AMERICAN INDIAN LAW—ELUCIDATING CONSTITUTIONAL LAW

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I. INTRODUCTION

The incorporation of American Indian law into the study of Constitutional Law accomplishes a number of pedagogical goals as well as understanding questions concerning American Indian law that naturally evolve in the study. This broadened understanding of the United States Constitution helps to explain the complex subject of opinion writing and the role of politics in reading United States Supreme Court decisions. From a practice perspective, the incorporation of American Indian law into a Constitutional Law study further serves the purpose of explaining legal distinctions, which enable future practitioners to be knowledgeable in "spotting" issues where clients present such facts.

In the first introduction of the Constitutional Law class, it takes only a few minutes to raise the subject of Indians in the United States Constitution. This discussion helps to lay the groundwork for the issues that arise throughout the course.

Mentioning Indian issues may be problematic because of the question concerning the "politically correct"[1] term for referring to America's indigenous people. "American Indian" has been the term frequently used in cases and in legal contexts; and the term "Native American" has been recently adopted to encompass not only the indigenous people of the continental United States, but the Alaskan Natives as well.[2]

If you address the Articles of Confederation, this is a good time to point out that relations with Indians provided a good bit of the impetus

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1. Colloquial term for framing issues in a politically acceptable manner, sensitive to all political viewpoints.

2. Both the American Association of Law Schools Section and the National Native American Bar Association have considered these references. The decision for both legal groups has been for inclusion, rather than exclusion.

to create the document that arose from the Constitutional Convention of 1787, held to simply amend the Articles of Confederation.[3] It was from that convention that the Constitution of the United States was drafted. Article III of the Articles notes that, "the said states hereby severally enter into a firm league of friendship with each other." This basis of friendship, however, held none of the power needed to collect taxes, defend the country, pay the public debt or to encourage trade and commerce—some of the most important issues for the new country. Indian nations were particularly important in trade and commerce, which gave rise to the mention of Indians in three parts of the Constitution.

Charles Pickney from South Carolina, a state that had a history in Indian trade dating back to the seventeenth century, proposed the Indian commerce clause. The Indian Commerce Clause was constructed to place power in the federal government. Among the enumerated powers of the federal government is the power "[t]o regulate commerce . . . with the Indian Tribes."[4]

Indians are also mentioned in Article I, section 2, clause 3, which provides, "[r]epresentatives and direct Taxes shall be apportioned among the several states . . . which shall be determined by adding to the whole Number of free persons, including those bound to service for a Term of Years, *and excluding Indians not taxed*, three fifths of all other Persons."[5]

And in 1868, the exclusion of Indians was reaffirmed in the Fourteenth Amendment, which provides, "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each state, *excluding Indians not taxed . . . .*"[6]

II. MARSHALL COURT—THE *MADISON V. MARBURY* OF INDIAN LAW

A discussion of the Marshall court typically introduces the concept of opinion writing and Chief Justice John Marshall's approach to preserving the power of the United States Supreme Court in its early days. The cases of *Marbury v. Madison*[7] and *Martin v. Hunter's Lessee*[8]

3. Article IX of the Articles of the Confederation, vested the Continental Congress "with the sole and exclusive right and power of . . . regulating the trade and managing all affairs with Indians not members of any of the states; provided that the legislative right of any state within its own limits by not infringed or violated. . . ." *Journals of the Continental Congress* vol. 33, 457-59 (U.S. Govt. 1909-1937). *See The Federalist* No. 42 (James Madison) (C. Rossiter ed., N.Y. New Am. Library 1961) ("The regulation of commerce with the Indian Tribes is very properly unfettered from two limitations in the articles of confederation, which render the provision obscure and contradictory.").

4. U.S. Const. art. I, § 8, cl. 3.

5. U.S. Const. art. I, § 2, cl. 3 (emphasis added).

6. U.S. Const. amend. XIV, § 2 (emphasis added).

7. 5 U.S. 137 (1803).

8. 14 U.S. 304 (1816).

can be elucidated by the Marshall court's Indian law cases.

A. *Federalism*

The Federalist Papers, which helped explain the provisions of the United States Constitution prior to ratification in 1787, discuss the powers apportioned to the states and the federal government in terms of state sovereignty.[9] But how did the sovereignty of Indian tribes figure in this careful balance of sovereign powers?

