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LEGISLATIVE CONSTITUTIONALISM & FEDERAL INDIAN LAW

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> *It is impossible to conceive a doctrine more opposed to the Constitution of our choice, than that a decision as to the constitutionality of all legislative acts rests solely with the Judiciary Department; it is removing the cornerstone on which our federal compact rests; it is taking from the people the ultimate sovereignty, and conferring it on agents appointed for specified purposes.* – Albany Register, March 5, 1799[i]

> *[] Congress may not legislatively supersede our decisions interpreting and applying the Constitution.* – Dickerson v. United States, 530 U.S. 428 (2000)

> *[Our earlier cases], then, are not determinative because Congress has enacted a new statute, relaxing restrictions on the bounds of inherent tribal authority that the United States recognizes. And that fact makes all the difference.* – United States v. Lara, 541 U.S. 193 (2004)

The United States has reached a moment in its constitutional history when the Supreme Court has asserted itself as not only one of, but the exclusive audience to ask and answer questions of constitutional meaning and constitutional law. In decision after decision, the Court has declared the federal judiciary as the primary forum and itself the primary arbiter of constitutional conflict and debate.[ii] The Court has asserted its methods—text, history, tradition—as the preeminent modes of constitutionalism. The Court has also established the superiority of its substantive vision of constitutional law and values—including a narrowed vision of equality as "equal treatment" as the sole vision of equality recognized by our constitutional framework.[iii] This "juricentric constitutionalism" has relegated the other, so-called political branches to a second-class status with respect to the Constitution.[iv] Not only has the dominance of the Court dampened our constitutional culture writ large, but it has also occluded the ways that the Congress and the executive branch, as unique institutions, play distinctive and vital roles within constitutional lawmaking. This Article explores what lessons public law scholars might draw from federal Indian law in building an alternative constitutional culture to our current, and deeply flawed, juricentric system.

The United States arrived at this constitutional moment in part due to accretion. As Congress has fallen into dysfunction and increasingly stalled, the Supreme Court stepped into the breach.[v] But it has also arrived at this moment because of a belief that our constitutional order requires aggressive and exclusive judicial review by the Supreme Court.[vi] Without the "least dangerous branch,"[vii] who would enforce the limits set by the constitution? Many of our current government leaders came of age steeped in Alexander Bickel, John Hart Ely, and debates over the counter-majoritarian difficulty.[viii] Our current Supreme Court, educated almost entirely at Harvard and Yale Law Schools, are students of these men, if not their theories.[ix] The lessons of the Warren Court and the Civil Rights Revolution seemingly taught us that courts were the sanctuaries of subordinated minorities and that constitutional failures, like that of slavery and Jim Crow segregation, could be resolved by calling forth the power and empathy of the Supreme Court.[x]

So, what is to be done once scholars and the public lose the taken-for-granted belief that aggressive judicial review is necessary or even beneficial for our constitutional framework? How does one navigate a Supreme Court that is hostile to fundamental constitutional values, especially in the context of minority protection, rather than the best suited "pronouncer and guardian of such values"?[xi]

This article offers some preliminary answers to these questions through the lens of Native people and their advocacy strategies, histories, constitutional philosophies, and the legal frameworks that govern them. The body of law that governs the relationship between Native peoples, Native nations, and the United States—termed federal Indian law—offers a unique perspective on the distinctive roles of the other branches in making and interpreting constitutional law.[xii] Of course, the success of Native advocates in shaping the United States constitutional system should not be overstated, nor should it be washed of the blood of generations of Native men, women, and children required to secure even the most tenuous constitutional change. But this Article begins to

explore the ways that the resilience of Native advocates, their innovative strategies and the legal frameworks born of those strategies offer lessons for our current constitutional moment.

However imperfect, the framework of federal Indian law has reshaped fundamentally the constitutional structure of the United States, often forming the only backstop against the seemingly endless American colonial project. Most of these fundamental constitutional changes have taken place without the involvement of the federal courts. Through petitioning, lobbying, diplomacy, and even military standoffs, Native advocates have built and rebuilt the modern framework of federal Indian law—a framework that recognizes tribal sovereignty and supports self-determination and collaborative lawmaking.[xiii] Federal Indian law has thus reshaped the face of United States government from the Congress to the American state, as well as its federalist and constitutional framework.

Most important for our current constitutional moment, many of these constitutional changes have taken root in the face of open hostility by the Supreme Court. In contrast to generalist scholars of public law, scholars of federal Indian law have long understood Native people to be the proverbial indigenous "canary" in the coal mine of American democracy. As Felix Cohen famously stated, "[l]ike the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith."[xiv] With respect to the Supreme Court, Native people have been the canary in an often hostile coal mine. Most notably, Native people did not experience the legal gains before the Court seen by other marginalized groups during the reign of Thurgood Marshall.[xv] The primary protections by the courts came during the tenure of a much earlier Marshall, Chief Justice John Marshall.[xvi] But these gains were over one hundred fifty years prior and were so short-lived as to not prevent the bloodshed of removal, including the Trail of Tears a handful of years later.[xvii] Exploring the constitutional development of federal Indian law

offers insights into alternative ways of understanding the function of judicial review and of the place of Congress and the executive in helping to interpret, make, and enforce constitutional law. As this Article aims to show, in the context of federal Indian law, the formation of the doctrine occurred often through conflict with Congress and through the constant activism of Native peoples.

Congress has been at the heart of these constitutional reforms in three primary areas: First, Congress has restructured the federalist framework to affirm national power as central to Indian affairs and has cemented the boundaries between Native nations and the several states. During the very first congress, Congress passed the first of a series of Trade & Intercourse Acts that affirmed federal power over Indian Country and limited state power and Congress later reinforced the separation of state jurisdiction from Indian Country within each state's enabling act.[xviii] Congress continues to structure the relationship between states and Native nations today through collaborative lawmaking frameworks like the Indian Gaming Regulatory Act and by ratifying and enforcing agreements between states and Native nations.[xix] Second, Congress has affirmed and structured the recognition of inherent tribal sovereignty and it continues to structure and facilitate today the ongoing government-to-government relationship between the United States and the over 570 federally recognized Native nations it recognizes.[xx] Today, Native nations govern hundreds of thousands of tribal members and land masses larger than several states—all as semi-sovereign enclave states enclosed within the alleged territorial borders of the United States.[xxi] Through a series of self-determination statutes, beginning in the 1930s and continuing in the 1970s, Congress has also recognized the ability of Native nations to assume administration of federal regulatory schemes, receive federal funds to administer federal welfare programs, contract with other United States governments, and to assume control of hospitals, schools, and other infrastructure within Indian Country run previously by the national government.[xxii] Finally, Congress has reshaped the structure of the United States government across all three branches to facilitate better representation of

Native nations and Native people. In addition to establishing specialized committees with its own chambers,[xxiii] Congress has also most notably reshaped the face of the American state and placed Native peoples at the helm of that state. Today, Native nations are governed by a specialized branch of executive, the Bureau of Indian Affairs (BIA). As of 2010, because of hiring preferences established by the Congress beginning in the 1930s, 95% of employees within the BIA were citizens of Native nations.[xxiv] Excluded from the promise of birthright citizenship in the Fourteenth Amendment, Congress created a complex form of citizenship for Native people by statute in the 1920s—a form of citizenship that allowed Native people to retain allegiance to their Native nations and serve as the first dual-nationals recognized by the United States. The lessons of Native movements, struggles, and successes to establish these fundamental changes are myriad. But they offer guidance toward developing a constitutional culture that embraces the distinctive roles of the other branches and decenters the courts.

Centering federal Indian law within a study of constitutionalism offers a range of theoretical implications. This Article explores three. First, is that Congress has a particular role in the making and interpretation of constitutional law. This lesson is not new; public law scholars have long explored Congress's central role in constitutional lawmaking—what some scholars have termed "legislative constitutionalism"[xxv] and others "departmentalism." But this Article aims to build on these literatures by studying Congress's role in mitigating the constitutional failure of American colonialism. Because federal Indian law rests in the context of judicial abnegation or the absence of judicial review, this body of laws and their histories provide insights into what Congress may uniquely offer the constitutional lawmaking process—that is, what is particularly *legislative* about legislative constitutionalism. When the now dominant tide of the Court pulls back, it reveals the unique strengths and weaknesses of centering the process of development of constitutional,

meaning, values, and law within a legislature, rather than a court, a president, or in an inter-branch conflict.

This Article posits that it is not coincidental that Native advocates focused their efforts on Congress, because it was the lawmaking institution most open to claims and debates about American colonialism and it was most able to fashion the constitutional remedies needed to mitigate American colonialism. Much of the vitality of Congress's role is rooted in the unique form of participation in the lawmaking process offered the public by the institutional structure of the Congress—more directly through the lower chamber of the House and more indirectly through the upper chamber of the Senate—through channels like the electoral process and through petitioning or lobbying.[xxvi] Because it has facilitated and supported practices of empowered engagement and discourse since the Founding, the Congress has long functioned as a central site of intersection between "the people themselves," social movements, and the formal and informal shaping of constitutional law, values, and meaning. Beyond unique forms of participation, Congress also offers distinctive constitutional remedies and, thus, fosters deliberation in distinctive constitutional registers than the courts. Rather than packaging claims in terms of positive or negative rights and liberties, Native advocates have been able to address directly constitutional failures of representation, faulty structures of government, and the distribution of power. Most central to the mitigation of American colonialism, Congress offers Native advocates the ability to reform the structure of the United States government, reshape its federalist framework, and redistribute power to subordinated communities as an insufficient and imperfect, but innovative form of constitutional remedy.

