THERE IS NO FEDERAL SUPREMACY CLAUSE FOR INDIAN TRIBES

Robert N. Clinton*

I. INTRODUCTION: THE ORIGINAL BASELINE UNDERSTANDING OF THE TRIBAL↔FEDERAL RELATIONSHIP 118

II. DELEGATION AND CONSENT OF THE GOVERNED: AMERICAN CONSTITUTIONAL FIRST PRINCIPLES ON THE LEGITIMACY OF GOVERNMENTAL POWER 148

III. PLENARY POWER OVER INDIAN AFFAIRS AND THE RISE OF AMERICAN COLONIALISM.. 162
   A. Nineteenth Century American Imperialism and the Rise of the Indian Plenary Power Doctrine 164
   B. The Emergence of an Activist Judicial Indian Plenary Power Doctrine from a Judicially Conservative Court............................. 205

IV. FEDERAL SUPREMACY DOES NOT APPLY TO INDIAN TRIBES 235

V. INDIAN CITIZENSHIP: THE FORMAL RATIONALE THAT FAILS 246

VI. POLISHING THE CHAIN OF FRIENDSHIP BY RECONSIDERING THE LEGAL LEGACY OF AMERICAN COLONIALISM 252

VII. CONCLUSION... 259

Copyright, 2002, Robert N. Clinton.

* Barry Goldwater Chair of American Institutions, Arizona State University. B.A., 1968, University of Michigan; J.D., 1971, University of Chicago. The author also serves as the Chief Justice of the Winnebago Supreme Court and as an Associate Justice of the Cheyenne River Sioux Tribal Court of Appeals and the Colorado River Indian Tribal Court of Appeals. He wishes to express his appreciation to Jacki T. Rand, Nacole Heslep, Robert B. Porter, Allie Maldonado and Philip S. Deloria for their helpful comments on earlier drafts of this essay or oral presentations of it. The author also notes with appreciation the helpful research work of his research assistant, Lee Strang, and the staff of the University of Michigan Law Library to the completion of this project. An earlier version of this paper was also presented to the faculty of the University of Michigan Law School and the author wishes to thank the members of the Michigan faculty for their helpful comments on the manuscript. The views expressed in this article, however, are solely the personal views of the author in his scholarly capacity and do not constitute official positions of any of the governments that employ him or of any of the persons who generously provided their comments.

> *They say we have been here before and made an alliance. The Dutch, indeed, say we are brothers and are joined together with chains, but that lasts only as long as we have beavers. After that we are no longer thought of, but much will depend upon it when we shall need each other. [They thereupon gave two beavers.]*
>
> *They say, the alliance which was made in this country, who can break it? Let us always maintain this alliance which was once made. [Give thereupon two beavers.]*
>
> *—Mohawk Treaty Propositions, September 6, 1659.*[1]

Indians often describe life and the universe as a circle. So it may also be for constitutional law. Once again, American constitutional law is concerned with finding and enforcing limitations on the authority of the federal government to protect another sovereign within the country, the states. After many years of federal judicial deference to Congressional initiatives in adjusting the balance of power between the federal government and the states, the United States Supreme Court has recently become more active in protecting the sovereign prerogatives of the states against federal legislative and judicial intrusion. The Supreme Court has wielded the Interstate Commerce Clause,[2] the Tenth Amendment,[3] the Eleventh Amendment,[4] and the general structural arrangements of the United States Constitution[5] as constitutional weapons to support its heightened scrutiny of national initiatives that impinge on state authority.

This essay reflects on the failure of the federal judiciary to employ any similarly probing analysis with respect to the breadth of authority the

---

1. *Quoted in* FRANCIS JENNINGS, THE AMBIGUOUS IROQUOIS EMPIRE 47 (1984). The reference to the chain in the Mohawk presentation is to the Covenant Chain of Friendship often used to describe the alliance that existed between the Iroquois Confederation, including the Mohawk, and the European colonial powers that settled near their territory, including the British and Dutch. *See generally* FRANCIS JENNINGS, THE AMBIGUOUS IROQUOIS EMPIRE 8–9 (1984); FRANCIS JENNINGS, THE FOUNDERS OF AMERICA 216–21 (1993); ROBERT A. WILLIAMS, LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE 1600–1800, 113–22 (1997). While the actual Mohawk presentation in 1659 was to *Dutch*, not British, treaty negotiators, this article employs the Mohawk's plea as emblematic of their understanding of the relationship with all allied Euro-American colonial powers. Indeed, the British, and later the Americans, continued the Covenant Chain of Friendship after the Dutch abandoned their colonial efforts in North America.

2 . United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

3. Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

4. Bd. of Trustees v. Garett, 531 U.S. 356 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

5. Alden v. Maine*,* 527 U.S. 706 (1999).

federal government claims over another sovereign directly referenced in the Commerce Clause—Indian tribes. Specifically, this essay suggests that application of the Supreme Court's historically-based, originalist methodology to those portions of the Constitution dealing with federal power over Indian affairs compels the need to reexamine several basic Indian law doctrines, most notably the so-called federal Indian plenary power doctrine. It also suggests that such scrutiny is consistent with perhaps the most revered principle of the United States Constitution—namely, that all legitimate governmental authority derives from the consent of the people who have chosen to delegate only certain limited powers to the federal government (a theory often called "popular delegation" or "popular sovereignty").

While some scholars have invoked international law constraints to arrive at similar conclusions,[6] many Americans too readily dismiss such exogenous standards in favor of their own constitutional principles. The purpose of this essay is to invite discussion of whether the basic American constitutional principles, history, and legal structure of this country require the same result. This essay challenges the federal government and, most notably, the federal judiciary, to honor American legal traditions by abiding by the nation's own founding principles with respect to the nation's first people. Thus, the essay offers primarily a historically-derived immanent, rather than an external, critique of American constitutional law applied to Indian affairs. It challenges the American legal structure to rethink its colonialist past and to revisit its concern for democracy, local control, consent, and territorial sovereignty in application to the nation's Indian tribes, just as it has recently done in affording greater protections to state sovereignty.

The ultimate conclusion of this essay, nevertheless, is far more provocative in American constitutional terms. It is simply that there is no acceptable, historically-derived, textual constitutional explanation for the exercise of any federal authority over Indian tribes without their consent manifested through treaty. Reduced to its starkest statement, this thesis means that, unlike the legal primacy the federal government enjoys over states by virtue of the Supremacy Clause of the United States,[7] the federal

6. *E.g.*, S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (1996); Hurst Hannum, *New Developments in Indigenous Rights*, 28 VA. J. INT'L L. 649 (1988); Catherine J. Iorns, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty*, 24 CASE W. RES. J. INT'L L. 199 (1992); Glenn T. Morris, *In Support of the Right of Self-Determination for Indigenous Peoples Under International Law*, 29 GERMAN Y.B. OF INT'L L. 277 (1986); Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L. J. 660.

7. U.S. CONST. art. VI, § 1, cl. 2.

government has no legitimate claim to legal supremacy over Indian tribes. Consequently, neither Congress nor the federal courts legitimately can unilaterally adopt binding legal principles for the tribes without their consent. This essay also suggests that this constitutional arrangement accurately reflects the founders' original understanding of the United States Constitution. Subsequent late-nineteenth century doctrinal departures from this original understanding resulted from racist, ill-reasoned, constitutionally illegitimate efforts to legally rationalize colonialism in Indian country. This essay suggests that those developments cannot be reconciled with the basic popular delegation principles of American constitutional theory, whatever their legality under international or tribal law.

This essay, therefore, sketches the broad outlines of and seeks preliminary support for this simple, yet revolutionary, theory of tribal↔federal relations, leaving to subsequent work detailed proof of its historical accuracy. As in most essays, these reflections are intended primarily as a working constitutional hypothesis, serving as the basis for further work by the author and other scholars. It is an essay intended to translate into American constitutional terms the pride in tribal sovereignty and the deep grief over America's illegitimate colonial expropriation of that authority that the author has learned from working with tribal people for over a quarter-century. As this nation should be, the author is deeply indebted to Indian peoples for the political vision they have shared with him and the profound insights it has brought. Thus, this paper is intended to provide a legal framework and constitutional roadmap for giving voice, in American constitutional terms, to legitimate tribal claims of federal encroachment on their sovereignty. To sketch the contours of this thesis, the essay will first examine the baseline understanding of the tribal↔federal relationship at the time of the formation of this country and the United States Constitution. It then briefly reviews the basic constitutional theory surrounding popular delegation of power, the protections of state sovereignty, and its partial subordination to federal supremacy under the Supremacy Clause of the United States Constitution.

The paper then examines the historical developments and doctrinal changes that destroyed the original understanding of tribal↔federal relations and substituted in its place the federal Indian plenary power doctrine.[8] Since its invention, the so-called federal Indian plenary power doctrine simultaneously has performed two roles for the federal government: (1) assuring a broad source of federal constitutional authority

8. *See infra* Part III.

in Indian affairs and (2) unilaterally claiming federal supremacy over Indian tribes.[9] This section of the essay demonstrates how the plenary power doctrine first emerged to rationalize late-nineteenth and early-twentieth century efforts *by Congress* to assert colonial hegemony over Indian peoples in Indian country without their consent. It demonstrates that these claims had no basis in the text, history, or theory of the United States Constitution. It further suggests that these claims, like most European colonial theories of the day, were deeply rooted in late-nineteenth century notions of racial superiority. The essay also suggests that a century later, the Supreme Court began to wield a plenary power club by unilaterally claiming a *judicial power* through common law development to set Indian policy and curtail tribal sovereignty and authority, again without tribal consent.[10] This section further shows that beginning in the late-twentieth century, the Supreme Court has arrogated to itself the plenary power it previously rationalized for Congress and has begun defining federal Indian law in an exercise of judicial plenary power,[11] similarly without any lawful justification. While internally consistent with one another, none of these cases can be reconciled with basic American constitutional principles, the constitutional history of the Indian Commerce Clause or the principles of the Anglo-American legal system. It is a house of cards ultimately built upon a constitutionally-flawed thesis. Thus, the entire analytical underpinning of much of modern federal Indian law rests on assumptions, or perhaps naked assertions of colonial power, the legitimacy of which can and should be questioned *under American legal principles*, quite apart from any critique that can be and has been offered from international or tribal law perspectives.

Just as the Supreme Court recently has actively reevaluated prevailing constitutional assumptions underlying federal-state relations, a similar reappraisal of the underlying assumptions of federal Indian law is long overdue, and, ironically, in keeping with the recent judicial activism in favor of protecting states' rights. The Supreme Court's total silence on this question and its utter failure to apply its new-found skepticism of federal power even-handedly to both state and tribal governments may reveal more

---

9. *Id.*

10. *Id.*

11. The apt phrase "judicial plenary power" was coined by Professor Frank Pommersheim to refer to the federal judicial aggrandizement of authority in the recent spate of United States Supreme Court decisions unilaterally purporting to announce various limitations on tribal authority. Frank Pommersheim, *"Our Federalism" in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community*, 71 U. COLO. L. REV. 123, 128–29 (2000).

about its views on race and colonialism than anything it actually has expressed in its opinions.

The last section of the article includes a broad outline of where such a reappraisal might lead. The conclusion, of course, is that there is no federal supremacy clause for Indian tribes and that any federal legislative activity that might affect Indian tribes or their lands requires their formal consent, through treaty or analogous procedure.

I. INTRODUCTION: THE ORIGINAL BASELINE UNDERSTANDING OF THE TRIBAL↔FEDERAL RELATIONSHIP

During the American Revolution, the Continental Congress sought to out-position British military contingents. The British presence in Canada and the Crown's forts and other outposts on the St. Lawrence and on the Great Lakes constituted one of the major threats to the Continental Army led by George Washington. American troops could only reach these outposts by crossing through the territory of the Haudenosaunee (the Iroquois Confederation) in upstate New York and through the territory of Lenni Lenape (the Delaware) in the western Pennsylvania and Ohio valleys. The Continental Congress and the Army undertook major efforts to secure the alliance, or at least neutrality, of these tribes. These efforts produced an alliance with the Oneida. Ultimately, that alliance militarily split the Iroquois Confederation and violated the central norm of the Great Law of Peace of the Iroquois, the long revered constitutional tradition and law of the confederation. The Great Law of Peace that created a confederation of the constituent original five tribes of the Haudenosaunee (Onondaga, Cayuga, Mohawk, Seneca and Oneida) contained a central organizing principle that stipulated that they not make war on one another, a norm violated by the alliances created during the American Revolution.[12]

These federal diplomatic initiatives by the United States also resulted in the nation's first ratified treaty with an Indian tribe, the Treaty of Fort Pitt of 1778, signed with the Delaware Nation.[13] The lands of the Lenni Lenape (Delaware) were located within the newly independent states (established by imprecise colonial charters). Consequently, Delaware tribal lands were within the exterior boundaries of the United States. Since Indian title to the land had not been extinguished by cession, the Continental Congress assumed that neither the national government nor the states had any

12. BARBARA GRAYMONT, THE IROQUOIS IN THE AMERICAN REVOLUTION (1972); GREGORY SCHAAF, WAMPUM BELTS & PEACE TREES: GEORGE MORGAN, NATIVE AMERICANS, AND REVOLUTIONARY DIPLOMACY (1990); WILLIAMS, *supra* note 1, at 57–61.

13. Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13 [hereinafter Treaty of Fort Pitt].

authority to enter or otherwise govern the territory. Thus, in Article III of the Treaty of Fort Pitt, the fledgling government of the United States clearly negotiated for permission from the Delaware Nation authorizing General Washington's army to reach the British outposts "by passing through the country of the Delaware nation" and by "permitting free passage through their country to the troops aforesaid."[14] Both parties to the treaty clearly assumed that continuing Indian ownership and possession of aboriginal lands included the Indian's right to govern, control, and exclude anyone on their lands, including Washington's army. Tribal permission, therefore, was legally required to enter the Delaware Nation's territory and the United States formally sought that permission so that Washington's military forces could strike at the menacing British outposts to the north and northwest.[15]

The model of intergovernmental negotiation and cooperation contemplated by the Treaty of Fort Pitt was also evident in an other explicit provision of that treaty which, measured by the current model of tribal↔federal relations, appears remarkable. Article III of the Treaty of Fort Pitt expressly contemplated joint establishment of a system for handling offenders who might disturb the chain of friendship that bound the two treaty parties together.[16] This system can only be described as a process of international agreement. It contemplated that neither signatory to the treaty would attempt to inflict punishment on the offenders of the other party until "[t]he mode of such trials [could] be hereafter fixed by the wise men of the United States in Congress assembled, with the assistance of such deputies of the Delaware nation, as may be appointed to act in concert with them in adjusting this matter to their mutual liking." The article implicitly recognized that either sovereign party to the treaty might have the right to punish or otherwise seek restitution or retribution from the others' citizens who committed crimes outside the borders of their own country, but it exhorted the parties to stay their hands in the interest of the "chain of friendship" until a workable middle ground procedure was established agreeable to both.

In short, the general thrust of the nation's first ratified treaty with an Indian tribe appears to contain all of the hallmarks of international

---

14. *Id.*

15. Another later illustration of the same principle can be found in Article V of the Treaty of Philadephia of July 2, 1791 with the Cherokee Nation in which the United States carefully negotiated safe passage for its citizens in certain portions of the Cherokee Nation by securing agreement "that the citizens and inhabitants of the United States, shall have a free and unmolested use of a road from Washington district to Mero district, and of the navigation of the Tennessee river." Treaty with the Cherokee Nation, July 2, 1791, art. V, 7 Stat. 39 [hereinafter Treaty of Philadelphia].

16. Treaty of Fort Pitt, *supra* note 13, at art. 3

diplomacy. It embodied a paradigm for tribal↔federal relations that can only be described as one of international self-determination. The Lenni Lenape (Delaware) people constituted a nation with which the United States negotiated treaties. All presumed the Delaware Nation controlled its territory so pervasively that the United States required its formal permission for Washington's army to enter into and pass through its lands, both to recognize the sovereign control of the Delaware Nation over their territories located within United States boundaries and to avoid causes for disruption in the relationship. The internal sovereignty of the Lenni Lanape, therefore, was considered identical to the internal sovereignty of any nation—encompassing complete territorial control of *all* persons and property located within their territory.

This recognition of legal autonomy and sovereignty, while implicit in most Indian treaties establishing the boundaries of tribal land, was stated far more expressly in some of the later removal treaties of the 1830s.[17] As a direct result of the incursions on their territory and their sovereignty experienced by the southeastern tribes as a result of illegal state laws, these tribes carefully negotiated for explicit guarantees of a commonly understood relationship that theretofore had assumed total tribal control over Indian country. These tribes also demanded explicit guarantees of this understanding as a precondition to their agreement to cede and remove from their aboriginal territories in exchange for new lands in the Louisiana Purchase area, later designated the Indian Territory. For example, in exchange for Choctaw agreement to remove to lands west of the Mississippi River, the Dancing Rabbit Creek Treaty of 1830 with the Choctaw Nation expressly guaranteed that:

> The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People the *jurisdiction and government of all the persons and property that may be within their limits west*, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or

17. For example, Article II of the Fort Laramie Treaty of 1868 with the Sioux, signed to establish peace after the Lakota (Sioux) led by Red Cloud had driven the American army out of Sioux country, ratified exclusive Sioux sovereignty and control of their lands by simply reserving Sioux lands for the "absolute and undisturbed use and occupancy" of the Lakota people. Treaty with the Sioux Indian Nation, Apr. 29, 1868, art. II, 15 Stat. 635 [hereinafter Treaty of Fort Laramie]. Later cases properly assumed that this language recognized *exclusive* Sioux sovereignty over their territory, including control over entry by and non-criminal jurisdiction over non-Indians. *Ex parte* Crow Dog, 109 U.S. 556, 572 (1883); South Dakota v. Bourland, 508 U.S. 679, 687–88 (1993).

> State; but the U.S. shall forever secure said Choctaw Nation from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs.[18]

Similarly, the 1835 Treaty of New Echota with the Cherokee Nation (the infamous and controversial treaty that led to their long removal march in the dead of winter on the Trail of Tears) assured the Cherokee Nation that:

> The United States hereby covenant[s] and agree[s] that the lands ceded to the Cherokee nation in the forgoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them.[19]

The recognition of complete territorial sovereignty of the removed Indian tribes over their lands constituted, for them, perhaps the most important part of the removal treaty.[20] The United States, of course, breached that promise

---

18. Treaty of Dancing Rabbit Creek with the Choctaw Nation, Sept. 27, 1830, art. IV, 7 Stat. 333 [hereinafter Treaty of Dancing Rabbit Creek] (emphasis added).

19. Treaty of New Echota, Dec. 29, 1835, art. V, 7 Stat. 478 [hereinafter Treaty of New Echota]; *see also* Treaty of Washington D.C. with the Cherokee Nation, July 19, 1866, art. XIII, 14 Stat. 799 [hereinafter Treaty of Washington D.C.].

20. The importance to the Indian tribes of maintaining their *exclusive* sovereignty over their territory is perhaps best reflected in the Preamble to the Choctaw removal treaty, Treaty of Dancing Rabbit Creek, *supra* note 18, that clearly provided that the Choctaws had agreed to leave their aboriginal homelands and remove to new territories solely to assure their self-governing powers:

> WHEREAS the General Assembly of the State of Mississippi has extended the laws of said State to persons and property within the chartered limits of the same, and the President of the United States has said that he cannot protect the Choctaw people from the operation of these laws; Now therefore that the Choctaw may live under their own laws in peace with the United States and the State of Mississippi they have determined to sell their lands east of the Mississippi and have accordingly agreed to the following articles of treaty.

Treaty of Dancing Rabbit Creek, *supra* note 18.

While the United States Senate ratified the remainder of the Treaty of Dancing Rabbit Creek containing the Choctaw cession of their aboriginal homelands and their agreement to remove, it specifically refused to ratify the Preamble, possibly fearing that overt recognition of the duress involved in securing the Treaty might constitute grounds to voiding the cessions it contained.

when it admitted Oklahoma to the union in the early twentieth century as a multi-racial, pluralistic state. The complete territorial sovereignty of Indian tribes was also recognized and honored throughout the treaty period by express treaty provisions designed to facilitate extradition of Indian offenders wanted by state or federal authorities for crimes committed against other persons under the protection of the United States government, usually for crimes committed off-reservation.[21]

Notwithstanding the fact that the tribal lands were located within the exterior boundaries of lands claimed by the United States, the federal government presumed it had no authority to enter Indian country to retrieve the offender and, instead, needed the cooperation of the tribe, the governing authority of the reservation, to secure his extradition. The federal government, therefore, carefully negotiated with tribes to secure such cooperation. Similarly, a number of the early treaties attempted to protect Indian land title and enforce the federal statutes restricting the sale of Indian lands without Congressional approval by providing that:

---

21. Treaty of Fort Laramie, *supra* note 17, at art. 1:

> If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws; and in case they willfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no one sustaining loss while violating the provisions of this treaty or the laws of the United States shall be reimbursed therefor.

Another treaty similarly provided that:

> If the bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they willfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this treaty, or any others that may be made with the United States. And the President may prescribe such rules and regulations for ascertaining damages under this article as in his judgment may be proper; but no such damage shall be adjusted and paid until examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss whilst violating, or because of his violating, the provisions of this treaty or the laws of the United States, shall be reimbursed therefor.

Treaty of Fort Sumner with the Navajo Nation, June 1, 1868, art. I, 15 Stat. 667 [hereinafter Treaty of Fort Sumner].

> If any citizen of the United States, or any other white person or persons, shall presume to settle upon the lands now relinquished by the United States, such citizen or other person shall be out of the protection of the United States; and the Indian tribe, on whose land the settlement shall be made, may drive off the settler, or punish him in such manner as they shall think fit; and because such settlements made without the consent of the United States, will be injurious to them as well as to the Indians, the United States shall be at liberty to break them up, and remove and punish the settlers as they shall think proper, and so effect that protection of the Indian lands herein before stipulated.[22]

Such treaty provisions, contained in almost every Indian treaty negotiated immediately before and after the adoption of the United States Constitution clearly reflect the then contemporaneous understanding that Indian tribes had complete territorial sovereignty over their lands, including complete jurisdiction over any non-Indian intruders.

While premised on a model of international diplomacy, the Treaty of Fort Pitt nevertheless contained a second important provision that planted the seeds for a political change that would alter this model of tribal↔federal relations. Those seeds, once germinated, provided fodder (or, perhaps, compost) for the long, agonizing and unresolved national conversation about the legal place of Indian tribes within the federal union. Specifically, Article VI of the Treaty of Fort Pitt contained two provisions, the broad

22. Treaty of Greenville with the Wyandots and Other Tribes, Aug. 3, 1795, 7 Stat. 49 [hereinafter Treaty of Greenville]. Such express treaty provisions expressly recognizing the territorial sovereignty of the tribes over illegal settlers were contained in almost every treaty the United States signed immediately before and after the drafting of the United States Constitution. For example:

> If any citizen of the United States, or other person not being an Indian, shall attempt to settle on any of the lands hereby allotted to the Indians to live and hunt on, such person shall forfeit the protection of the United States of America, and the Indians may punish him or not as they please.

Treaty of Hopewell with the Cherokee Nation, Jan. 3, 1786, art. IV, 7 Stat. 21. *See also* Treaty of Hopewell with the Chickasaw Nation, Jan. 3, 1786, art. IV, 7 Stat. 24; Treaty on the Great Miami with the Shawnee, Jan. 31, 1786, art. 7, 7 Stat. 26; Treaty of Fort Harmar with the Wyandot Nation and other tribes, Sept. 27, 1789, art. 9, 7 Stat. 28; Treaty of New York with the Creek Nation, Aug. 7, 1790, art. 6, 7 Stat. 35; Treaty of Holston with the Cherokee Nation, July 2, 1791, art. 8, 7 Stat. 39. The Treaty on the Great Miami with the Shawnee perhaps put the explanation for such provisions most explicitly providing that, "[I]f any citizen or citizens of the United States, shall presume to settle upon the lands allotted to the Shawanoes by this treaty, he or they shall be *put out of the protection of the United States*." Treaty on the Great Miami with the Shawnee, *supra*, at art. 7 (emphasis added). A clearer and more explicit statement of the assumption at the time of the drafting of the United States Constitution of the complete territorial jurisdiction of the Indian tribes over all persons, including non-Indians, within their territory is hard to imagine.

contours of which haunt tribal↔federal relations to the present day.[23] The issues on which they touch serve as the focus of a never-ending debate about the place of Indian nations within the federal structure. First, under Article VI, the United States assumed a federal treaty obligation of protecting the territorial integrity of the Delaware Nation.[24] The terms of the agreement are instructive since they illuminate the purpose of the duty of protection, that later ripened into the so-called federal trust doctrine:

> Whereas the enemies of the United States have endeavored, by every artifice in their power, to possess the Indians in general with an opinion, that it is the design of the States aforesaid, to extirpate the Indians and take possession of their country: to obviate such false suggestion, the United States do engage to guarantee to the aforesaid nation of Delawares, and their heirs, all their territorial rights in the fullest and most ample manner, as it has been bounded by former treaties, as long as they the said Delaware nation shall abide by, and hold fast the chain of friendship now entered into.[25]

This provision imposed an obligation of protection on the United States for one and only one purpose—"to guarantee to the aforesaid nation of Delawares, and their heirs, all of their territorial rights in the fullest and the most ample manner."[26] It contemplated the continued *permanent* occupation of islands of Indian sovereignty and control within the territorial borders of the United States. The federal trust supervision over Indian land therefore had only one purpose—the full protection of the territorial integrity and sovereignty of the Indian tribe. Since the Indian trust doctrine would later be used to subvert the sovereign rights of Indian tribes, the importance of this language in reflecting the original understanding of the federal protective trusteeship cannot be understated. The United States' apparent concern that the Delaware Nation might not "hold fast the chain of friendship now entered into"[27] is ironic since today the Lenni Lanape hold none of the aboriginal lands guaranteed them in the Treaty of Fort Pitt. As a result of the Tribe's sad history of dispossession and removal at the hands of the federal government, many of the Delaware descendents were incorporated into the Cherokee Nation of Oklahoma, and their separate national identity submerged for long periods, until the Department of the

23. Treaty of Fort Pitt, *supra* note 13, at art. 6.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*

Interior granted separate federal recognition in 1996.[28] Other Delaware descendents wound up living on Indian lands with the Wichitas and Caddos.

The second provision of significant interest and, perhaps, prescience, is also found in Article VI of the Treaty of Fort Pitt. The provision involves the promise by the United States of statehood "should it for the future be found conducive for the mutual interest of both parties to invite any other tribes who have been friends to the interest of the United States, *to join the present confederation*, *and to form a state whereof the Delaware nation shall be the head, and to have representation in Congress*."[29] The striking provision requires some explanation. At the time of the Treaty of Fort Pitt ratification, the Indian Nations were composed of native peoples who were not citizens of the United States. As Chief Justice Marshall later put the matter in *Cherokee Nation v. Georgia*, Indians were "aliens, not owing allegiance to the United States."[30] The United States Constitution clearly recognized and ratified the status of Indian tribes as nations originally *outside* the federal union. The provisions in the Article I, section 2 census clause expressly exclude "Indians not taxed" from the count in the census.[31] This exclusion had no roots in the abhorrent history of race relations and slavery that originally resulted in slaves being counted as three-fifths of a person. Rather, it constituted a recognition that Indians, while geographically located within territory claimed by the United States, were not in any political sense part of the nation and should not be counted for representational purposes. The repetition of the "Indians not taxed" clause in the revised census provision of section 2 of the Fourteenth Amendment clearly reflects the common contemporary legal understanding that interim events, including the massive removal of Indian tribal members and the altered federal-state balance generated by the Civil War, had done nothing to change the political relationship of Indian tribes and their people to the federal union as late as 1868 when the Fourteenth Amendment was ratified.[32]

Nevertheless, by holding out the promise of statehood and representation in Congress, the Treaty of Fort Pitt confronts a problem that has perplexed federal Indian law ever since. Should the Indian tribes be incorporated as

---

28. *See generally* Cherokee Nation of Oklahoma v. Babbitt, 944 F. Supp. 974 (D.D.C. 1996) (discussing background of the federal recognition).

29. Treaty of Fort Pitt, *supra* note 13, at art. VI (emphasis added).

30. 30 U.S. (5 Pet.) 1, 16 (1831).

31. U.S. CONST. art I, § 2, cl. 3.

32. *See* Elk v. Wilkins, 112 U.S. 94 (1884) (holding that the Fourteenth Amendment did not confer citizenship to Indians born within the United States, "members of, and owing immediate allegiance to" a tribe merely upon abandonment of tribal affiliation and residence among non-Indians).

separate sovereign peoples and nations into the federal union and, if so, by what procedure and on whose terms? The Continental Congress, the Constitutional Convention of 1787 and subsequent state ratification conventions clearly answered such questions for the states. While the Treaty of Fort Pitt contained promises of a like resolution for the tribes, no such bilateral agreement between the people of the United States and the various peoples of the Indian tribes ever emerged that ultimately produced Indian statehood. Obviously, Article VI contemplated a consensual change in tribal↔federal relations. It envisioned moving from a model of international self-determination and sovereignty toward a new federalism paradigm, *by tribal consent*.

The reason why the parties might contemplate such a repositioning of their otherwise arms-length diplomatic relationship is worth considering. Perhaps both signatory parties concluded that a permanent arrangement in which Indian nations live within the exterior boundaries of another country in which they have no representation and to which they owe no allegiance might constitute a permanently unstable political situation, fraught with potential for conflict, misunderstanding and violence (a description that, with the benefit of hindsight, was not far from what ultimately happened). The parties, therefore, contemplated ultimate *inclusion* of the tribes within the federal union as one or more separate Indian states. This idea was later echoed in treaty promises made to the Cherokee Nation that contemplated Cherokee representation in Congress[33] and in later proposals repeatedly heard throughout the second half of the nineteenth century with respect to incorporating all or parts of the Indian Territory as an Indian state.[34] Of course, these late-nineteenth century proposals were rejected when the Indian Territory was later incorporated (in violation of express treaty promises) into the multiracial, pluralistic state of Oklahoma. Nevertheless, from the start, statehood for Indian tribes and inclusion of them within the federal union contemplated (1) the consent of the tribes through treaty and

33. Treaty of New Echota, *supra* note 19. Specifically, this provision held:

> The Cherokee nation having already made great progress in civilization and deeming it important that every proper and laudable inducement should be offered to their people to improve their condition as well as to guard and secure in the most effectual manner the rights guarantied to them in this treaty, and with a view to illustrate the liberal and enlarged policy of the Government of the United States towards the Indians in their removal beyond the territorial limits of the States, it is stipulated that they shall be entitled to a delegate in the House of Representatives of the United States whenever Congress shall make provision for the same.

Id.

34. Annie H. Abel, *Proposals for an Indian State 1778–1878*, *in* 1907 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASS'N 89.

(2) representation in Congress as *separate* constituent Indian states within the union. It did not assume the exercise of direct federal legislative power over Indian nations without their consent or representation. Such proposals, therefore, were advanced in a manner consistent with the basic Lockean social compact notions of popular delegation that animated early American constitutional theory.[35]

This baseline original understanding of the tribal↔federal relationship was also evident in the nation's constitutional documents and early history. While the Articles of Confederation contained no antecedents of the Foreign and Interstate Commerce Clauses of the United States Constitution, the Articles did contain the seeds of the Indian Commerce Clause. Article IX of the Articles of Confederation delegated to the Continental Congress "the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indian tribes, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated." This power was the culmination of a movement commencing with Benjamin Franklin's draft of a plan of union at the Albany Congress in 1754, a Congress that actually was part of a larger treaty conference with the Haudenosaunee (the Iroquois Confederation). Franklin's idea of a unified government for the states derived from his desire to coordinate Indian policy in negotiating with and confronting the unified Five Nations Confederation of the Haudenosaunee. Indeed, in the Franklin draft, the power to handle trade and affairs with the Indian tribes was the first, and perhaps, most important power delegated to the national government.[36]

---

35. John Locke's theory of the relation between the state and the individual justified government as arising out of the agreement of the members of society to submit to being governed, i.e., a social compact. Government's power as conceived by Locke is limited to those rights that the members agree to grant to the sovereign. JOHN LOCKE, TWO TREATISES OF GOVERNMENT §§ 99, 149 (Peter Laslett ed., 1971) (1690). The framers clothed the American Constitution in Lockean doctrine, e.g., by characterizing the establishment of the Union as an exercise of "the People" forming a "Union" and expressly reserving to (the states or) the people any power not "delegated" to the federal government. U.S. CONST. pmbl.; U.S. CONST. amend. X.

36. Proceedings of the Colonial Congress held at Albany (June 19–July 11, 1754), in 6 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 853, 858–65 (E.B. O'Callaghan ed. 1955) [hereinafter N.Y. COL. DOC.]. The proceedings of the Albany Congress and related documents are set forth in *id.* at 850–92. The Franklin draft of the national Indian powers reads:

> That the President General with the advice of the Grand Council, hold or direct all Indian Treaties in which the general interest or welfare of the Colonys [sic] may be concerned; and make peace or declare War with the Indian Nations. That they make such Laws as they judge necessary for the regulating all Indian Trade. That they make all purchases from Indians for

The Indian affairs power set forth in the Articles of Confederation stated that federal power involved regulating trade and affairs *with* the Indian tribes, not the affairs *of* the Indians tribes. When read in conjunction with the reference to "managing all affairs with the Indian tribes," the trade clause takes on a clear meaning. The management of affairs with another sovereign clearly involves regulating the United States' side of a bilateral political, diplomatic, economic and social relationship. Similarly, the trade regulation power was not a plenary authority to regulate the trade *of* the tribes, but a regulation to assure that what trade occurred with tribes within the United States occurred with American traders, rather than British, French or Spanish traders, and to regulate the American traders who dealt with the tribes. The power constituted an authority to regulate the non-Indians who traded with the tribes, not an authority to regulate the tribes themselves. Indeed, any review of trade regulations enacted during the colonial period, the regime of the Articles of Confederation and during the first hundred years of the nation's existence reflects the fact that this was the common understanding of the phrase. Virtually no statute can be found regulating Indians, in their trade or otherwise, within Indian country. It was non-Indian Americans who dealt with Indians who were regulated in their trade, land cessions, permission to enter Indian country and the like.

The Framers perceived the Articles of Confederation to be deficient *not* primarily because of any lack of power over the Indian tribes, but because the two provisos that reserved power to the states embarrassed the "*sole and exclusive*" right of the national government in Indian affairs. These provisos recognized state power over Indians who were "members" of the states (presumably Indian voting citizens, like the Indians in the Massachusetts praying Indian towns[37]) and protected the states in their "legislative right . . . within [their] own limit," whatever that meant in Indian country. After independence, and even at the point of the drafting of the Articles, any and all Indian lands within the United States were located within territory claimed by a state, since the United States Continental Congress only claimed lands located within the original chartered boundaries of the thirteen original colonies that declared independence. Thus, if the last proviso in the Indian affairs clause of the Articles were read

---

> the Crown, of lands [now] not within the bounds of particular Colonies, or that shall not be within their bounds when some of them are reduced to more convenient dimensions. That they make new settlements on such purchases by granting Lands, [in the King's name] reserving a Quit rent to the Crown, for the use of the General Treasury.

Id. at 890. *See also* Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1078–79 (1995).

37. *See generally* JACK CAMPISI, THE MASHPEE INDIANS: TRIBE ON TRIAL (1991).

to reserve to the states complete legislative power over any portion of Indian country located within a state, the sole and exclusive power of the Continental Congress would be rendered a nullity. Yet that reading is precisely how New York, Georgia and North Carolina interpreted the clause when they protested to the Continental Congress national treaty initiatives undertaken with the Iroquois and Cherokee Nations respectively.[38] After due investigation of their complaints, a committee of the Continental Congress reported at about the same time as the Constitutional Convention was convening in Philadelphia:[39]

> The construction contended for by those States, if right, appears to the committee, to leave the federal power, in this case, a mere nullity; and to make it totally uncertain on what principle Congress is to interfere between them and the said tribes; the States not only contend for this construction, but have actually pursued measures in conformity to it. North Carolina has undertaken to assign land to the Cherokees, and Georgia has proceeded to treat with the Creeks concerning peace, lands, and the objects, usually the principal ones in almost every treaty with the Indians. This construction appears to the committee not only to be productive of confusion, disputes and embarrassments in managing affairs with the Independent tribes within the limits of the States, but by no means the true one. The clause referred to is, "Congress shall have the sole and exclusive right and power of regulating the trade and managing all affairs with the Indians, not members of any of the States; provided that the Legislative right of any States within its own limits be not infringed or violated." In forming this clause, the parties to the federal compact, must have had some definite objects in view; the objects that come into view principally, in forming treaties of managing Affairs with the Indians, had been long understood and pretty well ascertained in this country. The committee conceive that it has been long the opinion of the country, supported by Justice and humanity, that the Indians have just claims to all lands occupied by and not fairly purchased from them; and that in managing affairs with them, the principal objects have been those of making war and peace, purchasing certain tracts of their lands, fixing the boundaries between them and our people, and preventing the latter settling on lands left in possession of the former. The powers necessary to these objects appear to the committee to be indivisible, and that the parties to the confederation must have intended to give them entire to the

38. Clinton, *supra* note 36, at 1126–27.

39. 33 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 457–59 (1936) [hereinafter CONTINENTAL].

> Union, or to have given them entire to the State; these powers before the revolution were possessed by the King, and exercised by him nor did they interfere with the legislative right of the colony within its limits; this distinction which was then and may be now taken, may perhaps serve to explain the proviso, part of the recited clause. The laws of the States can have no effect upon a tribe of Indians or their lands within the limits of the state so long as that tribe is independent, and not a member of the state, yet the laws of the state may be executed upon debtors, criminals, and other proper objects of those laws in all parts of it, and therefore the union may make stipulations with any such tribe, secure it in the enjoyment of all or part of its lands, without infringing upon the legislative right in question. It cannot be supposed, the state has the powers mentioned without making the recited clause useless, and without absurdity in theory as well as in practice; for the Indian tribes are justly considered the common friends or enemies of the United States, and no particular state can have an exclusive interest in the management of Affairs with any of the tribes, except in some uncommon cases.[40]

When understood against this backdrop, the adoption of the Indian Commerce Clause and the reference to "Indians not taxed" in the census clause clearly reflect the original baseline understanding of the tribal↔federal relationship established by review of the Fort Pitt Treaty provisions. Indians tribes constituted separate nations. The United States Constitution recognized tribal sovereignty in two ways. First, since the tribes constituted separate peoples owing no political allegiance to the United States beyond their existing treaty obligations, they were not citizens and formed no part of the "We the people of the United States" who created the United States Constitution and their members, consequently, were excluded from the census and from political participation by the "Indians not taxed" clause. Second, and too often overlooked in discussions of tribal sovereignty, the Indian Tribes are expressly included in the Commerce Clause, together with two other sovereigns—foreign nations and the states. The text of the United States Constitution, therefore, unquestionably recognizes the sovereignty of the Indian tribes. More importantly, the Indian Commerce Clause eliminated the two provisos in the Articles reserving state authority that so plagued management of Indian affairs by the Continental Congress under the Articles of Confederation.

Understanding the proper original meaning of the Indian Commerce Clause within the larger framework of the Commerce Clause further

40. *Id.*

reinforces the notion that the United States Constitution not only recognized, but constitutionalized, this original baseline understanding. Since the Commerce Clause governs commerce with foreign nations, with which the United States maintained diplomatic contact, the covered commerce, at least in that context, must be the United States' side of various bilateral exchanges with foreign nations, including not only trade with those nations but the maintenance of embassies, consulates and other forms of diplomatic contacts and exchanges, i.e., "intercourse." Interpreting "commerce with foreign nations" to subsume regulatory power over the internal commerce *of* foreign nations would, of course, self-evidently invade the sovereignty of such foreign nations and, therefore, never has been contemplated as a legitimate exercise of federal authority under the Foreign Commerce Clause. Similarly, the renewed debate currently raging over the limitations of Congressional power under the Interstate Commerce Clause should be seen, but to date has not been waged, as a debate over the precise boundary of "Commerce *among* the Several States."[41] Finally, the Indian Commerce Clause employs precisely the same phrase used in the Foreign Commerce Clause, i.e., "Commerce . . . *with* the Indian Tribes."[42] Presumably, by employing the same language within the same clause, the Framers meant the Indian commerce power to have precisely the same meaning and scope as the foreign commerce power, i.e., the regulation of the United States' side of the various bilateral exchanges, economic, political and diplomatic, with the Indian tribes.[43]

The history of the adoption of the Indian Commerce Clause strongly suggests that it was intended to afford Congress *all* of the power accorded to the Continental Congress under Article IX of the Articles of Confederation, while dispensing with the reservation of any state power over the field contained in the two provisos of Article IX that had so hamstrung and embarrassed the exercise by the Continental Congress of the Indian Affairs Clause powers.[44] This author has described the background and history of that adoption in great detail elsewhere and will not belabor the reader again with it here.[45] For present purposes, it is sufficient to note

41. Clinton, *supra* note 36, at 1064–1147.

42. 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316, 326, 330 (Max Farrand ed. 1966) [hereinafter 1 FARRAND].

