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I. THE EXECUTIVE-ORDER RESERVATION CONSTITUTIONAL PROBLEM[1]

Federal Indian law constitutional doctrine markedly differs from other, mainstream constitutional law doctrine. Mainstream constitutional law fairly clearly separates Congress' power from the President's power.[2] But, Indian law constitutional doctrine has failed to clearly separate Congress' power from executive and judicial power.[3]

In essence, congressional primacy has evolved in federal Indian law over the past 150 years.[4] For instance, Congress passed the March 3, 1871, Indian Appropriations Act (1871 Act) purporting to bar the President from negotiating treaties and agreements with Indian tribes;[5] the 1885 Major Crimes Act defining federal crimes on Indian land;[6] the 1887 General Allotment (Dawes) Act breaking reservations into distinct lots resulting in

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[1] *See* Frank Pommersheim, *Is There a (Little or Not So Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay*, 5 U. PA. J. CONST. L. 271 (2003). Pommersheim critiqued Supreme Court doctrine in Indian law. *Id.* But, his paper did not examine executive-order reservations and came before *United States v. Lara*, 541 U.S. 193 (2004).

[2] *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 233–83 (3d ed. 2006) [hereinafter CHEMERINSKY, PRINCIPLES & POLICIES]; ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 317–427 (3d ed. 2009) [hereinafter CHEMERINSKY, CONSTITUTIONAL LAW]; GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 357–405 (5th ed. 2005).

[3] *See generally* ROBERT T. ANDERSON ET AL., AMERICAN INDIAN LAW 167–252, 323–91 (2d ed. 2010).

[4] *Id. See generally* CAROLE E. GOLDBERG ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 77–108 (6th ed. 2010); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 25–81 (2002) (detailing the rise of Congress' power in Indian affairs); WADE DAVIES & RICHMOND L. CLOW, AMERICAN INDIAN SOVEREIGNTY AND LAW: AN ANNOTATED BIBLIOGRAPHY 127–29 (2009) (listing references on federal plenary power).

[5] Rev. Stat. § 2079, Act of Mar. 3, 1871, ch. 120, 16 Stat. 566 (codified at 25 U.S.C. § 71).

[6] 18 U.S.C. § 1153 (2012). *See generally* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW 149–50, 182–87 (5th ed. 2009); GOLDBERG ET AL., *supra* note 4, at 25.

Indians losing millions of acres and creating "checkerboard" reservations with vague boundaries;[7] the 1934 Indian Reorganization (Wheeler-Howard) Act repealing the Dawes Act;[8] Public Law 280 granting state criminal jurisdiction in Indian nations;[9] the 1968 Indian Civil Rights Act granting statutory rights like, but not the same as, those in the Bill of Rights and in the Fourteenth Amendment to tribe members;[10] and the Indian Gaming Regulatory Act, 25 U.S.C. § 2702, regulating Indian gaming.[11]

The Supreme Court has almost always upheld these acts of Congress. For instance, the Court has upheld denying state criminal jurisdiction on Indian land;[12] the Major Crimes Act extending federal jurisdiction over many felonies on Indian land;[13] Congress' power to abrogate Indian treaties;[14] Congress' power to recognize tribes;[15] and Congress' power to define tribal sovereignty.[16]

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[7] General Allotment Act, ch. 119, 24 Stat. 388 (Feb. 8, 1887). *See generally* CANBY, *supra* note 6, at 21–24; GOLDBERG ET AL., *supra* note 4, at 25–30.

[8] *See generally* CANBY, *supra* note 6, at 25–26, 66; GOLDBERG ET AL., *supra* note 4 at 30–33; GELYA FRANK & CAROLE GOLDBERG, DEFYING THE ODDS: THE TULE RIVER TRIBE'S STRUGGLE FOR SOVEREIGNTY IN THREE CENTURIES 181–220 (2010) (providing context for the Indian Reorganization Act's context and results). The Tule River and Hoopa Valley Reservations are both in California. *Id.* at 189. Executive orders formed the Tule River Reservation. *Id.* at 231–34.

[9] Act of Aug. 15, 1853, ch. 505, 67 Stat. 588, (codified in part at 218 U.S.C. § 1360 (2012)).

[10] 25 U.S.C. §§ 1301–1303 (2012). *See generally* CANBY, *supra* note 6, at 30–31, 152, 394–408; GOLDBERG ET AL., *supra* note 4, at 36–37.

[11] 25 U.S.C. §§ 2701–2721 (2012). *See generally* CANBY, *supra* note 6, at 333, 337–46; GOLDBERG ET AL., *supra* note 4, at 40.

[12] Worcester v. Georgia, 31 U.S. 515 (1832) (Marshall, C.J.). *See generally* CANBY, *supra* note 6, at 18, 93–101.

[13] United States v. Kagama, 118 U.S. 375 (1886) (Miller, J.). *See generally* CANBY, *supra* note 6, at 38, 150.

[14] Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). *See generally* CANBY, *supra* note 6, at 39, 130–37.

[15] United States v. Sandoval, 231 U.S. 28 (1913).

[16] United States v. Wheeler, 435 U.S. 313, 323 (1978); *see also* United States v. Lara, 541 U.S. 193 (2004). *See generally* CANBY, *supra* note 6, at 76–144 (tribal sovereignty).

The Supreme Court's case law undergirding Congress' primacy has been strongly questioned.[17] In particular, Justice Thomas has criticized the Supreme Court's separation of powers doctrine in federal Indian affairs.[18] First, Justice Thomas contrasted mainstream constitutional law with Indian law.[19] He stressed neither the Treaty Clause[20] nor the Indian Commerce Clause[21] empowers Congress to decide Indian tribal sovereignty's scope.[22] Justice Thomas also questioned Congress' power to usurp the President's treaty-making power through the 1871 Act.[23] Instead, the President has innate power to recognize governments and to make treaties.[24] Second, Thomas stressed Indian law doctrine's logical conflict—Indian nations have sovereignty, but Congress can change that sovereignty. He thus reasoned the Court should either overrule *United States v. Wheeler*,[25] which confirmed an Indian nation's sovereignty to try and to convict its members independent of federal criminal law, or curtail Congress' power over Indian sovereignty.[26]

Returning federal power in Indian affairs from Congress to the President could have dramatic effects on Indian nations, especially regarding

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[17] *Lara*, 541 U.S. at 215 (Thomas, J., concurring); Cleveland, *supra* note 4, (questioning the constitutionality of the Major Crimes Act, 18 U.S.C. § 1153, and the Indian Civil Rights Act, 25 U.S.C. §§ 1301–1303, under the Indian Commerce Clause in light of "vertical" separation of powers cases United States v. Lopez, 514 U.S. 549 (1995) (striking the Violence Against Women Act) and Morrison v. Olson, 529 U.S. 598 (2000) (striking the Gun-Free School Zones Act)). This paper considers "horizontal" separation of powers between the President and Congress.

[18] *Lara*, 541 U.S. at 215.

[19] *Id.*

[20] U.S. CONST. art. II, § 2, cl. 2.

[21] U.S. CONST. art. I, § 8, cl. 3.

[22] *Lara*, 541 U.S. at 215.

[23] *Id.* at 218 (citing Act of Mar. 3, 1871, Rev. Stat. § 2079, 16 Stat. 566 (codified at 25 U.S.C. § 71)); *Id.* (citing U.S. CONST. art. II § 2, cl. 2, § 3; United States v. Pink, 315 U.S. 203, 228–30 (1942)).

[24] *See id.* at 214–15.

[25] United States v. Wheeler, 435 U.S. 313 (1978).

[26] *Lara*, 541 U.S. at 214–227.

executive-order reservations. After the 1871 Act banning new Indian treaties, active combat waged on between the United States and many Indian nations.[27] As battles and wars ended, the War Department bargained for, or imposed, Indian reservation partition plans.[28] The President then approved and implemented the plans through executive orders.[29] In this way, presidents created millions of acres of Indian reservations before Congress banned these executive orders in 1919.[30]

But, Congress' supremacy in Indian affairs and failure to approve the reservation land granted by executive orders have left Indian nations vulnerable to government takings of millions of acres without compensation. The Federal Circuit's *Karuk Tribe of California v. Ammon* held executive orders forming reservation land and a tribe's occupation of that land for 100 years failed to make a compensable right unless Congress expressly approved.[31] In arguing for just compensation for taking reservation land, Judge Newman's dissent stressed that the Fifth Amendment does not require title to land for compensation and that Congress wanted the executive-order reservations to be equal to reservations formed by treaties.[32]

This paper looks at the effects of realigning the separation of powers between Congress and the President in Indian law to more resemble

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[27] *E.g.*, ANDERSON ET AL., *supra* note 3, at 231–32; DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 266–68 (5th ed. 2005). *See generally* FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 329–60 (1994).

[28] PRUCHA, *supra* note 27, at 329–60. *See generally* CANBY, *supra* note 6, at 19–21.