In *Johnson v. M'Intosh*,[10] Chief Justice Marshall addressed the question of whether Indian tribes had the authority to transfer title to land occupied by the Indians.[11] The Marshall court found that the tribes must have some sovereignty in order to possess any title to transfer; however, not enough sovereignty to prevent their subjugation to the federal government.[12] The thrust of this determination was that Indigenous peoples do not have the natural rights of citizens of "civilized" nations, but they were admitted to be "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it . . . ."[13] Complete sovereignty was diminished, and power to dispose of soil was denied: giving to the discoverer exclusive title by virtue of "Discovery."[14]

In justifying the doctrine of discovery, Justice Marshall said,

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards, sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.[15]

This case was important because it defined the sovereignty of the tribes in relation to the states and the federal government. In defining sovereignty, Justice Marshall used as a premise that the United States is sovereign and therefore Indian Tribes cannot *also* be sovereign.[16] Chief Justice Marshall reasoned that while the doctrines of discovery and conquest were nothing more than pretenses; nevertheless, they were the foundation of property rights for all white Americans, and he was compelled to uphold them. Marshall could not conclude that the Indians had the same fee-simple title as other citizens because their title would remain wholly unaffected by their lands' discovery by white

9. *The Federalist* No. 39 (James Madison) (C. Rossiter ed., N.Y. New Am. Library 1961).
10. 21 U.S. 543 (1823).
11. *Id.*
12. *See id.* at 603-04.
13. *See id.* at 574.
14. *Id.*
15. *M'Intosh*, 21 U.S. at 591.
16. *Id.*

Europeans. Chief Justice Marshall held that tribes had extinguished the title of the plaintiffs by selling it again to the United States.[17] Thus, the doctrines of discovery and conquest defined the sovereignty of tribal governments.

B. *The Marbury v. Madison of Indian Law*

In *Martin v. Hunter's Lessee*,[18] the United States Supreme Court confronted the Virginia Supreme Court on interpretation of the Constitution and remanded the Virginia decision to the consternation of the Virginians. The Supreme Court's assumption of appellate jurisdiction over state supreme courts was seen by many as a blow to state sovereignty.

In *Cherokee Nation v. Georgia*,[19] the federalism concept was tested again. The Georgia Court had declared that all Indian land belonged to the state.[20] Missionaries were going into the reservation creating conflicts with the state of Georgia, so Georgia asserted civil jurisdiction over the Cherokee lands.[21] This placed the question of state and federal powers directly before the courts, again, on the issue of whether Georgia or the federal government had jurisdiction over the tribal governments. In making this decision, the court again had to address the sovereign status of tribal governments, because to refer to Indian nations as "foreign States," as England or France, would confer original jurisdiction in the United States Supreme Court.[22] Indian tribes are not "foreign nations" under the Constitution, but rather defined in this case as "domestic, dependent nations."[23]

Through this decision, the United States Supreme Court avoided giving primary jurisdiction to tribal governments to litigate with states, yet determined the status of tribal governments in its dicta and ultimate dismissal of the case. Because the greatest impact of this case on law and on history was derived from this dicta, it is considered the *Marbury v. Madison* of Indian law.[24]

In *Worcester v. Georgia*,[25] the United States Supreme Court was faced with another controversy between the state of Georgia and the Cherokee Nation. Here, a missionary, Worcester, had been jailed

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17. *See id.* at 604-05.
18. 14 U.S. 304 (1816).
19. 30 U.S. 1 (1831).
20. *Id.* at 15.
21. Vine Deloria, Jr. & Clifford M. Lytle, *American Indians, American Justice* 28-29 (U. of Tex. Press 1983).
22. *See* U.S. Const. art. III, § 2, cl. 2.
23. *Cherokee Nation*, 30 U.S. at 17.
24. The reference to the case being known as the *Marbury v. Madison* of American Indian law was a statement made by Nell Jessup Newton at American University, August 29, 1996.
25. 31 U.S. 515 (1832).

because he had failed to comply with the registration of missionaries required by Georgia state law.[26]

The court determined that the state of Georgia had no authority over the Cherokee Nation; therefore they had no right to arrest Worcester and should have released him from jail.[27]

Thus, *Johnson* was implicitly overruled by the recognition of sovereignty in *Worcester.* Nevertheless, it is still cited regularly and relied upon as precedent by the Supreme Court.

C. *What do these cases tell us about Justice Marshall's Court in its opinion writing?*

Chief Justice Marshall did not begin with the jurisdictional issue in either *Marbury* or *Cherokee Nation.* He could have disposed of the case on the jurisdictional issue but would have been unable to decide the issues he really wanted to decide, such as judicial review, the interpretation of sovereignty for state and federal governments, and the preservation of the power of the United States Supreme Court-the latter perhaps most important.

In *Marbury,* the opinion avoided ordering Jefferson to deliver the appointments, which it would have had great difficulty accomplishing, since these political appointments made by the previous President. And in *Worcester,* Georgia granted a pardon to Worcester rather than accede to the United States Supreme Court judgment, but thereby avoided a confrontation and preserved the power of the Supreme Court.

III. COMMERCE CLAUSE—THE INDIAN COMMERCE CLAUSE

The discussion of the Commerce Clause[28] gives rise to the question: what is the Indian Commerce Clause,[29] and is it analyzed differently?

