American Indian Law Review

Volume 43 | Number 1

2018

Foundations of Sand: Justice Thomas's Critique of the Indian Plenary Power Doctrine

Taylor Ledford

FOUNDATIONS OF SAND: JUSTICE THOMAS'S CRITIQUE OF THE INDIAN PLENARY POWER DOCTRINE

Taylor Ledford[*]

I. Introduction

The federal government of the United States is one of enumerated powers.[1] There appears, however, to be a glaring exception to this rule when the federal government regulates Indians.[2] In this area, Congress possesses "[p]lenary authority" over tribal affairs,[3] an authority not drawn from the Constitution.[4] Since the Supreme Court declared this power to be "a political one, not subject to be controlled by the judicial department,"[5] Congress's "schizophrenic"[6] approach to Indian affairs has been premised upon the ability "to legislate for the Indian tribes in all matters."[7]

At the same time, the Supreme Court has continuously recognized that "the Indian tribes have not given up their full sovereignty."[8] Despite Congress passing legislation wholly altering tribal jurisdiction and governance,[9] the Court has recognized that "[t]he sovereignty that the Indian tribes retain is of a unique and limited character."[10] This sovereignty

---

* Third-year student, University of Oklahoma College of Law.

1. United States v. Morrison, 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.").

2. The terms "Native American," "American Indian," "Native," and "Indian" are often used interchangeably to refer to the indigenous peoples of the United States. In this Comment, outside of quotations, I will favor the terms "Native American" or "Native" when referring to indigenous peoples more generally and the term "Indian" as it is most commonly used in federal law—that is, referring to members of federally recognized tribes. *See, e.g.*, 25 U.S.C. § 1903(3) (2012) (defining "Indian" for the purposes of the Indian Child Welfare Act).

3. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903).

4. United States v. Kagama, 118 U.S. 375, 378–80 (1886).

5. *Lone Wolf*, 187 U.S. at 565. *But see* Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84–85 (1977) (holding that congressional action is within the grant of plenary power if it "can be tied rationally to the fulfillment of Congress' unique obligation towards the Indians." (quoting Morton v. Mancari, 417 U.S. 535, 555 (1974))).

6. United States v. Lara, 541 U.S. 193, 219 (2004) (Thomas, J., concurring).

7. United States v. Wheeler, 435 U.S. 313, 319 (1978).

8. *Id.* at 323; *see* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

9. *See* General Allotment Act (Dawes Act), ch. 119, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C.); Indian Reorganization Act (IRA), ch. 576, 48 Stat. 984 (1934) (codified as amended in 25 U.S.C. §§ 5101–5144).

10. *Wheeler*, 435 U.S. at 323.

comes not from some delegation by Congress but "existed prior to the Constitution."[11] It provides tribes jurisdiction "over both their members and their territory."[12] Paradoxically, this sovereignty is simultaneously inherent, yet, "subject to complete defeasance" by Congress.[13] Like Congress's plenary authority, tribes' inherent sovereignty is not based upon any language present in the Constitution. Rather, the Court's definition of tribes' inherent sovereignty results from attempts by the Court to reconcile the position of the United States government as the heir to the colonization and conquest of North America[14] with the fact that tribes remain distinct political entities exercising aspects of civil and criminal jurisdiction over their members.[15]

The Court has analyzed both the plenary authority of Congress and the retained sovereignty of tribes in recent years, attempting to define the federal-tribal relationship for the twenty-first century. In *Duro v. Reina*, the Court addressed the question of whether inherent tribal sovereignty gives tribes jurisdiction over non-member Indians.[16] Just twelve years earlier, in *Oliphant v. Suquamish Indian Tribe*, the Court found that while tribes' inherent sovereignty gave them jurisdiction over tribal members, they had no jurisdiction over non-Indians, even within the boundaries of their reservations.[17] The Court in *Duro*, relying on *Oliphant* and *Wheeler*, held that inherent sovereignty no longer provided tribes with jurisdiction over Indians who were not members of that specific tribe, even on a tribe's own land.[18]

In response to the Court's holding in *Duro*, Congress amended the Indian Civil Rights Act to recognize "the inherent power of Indian tribes . . . to

11. Talton v. Mayes, 163 U.S. 376, 384 (1896).

12. *Wheeler*, 435 U.S. at 323 (quoting United States v. Mazurie, 419 U.S. 544, 557 (1975) (internal quotation marks omitted)).

13. *Id.*

14. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

15. *See Wheeler*, 435 U.S. at 329.

16. 495 U.S. 676, 679, 684–85 (1990).

17. 435 U.S. 191, 211–12 (1978).

18. *Duro*, 495 U.S. at 691–92. One impact of the decision was that misdemeanors committed by one Indian in the Indian Country of another tribe became immediately unprosecutable. Aside from enumerated felonies listed at 18 U.S.C. § 1153, federal law explicitly disclaims jurisdiction over crimes committed by Indians against the persons or property of other Indians in Indian Country. 18 U.S.C. § 1152 (2012).

exercise criminal jurisdiction over all Indians."[19] In *United States v. Lara*, the Court examined whether Congress could use its plenary power to return elements of inherent tribal sovereignty previously ceded.[20] The Court took this as an opportunity to shore up the text-wanting foundation of the plenary power doctrine, locating in the Indian Commerce Clause[21] and the Treaty Clause[22] the definitive textual source for congressional oversight of tribes.[23] Writing for the Court, Justice Stephen Breyer concluded that, to a certain extent, what Congress taketh away, it can giveth back.[24] This interpretation gave tribes jurisdiction over all federally recognized Indians within Indian Country[25] without implicating restrictions under the federal Bill of Rights.[26]

The Court in *Lara* decided that the best path to resolve the tensions between inherent tribal sovereignty and Congress's plenary authority was to pretend as though Congress's authority was never extra-constitutional.[27] Justice Clarence Thomas suggested a different path.[28] In his concurrence, Justice Thomas asserted that "the time has come to reexamine the premises and logic of our tribal sovereignty cases."[29] Specifically, he rejected the Court's holding "that the Constitution grants to Congress plenary power to calibrate the 'metes and bounds of tribal sovereignty.'"[30] Addressing each of the constitutional provisions relied upon by the majority in turn, Justice Thomas noted that the *Kagama* Court, which itself originated the plenary power doctrine, "consider[ed] [government reliance on] such a construction of the Indian Commerce Clause to be 'very strained.'"[31]

This Comment addresses Justice Thomas's critique of the plenary power doctrine. It will first provide a background of the history and caselaw surrounding the doctrine. This background will track the drafting of the

19. Pub. L. No. 101-511, 104 Stat. 1892 (1990) (the "Duro fix") (codified at 25 U.S.C. § 1301(2)).

20. 541 U.S. 193, 196 (2004).

21. U.S. CONST. art. I, § 8, cl. 3.

22. U.S. CONST. art. II, § 2, cl. 2.

23. *Lara*, 541 U.S. at 200.

24. *Id.*

25. 18 U.S.C. § 1151 (2012) (defining "Indian Country").

26. *Lara*, 541 U.S. at 210; *see also* Talton v. Mayes, 163 U.S. 376, 384 (1896) (holding that the Fifth Amendment, specifically its Grand Jury Clause, had no application in tribal courts and did not constrain tribal government).

27. *Id.* at 200.

28. *Id.* at 214 (Thomas, J., concurring).

29. *Id.*

30. *Id.* at 215 (quoting *Lara*, 541 U.S. at 202).

31. *Id.* at 224 (quoting United States v. Kagama, 118 U.S. 375, 378–79 (1886)).

Indian Commerce Clause and the establishment of the "domestic dependent nations" concept. Then, it will address the historical context surrounding *Kagama* and *Lone Wolf*. Finally, it will explore congressional reliance on plenary power to justify Congress's various policies that attempt to destroy or reinvigorate tribal governance over time and the limited standard of review the Supreme Court affords congressional action taken in accordance with the plenary power doctrine.

Next, this Comment addresses Justice Thomas's specific critiques of the plenary power doctrine. First, it will attempt to evaluate his short critique of reliance upon the treaty power in *Lara*. The Comment will then explore his detailed criticism of reliance on the Indian Commerce Clause to justify congressional action in *Adoptive Couple v. Baby Girl*.[32] Justice Thomas contends that the concepts of inherent tribal sovereignty and plenary power are on a collision course that will lead to either the total destruction or total vindication of tribal sovereignty.[33] This Comment will provide the alternative views of Professor Gregory Ablavsky, who asserts that a version of plenary power effectively emanates from the penumbras of the Constitution.[34] His initial premise, as well as the likelihood and effects of his proposed outcomes, will be evaluated. The Comment concludes that the total destruction of tribal sovereignty is the more likely result, but it is not desirable as a policy matter and is not constitutionally required.

Finally, this Comment suggests an alternative analysis for determining congressional authority over tribes, beyond Congress's enumerated powers, that stems from the Supreme Court's decision in *Solem v. Bartlett*.[35] This approach would require a return to the treatymaking regime and the Executive duty of recognizing and negotiating with tribal governments, as any other foreign government, per the Constitution.[36] The proper and constitutional solution for Congress is, as Justice Thomas urges, to "cease[] treating all Indian tribes as an undifferentiated mass" and instead recognize that each tribe did or does possess an individual sovereignty limited only to the extent voluntarily ceded by the individual tribe.[37] Such a nuanced re-thinking of dual sovereignty principles would be beneficial for tribal, federal, and even state governments.

---

32. 570 U.S. 637 (2013).

33. *Lara*, 541 U.S. at 217–18.

34. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1012 (2015).

