

REVITALIZING TRIBAL SOVEREIGNTY IN TREATYMAKING

DAVID H. MOORE† & MICHALYN STEELE‡

In the current model of federal-Indian relations, the United States claims a plenary legislative power, as putative guardian, to regulate Indian tribes. Under this model, tribes are essentially wards in a state of pupilage. But the federal-tribal relationship was not always so. Originally, the federal government embraced, even promoted, a more robust model of tribal sovereignty in which federal-Indian treaty-making and diplomacy figured prominently. Through treaties, the United States and tribes negotiated territorial boundaries, forged alliances, facilitated trade, and otherwise managed their relations. In 1871, Congress attempted to put an end to federal-Indian treaty-making by purporting to strip tribes of their status as legitimate treaty partners. In a rider to the 1871 Appropriations Act, Congress prohibited the recognition of tribes as sovereign entities with whom the United States could negotiate treaties. Since that time, the 1871 Act and the plenary power-pupilage model it entrenched have grown deep roots in federal Indian law and the policies of the United States. Congress has aggrandized its role in tribal life at the expense of tribal sovereignty, and the coordinate branches of the federal government have acquiesced in this foundational shift.

*The literature of federal Indian law has wrestled with the doctrine of plenary power, contemplated the fate of the federal-tribal treaty relationship, and questioned the constitutionality of the 1871 rider. This Article posits new arguments for the unconstitutionality of the 1871 Act, uprooting the presumptions underlying the Act and revitalizing the prospect of federal-Indian treaty-making. Two recent developments provide an opportunity for such a transformation. In *Zivotofsky v. Kerry*, the Supreme Court held that the President alone possesses the power to recognize foreign states and governments. While *Zivotofsky* was a landmark case for U.S. foreign relations law, its potential significance for federal Indian law has gone underappreciated. *Zivotofsky* did not directly address the locus of power to recognize tribal sovereignty to enter treaties, but it prompts the question and provides a blueprint for arriving at an answer. Engaging that blueprint, this Article argues that the President possesses the exclusive power to recognize tribes' sovereign capacity to enter treaties. The result: The 1871 Act is unconstitutional because it attempts to limit that power. In our view, the President can and should unilaterally reengage in federal-Indian treaty-making, revitalizing treaty-making and reanimating the sovereignty model of federal-Indian relations.*

† Sterling and Eleanor Colton Endowed Chair in Law and Associate Director, International Center for Law and Religion Studies, Brigham Young University, J. Reuben Clark Law School.

‡ Associate Dean for Research and Academic Affairs and Marion G. Romney Professor of Law, Brigham Young University, J. Reuben Clark Law School; Member, Seneca Nation of New York. We thank Gregory Ablavsky, Brook Gotberg, Cliff Fleming, Cree Jones, Bradley Rebeiro, Brett Scharffs, and Lisa Grow Sun for helpful comments on previous versions of this Article. We also thank Morgan Farnsworth, Jennifer Kimball, and Mickala Mahaffey for excellent research assistance and Annalee Hickman and Shawn Nevers for exceptional library support. Copyright © 2022 by David H. Moore & Michalyn Steele.

A second development, the Supreme Court's decision in McGirt v. Oklahoma, is less fundamental to the argument but also significant for revitalizing tribal sovereignty. In McGirt, the Court recognized the ongoing vitality of federal-Indian treaties that were entered when the sovereignty model prevailed, strengthening both claims to tribal sovereignty and the viability of treaty-making in the federal-Indian relationship.

The implications of these developments are significant. Deracinating the 1871 Act disrupts the dominance of the plenary power doctrine and pupilage model with their attendant abuses, more fully realizes the promise of the United States' policy of Indian self-determination and commitment to international norms, and generates positive ripples for Indigenous-state relationships across the globe.

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INTRODUCTION

Indian tribes were essential treaty partners to the European potentates vying for dominion in North America prior to the adoption of the United States Constitution, and for the United States thereafter.¹ For roughly the first one hundred years of United States history, the federal government recognized and actively relied upon the sovereign Indian tribes as capable treaty partners.² Under this model of federal-Indian relations, the President negotiated and the Senate ratified treaties with Indian tribes just as the federal government did with foreign states, and just as sovereign predecessors to the United States did with Indian tribes prior to the Revolutionary War.³ Treaty-making not only relied on but affirmed tribal sovereignty. As Chief Justice John Marshall wrote, in declaring treaties made both prior and pursuant to the Constitution to be the supreme law of the land, the Constitution “sanctioned the previous treaties with the Indian nations, and consequently admit[ted] their rank among those powers who are capable of making treaties.”⁴ While treaty-making was not the exclusive means of dealing with Indian affairs, treaties with the tribes addressed issues that were critical to the young nation. Treaties purported to establish boundaries between the peoples, allocate criminal and civil jurisdiction, secure peace through the cessation of hostilities, facilitate trade on favorable terms, and further ongoing diplomatic relations.⁵

Unfortunately, the federal government’s appetite to make promises and build alliances through treaties with tribes often exceeded its will to deliver on the promised benefits and its ability to

¹ See ROBERT A. WILLIAMS, JR., *LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600–1800*, at 8–10 (1997) (describing the importance that colonizing European powers and the United States placed on their dealings with Indian tribes).

² See, e.g., Phillip M. Kannan, *Reinstating Treaty-Making with Native American Tribes*, 16 WM. & MARY BILL RTS. J. 809, 815 (2008) (noting that “[u]ntil 1871, treaty-making was the predominate means of implementing federal Indian policy”).

³ See, e.g., Chief Irving Powless, Jr., *Treaty Making*, in *TREATY OF CANANDAIGUA 1794: 200 YEARS OF TREATY RELATIONS BETWEEN THE IROQUOIS CONFEDERACY AND THE UNITED STATES* 15, 24–30 (G. Peter Jemison & Anna M. Schein eds., 2000) (recounting the Haudenosaunee oral history of the negotiation of the Canandaigua treaty between the Haudenosaunee and the United States); 1 VINE DELORIA, JR. & RAYMOND J. DEMALLIE, *DOCUMENTS OF AMERICAN INDIAN DIPLOMACY: TREATIES, AGREEMENTS, AND CONVENTIONS, 1775–1979*, at 6–8 (1999) (describing traditional Indian treaty-making).

⁴ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559–60 (1832) (“The words ‘treaty’ and ‘nation’ are words of our own language, selected in our diplomatic and legislative proceedings, . . . having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations.”).

⁵ See *infra* Section I.B.

effectively govern its frontiers.⁶ By the mid-1860s, dealing with the strife and expense of war and confronted with the ever-growing pressure to expand its reach over territory and resources, the United States' commitment to the founding principles of treaty-making with tribes waned.⁷ In its place, the United States developed a legal theory that its own power over the tribes was plenary.

As part of this transformation, Congress passed a rider to the 1871 Appropriations Act that effectively halted any expansion of the federal-Indian treaty relationship.⁸ The 1871 Act prohibited future treaty-making with the tribes by statutorily dictating that tribes would no longer qualify as treaty partners.⁹ Congress did not attempt to prohibit treaty-making through a direct assault on the treaty power itself. Presumably, Congress recognized that Article II vests the treaty power in the Executive, with Senate consent.¹⁰ Congress could not reduce the President's treaty power through statute, even with presidential acquiescence.¹¹ The Constitution is not so easily amended.¹² Rather, Congress effectively put a stop to treaty-making with the tribes

⁶ See, e.g., Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 794 (2006) (discussing the federal government's failure to enforce treaty obligations and "protect Indians and tribes from unlawful incursions by increasingly aggressive settlers"); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1034, 1045–48 (2015) (noting various state challenges to federal treaties with tribes); 1 DELORIA & DEMALLIE, *supra* note 3, at 6.

⁷ See ROBERT T. ANDERSON, SARAH A. KRAKOFF & BETHANY BERGER, *AMERICAN INDIAN LAW: CASES AND COMMENTARY* 87–89 (4th ed. 2020); Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1811–12 (2019); see also Kannan, *supra* note 2, at 817–18; Ann Piccard, *Death by Boarding School: "The Last Acceptable Racism" and the United States' Genocide of Native Americans*, 49 GONZ. L. REV. 137, 151–52 (2013) (citing Darek Hunt, *BIA's Impact on Indian Education Is an Education in Bad Education*, INDIAN COUNTRY TODAY (Jan. 30, 2012), <https://indiancountrytoday.com/archive/bias-impact-on-indian-education-is-an-education-in-bad-education> [<https://perma.cc/VDK7-3MKZ>] (noting the effects of the end of the Civil War on the emergence of the policy of forced assimilation)).

⁸ Larry EchoHawk & Tessa Meyer Santiago, *Idaho Indian Treaty Rights: Historical Roots and Modern Applications*, 44 ADVOC. 15, 15 (2001) ("The year 1871 officially ended treaty making when the House of Representatives attached a rider to the Indian Appropriations Act declaring that no more treaties could be concluded between the United States and neighboring Indian tribes. . . . After 1871, the United States . . . continued . . . acquiring [Indian] lands through statutory agreements . . .").

⁹ Appropriations Act of March 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71). Prior to enacting the 1871 rider, Congress forbade the Executive from entering treaties with Indian tribes for about four months in 1867. *Antoine v. Washington*, 420 U.S. 194, 202 (1975) (citing Act of March 29, 1867, ch. 13, 15 Stat. 7, *repealed by* Act of July 20, 1867, ch. 34, 15 Stat. 18).

¹⁰ See U.S. CONST. art. II, § 2, cl. 2; cf. David P. Currie, *Indian Treaties*, 10 GREEN BAG 2D 445, 446, 448–49 (2007) (recording that some members of Congress rejected the notion that Congress could control the treaty power).

¹¹ See Currie, *supra* note 10, at 446, 448–51 (recording that this argument was made in opposition to enactment of the 1871 Act and independently endorsing the argument);

by invoking the recognition power¹³: the authority to recognize, or not, the sovereignty of other states.¹⁴ The operative provision of the 1871 Act thus states, “hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty.”¹⁵

Thus, the 1871 Act did not claim to eliminate tribal sovereignty in its entirety, but it did strike at a key aspect of that sovereignty: the power to enter treaties.¹⁶ By designating tribes as non-sovereigns for purposes of treaty-making, Congress sought to disable tribes as treaty-making partners. Consistent with this approach, Congress did not attempt to alter or undo past treaties that had been entered into when the United States had acknowledged the sovereign capacity of tribes to engage in treaty-making.¹⁷

Nonetheless, the effects of striking tribal sovereignty to enter into treaties were far-reaching. Instead of negotiating treaties with the tribes for lands and jurisdiction, Congress and the President claimed a largely unrestrained power to enact policy regulating tribes and to modify, or even entirely abrogate, treaties by legislation. Under this reimagining of federal-tribal relations, tribes became subject to an overweening federal plenary power to legislate on their behalf on the foundational presumption that the political branches would act in the

Kannan, *supra* note 2, at 812, 824 (rejecting the argument that the political branches may amend the Constitution by agreement).

¹² See U.S. CONST. art. V (detailing the processes for amending the Constitution).

¹³ See Currie, *supra* note 10, at 446, 449 (describing arguments made in support of the 1871 Act to the effect that even though Congress could not control the treaty power, Congress could declare that Indian tribes may not be recognized as entities competent to make treaties).

¹⁴ See, e.g., 1 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW, § 4, at 19 (1906) (“The external sovereignty of any state . . . may require recognition by other states in order to render it perfect and complete.” (quoting HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 31–33 (Richard Henry Dana, Jr. ed. 1866))).

¹⁵ Appropriations Act of March 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71).

¹⁶ See, e.g., Kannan, *supra* note 2, at 810–11 (describing how the 1871 Act limited the sovereignty of Indian tribes to that of “domestic dependent nations” legally prohibited from making treaties with the United States).

¹⁷ The treaties themselves, as well as the ceremonies surrounding their negotiation, frequently conveyed the mutual expectation of the parties that the treaties would be, in legal effect, in perpetuity. See Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567, 571 n.20 (noting Senator Sam Houston’s soaring 1845 oratory promising the tribes that “[a]s long as water flows, or grass grows upon the earth” they will “never again . . . [be] removed from [their] present habitations” (quoting CONG. GLOBE, 33d Cong., 1st Sess. app. at 202 (1854))). While this language is generally not present in the treaties themselves, it was invoked during treaty negotiations. *Id.*

best interests of tribes, like a trustee to a beneficiary.¹⁸ Courts acquiesced in this tectonic shift re-allocating federal power.¹⁹ In the wake of the 1871 Act, tribes have been objects of legislation much more than they have been sovereign partners. The plenary power doctrine has led to many of the abuses of Native peoples that mar the history of federal Indian law, including efforts at forced assimilation and privatization of tribal lands.²⁰

Since 1871, the principle of plenary power, and the diminishment of tribal sovereignty upon which the 1871 Act rests, have become the bedrock of federal Indian law. This Article aims to shake this bedrock to revitalize a more constitutionally faithful sovereignty model of federal-Indian relations. The Article's central claim is that the 1871 Act is unconstitutional because the President has the exclusive power to recognize sovereignty for purposes of treaty-making.

The text and structure of the Constitution support the principle of the sovereignty of Indian tribes, including their legal capacity as treaty partners. The text and structure of the Constitution, however, are as old as the Republic. Were this all the Article had to rely on, its prospects of revitalizing the sovereign treaty relationship with the United States would be slim indeed. Others have previously questioned,²¹ or contested,²² the constitutionality of the 1871 Act. Justice Thomas, for example, noted that the Act is "constitutionally suspect," even if it "reflects the view of the political branches that the tribes [have]

¹⁸ See, e.g., *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) ("When, . . . treaties were entered into between the United States and a tribe . . . it was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with . . . good faith towards the Indians.").

¹⁹ See *id.* at 566–67.

²⁰ See Kannan, *supra* note 2, at 818–22 (identifying examples of "the primary statutory sources of the harm that has befallen Indians after the end of treaty-making," including allotment and assimilation).

²¹ See *id.* at 811 n.16 (surveying earlier commentators who, in passing, described the 1871 Act as likely unconstitutional); see also, e.g., G. William Rice, *Teaching Decolonization: Reacquisition of Indian Lands Within and Without the Box—An Essay*, 82 N.D. L. REV. 811, 841–42 (2006) (arguing the 1871 Act is "constitutionally suspect"); Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. STATE L.J. 113, 168–69 (2002) (arguing that there are "significant reasons to question the constitutionality of the [1871] statute").

²² See, e.g., Kannan, *supra* note 2, at 811–12 (arguing that the 1871 Act is unconstitutional based on the Constitution's text, structure, and recent precedent); Currie, *supra* note 10, at 451 ("[T]he entire enterprise was flatly unconstitutional, and it seems extraordinary that President Grant unblinkingly signed it into law."); see also Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1264 n.144 (1995) (questioning whether the 1871 Act would be a legal impediment to a treaty negotiated with a tribe and ratified by the Senate).

become a purely domestic matter.”²³ Yet, there has not been change to the plenary power over tribes. Others have argued that even if the Act were to be deemed unconstitutional, that determination would be inconsequential since the United States declines to engage in treaty negotiations with the tribes.²⁴ This Article broadens prior scholarship to propound new arguments for a revitalized federal-tribal treaty relationship by building upon two recent developments at the Supreme Court. These recent developments reveal the legal foundations for reanimating a model of tribal sovereignty that more fully respects founding principles and furthers contemporary goals, both domestic and international.

The first development arose in U.S. foreign relations law, a body of law that governs how the United States conducts its foreign affairs.²⁵ While U.S. foreign relations law and federal Indian law have obvious parallels, they rarely intersect. This Article attempts to correct that gap in the literature by underscoring the importance of the Supreme Court’s recent decision in *Zivotofsky v. Kerry*²⁶ for federal Indian law. In *Zivotofsky*, the Supreme Court held that the President alone has the power to recognize foreign states and governments.²⁷ This was a significant decision for U.S. foreign relations law, not least because it was the first time in U.S. history that the Court upheld direct presidential defiance of congressional action in foreign affairs.²⁸ Yet its import for federal Indian law has gone underappreciated. *Zivotofsky* did not directly address the power to recognize tribal sovereignty; indeed, it expressly skirted that issue.²⁹ But *Zivotofsky* high-

²³ *United States v. Lara*, 541 U.S. 193, 218 (2004) (Thomas, J., concurring).

²⁴ See Philip P. Frickey, (*Native*) *American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 474 (2005) (arguing, as a practical matter, that treaties are not a necessary instrument of federal Indian policy, given that “[s]ince 1871, a variety of agreements have been negotiated with tribes by the executive branch, with ultimate federal approval occurring through bicameralism and presidential signature”).

²⁵ See, e.g., CURTIS A. BRADLEY, ASHLEY S. DEEKS & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS*, at xix (7th ed. 2020) (explaining that U.S. foreign relations law “examines the constitutional and statutory law that regulates the conduct of U.S. foreign relations”).

²⁶ 576 U.S. 1 (2015).

²⁷ *Id.* at 14, 28, 30–32.

²⁸ *Id.* at 61, 66–67 (Roberts, C.J., dissenting) (lamenting that “the Court takes the perilous step—for the first time in our [225 year] history—of allowing the President to defy an Act of Congress in the field of foreign affairs”). The possibility that the President might prevail in a *Youngstown* category three situation—when acting contrary to congressional will—had been recognized by Justice Jackson in his *Youngstown* concurrence in 1952. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

²⁹ See *Zivotofsky*, 576 U.S. at 22 (“[R]ecognition of Indian tribes . . . is . . . a distinct issue from the recognition of foreign countries.”).

lighted the importance of the Executive's recognition power, raised the possibility that the power to recognize tribal sovereignty in treaty-making is exclusively presidential, and provided a blueprint for analyzing the limits on congressional power over recognition determinations. Thus, the reasoning of *Zivotofsky* has important consequences for the argument that the 1871 Act—in which Congress attempted to prevent Executive recognition of tribal sovereignty to enter into treaties—is unconstitutional.