A second theoretical implication arises from the fact that federal Indian law offers legislative constitutionalism a clear example where Congress interprets the United States Constitution directly. In contrast to quasi-constitutionalism, federal Indian law reveals areas of constitutionalism where Congress interprets and constructs big "C" constitutional law. This is not to say that a legislative

constitutionalism informed by federal Indian law has no role for the courts. Rather, in these domains, courts should be seen as collaborators within the constitutional lawmaking process—a polycentric constitutionalism among multiple constitutional lawmakers—and judges should be aware of their vital, but secondary role in making constitutional law in conversation with Congress. Within federal Indian law, the courts have played this role by developing a range of judicial tools to engage in the constitutional lawmaking process alongside Congress, but without recognition of the constitutional implications—these include clear statement rules, canons of construction for treaties and statutes, and the rational basis review of congressional plenary power over Indian affairs. Scholars have debated readily the ambiguous status of these tools. Understanding them as small "c" constitutional lawmaking in certain contexts could allow legal scholars, as well as courts, to reconcile clear statement rules, interpretive canons, and deferential review of plenary power as constitutional law—but constitutional law that defers to the greater authority of Congress as Congress interprets the Constitution directly.

Finally, studying an area of law that necessarily deals with questions of government structure, fundamental rights, and constitutional values, but is largely regarded as "not constitutional law," has much to contribute to the debate among public law scholars about the limits and possibilities of "constitutionalizing" areas of law. Famously, a debate between Professors Reva Seigel and Robin West over the "de facto" Equal Rights Amendment began to address some of the concerns at stake in transforming issues of "ordinary politics" into questions of constitutional concern.[xxvii] Federal Indian law, comprised of statutes and doctrine that advocates have fiercely reframed as "not constitutional law," seems to support at first blush Professor West's admonishment to avoid casting every political dispute into constitutional terms.[xxviii] It is true that the recognition of inherent tribal sovereignty and its framework have been surprisingly stable,[xxix] especially in comparison to other constitutional failures and efforts to mitigate those failures. Nor has federal Indian law fallen into

the individualistic or anti-communitarian ethos identified by West as a flaw inherent in constitutional discourse[xxx]—quite to the contrary.[xxxi] But the construction of federal Indian law as "ordinary politics" reveals shortcomings also in avoiding a full-fledged constitutional conversation about American colonialism. Federal Indian law fails to achieve wholly transcendent legal and policy solutions, because advocates must couch their advocacy in quotidian legal and political terms.[xxxii] Given the low profile of legislative constitutionalism at present, Congress seems to offer some respite from these shortcomings—allowing advocates to make constitutional arguments behind the closed doors of member offices. But recognition of legislative constitutionalism within the academy and of Congress as a central constitutional lawmaker could serve to foster a more full-throated constitutional conversation about American colonialism and constitutional democracy and, thus, could foster more radical future solutions across a range of issues.

This Article proceeds in four parts. Part I explores legislative constitutionalism in the context of a particular case: federal Indian law—the intricate, exceptional, and deeply flawed body of laws that regulate the American colonial project. Parts II through IV explore the theoretical implications of this case study. Part II offers ways to better center the institution of the legislature in "second wave" legislative constitutionalism by examining the *longue durée* history of the Congress and the distinctive forms of participation and remedy it offers in the context of constitutional lawmaking. It concludes that not only must reformers focus their efforts on restraining the courts, but they must, too, strive to empower the Congress to join our constitutional conversation as a full-throated participant. Part III offers ways to theorize Congress as an embedded and discursive institution—not a branch at war with the courts—by envisioning the Supreme Court's role, in particular domains, as a creator of little "c" constitutional law to support big "C" constitutional interpretation in Congress. This Part also situates federal Indian law within other areas of substantive constitutional law over which Congress wields supremacy today—either through judicial

abnegation or the Court's declination of judicial review—to identify similar dynamics of polycentric constitutionalism across substantive areas. Finally, Part IV closes with an exploration of the benefits and burdens of declaring areas of congressional supremacy as "not constitutional law" and speculates as to what might be gained by embracing Congress's direct role in constitutional lawmaking and thereby allowing broad engagement with American colonialism in a constitutional register.

I. Case Study: Federal Indian Law & Legislative Constitutionalism

The following sections provide a study of Congress's direct role in constitutional lawmaking in the case of American colonialism. These sections describe the tactics, successes, and failures of Native advocates and their allies as they have forced Congress to recognize American colonialism as constitutional failure and to mitigate this failure by treaty, statute, and regulation. Amidst this project, the United States has fashioned the body of law that regulates the relationship between Native people and the United States—federal Indian law.[xxxiii] These laws are exceptional and offer the most robust form of recognition of tribal government sovereignty in the world. These laws and their histories also offer a seemingly rare window into the process of congressional interpretation of the Constitution, its recognition of a constitutional failure at the heart of our constitutional law, and efforts to develop innovative forms of constitutional remedy and mitigation of that failure. The lessons of Native movements, struggles, and successes to establish these fundamental changes are myriad. But they offer guidance toward developing a constitutional culture that decenters courts and embraces the distinctive roles of the other branches in constitutional deliberation and in crafting structural solutions to constitutional problems.

This Part details first how Native people advocated to the national government, and particularly Congress and the executive, to shape the American colonial project in ways that would better comport with United States constitutional values. This Part then turns to the unique

constitutional remedies offered by Congress to mitigate the American colonial project. Again, highlighting the agency and successes of colonized, subordinated peoples is not intended to diminish the constitutional failure of American colonialism; nor is it intended to whitewash the violence wrought upon Native people by the United States government and its polity in ways that were often embraced as lawful. Rather, these examples reveal the unique constitutional conversation that formed around questions of colonialism in the context of a constitutional democracy—a unique constitutional culture that was and continues to be fostered by the institutional structure of the political branches and one that remains surprisingly absent from the courts. Our common constitutional parlance might try to lump these conversations into those around rights—largely positive rights, but with some negative rights as well. But a closer examination reveals constitutional discourse over American colonialism focused on failures of structure and representation directly, rather than crafting these conversations in terms of rights.

A. Structural Constitutional Claims

[Section omitted (sample for context): It is likely more accurate to say that Native people began by shaping the reach and meaning of the Constitution itself than to characterize their advocacy as more traditional constitutional claims making. Native nations shaped the treaty power, for example, through practice, political power, military might, and diplomacy before arguing from those constitutional powers once established. Native people argued from fundamental little "c" constitutional principles like the rule of law, consent of the governed, and the equal value of all men to persuade members of the Philadelphia Convention that conquest of Indian Country through violence was antithetical to the fledgling constitutional democracy. A delegation of deputies from the Cherokee, Chickasaw, and Choctaw Nations traveled to Philadelphia in June of 1787, during the time of the constitutional convention. During that visit, the deputies successfully persuaded the drafters of the new Constitution to adopt a policy of "purchase" as opposed to "conquest" in the

context of Indian affairs and Indian land, and to secure this policy by affirming the superiority of treaty law in the Supremacy Clause, grounding definitely the power to make treaties with Native nations and the power to "manag[e] affairs with" Native nations in the national government, and blocking all potential powers of state governments over Indian affairs. State governments had competed with the national government for power over Indian lands under the Articles of Confederation leading to not only confusion, but bloodshed.]

B. Structural Constitutional Remedies

In response to claims from Native advocates and their allies about the inherent tensions between colonialism and constitutional democracy, the national government has built a complex and innovative legal framework through statute, treaty, and regulation to mitigate American colonialism over the past two-hundred years. These remedies reveal themselves as distinct from the remedies commonly offered in response to either positive or negative rights claims—instead, Congress crafted remedies that sound in structure rather than rights.

First, in response to advocacy by Native nations and Native people, Congress reshaped the structure of the United States government across all three branches, as well as the breadth and reach of national power to facilitate better representation of Native peoples in their distinctive relationship with the United States as colonized peoples. Many of these innovations repurposed government infrastructure that had been built initially to further the American colonial project.[xxxiv] Second, through statute and treaty, the Congress defined the relationship between Native nations and the United States as one that excludes state power and jurisdiction, unless the national government authorizes and sets the terms of that jurisdiction.[xxxv] Lastly, Congress has affirmed and structured the recognition of inherent tribal sovereignty and it continues to structure and facilitate today the ongoing government-to-government relationship between the United States and the over 570

federally recognized Native nations it recognizes.[xxxvi] The following sections explore each of these forms of structural remedy in turn.

1. *Reshaping Representation*

Like many social movements, Native advocates have succeeded over time in changing the meaning and shape of our Constitution. But the methods and aims of Native movements bear important distinctions from those of other social movements. The first is that Native advocates have focused on developing forms of representation and relationship with the United States largely outside of the framework of citizenship and the vote. The relationship between the United States and Native people, and especially the longstanding recognition of inherent tribal sovereignty by the United States, provides a form of representation to colonized peoples unlike any other government in the world.[xxxvii] This is not to say Native advocates never sought citizenship and the franchise.[xxxviii] But Native people more often sought recognition of their Native nations as the primary aim of their advocacy and crafted their strategies as citizens of separate nations—a form of foreign national. Rather than a representative relationship mediated through the franchise, Native people sought recognition of their nations and a government-to-government relationship as their primary channel of representation as colonized peoples.

