Indians, Tribes, and (Federal) Jurisdiction

*William Wood**

I. INTRODUCTION

Land, and controlling what happens on it and the revenues from it, has always been the focal point of relations between Indigenous peoples and non-Natives in North America.[1] Today, as many Indian tribes rebuild their land bases after centuries of dispossession, with the result that state and local governments generally lose jurisdiction over the land, the politics around tribal land (re)acquisitions[2] are among the most contentious in Indian-white relations and federal Indian policy. Conflicts over tribal land reacquisitions exist throughout the United States, from New England across the Great Lakes and Great Plains regions to California, and in the suburbs of some of America's largest cities and the capital cities of several states.[3] And though the overwhelming majority of tribal

---

* Visiting Associate Professor of Law, Southwestern Law School; Visiting Professor of Law, UCLA School of Law. I thank Gregory Ablavsky, Kirsten Carlson, Carole Goldberg, Matthew Fletcher, Angela Riley, and Addie Rolnick for their comments on earlier drafts, and Lilit Arabyan, Rosio Flores, and Tamara Honrado for their research assistance. I also thank the librarians at Southwestern Law School, particularly David McFadden, and UCLA School of Law, as well as Lauren Benton, Drea Douglas, Heather McMillan-Nakai, and Helen Rountree, for their help locating and providing sources. And I thank Andrew Kershen, Erica McCabe, and the other editors and staff members of the *Kansas Law Review* for their work to improve this article.

1. This article uses the terms "Indigenous," "Indian," and "Native," and "peoples," "nations," and "tribes," interchangeably, with acknowledgment that none of these words is from a language indigenous to what is now called North America that people indigenous to this continent use to describe themselves. *See also infra* note 25.

2. The word "reacquisition" is used hereafter to reflect that, in almost all instances, tribes are purchasing or otherwise obtaining title to their ancestral lands.

3. *E.g.*, Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, and History*, 49 IDAHO L. REV. 519, 535–38 (2013) (discussing South Dakota's opposition to and lawsuits over tribal land reacquisitions); *Arkansas Lawmakers Oppose Tribe's Request to Put Land into Federal Trust*, ARK. NEWS (July 8, 2015), http://www.arkansasnews.com/news/arkansas/arkansas-lawmakers-oppose-tribe-s-request-put-land-federal-trust (Little Rock, Arkansas); Perry Backus, *County Discusses Medicine Tree Plan*, RAVALLI REPUBLIC (Nov. 21, 2013), http://ravallirepublic.com/news/local/article_cd7120f4-5323-11e3-8288-0019bb2963f4.html (Confederated Salish and Kootenai Tribes in Montana); Dean Baker, *Cowlitz Tribe Continues Push for Casino near La Center,* THE OREGONIAN (July 17, 2013), http://www.oregonlive.com/clark-county/index.ssf/2013/07/cowlitz_tribe_continues_push_f.html (suburban Portland); Susannah Bryan, *Davie Fighting Seminole Tribe's Bid to Absorb 10 Acres*, SUN SENTINEL (Feb. 21, 2014), http://articles.sun-sentinel.com/2014-02-21/news/fl-seminole-land-davie-20140221_1_seminole-tribe-sovereign-land-

land reacquisitions are for agriculture, government infrastructure, housing, and cultural purposes,[4] passions can be especially heated where a casino is potentially in the mix (or is perceived to be, as is often the case), particularly in a place like the Hamptons or California wine country.[5]

---

councilman-bryan-caletka (suburban Miami); Steve Carmody, *Long Planned Lansing Casino Project Remains in Limbo*, MICH. RADIO (Oct. 31, 2016), http://michiganradio.org/post/long-planned-lansing-casino-project-remains-limbo (Lansing, Michigan); Charles McConnell, *Court Sides with Tohono O'odham—Again—in Fight over Glendale Casino*, CRONKITE NEWS (Nov. 6, 2015), https://cronkitenews.azpbs.org/2015/11/06/court-sides-with-tohono-oodham-again-in-fight-over-glendale-casino/ (suburban Phoenix); Sean P. Murphy, *Taunton Property Owners Sue to Block Tribal Casino*, BOS. GLOBE (Feb. 4, 2016), https://www.bostonglobe.com/metro/2016/02/04/taunton-property-owners-file-lawsuit-block-tribal-casino-taunton/ysNpoe7y7mFUsGrdAmEyMP/story.html (challenge to new reservation lands for the Mashpee Wampanoag Tribe in Massachusetts); Emma Nelson, *Prior Lake City Council Opposes Shakopee Tribe's Land Plans*, STAR TRIBUNE (Dec. 21, 2015), http://www.startribune.com/prior-lake-city-council-opposes-shakopee-tribe-s-land-plans/363092071 (Shakopee Mdewakanton Sioux Community in Minnesota); Adam Rodewald, *Hobart to Green Bay: Fight for Tribal Land*, GREEN BAY PRESS-GAZETTE (Jan. 20, 2016), http://www.greenbaypressgazette.com/story/news/local/2016/01/20/hobart-green-bay-fight-tribal-land/79061984 (Oneida Tribe in Wisconsin); Hudson Sangree & Richard Chang, *Casino Proposed for Southern Sacramento County Prompts Hopes, Concerns*, SACRAMENTO BEE (Feb. 16, 2016), http://www.sacbee.com/entertainment/casino/article60266761.html (outside Sacramento, California); Edward Sifuentes, *Valley Center: Tribe's Land Transfer Plan Opposed*, SAN DIEGO UNION-TRIBUNE (Apr. 15, 2011), http://www.sandiegouniontribune.com/news/2011/apr/15/valley-center-tribes-land-transfer-plan-opposed/ (suburban San Diego).

4. Inadequate Standards for Trust Land Acquisition in the Indian Reorganization Act of 1934: Oversight Hearing Before the H. Subcomm. on Indian, Insular and Ala. Native Affairs of the H. Comm. on Nat. Res., 113th Cong. 4:08–4:30 (2015) [hereinafter Oversight Hearing Recording] (statement of Kevin Washburn, Assistant Secretary – Indian Affairs), https://soundcloud.com/indianz/testimony-17?in=indianz/sets/house-subcommittee-on-indian-insular-and-alaska-native-affairs-may-14-2015 ("You may have been told that land into trust is only about gaming. But in six-plus years, out of 1,900 applications for land into trust approved [under the Obama Administration], fewer than twenty . . . were for gaming. Most were for agriculture, followed by infrastructure such as schools and detention centers, then for non-gaming economic development, and then housing.").

5. *E.g.*, Scott Gold, *Tension Rises over Chumash Indian Plan for Santa Ynez Valley Casino*, L.A. TIMES (Apr. 5, 2014), http://articles.latimes.com/2014/apr/05/local/la-me-casino-expansion-20140406 (noting "persistent allegations" that the Santa Ynez Band of Chumash Indians "is secretly planning to build a second casino" on land slated for a tribal housing development in the Santa Ynez Valley); Danny Hakim, *U.S. Recognizes an Indian Tribe on Long Island, Clearing the Way for a Casino*, N.Y. TIMES (June 15, 2010), http://www.nytimes.com/2010/06/16/nyregion/16shinnecock.html?pagewanted=all&_r=0 (discussing speculation about the Shinnecock Indian Nation building a casino in Southampton or New York City's suburbs); Mark Harrington, *Shinnecocks to Consider Revisiting Casino Proposals*, NEWSDAY (July 14, 2016), http://www.newsday.com/long-island/suffolk/shinnecocks-weigh-revisiting-proposals-for-gaming-casino-1.12044417 (same); Clark Mason, *Lytton Pomo Tribe on Buying Spree in Sonoma County*, PRESS DEMOCRAT (Dec. 1, 2013), http://www.pressdemocrat.com/csp/mediapool/sites/PressDemocrat/News/story.csp?cid=2226315&sid=555&fid=181 (speculation about the Lytton Band of Pomo Indians building a casino on land the Tribe purchased in the Sonoma County); *see also Quapaw Tribe Says No Casino on Pulaski County Property*, WASH. TIMES (July 11, 2015), http://www.washingtontimes.com/news/2015/jul/11/quapaw-tribe-says-no-casino-on-pulaski-county-prop/ (discussing the Quapaw Tribe's offer, in response to opposition from Arkansas's governor and U.S. Congressional delegation, to sign an agreement that it will not build a casino on a 160-acre tract outside of Little Rock that encompasses an old Quapaw village, including cemeteries).

Most tribes are rebuilding their land bases using the Indian Reorganization Act (the "IRA"), a 1934 law that authorizes the U.S. Secretary of the Interior to acquire land for Indians.[6] Through the "fee-to-trust" administrative process, a tribe requests the Secretary to acquire and hold (fee) title to the land in trust for the tribe, and the Secretary, after giving state and local governments and members of the public the opportunity to comment, decides whether to take the land into trust.[7] As the Interior Department has exercised this authority more frequently in recent years,[8] the backlash against tribal land reacquisitions has grown. It is evidenced by the numerous lawsuits and administrative challenges regarding fee-to-trust decisions happening across the country.[9] Two of these challenges reached the Supreme Court in the past decade.[10]

For a general discussion of the modern stereotype of the "rich casino Indian" and how the politics around Indian casinos have reshaped tribal-state-local government relations, see JEFF CORNTASSEL & RICHARD C. WITMER, FORCED FEDERALISM: CONTEMPORARY CHALLENGES TO INDIGENOUS NATIONHOOD 4–6 (2008).

6. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984. The Secretary's land acquisition authority is codified at 25 U.S.C. § 465 (2012) (editorially reclassified as § 5108 in Aug. 2016).

7. The regulations governing the fee-to-trust process are codified at 25 C.F.R. Part 151 (2016).

8. In a May 2015 Congressional hearing, Assistant Secretary – Indian Affairs Kevin Washburn, the highest-ranking official in the U.S. Indian affairs bureaucracy, referred to legislators' "question[ing] . . . the legitimacy of the Administration's power to take land into trust for tribes" and explained that

> [the] Interior [Department] has exercised this power for over eighty years . . . without any problems. . . . Now admittedly, Interior's power to take land into trust was used only rarely during the previous Presidential Administration. But when President Obama came into office . . . Interior dusted off the power and began taking land into trust [for tribes] again. Since 2009, we've taken nearly 300,000 acres of land into trust for well more than one hundred tribes.

Oversight Hearing Recording, *supra* note 4, at 0:45–1:43, 3:00–3:04; *see also* Press Release, U.S. Dep't of the Interior, Obama Administration Exceeds Ambitious Goal to Restore 500,000 Acres of Tribal Homelands (Oct. 12, 2016), https://www.doi.gov/pressreleases/obama-administration-exceeds-ambitious-goal-restore-500000-acres-tribal-homelands (noting the Interior Department has placed more than 500,000 acres into trust since 2009).

9. *E.g.*, Stand Up for California! v. Dep't of Interior, No. 12-2039, 2016 WL 4621065 (D.D.C. Sept. 6, 2016) (North Fork Rancheria of Mono Indians in California); Littlefield v. Dep't of Interior, No. 16-10184, 2016 WL 4098749 (D. Mass. July 28, 2016) (Mashpee Wampanoag Indian Tribe in Massachusetts); Cty. of Amador v. Dep't of Interior, 136 F. Supp. 3d 1193 (E.D. Cal. 2015), *appeal filed*, No. 15-17253 (9th Cir.) (Ione Band of Miwok Indians in California); Citizens for a Better Way v. Dep't of Interior, No. 2:12-cv-3021, 2015 WL 5648925 (E.D. Cal. Sept. 24, 2015) (Estom Yumeka Maidu Tribe of the Enterprise Rancheria in California)); Patchak v. Jewell, 109 F. Supp. 3d 152 (D.D.C. 2015), *aff'd*, 828 F.3d 995 (D.C. Cir. 2016) (Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians in Michigan); Upstate Citizens for Equal., Inc. v. Jewell, No. 5:08-cv-0633, 2015 WL 1399366 (N.D.N.Y. Mar. 26, 2015), *aff'd sub nom.* Upstate Citizens for Equal., Inc. v. United States, No. 15-1688, 2016 WL 6608942 (2d Cir. Nov. 9, 2016) (Oneida Indian Nation in New York); Confederated Tribes of the Grand Ronde Cmty. v. Jewell, 75 F. Supp. 3d 387 (D.D.C. 2014), *aff'd*, 830 F.3d 552 (D.C. Cir.), *petition for cert. filed sub nom.* Citizens Against Reservation Shopping v. Jewell (U.S. Oct. 27, 2016) (No. 16-572) (Cowlitz Indian Tribe in Washington); Grand

In 2009, the Court in *Carcieri v. Salazar* interpreted the Indian Reorganization Act to authorize land acquisitions only for Indian tribes that were "under Federal jurisdiction" in 1934, when Congress passed the IRA.[11] Although the Court did not say what it means for a tribe to have been under federal jurisdiction in 1934, its decision gave fee-to-trust opponents a new argument: that the federal government cannot take the land into trust because the tribe in question was not under federal jurisdiction in 1934. The first cases where local governments and others (including other tribes in some instances) make this argument are percolating through the courts.[12] The *Carcieri* issue—whether a tribe was under federal jurisdiction in 1934—has also come up in lawsuits over property taxes,[13] casino licenses,[14] and tribal-state gaming compact negotiations.[15]

Carcieri, like the broader fee-to-trust politics it is part of, is a lens for watching the centuries-old struggle over control of land and resources that underlies federal Indian law play out in the new millennium. It is thus unsurprising that "Carcieri," the last name of the former Rhode Island governor who filed the lawsuit, has in the last several years assumed both a descriptive (e.g., a "*Carcieri* question" or something "*Carcieri*-related") and doctrinal status (the "*Carcieri* issue") in the federal Indian

---

Traverse Cty. Bd. of Comm'rs. v. Acting Midwest Reg'l Dir., 61 IBIA 273 (2015), 2015 WL 10939236 (rejecting challenge to acquisition for the Grand Traverse Band of Ottawa and Chippewa Indians in Michigan, and upholding Interior Department finding that the Band was under federal jurisdiction in 1934); Miami-Dade Cty. v. Acting E. Reg'l Dir., 57 IBIA 192 (2013), 2013 WL 4405996 (Seminole Indian Tribe in Florida); Vill. of Hobart v. Bureau of Indian Affairs, 57 IBIA 4 (2013), 2013 WL 3054077 (Oneida Tribe of Indians in Wisconsin); Nelson, *supra* note 3 (discussing Prior Lake City Council challenge to acquisition for the Shakopee Mdewakanton Sioux Community). In addition to these challenges to fee-to-trust acquisitions for particular tribes, the State of Alaska sued to block implementation of a rule authorizing the Interior Secretary to acquire lands in trust for Alaska Native villages. Akiachak Native Cmty. v. Salazar, 935 F. Supp. 2d 195 (D.D.C. 2013) (upholding Secretary's authority to acquire land into trust for Native villages and tribes in Alaska), *vacated sub nom. Akiachak Native Cmty. v. Dep't of Interior*, 827 F.3d 100 (D.C. Cir. 2016); *see also* Raenne Holmes, *No Appeal from State of Alaska in Land-into-Trust Case*, ALASKA NATIVE NEWS (Aug. 16, 2016), http://alaska-native-news.com/no-appeal-from-state-of-alaska-in-land-into-trust-case-23724 (discussing Alaska's announcement that it would no longer pursue the litigation).

10. Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199 (2012) (challenge to acquisition for Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians); Carcieri v. Salazar, 555 U.S. 379 (2009) (challenge to acquisition for Narragansett Indian Tribe).

11. *Carcieri*, 555 U.S. at 391.

12. *See* cases listed *supra* note 9.

13. Poarch Band of Creek Indians v. Hildreth, No. 1:15-0277, 2015 WL 4469479 (S.D. Ala. July 22, 2015), *aff'd*, No. 15-13400, 2016 WL 3668021 (11th Cir. July 11, 2016) (county property taxes in Alabama).

14. KG Urban Enters. v. Patrick, 693 F.3d 1 (1st Cir. 2012) (commercial gaming licenses in Massachusetts).

15. Big Lagoon Rancheria v. California, 789 F.3d 947 (9th Cir. 2015) (gaming compact negotiations in California).

law lexicon. The *Carcieri* case is significant not simply because of the litigation it has spurred, which can determine whether or not a casino or some other tribal project gets built.[16] The case and its fallout—including various Congressional hearings and attempts at a "*Carcieri*-fix" amendment to the Indian Reorganization Act[17]—encapsulate some of the most dynamic aspects of modern federal Indian law and policy: judicial discomfort with tribal sovereignty, and particularly with tribes' exercising

16. The fee-to-trust regulations require the Secretary to consider the purpose for which the land will be used, 25 C.F.R. §§ 151.10(c), 151.11(a) (2016), but whether land is eligible for gaming is ultimately determined by criteria in the Indian Gaming Regulatory Act of 1988 § 4, 25 U.S.C. § 2703(4) (defining "Indian lands"); § 11, 25 U.S.C. § 2710 (regulation of gaming on Indian lands); § 20, 25 U.S.C. § 2719 (gaming on lands acquired in trust after October 17, 1988). That the land is held in trust may be, and often is, a precondition for operating a casino there.

17. See, e.g., The Carcieri Crisis: The Ripple Effect on Jobs, Economic Development, and Public Safety in Indian Country: Hearing Before S. Comm. on Indian Affairs, 112th Cong. (2011); Supreme Court Decision, Carcieri v. Salazar, Ramifications to Indian Tribes: Oversight Hearing Before H. Comm. on Nat'l Res., 111th Cong. (2009). So-called "Carcieri-fix" legislation, which would affirm the Interior Secretary's authority to acquire land for all federally recognized tribes, has been introduced in every Congress since Carcieri was decided. S. 1879, 114th Cong. (2015); S. 732, 114th Cong. (2015); H.R. 407, 114th Cong. (2015); H.R. 249, 114th Cong. (2015); S. 2188, 113th Cong. (2014); S. 676, 112th Cong. (2012); H.R. 1291, 112th Cong. (2011); H.R. 1234, 112th Cong. (2011); S. 1703, 111th Cong. (2010); H.R. 3742, 111th Cong. (2009); H.R. 3697, 111th Cong. (2009); Heidi McNeil Staudenmaier & Ruth K. Khalsa, A Post-Carcieri Vocabulary Exercise: What If "Now" Really Means "Then"?, 1 UNLV GAMING L.J. 39, 67–69 (2010) (discussing amendments proposed following Carcieri); see also H.R. 3137, 114th Cong. (2015) (proposed legislation that would affirm the trust status of all lands acquired in trust before the Carcieri decision); Rep. Tom Cole Suffers Defeat as Land-into-Trust Fix Goes Down in House, INDIANZ.COM (July 13, 2016) http://www.indianz.com/News/2016/07/13/rep-tom-cole-suffers-defeat-as-landintot.asp (discussing unsuccessful effort to include the relevant language from H.R. 3137 in the fiscal year 2017 Interior appropriations bill). Some of these legislative proposals have been tied to broader changes to the fee-to-trust process. Press Release, Senate Comm. On Indian Affairs, Barrasso Introduces the Interior Improvement Act (July 29, 2015), http://www.indian.senate.gov/news/press-release/barrasso-introduces-interior-improvement-act (discussing the Interior Improvement Act, S. 1879, 114th Cong. (2015), which would remove the "now under Federal jurisdiction" language from the IRA and, according to the sponsoring senator's press release, "restore[] the Secretary of the Interior's authority to take land into trust for all federally recognized tribes" while "incentivizing the use of cooperative agreements" with local governments); Julie Bykowicz and Derek Wallbank, Feinstein Battles with Obama over Casinos Using 1934 Law, BLOOMBERG (Sept. 18, 2013), http://www.bloomberg.com/news/2013-09-19/feinstein-battles-with-obama-over-casinos-using-1934-law.html (discussing senators' use of the Carcieri ruling "as leverage" in their efforts "to curb tribal gaming expansion"); see also Sen. Feinstein Pushing for Anti-Gaming Language in Carcieri Fix, INDIANZ.COM (July 14, 2016), http://www.indianz.com/IndianGaming/2016/07/14/sen-feinstein-pushing-for-anti.asp (discussing Senator Diane Feinstein's statement regarding a potential amendment to the Interior Improvement Act, mentioned supra, that would restrict tribal casinos on certain acquired lands). In addition, the Carcieri decision and interpretation of the Indian Reorganization Act's "under Federal jurisdiction" language are the subject of one of the eight Interior Department Solicitor's opinions issued during the Obama Administration. See Memorandum from Hilary C. Tompkins, Solicitor of the Dep't of the Interior, to Sally Jewell, Sec'y of the Dep't. of Interior, M-37029 (Mar. 12, 2014), https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37029.pdf; see also Solicitor's Opinions, DEP'T OF INTERIOR, https://www.doi.gov/solicitor-dev/opinions (last visited Sept. 28, 2016) (listing opinions).

sovereignty over land removed from state and local government jurisdiction;[18] perceptions about so-called "reservation shopping" by tribes trying to take land into trust for casinos[19] (and that tribes always plan to build casinos no matter the stated purpose for the acquisition);[20] and the political power and relative influence of tribes, states, and local governments in Congress.

But the *Carcieri* case has received relatively little attention in federal Indian law scholarship.[21] That is unfortunate, given not just its obvious practical importance for Indian tribes trying to rebuild their land bases

18. During the *Carcieri* oral argument, Justice Kennedy twice queried whether the Court should be "cautious" about removing land from Rhode Island's jurisdiction, and Chief Justice Roberts called the IRA's land acquisition authority "an extraordinary assertion of [federal] power." Transcript of Oral Argument at 36, Carcieri v. Salazar, 555 U.S. 379 (2009) (No. 07-526) (statement of Roberts, C.J.) ("[W]e are talking about an extraordinary assertion of power. The Secretary gets to take land and give it a whole different jurisdictional status apart from State law and all . . . ."); *id*. at 38–39 (statement of Kennedy, J.) (referencing Roberts's question and asking "Is there any overriding principle[] about which we must be most cautious before we interpret the statute as depriving the State of the ownership and jurisdiction of this land?").

19. As described by Senator Diane Feinstein in a 2010 newspaper op-ed, "reservation shopping" happens when "tribes from rural areas seek federal approval to acquire lands in trust in densely populated urban areas." Diane Feinstein, Opinion, *It's Time to Say "Enough is Enough" to Reservation Shopping*, EAST BAY TIMES (Nov. 29, 2010), http://www.eastbaytimes.com/2010/11/29/readers-forum-must-stop-reservation-shopping-once-and-for-all/.

20. After the Assistant U.S. Solicitor General explained to the *Carcieri* Court that the Narragansett Tribe was building housing on the land at issue, Chief Justice Roberts asked if "[t]hey could engage in other activities that Indian tribes can engage in[,]" which the Assistant Solicitor General understood to be Roberts's "concern[] with . . . the specter of gaming" on the land. Transcript of Oral Argument at 37, *Carcieri*, 555 U.S. 379 (No. 07-526).

21. A search on Westlaw (for "Carcieri" in the Law Reviews & Journals Database) yielded just three articles and a few student comments that discuss the *Carcieri* case with anything more than a passing reference, and they mostly focus on legislative, judicial, and administrative remedies. *See* G. William Rice, *The Indian Reorganization Act, The Declaration on the Rights of Indigenous Peoples, and a Proposed Carcieri "Fix": Updating the Trust Land Acquisition Process*, 45 IDAHO L. REV. 575, 592–94 (2009) (discussing the *Carcieri* holding and its impacts in the context of a broader argument for revising the IRA and Indian trust land acquisition process); Staudenmaier & Khalsa, *supra* note 17, at 67–69 (focusing on proposed amendments to the IRA following *Carcieri*); Scott A. Taylor, *Taxation in Indian Country After Carcieri v. Salazar*, 36 WM. MITCHELL L. REV. 590, 601–20 (2010) (examining the case's potential consequences for tribal, state, and federal taxes); Noah Nehemiah Gillespie, Essay, *Preserving Trust: Overruling* Carcieri *and* Patchak *While Respecting the Takings Clause*, 81 GEO. WASH. L. REV. 1707 (2013); Amanda D. Hettler, Note, *Beyond a* Carcieri *Fix: The Need for Broader Reform of the Land-into-Trust Process of the Indian Reorganization Act of 1934*, 96 IOWA L. REV. 1377 (2011); Howard L. Highland, Recent Development, *A Regulatory Quick Fix for* Carcieri v. Salazar*: How the Department of the Interior Can Invoke an Alternative Source of Existing Statutory Authority to Overcome an Adverse Judgment Under the Chevron Doctrine*, 63 ADMIN. L. REV. 933 (2011); Melanie Riccobene Jarboe, Note, *Collective Rights to Indigenous Land in* Carcieri v. Salazar, 30 B.C. THIRD WORLD L.J. 395 (2010); Christian Vareika, Comment, *Mere Speculation: Overextending* Carcieri v. Salazar *in* Big Lagoon Rancheria v. California, 56 B.C. L. REV. E-SUPPLEMENT 180 (2015); Sarah Washburn, Comment, *Distinguishing* Carcieri v. Salazar*: Why the Supreme Court Got It Wrong and How Congress and Courts Should Respond to Preserve Tribal and Federal Interests in the IRA's Trust-Land Provisions*, 85 WASH. L. REV. 603 (2010).

and those opposing them, but also the doctrinal and historical complexities at play. Delving into those complexities, this article explores the question the *Carcieri* Court left unanswered—the meaning of "under Federal jurisdiction"—and whether there can be an Indian tribe that is recognized by the United States today that was not under federal jurisdiction in 1934.

I argue that, doctrinally, all Indian tribes currently recognized as such by the U.S. government—all "federally recognized tribes"[22]—necessarily were under federal jurisdiction in 1934. Under the doctrine of discovery (or discovery doctrine), the United States, like the European powers that preceded it, asserted jurisdiction regarding the Indigenous peoples within its claimed territories and assumed certain obligations to those peoples.[23] As it developed this doctrine into the plenary Indian affairs power doctrine (or plenary power doctrine), the Supreme Court explained that the federal government had since its inception possessed this plenary jurisdiction regarding all Indians within the United States' boundaries.[24] It was part of the colonial relationship: because the United States claimed sovereignty over their territories, the Indians living there fell under the federal government's jurisdiction.

---

22. As explained on the Bureau of Indian Affairs website,

> [a] federally recognized tribe is an American Indian or Alaska Native tribal entity that is recognized as having a government-to-government relationship with the United States, with the responsibilities, powers, limitations, and obligations attached to that designation, and is eligible for funding and services from the Bureau of Indian Affairs.
>
> Furthermore, federally recognized tribes are recognized as possessing certain inherent rights of self-government (i.e., tribal sovereignty) and are entitled to receive certain federal benefits, services, and protections because of their special relationship with the United States.

Frequently Asked Questions, BUREAU OF INDIAN AFFAIRS, http://www.bia.gov/FAQs/ (last visited Sept. 28, 2016).

23. *See generally* ANTHONY PAGDEN, LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE C. 1500–C.1800 ch. 3 (1995); *see also* Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 293 (discussing the "guardianship responsibility by which individual European colonizers arrogated to themselves an unquestioned authority over Indian Nations"). By using the discovery doctrine and its progeny, including the plenary power doctrine, to make its argument, this article's intention is neither to perpetuate nor entrench further these doctrines. But so long as they remain part of United States law, the United States government and its institutions should abide the concomitant principle that—according to these doctrines—federal jurisdiction extends to all Indigenous peoples in territories over which the United States asserts title.

24. Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 207–11 (1984) (arguing that the discovery doctrine is "the central analytical element" of the federal government's power); Judith V. Royster & Rory SnowArrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 587 (1989) (noting that federal plenary power in Indian affairs "derive[s] from the doctrine of discovery"); *see infra* Part IV.

Thus, whether federal jurisdiction exists with respect to particular people(s),[25] or whether they are "under Federal jurisdiction" in IRA parlance, has always involved a singular inquiry—whether the people(s) continue to exist as a distinct Indian community, such that the Indian affairs jurisdiction attaches to them. Throughout U.S. history, however, federal decisionmakers have expressed uncertainty, and changed their minds, regarding whether certain people(s) were Indians or Indian tribes (or whether they had become too intermarried or assimilated). But the fact that federal officials did not—for whatever reason—exercise jurisdiction with respect to specific people(s) does not negate its existence. The federal government's Indian affairs jurisdiction was always (assumed to be) there, to be exercised whenever officials decided. That they eventually did exercise this jurisdiction, even if not until after 1934, begs the question of when and how it arose.

Part II of this article presents an overview of the *Carcieri* case. Part III follows with a brief discussion of the histories of particular Indigenous people(s) to illustrate the difference between their being, de jure, under federal jurisdiction and federal officials, de facto, exercising that jurisdiction. Part IV discusses the meaning of jurisdiction, as it was commonly understood in 1934 and as it has been used in the context of the federal government's jurisdiction in Indian affairs, focusing on the plenary power doctrine that developed in the late nineteenth and early twentieth centuries. Part V examines what it meant for an Indian tribe to be "recognized" by the federal government in the years around the IRA's passage and how the concept has evolved over time into its current reference to tribes appearing on a list published annually by the Bureau of Indian Affairs.

With that doctrinal and historical background, Part VI looks specifically at what Congress was doing when it passed the Indian Reorganiza-

---

25. "Tribe" is the operative word in federal Indian law generally, and in the Indian Reorganization Act. But it is defined and understood to include Indian nations, Pueblos, bands, communities, colonies, rancherias, and villages as well. Where possible, I use the term "people(s)" because it is consistent with developing international human rights norms, *see* Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CAL. L. REV. 173 (2014) (discussing international human rights law developments and using the term "indigenous peoples" throughout), and because it reflects federal officials' uncertainty regarding whether certain people, or groups of people, qualified as a "tribe" and therefore as an Indigenous people under United States law. *Cf.* Sharon O'Brien, *Tribes and Indians: With Whom Does the United States Maintain a Relationship?*, 66 NOTRE DAME L. REV. 1461, 1494 (1991) ("The United States must recognize that it has an obligation to all indigenous peoples within its borders. The source of these obligations does not depend solely upon the existence of treaties and legislation which assist some and not others, or upon the whimsical nature of the judiciary, but is based ultimately upon the status of Indians (and Native Alaskans, Aleuts, and Native Hawaiians) as indigenous peoples.").

tion Act in 1934 and defined "Indian" in the legislation to include "members of any recognized Indian tribe now under Federal jurisdiction."[26] Using the legislative history of the IRA and of post-1934 Indian affairs laws, I show that the Congressional debates were about—and the "under Federal jurisdiction" language was added to address concerns regarding—who was and wasn't "Indian," and therefore who should or shouldn't qualify for federal services and programs for Indians. I conclude with thoughts on some normative, interpretive, and doctrinal questions involved with deciding what it means to have been a "recognized Indian tribe . . . under Federal jurisdiction" in 1934.

II. THE *CARCIERI* DECISION

The *Carcieri* litigation involved a 31-acre land acquisition for a housing development for the Narragansett Indian Tribe, whose presence in what is now Rhode Island dates back millennia.[27] The Narragansett had diplomatic relations with the British crown and colony of Rhode Island, ceded most of their territory to Rhode Island in the early 1700s, and were the subject of an 1880 Rhode Island state law purporting to abolish the tribe's authority and alienate all but two acres of its remaining lands.[28] In 1983, the United States formally acknowledged a political relationship with the Narragansett Tribe, finding that the Tribe had continually existed from colonial times as a distinct Indian community and polity.[29] The following decade, the Tribe purchased and asked the Secretary of the Interior to place in trust the land at issue in the Supreme Court's 2009 decision.[30]

---

26. Indian Reorganization Act of 1934 § 19, 25 U.S.C. § 479 (2012) (editorially reclassified as § 5129 in Aug. 2016).

27. Carcieri v. Salazar, 555 U.S. 379, 384–85 (2009).

28. Different versions of the tribe's history, both of which discuss the Narragansett being placed under the formal guardianship of Rhode Island in the early 1700s and that guardianship's ending with the 1880 law, are presented in the majority and Justice Stevens' dissenting opinions. *See id*. at 383; *id.* at 403 (Stevens, J. dissenting). A general overview of the tribe's history can be found on the tribe's website, *Historical Perspective of the Narragansett Indian Tribe*, NARRAGANSETT INDIAN TRIBE, http://www.narragansett-tribe.org/history.html (last visited Sept. 28, 2016), and in ROBERT A. GEAKE, A HISTORY OF THE NARRAGANSETT TRIBE OF RHODE ISLAND: KEEPERS OF THE BAY (2011).

29. Final Determination for Federal Acknowledgement of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177 (Feb. 2, 1983) (publishing determination of Narragansett tribal status); *see also infra* notes 259–69 and accompanying text (discussing 25 C.F.R. Part 83 administrative process for federal recognition and criteria in 25 C.F.R. § 83.11(a), (b), (c), and (e) requiring continuous existence as a distinct community and autonomous political entity).

