Reinstating Treaty-Making with Native American Tribes

Phillip M. Kannan
REINSTATING TREATY-MAKING WITH NATIVE AMERICAN TRIBES

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"Mr. [President], tear down this wall!"

INTRODUCTION

There is a wall that prevents Native American tribes and the United States from forming political partnerships under the Treaty Clause of the Constitution. It was created by a rider to the Indian Appropriation Act of 1871. The current text of the statute states, in part:

[N]o Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: Provided, further, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty therefore lawfully made and ratified with any such Indian nation or tribe.

This Act can be analyzed from the perspective of its fidelity to constitutional principles or merely as a change to the process used by the United States to manage relations with Indian tribes. The Supreme Court has never had an occasion to determine the constitutionality of the Act. In a case in which the Act’s constitutionality was not at issue, the Court found the Act to be no more than a change in the means

* Distinguished Lecturer and Legal-Scholar-in-Residence, Colorado College.

1 "General Secretary Gorbachev, if you seek peace, if you seek prosperity for the Soviet Union and Eastern Europe, if you seek liberalization: Come here to this gate! Mr. Gorbachev, open this gate! Mr. Gorbachev, tear down this wall!" Ronald Reagan, Remarks at the Brandenburg Gate, West Berlin, Germany, 23 WEEKLY COMP. PRES. DOC. 657, 658–59 (June 12, 1987).

2 U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . "). The term "treaty-making" as used in this Article always refers to the authority and process specified in this Clause.


4 Id.
by which the United States would conduct interactions between itself and tribes and between tribes and states.⁵ In that case, Antoine v. Washington, the Court stated:

[The Indian Appropriation Act of 1871] meant no more, however, than that after 1871 relations with Indians would be governed by Acts of Congress and not by treaty. The change in no way affected Congress' plenary powers to legislate on problems of Indians, including legislating the ratification of contracts of the Executive Branch with Indian tribes to which affected States were not parties.⁶

More recently, the Court reaffirmed this interpretation of the Act in United States v. Lara but characterized the effect of the Act as reducing tribal sovereignty: “Such major policy changes inevitably involve major changes in the metes and bounds of tribal sovereignty. The 1871 statute, for example, changed the status of an Indian tribe from a ‘power[r] . . . capable of making treaties’ to a ‘power with whom the United States may [not] contract by treaty.’”⁷ In Lara, as in Antoine, the constitutionality of the Act was not before the Court.⁸

The Executive Branch has developed an approach to the relationship between Indian tribes and the United States that does not call into question the constitutionality of the Act. In June of 1995, the Department of Justice affirmed the legal status of Native American tribes as domestic dependent nations with sovereignty.⁹ Both as evidence of and political support for the continuation of this status, the Department of Justice committed to a nation-to-nation relationship between the United States and Indian tribes.¹⁰ This policy statement, however, is weak and ineffective on both counts. In the same sentence in which tribal sovereignty is acknowledged, the Department of Justice, on behalf of the United States, asserts the power of Congress to limit sovereignty: “The Department recognizes that Indian tribes as domestic dependent nations retain sovereign powers, except as divested by the United States . . . .”¹¹ Then, to assure that the policy creates neither obligations for the United States nor rights in the tribes, the policy limits all undertakings to making “all reasonable efforts to ensure that . . . activities are consistent with the above sovereignty and trust principles”¹²

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⁶ Id. at 203 (citing Elk v. Wilkins, 112 U.S. 94 (1884); In re Heff, 197 U.S. 488 (1905)).
⁸ See id. at 196.
⁹ See infra notes 27–31 and accompanying text for a discussion of the Supreme Court’s treatment of domestic dependent nation status.
¹⁰ Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes, 61 Fed. Reg. 29,424 (June 1, 1995).
¹¹ Id. at 29,425 (emphasis added).
¹² Id. at 29,426.
and denies enforceability even of these “reasonable efforts” undertakings. Moreover, the policy fails to mention treaty-making, which is an inherent part of nation-to-nation relations.

The policy of nation-to-nation relations was adopted in Executive Order 13,175 on November 6, 2000. This executive order, like the Department of Justice policy, is an endorsement of a non-treaty-making approach to the relations between Indian tribes and the United States—in this case, by federal agencies. The same is true of the Memorandum for the Heads of Executive Departments and Agencies issued by President Clinton on April 29, 1994.

Missing from the Department of Justice policy, Executive Order 13,175, the presidential memorandum of April 29, 1994, and every official action since 1871 by both Congress and the executive branch, is a repudiation of the law that ended the making of treaties between Indian nations and the United States. Treaties signify sovereignty; a legal prohibition of treaty-making is a denial of it.

In this Article, I argue that the law which purports to prohibit the United States from making treaties with Indian tribes is unconstitutional. Other commentators have questioned the constitutionality of this law; however, they have provided no reasoned arguments for that conclusion.

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13 *Id.* ("This policy . . . is not intended to create any right enforceable in any cause of action by any party against the United States, its agencies, officers, or any person.").
16 *See, e.g., William C. Canby, Jr., American Indian Law in a Nutshell 18 (3d ed. 1998) ("While it is questionable that Congress could limit the constitutional treaty-making power of the President, the statute did effectively end the making of Indian treaties by serving as notice that none would thereafter be ratified."); Steven Paul McSloy, *Back to the Future: Native American Sovereignty in the 21st Century, 20 N.Y.U. Rev. L. & Soc. Change 217, 243 (1993) ("While the 1871 act was probably unconstitutional because it eliminated the constitutionally enumerated powers of the executive branch both to make treaties and to recognize foreign nations, it has never been so held." (footnotes omitted)); G. William Rice, *Teaching Decolonization: Reacquisition of Indian Lands Within and Without the Box—An Essay, 82 N.D.L. Rev. 811, 841 (2006) ("Of course, an additional consideration would be the negotiation and ratification of new treaties. The provision by which the United States ended the classical treaty era is constitutionally suspect . . . ."); *id.* at 841 n.140 ("How can the legislative branch prohibit the treaty-making branch from exercising its constitutional function?"); Joseph William Singer, *Nine-Tenths of the Law: Title, Possession & Sacred Obligations, 38 Conn. L. Rev. 605, 609 (2006) ("The Congress could also choose to repeal the 1871 statute that prohibited the President and Senate from entering into treaties with Indian nations—a statute that may well be unconstitutional given the fact that the Constitution specifically grants the treaty power to the President and the Senate."); George William Rice, Note, *Indian Rights: 25 U.S.C. § 71: The End of Indian Sovereignty or a Self-Limitation of Contractual Ability?, 5 Am. Indian L.
In a recent concurring opinion, Justice Thomas questioned, but did not analyze, the law’s constitutionality, stating:

Further, federal policy itself could be thought to be inconsistent with this residual-sovereignty theory. In 1871, Congress enacted a statute that purported to prohibit entering into treaties with the “Indian nation[s] or tribe[s].” Although this Act is constitutionally suspect (the Constitution vests in the President both the power to make treaties and to recognize foreign governments), it nevertheless reflects the view of the political branches that the tribes had become a purely domestic matter.17

At the outset of his concurring opinion, Justice Thomas ascribed great significance to section 71 and implicitly called into question its constitutionality;18 however, neither there nor in connection with the above quotation did he provide an argument supporting a conclusion that it was indeed unconstitutional.