43. 3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 548 (Max Farrand ed. 1966) [hereinafter 3 FARRAND].

44. THE FEDERALIST NO. 42, at 284–85 (James Madison) (J.E. Cooke ed., 1961). This observation suggests that the semantic grounding of the Court's recent foray into finding judicially enforceable limitations on the scope of Congress' power under the Commerce Clause may not be historically or semantically well conceived.

45. Clinton, *supra* note 36, at 1064–1147.

that James Madison was the moving force behind its inclusion during the 1787 Constitutional Convention and its leading defender during the ratification debates.[46] During the Convention, Madison strongly criticized the New Jersey Plan for its lack of any clear assertion of exclusive national power to deal with the Indian tribes.[47] In a transparent reference to the positions of North Carolina, Georgia and New York, and the Muscogee (Creek) war then underway on the Georgia frontier caused by state usurpation of federal Indian treaty prerogatives, he asked:

> Will it [the New Jersey Plan] prevent encroachments on the Federal authority? A tendency to such encroachments has been sufficiently exemplified among ourselves, as well as in every other confederated republic, ancient and modern. By the Federal Articles, transactions with the Indians appertain to Congress, yet in several instances the States have entered into treaties and wars with them.[48]

Madison therefore assumed the national government generally had exclusive power over Indian affairs under Articles IX. He saw the problem as one of preventing state encroachment on the exercise of this national authority, a position entirely consistent with the dominant construction in the Continental Congress. Madison would echo the same theme much later in his life when in his sketch for a Preface to Debates in the Convention of 1787 he complained of state encroachments on national authority, stating, "In other cases the Fedl authy [sic] was violated by Treaties & wars with Indians, as by Geo[rgia]."[49]

In arguing for the ratification of the proposed Constitution in *The Federalist* No. 42, James Madison offered the following defense of the Indian Commerce Clause:[50]

> The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What descriptions of Indians are to be deemed members of a State, is not yet settled; and has been a question of frequent perplexity and contention in the Federal Councils. And how the trade with Indians, though not members of

46. *Id.*
47. *Id.*
48. 1 FARRAND, *supra* note 42, at 316, 326, 330.
49. 3 FARRAND, *supra* note 43, at 548.
50. THE FEDERALIST NO. 42, at 284–85 (James Madison) (J.E. Cooke ed., 1961).

> a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the articles of confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain.[51]

The primary proponent of the Indian Commerce Clause, therefore, clearly viewed the clause as granting Congress all the power contained in the Indian Affairs Clause of Article IX of the Articles of Confederation, i.e., "the sole and exclusive right and power of regulating the trade and managing all affairs with the Indians," without any of the reservations of state power that had embarrassed and hamstrung the Continental Congress under the Articles. The Indian Commerce Clause grants broad Indian affairs powers, but the power is broad vis-à-vis the states; it does not affect the powers or sovereignty of the Indian tribes. Nothing whatsoever in the history of the Indian Commerce Clause suggests that the Framers meant to grant Congress any power to govern the tribes directly in any fashion! Indeed, since the Indians were not then citizens, not represented in the Constitutional Convention, and not participants in the state ratification debates, such an interpretation of the clause would indeed have been inconsistent, for reasons discussed below, with the basic Lockean popular delegation notions that animated the drafting of the document.

The subsequent behavior of Congress for the first century after adoption of the United States Constitution further reflects this limited understanding of Congressional power under the Indian Commerce Clause. During this period one can hardly find any statutes directly regulating an Indian Tribe or its members in any fashion. For example, the primary legislative regulatory statutes dealing with Indian affairs until the late-nineteenth century were a series of federal statutes enacted and reenacted several times between 1790 and the enactment of the permanent statute in 1834, commonly known as the Trade and Intercourse Acts.[52] The provisions of the Trade and Intercourse Acts prohibited the purchase of Indian land without federal consent, regulated and licensed the trade between non-

51. *Id.*

52. Act of July 22, 1790, ch. 33, 1 Stat. 137; Act of Mar. 1, 1793, ch. 19, 1 Stat. 329; Act of May 19, 1796, ch. 30, 1 Stat. 469; Act of Mar. 30, 1802, ch. 13, 2 Stat. 139; Act of June 30, 1834, ch. 161, 4 Stat. 729. *See generally* FRANCIS P. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790–1834 (1962) (discussing the Trade and Intercourse Acts and their impact).

Indians and Indians, prohibited the introduction of liquor into Indian country, and contained other provisions designed to promote, in the language of these laws, the civilization and education of the Indians. Almost invariably, these provisions either explicitly or implicitly regulated only the non-Indians who venture into Indian country to deal with Indians. They did not purport to regulate the tribes or their members. Thus, the trade provisions provided that "no person shall be permitted to carry on any trade or intercourse with the Indian tribes, without a license for that purpose" issued under presidential authority.[53] Other provisions are more opaque in their application, but, nevertheless, clearly were aimed at non-Indians who dealt with Indians. For example, the restraint on alienation of Indian land without the approval of Congress provided:

> 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*, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.[54]

This statute followed a long line of colonial and other limitations on non-Indians privately negotiating Indian land cessions in contravention of the right of the Crown, and later the states, to the first acquisition of those lands. This provision, too, can only be understood as a restraint on those subject to American sovereignty who dealt with Indian tribes and their members, not as a restraint on the Indian tribes themselves.[55] Indeed, the mere fact that the section required a treaty to bind the tribe suggests that the statutory provision alone was binding not on the tribe, but only on the

---

53. Act of July 22, 1790, § 1, ch. 33, 1 Stat. 137. The wording of the provision was varied slightly in later versions. Thus, the 1834 Act provided "[t]hat no person shall be permitted to trade with any of the Indians (in the Indian country) without a license" under Presidential authority. Act of June 30, 1834, § 1, ch. 161, 4 Stat. 730. Clearly, this provision did not apply, for example, to western tribes that still had thriving trade with tribes further east who sometimes acted as intermediaries in the Indian trade routes with Americans.

54. Act of July 22, 1790, § 4, 1 Stat. 137, 138 (emphasis added).

55. The limited applicability of these statutes seems to have been missed by a number of leading scholars of Indian law who have severely criticized both the federal statutory restraints on alienation of Indian lands and the Doctrine of Discovery, explained in *Johnson v. M'Intosh,* 21 U.S. (8 Wheat.) 543 (1823), which the statutory restraints implement as unjustified, unilateral, colonialist limitations of tribal sovereignty. *See, e.g.,* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT 312, 312–17 (1990). While the statutory restraints certainly affected Indians tribes by artificially depressing the market for their resources through the creation of a single monopolist purchaser, a feature later tried with Indian trade through the so-called American factory system, the regulations did *not* directly govern Indian tribes, as some scholars seem to assume.

persons or states that tried to buy land grants from a tribe or a tribal member.

Until 1885, the only statute Congress enacted that purported to directly govern any Indian in Indian country was the forerunner of provisions now found in 18 U.S.C. § 1152. First enacted in 1817 and recodified in varying forms,[56] this Act purported to apply to Indian country the basic federal criminal law that applied to other federal enclaves within the exclusive control of the United States. It, nevertheless, contained two important provisos that clarified the fact that it was principally designed to cover non-Indians who committed crimes, particularly against Indians, in Indian country.[57] Specifically, it expressly excluded from its coverage crimes by Indians against the person or property of other Indians within Indian country, an obvious recognition of the fact such matters remained solely governed by tribal law. It also expressly excluded from its coverage any Indian who had already been punished by tribal law. Since the first proviso expressly excluded crimes between Indians, the latter one obviously referred solely to crimes committed by Indians against the person or property of non-Indians under the protection of the United States. Consequently, until 1885, the only time the federal government tried to directly govern Indians was when they harmed the person or property of anyone subject to the protection of the United States and then only when the offender's tribe refused to punish them or otherwise resolve the matter. This aspect of the statute presages by over a century more recent federal criminal statutes, often aimed at terrorists, by which the United States asserts criminal jurisdiction over acts committed outside of American territorial jurisdiction against American citizens.[58] As with their modern counterparts, this isolated 1817 statute should not be seen as an illustration of a broad assertion of federal power over the tribes and their members, but, rather, as an effort to protect American citizens outside of the normal territorial reach of American law. Even then, the 1817 statute and its

---

56. Act of Mar. 3, 1817, ch. XCII, 3 Stat. 383; Act of June 30, 1834, ch. CLXI, § 25, 4 Stat. 729; Act of Mar. 27, 1854, ch. XXVI, §§ 3–6, 10 Stat. 269, 270 (codified as amended at 18 U.S.C. § 1152).

57. The fact that an early Congress enacted this criminal statute under the guise of the Indian Commerce Clause reflects, at least, an initial congressional understanding that the intercourse covered by the Commerce Clause was *not* restricted to economic transactions, but included all forms of economic, social, and political interchange with the various sovereigns mentioned in the clause. Thus, even crimes between citizens of the United States and Indians might be seen, under this interpretation of the clause, to constitute Indian commerce.

58. *E.g.*, 18 U.S.C. §§ 7(7), 32(b), 111, 115, 1114, 1117, 1201, 1203, 2331 (2000); 21 U.S.C. §§ 846, 959(c), 963 (2000); 46 U.S.C. app. § 1903(h) (1994); 49 U.S.C. app. § 1472(n) (1994). *See generally* United States v. Verdugo-Urquidez, 494 U.S. 259, 279–82 (1990) (Brennan, J., dissenting) (discussing these developments).

successors preferred a tribal response to the issue. Federal jurisdiction existed only when a cooperative response from the tribe was not forthcoming.

Perhaps the best evidence during the nation's first century of early understanding of the limited nature of federal power over Indian affairs under the Indian Commerce Clause can be found in Congressional behavior during the removal controversy. While Congress debated and narrowly passed the Removal Act of 1830,[59] establishing as national policy the removal of tribes from existing state boundaries to west of the Mississippi River, both the text and the surrounding legislative history clearly reflect the view that Congress had no authority under the Constitution to unilaterally impose this result on the Indian tribes. While President Jackson sought to remove the Indian tribes by military force, the Removal Act of 1830 expressly required tribal consent through treaty for any removal.[60] Indeed, during the debates over the Removal Act, the reason for the required consent was perhaps best stated by Representative Bates. Focusing on the 1802 cession by which the United States ceded to Georgia whatever claim of preemption it might have had in remaining Indian lands, he questioned Georgia's abuse of that document in arguing for a right to unilaterally annex those lands and directly regulate and annihilate the Cherokee government. He indicated that the right ceded to Georgia by the 1802 cession was "[n]ot a right to dictate laws to the Cherokees; not a right to cancel their laws and customs; not a right to invade, cut up, and distribute their country at pleasure. No, sir; *the United States never claimed, nor had, nor exercised that right*."[61] Noting that the prior treaties imposed an obligation of protection, he argued "[t]hat was, in no sense, a jurisdictional right, but an obligation, growing out of treaty stipulations—a trust, personal and confidential, to be exercised by the United States, and not assignable nor removable, *but by the consent of the Cherokees*."[62] Elsewhere, during the same debate another member of Congress pointed out that an 1814 letter from John Quincy Adams, James Bayard, Henry Clay, and Albert Gallatin, American envoys negotiating with the British during the War of 1812, specifically rejected the British charge that the American government had improperly and unilaterally declared all Indians living within the United

---

59. Act of May 28, 1830, ch. 148, 4 Stat. 411.

60. The Act only applied to "such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there." 4 Stat. at 412; *see generally,* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 188 (1999) (invalidating a removal order for lack of tribal consent).

61. VI Gale & Seaton's Register of Debates in Congress, 21st Cong., 1st Sess., Part 2 1056 (May 19, 1830) (emphasis added).

62. *Id*. (emphasis added).

States as their subjects. The American envoys, formally presenting the position of the United States, responded:

> Under [the United States constitutional] system, the Indians residing within the United States are so far independent that they live under their own customs, *and not under the laws of the United States*; that their rights upon the lands where they inhabit or hunt are secured to them by boundaries defined in amicable treaties between the United States and themselves; and that, whenever those boundaries are varied, it is also by amicable and voluntary treaties, by which they receive from the United States ample compensation for every right they have to the lands ceded by them.[63]

This formal American response to the British reflected the common understanding and the formal American legal position that the Indian tribes, while geographically located within the exterior boundaries of the nation, were not subject to federal law and were otherwise beyond the authority of the United States to take or vary their lands (or the tribal sovereignty bound up with such landholdings) except through consensual treaty.

Just as Congress respected at least the forms of the original understanding of the tribal↔federal relationship, so did the United States Supreme Court. In *Johnson v. M'Intosh,*[64] the first reported decision of the Supreme Court to discuss federal Indian law questions at any length, Chief Justice Marshall's opinion for the Court took great pains to clarify that the Court could only decide the question presented for United States courts, it could not bind the tribes. Specifically, the *M'Intosh* case discussed at length the nature of aboriginal title and described the so-called Doctrine of Discovery that impressed upon the Indians' aboriginal right of occupancy exclusive preemptive rights of first purchase or acquisition in favor of the colonial sovereign based on nothing more than the European "discovery" of lands the Indians already knew were there. One consequence of these preemptive rights of the discovering sovereign, according to the opinion, was that citizens owing allegiance to that sovereign or other foreign powers or traders could not acquire the land from the tribes by direct purchase without authority from the sovereign holding the preemptive rights. Nevertheless, Chief Justice Marshall very carefully limited the reach of the issue and therefore his holding to determining whether sales in violation of the doctrine "can be sustained in the courts of this country."[65] Elsewhere he explained his holding by suggesting that "[c]onquest gives a title which the

63. *Id.* at 1059 (emphasis added).
64. 21 U.S. (8 Wheat.) 543 (1823).
65. *Id*. at 572; *see also id.* at 589 (containing a similar limitation on the holding).

courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim."[66] Yet, the opinion was quite clear that the *federal* law doctrine it announced in no way bound the tribe. The federal government and the federal courts had no such power. Thus, the opinion concluded by noting:

> Admitting [tribal] power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is a part of their territory, and is held under them, *by a title dependent on their laws*. The grant derives its efficacy from their will; and, if they choose, to resume it, and make a different disposition of the land, the courts of the United States cannot interpose for the protection of the title. The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; *holds their title under their protection, and subject to their laws.* If they annul the grant, we know of no tribunal which can revise and set aside [their decision].[67]

Since the first part of the *M'Intosh* opinion had clearly held such individual grants from the tribes illegal *under federal law* when undertaken without license or other authority from the colonial sovereign, this paragraph clearly conceded not only the separate sovereign status of the tribes under their own law, it also recognized that the tribes were in no way bound by federal Indian law. Since they had the power to make and enforce their own laws in their own forums, they could sell lands to individuals not authorized by the United States to purchase such lands, but the purchaser's only recourse for protection was to tribal forums under tribal law. Federal supremacy simply did not apply to Indian tribes as separate domestic nations.

The Cherokee removal cases, occasioned in part by the results of the Congressional debate noted above, provided another early opportunity for the United States Supreme Court to reaffirm this original conception of the tribal↔federal relationship. After failing to secure enforcement of their treaty obligations from President Andrew Jackson or from Congress, the Cherokees finally hired leading United States attorneys to file suit on their behalf to restrain enforcement of Georgia laws they claimed illegally annexed and expropriated their lands, suspended their tribal government, and made them virtual outlaws in their own country. Since there was no general federal question jurisdiction in federal trial courts at the time, the

66. *Id.* at 588 (emphasis added).
67. *Id.* at 593 (emphasis added).

only recourse the Cherokee's lawyers thought they had was filing an original bill in the United States Supreme Court seeking an injunction. Notwithstanding the adoption and ratification of the Eleventh Amendment, they named the State of Georgia as the defendant. While the State of Georgia claimed sovereign immunity and refused to appear or argue the case, the Court unceremoniously rejected the sovereign immunity claim.[68] Nevertheless, for the Cherokee Nation's strategy to work, the Court would have been required to treat the Cherokee Nation as a "foreign nation" within the meaning of the grant of original jurisdiction to the Supreme Court contained in Article III, section 2, paragraph 2. In rejecting the right of the Cherokee Nation to initiate an original action in the United States Supreme Court against the State of Georgia to enforce federal treaty obligations of protection, the Supreme Court asserted, over two dissents, that Indian tribes were not foreign nations, but a different type of domestic nation. The dissenters would have treated the Cherokee Nation as a foreign nation within the meaning of Article III.

In the course of his opinion for the majority in *Cherokee Nation v. Georgia,*[69] Chief Justice Marshall was highly deferential to the complete autonomy of the Tribe and guardedly critical of the political branches of the United States government that had refused to enforce the treaty obligations of protection when Georgia unilaterally attacked Cherokee sovereignty and annexed Cherokee lands. The Chief Justice described the Indian tribes as "states" and "nations." He wrote:

> [The Indian tribes] have been uniformly treated as a state from the settlement of our country. The numerous treaties made with them by the United States recogni[z]e 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.[70]

The problem, of course, was that "[t]he Indian territory is admitted to compose a part of the United States."[71] Thus, it was difficult for the Court to think of the Indian nations as foreign nations. As Chief Justice Marshall

68. Chief Justice Marshall's usually overlooked response to Georgia's claim of sovereign immunity was a one-sentence rejection—"The party defendant may then unquestionably be sued in this court." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 19 (1831). The question for the Court, according to Marshall, was *not* the sovereign immunity of the State of Georgia, but, rather, the right of the Cherokee Nation to file the suit in the Supreme Court. As Marshall put it in the very next sentence of the opinion, "May the plaintiff sue in it?" *Id.*

69. *Id.* at 1.

70. *Id.* at 16.

71. *Id*.

put it, "it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated as foreign nations. They may, more correctly, perhaps, be denominated as domestic dependent nations."[72] The Chief Justice bolstered this characterization with two other observations that provided legal support for the separate sovereign status of the tribes, which Georgia had denied. First, he noted that in the Commerce Clause, the tribes were listed with other sovereigns but with a different label than foreign nations, thereby suggesting that the Framers did not regard the sovereign Indian tribes as synonymous with foreign nations, although nevertheless fully sovereign other than in their external relations. Thus, Chief Justice Marshall wrote, "[w]e perceive plainly that the constitution in this article does not comprehend Indian tribes in the general term 'foreign nations;' *not we presume because a tribe may not be a nation*, but because it is not foreign to the United States."[73]

Even more significantly, the Chief Justice doubted the idea of having a federal court redress the grievances of an Indian tribe, just as it would provide an unlikely forum for redress of federal encroachments on the sovereignty of another foreign nation. Marshall suggested that at the time the Constitution was drafted "the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government."[74] Thus, the Court saw that the appropriate forum for the resolution of tribal grievances, just like the proper forum for international disputes, was diplomatic negotiations with the federal government or warfare. The Chief Justice revisited this theme in the last paragraph of the *Cherokee Nation* opinion, prosaically writing:

> If it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.[75]

In explaining why Indian tribes constituted "domestic dependent nations," rather than foreign nations, Chief Justice Marshall noted that the tribes were located within territory that is formally within the exterior boundaries of the United States. Consequently, they were *domestic* nations,

---

72. *Id*.
73. *Id*. at 19 (emphasis added).
74. *Id.* at 18.
75. *Id.* at 20.

rather than foreign nations. More importantly, Chief Justice Marshall tried to explain the special tribal↔federal relationship. The Court noted that in the Treaties of Hopewell and Holston the Cherokee Nation "acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper."[76] In that sense, they were a *dependent* nation, i.e. they looked to the United States for protection against both foreign and domestic foes. In *Cherokee Nation*, Chief Justice Marshall employed the term dependent, not as a statement of political inferiority or a statement of federal supremacy, but, rather, as an implied criticism of the political branches of the United States government which had failed to enforce the treaty obligations of protection when requested to do so by the Cherokee Nation. Thus, dependence for Chief Justice Marshall was not a source of federal authority over the Cherokee Nation. Rather, it constituted a description of a relationship created by treaty in which the federal government owed the Cherokee certain obligations of protection. It was a source of Indian right!

When two white missionaries appealed their convictions for violating the Georgia laws at issue in *Cherokee Nation*, the Court reached the merits of the controversy during the next term of court in *Worcester v. Georgia.*[77] The Court held the Georgia laws invalid, in part because they infringed on the territorial sovereignty of the Cherokee Nation. In the course of the opinion, Chief Justice Marshall further explained his concept of dependence and why it did not detract from the separate sovereign status of Indian tribes. He noted:

> The very fact of repeated treaties with [the Indian tribes] recogni[z]es [their right of self-government]; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. "Tributary and feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states, so long as self government and sovereign and independent authority are left in the administration of the state." At the present day, more than one state may be considered as holding its right of

76. *Id.* at 16.
77. 31 U.S. (6 Pet.) 515 (1832).

> self-government under the guarantee and protection of one or more allies.[78]

Indian tribes, thus, bore the same relationship to the United States that the feudal states of Europe bore to their protecting allies. The most common examples of such relationships today undoubtedly are those between Monaco and France, and the Vatican City and San Marino and Italy. Within their own territories, such feudal states are completely independent and self-governing. They have complete internal sovereignty over their territory, including over all persons not possessing diplomatic immunity, of whatever nationality or over any property found there. They are *not* subject to governance by the dominant protectorate nation with which they are allied. Rather, they rely on that nation solely for their external relations, i.e., diplomatic contact with other nation states and protection of their sovereignty and territorial integrity from foes, both foreign and domestic.

Chief Justice Marshall basically described the Indian tribes' relationship with the dominant Anglo-American colonial power in similar terms in *Worcester.* Focusing on the history of British colonial management of Indian relations, Chief Justice Marshall offered the following accurate description of that history to explain the contemporary legal status of Indian tribes:

> Certain it is, that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The king purchased their lands when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only.[79]

Thus, the hallmark of the early conception of Indian sovereignty was the tribes had the complete right of self-governance over their lands. The tribes relied on federal authority and the federal government could legitimately assert power *only* with respect to external affairs, i.e., negotiations between the tribes and foreign nations and their protection from foreign invasion. The federal government had not claimed, and the tribes had not conceded, any power to regulate internal tribal affairs without tribal consent.

---

78. *Id.* at 560–61.
79. *Id.* at 547.

In summing up the reasons for the illegality of Georgia laws that had sought to unilaterally assert state governing power over Cherokee territory, the Chief Justice reflected this relationship when he wrote:

> The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, *but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.*[80]

The quoted language reflects not only the lack of power of the State of Georgia over Cherokee lands, but also that of the federal government. Thus, Georgia citizens could only enter Cherokee country either with the assent of the Cherokees themselves, i.e., in conformity with Cherokee law, or pursuant to an act of Congress and, then, only if "in conformity with treaties."[81] Congress could act with reference to Cherokee lands only if confirmed by the consent of the Cherokee Nation through a treaty. Congress possessed no unilateral power under the Indian Commerce Clause or otherwise to legislate for the Indians themselves or for their territory. Exercises of congressional power that directly affected an Indian tribe had to be authorized and confirmed by treaty entered into with the affected tribe. Unilateral federal legislative power was limited to governing nonmembers subject to its authority in their dealings with Indian tribes. Significantly, because power over *non-Indian* missionaries constituted the basis for the jurisdictional contest in *Worcester,* the case must hold that the Cherokee Nation had complete sovereignty over its territory and that state power over the same territory was accordingly ousted. *Worcester,* therefore, suggests that tribal sovereignty, like federal and state sovereignty, was conceived at the time as territorial and not dependent on the political allegiance of the party involved.

Two cases decided by the United States Supreme Court during the 1880s highlight the fact that over a century after the negotiation of the nation's first treaty with an Indian tribe, this original conception of Indian tribes as sovereign peoples located geographically within the territorial boundaries of the United States but otherwise not subject to its governance remained fully intact. Nevertheless, the tribal↔federal relationship would change dramatically during that following decade as the United States unilaterally asserted greater colonial hegemony in Indian country and elsewhere. In *Ex*

80. *Id*. at 561 (emphasis added).
81. *Id*. at 560.

parte Crow Dog,[82] the Supreme Court held in 1883 that the federal government lacked jurisdiction to try Kan-gi-shun-ca (Crow Dog), a Lakota (Sioux) Indian, for the murder of Chief Sin-ta-ga-le-Scka (Spotted Tail), another member of his tribe, near the Rosebud Agency on the Great Sioux Reservation. As Chief Justice Marshall had done fifty years before in *Worcester*,[83] Justice Mathews understood Indian treaties guaranteeing federal protection of Indian tribes as federal guarantees of tribal political sovereignty, rather than sources of federal authority over the tribes.[84] Thus, as part of its analysis, the Supreme Court interpreted a provision of an 1877 agreement purportedly entered into by the Sioux which Congress ratified by statute in light of the historical tribal↔federal relationship. The agreement provided, "Congress shall, by appropriate legislation, secure to [the Sioux Nation] an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life."[85]

The issue before the Court was whether this language subjected each individual member of the Sioux Nation to "the laws of United States" or merely reinforced an already extant tribal↔federal intergovernmental relationship. The Court interpreted the language in light of the historical relations and adopted the latter interpretation. Justice Mathews wrote:

> The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government, by appropriate legislation thereafter to be framed and enacted, necessarily implies, having regard to all the circumstances attending the transaction, that among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize among them, was the highest and best of all, that of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs. They were nevertheless to be subject to the laws of the United States, *not in the sense of citizens*, but, as they had always been, as wards subject to a guardian; *not as individuals, constituted members of the political community of the United States, with a voice in the selection of representatives and*

82. 109 U.S. 556 (1883). For a good historical survey of the case and the pressures on the traditional model of tribal↔federal relations at the time it was decided, see SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY (1994).

83. 31 U.S. (6 Pet.) 513 (1832).

84. *Ex parte* Crow Dog, 109 U.S. at 568–69.

85. *Id.* at 566.

> *the framing of the laws, but as a dependent community* who were in a state of pupilage, advancing from the condition of a savage tribe to that of a people who, through the discipline of labor and by education, it was hoped might become a self-supporting and self-governed society. The laws to which they were declared to be subject were the laws then existing, and which applied to them as Indians . . . .[86]

The trusteeship protection was of the Tribe, not individual Indian persons. Consequently, the language in question did not subject the members of the Sioux Nation to direct governance by Congress. The federal government had no jurisdiction over an intra-tribal murder occurring on the Great Sioux Reservation. Rather, the Lakota (Sioux) only voluntarily agreed to abide by the federal legislation governing the tribal↔federal relationship, most notably the so-called Trade and Intercourse Acts.[87] Indeed, without their express agreement by treaty, they would not have been bound by the federal legislation. The relationship upon which such agreements were premised was a government-to-government relationship between Indian tribes and the federal government, not an authority to directly govern Indian people or any overriding federal power. Furthermore, subjecting the Lakota to such federal legislation required their consent, which was affirmatively sought during the treaty negotiations.

The Court's explanation further explains why the baseline understanding of tribal↔federal relationship was compelled by the American constitutional tradition. At the time, Indians were not citizens and therefore, according to *Crow Dog*, had no "voice in the selection of representatives and the framing of the laws."[88] The reference, of course, is the basic American conception of governmental legitimacy deriving from the consent of the governed through constitutional delegation, a basic American constitutional theme addressed in the next section.

In *Elk v. Wilkins*,[89] decided the year after *Crow Dog*, the United States Supreme Court reaffirmed, for the last time, the basic tribal↔federal relationship that had existed for almost a century following the drafting of the United States Constitution.[90] In that case John Elk, an Omaha Indian

---

86. *Id.* at 568–69 (emphasis added).

87. The nature of such agreements was perhaps made most clear by the provisions of article 6 of the Treaty of Holston with the Cherokee Nation, July 2, 1791, 7 Stat. 40, which provided, "It is agreed on the part of the Cherokees, that the United States shall have the sole and exclusive right of regulating their trade."

88. *Ex parte* Crow Dog, 109 U.S. at 569.

89. 112 U.S. 94 (1884).

90. *See id.*

born in a tribal community, separated himself from his tribal community, moved to and resided in Omaha, Nebraska, and claimed the right to vote as citizen of the United States and the State of Nebraska by virtue of the citizenship clause in first sentence of the Fourteenth Amendment. Over the sole dissent of Justice Harlan, the sole dissenter in *Plessy v. Ferguson*,[91] the Court rejected the claim. Noting that the language of the Fourteenth Amendment conferred citizenship only on persons born in the United States who were "subject to the jurisdiction thereof," the Court emphasized the lack of any governing relationship between the federal government and tribal Indians.[92] Thus, Justice Gray wrote:

> Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes (an alien, though dependent, power), although in a geographical sense born in the United States, are no more "born in the United States and subject to the jurisdiction thereof," within the meaning of the first section of the Fourteenth Amendment, than the children of subjects of any foreign government born within the domain of that government, or the children born within the United States, of ambassadors or other public ministers of foreign-nations.
>
> This view is confirmed by the second section of the Fourteenth Amendment, which provides that "representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." Slavery having been abolished, and the persons formerly held as slaves made citizens, this clause fixing the apportionment of representatives has abrogated so much of the corresponding clause of the original Constitution as counted only three-fifths of such persons. But Indians not taxed are still excluded from the count, for the reason that they are not citizens. Their absolute exclusion from the basis of representation, in which all other persons are now included, is wholly inconsistent with their being considered citizens.[93]

Thus, the basic relationship between the Indian tribes and the federal government prevented an individual tribal member from securing citizenship without naturalization.

Since tribal Indians were not subject to federal governance, they were not subject to the authority of the United States within the meaning of the citizenship clause of the Fourteenth Amendment. Indeed, less than a decade

91. 163 U.S. 537 (1896).
92. *Elk*, 112 U.S. at 102.
93. *Id.*

before, in *Joseph v. United States*,[94] the Court had indicated that most tribes in the country had "always [been] recognized as exempt from our laws, whether within or without the limits of an organized State or Territory, and, in regard to their domestic government, left to their own rules and traditions."[95] As a consequence, Indians born within the exterior boundaries of the United States nevertheless remained non-citizens and could acquire citizenship only through naturalization, a process discussed in later sections of this essay. The individual act of John Elk in separating himself from the Omaha tribal community and seeking to acquire a new American identity could not alter his basic status as an Indian subject to tribal, rather than, federal authority. The *Elk* decision strongly suggested that naturalization of tribal Indians was a process that theretofore had occurred only rarely and generally through treaty negotiations with the Indian tribe and their formal collective tribal consent reflected in a treaty *and* their individual consent reflected in naturalization proceedings. For example, the *Elk* court pointed to an 1867 treaty with certain Kansas tribes that authorized naturalization proceedings in the federal district court for tribal members who sought United States citizenship.[96] For present purposes, however, it is sufficient to note that both the holding and analysis of the *Elk* Court reaffirmed the basic principle that Indian tribes and their members were not subject to direct governance by the federal government and could only be made subject to the authority of the United States through their consent.

At the time the Constitution of the United States was drafted, the Framers generally accepted the notion that the Indian tribes constituted separate sovereign peoples who were totally self-governing within their territory and who relied on the federal government solely for external relations, i.e., diplomatic representation with foreign governments and protection from foreign foes and citizens of the United States. Their inclusion in the Commerce Clause with two other sovereigns, foreign nations and the states, whose political existence the United States also had no power to destroy, reflects that conception of the power.

Furthermore, the exclusion of "Indians not taxed" from the census clauses of both Article I, section 2 of the Constitution and from section 2 of the Fourteenth Amendment reflects the fact that Indian tribes and their citizens simply did not constitute part of the American polity. They were not subject to federal governance and had no representation or voice in its

94. 94 U.S. 614 (1876).

95. *Id.* at 617.

96. Treaty of Washington, D.C. with the Seneca, Ottawa, Miami, Peoria, and other tribes, Feb. 23, 1867, 15 Stat. 513, 514, 517, 518, 520, 521.

selection, as *Elk v. Wilkins* specifically held.[97] Indeed, the Supreme Court would reaffirm that position as late as 1896 when it held in *Talton v. Mayes*[98] that murder prosecutions conducted by the Cherokee Nation were conducted under their own aboriginal sovereignty and, therefore, were not subject to federal Bill of Rights limitations or Fourteenth Amendment guarantees. The Cherokee Nation, like all Indian tribes, was not an arm of either the federal or state government and, therefore, was not subject to the Bill of Rights or the Fourteenth Amendment, which applied only to those governments respectively. The promise of inclusion in the Federal Union by consensual agreement leading to statehood, or at least Congressional representation of Indian communities, held out in the Treaty of Fort Pitt and repeated in later treaties and proposals for Indian statehood, never materialized. Indian tribes simply never were brought into the Federal Union or made subject to its governance through their own consent. As we shall see, that point is critical to evaluating the legitimacy of federal claims to authority over Indian tribes under American constitutional principles.

II. DELEGATION AND CONSENT OF THE GOVERNED: AMERICAN CONSTITUTIONAL FIRST PRINCIPLES ON THE LEGITIMACY OF GOVERNMENTAL POWER

If American claims to political hegemony over Indian tribes are to be legitimated under American constitutional principles, they must conform to the basic popular delegation theory of the United States Constitution. Having established the baseline understanding of the tribal↔federal relationship at the time the United States Constitution was drafted and for almost a century thereafter, it is worth pausing and recalling the basic theory of constitutional legitimacy based on popular delegation employed outside of the Indian affairs. This section, therefore, returns to first principles, perhaps restating the obvious, mostly because for over a century the federal government has totally lost sight of or failed to apply its own basic constitutional theory when it comes to Indian tribes.

American constitutional traditions have long emphasized that the legitimacy of governmental power rests on a lawful delegation of authority. The very nature of a written constitution involves a delegation of power to government. In *Marbury v. Madison*,[99] the Supreme Court expressly justified the exercise of judicial review, in part, on the ground that the act of the people of the United States delegating power to Congress in the

97. *See supra* note 89 and accompanying text.
98. 163 U.S. 376 (1896).
99. 5 U.S. (1 Cranch) 137 (1803).

Constitution constituted a superior and limiting delegation that controls the exercises of authority undertaken by Congress pursuant to the delegation. Legislation enacted beyond the grant of the delegation of power therefore simply did not constitute valid or enforceable law. The important questions that have long troubled American constitutional theory are the *source* of the delegation and, more recently, the *scope* of the delegation.

In the Articles of Confederation, the nation's first constitution, federal power and legitimacy derived from the states which delegated national authority. Relying on British constitutional traditions of the unitary sovereignty of the Crown, the Articles conceived the states as having succeeded at independence to the British Crown's sovereignty over American soil. Thus, the Articles of Confederation were styled as the states entering into "a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare."[100] The premise was that the confederation government derived its powers through delegation from the sovereign states. This conception of the federal union explains why the Indian Affairs Clause of Article IX was so problematic. On the one hand, the states purported to delegate to the confederation government "sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians."[101] On the other hand, without defining the scope of the reservation, the Articles purported to reserve some powers to the states by providing that some ill-defined "legislative right of any State within its own limits be not infringed or violated."[102] Under the British legal tradition, the states' sovereignty over their "realm" might have been coextensive with the state boundaries, which would have included all Indian tribes located therein. Indeed, North Carolina, Georgia and New York unsuccessfully adopted this construction throughout the confederation period to the consternation of the Continental Congress. Since all Indian owned lands within the United States were at the time within territory claimed by states, this interpretation of the reservation of delegated power threatened to nullify the entire grant, as a committee of the Continental Congress pointed out.[103] Ultimately, this conflict necessitated, as discussed above, adoption of the Indian Commerce Clause without any reservations of state authority.

The problems with interpreting the Indian Affairs clause of the Articles of Confederation were but one difficulty among many that prompted the movement toward to a new governmental structure premised on an entirely

100. ARTICLES OF CONFEDERATION, art. III.
101. *Id*.
102. *Id*.
103. *See supra* text accompanying notes 38–39.

different theory of delegation. Ironically, the Articles of Confederation were not in conformity with the basic principles of popular sovereignty that inspired the Declaration of Independence. Relying significantly on secular natural law theories popularized by John Locke in his *Second Treatise on Government,*[104] the Declaration of Independence had not been premised on notions of state sovereignty, but, rather, on principles of popular sovereignty, i.e., the right of people to enter into social compacts to form governments. Thus, Thomas Jefferson wrote in the Declaration that "[g]overnments are instituted among Men, *deriving their just powers from the consent of the governed*."[105] His very justification for the right of revolution and assertion of independence in that document was that the British Crown had exceeded its delegation of authority and become oppressive. Thus, when there has been "a long train of abuses and usurpations, pursuing invariably the same Object [that] evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security."[106] From the very start of the American constitutional system, questions of the existence and scope of a delegation of authority have been central to American conceptions of the legitimacy of governmental power.

In abandoning the Articles of Confederation and adopting the United States Constitution, the Framers of the latter document not only adopted a new frame of government, they brought American constitutional traditions back into conformity with the Lockean popular delegation theories that animated the Revolution and the Declaration of Independence. Indeed, they clearly understood the difference between a compact among states and a social compact among the people. For example, when James Patterson of New Jersey claimed that the Constitutional Convention had no lawful authority to dissolve the Articles of Confederation without unanimous consent of the states, as required in the document, Madison responded that the document had already been dissolved because its breach by any of the states that comprised the Confederation alleviated the obligation of every other state to comply with it, precisely because it was a compact among the states.[107] Thus, the choice was deliberately made to rest the authority of the

---

104. JOHN LOCKE, SECOND TREATISE ON GOVERNMENT (J.W. Gough ed., Basil Blackwell 1976) (1690).

105. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

106. *Id*.

107. 1 FARRAND, *supra* note 42, at 314–15:

> It had been alleged (by Mr. Patterson), that the Confederation having been formed by unanimous consent, could be dissolved by unanimous Consent only[.] Does this doctrine result from the nature of compacts? [D]oes it arise from any particular stipulation in the articles of Confederation? If we

United States government on delegation directly from the people of the United States.

The basic idea of popular sovereignty, of course, is that sovereignty initially rests with individuals and that governments derive their lawful authority through delegation of portions of their individual sovereignty to a government in the social compact we call a constitution. During the Constitutional Convention, Colonel Mason defended ratification of the document, as ultimately provided for through conventions elected by the people, rather than the state legislatures, on precisely these grounds.[108]

> consider the federal union as analogous to the fundamental compact by which individuals compose one Society, and which must in its theoretic origin at least, have been the unanimous act of the component members, it cannot be said that no dissolution of the compact can be effected without unanimous consent. [A] breach of the fundamental principles of the compact by a part of the Society would certainly absolve the other part from their obligations to it. If the breach of *any* article by *any* of the parties, does not set the others at liberty, it is because, the contrary is *implied* in the compact itself, and particularly by that law of it, which gives an indefinite authority to the majority to bind the whole in all cases. This latter circumstance shows that we are not to consider the federal Union as analogous to the social compact of individuals: for if it were so, a Majority would have a right to bind the rest, and even to form a new Constitution for the whole, which the Gentn: from N. Jersey would be among the last to admit. If we consider the federal Union as analogous not to the <social compacts> among individual men: but to the conventions among individual States. What is the doctrine resulting from these conventions? Clearly, according to the Expositors of the law of Nations, that a breach of any one article, by any one party, leaves all the other parties at liberty, to consider the whole convention as dissolved, unless they choose rather to compel the delinquent party to repair the breach.

Id.

108. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 88–89 (Max Farrand ed., 1966):

> [A] reference of the plan to the authority of the people as one of the most important and essential of the Resolutions. The Legislatures have no power to ratify it. They are the mere creatures of the State Constitutions, and cannot be greater than their creators. And he knew of no power in any of the Constitutions, he knew there was no power in some of them, that could be competent to this object. Whither then must we resort? To the people with whom all power remains that has not been given up in the Constitutions derived from them. It was of great moment he observed that this doctrine should be cherished as the basis of free Government. Another strong reason was that admitting the Legislatures to have a competent authority, it would be wrong to refer the plan to them, because succeeding Legislatures having equal authority could undo the acts of their predecessors; and the National Govt. would stand in each State on the weak and tottering foundation of an Act of Assembly. There was a remaining consideration of some weight. In some of the States the Govts. were not derived from the clear & undisputed authority of the people.

Id.

Indeed, during the same debate, James Madison indicated that "[h]e considered the difference between a system founded on the Legislatures only, and one founded on the people, to be the true difference between a *league* or *treaty* and a *Constitution.*"[109] In fact, Madison justified the very notion of constitutional judicial review on this difference. He noted, "[a] law violating a treaty ratified by a preexisting law, might be respected by the Judges as a law, though an unwise or perfidious one. A law violating a constitution established by the people themselves, would be considered by the Judges as null & void."[110] Thus, the governing authority of the federal government legitimately is derived, as reflected in the Preamble to the Constitution, from a delegation from "We the People of the United States" who entered into that social compact "to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity."[111] It was the people of the United States in their ratification conventions, rather than the state legislatures, that breathed life into the document. Chief Justice John Marshall would later invoke this argument in *McCulloch v. Maryland*[112] to establish that the basis of legitimate federal authority was popular, rather than state, delegation.

---

109. *Id*. at 93 (emphasis added).
110. *Id*.
111. U.S. CONST. pmbl.
112. 17 U.S. (4 Wheat.) 316, 402–04 (1819):

> The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.
>
> It would be difficult to sustain this proposition. The Convention which framed the constitution was indeed elected by the State Legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation, or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a Convention of Delegates, chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification." This mode of proceeding was adopted; and by the Convention, by Congress, and by the State Legislatures, the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively, and wisely, on such a subject, by assembling in Convention. It is true, they assembled in their several States–and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the state governments.
>
> From these Conventions, the constitution derives its whole authority. The government proceeds directly from the people; is "ordained and

Thus, the basic conception of the federal union is that the people of the United States delegated their sovereign authority respectively to the federal government in the United States Constitution and to their states through their state constitutions. Since they could choose to limit the authority of the state through either their delegations of authority of the central government in Article I, section 8 or through express prohibitions on the exercise of state authority in Article I, section 10, actions taken in pursuance of the Constitution have primacy over conflicting state laws and the Supremacy Clause of Article IV of the United States Constitution expressly so provides. The theory of that supremacy, however, obviously is not the inherent omnipotence or infallibility of the federal government. It is, rather, that "We the People of the United States" chose through their multiple delegations of authority to give supremacy to legitimate federal actions undertaken within the confines of the federal government's limited enumerated powers. Consequently, the Supremacy Clause does not simply declare federal law supreme over the entire potential universe of conflicting law, including foreign or international law. Rather, it expressly limits the claim of supremacy to primacy over *state* law, providing that the state judges shall be bound by federal law "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[113]

Indeed, the ratification debates supporting the document all reflect the basic elements of the constitutional theory spelled out here: (1) legitimate government authority was derived from popular grant; (2) the authority of the federal government was derived from a grant from the people of the United States, not from the states; (3) the people can and did choose to make federal law supreme over state law; and (4) the legitimacy of governing authority was to be measured by whether its exercise was within the scope of the delegation. For example, *The Federalist* is replete with allusions to this theory. In *The Federalist* No. 22, Alexander Hamilton nicely summarized several of those elements:

> established," in the name of the people; and is declared to be ordained, "in order to form a more perfect union, establish justice, ensure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity." The assent of the States, in their sovereign capacity, is implied in calling a Convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it; and their act was final. It required not the affirmance, and could not be negatived, by the State governments. The constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.

Id.

113. U.S. CONST. art. IV.

> It has not a little contributed to the infirmities of the existing federal system, that it never had a ratification by the PEOPLE. Resting on no better foundation than the consent of the several Legislatures, it has been exposed to frequent and intricate questions concerning the validity of its powers; and has in some instances given birth to the enormous doctrine of a right of legislative repeal. Owing its ratification to the law of a State, it has been contended, that the same authority might repeal the law by which it was ratified. However gross a heresy it may be to maintain that *a party to a compact* has a right to revoke that *compact*, the doctrine itself has had respectable advocates. The possibility of a question of this nature, proves the necessity of laying the foundations of our national government deeper than in the mere sanction of delegated authority. The fabric of American Empire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE. The streams of national power ought to flow immediately from that pure original fountain of all legitimate authority.[114]

Similarly, in *The Federalist* No. 78, Hamilton presaged the same argument later made by Chief Justice John Marshall for judicial review in *Marbury v. Madison*,[115] when he wrote:

> There is no position which depends on clearer principles, than that *every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void*. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authori[z]e, but what they forbid.[116]

Thus, the very nature of the invalidity of an unconstitutional exertion of power is not simply its inconsistency with the text of the Constitution, it is, rather, that it is outside the scope of the delegation of authority from the people; it is *ultra vires*.

In his later defense of the institution of judicial review, Chief Justice John Marshall would echo Hamilton's analysis in *The Federalist* No. 78. Specifically, in *Marbury v. Madison*,[117] he would find both the source of

---

114. THE FEDERALIST NO. 22, at 145–46 (Alexander Hamilton) (J.E. Cooke ed., 1961).

115. 5 U.S. (1 Cranch) 137 (1803).

116. THE FEDERALIST NO. 78, at 524 (Alexander Hamilton) (J.E. Cooke ed., 1961) (emphasis added).

117. 5 U.S. (1 Cranch) 137 (1803).

constitutional delegation in the people of the United States and a justification for ignoring unconstitutional acts in the act being *ultra vires* as beyond the delegated authority.[118] He would write:

> That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.
>
> This original and supreme will organizes the government, and assigns to different departments their respective powers. . . . It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.
>
> Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.
>
> If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.
>
> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.
>
> This theory is essentially attached to a written constitution, and, is consequently, to be considered, by this court, as one of the fundamental principles of our society.[119]

The legitimacy of the exercise of constitutional power therefore must be in conformity to the document since the Constitution constitutes the delegation of authority to government by the people.

In order to reinforce this theory the states insisted upon, and the country ratified, the Tenth Amendment under which "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are

118. *Id.* at 175–77.
119. *Id.*

reserved to the States respectively, or to the people."[120] As has been repeatedly pointed out, this amendment differed from a similar prohibition appearing in the Articles of Confederation[121] in two ways. First, it eliminated the phrase "*expressly* delegated" that had appeared in the Articles. Second, and perhaps more important, in keeping with the new theme of delegated federal authority deriving from delegation by the people of the United States, it contemplated that the people may have delegated power to *neither* the federal government nor the states, thereby reserving it exclusively for individual decision making or subsequent popular action. Thus powers are reserved additionally "to the people."

This theory of delegation from the people, perhaps, rings a bit hollow today because the current population of the society is many generations and several waves of immigration removed from the actual voters who comprised the "We the People of the United States" that originally ratified the document. Indeed, that original group of voters, because of the property qualifications for voting, gender disqualification of half the population, and the nefarious institution of slavery, actually constituted but a small percentage of the American society. This problem of intergenerational legitimacy, however, was one that did indeed trouble the Framers. Recall that Thomas Jefferson espoused the view that revolution was periodically necessary to renew the popular mandate of government with the current generation and thereby to keep it current.[122] In his *Notes on the State of Virginia*, Jefferson proposed frequent resort to constitutional conventions whenever two branches of government disagreed with a third on the nature of the constitutional mandate in order to keep the constitutional delegation fresh and clear.[123] The author of *The Federalist* No. 49, possibly James Madison, responded to such suggestions by pointing out the governmental instability that would be created thereby. He suggested:

> The danger of disturbing the public tranquillity by interesting too strongly the public passions, is a still more serious objection against a frequent reference of constitutional questions, to the decision of the whole society. Notwithstanding the success which has attended the revisions of our established forms of government, and which does so much honour to the virtue and intelligence of

---

120. U.S. CONST. amend. X.

121. ARTICLES OF CONFEDERATION, art. II: "Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation *expressly* delegated to the United States, in Congress assembled." (emphasis added).

122. THOMAS JEFFERSON, WRITINGS 235–55 (Merrill D. Peterson ed., 1984).

123. *Id.* at 250.

> the people of America, it must be confessed, that the experiments are of too ticklish a nature to be unnecessarily multiplied.[124]

Therefore, in order to promote social stability and a confidence of the people in their government, delegations are presumed to continue intergenerationally among the descendents of the ever-changing "People of the United States" until altered by amendment or revoked by revolution.

The most basic tenet of American constitutional law has long sought to analyze the legitimacy of the exercise of federal governing power by grounding and confining such authority to the scope of the popular delegation contained in the Constitution. For example, in the most classic statement of the test for the constitutionality of legislation, Chief Justice Marshall wrote in the famous case of *McCulloch v. Maryland*,[125] "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[126]

Thus, the touchstone of constitutional exercises of federal power involves confining the exercises of federal power to express and implied grants of authority delegated by the people in the document and not running afoul of any prohibition on the exercise of power contained in the Bill of Rights and elsewhere. American constitutional theory, therefore, is fundamentally grounded upon and enforces the idea of popular delegation of authority.

This constitutional understanding has been, both expressly and impliedly, at the center of recent debates over the Supreme Court's increased judicial activism on federalism questions in favor of state sovereignty and autonomy. Indeed, it has been the theoretical cornerstone for much of the judicial activism witnessed in recent years in the name of enforcing federalism. For example, in *United States v. Lopez*[127] Chief Justice Rehnquist commences his opinion for the Court by restating these basic principles in order to place the delegation of national power found in the Commerce Clause into some perspective.[128] Similarly, in *New York v.*

---

124. THE FEDERALIST NO. 49, at 340–41 (James Madison) (J.E. Cooke ed., 1961).
125. 17 U.S. (4 Wheat.) 316, 421 (1819).
126. *Id.* at 421.
127. 514 U.S. 549 (1995).
128. *Id.* at 552–53. In the majority opinion, Chief Justice Rehnquist explained:

> We start with first principles. The Constitution creates a Federal Government of enumerated powers. See Art. I, § 8. As James Madison wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp. 292–293 (C. Rossiter

United States,[129] Justice O'Connor employed delegation theory to explain the need for judicial enforcement of limitations on the power of Congress to commandeer the state legislative process in support of national policy initiatives.[130] While not all opinions in the recent spate of decisions over

---

> ed., 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (internal quotation marks omitted). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."
>
> The Constitution delegates to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, cl. 3.

Id. at 522–23.

129. 505 U.S. 144 (1992).

130. *Id.* at 155–56. Justice O'Connor justified judicial enforcement by stating:

> In 1788, in the course of explaining to the citizens of New York why the recently drafted Constitution provided for federal courts, Alexander Hamilton observed: "The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may, in a particular manner, be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties." The Federalist No. 82, p. 491 (C. Rossiter ed. 1961). Hamilton's prediction has proved quite accurate. While no one disputes the proposition that "[t]he Constitution created a Federal Government of limited powers," *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); and while the Tenth Amendment makes explicit that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"; the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases. At least as far back as *Martin v. Hunter's Lessee*, 1 Wheat. 304, 324 (1816), the Court has resolved questions "of great importance and delicacy" in determining whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States.
>
> These questions can be viewed in either of two ways. In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution. See*, e.g.*, *Perez v. United States*, 402 U.S. 146 (1971); *McCulloch v. Maryland*, 4 Wheat. 316 (1819). In other cases the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment. See, *e.g., Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985); *Lane County v. Oregon*, 7 Wall. 71 (1869). In a case like these, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is

the meaning of federalism recur to such discussions of constitutional first principles, the very notion of confining the federal government to the limitations contained in the terms of the document derives from this original delegation theory of a written constitution based on popular sovereignty. What debate exists about the appropriateness of the recent re-energizing of federalism limitations on the exercise of national powers centers not around the question of whether such limitations exist, but, rather, over whether the federal judiciary or the political branches are best suited for determining the outer limits of and enforcing such limitations. Since some evidence in *The Federalist Nos*. 45 and 46[131] suggests the Framers envisioned political, rather than judicial, enforcement of federalism limitations on national power, some have questioned the appropriateness and manageability of judicially crafted efforts to ascertain and enforce the outer limitations of the scope of the popular delegation of federal power contained in the Constitution.[132]

This reminder that the historical and contemporary theory of popular delegation provides the basis for determining the constitutional legitimacy of the exercise of governmental power fully explains the foundation in American constitutional law for the baseline understanding of the limited nature of federal power in Indian affairs. The Indian tribes and their members, unlike the states and their citizens, were not part of the "We the People of the United States" who drafted the United States Constitution.

> an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress. See *United States v. Oregon*, 366 U.S. 643, 649 (1961); *Case v. Bowles*, 327 U.S. 92, 102 (1946); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co*., 313 U.S. 508, 534 (1941).
>
> It is in this sense that the Tenth Amendment "states but a truism that all is retained which has not been surrendered." *United States v. Darby*, 312 U.S. 100 (1941).

Id. at 155–56.

131. THE FEDERALIST NOS. 45, 46, at 308–23 (James Madison) (J.E. Cooke ed., 1961).

132. *E.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

> In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

Id. at 552–54. S*ee generally* JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175–184 (1980); D. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation,* 60 WASH. U.L.Q. 779 (1982); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

They constituted separate sovereign peoples which federal Indian law would later label domestic dependent nations. They were outside the federal union and owed no allegiance to it other than bi-national alliances created by treaty. The very exclusion of tribal Indians from the census by the "Indians not taxed" clause contained in Article I clearly recognizes that status in the text of the Constitution itself. As such, unlike the states, the citizens of the tribes never delegated any power to the federal government!

Thus, under basic American principles of constitutional authority, the federal government could not directly exercise any authority over the Indian tribes or their members in Indian country, except by their consent through treaty. Indeed, the treaty provisions, discussed above, in which federal treaty commissioners successfully sought tribal agreement to abide by the Trade and Intercourse Acts or the Removal Act, demonstrate contemporary understanding that federal legislation could not directly reach or act upon Indian tribes without their consent through treaty. Congress had no power to legislate for or upon them directly. Therefore, the grant of power to Congress in the Indian Commerce Clause to regulate commerce with Indian tribes merely constituted a delegation of authority to regulate those persons who were subject to United States authority who entered into Indian country to engage in such commerce. Properly understood in conformity with America's basic principles of governmental legitimacy, the constitutionally delegated power consisted of authority to regulate commerce "*with* the Indian tribes,"[133] not a power to regulate the commerce *of* the Indian tribes. It was a power to regulate non-Indians who dealt with the tribes and to manage the American side of the bilateral diplomatic, economic, political and social intercourse with tribes. That delegation did not include any power to directly regulate tribal Indians, who, of course, had not delegated authority to the federal government, other than perhaps a claimed power to protect American citizens from harm.

The basic theory of American constitutional law, therefore, not only explains the baseline understanding of power and authority in the tribal↔federal relationship, it also explains why virtually all federal laws enacted prior to 1885 only applied to non-Indians who dealt with Indians, rather than regulating the Indian tribes directly. Since the Indian tribes were not part of the federal union and their citizens (members) were not part of "We the People of the United States," they had delegated no authority to the federal government other than through treaty. Federal and state powers simply could not be asserted over them directly without the benefit of their agreement through treaty.

---

133. U.S. CONST. art I, § 8.

Finally, American constitutional theory also explains why federal law is not supreme over tribal law. The group of people comprising "We the People of the United States" that delegated authority to the federal government in the United States Constitution were comprised of the citizens of the various states then in existence. If one assumes, as did the federalist proponents of the United States, that all sovereignty originally rests with the people, then the people of the United States not only were in a position to delegate portions of their popular sovereignty to the federal government, but they were also in a position to limit the exercise of state power to protect national authority. The limitations on the exercise of authority by the state governments found in Article I, section 10 of the Constitution constitute illustrations of the exercise of that power. More importantly, the Supremacy Clause of Article VI, section 2 makes federal law supreme, albeit by its express terms only over *state* law, not tribal law. By its own terms, the Supremacy Clause limits the assertion of federal primacy, i.e., "any Thing in the Constitution or Laws of *any State* to the Contrary Notwithstanding."[134] Because the people of the United States were citizens of the states, they could limit state authority to assure federal supremacy and did so in the Supremacy Clause.

Since the very text of the Constitution conclusively demonstrates that the people of the United States did *not* include the Indian tribes or their citizens, the document had no power whatsoever to limit tribal authority or to assure federal supremacy over tribal authority. Based on the first principles of the American constitutional system, Congress, therefore, has no authority to legislate directly for the tribes. Furthermore, nothing in the Constitution or in any legislation can or should be thought to limit tribal authority to simply ignore federal law. The federal government has no greater claim to supremacy for its law over the Indian tribes than it has for the supremacy of its law over Great Britain, Canada, or Mexico! None of those sovereign powers were parties to the American original constitutional compact and none are legally bound by it. Of course, the subsequently-admitted states similarly had no seat at the table when the original constitutional compact was crafted. Unlike the Indian tribes and foreign nations, however, the voluntary requests by the later-admitted states for admission to the Union required them to abide by the United States Constitution, and thereby, to principles of popular delegation of authority and federal supremacy.[135] In

134. U.S. CONST. art. VI (emphasis added).

135. By the same token, later waves of immigrants whose ancestors played no role in the drafting of the United States Constitution are thought by their voluntary acts of seeking residence and citizenship in the United States to be similarly bound by the prior delegation of authority contained in the Constitution. Notice that since the ancestors of the Indian tribes were

short, if one properly views the United States Constitution in light of the Lockean social compact theory of popular delegation that animated its drafting, there not only is no legitimate basis for the exercise of direct federal legislative power over Indian tribes, but there also is no federal supremacy clause for Indian tribes!

III. PLENARY POWER OVER INDIAN AFFAIRS AND THE RISE OF AMERICAN COLONIALISM

Colonialism can be conveniently defined as the assertion of political sovereignty or other authority over a separate people, often of a different race, without their consent.[136] So defined, it is clear that colonialism is centrally at odds with America's first principles. If all legitimate governing authority derives from the consent of the governed through constitutional delegation, then the assertion of political hegemony over another people *without their consent* does not constitute a legitimate exercise of governing authority. Of course, such colonialism is also diametrically opposed to the now internationally-recognized right of the colonized people to self-determination.[137] The decolonization movement of the post-World War II era, which finally has enforced for some peoples that right of self-determination, has had profound implications for redrawing of boundaries and spheres of legitimate governing power everywhere in the world except the Americas, where perhaps the first wave of mass European colonialism occurred.

In this section, the author will show how current conceptions of the tribal↔federal relationship derive not from original American constitutional principles or any real grant of power to Congress in the Constitution, but rather from judicial efforts in the late-nineteenth and early-

---

here before the very first wave of European immigration, they and their descendents are not bound by federal law or federal supremacy under this theory. Indeed, the Indian tribes perhaps have an even stronger claim, based on the same rationale, to insist that all Americans should be bound by *their* laws.

136. Robert B. Porter, *Legalizing, Decolonizing, and Modernizing New York State's Indian Law*, 63 ALB. L. REV. 125, 128 n.18 (1999); Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 86 (1993).

137. *See generally* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 75–125 (1996) (surveying principles of international law related to the right of self-determination and applying them to the problems of indigenous peoples); Curtis G. Berkey, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples*, 5 HARV. HUM. RTS. J. 65, 75–80 (1992); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 76 n.177 (1996); Williams, *supra* note 6, at 676–82 (all discussing the decolonization movement in the international community and its application to indigenous peoples).

twentieth centuries to rationalize and legitimate American colonialism. Indeed, this section demonstrates how the so-called federal Indian plenary power doctrine under which Congress claims complete, virtually unlimited, legislative control over any matter involving Indians, including the very continued existence of the Indian tribes, merely constitutes a racist American relic of "white man's burden"[138] arguments employed to justify American colonialism.[139] The legislative Indian plenary power doctrine was not a reasoned analysis derived from the text, history, or purposes of the United States Constitution. Rather, it constituted an unprincipled assertion of raw federal authority based on nothing more than the naked power to effectuate it. Furthermore, this section suggests that, if the turn of the last century witnessed the federal judicial rationalization of *congressional* efforts to assert colonial control over Indian tribes, the current Supreme Court, far from enforcing the limited understandings of the delegation employed where state interests are concerned, has usurped the congressional prerogatives in Indian affairs it rationalized over a century ago and has begun to craft a *judicial* Indian plenary power doctrine under which it has created its own federal Indian policy through common law development. Even more remarkable, the Court's exercise of judicial Indian plenary power often is in conflict with the spirit, if not the letter, of existing congressional statutes.

The purpose of this section, therefore, is to demonstrate that the roots and functions of both the legislative Indian plenary power doctrine and the new judicial Indian plenary power doctrine lie in late-nineteenth century theories of racial superiority invoked to justify colonialism. The section will further suggest that neither has any basis whatsoever in the American constitutional system. In short, this section attacks the underpinnings of the

---

138. The phrase "white man's burden" derives from a Rudyard Kipling poem about colonialism over "Your new-caught, sullen peoples, Half devil and half child." Rudyard Kipling, *Take Up the White Man's Burden*, *quoted in* STEPHEN JAY GOULD, THE MISMEASURE OF MAN 119 (1981). The full work is set forth at Rudyard Kipling, *The White Man's Burden*, *in* RUDYARD KIPLING'S VERSE: INCLUSIVE EDITION, 1885–1932, at 373 (1938). While often thought to justify British imperial adventures, one commentator argued that Kipling's verse specifically addressed the late-nineteenth century American colonialism involved in acquiring the Philippines, Puerto Rico, and Cuba as a result of the Spanish American War. RALPH DURAND, A HANDBOOK TO THE POETRY OF RUDYARD KIPLING 229 (1914). While not specifically addressed to Indian peoples, the late-nineteenth century racism and notions of cultural superiority invoked by the phrase are particularly apt for the Indian context. *See generally* Leonard M. Baynes, *An Investigation Of The Alleged "White Man's Burden" In The Implementation Of An Affirmative Action Program In Telecommunications Ownership*, 30 RUTGERS L.J. 731, 732–36 (1999); Keith E. Sealing, *Blood Will Tell: Scientific Racism And The Legal Prohibitions Against Miscegenation*, 5 MICH. J. RACE & L. 559, 582 (2000).

139 *E.g.*, Downes v. Bidwell, 182 U.S. 130.

Indian plenary power doctrine, the cornerstone of most federal Indian law for the past century.

A. Nineteenth Century American Imperialism and the Rise of the Indian Plenary Power Doctrine

During the late-nineteenth and early-twentieth centuries, United States foreign policy came into direct conflict with American constitutional ideals. The United States became caught up in the European rush to empire and began its own colonial expansion. This was the period in which the United States acquired Cuba and the Philippines through the Spanish-American War, engaged in gunboat diplomacy in the Caribbean basin and Latin America, acquired the rights to build the Panama Canal by taking Panama away from Columbia, and overthrew the internationally-recognized indigenous monarchy of the Republic of Hawaii, ultimately annexing Hawaii to the United States. In short, it was the period when the American will toward empire reached its peak. During this period, in order to justify the expanding American colonial empire, both the political branches and the federal judiciary virtually ignored the constitutional principles upon which the nation was founded. Yet, the colonial expansion of American authority continued to raise thorny constitutional problems that the Supreme Court could not easily resolve by resorting to the first principles of the United States Constitution.[140] Ultimately, it gave up trying.

The situation in Indian country within the United States paralleled the colonial expansion occurring abroad. Indeed, expansion of American authority over non-consenting Indian peoples preceded American expansion abroad and may have constituted the first step toward jettisoning American constitutional principles in favor of a will toward empire and American colonial control over non-consenting peoples. The situation of Indians in the late-nineteenth century contributed to the ability of the United States to enlarge its claims to political hegemony over Indian peoples. Since the removal period,[141] federal policy sought to separate Indians from non-Indian settlement of the country. Initially the idea was to remove Indians outside of the settled states. As settlement leapfrogged the central continent in a western rush of Anglo migration toward California and the Pacific Northwest, a direct result of the California gold rush, the logistics of relocating tribes outside of and beyond state boundaries became increasingly problematic. After initial controversial experiments with

140. *E.g.*, Dorr v. United States, 195 U.S. 138 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); Downes v. Bidwell, 182 U.S. 244 (1901).

141. *See supra* notes 17–21 and accompanying text.

setting up more permanent reservations in Kansas and California, federal policy ultimately bowed to the inevitable pressure of non-Indian settlement after the Civil War. Congress moved toward a new policy of relocation by fencing Indians into separated reservations that would constitute jurisdictional islands of tribal sovereignty *within* states.

For the twenty years after the Civil War, non-Indian settlement, fueled by the development of the transcontinental railroad, created a pincher movement in which the more nomadic tribes of the plains and the west were squeezed between non-Indian settlers rapidly advancing westward from Missouri, Kansas and Iowa and others pushing the frontier of non-Indian settlement eastward from pre-Civil War beachheads of California and the Pacific Northwest. As habitat and available land for exercise of traditional Indian ways of life dwindled in the face of this development, Indian tribes often reluctantly accepted reservations as last bastions for the retention of their communities and exercise of sovereignty, if, not always, retention of their subsistence ways of life. For those tribal groups that resisted these unwanted intrusions of Anglos on their cultures and their lands, like the Lakota Bands led by Sitting Bull and Crazy Horse, the Chiricahua Apache led by Geronimo, the Nez Perce led by Chief Joseph, and many others, this was a period in which American enforcement of the reservation policy by military force often produced the classic western Indian battles over-romanticized and celebrated in the America psyche as fueled by the mass media. Surprisingly, this period was really quite short lived, lasting from perhaps 1865 until Geronimo was captured in 1886.

Contrary to the great American myth,[142] however, actual conquest was not the basis for most of the pacification of the tribes during this period. Active military resistance was the exception, not the rule. Some tribes that initially rejected the idea of Indian reservations later actively embraced the concept when they saw their ancestral domains voraciously, and often illegally, taken over by squatting white settlers.[143]

---

142. *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 289–90 (1955). Justice Reed explained that:

> Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.

Id.

143. *E.g.,* United States v. Sante Fe Pac. R.R., 314 U.S. 339, 354–56 (1941) (describing initial unsuccessful efforts to impose reservations on Walapais, followed by tribal request for reservation as non-Indian settlers increasingly encroached on their lands).

Others were subdued not by military force but through subversion of their economies. This fate was particularly a problem for the buffalo hunting tribes of the plains and southwest since deliberate federal policy effectuated by the likes of Buffalo Bill Cody hunted the North American bison virtually to extinction in a brief period of years, primarily to undercut native economies. Since most of the buffalo were simply left to rot on the plains, it is clear that the hunt had little to do with the value of the resource. In fact, the Lakota (Sioux) never lost a major battle with the United States, their last armed military encounter being the Battle of Greasy Grass (the Little Big Horn) in which they clearly emerged victorious. Yet, even the descendents of the victorious bands that followed Sitting Bull and Crazy Horse were forced onto the reservations by starvation as the buffalo herds disappeared.[144] They had won the military battle, yet the Sioux lost the economic war. While they remain among the very poorest communities in the United States to this day as a result of federal subversion of their subsistence economy, it is clear that military conquest was not the basis for their current plight.

Thus, the 1880s marked the beginnings of a major new phase in tribal↔federal relations. The United States military had quelled virtually all of the armed tribal resistance to American authority and those tribes that had resisted had been disarmed and fenced into reservations—small islands of sovereignty in which they sought to continue their separate national existence, often with cultures developed for asserting economic and political hegemony over far greater areas. This period also marked the nadir of Indian population in the United States. According to the 1890 census, the original ten to eighteen million Indian occupants of North America[145] had decreased in the span of 400 years from first contact to approximately a quarter-million in the United States.[146] Thus, through disease, warfare, systematic destruction of economies and cultures, mass genocide and other factors, nearly ninety-eight percent of the Indian population had died by the late-nineteenth century. While some tribes clearly had disappeared entirely, the remaining Indian nations were struggling to maintain their tribal identities in the face of incredible social, political, and economic pressures.

---

144. JAMES C. OLSON, RED CLOUD AND THE SIOUX PROBLEM 114–43 (1965); ROBERT M. UTLEY, THE LANCE AND THE SHIELD: THE LIFE AND TIMES OF SITTING BULL 211–59 (1993) (describing the aftermath of the Sioux Wars).

145. DAVID E. STANNARD, AMERICAN HOLOCAUST: COLUMBUS AND THE CONQUEST OF THE NEW WORLD 11, 261–68 (1992).

146. REP. ON INDIANS TAXED AND INDIANS NOT TAXED IN THE U.S. (EXCEPT ALASKA), H.R. MISC. DOC. NO. 340, pt. 15, at 24 (1st Sess. 1894).

At precisely this low-point in Indian national existence, the United States unilaterally sought to greatly enlarge its governing power over the weakened tribal Indians. While not intended to initiate this result, the process probably began as early as 1871 as a result of a fight between the United States Senate and the House of Representatives over primacy in the formulation of federal Indian policy. Until that time *all* major policy initiatives were implemented with the tribes through treaty negotiations. Often Indian assent was purchased with gifts (today, we would call them bribes) to tribal leaders[147] or through inducements to the entire tribal community of rations and subsistence awards to replace destroyed economies,[148] payment of annuity monies[149] and the payment of accumulated tribal debt,[150] or promises of blacksmiths, medical care, and educational services.[151] After the Civil War, however, a fierce dispute broke out between the two branches of Congress over the procedural niceties of the process of approving the necessary treaties.

Until that time, Indian treaties had been negotiated by federal treaty commissioners responsible to the President. Once signed by the tribes, Indian treaties were taken back to the Senate for ratification, as required by Article II, Section 2, Clause 2. In a debate reminiscent of the 1796 debate over the process of approving commercial treaties,[152] the House of Representatives resisted the continuation of this process of Indian policymaking. Since Indian treaties often involved substantial federal expenditures in annuities, rations, and service obligations, the House of Representatives insisted on a co-equal role in their approval, invoking its traditional role as initiator of all appropriations legislation as a justification for its position.[153] The House therefore refused to pass appropriations bills for the Department of the Interior until their demands for co-equality were

147. *E.g.*, Treaty with the Sacs and Foxes, Oct. 11, 1842, art. 4, 7 Stat. 596, 597 [hereinafter Treaty with Sacs and Foxes].

148. *E.g.*, Treaty of Fort Laramie, *supra* note 17, art. 10, at 638.

149. *E.g.*, Treaty of Dancing Rabbit Creek, *supra* note 18, art. 17, at 336; Treaty with Sacs and Foxes, *supra* note 147, art. 2, at 596.

150. Treaty with Sacs and Foxes, *supra* note 147, art. 2, at 599.

151. *E.g., id.* at 596; Treaty of Dancing Rabbit Creek, *supra* note 18, art. 20, at 333; Treaty of Fort Laramie, *supra* note 17, art. 4, at 636, art. 7, at 637–38.

152. For a discussion of the debate over commercial treaties and selected references to original sources, see Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1198–1208 (1987); *see also* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1154–1210 (2000); Mark. J. Rozell, *Restoring Balance to the Debate over Executive Privilege: A Response to Berger,* 8 WM & MARY BILL RTS. J. 541, 558–59 (2000).

153. U.S. CONST. art. I, § 7.

satisfied. This debate clearly brought out a number of opponents of the idea of tribal sovereignty, most notably Ely Parker, an educated Seneca Indian who had served as General Ulysses S. Grant's personal secretary during the Civil War and was rewarded for his service with an appointment as Commissioner of Indian Affairs (the nation's first Indian to serve in that capacity and the only one to do so for almost a century thereafter).[154] Nevertheless, history demonstrates that it was the elimination of the primacy of the Senate in the development or approval of Indian policy, and not opposition to tribal sovereignty *per se*, that ended the Indian treaty-making process by statute in 1871.[155] Not only did the statute keep in force all existing Indian treaties, but federal practice for over thirty-five years after enactment of the statute ending treaty-making continued to be the negotiation of *agreements* with Indian tribes affected by Indian policy. The difference was that such agreements were taken back to Washington, D.C. and enacted as statutes, rather than ratified as treaties.[156] From the perspective of the Indian tribes, the process of negotiation remained unchanged. Indeed, from the tribal perspective, treaty-making continued into the twentieth century. The 1871 statute only changed what happened to the documents once returned to Congress for ratification. Since Congress began to approve such treaty-substitutes in statutory format, Congress gradually felt at liberty to unilaterally amend or alter the form of the agreement during the legislative deliberations.

While the constitutionality of the 1871 federal statute ending Indian treaty-making has never been questioned, there are significant reasons to question the constitutionality of the statute ending Indian treaty-making. First, the statute purported to prohibit the exercise of the treaty-making

---

154. For a sample of Ely Parker's views on Indian sovereignty, see COMM'R IND. AFF. ANN. REP., H.R. EXEC. DOC. NO. 1, 41st Cong., 2d Sess. 448 (1869), set forth, in part, in FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 106 (Rennard Strickland ed., 1982) [hereinafter COHEN].

155. Act of Mar. 3, 1871, ch. 120, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71):

> That hereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty: *Provided*, *further*, That nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe.

See generally COHEN, *supra* note 154, at 106–07 (citing relevant primary historical materials). For a judicial discussion regarding the end of treaty-making, see Antoine v. Washington, 420 U.S. 194, 201–04 (1975).

156. Congress apparently regarded the agreements as functionally equivalent to treaties, particularly for purposes of securing tribal consent. *See, e.g.*, Act of May 1, 1876, ch. 88, 19 Stat. 41, 45 (specifically authorizing federal commissioners "to treat with the Sioux Indians" to secure an agreement).

power which, under Article I of the Constitution, is allocated to the President of the United States. A federal statute prohibiting the President from exercising one of his constitutionally assigned duties seems to pose significant separation of powers problems, even if the Senate ultimately must ratify negotiated treaties.[157] Second, while not expressed on the face of the statute, by effectively converting the presidentially initiated treaty-making process into a legislative process, the 1871 statute might be thought to aggrandize congressional power at the expense of the executive branch, thereby posing a different separation of powers concern.[158] Third, by effectively substituting a process of statutory approval of Indian agreements for the Senate treaty ratification process prescribed in Article II, Congress has, by statute, attempted to amend the constitutionally prescribed Congressional process for treaty approval.[159] Whatever the constitutionality of the 1871 statute, the historical fact is that it was implemented by negotiating agreements with Indian tribes that Congress ratified as statutes.

It was not, however, until after the United States Supreme Court declared in 1903 that Congress had the unilateral power to alter and abrogate Indian treaties that the process of agreement-making with Indian tribes ended. Tribal consent to effectuation of federal Indian policy, therefore, ended not as a result of the end of treaty-making, but as a casualty of the United States Supreme Court's development of a doctrine of federal plenary power in the field of Indian affairs.

The first step in that development came in a case testing the first major unilateral congressional intrusion into the internal governance of the tribe. After strong pressure by the Indian agents and the Indian Service, Congress in 1885 enacted the Federal Major Crimes Act.[160] This legislation overturned the result of the *Crow Dog*[161] decision, discussed above, which held that the Sioux Nation had exclusive jurisdiction over an intra-tribal murder. Recall that Chief Justice Marshall had noted in *Worcester* that British and American policy had never been to intrude into the internal

---

157. *See, e.g.*, United States v. Klein, 80 U.S. (13 Wall.) 128, 128–29 (1871) (holding unconstitutional Congressional efforts to nullify the effects of a Presidential pardon).

158. *See, e.g.*, Weiss v. United States, 510 U.S. 163, 188 n.3 (Souter, J. concurring) (1994); Freytag v. Comm'r, 501 U.S. 868, 884 (1991); Mistretta v. United States, 488 U.S. 361, 395 (1989) (all discussing separation of powers limitations on Congress aggrandizing its own power).

159. *Cf.* Clinton v. New York, 524 U.S. 417, 421, 447–49 (1998) (rejecting the line item veto statute as a Congressional substitution of a constitutionally-prescribed procedure without constitutional amendment).

160. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153).

161. 109 U.S. 556 (1883).

governance of the Indian tribes.[162] The Federal Major Crimes Act, as originally enacted, altered that approach by expressly granting the federal government jurisdiction over seven serious crimes,[163] ranging from murder and rape to larceny, when committed in Indian country by an Indian against the person or property of an Indian or other person. While the statute, as originally proposed, called for Indian offenders to be tried in federal court and "not otherwise," the bill was amended to clearly indicate that it did not affect or displace preexisting tribal jurisdiction over such serious crimes.[164]

The Federal Major Crimes Act, passed only 115 years ago, therefore constituted the very first Anglo-American colonial effort to assert direct governing power over the Indian tribes. Nevertheless, this effort left the pre-existing power of the tribes in place. Thus, for three-quarters of the almost 400 year period since first contact between the tribes and Anglo-American colonial powers in the United States, no direct governing power had ever been asserted by the British or Americans over the Indian tribes or their members. The tribes' relative military strength alone could explain this result from the time of initial contact to the War of 1812. After the War of 1812, however, a further explanation for the lack of federal governing power over Indian tribes was their lack of allegiance to the United States and their general lack of consent to joining the American Union (beyond those few Indian treaties containing unfulfilled promises of statehood and representation in Congress). Thus, the constitutional theory developed to sustain the Federal Major Crimes Act represented a major turning point in American approaches toward Indians, legitimating assertion of governing authority over non-consenting peoples who were not then citizens of the United States or, as *Elk v. Wilkins*[165] demonstrated, eligible to vote in federal or state elections.

The United States Supreme Court addressed the constitutionality of the Federal Major Crimes Act in *United States v. Kagama*,[166] perhaps the first

---

162. *See supra* notes 77–81 and accompanying text.

163. By amendment the list has now grown to fourteen enumerated crimes. 18 U.S.C. § 1153 (2000).

164. For a review of this legislative history with appropriate original citations and later case decisions on the question, see ROBERT N. CLINTON, NELL JESSUP NEWTON & MONROE E. PRICE, AMERICAN INDIAN LAW: CASES AND MATERIALS 276–78 (1991). Indeed, the United States Supreme Court heard a habeas case involving a Cherokee tribal court murder conviction in 1896, thirteen years after enactment of the Major Crimes Act, with no suggestion whatsoever that the tribe lacked jurisdiction to try an Indian who committed a murder on the reservation. Talton v. Mayes, 163 U.S. 376 (1896).

165. 112 U.S. 94 (1884).

166. 118 U.S. 375 (1886). For a good survey of the *Kagama* decision and the plenary power doctrine it created, see Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984).

American constitutional case to contest the validity of a *federal* Indian statute on constitutional grounds. Since virtually all prior federal statutes in Indian affairs conformed to the baseline understanding of the tribal↔federal relationship, there had been no occasion prior to *Kagama* to test the power of Congress to depart from the treaty-based understandings of the limitations of federal authority. While the decision by the United States Attorney to initiate a federal prosecution in *Crow Dog* certainly had departed from that understanding, the Supreme Court rejected that effort as not authorized by federal statutes. Thus, the result in *Crow Dog* reflected and implemented the baseline understanding of the tribal↔federal relationship. In overturning *Crow Dog*, Congress clearly had ventured into new constitutional territory. As *Kagama* demonstrates, the United States Supreme Court rapidly closed ranks with Congress, developing new and novel theories to rationalize and legitimate the expanding American colonialism in Indian country.[167] The Supreme Court simply validated the unilateral claims by Congress to a greatly enlarged legal hegemony over non-consenting Indian peoples. The Court's first effort at rationalizing this new federal role in *Kagama* is truly instructive. It indicates how novel, and constitutionally unfounded, the federal Indian plenary power doctrine that evolved from that case really was.

In *Kagama*, the United States tried to defend the enactment of the Federal Major Crimes Act, in part based on the one textual source of power involving Indians found in the United States Constitution—the Indian Commerce Clause.[168] Close reading of the opinion reflects the fact that the Court clearly *rejected* the Indian Commerce Clause as a broad source of Congressional authority to directly regulate Indians.[169] Justice Miller's opinion for the Court, therefore, expressly rejected the only textual source of federal power dealing with Indians as a source for any broad plenary authority in the field of Indian affairs. He wrote:

> The mention of Indians in the Constitution which has received most attention is that found in the clause which gives Congress "power to regulate commerce with foreign nations and among the several States, and with the Indian tribes." This clause is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian tribes. But we think it would be a very strained construction of this clause, that a system of criminal laws for Indians living peaceably in their reservations, which left out the

167. *See generally Kagama*, 118 U.S. 375 (1886).
168. *Id.* at 378–79.
169. *Id.*

> entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.[170]

Despite rejecting the only textual source of power over Indian affairs, the Court nevertheless sustained the constitutionality of the Federal Major Crimes Act.[171] Its analysis represented a *tour de force* in judicial constitutional creativity and marked a major departure from established norms of constitutional interpretation.

