Domesticating Federal Indian Law

Philip P. Frickey*

"As every schoolchild learns," the Supreme Court has said, "our Constitution establishes a system of dual sovereignty between the States and the Federal Government."[1] What schoolchildren—and almost all law students—do not learn is that this story of sovereignty is radically incomplete. "Our Federalism"[2] came about through our colonialism. Accordingly, although sovereignty created by the United States Constitution is indeed dual, sovereignty within the United States is triadic: American Indian tribes have sovereignty as well. Precisely a century ago, the Supreme Court itself squarely recognized that tribal sovereignty is not "created by and springing from the Constitution,"[3] but rather is an inherent sovereignty that "existed prior to the Constitution"[4] and is, therefore, not subject to it.[5] Tribes today continue to exercise sovereignty in a

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* Faegre & Benson Professor of Law, University of Minnesota. T. Alexander Aleinikoff, S. James Anaya, Jim Chen, Carol Chomsky, Daniel Farber, Daniel Gifford, Carole Goldberg-Ambrose, Stephen Legomsky, Fred Morrison, Hiroshi Motomura, Gerald Neuman, Nell Jessup Newton, Todd Rakoff, Joseph William Singer, Gerald Torres, David Weissbrodt, and participants at faculty workshops at Harvard Law School and the University of Minnesota Law School provided helpful comments on a draft of this article. Laura Walvoord provided valuable research assistance.

Casebooks are rarely cited as scholarly sources, but for this project, which I began with little knowledge of either immigration law or international human rights, I found very educational the excellent books of THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION: PROCESS AND POLICY (3d ed. 1995); STEPHEN H. LEGOMSKY, IMMIGRATION LAW AND POLICY (1992); and FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS (2d ed. 1996).

1. Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).
2. Younger v. Harris, 401 U.S. 37, 44 (1971).
3. Talton v. Mayes, 163 U.S. 376, 382 (1896).
4. *Id.* at 384.
5. *See id.* at 385. In 1968, Congress by statute applied many Bill of Rights limitations to tribal action. *See* Indian Civil Rights Act of 1968, Pub. L. No. 90-284, tit. II, 82 Stat. 77 (codified as amended at 25 U.S.C. §§ 1301-03 (1994)).

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variety of important ways, including having a local police power over their members[6] as well as the authority to regulate nonmembers in some circumstances.[7]

What the Supreme Court has assumed that schoolchildren learn reveals more than merely an incomplete picture of sovereignty, however. Just a generation ago, and only one year after *Brown v. Board of Education*,[8] the Warren Court concluded that the federal government could unilaterally take the aboriginal lands of Indians without constitutional consequence, including any requirement of just compensation.[9] Writing for the majority, Justice Reed stated that "[e]very schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land."[10] Every learned schoolchild would be appalled by this point, for it cannot be defended as accurate, if incomplete. Instead, it is just plain wrong, a mixture of myth and ethnocentrism masquerading as past legal practice.[11]

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6. *See, e.g.*, United States v. Wheeler, 435 U.S. 313, 322 (1978) ("It is undisputed that Indian tribes have power to enforce their criminal laws against tribe members.").

7. *See, e.g.*, Duro v. Reina, 495 U.S. 676, 696 (1990) (explaining that tribes possess a "traditional and undisputed power to exclude persons whom they deem to be undesirable from tribal lands"); Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408, 438-44 (1989) (holding that a tribe may zone non-Indian land on a closed portion of a reservation); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 141 (1982) (holding that a tribe may tax nonmembers who conduct business on a reservation); Montana v. United States, 450 U.S. 544, 566 (1981) (explaining that a tribe may "retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe") (dictum).

8. 347 U.S. 483 (1954).

9. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 288-89 (1955). No Justice dissented from this conclusion about the unprotected status of aboriginal lands. Rather, the dissenting opinion argued that Congress by statute had recognized the Indians' title to the land and thereby rendered it property protected by the Fifth Amendment. *See id.* at 294 (Douglas, J., joined by Warren, C.J. & Frankfurter, J., dissenting).

10. *Id.* at 289-90.

11. One of the oddest things about Justice Reed's dictum is that *Tee-Hit-Ton* involved the taking of aboriginal property interests in Alaska, where no Seventh Cavalry ever waged war upon Natives. What federal governmental institution "conquered" the Tee-Hit-Ton, and when did it happen? Nell Jessup Newton persuasively argues that the institution had to be the Supreme Court and the year had to be 1955, the date of the decision. *See* Nell Jessup New-

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The problem for schoolchildren as well as the rest of us is that the assumptions we make as proud Americans about our country and its Constitution run headlong into an alternative reality when our vision is expanded to include the historical facts and the ongoing nature of the colonization of this continent. The involuntary displacement of indigenous peoples from their lands and their political subjugation by a self-proclaimed superior sovereignty is ironic, indeed, in a country that began by declaring itself independent of colonial status and that soon adopted a Constitution that has served as a model for restraining the abuse of public power. In both law and life, things are a good deal more complicated—both descriptively and normatively—than grade school history classes, high school civics classes, and law school constitutional law classes suggest.

The complexity has not been lost on the Supreme Court. Over a century ago, in *United States v. Kagama*,[12] it stated that "[t]he relation of the Indian tribes living within the borders of the United States, both before and since the Revolution, to the people of the United States has always been an anomalous one and of a complex character."[13] As an observation on American law, this conclusion was, and remains, a colossal understatement. That federal Indian law is a snarl of doctrinal complica-

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ton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HAST. L.J. 1215, 1241-44 (1980).

Justice Reed's choice of words suggests a direct slap at the preeminent scholar of federal Indian law, Felix Cohen, who had earlier challenged what "[e]very American schoolboy is taught to believe" about the transfer of Indian lands to the European colonists and their successors. *See* Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 34 (1947). *See generally* Newton, *supra*, at 1215 (noting the parallelism between the Cohen and Reed phrases). Cohen argued that in almost every instance tribes had relinquished the land by transaction rather than by conquest. *See* Cohen, *supra*, at 35. To be sure, he acknowledged that the government paid inadequate consideration in many instances. *See id.* at 42. Cohen hoped, however, that these inadequacies would be remedied through the recently adopted Indian Claims Commission process. *See id.* at 42-43.

In *Tee-Hit-Ton*, the Court apparently engaged in what can only be called judicial fiscal restraint. Had it concluded that aboriginal property interests were "property" for Fifth Amendment purposes, and that just compensation must be paid for taking such property, the federal government would have been exposed to very substantial liability in the Indian claims process. The Court as much as acknowledged that this concern influenced its conclusions. *See Tee-Hit-Ton*, 348 U.S. at 283 n.17 (noting that approximately nine billion dollars in claims and interest had accrued against the government).

12. 118 U.S. 375 (1886).

13. *Id.* at 381.

tions is probably the single thing most commonly known about it.[14] Most likely, it is also the only thing about it known by any sizable portion of the American legal community.

In *Kagama*, the Court translated the anomaly, if not the complexity, into law. It upheld the authority of Congress to enact legislation[15] criminalizing conduct between members of an Indian tribe while on its reservation. The Court candidly acknowledged that this conclusion did not easily coincide with ordinary constitutional interpretation. It began by noting that the Constitution "is almost silent in regard to the relations of the government which was established by it to the numerous tribes of Indians within its borders."[16] The Court then forthrightly rejected the only theory put before it that might straightforwardly reconcile the statute with Article I—that the law was somehow within congressional authority under the Indian Commerce Clause—because the law lacked any substantial nexus with commerce.[17] Nonetheless, the Court justified this intrusion of supervening federal authority into a wholly intratribal matter on two grounds—one primarily descriptive, the other normative—spun together in a whirlwind of circular reasoning. Descriptively, the Indians were within the boundaries of the United States, owed allegiance to no foreign power, and, the Court assumed, were incapable of providing for themselves.[18] Normatively, "[f]rom their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, *and with it*

14. The Justices themselves have admitted their frustration with the complexities and seeming insignificance of federal Indian law. *See* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 382-83 (1993). Commentators have bemoaned the confusions and inconsistencies of this law as well. *See id.* at 418 n.158.

15. Major Crimes Act, ch. 341, 23 Stat. 385 (1883-1885).

16. *Kagama*, 118 U.S. at 378. In this conclusion, at least, the Court was on safe ground. The Constitution mentions Indians only three times—once to authorize Congress to regulate "commerce . . . with the Indian tribes," U.S. CONST. art. I, § 8, cl. 3, and twice more to exclude "Indians not taxed" from the population base for the apportionment of the House of Representatives. U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV, § 2.

17. *Kagama*, 118 U.S. at 378-79. This conclusion remains valid today as well. *Cf.* United States v. Lopez, 115 S. Ct. 1624, 1626-36 (1995) (invalidating a federal statute outlawing intrastate noncommercial activity as beyond Congress's authority to regulate interstate commerce); *infra* notes 73 and 164 (discussing *Lopez*).

18. *Kagama*, 118 U.S. at 379-80.

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the power."[19]

Kagama was the first case in which the Supreme Court essentially embraced the doctrine that Congress has plenary power over Indian affairs.[20] Its apparent inconsistency with the most fundamental of constitutional principles—the *McCulloch*[21] understanding that Congress ordinarily possesses only that authority delegated to it in the Constitution—is an embarrassment of constitutional theory. Its slipshod method of bootstrapping a congressional plenary power over Indian affairs is an embarrassment of logic. Its holding, which intimates that congressional power over Indian affairs is limitless, is an embarrassment of humanity.

Almost two decades later, in *Lone Wolf v. Hitchcock*,[22] the Court avoided the illogic of *Kagama* while nonetheless further entrenching congressional plenary power. In *Lone Wolf*, the Court concluded that exercises of congressional authority over Indian affairs were nonjusticiable political questions.[23] The Court subjected domestic Indian treaties to the same status under domestic law as international treaties: both may be unilaterally abrogated by Congress without fear of domestic legal consequences.[24] In reaching this conclusion, the Court conjoined the plenary power over Indian affairs with a similarly expansive authority over immigration recognized in the *Chinese Exclusion Case*.[25]

In a legal system that prides itself as based on a Constitution that delegates only specified powers to its national legislature and then cabins the exercise of that authority by a Bill of Rights, it may seem remarkable that Congress could have ever

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19. *Id.* at 384 (emphasis added). The only alternative considered, leaving governance of Indians to states, was rejected because "[t]hey owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies." *Id.*

20. For overviews of the development of the plenary power doctrine, see Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 207-28 (1984); Laurence M. Hauptman, *Congress, Plenary Power, and the American Indian, 1870-1992, in* EXILED IN THE LAND OF THE FREE 317 (Oren Lyons et al. eds., 1992).

21. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

22. 187 U.S. 553 (1903).

23. *Id.* at 566.

24. *Id.*; *see also* The Cherokee Tobacco, 78 U.S. 616, 620-22 (1870) (treating Indian treaties and federal statutes as equivalent sources of law, such that a treaty may be abrogated by a subsequent statute).

25. 130 U.S. 581 (1889).

been accorded a "plenary power" in these two fields.[26] Even more remarkably, plenary power remains, at least in form, the law of both.[27] A less palatable contemporary constitutional doctrine would be hard to identify, for it denies the immigrant the dignity of fair treatment and the Native the dignity of self-determination and cultural survival.

In this Article, I will critically examine the constitutional problems arising from the plenary power in federal Indian law. This assessment will require, first, a more complete review of the late-nineteenth-century origins of plenary power in the field. This review, in turn, necessitates revisiting the parallel development of plenary power in the allied field of immigration law. As I will explain, although the plenary power doctrines in both fields are similar, reform cannot take the same path for each of them. To be sure, the doctrines in both should be domesticated, in two senses of that term: each doctrine needs to be civilized by domestic law clearly enforceable in American courts. Nonetheless, the theory by which domestic law can perform this reform must be quite different in the two fields. Indeed, I will suggest that one potentially appropriate tack taken to ameliorate the anomalous and harsh aspects of immigration law would be disastrous for federal Indian law.

Paradoxically, I shall argue that the domestication of federal Indian law may require internationalizing the way we think about the field—and the way we think about how the Constitution works in this unique area of the law. For I shall

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26. Throughout this Article, I will follow conventional usage by defining the field of "immigration law" to mean "that body of law that governs the admission and expulsion of aliens." Stephen H. Legomsky, *Ten More Years of Plenary Power: Immigration, Congress, and the Courts*, 22 HAST. CON. L.Q. 925, 925 n.2 (1995); *see also* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1626 (1992) (using same definition). My argument is that this subset of the law concerning aliens is similar to federal Indian law in important ways. "The more general law of aliens' rights and obligations lends itself to fewer generalizations," Legomsky, *supra*, at 925, and is less similar to federal Indian law.

27. On federal Indian law, see Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."); on immigration law, see Fiallo v. Bell, 430 U.S. 787, 792 (1977) (describing Congress's "broad power over immigration and naturalization"); Kleindienst v. Mandel, 408 U.S. 753, 765-66 (1972) (emphasizing the numerous reaffirmations of Congress's plenary power over immigration). *But cf. infra* text accompanying notes 52-76 (discussing implications of recent decisions on the plenary power over Indian affairs).

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contend that, properly understood, plenary power in federal Indian law, like that in immigration law, arose from conceptions of the inherent sovereignty of nations under international law. All nations have inherent authority to control the influx of foreigners. Only those nations created by colonization, however, 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. All this proves, however, is that the United States government should have authority over Indian affairs. In this sense, congressional "plenary" power at most simply means "complete and exclusive"—both internationally vis-à-vis other nations and domestically vis-à-vis the states of the union—but not "absolute" in either sphere. In short, the power over Indian affairs, like all other congressional powers, should be subject to limitation through the judicial process.

Moreover, if international law notions of inherent sovereignty provide the only justification for even this more limited conception of congressional power, it follows that the Constitution is inextricably linked to international law on issues of Indian affairs. Thus, the interpretation not only of the existence and nature of congressional power, but of its constitutional limits as well, should be informed by international law, including the evolving component of it concerning the rights of indigenous peoples. On this understanding, the emerging international law concerning the rights of indigenous peoples becomes more than simply a set of externally derived norms that do not bind the United States without its formal consent. Instead, these norms have true linkage to our Constitution and provide a domestic interpretive backdrop for both constitutional interpretation and quasi-constitutional interpretive techniques, such as canons for construing federal Indian treaties and statutes. Through several examples, I hope to demonstrate that internationalizing our understanding of federal Indian law would revive a Constitution now moribund in the field and would provide further legitimacy to interpretive techniques that have long been at the heart of federal Indian law, but that today have less force in the Supreme Court.

I write against the backdrop of my earlier work in this field, which has attempted to demonstrate several basic facets of federal Indian law. First, I have contended that federal In-

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dian law is doctrinally chaotic, awash in a sea of conflicting, albeit often unarticulated, values, and that reconstruction of the field should be accomplished in a pragmatic, contextually sensitive way.[28] Second, I have argued that this reconstruction should not be ad hoc, but instead should be structured around the basic strategies embraced by Chief Justice Marshall in his foundational opinions in the field.[29] I have argued that Marshall attempted to mediate the extraordinary tensions between colonialism and constitutionalism through interpretive techniques that conceptualized Indian treaties and other articles of positive law as constitutive documents—that is, text constituting the institutions and relationships of an ongoing sovereign-to-sovereign relationship, much like the United States Constitution operates to arrange governmental powers and their limits within our federal system.[30] Marshall's mediating approach essentially considered the historical realities of colonization to be beyond judicial reconsideration, but it addressed new questions of the unilateral displacement of indigenous peoples by approaching these constitutive documents through a complex interpretive calculus, represented by the canons of interpretation in federal Indian law, that attempted to preserve indigenous rights against all but clear congressional deprivations.[31] This interpretive strategy put the complete burden of colonization upon the centralized legislature—the Congress. Thus, the states were excluded from the process of colonialism, and Congress bore the responsibility of identifying Indian rights, weighing whether they should be abrogated, and drafting clear text to effect any loss of those rights.[32]

The present Article addresses two primary gaps in this work. The first is that the interpretive approach of Chief Justice Marshall has lost much of its force in the current Supreme Court.[33] This Article attempts to provide strong justifications in contemporary law as well as contemporary norms for revital-

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28. *See* Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CALIF. L. REV. 1137, 1142-1209, 1216-22 (1990).

29. *See id.* at 1222-30; Frickey, *supra* note 14, at 406-17.

30. *See* Frickey, *supra* note 14, at 427-29; *cf.* RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 270-82 (1980) (arguing for a relationship of "treaty federalism" between tribes and the United States).

31. *See* Frickey, *supra* note 14, at 412-17.

32. *See id.* at 417.

33. *See id.* at 422-26, 432-37.

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izing that methodology. Second, and even more fundamentally, the method that I have ascribed to Marshall assumes that Congress does have something approximating a plenary power over Indian affairs, so long as Congress exercises that power through clear positive law. That remains my understanding of his approach, but must we be satisfied with this absence of judicial review today? After all, we live five centuries after the colonial process began and one and one-half centuries after Marshall considered these questions, in a time in which colonialism has fallen into complete disrepute and in which the institution of judicial review is a good deal less fragile than in Marshall's time. Just as, in my view, Marshall struggled within his own situatedness to mediate constitutionalism and colonialism,[34] we, too, can renew that struggle in today's quite different context. I argue that we can break new conceptual and doctrinal ground while remaining steadfast to Marshall's basic human instinct to mediate our constitutional and colonial traditions rather than simply deferring to the latter. In short, we can do better today, and doing so is perfectly consistent with Marshall's approach to these conundrums.

