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Constitutional Law: Congressional Plenary Power Over Indian Affairs--A Doctrine Rooted in Prejudice

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NOTES

CONSTITUTIONAL LAW: CONGRESSIONAL PLENARY POWER OVER INDIAN AFFAIRS—A DOCTRINE ROOTED IN PREJUDICE

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Introduction

Where there is the duty of protection, there is the power.[1] This was the theory upon which the United States Supreme Court in 1886 rested its decision that Congress had the power to vest criminal jurisdiction over Indians accused of murdering Indians in federal courts as opposed to state forums.[2] While the Court thus resolved the narrow question in *United States v. Kagama*, the case's rationale and rule simultaneously generated the doctrine of plenary power over Indians.[3] Later Supreme Court decisions have both conceptually refined and broadly applied the doctrine enunciated in *Kagama*.

Though *Kagama* referred to the power of the "General Government,"[4] subsequent decisions clarify that Congress wields

* First-place Winner, 1983 Indian Law Writing Competition.

1. United States v. Kagama, 118 U.S. 375, 384 (1886).

2. *Id.* at 375, 385. The author of this paper readily acknowledges the variety of preferences concerning appellations for the peoples originally inhabiting the United States. In the main, the author has chosen to use the designation Indians instead of Native Americans, tribal names, or other terms.

3. *See* F. COHEN, FEDERAL INDIAN LAW 90 (1942); Carter, *Race and Power Politics as Aspects of Federal Guardianship over American Indians: Land Related Cases, 1887-1924*, 4 AM. INDIAN L. REV. 197, 209 (1976). The *Kagama* Court's construction of the notion that the duty of protection leads to power occurs within a paragraph near the end of the opinion reading:

> It seems to us that this [enactment of a federal criminal law encompassing certain acts of tribal Indians within reservation limits] is within the competency of Congress. These Indian tribes *are* 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 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.

Kagama, 118 U.S. at 383-84 [emphasis in original].

4. *Id.* at 384. The plenary power "has always been recognized by the Executive and by Congress, and by this Court, whenever the question has arisen." *Id.*

this power.[5] Similarly, though *Kagama* neglected to restrain the reach of plenary power, and later opinions even expressly declared that the judicial branch must decline invitations to recognize parameters of Congress' paramount authority,[6] the Court currently admits to constitutional limitations upon the exercise of plenary power.[7]

On one hand, the Court has thus conceptually refined the doctrine by naming it a congressional power and subjecting it to constitutional scrutiny. On the other hand, the Court has continued to refer to the plenary power doctrine as permitting broad exercises of congressional power in derogation of Indian rights. While *Kagama*'s facts allowed plenary authority over criminal adjudication, plenary power now extends over "matters of Indian affairs."[8] The disposition of tribal property,[9] the regulation of liquor traffic,[10] and the exercise of Indian sovereignty[11] are among those concerns subjected to the doctrine.

Development of Congressional Plenary Power over Indian Affairs

A brief survey of Supreme Court opinions reveals both the confines and the expanse of plenary power. Yet, the most surprising result is not what the study reveals; rather, its extraordinary nature grows from what the examination fails to reveal. What is the constitutional source of the plenary power doctrine?

The United States Supreme Court, ultimate arbiter of the Constitution, looks to that document's clauses to gauge the legitimacy of congressional action. The Congress, a branch of government possessing only enumerated powers, exceeds its authority when its acts are unrelated to the concerns specified in the Constitution.[12]

5. Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 501 (1979); United States v. Wheeler, 435 U.S. 313, 323 (1978); Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 83-84 (1977); United States v. Nice, 241 U.S. 591, 597 (1916); Perrin v. United States, 232 U.S. 478, 485 (1914); United States v. Sandoval, 231 U.S. 28, 46 (1913); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903); Stephens v. Cherokee Nation, 174 U.S. 445, 484, 486, 488 (1899).

6. United States v. Sandoval, 231 U.S. 28, 46 (1913); United States v. Rickert, 188 U.S. 432, 445 (1903); Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903); Cherokee Nation v. Hitchcock, 187 U.S. 294, 308 (1902).

7. *See* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 84 (1977).

8. *Id.* at 83-84.

9. *Id.* at 83; Tiger v. Western Inv. Co., 221 U.S. 286, 311 (1911).

10. United States v. Nice, 241 U.S. 591, 597 (1916). *See* Perrin v. United States, 232 U.S. 478, 482 (1914); United States v. Sandoval, 231 U.S. 28, 48 (1913).

11. United States v. Wheeler, 435 U.S. 313, 323 (1978).

In subscribing to the principle that Congress has plenary authority without attempting to connect the doctrine to a constitutional concern, the Court has consistently overlooked this fundamental premise of constitutional law. Cohen, when discussing *Kagama* and its heirs, summarized the situation by observing: "Reference to the so-called 'plenary' power of Congress . . . becomes so frequent . . . that it may seem captious to point out that there is excellent authority for the view that Congress has no constitutional power over Indians except what is conferred by the commerce clause and other clauses of the Constitution."[13] Cohen, reading *Kagama*, found the roots of the plenary power doctrine not in the Constitution but in the "practical necessity of protecting the Indians and the nonexistence of such power in the states."[14]

This paper does not challenge Cohen's explanation; instead it seeks to elaborate on Cohen's analysis by asking: why is it necessary to protect Indians? The study proceeds on the premise that a court responds to a "situation in terms of how it defines or interprets the situation,"[15] and demonstrates that, whereas discovering authority in the Constitution for plenary power is a futile effort, locating the source of the doctrine in bias is a productive work. A search for the source of plenary power essentially establishes that the Court's interpretation of Indian conditions from a prejudicial point of view dictated the Court's discriminatory response: Indians, being a race inferior to white Americans, need protection and pupilage. And there being the obligation, there is the power.

12. *See generally* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); D. ENGDAHL, CONSTITUTIONAL POWER—FEDERAL AND STATE ch. 103 (1974).

13. COHEN, *supra* note 3, at 90. Indians are explicitly mentioned twice in the Constitution: Congress has the power "[t]o regulate Commerce . . . with the Indian Tribes," art. I, § 8; amend. XIV, § 2 amending art. I, § 2, provides that "Indians not taxed" shall be excluded in apportioning congressional representatives among the states.

14. COHEN, *supra* note 3, at 90. Cohen's focus on "practical necessity" as the foundation for *Kagama*'s formulation of the plenary power doctrine derives support from the last paragraph of the opinion itself:

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all tribes.

Kagama, 118 U.S. at 384-85.

15. R. BERKHOFER, A BEHAVIORAL APPROACH TO HISTORICAL ANALYSIS 33 (1969). Berkhofer formed this thesis of interpretation and response with respect to the behavior of the "human organism." *Id.*

The process here employed to demonstrate that the plenary power doctrine is a product of prejudice basically divides into two phases. The first part of the paper develops the Court's transformation of prejudice into legal principle by examining the language of Supreme Court opinions and then discussing the Court's prejudicial attitude and its discriminatory behavior. The paper's second part considers the extent to which the plenary power doctrine is the result of racism and ethnocentrism, and then studies the functions performed by the doctrine in structuring the relationship between Indians and white America. The paper concludes by deliberating the desirability of courts' and advocates' continued usage of the doctrine.

Transformation of Prejudice into Principle

Interpretation and Response: Indians are Inferior—They Need Protection and Pupilage

To label the plenary power doctrine an outgrowth of prejudice, one must first clarify the concept of prejudice. Prejudice is basically an attitude of prejudgment.[16] While the word "prejudice" commonly evokes negative connotations, prejudice, of course, can operate as an ally of those who are favorably prejudged.[17] This positive attitude is not the type of prejudice a reader often encounters in exploring Supreme Court opinions developing congressional plenary power over Indian tribes. On the contrary, the Court convincingly transmitted the message that Indians are inferior.

The stigma of inferiority inflicted upon the Indian race in Supreme Court opinions divides, in this paper, into three themes. Indians are marked as inferior in terms of (1) their civilization, (2) their character, and (3) their claims. Separating the investigation into distinct pigeonholes may imply that the legal opinions allow for convenient, clear-cut analysis. Yet, the fact is that often the themes intermingle. Perhaps nowhere is this interlacing more apparent than in *United States v. Sandoval*,[18] a case the Court decided in 1913.

The Court in *Sandoval*, within the context of a criminal prosecution, faced the question whether congressional legislation forbidding the introduction of liquor into New Mexico Indian coun-

16. R. DANIELS & H. KITANO, AMERICAN RACISM: EXPLORATION OF THE NATURE OF PREJUDICE 14 (1970).

17. *Id.*

18. 231 U.S. 28 (1913).

try encompassed the state's Pueblo Indian community, a community owning its lands in fee simple. In arriving at its decision that the pueblo lands fell subject to plenary power and thus to the liquor legislation, the Court had to determine the underlying issue, the status of the lands' occupants.[19] In deciding that the community was a "dependent" one requiring congressional protection,[20] the Court faced the hurdle posed by *United States v. Joseph*,[21] an 1876 case involving a determination that this group was not Indian for purposes of legislation regulating intercourse between Indians and non-Indians. This factor perhaps explains the strenuous effort the *Sandoval* Court devoted to establishing the pueblo people as a dependent Indian community. The Court accomplished its objective by leveling the cultural and personal integrity of the group.