Despite the fact that conventional constitutional analysis then and now favored grounding exercises of federal legislative power in textual delegations derived from the language of the United States Constitution,[172] the Supreme Court in *Kagama* totally abandoned such traditions and grounded the exercise of federal colonial governing power over the Hoopa Valley Indian involved in the case on a totally unique theory. Justice Miller explained that since the lands of the Indian tribes were located within the territorial boundaries of the United States, a point long acknowledged by the Court, the United States Constitution must grant governing authority and sovereignty over those lands to one of the sovereigns comprising the United States. As Justice Miller put it:

> But these Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exists within the broad domain of sovereignty but these two.[173]

---

170. *Id.*

171. *Id.*

172. For other criticisms of the lack of textual support for the plenary power doctrine that emerged from *Kagama*, see R. BARSH & J. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 257–69 (1980); Robert T. Coulter, *The Denial of Legal Remedies to Indian Nations Under U.S. Law, in* RETHINKING INDIAN LAW 103, 106 (National Lawyers Guild Committee On Native American Struggles ed., 1982) ("[T]here is not textual support in the Constitution for the proposition that Congress has plenary authority over Indian nations."); Milner S. Ball, *Constitution, Court, Indian Tribes,* 1987 AM. B. FOUND. RES. J. 1.

173. *Kagama*, 118 U.S. at 379. Some commentators have suggested that this quotation might suggest some basis for the federal plenary power doctrine in the power granted to Congress by Article IV, section 3, clause 2 "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." *E.*g,. NEWTON, *supra* note 166, at 195. The problem with that analysis is that the scope of the federal territorial power conferred by this clause is properly confined to disposing of and regulating portions of the federally-owned public domain. *E.g.*, Alabama v. Texas, 347 U.S. 272, 273

Of course, the problem with the premise of this approach is that it totally ignored the tribal aboriginal sovereignty that formed the basis for all Indian treaties and was central to the baseline understanding of the tribal↔federal relationship. In short, by premising his argument on the assumption that only federal and state governments had any authority over the lands comprising the United States, Justice Miller assumed away the very question he was asked to address—whether Congress, by arrogating to itself power previously exercised exclusively by the tribes, could enact statutes that infringed on the right of reservation Indians to peaceably govern themselves.

Justice Miller's defense of this approach was even more remarkable. He relied on *Cherokee Nation* and incorrectly suggested that it "held that the Cherokees were not a State or nation within the meaning of the Constitution, so as to be able to maintain the suit."[174] While *Cherokee Nation* clearly held that Indian tribes did not constitute *foreign* nations within the meaning of Article III, section 2 of the United States Constitution, Justice Marshall's opinion clearly indicated that the Cherokees were indeed both a state and a nation.[175] In short, Justice Miller cited *Cherokee Nation* for precisely the argument it clearly rejected. Whereas

---

(1954); United States v. California, 332 U.S. 19, 27 (1947); United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915). Indian lands, even when held in trust for a tribe by the federal government, have never been considered part of the federal public domain and require affirmative cession to the United States by the tribes and a federal declaration restoring the land to the public domain before they become part of the federal public domain. *E.g.,* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 354 (1998); Hagen v. Utah, 510 U.S. 399, 418 (1994). Any broader reading of the scope of federal authority conferred by the Property Clause would suggest that any lands within the territory of the United States were subject to direct, plenary federal power, rather than state or tribal governance—a result that would completely destroy the basic concept of federalism on which the document was drafted. Perhaps the argument might be made that within the states, the federal government and the states allocated powers between themselves by the constitutional plan, but the federal government retains *all* powers outside of states. The problem with this argument is three-fold. First, as this article demonstrates, this interpretation is plainly inconsistent with the tenor of all treaties signed with Indian tribes for over a hundred years, including treaties signed both before and after the Constitution was adopted. Second, as this article also points out, the plain text of the Constitution recognizes both the sovereignty and separate autonomy of the Indian tribes in the Indian Commerce Clause and the "Indians not taxed" clauses. Finally, reliance on a formal grant of property power by the people of the United States to the federal government fails to provide any tribal consent to that governance since the people of the United States expressly excluded tribal Indians, as the "Indians not taxed" clauses for the census demonstrate. Thus, use of the territorial power as a justification to override tribal sovereignty has the same problem as the *Kagama* opinion itself—it is simply inconsistent with the text, history, and theory of the adoption of the Constitution.

174. *Kagama*, 118 U.S. at 379 (citing Cherokee Nation v. Georgia, 30 U.S. (5 Pet) 1 (1831)).

175. *See* text accompanying *supra* note 72.

Chief Justice Marshall upheld tribal nationhood in *Cherokee Nation*, Justice Miller denied it in *Kagama*. Furthermore, totally ignoring the fact that in the Commerce Clause, Indian tribes are grouped with foreign nations and states, both unquestionably sovereign, Justice Miller offers the following argument derived from that clause to explain why tribes are not nations:

> The commerce with foreign nations is distinctly stated as submitted to the control of Congress. Were the Indian tribes foreign nations? If so, they came within the first of the three classes of commerce mentioned, and did not need to be repeated as Indian tribes. Were they nations, in the minds of the framers of the Constitution? If so, the natural phrase would have been "foreign nations and Indian nations," or, in the terseness of language uniformly used by the framers of the instrument, it would naturally have been "foreign and Indian nations."[176]

Thus, Justice Miller turned a constitutional clause, in which tribal sovereignty is directly recognized, on its head and employed it to deny tribal sovereignty. Elsewhere in the opinion, he incorrectly suggested that Indian tribes historically,

> were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.[177]

In this way, he denied the existence of tribal sovereignty and attributed the tribes' "semi-independent status" to the failure, to date, to subject them to local law, a failure his opinion sought to remedy. Ironically, the quotation nevertheless recognized that Indian tribes had not been subjected to state or federal law to that point, but Justice Miller considerably understated the constitutional significance of that fact.

Having established to his own satisfaction that the Indians were located within the United States and that governance of the country was exclusively committed to either the federal government or the states, the most remarkable portion of Justice Miller's opinion was his justification for vesting the power in Congress, rather than the states. His entire effort to legitimate the exercise of federal power in the field of Indian affairs derives from the following language:

---

176. *Kagama*, 118 U.S. at 379.
177. *Id*. at 381–82.

> [The] effect [of the Federal Major Crimes Act] is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation. 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. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. 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.[178]

Careful attention to this penultimate language from the *Kagama* opinion clearly demonstrates that the Court rationalized the growing colonial power of Congress on very peculiar constitutional grounds. Nowhere does the Court cite or rely on a textual delegation of congressional authority. Rather, the Court merely asserts a colonial power to govern Indians because they are "communities dependent on the United States."[179] The *Kagama* opinion, thus, employs their dependency and the federal government's trusteeship over them as a *source* of Congressional power. The very trusteeship that Chief Justice Marshall suggested in *Cherokee Nation* implemented the treaty-based federal obligation *to protect Cherokee sovereignty* and territorial integrity was employed in *Kagama* as a source of federal authority to attack tribal sovereignty. Again, the Court simply turned prior precedents on their head and cited them for arguments they had rejected.

Had the *Kagama* opinion merely misused prior precedents it would not be that remarkable. Of far greater significance are the actual political constructs that underlie the assertion of a federal Congressional power based on wardship. In *Kagama*, the Court does not respect tribal sovereignty, but, rather, it degrades their autonomy, claiming the tribes are "dependent largely for their daily food; dependent for their political rights."[180] As employed in *Kagama*, wardship was not about federal treaty obligations of protection of tribal sovereignty, which was the original conception of dependence offered in *Cherokee Nation*. Instead, the *Kagama* wardship rationale was about supposed racial, cultural, economic and political inferiority of tribes. Federal power over them derived from the

178. *Id.* at 383–84.
179. *Id.*
180. *Id.*

federal government's paternalistic superior authority to provide their governance. Under this construct, the federal government supplies governance to a dependent and inferior people whose very dependence and inferiority somehow creates, *without any textual constitutional delegation*, expansive paternalistic federal authority. Clearly, this image is nothing short of a late-nineteenth century "white man's burden" argument of the type commonly employed during the period to justify European colonial expansion.[181] The roots of expanded American "constitutional power" over Indians, therefore, did not lie in the text of the Constitution, but, rather, in late-nineteenth century racist rationalizations for western colonialism. These are political excuses, not reasoned constitutional analyses, despite their origin in United States Supreme Court opinions. The Supreme Court relied on no textual constitutional source for the wardship power it claimed. Indeed, the Supreme Court in *Kagama* expressly rejected any reliance on the primary textual source of Congressional power for dealing with Indians—the Indian Commerce Clause.

In short, the Congress succumbed to the late-nineteenth century colonial impulse and, far from standing in its way, the Supreme Court applauded the efforts, overtly employing the rhetoric of the "white man's burden" to save the Indian heathens from their own depravity. Significantly, nowhere in the *Kagama* opinion did Justice Miller note the crux of the point that was central to the Court's prior decisions in *Cherokee Nation*, *Worcester, Crow Dog* and *Elk v. Wilkins*, namely that Kagama and the other Indians of the Hoopa Valley Reservation were then *not* United States citizens, could not vote in federal or state elections, and owed no allegiance whatsoever to the United States. Indian political participation and consent had become irrelevant, as it was with most colonial assertions of authority over non-consenting peoples. Therefore, ensuring that federal legislative power did not exceed the constitutional limits of the people's delegation was beside the point, at least where allegedly inferior Indian wards of the federal government were concerned.

The sweeping significance of *Kagama* became evident in *Cherokee Nation v. Southern Kansas Railway Co.*,[182] in which the Supreme Court rejected a challenge by the Cherokees to a federal statutory grant of a railroad right of way without any condemnation proceedings over lands that

181. *See, e.g.*, Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law,* 40 HARV. INT'L L.J. 1 (1999); H. Murray Hofmeyr, *Christian Mission and Colonialism in Southern Africa and African Responses: Some Case Studies,* 14 EMORY INT'L L. REV. 1029 (2000); Ediberto Roman, *A Race Approach to International Law (RAIL): Is There a Need for Yet Another Critique of International Law?*, 33 U.C. DAVIS L. REV. 1519 (2000).

182. 135 U.S. 641 (1890).

the Cherokees held in fee simple. The Cherokees suggested, among other things, that the statutory grant of the right of way infringed on the Cherokee's exclusive sovereignty over their own territory. Justice Harlan's opinion for the Court responded:

> The proposition that the Cherokee Nation is sovereign in the sense that the United States is sovereign, or in the sense that the several States are sovereign, and that that nation alone can exercise the power of eminent domain within its limits, finds no support in the numerous treaties with the Cherokee Indians, or in the decisions of this court, or in the acts of Congress defining the relations of that people with the United States. From the beginning of the government to the present time, they have been treated as "wards of the nation," "in a state of pupilage," "dependent political communities," holding such relations to the general government that they and their country, as declared by Chief Justice Marshall in *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, "are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility." It is true, as declared in *Worcester v. Georgia*, 6 Pet. 515, 557, 569, that the treaties and laws of the United States contemplate the Indian Territory as completely separated from the States, and the Cherokee Nation as a distinct community . . . . But that falls far short of saying that they are a sovereign State, with no superior within the limits of its territory. By the treaty of New Echota, 1835, the United States covenanted and agreed that the lands ceded to the Cherokee Nation should at no future time, without their consent, be included within the territorial limits or jurisdiction of any State or Territory . . . . But neither these nor any previous treaties evinced any intention, upon the part of the government, to discharge them from their condition of pupilage or dependency, and constitute them a separate, independent, sovereign people, with no superior within its limits.[183]

Justice Harlan thereafter relied on *Kagama*, quoting the portion of the opinion set forth above that indicated that all territory in the United States was subject to either federal or state governance. Significantly, unlike *Kagama,* the Court's opinion in *Southern Kansas Railway* placed brief reliance on the Indian Commerce Clause, suggesting that the railroad running through and serving the Cherokees was engaged in Indian

183. *Id.* at 653–54.

commerce. The opinion, however, rested primarily on the broad congressional power in Indian affairs derived from the federal trusteeship over Indians, albeit in this case *not* over their lands, rather than resting any broad claims of congressional authority on the Indian Commerce Clause. The *Southern Kansas Railway* opinion therefore suggests the sweeping importance of *Kagama* in authorizing Congress to enact broad statutes under the guise of wardship that usurped traditional tribal prerogatives of governance of their own reservation and even displaced Indian property rights.

While the *Kagama* opinion virtually ignored the traditionally recognized sovereignty of the Indian tribes and the *Southern Kansas Railway* decision certainly disparaged tribal sovereignty, neither decision clearly extinguished that sovereignty and the federal courts continued to recognize it. For example, ten years after *Kagama*, in *Talton v. Mayes*,[184] the Supreme Court refused a writ of habeas corpus in a murder conviction case arising out of the courts of the Cherokee Nation. The Court indicated that the Cherokee courts were not subject to Fifth Amendment limitations on the exercise of their criminal powers since "the powers of local self government enjoyed by the Cherokee nation existed prior to the Constitution"[185] and, therefore, were not exercises of federal power subject to the Fifth Amendment. Echoing *Kagama*, the *Talton* Court nevertheless suggested that "the Indian tribes are subject to the dominant authority of Congress."[186]

Thus, the then emerging reconciliation of the traditional baseline understanding of the tribal↔federal relationship with the newly developed justification for federal colonial power assumed that Indian tribal powers constituted interim vestigial remains of *aboriginal sovereignty*, which, nevertheless, were subject to being diminished or extinguished by Congress. While not at issue in that case, it should be noted that murder was a crime covered by the Federal Major Crimes Act and the *Talton* case clearly indicates that not only were tribes continuing to exercise their preexisting jurisdiction over such crimes after enactment of the Major Crimes Act, but the Supreme Court apparently conceded *sub silentio* enactment of the Federal Major Crimes Act had not displaced the preexisting tribal jurisdiction over the crime. Thus, while the Court was rhetorically staking out broad claims of authority for Congress, it was not, in fact, aggressively construing federal statutes in a fashion that interfered with tribal sovereignty.

---

184. 163 U.S. 376 (1896).
185. *Id.* at 384.
186. *Id.*

As Congress and the federal executive increasingly enlarged their colonial governance over Indians, later cases followed the trend established in *Kagama*. When, in 1883, the Indian Service created the Indian Police, the Courts of Indian Offenses, and the Code of Indian Offenses[187] to outlaw traditional Indian religious and cultural practices on their own reservation, all without the benefit of any authorizing federal statute, one federal judge upheld and applauded the new initiative effort.[188] Relying on *Kagama*, the court called these new federal colonial institutions "mere educational and disciplinary instrumentalities" and suggested that "the reservation itself is in the nature of a school, and the Indians are gathered there, under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man."[189]

As congressional efforts to enlarge federal governing authority over Indian peoples increased, the opportunities for federal judicial ratification of these new initiatives grew. Perhaps the two most important federal initiatives developed during this period to undermine tribal existence and to forcibly and involuntarily assimilate Indians into American society involved the implementation of the General Allotment Act of 1887[190] and the development of the Bureau of Indian Affairs and missionary boarding schools. The General Allotment Act deliberately sought to break down tribal cohesion and the authority of traditional tribal leaders by changing the Indian land tenure system from communal tribal ownership to individually-owned allotments.[191] Thus, the Act called for the allotment of tribal landholdings to individual members in fixed acreage plots, with any "surplus" land not needed for such allotments being sold to non-Indians. The Act therefore opened Indian reservations to non-Indian settlement for the first time. The Indian boarding schools that first emerged in the late-nineteenth century were designed to remove Indians from socialization by tribal elders and their families and to substitute a western-style vocational

187. *See generally* WILLIAM T. HAGAN, INDIAN POLICE AND JUDGES: EXPERIMENTS IN ACCULTURATION AND CONTROL (1966) (discussing the history of the Courts of Indian Offenses, the Indian Police, and the Code of Indian Offenses). A complete copy of the original Code of Indian Offenses is available from the author's website at http://www.law.asu.edu/HomePages/Clinton/Ind1/CFRCt.htm.

188. United States v. Clapox, 35 F. 575 (D. Or. 1888).

189. *Id*. at 577.

190. General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at scattered sections of 25 U.S.C.).

191. S*ee generally* FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880–1920, at 41–187 (1984); J. P. KINNEY, A CONTINENT LOST—A CIVILIZATION WON (1937); D.S. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (Francis Paul Prucha ed., 1973).

education far removed from the reservation that sought to eliminate tribal traditions, cultures and languages.[192]

Tribal efforts to resist imposition of allotment produced some of the most remarkable assertions of the wardship-based power first announced in *Kagama*. In *Stephens v. Cherokee Nation*,[193] the Court heard appeals in consolidated cases from the Five Tribes of Oklahoma contesting the establishment of a federal territorial court whose jurisdiction over the Indian Territory included appeals from a federal commission that determined tribal citizenship and enrollment for purposes of allotting their lands. The creation of such federal courts with jurisdiction over the Indian Territory obviously intruded into tribal sovereignty and clearly violated express federal treaty guarantees that the lands of the affected tribes would never be included in any states or territories and their inhabitants would never be subjected to state or territorial law.[194] Responding to the claim that the creation of the federal court for the Indian Territory was beyond the power of Congress, Chief Justice Fuller simply assumed the existence of a broad federal power over the Indians:

> The United States court in the Indian Territory is a legislative court and was authorized to exercise jurisdiction in these citizenship cases as a part of the machinery devised by Congress in the discharge of its duties in respect of these Indian tribes, and *assuming that Congress possesses plenary power of legislation in regard to them*, subject only to the Constitution of the United States, it follows that the validity of remedial legislation of this sort cannot be questioned unless in violation of some prohibition of that instrument.[195]

It appears that this brief reference in *Stephens* constitutes the very first time the Supreme Court suggested the existence of a "plenary power of legislation" over Indians.[196] Clearly, since this power appears to derive from the "discharge of [Congress's trust] duties in respect to these Indian tribes," the source of this so-called plenary power doctrine was the wardship power announced in *Kagama*.[197] Thus, while *Kagama* never employed the phrase "plenary power," it constitutes the cornerstone on

---

192. HOXIE, *supra* note 191, at 189–210 (discussing the boarding school movement); K. TSIANINA LOMAWAIMA, THEY CALLED IT PRAIRIE LIGHT: THE STORY OF CHILOCCO INDIAN SCHOOL (1994); BRENDA J. CHILD, BOARDING SCHOOL SEASONS: AMERICAN INDIAN FAMILIES, 1900–1940 (1998).

193. 174 U.S. 445 (1899).

194. *E.g.*, Treaty of Dancing Rabbit Creek, *supra* note 18, art. IV, at 333.

195. *Stephens*, 174 U.S. at 478 (emphasis added).

196. *Id.*

197. *Id.*

which the federal Indian plenary power doctrine was built. After suggesting that Congress unilaterally diminished tribal sovereignty by adopting the 1871 statute ending treaty-making and extensively quoting from the *Southern Kansas Railway* decision quoted above, Chief Justice Fuller reiterated that as a result of wardship, Indian tribes were now subject to the paramount authority of the United States for their own benefit:

> [Based on] the *paramount authority of Congress over the Indian tribes*, and of the duties imposed on the Government by *their condition of dependency*, we cannot say that Congress could not empower the Dawes Commission to determine, in the manner provided, who were entitled to citizenship in each of the tribes and make out correct rolls of such citizens, an essential preliminary to effective action in promotion of the best interests of the tribes.[198]

Thus, the federal government could arrogate to itself the determination of the citizenship in Indian tribes for purposes of implementing the federal allotment policy, thereby displacing tribal processes, based simply on the wardship of the tribe. As in *Kagama*, neither textual sources of constitutional power nor treaty agreements with the tribe were relied upon as a basis for this plenary power of Congress over Indian tribes. Plenary federal power over Indians derived simply from wardship—the "white man's burden" to protect the heathens, apparently from their own western-style governments. So much for traditional American constitutional principles of consent of the governed or constitutional delegation of authority!

The *Stephens* opinion is also significant because it reflects the two roles played by the Indian plenary power doctrine that the Supreme Court was busy inventing to legally rationalize expanding American colonialism in Indian country. First, in the absence of any textual delegation of such authority in the United States Constitution, the Supreme Court employed the wardship-based Indian plenary power doctrine to supply the source of federal Congressional authority. That the supposed wardship was unlimited by the treaty clauses guaranteeing tribal protection and constituted an exercise of undelegated power over a non-consenting people was irrelevant in an age of colonialism no longer ruled by America's original constitutional principles of social compact and popular delegation. Second, by making the plenary federal power over Indian affairs *paramount*, the plenary power doctrine supplied a notion of federal supremacy over Indian tribes that the Supremacy Clause of the United States Constitution could not supply because of its express references to supremacy over *state* law. Thus,

198. *Id.* at 488 (emphasis added).

not only the plenary power doctrine, but also the idea that federal law is superior to and can displace tribal law, are grounded on the late-nineteenth century doctrines of racial superiority that fueled the colonialism of that day. For the early twentieth century federal decisions, the Supreme Court's newly invented plenary doctrine constituted a full service legal doctrine that completely subjected the nation's Indian wards to unlimited federal governance, utterly without their consent or political participation, and purportedly bound them to abide by such involuntarily imposed laws.

This trend continued in the major case brought by the tribes to challenge implementation of the allotment policy—*Lone Wolf v. Hitchcock*.[199] One federal judge rightly said of this decision, "[t]he day *Lone Wolf* was handed down, January 5, 1903, might be called one of the blackest days in the history of the American Indian, the Indians' Dred Scott decision."[200] The case involved efforts by traditional Kiowa and Commanche, led by the Kiowa medicineman Lone Wolf, to enjoin enforcement of the allotment process on their reservation at Fort Sill, Oklahoma. They claimed that the tribal "agreement" that Congress approved by statute to implement the allotment process had been procured by fraud and did not comply with the procedures established for such agreements by prior treaties between the affected tribes and the United States.[201] Specifically, the tribal leaders argued that the Treaty of Medicine Lodge, which the Kiowa and Commanche negotiated in 1868 with the federal government, expressly required the approval of three-quarters of the adult males of the tribes for any future cession of lands.[202] Since the allotment agreement involved the sale of surplus lands to non-Indians, the Indians claimed not only that the agreement had been procured by fraudulent misrepresentations of its contents to tribal members who spoke no English, but also that it failed to secure the required signatures from three-quarters of the adult males of the tribes.[203] In addition to these treaty-based claims, the Indian petitioners also

199. 187 U.S. 553 (1903).

200. Sioux Nation v. United States, 601 F.2d 1157, 1173 (Ct. Cl. 1979) (Nichols, J., concurring), *aff'd* 448 U.S. 371 (1980).

201. The historical background and basis of these claims are nicely summarized in BLUE CLARK, *LONE WOLF V. HITCHCOCK*: TREATY RIGHTS AND INDIAN LAW AT THE END OF THE NINETEENTH CENTURY (1994).

202. *Lone Wolf*, 187 U.S. at 564.

203. This was not the first time that Congress had enacted a purported agreement that had not received the requisite number of signatures required by a prior Indian treaty. The Fort Laramie Treaty of 1868 with the Lakota (Sioux) also expressly required three-quarters of the adult males of the tribe to approve any future cession of Sioux lands protected under the treaty. When the Manypenny Commission was sent out to Sioux country to secure a cession of the Lakota's sacred *Paha Sapa* (the Black Hills) after gold was discovered in the area and as punishment for the Lakota military victory the year before over the 7th Cavalry led by General

claimed that the allotment process constituted a taking of their lands in violation of the Fifth Amendment.

The remarkable opinion of the Supreme Court written by Justice White summarily swept aside all of the Indian objections. Since prior treaties constituted the most serious legal impediment to growing American legal hegemony over non-consenting Indians, Justice White simply eliminated the treaties as binding legal obligations, at least with respect to the United States' obligations under the treaty. The *Lone Wolf* Court held that Congress could unilaterally abrogate its prior Indian treaties by statute,[204] thereby making noncompliance of the agreement with the Medicine Lodge

---

George Armstrong Custer at the Battle of Greasy Grass (the Little Big Horn), the treaty commissioners could secure signatures approving the agreement from only ten percent of the adult males, despite their repeated threat to cut off the Sioux Nation's rations (their only means of subsistence after federally-sponsored destruction of their buffalo-hunting based economy), a negotiating position described as "sell or starve." EDWARD LAZARUS, BLACK HILLS WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES 1775 TO THE PRESENT 71–95 (1991).

The importance of the rations and the federal government's ability to use starvation as a negotiating position is reflected in William T. Hagan, *The Reservation Policy: Too Little and Too Late*, *in* INDIAN-WHITE RELATIONS: A PERSISTENT PARADOX 161 (J. Smith & R. Kvasnicka, eds., 1976), *quoted in* United States v. Sioux Nation*,* 448 U.S. 371, 381 n.11 (1980):

> The idea had been to supplement the food the Indians obtained by hunting until they could subsist completely by farming. Clauses in the treaties permitted hunting outside the strict boundaries of the reservations, but the inevitable clashes between off-reservation hunting parties and whites led this privilege to be first restricted and then eliminated. The Indians became dependent upon government rations more quickly than had been anticipated, while their conversion to agriculture lagged behind schedule.
>
> The quantity of food supplied by the government was never sufficient for a full ration, and the quality was frequently poor. But in view of the fact that most treaties carried no provision for rations at all, and for others they were limited to four years, the members of Congress tended to look upon rations as a gratuity that should be terminated as quickly as possible. The Indian Service and military personnel generally agreed that it was better to feed than to fight, but to the typical late nineteenth-century member of Congress, not yet exposed to doctrines of social welfare, there was something obscene about grown men and women drawing free rations. Appropriations for subsistence consequently fell below the levels requested by the secretary of the interior.
>
> That starvation and near-starvation conditions were present on some of the sixty-odd reservations every year for the quarter century after the Civil War is manifest.

Despite the unsuccessful efforts by the United States to starve the Sioux into selling the Black Hills, Congress enacted the so-called agreement as a statute, Act of Feb. 28, 1877, 19 Stat. 254, and thereby unilaterally divested the Sioux of the Black Hills, an area that constituted probably the central most important and sacred part of the Great Sioux Reservation reserved to them in the Fort Laramie Treaty. *See generally* United States v. Sioux Nation, 448 U.S. 371 (1980) (describing these events and finding them to constitute a taking).

204. 187 U.S. at 553.

Treaty irrelevant. Tribal consent, therefore, also became legally irrelevant! The justifications offered for such sweeping federal power again derived from wardship.

Justice White's opinion in *Lone Wolf* began by suggesting that the Indians' treaty-based claim

> in effect ignores the status of the contracting Indians and the relation of dependency they bore and continue to bear towards the government of the United States. To uphold the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and to deprive Congress, in a possible emergency, when the necessity might be urgent for a partition and disposal of the tribal lands, of all power to act, if the assent of the Indians could not be obtained.[205]

Thus, wardship justified ignoring promises made to the Indian ward to protect the ward's lands where the promises were inconvenient for federal policy or inconsistent with the assertion of colonial authority. As the Court put it later in the opinion, "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."[206]

Since this sentence is perhaps the most frequently quoted source of the federal plenary power over Indians, it is worth carefully analyzing its context and its content. First, it is invoked to justify abrogating a treaty promise made to Indians, not exactly a responsible exercise of fiduciary responsibility since most fiduciaries are limited by the delegation of power contained in the instrument that creates their position, in this case the treaties and their guarantees of protection. Second, the opinion rests its justification for the plenary power doctrine on a historical assertion, i.e., that "[p]lenary authority over the tribal relations of the Indians *has been exercised by Congress from the beginning."*[207] As this essay demonstrates, this historical claim is demonstrably false! Congress never asserted *any* power to directly regulate Indian tribes until it enacted the Federal Major Crimes Act in 1885, a point validated by the decisions of the Supreme Court in *Crow Dog* and *Elk v. Wilkins*, decided during the two years preceding enactment of the Major Crimes Act. Thus, in point of historical fact, "the beginning" was less than two decades before *Lone Wolf*. While that was the beginning of major American assertions of colonial power over

---

205. *Id.* at 564.
206. *Id*. at 565.
207 . *Id.* (emphasis added).

Indian peoples, it surely was not and did not reflect the beginning of the tribal↔federal relationship.

If one accepted the *Lone Wolf* analysis of history, Congress simply could have sent George Washington's troops directly through Delaware country, rather than carefully negotiating a treaty with the Lenni Lenape, as it did. Obviously, at the time the Continental Congress knew it could not do so unilaterally. Indeed, the very fact that Congress sent federal treaty commissioners out to the Kiowa and Commanche to negotiate implementation of the allotment policy on their reservation clearly indicates that before *Lone Wolf,* Congress did not pretend to have broad power to unilaterally impose federal policy on non-consenting Indians, although it nevertheless had occasionally done so after 1885 as reflected by enactment of the Federal Major Crimes Act. *Lone Wolf*, of course, was decided well after a century of prior dealings with tribes in which the baseline understanding of the tribal↔federal relationship prevailed. As discussed below, it was the *Lone Wolf* decision itself that marked the real beginning of consistent unilateral congressional action in governing Indian tribes.

Finally, the federal Indian plenary power doctrine in part derives from a "hands-off" deferential attitude of the federal judiciary, leaving to Congress the final say on Indian matters. The last portion of the quoted sentence reads somewhat like an invocation of the modern political questions doctrine, and is often read that way. It also resembles, however, the deference the Supreme Court employed for almost a half-century with respect to congressional exercises of power under the Interstate Commerce Clause. While not expressly governed by or based on the political questions doctrine, the deference shown by the Supreme Court to congressional exercises of interstate commerce power in its decisions between 1938 and 1995 closely resembles the disinclination shown in *Lone Wolf* to carefully monitor exercises of the presumed plenary power of Congress over Indian affairs. Disappearance of that deference drives the Court's recent federalism revolution in favor of protecting state sovereignty by rigorously confining exercises of federal power within the strict confines of *delegated* federal powers. One might reasonably ask, given the similar origin of the Indian plenary power doctrine, why the same solicitude for confining Congress to *textually delegated* powers under the United States Constitution has not been applied to protect Indian sovereignty. Is it too much for the tribes to expect even-handed application of constitutional *delegation* principles in the United States Supreme Court?

The *Lone Wolf* decision also justified the unilateral abrogation of Indian treaties by Congress on the ground that treaties with foreign nations

similarly were subject to unilateral abrogation.[208] While the assertion is certainly correct, the Court totally failed to explore differences between foreign nations and Indian tribes. The territories of foreign nations are located outside the United States. Applying the analysis from *Kagama*, a power to unilaterally abrogate treaties with foreign nations involves no potential enlargement of American sovereignty over foreign nations or their subjects, merely a potential violation of international law. By contrast, as Chief Justice Marshall pointed out in *Cherokee Nation* and the Supreme Court emphasized in *Kagama* and the later plenary power cases, the lands held by Indian tribes are located within the exterior boundaries of the United States and are thought to comprise part of the United States, the very basis for the characterization of the tribes as *domestic* nations. Since *Kagama* employed the location of these lands within the United States as part of the basis for the justification of federal wardship power, there clearly is a different consequence of employing the same rule to Indian treaties that is applied to treaties with foreign nations—a substantial potential for the enlargement of the defaulting treaty party's power over the other party to the Indian treaty. Indeed, the facts of *Lone Wolf* drive home that point. The United States did not merely breach the treaty to pursue its own other diplomatic objectives, as say the United States did when it unilaterally abrogated its mutual defense treaty with Taiwan in order to pursue relations with the Peoples Republic of China. Rather, in *Lone Wolf*, the United States abrogated the Indian treaty so that it could appropriate and redistribute *tribal* land. The enlargement of the colonial authority of the federal government through unilateral treaty abrogation is transparent. No longer would the federal government's prior word or promises contained in treaty guarantees limit future Congressional actions in governing Indians.[209]

Perhaps the sweeping plenary power reaffirmed in *Lone Wolf* would not be quite so threatening if the courts were prepared at least to enforce the external prohibitions on the exercise of federal powers found in the Bill of Rights or otherwise against Congressional initiatives in Indian affairs. The *Lone Wolf* decision, however, responded to the petitioners' Fifth Amendment claims not only by rejecting them but also by announcing a general federal judicial policy of refusing in Indian cases to enforce the Bill of Rights limitations against Congress as well. Explaining that the United States as trustee of Indian property could transmute any real property assets through sale into cash, the Court tried to explain the expropriation of Kiowa

---

208. *Id.* at 566.

209. *Contra* F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting) ("Great nations, like great men, should keep their word.").

and Comanche land as an exercise of that trust power. Wardship, therefore, even trumped the Bill of Rights!

More importantly, however, the Supreme Court also rejected the Fifth Amendment claim on the ground that:

> We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress, and not to the courts.[210]

When coupled with congressional plenary power to legislate for its dependent, non-consenting, non-voting Indian wards, including the power to repudiate Indian treaties at will, the extraordinary deference the quoted portion of the *Lone Wolf* opinion demonstrated to Congress in response to the Fifth Amendment claim constituted a total judicial abdication of any enforcement of constitutional limitations on the federal government when it came to initiatives in Indian affairs. It was *colonialism über alles*! Wardship and dependency justified governance.

While *Cherokee Nation* too had suggested that political question considerations justified a judicial hands-off approach, Chief Justice Marshall's primary solution to the Indians' plight was negotiations between the tribe and the government, i.e., treaty-making. With treaty-making ended by law, if not in practice, and *Lone Wolf* holding that the United States government was not bound or limited by the obligations it previously assumed in Indian treaties, *Lone Wolf* rationalized and upheld unlimited and unreviewable congressional dominance over Indian wards of the federal government who at the time clearly could not even vote for the members of Congress who enacted the policies that governed them. Constitutional theories of limited government with delegated powers and the principles of popular delegation and consent of the governed had been cast to the winds, as had every other form of conventional constitutional government. Wardship and colonialism displaced conventional constitutional analysis in the United States Supreme Court. Even Justice Harlan, the sole dissenter in

---

210. *Lone Wolf*, 187 U.S. at 568.

Plessy v. Ferguson,[211] decided five years previously, joined in the result of the case, although not in the Court's opinion.

While Congress formally ended treaty-making with Indian tribes in 1871, *Lone Wolf* clearly demonstrates that, even by 1903, Congress clearly had *not* stopped negotiating individual agreements with the tribes. The only thing that the 1871 statute changed was that to facilitate the implementation of federal Indian policy, Congress approved individual agreements by statutory enactment, rather than by Senate ratification alone. Thus, the forms, if not the legal theory, of the original baseline understanding of the tribal↔federal relationship continued until the *Lone Wolf* decision. Within a couple of years after *Lone Wolf*, however, the federal government totally stopped negotiating formal treaties or agreements with Indian tribes. The theory seemed to be that if *Lone Wolf* held that Congress could simply legislate for Indians under the federal Indian plenary power doctrine without their consent, why bother to even get their consent. Thus, the disappearance of the treaty negotiation with Indians was not the formal result of the 1871 statute prohibiting such treaties; it was, rather, clearly a product of the justification for expanding American colonial power offered in *Lone Wolf*. The end of treaty-making was part and parcel of the mechanism for marginalizing Indian governance over their own reservation, in favor of expanded federal colonial authority. More surprisingly, the end of Indian treaty-making was a twentieth century phenomena, a casualty of late-nineteenth century colonialism. American Indian policy, therefore, has developed for less than a century under the colonial legacy of the federal Indian plenary power doctrine without formal consent from the affected tribes through treaty.

The unwillingness of the Supreme Court to enforce Bill of Rights limitations against federal exercises of the Indian plenary power doctrine was further reflected in the major Indian legal attack launched against the Indian boarding school movement. In *Quick Bear v. Leupp*,[212] the Court approved, over the objections from Lakota (Sioux) Indians, the use of Sioux trust funds (funds derived in part from treaty) for the payment of tuition of Indian students at boarding schools run by the Board of Catholic Indian Missions. Insofar as the plaintiffs invoked the Establishment Clause of the First Amendment to attack federal payments to sectarian schools, the Court rejected the claim, suggesting that the funds were actually Sioux trust monies. The Court held that nothing prevented the Lakota from using their own funds to send their children to such Catholic schools. Since the federal

211. 163 U.S. 537, 557 (1896) (Harlan, J., dissenting).
212. 210 U.S. 50 (1908).

government was making the contracts to send Lakota children to Catholic schools, often over their objections, as reflected by the suit, the Supreme Court therefore employed the Indians' wardship to justify use of Sioux trust monies to educate them in western religious and vocational ways, even when they objected to the practice. Wardship not only created the power, it trumped Establishment Clause limitations that otherwise would limit such federal actions. The trusteeship role of the federal government even permitted it to use Indian monies to attack Indian religious and cultural traditions and to promote, instead, *with Indian funds,* those of the Catholic Church and other western Christian missionary traditions.

Despite the Court's invention of the wardship power to validate unilateral federal legislative actions in Indian country, as *Talton* demonstrates,[213] many of the cases of that period did not overtly seek to limit tribal authority. The role of the federal judiciary during that period was primarily limited to validating and rationalizing the initiatives of the political branches of the federal government in Indian affairs, not directly limiting tribal authority itself. Thus, the contemporary cases held that the opening of some Indian reservations to massive non-Indian settlement created by various federal allotment programs had not diminished the complete sovereignty of the Indian tribes over their reservations where Congress had not clearly provided for such diminishment. For example, in *Buster v. Wright*,[214] the Eighth Circuit upheld application by the Creek Nation of a business activities tax on non-citizens of the Creek Nation to the activities of a nonmember who lived on the reservation. Significantly, the non-citizen who challenged the tax claimed he had purchased ceded Creek land that had been opened to non-Indian settlement through a cession and allotment agreement with the Creek Nation. Notwithstanding the fact that the nonmember taxpayer was conducting business on lands that he owned in fee simple within the Creek Nation, the court still held that the Creek Nation had ample authority to impose the tax since the activities were conducted within the boundaries of their nation. While the Eighth Circuit recognized that Congress had ample authority under the federal plenary power doctrine to limit such powers of the Creek Nation over nonmembers on such non-Indian owned lands within the reservation, the court found that it had not done so merely by entering into an agreement with the Creek Nation opening the reservation to non-Indian settlement. Such limitations on tribal authority would require a clearer, perhaps express, Congressional statement which was lacking in *Buster*. Thus, in the early federal plenary power doctrine cases the federal judiciary merely validated and rationalized

213. *See generally* Talton v. Mayes, 163 U.S. 376 (1896).
214. 135 F. 947 (8th Cir. 1905).

colonial policies undertaken by Congress or the President. As *Talton* and *Buster* demonstrate, it did not purport to chart its own colonial policy objectives limiting tribal authority. The irony is that with the late-twentieth century development of federal *judicial* Indian plenary power, the United States Supreme Court reversed this trend. In the process it would repeatedly hold that the very policies that *Talton* and *Buster* held had *not* curtailed tribal authority would be used to suggest that the authors of such legislation, indeed, had intended to seriously curtail tribal sovereignty. One might have thought that a contemporaneous court, such as the Eighth Circuit panel in *Buster*, which then had broad appellate jurisdiction over the Indian Territory, might have had a better understanding of the contemporaneous intention of Congress, than the Supreme Court almost a century later. While the current Court frequently cites *Talton*, and even *Buster*, approvingly, the broader significance of those decisions seems to have been lost on contemporary judicial understanding.

Other cases followed the *Kagama* wardship notion that developed the federal Indian plenary power doctrine, which reached its apex in *Lone Wolf*.[215] Perhaps the final doctrinal card the Supreme Court placed on its house of cards supporting the growing American colonialism in Indian country came in *United States v. Sandoval*,[216] a case contesting the legality of applying to the New Mexico Pueblos the federal liquor control laws originally enacted as part of the early Indian Trade and Intercourse Acts. Since these laws applied to other Indian reservations, the argument about

---

215. Illustrations can be gleaned from Supreme Court precedents of the period. In *Wallace v. Adams*, 204 U.S. 415, 422 (1907) (quoting Stephens v. Cherokee Nation, 174 U.S. 445, 447 (1899)), the Court noted:

> The United States court in Indian territory is a legislative court and was authorized to exercise jurisdiction in these citizenship cases as a part of the machinery, devised by Congress in the discharge of its duties in respect of these Indian tribes, and assuming that Congress possesses plenary power of legislation in regard to them, subject only to the Constitution of the United States, it follows that the validity of remedial legislation of this sort cannot be questioned unless in violation of some prohibition of that instrument.