My argument for the Act’s unconstitutionality has three independent bases: (1) section 71 is inconsistent with the text of the Constitution and underlying principles on which the Constitution was grounded;19 (2) section 71 is unconstitutional under precedent from Supreme Court decisions of the past thirty years;20 and (3) section 71 violates the guarantee of political liberty provided to each citizen by the federal structure of the Constitution.21 Ultimately, the prohibition in section 71 is an attempt to amend the Constitution to weaken the treaty-making powers of the President with the advice and consent of the Senate and to disregard the political theory of separation of powers between the legislative and executive branches of government created by the Constitution. The Constitution, however, cannot be amended by an agreement between a willing aggrandizer and a willing abdicator.22

This Article proceeds as follows. The legal history of treaties and treaty-making with Indian tribes and the significance of these treaties to United States law are explored in Part I. The dissatisfaction of the House of Representatives with the practice of Indian policy being established by the President with the advice and consent of

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18 Id. at 215 (“I would ascribe much more significance to legislation such as the Act of Mar. 3, 1871, Rev. Stat. § 2079, 16 Stat. 566, codified at 25 U.S.C. § 71 that purports to terminate the practice of dealing with Indian tribes by treaty.”) (emphasis added)).
19 See infra Part IV.
20 See infra Part V.
21 See infra Part VI.
22 See infra Part IV.
the Senate is outlined in Part II. Part III then recounts major legislation that followed the enactment of section 71 and the harm these laws caused Indian tribes. In Part III, I also analyze the mischaracterizations of that law by the Supreme Court and the harm this has caused. Building on this background, Part IV develops the argument that section 71 violates the express provisions of the Constitution and the political theory on which it was based; Part V analyzes applicable Supreme Court precedent and concludes that section 71 violates the principles established by these cases; and Part VI argues that it is inconsistent with a theory developed by Justice Kennedy, namely, the guarantee of political liberty provided to each citizen by the federal structure of the Constitution. Part VII then explores the constitutional consequences that would follow from upholding section 71. I conclude with some suggestions of how section 71 could be repealed or overturned.

I. TREATY-MAKING WITH INDIAN TRIBES

As the following discussion will demonstrate, the authority of Indian tribes to enter into treaties with European states and the United States is a prerequisite to the validity of land title in the United States. It is not surprising, therefore, that the recognition by the Supreme Court of tribes' treaty-making authority came in an opinion in which title to land was the central issue, namely in Chief Justice Marshall's opinion in Johnson v. McIntosh.23

The plaintiff, Johnson, claimed title from grants in 1773 and 1775 from the chiefs of the Illinois and Piankeshaw nations that had occupied the land.24 McIntosh's title came from the United States, which claimed ownership under a treaty with the occupying tribes;25 the validity of McIntosh's title was dependent on the power of the tribes to enter into treaties with the United States. Chief Justice Marshall explicitly recognized the validity of the treaties and thus, implicitly, the treaty-making authority of tribes:

23 21 U.S. (8 Wheat.) 543 (1823).

24 Id. at 571.

25 Id. at 560. Ownership of land in the United States was determined by the doctrine of discovery, which the Court recognized as international law and incorporated into United States law in this case. Under the doctrine of discovery, as articulated by Chief Justice Marshall:

Discovery [by a European nation] gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. . . . [Indian tribes] were admitted to be the rightful occupants of the soil, with "legal as well as just claim to retain possession of it."

Id. at 573–74. The tribes' exclusive usufruct right was called Indian title, which could be extinguished only by the discoverer who could do so either by conquest or purchase. Id. at 587. See generally Robert J. Miller, The Doctrine of Discovery in American Indian Law, 42 IDAHO L. REV. 1 (2005) (providing an extensive analysis of the legal history of the doctrine of discovery in American law).
By the treaties concluded between the United States and the Indian nations, whose title the plaintiffs claim, the country comprehending the lands in controversy has been ceded to the United States, without any reservation of their title. These nations had been at war with the United States, and had an unquestionable right to annul any grant they had made to American citizens. Their cession of the country, without a reservation of this land, affords a fair presumption, that they considered it as of no validity.26

Thus, Johnson took nothing from the chiefs, and McIntosh’s title was valid.

In *Cherokee Nation v. Georgia*, the Supreme Court had to decide whether the Cherokee Nation was a “foreign state” within the meaning of the term “foreign states” in Article III of the Constitution.27 If it was, the Court had original jurisdiction in the case.28 The Court bifurcated the issue by considering first whether the Cherokee Nation was a state, and if so, whether it was foreign.29 The existence of tribes’ treaty-making power was a determinative element in the Court’s holding that the Cherokee Nation was a state:

They have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties.30

The Court then concluded that the Cherokee Nation was not foreign under this article; it and other Indian tribes were, rather, domestic dependent nations:

They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.31

28 Id. at 15–16.
29 Id. at 16.
30 Id.
31 Id. at 17.
Treaty-making continued after this decision. Until 1871, treaty-making was the predominate means of implementing federal Indian policy.\textsuperscript{32} For example, in 1854 and 1855 when the United States wanted to extinguish Indian claims to land in what is now the state of Washington, the government entered into a series of treaties to accomplish this objective.\textsuperscript{33} This same procedure was used regarding Indian claims for land in what is now the state of Oregon.\textsuperscript{34}

In addition to the constitutionally prescribed treaty-making process in Article II, Section 2, Clause 2, there is a long-standing practice in the presidency and Congress of entering into executive agreements with Indian tribes and other nations.\textsuperscript{35} The constitutionality of this practice in the absence of a statutory predicate is far from settled;\textsuperscript{36} however, the Supreme Court has upheld the practice when the agreement is related to a statute and there is a history of the use of such agreements.\textsuperscript{37} Even if ultimately upheld, executive agreements do not have the same constitutional standing as treaties entered into in accordance with Article II, Section 2, Clause 2.\textsuperscript{38} This is not just a theoretical point for Indian tribes; it also has economic and political significance. For example, the Supreme Court held in \textit{Sioux Tribe v. United States} that the tribe was not entitled to compensation for tribal land taken from a reservation established by executive agreement.\textsuperscript{39} However, if the reservation was established by a treaty, the

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  \item \textsuperscript{32} \textit{See} United States v. Lara, 541 U.S. 193, 201 (2004) ("And for much of the Nation’s history, treaties, and legislation made pursuant to those treaties, governed relations between the Federal Government and the Indian tribes.").
  \item \textsuperscript{33} Washington v. Wash. State Commercial Passenger Fishing Vessel Ass’n, 443 U.S. 658, 661–62 (1979) ("To extinguish the last group of conflicting claims to lands lying west of the Cascade Mountains and north of the Columbia River in what is now the State of Washington, the United States entered into a series of treaties with Indian tribes in 1854 and 1855." (citations omitted)).
  \item \textsuperscript{34} \textit{Id.} at 661 n.1.
  \item \textsuperscript{35} \textit{See}, e.g., Sharon G. Hyman, \textit{Note, Executive Agreements: Beyond Constitutional Limits?}, 11 Hofstra L. Rev. 805, 812 (1983) ("By 1953 approximately 10,000 executive agreements had been concluded pursuant to the NATO treaty alone.").
  \item \textsuperscript{36} \textit{See}, e.g., Peter J. Spiro, \textit{Treaties, Executive Agreements, and Constitutional Method}, 79 Tex. L. Rev. 961 (2001) (analyzing the conflicting opinions of leading constitutional scholars on this point; Laurence Tribe maintains that executive agreements are not constitutional, and Bruce Ackerman and David Golove take the contrary position).
  \item \textsuperscript{37} Dames & Moore v. Regan, 453 U.S. 654, 680 (1981) ("Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement. This is best demonstrated by Congress’ enactment of the International Claims Settlement Act of 1949.").
  \item \textsuperscript{38} For example, executive agreements do not overrule prior inconsistent legislation. \textit{See} United States v. Guy W. Capps, Inc., 204 F.2d 655, 658 (4th Cir. 1953) ("[T]he executive agreement was void because it was not authorized by Congress and contravened provisions of a statute dealing with the very matter to which it related . . . "), \textit{aff’d on other grounds}, 348 U.S. 296 (1955).
  \item \textsuperscript{39} 316 U.S. 317, 330 (1942) (concluding that reservations established by executive orders conveyed no compensable interest to Indian tribes).
tribe must be compensated if the government later takes any part of it. Thus, executive agreements are not a substitute for treaty-making under Article II, Section 2, Clause 2, and the denial of treaty-making power with Native American tribes is not neutralized or rendered harmless by the authority to make executive agreements, even if that authority is constitutional.