The methods of Native advocates reflect those distinctive aims, as Native people turned early on to Congress and the President and leveraged international law, diplomacy, and treatymaking—coupled with petitioning, lobbying, and litigation brought largely by tribal governments.[xxxix] Then, following the closure of the treaty process to Native nations in the late nineteenth century, Native advocates focused more closely on lobbying and petitioning to reshape the federalist framework by statute and to ensure the ongoing recognition of their tribal governments.[xl] It was only in the twentieth century that Native advocates turned to citizenship, the

franchise, and enforcement of rights claims against the United States, and these aims were more often secondary to the aim of recognition of Native nations.[xli]

Because representation of Native people was primarily through the government-to-government relationship with Native nations, the structure of federal Indian law placed the "political branches" and, particularly Congress in the twentieth and twenty-first centuries, in the lead in interpreting the constitutional values and issues at stake in the context of American colonialism.[xlii] This distinctive form of representation ensured that the constitutional departmentalism of the nineteenth century carried into the twentieth, and that it survived even the rise of judicial supremacy in the context of constitutional issues generally and particularly over the protection of minorities.[xliii] Today, this distinctive representative relationship continues to position Congress as the primary institution to deliberate over and address constitutional values in the context of American colonialism—but supported now by an extensive administrative apparatus, largely run by citizens of Native nations.[xliv] Although the Supreme Court continues to adjudicate cases and to provide often in-depth forms of judicial review, the Court has also explicitly affirmed the authority of Congress to override the Court's decisions by statute.[xlv]

The relationship between Native people and Congress is, no doubt, in part due to historical contingency. It was a relationship that arose from powers over war, foreign affairs, treaties, and commerce that the United States—powers that the Constitution designated to the branches with control over the military and foreign affairs,[xlvi] and these powers were more often used to subordinate and dispossess. But the government-to-government relationship between Native peoples and the United States was also explicitly sought by Native people and Native advocates translated and repurposed subordinating frameworks into structures of empowerment and resistance. It was also through this distinctive representative relationship that Native advocates persuaded Congress to translate the treaty and recognition powers to build a complex government-

to-government relationship regulated by statute, engage in forms of legislative recognition when administrative recognition failed, and construct innovative statutory mechanisms of collaborative lawmaking.[xlvii]

With respect to innovations in Native representation through a government-to-government relationship, the most central has always been the fact that Congress has kept its doors open to petitions, lobbying, and other forms of participation by Native nations as Nations. Presidents, too, until the era of Andrew Jackson, engaged respectfully with delegates of Native nations as they did with other foreign diplomats.[xlviii] For the hundred years of this nation's birth, presidential administrations from Washington to Adams formed more treaties with Native nations than any other sovereign nation.[xlix] In contrast, the federal courts largely denied entrée to Native nations and Native people to bring suit at all over the long nineteenth century and, even today, still adjudicate central issues of federal Indian law today without the formal intervention of Native nations.[l] But, throughout history, the Congress has been open to the petitions of Native nations and Native people for redress—even when the executive branch turned against them.

As a result of this distinctive relationship, both chambers of Congress developed specialized standing committees on Indian affairs and Congress designated administrative apparatus to trade with Native nations in the early nineteenth century.[li] These specialized committees and administrative agencies had initially focused on war, removal, detention, and other forms of subordination.[lii] But they also served as a locus for expertise and deliberation over Indian Affairs and Native petitions, and as a central place of engagement with Native nations and Native people. By submitting petitions to the Congress, many Native nations successfully instigated the treaty making process and enforced treaty law requirements through congressional petitions.[liii] The nineteenth century is replete with examples of Native resistance to federal subordination. But, beginning in the late nineteenth century, Native advocates began to successfully repurpose these

subordinating frameworks and, in the twentieth century, they have claimed certain committees and agencies to develop a unique framework of representation for Native people and Native nations.

For example, Congress repurposed its established standing committees within each chamber to specialize in Indian Affairs and they are leveraged today to engage directly with Indian Country. Congress's specialized committees on Indian affairs were abolished briefly in the twentieth century by the Legislative Reorganization Act, but the Senate reinstated its standing Committee on Indian Affairs in 1984.[liv] The House also recently recreated its own standing subcommittee focused on Indigenous peoples during the 116th Congress (2019-2021).[lv] These committees serve as point of entry for Native advocates and often seek out the expertise and input of Native nations in crafting legislative mitigations of American colonialism.

These innovations of representation within Congress have fostered a longstanding relationship between Congress and Native nations and reflect a constitutional culture within Congress that recognizes the issues of American colonialism—even those involving constitutional values derived from a document that excluded Native people—and facilitates the participation of Native nations in determining mitigations and solutions. Congress has continued to support and to strengthen these innovative forms of representation even following the success of Native advocates in pressing for state and national citizenship for Native peoples, which they achieved via the Indian Citizenship Act of 1924.[lvi] No doubt, these innovations continue to fall short of certain responsibilities that the United States fails to fulfill under treaty law—the promise of the appointment of Native nation delegate to Congress in the 1835 Treaty of New Echota with the Cherokee Nation, most notably.[lvii] But highlighting them and their role in facilitating constitutional deliberation over issues of American colonialism could begin a conversation on whether these modest gains by Native advocates could be strengthened by a more full-throated conversation about legislative constitutionalism.

In addition to reshaping the inner structures of the House and Senate, Congress has also reshaped the face of the American state to provide an agency that specializes in regulating Indian affairs, engaging in consultation with Indian Country, and in mitigating American colonialis. Congress has also shaped parts of other agencies to better facilitate the regulation of the relationship between the United States and Indian Country.[lviii] Importantly, after developing this specialized infrastructure, Congress has affirmatively placed Native peoples at the helm of that state. Today, the government-to-government relationship is regulated by a specialized branch of executive, the Bureau of Indian Affairs (BIA), an agency that began as part of the Department of War in the early nineteenth century.[lix] As of 2010, because of hiring preferences established by the Congress beginning in the 1930s, 95% of employees within the BIA were citizens of Native nations.[lx] As would always be the case in the context of ongoing colonialism, the relationship between Native nations and the Bureau of Indian Affairs is complex and deeply imperfect in many ways. Scholars have also begun to recognize the ways that funding streams and other forms of institutional design have undermined the representative function of these institutions—leaving any government-to-government relationship in name only. But understanding these innovative forms of representative and their creation as a form of constitutional remedy crafted by Congress in response to the failures of American colonialism could help to clarify their purposes and to better secure their constitutional role in the future.

Beyond constructing innovative institutions within the federal government to provide unique forms of representation to Native nations and Native peoples, Congress has also reformed the horizontal separation of power between the branches. Congress envisions its role as so central to providing representation to Native nations that it has even claimed some of the power of the other branches for itself, when it has determined that other branches have failed to uphold the constitutional values at stake in mitigating American colonialism. For example, Congress has taken

steps across the latter half of the twentieth century to better define and articulate the recognition process by which the United States recognizes Native nations.[lxi] As the Supreme Court has noted,[lxii] recognition of Native nations operates differently as a constitutional matter in the context of the recognition of Native nations than it does in the context of the recognition of foreign nations. Traditionally, the recognition power is seen as largely the province of the executive.[lxiii] But, in federal Indian law, Congress has both asserted a formal role for itself and it has defined the process for the other branches. Much of that distinction is due to Congress taking a strong lead in regulating federal Indian law more generally and taking seriously its role in upholding the trust responsibility.

Although recognition of Native nations has a muddled and often contradictory legal history, historically, the United States has recognized Native nations through sovereign-to-sovereign forms of diplomacy and settlement like treaties and executive-legislative agreements.[lxiv] But the United States has also recognized Native nations through simple statute, executive order, and regulation.[lxv] Throughout, because Congress has declared that the federal trust responsibility is limited to those Native nations that the United States has recognized as sovereign, the Congress has taken an affirmative role in identifying those Native nations the United States has recognized and articulating the contours of the recognition process. Along with the drafting and the passage of the Indian Reorganization Act of 1934, Congress published a list of Native nations eligible for inclusion under the IRA.[lxvi] The IRA list was controversial and problematic.[lxvii] But it also created clarity for the first time as to which tribes the United States claimed to have recognized. Native nations excluded from the IRA list by Congress then began to petition the Bureau of Indian Affairs for recognition through an ad hoc process that continued until the 1970s.[lxviii] During this same period, however, Congress continued to assert a role for itself in the recognition process. Not only did Congress claim to have unilaterally terminated federal recognition of certain Native nations in the 1950s and 60s,[lxix] it also asserted the sole power to reinstate recognition of those Native nations once terminated. In the

early 1990s, Congress acted to make explicit the multiple channels of recognition available to Native nations—including recognition by the standard administrative process, the judiciary, as well as Congress through simple statute.