The timing of this proposal is propitious. This year, for the first time in history, the Supreme Court struck down a federal statute involving Indian affairs on structural constitutional principles.[35] Although it may be an exaggeration to say that federal Indian law has come, at last, to a constitutional crossroads, the time is ripe for considering an exit from the well worn but warped path of plenary power.

I. PLENARY POWER TODAY: THE DOMESTIC CONTEXT

The way to begin this assessment is to return to the era in which plenary power developed in both federal Indian law and immigration law. When read together, the *Chinese Exclusion Case*[36] and *Lone Wolf*[37] demonstrate the essentially unlimited power of Congress over immigration and Indian affairs at the turn of this century.

The first of these, the *Chinese Exclusion Case*, involved an 1880 treaty with China that suspended immigration from

34. *See id.* at 393-98.

35. *See* Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996); *infra* text accompanying notes 52-76 (discussing *Seminole Tribe*).

36. 130 U.S. 581 (1889).

37. 187 U.S. 553 (1903).

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China but preserved the right of Chinese citizens already here "to go and come of their own free will and accord."[38] The federal government gave Chinese citizens who temporarily returned to their homeland federal certificates that entitled them to reenter the United States. In 1888, Congress enacted a statute unilaterally abolishing the right of free exit and entry,[39] effectively stranding people who were temporarily in China, even though they possessed the reentry certificates. The Court concluded that congressional abrogation of an international treaty created nonjusticiable political questions that were "conclusive upon the judiciary."[40] Any relief would have to come from international, rather than domestic, law. This conclusion essentially relegated the victims to asking the Chinese government to negotiate with the American political branches for redress or to take retaliatory measures allowed under international law.

Lone Wolf involved a treaty between the federal government and an Indian tribe providing that no further cession of tribal land to the federal government could occur without the agreement of three-fourths of the adult male members of the tribe. Tribal members alleged that federal agents had fraudulently obtained the requisite signatures to a land-cession agreement. In any event, Congress ultimately enacted a statute compelling cession of tribal land that differed from the agreement in various respects. The Supreme Court in *Lone Wolf* refused to invalidate this breach of the treaty. It stated that "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one."[41] To be sure, the Court stated that "a moral obligation rested upon Congress to act in good faith in performing the [treaty] stipulations entered into on its behalf."[42] Nonetheless, the Court cited the *Chinese Exclusion Case* and concluded that, "as with treaties made with foreign nations, . . . the legislative power might pass laws in conflict with treaties made with the Indians."[43]

Since that time, immigration law and federal Indian law

38. Treaty of Nov. 17, 1880, U.S.-China, 22 Stat. 826, 827 (1881-1883).
39. Act of Oct. 1, 1888, 25 Stat. 504 (1887-1889).
40. *Chinese Exclusion*, 130 U.S. at 606.
41. *Lone Wolf*, 187 U.S. at 565.
42. *Id.* at 566.
43. *Id.* (citing The Chinese Exclusion Case, 130 U.S. 581, 600 (1889)).

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have stood together well outside the "constitutional law mainstream."[44] Although there may be many reasons for this extraordinary deference in both fields, probably the major one is sovereignty.[45] Foreign citizens and members of Indian tribes are full-fledged members of the polity of a sovereign other than the United States, which in turn has a sovereign-to-sovereign relationship with the United States. Federal regulation based on alienage or Indian status is therefore conceived of as a political classification, rather than one defined by race or other "discrete and insular minority" status.[46]

Although the implications of sovereignty distort both immigration law and federal Indian law, the latter seems the more anomalous. Unlike in immigration law, Congress exer-

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44. *See* Motomura, *supra* note 26, at 1691 & n.337.

45. Several other arguments for special judicial deference to immigration measures have little potential application in the context of federal power over Indian affairs. Legomsky notes that courts have sometimes considered aliens as having simply the revocable license of a guest. Legomsky, *supra* note 26, at 927-28. He further states that aliens might be considered as having manifested insufficient allegiance to the United States to become full beneficiaries of constitutional protections. *Id.* at 928. Neither of these notions applies to Native Americans, who by definition are American citizens today. *See infra* note 47 and accompanying text (discussing Indians' status as citizens). Legomsky also notes that courts have sometimes said that aliens should not have the "unfair advantage" of full constitutional rights when, under international law, they retain certain rights based on foreign citizenship. Legmosky, *supra* note 26, at 927-28. Again, this has little salience in the context of American Indians, for tribes lack full sovereignty under international law. *See infra* text accompanying notes 48-50 (describing Indians' lack of full international sovereignty).

46. The reference is, of course, to the theory associated with *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), under which discrete and insular minorities should receive special protection against prejudiced governmental decisions, and the elaboration of this theory found in JOHN HART ELY, DEMOCRACY AND DISTRUST (1980). The theory explains the Supreme Court's application of rigid constitutional scrutiny to most state governmental classifications that disadvantage aliens. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 373-83 (1971) (striking down denial of welfare benefits to noncitizens lawfully resident in the state). By analogy, the same approach should apply to state governmental discrimination against Native Americans. *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 646-49, 653-54, 658-60 (Rennard Strickland ed., 1982) [hereinafter HANDBOOK OF FEDERAL INDIAN LAW]. The premise of both lines of cases is that states ordinarily do not have any rational and legitimate sovereign purpose in treating aliens or Native Americans as different from other residents. In other words, the political (sovereign) aspects of alienage and membership in an Indian tribe are federal, not state, concerns. For federal Indian law, that principle is as old as *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). *See infra* text accompanying notes 97-106 (discussing the *Worcester* rationale).

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cises its plenary power in federal Indian law over persons who today are uniformly resident citizens.[47] Moreover, even at the turn of the century, Indians who were not United States citizens were essentially nationals of this country who lacked citizenship in any international sovereign.[48] Thus, unlike the Chinese citizens victimized in the *Chinese Exclusion Case*, the non-American sovereignty to which Indians owe allegiance—their tribe—is a "domestic dependent nation" involuntarily wedded into a "ward-guardian" relationship with the United States rather than a full-fledged international sovereignty.[49] The tribe has no capacity to use the retaliatory tools of international law—trade embargoes, cessation of relations, war—to seek to change congressional policies, nor has it access to any international forum to seek redress.[50] Moreover, unlike an alien, an American Indian who is fed up with the treatment accorded in the United States cannot leave and return to her native land and culture. If American Indian tribes as sovereigns and American Indian culture are to survive, they can only survive in the United States.

If, despite the backdrop of international law and sovereignty, there has been this seemingly complete domestication of federal Indian law issues, one might well expect American courts to be more generous in interpreting the Constitution as a source of protections for Indians than for noncitizen immigrants. Remarkably, however, constitutional judicial review has made more inroads into congressional power over immi-

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47. *See* Citizenship Act of 1924, ch. 233, 43 Stat. 253, 253 (1924) (codified as amended at 8 U.S.C. § 1401(b) (1994) and conferring citizenship upon "all non-citizen Indians born within the territorial limits of the United States").

48. Before the passage of the Citizenship Act of 1924, the citizenship of a Native American generally depended upon the effect of particular federal statutes or treaties upon her tribe. *See* HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 46, at 642-45. This was so because the adoption of the Fourteenth Amendment, which conferred citizenship upon all persons born "in the United States, and subject to the jurisdiction thereof," U.S. CONST. amend. XIV, § 1, was held inapplicable to Indians who had been born under tribal authority (and thus had been immediately subject to the primary jurisdiction of their tribe, not the federal government). *See* Elk v. Wilkins, 112 U.S. 94, 104-09 (1884). Because no foreign nation could confer citizenship upon Indians, *see Worcester*, 31 U.S. at 544 (explaining that the colonizing European nation had exclusive relationship of sovereignty with tribes within its colonial domain), Indians who were not citizens of the United States were apparently without citizenship under international law.

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

50. *See* Carole Goldberg-Ambrose, *Not "Strictly" Racial: A Response to "Indians as Peoples,"* 39 UCLA L. REV. 169, 170 (1991).

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gration than over Indian affairs.[51]

Until this year, an overview of congressional plenary power over Indian affairs was simple. As one leading commentator put it, "[w]hatever Congress wants, Congress gets."[52] This year, in *Seminole Tribe v. Florida*,[53] the Court invalidated a federal statutory provision concerning Indian affairs on Eleventh Amendment grounds. Assessing whether *Seminole Tribe* signals any meaningful departure from the heretofore established pattern of judicial restraint first requires an understanding of what at least had been the settled nature of plenary power.

Although, as *Kagama* itself strongly implies, the text of the Constitution lacks much of a hint of any plenary power,[54] the Court had never struck down a federal statute regulating Indian affairs on structural constitutional grounds until *Seminole Tribe*. Structural constitutional principles have not stopped Congress from invading—indeed, even abolishing—tribal sovereignty,[55] or from intruding upon core state functions in regulating Indian affairs.[56] Similarly, in this area, the Court

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51. See Legomsky, *supra* note 26, and Motomura, *supra* note 26, for interesting analyses of inroads upon plenary power in immigration law.

52. Newton, *supra* note 20, at 285.

53. 116 S. Ct. 1114 (1996).

54. *See supra* text accompanying note 16 (noting the Constitution's relative silence regarding Indian relations).

55. *See, e.g.*, Menominee Indian Termination Act of 1954, 68 Stat. 250, *repealed by* Pub. L. No. 93-197, § 3(b), 87 Stat. 770 (1973) (mandating federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin). In *Menominee Tribe v. United States*, 391 U.S. 404 (1968), the Court narrowly interpreted the Termination Act to preserve pre-existing hunting and fishing rights. *See id.* at 411.

56. Courts originally understood the federal power to exclude states from any role on an Indian reservation. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832). Later, the Supreme Court interpreted treaties as reserving rights of access to off-reservation resources necessary for the reservation and rejected any federalism objection to these rights. *See* Winters v. United States, 207 U.S. 564, 574-78 (1908); United States v. Winans, 198 U.S. 371, 377-84 (1905). In Act of Aug. 15, 1953, Pub. L. No. 280, 67 Stat. 588 (codified as amended at 18 U.S.C. §§ 1161-62, 25 U.S.C. §§ 1321-22, 28 U.S.C. § 1360 (1994)), Congress unilaterally delegated criminal jurisdiction over Indian country to several states and gave the other states the unilateral option to embrace this scheme as well. Congress provided states with no funding for these increased governmental services. Recently, Congress preempted all state laws prohibiting or burdening the use of peyote as a sacrament in a Native American religious service. *See* Pub. L. No. 103-344, § 2, 108 Stat. 3125 (1994) (codified at 42 U.S.C. § 1996 (1994)). Another fairly recent federal statute invading the core police power is the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (1994). *But see infra* note 75 (citing case law narrowly

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has never acknowledged any fundamental constitutional rights, such as the right to tribal or cultural integrity. Nor has the Court provided serious scrutiny to claims that tribes or individuals, whether Indian or non-Indian, have been subjected to discriminatory federal classifications based on race,[57] even though a complete Title of the United States Code is replete with classifications that turn on Indian status.[58] Indeed, only relatively recently did the Court explicitly repudiate the extraordinary notion that congressional acts in the field of Indian affairs are nonjusticiable political questions.[59] The Court has continued to use "plenary power" as a term of art in federal Indian law and has routinely assumed that the power is somehow both authorized in Article I[60] and immune from meaningful scrutiny under other constitutional provisions that ordinarily constrain congressional authority.[61]

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interpreting the Act). For discussion of whether the judicial refusal to protect states against such federal legislation will continue, see *infra* text accompanying notes 73-76.

57. *See infra* note 74 (describing the Court's treatment of federal Indian law as based on a political rather than racial classification).

58. *See* 25 U.S.C. §§ 1-4061 (1994).

59. *See* United States v. Sioux Nation, 448 U.S. 371, 413 (1980); Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 84 (1977).

60. *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) ("The central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.").

61. To my knowledge, in only four cases before *Seminole Tribe* has the Court found constitutional infirmity with a congressional action involving Indians. In *Muskrat v. United States*, 219 U.S. 346, 351-63 (1911), the statute called upon the courts to issue an advisory opinion. In three other cases, the Court found an invasion of individual property rights. *See* Hodel v. Irving, 481 U.S. 704, 713-18 (1987); Choate v. Trapp, 224 U.S. 665, 677-78 (1912); Jones v. Meehan, 175 U.S. 1, 31-32 (1899); *cf.* United States v. Sioux Nation, 448 U.S. at 423-24 (upholding an award of compensation for taking of tribal lands). Thus, the Court has never invalidated a statute on the ground that it violated any collective tribal sovereignty interests. The current general standard for constitutional review of federal action in Indian affairs is supposed to be a modified rational basis test inquiring whether "the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians." Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 74 (1977) (quoting Morton v. Mancari, 417 U.S. 535, 555 (1974)). This standard may seem slightly more aggressive than the usual rational-basis inquiry. *See, e.g.*, Federal Communications Comm'n v. Beech Communications, Inc., 508 U.S. 307, 309 (1993) (implying that a congressional regulation of cable television providers would withstand constitutional scrutiny if justified by "any conceivable rational basis"). In practice, however, the Indian law test and garden-variety rational basis review seem indistinguishable in their extreme deference to legislative judgments. *See* Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463, 501-02 (1979) (explaining that classifications in the Indian law context are "valid unless they bear no

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By virtue of its plenary power, Congress has run roughshod over tribal interests. As *Kagama* illustrates, it has federalized criminal regulation in Indian country.[62] Under the policy of allotment, Congress deprived Indians of more than two-thirds of their land base between 1887 and 1934.[63] As al-

rational relationship to the State's objectives"); United States v. Antelope, 430 U.S. 641, 646 (1977) (refusing to apply heightened scrutiny because "federal regulation of Indian affairs is not based upon impermissible classifications").

62. In addition to the Major Crimes Act upheld in *Kagama*, which provides federal jurisdiction over serious offenses committed by an Indian in Indian country, federal jurisdiction is also available under 18 U.S.C. § 1152 (1994), which brings general federal criminal laws into Indian country for "interracial crimes" (where the victim or defendant is Indian and the other person concerned is non-Indian). The general federal criminal laws include the Assimilative Crimes Act, 18 U.S.C. § 13 (1994), which purports to incorporate by reference all state criminal law needed to fill gaps in the federal criminal provisions. *See generally* Robert N. Clinton, *Criminal Jurisdiction over Indian Lands: A Journey Through a Jurisdictional Maze*, 18 ARIZ. L. REV. 503, 504-76 (1976) (exploring the conflicts in jurisdiction among federal, state and tribal courts).

63. *See* HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 46, at 138. Under allotment, "surplus lands" on the reservation became available for non-Indian homesteading. *See id.* The United States took much of the remainder of tribal land out of collective ownership and carved it up into small allotments held in trust for individual Indians. *See id.* When the trust period expired, the allottees often lost the allotted land, because it became alienable and subject to state taxation, and, ultimately, tax foreclosure. *See* ARELL MORGAN GIBSON, THE AMERICAN INDIAN: PREHISTORY TO THE PRESENT 507-10 (1980).

Lone Wolf refused to entertain any constitutional challenge to allotment, which was arguably the most disastrous policy in Indian affairs next to the outright massacre or forced removal of Indians from their homelands. The Indian Reorganization Act of 1934, §§ 1-2, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-62 (1994)), forbids further allotments and extends into perpetuity the trust restrictions on allotted land. The statute did not purport to undo its past effects, however. *See* County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 276-77 (1992). Today, much land remains in the allotment format. Solem v. Bartlett, 465 U.S. 463, 467 (1984). On allotted reservations, a "checkerboard" pattern of land ownership has resulted: some land is tribal land, some land is owned by non-Indians in fee simple, and some land remains as allotments for individual Indians. *Id.* Criminal and civil jurisdiction over such areas is difficult for any sovereign to exercise. *Id.* at 471-72 n.12. Moreover, because in many circumstances the allotments are too small for the individual allottee to farm, ranch, or harvest natural resources such as timber effectively, and because over the generations the beneficial ownership of many allotments has passed by intestate succession and is now owned in small fractional shares by many descendants, the federal government as trustee is left with the management responsibilities for allotments almost by default. The federal government has not always husbanded these resources consistent with its fiduciary responsibilities. For discussion of the overall problem in a series of decisions that ultimately upheld a finding of breach of fiduciary duty on the part of the United States, see *United*

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ready mentioned,[64] in the 1950s, a Congress bent on assimilating Indians actually passed legislation that purported to terminate the sovereignty of a number of tribes.[65] In that era, Congress also delegated criminal jurisdiction in Indian country to several states and provided the rest of the states with the unilateral authority to opt into this scheme,[66] all the while providing the states with no financial assistance to pay for these new responsibilities.

That the constitutional void in federal Indian law is harsh, anomalous, and merits reconsideration seems beyond question. Several scholars have taken up this point, contending that congressional plenary power is neither authorized by constitutional text nor consistent with constitutional limitations on federal authority.[67] Although these criticisms have made no inroads upon the federal judiciary, perhaps federal Indian law reformers can at least take heart that they now have allies in an allied field. In recent years, several scholars have lamented the anomalous status of immigration law and proposed reforms to neuter the plenary power doctrine by bringing the field into the mainstream of contemporary public law.[68]

States v. Mitchell, 463 U.S. 206, 224-28 (1983) and *United States v. Mitchell*, 445 U.S. 535, 536-46 (1980).