35. 465 U.S. 463 (1984).

36. U.S. CONST. art. II, § 2, cl. 2; U.S. CONST. art. II, § 3.

37. United States v. Bryant, 136 S. Ct. 1954, 1968 (2016) (Thomas, J., concurring).

II. Background

A. Natives at the Framing

The word "Indian" appears only three times in the United States Constitution. In Section 2 of Article I and Section 2 of the Fourteenth Amendment, the word makes appearances only to exclude "Indians not taxed" from both congressional or tax apportionment, respectively.[38] The word's sole substantive mention is in the Commerce Clause, which gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the *Indian tribes*."[39] This singular substantive appearance provides little insight into how the Framers intended their new government to interact with Indian tribes. Nor does the textual context indicate what the new republic's citizens would have understood those words to mean.[40]

The historical context before the drafting seems to support the notion that, as with so much of the Constitution, the inclusion of Indian tribes within the Commerce Clause was an attempt to remedy the problems inherent in the lack of any clear national-state delineation of jurisdiction under the Articles of Confederation.[41] Under the Articles of Confederation, Congress confusingly possessed "the sole and exclusive right and power" of "regulating the trade and managing all affairs with the Indians," but only so long as they were "not members of any of the States; provided that the legislative right of any State, within its own limits, be not infringed or violated."[42]

The result under the Articles was that Congress had exclusive jurisdiction over Indians outside United States' borders or within territories not yet organized into states. States possessed exclusive jurisdiction over "Member-Indians," which included those who paid taxes to or were considered citizens of the state.[43] State and national governments nevertheless effectively shared jurisdiction over non-member Indians

38. U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2.

39. U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

40. This is beyond, perhaps, that they intended to give Congress clear authority over all interstate or international commerce and wanted to leave nothing out.

41. *See* Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENVER U.L. REV. 201, 231–32 (2007).

42. ARTICLES OF CONFEDERATION OF 1781, art. IX, cl. 4. James Madison himself considered these provisions "obscure and contradictory." Natelson, *supra* note 41, at 234 (quoting THE FEDERALIST NO. 42, at 219 (James Madison) (George W. Carey & James McClellan eds., 2001)).

43. Natelson, *supra* note 41, at 230.

within states, because although Congress had "the sole and exclusive right and power" to regulate affairs of non-member Indians, it could not do so in any way that "infringed or violated" the legislative right of any state.[44] Thus, state legislation could pre-empt national policy. This led to jostling between state and national governments over which level of government should manage Indian policy.[45] Attempts to narrowly interpret the language were undermined by the provision's broad charge and clear drafting history, which rejected narrower language.[46]

At the Constitutional Convention, the question of Indian affairs initially flew below the radar. During its first two months, the Convention left undecided provisions concerning Indian affairs.[47] While the Committee of Detail, charged with drafting the new Constitution, had been presented with a plan granting to Congress the "exclusive Power of regulating Indian Affairs,"[48] the first draft the Committee brought to the Convention contained no provision addressing Indian affairs or commerce.[49] After James Madison suggested an Indian affairs clause containing no exclusivity language, the Committee returned with language that both narrowed congressional authority over Indian affairs to "commerce . . . with Indians, within the [l]imits of any State, not subject to the laws thereof"[50] and followed Madison's suggestion of using no exclusivity language.[51] The narrowing of the subject matter from "affairs" to "commerce" would have "den[ied] Congress competence over diplomacy, boundary adjustment, and other forms of intercourse, all of which would [have been] handled by treaty instead."[52] The removal of the exclusivity language would have effectively granted states exclusive jurisdiction over any Indians that they could subject to their laws,[53] while the Treaty Clause would give the federal government the ability to referee disputes between states and tribes.[54]

---

44. ARTICLES OF CONFEDERATION OF 1781, art. IX, cl. 4.

45. Natelson, *supra* note 41, at 235.

46. *Id.* at 234.

47. *Id.* at 235.

48. *Id.* at 236 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 158–59 (Max Farrand ed., rev. ed. 1937) (Committee of Detail)).

49. *Id.*

50. *Id.* at 237 (quoting THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 48, at 367 (Madison's Journal) (Aug. 22, 1787)).

51. *Id*. at 237–38.

52. *Id.* at 238.

53. *Id.*

54. U.S. CONST. art. I, § 10, cl. 1 (forbidding states from "enter[ing] into any Treaty").

The final draft of the Commerce Clause produced a minimalist compromise on the Indian question.[55] By placing Congress's grant over Indian affairs within the Commerce Clause and limiting its language to five words,[56] the final Indian Commerce Clause avoided much of the confusion that arose under the Articles of Confederation. First, with the removal of the exclusivity provision, a presumption of state jurisdiction absent affirmative congressional action replaced the impetus for litigation about where exclusivity began or ended.[57] Similarly, the removal of language limiting congressional authority to specific classes removed the incentive for gamesmanship by states to maximize the number of Indians outside federal authority (and therefore limit the ability of the federal government to intervene in what might be considered state affairs).[58] This culminated in the view that "states would enjoy concurrent, although subordinate, jurisdiction with Congress over Indian commerce."[59] If there was any doubt about the result of conflict between state and federal law, the Supremacy Clause erased it.[60]

The new Constitution appeared to create a government of limited powers, even towards Indians, by limiting Congress's purview "[t]o regulate *commerce* with . . . Indian tribes."[61] The document reserved more substantive government power to action by treaty, which required alliance between the Executive and Legislative branches,[62] while prohibiting such action by the states.[63]

B. The Marshall Trilogy and the Ward-Guardian Relationship

When the *Kagama* and *Lone Wolf* Courts pointed to authorities for the plenary power doctrine, they did not point to provisions of the Constitution, but instead to Marshall Court decisions.[64] Laid out over nine years, the aptly-named Marshall Trilogy consists of *Johnson v. M'Intosh*, *Cherokee*

55. Natelson, *supra* note 41, at 238.
56. *Id.*
57. *Id.* at 238–39.
58. *Id.*
59. *Id.*
60. U.S. CONST. art. VI, cl. 2.
61. U.S. CONST. art. I, § 8, cl. 3 (emphasis added).
62. U.S. CONST. art. II, § 2, cl. 2.
63. U.S. CONST. art. I, § 10, cl. 1.
64. Lone Wolf v. Hitchcock, 187 U.S. 553, 564–65 (1903); United States v. Kagama, 118 U.S. 375, 382 (1886).

Nation v. Georgia, and *Worcester v. Georgia*.[65] The trilogy is, among other things, largely a testament to the ability of the Marshall Court to create just as many problems as it solved.[66]

That *Johnson* itself became the first federal Indian law case was almost accidental. In *Johnson*, the question presented to the Court was limited in scope, addressing only whether a private purchase of Indian land, made in violation of the Proclamation of 1763, would have been recognized in British courts in 1773.[67] Further, if so, would United States courts be bound to recognize it in 1823?[68] Chief Justice Marshall, seeking to validate land claims Virginia awarded its militia veterans,[69] expanded and flipped the question so the Court could rule definitively on who could purchase Indian lands.[70] By lifting his historical analysis of discovery and conquest from his own critically-panned biography of George Washington[71] and tailoring his legal analysis to his desired outcome, Chief Justice Marshall proclaimed the discovery doctrine.[72] Under this doctrine, when European powers 'discovered' territory in the new world, fee simple title to the land immediately vested in the discovering sovereign.[73] Indian tribes retained solely an occupancy right, which could only be relinquished to the discovering sovereign or its successor in interest.[74]

Eight years later, when Cherokee Nation advocates confronted the Court with the results of *Johnson*, the Court opted not to directly address the question of what authority states possess over Indians within their borders.[75] The advocates in *Cherokee Nation v. Georgia*, having brought their suit under the Supreme Court's original jurisdiction,[76] should be forgiven for believing that they had forced the issue.[77] Instead, the Marshall Court held

65. *See generally* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

66. *See generally* Alex Tallchief Skibine, *Chief Justice John Marshall and the Doctrine of Discovery: Friend or Foe to the Indians?*, 42 TULSA L. REV. 125 (2006).

67. LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS 96–97 (2005).

68. *Id.* at 96.

69. *Id.*

70. *Johnson*, 21 U.S. (8 Wheat.) at 591–93.

71. ROBERTSON, *supra* note 67, at 101–02.

72. *Johnson*, 21 U.S. (8 Wheat.) at 572–73.

73. *Id.* at 572–74.

74. *Id.*

75. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

76. *Id.* at 15–16.

77. *See generally* U.S. CONST. art. III, § 2, cl. 2 (defining the original jurisdiction of the Supreme Court of the United States).

that because Cherokee Nation was neither a foreign nation nor a state of the United States, the Court had no authority to hear the case under its original jurisdiction.[78] Rather, the Court noted that the status of Indian nations within the United States is one of a "domestic dependent nation[]," a relationship that "resembles that of a ward to his guardian."[79]

The *Cherokee Nation* Court's explanation of this ward-guardian relationship contains some of the most paternalistic language in Supreme Court Indian caselaw. Under this relationship, Indian tribes turn to the federal government "for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father."[80] At the same time, the Court in *Cherokee Nation* began to recognize the founding tenants[81] of what would later be defined as "inherent tribal sovereignty."[82] The Court recognized that Indian tribes, or at very least the Cherokee, are "distinct political societ[ies], separated from others, capable of managing [their] own affairs and governing [themselves]."[83] Indeed, the Court noted that the Cherokee, in particular, "have been uniformly treated as a state from the settlement of our country."[84]

The Court's avoidance of this issue did not last. In *Worcester v. Georgia* just one year later, Chief Justice Marshall got the chance to fix the problems created in *Johnson* without the procedural pitfalls of *Cherokee Nation*.[85] In *Worcester*, a white non-Indian living within Cherokee Nation territory was arrested, tried, and convicted by the State of Georgia for the high crime of "'residing within the limits of the Cherokee nation without a license,' and 'without having taken the oath to support and defend the constitution and laws of the [S]tate of Georgia.'"[86] Marshall used *Worcester* to attempt to undo as much of *Johnson* as possible without explicitly overturning it.

