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Congressional Plenary Power and Indigenous Environmental Stewardship: The Limits of Environmental Federalism

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INTRODUCTION

Congressional plenary power has provided the legal foundation for Congress's extraordinarily wide range of legislation over indigenous Americans,[1] their lands, and their governments for more than a century.[2] The Plenary Power Doctrine, developed by the Supreme Court in the early nineteenth century, has bolstered this power through highly deferential judicial review of Congress's legislative acts.[3] Despite the lack of a strong constitutional foundation, over time, Congress encroached deeper into matters affecting indigenous nations and indigenous peoples, regulating matters like tribal governmental structures, criminal jurisdiction and the manner of punishment for crimes committed on tribal lands, tribal land acquisition, gaming on tribal lands, the extraction of natural resources from tribal lands, and the settlement of land claims involving states.[4] Congress has used plenary power to override Supreme Court decisions, abrogate treaties negotiated by the executive branch, terminate federal recognition of previously recognized tribes, divest tribes of vast landholdings in violation of treaty agreements, and involuntarily incorporate numerous indigenous nation-states, such as the Kingdom of Hawaii, into the United States.[5] At times, Congress has realized the folly, or even

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1 This Article uses the term "indigenous" to refer to those individuals residing within the borders of the United States who have indigenous ancestry, whether they live in Indian Country or not. It uses the term "Indian" when referring to federal statutory benefits or rights conferred by Congress on a given category of indigenous people. It uses the term "Indian Country" as that definition is explained in federal statutes and cases. It uses the term "tribe" to describe indigenous nations that denominate themselves as tribes and otherwise when relevant to a federal statute or regulation conferring or recognizing authority held by federally recognized tribes.

2 Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENV. U. L. REV. 201, 204 (2007); Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666, 669 (2016).

3 United States v. Kagama, 118 U.S. 375, 379–80 (1886) (first acknowledgment of congressional plenary power); Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903) ("We must presume that Congress acted in perfect good faith in the dealings with the Indians . . . ."); *see also* Natelson, *supra* note 2; Steele, *supra* note 2.

4 Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 213–14 (1984); *see also* Major Crimes Act, 18 U.S.C. § 1153 (2012); Indian Reorganization Act, 25 U.S.C. § 5123 (2012).

5 *See, e.g.*, General Allotment Act of 1887, ch. 119, § 1, 24 Stat. 388 (codified at 25 U.S.C. § 331), *repealed by* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462, § 106(a)(1), 114 Stat. 1991 (giving Congress authority to allot and sell tribally owned parcels of land); *Lone Wolf*, 187 U.S. at 566 (holding that Congress has the power to abrogate treaties with tribes); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124

tragedy, of its plenary power exercises and attempted to undo the damage with legislation that restored tribal jurisdiction and governmental authority, compensated tribes for the loss of their lands, attempted to stimulate economic development on tribal lands, and supported the rejuvenation of tribal governments.[6] Yet, on the whole, Congress has expanded its plenary power in a variety of areas since the Supreme Court first recognized this authority in the early nineteenth century.

In the area of environmental and land-use regulation specifically, Congress has used its plenary power to impose federal authority, directly and indirectly, over indigenous peoples and their lands.[7] At first, this legislation related to ownership and control of indigenous lands—and specifically to the federal and private divestiture of massive landholdings.[8] Later, Congress encroached into tribal authority over natural resources, abrogating treaties and authorizing federal control over tribal access to wild game, fish, and other species, as well as imposing federal oversight and authority in the areas of mineral extraction and timber harvesting.[9] More recently, Congress began amending several major environmental statutes, authorizing federal agencies to regulate tribal air quality, water quality, drinking water, and mining reclamation (Tribes as States (TAS) provisions).[10] The TAS

YALE L.J. 1012, 1081 (2015) (stating that the Supreme Court in *Kagama* "claimed that Congress could interfere with internal tribal affairs at will"); Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 149 (1977) (discussing House Concurrent Resolution 108, which began Congress's general termination policy of revoking federal recognition, among other things).

6 *See* CAROLE E. GOLDBERG ET AL., AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 278, 609 (7th ed. 2015).

7 Judith V. Royster & Rory SnowArrow Fausett, *Control of the Reservation Environment: Tribal Primacy, Federal Delegation, and the Limits of State Intrusion*, 64 WASH. L. REV. 581, 587 (1989).

8 Robert T. Anderson, *Negotiating Jurisdiction: Retroceding State Authority over Indian Country Granted by Public Law 280*, 87 WASH. L. REV. 915, 922 (2012) (discussing history of reservation policy).

9 Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668–68d (2012); Migratory Bird Treaty Act, 16 U.S.C. §§ 703–11 (2012); Endangered Species Act, 16 U.S.C. §§ 1533–44 (2012); *see also* United States v. Dion, 476 U.S. 734, 740, 745 (1986) (holding that Congress intended to abrogate Indian treaty rights to hunt bald and golden eagles when it passed the Bald and Golden Eagle Protection Act); Antonia M. De Meo, *Access to Eagles and Eagle Parts: Environmental Protection v. Native American Free Exercise of Religion*, 22 HASTINGS CONST. L.Q. 771, 782–84 (1995).

10 Royster & Fausett, *supra* note 7, at 619–20. Some of these statutes allow tribes to directly regulate discrete aspects of these areas under specific statutory provisions but only after satisfying federal criteria, which will be discussed in more detail below.

provisions, described in some statutes as delegations of federal authority to tribes and in others as recognition of inherent tribal sovereign authority,[11] have been widely lauded for the opportunities they created in the area of tribal regulatory authority over environmental quality.[12] It has also been argued that delegated environmental regulatory authority under the TAS provisions expands tribal sovereignty, particularly when exercised in a manner that regulates, restricts, or controls extraterritorial sources of environmental pollution (which tribes would otherwise lack authority to regulate).[13]

Despite the enthusiasm that the TAS provisions initially raised, their value remains open for debate. They do represent the opportunity for increased tribal regulatory control in a complex system of shared jurisdiction and authority. Yet, the provisions themselves are an exercise of congressional plenary power based on the assumption of an unequal degree of sovereign authority between the federal government and tribes.[14] Moreover, the arguably low rate of tribes obtaining primacy under the TAS provisions (at least on a percentage basis when viewed across the entirety of tribal and indigenous lands in the United States) calls into question the continuing role and value of the congressional Plenary Power Doctrine itself. Although the short-term goal of improving tribal environmental quality might be achieved by the handful of tribes that manage to satisfy the numerous criteria to obtain primacy in one or more discrete areas covered by the TAS provisions, ultimately, the federal government still controls the regulatory arena for the vast majority of tribes.[15]

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11 COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 10.01[2][b] (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK] (noting the difference between phrasing in statutes such as the Safe Drinking Water Act and the Clean Water Act (CWA)).

12 Elizabeth Ann Kronk Warner, *Tribes As Innovative Environmental "Laboratories*," 86 U. COLO. L. REV. 789, 806 (2015).

13 *Id.* at 806–07.

14 This argument may depend on perspective, though. From the tribal perspective, absent an express abrogation by Congress, inherent sovereign authority to regulate the environment is not lost until the tribe has ceded it. Therefore, some tribes adopt their own environmental standards outside the environmental federalism framework. *See, e.g.*, SWINOMISH CLIMATE CHANGE INITIATIVE, http://www.swinomish-nsn.gov/climate_change/about/about.html (last visited Oct. 14, 2018).

15 City of Albuquerque v. Browner, 97 F.3d 415, 422–24 (10th Cir. 1996), *cert. denied*, 522 U.S. 965 (1997) (allowing the Isleta Pueblo to adopt more stringent water quality standards than the federal standards under the TAS provision of the CWA); *see also* Royster & Fausett, *supra* note 7, at 612 ("Under domestic law, the federal government can exercise whatever regulatory authority it pleases on the reservation, either under its arrogated plenary power to regulate natives directly, or pursuant to the judicially created rule permitting general federal legislation to be applied to tribes.").

Congressional plenary power in fact may be anathema to true tribal environmental sovereignty, particularly when it comes to matters as critical to indigenous nations as the protection of their lands, natural resources, and the quality of their environment. Also, for the 500 or more tribes who lack primacy under one or more of the statutes, the Environmental Protection Agency (EPA) exercises primary regulatory authority over their lands and tribal environmental quality.[16] Congressional plenary power even determines the threshold by which indigenous peoples can avail themselves of these benefits conferred by Congress, with entire nations and populations excluded from the framework altogether because they cannot satisfy EPA's regulatory criteria.[17]

If the TAS provisions created a bright spot on the horizon for indigenous environmental sovereignty in the 1970s and 1980s, the past thirty years have dampened much of its luster. One of the reasons for this may be the slim legal foundation for the entire framework, which places too much authority in the hands of Congress and federal agencies like the EPA. The purpose of this Article is to examine critically the role of congressional plenary power in the past and in the modern era, the scholarship analyzing tribal environmental federalism,[18] and the jurisprudential basis for Congress's asserted power in this area. This Article will also examine critically the impact of the TAS provisions across the entirety of tribal landholdings in the United States,[19] including some serious concerns for tribes in the long term. If Congress continues to use plenary power as a basis for regulating tribes and tribal lands, it sends an unmistakable message that federal oversight of sovereign indigenous nations is acceptable under modern legal standards. This imprimatur of acceptability undermines,

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16 *See* Phillips Petroleum Co. v. EPA, 803 F.2d 545, 555–56 (10th Cir. 1986); COHEN'S HANDBOOK, *supra* note 11, § 10.01[2][a] (The EPA "retains implementation authority in Indian Country under statutes authorizing tribes to take primary regulatory control unless and until the tribes do so.").

17 COHEN'S HANDBOOK, *supra* note 11, §§ 5.04[2][b], 10.01[2][a].

18 *See* Kronk Warner, *supra* note 12; Sara Franklin & Rebekah King, Conference Report, *The Nineteenth Annual Water Law Conference Watershed Management: A New Governance Trend*, 4 U. DENV. WATER L. REV. 539, 543 (2001); Royster & Fausett, *supra* note 7, at 612; John L. Williams, *The Effect of the EPA's Designation of Tribes As States on the Five Civilized Tribes in Oklahoma*, 29 TULSA L.J. 345, 358 (1993).

19 As of November 2018, the EPA's website lists sixty tribes with TAS status under the CWA. ENVTL. PROT. AGENCY, EPA ACTIONS ON TRIBAL WATER QUALITY STANDARDS AND CONTACTS, https://www.epa.gov/wqs-tech/epa-actions-tribal-water-quality-standards-and-contacts (last visited Nov. 5, 2018) [hereinafter EPA ACTIONS].

rather than bolsters, the legal character of tribal sovereignty, including the sovereign powers to protect tribal lands, natural resources, and environmental quality.

In Part I below, this Article will discuss the history and rise of the Plenary Power Doctrine in federal Indian law and the sources of congressional plenary power and illustrate its questionable foundation in Article III of the Constitution. In Part II, the analysis will explain the environmental federalism framework and the special form it takes in the area of tribal environmental regulation. Part III will explain how the concept of tribal environmental federalism is limited by the Plenary Power Doctrine, both inherently and extrinsically. Finally, this Article will conclude in Part IV that tribal environmental federalism is invalid as well as ineffective and should be replaced with a framework that incorporates a more accurate reflection of tribal environmental sovereignty.