64. *See supra* text accompanying note 55 (discussing congressional abolition of tribal sovereignty).

65. *See* Charles F. Wilkinson & Eric R. Boggs, *The Evolution of the Termination Policy*, 5 AM. IND. L. REV. 139, 158-62 (1977).

66. *See* Pub. L. No. 280, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. §§ 1161-62, 25 U.S.C. §§ 1321-22, 28 U.S.C. § 1360 (1994)). It was only in 1968 that Congress gave tribes any say in the matter, and then only for future attempts by states to opt into this arrangement. *See* Indian Civil Rights Act of 1968, tit. IV, Pub. L. No. 90-284, 82 Stat. 78, 81 (codified at 25 U.S.C. §§ 1321-22 (1994)).

67. *See* Milner Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1; Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979 (1981); Newton, *supra* note 20. For a debate over the nature and appropriateness of the plenary power, see Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219; Robert Laurence, *Learning to Live with the Plenary Power of Congress over the Indian Nations: An Essay in Reaction to Professor Williams' Algebra*, 30 ARIZ. L. REV. 413 (1988); and Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence's Learning to Live with the Plenary Power of Congress over the Indian Nations*, 30 Ariz. L. Rev. 439 (1988).

68. *See* T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862 (1989); Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Prog-*

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Hiroshi Motomura, for example, argues that the mainstreaming of immigration law is already occurring through the use of procedural protections rooted in the Due Process Clause as a disguised way of developing substantive rights.[69] Motomura persuasively contends that a more direct constitutional approach would remove many of the remaining idiosyncrasies of immigration law, including subjecting classifications disadvantaging immigrants to meaningful equal protection challenge.

Indeed, the analogy between classifications based on immigration and those based on the paradigmatic equal protection concern—race—seems powerful. Those victimized by immigration law often seem to have discrete and insular minority status, and their legal complaint is that, although they are similarly situated to citizens in all relevant respects, they are being harshly and dissimilarly treated.[70] The reform movement in immigration law seeks to uncouple the immigrant from any collective sovereignty (her country of citizenship) so that she is seen as an individual. When so viewed, this individual is similarly situated to citizens in most relevant respects and, therefore, deserves similar treatment in most instances. This is the classic equal protection argument in the post-*Brown v. Board of Education* era: the message is to conceive of outsiders not as members of some inferior group, but as individuals who deserve the same treatment afforded those who are insiders. In short, the argument is individualistic, integrationist, and constitutionally conventional. It contends that the backdrop of international law and group sovereignty to immigration law, which is the basis for the harsh doctrines disadvantaging immigrants vis-à-vis citizens, should, in the face of a persuasive demonstration that immigrants and citizens are similarly situated, be replaced by more normatively attractive, less anomalous, and more conventional American

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eny, 100 HARV. L. REV. 853 (1987); Legomsky, *supra* note 26; Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Motomura, *supra* note 26; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 600-13 (1990); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 317, 341-90 (1984).

69. *See* Motomura, *supra* note 26, at 1656-704. For a discussion of other potential constitutional inroads upon plenary power in immigration law, see Legomsky, *supra* note 26, at 930-34 and Legomsky, *supra* note 68, at 296-303.

70. *See supra* note 46 (describing the theory of "discrete and insular minorities").

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domestic public law doctrines. It is, then, an effort to domesticate immigration law, in more than one sense.

Domestication by mainstreaming is not, however, the answer to what ails federal Indian law. Although both immigration law and federal Indian law share a plenary power based on outmoded notions of sovereignty, there the similarity of the fields may end. The most normatively attractive aspects of federal Indian law have respected tribal independence and federal supremacy over state governments in Indian affairs.[71] The

71. This conclusion is, of course, based on a cluster of normative and empirical judgments that are subject to debate. Essentially all major scholarship in federal Indian law is based on similar assumptions and focuses not so much on the appropriateness of the conclusion, but on how best to implement it in our public law. *See, e.g.*, Clinton, *supra* note 67, at 989-90 (calling for respect of tribal sovereignty in order to protect Indian culture); Frickey, *supra* note 14, at 383-84 (citing the absence of constitutional language relating to Indian relations as evidence of the framers' intention to respect tribal soverignty); Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, *supra* note 67, at 294-97 (calling for the tribal nations to assert their "legal voice and systematically combat the abuse of their human rights"). Several recent symposia on federal Indian law topics reveal these shared assumptions. *See Indian Law Symposium*, 46 ARK L. REV. 1 (1994); Symposium, *Rules of the Game: Sovereignty and the Native American Nation*, 27 CONN. L. REV. 495 (1995). Of course, simply because a normative conclusion seems self-evident to the scholars working in the field does not make it correct.

This is not the place for a full-blown defense of these working assumptions. In a nutshell, my own belief that these assumptions are correct is based on the following conclusions. Our Western traditions of limited government, consent of the governed, and respect for personal autonomy—embodied in that bundle of familiar assumptions we make in constitutional law, torts, property, and contracts—are simply incompatible with our history and our contemporary experience of colonizing this continent by unilaterally displacing indigenous peoples, either without any manifestation of consent or with inadequate consent found in documents written and negotiated in a foreign language against a backdrop of coercion. The justifications articulated at the time of colonization have little salience today. *See infra* text accompanying notes 78-84 (noting historical justifications for colonization). In addition, the international community has all but repudiated future acts of colonization. *See infra* note 177 (describing the international decolonization movement). Moreover, as a practical matter, even arguably well-meaning but unilateral non-Indian efforts to assimilate Indians have been abject failures. *See, e.g.*, Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 63-76 (1995) (discussing the allotment of reservations at the end of the nineteenth century and efforts in the 1950s to terminate tribes and to encourage relocation of reservation Indians to urban centers). A strong argument can be made, then, not simply from principles of autonomy but also from the perspective of comparative institutional competence, that tribes ought to be presumed the appropriate decisionmakers concerning their futures. In addition to these historical, theoretical, institutional, and practical reasons, there are positivist justifications for tribal sovereignty and separation as well—American federal common

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most protective aspects of federal Indian law have thus viewed Indians as having group rights—indeed, group sovereignty. Unlike in immigration law, where the person seeking entry and permanent residence in the United States ordinarily should not be disadvantaged by his allegiance to another sovereign,[72] in federal Indian law the tribal member's allegiance to his tribe is the legitimate element that distinguishes her from others. Uncoupling the tribal member from the sovereignty of her tribe would destroy most of what is unique and worth preserving in federal Indian law. Unlike reform in immigration law, federal Indian law must retain its collectivist, separatist, and unique legal elements. Yet it is precisely those aspects of federal Indian law that would be most jeopardized by the impulse to mainstream.

Indeed, there is a substantial risk that any diminution of congressional plenary power over Indian affairs in the near future will be rooted in an impulse to mainstream the field—and thus will come at the expense of the tribes, rather than for their benefit. For the treatment of tribes not as ethnic enclaves, but as sovereigns independent from the states and involved in a dependent, government-to-government relationship with the federal government, stands in stark contrast to the current Court's impetus to protect state sovereignty from federal intermeddling[73] and to forbid the congressional use of ra-

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law has always allowed tribal sovereignty, albeit at the sufferance of Congress, and congressional policy since the 1950s has favored tribal self-determination. *See, e.g.*, HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 46, at 182-88 (describing the abandonment of termination policy). For all these reasons, it seems to me that, at a minimum, the burden of argumentative persuasion is on the opponent of tribal sovereignty and separateness.

72. This is not to suggest that arguments based on group affiliation or sovereignty are necessarily irrelevant in immigration law. The argument that immigration law should be reconceptualized by considering the immigrant as an individual seems to me to be an intriguing and important one, but of course, upon reflection, the scholars in the field might justifiably supplement it with some arguments rooted in sovereignty or, of course, reject it altogether in favor of some other theory.

73. *See, e.g.*, United States v. Lopez, 115 S. Ct. 1624, 1626-34 (1995) (invalidating a congressional attempt to criminalize possession of guns near schools pursuant to the Commerce Clause); New York v. United States, 505 U.S. 144, 187-88 (1992) (invalidating as violative of the Tenth Amendment a congressional mandate that forces states that have failed to develop a plan for storage of low-level radioactive waste to take title to it).

For a recent decision invalidating a federal Indian statute on constitutional structural grounds involving the separation of powers rather than federalism, see *South Dakota v. United States Dep't of the Interior*, 69 F.3d 878, 881-89 (8th Cir. 1995) (invalidating § 5 of the Indian Reorganization Act, 25

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cial classifications even for the benefit of historically disadvantaged groups.[74] Moreover, the Court's current literalist approach to the interpretation of statutes and other positive law is deeply inconsistent with the interpretive practices of federal Indian law, where canons of interpretation have stood guard against the abuse of the plenary power by protecting Indian rights and interests against all but explicit congressional deprivation.[75]

The Court's recent decision in *Seminole Tribe* fits uneasily within either this prevailing understanding of an essentially limitless congressional plenary power or my proposed reconception of it. *Seminole Tribe* held that the Eleventh Amendment forbids Congress from subjecting a state to suit in federal

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U.S.C. § 465 (1995), under the theretofore long dormant nondelegation doctrine).

74. *See* Adarand Constructors v. Pena, 115 S. Ct. 2097, 2106-18 (1995) (overruling Metro Broadcasting, Inc. v. Federal Communications Comm'n, 497 U.S. 547, 563-601 (1990), and holding that a congressionally adopted racial affirmative action classification is subject to strict scrutiny). In federal Indian law, federal measures that turn on Indian status are considered political, not racial, classifications, and the courts do not subject them to stringent constitutional review. *See* Morton v. Mancari, 417 U.S. 535, 541-55 (1974) (upholding a federal statute providing Indians an employment and promotion preference for positions in the Bureau of Indian Affairs). The theory is that, because of the sovereign relationship between the federal government and the tribes, classifications based on Indian status turn on political, not racial, considerations. *See id.* at 554. If the Court returned to this issue with its current vigilance, however, it might well be troubled by the fact that in *Mancari* ethnicity was a "but for" requirement of obtaining the benefit in that case. *See id.* at 554 n.24 (giving preference only to those who, in addition to belonging to a federally recognized Indian tribe, had "one-fourth or more degree Indian blood"); Goldberg-Ambrose, *supra* note 50, at 172-85 (discussing the "mixed" classification in *Mancari*); Newton, *supra* note 20, at 271-88 (same). To be sure, the Court in *Adarand Constructors* may have indicated a desire not to reopen such issues in areas "in which we found special deference to the political branches of the Federal Government to be appropriate." *Adarand Constructors*, 115 S. Ct. at 2108 (citing Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), a case involving a federal alienage classification). Nonetheless, just how *Mancari* might be squared with the *Adarand* Court's admonition that "'[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination,'" 115 S. Ct. at 2100, is left open to question (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273-74 (1986)).

75. *See* Frickey, *supra* note 14, at 417; *infra* text accompanying notes 239-244 (describing canons of interpretation in the Indian law context). For a recent case that combined the concerns about constitutional structure and racial classifications in a manner that skewed statutory interpretation, see *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 519-37 (Cal. Ct. App. 1996) (narrowly interpreting the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963, to avoid doubts about its constitutionality based on federalism and Fifth Amendment substantive due process and equality limitations).

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court to enforce a congressionally created duty to bargain with a tribe concerning gaming in Indian country. The Court treated the case as one that involved nothing uniquely related to the governance of Indian affairs. Indeed, it conflated the Indian Commerce Clause with all the rest of Congress's Article I powers and held that the Eleventh Amendment uniformly prohibited subjecting a state to federal judicial jurisdiction, regardless of the source of Article I power Congress sought to exercise. On the one hand, *Seminole Tribe* may signal a new sensitivity to states' rights in federal Indian law. Any stringent constitutional protection of state sovereignty from federal regulatory power is likely to have serious implications for federal Indian law, where the governance of Indian affairs has generally been viewed as a matter exclusively for Congress by virtue of its plenary power. On the other hand, *Seminole Tribe* may indicate that tribes and individual Indians should renew efforts to persuade the federal judiciary to recognize congressional power over Indian affairs as subject to meaningful constitutional constraints.[76]

If the federal courts are to become more receptive to tribal interests, it will require a greater appreciation for what is unique about federal Indian law, what legitimately distinguishes it from the mainstream. I have argued that a revival of the legacy of the Marshall Court in federal Indian law would produce such a greater appreciation for tribal interests.[77] The Marshall Court incorporated into our public law a complex combination of judicial restraint and activity in addressing the colonization of this country. To achieve that synthesis, as the next section documents, the Marshall Court simultaneously ratified international law notions that colonization was lawful and that indigenous peoples possessed sovereignty and at least a limited set of legal rights. It is only through an understand-

76. Perhaps the most likely scenario is that *Seminole Tribe* will have little effect on federal Indian law. As on other occasions, an Indian law case may have been the vehicle for addressing a larger issue. *See* Rennard Strickland, *The Absurd Ballet of American Indian Policy, or American Indian Struggling with Ape on Tropical Landscape: An Afterword*, 31 MAINE L. REV. 213, 220 (1979) (criticizing a case in which the legal rights of Indians were "subordinated in the name of the public policy of national debt reduction"). A majority of the Court wished to hold that Congress may not abrogate the states' Eleventh Amendment immunity by use of its Article I powers, overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19-23 (1989), along the way. *Seminole Tribe* was simply the first case involving the Article I/Eleventh Amendment question to get to the Court.

77. *See* Frickey, *supra* note 14, at 427-40.

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ing of the Marshall Court's Indian law jurisprudence that the emergence of "plenary power" a half-century later makes sense. What this inquiry reveals is that federal Indian law—and the Constitution upon which this law is built—incorporates international law root and branch. If, as I shall contend, international law provides the best justification for a kind of federal plenary power in Indian affairs, logic demands that international law also suggest limitations on that power. The blending of international and domestic principles also provides a practical amalgamation of contemporary norms against which to judge the current condition of indigenous peoples.

II. PLENARY POWER YESTERDAY: THE INTERNATIONAL CONTEXT

By what right did European countries colonize this continent? Justice McLean, concurring in *Worcester v. Georgia*,[78] provided perhaps the most forthright discussion of this issue in American law:

> The abstract right of every section of the human race to a reasonable portion of the soil, by which to acquire the means of subsistence, cannot be controverted. And it is equally clear, that the range of nations or tribes, who exist in the hunter state, may be restricted within reasonable limits. They shall not be permitted to roam, in the pursuit of game, over an extensive and rich country, whilst in other parts, human beings are crowded so closely together, as to render the means of subsistence precarious. The law of nature, which is paramount to all other laws, gives the right to every nation, to the enjoyment of a reasonable extent of country, so as to derive the means of subsistence from the soil.[79]

These conclusions are, of course, rooted in the law of nations—the international law—that prevailed during the American colonial period.[80]

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78. 31 U.S. (6 Pet.) 515, 563-96 (1832).

79. *Id.* at 579 (McLean, J., concurring).

80. For recent, thorough, and critical discussions of these international assumptions, see ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990) and Howard R. Berman, *Perspectives on American Indian Sovereignty and International Law, 1600-1776*, *in* EXILED IN THE LAND OF THE FREE 125 (Oren Lyons et al. eds., 1992). For influential commentary preceding the early American colonial period, see FRANCISCUS DE VITORIA, DE INDIS ET DE IUREE BELLI RELECTIONES (Carnegie Inst. ed. 1917) (originally published in 1532). *See generally* Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 GEO. L.J. 1 (1942) (tracing and comparing treatment of Indian rights by the United States and Spanish governments). For a scholarly assessment of the international law concerning colonization roughly con-

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Chief Justice Marshall's foundational opinions for the Supreme Court in federal Indian law—in *Worcester* and two earlier cases, *Cherokee Nation v. Georgia*[81] and *Johnson v. McIntosh*[82]—never squarely addressed the legality or the morality of the colonization of America. He did refer to a variety of potential justifications,[83] but his essential conclusion was that the Court "will not enter into the controversy, whether agriculturalists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits."[84] In words that resemble the *Lone Wolf* Court's refusal, eighty years later, to entertain challenges to unilateral Indian treaty abrogation by Congress,[85] Chief Justice Marshall wrote that "[c]onquest gives a [land] title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim."[86]

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temporaneous with the Marshall Court, see EMER DE VATTEL, THE LAW OF NATIONS (1st Am. Ed. 1796), upon which the Marshall Court relied in *Worcester*. *See infra* note 105 (noting that the Court quotes Vattel's treatise in its decision). In the text, I focus on the approach adopted by the Supreme Court to incorporate international norms into American domestic law rather than examine the background norms themselves as an historical matter.

81. 30 U.S. (5 Pet.) 1 (1831).

82. 21 U.S. (8 Wheat.) 543 (1823).

83. In his first discussion, Marshall stated:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence.

Id. at 572-73.

84. *Id.* 21 U.S. (8 Wheat.) at 588.

85. *See supra* text accompanying notes 22-25, 41-43 (describing how *Lone Wolf* concluded that Congress has virtually unlimited power over Indian affairs); *see also infra* text accompanying notes 131-133 (noting that *Lone Wolf* likened Indians to foreigners within the borders of the United States).