Chief Justice Marshall began *Worcester* by providing an alternative account of discovery and colonization from the one he proffered in *Johnson*, premising the new account on "the actual state of things."[87] This alternative history, while not explicitly rejecting the discovery doctrine

78. *Cherokee Nation*, 30 U.S. (5 Pet.) at 20.
79. *Id.* at 17.
80. *Id.* This is especially ironic given that Andrew Jackson was President in 1831.
81. *Id.* at 16.
82. United States v. Wheeler, 435 U.S. 313, 322 (1978).
83. *Cherokee Nation*, 30 U.S. (5 Pet.) at 16.
84. *Id.*
85. *See* 31 U.S. (6 Pet.) 515 (1832).
86. *Id.* at 543.
87. *Id.* at 542–44.

wholesale, attempts to reformulate the concept from the Court's declaration in *Johnson* that Indian tribes' "power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it."[88] Instead, the history in *Worcester* pointed to a conclusion that discovery "gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell."[89] The Court based this seemingly opposite conclusion on its conceptualization of discovery as a contractual arrangement among European powers, one that did not directly implicate the rights of tribes.[90]

The Court concluded in *Worcester* by detailing, for the first time, the nature of tribal sovereignty,[91] expanding upon the foundations laid down in *Cherokee Nation*[92] and holding that the laws of the State of Georgia "can have no force" within the boundaries of the Cherokee Nation.[93] This affirmed Cherokee Nation's inherent authority to exclude any non-members, except to the extent required by treaties or federal statute.[94] "The Indian nations," the Court declared, "had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial."[95] As long as this "full right to the land[] they occupied" had not been extinguished by the federal government acting with tribal consent, "within [tribal] boundary, they possessed rights with which no state could interfere."[96]

---

88. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574 (1823).

89. *Worcester*, 31 U.S. (6 Pet.) at 544.

90. *Id.* ("[Discovery] was an exclusive principle which shut out the right of competition among those [European nations] who had agreed to it; not one which could annul the previous rights of those who had not agreed to it."). Chief Justice Marshall even went so far as to declare that "[t]he extravagant and absurd idea, that the feeble [British] settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, *did not enter the mind of any man*." *Id.* at 544–45 (emphasis added). This seems a far cry from *Johnson*'s summation "that discovery gave exclusive title to those who made it." 21 U.S. (8 Wheat.) at 574.

91. *Worcester*, 31 U.S. (6 Pet.) at 559.

92. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16–17 (1831).

93. *Worcester*, 31 U.S. (6 Pet.) at 561.

94. *Id.*

95. *Id.* at 559.

96. *Id.* at 560.

C. United States v. Kagama *and the Advent of Plenary Power*

In order to understand the historical circumstances surrounding the Court's discovery of extra-constitutional power in *Kagama*,[97] it is crucial to address the Court's decision in *Ex parte Crow Dog*[98] and the Major Crimes Act of 1885.[99] In *Crow Dog*, a federal jury in the Dakota Territory convicted Crow Dog, a Sioux Nation tribal member, for the murder of Spotted Tail, another Sioux Nation tribal member.[100] While the murder occurred squarely within the outer boundaries of the Dakota Territory, it also plainly occurred within Indian Country.[101] Thus, Crow Dog appealed his conviction on the grounds that federal criminal jurisdiction did not extend to crimes committed by Indians against Indians of the same tribe occurring within Indian Country.[102] The Supreme Court agreed, holding that while federal criminal jurisdiction had been extended to certain classes of crimes committed within Sioux Nation under an 1868 treaty, the language of the treaty did not cover Indian-on-Indian crimes occurring therein.[103] The Court noted that to hold otherwise, in the absence of clear congressional intent, would "impose upon [Indians] the restraints of an external and unknown code . . . according to rules and penalties of which they could have no previous warning."[104]

In 1885, Congress responded to *Crow Dog* by passing the Major Crimes Act (MCA).[105] The MCA expressly extended concurrent federal criminal jurisdiction to an enumerated list of crimes occurring in Indian Country so long as the crime was committed by a tribal member.[106] Between 1883 and 1885, no new treaties were signed with Sioux Nation.[107] Therefore, because the *Crow Dog* Court already held that the 1868 treaty did not extend to Indian-on-Indian crimes occurring in Indian Country,[108] the question the Court would have to address in *United States v. Kagama* was: Under what

97. *See generally* United States v. Kagama, 118 U.S. 375 (1886).

98. *See generally* 109 U.S. 556 (1883).

99. *See generally* 18 U.S.C. § 1153 (2012 & Supp. I 2013) (originally enacted as Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385).

100. *Crow Dog*, 109 U.S. at 557.

101. *Id.*

102. *Id.*

103. *Id.* at 571–72.

104. *Id.* at 571.

105. *See* Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (Major Crimes Act) (codified at 18 U.S.C. § 1153).

106. *Id.*

107. *Crow Dog*, 109 U.S. at 567–68.

108. *Id.*

provision of the United States Constitution is Congress empowered to regulate the internal criminal affairs of tribes?[109]

The proper test case appeared the next year when two Indians, Mahawaha and Kagama, were charged with the murder of another Indian, Iyouse, within the Hoopa Valley Reservation in California.[110] In *Kagama*, the Court reviewed essentially two questions certified to it: 1) was the MCA within the constitutional power of Congress to pass; and if it was, 2) did federal courts have jurisdiction to try Indian-on-Indian crimes occurring within a reservation?[111] The Court quickly dispensed with the second question because, unlike in *Crow Dog*, the MCA clearly placed enumerated Indian-on-Indian offenses occurring in Indian Country within federal jurisdiction, regardless of whether it occurred on or off reservation.[112]

The United States government presented two sources of congressional authority for the passage of the MCA: 1) the Indian Commerce Clause, and 2) the treaty power.[113] The Court rejected both arguments.[114] First, it held that it would be "a very strained construction" of the Indian Commerce Clause that would empower Congress to create "a system of criminal laws" within an act that did not contain even a tangential reference to commerce.[115] Likewise, the Court rejected the notion that Indian tribes fell within Congress's grant of authority over affairs with foreign nations.[116] If Indian tribes were foreign nations, the Court reasoned, there would have been no reason to include them within the Commerce Clause at all, as it already explicitly covered foreign nations.[117] The Court went even further, holding that Indian tribes were not "nations" within the meaning of the

109. 118 U.S. 375, 376 (1886).

110. *Id.* The procedural posture of *Kagama* proves it was a test case; the Court heard the case based solely upon a demurrer to the evidence prior to any actual conviction. *Id.* at 375. Moreover, the Supreme Court's factual accounting does little justice to that actual story, failing to identify, among other things, the tribe to which the parties belonged (Yurok), and that Kagama and Mahawaha were father and son. For a fuller accounting of the background, see Sindey L. Herring, *The Story of* United States v. Kagama, *in* INDIAN LAW STORIES 149, 152–53 (Carole Goldberg, Kevin K. Washburn, & Philip P. Frickey eds., 2011).

111. *Id.* at 376.

112. *Id.* at 377–78.

113. *Id.* at 378–79.

114. *Id.* at 378–80.

115. *Id.* at 378.

116. *Id.* at 378–79.

117. *Id.* at 379.

Constitution. The word "nation," despite numerous appearances throughout the Constitution, does not ever appear to reference Indian tribes.[118]

Despite finding no words in the Constitution to support the government's assertion of congressional authority, the Court ultimately found the MCA to be a valid exercise of federal power that "must exist in that government, because it never has existed anywhere else."[119] The Court began by drawing an analogy between the state of Indian tribes and federal territories, divorcing the source of federal power to make and enforce laws in its territories[120] from the words of the Constitution that would seem to provide such authority.[121] Instead, the Court reasoned that "this power of Congress . . . arises, not so much from the clause in the Constitution[,] . . . as from . . . the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else."[122]

The Court held that, due to the unique status of Indian tribes, general criminal laws must be "within the competency of Congress."[123] As "wards of the nation," Indian tribes "depend[] on the United States . . . for their daily food . . . [and] political rights."[124] Since the course of dealing with the federal government had left Indian tribes weak and helpless, the federal government had assumed a "duty of protection, and with it the power."[125] This power "over these remnants of a race once powerful, now weak and diminished in numbers" exists for "their protection, as well as to the safety of those among whom they dwell."[126] In order to protect Indian tribes from states whose people "are often their deadliest enemies," the Court held that this power must exist in the federal government.[127] Therefore, the Major Crimes Act was a valid exercise of that power.[128]

---

118. *Id.* ("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 . . . it would naturally have been 'foreign and Indian nations.'").

119. *Id.* at 384.

120. *Id.* at 380.

121. U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").

122. *Kagama*, 118 U.S. at 380.

123. *Id.* at 383.

124. *Id.* at 383–84.

125. *Id.* at 384.

126. *Id.*

127. *Id.*

128. *Id.* at 385.

