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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

Sarah Washburn

Abstract: Section 5 of the Indian Reorganization Act (IRA)¹ authorizes the Secretary of the Interior to acquire and hold land in trust for the purpose of providing land for Indians. In 2009, the Supreme Court held in *Carcieri v. Salazar*² that to qualify for the benefits of Section 5, tribes must show they were under federal jurisdiction at the time the IRA was enacted in 1934.³ The *Carcieri* Court then determined that the Narragansett tribe, which obtained federal recognition in 1983 under the 25 C.F.R. Part 83 recognition process, had not proven that it was under federal jurisdiction in 1934.⁴ *Carcieri* was the first case in which the Court decoupled jurisdiction from recognition for purposes of the IRA. It could be read to suggest that federal recognition on its own is not enough to prove federal jurisdiction for purposes of the IRA and thus threatens the interests of all tribes; especially at risk are tribes that obtained federal recognition after Congress enacted the IRA. Many of those tribes were simply overlooked and excluded from a list of recognized tribes compiled upon enactment of the IRA, and all of them have demonstrable historical relationships with the federal government. While the *Carcieri* Court limited its holding to the timing question—that the phrase “now under federal jurisdiction” in the IRA means that a tribe must prove federal jurisdiction existed in 1934—it did not consider how tribes might prove such jurisdiction existed. This Comment argues that tribes recognized after the enactment of the IRA, through either traditional recognition processes or the recognition procedures set forth in 25 C.F.R. Part 83, were necessarily under federal jurisdiction in 1934 and should therefore qualify under the IRA’s Section 5 trust-land provisions. It argues that Congress should respond to *Carcieri* with legislation clarifying that all federally recognized tribes were necessarily under federal jurisdiction in 1934. It further argues that until Congress acts, courts should allow tribes recognized after 1934 to prove through additional evidence that such jurisdiction existed.

INTRODUCTION

The Cheyenne River Sioux tribe’s documented history stretches back

1. Wheeler-Howard (Indian Reorganization) Act, Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (2006)).

2. 555 U.S. __ (Feb. 24, 2009), 129 S. Ct. 1058 (2009).

3. *Id.* at __, 129 S. Ct. at 1068. The Court interpreted the definition of “Indian” in Section 19 of the IRA to mean that tribes must have been under federal jurisdiction in 1934, when the IRA was enacted, to benefit from the IRA’s trust-land provisions.

4. *See id.*

to the mid-seventeenth century, when European explorers encountered the tribe's Sioux ancestors living in central Minnesota and northwestern Wisconsin.⁵ After the American Revolution, the tribe experienced rocky relations with the United States government until the Treaty of Fort Laramie established the Great Sioux Reservation.⁶ In 1935, the tribe was approved as an organized, recognized tribe⁷ under the Indian Reorganization Act (IRA).⁸

The documented history of the Narragansett tribe dates back to 1614. That tribe achieved federal recognition under the 25 C.F.R. Part 83 procedures in 1983,⁹ which means that, among other things, the tribe demonstrated it had been "identified as an American Indian entity on a substantially continuous basis since 1900" and "existed as a community from historical times until the present."¹⁰

Both tribes have extensive documented histories confirming their status as American Indian entities. However, under the 2009 Supreme Court decision in *Carciere v. Salazar*,¹¹ the Cheyenne River Sioux tribe can have land held in trust under Section 5 of the IRA, but the Narragansett tribe cannot. *Carciere* held that to qualify for the IRA's trust-land provisions, a tribe had to have been under federal jurisdiction in 1934—the year Congress enacted the IRA.¹² While the Court did not consider what evidence might prove that a particular tribe was subject to such jurisdiction, it did conclude that the Narragansett tribe had not proved it was under federal jurisdiction in 1934.¹³ As a result, courts

5. See GUY E. GIBBON, *THE SIOUX: THE DAKOTA AND LAKOTA NATIONS* 3 (Blackwell Publishing 2003); see also Cheyenne River Sioux Tribe Website, <http://www.sioux.org> (last visited May 11, 2010) (providing additional information on the history and culture of the Cheyenne River Sioux).

6. See Treaty with the Sioux Indians, 15 Stat. 635 (Apr. 29, 1868).

7. The Cheyenne River Sioux Tribe's Constitution was approved by the Secretary of the Interior in accordance with the provisions of the IRA in December 1935. See CONST. AND BY-LAWS OF THE CHEYENNE RIVER SIOUX TRIBE OF SOUTH DAKOTA (Dec. 27, 1935), available at <http://www.state.sd.us/oia/files/chysioxcon.pdf> (last visited June 23, 2010).

8. Wheeler-Howard (Indian Reorganization) Act, Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (2006)).

9. See Final Determination for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177 (Feb. 10, 1983). The federal government found that the "Narragansett community and its predecessors have existed autonomously since first contact . . . [t]he tribe has a documented history dating from 1614." *Id.* at 6178.

10. These are among the requirements for recognition under 25 C.F.R. Part 83. See 25 C.F.R. § 83.7 (2009).

11. 555 U.S. __ (Feb. 24, 2009), 129 S. Ct. 1058 (2009).

12. *Id.* at __, 129 S. Ct. at 1068.

13. *Id.* The Narragansetts were recognized as a tribe under 25 C.F.R. Part 83, but the Court held that "[n]one of the parties or amici, including the Narragansett Tribe itself, has argued that the Tribe

may be tempted to rely on the 1934 list of tribes organized and recognized under the IRA to determine which tribes satisfy *Carciery*,¹⁴ but such a response would create a dividing line that excludes tribes recognized after 1934 from the IRA's trust land benefits.

However and whenever it is attained, federal recognition has important consequences for Indian tribes. Recognition qualifies tribes for statutory benefits, affects tribal land ownership, and, above all, formalizes the historic trust relationship between tribes and the federal government, thus qualifying tribes for federal protection of their sovereignty and property.¹⁵ Since 1934, the government has recognized hundreds of tribes through traditional methods (including treaties, congressional legislation, executive orders, and other clear evidence of federal-tribal relations) and through the formal recognition process adopted in 1978, which is currently codified as amended at 25 C.F.R. Part 83.¹⁶ Under the latter process, a tribe seeking recognition must prove, among other things, historical existence as a community and identification as an American Indian entity since 1900.¹⁷

As a part of the historical federal-tribal trust relationship, the federal government has protected Indian land, including taking land into trust for tribes to protect against encroachment by states or private citizens.¹⁸ Congress codified this process in Section 5 of the IRA, which authorizes the Secretary of the Interior to acquire interests in land for the purpose of providing land for "Indians,"¹⁹ defined as "persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction."²⁰ Since 1934, the Department of the Interior has allowed land to be held in trust for tribes recognized under 25 C.F.R. Part 83, as

was under federal jurisdiction in 1934." *Id.*

14. See *infra* Part III.C (describing the IRA list and its exclusion of many potentially eligible tribes).

15. See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[3] (Neil Jessup Newton et al. eds., 2005) [hereinafter COHEN] (discussing the legal and political implications of federal recognition).

16. See Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39,361 (Sept. 5, 1978) (codified at 25 C.F.R. pt. 83 (2009)).

17. See 25 C.F.R. § 83.7 (2009).

18. Protection for tribal land began with the doctrine of discovery espoused by European explorers and continued with the Proclamation of 1763 and the Trade and Intercourse Act of 1790. See The Royal Proclamation, 1763, 3 Geo. 3 (Eng.), available at http://avalon.law.yale.edu/18th_century/proc1763.asp (last visited May 4, 2010); see also *infra* Part I.B (analyzing federal protection and control over Indian lands); *infra* note 50 and accompanying text (describing the doctrine of discovery).

19. Wheeler-Howard (Indian Reorganization) Act, Pub. L. No. 73-383, § 5, 48 Stat. 984, 985 (1934) (codified at 25 U.S.C. § 465 (2006)).

20. *Id.* § 19 (codified at 25 U.S.C. § 479).

well as for tribes recognized through traditional means after 1934.²¹ However, in *Carcieri v. Salazar*, the Supreme Court limited the scope of the IRA's trust-land provisions and instilled doubt concerning the ability of tribes recognized after 1934 to have land held in trust by the federal government. The Court held that the Narragansett tribe, which was unrecognized at the time of the IRA's enactment in 1934 but obtained federal recognition in 1983 through the 25 C.F.R. Part 83 process, did not qualify to have land held in trust under the IRA.²² The Court read the IRA's definition of "Indian" to mean that the Secretary's trust authority is limited to "those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934."²³ Despite the fact that the Narragansett tribe did not have a chance to argue the jurisdiction issue,²⁴ the Court found that the tribe failed to prove it was under federal jurisdiction in 1934 and did not qualify for the benefits of Section 5 of the IRA.²⁵

Congress responded to *Carcieri* in September 2009 by introducing Senate Bill 1703, a bill "[t]o amend the [IRA of 1934], to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian tribes."²⁶ The bill, if passed, would allow any federally recognized Indian tribe, regardless of the date of recognition, to benefit from the trust-land provisions of the IRA.²⁷ The Senate Committee on Indian Affairs considered the bill and reported it on December 17, 2009.²⁸ As of this writing, Congress has taken no further action on the bill. Nonetheless, the Committee's consideration of S. 1703 demonstrates congressional recognition that *Carcieri* may require a legislative fix.

Carcieri calls into question the ability of tribes recognized after 1934 to have land held in trust pursuant to Section 5 of the IRA. This Comment argues that tribes formally recognized by traditional methods since 1934, as well as tribes recognized under 25 C.F.R. Part 83, were

21. See *infra* Part IV (providing examples of tribes that were recognized after 1934 and have since had land held in trust by the federal government under Section 5 of the IRA).

22. *Carcieri v. Salazar*, 555 U.S. __ (Feb. 24, 2009), 129 S. Ct. 1058, 1068 (2009).

23. *Id.*

24. See *infra* Part V.B (describing the Court's approach to the federal jurisdiction issue in *Carcieri*).

25. *Carcieri*, 555 U.S. at __, 129 S. Ct. at 1068.

26. S. 1703, 111th Cong. § 1 (as reported by S. Comm. on Indian Affairs, Dec. 17, 2009).

27. *Id.*

28. See GovTrack, <http://www.govtrack.us/congress/bill.xpd?bill=s111-1703> (last visited May 4, 2010).

necessarily under federal jurisdiction in 1934 and thus should be eligible for the benefits of Section 5 of the IRA.

Part I provides an overview of the history of federal plenary power over Indian affairs and its implications for Indian property ownership. Part II describes one historical implication of the plenary power doctrine, namely the duties and responsibilities owed to tribes by the federal government as a result of the federal-tribal trust relationship. Part III details the various approaches to tribal recognition that the federal government has used throughout the history of federal-tribal relations, including an analysis of the IRA's approach to recognition and the problems caused by that approach. Part IV details the experiences of several tribes that went unrecognized under the IRA in 1934 but were subsequently recognized by traditional means of recognition or by the modern 25 C.F.R. Part 83 recognition process. Part V introduces *Carcieri v. Salazar*, a decision that affects the interests of tribes recognized after 1934.

Finally, Part VI argues that because tribes formally recognized since 1934 were necessarily under federal jurisdiction in 1934, they should qualify for IRA Section 5 benefits regardless of date or method of recognition and that finding otherwise conflicts with express federal policy, long-standing principles of Indian law, and principles underlying federal-tribal relationships. Congress should legislate to require such a result. Until then, courts should distinguish *Carcieri* because the tribe in that case, which was recognized under 25 C.F.R. Part 83, did not argue the question of jurisdiction. Thus, tribes recognized through 25 C.F.R. Part 83 might still introduce additional evidence and successfully prove such jurisdiction existed. All other recognized tribes were necessarily under federal jurisdiction in 1934.

I. THE FEDERAL GOVERNMENT POSSESSES PLENARY POWER OVER INDIAN AFFAIRS

Plenary power over Indian affairs stems from a long history of relations between tribes, European explorers, colonists, and, eventually, the United States government.²⁹ From the beginning of the new American Republic, the government viewed tribes as dependent wards

29. See *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 470–71 (1979) (describing Congress's "plenary and exclusive" power over Indian affairs); see also COHEN, *supra* note 15, § 5.01[1] (providing a general overview of the sources of federal power over Indian affairs).

over which Congress had broad powers of control.³⁰ This Part illustrates that the plenary power doctrine looms large in Indian law and has broad implications for all aspects of the federal-tribal relationship, including federal control over Indian property ownership and federal jurisdiction over tribes within Indian country.

A. *Plenary Power Developed from Constitutional and Extra-Constitutional Sources and Played a Key Role in the Historical Development of Federal-Tribal Relations*

Congressional plenary power over Indian affairs reflects a long history of conflict and compromise in the arena of federal-tribal relations. This broad federal power has both constitutional and extra-constitutional sources.

Congress derives its plenary power over Indian affairs from several provisions of the Constitution, the most important of which³¹ are the Indian Commerce Clause³² and the Treaty Clause.³³ The Supreme Court has recognized that these provisions grant Congress broad authority to legislate with respect to Indian affairs³⁴ and has confirmed Congress's power to impose federal law on tribes even without their consent, including the abrogation of treaty rights.³⁵ In addition to these provisions, the Necessary and Proper Clause³⁶ broadens the reach of federal power, and the Supremacy Clause³⁷ ensures that federal laws concerning Indian affairs preempt conflicting state laws.³⁸ Today, the

30. See *United States v. Kagama*, 118 U.S. 375, 384–85 (1886) (“The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it has never existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.”).

31. See COHEN, *supra* note 15, § 5.01[1], at 390–91 (noting that the “Indian commerce clause and the treaty clause are most often cited today as the constitutional bases for legislation regarding Indian tribes”).

32. U.S. CONST. art. I, § 8, cl. 3.

33. *Id.* art. II, § 2, cl. 2.

34. See *United States v. Lara*, 541 U.S. 193, 200 (2004).

35. See *id.* at 202 (“Congress, with this Court’s approval, has interpreted the Constitution’s ‘plenary’ grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority.”); see also *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903) (noting that “as with treaties made with foreign nations, the legislative power might pass laws in conflict with treaties made with the Indians”) (citations omitted).