86. *Johnson*, 21 U.S. at 588. Nine years after *Johnson*, Marshall returned to the issue of colonization:

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the

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It is obvious that this conclusion, although guised in terms of nonjusticiability, in effect ratified the basic assumptions of historical colonization, which were consistent with the law of nations during the so-called "age of discovery."[87] Thus, the Supreme Court acquiesced in the fundamental approach taken to the European settlement of what became the United States. In particular, the Court in *Johnson* embraced the doctrine that, upon "discovery" of the continent by Europeans, Indian rights in land were diminished to a sort of aboriginal title[88]—usually called "original Indian title"[89]—that amounted to an occupancy at the sufferance of the "discovering" European sovereign. That sovereign could extinguish original Indian title "either by purchase or by conquest."[90] The tribe was involuntarily thrust into an exclusive sovereign-to-sovereign relationship with that European sovereign, which forbade the tribe to have relations with any other nation or to engage in land transactions with

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> discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.
>
> After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting, and fishing.
>
> Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturalists and manufacturers?
>
> But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on existing pretensions.

Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 542-43 (1832). This passage, although seemingly more sympathetic than the language in *Johnson* quoted in the text accompanying note 84, *supra*, likewise considers the historical issue settled for American courts.

87. All that Chief Justice Marshall purported to do concerning colonization in his three foundational opinions was reflect "the actual state of things," a phrase he repeatedly used. *See Johnson*, 21 U.S. (8 Wheat.) at 591; *Worcester*, 31 U.S. (6 Pet.) at 543, 546, 560.

88. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 574 (1823).

89. *See* Cohen, *supra* note 11, at 28.

90. *Johnson*, 21 U.S. (8 Wheat.) at 587. In *Worcester*, however, Chief Justice Marshall emphasized purchase as the appropriate method of obtaining the Indian land estate. *See* 31 U.S. (6 Pet.) at 544-45.

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any entity or person other than that sovereign.[91] Discovery did not extinguish all tribal sovereignty, however—a tribe remained "a distinct political society, separated from others, capable of managing its own affairs and governing itself."[92] Tribes ended up not as foreign states, though, but as "domestic dependent nations . . . in a state of pupilage."[93] In language that was later distorted in *Kagama*,[94] Chief Justice Marshall said that "[t]heir relation to the United States resembles that of a ward to his guardian."[95]

It does not follow from these conclusions, however, that American courts will never address an issue in federal Indian law. Indeed, I have argued that, although Marshall viewed the historical aspects of colonization as so well settled that they could not be considered judicially, his decisions treated future exercises of colonial power as subject to judicial evaluation as a matter of domestic American law.[96] In fact, in *Worcester* the Supreme Court dramatically rejected Georgia's efforts to exercise a police power within an Indian reservation in that state. Marshall wrote for the Court that the tribe was a distinct entity "occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress."[97]

Marshall reached this conclusion based on his understanding of three aspects of the colonial process, all of which are in tension with later decisions of the Supreme Court. The first—inconsistent with *Kagama*[98]—was that the exercise of a Euro-American police power within Indian country was an extraordinary idea inconsistent with the practices of Great Britain.[99]

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91. *See Johnson*, 21 U.S. (8 Wheat.) at 573.

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

93. *Id.* at 17.

94. *See infra* note 113 (quoting the Court's description of Indian tribes as "wards of the nation" in *Kagama*).

95. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

96. *See* Frickey, *supra* note 14, at 385-406.

97. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

98. *See supra* text accompanying notes 18-19 (explaining how *Kagama* justified federal intrusion in intratribal affairs).

99. Great Britain had never attempted "to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances." *Worcester*, 31 U.S. (6 Pet.) at 547. Indeed, "[t]he king purchased their lands

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Second, by virtue of the American revolution, the control over colonization had shifted from the British Crown to the United States government. Although the Articles of Confederation created ambiguity about the allocation of power over Indian affairs between the federal government and the states,[100] the Constitution had resolved that ambiguity in favor of Congress,[101] by assigning it exclusive authority over Indian affairs.[102] Ordinarily, therefore, state law had no role in Indian country. This conclusion stands in stark contrast to current trends in the Supreme Court, where state law is only occasionally preempted by the federal-tribal relationship.[103] Third, even though a treaty with the tribe had language that could rather easily be interpreted as a surrender of tribal independence, and therefore possibly a capitulation to the local police power of Georgia,[104] Marshall resisted this interpretation. He concluded that the pattern of treaties with the tribe "recogniz[ed] their title to self government" rather than a surrender of it, and then squarely relied upon "the settled doctrine of the law of nations" that "a weaker power does not surrender its independence—its right of self government, by associating with a stronger, and taking its protection."[105] Based on this

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when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them." *Id.* The king "also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self government, so far as respected themselves only." *Id.*

100. Article IX of the Articles of Confederation provided:

> The united states in congress assembled, shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated.

ARTICLES OF CONFEDERATION AND PERPETUAL UNION art. IX.

101. Marshall stated:

> The correct exposition of this article is rendered unnecessary by the adoption of our existing constitution. That instrument confers on congress the powers of war and peace; of making treaties, and of regulating commerce with . . . *Indian tribes*. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power, in the confederation, are discarded.

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

102. *Id.*

103. *See infra* note 162 (describing the current Court's treatment of state regulation in Indian country).

104. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 551-57 (1832).

105. *Id.* at 561. Marshall continued:

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strong vision of tribal sovereignty, surviving all but the most explicit extinguishment through colonization, Marshall created the canons for interpreting Indian treaties. These canons are designed to require a clear statement before the interpreter may conclude that tribal sovereignty or rights have been lost.[106]

In short, the Supreme Court in the Marshall trilogy embraced pre-constitutional notions of the colonial process, rooted in the law of nations, involving both inherent tribal sovereignty and a colonial prerogative vested exclusively in the centralized government.[107] Did this incorporation of international law into the domestic law of Indian affairs survive the plenary power era, over a half-century later? Standing alone, *Kagama* seemingly repudiates the notion that the incorporation of tribes and their lands into the colonial government was to be consensual and was to leave intact the internal sovereignty of the tribes.[108] Indeed, by itself, *Kagama* may appear to embrace the notion that tribes had been degraded to the point of a dependency devoid of sovereignty. But *Kagama* cannot be viewed in isolation. For example, a decade later, the Court vigorously reaffirmed

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> A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. "Tributary and feudatory states," says Vattel, "do not thereby cease to be sovereign and independent states, so long as self government and sovereign and independent authority are left in the administration of the state."

Id. (quoting, without citation to the source, the international law treatise of Vattel).

106. In a nutshell, Marshall interpreted the treaty as the Indians would have understood it, conceptualized the transaction as one in which the tribe was reserving for itself all rights not clearly ceded to the United States, and, more generally, understood the treaty as representing an ongoing relationship of sovereignty between the tribe and the United States. *See* Frickey, *supra* note 14, at 397-417. Unfortunately, those canons have had increasingly little impact on the current Supreme Court. *See id.* at 418-26, 432-37.

107. *See* S. James Anaya, *The Rights of Indigenous Peoples and International Law in Historical and Contemporary Practice, in* 1989 HARV. INDIAN L. SYMP. 191, 201-03 & nn. 50-56 (analyzing the Marshall Court reliance on Vattel's treatise in classifying tribes as sovereign states dependent on the United States); Helen W. Winston, Comment, *"An Anomaly Unknown": Supreme Court Application of International Law Norms on Indigenous Rights in the Cherokee Cases (1831-32)*, 1 TULSA J. COMP. & INT'L L. 339, 357-58 (1994) (describing Marshall's incorporation of international law into the domestic law of Indian affairs). Professor Anaya has returned to this subject in his most recent book. *See* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 16-19 (1996) [hereinafter ANAYA, INDIGENOUS PEOPLES].

108. *See supra* text accompanying notes 12-19 (explaining the *Kagama* rationale).

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inherent tribal sovereignty.[109] More generally, the entire plenary power era lends itself to the interpretation, consistent with the Marshall decisions, that federal authority as well as tribal sovereignty is inherent under international law, and that these competing powers are to be mediated by conceiving of tribes as dependent sovereigns—that is, sovereign with respect to their internal affairs while subject to supervening federal control.

Kagama was not simply the first plenary power case, but also a judicial response to congressional objection to an earlier decision faithful to Marshall's constructs. In *Ex parte Crow Dog*,[110] the Supreme Court refused to find federal jurisdiction to prosecute the alleged murder in Indian country of one Indian by another. Consistent with the Marshall legacy, which requires courts to use the canons of interpretation to buffer attempts at non-Indian intrusion into tribal affairs, the Court construed imprecise language in a treaty and a later agreement with the tribe as not embodying tribal consent to federal criminal jurisdiction.[111] As noted earlier, Congress responded immediately by adopting a statute providing federal criminal jurisdiction for certain serious offenses committed by Indians in Indian country.[112] In *Kagama*, the Court deferred to the congressional power to enact this statute. The Court essentially assumed that some non-Indian sovereignty must have the ultimate authority to intrude upon internal tribal sovereignty, and that the federal government was preferable to the states because it had been dealing exclusively with tribes, alone had the capacity to enact general legislation sweeping across all tribes, and alone was responsible for the deprivations that colonization had caused.[113]

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109. *See supra* text accompanying notes 3-5 (discussing the Court's recognition of tribal sovereignty in *Talton v. Mayes*, 163 U.S. 376 (1896)).

110. 109 U.S. 556 (1883).

111. *See id.* at 572.

112. *See supra* text accompanying note 15 (discussing the Major Crimes Act).

113. The Court in *Kagama* stated:

> [T]hese Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two. . . . The territorial governments owe all their powers to the statutes of the United States conferring on them the powers which they exercise, and which are liable to be withdrawn, modified, or repealed at any time by Congress. . . . [T]his power of

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Kagama, then, is more complex than first appears. The decision indicates that Congress has power over Indian affairs based more on inherent notions of centralized national power in a colonial government than on a strict interpretation of the congressional powers enumerated in the Constitution. It is, to that extent, an extension of the Marshall trilogy. Marshall thought that the Constitution, by providing Congress with power over war, treaties, and the regulation of commerce with tribes, "comprehend[s] all that is required for the regulation of our intercourse with the Indians"[114] because he assumed that the historical pattern of noninterference with internal tribal matters would continue.[115] These and other conventional constitutional arguments were not available in *Kagama*, however.[116] The reliance in *Kagama* upon the inherent powers of

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> Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the Territory and other property of the United States, as from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else.
>
> ....
>
> It seems to us that this [statute] is within the competency of Congress. These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen [citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)].
>
> ....
>
> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

United States v. Kagama, 118 U.S. 375, 379-80, 383-85 (1886) (other citations omitted).

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

115. *See supra* text accompanying notes 98-106 (outlining Marshall's understanding of the reluctance to impose "police power" in Indian country).

116. As Nell Jessup Newton has explained:

> In the first place, congressional power to regulate activities within

the centralized sovereign for colonial purposes is consistent, however, with Marshall's understanding of the allocation of the colonial power.[117] If there is any fundamental disagreement between *Kagama* and the Marshall trilogy, it is whether the power to interfere in internal tribal matters is a necessary attribute of the ongoing, centralized colonial power. Whatever the extent of that power, however, Marshall sought to limit it by interpretive canons designed to force Congress, not the localities, to make the difficult decisions, and to require the judiciary to neuter colonizing acts disadvantageous to tribes unless the language of the positive law was clear in that regard. *Crow Dog* was consistent with this tradition.

This understanding of *Kagama*—in which notions of inherent, centralized colonial sovereignty rather than simple reliance upon the language of the Constitution explain the plenary power in Indian affairs[118]—makes it fit in well with the decisions that followed it. In particular, it makes *Kagama* consistent with the approach taken to the plenary power over immigration affairs three years later in the *Chinese Exclusion Case*, which was then transplanted into Indian affairs in *Lone Wolf*.

Recall that in the *Chinese Exclusion Case* the Court refused to entertain a challenge to a unilateral congressional abrogation of an international treaty.[119] Just where did Congress get this plenary power over immigration?[120] According to the

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> the territories [by virtue of the property clause] could not be invoked, because the land was within the state of California. Nor could the power to regulate Indian commerce be used, since at that time, the Court required a direct nexus with commerce to sustain federal laws regulating interstate and Indian commerce. The power to enact a criminal code applicable within the states, although fairly well-established today, was beyond the grant of power to regulate commerce with Indian tribes in 1885. Finally, the congressional power to effectuate treaties with Indian tribes was similarly inapplicable, since no treaty was involved.

Newton, *supra* note 20, at 213-14 (citations omitted).

117. *See supra* text accompanying notes 15-19 (describing the *Kagama* rationale).

118. Nonetheless, the argument for centralizing the power over Indian affairs in the federal government can be bolstered by constitutional text as well as relatively conventional interpretive techniques. *See infra* text accompanying notes 153-163 (noting constitutional authority for centralized power over Indian affairs, including provisions authorizing the powers of treaty, war, territory, and commerce over Indian tribes).

119. *See supra* text accompanying notes 38-40 (describing the Court's holding in the *Chinese Exclusion Case*).

120. For a succinct and insightful analysis that has informed this discus-

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Court, the control over the influx of foreigners is an inherent power of every nation under international law.[121] The Court stressed that, when sovereignty involving national rather than local purposes and involving the entire national territory was concerned, that sovereignty resided in Congress.[122] The Court reinforced this theme three years later, in *Nishimura Ekiu v. United States*,[123] where, in upholding the Immigration Act of 1891,[124] it stated:

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war.[125]

Just one year later, the Court upheld congressional power to deport aliens on the same ground[126] and quoted leading in-

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sion, see Aleinikoff, *supra* note 68, at 863-64.

121. *See* The Chinese Exclusion Case, 130 U.S. 581, 603 (1889).

122. The Court stated:

> That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power. . . .
>
> While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with power which belongs to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory. . . .
>
> The control of local matters being left to local authorities, and national matters being entrusted to the government of the Union, the problem of free institutions existing over a widely extended country, having different climates and varied interests has been happily solved. For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.

Chinese Exclusion, 130 U.S. at 603-06.

123. 142 U.S. 651 (1892).

124. Ch. 551, 26 Stat. 1084 (1889-1891) (codified as amended at 8 U.S.C. § 1182 (1994)).

125. *Nishimura Ekiu*, 142 U.S. at 659 (citations omitted).

126. *See* Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893) (stating that the deportation power is "an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare").

ternational law scholars in support of this conclusion.[127]

This approach is obviously consistent with *Kagama*. The *Chinese Exclusion Case* and *Nishimura Ekiu* concluded that the centralized national government must have inherent and plenary power over the immigration of foreigners; *Kagama* reached a similar conclusion about power over "foreigners" already in the midst of a colonial country—unassimilated, tribal, non-citizen, indigenous peoples. As to such persons, the colonizing government never had the opportunity, in the language of *Nishimura Ekiu*, "to admit them" into the country "only in such cases and upon such conditions as it may see fit to prescribe." Whatever conditions are placed upon indigenous peoples by colonizing authorities must either be consensual (by treaties, for example) or unilateral (by the exercise of a plenary colonizing power). *Kagama* essentially stands for the proposition that in a colonized nation the centralized government has inherent power over the indigenous persons who are the victims of colonization.

In addition to allocating governmental power, *Kagama* and the *Chinese Exclusion Case* may share a similar policy concern. In *Kagama*, the Court defended centralizing the power over Indian affairs in part for fear that otherwise the states and localities would treat Indians idiosyncratically and harshly.[128] On the same day it decided *Kagama*, the Court also handed down *Yick Wo v. Hopkins*.[129] In *Yick Wo*, the Court invalidated, as a denial of equal protection, San Francisco ordinances designed to drive Chinese laundries out of business. The Court concluded that "[n]o reason for [the laws] . . . exists except hostility to the race and nationality to which the petitioners belong."[130] Thus, when it decided the *Chinese Exclusion Case*, the Court was surely aware of the special problems that lurked if local or state power could intrude into immigration affairs. The timing of *Yick Wo*, *Kagama*, and the *Chinese Exclusion Case* seems significant in explaining their results and theories.

The Court in *Lone Wolf* then applied the principle of the *Chinese Exclusion Case* to federal Indian law, holding that Congress may unilaterally abrogate an Indian treaty without consequence under domestic law. *Lone Wolf* stated that

127. *See id.* at 707-09 (quoting Vattel, Ortolan, Phillimore, and Bar).

128. *See supra* note 113 (quoting *Kagama*'s description of states as the "deadliest enemies" of Indians).

129. 118 U.S. 356 (1886).

130. *Id.* at 374.

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"[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."[131] In so holding, the Court in *Lone Wolf* assumed that, somewhat like immigrants, "Indians who had not been fully emancipated from the control and protection of the United States are subject, at least so far as the tribal lands [are] concerned, to be controlled by direct legislation of Congress."[132] As in *Kagama*, then, the Court in *Lone Wolf* treated non-citizen tribal Indians as foreigners within the borders of the United States, the power over whom was a national, not a local, concern. The rationale has striking parallels to that underlying the power over immigration, as understood in the *Chinese Exclusion Case* and *Nishimura Ekiu*.[133]

The third major plenary power case in federal Indian law, *United States v. Sandoval*,[134] demonstrates that the theory that power over Indian affairs is inherent is the only rationale that can possibly explain this area. In *Sandoval*, the question involved whether federal statutes governing the introduction of liquor into Indian country[135] applied to the Santa Clara Pueblo. The case presented a fascinating and novel factual situation, for unlike the Indians involved in the typical case, the Santa

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131. 187 U.S. 553, 565 (1903).

132. *Id.* at 567. The Court in *Lone Wolf* also quoted the similar language in *Kagama*, *see supra* note 113, concerning the power of the "General Government" over Indians. *See Lone Wolf*, 187 U.S. at 565.