D. Lone Wolf *and the Exercise of Pax-Plenary Power*

1. Allotment Era

While it was clear after *Kagama* that Congress could assert complete criminal jurisdiction in Indian Country, the Court did not describe the full extent of that power until 1903.[129] In the immediate aftermath of *Kagama*, Congress flexed its newly text-liberated power over Indian affairs through the passage of the General Allotment Act of 1887 (also known as the Dawes Act).[130] The Dawes Act represented a titanic policy shift from one that favored effective segregation by reservation to one that favored assimilation through the allotment of reservation land.[131] Under the Dawes Act, the President was authorized to divide up reservation land and grant a fixed sum of land (an allotment) to each tribal member.[132] The allotment land itself would be selected by the recipient or his guardian (or the Secretary of the Interior if no selection was made within four years) and would be held in trust for the sole use and benefit of the individual allottee for twenty-five years.[133] After this period, the allottee, now presumably "assimilate[d] to agriculture, to Christianity, and to citizenship," would receive a patent in fee simple for the land and would become subject to state civil and criminal jurisdiction.[134]

For this assimilation plan to actually work, Congress reasoned, there must be a dominant culture on hand into which the newly individualized Indians could assimilate.[135] The Dawes Act served this function by providing for the opening of the "surplus" lands for non-Indian settlement, at the President's discretion, after all allotments had been assigned.[136] Unlike allotment itself, the opening of surplus lands would seem to require tribal consent under the Act.[137] Section 5 of the Dawes Act instructed the "Secretary of the Interior to *negotiate* with such Indian tribe for the

129. Lone Wolf v. Hitchcock, 187 U.S. 553, 565–66 (1903).

130. General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (repealed 2000).

131. Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 9 (1995).

132. Dawes Act § 1, 24 Stat. at 388. Initially the statute provided different sums based upon the status of a tribal member. *See id.* By 1891, however, the statute had been amended to provide an equally sized allotment to each tribal member. Act of Feb. 28, 1891, ch. 383, § 1, 26 Stat. 794, 794; *see also* Royster, *supra* note 131, at 10 n.34 (summarizing congressional changes to standard allotment sizes between 1887 and 1910).

133. Dawes Act §§ 2, 5, 24 Stat. at 388, 389–90.

134. Royster, *supra* note 131, at 10; Dawes Act § 6, 24 Stat. at 390.

135. Royster, *supra* note 131, at 13.

136. Dawes Act § 5, 24 Stat. 389–90.

137. *Id.*

purchase and release . . . of such portions of its reservation not allotted as such tribe shall, from time to time, *consent* to sell."[138] Even if tribes and commissioners agreed to the contents of an agreement, the agreement still required passage of a congressional act to become binding.[139] While some agreements were successfully negotiated, many tribes refused to sell or asked too high a price.[140] It is against this backdrop that the Supreme Court decided what has since been called the *Dred Scott v. Sandford*[141] of Indian law: *Lone Wolf v. Hitchcock*.[142]

2. Lone Wolf v. Hitchcock

In 1892, at the height of allotment, commissioners representing the United States were sent to negotiate the allotment of a reservation belonging jointly to the Kiowa, Comanche, and Apache tribes.[143] In ostensible compliance with the "Medicine Lodge Treaty," which required the signatures of three-fourths of all adult male tribal members before cession of any part of the reservation, the commissioners collected the signatures of 456 adult male Indians.[144] The Indian Agent certified that there were only 562 adult male Indians within the three tribes, placing the number of signatures squarely above the three-fourths requirement.[145] Under the agreement, the tribes would surrender their land rights to the United States.[146] The federal government would then allot the standard amount of land to individual Indians to be held in trust by the United States and taken in fee simple by the allottee or their heirs after twenty-five years. In accordance with the agreement, the tribes would receive $2,000,000 as consideration for the 2,150,000 acres of arable surplus land.[147] Specially provided for were the "sundry named friends of the Indians," which included the Indian Agent and an Army officer, who received land benefits as if they were members of the tribe.[148]

---

138. *Id.* (emphasis added).
139. *Id.*
140. Royster, *supra* note 131, at 13.
141. 60 U.S. (19 How.) 393 (1857).
142. Joseph William Singer, Lone Wolf*, or How to Take Property by Calling It a "Mere Change in the Form of Investment*,*"* 38 TULSA L. REV. 37, 37 (2002).
143. Lone Wolf v. Hitchcock, 187 U.S. 553, 554–55 (1903).
144. *Id.* at 554.
145. *Id.* at 554–55.
146. *Id.* at 555.
147. *Id.*
148. *Id.*

As it happened, the Indian Agent's count of total adult male Indians was incorrect.[149] After the agreement was submitted to Congress, representatives of the tribes immediately objected that the commissioners obtained the signatures as a result of their interpreters' fraudulent misrepresentations and that three-fourths of the adult male members had not signed.[150] While the House of Representatives passed the bill without comment, the Senate requested that the Secretary of the Interior certify that the signatures attached to the agreement constituted three-fourths of the male adult tribal membership when the agreement was signed.[151] The Secretary reported that no 1892 census records existed, but 1893 records indicated that there were 725 men over the age of eighteen, with 639 over the age of twenty-one.[152] Under either measure, the Secretary admitted, "less than three fourths of the male adults appear[ed] to have so signed."[153]

Congress amended the agreement to provide 480,000 acres of grazing land to be held in common by the tribes and eliminated the special benefits for the Indian Agent and Army officer.[154] Nevertheless, the tribes' representatives did not consent, and on June 6, 1900, Congress passed the bulk of the agreement over their objections and without any further attempt to gather signatures.[155] Shortly thereafter, Lone Wolf, Principal Chief of the Kiowa Tribe, brought suit, alleging a violation of the Medicine Lodge Treaty, among other improprieties in the agreement process.[156] The Supreme Court granted review to determine whether Congress acted improperly by failing to gather the signatures of three-fourths of the adult male tribal members in violation of the Medicine Lodge Treaty.[157] The Court held that it had not.[158]

The Court took this opportunity to declare that not only was congressional authority over Indian affairs extra-constitutional, but that it

149. *Id.* at 557.
150. *Id.* at 556.
151. *Id.* at 557.
152. *Id.*
153. *Id.* (internal quotation marks omitted).
154. *Id.* at 559–60.
155. *Id.* at 559–61. Congress passed additional amendments shortly thereafter to extend the time for allotting the land and to facilitate the opening of surplus land for white settlement, likewise without any attempt to comply with the Medicine Lodge Treaty. *Id.* at 560–61.
156. *Id.* at 560–61, 564.
157. *Id.* at 564.
158. *Id.*

was *plenary* in nature.[159] This power, the Court explained, had "always been deemed a political one, not subject to be controlled by the judicial department of the government."[160] The Court offered three justifications for its expansive view of this power. First, the Court noted the status of Indian tribes and their "relation of dependency."[161] Second, the Court reasoned that plenary authority is necessary, at least in the context of land, due to the United States' ownership of the underlying title.[162] Third, the Court argued that the federal government is the proper entity to trust with this sort of authority.[163]

The status of Indian tribes is crucial, the Court stated, because allowing the Medicine Lodge Treaty to limit the authority of Congress would have fundamentally altered the relationship between tribes and the federal government.[164] Congress could not fully care for and protect Indian tribes if it could not quickly, and without tribal assent, "partition and dispos[e] of" Indian lands.[165] As Indian tribes remain dependent on the federal government, the Court contended, the government's unencumbered ability to protect them remains paramount.[166] In order to quickly respond to any possible emergency, the Court concluded that Congress needed the ability to unilaterally abrogate treaties.[167]

Next, the Court turned to the nature of the lands at issue and the federal government's relationship to them.[168] The Court first distinguished prior caselaw that seemed to place the territorial integrity of Indian tribes' reservations in a place of special concern.[169] The Court cited to *Johnson*, *Cherokee Nation*, and *Worcester*, characterizing them as standing for the proposition that the Indian right of occupancy might be "as sacred as the fee of the United States in the same lands."[170] These cases are inapplicable, the Court said, because they involved a dispute between either an Indian tribe and a state or an individual, not a dispute between the federal government

159. *Id.* at 565.
160. *Id.*
161. *Id.* at 564.
162. *Id.* at 565.
163. *Id.* at 565–66.
164. *Id.* at 564.
165. *Id.*
166. *Id.* at 564–65.
167. *Id.* at 564.
168. *Id.*
169. *Id.* at 564–65.
170. *Id.*

and a tribe.[171] The Court made clear that when an Indian tribe's interest in occupancy is measured directly against the United States' interest in the underlying fee, the interest of the United States is greater.[172] This interest, which Congress may transfer at any time, brings with it "a paramount power over the property of the Indians, by reason of [the United States'] exercise of guardianship."[173] This authority, the Court held, may "be implied, even though opposed to the strict letter of a treaty with the Indians."[174]

Finally, the Court contended that the very nature of this extra-constitutional power makes judicial review unnecessary and imbues a per se presumption of good faith on congressional action.[175] The Court asserted, without providing any sources or examples, that this "[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."[176] The Court doubled down on some of its prior rhetoric from *Beecher v. Wetherby*,[177] holding that when Congress exercises this power, "[i]t is to be presumed that in this matter 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."[178] This presumption is proper, according to the Court, because even before Congress ended the practice of dealing with Indian tribes through treaties in 1871, "a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf."[179]

The Court created no outer limit to this new congressional power to abrogate provisions of treaties with Indians but instead merely expressed a hope that "such power will be exercised only when circumstances arise which . . . may demand, in the interest of the country and the Indians themselves, that it should do so."[180] The Court concluded, however, by unequivocally indicating that it would not enforce this hope, but would "presume that Congress acted in perfect good faith in the dealings with the

171. *Id.*
172. *Id.* at 565–66.
173. *Id.* at 565.
174. *Id.*
175. *Id.* at 566.
176. *Id.* at 565.
177. 95 U.S. 517 (1877).
178. *Lone Wolf*, 187 U.S. at 565 (quoting *Beecher*, 95 U.S. at 525) (internal quotation marks omitted).
179. *Id.* at 565–66.
180. *Id.* at 566.

