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The Reinvigoration of the Doctrine of 'Implied Repeals:' A Requiem for Indigenous Treaty Rights

by DAVID E. WILKINS*

INTRODUCTION

America's indigenous nations occupy a distinctive political/legal status within the United States as separate sovereigns whose rights are based in the doctrine of inherent tribal sovereignty, affirmed in hundreds of ratified treaties and agreements, acknowledged in the Commerce Clause of the U.S. Constitution, and recognized in ample federal legislation and case law. Ironically, while indigenous sovereignty is neither constitutionally defined or delimited, it may be restricted or enhanced by federal law. One could argue, then, that indeterminacy or inconsistency[1] is a hallmark of the tribal-federal political/legal relationship.

THE POWER TO ABROGATE INDIAN TREATIES: CONGRESS OR THE COURTS?

Much scholarly attention has focused on the question of what prompted and serves to perpetuate this indeterminacy. That is, why has the federal government been unable to maintain a consistent policy orientation either favoring the breakup of tribes and the assimilation of Indians,

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1. Evidence of federal indeterminacy in how to administer Indian tribes and their members is abundant. For example, are tribes "distinct, independent communities" capable of exercising a measure of external sovereign power (*Worcester v. Georgia* 31 U.S. (6 Pet.) 515 (1832) and *Mitchel v. United States,* 34 U.S. (9 Pet.) 711 (1835), or are they merely "domestic-dependent nations" limited to wielding a reduced degree of internal sovereignty (*Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831)?

Do tribal nations enjoy a uniquely "political" relationship with the federal government (*Morton v. Mancari,* 417 U.S. 535 (1974), or is their relationship with the U.S. based on majority-minority race relations theory (See, e.g., *United States v. Rogers,* 45 U.S. (4 How.) 567 (1846), *United States v. Celestine,* 215 U.S. 278 (1909), and *United States v. Nice,* 241 U.S. 591 (1916)?

Or, are general acts of Congress inapplicable to tribes unless they are specifically written into the legislation (*Elk v. Wilkins,* 112 U.S. 94, 100 (1884), or are tribes subject to congressional enactments unless they are specifically exempted (*The Cherokee Tobacco,* 78 (11 Wall.) 616 (1871)?

or respecting tribal national sovereignty.[2] This is a weighty and comprehensive political, legal, economic, geographical, and moral question and I will not answer it here. My attention is narrower and more institutionally focused. I am specifically interested in understanding the role of the U.S. Supreme Court in its efforts to quash or dramatically modify Indian treaty rights without congressional authorization or tribal consent. The question this essay proposes to answer is this: Does the power to abrogate, terminate, or modify Indian treaties/agreements rest solely with the political branches—that is, with Congress or the President—or does the Supreme Court have the constitutional right to "impliedly" abrogate Indian treaties?

I argue, and the evidence bears out, that the power to abrogate or modify Indian treaties (or agreements), or provisions of these documents, may only be exercised by the Congress[3] and then only after the legislative branch has expressly and unequivocally stated its intent to alter or annul the diplomatic arrangement between the U.S. and a particular tribal nation. I contend that when the Supreme Court hands down opinions which impliedly sever specific Indian treaty rights, and does so absent a specific legislative mandate directing the termination of the treaty right, that the Court has vastly overstepped its juridical power, is violating the federal Constitution, and is acting contrary to the acknowledged trust relationship[4] to tribes which holds that the U.S. has not only the legal but a

2. See Vine Deloria, Jr., and Clifford M. Lytle's, *The Nations Within: The Past and Future of American Indian Sovereignty,* with Clifford M. Lytle (New York: Pantheon Books, 1984); Nell Jessup Newton, "Let A Thousand Policy-Flowers Bloom: Making Indian Policy in the Twenty-First Century," *Arkansas Law Review,* vol. 46 (1993): 25-75; and Joanne Nagel, *American Indian Ethnic Renewal: Red Power and the Resurgence of Identity and Culture* (New York: Oxford University Press, 1996).

3. In *Minnesota v. Mille Lac Band of Chippewa Indians* (119 S.Ct. 1187), handed down March 24, 1999, the Court in a 5-4 ruling upheld the Chippewa's 1837 treaty right to hunt, fish, and gather on 13 million acres of land the eight Chippewa Bands ceded to the federal government in central Minnesota. In upholding these treaty rights, Justice O'Connor reiterated that "Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so." Quoting from *United States v. Dion* (1986), O'Connor stated that "there must be clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." There is," said O'Connor, "no such 'clear evidence' of congressional intent to abrogate the Chippewa Treaty rights here."