The Court introduced its deliberations on the status of the pueblo inhabitants by noting: "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."[22] In the next sentence the Court revealed that this group, always residing in "isolated communities," pursuing "primitive modes of life," tending to "superstition and fetishism," and serving "crude customs inherited from their ancestors," was "essentially a simple, uninformed and inferior people."[23] The Court both in its own words and by adoption of excerpts from government reports, elaborated

19. *Id.* at 38.

20. *Id.* at 47.

21. 94 U.S. 614 (1876). The *Joseph* Court found that since an act forbidding settlement by non-Indians upon Indian lands did not apply to the Pueblo Indians, the United States could not prosecute non-Indian settlers for violation of the act. *See id.* at 617, 619. The *Joseph* Court based its determination concerning the group's status on the grounds that the Pueblo Indians adopted the Spanish language and Christian religion, manufactured home goods, fostered integrity and virtue, assimilated the names, customs, and habits of their white neighbors, and had few criminal records. "In short," observed the Court:

> they are a peaceable, industrious, intelligent, honest and virtuous people. They are Indians only in feature, complexion, and a few of their habits . . . . The degree of civilization which they had attained, their willing submission to all the laws of the Mexican government [previously ruling New Mexico] . . . and their absorption into the general mass of the population . . . all forbid the idea that they should be classed with the Indian tribes.

Id. at 616-17.

22. United States v. Sandoval, 231 U.S. 28, 39 (1913).

23. *Id.*

upon the inferior complexion of not only the civilization but also the character of the pueblo residents.

Sandoval rather comprehensively treated elements of pueblo culture, including its propensity for paganism. The Court quoted a report establishing that the "'pagan'" custom of the "'secret dance from which all whites are excluded is perhaps one of the greatest evils . . . . [I]t is little less than a ribald system of debauchery.'"[24] Contemplating the group's system of government, the Court noted the "'one-man domination'" practiced by the pueblo governor,[25] and noted, too, that despite the Indian government's infliction of cruel punishments, the governed clung tenaciously to the system.[26] Continuing to dwell upon government structure, the tribunal repeated the conclusion drawn by one report: as long as the pueblo people were "'permitted to live a communal life and exercise their ancient form of government, just so long will there be ignorant and wild Indians to civilize.'"[27] Furthermore, government was not the only source of concern for the Court: as soon as an Indian child returned from a government-sponsored boarding school, the pueblo residents forced Indian dress upon the child; in fact, "'he is compelled to submit to all the ancient and heathen customs of this people.'"[28] The Court thus did not ignore the child-rearing practices of the community and similarly did not neglect its marital practices: these persons "'have no marriage ceremony that is binding . . . . If marriage and divorce laws could be enforced, it would be a great blessing to these people.'"[29]

Interspersed among *Sandoval*'s comments upon the uncivilized religious, governmental, child-rearing, and marital practices of the pueblo people are evaluations of the character of the group's members. While the Court conceded that the inhabitants of the communal fee lands were "industrially superior" to reservation Indians, the Court also maintained "they are intellectually and morally inferior to many of them."[30] For the tribunal, one indicator of moral inferiority was the finding that these Indians were "easy victims to the evils and debasing influence of intox-

24. *Id.* at 42.
25. *Id.*
26. *Id.* at 43.
27. *Id.*
28. *Id.*
29. *Id.* at 44.
30. *Id.* at 41. On the same page of the opinion the Court quoted a report finding the pueblo inhabitants too uninformed to vote "intelligently." *Id.*

icants."[31] Indeed, the Court believed "'[i]ntemperance is the besetting sin of the Pueblo.'"[32] The Court quoted from a report to establish that family life, like drinking habits, suffered moral deficiencies: the family relations of the group's members featured "'[i]mmorality and a general laxness.'"[33]

As the reader proceeds through *Sandoval*'s interpretation of Indian culture and character, yet another theme becomes evident in addition to those of inferior civilization and inferior make-up. These people, believed the High Court, needed agents and superintendents "guarding their interests," for they were "dependent upon the fostering care and protection of the Government."[34] In considering the pueblo people's need for "tutelage," the Court first commented on their condition under Spanish and Mexican rule. Under the direction of missionaries, "'considerable advancement had been made in civilizing and christianizing the race.'" In light of their "'degraded condition, however, and ignorance generally,'" these people "'still doubtless, required . . . fostering care and protection'" of the Spanish government.[35] Indeed, noted the Court, they were the "beneficiaries" of a Spanish law prohibiting the sale of wine to Indians.[36]

According to the Court, following the course of action adopted by predecessor governments, the United States similarly had to protect its "dependent wards,"[37] for the judiciary 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."[38] The extent of the necessary protection was, believed the Court, for the Congress, not the judiciary, to determine.[39] Moreover, the Court maintained that, considering the pueblo people's "Indian lineage, isolated and communal life, primitive customs and limited civilization, this assertion of guardianship over them cannot be said to be arbitrary."[40]

31. *Id.*
32. *Id.* at 43.
33. *Id.* at 44.
34. *Id.* at 40-41.
35. *Id.* at 45, *quoting* United States v. Ritchie, 58 U.S. (17 How.) 525, 540 (1854).
36. *Sandoval*, 231 U.S. at 44, *citing* Pollard v. Hagan, 44 U.S. (3 How.) 212, 225 (1845).
37. *Id.* at 45.
38. *Id.* at 46.
39. *Id.*, *quoting* Tiger v. Western Inv. Co., 221 U.S. 286, 315 (1911).
40. *Id.* at 47. The Court in one of the concluding paragraphs of the opinion unsurprisingly distinguished United States v. Joseph, 94 U.S. 614 (1876), a case determining the

Inferior in Civilization

From the *Sandoval* Court's perspective, the Pueblo Indians' uncivilized way of life manifested, for example, in their pagan, tyrannical, and familial practices,[41] merited congressional tutelage of the group through exercise of plenary power. So too the inferior character of the group's members, reflected, for instance, in their ignorance and immorality,[42] figured in the Court's decision that the pueblo was a dependent community. Nevertheless, there was at least one trait of the Pueblo Indians drawing affirmation from the *Sandoval* Court: they were "sedentary rather than nomadic in their inclinations."[43] The *Sandoval* Court, therefore, could not rely on nomadic wandering as an indicator of the need for plenary power pupilage. When the Court in other cases found this cultural aspect, however, it used nomadic life-style as a measure of civilization. *Tee-Hit-Ton Indians v. United States*,[44] a case determined in 1955, furnishes an example of the Court's resort to this cultural factor.

The plaintiff in *Tee-Hit-Ton* was an Alaskan tribe seeking government compensation for timber taken under a congressional statute authorizing the Secretary of Agriculture to contract for timber sales.[45] After denying the Indians' contention that they held recognized title to the lands on which the timber had been located,[46] the Court went on to entertain the tribe's contention that, though unrecognized, its interest in the land was such that the tribe deserved compensation. Included within the portion of the opinion introducing the Court's discussion of this contention was a declaration of the "supreme" power of the Congress to terminate nonrecognized title, that is, title based on aboriginal possession.[47] The Court further declared that it had never held that Congress' exercise of this supreme authority compelled com-

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pueblo people as not being Indians subject to congressional power, see *supra* note 21 and accompanying text, as dealing with a different issue and deciding upon facts "which are at variance with other recognized sources of information, now available." *Sandoval*, 231 U.S. at 48-49.

41. *See supra* notes 24-29 and accompanying text.

42. *See supra* notes 30-33 and accompanying text.

43. *Sandoval*, 231 U.S. at 39.

44. 348 U.S. 272 (1955).

45. *Id.* at 276-77.

46. *Id.* at 278-79. Recognized title exists "[w]here the Congress by treaty or other agreement has declared that thereafter Indians were to hold the lands permanently." *Id.* at 277.