[29] CANBY, *supra* note 6, at 19–21.

[30] *Id. See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 1–15 (Nell Jessup Newton et al. eds., 2009) [hereinafter COHEN].

[31] Karuk Tribe of Cal. v. Ammon, 209 F.3d 1366, 1374, 1375, 1380 (Fed. Cir. 2000) (Rader, J.) (citing Hynes v. Grimes Packing Co., 33 U.S. 86, 103 (1949); Sioux Tribe of Indians v. United States, 316 U.S. 317, 325 (1942)). *See generally* CANBY, *supra* note 6, at 420–21.

[32] *Karuk Tribe of Cal.*, 209 F.3d at 1382–84 (Newman, J., dissenting).

mainstream separation of powers. Section II reviews current doctrine on power separation between Congress and the President on mainstream issues and on federal Indian law. Section III looks at the effects of letting Indian sovereignty more closely match foreign-nation or domestic-state sovereignty under current mainstream separation of powers doctrine.

II. SEPARATION OF POWERS DOCTRINE

This paper focuses on "horizontal" separation of powers between the President and Congress. Supreme Court case law sharply distinguishes between mainstream and Indian-affairs separation of powers.

Section A describes mainstream separation of powers doctrine. The president has maximum power in foreign affairs. That power includes negotiating treaties (ratified by the Senate) and executive agreements with foreign nations. Presidents also may unilaterally abrogate treaties, and only the President can recognize governments. In contrast, in domestic affairs, the President has much less power.

Section B describes Indian law separation of powers. Indian law separation of powers between the President and Congress has evolved differently. At first, the President treated Indian tribes as foreign nations. But eventually, in 1871, Congress sharply curtailed that power by banning the President from entering into new treaties with Indian tribes. Even so, over the past fifty years presidents have supported Indian self-determination. Presidents may not abrogate Indian treaties, but Congress can.

As noted, executive orders have created millions of acres of Indian reservations.[33] Under current doctrine, the President has no innate power

[33] CANBY, *supra* note 6, at 19–21; COHEN, *supra* note 30, §§ 15.04, 15.09[d][iii].

over Indian land.[34] In contrast, Congress has almost complete power to reshape Indian land.[35]

A. Mainstream Separation of Powers Between the President and Congress

The relevant areas of mainstream constitutional doctrine relate to foreign and domestic affairs. As will be discussed in section III, whether Indian affairs mimic, or should mimic, foreign or domestic affairs has been hotly debated.

1. The President's Power

a) Foreign Power[36]

This section very briefly reviews four foreign affairs powers. First, the Constitution grants the President the power to negotiate treaties ratified by the Senate.[37] Second, along with treaties, the President can make executive agreements with other governments, which require no Senate ratification.[38] Third, implied by the President's power to negotiate with other governments is the power to recognize them.[39] Fourth, whether a pact is made by treaty or executive agreement, the President may abrogate it.[40]

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[34] *Karuk Tribe of Cal.*, 209 F.3d 1366.
[35] *Id.*
[36] *See generally* CHEMERINSKY, PRINCIPLES & POLICIES, *supra* note 2, at 366–73; CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 2, at 369–81; STONE ET AL., *supra* note 2.
[37] U.S. CONST. art. II, § 2.
[38] CHEMERINSKY, PRINCIPLES & POLICIES, *supra* note 2, at 369.
[39] *See, e.g.*, Goldwater v. Carter, 444 U.S. 996, 996 (1979) (Powell, J., concurring) (discussing the context of abrogating a treaty with Taiwan by President Carter's recognition of the People's Republic of China); *id.* at 1006–07 (Brennan, J., dissenting) (noting the President's "well-established authority to recognize, and withdraw recognition from, foreign governments").
[40] *Id.* at 996 (Powell, J., concurring).

(1) Treaties Ratified by the Senate

Presidents have the power to make treaties with foreign nations.[41] The Court has placed very few limits on this power.[42] Even so, treaties cannot conflict with constitutional provisions.[43] Ratified treaty provisions become "the supreme Law of the Land," on par with constitutional provisions,[44] but, the Tenth Amendment and state sovereignty do not trump treaties.[45]

(2) Executive Agreements Without Senate Ratification

Unlike treaties proper, executive agreements are harder to square with the Constitution, as no constitutional provision expressly binds the United States to an agreement with another nation without Senate ratification. Even so, the Supreme Court has affirmed the President's power to make executive agreements between the United States and foreign governments without either Senate or House approval.[46] Classic cases involving Russian insurance companies, nationalized during the Soviet revolution, upheld executive agreements as required to be implemented in state law.[47] Later, the Court upheld executive agreements, which exchanged American hostages in Iran for the unfreezing of Iranian assets in the United States[48] and which enforced international insurance settlements.[49] Despite executive agreements' innately constitutionally suspect nature, the Court has never voided one.[50]

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[41] U.S. CONST. art. II, § 2.
[42] Geofroy v. Riggs, 133 U.S. 258, 266–67 (1890).
[43] Reid v. Covert, 354 U.S. 1 (1957).
[44] U.S. CONST. art. VI.
[45] Missouri v. Holland, 252 U.S. 415 (1920).
[46] CHEMERINSKY, PRINCIPLES & POLICIES, *supra* note 2, at 369.
[47] United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).
[48] Dames & Moore v. Regan, 453 U.S. 654 (1981).
[49] Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003).
[50] CHEMERINSKY, PRINCIPLES & POLICIES, *supra* note 2, at 368–69.

(3) Recognizing Governments

The President's power to "receive Ambassadors and other public Ministers"[51] impliedly includes the power to recognize governments.[52] In fact, the President's power to negotiate treaties and executive agreements impliedly includes the power to recognize governments.[53]

(4) Abrogating Treaties

The Constitution does not mention presidential abrogation of agreements with other nations.[54] In fact, it does not mention abrogating ratified treaties, unratified treaties, or executive agreements.[55] Even so, in hearing a first-impression case, by refusing to rule based on justiciability and ripeness,[56] the Court in essence upheld President Carter's abrogation of the Sino-American Mutual Defense Treaty.[57] Thus, presidents can abrogate treaties.

b) Domestic Power

Unlike foreign affairs, the executive branch shares much of its power with the other branches in domestic affairs. Normally, the core domestic presidential power analysis weighs whether the President has acted with or

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[51] U.S. CONST. art. II, § 3.
[52] *See, e.g.*, Goldwater v. Carter, 444 U.S. 996, 996 (1979) (Powell, J., concurring) (discussing the context of abrogating a treaty with Taiwan by President Carter's recognition of the People's Republic of China); *id.* at 1006–07 (Brennan, J., dissenting) (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964); Baker v. Carr, 369 U.S. 186, 212 (1962); United States v. Pink, 315 U.S. 203, 228–30 (1942)) ("Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes."); STONE ET AL., *supra* note 2, at 128 n.2 (summing up *Goldwater*'s history).
[53] *Goldwater*, 444 U.S. at 996 (Powell, J., concurring); *id.* at 1006–07 (Brennan, J., dissenting).
[54] *Id.* at 1003 (Rehnquist, J., concurring).
[55] *See id.* at 996 (Powell, J., concurring).
[56] *Id.* at 1002 (Rehnquist, J., concurring) (justiciability); *id* at 996 (Powell, J., concurring) (ripeness).
[57] *Id.* at 996 (Powell, J., concurring); STONE ET AL., *supra* note 2, at 128 n.2 (summing up *Goldwater*'s history).

against Congress' approval, or in an area where Congress has not expressed its will.[58] Presidential power is strongest when acting with Congress' approval[59] and weakest when acting against Congress' approval.[60] When Congress has not expressed its will on an issue, the President relies only on innate constitutional power.[61] But, Congress' long-standing acceptance enhances presidential power in an area.[62] These approaches imply some innate domestic presidential power. Other approaches positing the President lacks innate domestic power now seem unworkable, as presidents can domestically enforce executive agreements with other nations.[63]

2. Congress' Power

Though the Constitution lists many congressional powers, only three readily relate to the analysis here. First, the Senate ratifies treaties by a two-thirds vote.[64] Second, to give a treaty practical domestic effect, Congress normally passes statutes compatible with the ratified treaty.[65] But, some treaties' wording make their domestic effects clear, and thus self-executing without congressional statutes.[66] Third, the Indian Commerce Clause lets Congress "regulate Commerce with foreign nations, and among the several

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[58] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring).
[59] *Id.*
[60] *Id.* at 637.
[61] *Id.*
[62] *Id.* at 610–11 (Frankfurter, J., concurring).
[63] *Compare Steel Seizure*, 343 U.S. at 585, 587–88 (Black, J.) (holding that the President lacks innate domestic power), *with* Dames & Moore v. Regan, 453 U.S. 654 (1981) (upholding domestically enforcing an executive agreement exchanging hostages for assets), *and* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) (upholding domestically enforcing an executive agreement on insurance settlements).
[64] U.S. CONST. art. II, § 2.
[65] Medellin v. Texas, 552 U.S. 491, 505 (2008) (plurality) (Roberts, C.J.) (quoting Whitney v. Robertson, 124 U.S. 190, 194 (1888)).
[66] *Id.* (quoting Foster v. Neilson, 27 U.S. 253 (2 Pet. 253) (1829) (Marshall, C.J.)).