4. I agree with the definition of trust which holds that the federal government is under the legal and moral obligation to protect Indian lands, waters, minerals, and all other natural resources and is also obligated to protect and encourage tribal self-government, to assist the tribes in their movement towards economic independence, and to provide social programs and services to raise the standard of living of Indian people to a level comparable to what the majority enjoys (See, U.S. Congress, American Indian Policy Review Commission, *Final Report,* 2 vols. (Washington, D.C.: Government Printing Office, 1977): p. 136. The trust relationship, however, is not and cannot be not uniform across tribes. No two tribal entities enjoy the exact same relationship with the federal government because of variations centered around when and why a tribe first established its political relationship with a European power (typically Spain, France, or Great Britain) or with the United States; what the relative strengths or weaknesses of the tribal nation were at the time it negotiated its relationship and whether these shifted across time; and in whether or not a treaty basis exists between the two parties.

moral duty to assist tribes by protecting their lands, resources, sovereignty, and cultural heritage.

The judicial doctrine of implied repeals of politically created treaty arrangements is an invalid and unwarranted exercise of power not sanctioned by the Constitution or the distinctive political relationship between tribes and the federal government. Even when there is an alleged conflict between a preexisting treaty right and a later congressional or state statute, the courts, because of the trust doctrine and the good faith test, must, in the absence of a specific repealing or terminating statute, uphold the federal government's treaty obligations to tribes. The principal task of the Supreme Court in sorting out alleged irreconcilable differences between treaty provisions and statutory provisions should be to uphold the treaty and to interpret the statute in conformity with the context in which the treaty was negotiated.

WHAT IS IMPLIED REPEAL? (A.K.A. REPEAL BY IMPLICATION)

By "implied" I mean an action by the court when the intention in regard to the subject matter is not manifested by explicit and direct words, but is gathered by implication or deduction from the circumstances, the general language, or the conduct of one or both of the parties. By "repeal" I mean the abrogation of a previously existing law or treaty by another measure that contains provisions perceived to be so contrary to or irreconcilable with those of the earlier law that only one of the two can stand in force. The conjunction of the two terms leads to a definition of implied repeal which means the superseding of an existing law, rule, or treaty provision without an express directive to that effect.

This doctrine is of critical importance for tribal nations whose collective sovereign rights and some individual Indian rights generally hinge on treaties. This issue also is significant for American democracy because it raises questions of non-discrimination, consent, and self-determination, as well as justice, fairness, and respect for the rule of law. And any discussion of implied repeals of necessity warrants some discussion of how the courts ascertain congressional intent. This is an especially salient point for federal Indian policy because Congress, via the Commerce Clause, has exclusive constitutional authority to regulate the federal government's affairs with tribes.

The political/legal doctrine of "good faith," a close corollary to the trust doctrine, first articulated by the Congress in the 1787 Northwest Ordinance, succinctly states that the federal government would always observe "the utmost good faith towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just the lawful wars authorised [sic] by Congress; but laws founded in justice and humanity shall from time to time be made for pre-

venting wrongs being done to them, and for preserving peace and friendship with them. . . ."[5]

Any sovereign nation retains the power to unilaterally abrogate its treaty commitments, although since treaties are diplomatic arrangements between two or more nations, formal unilateral abrogations occur with the realization that the result might be a declaration of war by the other treaty signatories or international embarrassment before the family of nations. In the case of the U.S., the congressional power to abrogate, as Wilkinson and Volkman rightly noted,[6] "is based on the notion that a treaty represents the political policy of the nation at the time it was made. If there is a change of circumstances and the national interest accordingly 'demands' a modification of its terms, then Congress may abrogate a treaty in whole or in part."[7]

While agreeing that treaties are political arrangements which may be abrogated by either treaty party, and specifically that from the federal government's perspective it falls to Congress to be the nullifying agent, I disagree with Wilkinson and Volkman's later contention that "[t]here are so many tests for determining whether an abrogation has been effected, and most of them are so vague, that a court has little recourse but to arrive at an ad hoc, almost arbitrary decision when faced with the question of whether a particular treaty guarantee has been abrogated by Congress."[8]

Wilkinson and Volkman vest in the Supreme Court an amount of political power and policymaking leeway not authorized by Article III of the U.S. Constitution, which contradicts much prior judicial precedent, is contrary to the doctrine of tribal sovereignty, and which directly opposes federal Indian policy which recognizes that Congress has the exclusive authority to regulate the federal government's affairs with tribes, including the power to alter the nation's will—as evidenced in treaties—towards tribes. Furthermore, since Congress is the principal agent responsible for overseeing the United States' exercise of its trust obligations towards tribes, in the event that the trust is to be terminated or modified it falls to the legislative branch, not the judicial branch, to make such alterations.