36. U.S. CONST. art. I, § 8, cl. 18.

37. *Id.* art. VI, cl. 2.

imposition of federal law on the tribes is subject to constitutional limitations such as the Due Process Clause³⁹ and the Takings Clause,⁴⁰ and tribes may obtain judicial review of federal assertions of power.⁴¹

In addition to affirmative grants of power contained within the Constitution, extra-constitutional powers serve as a source of plenary power. Under one theory, Congress's power arises directly from the dependent status of tribes and their relationship with the federal government; as wards of the government, tribes are subject to the overriding authority of Congress in handling Indian affairs and managing and protecting Indian land and assets.⁴² Under a second theory, the Supreme Court has recognized the "Constitution's adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that this Court has described as 'necessary concomitants of nationality.'"⁴³ Under this approach, "national power in Indian affairs descended to the national government from Great Britain

38. See COHEN, *supra* note 15, § 5.01[1] (discussing these and other constitutional provisions from which federal plenary power derives).

39. U.S. CONST. amend. V.

40. *Id.*

41. See COHEN, *supra* note 15, § 2.01[3]. The Court once viewed the exercise of congressional plenary power as a political issue "not subject to be controlled by the judicial department of the government." *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). However, in 1946 the Indian Claims Commission was established to settle claims of tribes against the government; under the Indian Claims Commission Act, tribes were given five years to bring their historical claims (claims arising before 1946). See Indian Claims Commission Act, ch. 959, § 12, 60 Stat. 1049 (1946); see also COHEN, *supra* note 15, § 5.06[3] (discussing the purposes and effects of the Indian Claims Commission Act). Claims arising after 1946 are currently brought in the Court of Federal Claims, which has jurisdiction under the Tucker Act and the Indian Tucker Act to hear claims arising under the Constitution, laws and treaties of the United States, and Executive orders. See Act of Mar. 3, 1887 (Tucker Act), ch. 359, 24 Stat. 505 (codified at 28 U.S.C. § 1491(2006)); Act of Aug. 13, 1946 (Indian Tucker Act), ch. 959, § 24, 60 Stat. 1055 (codified at 28 U.S.C. § 1505(2006)); see also COHEN, *supra* note 15, § 5.06[4][c] (describing Tucker Act and Indian Tucker Act jurisdiction). For a modern example of judicial review of congressional action regarding tribal land, see *United States v. Sioux Nation*, 448 U.S. 371, 423–24 (1980) (invalidating the Act of Feb. 28, 1877, which abrogated the Fort Laramie Treaty and effected a taking of Sioux tribal property).

42. See *Lone Wolf*, 187 U.S. at 567 ("From [the tribes'] very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen."); see also *United States v. Kagama*, 118 U.S. 375, 380 (1886) ("[T]his power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the Territory and other property of the United States, as from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else.").

43. *United States v. Lara*, 541 U.S. 193, 201 (2004) (citing *United States v. Curtiss-Wright*, 299 U.S. 304, 318 (1936)).

and therefore does not require an explicit grant of power in the Constitution for its exercise.”⁴⁴

Both Congress and the President exercise federal plenary power, and the federal Bureau of Indian Affairs (BIA) plays a key role in the use of this power within the context of federal-tribal relations.⁴⁵ Executive authority in the field of Indian affairs “generally flows from the President to the Secretary of the Interior and is then further delegated to the Bureau of Indian Affairs (BIA), an agency within the Interior Department.”⁴⁶ Statutes and other congressional actions related to Indian affairs usually delegate administrative authority to the Secretary of the Interior, who then delegates to the BIA for implementation.⁴⁷ The BIA’s administrative power covers three broad areas: Indian trust asset management; involvement in tribal governmental affairs; and social services, including health, welfare, education, housing, and other programs.⁴⁸

B. Plenary Power Justifies Vast Federal Powers of Control over Indian Property Ownership

To understand the government’s modern view of federal power over property held by individual Indians and Indian tribes, it is helpful to consider the development of this power throughout the history of federal-tribal relations. Historical and modern examples suggest that the plenary power doctrine provides the basis for federal power over Indian property ownership.

Throughout the early history of federal-tribal relations, development of the plenary power doctrine led to increasing federal control over Indian property ownership. From the beginning of Indian relations with the newly established United States,⁴⁹ the federal government held the fee title to Indian property in trust for the tribes and possessed a

44. COHEN, *supra* note 15, § 5.01[4], at 397.

45. *See id.* § 5.03[1], at 403–04.

46. *Id.*

47. *See id.* at 404.

48. *See id.*

49. Under British rule in the Americas, the Royal Proclamation of 1763 reserved certain land under the dominion and protection of the crown for use by the Indians, preventing settlement by whites in the reserved areas. *See* The Royal Proclamation, 1763, 3 Geo. 3 (Eng.), available at http://avalon.law.yale.edu/18th_century/proc1763.asp (last visited May 4, 2010). This idea of government authority over Indian lands passed to the new Republic. *See* COHEN, *supra* note 15, § 15.03, at 967.

preemptive power concerning acquisition of Indian lands.⁵⁰ This strong preemptive power arose from the dependent status of tribes and the perceived need for the government to exercise its powers of protection and control over tribes when transfers of Indian land were involved.⁵¹ Throughout the years, the federal right of preemption has justified broad congressional power to act concerning tribal property interests, including granting leases and rights of way on Indian lands, terminating trust status, and imposing, modifying, or removing restrictions on the sale or transfer (alienation) of Indian lands.⁵² Early Supreme Court decisions upheld the idea of broad federal control over Indian property ownership and helped to legitimize federal restrictions on alienation.⁵³ In addition,

50. See *Johnson v. M'Intosh*, 21 U.S. 543, 587 (1823) (“The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise.”). The *M'Intosh* Court noted that the government received “complete ultimate title, charged with [the Indian] right of possession, and . . . the exclusive power of acquiring that right.” *Id.* at 603. See also COHEN, *supra* note 15, § 15.06[1] (describing federal protection of tribal land and its origin in the doctrine of discovery).

51. Several Supreme Court cases provide analysis of the plenary power doctrine stemming from the dependent status of tribes. See, e.g., *United States v. Lara*, 541 U.S. 193, 201 (2004) (noting that plenary power stems partly from “affirmative grants of the Constitution” and partly from the Constitution’s “adoption of preconstitutional powers necessarily inherent in any Federal Government, namely, powers that this Court has described as ‘necessary concomitants of nationality’” (quoting *United States v. Curtiss-Wright*, 299 U.S. 304, 318 (1936))); *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”); *United States v. Kagama*, 118 U.S. 375, 383–84 (1886) (“Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.”).

52. See generally COHEN, *supra* note 15, § 5.02[4] (describing federal power over Indian property). Restriction on alienation of Indian property is a theme present from historical times to today. As early as 1790, Congress exercised its exclusive power over Indian affairs, derived from the Indian Commerce Clause, when it passed the Trade and Intercourse Act banning the transfer of Indian title to any state or person unless made by a treaty under federal authority. See Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137, 138 (“And be it enacted and declared, That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.”). This restriction is currently codified in the United States Code in nearly identical form: “No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.” 25 U.S.C. § 177 (2006).

53. *Johnson v. M'Intosh* established the federal-tribal relationship regarding alienation of Indian land, holding that the doctrine of discovery invalidates alienation of Indian title without the consent

the development of the federal-tribal trust relationship, which establishes responsibilities and duties owed by the federal government to the tribes, has greatly influenced federal power in Indian property holding.⁵⁴

The modern view of Indian property holding recognizes several sources of Indian land ownership rights, the most relevant being treaties, executive actions, and acts of Congress.⁵⁵ Treaties and executive orders are no longer used to reserve land for tribes, but they remain important because the federal government still recognizes Indian lands previously set aside under these methods.⁵⁶ The final source of recognized Indian

of the European sovereign (or consent of the United States as a successor nation) and gives the sovereign the exclusive power to purchase Indian land. 21 U.S. at 603–05. In the mid-nineteenth century, the federal government’s interest in tribal land was reconceived as a trustee’s fee title, and the tribal interest as beneficial ownership under trust. See COHEN, *supra* note 15, § 5.04[4][a], at 419–20. In *Cherokee Nation v. Georgia*, the Supreme Court noted that Indians have an “unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government . . .” 30 U.S. 1, 17 (1831). One year later, in *Worcester v. Georgia*, the Supreme Court enunciated the “universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent . . . that, within their boundary, they possessed rights with which no state could interfere: and that the whole power of regulating the intercourse with them, was vested in the United States.” 31 U.S. 515, 560 (1832).

54. See *infra* Part II for further explanation of the federal-tribal trust relationship. Plenary power and the trust relationship are intertwined, as is demonstrated by one issue in particular having great importance for the tribes and the government—the taking of Indian land without compensation. Broad congressional power over Indian landholding has been used to justify the taking or modification of Indian lands, but as long as the federal government recognizes Indian title (right of possession or occupation), and thus when property rights have vested in the tribe, the United States must pay just compensation for the taking or destruction of such property. See *United States v. Sioux Nation*, 448 U.S. 371, 416–17 (1980) (distinguishing between cases in which the government acts as a trustee and merely changes the form of trust assets, and cases in which the government acts as a sovereign and takes recognized title from tribes; in the latter case, the Court investigates the adequacy of the consideration provided in order to determine if an unconstitutional taking of land has occurred). Recognition of the Indian right of permanent occupancy must be established by congressional intent to accord legal rights, not merely permissive occupation. See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278–79 (1955). If the federal government does not recognize Indian title to a particular piece of land, tribes have no right to compensation for the taking of the land. *Id.* at 288–89 (“The line of cases adjudicating Indian rights on American soil leads to the conclusion that Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation.”).

55. See COHEN, *supra* note 15, § 15.04[1], at 969 (introducing tribal acquisition of interests in real property).

56. A rider attached to the Indian Appropriation Act of 1871 prospectively banned treaty-making, but since that Act, tribes have had their lands recognized in other ways. See Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566 (“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.”) (codified in part at 25 U.S.C. § 71 (2006)); ROBERT T. ANDERSON ET AL., *AMERICAN INDIAN LAW: CASES AND COMMENTARY* 89–90 (2008); see also *Antoine v. Washington*, 420 U.S. 194, 202–03 (1975) (discussing the 1871 rider and noting that the ban on treaty-making “meant no more, however, than that after 1871 relations with Indians

title, recognition by act of Congress, is the primary method in use today.⁵⁷ Congress may set aside lands by using statutes, agreements, or other acts, ranging from specific grants of fee simple rights to broad designations that a certain area must be used for the benefit of Indians or that Indian occupancy must be respected by third parties.⁵⁸

Two specific examples illustrate the breadth of the federal government's modern power over Indian property ownership. First, Section 5 of the IRA plays an important role in governing land acquisition and consolidation; it authorizes the Secretary of the Interior to acquire interests in lands for the purpose of providing land for Indians.⁵⁹ Second, the BIA exercises a variety of powers within the field of Indian affairs; most relevant for showing federal control over Indian

would be governed by Acts of Congress and not by treaty.” The rider banning future treaty-making is of dubious constitutionality. The Constitution grants the treaty power to the Senate and the President; such an affirmative grant of power cannot be changed by ordinary legislation. *See* ANDERSON at 89–90. In short, the 1871 rider to the appropriations bill is “constitutionally suspect.” *Lara*, 541 U.S. at 218 (Thomas, J., concurring in judgment). Congress barred the creation of executive order reservations in 1919. *See* Act of June 30, 1919, ch. 4, § 27, 41 Stat. 3, 34 (“That hereafter no public lands of the United States shall be withdrawn by Executive Order, proclamation, or otherwise, for or as an Indian reservation except by act of Congress.”). However, for most purposes the executive order reservations already established at that time have the same validity and status as a treaty- or statute-based reservation. *See* *United States v. Dion*, 476 U.S. 734, 745 n.8 (1986) (“Indian reservations created by statute, agreement, or executive order normally carry with them the same implicit hunting rights as those created by treaty.”). Reservations created by executive order before 1919 have been confirmed by federal statute and also by congressional acquiescence. *See* COHEN, *supra* note 15, § 15.04[4], at 983. However, some doubt surrounds the status of such reservations. Unless Congress later ratified the executive order reservation or otherwise recognized the Indian title, the reservation is not considered to be held by recognized title. Congress theoretically has the power to abolish such reservations, take the lands, and not be subject to a takings claim by the Indians. *See* ANDERSON at 227–28 (noting that Congress’s ability to abolish executive order reservations could lead to “incredible harshness” toward the tribes).

57. *See* COHEN, *supra* note 15, § 15.04[3][b], at 978 (noting that since the end of treaty-making in 1871, specific acts of Congress have recognized tribal property rights in land); *see also id.* § 15.04[5], at 985 (explaining that fee simple lands held by tribes may be placed in trust by acts of Congress).

58. *Id.* § 15.04[3][b], at 978. Congress uses two basic kinds of statutes to provide land for Indians: statutes that withdraw public land for the benefit of tribes and statutes that enable the purchase or condemnation of private land for tribal use. *See, e.g.,* Act of Aug. 4, 1978, Pub. L. No. 95-337, 92 Stat. 455 (holding former public lands in trust for the benefit of the Paiute and Shoshone tribes); Act of May 24, 1940, ch. 206, 54 Stat. 219 (authorizing the Secretary of the Interior to purchase private lands and hold them in trust for the Indians of the Turtle Mountain reservation).

59. Wheeler-Howard (Indian Reorganization) Act, Pub. L. No. 73-383, § 5, 48 Stat. 984, 985 (1934) (codified at 25 U.S.C. § 465 (2006)). The Secretary must determine that at least one of three conditions exists before taking land into trust under Section 5: the acquired lands must either be within the exterior borders of an existing reservation or adjacent to it; the tribe must already own an interest in the land; or acquisition must be necessary to facilitate tribal self-determination, economic development, or housing needs. *See* 25 C.F.R. § 151.3 (2009). The workings of the IRA are discussed *infra*, Part III.B.

property ownership is the BIA's trust management power.⁶⁰ The BIA has promulgated regulations relating to Indian trust assets, including regulations governing the acquisition and holding of land in trust for tribes and individual Indians under the IRA,⁶¹ the removal of restrictions on alienation of Indian allotments,⁶² the approval or cancellation of leases of tribal trust lands,⁶³ and the management of other issues related to tribal land.⁶⁴

C. *"Indian Country" Encompasses Broad Notions of Indian Property Ownership and Federal Control over Indian-Held Lands*

Because landholding is of such critical social and economic importance to tribes, federal power in this area continues to be an important part of federal-tribal relations. Under the plenary power doctrine, federal power and jurisdiction extend to lands qualifying as "Indian country."⁶⁵

During the early development of federal-tribal relations, no clear definition of "Indian country" prevailed; the federal government generally considered Indian country to be "country within which Indian laws and customs and federal laws relating to Indians" applied.⁶⁶ Despite

60. For general information on the nature and scope of the BIA's powers, see *supra* Part I.A.

61. See 25 C.F.R. pt. 151 (2009).

62. See *id.* pt. 152 (2009).

63. See *id.* pt. 162 (2009).

64. Other examples of federal power exercised over Indian lands through the BIA are regulations governing the leasing of mineral resources, water resources, and timber on tribal lands; regulations concerning activities of Indian traders on Indian land; and regulations concerning how Indians may use their trust land, particularly in the context of the Indian Gaming Regulatory Act. See COHEN, *supra* note 15, § 5.03[3][a]–[b] (describing principles of federal trust management).