30. *Carcieri*, 555 U.S. at 385.

The *Carcieri* Court held that because the Indian Reorganization Act authorizes the Interior Secretary to acquire land for "Indians,"[31] which the statute defines to include "persons of Indian descent who are members of any recognized Indian tribe *now* under Federal jurisdiction,"[32] this authorization extends only to tribes that were under federal jurisdiction in 1934, when Congress passed the IRA.[33] The majority—in an opinion authored by Justice Thomas and joined by Justices Roberts, Scalia, Kennedy, and Alito—adopted a textualist approach that focused on the plain meaning of the word "now," which they said was unambiguous.[34] They relied primarily on contemporaneous dictionary definitions that defined "now" as "the present time or moment,"[35] and noted that the Court had interpreted the word in other statutes consistently with those dictionary definitions.[36]

---

31. 25 U.S.C. § 465 (2012) (editorially reclassified as § 5108 in Aug. 2016). ("The Secretary of the Interior is authorized . . . to acquire . . . any interest in lands . . . for the purpose of providing land for Indians.").

32. *Id*. § 479 (emphasis added) (editorially reclassified as § 5129 in Aug. 2016). 25 U.S.C. § 479 provides that

> [t]he term "Indian" as used in this Act shall include [1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include [3] all other persons of one-half or more Indian blood.

Id. The argument in *Carcieri* focused only on the first prong of the definition; thus the Court did not discuss the other two categories—descendants and half-(or-more-)bloods—of Indians listed. *See Carcieri*, 555 U.S. at 391–92.

33. *Carcieri*, 555 U.S. at 395. The Court rejected the United States' and Narragansett Tribe's argument that "now" referred to the time at which the Interior Department decided to acquire the land. *Id*. at 391. Although the case was ostensibly about interpreting the word "now," larger issues were at play. *See id*. at 414 (Stevens, J., dissenting) ("[T]he Court's decision can best be described as protecting one sovereign (the State) from encroachment from another (the Tribe). Yet in matters of Indian law, the political branches have been entrusted to mark the proper boundaries between tribal and state jurisdiction."). Justices Roberts and Kennedy expressed their concerns at oral argument about the federal government's taking land into trust for tribes—thereby removing it from state jurisdiction—being an infringement on states' rights. *See supra* note 18. Also in the background was a concern that the Narragansett Tribe might try to build a casino on the land. *See supra* note 20 (discussing Assistant Solicitor General's exchange with Chief Justice Roberts about "the specter of gaming" during *Carcieri* oral argument); *see also* Carcieri v. Norton, 290 F. Supp. 2d 167, 172 (D.R.I. 2003) (discussing "possible use of the parcel for gaming purposes"), *aff'd en banc sub. nom.* Carcieri v. Kempthorne, 497 F .3d 15 (1st Cir. 2007), *rev'd sub nom. Carcieri*, 555 U.S. 379 (2009).

34. *Carcieri*, 555 U.S. at 395 ("We hold that the term 'now under Federal jurisdiction' in § 479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934."); *id*. at 390 (referring to § 479 as "this unambiguous statute").

35. *Id*. at 388 (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1934) ("[a]t the present time . . . moment") (alteration in original) and BLACK'S LAW DICTIONARY (3d ed. 1933) ("[a]t this time; . . . present moment; . . . '[n]ow' as used in a statute *ordinarily* refers to the date of its taking effect") (alterations in original)).

36. *Id*. at 388–89 (examining opinions interpreting "now" in legislation passed before and after the IRA). The majority also noted that interpreting "now" to mean 1934 "align[ed] with the natu-

Having held that "now" meant 1934,[37] the majority concluded that the Narragansett were not under federal jurisdiction then, although the issue was not briefed or argued. Rhode Island asserted in its petition for certiorari and during oral argument that the Narragansett Tribe was not under federal jurisdiction in 1934,[38] neither the United States nor the Tribe (who participated as an amicus curiae) challenged this assertion, and, according to the Court, the only evidence in the record indicated that the Tribe was not under federal jurisdiction in 1934.[39] Thus the Court never debated whether the Narragansett were, or even what it meant to be, under federal jurisdiction in 1934.[40] The Court simply treated the point as conceded with respect to the Narragansett Tribe.

Justices Souter and Ginsburg noted as much, arguing that the case should be remanded because "the very notion of jurisdiction as a distinct statutory condition was ignored in th[e] litigation."[41] They also ex-

---

ral reading of the word within the context of the IRA[,]" pointing to two other places where the IRA used "now or hereafter," and that Commissioner of Indian Affairs John Collier had explained in 1936 that the IRA definition included Indians who were members of tribes that were "under Federal jurisdiction at the date of the Act." *Id*. at 389–90 (citing 25 U.S.C. §§ 468 and 472).

37. *Id.* at 395. Justices Breyer, Souter, and Ginsburg, in their concurring opinions, found the "now under Federal jurisdiction" language to be ambiguous but deferred to the Interior Department's historic practice of interpreting "now" to mean 1934. Justice Breyer thought that the statutory language was ambiguous but agreed that "now" meant 1934 principally because the Interior Department took that position in the years after the IRA's passage. *See id*. at 396 (Breyer, J., concurring). Justices Souter and Ginsburg agreed with Breyer on this point. *Id*. at 400–01 (Souter, J., concurring in part).

38. Petition for a Writ of Certiorari at 3, Carcieri v. Kempthorne, 552 U.S. 1229 (2008) (No. 07-526); Transcript of Oral Argument at 20–21, 57, *Carceiri*, 555 U.S. 379 (No. 07-526).

39. *Carcieri*, 555 U.S. at 382 ("[T]he record in this case establishes that the Narragansett Tribe was not under federal jurisdiction when the IRA was enacted . . . ."); *id*. at 384 ("[I]n correspondence spanning a 10-year period from 1927 to 1937, federal officials . . . not[ed] that the Tribe was, and always has been, under the jurisdiction of the New England States, rather than the Federal Government."). The Court ended its opinion by noting that

> [n]one of the parties or *amici*, including the Narragansett Tribe itself, has argued that the Tribe was under federal jurisdiction in 1934. And the evidence in the record is to the contrary. Moreover, the petition for writ of certiorari filed in this case specifically represented that "[i]n 1934, the Narragansett Indian Tribe . . . was neither federally recognized nor under the jurisdiction of the federal government." The respondents' brief in opposition declined to contest this assertion. Under our rules, that alone is reason to accept this as fact for purposes of our decision in this case.

Id. at 395–96 (second alteration and omission in original) (citations omitted).

40. *Id.*; *see* Memorandum from Hilary C. Tompkins, *supra* note 17, at 17 (noting that "the issue of whether the [Narragansett] Tribe 'was under federal jurisdiction' was not litigated before the Court" and that "neither the Court nor the parties elaborated on what would be necessary to demonstrate that a tribe was under federal jurisdiction in 1934").

41. *Carcieri*, 555 U.S. at 401 (Souter, J., dissenting in part). Noting the federal government's explanation during oral argument that the Department had "understood recognition and under Federal jurisdiction at least with respect to tribes to be one and the same," *id*. (quoting Transcript of Oral Argument at 42, *Carceiri*, 555 U.S. 379 (No. 07-526)), Justices Souter and Ginsburg said it was "not surprising that neither [the United States] nor the Tribe raised a claim that the Tribe was under fed-

plained that the United States' ignoring—or being "ignorant of"—"a tribe in 1934 does not preclude that tribe from having been under federal jurisdiction [in 1934]."[42] Justice Breyer agreed that a tribe could have been under federal jurisdiction in 1934 even though government officials did not believe so at the time,[43] and he offered treaty obligations, congressional appropriations, and "enrollment (as of 1934) with the Indian Office" as examples of indicia of a relationship between a tribe and the United States "that could be described as jurisdictional."[44] Breyer also offered the examples of three specific tribes the Interior Department—after 1934—formally recognized, or treated, as Indian tribes under federal jurisdiction and acknowledged "that it should have recognized . . . in 1934 even though it did not[,]" including a tribe the department thought had been "dissolved" and another tribe the department concluded "no longer existed" based on an early 1900s anthropological study.[45]

The Court was mistaken, however, in its assumptions regarding basic federal Indian law doctrine(s) and how it situated Narragansett tribal history in that doctrinal context. First, the Justices (except Ginsburg, Sout-

---

eral jurisdiction in 1934: they simply failed to address an issue that no party understood to be present." *Id*. Souter and Ginsburg also stated that they "kn[e]w of no body of precedent or history of practice giving content to the condition sufficient for gauging the [Narragansett] Tribe's chances of satisfying it[,]" but they "c[ould] agree . . . that the current record raise[d] no particular reason to expect that the Tribe might be shown to have been under federal jurisdiction in 1934." *Id*.

42. *Id*. at 400 ("[T]he fact that the United States government was ignorant of a tribe in 1934 does not preclude that tribe from having been under federal jurisdiction at that time.").

43. *Id*. at 399 (Breyer, J., concurring); *see also id*. at 397–98 (discussing tribes that were "'under Federal jurisdiction' in 1934—even though the Department did not know it at the time.") Like the majority, Justice Breyer accepted that the Narragansett Tribe was not under federal jurisdiction in 1934. *Id*. at 399–400 ("[B]oth the State and Federal Government considered the Narragansett Tribe as under *state*, but not under *federal*, jurisdiction in 1934. And until the 1970's there was 'little Federal contact with the Narragansetts as a group.'") (quoting Memorandum from Deputy Assistant Secretary – Indian Affairs (Operations) to Assistant Secretary – Indian Affairs 8 (July 29, 1982)); *id*. at 399 ("Neither the Narragansett Tribe nor the Secretary has argued that the Tribe was under federal jurisdiction in 1934. . . . And I have found nothing in the briefs that suggests the Narragansett Tribe could prevail on [this] theory.").

44. *Id*. at 399 (discussing examples of "post-1934 recognition on grounds that implied a 1934 relationship between the tribe and Federal Government that could be described as jurisdictional, for example, a treaty with the United States (in effect in 1934), a (pre-1934) congressional appropriation, or enrollment (as of 1934) with the Indian Office."); *id.* at 397 ("[A]n examination of the provision's legislative history . . . shows that Congress expected the phrase would make clear that the Secretary could employ § 465's power to take land into trust in favor only of those tribes in respect to which the Federal Government already had the kinds of obligations that the words 'under Federal jurisdiction' imply."). It is unclear what exactly Justice Breyer meant by "enrollment . . . with the Indian Office"; presumably he was talking about local BIA agencies keeping censuses of or other records regarding certain Indians, administering services to and corresponding with them, and such.

45. *Id*. at 398–99 (discussing the Stillaguamish Tribe, the Grand Traverse Band of Ottawa and Chippewa Indians, and the Mole Lake Tribe); *see also infra* notes 132–33, 253, 256 and accompanying text (discussing Stillaguamish, Grand Traverse, and Mole Lake Tribes).

er, and Stevens) wrongly equated the exercise of federal jurisdiction with its existence.[46] Whether a government exercises jurisdiction in any given instance is a factual inquiry distinct from whether that jurisdiction exists as a matter of law.[47] Second, the Court was wrong to suggest that the Narragansett Tribe, which in 1983 was added to the list of Indian tribes recognized by the United States based on an administrative determination that the Tribe had existed continually since the 1600s,[48] was not under federal jurisdiction in 1934. If the Narragansett were an Indian tribe before, in, and after 1934, and the United States (according to the discovery and plenary power doctrines) has jurisdiction over all tribes within its territory, how could they not have been under federal jurisdiction in 1934?[49]

---

46. Justices Souter and Ginsburg, as noted, thought the case should have been remanded to give the Narragansett Tribe and the United States an opportunity to argue the Tribe was under federal jurisdiction in 1934—and to explain what "under Federal jurisdiction" means, since it was not argued in the litigation. *Carcieri*, 555 U.S. at 400–01 (Souter, J., dissenting in part); *see also supra* notes 43–44 and accompanying text. Justice Stevens wrote a lone dissent arguing that because the IRA authorizes the Secretary to acquire land for Indian tribes as well as individual Indians and places no temporal restraint on the definition of "Indian tribe," it was senseless to argue about whether a tribe was under federal jurisdiction in 1934 so as to qualify as an "Indian" under the statute. *Id*. at 409–13 (Stevens, J., dissenting); *see also* Brief of Historians Frederick E. Hoxie, Paul C. Rosier, and Christian W. McMillen As *Amici Curiae* Supporting Respondents at 28, Carcieri v. Kempthorne, 552 U.S. 1229 (2008) (No. 07-526) [hereinafter Historians' Brief] ("[I]t is hardly plain—or even likely—that Congress meant the disputed language to affect the Act's application to tribes, rather than just to 'persons.'").

47. *See infra* notes 143–49 and accompanying text.

48. *See supra* note 29 and accompanying text.

49. The fact that federal (and state) officials considered the Narragansett to be under state jurisdiction in 1934, *see Carcieri*, 555 U.S. at 382–84, *id*. at 399–400 (Breyer, J., concurring); *see also infra* notes 72–95 and accompanying text (discussing federal officials' correspondence regarding the Narragansett and other East Coast tribes), based on a relationship between the Narragansett Tribe and Rhode Island predating the United States, does not preclude them from also having been under federal jurisdiction. *See* Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1077 (2014) [hereinafter Ablavsky, *Constitution*] (noting that "many states claimed and exercised a constitutional right to govern Indians until well after the Civil War") (citing, among other sources, DEBORAH A. ROSEN, AMERICAN INDIANS AND STATE LAW: SOVEREIGNTY, RACE, AND CITIZENSHIP, 1790–1880, at 51–79 (2007)).

Indeed, in litigation involving whether the Narragansett Tribe fell within the federal government's jurisdiction under the Nonintercourse Act, 25 U.S.C. § 177 (2012), which was first passed in 1790 and voids land transfers "from any Indian nation or tribe of Indians" without federal approval—and through which, courts have found, a (jurisdictional) trust relationship exists between the federal government and Indigenous people(s) that (continually) exist(ed) as an Indian tribe (or nation) within the meaning of the Act (which, in turn, requires that the people continually exist as a distinct Indian community)—the U.S. district court in Rhode Island explained that

> neither the State's alleged unilateral attempt to disband the tribe in 1880, nor its assumption of "almost exclusive responsibility for the protection and welfare of the" tribe's members in the face of almost complete disregard by the federal government . . . could operate to terminate the trust relationship between the tribe and the federal government which would be established by proof that the Nonintercourse Act applies herein.

III. JURISDICTION AND RECOGNITION: EXISTENCE VERSUS EXERCISE

This article's examination of federal Indian law doctrine, policy, and history, and the legislative history of the Indian Reorganization Act—which the *Carcieri* Court did not undertake—demonstrates that people(s) like the Narragansett who continuously existed as distinct Indian communities were always considered to be under federal jurisdiction as a matter of law. However, as the histories of the Narragansett and other people(s) discussed in this Part exemplify, federal officials did not always treat, or recognize, certain people(s) as Indians or tribes, whether because they thought those people(s) were too intermarried (with non-Indians) or assimilated (into the larger economy and society), because of a lack of resources or political or bureaucratic will, or for a combination of these and/or other reasons.[50] But as Justices Breyer, Ginsburg, and

---

Narragansett Tribe of Indians v. S.R.I. Land Dev. Corp., 418 F. Supp. 798, 803–04 (D.R.I. 1976) (citing and quoting Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. 649, 652–53, 663 n.15 (D. Me.), *aff'd*, 528 F.2d 370 (1st Cir. 1975)); *see also* Mashpee Tribe v. Sec'y of the Interior, 820 F.2d 480, 482 (1st Cir. 1987) (noting that the Nonintercourse Act applies "only if plaintiffs show they are . . . entities that 1) were tribes at the time the land was alienated and 2) remain tribes at the time of suit"). The *Narragansett Tribe* court never decided whether the Nonintercourse Act applied to the Narragansett Tribe; the litigation led to the Rhode Island Indian Claims Settlement Act, Pub. L. No. 95-395, 92 Stat. 813 (1978) (codified at 25 U.S.C. § 1701 et seq. (2012)), which recognized Narragansett title to 1,800 acres of their ancestral lands and provided monetary compensation to the Tribe. *See Carcieri*, 555 U.S. at 384.

Similarly, the Second Circuit, in a Nonintercourse Act case involving the Mohegan Tribe (which also resulted in Congressional settlement legislation, *see* Mohegan Nation of Connecticut Land Claims Settlement Act, Pub. L. No. 103-377, 108 Stat. 3501 (1994) (codified at 25 U.S.C. § 1775 et seq. (2012))), stated that

> the fact that the federal government disclaimed responsibility for the[] [Mohegan and other New England] tribes is not determinative here. We believe that, although considerable evidence amassed by the State supports the proposition that the federal government did not avail itself of the provisions of the Nonintercourse statute and appeared to leave management of the affairs of the eastern tribes to the individual states, it does not follow that the federal government had no obligation to do so, or that the states had the authority unimpeded by the Acts to buy land from the eastern tribes without federal approval.

Mohegan Tribe v. Connecticut, 638 F.2d 612, 623 (2d Cir. 1981).

50. Federal officials often based their decisions about exercising the government's Indian affairs jurisdiction regarding certain people(s) on whether they thought those people(s) were Indian enough, either racially (because of intermarriage) or culturally (because of acculturation), or both, *see* MARK EDWIN MILLER, FORGOTTEN TRIBES: UNRECOGNIZED INDIANS AND THE FEDERAL ACKNOWLEDGMENT PROCESS 16 (2004) ("Legislative acknowledgment and federal court decisions generally . . . favored groups that retained some anachronistic survivals of aboriginal culture and visible racial features; in essence, groups that 'looked' Indian."), *id*. at 30 (noting that Interior Department determinations of tribal status in the mid-twentieth century "often hinged on the perceived level of assimilation of the group in question, racial issues, finances, or opinions whether the group needed wardship—not necessarily on the merits of a group's tribal identity or status"), and across decades and centuries have changed their positions about whether some of these people(s) should be under federal jurisdiction. *See infra* notes 76–103 and accompanying text (discussing changed Department of Interior positions regarding the status of the Narragansett, Shinnecock, and other tribes),

Souter noted in *Carcieri*,[51] just because federal officials did not exercise the government's Indian affairs jurisdiction with respect to particular people(s) doesn't mean that jurisdiction did not exist.

Two patterns demonstrating federal officials' scattered approach to tribal recognition, and the exercise of jurisdiction based thereon, are evident in U.S. history. On one hand, some people(s), including the Narragansett and other East Coast tribes, had to convince federal decisionmakers that they continued to exist as distinct Indian communities (and that they were still racially and culturally "Indians") and therefore came within the government's Indian affairs jurisdiction. On the other hand, some people(s) whose "Indianness," or identity as Indian communities, no one questioned struggled to persuade reluctant bureaucrats to exercise jurisdiction they knew—and even acknowledged—existed but, for whatever reason(s), did not want to employ.

In both scenarios, the federal government for some period of time does not exercise jurisdiction it assumed under the law but later "recognizes" those people(s) as Indian tribes, accords them the same legal status as other tribes, and (re)establishes a formal government-to-government relationship through which the United States exercises the Indian affairs jurisdiction always presumed there.[52] Federal officials' haphazardness regarding tribal recognition was exacerbated by the fact there was no formal policy or process for determining tribal status until

---

notes 219–26 and accompanying text (discussing Supreme Court cases holding Pueblo Indians in New Mexico were not Indians and later that they were Indians), and notes 132–36 and accompanying text (discussing Department of the Interior opinions changing Department position regarding whether the Catawba, Nooksack, Burns Paiute, and Stillaguamish tribes were under federal jurisdiction). Limited federal resources also played a role, and may have led to federal officials' prioritizing among tribes based on their perceived "Indianness" and needs. *See* MILLER, *supra*, at 30 (noting that "John Collier and the Indian Service . . . denied recognition to many Chippewa and Ottawa bands in Michigan for the simple reason that federal funds were thin during the Great Depression."); *see also infra* note 108 and accompanying text (discussing Interior Department officials' concerns about the fiscal impacts of extending the Indian Reorganization Act to people(s) in Michigan).

51. *See supra* notes 41–45 and accompanying text.

52. *See, e.g.*, Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 694 (1st Cir. 1994) ("Federal recognition is just that: recognition of a previously existing [tribal] status."). Discussing the "fluidity of tribal existence," a group of professors specializing in federal Indian law explained in an amicus brief filed in *Carcieri* that

> historically tribal status was not static. Some groups considered Indian tribes early in their history were ultimately no longer identified by the federal government as such, because their membership had significantly dwindled in size or had fully assimilated into white society. On the other hand, some groups determined not to be tribes later regained their tribal status.

Brief of Law Professors Specializing in Federal Indian Law As *Amicus Curiae* Supporting Respondents at 4, Carcieri v. Kempthorne, 552 U.S. 1229 (2008) (No. 07-526) [hereinafter Law Professors' Brief].

1978, and no requirement to publish a list of tribes recognized by the United States until 1994.[53] The examples discussed below of the Pamunkey Indian Tribe, Shinnecock Indian Nation, Mashpee Wampanoag Tribe, and Tejon Indian Tribe—the four peoples added to the list of federally recognized Indian tribes within the past decade—illustrate federal decisionmakers' historical arbitrariness.[54]

A. Eastern Seaboard Tribes (the Original Thirteen States)

For most of its history, United States government officials treated the Narragansett, Pamunkey, Shinnecock, Mashpee, and other Indigenous people(s) along the eastern seaboard as "remnants" or "fragments" of polities that had formed political and economic relationships with the British crown and its colonies, which continued these relationships after they became states. Federal officials for the most part deferred to the states' exercise of authority regarding these tribes, citing their jurisdictional relationships with the various states and, in some instances, their intermarriage with non-Indians and adaptation to Anglo culture. However, historical documents show that federal officials also understood that, although they were not doing so, they always had the prerogative to exercise the federal Indian affairs jurisdiction—what the Supreme Court has called the "power to deal with" these people(s)[55]—should they choose. And they eventually did, raising the question(s) of when and how this jurisdiction arose.

The different eastern seaboard tribes' jurisdictional relationships with the states around them date back to seventeenth century colonial

---

53. *See infra* notes 259–63 and accompanying text (discussing Interior Department regulations adopted in 1978 and codified at 25 C.F.R. Part 83). Though the first such list was published in the Federal Register in 1979, *see* Indian Tribal Entities that Have a Government-to-Government Relationship with the United States, 44 Fed. Reg. 7235 (Jan. 31, 1979), in conjunction with the implementation of the 1978 regulations, the Department was not required to (and did not regularly) publish a list until Congress passed the Federally Recognized Indian Tribes List Act of 1994, mandating the publication of a list annually in the Federal Register. Pub. L. 103-454, tit. I, § 104, 108 Stat. 4791 (1994) (codified as 25 U.S.C. § 479a-1 (editorially reclassified as § 5131 in Aug. 2016)).

54. The Pamunkey, Shinnecock, Mashpee, and Tejon were added to the list in 2016, 2010, 2007, and 2012, respectively. *See infra* notes 97–100, 113 (citing Federal Register notices).

55. United States v. John, 437 U.S. 634, 653 (1978). Consistent with their dictionary and jurisprudential meanings (which equate them), this article uses the words jurisdiction, power, and authority interchangeably. *See infra* notes 143–49 and accompanying text. However, I try to use "jurisdiction" where possible to reflect the statutory language in the Indian Reorganization Act, and "power" more when discussing the phenomenon described by the Supreme Court (and to reflect the Court's own usage).

treaties and were embodied in subsequently enacted state laws.[56] Sometimes called "tributary tribes" or "tributary Natives" because of these relationships, these peoples lived (and continue to live) on reservations in Virginia, New York, Connecticut, Rhode Island, Massachusetts, Maine (which was part of Massachusetts until 1820), and South Carolina set aside under colonial and state laws.[57] State laws regulated land ownership and use, natural resources, and economic activity on these reservations,[58] and the states (like the colonies before them) appointed guardi-

56. *See* David H. DeJong, American Indian Treaties: A Guide to Ratified and Unratified Colonial, United States, State, Foreign, and Intertribal Treaties and Agreements, 1607–1911, at 14–16 (2015) (discussing seventeenth century British treaties with the Powhatan Confederacy in present-day Virginia, the Wampanoag in Massachusetts, the Pequot in Connecticut, and the Narragansett in Rhode Island); Helen C. Rountree, Pocahontas's People: The Powhatan Indians of Virginia Through Four Centuries 87 (1990) (discussing 1646 treaty between the Powhatan Confederacy and the English); Diana Scully, Me. Indian Tribal-State Comm'n, Maine Indian Claims Settlement: Concepts, Context, and Perspectives 4–5 (1995), http://www.mitsc.org/documents/21_Body.doc.pdf (discussing eighteenth-century Passamaquoddy, Penobscot, Maliseet, and Micmac treaties with the British and Commonwealth of Massachusetts, and an unratified 1777 treaty with the United States).

57. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[9] (Nell Jessup Newton ed., 2012) (discussing reservations and "relationships that developed with English colonies and continued with the states after the American Revolution"). The various colonial and state laws for Massachusetts, Connecticut, Rhode Island, Maine, New York, Virginia, and South Carolina (as well as New Jersey and North Carolina, where state reservations existed into the 1700s) can be found in LAWS OF THE COLONIAL AND STATE GOVERNMENTS, RELATING TO INDIANS AND INDIAN AFFAIRS, FROM 1633 TO 1831, INCLUSIVE (photo. reprint 1979) (1832). Gregory Ablavsky has used the phrase "tributary Natives" to refer generally to "eastern tribes surrounded by Anglo-American communities" that "were subject to state law." Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L. J. 1012, 1054 (2015) [hereinafter Ablavsky, *Beyond*]; *see also* CAROLE E. GOLDBERG ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 61 (7th ed. 2015) (noting that "the Commonwealth [of Virginia] entered into treaties that established the . . . tribes of that region . . . as 'tributary tribes,' formally paying feudal tribute to the colonial government"); JAMES H. MERRELL, THE INDIANS' NEW WORLD: CATAWBAS AND THEIR NEIGHBORS FROM EUROPEAN CONTACT THROUGH THE ERA OF REMOVAL 150–51, 198–202 (1989) (discussing South Carolina colonial governor's reference to Catawba Indians as "Tributaries," military commissions extended to Catawba leaders by South Carolina, and British crown superintendence regarding the Catawba reservation in South Carolina).

58. *E.g.*, DANIEL R. MANDELL, TRIBE, RACE, HISTORY: NATIVE AMERICANS IN SOUTHERN NEW ENGLAND, 1780–1880, at 10–12 (2008) (discussing land management and resource use laws for the Mashpee in Massachusetts, the Mohegan in Connecticut, and the Narragansett in Rhode Island); *id.* at 18–20, 125 (discussing laws protecting Mashantucket Pequot and Mohegan lands in Connecticut and Wampanoag lands in Massachusetts); *id.* at 71 (noting that by the early 1800s, "laws in the [New England] region for more than two centuries had barred the sale of tribal lands to outsiders without the approval of the legislature"); ROSEN, *supra* note 49, at 161–63 (2007) (discussing Massachusetts laws regarding property and contracts); ROUNTREE, *supra* note 56, at 112–15 (discussing Virginia laws governing Pamunkey land sales and leases adopted in the late 1600s and early 1700s); SCULLY, *supra* note 56, at 6 (discussing Maine laws governing timber harvesting and land sales and leases).

ans, or trustees, to oversee the administration of these laws and the tribes' affairs.[59]

When the United States came into existence, federal officials focused their attention and limited resources on relationships with the Native peoples who governed lands the new nation claimed along its western border.[60] Colonists already occupied almost all the aboriginal lands of the eastern seaboard tribes, whose populations and military and economic power had declined significantly since the mid-1600s.[61] Most people,

---

59. GOLDBERG ET AL., *supra* note 57, at 61 ("During the colonial period, Massachusetts . . . , Connecticut, and other colonies . . . formally appointed non-Indian trustees to supervise Indian lands . . . ."); MANDELL, *supra* note 58, at 70–75, 129, 171–72 (discussing the appointment and authority of guardians in Connecticut, Massachusetts, and Rhode Island following the Revolutionary War); ROSEN, *supra* note 49, at 10, 163 (discussing guardians in Massachusetts); ROUNTREE, *supra* note 56, at 164–65 and 177–79 (discussing the appointment of trustees by Virginia for the Pamunkey, colonial guardians and superintendent of Indian affairs in Massachusetts, and New York laws appointing trustees for the Shinnecock and Montauk Indians on Long Island in the 1700s); *see also* Final Determination for Federal Acknowledgment of the Pamunkey Indian Tribe, 80 Fed. Reg. 39144, 39147 (July 2, 2015) (discussing appointment of trustees for the Pamunkey in the 1700s).

60. *See* Ablavsky, *Constitution*, *supra* note 49, at 1003–04, 1004 n.12 ("When the Constitution was written, powerful Native nations owned and governed much of the territory mapmakers labeled 'United States.' . . . [N]early all territory west of the Appalachians . . . remained Indian country, both de facto and de jure."). When he was President, for example, George Washington apparently felt inconvenienced by (and tried to avoid) meetings with delegations of Catawba Indians; but he and other British colonial leaders sought the Catawbas' alliance just decades earlier during the Seven Year's War against France. *See* MERRELL, *supra* note 57, at 280–81 (citing correspondence from President Washington and explaining that "[h]e and most of his fellow Americans had come to regard Catawbas as something of a nuisance, a ragged, insignificant people hardly worth a second thought, or even a first"). And a U.S. congressional committee, who met with a Catawba delegation that traveled to Philadelphia in 1782 "in an attempt to establish relations with the federal government," simply "recommended that South Carolina 'take such Measures for the Satisfaction and security of the . . . Tribe as the [South Carolina] Legis[lature] shall in their wisdom think fit.'" *Id.* at 208 (quoting Letter from Benjamin Lincoln, Sec'y of War, to President of Congress (Nov. 1, 1782)) (second alteration in original). Similarly, President Washington, in response to a request from the Archbishop of Baltimore for help with the Catholic Church's proselytizing among Indians in Maine (then part of Massachusetts), wrote that "[a]ny application, therefore, relative to those Indians . . . would seem most proper to be made to the government of Massachusetts" because they (like other Indians "who dwell[ed] in the eastern extremity of the United States") were "so situated as to be rather considered a part of the inhabitants of the State of Massachusetts than otherwise, and that State has always considered them under its immediate care and protection." PETER GUILDAY, THE LIFE AND TIMES OF JOHN CARROLL 606–07 (1922) (quoting Letter from George Washington to Archbishop John Carroll (Apr. 10, 1792)).

61. Ablavsky, *Constitution*, *supra* note 49, at 1010 (noting that the U.S. population was "heavily concentrated along the coast between New England and Virginia"). The declines in population and military power among these tribes resulted from years of ecological, epidemiological, and military depredations, including recurring epidemics of smallpox and other European-brought diseases in the sixteenth, seventeenth, and eighteenth centuries, as well as wars between the Powhatan Confederacy and the English in Virginia in the 1620s and 1640s, the 1636–1638 war between the Pequot and the English and their Mohegan and Narragansett allies, and the 1675–1676 war between the English and the Wampanoag, Narragansett, and other tribes. *See* DANIEL K. RICHTER, FACING EAST FROM INDIAN COUNTRY: A NATIVE HISTORY OF EARLY AMERICA 53–60, 75, 95–96, 101–106, 173

including the drafters of the United States' founding documents, assumed that the (former-colonies-turned-)states would continue to exercise jurisdiction regarding these Eastern tribes.[62] This assumption is reflected in both the Articles of Confederation and the United States Constitution,[63] and it is borne out in historical practice continuing well into the nineteenth century.[64]

Underlying the assumption and practice regarding state jurisdiction over Eastern tribes was the belief, widely shared inside and outside of government, that they (and other Indians) were doomed to cultural, if not

---

(2001) (discussing the impacts of these events, and European colonization generally, on Eastern seaboard tribes).

62. *See* MANDELL, *supra* note 58, at 117 ("While the U.S. Constitution had given the national government control over relations with sovereign Indian tribes, . . . no state or federal official questioned the paradigm that southern New England Natives had been subjugated during the colonial period."); ROSEN, *supra* note 49, at 56 (noting that "[b]y the early national period, many Indians had already been dispossessed from northeastern states, and those who remained were left under state jurisdiction[,]" and that "[t]he premise that Massachusetts, Connecticut, Rhode Island, New Jersey, and Pennsylvania would continue to have the same authority over Indians that they had exercised as colonies met with no serious challenge").