The status of tribes as domestic dependent sovereigns, the existence of a guardian-ward relationship between Indians and the United States, and provisions in the Constitution combine to vest in Congress plenary power over Indian tribes. Thus, treaties and executive agreements were not the only means the United States used for implementing its Indian policies. Prior to 1871, Congress's plenary power over tribes had been used, but in a way that created exceptions for internal matters.

Treaties made in the era that ended in 1871 are the basis for much of modern American Indian law. I have discussed their critical role in land law. In addition, reservations were designated by treaties; Indian water rights were linked to treaties; Indian hunting and fishing rights on and off reservations were preserved under

40 *Id.* at 326 ("[W]here lands have been reserved for the use and occupation of an Indian Tribe by the terms of a treaty or statute, the tribe must be compensated if the lands are subsequently taken from them." (citing United States v. Klamath & Moadoc Tribes, 304 U.S. 119 (1938); United States v. Shoshone Tribe, 304 U.S. 111 (1938); Shoshone Tribe v. United States, 299 U.S. 476 (1937))).

41 *United States v. Kagama*, 118 U.S. 375, 383–84 (1886) (upholding the Major Crimes Act in the Indian Appropriation Act of 1885, which made it a federal crime for one Indian to commit certain enumerated acts against another Indian). The Court justified this conclusion as follows:

> It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. . . . 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. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.

*Id.* (emphasis added).

42 *United States v. Lara*, 541 U.S. 193, 200 (2004) ("First, the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as ‘plenary and exclusive’ . . . . This Court has traditionally identified the Indian Commerce Clause and the Treaty Clause as sources of that power." (citations omitted)).

43 *See, e.g.*, *Ex parte Crow Dog*, 109 U.S. 556 (1883) (discussing criminal statutes that apply to Indian reservations, but not when the crime involves only Indians).


45 *Winters v. United States*, 207 U.S. 564 (1908) (holding that when the Fort Belknap Reservation in Montana was established by treaty in 1888 the parties reserved water rights necessary to achieve the purposes for which the reservation was created).
treaties;\(^4\) and limited sovereignty was preserved by treaties.\(^4\) By 1871, treaties had served the interests of the United States well. They had provided a legal means to take vast quantities of Indian land, to remove tribes from land desirable for settlers, and to create a façade of stability for Indians that gave settlers time to increase in number and political power so they could press their case for more land.

As the following discussion demonstrates, the practical benefits to tribes and to the United States of treaty-making were not sufficient to overcome the political opposition to them and to their role as the basis of the Indian policy that arose in the House of Representatives. The tribes had little political power to resist the House’s aggressive demand to end treaty-making, and the United States had other means of implementing its policy, namely, the plenary power of Congress and the President’s power to enter into executive agreements,\(^4\) which Presidents continued to exercise even after 1871.\(^4\)

II. WILLING AGGRANDIZER AND WILLING ABDICATOR FIND COMMON GROUND

Under the Constitution, the President is empowered to make treaties with the advice and consent of the Senate as expressed by the concurrence of two-thirds of the Senators present.\(^5\) From 1789 when the Constitution was ratified, treaty-making with Native American tribes was carried out as an implementation of this constitutional authority. The President appointed a commission to negotiate with a tribe; if agreement was reached and the President approved, it was submitted to the Senate for its advice and consent.\(^5\) The only role of the House of Representatives in this treaty-based relationship with Indian tribes was to appropriate funds to implement what the


\(^{47}\) See, e.g., Montana v. United States, 450 U.S. 544, 548 (1981) (recognizing that the treaty provision that gave the tribe “absolute and undisturbed use and occupation” of the reservation continued tribal sovereignty, but only as long as absolute and undisturbed use and occupation existed).

\(^{48}\) See supra notes 35–40 and accompanying text.

\(^{49}\) COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 1.03[9] (Nell Jessup Newton ed., 2005) (“Although formal treaty-making was abandoned, the federal government continued to make agreements with Indian tribes, many of which were similar to treaties.”).

\(^{50}\) U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .”)

\(^{51}\) See, e.g., United States v. Sioux Nation, 448 U.S. 371, 381 (1980) (discussing the appointment and negotiations of a commission headed by George Manypenny); Wash. State Commercial Passenger Fishing Vessel Ass’n, 443 U.S. at 666 (discussing the appointment and negotiations of a commission headed by Isaac Stevens).
President and Senate had finalized. The House was dissatisfied with this after-the-fact role. The Supreme Court characterized the House’s reaction as follows:

The Act of 1871 resulted from the opposition of the House of Representatives to its practical exclusion from any policy role in Indian affairs. For nearly a century the Executive Branch made treaty arrangements with the Indians “by and with the Advice and Consent of the Senate.” Although the House appropriated money to carry out these treaties, it had no voice in the development of substantive Indian policy reflected in them.

In 1871, to express its dissatisfaction with its powerlessness in Indian policy, the House refused to pass legislation granting funds to implement new treaties. Faced with the political reality of a power grab by a willing aggrandizer, the Senate became a willing abdicator, and the rider was passed.

III. LIFE AFTER DEATH: HARM VISITED ON TRIBES AFTER THE END OF TREATY-MAKING

No new treaty between the United States and an Indian tribe has been made under Article II, Section 2, Clause 2 since the enactment of the Indian Appropriation Act of 1871. Since that year, Indian policy has been created and implemented through the legislative process and executive agreements. The discussion in this Part focuses on the harm done to Indian tribes after this change in the way the United States exercises political power. The first Subpart discusses the statutes most harmful to tribal sovereignty enacted after section 71. The second Subpart analyzes the harm caused by the Supreme Court’s misinterpretation of it. In addition to this harm to Indian tribes, the Act also caused harm to the institutions of the government of the United States as established by the Constitution.

53 See id.
54 Id. (citing U.S. CONST. art. II, § 2, cl. 2).
55 See id.
56 See id. (“Finally, the Senate capitulated and joined the House in passage of the 1871 Act as a rider to the Appropriation Act of 1871.” (citation omitted)).
57 See infra Part IV (analyzing the diminution of the power of the President and the Senate caused by section 71 and demonstrating that repealing the Act will benefit these institutions of the United States Government as well as Indian Tribes). It is often the case that when the government acts to correct laws and policies that have harmed a minority, the corrective action will benefit the government itself and the majority population as well as the minority. See, e.g., Grutter v. Bollinger, 539 U.S. 306, 330–31 (2003) (concluding that exposure of non-minority students to widely diverse peoples, cultures, ideas, and viewpoints will benefit them and is necessary to protect American business and military interests in a global economy, and thus
A. Federal Laws that Have Diminished Tribal Sovereignty

It would be difficult to prove that but for section 71 the Indian policies discussed in this Subpart that have been so destructive of Indian sovereignty would not have been put in place, especially given that in 1903 the Supreme Court held that Congress had the authority to abrogate treaties with Indians.\(^5\) In fact, for the first 125 years of this period, the diminishment of tribal sovereignty was the effect, and very likely the goal, of much major Indian policy.\(^5\) This Part is not intended to provide that proof. Instead, its purpose is to identify the primary statutory sources of the harm that has befallen Indians after the end of treaty-making and to indicate the continuing harm these policies can inflict by illustrating the enduring harm resulting from the most egregious policy: allotment.

Before I discuss in some detail the allotment laws, which are by far the most destructive of tribal sovereignty, I will mention briefly other examples.\(^6\) The termination policy, by which many reservations were dissolved, was intended to end both tribal sovereignty and all federal programs for the tribes whose reservations were dissolved.\(^6\) Public Law 280 was enacted to subject many tribes to state civil and criminal jurisdiction, and thereby, to weaken tribal sovereignty.\(^6\) The Indian Gaming

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\(^{5}\) Lone Wolf v. Hitchcock, 187 U.S. 553, 565-66 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning.... The power exists to abrogate the provisions of an Indian treaty....").