In *Rice v. Cayetano,*[30] Justice Stevens wrote:

> Throughout our Nation's history, this Court has recognized both the plenary power of Congress over the affairs of the native Americans and the fiduciary character of the special federal relationship with descendants of those once sovereign peoples . . . and . . . as long as the special treatment can be tied rationally to fulfillment of Congress' unique obligations towards the Indians, such legislative judgments will not be disturbed.[31]

That plenary power is found in the Indian Commerce Clause, which

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26. *Id.* at 528-29.
27. *Id.* at 596. The U.S. Supreme Court had no ability to enforce this decision, and Georgia kept Worcester in jail for another year before granting him a pardon—making a confrontation unnecessary.
28. U.S. Const. art. I, § 8, cl. 3.
29. *Id.*
30. 528 U.S. 495 (2000).
31. *Id.* at 529-32 (citations and quotations omitted).

provides that Congress has the power to "regulate Commerce . . . with the Indian tribes."[32] Relying upon this enumerated power, the United States Supreme Court in *Morton v. Mancari*,[33] concluded that Congress could therefore single out Indians as a proper subject for separate legislation.[34]

The test for whether Congress can single out Indians for special legislation, as described in *Rice*, is the rational basis test. Legislation will be constitutional "as long as the special treatment can be tied rationally to fulfillment of Congress' unique obligations towards the Indians. . . ."[35]

Unlike legislation under the Indian Commerce Clause, legislation under the Interstate Commerce Clause is reviewed with an additional test for whether there is a "substantial effect" on interstate commerce.[36] There is no "substantial effect" test in the Indian Commerce Clause, based upon the broad plenary power held by Congress. Thus, the Indian Commerce Clause power is broader than the Interstate Commerce Clause power.

IV. WAR POWERS AND TREATIES—TREATIES WITH INDIAN NATIONS

War powers and treaties must necessarily raise the question: what is the legal status of a treaty with an Indian Nation? Are they foreign nations under the Constitution?

The Executive Branch typically negotiates treaties for Congressional ratification.[37] However, Congress, tired of little control of the treaty making process with Indians,[38] passed the Appropriations Act of March 3, 1871, which ended the Executive's treatymaking authority by stating:

> *Provided*, that 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: *Provided further*, that nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any Indian nation or tribe.[39]

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32. U.S. Const. art. I, § 8, cl. 3.

33. 417 U.S. 535 (1974).

34. *Id.*

35. *Rice*, 528 U.S. at 531-32.

36. *See Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engrs.*, 531 U.S. 159 (2001).

37. *See* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 398-424 (1993) ("[I]n *Worchester* [Chief Justice Marshall] signaled that *further* encroachment upon tribe—the ongoing process of colonization—would receive no special assistance from the judiciary. The executive branch, when it negotiated treaties, and the Senate, when it ratified them, were the only institutions appropriate to do the problematic work for further colonization. The judiciary would not enforce their work unless it was compelled to do so.").

38. *Id.*

39. Appropriations Act of March 3, 1871, § 1, 16 Stat. 544, 566 (now codified at 25

Congress had become impatient with their lack of power, given that the Senate, alone, ratified treaties with tribal nations.

This action by Congress to limit the President's authority may raise a separation of power issue: was this constitutional or a violation of the separation of powers? Since the President carefully protects the power to negotiate and enter into treaties with other nations, why did the President not object to this abolishment of the President's power to make treaties with Indian nations? Treatymaking continued in the form of agreements for many decades.[40] The most likely reason that the President did not object is that whoever was in office likely viewed the treaties with the Indians as problematic, and most of the "hostilities" had ended by this time.

The treaties ratified by the Senate have the force of law. However, the Supreme Court or other inferior federal courts interpret them. Various canons of construction have evolved from the case law in these interpretations; including the canon that implied hunting and fishing rights were included in treaties although not specifically mentioned, and the canon that reductions in reservation lands had to be made expressly by Congress.[41] A broad canon of construction requires that treaties must be interpreted in terms of what the understanding of the tribes would have been at the time the treaties were made; and they must be construed in favor of tribes where the language is vague.[42]

Two remedies exist when Indian treaties are violated: compensation and land or federal recognition bringing federal money.

Another interesting question that arises, is whether the United States still recognizes treaties between the tribes and the colonies prior to 1776. Pre-Constitutional treaties are recognized with successor-in-interest logic; the United States is the successor to the colonies.[43] But a different relationship arises in the consideration of the treaties made

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U.S.C. § 71 (1982)).