Determining whether the 1871 Act is constitutional does not require locating the full power to recognize tribal sovereignty in the President but rather only a part of that power: the power to recognize sovereignty for the purposes of treaty-making. If the President possesses exclusive authority to determine whether a tribe is competent to engage in treaty-making, then the 1871 Act is an unconstitutional assumption of that power by Congress. Consequently, this Article focuses not on the full breadth of the recognition power, as the Court did in *Zivotofsky* (in the context of foreign not Indian affairs), but on the location of the power to recognize sovereignty to make treaties. *Zivotofsky* instructs that the answer to that question turns on an analysis of constitutional text and structure, functional considerations, history, and precedent. Following *Zivotofsky*'s blueprint, this Article concludes that the President possesses the exclusive power to decide whether a tribe may be recognized to engage in treaty-making, displacing the 1871 Act and undermining the troubling pupilage model of federal-Indian relations that it codified. We argue that the President should exercise the full scope of this constitutional power to revitalize federal-Indian treaty-making and a sovereignty model of relations.

Another significant development for revitalizing the sovereignty model came as the Supreme Court recognized the ongoing vitality of Indian treaties in *McGirt v. Oklahoma*.³⁰ The *McGirt* decision both strengthens claims to presumptive tribal sovereignty and affirms the viability and advisability of treaty-making to shape the federal-tribal relationship. Oklahoma argued that despite Congress never having terminated or disestablished the Creek Reservation guaranteed to the Tribe by various treaties, the treaty guarantees had been nullified by the practice of the state ignoring them.³¹ In rejecting this argument, the Court concluded that finding the relevant treaty language to have been modified by implication, through congressional silence and state practice, would be “the rule of the strong, not the rule of law.”³² Simi-

³⁰ 140 S. Ct. 2452 (2020).

³¹ *Id.* at 2468, 2470–71.

³² *Id.* at 2474.

larly, to give effect to an unconstitutional statute disabling tribes as treaty sovereigns would be to fall short of the rule of law.

In light of these developments, this Article argues that the President could unilaterally reengage with Indian tribes in negotiating treaties to address the many outstanding issues that tribes face in their relations with the United States. Such a pursuit would introduce a new era of federal-tribal relations that would undermine the dominance of the plenary power doctrine, more meaningfully realize the promises of the Indian self-determination policy currently espoused by the United States, and produce positive ripples for Indigenous-state relationships across the globe.

The Article proceeds as follows. Part I highlights the original sovereign-to-sovereign relationship between the federal government and Indian tribes that revolved around treaty-making. Part II documents the shift punctuated by the 1871 Appropriations Act's rejection of both tribal sovereignty and Indian treaty-making and the consequences flowing therefrom. Part III distills this history into two models of the federal-Indian relationship—a sovereignty model and a pupilage model—and explores the theories and foundations of each. Part IV develops the core assertion of this Article: that the 1871 Appropriations Act is unconstitutional and that the President may unilaterally reinvigorate federal-Indian treaty-making notwithstanding the 1871 Act. This Part emphasizes the two recent developments—*Zivotofsky* and *McGirt*—that put disruption of the 1871 Act and revitalization of treaty-making more clearly in reach. Part V assesses the promises and prospects—domestic and international—of the revitalization of tribal sovereignty and treaty-making.

I

TREATY RELATIONS BEFORE 1871

From its earliest days, the United States negotiated treaties with the Indian tribes to consolidate federal power over Indian affairs, to seek cessions of Indian land, to quell hostilities, and to cement strategic alliances for mutual defense with the tribes.³³ Moreover, the fledgling federal government lacked the reach and resources to exercise effective governance in the tribal territories and borderlands, so the United States relied on tribes as partner sovereigns to exercise cooperative jurisdiction in these territories.³⁴ In addition to these domestic objectives, the new United States pursued Indian

³³ 1 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.03[1] (Nell Jessup Newton ed.) (1941), LexisNexis (database updated June 2019) [hereinafter COHEN'S HANDBOOK].

³⁴ See *id.*

treatymaking to legitimize its own standing among European rivals as the lawful successor to their prior claims to sovereignty.³⁵ The United States actively embraced the instrument of tribal treatymaking as an essential tool fit for these national tasks. Indian treatymaking was also a legal and moral imperative as the United States lacked justification for unilaterally extinguishing tribal self-government or land claims,³⁶ even under extravagant legal theories of colonization, such as the doctrine of discovery.³⁷ The United States relied on its sovereign treaty power, and the concomitant sovereign capacity of tribes as treaty partners, to pursue these critical interests and objectives.

The federal-tribal treaty relationship was pursued vigorously by the Washington administration and the nascent federal government in furtherance of constitutional federalism's allocation of exclusive treatymaking power, and indeed, of the Indian affairs power, to the federal government and not to the states.³⁸ In addition to the treaty relationships, the federal government took additional steps to preempt state authority to deal with the tribes.³⁹ The Trade and Intercourse Acts, inter alia, sought to prevent abuses against the Indians by "licensing the traders who entered Indian country" and by "prohibiting the sale of Indian lands to individuals and to states" except under U.S. auspices.⁴⁰ Other legislation authorized the President to negotiate with Indian tribes to exchange lands east of the Mississippi for U.S. territory west of the Mississippi.⁴¹ During almost 100 years of tribal treatymaking, the United States entered into

³⁵ See *id.* § 1.03[2] (describing provisions in the Trade and Intercourse Act of 1800 penalizing "European agitators" from interfering with any treaty, since "[t]he threat that European countries would ally with Indian tribes against the United States was . . . a significant concern"); see also Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 46–47 (2005) (observing that early treaties between tribes and the United States declared that the tribes were "under the protection of the United States of America and of no other sovereign whatsoever").

³⁶ See CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 121 (1987) (describing the moral weight of Indian treaties on the United States).

³⁷ See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 573 (1823) ("[The European doctrine of discovery] gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.").

³⁸ Ablavsky, *supra* note 6, at 1019–20 (arguing that the Washington administration's claim to sole authority over Indian affairs was rooted in the federal government's exclusive diplomatic and military powers).

³⁹ *Id.* at 1040–45 (describing efforts by the Continental Congress, the Washington administration, and Congress to limit state authority over Indian tribes).

⁴⁰ Jack Campisi, *Colonial and Early Treaties, 1775–1829*, in 1 TREATIES WITH AMERICAN INDIANS: AN ENCYCLOPEDIA OF RIGHTS, CONFLICTS, AND SOVEREIGNTY 69, 74–77 (Donald L. Fixico ed., 2008).

⁴¹ *Id.* at 78.

roughly 370 treaties, and negotiated many more that were never ratified.⁴²

The proffered theories animating the federal-tribal relationship, including the nature of tribal sovereignty, varied widely throughout this formative period. The shifting American view of tribal sovereignty, during the treaty era and the years that have followed, says more about the shifting values of the United States than about any changes in the nature and dignity of tribes as sovereigns. Throughout this period, one sees the perpetual wrestle at the heart of federal-tribal relations, the “cycle[] of confrontation and accommodation,” as Professor Williams has described it.⁴³ The period of treaty-making reflects three distinct but overlapping approaches to tribal treaty-making and sovereignty—conquest, diplomacy, and empire—each with its own animating principles and theoretical justifications.

A. Conquest

The earliest treaties in the wake of the Revolutionary War and the transition from the Articles of Confederation to the Constitution were animated by America’s confidence in its own might and right by conquest to deal with the tribes as vanquished foes.⁴⁴ The terms of these treaties were largely dictated by the United States and imposed upon the tribes.⁴⁵

Three such treaties between the United States and Indian tribes demonstrate the initial efforts of the new nation to formulate a cohesive national policy toward the Indians based on theories of conquest: the Treaty of Fort Stanwix (1784) with a contingent of the Haudenosaunee, the Treaty of Fort McIntosh (1785) with the Delaware and Wyandott, and the Treaty at the Mouth of the Great

⁴² See, e.g., 155 CONG. REC. S13696 (daily ed. Dec. 21, 2009) (statement of Sen. Daniel Akaka) (“The United States entered into 370 treaties with Indian nations and treaties of peace, friendship and commerce.”); *Examining the Challenges Facing Native Am. Schools: Hearing Before the Subcomm. on Early Childhood Educ., and Secondary Educ. Comm. on Educ. and the Workforce*, 114th Cong. 20 (2015) (statement of Brian Cladoosby, President, National Congress of American Indians) (“[O]ver 370 treaties were ratified with tribes ceding their lands for the right to self-govern.”); 1 DELORIA & DEMALLIE, *supra* note 3, at 181 (“The figure of 369 ratified treaties is generally accepted by most people who work in the field.”); 148 CONG. REC. S9016 (daily ed. Sept. 23, 2002) (statement of Sen. Daniel Inouye) (“I must report that the Senate—of the 800 treaties we have had signed by the President of the United States and by the ruling monarchy of the nation, 430 were ratified by our predecessors and 370 are still in the files.”); CONG. GLOBE, 41st Cong., 3d Sess. 1490 (1871) (statement of Sen. James A. Harlan) (proclaiming that many “treaties [were] negotiated that [Congress] never ratified”).

⁴³ WILLIAMS, *supra* note 1, at 7.

⁴⁴ John C. Mohawk, *The Canandaigua Treaty in Historical Perspective*, in TREATY OF CANANDAIGUA, *supra* note 3, at 43, 47–48.

⁴⁵ *Id.*

Miami (1786) with the Shawnee.⁴⁶ The Americans, flush with a new claim to sovereignty from their victory over the British, insisted that they could dictate the terms of these treaties to the tribes by right of conquest.⁴⁷ Because of pre-existing, strategic treaty alliances with the British, several of the Haudenosaunee (or Iroquois Confederacy) tribes—including the Seneca, Cayuga, Mohawk, and Onondaga—had primarily fought with their British allies during the Revolutionary War.⁴⁸ Thus, the Americans approached these treaty negotiations with a presumption of strength that was not borne out by subsequent events. The process ignored the longstanding diplomatic traditions of the tribal nations involved, and it purported to require the tribes to abandon claims to lands and jurisdiction, even as these instruments insisted on promises of peace, loyalty, and submission from the tribes.⁴⁹

These earliest treaties did not represent a true sovereign-to-sovereign negotiation nor secure the benefits of mutual understanding and lasting alliance that are the presumptive aims of treaty-making.⁵⁰ This approach failed to achieve the objectives of the treaties in large part because the United States failed to anticipate the enduring cultural and political strength of tribes and underestimated the need for tribal allies as a practical and legal matter. A Western Confederacy of Tribes arose in response to the “aggressive and insulting” diplomacy surrounding these treaties.⁵¹ The Western Confederacy repudiated these three treaties in 1786, explicitly rejecting the American legal theory of unilateral rights by conquest.⁵² The Western Confederacy tribes insisted on the vitality of their own sovereignty and denied any suggestion that they had been made subjects of the United States by

⁴⁶ *Id.*

⁴⁷ *Id.* at 48; see also FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* 49–51 (1994) (discussing how American treaty negotiators invoked conquest to dismiss tribal claims to land).

⁴⁸ Mohawk, *supra* note 44, at 47.

⁴⁹ See *id.* at 48 (“At these negotiations, the American representatives were very aggressive and insulting . . . They insisted on land cessions . . . and urged that the Indians were a conquered people and had thus forfeited their right to their lands.”); see also Francis Jennings, *Iroquois Alliances in American History*, in *THE HISTORY AND CULTURE OF IROQUOIS DIPLOMACY: AN INTERDISCIPLINARY GUIDE TO THE TREATIES OF THE SIX NATIONS AND THEIR LEAGUE*, 37, 58–59 (Francis Jennings, William N. Fenton, Mary A. Druke, David R. Miller, eds., 1985) (describing the diplomatic failures inherent in the Treaty of Fort Stanwix of 1784, motivated by a presumption of a “right of conquest,” later disavowed by Colonel Pickering, and a demand that the tribes “renounce all claims to land”).

⁵⁰ See Mohawk, *supra* note 44, at 47–51.

⁵¹ *Id.* at 48–49.

⁵² *Id.*

conquest.⁵³ Because the tribes did not view these treaties as equitable or binding, territorial boundaries and resources remained in dispute while costly hostilities continued to flare.⁵⁴

B. Diplomacy

President Washington, faced with this reality, shifted to a policy of treating the Indians as other nations had done: as one sovereign treats another.⁵⁵ By the mid-1790s, the United States was evolving in its stance from a footing of conquest over the tribes to one of engaged diplomacy with the tribes.⁵⁶ Although this approach varied in the consistency of its application and success, the choice to recognize tribes as treaty partners and to build upon tribal diplomatic traditions was certainly a more effective and enduring strategy than unilateral fiat had been.

As Professor Gregory Ablavsky has argued, Washington's objectives in pursuing more enduring treaty relationships with tribes were animated by federalism concerns (ensuring the dominance of the federal government in Indian affairs) and by national security concerns (ensuring that the tribes would be allied to the United States and not to its international rivals).⁵⁷ In entering into treaties during this time, the United States not only acknowledged the continuing sovereign status of tribes as treaty partners, but relied upon that sovereignty as a critical element for achieving these and other federal objectives.⁵⁸ In the admittedly erratic diplomacy that followed, the United States

⁵³ *Id.*

⁵⁴ *Id.* at 47–50.

⁵⁵ See Ablavsky, *supra* note 6, at 1060–61 (discussing how European concepts of international law governed early relations between the federal government and Native tribes).

⁵⁶ See *id.* at 1060–62 (explaining that the Washington administration's emphasis on the law of nations, which emphasized how tribes should be treated as independent nations, led it to replace "claims of conquest with diplomacy" and in turn, led to increased treaty-making, which "largely disclaimed authority over Natives or their self-governance").

⁵⁷ See *id.* at 1061 ("Federal officials feared, with some justification, that the British and Spanish supported Native nations as buffers against U.S. expansion . . .").

⁵⁸ See COHEN'S HANDBOOK, *supra* note 33, § 1.02[3] (discussing how at the time of the Constitutional Convention, "disagreement over congressional power and eagerness for Indian lands," and "federal attempts to check state intrusions," which states often ignored, contributed to "the understanding of the Indian commerce clause as a broad grant of power to the federal government and a limit on state power to interfere with federal Indian policy"); *id.* § 1.03[1] (noting how some treaties provided for prisoner exchanges, mutual assistance pacts to suppress insurrections, prevention of tribes from making hostile demonstrations against the United States, and fixing of boundaries between tribes and the United States); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 200 (1984) (discussing the Washington administration's embrace of the doctrine of tribal sovereignty to secure cessions of Indian lands and negotiate peace).

stepped into the sovereign shoes of predecessor nations who had pursued diplomatic relations with the Indian tribes.

Indeed, treaty relations between nation states and the Indian tribes predated the formation of the United States by hundreds of years. Various Indian tribes were vital treaty partners with the English, Dutch, Spanish, and French.⁵⁹ Moreover treaty-making was an important Indigenous practice for centuries before the first treaties with the United States and certainly before the 1871 Act. Indeed, treaties, with the attendant political, social, economic, and cultural alliances they foster, were a feature of intertribal Indigenous life in the Americas long before the arrival of European powers that were intent on colonization.⁶⁰ For Indigenous tribes, "treaties were sacred texts," creating bonds of kinship and enduring obligations and relationships between the treaty parties.⁶¹

One particular example from the Washington administration illustrates the diplomatic approach that would primarily characterize tribal treaty-making in the decades that followed. A senior diplomat from the Seneca Nation, Cornplanter, was sent to visit President Washington in 1790 to address ongoing disputes and raise concerns with earlier treaty processes.⁶² Cornplanter advocated for engagement in a peace process that would take heed of the traditional Indigenous rituals of treaty-making and would demonstrate appropriate respect for the sovereign status of the tribes.⁶³

In response, President Washington dispatched Colonel Thomas Pickering to negotiate a new treaty with the Haudenosaunee nations,

⁵⁹ COHEN'S HANDBOOK, *supra* note 33, § 1.02[1]; see 1 FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 16 (1984) ("A common vehicle [used by Europeans] for dealing with the Indians . . . was the treaty negotiation.")

⁶⁰ WILLIAMS, *supra* note 1, at 33–34; Powless, *supra* note 3, at 15–19 (discussing the process of establishing peace among the Mohawk, Oneida, Onondaga, Cayuga, and Seneca tribes).

⁶¹ WILLIAMS, *supra* note 1, at 103. As Professor Williams describes, the "constitutional" expectation of the tribes in forming the "sacred covenant[s] of peace" attendant to treaty-making was that "[c]hanges in circumstance or . . . bargaining position[] . . . were . . . irrelevant as far as Indians were concerned," for "Indians . . . tr[ie]d to educate their . . . treaty partners that the duty to provide aid . . . did not change . . . because one party became weaker . . . [Rather,] the . . . partner who grew stronger . . . [had] an increased obligation to protect its weaker partner." *Id.* at 103–04.

⁶² Mohawk, *supra* note 44, at 50, 53–54, 58.

⁶³ See generally *id.* at 50 (highlighting how a meeting between Cornplanter, President Washington, and several Seneca chiefs, where the parties discussed unfair land deals with New York, "may have been a factor in shaping Washington's policy toward Indian land cessions to adopting treaty making and a principle of fair and honest treatment of the Indians"); see also WILLIAMS, *supra* note 1, at 71, 76 (describing the role of Indigenous negotiation rituals in the formation of early treaties).

or Six Nations of the Iroquois.⁶⁴ Duly authorized representatives of the parties met in formal government-to-government sessions that observed many of the longstanding Indigenous rituals of treaty formation.⁶⁵ In 1794, these efforts achieved a remarkable and enduring treaty agreement: the Treaty of Canandaigua between the United States and the Six Nations of the Iroquois.⁶⁶ The Treaty of Canandaigua represented genuine diplomacy in federal-tribal relations and provides a powerful example of what can be achieved through meaningful treaty engagement with tribes. Though its observation and implementation have been marred by notable breaches,⁶⁷ it remains a foundational legal document ordering the sovereign relationship between the parties to this day.⁶⁸

Other treaties negotiated during this era of federal-tribal diplomacy likewise endure and shape the contemporary relationship with Indian tribes; they continue to provide both for reserved usufructuary hunting and fishing rights for tribal members and for federal program-

⁶⁴ Mohawk, *supra* note 44, at 58.

