Against Tribal Fungibility

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AGAINST TRIBAL FUNGIBILITY

Saikrishna Prakash†

The federal courts maintain that the Constitution grants the federal government a plenary power over all Indian tribes. In response, some Indian law scholars claim that the federal government does not have plenary power over any Indian tribe. Both parties to this dispute fall into the unfortunate trap of treating the Indian tribes as if they are all similarly situated. In fact, there are reasons to believe that the federal government's power over individual Indian tribes varies from tribe to tribe. When an Indian tribe is located on federal property or within a federal territory, the federal government enjoys something like a plenary power by virtue of the Territory/Property Clause. Likewise, some Indian tribes might have ceded to the federal government a plenary power via treaty or agreement. When a tribe does not fit within either of these two categories, the federal government does not have plenary power over it. The misguided tendency to regard the tribes as fungible has obscured the possibility of relevant differences that might yield variable federal power. Once we stop treating the tribes as if they were fungible, we can begin to see more clearly how and why federal authority might vary across tribes.

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INTRODUCTION

Some people have trouble distinguishing amongst individuals; somehow, they all seem to look the same. Infrequently this phenomenon arises from a medical condition called prosopagnosia, which is characterized by an inability to recognize familiar faces.¹ Other people have no problems identifying individuals of their own ethnicity, but have grave difficulties distinguishing people of other, unfamiliar ethnicities.

The Justices of the U.S. Supreme Court are an enlightened group who generally do not lump together people of the same background. Still, they seem to have grave difficulties noting important differences among the Indian tribes. Instead of determining how individual Indian tribes are differently situated, the Court treats the Indian tribes as wholly fungible. Irrespective of a particular tribe's treaties with the United States or its pattern of land ownership, the Court has declared that the federal government enjoys a "plenary power" over *all* Indian

¹ See STEDMAN'S MEDICAL DICTIONARY 1270 (25th ed. 1990).

tribes.² To the “Courts of the conqueror,”³ Indian tribes are all the same.

In a case of strange bedfellows, some Indian law scholars also treat Indian tribes as if they were fungible. Specifically, some claim that nothing in the Constitution could possibly authorize plenary federal power over any Indian nation.⁴ Under a proper understanding of the Constitution, we are told, every tribe is free from the plenary power yoke.⁵ The Seminole are like the Navajo are like the Mohawk are like the Menominee; none are subject to plenary federal power.

In some ways, Indian tribes are alike. Regardless of the particular circumstances of individual Indian tribes, the Constitution authorizes Congress to regulate commerce with all of them.⁶ Likewise, from the standpoint of many critics, all Indian tribes have historical grievances against the federal and state governments.⁷ In certain situations, then, it makes sense to treat the tribes as if they were fungible because they all share relevant traits.

As far as the constitutional limits of federal power are concerned, however, it is a fundamental mistake to treat Indian tribes as if they

² See, e.g., *infra* Part I.A; see also *United States v. Lara*, 124 S. Ct. 1628, 1633 (2004) (Thomas, J., concurring). The term “plenary power” may describe several concepts. Professor David Engdahl has suggested the following three: an exclusive power; a power that is unlimited by other textual provisions of the Constitution or unlimited as to the objectives pursued; and a power capable of preempting state law. See David E. Engdahl, *State and Federal Power over Federal Property*, 18 ARIZ. L. REV. 283, 362–66 (1976).

This Article uses “plenary power” in the sense in which the courts use it—that is, an all-encompassing legislative power that lacks subject-matter limitations. See, e.g., *infra* notes 41–43 and accompanying text. To say that the federal government has a plenary power over Indian tribes is to say that where Indian tribes are concerned, Congress is not limited to the grants of legislative authority in Article I, Section 8 of the Constitution. For instance, even though Congress lacks the power to enact a general criminal law applicable throughout the United States, under the plenary power theory, it may regulate crimes committed by Indian tribal members wherever they occur. See *United States v. Kagama*, 118 U.S. 375, 383–85 (1886). Similarly, even though Congress lacks the power to enact a nationwide law relating to marriage, see *Trammel v. United States*, 445 U.S. 40, 50 (1980), it could regulate Indian marriages throughout the nation.

The phrase “plenary power” is not meant to suggest that the power is entirely without limits. Although the plenary power doctrine does not recognize any subject-matter limits on federal power over Indian tribes, some limits do exist. For example, the Supreme Court has held that the federal government must pay compensation when taking Indian property. See, e.g., *United States v. Creek Nation*, 295 U.S. 103, 109–11 (1935). More recently, the Court struck down a portion of a federal statute that granted Indian tribes the right to sue the states. See *Seminole Tribe v. Florida*, 517 U.S. 44, 72–73 (1996).

³ *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 588 (1823).

⁴ See *infra* notes 60–64 and accompanying text.

⁵ See, e.g., Steven Paul McSloy, *Back to the Future: Native American Sovereignty in the 21st Century*, N.Y.U. REV. L. & SOC. CHANGE 217, 253 (1993) (“There is no power in the Constitution that permits Congress to legislate over Indian nations.”).

⁶ See U.S. CONST. art. I, § 8, cl. 3.

⁷ For a history of U.S.-Indian relations, see VINE DELORIA, JR., *BEHIND THE TRAIL OF BROKEN TREATIES* (1974).

were all fungible. Just as the United States does not lump all nations together in formulating and executing its foreign policy, so it ought not lump all Indian nations together in determining the reach of federal power. In ways relevant to the scope of federal power, the various Indian tribes are likely quite different. To assess whether tribal differences are relevant to the scope of federal power, we must examine the various treaties and landholding patterns of Indian tribes. After some tough slogging, it will become clear that the federal government likely has plenary power over some tribes and not others.

This Article begins the slogging process, advancing several claims along the way. First, despite the Supreme Court's assertion that the commerce⁸ and treaty powers⁹ grant the federal government a plenary "Indian power"¹⁰ applicable to all tribes,¹¹ neither power does anything of the sort. Just as important, no other constitutional provisions grant the federal government a plenary power over Indian tribes qua Indian tribes. The Constitution no more grants Congress a generic power to control Indians than it cedes to Congress a plenary power over Texans or Californians.

Second, notwithstanding the absence of a nationwide "Indian power," the Constitution likely enables the federal government to exercise a plenary power over at least some Indian tribes. A federal plenary power might derive from two sources. The Territory/Property Clause¹² might endow Congress with a plenary power over certain Indian tribes. In particular, the federal government would have broad control over those tribes located on U.S. property and those tribes located within a U.S. territory.¹³ Alternatively, a treaty or agreement

⁸ See U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

⁹ See *id.* art. II, § 2, cl. 2 ("[The President] shall have Power, hy and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .").

¹⁰ Courts have sometimes referred to Congress's plenary power as the "Indian powers." See, e.g., *Irving v. Clark*, 758 F.2d 1260, 1263 n.4 (8th Cir. 1985) (noting that "[t]he power of Congress over Indians has been characterized as similar to the power Congress exercises over the District of Columbia, territories and possessions, and other federal enclaves," and that "Congress'[s] Indian powers thus are comparable to those of state governments in their respective realms" (internal citation omitted)).

¹¹ See *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973).

¹² U.S. CONST. art. IV, § 3, cl. 2 (stating that "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").

¹³ This Article uses "territory" in the Article IV sense of the term—namely, a portion of the United States not part of any state. See *id.*; see also *Nat'l Bank v. County of Yankton*, 101 U.S. 129, 133 (1879) ("All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress."). For instance, although California is not part of the territory of the United States in the Article IV sense of the term, Puerto Rico is.

might either confer or confirm a plenary federal power.¹⁴ A treaty or agreement might enable Congress to draw upon the plenary power that springs from the Territory/Property Clause either by containing an acknowledgment that tribal lands are located within a territory of the United States¹⁵ or by declaring that Indian-occupied land is actually the property of the United States.¹⁶ Moreover, a treaty might grant the federal government a power to regulate a tribe's internal affairs, such as tribal governance, taxation, and property ownership.¹⁷ Hence, while the Constitution does not grant a plenary power over Indian tribes, it establishes a framework that allows the federal government to acquire plenary power over tribes.

Given the fact-intensive nature of the above inquiries, one simply cannot make blanket claims about the scope of federal power regarding Indian tribes. In particular, one cannot paint with a broad brush and hastily conclude that the federal government has a plenary power over all tribes. Likewise, one cannot declare with confidence that absolutely no Indian tribes are subject to the federal government's plenary control. Because America's "domestic dependent nations"¹⁸ are not fungible when it comes to the scope of federal power, one must gauge the extent of federal authority on a tribe-by-tribe basis.¹⁹

¹⁴ U.S. CONST. art. II, § 2, cl. 2 (granting the President "Power, by and with the Advice and Consent of the Senate[,] to make Treaties").

¹⁵ Treaties that cede territory can grant power over the territory's native inhabitants to the country acquiring the territory. See, e.g., DeAnna Marie Rivera, Note, *Taino Sacred Sites: An International Comparative Analysis for a Domestic Solution*, 20 ARIZ. J. INT'L & COMP. L. 443, 449-450 (2003) (discussing the Treaty of Paris, in which Spain ceded Puerto Rico to the United States, and noting that it constituted "the first move toward United States congressional plenary power over the daily lives of the [native] citizens of [Puerto Rico]").

¹⁶ See *infra* Part III.C.

¹⁷ See *infra* notes 240-44 and accompanying text.

¹⁸ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

¹⁹ This Article does not discuss the extent of state power over federally recognized Indian tribes. Nonetheless, because the autonomy of Indian tribes interests many, some comments seem appropriate. To conclude that Indian tribes would be truly autonomous with the demise of plenary federal power, one must first conclude that a state lacks plenary power over federally recognized Indian tribes located within its borders. Preemption of state power could arise by federal statutory preemption or by implicit constitutional preemption. Statutory preemption would occur when a federal treaty or statute preempts state power over the Indian tribes and buttresses tribal sovereignty. See William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 7 (1987). Alternatively, the Constitution might grant the federal government an implicit monopoly over relations with Indian nations, thus completely preempting state interference in tribal matters. As between these two possibilities, implicit constitutional preemption would seem a more plausible basis for the preemption of state law regulating Indian affairs. See *United States v. Lara*, 124 S. Ct. 1628, 1633 (2004) (describing federal power as "plenary and exclusive") (quoting *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 470-71 (1979)); see also, *Williams v. Lee*, 358 U.S. 217, 219-23 (1959) (holding that the federal government's power over Indian tribes, derived in part from Article I, Section 8, Clause 3, preempts a state from exercising jurisdiction over a civil suit arising on an Indian reservation by a non-Indian against an Indian); cf. LOUIS HENKIN, *FOREIGN AF-*

Part I of this Article recounts the judiciary's plenary power doctrine and the fierce scholarly criticism of it. By examining the Constitution's text, structure, and original understanding, Part II develops the framework for a tribe-by-tribe approach.²⁰ Part III considers several hypothetical situations to demonstrate how federal power ought to vary given the multifarious circumstances of Indian tribes. Finally, Part IV briefly considers and rejects potential difficulties with discarding the plenary power doctrine.

Once we stop stereotyping the tribes, we can begin to appreciate how the Constitution authorizes various types of relationships with Indian nations, and, indeed, any nation. We should not regard all tribes as the sovereign wards of the federal government because the Constitution, by itself, does not enshrine the federal government as their all-powerful constitutional guardian. At the same time, we should not regard every Indian nation as completely independent of the United States, as if they were all the equals of France or Germany. The Constitution allows for far more variety and complexity where America's relations to the domestic dependant nations are concerned.

I

OPPOSING VIEWS OF FEDERAL POWER OVER INDIAN TRIBES

Though criticism of the courts is the bread and butter of legal academics, Indian law scholars have been unusually critical of the judiciary's pronouncements on Indian law. One respected scholar has claimed that "[f]ederal Indian law is rooted in conflicting principles that leave the field in a morass of doctrinal and normative incoherence."²¹ Another noted professor has observed that the "existence of conflicts, gaps, and ambiguities in enforceable judicial authority may

FAIRS AND THE UNITED STATES CONSTITUTION 162-65 (2d ed. 1996) (describing the concept of dormant preemption in the foreign affairs context as an implicit constitutional limitation on the states' power to legislate).

If one rejects both the plenary power doctrine and the assertion that the Constitution grants a federal monopoly over Indian relations, then states might well have a police power over Indian tribes located within their boundaries. In this scenario, the tribes would simply be replacing one super-sovereign (the federal government) with another (the state).

²⁰ This study adopts a partially originalist approach by examining the original understanding of the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3; the Executive Power Vesting Clause, *id.* art. II, § 1, cl. 1; and the War Power Clause, *id.* art. I, § 8, cl. 11. It accepts, however, the validity of current doctrines relating to the treaty power and the Territory/Property Clause, doctrines that sanction broad federal power. Assuming the originalist validity of these doctrines helps to establish the outer limits of federal power. If current doctrines relating to the treaty and Territory/Property powers are wrong, then federal power over Indian tribes is even more circumscribed than described here. In other words, this Article adopts constructions of crucial clauses that might artificially *inflate* the extent of federal power over Indian tribes, at least as an originalist matter.

²¹ Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1754 (1997).

be more true in American Indian law than in any other field of law."²² A third has simply noted the "chaos" in the field.²³ There is reason to believe that in the past, at least some members of the Supreme Court held similar views.²⁴

Notwithstanding this criticism, at least two discernible and closely related fundamental principles emerge from the case law. The first principle is that despite myriad abuses and indignities visited upon the Indian tribes—violation of treaties, forced assimilation and migration of many Indians, and unjust takings of Indian property²⁵—the judiciary regards Indian tribes as enjoying some measure of sovereignty.²⁶ To be sure, Indian tribes are not fully sovereign states like France or Mexico. For instance, they cannot establish their own international commercial and foreign affairs policies.²⁷ Nor can they try non-Indians in tribal courts²⁸ or freely alienate their lands to non-Indians.²⁹ Yet Indian tribes retain the powers to tax transactions occurring on

²² Joseph William Singer, *Remembering What Hurts Us Most: A Critique of the American Indian Law Deskbook*, 24 N.M. L. REV. 315, 318 (1994).

²³ McSloy, *supra* note 5, at 218.

²⁴ See Robert S. Pelcyger, *Justices and Indians: Back to Basics*, 62 OR. L. REV. 29, 30–31 (1983) (citing comments by then-Justice Rehnquist about the case-by-case nature of Indian issues and Justice Stewart's supposed comments that Indian law cases had "no precedential value").

²⁵ See generally DELORIA, *supra* note 7 (surveying the history of U.S.-Indian relations).

²⁶ See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) ("The Indian nations had always been considered as distinct, independent political communities . . ."). But see *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (suggesting that the states may have limited power to regulate tribes).

²⁷ See *Worcester*, 31 U.S. (6 Pet.) at 558–59.

²⁸ See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210–12 (1978). *Duro v. Reina* extended *Oliphant*, holding that only the federal government had jurisdiction over nonmember Indians. See 495 U.S. 676, 688 (1990). Congress reacted to *Duro* by passing the 1990 amendments to the Indian Civil Rights Act. See H.R. CONF. REP. NO. 101-938, at 132–33 (1990). The amendments redefined the "powers of self-government" to include "the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. § 1301(2) (2000). It also defined "Indian" as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, . . . if that person were to commit an offense listed in that section in Indian country to which that section applies." *Id.* § 1301(4).

The legislative history behind these changes suggests that some members sought to override *Duro* by declaring that an Indian tribe inherently enjoyed criminal jurisdiction over nonmember Indians. See, e.g., H.R. CONF. REP. NO. 102-261, at 3 (1991), *reprinted in* 1991 U.S.C.A.N. 379, 379 ("The Committee of Conference is clarifying an inherent right which tribal governments have always held and was never questioned until the recent Supreme Court decision of *Duro v. Reina* . . ."); 137 CONG. REC. H2988 (daily ed. May 14, 1991) (statement of Rep. Miller) ("[T]his bill recognizes an inherent tribal right which always existed. It is not a delegation of authority but an affirmation that tribes retain all rights not expressly taken away."). In the recent case *United States v. Lara*, the Supreme Court held that Congress may permit tribes to exercise criminal jurisdiction over nonmember Indians. *United States v. Lara*, 124 S. Ct. 1628, 1639 (2004).

²⁹ See *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667–68 (1974).

Indian land,³⁰ to punish members who violate tribal law,³¹ and to govern themselves.³² Given these powers, Indian tribes are not merely private associations like corporations, partnerships, and clubs.³³ They are sovereign governments.³⁴

Tribal sovereignty is not a product of the Constitution.³⁵ Nor should we view tribal sovereignty as emanating from federal statutes.³⁶ Unlike cities and counties, tribes are not the subunits of another sovereign.³⁷ Instead, Indian tribal sovereignty is "primeval,"³⁸ predating the Constitution,³⁹ and, indeed, the United States. In fact, the Constitution presumes that the federal government would treat with Indian tribes, just as it presumes that the federal government would treat with other nations generally.⁴⁰

The second bedrock principle emerging from the judicial morass is that the federal government enjoys a plenary power over Indian tribes. However confusing or contradictory it may be in other respects, federal Indian law is quite clear about the federal government's complete supremacy. Given the federal government's plenary power, the limited Indian sovereignty described above exists "at the sufferance of Congress and is subject to complete defeasance."⁴¹ Congress may limit, modify, or eliminate any aspect of tribal governance or tribal law.⁴² If it were so inclined, Congress could even abolish all

³⁰ See *Washington v. Confederated Tribes of the Coleville Indian Reservation*, 447 U.S. 134, 152-54 (1980) (upholding taxation of cigarette sales even as to non-Indians).