I
PLENARY POWER OVER INDIAN AFFAIRS: A CONGRESSIONAL EXERCISE OF AUTHORITY LACKING A CONSTITUTIONAL FOUNDATION

A. Origins: An Unenumerated Power Born of Necessity and Circumstance

Broad congressional plenary power over indigenous peoples was not what the framers of the Constitution envisioned. As the Supreme Court has observed, "the Constitution of the United States 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."[20] Yet, over time, it has become a settled principle of law that Congress has authority related to indigenous lands and indigenous peoples (all referred to using the term "Indian"[21] in the statutes and case law) and that this authority has existed perhaps since the preconstitutional era.[22] In the preconstitutional era, though, this authority was somewhat vaguely defined.[23] The framers contemplated various forms of express

20 United States v. Kagama, 118 U.S. 375, 378 (1886).

21 This began as an authority over indigenous peoples native to the contiguous forty-eight states and later came to include the authority to legislate in all matters regarding Native Alaskans and Native Hawaiians, although these peoples do not consider themselves to be "Indians."

22 COHEN'S HANDBOOK, *supra* note 11, § 5.01[1]; Newton, *supra* note 4, at 199.

23 COHEN'S HANDBOOK, *supra* note 11, § 5.01[1]; Newton, *supra* note 4, at 199.

authority for Congress to regulate commerce with tribes, and other matters, in the Articles of Confederation.[24] The scope of congressional power in the area of indigenous nations was hotly debated leading up to and during the Constitutional Convention.[25] Some delegates favored "exclusive congressional jurisdiction over all Indian affairs," while others supported congressional authority over "Indian trade" only.[26] The ratified language of Article I, section 8, included the more limited power "to regulate Commerce . . . with the Indian tribes,"[27] rather than a more expansive power to regulate tribes. This power later became known as the Indian Commerce Clause.[28]

The Constitution makes scant reference elsewhere to federal authority *related to*, much less *over* tribes.[29] The Treaty Clause gives the President authority to enter into treaties with foreign nations upon the "advice and consent" of the Senate, and up until the late 1800s, this included the authority to make treaties with tribes.[30] As the Supreme Court has noted, "[t]he treaty power does not literally authorize Congress to act legislatively, for it is an Article II power authorizing the President, not Congress, 'to make Treaties.'"[31] However, "treaties made pursuant to that power can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal.'"[32] Although the Treaty Clause does not expressly enumerate authority for Congress to legislate in matters affecting indigenous peoples or their lands, the Supreme Court has held that Treaty Clause authority, combined with authority in the Indian Commerce Clause, gives Congress "plenary and exclusive" powers to legislate "in respect to Indian tribes."[33]

The scope of this legislative authority has varied over time.[34] In the early years after the Constitution was ratified, there was a general principle that the Indian Commerce Clause, and other constitutional powers such as the War Power and the Treaty Power, gave Congress

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[24] Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 127 (2002).

[25] Natelson, *supra* note 2, at 228.

[26] *Id.* at 227–28.

[27] U.S. CONST. art. I, § 8, cl. 3.

[28] Newton, *supra* note 4, at 230.

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

[30] U.S. CONST. art. II, § 2, cl. 2; United States v. Lara, 541 U.S. 193, 201 (2004).

[31] *Lara*, 541 U.S. at 201 (quoting U.S. CONST. art. II, § 2, cl. 2).

[32] *Id.* (citations omitted).

[33] *Id.* at 194.

[34] *Id.* at 201; *see also* Newton, *supra* note 4, at 202.

authority to pass general legislation in the area of "Indian affairs."[35] While Congress operated under this principle, the Supreme Court was admittedly unsure of the source, nature, or scope of Congress's power and largely avoided addressing the constitutional sources of congressional legislation.[36] At the same time, the Court affirmed Congress's own view of its power as broad, deferring to Congress on the basis that it should possess the necessary authority to accomplish the federal government's policy goals in the area of relations with indigenous nations—even if only as a matter of practicality or necessity.[37] In Chief Justice Marshall's words from *Worcester v. Georgia*, Congress's constitutional powers "comprehend[ed] all that [wa]s required for the regulation of [the federal government's] intercourse with Indians."[38] However, many questioned Marshall's expansive view of Commerce Clause power, "point[ing] out that the Commerce Clause, which was the only fount of constitutional authority available, could not give Congress power over noncommercial affairs with indigenous nations when it did not grant such a police power elsewhere."[39]

The subject of early congressional legislation was largely "Indian lands," including the regulation of transactions involving tribal lands, removal of tribes from their lands, relocation of tribes (sometimes thousands of miles away), and creation of reservations.[40] While Congress was passing these early statutes, the Supreme Court struggled with conflicting principles surrounding the relationship between the federal government and indigenous nations residing within the rapidly expanding boundaries of the territorial United States.[41] On the one hand, the Court recognized that tribes were "external" sovereigns, possessing independent governmental authority over lands that were

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35 COHEN'S HANDBOOK, *supra* note 11, § 5.01[1] (suggesting that the Treaty Power, the War Power, and the Commerce Power are augmented by the Necessary and Proper Clause and the Supremacy Clause in the area of Indian affairs); Newton, *supra* note 4, at 202.

36 United States v. Kagama, 118 U.S. 375, 378–79 (1886) (discussing extensively the various sources of constitutional authority related to Indians in the Constitution but struggling to find one that supported the passage of the Major Crimes Act).

37 *Id.*; Gerard N. Magliocca, *The Cherokee Removal and the Fourteenth Amendment*, 53 DUKE L.J. 875, 898 (2003) ("Holding that Congress had exclusive power over commerce with the Tribes was reasonable. Expanding that rationale to cover all interactions with Native Americans, however, was suspect.").

38 31 U.S. 515, 559 (1832); Newton, *supra* note 4, at 202.

39 Magliocca, *supra* note 37, at 898–99.

40 *Worcester*, 31 U.S. at 530.

41 *See id.*

within the United States but not a part of any state.[42] On the other hand, there was also a general operating principle that tribes were at least geographically part of the nation and that the federal government had the authority to take tribal property, remove tribes from their lands, regulate commerce with tribes, and prevent states from encroaching upon tribal governments.[43] For instance, in *Worcester*, the Court acknowledged that Congress had broad powers over tribal land while simultaneously recognizing that tribal governments possessed the exclusive sovereign authority to regulate matters internal to the tribe.[44]

Although the Supreme Court did not clarify how these seemingly conflicting principles of law could be reconciled, the outlines of a rule emerged early on that internal tribal matters were subject to tribal governmental authority and that relations with external powers, such as the federal government, were subject to federal authority.[45] This interpretation is somewhat consistent with the text of the Indian Commerce Clause, which gives Congress express power to regulate "commerce . . . with the Indian tribes," rather than commerce within the Indian Tribes or within the "Indian Territory."[46] This was somewhat of a comfortable middle ground for the Court because there was no pressing need for Congress to legislate regarding purely internal tribal matters; the primary concerns of the federal government were in acquiring tribal land, which was a matter of external relations between tribal governments and the federal government.[47]

In the late eighteenth century and early nineteenth century, as nonindigenous settlers moved west, land fraud schemes emerged in which speculators were acquiring territory from tribes and selling it, often without proof of title and sometimes multiple times over.[48] When major East Coast investors saw some of their investments evaporate because of these fraudulent conveyances, Congress passed the

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42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.* at 520, 557.

46 *Id.* at 520, 559 (noting that "[t]he Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress [sic]").

47 *See* N. BRUCE DUTHU, AMERICAN INDIANS AND THE LAW 197 (2008).

48 Newton, *supra* note 4, at 201 (discussing the Trade and Intercourse Acts, starting in the 1790s).

Nonintercourse Acts.[49] These statutes clarified that the federal government maintained the exclusive right to negotiate land transactions with indigenous nations, barring private enterprises from defrauding investors and tribes alike with duplicitous purchase and sale arrangements.[50]

During the first 100 years of United States history, if the federal government sought to remove a tribe or otherwise regulate an internal tribal matter, this was generally accomplished using the Treaty Power and left to the executive branch to negotiate.[51] The reason was simple: negotiating with indigenous nations and procuring treaty promises ensured more peaceful outcomes and guaranteed that the military would remain free to focus on external threats.[52] Treaty-making also created a somewhat more consistent map for legal rules separating federal jurisdiction and regulatory authority from tribal jurisdiction and regulatory authority.[53] During this period, the Executive Branch negotiated with tribes, while Congress focused elsewhere.

From roughly 1776 to 1871, the Supreme Court recognized on numerous occasions that Congress possessed broad powers to legislate regarding tribal lands, and perhaps in other areas of "Indian affairs."[54] During that period, therefore, "the integrity of tribal sovereignty rested precariously on the whim of Congress owing . . . to the Court's extraordinary deference to the political branches' exercise of the foreign affairs power in their dealings with the Indians;" a whim that Congress could easily reverse at any time.[55] When it appeared that the option of negotiation was not producing the results that states and nonindigenous settlers wanted, Congress did leap into the fray.[56]

In 1871, Congress passed a rider to the Appropriations Act of 1871.[57] The rider declared that, after 1871, "[n]o Indian nation or tribe,

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49 David M. Schraver & David H. Tennant, *Indian Tribal Sovereignty—Current Issues*, 75 ALB. L. REV. 133, 139–40 (2012) (describing the history of the Indian Trade and Intercourse Acts).

50 *Id.*

51 Newton, *supra* note 4, at 200.

52 *Id.*

53 *See id.*

54 *Id.*

55 *Id.* at 205.

56 DUTHU, *supra* note 47, at 200 (noting that "[d]emand for Indian land and resources, fed by the growing sense of entitlement that would later flourish under the banner of manifest destiny, and a pretty toxic brew of racism toward Indians and their 'primitive' ways of life . . . helped fuel the shift in national policy").

57 United States v. Kagama, 118 U.S. 375, 382 (1886); DUTHU, *supra* note 47, at 200.

within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty."[58] The historical context for this legislation was the end of the policy of removing tribes to the west, into what are now the states of Kansas and Oklahoma, and out of the way of non-native settlers seeking to occupy their lands.[59] After the rider passed, as a matter of federal law, tribes would not be treated as entirely separate sovereign entities; they would be absorbed into and made subject to relevant state and federal laws.[60]

After 1871, Congress legislated more extensively over matters that had previously been negotiated by the executive branch through treaties, asserting more comprehensive authority over tribal governments, tribal territories, and tribal members.[61] Tribal members thereafter became "subjects to be governed [by the United States federal government], rather than foreign nationals," governed by their own national bodies and independent of the federal legal system.[62] One example of this new, expanded authority was the Major Crimes Act, which Congress passed to unilaterally impose federal jurisdiction over serious crimes committed by "Indian[s] . . . within . . . Indian country."[63] Prior to its passage, only tribal authority had governed these crimes.[64]

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58 *Kagama*, 118 U.S. at 382 (citation omitted).

59 Newton, *supra* note 4, at 205 (noting that the policy was ending essentially because all the tribes that removed themselves voluntarily, or the ones that the federal government could force out, had gone, and the small populations that remained could, in the eyes of the federal government, be forcibly assimilated into the general American citizenry).

60 *Id.* at 206. The problem with the line of congressional reasoning was that many tribes had executed prior treaties guaranteeing them certain governmental authority and certain autonomous rights, and the Supreme Court continued to recognize these treaty guarantees after 1871. *See* COHEN'S HANDBOOK, *supra* note 11, § 18.07[1] (citing FPC v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960)).