⁶⁵ *Id.* (“The opening ceremonies of this negotiation adhered to Indian customs that required expressions of condolences for people who had passed away since the parties last met.”).

⁶⁶ *Id.* at 61–62 (noting how the Canandaigua Treaty not only provided the United States with security in a time of continued warfare, but also “represents a historical moment when ‘fair treatment’ of the Indians . . . was arguably the best policy for the survival of the country”).

⁶⁷ A significant swath of the Seneca Nation’s Allegeny Reservation in western New York was flooded by a U.S. Bureau of Reclamation dam project in 1960. The federal project diminished tribal territory reserved for the Tribe by the Canandaigua Treaty and displaced many families, flooding homes, sacred sites, and burial grounds. See Michalyn Steele, *Indigenous Resilience*, 62 ARIZ. L. REV. 305, 326 (2020); JOY A. BILHARZ, *THE ALLEGANY SENECAS AND KINZUA DAM: FORCED RELOCATION THROUGH TWO GENERATIONS* 56–73 (1998) (broadly discussing the impact of the dam project and its devastating consequences for families).

⁶⁸ In accordance with Haudenosaunee treaty tradition, the Treaty is ratified by strings of shell beads called wampum signifying the bonds forged between the nations. The George Washington Covenant Belt represents the Treaty of Canandaigua. The belt includes a visual representation of thirteen larger figures holding hands; these represent the thirteen American states. At the center of the belt is a traditional longhouse dwelling of the Haudenosaunee. There are two smaller figures around the longhouse, also holding hands, representing a sacred figure of the Haudenosaunee Confederacy and George Washington. The Treaty contemplated an agreement that would govern the parties “forever.” See Mohawk, *supra* note 44, at 62 (displaying a photograph of the belt). As just one example, a provision of the Treaty calls for the United States to send a certain quantity of cloth each year to tribes. See Powless, *supra* note 3, at 31 (explaining that the federal government still sends treaty cloth to members of the Haudenosaunee tribe every year). The treaty cloth has come to stand for the ongoing vitality of the treaty relationship between the Seneca Nation and the United States; the Secretary of Interior continues to send what is a largely symbolic quantity of plain muslin cloth each year to the tribes in recognition of the treaty’s obligations. *Id.*

matic obligations for the health and education of tribal members.⁶⁹ As the United States certainly continues to reap the benefits of these bargains, which represented massive tribal cessions of lands, tribes continue to advocate for compliance with the terms of these treaties.⁷⁰ This is not to say that all the treaties of this era were exemplary; the variety of terms, durability, equity, and circumstances of these treaties make it difficult to generalize. Some seem to have been negotiated in good faith, while others appear infected by unscrupulous self-interest.⁷¹ But the period demonstrates the possibility and promise of effective federal-tribal treaty-making.

C. *Empire*

By the 1850s, the imperative to engage diplomatically with tribes began to flag and the United States asserted a renewed dominance in its relations, including in treaties, with the tribes. Professor Ablavsky has described this resurgence of unilateralism in tribal relations as part of the quest for expansion and empire.⁷² During this period, the treaties sought enhanced federal authority over the tribes and rejected the checks imposed on federal prerogatives by earlier treaties.⁷³

The United States grew weary of seeking tribal cooperation with federal objectives, and especially with tribal determination to remain

⁶⁹ See, e.g., *Herrera v. Wyoming*, 139 S. Ct. 1686, 1692–94 (2019) (upholding tribal members' hunting rights under the 1868 Treaty between the United States and the Crow Tribe); *Rosebud Sioux Tribe v. United States*, 450 F. Supp. 3d 986, 996 (D.S.D. 2020) (noting that the 1868 Treaty of Fort Laramie with the Sioux Nation includes a provision for health care to the tribes); *Reuben Quick Bear v. Leupp*, 210 U.S. 50, 80 (1908) (acknowledging that the 1868 Sioux Treaty provided for a federal commitment to educate tribal children).

⁷⁰ For example, in 2019, pursuant to Article VII of the 1835 Treaty of Echota with the Cherokee, the Cherokee Nation launched its effort to invoke its right to send a delegate to the House of Representatives. See, e.g., All Things Considered, *Cherokee Nation Takes Up 1835 Promise to Send Delegate to Congress*, NPR (Sept. 1, 2019, 5:07 PM), <https://www.npr.org/2019/09/01/756564712/cherokee-nation-takes-up-1835-promise-to-send-delegate-to-congress> [<https://perma.cc/P9YG-9VKQ>] (Michel Martin's interview of Kimberly Teehee, delegate to Congress for the Cherokee Nation).

⁷¹ The contrasting approaches to treaty negotiations with tribes were present from the beginning of American tribal diplomacy. See COHEN'S HANDBOOK, *supra* note 33, § 1.03[2] (describing Secretary of War Henry Knox's insistence on "the need to treat honorably with the Indians"); *id.* § 1.03[3] (describing Indiana Governor William Henry Harrison's tactics for "acquiring many millions of acres for the United States, often paying pennies on the acre for lands worth many times more").

⁷² See Ablavsky, *supra* note 6, at 1080; COHEN'S HANDBOOK, *supra* note 33, § 1.03[1] ("Treaties concluded during the last two decades of the treaty-making period, however, increasingly encroached upon the autonomy of tribes.").

⁷³ See Ablavsky, *supra* note 6, at 1081 (discussing the new recognition of federal government plenary power over Native tribes).

in their homelands.⁷⁴ The prevailing political winds, both from those who sought to ensure tribal survival and those who sought seizure of tribal land, was to pursue a policy of removal, under which the tribes would “trade” lands east of the Mississippi for lands west of the Mississippi.⁷⁵ As securing the cooperation and consent of tribes to removal became more difficult, and as intrusions on tribal territories in the east became more frequent, the determination of the United States to engage with tribes through negotiation faltered.⁷⁶ Although terms committing the United States to respect the right of self-government of the tribes were still present in many of the treaties during the sunset of the treaty-making era, the treaties also included increasingly onerous terms seeking broad concessions of power to the United States.⁷⁷

This imperial impulse culminated in the 1871 Act abandoning tribes as treaty partner sovereigns altogether and accelerating the assertion of federal plenary power in Indian affairs. The next Part examines the devastating consequences of that foundational shift.

II

THE AFTERMATH OF 1871

The Appropriations Act of 1871, through a rider, took the related steps of downgrading tribes’ status as sovereigns and effectively ending Indian treaty-making. The Act stated, “hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty.”⁷⁸ This legislative fiat reflected the assertion of plenary legislative power over Indians and tribes by claiming to strip tribes of their sovereign capacity to enter into treaties with the United States. Congress accomplished this objective by usurping the Executive’s power to recognize or acknowledge tribes as treaty partners, a move that we argue below was unconstitutional.

⁷⁴ See COHEN’S HANDBOOK, *supra* note 33, § 1.03[4] (“As Indian tribes increasingly resisted demands to relinquish their lands by treaties of cession, the federal government accelerated a policy of removing Indians to lands in the West in exchange for their territory in the East.”).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See *id.* § 1.03[1] (explaining that “[t]reaties concluded during the last two decades of the treaty-making period . . . increasingly encroached upon the autonomy of tribes” by enhancing the power of the federal government over the internal affairs of tribes with expanding federal jurisdiction over money, lands, and intratribal disputes).

⁷⁸ Appropriations Act of March 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71).

In some respects, the 1871 Act merely formalized the United States' decision to move away from engaging in treaty negotiation and diplomacy with tribes. The federal commitment to tribes as treaty partners had already waned as the relative strength of the parties altered.⁷⁹ The United States was losing patience with tribal resistance to the insatiable demand for tribal land and resources. Nor did the United States seem interested in (nor particularly capable of) stemming that demand, despite the treaties promising the tribes undisturbed use of reserved lands.⁸⁰ Where tribes resisted federal aims for removal and vast cessions of land, a rising federal unilateralism, especially in Congress, muscled out the principle of tribal treaty diplomacy, and with it, any solicitude for tribal cooperation and consent.⁸¹

The 1871 Act was motivated by another concern as well. The debate over the 1871 rider reveals frustration in the House of Representatives that the Constitution's assignment of treaty ratification to the Senate gave the House an inadequate voice in Indian affairs when such affairs are conducted by treaty-making.⁸² The debates over the terms of the rider show the Senate's insistence on protecting its treaty ratification power and the rider's sponsors insisting on a greater role for the House in the management of Indian issues. The solution settled on focused neither on the Senate's ratification power, nor the House's lack of treaty power, but rather on the sovereign character of tribes as treaty partners. Interestingly, for decades after the 1871 Act, the United States continued to negotiate agreements with tribes, but these agreements were approved by both houses of Congress rather than by the Senate alone, and more often, federal Indian policy was set by statute.⁸³ In the wake of the 1871 Act, then, treaty-making with tribes eventually ceased, replaced fully by statutory regulation of Indian affairs. The result for tribes was catastrophic.

Indeed, Congress's aggrandizement of its role in Indian affairs—punctuated by the passage of the 1871 Act—is an object lesson in the need for checks and balances. Unconstrained by the checks of negotiation with treaty partners and supermajority consent by the Senate,

⁷⁹ See *supra* notes 74–77 and accompanying text.

⁸⁰ See *infra* notes 263–65 and accompanying text.

⁸¹ See *infra* notes 103–04 and accompanying text.

⁸² See Currie, *supra* note 10, at 445–46 (discussing how some House representatives asserted that they should have a voice in whether Native tribes are sovereign nations, whereas others objected that this fell within the treaty-making power granted solely to the President and Senate).

⁸³ See Frickey, *supra* note 24, at 441 (explaining that since 1871, agreements between the federal government and tribes became law through bicameral approval and presidential signature).

Congress soon laid claim to virtually unfettered legislative power to regulate tribes and to abrogate treaties.

For example, treaties with Indian tribes frequently provided for cooperative law enforcement procedures, including the extradition and punishment of offenders.⁸⁴ The United States did not generally “presume the authority to prosecute an Indian who committed a crime against another Indian on Indian lands.”⁸⁵ As federal agents in the tribal territories grew in dominance over day-to-day tribal life, they were frustrated by the legal impediments to criminally punish tribal members.⁸⁶ They sought both legislative and judicial support for expanding federal criminal jurisdiction over tribal members.⁸⁷

When Crow Dog of the Lower Brule Sioux Tribe killed Spotted Tail, also of the Lower Brule, federal officials indicted and prosecuted Crow Dog.⁸⁸ In *Ex parte Crow Dog*, the Supreme Court relied on the Tribe’s treaties and the Trade and Intercourse Acts to find that the federal government had no criminal jurisdiction over the murder, and that it was a matter within the Tribe’s jurisdiction.⁸⁹

In response to this judicial constraint on federal authority, Congress passed the Major Crimes Act, denominating seven major crimes committed by Indians on reservations as federal crimes within the jurisdiction of the federal courts.⁹⁰ When a member of the Hoopa Valley Tribe of Northern California was prosecuted for the murder of another tribal member under the newly passed Major Crimes Act,⁹¹ the Supreme Court upheld the Act as within a broad legislative

⁸⁴ Washburn, *supra* note 6, at 792–93.

⁸⁵ *Id.* at 798.

⁸⁶ *Id.* at 798–99 (noting how even after the Senate rejected an 1874 bill that would have extended federal criminal jurisdiction to Native Americans who committed serious crimes against other Native Americans, “federal officials overseeing Indian affairs continued to seek laws” that would do so).

⁸⁷ *See id.* at 798–801 (discussing efforts to extend federal criminal jurisdiction to certain Native Americans who commit serious crimes, as well as criminal prosecutions motivated by the desire to prosecute Native Americans who committed serious crimes against tribal leaders who were “friendly” to the United States).

⁸⁸ *Id.* at 800–02.

⁸⁹ *See id.* at 802–03; *see also* *Ex parte Crow Dog*, 109 U.S. 556, 560–64, 572 (1883) (“[T]o uphold the jurisdiction exercised in this case, would be to reverse in this instance the general policy of the government towards the Indians, as declared in many statutes and treaties, and recognized in many decisions of this court, from the beginning to the present time.”).

⁹⁰ Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153 (1948)); *see also* Washburn, *supra* note 6, at 803–04 & 803 n.129 (noting the historical debate surrounding the impetus for passage of the Major Crimes Act); Frickey, *supra* note 24, at 441–42.

⁹¹ *United States v. Kagama*, 118 U.S. 375 (1886); *see also* Washburn, *supra* note 6, at 806–07 (discussing *Kagama*, 118 U.S. 375).

authority of Congress regarding Indians.⁹² As Professor Washburn summarized it, “contrary to the well-known doctrine of enumerated powers, the Court held that the power to enact the Major Crimes Act was extraconstitutional yet entirely legitimate”⁹³ While early Supreme Court precedent had described the federal-tribal relationship as “resembl[ing] that of a ward to its guardian,” the *Kagama* case “converted this simile into fact: ‘These Indian tribes *are* the wards of the nation.’”⁹⁴

In the ensuing years, the United States exploited the claim to sweeping, exclusive power over Indian affairs to pursue a dramatically varied set of policies. Among the most detrimental for tribes: the policy of forced assimilation, designed to eradicate tribal identity and culture through the prohibition of tribal religious practices and the large-scale removal of Indian children from their families, communities, cultures, and identities;⁹⁵ the policy of allotment, the “pulverizing engine” designed to break up what remained of the tribal land mass, which resulted in wresting almost 100 million acres of treaty-protected land from the tribes;⁹⁶ and the policy of termination, the mid-twentieth century’s social experiment aimed anew at disbanding tribes and forcing tribal members to adopt a more individualistic lifestyle.⁹⁷

More recently, the plenary power that replaced treaty-making has been invoked to benefit tribes. One hundred years after the 1871 rider, President Nixon announced a policy of promoting tribal self-determination.⁹⁸ Congress has, since that time, enacted statutes

⁹² *Kagama*, 118 U.S. at 381 (holding that “the Indian tribes, residing within the territorial limits of the United States, are subject to their authority” and that “Congress may by law punish any offence committed” on tribal lands, whether the offender be white or Native American).

⁹³ Washburn, *supra* note 6, at 807; *see also id.* at 806 n.149 (noting the observation that plenary power in Indian affairs is an “it-must-be-somewhere” doctrine) (citing Ann L. Estlin, *Federal Plenary Power in Indian Affairs After Weeks and Sioux Nation*, 131 U. PA. L. REV. 235, 246–48 (1982)).

⁹⁴ Frickey, *supra* note 24, at 444 (explaining that in 1970, President Nixon proclaimed that his administration would work towards greater tribal self-government, a policy which remains the federal approach today).

⁹⁵ *See* Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47, 51–53 (2008) (noting the history and consequences of the federal policy of forced assimilation of Indian people, especially Indian children).

⁹⁶ *See* Kristen A. Carpenter & Angela R. Riley, *Privatizing the Reservation?*, 71 STAN. L. REV. 791, 815–18 (2019) (describing the consequences of the allotment policies on tribal lands).

⁹⁷ *See* Lance F. Sorenson, *Tribal Sovereignty and the Recognition Power*, 42 AM. INDIAN L. REV. 69, 117–18 (2017) (“[T]he federal government’s long oppression of Native Americans . . . was enacted through policies of acculturation, removal, reservation, allotment and assimilation . . .”).

⁹⁸ Special Message to the Congress on Indian Affairs, 213 PUB. PAPERS 564–65 (July 8, 1970) (“The time has come to break decisively with the past and to create the conditions

designed to foster greater self-determination for the tribes, including the Indian Child Welfare Act,⁹⁹ the Indian Self-Determination and Educational Assistance Act,¹⁰⁰ and the tribal provisions of the Violence Against Women Act.¹⁰¹ Even when the ultimate policy has been beneficial, however, the process has lacked the respect inherent in treaty-making. And despite the growing sophistication of tribal participation in the political process, the reality remains that tribes' ability to influence legislation about them is inconsistent and ultimately subject to the plenary power doctrine.¹⁰² In the modern era, the federal government engages in routine tribal consultations, but these sessions frequently leave tribes frustrated by their limited ability to shape the laws and policies that constrain them.¹⁰³

Moreover, consultation is not simply about respect. On issues implicating the fundamental interests of tribal survival, such as climate change, access to sacred sites, and issues of shared jurisdiction and disputed boundaries, a return to a diplomatic model that respects the fundamental sovereignty of tribes and engages them in meaningful ways may be imperative. In the next Part, we explore two models of federal-tribal relations, the sovereignty model and the pupilage model, to more fully develop the argument for a return to the sovereignty model of treaty relations.

III TWO MODELS

As the previous Parts have outlined, the history of federal-Indian relations reveals starkly different relational models. Under one model, tribes are subjects in the grammatical sense: They act; they negotiate as sovereigns with the government; they consent in meaningful ways; and they shape their futures guided by their values and priorities. We

for a new era in which the Indian future is determined by Indian acts and Indian decisions.”).

⁹⁹ 25 U.S.C. §§ 1901–1963.

¹⁰⁰ *Id.* §§ 5301–5423.

¹⁰¹ *Id.* § 1304.

¹⁰² See generally Kirsten Matoy Carlson, *Lobbying as a Strategy for Tribal Resilience*, 2018 BYU L. REV. 1159 (analyzing tribal lobbying efforts and specific outcomes shaping federal Indian law and policy).