Indians."[181] If tribes wished to call foul on congressional action, the Court mandated that "relief must be sought by an appeal to that body for redress, and not to the courts."[182] Taking the position that "the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation," the Court held that the June 6, 1900, Act and its subsequent, related acts were constitutionally valid.[183] To the extent they conflicted with provisions of the Medicine Lodge Treaty, they abrogated those portions of the Treaty.[184]

3. After Lone Wolf

In the years after *Lone Wolf*, Congress's allotment policy kicked into high gear. From the passage of the General Allotment Act of 1887 to 1900, Congress created only "55,996 allotments, covering 6,736,504 acres"; by 1910, there were "190,401 allotments[,] covering 31,093,647 acres."[185] Whereas tribal consent appeared important, if not vital, before *Lone Wolf*, all pretense was dropped with the judicial declaration of plenary power. For example, when Commissioner of Indian Affairs William A. Jones testified before the House Committee on Indian Affairs in 1904 concerning the setting of a per-acre purchase price for surplus lands on the Rosebud Reservation, he emphatically urged the Committee to act without seeking tribal consent.[186] Jones made the ward-guardian analogy literal, comparing the Native residents of the Rosebud Reservation to "child[ren] [of] 8 or 10 years of age."[187] Jones asked rhetorically if the Committee would "ask the consent of [a] child as to the investment of its fund?"[188] Over the protest of Indian advocates, Congress passed the measure without consultation with, let alone the consent of, the tribes.[189] The Committee's only justification for

181. *Id.* at 568.
182. *Id.*
183. *Id.*
184. *Id.* The comparisons to *Dred Scott* began almost immediately. *See, e.g.*, 36 CONG. REC. 2028 (1903) (statement of Sen. Matthew Quay) ("It is the Dredd Scott decision No. 2, except that in this case the victim is red instead of black. It practically inculcates the doctrine that the red man has no rights which the white man is bound to respect, and that no treaty or contract made with him is bind. Is not that about it?").
185. 2 FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 865 (1984).
186. *Id.* at 868.
187. *Id.*
188. *Id.*
189. *Id.* at 869.

altering the course of its dealing was the one offered to it by the Court: whenever Congress acted, it did so in the best interests of the Indians.[190]

This pattern of congressional action without any serious tribal consultation or consent, justified as being in the tribe's best interest, continued.[191] Congressional acts concerning tribal lands "were proposed by western politicians, approved by a voice vote in Congress, and greeted with cheers from local settlers and businessmen."[192] During this time, the federal government attempted to regulate nearly every aspect of life on Indian reservations in a continuing attempt to Christianize and civilize.[193]

For example, the Office of Indian Affairs regulated not only liquor consumption on reservations, but also intimately regulated tribal religious ceremonies, carefully monitoring dances that may involve "acts of self-torture, immoral relations between the sexes, the sacrificial destruction of clothing or other useful articles, the reckless giving away of property, the use of injurious drugs or intoxicants, and frequent or prolonged periods of celebration."[194] Traditional Native religious or cultural ceremonies that involved these practices were classified as "[I]ndian offenses" and prohibited by law.[195]

When current Supreme Court precedent would seem to limit the population within the federal government's jurisdiction, the Court changed the law. The Pueblos of New Mexico and Arizona, for example, had long been considered legally distinct from Native communities elsewhere in the United States by virtue of the Treaty of Guadalupe Hidalgo under which the United States acquired the territory.[196] The Treaty of Guadalupe Hidalgo guaranteed that those who suddenly found themselves residents of the United States due to the Treaty could "retain[] the property which they [had] possess[ed] in the said territories," or, if they wished, sell their property and expatriate the profits unencumbered.[197] Under the laws of Mexico, and Spain before it, Pueblo Indians retained fee title to their lands,

190. *Id.*

191. Royster, *supra* note 131, at 14.

192. *Id.* (quoting FREDERICK E. HOXIE, A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS, 1880–1920, at 165 (1984)).

193. PRUCHA, *supra* note 185, at 764–66.

194. *Id.* at 801 (quoting Office of Indian Affairs Circular no. 1665 (Apr. 26, 1921) (M1121, reel 12)) (internal quotation marks omitted).

195. *Id.*

196. United States v. Joseph, 94 U.S. 614, 618 (1876).

197. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Mex.-U.S., art. 8, July 4, 1848, 9 Stat. 922.

not "Indian title" in the spirit of *Johnson*.[198] As a result, Pueblo title was as freely alienable as land owned by non-Indians in the United States.[199]

More than that, Pueblo were not initially considered "Indians" in the legal sense.[200] Noting the cultural differences between Pueblo Indians and Native peoples elsewhere within the United States, as well as their more assimilated status (having adopted both the Spanish language and Catholicism), the Court held in *United States v. Joseph* that Pueblo Indians were "Indians only in feature, complexion, and a few of their habits; in all other respects superior to all but a few of the civilized Indian tribes of the country, and the equal of the most civilized."[201] Thus, the Court reasoned, Pueblos were neither Indians in the traditional sense, nor were they intended to be covered by the use of the term in the relevant 1834 statute.[202]

When Congress attempted to exercise its plenary power to prohibit the introduction of alcohol to Pueblos, it appeared that things had changed.[203] In *United States v. Sandoval*, the Court reviewed the legality of a criminal prosecution for selling liquor to the Santa Clara Pueblo.[204] Federal law prohibited the introduction of liquor and other intoxicating beverages to Indian Country.[205] New Mexico's Enabling Act mirrored the federal prohibition and deemed Pueblo lands to be Indian Country within the meaning of federal law.[206] The question for the Court, then, was "whether the status of the Pueblo Indians and their lands" placed them within the scope of Congress's plenary power over Indian affairs.[207] Based upon reports from Indian agents, the Supreme Court determined that due to the Pueblo's "degraded condition" and subsequent acts of Congress regulating them, Pueblos were now 'Indians' that Congress had plenary power to regulate.[208]

198. *Joseph*, 94 U.S. at 618.
199. *Id.* at 618–19; *see also* United States v. Sandoval, 231 U.S. 28, 48 (1913).
200. *Joseph*, 94 U.S. at 617–18.
201. *Id.* at 616–17.
202. *Id.* at 617.
203. *Sandoval*, 231 U.S. at 38–39.
204. *Id.* at 36.
205. *Id.*
206. *Id.* at 36–37.
207. *Id.* at 38. Interestingly enough, the Court held that New Mexico's statehood act did not resolve the question, because although Congress may determine whether tribal groups are "distinctly Indian communities," it may not arbitrarily determine if they are racially "Indian." *Id.* at 46.
208. *Id.* at 45, 46–48.

4. The Indian Reorganization Act

Part of the attractiveness of plenary power is that when in the proper hands, its exercise is capable of accomplishing just as much good as ill. For example, in the aftermath of the Meriam Report's scathing review of the Allotment Era Office of Indian Affairs,[209] with new leadership in the Interior Department and the New Deal Congress in full swing, Congress passed the Indian Reorganization Act (the IRA).[210] The sweeping legislation officially ended the policy of allotment, prohibiting further allotments, extending trust periods on allotted land with existing Indian title indefinitely, maintaining restrictions on the alienability of Indian lands, barring the transfer of restricted lands except to tribes, and limiting their ability to be devised.[211] The IRA allowed tribes to organize and adopt constitutions to further self-government and permitted tribes to incorporate for the purpose of business endeavors.[212] The IRA allowed tribes to devise their own constitutions while also providing a model constitution tribes could adopt.[213] Although officially most of its provisions were optional to tribes, there was an opt-out process for the IRA that required tribes to affirmatively opt-out by a majority vote of the tribe's members.[214]

The IRA went much further than simply attempting to right prior wrongs through reinstating meaningful tribal self-government; it also sought to restore tribal control over land long since removed through allotment.[215] In particular, section 5 of the IRA authorized the Secretary of the Interior to take land into trust for the benefit of tribes, "restore remaining surplus lands to tribes," create new reservation lands, or extend existing ones.[216] This effectively allowed the Secretary to unilaterally grant tribal sovereignty over any lands within the United States, taking what before 1871 required a treaty signed by the President and agreed upon by two-thirds of the United States Senate, and turning it into a purely administrative function.

---

209. PRUCHA, *supra* note 185, at 810 (the report found "deplorable conditions in health, education, and economic welfare and found incompetent and inefficient personnel").

210. *Id*. at 957–63.

211. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.05 at 82 (Neil Jessup Newton et al. eds., 2012).

212. *Id.*

213. *Id.* at 83 n.16.

214. *Id.*

215. *Id.* at 82.

216. *Id.*; *see also* 25 U.S.C. § 5108 (2012).

