner of Indian Affairs, 1901, in House Document No. 5, 57th Cong., 1st Sess., serial 4290, at 4).

131. L. BARSH & J. HENDERSON, *supra* note 7, at 93.

132. This transformation has been implemented by congressional waivers of soverign immunity, see, e.g., 28 U.S.C. § 1505 (1982) and by judicial recognition of breach of trust claims against the executive branch. *See* United States v. Creek Nation, 295 U.S. 103 (1935); Cramer v. United States, 261 U.S. 219 (1923); Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919); Chambers, *supra* note 121, at 1230-32.

133. 295 U.S. 103 (1935).

134. *Id.* at 110 (quoting Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113 (1919)). *See also* Shoshone Tribe v. United States, 299 U.S. 476, 498 (1937) ("Spoliation is not management.") (Cardozo, J.).

135. 463 U.S. 206 (1983).

or properties, the fiduciary relationship normally exists . . . even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.' "[136]

The Supreme Court has more generally held that "[t]here is no doubt that the United States serves in a fiduciary capacity with respect to [the] Indians and that, as such, it is duty bound to exercise great care in administering its trust."[137] Moreover, in recognizing causes of action against the United States, courts have broadly interpreted the trust doctrine to be "an incident of federal recognition of any tribe. Thus it is not necessary to establish a breach of a specific provision in a treaty, executive order, or statute in order for the courts to find a federal liability to Indians."[138]

Other cases have interpreted the trust responsibility to directly limit congressional plenary power. In *Morton v. Mancari*[139] the Supreme Court held that legislation concerning Indians must be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians."[140] Therefore, the trust responsibility apparently requires that federal "statutes be based on a determination that the Indians will be protected."[141] Modern cases concerning the trust doctrine have thus arguably returned to Marshall's notion that "the basic guarantee of the United States was the territorial and governmental integrity of the tribes."[142] Such protection, in

136. *Id.* at 225, quoting Navajo Tribe of Indians v. United States, 224 Ct. Cl. 171, 183, 624 F.2d 981, 987 (1980). *Mitchell II* has been called a "significant tribal victory". Barsh, *supra* note 5, at 886. The First Circuit in Joint Tribal Council of the Passamoquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), held that a trust relationship arose from the Trade and Intercourse Act of 1790, 1 Stat. 137 (1790), which had codified the colonial doctrine that Indians could not alienate land without the United States' consent. The court held that this trust relationship required the United States to litigate the tribe's claim against the State of Maine, which acquired title to tribal lands without federal consent. 528 F.2d at 379-80. The case was later settled by the Maine Indian Claims Settlement Act of 1980, Pub. L. 96-420, 94 Stat. 1785 (codified at 25 U.S.C. § 1721 (1982)).

137. United States v. Mason, 412 U.S. 391, 398 (1973) (citing Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942)); *see also* Chambers, *supra* note 121, at 1213 n.1 and cases cited therein.

138. *American Indian Lawyer Training Program, supra* note 90, at J-8; *see also* Chambers, *supra* note 121, at 1215, 1247.

139. 417 U.S. 535 (1974).

140. *Id.* at 555. This standard was restated in Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 85 (1977).

141. F. COHEN, *supra* note 10, at 221.

142. Chambers, *supra* note 121, at 1246; *see also* Note, *supra* note 115, at 423 ("development of a coherent trust doctrine . . . requires a principle of respect for the tribes' right to substantial self-government") (footnote omitted)

Marshall's view, was not paternalistic but rather the protection by consent of a weaker power by a stronger one, a political relationship of which many examples existed in contemporary foreign affairs.[143]

Despite its ad hoc judicial origin in *Cherokee Nation*[144] and its later development under theories of dependency and inferiority,[145] the modern trust doctrine has come to require that "where the federal government manages Indian property under congressional authority, a trust relationship presumptively exists."[146] This trust relationship imposes fiduciary duties upon the federal government in its conduct regarding Indians, and under *Mancari* conceivably requires that federal power be exercised only in the Indians' interest. The Supreme Court, however, has not coherently reformulated its conception of the trust relationship. What is necessary is a clear-cut acknowledgment that the traditional, ad hoc, judicially-created idea of a paternalistic guardian-ward trust relationship is no longer valid, and a recognition of the growing trend in the law to find the United States subject to traditional, common-law standards of fiduciary obligation and constructive trust in its management of Indian property.

B. The Trust Relationship and Plenary Power

Throughout the history of United States-Indian relations, there has been a conflict of interest between the duties the United States has undertaken toward Indians, whether morally or legally imposed, and the exercise of its political, military and legal power over the Indians in the various guises of discoverer, conqueror and guardian. This conflict is crystallized in the tension between the federal government's fiduciary duties under the trust responsibility and its exercise of broad legislative power under the plenary power doctrine.[147]

143. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560-61 (1832); *see also* United States v. Wheeler, 435 U.S. 313, 326 (1978). However, in return for such protection the Indians' surrendered certain of their rights of external sovereignty. *See supra* notes 4 & 28.

144. *See* F. COHEN, *supra* note 10, at 220 (the "federal trust responsibility to Indians evolved judicially").

145. *See* Note, *supra* note 115, at 426-27.

146. Note, *Indians May Sue for Breach of Federal Trust Relationship: United States v. Mitchell*, 26 B.C. L. REV. 809, 842 (1985).

147. See F. COHEN, *supra* note 10, at 207.

The Supreme Court addressed this tension in *United States v. Sioux Nation*,[148] a case involving the taking of treaty-protected property.[149] The Court's solution was to state that " 'Congress can own two hats, but it cannot wear them both at the same time,' "[150] and further that the determination of the capacity in which Congress was acting in any given situation was a question of fact.[151] A finding that Congress was acting as a trustee depended on whether the particular measure enacted "was appropriate for protecting and advancing the tribe's interests."[152] As regarded the taking of property, if the action was found to be so appropriate it would not be subject to "the constitutional command of the Just Compensation Clause."[153] Congress would, however, remain " 'subject to limitations inherent in . . . a guardianship and to [other] pertinent constitutional restrictions,"[154] the substance of which the Court did not elaborate. On the other hand, if Congress was found to have acted pursuant to its eminent domain power, just compensation would have to be paid.[155] The Court held that although there was no longer a "presumption of congressional good faith,"[156] proof of Congress' good faith in seeking to advance tribal interests would be sufficient to qualify its

148. 448 U.S. 371 (1980). For commentary, see Newton, *The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the Sioux Nation Rule*, 61 OR. L. REV. 245 (1982); Hanson, Special Recent Development: *United States v. Sioux Nation: Political Questions, Moral Imperative, and the National Honor*, 8 AM. INDIAN L. REV. 459 (1980). Earlier consideration of the question can be seen in the Court of Claims' decision in *Sioux Nation*, 601 F.2d 1157 (Ct. Cl. 1979), and in Three Tribes of Fort Berthold Reservation v. United States, 390 F.2d 686, 691-94 (Ct. Cl. 1968).