¹⁰³ See, e.g., *Hearing on H.R. 3490, H.R. 3522, H.R. 5608, H.R. 5680 and S. 2457 Before the H. Comm. on Nat. Res.*, 110th Cong. 23 (2008) (statement of Joe Shirley, President, Navajo Nation) (“[P]articipation through a tribal consultation policy does not necessarily equate to meaningful consultation. At present there is little meaningful consultation with tribal governments. . . . [At times,] tribal delegations are convened to inform us of a decision already made just so that the agency can check off its tribal consultation box.”).

call this the “sovereignty model.” Treaty-making is a hallmark of the sovereignty model.¹⁰⁴

The second model of federal-Indian relations regards Indian tribes not as subjects, but as objects—objects of federal regulation and under the plenary power of the United States. We call this the “pupilage model.” Tribes may try to influence the legislative process, but they are ultimately at the mercy of Congress, as wards to a guardian. Congress, acting as putative trustee, may take steps that benefit the tribes, but this model, by its very premise, not only runs the significant risk of harmful outcomes but also undermines the dignity of tribes as self-determining peoples with rights to decide their course. Indeed, the model in which Congress unilaterally legislates for and about Indian tribes in the name of guardianship has led to many of the horrors committed against Native peoples, including forced assimilation, the allotment of reservation lands, and the policy of termination described above.¹⁰⁵ The 1871 Act is a cornerstone of this pupilage model.¹⁰⁶

The current federal-tribal relationship lies uncomfortably and improbably somewhere between these models, where the United States asserts broad plenary political power regarding Indian tribes pursuant to the pupilage principle, while espousing an official policy of benevolent restraint, in which it fosters a government-to-government relationship. But the power differential by which one party asserts plenary power over the other and recognizes the other’s “sovereignty by sufferance”¹⁰⁷ is a significant degradation of what once was. The relationship also contravenes the international human rights values which the United States ought to embody.¹⁰⁸

¹⁰⁴ See, e.g., Kannan, *supra* note 2, at 810–11 (“Treaties signify sovereignty; a legal prohibition of treaty-making is a denial of it.”).

¹⁰⁵ See *id.* at 818–21 (discussing, with a focus on allotment, “the harm done to Indian tribes” and their sovereignty after the United States shifted from a sovereignty to a pupilage model); see also *supra* notes 93–97 and accompanying text.

¹⁰⁶ See, e.g., Kannan, *supra* note 2, at 818–23 (noting that ever since passage of the Indian Appropriations Act in 1871, “Indian policy has been created and implemented through the legislative process and executive agreements”). The Supreme Court has acknowledged, even overstated, the effect of the 1871 Act on tribal sovereignty. See, e.g., *DeCoteau v. Dist. Cnty. Ct.*, 420 U.S. 425, 432 (1975) (“After 1871, the tribes were no longer regarded as sovereign nations, and the Government began to regulate their affairs through statute or through contractual agreements ratified by statute.”); Kannan, *supra* note 2, at 821–23 (arguing that the Supreme Court improperly interpreted the 1871 Act as diminishing tribal sovereignty rather than presidential power).

¹⁰⁷ See *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (“The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance.”).

¹⁰⁸ See G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter *Indigenous Peoples Declaration*] (“[T]reaties,

This Article thus seeks to reinvigorate the sovereignty model with its embrace of tribes as capable, cognizable treaty partners. Granted, restoring treaty-making would not fully restore the sovereignty model. That model was undermined not only by the termination of treaty-making but by the ascendance of the plenary power doctrine.¹⁰⁹ There is always the risk, perhaps even a likelihood, that Congress will opt to legislate unilaterally as an exercise of plenary power, rather than choose to ratify treaties. Moreover, even if the federal government chooses treaty-making, tribes' bargaining power may be weak in comparison to that of the federal government in any given negotiation.¹¹⁰ The government might exploit its position of strength to pursue nefarious aims in treaty negotiations, such as a return to the unwelcome policies of acquisition, assimilation, and allotment.¹¹¹ If the tribes secured benefits instead, those would reach only the tribes that are parties to the treaty.

Yet even though treaty-making is not a panacea, it has significant benefits. Most prominently, treaty-making respects sovereignty and more fully promotes both the tribal self-determination the United States has espoused since the Nixon administration¹¹² and international norms.¹¹³ Acknowledgement of tribal sovereignty in treaty-making would also put pressure on the assumption of perpetual tribal pupillage undergirding the plenary power doctrine. The legal conceit by which the United States claimed power over tribes because tribes were within its pupillage, though never well-founded, is clearly obsolete and insulting. A guardianship presumes the legal incompetence of the ward. That never was an apt model for the federal-tribal relation and its persistence as a legal fiction is no argument for its

agreements and other constructive arrangements, *and the relationship they represent*, are the basis for a strengthened partnership between indigenous peoples and States" (emphasis added)).

¹⁰⁹ See Newton, *supra* note 58 at 207 (discussing the origins of the plenary power doctrine and "statutes designed to implement the new assimilationist policies").

¹¹⁰ See Campisi, *supra* note 40, at 80 (noting that federal negotiators used the threat of force, as well as bribes, to secure consent in early treaties).

¹¹¹ See, e.g., *id.* at 72–80 (discussing numerous instances in which tribes were forced to agree to treaty provisions that not only required them to relinquish land, but also fundamentally change their lifestyles). For instance, during Thomas Jefferson's administration, a national consensus emerged that acquiring tribal lands would require tribes to abandon hunting and fishing in favor of agriculture, and towards "increasing [the] domestic comforts" of tribes. *Id.* at 77. The result was that trade provisions were incorporated into some treaties. *Id.*

¹¹² See *supra* note 98 and accompanying text.

¹¹³ Cf. Indigenous Peoples Declaration, *supra* note 108; see also Frickey, *supra* note 24, at 489 ("In not merely a symbolic sense, a commitment to renewed treaty-making, whether of the Article II variety or by agreements ratified through bicameralism and presentment, would be a major step toward greater normative, doctrinal, and practical legitimacy.").

continued role as a foundation stone in the edifice of federal Indian law, particularly in the face of rebounding sovereignty to enter treaties.

The 1871 Act—with its rejection of tribal sovereignty to engage in treaty-making—continues to prop up that fiction and has stood as an obstacle to revitalizing the sovereignty model. In the next Part, we argue that the 1871 Act is unconstitutional, and therefore, that there is no legal hurdle to reengaging in the federal-tribal treaty relationship. Even if the 1871 Act did not stand in the way, however, the federal government would have to choose to engage in treaty-making as a policy matter. In Part V, therefore, we briefly envision how that policy hurdle might be overcome and what a return to Indian treaty-making with the federal government might look like.

IV

THE UNCONSTITUTIONALITY OF THE 1871 ACT

As noted, the 1871 Appropriations Act prohibited the recognition of a tribe “as an independent nation, tribe, or power with whom the United States” could enter into a treaty.¹¹⁴ In so doing, Congress exercised the recognition power with the acquiescence of President Grant. As discussed more fully below, by recognition power we do not mean the power to acknowledge the federal-tribal relationship or the acknowledgment of internal tribal sovereignty that makes tribes eligible for federal programs and services or to exercise certain incidents of sovereignty. We mean, very specifically, the power to recognize—or alternatively to deny or remove recognition from—sovereigns as eligible partners of the United States in treaty-making.¹¹⁵ The question thus becomes whether this recognition power over treaty-making sovereignty lies with Congress or the President.

A. *Scope of the Recognition Power*

Before reaching that question, it is worth asking briefly whether federal power includes discretion to deny and dismantle tribal sovereignty at all. If not, the step taken by the 1871 Act to diminish tribal

¹¹⁴ 25 U.S.C. § 71.

¹¹⁵ Certainly, both Congress and the Executive have exercised the power to acknowledge tribes as “federally recognized” for purposes of eligibility for federal programs and services for Indians. See 25 U.S.C. § 5131; Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 86 Fed. Reg. 7,554 (Jan. 29, 2021); see generally Kirsten Matoy Carlson, *Congress, Tribal Recognition, and Legislative-Administrative Multiplicity*, 91 IND. L.J. 955, 959 (2016) (empirically evaluating the role that Congress and the Bureau of Indian Affairs each play in recognizing Indian nations).

sovereignty would be unconstitutional regardless of whether it was taken by Congress or the President. Several constitutional provisions suggest that tribal sovereignty may be constitutionally enshrined.

The Treaty Clause authorizes the President, “by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”¹¹⁶ Washington used this power shortly after the Constitution’s ratification to enter into treaties with Indian tribes.¹¹⁷ The combination of text and immediate practice suggests a constitutional understanding that Indian tribes were sovereign for the purposes of treaty-making with the United States.

That view originated even before the Constitution. The Supremacy Clause refers to “[t]reaties made, or which shall be made, under the Authority of the United States.”¹¹⁸ The Supreme Court reasoned that “by declaring treaties already made, as well as those to be made, to be the supreme law of the land, [the Constitution] . . . adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admit[ted] their rank among those powers who are capable of making treaties.”¹¹⁹

The Indian Commerce Clause strengthens this view. Congress is empowered “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹²⁰ Several aspects of this clause are notable. For one, the phrase “with the Indian Tribes” suggests that tribes are separate from and not fully under the regulatory hand of the federal government, similar to foreign nations and states.¹²¹

Similarly, tribes appear in a list with two other sovereigns: foreign nations and U.S. states. It took Article 1, Section 10 to establish that

¹¹⁶ U.S. CONST. art. II, § 2, cl. 2.

¹¹⁷ See Campisi, *supra* note 40, at 73.

¹¹⁸ U.S. CONST. art. VI, cl. 2.

¹¹⁹ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 519 (1832), *abrogated on other grounds by Nevada v. Hicks*, 533 U.S. 353 (2001).

¹²⁰ U.S. CONST. art. I, § 8, cl. 3.

¹²¹ The use of the term “tribe” rather than “nation” may diminish the strength of this argument. While “tribe” and “nation” were “often used interchangeably” at the Founding, “nation” suggested “the independence and equality of Native polities” while “tribe” suggested their distinctness in terms of descent and level of civilization. Gregory Ablavsky, “*With the Indian Tribes*”: Race, Citizenship, and Original Constitutional Meanings, 70 STAN. L. REV. 1025, 1042 (2018). On the other hand, “Indian,” as used in “law and diplomacy,” tended to mean “noncitizen[.]” and “conveyed a sense of political and jurisdictional difference, of Indian as alien—a person who was a member of a polity *other* than the United States.” *Id.* at 1055–56; *see also id.* at 1068–69. Moreover, the first and only time the Supreme Court considered the Constitution’s election of the term “tribe,” the majority concluded that Indian tribes qualified as states, just not foreign states. *See id.* at 1042–44; *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16, 18–20 (1831); *infra* text accompanying notes 252–56.

states, notwithstanding their sovereignty, lack power to “enter into any Treaty, Alliance, or Confederation.”¹²² Even then, states remain empowered to enter into “Agreement[s] or Compact[s] with . . . a foreign Power” with congressional consent.¹²³ States were active participants in the constitutional ratification process and they might have surrendered part of their sovereignty through that process in ways that foreign nations and Indian tribes did not.¹²⁴ But states did not concede a general power for Congress to further downgrade their sovereignty.¹²⁵ Foreign states, by contrast, might find themselves unable to engage in treaty-making with the United States if the United States refuses to recognize their sovereign status.¹²⁶ It could be that Indian tribes, as non-participants in the constitutional process, are more like foreign states who do not qualify for constitutional protection of their sovereignty.¹²⁷ On the other hand, tribes, as sovereigns within U.S. territory, might more closely resemble U.S. states than foreign nations when it comes to their sovereignty, suggesting a constitutional limit on federal power to abrogate their sovereignty.

Constitutional structure “split[ting] the atom of sovereignty”¹²⁸ lends support to this conclusion. The Constitution’s structure, a division and diffusion of powers that runs both horizontally among the federal branches and vertically between federal and state sovereigns, was designed to prevent the concentration of power and the attendant temptation to abuse it. A division of powers between the federal government and the tribes certainly would have helped to prevent the history of abuses committed against Native peoples. Whether or not

¹²² U.S. CONST. art. I, § 10, cl. 1.

¹²³ U.S. CONST. art. I, § 10, cl. 3.

¹²⁴ See Ablavsky, *supra* note 6, at 1076–77 (noting that a key constitutional difference between states and tribes is that “[t]hrough ratification, state citizens . . . , at least formally, ceded portions of state sovereignty to the United States” while “Native nations never consented to their inclusion within the United States”).

¹²⁵ The Supreme Court has held that “the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.” *New York v. United States*, 505 U.S. 144, 162 (1992). Rather, “[t]he people, through [the Constitution] established a more perfect union by substituting a national government, acting, with ample power, *directly upon the citizens*” *Id.* (quoting *Lane Cnty. v. Oregon*, 74 U.S. 71, 76 (1868)). Similarly, the Court has understood “foreign nation states to be ‘independent sovereign’ entities” from American law. *Bolivarian Republic of Venezuela v. Helmerich & Payne Int’l Drilling Co.*, 137 S. Ct. 1312, 1319 (2017).

¹²⁶ See, e.g., *Zivotofsky v. Kerry*, 576 U.S. 1, 10 (2015) (recognizing the domestic legal consequences of recognition as a sovereign).

¹²⁷ See *United States v. Lara*, 541 U.S. 193, 219 (2004) (Thomas, J., concurring) (“The tribes, [unlike the states], are not part of th[e] constitutional order, and their sovereignty is not guaranteed by it.”).

¹²⁸ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

embodied in the Constitution,¹²⁹ a more robust recognition of tribal sovereignty would thus be consistent with the Constitution's structural aims.

In short, there is an argument to be made that the Constitution itself enshrines tribal sovereignty. If true, the recognition power, wherever vested, could not be used to diminish that sovereignty. This Article's attempt to revitalize tribal sovereignty, with its attendant treaty-making, need not rely on this argument, however. The argument, based as it is on constitutional text and structure, has been available for as long as the United States has existed. Yet the 1871 Act remains. Without dismissing the argument, this Article turns to an argument that derives strength from two recent developments at the Supreme Court. These developments undercut the 1871 Act with fresh force.

B. Recent Developments

These developments are the Supreme Court's decisions in *Zivotofsky v. Kerry* and *McGirt v. Oklahoma*. Neither case dictates the conclusion that Congress acted unconstitutionally in passing the 1871 Act or that the President may reengage in federal-Indian treaty-making. But these two cases helpfully provide both an opportunity and a blueprint for assessing the 1871 Act's constitutionality and for returning to greater tribal sovereignty through treaty-making.

I. *Zivotofsky v. Kerry*

In *Zivotofsky v. Kerry*, the parents of a U.S. citizen born in Jerusalem wished to have their son's place of birth recorded as "Israel" on his passport.¹³⁰ Congress had by statute instructed the Secretary of State to comply with such requests,¹³¹ but the State Department refused based on an executive branch policy that Jerusalem's status should be resolved through multilateral negotiation.¹³² The resulting lawsuit required the Court "[t]o determine whether the President possesses the exclusive power of recognition"¹³³

¹²⁹ See Ablavsky, *supra* note 6, at 1076, 1084–88 (arguing that while the constitutional status of states and tribes is different, "Native nations' position within the United States was conceived similarly to federalism" and that conception should yet influence the Supreme Court's understanding of Native sovereignty).

¹³⁰ *Zivotofsky*, 576 U.S. at 8–9.

¹³¹ *Id.* at 7; Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, § 214, 116 Stat. 1350, 1365–66 (2002).

¹³² *Zivotofsky*, 576 U.S. at 6–7, 29.

¹³³ *Id.* at 10; see also *id.* at 5 (noting that the Court "must determine whether the President has the exclusive power to grant formal recognition to a foreign sovereign").

In answering that question, the Court consulted “the Constitution’s text and structure, as well as precedent[,] . . . history,” and functional considerations.¹³⁴ The Court ultimately concluded that the President not only possesses the recognition power but that the President’s power is exclusive.¹³⁵

Zivotofsky was a significant case for U.S. foreign relations law. As the Chief Justice recognized in his dissent, it was the first time in the nation’s 225-year history that the “Court accepted a President’s direct defiance of an Act of Congress in the field of foreign affairs.”¹³⁶ At the same time, the Court cut back on prior dicta that had long been cited, including in *Zivotofsky* itself, to support “broad, undefined [presidential] powers over foreign affairs.”¹³⁷ The decision was thus both an astounding victory for a President who acted against Congress’s will and a loss for broad claims of presidential power in foreign relations. It is no wonder, then, that *Zivotofsky* has garnered significant scholarly attention among foreign relations law scholars.¹³⁸

But U.S. foreign relations law and federal Indian law scholarship rarely intersect. Perhaps as a result, federal Indian law scholarship has not explored the potential significance of *Zivotofsky*, with one exception.¹³⁹ One article relies on *Zivotofsky* to argue that the judiciary has no role in the recognition of Indian tribes.¹⁴⁰ That article expressly declines to address the “interesting question left open by the Court in *Zivotofsky* regarding whether tribal recognition is . . . an exclusive executive power or shared political power.”¹⁴¹ *Zivotofsky* indeed left

¹³⁴ *Id.* at 10, 14–15.

¹³⁵ *Id.* at 28, 30–32 (recognizing that the President’s recognition power is exclusive).

¹³⁶ *Id.* at 61 (Roberts, C.J., dissenting).

¹³⁷ *Id.* at 20 (majority opinion). The dicta arose from the landmark decision in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936), which one scholar has described as the Executive’s “‘Curtiss-Wright, so I’m right’ cite.” HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 94 (1990); see also *Zivotofsky*, 576 U.S. at 66 (Roberts, C.J., dissenting) (“The expansive language in *Curtiss-Wright* casting the President as the ‘sole organ’ of the Nation in foreign affairs certainly has attraction for members of the Executive Branch. . . . But our precedents have never accepted such a sweeping understanding of executive power.” (citation omitted)).