47. *Id.* at 281, *quoting* United States v. Santa Fe Pacific R.R., 314 U.S. 339, 347 (1941).

pensation for the taking of land despite the fact that the "drive of civilization" stripped Indians of their homes and hunting grounds.[48]

The Court returned to the notion of civilization later in the opinion when it considered an argument mounted by the plaintiff. The Indians maintained that their "stage of civilization," as well as their ownership through use and possession at the time when Russia first claimed Alaska, raised their interest in the lands to one of proprietary stature.[49] The Court responded negatively to this argument as well. The facts that the group purported to pass tribal membership only through the female line, maintained tribal instead of individual title, and allowed other tribes to share its lands,[50] did not seem to help the Indians' civilization and ownership argument. Moreover, their "hunting and fishing stage of civilization," characterized by frequent resettlement hinging on availability of game and fish, plainly militated against the Indian position and contributed to the Court's conclusion that the Indians' use of the lands "was like the use of the nomadic tribes" of the lower states.[51]

While *Tee-Hit-Ton* thus relied on nomadic tendencies as a rationale for denying relief requested by a tribe, *Cramer v. United States*,[52] decided in 1923, discussed Indian migration within the context of policy dictated by the federal government. A discussion of Indian wandering surfaced in the Court's determination of two issues in *Cramer*. First, *Cramer* partially canceled a grant of land to a railroad in favor of Indians who had continuously occupied the land for more than sixty years with the implied consent of the government and in accordance with federal policy.[53] With respect to the clash of the railroad's land claim with federal policy, the Court sided with federal policy, describing it as one of "inducing the Indian to forsake his wandering habits and adopt those of civilized life."[54] The Court refused to grant the railroad's claim of priority over government policy, for to have decided against the Indians would have been to contravene the "whole spirit of the traditional American policy toward these dependent wards of the nation," since the Indians had harmon-

48. *Tee-Hit-Ton*, 348 U.S. at 281.
49. *Id.* at 285-86.
50. *Id.* at 285-87.
51. *Id.* at 287-88.
52. 261 U.S. 219 (1923).
53. *Id.* at 230.
54. *Id.* at 227.

ized their lives with the government's desires by "abandoning their nomadic habits and attaching themselves to a definite locality, reclaiming, cultivating, and improving the soil and establishing fixed homes thereon."[55]

A second issue considered in *Cramer* was whether the United States had authority to sue on behalf of the three Indians occupying the disputed land.[56] In discussing this issue, the *Cramer* Court referred to the policy of the government to "teach" Indians and to "persuade them to abandon their nomadic habits."[57] Concomitantly, the Court perceived that the need to promote such policy argued forcefully for capacity to sue on the part of the United States.[58] In determining this issue the Court also asserted that, given the status of Indian tribes as "wards of the nation, communities dependent on the United States . . . . [the] duty of protection and power extend[s] to individual Indians, even though they may have become citizens."[59] This duty and power would persist, observed the tribunal, until Congress thought it appropriate to "emancipate Indians from their wardship."[60] This assertion by the *Cramer* Court had itself been an issue in *In re Heff*,[61] decided in 1905. While studying the railroad's land claim as well as the United States' capacity to sue, the *Cramer* Court found significant the federal policy diverting the government's Indian charges from their nomadic ways. In *Heff* the Court had referred to the transient Indian life-style, and policy had also assumed importance; more precisely, shifts in policy and their impact upon the duration of Indian wardship became focal.

Heff decided that congressional legislation prohibiting sale of

55. *Id.* at 228-29. Concerning the final issue before the Court in *Cramer*, the determination of a remedy, the Court decided that while the Indians asserted a right to 360 acres, only that portion "clearly fixed by the inclosure, cultivation, and improvements," *id.* at 235, or in other words, only that portion civilized, belonged to them. The Court found this determination to be "in accordance with the general rule that possession alone, without title or color of title, confers no right beyond the limits of actual possession." *Id.* at 236.

56. *Id.* at 232.

57. *Id.*

58. *Id.* at 233 *quoting* United States v. Fitzgerald, 201 F. 295, 296 (8th Cir. 1912).

59. *Id.* at 232. Carter has pointed out the rather contrived nature of *Cramer*'s application of the plenary power doctrine. Carter noted that although Indians who had occupied the same land for more than fifty years had ostensibly fulfilled the government policy objectives geared to stabilize and thus civilize Indians, the *Cramer* Court still found the Indians involved needed plenary power protection. Carter, *supra* note 3, at 223.

60. *Cramer*, 261 U.S. at 233.

61. 197 U.S. 488 (1905).

liquor to Indians did not encompass those Indian allottees[62] who, while not undertaking ownership of land in fee simple, had become citizens of the United States. After briefly summarizing the facts and subject of the case, the *Heff* opinion began with the recognition that the relationship between the government and the Indians was "that of a superior and an inferior, whereby the latter is placed under the care and control of the former."[63] *Heff* next considered the policy history of the government that, in an earlier time, sought "sometimes by treaties and sometimes by the use of force to put a stop to the wanderings of these tribes and locate them on some definite territory or reservation, there establishing for them a communal life."[64] The *Heff* Court proceeded, pointing out that although Indian communal settlement was a policy in the past, Congress in the plenitude of its power expressed a new policy through its legislation, "a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship. . . ."[65] The *Heff* Court recognized that, in accordance with this policy, the government sought "to relieve some of the Indians from their tutelage."[66] The Court recognized further that Congress could cease to exercise its protective power without violation of any obligation, and Congress could terminate the ward relationship without accountability in courts of law.[67] The *Heff* Court concluded that Congress, by enactment of the Allotment Act, had indicated its termination of duty to and power over allottee Indians.[68] Consequently, the Court determined that the Indians in this case were not Indians for purposes of congressional liquor legislation.[69]

Eleven years after *Heff*, the Court in 1916 expressly overturned the case and held that those selling whiskey to allottee Indians whose lands were still in trust violated the congressional law pro-

62. The Indian General Allotment Act of Feb. 8, 1887, 24 Stat. 388, found now at 25 U.S.C. § 331 (1976), provided a procedure whereby Indians would assume individual ownership of lands as opposed to tribal. The Act prescribed an interim period during which the lands would be held in trust by the United States before passing in fee to the Indian owner. The Act also granted citizenship to Indians.

63. *In re* Heff, 197 U.S. 488, 498 (1905).

64. *Id.*

65. *Id.* at 499.

66. *Id.* at 501.

67. *Id.* at 499.

68. *Id.* at 504-05.

69. *Id.* at 509.

hibiting such sales. *United States v. Nice*,[70] the case overruling *Heff*, located the sources of congressional power to enact the legislation in both the Indian commerce clause and in the plenary authority of Congress to discharge its protective duty. It was, asserted *Nice*, for Congress to determine the time of Indian "emancipation" from pupilage and dependency—the time when Indians were "prepared to exercise the privileges and bear the burdens of one *sui juris*."[71] The High Court admitted *Heff*'s mistaken reading of Congress' intent as to the time when the guardian-ward relationship was to end under the Allotment Act.[72] Indeed, to the *Nice* Court, the Act "disclosed in an unmistakable way" that during the interim trust period, the "education and civilization of the allottees and their children were to be under the direction of Congress. . . ."[73]

While in *Nice* the Court exhibited a change of opinion as to when Indians became civilized, the underlying thrust of civilizing Indians is common to both *Nice* and *Heff* and apparent too in the 1903 case of *United States v. Rickert*.[74] The *Rickert* Court essentially determined that neither real nor personal property of allotment Indians was subject to state taxation while the United States held the Indians' lands in trust before they assumed fee ownership. The Court centered its reasoning upon the perception that the Indians, during the interim period, were still "wards of the Nation, in a condition of pupilage and dependency" and not yet "discharged from that condition."[75] Thus, the Court claimed the established relation between superior and inferior continued.[76] According to the Court, the interim time implemented a "national policy by which Indians are to be maintained as well as prepared for assuming the habits of a civilized life."[77] The Court went on to point out that Congress allotted lands with the expectation that they would be "improved and cultivated,"[78] and to conclude that to tax either the lands or land improvements would impermissibly interfere with the federal government's control over its dependents.[79] The *Rickert* Court then proceeded to state

70. 241 U.S. 591, 601 (1916).
71. *Id.* at 598.
72. *Id.* at 601.
73. *Id.* at 600.
74. 188 U.S. 432 (1903).
75. *Id.* at 437.
76. *Id.* at 443, *quoting* Choctaw Nation v. United States, 119 U.S. 1, 28 (1886).
77. *Rickert*, 188 U.S. at 437.
78. *Id.* at 442.
79. *Id.* at 441-42.

that not only lands and improvements but also personal property consisting of cattle, horses, and other livestock were purchased by the government for Indians in order to "induce them to adopt the habits of civilized life."[80] Therefore, just as the Court could not condone taxation of the land or improvements, it could not allow taxation of personal property for such a tax would have had the effect of defeating the government's civilizing purpose.[81]

Next, the *Rickert* Court confronted objections to the United States' prosecution of the suit on behalf of Indian interests. The United States, decided the Court, by virtue of its policy-making authority, its interest in the property, and its relation to "these dependent Indians still under national control," properly sued to prevent the imposition of taxes[82] the United States would ultimately pay on behalf of Indians.[83] The Court concluded by suggesting that states dissatisfied with the exemption of allottee Indians from taxes address their complaints to Congress because "[i]t is for the legislative branch of the Government to say when these Indians shall cease to be dependent and assume the responsibilities [of tax burdens] attaching to citizenship."[84]

Inferior in Character

Sandoval demonstrates the Court's interpretation of the inferiority of Indian civilization in its customs and government as well as the consequent assertion of the need for protection and tutelage.[85] Other opinions reinforce the thrust of *Sandoval*'s view by revealing distaste for the wandering way of life[86] and the general desire to civilize the dependent race.[87] Yet, the uncivilized condition of Indians is not the only theme of *Sandoval*. Indians are said to be plagued also by ignorance, immorality, and intemperance.[88] Other cases pick up this thread of character degradation.