149. 448 U.S. at 415. Under Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 277-78 (1955), just compensation must be paid for the taking of such property. On the basis of the plenary power doctrine, however, it has been held that property not guaranteed to Indians by treaty may be disposed of by the federal government without just compensation.

150. 448 U.S. at 408 (quoting *Three Tribes of Fort Berthold Reservation*, 390 F.2d at 691).

151. *Id.* at 416.

152. *Id.* at 415.

153. *Id.*

154. *Id.* (quoting United States v. Creek Nation, 295 U.S. 103, 109-10 (1935)).

155. 448 U.S. at 415 n.29.

156. *Id.* at 416; *see also id.* at 410-15. The presumption of congressional good faith extinguished by the *Sioux Nation* Court originated in Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903).

actions as that of a trustee.[157] It would not be necessary to prove that the measure was in fact the best option open to Congress in pursuing the tribes' welfare.

The *Sioux Nation* standard of deferring to congressional judgment as to the interests of Indians has been strongly criticized as insufficiently protective of Indian rights and violative of Indian sovereignty.[158] One commentator states that "[a]lthough the fifth amendment requires Congress to pay just compensation to all other Americans, the good faith effort test creates a special exemption for Indians."[159] A further criticism of the *Sioux Nation* rule is that a "good faith" standard is much less stringent than the fiduciary obligations required by the Court's other cases, and also less stringent than the "rationally tied" standard set forth in *Mancari*. The *Sioux Nation* standard also would freely permit post hoc characterizations of Congress' actions regarding Indians as having been done in the Indians' interests.

Despite these criticisms, and despite the fact that *Sioux Nation* addressed only the narrow balance between the United States' responsibilities as a trustee over Indian lands and its powers of eminent domain, the Court's analysis is susceptible to a much broader application.[160] In holding that Congress cannot wear "two hats" simultaneously, the Court provided a framework for examining the fundamental tension in American Indian law between the United States' fiduciary duties under the trust responsibility and the powers Congress has arrogated to itself pursuant to the plenary power doctrine.[161] This framework provides a point of departure for reconceiving the trust relationship in light of the strict constitutional limits on plenary power demonstrated above.

157. Cases applying this good faith standard include Confederated Salish and Kootenai Tribes v. United States, 437 F.2d 458, 459-60 (Ct. Cl. 1971); Klamath and Modoc Tribes v. United States, 436 F.2d 1008, 1015 (Ct. Cl. 1971).

158. *See* Newton, *supra* note 148, at 260-65; Hanson, *supra* note 148, at 482-83; Comment, *supra* note 110, at 259.

159. Newton, *supra* note 148, at 261. The Court specifically stated that while "there is no doubt that the Black Hills were 'taken' from the Sioux in a way that wholly deprived them of their property rights," a determination that the federal government was acting "pursuant to its unique powers to manage and control tribal property" would render the just compensation clause inapplicable. 448 U.S. at 409 n.26; *see also* Comment, *supra* note 110, at 265.

160. Other commentators have similarly asserted that "[t]here is no principled reason to confine [the *Sioux Nation* analysis] to takings cases." Comment, *supra* note 110, at 255.

161. This idea was first suggested by Comment, *supra* note 110.

On one side of the balance is the federal government's legislative and executive power under the plenary power doctrine. This article has argued, however, that this broad plenary power is wholly without constitutional support and that the enumerated powers of the federal government regarding Indians encompass only the regulation of commerce and the negotiation of treaties. These constitutional limits on federal power in the conduct of the United States' relations with Indian nations reveal the complete lack of legal, constitutional support for the exercise of federal plenary power over the internal affairs and territory of Indian nations. The first alleged constitutional basis for plenary power, the Indian commerce clause, in actuality provides only for the regulation of the citizens and states of the United States in their interaction with Indian nations, just as the foreign commerce clause controls the field of foreign affairs and trade. Federal authority under the treaty power, the second alleged basis for plenary power, is constitutionally confined within the bounds of the government's other enumerated powers. The only case in which a treaty could provide the federal government with power not enumerated in the Constitution would be one where a sovereign nation, Indian or otherwise, delegated to the United States certain of its national powers.[162] The scope of federal power regarding Indians is therefore small, and constitutionally presupposes a treaty-like consensual relationship. The constraints imposed by the Constitution and the inherent sovereignty of Indian nations forbid the exercise of federal control over Indian peoples without their consent.

On the other side of the balance, the federal government is a trustee, albeit often self-imposed, over Indian lands and assets. This trust relationship should be narrowly drawn to exist only where explicitly provided for in treaties. Indian lands and assets currently held by the federal government which were never formally conveyed in a treaty by the Indians must either be returned to them or a treaty must be negotiated to create a strict fiduciary trust relationship. In addition, a constructive trust should be imposed upon the United States in any situation where it undertakes to control Indian land, natural resources, or other assets, as was recognized in *Mitchell II*.[163] This constructive trust would

162. Delegation of sovereign powers by an Indian nation in trust to the United States pursuant to treaties or other agreements would confer power upon the United States, but the source of such power would be the Indians' own sovereignty.

163. 463 U.S. 206 (1983). *See supra* notes 135-36, 138, 146 and accompanying text.

remain in force until the property is formally conveyed in a treaty by the Indians to the United States, either in trust or in fee, or is returned to the Indian nations. Similarly, the ability of the federal government to escape the just compensation clause regarding Indian lands upheld in *Tee-Hit-Ton* should be abolished, and legal title to all Indian lands, either in fee or under trust, should be recognized as belonging to the various Indian nations.

Along with the full recognition of Indian property rights, there should be no federal assertion of power over Indian property beyond the traditional bounds of the eminent domain power and the proper powers of a trustee. Regarding the latter, the United States should be held to the strictest of fiduciary duties in its control and management of Indian land and resources,[164] and Indians should have an effective voice in the administration of their property. The "trust responsibility" would therefore no longer be a unitary source or doctrine of power over Indians, but rather a broad term encompassing all the various means of fulfilling the obligations and duties the United States has undertaken and the powers it has received through treaties. The intention of the trust responsibility should be to return land and assets held in trust to the Indians as soon as economically and politically feasible. The term "trust responsibility" should remain in usage only to point out the one cardinal difference between the United States' relationship with sovereign Indian nations and its relationships with foreign nations: that because of the United States' egregious history of treatment of the Indians, it should be bound to exercise a duty of care and loyalty in its relations with Indians which goes beyond that accorded other foreign nations.

Recognition of the limited constitutional powers of the federal government and of the Indians' rights to sovereignty and full ownership of their lands would create a large vacuum in United States-Indian relations where federal power currently encroaches on Indian autonomy and territory. This vacuum should be filled by the rightful and original sovereignty of the Indian nations, and

164. As is ostensibly the current state of the law. *See supra* notes 132-46 and accompanying text; F. COHEN, *supra* note 10, at 225 ("the federal trust responsibility imposes strict fiduciary standards on the conduct of executive agencies"); *see generally id.* at 225-28. The doctrine of plenary power has barred breach of trust claims or other enforcement of the fiduciary responsibility against Congress itself, *see id.*, except where by statute Congress has waived its immunity. *See, e.g.*, 28 U.S.C. § 1505 (1982). However, recognition of the plenary power doctrine's lack of constitutional foundation would remove this bar.