\(^{5}\) Solem v. Bartlett, 465 U.S. 463, 468 (1984) ("Another reason why Congress did not concern itself with the effect of surplus land Acts on reservation boundaries was the turn-of-the-century assumption that Indian reservations were a thing of the past. Consistent with prevailing wisdom, Members of Congress voting on the surplus land Acts believed to a man that within a short time—within a generation at most—the Indian tribes would enter traditional American society and the reservation system would cease to exist."); Montana v. United States, 450 U.S. 544, 559 n.9 (1981) ("The policy of the [allotment] Acts was the eventual assimilation of the Indian population and the 'gradual extinction of Indian reservations and Indian titles.' The Secretary of the Interior and the Commissioner of Indian Affairs repeatedly emphasized that the allotment policy was designed to eventually eliminate tribal relations." (citations omitted)).

\(^{6}\) For an excellent source of an in-depth narrative of these policies and the harm they caused, see CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 57-86 (2005) (discussing termination); id. at 18–21 (discussing Public Law 280); id. at 329–45 (discussing Indian gaming and the Indian Gaming Regulatory Act).

\(^{6}\) See Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968) (discussing the policy and laws implementing the termination policy).

\(^{6}\) 18 U.S.C. § 1162 (2000). For data on the detrimental consequences of this law, see
Regulatory Act of 1988\textsuperscript{63} limited the gaming authority that the Supreme Court had held was part of a tribe's inherent sovereignty.\textsuperscript{64}

The Dawes Act of February 8, 1887,\textsuperscript{65} also known as the Indian General Allotment Act of 1887,\textsuperscript{66} empowered the President to apply the theory of allotment to any Indian tribe\textsuperscript{67}—that is, to grant 160 acres of the tribe's land to each family head and lesser amounts to other individuals.\textsuperscript{68} A patent was issued to the individual, but the allotment was held in trust by the United States for a period of twenty-five years; at the end of that period, the allotment was freely alienable and taxable under state law.\textsuperscript{69} A tribe's land that was not allotted was divided into two parts: a portion was retained by the tribe, and the remainder, called surplus land, was transferred to the United States which would open it for homesteading.\textsuperscript{70} One result of allotment was a reduction of Indian land from 138 million acres in 1887 to 48 million acres in 1934 when the allotment policy ended.\textsuperscript{71} This is a sixty-five percent reduction in the quantity of land. The land that was declared surplus was often the most valuable; as a result, allotment reduced the value of tribal land by a much greater eighty percent.\textsuperscript{72}

Although the allotment policy ended in 1934 with the enactment of the Indian Reorganization Act of 1934,\textsuperscript{73} Indians and Indian tribes continue to suffer from what one scholar, Professor Judith V. Royster, called the legacy of allotment.\textsuperscript{74} For example, she points to the Supreme Court's decision in \textit{County of Yakima v. Yakima Indian Nation} in which the Court held that allotted land, the fee to which is held by

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\textsuperscript{65} 24 Stat. 388 (1887) (repealed 1934).


\textsuperscript{67} There were other allotment acts, however, all had the same characteristics as the Indian General Allotment Act.


\textsuperscript{69} Id.

\textsuperscript{70} See id.


\textsuperscript{72} Id. at 172.

\textsuperscript{73} Ch. 576, 48 Stat. 984 (1934) (codified at 25 U.S.C. §§ 461-494 (2000)).

an individual Indian after the repeal of the Indian General Allotment Act, is subject
to state property tax.\textsuperscript{75}

A second example of the continuing harm of allotment, perhaps the most
destructive legacy of allotment, is its impact on determining the extent of reservation land
over which a tribe is able to exercise limited sovereignty; in many cases, the impact
can be characterized as an aftershock that caused as much destruction to sovereignty
as allotment itself.\textsuperscript{76} Because allotment resulted in the conveyance of unallotted land
to the United States, which made the unallotted land a part of the public domain open
for homesteading,\textsuperscript{77} much land within the boundaries of what had been the reservation
is held by non-Indians, municipalities, and other non-tribal members. In some of these
cases, the Supreme Court has held that Congress intended the allotment process to
diminish the reservation.\textsuperscript{78} If the Court finds that diminishment has occurred, the
tribe’s jurisdiction no longer extends to those lands.\textsuperscript{79} The lands are no longer a part
of the reservation.

\textbf{B. The Harm Caused by the Supreme Court’s Misinterpretation of Section 71}

Perhaps the most important reason to repeal section 71 is to end the mischarac-
terization of its legal consequences and to end the use of the mischaracterization as at
least a part of the basis for encroachment on tribal sovereignty, as was done by the
Supreme Court in \textit{DeCoteau v. District County Court}.\textsuperscript{80} The issue in that case was
“whether the Lake Traverse Indian Reservation in South Dakota, created by an 1867
treaty,” was terminated by an 1891 statute.\textsuperscript{81} The Court began its analysis with the
following statements: “This Court does not lightly conclude that an Indian reservation
has been terminated. . . . But in this case, ‘the face of the Act,’ and its ‘surrounding
circumstances’ and ‘legislative history,’ all point unmistakably to the conclusion that
the Lake Traverse Reservation was terminated in 1891.”\textsuperscript{82} Section 71 was part of the
surrounding circumstances relied on by the Court. The Court referred to that law
in the following terms: “After 1871, the tribes were no longer regarded as sovereign
nations . . . .”\textsuperscript{83} If tribes were no longer sovereign nations, it was easier for the Court

\textsuperscript{75} 502 U.S. 251 (1992); see Royster, \textit{supra} note 74, at 21.
\textsuperscript{76} See Royster, \textit{supra} note 74, at 29–43.
\textsuperscript{77} \textit{Id.} at 31–32.
\textsuperscript{78} See, \textit{e.g.,} DeCoteau v. Dist. County Court, 420 U.S. 425 (1975).
\textsuperscript{79} \textit{Id.} at 446 (“[The relevant treaty language] is virtually indistinguishable from that used
in the other sum-certain, cession agreements ratified by Congress in the same 1891 Act. That
the lands ceded in the other agreements were returned to the public domain, \textit{stripped of
reservation status,} can hardly be questioned . . . .” (citations omitted) (emphasis added)).
\textsuperscript{80} 420 U.S. 425 (1975).
\textsuperscript{81} \textit{Id.} at 426.
\textsuperscript{82} \textit{Id.} at 444, 445.
\textsuperscript{83} \textit{Id.} at 432.
to find that the reservation had been terminated. And that is what the Court did; however, to say that section 71 took away tribal sovereignty is a mischaracterization of that law.

The mischaracterization of section 71 did not end in 1975. For example, in a recent decision, the Supreme Court, albeit in dicta, credited that section with "chang[ing] the status of an Indian tribe from a 'powe[r] ... capable of making treaties' to a 'power with whom the United States may [not] contract by treaty.'" This quote implies that it is the status and power of Indian tribes that have been reduced, whereas section 71 by its terms is a limitation on the power of the President and the Senate. This is clear from the language used in section 71. Who is being ordered not to acknowledge or recognize Indian tribes as powers with whom the United States may enter into treaties? The answer is clearly the President. The Constitution gives the President alone the power to "receive Ambassadors and other public Ministers." This power has been acknowledged by legal scholars and the Supreme Court as including the power to recognize or not to recognize governments.

Not only is this Supreme Court characterization of section 71 clearly incorrect on its face, it also violates the Court's well established precedent for the interpretation of statutes regarding Indians: "[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." Thus, to the extent the statute is ambiguous regarding whose power Congress intended to limit, it must be construed to the Indian tribes' benefit. That interpretation denies that their sovereignty was limited by section 71.