40. Felix Cohen, *Handbook of Federal Indian Law* 67 (U. N.M. Press 1972) (originally published 1942).

41. Frickey, *supra* n. 37, at 400 ("First, Chief Justice Marshall stressed that the treaty was negotiated and written in English, a language foreign to the tribal negotiators. They should not have been expected, therefore, to distinguish the word 'allotted' from the words 'marked out.' Nor would the words 'hunting ground' have suggested any limitation to the tribe, because hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. In other words, the term 'hunting ground' should be construed as the Indians would have understood it—complete land possession and control—rather than as non-Indians would have—at most an exclusive license to hunt.").

42. *Id.*

43. *See generally* Barry E. Hill & Nicholas Targ, *The Link Between Protecting Natural Resources and the Issues of Environmental Justice*, 28 B.C. Envlt. Aff. L. Rev. 1, 30 n. 158 (2000) ("The Treaty of 1677, between the Mattaponi Indian and Pamunkey tribes and the English Crown, is known as the 'Treaty at Middle Plantation.' The Commonwealth stands as the successor to the Crown. *See* 1976-1977 Op. Va. Atty. Gen. 107, 108; *Baker v. Harvey*, 181 U.S. 481 (1901).").

between Indian nations and the Republic of Texas. A treaty made between the Republic of Texas and the Texas Cherokees was not assumed by the United States when Texas joined the United States.[44] Since Texas was considered a different country, the United States did not succeed to interest in Texas's treaties.[45] The Indian Claims Commission heard this case in the 1950s.[46]

V. 14TH AMENDMENT EQUAL PROTECTION—WHAT IS THE INDIAN STATUS ANALYSIS? *MORTON V. MANCARI*

The case of equality is a complex issue as applied to American Indians; and many practicing attorneys, usually amenable to learning new law, often refuse to take such cases because of the different Constitutional and statutory status of Indians. The question of *equality* is one such area of Indian law that differs markedly from law applied to non-Indians.

In *Rice*, Justice Stevens summarized the current state of the law:

> As our cases have consistently recognized, Congress' plenary power over these peoples has been exercised time and again to implement a federal duty to provide native peoples with special 'care and protection . . . . [Today], the Federal Bureau of Indian Affairs [administers] countless modern programs responding to pragmatic concerns, including health, education, housing and impoverishment. Federal regulation in this area is not limited to the strictly practical but has encompassed as well the protection of cultural values . . . .
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> [This] Court has taken account of the 'numerous' occasions' on which 'legislation that singles out Indians for particular and special treatment' has been upheld and has concluded that as 'long as the special treatment can be tied rationally to fulfillment of Congress' unique obligations towards the Indians, such legislative judgments will not be disturbed.'[47]

In *Morton*, the United States Supreme Court held that Indian preference was not subject to strict scrutiny because these were political distinctions, not racial distinctions.[48]

In *Morton*, the Indian Reorganization Act of 1934 ("IRA") was challenged because it accorded a hiring preference for qualified Indians in the Bureau of Indian Affairs ("BIA").[49] The IRA was intended to give

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44. Indian Claims Commission Decisions, *Texas-Cherokees v. U.S.*, 526, vol. II-B (Nov. 13, 1835), Pl. Ex.1 at 111.

45. Indian Claims Commission Decisions, *Texas-Cherokees v. U.S.*, 522 at 532, vol. II-B (Dec. 28, 1953).

46. *Id.* (The Indian Claims Commission no longer exists, and the remaining caseload was assigned to the U.S. Court of Claims.).

47. *Rice*, 528 U.S. at 529-30 (citing *U.S. v. Sandoval*, 231 U.S. 28 (1913)); *Morton*, 417 U.S. at 554-55).

48. *Morton*, 417 U.S. at 554.

49. *Id.* at 537.

Indians greater participation in their own self-government; to further the government's trust obligation toward the Indian tribes; and, to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life.[50] Non-Indian BIA employees challenged this preference as contrary to the anti-discrimination provisions of the Equal Employment Opportunity Act of 1972.[51] The District Court held that the 1934 Act had been implicitly repealed by the 1972 Act.[52]

The court relied upon the intent of Congress through a reading of Title VII of the Civil Rights Act of 1964,[53] which explicitly exempted from coverage the preferential employment of Indians by Indian tribes or by industries located on or near Indian reservation. This, the United States Supreme Court found, revealed a clear Congressional recognition of the unique legal status of tribal and reservation-based activities, opining, "The anti-discrimination provision, aimed at alleviating minority discrimination in employment, obviously is designed to deal with an entirely different and, indeed, opposite problem. Any perceived conflict is thus more apparent than real."[54]

The Court further relied upon the plenary power of Congress found in Article I, section 8, clause 3, providing Congress with the power to "regulate Commerce . . . with the Indian tribes," and thus to single Indians out as a proper subject for separate legislation.[55]

The holding in *Morton* explains why the traditional equal protection analysis does not apply:

> The preference is not directed towards a 'racial' group consisting of 'indians;' instead, it applies only to members of 'federally recognized' tribes. This operates to exclude many individuals who are racially to be classified as 'indians.' In this sense, the preference is political rather than racial in nature.[56]