United States-Indian relations should return to a contractual, consensual and treaty-like relationship. Past treaties between the Indians and the federal government, long subject to abrogation by the United States, should be recognized as being subject to abrogation by either party, thus providing a context for their bilateral renegotiation. Political considerations, international attention, and common morality should prohibit the United States from attempting to reassert the powers it once exercised under the plenary power doctrine, and Indians' newly recaptured sovereignty would be a spur to their political and economic advancement as independent nations.

A properly conceived trust relationship, based solely upon treaties and mutual agreements and administered according to strict fiduciary principles, would thus provide a framework of federal-Indian relations which conforms with the constitutional limits on federal power and which would reinstate both the inherent sovereignty of Indian nations and their original consent-based relationship with the United States. Adoption of these principles would fulfill the Framers' constitutional design for United States-Indian relations and would re-empower the Indian nations.

III. The Problem of Citizenship

Recognition of the sovereign Indian nationhood advocated in the previous sections would put the Indian nations in a "government to government,"[165] consensual, treaty relationship with the United States, and also with the several states through the mediation of the federal government. A problem which would be created by the implementation of such a conception of the Indian tribes as nations is the problem of Indian citizenship. This problem is rooted in the reality discussed above with regard to the national political process: that the focus of modern United States politics is on the individual rather than on the states or other mediating bodies such as the Electoral College, as was originally provided in the Constitution.[166] Thus, a conception of the Indian nations as nations, as possessing "a status higher than states,"[167] or even

165. This phrase is an important slogan for Indian advocates, see V. DELORIA, JR., & C. LYTTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY 259-60 (1984), and has been adopted by the United States. *See* President Reagan, Statement of Indian Policy, quoted *supra* note 10.

166. *See supra* notes 48-57, 102-05 and accompanying text.

167. V. DELORIA, JR., & C. LYTTLE, *supra* note 165, at 1.

as deserving treatment at least equal to that of the states within the federal system[168] does not substantially address the problem of defining a political status for the individual Indian American. The plenary power doctrine has given the federal government broad power to directly legislate over the lives of United States citizens,[169] and the full naturalization and enfranchisement of all American Indians in 1924[170] places Indians in the same "one person, one vote" relation to the federal government as other citizens.[171] Thus a disaffiliation of an Indian Nation from the American body politic and a recognition of its nationhood would leave substantial questions open as to the nationality, citizenship, allegiances, rights and privileges of its individual Indian members.

A. Dual Nationality

Some of these problems could be easily dealt with by reference to the traditional concepts of "dual nationality" or "dual citizenship". In 1952 the Supreme Court stated that dual nationality is "a status long recognized in the law,"[172] and further that "[t]he concept of dual citizenship recognizes that a person may have and exercise rights of nationality in two countries and be subject to the responsibilities of both. The mere fact that [one] asserts the rights of one citizenship does not without move mean that he renounces the other."[173] Dual nationality is, however, limited by the similarly "recognized fact of international law that a dual national is never entitled to invoke the protection or assistance of one of the two countries while within the other country."[174] This

168. *See* L. BARSH & J. HENDERSON, *supra* note 7, at 258-60 ("Congress should read the words 'or tribes' into the Constitution's references to 'states.' " *Id.* at 260.).

169. *See supra* notes 47, 56-57 and accompanying text.

170. Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401(b) (1982)).

171. At least in theory. *But see supra* notes 64-67 and accompanying text.

172. Kawakita v. United States, 343 U.S. 717, 723 (1952) (citing numerous cases and secondary sources). *See also* Perkins v. Elg, 307 U.S. 325, 344 (1939); Comment, *Dual Nationality and the Problem of Expatriation*, 16 U. SAN FRANCISCO L. REV. 291, 293 (1982).

173. *Kawakita*, 343 U.S. at 723-24. *See also* Comment, *supra* note 172, at 313 (discussing the 1930 Hague Conference on Certain Questions Relating to Conflict of Nationality Laws, at which the validity of dual nationality was recognized. Though the United States was not a signatory to the 1930 Hague Codification Conference Convention which resulted from the Conference, it has nonetheless followed the principles put forth in that document. *Id.* at 314).

174. United States v. Matheson, 400 F. Supp. 1241, 1245 (S.D.N.Y. 1975), *aff'd*, 532 F.2d 809 (1976), *cert. denied*, 429 U.S. 823, citing Nishikawa v. United States, 356 U.S.

latter principle is in theory applied analogously to the relationship between Indian tribes and tribal members on their reservations (i.e., within "Indian country") and the governments of the surrounding states of which they are also citizens, in that the laws and jurisdiction of tribes and of the states are in no way concurrent but in fact mutually exclusive except where provided by a treaty properly consented to by the federal government.[175] Its application in a federal/Indian context following the recognition of Indian nationhood should thus not be problematic because of Congress' and the judiciary's acquaintance with such principles. However, any recognition of Indian nationhood would need to be accompanied by clear territorial demarcations, as in foreign relations generally, and the adoption of accepted (or perhaps specially modified) principles of international conflict of laws doctrine.[176]

Every nation has the right under international law to create its own conditions for citizenship and nationality.[177] This right has been similarly recognized by the Supreme Court as belonging to American Indian tribes with regard to determining conditions for membership in a tribe. In *Santa Clara Pueblo v. Martinez*[178] the Court held that neither the Constitution nor the Indian Civil Rights Act,[179] the latter of which had on the basis of congres-

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129, 132 (1958) and *Kawakita*, 343 U.S. at 733. By analogous reasoning, it was only when Congress enacted and imposed the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302 (1982), upon Indian tribes that the constitutional protections set out in the Bill of Rights were afforded to Indian defendants before Indian courts. Prior to 1968, an Indian could not invoke fifth amendment or other constitutional privileges and protections in a tribal tribunal.

In *Matheson* the principle was invoked to hold that a declaration to the government of Mexico by an American citizen renouncing the protection of foreign (i.e., American) laws against Mexican laws and authorities did not operate as a renunciation of American citizenship because the declarant already believed herself to be a Mexican national by marriage. Thus, under the principle at issue her declaration was redundant as a matter of international law and thus could not serve to show a willful act of expatriation.

175. This principle, a function of the commerce and supremacy clauses of the Constitution, has been greatly eroded in the twentieth century by Supreme Court case law. *See supra* notes 4, 41-43; Comment, *supra* note 2, at 556-86.

176. This article will not address these issues of territorial demarcation or conflict of law rules because they are uncontroversial from a constitutional standpoint and are primarily political questions. The Marshall Court cases recognizing Indian sovereignty were essentially geographically determinate in their analysis of Indian and United States powers. *See* Canby, *supra* note 4, at 4.