The standard story within federal Indian law is that recognition is primarily the work of the executive branch through the Office of Federal Acknowledgement and through the formal recognition process established by that office.[lxx] But recent studies have shown that more nations in the last twenty years have received recognition by lobbying Congress than by petitioning the executive. There is also evidence that Congress took the lead in exercising the recognition power even before that time. Recent empirical work by Professor Kristen Carlson found that in the nearly forty-year period from 1975 until 2013 more Native nations had gained recognition by congressional statute than the formal administrative process within the Bureau of Indian Affair's Office of Federal Acknowledgment.[lxxi] Although the majority of Native nations advocated to both the Congress and the BIA, Carlson also found that the success rate for lobbying Congress—measured by legislative activity, including bill introduction, hearings, and bill passage—to gain recognition was higher than the success rate for petitions submitted to the BIA.[lxxii]

On the eve of the Congress's end-of-the-year holiday recess in 2019, for example, one of the final votes cast that year resolved a 125-year advocacy campaign by the Little Shell Chippewa Nation to gain recognition from the United States.[lxxiii] Congress then sent the bill to the desk of President Donald Trump, where it was signed without fanfare.[lxxiv] In gaining recognition by statute, the Little Shell Nation joins a burgeoning number of Native nations that have received recognition through Congress in recent years. The Trump Administration alone signed bills that recognized seven Native nations, all sent to the President's desk within the last two years of his administration.[lxxv]

The innovative forms of representation Native people and participation of Native nations crafted by Congress in the context of federal Indian law, do gesture toward something more than

historical accident. Congress has taken a distinctive role in building and preserving the government-to-government relationship between the United States and Native nations—a relationship that serves as the sole bulwark against furtherance of the American colonial project. In doing so, Congress most often points to its "trust responsibility" in recognizing Native nations and fostering their self-determination.[lxxvi] Scholars have parted ways on the source and substance of the trust responsibility. But the national government has described the trust responsibility in essentially constitutional terms: "The Government, following 'a humane and self-imposed policy . . ., has charged itself with moral obligations of the highest responsibility and trust,' obligations 'to the fulfillment of which the national honor has been committed.'"[lxxvii] For a variety of reasons, most notably to avoid the encroachment of juricentric constitutionalism and to preserve Congress's role, the trust responsibility is rarely addressed in an explicit Constitutional register. It is difficult, if not incorrect, to identify a single cause of the continued centrality of Congress to identifying the constitutional issues at stake in the context of American colonialism. But Congress continues to affirmatively point to the trust responsibility and deliberate over its terms in crafting unique forms of representation for Native nations and Native peoples. Whatever the cause, Congress has long provided a unique form of representation to Native nations and Native peoples and, in that role, it has taken the lead in identifying, deliberating over, and crafting solutions to uphold constitutional values in the context of American colonialism.

2. *Shifting Power*

In addition to shaping distinctive forms of representation, Congress has also responded to Native advocacy by shifting "power" to Native communities. Rather than seek substantive outcomes from another government—like equality, freedom of speech, or economic security—Native advocates have long focused their efforts primarily on shifting governing power to their communities to allow their own governments to secure equality, freedom, and economic security.

The paradigmatic strategy by which Native advocates have successfully shifted power to their communities has been by securing the recognition of inherent tribal sovereignty—recognition that was secured not through the courts, but through the President and Congress—and then by shaping the reach and meaning of that recognition.

Today, Native nations govern hundreds of thousands of tribal members and land masses larger than several states—all as semi-sovereign enclave states enclosed within the alleged territorial borders of the United States.[lxxviii] Of the over 570 federally recognized Native nations, many have drafted, ratified, and amended their own tribal constitutions.[lxxix] These constitutions have established federated governments, judiciaries, executive branches, and legislatures.[lxxx] Over the lands reserved to Native nations by treaty, those nations exercise civil and criminal jurisdiction through their own governments.[lxxxi] Many Native nations have passed complex criminal and civil codes by statute and regulation, and many have developed nuanced bodies of published common law through their court systems.[lxxxii] Some tribal governments have successfully established a social safety net for their tribal citizens unseen within the United States—including head start education,[lxxxiii] elder care,[lxxxiv] health insurance,[lxxxv] energy to heat and cool homes,[lxxxvi] and universal basic income.[lxxxvii] Native nations have also assumed power within our federal framework. Through a series of self-determination statutes, beginning in the 1930s and peaking in the 1970s, Congress has recognized the ability of Native nations to assume administration of federal regulatory schemes, receive federal funds to administer federal welfare programs, contract with other United States governments, and to assume control of hospitals, schools, and other infrastructure within Indian Country run previously by the national government.[lxxxviii] In addition to establishing governments born of and limited by constitutions, many tribal governments formed business organizations insulated from tribal politics to administer natural resources[lxxxix] and to run tribal businesses[xc]—

allowing for a level of experimentation and exploration of social democracy unheard of in neighboring jurisdictions.

The recognition of inherent tribal sovereignty and the complex statutory frameworks that govern that recognition today were born of longstanding advocacy tactics of Native nations and Native peoples that predated the founding of the United States. Even before the Founding, the Native peoples of North American organized around power to endure and resist the violence and subordination to which they were subjected by European governments who claimed ownership over Native homelands and their settler citizens. Arguing from principles of international law, Native advocates centered "sovereignty" as the locus of an independent power and sought recognition of that sovereignty through a range of advocacy tactics. In particular, Native people leveraged longstanding Indigenous forms of diplomacy, petitioning, treatymaking, and war to force the fledgling United States to recognize the inherent sovereignty of Native nations from its earliest days.[xci] These tactics resulted in both formal and informal constitutional change. When treaty practice with both state governments and the federal government became muddled under the Articles of Confederation, Native people sent delegates to the constitutional convention to argue for and secure an exclusive national power over Indian Affairs. The face of the Constitution reflected the fact that the United States intended to construct an empire through the dispossession of Native homelands. But the process by which this dispossession would occur, through militarized violence or through diplomacy, was unsettled. Native delegates, at least in part, helped shape the formal constitutional power of the national government over Indian affairs. But Native advocates leveraged these tactics, as well, to informally shape the constitutional power of the National government.

It is important to not overstate the influence of Native advocacy in resisting American colonialism, especially during the long nineteenth century. The history of this period largely reflects

the fact that the United States approached the colonization of Native peoples and lands through militarized violence.[xcii] The United States waged a lawless and extraordinarily violent series of wars against Native nations and Native peoples—wars provoked by the failure of the United States to uphold treaty promises and to respect the sovereignty of an independent people.[xciii] The "closure of the frontier" in the late nineteenth century saw Native people held in detention camps built by the national government on remnants of the lands guaranteed to them by treaty law. Federal law continued the colonial project that violence had started: In the latter half of the nineteenth century, Congress abolished recognition of Native governments, criminalized political practice, outlawed Native religions, regulated the structure of Native families, and forced Native children into federally-run boarding schools that would "kill the Indian in him, to save the man."[xciv] Critics are right to identify the racism at the heart of these laws, and there are deep issues with overstating the agency of subordinated peoples subject to the American colonial project. But the body of federal Indian law is not exhausted by the reservation era. Its breadth did not begin, nor does it end there.

Federal Indian law reflects also the tactics and strategies of Native agency. These laws reflect the ways that Native nations and Native peoples organized to resist American colonialism and to eventually force the United States to translate its diplomatic constitutional powers to recognize their governments even following these periods of subordination and to secure power to their communities to govern. Originally, the United States Constitution reflected a compromise over the constitutional failure of colonialism.[xcv] Native advocacy did not resolve the compromise toward diplomacy. But it did ensure that the diplomatic approach to colonization would continue and not fall into dormancy like so many other aspects of constitutional text. Native advocates forced the United States to exercise the powers of recognition and treaty making granted it by the Constitution[xcvi]—shaping these powers across the nineteenth century even beyond their application to Indian Country.[xcvii]

Because national power stood at the helm of the American colonial project and because Congress captained that power, the institution has been behind policies both egregious and not. The dominant narrative of Native history across the long nineteenth century rightly centers the violent and subordinating policies of federal government like the antebellum era Trail of Tears—a result of Congress's passage of the Removal Act[xcviii]—and the reservation era of the late nineteenth century—a project largely of the executive, but sanctioned by congressional appropriations and facilitated by Congress's allotment efforts that followed.[xcix] It is important to not overlook, however, histories of Native political agency and advocacy also, and the role of Congress in translating that advocacy into innovative structural and constitutional change. Treaty law, rather than statutes, dominated the formation of federal Indian law from the Founding into the antebellum era, and Native nations were involved directly within the lawmaking process as initiators, negotiators, signatories, and joint implementors of that treaty law. The first treaty signed by the fledgling United States was with a Native nation,[c] and the United States negotiated and signed the majority of its treaties with Native nations in its first hundred years.[ci] Over the long nineteenth century, it was the Senate that took the lead in ratifying hundreds of treaties with Native nations, while the House involved itself in upholding treaty law through the appropriations process. Notably, it was this same treaty practice that fueled the expansion of the United States—from a thin strip of colonies clinging to the Eastern Seaboard to a vast and plural Nation state that ran from "sea to shining sea" by the twentieth century. Then, in response to an appropriations rider passed in 1871 that purported to end the treaty practice with Native nations,[cii] Native advocates persuaded Congress to translate the recognition and treaty powers into complex and innovative forms of recognition and collaborative lawmaking across the twentieth and twenty-first centuries.[ciii]

Congress has exercised these translated treaty and recognition powers to construct innovative statutory and institutional frameworks that aim to mitigate American colonialism by

regulating the relationship between Native nations, the United States, and the several states. These "super statutes" ensure ongoing recognition of inherent tribal sovereignty and maintain a more collaborative government-to-government relationship during the lawmaking process. When faced with the abject failure of the ongoing project of American colonialism over Native people in the 1920s in the publication of the Meriam Report,[civ] Congress crafted over the twentieth and twenty-first centuries intricate statutory frameworks that mitigate the realities of American colonialism by recognizing Native Nations, fostering tribal sovereignty, and mimicking through domestic legislation the collaborative lawmaking process of treaty lawmaking.[cv] Much like the Congress's approach to other constitutional values in the nineteenth century, the Congress began to create a swath of innovative forms of governance during the progressive era in order to better mitigate the realities of American colonialism.[cvi] The centerpiece of these statutory frameworks—and the statute that provides the primary framework by which the relationship between the United States government and the over 570 federally recognized Native Nations is defined—is the Indian Reorganization Act ("IRA") passed in 1934.[cvii] Like other super-statutes,[cviii] the IRA was crafted after over a hundred years of experimentation in the realm of Indian affairs and was passed following deep deliberation regarding the nature of the United States as a constitutional democracy and a colonial power.[cix] The IRA aimed to mitigate the realities of American colonialism by providing a framework through statute that would recognize the inherent sovereignty of Native Nations, foster self-governance by offering Native Nations the ability to form constitutional governments that the United States would recognize, and by providing a formal framework through which the three sovereigns within the United States—the national government, the states, and tribal governments—would interact in government-to-government relationships and engage in collaborative lawmaking.[cx] The bill itself was crafted in collaboration with Native Nations and their representatives, and required affirmative consent by each Native Nation in order to take effect within that jurisdiction.[cxi]