63. The Indian affairs power clause in the Articles of Confederation granted Congress the "sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the States; provided that the legislative right of any State, within its own limits, be not infringed or violated." ARTICLES OF CONFEDERATION OF 1781, art. IX, § 4. The Apportionment Clause in Article I, Section 2 of the Constitution excludes "Indians not taxed" from (and, by implication, includes those who were taxed among) the populations of free persons used for apportioning legislative representatives and taxes. U.S. CONST., art. I, § 2, cl. 3. ("Indians not taxed" are similarly excluded from the Apportionment Clause in the Fourteenth Amendment. *Id.* amend. XIV, § 2.) Gregory Ablavsky has suggested that members of "eastern tribes surrounded by Anglo-American communities [that] were subject to state law" were "likely the 'members of the States' under Article IX of the Articles" and "presumably also the 'taxed' Indians implied in the Constitution." Ablavsky, *Beyond*, *supra* note 57, at 1054–55; *see also* GOLDBERG ET AL., *supra* note 57, at 61 (noting that "[Thomas] Jefferson specifically referred to the Virginia tributary or feudatory tribes when he proposed the somewhat confused Indian affairs clause of the Articles of Confederation to the Continental Congress"). To the extent Indians in New England and other states were not taxed and did not have rights as state citizens until after the U.S. Civil War, *see* Danzell v. Webquish, 108 Mass. 133, 134 (1871) ("By the law of Massachusetts, until very recently [1869], these Indians were not subjected to taxation, nor endowed with the ordinary civil and political rights of citizens, but were treated as wards of the Commonwealth."); ROSEN, *supra* note 49, at 160–61 (noting that Massachusetts, Connecticut, and Rhode Island did not extend citizenship rights to Indians until the late 1800s), they would seem to fall outside of these categories (of, respectively, Indians that were "members of" a state and "taxed" Indians).

64. *See* MANDELL, *supra* note 58, at 216 (noting that "Indians in [New England] were under state rather than federal administration, and many held their reserves under colonial treaties and laws that continued to have strong legal power within the states" throughout the nineteenth century); *id.* at 195–96 (noting that "[b]etween 1860 and 1880, . . . the three southern New England states [Connecticut, Rhode Island, and Massachusetts] ended the special legal status of nearly all Indians" and discussing state laws "terminating" tribes and authorizing land divisions and sales); *id.* at 117 ("Special [state] legislative commissions and commissioners visited and reported on the Narragansetts in 1831, 1832, 1843, 1858, and 1879–80; the Mohegans in 1830, 1859, and 1860; the Golden Hill Paugussetts in 1823; the Mashantucket Pequots in 1855; and most Indian groups in Massachusetts in 1827, 1849, and 1861.").

physical, extinction. This belief was manifest in the "vanishing Indian" stereotype that developed and was prevalent in the late 1700s and early 1800s,[65] itself a reflection of Anglo societal thinking that Indigenous peoples along the eastern seaboard (among whom, some more than others, intermarriage with non-Indians increased significantly after the Revolutionary War) were no longer racially or culturally "pure" Indians.[66] The vanishing Indian trope pervaded popular culture (including literature and news accounts, and among historians) and all levels of government.[67]

---

65. As described by Kathryn Fort,

> [t]he vanishing Indian concept refers to a literary, historical, and cultural understanding of the clash between "civilized" colonizers and "savage" Indians. The concept is rooted in the belief that in the face of "advancing civilization," tribes and tribal citizens would necessarily and inevitably disappear. This idea shifted over time from one of extirpation of all individual Indians to the disappearance of tribes as sovereign governments as an organizing force, and the assimilation of tribal members into the dominant society.

Kathryn E. Fort, *The Vanishing Indian Returns: Tribes, Popular Originalism, and the Supreme Court*, 57 ST. LOUIS L.J. 297, 309 (2013); *id.* at 310 (noting that "[t]hroughout the early 1800s the vanishing Indian became 'a habit of thought'") (quoting BRIAN W. DIPPIE, THE VANISHING AMERICAN: WHITE ATTITUDES AND U.S. INDIAN POLICY 15 (1982)).

66. *See* MANDELL, *supra* note 58, at 35, 193 (explaining that "[b]y the end of the Revolutionary War, Anglo-Americans increasingly viewed the remaining coastal Indians as part of an undifferentiated group of people of color[,]" and that "[t]he vanishing Indian trope that appeared in so many . . . [early nineteenth century] writings rested in large part on hardening notions of race"); Gregory Ablavsky, Comment, *Making Indians "White": The Judicial Abolition of Native Slavery in Revolutionary Virginia and Its Racial Legacy*, 159 U. PA. L. REV. 1457, 1472, 1510–12, 1520 (2011) [hereinafter Ablavsky, Comment] (noting the "demographic transformation that occurred [in Virginia] over the course of the eighteenth century" alongside the "rise of racial essentialism,"; that, following the Revolutionary War, "Virginia elites assumed . . . that Natives had disappeared from their society"; and that Indians in Virginia "were relegated to an undifferentiated underclass along with Africans and mixed-race peoples" [because] "[t]he[y] . . . no longer represented a supposedly 'pure' Native culture"); *id.* at 1510 (noting that, at the turn of the nineteenth century in Virginia, "[o]nly a handful of Indians remained on state-created reservations, where their supposed abandonment of their traditional culture and intermarriage with non-Natives compromised their identity in Anglo-Virginian eyes"); *see also* Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940, 944 (D. Mass. 1978) (noting that "a very large number" of Mashpee men were killed during the Revolutionary War, leaving some "70 widows . . . out of a population of a few hundred[,]" a "situation [that] encouraged a considerable influx of unattached non-Indian males, mostly black"), *aff'd sub nom.* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979); MANDELL, *supra* note 58, at 43–44, 49 (discussing Indian male population declines and increasing intermarriage, particularly between Native women and African-American men, among New England tribes after the Revolutionary War).

67. *See* DIPPIE, *supra* note 65, at 10–25 (examining the development and prevalence of the vanishing Indian stereotype in early nineteenth-century American popular culture and literature, including the 1826 publication of James Fenimore Cooper's *The Last of the Mohicans*, which Dippie calls the "solitary masterpiece" in the Vanishing Indian American fiction literature genre); MANDELL, *supra* note 58, at 145–46, 178–79 (discussing the vanishing Indian trope in late eighteenth and early nineteenth-century popular literature and poetry); *id.* at 175 (noting early historians' "increasing[] sensitiv[ity] . . . to scientific notions of race [that] began to gain credence" and their general agreement "that the few 'pure bloods' who remained were but a shadow of their ancestors."); Fort, *supra* note 65, at 311–12 (describing how the "societal and cultural understanding of the vanishing Indian informed political leaders from the local to the national level" and "informed their decision-

In the 1780s, for example, Thomas Jefferson "describ[ed] what he regarded as the remnants of Virginian Indian tribes . . . [as] no longer 'pure' and ha[ving] 'lost their language[s].'"[68] In his first annual address to Congress in 1829, President Andrew Jackson referred to the Narragansett and Mohegan as tribes who "ha[d] left but remnants to preserve for a while their once terrible names."[69] A report prepared for the War Department earlier that decade on the Narragansett, Mashpee, Mohegan, and other New England Indians said that

> [t]hese Indians are all provided for . . . by the governments and religious associations, of the several states in which they reside . . . . Should the Government of the United States[] provide an Asylum for the remnants of these depressed and wretched people . . . a portion of them might be persuaded to take shelter in it from the ruin which otherwise seems inevitably to await them.[70]

---

making processes and their policy initiatives"); *see also* MANDELL, *supra*, at 24, 146, 190 (discussing early 1800s newspaper and other accounts of the "last" Indians in different New England towns and noting "how many Indians described as the last ones in town were also noted as having children and even grandchildren").

68. Ablavsky, Comment, *supra* note 66, at 1510 n.308 (citing THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 1781–1787 (1787), *reprinted in* BY THOMAS JEFFERSON WITH RELATED DOCUMENTS, 147 (David Waldstreicher ed., 2002)) (final alteration in original); *see also* ARICA L. COLEMAN, THAT THE BLOOD STAY PURE: AFRICAN AMERICANS, NATIVE AMERICANS, AND THE PREDICAMENT OF RACE AND IDENTITY IN VIRGINIA 58–59 (2013) (quoting Jefferson's statements about language use and intermarriage among the Pamunkey and other tribes and noting that "Jefferson envisioned the American Indians of Virginia as historical artifact, rather than present day reality. In Jefferson's estimation, the Virginia Indians were all but extinct."); 2 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, app. H, 66 (1803) (stating that "[t]he number of Indians and their descendants in Virginia . . . is too small to require particular notice").

69. President Andrew Jackson, First Annual Message to Congress (Dec. 8, 1829). Speaking of eastern seaboard tribes generally, Jackson said that

> [b]y persuasion and force they have been made to retire from river to river and from mountain to mountain, until some of the tribes have become extinct and others have left but remnants to preserve for a while their once terrible names. Surrounded by the whites with their arts of civilization, which by destroying the resources of the savage doom him to weakness and decay, the fate of the Mohegan, the Narragansett, and the Delaware is fast overtaking the Choctaw, the Cherokee, and the Creek.

Id.; *see also* President Andrew Jackson, Message to Congress 'On Indian Removal' (Dec. 6, 1830) ("The tribes which occupied the countries now constituting the Eastern States were annihilated or have melted away to make room for the whites.").

70. JEDIDIAH MORSE, A REPORT TO THE SECRETARY OF WAR OF THE UNITED STATES ON INDIAN AFFAIRS 23–24 (1822); *see also id.* at 75 (noting that Connecticut had "assumed the care" of the Mohegans and their property "in like manner as the other New England States have done for their Indians"). From its creation in 1789 until the Office of Indian Affairs (or Bureau of Indian Affairs) was established in 1824, the War Department handled all federal Indian affairs matters. *See* RONALD N. SATZ, AMERICAN INDIAN POLICY IN THE JACKSONIAN ERA 151–52 (1975); *see also*

And dicta in some nineteenth century Supreme Court opinions references "remnants of tribes" in the original thirteen states to whom state law applied by treaty or because they had "lost the power of self government" due to "their reduced numbers."[71]

STEPHEN J. ROCKWELL, INDIAN AFFAIRS AND THE ADMINISTRATIVE STATE IN THE NINETEENTH CENTURY chs. 2–4 (2010) (discussing U.S. Indian affairs administration up through the 1820s).

According to historian Daniel Mandell, Morse and the author of an 1831 Rhode Island state report on the Narragansett "both focused on how few pure-blood Indians remained in the communities, and both embraced the paradigm that this racial makeup meant that the groups were no longer truly Indian and therefore should no longer be protected or separated by distinct laws." MANDELL, *supra* note 58, at 197; *see also* Mashpee Tribe v. Sec'y of the Interior, 820 F.2d 480, 483 (1st Cir. 1987) (quoting Morse's statements that "the number of *pure blooded* Indians [at Mashpee] is extremely small, say fifty or sixty, and is rapidly decreasing"; that the Mashpee and other Indians in Massachusetts had "altogether adopted the habits of civilized life"; and that the number of Indians at Mashpee was "diminishing, though rather slowly" (alteration in the *Mashpee Tribe* opinion)). Similar attitudes regarding eastern seaboard Indians are evident in other state documents from the mid-1800s. *See* MANDELL, *supra* note 58, at 146 (quoting the chair of the Massachusetts state Indian commission's 1848 statement that "[t]here are not probably half a dozen" families (or perhaps individuals; the statement is not clear) "of pure Indian blood" in the state and that "[t]he red man is gone, and has left only the most vicious of his characteristics").

71. Worcester v. Georgia, 31 U.S. 515, 580 (1832) (M'Lean, J., concurring) ("In . . . Massachusetts, Connecticut, Rhode Island, and other[] [states], where small remnants of tribes remain . . . who, by their reduced numbers, had lost the power of self government, the laws of the state have been extended over them, for the protection of their persons and property."); Fletcher v. Peck, 10 U.S. 87, 146 (1810) (Johnson, J., concurring and dissenting) (referring to Indian nations that "ha[d] totally extinguished their national fire, and submitted themselves to the laws of the states[,]" and "others [that] ha[d], by treaty, acknowledged that they hold their national existence at the will of the state within which they reside[,]" and distinguishing these polities from those that "retain[ed] a limited sovereignty, and the absolute proprietorship of their soil"); *see also* Elk v. Wilkins, 112 U.S. 94, 108 (1884) (describing Indians in Massachusetts as "remnants of tribes never recognized by the treaties or legislative or executive acts of the United States as distinct political communities") (citing Pells v. Webquish, 129 Mass. 469 (1880) (regarding lands at Mashpee); Danzell v. Webquish, 108 Mass. 133 (1871) (lands at Herring Pond); MASS. STATUTES 1862, ch. 184 (establishing the district of Gay Head on Martha's Vineyard, encompassing the lands of the Wampanoag Tribe of Gay Head (Aquinnah)); MASS. STATUTES 1869, ch. 463 (extending Massachusetts citizenship status and rights to Indians)). In Justice Johnson's opinion concurring with the Court's 1831 holding that the Cherokee Nation, although a "state" in the general political sense, was not a foreign state for purposes of Article III standing, *Cherokee Nation v. Georgia*, 30 U.S. 1, 16–18 (1831) (noting that "[t]he acts of [the U.S. government] plainly recognize the Cherokee nation as a state" but holding that the Cherokee Nation was not a foreign state), Justice Johnson expressed concern about the breadth of any rule recognizing Native polities as foreign states:

> Where is the rule to stop? Must every petty kraal of Indians, designating themselves a tribe or nation, and having a few hundred acres of land to hunt on exclusively, be recognized as a state? We should indeed force into the family of nations, a very numerous and very heterogeneous progeny. The Catawbas, having indeed a few more acres than the republic of San Marino, but consisting only of eighty or an hundred polls, would then be admitted to the same dignity. They still claim independence, and actually execute their own penal laws, such as they are, even to the punishment of death; and have recently done so. We have many ancient treaties with them; and no nation has been more distinctly recognized, as far as such recognition can operate to communicate the character of a state.

Id. at 25 (Johnson, J., concurring).

Federal officials continued to refer to Indigenous peoples in New England and elsewhere along the eastern seaboard as "remnants" or "fragments" of tribes throughout the nineteenth century, while noting they still existed as tribal communities.[72] The Secretary of the Interior's 1890 annual report to Congress identified the Mashpee (and other Wampanoag) and Shinnecock Indians as among those "within the limits of the thirteen original States . . . found holding a tribal relation and in possession of specific tracts [of land]."[73] And the Secretary wrote in an 1899 memorandum on the Narragansett, Shinnecock, and other New England tribes that

> [t]hese Indians were and their remnants are residents of that portion of the country which constituted the Territory of the thirteen original states. . . . Their political status is unknown, but it is presumed that

72. *See* Mashpee Tribe v. Sec'y of the Interior, 820 F.2d 480, 507 (1st Cir. 1987) (reproducing a portion of the 1850 Henry Schoolcraft Report) (listing eastern seaboard tribes, including the Mashpee and Narragansett, in a table of "Fragmentary Tribes still existing within the Boundaries of the Old States")); *id.* at 497–501 (reproducing Letter from Thomas McKenney to Secretary of War (Jan. 10, 1825) (referring to a table listing "sixty-four tribes and remnants of tribes of Indians" that "remain[ed] within the limits of the different states and territories" and listing peoples in New England (including the Mashpee and Narragansett), New York, Virginia, and South Carolina)); *see also id.* at 502–03 (reproducing a portion of H.R. Rep. No. 23-474 (1834) (listing Indians in New England, New York, Virginia, and South Carolina in a table of "[t]he tribes east of the Mississippi . . . who have not yet agreed to remove west of the Mississippi")).

73. DEP'T OF INTERIOR, ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS, 51st Cong., 2d Sess. 26–29 (1890) (stating that "no Indians within the limits of the thirteen original States retained their original title of occupancy, and only in Massachusetts, New York, and North Carolina are they found holding a tribal relation and in possession of specific tracts[,]" and mentioning (Wampanoag) Indians at Mashpee, Chappaquiddick, and Gay Head in Massachusetts; Shinnecock, Seneca, Oneida, Onondaga, St. Regis Mohawk, and Tuscarora Indians in New York; and the Eastern Cherokees in North Carolina). Courts would later determine that, contrary to the Commissioner's statement, at least some Indigenous peoples on the eastern seaboard retained aboriginal title to their lands (which required those peoples to show continual existence as Indian tribes, see *supra* note 49). *See* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 235–36 (1985); Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 376–79 (1st Cir. 1975). And the Commissioner's successors would determine that other peoples (besides those mentioned), including the Narragansett (in Rhode Island) and Pamunkey (in Virginia), maintained "a tribal relation" and remained in possession of specific tracts of land from (before) the 1700s through the present, including when the Commissioner wrote his report. *See infra* notes 96–103 and accompanying text. Aboriginal title litigation involving the Narragansett and other tribes was settled without the courts determining whether their title still existed. *See* Rhode Island Indian Claims Settlement Act, Pub. L. No. 95-395, 92 Stat. 813 (1978) (codified at 25 U.S.C. § 1701 et seq.) (following Narragansett Tribe of Indians v. S.R.I. Land Dev. Corp., 418 F. Supp. 798 (D.R.I. 1976)); Wampanoag Tribal Council of Gay Head, Inc., Indian Land Claims Settlement Act, Pub. L. No. 100-95, 101 Stat. 704 (1987) (codified at 25 U.S.C. § 1771 et seq.) (following Wampanoag Tribal Council of Gay Head, Inc. v. Town of Gay Head, No. 74-cv-5826 (D. Mass. 1974)); Mohegan Nation of Connecticut Land Claims Settlement, Pub. L. No. 103-377, 108 Stat. 3501 (1994) (codified at 25 U.S.C. § 1775 et seq.) (following Mohegan Tribe v. Connecticut, 528 F. Supp. 1359 (D. Conn. 1982)).

> they are citizens and subject to the laws of the several States in which they reside. . . .[74]

The Commissioner of Indian Affairs' annual report that same year mentioned the Shinnecock among the "fragments of tribes on Long Island."[75]

In the early twentieth century, Interior Department officials continued to defer to the colonies-turned-states' jurisdiction regarding—and to focus on racial and cultural purity (or lack thereof) among—peoples they categorized together as "small Eastern [Indian] groups" or "communities of Indian blood."[76] The Narragansett, Shinnecock, Pamunkey and various other eastern seaboard tribes still functioned as polities that maintained their historical relationships with the states.[77] Federal officials, however, refused to extend services, programs, or legal protections to these tribes, although some of their children attended federal boarding schools for Indians.[78]

---

74. Memorandum from Sec'y of the Interior to Comm'r of Indian Affairs (June 23, 1899), *quoted in* William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 AM. J. LEGAL HIST. 331, 353 (1990) (final omission in Quinn); *see also id.* 353–54 ("Their political condition is, therefore, radically different from that of what might be termed the 'plains' Indians . . . not all of whom, however, have been officially recognized as wards by formal treaty or agreement." (omission in Quinn)).

75. A.W. Ferrin, *Report Concerning Indians in New York*, *in* DEP'T OF INTERIOR, ANNUAL REPORT OF THE COMMISSIONER OF INDIAN AFFAIRS 262 (1899).

76. Letter from John Collier, Comm'r of Indian Affairs, to Mabel L. Avant (undated) (on file with author) [hereinafter Undated Collier Letter] (referring to "small Eastern groups under the States," "Indian groups or communities of Indian blood under the State," and "Indian communities . . . not formally covered by the Federal Indian program"); Letter from William Zimmerman, Assistant Comm'r of Indian Affairs, to Rep. Dave E. Satterfield, Jr. (Nov. 25, 1944) (on file with author) (referring to "small Indian groups in the thirteen original colonies"); *see also* Letter from W. Carson Ryan, Jr., Dir. of Educ., Office of Indian Affairs, to James F. Peebles, Superintendent of Schools, Bourne, Mass. (Nov. 20, 1934) (on file with author) (referring to "communities with *slight* Indian blood directly under the State") (emphasis added).

77. *See* ROUNTREE, *supra* note 56, at 204–05, 237 (describing a late-nineteenth century compilation of Pamunkey laws and noting that they and other tribes in Virginia had "tribal governments and . . . churches which belonged to them but were run on Anglo-Virginian lines"); GLADYS TANTAQUIDGEON, DEP'T OF INTERIOR, SURVEY OF THE NEW ENGLAND INDIANS 10–11, 24 (1934) (on file with author) (outlining tribal organizations and government structures for the Narragansett; the Mohegan, Pequot, and Scaghticoke in Connecticut; the Mashpee, Gay Head, and other Wampanoag tribes in Massachusetts; and the Penobscot and Passamaquoddy in Maine); SHINNECOCK INDIANS, http://shinnecockindians.org/home (last visited Sept. 29, 2016) (discussing Shinnecock governance from 1792 to 2007 through a trustee system established under New York state law); *see also* Historians' Brief, *supra* note 46, at 16 n.7 (noting that the Narragansett Tribe functioned under a Rhode Island state charter issued in 1934).

78. Historians' Brief, *supra* note 46, at 9 (describing officials' "reluctance to provide federal services . . . based on the (legally untenable) premise that, as 'State Indians' they were outside the federal government's 'guardianship' responsibility").

As the Supreme Court noted in *Carcieri*, the Narragansett sought federal assistance with land and other issues in the early 1900s, but federal bureaucrats denied their requests, saying that the Tribe was under the jurisdiction of Rhode Island and not the U.S. government.[79] And though Congress held hearings in 1900 regarding the taking of Narragansett lands, Narragansett children attended federal Indian boarding schools into the twentieth century, and Narragansetts were included on federal Indian Office censuses as late as 1930,[80] federal officials in the 1920s and 1930s wrote that "[t]he Federal Government ha[d] never had any jurisdiction over the[m]" and that their "affairs should be taken up with the proper state officials."[81] Similarly, although Mashpee children were sent to Carlisle Indian School,[82] federal officials in the 1930s said they could not provide educational or other assistance to the Mashpees living on their ancestral lands on Cape Cod because there was no "Federal policy

---

79. Carcieri v. Salazar, 555 U.S. 379, 383–84 (2009) ("[I]n correspondence spanning a 10-year period from 1927 to 1937, federal officials . . . not[ed] that the [Narragansett] Tribe was, and always had been, under the jurisdiction of the New England States, rather than the Federal Government."); *see also* MANDELL, *supra* note 58, at 220 (mentioning unsuccessful efforts by Narragansett tribal leaders in 1906 and 1913 "to get the federal government to adjudicate" title to lands taken in the eighteenth century).

80. Historians' Brief, *supra* note 46, at 16 n.7 (citing Ethel Boissevain, *Narraganset Survival: A Study of Group Persistence Through Adapted Traits*, 6:4 ETHNOHISTORY 347–62 (1959)).

81. Brief of Petitioner Town of Charlestown at 8, Carcieri v. Kempthorne, 552 U.S. 1229 (2008) (No. 07-526) (quoting Letter from Assistant Comm'r of Indian Affairs to John Noka (May 5, 1927)). In response to a letter from John Noka, a Narragansett tribal leader, "request[ing] the Federal Government to take charge of the affairs of the Narragansett Indians[,]" *id.* at 7–8 (quoting Letter from John Noka to Comm'r of Indian Affairs (Apr. 25, 1927)), the Assistant Commissioner of Indian Affairs wrote that

> [t]he Narragansett Indians are and have been under the jurisdiction of different states of New England. The Federal Government has never had any jurisdiction over these Indians and Congress has never provided any authority for the various Departments of the Federal Government to exercise the jurisdiction which is necessary to manage their affairs. . . . [A]ll communications in regard to your affairs should be taken up with the proper state officials.

Id. at 8 (omission and second alteration in original) (quoting Letter from Assistant Comm'r of Indian Affairs to John Noka (May 5, 1927)); *id.* (citing Letter from Assistant Comm'r of Indian Affairs to John Noka (July 19, 1927)) (stating that "[t]he Narragansett Indians are not under the jurisdiction of the Federal Government" and returning a list of Narragansett Indians "for submission to the proper state authorities" (alteration in original)); *see also id.* (citing Letter from Assistant Comm'r of Indian Affairs to Daniel Sekater (June 29, 1927)) (withholding aid in letter to different Narragansett tribal leader). Taking the same position the following decade, federal officials cited, and repeated verbatim, language from this 1927 correspondence. *Id.* at 8–10 (citing Letter from the Comm'r of Indian Affairs to Daniel Sekater (Jan. 11, 1930) and Letter from John Collier, Comm'r of Indian Affairs, to Rep. John M. O'Connell (Mar. 18, 1937) (referencing June 29, 1927 letter and stating that "[t]he situation has not changed since th[at] letter was written")).

82. Mashpee Tribe v. Town of Mashpee, 447 F. Supp. 940, 946 (D. Mass. 1978) (noting that "several students at the Carlisle Indian School . . . g[a]ve[] 'Mashpee' as their tribal designation during th[e] period" between 1870 and 1920).

at the present time with regard to . . . Indian groups or communities of Indian blood under the State."[83] And in the 1940s, bureaucrats said that, because the federal government "ha[d] no responsibility for" the Pamunkey and other tribes in Virginia, they could not "intervene in any official capacity" (but only "in an advisory capacity") with these tribes' efforts to "obtain[] proper racial recognition from" the state so that their children would not have to attend "colored" schools.[84]

While officials' perceptions about the groups' racial and cultural "Indianness" played a role in their refusal to exercise federal jurisdiction

---

83. Undated Collier Letter, *supra* note 76 (stating that "[i]n the absence . . . of any Federal policy at the present time with regard to other Indian groups or communities of Indian blood under the State – such as I understand the Mashpee community to be – I am unable to hold out any hope to you that the Federal Government can be of help at this particular time[,]" and explaining that the Mashpee would have to seek help "through local and State channels" like "any other Massachusetts community"); *see also* Letter from W. Carson Ryan, *supra* note 76 (using the same language as the Undated Collier Letter though referring to "communities with slight Indian blood directly under the State," and noting that the federal government built schools only for Indian children "in recognized Federal Indian areas where the Federal Indian Service operates its own schools or pays the school district Indian tuition because of the untaxed Federal land"); Letter from Fred Daiker, Assistant to the Comm'r, Office of Indian Affairs, to Chief Wild Horse (Oct. 2, 1937) (on file with author) (stating that "the Indian Office can offer no assistance to Indians not members of a tribe under Federal jurisdiction[,]" and that the Mashpee "are of the same status as other citizens of the State of Massachusetts, and . . . must look to the local authorities for assistance"); Letter from Fred Daiker, Assistant to the Comm'r, Office of Indian Affairs, to Chief Wild Horse (Dec. 21, 1936) (on file with author) [hereinafter 1936 Daiker Letter] (referencing Chief Wild Horse's December 14, 1936 letter and stating that "[t]he Indians of the Mashpee Tribe are not under Federal jurisdiction or control. They have never been regarded as wards of the United States.").

84. Letter from John Collier, Comm'r of Indian Affairs, to Douglas Freeman, Editor, Richmond News Leader (May 3, 1943) (on file with author) (discussing Virginia tribes' efforts to "obtain[] proper racial recognition" and stating that because "the United States . . . [had] no treaties with the Virginia Indians" and Congress had not "enacted any laws assuming responsibility for them," the Office of Indian Affairs "ha[d] no responsibility for the Virginia Indians, as a matter largely of historical accident[,]" and therefore could not "intervene in any official capacity, but w[as] . . . interested in [the Virginia tribes] as descendants of the original inhabitants of the region"); Letter from William Zimmerman, Assistant Comm'r of Indian Affairs, to Rep. Dave E. Satterfield, Jr. (Nov. 25, 1944) (on file with author) (noting Pamunkey objections to being "classified by the state [of Virginia], for various purposes [including education], as 'colored'" but stating that the Office of Indian Affairs was "unwilling to interfere except in an advisory capacity" without "an express declaration by Congress that the Pamunkeys are a Federal responsibility" because "[l]ike some other small Indian groups in the thirteen original colonies, the Pamunkeys are a tribe with which the Federal government has not had a treaty[,]" "live[d] on . . . a state reservation[,]" and "ha[d] always been under state supervision"). As noted in Assistant Commissioner Zimmerman's 1944 letter, Pamunkey children were "refused admission to schools . . . for white children, and . . . they refuse[d] to attend schools for colored children." *Id.* After a staff visit to Virginia reservations in 1945, the Indian Office's Director of Education, Willard Beatty, began allowing children from the Pamunkey and other (state) reservations in Virginia to attend Indian boarding schools in North Carolina, Kansas, and South Dakota. ROUNTREE, *supra* note 56, at 236–37. For a discussion of the racial classification of Virginia Indians in the twentieth century, Virginia's 1924 Racial Integrity Act (and its administration by Registrar Walter Ashby Plecker), and the relationship to tribal identity, *see* COLEMAN, *supra* note 68, at chs. 3–7, Epilogue and ROUNTREE, *supra* note 56, at 219–29.

regarding the Narragansett, Mashpee, and Pamunkey,[85] they were more explicit in their correspondence regarding the Shinnecock—who the Department said could not organize a government under the Indian Reorganization Act in the 1930s because they were too intermarried with Black people and had lost their culture.[86] In the opinions of the Commissioner of Indian Affairs, Interior Department Solicitor, and Secretary of the Interior, the Shinnecock were "not Indians" because they had "none of the traditional or cultural traits of Indians."[87] Their conclusions were

---

85. A 1934 letter from the Office of Indian Affairs' Director of Education regarding the Mashpee, for example, refers to them and other Eastern tribes as "communities with *slight* Indian blood" under state jurisdiction, Letter from W. Carson Ryan, *supra* note 76 (emphasis added), and the Indian Affairs Office inquired about whether Indian children in Virginia looked "negroid" before admitting them to federal Indian schools in the 1940s. *See* ROUNTREE, *supra* note 56, at 236, 236 n.144*; see also* MANDELL, *supra* note 58, at 197 (noting that the author of the 1822 War Department report on the Narragansett, Mashpee, and other New England Indians "focused on how few pure-blood Indians remained in the communities, and . . . embraced the paradigm that this racial makeup meant that the groups were no longer truly Indian and therefore should no longer be protected or separated by distinct laws").

86. MILLER, *supra* note 50, at 30 (noting that Department officials rebuffed the Shinnecock "on the basis that a researcher determined that the[y] . . . were too intermarried with blacks").

87. Letter from John Collier, Comm'r of Indian Affairs, to William Harrison, Special Agent in Charge, N.Y. Agency (May 18, 1936) (on file with author) (describing "Indians located on the so-called Shinnecock and Poosepatuck [sic] Reservations" as "those who might be classed as Indians but who apparently were not so recognized in their own community and have none of the traditional or cultural traits of Indians," and stating that "these so-called reservations are not Federal territory but state reservations which have never been under Federal supervision"); *see also* Memorandum from John Collier, Comm'r of Indian Affairs, to Harold Ickes, Sec'y, Dep't of the Interior (May 18, 1936) (on file with author) ("These Indians have not been under the jurisdiction of the Federal Government; they have not got the [requisite] degree of blood . . . and culturally viewed, they are not Indians at all."). The letter from Collier to Special Agent Harrison is stamped "Approved" by Interior Secretary Ickes on May 21, 1936, *see* 1936 Collier Letter, *supra*, and the Memorandum to Secretary Ickes bears handwriting dated May 19, 1936 from Interior Solicitor Nathan Margold stating his "opinion that the [Shinnecock] . . . are not Indians and therefore not within the application of the Indian Reorganization Act." 1936 Collier Memorandum, *supra*.