In *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 306 (1902), the Court indicated:

> The plenary power of control by Congress over the Indian tribes and its undoubted power to legislate, as it had done through the act of 1898, directly for the protection of the tribal property, was in [*Stephens v. Cherokee Nation*] reaffirmed.

See also In re Heff, 197 U.S. 488, 498–99 (1905); Tiger v. W. Inv. Co., 221 U.S. 286, 311 (1911). After *Lone Wolf*, the cases generally cited its broad, sweeping and historically inaccurate statement that plenary power had been exercised by Congress over Indian affairs from the beginning. Thus, increasingly, the federal plenary power doctrine was based simply on a broad historical lie perpetrated by the Supreme Court to defend late-nineteenth century colonialism.

216. 231 U.S. 28 (1913).

their applicability to the Pueblos turned on their special legal status. In 1876, ten years before the initiation of this new colonial assault on Indians, the Supreme Court had been faced with a question of whether the restrictions on illegal settlements on Indian lands contained in the Trade and Intercourse Acts applied to Pueblo Indians, specifically those of Taos Pueblo. Reviewing the history of the Pueblo peoples of New Mexico and noting their peaceful, sedentary agricultural existence and their adoption of the Roman Catholic religion under Spanish and Mexican rule prior to United States accession to sovereignty in the area, the Court in *United States v. Joseph*[217] held that the Trade and Intercourse Acts did not apply to them. Indeed, the Court virtually found that the Pueblo Indians were not Indians for purposes of federal Indian law because of their civilized ways:

> The pueblo Indians, if, indeed, they can be called Indians, had nothing in common with this class [of tribes such as the Senecas and Oneidas]. The degree of civilization which they had attained centuries before, their willing submission to all the laws of the Mexican government, the full recognition by that government of all their civil rights, including that of voting and holding office, and their absorption into the general mass of the population (except that they held their lands in common), all forbid the idea that they should be classed with the Indian tribes for whom the intercourse acts were made, or that in the intent of the act of 1851 its provisions were applicable to them. The tribes for whom the act of 1834 was made were those semi-independent tribes whom our government has always recognized as exempt from our laws, whether within or without the limits of an organized State or Territory, and, in regard to their domestic government, left to their own rules and traditions; in whom we have recognized the capacity to make treaties, and with whom the governments, state and national, deal, with a few exceptions only, in their national or tribal character, and not as individuals.[218]

Having stereotyped most Indians as nomadic and uncivilized, the *Joseph* Court refused to treat sedentary agricultural Indian communities as Indians for purposes of the Trade and Intercourse Acts.[219]

Of course, the *Joseph* characterization of the Pueblo Indians as civilized threatened their wardship and therefore the justification for the exercise of federal plenary power over them. Other aspects of their legal history also raised similar problems. Since their primary political dealings had been

217. 94 U.S. 614 (1876).
218. *Id*. at 617.
219. *Id.*

with Spain and Mexico, before acquisition of United States sovereignty over New Mexico through the Treaty of Guadalupe Hidalgo between Mexico and the United States,[220] most of their rights derived from Spanish and Mexican law and the continued protection of those rights under the protection of the Treaty of Guadalupe Hildalgo. Thus, the Pueblo Indians, like the Cherokees, held their lands in fee simple; their lands were not held in trust by the United States, as are the reservation lands of many other Indian tribes. Furthermore, since the Pueblo Indians were citizens of Mexico and the Treaty of Guadalupe Hildalgo required the United States to treat all former Mexican citizens in the ceded territory as United States citizens and to respect their preexisting rights, the Pueblo Indians were arguably citizens of the United States.[221] The problem, of course, was whether Indians who were citizens of the United States could nevertheless be considered wards of the nation and subjected to the virtually uncontrolled power of Congress under the federal Indian plenary power doctrine.

Notwithstanding the fact that between 1876 and 1913 nothing had changed in the socio-economic or cultural patterns of the Pueblo Indians, other than perhaps an improvement in their income through the emergence of a thriving trade in pottery and Indian jewelry spawned by the railroads and Fred Harvey's tourist efforts, the Supreme Court in *Sandoval*[222] justified application to the Pueblos of the federal liquor control provisions of the Trade and Intercourse Acts by noting their purportedly primitive condition. The same people that the *Joseph* Court had called civilized had suddenly become primitive, described by the *Sandoval* Court as follows:

> The people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government. Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetichism, and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed and inferior people.[223]

Thus, the very same civilized Pueblo Indians described in the *Joseph* opinion were mischaracterized by the Supreme Court three decades later in *Sandoval* as having primitive ways of life with crude customs. The Court

220. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo].

221. *Id*. at arts. VII–IX.

222. United States v. Sandoval, 231 U.S. 28 (1913).

223. *Id.* at 39.

simply dismissed the earlier characterization of the Pueblo peoples as the "opinion of the territorial court, then under review, which are at variance with other recognized sources of information, now available."[224]

Since wardship supported federal plenary power and since both colonialism and wardship were tied to late-nineteenth century racial superiority notions, the Court simply described the Pueblos as an inferior people to subject them to the plenary power of Congress. To support the newly discovered primitiveness of the Pueblo Indians, the Court extensively cited and quoted from the reports of the Indian agents, who merely reported in characteristically disparaging ethnocentric terms on the religious and cultural traditions of the Pueblos, including their colorful ceremonial dance cycles that currently attract major tourist audiences. Apparently, one decade's religious practice was another decade's primitive exercise in fetishism. Many have suggested that race may be a socially-constructed concept, having no basis in scientific fact. This discussion clearly indicates that Indian wardship and the federal plenary power doctrine it supported constituted a legally-constructed doctrine, similarly having no basis either in any factual reality about the Indian tribes or in any legitimate constitutional, treaty, or other source. It derived solely from judicial *fiat* employing doctrinal approaches that could most charitably be considered radically unconventional constitutional analyses.

More importantly, in *Sandoval,* the Court summarily swept away the objections that the United States exercised no trust authority over Pueblo lands and that as citizens Indians could not be made wards of the United States subjected to the plenary power doctrine.[225] Citing *Kagama*, the Court indicated:

> [A]n unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state.[226]

This description of the wardship notion most clearly demonstrates the late-nineteenth century notions of white racial superiority involved in the creation of the Indian plenary power doctrine. As the *Sandoval* Court saw

224. *Id*. at 49.

225. *Id.*

226. *Id.* at 46. While the Court did note the existence of the Indian Commerce Clause at the same point in the opinion, the entire tenor of the opinion and the context of the reference clearly indicate that the Court grounded its decision, as it had in all the previous plenary power doctrine cases, on the wardship power of the United States and not on the Indian Commerce Clause. *Id.*

the matter, the United States, as "a superior and civilized nation," had a duty to civilize and protect inferior "dependent Indian communities."[227] Since the wardship power that supported the federal Indian plenary power doctrine derived from the supposed racial superiority of the federal government and the dependent status of Indian communities, rather than the trust status of Indian land holdings, the fact that the Pueblos held their title in fee simple, rather than trust title, was irrelevant to the scope of federal authority. Furthermore, since the Pueblos held their lands in communal, rather than individual, title, their lands resembled those of the Five Nations, which the Court already had subjected to the Indian plenary power doctrine. Insofar as United States citizenship of individual Indians was claimed to thwart application of the Indian plenary power doctrine, the Court responded simply, "[w]hether they are citizens is an open question, and we need not determine it now, because citizenship is not in itself an obstacle to the exercise by Congress of its power to enact laws for the benefit and protection of tribal Indians as a dependent people."[228]

If the wardship power is predicated on the racial superiority of the federal government over allegedly primitive Indian communities, then merely conferring citizenship on the Indians does not abolish the power unless their primitive condition thereby has been alleviated. But since the juxtaposition of *Joseph* and *Sandoval* strongly suggests that it was merely the race of the Pueblo Indians that rendered them primitive, no conferral of citizenship could alleviate their dependence since the Indians clearly cannot alter their race. Citizenship did not alter race! Indeed, the Supreme Court virtually conceded as much when in *Sandoval* it briefly suggested the only limit it recognized on the Indian plenary power doctrine. The Court opined:

> Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.[229]

Thus, the only limitation on the Indian plenary power doctrine was that it could only be invoked with respect to "distinctly Indian communities." And, of course, the juxtaposition of *Joseph* and *Sandoval* clearly

227. *Id.*
228. *Id.* at 48.
229. *Id.* at 46.

demonstrates that the only characteristic that American law recognizes, which all distinctly Indian communities share, is that they are composed of people who are racially and ethnically Indian.[230] Wardship, therefore, was simply a result of claimed racial superiority of the federal government. Consequently, the Indian plenary power doctrine demonstrably rested solely on the claimed superiority and dominance of the federal government over Indian tribes, based solely on the race of the members of the political communities involved. It had no foundation whatsoever in the text, structure, or history of the United States Constitution. Indeed, *Kagama*, the intellectual origin of the federal Indian plenary power doctrine, expressly disclaims reliance on the Indian Commerce Clause or any other textual source for delegation of constitutional power.[231]

The modern cases blindly follow the federal Indian plenary power doctrine originally developed under the guise of a wardship power. Modern cases, however, have made two important changes in the doctrine, one subtle and one overt. Not only did the Court back off the racist underpinnings of the Indian plenary power doctrine (although without reexamining the doctrine), but also generally refused to enforce external limitations imposed on the exercise of federal powers by other constitutional provisions such as the Bill of Rights.

First, the Supreme Court, not surprisingly, no longer overtly acknowledges notions of wardship, racial superiority and dominance as the source of the Indian plenary power doctrine. This subtle change probably

---

230. Tribal law, by contrast, had not always drawn tribal membership lines along racial, ethnic, or ancestral categories. Before Indian tribes were forced into employing racially-drawn membership lines as part of the enrollment process for the late-nineteenth century allotment policy, many tribes, organized around clan and extended kinship groups, determined membership by kinship, rather than race. Thus, an outsider, whether a white or a member of another tribe, who married into the tribe became a tribal member through marriage. The Cherokee Nation formalized that tradition in their nineteenth century membership laws which treated as a full tribal member anyone who married a Cherokee, even after the death of the Cherokee spouse, so long as the person did not remarry outside of the tribe. When this practice first came to the attention of the Untied States Supreme Court in *United States v. Rogers,* 45 U.S. (4 How.) 567 (1846), the Court refused to recognize a white member of the Cherokee Nation as an Indian, for purposes of federal jurisdictional statutes that excluded from federal criminal jurisdiction crimes between Indians. Chief Justice Taney wrote for the Court, "Whatever obligations the prisoner may have taken upon himself by becoming a Cherokee by adoption, his responsibility to the laws of the United States remained unchanged and undiminished. *He was still a white man, of the white race*, and therefore not within the exception in the act of Congress." *Id*. at 573 (emphasis added). *Contra* Alberty v. United States, 162 U.S. 499, 502 (1896); Nofire v. United States, 164 U.S. 657, 662 (1897) (later cases recognizing Cherokee or Choctaw nationality of ethnically non-Indian person as proof of Indian status for federal jurisdictional purposes).

231. United States v. Kagama, 118 U.S. 375, 378–79 (1886).

occurred in a footnote in the Supreme Court's decision in *McClanahan v. Arizona State Tax Commission*,[232] in which Justice Marshall wrote in an incredible understatement, "[t]he source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making."[233] Thus, in a footnote, the Court in passing glossed over the colonialist, racially-based wardship origins of the Indian plenary power doctrine. It purported to ground the federal Indian plenary power doctrine in part on precisely the ground that *Kagama,* the cornerstone case, rejected—the Indian Commerce Clause. Since the Supreme Court *expressly* held in *Kagama* that the scope of federal congressional power under the Indian Commerce Clause was not co-extensive with the plenary power developed under the wardship theory,[234] consistent application of Supreme Court precedents would suggest that, once wardship was rejected in favor of the Indian Commerce Clause, the Indian plenary power doctrine should disappear in favor of a searching textual and historical inquiry into the limits of Indian Commerce Clause power, not unlike the similar inquiry recently undertaken by the Court with reference to the limitations on Interstate Commerce Clause power in *United States v. Morrison*[235] and *United States v. Lopez.*[236] Unfortunately, no similar reexamination of the limitations of federal power has been undertaken to protect Indian tribal sovereignty. Rather, the federal judiciary simply continues to espouse an Indian plenary power doctrine, albeit now grounding it on the Indian Commerce Clause, rather than the racially-tainted colonialist wardship theory under which it first developed.

While the labels may have changed as to the source of federal power in Indian affairs, the Supreme Court has not abandoned the sweeping claims to federal colonialist authority over Indian tribes developed under the colonialist wardship theory. Two modern illustrations make this point by indicating the scope of federal power currently claimed over Indian tribes.

United States v. Wheeler[237] perhaps best restates the current doctrinal conception of the relationship of federal power to Indian tribal sovereignty. The case involved a double jeopardy claim, testing whether the tribal criminal conviction of an accused Indian barred subsequent federal prosecution for a crime arising from the same events.[238] Relying in part on

232. 411 U.S. 164 (1973).
233. *Id.* at 172 n.7.
234. *Kagama*, 118 U.S. at 379–80.
235. 529 U.S. 598 (2000).
236. 514 U.S. 549 (1995).
237. 435 U.S. 313 (1978).
238. *Id.*

Talton, the Court held that the exercise of tribal criminal jurisdiction over the accused derived from the aboriginal sovereignty of the tribe and did not constitute an exercise of delegated federal authority over the accused.[239] In the course of discussing the scope and nature of tribal sovereignty, the *Wheeler* opinion offered the following frequently quoted statement of the current federal-tribal relationship:

> The powers of Indian tribes are, in general, "*inherent powers of a limited sovereignty which has never been extinguished.*" Before the coming of the Europeans, the tribes were self-governing sovereign political communities. Like all sovereign bodies, they then had the inherent power to prescribe laws for their members and to punish infractions of those laws.
>
> . . . .
>
> Indian tribes are, of course, no longer "possessed of the full attributes of sovereignty." Their incorporation within the territory of the United States, and their acceptance of its protection, necessarily divested them of some aspects of the sovereignty which they had previously exercised. By specific treaty provision they yielded up other sovereign powers; by statute, in the exercise of its plenary control, Congress has removed still others.
>
> But our cases recognize that the Indian tribes have not given up their full sovereignty. We have recently said that: "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . . [They] are a good deal more than 'private, voluntary organizations.'" The sovereignty that the Indian tribes retain is of a unique and limited character. *It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers.* In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.[240]

Thus, while Indian tribes retain their own inherent sovereignty derived from their preexisting national existence before the coming of the white man to the North American continent, that sovereignty under current constitutional doctrine is claimed to be subject to the complete control, curtailment, and destruction by the federal government. The current explanations of the reasons for such claimed plenary power are no longer wardship, but, rather, the inclusion of the tribes within the boundaries of the United States and the states and the treaty obligations of protection. Yet, recall that in *Worcester*,

239. *Id.* at 329–32.
240. *Id*. at 322–23 (second emphasis added) (citations omitted).

the Supreme Court did *not* regard the inclusion of the tribes within the boundaries of Georgia and United States sufficient to create or enlarge the authority of either government over the Cherokee Nation.[241] Furthermore, in *Crow Dog,* the United States Supreme Court expressly held, as it had earlier suggested in *Cherokee Nation* and *Worcester,* that treaty guarantees of protection to the tribe did *not* diminish complete tribal sovereignty over their lands or enlarge the authority of the United States government.[242] As those cases suggested, such a perverse interpretation of the treaties would suggest that a guarantee of protection of territorial political integrity had somehow destroyed the national existence of the tribes, which it was meant to protect. Yet, that is precisely how the current Supreme Court is interpreting such clauses, presumably because it was forced to abandon the racially-motivated colonial wardship theory as a justification for such sweeping plenary power.

While *Wheeler* did not involve any consideration of a federal statute that purported to curtail or in any fashion direct the manner of exercise of the sovereign powers of an Indian tribe, the decision in *Santa Clara Pueblo v. Martinez*[243] involves exactly this kind of statute. Specifically, the Court had before it a number of questions raised by the federal enactment of the Indian Civil Rights Act of 1968 (ICRA).[244]

The ICRA was designed to impose by statute on the operation of tribal governments many of the constitutional guarantees found in the Bill of Rights, as a well as an equal protection clause. This statute, of course, was thought necessary because of the Court's decision in *Talton*, holding that Bill of Rights limitations did not apply to tribal government since their sovereignty derived from aboriginal sources and did not constitute an exercise of federal power.[245] It clearly was a product of the civil rights movement and the focus on protecting constitutional rights against governmental intrusion during that period. Nevertheless, by imposing such limitations on tribal government, the ICRA purports to curtail the powers of Indian tribes to structure their own governing mechanisms in tribally-centered, non-western ways that may not comply with the adversarial and individual-rights focus of much of the Bill of Rights. While some concessions were made to tribal cultures in enacting the statute, such as omitting an establishment clause from the guarantees, the Act nevertheless

241. Worcester v. Georgia, 31 U.S. (16 Pet.) 515, 561 (1832).
242. *Ex parte* Crow Dog, 109 U.S. 556, 568–69 (1883).
243. 436 U.S. 49 (1978).
244. 25 U.S.C. §§ 1301–03 (2000).
245. Talton v. Mayes*,* 163 U.S. 376, 384 (1896).

imposes western legal values on kinship and communally-oriented tribal societies with different customary legal values.

More significantly, the ICRA goes beyond the Bill of Rights by purporting to limit tribal court sentencing powers to a one year term of imprisonment or a $5,000 fine (originally enacted as six months and a $500 fine). Thus, while an Indian tribe can try an offender for murder, as the Cherokee Nation did in *Talton*, or for other serious crimes like rape, under the ICRA the offender cannot be subjected to a punishment beyond the ICRA limitations, an obviously inadequate response to the severity of the crime.

In *Martinez*, the Court was faced with a number of jurisdictional issues. It nevertheless briefly adverted to the power of Congress to adopt the ICRA under the United States Constitution.[246] Despite the obvious intrusion on tribal sovereignty created by the ICRA, the Court ruled:

> Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess. *Ibid*. *See, e. g., United States v. Kagama*, *supra*, [118 U.S.,] at 379–381, 383–384; *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 305–307 (1902). Title I of the ICRA, 25 U.S.C. §§ 1301–1303, represents an exercise of that authority.[247]

Any review of the cases cited by the Court amply demonstrates the questionable lineage of these precedents in the American history of race relations and colonialism. Its proof of the plenary power of Congress to "limit, modify or eliminate" the sovereignty of Indian tribes, therefore, rests entirely on cases derived from late-nineteenth century "white man's burden" racial-superiority arguments. Yet, the Supreme Court continues to cite them as controlling precedent. The closest analogy might be the Court unabashedly citing *Dred Scott v. Sanford*[248] or *Plessy v. Ferguson*[249] to make a controlling point in a modern affirmative action case. If such an event occurred, the uproar from the public and the academic and legal community undoubtedly would be deafening. Yet, unfortunately, no one notices, cares or comments when the federal courts cite and rely upon precedents of like ilk in modern Indian law decisions.

More significantly, the idea that Congress can "limit, modify, or eliminate" Indian sovereignty is truly remarkable compared to the usual rule that Congress can do nothing to impair the existence or the sovereign

246. 436 U.S. at 56–57.
247. *Id.*
248. 60 U.S. (19 How.) 393 (1856).
249. 163 U.S. 537 (1896).

integrity of the states.[250] Both the states and the Indian tribes are expressly recognized as sovereigns in the Interstate and Indian Commerce Clauses. Yet, state sovereignty is zealously guarded by the current Supreme Court against federal encroachment, while the Court continues to assert and exercise a federal power to encroach on Indian tribal sovereignty at will. Even those who detract from the modern efforts to find limitations on federal sovereign authority vis-à-vis the states, might see a greater need for judicial enforcement of limitations against the federal government when it comes to tribal government. Most critics of the current Court's efforts to breathe life back into Interstate Commerce Clause limitations on the power of Congress subscribe to some variant of a theory that the political safeguards for federalism extant in the structure of the federal government provide adequate *political* protections for the states, thereby suggesting that the primary safeguards of federalism, as Herbert Wechsler put it,[251] should be political and not legal. This theory, the roots of which lie deep in James Madison's language in *The Federalist* Nos. 45 and 46,[252] finds doctrinal support in *McCulloch v. Maryland*[253] and *Garcia v. Metropolitan Transit Authority*.[254] Certainly, the behavior of the United States Supreme Court from 1937 to 1996 in reviewing federal statutes under the Interstate Commerce Clause followed the implications of this theory.

Because Indian tribes constituted no part of the federal union at the time the Constitution was drafted, no structural protections exist to protect their sovereignty within the framework of the federal government. While the Treaty of Fort Pitt and later similar proposals expressly contemplated that Indian tribal statehood might accomplish that objective *by tribal consent*, such tribal statehood, with appropriate votes in the Senate and the Electoral College to structurally protect their interests, never emerged. Furthermore, today Indians constitute a very small minority of the United States population with no great likelihood to significantly affect the political

250. *See, e.g.,* Nat'l League of Cities v. Usery, 426 U.S. 833, 855 (1976), *overruled on other grounds by* Garcia v. Metro. Transit Auth., 469 U.S. 528 (1985); Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523 (1926); Coyle v. Smith, 211 U.S. 559 (1911); Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1869); Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1868) (all suggesting lack of federal power to impair or destroy state sovereignty).

251. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558–60 (1954); *see* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175–184 (1980); O. Bruce La Pierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779 (1982).

252. THE FEDERALIST NOS. 45–46, at 308–23 (James Madison) (J.E. Cooke ed., 1961).

253. 17 U.S. (4 Wheat.) 316, 337–38 (1819).

254. 469 U.S. 528, 549–51 (1985).

process through the ballot box. Thus, most traditional theories of the need for judicial intervention suggest that federal judicial protection for tribal sovereignty against federal initiatives should be required.[255] Yet, as a result of the federal Indian plenary power doctrine derived from late-nineteenth century notions of supposed racial-superiority and the "white man's burden," the Supreme Court perpetuates and reinforces a colonial authority in Indian country that cannot be justified under traditional American constitutional analysis and values.

The modern cases have departed from the early "hands off" approach of *Lone Wolf* in a second, substantively more significant way. This change involves an increased willingness to enforce Bill of Rights and other external constitutional limitations on the exercise of power. Commencing with hints to that effect in the Court's decision in *Choate v. Trapp*,[256] this development first emerged in more rigorous enforcement of the takings clause against federal expropriation of Indian lands and resources. Since the takings clause generally requires only fair monetary compensation for taking title to land, this change was, perhaps, the easiest for the Court to undertake without undermining the colonialist wardship power of Congress.

The decision in *United States v. Sioux Nation*,[257] perhaps the most important Indian takings case decided by the Court, illustrates the point. *Sioux Nation* presented to the Court the question of whether the United States expropriation of the Lakota's sacred *Paha Sapa* (the Black Hills) by statute in 1877 constituted a taking of Lakota property without just compensation. The 1868 Fort Laramie Treaty with the Lakota (Sioux) contained a provision virtually identical to the one at issue in *Lone Wolf*[258] requiring three-quarters adult male signatures to approve any future cession of land. After the discovery of gold in the Black Hills and the defeat of General George Armstrong Custer at the Battle of Greasy Grass, Congress sought to extinguish title to the Black Hills through treaty negotiations with a threat to cut off the Lakota's federal rations, their primary means of subsistence after the government sponsored destruction of the buffalo herds. Despite this "sell or starve" negotiating position, the Manypenny Commission, charged with securing the treaty, secured approval from no more than ten percent of the adult males for their treaty. Nevertheless,

255. *See* United States v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938) (suggesting in a famous footnote that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

256. 224 U.S. 665, 677–78 (1912).

257. 448 U.S. 371 (1980).

258. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

Congress enacted the "agreement" as a statute to punish the Lakota for the defeat of Custer's regiment. The Lakota have always regarded this expropriation of the spiritual center of their universe as illegal under the Fort Laramie Treaty.

When it finally became possible, however, during the twentieth century to attack the expropriation of the *Paha Sapa*, the only legally cognizable claim, in light of *Lone Wolf*, was a takings claim, the remedy for which was a cash payment to the Lakota, rather than return of their sacred lands. After almost a half-century of litigation of that claim, the Black Hills case finally reached the Supreme Court in *Sioux Nation*. At issue was whether a claims judgment for the expropriation of the Black Hills was entitled to accrued interest, making a claims judgment otherwise worth $17 million worth over $125 million.[259] Litigation over the sacred center of the Lakota universe had degenerated into a squabble over money under western law. In *Sioux Nation*, the Court limited the Fifth Amendment holding of *Lone Wolf*, finding that the United States could not simultaneously seek to further national policy objectives at the same time it served as the trustee for the Indians.[260] The Court therefore held that the conclusive presumption of the regularity of United States actions as the Indians' trustee announced in *Lone Wolf* would only be applied where the federal government undertook a good faith effort to secure for the Indians the fair market value for their lands.[261] Since a renewed rations obligation undertaken by the 1877 legislation was not so intended, and, indeed, was not even quantified at the time to determine the monetary obligation it imposed on the federal government, the federal government was found to have unconstitutionally taken Sioux land without providing just compensation.[262] Only Justice Rehnquist dissented, criticizing the Court's reliance on "revisionist" history, and ending his dissent by resort to "the Biblical adjuration 'Judge not, that ye be not judged.'"[263] Given the role that now Chief Justice Rehnquist would later play in repudiating over 175 years of history (including several of his own opinions) by overturning the baseline understanding of the tribal↔federal relationship, his criticism of revisionist history rings truly hollow.

More importantly, *Sioux Nation*, like most takings claims, only resulted in a cash payment to the Lakota, not the return of their sacred *Paha Sapa*. For this reason, the Sioux uniformly refused to accept the money, which is

---

259. *Id.*
260. *Id.* at 414–16.
261. *Id.* at 416–17.
262. *Id.* at 422–23.
263. *Id*. at 437 (Rehnquist, J., dissenting).

now approaching $500 million held in the United States Treasury for their benefit. They believe they are morally and legally entitled to the Black Hills and will not rest until the *Paha Sapa* are returned. Enforcement of the takings clause left the whites in possession of the Black Hills, a result of the nature of the remedial regime for takings claims which makes enforcement of such claims consistent with the implicit colonial bent of federal Indian law since *Kagama*.

Ironically, despite the Supreme Court's willingness to enforce the Fifth Amendment against federal statutes in the field of Indian affairs after *Sioux Nation*, the Court has more often struck down efforts to protect tribes by redressing some of the harms to tribal sovereignty created by the late-nineteenth century allotment policy, than it has invoked the clause to protect tribal interests. The allotment policy fractionated Indian tribal land ownership into individual Indian-owned allotments. Under the Act, the lands of an Indian allottee passed to his heirs, as defined by state law, if the allottee died without a will. Since Indians unfamiliar with western legal traditions, and not fluent in English or any other written language, rarely made written legally-enforceable wills, over time ownership of the allotments became divided, with interests owned inter-generationally between more and more heirs, each often possessing only small interests in the property (often measured in the thousandths of one percent). When Congress tried to redress this so-called fractionated heirship problem by returning small unproductive interests to the tribes through escheat in two different versions of the Indian Land Consolidation Act of 1983,[264] the Supreme Court twice declared these efforts unconstitutional on takings clause grounds creating a truly novel vested right to pass lands through inheritance.[265] In a major departure from conventional takings analyses, both of these cases invalidated the escheat of the property interest to the Tribe, rather than merely requiring the federal government to pay compensation for the escheat. Yet, ironically, because of *Lone Wolf* the Indian tribes have never been compensated in their governmental capacities for the expropriation of their lands for use as individual Indian allotments.

Thus, when one carefully evaluates the effects of increased enforcement by the Supreme Court of the takings clause against Congressional initiatives in Indian affairs, it has tended to reinforce the colonial roots of *Lone Wolf,* rather than overturn it. Indians can finally get just compensation for federal takings of the lands or resources, but they cannot keep those resources or

---

264. Pub. L. No. 97–459, § 207, 96 Stat. 2519 (1983).

265. *See generally* Babbitt v. Youpee*,* 519 U.S. 234 (1997); Hodel v. Irving, 481 U.S. 704 (1987) (both basing holdings on the novel theory that the General Allotment Act of 1887 created a vested right to devise or bequeath Indian allotments).

secure their return once expropriated. When resources are retransferred *to* tribes, the takings clause is invoked to restrain transfer of ownership interest, not merely to require payment for the interest extinguished. For Indian tribes whose cultures and sovereignty are entirely dependent on land ownership, the current constitutional doctrines create a no-win situation.

In *Morton v. Mancari*[266] and its progeny,[267] the Court indicated a willingness to enforce the equal protection concepts implicit in the Fifth Amendment Due Process Clause against federal Indian policies reflected in statutes and treaties. Disinclined to declare unconstitutional in its entirety Title 25 of the United States Code, specifically dealing with Indians, the Court in *Mancari* indicated that it would uphold federal statutes and other initiatives where "tied rationally to the fulfillment of Congress' unique obligation to the Indians."[268] Even in the arena of equal protection, however, the recent decisions of the Supreme Court suggest that rigorous enforcement of Bill of Rights and other like prohibitions of the exercise of governmental power may pose great threats to protections of tribal sovereignty.

For example, in *Rice v. Cayetano*[269] the Supreme Court recently held that after Congress delegated to the State of Hawaii its trust obligation to protect Native Hawaiian lands and the interests of the Native Hawaiians, the State of Hawaii could not, consistent with the Fifteenth Amendment restrictions on discriminating in the franchise on the basis of race, constitutionally limit to Native Hawaiian descendents the voting for the Office of Hawaiian Affairs, which discharged those trust responsibilities.[270] Again, the Court employed the Constitution to run roughshod over the few remaining legal protections afforded the once totally independent, internationally recognized Native Hawaiian people.

Finally, anyone familiar with the sad history of the legal protection of free exercise religious freedom rights for the indigenous people of the United States from the outlawing of ceremonial dances and the practices of medicinemen in the Code of Indian Offenses in 1883 to the United States Supreme Court's recent trilogy of cases refusing to protect Indian religious

266. 417 U.S. 535 (1974).

267. *See* Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 672 n.20 (1979); Washington v. Yakima Indian Nation, 439 U.S. 463, 500–01 (1979); United States v. Antelope, 430 U.S. 641, 645–47 (1977); Del. Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977); *see also* Simmons v. Eagle Seelatsee, 244 F. Supp. 808, 814 n.14 (E.D. Wash. 1965), *aff'd*, 384 U.S. 209 (1966).

268. 417 U.S. at 555.

269. 528 U.S. 495 (2000).

270. *Id.*

freedom rights,[271] culminating in the peyote case, recognizes that the dicta found in some cases suggesting that the Court will enforce external limitations on federal Indian powers against Congress and the executive branch has rarely been followed. Thus, the colonial, racist Congressional powers the Supreme Court rationalized on "white man's burden" grounds during the late-nineteenth century remain alive and well in modern Indian law doctrine.

B. The Emergence of an Activist Judicial Indian Plenary Power Doctrine from a Judicially Conservative Court

Initially, the assaults on Indian tribal sovereignty were the product of congressional and executive initiatives, such as the Federal Major Crimes Act,[272] the General Allotment Act,[273] the Courts of Indian Offenses of the Indian boarding schools, that the Supreme Court simply rationalized and legitimated by inventing the Indian plenary power doctrine. Thus, the role of the Court was to uphold colonial initiatives originated in the political branches. That role changed dramatically in the last quarter of the twentieth century (and particularly the past fifteen years) when the federal judiciary through common law development increasingly usurped the historical role of the political branches in the formulation of Indian policy, often adopting legal rules inconsistent with the spirit, and sometimes the letter, of congressional statements in the field.

Recognizing the moral and economic bankruptcy of the allotment policy, Congress ended allotment in the Indian Reorganization Act of 1934 (IRA)[274] and charted a course of turning responsibility and authority for the governance of Indian country back to tribes. In short, the IRA, particularly as originally envisioned by Commissioner of Indian Affairs John Collier, constituted the first abortive effort by the United States to commence a process of decolonization with respect to Indian tribes. It ended allotment, extended trust periods on outstanding allotments (thereby preventing further

---

271. *See* Employment Div. v. Smith, 494 U.S. 872 (1990) (holding that Indians had no free exercise clause right protecting their ceremonial use of peyote); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (holding that Indians had no free exercise clause right protecting sacred area of national forest that they still used for ceremonial purposes from disturbance by logging road); Bowen v. Roy, 476 U.S. 693 (1986) (holding that Indians had no free exercise clause right to refrain from securing and supplying a social security number for a minor child as part of welfare payment application).

272. 18 U.S.C. § 1153 (2000).

273. General Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended at scattered sections of 25 U.S.C.).

274. Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at scattered sections of 25 U.S.C.).

loss of the Indian landbase) and returned to Indian tribes primary governing power over Indian reservations.[275] Nevertheless, the manner in which the Bureau of Indian Affairs implemented the policy often left significant colonial control in the hands of the federal bureaucracy, often through federal approval requirements that Indian Service bureaucrats drafted into tribal constitutions.[276] Since that date, with the major exception of a decade-long digression during the 1950s era of enforcement of tribe-specific termination policy (including Public Law 280),[277] Congress generally has charted a policy of recognizing and respecting tribal authority over Indian country. Congress could not simply repeal and undo the effects of the General Allotment Act of 1887 or the related policies adopted in tribe-specific ways in Oklahoma, Minnesota, and elsewhere, since millions of acres of individual Indian and non-Indian land titles depended on the legislation. Nevertheless, as originally proposed, the IRA clearly sought to end the underlying colonialist policies surrounding allotment by returning governance of Indian country to the Indian tribes. The implementation of the policy, however, still contained many colonialist elements, thereby making the IRA policy but a significant shift in direction back toward greater reliance on and deference to tribal governments. Nevertheless, it did not accomplish a full-fledged decolonization.

In implementing the IRA, Congress meant Indian country to be governed as a coherent jurisdictional governmental unit, irrespective of the checkerboarding of land ownership within any reservation created by the allotment policy. Thus, Congress redefined Indian country in 1948 to include all lands within the exterior borders of a reservation, irrespective of the issuance of any fee patents on or any rights-of-way over those lands.[278] Through the definition of Indian country, Congress also tried to redress the ravages of allotment where reservations had been extinguished. Therefore, the definition also included within Indian country all Indian trust allotments *outside* of any Indian reservations and all dependent Indian communities, irrespective of reservation status. That definition is now found in 18 U.S.C. § 1151.[279] The courts uniformly have held that this statutory definition

---

275. *Id.*

276. *E.g.,* CONST. OF THE SAC AND FOX TRIBE OF THE MISS. IN IOWA, art. X, § 1(a), (b) & (k) (1937).

277. *See generally* DONALD L. FIXICO, TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945–1960 (1986) (surveying the termination policies of the 1950s and Public Law 280).

278. 18 U.S.C. § 1151(a) (2000).

279. The full text of 18 U.S.C. § 1151 reads as follows:

> Except as otherwise provided in sections 1154 and 1156 of this title [regulating liquor in Indian country], the term "Indian country", as used in

governed not only the enforcement of federal Indian country criminal laws for which it was originally adopted, including the Federal Major Crimes Act, but also controlled civil and criminal jurisdictional boundaries for the exercise of federal, tribal, and state sovereignty.[280] It is also important to note that the fee patents expressly referenced in § 1151(a) involved the non-Indian lands owned within Indian reservations as a result of the sale to non-Indians of "surplus" Indian lands as well as former Indian allotted lands that fell out of trust and were owned by nonmembers as a result of legal or illegal tax sales, alienation, mortgage foreclosure, or inheritance by a nonmember. Thus, Congress primarily allocated to tribal, and secondarily federal, governance *all* lands within the Indian reservations irrespective of ownership, as a way to redress the ravages of colonialism wrought by allotment and to rejuvenate and protect tribal sovereignty. Further reinforcing the notion of tribal authority over their own reservation in the 1968 amendments to Public Law 280, Congress expressly required tribal consent through referendum for any future delegations to the states of jurisdiction over Indian country and facilitated the retrocession of state jurisdiction already acquired.[281]

Notwithstanding these congressional efforts to end the colonialist policy of forced assimilation created in part by allotment, the Supreme Court through common law development, over the past quarter-century (but most dramatically within the past fifteen years) has continued an assault on tribal sovereignty, primarily by continuing to implement the very policies of allotment, that Congress sought to end in 1934.[282] Yet, it had not always

> this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (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 extinguished, including rights-of-way running through the same.

280. Alaska v. Native Vill. of Venetie, 522 U.S. 520, 527 (1998); DeCoteau v. Dist. County Court, 420 U.S. 425, 427 n.2 (1975).

281. 25 U.S.C. §§ 1321–1326 (2000).

282. For a survey of the literature explaining and criticizing these developments, see generally Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979); Philip S. Deloria & Nell Jessup Newton, *The Criminal Jurisdiction of Tribal Courts over Non-Member Indians: An Examination of the Basic Framework of Inherent Tribal Sovereignty Before and After* Duro v. Reina, 38 FED. B. NEWS & J. 70 (1991); N. Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353 (1994); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1 (1999); Philip P.

been that way. Initially, when confronted with these changes in congressional policy, the Court deferred to Congress as the primary expositor of Indian policy, just as it had done in the late-nineteenth century. Only later, as it became clear that the Congressional policy meant a substantially enlarged role for tribes over that which had existed before 1934, did the Court reverse itself and aggressively seek to curtail tribal authority, often invoking and broadly interpreting allotment era policies and statutes. Through it all, the Court unilaterally developed a complex body of common law limitations on tribal authority and dramatically enlarged the role of the states in Indian country, blithely assuming its decisions would bind the tribes, presumably because of the supposed plenary power of the federal government in Indian affairs.

The Court's drastic change in its approach to protecting tribal sovereignty can be seen by comparing three cases decided before the recent period with the Court's emergent common law jurisdictional doctrines for Indian country. In perhaps its first jurisdictional decision of the modern era, the Supreme Court held in *Williams v. Lee*[283] that the state courts of Arizona lacked civil subject matter and personal jurisdiction over a suit brought by a *non-Indian* trader on the Navajo Reservation to collect on an installment payment contract signed by two Navajo members.[284] Recognizing that the Fort Sumner Treaty of 1868 with the Navajo set aside the Navajo Reservation for the exclusive use and occupation of the Navajo, the Court

---

Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137 (1990); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996); L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996); B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457 (1998); Karl J. Kramer, Comment, *The Most Dangerous Branch: An Institutional Approach to Understanding the Role of the Judiciary in American Indian Jurisdictional Determinations*, 1986 WIS. L. REV. 989; Robert Laurence, *The Dominant Society's Judicial Reluctance to Allow Tribal Civil Law to Apply to Non-Indians: Reservation Diminishment, Modern Demography and the Indian Civil Rights Act*, 30 U. RICH. L. REV. 781 (1996); Robert Laurence, *The Unseemly Nature of Reservation Diminishment by Judicial, As Opposed to Legislative, Fiat and the Ironic Role of the Indian Civil Rights Act in Limiting Both*, 71 N.D. L. REV. 393 (1995); Laurie Reynolds, *"Jurisdiction" in Federal Indian Law: Confusion, Contradiction, and Supreme Court Precedent*, 27 N.M. L. REV. 359 (1997); Alex Tallchief Skibine, Duro v. Reina *and the Legislation that Overturned It: A Power Play of Constitutional Dimensions*, 66 S. CAL. L. REV. 767 (1993); Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence,* 1986 WIS. L. REV. 219.

283. 358 U.S. 217 (1959).