Had Congress exercised its plenary power over Indian tribes to enact legislation that removed the authority of those governments to enter into treaties with the United States, that legislation would be a change in tribal authority and tribal sovereignty. Such a law would be more difficult than section 71 to overturn in court because it is not so clearly in conflict with an express provision in the Constitution and because there is no clear Supreme Court precedent supporting a finding that it is unconstitutional. Moreover, it would be more difficult politically for Congress and the President to restore tribal sovereignty after they had limited it. This fine distinction regarding whose power section 71 reduced will be lost if a future court relies on the Supreme Court's dicta interpreting the section as a loss of tribal power and then

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84 Id. at 427–28.
87 U.S. CONST. art. II, § 3.
90 See, e.g., WILKINSON, supra note 60, at 71–75, 77–84, 182–89 (describing the termination of the Menominee and Klamath Indian Tribes and the long fight waged by each to reinstate its tribal sovereignty).
applies that interpretation of section 71 as at least part of the basis for further reducing tribal sovereignty.

IV. THE (NON)ROLE OF THE HOUSE OF REPRESENTATIVES IN TREATY-MAKING

The Constitution specifically gives the President the power to make treaties if two-thirds of the Senate concurs.\textsuperscript{91} Clearly absent from this allocation of authority is any role for the House; this exclusion was deliberate.\textsuperscript{92} Alexander Hamilton explained both the inclusion of the President and the Senate and the exclusion of the House in The Federalist Papers.\textsuperscript{93} Hamilton argued that treaty-making has primarily a legislative character, although it has elements of both executive and legislative functions.\textsuperscript{94} He concludes that the President is “the most fit agent in those transactions.”\textsuperscript{95} However, the unchecked authority of the President to commit the United States to treaties was notacceptable to Hamilton because of the possibility that a foreign state could bribe the President.\textsuperscript{96} The “intermixture of powers,”\textsuperscript{97} that is, the executive with the legislative, provided the best allocation of power and a check on the abuse of that power.

Hamilton then rejected the argument that the check should be provided by Congress, that is, by both the Senate and the House.\textsuperscript{98} Hamilton argued that the House by its size, interests, constituency, and term of office would not be able to be the check on the executive’s power.\textsuperscript{99} Hamilton stated his argument as follows:

The remarks made in a former number ... will apply with conclusive force against the admission of the House of Representatives

\textsuperscript{91} U.S. CONST. art. II, § 2, cl. 2.
\textsuperscript{92} See THE FEDERALIST NO. 53, at 298 (Alexander Hamilton) (E.H. Scott ed., 1898). Hamilton, in explaining the functions and election cycle of the House of Representatives, stated: “[T]he House of Representatives is not immediately to participate in foreign negotiations and arrangements . . . .” Id.
\textsuperscript{93} THE FEDERALIST NO. 55 (Alexander Hamilton).
\textsuperscript{94} THE FEDERALIST NO. 75, at 410 (Alexander Hamilton) (E.H. Scott ed., 1898) (“[Treaty-making] partake[s] more of the Legislative, than of the Executive character, though it does not seem strictly to fall within the definition of either.”).
\textsuperscript{95} Id. at 411.
\textsuperscript{96} Id. (“[A] man raised from the station of a private citizen to the rank of chief magistrate, possessed of but a moderate or slender fortune, and looking forward to a period not very remote, when he may probably be obliged to return to the station from which he was taken, might sometimes be under temptations to sacrifice duty to interest . . . . An avaricious man might be tempted to betray the interests of the State for the acquisition of wealth. An ambitious man might make his own aggrandizement, by the aid of a foreign Power, the price of his treachery to his constituents.”).
\textsuperscript{97} Id. at 410.
\textsuperscript{98} Id. at 412.
\textsuperscript{99} Id.
to a share in the formation of treaties. The fluctuating, and taking its future increase into the account, the multititudinous composition of that body, forbid us to expect in it those qualities which are essential to the proper execution of such a trust. Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decision, secrecy, and despatch [sic], are incompatible with the genius of a body so variable and so numerous. The very complication of the business, by introducing a necessity of the concurrence of so many different bodies, would of itself afford a solid objection.\footnote{Id.}

Hamilton's rationale is complete and persuasive. Moreover, it is consistent with the Constitution as a whole; it grants limited power to one\footnote{For example, the power of the President in foreign affairs does not include foreign trade or trade with Indian nations; those powers are vested in Congress. U.S. CONST. art. I, § 8, cl. 3.} branch and provides a check on that power by another branch.\footnote{See John C. Reitz, Political Economy and Separation of Powers, 15 TRANSNAT'L L. & CONTEMP. PROBS. 579, 581 (2006) ("[T]he Fathers of the American Constitution... [adopted] some form of a partial separation of powers, that is the pure doctrine modified by a system of checks and balances... [This] understanding, generally referred to as the doctrine of 'checks and balances,' does not 'separate' power, but rather provides for overlapping sharing of powers as a way of limiting the power of any one branch to act alone. This approach emphasizes the function of the separation of powers doctrine to distribute power so that no one branch can dominate the others." (citations omitted)).} If section 71 were constitutional, it would empower Congress and the President—and even Congress acting alone if it could overrule a presidential veto—to cancel express constitutional powers.\footnote{25 U.S.C. § 71 (2000).} If, by legislation, the treaty-making power given to the President with the advice and consent of the Senate could be replaced by executive agreements or other means, then there would be no need for the treaty-making provision; it would be surplusage. An interpretation of the Constitution leading to such a consequence is contrary to long-established principles of constitutional interpretation dating at least from 1821 in Cohens v. Virginia in which Chief Justice Marshall rejected an interpretation of Article III of the Constitution that would have made part of it surplusage.\footnote{19 U.S. (6 Wheat.) 264, 391 (1821) ("If jurisdiction depended entirely on the character of the parties, and was not given where the parties have not an original right to come into Court, that part of the 2d section of the 3d article, which extends the judicial power to all cases arising under the constitution and laws of the United States, would be mere surplusage.")}
As the discussion above of Alexander Hamilton’s explanation demonstrates, the treaty-making provision of the Constitution was the result of careful consideration of the desirability of balancing power with checks against its abuse. The treaty-making power fits the following description the Supreme Court applied to the Constitution as a whole: "[E]very word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." The due force of Article II, Section 2, Clause 2 extends to a full range of subject matters about which treaties can be made legally, to the complete set of nations that have sovereignty to enter into treaties, and to the full spectrum of obligations the United States can undertake and/or accept. Section 71 prevents Article II, Section 2, Clause 2 from having its due force. It removes all Indian tribes from the force of Article II, Section 2, Clause 2; it removes all subjects related to Indian tribes from the force of Article II, Section 2, Clause 2; it prohibits all benefits and obligations to or from Indian tribes from the force of Article II, Section 2, Clause 2. Because of these conflicts between section 71 and the Constitution, section 71 is unconstitutional.

V. THE CONFLICT OF SECTION 71 WITH CONTROLLING SUPREME COURT PRECEDENT

The incorporation of the basic principles that underlie the Constitution—namely limited power, separation of powers, and checks and balances—into the treaty-making clause is replicated in two other constitutional clauses that have been before the Supreme Court in the past thirty years. These are the Presentment Clause and the Appointments Clause. The constitutionality of statutes that did not literally incorporate these clauses has been decided by the Supreme Court in the cases Immigration and Naturalization Service v. Chadha, Clinton v. City of New York, and Buckley v. Valeo.

A. Analysis of Controlling Supreme Court Precedent

These three cases provide legal principles and benchmarks that can be applied to determine the constitutionality of section 71. In each of these cases, the Court found

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105 See supra notes 93–102 and accompanying text.
107 U.S. CONST. art. II, § 2, cl. 2.
108 Id. art. I, § 7, cl. 2.
109 Id. art. II, § 2, cl. 2.
that the non-literal incorporation of the constitutional provisions into the statutes at issue resulted in unconstitutional laws. Each of these statutes created procedures and allocated authority in conflict with what is explicitly given in the Constitution. In a metaphor of the Court, each collided with the Constitution and therefore violated it. These cases will be analyzed and then applied to determine the constitutionality of section 71.