³¹ See *United States v. Wheeler*, 435 U.S. 313, 328 (1978).

³² See F. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 247-57 (1982).

³³ See *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (remarking that tribes possess attributes of sovereignty and are "a good deal more than private, voluntary organizations" (internal quotation marks omitted)).

³⁴ See *Morton v. Mancari*, 417 U.S. 535, 554 (1974) (referring to Indians as "members of quasi-sovereign tribal entities").

³⁵ See *Talton v. Mayes*, 163 U.S. 376, 382-84 (1896) (observing that tribal sovereignty was not created by the Constitution).

³⁶ See *Wheeler*, 435 U.S. at 327-28 (observing that statutes may regulate Indian sovereignty, but statutes are not the source of Indian sovereignty).

³⁷ See *id.* at 328 (noting that when it enforces its own criminal laws, the Navajo tribe is not an "arm" of federal government).

³⁸ See *id.*

³⁹ See *Talton*, 163 U.S. at 382-84 (observing that tribal sovereignty was not created by the Constitution); see also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority.").

⁴⁰ See U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power to regulate commerce with Indian tribes as well as with foreign nations); *id.* art. II, § 2, cl. 2 (granting the President the power to make treaties with the advice and consent of the Senate).

⁴¹ *Wheeler*, 435 U.S. at 323.

⁴² See *Martinez*, 436 U.S. at 56.

tribes and effectively smother what remains of tribal sovereignty.⁴³ In short, “[w]hatever Congress wants, Congress gets.”⁴⁴

State sovereignty provides a useful contrast. States enjoy a monopoly of power and are fully sovereign over those subjects not committed to the federal government by the Constitution.⁴⁵ By comparison, the courts have concluded that Indian tribes are not fully sovereign over any subject matters. In the language of the Tenth Amendment, there is no power exclusively “reserved”⁴⁶ to the tribes because, according to the courts,⁴⁷ the Constitution delegates complete power over tribes to the federal government.

This Part lays out opposing views about the scope of federal power relating to Indian tribes. Though the plenary power doctrine is more than a century old, it lacked a textual justification until the judiciary belatedly furnished one. Some Indian law scholars have had an easy time belittling the plenary power doctrine and the recent attempts to shore up its textual support.⁴⁸

A. The Judicial View

The constitutional foundations of the plenary power doctrine have long been unsettled. The first Supreme Court case that definitively asserted a plenary federal power over all Indian tribes is the

⁴³ See, e.g., An Act To Provide for a Per Capita Distribution of Menominee Tribal Funds and Authorize the Withdrawal of the Menominee Tribe from Federal Jurisdiction, Pub. L. No. 83-399, 68 Stat. 250 (1954), *repealed by* Menominee Restoration Act, Pub. L. No. 93-197, § 3(b), 87 Stat. 770, 770 (1973) (codified at 25 U.S.C. § 903a(b) (2000)) (reinstating the Menominee Indian Tribe of Wisconsin and recognizing all federal rights and privileges of members of that tribe).

⁴⁴ Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 285 (1984). In an undoubted overstatement, the Oklahoma Supreme Court, quoting Webster's New International Dictionary, claimed that Congress's plenary power over Indian tribes was “[f]ull; entire; complete; absolute; perfect; unqualified.” *Mashunkashey v. Mashunkashey*, 134 P.2d 976, 979 (Okla. 1942) (internal quotation marks omitted).

⁴⁵ In truth, the Constitution reserves powers not delegated to the federal government either to the states or to the people. See U.S. CONST. amend. X. Yet, because states typically enjoy plenary legislative authority (subject to individual rights constraints), subject matters not delegated to the federal government are typically left to the states. See *United States v. Lopez*, 514 U.S. 549, 552 (1995) (“The Constitution creates a Federal Government of enumerated powers [T]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” (internal citation omitted) (quoting THE FEDERALIST NO. 45, at 298 (James Madison) (Robert Scigliano ed., 2000))).

⁴⁶ U.S. CONST. amend. X.

⁴⁷ See *supra* notes 41–42 and accompanying text.

⁴⁸ See, e.g., Mark Savage, *The Great Secret About Federal Indian Law—Two Hundred Years in Violation of the Constitution—and the Opinion the Supreme Court Should Have Written To Reveal It*, 20 N.Y.U. REV. L. & SOC. CHANGE 343, 343–44 (1993) (comparing the United States to South Africa under apartheid and to Iraq during its invasion of Kuwait).

1886 decision *United States v. Kagama*.⁴⁹ The *Kagama* Court upheld the constitutionality of a federal prosecution of two Indians for the murder of another Indian on the Hoopa Valley reservation in California.⁵⁰ Dismissing the argument that the federal statute authorizing the prosecution could be justified under the Indian Commerce Clause, the Court declared that "it would be a very strained construction of [the] clause, that a system of criminal laws for Indians . . . was authorized by the grant of power to regulate commerce with the Indian tribes."⁵¹ Nonetheless, the Court observed that "Indian tribes *are* the wards of the nation"⁵² and insisted:

They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. . . . Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness . . . there arises [in the federal government] the duty of protection, and with it the power. This has always been recognized by the Executive, and by Congress, and by this court, whenever the question has arisen.⁵³

Hence, the Court concluded that a plenary power lay with the federal government, not by virtue of anything in the Constitution's text, but because of tribal "weakness and helplessness."⁵⁴ To this day, some courts continue to cite this wardship theory as a basis for plenary power over Indian tribes.⁵⁵

Perhaps embarrassed by the nontextual foundations of the wardship theory and ashamed of *Kagama's* paternalistic flavor, the Court in more recent times has retreated from the assertion that Indian depen-

⁴⁹ 118 U.S. 375 (1886). Previous cases came close to asserting a plenary power without actually doing so. See Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 44-47, 52-54 (2002) (discussing cases preceding *Kagama*, such as *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846) and *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616 (1870)).

⁵⁰ See *Kagama*, 118 U.S. at 376.

⁵¹ *Id.* at 378-79.

⁵² *Id.* at 383.

⁵³ *Id.* at 383-84.

⁵⁴ *Id.* at 384. One could also read *Kagama* as arguing that the U.S. government had plenary power over the tribe because it was located "within the geographical limits of the United States." *Id.* at 379. It is unclear whether the Court was invoking the Territory/Property Clause of the United States. See U.S. CONST. art. IV, § 3, cl. 2. Because the tribe was within the state of California, the only way the Court could have invoked the Clause was if the tribe occupied federal property. The Court never claimed that the crime occurred on federal property and the opinion consistently sought to justify federal power over Indian tribes wherever these tribes might be located. See, e.g., *Kagama*, 118 U.S. at 384-85 ("[T]he United States . . . alone can enforce its laws on all the tribes."). In light of this, the better reading is that the Court did not rely upon the Territory/Property Clause as a basis for plenary power over Indian tribes.

⁵⁵ See, e.g., *United States v. Long*, 324 F.3d 475, 479 (7th Cir. 2003) (citing *Kagama's* wardship theory as one basis for plenary power).

dency authorizes plenary power. Admitting that the "source of federal authority over Indian matters has been the subject of some confusion," the Court has claimed that plenary federal power arises from the Commerce Clause and the treaty power.⁵⁶ Writing for the Court, Justice Stevens has even asserted that "the *central function* of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."⁵⁷ Although these pronouncements at least are tied to the Constitution's text, the Court has never explained how seemingly modest grants of authority might ever grant plenary authority over all Indian tribes. Indeed, in its latest foray into this area, the Court blithely repeated these claims without pausing to make sense of them.⁵⁸ As the *Kagama* Court correctly observed, the power to regulate commerce with the Indian tribes hardly seems like a power to regulate the Indian tribes themselves. Likewise, the authority to make treaties with Indian nations scarcely seems to grant federal power to unilaterally legislate upon Indian nations.⁵⁹

B. Scholarly Critiques

For good reason, the plenary power doctrine has no shortage of detractors. Critiques usually take two forms. First, academics have disparaged the frail textual bases of the plenary power claim. Professor Philip Frickey, one of the milder critics, has noted that the "text of the Constitution lacks much of a hint of any plenary power,"⁶⁰ and has observed that nothing in the Constitution's text renders "plenary power . . . legitimate."⁶¹ Any plenary power must, therefore, be "extratextual."⁶² Other critics have been far less kind. Noting that there "is no power in the Constitution that permits Congress to legislate over Indian nations," one scholar has claimed that existing judicial doctrine "is repugnant to the doctrine of enumerated powers."⁶³ Another has observed that "[i]t is a long, twisted path indeed from the [F]ramers' decision to give Congress the exclusive power to regulate commerce and other relations *with* the Indian tribes to the modern assertion of plenary power *over* them."⁶⁴

⁵⁶ See *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973).

⁵⁷ *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (emphasis added).

⁵⁸ See *United States v. Lara*, 124 S. Ct. at 1633-34.

⁵⁹ *C.f. id.* at 1641, 1648 (Thomas, J., concurring).

⁶⁰ Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 43 (1996).

⁶¹ Frickey, *supra* note 21, at 1760. Regarding *Kagama's* argument for plenary power, Professor Frickey has been far more critical, deriding *Kagama* as an "embarrassment of constitutional theory" and labeling "[i]ts slipshod method of bootstrapping . . . an embarrassment of logic." Frickey, *supra* note 60, at 35.

⁶² Frickey, *supra* note 21, at 1760.

⁶³ McSloy, *supra* note 5, at 253.

⁶⁴ Robert N. Clinton, Book Review, 47 U. CHI. L. REV. 846, 859 (1980).

Second, scholars have argued that the Founders' original understanding points to a narrow federal power. These intentionalist claims about what the Founders did or desired generally come in two forms. The more modest claim is that the Constitution's "legislative history" confirms that the Founders never read the Constitution as granting the federal government a plenary power over Indians. Rather, the Founders regarded Indians as distinct nations to be dealt with diplomatically and at arm's length.⁶⁵ Although Congress might be able to regulate commerce with the tribes on a unilateral basis (in the same way it could regulate commerce with other nations on a unilateral basis), diplomacy—principally treaties—generally would regulate the relationship.⁶⁶ None of the Founders envisioned that the federal government—a government of enumerated powers—would enjoy a plenary power over all aspects of tribal life.⁶⁷

The more sweeping claim is that the Founders wished to safeguard Indian sovereignty. First, some scholars assert that the Founders sought to protect Indian tribes from the states.⁶⁸ Pointing to the omission from the Constitution of certain language found in the Articles of Confederation,⁶⁹ some scholars insist that the states could no longer act as if members of Indian tribes residing within their borders were subject to state laws.⁷⁰ If the Constitution implicitly granted the federal government a monopoly on relations with tribes (in the form of the dormant Indian Commerce Clause),⁷¹ then Indian tribes generally were to be free of state interference.⁷² Scholars further argue that by granting rather limited power to Congress, the Framers ensured that Congress would have only modest authority over the Indian nations. Congress would have some narrow unilateral authority via the Commerce Clause, but everything else would require Indian consent

⁶⁵ See, e.g., Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 AM. INDIAN L. REV. 57, 72–76 (1991).

⁶⁶ See McSloy, *supra* note 5, at 269.

⁶⁷ See Savage, *supra* note 65, at 72–77 (observing that the Framers neither discussed plenary power over Indian tribes nor suggested that the War, Property, or Treaty clauses granted such a power).

⁶⁸ See, e.g., Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1155–56 (1995).

⁶⁹ Compare ARTICLES OF CONFEDERATION, art. IX, cl. 5 (noting that the Confederate Congress had "sole and exclusive authority" for "regulating the trade and managing all affairs with the Indians not members of any of the States, provided that the legislative right of any State within its own limits [must] not be infringed or violated"), with U.S. CONST. art. I, § 8, cl. 3 (apparently reserving solely for the federal government the right to regulate commerce with the Indian tribes, thereby eliminating the legislative rights of states with respect to commerce).

⁷⁰ See Clinton, *supra* note 68, at 1149–51.

⁷¹ See *id.* at 1154–55, 1164.

⁷² See *id.* at 1164.

in the form of a treaty.⁷³ Summing up these related assertions, Professor Robert Clinton has suggested that the Framers sought to "guarantee[] the Indian tribes legal and political autonomy as sovereigns exempt from federal and state control over their internal affairs."⁷⁴

C. Difficulties with Both Views

While different rationales for plenary federal power have come and gone during the past century, the one seeming constant is a desire by courts to affirm plenary federal power over Indian tribes. A cynic might conclude that the courts have shown far more interest in propping up plenary federal power than in examining whether the doctrine has a solid foundation. Cynic or not, most recognize that the judiciary does not appear eager to reexamine the plenary power doctrine.⁷⁵ Indeed, notwithstanding Justice Thomas's prodding, the majority in *United States v. Lara* was content to merely reiterate the existing (and unedifying) textual arguments for plenary power.⁷⁶

Although the modern defenses of the plenary power doctrine at least offer a textual foundation, the foundation is fatally weak. The Commerce Clause does not confer upon Congress complete power over Indian tribes. One cannot read the power to regulate commerce with Indian tribes as a power to regulate the Indian tribes themselves. Likewise, the treaty power authorizes the federal government to establish bilateral and multilateral treaties with other sovereign nations.⁷⁷ It does not authorize plenary power over those entities with which the federal government may treat. This aspect of the scholarly critique of the plenary power doctrine seems quite powerful.

Yet the scholarly critique has its own shortcomings. Though the judiciary's justifications for the plenary power doctrine are rather dubious, it does not follow that the federal government lacks plenary power over all Indian tribes. Plenary power may exist as to some tribes, even if its typical textual justifications are flimsy. In order to discern the limits of federal power with respect to Indian tribes, one must conduct a comprehensive, dispassionate analysis of (a) whether the Constitution itself grants a plenary power over all Indian tribes,

⁷³ See Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 993-1001 (1981); Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 657 (2003).

⁷⁴ Clinton, *supra* note 64, at 851.

⁷⁵ See, e.g., Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 239 (2002).

⁷⁶ See 124 S. Ct. at 1633-34.

⁷⁷ See U.S. CONST. art. II, § 2, cl. 2; *United States v. Belmont*, 301 U.S. 324, 331 (1937) ("[T]he external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning.").

and (b) whether the Constitution enables the federal government to acquire a plenary power over particular tribes. Part II addresses both inquiries.

II

THE FRONTIERS OF FEDERAL POWER OVER INDIAN TRIBES

This Part establishes that at the founding of the Constitution, Indian tribes were sovereign nations. It then considers possible textual sources of a plenary power. In mapping out the frontiers of federal power, the commerce power,⁷⁸ the treaty power,⁷⁹ the war-making power,⁸⁰ the territory/property power,⁸¹ and the executive power⁸² are all relevant. Next it examines two possible nontextual sources of plenary federal power: *Kagama's* wardship theory and Professor Frickey's international law theory. Continuing, Part II briefly discusses the possibility that the Constitution implicitly safeguards Indian tribal sovereignty. Finally, it crafts a framework that helps gauge federal power over particular Indian tribes.

A. Indian Tribes as Indian Nations

The Founders did not generally view Indian tribes as chaotic, disorganized groups of savages who roamed the countryside.⁸³ Nor did they regard individual Indians as citizens of the states in which their tribal territories were located.⁸⁴ Instead, the Founders regarded Indian tribes as sovereign nations, with the ability to make war, treaties, and laws for their own people.

The Constitution signaled that Indian tribes and Indians generally were outsiders, alien to the American polity. The original Constitution mentioned Indians twice. The first reference, in the original

⁷⁸ See U.S. CONST. art. I, § 8, cl. 3.

⁷⁹ See *id.* art. II, § 2, cl. 2.

⁸⁰ See *id.* art. I, § 8, cl. 11 (granting Congress the power to declare war); *id.* art. I, § 10, cl. 3 (prohibiting states from engaging in war without the consent of Congress, except in cases of actual invasion or "in such imminent Danger as will not admit of delay").

⁸¹ See *id.* art. IV, § 3, cl. 2.

⁸² See *id.* art. II, § 1, cl. 1. From time to time, other powers have been thought relevant to federal power vis-à-vis Indian tribes. See VINE DELORIA, JR. & DAVID E. WILKINS, *TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS* 30-31 (1999) (listing ten powers that have been regarded as applicable to Indians, such as the powers to collect taxes, to make rules of naturalization, and to make new states). Because none of the powers listed by Deloria and Wilkins (save for the territory/property power discussed above) could possibly result in plenary power, there is no reason to consider these powers.

⁸³ See Savage, *supra* note 65, at 98 (rejecting claims that the Founders considered Indians uncivilized because the United States had recognized Indian claims to land at that time).

⁸⁴ See Clinton, *supra* note 68, at 1150-51 (discussing how the Founders rejected the notion that states retained power over Indian tribes).