I believe this position is defensible throughout the history of treaty relations between the U.S. and tribes, but that it was made more compelling after 1871[9] when Congress unilaterally stopped negotiating treaties with tribes, thus precluding Indian nations, who remained outside the U.S. Constitution's pale, from that important form of negotiation. And since tribes, qua tribes, lack congressional representation, and tribal rights are based largely on inherent sovereignty and treaties/agreements, and are

5. 1 Stat., 50.

6. "Judicial Review of Indian Treaty Abrogation: 'As Long as Water Flows, or Grass Grows Upon the Earth'—How Long a Time is That?" *California Law Review,* vol. 63 (1975): 601-61.

7. Ibid., p. 604.

8. Ibid., p. 608.

9. 16 Stat., 544, 566.

not grounded in the U.S. Constitution, this is all the more reason for the courts to uphold the extant treaty rights absent an explicit congressional directive to the contrary or a mutually agreed upon decision between a tribe and the U.S. to modify the basis of their political relationship.

Finally, American Indians gradually became naturalized as American citizens (both state and federal, which were layered onto their tribal citizenship) via treaty provisions, land allotments, and specific statutory measures. This layering of multiple citizenships, in conjunction with the ongoing federal trust doctrine, meant that a congressional decision to unilaterally abrogate Indian treaty rights would normally occur only in the event of compelling national reasons (i.e., Indian land cessions for the expanding Euro-American presence) and sometimes with the direct concurrence of a tribe. The Supreme Court, charged, among other things, with upholding the Constitution, the laws, and "all treaties made" as the supreme law of the land, is required to closely examine any conflicts and finding no direct congressional intent to abrogate an Indian treaty should not presume it has the authority to impliedly repeal the same.

The policies of tribal self-determination[10] and self-governance,[11] inaugurated in the early 1970s and continuing into the 1990s, point toward a federal policy orientation bent on recognizing the semi-sovereign cultural, political, and economic rights of tribal nations to function with an increasingly greater measure of political independence. There is firm evidence, however, that since the late 1980s, as the United States Supreme Court turned more conservative, it has veered away from the congressional policy of tribal self-determination and is rendering opinions that harken back to the nineteenth-century policy of overt assimilation and acculturation.[12] And since the ascendance of the Republican Party to power in both houses of Congress in 1994, the Congress has also become more conservative. Legislative conservatism, augmented by the resurgent ideology of states' rights, threatens tribal economic growth, political development, and social progress as tribes have to compete with states for a share of federal dollars, or, in some cases, tribal governments are required to seek funding directly from states when Congress devolves funds for certain programs to the states under block grants.[13] Hence, the tribal situation is more precarious in the 1990s because tribes face legislative and judicial assaults on their treaty rights.

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10. 88 St. 2203.

11. 108 St. 4250, see, especially Title II "Self-Governance."

12. See, e.g., Frank Pommersheim, *Braids of Feathers* (Berkeley: University of California Press, 1995); and David E. Wilkins, *American Indian Sovereignty and the U.S. Supreme Court: The Masking of Justice* (Austin: University of Texas Press, 1997). But see, *Minnesota v. Mille Lac Band of Chippewa Indians* (119 S.Ct. 1187 (1999) and *Puget Sound Shellfish Growers v. United States* (1999 U.S. Lexis 2504) (1999), two decisions which upheld the treaty rights of tribes in Minnesota and Washington State.

13. David E. Wilkins, "GOP May Railroad Indian Interests," *Arizona Daily Star* (November 27, 1994), sec. f, p. 2.

POLICYMAKING BY THE SUPREME COURT: MAJORITY OR JUSTICE

The issue of the Supreme Court's policymaking role was argued well by Robert Dahl, a political scientist, in a classic article written nearly forty years ago.[14] Dahl asserted that in determining the extent to which the Supreme Court makes policy decisions, it is important to understand whether the Court goes outside established "legal" criteria found in past precedent, statutes, and the Constitution. In this respect, the Supreme Court occupies a distinctive position because it is an important characteristic of the Supreme Court that on occasion its members are required to render decisions "where legal criteria are not in any realistic sense adequate to the task."[15] In other words, cases sometimes come before the Court involving alternatives about which there are profound disagreements in society—abortion, desegregation, drug use and regulation, criminal and victims' rights, religious issues—that is to say, the setting of the case is clearly "political."