133. Contemporaneously with the rise of plenary power in federal Indian law and immigration law, the Supreme Court had to address thorny and somewhat analogous questions concerning another problem of sovereignty, the application of the Constitution to "unincorporated" territories, such as Puerto Rico. For two rather recent discussions of whether "the Constitution follows the flag," see Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853 (1990), and Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909 (1991). For a discussion that includes consideration of federal Indian law, see T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMM. 15 (1994). For an argument that congressional plenary power in Indian affairs should be abandoned in favor of an approach, modeled after that taken with the former insular territories, whereby the United States would enter into consensual relationships with tribes, see Alex Tallchief Skibine, *Reconciling Federal and State Power Inside Indian Reservations with the Right of Tribal Self-Government and the Process of Self-Determination*, 1995 UTAH L. REV. 1105 (1995).

134. 231 U.S. 28 (1913).

135. Act of January 30, 1897, ch. 109, 29 Stat. 506 (1895-1897).

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Clara Pueblo possessed their lands in fee simple title rather than some form of Indian title and allegedly were citizens of the United States.[136] In this case, therefore, it could not be argued that the power over these Indians flowed from the constitutional provision granting Congress the authority to control property of the United States,[137] even if that property were broadly defined to include Indian trust lands. Nor was there any treaty with the Santa Clara Pueblo in which the tribe could have conferred plenary power upon Congress or could have formally established a ward-guardian relationship. Nor had there been any war with that tribe which could have worked as a conquest. In order to regulate "commerce" with the tribe in commodities such as alcohol, Congress would have had to deem tribal members "Indians" despite all these factors. It was difficult, however, to see how in law the Santa Clara Pueblo were any different from non-Indian citizens within the United States who happened to be ethnically homogeneous and had formed themselves into a self-governing voluntary association.

The Court in *Sandoval* nonetheless held that congressional power reached the Santa Clara Pueblo, on the grounds that they were ethnically Indians and that the federal government had dealt with them as such. Relying upon the language in *Kagama* about the power of the "general government" over Indians, the Court in *Sandoval* stated:

> [L]ong continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State.[138]

In *Sandoval,* the Court for the first time suggested a judicially enforceable limitation upon plenary power in Indian affairs, and that limitation demonstrates that the power in question is one of inherent sovereignty rather than one strictly rooted in constitutional text. The Court stated:

> [I]t is not meant by this that Congress may bring a community or

136. These unusual features were the result of the Treaty of Guadalupe Hildalgo, Feb. 2, 1848, U.S.-Spain, T.S. No. 207, which ended the Mexican-American war and protected the residents of what became New Mexico from the loss of any rights that had been recognized or granted by the Spanish.

137. *See* U.S. CONST. art IV, § 3, cl. 2.

138. *Sandoval,* 231 U.S. at 45-46.

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> body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.[139]

As in *Kagama* and *Lone Wolf*, the Court in *Sandoval* considered Indians—even fee-simple-owning citizens—"the other," not full-fledged members of the political community of the United States unless and until Congress acts accordingly. In short, the "territorial integrity" notion of inherent sovereignty in the *Chinese Exclusion Case* and *Nishimura Ekiu* has an analogue in the "political integrity" approach of *Sandoval* and prior cases. In both lines of cases, the Court deferred to the inherent power of the federal government, as centralized sovereign, to determine the integration of "foreigners" into the Anglo-American polity.[140] The immigration cases involve the inherent sovereignty of all nations; the Indian law cases involve the inherent sovereignty of all colonial nations.

Establishing that the power over Indian affairs, like the power over immigration, is inherent and flows from international law does not, of course, legitimate it, either legally or normatively. Legally, under a strict understanding of *McCulloch v. Maryland*,[141] there is no such thing as an inherent congressional power: if the Constitution does not grant the power to Congress, it does not have that power.[142] Normatively, even if there is such a thing as inherent sovereignty, it should be exercised only within appropriate limits.

One response to the legal concern is that the Court has sanctioned inherent federal power in related sectors as well. In *United States v. Curtiss-Wright Export Corp.*,[143] the Court concluded that "the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America" and therefore that "the investment of the federal gov-

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139. *Id.* at 46.

140. That strong notion of deference continues today in the area of naturalization and citizenship, where federal classifications based on alienage receive only the most minimal of constitutional scrutiny. *See* Mathews v. Diaz, 426 U.S. 67, 77-80 (1976).

141. 17 U.S. (4 Wheat.) 316 (1819).

142. For a discussion of this argument in the allied field of immigration, see STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 184-92 (1987).

143. 299 U.S. 304 (1936).

ernment with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution."[144] This notion of inherent federal sovereignty over foreign affairs resonates with Chief Justice Marshall's understanding of Indian affairs in the colonial period[145] and is consistent with the notion that the power over Indian affairs is an exercise of the "external sovereignty" of a colonizing country. It is also consistent with the understanding, explicitly adopted by the Court during the plenary power era, that tribal sovereignty itself is "extra-constitutional" authority derived under international law.[146]

To be sure, the language in *Curtiss-Wright* has been subjected to withering criticism,[147] but then so has the plenary power in Indian affairs.[148] Nonetheless, the federal Indian affairs power is hardly likely to be repudiated any time soon,[149] at least in a way that advantages tribes. Moreover, there are aspects of that power that are worth saving. In Indian law, as in immigration law, there are efficiencies in centralizing the power in the federal government, and it does limit the opportunities of states and localities antagonistic to Indians and immigrants to engage in discrimination. A uniform national approach to the ongoing colonization of the country provides tribes one legislative forum rather than fifty in which to focus their energies and centralizes the significant legal issues in one judiciary as well.

The real problem with the supposed plenary power is not that it exists in the federal government versus the states, but that the adjective "plenary" makes it seem unlimited. In other words, the constitutional problem is not so much one of whether the power should be attributed to Congress, whether

144. *Id.* at 316, 318.

145. *See supra* text accompanying notes 98-106 (describing Marshall's understanding of the colonial process).

146. *See supra* text accompanying notes 3-5 (explaining that tribal sovereignty existed before the Constitution).

147. *See, e.g.*, LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 19-26 (1972) (describing criticisms revealing "difficulties" in the *Curtiss-Wright* theory); Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1 (1973) (arguing against the Court's conclusion in *Curtiss-Wright*).

148. *See supra* sources cited in note 67 (criticizing the plenary power in Indian affairs).

149. *See supra* text accompanying notes 60-61 (noting the Court's recent use of "plenary power").

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through Article I or other legitimate means, but instead one of what limits, if any, the Constitution or other sources of law might place upon it. If the authority over Indian affairs is an inherent attribute of national sovereignty in a colonial state, as I have argued, the danger would be that the power would be seen as wholly "extra-constitutional," and thereby beyond any limiting force of the rule of law at all.

Yet the Supreme Court has repudiated this notion, formally abandoning *Lone Wolf's* nonjusticiability approach in favor of a very deferential application of constitutional limitations.[150] If ever so weakly, then, the Supreme Court has assumed that what Congress does in Indian affairs is now subject to judicial evaluation in general and constitutional constraint in particular.[151] As with other areas of federal power, "plenary" should simply mean "complete," not "absolute."[152]

The international law backdrop concerning colonization provides a solid theory for legitimating this kind of federal power over Indian affairs while simultaneously subjecting it to limitations rooted in the Constitution and the canons of interpretation.[153] The Constitution is not a closed set of words, but rather a document with a purpose: to establish constitutive institutions that, through an ongoing, interactive process, effectively govern the peoples and territory of this country.[154] The nature, processes, and relationships of these governmental in-

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150. *See supra* note 61 (describing rational basis review of federal statutes concerning Indian affairs). Only time will tell whether *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996), is an anomaly related to the current Court's enthusiasm for enforcing the Eleventh Amendment or instead signals some movement away from judicial restraint in federal Indian law. *See supra* text accompanying notes 75-76 (discussing the potential impact of *Seminole Tribe*).

151. The same has occurred in immigration law, where the Court has repeatedly said that congressional power is subject to constitutional limitations. For examples of this conclusion, see *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950), *Bridges v. Wixon*, 326 U.S. 135 (1945), and *Wong Wing v. United States*, 163 U.S. 228 (1896).

152. This is, of course, the way Chief Justice Marshall described the federal plenary power over interstate and foreign commerce in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196-97 (1824).

153. The argument that follows is derived from the evocative discussion in THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION: PROCESS AND POLICY 16-17 (3d ed. 1995).

154. *See generally* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969) (elaborating on a theory of constitutional interpretation rooted in the structures and relationships created by the Constitution).

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stitutions must be understood within the framework in which the country was created—that is, through colonization. As the Marshall trilogy acknowledged, the United States simply could not function as an Anglo-European society without some centralized and effective capacity to engage in sovereign relationships with Indian tribes concerning peace, land, membership in the polity of the United States, and so forth. In short, because the sovereign nation that the constitutional framers set out to establish resulted from a colonial process that would remain ongoing for the foreseeable future, if not forever, certain centralized governmental powers are inherent in that enterprise and, therefore, are inherent in the Constitution itself.

This structural argument proposes that inherent in the Constitution, not outside the Constitution, are all those notions of inherent sovereignty under international law that are not inconsistent with constitutional text, structures, or institutional relationships.[155] In this light, the abandonment of the ambiguous provision in the Articles of Confederation about power over Indian affairs[156] and the language in the Constitution about treaty power, war power, territorial power, and power over commerce with Indian tribes provide strong reason to conclude that the colonial power resides in Congress, not in the states.[157] A rather conventional route to this conclusion is that a centralized and plenary authority over colonization was "necessary and proper"[158] for the achievement of the powers expressly granted to Congress, including management of federal lands and territories,[159] naturalization of the citizenship of

155. *Cf.* Tiaco v. Forbes, 228 U.S. 549, 557 (1913) (Holmes, J.) ("It is admitted that sovereign states have inherent power to deport aliens, and seemingly that Congress is not deprived of this power by the Constitution of the United States.").

156. *See supra* text accompanying notes 100-102 (describing this provision).

157. This was, of course, Chief Justice Marshall's own analysis that was adopted by the Court in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832). *See supra* note 101 (quoting this analysis). It is fully consistent with the understandings of the Framers. *See* FEDERALIST NO. 42, at 268-69 (James Madison) (Clinton Rossiter ed., 1961); Letter from President George Washington to the Cornplanter, Half Town, and Great Tree, Chiefs and Counselors of the Seneca Nation of Indians, (Dec. 29, 1790) *in* 31 WRITINGS OF GEORGE WASHINGTON 179, 180 (John C. Fitzpatrick ed., 1939); Timothy Joseph Preso, *A Return to Uncertainty in Indian Affairs: The Framers, the Supreme Court, and the Indian Commerce Clause*, 19 AM. INDIAN L. REV. 443 (1994).

158. *See* U.S. CONST. art. I, § 8, cl. 18.

159. *See* U.S. CONST. art. IV, § 3, cl. 2.

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the polity,[160] admission of new states into the Union,[161] and so forth.

If this argument is accepted, it leaves the states completely out of the picture in Indian affairs—the authority over Indian affairs is both centralized and plenary, in the same sense that the power over interstate commerce is centralized and plenary[162]—unless Congress chooses to delegate some power to the

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160. *See* U.S. CONST. art. I, § 8, cl. 4.

161. *See* U.S. CONST. art. IV, § 3, cl. 1.

162. This conclusion is, after all, how federal Indian law started out in the Marshall trilogy. *See supra* text accompanying notes 98-106 (describing Marshall's understanding of the colonial process). It also parallels the tack taken in immigration law, where an analogous inherent authority has been considered exclusively federal. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 62-63 (1941) ("When the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations, or burdens of aliens as such, the treaty or statute is the law of the land. No state can add to or take from the force and effect of such treaty or statute. . . ."); Chy Lung v. Freeman, 92 U.S. (2 Otto) 275, 280 (1875) ("The passage of laws which concern the admission of aliens and subjects of foreign nations belongs to Congress, and not to the states."). Moreover, as a functional matter, as the Court itself recognized in *Kagama*, the complete federalization of this power would promote institutional coordination of the federal-tribal sovereign relationship and prevent the states from invading this domain with idiosyncratic or abusive local measures. *See supra* note 113 (quoting *Kagama*'s recognition that states are often the "deadliest enemies" of Indian tribes). On this understanding, *Seminole Tribe* could simply be understood as involving the immunity of states from federal judicial jurisdiction, and not a sign that states have any legislative authority in Indian affairs. *See supra* 76 (noting this possibility).

Nonetheless, acceptance of this approach would profoundly change contemporary federal Indian law. Currently, states may sometimes regulate in Indian country. *See, e.g.*, Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 431 (1989) (plurality opinion) (holding state action did "not imperil any interest" of a tribe); *id.* at 438-47 (Stevens, J., joined by O'Connor, J.) (providing critical votes that a state may zone the opened portion of a reservation, while a tribe may zone the closed remainder of reservation); Montana v. United States, 450 U.S. 544, 557 (1981) (concluding that a state, not a tribe, may regulate hunting and fishing by nonmembers on non-member-owned fee land on a reservation); United States v. McBratney, 104 U.S. 621, 624 (1881) (holding that a state court has exclusive criminal jurisdiction over an offense committed in Indian country by a non-Indian against another non-Indian). The problem frequently manifests itself on allotted reservations where non-Indians may own a significant share of the land and make up a major proportion of the population. These demographics might lead to the conclusion that the area has lost its "Indian character," Solem v. Bartlett, 465 U.S. 463, 471-72 (1984), and accordingly should not be treated as Indian country. *See, e.g.*, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 588 n.3, 604-05 (1977) (noting large non-Indian presence in concluding that allotment of reservation had diminished its boundaries); DeCoteau v. District County Court, 420 U.S. 425, 427-28 (1975) (same). The demographics also might suggest that, even if the area in question is Indian country, tribal

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states.[163] It still leaves undecided the nature and extent of federal power. To be sure, there is a strong argument that federal power may flow only from express grants in the Constitution. Because no constitutional provision clearly provides congressional authority over internal tribal matters, arguably any congressional activity along those lines would, by analogy to the foreign relations power, have to result either from conquest or from negotiations.[164] Alternatively, if the express powers of

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sovereignty over non-Indians is implausible. *Cf.* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 193 n.1, 194-95 (1978) (noting large non-Indian presence on reservation while holding that the tribe lacked criminal jurisdiction over a non-Indian resident of the reservation). Whatever might be said about the arguable contextual sensitivity of these decisions, they cannot support the assertion of state authority over non-Indians consensually involved in business activities on an unallotted reservation, at least so long as there are not significant spillover effects outside Indian country. *See, e.g.*, White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980) (concluding that a state may not tax non-Indian contractor's activities in Indian country without showing a close nexus between the activities and legitimate off-reservation state concerns); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 161 (1980) (holding that a state may tax Indian sales of cigarettes to non-Indians in Indian country because the product has no reservation nexus and tribe is attempting to market a tax exemption to non-Indians); Williams v. Lee, 358 U.S. 217, 223 (1959) (explaining that a state court has no jurisdiction to entertain a breach of contract action brought by a non-Indian against an Indian where the cause of action arose in Indian country). Accordingly, the conclusion in *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191 (1989), that states may impose a severance tax upon a non-Indian oil company operating wells in Indian country seems insupportable in the absence of clear congressional permission to do so. *Cotton Petroleum* may flip the former presumption in favor of state taxation. *See* Frickey, *supra* note 14, at 422-23, 433-39 (explaining *Cotton Petroleum's* inconsistency with Marshall's clear statement approach). *But cf.* Gila River Indian Community v. Waddell, 967 F.2d 1404, 1410-12 (9th Cir. 1992) (distinguishing *Cotton Petroleum* and applying a presumption against state taxation).

Untying this Gordian knot would be no simple matter. In the future, however, the notion that the authority over Indian affairs is an inherent attribute of *national* sovereignty ought to encourage federal courts to engage in strong presumptions against the exercise of state power in Indian country, which would in turn encourage states to untangle themselves from relationships in Indian country or negotiate some mutually acceptable arrangement with tribes.

163. The analogy would be similar to the approach taken under the "dormant commerce clause," where, in the absence of congressional legislation, the default rule is that state legislation having a discriminatory or undue burden on interstate commerce is invalid. Congress may, however, alter that outcome by enacting legislation permitting the states to regulate. *See, e.g.*, Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 421-27 (1946) (upholding a South Carolina tax regulating foreign insurance companies following congressional authorization of such regulation).

164. For good arguments that congressional power is limited by express constitutional provisions such that Congress has no authority to regulate in-

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Congress may be supplemented by a quantum of inherent or implied power, the question becomes whether the power to make a particular intrusion upon internal tribal sovereignty was implicit in—perhaps, because "necessary and proper" for—the colonial process.

Neither of these choices is entirely satisfactory. Although limiting congressional power to the express grants in the Constitution is both normatively attractive and consistent with overall principles of domestic constitutional interpretation under *McCulloch*, it is overwhelmingly inconsistent with past practice, as ratified by the federal courts. The Marshall trilogy itself assumed that certain nonconsensual intrusions upon internal tribal sovereignty were worked by the colonial process even in the absence of any conquest.[165] For over a century Congress has behaved as if it has inherent colonial power to intrude upon tribes, and the federal courts have never invalidated any such measures.