Apportionment Clause, reveals the outsider status of certain Indians.⁸⁵ Those Indians not subject to state tax were not counted as part of the state's populace for purposes of apportioning taxes and congressional Representatives.⁸⁶ This was because they (and their tribes) were not part of the American polity;⁸⁷ instead, they were members of other nations.⁸⁸ If such Indians were not citizens or residents of states—or of the United States, for that matter—there was no reason to count them in determining either state representation in the House of Representatives or states' federal tax burdens.⁸⁹

The Commerce Clause⁹⁰ provides a complementary clue. As Professor Robert Clinton has suggested, each branch of the Commerce Clause refers to a different set of sovereigns: states, Indian tribes, and foreign nations.⁹¹ Hence, tribes were not only outsiders, as the Apportionment Clause suggested, they were also sovereign entities. The Constitution's predecessor, the Articles of Confederation, likewise indicated that Indian tribes were sovereign nations. The Constitution provides that states cannot engage in war without the consent of Congress, except when they are invaded or when there is an imminent danger of hostilities.⁹² The predecessor clause in the Articles of Confederation highlighted one such imminent danger: if a state received warning of a decision by "some nation of Indians to invade such State" and the danger was so imminent as not to admit delay, then the State could engage in war.⁹³ This clause underscored the status of Indian

⁸⁵ See U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV, § 2; U.S. CONST. amend. XVI.

⁸⁶ See *id.*

⁸⁷ See *Elk v. Wilkins*, 112 U.S. 94, 99 (1884) (claiming that members of Indian tribes "were not part of the people of the United States"); see also *id.* at 112 (Harlan, J., dissenting) (arguing that at the Constitution's adoption, "Indians not taxed" were not part of the American polity). On the other hand, if an Indian was taxed, he could be counted for purposes of representation and taxation. This would mean that such Indians were citizens/residents of the taxing state. See *id.* (arguing that Indians not members of any tribe were counted to establish representation in Congress and "constituted a part of the people for whose benefit the State governments were established").

⁸⁸ See *id.* ("The Indian tribes, being within the territorial limits of the United States, were not, strictly speaking, foreign states; but they were alien nations, distinct political communities.").

⁸⁹ For a thorough history of the phrase "Indians not taxed," see Savage, *supra* note 65, at 64–72; see also COHEN, *supra* note 32, at 388–89 (describing the changes in status of nontaxed Indians since the adoption of the Apportionment Clause).

⁹⁰ U.S. CONST. art. I, § 8, cl. 3.

⁹¹ See Clinton, *supra* note 75, at 131.

⁹² See U.S. CONST. art. I, § 10, cl. 3.

⁹³ See ARTICLES OF CONFEDERATION art. VI, cl. 5 (

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted

tribes as nations by explicitly referring to "nation[s] of Indians," and by noting that states could make "war" if they were "invade[d]" by Indian nations.⁹⁴ Indeed, if the drafters of the Articles merely considered the Indians marauding scofflaws, there would be no need to specially authorize state action. Stopping Indian scofflaws would have been an ordinary matter of state law enforcement, not an occasion for making war, and hence not a concern for either the Articles or the Constitution.⁹⁵

The particular manner in which the Articles granted the Continental Congress the executive power of external relations with Indians also hints at the status of the Indian tribes. Instead of granting Congress the power to "manage all the affairs of the Indians," the Articles allowed Congress to manage the United States' relationship "with" Indian nations.⁹⁶ This phrasing suggests that the drafters of the Articles understood Indian tribes to be sovereign entities and therefore gave the Continental Congress power to manage relationships with them. Indeed, when discussing this power, a committee of the Continental Congress listed its "principal objects" as "making war and peace, purchasing certain tracts of their lands, fixing the boundaries between them and our people, and preventing the latter settling on lands left in possession of the former."⁹⁷ All of these objects suggest that Indian tribes were separate nations composed of non-U.S. citizens.⁹⁸

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⁹⁴ *Id.*; cf. THE DECLARATION OF INDEPENDENCE para. 29 (U.S. 1776) (complaining that the English King had encouraged "the merciless Indian savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions" and thereby confirming that Indian tribes were entities external to the United States).

⁹⁵ Even though the Constitution omits the specific reference to invasions by Indian nations, it retains general language that permits states to wage war when invaded or when under imminent threat of invasion. U.S. CONST. art. I, § 10, cl. 3. ("No State shall, . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."). Historical accounts shed little light on the meaning of this language. *See, e.g.*, THE FEDERALIST No. 44, at 229 (James Madison) (Max Beloff ed., 2d ed. 1987) (stating that much of the clause "fall[s] within reasonings which are either so obvious, or have been so fully developed, that they may be passed over without remark"). Presumably this language continued to allow states to make war when attacked by Indians or when faced with an imminent attack. In light of how the nation engaged with Indian tribes before and after the Constitution's ratification, it would be a mistake to read the elimination of the specific reference to Indian nations as a rejection of the notion that Indian tribes were nations.

⁹⁶ *See* ARTICLES OF CONFEDERATION art. IX, cl. 5 (granting Congress sole authority for "regulating the trade and managing all affairs with the Indians").

⁹⁷ 33 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 458 (Aug. 3, 1787) (Roscoe R. Hill ed., Gov't Printing Office 1936) [hereinafter CONTINENTAL CONG.].

⁹⁸ The Articles of Confederation contained one final hint confirming the status of Indian tribes as nations. The Articles granted Congress the power to regulate "the trade and manag[e] all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated." ARTICLES OF CONFEDERATION art. IV, cl. 5. Once again, Indians "not members of any of the

Apart from the textual clues from the Constitution and the Articles of Confederation, documents from that time period confirmed the status of Indian tribes. Charles-Louis de Secondat, Baron de Montesquieu called the Indian tribes of America "petty, barbarous nations."⁹⁹ The Swiss international law theorist Emmerich de Vattel claimed that the Indians were "erratic nations" who failed to make full use of the land.¹⁰⁰ The Albany Plan of Union, a 1754 proposal to create a "General Government" for America, likewise noted that the tribes were nations.¹⁰¹ Records from the Continental Congress are rife with references to various "Indian nations,"¹⁰² as are the Philadelphia Convention records¹⁰³ and the ratification debates.¹⁰⁴ Even Pub-

States" were those Indians who remained members of distinct, sovereign Indian tribes with whom Congress might trade. The precise meaning of this clause led to much disagreement during the Confederation period. States tried to monopolize relations with any Indians located in their geographic limits, either claiming that such Indians were "members of a State" or that federal control of the relationship would improperly infringe upon the state's legislative rights. See Clinton, *supra* note 68, at 1103. These difficulties contributed to the Indian Commerce Clause's enactment. See *id.* at 1105, 1155–56.

⁹⁹ See 1 MONTESQUIEU, *THE SPIRIT OF LAWS* bk. XVII, ch. 7, at 290 n.9 (Thomas Nugent trans., J.V. Prichard ed., G. Bell and Sons, Ltd. 1914) (1748); see also *id.* bk. XV, ch. 3, at 256 (observing that Spain had enslaved Indians and explaining that the right of slavery "proceeds from the contempt of one nation for another"); *id.* bk. XXVIII, ch. 2, at 184 (equating German tribes with nations). Apparently, John Locke shared Montesquieu's understanding of the Indian tribes. See JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 61–62 (Thomas P. Peardon ed., The Liberal Arts Press 1952) (1690) (noting that Indian kings of America have very little sovereignty over their tribes, thereby indicating that Indian tribes were nations).

¹⁰⁰ See VATTEL, *THE LAW OF NATIONS* bk. I, § 209, at 100 (Joseph Chitty ed., Philadelphia, T. & J. W. Johnson 1852) (1758). Vattel later noted that Indian "savages" followed the law of nations when it came to diplomatic privileges and thereby confirmed that Indian tribes were nations. See *id.* bk. IV, § 103, at 482. More generally, Vattel treated "tribes" as nations. See *id.* bk. II, § 104, at 173 (referring to the Scythian "tribe" as a "savage nation"); *id.* bk. III, § 34, at 305 (referring to German tribes as savage nations).

¹⁰¹ The plan provided that the executive and the legislature could make "all Indian Treaties in which the General Interest or welfare of the Colonies may be concerned, [and] to make Peace or declare War with Indian Nations." The Albany Plan of Union (1754), in ROBERT C. NEWBOLD, *THE ALBANY CONGRESS AND PLAN OF UNION OF 1754*, at 184 app. at 186 (1955).

¹⁰² See, e.g., 2 CONTINENTAL CONG., *supra* note 97, at 123 (July 1, 1775); *id.* at 109 (June 27, 1775); *id.* at 93 (June 16, 1775).

¹⁰³ For instance, Madison complained that though the national government had a monopoly on Indian affairs, the states made war and treaties with the Indians. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 316 (Max Farrand ed., rev. ed. 1966) [hereinafter *FEDERAL CONVENTION*]; see also *id.* at 448 (suggesting that weak ties between Indian sovereigns allowed the weak tribes to be dominated by strong tribes).

¹⁰⁴ See 3 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 579–80 (2d ed. 1836) (comments of Patrick Henry and Adam Stephen) (referring to Indians as "nations" in a debate on June 23, 1788, in Virginia); *id.* at 634 (comments of a Mr. Innes) (referring to the "many nations of Indians" in a debate on June 25, 1788, in Virginia).

lius referred to the Indian "nations" that surrounded the United States.¹⁰⁵

Finally, that quintessentially international contract, the treaty, confirmed the tribes' status as nations. Under the Articles of Confederation, Congress entered numerous treaties with Indian tribes.¹⁰⁶ After ratification of the Constitution, the nation's first treaty was with Indian tribes.¹⁰⁷ Hence, both before and after ratification of the Constitution, the political branches treated Indian tribes as sovereign nations.¹⁰⁸ Indeed, as late as 1806, President Thomas Jefferson noted that the Creeks were "in law as well as in fact an independent nation."¹⁰⁹ There is no reason to believe that the Creeks were singular in this regard.

B. Textual Sources of Power over Indian Nations

Establishing that in 1789 the U.S. government generally considered Indian tribes to be nations demonstrates that the government did not regard Indian tribes as private entities like associations or companies. Instead, Indian tribes were nations fully capable of making war, peace, and treaties and of governing their own members. But

¹⁰⁵ See THE FEDERALIST NO. 25, at 120 (Alexander Hamilton) (Max Beloff ed., 2d ed. 1987).

¹⁰⁶ The United States entered into eleven treaties with foreign nations prior to 1789, see 8 Stat. ix (listing treaties with foreign nations in table of contents), and seven treaties with various Indian tribes during the same period, see 7 Stat. iii (listing seven treaties with Indian tribes in table of contents).

¹⁰⁷ Treaty with Wiandot, Delaware, Ottawa, Chippewa, Pottawatima, and Sac Nations, Jan. 9, 1789, 7 Stat. 28 (ratified on Sept. 27, 1789).

¹⁰⁸ In *Cherokee Nation v. Georgia*, Chief Justice Marshall asserted that Indian tribes were not considered *foreign* nations within the meaning of Article III, Section 2, but were instead regarded as "domestic dependent nations." See 30 U.S. (5 Pet.) 1, 17 (1831). Although outside the scope of this Article, there is evidence supporting Chief Justice Marshall's conclusion that Indian tribes might not have been viewed as "foreign" nations. Both before and after the Constitution's ratification, the Secretary of Foreign Affairs had no jurisdiction over Indian affairs. Instead, the power was granted to Indian commissioners or to the War Department under the President's direction. See COHEN, *supra* note 32, at 58-62; see also An Act To Establish an Executive Department, To Be Denominated the Department of War, ch. 7, § 1, 1 Stat. 49, 49-50 (1789) (creating the Department of War, with the duty to oversee matters "relative to Indian affairs"). Moreover, a perusal of the Journals of the Continental Congress indicates that when discussing "foreign nations," members of Congress never seemed to have Indian tribes in mind. See, e.g., 29 CONTINENTAL CONG., *supra* note 97, at 860 (Oct. 31, 1785) (discussing, in correspondence from the Office of Foreign Affairs, fees and duties of consuls to "foreign Nations," including England, France, the Netherlands, and Spain, but not mentioning Indian country); 3 *id.* at 479 (Oct. 4, 1775) (describing trade with foreign nations, including Britain, France, Ireland, and Spain, but not mentioning Indian tribes); cf. 33 *id.* at 488-93 (Aug. 7, 1786) (discussing an ordinance regulating Indian affairs but never referring to Indian nations as foreign nations). Finally, the Commerce Clause mentions Indian tribes separately from foreign nations, suggesting a difference between the two. See U.S. CONST. art. I, § 8, cl. 3.

¹⁰⁹ Letter from Thomas Jefferson to Henry Dearborn (January 5, 1806) available at [http://lcweb2.loc.gov/cgi-bin/query/r?ammem/mjtj:@field\(DOCID+@lit\(tj100085\)\)](http://lcweb2.loc.gov/cgi-bin/query/r?ammem/mjtj:@field(DOCID+@lit(tj100085))).

establishing this status does not, by itself, preclude the possibility that the federal government might nonetheless possess a plenary power over Indian tribes. After all, though the states were generally regarded as sovereign in 1789, the Constitution nonetheless created a federal government that curbed state sovereignty in a number of ways.

To determine whether the Constitution grants the federal government a plenary power over some or all Indian tribes requires a detailed examination of the Constitution's provisions relating to Indian tribes. This subpart explores five textual sources of federal power over Indian nations: the Commerce Clause,¹¹⁰ the Territory/Property Clause,¹¹¹ the treaty power,¹¹² the war power,¹¹³ and the executive power.¹¹⁴

1. *The Commerce Clause*

It is well known that the Commerce Clause authorizes the federal government to regulate commerce with Indian tribes.¹¹⁵ Curiously, both courts and their academic critics ascribe greater meaning to the Commerce Clause than it will bear. As discussed earlier, courts cite the Clause as one of the two sources of the federal government's plenary power over Indians.¹¹⁶ Indian law scholars often make a related mistake, concluding that Congress enjoys at least as much authority as the Continental Congress did under the Articles of Confederation. This argument assumes that because the Continental Congress could "manag[e]" all relations with the tribes,¹¹⁷ our Congress must have that authority as well. This assumption leads to the common conclusion that Congress controls relations with Indian tribes because of the Commerce Clause.¹¹⁸

Regarding the plenary power claim, it is hard to see how the Indian Commerce Clause itself could grant plenary power over Indians or their tribes. Regardless of the original meanings of "commerce" or "regulate," the claim seems implausible. If the plenary power claim

¹¹⁰ U.S. CONST. art. I, § 8, cl. 3.

¹¹¹ *Id.* art. IV, § 3, cl. 2.

¹¹² *Id.* art. II, § 2, cl. 2.

¹¹³ *Id.* art. I, § 8, cl. 11; *id.* art. I, § 10, cl. 3.

¹¹⁴ *Id.* art. II, § 1, cl. 1.

¹¹⁵ *See id.* art. I, § 8, cl. 3.

¹¹⁶ The other source of the plenary power doctrine is the treaty power. *See supra* notes 56–57 and accompanying text. *See also* United States v. Lara, 124 S. Ct. 1628, 1633–34 (2004).

¹¹⁷ ARTICLES OF CONFEDERATION art. IX, cl. 5 (granting Congress sole authority for "regulating the trade and managing all the affairs with the Indians").

¹¹⁸ *See, e.g.,* Clinton, *supra* note 73, at 999 (arguing that "commerce" with the Indian tribes includes power "to regulate Indian tribes in their relations with each other, the federal government, the states, and non-Indians"); *see also* DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT 24 (1997) (contending that the Commerce Clause states "that Congress will be the branch to treat with Indian tribes").

were true, it would suggest that Congress enjoys a plenary power over all foreign nations. After all, Congress can regulate commerce with foreign nations,¹¹⁹ and there are strong reasons for believing that there is only one power to regulate commerce that applies to three different types of sovereigns.¹²⁰ Even more absurd, strict adherence to the plenary power doctrine would suggest a plenary power over the states. If Congress can regulate the Indian tribes themselves because it can “regulate commerce” with them, it likewise should have authority to regulate the states because it has the power to regulate commerce among them.¹²¹

Moreover, nothing about the phrase “Indian tribe” in any way suggests that some other government—in this case the federal government—must have plenary power over Indian tribes. In particular, this phrase does not suggest that these nations were externally controlled or dominated. It is not as if the Constitution granted Congress the power to regulate the “subjugated” or “conquered” Indian tribes, thereby indicating that some other entity might have complete power over them. In fact, as we have seen, during the Founding era the Indian tribes were understood to be separate nations.¹²²

The original meaning of “commerce” within the Commerce Clause also belies the plenary power claim. As Professor Randy Barnett has thoroughly demonstrated, during the Founding era, “commerce” was a synonym for trade and did not encompass all gainful activity (as some modern authors have suggested).¹²³ If the power to regulate commerce among the several states did not permit Congress to regulate all gainful activity between the states, the power to regulate commerce with the Indian tribes certainly should not be read as granting Congress plenary power over the Indian tribes.

Furthermore, no historical evidence supports the view that the original meaning of the phrase “regulate commerce . . . with the In-

¹¹⁹ See U.S. CONST. art. I, § 8, cl. 3.