284. *Id.* at 220.

held that the Navajo tribal courts had exclusive jurisdiction over this suit brought by a nonmember because the case arose in Indian country.[285] According to Justice Black, speaking for the Court, states could exercise jurisdiction over matters arising in Indian country only where there was no Indian interest involved, such as where non-Indians committed crimes against each other.[286] Notice this is precisely the point at which there is no claim of any Indian commerce involvement. If any Indian interest were involved, however, the exercise of state authority in Indian country was preempted because it "infringed on the right of reservation Indians to make their own laws and be ruled by them."[287] *Williams*, therefore, reinforced the post-1934 Congressional policy of leaving the governance of Indian country with Indian tribes, even when non-Indians were involved.[288] Indeed, the *Williams* opinion noted that Congress had provided a way for Arizona to secure jurisdiction over the case through Public Law 280 and the state had not availed itself of this option.[289] Thus, the rule appeared to be that states could secure jurisdiction in Indian country where Indian interests were involved only through Congressional delegation; they had no inherent sovereignty over such matters themselves. Indeed, the Supreme Court had so held over 125 years before in *Worcester*[290] and the *Williams* opinion noted that, with certain limited exceptions, "the basic policy of *Worcester* has remained."[291]

In addition, the Court initially recognized and enforced the Congressional decision reflected in § 1151(a) to avoid the checkerboarding of jurisdiction in Indian country. In *Seymour v. Superintendent*,[292] when confronted with an argument that states had criminal jurisdiction over non-Indian fee patent land within the Colville Reservation, the Court expressly rejected the notion that Congress intended checkerboard jurisdiction on the Indian reservations depending on the nature of land ownership within the reservation.[293] Thus, the Court also rejected the notion that the non-Indian owned parcels at Colville were subject to state jurisdictions, pointing out:

> [The state's] argument rests upon the fact that where the existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction, depends upon the

285. *Id.* at 221–22.
286. *Id.* at 220.
287. *Id.*
288. *Id.*
289. *Id*. at 222–23.
290. Worcester v. Georgia, 31 U.S. (16 Pet.) 515, 561 (1832).
291. *Williams,* 358 U.S. at 223.
292. 368 U.S. 351 (1962).
293. *Id.* at 358.

> ownership of particular parcels of land, law enforcement officers operating in the area will find it necessary to search tract books in order to determine whether criminal jurisdiction over each particular offense, even though committed within the reservation, is in the State or Federal Government. *Such an impractical pattern of checkerboard jurisdiction was avoided by the plain language of § 1151* and we see no justification for adopting an unwarranted construction of that language where the result would be merely to recreate confusion Congress specifically sought to avoid.[294]

Similarly, in *United States v. Mazurie*,[295] in a decision that may have featured then-Justice Rehnquist's first Indian law opinion, the Court expressly rejected an argument that Congress could not authorize tribes to control liquor sales by nonmembers on non-Indian owned fee patent lands within the Wind River Reservation.[296] The opinion specifically noted that *Seymour* had expressly rejected any such checkerboarding of the jurisdiction in Indian country based on the language of § 1151(a).[297] Likewise in *Moe v. Confederated Salish & Kootenai Tribes*,[298] again in an opinion authored by then-Justice Rehnquist, the Court rejected precisely the same argument when offered by Montana to distinguish the allotted Flathead Reservation from the unallotted Navajo Reservation in order to justify its claim to taxing power within the Reservation.[299] Writing for the Court, Justice Rehnquist simply cited *Mazurie* and indicated that in that case "[w]e concluded that '[s]uch an impractical pattern of checkerboard jurisdiction,' was contrary to the intent embodied in the existing federal statutory law of Indian jurisdiction."[300] Thus, the Court clearly understood that § 1151(a) sought to avoid the checkboarding of jurisdiction in Indian country. That point is important since, as will be demonstrated, the later judicially-developed common law limitations on tribal jurisdiction and the simultaneous enlargement of state authority accomplished precisely what the Court clearly understood in *Mazurie* and *Moe* Congress intended to prevent—the checkerboarding of jurisdiction in Indian country. Indeed, Chief Justice Rehnquist, the author of the *Mazurie* and *Moe* opinions, was instrumental in later common law developments that totally ignored the

294. *Id.* (emphasis added) (footnote omitted).
295. 419 U.S. 544 (1975).
296. *Id.* at 554.
297. *Id.* at 555.
298. 425 U.S. 463 (1976).
299. *Id.* at 466.
300. *Id.* at 478.

letter and purpose of § 1151(a), which he had expressly acknowledged in *Mazurie* and *Moe*.

Perhaps more significantly, just as *Williams v. Lee* had acknowledged that the original baseline understanding of the tribal↔federal relationship reflected in *Worcester* contemplated *tribal* jurisdiction over non-Indians and nonmembers found in Indian country based on the Indian tribe's inherent sovereignty over its lands, so Justice Rehnquist's opinion in *Mazurie* conceded the same in 1975.[301] In that case, federal law required the non-Indian owner of a bar located on land he owned within the Reservation to comply with the tribal liquor laws by securing a tribal liquor license and by conforming to tribal regulations.[302] The Court of Appeals had expressed doubt about the ability of Congress to "delegate" such authority to an Indian tribe, analogizing the tribe to a private voluntary association whose powers derive from consent of its members.[303] Justice Rehnquist's opinion rejected the analogy and the notion that tribal powers derive from the consent of the members.[304] Citing *Worcester*, he held that "Indian tribes within 'Indian country' are a good deal more than 'private, voluntary organizations.'"[305] Rather, they are "entities which possess a certain degree of *independent authority over matters that affect the internal and social relations of tribal life*. Clearly the distribution and use of intoxicants is just such a matter."[306] Thus, since the Indian tribes had *inherent authority* over the sale of liquor on a reservation, even by nonmembers on non-Indian owned lands, the Court was not concerned that Congress reinforced those powers in the federal liquor control statutes. Such was not an illegal delegation, if a delegation at all. Clearly, in *Mazurie*, activities by non-Indians on non-Indian owned lands within the reservation therefore constituted part of the tribe's "independent authority," i.e., its inherent sovereignty.[307] Because these attitudes occurred within the reservation, even on non-Indian owned land, they affected the internal and social relations of tribal life.[308] *Mazurie,* therefore, drew the line between internal and external affairs powers of an Indian tribe precisely where the *Worcester* case had drawn it. Matters

301. 419 U.S. at 554.
302. *Id.* at 547–48.
303. *Id.* at 556.
304. *Id.* at 557.
305. *Id.*
306. *Id.* (emphasis added).
307. *Id.*. The Court did note, however, that it need not decide the question of lawfulness of the application of the tribal liquor control laws to a nonmember seller on non-Indian owned lands within the reservation since the federal law clearly made the tribal law controlling. While that issue clearly was not before the Court, its rationale suggested that the tribe had inherent authority on its own to apply its liquor laws. *Id.* at 558 n.12.
308. *Id.* at 558.

occurring within the reservation, even on non-Indian owned land and even involving nonmembers, were subject to tribal governance if they affected tribal life in any way.[309] The external powers of the tribes which had been ceded to the federal government by treaty were only their powers of diplomatic relations with foreign governments and their unilateral authority to draw the United States into war.

Indeed, the *Mazurie* case directly addressed the major objection that later would be voiced against tribal governance over nonmembers. Justice Rehnquist wrote:

> The fact that the Mazuries could not become members of the tribe, and therefore could not participate in the tribal government, does not alter our conclusion. This claim, that because respondents are non-Indians Congress could not subject them to the authority of the Tribal Council with respect to the sale of liquor, is answered by this Court's opinion in *Williams v. Lee*, 358 U.S. 217 (1959). In holding that the authority of tribal courts could extend over non-Indians, insofar as concerned their transactions on a reservation with Indians, we stated:
>
>> It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it.[310]

Thus, as late as 1975, in a case involving tribal jurisdiction over nonmember activities on non-Indian owned land within the reservation, the Supreme Court clearly conceded that the inherent sovereignty of an Indian tribe over its reservation governed the matter, irrespective of inability of the nonmember to participate in the governing processes of the reservation.[311] Tribal sovereignty, like the sovereignty of state and federal governments, extended over all of its territory and while its authority was delegated by its members, membership did *not* form the outer limits of the sovereignty. As in the *Buster v. Wright*[312] case seventy years earlier, tribal authority was thought to extend to those who resided or otherwise came within the tribe's territory. Inability to vote in tribal elections was no more an impediment to

---

309. *Id.*
310. *Id*. at 556–57.
311. *Id.* at 559.
312. 135 F. 947 (8th Cir. 1905).

tribal jurisdiction than the exercise of state (or federal) jurisdiction over residents of other states or nations, resident aliens, minors, or those, like General Manuel Noriega, involuntarily retrieved from other countries. Citing *Williams v. Lee*, the Court very clearly noted that, under the then-prevailing versions of the Indian plenary power doctrine, only *Congress* could curtail those inherent *territorially-based* sovereign powers of the tribe.[313]

The irony is that the year after *Mazurie* was decided, Justice Rehnquist, the author of the *Mazurie* opinion, would begin a process of common law development that would radically limit the historic territorially-based understanding of tribal sovereignty, often in contravention of not only the treaties and the original conception of the tribal↔federal relationship, but also the spirit, and sometimes the letter, of governing acts of Congress. Perhaps the point most repeatedly ignored during this development was the congressional purpose underlying the definition of Indian country set forth in § 1151(a) that the Court found in *Seymour, Mazurie* and *Moe* to be avoiding checkerboard jurisdiction.[314] The Court's common law development of jurisdictional limitations over the past quarter century not only created the checkerboarding of jurisdiction in Indian country, precisely what the Court admitted in *Seymour*, *Moe* and *Mazurie* that Congress sought to avoid, but it ensured that the jurisdiction was divided along *racial* lines! In the process, the Court has made jurisdictional analysis in Indian country complex, arcane and unmanageable, creating lawlessness and chaos in the name of its own conceptions of the appropriate balance between tribal and non-Indian power, apparently irrespective of the treaty process or congressional policy.

Basically, what the Court has sought to do over the past quarter century is to continue the jurisdictional assault on tribalism and tribal sovereignty undertaken in the General Allotment Act of 1887, notwithstanding subsequent express repudiation of that policy by the Indian Reorganization Act of 1934. Not surprisingly, therefore, many of the holdings of the Court during this period seek meaning in actions taken during the allotment period, while totally ignoring subsequent federal policies meant to curtail or overturn those policies such as the Indian Reorganization Act or the definition of Indian country Congress enacted in § 1151(a). In essence, for the past quarter-century the United States Supreme Court has usurped the power and decisional authority that its earlier Indian plenary power doctrine decisions, illustrated by *Williams v. Lee* and *Mazurie*, indicated belonged

313. 419 U.S. at 558.
314. *See supra* notes 292–300 and accompanying text.

solely to Congress. Relying on the claimed supremacy of federal law created by the Indian plenary power doctrine, the federal judiciary has unilaterally exercised judicial plenary power over Indian affairs, assisted by opponents of Indian sovereignty, and sometimes by the tribes themselves, who continue to present and argue such cases to the federal courts.[315]

The growth of judicial federal plenary power began with the United States Supreme Court decision in *Oliphant v. Suquamish Indian Tribe,*[316] in which the Court held that Indian tribes lacked inherent criminal jurisdiction over non-Indians.[317] The opinion of the Court, authored by then-Justice Rehnquist, engaged in an inventive process of judicial historical revisionism to suggest that Indian tribes were never understood to exercise criminal jurisdiction over non-Indians.[318] Since most tribal justice systems of the nineteenth century were informal and restorative, rather than punitive, the Court not surprisingly found few examples of Indian tribes actually punishing whites after trial during the period.[319] Nevertheless, to solidify its historical point, the Court was forced to marginalize early treaties that expressly provided that Indian tribes could punish illegal white settlers.[320] Few Indian tribes during the period on which the opinion focused actually employed western-style courts of record. Among the Five Tribes, however, which had developed adversarial western-style courts of record, certain treaty promises expressly guaranteed the exclusivity of tribal authority, including court jurisdiction, over their new lands, including over non-Indians who had become associated with them.[321] Instead of noting that

---

315. Indian tribes must shoulder some blame for encouraging federal courts to resolve disputes over the limitations on tribal jurisdiction and authority. In recent years Indian tribes routinely have taken such disputes to federal courts for resolution, rather than to tribal court or political negotiation. *E.g*., Brendale v. Confederated Tribes, 492 U.S. 408 (1989) (Indian tribe initiating a mostly unsuccessful suit to secure federal court validation of its exclusive right to zone nonmember-owned land on its reservation). Additionally, recent federal cases attacking tribal jurisdiction after exhaustion of tribal remedies frequently have involved suits against tribal governments or tribal courts, despite the fact that Indian tribes and their agencies, including tribal courts, are immune from suit in federal court under the federal tribal sovereign immunity doctrines. *E.g*., Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc., 523 U.S. 751 (1998); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978). Nevertheless, in some cases, tribes or tribal parties refuse to assert their immunity claims in order to secure a federal court determination of the question. *E.g*., Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087 (8th Cir. 1998) (sovereign immunity apparently not asserted against suit naming tribal court as a party).

316. 435 U.S. 191 (1978).

317. *Id.* at 212.

318. *Id.* at 211.

319. *Id.* at 196.

320. *Id.* at 197.

321. *Id.*

these examples were the primary ones that answered the historical question posed in *Oliphant*, the opinion marginalized the importance of express treaty guarantees to Choctaws that their jurisdiction would extend to all persons within their territories, including non-Indians,[322] and totally ignored a similar treaty promise to the Cherokee.[323] In addition, the Court simply ignored other inconsistent treaties, like the Treaty of Fort Pitt that expressly recognized the sovereign right of the tribe to punish non-Indian offenders, but, under which, each party mutually agreed to refrain from exercising those powers in favor of a mutually agreeable procedure.[324] Rather, the Court relied on the legislative history of a statute that Congress never passed, the Western Territories Bill which had sought to organize the Indian Territory into a federal territory.[325] Part of the claimed need for the bill, which, of course, the *Oliphant* opinion stressed, was the claimed lack of tribal criminal jurisdiction over non-Indians.[326] The *Oliphant* opinion, of course, conveniently failed to note that the Western Territories Bill never passed because the Indian tribes of the Indian Territory already were exercising exclusive jurisdiction over the area Congress sought to organize and therefore Congress concluded that the legislation was unnecessary.

More important than the revisionist nature of the history in the *Oliphant* opinion was its rationale. While the opinion contains references to the lack of non-Indians on the Suquamish juries[327] and adverts to a claimed lack of civil liberties protections despite enactment of the Indian Civil Rights Act of 1968,[328] at core the rationale of the opinion rests on the notion that tribal exercise of criminal jurisdiction over non-Indians is "inconsistent with their [dependent] status."[329] Thus, the exercise of *judicial* plenary power picks up where legislative plenary power left off, with the Court applying a wardship theory to determine limits on tribal sovereignty, limits created by

---

322. *Id*. at 198; *see supra* note 18, and accompanying text.
323. *See supra* note 19 and accompanying text.
324. *See supra* note13, and accompanying text.
325. 435 U.S. at 201.
326. *Id.* at 202.
327. *Id.* at 194 n.4.
328. *Id*. at 212.
329. *Id*. at 208. *See also id.* at 210:

> By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. This principle would have been obvious a century ago when most Indian tribes were characterized by a "want of fixed laws [and] of competent tribunals of justice." H.R. Rep. No. 474, 23d Cong., 1st Sess., 18 (1834). It should be no less obvious today, even though present-day Indian tribal courts embody dramatic advances over their historical antecedents.

their supposed dependency. As part of the claimed limitations on tribal power, later cases explained *Oliphant* on the grounds that tribal powers of self-government were merely internal and did not include external powers, by which they meant that tribes could govern their members but not others.[330] The internal/external powers distinction which the Cherokee Removal Cases had used to denote a difference between domestic and foreign affairs functions had been significantly altered to suggest an Indian/non-Indian distinction. Suddenly Indian tribal sovereignty no longer meant what sovereignty means in other Euro-American contexts—governing authority over *all* persons and property within the exterior borders of the sovereign government.[331] For Indians, and Indians alone, their right of self-government had come to mean their power to govern themselves, but no one else, within their territory. Instead of focusing on the sovereign governing portion of the term "self-government," the Court chose to focus on the idea of *self*. Indeed, as the opinion concluded, Justice Rehnquist quoted from the infamous *Kagama* language to effect that the sovereignty over United States soil is comprised of merely the federal government and the states.[332] Thus, the *Oliphant* opinion hinted that Indian powers of self-government were no longer even considered sovereign powers, as the prior cases uniformly had suggested, but some other governing authority derived from a different source than the sovereignty of the tribe. Later cases would develop that theme. Thus, the Court suggested that the federal government, rather than the tribe, exercised criminal jurisdiction over non-Indians for crimes occurring in Indian country against the person or property of Indians.[333]

The *Oliphant* reshaping of the baseline understanding of tribal authority was significantly assisted by the grant of jurisdiction contained in the Indian Civil Rights Act of 1968,[334] authorizing the federal courts to hear habeas corpus petitions for those held in tribal detention in violation of federal law. While ostensibly designed to permit the enforcement of the criminal procedure guarantees contained in the Indian Civil Rights Act, it was

330. *See, e.g.*, Strate v. A-1 Contractors, 520 U.S. 438, 459 (1997); South Dakota v. Bourland, 508 U.S. 679, 694–95 (1993); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 330–33 (1983); Montana v. United States, 450 U.S. 544, 563–64 (1981); United States v. Wheeler, 435 U.S. 313, 324–25 (1978).

331. While recognizing a limitation on tribal authority to govern nonmembers, the *Oliphant* opinion clearly reflected that complete territorial control of a land area constituted an essential part of sovereignty. Chief Justice Rehnquist wrote, "Protection of territory within its external political boundaries is, of course, as central to the sovereign interests of the United States as it is to any other sovereign nation." *Oliphant*, 435 U.S. at 209–10.

332. *Id.* at 211.

333. *Id.* at 212.

334. 25 U.S.C. § 1303 (2000).

employed in *Oliphant* and later cases to attack the existence of tribal jurisdiction, rather than the manner of its exercise, as originally contemplated. No similar grant of jurisdiction expressly authorizes federal courts to review the regulatory or taxing authority of tribal councils or the civil adjudicatory jurisdiction of tribal courts. Nevertheless, in the exercise of judicial Indian plenary power, the federal courts undertook to adjudicate the limitations on tribal power in these areas, employing general grants of federal question jurisdiction. In these cases, the tribes were often complicit with this effort since they frequently initiated litigation in federal courts, rather than tribal courts, to establish their jurisdiction or to limit state authority over Indian country.

The problem of review of the exercise of tribal civil adjudicatory jurisdiction proved particularly thorny since federal courts generally abstain from interfering in ongoing civil adjudication proceedings in other courts, particularly state courts.[335] Furthermore, in the case of state courts, the federal courts generally would allow the state court to determine the scope of its own jurisdiction, even when attacked on grounds of federal law. While the state court decision could be reviewed in appellate courts, it could not be collaterally attacked in federal court on federal grounds as a result of the credit due on the Full Faith and Credit Act[336] to the final judgment and the determination of the jurisdiction reflected therein.[337] When initially confronted with an attack on tribal civil subject matter jurisdiction, the Court ruled in *National Farmers Union v. Crow Tribe*[338] that while federal courts had federal question jurisdiction over a suit based on federal common law claims that a tribe lacked civil jurisdiction over a suit pending in its courts, the federal courts should temporarily abstain from exercising that jurisdiction in favor of the full exhaustion of tribal remedies.[339] Exhaustion of tribal remedies permitted the tribal court to more fully inform the federal courts of the nature and basis of the tribal claim to civil adjudicatory authority. In *Iowa Mutual Insurance Co. v. LaPlante*,[340] the Court later extended its *National Farmers Union* exhaustion rule to cases filed in

335. 28 U.S.C. § 2283 (1994); *see, e.g.,* Juidice v. Vail, 430 U.S. 327 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Younger v. Harris, 401 U.S. 37 (1971).

336. 28 U.S.C. § 1738 (1994).

337. Durfee v. Duke, 375 U.S. 106 (1963) (holding that a prior final judgment in which challenging party participated is binding in subsequent collateral attack on all issues of jurisdiction due to full faith and credit); Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931); Des Moines Navigation Co. v. Iowa Homestead Co., 123 U.S. 552, 557 (1887) (holding same where no attack on subject matter jurisdiction in prior proceeding); *see also* Skillern's Ex's v. May's Ex's, 10 U.S. (6 Cranch) 267 (1810).

338. 471 U.S. 845 (1985).

339. *Id.* at 854–55.

340. 480 U.S. 9 (1987).

federal court on diversity grounds.[341] The problem with this exhaustion of remedies requirement, of course, was that it totally ignored the full faith and credit that normally would have been given to a final judgment of a state court in like circumstances. In the process, therefore, the Supreme Court by common law development, without the benefit of a statute, created a functional route for appellate review from tribal courts to federal courts on questions of the scope of jurisdiction of the tribal court. Of course, this functional avenue of appellate review actually involved filing an original action in the federal district court, but it nevertheless functioned to permit the federal court to exercise a paramount, supervisory power over the ostensibly dependent tribal courts. It permitted the federal courts to second-guess tribal judicial determinations of their jurisdiction. In no other context have the federal courts crafted, *totally without the benefit of any supporting statute*, an appellate review process supervising the courts of another sovereignty. Judicial Indian plenary power apparently contains few limitations on judicial activism and creativity, just as it failed to limit Congressional excesses during the height of American colonialism in Indian country. Furthermore, apparently relying on the claimed plenary nature of federal power in Indian affairs, the federal courts have simply assumed that tribal courts would be bound by their determination of the limitations of tribal court jurisdiction, notwithstanding broader claims of tribal authority contained in tribal codes.

While it is far beyond the scope of this essay to provide any detailed examination of the complex and arcane jurisdictional doctrines that the Supreme Court has crafted wielding these tools of judicial Indian plenary power, a quick overview of the Court's initiatives will demonstrate their inconsistency both with the baseline understanding of the tribal↔federal relationship and with the thrust of much Congressional policy since the Indian Reorganization Act of 1934.

First, in a long series of reservation diminishment and termination cases,[342] the Court has sought to diminish the geographic reach of tribal claims to sovereignty by finding, often on very thin justifications, that various legislative actions (mostly derived from the allotment era) diminished the geographic scope of an Indian reservation or terminated the reservation altogether, thereby reducing the size of the tribal claims to sovereignty. These cases, therefore, find that all or portions of an Indian reservation, the exterior boundaries of which were first established in a

341. *Id.* at 15–16.

342. *E.g.*, South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998); Hagen v. Utah, 510 U.S. 399 (1994); Solem v. Bartlett, 465 U.S. 463 (1984); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. Dist. County Ct., 420 U.S. 425 (1975).

treaty, statute, or executive order, were later shrunken or eliminated by subsequent, often *unilateral*, Congressional action.[343] Most of these diminishment or termination cases turn on statutes enacted to implement allotment, only occasionally supported by a tribal agreement. Despite the fact that the broad definition of Indian country set forth in 18 U.S.C. § 1151(a) was designed to redress the harms of allotment and prevent checkerboard jurisdiction, as *Seymour*, *Mazurie* and *Moe* previously had held, these cases invariably focus singularly on the legislative history of events during and immediately after the allotment period, totally ignoring the purposes these cases ascribed to the Congressional definition of Indian country. The net effect of these diminishment and termination cases has been to checkerboard jurisdiction in the diminished or terminated areas since the Indian trust allotments located in those areas remain Indian country, as the Court concedes, under 18 U.S.C. § 1151(c). While inconsistent with the spirit of § 1151(a), the cases to date have not technically violated the precise language of the statutes since they generally rely on a Congressional act claimed to have reduced the exterior boundaries of reservation (the touchstone of Indian country under § 1151(a)). Nevertheless, the Supreme Court has grown so aggressive in finding a reduction of Indian reservations in these reservation diminishment and termination cases that one Court of Appeals was emboldened to find that the private sale of Indian land and other private actions that removed lands from Indian trust ownership within a reservation also diminished the reservation to the extent of the non-trust lands.[344] Despite the fact that this result is squarely inconsistent with the precise language of § 1151(a), which the Court of Appeals never cited, the Supreme Court declined review. Thus, under the guise of interpreting allotment statutes, these cases accomplish precisely what Congress later sought to avoid by enacting its definition of Indian country—a clear indication that the Court has established and is enforcing its own Indian policy under the guise of judicial Indian plenary power.

Second, where the history of a reservation will not permit the Court to find diminishment or termination, the Court has developed a series of doctrines that enlarge state authority and curtail tribal authority in Indian country. Despite the fact that *Worcester* held that states lacked any authority in Indian country, even over a non-Indian missionary,[345] the

343. *E.g.*, *Yankton Sioux Tribe*, 522 U.S. 329; *Hagen*, 510 U.S. 399; *Solem*, 465 U.S. 463; *Rosebud Sioux Tribe*, 430 U.S. 584; *DeCoteau*, 420 U.S. 425.

344. Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010, 1030 (8th Cir. 1999), *cert. denied* 530 U.S. 1261 (2000).

345. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561–62 (1832).

modern Court has developed doctrines that permit states to claim some inherent authority to tax and regulate nonmembers for activities in Indian country, including Indian commerce, where not preempted by federal statutes or regulations.[346] Thus, the Court permitted state cigarette excise taxation of cigarette sales to non-Indians,[347] and later nonmember Indians.[348] Consequently, the Court has altered the basic default position in Indian country. The baseline understanding of the tribal↔federal relationship reflected in *Worcester* was that irrespective of any federal statutory action, states had no authority in Indian country unless affirmatively delegated power by Congress.[349] Indeed, as noted earlier, a number of the removal-era treaties are express on this point as a result of the experiences those tribes had with the states immediately prior to their removal. Now the default doctrine appears to be that states have inherent jurisdiction to tax nonmembers on the reservation unless preempted by federal law. In *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*[350] and *South Dakota v. Bourland*,[351] the Court extended this line of thinking to permit state and county zoning of nonmember owned land within the reservation and state regulation of nonmember hunting and fishing on non-Indian lands of the reservation. While *Worcester* is still cited, the historic baseline understanding of the tribal↔federal relationship has been replaced with a doctrine virtually opposite to the original default position of *Worcester*.

While enlarging the powers of states in Indian country, the Court has employed judicial Indian plenary power to attempt to curtail the reach of tribal power in Indian country. In the area of tribal regulatory power, the Court has strayed from the *Oliphant*[352] limitations since it recognizes some tribal power over nonmembers. In *New Mexico v. Mescalero Apache Tribe*,[353] the Court held that the Tribe could regulate non-Indian hunting and fishing on *Indian lands* within the reservation. It also sustained tribal

---

346. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 483 (1976); *see also* Dep't of Taxation & Fin. Of New York v. Milhelm Attea & Bros., Inc., 512 U.S. 61, 76 (1994); Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 514 (1991).

347. *Moe*, 425 U.S. at 483; *see also Milhelm Attea & Bros.*, 512 U.S. at 76; *Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 514.

348. Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 161 (1980).

349. *Worcester*, 31 U.S. (6 Pet.) at 560–61.

350. 492 U.S. 408 (1989).

351. 508 U.S. 679 (1993).

352. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211 (1978).

353. 462 U.S. 324, 344 (1983).

taxation of non-Indian activities on *Indian lands* within the reservation.[354] Nevertheless in both *Montana v. United States*[355] and *South Dakota v. Bourland*[356] the Court held that tribes lacked jurisdiction to regulate similar activities on *non-Indian* owned lands within the reservation. Indeed, *Montana* suggested that there was no acceptable justification for the exercise of tribal authority over non-Indian owned lands within the reservation except that:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.[357]

Williams v. Lee,[358] which clearly involved a holding that tribes had exclusive adjudicatory power over a case involving a nonmember, was explained on the ground that it involved such commercial dealings. When Indian tribes, relying on the *Montana* test, claimed that they could zone non-Indian owned land because it had a "direct effect on the . . . economic security, or the health or welfare of the tribe" due to externalities to adjacent Indian-owned parcels, the Court rejected the claim in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*,[359] at least with respect to fee patent lands located in areas of the reservation open to non-Indian settlement. Thus, for open areas of the reservation, *Brendale* created a situation where state municipal governments zoned non-Indian owned parcels within open areas of the reservation and the tribe zoned the Indian parcels. Since those parcels are interspersed on most reservations in a checkerboard pattern, *Brendale* produced for the exercise of civil regulatory power in Indian country precisely what the Court's earlier decisions in *Seymour, Mazurie*, and *Moe* recognized Congress meant to avoid by enacting § 1151(a)—checkerboard jurisdiction in Indian country. Again, the *Brendale* majority opinion simply ignored the significance of those decisions and definition of Indian country and, in the process, the

354. Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195, 201 (1985); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 152 (1982).

355. 450 U.S. 544, 565–66 (1981).

356. 508 U.S. at 691.

357. *Montana*, 450 U.S. at 565–66.

358. 358 U.S. 217 (1959); s*ee also* text accompanying *supra* note 283.

359. 492 U.S. 408, 428–29, 432 (1989).

Court rendered zoning of allotted reservations, which generally requires a comprehensive regional zoning plan, virtually impossible.

In light of the *National Farmer's Union* exhaustion rule,[360] it was predictable that eventually cases would come back to federal courts contesting the scope of tribal civil adjudicatory power over cases involving nonmembers. The lower federal courts predictably worked out a system of deferring to tribal findings of fact by reviewing them on a clearly erroneous standard, but virtually ignoring the tribal court's determination of its own jurisdiction, reviewing it *de novo*.[361] When such a case reached the Supreme Court in *Strate v. A-1 Contractors*,[362] the Court gave the tribal claim of interest short shrift. The Court unanimously ruled that tribes lacked inherent civil adjudicatory authority over a suit brought by a nonmember against another nonmember for an automobile accident that occurred on the reservation.[363] The Court paid little attention to the fact that the Tribe technically owned land over which the state highway ran since the state merely held a right-of-way. Instead, it stressed that the tribe had no present possessory interest in the land, as if its civil adjudicatory power turned on its right of access.[364] Indeed, the Court virtually ignored the fact that the Congressional definition of Indian country set forth in § 1151(a) *expressly includes rights-of-way within Indian reservations*, just as it includes fee patent lands.[365] Despite the fact that the plaintiff in the case was married to a tribal member, was the mother of several children who were tribal members, and was turning left into the driveway of her husband's Indian-owned trust allotment when the accident occurred, the Court merely focused on the fact that she was non-Indian. Furthermore, despite the fact that the defendant was driving a gravel truck for a non-Indian firm that held contracts for tribal construction work on the reservation, the Court merely focused on his race as well.[366]

In short, not only is the exercise of federal judicial Indian plenary power ignoring important, perhaps controlling, congressional directives it finds inconvenient for the formulation of its own judicial Indian policy, the current exercise of judicial Indian plenary power seems to be doing precisely what the wardship policies rationalized for Congress—racializing federal Indian law. No longer is the boundary of Indian country the demarcation point for exercise of tribal power; now the issue turns on the

360. Nat'l Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985).
361. *E.g.,* FMC v. Shoshone-Bannock Tribes, 905 F.2d 1311, 1313 (9th Cir. 1990).
362. 520 U.S. 438 (1997).
363. *Id.* at 459.
364. *Id.* at 455–56.
365. *Id.* at 454 n.9.
366. *Id.* at 459.

race, or perhaps tribal membership, of the parties involved and the race or membership status of the owners of relevant lands within the reservation. In short, the exercise of federal judicial Indian plenary power is all about protecting nonmembers, primarily whites, from Indian governance!

Obviously, in a post-*Brown v. Board of Education*[367] world, some non-racial explanation of this effort was necessary in order to mask the overt racism and colonialism involved in the Court's most recent foray into the world of Indian wardship, dependency and plenary power. *Duro v. Reina*[368] supplied that rationale. In this case, the Court returned to the theme of the reach of a tribe's inherent criminal jurisdiction, this time in a case involving criminal prosecution of an Indian who was an enrolled member of a tribe other than the one where the crime occurred. Since *Oliphant* had held that Indian tribes lacked criminal jurisdiction over non-Indians,[369] if the Court sustained tribal jurisdiction in *Duro*, it clearly would draw a racial line for criminal jurisdiction between Indian and non-Indian nonmembers of the Tribe. Yet, the *Oliphant* determination of whether the exercise of a tribal power was inconsistent with its dependent status theoretically had been based on a *historical* inquiry to determine whether Indian tribes traditionally exercised such jurisdiction. Clearly, the jurisdictional line drawn for the Court of Indian Offenses (CFR Courts), which most tribal courts displaced, was a racially-based Indian/non-Indian line, as the Supreme Court conceded.[370] Since the regulations that permitted tribal courts to displace CFR Courts until recently required the tribal government to adopt a law and order code that was at least substantially equivalent to the modernized federal Code of Indian Offense,[371] one might have assumed the history of jurisdiction of the CFR courts could have disposed of the issue in *Duro*. Instead, the Court found that history inconclusive as a history of federal, rather than tribal, jurisdiction.[372]

The Court, therefore, offered an ahistorical reason to explain why tribes lacked inherent criminal jurisdiction over nonmembers. Justice Kennedy's opinion for the Court clearly jettisoned the historic constitutionally recognized roots of the tribal↔federal relationship, by suggesting "[w]hatever might be said of the historical record, we must view it in light of petitioner's status as a citizen of the United States."[373] Thus, according

367. 347 U.S. 483 (1954).
368. 495 U.S. 676 (1990).
369. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).
370. *Duro*, 495 U.S. at 689–90.
371. *Compare* 25 C.F.R. § 11.100(c) (2000), *with* 25 C.F.R. § 11.1(b), (d) (1993).
372. *Duro*, 495 U.S. at 690.
373. *Id.* at 692.

to the *Duro* opinion, Indians, like other citizens, can look to the federal government to find protection against unwarranted intrusions on their personal liberty. Finding that criminal punishment involving the deprivation of personal liberty was so serious a punishment, the Court suggested, relying solely on *Oliphant* and without any historical support, that "its exercise over non-Indian citizens was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States."[374] Yet for the Salt River Maricopa Community involved in *Duro*, the Court did not and could not cite any treaty the tribe ever entered into by which it submitted to any overriding sovereignty of the United States. Thus, the theory of *Duro* totally ignored *Crow Dog* and *Worcester*, both of which specifically held that treaty guarantees of protection were not relinquishments of sovereignty or jurisdiction, but instead, federal guarantees of protection of that sovereignty.[375] More important was the Court's finding of "a submission to the overriding sovereignty of the United States"[376] even where there was no treaty whatsoever expressing any tribal intent to submit. The alleged submission was nothing more than a renewed statement of colonial dominance imposed without tribal consent. It was a judicially-constructed wardship theory not grounded in any historical facts surrounding the dealings between the Salt River Mariciopa Community and the federal government.

The penultimate theoretical paragraph of *Duro* clearly states a new, radically different, and highly limited paradigm for tribal powers of self-government. Justice Kennedy wrote:

> As full citizens, Indians share in the territorial and political sovereignty of the United States. The retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members. Indians like all other citizens share allegiance to the overriding sovereign, the United States. A tribe's additional authority comes from the consent of its members, and so in the criminal sphere membership marks the bounds of tribal authority.[377]

Indian tribal sovereignty, therefore, was no longer conceptualized by the Court as complete territorial sovereignty for which some tribes had carefully negotiated in prior treaties. Rather, the federal and state government shared the territorial sovereignty, and tribes simply had certain

---

374. *Id*. at 693.

375. *Ex parte* Crow Dog, 109 U.S. 556, 569 (1883); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 553 (1832).

376. *Duro*, 495 U.S. at 693.

377. *Id*.

"additional authority" derived from consent of their members.[378] Since non-Indians and nonmembers had not consented to tribal criminal jurisdiction, there was none. Ironically, as this essay notes, given the stress the *Duro* opinion placed on the fundamental constitutional principles of consent and delegation of power, it never stopped to analyze the central question posed by this issue—whether tribes ever consented to any exercise of paramount overriding federal power over themselves and their land. As this essay suggests, the consent rationale works both ways.

The *Duro* Court also stressed, as have many opponents of tribal sovereignty, that the Indian tribes are not subject to Bill of Rights limitations,[379] as *Talton v. Mayes* holds.[380] This argument has always seemed specious for a Court that honors the Indian plenary power doctrine since Congress, in the exercise of legislative Indian plenary power, purported to subject Indian tribes to most of the Bill of Rights, and in particular most of the guarantees afforded in criminal trials, by enacting the Indian Civil Rights Act of 1968.[381] Nevertheless, the *Duro* Court noted:

> The special nature of the tribunals at issue makes a focus on consent and the protections of citizenship most appropriate. While modern tribal courts include many familiar features of the judicial process, they are influenced by the unique customs, languages, and usages of the tribes they serve. Tribal courts are often "subordinate to the political branches of tribal governments," and their legal methods may depend on "unspoken practices and norms." It is significant that the Bill of Rights does not apply to Indian tribal governments. *Talton v. Mayes*, 163 U.S. 376 (1896). The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts. There is, for example, no right under the Act to appointed counsel for those unable to afford a lawyer. See 25 U.S.C. § 1302(6).
>
> Our cases suggest constitutional limitations even on the ability of Congress to subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right. We have approved delegation to an Indian tribe of the authority to promulgate rules that may be enforced by criminal sanction in *federal* court, *United States v. Mazurie*, 419 U.S. 544 (1975), but no delegation of authority to a tribe has to date included the power to punish non-members in *tribal* court.

378. *Id*.
379. *Id*.
380. 163 U.S. 376, 385 (1896).
381. 25 U.S.C. § 1302 (2000).

> We decline to produce such a result through recognition of inherent tribal authority.[382]

The lack of appointed counsel was, indeed, the *only* major difference in criminal procedure rights guaranteed by the Bill of Rights and the Indian Civil Rights Act of 1968 (ICRA). Congress thought the difference acceptable given the extreme limitations on punishment the ICRA also purported to impose on tribes and the fact that the Indian tribes were in no position in 1968 (and many are not today in a position) to absorb the costs of appointed counsel, both points totally ignored by the *Duro* opinion. Had the question been a policy question of whether to delegate authority to Indian tribes that lacked such powers, discussion of the nature and contours of the rights afforded by tribes may have been relevant to the policy question. Even the Court recognized, however, that the issue was whether the inherent aboriginal powers of tribal sovereignty included the authority to exercise criminal jurisdiction over nonmembers.[383] The rights afforded by the tribunal which exercises that power should be totally irrelevant to that legal question. The mere fact that the Court considered it in *Duro* reflects the Indian policy making role the Court has undertaken under the guise of federal judicial Indian plenary power. By common law development it has charted its own Indian policy and formulated its own conception of tribal sovereignty which is far narrower than anything the tribes negotiated for or were guaranteed in their treaties and narrower, even, than the Congressional policies reflected in modern statutes. Indeed, Congress reacted quickly to *Duro* by overturning its result by statute.[384] Nevertheless, the consent paradigm adopted by *Duro* as the touchstone of tribal sovereignty remains and continues to pervade the federal cases in the area. Thus, today federal courts are actively invoking the notion that the federal common law conception of tribal sovereignty comes from the "overriding sovereign," as *Duro* put it,[385] and have actively sought to limit the exercise of tribal power on numerous fronts.

The recent 2000 Term of the United States Supreme Court continued the trend toward enlarging state authority and diminishing the autonomy and powers of tribal governments. In *Atkinson Trading Company, Inc. v.*

---

382. *Duro*, 495 U.S. at 693–94 (citations omitted).

383. *Id.* at 679.

384. Pub. L. No. 101-511 § 8077(b), (c), 104 Stat. 1892 (codified at 25 U.S.C. § 1301(2), (4)); *see generally* United States v. Enas, 204 F.3d 915 (9th Cir. 2000), *cert. denied,* 122 S. Ct. 925 (2002); Means v. Northern Cheyenne Tribal Court, 154 F.3d 941, 946 (9th Cir. 1998); United States v. Weaselhead, 36 F. Supp. 2d 908, 914–15 (D. Neb. 1997), *aff'd by an equally divided court*, 165 F.3d 1209 (8th Cir. 1999); Tallchief Skibine, *supra* note 282; Deloria & Jessup Newton, *supra* note 282.

385. *Duro*, 495 U.S. at 693.