Collier's memorandum to the Secretary, like other Department post-IRA correspondence regarding Eastern tribes, appears to conflate (improperly) the different prongs of the definition of "Indian" in the IRA—one for members of tribes that were under federal jurisdiction in 1934, and another for "persons of one-half or more Indian blood" (regardless of whether they were tribal members, or whether the tribes they were members of were under federal jurisdiction), *see* 25 U.S.C. § 479 (editorially reclassified as § 5129 in Aug. 2016); *see also supra* note 32 (discussing the different prongs)—something that (at least some) senators also seemed confused about in the legislative debates on the definition. *See* Undated Collier Letter, *supra* note 76 (suggesting that the Mashpee Tribe would have to "prove its people have the requisite degree of Indian blood" before the federal government would assist them); Letter from W. Carson Ryan, *supra* note 76 (same); *but see* Memorandum from Felix S. Cohen, Assistant Solicitor, Dep't of the Interior, to John Collier, Comm'r of Indian Affairs (Apr. 3, 1935) (on file with author) [hereinafter 1935 Cohen Memorandum] (stating that, because they were "not a 'recognized Indian tribe now under Federal jurisdiction,'" "the Siouan Indians of North Carolina" (the Lumbee people) could, "like many other Eastern groups, . . . participate in the benefits of the [IRA] only in so far as individual members may be of one-half or more Indian blood[,]" and that those benefits included the IRA's education and employment benefits as well as the ability to organize a government under the Act, and discussing the possibility of "[a]

based on a report by a field agent who was more crude in his assessment, describing the Shinnecock as "no longer Indians," both "biologically" and "culturally," and stating that "these people are not Indians at all; . . . . They are Negroes."[88]

Whatever racial (and racist) attitudes they reflect, federal officials' statements over the centuries also reflect their understanding that they could exercise jurisdiction regarding these people(s), even though they refused to do so (and instead deferred to the states).[89] The author of the 1822 War Department report on the Narragansett, Mashpee, and other New England tribes, for example, allowed for the possibility of the fed-

---

group of . . . [Lumbee] Indians of one-half blood or more . . . approved by the Commissioner of Indian Affairs . . . purchas[ing] a suitable tract of land and submitting title to the United States to be held in trust for the group") (quoting 25 U.S.C. § 479 (editorially reclassified as § 5129 in Aug. 2016)); 1936 Daiker Letter, *supra* note 83 (explaining that the IRA provided opportunities "[f]or Indians, irrespective of tribal membership or residence on a reservation, who can prove they are of one-half degree or more Indian blood"); *see also infra* notes 300–04 and accompanying text (discussing confusion among senators during IRA legislative debates). In June 1936, Indian Office bureaucrats "conduct[ed] scientific tests to determine how much Indian blood" Lumbee people in North Carolina had by "examin[ing their] various physical features . . . such as the color of their skin, eyes, and hair and the shape of their noses, lips, and cheekbones." MALINDA MAYNOR LOWERY, LUMBEE INDIANS IN THE JIM CROW SOUTH: RACE, IDENTITY, AND THE MAKING OF A NATION 2–3 (2010). Based on these tests (or "racial diagnoses"), Department officials concluded that twenty-two Lumbees (out of the 209 studied) were half-blood (or more) Indians—and thus qualified under the IRA—but that some of their full siblings were not. *Id.* at 196–201 (noting that "[i]n twelve separate cases, [the Department] identified individuals as 'less than one-half Indian' while . . . designat[ing] their full siblings as 'borderline,' 'near borderline,' or 'more than one-half Indian').

88. REPORT ON THE SHINNECOCK AND POOSEPATUCK INDIAN RESERVATIONS, IN RELATION TO THE REORGANIZATION ACT 1, 10 (Jan. 1936) (on file with the author); *see id.* at 1 ("The assimilation of the original Indian with the Negro has proceeded so far that the former would appear to have been completely absorbed, racially by the latter."); *id.* at 2, 10 (pointing to a supposedly "complete extinction of Indian culture" among the Shinnecock and stating that "[c]ulturally, they have ceased to be Indians, though . . . a few superficial practices . . . remain"); *id.* at 2 (discussing the Shinnecocks' "hair and features" and stating that "the 'Shinnecock Indians' present, in their appearance, such marked negroid physical characteristics that it is difficult for me even to speak of them as Indians"); *id.* ("[T]o the casual observer, these people are Negroes. They are so considered by the white people in the neighboring city of Southampton."); *cf.* Ablavsky, Comment, *supra* note 66, 1523 & n.376 (noting that non-Natives on Long Island still sometimes refer to Shinnecocks as "'monigs,' meaning 'more nigger than Indian'") (citing and quoting Ariel Levy, *Reservations*, NEW YORKER (Dec. 13, 2010), http://www.newyorker.com/magazine/2010/12/13/reservations).

89. The various reports and documents containing these statements also evidence some minimal, even if indirect, supervision on the part of federal officials. To the extent they contemplate removal of, or the extension of other specific federal policies to, Eastern tribes, these documents demonstrate more concrete manifestations of supervision—or the exercise of jurisdiction. *See infra* note 90 and accompanying text (discussing nineteenth century reports regarding the removal of eastern seaboard tribes); *see also infra* notes 95 and 135 and accompanying text (discussing memoranda from the Department of the Interior's Office of the Solicitor discussing Congressional appropriations for the removal of the Catawba Indian Tribe). Removal undoubtedly is an (egregious) exercise of federal jurisdiction, and federal officials' contemplating—and taking steps towards effecting—the removal of these people(s) to Indian Territory certainly evidences a federal jurisdictional relationship between them and the government.

eral government "provid[ing] an Asylum for" them, and federal officials contemplated their removal to Indian Territory.[90] Similarly, the Commissioner of Indian Affairs' statement in his 1899 annual report that the Indian Office's "New York agent has not exercised any jurisdiction over [the Shinnecock] during my knowledge[]" implies that such jurisdiction existed and could be exercised, if the agent chose.[91]

In the 1930s, Indian Office officials (including the Commissioner of Indian Affairs) said they would reconsider their decision to deny educational assistance to the Mashpee "[i]f at any time the Federal Government should undertake further provision for [them and other] small Eastern groups under the States."[92] Other officials explained that the states' exercise of jurisdiction did not "involv[e] a surrender by the U.S. of its right to assume jurisdiction at any time[,]"[93] and urged that "[t]he United States Government should not recede from its possession of technical superiority over the State of New York in the matter of guardianship and should be prepared at any time to step into the picture" to protect the Shinnecocks' rights.[94] And though concluding that the Indian Reorganization Act did not apply to the Shinnecock because they were not Indians, the Solicitor of the Department of the Interior (the highest-ranking

90. MORSE, *supra* note 70, at 24; MANDELL, *supra* note 58, at 110–11, 197, 215–16 (discussing the report and federal officials' considering removal of New England tribes, and the tribes' opposition); *see also* Mashpee Tribe v. Sec'y of the Interior, 820 F.2d 480, 503 (1st Cir. 1987) (reproducing a portion of H.R. Rep. No. 23-474 (1834) (listing Indians in New England, New York, Virginia, and South Carolina in a table of "[t]he tribes east of the Mississippi . . . who have not yet agreed to remove west of the Mississippi")). In recommending against removal of the Mashpee specifically, Morse wrote that even "*were they in favor of the measure*, it would scarcely be an object[]" because the Mashpee "[we]re of public utility [in Massachusetts], as expert whalemen and manufacturers of various light articles." MORSE, *supra* note 70, at 70 (also noting the Mashpee's attachment to their lands and that "of course, the idea of alienating them and removing to a distance, would be very unpopular"). Though not clear whether in response to Morse's report, the War Department in 1831 provided funding to support a teacher for the Mohegans' school. MANDELL, *supra* note 58, at 116.

91. A.W. Ferrin, *Report Concerning Indians in New York*, *in* Dep't of Interior, Annual Report of the Commissioner of Indian Affairs, Report Concerning Indians in New York, at 262 (1899).

92. Undated Collier Letter, *supra* note 76; *see* Letter from W. Carson Ryan, *supra* note 76; *see also supra* note 87 (noting that these letters, based on a misinterpretation of the Indian Reorganization Act's language, mistakenly suggest that the Mashpee Tribe would also have to show that its members were half-blood (or more) Indians).

93. Memorandum from Kenneth Meiklejohn, Assistant Solicitor, Dep't of Interior, to Fred Daiker, Director, Welfare Div., Office of Indian Affairs 1 (May 14, 1936) (on file with author) ("Jurisdiction over these Indians [of the Allegheny, Cattaraugus, Onondaga, St. Regis, Tonawanda, and Tuscarora reservations] has long been exercised by the State of New York, without involving a surrender by the United States of its right to assume jurisdiction at any time.").

94. REPORT ON THE SHINNECOCK, *supra* note 88, at 11.

legal official in the Department) opined in 1936 that the IRA "applies to Indians living on reservations that are not federal reservations."[95]

Eventually, federal officials changed their positions on the tribal status of, and on whether to exercise (even if reluctantly) jurisdiction regarding, the Shinnecock and other eastern seaboard tribes. Following years of litigation and a federal district court decision finding that "the Shinnecock Indians are in fact an Indian Tribe" under federal law,[96] the Interior Department in 2010 determined that the Shinnecock were indeed Indians—and had always existed as an Indian tribe—and added them to the list of federally recognized tribes.[97] Three years earlier (and similarly only after years of litigation), Department officials added the Mashpee

---

95. Memorandum from John Collier, Comm'r of Indian Affairs, to Harold Ickes, Sec'y, Dep't of the Interior (May 18, 1936) (on file with author). This memorandum bears handwriting (dated May 19, 1936) from Interior Solicitor Nathan Margold stating his "opinion that the occupants of these reservations are not Indians and therefore are not within the application of the Indian Reorganization Act even though that act applies to Indians living on reservations that are not federal reservations." In a May 14, 1936 memorandum, the Department's Assistant Solicitor likewise opined the IRA applied to Indians on state reservations—and to the Shinnecock and Poospatuck in particular. Memorandum from Kenneth Meiklejohn, *supra* note 93, at 1 and 3 (noting that "[t]here is nothing to indicate that [the IRA] was intended to be limited to reservations established and recognized under Federal jurisdiction" and that, although the residents of the Shinnecock and Poospatuck reservations "possess[ed] more of the characteristics of Negroes than of Indians," the Department was "not concerned, when dealing with the application of the Indian Reorganization Act to the residents of a reservation, with the degree of blood possessed by such residents[,]" and stating that the Department "should call an election at these two reservations"). Interior Department lawyers and bureaucrats also disagreed—in correspondence authorizing the Catawba Indian Tribe to organize a government under the IRA in the 1940s—regarding the Catawbas' status, with Solicitor Fowler Harper questioning Collier's statement that "'[t]he Federal Government has not considered these Indians as Federal wards.'" *See* Catawba Tribe—Recognition Under IRA, 2 Op. Solicitor on Indian Affairs 1255 (1944) (Solicitor Harper stating that he was "not entirely clear what is intended by [Collier's] statement" and concluding that the IRA applied to the Catawba because Congress had appropriated (never-used) funds for their removal to Indian territory in the mid-1800s, and because the Catawbas' tribal organization continually existed); Questions of the Catawbas' Identity and Organization as a Tribe and Right to Adopt IRA Constitution, 2 Op. Solicitor on Indian Affairs 1261 (1944) (concluding same, with Solicitor Harper stating that he "must disagree" with any implication by Collier "that the Catawba tribe has not been recognized by the Federal Government").

96. New York v. Shinnecock Indian Nation, 400 F. Supp. 2d 486, 489 (E.D.N.Y. 2005) (finding that the Shinnecock were an Indian tribe under the federal common law test discussed in Part V.B, *infra*); *see generally* Shinnecock Indian Nation v. Kempthorne, No. 06-CV-5013, 2008 WL 4455599 (E.D.N.Y. Sept. 30, 2008) (discussing the decades-long history of Shinnecock engagement with the Interior Department's administrative process, dating back to its implementation in 1978, and litigation over bureaucratic delays).

97. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 75 Fed. Reg. 66124 (Oct. 19, 2010) (supplementing the 2010 BIA List of federally recognized tribes to include the Shinnecock Indian Nation and "announc[ing] that, as of October 1, 2010, the Shinnecock Indian Nation is an Indian entity recognized and eligible to receive services from the Bureau of Indian Affairs"); *see also* Ariel Levy, *Reservations*, NEW YORKER (Dec. 13, 2010), http://www.newyorker.com/magazine/2010/12/13/reservations (noting that "[a]nxiety about being perceived as insufficiently Indian was one of the reasons that it took the Shinnecocks so long to gain federal recognition").

Indian Tribe to the list after determining that they had always existed as an Indian tribe.[98] Most recently, the Department added the Pamunkey Indian Tribe to the list in May 2016,[99] following a 2015 determination that they had continually existed and functioned as a "distinctly Pamunkey settlement" and "distinct self-governing community" on their reservation in Virginia since the 1600s.[100]

All of these tribes, like the Narragansett, were "recognized" through a process—and under criteria—that required them to prove, and the Interior Department to conclude, they had continuously existed as distinct, self-governing Indian communities since their first contact with non-Indians.[101] According to the most basic federal Indian law principles, they (as continuously existing Indigenous polities) were also always subject to the federal Indian affairs jurisdiction,[102] an understanding reflected in the various government documents discussed above. And though Interior Department officials determined in 1983 that "the Narragansett community and its predecessors have existed autonomously since first contact" and that "[t]he tribe has a documented history dating from 1614[,]"[103] the United States did not argue in the *Carcieri* litigation that the Narragansett therefore were under federal jurisdiction in 1934. A majority of Justices concluded they were not, based on the aforementioned correspondence from the 1920s and 1930s wherein federal officials opined that the Narragansett were under state and not federal jurisdiction.[104]

---

98. Final Determination for Federal Acknowledgement of the Mashpee Wampanoag Indian Tribal Council, Inc. of Massachusetts, 72 Fed. Reg. 8007 (Feb. 15, 2007). The Mashpees' decades-long effort to litigate their tribal status in federal court, including in cases involving aboriginal title to their lands, is discussed in *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1097 (1st Cir. 2003) and *Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480, 482 (1st Cir. 1987). Like the Shinnecock, the Mashpee began the administrative process under 25 C.F.R. Part 83 shortly after it was adopted in 1978. *See Wampanoag Tribal Council*, 336 F.3d at 1097.

99. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 81 Fed. Reg. 26826 (Apr. 25, 2016) (updating list to include the Pamunkey Indian Tribe).

100. Final Determination for Federal Acknowledgement of the Pamunkey Indian Tribe, 80 Fed. Reg. 39144, 39145–48 (July 2, 2015).

101. *See infra* notes 262–63 and accompanying text (discussing criteria in 25 C.F.R. § 83.11(b) and (c)). As noted *infra*, the criteria were amended in 2015 to require continual existence as a distinct Indian community since 1900, but all tribes acknowledged through the Part 83 process to date were evaluated under the previous criteria, which required continual existence since first contact.

102. *See infra* Parts IV.B, IV.C, and V.A.

103. Final Determination for Federal Acknowledgement of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177, 6178 (Feb. 2, 1983).

104. *See supra* note 79 and accompanying text.

However federal officials viewed or described them over the years, the Narragansett, Pamunkey, Shinnecock, and Mashpee always remained self-governing peoples. What changed was whether federal decisionmakers thought they still existed as Indian tribes, as opposed to too-intermarried and/or too-acculturated "remnants" or "fragments" thereof, and treated them like other Indian tribes. Federal jurisdiction was always there; it was simply a matter of whether officials chose to exercise it.

B. United States and Empire: The Tejon Indian Tribe in California

While federal officials decided not to exercise jurisdiction regarding the Narragansett and other tribes in the United States' original territory—whether because officials did not think those people(s) still existed as Indian tribes,[105] were unsure of their legal status,[106] chose to defer to the states' exercise of jurisdiction,[107] lacked or were unwilling to expend government resources,[108] or were corrupt or just incompetent[109]—the

---

105. *See* Quinn, *supra* note 74, at 348 ("The administrative 'extinction' of the New England tribes and other Atlantic seaboard tribes subject to state supervision prior to 1783 was considered a *fait accompli* and never dealt with, but other tribes would occasionally become 'extinct' and thus lose federal acknowledgment."); *cf.* MILLER, *supra* note 50, at 29–30 ("It was never clear how to decide whether a tribe's extinction was voluntary, or how to determine if the band in question was really extinct.").

106. *Compare* E. Band of Cherokee Indians v. United States, 117 U.S. 288, 309 (1886) ("[T]hey have never been recognized as a separate nation by the United States; no treaty has been made with them; they can pass no laws; they are citizens of that state [North Carolina], and bound by its laws.") *and* State v. Ta-Cha-Na-Tah, 64 N.C. 614, 615 (1870) (holding that Eastern Cherokees were subject to North Carolina state criminal laws), *with* United States v. Boyd, 83 F. 547, 552 (4th Cir. 1897) (holding that Eastern Band of Cherokee were a tribe under federal jurisdiction), *and* United States v. Wright, 53 F.2d 300, 312 (4th Cir. 1931) (upholding constitutionality of congressional act exempting Eastern Cherokee lands from state taxation); *see also* JOHN R. FINGER, THE EASTERN BAND OF CHEROKEES 1819–1900 xii (1984) (noting that "the Eastern Band endured a precarious and anomalous legal status vis-à-vis their white neighbors, the State of North Carolina, and the federal government" during the nineteenth century and that "certain features of mixed [federal and state] jurisdiction continued" in the twentieth century, after federal courts had declared them to be "wards" under the jurisdiction of the federal government).

107. *See supra* notes 62–64, 76–84, 92–94 and accompanying text (discussing federal officials' deference to state jurisdiction regarding Indians in Massachusetts, New York, Rhode Island, and Virginia in the nineteenth and early twentieth centuries).

108. *See* MILLER, *supra* note 50, at 27 (noting that federal officials during the nineteenth century "often overlooked many viable Indian tribes and peoples, seeing them as simply too weak, dependent, or numerically insignificant to bother with. These forgotten tribes were left outside the federal circle as a result."); *id.* at 30 (discussing federal officials' correspondence regarding the unavailability of resources to provide services to Indians in Michigan); Grand Traverse Cty. Bd. of Comm'rs v. Acting Midwest Reg'l Dir., 61 IBIA 273, 280 (2015), 2015 WL 10939236 (suggesting that "the Department's reticence to extend IRA benefits to the [Grand Traverse Band] in the 1930s . . . reflected fiscal concerns").

109. *See, e.g.*, United States v. John, 437 U.S. 634, 642–43 (1978) (describing federal officials' dealings with, and failure to fulfill legal obligations to, Choctaws who remained in Mississippi dur-

United States necessarily assumed jurisdiction regarding other Indigenous peoples as it asserted its sovereignty across other areas of North America.[110] Significant among these assumptions of jurisdiction is the Treaty of Guadalupe-Hidalgo by which the United States expanded to California, home to more federally recognized tribes than any other state in the contiguous United States, as well as numerous *Carcieri*-based fee-to-trust challenges.[111] California is also home to the Tejon (also known as the Kitanemuck or Tejoneño) people,[112] whose history exemplifies the federal government's arbitrary and haphazard exercise of its jurisdiction in California and elsewhere.

---

ing the nineteenth and early twentieth centuries as "characterized by incompetence, if not corruption, [which] proved an embarrassment and an intractable problem for the Federal Government for at least a century").

110. As the Supreme Court explained in 1913, "the United States as a superior and civilized nation [assumed] the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state." United States v. Sandoval, 231 U.S. 28, 46–47 (1913). After acquiring its original boundaries from Great Britain in the 1783 Treaty of Paris, the United States entered into the Louisiana Purchase in 1803 (covering all or parts of eighteen present-day states), the Adams-Onis Treaty in 1819 (acquiring Florida and parts of present-day Mississippi, Alabama, and Colorado from Spain), the Convention of 1818 and the 1846 Treaty of Oregon (drawing the United States northwestern boundary at the forty-ninth parallel, to include, respectively, parts of present-day Minnesota and North Dakota, and present-day Idaho, Oregon, and Washington), the Texas Annexation in 1846, the Treaty of Guadalupe-Hidalgo in 1848 (California, Nevada, Utah, and parts of Arizona, Colorado, New Mexico, and Wyoming) and the Gadsden Purchase in 1853 (present-day Arizona and New Mexico along the U.S.-Mexico border). The United States similarly assumed jurisdiction regarding Indigenous peoples in Alaska, Hawai'i, and islands in the Pacific Ocean and Caribbean (American Samoa, Guam, Puerto Rico, and Virgin Islands) in the late nineteenth and early twentieth centuries.

111. *E.g.*, Stand-Up for California! v. Dep't of Interior, No. 12-2039, 2016 WL 4621056 (D.D.C. Sept. 6, 2016) (North Fork Rancheria of Mono Indians); Butte Cty. v. Chaudhuri, No. 1:08-cv-519, 2016 WL 3919803 (D.D.C. July 15, 2016) (Mechoopda Indian Tribe); Cty. of Amador v. Dep't of Interior, 136 F. Supp. 3d 1193 (E.D. Cal. 2015), *appeal docketed,* No. 15-17253 (9th Cir. Nov. 13, 2015) (Ione Band of Miwok Indians); Citizens for a Better Way v. Dep't of Interior, No. 2:12-cv-3021, 2015 WL 5648925 (E.D. Cal. Sept. 24, 2015) (Estom Yumeka Maidu Tribe of the Enterprise Rancheria)); Pres. of Los Olivos v. Dep't of Interior, 635 F. Supp. 2d 1076 (C.D. Cal. 2008), *appeal filed*, No. 15-55486 (9th Cir.) (Santa Ynez Band of Chumash Indians); Cal. Coastal Comm'n v. Pacific Reg'l Dir., 51 IBIA 141 (2010), 2010 WL 722024 (Big Lagoon Rancheria); *see also* Big Lagoon Rancheria v. California, 789 F.3d 947, 953 (9th Cir. 2015) (rejecting as untimely California's argument that 1994 fee-to-trust acquisition was unlawful because the tribe was not under federal jurisdiction in 1934).

112. A request for confirmation of status submitted by the Tejon Indian Tribe to the Interior Department in 2006 explains that "the Tejon Indian Tribe is the historic Kitanemuck Tribe," who over time adopted the name federal officials used to refer to them because their ancestral lands include an area in southern California "variously described" as Tejon Canyon, Tejon Ranch, Tejon Pass, Tejon Valley, "or simply Tejon." THE TEJON INDIAN TRIBE REQUEST FOR CONFIRMATION OF STATUS 3 (2006) (on file with author). The use of "Tejoneños" in reference to the Tejon Tribe dates back to Spanish and Mexican colonization of the area. *See* GEORGE HARWOOD PHILLIPS, "BRINGING THEM UNDER SUBJECTION:" CALIFORNIA'S TEJÓN INDIAN RESERVATION AND BEYOND, 1852–1864 2 (2004) [hereinafter PHILLIPS, SUBJECTION].

The Tejon Indian Tribe was added to the list of federally recognized tribes in 2012,[113] after the Assistant Secretary – Indian Affairs determined that the Tribe had been improperly excluded when the list was first compiled in 1979 and ever since.[114] Their ancestral lands, located seventy-five miles north of Los Angeles, were set aside in an 1851 treaty with the United States in which the Tejoneños and other Indians "acknowledged themselves to be under the exclusive jurisdiction, control, and management of the United States."[115] The U.S. Senate never ratified the treaty,[116] but in 1853 the United States established the Tejon Indian Reservation, which included the Tejoneños' villages.[117] Following a series of reorganizations in the Indian affairs bureaucracy in California, the federal government abandoned the Tejon Reservation in 1864.[118]

After a consortium of Los Angeles investors acquired title to the former reservation land in the early 1900s,[119] federal officials attempted (without success) to purchase and set aside some of it for the Tejon

113. Indian Entities Recognized and Eligible to Receive Services from the Bureau of Indian Affairs, 77 Fed. Reg. 47868, 47871 (Aug. 6, 2012).

114. Letter from Larry Echo Hawk, Assistant Sec'y – Indian Affairs, to Kathryn Morgan, Chairwoman, Tejon Indian Tribe (Jan. 6, 2012) [hereinafter AS–IA Tejon Letter], http://www.bia.gov/cs/groups/public/documents/text/idc015962.pdf, ("affirm[ing] the Federal relationship between the United States and the Tejon Indian Tribe" and explaining that the affirmation "concludes the long and unfortunate omission of the Tejon Indian Tribe from the list of federally recognized tribes"); *see also* Memorandum from Assistant Sec'y – Indian Affairs to Reg'l Dir., Pac. Region and Deputy Dir., Office of Indian Services 1 (Apr. 24, 2012) [hereinafter AS–IA Tejon Memorandum], http://www.bia.gov/cs/groups/public/documents/text/idc-018480.pdf (stating that although the Tejon Tribe had been "recognized by the Federal Government and received services from the BIA[,] . . . it was simply disregarded in 1978 as the BIA developed its list of recognized tribal entities pursuant to the [Part 83] regulations"); *id.* at 4 (discussing the "inadvertent omission of the Tribe by the Department from the Bureau's [1979] list of federally recognized tribes – an error that was unintentionally carried through to successive lists").

115. PHILLIPS, SUBJECTION, *supra* note 112, at 37 (quoting treaty); *see also id.* at 36–38 (discussing treaty negotiation).

116. *Id.* at 73. It was one of eighteen treaties the United States negotiated with California Indian peoples between March 1851 and January 1852 which the Senate rejected in a secret session in June 1852, classified as secret and sealed in a vault in the Senate basement, and did not make public until 1905. *See* GEORGE HARWOOD PHILLIPS, INDIANS AND INDIAN AGENTS: THE ORIGINS OF THE RESERVATION SYSTEM IN CALIFORNIA, 1849–1852 182 (1997) (discussing the Senate's rejection of the California treaties).

117. *See* PHILLIPS, SUBJECTION, *supra* note 112, at 106, 112, 120.

118. *Id.* at 250. Most Tejoneños continued to live at Tejon Ranch after the reservation's abandonment, and after the United States established another, separate reservation for them and other Indians in 1873. *See* AS–IA Tejon Memorandum, *supra* note 114, at 4 ("In 1873, the Tule River Indian Reservation was established . . . for the Tejon (Manche Cajon) and other bands of Indians. But not all Tejon Indians moved there."). The United States set aside 880 acres of different land from the public domain for the El Tejon Band of Indians in 1916. *Id.* at 7.

119. *Id.* at 4–5.

Tribe.[120] The United States Department of Justice, acting as the "guardian" for the Tejon Indians—who it said had "now and from time immemorial . . . been tribal Indians, and at all times since July 7, 1846, ha[d] been . . . wards of the United States"—litigated a case up to the Supreme Court in defense of the Tejoneños' land rights.[121] When the Court ruled against the United States and the tribe in 1924,[122] federal officials entered into an agreement with the investors which allowed the Tejoneños to stay in their villages.[123] Government efforts to set aside land for the Tejon Tribe had ceased by 1952, when an earthquake destroyed many of their homes and federal officials monitored the situation but decided not to use Indian services appropriations to help them.[124] Federal officials did not exercise jurisdiction with respect to the Tejon Indians again until 2011, when the Assistant Secretary – Indian Affairs "[re]affirm[ed] the Federal relationship between the United States and the Tejon Indian Tribe."[125]

The government's early twentieth century efforts to set aside land for the Tejoneños were part of a larger program to secure lands for California Indians after the unratified U.S. treaties with the Tejon Tribe and other California Indians were made public in 1905.[126] For the next three decades, Congress passed legislation to fund land purchases for non-

120. *Id.* at 5.

121. THE TEJON INDIAN TRIBE REQUEST FOR CONFIRMATION OF STATUS 4 (2006) (quoting Bill of Complaint at 1, United States v. Title Ins. & Trust Co. (S.D. Cal.) (Complaint filed Dec. 20, 1920)); United States v. Title Ins. & Trust Co., 265 U.S. 472, 481 (1924) ("This is a suit by the United States, as guardian of certain Mission Indians, to quiet in them a 'perpetual right' to occupy, use, and enjoy a part of a confirmed Mexican land grant in Southern California . . . ."); Bill of Complaint at 1, United States v. Title Ins. & Trust Co. (S.D. Cal.) (Complaint filed Dec. 20, 1920) (on file with author) (stating that it filed suit "as guardian for sundry Indians known as the Tejon Band or Tribe of Indians now and from time immemorial residing on certain premises . . . in what is now Kern County, California[,]" and that the Tejoneños "are and from time immemorial have been tribal Indians, and at all times since July 7, 1846, have been and now are wards of the United States"); AS–IA Tejon Memorandum, *supra* note 114, at 6 ("From 1920–1924, the [Interior] Department worked with the Department of Justice to secure the Tribe's rights to Tejon Ranch land, first meeting with the Tribe's Chief and endeavoring to open negotiations with the ranch owners, and then through litigation.") (citations omitted).

122. *Title Ins. & Trust Co.*, 265 U.S. at 486–87 (ruling that the Tejoneños lacked rights in the land).

123. AS–IA Tejon Memorandum, *supra* note 114, at 5 (citing BIA officials' correspondence). The investors refused to sell a tract for the Tejoneños but agreed they could stay in their villages if no further claims were made challenging the investors' title. *Id.* Federal officials pointed to this agreement throughout the 1920s and 1930s, in part as a reason for not making further efforts to purchase lands for the Tejon Tribe. *Id.* at 5–6.

124. *Id.* at 6.

125. AS–IA Tejon Letter, *supra* note 114; *see* AS–IA Tejon Memorandum, *supra* note 114, at 1.

126. See William Wood, The Trajectory of Indian Country in California: Rancherías, Villages, Pueblos, Missions, Ranchos, Reservations, Colonies, and Rancherias, 44 TULSA L. REV. 317, 356–57 (2008).

reservation Indians in California, but the program ended during the Great Depression, with many California Indians still lacking a land base.[127] Federal officials in charge of the program readily admitted they had neither the resources nor time to carry out the task Congress bestowed, such as when the superintendent of the Sacramento BIA agency wrote that "it ha[d] not been physically possible to comply literally with [their] instructions" to locate Indian communities and buy land for them, in part because the BIA had prepared Indian censuses in only seven of the forty-five counties in the agency's jurisdiction, which covered most of California.[128] As a contemporary observer explained in the *California Law Review*, the United States assumed a colonial fiduciary jurisdiction regarding the Tejoneños and other California Indians following the U.S.–Mexico War, but it was an "indisputably slothful" guardian that had for the most part failed to exercise that jurisdiction—thus illustrating the difference between the "legal status" or "theoretical status" of Indians in California "as . . . federal ward[s], as declared by the Supreme Court[,]" and their "actual status, as that wardship is administered."[129]

C. Jurisdiction: Exercise ≠ Existence

The examples discussed above illustrate clearly the difference between the federal government's having jurisdiction, and even explicitly acknowledging it had jurisdiction regarding certain Indians, and actually exercising it. Other people(s), including those mentioned in Justice Breyer's concurring opinion in *Carcieri*,[130] share similar histories. Sometimes Congress affirmed their tribal status;[131] otherwise, affirmation was by the Interior Department, either through a formal administrative process or in a legal opinion. All of these situations involve the federal government establishing (or, in some cases, reestablishing) a formal po-

127. *See id.* at 357–58 nn.224–27 (citing legislation and providing historical background).

128. *See* Letter from L.A. Dorrington, Superintendant, to Comm'r Indian Affairs 1, 27 (June 23, 1927) (on file with author) ("In conclusion, kindly be advised that it has not been physically possible to comply literally with Office instructions, and it is believed from the foregoing the magnitude of the undertaking will be realized, especially as census, so far as we are aware, is available for only seven counties."). Superintendent Dorrington in Sacramento also reported to his superiors in Washington throughout the 1920s on the situation at Tejon. *See* AS–IA Tejon Memorandum, *supra* note 114, at 5–6 (citing 1924, 1925, and 1927 letters from L.A. Dorrington to the Commissioner and Assistant Commissioner for Indian Affairs).

129. Chauncey S. Goodrich, *The Legal Status of the California Indian*, 14 CAL. L. REV. 83, 97–98 (1926).

130. Carcieri v. Salazar, 555 U.S. 379, 398–99 (2009) (Breyer, J., concurring) (discussing the Stillaguamish Tribe, the Grand Traverse Band of Ottawa and Chippewa Indians, and the Mole Lake Tribe).

131. *See infra* note 135.

litical relationship with people(s) who were already under federal jurisdiction as a matter of law.

Interior Department officials in the 1930s refused to extend the Indian Reorganization Act to the Grand Traverse Band of Ottawa and Chippewa Indians, arguing that an 1855 treaty had terminated the tribe, but the Department later rejected this "erroneous belief" and in 1980 acknowledged the tribe's status.[132] After the Stillaguamish sued the United States to have their tribal status and fishing rights recognized in the 1970s, the Department—reversing previous determinations to the contrary—concluded in 1980 that the Stillaguamish were a tribe, focusing on their "continuous tribal existence" and noting two other instances (involving the Burns Paiute Tribe and the Nooksack Indian Tribe) where the Department had "reassessed the status of groups initially determined not to be tribes."[133] And though it refused to provide assistance to the Catawba in the early 1900s, saying they were "state Indians" for whom the federal government had no responsibility,[134] the Department deter-

132. Grand Traverse Cty. Bd. of Comm'rs v. Acting Midwest Reg'l Dir., 61 IBIA 273, 279–80 (2015), 2015 WL 10939236 (discussing the tribe's history, including 1795, 1836, and 1855 treaties with the United States, and explaining that "the correspondence reflected the erroneous belief, held by the Department at the time, that the 1855 Treaty had terminated the tribe, an idea later rejected by both the Department and the courts"); *see also Carcieri*, 555 U.S. at 398 (Breyer, J., concurring) (discussing Grand Traverse Band history); *Grand Traverse*, 61 IBIA at 280 (suggesting that "the Department's reticence to extend IRA benefits to the Tribe in the 1930s also reflected fiscal concerns"). The Grand Traverse Band was the first tribe recognized through the administrative process in 25 C.F.R. Part 83. *Carcieri*, 555 U.S. at 408 (Stevens, J., dissenting). In 2013, the Interior Department acquired approximately 159 acres of land for the tribe under the IRA, finding that the tribe was a recognized Indian tribe "under Federal jurisdiction . . . in 1934." *Grand Traverse*, 61 IBIA at 273, 277. In September 2015, the Interior Board of Indian Appeals, an administrative hearing body within the Interior Department, rejected a challenge to this determination. *Id.* at 273.