E. Review of Congressional Action

Although the Supreme Court stated in *Lone Wolf* that Congress's Indian power was "a political one, not subject to be controlled by the judicial department,"[217] the Court has since backed away from a total bar on judicial review. Beginning in *United States v. Alcea Band of Tillamooks*, a plurality of the Court explicitly recognized that "[t]he power of Congress over Indian affairs may be of a plenary nature; but it is not absolute."[218] There, although the Court did not invalidate congressional action per se, it rejected the federal government's interpretation of the Act of 1935.[219] The government's interpretation would have allowed it to legitimize its prior taking of tribal lands "without rendering, or assuming an obligation to render, just compensation for them," in violation of the Fifth Amendment's Takings Clause.[220]

Likewise, in *Morton v. Mancari*, the Court reviewed a challenge to the Bureau of Indian Affairs' preferential hiring policy (under provisions of the IRA) towards tribal members on the grounds that it constituted racial discrimination in violation of the Due Process Clause of the Fifth Amendment.[221] Even as the Court acknowledged that the challenger's theory would effectively eliminate federal Indian policy, it did not reject the challenge out of hand.[222] Instead, the Court went on to seriously consider the claims presented, ultimately deciding that the classification itself was not a racial preference at all, but a political one that turned on whether the applicant was a member of a federally recognized tribe.[223]

The only Supreme Court case to squarely address, in the modern context, the standard of review for whether Indian affairs related legislation properly falls within Congress's ambit occurred a few years later in *Delaware Tribal*

---

217. 187 U.S. 553, 565 (1903).

218. 329 U.S. 40, 54 (1946) (plurality opinion).

219. *Id.*; *see also* Act of Aug. 26, 1935, ch. 686, 49 Stat. 801, 801–02 (giving the United States Court of Claims jurisdiction to hear claims of certain tribes residing in Oregon).

220. *Alcea Band*, 329 U.S. at 54 (quoting United States v. Creek Nation, 295 U.S. 103, 110 (1935) (internal quotations omitted)).

221. 417 U.S. 535, 537 (1974).

222. *Id.* at 552 ("If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.").

223. *Id.* at 553–54. It might be noted that the BIA's policy also required applicants "be one-fourth or more degree Indian blood," a facet of the policy the Court did not address directly. *Id.* at 553 n.24 (quoting 44 BIAM 335, 3.1).

Business Committee v. Weeks.[224] There, the Court reviewed a challenge to the federal government's award distribution scheme following an Indian Claims Commission decision to compensate for a breach of an 1854 treaty with the Delaware Tribe.[225] In *Weeks*, the government argued that "congressional exercise of control over tribal property is final and not subject to judicial scrutiny."[226] The Court, citing *Alcea Band* and *Mancari*, rejected the notion of a categorical bar on review.[227] Instead, the Court held that review was proper but limited the standard to whether "the special treatment can be tied rationally to the fulfillment of Congress'[s] unique obligation toward the Indians."[228] Under this permissive standard of review, the Court upheld Congress's choice to exclude the Kansas Delaware from the award because they had split off from the main Delaware Tribe and accepted United States citizenship—even though they did so *after* the breach of the treaty.[229]

Even on the sparing occasions when the Court has struck down Indian affairs related legislation, it has not done so because it was an improper use of plenary power, but rather because it violated some other constitutional provision. For example, in *Seminole Tribe of Florida v. Florida*, the Court invalidated a portion of the Indian Gaming Regulatory Act, which abrogated state sovereign immunity in order to enforce a good-faith negotiating duty with tribes.[230] It did not invalidate the provision because its regulation of state behavior could not "be tied rationally to the fulfillment of Congress'[s] unique obligation toward the Indians"[231]—in fact, the Court did not review it under this standard at all. Rather, the Court held that the Eleventh Amendment barred the federal government from abrogating state sovereign immunity, save for action under the Fourteenth Amendment.[232] What was facially a case about Congress's Indian affairs power contained no actual analysis of either the Indian Commerce Clause or plenary power, instead lumping it in with the rest of Congress's Article I powers.[233]

---

224. 430 U.S. 73 (1977).

225. *Id.* at 75.

226. *Id.* at 83.

227. *Id.* at 84.

228. *Id.* at 85 (quoting *Mancari*, 417 U.S. at 555).

229. *Id.* at 86–87, 89.

230. 517 U.S. 44, 47 (1996).

231. *Mancari*, 417 U.S. at 555.

232. *Seminole Tribe of Florida*, 517 U.S. at 72–73 ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.").

233. *Id.* This is especially odd given that less than ten years later, the Court would find at

III. Justice Thomas's Critique

In more recent years, the swinging of the federal Indian policy pendulum towards a policy that favors tribal sovereignty—rather than one that seeks to diminish it through the hammer of plenary power—has exacerbated the theoretical tension between the two concepts. Congress's reliance on certain principles of tribal sovereignty as it sought the complete destruction of tribal governments raised constitutional concerns never seriously addressed by the Court. Similarly, recent action relying on ethereal power to restore prior functions of tribal sovereignty has created concerns about both the source and scope of the underlying power and the sincerity of Congress's adherence to its claimed principles. In the modern context, however, Justice Clarence Thomas has initiated a full critique of the doctrine, recognizing the time has come to reconsider the foundations of congressional authority to alter the character of tribes recognized as sovereign by our government.

A. Treaty Clause

While Justice Thomas focuses most of his critique on the Court's reliance on the Indian Commerce Clause, he does address the doubtful notion that the power might derive from the Treaty Clause. In *Lara*, Justice Thomas focuses his critique of the majority's plenary power logic with its Treaty Clause justification.[234] He notes the *Lara* majority's own acknowledgement "that '[t]he treaty power does not literally authorize Congress to act legislatively, for it is an Article II power.'"[235] Justice Thomas emphasizes the fact that the treaty power is a creature of Article II, not Article I, and so vests authority in the *President* "to make Treaties, provided two thirds of the Senators present concur[.]"[236] However, to Congress, "it provides *no* power . . . at least in the absence of a specific treaty."[237]

While Justice Thomas acknowledges that, at times, congressional assertions of power might be reinforced by historical circumstances and effective concession by other branches, he contends that the history of

---

least some of the federal government's Indian plenary power comes from the Treaty Clause, plainly a creature of Article II and not Article I. United States v. Lara, 541 U.S. 193, 201 (2004).

234. *Lara*, 541 U.S. at 225 (Thomas, J., concurring).

235. *Id.* (quoting majority opinion, 541 U.S. at 201).

236. U.S. CONST. art. II, § 2, cl. 2.

237. *Lara*, 541 U.S. at 225 (citing Missouri v. Holland, 252 U.S. 416 (1920)).

federal Indian law does not provide such a clear picture.[238] The history, he contends, is fundamentally at odds with itself because "[t]he Federal Government cannot simultaneously claim power to regulate virtually every aspect of the tribes through ordinary domestic legislation and also maintain that the tribes possess anything resembling 'sovereignty.'"[239] He concludes by chastising the Court for finding that the treaty power gives Congress a "free-floating power to legislate as it sees fit on topics that could potentially implicate some unspecified treaty."[240]

B. Indian Commerce Clause

Since his concurrence in *Lara*, Justice Thomas has continued developing his critique of the modern dual-sovereignty regime, focusing on the plenary power doctrine and its "shak[y] foundations."[241] In *Adoptive Couple v. Baby Girl*, Justice Thomas's concurrence addressed in depth the argument that the Indian Commerce Clause "provides Congress with 'plenary power over Indian affairs.'"[242] Thomas began by noting that the Indian Commerce Clause, itself merely a sub-clause of the larger Commerce Clause, draws its meaning from the same "[c]ommerce"[243] as the larger one. This construction stands unless the Framers specifically intended that word to have a different meaning when applied to Indian tribes.[244] He follows by noting that the phrase "commerce with Indian tribes" was, at the founding, synonymous with the phrase "trade with the Indians."[245] Therefore, at very least, Congress has no more power to regulate Indians through the Indian Commerce Clause than it has to regulate through the general Commerce Clause.[246]

Justice Thomas identifies "an additional textual limitation": that the Indian Commerce Clause grants Congress only "the power to regulate Commerce 'with the Indian *tribes*.'"[247] When relying on the Indian

238. *Id.* (citing Dames & Moore v. Regan, 453 U.S. 654, 686 (1981); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)).

239. *Id.*

240. *Id.*

241. United States v. Bryant, 136 S. Ct. 1954, 1968 (2016) (Thomas, J., concurring).

242. 570 U.S. 637, 658 (2013) (Thomas, J., concurring) (quoting 25 U.S.C. § 1901(1) (2012)).

243. *Id.* at 659 (citing United States v. Lopez, 514 U.S. 549, 585 (1995) (Thomas, J. concurring)).

244. *Id.* at 659–60.

245. *Id.* at 659 (internal quotations omitted).

246. *Id.*

247. *Id.* at 660 (quoting U.S. CONST. art. I, § 8, cl. 3).