States, and with the Indian Tribes."[67] In practice, the Court has placed almost no limits on Congress' Commerce Clause power.[68]

B. Indian Law's Separation of Powers Between the President and Congress

1. Treaty Power

a) The President's Original Power

Before the Constitution, Europeans treated Indian nations as foreign governments. For instance, Britain and France made treaties with Indians before American independence.[69] Under the Articles of Confederation, both the states and the federal government signed treaties with Indian nations.[70]

The Constitution changed these practices. James Madison and John Jay knew well the Articles of Confederation's ambiguous language letting both state and federal powers negotiate with Indians.[71] So, Madison proposed the Constitution's less ambiguous Indian Commerce Clause to grant power to the federal government to negotiate with tribes.[72]

After the Constitution was ratified, President George Washington sent the 1789 Treaties of Fort Harmar and the 1790 New York Creek Treaty, negotiated under the Articles of Confederation, to the Senate for approval.[73] Once the Senate resolved to "execute and enjoin" one Indian treaty, President Washington urged it to treat Indian nation treaties as equal to European-nation treaties.[74] The Senate's resulting ratification of the treaties

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[67] U.S. CONST. art. I, § 8, cl. 3.
[68] *See* CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 2, at 242–73.
[69] *E.g.*, ANDERSON ET AL., *supra* note 3, at 28.
[70] *Id.* at 30–31.
[71] *Id.* at 31 (quoting JAMES MADISON, THE FEDERALIST NO. 42, at 284–285 (James Madison) (J.E. Cook ed., 1961)); JOHN JAY, THE FEDERALIST NO. 3, at 96 (John Jay) (Isaak Kramnick ed., 1987).
[72] *E.g.*, ANDERSON ET AL., *supra* note 3, at 31.
[73] COHEN, *supra* note 30, at § 1.103[2]; PRUCHA, *supra* note 27, at 70–79.
[74] COHEN, *supra* note 30, at § 1.103[2]; PRUCHA, *supra* note 27, at 71–72.

started the federal government's recognition of Indian nations as equal to European foreign nations.[75]

This treaty-making pattern by the secretaries of war, state, and interior lasted for decades.[76] For instance, Secretary of War Henry Knox[77] and Secretary of State Thomas Jefferson[78] under President Washington, and, later, Secretary of War James McHenry under President Adams,[79] arranged treaties with Indian nations. Into the nineteenth century, Secretary of War Henry Dearborn under President Jefferson continued the treaty-making process with scant change,[80] as did Secretary of War William Eustis under President James Madison.[81] As late as 1830, President Andrew Jackson publicly recognized Indian nations as self-ruling and analogized them with foreign nations.[82]

b) Congress' Encroachment on the President's Treaty Power[83]

By the Civil War's end, this treaty-making pattern had greatly changed.[84] Though Congress had passed almost no laws directly regulating tribes under the Indian Commerce Clause,[85] the March 29, 1867 Act repealed "all laws allowing the President, the secretary of the interior, or the commissioner of Indian affairs to enter into treaties with any Indian tribes."[86] Within four

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[75] COHEN, *supra* note 30, at § 1.103[2]; PRUCHA, *supra* note 27, at 72–73.
[76] PRUCHA, *supra* note 27, at 209; GOLDBERG ET AL., *supra* note 4, at 78–79.
[77] PRUCHA, *supra* note 27, at 79–102.
[78] COHEN, *supra* note 30, at § 1.103[2]; PRUCHA, *supra* note 27, at 93–94.
[79] PRUCHA, *supra* note 27, at 88.
[80] *Id.* at 103, 105–07, 113–14, 117–19, 123–26.
[81] *Id.* at 121, 127–28.
[82] COHEN, *supra* note 30, at § 1.103[4][b] (quoting Andrew Jackson, the Annual Report of the President to Congress (Dec. 7, 1830)).
[83] *See generally* Cleveland, *supra* note 4 (detailing Congress' power rise in Indian affairs).
[84] COHEN, *supra* note 30, at § 1.103[9].
[85] GOLDBERG ET AL., *supra* note 4, at 78 (citing Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113 (2002)).
[86] *Id.* (quoting Act of Mar. 29, 1869, 40 Cong. ch. 13, 15 Stat. 7).

months, Congress repealed the Act.[87] But, four years later, Congress passed the March 3, 1871, Indian Appropriations Act (1871 Act) mandating that "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."[88]

2. Recognizing Indian Nations/Tribes

a) Modern Presidents' Policies Pseudo-Recognizing Indian Nations and Promoting Indian Self-Rule

Despite Congress' ban on formally recognizing Indian nations and tribes, presidents have recognized Indian nations and tribes as separate sovereigns.[89] President Franklin D. Roosevelt began a shift away from a colonial approach on Indian nations toward self-rule.[90] But, during the Truman and Eisenhower administrations, the Termination Era policies wiped out many tribes in trying to blend Indians into the United States.[91]

Even so, the 1960s' presidents furthered Indian-nation self-rule. In 1961, following campaign promises to protect Indian land and promote Indian economic growth, President John F. Kennedy called the American Indian Chicago Conference for Indian leaders to discuss Indians' status and

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[87] *Id.* (citing Act of July 20, 1867, 40 Cong. ch. 34, 15 Stat. 18).
[88] *Id.* (quoting Act of Mar. 3, 1871, § 1, 41 Cong. ch. 120; 16 Stat. 544 (codified at 25 U.S.C. § 71). *See generally* PRUCHA, *supra* note 27, at 287–310 (describing events leading to the 1871 Act banning treaty-making with Indians).
[89] Dale Beck Furnish, *Sorting Out Civil Jurisdiction in Indian Country After Plains Commerce Bank: State Courts and the Judicial Sovereignty of the Navajo Nation*, 33 AM. INDIAN L. REV. 385, 387 n.11 (2008).
[90] Bruce E. Johansen, *Native American Self-Government and Its Impact on Democracy's Development*, in NATIVE AMERICANS 21, 26–27 (Donald A. Grinde, Jr. ed., 2002); GOLDBERG ET AL., *supra* note 4, at 30–31; ANDERSON ET AL., *supra* note 3, at 132.
[91] ANDERSON ET AL., *supra* note 3, at 142–51; GOLDBERG ET AL., *supra* note 4, at 33–35.

future.[92] After Kennedy's death in 1963, President Lyndon B. Johnson indirectly strengthened Indian self-rule by stressing local poverty-program control.[93] Also, the 1964 Equal Employment Opportunity Act granted Indian nations the power to run pilot school, college, and social projects.[94]

In 1970, President Richard M. Nixon opened a new Indian self-rule era.[95] He rejected termination policies in favor of letting Indian nations manage federal programs.[96] In essence, Nixon sought to extend Johnson's approach beyond the War on Poverty to many more federal programs. As a first step, he proposed letting tribes choose to "take over the control or operation of Federally funded and administered programs in the Department of Interior and the Department of Health, Education, and Welfare."[97] President Nixon based his policy on moral and legal concepts implied by the treaty relationship between the United States and Indian nations.[98]

Unlike Nixon's approach, in the 1980s President Ronald Reagan pushed self-rule based on economics.[99] As part of his general push to prune the federal government, President Reagan stressed tribal government self-sufficiency through economic growth and local tribal taxes.[100] Reagan also formed the Commission on Indian Reservation Economies.[101] The

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[92] ANDERSON ET AL., *supra* note 3, at 152; Furnish, *supra* note 89, at 27; GOLDBERG ET AL., *supra* note 5, at 34–35.
[93] ANDERSON ET AL., *supra* note 3, at 152.
[94] *Id.*
[95] Richard M. Nixon, Pres., Special Message on Indian Affairs, Jul. 8, 1970 *as reprinted in* ANDERSON ET AL., *supra* note 3, at 153–55; GOLDBERG ET AL., *supra* note 4, at 37.
[96] Nixon, *supra* note 95.
[97] *Id.* at 155.
[98] *Id.* at 153–54.
[99] GOLDBERG ET AL., *supra* note 4, at 39–40.
[100] *Id.* (quoting 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN, 1983, at 96, 97 (1984)).
[101] *Id.* at 40.