65. *Alaska v. Native Village of Venetie*, 522 U.S. 520, 527 n.1 (1998) ("Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States.").

66. COHEN, *supra* note 15, § 3.04[1], at 182. Primary federal jurisdiction was established, albeit vaguely at times, by several early statutes. For example, the Trade and Intercourse Act of 1790 imposed penalties for being present in "Indian country" with merchandise usually sold to Indians, without having obtained an Indian trader license from the federal government. See Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137, 138. The Act also extended federal criminal jurisdiction to crimes committed by non-Indians against Indians in "any town, settlement, or territory belonging to any nation or tribe of Indians." *Id.* § 5, 1 Stat. at 138. Other acts of Congress at the time used similar language to describe the vague notion of Indian territory. See COHEN, *supra* note 15, § 3.04[2][b] (describing early ideas about the extent of Indian country). It was not until the Trade and Intercourse Act of 1834 that a formal definition of Indian country emerged. See Act of June 30, 1834, ch. 161, § 1, 4 Stat. 729, 729 (defining Indian country as "all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished"). However, due to changed conditions in land ownership and

its vague nature, the Indian country concept was important because it established primary federal jurisdiction over Indian lands, thus preempting state taxation or other state regulation in Indian country.⁶⁷

In the late nineteenth century, lacking a definition of Indian country, the Supreme Court clarified the term in a series of decisions that would serve as the foundation of the modern Indian country statute.⁶⁸ First, in *Donnelly v. United States*,⁶⁹ the Court held that Indian reservations established after statehood by executive orders issued pursuant to federal statutes qualified as Indian country.⁷⁰ The same year, the Court in *United States v. Sandoval*⁷¹ expanded the idea of Indian country, holding that the United States has “the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders.”⁷² Finally, the Court addressed the issue of Indian allotments in *United States v. Pelican*⁷³ and *United States v. Ramsey*,⁷⁴ holding that both trust allotments and restricted fee allotments qualify as Indian country.⁷⁵ Congress finally codified these ideas—namely that Indian

settlement, this definition was omitted from the statute books in 1874. *See* R.S. § 5596, 1 Rev. Stat. 1085 (effective June 22, 1874).

67. *See supra* note 65; *see also* *Worcester v. Georgia*, 31 U.S. 515, 561 (1832) (declaring the Cherokee nation to be “a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force”).

68. *See* COHEN, *supra* note 15, § 3.04[2][b], at 186.

69. 228 U.S. 243 (1913).

70. *Id.* at 269 (“[N]othing can more appropriately be deemed ‘Indian country,’ . . . than a tract of land that, being a part of the public domain, is lawfully set apart as an Indian reservation.”). Thus, if the federal government created reservations for tribes, Indian country could exist within the boundaries of a state, even if the land was not part of the tribe’s aboriginal title. *See* COHEN, *supra* note 15, § 3.04[2][b], at 186–87.

71. 231 U.S. 28 (1913).

72. *Id.* at 46. This notion of “dependent Indian communities” was reaffirmed in *United States v. McGowan*, in which the Court held that land purchased in Nevada after statehood by the federal government and held in trust for Indians was Indian country; the Court found that Congress had set the land aside for the “protection of a dependent people” and that it could not be distinguished from Indian country. 302 U.S. 535, 538–39 (1938).

73. 232 U.S. 442 (1914).

74. 271 U.S. 467 (1926).

75. In *Pelican*, the Court held that a trust allotment was Indian country, noting that the question is whether the land “had been validly set apart for the use of the Indians as such, under the superintendence of the Government.” 232 U.S. at 449. The same idea was expressed in *Ramsey*, where the Court held that a restricted fee allotment also qualified as Indian country and noted that “it would be quite unreasonable to attribute to Congress an intention to extend the protection of the criminal law to an Indian upon a trust allotment and withhold it from one upon a restricted allotment; and we find nothing in the nature of the subject matter or in the words of the statute which would justify us in applying the term Indian country to one and not to the other.” 271 U.S. at 471–72.

reservations, “dependent Indian communities,” and allotment lands all constituted Indian country—in 1948.⁷⁶

The United States Code, which contains the 1948 Indian country statute, sets forth the current definition of Indian country:

[T]he term “Indian country”, as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished⁷⁷

The Indian country statute sets forth the areas where federal law, not state law, will apply.⁷⁸ The presumption of federal jurisdiction in Indian country—absent clear congressional intent to the contrary—exemplifies the broad federal authority over Indian affairs and property ownership that stems from the federal plenary power doctrine.⁷⁹

II. THE FEDERAL-TRIBAL TRUST RELATIONSHIP CREATES FEDERAL OBLIGATIONS REGARDING TRIBES AND TRIBAL LANDS

As a consequence of federal plenary power and the historical federal-tribal relationship, the federal government has assumed responsibilities and duties concerning the protection and management of American Indian tribes.⁸⁰ The trust doctrine represents “one of the cornerstones of Indian law”⁸¹ and serves as recognition of the federal government’s special “obligation to protect tribal sovereignty and property.”⁸² This Part describes the history of the federal-tribal trust relationship and its

76. See Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified at 18 U.S.C. § 1151 (2006)).

77. See 18 U.S.C. § 1151.

78. See *Alaska v. Native Vill. of Venetie*, 522 U.S. 520, 527 n.1 (1998); see also COHEN, *supra* note 15, § 3.04[1] (discussing the significance of Indian country status and the application of federal and tribal law in Indian country).

79. See COHEN, *supra* note 15, § 3.04[1], at 183 (“Territory classified as Indian country continues to exist as such unless and until Congress clearly expresses its intent to diminish or terminate the Indian country status.”).

80. See generally *id.* § 5.04[4] (detailing the historical development of the trust relationship doctrine and explaining how the trust responsibility evolved from early treaties, statutes, and Supreme Court opinions).

81. *Id.* § 5.04[4][a], at 419.

82. *Id.* at 420.

continuing pertinence in modern-day Indian affairs. One application of the trust relationship is the role federal courts play in construing various sources of federal power as implying a corresponding duty to the tribes; in doing so, courts use Indian law canons of construction to protect Indian interests.

A. *The Federal-Tribal Trust Relationship Developed from Ideas About the Proper Role of the Federal Government in Managing Indian Affairs*

Federal power over Indian affairs originated at the very inception of United States history; after the American Revolution, the United States assumed all powers previously held by the British Crown concerning Indian affairs.⁸³ The Constitution acknowledged the federal government's broad inherent power over Indian affairs by granting Congress the power to regulate commerce with Indian tribes,⁸⁴ by declaring federal supremacy over state law,⁸⁵ and by giving the executive the power to make treaties with Indian tribes.⁸⁶ These provisions ensured federal control in Indian affairs, but the early Supreme Court cases of *Johnson v. M'Intosh*,⁸⁷ *Cherokee Nation v. Georgia*,⁸⁸ and *Worcester v. Georgia*⁸⁹ established the idea that such expansive federal control implies a corresponding duty to protect tribal interests.⁹⁰ This duty, commonly called the federal-tribal trust

83. See *Johnson v. M'Intosh*, 21 U.S. 543, 574–88 (1823) (discussing early European rule and the United States's accession to power).

84. U.S. CONST. art. I, § 8, cl. 3.

85. *Id.* art. VI, cl. 2.

86. *Id.* art. II, § 2, cl. 2.

87. 21 U.S. 543 (1823).

88. 30 U.S. 1 (1831).

89. 31 U.S. 515 (1832).

90. In *Johnson*, the Court integrated the doctrine of discovery into federal Indian policy. Under this doctrine, ultimate title to land is vested in the United States government; Indian inhabitants “are to be considered merely as occupants, to be protected . . . in the possession of their lands, but to be deemed incapable of transferring the absolute title to others.” 21 U.S. at 591. *Cherokee Nation* and *Worcester* established the notion that states generally have no power over Indian affairs, and that the federal-tribal relationship is one of a trustee and beneficiary; because tribes are “domestic dependent nations,” the United States has the authority to manage tribal property and the corresponding duty to protect tribal interests. See *Cherokee Nation*, 30 U.S. at 17 (discussing the status of tribes as domestic dependent nations); *Worcester*, 31 U.S. at 520 (noting that the Cherokee Nation is under the protection of the federal government, but remains “a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . . [t]he whole intercourse between the United States and [the Cherokee] nation, is, by our constitution and laws, vested in the government of the United States”).

relationship, has defined federal Indian policy since the early years of the United States and continues to affect federal-tribal relations.⁹¹

B. The Indian Law Canons of Construction Reflect Key Concepts Inherent in the Federal-Tribal Trust Relationship, and Federal Courts Apply the Canons in Construing Laws Affecting Indians

Federal courts use a set of rules known as the Indian law canons of construction to construe statutes and treaties broadly in favor of protecting tribal property and sovereignty, thus upholding the basic concepts underlying the federal-tribal trust relationship.⁹² The Supreme Court has noted that “the standard principles of statutory construction do not have their usual force in cases involving Indian law.”⁹³ Courts use four canons of construction when construing laws concerning Indian tribes or individual Indians.⁹⁴ These rules establish that (1) treaties, agreements, statutes, and executive orders must be liberally construed in favor of the Indians; (2) ambiguities are to be resolved in favor of the Indians; (3) treaties and agreements are to be construed as the Indians would have understood them; and (4) tribal property rights and sovereignty are to be upheld unless Congress shows clear and unambiguous intent to the contrary.⁹⁵ The Indian law canons of construction reflect the idea that “tribes are not simply minority ethnic groups, but are sovereigns possessing a government-to-government relationship with the United States.”⁹⁶ Thus, by requiring courts to interpret treaties and statutes in favor of Indians, the canons ensure that the federal government’s duty to protect tribal sovereignty and property, stemming from the special government-to-government relationship between tribes and the United States, remains intact.

91. See COHEN, *supra* note 15, § 5.04[4] (describing the federal trust relationship from past to present).

92. See *id.* § 2.02[2], at 123.

93. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). See also *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (“The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians.”).

94. See COHEN, *supra* note 15, § 2.02[1] (describing the development of the Indian law canons of construction in the context of treaty interpretation).

95. See *id.* at 119–20.

96. *Id.* § 2.02[2], at 122–23.

III. FEDERAL RECOGNITION OF TRIBES VARIED THROUGHOUT HISTORY, CULMINATING IN THE IRA'S FORMAL LIST OF "RECOGNIZED" TRIBES

The process by which the federal government recognizes Indian tribes remains complex and ever-evolving. At its most basic level, recognition formalizes the federal-tribal trust relationship and provides a basis for tribes to receive benefits conferred by federal legislation.⁹⁷ The federal government has used various forms of recognition throughout the history of federal-tribal relations, all of which acknowledge some historical relationship between a tribe and the government.⁹⁸ In 1934, upon enactment of the IRA, the federal government compiled a list of recognized tribes eligible for the IRA's benefits.⁹⁹ This Part will explore the process of federal recognition before and after the IRA and will demonstrate that the IRA list of recognized tribes excluded hundreds of eligible Indian groups.

A. *Several Traditional Means of Recognition Predated the Enactment of the IRA*

The process of federal recognition or acknowledgment confirms a tribe's existence as a distinct political entity and formalizes the government-to-government relationship between the tribe and the United States.¹⁰⁰ Traditionally, the term "Indian tribe" referred to an indigenous North American group with which the United States had established a legal relationship.¹⁰¹ At the most basic level, recognition required the government to find that an Indian group had preserved its tribal organization and was recognized by the political department of the government as existing, thus proving itself to be a "people distinct from others."¹⁰² Before 1934, recognition also required proof of some

97. See generally COHEN, *supra* note 15, § 3.02[3] (describing the meaning and significance of federal recognition).

98. See generally *id.* § 3.02[4]–[5] (describing the federal power to recognize tribes and the historical establishment of federal-tribal relations through congressional acts, treaties, and executive orders).

99. See William W. Quinn, Jr., *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 AM. J. LEGAL HIST. 331, 356 (1990); see also THEODORE H. HAAS, TEN YEARS OF TRIBAL GOVERNMENT UNDER THE I.R.A. 13–20 (U.S. Indian Serv. 1947) (listing the tribes "which voted to accept or reject the terms" of the IRA).

100. See COHEN, *supra* note 15, § 3.02[3], at 138.

101. *Id.* § 3.01, at 135.