177. *See* Comment, *supra* note 172, at 294.

178. 436 U.S. 49 (1978).

179. 25 U.S.C. § 1302 (1982).

sional plenary power imposed the provisions of the Bill of Rights upon the operation of tribal governments, provided a remedy for an individual Indian's otherwise *prima facie* case of an equal protection violation against her tribe for denying her children membership in the tribe. The Court grounded its decision on the tribe's power (and more importantly but not correctly, Congress' recognition of the tribe's power) to determine its own membership.

Requirements for citizenship vary from country to country, but "[t]he two most common ways of acquiring nationality are by birth in a country which confers nationality by *jus soli*, right of the soil, or by birth of parents whose nationaltiy [sic] is conferred upon their children by *jus sanguinis*, right of blood."[180] The United States confers citizenship on the basis of both of these principles,[181] and thus under current United States law American Indians qualify as citizens by both soil and blood. However, some Indians and some tribes have never conceded nor accepted that they are United States citizens by any means.[182]

The official position of the United States is to discourage dual nationality,[183] and it neither recognizes nor approves it but "accepts it 'as the result of separate conflicting laws of other countries.' "[184] The United States, however, once granting citizenship to an Indian, by birth or otherwise, has long recognized and never challenged such Indian's right and ability to be both a citizen and a member of his or her tribe.[185] Thus, none of the general and internationally accepted principles described above concerning dual citizenship would in any material way act in derogation of dual

180. Comment, *supra* note 172, at 294.

181. *Id.*, citing U.S. CONST. amend. XIV (*jus soli*); United States v. Wong Kim Ark, 169 U.S. 649 (1898) (same); 8 U.S.C. § 1401(c)-(g) (1982 & Supp. IV 1986) (*jus sanguinis*). Up until the inclusion in 1924 of American Indians in what is currently 8 U.S.C. § 1401(b), Act of June 2, 1924, ch. 233, 43 Stat. 253, Indians had been held to be outside the reach of the fourteenth amendment's grant of citizenship. *See supra* notes 59-63 and accompanying text; L. BARSH & J. HENDERSON, *supra* note 7, at 67-74.

182. *See infra* notes 236-37 and accompanying text.

183. Comment, *supra* note 172, at 295.

184. Comment, *supra* note 172, at 295 (quoting *Sadat v. Mertes*, 615 F.2d 1176, 1184 (7th Cir. 1980)).

185. 8 U.S.C. § 1401(b) (1982), in granting citizenship to members of an "Indian, Eskimo, Aleutian, or other aboriginal tribe," provides that "the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property." Respect for tribal citizenship has not, however, prevented the United States' periodic and strenuous attempts aimed at assimilating American Indians. *See* Comment, *supra* note 2, at 529-34.

Indian/American citizenship should the Indian nations be accorded sovereign recognition.[186]

The only substantial problems Indian nationhood would pose for American Indian citizens under current United States law would arise from the United States' expatriation statute.[187] The provisions of the statute operate to revoke the citizenship of any citizen, and thus any Indian, who "voluntarily . . . with the intention of relinquishing United States nationality:-"[188]

> accept[ed], serv[ed] in, or perform[ed] the duties of any office, post or employment under the government of a foreign state or a political subdivision thereof, if he has or acquires the nationality of such foreign state; or for which office, post, or employment an oath, affirmation or declaration of allegiance is required.[189]

Conceivably, this provision could operate to denationalize any Indian American who undertook public or civil service in his or her newly recognized nation. Other provisions of the statute which trigger denationalization, such as service in the armed forces of

186. It has been written, however, that the "United States' adherence to the international process and laws in the resolution of problems of dual nationality has been equivocal." Comment, *supra* note 172, at 314. The United States rejected the signing of the 1930 Hague Convention, *see supra* note 173, holding that a " 'principle of election' " should have been included, under which a dual national would, after age 23, " 'be conclusively presumed to have elected the nationality' " of the state in which he "has his habitual residence." Comment, *supra* note 172, at 314 n.137 (citations omitted). However, the United States has signed several other international agreements concerning dual nationality and has presented cases concerning dual nationality to international tribunals designed to deal with such issues, and thereby has both explicitly and implicitly accepted international norms concerning dual nationality. *Id.* at 314-15. While a vigorous United States position against dual Indian/American nationality could prevent the recognition of Indian sovereignty, such a position would place the United States in conflict with both the invulnerable right of every American citizen to remain a citizen, see Afroyism v. Rusk, 387 U.S. 253 (1967), and the constitutional presupposition and requirement of the recognition of Indian sovereignty posited in this Article, whereas acceptance of dual nationality in the case of Indians would reconcile these positions.

187. 8 U.S.C. § 1481 (1982 & Supp. IV 1986). For a brief history of United States expatriation laws, see Comment, *supra* note 172, at 296-300.

188. This introductory language was added on Nov. 14, 1986, by Pub. L. 99-653, §§ 18, 19, 1986 U.S. CODE CONG. & ADMIN. NEWS (100 Stat.) 3655, 3658, apparently in order to codify the holding in Vance v. Terrazas, 444 U.S. 252 (1980), in which the Supreme Court held that the fourteenth amendment and prior case law required a finding of specific intent to relinquish citizenship.

189. 8 U.S.C. § 1481(a)(4) (1982).

a foreign state,[190] voluntary naturalization in a foreign state,[191] or "taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof,"[192] could likewise serve to denationalize a dual Indian/American citizen of his or her United States citizenship.

The requirement that the enumerated acts of expatriation must be done "voluntarily" and "with the intention of relinquishing United States nationality," however, would seem to work to preserve the United States citizenship of any dual Indian/American national who committed an otherwise expatriating act without the requisite intention of renouncing his or her United States citizenship.[193] While the statute does provide that once the fact of the performance of an expatriating act is proven by a preponderance of the evidence by the one asserting the loss of citizenship (i.e., the government), there is then a rebuttable presumption that the act was done voluntarily.[194] An Indian American performing a potentially expatriating act, such as serving in a tribal office, would in all likelihood be doing so voluntarily anyway. The need for the government to prove specific intent to renounce citizenship, however, would continue to work to preserve the Indian's dual nationality. There is, of course, the danger that the statute could serve to put an Indian American who commits an alleged act of expatriation in a public manner, such as holding a tribal post or office, continually on the defensive in attempting to retain citizenship should the United States become aggressive in prosecuting dual Indian American nationals for expatriation. Such a threat of expatriation could become a powerful tool by which the United States could gain leverage and acquire influence over independent tribal leaders, and could, therefore, serve to undo any of the benefits Indian nationhood would create for the Indians.

The only solution to this potential problem of harassment

190. *Id.* at § 1481(a)(3).

191. *Id.* at § 1481(a)(1).

192. *Id.* at § 1481(a)(2).