Commission's 1984 report stressed privatizing reservation economic growth by placing it in the hands of private Indian firms.[102]

Continuing this modern presidential policy recognizing tribal rule, in the 1990s President William Jefferson Clinton told executive departments to interact with tribes on government-to-government footing, thus recognizing tribal sovereignty.[103] President Clinton also met with many tribal leaders on government-to-government footing.[104] Very late in his presidency, Clinton also urged administrative changes that would recognize tribes.[105]

On taking office in 2001, President George W. Bush withdrew President Clinton's tribe-recognition proposals.[106] But in 2002, while proclaiming Native American Heritage Month, President Bush announced that he would continue Clinton's policy of recognizing tribal governments.[107]

President Barack Obama assumed office in 2009 after campaign commitments to rebuild Indian nations.[108] President Obama has restored government-to-government meetings with Indian nations.[109]

b) Congress' Recognition of Indian Nations/Tribes

Unlike the United States' recognition of foreign nations, Congress has detailed how the federal government will recognize tribes.[110] By statute, "'Indian tribe' means any Indian tribe, band, nation, or other organized group or community . . . which is recognized as eligible for the special

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[102] *Id*.
[103] Furnish, *supra* note 89, at 387 n.11 (quoting Presidential Memorandum, 59 Fed. Reg. 22,951 (May 4, 1994); citing Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000)); *see also* GOLDBERG ET AL., *supra* note 4, at 41.
[104] GOLDBERG ET AL., *supra* note 4, at 41.
[105] *Id.* at 42.
[106] *Id.*
[107] Furnish, *supra* note 89, at 387 n.11 (citing Proclamation No. 7620, 67 Fed. Reg. 67,773 (Nov. 6, 2002)).
[108] GOLDBERG ET AL., *supra* note 4, at 42.
[109] *Id.*
[110] *See generally* ANDERSON ET AL., *supra* note 3, at 253–74.

programs and services provided by the United States to Indians because of their status as Indians."[111] In practice, Congress has assigned recognition to the Bureau of Indian Affairs by applying the Mandatory Criteria for Federal Acknowledgement.[112]

3. Treaty Abrogation[113]

a) Presidential Treaty Abrogation

As *Goldwater v. Carter*, decided in 1979, seems to have been a first-impression case,[114] presidents seem to have not independently abrogated foreign-nation treaties without Congress' approval before the 1871 Act. In contrast, President Zachary Taylor's February 6, 1850, executive order purported to end Chippewa usufructuary, hunting and fishing, treaty rights.[115] In 1999, relying mainly on *Steel Seizure*, the Court voided Taylor's executive order due to a lack of Congress' authorization.[116] Thus, though the President can independently abrogate a treaty with a *foreign* nation,[117] the President cannot abrogate a treaty with an *Indian* nation without Congress' approval.[118]

The Court's rulings on Indian law treaties stem partly from traditional canons construing treaties to favor Indians:

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[111] *Id.* at 253 (quoting 25 U.S.C. § 450b(e) (2012)); *accord* 1871 Act of Mar. 3, 1871, ch. 120, 16 Stat. 566 (banning federal government recognition of Indian nations without Congress' approval).
[112] 25 C.F.R. § 83.7; ANDERSON ET AL., *supra* note 3, at 272–73.
[113] *See generally* CANBY, *supra* note 6, at 130–37.
[114] *See* Goldwater v. Carter, 444 U.S. 996, 1003 (1979) (Rehnquist, J., concurring).
[115] Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 172, 175 (1999).
[116] *Id.* at 188–94 (mainly relying on Youngstown Sheet & Tube v. Sawyer (*Steel Seizure*), 343 U.S. 579, 585 (1952) (main opinion) (Black, J.)).
[117] *Goldwater*, 444 U.S. at 996 (Powell, J., concurring).
[118] *Mille Lacs Band*, 526 U.S. at 188–94 (voiding an 1850 executive order purporting to abrogate hunting and fishing treaty rights mainly relying on *Steel Seizure*, 343 U.S. at 585 (main opinion) (Black, J.)).

> The basic Indian law canons of construction require that treaties, agreements, statutes and executive orders be liberally construed in favor of the Indians; all ambiguities are to be resolved in favor of the Indians; in addition, treaties and agreements are to be construed as the Indians would have understood them; and tribal property rights and sovereignty are preserved unless Congress's (sic) intent to the contrary is clear and unambiguous.[119]

Treaties are like contracts between sovereigns.[120] In fact, Chief Justice John Marshall explained applying special construction canons to Indian treaties by analogy with adhesion contracts.[121] Though the cannons' force has wavered, the courts still apply them to interpret treaties, statutes, executive orders, and administrative rules.[122] The Court has implied the canons to preserve Indian nation sovereignty absent Congress' clear intent.[123]

b) Congress' Treaty Abrogation[124]

Ratified treaties may or may not need statutes to implement them. When "treaty stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect."[125] But, a treaty is

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[119] ANDERSON ET AL., *supra* note 3, at 172 (quoting COHEN, *supra* note 30, § 2.02[1]).
[120] GOLDBERG ET AL., *supra* note 4, at 9.
[121] ANDERSON ET AL., *supra* note 3, at 172 (citing Worcester v. Georgia, 31 U.S. 515 (1832)); *see also* PRUCHA, *supra* note 27, at 233 (discussing treaties as contracts, with the United States as the much more powerful party); *id.* at 440 (quoting communication from Comm'r of Indian Affairs Luke Lea to A.H.H. Stuart regarding Fort Laramie Treaty of 1851 (May 29, 1852)).
[122] GOLDBERG ET AL., *supra* note 4, at 202–24 (discussing canon application history and modern case law overview); CANBY, *supra* note 6, at 122–30 (discussing treaty-construction history since 1900).
[123] GOLDBERG ET AL., *supra* note 4, at 219 (quoting Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978)).
[124] *See generally* ANDERSON ET AL., *supra* note 3, at 118–25, 175–85 (providing case excerpts on congressional treaty abrogation in federal Indian law).
[125] Medellin v. Texas, 552 U.S. 491, 505 (2008) (plurality opinion) (Roberts, C.J.) (quoting Whitney v. Robertson, 124 U.S. 190, 194 (1888)).

"'equivalent to an act of the legislature' and hence self-executing, when it 'operates of itself without the aid of any legislative provision.'"[126]

Thus, Congress can abrogate a treaty.[127] First, Congress impliedly abrogates a treaty when it fails to pass laws putting a non-self-executing treaty into effect.[128] Second, when Congress expressly resolves to refuse to implement a treaty or passes a statute directly against a treaty provision, Congress expressly abrogates a treaty.[129]

By analogy with foreign nations,[130] Congress can abrogate treaties with Indian nations.[131] Congress began abrogating Indian treaties before the 1871 Act, which claimed to end *all* Indian treaty-making.[132]

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[126] *Id.* (quoting Foster v. Neilson, 27 U.S. 253, 314 (2 Pet. 253) (1829) (Marshall, C.J.)).
[127] Chae Chan Ping v. United States (*Chinese Exclusion Case*), 130 U.S. 581, 600–02 (1889).
[128] *See Whitney*, 124 U.S. at 194.
[129] *Id.*
[130] *Chinese Exclusion Case*, 130 U.S. at 600–02.
[131] Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903) (citing *Chinese Exclusion Case*, 130 U.S. at 600; Thomas v. Gay, 169 U.S. 264, 270 (1898); Ward v. Race Horse, 163 U.S. 504, 511 (1896); Spalding v. Chandler, 160 U.S. 394, 405 (1896); Mo., Kan. & Tex. Ry. v. Roberts, 152 U.S. 114, 117 (1894); The Cherokee Tobacco, 78 U.S. 616 (1870), *sub nom.* 207 Half Pound Papers of Smoking Tobacco v. United States, 78 U.S. 616) (citing *Chinese Exclusion Case*, 130 U.S. at 600; *Thomas*, 169 U.S. at 270; *Ward*, 163 U.S. at 511; *Spalding*, 160 U.S. at 405; *Roberts*, 152 U.S. at 117; *Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, *sub nom. 207 Half Pound Papers of Smoking Tobacco*, 20 L. Ed. 227)) (analogizing treaties with Indians to treaties with foreign nations to explain Congress' power to abrogate an 1867 treaty with the Kiowa, Comanche, and Apache Tribes).
[132] COHEN, *supra* note 30, § 1.03[7], n.315 (citing ROY W. MEYER, HISTORY OF THE SANTEE SIOUX: UNITED STATES INDIAN LAW ON TRIAL 141 (Rev. ed. 1993)).

4. Removing or Reallocating Reservation Land Including Executive-Order Reservations—*Karuk Tribe of California v. Ammon*[133]

Normally, Indian tribes and their members do not possess title to reservation land.[134] Instead, they only have occupancy rights.[135]

a) The President's Power

Presidents began reserving land for Indians at least as early as 1855.[136] After the 1871 Act claiming to end treaty-making, presidents greatly sped up issuing executive orders reserving land for Indian nations.[137] Mostly, the Supreme Court upheld these set-asides.[138] In particular, the Court upheld a president's withdrawal of oil and gas deposits from public land based on Congress' implied acquiescence shown in the face of presidential formation of Indian reservations by executive orders.[139] Congress finally banned

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[133] Karuk Tribe of Cal. v. Ammon, 209 F.3d 1366 (Fed. Cir. 2000) (Rader, J.). *See generally* ANDERSON ET AL., *supra* note 3, at 212–21 (providing case excerpts related to Indian title extinguishment by the US government); John W. Ragsdale, Jr., *The Chiricahua Apaches and the Assimilation Movement, 1865–1886: A Historical Examination*, 30 AM. INDIAN L. REV. 291, 316–20 (2005–06) (summarizing the history of executive actions reclaiming reservation land and executive orders creating reservations, particularly with regard to the Apache).