Justices Steven and Ginsberg dissent in the case of *Adarand Constructors, Inc. v. Pena*[57] mischaracterizes the treatment of American Indians:

> We should reject a concept of 'consistency' that would view the special preferences that the National Government has provided to Native Americans since 1834 as comparable to the official discrimination against African Americans that was prevalent for much of our history.[58]

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50. *Id.* at 542.
51. *Id.* at 539.
52. *Id.* at 540.
53. 42 U.S.C.A. §§ 2000e(b), 2000(e)2(i) (West 2001) (formerly § 701(b) and § 703(1)).
54. *Morton*, 417 U.S. at 550.
55. *Id.* at 552.
56. *Id.* at 554 n. 24.
57. 515 U.S. 200 (1995).
58. *Id.* at 244-5. The dissent went on to explain:

> To be eligible for the preference in 1974, an individual had to 'be one fourth or

However, by relying solely upon the plenary power of Congress as comparable to the application of the Fourteenth Amendment through legislative power of Congress, the dissent ignores that the political distinction is based upon the government-to-government relationship of tribal governments to the state or federal government. Therefore, not all racial Indians enjoy the preference given by Congress to members of tribes recognized by the state or federal governments.

VI. FOURTEENTH AMENDMENT AND *LOVING V. VIRGINIA*: THE MISCEGENATION STATUTES

Loving v. Virginia,[59] represents the last vestiges of the application of the Fourteenth Amendment to discriminatory state legislation, because it was not discriminatory on its face.[60] As Virginia argued in *Loving*, it applied the prohibition equally to both whites and non-whites.[61] Anti-miscegenation statutes were intended to preserve whiteness; therefore they prohibited whites from intermarrying with African-Americans as well as with American Indians.[62]

Virginia had not always been hostile to intermarriage with American Indians. The first recorded marriage between a white settler and an American Indian was the famous marriage of John Rolfe and Pocahontas, daughter of Powhatan, in 1614, in Virginia.[63] But it was not without its social taboo. The mixing of native races was contrary to religious beliefs about purity based on a scriptural ban of such marriages; however diplomacy proved to be the more important principle, and this policy was largely a diplomatic effort to create peace between the settlers and the Indians.[64] When that effort failed in 1622 with the Powhatan Uprising, the idea of biracial marriages as a diplomatic measure ended.[65]

Early Virginia had few Indian-white marriages.[66] According to one

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> more degree Indian blood and be a member of a Federally-recognized tribe . . . . We concluded that the classification was not 'racial' because it did not encompass all Native Americans. In upholding it, we relied in part on the plenary power of Congress to legislate on behalf of Indian tribes. In this case respondents rely, in part, on the fact that not all members of the preferred minority groups are eligible for the preference, and on the special power to legislate on behalf of minorities granted to Congress by § 5 of the Fourteenth Amendment.

Id. at 244 n. 3 (citations omitted).

59. 388 U.S. 1 (1967).

60. *Id.*

61. *Id.* at 9.

62. *Id.*

63. Karen M. Woods, *Law Making: A "Wicked and Mischievous Connection:" The Origins of Indian-White Miscegenation Law*, 23 Legal Stud. Forum 37, 49 (1999).

64. *Id.*

65. *Id.*

66. David D. Smits, *"Abominable Mixture:" Toward the Repudiation of Anglo-Indian Intermarriage in Seventeenth-Century Virginia*, 95 Va. Mag. Hist. and Biography 166-67, 173-75, 184 (Apr. 1987).

writer "English anxieties, insecurities, and ethnocentrism, manifested in suspicion, discrimination, verbal abuse, exclusiveness, and violent aggression toward Indians, were the paramount deterrents to intermarriage. . . . Indian resentments, rebelliousness, marital customs, and female matrimonial preferences" led to few Indian-white marriages.[67] Indians were also routinely enslaved during the colonial wars as spoils of war, and continued to be held in slavery until the mid 1700s in spite of laws to the contrary.[68]

Reviving the old diplomatic strategy, Patrick Henry introduced a bill in the Virginia Assembly in 1784 offering financial incentives "for the encouragement of marriages with the Indians. . . . That the offspring of the intermarriages aforesaid, shall be entitled, in all respects, to the same rights and privileges, under the laws of this commonwealth, as if they had proceeded from intermarriages among free white inhabitants thereof."[69] This measure failed to pass the Virginia legislature.