102. See *The Kansas Indians*, 72 U.S. 737, 755 (1866). This case concerned Kansas's right to tax lands in the state held in severalty by individual Indians of the Shawnee, Wea, and Miami tribes

historical relationship with the federal government; the government recognized tribes by treaty, statute, administrative process, or other formal political action recognizing tribal existence.¹⁰³ Additionally, Congress had the power to directly confer recognition status upon “distinctly Indian communities” that were historically unrecognized,¹⁰⁴ an action that is sometimes still used—upon petition by Indian communities—to correct historical mistakes or oversights.¹⁰⁵ The executive branch also had the power to “undertake diplomatic and administrative actions consistent with federal recognition.”¹⁰⁶ Courts have generally deferred to executive and other governmental department decisions to regard a tribe as recognized.¹⁰⁷

The federal government also traditionally recognized tribes under specific statutes. For the purposes of federal statutes, a group was treated as a recognized tribe (and thus included within the statute’s coverage) if Congress or the executive had created a reservation for the group by treaty, agreement, statute, executive order, or valid administrative action, and the United States had some continuing political relationship with the group.¹⁰⁸ In some cases, tribes qualified under federal statutes even if they lacked formal federal recognition,¹⁰⁹ but such qualification does not provide the same broad benefits formally recognized tribes enjoy.¹¹⁰

under patents issued to them pursuant to treaties made between the United States and the tribes. As for the Shawnees, the Court held that the state could not tax the land: “If the tribal organization of the Shawnees is preserved intact, and recognized by the political department of the government as existing, then they are a ‘people distinct from others,’ capable of making treaties, separated from the jurisdiction of Kansas, and to be governed exclusively by the government of the Union.” *Id.*

103. See COHEN, *supra* note 15, § 3.02[3], at 138.

104. See *United States v. Sandoval*, 231 U.S. 28, 45–46 (1913) (noting that tribes may be subjected to federal guardianship as dependent wards and that the United States has “the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders”). When the federal government has regarded Indian groups as “dependent communities entitled to its aid and protection, like other Indian tribes, and, considering their Indian lineage, isolated and communal life, primitive customs and limited civilization, this assertion of guardianship over them . . . must be regarded as both authorized and controlling.” *Id.* at 47.

105. See COHEN, *supra* note 15, § 3.02[5], at 144.

106. *Id.* § 3.02[4], at 140.

107. See *United States v. Holliday*, 70 U.S. 407, 419 (1865) (“[With respect to tribal recognition], it 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.”).

108. See COHEN, *supra* note 15, § 3.02[6][a], at 144.

109. For example, in *Montoya v. United States*, the Court held that an Indian tribe is a “tribe” within the meaning of the Indian Depredation Act of 1891 if it is “a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory.” 180 U.S. 261, 266 (1901). The *Montoya* definition has since been used in determining which groups are included when Congress makes reference simply to “tribes” in statutes. ANDERSON, *supra* note 56, at 253. For example, in *United States v.*

B. *The IRA of 1934 Draws from Trust Relationship Principles in Its Treatment of Indian Property Rights and Sets Forth a Recognition Requirement for Tribes Seeking to Benefit from Its Provisions*

Congress enacted the IRA during the Indian New Deal, a period of increasing concern over the failure of the federal policy of allotment of Indian lands.¹¹¹ Under the allotment policy, Congress opened Indian lands to settlement, with individual allotments provided to Indians and white settlers alike.¹¹² The 1928 Meriam Report, a detailed study of federal Indian policy, described the problems of the allotment era: massive loss of tribal land and corresponding poverty, culture loss, disruption of tribal governments, and reliance on the federal government for basic survival needs.¹¹³ In response,¹¹⁴ Congress passed the IRA of 1934.¹¹⁵

Candelaria, the Court used the *Montoya* definition to conclude that the Pueblos of New Mexico were a tribe within the meaning of the Nonintercourse Act, finding that “[the Pueblos] are Indians in race, customs, and domestic government, always have lived in isolated communities, and are a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races.” 271 U.S. 432, 441–42 (1926). Similarly, in *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, the First Circuit held that the Passamaquoddy tribe could assert rights under the Nonintercourse Act even though it had never signed a treaty or entered into a political relationship with the United States. 528 F.2d 370, 379 (1st Cir. 1975) (“We agree with the district court that the words ‘any tribe of Indians’ appearing in the Act include the Passamaquoddy Tribe.”). The court found that there is “nothing in the [Nonintercourse] Act to suggest that ‘tribe’ is to be read to exclude a bona fide tribe not otherwise federally recognized.” *Id.* at 377. Moreover, “there is no evidence that the absence of federal dealings was or is based on doubts as to the genuineness of the Passamaquoddy’s tribal status, apart, that is, from the simple lack of recognition.” *Id.* at 378.

110. See COHEN, *supra* note 15, § 3.02[6][a], at 145 (noting that specific recognition is not the same as broad, general recognition because “[t]he legal principles developed under one statutory scheme often cannot be transferred to other situations because of the peculiar context in which the original principles were developed”).

111. See *id.* § 1.05 (describing the motivations and history behind enactment of the IRA).

112. See *id.* § 1.04 (describing allotment and its effects on Indian land and culture).

113. THE PROBLEM OF INDIAN ADMINISTRATION 3–8 (Lewis Meriam ed., Johns Hopkins Press 1928) [hereinafter Meriam Report] (setting forth the report’s findings concerning living conditions, economic and social problems, poverty, and loss of land and culture among Indian tribes).

114. See 78 CONG. REC. 11,123 (1934) (statement of Sen. Wheeler) (noting that a prime motivation behind introduction of the IRA in Congress was that “while the Government has been seeking to train the Indians of the United States, as a matter of fact most of them are in a much more deplorable condition economically than they ever have been In many instances they have lost their land We have pauperized them”); see also John Collier, extract from the *Annual Report of the Commissioner of Indian Affairs* 78–83 (1934), reprinted in DOCUMENTS OF UNITED STATES INDIAN POLICY 225–29 (Francis Paul Prucha ed., 3d ed., Univ. Neb. Press 2000) (describing the consequences of allotment and detailing Congress’s intent, as set forth in the Wheeler-Howard Act (IRA), to remedy the loss of Indian land and culture).

115. Wheeler-Howard (Indian Reorganization) Act, Pub. L. No. 73-383, 48 Stat. 984, 985 (1934) (codified as amended at 25 U.S.C. § 465 (2006)).

Congress enacted the IRA with the federal-tribal trust relationship in mind.¹¹⁶ Major IRA goals included ending the alienation of tribal land, facilitating tribal acquisition of additional land, protecting tribal land from future encroachment, and assisting tribes in establishing legal structures for self-government.¹¹⁷ In support of these goals, various provisions of the IRA ended the practice of allotment of Indian reservation lands,¹¹⁸ authorized the Secretary of the Interior to proclaim new reservations or add to existing reservation lands,¹¹⁹ and established a procedure for tribes to organize and adopt constitutions and bylaws.¹²⁰ Importantly, Section 5 of the IRA provided that

[t]he Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments . . . for the purpose of providing land for Indians.¹²¹

The United States holds lands acquired under Section 5 in trust for the benefit of Indians and Indian tribes, and the lands are not subject to state or local taxation.¹²²

Because the IRA specifically authorizes the Secretary to take land into trust for “Indians,”¹²³ a major issue involves the determination of who qualifies as an Indian under the IRA’s trust-land provisions. The IRA defines “Indian” as

116. See DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 114, at 226 (describing the duty of the federal government to undo the damage created by allotment and the intent of Congress to facilitate the “economic and the spiritual rehabilitation of the Indian race”).

117. See 78 CONG. REC. 11,123 (1934) (statement of Sen. Wheeler) (outlining the purposes and goals of the IRA); see also COHEN, *supra* note 15, § 1.05, at 86 (describing the federal objectives underlying passage of the IRA).

118. Indian Reorganization Act § 1 (codified as amended at 25 U.S.C. § 461).

119. *Id.* § 7 (codified at 25 U.S.C. § 467).

120. *Id.* § 16 (codified at 25 U.S.C. § 476).

121. *Id.* § 5 (codified at 25 U.S.C. § 465). Despite the fact that the Secretary has taken land into trust for various tribes since passage of the IRA in 1934, the Department of the Interior did not adopt specific criteria for deciding when to accept property into trust until 1980. See Land Acquisitions, 45 Fed. Reg. 62,034–37 (Sept. 18, 1980) (codified at 25 C.F.R. pt. 151 (2009)). Under these regulations, the Secretary may take land into trust for a tribe if a statute authorizes such an action, provided that the “property is located within the exterior boundaries of the tribe’s reservation or adjacent thereto,” the tribe “already owns an interest in the land,” or “the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.” 25 C.F.R. § 151.3(a) (2009).

122. Indian Reorganization Act § 5 (codified at 25 U.S.C. § 465).

123. *Id.*

all persons of Indian descent who are members of *any recognized Indian tribe now under Federal jurisdiction*, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.¹²⁴

Thus, in determining which tribes may claim the benefits conferred by Section 5 of the IRA, federal recognition of tribes and federal jurisdiction over such tribes are important considerations.

Congress amended the IRA in 1994 to reflect the notion that the federal government should treat all recognized tribes equally.¹²⁵ The 1994 amendment provides that

Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to [the IRA of 1934] as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.¹²⁶

Through the amendment, Congress expressed its desire to treat recognized tribes equally with regard to federal benefits, “[w]hatever the method by which recognition was extended.”¹²⁷ The congressional intent behind the 1994 amendment emphasizes that “Indian tribes recognized by the Federal Government stand on an equal footing to each other and to the Federal Government, and that each federally recognized Indian tribe is entitled to the same privileges and immunities as other federally recognized tribes.”¹²⁸

124. *Id.* § 19 (codified at 25 U.S.C. § 479) (emphasis added).

125. The Congressional Record for the 1994 IRA amendments supports the idea that “[t]he purpose of the amendment is to clarify that section 16 of the Indian Reorganization Act was not intended to authorize the Secretary of the Department of the Interior to create categories of federally recognized Indian tribes The recognition of an Indian tribe by the Federal Government is an acknowledgement that the Indian tribe is a sovereign entity with governmental authority which predates the U.S. Constitution Whatever the method by which recognition was extended, all Indian tribes enjoy the same relationship with the United States and exercise the same inherent authority.” *See* 140 CONG. REC. 11,376, 11,377 (May 23, 1994) (statement of Rep. Richardson).

126. Act of May 31, 1994, Pub. L. No. 103-263, § 5(b), 108 Stat. 707, 709 (codified at 25 U.S.C. § 476(f) (2006)).

127. *See* 140 CONG. REC. 11,376, 11,377 (May 23, 1994) (statement of Rep. Richardson).

128. *Id.*

C. *The Government's First Attempt to Officially Recognize Tribes
Was a 1934 List that Coupled Recognition with Federal
Jurisdiction and Excluded Hundreds of Eligible Tribes*

There is no specific date upon which the United States decided to formally recognize tribes. Instead, the history of recognition shows “consistent uncertainty and even confusion on the part of the several branches of the government of the United States.”¹²⁹ Until the IRA, no express congressional declaration or statement clarified which tribes were or were not recognized by the federal government.¹³⁰

In the early years of federal-tribal relations, the idea of federal recognition of Indian tribes remained vague and undefined.¹³¹ Beginning around the 1870s, the term “recognition” came to be used in a formal jurisdictional sense, meaning that the federal government acknowledged a tribe as a domestic dependent nation and dealt with it in a special government-to-government relationship.¹³² Although Congress ended the practice of making treaties with Indian tribes in a rider to the Indian Appropriation Act of 1871,¹³³ the federal government continued to recognize tribes by other means, including congressional agreements, legislation, and executive action.¹³⁴ Recognition proceeded on an ad hoc basis, as the BIA had no coherent policy for deciding which tribes deserved recognition and which did not.¹³⁵

The federal government finally compiled an official list of recognized tribes in 1934, when passage of the IRA necessitated a determination of which tribes would qualify for reorganization under the IRA's provisions.¹³⁶ Commissioner of Indian Affairs John Collier undertook the task of determining “which Indian groups were or should be

129. Quinn, *supra* note 99, at 332.

130. *See id.*

131. *See id.* at 333 (noting that in the early documentary record, “recognition” simply meant that federal officials knew or realized that a tribe existed as an entity).

132. *See id.*

133. Act of Mar. 3, 1871, ch. 120, §1, 16 Stat. 544, 566 (codified in part at 25 U.S.C. § 71 (2006)) (providing that from that date forward “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”).

134. *See* COHEN, *supra* note 15, § 3.02[4], at 141; ANDERSON, *supra* note 56, at 89.

135. *See* Quinn, *supra* note 99, at 352–53 (describing the federal government's slow progress in coming to terms with the concept of federal recognition of tribes); *see also* ANDERSON, *supra* note 56, at 248 (noting that “[t]he decision to recognize a group as a tribe at all might also be an accident of history.”).

136. *See* Quinn, *supra* note 99, at 356; *see also* HAAS, *supra* note 99, at 1–2 (describing the general process of tribal reorganization under the IRA).

recognized by the federal government and permitted to organize and vote on application of the Act.”¹³⁷ The original IRA required the Secretary of the Interior to call tribal elections for all IRA-eligible tribes within one year of its passage, with the eligible tribes permitted to choose whether or not to reorganize under the IRA.¹³⁸ Collier thus had a very short time to determine which tribes qualified to reorganize under the IRA, and despite a 1935 amendment to the IRA that extended this period for another year,¹³⁹ much of the work of studying and selecting tribes for purposes of the IRA was “done in haste.”¹⁴⁰

Collier ultimately compiled a list of 258 recognized tribes eligible to vote to reorganize under the IRA.¹⁴¹ These tribes, as well as tribes recognized after 1934, have been allowed to have land held in trust under Section 5.¹⁴² From the beginning of the IRA’s implementation, the government coupled recognition with federal jurisdiction;¹⁴³ tribes have not had to prove jurisdiction as an element separate from recognition every time they apply to have land taken into trust.¹⁴⁴

By creating a list, the government distinguished between recognized and unrecognized tribes for purposes of the IRA, but due to the haste with which Commissioner Collier determined tribal eligibility, several potentially eligible tribes were overlooked and excluded.¹⁴⁵ This created

137. See Brief of Law Professors Specializing in Federal Indian Law as Amicus Curiae Supporting Respondents at 22, *Carcieri v. Salazar*, 555 U.S. ___ (Feb. 24, 2009), 129 S. Ct. 1058 (2009) (No. 07-526), 2008 WL 3991411, at *22.

138. Wheeler-Howard (Indian Reorganization) Act, Pub. L. No. 73-383, § 18, 48 Stat. 984, 988 (1934) (codified at 25 U.S.C. § 478 (2006)).

139. See Act of June 15, 1935, ch. 260, § 2, 49 Stat. 378.

140. See William H. Kelly, *Indian Adjustment and the History of Indian Affairs*, 10 ARIZ. L. REV. 559, 569 (1968).

141. See Quinn, *supra* note 99, at 356. For the list of tribes Collier determined to be eligible to vote on application of the IRA, see HAAS, *supra* note 99, at 13–20.

142. See COHEN, *supra* note 15, § 15.07[1][a], at 1009–10 (describing the trust-land provisions of the IRA as applying to all Indian tribes, regardless of when they were recognized); see also *infra* Part IV (providing examples of tribes recognized after 1934 that have had land held in trust under the IRA).