¹²⁰ Writing in *Gibbons v. Ogden*, Chief Justice Marshall insisted that commerce “must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.” 22 U.S. (9 Wheat.) 1, 194 (1824). For an explication and defense of the intuition underlying Chief Justice Marshall’s claim, see Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 ARK. L. REV. 1149, 1159–65 (2003). For a criticism of a presumption of intrasentence uniformity, see Adrian Vermeule, *Three Commerce Clauses? No Problem*, 55 ARK. L. REV. 1175, 1178–82 (2003).

¹²¹ See U.S. CONST. art I, § 8, cl. 3.

¹²² See *supra* Part II.A.

¹²³ See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 114–25 (2001). But see Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles To Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 14–21, 35–42 (1999) (arguing that “commerce” had a far broader meaning than merely trade at the time the Founders adopted the Commerce Clause).

dian tribes”¹²⁴ granted Congress a plenary power over Indian tribes. Nor, for that matter, does any evidence suggest that the Continental Congress’s broader subject matter powers relating to Indians—the powers of regulating trade and managing all affairs with Indians—were ever understood as granting a plenary power over Indians or their tribes.¹²⁵

Finally, the current Commerce Clause case law points to a limited federal power arising out of the Clause.¹²⁶ It would be anomalous to conclude that a plenary power over Indian tribes arises out of the Commerce Clause when the Court has embarked on a conspicuous (if partial) return to first principles where interstate commerce is concerned.¹²⁷ If the Commerce Clause does not grant a plenary power over America’s states, it is difficult to imagine that the Clause grants a general police power over America’s Indian tribes.

The narrower claim, sometimes advanced by Indian law scholars, that Congress controls relations with Indian tribes because of the Commerce Clause is also wrong. The Clause’s text and legislative history, as well as a comparison with the Articles of Confederation, belie this claim. Given the original meaning of the Commerce Clause described above, it is hard to read the grant of a power to regulate commerce with Indian tribes as a grant of power to manage affairs with Indian tribes.¹²⁸ Moreover, because the Articles of Confederation explicitly granted both the power to regulate trade and the power to manage affairs with Indians,¹²⁹ whereas the Constitution grants only the power to regulate trade,¹³⁰ Congress arguably lost a power upon the Constitution’s ratification. Generally speaking, when the Constitution intended to grant Congress a power formerly held by the Continental Congress, it did so explicitly.¹³¹ Therefore, the fact that the Constitution never grants Congress the power to manage Indian af-

¹²⁴ U.S. CONST. art I, § 8, cl. 3.

¹²⁵ See *supra* notes 66–67 and accompanying text.

¹²⁶ See *United States v. Morrison*, 529 U.S. 598, 619 (2000) (rejecting “the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce”); *United States v. Lopez*, 514 U.S. 549, 552 (1995) (affirming the Court of Appeals for the Fifth Circuit’s decision that the Commerce Clause did not authorize a Federal criminal conviction for violation of the Gun-Free School Zones Act of 1990).

¹²⁷ See *Morrison*, 529 U.S. at 618–19.

¹²⁸ See *supra* notes 90–96 and accompanying text.

¹²⁹ ARTICLES OF CONFEDERATION art. IX.

¹³⁰ See U.S. CONST. art. I, § 8, cl. 3; *supra* notes 66–67 and accompanying text (noting that the word “commerce” in Article I, Section 8 should be properly read to mean “trade” and not any gainful activity).

¹³¹ See *Printz v. United States*, 521 U.S. 898, 920 n.10 (1997) (observing that “[m]any of Congress’s powers under Art. I, § 8, were copied almost verbatim from the Articles of Confederation, indicating quite clearly that ‘[w]here the Constitution intends that our Congress enjoy a power once vested in the Continental Congress, it specifically grants it.’” (quoting Saikrishna Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1972 (1993))).

fairs indicates that the Constitution does not mean for Congress to have such a power. The legislative history of the Commerce Clause supports such a reading of the Constitution, militating against a “manage Indian affairs” interpretation. Though in the waning days of the Convention James Madison proposed granting Congress the power to “regulate affairs with the Indians,”¹³² the Convention ultimately adopted the narrower Commerce Clause. In other words, though asked to approve broad authority, the Convention chose to grant Congress power only over commerce with Indian tribes.¹³³ For all these reasons, it appears that the Constitution reduced congressional power over Indian tribes, at least in the sense that *Congress* no longer enjoyed the authority to manage all affairs with Indians.¹³⁴

The Constitution’s original understanding—as demonstrated by both legislative history and a comparison with the Articles of Confederation—suggests that congressional power over Indian commerce is identical to congressional power over foreign and interstate commerce.¹³⁵ By virtue of the Commerce Clause, Congress may prescribe rules relating to trade and navigation involving any American (citizen or resident) and any Indian tribe or its members. The Clause does not grant plenary power over Indians. Nor does it even perpetuate the Continental Congress’s power to manage affairs with the Indian tribes.

2. *The Territory/Property Clause*

Under Article IV, Section 3, Clause 2, Congress has “Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”¹³⁶ The authority to make any needed laws respecting the territory¹³⁷ and

¹³² 2 FEDERAL CONVENTION, *supra* note 103, at 324.

¹³³ It must be noted that the convention records supply no reason for the rejection of Madison’s proposal. Further, the Convention did not add the Indian portion of the Commerce Clause until after Madison had made his proposal. *See id.* at 497. Given the sequence of events, some might contend that the Indian portion of the Commerce Clause was meant to incorporate Madison’s call for a congressional power to manage affairs with the Indians. For the reasons given in the text, I reject such an argument. *See supra* notes 121–128 and accompanying text.

¹³⁴ As Professor Michael Ramsey and I have argued elsewhere, the Constitution’s “legislative history” is also heretofore of any indication that those seemingly unallocated foreign affairs powers belong to Congress by virtue of the Commerce Clause. Apparently, no Founding-era politician ever cited the Commerce Clause as the source of a general or residual foreign affairs power. *See* Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 259 n.109 (2001).

¹³⁵ *See* Prakash, *supra* note 120, at 1160–65 (arguing that “regulate commerce” should apply uniformly to foreign nations, states, and Indian tribes).

¹³⁶ U.S. CONST. art. IV, § 3, cl. 2.

¹³⁷ As noted earlier, Article IV uses “territory” to indicate a portion of the United States that is not part of any State. *See supra* notes 12–13.

property of the United States bespeaks a broad power.¹³⁸ Hence, it is hardly surprising that the Supreme Court has noted that “[i]n the Territories of the United States, Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all subjects upon which the legislature of a State might legislate within the State.”¹³⁹ Perhaps beguiled by the Territory/Property Clause’s broad grant, courts have held that familiar constitutional restraints do not apply in the territories. For instance, courts do not pay much heed to separation of powers when it comes to territorial government.¹⁴⁰ Likewise, courts have held that the Constitution does not apply in so-called unincorporated territories.¹⁴¹

While the scope of federal power over territories may be settled, the extent of federal power over property is the subject of academic dispute. Few doubt the general proposition that Congress enjoys broad power over the personal property that the federal government owns. Yet a number of scholars question the scope of federal power

¹³⁸ Professor Sarah Cleveland has noted that both Thomas Jefferson and the Court in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 432 (1857), read the territory portion of the Clause as granting Congress the power to regulate only the territory belonging to the United States in 1789 and not territory acquired subsequently. See Cleveland, *supra* note 49, at 164 & n.1135. But there is no reason to think that either Jefferson or *Dred Scott* correctly gauged the Constitution’s original understanding. To begin with, the Clause supplies no reason to believe that it conveys a congressional power only over territory belonging to the United States in 1789. Second, if the Clause were so read, it would suggest that the federal power applied only to existing U.S. property. Given the transient nature of property holdings, this is improbable. Finally, these interpretations of the Clause were voiced well after the Constitution’s ratification, raising the possibility of subsequent institutional and personal biases. Jefferson’s interpretation, for instance, was noted in several letters in 1803, see Cleveland, *supra* note 49, at 167–68 & nn.1154–62, and *Dred Scott* was decided in 1857.

¹³⁹ *Simms v. Simms*, 175 U.S. 162, 168 (1899).

¹⁴⁰ See Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 875–77 (1990) (observing that normal separation of powers provisions do not seem to apply in territories).

¹⁴¹ See *Balzac v. Porto Rico*, 258 U.S. 298, 305 (1922); *Dorr v. United States*, 195 U.S. 138, 148–49 (1904); *Downes v. Bidwell*, 182 U.S. 244, 292–93 (1901) (White, J., concurring) (collectively, the “Insular Cases”). Though some Justices have questioned the Insular Cases, see *Torres v. Puerto Rico*, 442 U.S. 465, 475–76 (1979) (Brennan, J., concurring); *Reid v. Covert*, 354 U.S. 1, 14 (1957), the Court continues to adhere to the notion that the Constitution does not protect unincorporated territories. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268–69 (1990); *Harris v. Rosario*, 446 U.S. 651, 651–52 (1980) (per curiam) (upholding a statutory distinction for Puerto Rican citizens under the Aid to Families with Dependent Children program, pursuant to Article IV, Section 3, Clause 2 of the Constitution). To make matters more complicated, the Court has held that certain “fundamental rights” do apply in Puerto Rico, an unincorporated territory. See, e.g., *Posadas de P.R. Assocs. v. Tourism Co.*, 478 U.S. 328, 331 n.1 (1986) (confirming that “Puerto Rico is subject to the First Amendment Speech Clause”); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 7–8 (1982) (upholding equality of voting rights); *Torres*, 442 U.S. at 475–76 (applying search and seizure rights); *Examining Bd. of Eng’rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 600–01 (1976) (applying equal protection rights); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 676–80 (1974) (applying procedural due process).

over federal land, particularly federal land located in one or more states.¹⁴² Nonetheless, the Supreme Court has concluded that federal power over federal property—including federal land within a state—is just as complete as federal power with respect to territories.¹⁴³ The Court has likened federal power over federal land (including federal land within a state) to the police power enjoyed by states.¹⁴⁴ Hence, the plenary power over property mirrors the plenary power over territory.

The power that the federal government enjoys over U.S. territory and property enables Congress to exercise sweeping power over any inhabitants of such territory and property.¹⁴⁵ When an Indian tribe is located within a federal territory or on federal land located within the states, Congress has broad power over the tribe just as it has over any inhabitants of U.S. territory or property.¹⁴⁶ Unless all Indian tribes and their members are located within U.S. territory or on U.S.-owned land, however, the Territory/Property Clause cannot justify a police power over all Indian tribes and their members.

The territory portion of the Clause cannot establish a plenary power over all federally recognized Indian nations for the simple reason that all recognized Indian tribes are scattered among the fifty states, and apparently none is located within the confines of a U.S.

¹⁴² See, e.g., Albert W. Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 PAC. L.J. 693, 706–15 (1981); Engdahl, *supra* note 2, at 361–62; Ronald F. Frank & John H. Eckhard, *Power of Congress Under the Property Clause To Give Extraterritorial Effect to Federal Lands Law: Will "Respecting Property" Go the Way of "Affecting Commerce"?*, 15 NAT. RESOURCES LAW. 663, 678–84 (1982); Robert E. Hardwicke et al., *The Constitution and the Continental Shelf*, 26 TEX. L. REV. 398, 426–32 (1948); Carolyn M. Landever, *Whose Home on the Range? Equal Footing, the New Federalism and State Jurisdiction on Public Lands*, 47 FLA. L. REV. 557, 576–84 (1995); C. Perry Patterson, *The Relation of the Federal Government to the Territories and the States in Landholding*, 28 TEX. L. REV. 43, 60–62 (1949); Louis Touton, *The Property Power, Federalism, and the Equal Footing Doctrine*, 80 COLUM. L. REV. 817, 821–25 (1980).

¹⁴³ *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (“[The] power over the public land thus entrusted to Congress is without limitations.” (quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940))); see also *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 294 (1958) (stating that “[t]here can be no doubt of the Federal Government’s general authority” over land that the government reclaimed); *Alabama v. Texas*, 347 U.S. 272, 273 (1954) (per curiam) (“The power over the public land . . . entrusted to Congress is without limitations.”); *Fed. Power Comm’n v. Idaho Power Co.*, 344 U.S. 17, 21 (1952) (ruling that Congress, pursuant to Article IV of the Constitution, could “condition the use of public lands by requiring a public utility to carry government power”); *United States v. California*, 332 U.S. 19, 27 (1947) (dictum) (stating that, because of its unlimited power over federal lands, Congress could pass an act to limit the Attorney General’s power to prosecute claims by the government based on disputes over federal lands).

¹⁴⁴ See *Camfield v. United States*, 167 U.S. 518, 525 (1897).

¹⁴⁵ See, e.g., *Grafton v. United States*, 206 U.S. 333, 354 (1907) (holding that U.S. authority over the Philippines—then a U.S. territory—“and its inhabitants” was “paramount” (emphasis added)).

¹⁴⁶ See, e.g., *United States v. McGowan*, 302 U.S. 535, 539 (1938) (noting that Congress has the authority under the Property Clause to regulate Indians located on federal land).

territory.¹⁴⁷ Although many Indian tribes at one time occupied large portions of U.S. territories, the admission of states greatly reduced the total acreage of territories of the United States.¹⁴⁸

Nor can the federal government's property power justify a plenary power over all Indian tribes. Early courts sometimes held that the United States had a fee simple ownership of ancestral Indian lands based on a right of discovery and that Indians merely enjoyed a right of occupancy, or "Indian title."¹⁴⁹ According to Chief Justice Marshall, European colonial powers owned fee simple interests in the land occupied by Indians, and these powers passed along their interests to the United States.¹⁵⁰ Given the Territory/Property Clause, if the United States literally owned all Indian lands in 1789, the United States would have had a plenary power over all Indian tribes based on this ownership.¹⁵¹

If the United States currently owned all Indian lands occupied by Indian tribes and their members, it would enjoy a plenary power over the actions of all tribal members. Yet the United States owns very little Indian land. According to the Bureau of Indian Affairs (BIA), tribes own about 46 million out of some 56 million acres of "Indian land."¹⁵² Of the remaining 10 million acres, individuals own approximately 9.9 million acres.¹⁵³ The federal government owns only about 421,000

¹⁴⁷ See Indian Entities Recognized and Eligible To Receive Services from the United States Bureau of Indian Affairs, 67 Fed. Reg. 46,327, 46,328–33 (July 12, 2002) (listing 562 recognized tribal entities within the 48 contiguous states and Alaska).

¹⁴⁸ See S. LYMAN TYLER, A HISTORY OF INDIAN POLICY 70–71 (1973) (describing the acquisition of western territories and the creation of states that left Indian tribes on reservations within those states).

¹⁴⁹ See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 587 (1823) ("The United States . . . hold, and assert in themselves, the title by which [the country] was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy . . ."); see also MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 145 (6th ed. 1993) ("European international lawyers were sometimes reluctant to admit that non-European societies could constitute states for the purposes of international law, and territory inhabited by non-European peoples was sometimes regarded as *terra nullius*").

¹⁵⁰ See *Johnson*, 21 U.S. (8 Wheat.) at 588–89.

¹⁵¹ In 1789, it seems unlikely that the United States claimed any ownership interest in lands to the west of the Mississippi River. Hence, as to tribes located west of the Mississippi River, there could have been no plenary power based on federal ownership of the land.

¹⁵² See STATISTICAL RECORD OF NATIVE NORTH AMERICANS tbl. 675, at 1054 (Marlita A. Reddy ed., 1993) [hereinafter ACREAGE OF INDIAN LANDS]. The BIA defines "Indian land" as including

[A]ll lands held in trust by the United States for individual Indians or tribes, or all lands, titles to which are held by individual Indians or tribes, subject to Federal restrictions against alienation or encumbrance, or all lands which are subject to the rights of use, occupancy and/or benefit of certain tribes.

25 C.F.R. § 150.2(h) (2003). The term also includes "land for which the title is held in fee status by Indian tribes, and U.S. Government-owned land under Bureau jurisdiction." *Id.*

¹⁵³ See ACREAGE OF INDIAN LANDS, *supra* note 152, tbl. 675, at 1054.

acres of Indian land—about 0.7 percent.¹⁵⁴ The land beneficially owned by Indians has either been guaranteed or ceded to the Indians by treaty, by federal statute, by executive order, or by some combination of all three. Each of these cessions constitutes an admission that the United States does not own the land identified.¹⁵⁵ Consistent with the notion that tribes own Indian land, the Supreme Court has concluded that if the federal government takes “recognized” Indian land for the benefit of non-Indians, the government must compensate the Indian tribe.¹⁵⁶ This compensation requirement makes sense only if such Indian land is understood as private property that the federal government does not own. After all, if the U.S. government owned the land in fee simple and there was no aboriginal title,¹⁵⁷ then there would be no need to compensate Indians after federal repossession of this land, even if Indian tribes continued to reside on it. Given that Indian tribes and individual Indians own most “Indian land,” the federal government cannot have a nationwide power over all Indian tribes and their members by virtue of the Territory/Property Clause.