Today, there is probably no way to resolve this conflict definitively. Perhaps the best that we can do is hold these competing models of congressional power in tension and attempt to moderate the harshness of the inherent power model while not upsetting well-settled expectations that flow from past colonial practices. Indeed, it is the attempt at judicial amelioration of this tension in the Marshall trilogy that provides the most effective, practical model yet created for "doing" federal Indian

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ternal tribal matters, see Clinton, *supra* note 67, at 991-1001, and Curtis G. Berkey, *United States-Indian Relations: The Constitutional Basis, in* EXILED IN THE LAND OF THE FREE 189 (Oren Lyons et al. eds, 1992). The argument today could be bolstered by *United States v. Lopez*, 115 S. Ct. 1624 (1995), which, in striking down a federal statute outlawing gun possession within 1,000 feet of a school, took seriously the notion that Congress's legislative power must be tightly linked to constitutional text. My own sense is, however, that *Lopez* is not about the abstract limits of federal power under the Constitution, but about protecting the state police power from congressional intrusion. *See Lopez*, 115 S. Ct. at 1634 (stating that upholding the statute would transform the Commerce Clause into a general police power). Any attack upon congressional plenary power over Indian affairs would have to persuade the Court to prefer tribal, not state, legislative power to congressional power. It strikes me as unrealistic to suggest that the Court will prefer tribal power to congressional power. The greatest practical danger in federal Indian law today is probably that the Court will also more aggressively prefer state power to tribal power. *See, e.g.,* Frickey, *supra* note 14, at 422-24, 432-37 (analyzing the Rehnquist Court's decisions concerning state power in Indian country).

165. *See supra* text accompanying notes 98-106 (discussing Marshall's understanding of the colonial process).

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law.[166]

In any event, this dispute about the extent and nature of congressional power is only half of the relevant constitutional inquiry. If we assume that Congress has some inherent power to deal with the issues in Indian affairs that may extend beyond the precise text of the Constitution, there remains an obvious constitutional theory for ameliorating abuses of that power: the application of the Bill of Rights. Indeed, the practical problem today is not whether the federal power over Indian affairs is subject to some judicial limitations. It surely is. The Court has explicitly rejected the notion that the congressional power over Indian affairs is extra-constitutional.[167] Indeed, it has afforded Indians constitutional protections in certain limited contexts.[168] Moreover, in federal Indian law there is a long tradition, started in the Marshall trilogy, of subconstitutional interpretive protection through the canons, which should dictate that Congress may only invade Indian rights through a clear statutory statement of its intent to do so.[169] The problem is not, then, the complete absence of judicial review at the constitutional and subconstitutional levels. Instead, the dilemma today is whether the Constitution and the canons have any real vitality in protecting tribes against further colonization.[170] Judicial review has been available in form, but not in substance.

The approach taken in the Marshall trilogy suggests that a vitalization of the judicial role is appropriate. Marshall's leg-

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166. *See* Frickey, *supra* note 14, at 427-29, 437-39.

167. *See* Morton v. Mancari, 417 U.S. 535, 551-52 (1974).

168. The Court has long protected individual Indian property rights against takings. *See supra* note 61 (citing cases in which the Court found governmental invasion of individual property rights). More recently, the Court has expanded this protection to tribal lands. *See* United States v. Sioux Nation, 448 U.S. 371, 407-23 (1980) (providing a "just compensation" remedy for the taking of lands held in "recognized" Indian title—i.e., title formally recognized by Congress by treaty or otherwise). In addition, the Court has indicated a willingness to consider broader challenges based on constitutional limitations. *See supra* note 61 (suggesting the Court may employ a more aggressive rational basis test based on the unique aspects of congressional-Indian relations).

169. *See* Frickey, *supra* note 14, at 412-17 (detailing the quasi-constitutional clear statement rules employed by the Court in the Marshall trilogy).

170. *Cf.* Aleinikoff, *supra* note 68, at 866-67 (analyzing a similar dilemma in immigration law).

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acy has two basic components.[171] One is based on comparative institutional competence: courts should force Congress, rather than other federal entities or the states, to do the unattractive work of further colonization. The other is that Congress, in exercising its power in Indian affairs, should carefully consider the Native side of the argument and make a reasoned judgment, rather than blindly imposing ethnocentric perspectives.

The current Supreme Court has largely lost sight of the legacy left by Chief Justice Marshall. Although it will happily admit that constitutional limits apply to congressional exercises of power in Indian affairs, it has not yet seen a statute invading Indian interests that it has judged constitutionally troubling. Indeed, current constitutional trends suggest that any vitalization of constitutional limitations in federal Indian law might work to the detriment of tribes.[172] Of course, this passivity toward Indian claims at the constitutional level does not necessitate a similar nonchalance at the subconstitutional interpretive level where the canons are applied. Indeed, a proper understanding of Marshall's legacy is that the judicial reluctance to invalidate congressional measures in federal Indian law should produce a correspondingly heightened judicial energy in applying the canons to prevent inadvertent and unthoughtful invasions of tribal rights.[173] Unfortunately, however, the current Court has badly depreciated the canons, reducing them from clear statement requirements to be considered at the outset of the interpretive analysis to mere tiebreakers that apply only if the court would otherwise flip a coin.[174] No such tie ever emerges in its analysis of these disputes because the current Court venerates state sovereignty and has little respect for tribal independence. Consequently, the canons have lost most of their influence.[175]

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171. *See* Frickey, *supra* note 14, at 427-37 (discussing each component in light of recent Court precedent).

172. *See supra* text accompanying notes 73-75 (describing the risk involved with any diminution of Congress's plenary power over Indian affairs).

173. *See* Frickey, *supra* note 14, at 412-17 (discussing Marshall's use of quasi-constitutional clear statement rules to protect the spirit of constitutive documents such as Indian treaties).

174. *See id.* at 427-37 (describing this trend).

175. Indeed, in *Hagen v. Utah*, 510 U.S. 399 (1994), the Court passed up the invitation of the Solicitor General to hold that the Indian law canons be formally recognized as requiring a clear congressional statement in statutory text before Indian rights would be deemed to be invaded. *See id.* at 411-12. *Hagen* itself is a good example of the weakness of the canons, as they are applied today by the Court. The Court in that case concluded that an Indian

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What is needed is an understanding of federal Indian law in which the judicial role of countering colonization is legitimated in substance as well as in form. In the next section, I will propose such an approach, based on my reconstruction of the constitutionality of federal power in the field. This approach would vitalize constitutional limitations, revitalize the canons of interpretation, and more generally subject the field to the rule of law.

III. PLENARY POWER TOMORROW: INTERNATIONALIZING THE DOMESTIC CONTEXT

The argument is a straightforward one. If the only legitimate constitutional justification for an expansive federal power over Indian affairs lies in interpreting the Constitution against the backdrop of international law, then international law is an important framework for constitutional interpretation throughout the field of federal Indian law. In short, what is sauce for the constitutional goose (legitimating the power by informing the construction of Article I and other sources of congressional authority) is sauce for the constitutional gander (limiting the power by informing the interpretation of the Bill of Rights and

reservation had been diminished—its boundaries had shrunk, and with them the tribe's geographical sovereignty—by a federal statute that imposed allotment on the reservation. *See id.* at 412-14. The statute provided for allotments for male tribal members and stated that "all the unallotted lands within said reservation shall be restored to the public domain" and be available for non-Indian homesteading. *See id.* at 404 (quoting Act of May 27, 1902, ch. 888, 32 Stat. 263 (1901-1903)). The Court concluded that this language about the "public domain" diminished the reservation boundaries such that the unallotted lands were outside them. *See id.* at 412-22. A fairly obvious response is that opening up the reservation for non-Indian homesteading is one thing, while reducing the territorial sovereignty of the tribe is quite another. The term "public domain" seems sufficiently ambiguous on the latter question as to compel an interpretation through the canons that Congress did not act clearly enough to effectuate a diminishment of the reservation. *See id.* at 422-42 (Blackmun, J., joined by Souter, J., dissenting). Also in great tension with a proper application of the canons is a decision a year earlier, *South Dakota v. Bourland*, 508 U.S. 679 (1993), where the Court focused on the effects of statutory language rather than the intentions of Congress surrounding it. *See id.* at 691-92.

To the extent that the Indian law canons retain vitality, it tends to be in some lower courts rather than in the Supreme Court. *See, e.g.,* Reich v. Great Lakes Indian Fish and Wildlife Comm'n, 4 F.3d 490, 495-96 (7th Cir. 1993) (Posner, J.) (holding that the Fair Labor Standards Act does not apply to tribal game warden police); Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F. Supp. 784, 835-36 (D. Minn. 1994) (determining that a tribe's usufructary rights were not extinguished by subsequent executive order or treaty).

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by vitalizing subconstitutional judicial limits on congressional power, such as the canons of interpretation). Congressional power and the limits upon it should be viewed as two sides of a coin, and if international law is relevant for the one, it should be relevant for the other.

In addition to this formal symmetry, normative, functional and practical considerations strongly support the argument for the domestic relevance of international norms concerning indigenous peoples. As I have suggested,[176] federal Indian law has long stood outside our traditions of limited national government and of the fundamental protection of important aspects of personal autonomy, including freedom from unconsented invasions of important interests, freedom of association, and ownership of property. Whatever might be said about this sharp juxtaposition between our pre-constitutional pretensions and our post-constitutional conventions in the formative period in which Chief Justice Marshall struggled to accommodate constitutionalism and colonialism, it is simply indefensible today. Colonialism has now been unquestionably repudiated; constitutionalism, as implemented by judicial review, is now essentially unquestioned. If we reinvigorate Marshall's mediating methodology, informed as it was by international law, within our current context, in which a less deferential judicial role seems feasible, the emerging catalogue of norms concerning the treatment of indigenous peoples provides a highly useful checklist of possibilities for consideration in bringing federal Indian law into the mainstream of public law. Because of the shared international experience of colonization, these norms, rather than being foreign jurisprudential interlopers, may well resonate with our history, legal traditions, and current context. Indeed, in this Section I shall suggest that several of these norms have obvious practical relevance and appropriateness for domestic American law.

If accepted, this argument about the domestic constitutional relevance of international human rights norms concerning indigenous peoples goes a long way toward breaking the deadlock over the application of such norms in American domestic courts. The international human rights movement has been replete with efforts to identify and define the rights of

176. *See supra* text accompanying notes 11-12; note 71 (arguing that the assumptions underlying limited government are incompatible with our tradition of colonizing the continent).

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indigenous peoples.[177] Indeed, humanity recently embarked on the international decade of the world's indigenous peoples.[178]

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177. The United Nations Charter, adopted in 1945, urges member nations to embrace a principle of self-determination of peoples. U.N. CHARTER art. 1, para. 2; U.N. Charter art. 55. Beginning in the 1960s, the international community began pressuring for decolonization. The first efforts were focused more on foreign colonies—that is, those dependent on another country—rather than on independent nations, such as the United States, that resulted from colonization. *See generally* Curtis G. Berkey, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples*, 5 HARV. HUM. RTS. J. 65, 75-80 (1992) (analyzing the application of the international right of self-determination to American Indian law). The United Nations declared the right of overseas colonies to self-determination in 1960. *See Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16 at 66, U.N. Doc. A/4684 (1960). Later efforts have addressed the problems encountered by indigenous persons found in independent nations. *See Study of the Problem of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1983 /21/Add. 4 (1987); Berkey, *supra*, at 80-87 (reviewing U.N. efforts to protect the rights of indigenous people within independent nations).

In addition to any special protections related to their indigenous status, native peoples may, of course, also claim the rights identified by international law as available generally to ethnic, religious, or linguistic minorities. *See, e.g.,* International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 27, 999 U.N.T.S. 171, 179 (entered into force Mar. 23, 1976, entered into force for the United States Sept. 8, 1992) ("In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.").

The literature on contemporary international human rights norms that involve indigenous peoples is vast. *See, e.g.,* ANAYA, INDIGENOUS PEOPLES, *supra* note 107; NATIONAL LAWYERS GUILD, RETHINKING INDIAN LAW 129-77 (1982) (discussing the need for effective implementation of international norms to secure the survival and flourishment of indigenous peoples); S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, ARIZ. J. INT'L & COMP. L., Fall 1991, at 1-6 (reviewing significant advances made by indigenous peoples in the area of international human rights law); Russel L. Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INT'L L. 369, 369-85 (1986) (chronicling the development of indigenous rights and related international law); Hurst Hannum, *New Developments in Indigenous Rights*, 28 VA. J. INT'L L. 649, 649-78 (1988) (tracing the emergence of indigenous rights and analyzing the issues affecting the assertion of those rights today); Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L L. 127, 133-63 (1991) (arguing that the existing human rights norms adequately respond to the problem confronting indigenous populations); Robert A. Williams, Jr., *Encounters on the Frontier of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L.J. 660, 676-82 (discussing the emergence of indigenous human rights in contemporary international legal discourse).

178. *See* G.A. Res. 163, U.N. GAOR, 48th Sess., Supp. No. 49, at 281, U.N. Doc. A/48/49 (1993).

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Attempting to enforce these rights in American courts has been fraught with difficulty, however.[179] A congressional action inconsistent with human rights recognized in an international accord that the United States has ratified may simply be deemed a unilateral abrogation of that international obligation, a congressional power recognized in the *Chinese Exclusion Case*.[180] In addition, courts are likely to conclude that international accords are not self-executing, and thus the rights recognized in them have no domestic application without implementing legislation from Congress.[181]

The problem of direct enforcement gets only worse, of course, in the case of rights recognized in accords to which the United States is not a party. In theory, once a norm achieves sufficient international recognition it becomes part of customary international law, which is "part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction."[182] Of course, even on these terms, international customary law may apply only where no domestic source of law determines the result.[183] It is unsurprising, however, that federal courts have been loath to enforce these norms even to that extent, fearing that they may misjudge the international norm and that, in any event, the incorporation of customary international law invades the prerogatives of the American political branches to make law.[184]

My theory does not ask American courts to enforce international human rights norms directly as a matter of domestic law.[185] Instead, at first glance it is similar to the theory, propounded by many scholars, that these norms should provide an interpretive backdrop for our understanding of domestic law, especially the potentially expansive constitutional clauses pro-

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179. On the problems of enforcing these rights in international forums, see W. Michael Reisman, *Protecting Indigenous Rights in International Adjudication*, 89 AM. J. INT'L L. 350, 354-62 (1995).

180. *See* Berkey, *supra* note 177, at 88 (discussing the unilateral congressional power to abrogate treaty provisions).

181. *See id.* at 89.

182. The Paquete Habana, 175 U.S. 677, 700 (1900).

183. *See id.* ("For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.")

184. *See* Berkey, *supra* note 177, at 88-91 (analyzing the direct enforcement of the right of self-determination).

185. *Cf.* ANAYA, INDIGENOUS PEOPLES, *supra* note 107, at 49-58 (arguing that there is new customary international law governing the rights of indigenous peoples).

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tecting human rights.[186] The crucial difference is, however, that my theory expressly links one area of international human rights—that involving indigenous peoples—directly to the Constitution, rather than viewing it as merely a universal normative backdrop.[187]

The reason that this difference is important should be obvious. The federal courts will be reluctant to delegate the meaning of our Constitution and other domestic law to the international community. Not only does this make the direct enforcement of international human rights unlikely, it also deters judges from using those norms as a useful backdrop to their understandings of even vague constitutional provisions. In-

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186. *See* Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 23-27 (1992); Berkey, *supra* note 177, at 91-94; Richard B. Bilder, *Integrating International Human Rights into Domestic Law—U.S. Experience*, 4 HOUS. J. INT'L L. 1, 5-10 (1981); Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2312-14 (1991); Gordon A. Christenson, *The Uses of Human Rights Norms to Inform Constitutional Interpretation*, 4 HOUS. J. INT'L L. 39, 39-57 (1981); Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3, 12-13 (1983); Richard B. Lillich, *The United States Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. J. 53, 76-78 (1990); Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 408-12 (1985); Richard B. Lillich & Hurst Hannum, *Linkages Between International Human Rights and U.S. Constitutional Law*, 79 AM. J. INT'L L. 158, 159-63 (1985); Jordan J. Paust, *On Human Rights: The Use of Human Right Precepts in U.S. History and the Right to an Effective Remedy in Domestic Courts*, 10 MICH. J. INT'L L. 543, 570-96 (1989); Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805, 841-66 (1990). For a helpful overview, see FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS, ch. 12 (2d ed. 1996).

187. In the general scholarly dialogue represented by sources in note 186, *supra*, the "external" quality of international human rights norms is apparent. As Gordon Christenson put it:

> Human rights norms are a positive source of law external to the text of the Bill of Rights or cases interpreting it. External sources such as international law are not evidence of autonomous rules or authorities that limit federal or state power under federal common law, although such an argument has indeed been advanced. Rather, such external sources form part of a universal context in which a right, because it is juridically shaped from these sources, assumes importance in interpreting a limitation in the Bill of Rights, or in other constitutional provisions designed to protect individual rights, in ways that avoid unnecessary conflict with a state's obligations to the international community.

Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, *supra* note 186, at 4-5.

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deed, the Supreme Court in the past decade has demonstrated impatience with internationally informing our constitutional law, holding that international standards concerning the execution of juveniles are not relevant to interpreting the Eighth Amendment prohibition of "cruel and unusual punishment."[188]

My theory is premised upon a much narrower understanding of the domestic role of international human rights.[189] Even if the courts will not look to those rights to inform every question of domestic law involving human rights, such as free speech or inhumane punishment, in federal Indian law cases the courts are compelled to consider international law. The reason is simple: the backdrop of international law provides the only satisfactory basis for sorting out the existence of an inherent federal power over Indian affairs. Accordingly, the backdrop of international law should likewise be relevant in considering limitations upon that power. The difference between my theory and the broader theory by which international norms may inform domestic law is that in my theory, international law has a direct—indeed, essential—linkage to the area of domestic law in question.