In 1914, a year after *Sandoval* criticized the intemperance of Indians, *Perrin v. United States*[89] considered the subject. In sus-

80. *Id.* at 443-44.
81. *Id.* at 444.
82. *Id.*
83. *Id.* at 438.
84. *Id.* at 445.
85. See *supra* notes 20-29, 34-40 and accompanying text.
86. See *supra* notes 43-64 and accompanying text.
87. See *supra* notes 65-84 and accompanying text.
88. See *supra* notes 30-33 and accompanying text.
89. 232 U.S. 478 (1914).

taining a conviction for the sale of liquor upon lands ceded to the United States at the time of allotment and subsequently passing into private hands, the *Perrin* Court found that Congress, as opposed to states, had the power to prohibit the sale of liquor upon ceded lands even if neither the sellers nor the buyers were Indians. The Court initiated its reflections with the observation that both the Indian commerce clause and the plenary power doctrine confer authority on the Congress to regulate liquor on Indian reservations.[90] Similarly, reasoned the tribunal, "this power to protect the government's Indian wards against the evils of intemperance, of which they are easy victims," extends to ceded lands.[91] To buttress its analysis, the Court pointed out that both the Indians themselves and government commissioners agreed that the "welfare of Indians" required the regulation.[92] The Court then affirmed the reasoning that "'[i]f liquor is injurious to them inside of a reservation, it is equally so outside of it . . . . It is easy to see that the love of liquor would tempt [Indians] to stray beyond their borders to obtain it.'"[93] In addition, according to the Court, not only reason but obligation supported the validity of such liquor regulations: "'This stipulation was not only reasonable in itself, but was justly due from a strong government to a weak people it had engaged to protect.'"[94] Therefore, the *Perrin* Court pronounced, such a measure "[i]n this situation, and having some regard to the weakness of Indians in respect of the use of intoxicants,"[95] fails to stray from the "right conception of power of Congress in dealing with Indian wards and adopting measures for their protection."[96]

While a taste for spirits may have been one weakness of Indians, as *Sandoval* and *Perrin* indicated, it was not the only blemish the Court imputed to Indian character. Like *Sandoval*, *United States v. Chavez*,[97] a 1933 case, involved the Pueblo Indians. This time, however, the issue was not the power of Congress to prohibit liquor but whether a non-Indian violated federally enacted law when engaging in larceny of pueblo live-

90. *Id.* at 482.
91. *Id.* at 483.
92. *Id.*
93. *Id.* at 484, *quoting* United States v. 43 Gallons of Whiskey, 93 U.S. 188, 195 (1876).
94. *Perrin*, 232 U.S. at 484 *quoting 43 Gallons*, 93 U.S. at 197.
95. *Perrin*, 232 U.S. at 486.
96. *Id.* at 485.
97. 290 U.S. 357 (1933).

stock. The opinion adopted much of the *Sandoval* language in summarizing the crude, superstitious, and primitive nature of Indian civilization, and it echoed *Sandoval* in labeling the pueblo people a "simple, uninformed and dependent people."[98] The High Court shed light on these words, in the same sentence, by describing the Pueblo Indians as "easily victimized and ill-prepared to cope with the superior intelligence and cunning of others."[99]

Chavez again mirrored *Sandoval* in pointing out that this dependent group fell under the wing of Congress by virtue of both the Indian commerce clause and the power inherent in the duty of protection.[100] For the *Chavez* Court, given the way of life of the Pueblo Indians as well as their plight in being "ill-prepared to cope with the superior intelligence and cunning of other" races, it was "difficult to believe that Congress . . . was not intending to protect them" from crimes such as the larceny at issue when it enacted criminal legislation.[101]

The Court in *Tiger v. Western Investment Co.*[102] also discussed the difficulty Indians have in coping with other races, but additionally focused on the general incompetence of Indians instead of on their inferior intelligence. Decided in 1911, *Tiger* determined that a conveyance by an Indian without approval of the Secretary of the Interior as demanded by congressional legislation was invalid. *Tiger* further decided that Congress had the power to legislate the approval condition even though it extended alienation restrictions beyond the time stipulated in a prior treaty. Justifying the time extension, the Court explained that Congress had always undertaken "to deal with the Indians as dependent people, and to legislate concerning their property with a view to

98. *Compare id.* at 361, *with* United States v. Sandoval, 231 U.S. 28, 39 (1913).

99. United States v. Chavez, 290 U.S. 357, 361 (1933). *In re* Heff, 197 U.S. 488, 498 (1905), similarly evaluated the intellectual vulnerability of Indians during its discussion of policies (see generally text accompanying notes 61-69 *supra*) invented by the federal government to deal with Indians:

> While this policy [of establishing permanent settlements] was in force, and this location of wandering tribes was being accomplished, much of the legislation of Congress ran in the direction of the isolation of the Indians, preventing general intercourse between them and their white neighbors in order that they might not be defrauded or wronged through the superior cunning and skill of those neighbors.

197 U.S. at 498.

100. United States v. Chavez, 290 U.S. 357, 362-63 (1933), *quoting* United States v. Sandoval, 231 U.S. 28, 45-46 (1913).

101. *Chavez*, 290 U.S. at 364.

102. 221 U.S. 286 (1911).

their protection as such."[103] The Court then explained further that it had frequently affirmed the principle that Congress has plenary power over tribal property of the dependents.[104] Within the scope of this power, elaborated the Court, was Congress' prerogative to determine when this state of "'dependency and tutelage, which entitles [Indians] to care and protection'" ends.[105] Returning to this proposition later in the opinion, the Court framed it in other words: Congress, not the courts, determined whether the "true interests" of Indians merited continued tutelage.[106] Applying the proposition, the Court decided that although Congress conferred citizenship on Indians, citizenship did not in itself terminate dependency, for "[i]ncompetent persons, though citizens, may not have the full right to control their persons and property."[107] Therefore, concluded the *Tiger* Court, when Congress restricts "alienation of Indian lands in the promotion of what it deems the best interest,"[108] of its Indian wards, it acts legitimately.[109]

The year following *Tiger*, the Court explained the case in *Choate v. Trapp*.[110] *Choate* read *Tiger* as involving Congress' power to extend the period of Indian "disability." According to *Choate*'s version of *Tiger*, *Tiger* concerned a situation in which Congress, taking into account Indian "inexperience," had acted not only to protect the Indian against "those who might take advantage of his incapacity" but also to "protect him against himself."[111]

The 1913 case of *Monson v. Simonson*,[112] like *Tiger*, involved the disposition of allotted lands. In the *Monson* case, however, the Court did not not concern itself with Indians' incapacity, but rather with their thriftlessness. Also contrasting the case with *Tiger* was the fact that, in *Monson*, both parties were non-Indians claiming land previously owned by an Indian. In order to resolve the question as to which party had received valid title, the

103. *Id.* at 310.
104. *Id.* at 311.
105. *Id.* at 313-14, *quoting* Rainbow v. Young, 161 F. 835 (8th Cir. 1908).
106. *Tiger*, 221 U.S. at 315.
107. *Id.*
108. *Id.* at 316.
109. *Id.*
110. 224 U.S. 665 (1912) (holding that an act containing a provision exempting allotted land from taxation for a limited time conferred a fifth amendment property right immunizing its Indian holder from state taxation).
111. *Id.* at 678.
112. 231 U.S. 341 (1913).

Court raised an underlying issue. This root question was whether an Indian could convey land immediately after Congress enacted legislation authorizing the Secretary of the Interior to issue patents to the Indian or whether the land could only be conveyed after the Secretary in fact issued the final patent passing full and unrestricted title. In favoring the latter position, the Court looked to congressional intent for a rationale. Among the purposes of the Allotment Act, the Court found the aim of "conducting the individuals from a state of dependent wardship to one of full emancipation . . . . Realizing that so great a change would require years . . . and that in the meantime Indians should be safeguarded against their own improvidence,"[113] Congress took pains to avoid passing full and unrestricted title too quickly.[114]

In *Heckman v. United States*,[115] the High Court also reflected upon the improvident character of Indians in determining a subsidiary issue of the case. In the main, the 1912 case decided the United States had the ability to sue on behalf of Indians claiming the invalidity of conveyances executed in violation of a congressional extension of alienation restrictions. However, the case also weighed the contention that Indians ought to have been parties to the suit so that a court could have compelled them to return consideration they accepted during the invalid transaction. The Court rejected this suggestion, declaring "[i]t is plain" that recovery of consideration cannot be a precondition to cancellation of the transfer.[116] "Otherwise," reasoned the Court, "if the Indian grantor had squandered the money, he would lose the land which Congress intended he should hold, and the very incompetence and thriftlessness which were the occasion of the measures for his protection would render them of no avail."[117]

Inferior in Claim

In scrutinizing the Court's interpretation of the inferior character of Indians, one is concerned with the purported deficiencies of the race's individual members—their inferior intelligence,[118] as well as their immorality,[119] intemperance,[120] incompetence,[121] and

113. *Id.* at 345.
114. *Id.* at 345-46.
115. 224 U.S. 413 (1912).
116. *Id.* at 446.
117. *Id.* at 446-47.
118. See *supra* notes 97-101 and accompanying text.
119. See *supra* note 33 and accompanying text.
120. See *supra* notes 31-32, 89-96 and accompanying text.
121. See *supra* notes 102-111 and accompanying text.

improvidence.[122] In contrast, when considering the inferior claims of Indians, the entire race is pitted against the whole of white America. *Lone Wolf v. Hitchcock*,[123] a 1903 case, illustrates the subordination of interests.