[134] *See generally* CONFERENCE OF W. ATT'YS GEN., AMERICAN INDIAN LAW DESKBOOK 79–97 (Larry Long & Clay Smith eds., 4th ed. 2008).

[135] *Karuk Tribe of Cal.*, 209 F.3d at 1366, 1373–74.

[136] PRUCHA, *supra* note 27, at 330; GETCHES ET AL., *supra* note 27, at 266 n.3.

[137] PRUCHA, *supra* note 27, at 331.

[138] *Id.* at 330; Grisar v. McDowell, 73 U.S. 363, 381 (1867).

> [F]rom an early period in the history of the government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses. The authority of the President in this respect is recognized in numerous acts of Congress.

Id.; *see also* PRUCHA, *supra* note 27, at 333 (quoting Spalding v. Chandler, 160 U.S. 394 (1896)).

[139] United States v. Midwest Oil Co., 236 U.S. 459, 471–72 (1915) (citing *Grisar*, 73 U.S. (6 Wall.) at 381, 474–75, 481–83). *Cf. Karuk Tribe of Cal.*, 209 F.3d at 1370, 1374. As noted below, the Federal Circuit rejected a longstanding argument that the lawmaking

presidents from reserving land for Indians by executive orders in 1919.[140] Yet even after the ban, courts upheld presidential power to set aside land for Indians due to "longstanding Congressional and public acquiescence."[141]

Under current Supreme Court doctrine, presidents have no innate power over Indian land. Since Congress' 1919 Act banning new executive-order reservations, presidents cannot reserve land for Indians without Congress' prior approval.[142] Presidents also have "no authority to convey any interest in public lands without a clear and definite delegation in an Act of Congress."[143] And, absent Congress' prior approval, presidents may not shrink, abolish, or reallocate any reservation land, even land reserved by executive orders.[144]

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history of the 1927 Indian Mineral Leasing Act, 25 U.S.C. §§ 398a–398e (1994), acknowledged Indian title to executive-order reservation land. *Id.* at 1379 (citing United States v. Jim, 409 U.S. 80, 93 (1972); Sioux Tribe of Indians v. United States, 316 U.S. 317, 330–31 (1942); United States v. S. Pac. Transp. Co., 543 F.2d 656, 687 (9th Cir. 1976)).

[140] GETCHES ET AL., *supra* note 27, at 266 n.3 (citing 43 U.S.C.A. § 150).

[141] PRUCHA, *supra* note 27, at 329 (citing CHARLES J. KAPPLER, INDIAN AFFAIRS LAWS AND TREATIES 3: 692–95 (1913) (citing the Memorandum Regarding the Power of the President to Set Aside by Proclamation or Executive Order Public Lands for Indian Reservations and Other Public Purposes, and the Right of the President to Revoke Such Order), 4: 1056–64 (Letter from Harlan F. Stone, Att'y Gen., to Hubert Work, Secretary of the Interior, Executive Order Reservations (May 27, 1924)); Opinion by the Solicitor of the Department of the Interior as to the Extent or Character of Title Acquired by Indians in Lands Withdrawn for Their Benefit by Executive Order (Mar. 6, 1926)) (1904–41); CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 65–57 (1987)).

[142] COHEN, *supra* note 30, at § 15.04[4] ("no public lands of the United States shall be withdrawn by Executive Order, proclamation, or otherwise, for or as an Indian reservation except by an act of Congress" (quoting Act of June 30, 1919, ch 4§ 27, 41 Stat. 3 §27)).

[143] *Karuk Tribe of Cal.*, 209 F.3d at 1374 (Rader, J.) (citing *Sioux Tribe of Indians*, 316 U.S. at 325).

[144] COHEN, *supra* note 30, at § 15.04[4] n.135 ("[C]hanges in the boundaries of reservations created by Executive order . . . for the use and occupation of Indians shall not be made except by Act of Congress." (quoting 25 U.S.C. § 398d)).

b) Congress' Power

In sharp contrast to the President's power, the Court has held that Congress has almost limitless power to literally shape Indian land's parameters. Congress may abrogate treaties related to reservation land,[145] remove Indian land,[146] and reallocate land among Indian nations.[147]

And, Congress may waive federal government sovereign immunity, letting land takings be compensable under the Fifth Amendment's Takings Clause.[148] Cohen thinks Congress' Indian land takings, except land briefly added to reservations,[149] are subject to Fifth Amendment just compensation.[150] But, this view sums up Congress' modern *political* decisions, *not a Constitutional restriction* under Supreme Court case law.[151]

c) Reallocating Executive-Order Reservations Without Compensation— Karuk Tribe of California v. Ammon[152]

Karuk involved Congress' transfer of executive-order reservation land from one tribe to another.[153] An executive order formed the original Hoopa Valley Reservation, the "Square," on June 23, 1876.[154] Another executive

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[145] Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903) (White, J.).
[146] *Karuk Tribe of Cal.*, 209 F.3d at 1376 (citing Mattz v. Arnett, 412 U.S. 481, 505 (1973)).
[147] *Id.* at 1370.
[148] United States v. Sioux Nation of Indians, 448 U.S 371, 406–07 (1980).
[149] COHEN, *supra* note 30, § 15.04[4] (citing Confederated Bands of Ute Indians v. United States, 330 U.S. 169 (1947); Sioux Tribe of Indians v. United States, 316 U.S. 317, 325 (1942)).
[150] COHEN, *supra* note 30, at § 15.04[4].
[151] *See Karuk Tribe of Cal.*, 209 F.3d at 1374, 1376–77 (quoting Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289 (1955)) (citing United States v. Alcea Band of Tillamooks, 329 U.S. 40, 46 (1946)) (Indians' occupancy rights "may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.").
[152] *Id.*
[153] *Id.* at 1370.
[154] *Id.*

order added the "Addition" to the Hoopa Valley Reservation in 1891.[155] The 1887 General Allotment (Dawes) Act resulted in non-Indian land scattered within the Hoopa Valley Reservation.[156] Responding to suits over revenue from timber grown on the reservation,[157] Congress' Hoopa-Yurok Settlement Act cleaved the Hoopa Valley Reservation into the Square and the Addition.[158] The Square became the Hoopa Valley Reservation while the Addition became the Yurok Reservation.[159] Karuk tribe members had lived on both the Square and the Addition.[160] The Karuk tribe, Yurok tribe, and Ammon Group sought just compensation under the Fifth Amendment's Takings Clause.[161]

The Federal Circuit held they had no compensable Fifth Amendment property rights in the executive-order reservations.[162] The Federal Circuit mainly reasoned only Congress could grant permanent occupancy, rather than permissive occupancy, for US land.[163] Presidents Ulysses S. Grant and

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[155] *Id.*
[156] FRANK & GOLDBERG, *supra* note 8, at 60–61, 136, 138, 189.
[157] *Karuk Tribe of Cal.*, 209 F.3d at 1372–73 (citing Short v. United States, 486 F.2d 561, 562 (Ct. Cl. 1973); Short v. United States, 12 Cl. Ct. 36, 40 (1987)).
[158] *Id.* at 1370, 1372–73 (citing 25 U.S.C. § 1300i-1(c)).
[159] *Id.* at 1370.
[160] Karuk Tribe of Cal. v. United States, 41 Fed. Cl. 468, 470 (Fed. Cl. 1998), *aff'd*, 209 F.3d 1366 (Fed. Cir. 2000).
[161] *Karuk Tribe of Cal.*, 209 F.3d at 1370, 1374–75. The Federal Circuit also rejected a longstanding argument that the lawmaking history of the 1927 Indian Mineral Leasing Act, 25 U.S.C. §§ 398a–398e (1994), acknowledged title to executive-order reservation land. *Id.* at 1379 (citing United States v. Jim, 409 U.S. 80, 93 (1972); Sioux Tribe of Indians v. United States, 316 U.S. 317, 330–31 (1942); United States v. S. Pac. Transp. Co., 543 F.2d 656, 687 (9th Cir. 1976)). The rejected arguments were based on Note, *Tribal Property Interests in Executive Order Reservations: A Compensable Indian Right*, 69 YALE L.J. 627, 632–33 (1960). A Ninth Circuit court had already rejected these arguments. GETCHES ET AL., *supra* note 27 (more discussion than in the fifth edition of 2005); *see also* PRUCHA, *supra* note 27) (citing Sekaquaptewa v. MacDonald, 448 F. Supp. 1183, 1192 (D. Ariz. 1978) (citing *S. Pac. Transp. Co.*, 543 F.2d at 687), *aff'd* in part and *rev'd* in part on other grounds, 619 F.2d 801 (9th Cir. 1980)).
[162] *Karuk Tribe of Cal.*, 209 F.3d at 1376, 1378, 1380.
[163] *Id.* at 1373 (citing U.S. CONST. art. IV, § 3).