61 Newton, *supra* note 4, at 206.

62 *Id.* After 1871, the executive branch still negotiated agreements with tribes, which were then made effective by legislation, not a formal treaty. COHEN'S HANDBOOK, *supra* note 11, § 5.01[2]. The 1871 amendments, however, caused a seismic shift in the nature of the relationship between the federal government and tribes because Congress began to pass legislation that encroached upon purely internal tribal matters, such as the Major Crimes Act, the General Allotment Act. Those statutes certainly were not the result of negotiation between tribes and the federal government and were not based on a model of consent. *See* Matthew L.M. Fletcher, *Tribal Consent*, 8 STAN. J. CIV. RTS. & CIV. LIBERTIES 45, 76–77 (2012).

63 18 U.S.C. § 1153 (2012).

64 COHEN'S HANDBOOK, *supra* note 11, § 5.01[4]; GOLDBERG ET AL., *supra* note 6, at 90.

When the Major Crimes Act was challenged, the Supreme Court faced the difficult question of determining whether Congress's plenary power truly extended beyond land acquisition and purely external tribal matters into the heart of an essential tribal governmental function—the prosecution of crimes and assertion of criminal jurisdiction.[65] In *United States v. Kagama*, the Court answered this question in the affirmative.[66] Normally, a challenge to the legitimacy of a statute would require the Court to examine its constitutionality.[67] However, it was clear to the Court, after an initial examination of the potential sources of constitutional authority in the parties' arguments, that something else might be required to evaluate the Major Crimes Act.[68] This was because the scant references to Indians or tribes in the Constitution did not provide a solid legal rationale for upholding this statute, which asserted federal criminal jurisdiction over tribal members, inside tribal nations, and on tribal land.[69] The reference in the Fourteenth Amendment to "Indians not taxed" did not "shed much light" on the matter, but the Indian Commerce Clause, which was the primary basis for the government's argument that the statute was constitutional, seemed slightly more promising to the Court.[70] A plain reading of the text, however, led the Justices to conclude that

> it would be a very strained construction of this clause that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.[71]

Having concluded that the Indian Commerce Clause provided no support for the legislation, the Court looked to the Property Clause.[72] Alone, the Property Clause limited Congress to making "needful" regulations over federal land and, like the Commerce Clause, did not encompass prosecutorial authority or criminal jurisdiction on sovereign

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65 United States v. Kagama, 118 U.S. 375, 378 (1986).

66 *Id.*

67 M'Culloch v. Maryland, 17 U.S. 316, 421 (1819); GOLDBERG ET AL., *supra* note 6, at 91.

68 *Kagama*, 118 U.S. at 378.

69 *Id.*

70 *Id.*

71 *Id.* at 378–79.

72 *Id.* at 379.

tribal lands.[73] However, in addition to the general power to pass legislation acquiring, disposing of, and regulating the use of federal land, the Supreme Court recognized that Congress also had power over United States territories that was more extensive than the power over federal lands that had already become part of admitted states.[74] This general power of Congress to make laws related to territories and their occupants (a power that previously had been exercised only with respect to inhabitants of states, prior to admission) arose, in the Court's view, "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 [could] be found nowhere else."[75]

This issue of federal ownership of tribal lands and the corresponding notion of federal "exclusive sovereignty" over those lands in *Kagama* raised a question about the foundation for those principles, since they conflicted with the earlier cases acknowledging tribal sovereignty over tribal members and tribal lands.[76] The primary question was whether tribal lands were federal or not.[77] That question, in turn, invoked the Doctrine of Discovery, announced by Justice Marshall in *Johnson v. M'Intosh*.[78] According to this doctrine, "discovery" of land by a European sovereign established exclusive rights to settlement and development in that sovereign, although the indigenous nations retained rights to occupy their lands, which the Court also described as "sovereign" rights.[79] The doctrine therefore established corollary rights to the same land in the United States and tribes, in other words, and recognized dual forms of sovereign authority over the same territory.[80]

Under the Doctrine of Discovery, the United States—as successor in interest to Great Britain and the other European nations who originally landed and established claims in the Americas—could inherit sovereign powers over territories already "discovered" by European powers and establish exclusive authority and control over them, through purchase or by force.[81] As for the tribes,

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73 *Id.*

74 *Id.*

75 *Id.* at 380.

76 Worcester v. Georgia, 31 U.S. 515, 521 (1832).

77 *Kagama*, 118 U.S. at 380–81.

78 21 U.S. 543 (1823).

79 *Id.* at 583–84.

80 *Id.* at 587.

81 *Id.* at 573–74.

> [t]hey were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.[82]

Because tribal sovereignty was "diminished," not "divested," the Court concluded that tribes retained some sovereign powers.[83]

Justice Marshall did not clarify the meaning and scope of this diminished sovereignty, although a few parameters can be gleaned from what Marshall determined the tribes had lost. In Marshall's view, tribal sovereignty did not encompass absolute ownership of tribal lands.[84] Tribal sovereignty also did not include total "dominion," or control, over tribal lands—this was held by the "discovering" sovereign or, eventually, by any successor nonindigenous government, such as the United States.[85] The tribes' diminished form of sovereignty did not allow them to exclude the United States, but it did include a duty of protection owed by the United States to the tribes, particularly from the ever-encroaching states.[86] Therefore, indigenous nations retained sovereign authority, especially within their borders, even after *Johnson*.

Over time, the Court would use the Doctrine of Discovery to recognize increasing congressional legislative authority over indigenous lands, even when the factual circumstances underlying the legislation were distinguishable from those in Georgia in the early nineteenth century.[87] In *Kagama*, for instance, when the Court could not find an enumerated source of constitutional authority for Congress to pass the Major Crimes Act, Justice Samuel Freeman Miller cobbled together a rationale using the Doctrine of Discovery, which placed all tribal lands under the authority and control of the federal government, and Congress's general authority to pass legislation concerning all territories within the borders of the United States to reach the

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82 *Id.* at 574.

83 *See id.*

84 *Id.* at 586 (As Chief Justice Marshall noted in the *Johnson* opinion, "The ceded territory [by the States, to the federal government] was occupied by numerous and warlike tribes of Indians; but the exclusive right of the United States to extinguish their title, and to grant the soil, has never, we believe, been doubted.").

85 *Id.* at 579.

86 *Id.* at 594.

87 Newton, *supra* note 4, at 210.

conclusion that Congress possessed inherent power to enact criminal legislation governing tribal lands and their occupants.[88] Yet, Justice Miller failed to explain how sovereign indigenous lands were analogous to territories in reaching that conclusion, omitted entirely the prior nature of the relationship between tribes and the federal government (as separate sovereigns negotiating with one another at arm's length using treaties), and otherwise fell short of the level of reasoning that might be expected to support such a broad expansion of congressional power.[89]

However, the analysis did not end there. The Court found a second rationale supporting the decision in *Kagama*: the legislation was necessary to impose federal control over serious crimes committed in Indian Country.[90] This element of the holding derived from the federal government's view of indigenous peoples at this time as "weak[]," "helpless[]," in need of aid, and effectively "wards of the nation."[91] The Court acknowledged that this factual basis for the holding—the weak and diminished state of indigenous nations—was largely a result of the unilateral exercise of governmental power that the holding affirmed, creating a circular line of reasoning in which the Court used past consequences of congressional acts of plenary power to justify the validity of the Major Crimes Act and, by extension, the continuing assertion of plenary power.[92]

This confusing line of reasoning continued into the late 1800s when the Court finally acknowledged that congressional plenary power was not an enumerated constitutional power, making plenary power something of a congressional inherent power even though the Court generally declined to recognize that Congress possessed inherent, unenumerated powers in other contexts.[93] According to the Court, it

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88 United States v. Kagama, 118 U.S. 375, 378 (1986).

89 COHEN'S HANDBOOK, *supra* note 11, § 5.01[4]; Newton, *supra* note 4, at 214–15.

90 Newton, *supra* note 4, at 212–13.

91 *Kagama*, 118 U.S. at 383–84.

92 *Id.*

93 *Id.*; M'Culloch v. Maryland, 17 U.S. 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."); COHEN'S HANDBOOK, *supra* note 11, § 5.01[4] (suggesting that this notion of inherent congressional power is "analogous to that asserted in the field of international affairs in *United States v. Curtiss-Wright Export Corp.*: That national power in Indian affairs descended to the national government from Great Britain and therefore does not require an explicit grant of power in the Constitution for its exercise," but noting that this theory "has been criticized in the field of international law, however, and

was simply "valid" for Congress to legislate in this area, and the Court granted Congress wide deference to do so, even implementing a standard of review that instructed courts to presume that Congress acted "in perfect good faith" when passing legislation related to indigenous peoples and their lands.[94]

In part, the Court justified the principle that became the Plenary Power Doctrine, and the extreme judicial deference it invoked, using the national government's need to consolidate federal power over territory rather than a measured consideration of the constitutionality of the doctrine itself.[95] As historians have noted, at the time the doctrine really began to crystallize and judicial deference was at its apex, the United States was expanding at a feverish pace—determined to settle and occupy the lands acquired from France (the Louisiana Purchase), Mexico (after the Mexican-American War), Russia (purchase of Alaska) and annex island nations such as Cuba, the Philippines, and Hawaii.[96] When conflicts arose in the course of these territorial expansions, the Supreme Court deferred to the other branches and declined to place any true limits on their implementation of Manifest Destiny.[97] The Plenary Power Doctrine was an essential piece of this colonialist impulse, and the federal government badly needed it to rationalize the removal of indigenous peoples, whose presence impeded the expansion of the nonindigenous population.[98]

Lone Wolf v. Hitchcock exemplifies this tension.[99] In *Lone Wolf*, the Supreme Court reviewed the validity of Congress's ratification of a fraudulently obtained treaty agreement between the Kiowa, Comanche, and Apache Nations and the federal government in which the tribes allegedly ceded more than 2.1 million acres of land to the federal government, which the Department of Interior proceeded to place for sale to nontribal settlers.[100] The tribes sued to enjoin the sales, arguing that the statute authorizing them was invalid because it was based upon a fraudulent treaty agreement signed by less than the minimum

should be avoided in the field of Indian affairs as well."); GOLDBERG ET AL., *supra* note 6, at 91 ("Basic American constitutional law requires that exercises of congressional power be rooted in a textual grant of power to Congress reflected in the text of the United States Constitution."); Newton, *supra* note 4, at 208–09.

94 Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903); *see* Newton, *supra* note 4, at 217.

95 GOLDBERG ET AL., *supra* note 6, at 91.

96 *Id.*

97 Newton, *supra* note 4, at 221–22.

98 GOLDBERG ET AL., *supra* note 6, at 91.

99 187 U.S. 553; Newton, *supra* note 4, at 221.

100 *Lone Wolf*, 187 U.S. at 555.

percentage of tribal members required by a prior treaty (the Treaty of Medicine Lodge).[101] The Court faced two choices: invalidating the legislation authorizing the sale (because it violated the earlier treaty) or finding the statute to be valid (despite the earlier treaty agreements).[102] Choosing the former path would recognize the validity of the Treaty of Medicine Lodge and, at least implicitly, condemn the invalidity of congressional legislation based upon a fraudulent treaty modification, effectively ruling in favor of a validly executed treaty over an invalidly executed one.[103] Choosing the latter would recognize the plenary power of Congress to breach a treaty and unilaterally deprive tribes of extensive landholdings, affirming the power of Congress to legislatively undermine valid constitutional acts of the executive branch.[104]

The Court chose the latter path—abrogation—and sent a clear message about the legal validity of treaties and Congress's new and expansive powers over tribal members, tribal territory, and tribal governments.[105] In dismissing the tribes' argument that the legislation authorizing the land sale was a taking in violation of the Fifth Amendment of the Constitution, the Court noted the following:

> To uphold the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and to deprive Congress, in a possible emergency, when the necessity might be urgent for a partition and disposal of the tribal lands, of all power to act, if the assent of the Indians could not be obtained.[106]

Even though the Court revisited principles from earlier cases acknowledging tribal sovereignty over tribal territory and the nature of the tribes' sacred title, which the Court recognized "as sacred as the fee of the United States in the same lands," neither of those principles could overcome this new notion of congressional plenary authority, especially in situations deemed to be "emergencies" by the federal government.[107] Moreover, this authority was subject to virtually no

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101 *Id.* at 556. Some of the signatures were also fraudulent, having been penned by federal government officials, rather than adult male tribal members.