In the early 1800s, Thomas Jefferson advocated the use of Indian-white intermarriages as a way of adapting the Indians to white culture, rather than continuing a policy of genocide and devastation of the Indian population; thereby eliminating the "Indian problem."[70] In fact, this policy was supported by "every administration from Washington to John Quincy Adams and a variety of private philanthropic organizations."[71] Jefferson wrote to Creek agent Colonel Benjamin Hawkins in 1803 that "In truth, the ultimate point of rest and happiness for them is to let our settlements and theirs meet and blend together, to intermix and become one people. Incorporating themselves with us as citizens of the United States."[72] In his speeches to the Indians, Jefferson encouraged this policy saying, "we shall all be Americans; you will mix with us by marriage, your blood will run in our veins, and will spread over this great island."[73] Jefferson saw these intermarriages as a progression in the future, but did not believe it would be a policy for the present.[74] This was consistent with the federal Indian policy to remain friendly with Indians to subvert alliances with Britain or other foreign powers. This insurance was to pay off handsomely in the War of 1812 where Indians fought on the side of the Americans, potentially making the difference in

67. *Id.*

68. *See generally* Barbara Olexer, *The Enslavement of the American Indian* (Library Research Assoc. 1982)

69. William Wirt, *Life and Character of Patrick Henry* 258 (A.L. Burt Co. 1817).

70. Bernard W. Sheehan, *Seeds of Extinction: Jeffersonian Philanthropy and the American Indian* 15-44 (U. N.C. Press 1973).

71. *Id.*

72. Thomas Jefferson, *The Writings of Thomas Jefferson* 10 (Andrew Lipscomb & Albert Ellegy Berg eds., 1903-04) (Letter to Col. Hawkins, Feb. 18, 1803).

73. Thomas Jefferson, *The Complete Jefferson* 503 (Saul Padover ed., 1943) (letter to Capt. Hendrick, the Delawares Mohiccons, and Munries (no date)).

74. Sheehan, *supra* n. 70, at 55.

what was a critically close contest.

In 1816, the Secretary of War, who was charged with Indian responsibilities, was required to report to Congress under the 1791 Trade and Intercourse Act.[75] William H. Crawford, Secretary of War, proposed the controversial policy of intermarriages between whites and Indians in order to develop the idea of holding property by individuals rather than as commons among the Indians. He wrote, "When every effort to introduce among them ideas of separate property shall fail, let intermarriages between them and the whites be encouraged by the Government. This cannot fail to preserve the race, with the modifications necessary to the enjoyment of civil liberty and social happiness."[76] This proposal, however, did not serve Crawford well when he ran for president in 1824. His opponent's campaign pamphlet explained that "Crawford's positions on interracial marriage make him unfit to be president and a dangerous threat to the nation."[77]

The removal period of the 1830s created a revival in the enforcement of these miscegenation statutes in the southeastern states.[78] Indians not living on reservations were subject to the civil jurisdiction of the state and they were classified as "people of color" in an effort to reinforce the belief that all of the Indians in the east had been removed.[79]

With this history, it would seem logical that among the amici briefs submitted in *Loving* that American Indians would be represented. However, they were not: North Carolina was the only state that submitted an amicus curiae brief; and the associations, the Japanese American Citizen's League and the NAACP Legal Defense Education Fund submitted briefs. Why no American Indians? The answer is probably that the Native American Rights Fund and the American Indian Movement were both founded *after Loving*, and there was no organization representing the rights of individual American Indians.

The holding in *Loving* that the miscegenation statutes were unconstitutional, extended to all those states statutes which included American Indians as a class of exclusion.

VII. CIVIL RIGHTS—DOES THE INDIAN CIVIL RIGHTS ACT MEAN THE SAME THING AS THE BILL OF RIGHTS?

The Indian Civil Rights Act ("ICRA")[80] was to provide to Indians

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75. 25 U.S.C. § 177 (1994).

76. *American State Papers* (Indian Affairs) vol. 2, 26-28 (U.S. Govt. 1832-34).

77. *Id.*

78. *See* Victoria Sutton, *We Don't Have Indians Here Anymore: The Political Genocide of the American Indian in North Carolina* (Carolina Academic Press 2001).

79. *Id.*

80. 25 U.S.C.A. §1301 *et seq.* (West 2001).

subject to tribal governmental actions, eight of the same rights contained in the Bill of Rights. However, the ICRA is not identical to the Bill of Rights.