1. *Immigration and Naturalization Service v. Chadha*

Chadha was in the United States under a nonimmigrant student visa; he was subject to deportation because he stayed beyond the expiration date of his visa. He filed an application with the Attorney General for suspension of deportation under section 244(a)(1) of the Immigration and Nationality Act. The Attorney General recommended suspension of Chadha’s deportation and, as required by statute, conveyed this recommendation to Congress. Under section 244(c)(2) of the Act, either house of Congress had the power to veto, that is, to invalidate, the Attorney General’s determination that Chadha should not be deported. Section 244(c)(2) provided:

> In the case of an alien specified in paragraph (1) of subsection (a) of this subsection—if during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, either the Senate or the House of Representatives passes a resolution stating in substance that it does not favor the suspension of such deportation, the Attorney General shall thereupon deport such alien or authorize the alien’s voluntary departure at his own expense under the order of deportation in the manner provided by law. If, within the time above specified, neither the Senate nor the House of Representatives shall pass such a resolution, the Attorney General shall cancel deportation proceedings.

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113 See, e.g., *Goss v. Lopez*, 419 U.S. 565, 575 (1975) ("It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution.").

114 *Chadha*, 462 U.S. at 923.


116 Id. § 1254(c).

117 *Chadha*, 462 U.S. at 925.

118 8 U.S.C. § 1254(c)(2).

119 Id. (emphasis added).
Acting under this authority, the House vetoed the Attorney General’s decision, and the Board of Immigration Appeals, before which Chadha was contesting deportation, ordered Chadha deported. As provided by the Act, Chadha filed a petition for review of that order with the United States Court of Appeals for the Ninth Circuit claiming that the one house veto provision of section 244(c)(2) was unconstitutional. “The Immigration and Naturalization Service agreed with Chadha’s position” and supported his argument in that court.

The Supreme Court framed the challenge to the veto provision of section 244(c)(2) as one of consistency of this provision with the Presentment Clause of the Constitution:

*Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be re-passed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.*

In analyzing this allocation of authority, the Court identified four objectives embodied in this constitutional provision: (1) to share power between Congress and the President; (2) to provide a check on the ability of a particular Congress to enact bad law; (3) to assure that bills are evaluated from a national perspective before they become law; and (4) to attempt to have more careful legislative deliberation by requiring involvement of both houses of Congress. Testing the veto provision of section 244(c)(2) against these objectives as expressly stated in the Constitution, the Court found it to be in violation: “To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution’s prescription for legislative action: passage by a majority of both Houses

120 Chadha, 462 U.S. at 928.
121 8 U.S.C. § 1105a(a).
122 Chadha, 462 U.S. at 928.
123 *Id.*
124 *Id.* at 956–57 (“Since it is clear that the action by the House under § 244(c)(2) was not within any of the express constitutional exceptions authorizing one House to act alone, and equally clear that it was an exercise of legislative power, that action was subject to the standards prescribed in Art. I.”).
125 *Id.* at 945–46 (quoting U.S. CONST. art. I, § 7, cl. 3).
126 *Id.* at 947–50. The fourth of these objectives was to be achieved by having a bicameral legislature as specified in U.S. CONST. art. I, §§ 1, 7.
The Court rejected the argument that the undisputed efficiency of the one house veto made it constitutional even if inconsistent with the literal procedure expressed in the Constitution. The rationale of the Court in rejecting this efficiency argument will have application in determining the constitutionality of section 71: "[I]t is obviously easier for action to be taken by one House without submission to the President; but it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency." The values expressed in the Constitution, and the procedures and allocations of authority to protect them, are not to be overridden by claims of administrative efficiency.

Not only is administrative efficiency insufficient to bypass the express requirements of the Constitution, neither is political efficiency nor political custom. The Court acknowledged that the practice of Congress of including such vetoes in legislation dates from 1932 and extends to 295 such procedures in 196 different statutes. Justice White attached an appendix to his dissent that listed over 200 statutes containing a one house veto. The Court refused to allow Congress and the President to amend the Constitution by ignoring it or by acting contrary to its explicit requirements to add an alternative legislative process, no matter how long or how often these practices had been in place and no matter how politically useful they may be. Characterizing the one house veto as a "political invention," the Court held: "But policy arguments supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised."

Thus, the single house veto collides with the Constitution along two axes, namely: (1) the allocation of powers among the branches of government, and (2) the procedure by which that power can be exercised. As the discussion below demonstrates, section 71 also conflicts with the demands of the Constitution in these same two dimensions—the allocation of power and the procedure for using the power. In fact, the end of treaty-making is more destructive of constitutional power than the single house veto, because section 71 purports to terminate power given to the President.

127 Chadha, 462 U.S. at 958.
128 Id. at 958–59.
129 Id.
130 Id. at 944 ("Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . .").
131 Id. at 944 (citing James Abourezk, The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives, 52 IND. L. REV. 323, 324 (1977)).
132 Id. at 968 & n.2 (White, J., dissenting) ("[O]ver the past five decades, the legislative veto has been placed in nearly 200 statutes.").
133 Id. at 954 (majority opinion).
134 Id. at 945.
135 See infra Part V.B.
with the advice and consent of the Senate, whereas the one house veto did not replace or limit the procedure for enacting laws specified in the Constitution; it merely provided an alternative.

2. Clinton v. City of New York

The Line Item Veto Act became effective on January 1, 1997.\textsuperscript{136} It gave the President the power to cancel three types of subsections or subparts of laws that had been enacted: "(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit."\textsuperscript{137} A cancellation would take effect upon receipt by Congress of a special message from the President.\textsuperscript{138} A majority vote in both houses would enact the disapproved legislation.\textsuperscript{139} Using this authority, President Clinton cancelled an item of new direct spending that would have benefited New York City\textsuperscript{140} and an item that would have provided a limited tax benefit to potato growers in Idaho.\textsuperscript{141} The issue before the Supreme Court was whether the Line Item Veto Act was consistent with the constitutional allocation of authority and procedures for using that authority.\textsuperscript{142}

The Court found that the interaction of Congress and the President regarding the enactment of laws is controlled by Article I.\textsuperscript{143} Referring to this provision, the Court described the President's role as follows: "[A]fter a bill has passed both Houses of Congress, but 'before it becomes a Law,' it must be presented to the President. If he approves it, 'he shall sign it, but if not he shall return it' [to Congress]."\textsuperscript{144} The Court then contrasted the constitutional roles and procedures with those in the Line Item Veto statute:

The constitutional return takes place before the bill becomes law; the statutory cancellation occurs after the bill becomes law. The constitutional return is of the entire bill; the statutory cancellation is of only a part. Although the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes.\textsuperscript{145}

\textsuperscript{137} 2 U.S.C. § 691(a) (Supp. II 1994).
\textsuperscript{138} Id. § 691b(a).
\textsuperscript{139} Id. § 691d(d).
\textsuperscript{141} Id. at 425.
\textsuperscript{142} Id. at 436.
\textsuperscript{143} U.S. CONST. art. I, § 7, cl. 2.
\textsuperscript{144} Clinton, 524 U.S. at 438 (quoting U.S. CONST. art. I, § 7, cl. 2).
\textsuperscript{145} Id. at 439.
The Court held that the absence in the Constitution of any role for the President after enactment of a law amounted to an express denial of such presidential power. The Line Item Veto Act was unconstitutional because it created presidential power not found in the Constitution and it established a procedure for enacting laws not found in the Constitution. Referring to Chadha, the Court stated: "[P]ower to enact statutes may only ‘be exercised in accord with a single, finely wrought and exhaustively considered, procedure.’" Thus, as did the statute at issue in Chadha, the Line Item Veto Act collides with the Constitution along two axes, namely: (1) the allocation of powers among the branches of government, and (2) the procedure by which that power can be exercised.