193. *See* Richards v. Secretary of State, Dep't of State, 752 F.2d 1413, 1418-22 (9th Cir. 1985); Kahane v. Shultz, 653 F. Supp. 1486 (E.D.N.Y. 1987) (American citizen's election to and assumption of seat in Israeli Knesset was an expatriating act but did not serve to expatriate him because he manifested no intent to relinquish his American citizenship).

194. 8 U.S.C. § 1481(c). "There is no presumption, however, that the expatriating act was performed with the intent to relinquish citizenship." *Richards*, 752 F.2d at 1418, citing *Terrazas*, 444 U.S. at 268.

through aggressive attempts to expatriate Indians by the United States would be to ensure that the implementation of nationhood for a tribe be accomplished by means of a clear treaty agreement between the tribe and the United States, and perhaps also a concurrent congressional statute. These would codify an understanding of what actions and intentions are required to be proven and what standard of proof is necessary in order for an Indian to expatriate or be expatriated, and likewise what actions would be exempt from forming the basis of an expatriation action. Implementation of a broad program of recognizing Indian nationhood would in the interest of efficiency and practicality require the creation of a statutory exemption from the expatriation statute for dual Indian American nationals who wish to retain their United States citizenship yet also wish to serve their new Indian nations through otherwise expatriating acts.

The best means of establishing the citizenship status of Indians upon the recognition of a tribe's sovereign status would be to have the members of the tribe decide for themselves what manner of citizenship they wish to hold—dual United States/tribal citizenship or exclusive citizenship in one of the two. Such decisions should then be recognized by the United States. The United States and the tribe should also decide what presumption is to exist for children and the as yet unborn. There are many possibilities involved, given the varying statuses a child's parents may hold and the problem of children of unknown parentage. The technicalities of such arrangements, however, are not important to this article, as they have been fully worked out by various immigration and nationality statutes, regulations and court decisions over the years concerning foreign nations and citizens generally.

There is, however, one way in which Indian nationhood could be seen as different than foreign statehood in the context of the citizenship of newborns. If an Indian child's parents had completely and effectively renounced all citizenship and other ties to the United States, and indeed if the child's whole tribe had declared and had accepted its independence from the United States, could such a child still lay a claim to United States citizenship, based perhaps on *jus soli* (the right of the soil)? A child born in France of purely French parents has no such claim; would a child born in an independent Indian nation? A practical solution would be to hold that while a minor, such child should hold the same status his parents held or chose. Upon reaching maturity, the best option would be for the child to have the right to choose his or her own status, whether it be dual or exclusive. The United States,

however, may not wish to grant such easy naturalization upon maturity to a person who was an alien while a minor. Such a right of election could be negotiated for and codified in the treaty establishing an Indian nation's independence. This, however, is a question of policy for the United States. Moreover, while a persuasive moral argument could be made that every Indian child should have a right to United States citizenship, the question is really up to the child's people to answer. If they seek a nationhood completely independent from the United States with no ties of dual citizenship, then that is their choice for their future and for their children. Such children could always seek to naturalize, and the United States would presumably be and should be liberal in naturalizing independent Indians.

The last problem posed by these issues of citizenship is the converse of the one above. If a child is of Indian descent but his parents have severed all ties of citizenship with their tribe or tribes, can the child acquire Indian citizenship? At first blush, this is an easy issue, for the answer is to leave it to tribal policy, something which the United States should have no hand in. However, a problem arises if the tribe does allow the child to become a member and if the child does in fact become a member. The problem is that United States law holds that voluntary acquisition of a second nationality can constitute grounds for expatriation,[195] and thus the Indian child's actions might form the basis for an action to denationalize him. While this problem of voluntarily acquiring dual citizenship was once a fairly large concern for Americans who lived, worked or were educated abroad,[196] the Supreme Court held in 1980 in *Vance v. Terrazas*[197] that specific intent to relinquish United States citizenship is necessary in addition to proof of a voluntary act of expatriation in order to denationalize an American citizen. This, and the subsequent statutory codification of the court's intent requirement,[198] would work to preserve the United States citizenship of such Indian child despite his naturalization into a tribe so long as he did not manifest a specific intent to renounce that citizenship. The tribe perhaps could accommodate this situation by providing in whatever ceremony or document

195. 8 U.S.C. §§ 1481(a)(1), (2) (1982); *See also* Comment, *supra* note 172.
196. *See* Comment, *supra* note 172, at 292.
197. 444 U.S. 252 (1980).
198. 8 U.S.C. § 1481(a) (1982 & Supp. IV 1968); *see supra* note 188.

it may require to naturalize such a child that the child by doing so does not renounce United States citizenship.[199]

B. *Between Citizen and Alien*

A question could be raised as to whether there are any intermediate categories of nationality between alienage and full citizenship under existing law which might be useful in defining a political status for members of sovereign American Indian nations. The United States Code does provide for the status of "national of the United States,"[200] which is defined to mean either a citizen or "a person who, though not a citizen of the United States, owes permanent allegiance to the United States."[201] "Permanent allegiance" is not defined in the Code, but case law generally defines it as an obligation of fidelity and obedience to a government.[202] Persons who are nationals, but not citizens, of the United States "at birth"[203] include those born in the "outlying possessions"[204] of the United States and the children of nationals, subject to certain conditions.[205]

The problem which exists is that no truly functional definition of "national" seems to exist, other than that it is a category of persons owing allegiance to the United States which is somehow broader than the category of citizens.[206] A 1985 unpublished opinion from the Sixth Circuit[207] illustrates the confusion surrounding

199. Another way out of this problem would be based on the holding in United States v. Matheson, 400 F. Supp. 1241 (S.D.N.Y. 1975), *aff'd*, 532 F.2d 809 (1976), *cert. denied*, 429 U.S. 823, discussed *supra* at note 174. If by making such a child a citizen the tribe was only affirming a preexisting citizenship, rather than creating a new one, then an act of allegiance to the tribe performed by the child to obtain such affirmance, like the declaration in *Matheson*, would be redundant and thus could not serve as an expatriating act.

200. 8 U.S.C. §§ 1101(a)(21), 1408 (1982 & Supp. IV 1986).

201. 8 U.S.C. § 1101(a)(21) (1982).

202. *See* Cabebe v. Acheson, 183 F.2d 795, 797 (9th Cir. 1950) (" 'Nationality' is . . . a relationship . . . 'involving the duty of obedience [or 'allegiance'] on the part of the subject and protection on the part of the state.' "); 3A AM. JUR. 2d § 1455 n.47 (1986 and 1987 Supp.) and cases cited therein.

203. 8 U.S.C. § 1408 (1982).

204. Defined in 8 U.S.C. § 1101(a)(29) (1982) as including only "American Samoa and Swains Island."

205. *See* 8 U.S.C. § 1408 (1982 & Supp. IV 1986).

206. *See* Brassert v. Biddle, 59 F. Supp. 457, 462 (D. Conn. 1944).