Shirley,[386] the Court unanimously held that the Navajo Nation had no power to impose a hotel occupancy tax on the nonmember customers of a non-Indian motel operated on fee patent land located within the almost wholly tribally-owned Navajo Reservation. Assuming any stability to or force of prior precedent, the Court's ruling in *Brendale v. Yakima Indian Nation*[387] that areas retaining their dominant Indian character should remain within the sovereignty and control of the Tribe (in that case the zoning power of the Yakima Nation), certainly suggested that the Navajo Nation should have been able to exercise such taxing authority. Nevertheless, the Court rejected that conclusion and the Navajo Nation's reliance on *Brendale,* asserting that the *Brendale* holding was limited to that situation where nonmember activities within a dominantly Indian area placed the character of the entire area in jeopardy.[388] Virtually ignoring the fact that the Navajo Nation was the closest and primary provider of governmental services, including police, fire, and emergency medical services, the Court applied the *Montana* tests and rejected the Nation's authority to tax the nonmember customers.[389] In the process of purporting to apply the *Montana* tests, the Court significantly narrowed them and thereby sought to further restrict the powers of Indian tribes over nonmembers. The Navajo Nation had argued that by coming onto the Navajo Reservation and driving on roads protected and patrolled by the Navajo Police, hotel guests accepted the protection of the Navajo Nation and entered into a consensual relationship with it that justified the taxation.[390] Furthermore, the trading post in question employed well over 100 Navajos, sold Navajo crafts, and was licensed by the federal government as an Indian trader. All of these facts, argued the Navajo Nation, suggested on-going commercial and consensual relationships with the Nation sufficient to justify the taxation.[391] The Court rejected the argument. Its language clearly suggested its result-orientation:

> The consensual relationship must stem from "commercial dealing, contracts, leases, or other arrangements," and a nonmember's actual or potential receipt of tribal police, fire, and medical services does not create the requisite connection. If it did, the exception would swallow the rule: All non-Indian fee lands within

386. 532 U.S. 645 (2001).
387. 492 U.S. 408, 440 (2001) (controlling concurring opinion of Stevens, J.)
388. *Atkinson Trading Co.*, 532 U.S. at 658–59.
389. *Id.* at 659.
390. *Id.* at 654–55.
391. *Id.* at 655–56.

> a reservation benefit, to some extent, from the "advantages of a civilized society" offered by the Indian tribe.[392]

Thus, according to the *Atkinson Trading* decision, Indian tribes, unlike state governments, cannot justify their claims to taxing authority over *nonmembers* on the ground that they require funds to pay for the services they provide to such nonmembers.[393] The only authority offered by the Court to justify this otherwise amazing proposition was that to accept the argument would permit the tribes to use functional need for revenue to pay for services provided to nonmembers as a basis for invoking the *Montana* "exception [to] swallow the rule." Apparently, making sure that the colonial paradigm of judicial plenary power prevailed constituted a more important interest to this Court than assuring that Indian tribes could raise sufficient revenue to support the governmental services they were forced to provide to Indians and non-Indians, alike. One might wonder if this Court would deem it appropriate on the same analysis for the Navajo emergency medical units to refuse emergency treatment to a guest at the hotel because they were not within the taxpaying sources of its budget, even though clearly within its service area.

Surprisingly, Justice Souter wrote a brief concurring opinion in *Atkinson* suggesting that he would not limit application of the *Montana* tests solely to non-Indian owned land within Indian country.[394] Rather, he would apply the so-called *Montana* exceptions to determine the lawfulness of all exercises of tribal authority over nonmembers, including on Indian owned land within the reservation.[395] Since the *Montana* tests originally were developed as limited exceptions (applicable only to nonmember owned lands) to the then prevailing assumption of tribal governing authority over the whole of the reservation, this suggestion constituted a remarkable enlargement of the federal judicial curtailment of tribal authority under the guise of plenary judicial power. Notwithstanding the total lack of authority for this suggestion in the history of the tribal↔federal relationship or the prior precedents of the Court, it nevertheless prevailed in the next case decided by the Court, *Nevada v. Hicks*.[396]

---

392. *Id*. at 655 (citation omitted).

393. *Contra*, Commonwealth Edison Co. v. Montana, 453 U.S. 609, 620–21 (1981); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977) (both suggesting that state taxation over out-of-state corporations is justified by, and must be fairly related to, services provided to the corporation).

394. *Atkinson Trading Co.*, 532 U.S. at 659–60 (2001).

395. *Id*.

396. 121 S. Ct. 2304 (2001).

In *Nevada v. Hicks* the United States Supreme Court brought the exercise of judicial plenary power to its ultimate conclusion, all but overruling the baseline understanding of the tribal↔federal relationship and the *Worcester* decision. The precise question involved in *Hicks* was whether the Fallon Paiute-Shoshone Tribal Court could entertain both a tort action and an action under 42 U.S.C. § 1983 brought against state conservation officials who had damaged the personal property of a tribal member *on Indian-owned* land within the Reservation while executing state search warrants for an alleged off-reservation crime *pursuant to supplemental warrants issued by the tribal court.*[397] Consistent with the trend of its judicial plenary power decisions, the Supreme Court unanimously ruled that the tribal court lacked any jurisdiction to enforce either tribal or federal legal standards against the state conservations officials despite the fact that (1) the injured party was a tribal member, (2) the event took place on Indian-owned land within the reservation and (3) the state conservation officials' power over tribal members *on-reservation* initially had been thought by all parties involved in the case (other than the United States Supreme Court) to derive solely from warrants *issued by the tribal court*.[398]

Despite the fact that *Montana* and every case that applied its tests until *Hicks* had involved tribal governance over *non-Indian* owned lands within Indian country, the Court in *Hicks*, following the suggestion in Justice Souter's concurring opinion in *Atkinson Trading*,[399] announced by sheer judicial fiat that the *Montana* exceptions henceforth would constitute the test for determining tribal authority over nonmembers anywhere within Indian country, i.e., on *Indian*, as well as non-Indian, owned land.[400] The nature of the land ownership within a reservation simply became, according to the *Hicks* opinion, a factor for a court to weigh in applying the *Montana* tests, rather, than a determinative question governing which test to apply, as it had operated in all prior cases under the judicial plenary power doctrine.[401]

Both *Montana* and *Atkinson Trading* emphasized the importance of the existence of a direct consensual relationship as a means of supporting the exercise of tribal authority over a nonmember. The most troubling aspect of the *Hicks* decision, of course, was that such a consensual relationship clearly existed on the facts of the case. In issuing the state warrant, the state court recognized the baseline understanding of the tribal↔federal

397. *Id*. at 2309.
398. *Id.* at 2313–15.
399. *Atkinson Trading Co.*, 532 U.S. at 659–60.
400. *Hicks,* 121 S. Ct. at 2309–10.
401. *Id.* at 2310.

relationship and specifically stated in its warrants that they had no force in Indian country. The state search warrants therefore expressly required the state conservation officials to secure authority from the tribal court before executing them on a tribal Indian on-reservation. The state conservation officials therefore twice sought and invoked the power of the tribal courts, as well as the help of the tribal police, to execute their search warrants on-reservation against the tribal member. All the tribal court, therefore, really sought was the authority to oversee and enforce legal standards against state law enforcement officials who invoked *tribal judicial power* to bless their on-reservation search of the property of a tribal member. By contrast, the state conservation officials sought authority without concomitant responsibility or oversight. The colonial courts of the United States were no longer prepared to concede even this limited power of oversight of the exercise of delegated tribal power to the sovereign courts of an Indian nation, at least not where it involved non-Indians.

Instead, without ever overtly discussing the consensual relationship test of the *Montana* decision, Justice Scalia's opinion for the Court in *Hicks* went to great lengths to explain why the Nevada conservation officials' invocation of tribal authority was simply unnecessary.[402] In the process, the Court, over some objection from concurring justices, converted a case about tribal court jurisdiction into a case about state power and, in dicta, purported to greatly enlarge the scope of state authority over tribal Indians on-reservation at the expense of tribal authority. Specifically, Justice Scalia's opinion suggested that the state had inherent authority to enforce its search warrant against a tribal member *on-reservation* for an off-reservation crime over which it otherwise had subject matter jurisdiction.[403] Contrary to the baseline understanding of the tribal↔federal relationship and the historical intent of the Indian Commerce Clause, Justice Scalia plainly assumed that states had jurisdiction everywhere within a state, including Indian reservations, except where expressly preempted by federal law. Totally ignoring the express requirements for tribal extradition which were contained in many Indian treaties that assumed complete tribal territorial control over their Reservations, even where off-reservation crimes are concerned,[404] Justice Scalia wrote, "[T]he States' inherent jurisdiction on

402. *Id.* at 2315.
403. *Id.* at 2311–13.
404. *E.g.* Treaty of Fort Laramie, *supra* note 17, at art. 5, *discussed in Ex parte* Crow Dog, 109 U.S. 556, 563–64 (1883) (explaining these provisions as extradition provisions for off-reservation crimes, rather than enlargement of federal or state criminal jurisdiction over Indians who commit crimes, including homicide, on reservation); Treaty of Fort Sumner, *supra* note 21, at art. 1; Treaty of Dancing Rabbit Creek, *supra* note 18, at art. 6.

reservations can of course be stripped by Congress. But with regard to the jurisdiction at issue here that has not occurred."[405]

The contrast between *Worcester* and *Hicks* could not be more stark. In *Worcester*, the criminal defendant charged by the state was *non-Indian* and the Court, nevertheless, sustained the exclusive *territorial* jurisdiction of the Cherokee Nation over the matter.[406] Federal law therefore preempted all exercise of state power over Cherokee lands in order to protect the territorial sovereignty of the Cherokee Nation. By contrast, in *Hicks*, the Court assumed complete state jurisdiction over the reservation except where expressly preempted by federal law.[407] In *Hicks*, the non-Indian state conservation officials, consistent with *Worcester*, had actually invoked the power the of the Fallon tribal court to support execution of their state search warrant.[408] The Supreme Court, nevertheless, rejected the existence of any tribal jurisdiction over the matter. Far from the complete tribal territorial jurisdiction guaranteed by the original baseline understanding of the tribal↔federal relationship reflected in *Worcester*, Justice Scalia's opinion in *Hicks* suggested that tribal authority could only be sustained over nonmembers in Indian country where "'necessary to protect tribal self-government or to control internal relations,' [or where] such regulatory jurisdiction has been congressionally conferred."[409] In short, state sovereignty and authority, even in Indian country, constituted an unquestioned norm, while tribal sovereignty and jurisdiction, previously guaranteed by treaty and the baseline understanding of the tribal↔federal relationship, now existed, according to Justice Scalia, at the sufferance and whim of the Supreme Court. Justice Scalia was not oblivious to the stark contrast between his ruling and that of Chief Justice Marshall, since he sought to limit the *Worcester* decision virtually to its facts, if not overrule it altogether. Thus, Justice Scalia wrote:

> Our cases make clear that the Indians' right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation's border. Though tribes are often referred to as "sovereign" entities, it was "long ago" that "the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries. *Worcester v. Georgia*, 6 Pet. 515, 561, 8 L.Ed. 483 (1832). . . . "Ordinarily," it

405. *Hicks*, 121 S. Ct. at 2313 (citations omitted).
406. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560–61 (1832).
407. *Hicks*, 121 S. Ct. at 2313.
408. *Id.* at 2308.
409. *Id.* at 2310 (citations omitted).

> is now clear, "an Indian reservation is considered part of the territory of the State."[410]

The fact that the Court in *Hicks* was engaged in an unprincipled expansion of state authority and curtailment of tribal power by mere judicial fiat, in contravention of prevailing Congressional policy and legal history, is perhaps most graphically demonstrated by the authorities Justice Scalia invoked to support its effort to curtail *Worcester*. To support the preceding quotation, Justice Scalia relied on the 1958 edition of *The Handbook of Federal Indian Law*,[411] totally ignoring the fact that most scholars regard that edition of the work as a total bastardization of Felix Cohen's original concept designed solely to support now discredited and Congressionally-rejected termination and Public Law 280 policies of the 1950s.[412] As a result, the 1958 edition was superceded, at the direction of Congress, by a later edition.[413] Thus, by choosing to rely on the 1958 edition of the work, rather than the more recent edition, the Supreme Court clearly aligned itself with termination and jurisdictional policies that Congress expressly rejected over thirty years ago.

Even more startling, in footnote four of his opinion, Justice Scalia seeks to limit Chief Justice Marshall's *Worcester* opinion to its facts, suggesting that it was based on, or at least must be read as based on, a "1828 treaty with the Cherokee nation . . . guaranteed the Indians their lands would never be subjected to the jurisdiction of any State or Territory."[414] This statement is simply historically false! There is no reference whatsoever to any 1828 Treaty with the Cherokee Nation in the *Worcester* opinion because the Cherokee Nation had never signed the 1828 treaty with the United States that contained the referenced language. Rather, as its express text demonstrates, the 1828 treaty was signed by the so-called Old Settlers Faction of Cherokees who had separated from the Cherokee Nation and

---

410. *Id*. at 2311 (citations omitted).

411. U.S. Dept. of Interior, Federal Indian Law 510 n.1 (1958).

412. *See, e.g.,* Russel Lawrence Barsh, *Felix S. Cohen's Handbook of Federal Indian Law, 1982 Edition*, 57 WASH. L. REV. 799, 801 (1982) (book review) (explaining politicization of the 1958 edition of the Handbook); Ronald Eagleye Johnny, *Practicing Tribal and Indian Law Along Highway 50*, 5 NEV. LAW. 15, 17 (1997) (warning about the history of the 1958 edition of the Handbook); Joseph D. Matal, *A Revisionist History of Indian Country*, ALASKA L. REV. 283, 321–27 (1997) (discussing the history and criticisms of several versions of the Handbook). In the interests of disclosure, the reader should note that the author was on of the co-authors of the 1982 edition of the *Handbook*, a fact the standard citation would not disclose.

413. Indian Civil Rights Act of 1968, Pub. L. No. 90–284, § 701, 82 Stat. 77, 73, 81 (1969).

414. *Hicks*, 121 S. Ct. at 2311 n.4 (*quoting* Organized Village of Kake v. Egan, 369 U.S. 60, 71 (1962)).

voluntarily removed to new lands west of the Mississippi River.[415] The Cherokees who signed the 1828 treaty therefore were not part of the remaining eastern Cherokee Nation involved in the *Worcester* case that resisted removal, in part, through that case. Apparently for Justice Scalia if you have seen one Cherokee, you have seen them all! Almost four years after *Worcester*, the Cherokee Nation, however, did sign a removal treaty, the Treaty of New Echota of 1835 noted at the beginning of this article, which contained language identical to that referenced in Justice Scalia's footnote.[416] Obviously, however, the *Worcester* decision was not and could not be predicated on this language since it did not come into existence or enter into force until years after the *Worcester* case was decided. Far from constituting the exclusive basis for federal preemption of state authority over Cherokee territory, as suggested in Justice Scalia's footnote, this language, as discussed at the beginning of this article, merely reiterated and rendered explicit the baseline understanding of the tribal↔federal relationship enforced in *Worcester without reference to any such explicit preemptive treaty language*. *Hicks* therefore brought the exercise of federal judicial plenary power to its ultimate conclusion. In *Hicks*, the Supreme Court accepted, albeit in dicta, the precise argument that it rejected in *Worcester*, i.e., that states have some ill-defined inherent authority over matters affecting tribal Indians in Indian country.[417]

Hicks finally demolished the façade of tribal territorial jurisdiction derived from the baseline understanding of the tribal↔federal relationship that the prior federal judicial plenary power cases had maintained, but which they had gradually undermined and dismantled. The agenda of the judicial plenary power cases was stripped bare. It was nothing less than the complete dismantling of the pretense of territorial tribal sovereignty and jurisdiction that formed the backdrop for all Indian treaties and the basis of the original tribal↔federal relationship. Tribal consent to any of the major changes in the relationship wrought under the guise of federal judicial plenary power was totally irrelevant to the Court! Rank colonialism over tribes had triumphed in *Hicks*, even while the same Court was focusing on limiting federal authority to their perception of its claimed original understanding of the consensual constitutional bargain in order to protect the non-Indian local interests of states. Since the rise of the federal judicial

---

415. Treaty at Washington with Old Settlers Faction of Cherokees, West of the Mississippi, May 6, 1828, pmbl., 7 Stat. 311.

416. Treaty of New Echota, supra note 19, at art. 5; *see generally supra* notes 19–20 and accompanying text.

417. *Hicks,* 121 S. Ct. at 2311.

plenary power, the United States Supreme Court has never met an exercise of tribal sovereignty it did not instinctively dislike![418]

Two illustrations indicate the difficulty of the present state of federal judicial plenary power. In *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*,[419] the Eighth Circuit rejected the claims of the Rosebud Sioux Supreme Court that the tribal courts had jurisdiction over a suit by an off-reservation brewery to employ the name of Crazy Horse as the brand name of a malt liquor sold with a label invoking the rich heritage of the Sioux and Sioux country.[420] Tasunki Waito (Crazy Horse) always preached against the evils of liquor and many of the white man's ways and refused to have his image captured by the whites through photography or otherwise fearing it would capture and deprive him of his spirit.[421] The mass-marketing of Crazy Horse Malt Liquor, therefore, constituted a desecration of the name and memory of Crazy Horse. In a society where names are earned and owned, such gross misappropriation of his name for commercial purposes was challenged by his descendants suing on behalf of his estate. Their claims rested on tribal law regarding the ownership of names, the federal Lanham Act, the federal Indian Arts and Crafts Act, and certain traditional tort doctrines including unfair competition and the right of publicity. The Rosebud Sioux Supreme Court found that the tribe had an interest in protecting the name and memory of their great war leader and mystic and that the defendants' mass marketing to the Rosebud Sioux Reservation of products other than Crazy Horse Malt Liquor, such as Arizona Iced Tea, subjected them to jurisdiction in the Rosebud courts.[422] The Eighth Circuit, focusing on the fact that the defendants in the tribal actions were a non-Indian owned brewery and a non-Indian distributor that did not market Crazy Horse Malt Liquor at Rosebud, concluded that the Rosebud Sioux Tribal Courts lacked subject matter jurisdiction to protect the name and memory of their great war leader.[423]

In *Wilson v. Marchington*,[424] the inconsistency between the Court's approach in determining limits on tribal jurisdiction and the approach taken toward similar claims of lack of state jurisdiction became apparent. In that case a tribal member had been injured in an automobile accident with a non-

418. For an excellent recent statistical and doctrinal summary of the cases, see David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001).

419. 133 F.3d 1087 (8th Cir. 1998).

420. *Id.* at 1093–94.

421. *Id.* at 1088–89.

422. *Id.* at 1089.

423. *Id.* at 1093–94.

424. 127 F.3d 805 (9th Cir. 1997).

Indian on a state highway running through the reservation.[425] He sued in tribal court and secured a quarter-million dollar verdict. He then filed suit in federal court to enforce the tribal judgment off-reservation. Had the judgment come from a state court, the federal court, of course, would be required under the Full Faith and Credit Act[426] to give full faith and credit to the state judgment. In a case originating in state court, § 1738 would have barred the redetermination of the subject matter jurisdiction of the issuing court. In *Wilson*, the plaintiff argued that the tribal judgment was entitled to full faith and credit under § 1738 as a judgment of a court of a territory.[427] Notwithstanding a prior decision of the Supreme Court, holding under an analogous statute that Indian tribal adjudications were entitled to recognition as judgments of a territory,[428] the Ninth Circuit rejected full faith and credit and applied a comity approach to enforcement of the judgment, thereby permitting it to redetermine the tribal court's subject matter jurisdiction.[429] Despite the fact that a tribal member brought the tribal court case that produced the judgment in *Wilson*, the Ninth Circuit found that the case was controlled by *Strate,* even though in that case no tribal members were involved.[430] The Court virtually ignored the fact that *Williams v. Lee* had indicated that tribal courts could exercise jurisdiction in cases between tribal members and non-Indians.[431] Thus, federal judicial Indian plenary power is increasingly being used by lower courts to prevent tribal courts from exercising jurisdiction in cases involving non-Indians or to assure that tribal judgments in such cases are ignored. Tribes can no longer count on federal court support for their exercises of sovereignty and jurisdiction to protect their own members from reckless non-Indian drivers on their own reservations.

IV. FEDERAL SUPREMACY DOES NOT APPLY TO INDIAN TRIBES

Today, Indian tribes face a problem they have not previously confronted—whether to honor federally developed Indian law. At first glance, the problem may appear simple, but it involves a far more complex set of choices than may be apparent. Most tribes made no agreement expressly giving up their sovereignty and some even negotiated for and

425. *Id.* at 807.
426. 28 U.S.C. § 1738 (1994).
427. *Wilson,* 127 F.3d at 807.
428. United States *ex rel*. Mackey v. Coxe, 59 U.S. (18 How.) 100, 104 (1855).
429. *Wilson,* 127 F.3d at 809, 815.
430. *Id.* at 813.
431. 358 U.S. 217, 219–20 (1959).

received express treaty promises of complete territorial jurisdiction over their reservations.[432] While such guarantees were explicit in some treaties, implicit in all creation of Indian country, at least until recently, was the assumption created by the baseline understanding of the tribal↔federal relationship—that Indian reservations or other areas of Indian country were set aside for exclusive governance by the Indian tribes governing the areas. The Indian tribes still recognize those promises and the original understanding of the tribal↔federal relationship. Since there is no easy way for the tribes to seek rescission and get their ceded lands back as a result of federal breaches of treaty promises, the tribes insist that Congress and the federal courts honor the original bargain. Indeed, many tribal codes contain jurisdictional provisions that continue to assert such complete territorial jurisdiction over their reservation. The provisions of the Cheyenne River Sioux Law and Order Code illustrate the scope of such claims:

> Sec. 1-4-1 Jurisdiction—Tribal Policy.
>
> It is hereby declared as a matter of Tribal policy, that the public interest and the interests of the Cheyenne River Sioux Tribe demand that the Tribe provide itself, its members, and other persons living within the territorial jurisdiction of the Tribe as set forth in Section 4 of the Act of March 2, 1889, (48 Stat. 888) with an effective means of redress in both civil and criminal cases against members and non-Tribal members who through either their residence, presence, business dealings, other actions or failures to act, or other significant minimum contacts with this Reservation and/or its residents commit criminal offenses against the Tribe or incur civil obligations to persons or entities entitled to the Tribe's protection. This action is deemed necessary as a result of the confusion and conflicts caused by the increased contact and interaction between the Tribe, its members, and other residents of the Reservation and other persons and entities over which the Tribe has not previously elected to exercise jurisdiction. The jurisdictional provisions of this Code, to insure maximum protection for the Tribe, its members and other residents of the Reservation, should be applied equally to all persons, members and non-members alike.
>
> Sec. 1-4-2 Territorial Jurisdiction.
>
> The Jurisdiction of the Courts of the Cheyenne River Sioux Tribe shall extend to the territory within the exterior boundaries as set forth in Section 4 of the Act of March 2, 1889 (48 Stat. 888)

432. *See supra* notes 17–21 and accompanying text.

> and to such other lands without such boundaries as may hereafter be added to the Reservation or held in Trust for the Tribe under any law of the United States or otherwise.[433]

Clearly, the Cheyenne River Sioux Tribe claims complete territorial jurisdiction, not merely the limited consensual jurisdiction over its members that the modern exercises of the federal judicial Indian plenary power doctrine would permit the Tribe to exercise.

The growing gap between the Indian territorially-based conception of tribal sovereignty and federal courts' efforts to curtail the scope of tribal authority creates a clear legal dissonance for most Indian tribes. The problem which results both from federal statutes enacted under the Indian plenary power doctrine and from federal common law limitations on tribal sovereignty imposed by the federal judiciary is whether the tribe should adhere to its own conception of its authority, often guaranteed by treaty and certainly reinforced by the original understanding of the tribal↔federal relationship, or whether it should bend to and follow the allegedly paramount and overriding power of the federal government in Indian affairs. Not surprisingly, these questions often arise in tribal courts. Careful analysis of the themes in this paper and of the doctrines of *stare decisis* suggest that the tribes and the tribal courts should continue to adhere to their own conceptions of their sovereignty and should simply ignore contrary federal statutes and judicial decisions.

Tribal courts, like federal and state courts, can consider the constitutionality of legislation brought to the court for enforcement. That power of judicial review includes not only tribal laws, but also federal laws. Thus, the constitutionality of federal statutes enacted under the guise of the federal plenary power doctrine constitutes a question open for tribal court decision, although almost no tribal decisions have actually challenged the constitutionality of federal legislation. Given this fact, it is surprising that parties rarely challenge the constitutionality of federal statutes based upon the colonialist federal Indian plenary power doctrine in either tribal or federal court.[434] At least when challenged in tribal court, such statutes can and should be subjected to searching scrutiny.

---

433. Cheyenne River Sioux Law & Order Code, §§ 1-4-1, 1-4-2.

434. While not frequently challenged in actual cases, a body of scholarly literature, orchestrated by Professor Robert B. Porter, who has held mock arguments of notable federal Indian law landmark decisions before panels of actual tribal judges, has begun to involve tribal judges writing opinions in which they attempt to create a dialogue about the legitimacy of the federal plenary power doctrine and other aspects of American colonialism. *See* Robert B. Porter, *Foreword: The 2nd Annual Tribal Law and Governance Conference*, 8 KAN. J.L. & PUB. POL'Y 71 (1999); Johnson v. M'Intosh, *In the Supreme Court of the American Indian*

Such careful scrutiny reveals the intellectual bankruptcy of the federal Indian plenary power doctrine. *Kagama* clearly indicated that the basis of the federal Indian plenary power doctrine was *not* the Indian Commerce Clause nor any textual delegation of constitutional power to Congress, but rather, a late-nineteenth century "white man's burden" argument for colonialism derived from notions of racial superiority then prevalent in the western drive for colonial empires.[435] Applying conventional constitutional analyses derived from notions of delegated power, the Indian plenary power doctrine therefore has no basis whatsoever in American constitutional law. It was not grounded in any traditional conception of enumerated, delegated federal authority.

Just as the *Lopez* and *Morrison* cases have reconsidered the scope of the Interstate Commerce Clause on the basis of its historic roots,[436] so tribal and federal courts can and should reconsider the scope of Indian affairs powers of Congress in light of the limited delegation of such authority contained in the Indian Commerce Clause. Given popular sovereignty notions, the delegated governing could only include federal power over those then subject to authority of the United States, i.e., the non-Indian side of Indian commerce. Explication of the historic baseline tribal↔federal relationship reflected in the federal treaties, the history of the Indian Commerce Clause, and the very limited Congressional understanding and implementation of federal authority in Indian affairs for the first century of the nation's existence, all explain why the Indian Commerce Clause does not grant Congress plenary power over Indian affairs. Indeed, the Indian Commerce Clause originally was not intended to grant Congress any power to regulate Indian tribes or their members who were not founding members of the American union and were not even citizens of the United States.[437] The federal power delegated to Congress in the Indian Commerce Clause was the power to regulate non-Indians subject to the authority of the United States who dealt with tribes and the exclusive power of the United States, rather than the states, to manage diplomatic and economic relations with Indian nations. The Indian tribes were simply separate nations existing geographically within the United States, but as *Crow Dog* and *Elk v. Wilkins* expressly hold, *not* subject to its authority or jurisdiction.[438] The

---

Nations, 9 KAN. J.L. & PUB. POL'Y 889 (2000); Lone Wolf v. Hitchcock, *In the Supreme Court of the American Indian Nations*, 8 KAN. J. L. & PUB. POL'Y 174 (1999).

435. United States v. Kagama, 118 U.S. 375, 383–84 (1886).

436. United State v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995); s*upra* text accompanying note 2.

437. *Supra* notes 44–56 and accompanying text.

438. Elk v. Wilkins, 112 U.S. 94 (1884); *Ex parte* Crow Dog, 109 U.S. 556 (1883).

fiction that their location within the United States and the states somehow enlarged federal or state authority over Indian tribes was not part of the original understanding of the Indian Commerce Clause, but a myth perpetrated by the *Kagama* Court to justify enlarged federal colonial power over the tribes. Indeed, the Supreme Court's early decision in *Worcester* asserted almost the reverse position—inclusion of an Indian tribe within a state afforded the state no claim to authority over the tribe whatsoever.[439] Indian tribal courts, therefore, can and should reject the federal Indian plenary power doctrine in favor of the original understanding of the baseline tribal↔federal relationship, often guaranteed in a treaty creating the tribal reservation.

The problem, of course, is that current federal judicial precedents claim a far broader power for Congress under the guise of the Indian plenary power doctrine. Since *McClanahan* abandoned federal wardship as the basis for federal power,[440] subsequent cases continue to recite the plenary nature of the Indian affairs powers of Congress, without revisiting the scope of that power, as the Court has done with the interstate commerce power in *Lopez* and *Morrison*.[441] This essay certainly suggests that such a reexamination is long overdue and would lead to the conclusion that the claims of plenary federal power in Indian affairs are just as much relics of America's racial past as the contemporaneously developed doctrine of "separate but equal." Furthermore, the worldwide revulsion at western colonialism and the post-World War II decolonization movement also suggest that reconsideration of the plenary power doctrine derived from wardship is long overdue. Such a reconsideration should lead to the realization that Congress possesses only very limited power under the Indian Commerce Clause to regulate non-Indians who deal with Indian tribes and their members and to manage the United States' relations with Indian tribes. If the federal courts will not undertake such a reexamination, the tribal courts should!

Consistent with the original American constitutional tradition, the federal government can secure power to directly regulate Indian tribes or their members only through exercise of the treaty power. Because of doctrines of *stare decisis*, lower federal courts may not be at liberty to engage in such a reappraisal until the Supreme Court signals the non-controlling nature of the Indian wardship cases that produced the federal Indian plenary power doctrine.[442] That observation, however, does not mean that tribal courts

439. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 595 (1832).

440. McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 n.7 (1972).

441. *Lopez*, 514 U.S. at 567; *Morrison*, 529 U.S. at 617–18.

442. *E.g.*, Red Lake Band of Chippewa Indians v. Brown, No. 90-5273, 1991 U.S. App. LEXIS 4712 (D.C. Cir. Mar. 19, 1991) (unpublished dispositional order) (affirming summarily

may not engage in such a reappraisal. But are tribal courts, or Indian tribes, bound by United States Supreme Court decisions on the scope of their jurisdiction (exercises of *judicial* Indian plenary power) or by the plenary nature of the power of Congress to curtail and limit their sovereignty?

Since Indian tribes are sovereign, they have the power to adopt any approach to precedent and *stare decisis* they desire. Nevertheless, since most tribes today, outside of Alaska and a few southwestern tribes, have some variant of a western style tribal court, almost all tribal courts of record more or less follow American legal traditions with respect to the binding effect and use of precedent. Under those traditions, a court is technically bound only by the holdings of the same court or a court with authority to review its decisions. Presently, no Act of Congress authorizes the United States Supreme Court or any federal court to review tribal decisions.[443] Indeed, given the limited nature of Indian commerce power argued for in this essay, perhaps any federal statute extending such review should be subject to serious constitutional challenge. Whatever the constitutionality of extension of such federal review powers, at present, the simple fact is that none exists. As a consequence, the tribal appellate courts are truly courts of last resort, with no possibility of a direct appeal to the United States Supreme Court or any other federal or state court.[444] As such, they

---

the dismissal of a tribal challenge to the constitutionality of the Indian Gaming Regulatory Act of 1988 because "[u]nbroken precedent confirms the large authority of Congress, under the Indian Commerce Clause, to regulate tribal affairs, and the correspondingly large deference owed by the judiciary to congressional determinations in this area.").

443. Under 25 U.S.C. § 1303, persons held in detention by Indian tribes in violation of the federal law, including the Indian Civil Rights Act provisions found in 25 U.S.C. § 1302, can apply for a writ of habeas in federal district court. *See e.g.*, Means v. Northern Cheyenne Tribal Court, 154 F.3d 941, 949 (9th Cir. 1998); Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 885 (2d Cir. 1996). While the habeas jurisdiction created by § 1303 provides a limited means by which tribal orders limiting liberty can be reviewed in federal court, such actions do not constitute appeals. Petitions for writs of habeas corpus constitute independent civil actions. Oneal v. McAninch, 513 U.S. 432, 440, 449 (1995). Thus, tribes are no more bound as a matter of *stare decisis* by the outcome of such cases than the highest court of a state is by a federal district court grant of a writ of habeas corpus under 28 U.S.C. § 2254. While of no value as precedent, such cases clearly are binding on the parties as a matter of res judicata so long as the issuing court had lawful jurisdiction.

444. Certainly federal courts do review tribal decisions as to the reach of their jurisdiction under the doctrine of *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985). Since these actions also constitute independent actions in the nature of collateral attacks on jurisdiction, rather than appeals, they do not bind the tribal courts. An analogy on this point perhaps exists between federal decisions under *National Farmers Union* and decisions of the federal courts announcing state law under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Federal courts are required to offer their views on the meaning of state law since *Erie* binds them to apply state rules of decision in diversity cases. *Id.* Nevertheless, their decisions on the meaning of state law do not bind the state courts and, indeed, rarely are cited by them. Since the federal courts have no appellate review power over state courts on matters of state law, their

technically are bound only by their own precedents and the Indian tribes are not technically bound as a matter of *stare decisis* by decisions of the Supreme Court or lower federal courts purporting to curtail their jurisdiction or sustaining the constitutionality of federal statutes that attempt to regulate Indian tribes or purport to curtail their sovereignty.

Certainly, under the doctrine of *stare decisis*, decisions of the Supreme Court and other lower federal courts may have persuasive effect if their reasoning withstands close analysis. The message of this essay, of course, is that the inconsistency of these cases with the basic norms of American constitutional thought, their inconsistency with the original understanding of the Indian Commerce Clause, their tendency to undermine and invert the original baseline understanding of the tribal↔federal relationship, and the tainted roots of the wardship notion based on notions of racial superiority of late-nineteenth century colonialism, all significantly undermine, and indeed, totally destroy, the persuasive force of these decisions. They constitute a house of cards built entirely on the wardship foundations of *Kagama*.[445] They have no basis whatsoever in the American constitutional tradition of consent or limited delegated federal powers. Thus, Indian tribal courts can, and perhaps should, decline to follow both the federal judicial plenary power cases and other federal cases purporting to limit tribal authority and sustaining the application of broad federal statutes to Indian tribes.

Even if one accepts the view that Supreme Court precedents do not technically bind tribal courts as a matter of *stare decisis*, it might be objected that federal court decisions nevertheless constitute the supreme law of the land and so might be thought binding as a matter of federal supremacy. That claim, however, merely raises the question of the basis for any claims to federal supremacy over Indian tribes. Certainly, the Supremacy Clause of the United States Constitution[446] makes no such claim, since by its terms it only makes federal law binding on "any Thing in the Constitution or Laws *of any State* to the Contrary notwithstanding."[447] Indian tribes were not subject to direct federal governance at the time of the drafting the Constitution. Their members were not citizens, nor part of "[w]e the people of the United States"[448] and therefore could not participate in the drafting or ratification of the document. Imposing and enforcing

---

decisions on state law lack any force as binding precedent in state court. Likewise, state courts technically are not bound by the rulings of lower federal courts in federal constitutional claims challenging state convictions by writ of habeas corpus under 28 U.S.C. § 2254.

445. United States v. Kagama, 118 U.S. 375 (1886).

446. U.S. CONST. art. VI, § 2.

447. *Id*.

448. U.S. CONST. pmbl.

federal supremacy on Indian tribes would violate the fundamental principles of popular delegation and political participation that form the core of our constitutional system. The theory of the United States Constitution, the original baseline understanding of the tribal↔federal relationship, and the early behavior of Congress for the first century of our national existence all reflect the view that nothing in the Constitution, including the Supremacy Clause, rendered federal law or federal judicial decisions supreme over tribal law. Indeed, Chief Justice Marshall conceded as much in *Johnson v. M'Intosh*,[449] the Court's first major federal Indian law decision. After announcing the so-called Doctrine of Discovery as binding on "the courts of this country," he conceded that the Indian tribes could make and enforce their own separate law regarding their ability to grant their lands to others.[450] Their grants, however, would derive their force only from tribal, not federal, law and could be enforced, according to Chief Justice Marshall, only in tribal forums.[451] With that concession, the Supreme Court clearly held that Indian tribes were not bound by decisions of the United States Supreme Court on federal Indian law questions. There simply is no basis in the United States Constitution or its legal theory for binding Indian tribes to federal law as the supreme law of the land.

Some might also suggest that conquest provides the missing element of federal supremacy and authority. The conquest myth has played a fascinating role in federal Indian law. Derived from the original United States negotiating position with respect to the Indian tribes after the Revolution, it was formally abandoned by Congress in 1791.[452]

---

449. 21 U.S. (8 Wheat.) 543 (1823); s*ee supra* note 64 and accompanying text.

450. *M'Intosh*, 21 U.S. (8 Wheat.) at 572, 589.

451. *Id*. at 593.

452. Clinton, *supra* note 36, at 1134–35.

Responding to American claims of conquest during the treaty negotiations at Hopewell with the Cherokee Nation, Corn Tassel, a Cherokee spokesman, said:

> Suppose, in considering the nature of your claim (and in justice to my nation I shall and will do it freely), I were to ask one of you, my brother warriors, under what kind of authority, by what law, or on what pretense he makes this exorbitant demand of nearly all the lands we hold between your settlements and our towns, as the cement and consideration of our peace.
>
> Would he tell me that it is by right of conquest? No! If he did, I should retort on him that *we* had last marched over his territory; even up to this very place which he has *fortified* so far within his former limits; nay, that some of our young warriors (whom we have not yet had an opportunity to recall or give notice to, of the general treaty) are still in the woods, and continue to keep his people in fear, and that it was but till lately that these identical walls were your strongholds, out of which you durst scarcely advance.
>
> If, therefore, a bare march, or reconnoitering a country is sufficient reason to ground a claim to it, we shall insist upon transposing the demand,

Nevertheless, the Supreme Court employed the notion as a justification for dispossessing the Indians of their aboriginal title without just compensation.[453] Justification of federal overriding power based on conquest fails for at least two reasons. First, most of the tribes in the United States simply never engaged in any military encounters with the United States and some which did, like the Lakota (Sioux), actually never were defeated militarily. Indeed, the Lakota won both Red Cloud's War in 1868, forcing the closure of the Bozeman Trail, and their last armed military encounter with the United States involving General George Armstrong Custer's Seventh Calvary at the Battle of Greasy Grass (the Little Big Horn). Therefore, for most Indian tribes conquest is nothing more than a

---

> and your relinquishing your settlements on the western waters and removing one hundred miles back towards the east, whither some of our warriors advanced against you in the course of last year's campaign.
>
> Let us examine the facts of your present eruption into our country, and we shall discover your pretentions on that ground. What did you do? You marched into our territories with a superior force; our vigilance gave us no timely notice of your maneuvers; your numbers far exceeded us, and we fled to the stronghold of our extensive woods, there to secure our women and children.
>
> Thus, you marched into our towns; they were left to your mercy; you killed a few scattered and defenseless individuals, spread fire and desolation wherever you pleased, and returned again to your own habitations. If you meant this, indeed, as a conquest you omitted the most essential point; you should have fortified the junction of the Holstein and Tennessee rivers, and have thereby conquered all the waters above you. But, as all are fair advantages during the existence of a state of war, it is now too late for us to suffer for your mishap of generalship!
>
> Again, were we to inquire by what law or authority you set up a claim, I answer, *none*! Your laws extend not into our country, nor ever did. You talk of the law of nature and the law of nations, and they are both against you.
>
> Indeed, much has been advanced on the want of what you term civilization among the Indians; and many proposals have been made to us to adopt your laws, your religion, your manners and your customs. But, we confess that we do not yet see the propriety, or practicability of such a reformation, and should be better pleased with beholding the good effect of these doctrines in your own practices than with hearing you talk about them, or reading your papers to us upon such subjects.

Corn Tassel's (Cherokee Statesman) reply to U.S. Commissioners (July 1785) *in* NATIVE AMERICAN TESTIMONY 122–23 (Peter Nabokov ed., 1991).

453. *See M'Intosh*, 21 U.S. (8 Wheat.) at 589, 591; *see also* Tee-Hit-Ton v. United States, 348 U.S. 272, 289–90 (1955).

> Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land.

Tee-Hit-Ton, 348 U.S. at 289–90.

legal myth. It has no basis in actual historical fact. Second, in *Johnson v. M'Intosh*,[454] the very first Indian law decision issued by the Supreme Court, the Court denied that conquest enlarged national *governing* authority over Indians,[455] a position from which it has not directly retreated. Third, and more important for purposes of this essay, the question of constitutional power cannot be decided by conquest. Conquest itself does not constitute a constitutional popular delegation of power! As *Johnson v. M'Intosh* suggests, at most conquest represents a justification for amalgamating conquered people into the mass of citizens of the conquering nation. The express references in the text of the Constitution to Indian tribes in the Commerce Clause and the "Indians not taxed" clauses demonstrate that the conquest justification for federal power was *not* the American constitutional law with reference to Indian tribes.[456] Conquest of Indian tribes, even in those examples where it historically did exist, therefore, cannot create a constitutional delegation of power that otherwise did not exist.