¹³⁸ See, e.g., Jack Goldsmith, *Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 114 (2015) (discussing the impact *Zivotofsky* may have on separation-of-powers disputes going forward); Saikrishna Bangalore Prakash, *Zivotofsky and the Separation of Powers*, 2015 SUP. CT. REV. 1, 33 (arguing that the Court in *Zivotofsky* “held that presidential powers go beyond those specifically enumerated in Article II”); Symposium, *Agora: Reflections on Zivotofsky v. Kerry*, 109 AM. J. INT’L L. UNBOUND 1 (2015) (contributions by numerous scholars).

¹³⁹ See Sorenson, *supra* note 97, at 93–94 (arguing that the judiciary has no role in the recognition of Indian tribes).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

that question open, noting that “the recognition of Indian tribes . . . is . . . a distinct issue from the recognition of foreign countries”¹⁴² and thus was not settled by *Zivotofsky* itself. Yet *Zivotofsky* provides both a blueprint for analyzing the question and some reasoning that readily applies to the recognition of tribal sovereignty.

We note one key difference before turning to *Zivotofsky*’s blueprint for analyzing where the power to recognize tribal sovereignty lies. *Zivotofsky* asked whether the President or Congress possesses the entire power to recognize the sovereignty of foreign states and governments, with a focus on recognizing the territorial boundaries of those states.¹⁴³ Our question is narrower: Who possesses the power to recognize the sovereignty of Indian tribes to enter into treaties? While recognition may come as a bundle, it may also be more piecemeal.¹⁴⁴ As multiple opinions in *Zivotofsky* note, the United States recognized Israel in 1948, but reserved “recogniz[ing] Israeli sovereignty over Jerusalem.”¹⁴⁵ It was Congress’s efforts on this additional increment of recognition that gave rise to the litigation.¹⁴⁶ In a similar manner, this Article need not decide whether the President possesses all recognition powers when it comes to federal-Indian relations—for example, the power to recognize the territorial boundaries of tribal lands.¹⁴⁷ The constitutionality of the 1871 Act turns on whether the President possesses the exclusive power to recognize the

¹⁴² *Zivotofsky*, 576 U.S. at 22.

¹⁴³ *See id.* at 5 (asking whether the President’s recognition power is exclusive to assess whether Congress may require the President to communicate that Jerusalem is part of Israel); *id.* at 11 (explaining that, in addition to addressing whether an entity qualifies as a sovereign state and whether a particular government represents that state, recognition “may . . . involve the determination of a state’s territorial bounds”).

¹⁴⁴ *See id.* at 70 (Scalia, J., dissenting) (“A sovereign might recognize a foreign entity as a state, a regime as the other state’s government, a place as part of the other state’s territory, rebel forces in the other state as a belligerent power, and so on.” (citation omitted)); 1 OPPENHEIM’S INTERNATIONAL LAW §§ 47, 49 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) (avowing that “[g]enerally, recognition of a state signifies . . . the possession by it of the full range of rights and obligations which are the normal attributes of statehood,” but recognizing exceptions, including indigenous populations that assert a “separate national identity against an alien . . . administration” (footnote omitted)).

¹⁴⁵ *Zivotofsky*, 576 U.S. at 6; *see id.* at 70 (Scalia, J., dissenting) (“President Truman recognized Israel as a state in 1948, but Presidents have consistently declined to recognize Jerusalem as a part of Israel’s (or any other state’s) sovereign territory.”). *But see id.* at 60 (Thomas, J., concurring in part and dissenting in part) (arguing that “acknowledg[ing] Israel’s sovereignty over Jerusalem” would not be an act of recognition as the United States had already recognized Israel’s “status as a sovereign State”).

¹⁴⁶ *See id.* at 5 (majority opinion) (noting that, if the President possesses exclusive recognition power, the Court must determine the constitutionality of a congressional command concerning the status of Jerusalem).

¹⁴⁷ *Cf. id.* at 33 (Thomas, J., concurring in part and dissenting in part) (reasoning that the congressional command to list Israel in passports for citizens born in Jerusalem violated the President’s foreign affairs powers, while the same command with regard to

sovereignty of tribes to enter treaties. Guided by *Zivotofsky*'s focus on constitutional text and structure, functional considerations, history, and precedent, this Article turns to that particular question to find that the President alone possesses that power.

a. Constitutional Text and Structure

As with any constitutional analysis, including that performed in *Zivotofsky*, the question whether the President possesses the exclusive power to recognize tribal sovereignty to engage in treaty-making begins with the Constitution's text and structure.¹⁴⁸ Indeed, constitutional text and structure are the key considerations; precedent, history, and functional considerations play supporting roles.¹⁴⁹ Whereas the histories of, and precedents governing, foreign and tribal recognition are different, there is overlap in the textual and structural analyses of these two forms of recognition. *Zivotofsky*'s textual and structural analysis of the presidential power to recognize foreign states is thus instructive in the present assessment of the President's power of tribal recognition.

i. Enumerated Powers

The Treaty Clause appears in Article II, which addresses executive authority, and is phrased as a presidential power: "He shall have Power," the clause begins.¹⁵⁰ Arguably, "[t]he power to make treaties . . . include[s] the right to decide with whom to make them, [just] as the power to declare war includes the right to declare whom to fight."¹⁵¹ But even if the power to recognize treaty-making competence is not implicit in the treaty power itself, the treaty power is key to recognition.

As *Zivotofsky* explains, recognition of foreign sovereigns can be accomplished in a variety of ways: expressly through declaration, or implicitly through sending or receiving ambassadors or entering into a treaty.¹⁵² The most direct way to recognize tribal sovereignty to enter into treaties would be to negotiate a federal-Indian treaty. The power to negotiate treaties lies with the President. To continue from above, the clause specifically says that the President "*shall have Power*, by

consular reports of foreign birth did not, as that command fell under Congress's naturalization and necessary and proper powers).

¹⁴⁸ *Id.* at 10, 11, 13–14 (majority opinion).

¹⁴⁹ *Id.* at 10; see also *id.* at 23 ("In separation-of-powers cases [the] Court has often 'put significant weight upon historical practice'" (citing *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) (emphasis omitted))).

¹⁵⁰ U.S. CONST. art. II, § 2, cl. 2.

¹⁵¹ Currie, *supra* note 10, at 449.

¹⁵² See *Zivotofsky*, 576 U.S. at 11.

and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”¹⁵³ The Senate plays a necessary confirming role, but as the Supreme Court has stated, “[t]he President has the sole power to negotiate treaties.”¹⁵⁴ “Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.”¹⁵⁵

The very attempt to negotiate constitutes recognition of a sovereign power to make treaties. The United States could negotiate an endless number of treaties with another state without successfully finalizing a single one and the act of negotiation would underscore that state’s treaty-making authority. Similarly, the negotiation of even an unsuccessful treaty with an Indian tribe would acknowledge the treaty-making sovereignty of that tribe. Because the Constitution clearly places the power and discretion to negotiate solely in the President, the constitutional case for exclusive presidential power to recognize sovereign authority to enter into treaties is stronger than that for exclusive presidential authority over recognition as a whole. Based on the Treaty Clause alone, the textual case may be strong enough to conclude that the President possesses the exclusive power to recognize tribal sovereignty over treaty-making.

But the textual and structural case extends beyond the Treaty Clause. The powers to send and receive ambassadors—both avenues for recognition—also rest primarily or exclusively with the President.¹⁵⁶ A first step in treaty negotiations would be to send an authorized representative or receive an authorized representative who seeks to enter into a treaty. The Constitution designates the President alone to receive ambassadors: “[H]e shall receive Ambassadors and other public Ministers.”¹⁵⁷ Sending ambassadors involves a similar

¹⁵³ U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

¹⁵⁴ *Zivotofsky*, 576 U.S. at 13; see also *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (The President “makes treaties with the advice and consent of the Senate; but he alone negotiates”). Consistent with likely original intent, President Washington sought Senate advice and consent before negotiating the first treaty of his administration, but the practice of consulting with the Senate pre-negotiation quickly faded. See Jean Galbraith, *Prospective Advice and Consent*, 37 YALE J. INT’L L. 247, 256–60 (2012) (discussing how President Washington’s interaction with the Senate in treaty-making initially mirrored Alexander Hamilton’s conception of this relationship as expressed in *Federalist No. 84*).

¹⁵⁵ *Curtiss-Wright*, 299 U.S. at 319.

¹⁵⁶ See U.S. CONST. art. II, § 2, cl. 2; *id.* art. II, § 3; see also *Zivotofsky*, 576 U.S. at 11–13 (discussing the import of the President’s powers to send and receive ambassadors).

¹⁵⁷ U.S. CONST. art. II, § 3. While this provision appears among a list of duties, not powers, and was originally understood by Alexander Hamilton as a mere ministerial function, the Court in *Zivotofsky* concluded, as did Hamilton in later years, that the Reception Clause is a source of recognition power. See *Zivotofsky*, 576 U.S. at 11–13; *id.* at 62–63 (Roberts, C.J., dissenting).

dynamic to treaty-making. The President initiates through nomination and the Senate confirms.¹⁵⁸ Beyond the formal appointment of an ambassador, “the President himself has the power to open diplomatic channels simply by engaging in direct diplomacy with foreign heads of state and their ministers.”¹⁵⁹ In short, “[t]he Constitution . . . assigns the President means to effect recognition on his own initiative[.]”¹⁶⁰ and where a power that implicitly confers recognition is shared, it “is dependent upon Presidential power.”¹⁶¹

Congress can claim no similar power.¹⁶² The most relevant provision that Congress might cite is the Commerce Clause. Congress is empowered “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹⁶³ At best, this clause would support a power to recognize sovereignty to enter a subset of treaties—ones that address Indian commerce.¹⁶⁴ Yet the Court in *Zivotofsky* gave no weight to the Commerce Clause as a source of recognition power.¹⁶⁵ Rather, the Court cited the Commerce Clause—along with congressional prerogatives such as the powers to declare war, regulate naturalization, and appropriate funds—as a source of congressional power to affect foreign affairs more generally and to push back on recognition decisions of the President specifically.¹⁶⁶ “The various ways in which the President may unilaterally effect recognition—and the lack of any similar power vested in

¹⁵⁸ See U.S. CONST. art. II, § 2, cl. 2.

¹⁵⁹ *Zivotofsky*, 576 U.S. at 13–14.

¹⁶⁰ *Id.* at 14.

¹⁶¹ *Id.* at 13. The Vesting Clause, which vests “[t]he executive power” in the President, U.S. CONST. art. II, § 1, cl. 1, might also support the President’s power to recognize, though the *Zivotofsky* Court found it unnecessary to address this contested question. See *Zivotofsky*, 576 U.S. at 14. *But cf. id.* at 33–40 (Thomas, J., dissenting) (relying on the Vesting Clause to find “residual foreign affairs power” in the President). For an overview of the Vesting Clause thesis of presidential power, see David H. Moore, *The Missing D in U.S. Foreign Relations Law*, 109 GEO. L.J. 1139, 1155–56 (2021).

¹⁶² See *Zivotofsky*, 576 U.S. at 14 (observing that, unlike the President, Congress “has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation”).

¹⁶³ U.S. CONST. art. I, § 8, cl. 3.

¹⁶⁴ For divergent views on that question, compare *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 659–65 (2013) (Thomas, J., concurring) (limiting the Indian Commerce Clause to commercial trade), with Ablavsky, *supra* note 6, at 1024 (arguing not only “that the Clause’s meaning was open-ended when drafted: the terms ‘commerce’ and ‘trade’ had distinctive meanings in the Indian context that encompassed a broad range of interactions with Indians,” including such things as adoption, but that the Clause should be read in light of the view, then prevalent, that the Constitution as a whole, including its distribution of military, diplomatic, and commercial authorities, supported exclusive federal power in Indian affairs).

¹⁶⁵ *Zivotofsky*, 576 U.S. at 16.

¹⁶⁶ *Id.* at 16–17.

Congress—suggest that” the President’s power to recognize treaty-making sovereignty in Indian tribes is exclusive.¹⁶⁷

The consequences of a contrary conclusion are also instructive. If Congress possessed the power to decide who is competent to enter into treaties, Congress could completely neuter the treaty power.¹⁶⁸ By denying the competence of any entity, Congress would eliminate the possibility of treaty-making.¹⁶⁹ A power that would conflict so starkly with the Constitution’s distribution of enumerated powers is untenable.

ii. Scope of Legislative Versus Treaty Powers

A presidential power to recognize treaty-making competence is buttressed by the Court’s landmark decision in *Missouri v. Holland*, which compared the reach of the legislative and treaty powers.¹⁷⁰ The Court indicated in *Holland* that the federal government may, through the treaty power, accomplish things that Congress would be unable to do through its legislative powers: “It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could”¹⁷¹ While the principle that Congress may act pursuant to a treaty in ways it could not under legislative powers is contested,¹⁷² the principle has been recognized in federal Indian law as well.

In its 2004 decision in *United States v. Lara*, the Supreme Court reiterated that it has grounded Congress’s “broad general powers to legislate in respect to Indian tribes” in the Indian Commerce and

¹⁶⁷ *Id.* at 14.

¹⁶⁸ See Kannan, *supra* note 2, at 833 (arguing that the 1871 Act violates the constitutional “allocation of authority . . . by denying the President and Senate . . . the authority to enter into treaties with Indian tribes”).

¹⁶⁹ See *id.* at 834 (arguing that if the 1871 Act is constitutional, Congress could eliminate the treaty power by declaring foreign states incompetent to enter treaties). This is not to conclude that the judiciary would be unable to check the President’s power to recognize treaty-making sovereignty if the President sought to abuse that power. See *infra* text accompanying note 241 (explaining that the courts might prevent Congress from bringing an entity under its power merely by labeling it a tribe).

¹⁷⁰ 252 U.S. 416, 433 (1920).

¹⁷¹ *Id.*

¹⁷² See *Bond v. United States*, 572 U.S. 844, 876 (2014) (Scalia, J., concurring in judgment) (concluding that once a treaty is made, “Congress must rely upon its independent (though quite robust) Article I, § 8 powers” to implement it); Nicholas Quinn Rosenkrantz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1885 (2005) (“The ‘Power . . . to make Treaties’ does not extend, as a matter of logic or semantics, to the implementation of treaties already made.” (citation omitted)).

Treaty Clauses in significant part.¹⁷³ The Court acknowledged, however, that the treaty power, appearing in Article II and directed to the President, “does not literally authorize Congress to act legislatively.”¹⁷⁴ Rather, pursuant to *Holland*, “treaties made pursuant to that power can authorize Congress to deal with ‘matters’ with which otherwise ‘Congress could not deal.’”¹⁷⁵ The critical points from both *Holland* and *Lara* are that the treaty power arguably extends further than Congress’s legislative powers and that a treaty must exist before Congress can address all that a treaty might. The President’s negotiation of a treaty is therefore prerequisite to at least some congressional powers. As a result, Congress’s legislative powers cannot swallow the broader treaty power which, again, resides in the President.

iii. Supremacy Clause

The Supremacy Clause similarly suggests that Congress cannot stop the President from exercising the treaty power through mere legislation. The Constitution classifies both statutes and treaties as “supreme Law of the Land.”¹⁷⁶ When a judicially enforceable treaty and a statute conflict, “the later in time prevails.”¹⁷⁷ Consistent with this principle, Congress has been recognized as possessing the power to abrogate prior Indian treaties through legislation.¹⁷⁸ But the reverse is also true. Under the last-in-time rule, the President may pursue a treaty that conflicts with a prior statute, including the 1871 Act. Indeed, after the 1871 Act, the United States did continue to negotiate agreements with tribes, although these were approved by both houses of Congress rather than by a supermajority of the Senate.¹⁷⁹ In *Antoine v. Washington*, the Supreme Court upheld these agreements as “the supreme law of the land,” notwithstanding the earlier 1871 Act.¹⁸⁰ Again, the conclusion is that Congress cannot cripple the President’s power to negotiate treaties through legislative enactments.

¹⁷³ 541 U.S. 193, 200 (2004). *But cf.* Ablavsky, *supra* note 6, at 1082 (providing “a more accurate account of plenary power’s sources, one less reliant on an implausible reading of the Indian Commerce Clause”).

¹⁷⁴ *Lara*, 541 U.S. at 201.

¹⁷⁵ *Id.* (quoting *Holland*, 252 U.S. at 433).

¹⁷⁶ U.S. CONST. art. VI, cl. 2.

¹⁷⁷ 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. a (AM. L. INST. 1987) [hereinafter RESTATEMENT (THIRD)]; *see also id.* § 115 & reporters’ note 1.

¹⁷⁸ *See Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903). When it comes to treaties with foreign states, the treaty remains binding under international law, notwithstanding the subsequent statute. *See* RESTATEMENT (THIRD), *supra* note 177, § 115(1)(b).

¹⁷⁹ *See Antoine v. Washington*, 420 U.S. 194, 197–98, 201–04 (1975).