143. A search of the leading treatise, cases, and articles on the subject failed to reveal any case before 2009 where federal jurisdiction was considered separately from recognition for purposes of the IRA’s trust-land provisions. See *id.* at 1010 (“The IRA applies to all Indian tribes, whether recognized in 1934, or subsequently acknowledged by Congress or the executive.”).

144. See *id.* (describing the trust-land provisions of the IRA; until 2009, the provisions applied to all Indian tribes, regardless of date of recognition). This policy, which did not require recognized tribes to show separate evidence of federal jurisdiction in 1934 to qualify for benefits under the IRA, prevailed until the *Carcieri* decision. See *infra* Part V (describing *Carcieri* and its effects on tribes seeking to qualify for the IRA’s trust-land provisions).

145. See *infra* Part IV (providing examples of excluded tribes that have nevertheless achieved recognition since 1934).

a need for procedures by which tribes unrecognized in 1934 could achieve federal recognition¹⁴⁶—a status that increased in importance after the termination era of federal Indian policy.¹⁴⁷

The original IRA list included 258 tribes but excluded many more, as evidenced by the fact that the federal government has since recognized an additional 306 tribes for a total of 564 federally recognized tribes.¹⁴⁸ Government studies of Indian groups in the 1930s “were often quite limited and inaccurate,”¹⁴⁹ and some groups now known to have existed as tribes in 1934 were mistakenly portrayed by the federal government at the time as not having maintained stable communities or political leadership.¹⁵⁰ Many of the mistakes made during the compilation of the 1934 list concerned landless tribes, as the IRA referred only to tribes residing on reservations.¹⁵¹ The IRA list also excluded small tribes, tribes that had never had significant dealings with the United States, peaceful tribes that had never fought against the United States, and branches of tribes whose principal nations had already achieved recognition, but who sought independent tribal status.¹⁵² Additionally, in the late 1970s, an American Indian Policy Review Commission study of Indian tribe recognition concluded that in compiling the 1934 list, the government failed to recognize dozens of tribes simply “because of bureaucratic oversight.”¹⁵³ These inadequacies complicate the task of

146. See Quinn, *supra* note 99, at 357.

147. See generally COHEN, *supra* note 15, § 1.06[4], at 89–97 (describing the termination era and its effects on Indian tribes, including the end of the federal-tribal relationship and the discontinuation of federal benefits upon termination of tribal status).

148. All of these tribes can demonstrate continuously existing communities, historical existence as American Indian entities, and/or various historical relationships with the United States. See *supra* Part III.A (describing traditional methods of recognition); see also *infra* Part IV.B (describing the modern 25 C.F.R. Part 83 recognition process); Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 74 Fed. Reg. 40,218 (Aug. 11, 2009) (listing the 564 tribes recognized as of August 2009).

149. See Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. 9280, 9281 (Feb. 25, 1994).

150. *Id.*

151. See Brief of Law Professors, *supra* note 137, at 22–24, 2008 WL 3991411, at *22–24 (describing the exclusion of landless tribes from the IRA list).

152. See Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL'Y REV. 271, 274–75 (2001).

153. AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT 8 (1977). The Commission noted that “[t]rying to find a pattern for the administrative determination of a federally recognized Indian tribe is an exercise in futility The [recognition procedure] was subject to an accident of history.” *Id.* at 462; see also Brief of Law Professors, *supra* note 137, at 25, 2008 WL 3991411, at *25 (describing the Commission’s study).

determining which modern tribes qualify as recognized for purposes of the IRA.

IV. THE FEDERAL GOVERNMENT RECOGNIZED TRIBES BY TRADITIONAL MEANS UNTIL ESTABLISHING A FORMAL RECOGNITION PROCESS IN 1978

Despite the government's mistakes and oversights in compiling the original IRA list of recognized tribes, tribes excluded from that list have obtained federal recognition through traditional methods since 1934.¹⁵⁴ Additionally, in 1978, several decades after enactment of the IRA, the federal government established a formal administrative recognition process (codified as amended at 25 C.F.R. Part 83).¹⁵⁵ Since 1978, the federal government has recognized sixteen tribes through its formal administrative process.¹⁵⁶ This Part will demonstrate that tribes recognized under both traditional and 25 C.F.R. Part 83 processes have had land held in trust under the IRA's trust-land provisions.

A. *Between 1934 and 1978, Tribes that Were Not Included in the IRA List Achieved Traditional Federal Recognition and Had Land Held in Trust by the Government*

Because the IRA did not establish a formal mechanism for recognizing Indian tribes, the government continued to use traditional recognition procedures after the IRA's enactment.¹⁵⁷ Between 1934 and 1978, tribes excluded from the IRA list achieved recognition through those procedures, under which the government acknowledges preexisting historical relationships with particular tribes.¹⁵⁸ For example, the federal government recognized the Nooksack tribe of Washington in 1971¹⁵⁹ based on the tribe's long-standing treaty rights under the Point

154. See *supra* Part III.A for a description of traditional methods of recognition. The original IRA recognized 258 tribes and currently there are 564 recognized tribes, meaning the government has recognized 306 tribes by various means since enactment of the IRA. For the current list of recognized tribes, see Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 74 Fed. Reg. 40,218 (Aug. 11, 2009).

155. See 25 C.F.R. pt. 83 (2009); see also COHEN, *supra* note 15, § 3.02[7][a], at 155–59 (describing the 1978 promulgation of regulations governing federal recognition under 25 C.F.R. Part 83 and detailing the Part 83 process).

156. See Brief of Law Professors, *supra* note 137, at app. 3, 2008 WL 3991411, at app. 3 (listing the tribes recognized under 25 C.F.R. Part 83).

157. See *supra* Part III.A (describing traditional recognition methods).

158. See *supra* Part III.A.

159. See Brief of Law Professors, *supra* note 137, at app. 2, 2008 WL 3991411, at app. 2 (noting

Elliott Treaty of 1855.¹⁶⁰ Similarly, the Department of the Interior recognized the Stillaguamish tribe of Washington in 1976, noting that the tribe was “an Indian tribe entitled to exercise treaty fishing rights, and that the Department has a trust responsibility with respect to the protection of those rights.”¹⁶¹ The Department later concluded that the Secretary of the Interior could take land into trust for the tribe.¹⁶² Congress, which “may elect to recognize a tribe as a means to correct historical oversights from earlier legislation . . . or to accord similar treatment for tribes similarly situated,”¹⁶³ has also directly recognized tribes.¹⁶⁴ These examples demonstrate that the government does formally recognize tribes excluded from the 1934 list and that the Department of the Interior allows tribes recognized through traditional means after 1934 to take advantage of the IRA’s trust-land provisions.¹⁶⁵

the recognition of the Nooksack Indian Tribe by a Department of the Interior Solicitor’s opinion issued August 13, 1971).

160. See Barbara S. Lane, IDENTITY AND TREATY STATUS OF THE NOOKSACK INDIANS: PREPARED FOR U.S. DEPARTMENT OF THE INTERIOR AND THE NOOKSACK INDIAN TRIBE 21–22 (1974) (concluding that based on the evidence, the Nooksack Indian Tribe was a party to the Point Elliott Treaty of 1855).

161. See Letter from Kent Frizzell, Acting Secretary of the Interior, to David H. Getches, Esquire, Native American Rights Fund at 1 (Oct. 27, 1976) (on file with author).

162. See Memorandum from Associate Solicitor, Indian Affairs to Assistant Secretary, Indian Affairs, Request for Reconsideration of Decision Not to Take Land in Trust for the Stillaguamish Tribe (Oct. 1, 1980). The Associate Solicitor concluded that “the treaty fishing rights of the Stillaguamish render them a ‘recognized tribe now under federal jurisdiction’” and that “[i]t is irrelevant that the United States was ignorant in 1934 of the rights of the Stillaguamish and that no clear determination or redetermination of the status of the tribe was made at that time.” *Id.* at 6–7. After noting that the Stillaguamish “constitute a tribe for purposes of the IRA,” the Associate Solicitor concluded that based on the tribe’s poverty, high rate of unemployment, and lack of land base, “the Stillaguamish have adequately established their need for trust land and that the Secretary has the authority and discretion to take land in trust for the tribe.” *Id.* at 8.

163. COHEN, *supra* note 15, § 3.02[5], at 144. For examples of tribes recognized since 1960 and the various means by which recognition was conferred on those tribes, see U.S. GENERAL ACCOUNTING OFFICE, INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS 25–26 (2001).

164. See Brief of Law Professors, *supra* note 137, at app. 1, 2008 WL 3991411, at app. 1 (listing tribes recognized by congressional legislation).

165. See *id.* at app. 1–2, 2008 WL 3991411, at app. 1–2 (listing tribes recognized through congressional legislation and informal executive branch action since 1934); see also *supra* Part IV.A and *infra* Part IV.B (noting instances in which land has been taken into trust for tribes recognized after 1934).

B. In 1978, the Federal Government Created the First Formal Mechanism for Tribal Recognition

After years of ad hoc recognition and confusion regarding tribal status, the Department of the Interior finally created a formal administrative recognition process (codified as amended at 25 C.F.R. Part 83) in 1978.¹⁶⁶ As part of the implementation of the new recognition procedures, the government in 1979 published a comprehensive list of Indian tribes recognized by any means before that year.¹⁶⁷ Any Indian groups not included on the list are considered unrecognized and must complete the formal administrative process of 25 C.F.R. Part 83, or in extreme cases petition Congress,¹⁶⁸ to obtain federal benefits.¹⁶⁹

Detailed procedures for obtaining federal recognition of tribal status are set forth in 25 C.F.R. Part 83.¹⁷⁰ Tribes must meet seven mandatory criteria for recognition, the most pertinent of which are identification as an American Indian entity on a substantially continuous basis since 1900 and existence as a community from historical times until the present.¹⁷¹ The 25 C.F.R. Part 83 recognition process is long and cumbersome, but since its enactment, sixteen tribes have succeeded in obtaining recognition, including some that were excluded from the 1934 list of recognized tribes.¹⁷² For example, in 1934 the Department assumed that the Grand Traverse Band of Ottawa and Chippewa Indians had been dissolved.¹⁷³ However, in 1980 the Grand Traverse Band became the

166. See Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39,361 (Sept. 5, 1978) (codified as amended at 25 C.F.R. pt. 83 (2009)).

167. The 1979 list differs from the 1934 IRA list in that the 1979 list contains the tribes listed as recognized under the IRA, as well as tribes recognized by traditional means between 1934 and 1979. See Indian Tribal Entities That Have a Government-to-Government Relationship with the United States, 44 Fed. Reg. 7235 (Feb. 6, 1979).

168. See Brief of Law Professors, *supra* note 137, at app. 1, 2008 WL 3991411, at app. 1 (listing tribes recognized by congressional legislation).

169. See *id.* at 6, 2008 WL 3991411, at *6; see also Indian Tribal Entities That Have a Government-to-Government Relationship with the United States, 44 Fed. Reg. 7235 (Feb. 6, 1979) (listing the tribes recognized by the federal government as of 1979); Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 74 Fed. Reg. 40,218 (Aug. 11, 2009) (listing the 564 tribes recognized by the federal government as of August 2009).

170. See COHEN, *supra* note 15, § 3.02[7][a], at 155–59 (describing the 25 C.F.R. Part 83 process).

171. See 25 C.F.R. § 83.7 (2009).

172. See Brief of Law Professors, *supra* note 137, at 30, 2008 WL 3991411, at *30 (noting the use of 25 C.F.R. Part 83 to grant recognition to sixteen tribes since 1978); *id.* at app. 3, 2008 WL 3991411, at app. 3 (listing the sixteen tribes).

173. In the 1870s, the Secretary of the Interior misinterpreted the 1855 Ottawa Chippewa Treaty to provide for dissolution of the tribes. This led the Secretary to terminate relations with the tribe,

first tribe formally recognized under the new recognition procedures.¹⁷⁴ In making its decision to recognize the tribe, the Department determined that its previous position was mistaken and that the tribe had in fact existed continuously and autonomously since first contact with European settlers.¹⁷⁵ Since the 1980 recognition, the Department has taken multiple parcels of land into trust for the tribe under the IRA.¹⁷⁶

Similarly, the federal government recognized the Cowlitz tribe of Washington throughout the 1800s,¹⁷⁷ but changed its stance in the early- to mid-1900s after concluding that the tribe had assimilated into U.S. society.¹⁷⁸ As a result, the tribe was excluded from the list of recognized tribes compiled in 1934.¹⁷⁹ The tribe petitioned the federal government for recognition in 1975 and finally obtained recognition twenty-five years later, with the Department concluding that the tribe could “trace an unbroken line of leaders and a relatively unchanging membership” since 1870, thus establishing that the tribe had maintained its governmental structure and organization.¹⁸⁰ Thus, as it has with traditional methods of recognition, the federal government has recognized tribes under 25 C.F.R. Part 83 and has allowed those tribes to take advantage of the IRA’s trust-land provisions.

and the federal government proceeded to withdraw all government services. The tribe remained unrecognized in 1934 when the IRA was enacted. *See id.* at 33–34, 2008 WL 3991411, at *33–34.

174. *See id.* at 34–35, 2008 WL 3991411, at *34–35.

175. The Department of the Interior found that the tribe was “unquestionably Indian” and that “[n]o evidence was found that the members of the band [were] members of any other Indian tribes, or that the band or its members [were] terminated or forbidden the Federal relationship by an Act of Congress.” *See* Determination for Federal Acknowledgment of the Grand Traverse Band of Ottawa and Chippewa Indians as an Indian Tribe, 45 Fed. Reg. 19,321 (Mar. 25, 1980).

176. *See* Grand Traverse Band of Chippewa and Ottawa Indians Establishment of Reservation, 49 Fed. Reg. 2025, 2026 (Jan. 17, 1984) (designating a 12.5-acre parcel of land as reservation land for the tribe’s exclusive use); *see also* Grand Traverse Band v. United States, 198 F. Supp. 2d 920, 925 (W.D. Mich. 2002) (noting that between March 1988 and July 1990, “[t]he United States took into trust multiple parcels of property that continue to constitute the majority of [the Grand Traverse Band’s] trust lands”).

177. *See* Brief of Law Professors, *supra* note 137, at 31, 2008 WL 3991411, at *31.