Similarly, although Indian Affairs Commissioner John Collier wrote in 1933 that the Cowlitz were "no longer in existence as a communal entity," the government later changed this "mistaken belief" and recognized the Cowlitz Indian Tribe in 2002. Confederated Tribes of the Grand Ronde Cmty. v. Jewell, 830 F.3d 552, 565 (D.C. Cir.) (explaining that Collier's statement reflects a "sentiment [that] goes to the government's mistaken belief at the time that the Cowlitz had been absorbed into the greater population"), *petition for cert. filed sub nom.* Citizens Against Reservation Shopping v. Jewell (U.S. Oct. 27, 2016) (No. 16-572).

133. Memorandum of Hans Walker, Jr., Assoc. Solicitor, Indian Affairs, on Reconsideration of Status of Stillaguamish Tribe (Oct. 1, 1980) (on file with author) at 7–8; *see also Carcieri*, 555 U.S. at 398 (Breyer, J., concurring) (discussing Stillaguamish–U.S. relations); Stillaguamish Tribe of Indians v. Kleppe, No. 75-1718, 1976 U.S. Dist. LEXIS 17381, at *1–2 (D.D.C. Sept. 24, 1976) (ordering determination of Stillaguamish tribal status); Mark D. Myers, Comment, *Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL'Y REV. 271, 273 (2000) (discussing Stillaguamish litigation).

134. Historians' Brief, *supra* note 46, at 15 (noting that "the Commissioner of Indian Affairs had advised the Catawbas in 1906 and again in 1909 that the Interior Department would not seek relief on their behalf, on the ground that they were 'state Indians' for whom the United States had no responsibility") (quoting South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 515 (1986) (Blackmun, J., dissenting)).

mined in 1944 that the Catawba could organize under the IRA because they had continually existed as a tribe since at least the mid-1800s, when Congress appropriated funds to remove them to Indian Territory.[135] The situation of the Catawba, who remained on lands in South Carolina set aside under a nineteenth century treaty with the state,[136] is particularly noteworthy because senators' uncertainty about the Catawbas' status during the debates on the Indian Reorganization Act—and questions about whether they (and other tribes) were still Indians, and thus whether the Act should apply to them—led to the "now under Federal jurisdiction" language being added to the IRA's definition of Indian.[137]

In a 1978 case rejecting Mississippi's argument against federal jurisdiction over the Mississippi Band of Choctaw Indians based on "the long

---

135. *See* Catawba Tribe—Recognition Under IRA, 2 Op. Solicitor on Indian Affairs 1255 (1944) (stating that the Catawba Indian Tribe was "recognized by" the federal government via the Congressional legislation, and explaining that "although such recognition is of ancient date, the tribal organization has been continuously maintained and there is no serious dispute now as to the existence of membership of the tribe") (citing Act of July 29, 1848, 9 Stat. 252, 264; Act of July 31, 1854, 10 Stat. 315, 316); Questions of the Catawbas' Identity and Organization as a Tribe and Right to Adopt IRA Constitution, 2 Op. Solicitor on Indian Affairs 1261 (1944) (stating that the Department's "files are full of evidence which is conclusive that a tribal organization has been continuously maintained" and that "[t]here can be no doubt that the Catawba Indians now exist as a tribe and have had a known tribal existence for almost a century"). In a memorandum to the Indian Affairs Commissioner the following year, D'Arcy McNickle wrote that the Catawbas "occupy a position identical with that of the Alabama and Coushatta Indians in Texas, who for years were refused government aid because they were not Federal Indians." Historians' Brief, *supra* note 46, at 16–17 (quoting Memorandum from D'Arcy McNickle to the Commissioner Regarding Catawba Indians (undated) (published in *Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993: Hearing on H.R. 2399 Before the H. Subcomm. On Native Am. Affairs*, 103rd Cong. 823 (1993))). Other tribes that federal officials long considered "state Indians" and refused to exercise federal jurisdiction regarding were the subject of Congressional and administrative actions formally extending them federal recognition. *See, e.g.*, Aroostook Band of Micmacs Settlement Act, Pub. L. No. 102-171, § 6, 105 Stat. 1143 (1991) (federal recognition for the Aroostook Band in Maine); Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98-134, § 9, 97 Stat. 851 (1983) (federal recognition of the Mashantucket Pequot codified at 25 U.S.C. § 1758(a)); Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, § 6, 94 Stat. 1785 (1980) (federal recognition for the Passamaquoddy Tribe, Penobscot Indian Nation, and Houlton Band of Maliseet codified at 25 U.S.C. § 1725(i)); Federal Recognition of Indian Tribes, 59 Fed. Reg. 12140 (Mar. 15, 1994) (federal recognition for the Mohegan Indian Tribe); Federal Recognition of Indian Tribes, 52 Fed. Reg. 4193 (Feb. 10, 1987) (federal recognition for the Wampanoag Tribe of Gay Head (Aquinnah), before passage of the Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act of 1987, Pub. L. 100-95, 101 Stat. 704 (codified as 25 U.S.C. § 1171)).

136. *See* Historians' Brief, *supra* note 46, at 15 (discussing 1839 Treaty of Nation Ford between the Catawba Indian Tribe and South Carolina); Re: Draft Memorandum of Understanding Between the State of South Carolina, the Catawba Indian Tribe, the Dep't of the Interior, and the Farm Sec. Admin., 1 Op. Solicitor on Indian Affairs 1080 (1942) ("By the treaty of 1840 between the Catawbas and . . . South Carolina, the State took charge of this tribe and has since made considerable expenditure on [their] behalf . . . .").

137. *See infra* notes 297–304 and accompanying text.

lapse in the federal recognition of a [Choctaw] tribal organization,"[138] the Supreme Court explained that "the fact that federal supervision over [the Mississippi Choctaw] ha[d] not been continuous" did not "destroy[] the federal power to deal with them."[139] Thus, though unnoticed in *Carcieri*, the Court has already distinguished between the exercise of federal jurisdiction—"federal supervision"—regarding particular Indigenous people(s) and the existence of that jurisdiction, or the authority to deal with them. In order to situate these tribal histories relative to the "under federal jurisdiction" inquiry left open by *Carcieri*, this article next examines the nature of the federal Indian affairs jurisdiction,[140] the historical uncertainties and evolving standards regarding what people(s) were subject to it,[141] and how these dynamics came together in the debates leading up to, and the language in, the Indian Reorganization Act's definition of "Indian."[142]

IV. FEDERAL INDIAN AFFAIRS JURISDICTION

Jurisdiction, most simply, is a government's power to exercise authority within a certain area. Both the modern and contemporaneous (circa 1934) editions of the *Webster's International* and *Black's Law* dictionaries the *Carcieri* Court cited[143] define "jurisdiction" as a sovereign's general power, authority, or right to exercise its authority over persons and things within a particular territory.[144] The 1934 *Webster's* dictionary

138. United States v. John, 437 U.S. 634, 651 (1978).

139. *Id.* at 653; *cf.* Mohegan Tribe v. Connecticut, 638 F.2d 612, 623 (2d Cir. 1981) (opining that "although . . . the federal government did not avail itself of the provisions of the Nonintercourse [Act] and appeared to leave management of the affairs of the eastern tribes to the individual states, it does not follow that the federal government had no obligation to do so"); Narragansett Tribe of Indians v. S.R.I. Land Dev. Corp., 418 F. Supp. 798, 804 (D.R.I. 1976) (finding that states' exercising "'almost exclusive responsibility for the protection and welfare of the' tribe's members in the face of almost complete disregard by the federal government" could not "terminate the trust relationship between" the federal government and tribes covered by the Nonintercourse Act) (quoting Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. 649, 653 (D. Me.), *aff'd*, 528 F.2d 370 (1st Cir. 1975))).

140. *See infra* Part IV.

141. *See infra* Part V.

142. *See infra* Part VI.

143. Carcieri v. Salazar, 555 U.S. 379, 389 (2009) (citing the definition of "now" in WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1934) and BLACK'S LAW DICTIONARY (3d ed. 1933)).

144. WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1934) (defining jurisdiction as the "[a]uthority of a sovereign power to govern or legislate; power or right to exercise authority; control"); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002) (jurisdiction is "authority of a sovereign power to govern or legislate: power or right to exercise authority . . . sphere of authority . . . **syn** see POWER"); BLACK'S LAW DICTIONARY (9th ed. 2009) ("A government's general power to exercise authority over all persons and things within its territory."); *see also* THE NEW CENTURY

also explained that the words jurisdiction and authority "are often interchangeable."[145]

It appears that the Supreme Court has only once interpreted the word "jurisdiction" in a statute. The legislation at issue there (amending the federal criminal code) was passed the same day as the Indian Reorganization Act: June 18, 1934.[146] Fifty years later, a unanimous Court in *United States v. Rodgers*, noting that the statute did not define jurisdiction and citing the then-current *Webster's* dictionary, said that "[t]he most natural, nontechnical reading of the statutory language is that it covers all matters confided to the authority of an agency or department."[147] The Court explained that "[*Webster's*] broadly defines 'jurisdiction' as, among other things, 'the limits or territory within which any particular power may be exercised: sphere of authority.' A department or agency has jurisdiction, in this sense, when it has *the power to exercise authority* in a particular situation."[148] Justices Scalia and Alito, in a dissenting opinion in a 2008 case, similarly relied on a contemporaneous *Webster's International* dictionary to interpret the word "jurisdiction" in a 1905 interstate compact between Delaware and New Jersey, finding that it meant the "authority of a sovereign power to govern or legislate."[149]

Significantly, these opinions and the dictionaries they rely on equate jurisdiction with the *existence* of government power, not its exercise. Jurisdiction is the power a government has (or asserts)—and decides whether or not to exercise. The Justices in *Carcieri* who conflated juris-

---

DICTIONARY OF THE ENGLISH LANGUAGE (1927) (defining jurisdiction in part as "power or authority in general"); *cf.* BLACK'S LAW DICTIONARY (3d ed. 1933) (defining jurisdiction as "[t]he power and authority constitutionally conferred upon (or constitutionally recognized as existing in) a court or judge to pronounce the sentence of law, or to award the remedies provided by law"); WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1934) ("1. *Law*. The legal power, right, or authority to hear and determine a cause or causes, considered either in general or with reference to a particular matter; legal power to interpret and administer the law in the premises.").

145. Webster's New International Dictionary (2d ed. 1934).

146. United States v. Rodgers, 466 U.S. 475, 479 (1984) (discussing Act of June 18, 1934, 48 Stat. 996 (current version codified at 18 U.S.C. § 1001 (2012))).

147. *Rodgers*, 466 U.S. at 479 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976)).

148. *Id.* (emphasis added). In an earlier case involving the same statute, which criminalized false statements made "in any matter within the jurisdiction of any department or agency of the United States," the Court wrote that "the term 'jurisdiction' should not be given a narrow or technical meaning" and concluded that an individual "made a false statement in a 'matter within the jurisdiction' of the [National Labor Relations] Board" when he filed an affidavit denying affiliation with the Communist Party. Bryson v. United States, 396 U.S. 64, 70–71 (1969).

149. New Jersey v. Delaware, 552 U.S. 597, 632 (2008) (Scalia, J., dissenting) (quoting WEBSTER'S INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (1898)). The majority opinion did not interpret the word "jurisdiction"; it decided the case on other grounds. *Id.* at 609 (majority opinion).

diction's existence and exercise were wrong to do so as a general matter, and especially so as regards the federal government's Indian affairs jurisdiction, which the Supreme Court has described as "the federal power to deal with" Indians.[150] Across the centuries, the Court has consistently held that all Indians tribes have been under federal jurisdiction ever since they and their lands were "incorporated into" the United States.[151] But as explained above, federal officials were not always consistent in exercising jurisdiction regarding certain people(s), or in treating them as Indians or Indian tribes to whom federal jurisdiction attached.[152]

This Part examines the federal Indian affairs power as described and developed by the Supreme Court. The Court's early cases (discussed in Subpart A) relied on the discovery doctrine to create a power based in the United States' claims to land ownership and Constitution. The Court (as discussed in Subpart B) expanded this power around the turn of the twentieth century, branding the power "plenary" and acknowledging that it is based, ultimately, not in the Constitution but rather in Indians' presence in land claimed by the United States and their ascribed "dependent" and "inferior" status vis-à-vis the federal government.[153] The Court has continued to invoke this plenary power in its modern cases (discussed in Subpart C), most recently describing it as a "preconstitutional power[] necessarily inherent" in the federal government.[154]

A. The Early Federal Indian Affairs Power Cases

The Supreme Court first addressed the federal government's Indian affairs power in a trilogy of decisions authored by Chief Justice John Marshall in the early 1800s.[155] This Marshall Trilogy of cases (as they are called) sets forth the foundational premises of federal Indian law,[156]

---

150. *See* United States v. John, 437 U.S. 634, 653 (1978).

151. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978) ("Upon incorporation into the territory of the United States, the Indian tribes thereby came under the territorial sovereignty of the United States . . . .") (citing Johnson v. M'Intosh, 21 U.S. 543, 574 (1823); Cherokee Nation v. Georgia, 30 U.S. 1, 17–18 (1831)).

152. *See supra* notes 50, 76–100, 113–14, 132–35 and accompanying text; *infra* notes 253–56 and accompanying text.

153. *See, e.g.*, Choctaw Nation v. United States, 119 U.S. 1, 28 (1886) (describing the federal-tribal relationship as "that between a superior and inferior, whereby the latter is placed under the care and control of the former"); *see also infra* notes 174–85 and accompanying text.

154. United States v. Lara, 541 U.S. 193, 201 (2004).

155. Worcester v. Georgia, 31 U.S. 515 (1832); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Johnson v. M'Intosh, 21 U.S. 543 (1823).

156. FRANK POMMERSHEIM, BROKEN LANDSCAPE: INDIANS, INDIAN TRIBES, AND THE CONSTITUTION 87–115 (2009) (discussing Marshall Trilogy and foundational federal Indian law principles); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth*

including the characterization of Indigenous polities as "domestic dependent nations" who, like their territories, are "completely under the sovereignty and dominion of the United States."[157] According to Marshall, Indians were "in a state of pupilage," and their "relation to the United States resemble[d] that of a ward to his guardian."[158]

The United States' sovereignty and dominion were based in international law principles, primarily the discovery doctrine. Applied in North America by the same European powers that used it elsewhere, this doctrine holds that the Christian crown who first "discovered" a territory thereby obtained superior rights vis-à-vis the Indigenous peoples already there, as well as other colonial powers.[159] And it is based on the same principles—that Native Americans, like non-Christians generally, were savage, uncivilized, and inferior peoples—which served to justify the colonial enterprise throughout the Americas and the world.[160]

But with this discovery power came responsibility, what this article calls the colonial fiduciary relationship and Rudyard Kipling called the "white man's burden."[161] The colonizer took upon (itself) the general obligation of "civilizing" Indigenous peoples and assumed certain fiduci-

---

Century Origins of Plenary Power over Foreign Affairs, 81 TEX. L. REV. 1, 33–42 (2002) (discussing Marshall Trilogy).

157. *Cherokee Nation*, 30 U.S. at 17.

158. *Id.* Chief Justice Marshall wrote that

> it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.
>
> They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.

Id.

Although described in imperialist and paternalistic terms, the tribal-federal relationship contemplated in the Marshall Trilogy cases was akin to relationships governing tributary and feudatory states in Europe, under which one sovereign receives the military protection of another but does not thereby lose the right to govern itself. *See* N. BRUCE DUTHU, SHADOW NATIONS: TRIBAL SOVEREIGNTY AND THE LIMITS OF LEGAL PLURALISM 12–16 (2013).

159. PAGDEN, *supra* note 23, at ch. 2. For a discussion of the discovery doctrine as adopted by the English in North America, see ROBERT J. MILLER ET AL., DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES ch. 1 (2010).

160. *See Johnson*, 21 U.S. at 573 (explaining that "the [Indians'] character and religion . . . afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency"); *see also* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 312–17 (1990) (noting that the discovery doctrine was "assertedly recognized as part of the Law of Nations by virtually every European colonizing nation" and adopted into U.S. law in *Johnson v. M'Intosh*).

161. Rudyard Kipling, *The White Man's Burden* (1899).

ary duties regarding their well-being, their religious instruction and education generally, and, importantly, their resources.[162] Thus the United States, as the successor to Britain, France, Spain (and Spain's successor Mexico), and Russia, inherited both those nations' property interests and their responsibilities to the Indigenous peoples whose property interests they had usurped.[163]

Besides the discovery doctrine, Chief Justice Marshall identified three constitutional sources for the Indian affairs power: the war power clause, the treaty clause, and the commerce clause.[164] The Court's justification for the federal Indian affairs power (regarding Native peoples, as opposed to the states), however, remained more territorial than constitutional.[165] And though the Court made broad statements about Indian tribes being under the United States' dominion and authority,[166] Congress up through the U.S. Civil War limited its exercise of power to three areas: passing laws, namely the Indian Trade and Intercourse Acts (also called the Nonintercourse Acts), to regulate U.S. citizens' and the states' interactions with tribes and their members; ratifying treaties and funding obligations incurred therein; and paying for wars against Indians.[167] That would change after 1871, when the United States stopped making treaties with Indian tribes and steered the federal-tribal relationship towards unilateralism.[168]

---

162. *See* PAGDEN, *supra* note 23, at 86–89; *see also Johnson*, 21 U.S. at 573 ("The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing upon them civilization and Christianity . . . .").

163. *See* Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1 (1943); *see also Johnson*, 21 U.S. at 573–84 (tracing United States land title back to the fifteenth century through the claims of Britain, Spain, France, and the Netherlands).

164. Worcester v. Georgia, 31 U.S. 515, 559 (1832) (stating that the Constitution "confers on congress the powers of war and peace: of making treaties, and of regulating commerce . . . *with the Indian tribes*. These powers comprehend all that is required for the regulation of our intercourse with the Indians"); *see* U.S. CONST. art. I, § 8, cls. 3, 11; art. II, § 2, cl. 2.

165. *See* United States v. Rogers, 45 U.S. 567, 572 (1846) (stating that "the Indians [were] continually held to be, and treated as, subject to the[] dominion and control" of the European powers and their successors, and that "the Indian tribes *residing within the territorial limits of the United States* are subject to their authority") (emphasis added); Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) ("The Indian Territory is admitted to compose a part of the United States. In all our . . . laws, it is so considered. . . . [Indians] are considered as *within the jurisdictional limits of the United States* . . . .") (emphasis added); *see also* POMMERSHEIM, *supra* note 156, at 114 ("In the [Marshall] trilogy, the Constitution appears to constrain the states, but there is no express discussion about whether it constrains the federal government to any significant degree.").

166. *See supra* notes 157–58 and accompanying text.

167. *See* POMMERSHEIM, *supra* note 156, at 60–66; Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 SAINT JOHN'S L. REV. 153, 170–73 (2008).

168. Indian Appropriations Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 ("[H]ereafter 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.").

B. The "Plenary" Indian Affairs Power Doctrine

After pursuing policies of war against and removal of Indigenous peoples for most of the nineteenth century, the United States in the late 1800s adopted a formal policy of trying to assimilate Indian people(s), most of whom lived on reservations set aside through treaties or Executive Orders, into American society as (second-class) citizens.[169] Aimed at destroying traditional Indigenous societies and institutions, the policy was premised on Indians' ascribed racial and cultural inferiority—the same basis for the discovery doctrine—and the idea that Indians, as "wards" of the United States, were subject to federal government control of their property, education, religious practices, and other aspects of daily life until deemed "civilized" enough to become American citizens.

Lawmakers considered private property ownership under the Anglo-Saxon model a hallmark of civilized society, and so a centerpiece of assimilation era Indian policy was allotment—a process through which tribes' collective (national) landholdings were divided up among individual tribal members, who government officials hoped would become farmers and ranchers.[170] These allotted reservation lands were subject to federal oversight and restrictions against alienation, and federal bureaucrats managed individual Indians' property interests.[171] The growing federal Indian affairs bureaucracy also administered the distribution of goods and services, ran boarding schools for Indian children, oversaw the activities of missionaries, and enforced laws criminalizing traditional cultural practices.[172]

As the reservation system and the federal government's involvement in Indians' lives expanded, the Supreme Court found itself having to justify the United States' intruding into tribes' internal affairs and supplant-

---

169. *See generally* CORNTASSEL & WITMER, *supra* note 5, at 9–12 (discussing assimilation policy); FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880–1920 (1984).

170. CORNTASSEL & WITMER, *supra* note 5, at 9–11; ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 299–300 (1985 ed.); POMMERSHEIM, *supra* note 156, at 126–31. The General Allotment Act of 1887 (also known as the Dawes Severalty Act or Dawes Act), the principal allotment legislation, was drafted by Henry Dawes, a U.S. Senator from Massachusetts, and based at least in part on the Massachusetts Indian Citizenship Act of 1869. MANDELL, *supra* note 58, at 196; ROSEN, *supra* note 49, at 179; *see also supra* note 63 (discussing Massachusetts law).

171. *See* Graham D. Taylor, The New Deal and American Indian Tribalism: The Administration of the Indian Reorganization Act, 1934–45 5–6 (1980).

172. ROCKWELL, *supra* note 70, at 246, 254 (discussing expansion of the federal Indian affairs bureaucracy from the 1850s to 1890s); TAYLOR, *supra* note 171, at 8 (noting new Bureau of Indian Affairs divisions and programs in the late 1800s); Newton, *supra* note 24, at 226–28 (describing federal control over tribal members' lives).

ing tribal laws and institutions.[173] It did so in a body of jurisprudence that emphasized Indians' status as wards under federal law who were dependent on the federal government for protection.[174] Departing from the Marshall Trilogy's principles of military protection and political dependency, the Court relied instead on Indians' "factual dependency"[175] to develop what Nell Newton calls a "guardianship power over Indian tribes, which [the Court] frankly acknowledged to be extraconstitutional."[176]

The Supreme Court first expressly located the federal Indian affairs power wholly outside the Constitution in *United States v. Kagama*,[177] an 1886 case involving Congress's authority to exercise criminal jurisdiction over Indian-against-Indian crimes on Indian lands. Finding that neither the Commerce Clause nor the Apportionments Clauses (the only constitutional clauses that mention Indians or Indian tribes) provided a basis for Congress to pass the law in question,[178] the Court explained that Congress nonetheless had such authority because Indian tribes exist "within the geographical limits of the United States"[179] and

---

173. Newton, *supra* note 24, at 207 (explaining that "the Court was forced to develop new rationales to justify federal actions concerning Indians").

174. O'Brien, *supra* note 25, at 1465 ("As the government's objective turned from relating to tribes as national entities to supervising dependent individuals whose future lay in assimilation, the courts increasingly characterized Indians as 'wards.'").

175. *See* DUTHU, *supra* note 158, at 85 ("[T]he Court emphasized elements of . . . *factual dependency*, as opposed to *Worcester*'s international-law-derived notions of intergovernmental or *political* dependency in the tribal-federal relationship."); Gerald Torres, *Who Is an Indian? The Story of* United States v. Sandoval, *in* INDIAN LAW STORIES 109, 143–44 (Carole Goldberg et al. eds., 2011) (discussing the Court's use of "factual dependency" as a justification for the plenary power doctrine); *see also* Lauren Benton, *Shadows of Sovereignty: Legal Encounters and the Politics of Protection in the Atlantic World*, *in* ENCOUNTERS OLD AND NEW: ESSAYS IN HONOR OF JERRY BENTLEY (Alan Karras & Laura Mitchell eds., forthcoming 2017) (discussing nineteenth-century changes in the meanings of "protection" as used in the context of political and jurisdictional relationships between Native peoples and colonial powers in North America).

176. Newton, *supra* note 24, at 207.

177. 118 U.S. 375 (1886).

178. *Id.* at 378–79 (discussing U.S. CONST., art. I, § 8, cl. 3 ("The Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"), art. I, § 2, cl. 3 and amend. XIV, § 2 (both "excluding Indians not taxed" for apportionment purposes)). The Court said that "it would be a very strained construction of th[e commerce] clause that a system of criminal laws for Indians living peaceably in their reservations . . . was authorized by the grant of power to regulate commerce with the Indian tribes" and that the Apportionments Clauses did not "shed much light on the power of congress over the Indians in their existence as tribes distinct from the ordinary citizens of a state or territory." *Id.*

179. *Id.* at 379; *id.* at 384–85 (stating that the power "must exist in th[e federal] government, because it has never existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.").

> *are* the wards of the nation. They are communities *dependent* on the United States . . . . From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them . . . there arises the *duty of protection, and with it the power*.[180]

This, according to the Court, "ha[d] *always been recognized* by the executive, and by congress, and by this court, whenever the question has arisen."[181]

Over the next few decades, the Court entrenched the extraconstitutional power invoked in *Kagama*—which it described as the government's "plenary power" regarding Indian affairs—in a series of cases wherein Indians challenged federal acts appropriating tribal property and regulating other tribal matters.[182] As it had in *Kagama*, the Court justified these exercises of authority on the grounds that Indians were within the geographic (or territorial) limits of the United States and therefore subject to its authority and control,[183] and that they were "wards" in a state of "pupilage" and "dependent" on the United States' "protection."[184] The Court also continued to emphasize that the federal government had possessed this "plenary authority" over Indians from its begin-

---

180. *Id.* at 383–84 (third emphasis added).

181. *Id.* at 384 (emphasis added); *see id.* at 380–81 (citing United States v. Rogers, 45 U.S. 567 (1846)).

182. Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903) (rejecting challenge to legislation allotting the lands of the Kiowa, Comanche, and Apache Tribes); Cherokee Nation v. Hitchcock, 187 U.S. 294, 307–08 (1902) (upholding law authorizing the United States to lease Cherokee Nation lands for mining); Stephens v. Cherokee Nation, 174 U.S. 445, 478–79 (1899) (using the "plenary power" label for the first time and finding Congressional authority to enact legislation to determine the citizenship, allot the lands, and regulate the judicial systems and other institutions of the Cherokee, Chickasaw, Choctaw, Muscogee (Creek), and Seminole Nations); Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641, 656–57 (1890) (holding that Congress had the power to take Cherokee Nation land for a railroad).

183. *S. Kan. Ry. Co.*, 135 U.S. at 657 (stating that the Cherokee Nation and its citizens were "within the geographical limits of the United States . . . [and] subject to the authority of the general government"); *id.* at 653–55 (citing and quoting *Kagama*, *Rogers*, and Cherokee Nation v. Georgia, 30 U.S. 1 (1831)); *see also Cherokee Nation v. Hitchcock*, 187 U.S. at 305 (citing *Southern Kansas Railway* and *Stephens* for the proposition that "Indian tribes domiciled within the United States" were "subject to the paramount authority of the United States"); *Stephens*, 174 U.S. at 484–86 (quoting *Southern Kansas Railway*, *Kagama*, *Rogers*, and *Cherokee Nation v. Georgia*, and other case law regarding tribes' being under the "sovereignty and dominion" and "political control"—and "subject to the[] authority"—of the federal government because they were within the United States' "territorial limits" or "geographical limits").

184. *Cherokee Nation v. Hitchcock*, 187 U.S. at 305–06 (noting that Indian tribes were "regarded as in a condition of pupilage or dependency" and opining that Congress had the "undoubted power to legislate . . . for the protection of the tribal property") (citing *Stephens*, 174 U.S. at 484–85); *S. Kan. Ry. Co.*, 135 U.S. at 653–54 (citing case law describing Indian tribes as "wards of the nation," "in a state of pupilage," and "dependent political communities"); *see* Tiger v. W. Inv. Co., 221 U.S. 286, 286 (1911) ("Congress has had at all times, and now has, the right to pass legislation in the interest of the Indians as a dependent people . . . .").

ning, pointing in 1913 to a rule established by "long continued legislative and executive usage and an unbroken current of judicial decisions" that "attributed to the United States as a superior and civilized nation the power and . . . duty of exercising a fostering care and protection over *all dependent Indian communities within its borders*, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state."[185]

C. The Plenary Indian Affairs Power Doctrine—Continued . . .

The Court continued to rely on the plenary power doctrine throughout the twentieth century, and to locate this power both inside and outside of the Constitution.[186] It still does today. As recently as 2004, the Court grounded the plenary Indian affairs power not just in the Constitution's text (the Commerce and Treaty Clauses), but also in "the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that th[e] Court has described as 'necessary concomitants of nationality.'"[187]

---

185. United States v. Sandoval, 231 U.S. 28, 46 (1913) (emphasis added); *see Lone Wolf*, 187 U.S. at 565 ("Plenary authority over the tribal relations of the Indians has been exercised by Congress *from the beginning* . . . .") (emphasis added); *S. Kan. Ry. Co.*, 135 U.S. at 653 ("*From the beginning of the government* to the present time, [Indians] have been treated as 'wards of the nation' . . . .") (emphasis added).

186. *See, e.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 155 n.21 (1982) (stating that "when Congress acts with respect to the Indian tribes, it generally does so pursuant to its authority under the Indian Commerce Clause, or by virtue of its superior position over the tribes"); Morton v. Mancari, 417 U.S. 535, 551–52 (1974) (explaining that Congress's power "to deal with . . . Indians is drawn both explicitly and implicitly from the Constitution itself" and that the United States, "[i]n the exercise of the war and treaty powers, . . . overcame the Indians and took possession of their lands, . . . leaving them . . . needing protection," and therefore "[o]f necessity . . . assumed the duty of furnishing that protection, and with it the authority to do all that was necessary to perform that obligation") (quoting Bd. of Cty. Comm'rs v. Seber, 318 U.S. 705, 715 (1943) for the second and third passages)); Williams v. Lee, 358 U.S. 217, 219 n.4 (1959) ("The Federal Government's power over Indians is derived from [the Indian Commerce Clause] and from the necessity of giving uniform protection to a dependent people." (citing *Kagama* and Perrin v. United States, 232 U.S. 478 (1914)); *Perrin*, 232 U.S. at 482 (1914) (stating that the federal Indian affairs power "arises in part from the [Commerce] clause . . . and in part from the recognized relation of tribal Indians to the Federal government"); *see also* DUTHU, *supra* note 158, at 150–51 (discussing twentieth century cases that relied on "the Constitution's text and . . . the non-textually based, dependency theory as the source of federal power in Indian affairs"); Cleveland, *supra* note 156, at 77 ("As late as 1942, . . . lower courts continued to portray Congress's power over tribes as '[f]ull; entire; complete; absolute; perfect; [and] unqualified.'") (alterations in original) (citations omitted); Newton, *supra* note 24, at 216–22 (noting the early twentieth century Court's focus on the guardian-ward relationship as the basis for the plenary power doctrine).

187. United States v. Lara, 541 U.S. 193, 200–01 (2004) (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936)).

But whether tied to some constitutional provision or couched as a "pre-constitutional" power implicit in the Constitution, the plenary Indian affairs power is based, ultimately, in the discovery doctrine and colonial fiduciary relationship.[188] Though no longer using the overtly racist and imperialist language from its foundational federal Indian law cases, the Court still invokes the same extraconstitutional plenary power doctrine.[189] Because the United States asserts territorial claims and jurisdic-

---

188. *See* Cleveland, *supra* note 156, at 26, 31, 34 (examining different sources for the power, including the discovery doctrine, and explaining that the Court early on "established that U.S. authority over tribes . . . originated from two sources: colonial prerogatives deriving from discovery, and the nature of Indians as savages and incomplete sovereigns"); Newton, *supra* note 24, at 207 (describing an extraconstitutional "guardianship power" over Indian tribes that the Court developed based on the discovery doctrine and the United States' property interests and fiduciary obligations, and calling the discovery doctrine "the central analytical element" of the government's power); Royster & Fausett, *supra* note 24, at 587, 587 n.13 (describing the Court's attempts at using the Constitution to justify Congress's exercises of plenary power as "little more than an after-the-fact search for legal underpinnings" and commenting that the "bare skeleton of the doctrine" is "that the federal government has plenary legal power simply because it has the concomitant raw political power").