Later statutes have mimicked and built upon the structure of the IRA. During the self-determination era of the late 1960s and early 1970s, the Congress passed a slew of legislation similar to the IRA that, among many other policy areas, afforded Native Nations the ability to contract and compact over their own educational, safety, housing, and health services;[cxii] to assume authority over the placement of Native children in the context of adoption and foster care—including the ability to override state law with tribal law;[cxiii] as well as established a formal means by which states and Native Nations would govern, fund, and distribute profits from gaming enterprises within the state's territorial borders.[cxiv] Throughout these legislative histories, the Congress has routinely cited to the particular power it holds under the Constitution with respect to Native Nations and the particular responsibility it must fulfill under the trust doctrine to mitigating the realities of colonialism.[cxv]

Native advocates have also pressed Congress to translate the collaborative lawmaking values of the treaty power into the context of the twentieth and twenty-first centuries. Beginning with the IRA in the 1930s, Congress has conditioned much of federal Indian law on the consent of individual Native nations in the application of those laws—meaning that Native nations can opt-in or opt-out of various legal frameworks that shape their sovereignty, giving them a veto power over the laws that govern their citizens and territory. Congress has also given Native citizens the power to run the federal regulatory infrastructure that governs the government-to-government relationship with their nations through hiring preference statutes.[cxvi] Hiring preferences do not ensure a particular substantive outcome, nor do they exempt those regulations from the administrative processes that govern rulemaking and adjudication generally. But they do provide an innovative form of power shifting to Indian Country by ensuring that "cause lawyers inside the state" will wield the power of the state, should they choose to.[cxvii] Congress and the executive have also ensured that lawmakers outside of the BIA will seek out the consultation of Native nations in crafting regulations pertinent to Indian Country through statutes like the Native American Graves and Repatriation Act[cxviii] and

through a series of executive orders requiring consultation.[cxix] More recently, federal agencies have built upon this culture of collaborative lawmaking to begin to "comanage" certain areas of regulation, like public lands that include sites sacred to Native people, through intergovernmental cooperative agreements signed with Native nations.[cxx]

3. *Structuring Federalism*

In addition to formally and informally shaping the recognition and treaty powers, Native advocates have persuaded the Congress to reshape the federalist framework to mitigate the American colonial project. Under the Articles of Confederation and disputes over the Constitution, Native peoples learned quickly that state governments were often too close to their settler citizens to uphold the rule of law with respect to treaties, borders, and Native sovereignty. The national government was certainly not anti-colonial. But, at least in its early years, it seemed as though it would support forms of diplomacy and treaty making not consistently upheld by state governments.[cxxi]

Given those lessons, Native advocates pushed early on to strengthen national power over Indian Affairs and, given the predominant interest in land speculation among the Founding Fathers, Congress was happy to oblige. Since the Founding, Congress has consistently restructured the federalist framework to affirm national power as central to Indian affairs and has cemented the boundaries between Native nations and the several states. Even when Congress has authorized state jurisdiction over Indian Country in narrow instances,[cxxii] it has consistently affirmed federal power to set those boundaries and has adjusted state jurisdiction over time.[cxxiii] Although the Supreme Court has increasingly asserted an independent role for itself in determining these boundaries, it has—at least for now—continued to affirm the supremacy of congressional power in policing the federalist framework with respect to Native nations.[cxxiv]

During the very first congress, Congress passed the first of a series of Trade & Intercourse Acts that affirmed federal power over Indian Country, limited state power, and reinforced the separation of state jurisdiction from Indian Country within each state's enabling act. The very first Congress, for example, passed An Act to Regulate Trade and Intercourse With the Indian Tribes in 1790, a statute that defined the fundamental contours of our federal system by placing all of Indian Country under federal criminal jurisdiction and by requiring a federal license to enter Indian Country and trade with Native people.[cxxv] Congress continued to strengthen the Trade and Intercourse Act with a series of amendments until 1834, referred to collectively as the Trade and Intercourse Acts, in which Congress strengthened federal power over Native people, trade, and lands.[cxxvi] These statutes worked hand-in-glove with the treaty process to respect the borders of Native lands set by treaty[cxxvii] and to ensure the recognition of tribal sovereignty. Although state governments recognized exclusive federal power and that the result of these statutes and treaties was the exclusion of Indian Country from each state's "ordinary jurisdiction,"[cxxviii] many states continued to challenge federal power and tribal sovereignty.[cxxix] In response, Congress continued to strengthen the Acts during the antebellum era.[cxxx]

When it became clear that the Trade and Intercourse Acts and myriad treaties with Native nations were insufficient to affirm exclusive federal power over Indian Country in the face of increasingly combative southern states, Congress turned to other constitutional powers to shape the federalism framework. For example, Congress began to leverage its power under the Property Clause[cxxxi] to require that new states joining the union acquiesce in their enabling acts to federal power over Indian lands.[cxxxii] It also further strengthened federal power over Indian Country to combat complaints by state governments over Indian Country as a law-free jurisdiction.

The relationship between state and tribal governments has been one of the most contested and fraught areas of federal policy since the Founding.[cxxxiii] It also became an area of constitutional

crisis during the antebellum era, when the Supreme Court faced off with President Andrew Jackson on the question of the jurisdiction of the state of Georgia over the Cherokee Nation.[cxxxiv] It was in the context of federal Indian law that Congress constructed the federalist framework of the United States—envisioning its role as final decisionmaker over the states on questions of American colonialism.[cxxxv] It was also in this context that Native advocates learned that the Supreme Court, even when supportive of tribal sovereignty and Native advocacy, was too powerless to police the federal framework. Following the antebellum era, Native advocates turned instead increasingly to the political branches of the national government to police these boundaries and, in the twentieth and twenty-first centuries, Native nations have begun to advocate directly to state governments to ensure their powers of self-determination and the preservation of their borders.

Today, the relationship between state and tribal governments is far more enmeshed than at the Founding.[cxxxvi] But Native nations continue to set the terms of this relationship by calling in the power of Congress where necessary, as well as by exercising the economic and political capital secured by Native nations through self-determination over time. Congress also continues to structure the relationship between states and Native nations through statutes like Public Law 280[cxxxvii] that require the consent of Native nations, collaborative lawmaking frameworks like the Indian Gaming Regulatory Act,[cxxxviii] and by ratifying and enforcing agreements between states and Native nations.[cxxxix]

II. IMPLICATIONS: CENTERING THE "LEGISLATIVE" IN LEGISLATIVE CONSTITUTIONALISM

[Sections omitted (sample for context): Reflecting upon the history and structure of federal Indian law allows a broader conceptualization of legislative constitutionalism—and perhaps, even, constitutionalism writ large—than that proposed by earlier literatures. Rather than aiming specifically at core areas where the Supreme Court has asserted its juricentric constitutionalism,

federal Indian law reveals a constitutional culture that is collaborative and mutually constituted with the communities it governs—and also, importantly, still practiced today within the Congress.[cxl]

A closer examination of federal Indian law provides a deep dive into a form of legislative constitutionalism rarely seen today—that is, an area of constitutional law involving thorny constitutional values where Congress has maintained fidelity to its co-equal role in interpreting and enforcing the Constitution.[cxli] In essence, it offers us an opportunity to put the "legislative" back in legislative constitutionalism.

One of the central questions that arises in the context of federal Indian law is: why Congress? What better situates Congress as an arbiter of constitutional values in the context of American colonialism than the courts? Is the relationship between Native advocates and Congress a result of historical contingency or are there particular institutional features of Congress, both in terms of representation and remedy, that make it a more amenable forum than the courts?

The following sections explore some of the distinctive aspects of Congress—its openness to the public, including people and the margins and their movements, along with its ability to offer structural remedies to constitutional problems[cxlii]—to conclude that the centrality of Congress to federal Indian law is more than historical happenstance. Rather, recognizing Congress's constitutional leadership in the context of mitigating American colonialism as arising from its distinctive institutional features could provide us with a deeper understanding of legislative constitutionalism and could help us envision a constitutional culture with a more prominent role for Congress.]