102 *Id.*

103 *See id.*

104 *Id.*

105 *Id.* at 556–57.

106 *Id.* at 564.

107 *Id.*

judicial scrutiny, with the Court reasoning 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, not subject to be controlled by the judicial department of the government."[108] Furthermore, the Court noted the following:

> The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians.[109]

Even though the tribal members had argued and demonstrated bad faith on the part of the Secretary of the Interior and of Congress (in disregarding the fraudulent factual basis for the legislation authorizing the sale), the Court refused to address the merits of those arguments because they "were solely within the domain of the legislative authority" and that legislative authority—Congress—was deemed to have acted in "perfect good faith" toward the tribes.[110]

It is hard to envision a case with a more persuasive set of facts for any tribe than in *Lone Wolf*—a prior treaty, fraudulent negotiations to modify it, miscommunications by representatives of the Secretary to Congress, and thus an invalid legislative record supporting subsequent legislation authorizing a partition and sale of tribal lands.[111] In light of precedent at the time, such as *Worcester v. Georgia*, the tribes had the stronger legal arguments.[112] Only the newly formed Plenary Power Doctrine supported Congress's power to enact legislation affecting tribal land, but the federal government and the new Doctrine prevailed.[113] In the eyes of the Court, it was time to finish off any remaining vestiges of doubt about Congress's unilateral power over Indian affairs, lest tribes, settlers, or anyone else remain convinced that treaties negotiated by the executive branch were the "supreme law of

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108 *Id.* at 565.

109 *Id.* at 566.

110 *Id.* at 568.

111 *See id.*

112 *Id.* at 564–65.

113 *Id.*

the land."[114] If Congress took aim, the Court now had precedent supporting the principle that treaties sometimes must yield.[115]

After *Lone Wolf*, tribes began to turn to Congress to resolve their land claims and other problems that arose from the removal and reservation era.[116] This case was a turning point for Congress as well, bolstering support for Congress to exercise authority over broad new areas of legislation in Indian Country. For the next century, Congress passed statutes regulating practically anything and everything tribal—from the areas of land use and environmental regulation to mineral development, tribal jurisdiction, child welfare, gaming, and beyond.[117] Congress regulated even the internal governmental affairs of the tribes and passed legislation allowing the federal government to control tribes' collection and disbursement of monies received from natural resource development and other sources.[118] The effect of this era was Congress "treat[ing] . . . previously semi-independent Indian tribes as subject peoples."[119]

B. The Scope of the Modern Plenary Power Doctrine

In the early twentieth century, the Court used the Plenary Power Doctrine to validate congressional legislation without much inquiry at all, let alone searching judicial review.[120] This period was considered to be the apex of Congress's plenary power over indigenous Americans and their lands.[121] Up to 1930, Congress mainly used this power to pass legislation that furthered the goals of diminishing tribal governmental

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114 Newton, *supra* note 4, at 221–22.

115 *Lone Wolf*, 187 U.S. at 566.

116 Newton, *supra* note 4, at 222.

117 *Id.* at 222–24.

118 *See id.* at 223–24.

119 *Id.* at 223. Perhaps nowhere has this change been more apparent than in the treatment of the most recently colonized indigenous peoples of the United States—the Kingdom of Hawaii and the various nations of what is now the State of Alaska. Natsu Taylor Saito, *The Plenary Power Doctrine: Subverting Human Rights in the Name of Sovereignty*, 51 CATH. U. L. REV. 1115, 1138–39, 1146–47 (2002). As the last indigenous peoples to be enveloped into the United States, their entry was shepherded exclusively by Congress using its plenary power. There were no treaties with these nations allowing them to preserve their sovereignty, control their lands, access hunting and fishing grounds, or secure any of the other guarantees that tribes in the contiguous forty-eight states had been able to secure. Instead, Congress basically dictated the terms of entry using its plenary power to regulate the entry of Native Hawaiian and Native Alaskan peoples and their land.

120 Newton, *supra* note 4, at 228.

121 *Id.*

authority and assimilation of tribal members into nonindigenous American society.[122] After 1930, Congress began to pass legislation that could be deemed beneficial to tribes and tribal members, enabling some restoration of tribal landholdings (albeit under tightly controlled circumstances) such as conferring jurisdiction on federal courts to hear claims involving a tribe as plaintiff and granting citizenship to all indigenous peoples residing within the borders of the United States.[123] In the 1940s and 1950s, Congress created the Indian Claims Commission, which gave tribes a forum in which to press land claims of the sort argued by the tribes in *Lone Wolf* and repeated throughout the country.[124] During this time, the Supreme Court also finally recognized that individual tribal members had standing to sue in federal court under Article III of the Constitution, even in the absence of congressional authorization.[125] This provided a federal forum in which tribes could hold the federal government accountable for its treaty breaches and other legal harms.

Even when Congress passed legislation that ostensibly aided tribes or recognized tribes' sovereign authority, the legislation was still often based on a principle that Congress possessed authority over tribes. The Supreme Court bolstered this congressional authority by affording extreme levels of deference to every congressional act relating to indigenous nations or peoples.[126] Around the mid-twentieth century, however, congressional plenary power[127] and the Plenary Power Doctrine[128] diverged somewhat.[129] The Court became slightly more amenable to the notion of tribes as independent sovereigns operating within the broader federal legal system, or slightly apart from it,[130] while Congress was often on a completely different page.[131] After

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122 *Id.*

123 *Id.* at 228–29.

124 *Id.* at 229.

125 *Id.*

126 *Id.* at 229–30.

127 Congressional plenary power is the power of Congress to pass legislation derived from the Indian Commerce Clause, the Treaty Power, the Property Clause, and other sources. *See generally id.*

128 The Plenary Power Doctrine is the common law standard under which the Supreme Court reviews legislation Congress passed using its plenary power when that legislation relates to "Indians," tribes, or related "affairs." *See id.* at 215–16.

129 *Id.* at 229–30.

130 *See* Williams v. Lee, 358 U.S. 217, 223 (1959) (noting that tribal courts have authority over "[r]eservation affairs" and that "Indians" have a "right to govern themselves").

131 Judith v. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 18 (1995).

World War II, Congress initiated the termination of federal recognition for tribes by statute, which included ordering tribal assets, like the tribal land base, to be liquidated and "transferr[ing] jurisdiction over Indians to the states."[132] Under this congressional initiative, "[t]he loss of tribal territory and sovereignty was immediate and complete," rendering the Supreme Court's continuing recognition of tribal sovereign authority relatively meaningless.[133]

In the modern era, Congress's legislative efforts have aided or supported tribes more frequently than in the past, but even the most ostensibly beneficial legislation always seems to have at least one unintended consequence, if not more.[134] After the Termination Era of the 1950s, Congress passed legislation aimed at restricting states' abilities to legislate in Indian Country, protecting tribes from state regulation of liquor, state taxation, and other efforts at bringing Indian Country under the regulatory umbrella of the states.[135] In the 1970s and 1980s, Congress passed several statutes designed to aid amendments to major environmental statutes that included provisions for tribes to regulate their air and water quality.[136] These legislative efforts have affected tribes and their members differently, depending on the time frame, the subject of the legislation itself, and the circumstances of the individual tribes and their members.[137] The impacts of congressional legislation are not unimportant either, but the fact that Congress continues to legislate so aggressively with regard to indigenous nations, indigenous lands, and indigenous peoples demonstrates that congressional plenary power is not a relic of the historical archives but still an active source of federal law and federal authority.[138]

Additionally, even though the Supreme Court now applies a greater level of judicial scrutiny to congressional legislation in the area of indigenous affairs, the Court continues to recognize congressional

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132 *Id.*

133 *Id.*

134 *Id.* at 18–19.

135 Newton, *supra* note 4, at 230; *see* 18 U.S.C. § 1161 (2012).

136 Kronk Warner, *supra* note 12, at 806–08.

137 *See* Newton, *supra* note 4, at 233. Statutes like the Indian Gaming Regulatory Act (IGRA) have been particularly divisive, with some tribes embracing the opportunities that gaming brought to their communities and others opposing gaming due to the potential social problems it caused. Even within tribes, there has been a lot of discord, disagreement, and resentment over IGRA and what it brought to Indian Country. Matthew L.M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. LEGIS. 39, 56 (2007).

138 *See* Newton, *supra* note 4, at 230–31.

plenary power over tribal members, tribal lands, and tribal governments.[139] Today, the Supreme Court describes this as a constitutional, rather than extraconstitutional, power.[140] As recently as 2004, in *United States v. Lara*, the Court recognized that "the Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Court has] consistently described as 'plenary and exclusive.'"[141] The Court currently recognizes the textual sources of these broad general powers as the Indian Commerce Clause and the Treaty Clause.[142] Indeed, in *Lara*, the Court stated that "[t]he '*central function* of the Indian Commerce Clause . . . is to provide Congress with plenary power to legislate in the field of Indian affairs.'"[143] As for the Treaty Power, the Court explained that although "[t]he treaty power does not literally authorize Congress to act legislatively, for it is an Article II power authorizing the President, not Congress, 'to make Treaties' . . . treaties made pursuant to that power can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal.'"[144]

Although the modern Court applies the Plenary Power Doctrine more sparingly than in the New Deal Era, a majority of Justices on the Court today continue to view Congress's underlying power over and relating to indigenous matters as "plenary."[145] Similarly, Congress continues to assert plenary power over indigenous peoples and their lands, perhaps in a more comprehensive manner than ever before in the

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139 *Id.*

140 *Id.* at 231.

141 541 U.S. 193, 200 (2004). *See, e.g.*, Negonsott v. Samuels, 507 U.S. 99, 103 (1993); Washington v. Confederated Bands and Tribes of Yakima Nation, 439 U.S. 463, 470–71 (1979); *see* United States v. Wheeler, 435 U.S. 313, 323 (1978); *see also* WILLIAM C. CANBY, AMERICAN INDIAN LAW IN A NUTSHELL 2 (3d ed. 1998) ("[T]he independence of the tribes is subject to exceptionally great powers of Congress to regulate and modify the status of the tribes.").

142 *Lara*, 541 U.S. at 200. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 552 (1974); McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 172 n.7 (1973); *see also* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 209–10 (Rennard Strickland et al. eds., Michie 1982) (1942); CANBY, *supra* note 141, at 11–12.

143 *Lara*, 541 U.S. at 200 (emphasis added) (citing Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989)). *See also, e.g.*, Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N. M., 458 U.S. 832, 837 (1982) ("broad power" under the Indian Commerce Clause); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980) (citing *Wheeler*, 435 U.S. at 322–23) (recognizing Congress has "broad power" to regulate "tribal affairs" under the Indian Commerce Clause).

144 *Lara*, 541 U.S. at 201 (quoting U.S. CONST. art. II, § 2, cl. 2; Missouri v. Holland, 252 U.S. 416, 433 (1920)).