178. *See id.* (noting that in the early twentieth century, settlers flooded into the area formerly occupied by the Cowlitz Indians and the Cowlitz lost many of their aboriginal lands, which contributed to the government’s view that the tribe had been dissolved).

179. *See id.* at 32, 2008 WL 3991411, at *32.

180. *See* Final Determination to Acknowledge the Cowlitz Indian Tribe, 65 Fed. Reg. 8436, 8437 (Feb. 18, 2000); *see also* Brief of Law Professors, *supra* note 137, at 32–33, 2008 WL 3991411, at *32–33 (describing the tribe’s long-fought battle for recognition).

V. IN *CARCIERI v. SALAZAR*, THE SUPREME COURT
DECOUPLED FEDERAL JURISDICTION FROM FEDERAL
RECOGNITION FOR PURPOSES OF THE IRA

Since 1934, the Department of the Interior has recognized tribes excluded from the 1934 IRA list and has allowed those tribes to take advantage of the trust-land provisions of Section 5 of the IRA.¹⁸¹ However, in *Carcieri v. Salazar*, the Supreme Court threw this practice into doubt when it held that one such tribe, the Narragansett,¹⁸² did not qualify to have land held in trust by the federal government under Section 5 of the IRA. This Part examines the case along with the Court's decision and its implications.

A. *The Secretary of the Interior, a Federal District Court, and the Court of Appeals Found that the Narragansett Tribe, a Recognized Tribe Under 25 C.F.R. Part 83, Qualified for IRA Benefits*

The Narragansett tribe, an indigenous occupant of Rhode Island, has existed autonomously since its first contact with European settlers.¹⁸³ In 1709, the Colony of Rhode Island established guardianship over the tribe; this idea of guardianship passed to the state of Rhode Island upon statehood.¹⁸⁴ In 1880, Rhode Island began a “detrribalization” program under which the Narragansett tribe relinquished all tribal authority and gave up all but two acres of its territory.¹⁸⁵ The tribe regretted this decision and immediately petitioned the federal government seeking support in regaining the tribe's land and status; however, the federal government denied aid, claiming that the tribe had always been state-recognized, not federally recognized.¹⁸⁶

In the late 1970s, the tribe filed suit against Rhode Island in an attempt to recover its aboriginal title, claiming that the state had misappropriated the tribe's territory in violation of the Indian

181. See *supra* Part IV (providing examples of recent federal recognition of tribes excluded from the IRA's 1934 list and subsequent decisions by the Department of the Interior to hold land in trust for such tribes under Section 5 of the IRA).

182. Since being recognized in 1983, the tribe has had 1,800 acres of land successfully taken into trust under the IRA. See *Carcieri v. Salazar*, 555 U.S. __ (Feb. 24, 2009), 129 S. Ct. 1058, 1062 (2009).

183. Final Determination for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177, 6178 (Feb. 10, 1983).

184. See *id.*

185. *Id.* See also *Carcieri*, 555 U.S. at __, 129 S. Ct. at 1061 (describing Rhode Island's efforts to assimilate the tribe).

186. See *Carcieri*, 555 U.S. at __, 129 S. Ct. at 1061.

Nonintercourse Act.¹⁸⁷ The parties settled with the passage of the federal Rhode Island Indian Claims Settlement Act (“Settlement Act”)¹⁸⁸ in 1978 and the state Narragansett Indian Land Management Corporation Act¹⁸⁹ in 1979. The Settlement Act extinguished the tribe’s aboriginal title to certain lands,¹⁹⁰ and in return the tribe received title to 1800 acres of settlement lands in Charlestown, Rhode Island,¹⁹¹ over which the state exercised criminal and civil jurisdiction.¹⁹²

The Narragansett tribe obtained federal recognition through the 25 C.F.R. Part 83 process in 1983,¹⁹³ with the government finding that “the Narragansett community and its predecessors have existed autonomously since first contact The tribe has a documented history dating from 1614.”¹⁹⁴ Shortly thereafter, the tribe urged the Secretary of the Interior to accept a deed of trust to the 1800 acres granted to the tribe in the Settlement Act.¹⁹⁵ The Secretary acquiesced, and in 1988 the government formally took the land into trust for the tribe.¹⁹⁶ In 1991, the tribe purchased another thirty-one acres of land in Charlestown adjacent to the 1800 acres of settlement lands.¹⁹⁷ The tribe requested that the Secretary take the thirty-one-acre parcel into trust,¹⁹⁸ and in 1998 the BIA notified the tribe of its decision to do so.¹⁹⁹

187. *See id.* at ___, 129 S. Ct. at 1061–62.

188. *See* Rhode Island Indian Claims Settlement Act, Pub. L. No. 95-395, 92 Stat. 813 (effective Sept. 30, 1978) (codified at 25 U.S.C. §§ 1701–1716 (2006)).

189. The Narragansett Indian Land Management Corporation Act is codified as amended at R.I. GEN. LAWS §§ 37-18-1 to -15 (1997 & Supp. 2009).

190. *See* 25 U.S.C. § 1705(a)(2)–(3) (extinguishing all future claims by the Narragansetts to aboriginal title).

191. *See* 25 U.S.C. § 1707 (providing for purchase and transfer of the settlement lands to the tribe).

192. *See* 25 U.S.C. § 1708(a).

193. *See* Final Determination for Federal Acknowledgment of Narragansett Indian Tribe of Rhode Island, 48 Fed. Reg. 6177 (Feb. 10, 1983).

194. *Id.* at 6178.

195. *See* *Carcieri v. Salazar*, 555 U.S. ___ (Feb. 24, 2009), 129 S. Ct. 1058, 1062 (2009).

196. *See id.* at ___, 129 S. Ct. at 1062.

197. *See id.*

198. *See id.* The tribe wished to construct housing on the thirty-one acre parcel, and by having the land held in trust by the federal government, the tribe would avoid compliance with local zoning regulations. *Id.*

199. *See* Letter from Franklin Keel, Eastern Area Director, BIA, to Matthew Thomas, Chief Sachem, Narragansett Indian Tribe (Mar. 6, 1998), *reprinted in* Petition for Writ of Certiorari Joint Appendix at 45a, *Carcieri v. Salazar*, 555 U.S. ___ (Feb. 24, 2009), 129 S. Ct. 1058 (2009) (No. 07-526) (noting that “it has been determined to be in the best interest of the Tribe that the subject property be accepted into trust”).

The Town of Charlestown appealed the Secretary's decision to the Interior Board of Indian Appeals (IBIA), which upheld the decision to take the land into trust.²⁰⁰ The town and the governor of Rhode Island then challenged the IBIA decision in federal district court, arguing, *inter alia*, that the phrase "members of any recognized Indian tribe now under Federal jurisdiction"²⁰¹ restricts the Secretary's IRA trust authority to acquisitions made on behalf of tribes that were federally recognized as of the time of the IRA's enactment in June 1934.²⁰² The district court ruled for the Secretary, finding that tribes did not have to be recognized in 1934 to have land held in trust under Section 5 of the IRA.²⁰³ In so finding, the district court concluded that because the Narragansett tribe is currently federally recognized, and because the tribe *existed* in 1934, it "qualifies as an 'Indian tribe' within the meaning of [the IRA]"²⁰⁴ and thus the Secretary has the authority under the IRA to accept lands into trust for the tribe.²⁰⁵ The Court of Appeals for the First Circuit affirmed,²⁰⁶ finding that Congress used the word "now" ambiguously in Section 19 of the IRA (defining "Indian" as "persons of Indian descent who are members of any recognized Indian tribe *now* under Federal jurisdiction")²⁰⁷ and that "the Secretary's construction of [IRA Section 19] as allowing trust acquisitions for tribes that are recognized and under

200. *See* Town of Charlestown, 35 I.B.I.A. 93 (2000). The town challenged the constitutionality of 24 U.S.C. § 465, claiming that acquisition of land in trust without the consent of the state is unconstitutional. *Id.* at 96. The town also challenged the authority of the Secretary to take into trust lands other than the 1800 acres authorized by the Settlement Act. *Id.* at 97. The IBIA rejected both arguments, finding that the IBIA had no jurisdiction over the claims of unconstitutionality and finding that Congress did not intend in the Settlement Act to prohibit the Secretary from acquiring lands other than the settlement lands in trust for the tribe. *Id.* at 97–101. The town's other arguments, based on the potential for Indian gaming on the trust lands, and compliance with the Coastal Zone Management Act, were similarly struck down by the IBIA. *Id.* at 103–06.

201. Wheeler-Howard (Indian Reorganization) Act, Pub. L. No. 73-383, § 19, 48 Stat. 984, 988 (1934) (codified at 25 U.S.C. § 479 (2006)).

202. *See* *Carcieri v. Norton*, 290 F. Supp. 2d 167, 179 (D.R.I. 2003). The district court noted, "[u]nder plaintiffs' analysis, any tribe, including the Narragansetts, that was afforded federal recognition subsequent to June 1934 does not qualify as an 'Indian tribe' pursuant to § 479." *Id.*

203. *See id.* at 179.

204. *Id.* at 181.

205. *Id.*

206. The First Circuit affirmed first in a panel decision, *Carcieri v. Norton*, 423 F.3d 45, 71 (2005), and then in an en banc decision, *Carcieri v. Kempthorne*, 497 F.3d 15, 48 (1st Cir. 2007), *rev'd*, 555 U.S. ___ (Feb. 24, 2009), 129 S. Ct. 1058 (2009).

207. Wheeler-Howard (Indian Reorganization) Act, Pub. L. No. 73-383, § 19, 48 Stat. 984, 988 (1934) (codified at 25 U.S.C. § 479 (2006)) (emphasis added).

federal jurisdiction at the time of the trust application is entitled to deference.”²⁰⁸

B. The Court Held the Secretary’s Trust Authority Under the IRA Extends Only to Tribes Under Federal Jurisdiction in 1934 and the Narragansett Tribe Did Not Prove Such Jurisdiction Existed

The Supreme Court granted certiorari and reversed.²⁰⁹ The Court held that the use of the phrase “now under federal jurisdiction” in the IRA refers “solely to events contemporaneous with the Act’s enactment.”²¹⁰ Thus, the IRA limits the Secretary’s trust authority under Section 5 to “those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934.”²¹¹ Although the jurisdiction issue had not been litigated in the lower courts, the petition for certiorari and the governor’s brief stated that the tribe was neither federally recognized nor under federal jurisdiction when the IRA was enacted in 1934.²¹² Neither the tribe nor the Secretary argued that the tribe was under federal jurisdiction in 1934 because the Secretary’s understanding had always been that recognition and federal jurisdiction for purposes of the IRA were “one and the same.”²¹³ The Secretary’s brief instead focused on the structure and purpose of the IRA and the statute’s ambiguous definition of “Indian.”²¹⁴

When Justice Souter raised the jurisdiction issue at oral arguments, counsel for the Secretary argued that the case had not been litigated on that issue and that it should be remanded to give the tribe a chance to show federal jurisdiction.²¹⁵ In its decision, however, the Court construed the tribe’s and the Secretary’s failure to contest the governor’s “no federal jurisdiction” assertion against the tribe and concluded that

208. *Carcieri*, 497 F.3d at 30. The court reached this conclusion by using a *Chevron* analysis, asking first whether the statute was ambiguous and, upon so finding, asking whether the Secretary’s interpretation was reasonable and permissible.

209. *See Carcieri v. Salazar*, 555 U.S. ___ (Feb. 24, 2009), 129 S. Ct. 1058, 1063 (2009).

210. *Id.* at ___, 129 S. Ct. at 1065.

211. *Id.* at ___, 129 S. Ct. at 1068.

212. *See* Petition for Writ of Certiorari at 3, *Carcieri*, 555 U.S. ___, 129 S. Ct. 1058 (No. 07-526); Brief for Petitioner Donald L. Carcieri at 15, *Carcieri*, 555 U.S. ___, 129 S. Ct. 1058 (No. 07-526).

213. *See* Transcript of Oral Argument at 42, *Carcieri*, 555 U.S. ___, 129 S. Ct. 1058 (No. 07-526).

214. *See* Brief for Respondents at 9–11, *Carcieri*, 555 U.S. ___, 129 S.Ct. 1058 (No. 07-526) (providing a summary of the Secretary’s argument).

215. *See* Transcript of Oral Argument, *supra* note 213, at 41–43.

“[n]one of the parties or amici, including the Narragansett tribe itself, has argued that the tribe was under federal jurisdiction in 1934.”²¹⁶

Justice Breyer concurred, finding that although the IRA’s legislative history demonstrated Congress’s intent for the statute to apply only to tribes under federal jurisdiction in 1934, such an interpretation “may prove somewhat less restrictive than it at first appears,”²¹⁷ since a tribe may have been under federal jurisdiction in 1934 even though the federal government did not list it as so at the time.²¹⁸ In Breyer’s view, the IRA placed no time limit on recognition, and thus later recognition could reflect earlier jurisdiction.²¹⁹ He concluded, however, that there was no reason to believe that the Narragansett tribe was under such federal jurisdiction in 1934.²²⁰ Justice Souter agreed with Justice Breyer that tribes could have been under federal jurisdiction in 1934 even if the federal government was ignorant of that fact, but argued that because the Narragansett tribe had no opportunity to argue a particular construction of the “jurisdiction” phrase, the case called for remand.²²¹

Finally, Justice Stevens dissented, arguing that the Narragansett tribe qualified as a “tribe” within the meaning of the IRA²²² and that “[f]ederal recognition, regardless of when it is conferred, is the necessary condition that triggers a tribe’s eligibility to receive trust land.”²²³ Justice Stevens noted that Section 5 of the IRA allows the Secretary to take land in trust for Indian tribes, and requiring that a tribe be an “Indian tribe” simply requires that the tribe be formally recognized as such.²²⁴ In short, Justice Stevens argued that “[i]f a tribe satisfies the stringent criteria established by the Secretary to qualify for federal recognition . . . it is *a fortiori* an ‘Indian tribe’ as a matter of law.”²²⁵

216. *Carcieri*, 555 U.S. at ___, 129 S. Ct. at 1068.

217. *Id.* at ___, 129 S. Ct. at 1069 (Breyer, J., concurring).