Under this approach, international norms about the treatment of indigenous persons would not be directly enforceable in American courts, but instead would provide a relevant and worthwhile backdrop against which to consider constitutional and quasi-constitutional claims. Thus, an international norm that does not link up with a constitutional provision limiting governmental power would presumably have less persuasive force than one that is closely connected to a constitu-

188. *See* Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989); *cf.* Thompson v. Oklahoma, 487 U.S. 815, 830-31 & n.34 (1988) (plurality opinion of Stevens, J.) (containing an Eighth Amendment analysis informed by international norms); *id.* at 868-69 n.4 (Scalia, J., dissenting) (countering that international norms are irrelevant to Eighth Amendment interpretation). The Court also refused to interpret the United States-Mexico extradition treaty to forbid American agents from kidnapping a Mexican citizen in Mexico in order to prosecute him in the United States for his alleged involvement in the murder of an American agent in Mexico. *See* United States v. Alvarez-Machain, 504 U.S. 655, 663-65 (1992). To reach this conclusion, the Court had to interpret the treaty woodenly and avoid customary international law. *See id.* at 667-68. Indeed, the Court admitted that its interpretation "may be in violation of general international law principles." *Id.* at 669.

189. I do not mean to denigrate legal arguments urging a broader acceptance of international human rights in domestic American law. My point is that one need go only so far in order to embrace the proposition that those norms concerning indigenous peoples are highly relevant to the interpretation of the Constitution.

tional limitation.[190] Moreover, even those norms closely connected to constitutional limitations would not compel a constitutional interpretation equivalent to the international norm. Instead, the international norm should be treated as roughly equivalent to domestic norms that inform constitutional adjudication.

The theory that the power over Indian affairs in the United States must necessarily be interpreted against its international backdrop has many potential consequences for both the constitutional basis of and the limitations upon this power. For purposes of illustration, I begin with two examples that demonstrate how the constitutional aspects of federal Indian law would profit from an examination of the international perspective. I then conclude by considering how the internationalization of the domestic context should influence subconstitutional public law, such as the interpretation of treaties and statutes.

A. TAKINGS

No grant of authority to Congress in Article I squarely encompasses the power of eminent domain. Nonetheless, much like the power over immigration and, I have argued, the power over Indian affairs, the Supreme Court has concluded that Congress has eminent domain power because it is an inherent attribute of sovereignty,[191] an "offspring of political necessity."[192] It has been long settled[193] that Congress may exercise the power of eminent domain as long as it satisfies the Fifth Amendment's requirements that the taking of private property be for "public use" and that the owner receive "just compensa-

190. For example, our entire constitutional tradition is based on the notion of negative rights against governmental action, not positive rights to governmental protection or benefits. *See, e.g.,* DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 194-97 (1989) (holding that the Due Process Clause does not impose a positive duty to provide adequate protective services to members of the general public). International human rights norms involving indigenous peoples that amount to positive, rather than negative, rights will prove to be much harder to integrate with our Constitution. *See, e.g.,* ILO Convention 169, Jun. 7, 1989, 28 I.L.M. 1382, 1389-91 (creating positive rights to health care and education).

191. *See* United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 681 (1896).

192. Bauman v. Ross, 167 U.S. 548, 574 (1897).

193. *See* Kohl v. United States, 91 U.S. 367, 372-74 (1875).

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tion."[194] Under the current precedent, these two limitations provide no practical way to prevent the exercise of this congressional power. As long as Congress is willing to pay "just compensation"—defined as fair market value at the time of the taking[195]—the "public use" requirement will not prevent any taking. Although it remains true that a taking for a private use would be unconstitutional, the Court has essentially treated the public-purpose requirement as a legislative, not judicial, question. The requirement that the taking be for a public use is no more stringent a constraint than other limitations upon "a sovereign's police powers."[196] This approach essentially conflates the judicial review of the question whether the taking is for a public purpose with the question whether the action violates substantive due process or equal protection. For such governmental economic regulation, this standard, and therefore derivatively the takings public-use test, is the weakest form of rational-basis review: whether the governmental act is "rationally related to a conceivable public purpose."[197]

The relationship between the public-purpose requirement and the just-compensation requirement has been a fascinating one.[198] In a nutshell, because of the demise of *Lochner* and serious judicial second-guessing of economic legislation, the courts abandoned intrusive review of whether a taking was in the public interest. Instead, it is assumed that the requirement of just compensation sufficiently ensures that Congress or the state legislatures believe that a taking of property serves the common good. By making the government pay for expropriations, the theory is that there will be sufficient checks upon abuse, and that any remaining abuses are not susceptible to easy judicial identification and remediation.

This approach is nothing short of disastrous when applied to the taking of Indian lands.[199] The payment of money—even

194. U.S. CONST. amend. V.

195. *See* Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 474 (1973).

196. Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 240 (1984).

197. *Id.* at 241. For a recent and highly deferential version of the rational basis test for economic regulation, see *Federal Communications Comm'n v. Beech Communications, Inc.*, 508 U.S. 307, 314-18 (1993).

198. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 588-92 (2d ed. 1988).

199. *See* Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law*, 46 ARK. L. REV. 77, 153-58 (1993); Clinton, *supra* note 67, at 1042-44. Of course, this approach at least

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fair market value—does not begin to compensate when the taking involves aboriginal lands, with their extraordinary cultural significance. It is compensation, to be sure, but it is not "just" recompense. There is usually no way to take the money and buy equivalent land elsewhere. Ordinarily, no equivalent land exists, and even if it does, the current owner may not wish to sell. In the context of Indian lands, using the just-compensation requirement as a legislative process surrogate for substantive review of whether the taking is in the public interest imposes the western, capitalist assumption that land and capital are fungible upon a nonwestern, noncapitalist culture in which they are not. It is, in short, a form of judicial colonization.

The long saga of the taking of the Black Hills confirms this conclusion about the nonequivalence of land and money. After a legal battle that stretched over half a century, in 1980 the Supreme Court concluded that the United States had taken the Black Hills from the Sioux Nation and that just compensation, including interest, was required.[200] When the federal money was set aside in the federal treasury for the Sioux Nation, however, the tribes that constitute that Nation refused to accept it.[201] The tribes argued that money was not an appropriate substitutionary remedy for the loss of lands of such cultural and religious significance, and that taking the money would dissipate the tribes' moral claims to an entitlement to the return of the lands.[202] The money still sits in the federal treasury, earning interest, as the tribes hope for federal legislation returning some of the land.[203]

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provides some monetary compensation. Even worse is the rule that Congress may take Indian land without any requirement of compensation as long as the land is held in aboriginal title rather than recognized title (i.e., title formally recognized by Congress by treaty or otherwise). See *supra* notes 9-10 and accompanying text (describing the Court's adoption of this rule).

200. United States v. Sioux Nation, 448 U.S. 371, 424 (1980). For an overview of the history of this dispute, see Nell J. Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 763-65 (1992).

201. *See* EDWARD LAZARUS, BLACK HILLS: WHITE JUSTICE 353 (1991).

202. *See id.* at 353-54.

203. Because interest accrues to this account, the amount set aside for the tribes continues to grow. Newton, *supra* note 200, at 765 n.62 (noting that in 1992, the accumulated amount was more than $315 million).

During the 1980s, Senator Bradley introduced legislation that would have returned some of the Black Hills to the tribes. *See* S. 705, 100th Cong. (1987). No member of the South Dakota delegation in Congress ever co-sponsored the bill. *See* Frank Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D. L. REV. 246, 264 n.99 (1989).

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Of course, when the federal government confiscated the Black Hills in the 1870s, it probably did not imagine that just compensation was even required.[204] Even in more modern circumstances, however, in which Congress is on notice that fair market value must be paid for Indian lands, the requirement of payment has not produced any assurance that the sensitive issues involving the loss of aboriginal lands are carefully considered. For example, the availability of fair-market-value compensation for the takings of Indian lands did not prevent the expropriation in the mid-twentieth century of huge portions of Indian land in North and South Dakota for water projects along the Missouri River.[205] The federal government undertook this project without consulting with, much less with the consent of, the tribes, and it had draconian cultural and economic effects.[206] The requirement of fair-market-value payment was a wholly inadequate deterrent to this baldly colonial act, and the payment of it was hardly "just" compensation.

When the Takings Clause is read against the backdrop of international law in general and international human rights norms in particular, the ill fit between the context of federal Indian law and the usual understandings of "public purpose" and "just compensation" becomes even more apparent.[207] Documents seeking to identify the contemporary international human rights norms concerning indigenous people uniformly stress the value of aboriginal lands. For example, Convention

204. The tribes lost the Black Hills as part of an 1877 "agreement." Act of Feb. 28, 1877, ch. 72, 19 Stat. 254, 255 (1875-1877). Congress forced the Act upon them, and in return the Indians received some rations. *See Sioux Nation*, 448 U.S. at 383 n.14. At that time—the beginning of the "plenary power" era—Congress might well have assumed courts would not second-guess the legitimacy of this transaction, much less conclude it constituted a Fifth Amendment taking.

205. See Pommersheim, *supra* note 203, at 260-61, upon which this discussion is based.

206. The federal government took over 550 square miles of Indian land and displaced over 900 Indian families, resulting in the dismantling of Indian communities and the disruption of their economy. *Id.* at 261. The flooding of ancestral land had devastating religious and psychological consequences as well. *Id.* Vine Deloria, the eminent scholar of federal Indian policy, called this "the single most destructive act ever perpetrated on any tribe by the United States." *Id.* (quoting MICHAEL L. LAWSON, DAMNED INDIANS: THE PICK-SLOAN PLAN AND THE MISSOURI RIVER SIOUX, at xiv (1982)).

207. *See* Michael L. Ferch, *Indian Land Rights: An International Approach to Just Compensation*, 2 TRANSNAT'L L. & CONTEMP. PROBS. 301, 302-05 (1992); Lawrence B. Landman, *International Protection for American Indian Land Rights?*, 5 B.U. INT'L L.J. 59, 75-84 (1987).

169 of the International Labour Organisation, the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, contains an entire Part concerning aboriginal lands.[208] It calls upon governments to "respect the special importance for the cultures and spiritual values of the people concerning their relationship with the lands . . . which they occupy or otherwise use"[209] and, except in exceptional situations, to avoid removing indigenous persons from these lands without their consent.[210] If indigenous lands are taken, the preferred remedy is the provision of "lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development."[211] Money constitutes adequate compensation only when the peoples involved prefer it to land.[212]

The United States has not ratified this Convention, and as yet it has not garnered substantial agreement from other nations.[213] As such, it is unlikely to be directly enforceable in American law.[214] Nonetheless, as a contemporary expression of emerging international law norms applicable to colonized peoples, it provides an interesting, useful—and, I have argued, necessarily relevant[215]—backdrop against which critically to assess constitutional takings doctrine. Because the American experience with the taking of Native lands confirms the normative attractiveness as well as the practical importance of the

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208. ILO Convention 169, *supra* note 190, pt. II, at 1387. For a useful and succinct overview of International Labour Organisation Convention 169 and related international developments, see ANAYA, INDIGENOUS PEOPLES, *supra* note 107, at 43-58. For his discussion of Part II on land, see *id.* at 104-07.

209. Indigenous Peoples Convention, *supra* note 190, art. 13, at 1387.

210. *Id.* art. 16, at 1387-88.

211. *Id.* at 1388.

212. *Id.* Much the same approach to the land rights of indigenous peoples is taken by the Members of the Working Group on Indigenous Peoples. *U.N. Draft Declaration on Indigenous Peoples*, U.N. Economic and Social Council, 11th Sess., arts. 7(b), 10, 25-27, 30, U.N. Doc. E/CN.4/SUB.2/1993/29 (1993). This draft "recogniz[es] the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures, and from their cultures, spiritual traditions, histories and philosophies." *Id.* at Annex I.

213. *See* Barsh, *supra* note 177, at 43-46.

214. *But cf.* ANAYA, INDIGENOUS PEOPLES, *supra* note 107, at 49-58 (arguing for enforcement as customary international law).

215. See *supra* notes 176-177 and accompanying text (describing the constitutional relevance of international law norms concerning indigenous peoples).

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principles identified in the Convention, a reconsideration of American takings doctrine within the context of Native lands is in order.

This reevaluation is hardly a revolutionary idea. Indeed, the Marshall Court itself recognized that Indian lands are not identical in law to other lands. Under the colonizing process conceptualized in *Worcester*, which remains the most important case in federal Indian law, the colonizing sovereign did not possess a unilateral power of displacement, even if compensation was provided. Rather, it possessed only "the exclusive right of purchasing such lands as the natives were willing to sell."[216]

A more normatively attractive approach to the taking of Indian lands, consistent both with the longstanding assumptions of the Marshall Court and with emerging international norms, would recognize a presumption against the taking of Indian lands without consent and a preference for recompense in the form of land rather than money. This accommodation could be achieved rather easily under current constitutional law.

The place to begin is with the construction of a theory that ordinarily prevents the unilateral taking of Indian land. The obvious doctrinal modification would be to heighten the scrutiny applied to whether the taking of Indian land is "for public use." In addressing this inquiry, courts should ask whether the taking serves a public value rather than merely a private interest (for example, in using governmental power to effectuate a naked transfer from one private entity to another).[217] Ordinarily, the payment of fair market value, assumedly an adequate substitutionary remedy for the loss of property, and a facially plausible justification for the taking being in the general public interest should suffice. But Indian lands are not ordinary lands: they are not sufficiently fungible to make the payment of fair market value an acceptable equivalent to the land, and the fear of a governmental taking rooted in prejudice or selective cultural indifference is substantially greater for

216. Worcester v. Georgia, 31 U.S. 515, 545 (1832). Although in the first major federal Indian law case Marshall stated that under the colonial process Indian lands could be obtained "either by purchase or by conquest," Johnson v. McIntosh, 21 U.S. 543, 587 (1823), his later and far more important decision in *Worcester* omitted any reference to conquest. *See Worcester*, 31 U.S. at 545.

217. *See* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1723-27 (1984).

Indian lands than for the lands of others. At a minimum, then, no taking of Indian land should be allowed without a strong justification in public values that outweighs the hardship to the Indians and that cannot be well served by other means.[218] In particular, courts should inquire whether the federal government carefully considered alternatives to the taking of Indian land. Administrative convenience and saving federal money should not be boilerplate defenses to objections to the taking of Indian lands. Alternatives such as taking privately held land and encountering greater inconvenience and cost should not only be considered, they should be balanced against the hardship occasioned to the Indians by the proposed taking.

Second, in those instances in which the federal government makes the requisite showing and would be allowed to take Indian lands, the "just compensation" required should presumably be land as equivalent as possible to the taken land, not money. The burden ought to be on the government, pre-

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218. What I have in mind here is a rigorous rationality scrutiny akin to the intermediate scrutiny applied to a gender classification, which can be sustained only if it "serve[s] important governmental objectives and [is] substantially related to achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976). Gender classifications are presumptively unconstitutional, and the burden is on the government to demonstrate the constitutionality of such a classification. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982). Thus, before adopting a gender classification, the legislature must "choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact." *Craig*, 429 U.S. at 199.

Intermediate scrutiny of this kind would be a reasonable way to implement the constitutional rationality inquiry in federal Indian law. At the moment, in form the constitutional standard is whether the policy "can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians." Morton v. Mancari, 417 U.S. 535, 555 (1974). Note that this is a special kind of rational basis inquiry, for it seemingly precludes the constitutionality of measures that harm Indians. Perhaps for this reason, in later cases where classifications disadvantaging Indians were at issue, the Court seemingly reverted to garden-variety rational basis review, under which essentially any measure is constitutional. See *supra* note 61 and accompanying text (describing the dearth of Court decisions finding constitutional infirmity with congressional action involving Indians). However, at least where Indian claims match up well with international law norms, such as in the case of the taking of land, much more rigorous constitutional review should be required.

If courts did not wish formally to abandon rational basis review, many of these same objectives could be achieved by bringing into federal Indian law the "rationality with bite" approach taken in *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448-50 (1985), where the Court required that the regulation reasonably serve a legitimate public purpose, and *Evans v. Romer*, 116 S. Ct. 1620 (1996), where the Court struck down an anti-gay initiative because it lacked a legitimate public purpose.

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sumably with the cooperation of the tribe, to identify equivalent land, take title to that land by eminent domain, and then transfer title to that land to the tribe in compensation for the Indian land taken. The tribe has no private right of eminent domain: it cannot compel the owners of land of particular importance to the tribe to sell, whether for fair market value or any other price. The government has that power and should use it in a way that results in a best approximation of truly "just compensation" for the tribe. Only if the tribe prefers money should the presumption in favor of land for land be overcome. When there simply is no available land even roughly equivalent in significance to the Indian land proposed to be taken, that strongly counsels for even higher scrutiny of whether the taking is justified in the first place. The point, after all, is that compensation should be "just," and conclusions about justice in the area of the taking of Indian land are quite different from those usually encountered in the taking of other land for governmental purposes. These considerations are not simply matters of morality or natural law: they are made constitutionally cognizable through the backdrop of international law, as it should inform both the federal power over Indian affairs and the limitations upon that power.