Benjamin Harrison issued their executive orders forming the Square and the Addition under Congress' April 8, 1864, Act.[164] The Supreme Court had ruled the April 8, 1864, Act failed to grant Indians any compensable property right as "the Act of 1864 conferred a continuing discretion upon the [e]xecutive . . . for altering and enlarging the bounds of the reservations, restoring portions of the territory to the public domain, and abolishing reservations once made, and establishing others in their stead."[165] As Congress gave presidents very broad power to "create and terminate reservations, or parts of reservations, by fiat," Congress could not have created compensable rights to the executive-order reservations.[166] Further, President Grant's and President Harrison's executive orders included no words even trying to vest Indians with property rights against Congress' intent.[167]

III. INDIAN SOVEREIGNTY AND MAINSTREAM SEPARATION OF POWERS APPLIED TO INDIAN NATIONS

A. The Indian Nation Sovereignty Conundrum[168]—United States v. Lara[169]

United States v. Lara concerned Indian nation sovereignty in criminal law.[170] Under the Double Jeopardy Clause, a person may not be prosecuted twice for the same crime.[171] But, crimes are defined against one sovereign,

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[164] *Id.* at 1371, 1375.
[165] *Id.* at 1376 (quoting Donnelly v. United States, 228 U.S. 243, 257 (1913)).
[166] *Id.*
[167] *Id.* at 1375.
[168] *See generally* Cleveland, *supra* note 4; CANBY, *supra* note 6, at 76–114; Patrice H. Kunesh, *Constant Governments: Tribal Resilience and Regeneration in Changing Times*, 19 KAN. J.L. & PUB. POL'Y 8 (2009) (discussing general history of tribal sovereignty); FRANK & GOLDBERG, *supra* note 8 (describing in depth the history of one tribe's changing sovereignty in the face of European settlement and under the US government).
[169] United States v. Lara, 541 U.S. 193 (2004).
[170] *Id.* at 196–98 (Breyer, J.).
[171] U.S. CONST. amend. V.

so the Double Jeopardy Clause does not bar prosecutions by different sovereigns—for instance, a state and the federal government.[172] In *Lara*, after the Spirit Lake tribe convicted Billy Jo Lara—not a Spirit Lake member—for "violence to a policeman," the United States charged him with assaulting a federal officer.[173]

In upholding Lara's federal prosecution, Justice Breyer's majority opinion reaffirmed some measure of the Spirit Lake tribal sovereignty apart from the federal government.[174] Justice Breyer based the opinion on Congress' power to define tribal sovereignty.[175] He explained this power as derived from the Indian Commerce Clause[176] and the Treaty Power.[177] Though the Treaty Power empowers the President—not Congress—to make treaties, the Senate's power to ratify treaties gave it the power to pass the 1871 Act banning the President from entering into Indian treaties.[178] Breyer also stressed the Court had approved Congress' power over Indian affairs.[179]

But, Justice Thomas' concurrence criticized the Court's contradictory tribal-sovereignty case law.[180] On the one hand, the Court has assumed "Congress (rather than some other part of the Federal Government) can regulate virtually every aspect of the tribes without rendering their sovereignty a nullity."[181] On the other hand, "the Indian tribes retain inherent sovereignty to enforce their criminal laws against their own

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[172] *Lara*, 541 U.S. at 197 (citing Heath v. Alabama, 474 U.S. 82, 88 (1985)).
[173] *Id.*
[174] *Id.* at 199.
[175] *Id.* at 199–200.
[176] U.S. CONST. art. I, § 8, cl. 3.
[177] U.S. CONST. art. II, § 2, cl. 2; *Lara*, 541 U.S. at 200–02.
[178] *See id.* at 201.
[179] *Id.* at 202–07.
[180] *Id.* at 215 (Thomas, J., concurring).
[181] *Id.*

members."[182] Though he concurred in the judgment given these two assumptions, he disagreed with the majority's view that Congress had plenary power to change tribal sovereignty.[183] Justice Thomas did not see this congressional power flowing from either the Indian Commerce Clause or Treaty Clause.[184]

To cure this contradiction in the Court's case law, Justice Thomas argued the Court should hold tribes either have independent sovereignty or lack sovereignty.[185] If tribes have sovereignty as independent nations, the executive would keep the power to make treaties with tribes, but Congress would lack the power to pass the 1871 Act banning treaties with the tribes.[186] Conversely, if Congress has the power to ban treaties with tribes through the 1871 Act, tribes would lack independent-nation sovereignty, and *United States v. Wheeler*,[187] holding Indian tribes kept enough sovereignty to define and to prosecute crimes among tribe members, should be overruled.[188]

B. Applying Mainstream Separation of Powers Doctrine to Indian Nations and Executive-Order Reservations[189]

The following analysis considers a change in view of Indian nation sovereignty under US law. But, sovereignty is famously hard to define.[190]

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[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *See id.*
[187] United States v. Wheeler, 435 U.S. 313, 326 (1978).
[188] *Lara*, 541 U.S. at 215.
[189] Goldberg has previously compared and contrasted Indian sovereignty with sovereignty of foreign governments and domestic states, but the comparison did not consider *Lara*, executive-order reservations, or *Karuk*. *See* Carol Goldberg, *Critique by Comparison in Federal Indian Law*, 82 N.D. L. REV. 719 (2006).
[190] *See, e.g.*, JEFFREY L. DUNOFF ET AL., INTERNATIONAL LAW NORMS, ACTORS, PROCESSES: A PROBLEM-ORIENTED APPROACH 63–65, 107–09, 277, 415, 1059–60 (3d ed. 2006).

Sovereignty can connote a state's or nation's freedom to act.[191] The Mohawk Nation[192] and Thakiwa[193] have, in essence, expressed this view. The Mohawk Nation claims sovereignty independent of other governments and a right to make laws for its people and land.[194] Likewise, the Thakiwa see their sovereignty as derived from the Creator, and independent of Euro–American law and other governments' wills.[195] Under this view, Indian nations should have "interpretive sovereignty" to interpret their treaties rather than solely relying on the United States' interpretation.[196]

Rather than defining sovereignty as freedom, sovereignty may mean traits letting a state take part in a legal group.[197] Thus, a sovereign nation or country may make agreements with other nations or countries or take part in international legal groups such as the United Nations. Likewise, states within the United States retain sovereignty and take part in the group of states within the union.[198]

Regardless of sovereignty's precise meaning, the Indian Commerce Clause grants power to Congress "[t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."[199] It is thus natural to deem Indian tribes having sovereignty like "foreign Nations"

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[191] LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 8–10 (1995), *as reprinted in* DUNOFF ET AL., *supra* note 190, at 63.
[192] Mohawk Nation Council of Chiefs to National Chief of the Assembly of First Nations of Canada (July 1996), *as reprinted in* GOLDBERG ET AL., *supra* note 4, at 225 [hereinafter Mohawk Nation Council of Chiefs].
[193] Dagmar Thorpe, *Sovereignty, A State of Mind: A Thakiwa Citizen's Viewpoint*, 23 AM. INDIAN L. REV. 481, 481–84 (1998), *as reprinted in* GOLDBERG ET AL., *supra* note 4, at 226.
[194] Mohawk Nation Council of Chiefs, *supra* note 192.
[195] Thorpe, *supra* note 193.
[196] *See* Kristen A. Carpenter, *Interpretive Sovereignty: A Research Agenda*, 33 AM. INDIAN L. REV. 111 (2010–11).
[197] *See* STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 14–20 (1999) *as reprinted in* DUNOFF ET AL., *supra* note 190, at 108–09.
[198] *E.g.*, Massachusetts v. EPA, 549 U.S. 497, 519 (2007).
[199] U.S. CONST. art. I, § 8, cl. 3.

or the "several States." As discussed above, the United States treated Indian tribes on par with foreign nations for many decades.[200]

As Justice Thomas' *Lara* concurrence implies, the Court has sidestepped these hard sovereignty questions under political question doctrine.[201] However, political question doctrine is a judicial prudential standing doctrine, not a constitutional mandate.[202] As shown by *Bush v. Gore*, the Court can, and does, decide political questions.[203] In fact, political question doctrine may have no discernible bounds.[204]

Justice Thomas' concurrence suggests three possible changes to Indian nation sovereignty.[205] First, the Court could void the 1871 Act blocking the President from negotiating Indian nation treaties.[206] In effect, this would restore Indian nations' sovereignty by making it equal to foreign nations' sovereignty. Second, the Court could overrule *Wheeler*[207] and destroy Indian nation sovereignty, thus making tribes completely, and only, subject to federal law. Third, Indian nations could have some sovereignty unlike

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[200] PRUCHA, *supra* note 27, at 209; *see also* GOLDBERG ET AL., *supra* note 4, at 78–79.
[201] United States v. Lara, 541 U.S. 193, 218 (2004) (Thomas, J., concurring).