First, the plaintiff in *Lone Wolf* claimed that Congress had enacted an agreement in direct violation of a treaty provision precluding transfer unless consented to by a defined percentage of tribal males. Although the government and the Indians had negotiated an agreement, the requisite number of tribal males had never approved the agreement. The plaintiff further alleged fraudulent misrepresentation on the part of government interpreters who falsely translated provisions of the agreement, and finally, that Congress, before enacting the agreement, had changed provisions without submitting the alterations to the Indians for approval.[124] Nevertheless, the Court held that given the power of Congress, the Court could not "specially consider" any of the plaintiff's claims.[125]

After reciting the facts and the contentions, in the first sentence of its response to the plaintiff's claim of treaty violation the Court noted the "dependency" of the Indians.[126] In the second sentence the Court declared that to favor the claim would be to restrict seriously the power of Congress to protect 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 the power to act, if the assent of the Indians could not be obtained."[127]

The opinion then explained the plenary power of Congress by virtue of "guardianship over [Indian] interests." The Court next referred to an earlier case in which it had "'presumed'" that the "'United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race'"; in other words, exercise of plenary power was immune from judicial review.[128] The Court subsequently returned to the notion of a claim superior to that of Indians' and established that Congress has the power to abrogate a treaty, "though presumably such power will be exercised only

122. See *supra* notes 112-117 and accompanying text.
123. 187 U.S. 553 (1903).
124. *Id.* at 561.
125. *Id.* at 567.
126. *Id.* at 564.
127. *Id.*
128. *Id.* at 565, *quoting* Beecher v. Wetherby, 95 U.S. 517, 525 (1877).

when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so."[129]

Although both *Lone Wolf* and *Tee-Hit-Ton Indians v. United States*[130] arrived at the same destination, namely, that the Indian claims were inferior, the Court in each case pursued a different route. In *Lone Wolf* the reader finds the superior claim described vaguely, finds assertions of Congress' need to act in "emergency," and of "the interest of the country and the Indians themselves." On the other hand, in *Tee-Hit-Ton*, the Court was somewhat less timid about naming the superior claim: the Indians were divested of their lands "by the drive of civilization,"[131] by the "growth of the United States."[132]

Each opinion also approached differently the conclusion that the Indian claim was an inferior one. In *Lone Wolf*, the Court concluded it could not even entertain the Indians' allegations given the dominance of congressional plenary power. In *Tee-Hit-Ton*, the Court essentially conceded the Indians suffered a wrong: "Every American schoolboy knows that the savage tribes of the continent were deprived of their ancestral ranges by force."[133] Although admitting the claim, the *Tee-Hit-Ton* Court stamped it with a kind of legal inferiority, that is, the Court pronounced the claim incapable of judicial remedy. In developing its analysis, the Court resorted to the identical quotation on which *Lone Wolf* had relied presuming the government to be christian in its dealings with an "'ignorant and dependent race.'"[134] The Court then found that although the "American people" in their "compassion" have sought to ensure that Indians "share the benefits" spawned by "our society," provision for recovery by Indians was a matter of generosity, "a matter of grace, not . . . of legal liability."[135] From the perspective of the *Tee-Hit-Ton* Court, no solution other than the relegation of the Indians' claim to the status of a candidacy for generosity was feasible. In other words, the Court decided that no alternative would solve the problem posed by the "growth of the United States" other than

129. *Id.* at 566.
130. 348 U.S. 272 (1955). See *supra* notes 44-51 and accompanying text.
131. *Tee-Hit-Ton*, 348 U.S. at 281.
132. *Id.* at 290.
133. *Id.* at 289-90.
134. *Id.* at 281, *quoting* Beecher v. Wetherby, 95 U.S. 517, 525 (1877).
135. *Tee-Hit-Ton*, 348 U.S. at 281-82.

recognizing the discretion of Congress to make gratuitous "contributions," as opposed to binding the government to an "obligation" to pay for "taken" lands.[136] The Court in *Tee-Hit-Ton* concluded by observing that its decision to deny compensation to the Tee-Hit-Tons for the taking of their timber "leave[s] with Congress, where it belongs, the policy of Indian gratuities for the termination of Indian occupancy of Government-owned land."[137]

Prejudicial Interpretation and Discriminatory Response

Tee-Hit-Ton's conclusion that the Court's decision "leave[s] with Congress, where it belongs"[138] the dispensation of gratuities to Indians leads one back to the question prefacing the survey of Supreme Court plenary power opinions. What is it about Indians that induced the Court to believe that control over Indian matters "belongs" with Congress? In other words, why is it necessary to protect Indians? The preceding section of this paper has at least impliedly provided the answer. This section develops an explicit answer.

The language of the Court, especially that language conveying the Court's concern with Indian civilization and character, reflected a typical interpretation by the Court. The Court at one time or another manifested its opinion about Indian religious, government, child-rearing, marital, and migratory practices, and about Indian civilization in general.[139] Equally plain was the Court's attitude about Indian character—the Court's beliefs concerning Indian intelligence, morality, and competence, as well as concerning Indian drinking and fiscal habits.[140] Yet, though a reader of the Court's decisions arrives at the conclusion that the Court adopted a specific stance, can the reader with equal certainty label the interpretation prejudicial, and more specifically, call it negatively prejudicial?

A dissection of the operation of prejudice reveals that "the most common mechanism for maintaining prejudice is stereotyping."[141] The number and repetitiveness of the Court's assertions about Indian culture and character present in the opinions

136. *Id.* at 290.
137. *Id.* at 291.
138. *Id.*
139. See *supra* notes 22-29, 41-84 and accompanying text.
140. See *supra* notes 30-33, 85-117 and accompanying text.
141. DANIELS & KITANO, *supra* note 16, at 15.

rise to this level of generalization.[142] And just as stereotyping generalizations clue the observer to the presence of prejudice, drawing lines between inferior and superior alerts one to the operation of negative prejudice.[143] Although the Court itself expressly described the relationship between the government and Indians as one in which the Indians were inferior,[144] Cohen's essay, *The Vocabulary of Prejudice*,[145] adds support to the conclusion that negative prejudice was at work in the midst of the Court's development of the plenary power doctrine.

Cohen maintained that words have weighted values. He illustrated this contention with the example, "I am firm. You are obstinate. He is a pig-headed fool."[146] In other words: We migrate or travel. Indian nomads wander.[147] We are defrauded. Indians are victims of superior intelligence and cunning. We recognize the power of the presidency. Indians subject themselves to one-man domination. We practice a religion. Indians tend to superstition. We have made a bad deal. Indians are thriftless. We spend money. Indians squander it. In sum, we are superior. Indians are inferior.

Indians, believed the Court, in their religious, government, child-rearing, marital, and migratory practices approached the uncivilized. Furthermore, according to the Court, they were ignorant, intemperate, immoral, incompetent, and improvident in character. It is understandable, then, how the Court's conviction of Indian inferiority invited the Court to assume a corollary attitude of protectiveness toward Indians: Indians, being inferior, needed protection and pupilage. And even this corollary attitude of protectiveness reflected the superior/inferior dichotomy typical of negative prejudice: We are protectors. Indians are dependents and wards. The words "dependents" and "wards," or grammatical variations of these words, occur again and again in the legal literature. Their presence is so frequent that one might be inclined to discount them as legal terms of art. Yet,

142. Another related mode of reinforcing the attitude of prejudgment is the maintenance of contented ignorance about the subject being prejudged. *Id.* at 14. Although less certainly present than stereotyping, lack of knowledge on the part of the Court in terms of lack of actual experience with Indians is not unimaginable.

143. *See id.* at 14.

144. *In re* Heff, 197 U.S. 488, 498 (1905); United States v. Rickert, 188 U.S. 432, 443 (1903). See *supra* notes 63, 76 and accompanying text.

145. Cohen, *The Vocabulary of Prejudice*, in THE LEGAL CONSCIENCE 429 (L. Cohen ed. 1960).

146. *Id.* at 432.