218. *Id.* See also Brief of Law Professors, *supra* note 137, at 22–24, 2008 WL 3991411, at *22–24 (noting that no comprehensive list of federally recognized tribes existed at the time of enactment of the IRA; that upon creation of such a list, numerous tribes were mistakenly omitted; and that several of the omitted tribes have subsequently been recognized by actions of Congress or the executive).

219. *Carcieri*, 555 U.S. at ___, 129 S. Ct. at 1070 (Breyer, J., concurring).

220. *Id.*

221. *Id.* at ___, 129 S. Ct. at 1071 (Souter, J., concurring in part and dissenting in part).

222. *Id.* at ___, 129 S. Ct. at 1072 (Stevens, J., dissenting) (“The plain text of the [IRA] clearly authorizes the Secretary to take land into trust for Indian tribes as well as individual Indians, and it places no temporal limitation on the definition of ‘Indian Tribe.’”).

223. *Id.* at ___, 129 S. Ct. at 1075 (Stevens, J., dissenting).

224. *Id.*

225. *Id.*

C. *The Carcieri Rule Has Important Implications for Future Cases Involving Tribes Recognized After 1934*

When it established a rule that tribes must prove they were under federal jurisdiction in 1934 to qualify under the IRA's trust-land provisions, *Carcieri*—for the first time since the IRA took effect—decoupled federal recognition from federal jurisdiction.²²⁶ Because the majority opinion does not differentiate between tribes included in the 1934 IRA list and those recognized after, courts might interpret *Carcieri* to require all tribes—even those listed in 1934—to prove federal jurisdiction whenever applying under the Act's trust-land provisions. Such an interpretation calls into question the ability of all recognized tribes to utilize the IRA.

An alternative reading, however, is to view *Carcieri* as standing for the more narrow proposition that only tribes recognized after 1934, either under 25 C.F.R. Part 83 (as the Narragansett tribe was) or through traditional methods, must demonstrate federal jurisdiction separately from formal recognition.²²⁷ While the Court's decoupled approach suggests that proof of federal recognition is not enough in itself to establish that a tribe was under federal jurisdiction in 1934, it leaves open the possibility that tribes might be able to demonstrate such jurisdiction through additional evidence.²²⁸ The Court did not give the Narragansett tribe a chance to present such evidence, but in future cases tribes could presumably introduce at the outset of litigation evidence that federal jurisdiction existed in 1934 despite federal recognition occurring

226. A search of the leading treatise, cases, and articles on the subject failed to reveal another case where federal jurisdiction was considered separately from recognition for purposes of the IRA's trust-land provisions. See COHEN, *supra* note 15, § 15.07[1][a], at 1010 ("The IRA applies to all Indian tribes, whether recognized in 1934, or subsequently acknowledged by Congress or the executive."). During oral arguments in *Carcieri*, counsel for the government expressed the belief that "the Secretary's interpretation from the beginning . . . has understood recognition and under Federal jurisdiction at least with respect to tribes to be one and the same." See Transcript of Oral Argument, *supra* note 213, at 42. As Justice Souter noted in *Carcieri*, "[g]iven the Secretary's position, it is not surprising that neither he nor the Tribe raised a claim that the Tribe was under federal jurisdiction in 1934: they simply failed to address an issue that no party understood to be present." *Carcieri*, 555 U.S. at ___, 129 S. Ct. at 1071 (Souter, J., concurring in part and dissenting in part).

227. The Narragansett tribe was recognized under 25 C.F.R. Part 83 and yet the Court determined that it had not proven it was under federal jurisdiction in 1934. See *Carcieri*, 555 U.S. at ___, 129 S. Ct. at 1068.

228. See *id.* at ___, 129 S. Ct. at 1068 (concluding that "[n]one of the parties or *amici*, including the Narragansett Tribe itself, has argued that the Tribe was under federal jurisdiction in 1934"). This implies that tribes might prove jurisdiction by introducing evidence above and beyond the mere fact of their recognition under 25 C.F.R. Part 83.

after that time.²²⁹ *Carcieri* will thus effectively result in courts treating tribes unequally under the IRA by imposing a higher evidentiary bar on tribes recognized after 1934.²³⁰

Furthermore, *Carcieri* leaves the Department of the Interior and Congress in a difficult position because the government has long utilized the IRA to take land into trust for tribes recognized through 25 C.F.R. Part 83—including the Narragansett.²³¹ The effects on the Narragansett tribe are dramatic: its request to have land held in trust must be denied, and the land in question cannot be deemed “Indian country” subject to federal jurisdiction and protection.²³² The tribe’s thirty-one-acre parcel is now equivalent to a non-Indian owner’s land, meaning it is subject to state jurisdiction, laws, and taxation.²³³ In sum, regardless of how courts interpret *Carcieri*, its implications are great.

VI. COURTS AND CONGRESS SHOULD ACT TO LESSEN *CARCIERI*’S IMPACT ON TRIBES AND THE FEDERAL- TRIBAL TRUST RELATIONSHIP

The *Carcieri* Court, absent briefing by the parties on the issue, found that the Narragansett tribe, which was recognized under 25 C.F.R. Part 83, had not proven it was “under federal jurisdiction” in 1934—now a requirement to qualify for the IRA’s trust-land provisions. The Court ignored the fact that federal recognition under 25 C.F.R. Part 83 requires tribes to demonstrate that they were under a broad form of federal jurisdiction prior to 1934. Federally recognized tribes, regardless of the date of their recognition, have already shown historical existence as communities and identification as American Indian entities under the broad federal jurisdiction established by the plenary power doctrine and the federal-tribal trust relationship. Underscoring this notion, since it

229. In the future, tribes should present evidence of jurisdiction before they reach the Supreme Court, as the Court showed an unwillingness to remand for production of such evidence in *Carcieri*.

230. Tribes organized and recognized under the IRA of 1934, such as the Cheyenne River Sioux tribe, will likely be presumed to have existed under federal jurisdiction in 1934. Tribes recognized after 1934, such as the Narragansett tribe, will be required to show additional evidence that they were under federal jurisdiction in 1934.

231. See *supra* Part IV for examples of tribes recognized after 1934 having land held in trust under the IRA; see *supra* Part V.A for a description of the Narragansett tribe’s successful petition to have its 1800 acres of settlement lands held in trust under the IRA.

232. See *supra* Part I.C (describing federal preemption of state law in Indian country).

233. See COHEN, *supra* note 15, § 6.01[5], at 513 (“In Indian law, the pervasiveness of tribal governing authority and the preclusion of state jurisdiction are manifested primarily within Indian country. With respect to events occurring outside Indian country, however, nondiscriminatory state laws have been held to apply unless federal law provides otherwise.”).

went into effect, tribes recognized for purposes of the IRA have always qualified for IRA benefits without having to separately prove federal jurisdiction.²³⁴ Recognition has always been enough. *Carcieri* changed that.

Courts can interpret the opinion in different ways.²³⁵ While the *Carcieri* Court did not specifically address how its analysis might apply to tribes included on the 1934 list, Justice Breyer's concurrence suggests that the Court meant to distinguish between tribes listed in 1934 and those recognized later. It indicates that the Court assumed that tribes included on the 1934 list met the IRA's jurisdictional requirements.²³⁶

However, decoupling recognition and jurisdiction for some tribes and not others conflicts with Congress's 1994 amendment expressly forbidding such discrimination.²³⁷ Thus, until and unless Congress says otherwise, *Carcieri*'s conclusion that the Narragansett tribe failed to satisfy the IRA's jurisdiction requirement should be interpreted as narrowly as possible. This is appropriate because the Court did not discuss the effect of the 25 C.F.R. Part 83 recognition.²³⁸ Instead, the Court relied upon the fact that the federal government and the Narragansetts failed to contest the allegation that the tribe was not under federal jurisdiction in 1934.²³⁹

Congress should respond to *Carcieri* with legislation that corrects the Court's misstep and mandates that all federally recognized tribes be

234. *See supra* notes 142–44 and accompanying text (noting that prior to the *Carcieri* decision, the federal government did not require recognized tribes to show separate evidence of federal jurisdiction in 1934 to qualify for benefits under the IRA).

235. The broadest of these interpretations is that all recognized tribes must prove jurisdiction separately from recognition—even those included on the 1934 list. Such an interpretation would clearly contradict Congress's intent and more than seventy years of government action. *See supra* Part III.B (describing Congress's intent in enacting the IRA) and Part IV.A–B (demonstrating that the federal government has recognized tribes since 1934 and has held land in trust for such tribes under the IRA). While it is unlikely the Court had such an absurd result in mind, the possibility underscores the need for congressional response.

236. *See Carcieri v. Salazar*, 555 U.S. __ (Feb. 24, 2009), 129 S. Ct. 1058, 1069 (2009) (Breyer, J., concurring) (noting that “following the Indian Reorganization Act’s enactment, the Department [of the Interior] compiled a list of 258 tribes covered by the Act”). This statement suggests a distinction between tribes included in the 1934 list (those covered by the Act) and tribes recognized after 1934.

237. *See supra* Part III.B (describing the congressional intent underlying the 1994 IRA amendment).

238. However, counsel for the Secretary told the Court at oral argument that the Secretary's position had always been that federal recognition and jurisdiction were “one and the same” for IRA purposes and asked for a remand on the jurisdiction question. *See* Transcript of Oral Argument, *supra* note 213, at 42.

239. *See Carcieri*, 555 U.S. at __, 129 S. Ct. at 1068.

recognized as existing under federal jurisdiction in 1934 for purposes of the IRA. Until then, however, courts should find that tribes formally recognized through either inclusion on the IRA's 1934 list or traditional recognition methods after 1934 satisfy *Carcieri*'s primary holding that to qualify under the IRA's trust-land provisions, tribes must prove they were under federal jurisdiction in 1934. Those tribes should not be required to demonstrate 1934 jurisdiction separately from recognition. For tribes recognized through 25 C.F.R. Part 83, courts should distinguish *Carcieri* because the Narragansett tribe did not present, and the Court did not consider, jurisdictional evidence. Courts should consider such evidence when considering IRA trust-provision claims on behalf of 25 C.F.R. Part 83 tribes and decide on a case-by-case basis whether federal jurisdiction existed in 1934. For all other recognized tribes, courts should acknowledge the long-standing practice of coupling recognition and federal jurisdiction for purposes of the IRA. Such an approach minimizes the risk of additional harm to tribal interests and complies with the basic tenets of Indian law and congressional intent.

A. *Courts Should Find that Any Federally Recognized Tribe, Regardless of Its Date of Recognition, Was Under Federal Jurisdiction in 1934*

Traditional recognition processes, based on long-standing treaty rights or other historical relationships with the United States, require that tribes show they were under federal jurisdiction since at least the time of establishment of the relationship.²⁴⁰ Thus, all traditionally recognized tribes should qualify under the IRA. In addition, the 25 C.F.R. Part 83 recognition process is consistent with the IRA's definition of "tribe" because tribes must meet certain criteria under 25 C.F.R. Part 83 that necessarily show they were under federal jurisdiction since at least 1900. Since 1934, the Department of the Interior has allowed tribes recognized through traditional means or 25 C.F.R. Part 83 to have land held in trust under the IRA, demonstrating that the federal government views such tribal recognition as sufficient for eligibility under the IRA.

While the *Carcieri* Court did not address the issue directly, tribes recognized since 1934 based on traditional processes that consider long-standing but overlooked treaty rights also qualify as "tribes" under the IRA.²⁴¹ Treaty-making ceased in 1871, which means that treaty rights

240. See *supra* Part III.A (describing traditional methods of recognition).

241. See *supra* Part III.A (describing traditional recognition based on treaty rights against the United States).

against the United States were established before that date. Thus, modern-day recognition based on such treaty rights establishes that the federal government had jurisdiction over those tribes dating back at least as far as the date of the treaty.

Other historical relationships between tribes and the federal government also suffice to show that the federal government had jurisdiction over those tribes since at least the relationship's founding, as the government has repeatedly acknowledged since 1934.²⁴² Whether based on treaty, statute, agreement, or other means, traditional methods of recognition implicitly acknowledge that the federal government long ago established jurisdiction over a tribe in the broad sense of jurisdiction conferred by constitutional and extra-constitutional sources of plenary power.²⁴³ The federal government's power to "establish and maintain . . . political relations with Indian tribes derives from the Constitution's Indian commerce clause,"²⁴⁴ which is a key source of the government's plenary power over tribes.²⁴⁵ Thus, tribes acknowledged to have historical ties to the federal government were subject to its jurisdiction at the inception of the federal-tribal relationship.

Likewise, a tribe utilizing 25 C.F.R. Part 83 must prove identification as an American Indian entity on a substantially continuous basis since 1900 and existence as a community from historical times until the present.²⁴⁶ Meeting that requirement demonstrates that since at least 1900, the government possessed plenary power over a tribe's affairs under the broad preconstitutional "national" powers conferred upon the newly established United States.²⁴⁷ The United States had the power to deal or refuse to deal with such tribes as it saw fit, and thus these tribes were necessarily subject to federal jurisdiction. The federal government has recognized sixteen tribes through the 25 C.F.R. Part 83 process since 1978, and "[t]o gain recognition, each of these tribes was required to demonstrate that, from historical times to the present, it maintained a continuous existence as a distinct Indian community and exercised

242. *See supra* Part IV.A (providing examples of the federal government's recognition of tribes by traditional means after 1934 and subsequent holding of land in trust for those tribes under the IRA).

243. *See supra* Part I (describing the broad implications of federal plenary power and federal jurisdiction in Indian country).

244. COHEN, *supra* note 15, § 3.02[4], at 140.

245. *See supra* Part I.A (describing constitutional sources of plenary power).

246. *See* 25 C.F.R. § 83.7 (2009).

247. *See supra* Part I.A (describing the broad preconstitutional powers that the U.S. inherited upon nationhood).

political authority over its members.”²⁴⁸ These requirements establish that qualifying tribes were under federal jurisdiction in that they existed in 1934 and were subject to federal plenary power under the Indian Commerce Clause, the Treaty Clause, and the government’s broad, inherited, preconstitutional powers. The current requirements for recognition thus encompass the IRA’s definition of “Indian,”²⁴⁹ and should be sufficient for proving federal jurisdiction in 1934 and allowing newly recognized tribes to have land taken into trust by the federal government.