145 *See id.*

nation's history.[146] The judiciary more closely scrutinizes constitutional challenges to these assertions of authority[147] but still recognizes the nearly absolute authority of Congress in the particular areas of tribal land and tribal affairs.[148] A few examples of judicially recognized congressional authority over tribal land and tribal affairs include legislation narrowing "the boundaries of a reservation without tribal consent or compensation"; a series of statutes divesting tribes "of all criminal, civil, or regulatory jurisdiction"; statutory amendments abrogating treaties; and statutes subjecting "tribal laws and constitutions to federal approval."[149] In the area of land rights, the statutes Congress has enacted include measures "requir[ing] the Secretary of the Interior to approve land sales and leases by tribes, and contracts obligating money held by the federal government but owed to the tribe."[150] Congress has also legislated to "abrogate . . . future interests in Indian lands granted by earlier statutes," and "enlarge or decrease the class of beneficiaries of tribal trust funds or lands."[151] Moreover, the Court has also recognized that "Congress may take one kind of tribal property, aboriginal Indian property, without paying compensation; it may, without consent, dispose of recognized-title tribal property under the guise of management and sell it at less than fair market value without liability, as long as the tribe receives some proceeds."[152]

At the same time, Congress has also exercised its authority to regulate tribes and Indian Country in ways that tribes have seen as beneficial.[153] Given their beneficial value to tribes, many of these statutes were not directly challenged as outside the scope of Congress's authority and thus were never directly subject to judicial review under

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146 *See id.*

147 *See, e.g.*, *id* at 201–07.

148 Newton, *supra* note 4, at 234–45. As Dean Nell Jessup Newton explains that, "vestiges of the judicial attitude of nonintervention developed and nurtured in the plenary power era remain, especially in the areas of tribal sovereignty and property rights where the Court continues to rely on an inherent Indian affairs power of almost unlimited scope." *Id.* at 233.

149 *Id.* at 234–35.

150 *Id.*

151 *Id.* at 235.

152 *Id.*

153 *See* Fletcher, *supra* note 137, at 49 (discussing the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–21 (2012)). Courts even developed a canon of interpretation for such statutes, holding that they should be construed in favor of tribes. Venetie I.R.A. Council v. Alaska, 944 F.2d 548, 554 (9th Cir. 1991).

the Plenary Power Doctrine.[154] Some examples are statutes aimed at stimulating tribal economic growth, such as the Indian Gaming Regulatory Act;[155] statutes aimed at rectifying disastrous congressional efforts in earlier eras, such as the Indian Child Welfare Act;[156] and statutes that protect tribal cultural values, such as the Native American Graves Protection and Repatriation Act.[157] A final series of seemingly beneficial legislative acts aimed at tribes were the environmental amendments of the 1970s and 1980s, giving tribes primacy over the regulatory structure of several major federal statutes if the tribes could satisfy the relevant statutory and administrative criteria.[158]

As mentioned before, tribal governments, tribal members, and academics have viewed the latter examples of congressional plenary power as beneficial to tribal integrity and culture and even as supportive of tribal sovereignty.[159] However, the effects of these statutes must, in this context, be divorced from the underlying legal authority supporting them. This is because the underlying premise for *any* modern legislation relating to indigenous peoples, their lands, or their cultures is that Congress still possesses constitutional or extraconstitutional authority over tribes and other indigenous nations, despite their legal status as sovereign domestic nations.[160]

The continuing recognition of plenary power over tribal lands, tribal governments, and indigenous peoples more broadly means that they remain, to some extent, subject to Congress's authority in the view of Congress and the Supreme Court.[161] The modern Court's support for congressional plenary power also undermines treaty protections and allows for Congress to control the political, environmental, and legal structure governing modern tribes.[162] The judicial checks on congressional plenary power are generally limited to individual

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154 Indirectly, Justice Thomas has recently addressed the nature and scope of Congress's plenary power over Indian affairs in a challenge under one of these statutes, although the majority was not directly reviewing the relevant statutes under this lens. Adoptive Couple v. Baby Girl, 570 U.S. 637, 659–60 (2013) (Thomas, J., concurring) (referencing the majority opinion at 639–43).

155 25 U.S.C. §§ 2701–21 (2012).

156 *Id.* §§ 1901–03.

157 *Id.* §§ 3001–13.

158 *See, e.g.*, Kronk Warner, *supra* note 12.

159 *See id.*

160 Newton, *supra* note 4, at 233.

161 *See id.*

162 *See* United States v. Lara, 541 U.S. 193, 200–02 (2004); Newton, *supra* note 4, at 233 (quoting United States v. Wheeler, 435 U.S. 313, 323 (1978)).

circumstances when individual tribal members allege facial challenges to statutes violating their constitutional rights.[163]

That judicial support has seemingly encouraged Congress to continue to exercise broad powers over indigenous peoples. These powers are sometimes delegated through administrative agencies such as the Bureau of Indian Affairs or the EPA.[164] When this cycle of congressional power and judicial acquiescence is combined with the inherent flaws in the principles of congressional plenary power, the Plenary Power Doctrine, and the judicial deference toward Congress and administrative agencies, the result is that many recognized tribes possess only partial, and possibly tenuous, control over their regulatory landscape, and unrecognized tribes possess none at all.[165] The scope of modern plenary power is a reality that neither the framers, nor the tribes, could have ever intended or envisioned.[166]

C. Inherent Flaws in the Plenary Power Doctrine

The legal flaws in the Plenary Power Doctrine are many and varied[167] but can generally be grouped into three categories: (1) constitutional deficiencies, (2) violations of democratic governance principles, and (3) pragmatic considerations. Any one of the above categories calls into question the continuing recognition of congressional plenary power over indigenous peoples and their governments. But collectively, they present a compelling, comprehensive rationale for invalidating the principle of congressional plenary power and the corollary Plenary Power Doctrine altogether. The first two categories will be explored in Sections C1 and C2 below, and the pragmatic complications will be explored in context in Part III.

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163 Newton, *supra* note 4, at 242.

164 COHEN'S HANDBOOK, *supra* note 11, §§ 5.04[2][b], 10.01[2][a].

165 *See id.* Add to that cycle the doctrines requiring deference to administrative agencies and the playing field is potentially pitted completely against tribes, depending on the views of the administration.

166 Natelson, *supra* note 2, at 214–15.

167 *See, e.g.*, Clinton, *supra* note 24, at 115.

1. Constitutional Deficiencies

The constitutional flaws in the Plenary Power Doctrine have been documented in more than one hundred years of scholarly critiques.[168] They include the lack of an "acceptable, historically-derived, textual constitutional explanation for the exercise of any federal authority over Indian tribes without their consent."[169] Also, as Professor Matthew Fletcher has observed, "The Founders of the United States did not invite American Indian nations (or tribes) to the Constitutional Convention, nor did they ask Indian nations to ratify the Constitution."[170] Finally, the plain text of the Indian Commerce Clause—which is the most cited constitutional basis for congressional plenary power—does not support legislative efforts in matters affecting indigenous nations, their members, and their lands.[171]

The leading treatise on federal Indian law, *Cohen's Handbook of Federal Indian Law*, describes the Indian Commerce Clause as "not limited to regulations of trade or economic activities, or laws that are interstate in character or impact."[172] According to *Cohen's Handbook*, the Indian Commerce Clause is "broader in scope" than the Interstate Commerce Clause and has "become the linchpin in the more general power over Indian affairs recognized by Congress and the courts."[173] The courts, and especially the Supreme Court, struggle to articulate a reason for the distinction between the two commerce clauses and the plain language fails to offer one.[174] Some Justices have expressly critiqued the Court's continuing recognition of plenary power in light of the lack of textual support in the Indian Commerce Clause.[175]

Not only the plain language of the Indian Commerce Clause but also its historical context suggest that its application is limited to a much

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168 *See generally* Newton, *supra* note 4, at 196–97 (describing the history and development of the Plenary Power Doctrine and the Court's use of the Doctrine since the ratification of the Constitution and continuing into the 1990s).

169 Clinton, *supra* note 24, at 115.

170 Fletcher, *supra* note 62, at 55.

171 COHEN'S HANDBOOK, *supra* note 11, § 5.01[3]. The Indian Commerce Clause does indicate that Congress should properly exercise authority in the area of commerce with tribes, creating some authority to legislate in matters falling squarely within the domain of commerce, but not to the extent that Congress exercises authority currently. *Id.*

172 *Id.*

173 *Id.*

174 *See id.*

175 *See, e.g.*, United States v. Bryant, 136 S. Ct. 1954 (2016) (Thomas, J., concurring); Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863, 1873 n.5 (2016).

smaller scope of tribal activities.[176] When confronting the scope of authority to afford Congress in the final ratified version of the Constitution, the framers deliberately took a general police power *out* of the Constitution and chose instead to limit Congress's authority to the area of "commerce" and "with tribes" only.[177] The text does not confer power on Congress to legislate in matters other than commerce or in a manner that intrudes *within* a tribe or indigenous nation.[178] Therefore, the extent to which Congress has exercised power over tribes, their members, and their lands "is not supported by . . . the original understanding of the Framers."[179]

This understanding comports with the general recognition at the time of ratification that tribes were separate sovereigns with separate territory and governed under separate laws.[180] According to Professor Robert S. Clinton, "[Tribes'] inclusion in the Commerce Clause with two other sovereigns, foreign nations and the states, whose political existence the United States also had no power to destroy, reflects that conception of the power."[181] The extent to which the United States Congress had authority over tribes was limited to matters of trade, and arguably that authority was further limited to external trade regulation—in other words, Congress had the power to pass legislation ratifying trade agreements with tribes or regulating U.S. citizens and their ability to engage in trade with the tribes, but that authority did not extend to matters internal to the tribes.[182] Instead, tribes possessed inherent sovereign authority and autonomy, which was respected by the earliest Supreme Court opinions interpreting the Indian Commerce Clause.[183]

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176 COHEN'S HANDBOOK, *supra* note 11, § 5.02[1].

177 *See id.*

178 *See id.*

179 *Id.*

180 Clinton, *supra* note 24, at 147 ("At the time the Constitution of the United States was drafted, the Framers generally accepted the notion that the Indian tribes constituted separate sovereign peoples who were totally self-governing within their territory and who relied on the federal government solely for external relations, i.e., diplomatic representation with foreign governments and protection from foreign foes and citizens of the United States."); *see* Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31, 55–56 (1996).

181 Clinton, *supra* note 24, at 147.

182 *Id.*

183 United States v. Wheeler, 435 U.S. 313, 322–23. "[The legislation relating to tribal criminal jurisdiction] concerns a power similar in some respects to the power to prosecute a tribe's own members—a power that this Court has called 'inherent.'" United States v. Lara, 541 U.S. 193, 204 (2004) (quoting *Wheeler*, 435 U.S. at 322–23). The Supreme Court to

In the modern era, scholars and Supreme Court Justices alike question the continuing scope of congressional plenary power over indigenous nations.[184] Justice Clarence Thomas, in particular, declines to recognize the Indian Commerce Clause as a textual basis for anything beyond commerce.