Although scholars disagree about the scope and nature of federal power regarding Native peoples that the Framers intended, *see* Ablavsky, *Beyond*, *supra* note 57, at 1053, 1053 n.216, 1058, 1083 (questioning the assertion that plenary power and other "powers derived from sovereignty" are nineteenth-century judicial innovations inconsistent with the Constitution's original understanding) (citing William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1800–05 (2013); Cleveland, *supra* note 156, at 54–63; Matthew L.M. Fletcher, *Preconstitutional Federal Power*, 82 TUL. L. REV. 509, 555–60 (2007); Newton, *supra* note 24, at 212–16; Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1077–79 (2004)), the plenary power doctrine certainly encompasses authority beyond what the Framers had in mind. Ablavsky, *Beyond*, *supra* note 57, at 1082–1084 (describing "an internalist story for the development of plenary power" whereby "the first federal leaders' narrow claims of sovereignty over Native nations became the doctrinal tools for ever more aggressive assertions of federal authority to regulate Indians[,]" and noting that "the authority that the United States originally claimed over Indian tribes was importantly different from later, more aggressive invocations of federal power. It was *not* plenary[.]"). And both the plenary power and more limited power envisioned by the Framers are grounded in the same principles—federal power over Indigenous peoples living in places where the United States asserts jurisdiction—as, and can be traced back to, the discovery doctrine. *See id.* at 1082 (noting that "earlier and more limited federal claims of authority over Native nations rested on principles of dominance that . . . expand[ed] . . . into an assertion of complete and unfettered power"); *see also supra* notes 24, 155–63 and accompanying text.

189. *See* ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 156 (2005) (noting that the Court's opinion in *Lara* was "thoroughly cleansed of any of the embarrassing or anachronistic racist language or imagery from the nineteenth century . . . so often used by the Court in the past to justify Congress's plenary power over Indian tribes" and recognized a federal power "to make 'major policy changes in the metes and bounds of tribal sovereignty,' . . . without making any reference to the foundational principles of racial inferiority supporting U.S. powers over tribes under the Marshall [Trilogy] model.") (quoting *Lara*, 541 U.S. at 202); *see also* Ablavsky, *Beyond*, *supra* note 57, at 1082–83 ("Little has changed in plenary power doctrine in the century since *Kagama* was decided, except that as the racialized rhetoric and theories of unenumerated federal powers employed in *Kagama* fell out of favor in the late twentieth century, the Court dragged in the Indian Commerce Clause post hoc to sanitize the doctrine.").

tion over certain geographies where Indigenous peoples are present, the federal government assumes powers regarding (and obligations to) these people(s).

The Court has always presumed that this power attached to people(s) determined to be Indians and (members of) Indian tribes, as explained in the next Part. Whether government officials treated, or recognized, certain Indigenous people(s) as Indians or Indian tribes—and on that basis exercised the United States' Indian affairs jurisdiction with respect to those people(s)—is a separate, but related, issue.

V. "RECOGNIZED" INDIAN TRIBES

With a basic understanding of how the Supreme Court has described the federal Indian affairs power, and equated the federal government's power or authority with its jurisdiction, this Part looks at the criteria used over time for determining whether people(s) were "Indians" and "tribes," such that the federal Indian affairs jurisdiction attached to them—whether, in Indian Reorganization Act parlance, they were "recognized Indian tribe[s] . . . under Federal jurisdiction."[190] While the phrase "recognized Indian tribe" has a fairly straightforward meaning today—namely, an Indian tribe on the list of "Indian Entities *Recognized* and Eligible To Receive Services From the United States Bureau of Indian Affairs" published annually,[191] or the "BIA List"—this meaning only coalesced at the end of the twentieth century.[192] For most of its history, the

190. 25 U.S.C. § 479 (2012) (editorially reclassified as § 5129 in Aug. 2016). As with "under Federal jurisdiction," the *Carcieri* majority did not address the meaning of "recognized." *See* Carcieri v. Salazar, 555 U.S. 379 (2009). But a majority of the Justices seemed to agree that the word "now" modifies only "under Federal jurisdiction," and not "any recognized Indian tribe." *See id.* at 398 (Breyer, J., concurring) (arguing that the IRA "imposes no time limit upon recognition"); *id.* at 400 (Souter, J., concurring) ("[T]he statute imposes no time limit upon recognition . . . ."); *id.* at 402 (Stevens, J., dissenting) ("The plain text of the Act . . . places no temporal limitation on the definition of 'Indian Tribe.'"); *see also* Transcript of Oral Argument at 46–47, *Carcieri*, 555 U.S. 379 (2009) (No. 07-526) (statement of Scalia, J.) ("'Recognized tribe under Federal jurisdiction,' that, to me, means two different requirements."). Plaintiffs in some of the ongoing *Carcieri*-based fee-to-trust challenges have argued—unsuccessfully to date—that "now" modifies both phrases, such that a tribe must have been both a recognized Indian tribe and under federal jurisdiction in 1934 to qualify under the IRA. Confederated Tribes of the Grand Ronde Cmty. v. Jewell, 830 F.3d 552, 558–60 (D.C. Cir.) (holding that statute is ambiguous and deferring to agency's interpretation that "now" modifies only "under federal jurisdiction"), *petition for cert. filed sub nom.* Citizens Against Reservation Shopping v. Jewell (U.S. Oct. 27, 2016) (No. 16-572); No Casino in Plymouth v. Jewell, 136 F. Supp. 3d 1166, 1183–84 (E.D. Cal. 2015) (rejecting argument that "now" modifies both "recognized Indian tribe" and "under Federal jurisdiction").

191. 81 Fed. Reg. 26826 (Apr. 25, 2016) (emphasis added) (publishing the most recent list).

192. Confederated Tribes of the Grand Ronde Cmty. v. Jewell, 75 F. Supp. 3d 387, 406–07 (D.D.C. 2014) (noting that the "modern notion[] of 'federal recognition' . . . evolved in the 1970s, after the Department promulgated procedures by which a tribe could demonstrate its status as an

United States had no formal policy regarding tribal recognition. Yet federal officials still had to decide whether to deal with, or recognize, particular groups as Indian tribes. That required determining they existed (or continued to exist) as a tribe and employing standards, however crude or inconsistently applied, for making this determination.

The earliest references to Indigenous people(s) "recognized as" Indian tribes by, or Indian tribes "recognized by," the United States appear in Supreme Court jurisprudence from the late nineteenth century, during the same time (and in some of the same cases where) the Court crafted the plenary power doctrine. This case law is examined in Subpart A, alongside cases from the late 1800s and early 1900s that set forth criteria for determining whether particular Indigenous people(s) were "tribes" (or "bands") and how to distinguish among them, and what made people(s) distinctly "Indian" communities.[193] Those rudimentary criteria were still in use when Congress adopted the Indian Reorganization Act and first defined "Indian" and "tribe" in 1934, at a time when federal officials in all three branches were uncertain about whether certain Indigenous people(s) were Indian tribes toward whom the United States had legal obligations.[194]

Congress's defining "Indian" in the IRA to include members of "any recognized Indian tribe . . . under Federal jurisdiction" led the Interior

---

Indian tribe"), *aff'd*, 830 F.3d 552 (D.C. Cir.), *petition for cert. filed sub nom.* Citizens Against Reservation Shopping v. Jewell (U.S. Oct. 27, 2016) (No. 16-572); Memorandum from Hilary C. Tompkins, *supra* note 17, at 24 ("The political or legal sense of the term 'recognized Indian tribe' evolved into the modern notion of 'federal recognition' or 'federal acknowledgment' in the 1970s."); *see* Quinn, *supra* note 74, at 334–35 (discussing lists published since 1979, pursuant to regulations adopted in 1978).

As a group of professors specializing in federal Indian law noted in an amicus brief filed in *Carcieri*,

> [p]rior to enactment of the IRA, the government had not made any comprehensive effort to catalog Indian tribes. In 1934, therefore, there was no list of recognized tribes to which the scope of the Act could be limited. Nor were there standard criteria for determining whether recognition had been or should be extended to particular Indian groups.

Law Professors' Brief, *supra* note 52, at 3.

193. Developed in the Assimilation Era, these standards reflected popular ideas about racial and cultural hierarchies based in eugenics and ethnography, as well as the prevailing sentiment among both the public and policymakers that Indian people(s) and cultures had largely disappeared in most of, and were fast disappearing elsewhere in, the United States. *See* Quinn, *supra* note 74, at 347–49 (explaining that "[r]eservations, provision of services to Indians, and the BIA itself were all viewed as more or less temporary by policy makers and the American public at large" in the late 1800s and early 1900s); *see also* CORNTASSEL & WITMER, *supra* note 5, at 9–12 (noting that "[s]tereotypical images of indigenous peoples as 'childlike' and 'vanishing' are common in newspaper accounts and policy dictates" from the late 1800s); Fort, *supra* note 65, at 317–20 (discussing nineteenth century Supreme Court jurisprudence and noting that the Court "understood and accepted the issue of the time to be the inevitable disappearance of the Indian").

194. *See infra* note 218, 236–37 and accompanying text.

Department to develop criteria, discussed in Subpart B, that Department officials applied over the following decades to decide whether particular Indigenous people(s) qualified as Indian tribes for purposes of the IRA and other federal laws. These criteria were replaced by the current regulations and process for determining whether people(s) are an Indian tribe, discussed in Subpart C, that have been in place since 1978 and were updated in July 2015.

The one requirement common to all these benchmarks—across the centuries and changing criteria—is that the people(s) continue to exist as a distinctly Indian community. That is, fundamentally, the question federal officials in whatever branch have always asked when determining whether people(s) are Indian tribes and whether to deal with them accordingly and exercise the federal Indian affairs jurisdiction.

A. The Nineteenth and Early Twentieth Centuries (Before the Indian Reorganization Act)

As it first appeared in U.S. law in reference to Indian tribes, "recognized" was used in what William Quinn, in perhaps the most exhaustive and cited (including in *Carcieri*)[195] history of the concept of federal recognition, calls "the *cognitive* sense, i.e., that federal officials simply 'knew' or 'realized' that an Indian tribe existed, as one would 'recognize,' for example, the existence of a large Irish population in Boston."[196] The early cases that talk about whether people(s) were recognized as Indian tribes by federal officials are discussed below, together with early cases setting forth criteria for being an Indian tribe (or band).

1. Indians "Recognized" (by Federal Officials) as Tribes

The first use of "recognized" in the context of the federal government's relationship with Indian tribes was in *United States v. Holliday*, where the Supreme Court announced in 1865 that it would defer to "the executive and other political departments of the government" regarding whether people(s) were Indian tribes.[197] If they were "recognized as a tribe" by those departments, the Court said, it would follow course.[198]

---

195. 555 U.S. at 398 (Breyer, J., concurring) (citing Quinn, *supra* note 74, at 356–59).

196. Quinn, *supra* note 74, at 333.

197. 70 U.S. 407, 419 (1865).

198. *Id.* ("[I]t is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them [certain] Indians are recognized as a tribe, this court must do the same.").

And if they were a tribe of Indians, they came within the federal Indian affairs jurisdiction.[199]

Holliday said nothing about what made people an Indian tribe, but the Court offered some initial criteria the following year, stating in *The Kansas Indians* that it meant "exist[ing] . . . as a distinct people in the presence of [U.S.] civilization."[200] The Court explained that "[i]f the tribal organization of [a people] is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others'" and subject to the federal Indian affairs jurisdiction.[201] Throughout the late nineteenth and into the early twentieth century, the Court continually used "recognized" when discussing whether certain Indigenous people(s) were "recognized as" Indian tribes by, or "recognized by," the U.S. government.[202] It also relied on whether people maintained a "tribal organization" or "tribal relation" as the defining criterion for whether they were an Indian tribe to whom the federal Indian affairs jurisdiction attached.[203]

---

199. *Id.* ("If they are a tribe of Indians, then, by the Constitution of the United States, they are placed, for certain purposes, within the control of the laws of Congress.").

200. 72 U.S. 737, 756 (1866).

201. *Id.* at 755 ("If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union."); *see* United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 195 (1876) ("As long as these Indians remain a distinct people, with an existing tribal organization, recognized by the political department of the government, Congress has the power to say with whom, and on what terms, they shall deal, and what articles shall be contraband.").

202. *E.g.*, United States v. Sandoval, 231 U.S. 28, 46 (1913) (stating that it was Congress's, and not the judiciary's, job to determine "whether, to what extent, and for what time [Indians] shall be *recognized and dealt with as* dependent tribes requiring the guardianship and protection of the United States") (emphasis added) (citations omitted); Elk v. Wilkins, 112 U.S. 94, 99, 109 (1884) (holding that the Fourteenth Amendment's citizenship and Fifteenth Amendment's voting rights provisions did not apply to persons "born a member of one of the Indian tribes within the limits of the United States which still exists and is *recognized as* a tribe by the government of the United States.") (emphasis added); *see also* U.S. CENSUS BUREAU, REPORT ON INDIANS TAXED AND NOT TAXED IN THE UNITED STATES (EXCEPT ALASKA) AT THE ELEVENTH CENSUS: 1890 664 (1894) (stating that "[i]f the tribal organization of Indian bands is *recognized by* the national government[,]" states have no jurisdiction over them) (emphasis added).

203. *E.g.*, United States v. Nice, 241 U.S. 591, 600 (1916) (stating that Congress's plenary power applied to Indians "during the continuance of the tribal relation"); Perrin v. United States, 232 U.S. 478, 481 (1914) (describing Indians who were "still wards of the government" because their "tribal relation" had not "been dissolved"); United States v. Kagama, 118 U.S. 375, 381 (1886) (noting that Indians "were, and always have been" regarded as separate peoples "when they preserved their tribal relations"). The inquiry regarding whether the people as a whole preserved (or had "abandoned" or "dissolved") their tribal organization or relation, *see Kansas Indians*, 72 U.S. at 755–56, 758 (contrasting the situation where a tribal organization was "preserved intact" with one where the tribal organization was "so weaken[ed] . . . as to effect its voluntarily abandonment, and, as a natural result, the incorporation of the Indians with[in] the great body of the people"), is distinct from whether individuals had severed their tribal relations and joined the U.S. body politic. *See* In-

2. "Tribes" (and "Bands")

During the same time, in a series of what are known as Indian depredation cases, the U.S. Court of Claims was dealing with the question of whether certain groups of Indians were "tribes" or "bands" that were "in amity with" the United States.[204] These late-nineteenth century Court of Claims cases used "recognized" in the context of deciding how to apportion liability (in the form of treaty offsets) among different groups, or subdivisions, of Sioux, Apache, Cheyenne, and other Indians—and the extent to which the federal government had recognized, or accepted, these divisions.[205]

---

dian Homestead Act of 1875, ch. 131, sec. 15, 18 Stat. 402, 420 (1875) (making individual Indians who "abandoned" their "tribal relations" eligible for homesteads and citizenship); Instructions to Enumerators, Tenth Census, 1880, *reprinted in*, U.S. CENSUS BUREAU, 200 YEARS OF U.S. CENSUS TAKING: POPULATION AND HOUSING QUESTIONS, 1790–1990 30 (1989) (stating that "Indians not in tribal relations . . . who are found mingled with the white population, residing in white families, engaged as servants or laborers, or living in huts or wigwams on the outskirts of towns or settlements are to be regarded as part of the ordinary population of the country"); U.S. CENSUS BUREAU, Instructions to U.S. Marshals, Eighth Census 14 (1860) ("Indians *not taxed* are not to be enumerated. The families of Indians who have renounced tribal rule, and who under state or territory laws exercise the rights of citizens, are to be enumerated."). The Supreme Court also noted that U.S. citizenship, which was extended to all Native Americans by the Indian Citizenship Act of 1924 (also known as the Snyder Act), ch. 233, 43 Stat. 253 (1924), "is not incompatible with tribal existence or continued [federal] guardianship." *Nice*, 241 U.S. at 598; *see also Sandoval*, 231 U.S. at 48 (noting that "citizenship is not in itself an obstacle to the exercise" of Congress's plenary power).

204. The court in these cases was interpreting language in the Indian Depredation Act, ch. 538, 26 Stat. 851 (1891), which allowed the United States to deduct from treaty payments monies used to compensate U.S. citizens for property damage attributed to the actions of Indians who were members of a "band, tribe, or nation in amity with the United States." *Id.* § 1, 26 Stat. 851–52.

205. In addition to showing judicial deference regarding the subdivisions "recognized by" treaty or the Department of the Interior, the court adopted a policy of "accept[ing] the subdivision into tribes or bands made by the Indians themselves." Dobbs v. United States, 33 Ct. Cl. 308, 315–16 (1898). The Court of Claims explained in 1898 that

> a nation, tribe, or band will be regarded as an Indian entity where the relations of the Indians in their organized or tribal capacity has been fixed and recognized by treaty; . . . [but] where there is no treaty by which the Government has recognized a body of Indians, the court will recognize a subdivision of tribes or bands which has been recognized by . . . officers of the Government . . . [and] where there has been no such recognition by the Government, the court will accept the subdivision into tribes or bands made by the Indians themselves.

Id. (citing Tully v. United States, 32 Ct. Cl. 1 (1896)); *see also Tully*, 32 Ct. Cl. at 6–7 (noting that "the United States ha[d] not by treaty recognized the separate bands comprising the Apache nation" and that "[t]he policy of the United States in dealing with the Indians has been . . . to accept the subdivisions of the Indians into such tribes or bands as the Indians themselves adopted, and to treat with them accordingly."); Graham v. United States, 30 Ct. Cl. 318, 331, 333–34 (1895) (stating that "[t]he Sioux . . . have always been recognized by the political departments of the Government as belonging to the Siouan family or race" and that "the[ir] relations . . . in their organized or tribal capacity . . . [had been] fixed and recognized" by treaties with the U.S.).

In *Montoya v. United States*, a 1901 case involving the Mescalero Apache Tribe's liability for the actions of a group of Apaches known as Victoria's Band, the Supreme Court first set forth some criteria for determining who was an Indian "tribe" or "band."[206] It described a tribe as "a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory."[207] The Court in *Montoya* and *Conners v. United States*,[208] a companion case involving the status of Cheyennes who escaped from military imprisonment in Oklahoma (then Indian Territory), explained that a "band" also required a common leadership but was "an inferior and less permanent organization" than a tribe.[209] Like earlier courts, the Court in *Conners* and *Montoya* used the word "recognized" when discussing whether the Indians in question were treated as polities distinct from other groups of Indians—whether, respectively, they "had . . . been recognized either by the [U.S.] government or by the

206. 180 U.S. 261, 269–70 (1901). *See* Quinn, *supra* note 74, at 352 (calling *Montoya* the "first case that attempted to establish some criteria, however primitive, for what constituted a federally recognized tribe").

207. *Montoya*, 180 U.S. at 266. *Cf.* MILLER, *supra* note 50, at 28 ("[T]o white officials a tribe was a political unit living under leaders who controlled and directed the community's behavior."). Illustrating the thought process behind its categorization (and how it thought about Indigenous peoples generally), the *Montoya* Court described an Indian "nation" as

> little more than a large tribe or group of affiliated tribes possessing a common government, language, or racial origin, and acting, for the time being, in concert. Owing to the natural infirmities of the Indian character, their fiery tempers, impatience of restraint, their mutual jealousies and animosities, their nomadic habits, and lack of mental training, they have as a rule shown a total want of that cohesive force necessary to the making up of a nation in the ordinary sense of the word.

Montoya, 180 U.S. at 265.

208. 180 U.S. 271 (1901).

209. The Court in *Conners* explained that

> [t]o constitute a "band" . . . it [was not] necessary that the Indians composing it be a separate political entity, recognized as such, inhabiting a particular territory, and with whom treaties had been or might be made. These peculiarities would rather give them the character of tribes. The word "band" implies an inferior and less permanent organization, though it must be of sufficient strength to be capable of initiating hostile proceedings.

Id. at 275. A "band" of Indians, according to the *Montoya* Court, was

> a company of Indians not necessarily, though often, of the same race or tribe, but united under the same leadership in a common design. While a "band" does not imply the separate racial origin characteristic of a tribe, of which it is usually an offshoot, it does imply a leadership and a concert of action. How large the company must be to constitute a "band" . . . it is unnecessary to decide. It may be doubtful whether it requires more than independence of action, continuity of existence, a common leadership, and concert of action.

Montoya, 180 U.S. at 266.

[Northern Cheyenne] tribe as separate entities,"[210] or were "known and recognized as a band, separate and distinct in its organization and action from the several [other Apache] tribes."[211]

Thus the first cases to set forth criteria for what made people an Indian tribe (or band) required that the people maintain a "tribal organization"[212] or "tribal relation"[213] and share a common leadership,[214] such that they continue(d) to exist[215] as a distinct or separate people.[216] The federal Indian affairs jurisdiction attached to these people(s) because they were, or were members of, Indian tribes.[217] The criteria used for determining whether people(s) were Indian tribes to whom this jurisdiction attached, however, are circular and vague.

These early cases say that people must maintain a tribal organization or relation to be a tribe, but they are silent regarding what maintaining a tribal organization entailed, or exactly what made an organization (or relation) "tribal." Moreover, the requirements presuppose that the people(s) are "Indians." But whether particular people(s) were, or should be treated as, Indians and (therefore) Indian tribes, was something federal decisionmakers were unsure about in the late nineteenth and early twentieth centuries.[218]

---

210. *Conners*, 180 U.S. at 271 n.1 ("These so-called bands had no autonomy, and had not been recognized either by the government or by the tribe as separate entities.") (quoting Conners v. United States, 33 Ct. Cl. 317, 320 (1898)).

211. *Montoya*, 180 U.S. at 264 n.1 (quoting Montoya v. United States, 32 Ct. Cl. 349, 353 (1897)).

212. *See supra* note 201.

213. *See supra* note 203.

214. *See Conners*, 180 U.S. at 275; *Montoya*, 180 U.S. at 266.

215. *See Montoya*, 180 U.S. at 266 (requiring "continuity of existence"); *see also* United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 195 (1876) (requiring "an existing tribal organization"); The Kansas Indians, 72 U.S. 737, 755 (1866) (requiring that "the tribal organization . . . is preserved intact, and . . . existing").

216. *See supra* notes 201, 210–11 and accompanying text.

217. *See Forty-Three Gallons*, 93 U.S. at 195 (holding that federal liquor trafficking laws applied because Congress had power to legislate regarding Indians who "remain[ed] a distinct people, with an existing tribal organization"); *Kansas Indians*, 72 U.S. at 755–56 (holding that the federal Indian affairs power applied to preempt Kansas's taxation of lands belonging to the Shawnees and other Indians because they "preserved intact" their "tribal organization" and remained "a 'people distinct from others'"); United States v. Holliday, 70 U.S. 407, 417–19 (1865) (holding that federal Indian trade laws governed the sale of liquor to an Indian who was a member of "a tribe of Indians" and therefore subject to Congress's Indian affairs power); *see also supra* notes 173–85 and accompanying text (discussing contemporaneous plenary power jurisprudence which assumed that the federal Indian affairs jurisdiction attached to all Indian people(s) within the United States' territory).

218. Quinn, *supra* note 74, at 332 ("[T]he historical record reveals a consistent uncertainty and even confusion on the part of the several branches of the government of the United States about its relations with and legal obligations toward certain Indian tribes throughout the nineteenth and early twentieth centuries."); *see also id.* at 348 (noting concerns within the government's Indian Office

3. "Indians"

The uncertainty, and arbitrariness, around whether people(s) were considered Indians—and the criteria used for determining this—are perhaps best illustrated in case law from the late 1800s and early 1900s involving whether Pueblo peoples in New Mexico, specifically those at Taos Pueblo and Santa Clara Pueblo, were "Indians" for specific statutory purposes.[219] In *United States v. Sandoval*, the Supreme Court in 1913 explained that whether people(s) were Indians depended on their race, culture, and institutions, writing that

> [t]he people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless *Indians in race, customs, and domestic government*. Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetichism, and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed, and inferior people.[220]

Four decades earlier, the Court in *United States v. Joseph* had concluded that the Pueblos were *not* Indians, pointing to their use of the Spanish language and adoption of the Catholic religion, and their being "a pastoral and agricultural people" who lived "in fixed communities, each having its own municipal or local government."[221] These things,

---

about "which tribes once treated with and previously recognized no longer existed as tribes, and under what circumstances [could and] did this occur").

219. United States v. Joseph, 94 U.S. 614, 615–18 (1876) (holding that the Indian Trade and Intercourse Act, 25 U.S.C. § 180 (2012), which makes unlawful "settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe," did not apply to Taos Pueblo lands because the people at Taos were not Indians and thus not an "Indian tribe"); United States v. Sandoval, 231 U.S. 28, 38–39, 48–49 (1913) (holding that Felipe Sandoval, a non-Indian, could be prosecuted under a federal statute prohibiting the sale of liquor to Indians in Indian country because "the status of the Pueblo Indians and their lands is such that Congress" could criminalize alcohol trafficking at the Santa Clara Pueblo); *see also* Torres, *supra* note 175, at 126–45 (discussing the *Joseph* and *Sandoval* cases).

220. *Sandoval*, 231 U.S. at 39 (emphasis added).

221. *Joseph*, 94 U.S. at 616–17 (quoting United States v. Lucero, 1 N.M. 422, 453–54 (1869)). Quoting the New Mexico Supreme Court, Justice Miller noted that

> [f]or centuries, . . . the pueblo Indians have lived in villages, in fixed communities, each having its own municipal or local government. As far as their history can be traced, they have been a pastoral and agricultural people, raising flocks and cultivating the soil. Since the introduction of the Spanish Catholic missionary into the country, they have adopted mainly not only the Spanish language, but the religion of a Christian church. . . . They manufacture nearly all of their blankets, clothing, agricultural and culinary implements, &c. Integrity and virtue among them is fostered and encouraged. They are as intelligent as most nations or people deprived of means or facilities for education. Their names, their customs, their habits, are similar to those of the people in whose midst they reside,

and the "degree of civilization which they had attained" generally, made them "Indians only in feature, complexion, and a few of their habits" and distinguished them from "nomadic Apaches, Comanches, Navajoes, and other tribes whose incapacity for self-government required . . . th[e] guardian care of the general government."[222] According to the *Joseph* Court, "[t]he pueblo Indians, if, indeed, they can be called Indians, had nothing in common" with those people(s); the Pueblos were more like "the other inhabitants of New Mexico."[223] Though Pueblos differed from other New Mexicans because they held communal title to their lands and practiced "a certain patriarchal form of domestic life," that didn't make them Indians, only like "the Shakers and other communistic societies."[224]

The Court in both cases based its determination regarding the Pueblos' "Indianness"—whether they were Indians—on prevailing stereotypes about how Indians were supposed to live. And it emphasized, especially in *Sandoval*, the Pueblos' race, in both an ethnographic (or cultural) and genealogical (or phenotypical) sense, as the defining characteristic of Indianness.[225] It was not just their ancestry, but their supposed intellectual and moral inferiority, "primitive mode[] of life," "crude customs," and "limited civilization"—ascribed to them by judges, federal bureaucrats, and now anthropologists too—that made the Pueblos Indians.[226]

These characteristics, according to the Court, also explained their dependence on the federal government and justified the existence and

---

> or in the midst of whom their pueblos are situated. . . . They are Indians only in feature, complexion, and a few of their habits; in all other respects superior to all but a few of the civilized Indian tribes of the country, and the equal of the most civilized thereof.

Id.

222. *Id.*

223. *Id.* at 617.

224. *Id.* at 617–18 ("If the pueblo Indians differ from the other inhabitants of New Mexico in holding lands in common, and in a certain patriarchal form of domestic life, they only resemble in this regard the Shakers and other communistic societies in this country, and cannot for that reason be classed with the Indian tribes of whom we have been speaking.").

225. *See* Torres, *supra* note 175, at 143 (discussing the "role of race as a defining characteristic of Indian identity. Their 'race and condition' was a factor that drove the so-called ethnographic inquiry in both the district court and the Supreme Court [in *Sandoval*]"); *cf.* Cleveland, *supra* note 156, at 75–76 ("[T]he critical question [in *Sandoval*] . . . was . . . whether the Pueblo . . . were civilized.").

226. United States v. Sandoval, 231 U.S. 28, 39, 47 (1913) (discussing the Pueblos' "Indian lineage, isolated and communal life, primitive customs and limited civilization"). *Sandoval* introduced the use of anthropology as a (then-developing) body of knowledge weighing on these determinations, grafting these new ethnographic conceptions onto Enlightenment and nineteenth century ideas about racial and cultural hierarchies. *See id.* at 44 ("This view of Pueblo customs, government, and civilization finds strong corroboration in the writings of ethnologists . . . ."); *see also* Cleveland, *supra* note 156, at 76 (criticizing the Court's "pseudo-anthropological analysis" of the Pueblo peoples).

exercise of federal plenary Indian affairs jurisdiction regarding the Pueblos and other Indians.[227] Because they were determined to be Indians based on these criteria, the federal Indian affairs power applied to them. That was the rule established by

> long continued legislative and executive usage and an unbroken current of judicial decisions [which] attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over *all* dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state.[228]

The *Sandoval* Court, however, emphasized that federal officials, and Congress in particular, could not exercise this power by simply calling any "community or body of people . . . an Indian tribe."[229] The people had to be a "distinctly Indian community."[230] And what made people(s), or communities, distinctly "Indian" in the minds of federal judges and bureaucrats was not only their racial ancestry but also their "customs" and "habits," the same vague criteria the Supreme Court had used all along to distinguish Indians from non-Indians.[231]

4. "Recognized Indian Tribes" and the Indian Reorganization Act

Their deficiency notwithstanding, the Court had by the early twentieth century developed some basic criteria for what made people(s) Indian

---

227. *See Sandoval*, 231 U.S. at 40–42 (citing Indian Office superintendent reports to show that the Pueblos were "dependent upon the fostering care and protection of the government, like reservation Indians in general; that, although, industrially superior, they are intellectually and morally inferior to many of them; and . . . are easy victims to the evils and debasing influence of intoxicants").

228. *Sandoval*, 231 U.S. at 46 (emphasis added) (citing United States v. Kagama, 118 U.S. 375, 384 (1886), and other turn-of-the-twentieth century plenary power cases).

229. *Id.* at 46 ("Of course, . . . it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe . . . .").

230. *Id.* (explaining that Congress's power extended "only . . . [to] distinctly Indian communities").

231. *E.g.*, *id.* at 39–40, 47 (discussing Indians' "customs," "modes of life," and "civilization" in addition to their "race" and "lineage"); United States v. Joseph, 94 U.S. 614, 616 (1876) (describing Indians as "a well-known class, whose history, domestic habits, and relations to the government are of public notoriety"); United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 194 (1876) (stating that Indians' "peculiar habits and character required" that they be "place[d] . . . under the protection of the . . . government"); *cf.* United States v. Rogers, 45 U.S. 567, 573 (1846) (interpreting "Indian" in the 1834 Trade and Intercourse Act to include "those who by the usages and customs of the Indians are regarded as belonging to their race[,]" or "members of . . . the race generally, — of the family of Indians"); Cherokee Nation v. Georgia, 30 U.S. 1, 18 (1831) (considering "the habits and usages of the Indians" when deciding that Indian nations were not "foreign states" under Article III of the U.S. Constitution).

tribes, such that the federal Indian affairs jurisdiction attached to them. They had to live in a community (or communities) in the same geographic area, share a common leadership, and maintain their tribal organization or relation.[232] And they had to be Indians not only in terms of their phenotypic race, but also based on their culture(s), customs, and institutions—and whether, as perceived by federal decisionmakers, those markers comported with stereotypes about how Indians were supposed to live.[233]

The Supreme Court in the early twentieth century also continued to use "recognized" when referring to whether federal officials treated, or dealt with, people(s) as Indian tribes (as opposed to people whose "tribal relation . . . [had] been dissolved"),[234] stating in *Sandoval* that it was for Congress, and not the courts, to determine "whether, to what extent, and for what time [the Pueblos and other Indians] shall be *recognized and dealt with as* dependent tribes requiring the guardianship and protection of the United States."[235] Yet during the decades leading up to the Indian Reorganization Act's passage in 1934, uncertainty regarding whether certain people(s) were, and therefore should be treated as, Indians abounded not just in the judiciary but throughout the government. There was no clear standard anywhere.

The section of the 1892 Annual Report of the Commissioner of Indian Affairs titled "What Is An Indian?", for example, began by stating that

> [o]ne would have supposed that this question would have been considered a hundred years ago and been adjudicated long before this. Singularly enough, however, it has remained in abeyance, and the Government has gone on legislating and administering law without carefully discriminating as to those over whom it had a right to exercise such control.[236]

---

232. *See* United States v. Candelaria, 271 U.S. 432, 441–42 (1926) (applying the criteria from Montoya v. United States, 180 U.S. 261, 266 (1901) and concluding that the term "Indian tribe" included Pueblo Indians); *see also supra* notes 201, 203, 207–16 and accompanying text.

233. *See Candelaria*, 271 U.S. at 441 (concluding the Pueblos were "Indians in race, customs, and domestic government"); *see also supra* notes 225–31 and accompanying text.