3. Buckley v. Valeo

Buckley involves the Federal Election Campaign Act of 1971, as amended in 1974. The issue relevant to the present Article was the constitutionality of the provision of the Act specifying how the eight-person Federal Election Commission would be appointed and its powers. The Secretary of the Senate and the Clerk of the House of Representatives were to be ex officio members; two members were to be appointed by the President pro tempore of the Senate upon the recommendations of the majority and minority leaders of the Senate; two more were to be appointed by the Speaker of the House of Representatives upon the recommendations of its respective majority and minority leaders; and two members were to be appointed by the President. Each of the six voting members of the Commission was to be confirmed by a majority of both houses of Congress. Some of the duties of the Commission could only be carried out by "Officers of the United States." The issue in this case

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146 Id. ("There are powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition.").
147 Id. at 439–40 (citing INS v. Chadha, 462 U.S. 919, 951 (1982)).
152 Id. The Court specifically pointed out that, contrary to the explicit language of the Constitution, this provision injected the House of Representatives into the confirmation process. Buckley, 424 U.S. at 126 ("Although two members of the Commission are initially selected by the President, his nominations are subject to confirmation not merely by the Senate, but by the House of Representatives as well.").
153 Buckley, 424 U.S. at 138 ("The Commission’s enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution
was whether this appointment authority was consistent with the following provision of the Constitution:\textsuperscript{154}

\begin{quote}
[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.\textsuperscript{155}
\end{quote}

The Commission and its supporters advocated a functional argument to uphold this appointment provision.\textsuperscript{156} The Court characterized this argument as follows:

The position that because Congress has been given explicit and plenary authority to regulate a field of activity, it must therefore have the power to appoint those who are to administer the regulatory statute is both novel and contrary to the language of the Appointments Clause. Unless their selection is elsewhere provided for, all officers of the United States are to be appointed in accordance with the Clause.\textsuperscript{157}

The Court rejected that approach and instead applied the provision of the Constitution literally.\textsuperscript{158} It concluded: "[W]e hold that most of the powers conferred by the Act upon the Federal Election Commission can be exercised only by 'Officers of the United States,' appointed in conformity with Article II, Section 2, clause 2, of the Constitution, and therefore cannot be exercised by the Commission as presently constituted."\textsuperscript{159} The Court thus denied Congress and the President the power to amend the Constitution by interpreting it in a non-literal but politically and functionally convenient manner.

The same result was reached by the Court in \textit{Bowsher v. Synar}.\textsuperscript{160} In that case, the Court struck down the Balanced Budget and Emergency Deficit Control Act\textsuperscript{161} because the Act vested in a person under the control of Congress the authority to

\textsuperscript{154} \textit{Id.} at 118–19.
\textsuperscript{155} \textit{U.S. Const. art. II, § 2, cl. 2.}
\textsuperscript{156} \textit{Buckley}, 424 U.S. at 131–32.
\textsuperscript{157} \textit{Id.} at 132.
\textsuperscript{158} \textit{Id.} at 143.
\textsuperscript{159} \textit{Id.}
\textsuperscript{160} 478 U.S. 714 (1986).
execute the law.\textsuperscript{162} This was a violation of the allocation of authority made by the Constitution.\textsuperscript{163}

\textbf{B. Applying Controlling Supreme Court Precedent: Section 71 Violates Article II, Section 2, Clause 2 of the Constitution}

The three cases discussed above provide benchmarks for determining the constitutionality of section 71. If the section suffers from the same constitutional fallacies regarding Article II, Section 2, Clause 2 as the statutes found in those cases to be in violation of the Constitution, then it too is unconstitutional. As the following discussion demonstrates, section 71 does indeed collide with the Constitution in the same way as the statutes at issue in the previous three cases.

The one house veto law at issue in \textit{Chadha} was found to be unconstitutional for two reasons. First, it changed the allocation of authority specified in the Constitution. It did this by enabling either house of Congress acting alone to enact laws.\textsuperscript{164} This allocation of authority was found to be in conflict with that specified in the Constitution. Second, it changed the check and balance dynamic created by the Constitution. Under the one house veto law there was no bicameral check on either house, and there was no executive check.\textsuperscript{165} Both checks were constitutionally required.

The Line Item Veto Act debated in \textit{Clinton v. City of New York} was found to have the same basic constitutional flaws as the one house veto provision. It also changed the allocation of authority given in the Constitution, and it changed the check and balance dynamics specified there. The Court held that the Constitution gave the President no authority to modify a law after it had been enacted; the Line Item Veto Act purported to allocate that power to the President.\textsuperscript{166} Also, the Line Item Veto Act removed the checks the Constitution established for the enactment of legislation.\textsuperscript{167} The enactment procedure itself was a double-checking process: the veto power of the President for the entire bill checked Congress’s authority, and the demanding two house, two-thirds override power of Congress was intended to be a counterbalance for the President’s veto authority. The Court found the Line Item Veto Act to violate this “finely wrought and exhaustively considered procedure.”\textsuperscript{168}

\textsuperscript{162} \textit{Bowsher}, 478 U.S. at 736.
\textsuperscript{163} \textit{Id.} at 726 (holding that “[t]he structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess”).
\textsuperscript{164} See supra notes 124–25 and accompanying text (discussing INS v. Chadha, 462 U.S. 919 (1983)).
\textsuperscript{165} See supra notes 126–27 and accompanying text.
\textsuperscript{166} See supra notes 145–46 and accompanying text (discussing Clinton v. City of New York, 524 U.S. 417 (1998)).
\textsuperscript{167} See supra note 147 and accompanying text.
\textsuperscript{168} See INS v. Chadha, 462 U.S. 919, 951 (1983); see also supra note 147 and accompanying text.
In Buckley, the Federal Election Campaign Act of 1971 was found to be unconstitutional for the same two reasons as the one house veto law and the Line Item Veto Act.169 The new allocation of power under this law was the authority granted to a committee to appoint “Officers of the United States.”170 Under the Constitution, that authority was given to the President. The Court found this new allocation of power to be unconstitutional.171 The law also changed the constitutional check on the appointment power. Under the Constitution, the advice and consent of the Senate was required for all such officers.172 Under the Federal Election Campaign Act, the committee could appoint such officers without their being subject to the advice and consent of the Senate.173

Section 71 has both of these constitutional fallacies. First, it changes the allocation of authority specified in the Constitution. It does this by denying the President and Senate, acting together, the authority to enter into treaties with Indian tribes. This change in allocation of power is in conflict with that made by the Constitution. Second, section 71 changes the check and balance dynamics regarding treaty-making with Indian tribes specified in the Constitution. The Constitution empowers a minority of thirty-five senators to withhold the Senate’s advice and consent and thus prevent the ratification of a treaty with an Indian tribe; section 71 removes this check.

VI. SECTION 71 VIOLATES POLITICAL FREEDOM GUARANTEED BY THE CONSTITUTION

Justice Kennedy has argued that the federal structure of the Constitution provides a guarantee of political liberty to United States citizens: “The political freedom guaranteed to citizens by the federal structure is a liberty both distinct from and every bit as important as those freedoms guaranteed by the Bill of Rights. The individual citizen has an enforceable right to those structural guarantees of liberty, a right which the majority ignores.”174 Justice Kennedy based his concurring opinion in Clinton v. City of New York on this structural guarantee; there he stated: “By increasing the power of the President beyond what the Framers envisioned, the statute compromises the political liberty of our citizens, liberty which the separation of powers seeks to secure.”175

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169 See supra notes 158–59 and accompanying text (discussing Buckley v. Valeo, 424 U.S. 1 (1976)).
170 See supra notes 158–159 and accompanying text.
171 See supra note 159 and accompanying text.
172 U.S. Const. art. II, § 2, cl. 2.
173 See supra note 159 and accompanying text.
175 Clinton, 524 U.S. at 452.
For Native Americans, who are citizens of the United States, part of the structure that guarantees their liberty is the constitutional treaty-making power between Indian tribes and the United States as specified in the Constitution. Paraphrasing Justice Kennedy: by decreasing the power of the President with the advice and consent of the Senate to enter into treaties with Indian tribes, section 71 compromises the political liberty of Indian citizens of the United States.