207. United States v. Salem, 762 F.2d 1013 (6th Cir. 1985), *aff'g without published opinion* ___ F. Supp. ___ (N.D. Ohio 1984) (opinion available on LEXIS, Genfed Library, Courts file).

the term. The defendant, a resident alien, was convicted of fraudulently obtaining student loans by checking a box on a form indicating that he was either a citizen or a national. His conviction was upheld, but the majority opinion dealt primarily with the allegation that the defendant claimed to be a citizen. The dissent, however, argued that the majority "ignore[d] the alternative phrasing of the question asked of [the defendant, for he] may well have thought he was a 'national' even if he knew he was not a United States citizen."[208] The dissent noted that "the Assistant U.S. Attorney at oral argument, like the two government witnesses at trial, could not give a definition of the term, 'national,' "[209] and concluded that "because of the vagueness of the meaning of the term 'national,' and because of lack of evidence establishing the meaning of the term, . . . I would accordingly reverse the conviction."[210]

Thus, the only middling status between citizens and aliens existing in current United States law is not really functional. Likewise, the international agreements and compromises forged to smooth over the occasionally conflicting obligations of dual nationals do not offer any new, mediate citizenship statuses but instead simply reconcile the conflicts between dually held citizenship by settled rules aimed at preserving full dual nationality. They thus offer no guidance as to the construction of viable partial citizenships. Citizenship is therefore for all intents and purposes an all or nothing affair.[211]

C. *Treaties and Citizens*

It seems settled law that the United States cannot make a "treaty" with its own citizens.[212] Indeed, this is tautological, since the concepts of "treaty" and "citizen" are by definition mutually exclusive.[213] Moreover, since 1871 the United States has been

208. *Id.* (Wellford, J., concurring in part, dissenting in part).

209. *Id.* at n.2.

210. *Id.*

211. While it might nonetheless be possible to construct a partial, mediate type of citizenship, such a status would not serve the interests of some, if not many, Indians in retaining full United States citizenship, and thus no attempt is made here to design such a status.

212. *See*, Wiggan v. Connolly, 163 U.S. 56, 60 (1896) (treaty with Indians would have been invalid if the Indians had been citizens).

213. A treaty is a "compact made between two or more independent nations." BLACK'S LAW DICTIONARY (5th ed. 1979); *accord* 3 BOUVIER'S LAW DICTIONARY (3d rev. 8th ed. 1984).

barred by statute from concluding treaties with any "Indian nation or tribe within the territory of the United States."[214] Unless the 1871 Act is repealed or is constitutionally challenged and defeated,[215] the United States is forbidden from concluding treaties with the Indian nations, whether those nations are considered to be composed of sovereign Indians, United States citizens or dual Indian/American nationals.

If, as advocated above, Congress' plenary legislative powers over the Indian nations were abolished and Indian nationhood recognized, the 1871 Act would also have to be repealed. This repeal would be a logical entailment of any recognition of Indian sovereignty, since as it stands the Act prevents, or at least permits the prevention of, any Indian input or consent into their relations with the United States. Despite the current practices of making "executive agreements" in a manner approximating treaty negotiation and of utilizing Indian input in the legislative process,[216] repealing the 1871 Act would be an imperative, particularly because of the modern interpretation of the Act as incorporating a far-reaching plenary congressional power and because the potential for the exercise of such power would always exist. The Act's continued existence would be inimicable to the idea of full Indian national sovereignty and would likewise not be in keeping with the tenor of relationships between sovereign powers. Moreover, should the United States go so far as to recognize Indian nationhood, it hardly seems logical for it to continue to bar itself statutorily from dealing with such new Indian nations.

What is needed, and what the repeal of the 1871 Act would recognize, is a recognition of the necessity of Indian consent and cooperation in the United States' relationship with the Indian nations. This would mean a revitalization of the idea of freely and fairly negotiated treaties and agreements, however denominated semantically. The procedural technicalities of how the United States enacts its agreements with Indian nations, whether as treaties with a two-thirds concurrence of the Senate or as legislation by a majority of both Houses, should be a matter internal to the United States as a matter of its constitutional separation of powers doctrine. The only concern of the Indian nations in such matters would

214. 25 U.S.C. § 71 (1982). *See supra* notes 88-91 and accompanying text.

215. The latter is somewhat unlikely given the Supreme Court's acceptance of the 1871 Act. *See, e.g.*, Antoine v. Washington, 420 U.S. 194, 203 (1975).

216. *See supra* note 90 and accompanying text.

be to ensure that, however it was enacted, any agreement would be free of domestic legal impediments and constitute a valid and binding agreement and obligation of the United States in accordance with United States law. However, recognition of Indian nationhood, the abolition of plenary power and the repeal of the 1871 Act would still not resolve the problem of a country making treaties with its own citizens.

This problem would obviously not arise with regard to Indians who held only one citizenship. Were an Indian to renounce his or her Indian heritage and retain only United States citizenship, the Indian nation to which that person belonged would have the power and it can be assumed would use it to take whatever measures it felt necessary to exclude such persons from the benefits of its citizenship and its treaties. Likewise, an Indian who expatriated himself deliberately from the United States would not share in the benefits and privileges of United States citizenship, and making a treaty with such persons would thus be exactly like concluding foreign treaties. Were an entire Indian nation to renounce United States citizenship, it would place itself back into what had been the historical manner of Indian treaty making, the negotiation and conclusion of treaties between independent sovereign powers.[217]

The problem that would arise would be in the case where the members of an Indian nation retained or established dual citizenship. Again assuming that in the case of Indian nationhood the statutory bar of the 1871 Act would be removed, the question remains whether treaties could be concluded with Indians who are also United States citizens.

Barsh and Henderson, though arguing for a different program than nationhood in their call for a system of "treaty federalism,"[218] do introduce the useful concept of a "compact." While the distinction between a treaty and a compact is somewhat unclear, at least as presented by Barsh and Henderson[219] and also by the Framers in drafting the Constitution,[220] there is a sense in which a concep-

217. *See supra* notes 80-84, 110 and accompanying text.

218. *See* L. BARSH & J. HENDERSON, *supra* note 7, at 270-82.

219. *See id.* at 272-73, 275-76.

220. "The Constitution recognizes a distinction between 'treaties' and 'agreements' or 'compacts' but does not indicate what the difference is." THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. Doc. No. 82, 92d Cong., 2d Sess. 505 (1973).

tion of a compact would allow the United States to negotiate and contract with a political entity which is not entirely "foreign."[221]

The view held by the Framers that the Articles of Confederation and the Constitution were compacts,[222] and their view that any agreements between the states were "compacts" forbidden by the Constitution unless made with the federal government's consent,[223] work to yield a definition of a "compact" as an agreement between independent political subdivisions of a polity which "restructures the governing of the parties, establishes a permanent political relationship, and flows from the consent of the people."[224] Thus, if one views a sovereign Indian nation comprised of dual nationals as a collectivity of United States citizens constituting a distinct political entity, then an agreement between such entity and the United States could be seen as a compact analogous to an agreement between a state and the federal government and thus would not run afoul of the prohibition on a country treating with its own citizens. Indeed, on such a reading of the term "compact," the modern practice of concluding Indian "executive agreements," approved by the courts, could be seen as "compacting." This reading is reinforced by the fact that under the Constitution any agreements between Indian tribes and the states require federal consent,[225] just as do agreements between the states themselves under what is known as the "compact clause."[226] A 1978 bill designed to grant general federal approval to such Indian/state agreements was in fact titled the "Tribal-State Compact Act."[227]

221. Legal dictionaries define a treaty as a "compact between two or more independent nations." BLACK'S LAW DICTIONARY (5th ed. 1979); *accord* 3 BOUVIER'S LAW DICTIONARY (3d rev. 8th ed. 1984) Thus the idea of a compact is the foundational idea, which is transformed into a treaty depending on the nationhood status of the compactors. The dual citizenship held by the members of an independent tribe might thus upset the idea of a "treaty," since the Indian nation might not be considered fully "independent," but the underlying concept of a "compact" would be unaffected.