The Department of the Interior has adopted the position that later recognition reflects earlier federal jurisdiction. For example, the federal government recognized the Stillaguamish Tribe in 1976 based partly on the fact that the tribe had maintained treaty fishing rights against the United States.²⁵⁰ The Department subsequently concluded that the government could take land into trust for the tribe under the IRA.²⁵¹ Similarly, the federal government recognized the Grand Traverse Band of Ottawa Indians in 1980 under the federal government’s new recognition procedures,²⁵² and the Department has since taken multiple parcels of land into trust for the tribe under the provisions of the IRA.²⁵³ Because the IRA “imposes no time limit upon recognition,”²⁵⁴ tribes that can establish through later recognition that some form of federal jurisdiction existed in 1934 should be able to qualify under the IRA’s trust-land provisions. Courts should not controvert the Department’s policy of coupling recognition with jurisdiction, as tribes have relied on

248. See Brief of Law Professors, *supra* note 137, at 6, 2008 WL 3991411, at *6.

249. See Wheeler-Howard (Indian Reorganization) Act, Pub. L. No. 73-383, § 19, 48 Stat. 984, 988 (1934) (codified at 25 U.S.C. § 479 (2006)).

250. See Letter from Kent Frizzell, Acting Secretary of the Interior, to David H. Getches, Esquire, Native American Rights Fund at 1 (Oct. 27, 1976) (on file with author).

251. See *supra* note 162 and accompanying text.

252. See Determination for Federal Acknowledgment of the Grand Traverse Band of Ottawa and Chippewa Indians as an Indian Tribe, 45 Fed. Reg. 19,321 (Mar. 25, 1980). The Grand Traverse Band was the first tribe to be recognized under the government’s formal administrative recognition process, adopted in 1978. See *supra* Part IV.B (describing the government’s adoption of the new recognition process, which is codified as amended at 25 C.F.R. Part 83, and the recognition of the Grand Traverse Band). The Grand Traverse Band was recognized based on its satisfaction of the criteria contained in 25 C.F.R. § 54.7, which was a precursor to the modern 25 C.F.R. Part 83. See Federal Acknowledgement of the Grand Traverse Band, 45 Fed. Reg. at 19,321; Procedures for Establishing that an American Indian Group Exists as a Tribe, 25 C.F.R. § 54.7 (1980).

253. See *supra* note 176 and accompanying text.

254. *Carcieri v. Salazar*, 555 U.S. ___ (Feb. 24, 2009), 129 S. Ct. 1058, 1070 (2009) (Breyer, J., concurring).

having land held in trust upon recognition since the IRA was enacted in 1934.²⁵⁵

Courts should also interpret *Carcieri*'s rule—that to qualify under the IRA's trust provisions, a tribe must have been under federal jurisdiction in 1934—as including tribes recognized since 1934 because doing otherwise defies the Indian law canons of construction that require courts to respect the federal-tribal trust relationship. The canons, a manifestation of the federal-tribal trust relationship,²⁵⁶ bind the courts and suggest that at the very least, the IRA should be “construed liberally in favor of the Indians”²⁵⁷ to accomplish its purposes of protecting and providing land for Indians. The federal trust relationship, and the canons of construction “interpreting federal action toward Indians expressed in treaties, agreements, statutes, executive orders, and administrative regulations in light of the government's obligation to protect tribal sovereignty and property,”²⁵⁸ counsel against barring tribes recognized after 1934 from having land held in trust under Section 5 of the IRA.²⁵⁹

Even though the government recognized the Narragansett tribe under 25 C.F.R. Part 83, the *Carcieri* Court found that the tribe had not proven it was under federal jurisdiction in 1934. However, the tribe never argued—and the Court never considered—jurisdictional evidence to the contrary.²⁶⁰ Therefore, the Court's decision that the Narragansett tribe failed to satisfy the 1934 federal jurisdiction requirement should be interpreted as standing merely for the notion that, unless or until Congress says otherwise, 25 C.F.R. Part 83 recognition on its own is not enough to prove a tribe was under federal jurisdiction in 1934. That does not mean that tribes recognized under 25 C.F.R. Part 83 were not under

255. See *supra* Part III.C (describing the federal government's historical policy of coupling jurisdiction with recognition for purposes of the IRA).

256. See *supra* Part II.B (describing the four basic Indian law canons of construction).

257. *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (citing *Montana v. Blackfoot Tribe*, 471 U.S. 759, 766 (1985)).

258. COHEN, *supra* note 15, § 5.04[4][a], at 420.

259. Congress has recognized the issues created by *Carcieri*; Senate Bill 1703, a bill “[t]o amend the Act of June 18, 1934, to reaffirm the authority of the Secretary of the Interior to take land into trust for Indian tribes,” was introduced on September 24, 2009. The bill, if passed, would amend the IRA of 1934 by striking the term “any recognized Indian tribe now under Federal jurisdiction” and inserting “any federally recognized Indian tribe.” See S. 1703, 111th Cong. § 1 (as reported by S. Comm. on Indian Affairs, Dec. 17, 2009); see also GovTrack, <http://www.govtrack.us/congress/bill.xpd?bill=s111-1703> (last visited May 4, 2010) (providing up-to-date information on Senate Bill 1703's status in Congress, including the date it was reported by the Senate Committee on Indian Affairs).

260. See *supra* Part V.B (describing the Court's refusal to remand the case to be litigated on the jurisdiction issue).

federal jurisdiction in 1934; it simply means they still need to prove it for purposes of the IRA trust provisions. A tribe might demonstrate 1934 jurisdiction by supplying the evidence it used to attain federal recognition under 25 C.F.R. Part 83 or other traditional recognition methods.²⁶¹ Thus, courts should consider such evidence to determine whether a tribe was under federal jurisdiction in 1934 for purposes of the IRA.

B. Congress Should Remedy Carcieri Because It Contradicts Policies Underlying the IRA and the 25 C.F.R. Part 83 Recognition Process and Undermines the Federal-Tribal Trust Relationship

The federal policies and purposes that led Congress to enact the IRA support an interpretation of “tribe” that includes tribes recognized after 1934. Similarly, the policies underlying 25 C.F.R. Part 83 emphasize inclusion of such tribes when distributing federal benefits. The federal-tribal trust relationship underlies both the IRA and 25 C.F.R. Part 83, and the basic duties and obligations created by this relationship should motivate Congress to pass the remedial bill currently in committee.

The government actors responsible for the Indian New Deal and the IRA recognized that decades of federal policies designed to assimilate Indians and destroy their cultural and religious traditions had caused great damage to tribal culture and land base.²⁶² The 1928 Meriam Report, which provided the impetus for much of the IRA, established that many Indians were living on lands of little value, while better lands had fallen into the hands of white settlers; that the policy of allotment had failed to protect the Indian land base; and that federal Indian policy had severely compromised Indian health, education, and economic development.²⁶³ During the Indian New Deal, “[f]or the first time, the federal government would encourage development of tribal

261. The *Carcieri* Court left the door open for tribes recognized under 25 C.F.R. Part 83 to prove federal jurisdiction existed in 1934. See *Carcieri v. Salazar*, 555 U.S. ___ (Feb. 24, 2009), 129 S. Ct. 1058, 1068 (2009) (“None of the parties or *amici*, including the Narragansett Tribe itself, has argued that the Tribe was under federal jurisdiction in 1934.”). This statement implies that other tribes, regardless of how or when they were recognized, could introduce evidence of such federal jurisdiction in order to qualify under the IRA’s trust-land provisions. Tribal attorneys should take note of this critical implication.

262. See 78 CONG. REC. 11,123 (1934) (statement of Sen. Wheeler) (“[H]eretofore there has been pursued a policy whereby . . . the Indians would find themselves without land and pauperized . . . [T]here are many Indians who have no lands whatsoever, and are unable to make a living.”).

263. See Meriam Report, *supra* note 113, at 3–8.

governments, economies, and cultures.”²⁶⁴ By passing the IRA, Congress intended to further these goals and to preserve tribal culture and organization; the drafters described the new legislation as an act “[t]o conserve and develop Indian lands and resources; to extend to Indians the right to form businesses and other organizations . . . and for other purposes.”²⁶⁵

Congress’s concern for the well-being of tribes, expressed in both the Congressional Record for the IRA²⁶⁶ and in the Act itself, is inconsistent with a desire to exclude tribes simply because the government failed to include them in its hastily compiled list of “recognized” tribes in 1934. In addition, because no comprehensive list of federally recognized tribes existed prior to enactment of the IRA in 1934,²⁶⁷ and because no formal process for recognizing tribes emerged until decades later,²⁶⁸ it is unlikely that the Congress that enacted the IRA would have intended to exclude tribes mistakenly left off the list.²⁶⁹

The 1994 IRA amendment also demonstrates congressional intent to include, rather than exclude, recognized tribes when distributing federal benefits.²⁷⁰ Congress has evidenced a preference to treat recognized tribes as equals where federal benefits are concerned, regardless of date or method of recognition.²⁷¹ *Carciari* undermines congressional intent by drawing an arbitrary line between tribes recognized in 1934 and those

264. ANDERSON, *supra* note 56, at 128. *See also* 78 CONG. REC. 11,123 (1934) (statement of Sen. Wheeler) (describing the purposes and goals of the IRA, including support for tribal self-government and economic development).

265. Wheeler-Howard (Indian Reorganization) Act, Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (2006)).

266. The Congressional Record describes Congress’s intent “to conserve and develop Indian lands and resources . . . to provide for higher education for Indians, to extend toward Indians the right to form business and other organizations, and for other purposes.” *See* 78 CONG. REC. 11,122 (1934) (statement of Sen. Wheeler).

267. *See supra* Part III.C (describing the lack of a formal list of recognized tribes prior to 1934).

268. *See supra* Part IV.B (describing the formal administrative recognition process established by 25 C.F.R. Part 83).

269. In fact, during consideration of the IRA bill by the Senate, Senator Wheeler acknowledged that the bill, if passed, would be generally applicable to Indians throughout the country. *See* 78 CONG. REC. 11,122 (1934) (statement of Sen. Wheeler) (responding to question by Senator McNary).

270. *See supra* Part III.B (describing Congress’s intent in amending the IRA).

271. *See* 140 CONG. REC. 11,376, 11,377 (May 23, 1994) (statement of Rep. Richardson) (“Whatever the method by which recognition was extended, all Indian tribes enjoy the same relationship with the United States and exercise the same inherent authority . . . [the 1994 amendment] is intended to prohibit the Secretary or any other Federal official from distinguishing between Indian tribes or classifying them not only on the basis of the IRA but also on the basis of any other Federal law.”).

recognized later. A bill currently in committee that would remedy the problems arising from *Carciery* supports this conclusion. The bill reiterates what Congress and the Department of the Interior have acknowledged for decades: that “any federally recognized Indian tribe” is eligible to receive IRA benefits.²⁷²

Congress’s purpose in developing a federal scheme for recognizing tribes does not support the idea that simply because a tribe was mistakenly left off the list of recognized tribes in 1934, it should be excluded from the beneficial trust-land provisions of the IRA. Procedures and policies for recognizing that an existing Indian group is a “tribe” are set forth in 25 C.F.R. Part 83; these procedures affirm that a government-to-government relationship exists between the tribe and the United States, thus entitling the tribe to the “immunities and privileges available to other federally acknowledged Indian tribes”²⁷³ Such immunities and privileges include the “protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes”²⁷⁴ and presumably would include entitlement to have land held in trust by the government pursuant to the IRA. Like the IRA and its amendments, 25 C.F.R. Part 83 emphasizes equal treatment among federally recognized tribes, supporting the idea that tribes recognized since 1934 should have the same access to the IRA’s trust-land provisions as tribes included on the 1934 list.

Additionally, Congress should take legislative action to address *Carciery* because under the federal-tribal trust relationship, the federal government owes certain duties and obligations to recognized Indian tribes.²⁷⁵ The trust relationship provides the lens through which all of Indian law must be viewed; the government’s power to manage Indian affairs is balanced by the duty to protect and respect tribal sovereignty and property.²⁷⁶ Many statutes, court decisions, and presidential policy statements reflect this special relationship,²⁷⁷ demonstrating that all three branches of government are bound by the principle that tribes are to be treated as beneficiaries of the federal-tribal trust relationship. The IRA itself reflects the trust relationship in its focus on protection of the tribal land base and promotion of tribal self-government; similarly, the 25

272. See S. 1703, 111th Cong. § 1 (as reported by S. Comm. on Indian Affairs, Dec. 17, 2009).

273. 25 C.F.R. § 83.2 (2009).

274. *Id.*

275. See *supra* Part II (describing the federal obligations stemming from the historical federal-tribal trust relationship).

276. See COHEN, *supra* note 15, § 5.04[4][a], at 420.

277. See *id.* at 420–21.

C.F.R. Part 83 recognition process acknowledges that recognition by the federal government entitles tribes to the immunities and privileges enjoyed by other federally recognized tribes.²⁷⁸ The policies and purposes behind the federal-tribal trust relationship weigh heavily against punishing tribes for mere governmental mistake and inadvertence, and Congress should act to support this cornerstone of Indian law. If Congress fails to take action, *Carcieri* will continue to erode basic Indian law principles and undercut congressional policy and intent.

CONCLUSION

The *Carcieri* decision potentially divides American Indian tribes into two classes: those included in the IRA list, and those recognized since 1934 based on traditional recognition methods or the 25 C.F.R. Part 83 process. This division is arbitrary, as each group must meet the same basic criteria for recognition. All federally recognized tribes were under federal jurisdiction in 1934 in the broad sense that federal plenary power and trust relationship principles governed federal relations with existing tribes. To qualify for recognition, tribes must show historical existence as American Indian entities and existence as communities from historical times until the present, and Congress has clearly expressed that such proof satisfies the IRA.

The purposes underlying the IRA, the criteria imposed by federal recognition procedures, and long-standing principles of federal Indian law suggest that tribes formally recognized after 1934 should be entitled to benefits stemming from the trust-land provisions of Section 5 of the IRA. If interpreted to exclude such tribes from obtaining these benefits, the Court's decision in *Carcieri v. Salazar* will contradict Department of the Interior policies as well as Indian law canons of construction. Such an interpretation will subject tribes to discriminating treatment. In allowing recognized tribes to have land held in trust under the IRA, the Department of the Interior has embraced the protective principles implicit in federal plenary power and the federal-tribal trust relationship. Congress and the courts should act to ensure that *Carcieri* does not override that policy.

278. See 25 C.F.R. § 83.2.