> Congress is given the power to regulate Commerce "with the Indian *tribes*." The Clause does not give Congress the power to regulate commerce with all Indian *persons* any more than the Foreign Commerce Clause gives Congress the power to regulate commerce with all foreign nationals traveling within the United States. A straightforward reading of the text, thus, confirms that Congress may only regulate commercial interactions—"commerce"—taking place with established Indian communities—"tribes."[185]

Critically, Justice Thomas also stated that the power to regulate commerce in the Indian Commerce Clause is "far from 'plenary'"[186] and that "Congress' assertion of 'plenary power' over Indian affairs is also inconsistent with the history of the Indian Commerce Clause."[187] Rather, according to Justice Thomas,

> [a]t the time of the founding, the Clause was understood to reserve to the States general police powers with respect to Indians who were citizens of the several States. The Clause . . . conferred on Congress the much narrower power to regulate trade with Indian tribes—that is, Indians who had not been incorporated into the body-politic of any State.[188]

Yet, despite these constitutional flaws, Congress has continually invoked its power under the Indian Commerce Clause to regulate everything from "tribal cultural resources . . . [and] gaming in Indian country" to environmental regulation, wildlife conservation, energy projects, and matters as far removed from commerce as criminal jurisdiction, family law, and acceptable forms of tribal governments.[189]

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this day recognizes inherent tribal sovereignty but cabins it to "a tribe's authority to control events that occur upon the tribe's own land." *Id.*

184 *See, e.g.*, United States v. Bryant, 136 S. Ct. 1954 (2016) (Thomas, J., concurring); Puerto Rico v. Sánchez Valle, 136 S. Ct. 1863, 1873 n.5 (2016); Clinton, *supra* note 24, at 147.

185 Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2567 (2013) (Thomas, J., concurring).

186 *Id.*

187 *Id.*

188 *Id.*

189 COHEN'S HANDBOOK, *supra* note 11, § 5.01[3]. *See* Water Quality Act of 1987, 33 U.S.C. § 1377 (2012); Safe Drinking Water Act Amendments of 1986, 42 U.S.C. § 300j-11 (2012); Clean Air Act Amendments of 1977, 42 U.S.C. § 7474(c) (2012); United States v. Billie, 667 F. Supp. 1485, 1490 (S.D. Fla. 1987) (noting that text and legislative history of

A majority of Supreme Court Justices have declined to invalidate those congressional exercises, and the modern Court still uses the Indian Commerce Clause as the constitutional basis for the Plenary Power Doctrine.[190]

2. General Democratic Principles: Consent of the Governed

One of the most fundamental principles underlying the governance structure of the United States is that "all legitimate governmental authority derives from the consent of the people who have chosen to delegate only certain limited powers to the federal government (a theory often called 'popular delegation' or 'popular sovereignty')."[191] Indigenous nations were separate sovereigns at the time the United States was founded—their citizens' allegiance lay with their own governments, not with the government of the United States, and that allegiance supported the inherent sovereignty of those indigenous governments. Tribal governments negotiated agreements resolving disputes with the U.S. government, states, and U.S. citizens via treaties.[192]

Conversely, tribes played no role in selecting or designing the governance structure of the United States—they were simply not "part of the American polity."[193] As Professor Robert Clinton has noted, the "exclusion of 'Indians not taxed' from the census clauses of both Article I, section 2 of the Constitution and from section 2 of the Fourteenth Amendment" demonstrate this separate status.[194] Tribes simply "were not subject to federal governance and had no representation or voice in its selection."[195] Instead, "they were outsiders, just like foreign nations."[196]

Congress's exercise of expansive authority over indigenous nations does not adhere to the fundamental democratic principle that citizen participants validate governmental actions through consent. As numerous scholars have noted, "consent of the governed [was] a

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the Endangered Species Act indicate "that Congress intended to subject Indians to its prohibitions").

190 DUTHU, *supra* note 47, at 200.

191 Clinton, *supra* note 24, at 115.

192 Worcester v. Georgia, 31 U.S. 515, 530 (1832).

193 Clinton, *supra* note 24, at 147.

194 *Id.*

195 *Id.* at 147–48.

196 Fletcher, *supra* note 62, at 55.

cardinal principle of the founders."[197] Yet, the fact "that Indians were not citizens and could not vote" has never seemed persuasive enough to convince a majority of members of Congress, or the Supreme Court, that legislating in Indian Country to the extent that Congress historically has done is inherently undemocratic.[198] Instead, "by concentrating on justifying federal power, the Court [has always] reinforced earlier precedents abdicating its role in accommodating the legitimate but competing interests raised by the federal government's interference with tribal rights. Such accommodation was left to the political arena—an arena from which Indians were [historically] excluded."[199] In effect, the Court and Congress have been content to rationalize this congressional action based on a lack of consent to be governed.

In *Marbury v. Madison*, the Supreme Court "expressly justified the exercise of judicial review, in part on the ground that the act of the people of the United States delegating power to Congress in the Constitution constituted a superior and limiting delegation that controls the exercises of authority undertaken by Congress pursuant to the delegation."[200] This limited Congress from exceeding the scope of its authority under the Constitution and from creating laws with no constitutional authority.[201] Under this principle, "[l]egislation enacted beyond the grant of the delegation of power therefore simply did not constitute valid or enforceable law."[202]

One theory of the early position of tribes as separate, independent sovereigns—which also explains their inclusion in the Constitution—is that treaty negotiations were used as a means of transitioning tribes from being separate and independent to a status similar to states.[203] This theory is debatable, however, and the available historical records do not shed much light on its validity. From the start, "statehood for Indian tribes and inclusion of them within the federal union contemplated (1) the consent of the tribes through treaty and (2) representation in Congress as separate constituent Indian states within the union."[204] The early understanding "did not assume the exercise of

197 Newton, *supra* note 4, at 216; s*ee id.*; Clinton, *supra* note 24, at 148–49.

198 Newton, *supra* note 4, at 216.

199 *Id.*

200 Clinton, *supra* note 24, at 148–49.

201 *See id.*

202 *Id.* at 149.

203 *Id.* at 126.

204 *Id.* at 126–27.

direct federal legislative power over Indian nations without their consent or representation. Such proposals, therefore, were advanced in a manner consistent with the basic Lockean social compact notions of popular delegation that animated early American constitutional theory."[205]

In short, if popular ratification and consent formed the basis for the Constitution and gave it legal validity, the Constitution would not apply to entire populations that were deliberately excluded from its development and ratification.[206] The Constitution should not govern peoples who did not take part in its development or adoption. Continuing to recognize constitutional authority for Congress to legislate in Indian Country, therefore, undermines the foundational principles of popular delegation and consent.

II
TRIBAL ENVIRONMENTAL FEDERALISM: THE FLAWED COUPLING OF FEDERAL PLENARY POWER AND TRIBAL ENVIRONMENTAL REGULATORY AUTHORITY

A. Overview of Cooperative Federalism and Environmental Federalism

The uncertain constitutional foundation for plenary power over tribes has produced similarly complex and challenging legal relationships in the area of environmental protection of indigenous peoples and management of their lands and natural resources. In the TAS provisions, Congress either delegated or otherwise recognized tribal authority to regulate air quality, water quality, drinking water, and mining reclamation, among others.[207] Despite the seemingly expansive authority recognized in TAS provisions, a relatively small

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205 *Id.* at 127.

206 At least one scholar raises the question of whether tribes ever consented to be part of the Union and concludes that "[i]f they did so at all, it was through the treaty process." Joseph William Singer, Lone Wolf*, or How to Take Property by Calling It a "Mere Change in the Form of Investment*,*"* 38 TULSA L. REV. 37, 40 (2002). This would mean that "treaties are quasi-constitutional documents; they form the basis for the relationship between the United States and the tribes." *Id.* at 41.

207 Elizabeth Ann Kronk Warner, *Returning to the Tribal Environmental "Laboratory": An Examination of Environmental Enforcement Techniques in Indian Country*, 6 MICH. J. ENVTL. & ADMIN. L. 341, 349 (2017).

percentage of tribes has been able to assume primary authority to implement and enforce the federal statutes.[208]

Environmental federalism, or the sharing of authority between the federal government and the states or tribes, has provided a framework for environmental regulation in the United States for nearly half a century.[209] Under this system, Congress has been the primary legal driver of environmental law and policy, determining the nature and scope of environmental protections in various areas, while allowing states (and eventually tribes) to participate in a regulatory capacity if they meet certain minimum federal criteria.[210] In other words, "Congress has the authority to regulate private activity under the Commerce Clause," but has chosen in certain circumstances "to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation."[211] In some senses, it is less of a choice than it may seem given that the federal government imposes baseline requirements, which states must meet or exceed if they wish to obtain and keep primacy under one of the federal statutes.[212]

One impetus for this structure was a "long history of state failure to protect what had come to be viewed as nationally important interests."[213] The failures were not necessarily due to a lack of willingness by the states to regulate pollution or use of natural resources but because states imposed different standards and lacked constitutional authority to regulate interstate pollution.[214] The failure of state regulations, combined with urgent requests from the regulated entities for an even body of federal law and regulation, prompted the

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208 *Id.* at 358 ("A previous survey of tribal environmental codes reviewed the codes of the 74 federally recognized tribes located within the boundaries of Arizona, Montana, New York, and Oklahoma to determine how many of these tribes possessed tribal environmental code provisions related to air pollution, water pollution, solid waste disposal, and environmental quality generally. As to the regulation of air pollution, the survey determined that only four tribes, or 5% of the survey group, enacted tribal code provisions related to the regulation of air pollution.").

209 Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719, 719–20 (2006).

210 *Id.* at 727–29; Royster & Fausett, *supra* note 7, at 618–20.

211 Glicksman, *supra* note 209, at 726–27.

212 Royster & Fausett, *supra* note 7, at 617.

213 Keith S. Porter, *Good Alliances Make Good Neighbors: The Case for Tribal-State-Federal Watershed Partnerships*, 16 CORNELL J.L. & PUB. POL'Y 495, 497 (2007) (quoting Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1144 (1995)).

214 Glicksman, *supra* note 209, at 730–31.

federal government to enact legislation to provide a cohesive and coherent body of federal environmental law.[215]

Through various statutes passed in the 1970s and 1980s, Congress instituted comprehensive and uniform standards in several areas.[216] These areas included air quality, water quality, solid waste disposal, toxic pollutants, drinking water quality, and protection of the "human environment," more generally.[217] The purpose statement of one of these statutes—the Clean Water Act—illustrates the delicacy required to ensure state participation, clarifying that despite the extensive federal role in overseeing water pollution control, "[i]t [was] the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources."[218] Similar clarifications are found in the other statutes, like the Clean Air Act.[219]

Despite recognition of a state role in the regulatory framework, the underlying principle of the TAS provisions is that Congress controls the regulatory landscape.[220] In other words, where Congress has delegated authority to states, but the states cannot satisfy the criteria necessary to obtain primacy, Congress has named the EPA the default environmental regulatory authority over any subject covered by one of these statutes.[221] Furthermore, the statutes authorize the EPA to develop the criteria by which the states can establish primacy.[222] This has placed the EPA in somewhat of a supervisory role over the states

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215 *Id.*; Porter, *supra* note 213.

216 Glicksman, *supra* note 209, at 728–31.

217 *Id.* at 739–40; *see* Royster & Fausett, *supra* note 7, at 629.

218 33 U.S.C. § 1251(b) (2012).

219 42 U.S.C. § 7401(a)(3) (2012); *see* Glicksman, *supra* note 209, at 738.

220 Glicksman, *supra* note 209, at 740 ("The federal pollution control statutes unquestionably put the federal government, acting through authority delegated to EPA, in the driver's seat.").

221 *Id.* at 740–41.