¹⁸⁰ *Id.* at 204.

iv. Extraconstitutional Power

Given the textual and structural support for an exclusive presidential power to recognize tribal authority to enter into treaties, it is hard to imagine how Congress could prevail by reference to the Constitution. The case for a congressional power to control tribal sovereignty to enter into treaties would have to rest on extraconstitutional powers. The Supreme Court recognized such powers in *United States v. Curtiss-Wright Export Corp.*¹⁸¹ There, the Court reasoned that while domestic powers were delegated to the federal government by the states, the United States as a whole obtained the external powers of a sovereign when it gained independence.¹⁸² As a result, “[t]he powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.”¹⁸³ The Court went on to find that the extraterritorial authority over foreign affairs was vested largely in the President.¹⁸⁴

The Court has incorporated *Curtiss-Wright*’s concept of extraconstitutional power into the realm of Indian affairs, but it has done so to buttress Congress’s powers. Quoting *Curtiss-Wright*, the Court in *Lara* reasoned that, at least during the years when Indian affairs looked more like foreign and military policy than domestic affairs, “Congress’s legislative authority would rest in part, not upon ‘affirmative grants of the Constitution,’ but upon the Constitution’s adoption of preconstitutional powers necessarily inherent in any Federal Government.”¹⁸⁵

¹⁸¹ 299 U.S. 304 (1936); see *id.* at 318 (“[T]he power to make such international agreements as do not constitute treaties in the constitutional sense . . . is [not] expressly affirmed by the Constitution, [but] nevertheless exist[s] as inherently inseparable from the conception of nationality.”).

¹⁸² See *id.* at 315–16 (“As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America.”).

¹⁸³ *Id.* at 318. *Curtiss-Wright*’s theory of extraconstitutional foreign affairs powers has been hotly contested. See, e.g., Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379, 379–81 (2000) (noting the “vigorous dispute” that *Curtiss-Wright*’s extraconstitutional approach has engendered and offering a historical rebuttal to the approach).

¹⁸⁴ See *Curtiss-Wright*, 299 U.S. at 319–22.

¹⁸⁵ *United States v. Lara*, 541 U.S. 193, 201 (2004) (quoting *Curtiss-Wright*, 299 U.S. at 318). *But see* Ablavsky, *supra* note 6, at 1066–67 (arguing that while aspects of the broad federal power over Indian affairs appear extraconstitutional from a textualist perspective, the pervasive international law influence in the Constitution provides constitutional support for this power).

Notwithstanding the Court's recognition of this amorphous power, the likelihood that Congress could claim authority to determine a tribe's sovereign capacity to enter into treaties is slim. First, *Lara* itself suggests that this power had purchase in a particular environment—when, for example, tribes remained a military threat.¹⁸⁶ That environment no longer exists. Second, even if the Constitution were not necessary to vest sovereign powers in the federal government, the Constitution has directed the distribution of those powers among the federal branches. As we have emphasized, the treaty power was assigned to the President, not Congress.¹⁸⁷ Finally, the Court in *Zivotofsky* stepped back from *Curtiss-Wright's* suggestion of untethered presidential power and emphasized the Constitution's express assignment of power.¹⁸⁸ “[W]hether the realm is foreign or domestic,” the Court pronounced, “it is still the Legislative branch, not the Executive branch, that makes the law.”¹⁸⁹ Applying this same rationale, whether the realm is foreign or federal-Indian relations, it is still the President who possesses the treaty power and, tied to that power, the discretion to recognize entities with whom treaties might be made.

b. Functional Considerations

Functional considerations support the same conclusion.¹⁹⁰ It has long been recognized that the President possesses certain functional advantages over Congress in foreign affairs.¹⁹¹ The President can, for example, act with unity, speed, secrecy, and based on information more readily at her disposal.¹⁹² These functional advantages may not apply to federal-Indian relations in the same way that they do in foreign relations. For example, the President would probably not rely on the United States's vast network of diplomatic agents to gather infor-

¹⁸⁶ See *Lara*, 541 U.S. at 201 (noting that during the first 100 years of U.S. history, Indian matters fit better within foreign and military policy than domestic policy).

¹⁸⁷ See U.S. CONST. art. II, § 2, cl. 2.

¹⁸⁸ See *Zivotofsky v. Kerry*, 576 U.S. 1, 19–21 (2015) (“In a world that is ever more compressed and interdependent, it is essential the congressional role in foreign affairs be understood and respected.”); *id.* at 67–68 (Scalia, J., dissenting) (“The People therefore adopted a Constitution that divides responsibility for the Nation’s foreign concerns between the legislative and executive departments.”).

¹⁸⁹ *Id.* at 21 (majority opinion).

¹⁹⁰ See *id.* at 14–15.

¹⁹¹ See *id.* (recognizing the President’s ability to act with unity, speed, and secrecy (citing THE FEDERALIST NO. 70 (Alexander Hamilton))); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320–21 (1936) (recognizing the President’s better access to information and ability to act with secrecy).

¹⁹² See *Curtiss-Wright*, 299 U.S. at 320–21; see also *Zivotofsky*, 576 U.S. at 14–15 (recognizing the President’s capacity to act with unity, speed, and secrecy).

mation about Indian tribes.¹⁹³ Yet the President's functional advantages are still relevant to the recognition of tribal sovereignty to enter treaties.¹⁹⁴

Congress is certainly able to gather information about Indian tribes through hearings, requests to the Department of the Interior, and member visits to tribal territories. Similarly, Congress can direct the actions of the executive in many ways through legislation or by exerting less formal pressures. However, the day-to-day interaction with the tribes occurs in the executive branch. Constitutionally empowered to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices,"¹⁹⁵ the President is able to gain relevant information from within the executive branch and likely to receive at least some of that information in the ordinary course of executive operations, without a request. The President is also able to privately conduct assessments of the conditions of each tribe and to confidentially communicate with tribes in determining whether to recognize a tribe's sovereignty over treaty-making.¹⁹⁶ Once a decision is made, the President can communicate it clearly and in a single, unified voice.¹⁹⁷ Thus, whatever the ideal distribution of responsibility when it comes to determining tribal qualification for legislative benefits, the President offers functional advantages in deciding when tribes may engage in treaty-making.

c. History

The Court in *Zivotofsky* concluded that the President exclusively possesses the recognition power with regard to foreign states and governments, even though "history [was] not all on one side."¹⁹⁸ The same can be said of the history of treaty-making with, and recognition of, Indian tribes. As Parts I and II demonstrate, that history is mixed.

The first century—in which the President led federal-tribal relations on behalf of the United States and embraced treaty-making as

¹⁹³ Cf. *Curtiss-Wright*, 299 U.S. at 320 (noting the President's informational advantage over Congress from having diplomatic agents who gather information about conditions in foreign states).

¹⁹⁴ See Sorenson, *supra* note 97, at 93–94 (recognizing "the need for delicacy and tact in the area of tribal recognition," albeit to reject a judicial role in tribal recognition).

¹⁹⁵ U.S. CONST. art. II, § 2, cl. 1.

¹⁹⁶ See *Zivotofsky*, 576 U.S. at 15 (discussing the President's ability to "engag[e] in the delicate and often secret diplomatic contacts that may lead to a decision on recognition").

¹⁹⁷ See *id.* at 14–15, 17 (recognizing the President's ability to "take the decisive, unequivocal action necessary to recognize other states" and ensure that the United States adopts "a single policy regarding which governments are legitimate in the eyes of the United States and which are not").

¹⁹⁸ *Id.* at 23.

the primary, if not sole, vehicle for those relations¹⁹⁹—supports exclusive presidential power both to recognize tribal sovereignty to make treaties and to initiate treaty-making with the tribes. The 1871 Act marked a shift toward greater involvement by Congress, and particularly the House of Representatives, in federal-Indian relations.²⁰⁰ Initially, that involvement continued to include treaty-making, although the agreements entered into were ratified by both Houses of Congress rather than by the Senate alone.²⁰¹ More recently, legislation has replaced treaty-making.²⁰² Legislation often addresses federal benefits that tribes may receive if recognized by the executive branch, or occasionally by Congress.²⁰³ This more recent history might support a greater role for Congress in the recognition of tribal sovereignty over treaty-making.

As explained more fully in the subsections that follow, however, we believe that to the extent history informs constitutional meaning, the history closest to the Founding is the most relevant for several reasons. First, history plays a supporting, not leading, role in constitutional interpretation. Recent history, even if longstanding, cannot overcome the dictates of constitutional text and structure. Second, greater congressional involvement in Indian affairs does not diminish the constitutional powers of the President, even if the President allows those powers to lie dormant. Parallel developments in U.S. foreign relations law illustrate this point.²⁰⁴ Third, while the term “recognition” is used in identifying tribes that qualify for modern legislative benefits (including federal acknowledgment of aboriginal sovereignty), this is not the recognition on which we focus. As a result, this more modern history is not probative of the power to recognize tribal sovereignty to enter treaties. Consequently, we find the history closest to the Founding to be the most relevant, the most compelling, and the most consistent with constitutional text and structure. As noted, that history supports presidential power to recognize tribal treaty-making sovereignty.

¹⁹⁹ See Kannan, *supra* note 2, at 815, 817–18 (noting the predominance of Article II treaty-making with tribes prior to 1871).

²⁰⁰ See discussion *supra* Part II.

²⁰¹ See *supra* note 83 and accompanying text.

²⁰² See *id.*

²⁰³ See, e.g., Sarah Washburn, *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, 619, 623 (2010).

²⁰⁴ See discussion *supra* Section IV.B.1.

i. The Limits of Historical Evidence

Historical practice is unquestionably influential in constitutional interpretation. The Supreme Court recently affirmed its long-standing practice of looking to history to inform separation of powers decisions.²⁰⁵ Consulting history is appropriate, the Court said, “even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era.”²⁰⁶

It is important to remember, however, that history provides a gloss on constitutional provisions;²⁰⁷ it does not replace them. As Justice Frankfurter stated in *Youngstown Sheet & Tube Co. v. Sawyer*:

[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.²⁰⁸

If a historical practice violates the Constitution, by contrast, it must be declared unconstitutional.²⁰⁹

To illustrate, in *INS v. Chadha*, Congress and the President approved a statute by which one house of Congress could veto the President’s decision, pursuant to delegated authority, “to allow a particular deportable alien to remain in the United States.”²¹⁰ The first legislative veto of this type had been adopted in 1932, over fifty years before *Chadha* was decided.²¹¹ Since that time, almost three hundred such provisions had been included in roughly two hundred statutes.²¹² Moreover, the prevalence of the legislative veto was only increasing.²¹³ Nonetheless, the Court struck down the legislative veto as unconstitutional, noting that “[e]xplicit[,] [applicable,] and unam-

²⁰⁵ See *NLRB v. Noel Canning*, 573 U.S. 513, 524–26 (2014) (describing how since *McCulloch*, the Supreme Court has given “*significant weight*” to historical practice, and this was anticipated by the Founders).

²⁰⁶ *Id.* at 525 (citations omitted).

²⁰⁷ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (stating that a long-running executive practice that has not been challenged by Congress should be treated as evidence of the scope of executive power).

²⁰⁸ *Id.*

²⁰⁹ See *INS v. Chadha*, 462 U.S. 919, 944–45, 959 (1983) (holding the legislative veto unconstitutional, notwithstanding supportive history).

²¹⁰ *Id.* at 923.

²¹¹ See *id.* at 944 (citing James Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 *IND. L.J.* 323, 324 (1977)).

²¹² *Id.*

²¹³ See *id.* at 944–45.

biguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process.”²¹⁴ The Court rejected Congress’s long-standing attempt to aggrandize itself by inserting itself into the Executive’s implementation and enforcement of federal law, despite the President’s acquiescence to this practice. Congress’s attempt to aggrandize itself by diminishing the President’s power to negotiate treaties with tribes should likewise be rejected, notwithstanding long-standing presidential acquiescence.

ii. Comparative Perspectives from U.S. Foreign Relations Law

U.S. foreign relations law confirms that increased congressional involvement in federal-Indian relations—including the post-1871 practice of ratifying agreements with Indian tribes through bicameralism—does not undermine the President’s constitutional power. Again, Article II of the Constitution authorizes the President, “by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”²¹⁵ The Constitution also refers to agreements and compacts with foreign countries in the course of prohibiting states from entering such agreements without congressional consent, but nowhere besides Article II does the Constitution lay out a process for entering into international treaties.²¹⁶ For those unfamiliar with foreign relations law, it may come as a surprise to learn that the United States nonetheless enters into treaties through three additional mechanisms, collectively called executive agreements.²¹⁷ First, the President enters into agreements pursuant to authority from prior Article II treaties.²¹⁸ Second, the President enters into congressional-executive agreements based on *ex ante* or *ex post* approval from a majority of both Houses of Congress.²¹⁹ These agree-

²¹⁴ *Id.* at 945; *see id.* at 944–59 (concluding that because the one-house veto authorized by section 244(c)(2) of the Immigration and Nationality Act was a legislative act, it could not escape the carefully crafted bicameralism and presentment requirements of the Constitution).

²¹⁵ U.S. CONST. art. II, § 2, cl. 2.

²¹⁶ *See* U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power . . .”).

²¹⁷ *See, e.g.*, 11 U.S. DEP’T OF STATE, FOREIGN AFFS. MANUAL § 723.2 (2006) [hereinafter FOREIGN AFFAIRS MANUAL]; RESTATEMENT (THIRD), *supra* note 177, § 303 & cmt. a; Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1254–55 (2008).

²¹⁸ *See, e.g.*, FOREIGN AFFAIRS MANUAL, *supra* note 217, § 723.2-2(A); RESTATEMENT (THIRD), *supra* note 177, § 303(3); Hathaway, *supra* note 217, at 1255.

²¹⁹ *See, e.g.*, FOREIGN AFFAIRS MANUAL, *supra* note 217, § 723.2-2(B); RESTATEMENT (THIRD), *supra* note 177, § 303(2); Hathaway, *supra* note 217, at 1238, 1255–56.

ments thus involve the same process of bicameralism and presentment used to enact statutes.²²⁰ Third, the President enters into sole executive agreements based on her independent constitutional authority, without any involvement from Congress.²²¹

Perhaps even more surprising, the United States does not enter into most treaties through the Article II process.²²² In the last two decades of the twentieth century, for example, the United States entered 2,744 executive agreements but only approximately 372 Article II treaties.²²³ Most of the United States' international agreements are *ex ante* congressional-executive agreements.²²⁴ As a result, at least formally, Congress is far more involved in international treaty-making than Article II would suggest.²²⁵ Scholars debate whether Article II treaties and congressional-executive agreements are completely interchangeable.²²⁶ But even if they are, no one claims that the presence or even predominance of congressional-executive agreements writes the President's Article II treaty power out of the Constitution. Moreover, the United States could enter into a centuries-long period of trade isolationism in which it declined to pursue a single trade agreement, opting for unilateral legislation on tariffs and other trade-related issues, without writing the Article II treaty power out of the Constitution. Similarly, the historical evolution in federal-Indian relations away from Article II treaties to agreements approved by both Houses of Congress and then to legislation does not eliminate the President's discretion to initiate treaty-making at any point.

²²⁰ See, e.g., Hathaway, *supra* note 217, at 1255.

²²¹ See, e.g., FOREIGN AFFAIRS MANUAL, *supra* note 217, § 723.2-2(C); RESTATEMENT (THIRD), *supra* note 177, § 303(4); Hathaway, *supra* note 217, at 1255.

²²² See, e.g., Hathaway, *supra* note 217, at 1254 n.45.

²²³ See *id.* at 1254 n.45, 1258 tbl.1.

²²⁴ See *id.* at 1254 n.45, 1256, 1259–60 tbl.2 & n.53. Of the roughly 2,745 executive agreements, Hathaway could not identify authorizing legislation for 782. See *id.* at 1259–60 tbl.2 & n.53. If these agreements were entered pursuant to a prior treaty or as sole executive agreements, that would leave almost 2,000 congressional-executive agreements in the period studied. See *id.* (finding that there were 2,744 total agreements and 782 agreements that were “not obviously sole executive agreements, treaties, or simply amendments to prior agreements”).

²²⁵ But cf. Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 104, 144–47 (2009) (exposing, and lamenting, that while *ex ante* congressional-executive agreements may give the impression of active congressional involvement, because Congress authorizes these agreements before the President negotiates, these agreements actually shift significant power to the President).

²²⁶ Compare Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 802–03 & n.6, 806–08, 811 (1995), with Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1235 n.47 (1995). The Restatement takes the position that complete fungibility is “[t]he prevailing view.” RESTATEMENT (THIRD), *supra* note 177, § 303 cmt. e.

Since the Founding, there have been unsuccessful efforts to secure a greater role for the House of Representatives in treaty-making.²²⁷ Just because a shift away from treaty-making toward a greater role for the House in Indian affairs happened to be successful does not change the constitutional blueprint that treaty-making may occur without the House. The fact that the shift occurred in an area of law that has seen more than its share of racism and oppression as well as constitutional exceptionalism likewise counsels against giving the more recent historical practice too much weight.

iii. Modern Recognition

Finally, to the extent history is relevant, we find the first one hundred years of federal-Indian relations to be the most compelling, not only because they are most likely to reflect the original constitutional understanding due to proximity but also because they specifically addressed the question on which we focus: recognition of tribal sovereignty to make treaties. With the shift from a sovereignty to a pupilage model and from “negotiation with” to “regulation of” Indian tribes, the recognition decisions at issue in more recent history mean something quite different than the recognition of tribal sovereignty to negotiate treaties.

The Bureau of Indian Affairs’ current regulations governing recognition illustrate this point. The regulations explain how to qualify as “a federally recognized Indian tribe.”²²⁸ Interestingly, one of the avenues involves demonstrating prior “[t]reaty relations with the United States,”²²⁹ thus affirming the continuing significance of federal-Indian treaty-making. But the consequence of recognition is quite different. Whereas treaty-making recognized tribal sovereignty, modern acknowledgement is an administrative procedure that largely determines eligibility “for the special programs and services provided by the United States to Indians because of their status as Indians.”²³⁰

²²⁷ See, e.g., David H. Moore, *Constitutional Commitment to International Law Compliance?*, 102 VA. L. REV. 367, 438–39 (2016) (describing efforts during the Constitution’s drafting and ratification to include the House in treaty-making); Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 415–16 (1998) (discussing a post-Founding effort by Thomas Jefferson to limit treaty-making to matters beyond Congress’s powers); Hathaway, *supra* note 217, at 1302 (describing mid-twentieth-century efforts—motivated in large part by opposition to human rights—to amend the Constitution to prevent treaties from becoming domestic law except through the exercise of Congress’s enumerated powers).