147. *Id.* at 434.

however innocent their usage may appear, even these words are weighted; they both carry and reinforce attitudes of prejudicial superiority.[148]

The Court's interpretation of Indian contributions to American society was an interpretation negatively prejudicial. Both the Court's prejudicial attitude toward Indians and its corollary prejudging attitude of protectiveness reflected a superior/inferior dichotomy. By itself, however, demonstration of the Court's negative prejudice sheds little light on the development of the plenary power doctrine. Behavior as well as attitude is important. For example, although an employer may be biased against Indians, his bias does not necessarily dictate that the employer will not hire an Indian.[149] Prejudicial attitude is one thing; discriminatory behavior, another.[150] Although in the judiciary's attitude amounting to negative prejudice one discovers the roots of the plenary power doctrine, it is in the judicial behavior amounting to discrimination that one finds its genesis. The substance of judicial behavior is the reasoning and rendering of decisions. A brief excursion into the field of jurisprudential thought on legal reasoning will demonstrate the formulation and application of the plenary power doctrine as an act of discrimination.

Levi described the process of legal thinking as reasoning by analogy—pairing the facts of the case at hand with the facts and rule of a similar case. "The problem for the law is: When will it be just to treat different cases as though they were the same?"[151] Applying and answering Levi's question in the context of Indian plenary power cases suggests the discriminatory nature of the doctrine. The Court has never found it just to treat cases unrelated to Indian affairs the same as plenary power cases. First, in its formulation of the plenary power doctrine the Court subjected Indians to a discriminatory process of reasoning. When dealing with Indians the Court has made an unprecedented leap by reasoning from the duty of protection to the power of control irrespective of constitutional anchors for its ruling. When dealing with Indians the Court has said simply, such power "must exist,"[152] even if the Constitution fails to authorize such power.

148. *Id.* at 430.

149. *See* DANIELS & KITANO, *supra* note 16, at 22.

150. *Id.*

151. E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1948) *reprinted in part* in G. CHRISTIE, JURISPRUDENCE 963, 964 (West 1973).

152. United States v. Kagama, 118 U.S. 375, 384 (1886). See *supra* note 14.

Second, in its application of the doctrine, the Court has discriminated. Predictably, the Court has applied a doctrine uniquely reasoned to suit Indians only in Indian cases. Only Indians have been subjected to this extraordinary, extraconstitutional principle.[153]

While the Court, then, manifested a prejudicial attitude toward Indians, it was the Court's action on the basis of this attitude that gave birth to the plenary power doctrine. The Court responded to the situation according to its interpretation of the situation. Seeing an inferior people, in need of protection and instruction, the Court responded by generating and applying a doctrine tailored to the race's need: there being the duty of protection, there is the power.

Plenary Power Protection and Pupilage

Racist and Ethnocentric Sources of the Plenary Power Doctrine

A survey and analysis of the language used by the Court in plenary power cases compels the conclusion that the Court launched the doctrine as a discriminatory response to its prejudicial interpretation of the Indian condition. Yet, the investigation fails to terminate with this finding because further analysis is necessary to

153. The plenary power doctrine was applied not only to full-blood Indians but also to those of mixed blood. The fact of mixed blood, however, arguably affected the doctrine's application, as the case of United States v. Waller, 242 U.S. 452 (1917), illustrates. *Waller* centered around the interpretation of a congressional act. On one hand, the act removed all alienation restrictions upon lands allotted to mixed-blood Indians. On the other, the act demanded that the Secretary of the Interior be "satisfied that . . . adult full-blood Indians are competent to handle their own affairs" before granting them a fee simple patent for their lands. *Id.* at 461. In *Waller* the United States sought to bring suit to cancel conveyances fraudulently obtained from mixed-blood Indians. The Court denied the capacity of the United States to sue on behalf of the mixed-blood Indians. The Court based its decision upon the finding that the congressional act embodied a legislative intent to grant full control to the mixed-blood Indians with respect to their lands. *Id.* at 462. Thus, reasoned the Court, since the act had released the mixed-blood Indians from their wardship with regard to land transactions, the United States had no interest in the lands, and consequently, no capacity to sue. *Id.* at 463. The Court explained its reasoning by declaring that the act "evidences a legislative judgment that adult mixed-blood Indians are, in the respects dealt with in the act, capable of managing their own affairs, and for that reason they are given full power and authority to dispose of allotted lands." *Id.* at 462. The Court next noted that the Congress' assumption that all mixed-blood Indians are capable may have been erroneous with regard to some cases, for "it is quite evident that the Indians here involved were incapable of making an intelligent disposition of their lands." *Id.* Yet, concluded the Court, "Congress dealt with general conditions" and dealt having "authority over the subject"; therefore, "[i]t is not for the courts to question this legislative judgment." *Id.*

specify the exact nature of the negative prejudice. On the one hand, did the Court's prejudice rise to racist proportions? Or, on the other, was the Court's prejudice ethnocentric in its hue? A necessary precondition for answering these questions is an understanding of racism, ethnocentrism, and the distinction between these two species of prejudice.

Racism is a composite of three elements: (1) the conviction that America is a white country and the concomitant intolerance of nonwhite institutions; (2) the sense that white people comprise an inherently superior strain of humanity; and (3) the fear whites harbor about nonwhites.[154] This description of racism is identical to that of ethnocentrism except in one respect. The principal distinction between the two lies in a variation of the second element. While racism attributes inherent inferiority to a race, ethnocentrism does not contend that the inferiority is of an innate variety.[155] Before considering the sense of superiority the Court assumed, however, this study discusses the first element of the composite, the institutional clash between the races.

The Court's concept of Indians as inferior in civilization reflected its conviction that America is a white country intolerant of nonwhite institutions. Generally, the Court believed the Indian way of life to be a primitive one.[156] Specifically, the Court espoused the view that the Indians' communal economy, religious rituals, government structure, and family life-style did not meet the standards required in white America.[157] The Court gauged Indians to be relatively uncivilized and recognized the plenary power doctrine's utility in eliminating uncivilized practices and inducing and teaching Indians to adopt a civilized way of life.[158] The intolerance of the Court is especially evident in its disaffection for Indian migration and its promotion of the plenary power as a means of obliterating the nomadic mode of existence.[159]

As plain as the Court's intolerance of Indian cultural institutions is its opinion that Indians were an inferior race. The second element of the composite, racial inferiority, coincides with the Court's interpretation of Indians as deficient in character, as be-

154. D. BELL, RACE, RACISM AND AMERICAN LAW 42 (1980).

155. DANIELS & KITANO, *supra* note 16, at 2. Another distinction between racism and ethnocentrism is that the latter may have as its target an ethnic or other group as well as racial groups. *Id.* at 2.

156. See *supra* note 23 and accompanying text.

157. See *supra* notes 22-29, 40-84 and accompanying text.

158. See, e.g., *supra* notes 37-40, 54-60, 64, 73, 77, 80 and accompanying text.

159. See generally *supra* notes 54-60, 64 and accompanying text.

ing ignorant, immoral, intemperate, incompetent, and improvident.[160] The question when considering this component is not so much white America's conviction of Indian inferiority in character but whether this inferiority was of an inherent variety; that is, whether the Court operated with a racist or an ethnocentric frame of mind.

The language best illustrating doubts about the Court's conviction of Indians' inherent inferiority is that of tutelage and pupilage.[161] Such terms infer that the Court believed Indians could be transformed, that some day Indians would reach a degree of progress enabling their emancipation from their state of dependency, wardship, and incompetence.[162] Indeed, the entire thrust of the policy background of the plenary power doctrine's formulation was confidence in the ability of Indians to assimilate.[163] This line of thought, then, leads to a conclusion that the prejudice of the plenary power had ethnocentric rather than racist roots.

Yet, the Court's language characterizing Indians as "essentially" an "inferior people"[164] counsels against ethnocentrism as the sole source of the plenary power doctrine. In addition, when the Court found plenary power protection necessary in part because of "Indian lineage,"[165] it is even more questionable that the Court operated on ethnocentric assumptions alone. Perhaps most telling, however, is the Court's belief that non-Indians possessed "superior intelligence."[166] The Court's expression of such beliefs as well as the Court's unqualified language expounding upon Indians' weakness for liquor,[167] and their thriftless bent,[168] strongly suggest that the Court believed it was dealing with an innately inferior order of humanity as it developed the plenary power doctrine. In sum, the argument that both ethnocentric and racist biases had a hand in the genesis of the doctrine is plausible.

160. See *supra* notes 23, 31-33, 89-117 and accompanying text.

161. See, e.g., *supra* notes 57, 66, 75, 105 and accompanying text.

162. See, e.g., *supra* notes 60, 71, 75 and accompanying text.

163. *See generally* D. GETCHES, D. ROSENFELT, C. WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW 69-79 (West 1979) [hereinafter cited as GETCHES et al.].

164. United States v. Sandoval, 231 U.S. 28, 39 (1913). See *supra* note 23 and accompanying text.

165. United States v. Sandoval, 231 U.S. 28, 47 (1913). See *supra* note 40 and accompanying text.

166. United States v. Chavez, 290 U.S. 357, 361, 364 (1933). See *supra* notes 99, 101 and accompanying text.

167. See *supra* notes 31, 91 and accompanying text.

168. See *supra* notes 113, 117 and accompanying text.

Of course, before claiming that either of the two varieties of prejudice were present, the third element of the scheme, the fear of Indians, needs attention.