U.S. trusteeship of a great majority of Indian lands does not alter this conclusion. A trustee holds legal title to property for the benefit of some other party.¹⁵⁸ Because the United States holds title to the Indian land, one might initially conclude that the federal government can exercise plenary power over the land and its inhabitants. But the United States’ trust ownership of Indian lands is most likely a product of the plenary power doctrine. Over the course of decades, the U.S. government appointed itself trustee of Indian land via statute.¹⁵⁹ Congress passed statutes like the Dawes Act, which placed millions of acres of Indian land in trust,¹⁶⁰ and the Indian Reorganization Act, which indefinitely extended federal trusteeship.¹⁶¹ The only plausible legal way that the federal government could appoint itself as trustee for nearly all Indian tribes is if the federal government otherwise had a plenary power over these tribes. After all, the U.S. government has

¹⁵⁴ See *id.* Given the many well-publicized difficulties with the BIA’s stewardship of Indian funds and lands, one might distrust the accuracy of these statistics. See Rodina Cave, *Simplifying the Indian Trust Responsibility*, 32 ARIZ. ST. L.J. 1399, 1399–1400 (2000); Ronald E. Johnny, *Can Indian Tribes Afford to Let the Bureau of Indian Affairs Continue to Negotiate Permits and Leases of Their Resources?*, 16 AM. INDIAN L. REV. 203, 203–04 (1991). Still, the figures suggest that Indians, not the federal government, own most Indian land.

¹⁵⁵ See COHEN, *supra* note 32, at 473–84, 493–99.

¹⁵⁶ See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 n.29 (1980).

¹⁵⁷ Cf. *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 51–54 (1946) (holding that, pursuant to statutory recognition of the Indians’ original title, the government could not take possession without compensation).

¹⁵⁸ See BLACK’S LAW DICTIONARY 1519 (7th ed. 1999).

¹⁵⁹ See COHEN, *supra* note 32, at 477–78.

¹⁶⁰ Indian General Allotment Act of 1887, ch. 119, § 5, 24 Stat. 388, 389.

¹⁶¹ Indian Reorganization Act of 1934, ch. 576, § 2, 48 Stat. 984, 984 (codified at 25 U.S.C. § 462 (2000)).

no generic constitutional power to take title to the property of others and appoint itself as trustee. If a supposed plenary power over Indian tribes helped justify U.S. trusteeship of Indian lands in the first instance, the U.S. trust ownership of Indian lands could not in turn justify plenary power. This would amount to bootstrapping. Accordingly, even though the U.S. government holds legal title to vast amounts of Indian land, its trusteeship is likely a product of the plenary power doctrine and cannot be used to justify a federal plenary power.

As we have seen, the Territory/Property Clause does not grant a power over Indians qua Indians. Instead, it grants power over U.S. territory and real property and thereby indirectly grants power over individuals who reside there. More importantly, the Clause cannot grant Congress a plenary power over all Indian tribes because most Indian tribes do not reside within the confines of a U.S. territory or on federal property. While the Territory/Property Clause may have been an important source of authority over Indian tribes in the nineteenth century, its significance has waned as the acreage of U.S. territories has contracted and as the U.S. government has either acknowledged or granted Indian ownership of particular lands.

3. *The Treaty Power*

Besides the Commerce Clause, the modern Supreme Court has also cited the treaty power as a source of plenary federal power over Indian tribes.¹⁶² Common sense suggests that the power to make bilateral and multilateral contracts with other nations does not encompass a power to unilaterally regulate the other nations themselves. For good reason, no one would claim that the federal power to make treaties with Russia gives the federal government a plenary power over Russia. Presumably, the Court meant to suggest that actual Indian treaties might empower Congress to legislate in situations in which Congress otherwise would not have legislative power.¹⁶³ Under *Missouri v. Holland*,¹⁶⁴ treaties are not subject to the enumerated powers

¹⁶² See *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973) ("The source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making.").

¹⁶³ To conceive of the Court's claim in this way might be too charitable. The *McClanahan* Court seemed to argue that federal power arose from the power to make treaties and not from actual treaties. See *id.* On the other hand, the Court recently seemed to admit the treaty power "does not literally authorize Congress to act legislatively." *United States v. Lara*, 124 S. Ct. at 1633.

¹⁶⁴ 252 U.S. 416 (1920).

doctrine.¹⁶⁵ This enables treaties to grant the federal government power that it would otherwise lack.¹⁶⁶

Treaty-based authority over Indian tribes could take at least two forms. A treaty might provide that the federal government has plenary power over an Indian nation. For instance, a tribe might acknowledge the federal government's overarching supremacy.¹⁶⁷ The Indian tribe could continue to govern itself, but the federal government could modify or supplant whatever laws the Indian nation might adopt. Alternatively, an Indian treaty might implicitly grant or concede a broad power over the tribe. For example, a treaty might acknowledge that tribal lands were located within a U.S. territory.¹⁶⁸ Under the Territory/Property Clause, such an admission would give rise to plenary power over the tribal lands and its owners.¹⁶⁹ Similarly, a treaty might concede that land occupied by a tribe is actually U.S. property, thereby granting Congress plenary power over that property.¹⁷⁰ Again, the tribe's power to regulate itself and its members would remain intact unless and until the federal government modified the tribe's laws.

Why might particular Indian tribes grant the federal government authority over their internal matters? Further, why might some In-

¹⁶⁵ See *id.* at 434–35 (holding that the federal government could regulate migratory birds within Missouri because of a treaty signed with Britain).

¹⁶⁶ Recently, much has been written about federalism and the treaty power. See, e.g., Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998) (claiming that federalism principles limit the treaty power); Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000) (same); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000) (arguing that the “nationalist” view is correct); Thomas Healy, *Is Missouri v. Holland Still Good Law? Federalism and the Treaty Power*, 98 COLUM. L. REV. 1726 (1998) (arguing that “the treaty power should not be subjected to federalism-based limitations”); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403 (2003) (discussing new federalism doctrines as applied to the treaty power) .

This Article assumes that treaties may regulate matters that go beyond the enumerated powers—in particular, that treaties may cede not only territory and property to the federal government but also control of other nations' external and internal functions. This assumption is consistent with practice because the United States has long used treaties to acquire territory and land. See, e.g., Treaty of Peace Between the United States of America and the Kingdom of Spain, Dec. 10, 1898, Spain-U.S., arts. II, III, 30 Stat. 1754, 1755 (providing that Spain cede Guam, the Philippine Islands, and Puerto Rico); Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, Mex.-U.S., art. V, 9 Stat. 922, 926–27 (defining boundary line between Mexico and United States as part of peace agreement). More generally, the United States has long entered into treaties that concern matters not committed to the federal government under Article I, Section 8 of the Constitution. See Golove, *supra*, at 1149–1278 (providing an extensive historical account of the nationalist view of treaty law).

¹⁶⁷ See *infra* notes 242–244 and accompanying text.

¹⁶⁸ See *infra* Part III.B.

¹⁶⁹ See *supra* notes 141–145 and accompanying text.

¹⁷⁰ See *supra* notes 138–140 and accompanying text.

dian tribes admit or acknowledge a plenary federal power?³ War threats could lead to submission via treaty. Rather than face forced removal or assimilation, some tribes might accept plenary federal power. Alternatively, the federal government could induce Indian tribes to accept plenary federal power with land, money, or supplies. Indian nations in dire straits might be willing to cede some power in return for crucial funds or supplies.

While one may speculate why some Indian tribes might ratify treaties that grant federal supremacy over them, it is unlikely that all recognized Indian nations have entered into such treaties. To begin with, many Indian tribes have never entered into treaties or agreements with the federal government.¹⁷¹ As to such tribes, the treaty power is of little relevance. Moreover, even when particular tribes have signed treaties or agreements with the federal government, it is unlikely that every such tribe has explicitly or implicitly accepted plenary federal power in such agreements. For all these reasons, existing treaties and agreements with Indian tribes cannot justify plenary power over all Indian nations. When the Supreme Court asserts that the treaty power helps justify federal plenary power over all Indian tribes,¹⁷² it apparently assumes the existence of treaties and treaty provisions that do not actually exist.

The Treaty power, like the Territory/Property Clause, does not grant a plenary “Indian power.” Nonetheless, it enables the United States to enter into significant agreements with other nations, agreements that might authorize expansive—even plenary—power over those nations, including Indian nations.

4. *The War Power*

Though the federal government’s power to wage war¹⁷³ is sometimes cited as a source of federal power over Indian tribes,¹⁷⁴ the precise manner in which this power grants federal authority over Indians is never made clear. The mere threat of war would not seem to invest the federal government with additional power unless the threat induced a vulnerable nation to enter into a treaty that granted a plenary

¹⁷¹ See, e.g., Henry Sockbeson, *Reflections on a Flawed System*, 37 NEW ENG. L. REV. 483, 484 (2003) (noting that “the federal government did not [historically] form treaties at all, for the most part, on the east coast where many Indian tribes existed”).

¹⁷² See, e.g., *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 172 n.7 (1973).

¹⁷³ See U.S. CONST. art. I, § 8, cl. 11. The claims made here are not predicated on who has the power to initiate or direct a war. Hence, the well-known disputes about the allocation of the war power are irrelevant with regard to how the United States might acquire a plenary power over foreign territory. For a discussion of who may take America into war, see John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996); Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543 (2002).

¹⁷⁴ See COHEN, *supra* note 32, at 210.

power. Nor would a successful war be sufficient for a permanent expansion of the territorial reach of federal power. The United States does not enjoy plenary power over Japan or Germany merely because it temporarily possessed something akin to a plenary power over those countries following World War II.¹⁷⁵ The mere existence of a war in the past does not sanction the indefinite existence of wartime powers.

The war power permits the permanent augmentation of federal power over other nations or their territories only after there has been an actual war and the United States has unilaterally annexed the defeated nation's territory. In other words, by permitting the United States to conquer territory, the war power permits the geographical expansion of federal power. The annexed territory becomes either a territory or a property of the United States, and Congress may regulate it under the Territory/Property Clause.¹⁷⁶ Absent annexation, the defeated nation's territory never becomes a U.S. territory, never becomes subject to U.S. authority under the Territory/Property Clause, and never permanently expands the territorial reach of federal power.¹⁷⁷

Nothing here suggests that the United States may acquire territory only pursuant to a war.¹⁷⁸ Rather, the claim is that if the war power matters at all, it matters only when there is a war followed by unilateral annexation. When other countries agree to cede territory by treaty or when the United States incorporates new territory by stat-

¹⁷⁵ See U.S. DEP'T OF STATE, OCCUPATION OF JAPAN: POLICY AND PROGRESS 88 app. at 89 (1946) (quoting a statement to General MacArthur, informing him that his power was "supreme" and that he "[would] not entertain any question on the part of the Japanese as to its scope"); HAROLD ZINK, AMERICAN MILITARY GOVERNMENT IN GERMANY 205 (1947) ("The Potsdam agreement . . . made it clear that the United States had paramount responsibility for determining what steps should be taken by military government within the American Zone [in postwar Germany].").

¹⁷⁶ U.S. CONST. art. III, § 3, cl. 2; see *supra* Part II.B.2. Obviously, this discussion assumes that the territory in question was clearly not part of the United States prior to the war. Otherwise, the federal government already would believe that it had plenary power over such territory pursuant to the Territory/Property Clause. If that were true, a successful war would not enable the federal government to acquire a plenary power; instead the war would merely help confirm that the territory was part of the United States.

¹⁷⁷ The United States might also have plenary power over another nation for a long period of time (perhaps indefinitely) if the United States militarily occupies some portion of the nation over a long period of time. Yet, even if the United States has the power to occupy a nation without ever incorporating it, such power cannot serve as a font of authority over Indian tribes because the United States does not militarily occupy Indian lands. (The possibility of indefinite military occupation was suggested to me by Professor Michael Rappaport.)

¹⁷⁸ As noted earlier, the United States may clearly acquire territory by treaty as well. See *supra* Part II.B.3.

ute,¹⁷⁹ the war power plays no *direct* role in the territorial expansion of federal power.¹⁸⁰

If one accepts that an actual war is a necessary (but not sufficient) condition for the war power to secure plenary power over another nation's territory, the history of the United States' relations with Indians suggests that the war power has not played a large role in the acquisition of territory. Professor Felix Cohen, the "Blackstone of American Indian law,"¹⁸¹ has noted "that practically all of the real estate acquired by the United States since 1776 was purchased not from Napoleon or any other emperor or czar but from its original Indian owners."¹⁸² Hence, while the United States has undoubtedly waged war on various Indian tribes and while successes may have led to favorable treaty terms with vanquished tribes,¹⁸³ the United States typically has not unilaterally annexed Indian territory.

In sum, both the treaty and war powers provide means by which the United States may acquire additional territory and extend plenary power. While a treaty might cede to Congress plenary power over an Indian nation even without territorial cessions—for example, where a tribe acknowledges U.S. supremacy and control in return for protection—war, by itself, can never lead to permanent plenary power over another nation. Instead, for the war power to matter independent of the treaty power or other powers, there must be a war followed by a unilateral annexation, that is, the conquest of territory.

5. *The Executive Power*

In a previous article, Professor Michael Ramsey and I laid out four constitutional principles of foreign affairs law.¹⁸⁴ First, the President has a "residual" foreign affairs power arising from the Article II, Section 1 grant of "the executive Power."¹⁸⁵ The executive power, as political theorists such as Montesquieu and William Blackstone de-

¹⁷⁹ See, e.g., Joint Resolution To Provide for Annexing the Hawaiian Islands to the United States, No. 55, 30 Stat. 750 (1898). This Article takes no position on whether the United States may annex territory by statute. The answer to this question does not affect the plenary power inquiry because even if Congress unilaterally annexed Indian territory rather than bargaining for it in treaties, the federal government would not necessarily have a permanent plenary power over the Indians on such territories. As those territories became states, the federal government would have lost the plenary power it had over the territories, including the plenary power over the Indian inhabitants.

¹⁸⁰ Obviously, the war power could have played an indirect role, in that war may have led a nation to agree to a treaty that grants the United States a plenary power. But here the treaty power is a direct mechanism by which the United States acquires a plenary power over another nation. The war power is not directly relevant.

¹⁸¹ COHEN, *supra* note 32, at viii.

¹⁸² Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 35 (1947).

¹⁸³ See, e.g., COHEN, *supra* note 32, at 59, 78.

¹⁸⁴ Prakash & Ramsey, *supra* note 134, at 252–56.

¹⁸⁵ See *id.* at 252–53.

scribed it, included foreign affairs power.¹⁸⁶ By using a phrase—the executive power—with a common meaning, the Constitution establishes a presumption that the President has the external affairs powers traditionally part of the executive power.¹⁸⁷ Second, the Framers thought that the traditional executive had too much power over foreign affairs, so they allocated many key powers, in whole or in part, to other branches.¹⁸⁸ These powers included commerce,¹⁸⁹ treaty-making,¹⁹⁰ and war.¹⁹¹ Thus, despite having “the executive Power,” the President cannot claim independent authority in those areas. Third, although Congress has no general power over foreign affairs, it has two textual sources of foreign affairs power: powers specifically given to it, such as declaring war and regulating commerce, and authority to carry into execution the powers of the federal government.¹⁹² The latter is a derivative power, exercisable in conjunction with the President, to give effect to the President’s executive power over foreign affairs.¹⁹³ Finally, the President’s residual power over foreign affairs does not extend to matters not part of the traditional executive power.¹⁹⁴ Accordingly, the President lacks lawmaking or appropriations power in foreign affairs.

Each of these principles applies to the branch of international affairs relating to Indian tribes.¹⁹⁵ Because the President enjoys the

¹⁸⁶ See *id.* at 266–73.

¹⁸⁷ See *id.* at 256–57.

¹⁸⁸ See *id.* at 253–54.

¹⁸⁹ See U.S. CONST. art. I, § 8, cl. 3.

¹⁹⁰ See *id.* art. II, § 2, cl. 2.

¹⁹¹ See *id.* art. I, § 8, cl. 11.

¹⁹² See Prakash & Ramsey, *supra* note 134, at 255–56; see also U.S. CONST. art. I, § 8, cl. 18 (granting Congress the power to “make all Laws which shall be necessary and proper”).

¹⁹³ See Prakash & Ramsey, *supra* note 134, at 255–56 & n.100.

¹⁹⁴ See *id.* at 254–55.