222 *See id.* Outside the area of pollution control, there is an even greater degree of federal control over standards governing protected lands, natural resources, and wildlife. Under the federal land management statutes regulating the management and use of protected places such as national parks, national forests, national wildlife refuges, wilderness areas, and others, the federal government retains significant authority and control, even if tribes possessed treaty rights guaranteeing them access or sovereign rights to those places and resources. *Id.* at 744–45.

for several decades, although this role is based on the constitutional principles of preemption that arise from the Supremacy Clause.[223]

B. Environmental Federalism and Indigenous Nations

The framework of environmental federalism involving indigenous nations is limited to federally recognized tribes and, even more specifically, to the subset cohort of tribes that has satisfied statutory and regulatory criteria to obtain primary regulatory authority under certain statutes.[224] Only 573 indigenous nations in the United States are eligible to apply for regulatory primacy,[225] leaving perhaps as many as 200 out of the regulatory framework altogether, even though they might possess state recognition.[226] A discussion of the federal rationale for including the 573 tribes on the official list and excluding the others is outside the scope of this Article, but enough sufficient scholarly criticism of the arbitrary and arcane process of recognition exists that it is at least worth mentioning as a starting point for the critique of patchwork environmental laws governing tribal lands.[227]

For the federally recognized tribes to obtain primacy they must make a detailed showing that involves a demonstration of certain criteria.[228] Under the Clean Air Act, for example, tribes must show that they (1) "carry out substantial governmental duties and powers, (2) have authority over the exterior boundaries of the reservation or other areas within tribal jurisdiction, and (3) [are] capable of implementing the CAA requirements and applicable regulations."[229] If they can satisfy these criteria, the EPA awards them "Tribes as States" (TAS) status.[230] The statutes that include some form of TAS eligibility are the Clean

223 *See* Scott C. Seiler, *Federal Preemption of State Law Environmental Remedies After* International Paper Co. v. Ouellette, 49 LA. L. REV. 193, 203 (1988).

224 JUDITH V. ROYSTER ET AL., NATIVE AMERICAN NATURAL RESOURCES LAW 228 (3d ed. 2013); Kronk Warner, *supra* note 207, at 350.

225 *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 83 Fed. Reg. 34,863, 34,363 (July 23, 2018).

226 Alexa Koenig & Jonathan Stein, *Federalism and the State Recognition of Native American Tribes: A Survey of State-Recognized Tribes and State Recognition Processes Across the United States*, 48 SANTA CLARA L. REV. 79, 82–83 (2008).

227 *See, e.g.*, *id.*

228 Steffani A. Cochran, *Treating Tribes As States Under the Federal Clean Air Act: Congressional Grant of Authority–Federal Preemption–Inherent Tribal Authority*, 26 N.M. L. REV. 323, 327 (1996).

229 *Id.*

230 Kronk Warner, *supra* note 207, at 350.

Air Act;[231] the Clean Water Act;[232] the Safe Drinking Water Act;[233] the Comprehensive Environmental Response, Compensation, and Liability Act;[234] and the Federal Insecticide, Fungicide, and Rodenticide Act.[235] In addition, some lesser known environmental statutes "were amended to treat tribes and states substantially the same without a requirement that tribes seek 'state' status," and others "generally also placed tribes and states in substantially identical positions."[236] Should eligible tribes not seek TAS status or fail to qualify, the agency with primary authority to implement and enforce all these statutes in Indian Country is the EPA.[237]

The EPA separates the tribes into two large groups: (1) those with TAS status and approved tribally developed regulatory programs, which involve "an exercise of regulatory authority by the applicant tribe"; and (2) those with TAS approval "for purposes of administering an environmental regulatory program without an enforcement component, an environmental regulatory program with an enforcement component, or an administrative environmental function."[238] In the first group, the EPA notes that there are twelve tribes exercising regulatory authority under various Clean Air Act provisions, sixty tribes administering water quality standards under the Clean Water Act,

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231 42 U.S.C. § 7601(d)(1)(A) (2012) (authorizing the EPA "to treat Indian tribes as States"); *see also* 42 U.S.C. § 7474 (2012) (authority of tribes to redesignate their lands); Cochran, *supra* note 228, at 326.

232 33 U.S.C. § 1377(e) (2012) (authorizing the EPA "to treat an Indian tribe as a State").

233 *Id.*; 42 U.S.C. § 300j-11(a) (2012) (authorizing the EPA "to treat Indian Tribes as States . . . [and to] delegate to such Tribes primary enforcement responsibility" for certain programs); *see also* 42 U.S.C. § 300h-1(e) (2012).

234 42 U.S.C. § 9626(a) (2012) ("Indian tribe shall be afforded substantially the same treatment as a State . . . .").

235 7 U.S.C. § 136u(a)(1) (2012) (The EPA may "delegate to any . . . Indian tribe the authority to cooperate in the enforcement of [FIFRA].").

236 COHEN'S HANDBOOK, *supra* note 11, § 10.02[1] (citing the Hazardous Materials Transportation Act, 49 U.S.C. § 5101 (2012), and the Nuclear Waste Policy Act of 1983, 42 U.S.C. § 10101 (2012)).

237 ENVTL. PROT. AGENCY, EPA POLICY FOR THE ADMINISTRATION OF ENVIRONMENTAL PROGRAMS ON INDIAN RESERVATIONS (1984) ("Until Tribal Governments are willing and able to assume full responsibility for delegable programs, the Agency will retain responsibility for managing programs for reservations (unless the State has an express grant of jurisdiction from Congress sufficient to support delegation to the State Government)."); *see* Memorandum from E. Scott Pruitt, Administrator, to All EPA Employees, on the Reaffirmation of the Indian Policy (Oct. 11, 2017).

238 ENVTL. PROT. AGENCY, TRIBES APPROVED FOR TREATMENT AS A STATE (TAS), https://www.epa.gov/tribal/tribes-approved-treatment-state-tas [hereinafter EPA TAS APPROVAL] (last visited Nov. 5, 2018).

three tribes exercising two separate functions under the Safe Drinking Water Act (related to public water system supervision and underground injection control standards), and four tribes administering three different sections of the Toxic Substances Control Act.[239] The total number of tribes exercising full regulatory authority, however, is not the sum of those individual categories (despite the EPA's posting of a "total" of seventy-seven tribes exercising TAS authority) because some tribes, like the Navajo Nation and the Southern Ute Tribe, have qualified for TAS status under multiple statutory provisions.[240] Therefore, for the Clean Air Act, as one example, the total number of tribes exercising authority over air pollution is actually seven, not twelve, and the total number of TAS tribes under every statute is closer to sixty, rather than seventy-seven.[241] This adjusted total represents slightly more than .01% of federally recognized tribes.

For the individual tribes that have qualified, the power that accompanies the TAS designation and authorization to implement a tribal program is broad. The Clean Water Act is the most expansive source of tribal environmental federalism, with sixty TAS tribes exercising regulatory authority over water quality in sixteen states.[242] It is also a useful illustration of a TAS provision. Under the Clean Water Act, the EPA has primary authority to administer and implement the statutory requirements, although the EPA can allow states and tribes to assume primacy.[243] Section 518 provides that the EPA can "treat an Indian tribe as a state" in the area of setting water quality standards

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239 *Id.*

240 *E.g.*, *compare id.*, *with* The Navajo Nation Air Pollution Prevention and Control Act of 2004, NAVAJO NATION CODE ANN. tit 4, §§ 1101–62 (2010), http://www.navajonation epa.org/Pdf%20files/NNAQCP-NavajoNationCleanAirAct_Final.pdf. The Navajo Nation exercises authority under section 110 and Title V of the Clean Air Act, as well as under section 1413 of the Safe Drinking Water Act and the Clean Water Act.

241 EPA TAS APPROVAL, *supra* note 238. The tribes exercising authority under the Clean Air Act are the Gila River Tribe, the Pechanga Band, the Shoshone-Bannock Tribes, the Navajo Nation, the St. Regis Mohawk Tribe, the Mohegan Tribe, and the Southern Ute Indian Tribe. *See* Arnold W. Reitze, Jr., *The Control of Air Pollution on Indian Reservations*, 46 ENVTL. L. 893, 922 (2016).

242 *See* EPA ACTIONS, *supra* note 19 (containing a complete list of tribes located in Washington, Oregon, California, Arizona, Nevada, Idaho, Montana, Utah, Colorado, New Mexico, Oklahoma, Minnesota, Wisconsin, Florida, New York, and North Carolina); Charles G. Curtis, Jr. et al., *Tribal "Treatment As State" Programs Under Federal Environmental Statutes: Key Provisions and Case Studies*, 2015 WL 9194946, at *10 (2015).

243 33 U.S.C. § 1377(a) (2012); Robin Kundis Craig, *Borders and Discharges: Regulation of Tribal Activities Under the Clean Water Act in States with NPDES Program Authority*, 16 UCLA J. ENVTL. L. & POL'Y 1, 9–10 (1998).

(WQS) under the National Pollution Discharge Elimination System and with respect to enforcement of any resulting violations of those standards.[244] The EPA has interpreted this statutory language not as a delegation but as statutory authority for tribes to carry out "federal programs within the scope of their inherent powers."[245] However, before tribes can receive TAS status, if their reservation contains fee lands, they must demonstrate the need to regulate water quality or water pollution on the fee lands consistent with the tribal health and economic well-being exception to the Supreme Court's general prohibition on tribal regulatory authority over nonmembers in *Montana v. United States*.[246] Otherwise, the *Montana* rule prohibits tribes from regulating nonmember activity on fee lands within a reservation.[247]

Additionally, to receive TAS status, the Clean Water Act requires that a tribe must "ha[ve] a governing body carrying out substantial governmental duties and powers" and be "reasonably expected to be capable . . . of carrying out the functions to be exercised . . . ."[248] More specifically,

> [t]he functions to be exercised by the Indian tribe [must] pertain to the management and protection of water resources which are *held* by an Indian tribe, *held* by the United States in trust for Indians, *held* by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation, *or otherwise within the borders of an Indian reservation.*[249]

In addition, tribes must obtain TAS authority for each major section of the Clean Water Act to exercise corresponding authority thereunder.[250] These sections include "the setting of WQS for tribal waters" and "issuing water quality certifications, discharge permits, and wetlands

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244 Craig, *supra* note 243, at 10 (quoting 33 U.S.C. § 1377(e) (1994)).

245 COHEN'S HANDBOOK, *supra* note 11, § 10.03[2][a]. Because this is a matter of agency interpretation, it is possible that it could change, depending on the policy choices of the EPA administrator. It is far less complicated for an administrative agency to change course on a matter of statutory interpretation than it is for Congress to pass legislation amending the Clean Water Act and other statutes, making this recognition of tribal inherent sovereignty perhaps even more tenuous and less certain than it would seem. Also, the EPA's interpretation of the Clean Water Act's TAS provision as a recognition of tribal inherent sovereignty has been questioned and criticized in multiple judicial opinions. *See, e.g.*, Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 428 (1989); Montana v. EPA, 137 F.3d 1135, 1140–41 (9th Cir. 1998).

246 450 U.S. 544, 565–66 (1981).

247 *Id.*

248 Craig, *supra* note 243, at 11 (quoting 33 U.S.C. § 1377(e)(1), (3) (1994)).

249 *Id.* (emphasis added) (quoting 33 U.S.C. § 1377(e)(2) (1994)).

250 *Id.* at 12.

dredge-and-fill permits."[251] Thus far, all TAS approvals have been limited to the setting of WQS for tribal waters.[252]

The second group of tribes the EPA includes in the TAS program are those tribes approved to exercise an administrative function under one of the environmental statutes but without authority to design or enforce a tribally generated regulatory regime.[253] This group includes thirty-two tribes in fourteen states.[254] Every tribe in this group administers provisions of the Clean Air Act Prevention of Significant Deterioration Program, although none of these tribes have independent authority to develop performance standards that differ from EPA's.[255] Also, the EPA can exempt sources it wishes to independently regulate directly, as it did with the Four Corners Power Plant and the Navajo Generating Station on the Navajo Reservation in 2004.[256] Finally, the EPA retains enforcement authority under the Clean Air Act even when it has granted administrative authority to a tribe.[257] For the .05% of federally recognized tribes that have obtained TAS status under the Clean Air Act, it has given them some role in the regulation of air pollution on their lands, but not complete regulatory authority, which would include enforcement power.