The ICRA was tested in *Santa Clara Pueblo v. Martinez*,[81] where gender discrimination was the issue.[82] Respondent tribe member sought to prevent enforcement of a tribal ordinance that denied tribe membership to children of female tribe members who married outside the tribe, but not to the children of male tribe members who did so.[83] The respondent claimed that this violated Title I of the ICRA, discriminating on the basis of both sex and ancestry.[84]

The federal district court held that equal protection analysis applied to the ICRA, but that the balance to be struck between these competing interests was better left to the judgment of the Pueblo tribal government.[85] The district court majority wrote that "to abrogate tribal decisions, particularly in the delicate area of membership, for whatever 'good' reasons, is to destroy cultural identity under the guise of saving it."[86]

The United States Supreme Court found that since this practice reflected traditional values of patriarchy still significant in tribal life, and since membership rules are vital to the tribe's survival as a cultural and economic entity, traditional equal protection analysis did not apply. The district court opined:

> The equal protection guarantee of the Indian Civil Rights Act should not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival and should therefore be preserved. . . . Such a determination should be made by the people of Santa Clara; not only because they can best decide what values are important, but also because they must live with the decision every day. . . .[87]

The Supreme Court held that tribes retain their original natural rights to self-government.[88]

Further, the United States Supreme Court held that the writ of habeas corpus is the only mechanism by which the federal court can hear claims under the ICRA.[89] This virtually put an end to claims being made under the ICRA.

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81. 436 U.S. 49 (1978).
82. *Id.*
83. *Id.* at 51.
84. *Id.*
85. *Martinez v. Romney*, 402 F. Supp. 5, 18 (D. N.M. 1975).
86. *Id.* at 18-19.
87. *Id.*
88. *Santa Clara Pueblo*, 436 U.S. at 63-64.
89. *Id.* at 61-62.

VIII. VOTING—A FUNDAMENTAL RIGHT

In *Shaw v. Reno*,[90] the United States Supreme Court found that a redistricting plan was unconstitutional because it was so irregular on its face that racial discrimination in voting must be concluded as the motivation.

The Fourteenth Amendment adopted in 1868 precluded Indians from the grant of citizenship and thereby precluded Indians from voting.[91] Indians were granted citizenship in 1924, and thereafter the one-man-one-vote standard applied. In *Goodluck v. Apache County*,[92] the court ruled that where one of the three designated county districts was the Navajo Nation, which was six times as large as the next largest district, the county must be reapportioned to avoid a political majority of non-Indian districts. This was based upon the one-man-one-vote principle; not on the basis of *Shaw*.

IX. FIFTH AMENDMENT—TAKINGS CLAUSE

Out of the Fifth Amendment Takings Clause[93] discussions, a question concerning the application of the Takings Clause to Indian lands might naturally arise. After all, given the takings analysis for physical invasions,[94] as well as regulatory takings, the federal government's actions of taking Indian land would seem obvious. The takings analysis concludes that if a government regulation "goes too far",[95] there will be a compensable taking. Further, the "abridgment of property rights through the police power . . . [must prove to be] substantially advancing a legitimate state interest,"[96] and there must be an "essential nexus" between the governmental action and the governmental interst.[97]

However, the analysis here is also different and a three-part test is applied. First, the court asks what kind of property is involved.If the land is aboriginal (not granted by treaty) it is not compensable under the Fifth Amendment Takings Clause.[98] In *Tee-Hit-Ton Indians v. United States*,[99] the Tee-Hit-Ton Indians, an Alaskan clan of the Tlingit Tribe, were not compensated for over 350,000 acres of land based on their

90. 509 U.S. 630 (1993).
91. U.S. Const. amend. XIV.
92. 417 F. Supp. 13 (D. Ariz. 1975), *aff'd sub. nom., Apache County v. U.S.*, 429 U.S. 876 (1976).
93. U.S. Const. amend. V.
94. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).
95. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).
96. *Nollan v. Cal. Coastal Commn.*, 483 U.S. 825, 841 (1987).
97. *Id.* at 837.
98. *Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 272 (1955).
99. *Id.*

mere Indian right of occupancy.[100] If the property is not aboriginal, then the second question is whether there was a taking. This is a different analysis inherent in the federal government trustee relationship. In the case of the Sioux Nation and the taking of the Black Hills,[101] the court found that although the federal government provided rations for the Nation since the federal government acquired the Black Hills through an act of Congress in 1877, the rations were clearly not intended to be equivalent to the value of the land. The court further concluded that the 1877 was a breach of the Treaty of Fort Laramie and the land had been taken "in a way that wholly deprived [the Sioux Nation] of their property rights. . . ."[102]

X. FIRST AMENDMENT, FREE EXERCISE CLAUSE—*DEPARTMENT OF HUMAN RESOURCES OF OREGON V. SMITH*

The Free Exercise Clause analysis as applied to tribal cultural practices is analyzed no differently than when applied to other groups or individuals. After the decision in *Department of Human Resources of Oregon v. Smith*,[103] Congress reacted by passing the Religious Freedom and Restoration Act. [104] *Smith* involved the challenge to the criminalization of peyote use by the members of the Native American Church. Alfred Smith and Galen Black were fired from their jobs with a private drug rehabilitation organization because they had used peyote at a ceremony of the Native American Church, where they were members. They were determined by the employment commission to have been discharged for work-related misconduct that resulted in the denial of unemployment benefits. The Religious Freedom and Restoration Act sought to correct this burden on religion by providing that the government could only burden religion by showing a compelling state interest and by using the least restrictive means.[105] The Supreme Court held that the act was unconstitutional, because Congress could not expand the constitutional free exercise clause through legislation.[106]