III. IMPLICATIONS: THE ROLE OF THE COURTS IN LEGISLATIVE CONSTITUTIONALISM

[Omitted]

IV. IMPLICATIONS: ENSURING "CONSTITUTIONALISM" IN LEGISLATIVE CONSTITUTIONALISM

[Omitted]

CONCLUSION

[Omitted]

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[i] *Legislative Acts/Legal Proceedings*, INDEP. CHRONICLE (Boston), Feb. 25, 1799, at 2.
[ii] *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 437 (2000); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L. J. 1, 1 (2003) [hereinafter Post & Siegel, *Protecting the Constitution from the People*].
[iii] *See, e.g.*, Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 317, 331-32 (1978).
[iv] *See* Post & Siegel, *Protecting the Constitution from the People*, *supra* note 2, at 2.
[v] *See, e.g.*, Nolan McCarty, *Polarization, Congressional Dysfunction, and Constitutional Change*, 50 IND. L. REV. 223, 243 (2016).
[vi] *See* Post & Siegel, *Protecting the Constitution from the People*, *supra* note 2, at 2.
[vii] *See* THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 2003).
[viii] *See generally* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (Josephine Ann Bickel ed., 2d ed. 1986).
[ix] *See FAQs – Supreme Court Justices*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/faq_justices.aspx (last visited Sept. 26, 2022).
[x] *See* Rebecca E. Zietlow, *The Judicial Restraint of the Warren Court (and Why it Matters*), 69 OHIO ST. L. J. 255, 255, 270–71 (2008) (describing the "judicial activism" of the Warren Court, which "enhanced the power of the federal courts through, among other things, articulating expansive tests for private rights of action, narrowly reading the political question doctrine and standing limitations, and engaging the federal courts in remedying the segregation of public schools").
[xi] BICKEL, *supra* note 8, at 24.
[xii] For many years, Indian law was seen as too *sui generis* to offer generalized lessons for constitutional law writ large. *See* Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 Harv. L. Rev. 433, 440 (2005); Angela R. Riley, *Native Nations and the Constitution: An Inquiry into "Extra-Constitutionality,"* 130 Harv. L. Rev. F. 173, 199 (2017). But more and more, public law scholars are beginning to realize that treatment of Native people might not be so exceptional—rather, it might provide an overlooked wealth of experience from which to draw lessons in a range of other areas. *See, e.g.*, Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 675–80 (1989).
[xiii] *See, e.g.*, CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 82-83 (1987) ("Indians have learned how to lobby. Highly effective legislative campaigns have been pursued by individual tribes and by national organizations"); FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION 23 (2009) ("the key point of political interaction in these contexts was treaty making, where diplomatic necessity displaced (at least temporarily) cultural ignorance and racial animus"); Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myths and the Methods of* Marbury v. Madison *to Tribal Courts' Criminal Jurisdiction*, 36 ARIZ. ST. L. J. 77, 77 (2004) [hereinafter Resnik, *Tribes, Wars, and the Federal Courts*].
[xiv] Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L. J. 348, 390 (1953).
[xv] For Marshall's account of the U.S. Supreme Court's capacity to protect racial minorities, *see* Thurgood Marshall, *The Supreme Court as Protector of Civil Rights: Equal Protection of the Laws*, 275 ANNALS AM. ACAD. POL. & SOC. SCI. 101 (1951).
[xvi] *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) (affirming the sovereignty of Native nations by holding that Georgia state laws have no force within the boundaries of the Cherokee Nation's territory).
[xvii] *See* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 Harv. L. Rev. 1787, 1823 (2019) ("Six years after the Court issued its decision in *Worcester*, federal soldiers and state militiamen forced the Cherokee people down the Trail of Tears").
[xviii] Trade and Intercourse Act of 1790, Pub. L. No. 1-33, 1 Stat. 137 (1790).

[xix] Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701–2721).
[xx] Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 86 Fed. Reg. 7554 (Jan. 29, 2021).
[xxi] *See, e.g.*, *Frequently Asked Questions*, CHEROKEE NATION, https://www.cherokee.org/about-the-nation/frequently-asked-questions/common-questions/?term=&page=2&pageSize=7 (last visited Sept. 25, 2022) ("There are more than 400,000 Cherokee Nation citizens"); *Tribal Governance*, NAT'L CONG. OF AM. INDIANS, https://www.ncai.org/policy-issues/tribal-governance (last visited Sept. 25, 2022) ("tribal governments exercise jurisdiction over lands that would make Indian Country the fourth largest state in the nation").
[xxii] *See, e.g.*, Indian Reorganization Act, Pub. L. No. 73-383, 48 Stat. 984 (1934); ROBERT ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 152-54 (3d ed. 2015).
[xxiii] *See Senate Indian Affairs Committee*, U.S. CONG., https://www.congress.gov/committee/senate-indian-affairs/slia00 (last visited Sept. 26, 2022).
[xxiv] *See* Indian Reorganization Act, Pub. L. No. 73-383, § 12, 48 Stat. 984, 986 (1934) ("Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions"); Livia Gershon, *Native Nations and the BIA: It's Complicated*, JSTOR Daily (Jan. 15, 2021), https://daily.jstor.org/native-nations-and-the-bia-its-complicated/.
[xxv] *See generally, e.g.*, SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION: FROM THE NEW DEAL TO THE NEW RIGHT (2014); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE (2016); Sotirios A. Barber & James E. Fleming, *The Canon and the Constitution Outside the Courts*, 17 CONST. COMMENT. 267 (2000); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L. J. 1943 (2003).
[xxvi] U.S. CONST. art. I, §§ 2–3; U.S. CONST. amend. I.
[xxvii] *See infra* notes **Error! Bookmark not defined.–Error! Bookmark not defined.** and accompanying text.
[xxviii] *Id.*
[xxix] *See infra* notes XX–XX and accompanying text.
[xxx] *See* Robin West, *Constitutional Culture or Ordinary Politics: A Reply to Reva Siegel*, 94 CALIF. L. REV. 1465, 1483–85 (2006) (arguing that constitutionalizing issues, such as the de facto ERA, has promoted individual rights at the expense of communal rights).
[xxxi] *See infra* notes XX–XX and accompanying text.
[xxxii] *See infra* notes XX–XX and accompanying text.
[xxxiii] *See supra* note 22 and accompanying text.
[xxxiv] *See infra* Part II.A, pp. XX.
[xxxv] For example, in *Ysleta del Sur Pueblo v. Texas*, the Court held that Congress can "exercise its authority to allow state law to apply on tribal lands" but not without expressly doing so. 142 S. Ct. 1929, 1934 (2022) (noting "[u]nder our Constitution, treaties, and laws, Congress too bears vital responsibilities in the field of tribal affairs" in addition to tribes' "inherent sovereign authority").
[xxxvi] *See, e.g.*, Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 5301–5423); Tribal Self-Governance Act, Pub. L. No. 103-413, 108 Stat. 4250 (1994) (codified as amended at 25 U.S.C. §§ 5361–5377); *see* Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 86 Fed. Reg. 7554 (Jan. 29, 2021).
[xxxvii] As early as the Washington Administration, the federal government recognized Native nations as "foreign nations, not as the subjects of any particular state." COLIN G. CALLOWAY, PEN AND INK WITCHCRAFT: TREATIES AND TREATY MAKING IN AMERICAN INDIAN HISTORY 98 (2013) (quoting Letter from Henry Knox to George Washington (July 7, 1789), in 3 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 134, 138 (Dorothy Twohig ed., 1989)).
[xxxviii] Native advocates achieved citizenship for Native people via the Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (1924).
[xxxix] *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560–61 (1832) (invoking "settle doctrine of the law of nations" to resolve a dispute between the Cherokee Nation and the state of Georgia); POMMERSHEIM, *supra* note 14 (in the colonial era, "the key point of political interaction in these contexts was treaty making, where diplomatic necessity displaced (at least temporarily) cultural ignorance and racial animus"); WILKINSON, *supra* note 14 ("Indians have learned how to lobby. Highly effective legislative campaigns have been pursued by individual tribes and by national organizations").
[xl] *See* Indian Appropriations Act, Pub. L. No. 41-120, 16 Stat. 544, 566 (1871) ("hereafter 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"). Since this appropriations rider in 1871, Congress and the President have utilized legislation and executive orders as a substitute for treaty making, including for the recognition of

tribes and establishment of reservations. *See, e.g.*, Leech Lake Band of Ojibwe Reservation Restoration Act, Pub. L. No. 116-255, 134 Stat. 1139 (2020).

[xli] *See* Indian Citizenship Act of 1924, Pub. L. No. 68-175, 43 Stat. 253 (1924); *see also* DEBORAH A. ROSEN, AMERICAN INDIANS AND STATE LAW: SOVEREIGNTY, RACE, AND CITIZENSHIP, 1790–1880, at 155–179 (describing "Indians' [multifaceted] reasons for supporting or opposing citizenship" through a case study on debates over citizenship by state legislative action).

[xlii] *See, e.g.*, United States v. Lara, 541 U.S. 193, 202 (2004) ("Congress, with this Court's approval, has interpreted the Constitution's 'plenary' grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority").

[xliii] *See, e.g.*, United States v. Morrison, 529 U.S. 598, 616 n.7 (2000) ("ever since *Marbury* this Court has remained the ultimate expositor of the constitutional test"); Zietlow, *supra* note 10 (describing the "judicial activism" of the Warren Court).

[xliv] *See* sources cited *supra* note 29 and accompanying text.

[xlv] *See, e.g.*, Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 799 (2014) ("Congress exercises primary authority in this area [tribal immunity] and 'remains free to alter what we have done'") (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989)).

[xlvi] U.S. Const. art. I, § 8; U.S. Const. art. II, § 2.

[xlvii] *See, e.g.*, Indian Reorganization Act, Pub. L. No. 73-383, 48 Stat. 984 (1934). The Indian Reorganization Act, among others, is considered a "super-statute" and is central to the federal Indian law framework. *See infra* Part II.B, pp. XX.

[xlviii] *See, e.g.*, CALLOWAY, *supra* note XX (recording the Washington Administration's acknowledgement of Native nations as "foreign nations, not as the subjects of any particular state.")

[xlix] *See* Arthur Spirling, *U.S. Treaty Making with American Indians: Institutional Change and Relative Power, 1784–1911*, 56 AM. J. POL. SCI. 84, 86 (2012) (noting that there are 367 treaties with Native Nations that were created between 1778 and 1868); Quincy Wright, *The United States and International Agreements*, 38 AM. J. INT'L L. 341, 345 (1944) (identifying 275 treaties with non-Native Nations from 1789 to 1889).