¹⁹⁵ Remembering *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), some readers might question the relevance of drawing from the language of foreign affairs to understand the Constitution’s interbranch allocation of powers relating to Indians. After all, in *Cherokee Nation*, Chief Justice Marshall concluded that Indian tribes were *not* foreign nations within the meaning of Article III. See *id.* at 19–20. Instead, they were “domestic dependent nations.” *Id.* at 17. There is ample evidence that Indian tribes were treated differently from other nations. See *supra* note 108 and accompanying text. If Indian tribes were not and are not foreign nations under the Constitution, one might question how arguments about the allocation of foreign affairs authority matter with respect to the distinct category of Indian affairs. But this seemingly anomalous treatment of Indians does not detract from the conclusion that the President holds the residual power to manage relations with Indian tribes. It bears repeating that Indian tribes were historically considered separate nations. See *supra* Part II.A. Indeed, Congress granted the “war department” authority with respect to Indian tribes precisely because they were other nations with whom war was possible. See An Act To Establish an Executive Department, To Be Denominated the Department of War, ch. 7, § 1, 1 Stat. 49, 50 (1789) (stating that the Secretary of War “shall perform and execute such duties as shall from time to time be enjoined on, or entrusted to him by the President of the United States”). The legislative history surrounding this Act is sparse, but the circumstances at the time demonstrate ongoing strife with

“executive Power,”¹⁹⁶ he may exercise residual powers related to Indian and foreign affairs not granted to Congress or shared with the Senate. Although Congress may regulate Indian commerce¹⁹⁷ and the Senate plays a role in Indian treaty making,¹⁹⁸ the President controls other aspects of Indian policy. Because Congress conspicuously lacks power to “manag[e] all” affairs with the Indians (as it enjoyed under the Articles of Confederation),¹⁹⁹ the President has those residual international affairs powers that the Constitution does not otherwise allocate. Hence, the President may recognize Indian tribes.²⁰⁰ Likewise, the President may control the instruments of Indian affairs, such as the BIA²⁰¹ (and before that, the War Department²⁰²). Finally, the President may establish the nation’s Indian policy but may not unilaterally make Indian relations law. Tellingly, the first Congress acknowledged the President’s control of residual Indian affairs when it granted the President the authority to delegate duties “relative to Indian affairs” to the Secretary of War.²⁰³ Rather than first vesting the President with authority and then permitting a delegation of such authority—as would have occurred if the Constitution gave Congress the power to manage Indian affairs—Congress apparently legislated against the background understanding that the President enjoyed power by virtue of the Constitution. Otherwise the President would have had absolutely no power to delegate authority to the Secretary of War.

Nothing about the residual executive power over Indian affairs suggests that either the President or the federal government enjoys a plenary power over Indian tribes. The grant of executive power

Indian tribes. *See, e.g.*, Message from President George Washington to Congress (Aug. 7, 1789) in 1 ANNALS OF CONG. 58 (1834) (informing Congress of disputes with “several powerful tribes of Indians” and of “hostilities which have, in several instances, been committed on the frontiers”); Message from President George Washington to Congress (Aug. 10, 1789), *in id.* at 61 (requesting further support of troops “to protect the frontiers from the depredations of the hostile Indians”). By virtue of the executive power, the President controls relations with other nations. Hence, whether Indian nations are domestic or foreign, the President has the residual executive powers of handling relations with them.

¹⁹⁶ U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).

¹⁹⁷ *See id.* art. I, § 8, cl. 3.

¹⁹⁸ *See id.* art. II, § 2, cl. 2.

¹⁹⁹ *See* ARTICLES OF CONFEDERATION art. IX, cl. 5 (granting Congress sole authority for “regulating the trade and managing all affairs with the Indians”).

²⁰⁰ *See* 25 C.F.R. § 83 (2003) (providing regulations regarding the federal recognition of Indian tribes).

²⁰¹ *See* 25 U.S.C. § 2 (2000) (providing that the Commission of Indian Affairs manage Indian affairs “agreeably to such regulations as the President may prescribe”).

²⁰² *See* An Act To Establish an Executive Department, To Be Denominated the Department of War, ch. 7, § 1, 1 Stat. 49, 50 (1789) (stating that the Secretary of War “shall perform and execute such duties as shall from time to time be enjoined on, or entrusted to him by the President of the United States”).

²⁰³ *See id.*

means that the President enjoys those external affairs authorities typically vested in an executive that the Constitution does not grant to another branch or that are not shared with the Senate.²⁰⁴ Although a treaty might convey authority to the President to direct the internal or external affairs of another nation, the executive power itself does not encompass such authority.

Nonetheless, which federal institution has such residual power matters quite a bit. For instance, whoever has the residual power with respect to Indian affairs decides which Indian tribes to recognize (or to continue to recognize) as separate nations.²⁰⁵ Hence, if one accepts that the President possesses those residual executive powers not allocated to Congress, then Congress lacks power to end recognition of Indian tribes. Moreover, the residual principle indicates that the President (and not Congress) may determine U.S. policy toward individual Indian tribes. Such authority further suggests that the President (and not Congress) may decide whether, and with whom, to negotiate treaties.²⁰⁶ Indeed, the residual principle calls into question the constitutionality of many federal statutes in which Congress has legislated as if it had an all-encompassing Indian power.²⁰⁷ All this means that not only does Congress lack a plenary power over Indian tribes, it also lacks complete control over whatever limited powers the federal government actually enjoys with respect to Indian tribes.

C. Nontextual Sources of Plenary Power

From time to time, some have advanced nontextual bases for plenary power. Most famously, *Kagama* claimed that the federal government possessed plenary power by virtue of the "weakness and helplessness" of the Indian tribes.²⁰⁸ According to this logic, the federal government had plenary power over the tribes because they were wards of the federal government. More recently, Professor Frickey has argued that international law may offer the strongest justification for

²⁰⁴ See Prakash & Ramsey, *supra* note 134, at 262–65.

²⁰⁵ See, e.g., 25 C.F.R. § 83.

²⁰⁶ In other words, the Act Making Appropriations for the Current and Contingent Expenses of the Indian Department, and for Fulfilling Treaty Stipulations with Various Indian Tribes, ch. 120, § 1, 16 Stat. 544, 566 (1871) (codified as amended at 25 U.S.C. § 71 (2000)) [hereinafter Indian Department Appropriations Act], was unconstitutional because it sought to prevent the President from making further treaties with the Indian tribes.

²⁰⁷ See, e.g., 25 U.S.C. § 81(b) (prohibiting agreements encumbering Indian land for seven years or more); *id.* § 305(a) (requiring the Secretary of the Interior "to promote the economic welfare of the Indian tribes and Indian individuals through the development of Indian arts and crafts"); *id.* § 2905(a) (directing the President to take action with respect to the preservation, protection, and promotion of Native American languages).

²⁰⁸ See *United States v. Kagama*, 118 U.S. 375, 383–84 (1886).

plenary power over Indian tribes.²⁰⁹ Under international law, imperial countries were understood to have plenary power over the countries they conquered.²¹⁰ If we conclude that the federal government enjoys the inherent rights of a colonizer—as well as all other rights of sovereignty not inconsistent with the Constitutional text and structure²¹¹—we can explain why the federal government enjoys plenary power over Indian tribes. By suggesting international law as a basis for plenary power, Professor Frickey hopes to employ modern international law limitations to constrain Congress's exercise of plenary power.²¹² Finally, the *Lara* majority recently suggested that plenary power arises from “preconstitutional powers necessarily inherent in any Federal Government.”²¹³

Of course, none of these rationales will win over those who steadfastly believe that the federal government is a government of enumerated powers. Notwithstanding *Kagama*, the supposed vulnerability of Indian tribes that underlies the wardship theory of plenary power cannot expand federal power. Necessity, however strongly felt, cannot enlarge the Constitution's grants of federal power.²¹⁴ Moreover, those strictly committed to the doctrine of enumerated powers will reject any assertion that the federal government enjoys “inherent” powers.

But even those who do not hold the enumerated powers doctrine close to their breast have sound reasons to reject these arguments for plenary power. The wardship theory is problematic because there is no determinate means of judging whether a nation is weak and helpless. For instance, in the United States' eyes, India may seem weak; to India's neighbors, however, it may appear to be a formidable rival. Moreover, something more than weakness and helplessness is necessary to justify plenary power over persons and nations. Even where we might generally agree that certain individuals are weak and helpless, such as the comatose and the mentally retarded, the federal government does not have plenary power over all such persons. Likewise,

²⁰⁹ Frickey, *supra* note 60, at 68–69.

²¹⁰ *See id.* at 37.

²¹¹ *See id.* at 68.

²¹² *See id.* at 75–80.

²¹³ *Id.* at 1634.

²¹⁴ Of course, in times of emergency, some dormant powers (such as the war power) may temporarily augment federal power. But such emergencies do not actually expand federal power. Rather, the better view is that certain emergency powers were always part of the Constitution and lay dormant until the emergency. The same cannot be said of arguments of necessity. The Constitution certainly does not grant Congress a power to do whatever it wishes on grounds of necessity.

For a discussion of how the Constitution applies differently in emergency situations, see Michael Stokes Paulsen, *The Constitution of Necessity*, 79 *Notre Dame L. Rev.* (forthcoming 2004) and Saikrishna Prakash, *The Constitution as Suicide Pact*, 79 *Notre Dame L. Rev.* (forthcoming 2004).

even if we generally agree that a nation, such as Ethiopia, is frail and dependent, no one thinks that the United States has a plenary power over Ethiopia or similarly situated countries.

Even if one accepted the dubious wardship theory, it cannot justify the plenary power doctrine. To begin with, in order to justify the unbroken exercise of plenary power since *Kagama*, one must conclude that *every* Indian tribe has been continuously weak and helpless for the past century. More importantly, to validate existing plenary power over all Indian tribes, there must be some consensus that every Indian tribe is weak and helpless. In an era where quite a few tribes run multi-million dollar business enterprises, all this seems rather unlikely. The wardship theory offers more of a feeble rationalization for plenary power than it does a sound theory of constitutional law.

Professor Frickey's approach is more coherent and therefore seems more promising. But his article has limitations. Frickey makes clear that he is not interested in identifying a constitutional justification for plenary power. Though at times his article reads as if he is supplying a basis for plenary power,²¹⁵ he does not wish to prop up the current plenary power regime.²¹⁶ Instead, he attempts to replace the plenary power doctrine with a system in which the federal government has generous powers over Indian tribes cabined by emerging international law principles that limit federal power.²¹⁷ For instance, in cases involving takings of Indian land, Professor Frickey suggests that the courts reinvalidate the "public use" takings requirement as a means of implementing "emerging international norms."²¹⁸ Thus, in the end, Professor Frickey ultimately undermines plenary power by introducing new extraconstitutional constraints on plenary power. To subscribe to Professor Frickey's argument, one must reject the plenary power doctrine, at least as it is currently constituted.²¹⁹

The Supreme Court's latest nontextual argument for plenary power is perhaps the most puzzling. It is hard to see why any government, let alone a government of enumerated powers, would have an "inherent" "preconstitutional power" to completely control another

²¹⁵ See, e.g., Frickey, *supra* note 60, at 37 ("[T]hose nations created by colonization . . . face the question of inherent power over 'foreigners' already present—indigenous peoples. Because international law sanctioned colonization, it also must have had within it a notion that the colonial government that results has inherent authority to engage in relations with indigenous peoples.").

²¹⁶ See *id.* at 75 (describing the lack of restraint on federal power over Indian tribes through judicial review as "indefensible").

²¹⁷ See *id.* at 75–80.

²¹⁸ *Id.* at 85.

²¹⁹ My point is not to challenge Professor Frickey's claims about international law. Instead, my point is that Frickey's article does not provide a viable basis for the plenary power that the federal government currently enjoys over Indian tribes.

nation.²²⁰ At the extreme, the Supreme Court's claim bizarrely suggests not only that the United States might have an inherent plenary power over other nations (Mexico, Canada?) but also that other nations (Russia, Portugal?) might have the same power over the United States.

All this confirms the sound intuition that arguments about inherent federal power are quite suspect. Professor Ramsey has convincingly argued that the Founders did not subscribe to the theory that control over foreign affairs was an inherent power of the federal government.²²¹ That conclusion seems equally fitting with respect to Indian powers. Apparently, none of the Founders discussed an inherent Indian power. There are good reasons for their silence, for such a theory would not fit well with what we know about the Constitution and the Articles. To begin with, an inherent "Indian power" would have rendered the Commerce Clause, and earlier explicit Indian powers in the Articles of Confederation, redundant.²²² Moreover, many Founders acted as if the Commerce Clause was necessary precisely to ensure that the federal government had greater power over Indian relations under the Constitution than it had under the Articles of Confederation.²²³ Given the express constraints on congressional stewardship of Indian affairs in the Articles and the Constitution's limited grant of direct authority regarding Indians, it is difficult to believe that the drafters of either document thought that the federal government had an inherent plenary power over Indian tribes. The better reading is that neither the Constitution nor the Articles contemplated an inherent national or federal power to control Indian tribes.

D. Nontextual Prohibitions on Plenary Power

In addition to the various textual sources of federal power over Indian tribes, one must also consider whether the Constitution protects the independence of Indian tribes. After all, some scholars have

²²⁰ See *United States v. Lara*, 124 S.Ct. 1628, 1634 (2004).

²²¹ See generally Michael D. Ramsey, *The Myth of an Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379 (2000) (rejecting the Court's proposition that foreign affairs powers are inherently federal and arguing that one can construct a framework for foreign affairs law from the Constitution).

²²² To be sure, the Constitution contains a number of redundancies. See, e.g., Saikrishna Prakash, *Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 729 & nn. 129–33; Prakash & Ramsey, *supra* note 134, at 260 n.112. Hence, I do not adopt the view that the Constitution must be read as containing no redundant or superfluous provisions.

²²³ Under the Constitution, the federal government's commerce power with respect to Indian tribes would no longer be limited by the Articles provision precluding infringement of a state's "legislative rights" within its own limits. See ARTICLES OF CONFEDERATION art. IX; see also Clinton, *supra* note 68, at 1102–03 (discussing the adoption of Article IX).

suggested that the Constitution affirmatively limits federal and state encroachment on Indian prerogatives.²²⁴

There is very little reason to believe that the Constitution affirmatively protects tribal autonomy. As discussed above, the Constitution says little specifically about Indian tribes and says nothing to suggest that they must enjoy autonomy from federal and state governments. Indeed, the Constitution's text would appear to evince no solicitude for the continued existence of any sovereigns, save the states. For a number of reasons, the continued existence of the states is necessary for the Constitution to function;²²⁵ whether we like it or not, the continued existence of Chile or the Comanche as separate nations is not.

Indeed, our framework suggests that the Constitution enables the federal government to acquire broad, even plenary, powers over Indian tribes (or any nation for that matter). The federal government may enjoy such powers because of a treaty,²²⁶ because of the location of tribal lands and members,²²⁷ or as a result of federal conquest followed by annexation.²²⁸ The federal government's ability to acquire such plenary control indicates that the Constitution does not protect Indian (or other) nations.

Moreover, the federal government—the executive branch in particular—also has the power to end recognition of nations, foreign or domestic, and thereby refuse to acknowledge their sovereignty.²²⁹ Although the United States currently does not enjoy a plenary power over all Indian tribes, it has the same power to recognize (or not recognize) Indian tribes that it has with respect to any foreign entity. Just as the United States may end recognition of the Republic of China, so too may it end recognition of any Indian nation. Given the peculiar circumstances of Indian tribes, ending federal recognition of an Indian tribe may destroy the tribe's claim to sovereignty.²³⁰

²²⁴ See, e.g., Clinton, *supra* note 64, at 851.

²²⁵ Most prominently, the continued existence of the states is necessary to elect Congress and the President. See U.S. CONST. art. I, § 2, cl. 1; *id.* art. II, § 1, cls. 2–3.

²²⁶ See *supra* Part II.B.3.

²²⁷ See *supra* Part II.B.2.

²²⁸ See *supra* Part II.B.4.

²²⁹ See Prakash & Ramsey, *supra* note 134, at 312–14 (claiming that executive has the power to recognize foreign governments by virtue of the executive power).

²³⁰ Professor Cohen contends that “terminated” tribes still retain aspects of their sovereignty, and notes that the federal government has resumed relations following derecognition decisions. See COHEN, *supra* note 32, at 19. One might add that states could continue to recognize a tribe as a sovereign entity regardless of the federal government's derecognition decision. A list of state-recognized tribes can be found at 500 NATIONS, STATE RECOGNIZED TRIBES, at http://www.500nations.com/tribes/Tribes_States.asp (last visited Mar. 7, 2004). Having determined to continue to treat a tribe as sovereign, a state might refrain from expanding state power in a manner that would invade tribal sovereignty. Thus, federal derecognition might not be so catastrophic for a tribe.

As far as the intentions of the Constitution's Founders (both the Framers and the Ratifiers), there is no evidence that any of them sought to have the Constitution protect Indian tribes. To be sure, many Founders sought to augment federal power at the expense of the states, believing that restricting state power would make it more difficult for any one state to drag the nation into an Indian war.²³¹ But this implicit preemption of state power was meant to safeguard national interests, not to safeguard Indian tribes. Put another way, if centralizing power over Indian affairs helped the tribes, this was an incidental byproduct of a desire to strengthen the federal government. Though the judicial and political branches certainly may act to protect Indian nations, the Founders' intentions do not reflect a concern to provide judicial or political safeguards for any other nation.

In sum, the Constitution was no more meant to protect Indian tribes than it was meant to protect Prussia or the Republic of Texas. Though the enumerated powers doctrine might limit federal power with respect to other nations, this does not mean that the federal government must continue to recognize any nation. It may seem paradoxical, but even though the United States lacks plenary power over many Indian tribes, nothing in the Constitution prevents the federal government from conquering these tribes. More relevant for today's circumstances, the Constitution does not oblige the United States to continue to recognize any Indian tribe as a nation.