²²⁸ 25 C.F.R. §§ 83.5, 83.11, 83.12.

²²⁹ *Id.* § 83.12(a)(1) (2021); see *id.* § 83.5(a) (designating one route to recognition as requiring demonstration of “previous Federal acknowledgment under § 83.12(a)”).

²³⁰ *Id.* § 83.2; see also *id.* § 83.2(a) (explaining that recognition “[i]s a prerequisite to the protection, services, and benefits of the Federal Government available to those that qualify

Each year, the Department of the Interior “publish[es] in the Federal Register” a list of tribes eligible for these benefits.²³¹ Recognition mostly qualifies a tribe for federal benefits rather than sovereign authorities.²³² Recognition does bear on sovereignty in some ways: It secures the powers, privileges, and immunities “available to other federally recognized Indian tribes.”²³³ On the other hand, recognition also “[m]eans the tribe has the responsibilities, . . . limitations, and obligations” of and is subject “to the same authority of Congress and the United States as other federally recognized Indian tribes.”²³⁴ In short, federal recognition nowadays is as much or more about qualifying for benefits than it is about sovereignty. When it comes to sovereignty, modern recognition implies subjection at least as much as power. Notwithstanding use of the same term, then, the recognition at issue in recent history describes a different dynamic than the recognition with which we are concerned: recognition of sovereign authority to enter treaties.

d. Precedent

As was the case in *Zivotofsky* regarding the recognition of foreign sovereigns, Supreme Court precedent does not directly settle the location of the power to recognize tribal sovereignty to enter treaties. At first glance, three strands of precedent might stand in the way of locating the power to recognize tribal sovereignty in the President. The first consists of opinions declaring that Congress has “broad general powers to legislate in respect to Indian tribes, powers [the Court has] consistently described as ‘plenary and exclusive.’”²³⁵ Three words are key to understanding these precedents: legislate, exclusive, and

as Indian tribes and possess a government-to-government relationship with the United States”).

²³¹ See *id.* § 83.6(a); see also *id.* § 83.1 (defining a “[f]ederally recognized Indian tribe” as “an entity listed on the Department of the Interior’s list under the Federally Recognized Indian Tribe List Act of 1994, which the Secretary currently acknowledges as an Indian tribe and with which the United States maintains a government-to-government relationship”).

²³² See *id.* § 83.2 (explaining that the regulations “implement Federal statutes for the benefit of Indian tribes”).

²³³ See *id.* § 83.2(b)–(c).

²³⁴ *Id.* § 83.2(c)–(d).

²³⁵ *United States v. Lara*, 541 U.S. 193, 200 (2004) (citations omitted); see also *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) (“Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.”). *But see* *Ablavsky*, *supra* note 6, at 1084 (“[T]he authority that the United States originally claimed over Indian tribes . . . was *not* plenary; it acknowledged tribal sovereignty and restricted the authority of the United States to the regulation of Natives’ international alliances and land sales.”).

plenary. Fundamentally, the Court's statements in these opinions address Congress's power to *legislate*—not to enter into treaties. Even when agreements are ratified through bicameralism, legislation is different than treaty-making, which involves negotiation with another entity. The placement of the processes for adopting treaties and legislation in two separate articles of the Constitution confirms as much.²³⁶ As a result, Supreme Court statements about the breadth of Congress's legislative powers should not be assumed to embrace the power over treaty-making. Nor should they be read to step even beyond that to find that Congress has an exclusive power vis-à-vis the President. The *exclusive* nature of Congress's legislative powers over Indian affairs limits state assertions of authority to regulate Indian tribes;²³⁷ it does not exclude the President's independent powers.

Finally, assertions that Congress's power is both *plenary* and *exclusive* appear to compensate for the fact that Congress's textual claim to broad power over Indian tribes is weak.²³⁸ The Indian Commerce Clause speaks of "regulat[ing] Commerce *with* . . . Indian Tribes," not of regulating tribes themselves.²³⁹ Moreover, "the history of the . . . Clause's drafting, ratification, and early interpretation does not support either 'exclusive' or 'plenary' federal power over Indians."²⁴⁰ The Court has filled the resulting textualist vacuum with an exclusive and plenary power, but two qualifications are critical. First, there is no vacuum when it comes to the treaty power: That power is expressly vested in the federal government, and specifically the President, eliminating any need to find a power to enter into treaties in Congress. Second, notwithstanding the descriptors "plenary" and "exclusive," the Court recognizes limits to Congress's power. For example, the Court has said that it would step in if Congress tried to

²³⁶ Compare U.S. CONST. art. II, § 2, cl. 2, with *id.* art. I, § 7, cl. 2.

²³⁷ See, e.g., Ablavsky, *supra* note 6, at 1014 (noting that the Supreme Court sometimes uses "plenary" and "exclusive" "interchangeably . . . to describe federal power over Indian affairs to the exclusion of states"); *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865) ("Neither the Constitution of the State nor any act of its legislature, however formal or solemn, whatever rights it may confer on those Indians or withhold from them, can withdraw them from the influence of an act of Congress which that body has the constitutional right to pass . . .").

²³⁸ See Ablavsky, *supra* note 6, at 1050–51 (agreeing with revisionists that "the Indian Commerce Clause alone cannot justify exclusive federal power over Indian affairs," while finding support for exclusive federal power over Indian affairs in the original, structural understanding of the Constitution).

²³⁹ U.S. CONST. art. I, § 8, cl. 3 (emphasis added). Consistent with this point, Ablavsky argues that the Clause "was drafted as the United States was repudiating a failed effort to aggressively assert authority against Native nations" and "return[ing] to diplomatic models for negotiating with Natives as independent polities." Ablavsky, *supra* note 6, at 1054.

²⁴⁰ Ablavsky, *supra* note 6, at 1017. *But cf. id.* at 1050–51 (finding support beyond the Indian Commerce Clause for exclusive federal power over Indian affairs).

bring an entity under its power by improperly labeling it as an Indian tribe.²⁴¹ The result is that even what the Court describes as “plenary” and “exclusive” power has limits.

The second strand of precedents addresses the power to determine whether an entity remains a tribe subject to Congress’s power over Indian affairs. The judiciary generally defers “to the political departments in determining whether Indians are recognized as a tribe.”²⁴² Locating decisions regarding tribal status in the political branches rather than the courts does not answer the question at hand: whether the President possesses the power to recognize treaty-making sovereignty.

Nonetheless, in some cases the Court has identified Congress as the authority to decide tribal status.²⁴³ In *United States v. Sandoval*, for example, the Court stated “that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.”²⁴⁴ Again, the Court’s focus was on the role of the judiciary rather than the division of power

²⁴¹ See *Baker v. Carr*, 369 U.S. 186, 216–17 (1962) (asserting that the judiciary would “strike down any heedless [congressional] extension of [the Indian tribe] label”); see also *United States v. Sandoval*, 231 U.S. 28, 46 (1913) (“Congress may [not] bring a community or body of people within the range of [the federal power over Indians] by arbitrarily calling them an Indian tribe.”).

²⁴² *Baker*, 369 U.S. at 215; cf. *Zivotofsky v. Kerry*, 576 U.S. 1, 10 (2015) (noting prior cases that had “address[ed] the division of recognition power . . . between the courts and the political branches, . . . not between the President and Congress”). *Baker* emphasizes, however, that “there is no blanket rule.” *Baker*, 369 U.S. at 215. Thus, in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 12 (1831), the Court deferred to the political branches as to whether the Cherokee nation “was an entity, a separate polity,” *Baker*, 369 U.S. at 215 n.43, but made its own determination as to whether the nation was a foreign state for jurisdictional purposes. See *id.* (noting that “whether . . . the tribe had such status as to be entitled to sue originally was a judicially soluble issue”). For pre-*Baker* cases stating the general rule, see *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865) (“[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 . . . Indians are recognized as a tribe, this court must do the same.”); *Sandoval*, 231 U.S. at 47 (quoting the same from *Holliday*, 70 U.S. (3 Wall.) at 419).

²⁴³ Cf. *Zivotofsky*, 576 U.S. at 10 (noting that “some isolated statements in [prior] cases len[t] support to the position that Congress has a role in the recognition process”).

²⁴⁴ *Sandoval*, 231 U.S. at 46–47; see also *Tiger v. W. Inv. Co.*, 221 U.S. 286, 315 (1911) (citing prior decisions for the “settled doctrine” that “Congress, in pursuance of the long-established policy of the government, has a right to determine for itself when the guardianship . . . shall cease,” for “[i]t is for that body, and not the courts, to determine when the true interests of the Indian require his release from such condition of tutelage”); *In re Heff*, 197 U.S. 488, 499 (1905), *overruled in part by United States v. Nice*, 241 U.S. 591 (1916) (“[I]t is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress.”).

between the political branches. Indeed, immediately after making this statement of Congress's role, the Court looked to the actions of both "the legislative and executive branches" regarding the status of the tribe at issue.²⁴⁵ Likewise, the Court repeated its general rule that it will "follow the action of the executive and other political departments" when it comes to whether tribes remain in a status of pupillage to the United States.²⁴⁶

To the extent *Sandoval* is relevant to the separation of powers between Congress and the President, two additional points are critical. The first point concerns the power the Court was addressing. The question in *Sandoval* was whether the Pueblo and their lands could be considered Indian for purposes of a legislative prohibition on "the introduction of intoxicating liquor" into Indian country.²⁴⁷ Following the general rule of deference noted above, the Court deferred to Congress's own determination on that issue.²⁴⁸ The congressional power the Court acknowledged in *Sandoval* was the power to classify people or lands as Indian which would bring them within the scope of congressional authority to regulate the federal-Indian relationship,²⁴⁹ not the power to recognize the sovereign authority of tribes.

Second, the Court focused on Congress because Congress had enacted the statute classifying Pueblo lands as Indian.²⁵⁰ In *Holliday*, the Court emphasized the decisions of "the Secretary of the Interior and the Commissioner of Indian Affairs [for they had] decided that it [was] necessary, in order to carry into effect the provisions of [a]

²⁴⁵ *Sandoval*, 231 U.S. at 47; see also *id.* at 39–44 (describing the actions and assessment of the federal government's actions that manifest treatment as an Indian tribe).

²⁴⁶ *Id.* at 47 (quoting *Holliday*, 70 U.S. (3 Wall.) at 419). This apparent inconsistency is not limited to the opinion in *Sandoval*. Compare *United States v. Rickert*, 188 U.S. 432, 443 (1903) ("Indians are in a state of dependency and pupillage, entitled to the care and protection of the government. When they shall be let out of that state is for the United States to determine without interference by the courts or by any state."), with *id.* at 445 ("It is for the legislative branch of the government to say when these Indians shall cease to be dependent That is a political question, which the courts may not determine.").

²⁴⁷ *Sandoval*, 231 U.S. at 38. Similarly, in *Tiger v. Western Investment Co.*, the question was whether an Indian's conveyance of allotted lands required the Secretary of Interior's approval, a requirement Congress had imposed to protect Indians from harmful conveyances. 221 U.S. at 299, 305–06.

²⁴⁸ See *Sandoval*, 231 U.S. at 46–47.

²⁴⁹ See *Baker v. Carr*, 369 U.S. 186, 282 (1962) (Frankfurter, J., dissenting) (citations omitted) ("[E]ven for the purpose of determining the extent of congressional regulatory power over tribes and dependent communities of Indians, it is ordinarily for Congress, not the Court, to determine whether or not a particular Indian group retains the characteristics constitutionally requisite to confer the power."); *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865) (stating that if the political departments recognize an entity as a tribe, "then, by the Constitution of the United States, they are placed, for certain purposes, within the control of the laws of Congress").

²⁵⁰ See *Sandoval*, 231 U.S. at 37–38.

treaty, that the tribal organization should be preserved.”²⁵¹ What appears from these cases, then, is that the political branches have discretion to determine the status of tribes as it relates to the authorities the particular political branch possesses. Congress may decide whether an entity qualifies as a tribe under a law regulating trade with tribes. And, critical for this Article, the President may decide whether a tribe is competent to conclude a treaty for purposes of federal-Indian treaty-making. This strand of precedent thus supports a presidential recognition power.

A final precedent might also appear initially to bear on the recognition power. In 1831, the Supreme Court faced a petition from the Cherokee Nation to prevent Georgia from enforcing its laws in Cherokee territory in what was a concerted effort to break the Cherokee Nation.²⁵² The Cherokee Nation invoked the Court’s original jurisdiction, arguing the case was one by “a foreign state against the state of Georgia.”²⁵³ The Court was thus called upon to decide whether an Indian nation qualifies as a foreign state for jurisdictional purposes.²⁵⁴ The Court concluded that Indian tribes or nations do not; although they may “be a nation, . . . [they are] not foreign to the United States.”²⁵⁵ This conclusion might be taken out of context to suggest that treaties with Indian tribes are likewise inappropriate because tribes are not foreign states. Yet the Court handed down this decision during the era of treaty-making with tribes and specifically cited “[t]he numerous treaties made with them” as evidence that “[t]hey have been uniformly treated as a state.”²⁵⁶

In all of these precedents, there is a risk of taking pronouncements out of context. The cases discussed concern the nature of the federal-Indian relationship, as well as the separation of federal powers with regard to Indian affairs, and are thus consistent with this Article’s focus on the question of who has the power to recognize an Indian nation’s competence to engage in federal-Indian treaty-making. However, none of the cases directly engage with this question, and some suggest that recognition follows the federal power being exercised such that the President would decide whether a tribe is competent to engage in treaty-making.

Using *Zivotofsky*’s framework as a guide, the case for exclusive presidential power to recognize tribal sovereignty to enter into trea-

²⁵¹ *Holliday*, 70 U.S. (3 Wall.) at 419.

²⁵² *See Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 1, 4, 7–9, 11 (1831).

²⁵³ *Id.* at 1.

²⁵⁴ *See id.* at 15–16.

²⁵⁵ *Id.* at 19.

²⁵⁶ *Id.* at 16.

ties is compelling. Constitutional text, and structure in particular, locate the treaty-making power and the recognition of aspects of sovereignty in the President. Early history supports this conclusion. Later history is more complicated, but history can only bear so much weight in constitutional interpretation and a history of greater congressional involvement in Indian affairs does not eliminate presidential power that is enshrined in the Constitution, whether in Indian or foreign affairs.

Finally, because the Court's precedents do not speak directly to the power to recognize treaty-making competence, they do not contend with the conclusion supported by the Constitution itself. Together, then, the evidence supports a uniquely presidential power: the power to recognize the sovereignty of Indian tribes to engage in treaty-making.²⁵⁷

e. The President's Exclusive Recognition Power and the 1871 Act

Having concluded that the President possesses an exclusive power to recognize the sovereignty of Indian tribes to enter treaties, it remains to determine whether the 1871 Act unconstitutionally usurps that power.²⁵⁸ The answer is apparent: The statute that the Court held unconstitutional in *Zivotofsky* was less of an intrusion on the President's recognition power than is the 1871 Act. Representing in a passport that a U.S. citizen was born in Jerusalem, Israel, as the *Zivotofsky* statute required, "would not itself constitute a formal act of recognition."²⁵⁹ It would instead require the President to "contradict his prior recognition determination [and to do so] in an official document issued by the Secretary of State."²⁶⁰ That alone was enough to render the statute in *Zivotofsky* unconstitutional.²⁶¹ The 1871 Act goes further. It exercises the recognition power itself to prohibit the

²⁵⁷ Given the strength of the case for an exclusive presidential power to recognize tribal sovereignty to enter treaties, we, like the Court in *Zivotofsky*, find it unnecessary to consider whether the Vesting Clause of Article II strengthens the argument. See *Zivotofsky v. Kerry*, 576 U.S. 1, 14 (2015).

²⁵⁸ See *id.* at 28 (assessing the constitutionality of the statute at issue after concluding that "the power to recognize foreign states resides in the President alone").

²⁵⁹ *Id.* at 30. The dissenting opinions emphasize this point, albeit to conclude that the statute at issue in *Zivotofsky* was not an incursion on the recognition power. See *id.* at 64–65 (Roberts, C.J., dissenting); *id.* at 71–77 (Scalia, J., dissenting) (same).

²⁶⁰ *Id.* at 30 (majority opinion).

²⁶¹ *Id.* The Court found additional support for that conclusion in "the longstanding treatment of a passport's place-of-birth section as official executive statement implicating recognition" and in "the undoubted fact that the purpose of the statute was to infringe on the recognition power." *Id.* at 30–31. The 1871 Act's intention to infringe on the recognition power is equally clear from its text.

recognition of any “Indian nation or tribe within the territory of the United States . . . as an independent nation, tribe or power with whom the United States may contract by treaty.”²⁶² The unconstitutionality of the 1871 Act is therefore even more apparent than was the unconstitutionality of the statute in *Zivotofsky*. A cornerstone of the pupilage model of federal-Indian relations crumbles under the *Zivotofsky* analysis, making room for revitalization of the sovereignty model.

2. *McGirt v. Oklahoma*

One other recent case strengthens the argument for tribal sovereignty to enter treaties: *McGirt v. Oklahoma*, which turned on treaty guarantees made during the period of federal-Indian treaty-making.²⁶³ In the 1800s, the United States forced the Creek Nation “to leave their ancestral lands in Georgia and Alabama.”²⁶⁴ Traveling the Trail of Tears, the Creek settled on a reservation beyond the western bank of the Mississippi in what is now Oklahoma.²⁶⁵ By treaty, the United States guaranteed that these lands “would be secure forever.”²⁶⁶ The United States also guaranteed the Creek Nation the right to self-government.²⁶⁷

As with so many promises made to Native peoples, the United States reneged on these guarantees in various ways.²⁶⁸ Although later shifting course, the United States restricted the Creek Nation’s self-governance through various actions, including abolishing its tribal courts.²⁶⁹ Through allotment, the United States disrupted Creek territory, leaving the land, which was “once undivided and held by the Tribe, . . . now fractured into pieces,” many of which “now belong to persons unaffiliated with the [Tribe].”²⁷⁰

McGirt v. Oklahoma arose out of this troubled history. *McGirt*, a member of the Creek Nation, was convicted of serious sexual crimes

²⁶² Appropriations Act of March 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (codified as amended at 25 U.S.C. § 71).