> Further, federal policy itself could be thought to be inconsistent with this residual-sovereignty theory. In 1871, Congress enacted a statute that purported to prohibit entering into treaties with 'Indian nation[s] or tribe[s.]' . . . *Although this Act is constitutionally suspect* . . . , it nevertheless reflects the *view of the political branches* that the tribes had become a purely domestic matter.

Id. (emphasis added); *see also* Baker v. Carr, 369 U.S. 186 (1962) (primary modern case on political question doctrine). *See generally* CHEMERINSKY, PRINCIPLES & POLICIES, *supra* note 2, at 129–47; CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 2, at 129–47.
[202] *See Baker*, 369 U.S. at 210–26.
[203] Bush v. Gore, 531 U.S. 98 (2000) (deciding the 2000 Presidential election for George W. Bush over Albert Gore).
[204] *See* Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976).
[205] *See Lara*, 541 U.S. at 215 (Thomas, J., concurring).
[206] *See id.* at 216.
[207] *Id.*

foreign nations, yet consistent with the Constitution. For instance, though not proposed by Thomas, the Court could hold Indian nations have sovereignty like the "several States."[208]

The second alternative, overruling *Wheeler* and destroying all Indian sovereignty, is trivial to analyze; all Court decisions confirming any Indian sovereignty would be overruled.[209]

The rest of this article considers the first and third alternatives. The first alternative, restoring the President's negotiating power, would be the most radical change in practice, but the simplest constitutionally; it would merely restore the original power balance between the executive and Congress. The effects of changing sovereignty via the first or third alternatives will be analyzed in the context of executive-order reservations, particularly the situation in *Karuk*.

1. Indian Nations as Sovereign Foreign Nations

If Indian nations had sovereignty on par with foreign nations, the president would have full power to make treaties and executive agreements with them.[210] Treaty and agreement provisions needing domestic funding would be subject to congressional appropriations.[211] Thus, Congress could,

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[208] T. Alexander Aleinikoff, *Securing Tribal Sovereignty: A Theory for Overturning Lone Wolf*, 38 Tulsa L. Rev. 57 (2002–03) (arguing that Indian nations should have state-like sovereignty) [hereinafter Aleinikoff, *Securing Tribal Sovereignty*]. *See generally* T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP (2002) [hereinafter ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY].

[209] *E.g.*, *Lara*, 541 U.S. at 193 (majority opinion); Duro v. Reina, 495 U.S. 676 (1990); Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408 (1989).

[210] U.S. CONST. art. II, § 2, cl. 2; *see, e.g.*, Goldwater v. Carter, 444 U.S. 996 (1979) (Powell, J., concurring) (vacating suit against President Carter by noting that abrogating a treaty with Taiwan is a political rather than a judicial question); *id.* at 1006–07 (Brennan, J., dissenting) (noting the president's "well-established authority to recognize, and withdraw recognition from, foreign governments").

[211] *See* U.S. CONST. art. I, § 8, cl. 1.

in effect, abrogate those provisions, yet it would have no power to stop the President from recognizing Indian nations as independent governments and negotiating with them.[212] The President could independently abrogate treaties with Indian nations without Congress' approval.[213]

Of course, neither the President nor Congress could change the boundaries of independent sovereign Indian nations. Neither the President nor Congress has this power over foreign nations. Thus, Indian nations having the same boundaries as when the United States was founded could not have the President or Congress change their boundaries.

The President could make a self-executing treaty with an Indian nation as with a foreign nation,[214] which Congress would need to ratify.[215] If the self-executing treaty required no further action by Congress for it to be enforceable, Congress would have no further power over it. For instance, the President could sign a treaty with an Indian nation regarding its reservation's boundaries. Presidents made these kinds of treaties with Indian nations in the nineteenth century.[216] The treaty would only come into effect after Senate ratification.[217] As a treaty over reservation boundaries of land originally and solely held by an Indian nation, it would clearly be self-executing. Thus, Congress would be powerless to change the reservation's boundaries. If a certain treaty had other provisions, the boundary provision would be self-executing if the provisions were severable.

This reasoning would apply to reservations made by an executive order in accord with Indian nation treaties signed by the President. Suppose the

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[212] U.S. CONST. art. II, § 2, cl. 2; *see, e.g.*, *Goldwater*, 444 U.S. at 996 (Powell, J., concurring); *id.* at 1006–07 (Brennan, J., dissenting).
[213] *Id.* at 996 (Powell, J., concurring).
[214] U.S. CONST. art. II, § 2, cl. 2.
[215] *Id.*
[216] *See* PRUCHA, *supra* note 27, at 136 ("most of these treaties dealt with boundaries and cessions to the United States"); *id.* at 226–34 (discussing treaties used as a federal government tool to gain Indian land).
[217] U.S. CONST. art. II, § 2, cl. 2.

President signed a treaty with an Indian nation over reservation boundaries. As just explained, that treaty would be self-executing. An executive order recognizing those boundaries would not need congressional funding. Thus, Congress would be powerless to change that reservation's boundaries memorialized in domestic law by the executive order.

Instead of treaties, the President could sign executive agreements with Indian nations. For instance, the President could make an agreement with an Indian nation to respect its boundaries.[218] As the President would not submit the agreement for Senate ratification, the agreement would immediately bind the United States.

Likewise, presidents formed many executive-order reservations in similar settings.[219] At the end of various wars with Indian nations, many presidents negotiated agreements with tribes to respect their boundaries.[220] To implement those agreements, presidents issued executive orders reserving land.[221] Thus, in this analysis, executive orders would bind the United States to respect those reservation boundaries and would not be subject to review by the Senate or by full Congress.

This analysis assumes the president has almost complete foreign affairs power. This assumption comports with the traditional *Steel Seizure* analysis.[222] In that scheme, executive power is maximized and unrivaled in foreign affairs.[223] Thus, though presidents would only rely on their innate power, these treaties, executive agreements, and executive orders would withstand congressional challenge if they related only to reservations'

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[218] *See generally* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003); Dames & Moore v. Regan, 453 U.S. 654 (1981); United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).
[219] *See* PRUCHA, *supra* note 27, at 329–39.
[220] *Id.* at 312, 320–22.
[221] *Id.*
[222] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring).
[223] *Id.*

boundaries and thus remained part of foreign affairs. To the extent that these orders and agreements would have domestic effects—for instance, on states—they would be binding if they required no further direct action by Congress.[224]

Cohen[225] and Judge Newman, in the *Karuk* dissent,[226] argued that Congress' acquiescence implied executive-order reservations could not be changed by Congress without creating a taking.[227] In essence, these arguments rely on the *Steel Seizure* scheme supporting executive action in domestic affairs when faced with Congress' inaction.[228] Judge Newman also argued the President acted with Congress' approval in forming the reservations.[229] Thus, the President acted with maximum power in the *Steel Seizure* scheme in forming the Hoopa Valley Reservation by executive order.[230]

If Indian nations had foreign-nation sovereignty, the aboriginal title and extinguishment by conquest doctrines—on which Judge Rader relied in *Karuk*[231]—would become quite troubling. These doctrines started with Chief Justice Marshall's opinion in *Johnson v. M'Intosh*.[232]

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[224] *See, e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003); Dames & Moore v. Regan, 453 U.S. 654 (1981); United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).
[225] *See* COHEN, *supra* note 30, at 1059.
[226] Karuk Tribe of Cal. v. Ammon, 209 F.3d 1366, 1381 (Fed. Cir. 2000) (Newman, J., dissenting).
[227] *See also* PRUCHA, *supra* note 27, at 329 (noting courts sustaining executive-order reservations based on longstanding congressional acquiescence).
[228] *Steel Seizure*, 343 U.S. at 635–37 (1952) (Jackson, J., concurring); *id.* at 601–11 (Frankfurter, J., concurring).
[229] *Karuk Tribe of Cal.*, 209 F.3d at 1382.
[230] *See Steel Seizure*, 343 U.S. at 635–37 (Jackson, J., concurring).
[231] *Karuk Tribe of Cal.*, 209 F.3d at 1373–74.
[232] 21 U.S. (8 Wheat.) 543 (1823) (Marshall, C.J.). Perhaps Justice Marshall's opinion sounded sympathetic towards Indian nations 200 years ago. Now, his opinion's references to aboriginals without Christianity sounds racist. For a thorough critique of Marshall's discovery doctrine, see Robert A. Williams, Jr., *The Algebra of Federal*

Contrary to aboriginal title and extinguishment by conquest, the United States renounced annexing territory by force with the Stimson Doctrine.[233] Secretary of State Henry Stimson served under President Franklin D. Roosevelt.[234] In 1932, Secretary Stimson wrote to China and Japan stating that the United States did not recognize Japan's 1931 seizure of Manchuria as annexing territory.[235]

Thus, in modern times, it is hard to picture the United States conquering or taking land from a foreign nation and ending that nation's sovereignty over that land. For instance, during World War II, the United States conquered Germany and Japan but left them intact as sovereign nations. In fact, the post-World War II war crimes charged against Nazi and Japanese leaders were partly based on the Stimson Doctrine.[236]

Finally, in passing, if the United States deemed Indian nations to be like foreign nations, US federal and state courts might recognize tribal-court judgments under international comity.[237]

2. Indian Nations as Sovereign Domestic States

In some cases, Indian nations may have ceded land to the United States in exchange for benefits. This is like domestic states ceding sovereignty to the federal government in exchange for benefits.[238] Of course, domestic states

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Indian Law: The Hard Trial of Decolonizing and Americanizing the White Man's Indian Jurisprudence, 1986 WIS. L. REV. 219 (1986).