Commerce Clause, Congress may only regulate commerce with tribes as tribes.[248] The Clause does not contain language that would authorize congressional regulation of individual tribal members' commercial conduct.[249] This is especially relevant in the context of the Indian Child Welfare Act (ICWA).[250] ICWA was passed largely as a remedial statute in response to "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes."[251] In order to combat this wide-reaching problem, Congress elected to apply several provisions of ICWA to "all child custody proceedings involving an Indian child, regardless of whether an Indian tribe is involved."[252] Often then, the unit of application is not tribes, specifically within Congress's grant under the Indian Commerce Clause, but rather individual Indian children.[253] This includes Indian children who are United States citizens and residents of states far removed from tribal jurisdiction.[254] It even covers Indian children without tribal members as parents.[255]

Recently, Justice Thomas applied his originalist formulation of the Indian Commerce Clause to the IRA's land-into-trust provisions. In *Upstate Citizens for Equality, Inc. v. United States*, Justice Thomas dissented[256] from the Court's decision to deny a petition for a Writ of Certiorari. The appeal arose from the Second Circuit's decision to allow the federal government to take into trust between 13,000 and 17,000 acres in upstate New York for the benefit of the Oneida Nation.[257] In Justice Thomas's view, the act of taking land into trust for an Indian tribe is not "commerce" within the meaning of the Indian Commerce Clause.[258] Even then, assuming that it could be considered commerce, often enough the IRA is applied in ways that "do not involve trade of any kind," as "[t]he IRA permits the Secretary to take into trust land that an Indian tribe *already owns*."[259]

248. *Id.*
249. *Id.*
250. *Id.* at 665.
251. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989).
252. *Adoptive Couple*, 570 U.S. at 665 (Thomas, J., concurring).
253. *Id.*
254. *Id.*
255. *Id.*
256. 199 L. Ed. 2d 372, 372 (2017).
257. Upstate Citizens for Equal. v. United States, 841 F.3d 556, 564 (2d Cir. 2016).
258. *Upstate Citizens*, 199 L. Ed. 2d at 373.
259. *Id.*

As the process itself allows land taken into trust to be considered federal land for the purpose of state taxation and regulation, the land-into-trust provisions effectively allow the federal government to take swathes of land from states and "strip the State of almost all sovereign power over it."[260] Taking the argument to its logical extreme, Justice Thomas argues that this view of plenary power gives Congress the ability to "reduce a State to near nonexistence by taking all land within its borders and declaring it sovereign Indian territory."[261]

C. Alternative View

Justice Thomas's approach to the Indian Commerce Clause is not without critiques. Professor Gregory Ablavsky has argued that Justice Thomas's clause-by-clause approach to Congress's power over Indian affairs misses the point.[262] Ablavsky argues that the constitutional powers over Indian affairs emanate not only from the Indian Commerce and Treaty Clauses, but also from "the Supremacy Clause, the Guarantee Clause, Article III jurisdiction, restrictions on the states, and military powers."[263] The interplay between these clauses was intended. The text of the Supremacy Clause serves as a barrier to state interference not only in matters of pure commerce, but also makes treaties, the primary means of dealing with Indian relations at the time, the supreme law of the land.[264] These treaties are then provided an enforcement mechanism through the judicial branch's Article III jurisdiction.[265] Likewise, the convention dropped the word "foreign" from the Guarantee Clause's mandate that the "United States . . . shall protect each [state] against Invasion."[266]

This framework, Ablavsky argues, created an environment of effective field preemption in the early republic.[267] Conceptualizing Congress's Indian power in this manner, rather than using a clause-based approach, "makes

260. *Id.* at 374.
261. *Id.*
262. Ablavsky, *supra* note 34, at 1040–41.
263. *Id.* at 1041.
264. Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1055 (2014).
265. *Id.* at 1043–44.
266. *Id.* at 1047 (quoting U.S. CONST. art. IV, § 4).
267. Ablavsky, *supra* note 34, at 1040; *see* Arizona v. United States, 567 U.S. 387, 398–400 (2012) (discussing the concept of federal preemption of state laws where the federal government's policy is "so pervasive . . . that Congress left no room for States to supplement [additional laws]" (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)) (alteration in original)).

the Indian Trade and Intercourse Act of 1790 more intelligible."[268] The Act and its subsequent amendments "codified a hodgepodge of federal powers, some intended to protect the federal treaty power, others related to trade."[269] Attempting to discover a single constitutional source authorizing the Act, according to Ablavsky, "asks the wrong question."[270] Instead, he argues that the Act is simply the federal government flexing its muscles, demonstrating that it has all the marbles when it comes to Indian affairs.[271] Through the Constitution and the Trade and Intercourse Act, Ablavsky contends that Congress reserved essentially every contemporaneously salient aspect of Indian policy for itself, a result "roughly analogous to present-day concepts of field preemption."[272] As such, more nationalistic federalists argued that the Constitution "prohibited the exercise of state authority" in Indian affairs.[273]

The broad-reaching implications of Ablavsky's theory do not stop there. Acknowledging that the conclusions of the nationalistic factions were not universally held, he argues that even the state-oriented anti-federalist opposition based its arguments on the structure of the Constitution, not on the Indian Commerce Clause or any other clause alone.[274] Ablavsky uses the example of Georgia Congressman James Jackson's opposition to a provision of the 1790 Treaty of New York, which guaranteed the Creek Nation title to land in Georgia.[275] Jackson cited "the plainest principles of the Constitution, particularly those parts which secured to every citizen the rights of property," as well as Article IV's promise that "nothing in the Constitution would prejudice state territorial claims."[276]

Others relied on more abstract principles of state sovereignty that they believed were retained under the Constitution.[277] The legislature of Georgia

---

268. Ablavsky, *supra* note 34, at 1043 ("[T]he [Act] established a licensing scheme for Indian traders, barred treaty-making with tribes without federal approval, and extended state laws over whites traveling into Indian country.").

269. *Id.* at 1044.

270. *Id.* at 1043–44.

271. *Id.* at 1044.

272. *Id.*

273. *Id.*

274. *Id.* at 1045.

275. *Id.* at 1046.

276. *Id.* (quoting 2 ANNALS OF CONG. 1793 (1790)).

277. *Id.* at 1047 ("Georgian representatives even denounced licenses required to attend federal treaty negotiations with Natives, declaring, 'We know of no power on earth, competent to hinder a citizen of Georgia . . . from exercising the locomotive faculty, within

itself, Ablavsky notes, justified selling the federally guaranteed land to land companies on its "full exercise of the jurisdiction and territorial right . . . of disposing thereof."[278] This right is apparently derived from the Treaty of Paris (evidently adopted by the Constitution), the Ex Post Facto Clause, and the Constitution's guarantee of state territory.[279] Ablavsky concludes by acknowledging that this more abstract practice of reading a general power from narrower, more specific grants, gave way fairly early on to the more clause-based approach. By the 1830s, aggressive state sovereignty advocates relied on narrow interpretations of the Indian Commerce Clause to support assertions of sovereignty over Indian nations.[280]

D. Collision Course Between Inherent Tribal Sovereignty and Plenary Power

Unlike other areas of Indian law, which focus primarily on statutes and treaties as applied or relevant to either individual or specifically enumerated tribes,[281] the theories of inherent sovereignty and plenary power result in laws and precedent that apply broadly to Indian tribes as a class.[282] Plenary power treats the federal government's authority over tribes as uniform, regardless of the tribe and that tribe's relationship with the United States. Inherent sovereignty, meanwhile, assumes that every tribe has given up precisely the same amount of its sovereignty in order to exist within the United States, without reference to its individual treaties or relationship with the United States.[283]

Providing the federal government with such broad power to define what sovereignty means for every tribal government stretches the term "inherent"

---

the limits of the State, in the most liberal extent.'" (quoting Letter from James Hendricks to the Comm'rs of the United States (May 31, 1796)).

278. *Id.* (quoting Act of Jan. 7, 1795, 1795 Ga. Laws 3, § 1.)

279. *Id.*

280. *Id.* at 1049.

281. *See generally* Solem v. Bartlett, 465 U.S. 463 (1984) (diminishment and disestablishment of reservations); South Dakota v. Bourland, 508 U.S. 679 (1993) (abrogation of treaty rights); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (looking to federal interests as applied to regulation of timber within specific tribe's reservation).

282. *See* United States v. Lara, 541 U.S. 193, 209–10 (2004) (holding that Congress's plenary power could restore inherent power to criminally punish non-member Indians).

283. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211–12 (1978) (holding that Indian tribes generally lacked inherent power to criminally punish non-Indians); Duro v. Reina, 495 U.S. 676, 697–98 (1990) (holding that Indian tribes generally lacked inherent power to criminally punish non-member Indians).

to its limits. At some point, the tribe is no longer exercising its own sovereignty but instead what limited sovereignty the federal government deigns to allow. Likewise, true recognition of the sovereignty of any nation implies that dealings with it are maintained through the consent of the nation and the recognition that its internal affairs are its business. The plenary power doctrine does not respect tribal sovereignty and has sought its effective destruction since its advent.

IV. Analysis

Sovereignty is and always has been a fluid concept and matters of sovereignty are best resolved by negotiations and agreements between the two sovereigns. These agreements can be altered as needed by the parties, not by micromanagement through plenary power or by resort to the courts for a final answer that produces a winner and a loser. The contradictions intrinsic in the dueling concepts of inherent tribal sovereignty and congressional plenary power will eventually resolve themselves, one way or another. The federal government has wielded plenary power in a way that can often be described as arbitrary and heavy-handed. Some have been tempted,[284] for the sake of legal sanity, to attack title 25 in its entirety and seek to start from scratch. However, any sincere reconciliation of federal Indian policy with its constitutional limitations cannot do away with title 25 in one fell swoop.

To that end, two results present themselves. The first, heavily implied by Justice Thomas, is largely mechanical. This approach begins from the premise that the plenary power doctrine is a power grab, not only from tribal governments, but also from state and local governments.[285] The Act of 1871, although likely unenforceable as a restraint on the ability of the executive to negotiate and sign treaties,[286] is dispositive insofar as it declares the opinion of Congress that tribes no longer possess an independent sovereignty. From here, the structure of our constitutional government dictates the terms. To the extent that tribes are dealt with as tribes, the federal government retains primary, although non-exclusive, jurisdiction over matters of "commerce." State governments, as recognized sovereigns under the Constitution, will have concurrent jurisdiction over the

284. *See, e.g.*, Brackeen v. Zinke, 338 F. Supp. 3d 514, 536 (N.D. Tex. 2018) (holding ICWA unconstitutional as a racial classification that failed to survive strict scrutiny).