234. Perrin v. United States, 232 U.S. 478, 487 (1914); *see* United States v. Nice, 241 U.S. 591, 596–98 (1916).

235. *Sandoval*, 231 U.S. at 46 (emphasis added) (citations omitted).

236. T.J. Morgan, Sixty-First Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior 31 (1892).

And a 1929 legal treatise explained that "[n]o precise, all-inclusive definition of 'Indians' has been attempted by the courts or by Congress."[237]

This uncertainty is reflected in the legislative debates leading up to the IRA,[238] where Congress for the first time defined "Indian" and "tribe"[239] and in the definition of Indian first used the words "recognized Indian tribe."[240] Rather than bring clarity to the situation, however, the statutory language's circularity—defining "Indians" as people who were members of "Indian tribes," and "tribe" to include "any Indian tribe" (or "organized band" or "pueblo") or "the Indians residing on one reservation"[241]—only exacerbated the confusion. The Interior Department was left to figure out on a case-by-case basis whether, applying criteria based on the jurisprudence discussed above, certain people(s) were Indian tribes under the IRA and for purposes of federal Indian law generally.[242]

---

237. 14 R.C.L. *Indians* § 1 (1929).

238. *See infra* Part VI.A.

239. *See* MILLER, *supra* note 50, at 26 (noting that in the "series of six Indian Trade and Nonintercourse Acts, Congress . . . maintained a vague use of the term 'tribe,' stating simply that these laws applied to 'any Indian nation or tribe of Indians.' As late as 1921 the sweeping Snyder Act maintained this imprecise usage by identifying its beneficiaries simply as 'the Indians throughout the United States'") (footnotes omitted); *see also* Quinn, *supra* note 74, at 354 ("The enactments of Congress during this period were of little help, tending as they did to obscure or ignore rather than clarify which tribes were to receive the provisions of their appropriations or were subject to the constraints of their restrictive legislation. Perhaps Congress simply assumed it was the duty of the BIA to make such determinations.").

240. 25 U.S.C. § 479 (2012) (editorially reclassified as § 5129 in Aug. 2016) (defining "Indian" to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction," and "tribe" as "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation").

241. *Id.*

242. According to William Quinn,

> [t]he issues of determining tribal status were thus left squarely with the Department of the Interior and the BIA and, for the ensuing two to three decades from the early 1930s, those agencies would attempt to make case-by-case determinations of tribal status in terms of recognition. While the Department's phraseology shifted somewhat to accommodate itself to that of the IRA, so that the central issue was whether an Indian group[] "could organize under the Act," the effect—the concept—was the same.

Quinn, *supra* note 74, at 357. *See* Memorandum of Hans Walker, Jr., *supra* note 133, at 7 ("It is very clear from the early administration of the [Indian Reorganization] Act that there was no established list of 'recognized tribes now under Federal jurisdiction' in existence in 1934 and that determinations would have to be made on a case by case basis for a large number of Indian groups."); *see also* MILLER, *supra* note 50, at 27–28 ("The Indian New Deal ushered in the modern tribal acknowledgment issue. During the 1930s and early 1940s questions regarding tribal acknowledgment arose as Indian Office lawyers had to decide which Indian communities qualified as tribes or bands eligible to hold elections and organize under the Indian Reorganization Act."); Quinn, *supra* note 74, at 356 (arguing that the IRA's passage marked "the final point of demarcation from the cognitive usage of the term recognition to the jurisdictional usage" employed today to refer to tribes with whom the United States has a formal, government-to-government relationship, and noting "[f]rom the date of

B. The Twentieth Century (After the Indian Reorganization Act)

The Department's post-1934 determinations regarding tribal status came in a series of opinions issued by the Interior Department's Office of the Solicitor applying criteria developed by Felix Cohen, the Department lawyer who also authored many of the opinions, much of the IRA, and the first Indian law treatise.[243] Just as before, the inquiry under the IRA's statutory language—whether people were a "recognized Indian tribe . . . under Federal jurisdiction"[244]—boiled down to whether the people still existed as an Indian tribe. Indeed, Cohen spelled out the criteria in the "Tribal Existence" section of his treatise, stating that the "question of tribal existence, in the legal or political sense," had generally come up when deciding whether people(s) were Indian tribes subject to the federal government's Indian affairs jurisdiction.[245] He also explained that the Supreme Court had based such determinations on "whether or not the individuals concerned were living in tribal relations[,] . . . thus making the validity of congressional and administrative actions depend upon the existence of tribes."[246]

Drawing from the Indian depredation cases (namely *Montoya*) and the Supreme Court's opinions in *Holliday*, *The Kansas Indians*, *Sandoval*, and other assimilation era cases,[247] as well as prior Department prac-

---

its enactment onward, only Indian tribes which were 'recognized' would be provided services and dealt with in trust relationships").

243. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 270–71 (1942) [hereinafter COHEN, 1942 HANDBOOK] ("The question of what groups constitute tribes or bands has been extensively considered in recent years by the administrative authorities of the Federal Government in connection with [the IRA]. . . . In cases of special difficulty, a ruling has generally been obtained from the Solicitor . . . as to the tribal status of the group . . . ."); ELMER R. RUSCO, A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE INDIAN REORGANIZATION ACT 189 (2000) (calling Cohen "the principal drafter of the bill that became the IRA"); Quinn, *supra* note 74, at 358–59 (discussing criteria and noting that "Cohen was probably author of many if not most of these Opinions until his departure from Interior in 1948").

244. 25 U.S.C. § 479 (2012) (editorially reclassified as § 5129 in Aug. 2016).

245. COHEN, 1942 HANDBOOK, *supra* note 243, at 268 ("The question of tribal existence, in the legal or political sense, has generally arisen in determining whether some legislative, administrative, or judicial power with respect to Indian 'tribes' extended to a particular group of Indians.").

246. *Id.* ("The Supreme Court has, in a number of cases, taken the position that the applicability or constitutionality of congressional legislation affecting individual Indians, and the inapplicability or unconstitutionality of state legislation affecting such individuals, depended upon whether or not the individuals concerned were living in tribal relations.").

247. *Id.* at 268–271 (citing, inter alia, United States v. Sandoval, 231 U.S. 28 (1913); Montoya v. United States, 180 U.S. 261 (1901); Conners v. United States, 180 U.S. 271 (1901); Dobbs v. United States, 33 Ct. Cl. 308 (1898); Tully v. United States, 32 Ct. Cl. 1 (1896); The Kansas Indians, 72 U.S. 737 (1866); United States v. Holliday, 70 U.S. 407 (1865)). *See also* MILLER, *supra* note 50, at 28 ("According to Cohen, the department's criteria were based on the limited case law on the matter and past federal policies. The Supreme Court decision [in] *Montoya* . . . was particularly sali-

tice,[248] Cohen set forth the "considerations which, *singly or jointly*, have been particularly relied upon in reaching the conclusion that a group constitutes a 'tribe' or 'band.'"[249] They were whether the group had:

> (1) . . . treaty relations with the United States[;]
>
> (2) . . . been denominated a tribe by act of Congress or Executive Order[;]
>
> (3) . . . been treated as having collective rights in tribal lands or funds, *even though not expressly designated a tribe*[;]
>
> (4) . . . been treated as a tribe or band by other Indian tribes[;] [or]
>
> (5) . . . exercised political authority over its members, through a tribal council or other governmental forms.[250]

Cohen also noted that "[o]ther factors considered, though not conclusive, are the existence of special appropriation items for . . . and the social solidarity of the group"—indicating that any one of the five criteria above (since they could be relied upon singly or jointly) was conclusive—and that "[e]thnological and historical considerations, although not conclusive, are entitled to great weight in determining the question of tribal existence."[251]

In the four decades following the IRA's passage, the Department relied on some version of these Cohen Criteria (as they're known) in Solicitor opinions regarding the status of nearly twenty tribes.[252] Three of

---

ent."); *id.* ("The *Montoya* definition of tribe, although somewhat vague and imprecise, would be the primary common law definition of the concept used by the Interior Department during the 1930s and early 1940s.").

248. COHEN, 1942 HANDBOOK, *supra* note 243, at 271 n.24 (citing Memorandum of the Solicitor on the Mole Lake and St. Croix Chippewa (Feb. 8, 1937)).

249. *Id.* at 271 (emphasis added).

250. *Id.* (emphasis added) (footnotes omitted).

251. *Id.* (footnote omitted).

252. *See* Brian Klopotek, Recognition Odysseys: Indigeneity, Race, and Federal Tribal Recognition Policy in Three Louisiana Indian Communities 24–26 (2011) (discussing the Cohen Criteria's development and application); Miller, *supra* note 50, at 28 ("Until the BIA created . . . regulations [in 1978], the 'Cohen Criteria' were the primary templates officials used when determining Interior Department jurisdiction."); Quinn, *supra* note 74, at 358–59 (citing "[a] rash of Solicitor's Opinions . . . in the late 1930s and 1940s" including for St. Croix, Mole Lake, Ho-Chunk, Nahma and Beaver Indians, Thopthlocco and Alabama-Dwashadi Tribal Towns, United Keetoowah Band, Miami and Peoria, Catawba); Letter from Derril B. Jordan and Steven J. Bloxham, Fredericks Peebles & Morgan LLP, to Larry Echo Hawk, Assistant Sec'y – Indian Affairs, and Hilary Tompkins, Solicitor, Dep't of Interior, 14 & n.15 (Oct. 23, 2009) (on file with author) (stating that "[i]n addition to the Catawba Tribe and the Stillaguamish Tribe, in at least nine other instances between 1934 and 1980, the Department revisited and revised its view of the extent of its administrative jurisdiction

these tribes—the Catawba, Mole Lake Chippewa, and Stillaguamish—were offered by Justice Breyer (in his opinion and during oral argument in *Carcieri*)[253] as examples of tribes that were under federal jurisdiction in 1934 "even though the Department did not know it at the time,"[254] and that the Department later acknowledged "it should have recognized . . . in 1934 even though it did not."[255] These Solicitor opinions evidence not only the Department's inconsistent approach to tribal status (even regarding the same people), but also the extent to which the "ethnological and historical considerations" mentioned by Felix Cohen figured in officials' determinations.[256]

---

and acknowledged its responsibility to particular Indian tribes[,]" and listing the Miccosukee, Burns Paiute, Nooksack, Sauk-Suiattle, Penobscot, Sault Ste. Marie, Coushatta, and Karuk Tribes). In 1947, the Department published a list of 258 Indian tribes covered by the Act, but both the Department and the Court have recognized this list was incomplete. *See* Theodore H. Haas, U.S. Indian Service, Ten Years of Government Under I.R.A. (1947); *see also* Carcieri v. Salazar, 555 U.S. 379, 397–98 (Breyer, J., concurring) ("[F]ollowing 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.") (citations omitted); Memorandum from Hilary C. Tompkins, *supra* note 17, at 25 n.158 (noting that this report "did not purport to list all recognized or federally recognized tribes").

253. *Carcieri*, 555 U.S. at 398–99 (Breyer, J., concurring) (discussing the Mole Lake Chippewa Tribe and Stillaguamish Tribe); Transcript of Oral Argument at 26–27, *Carcieri*, 555 U.S. 379 (No. 07-526) (statement of Breyer, J.) (discussing the Catawba Indians). The Solicitor opinions on the Stillaguamish and Catawba are discussed, respectively, in notes 133 and 135–36, *supra*, and accompanying text. A Solicitor opinion concluding that the Mole Lake Chippewa were—but that the St. Croix Chippewa were not—eligible to organize under the IRA based on differing levels of intermarriage (with non-Indians) and assimilation between the tribes is discussed in note 256 *infra*.

254. *Carcieri*, 555 U.S. at 398 (Breyer, J., concurring).

255. *Id*.

256. *See supra* note 251 and accompanying text; *see also* MILLER, *supra* note 50, at 29 ("The 'Cohen Criteria' . . . contained a combination of legal precedent and ill-defined historical and anthropological methodology and concepts. Significantly, Interior Department lawyers never made clear the weight afforded to each factor."); *id.* at 28 (noting that the Cohen Criteria relied on *Montoya* but "also included both political and ethnological factors"). In a 1937 Solicitor memorandum, for example, Solicitor Nathan Margold opined that the St. Croix Indians in Wisconsin could not organize a government under the IRA, writing that they were "deculturated" and "highly assimilated into the white population." Status of St. Croix Chippewas, 1 Op. Solicitor on Indian Affairs 724, 725 (1937) (first quotation from a 1936 anthropologist report); *see also id.* (distinguishing the St. Croix Chippewa from the Mole Lake Chippewa, who the Department said could organize under the IRA, because "whereas the St. Croix Indians live[d] in numerous white villages and towns throughout Wisconsin," the Mole Lake Indians "live[d] in one principal Indian community" and were "principally full bloods and near full bloods who have kept distinct from the white population"); St. Croix Indians—Enrollees of Dr. Wooster, 1 Op. Solicitor on Indian Affairs 735, 736 (1937) (citing a 1914 report that "describes the St. Croix Indians as having 'adopted the habits and customs of civilized life' and enumerates other facts which indicate abandonment of tribal relations"). But in 1941, Solicitor Margold said the St. Croix could "organize as a recognized band under the IRA" because they had "common property interests, a common history, and a common past identity." St. Croix Indians—Organization Under Sec. 16 of Indian Reorganization Act, 1 Op. Solicitor on Indian Affairs 1026, 1028 (1941).

Courts in the twentieth century continued to apply the common law test from *Montoya* to decide the legal status of certain Indians when the issue arose, most notably in 1970s land claims and treaty rights litigation, respectively, in the Northeast and Northwest.[257] This litigation, together with the work and recommendations of the Congressionally-appointed American Indian Policy Review Commission and other entities including the National Congress of American Indians and the United South and Eastern Tribes, led the Interior Department to adopt regulations in 1978[258]—now codified at 25 C.F.R. Part 83—with criteria and a formal

---

These Solicitor opinions also reflect a Department practice of evaluating whether people(s) were "recognized Indian tribe[s] . . . under Federal jurisdiction," 25 U.S.C. § 479 (editorially reclassified as § 5219 in Aug. 2016), at the time of the proposed agency action—which required determining whether people(s) were tribes regarding whom the agency had jurisdiction. *See* St. Croix Indians—Enrollees of Dr. Wooster, *supra*, at 736 (stating that "it would be necessary for [the St. Croix Chippewas] to show that they are members of recognized Indian tribes at the time land is purchased under the Reorganization Act, in order to be entitled to share in its enjoyment"); *see also Carcieri*, 555 U.S. at 401 (Souter, J., concurring and dissenting) (noting that the United States during oral argument "explained that the Secretary's more recent interpretation of this statutory language had 'understood recognition and under Federal jurisdiction at least with respect to tribes to be one and the same'") (quoting Transcript of Oral Argument at 42, *Carcieri*, 555 U.S. 379 (2009) (No. 07-526))). That makes sense in light of the jurisprudence discussed in Parts IV and V.A, *supra*, because, as explained *infra*, notes 262–70 and accompanying text, the Department (like the Court) always focused on whether people(s) continued to exist as distinct Indian communities, such that the federal Indian affairs jurisdiction attached to them. If they continually existed as (and thus were recognized) as a tribe at the time of the decision, then they also existed as a tribe before (including in 1934)—and therefore were under federal jurisdiction at the time of and before the decision, even if federal officials had not been exercising that jurisdiction.

The Solicitor opinions also evidence the Department's practice of allowing half-blood (or more) Indians to organize and otherwise qualify under the IRA based on blood quantum alone, regardless of whether they were members of "recognized Indian tribe[s] . . . under Federal jurisdiction." *See* Status of St. Croix Chippewas, *supra*, at 725 (discussing a proposal to purchase land for "the St. Croix Chippewa Indians of the half blood or more" and the subsequent organization of a government under the IRA); *see also Carcieri*, 555 U.S. at 406–07 (Stevens, J., dissenting) (discussing Solicitor opinions outlining the possibility of purchasing land for (groups of) individual half-blood St. Croix and Mole Lake Indians).

257. Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 581–88 (1st Cir.), *cert. denied*, 444 U.S. 866 (1979), 464 U.S. 866 (1983); Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 376–79 (1st Cir. 1975); United States v. Washington, 520 F.2d 676, 692–93 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); Stillaguamish Tribe of Indians v. Kleppe, No. 75-1718, 1976 U.S. Dist. LEXIS 17381, at *1–2 (D.D.C. Sept. 24, 1976); *see also* MILLER, *supra* note 50, at 35–36 (discussing Pacific Northwest fishing rights and New England land rights cases); Quinn, *supra* note 74, at 362–63 (discussing litigation); O'Brien, *supra* note 25, at 1473–76 (same); Myers, *supra* note 133, at 273 (discussing Stillaguamish litigation). Courts have continued to use this common law test in the twenty-first century. Schaghticoke Tribal Nation v. Kent Sch. Corp. Inc., 595 Fed. Appx. 32, 34 (2d Cir. 2014) (applying test to rule that plaintiffs were not an Indian tribe for purposes of the Indian Trade and Intercourse Act(s)); New York v. Shinnecock Indian Nation, 400 F. Supp. 2d 486, 491–93 (E.D.N.Y. 2005) (applying common law criteria from *Montoya* and other cases to find that the Shinnecock are a tribe).

258. KLOPOTEK, *supra* note 252, at 23–31 (examining litigation and policy developments leading up to the Part 83 regulations); MILLER, *supra* note 50 at 35–46 (discussing the litigation and history that produced the Part 83 regulations); Quinn, *supra* note 74, at 362–63 (explaining that as the

process for establishing whether people(s) exist as Indian tribes.[259] This process is administered by the Office of Federal Acknowledgment, a division within the Department's Indian affairs bureaucracy that makes recommendations to the Assistant Secretary – Indian Affairs, who then decides whether to acknowledge the people exist as a tribe.[260] People(s) so acknowledged by the Assistant Secretary are placed, alongside other recognized tribes, on the list published annually in the Federal Register.[261]

C. "Recognized Indian Tribes" Today and Across Time

The criteria in 25 C.F.R. Part 83 now require that, to qualify as a tribe, the group must—from at least 1900 until the present—be "identified as an American Indian entity on a substantially continuous basis[,]" and "comprise[] a distinct community and . . . exist[] as a community" that has "maintained political influence or authority over its members as an autonomous entity."[262] Until they were amended in 2015, the regula-

---

litigation led to an increase of requests from tribes for clarification of their status, the Department "instituted an unofficial moratorium on acknowledging tribes until a system could be developed[,]" and, following a court order requiring the Department to make a decision on the Stillaguamish Tribe, "placed the formulation of standard acknowledgment regulations on high priority" and published its proposed regulations within months); Myers, *supra* note 133, at 273 (noting that "[i]n the mid 1970s, a dramatic increase in the number of Indian groups requesting federal recognition led to increased formalization of the recognition process[,]" and arguing that "the regulations were simply an attempt to deal with the increasing number of groups pursuing federal recognition following the decision in *Passamaquoddy* and to formalize what had been until then an *ad hoc* process") (footnotes omitted).

259. As originally adopted, the regulations stated their purpose was "to establish a departmental procedure and policy for acknowledging that certain American Indian tribes exist." 25 C.F.R. § 54.2 (1979) ("The purpose of this part is to establish a departmental procedure and policy for acknowledging that certain American Indian tribes exist."). In 1994, this language was changed to reference a procedure and policy for "acknowledging that certain American Indian groups exist as tribes." 25 C.F.R. § 83.2 (1994). The regulations were amended again in 2015 and now state that their purpose is "to determine whether a petitioner is an Indian tribe eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 C.F.R. § 83.2 (2016); *see Revisions to Regulations on Federal Acknowledgement of Indian Tribes*, BUREAU OF INDIAN AFFAIRS, http://www.bia.gov/WhoWeAre/AS-IA/ORM/83revise/index.htm (last visited Nov. 17, 2016) (discussing changes from previous regulations).

260. Office of Federal Acknowledgment, BUREAU OF INDIAN AFFAIRS, http://www.bia.gov/WhoWeAre/AS-IA/OFA/ (last visited Nov. 17, 2016) (outlining the Federal Acknowledgment Process).

261. *E.g.*, 81 Fed. Reg. 26,826 (Apr. 25, 2016) (publishing the most recent list).

262. 25 C.F.R. § 83.11(a)–(c) (2016). The evidence for "determining a group's Indian identity may include one or a combination of the following, as well as other evidence of identification[:] [i]dentification as an Indian entity by federal authorities[;] [r]elationships with State . . . [,] county, parish or other local government" based on identification of the group as Indian; and "[i]dentification as an Indian entity by anthropologists, historians and/or other scholars[,] in newspapers and books[,] in relationships with Indian tribes or with national, regional, or state Indian organizations[,]" or by the group itself. *Id.* § 83.11(a)(1)–(7). The regulations also require that the group's

tions required petitioning groups to show continuous existence as distinct communities (and autonomous entities) since their "first sustained contact with non-Indians."[263] Thus the Part 83 criteria, like the federal common law standards and Cohen criteria that preceded them, focus on whether people(s) continue to exist as a distinct, autonomous Indian community or entity.[264] That has always been the defining criterion for being (recognized as) an Indian tribe, and for the federal Indian affairs jurisdiction to apply.

Whether people(s) in fact continue to exist as Indian tribes is, of course, a different matter from whether federal officials acknowledge, or recognize—and therefore treat and deal with—them as Indian tribes under the law.[265] Federal recognition, or acknowledgment, is about whether government officials establish and maintain a formal political relationship through which they exercise the federal Indian affairs jurisdiction

---

"membership consist[] of individuals who descend from a historical Indian tribe (or from historical Indian tribes that combined and functioned as a single autonomous political entity)[,]" *id.* § 83.11(e), and not be composed principally of persons who are (already) members of other federally recognized tribes, *id.* § 83.11(f); that neither the petitioning entity nor its members have been subjected by Congressional termination legislation, *id.* at § 83.11(g); and that the entity provide its governing documents, *id.* § 83.11(d).

263. 25 C.F.R. § 83.1 (2015). The previous regulations required that the group (or a "predominant portion" thereof) "comprise[] a distinct community and . . . exist[] as a community" that "maintained political influence or authority over its members as an autonomous entity" since "historical times," or the group's "first sustained contact with non-Indians." *Id.* § 83.7 (b)–(c) (2015); *see also id.* § 83.1 ("[H]istorical . . . means dating from first sustained contact with non-Indians."). The Department explained in the Final Rule adopting the 2015 amendments that, "based on its experience in nearly 40 years of implementing the regulations, every group that has proven its existence from 1900 forward has successfully proven its existence prior to that time as well, making 1900 to the present a reliable proxy for all of history but at less expense." 80 Fed. Reg. 37,861, 37,863 (June 23, 2015).

264. The early cases looked at whether people(s) continued to live together as distinct Indian communities, maintaining their tribal relations or organization and sharing a common leadership. *See supra* notes 201, 203, 210–16 and accompanying text. Felix Cohen, synthesizing the criteria used in those cases and Interior Department practice, developed criteria that similarly centered on (a) people's continuing existence as an Indian tribe to determine whether people(s) were "recognized Indian tribes . . . under Federal jurisdiction" under the IRA, and Indian tribes under federal law generally. *See supra* notes 247–51 and accompanying text. The examination under 25 C.F.R. Part 83 likewise concentrates on whether people(s) have continued to, and whether Interior Department officials acknowledge they still, exist as an Indian tribe (or band, pueblo, village, or community). *See supra* notes 262–63 and accompanying text; *see also* 25 C.F.R. § 83.1 (2016) ("*Tribe* means any Indian tribe, band, pueblo, village or community."). The previous regulations provided that "Indian tribe, also referred to herein as *tribe*, means any Indian or Alaska Native tribe, band, pueblo, village, or community within the continental United States that the Secretary of the Interior presently acknowledges to *exist* as an Indian tribe." 25 C.F.R. § 83.1 (2015) (second emphasis added).

265. *See* Myers, *supra* note 133, at 271 (noting that "recognition does not change what a tribe in fact always was; rather, it offers groups one way to demonstrate that they ought to be treated as Indian tribes under the law"); *cf. id*. at 276 ("[A] group's failure to be recognized [through the Part 83 process] is properly understood as a failure to provide sufficient evidence to overcome the [Department's] presumption that it is not an Indian tribe under the meaning of § 83; it is not determinative of whether the group is actually an Indian tribe.").

and provide services and funding to Indian people(s) in fulfillment of the United States' obligations under the colonial fiduciary relationship.[266] By acknowledging people(s) as Indian tribes under Part 83, the United States is just saying that they have been tribes all along and that, going forward, the government will exercise its jurisdiction and carry out the trust responsibilities that have been there all along as well.[267]

While the current Part 83 administrative process is certainly not without its criticisms,[268] any tribe added to the BIA List through it by definition existed before 1934 and continuously into the present. The criteria expressly require so.[269] If they were an Indian tribe in 1934, they were considered—as a matter of federal Indian law doctrine—to be under federal jurisdiction, even if the Department did not acknowledge or exercise that jurisdiction at the time.

Federal acknowledgment under Part 83—like determinations of tribal status made by the Interior Department outside of the Part 83 process (in Solicitor opinions or through other administrative actions), by Congress, or by the judiciary—involves federal officials deciding when, whether, and upon what basis to treat people(s) as Indian tribes and exercise the Indian affairs jurisdiction that was always presumed to exist.[270]

---

266. *See* Confederated Tribes of the Grand Ronde Cmty. v. Jewell, 830 F.3d 552, 565 (D.C. Cir.) ("Whether the government acknowledge[s] federal responsibilities toward a tribe through a specialized, political relationship is a different question from whether those responsibilities in fact existed."), *petition for cert. filed sub nom.* Citizens Against Reservation Shopping v. Jewell (U.S. Oct. 27, 2016) (No. 16-572).

267. As explained in an amicus brief authored by Professor Phil Frickey and others filed with the *Carcieri* Court, "federal recognition . . . 'acknowledges' a Tribe's continuous historical existence[,]" and "[b]ecause recognition reflects a historical fact, the only reason a tribe would be recognized currently but not in 1934 is that the federal government—due to mistake, neglect, or lack of awareness—failed to acknowledge the Tribe's existence." Brief of the National Congress of American Indians As Amicus Curiae Supporting Respondents at 20, Carcieri v. Kempthorne, 552 U.S. 1229 (2008) (No. 07-526) (citations and footnotes omitted).

268. *E.g.*, Mackinac Tribe v. Jewell, 829 F.3d 754, 760 (D.C. Cir. 2016) (Brown, J., concurring) (calling the process a "bureaucratic morass" and noting criticisms regarding lack of transparency, vagueness, and improper influence with the process), *petition for cert. filed*, (U.S. Oct. 20, 2016) (No. 16-539); Myers, *supra* note 133, at 271 (citing the "flawed application of the federal recognition process" and "uneven application of standards"); *id.* at 280–85 (discussing problems with the standards and methods of review). For other criticisms of the process, including the role that racial and political factors play in it, see RENÉE ANN CRAMER, CASH, COLOR, AND COLONIALISM: THE POLITICS OF TRIBAL ACKNOWLEDGMENT 37–65, 97–103 (2005); MILLER, *supra* note 50, at 47–78; Matthew L.M. Fletcher, *Politics, History, and Semantics: The Federal Recognition of Indian Tribes*, 82 N.D. L. REV. 487, 490–91, 494, 499, 516 (2006); Lorinda Riley, *Shifting Foundation: The Problem with Inconsistent Implementation of Federal Recognition Regulations*, 37 N.Y.U. REV. L. & SOC. CHANGE 629, 639–62 (2013).

269. *See supra* notes 262–63 and accompanying text.

270. In addition to acknowledging eighteen tribes through the Part 83 process, the Interior Department has in recent decades issued opinions clarifying and acknowledging the tribal status of the Ione Band of Miwok Indians (1994), the Lower Lake Rancheria (2000), the Stillaguamish Tribe

The people(s) continue to live as distinct communities; that is the one criterion for being an Indian tribe which has remained constant. What changes over time are the other criteria government officials use to determine if people(s) are Indian tribes, and whether, under those criteria, officials exercise the government's jurisdiction and deal with those people(s) as Indian tribes. As Justices Breyer, Ginsburg, and Souter explained in their *Carcieri* opinions, people(s) could be under federal jurisdiction even though federal officials "did not know it[,]" were "ignorant of" those people(s), or simply chose not to deal with them—and did not (re)establish a formal political relationship with them until later.[271]

So if whether particular people(s) are "recognized" as Indian tribes and whether they are under federal jurisdiction has always turned on the same determination—whether they continue to exist as distinct Indian communities—why did Congress include the words "now under Federal jurisdiction" after "any recognized Indian tribe" in the Indian Reorganization Act's definition of Indian? As the following Part shows, some senators were concerned about the government's exercising jurisdiction regarding people(s) they thought were no longer Indians, or "Indian" enough, to qualify under the Act. So lawmakers, defining "Indian" for the first time in federal legislation, tried to come up with language clarifying that the IRA would apply only to people(s) who satisfied those senators' racial, cultural, and armchair anthropological standards for being Indians. The "now under Federal jurisdiction" wording was offered as a way to limit the Act's scope, but legislators could not agree on whether certain people(s) were (still) Indians who came within it.[272] Un-

---

(1980), the Tejon Indian Tribe (2011), and the Texas Band of Traditional Kickapoos (1981). STATUS SUMMARY OF ACKNOWLEDGMENT CASES (Nov. 12, 2013), http://www.bia.gov/cs/groups/xofa/documents/text/idc1-024435.pdf; Press Release, Bureau of Indian Affairs, Action Corrects Oversight to Federally Recognized Tribes List (Jan. 3, 2001), http://www.bia.gov/cs/groups/public/documents/text/idc-018346.pdf. Congress has declared and acknowledged the tribal status of the Aroostook Band of Micmacs; Auburn Rancheria; Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians; Cow Creek Band of Umpqua Indians; Federated Indians of Graton Rancheria; Little Traverse Bay Bands of Odawa Indians; Little River Band of Ottawa Indians; Loyal Shawnee Tribe; Mashantucket Pequot Tribe; and the Pokagon Band of Potawatomi Indians. STATUS SUMMARY, *supra*; *see also* Myers, *supra* note 133, at 273 & n.25 (discussing the Cow Creek Band of Umpqua Indians and "[f]ive other tribes . . . legislatively recognized since 1978" and listing the Lac Vieux Desert Band of Lake Superior Chippewa Indians as "ha[ving] had its recognition status clarified by legislation").

271. Carcieri v. Salazar, 555 U.S. 379, 398–400 (Breyer, J., concurring) (discussing tribes that were "'under Federal jurisdiction' in 1934—even though the Department did not know it at the time"); *id.* at 400 (Souter, J., concurring in part) ("[T]he fact that the United States Government was ignorant of a tribe in 1934 does not preclude that tribe from having been under federal jurisdiction at that time").

272. They were also unclear regarding what exactly the "now under Federal jurisdiction" language entailed. *See* Confederated Tribes of the Grand Ronde Cmty. v. Jewell, 830 F.3d 552, 561

derstood against the doctrinal and historical background discussed above, and in its proper legislative context, the IRA's "under Federal jurisdiction" language simply encapsulates the same dilemma it perpetuated: trying to figure out which people(s) are Indians to whom federal jurisdiction attaches, and what makes them so.

VI. WHAT DID CONGRESS MEAN IN 1934?

The Indian Reorganization Act was the centerpiece legislation of the Indian New Deal, a series of policy and legislative reforms brought about under the leadership of John Collier, who was appointed as the Commissioner of Indian Affairs in 1933, the same year Felix Cohen joined the Interior Department as its Associate Solicitor.[273] A principal goal of the Indian New Deal was to reverse some of the more disastrous effects of the government's assimilationist policies, particularly allotment—through which tribal landholdings had declined by 90 million acres, or approximately two thirds, since 1887[274]—and to rebuild tribal land bases and economies.[275] To that end, the IRA provided a mechanism for tribes to (re)organize their governments (along Western models) and charter corporations, established an economic development loan program, implemented a hiring preference in the BIA, and authorized the Secretary of

---

(D.C. Cir.) (noting that the IRA's legislative history "[a]t most . . . reflects Congressional intent to limit what was a much broader concept of recognition by some 'jurisdictional' connection to the government, even though, . . . nobody seemed to know what that jurisdictional connection might be"), *petition for cert. filed sub nom.* Citizens Against Reservation Shopping v. Jewell (U.S. Oct. 27, 2016) (No. 16-572); *see also infra* notes 309–10 and accompanying text (citing memoranda from Felix Cohen and the Interior Department Solicitor's office expressing uncertainty over the meaning of the added "now under Federal jurisdiction" language).