Lastly, for statutes that do not mention tribal authority at all, the EPA's position is that it possesses delegated authority to oversee implementation in Indian Country.[258] For statutes that mention tribes and contain TAS provisions, the EPA assumes authority only if the tribe does not obtain primacy through an application process that requires the tribe to satisfy certain administrative criteria before being deemed capable of regulating the particular activity or pollutant.[259] To date, and at least through the Obama Administration, the EPA has taken the position that it possesses the authority to interpret federal pollution control statutes in a manner that allows tribes to obtain primacy, although that is an administrative interpretation of a statute not

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251 *Id.*

252 *Id.* (noting that WQS TAS "is powerful authority because 'upstream' jurisdictions must, when revising their standards, provide the attainment and maintenance of the downstream TAS standards"); EPA ACTIONS, *supra* note 19.

253 EPA TAS APPROVAL, *supra* note 238.

254 *Id.* (California, Washington, Idaho, Nebraska, Arizona, New York, Minnesota, Oklahoma, New Mexico, Kansas, Nevada, Wyoming, Wisconsin, and Oregon).

255 Reitze, *supra* note 241, at 924.

256 *Id.*

257 *Id.*

258 Royster & Fausett, *supra* note 7, at 629.

259 *Id.* at 629–30.

contained within the statute itself, and thus potentially subject to change.[260]

III
THE FLAWED COUPLING OF CONGRESSIONAL PLENARY POWER AND TRIBAL ENVIRONMENTAL FEDERALISM

Indigenous environmental federalism has several inherent and extrinsic limitations. To start, the Supreme Court's recognition that Congress possesses such sweeping power over indigenous nations is inherently constitutionally flawed. It also makes for confusing precedent when the Supreme Court attempts to reconcile broad congressional power with a continual recognition of (also somewhat broad) tribal sovereignty. It would seem that one or the other of the two principles would or should have been cast aside, but the Supreme Court continues to recognize both (sometimes in the same opinion).[261]

Another inherent limitation of the Plenary Power Doctrine and the underlying congressional plenary power, particularly in the context of tribal environmental federalism, is that relegating such broad power to Congress means that Congress can essentially change tribal sovereignty over the environment through legislation, which leaves tribes in a somewhat legally and politically tenuous position.[262] For example, the Supreme Court has continually recognized that Congress has the power to abrogate treaties and infringe upon inherent sovereign powers.[263] Although this method of congressional interference with tribal sovereign authority has not been frequent in the modern era, the fact that it is legally possible means that tribes have a somewhat less certain and less permanent legal authority to regulate their environment and that the authority they do exercise (pursuant to the delegations in the TAS provisions) is potentially legally subordinate to the authority of Congress. This result leaves tribes at the proverbial mercy of Congress and the executive branch in these areas, which is not the relationship that the Constitution seems to contemplate.

There are also pragmatic limitations to tribal environmental federalism. An obvious limitation is that the entire environmental federalism structure applies only to federally recognized tribes, leaving

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260 *See id.*

261 United States v. Lara, 541 U.S. 193, 199–200 (recognizing both tribal sovereignty and congressional plenary power).

262 *See id.* at 200–04.

263 *See* COHEN'S HANDBOOK, *supra* note 11, § 10.01[1].

numerous indigenous nations out of the framework altogether and therefore subject to state and federal regulations.[264] Unrecognized nations do not have the legal right to opt in to the TAS provision framework because the federal government does not recognize their status as sovereign nations.[265] Complicating matters even further, one aspect of Congress's Plenary Power is the authority to recognize tribes, which gives Congress the power to determine which tribes are in and which are out of the environmental regulatory framework of the TAS provisions.[266]

A further pragmatic limitation is that, before native nations can exercise authority under the TAS provisions, they must satisfy the administrative criteria developed by the EPA to obtain primacy.[267] Under the Clean Water Act, for instance, 60 out of 573 federally recognized tribes have TAS status, and 44 of those have actually seen their water quality standards approved by the EPA.[268] Under the remaining statutes, far fewer have been able to apply for or obtain TAS status, resulting in less than 1% of all federally recognized tribes possessing delegated regulatory power over their environment.[269] Even tribes that have been unable to opt in remain subject to some federal regulatory authority.

Yet another pragmatic concern is that states may be able to regulate fee lands within reservations or other areas designated as Indian Country under *their* delegated authority pursuant to the same federal

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264 *See* Mark D. Myers, Comment, *Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL'Y REV. 271, 277 (2001).

265 *See id.*; *see also* United Houma Nation v. Babbitt, No. CIV. A. 96-2095, 1997 WL 403425, at *1 (D.D.C. July 8, 1997).

266 Myers, *supra* note 264, at 272. The executive branch, through the Bureau of Indian Affairs, can also recognize a tribe, as can the judiciary. *Id.* Congressional recognition is somewhat rare; however, it is constitutionally within Congress's powers to recognize tribes. *Id.*

267 Elizabeth Ann Kronk Warner, *Examining Tribal Environmental Law*, 39 COLUM. J. ENVTL. L. 42, 61 (2014).

268 EPA ACTIONS, *supra* note 19. There are now 573 federally recognized tribes, controlling more than 56.2 million acres of land in the United States. BUREAU OF INDIAN AFFAIRS, FREQUENTLY ASKED QUESTIONS, https://www.bia.gov/frequently-asked-questions (last visited Oct. 14, 2018). This number increased after President Trump signed into law the Thomasina E. Jordan Indian Tribes of Virginia Federal Recognition Act of 2017, Pub. L. No. 115-121, 132 Stat. 40 (2018).

269 Kronk Warner, *supra* note 207, at 358; Kronk Warner, *supra* note 12, at 847–52. TAS programs have not been as effective as many had expected. As of early 2015, only 48 of the then 567 federally recognized tribes had received TAS status under the Clean Water Act. *Id.* at 850–51. Professor Warner's survey of tribes located in four states yielded only four tribes with code provisions covering the regulation of air pollution. *See* Kronk Warner, *supra* note 267, at 68.

statutes. This is controlled by the *Montana v. United States* decision, in which the Supreme Court held that the Crow tribe lacked authority to prohibit nonmember hunting and fishing on fee lands owned by nonmembers located within the Crow reservation.[270] The only exceptions to this rule are for tribes that can demonstrate nonmember consent to the assertion of tribal regulatory authority; or when the exercise of tribal regulatory authority over the fee lands is necessary because the nonmember activity "threatens or has some direct effect on the political integrity, economic security, or the health and welfare of the tribe."[271] In *Montana*, the Supreme Court held that neither exception was satisfied.[272]

Like many other reservations, the Crow reservation is a checkerboard, containing a variety of different categories of lands, with only sixty-nine percent of the total land base held in trust for the tribe or tribal members.[273] After the *Montana* decision, the tribe was divested of authority to regulate the other thirty-one percent,[274] potentially opening the door for state environmental regulation on those lands, even though they are within the borders of the Crow reservation.[275] In other circumstances, such as for the Oklahoma tribes, the state has a congressionally delegated role in shaping the tribes' environmental regulation and enforcement structure.[276] As these examples show, even if it is only legally possible for states to regulate environmental quality in Indian Country, tribal authority is potentially undermined.[277]

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270 450 U.S. 544, 557 (1981).

271 *Id.* at 565–66.

272 *Id.*

273 *Id.* at 548.

274 *See id.*

275 COHEN'S HANDBOOK, *supra* note 11, § 10.02[1] ("In general, states may exercise jurisdiction over Indians and Indian lands only as authorized by Congress, and state jurisdiction over nonmembers on fee lands is constrained both by tribal rights to regulate nonmembers in order to protect core tribal governmental interests and by federal preemption of state authority."); *see also* Porter, *supra* note 213, at 535 ("EPA may have the option of allowing states to include tribal reservations in their water programs. Federal preemption of state law applies when a federal law explicitly preempts state law or occupies the field to the exclusion of state law. When Congress authorized EPA to treat tribes as states, it preempted state jurisdiction over tribal reservations. However, there is no express language in the statutes providing for the designation of tribes as states that would deny EPA the option of allowing states to administer state-crafted regulations on reservation lands.").

276 Kronk Warner, *supra* note 207, at 357.

277 Worchester v. Georgia, 31 U.S. 515, 559 (1832).

A final flaw is that delegations of authority under discrete statutes are not comprehensive environmental enforcement strategies. As mentioned above, tribes must obtain TAS status under each statute and sometimes under discrete areas within the same statute. Therefore, a tribe that obtains Title V permitting authority under the Clean Air Act, but does not have any TAS status under the remaining sections of the Clean Air Act or any other statute, can implement environmental regulations only under its inherent sovereign powers. This might mean that, if the tribe cannot establish inherent sovereign authority over checkerboard lands under *Montana*, the tribe is reliant upon the EPA to protect its environmental quality, wildlife, and land base.[278] Moreover, even if a tribe's reservation is 100 percent Indian Country (noncheckerboard), it still might be able to obtain approval only under one statute, allowing the tribe to regulate its water quality but not air pollution or underground injection of fracking fluids, for example. The tribal environmental federalism structure is a piecemeal approach to improving tribal environmental quality, at best.

IV
MOVING FORWARD: INDIGENOUS ENVIRONMENTAL PROTECTION IN THE 21ST CENTURY

Working within the tribal environmental federalism framework, or outside of it, indigenous Americans steward the environment in comprehensive and effective ways.[279] However, the tribal environmental federalism framework is constitutionally flawed, unavailable to many indigenous nations, and not capable of addressing the totality of environmental problems that affect indigenous communities and their lands. Also, in some areas, indigenous environmental stewardship has already evolved beyond this framework, given that tribes are already using this sovereign authority to develop environmental laws and regulations best suited to accomplishing their particular environmental stewardship objectives.[280]

Circumstantial yet compelling evidence that the framework is flawed is found in data showing that tribes able to obtain TAS status are clearly choosing other methods of protecting their environments.[281] Given the diversity and breadth of ecosystems contained within tribal

278 *See Montana*, 450 U.S. at 557.

279 *See* Kronk Warner, *supra* note 207, at 343.

280 *Id.*

281 *See id.*

lands and the diversity of indigenous nations within the United States, it would make more sense to let the environmental federalism structure pass into the annals of legal history when tribes are bypassing the structure anyway and when tribal solutions to the problems plaguing tribal lands might produce better and more individualized solutions in the long run.[282]

In short, congressional plenary power over indigenous nations "is a house of cards ultimately built upon a constitutionally-flawed thesis."[283] This congressional power, and the corollary Plenary Power Doctrine, may have served a limited, yet flawed, purpose at a time in United States history that is now long past. In the modern era, there is simply no place for extraconstitutional assertions of federal authority over indigenous nations, especially in the area of environmental protection. The time has come to acknowledge the flaws, fold the house of cards, and construct a model of indigenous environmental stewardship built on a foundation that will last.

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[282] *Id.* at 345–46 (noting that tribes can be "more motivated to innovate and experiment with environmental law given factors potentially driving tribes that do not have the same impact on states").

[283] Clinton, *supra* note 24, at 117.