The Court's conviction about the inferiority of Indian civilization reflected intolerance of nonwhite institutions. The Court's opinion about the inferiority of Indian character mirrored an assumption of white racial and ethnocentric superiority. In the same parallel fashion, the Court's assertion of claims superior to those of Indians' manifested fear of Indians. *Lone Wolf* and *Tee-Hit-Ton*[169] impliedly suggested the basic fear evoked by Indians, that is, the fear of Indians' plausible claim to the land. The land greed rampant during the years of the allotment era, 1871 to 1928,[170] set the stage for the *Lone Wolf* decision in 1903. *Lone Wolf* glossed over treaty abrogation and consequent deprivation of Indian lands with vague notions of congressional emergency, as well as national and Indian interests. The *Tee-Hit-Ton* Court recognized past exploitation of Indians, but absolved itself with the declaration that, given the non-Indian need for land, the Court's only choice was to refer Indian claims to the discretionary generosity of Congress.

While one senses the fears evoked by Indian land claims in *Lone Wolf* and *Tee-Hit-Ton*, in *Heckman v. United States*,[171] another case involving Indian land claims, one finds explicit admission of fears harbored by the Court. *Heckman* grew out of an attempt by the United States on behalf of Indians to cancel some thirty thousand conveyances made in violation of a congressional extension of alienation restrictions on Indian lands. *Heckman* dealt with a portion of the 3,715 conveyances transacted by Cherokee Indians. Two of the defendant grantees appealed to the Court for reversal of an unfavorable decision by the court below.[172] A central issue in the case was whether the United States had the capacity to sue on behalf of the Indian grantors. During the course of its deliberations, the *Heckman* Court discussed the "right and duty" of Congress to enforce alienation restrictions as well as to legislate them.[173] This power, noted the Court, related not only to the "welfare of the Indians" but also

169. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). See *supra* notes 123-37 and accompanying text.

170. *See* GETCHES et al., *supra* note 163, at 71. *See generally* Carter, *supra* note 3, at 211.

171. 224 U.S. 413 (1912). See generally *supra* notes 115-17 and accompanying text.

172. *Heckman*, 224 U.S. at 415.

173. *Id.* at 437, 441-42 *quoting* McKay v. Kalyton, 204 U.S. 458, 469 (1907).

to the "interest of the United States" because "[o]ut of its peculiar relation to these dependent peoples sprang the obligations to the fulfillment of which the national honor has been committed."[174] As one reads farther into the opinion, however, one finds that national honor is not the only stake of the United States in the litigation.

The *Heckman* Court approvingly quoted an opinion issued by the court below asserting that a land transfer violating the congressional restrictions not only tread on Indians' proprietary rights but also "'violates the governmental rights of the United States. If these Indians may be divested of their lands, they will be thrown back upon the Nation, a pauperized, discontented, and, possibly belligerent people.'"[175] The Court immediately followed this quotation with the conclusion that the "authority to enforce [such] restrictions . . . is the necessary complement of the power to impose them."[176] After considering, in addition, provisions by Congress expressly authorizing government suits, the Court decided the United States had the ability to sue for cancellation of the conveyances.[177]

In sum, the themes of inferiority running through plenary power legal literature are significant not only as indicators of negative prejudice on the part of the Court but also as evidence of the species of prejudice at work. The Court's attitude that white civilization was superior to that of Indian civilization reflected the Court's intolerance of nonwhite institutions. Furthermore, the Court's conviction of Indian character inferiority substantiates the thesis that the Court saw Indians as an inferior group. Finally, the Court's avoidance in *Lone Wolf* and *Tee-Hit-Ton* of valid Indian claims as well as the Court's concern in *Heckman* with the prospect of "'a pauperized, discontented, and, possibly belligerent people'" indicates the Court's fearful and defensive posture. Taken together, these three elements—institutional intolerance, group superiority, and fear—form a composite picture of racist and ethnocentric prejudices operating during the development of the plenary power doctrine.

Functions of the Plenary Power Doctrine

Though an examination of the Court's language may explain

174. *Id.* at 437.
175. *Id.* at 438.
176. *Id.*
177. *Id.* at 442-44.

the plenary power doctrine as a discriminatory response to a racist and ethnocentric interpretation ascribing inferiority to Indians, such a survey does not fully clarify the emergence of the doctrine. This study began by asking why it was necessary to protect Indians with congressional plenary power. A survey of the Court's opinions revealed the answer: because Indians are inferior. Yet, the answer to the question leads to a further inquiry asking: why was it necessary to attribute inferiority to Indians? This phase of the study attempts to respond by suggesting how the plenary power doctrine, apparently devised for the protection of Indians, performs functions of questionable protective value to Indians.

Higginbotham has pointed out in his comments on antiblack statutes that laws "subtly cast in the language of lawyers, can make one oblivious to the fact that the lives of human beings were involved."[178] Thus, when the racist says the innate inferiority of Indians makes them properly subject to the rule of a superior order of humanity, chances are the hearer will recognize the statement as racist. However, when the Supreme Court of the United States proclaims—as it did in the 1959 case of *Williams v. Lee*—that the "Federal Government's power over Indians is derived . . . from the necessity of giving uniform protection to a dependent people," and supports its statement by citing precedent,[179] the reaction may well be different. Chances are that the reader recognizes the assertion only as a principle of law. The words "dependent people" assume a kind of innocence. It is likely that the reader sees only the language of lawyers and is unaware of prejudicial slur. Furthermore, only those versed in Indian law have the background allowing them to comprehend that the precedent on which the Court relied—*Kagama*—is overtly prejudicial. Yet, paradoxically, those versed in Indian law, handling frequently the concept of Indians as wards and dependents, are most likely to see the words as terms of art rather than as terms of prejudice. To be sure, even today the Court itself describes Indian tribes as dependent and resorts to decisional authority marked by prejudice.[180]

178. L. HIGGINBOTHAM, IN THE MATTER OF COLOR 13 (1978).

179. Williams v. Lee, 358 U.S. 217, 219 n.4 (1959) *citing* United States v. Kagama, 118 U.S. 375 (1886).

180. *See, e.g.*, Montana v. United States, (1981). ("[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express Congressional delegation.") Among other cases, *Montana* cited United States v. Kagama, 118 U.S. 375, 381-82 (1886).

When the law deals with Indians, then, it deals not with persons but with dependents and wards designated as such by time-honored legal processes. And the operation of the plenary power doctrine has other functions aside from its dehumanizing effects. Indeed, an attribute of discrimination is its power to legitimate and sustain the inferiority of a group.[181] Daniels and Kitano have further illuminated the effectiveness of discrimination by explaining: "Once discrimination is institutionalized, it pervades the entire system so that those with racial prejudices find validation for their biased prejudgments, while those without initial . . . prejudice eventually adhere to what has been known in the past as the 'earned reputation' theory."[182]

The pertinence of these comments to the plenary power doctrine needs little emphasis. The age of a doctrine dating back to the late nineteenth century as well as its consistent usage persuasively establishes the doctrine's institutionalization within the legal world. And predictably, an institutionalized principle borne of notions that Indians not only were relatively uncivilized but also immoral, unintelligent, intemperate, improvident, and incompetent fueled the beliefs of those already committed to prejudice. Yet, this legitimating function is less tragic than the doctrine's complicity in earning Indians a reputation they did not merit. Those already convinced of Indian inferiority could doubtless find other ways of validating their bigotry; the plenary power doctrine simply provided one more tool. On the other hand, the Court introduced those uncommitted to prejudice to a new way of viewing Indians: Indians are inferior; they need protection. Although the Court has exorcised most of the derogatory language it found in the past to be indispensable, even today the judiciary performs this maintaining function. Those operating within the legal system and dealing with the doctrine are soon initiated to a concept that may never have crossed their minds: Indians are a dependent people. It is not far-fetched to suggest that the uninitiated become accustomed to the concept, conform their own thinking to it, and ultimately internalize the notion.

It is important to remember that non-Indian litigants, judicial personnel, and government agents are not the only persons who operate within the legal system and deal with the plenary power doctrine. The doctrine, of course, affects Indians also. The doctrine and its explanation in the past may have contributed to the

181. DANIELS & KITANO, *supra* note 16, at 23.
182. *Id.*

internalization of inferiority by some Indians. Alternatively, the doctrine may have validated and maintained hostility to the legal process on the part of others. In addition, whatever impression the doctrine has made upon hearts, plenary power doubtless affects Indian legal strategy. If Indians want to engage in adjudication involving the doctrine, they must conform to the roles the doctrine ascribes to them. For instance, in *Tee-Hit-Ton*, the Court's interpretation of the doctrine holding that Congress deemed compensable only recognized title to land forced the tribal plaintiff to contend that, although unrecognized, it had a proprietary interest in the land. Whatever the Indians themselves may have believed, the Court's construction reduced them to arguing that their "stage of civilization" had transcended the inferior level traditionally attributed to Indian culture and had advanced to a degree commensurate with white standards.[183] Furthermore, the doctrine not only can force Indians to adopt a demeaning strategy but also can result in a kind of legal schizophrenia for all who deal with the doctrine in a period marked by conflicting governmental policy. To be sure, the identity of Indians as dependent upon the wisdom of Congress to determine their best interests clashed with the era of self-determination seriously inaugurated in the early 1970s.[184] The only way to avoid such a conflict is to adopt the paradox that Congress concluded that self-determinaton was in the best interest of a dependent people.