B. FREE EXERCISE OF RELIGION

In *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[219] Indians were big losers in a decision narrowly interpreting the Free Exercise Clause of the First Amendment. In *Lyng*, the Court rejected a claim that the Free Exercise Clause was violated by the federal construction of a road across the federal public domain that would allegedly drastically interfere with—indeed, perhaps destroy—the religious practices of Indians. The backdrop of international human rights norms, as they inform limitations upon federal and state power, confirms the incorrectness of this decision.

Lyng involved sacred religious sites on land that is now within the federal National Forest System but to which Indians had access for their religious practices. The plaintiffs objected to a United States Forest Service proposal to build a paved road and allow timbering near these sites. The Forest Service's own study of the issue concluded that the area "is significant as an integral and indispensible [sic] part of Indian

219. 485 U.S. 439 (1988).

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religious conceptualization and practice" and that constructing the road "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway" of the Indians.[220] Although the Forest Service modified the proposal somewhat in an effort to lessen the interference with Indian religion, the district court concluded that even as revised both the road building and the timbering "would seriously damage the salient visual, aural, and environmental qualities of the high country" and accordingly found a violation of the Free Exercise Clause.[221] The Ninth Circuit agreed.[222]

In rejecting this conclusion, the Supreme Court assumed "that the Indian respondents' beliefs are sincere and that the Government's proposed actions will have severe adverse effects on the practice of their religion,"[223] indeed perhaps " 'virtually destroy[ing] the . . . Indians' ability to practice their religion.' "[224] Nonetheless, in the view of the Court, no free exercise violation had occurred for two reasons. First, the First Amendment does not require the government to conduct its internal affairs, including the management of federal lands, in ways that comport with particular religious beliefs.[225] Second, the challenged governmental action did not prohibit, punish, or coerce any particular religious practice.[226] Because the Supreme Court could find no burden on the free exercise of religion, it never balanced the importance of the governmental project against the harm caused to religion.[227] When stripped of its

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220. *Id.* at 442.

221. *Id.* at 443-44 (quoting Northwest Indian Cemetery Protective Ass'n. v. Peterson, 565 F. Supp. 586, 594-95 (N.D. Cal. 1983)).

222. *See* Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 698 (9th Cir. 1986), *rev'd*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988). The opinion was written by Judge Canby, a respected scholar of federal Indian law. For examples of his work, see WILLIAM CANBY, AMERICAN INDIAN LAW IN A NUTSHELL (2d ed. 1988); William Canby, *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1 (1987).

223. *Lyng*, 485 U.S. at 447.

224. *Id.* at 451-52 (quoting Ninth Circuit opinion below).

225. *See id.* at 447-49 (relying upon Bowen v. Roy, 476 U.S. 693 (1986)).

226. *See id.* at 449.

227. In earlier cases in which a burden on a religious practice was acknowledged, the Court purported to apply strict scrutiny by asking whether the interference with the free practice of religion was justified by a compelling government interest that could not be served by less intrusive means. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (determining that no compelling state interest existed in requiring a member of Seventh-Day Adventist

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First Amendment veneer, however, the Court's view of the case boiled down to an assessment of competing property interests. The Court described the Indians' claim as one to a "religious servitude"[228] on public land, surmised that this claim could ultimately result in "de facto beneficial ownership of some rather spacious tracts of public property,"[229] and concluded that "[w]hatever rights the Indians may have to the use of the area, . . . those rights do not divest the Government of its right to use what is, after all, *its* land."[230]

The basic problem with the analysis in *Lyng* is that it takes an extraordinarily ethnocentric approach to freedom of religion.[231] The assumption in *Lyng* is that religion is transcendental: belief consists of a faith in a God out in the ether somewhere, and religious practice is simply activity connected to that kind of belief. What happens on earth cannot destroy religious beliefs. Thus, for example, if a state highway department by eminent domain takes a Lutheran church building for a road project, the congregation simply accepts fair market value as the measure of just compensation and goes elsewhere to buy or build a new church, with their religious beliefs fully intact. As *Lyng* acknowledged, however, American Indian religions are often not transcendental: the gods are found on the earth, and the practice of the religion is inextri-

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Church to work on the Saturday sabbath day or risk losing unemployment compensation benefits).

228. *Lyng*, 485 U.S. at 452.

229. *Id.* at 453.

230. *Id.*

231. Another problem is the Court's failure to consider that the federal government had not owned this land from time immemorial. The question begged by this analysis is how this land came to be federal land. In another sensitive area of property rights in the arid western United States—water rights—the Supreme Court has long held that tribes may have off-reservation reserved water rights that amount to a servitude providing access across private and public land and guaranteeing enough water to make the reservation a viable enterprise. *See* Winters v. United States, 207 U.S. 564, 576-77 (1908); United States v. Winans, 198 U.S. 371, 384 (1905). The theory of the reserved water rights cases is that the tribe would not cede lands adjoining water to the federal government and be left with a reservation lacking access to water without implicitly reserving to the tribe enough water to make the remaining reservation functional. Contrary to the suggestion in *Lyng*, then, tribes do sometimes have "servitudes" across lands that they lost through some earlier dealings with the federal government. To be sure, there may be important distinctions between off-reservation water rights and rights of religious access. Nonetheless, at a minimum the water-rights cases severely undercut the Court's instinctive reaction that off-reservation servitudes are highly implausible.

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cably linked to where those gods are and what believers must do at those locations. Thus, as lower court cases before *Lyng* graphically demonstrated, taking Indian sacred lands by eminent domain for a water project that results in the flooding of those lands causes harm to religion well beyond the nuisance factor experienced by the Lutheran congregation hypothesized above. The flooding drowns the gods present on those lands and effectively destroys the religious beliefs of these people.[232]

Application of such Euro-American assumptions about what free exercise of religion should mean is simply another example of the unilateral displacement of Native interests and the ongoing colonization of this continent. International human rights norms confirm this conclusion. For example, ILO Convention 169 endorses the protection of "the social, cultural, religious and spiritual values and practices"[233] of Natives. In addition, as noted before,[234] the Convention recognizes "the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands . . . which they occupy or otherwise use,"[235] as well as to "lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities."[236]

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232. *See* Badoni v. Higginson, 638 F.2d 172, 177 (10th Cir. 1980); Sequoyah v. Tennessee Valley Authority, 620 F.2d 1159, 1160 (6th Cir. 1980). *See generally* Sarah B. Gordon, Note, *Indian Religious Freedom and Government Development of Public Lands*, 94 YALE L.J. 1447 (1985) (describing challenges by Indian tribes that development plans affecting sacred areas in previously undisturbed federal and state lands are violations of the Free Exercise Clause).

233. ILO Convention 169, *supra* note 190, at 1385.

234. *See supra* text accompanying notes 208-212 (discussing the Convention's recommendation that governments respect the special importance of the cultures and spiritual values of indigenous people).

235. ILO Convention 169, *supra* note 190, at 1387.

236. *Id.* Similar norms are presented in the *U.N. Draft Declaration of the Rights of Indigenous Peoples*, *supra* note 212, arts. 7(a), 8, 12-14, 25. In particular, it provides that indigenous peoples have "the right to maintain, protect, and have access in privacy to their religious and cultural sites." *Id.* art. 13. In this respect, *Lyng*, in involving religious sites, is distinguishable from *Bowen v. Roy*, 476 U.S. 693 (1986), in which the claim was that the federal assignment and internal governmental use of a social security number invaded Native American religious freedom.

In addition, in this context Native Americans could also contend that their right to free exercise of religion is informed by Article 18 of the International Covenant on Civil and Political Rights. Unlike ILO Convention 169, *supra* note 190, the International Covenant has been ratified by the United States. *See supra* text accompanying note 213 (noting that the United States has not ratified the Convention). The support of the International Covenant

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These international human rights norms squarely support the criticism that *Lyng* defined a "burden" on the free exercise of religion too narrowly.[237] Even if some minority religions lack protection against their destruction through governmental actions antagonistic to their belief structures, Native American religions stand on a different footing. At a minimum, the judicial role in ameliorating ongoing colonization should have led the Court to balance the relevant interests in the case, rather than abjure from any balancing test through the threshold requirement of a too-narrowly-defined "burden." That balance would have almost surely favored the Native claim: the governmental interest in promoting direct routing of traffic and timbering of federal trees seems quite insignificant measured against the destruction of a religion.[238]

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would therefore add particular weight to this claim.

237. *See* Ira Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989) (critiquing the current judicial requirement to show burden on religious activity to establish a violation of the Free Exercise Clause). For a related but broader critique of *Lyng* challenging the Court's refusal to approach the context of that case critically, see Joseph William Singer, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism*, 63 S. CAL. L. REV. 1821 (1990).

238. Of course, because international human rights norms under my theory are not directly translatable into constitutional rights, but rather provide a relevant backdrop for them in the Native American context, there may well be cases in which federal action of great significance would outweigh Native religious claims. My point is that *Lyng* becomes an easy case once judicial balancing is required.

In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court rejected the argument that a state violated the Free Exercise Clause by denying unemployment compensation to a Native American who had been fired as a drug counselor at a private firm because he had taken sacramental peyote during a religious service of the Native American Church. A consideration of international human rights norms would provide a considerably greater sensitivity about any governmental action penalizing the use of a Native religious sacrament. This conclusion seems inescapable in *Smith*, where there was no showing that the use of sacramental peyote had ever caused any law-enforcement problems or other public policy concerns. *See id.* at 911-13 (Blackmun, J., dissenting). Again, the backdrop of international norms, as influencing constitutional interpretation, should produce a balancing test in which the government is put to the challenge of defending its regulatory interest as serving an important government interest through narrowly tailored means that transcends the hardship to Native American religious practitioners.

Congress has overturned the result in *Smith* by statute. *See* Pub. L. No. 103-344, 108 Stat. 3125 (1994) (codified at 42 U.S.C. § 1996a (1994) and preempting state laws penalizing the use of sacramental peyote). In light of the federalization of Indian affairs, *see supra* note 162, there should be no constitutional federalism objection to this statute.

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C. QUASI-CONSTITUTIONAL INTERPRETIVE TECHNIQUES

As long ago as 1804, the Supreme Court announced that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[239] Essentially throughout its entire history, then, the Supreme Court has embraced a canon of interpretation that promotes an interpretation of domestic statutes consistent with international law.[240] When, in relatively short order, the Court confronted the question of interpreting Indian treaties, it adopted similar canons designed to preserve the pre-existing inherent tribal rights under international law from all but clear textual abrogation.[241]

The current Supreme Court has largely lost this profoundly important legacy of the Marshall Court.[242] Yet if, as I have argued, constitutional interpretation should be informed by international norms, statutory interpretation should be even more amenable to that kind of principled supplementation. Indeed, it is a time-honored tradition, with many contemporary examples, that constitutional values that are difficult to enforce through direct judicial review become reflected in canons of interpretation that attempt to mold statutory

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Congress also attempted to promote minority religious freedom in the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (1994)). Unfortunately, the trigger for these enhanced statutory protections of the exercise of religion is a showing of a substantial burden on religion. *See* 42 U.S.C. § 2000bb(b)(1) (1994). By retaining this threshold test, the statute probably does not overturn the result in *Lyng*. Recently, President Clinton issued an executive order directing federal agencies to take practicable steps to accommodate access to and use of Indian sacred sites. *See* Exec. Order No. 13,007, 61 Fed. Reg. 26,771 (1996).

239. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

240. *See* Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990) (analyzing the principles behind the juridical relationship between international law and domestic law).

241. *See* Frickey, *supra* note 14, at 398-417; text accompanying notes 104-106 (suggesting that Marshall created canons recognizing inherent tribal sovereignty for interpreting Indian treaties). The parallelism to immigration law continues to hold here as well. *See* Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, *supra* note 68, at 567-75 (positing that federal courts have used "phantom norms" embodied in canons of interpretation to ameliorate some of the harshness of the plenary-power doctrine in immigration law).

242. *See* Frickey, *supra* note 14, at 418-26, 432-37; *supra* text accompanying notes 171-175 (elaborating upon this conclusion).

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meaning consistent with those values.[243] The advantage of the canonical method over judicial statutory invalidation under *Marbury v. Madison*[244] is that the former is often less counter-majoritarian and may engage Congress in a dialogue about public values.

Federal Indian law issues, like issues concerning separation of powers and federalism, often involve the question whether Congress has gone too far in invading the prerogatives of another sovereign entity (the executive branch, the states, the tribes). The Court currently uses canons to buffer congressional excesses in these other constitutionally sensitive structural areas,[245] and the same strategy is evident in Chief Justice Marshall's creation and application of the Indian law canons.[246] Because he molded these canons against the backdrop of international law,[247] they should be nurtured by international norms as well as domestic values.

A brief return to the constitutional values involved in the taking of Indian land[248] and in the interference with the free exercise of Native religious freedom[249] illustrates the power of the canonical approach to federal Indian law, as informed by international human rights norms. As a threshold requirement before addressing whether the government can defend the taking of Indian lands against a constitutional challenge, for example, a court should require a clear statement in statutory text acknowledging that the land is held by Indians and expressly intending to take the land for an articulated national purpose.[250] Similarly, courts should expansively construe stat-

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243. *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992).

244. 5 U.S. (1 Cranch) 137 (1803).

245. *See* Eskridge & Frickey, *supra* note 243, at 609-11.

246. *See* Frickey, *supra* note 14, at 412-17 (suggesting Marshall created canons to protect documents from interpretations that would violate their underlying nature and purposes).

247. *See* Angela R. Hoeft, Note, *Coming Full Circle: American Indian Treaty Litigation from an International Human Rights Perspective*, 14 LAW & INEQ. J. 203, 212 (1995); *supra* text accompanying notes 98-107 (indicating that Marshall incorporated international law into the domestic law of Indian affairs).

248. *See supra* text accompanying notes 191-218 (discussing the Takings Clause and the power of eminent domain in the context federal Indian law).

249. *See supra* text accompanying notes 219-238 (discussing the Free Exercise Clause and Native American religion).

250. *Cf.* United States v. Winnebago Tribe, 542 F.2d 1002 (8th Cir. 1976)

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utes to protect Native American religious liberty[251] and require a clear showing of legislative intent before assuming that Congress wished to invade Indian religious rights. Indeed, had the Supreme Court taken this approach in *Lyng*, the constitutional issue might have disappeared.[252]

CONCLUSION

Louis Henkin, the eminent international law scholar, once wrote that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[253] Whatever might be said about the accuracy of this generalization in international law, it has little relationship to the reality of federal Indian law. Federal Indian law has been impoverished of principles, and the treaty obligations found in it have been routinely violated from the colonial period onward. The congressional irresponsibility and the judicial abdication might be summed up in three not-so-little words: "congressional plenary power."

Over five centuries after the Columbian encounter and over two centuries after the constitutional incarnation, the co-

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(recognizing that congressional intent to take particular Indian lands was not sufficiently clear to authorize the Army Corps of Engineers to acquire the land by eminent domain). The approach would be similar to that taken for congressional abrogation of the states' Eleventh Amendment immunity or for congressional invasion of a core state function through the authority to regulate interstate commerce: whether Congress has made its intention to do so "'unmistakably clear in the language of the statute.'" Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991) (discussing Tenth Amendment standard while quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985)).

251. *See supra* note 238 (discussing two statutes and an executive order dealing with Native American religious liberty).

252. In *Lyng*, the Court held that the American Indian Religious Freedom Act of 1978, Pub. L. No. 95-341, 92 Stat. 469 (codified at 42 U.S.C. § 1996 (1994)), created no judicially enforceable rights. *See Lyng*, 485 U.S. at 455.

In *Smith*, the Oregon Supreme Court missed a similar opportunity. The first time that case made its way to the Supreme Court, the Court reversed and remanded for a determination whether sacramental use of peyote violated state law. *See Smith*, 485 U.S. at 660. Had the Oregon Supreme Court approached the issue in a canonical manner, it might well have found an implied exception to the state criminal laws for sacramental use of peyote and thereby avoided the constitutional issue. *Cf.* NLRB v. Catholic Bishop, 440 U.S. 490, 500-01 (1979) (holding that courts should avoid addressing a constitutional issue unless "the affirmative intention of the Congress clearly expressed" requires the court to do so); Holy Trinity Church v. United States, 143 U.S. 457 (1892) (reading a federal criminal statute creatively and narrowly to avoid interference with free exercise of religion).

253. LOUIS HENKIN, HOW NATIONS BEHAVE 42 (1968).

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lonial process continues. For a century, it has been viewed as a matter both solely domestic and almost completely nonjudicial. An appreciation for the backdrop of international law destroys both of these easy assumptions and provides the missing link between colonialism and constitutionalism.

"But," one might respond, "power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend."[254] So said Chief Justice Marshall, in declining to evaluate the normative questions surrounding the original colonization of this continent. Need we, a century and one-half later, in a world considerably less sanguine about colonization, settle for this little? Marshall himself had at least a partial answer: "We proceed, then, to the actual state of things, having glanced at their origin, because holding it in our recollection might shed some light on existing pretensions."[255] Congressional plenary power is an existing pretension. As Marshall himself understood, it was only by reference to its "origin" in international law that congressional power over Indian affairs could become part of our domestic law. "Holding" historical and contemporary international law "in our recollection" does "shed light" on congressional plenary power in much the same way as sunshine disinfects. It is time to domesticate this most undelimited of domestic powers by internationalizing our understanding of it.

254. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 543 (1832).
255. *Id.*

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