E. A Framework for Gauging Federal Power over Indian Tribes

Some general principles emerge from the discussion above. The U.S. government may exercise plenary power over another nation, whether foreign or domestic, in two circumstances. First, if another nation's citizens are within a U.S. territory or on U.S. property, Congress can unilaterally exercise a plenary power over the other nation's nationals by virtue of the Territory/Property Clause.²³² Second, if a nation agrees to allow the United States to exercise plenary power

On the other hand, other states might attempt to expand state power over the former nation. Indeed, keenly aware that Indian sovereignty reduces their authority, state officials often oppose federal recognition of Indian tribes. See, e.g., Gloria Valencia-Weber, *Shrinking Indian Country: A State Offensive To Divest Tribal Sovereignty*, 27 CONN. L. REV. 1281, 1308-09 (1995) (discussing Alaskan opposition to an "Indian Country" in Alaska). Given these considerations, it is hard to make any generalizations about what authority and autonomy will be left with an Indian tribe once the federal government terminates its recognition.

²³¹ See Clinton, *supra* note 68, at 1099-1100 (discussing the first draft of the Articles of Confederation, which consolidated power over Indian affairs in the federal government); *id.* at 1152-53 (discussing Madison's concerns over state encroachments on federal power over Indian tribes).

²³² See *supra* Part II.B.2.

over it, the United States acquires a plenary power over that nation and its nationals.²³³

The treaty power is relevant to this framework because treaties are the typical means by which one nation acknowledges plenary control of another. In addition, treaties may provide for the annexation of territory, thereby extending plenary federal power over the annexed territory and its residents. If an Indian nation has not entered into either type of treaty, the treaty power cannot help justify a plenary power over such nation.

The other powers that scholars have cited as the source of plenary federal power over Indian tribes—commerce and war—do not, by themselves, grant plenary power. Just as Congress lacks the power to regulate all aspects of life by virtue of the Interstate Commerce Clause,²³⁴ so too does it lack the power to regulate all aspects of Indian tribes by virtue of the Indian Commerce Clause. What is good for Alfonso Lopez²³⁵ is good for the Apache Tribe as well.

The war power is germane to the plenary power inquiry only because war is a means of unilaterally expanding the territories of the United States.²³⁶ If the United States conquers an Indian tribe and annexes its land, the United States would have plenary power over the land and its Indian inhabitants. If war does not result in annexation of territory or expropriation of property, however, the war power cannot permanently augment congressional power over some territory or property.

Given this framework, the content of Indian treaties, and the ownership patterns of Indian tribes and their members, the federal government lacks a plenary, nationwide "Indian power." This result comports with at least one consequence of the enumerated powers doctrine: the federal government's lack of a nationwide police power. Just as the federal government lacks a plenary power over Iowans and Idahoans, so too does it lack such power over Indians. This result also coheres with evidence of the Founders' original understanding. Although they discussed commerce,²³⁷ war, and peace²³⁸ relating to the

²³³ See *supra* Part II.B.3.

²³⁴ See *supra* notes 125–126 and accompanying text.

²³⁵ See *Lopez v. United States*, 514 U.S. 549, 551–52, 567–68 (1995) (affirming a lower court decision overturning Alfonso Lopez's conviction because the Gun-Free School Zones Act, under which he was convicted, did not fall within Congress's Commerce Clause powers).

²³⁶ See *supra* Part II.B.4.

²³⁷ See, e.g., *THE FEDERALIST* No. 42, at 215–16 (James Madison) (Max Beloff ed., 2d ed. 1987) (discussing changes from the Articles of Confederation regarding the regulation of commerce with the Indians).

²³⁸ See, e.g., 1 *FEDERAL CONVENTION*, *supra* note 103, at 107 (noting a discussion of an Indian invasion); *id.* at 326 (quoting Madison's statement regarding Georgia's war with

Indians, the Founders did not claim that the federal government would have plenary power over all Indian tribes.²³⁹

Nonetheless, there may be plenary power (or something approaching it) with respect to particular Indian tribes. First, if a tribe resides within a U.S. territory or on federal property, Congress would have the same police power over such a tribe that a state enjoys over its residents. Second, particular tribes may have ceded a plenary power to the federal government through a treaty or agreement. Thus, although the Constitution did not grant an "Indian power," Congress may acquire a plenary power over particular Indian nations.

This framework suggests that we must stop lumping together all Indian tribes. We must stop assuming that every tribe is similarly situated and that federal power over each tribe must be uniformly complete (or uniformly limited). If we are to take seriously the notion that the federal government is one of enumerated powers, we must consider assertions of federal power over Indian nations on a nation-

Indian tribes); THE FEDERALIST NO. 4, at 11 (John Jay) (Max Beloff ed., 2d ed. 1987) (discussing hostilities between states and Indian tribes).

²³⁹ This Article examines the current scope of federal power over Indian tribes and does not address whether the federal government might have had a plenary power over some or all Indian tribes in 1789. Nonetheless, several comments are in order. For various reasons, the governments under the Articles of Confederation and during the early days under the Constitution did not likely have a plenary power over all Indian tribes in 1789. To begin with, many tribes were clearly outside the territorial confines of the United States. In 1789, the federal government would have had no basis for asserting that it had plenary power as to tribes in present day Idaho or Alaska. The same result obtains with respect to tribes within the individual states. Unless such tribes entered into a treaty with the federal government conceding plenary power or unless such tribes were somehow viewed as residing upon federally-owned land, there likely was no federal plenary power over such tribes.

The only set of tribes over which there might have been a plenary power were those in the extant territory of the United States. Congress might have had a constitutional right to exercise a plenary power over those tribes by virtue of the Territory/Property Clause. However, given the precarious position of the United States at that time, it would have been foolish to press such a claim. Indeed, while treaties written immediately after the War of Independence took the bold position that the United States was granting land to the Indians (thereby suggesting that the Indians had no rights until the treaty), later treaties involved purchases from the Indians. Compare Treaty with the Six Nations, Oct. 22, 1784, art. 3, 7 Stat. 15, 15-16 (merely declaring boundaries between United States and Six Nations), with Treaty for Removing All Causes of Controversy, Regulating Trade, and Settling Boundaries with the Six Nations, Jan. 9, 1789, art. 1, 7 Stat. 33, 33-34 (providing funds to Six Nations for confirming the boundaries drawn up in the earlier treaty). Moreover, there is little evidence that the federal government believed it could (or ought to) exercise a plenary power over Indian tribes within U.S. territory. As long as Indians kept separate from U.S. settlers and remained under U.S. suzerainty, there likely was no interest in legislating the internal affairs of Indian tribes. See TYLER, *supra* note 148, at 38-43 (arguing that early policy goals of the United States included maintaining peace between settlers and Indian tribes by keeping the two separate and respecting Indian land). It is perhaps for this reason that Chief Justice Marshall declared in *Worcester v. Georgia* that the authority of Indian tribes was "exclusive[]" within their territorial boundaries. See 31 U.S. (6 Pet.) 515, 557 (1832).

by-nation basis, taking into account a tribe's treaties, land tenure, and location. The next Part preliminarily applies this framework.

III

APPLYING THE FRAMEWORK

This Part considers Indian tribes in different hypothetical situations to help discern how federal power might vary across tribes. Though this Part cites actual treaty language, it draws no definitive conclusions about actual Indian tribes or treaties. Nor does it estimate how many Indian tribes fall into each of the categories below. Instead, the discussion is meant to illustrate how one ought to apply the framework derived in Part II.

A. Treaties Granting a Plenary Power

As noted earlier, a treaty may grant the federal government a plenary power in situations in which the government would otherwise lack this power. Other treaties might instead grant a circumscribed power to legislate upon certain aspects of a tribe's internal affairs. The key is to examine actual treaty provisions to determine what powers the treaty actually conveys.

Some treaties ratified in the late nineteenth century, toward the end of the treaty period,²⁴⁰ appear to have granted the U.S. government the ability to control internal tribal matters. In the original edition of his handbook, Professor Cohen recounts provisions of several treaties ratified after the Mexican-American war that appear to have granted such power.²⁴¹ For instance, the Navajo Treaty provided that the United States may "pass and execute in [Navajo] territory such laws as may be deemed conducive to the prosperity and happiness of said Indians."²⁴² Likewise, the Klamath Treaty provided that the Klamaths "will submit to and obey all laws and regulations which the United States may prescribe for their government and conduct."²⁴³ Other treaties stated that the President or Congress could adopt "[r]ules and regulations to protect the rights of persons and property among the Indians."²⁴⁴

²⁴⁰ The Treaty Period ended in 1871 with the passage of a statute prohibiting treaties with Indian tribes. See COHEN, *supra* note 32, at 105-07 (discussing the end of the treaty period).

²⁴¹ See FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 62-63 (1942).

²⁴² Treaty Between the United States of America and the Navajo Tribe of Indians, Sept. 9, 1849, art. IX, 9 Stat. 974, 975.

²⁴³ Treaty Between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians, Oct. 14, 1864, art. IX, 16 Stat. 707, 709.

²⁴⁴ *E.g.*, Treaty with the Med-ay-wa-kan-toan and Wah-pay-koo-tay Bands of Dakota or Sioux Indians, Aug. 5, 1851, art. VII, 10 Stat. 954, 955; Treaty with the See-see-toan and Wah-pay-toan Bands of Dakota or Sioux Indians, July 23, 1851, art. VI, 10 Stat. 949, 950.

Earlier treaties were less specific, merely acknowledging federal supremacy over a tribe. For example, in 1825 the Poncar tribe of Indians acknowledged the “supremacy” of the United States.²⁴⁵ That same year, the United States entered into several Indian treaties with identical language.²⁴⁶ This language might have reflected an agreement that the United States would enjoy plenary power—supremacy—over the relevant Indian tribes.²⁴⁷

The earliest treaties were far more ambiguous. As early as 1785, Indian treaties often noted that the relevant tribe would be under the “protection” of the United States “and of no other sovereign whatsoever.”²⁴⁸ While one might read such language as merely establishing the United States as suzerain over the relevant Indian tribe²⁴⁹ one might instead interpret the language as establishing a plenary power in which a “super-sovereign” could displace rules enacted by the subordinate nation.

Regardless of the best reading of these actual treaty provisions, a treaty could clearly provide that the U.S. government could exercise plenary (or some lesser) power over particular Indian tribes. And when a treaty’s best reading²⁵⁰ indicates that the United States may

²⁴⁵ See Treaty with the Poncar Tribe, June 9, 1825, art. 1, 7 Stat. 247, 248.

²⁴⁶ See, e.g., Treaty with the Cheyenne Tribe, July 6, 1825, art. 1, 7 Stat. 255, 255; Treaty with the Sioune and Ogalala Tribes, July 5, 1825, art. 1, 7 Stat. 252, 252; Treaty with the Teton, Yanceton, and Yantonies Bands of the Sioux Tribe of Indians, June 22, 1825, art. 1, 7 Stat. 250, 250.

²⁴⁷ Of course, one could argue that acknowledging federal supremacy was meant neither to convey plenary power nor to confirm its existence. This discussion merely raises the possibility that the language might have conferred a plenary power.

²⁴⁸ E.g., Treaty with the Cherokees, Nov. 28, 1785, art. III, 7 Stat. 18, 19; Treaty with the Wiandot, Delaware, Chippawa and Ottawa Nations, Jan. 21, 1785, art. II, 7 Stat. 16, 16.

²⁴⁹ Chief Justice Marshall so read this language in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 551–52, 561–62 (1832).

²⁵⁰ There are, of course, established rules for construing treaties with Indian tribes. One such rule is that treaties are to be construed as the Indians would have understood them. On numerous occasions, the Court has adhered to “the general rule that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians.” *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 89 (1918); see also, e.g., *Bryan v. Itasca County*, 426 U.S. 373, 392–93 (1976) (citing *Alaska Pacific Fisheries* and interpreting a jurisdictional statute narrowly in favor of Indian tribes to prevent state taxation of Indian property); *Antoine v. Washington*, 420 U.S. 194, 199–200 (1975) (“The canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice.”); *Jones v. Meehan*, 175 U.S. 1, 11 (1899) (holding that an Indian treaty must “be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians”). This Article does not argue against such a rule of construction but observes that treaty language can convey a plenary power to the federal government.

exercise plenary power over an Indian tribe, the federal government has secured the power to regulate all aspects of that Indian tribe.²⁵¹

B. Tribes Located Within a Territory of the United States

When a tribe resides within a U.S. territory (such as Puerto Rico or Guam), the Territory/Property Clause grants Congress a plenary power over that tribe. Perhaps as a means of establishing that Indian tribes were located within a U.S. territory, Indian treaties sometimes contained assertions that Indian tribes were within the United States. The 1785 Treaty with the Cherokees, for example, allotted "hunting grounds . . . within the limits of the United States of America."²⁵² Several other treaties of the era provided the same.²⁵³ A half century later, the United States ratified similar treaties in which Indian tribes formally "admitted" that tribal lands were within the "territorial limits of the United States."²⁵⁴ If one reads the latter as providing that these tribes were located within U.S. territory (rather than within a state or states²⁵⁵), then these treaties would have granted the federal government general power over the Indian signatories.²⁵⁶ This is regardless of whether the treaty parties intended the treaties to convey broad power to the federal government. Once a person or group is within

²⁵¹ There has been much criticism of the manner in which treaties were signed, and some scholars have cast doubt upon the existence of true Indian consent to the terms of various treaties. See, e.g., Matthew L.M. Fletcher, *Sawnawgezewog: "The Indian Problem" and the Lost Art of Survival*, 28 AM. INDIAN L. REV. 35, 100 (2003) ("In the treaty era, the federal government sometimes used alcohol to coerce or trick Indian leaders into signing truly dreadful treaties."). In deciding whether to require other nations to honor treaty commitments (including grants of plenary power to the federal government), the President and the Congress ought to take into account whether the other nation actually consented to the treaty.

²⁵² Treaty with the Cherokees, Nov. 28, 1785, art. III, 7 Stat. 18, 19.

²⁵³ See, e.g., Treaty with the Chickasaws, Jan. 10, 1786, art. III, 7 Stat. 24, 24 (providing lands "to live and hunt on, within the limits of the United States of America"); Treaty with the Choctaws, Jan. 3, 1786, art. III, 7 Stat. 21, 21-22 (same). Of course, none of these treaties could have relied upon the Territory/Property Clause to establish plenary power, for the Constitution was not supreme law until after these treaties were made.

²⁵⁴ E.g., Treaty with Teton, Yanceton, and Yanctonies Bands of the Sioux Tribe of Indians, June 22, 1825, art. 1, 7 Stat. 250, 250; Treaty with the Poncar Tribe, June 9, 1825, art. 1, 7 Stat. 247, 248.

²⁵⁵ To say that the tribes were within the territorial confines of the United States does not necessarily mean that they were within a U.S. territory in an Article IV sense. Depending on their geographic location, tribes could have been within the confines of one or more states and might not have been understood to be within an Article IV territory of the United States. If tribes were in the latter situation, the Territory/Property Clause would not have come into play. See *supra* Part II.B.2.

²⁵⁶ The latter set of treaties concluded that the federal government was supreme immediately after providing that the tribal lands were within the territorial limits of the United States. See Treaty with the Teton, Yanceton, and Yanctonies Bands of the Sioux Tribe of Indians, June 22, 1825, art. 1, 7 Stat. 250, 250; Treaty with the Poncar Tribe, June 9, 1825, art. 1, 7 Stat. 247, 248. The treaties, therefore, seemed to suggest that supremacy followed from the tribal land's location within the territorial limits of the United States.

the confines of a U.S. territory, the Territory/Property Clause grants broad power to Congress over that individual or group.²⁵⁷

Of course, even if tribes long ago acknowledged that they were within U.S. territory, that admission would hardly matter in gauging federal power today. If a particular tribe is no longer located within a U.S. territory but instead is located within state boundaries or on private property, the United States may have lost its broad power over the tribe.²⁵⁸ Because no recognized tribes are located on U.S. territory,²⁵⁹ the territory power no longer grants the federal government a plenary power over any recognized tribe.

C. Tribal Lands on U.S. Property

When a tribe resides on federal property located within a state, the Territory/Property Clause provides that Congress enjoys broad power over that tribe. As noted earlier, the BIA reported that there were more than 56 million acres of Indian land in 1990.²⁶⁰ Of this land, the federal government owned some 421,000 acres.²⁶¹ While on this federal land, Indian tribes, like any other occupants or visitors, are subject to broad congressional power of the type that states enjoy over their residents. Because the federal government owns such a small portion of Indian land,²⁶² however, this particular source of federal power is likely inconsequential. No statistics exist that indicate how Indians are dispersed across Indian lands. Assuming that Indian residency is evenly dispersed across all Indian land, only a small percentage of Indians reside on federally owned lands. And, if most Indians live on private or tribal property, the United States cannot cite the Territory/Property Clause as a basis for a plenary power over such Indians. While quite relevant in the distant past, under current circumstances the Territory/Property Clause likely grants the federal government a plenary power over few, if any, Indian tribes.

D. Tribal Lands on Private Property in a State

When the only land that a federally recognized tribe owns is located within one or more states, the federal government must accept

²⁵⁷ See *supra* Part II.B.2.

²⁵⁸ The only way that the prior treaty language could have continuing effects respecting a plenary power is if the treaty conveyed to the federal government broad power over the tribes, regardless of their location. Indeed, treaties that specified that Indian tribes were within the territorial limits of the United States often also acknowledged federal supremacy, thereby suggesting the possibility that these treaties were meant to convey (or acknowledge) plenary power over the tribes.