222. *See* L. BARSH & J. HENDERSON, *supra* note 7, at 270-78.

223. U.S. CONST. art. I, § 10, cl. 3.

224. L. BARSH & J. HENDERSON, *supra* note 7, at 276 (discussing the "principles criteria of compact.").

225. This is because the Indian commerce clause, U.S. CONST. art. I, § 8, cl. 3, and the treaty clauses grant exclusive power over Indian affairs to the federal government. *See supra* notes 41-43 and accompanying text; Comment, *supra* note 2, at 557-60. The necessity of this consent was first codified in the Trade and Intercourse Act of the 1790s. *See* 1 Stat. 136 (1790); 1 Stat. 329 (1793); 1 Stat. 469 (1796).

226. U.S. CONST. art. I, § 10, cl. 3.

227. For a history of this unenacted legislation, *see* Comment, *supra* note 2, at 522-28.

A more direct approach than the idea of "compacts" to the problem of developing a treaty-like relationship between the United States and an Indian nation, many of whose members have retained or acquired United States citizenship, would be to simply acknowledge the fact that the Indian nation is being dealt with *qua* nation, and not as a collectivity of United States citizens. The nationhood of the Indian tribe would be both *de facto* and *de jure*, and the Indian citizenship of its members would likewise be bona fide. The legitimate "foreign" nature or aspect of the Indians' dual nationality could be viewed in isolation, especially since it is that status and that status alone which prompts the treaty in the first place. The fact that many or all of the Indians so treated with are also United States citizens could be disregarded as superfluous except to the extent that it would have an impact on the specific terms of the treaty, i.e., the negotiation of the treaty's terms would not be isolated from context in the same way the execution of the treaty would be.[228] Moreover, even if the United States citizenship of the Indians could not legitimately or legally be disregarded, the Supreme Court has upheld the validity of legislation which particularly favors Indians over other citizens.[229] Thus, other American citizens could not state a claim on equal protection or other grounds against the preferential treatment given an Indian or a tribe, even if the Indian or a substantial portion of the tribe holds United States citizenship.[230]

D. Consent and Citizenship

The principle of consent has animated this article's normative arguments, which have sought to establish a constitutional basis and framework for a treaty-based, consensual and cooperative relationship between the United States and "the nations within."[231] The concept of consent also raises an issue concerning Indian American citizenship. Taking as a point of departure the holding in *Elk v. Wilkins*[232] that an Indian could not make himself a United

228. Much as it is, albeit on a smaller scale, when the United States conducts foreign relations with countries whose citizens do or might possess dual citizenship.

229. *See* Morton v. Mancari, 417 U.S. 535 (1974).

230. The only limitation would be *Mancari's* rational basis test for upholding such preferential treatment. *Mancari*, 417 U.S. at 555.

231. *See* V. Deloria, Jr., & C. Lyttle, *supra* note 165.

232. 112 U.S. 94 (1884).

States citizen without the express consent of the United States,[233] it could be argued conversely that the United States cannot confer or impose citizenship on Indians without their express consent.[234] Indeed, dictum in several Supreme Court cases and an 1870 Report of the Senate Judiciary Committee had all drawn the conclusion that Indians could not be made citizens automatically without their consent.[235] American Indians have continually urged and affirmed this principle and held themselves not to be United States citizens.[236] DeLoria notes that after the passage of the 1924 Indian citizenship act the

> Iroquois politely sent a note to the United States informing the government that they were not then, had never been, and did not intend to become American citizens. They would not, they stated, consider that the 1924 statute had any effect with respect to them. They have never wavered from that official position in the years since.[237]

The issue that thus arises is whether or not the 1924 citizenship act, or any of the prior citizenship acts which operated to confer citizenship on Indians automatically, in fact validly established Indians as citizens if such acts imposed citizenship and its attendant obligations without Indian consent.

This issue, however, has not been substantively pressed by modern American Indians, though it remains part of their rhetoric. This is in part due to the omnipresence of the United States and the realization of the stark imbalance of power between the Indian tribes and the United States.[238] In order to work within the United States' political system for Indian rights and benefits, Indians must

233. *Id. See also supra* notes 59-63 and accompanying text; L. Barsh & J. Henderson, *supra* note 7, at 69-74.

234. *See* L. BARSH & J. HENDERSON, *supra* note 7, at 276 n.17.

235. *See id.* at 71-73; *supra* notes 59-63 and accompanying text.

236. *See* V. DELORIA, JR., & C. LYTTLE, AMERICAN INDIANS, AMERICAN JUSTICE 218 (1983).

237. V. DELORIA, JR., BEHIND THE TRAIL OF BROKEN TREATIES: AN INDIAN DECLARATION OF INDEPENDENCE 18 (1985 ed.). Deloria also relates how the Iroquois had managed to avoid the citizenship question and the question of the United States' power to conscript Indians during the First World War by independently declaring war on Germany and authorizing Indians to serve in the United States Armed Forces as allies. *Id.*

238. Even some of the most ardent Indian advocates feel that separation of the Indian Nations from the United States "is practically impossible." R. Barsh & J. Henderson, *supra* note 7, at 274.

be citizens. In addition, participation in some social welfare programs of which Indians are beneficiaries are restricted to citizens.[239] Another potential reason for the conferring and acceptance of Indian citizenship proceeds from the fact that the United States for a long time has declined to recognize Indian tribes as "foreign" nations,[240] and thus not enforcing citizenship with regard to Indians would result in their being "stateless" from the point of view of the United States, a status not favored in the law.[241]

This article will not address the question of whether the present-day United States citizenship of the American Indians is valid if not consented to, nor whether as a general principle a citizen needs to consent to a grant of citizenship for it to be valid and for its attendant obligations to attach. It is clear that the United States may grant citizenship to whomever it might wish.[242] It is likewise clear that an Indian or any other citizen may deliberately expatriate himself from the United States as provided for by statute.[243] Given the United States' power to confer citizenship and an Indian's right to renounce it, the only question presented by the issue of consent to citizenship for an American Indian is whether he or she may declare to not be a citizen as a defense to an imposition by the United States of an obligation based on a prior presumption of citizenship. For example, could an Indian claim that lack of consent to United States citizenship was a defense to an action for back taxes or provided an exemption from conscription? The argument is for the most part moot, however, since it seems unlikely that this argument would sway any United States court. The power of the United States and the now long-standing presumption of American citizenship for Indians would render such a defense trivial. As two prominent Indian authors noted in an analogous context, when the Indians took up arms a century ago, it constituted an official state of war; when Indians took up arms in 1973 at Wounded Knee, their actions were considered

239. V. DELORIA, JR., & C. LYTTLE, *supra* note 236, at 217.

240. This goes back to Chief Justice Marshall's "domestic dependent nations" formulation in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

241. *See* Comment, *supra* note 172, at 301 (discussing *Trop v. Dulles*, 356 U.S. 86 (1958)); *id.* at 314 (discussing the 1961 United Nations Convention on the Reduction of Statelessness).