XI. TENTH AMENDMENT

Tribal governments are sovereigns and have sovereign powers.[107] However, the Tenth Amendment does not reserve powers to tribal governments as it does to state governments. However, some scholars

100. *Id.* at 279.
101. *U.S. v. Sioux Nation*, 448 U.S. 371 (1980).
102. *Id.*
103. 494 U.S. 872 (1990).
104. 42 U.S.C.A. § 2000(b) *et seq.* (West 2001).
105. *Id.*
106. *City of Boerne v. Flores*, 521 U.S. 507 (1997).
107. *Cherokee Nation*, 31 U.S. 1; *Worcester*, 30 U.S. 1.

have found a reservation for tribes in a combination of treaties and the concept of inherent sovereignty. For example, Charles F. Wilkinson has written that tribes are a "third source of sovereignty in the United States . . . [and therefore] the rule of law requires that tribes continue to be reconciled into our constitutional system."[108]

This concept of sovereignty has resulted in a presumption against the encroachment of state jurisdiction over Indian affairs. This concept of sovereignty has resulted in a presumption against the encroachment of state jurisdiction over Indian affairs, after the Court determined that sovereignty was assumed where a balancing test found that areas of tribal sovereignty were not inconsistent with state law, and the tribes were limited only in that they did not have jurisdiction over non-Indians.[109] However, the Supreme Court later reversed that presumption. Instead, tribes are presumed *not* to have sovereignty unless two exceptions are met: (1) the state law is inconsistent with independent tribal status; and (2) there is either a consensual agreement by the tribe or a Congressional grant of authority for state regulation.[110] The application of state law to tribal reservations is governed more by the subject matter and the character of the reservation, leading to a very fluid analysis of these issues. For example, where self-government of a cultural issue is at stake, the tribal government will be more likely to have jurisdiction, and not the state.[111] However, in zoning issues, often the state will be found to have jurisdiction over tribal land, if the character of the reservation is not predominately tribal.[112]

XII. PREEMPTION

Preemption, arising from the Supremacy Clause,[113] is also analyzed differently from preemption for the states and federal governments. Tribal interests are weighed against state interests and federal interests to determine whether the state interest will preempt the federal interest. In *New Mexico v. Mescalero Apache Tribe*,[114] federal law preempted state law where the tribe sought to govern its own natural resources by regulating hunting and fishing on the reservation for members and nonmembers. The state was preempted from applying its own state hunting and fishing regulations.[115] Here, the court found that the

108. Charles F. Wilkinson, *American Indians, Time and the Law: Native Societies in a Modern Constitutional Democracy* 103-04 (Yale U. Press 1987).
109. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).
110. *See Mont. v. U.S.*, 450 U.S. 544 (1981).
111. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).
112. *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 109 S. Ct. 2994 (1989).
113. U.S. Const. art. VI, cl. 2.
114. 462 U.S. 324 (1983).
115. *Id.* at 344.

interests of the tribe in managing its own resources and in economic development outweighed any state interest.[116]

XIII. CONCLUSION

Steven McSloy has observed that "the treatment of American Indians in the study of American constitutional law has largely been ignored."[117] He further notes that the leading constitutional treatise, Harvard Law Professor Laurence Tribe's American Constitutional Law deals with Indians largely in footnotes.[118] In *The Brethren*, Bob Woodward wrote that the Justices considered Indian cases to be "peewee" matters, and "Chief Justice Burger would punish junior Justices by making them write Indian law opinions."[119]

Rennard Strickland observed that in his early years of teaching in the 1970s, he spoke with a number of professors who had worked with Indian law at some time in the past, and he said that

> A number of them told me that they had taught Indian Law in their Constitutional Law courses and had begun to move it into other courses. . . . It is jurisprudentially so tasty that once people who are very bright have seen what is there, they find it hard to go back to A to B remainder to C.[120]

If this was a trend in the 1970s, it appears that the pendulum since swung in the opposite direction for many of the next class of legal academicians in the 1980s and 1990s. Let us hope that the pendulum, in the early 2000s, must therefore be swinging toward an incorporation of Indian law into required course materials.

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116. *Id.* at 343.

117. Steven Paul McSloy, *Border Wars: Haudenosaunee Lands and Federalism*, 46 Buff. L. Rev. 1041, 1041 (1998).

118. *Id.*

119. Bob Woodward, & Scott Armstrong, *The Brethren: Inside the Supreme Court* (Simon & Schuster 1979).

120. Rennard Strickland & Gloria Valencia-Weber, *Observations on the Evolution of Indian Law in the Law Schools*, 26 N.M. L. Rev. 153, 156 (1996).