²⁵⁹ See *supra* note 146 and accompanying text.

²⁶⁰ See *supra* note 144 and accompanying text.

²⁶¹ See *supra* note 146 and accompanying text.

²⁶² See *supra* notes 151–153 and accompanying text.

the possibility that it lacks sweeping powers over such a tribe. If no treaty grants the federal government powers over the tribe, there is no basis for the federal government to exercise anything approaching a plenary power over it. These circumstances describe the greatest potential retrenchment in federal power over particular Indian tribes.

Still, the federal government would hardly be powerless. The federal government could still regulate commerce with such a tribe.²⁶³ Moreover, because all Indian tribes are within the United States,²⁶⁴ the federal government likely can exercise its nationwide powers, such as its powers over patents, copyrights, taxation, and bankruptcy.²⁶⁵ In this respect, Indian tribes are no different from any other individuals or groups located in a state; all are subject to the federal government's exercise of nationwide powers.²⁶⁶

E. Examining Indian Tribes on a Case-by-Case Basis

The preceding discussion underscores the pitfalls of making sweeping claims about federal power over Indian tribes. On the one hand, the federal government does not have a plenary power over all Indian tribes. On the other hand, one cannot conclude that each and every Indian tribe is the equivalent of Mexico or Canada, with the federal government utterly powerless to regulate internal tribal affairs. Discerning the extent of federal power over Indian tribes requires us to focus on particular Indian tribes, their treaties and their landholdings. Once we stop stereotyping the tribes, it becomes clear that meaningful variations across the Indian tribes make for varying degrees of federal power.

²⁶³ See *supra* Part II.B.1.

²⁶⁴ Notwithstanding that the federal government regards Indian tribes as sovereign entities, all Indian lands are best understood as being within the United States. The alternative would be to recognize that some or all of Indian land is the distinct sovereign territory of Indian tribes. The United States would then have to consider some or all Indian land as the land of a separate country, much as Italy considers the Vatican a separate country despite its location within Italy. See generally Thomas D. Grant, *Between Diversity and Disorder: A Review of Jorri C. Duursma*, Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood, 12 AM. U. J. INT'L L. & POL'Y 629, 671-74 (1997) (describing the Vatican's unique independent statehood and its relationship with Italy).

²⁶⁵ See COHEN, *supra* note 32, at 282.

²⁶⁶ U.S. CONST. art. I, § 8. Professor Clinton has argued that federal law relating to Congress's enumerated powers (e.g., patents, bankruptcy) should not apply to Indian tribes, regardless of the Supremacy Clause. See Clinton, *supra* note 75, at 253-56. He makes a strong claim that absent a treaty, Congress can regulate only commerce with the tribes and has no other legislative power. Still, the better view is that the tribes are part of the United States and Congress should be able to exercise its enumerated powers over them. See *supra* note 253.

IV

DIFFICULTIES WITH TURNING BACK THE CLOCK ON FEDERAL
INDIAN POWER

To declare that the federal government lacks a general plenary power over Indian tribes is to turn one's back on almost a century and a half of received wisdom. Discarding this rooted practice will likely create a number of both real and perceived difficulties. None of the arguments listed below should preclude the overdue abandonment of the dubious plenary power doctrine.

A. Changed Circumstances

Much has changed in the century since *Kagama*. Perhaps these changed circumstances wholly undermine the framework outlined above, either because the conditions necessary for treating Indian tribes as nations no longer exist or because all members of Indian tribes are now also U.S. citizens. In other words, perhaps the framework is an anachronism, better suited to the 1780s or the 1880s than to the Twenty-First century.

1. *Indian Tribes Are No Longer Nations*

Those skeptical of the framework proposed in this Article might deny that Indian tribes are nations in any meaningful sense. These skeptics might claim that the federal government has exercised such pervasive and intrusive authority over Indian tribes for such a long period of time that the tribes should no longer be considered nations. Given that the Indian tribes no longer seem like distinct nations, these skeptics might argue, plenary federal power over Indians ought to continue in its current form.

This argument fails for the simple reason that nationhood is not some determinable fact. Whether some group constitutes a sovereign nation is a political decision to be made by the political branches, particularly the executive. So long as the political branches treat some group as a nation, that group constitutes a nation for purposes of the U.S. Constitution, regardless of whether the general public considers the group a nation. Hence, the relevant inquiry is not which groups the public will accept as nations, but which groups the political branches treat as nations. Currently, these branches treat 562 Indian tribes as nations.²⁶⁷

Even if one agreed that Indian tribes are not really nations, an insuperable barrier precludes plenary federal power over tribes. Federal power over a foreign nation does not increase merely because the

²⁶⁷ See Indian Entities Recognized and Eligible To Receive Services from the United States Bureau of Indian Affairs, 67 Fed. Reg. 46,327, 46,328–33 (July 12, 2002).

United States stops recognizing that nation's separate existence. For instance, the federal government did not acquire a plenary power over Taiwan when it ended diplomatic recognition of the Nationalist government of the Republic of China.²⁶⁸ Likewise, if the United States ended recognition of the Cherokee, the federal government would not thereby acquire a plenary power over the Cherokee. Federal power would turn upon whether Cherokee resided on federal land or territory. If the nonrecognized Cherokee owned private property only in Oklahoma, they likely would be ordinary Oklahomans and not subject to plenary federal control. Though derecognition of Indian tribes might expand the reach of state power,²⁶⁹ ending recognition will not shore up the plenary power doctrine. Put simply, even if the Indian tribes are no longer regarded in any sense as separate nations, the foundations of plenary power would still be fatally weak.

2. *All Indians Are U.S. Citizens*

Until the early Twentieth century, most Indians were not considered U.S. citizens.²⁷⁰ Instead, over time, Congress gradually granted citizenship to members of particular Indian tribes.²⁷¹ In 1924, Congress passed an Indian citizenship act that conferred citizenship on all "non-citizen Indians born within the territorial limits of the United States."²⁷² Some might believe that the conferral of U.S. citizenship on all Indians somehow justifies plenary federal power over them. There are good reasons why no one seems to have made such an argument. While the conferral of citizenship might have enhanced federal power,²⁷³ it did not and could not yield a plenary power over the new citizens. After all, the federal government does not have plenary power over all U.S. citizens. Indeed, U.S. citizenship is neither neces-

²⁶⁸ See CONTEMPORARY U.S. FOREIGN POLICY: DOCUMENTS AND COMMENTARY 690-96 (Elmer Plischke ed., 1991).

²⁶⁹ For a discussion regarding the consequences for Indian tribes after the federal government ends its recognition, see *supra* note 230.

²⁷⁰ See COHEN, *supra* note 32, at 640-42.

²⁷¹ See, e.g., An Act To Provide for the Allotment of Lands in Severalty to Indians on the Various Reservations, and To Extend the Protection of the Laws of the United States and the Territories over the Indians, and for Other Purposes, ch. 119, § 6, 24 Stat. 388, 390 (1887) (conferring citizenship on all Indian allottees of reservation land); An Act Making Appropriations for the Current and Contingent Expenses of the Indian Department and for Fulfilling Treaty Stipulations with Various Indian Tribes, ch. 296, § 10, 16 Stat. 335, 361 (1870) (offering citizenship for members of the Winnebago tribe in Minnesota).

²⁷² An Act To Authorize the Secretary of the Interior To Issue Certificates of Citizenship to Indians, ch. 233, 43 Stat. 233, 253 (1924).

²⁷³ The grant of citizenship might be a partial response to Professor Clinton's claim, see *supra* note 264, that Congress cannot enact laws pursuant to its enumerated powers (such as tax or copyright) that apply to Indians. If all Indians are citizens of the United States, the federal government arguably ought to be able to exercise its enumerated powers over these Indian citizens.

sary nor sufficient for the exercise of plenary federal power over some individual or group.

3. *Indians Cannot Handle True Self-Government Without the Plenary Power Safety Net*

Some might believe that having been the sovereign wards of the federal government for over a century, Indians are incapable of proper self-government. Perhaps tribes have grown too accustomed to federal superintendence to resume the difficult task of governing themselves. Or, perhaps tribal oligarchies or tyrannies would arise in a world without plenary power. It might turn out that the tribes (and their members) are better off with the plenary power backdrop.²⁷⁴

In reality, the tribes have shown themselves quite capable of self-government. Tribes have robust, well-functioning governments,²⁷⁵ complete with legislative bodies and courts.²⁷⁶ Even commentators who might question the competence of tribal governments have reason to doubt that Indian tribes have benefited from plenary power. The basic question is one of comparative competence: Will the tribes do a better job than the federal government has done? There are reasons to believe that many Indian tribes would be better off governing themselves.

First, federal Indian policy has been highly cyclical, moving from extreme measures to assimilate Indians and end Indian tribal autonomy²⁷⁷ to the eventual resurrection of Indian tribes and implementation of policies meant to foster Indian self-government.²⁷⁸ These wild swings in federal Indian policy do not speak well of federal control. Second, though many claim that Indian tribes are unable to manage their own resources wisely,²⁷⁹ the federal government's stewardship of Indian property leaves much to be desired. The ongoing *Cobell* litigation has exposed the government's shocking inability to handle even simple tasks like properly accounting for the property held in trust for

²⁷⁴ Gandhi famously claimed he would rather have the anarchy of self-rule than the orderliness of foreign rule. M.K. GANDHI, *HIND SWARAJ OR INDIAN HOME RULE* 71–72 (rev. new ed. 1939). Undoubtedly some tribal advocates would say the same about federal plenary power.

²⁷⁵ See, e.g., ERIN HOGAN FOUBERG, *TRIBAL TERRITORY, SOVEREIGNTY, AND GOVERNANCE: A STUDY OF THE CHEYENNE RIVER AND LAKE TRAVERSE INDIAN RESERVATIONS* 151–75 (John R. Wunder & Cynthia Willis Esqueda eds., 2000) (describing tribal governments of the Cheyenne River Sioux and the Sisseton-Wahpeton Sioux).

²⁷⁶ See *id.* at 177–78.

²⁷⁷ See TYLER, *supra* note 148, at 172–81 (describing the termination policy period from 1953 to 1958).

²⁷⁸ See COHEN, *supra* note 32, at 183–86.

²⁷⁹ See Matthew B. Krepps, *Can Tribes Manage Their Own Resources? The 638 Program and American Indian Forestry*, in *WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT* 179 (Stephen Cornell & Joseph P. Kalt eds., 1992).

the Indians.²⁸⁰ Whatever their property management skills in a prior era, today's Indian tribes seem far more likely than the federal government to manage their own property suitably. This argument coheres with the general notion that a principal will be much more careful with its own property than a relatively unchecked agent.

Third, if, contrary to current practices, Indian tribes were to adopt antidemocratic or even tyrannical policies vis-à-vis minority factions within tribes, the federal government always has the military power to intervene and restore order. The United States has intervened overseas on numerous occasions, and there is no reason to think that the United States would sit idly by while oppression occurs within the United States. Borrowing from the Constitution, the U.S. government might even guarantee each Indian tribe a "Republican Form of Government."²⁸¹

Finally, any tribe may invoke the plenary power safety net through treaties or agreements with the federal government. Those tribes that lack confidence in their self-governing abilities may always "contract" for the federal government backstop that plenary power provides. Alternatively, some tribes might opt for more circumscribed federal power, to be wielded in select areas that have proven troublesome for the tribes in the past.²⁸² Rejection of across-the-board plenary power does not mean that the federal government cannot acquire a broad power over those tribes that see some wisdom in plenary federal power. At the end of the day, many would argue that the federal government has been a rather poor guardian of its Indian wards.²⁸³ Nonetheless, if a tribe fears that it will manage its affairs worse than the federal government, or if a tribe's leadership becomes truly oppressive, federal control is always possible.

²⁸⁰ See *Cobell v. Norton*, 240 F.3d 1081, 1104–06 (D.C. Cir. 2001). The *Cobell* litigation is a class action lawsuit filed in 1996 against the federal government on behalf of 500,000 Indians and their heirs. See Anne C. Mulkern, *Indians, Feds to Resume Talks Mediation Explored To Lift Impasse in Trust-Fund Case*, DENV. POST, February 24, 2004, at A1. The lawsuit alleges that the federal government has not kept adequate property and beneficiary records and that, as a result, the Indian beneficiaries are not receiving their due from the property that the government held on their behalf. See *Cobell*, 240 F.3d at 1085. Judge Royce Lamberth of the U.S. District Court of the District of Columbia has found two Secretaries of the Interior and one Secretary of the Treasury in contempt of court in the course of this litigation. See *Cobell v. Babbitt*, 37 F. Supp. 2d 6, 9 (D.C. 1999). The many twists and turns of this case are discussed at BLACKFEET RESERVATION DEV. FUND, INC., INDIAN TRUST: *Cobell v. Norton*, at <http://www.indiantrust.com> (last visited Mar. 7, 2004) (providing extensive information about the case and court documents).

²⁸¹ U.S. CONST. art. IV, § 4.

²⁸² Presumably, those areas of difficulty might vary from tribe to tribe.

²⁸³ See, e.g., Fletcher, *supra* note 251, at 46 ("The federal government has used this ward status for the purpose of exploiting Indians.").

B. The Federal Reaction to a World Without Plenary Power

Advocates of tribal autonomy might fear that once the federal government understands that it lacks a plenary power over Indian tribes, it will be more likely to end recognition of some or all Indian tribes. Alarmed by the potential consequences of unbridled tribal sovereignty, the federal government might choose to end recognition of Indian nations altogether and hasten the assimilation of Indians. For these reasons, advocates of tribal autonomy might dread, rather than welcome, a world without federal plenary power.

This possibility warrants serious consideration. Still, we must take some countervailing factors into account. First, the proposed framework for federal power does not augment the federal government's power to recognize other nations. Whether one accepts the framework or not, the federal government may continue to decide which nations, domestic and foreign, to recognize. This suggests that if the political branches wished to terminate Indian sovereignty, they could have already done so.²⁸⁴

Moreover, the political branches are unlikely to accept this framework and then proceed to end recognition of tribes. Restoration of Indian autonomy is one of the most important reasons to accept the proposed framework. On the other hand, if the political branches do not wish to empower Indian nations, they will most likely reject the framework and adhere to the status quo, which props up the plenary power theory. In other words, if the political branches accept the framework, thereby laying the plenary power doctrine to rest, the most likely result is that the tribes will gain greater autonomy.

Finally, the federal government does not face the choice of either losing plenary power (and thereby granting Indian tribes greater autonomy) or ending recognition of Indian tribes. As noted earlier, the Constitution does not permanently constrain federal power over Indian tribes. If either the federal government or the tribes sought to augment federal power, the Constitution poses no insurmountable barrier. Therefore, if it appeared that the federal government would end recognition of Indian nations rather than admit greater tribal autonomy, the tribes (with sympathetic elements in the federal government) could act to either restore plenary power or grant broad powers to the federal government. For all these reasons, the political branches' acceptance of the proposed framework would not likely end the federal government's recognition of Indian tribes as separate nations.

²⁸⁴ Between 1953 and 1968, Congress terminated recognition of over 100 tribes or bands. See WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 25–28, 55–58 (3d ed. 1998).

CONCLUSION

The plenary power doctrine has proven remarkably resilient. Though its supporting rationales have come and gone, the doctrine has endured for over a century. One might conclude that plenary power over Indians is here to stay—a permanent fixture of American constitutional law.

Yet the foundations of plenary power are crumbling. The enumerated powers doctrine, so clearly revitalized in the *Lopez* and *Morrison* cases, undermines the claim that Congress somehow enjoys plenary power over all Indian tribes. Moreover, the Supreme Court's recent anemic defense of plenary power does nothing to shore up the doctrine.²⁸⁵ In fact the more the Court attempts to make sense of the plenary power doctrine, the less sense the Court makes, for the doctrine is plainly untenable.²⁸⁶ If the Constitution's limited enumeration of power matters with respect to Alfonso Lopez or Antonio Morrison, it ought to matter equally when it comes to the descendants of Kagama.²⁸⁷

Does application of the enumerated powers doctrine lead to the conclusion that the federal government lacks a plenary power as to any particular tribe? Not at all. Indian law scholars discussing the scope of federal power have made the same mistake as the courts. They also treat the Indian tribes as if they are all fungible when it comes to the scope of federal power. But if the Constitution enables the federal government to acquire a plenary power over another nation, and if Indian tribes are differently situated when it comes to treaties and land ownership, tribes are not fungible. To the contrary, it is quite possible that the federal government has a plenary power over some of the tribes. Indeed, several Indian treaties appear to have granted the federal government just such a power.

The strange bedfellows, the courts and their academic critics, need to get out of their bed. To properly gauge federal power over Indian tribes, both must stop stereotyping Indian tribes and, instead, conduct a tribe-by-tribe analysis taking into account the treaties, land ownership, and other relevant circumstances of each tribe. Only then will America's sovereign wards truly come of age.

²⁸⁵ See *United States v. Lara*, 124 S.Ct. 1628 (2004).

²⁸⁶ In fairness to the Court it must be said that the issue of plenary power does not appear to have been briefed to the Court.

²⁸⁷ See *United States v. Kagama*, 118 U.S. 375, 383 (1886) (upholding the constitutionality of a federal act that criminalized, among other acts, murder committed on a reservation).