Nevertheless, despite the lack of any justification for federal supremacy over Indian tribes that withstands careful constitutional scrutiny, cases, such as *Duro v. Reina*,[457] repeatedly suggest an overriding federal authority that binds Indian tribes. Close analysis of such decisions, however, clearly indicates that they predicate federal supremacy on plenary power, not on the Supremacy Clause. Thus, if the tainted wardship roots and the lack of any acceptable constitutional justification for the Indian plenary power doctrine

---

454. 21 U.S. (8 Wheat.) 543 (1823):

> When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes these restraints upon him; and he cannot neglect them without injury to his fame, and hazard to his power.
>
> But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; *to govern them as a distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence*.
>
> What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and *who could not be governed as a distinct society*, or of remaining in their neighbourhood, and exposing themselves and their families to the perpetual hazard of being massacred.

Id. at 589–90 (emphasis added).

455. *Id.* at 589.

456. U.S. CONST. art. I, § 8; U.S. CONST. art. I, § 2.

457. 495 U.S. 676 (1990).

undermine that doctrine, all bases for claims of federal supremacy over Indian tribes disappear with it. Both plenary federal power in Indian affairs and claims to a federal overriding power constitute insupportable wardship relics of the racism of late-nineteenth century colonialism that should have disappeared along with other aspects of America's racist past. Once one realizes that fact, there is no constitutionally acceptable justification for claims of overriding federal power. In short, there is no federal supremacy clause for Indian tribes!

An important cautionary practical note, however, must be added to this conclusion.[458] This essay is intended to explore the important constitutional theory surrounding the tribal↔federal relationship. It is not offered as a prescription for future tribal governmental behavior. Even if American constitutional law cannot offer any satisfactory constitutional theory binding Indian tribes to unilaterally adopt federal law or judicial decisions limiting tribal authority, ignoring such decisions can have significant adverse costs for tribes. First, whatever the original constitutional theory, Indian tribes over time have in fact become enmeshed with and often financially dependent on the federal government, often in ways not unlike the states. Just as the states can resist perceived federal governmental overreaching, as they recently have done, but are in no financial or other position to simply ignore or flaunt the federal government, likewise Indian tribes, which often are substantially more dependent on the federal government for social service program funding or the protection of their

---

458. After hearing a necessarily abbreviated oral presentation of portions of this article, Philip S. Deloria, the Director of the American Indian Law Center, Inc., rightly cautioned the author that if tribal leaders irresponsibly flaunt federal law in response to the author's legal theories, it could make life far worse for many Indian communities, whose socioeconomic data already places them at the bottom of most material and health measures of American society. These perceptive comments suggest that, whatever the original constitutional theory of federal power with respect to Indian tribes and irrespective of the nature of the relationship developed when treaties were negotiated, the model of the tribal↔federal relations in fact has been a historically evolutionary one in which Indian tribes increasingly have become enmeshed with, controlled by, and economically dependent upon the federal government. Whatever its theoretical constitutional legitimacy, that practical reality clearly suggests that tribal leaders and tribal judges must be extremely cautious in exercising the powers they legitimately can claim.

For an argument that this history practically requires tribes to accept federal authority and supremacy, see Robert Laurence, *Learning to Live with the Plenary Power of Congress Over the Indian Nations: An Essay in Reaction to Professor Williams' Algebra*, 30 ARIZ. L. REV. 413 (1988). For a contrasting view, see Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence's Learning to Live with the Plenary Power of Congress Over the Indian Nations*, 30 ARIZ. L. REV. 439 (1988). The mere fact that tribes often may have little practical choice but to accept exercises of federal plenary power does not necessarily constitutionally legitimate the use of that power by the federal government. This essay primarily addresses that latter question.

lands, cannot now and never have been able to simply ignore the policy of the federal government in Indian affairs. Failure to recognize and often cooperate with federal policy objectives can easily lead to loss of important federal economic, logistical, and political support for tribal governments. Since federal law often constitutes the major bulwark against Indian country being overrun by aggrandizing efforts by the states to increase their political hegemony over Indian peoples, the loss of federal support very well could make tribal governance a practical impossibility, whatever its legal legitimacy. Second, while not technically binding on tribal courts, the decisions of the Supreme Court in the area of Indian law certainly constitute precedents that must be considered for their *persuasive* analytical force. Tribal courts that simply ignore federal law or Supreme Court precedents clearly will be seen by other courts in the federal system as acting illegally. Since such courts often need to cooperate on the enforcement of judicial decrees, criminal extradition, the execution of search warrants, cross-deputization arrangements and the like, tribal courts and judges cannot afford the reputation of becoming judicial "loose canons." No sovereign is an island. All are interdependent. Tribal governments, leaders and judges must exercise tribal sovereignty responsibly in ways that both foster the social, economic, and political welfare of tribal members and facilitate the intergovernmental cooperation on which tribal well-being often depends.

The international human rights movement often employs the slogan "speaking truth to power."[459] This essay constitutes an effort to accomplish precisely that result. There is, however, a difference between "speaking truth to power" and acting recklessly. Any tribe must pick its battles cautiously. Part of that caution must involve full consciousness of the risks, the costs, and the chances of success. The single Chinese citizen who stood in front of the advancing tanks of the Peoples Army during the Tianamen protests in the Peoples Republic of China clearly was speaking truth to power. Had he simply been crushed by the advancing tanks, his actions would have been seen as reckless and his protest would have attracted far less attention worldwide. Any tribe seeking to speak truth to power must assure that its actions do not result in the tribe being crushed under the metaphorical weight of federal tanks.

V. INDIAN CITIZENSHIP: THE FORMAL RATIONALE THAT FAILS

The reliance placed in the *Duro* opinion on Indian citizenship suggests, perhaps, an alternative rationale that might be offered to justify the exercise

459. *Duro v. Reina*, 495 U.S. 676 (1990).

of federal power over Indian tribes—the current American citizenship of Indians. The argument would run that while Indians were only citizens of their tribes and not part of the American people at the time the United States Constitution was drafted or when the Fourteenth Amendment definition of citizenship was adopted, as *Elk v. Wilkins* holds,[460] they are today American citizens, who may (but often do not) participate in, and theoretically consent to, American governance. The argument, therefore, is that Indian tribes, originally existing outside of the federal system, were brought into the federal union by the conferral of citizenship on their members through the Indian Citizenship Act of 1924.[461] Given the way many Indians view

---

460. 112 U.S. 94 (1884).

461. Indian Citizenship Act of 1924, ch. 233, 43 Stat. 253 (1924) (codified at 8 U.S.C. § 1401(b)):

> (b) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property.

In a recent article, Professor Robert Porter has questioned the constitutionality of the Indian Citizenship Act of 1924. Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 HARV. BLACK LETTER L.J. 107, 135–38 (1999) (focusing on the lack of Indian consent).

Significantly, although the Indian Citizenship Act of 1924 conferred United States citizenship, it did *not* confer state citizenship. Since the Supreme Court held in *Elk v. Wilkins*, 112 U.S. 94 (1884), that the citizenship clause of the Fourteenth Amendment did *not* apply to Indians, there is perhaps no justifiable explanation for treating tribal Indians as citizens of a state. Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 ARIZ. ST. L.J. 439, 472–73 (1999). The citizenship statutes, themselves, continue to draw a distinction between natural born citizens, and Indians born in the United States whose citizenship depends on naturalization. *Compare* 8 U.S.C. § 1401(a) (2000), *with* § 1401(b) (2000). Perhaps federal Indian law distinctions are more understandable if one assumes that Indians are citizens of the Untied States and their tribes, while state citizens are citizens of United States and their states. This distinction would go far to explain to the American public why state law does not apply to Indians in Indian country. Nevertheless, a series of cases, commencing with post-World War II voting rights cases, simply assumed that Indians were citizens of the states in which they reside, often citing the Fourteenth Amendment without noting the *Elk v. Wilkins* holding. *E.g.,* Harrison v. Laveen, 196 P.2d 456, 458 (Ariz. 1948); Goodluck v. Apache County, 417 F. Supp. 13, 15 (D. Ariz. 1975); Acosta v. San Diego County, 272 P.2d 92, 97 (Cal. Ct. App. 1954). These cases went far toward blurring the citizenship and, ultimately, jurisdictional boundaries that had been part of the original baseline understanding of the tribal relationship. Nevertheless, since federal policy has involved states in aggressively providing certain services to Indians, such as public educational services, denying Indians state citizenship on the basis of the limited grant of the Citizenship Act of 1924 would have the unfortunate result of denying Indians the right to vote for important municipal and school board authorities who are responsible for providing them important governmental services. Denial of state citizenship also would affect the ability of parties to invoke the federal diversity of citizenship jurisdiction set forth in 28 U.S.C. § 1332 where tribal Indians constitute parties to the litigation.

themselves today and their patriotic pride in dual American citizenship and tribal membership, there is some practical, grass roots force to this potential argument.[462] Nevertheless, this seemingly simple answer to the consent/delegation question ultimately fails to justify the exercise of federal plenary power over Indian tribes and their members for several reasons.

First, granting citizenship to Indians as individuals does not diminish or alter the sovereignty of Indian tribes as governments. The United States Constitution expressly recognizes two different statuses for Indians.[463] Indian tribes are recognized as sovereign nations in the Indian Commerce Clause, by their grouping in that clause with two other sovereigns, foreign nations and the sovereign states of the union. Thus, the Constitution recognizes the national sovereignty of Indian tribes, i.e., the sovereignty of Indians in their corporate form as a body politic. Indeed, *Crow Dog* clearly understood this distinction when it held that treaty guarantees of orderly government to the Sioux constituted a protection of the Sioux Nation's corporate existence, not a promise to supply federal governance for Lakota Indians as individuals.[464] In addition, the "Indians not taxed" clause of the census provision of Article I recognizes the non-citizen status of Indians, as individuals. Originally, tribal Indians were not counted in the census because they owed no allegiance to the United States, were not subject to its laws (as *Crow Dog* and *Elk v. Wilkins* held), and therefore were not part of the people of the United States who should be counted for representation purposes in the census.

Early Indians treaties, such as the Treaty of Fort Pitt and the various Cherokee treaties,[465] contemplated that Indian tribes could be brought into the federal union only by exercise of their affirmative consent through their political agreement to become a state. That is precisely the way other pre-

---

A further interesting question posed by *Elk v. Wilkins* and the federal citizenship laws involves whether a tribal Indian who is also a citizen of the United States constitutes "a natural born Citizen" for purposes of eligibility to be President or Vice-President under Article II, sec. 1, cl. 5 of the United States Constitution. Since *Elk* holds that the citizenship clause of the Fourteenth Amendment does not apply to tribal Indians who can only become United States citizens though naturalization, and since the federal citizenship laws continue a distinction between natural born citizens and Indians born in the United States, compare 8 U.S.C. § 1401(a) with § 1401(b), and cannot, in any event, constitutionally overturn *Elk v. Wilkins*, a reasonable argument can be made that all tribal Indians, even those born in the United States to Indian parents who are United States citizens, are only *naturalized* citizens of the United States.

462. Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 851–60 (1990) (discussing the background of Indian citizenship, noting current Indian dual allegiance between tribal and United States citizenship, and suggesting that tribes exist today within, instead of outside, the federal system).

463. U.S. CONST. art. I, § 8; U.S. CONST. art. I, § 2.

464. *Ex parte* Crow Dog, 109 U.S. 556 (1883).

465. *See supra* notes 13–22 and accompanying text.

existing political communities, like Texas or Vermont, joined the union. Including Indian tribes within the federal union as one or more states, therefore, necessarily contemplated continued recognition of their separate political existence in the federal union because the federal government must constitutionally recognize the separate sovereign status of the states. Obviously, the last proposal for an Indian state was abandoned when the governments of the tribes in the Indian Territory were suspended, through questionable exercises of the claimed federal Indian plenary power, and the area was submerged into the multi-racial, pluralistic state of Oklahoma. Yet, the original conception that Indian tribes could only be brought into the federal union as sovereign political communities remains. The problem is that the grant of citizenship to Indian members of tribes clearly does not affect the separate sovereign status of Indian tribes. The tribes never engaged in any process of consent as political entities nor voluntarily agreed to join the federal union.[466]

The analogy to the current dilemma of the status of Puerto Rico makes the point nicely. Even though the citizens of Puerto Rico may have the status of American citizens for many purposes,[467] the United States is not prepared to simply annex Puerto Rico and make it a state without the collective political approval of a majority of the people of Puerto Rico in a referendum, which has not been secured. The future status of Puerto Rico, therefore, must be determined not by status of Puerto Rican citizens as individual United States citizens, but by the collective will of the Puerto Rican people, as reflected in a referendum. Most tribes were never afforded any choice of whether to join the federal union or be bound by its laws, although there clearly are a few tribes that agreed *in treaty* to such experimental inclusion in the federal union by accepting American citizenship, accepting individual allotments, and becoming subject to American laws.[468] Indeed, the very name of the Citizen Band of

466. Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365, 365–87 (1989); Frank Pommersheim, *supra* note 461, at 473 (both discussing lack of tribal consent to American governance).

467. Act of July 3, 1950, Pub. L. No. 81-600, 64 Stat. 319 (1950) (codified at 48 U.S.C. §§ 731–916) (1994); *see* Examining Bd. of Eng'rs v. Otero, 526 U.S. 572 (1976); *see generally* Jose Trias Monge, *Plenary Power and the Principle of Liberty: An Alternative View of the Political Condition of Puerto Rico*, 68 REVISTA JURIDICA DE LA UNIVERSIDAD DE PUERTO RICO 1 (1999) (discussing the political status of Puerto Rico); Lisa Napoli, *The Legal Recognition of The National Identity of a Colonized People: The Case of Puerto Rico,* 18 B.C. THIRD WORLD L.J. 159, 182–85 (1998); Dorian A. Shaw, *The Status of Puerto Rico Revisited: Does the Current U.S.-Puerto Rico Relationship Uphold International Law?,* 17 FORDHAM INT'L L.J. 1006, 1024–28 (1994).

468. *E.g.,* Treaty with the Ottawa Indians, June 24, 1862, art. I, 12 Stat. 1237; Treaty of Washington D.C. with the Senecas, the Ottawa, Miami, Peoria and Other Tribes, Feb. 23, 1867,

Potawatomi located in Oklahoma reflects the nature of such prior agreements.[469] For these few tribes there might exist, perhaps, the type of collective political consent to become part of the federal union that may subject them to federal authority, although the federal government frequently failed to fulfill its side of the bargain. Most other tribes, however, never entered into any such agreements with the United States. Therefore, for most tribes, there has been no collective political consent, of the type originally envisioned in the Treaty of Fort Pitt, to subject them to federal authority and supremacy and to make them part of the federal union. Since most of the debates over federal authority relate to federal statutes or federal common law doctrines specifically aimed at Indian tribes as political entities, the grant of individual American citizenship to tribal members does not justify the exercise of federal Indian plenary power *over the tribes* since it did not alter the preexisting political relationship between the tribes and the federal government.

Second, the structure and history of the Indian Citizenship Act of 1924 prevent it from resolving the constitutional problems created by the nation's failure to secure tribal consent. In accordance with *Elk v. Wilkins*,[470] the Indian Citizenship Act constituted a naturalization statute, granting United States citizenship to all Indians born in the United States. Unlike all other naturalization statutes, however, the Indian citizenship did not require any application for naturalization. Rather, the legislation simply constituted a blanket grant of American citizenship to all Indians, irrespective of their desires in the matter. To this day, many of the Haudenosaunee (the Iroquois Confederation) resist the idea that they are American citizens, traveling on their own passports and refusing service and conscription into the United States military.[471]

Given the timing of the Indian Citizenship Act, one suspects that part of the reason for the federal government's willingness to grant Indians citizenship after World War I was to bring American practices back into conformity with its professed commitment to democratic values, in keeping with its post-war role as a promoter of democratic values. For over four decades, the federal government had sought to govern Indian country directly, despite the fact that Indians were not citizens and could not even vote for the representatives in the very Congress that claimed the right to

---

15 Stat. 513, 517, 520, 521; Treaty with the Delaware Indians, July 4, 1866, art. IX, 14 Stat. 793; *see generally* Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 77–80 (1977) (discussing the Delaware experience with such treaties).

469. Treaty on the Kansas River with the Potawatomi, Nov. 15, 1861, art. 3, 12 Stat. 1191.

470. 112 U.S. 94 (1884).

471. *See* Porter, *supra* note 461, at 127–28.

exercise plenary power over them. On any measure of democratic values, such involuntary dictatorial governance of Indian country under the federal Indian plenary power doctrine embarrassed the United States. Involuntarily imposing United States citizenship on tribal Indians may have alleviated international embarrassment, but it surely did not supply the constitutionally necessary consent of the governed that would have legitimated the assertion of American colonial authority over Indian tribes and their members. Clearly, a blanket grant of American citizenship to all Canadians, irrespective of their desires in the matter, would not alter the sovereign national existence of Canada and would come as great surprise to many Canadians. Originally, the Indian Citizenship Act performed the same function in Indian country. At best, the Indian Citizenship Act constituted an effort to subvert tribal sovereignty by co-opting tribal members through the substitution of a new allegiance. That approach was certainly consistent with the colonialism of the plenary power era, but inconsistent with traditional American constitutional democratic values.

If voluntarily assumed, the grant of American citizenship might provide an explanation for subjecting individual Indians to federal laws *in their individual capacities*, a conclusion that in fact has not proven controversial in most of Indian country outside of the Iroquois Confederation, except with regard to federal taxation.[472] The argument usually made, however, is not that *individual* Indians can be subjected to general federal laws, it is that *Indian tribes* have been subjected to federal and state laws by granting citizenship to individual tribal members. Just as the United States cannot unilaterally co-opt the sovereignty of Canada by granting American citizenship to Canadian citizens, so the involuntary grant of United States citizenship to Indians did not justify any enlargement of federal sovereign powers over the Indian tribes.

Thus, Indian citizenship ultimately fails as a justification for the exercise of federal authority over Indian tribes because: (1) most Indian tribes never consented *as governments* to such governance and (2) most tribal members

---

472. Federal taxation questions have proved controversial in Indian country because many tribal members read the "Indians not taxed" clause of the United States Constitution as a prescriptive grant of tax immunity, rather than as a descriptive clause reflecting their status when the Constitution was adopted. Nevertheless, their claim of tax immunity has not thwarted imposition of federal taxes on individual Indians (but not their tribes) except for taxes of income derived from treaty rights or statutory rights containing express tax immunities. *See* Rev. Rul. 94-16, 1994-1 C.B. 19; Rev. Rul. 81-295, 1981-2 C.B. 15; Rev. Rul. 67-284, 1967-2 C.B. 55. *See generally* Stephanie Dean, *Getting a Piece of the Action: Should the Federal Government Be Able to Tax Native American Gambling Revenue*, 32 COLUM. J.L. & SOC. PROBS. 157 (1999); Scott A. Taylor, *An Introduction and Overview of Taxation and Indian Gaming,* 29 ARIZ. ST. L.J. 251, 252 (1997).

never voluntarily applied for or assumed American citizenship; it was imposed on them. Indian consent was lacking on both counts!

This discussion highlights the truly ironic nature of the *Duro*[473] rationale and its reliance on American citizenship and consent. The opinion focuses on consent as the touchstone of the scope of *tribal* governance.[474] Indeed, the most important section begins by assuming that Indians were citizens of the United States and then focuses on the overriding, plenary power of the federal government.[475] The *Duro* analysis, however, totally ignored the fact that, for most tribal Indians, the conferral of such Indian citizenship and the emergence of federal Indian plenary power occurred totally *without any Indian consent at all*. A more historically myopic and disingenuous approach to applying fundamental principles of constitutional delegation and democratic consent to Indian tribes is hard to imagine! Apparently, the scope of Indian tribal sovereignty is limited by notions of democratic consent, but the scope of federal authority over Indian tribes knows no such democratic or constitutional limitations. Any constitutional, legal or moral justification for such asymmetry is hard to imagine.

VI. POLISHING THE CHAIN OF FRIENDSHIP BY RECONSIDERING THE LEGAL LEGACY OF AMERICAN COLONIALISM

Just as America could not redress its racist legacy of slavery without directly addressing and overturning the late-nineteenth century doctrine of "separate but equal" announced in *Plessy v. Ferguson*,[476] so the nation really cannot redress its racist history of colonialism in Indian country without confronting the Indian plenary power doctrine announced by the same court a decade before *Plessy* and defended on similarly racist grounds. It is truly remarkable, however, that the federal judiciary and the legal academe have devoted so much attention to redressing the legacy of slavery, while virtually ignoring the continued operation of the similarly racist Indian plenary power doctrine. Perhaps this disparity can be attributed to a mass process of national psychological denial noted by the respected western American historian Patricia Limerick, who wrote, "to most twentieth-century Americans, the legacy of slavery was serious business, while the legacy of conquest was not."[477] Whatever the reason for

---

473. Duro v. Reina, 495 U.S. 676 (1990).

474. *Id.*

475. *Id.*

476. 163 U.S. 537 (1896).

477. PATRICIA NELSON LIMERICK, THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST 18 (1987). While Professor Limerick employs the term conquest to describe colonialism, her choice of noun is not entirely accurate. Many, perhaps most, tribes

the failure of the nation to address its racist legacy of colonialism in Indian country, the nation should no longer pretend to legitimate its exercise of authority over Indian tribes by asserting Indian plenary power, a doctrine that has no basis whatsoever in any textual delegation of constitutional power and whose roots are deeply stained with late-nineteenth century racism. Only by limiting the exercise of federal power to the original scope under the Indian Commerce Clause and by abandoning the racially-motivated colonial pretense of federal plenary power dominance of Indian tribes can the nation rebuild any respectability or legitimacy, with Indians and the rest of the world, for its practices in Indian country. That effort certainly would begin to brighten and renew the chain of friendship that long ago bound Indian tribes in alliance to the United States and, indeed, significantly contributed to the founding of the nation during the American Revolution.[478]

More importantly, it is worth considering what abandonment of the Indian plenary power doctrine would mean. First, and foremost, it would mean that unilateral exercises of federal legislative power would be limited to textual sources of delegation—the Indian Commerce Clause and treaty

---

never went to war with the United States and still others actually emerged victorious. For example, except for the massacre of mostly unarmed Sioux at Wounded Knee, the Sioux won virtually every major conflict with the United States military, prevailing in both Red Cloud's War and over General George Armstrong Custer at the Battle of Greasy Grass (Little Big Horn). They were not conquered militarily. Rather, the United States subverted the economy of the plains tribes by destroying the buffalo herds upon which they depended both by bisecting the herds with transcontinental railways and by supporting deliberate mass slaughter of herds by Buffalo Bill Cody and others.

478. For discussions of the contributions of American Indian tribes to the American victory in the Revolution and their often overlooked contributions to the very idea of an American confederation, see generally BARBARA GRAYMONT, THE IROQUOIS IN THE AMERICAN REVOLUTION (1972); BRUCE E. JOHANSEN, FORGOTTEN FOUNDERS: BENJAMIN FRANKLIN, THE IROQUOIS, AND THE RATIONALE FOR THE AMERICAN REVOLUTION (1982); GREGORY SCHAAF, WAMPUM BELTS & PEACE TREES: GEORGE MORGAN, NATIVE AMERICANS AND REVOLUTIONARY DIPLOMACY (1990); Donald A. Grinde, Jr*., Iroquois Political Theory and the Roots of American Democracy*, *in* EXILED IN THE LAND OF THE FREE: DEMOCRACY, INDIAN NATIONS, AND THE U.S. CONSTITUTION 227 (Oren Lyons et al. eds., 1992); Steven Paul McSloy, *Border Wars: Haudenosaunee Lands and Federalism,* 46 BUFF. L. REV. 1041, 1044–45 (1998); Larry Sager, *Rediscovering America: Recognizing the Sovereignty of Native American Indian Nations,* 76 U. DET. MERCY L. REV. 745, 770 (1999); Gregory Schaaf, *From the Great Law of Peace to the Constitution of the United States: A Revision of America's Democratic Roots*, 14 AM. INDIAN L. REV. 323 (1989). *But see*, Erik M. Jensen, *The Imaginary Connection Between 7the Great Law of Peace and the United States Constitution: A Reply to Professor Schaaf*, 15 AM. INDIAN L. REV. 295 (1990) (disputing the Indian contribution). Congress by resolution specifically recognized the contributions of the Iroquois Confederation to the idea of an American confederation of states. S. Con. Res. 76, 100th Cong. (1987); *see also Hearing on Senate Concurrent Resolution 76 Before the Senate Select Committee on Indian Affairs,* 100th Cong. (1987).

powers. For purposes of the Indian Commerce Clause the nation must engage in the painful reexamination of the limited power implicit in that clause. Just as *Lopez* and *Morrison* recently have suggested the existence of historically-derived limitations on the scope of congressional delegation under the Interstate Commerce Clause, so a careful reexamination of the scope of the historic origins of the Indian Commerce Clause suggests the existence of an even more powerful set of limitations. Under the Interstate Commerce Clause, *Lopez* and *Morrison* indicate that Congress can only enact statutes that directly regulate interstate commerce, protect and secure the channels and instrumentalities of interstate commerce, or regulate other economic transactions that have a substantial effect on commerce. The ostensible reason offered for rigorous judicial enforcement of such limitations is to protect state sovereignty otherwise recognized in the Constitution and to assure that exercises of federal authority do not unduly intrude on legitimate realms for state regulation. Applying a similar approach to the Indian Commerce Clause suggests that this clause grants Congress no power whatsoever to regulate Indian tribes or their members and that the exercise of congressional Indian commerce authority is limited to nonmembers subject to federal authority who deal with tribes and to the management of federal relations with the tribes. Since the Indian tribes and their members did not comprise part of the United States when the Constitution was drafted, as clearly reflected by the "Indians not taxed" clause of Article 1, section 2, they did not and could not delegate any power to Congress to regulate their internal affairs. Certainly, the people of the United States who formed the Constitution did not conceive that they had any authority to delegate to the national government power to regulate the tribes directly. If popular sovereignty meant anything, it meant that they could not delegate power to the federal government over other peoples who were not part of the federal union. The power granted under the Indian Commerce Clause was a power to regulate the non-Indian side of the tribal↔federal relationship, not a power to regulate the Indians themselves. It was a power to regulate commerce *with* the tribes, not the commerce *of* the tribes. Congress could only regulate those who legitimately were subject to the authority of the United States, which did not include tribal Indians. As with the Interstate Commerce Clause, one of the reasons for rigorous enforcement of such limitations on federal authority would be to protect the sovereignty of the other government in the political relationship, the Indian tribe. And, as argued above, since Indian tribes, unlike states, have no structural protections of their sovereignty in the structure of the political arms of the federal government, there is an even stronger argument for rigorous adherence to and enforcement of such limitations.

Second, abandonment of the Indian plenary power doctrine would require the federal government to abandon the pretense of having a dominant colonial authority in Indian country. Relinquishing the claim to the overriding supremacy of federal law over tribal authority in Indian country would follow as a necessary result. Absent such overriding federal colonial power, the federal government could claim no authority to unilaterally abrogate Indian treaties in a fashion that enlarges federal power over Indians. Abandonment of the Indian plenary power doctrine, therefore, requires overturning the Indian *Dred Scott* decision—*Lone Wolf v. Hitchcock.*[479] It highlights the illegitimacy of recent exercises of judicial plenary power by the federal judiciary, especially those that unilaterally impose newly fashioned limitations on the power of Indian tribes as a matter of federal common law. Since the federal common law would not be supreme over tribal law, the common law doctrines announced by such cases effectively should not limit tribal authority.

Third, to the extent that the federal government desires to assure application of federal laws to Indians tribes, abandonment of the Indian plenary power doctrine would require the federal government to formally negotiate with the Indian tribes and obtain their consent, as it did by treaty when the Constitution was drafted and throughout the treaty period.[480] Thus, for Indian tribes, the missing Constitutional component for the legitimate exercise of federal power is supplied through treaty or, if constitutional, treaty-substitutes, such as the agreements negotiated with Indian tribes after treaty-making ended. This result virtually compels the federal government to return to a process of negotiating treaties or agreements with Indian tribes, finally abandoned by Congress only after *Lone Wolf* found that plenary power and the logic of wardship and colonialism made them unnecessary. Thus, abandonment of the Indian plenary power doctrine requires a return to the mutual intergovernmental respect that was part of the original tribal↔federal relationship reflected in the treaty process, i.e., a model of treaty federalism. Consequently, if the 1871 statute ending Indian-treaty making is constitutional at all, it must be repealed if the United States actually desires to assure application of its laws to Indian tribes.

While some might regard the process of securing individual tribal consent for the application of federal law as onerous, inconvenient or

479. *See generally Decision from the American Indian Nations Supreme Court in* Lone Wolf v. Hitchcock, 8 KAN. J. L. & PUB. POL'Y 174 (1999).

480. For discussions of the importance of tribal consent, see generally Richard B. Collins, *supra* note 466; Robert B. Porter, *A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law*, 31 U. MICH. J.L. REFORM, 899, 974–78 (1998).

impossible, a few observations about its feasibility are in order. Historically, the federal government long employed monetary incentives in the form of federal program services and annuities to secure tribal consent in treaties, just as it uses foreign assistance and offers trade incentives and benefits to encourage appropriate behavior from foreign nations. Given the heavy reliance of many tribes on federal program funds, such incentives would produce significant leverage to encourage cooperation with federal policies or goals, just as Congress today still can employ program-relevant conditions on federal spending measures to encourage appropriate cooperation from sovereign states, even in areas over which it may have no direct regulatory power.[481] In this respect, federal negotiation of treaty-like agreements with tribes to implement federal programs might resemble the spending-power based deals increasingly imposed on states. In both cases, the sovereign impacted by federal policy initiatives could avoid application or enforcement of the federal rule within its jurisdiction by refusing participation in the federal program, albeit not without the cost of some lost federal program funds.

Additionally, during the treaty-making period, the federal government actually negotiated some treaties under which the contracting tribal party agreed to accept the supremacy of federal law.[482] Such negotiations therefore are not impossible. For example, the guarantees of exclusive jurisdiction over their new land made to the Choctaw Nation contained in the Treaty of Dancing Rabbit Creek (1830) expressly provided that:

> The U.S. shall forever secure said Choctaw Nation from, and against, all laws except such as from time to time may be enacted in their own National Councils, *not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress, to the*

---

481. *E.g.,* South Dakota v. Dole, 483 U.S. 203 (1987); *see also* New York v. United States, 505 U.S. 144, 145 (1992).

482. Perhaps the clearest example of such an agreement is found in the Treaty with the Shawnees:

> If, from causes not now foreseen, this instrument should prove insufficient for the advancement and protection of the welfare and interest of the Shawnees, Congress may hereafter, by law make such further provision, not inconsistent herewith, as experience may prove to be necessary to promote the interests, peace, and happiness of the Shawnee people.

Treaty of Washington, D.C. with the Shawnees, May 10, 1854, art. XII, 10 Stat. 1053.

Despite conceding a limited willingness to be bound by future direct acts of Congress enacted for the "advancement and protection of the welfare and interest of the Shawnees," note that the Shawnees' agreement to abide by direct federal governance still maintains the primacy of the prior treaty, precisely the reverse of *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903).

> *extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs.*[483]

While some might argue that Indian treaty-making is impossible, outmoded, and a relic of the past, the recent processes of tribal↔federal agreement under the Self-Governance Compact Process,[484] and tribal↔state negotiation of compacts mandated by the Indian Gaming Regulatory Act of 1988,[485] suggest that the process of tribally negotiated agreements remains

---

483. *See supra* note 18.

484. Through recent amendments to the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450–58, Congress requires the Secretary of the Interior and the Secretary of Health and Human Services to negotiate written "compacts" with certain Indian tribes:

> The Secretary [of Health and Human Services] *shall negotiate* and enter into a written compact with each Indian tribe participating in self-governance in a manner consistent with the Federal government's trust responsibility, treaty obligations, and the government-to-government relationship between Indian tribes and the United States.

Tribal Self-Governance Amendments of 2000, Pub. L. No. 106-260, § 504(a), 114 Stat. 715 (codified as amended at 25 U.S.C. § 458aaa-3(a)) (emphasis added). *See id.* § 505(a) (requiring negotiation of annual funding agreements). *Compare* 25 U.S.C. § 458cc(a) (2000) ("The Secretary [of the Interior] shall negotiate and enter into an annual written funding agreement with the governing body of each participating tribal government in a manner consistent with the Federal Government's laws and trust relationship to and responsibility for the Indian people."). Several explicit findings support these requirements. In particular, Congress finds that:

> (1) the tribal right of self-government flows from the inherent sovereignty of Indian tribes and nations; [and]
>
> (2) the United States recognizes a special government-to-government relationship with Indian tribes, including the right of Indian tribes to self-governance, as reflected in the Constitution, treaties, Federal statutes, and the course of dealings of the United States with Indian tribes[.]

Pub. L. No. 106-260, § 2(1)-(2) (codified as amended at 25 U.S.C. § 458aaa). *See also* Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, § 202, 108 Stat. 4272 (codified as amended at 25 U.S.C. § 458aa, et seq.) (making identical findings for the purposes of Title IV of the Indian Self-Determination Act). Accordingly, the Secretary of Health and Human Services must negotiate written agreements with Indian tribes, in part, to "permit an orderly transition from Federal domination of programs and services to provide Indian tribes with meaningful authority, control, funding, and discretion to plan, conduct, redesign, and administer programs, services, functions, and activities (or portions thereof) that meet the need of the individual tribal communities" and to "strengthen the government-to-government relationship between the United States and Indian tribes through direct and meaningful consultation with the tribes." Pub. L. No. 106-260, §3(E)-(F). *Compare* Pub. L. No. 103-413, § 203(1) & (5) (codified at 25 U.S.C. § 458aa, Historical and Statutory Notes) (describing similar congressional purposes in enacting Title IV).

485. 25 U.S.C. § 2710(d) (2000); *see generally* Confederated Tribes of Siletz Indians of Or. v. Oregon, 143 F.3d 481 (9th Cir 1998); United States v. Spokane Tribe of Indians, 139 F.3d 1297 (9th Cir. 1998); Mescalero Apache Tribe v. New Mexico, 131 F.3d 1379 (10th Cir. 1997); Jicarilla Apache Tribe v. Kelly, 129 F.3d 535 (10th Cir. 1997); Santee Sioux Tribe of Neb. v.

viable in the twenty-first century, albeit still sometimes fraught with the inconveniences and disagreements attendant to all negotiations between sovereign governments. With all of its attendant problems, treaty-making remains more consistent with American constitutional traditions than simple unilateral federal imposition of its laws on non-consenting Indian tribes.

Some have proposed that the historic lack of federal power over Indian tribes might be cured by a constitutional amendment that clearly spells out the place of Indian tribes in the federal union.[486] While that process might, perhaps, be preferable to incremental and inconsistent adjudication of such questions in federal courts, it fails to supply the essential constitutional element currently lacking in all claims to federal Indian plenary power—tribal consent and delegation of authority to the federal government. Since amendments are proposed by Congress, where the Indian tribes have no structural protections and virtually no effective representation, and are ratified by the states, not the tribes, any such constitutional amendment might be thought to resolve technical legal defects about the purported *scope* of federal authority under the Indian Commerce Clause, but cannot supply the consent of the Indian tribes required to bring the exercise of power over the Indians into conformity with America's basic commitments to constitutional delegation of authority by those governed. Only a treaty-like process, i.e., a treaty federalism model, can accomplish that result. Thus, abandonment of the pretense of colonial federal plenary power necessarily requires the return of the United States to the bargaining table with Indian tribes, just as recent Indian negotiations in Canada have rejuvenated the treaty process.[487] A return to treaty federalism, i.e., the bilateral negotiation of the tribal↔federal relationship, constitutes the only conceptual solution to the basic constitutional problem raised in this article. Such mutual respect and recognition would go far to redress the legacy of colonialism and polish the chain of friendship which once bound the Indians to the United States and helped secure the very existence of the United States during the American Revolution.

Nebraska, 121 F.3d 427 (8th Cir. 1997); Pueblo of Santa Ana v. Kelly, 104 F.3d 1546 (10th Cir. 1997); Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273 (8th Cir. 1993).

486. Frank Pommersheim, *Democracy, Citizenship, and Indian Law Literacy: Some Initial Thoughts,* 14 T.M. COOLEY L. REV. 457, 460–63 (1997); Frank Pommersheim*, Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 445 n.129 (1992).

487. *E.g.*, Campbell v. British Columbia, [2000] B.C.S.C. 1123, [2000] Carswell B.C. 1545 (sustaining recent treaty between Nisga Nation, Canada and British Columbia); *see generally Critics Vow to Appeal Nisga's Decision: Treaty Supporters Warned Disputes are Hurting B.C. Economy*, TORONTO STAR, July 26, 2000, *available at* 2000 WL 24060309.

VII. CONCLUSION

The short version of this lengthy exegesis on the illegitimacy of the federal Indian plenary power doctrine and the lack of federal supremacy over Indian tribes is simply that the emperor has no clothes! It is high time legal scholarship routinely speaks truth to power in the hope that constitutional scholars, lawyers, and judges will conclude finally that what Congress and the Supreme Court have long claimed as a legitimate federal plenary power over Indian tribes, in fact, simply has no constitutional textual or original historical basis. The federal Indian plenary power doctrine is nothing more than a raw assertion of naked colonial power ostensibly cloaked with an aura of constitutional legitimacy by mere judicial *fiat*.

The same theoretical foundation that supports the Supreme Court's recent federalism revolution and its rigorous enforcement of rediscovered federalism limitations on the power of Congress, in order to protect *state* sovereignty, amply justifies a parallel revolution in Indian constitutional jurisprudence. That foundation more than explains why the Court should reconsider the plenary power doctrine in Indian affairs and recognize severe limitations on both congressional and federal judicial power in the field. In both cases, the claims fundamentally involve the complete absence of any constitutional delegation of authority by the affected people to the national government. In both cases limiting federal power to the historically defensible reach of the original delegation also protects the sovereignty of a local government against overreaching by outsiders. Both sovereigns are expressly referenced in the Commerce Clause and elsewhere in the Constitution. In the state case, however, the issue involves interpreting the *scope* of the delegation. Since Indian tribes and their members never were part of "We the People of the United States" who delegated power to the federal government, the Indian tribal claim is even stronger because the tribes never delegated *any* power to the national government other than through a few, limited, tribe-specific agreements contained in treaties.

The failure of the Supreme Court to protect Indian tribal sovereignty by applying the same constitutional delegation analyses it rigorously invokes to protect state sovereignty and its failure to explore and enforce the original conception of constitutional limitations on federal power over Indian tribes speaks volumes about the continued institutionalization of colonialism and racism with respect to Indians in the American legal system. The only effective way to clothe the emperor with constitutional legitimacy and redress America's legal colonialist legacy with respect to Indian tribes is to polish the chain of friendship that previously bound Indian tribes to the United States by restoring mutual respect through treaty negotiation and the

fulfillment of treaty obligations. That process necessarily involves abandoning all colonialist pretenses of federal plenary power and supremacy over Indian tribes.

In 1659, the Mohawk treaty negotiators, on behalf of the Iroquois Confederation, complained to the European settlers that the Covenant Chain of Friendship was tarnished because "[since the alliance as made] we are no longer thought of [by you], but much will depend upon it when we shall need each other." During the American Revolution, much, indeed, did depend on the Covenant Chain of Friendship and some of the Iroquois, the Delaware, and other tribes were helpful to the American victory and, ultimately, contributed much to the very existence and structure of the nation. Today, the problem for most tribes is the opposite of that faced by the Iroquois in 1659—it is making the federal government get out of their way. Nevertheless, the solution remains the same. The polishing of the chain of friendship that helped facilitate the American Revolution is long overdue, not only with the Haudenosaunee but with all Indian tribes! The message of this essay, therefore, is that Mohawk treaty negotiators were profoundly correct when they presciently suggested to their Euro-American counterparts in 1659, "Let us always maintain this alliance which was once made."