[l] *See, e.g.*, Alegre v. United States, No. 16-cv-2442-AJB-KSC, 2021 WL 5920095, at *1–2 (S.D. Cal. 2021) (adjudicating whether the BIA's decision to deny federal recognition of Plaintiffs' membership in the San Pasqual Band of Mission Indians was arbitrary and capricious, despite the Band having unanimously voted to enroll Plaintiffs and without the Band's intervention in judicial review).

[li] 130 Cong. Rec. 15026 (1984) (reestablishing the Senate Committee on Indian Affairs); 165 Cong. Rec. H1574 (daily ed. Feb. 13, 2019) (establishing the House Subcommittee for Indigenous Peoples of the United States).

[lii] *See, e.g.*, 4 Stat. 564 (1832) (establishing the first iteration of the BIA within the Department of War); MARGARET D. JACOBS, A GENERATION REMOVED 5–6 (2014) (describing the BIA's responsibility to carry out federal boarding school policy).

[liii] *See* Blackhawk, *supra* note 18, at 1874–75.

[liv] Legislative Reorganization Act, Pub. L. No. 79-601, 60 Stat. 812 (1946); 130 Cong. Rec. 15026 (1984).

[lv] 165 Cong. Rec. H1574 (daily ed. Feb. 13, 2019).

[lvi] Pub. L. No. 68-175, 43 Stat. 253 (1924).

[lvii] Treaty with the Cherokee, art. 7, Dec. 29, 1835, 7 Stat. 478.

[lviii] 9 Stat. 395, 395 (1849) (establishing the Department of the Interior and authorizing the Secretary of the Interior to "exercise the supervisory and appellate powers [. . .] in relation to all the acts of the Commissioner of Indian Affairs"); *see, e.g.*, *Native American Affairs*, U.S. Dep't of Commerce, https://www.commerce.gov/bureaus-and-offices/os/olia/native-american-affairs (last visited Sept. 30, 2022).

[lix] 4 Stat. 564 (1832) (authorizing the President to appoint a commissioner of Indian affairs under the Secretary of War).

[lx] *See* sources cited *supra* note 29.

[lxi] *See, e.g.*, Indian Federal Recognition Administrative Procedures Act of 1994, H.R. 4462, 103d Cong., § 2(1) (2d Sess. 1994) (proposing an act to "establish an administrative procedure to extend Federal recognition to certain Indian groups"); *see generally* Kristen Matoy Carlson, *Tribal Recognition, and Legislative-Administrative Multiplicity*, 91 IND. L. J. 955 (2016) (contending that Congress, more so than the BIA, plays an enduringly prominent role in the recognition of Indian tribes); RICHARD C. EHLKE, CONG. RSCH. SERV., CRS-1983-AML-0037, FEDERAL RECOGNITION OF INDIAN TRIBES (1983) (summarizing congressional recognition of Indian tribes generally and pertaining to particular statutes).

[lxii] *See* Zivotofsky v. Kerry, 576 U.S. 1, 22 (2015) ("the recognition of Indian tribes [is] a distinct issue from the recognition of foreign countries").

[lxiii] *See Zivotofsky*, 576 U.S. at 28 ("This history confirms the Court's conclusion in the instant case that the power to recognize or decline to recognize a foreign state and its territorial bounds resides in the President alone.").

[lxiv] *See, e.g.*, Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J.C.R. & C.L. 45, 70–71 (2012).

[lxv] *Id.*
[lxvi] *See* William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: The Historical Development of A Legal Concept*, 34 AM. J. LEGAL HIST. 331, 356 (1990).
[lxvii] *See, e.g.*, *id.* ("Immediately there were questions concerning recognition that followed inevitably in the wake of the IRA, owing primarily to the anomalous and confused legal status occupied by American Indian communities."); Carcieri v. Salazar, 555 U.S. 379, 397–98 (2009) (Breyer, J., concurring) ("We know, for example, that following the Indian Reorganization Act's enactment, the Department compiled a list of 258 Tribes covered by the Act; and we also know that it wrongly left certain tribes off the list.").
[lxviii] *See* Quinn, *supra* note 34, at 356–63.
[lxix] *See id.*
[lxx] *See, e.g.*, Lance F. Sorenson, *Tribal Sovereignty and the Recognition Power*, 42 AM. INDIAN L. REV. 69 (2017).
[lxxi] *See* Carlson, *supra* note 29, at __.
[lxxii] *Id.* at __.
[lxxiii] Kathleen McLaughlin, *A Big Moment Finally Comes for the Little Shell: Federal Recognition of Their Tribe*, WASH. POST (Dec. 21, 2019), https://www.washingtonpost.com/national/a-big-moment-finally-comes-for-the-little-shell-federal-recognition-of-their-tribe/2019/12/20/72f5ee86-204d-11ea-bed5-880264cc91a9_story.html.
[lxxiv] *Id.*
[lxxv] *See id.* (noting recognition of the Little Shell Nation); Jenna Portnoy, *Trump Signs Bill Recognizing Virginia Indian Tribes*, WASH. POST (Jan. 30, 2018), https://www.washingtonpost.com/local/virginia-politics/trump-signs-bill-recognizing-virginia-indian-tribes/2018/01/30/8a46b038-05d4-11e8-94e8-e8b8600ade23_story.html (noting the recognition of six tribes in Virginia).
[lxxvi] *See, e.g.*, *Fulfilling the Federal Trust Responsibility: The Foundation of the Government-to-Government Relationship: Hearing Before the S. Comm. on Indian Affs.*, 112th Cong. 1 (2012) (statement of Sen. Daniel Akaka, Chairman, S. Comm. on Indian Affs.) ("All branches of the Government, the Congress, Administration and the courts acknowledge the uniqueness of the Federal trust relationship . . . [w]hen the trust responsibility is acknowledged and upheld by the Federal Government, a true government-to-government relationship can exist and thrive.").
[lxxvii] United States v. Jicarilla Apache Nation, 564 U.S. 162, 177 (2011) (quoting Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942); Heckman v. United States, 224 U.S. 413, 437 (1912)).
[lxxviii] *See Tribal Governance*, NAT'L CONG. OF AM. INDIANS, https://www.ncai.org/policy-issues/tribal-governance (last visited Oct. 1, 2022).
[lxxix] *Tribal Nations and the United States: An Introduction*, NAT'L CONG. OF AM. INDIANS (Feb. 2020), https://www.ncai.org/tribalnations/introduction/Indian_Country_101_Updated_February_2019.pdf [hereinafter *Tribal Nations: An Introduction*].
[lxxx] *Id.* at 23–24.
[lxxxi] *Id.*
[lxxxii] *See, e.g.*, Matthew L.M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 HOUS. L. REV. 701 (2006).
[lxxxiii] *Tribal Early Care and Education Programs: An Overview*, BIPARTISAN POL'Y CTR. (Mar. 2021), https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2021/03/Funding-overview-tribal.pdf.
[lxxxiv] Jessica Bylander, *Meeting the Needs of Aging Native Americans*, HEALTHAFFAIRS (Mar. 8, 2018), https://www.healthaffairs.org/do/10.1377/forefront.20180305.701858/full.
[lxxxv] *See Tribal Nations: An Introduction*, *supra* note XX, at __.
[lxxxvi] *Id.*
[lxxxvii] *See* Naomi Schaefer Riley, *What Can We Learn from Native Americans About a Universal Basic Income?*, INST. FOR FAM. STUD. (Jan. 19, 2017), https://ifstudies.org/blog/what-can-we-learn-from-native-americans-about-a-universal-basic-income (describing a form of universal basic income developed by the Seneca Nation).
[lxxxviii] *See, e.g.*, *Self-Determination*, U.S. DEP'T OF THE INTERIOR: INDIAN AFFS., https://www.bia.gov/regional-offices/great-plains/self-determination (last visited Oct. 1, 2022) (discussing the Indian Self-Determination and Education Assistance Act, which "allowed for Indian tribes to have greater autonomy and to have the

opportunity to assume the responsibility for programs and services administered to them on behalf of the Secretary of the Interior through contractual agreements"); *About Tribal Programs*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.acf.hhs.gov/ofa/programs/tribal/about (last visited Oct. 1, 2022) (discussing tribal administration of welfare programs); *Tribal Nations: An Introduction*, *supra* note XX, at 23–24 (discussing tribal control of, among other things, "education, law enforcement, judicial systems, health care, environmental protection, natural resource management, and the development and maintenance of basic infrastructure such as housing, roads, bridges, sewers, public buildings, telecommunications, broadband and electrical services, and solid waste treatment and disposal.").

[lxxxix] *See* Maura Grogan, Rebecca Morse, & April Youpee-Roll, *Native American Lands and Natural Resource Development*, REVENUE WATCH INST. (2011), https://resourcegovernance.org/sites/default/files/RWI_Native_American_Lands_2011.pdf.

[xc] *See, e.g.*, *Tribal Nations: An Introduction*, *supra* note XX, at __.

[xci] *See, e.g.*, Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL'Y REV. 271 (2001); John Fredericks III, *America's First Nations: The Origins, History and Future of American Indian Sovereignty*, 7 J.L. & POL'Y 347 (1999); *see also supra* note 7 and accompanying text.