²⁶³ 140 S. Ct. 2452 (2020).

²⁶⁴ *Id.* at 2459.

²⁶⁵ *Id.*

²⁶⁶ *Id.*; see also *id.* at 2461–62.

²⁶⁷ *Id.* at 2459, 2462. The United States repeated these promises in later years. See *id.* at 2461.

²⁶⁸ *Id.* at 2462; see also *id.* at 2463, 2465–66.

²⁶⁹ *Id.* at 2465–68.

²⁷⁰ *Id.* at 2462; see *id.* at 2463 (discussing the impact of the “allotment era” on Creek lands). The majority and principal dissent see this history quite differently. See *id.* at 2483–85 (Roberts, C.J., dissenting) (recounting and interpreting the historical context differently from the majority).

by an Oklahoma state court.²⁷¹ By federal statute, Oklahoma had no jurisdiction to prosecute McGirt if the crimes were committed on the Creek reservation.²⁷² No one questioned that McGirt's offenses occurred on that land.²⁷³ Rather, Oklahoma asserted that, treaties notwithstanding, the land in question was "no longer a reservation."²⁷⁴ In support of this proposition, Oklahoma proffered a range of arguments. Oklahoma's primary argument was that the United States' broken promises to the Creek evidenced a further breach: disestablishment of the Creek reservation.²⁷⁵ Oklahoma likewise argued that its own practice of disregarding the reservation's status in prosecuting crimes was evidence of disestablishment.²⁷⁶ Oklahoma also cited, *inter alia*, changed demographics resulting from the "speedy and persistent movement of white settlers onto Creek lands throughout the late 19th and early 20th centuries,"²⁷⁷ and the potential consequences of the Court finding that the Creek land was still, consistent with treaty, a reservation.²⁷⁸

The Court's 5-4 split suggests that Oklahoma's arguments could easily have provided a way out of the federal government's treaty obligations. Prior precedents made room for the Court to look beyond congressional statutes to find the disestablishment of a reservation otherwise guaranteed by treaty.²⁷⁹ Indeed, the dissent in *McGirt* would have relied on these precedents to effectively assist Congress in disestablishing the reservation and pointedly criticized the majority for departing from the Court's established approach.²⁸⁰

²⁷¹ *Id.* at 2459 (majority opinion).

²⁷² *See id.* at 2459–60.

²⁷³ *Id.* at 2460.

²⁷⁴ *Id.*

²⁷⁵ *See id.* at 2463 (pointing to congressional efforts to obtain cession or allotment of Creek lands); *id.* at 2465–66 (pointing to other ways Congress intruded on the Creek's promised right to self-governance during the allotment era).

²⁷⁶ *See id.* at 2470–71.

²⁷⁷ *Id.* at 2473.

²⁷⁸ *See id.* at 2478–79 (noting that such a decision could implicate half of Oklahoma and about "1.8 million of its residents").

²⁷⁹ *See id.* at 2482 (Roberts, C.J., dissenting) (arguing that under prior precedents, the Court "determine[s] whether Congress intended to disestablish a reservation by examining" not only statutes but "'all the surrounding circumstances,' including the 'contemporaneous and subsequent understanding of the status of the reservation'" (quoting *Nebraska v. Parker*, 577 U.S. 481, 488 (2016))). *But see id.* at 2468–69 (majority opinion) (distinguishing prior precedents).

²⁸⁰ *See id.* at 2482–83, 2485–502 (Roberts, C.J., dissenting) (relying on prior precedent to conclude that Congress had disestablished any Creek reservation more than one hundred years ago).

Not only was there a well-worn path to disestablishment, the stakes for upholding the Creek's treaty rights were high.²⁸¹ Consider the consequences. McGirt's crimes were serious;²⁸² he was convicted "of molesting, raping, and forcibly sodomizing a four-year-old girl" and "sentenced to 1,000 years plus life in prison."²⁸³ Upholding the Creek's treaty rights would annul his conviction, though it might well result in a new trial in federal court.²⁸⁴ Upholding treaty rights would also call into question decades of convictions of serious crimes committed by other defendants.²⁸⁵

The consequences for Oklahoma were likewise significant. If the Creek's treaty rights were upheld, Oklahoma would have no authority "to prosecute Indians for crimes committed in a portion of Northeastern Oklahoma that includes most of the city of Tulsa."²⁸⁶ Moreover, other tribes might be emboldened "to vindicate similar treaty promises."²⁸⁷ "Oklahoma fear[ed] that perhaps as much as half its land and roughly 1.8 million of its residents could wind up within

²⁸¹ Indeed, they were sufficiently high that Oklahoma has petitioned the Court in a series of cases to reverse its decision rejecting disestablishment. *See, e.g., Oklahoma v. Castro-Huerta*, No. F-2017-1203 (Okla. Crim. App.), *petition for cert. filed*, No. 21-429 (U.S. Sept. 17, 2021); Curtis Killman, *Oklahoma AG Dismisses Appeal Targeting McGirt After State Court Reverses Course on Death-Row Convicts*, TULSA WORLD (Sept. 4, 2021), https://tulsaworld.com/news/local/crime-and-courts/oklahoma-ag-dismisses-appeal-targeting-mcgirt-after-state-court-reverses-course-on-death-row-convicts/article_90ca9e64-0cd4-11ec-9e14-93c0ebcc47fa.html [<https://perma.cc/WF7P-XWMY>] (last updated Oct. 17, 2021) ("The state currently has nine petitions before the U.S. Supreme Court that are aimed at overturning or limiting the *McGirt* decision.").

²⁸² *McGirt*, 140 S. Ct. at 2459 (majority opinion).

²⁸³ *Id.* at 2482 (Roberts, C.J., dissenting).

²⁸⁴ *See id.* at 2459 (majority opinion) (acknowledging the petitioner's argument that "[a] new trial . . . must take place in federal court"). The Court notes that "many defendants may choose to finish their state sentences rather than risk re prosecution in federal courts where sentences can be graver." *Id.* at 2479. Noting that McGirt did not choose to complete his "1,000 years plus life" sentence, the dissent warns that "the federal government . . . may lack the resources to re prosecute all [whose convictions would be overturned], and the odds of convicting again are hampered by the passage of time, stale evidence, fading memories, and dead witnesses." *Id.* at 2501 (Roberts, C.J., dissenting). The likelihood of federal prosecution is thus hard to predict.

²⁸⁵ *See id.* at 2479 (majority opinion); *id.* at 2482, 2500–01 (Roberts, C.J., dissenting). The majority notes that finding disestablishment could similarly "call into question every federal conviction obtained for crimes committed on trust lands and restricted Indian allotments since Oklahoma recognized its jurisdictional error [in prosecuting such crimes] more than 30 years ago." *Id.* at 2480 (majority opinion).

²⁸⁶ *Id.* at 2460 (majority opinion); *id.* at 2501 (Roberts, C.J., dissenting). Because Oklahoma would only be prevented from prosecuting Indians who committed certain crimes on reservation lands, the majority and dissent disagree over the degree of disruption the Court's holding would cause. *Compare id.* at 2479 (majority opinion), *with id.* at 2501 (Roberts, C.J., dissenting).

²⁸⁷ *Id.* at 2479 (majority opinion).

Indian country.”²⁸⁸ Confirming the continuing existence of the reservation would not only disable Oklahoma’s jurisdiction to prosecute certain crimes, but it would also “create[] significant uncertainty for the State’s continuing authority over any area that touches Indian affairs, . . . from zoning and taxation to family and environmental law.”²⁸⁹ Similarly, confirming the reservation might “trigger a variety of federal civil statutes and rules, including ones making the region eligible for assistance with homeland security, . . . historical preservation, . . . schools, . . . highways, . . . roads, . . . primary care clinics, . . . housing assistance, . . . nutritional programs, . . . disability programs, . . . and more.”²⁹⁰ In short, the potential consequences of upholding the Creek’s treaty rights to their reservation were significant. In the majority’s view, the arguments against confirming the continued existence of the reservation “follow[ed] a sadly familiar pattern”: “Yes, promises were made, but the price of keeping them has become too great, so now we should just cast a blind eye.”²⁹¹

In a surprising turn, the Court refused to endorse this pattern. Although the Court acknowledged that Congress has “significant constitutional authority when it comes to tribal relations, possessing even the authority to breach its own promises and treaties,”²⁹² the Court required that Congress “clearly express its intent to do so.”²⁹³ In the absence of such an expression, the Court refused to take that step for Congress.²⁹⁴ Without a clear indication from Congress, the *McGirt* Court held “the government to its word.”²⁹⁵

The Court’s opinion is a significant win for federal-Indian treaty-making and the sovereignty model of federal-Indian relations. The Court respected the sovereignty of the Creek Nation to enter into treaties at the time of the relevant treaty. Moreover, by upholding the ongoing vitality of the resulting treaty, the Court confirmed the value

²⁸⁸ *Id.*; see also *id.* at 2482 (Roberts, C.J., dissenting) (noting that “the Court’s reasoning portends that there are four more . . . reservations in Oklahoma . . . [that] encompass the entire eastern half of the State—19 million acres that are home to 1.8 million people, only 10%–15% of whom are Indians”).

²⁸⁹ *Id.* at 2482 (Roberts, C.J., dissenting); see also *id.* at 2480 (majority opinion) (noting the State’s concern that upholding the Creek Nation’s reservation rights would “have significant consequences for civil and regulatory law”).

²⁹⁰ *Id.* at 2480 (citations omitted); see also *id.* at 2498 (Roberts, C.J., dissenting) (identifying various statutes that apply to former reservations).

²⁹¹ *Id.* at 2482 (majority opinion).

²⁹² *Id.* at 2462.

²⁹³ *Id.* at 2463; see also *id.* at 2462 (“If Congress wishes to break the promise of a reservation, it must say so.”). The principal dissent, by contrast, argued that there was compelling evidence of congressional intent to disestablish. See *id.* at 2483–85, 2489–502 (Roberts, C.J., dissenting).

²⁹⁴ See *id.* at 2459, 2462, 2482 (majority opinion).

²⁹⁵ *Id.* at 2459.

of treaties as a tool in federal-Indian relations. Thus, although *McGirt* does not speak directly to tribal sovereignty to enter into treaties nor to the recognition of that sovereignty, *McGirt* reinvigorates the prospects of federal-Indian treaty-making and of a sovereignty model. It provides a compelling contemporary example of the kind of problem that might profitably be addressed by engaging in genuine treaty negotiations.

V

PROSPECTS AND IMPLICATIONS

A return to treaty-making requires two things: elimination of the Act of 1871 and federal re-engagement in treaty-making. The constitutional arguments developed in the prior Part accomplish the first task. Without these constitutional arguments, the 1871 Act might be an insurmountable obstacle. Advocates would be left in the position of marshalling policy arguments to try to persuade Congress to retire a statute that has governed federal-Indian relations for over one hundred years to return to a process—treaty-making—in which Congress, or at least the House of Representatives, has a diminished voice. The prospects of such an effort are slim indeed. Moreover, to effect the change, Congress would have to engage in bicameralism and presentment, hurdles deliberately designed to favor the status quo.²⁹⁶ Even if those hurdles did not prevent retirement of the 1871 Act, the current climate of hyper-partisanship likely would. The arguments made in this Article provide a constitutional vehicle for excavating the 1871 Act from the bedrock of federal Indian law more expeditiously and definitively.

The arguments make it possible for the executive to act alone both to recognize tribal sovereignty in treaty-making and to initiate treaty-making. The recent appointment of Deb Haaland as the first Native Secretary of the Interior,²⁹⁷ combined with the current federal policy of promoting tribal self-determination, may signal greater openness of the executive branch to taking such steps.

The benefits of a return to treaty-making are numerous, significant, and extend even beyond the United States. Perhaps the most significant benefit would be a shift away from the pupilage model and toward the sovereignty model of federal-Indian relations. As noted in

²⁹⁶ Cf. *id.* at 2462 (“Mustering the broad social consensus required to pass new legislation is a deliberately hard business under our Constitution.”).

²⁹⁷ See Nathan Rott, *Deb Haaland Confirmed as 1st Native American Interior Secretary*, NPR (Mar. 15, 2021, 6:21PM), <https://www.npr.org/2021/03/15/977558590/deb-haaland-confirmed-as-first-native-american-interior-secretary> [https://perma.cc/UZ4E-UB2T].

Part III,²⁹⁸ neither eliminating the 1871 Act nor engaging in treaty-making eliminates the plenary powers doctrine, which lies at the heart of the pupilage model. Congress could still legislate pursuant to that plenary power in lieu of approving treaties and even abrogate treaties. Yet rejection of the 1871 Act and a return to treaty-making would challenge the foundation of the pupilage model: that tribes are mere wards of the state. Even if negotiations never resulted in a treaty or even if a negotiated treaty never secured Senate consent, the mere act of engaging in treaty negotiations would go a significant distance in communicating a revived respect of tribal sovereignty.²⁹⁹

On a more practical level, consider the issues that might be addressed through reviving treaty negotiations. The ruling in *McGirt* left the state of Oklahoma with many questions regarding the scope of its authority.³⁰⁰ Rather than resolve these issues through piecemeal litigation delving into the history of particular parcels of land, the executive could negotiate a resolution with the Creek Nation. Treaty-making might also be used to address the concerns of tribes regarding land use, such as proposed pipelines that may threaten treaty-protected water and other resources.³⁰¹

Revival of tribal sovereignty would also advance the current federal policy of promoting tribal self-determination. Since the 1970s, the federal government has engaged in efforts to strengthen Indian self-determination.³⁰² A return to treaty-making would be a powerful way of effectuating that policy.

Reviving treaty-making would also ensure compliance with international norms. The principal international document on Indigenous rights, the U.N. Declaration on the Rights of Indigenous Peoples, repeatedly emphasizes the need to consult with Native peoples in matters affecting them. For example, the Declaration states that “Indigenous peoples have the right to participate in decision-making

²⁹⁸ See *supra* Part III.

²⁹⁹ See Kannan, *supra* note 2, at 837 (“Tearing [the 1871 Act] down . . . would be an unambiguous, strong endorsement of sovereignty by the United States and a proclamation that the United States is an ally of the tribes in their lonely battle to protect their tribal sovereignty.”).

³⁰⁰ See *supra* text accompanying notes 292–95.

³⁰¹ See, e.g., Yasmine Askari, *What Are the Treaties Being Invoked by Line 3 Opponents?*, MINNPOST (July 14, 2021), <https://www.minnpost.com/environment/2021/07/what-are-the-treaties-being-invoked-by-line-3-opponents> [<https://perma.cc/P7Z5-ASND>] (discussing the construction of and subsequent opposition to the Enbridge Line 3 pipeline in Minnesota).

³⁰² See *supra* notes 98–101 and accompanying text.

in matters which would affect their rights.”³⁰³ Treaty-making ensures not only consultation but also consent.

Compliance with these norms would also benefit U.S. standing in the international community. More importantly, U.S. adoption of sovereign-to-sovereign treaty-making would be a model across the globe. Other countries with significant Indigenous populations, such as Canada and Australia, have adopted aspects of the U.S. approach to Indigenous peoples.³⁰⁴ Indeed, they have gone so far as to rely on U.S. Supreme Court precedents on matters of Indian law.³⁰⁵ As a result, U.S. improvement in the treatment of Native peoples brought about through renewed treaty-making would likely redound to the benefit of Indigenous people around the world.

CONCLUSION

The pupilage model of federal-Indian relations that has been in place since 1871 has led to untold abuses. There is another way: the original sovereignty model in which treaty-making played a prominent role. The Appropriations Act of 1871 tried to put a hard stop to this model. Drawing on U.S. foreign relations law, this Article establishes that the 1871 Act is unconstitutional. Under the blueprint provided in *Zivotofsky v. Kerry*, the President possesses an exclusive power to recognize tribal sovereignty to engage in treaty-making. Moreover, the Court’s recent decision in *McGirt* confirms the validity and viability of treaty-making in federal-Indian relations. Revealing the significance of these developments, this Article paves a path for the revitalization of Indian sovereignty and treaty-making, with significant benefits both at home and abroad.

³⁰³ Indigenous Peoples Declaration, *supra* note 108, art. 18. Another provision requires states to “consult and cooperate in good faith with the indigenous peoples concerned . . . in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that affect them.” *Id.* art. 19. Other provisions require consultation, cooperation, and/or consent before states take specified actions such as safeguarding Indigenous children, combatting prejudice against Indigenous peoples, or developing health and housing programs. *See id.* arts. 10, 11(2), 12(2), 15(2), 17(2), 22(2), 23, 27, 28(2), 29(2)–(3), 30, 31(2), 32(2), 36(2); *cf. id.* art. 41 (requiring the United Nations and other international organizations, in their efforts to “contribute to the full realization of the . . . Declaration[.]” to establish “[w]ays and means of ensuring participation of indigenous peoples on issues affecting them . . .”).

³⁰⁴ *See generally* Blake A. Watson, *The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand*, 34 SEATTLE U. L. REV. 507 (2011) (discussing the impact of the “American doctrine of discovery” on Indigenous land rights in former British colonies).

³⁰⁵ *See, e.g., id.* at 508–09, 515, 527–28, 533–34 (discussing the influence of *Johnson v. M’Intosh* and the doctrine of discovery on Indigenous rights in an early Australian legal opinion, a New Zealand court, and the Supreme Court of Canada).