273. *See* DAVID W. DAILY, BATTLE FOR THE BIA: G.E.E. LINDQUIST AND THE MISSIONARY CRUSADE AGAINST JOHN COLLIER 3 (2004). For a general discussion of Collier's and others' broader reform efforts as part of the Indian New Deal, see LAWRENCE C. KELLY, THE ASSAULT ON ASSIMILATION: JOHN COLLIER AND THE ORIGINS OF INDIAN POLICY REFORM (1983); KENNETH R. PHILIP, JOHN COLLIER'S CRUSADE FOR INDIAN REFORM 1920–1954 (1977); TAYLOR, *supra* note 171.

274. CORNTASSEL & WITMER, *supra* note 5, at 11 ("By 1934 Native land holdings were reduced by 90 million acres, down from 138 million in 1887 to 48 million in 1934 because of rampant land speculation and fraud.").

275. *See Grand Ronde*, 830 F.3d at 556 (noting that "Congress enacted the IRA, among other things, to 'conserve and develop Indian lands and resources'" and "to promote economic development among American Indians, with a special emphasis on preventing and recouping losses of land caused by previous federal policies") (first quoting the Indian Reorganization Act, ch. 576, 48 Stat. 984, 984 (1934), then quoting Mich. Gambling Opposition v. Kempthorne, 525 F.3d 23, 31 (D.C. Cir. 2008)); *see also* CORNTASSEL & WITMER, *supra* note 5, at 12 ("The appointment of long-time indigenous advocate John Collier as commissioner of Indian affairs in 1933 signaled a new policy shift toward reinstating indigenous governments. . . . [T]he Indian Reorganization Act . . . was passed by Congress in 1934 to counter the previous allotment policies.").

the Interior to acquire lands for tribes and individual Indians.[276] While Commissioner Collier and Burton Wheeler, the senator from Montana who chaired the Senate Indian Affairs Committee, are considered to be primarily responsible for the legislation and its content, Felix Cohen was its primary author.[277]

Nothing indicates anyone in the Congress that passed the IRA questioned the extent of the federal government's Indian affairs jurisdiction, which they like others understood to be plenary as described in Supreme Court opinions from the preceding decades.[278] But many congressmen in the early 1900s remained strong supporters of assimilation. As stated by Senator Wheeler, they wanted to "get rid of the Indian problem rather than add to it[,]"[279] and thus to limit exercises of that jurisdiction.

In the spring of 1934, a month before the IRA passed, Wheeler and other members of the Senate Indian Affairs Committee questioned Commissioner Collier regarding exactly which Indians and tribes would be covered by the Act.[280] To address these senators' concerns about exercising jurisdiction over people(s) they thought were not Indian enough—racially, culturally, or both—Collier suggested the "now under Federal jurisdiction" language, which was adopted almost as an after-

---

276. *See* 25 U.S.C. § 5108 (land acquisition authority); *id.* § 5123 (provisions for tribal government organization); *id.* § 5124 (provisions for tribal corporations); *id.* § 5113 (establishing loan fund for tribal corporations); *id.* § 5115 (provisions for educational loans to individual Indians); *id.* § 5116 (hiring preference for Indians within the Bureau of Indian Affairs); *see also* Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Salazar, 132 S. Ct. 2199, 2211 (2012) (describing the land acquisition authority as the "capstone" of the statute's land-related provisions).

277. *See* RUSCO, *supra* note 243, at 192–93, 235; Pommersheim, *supra* note 3, at 525–26; Sarah B. Pfouts, Senator Burton K. Wheeler and the 1934 Indian Reorganization Act ii (Mar. 3, 1981) (unpublished M.A. thesis, University of Montana), http://scholarworks.umt.edu/cgi/viewcontent.cgi?article=4544&context=etd. According to Elmer Rusco, Collier was "the most important single actor in the adoption and implementation of the Indian Reorganization Act." RUSCO, *supra* note 243, at 137.

278. Indeed, the legislative debates reflect senators' concerns about the federal government exercising such a broad guardianship power. *See infra* notes 292–305 and accompanying text; *see also supra* notes 173–89 and accompanying text (discussing plenary power cases). Citing *United States v. Sandoval*, 231 U.S. 28 (1913), *United States v. Kagama*, 118 U.S. 375 (1886), and other case law, a leading treatise of the time stated, under the headings "Government of Indians" and "Federal Jurisdiction," that the United States ("as a superior and civilized nation") had "the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders." 14 R.C.L. *Indians* § 30 (1929).

279. To Grant to Indians Living Under Federal Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings Before the Comm. on Indian Affairs on S. 2755 and 3645, 73d Cong. 263–64 (1934) [hereinafter 1934 Hearings] (statement of Sen. Burton Wheeler, Chairman, Comm. on Indian Affairs); see also Pfouts, supra note 277, at ii ("Wheeler was basically an assimilationist in his attitude toward the American Indian.").

280. *See infra* notes 286–90 and accompanying text.

thought, with no discussion of what the phrase meant.[281] While the congressional debates around the IRA's definition of "Indian" reflect legislators' uncertainty and disagreement regarding whether particular people(s) were Indians to whom the Act would apply, the debates also show that lawmakers shared the common understanding that the federal Indian affairs jurisdiction applied to people(s) if they were Indians.

A. The Indian Reorganization Act's Legislative History

The legislative history regarding the IRA's definition of Indian and "now under Federal jurisdiction" language is scant. Early drafts of what became the Indian Reorganization Act began circulating in 1932 and included among the Indians to whom the law applied persons of Indian descent who were members of "any recognized Indian tribe," as well as descendants of such members living on reservations and persons of one-fourth or more "Indian blood."[282] Like the final version, however, they did not define what a recognized Indian tribe was.[283]

The issue of exactly which people(s) the IRA's definition of Indian covered first appears in the legislative debates in April 1934, when Senator Elmer Thomas of Oklahoma asked Commissioner of Indian Affairs Collier about tribes the Senator described as "lost"—specifically naming the Catawbas in South Carolina, the Seminoles in Florida, and the Miamis in Oklahoma—and whether it was "contemplated now to hunt those Indians up and give them a status again and try to do something for them?"[284] Collier responded that the bill (as then drafted, without the "now under Federal jurisdiction" language) would make "any Indian who is a member of a recognized tribe or band" eligible for government aid—including "those rejected Indians" whom Thomas described as not under the Department's "supervision" at the time.[285] The discussion then moved to another topic.

Senator Thomas again raised the issue of "lost" Indians in a May 1934 hearing, stating that in Oklahoma there were "a great many num-

---

281. *See infra* notes 302–07 and accompanying text.

282. RUSCO, *supra* note 243, at 176, 268 (discussing and quoting draft legislation). The earlier drafts also included "or other native political group or organization" in the definition of "tribe." *See* 1934 Hearings, *supra* note 279, at 265 (Chairman Wheeler reading the bill).

283. RUSCO, *supra* note 243, at 267.

284. 1934 Hearings, *supra* note 279, at 80. At a hearing on the Catawbas' status held four years earlier, Senator Thomas asked, "[a]t the present rate of decrease, how long will it be before they become extinct?" *Survey of Conditions of Indians in the United States: Hearings Before a Subcomm. of the Comm. on Indian Affairs*, 71st Cong. 7542 (1930).

285. 1934 Hearings, *supra* note 279, at 80.

bers of Indians that are practically lost . . . not registered . . . not enrolled . . . not supervised[,]" who were "remnants of a band" and "could not come under th[e] act because they are not under the authority of the Indian Office."[286] Thomas's statement led to an exchange among him, Collier, and Senators Wheeler, Lynn Frazier, and Joseph O'Mahoney which covers four pages of the Senate record and concludes with Collier suggesting that "now under Federal jurisdiction" be inserted after "recognized Indian tribe."[287] A summary of that exchange follows, and lays bare the extent to which the senators' racial and cultural attitudes—particularly their fixation on blood quantum and other perceptions of Indianness—shaped their ideas about over whom the Department should (and should not) be exercising its jurisdiction.

Senator Wheeler responded to Senator Thomas's concern about "lost" Indians by stating that the IRA was "being passed . . . to take care of the Indians that are taken care of at the present time."[288] Senators Frazier and Thomas then brought up the Seminoles in Florida and unspecified "other Indians" and whether they should "be taken care of" by the Interior Department.[289] After Thomas said that the Florida Seminoles and Catawbas were "*just as much Indians as any others*," Wheeler answered that there was "a later provision . . . covering that, and defining what an Indian is."[290] Collier then interjected, "[t]his is [the] more than one-fourth Indian blood [provision]"[291]—referring to the part of the bill's definition of Indian that included individuals of a quarter or more Native ancestry, irrespective of whether they were tribal members or lived on a reservation.

Wheeler, who felt that Congress should be "trying to . . . get rid of the Indian problem rather than add to it[,]" expressed his opinion that the requirement should be one-half Indian blood.[292] He "d[id] not think that the Government of the United States should go out . . . and take a lot of Indians . . . that are quarter bloods . . . in under the provisions of th[e

286. *Id.* at 263. Thomas also noted that the previous administration's policy had been "to not recognize Indians except those already under authority." *Id.*

287. *Id.* at 263–67. Collier's suggestion seems to have ended discussion on the issue, as it does not appear again in the legislative history.

288. *Id.* at 263.

289. *Id.* (statements of Sen. Frazier ("Those other Indians have got to be taken care of, though.") and Sen. Thomas ("I think the Seminoles in Florida should be taken care of.")).

290. *Id.* (emphasis added).

291. *Id.*

292. *Id.* at 263–64.

IRA]."[293] Senator Wheeler also argued that it was "perfectly idiotic" for the federal government to "continue to manage the property of Indians who are of the one-eighth blood" and asked why the government should be "managing the property of a lot of *Indians who are practically white* and hold office and do everything else[,]"[294] referring to former United States Vice President Charles Curtis, who was a citizen of the Kaw Nation and between one-fourth and one-eighth Native (Kaw, Osage, and Potawatomi) ancestry.[295] But Senators Wheeler and Thomas both agreed, along with Commissioner Collier, that the bill did not change existing law regarding members of recognized tribes (and their descendants living on reservations)—and that they were covered by the bill, without regard to blood quantum.[296]

After more debate on the definition's blood quantum provision (and whether it should be one-half or one-quarter), the senators returned to discussing the Catawba and whether they should come under the IRA.[297] According to Senator Thomas, they were living on a 500-acre reservation, though "[t]he [federal] Government ha[d] not found out they live yet, apparently."[298] Some Catawbas "presumably" were half-bloods, but most of them were not, and "[s]ome of them [we]re *practically white*."[299] Senator Wheeler thought they would not be affected unless they were half-bloods, in which case the federal government "would have to take them over."[300] Senator O'Mahoney, however, questioned Wheeler's interpretation, noting that there was "no limitation of blood" for "persons of Indian descent who are members of any recognized Indian tribe" and that "the Catawbas *certainly are an Indian tribe*."[301]

---

293. *Id.* at 263. That, he said, would lead to "all kinds of people coming in and claiming they are quarter-blood Indians and want[ing] to be put upon the Government rolls." *Id.*

294. *Id.* at 264 (emphasis added).

295. *See* Scott McKie, *Charles Curtis: America's Indian Vice President*, CHEROKEE ONE FEATHER (Feb. 4, 2014), http://theonefeather.com/2014/02/charles-curtis-americas-indian-vice-president/.

296. 1934 Hearings, *supra* note 279, at 264. Senators Wheeler and Thomas also appeared to agree on the need to—eventually, though not in the present bill—end the federal government's management of at least some Indians' property. *Id.*

297. *Id.* at 265–66. The discussion focuses on the Catawba but was prompted by Senator Thomas's asking whether the bill's language would "cover into the Department under its jurisdiction the Catawbas and Miamis?" *Id.* at 265. Although Senator Thomas mentioned the Miami, there appears to be some confusion, as Senator Thomas responded "Yes" when Senator Wheeler asked "You mean down in Florida?"—even though neither the Catawba nor Miami are from Florida. *Id.*

298. *Id.* at 265–66.

299. *Id.* at 266 (statements of Sen. Thomas) (emphasis added); *id.* at 265 ("They are living on a reservation and they are descendants of Indians and they are not half-bloods.").

300. *Id.* at 266.

301. *Id.* (emphasis added).

Senators Wheeler and O'Mahoney agreed on the need to "have a limitation" after the bill's definition of "tribe" if they wanted to try to exclude the Catawba or other tribes.[302] But whereas Senator O'Mahoney thought the IRA's provisions should be extended to the Catawba—"if they are *living as* Catawba Indians"—the same as to Indians living on federally-established reservations,[303] Wheeler thought they should be covered only if they were "half-blood Indians."[304] Wheeler then spoke about the need to "eliminate" from federal supervision persons he did not consider Indian enough anymore, invoking a specific "instance in Northern California, [of] several *so-called 'tribes'* there[,]" whom he told Senator O'Mahoney were "*no more Indians than you or I*, perhaps. I mean they are *white people essentially*. And yet they are under the supervision of the Government of the United States, and there is no reason for it at all, in my judgment."[305]

After Senator O'Mahoney suggested "some separate provision excluding from the benefits of the act certain types" of Indians, Commissioner Collier responded "Would not this meet your thought, Senator: After the words 'recognized Indian tribe' in line 1 insert 'now under Federal jurisdiction'? That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help."[306] With the senators still not agreeing on exactly which Indians were then under federal jurisdiction—and to whom the Act would apply—the hearings adjourned after Collier made his suggestion.[307] There is nothing further in the legislative history regarding the act's definition of Indian.

The final bill included both Senator Wheeler's preference for the half-blood requirement and Collier's "now under Federal jurisdiction" language,[308] despite Felix Cohen's uncertainty about its meaning—he wrote "*whatever that may mean*" when referring to Collier's added language in a memorandum comparing the Senate and House versions of

---

302. *Id*.

303. *Id.* (emphasis added).

304. *Id.* ("They would not be affected unless they are half-blood Indians."); *id.* at 265 ("If they are not half-blood Indians, we should not take them in.").

305. *Id.* (emphasis added).

306. *Id.*

307. *See id.* at 266–67.

308. Indian Reorganization Act of 1934, ch, 576, § 19, 48 Stat. 984, 988 (codified as 25 U.S.C. § 5129 (formerly 25 U.S.C. § 479)). *See* RUSCO, *supra* note 243, at 269 (noting that Collier favored the one-quarter blood criterion but reluctantly accepted the half-blood provision in the final bill).

the bill.[309] Indeed, the Solicitor's office recommended that the language be removed because it was likely to "provoke interminable questions of interpretation."[310] Like the debates about the status of the Catawba (who the Interior Department Solicitor's office determined ten years later were indeed an Indian tribe, and always had been)[311] and other Indians that yielded it, the "now under Federal jurisdiction" language left unresolved—and simply reproduced—the question of whether certain people(s) were Indians or Indian tribes such that they fell under that jurisdiction.

B. Post-1934 Congressional Debates and Legislation

In the years following the IRA, Congress continued to debate whether the federal government should be exercising its guardianship jurisdiction with respect to people(s) whose Indianness lawmakers questioned. Many congressmen, including Senator Wheeler and others involved in the IRA debates, still favored assimilation, remained unhappy about the federal government's exercising jurisdiction regarding people they felt were becoming more "civilized" and "moving toward an amalgamation with the general population," and wanted to dismantle the Indian affairs bureaucracy.[312] After barely a decade under the Indian New Deal, federal Indian policy shifted to focus on formally ending—or terminating—the United States' relationships with and obligations to Indian people(s), "turn[ing] the Indians loose[,]" and transferring the federal government's jurisdiction to the various states.[313]

---

309. Memorandum from Felix Cohen on Differences Between House Bill and Senate Bill 2 (undated) (on file with author) (emphasis added).

310. Memorandum Analysis of Difference Between House Bill and Senate Bill 14 (undated) (on file with author).

311. *See supra* notes 135–36 and accompanying text.

312. Hearings Before the H. Comm. on Indian Affairs on H. Res. 166, A Bill to Authorize and Direct and Conduct an Investigation to Determine Whether the Changed Status of the Indian Requires a Revision of the Laws and Regulations Affecting the American Indian, 78th Cong. 19 (1943) [hereinafter 1943 Hearings] (response of John Collier, Comm'r of Indian Affairs); id. at 12 (distinguishing between the "more civilized" and "the less civilized" Indians in Idaho) (response of Rep. Compton I. White, Idaho); id. at 19 (describing Indians in South and North Dakota, Montana, and Oklahoma) (response of John Collier); ALISON R. BERNSTEIN, AMERICAN INDIANS AND WORLD WAR II: TOWARD A NEW ERA IN INDIAN AFFAIRS 100–05 (1991) (discussing Congressional opposition to the Indian New Deal and support for assimilation); Pfouts, supra note 277, at ii (noting that "[b]y 1937, [Senator Wheeler] felt that the Act was not promoting his goal of fairly immediate Indian assimilation, and he made an attempt to repeal it. Though his and several similar repeal efforts failed, Wheeler continued to separate himself from the Act in later years.").

313. *See* 1943 Hearings, *supra* note 312, at 12–13 (discussing an earlier "bill . . . introduced to wind up the affairs of the Indians and turn the Indians loose" and "provide[] that [their] land shall be turned over by the Government to the States") (statement of Rep. Usher L. Burdick, N.D.); *id.* at 1,

John Collier and other New Deal reformers in the Bureau of Indian Affairs had found themselves fighting to defend their policies and programs, including the IRA, since their adoption. But Collier was also a pragmatist and willing to downsize the BIA in order to preserve it, and he apparently shared lawmakers' concerns about exercising jurisdiction over people they felt were no longer Indians.[314] In a March 1943 House Committee on Indian Affairs hearing on a bill to authorize a study on changes to U.S. Indian law and policy, Collier read aloud from a letter he received asking how many of the 400,000 Indians mentioned in a recent Interior Department news release were "full-blooded Indians, . . . half-breeds, and . . . blood of lesser degree" and whether the government was "just handing out political pap to *a great number of persons who are not Indians; who do not live as Indians*, and should not be subsidized as Indians."[315] Collier then suggested that Congress and the Department "find out how many of the Indians, here and now, can be relieved of Federal supervision[,]" so that the government would not "go on unto eternity providing subsidy for *Indians who really are Indians no more*."[316]

Collier's other testimony, including his written statement, noted various obligations—including building schools and hospitals, providing economic development, institutional, and technical assistance, and resolving Indian land rights and tenure—the United States had to Indian peoples and emphasized his belief that it was best to consolidate these functions in a single government agency.[317] His testimony also shows that Collier understood these obligations to arise not just through treaties but also the discovery doctrine and colonial fiduciary relationship, and that they would continue even if the BIA did not fulfill them or did not

---

18–22 (debating H. Res. 166, a resolution to "instigate an investigation and study to determine the necessity and advisability of revising the Federal laws and regulations relating to Indian affairs"); *see also* CORNTASSEL & WITMER, *supra* note 5, at 12–14 (discussing shift from Indian New Deal to termination policies); DAILY, *supra* note 273, at 127 (noting "the termination policies that Congress instituted in the late forties and fifties, largely in reaction to Collier's New Deal measures").

314. *See* RUSCO, *supra* note 243, at 175 (noting that "Collier shared an assumption of many others acquainted with Indian affairs . . . that most Indians had lost their tribal cultures; particularly, their governmental institutions had largely disappeared"); *see also supra* notes 76–88, 95 and accompanying text (discussing correspondence and memoranda from Collier and other Indian affairs officials regarding the Shinnecock and other people(s) in the Northeast and Southeast).

315. 1943 Hearings, *supra* note 312, at 15 (emphasis added). The letter, which Collier said was "from a disinterested California lawyer, who knows a great deal about Indians[,]" also asked how many of those Indians were "no longer in need of a guardian, Federal or otherwise." *Id.* at 15–16.

316. *Id.* at 16 (emphasis added). In subsequent questioning by Committee Chairman James O'Connor, Collier agreed that "there [we]re many, there [we]re thousands" of "Indians capable of looking after themselves if restored to full citizenship and . . . able to go about like a white man[,]" though he was "not prepared to say what percentage." *Id.* at 20.

317. *Id.* at 23–24.

exist. According to Collier, "[t]hese [we]re obligations and responsibilities which the Nation took upon itself in its announced intention of civilizing and incorporating into its body politic the nations whom it had conquered and subjected."[318]

Two months after the House committee hearing, Senator Elmer Thomas (who had replaced Senator Burton Wheeler as the Senate Indian Affairs Committee Chairman, with Wheeler becoming the ranking member) issued a report which condemned Collier's administration, recommended that the BIA be abolished, and "marked a turning point in Congress's renunciation of Collier's policies and an omen of Collier's forced resignation in 1945."[319] Additional Congressional hearings and reports that followed resulted in Congress's officially adopting the termination policy on August 1, 1953, when it passed House Concurrent Resolution 108 with the express goal "to make the Indians within the territorial limits of the United States subject to the same laws . . . as are applicable to other citizens of the United States, [and] to end their status as wards of the United States."[320] This resolution accompanied Public Law 280, the centerpiece legislation of termination policy which transferred criminal and certain civil jurisdiction over Indians from the federal government to states.[321] Legislation specifically "terminating" the federal status of various tribes followed, until the United States ended the termination policy under President Richard Nixon in the early 1970s.[322]

But even as Congress moved to shed the government's responsibilities to Indian peoples, legislators and other federal officials continued to

---

318. *Id.* at 24.

319. S. REP. NO. 78-310, at 17–22 (1943); DAILY, *supra* note 273, at 143. The House Committee on Indian Affairs held several hearings on Senator Thomas's report throughout 1944. *Hearings Before the H. Comm. on Indian Affairs on H. Res. 166, A Bill to Authorize and Direct and Conduct an Investigation to Determine Whether the Changed Status of the Indian Requires a Revision of the Laws and Regulations Affecting the American Indian*, pt. 2, 78th Cong. (1944).

320. H.R. CON. RES. 108, 83rd Cong., 67 Stat. B132 (1953). *See* Charles F. Wilkson and Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 145 (1977) ("Termination was not to become official policy until 1953. The clear movement in that direction, however, began in the mid-1940's when reaction against the IRA reform efforts became intense."); *see also* ADVISORY COUNCIL ON CALIFORNIA INDIAN POLICY, ACCIP TERMINATION REPORT: THE CONTINUING DESTRUCTIVE EFFECTS OF THE TERMINATION POLICY ON CALIFORNIA INDIANS app. 1–5 (1997) (providing a legislative history of termination in California).

321. *See* Carole E. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L. REV. 535 (1975). When enacted in 1953, Public Law 280 applied to all tribes in California, Minnesota (except for the Red Lake Reservation), Nebraska, Oregon (except for the Warm Springs Reservation), and Wisconsin. In the decades following, it was extended to include exercises of jurisdiction by Alaska, Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington. *Id.* at 537 n.11, 563, 567–69, 568 n.149. Similar legislation, which predates Public Law 280, applies in New York. *Id.* at 577.

322. *See* ACCIP TERMINATION REPORT, *supra* note 320, at 3.

grapple with figuring out which people(s) were Indians and Indian tribes. The 1952 House report that was the basis for House Concurrent Resolution 108, for example, noted "the danger of relying on what appear to be artificial and somewhat unreal social criteria in defining an Indian[,]" and that "[t]he trouble in defining an Indian appears in redoubled form in the phrase, 'Indian tribe.'"[323] And while Congress remained unsure about exactly which people(s) were Indians and tribes subject to the federal government's Indian affairs jurisdiction, Congress's terminating federal jurisdiction with respect to certain people(s) and transferring it to the states is an obvious acknowledgment that those Indians were (theretofore) under federal jurisdiction. It also raises the questions of when and how that jurisdiction came about—and how, if it existed in the 1950s and 1940s, it could not have existed in 1934. So does any post-1934 exercise of the government's federal Indian affairs jurisdiction.

VII. CONCLUSION

The legislative debates, law, and history reviewed above suggest that the Indian Reorganization Act's "any recognized Indian tribe now under Federal jurisdiction" language envelops a singular inquiry: whether people(s) continued to exist as distinct Indian communities, such that the federal Indian affairs jurisdiction attached to them. However backwards the language or standards used, government officials across the branches and centuries have asked that same question. The "now under Federal jurisdiction" language and the debates that produced it certainly embody a moment of racial essentialism in which many Native people(s) were dismissed for failing to conform to stereotypical conceptions of "Indianness." They also encapsulate officials' continual grappling with which people(s) the U.S. government should treat as Indian tribes, and on what basis it should do so. The language is, after all, in the statute's definition of "Indian."

According to the most basic federal Indian law doctrines, people(s) determined to be Indians and Indian tribes were—and had been, since the

---

323. H.R. REP. No. 82-2503, app. II, at 139 (1952); *see also id.* at 140 (stating a need for "[t]he concepts involved in Indian affairs . . . to be listed and defined and the definitions standardized"); Quinn, *supra* note 74, at 360–61 (noting that the report "basically defined Indian 'tribes and bands' as those '[w]hich were reconstructed with the passage of the [IRA] and were set up with formal legal existence as tribes recognized by the Government,' and . . . 'Indian' as a '[p]erson who is a member of an Indian group or tribe which has special relations to the Federal government[,]'" and that these "administrative definitions for both 'Indian' and 'Indian tribe' were set and were to last right up to the promulgation of 25 C.F.R. § 83 [in 1978]") (first and third alterations in original) (quoting H.R. REP. No. 82-2503, app. II, at 139 (1953)).

United States first asserted jurisdiction over their territories—under federal jurisdiction. Some senators, however, were uncomfortable with exercising jurisdiction over people(s) whose Indianness they questioned, so they added "now under Federal jurisdiction" in the IRA's definition of Indian in an attempt to exclude those people. They clearly understood the government to have that jurisdiction; they just did not want to exercise it. But they could not agree among themselves whether certain people(s) were (still) Indians, and the language they added exacerbated the very problem it was offered to solve—figuring out which people(s) were Indians who came within the federal Indian affairs jurisdiction.

In the years following the Indian Reorganization Act, Interior Department and other government officials still had to determine on a case-by-case basis whether certain people(s) were Indian tribes for purposes of the IRA and federal law generally—whether to recognize those people(s) as Indian tribes who, therefore, were under federal jurisdiction. The "indeterminable questions of interpretation" the Interior Department Solicitor's Office warned about when it argued against including the "under Federal jurisdiction" language in the IRA are now compounded by the Court's decision in *Carcieri*.[324] It has left judges, government lawyers, agency officials, practitioners, and scholars with the task of deciphering the meaning of language that Felix Cohen, who authored much of the IRA and developed the criteria for determining whether people(s) qualified as Indian tribes under it, himself was at a loss to define.[325]

The inquiry regarding whether people(s) fall under the Indian affairs jurisdiction has never been, and should not now be, about whether the government exercised that jurisdiction. The Supreme Court has acknowledged that Interior Department officials' decisions not to exercise their jurisdiction with respect to certain people(s) do not negate its existence.[326] By the same token, what Interior Department officials in Washington and elsewhere thought is not determinative of what Congress, or a few of its members, intended when they passed the Indian Reorganization Act.[327] And regardless of one's philosophy on statutory in-

---

324. *See supra* note 310 and accompanying text.

325. *See supra* notes 243–51, 309 and accompanying text.

326. United States v. John, 437 U.S. 634, 653 (1978) (explaining that "the fact that federal supervision over [the Mississippi Band of Choctaw Indians] has not been continuous" did not "destroy[] the federal power to deal with them"); *see also supra* notes 138–39 and accompanying text.

327. *Carcieri* reminds us that it is, after all, the Supreme Court's interpretation of statutory language that controls, not what Interior Department officials argue. *See supra* notes 31–36. However, administrative law principles suggest some degree of judicial deference is owed to the Interior Department's interpretation of the statute. *See* Carcieri v. Salazar, 555 U.S. 379, 396 (2009) (Breyer, J., concurring); Confederated Tribes of the Grand Ronde Cmty. v. Jewell, 830 F.3d 552, 558–59

terpretation, it is questionable how much, if at all, statements made by a few senators about particular Indigenous people(s) when discussing the statute's definition of Indian (and whether the statute would apply to those people) should bear on the meaning of language they did not debate.[328]

Assigning meaning to the IRA's "under Federal jurisdiction" language presents normative, interpretive, and political questions in addition to doctrinal ones. Conflating the exercise and existence of federal jurisdiction is not only incorrect as a matter of law; it is also unfair. Requiring tribes to produce evidence showing the federal government was actively exercising its jurisdiction with respect to them in and before 1934 penalizes tribes for whom such evidence might be lacking because federal officials were not doing their jobs and fulfilling the government's obligations to those tribes in the years before and around the IRA's passage.[329] This position is especially troubling given that government officials chose not to exercise their jurisdiction regarding certain people(s) based on racial and ethnographic standards that are, ostensibly, no longer used and have been replaced by criteria under which these same people(s) have since been determined to be Indian tribes.[330]

(D.C. Cir.), *petition for cert. filed sub nom.* Citizens Against Reservation Shopping v. Jewell (U.S. Oct. 27, 2016) (No. 16-572).

328. *See supra* notes 302–07 and accompanying text. In the *Carcieri* oral argument, Justice Scalia seemed rather dismissive of the Senate Indian Affairs Committee debate that yielded the language. Transcript of Oral Argument at 28, *Carcieri*, 555 U.S. 379 (2009) (No. 07-526) ("Was it even on the floor of Congress? . . . . It was at a hearing, oh."). But Justice Breyer retorted that "[y]ou learn a lot at hearings, actually." *Id.*

329. The Interior Department's Office of the Solicitor has taken the position that the phrase "under Federal jurisdiction" is ambiguous and that, in order to qualify as having been under federal jurisdiction in 1934, a tribe must "show[] . . . that the United States has *exercised* its *jurisdiction* at some point prior to 1934 and that this jurisdictional status remained intact." Memorandum from Hilary C. Tompkins, *supra* note 17, at 18–19 (emphasis added); *see also id.* at 18 (stating that "the . . . Court's ruling in *Carcieri* counsels the Department to point to some indication that in 1934 the tribe in question was under federal jurisdiction. Having indicia of federal jurisdiction beyond the general principle of plenary authority *demonstrates the federal government's exercise of* responsibility for and obligation to an Indian tribe and its members in 1934") (emphasis added). This interpretation, by requiring tribes to point to specific examples of the federal government's exercising its jurisdiction in order to show they were under that jurisdiction, appears to be at odds with federal Indian law canons of interpretation which require that ambiguous statutes be interpreted in favor of Indian tribes—and which the Solicitor's opinion cites. *See id.* at 5 ("[S]tatutory silence or ambiguity is not to be interpreted to the detriment of Indians. Instead, statutes establishing Indian rights and privileges are to be construed liberally in favor of the Indians, with any ambiguities to be resolved in their favor.").

330. *See supra* notes 95–103 and accompanying text.

The plain meaning of the word *jurisdiction*, its usage in the IRA's legislative history and in other contexts,[331] and particularly its usage in the context of the plenary federal Indian affairs power suggest that all federally recognized Indian tribes were under federal jurisdiction before, during, and after 1934. If the phrase is deemed ambiguous, federal Indian law canons of interpretation mandate that statutory ambiguities be resolved in favor of tribes.[332] That, seemingly, also requires construing jurisdiction to mean authority and concluding that if people(s) existed as tribes in 1934—whether or not the United States recognized them as such at the time—they were under federal jurisdiction then too.

The questions surrounding the meaning of the "under Federal jurisdiction" language, of course, involve more than just statutory construction principles. They cannot be separated from the larger politics around tribal land reacquisitions—not only concerning Indian casinos, but more generally about state and local governments losing control over, and revenue from, the land. The extent to which politics and ideologies about federalism, as well as attitudes about Indigenous people(s) (including perceptions of Indianness and views on tribal sovereignty), shape judicial interpretations of the Indian Reorganization Act's language remains to be seen, along with how judges' explanations will square with federal Indian law's most fundamental doctrines.

---

331. The phrase "federal jurisdiction" appears nowhere else (besides the definition of "Indian" in 25 U.S.C. § 5129) in the statutory text or legislative history of the IRA. The phrases "federal supervision," "federal guardianship," and "federal tutelage," however, do appear elsewhere in the statute's legislative history, indicating that members of Congress understood those phrases to have a different meaning than federal jurisdiction and could have used them, instead of "jurisdiction," had they intended to limit the IRA's application to people(s) over whom the federal government was exercising jurisdiction in 1934. *See* Memorandum of Hans Walker, Jr., *supra* note 133, at 4–5 (comparing the usages of "federal jurisdiction," "federal supervision," "federal guardianship," and "federal tutelage" in the IRA's text and legislative history).

332. *See, e.g.*, Bryan v. Itasca Cty., 426 U.S. 373, 392 (1976); Menominee Tribe of Indians v. United States, 391 U.S. 404, 412 (1968).