[xcii] *See, e.g.*, Fletcher, *supra* note XX, at 53 (citing WILCOMB E. WASHBURN, RED MAN'S LAND--WHITE MAN'S LAW: A STUDY OF THE PAST AND PRESENT STATUS OF THE AMERICAN INDIAN 25-97 (1971)) ("Anyone with even a superficial knowledge of American political theory would have to shake their head at the irony of a group of people subject to the control of a government only through what could charitably be described as acquiescence, and less charitably as violent conquest."); Fredericks, *supra* note XX, at __.

[xciii] *See, e.g.*, *Plains Wars*, BRITANNICA, https://www.britannica.com/event/Plains-Wars (last visited Oct. 1, 2022).

[xciv] *See, e.g.*, ROBERT ANDERSON ET AL., AMERICAN INDIAN LAW: CASES AND COMMENTARY 124-26 (3d ed. 2015); Indian Appropriations Act, Pub. L. No. 41-120, 16 Stat. 544, 566 (1871) (abolishing recognition rights for tribal governments); Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, *supra* note XX, at 1831 (describing the development of federally-run boarding schools on reservations).

[xcv] *See, e.g.*, AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005); 1 MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 377–537 (3d ed. 2011).

[xcvi] U.S. CONST. art. II, § 2.

[xcvii] *See* Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, *supra* note XX, at 1809–15 (explaining how the federal treatymaking and recognition powers were developed in the context of federal Indian affairs).

[xcviii] Act of May 28, 1830, ch. 148, 4 Stat. 411.

[xcix] *See* Sorenson, *supra* note **Error! Bookmark not defined.** ("Just two years following the creation of the Department of the Interior, Congress began creating the reservation system. It did so by allocating funds for reservations in the Indian Appropriation Bill of 1851."); *see also* FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS (1984).

[c] Jean Galbraith, *Prospective Advice and Consent*, 37 YALE J. INT'L L. 247, 258 (2012).

[ci] *See* Spirling, *supra* note **Error! Bookmark not defined.**, at 86 (noting the 367 treaties that were created with Native nations between 1789 and 1889).

[cii] Indian Appropriations Act, Pub. L. No. 41-120, 16 Stat. 544, 566 (1871) ("hereafter 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").

[ciii] Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, *supra* note XX, at 1812 (describing how the "collaborative model of lawmaking born of the treaty power resurfaced" during the twentieth century).

[civ] INST. FOR GOV'T RSCH, THE PROBLEM OF INDIAN ADMINISTRATION (Lewis Meriam ed., Johns Hopkins Press 1928); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.05 (Nell Jessup Newton et al. eds., University of New Mexico Press 1941) (2005) (describing how the Meriam Report brought to public attention the deplorable living conditions of Native people).

[cv] Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, *supra* note XX, at 1812–15.

[cvi] *Id.*

[cvii] Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C.A. §§ 5101–5129 (2012)).
[cviii] *See* Eskridge & Ferejohn, *supra* note XX, at 1216–17, 1260 n.201 (defining "super-statutes" as "quasi-constitutional" laws that "seek[] to establish a new normative or institutional framework" that cements within law and effects broad change and noting the Indian Reorganization Act as a super-statute); *see also* Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, *supra* note XX at 1814.
[cix] 48 Stat. at 984 ("[H]ereafter no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.").
[cx] *Id.* at 987, § 16.
[cxi] *Id.* at 988, § 18 ("This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election called by the Secretary of Interior, shall vote against its application.").
[cxii] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note **Error! Bookmark not defined.**, § 1.07.
[cxiii] *Id.*
[cxiv] *Id.*
[cxv] *See, e.g.*, Indian Child Welfare Act of 1978, 25 U.S.C. § 1902 (declaring that "it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes" which will reflect the "unique values of Indian culture.").
[cxvi] Act of June 18, 1934, Pub. L. No. 73-383, ch. 576, § 12, 48 Stat. 984, 986 (codified as amended at 25 U.S.C. §§ 461–79 (2000)) (instituting a hiring preference for the Bureau of Indian Affairs). For additional discussion, see Steven J. Novak, *The Real Takeover of the BIA: The Preferential Hiring of Indians*, 50 J. ECON. HIST. 639, 640 (1990).
[cxvii] *Cf.* Douglas NeJaime, *Cause Lawyers Inside the State*, 81 FORDHAM L. REV. 649 (2012) (examining the impacts cause lawyers can have in working inside government to harness state power to advance social movement goals and the limitations they face in doing so).
[cxviii] Pub. L. 101-601, 104 Stat. 3048 (codified at 25 U.S.C. § 3001 *et seq.*).
[cxix] *See, e.g.*, Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13,175, 3 C.F.R. 304 (2001); Tribal Consultation, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57,879 (Nov. 5, 2009); Tribal Consultation and Strengthening Nation-to-Nation Relationships, Memorandum for the Heads of Executive Departments and Agencies, 86 Fed. Reg. 7491 (Jan. 21, 2021).
[cxx] *See, e.g.*, S.O. 3403, Joint Secretarial Order on Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of Federal Lands and Waters (2021) (directing co-stewardship of federal lands that are located within or adjacent to reservation land).
[cxxi] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note **Error! Bookmark not defined.**, § 1.03[1] (detailing how certain early federal leaders, such as Secretary of War Henry Knox, demanded respect for tribal property rights and treaty obligations).
[cxxii] *See id.* § 6.04
[cxxiii] *See, e.g.*, Public Law 83-280 (granting certain states criminal jurisdiction over Indians on reservations and allowing civil litigation that had come under tribal or federal court jurisdiction to be handled by state courts); 18 U.S.C. § 3243 (giving Kansas jurisdiction over offenses committed by or against Indians on reservations in Kansas); 25 U.S.C. § 233 (conferring concurrent jurisdiction to tribal and state courts over private civil disputes between members of Indian tribes).
[cxxiv] *See infra* Section II.D. *See also* United States v. Lara, 541 U.S. 193, 219 (2004) (discussing federal plenary power); Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 290–91 (1955) (same); Seminole Tribe v. Florida, 517 U.S. 44, 60 (1996) (same); Cotton Petrol. Corp. v. New Mexico, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs . . . .").
[cxxv] Trade and Intercourse Act of 1790, Pub. L. No. 1-33, 1 Stat. 137 (1790).

[cxxvi] Act of June 30, 1834, ch. 161, 4 Stat. 729; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; Act of Mar. 3, 1799, ch. 46, 1 Stat. 743; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of Mar. 1, 1793, ch. 19, 1 Stat. 329. *See also William Wood, Indians, Tribes, and (Federal) Jurisdiction*, 65 U. KAN. L. REV. 415, 457 (2016) (describing the series of intercourse acts).
[cxxvii] For examples of treaties that contain land negotiations, see Treaty of Peace and Friendship, U.S.-Creeks, art. III, Aug. 7, 1790, 7 Stat. 35; Treaty of Hopewell, U.S.-Cherokees, arts. I & II, Nov. 28, 1785, 7 Stat. 18.
[cxxviii] *See United States v. Cisna*, 25 F. Cas. 422, 423 (C.C.D. Ohio 1835) (interpreting Act March 30, 1802, 2 Stat. 139 and noting that tribes do "not reside within the ordinary jurisdiction of any state.").
[cxxix] *See, e.g.*, *Worcester v. State of Georgia*, 31 U.S. 515 (1832) (ruling that only the United States, and not the individual states, had power to regulate or deal with the Indian nations despite Georgia's claims to the contrary); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (holding a Georgia statute which rescinded an earlier land grant as unconstitutional under the Contract Clause). New York, in particular, openly resisted federal supremacy over Indian affairs and ignored the Trade and Intercourse Acts by engaging in dubious land transactions with Natives. *See, e.g.*, Oneida Indian Nation v. Cnty. of Oneida, 414 U.S. 661 (1974); *see generally* LAURENCE M. HAUPTMAN, CONSPIRACY OF INTERESTS: IROQUOIS DISPOSSESSION AND THE RISE OF NEW YORK STATE 58-97 (1999).
[cxxx] *See* sources cited *supra* note 90.
[cxxxi] *See* U.S. CONST. art. IV, § 3, cl. 2 (granting Congress the "[p]ower to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").
[cxxxii] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW *supra* note XX, § 3.02[5], § 6.01 n.81–83; *see, e.g.*, *United States v. Sandoval*, 231 U.S. 28, 38 (1913) (articulating one of the purposes of the Enabling Act as treating the lands of Pueblo Indians as Indian country); S. REP. NO. 83-699, at 7 (1953) (noting that the enabling acts of Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and Washington contain express disclaimers of state jurisdiction over Indian land within state borders).
[cxxxiii] The body of literature on the relationship between state and tribal governments is particularly rich. *See, e.g.*, Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989); Matthew L.M. Fletcher, *Retiring the "Deadliest Enemies" Model of Tribal-State Relations*, 43 TULSA L. REV. 73 (2007).
[cxxxiv] *Cherokee Nation v. State of Georgia*, 30 U.S. 1 (1831).
[cxxxv] *See* Blackhawk, *supra* note XX, at 1815–26.
[cxxxvi] *See* Fletcher, *supra* note 98.
[cxxxvii] Public Law 83-280.
[cxxxviii] 25 U.S.C. § 2710 (2000).
[cxxxix] For examples of tribal-state agreements, see Fletcher, *supra* note 98, at 82–83.
[cxl] *See supra* note XX and accompanying text.
[cxli] *See, e.g.*, United States v. Lara, 541 U.S. 193, 202 (2004) ("Congress, with this Court's approval, has interpreted the Constitution's 'plenary' grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority").
[cxlii] *See, e.g.*, Maggie McKinley, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131, 1131 (2016) [hereinafter McKinley, *Lobbying and the Petition Clause*].