Under Justice Kennedy's theory that the federal structure of the Constitution provides a guarantee of political liberty, it is not only Indian citizens whose constitutional rights are violated by section 71; the rights of all citizens are violated by it. This is because section 71 constitutes an abdication of responsibility, and as Justice Kennedy observed, "[a]bdication of responsibility is not part of the constitutional design." Thus, under this theory, when Congress and the President enacted section 71, they violated the constitutional rights of every citizen of the United States.

VII. WHAT IF SECTION 71 WERE CONSTITUTIONAL?

If section 71 were constitutional, it would serve both as a model for future legislation affecting, even changing, other constitutional provisions and as a precedent for upholding their constitutionality. Here are some candidates.

The most obvious next step to reallocate authority would be to finish the job on the treaty-making power that section 71 started: end the treaty-making power vested in the President and the Senate. A simple change in section 71 to read as follows would suffice: no foreign nation shall be acknowledged or recognized as an independent nation or power with whom the United States may contract by treaty. Because section 71 is a change to the allocation of constitutional powers among the branches of the United States government, no characteristic of Indian tribes, in particular their status as domestic dependent nations, can be the basis for its constitutionality. Therefore, the validity of section 71 would imply the constitutionality of this broader change to Article II, Section 2, Clause 2.

Once the treaty-making power of the President and the Senate has been gutted, the other authority of the President in this Clause, checked by the advice and consent of the Senate, could become a target. This would include "[appointment of] Ambassadors, other public Ministers and Consuls, [and] Judges of the Supreme Court." Although the list of appointees contained in this Clause includes "Officers of the United States," perhaps the President’s and Senate’s authority to appoint them should not be attacked given the failure of that attempt in Buckley v. Valeo.  

177 Clinton, 524 U.S. at 452.
178 Id. at 452.
179 U.S. CONST. art. II, § 2, cl. 2.
180 Id.
181 424 U.S. 1, 132 (1976); see also supra Part V.A.3.
The power of the President to make recess appointments has been used by Presidents to bypass the constitutional requirement that they receive the Senate’s advice and consent for controversial nominees. Legislation based on section 71 could either end this presidential power or limit the term of the appointment to last only while Congress is actually in recess.

These changes to the allocation of power among the branches of government should not be limited to reducing the power of the President. The authority to approve compacts among states is vested in Congress with no role for the President. Because compacts have become important instruments of government, this is a significant weakness in presidential power. The President has no role in the formation of new states and none in proposing amendments to the Constitution. If section 71 were constitutional, legislation based on it could remedy all of these “problems.”

Section 71, as a model and as precedent if upheld, possibly could be used to benefit states. The definition of treason against the United States and the requirement for proving it are given in the Constitution. Congress is given the power to “declare the Punishment of Treason.” Legislation based on section 71 could be used to include power for the President regarding treason and to empower states to define treason-like laws and the punishment for violations. Chief Justice Marshall considered a related question in *Marbury v. Madison*:

“No person,” says the constitution, “shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.” Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act? From these, and many other selections which might be made, it is apparent, that the framers

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182 U.S. CONST. art. II, § 2, cl. 3.
184 U.S. CONST. art. I, § 10, cl. 3.
186 U.S. CONST. art. IV, § 3, cl. 1.
187 id. art. V.
188 Id. art. III, § 3, cl. 1.
189 Id. art. III, § 3, cl. 2.
of the constitution contemplated that instrument, as a rule for the
government of courts, as well as of the legislature.\footnote{5}{U.S. (1 Cranch) 137, 179–80 (1803).}

These examples should suffice to demonstrate the far reaching consequences
of section 71 being constitutional. It is true that section 71 has harmed Indians and
Indian tribes.\footnote{92}{See supra Part III.} Moreover, as discussed above, section 71 has harmed all United States
citizens.\footnote{93}{See supra Part VI and note 57.} But more is at stake. As the above examples illustrate, the potential
collateral damage is greater by orders of magnitude than the direct injury.

CONCLUSION

Treaties between Indian tribes and the United States are needed. For example,
every tribe that has a reservation should have a treaty that establishes its reservation,
so that if land is taken by the United States the tribe will be assured compensation.
Transboundary water pollution and air pollution are common environmental prob-
a model for treaties between the United States and tribes to mitigate transboundary
air or water pollution. Species protection is another objective that would benefit from
treaties between the United States and tribes whose reservations include part of the
species' range.\footnote{95}{See, e.g., Robert B. Keiter, Public Lands and Law Reform: Putting Theory, Policy, and Practice in Perspective, 2005 Utah L. Rev. 1127, 1201–02 (concluding that because ecosystems do not respect political boundaries, "shared decision-making responsibility" between tribal governments and other governments is needed to protect endangered ecosystems).}

To restore the due force of Article II, Section 2, Clause 2,\footnote{96}{See supra notes 106–07 and accompanying text.} section 71 must either be repealed by legislative action or voided by judicial decision. Legislative action
repealing a law the constitutionality of which is doubtful might appear to be no more
than donating the sleeves from one's vest to charity. But the repeal would be more
than that. Because the unconstitutionality of section 71 is not a certainty, the repeal
would achieve the desirable objective of introducing more certainty into the law.

Standing to challenge section 71 could be problematic. Members of the Senate
could claim standing by claiming that section 71 has reduced their power by ending
treaty-making as provided by Article II, Section 2, Clause 2 of the Constitution. This
would be similar to the basis for standing asserted in *Raines v. Byrd* by the six members of Congress who voted against the Line Item Veto Act. The Court found, however, that they did not have standing because they had "not alleged a sufficiently concrete injury.".

After *Raines v. Byrd*, where the Court found the plaintiffs did not have standing, and *Clinton v. City of New York*, where the specific denial of funds resulting from the President's exercise of the line item veto power was held to be sufficient to support standing, it appears that the surest way to assure standing for a tribe to bring such a challenge would be for the President to negotiate a treaty with a tribe, receive advice and consent from the Senate for ratification, and then refuse to provide a benefit specified in the treaty to the tribe. Another approach would be for the President to negotiate a treaty with a tribe and submit it to the Senate for advice and consent. If the Senate refused to consider the treaty because of section 71, the tribe very likely would have standing to challenge section 71.

It was well known that many officials in the United States government considered treaty-making with Indian tribes to be a fiction because these officials rejected the very existence of tribal sovereignty. Thus, ending treaty-making with Indian nations promoted the attitude that their sovereignty was a farce and transmitted to Indians the message that they were considered by the United States government to be inferior. For Indians and Indian tribes, section 71 is as much a psychological barrier as a political one. The same may be the case for the United States government.

Tearing down the wall will not create equality of tribal governments with the United States, but it would symbolize equity between them. Tearing it down, however, would be more; instead of the hollow statements and policies that are no more than a nod in the direction of tribal sovereignty, it would be an unambiguous, strong endorsement of sovereignty by the United States and a proclamation that the United States is an ally of the tribes in their lonely battle to protect their tribal sovereignty.

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198 *Id.* at 830.
200 See, e.g., Indian Commissioner Parker on the Treaty System, from the Annual Report of the Commissioner of Indian Affairs, Dec. 23, 1869, *reprinted in Getches et al.*, supra note 68, at 150–51 ("A treaty involves the idea of a compact between two or more sovereign powers... The Indian tribes of the United States are not sovereign nations, capable of making treaties... They are held to be the wards of the government... But, because treaties have been made with them, generally for the extinguishment of their supposed absolute title to land inhabited by them, ... they have become falsely impressed with the notion of national independence. It is time that this idea should be dispelled, and the government cease the cruel farce of thus dealing with its helpless and ignorant wards.").
201 See, e.g., *supra* notes 9–15 and accompanying text.