[233] Ward Churchill, *Subverting the Law of Nations: American Indian Rights and U.S. Distortions of International Legality*, *in* NATIVE AMERICANS, *supra* note 90, at 37, 46 (quoting Herbert W. Briggs, *Non-Recognition of Title by Conquest and Limitations of the Doctrine*, 34 PROC. OF THE AM. SOC'Y OF INT'L L. 72, 73 (1940)).

[234] *See id.*

[235] *Id.* at 73 n.3.

[236] Churchill, *supra* note 233, at 46.

[237] Dan St. John, *Recognizing Tribal Judgments in Federal Courts Through the Lens of Comity*, Comment, 89 DENVER U. L. REV. 523, 535–37, 539–44 (2012).

[238] *E.g.*, Massachusetts v. EPA, 549 U.S. 497, 519 (2007) ("When a State enters the Union, it surrenders certain sovereign prerogatives.").

did not cede land but certain political rights,[239] which are arguably less valuable than land.

If Indian nations had the same sovereignty as domestic states,[240] the nations' boundaries would not change. This is the circumstance with the several states. Likewise, Indian nations' boundaries would not change after the initial bargain.[241] For executive-order reservations formed under treaties between the United States and Indian nations the boundaries should not change. Thus, boundaries of reservations, such as the Hoopa Valley Reservation, would not be subject to redrawing by Congress.[242]

As domestic sovereigns equal to states, Indian nations would be far less subject to presidential power. The traditional *Steel Seizure* scheme would subject the President's power to much more control by Congress.[243]

Also, US courts might recognize tribal courts. Federal courts might apply abstention doctrines against interfering with states' rights to avoid interfering with Indian nations' rights.[244] State courts might recognize tribal-court judgments under the Full Faith and Credit Clause.[245]

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[239] *Id*.
[240] *See generally* Aleinikoff, *Securing Tribal Sovereignty*, *supra* note 208 (excerpted from ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY, *supra* note 208) (arguing that Indian nations should have state-like sovereignty).
[241] *Id.*
[242] *Contra* Karuk Tribe of Cal. v. Ammon, 209 F.3d 1366, 1385 (Fed. Cir. 2000) (upholding the redrawing of the Hoopa Valley reservation by the Hoopa-Yurok Settlement Act, 25 U.S.C. §§ 1300i–1300i-11 (1994)).
[243] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring); *id.* at 601–11 (Frankfurter, J., concurring).
[244] Joshue Jay Kanassatega, *The Case for "Expanding" the Abstention Doctrine to Account for the Laws and Policies of the American Indian Tribes*, 47 GONZAGA L. REV. 589 (2012).
[245] St. John, *supra* note 237, at 537–39 (citing Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 905, 907–08 (1990); Lindsay Loudon Vest, Comment, *Cross-Border Judgments and the Public Policy Exception: Solving the Foreign Judgment Quandary by Way of Tribal Courts*, 153 U. PA. L. REV. 797, 809–10 (2004)).

The federal government already treats Indian nations like states in some instances. Most notably, the federal government treats Indian nations on par with states for a broad range of environmental laws.[246] For instance, the Clean Water Act lets the EPA entrust standard-setting to tribes.[247]

At least two early treaties proposed treating Indian nations as states.[248] A Delawares treaty allowed for forming an Indian state headed by the Delawares and "representation in Congress."[249] The Cherokees also exchanged representation in the House of Representatives as part of removal.[250] Neither treaty ever resulted in Indian representatives in Congress.[251]

During the republic's first hundred years, various entities proposed forming Indian states as part of the United States.[252] Whether an Indian nation were deemed a foreign nation or a US "territory," nothing in principle would stop an Indian nation from asking the United States for statehood. But admitting an Indian nation as a state would make the Bill of Rights' *constitutional* strictures apply to the state via the Fourteenth Amendment[253] and obviate the *statutory* demands of the 1968 Indian Civil Rights Act[254] for that nation/state.

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[246] *E.g.* CONFERENCE OF W. ATT'YS GEN., *supra* note 134, at 174–75, 436–58.
[247] 33 U.S.C. § 1177 (1978).
[248] GOLDBERG ET AL., *supra* note 4, at 75 n.4.
[249] Article VI of the Treaty of Sept. 17, 1778, 7 Stat. 13, *as excerpted in* GOLDBERG ET AL., *supra* note 4.
[250] GOLDBERG ET AL., *supra* note 4, at 75 n.4 (quoting the 1835 Treaty of New Echota).
[251] *Id.* at 75–76 n.4.
[252] *Id.* (citing Annie H. Abel, *Proposals for an Indian State 1778–1878*, 1 ANN. REP. OF THE AM. HIST. ASS'N 89, 94–102 (1907)).
[253] Twining v. New Jersey, 211 U.S. 78 (1908) (Fourteenth Amendment's Due Process Clause incorporates some Bill of Rights provisions against states); Chi., Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226 (1897) (Fifth Amendment just compensation for takings); Duncan v. Louisiana, 391 U.S. 145 (1947) (fundamental rights incorporated); Gitlow v. New York, 268 U.S. 652 (1925) (First Amendment freedom of speech); Everson v. Bd. of Educ., 33 U.S. 1 (1947) (First Amendment Establishment Clause); Wallace v. Jaffree, 472 U.S. 38 (1985) (First Amendment

IV. CONCLUSION

Supreme Court doctrine has sharply distinguished between mainstream and Indian law separation of powers. Justice Thomas recently questioned the contradictions in separation of powers doctrine in the Indian sovereignty context. As the Indian Commerce Clause deals with Indian tribes, foreign nations, and the several states, treating Indian tribes as having the same sovereignty as either foreign nations or the states would be a natural change within constitutional doctrine. Changing Indian sovereignty to match either foreign nation or domestic state sovereignty would substantially shift the power balance between the president and Congress, especially regarding executive-order reservations. Those reservations would get far more protection against congressional reshaping than under current Indian law power-separation doctrine.

Establishment Clause); Cantwell v. Connecticut, 310 U.S. 296 (1940) (First Amendment Free Exercise Clause); Near v. Minnesota, 283 U.S. 697 (1931) (First Amendment freedom of the press); DeJonge v. Oregon, 299 U.S. 353 (1937) (First Amendment freedom of assembly); Hague v. CIO, 307 U.S. 496 (1939) (First Amendment freedom to petition the government); Wolf v. Colorado, 338 U.S. 25 (1949) (Fourth Amendment unreasonable search and seizure protection); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule for Fourth Amendment infractions); Benton v. Maryland, 395 U.S. 784 (1969) (Fifth Amendment Double Jeopardy Clause); Malloy v. Hogan, 378 U.S. 1 (1964) (Fifth Amendment self–incrimination protections); Klopfer v. North Carolina, 386 U.S. 213 (1967) (Sixth Amendment speedy trial right); In re Oliver, 333 U.S. 257 (1948) (Sixth Amendment rights to a public trial and to confront adverse witnesses); Irvin v. Dowd, 366 U.S. 717 (1961) (Sixth Amendment right to an impartial jury); Pointer v. Texas, 380 U.S. 400 (1967) (Sixth Amendment compulsory process rights); Gideon v. Wainwright, 372 U.S. 335 (1963) (Sixth Amendment right to counsel); Schilb v. Kuebel, 404 U.S. 357 (1971) (Eighth Amendment excessive bail prohibition); Robinson v. California, 370 U.S. 660 (1962) (Eighth Amendment cruel and unusual punishment prohibitions); Harmelin v. Michigan, 501 U.S. 957 (1991) (Eighth Amendment cruel and unusual punishment prohibitions). *See generally* CHEMERINSKY, PRINCIPLES & POLICIES, *supra* note 2, at 499–507.

[254] 25 U.S.C. §§ 1301–1303 (2012). *See generally* ANDERSON ET AL., *supra* note 3, at 332–55; GOLDBERG ET AL., *supra* note 4, at 412–25.