The fragmentation of a coherent legal approach to Indian affairs, legitimation and maintenance of a superior/inferior dichotomy, and legal language dehumanization are all functions of the plenary power doctrine. Yet, these effects serve to raise further questions rather than to answer the initial one. For example, why was it necessary to validate and maintain the dichotomy? And, reverting to the initial query of this phase of the study, why was it necessary to propound a doctrine mounted on a prejudicial foundation? The quest for an understanding of plenary power prejudice could terminate with observations about the "unsavory" hue of human nature.[185] After all, the propensity to secure self-esteem by leveling others is a tempting and, in fact, credible explanation.[186] On the other hand, by seeking to determine the

183. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955). See *supra* notes 49-51 and accompanying text. *See generally* Postow, *Thomas on Sexism*, in SEXIST LANGUAGE 271, 274 (M. Vetterling-Braggin ed. 1981).

184. *See generally* GETCHES et al., *supra* note 163, at 106-19.

185. DANIELS & KITANO, *supra* note 16, at 17.

186. *See generally* Ketchum, *Moral Redescription and Political Self-Deception*, in SEXIST LANGUAGE 279, 285 (M. Vetterling-Braggin ed. 1981).

benefactors of the doctrine, additional understanding of the doctrine's functions is possible.

The doctrine in its seminal state apparently functioned to protect Indians from victimization by state criminal processes antagonistic toward Indians.[187] In time the doctrine protected the Indian from the "superior intelligence and cunning" of white neighbors,[188] and moreover, protected the Indian "against himself."[189] Despite these descriptions of the doctrine's intended operation, when one confronts factors contributing to the Court's decisions in specific instances, a different dynamic emerges. In *Rickert*, for instance, one finds that protection of government policy, devoted to conferring civilization upon Indians, from interference by the imposition of state taxes upon Indian property was not the only consideration militating against taxation. The Court realized that if it recognized state taxing power, the federal government would ultimately assume the costs.[190] Moreover, the plenary power doctrine in both *Lone Wolf* and *Tee-Hit-Ton* was clearly disadvantageous to Indians and advantageous to non-Indians. In both cases Indians lost their land claims to the government.[191]

Cases such as *Rickert* demonstrate that Indians have not been the only beneficiaries of plenary power.[192] Cases such as *Lone Wolf* and *Tee-Hit-Ton* undermine the notion that plenary power operated primarily for the benefit of Indians. As a matter of fact, the *Tee-Hit-Ton* Court itself undercut the proposition that government control was intended to benefit Indian land interests. *Tee-Hit-Ton* rejected the plaintiff tribe's reliance on a case upholding a Philippine native's land claim against the United States' claim of ownership. The *Tee-Hit-Ton* Court distinguished *Carino v. Insular Government of the Philippine Islands* from the facts before it by noting: the *Carino* Court based its decision on the United States' purpose in acquiring the Philippines; this purpose "was to administer property and rights 'for the benefits of

187. See *supra* note 3 and accompanying text.

188. United States v. Chavez, 290 U.S. 357, 361 (1933). See *supra* note 99 and accompanying text.

189. Choate v. Trapp, 224 U.S. 665, 678 (1912). See *supra* note 111 and accompanying text.

190. United States v. Rickert, 188 U.S. 432, 438 (1903). See *supra* note 83 and accompanying text.

191. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). See *supra* notes 46-51, 123-37 and accompanying text.

192. Such cases also support Bell's insight that the interests of minorities progress only when coinciding with self-interests of the majority or perceived national interests. BELL, *supra* note 154, at 7.

the inhabitants thereof.'"[193] *Tee-Hit-Ton* then proceeded to explain how this beneficial purpose differed from the purpose effected in North America: "The purpose in acquisition and its effect on land held by [Philippine] natives was distinguished [by the *Carino* Court] from the settlement of the white race in the United States where the 'dominant purpose of the whites in America was to occupy the land.'"[194]

A search for the true benefactors ineluctably leads to the conclusion that a concrete and core function of the doctrine has been deception fostering the self-interests of white America. By fabricating inferiorities in Indians, the Court justified rule over them.[195] Not only has the doctrine been deceptive by virtue of the manufactured inferiorities predicating it; more significantly, the doctrine has deceptively portrayed the relationship between Indian and white America and this deception has accommodated exploitation. Plenary power casts the relationship between Indians and whites into a distinct mold. White America is the guardian, protector, teacher. Indian America is the ward, dependent, pupil. Plenary power posits white America as the provider, Indian America as the beneficiary. Yet, the truth of the matter is that it was Indians who provided the crucial resource—land—upon which the growth of white America depended.[196] By distorting the relationship between Indian and white America, plenary power deception has contributed to the enhancement of self-esteem of guardian whites. By distorting the relationship, the doctrine also has played a role leading to concrete gains for the protectors. The doctrine has propounded white America as the protector of the true interests of Indians during times when the doctrine's effects were anything but protective. The Court's own admission distinguished the purpose of administering property for the benefit of its inhabitants from the purpose motivating white treatment of Indians in America "where the 'dominant purpose of the whites . . . was to occupy the land.'"[197]

Unprejudiced Protection

The plenary power doctrine is a troubling phenomenon. Pre-

193. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 284 n.18 (1955), *citing* Carino v. Insular Government of the Philippine Islands, 212 U.S. 449 (1909).

194. *Tee-Hit-Ton*, 348 U.S. at 284 n.18, *quoting Carino*, 212 U.S. at 458.

195. *See generally* Ketchum, *supra* note 186, at 283.

196. *Id.* at 281.

197. *Tee-Hit-Ton*, 348 U.S. at 284 n.18, *quoting Carino*, 212 U.S. at 458. See *supra* notes 193-194 and accompanying text.

dicated on a fabricated set of inferiorities obligating "superior" white America to rule the Indian, the formulation and application of the doctrine amount to an act of judicial discrimination. The circumstances of the doctrine's birth are embarrassing to a legal system holding out the guarantee of impartial tribunals. Moreover, as this study's introduction pointed out,[198] the doctrine is troubling in another sense. In a legal system demanding constitutional authority as a precondition for federal action, the plenary power is a free-floating peculiarity, unrelated to a clause of the Constitution.

Of course, the operation of the plenary power doctrine has not been an unmitigated catastrophe. At times the doctrine has sheltered Indian interests, or, at the very least, has promoted Indian concerns when these have coincided with the perceived interests of a nation. Yet, it is doubtful that the beneficial effects of the doctrine outweigh its harmful ramifications to such an extent that the doctrine merits judicial perpetuation. Reinforcing this doubt is the fact that the courts can support congressional action with an alternative legal rationale lacking the flaws of the plenary power doctrine. Two facts persuasively advise resort to the Indian commerce clause[199] instead of plenary power as a better approach to Indian affairs. First, measures implemented under the Indian commerce clause, or under the necessary and proper clause[200] allowing measures related to the regulation of Indian commerce, would plainly carry the validating mark of explicit constitutional authority. Second, the rationale for Indian commerce clause measures would justify an enactment in terms of its effectiveness in keeping the arteries of Indian commerce free from obstruction. Analysis would concentrate on commerce rather than on the dependent status of a race. Courts would not have to legitimate congressional legislation by relying on a principle borne of a superior/inferior dichotomy.

While the future of the prejudicial doctrine ultimately rests in the hands of the judiciary, Indian advocates, too, figure in the doctrine's fate. However, the fact that an advocate seeks to advance the claims of Indian clients instead of presiding as a disinterested decision-maker complicates the advocate's choices with respect to the doctrine, especially when invocation of the doctrine affords the strongest chance for prevailing in litigation. Even assuming a client chooses to submit the doctrine as a line of argu-

198. *Supra* notes 12-14 and accompanying text.
199. U.S. CONST. art. I, § 8, cl. 3.
200. *Id.*, art. I, § 8, cl. 18.

ment in order to maximize chances of success within a legal context, an advocate, by arguing alternative theories in addition to plenary power, can still promote the demise of the doctrine. By supplying analytics similar to those used in connecting congressional action with the Constitution's interstate commerce clause,[201] advocates can aid courts in making the transition from reliance on plenary power to reliance on the Indian commerce clause. Advocates can also propel this transition when they are in a posture opposing plenary power action. When facing adversaries justifying congressional action on plenary power grounds, Indian advocates can question the doctrine's constitutional authority. Alternatively, they can, in their pleadings, frame the issues as ones involving the Indian commerce clause rather than the plenary power doctrine. Finally, they can credibly contend that the plenary power doctrine itself violates the spirit, if not the letter, of the Constitution's promise of equal protection of the laws.

201. *Id.*, art. I, § 8, cl. 3.