285. *See* United States v. Lara, 541 U.S. 193, 218–25 (2004) (Thomas, J., concurring).

286. *Id.* at 218 (noting that "the Constitution vests in the President both the power to make treaties and to recognize foreign governments") (citation omitted).

regulation of tribes as tribes, should they choose to regulate in that fashion, and exclusive jurisdiction over individual tribal members. In this scenario, tribes will necessarily cease to be a constitutionally relevant entity. Tribes will be indistinguishable from private groups or businesses for the purposes of their ability to regulate their members or those doing business with them.

This is not, however, the only possible outcome. This alternative outcome recognizes that the end of plenary power would necessarily mean the rethinking of much of title 25, but it does not have to leave a vacuum. Depending on how Congress chooses to react, either tribal governments or state governments will pick up the slack. If Congress elects to recognize tribes as nations (requiring repeal of the Act of 1871's prohibitions on treatymaking, even if the Act is likely unconstitutional), then it must disclaim all power over the internal affairs of tribes, essentially recognizing their total sovereignty. Congress can retain the status quo vis-a-vis treaties negotiated with individual tribes.

Except to the extent that Congress may regulate commerce with tribes, Indian tribes are afforded no special or lesser status within the Constitution's text.[287] There is no special grant of power to either the states or federal government that would authorize *any* governmental action beyond what is necessary and proper to regulate commerce with the tribes.[288] Under the Constitution, the federal government is wholly without the subject matter authority recognized in *Kagama* and *Lone Wolf*. In the absence of explicit authorization, the Constitution provides only two ways for the federal government to extend its subject matter grant: 1) passage of a constitutional amendment, or 2) ratification of a treaty, so long as neither the treaty nor any implementing legislation violates explicit constitutional prohibitions on the exercise of federal power.[289]

As none of the twenty-seven amendments to the Constitution extend such authority, and Ablavsky himself recognizes that the penumbra approach to Congress's enumerated powers fell out of vogue very early in the Republic,[290] the only remaining sources are treaties negotiated by the executive and ratified by two-thirds of the Senate.[291] The metes and bounds of tribal sovereignty and relations with the United States, for each tribe so recognized by the federal government, are then defined not by unilateral and unsupported congressional action, but by mutual agreement between

287. U.S. CONST. art. I, § 8, cl. 3.
288. *Id.*
289. Missouri v. Holland, 252 U.S. 416, 433 (1920).
290. Ablavsky, *supra* note 34, at 1049.
291. U.S. CONST. art. II, § 2, cl. 2.

truly separate sovereigns, ratified by two-thirds of the states' representatives.[292] If this seems strange, it shouldn't. After all, prior to 1871, all dealings with Indian tribes were conducted by treaty. It was only after an act of Congress purported to remove from the executive branch the ability to make treaties with Indian tribes that this practice ceased; even then, the practice continued at least in form until *Kagama* and *Lone Wolf*. While the effects of the Act inform the facts that have developed since 1871, the blatantly unconstitutional law can have no continuing force on executive action, if it ever had any at all.

The consideration of tribal sovereignty and congressional authority to regulate tribes on an individual basis is not impracticable.[293] Treaty rights and reservation boundaries are already litigated on a tribe-by-tribe basis.[294] While perhaps less of a perfect fit for judicial disposition than treaty rights or reservation boundaries, the Court already provides a framework, used elsewhere in federal Indian law, that could easily be applied here.

When the Court reviews claims that Congress has diminished or disestablished the borders of a reservation, it follows the well-established framework from *Solem v. Bartlett*.[295] First, this test looks to see if the text of any congressional act or treaty contains words or phrases that would clearly indicate that the act or treaty intended to diminish or disestablish the borders of a reservation.[296] If the text provides no such indication, as is often the case because the Court did not establish what it considered to be the proper magic words until decades later, then the Court looks to the justifiable expectations of *both* parties.[297] Unless both parties (especially the Indian negotiating team) clearly expected that the *particular* act would diminish or disestablish the reservation, and not that it was part of a series

292. *Id.*

293. Nor is the idea of measuring federal plenary power on a tribe-by-tribe basis in the modern context new. Professor Saikrishna Prakash has argued that federal plenary power, to the extent that any can exist over Indian tribes, must be determined on a tribe-by-tribe basis and that many existing treaties recognize such power. *See* Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1110–12 (2004). Justice Thomas even cites Professor Prakash's arguments, if only in passing, in his concurrence in *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 664 (2013) (Thomas, J., concurring).

294. *See, e.g.,* Solem v. Bartlett, 465 U.S. 463 (1984); South Dakota v. Bourland, 508 U.S. 679 (1993).

295. *Solem*, 465 U.S. at 470–72.

296. *Id.* at 470.

297. *Id.* at 471.

that would eventually have that effect, then no diminishment or disestablishment occurred.[298]

Finally, if there is conflicting evidence with at least some evidence pointing towards diminishment or disestablishment, then the Court may look to the demographic history of the reservation immediately following the act.[299] While this step is never enough on its own to prove disestablishment, it can confirm what evidence from the first two steps might suggest.[300] The Court considers this step to be "unorthodox" in the context of reservation boundaries. The Court applies the step only rarely, as diminishment or disestablishment is a purely legal matter.[301] Boundaries cannot simply vanish by means of adverse possession or the passage of time.[302]

Applying this framework to determine which elements of sovereignty have been ceded or what authority was granted to the federal government over time is fairly straightforward. First, courts could look to treaties signed by the tribes and subsequent acts of Congress based upon the relevant treaty. Courts determine whether any power inherent as a matter of sovereignty had been ceded or whether there was an explicit grant of authority to the United States. This step might look to questions of how the individual tribe exercised its sovereignty historically, before the Columbian encounter, where evidence is available. Where evidence is less available (as will often be the case), courts might look to the continuity of government. Courts may set a bright-line rule that if the tribal government was completely dissolved at any time in the last 150 years, then it is presumed to have lost most, if not all, of its inherent sovereignty. The burden would shift to the defendant or tribe to prove that Congress had given that aspect of sovereignty back to the tribe.

The second step would look to the expectations of parties negotiating any act or treaty and if they believed that the passage of any act would result in the elimination of an aspect of inherent sovereignty. Historical evidence, while possibly sparse, can help elucidate both how individual tribes historically exercised sovereignty and how they altered it vis-a-vis their relationship with the United States. As with the diminishment and

298. *Id.*

299. *Id.* at 471–72.

300. *Id.*

301. *Id.* at 472 n.13; *see also* Nebraska v. Parker, 136 S. Ct. 1072, 1081–82 (2016) (holding that a tribe's 120-year absence did not assign the Court the "role to 'rewrite' the 1882 Act in light of this subsequent demographic history").

302. *Solem*, 465 U.S. at 472 n.13.

disestablishment test, the critical factor in this step is whether the tribal negotiator firmly believed that a *specific* act of Congress would eliminate a *particular* aspect of tribal sovereignty.[303]

The third step for this test would be more expansive than the third step in *Solem*. As sovereignty is a more fluid concept than legal borders, courts would look to whether, after the passage of a certain act, either a federal or state official began to assume a traditional tribal responsibility. The tribe must have either consented or relented to the result. Caution is urged in this step, but this is also the proper place to examine whether an aspect of tribal sovereignty, surrendered either under step one or step two, had ever been restored by a subsequent action of Congress. Behavior by tribal, state, or federal government following ambiguous legislation can be indicative of the parties' expectations. If there is a function of government inherent in sovereignty that evidence shows the tribe continued to perform without objection from either federal or state officials, it can serve as confirmation that an aspect of tribal sovereignty has not been surrendered.

V. Conclusion

The Constitution has, since its framing, promised a government of enumerated powers. It removed from the regular order of government the means to alter its original grant, requiring supermajorities of Congress and sometimes the states to so act. The republic, likewise, has included distinct sovereigns within its borders in the form of states and Indian tribes. This is accounted for in the framing, providing the extraordinary measure of amending the Constitution to regulate the affairs of the states and the extraordinary measure of a treaty to regulate the behavior of tribes.

If there are truly extraordinary situations that require an inference of federal power from words not present in the Constitution's text, plenary power over Indian affairs is not the case. The plenary power doctrine has been extra-constitutional since its beginning. It serves as a stark reminder of a time where the Court readily altered the scope of Congress's constitutional authority to meet the demands of the day. The doctrine has been based upon paternalistic and racist assumptions that Indian tribes are incapable of governing themselves, or if they are to govern themselves, they must assimilate completely and abandon all aspects of their culture and heritage. That the power has been utilized in ways beneficial to tribes does not save it. Federal Indian policy has almost always been shaped, at least in part, by those who earnestly believed that they were acting in the best

303. *Id.* at 470–72.

interests of the tribe. The policymakers behind allotment believed that ending tribal government and forcing the issue of individual lands would be beneficial for tribes.

The end of plenary power does not and should not mean the end of tribal sovereignty or the federal government's role in recognizing and managing relations with tribes. Congress should, nevertheless, follow the structure provided by the Constitution in doing so. Commerce with Indian tribes is properly regulated by Congress, but tribes, as individual sovereigns distinct from the national and state governments, should be recognized by and dealt with on a tribe-by-tribe basis. Binding agreements between tribes and the United States should be ratified by a supermajority of United States Senators. This was the state of affairs for nearly the first hundred years of the republic's existence, during times where the tribal-federal relationship was anything but friendly. This is not a simple process, but the fact that the Constitution makes the creation of national policy more difficult is no excuse to invent new federal powers based upon foundations of sand.