242. U.S. CONST. art. I, § 8, cl. 4. *See, e.g.*, Pub. L. 88-6, 77 Stat. 5 (1963) (making Sir Winston Churchill an "honorary citizen of the United States.")

243. 8 U.S.C. § 1481 (1982 & Supp. IV 1986). *See supra* notes 187-98 and accompanying text.

"merely criminal, perhaps treasonous."[244] Because of this inflexible political, economic, military, and now long-standing reality, the question of whether the current fact that Indians are American citizens with or without their consent is correct or incorrect from a moral or other standpoint will not be addressed. When the Indian nations were in fact separate from the United States, the concept of consent to citizenship was an issue. Now that it is necessary *to separate* the Indian nations from the United States, any treaty of separation and independence would necessarily have to include provisions detailing the citizenship of the tribe and its future members. Because a separation would have to be worked out as a matter of first principles, no question of presumptions about citizenship or other matters would exist. Positions taken in contrast to such assumptions, such as the position that consent is required of the citizen, would be moot.

Conclusion

The main thrust of establishing a consensual and cooperative relationship between the United States and independent sovereign Indian nations should not be lost in the confusion of technicalities concerning treaties, compacts, dual nationality and the like. Undoubtedly a broad restructuring of the United States/Indian relationship such as this article advocates will require the passage of new statutes, the repeal of old ones, complex and difficult treaty negotiations, the overturning of decades of Supreme Court case law and a fundamental shift in attitudes from treating Indians as conquered peoples to recognizing them as sovereign nations.

The central thesis of this article, however, is that not only would the recognition of Indian sovereignty fit within our constitutional scheme, but further that the Constitution in fact presupposes and requires the implementation of such a scheme. The government of limited, enumerated powers established by the Framers has grown and expanded its power and jurisdiction over American citizens and over the states, and that process is both unlikely to be reversed and in the view of many has been beneficial. However, as demonstrated in this article, the single most important constitutional support for this expansion, the modern interpretation of the commerce clause and its reliance on the national political process, is completely inapplicable to the situation of the American

244. L. BARSH & J. HENDERSON, *supra* note 7, at 274-75.

Indians. What is particularly dismaying is the fact that the Supreme Court had sanctioned the exercise of congressional plenary power over Indians, a power much broader than Congress' modern commerce clause power, decades before the modern interpretation of the commerce clause appeared. As far back as 1886 in *United States v. Kagama*[245] the Court had upheld a power in Congress over Indian nations which was unlimited, unconstitutional and unreviewable.[246]

The moral and constitutional command of recognizing Indian sovereignty must be heeded, and while the latter sections of this article have offered some suggestions as to the logistics of defining citizenships, a trust relationship and a system of treaty-making, such matters must not be seen as obstacles to or even as the main questions to be addressed in regard to Indian empowerment and the establishment of a United States-Indian relationship based on consent and cooperation. What must be seen as the key question is whether the United States will recognize the inherent, original and sovereign nationhood of Indian nations which was presupposed and acknowledged by the Founding Fathers.

The United States will most likely always possess the political and military power necessary to preserve its national security, certainly as far as independent Indian nations might be concerned, and thus there is little possibility that an independent Indian nation might ally with the Soviet Union or some other antagonist of the United States, develop nuclear weapons, or take some other action incompatible with the United States' national interests. What must be made clear is that is exactly the Framers' understanding, a conception since eroded and one which needs to be recovered. In his seminal opinions, Chief Justice Marshall recognized and upheld on the grounds of political necessity the limiting of the Indian tribes' ability to freely alienate lands and to treat with the European powers. However, he did not seek constitutional support for such ideas because they were not constitutional questions—they were questions of foreign policy. Likewise, he did not infer power over the Indian nations' internal affairs from the United States' assertion of political power with respect to their external affairs but instead explicitly denied the existence of such power.[247]

245. 118 U.S. 375 (1886).

246. *See* Comment, *supra* note 2, at 526-29.

247. *See supra* notes 4 & 42 and accompanying text; Comment, *supra* note 2, at 514-22.

The Court's later assertions of broader federal power over the Indian nations, as exemplified by cases like *Kagama*, nonetheless echoed Marshall's view in that the Court did not view the United States' power as being constitutionally derived but rather as historically and politically contingent. The *Kagama* Court saw the United States' power as a function of the dependence and historical decline of "a race once powerful, now weak and diminished,"[248] and held that there was a commensurate requirement that the United States be charitable toward them and legislate in their (erroneously) perceived interests. While the Court's holding was racist, paternalistic, proselytical and devoid of any recognition of the United States' responsibility for the Indians' situation, it was at least consistent with the Constitution and prior Marshallian constitutional jurisprudence.[249]

It was only after the plenary power era, when the Indians' position as completely subjugated, assimilated, enfranchised and geographically surrounded had been fairly well established, that the Court found the need to "constitutionalize" the United States' assertion of power over them. The historical and constitutional erroneousness of these attempts has been explored and demonstrated above. What is necessary now is not only a recognition of the lack of constitutional support for the plenary power doctrine but also redress of the earlier historical, economic, political and military contingencies which first gave rise to the United States' desire and occasional need to exert power over the Indians. A return to a consensual and treaty-based relationship between sovereign Indian nations and the United States would not only be correct constitutionally (from both an original intent and a political process protection standpoint) but would also work to reverse the tragic history of the Indian nations' relationship with the now great nation which in its infancy they nurtured and inspired.[250] Only then would "thanksgiving" be appropriate.

248. 118 U.S. at 383. *See supra* note 22.

249. The *Kagama* Court explicitly denied the possibility that either commerce clause, the treaty power, the property clause or any other constitutional provision supported the exercise of the federal power which the Court nonetheless upheld. *See* 118 U.S. at 378-80; Comment, *supra* note 2, at 528.

250. Both Benjamin Franklin and Thomas Jefferson were inspired in their political thought by Indian examples of democracy and comity. See Comment, *supra* note 2, at 513; B. JOHANSEN, FORGOTTEN FOUNDERS (1982).