Historically, this was certainly true of Indian issues. The Court has occasionally acted contrary to congressional policy, administrative direction, and public sentiment in rendering Indian law decisions. Examples are *Worcester v. Georgia*[16] (1832—State law is inferior to Indian treaty law), *Ex parte Crow Dog*[17] (1883—tribes have criminal jurisdiction over their own members), *Matter of Heff*[18] (1905—Indians who become naturalized as American citizens have the right to drink liquor), and *Choate v. Trapp*[19] (1912)—Indian allottees are exempt from state taxation), to name but a few. Nevertheless, in the area of treaty abrogation, I argue that the Supreme Court exceeds its constitutional authority when it relies on the doctrine of implied repeal to explicitly abrogate Indian treaty rights since a treaty is a formal political arrangement between two or more sovereign entities. They are negotiated by designated individuals and ratified by the nations of the participatory powers. Hence, as political agreements, it follows that the power to abrogate should be wielded solely by the branch constitutionally empowered to act.

In determining the role of the Court, Dahl argued that two very different, conflicting criteria are sometimes used. These are the *majority criterion* and the *criterion of right or justice*. The majority criterion refers to the fact that every conflict in society invariably is a dispute between a majority of those eligible to participate and a minority or minorities, or else it is a dispute between or among minorities only. Thus the outcome

14. "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," *Journal of Public Law,* vol. 6 (1957): 279-295.

15. Ibid., p. 280.

16. 31 U.S. 515 (1832).

17. 109 U.S. 556 (1883).

18. 197 U.S. 488 (1905).

19. 224 U.S. 665 (1912).

of the court's decisions must either (1) accord with the preferences of a minority—counter to those of a majority; (2) accord with the preferences of a majority—counter to those of a minority; or (3) accord with the preferences of one minority, counter to another minority.[20]

For example, Dahl discussed the popular view that the Supreme Court's primary role is to protect the rights of minorities against the tyranny of the majority. His analysis of data (he examined decisions where the Court declared portions of federal legislation unconstitutional) in the 1950s, however, showed that, in fact, "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."[21]

In other words, Dahl found that "the evidence is not impressive" that the Court has protected fundamental or natural rights and liberties against the tyranny of some lawmakers. Of course, as Jonathan Casper would later show,[22] Dahl's article was written during an era of national political repression (e.g., fear of communism) and before the Warren Court had settled in and begun to render decisions favoring fundamental rights of minorities against tyrannical or indifferent majorities. Casper also correctly chided Dahl for his exclusion of data—he did not examine cases involving statutory construction or cases arising out of state and local legislation—and for his reliance on a policy framework that was rooted in influence or power. This winners and losers approach, Casper asserted, "imposes an artificial distinction that obscures a dynamic process in which even 'losers' contribute importantly to outcomes that eventually emerge."[23] Nevertheless, although Casper's 1976 article identified some central flaws in Dahl's arguments and data, a reexamination of Dahl's larger thesis and an emphasis on his second approach, the justice criterion, still has merit.

The criterion of right or justice, according to Dahl, holds that the most important policy function of the Court is to protect rights that are considered basic or fundamental. The Constitution, in other words, assumes an underlying fundamental body of rights and liberties, which the Court guarantees by its decisions. Dahl found that except for short-lived transitional periods, the Supreme Court was inevitably a part of the dominant national alliance and generally supported the major policies of that alliance. The main task of the Court, he said, was to confer legitimacy on the fundamental policies of the political branches and also, more broadly, on the basic patterns of behavior required for the operation of democracy.

Dahl recognized, and the evidence vividly shows, that the Court is not simply an agent of the dominant ruling alliance. In fact, the Supreme Court has real power bases of its own, the most important of which is the

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20. Ibid., p. 281-282.

21. Ibid., p. 285.

22. "The Supreme Court and National Policy Making," *American Political Science Review*, vol. 70, no. 1 (March 1976): 50-63.

23. Ibid., p. 62.

distinctive legitimacy extended to the court's interpretations of the Constitution. The evidence in Indian law bears out this claim. There are more than a few cases, which Dahl would categorize as justice cases, in which the Supreme Court has rendered powerful rulings supporting tribal rights and sovereignty, even when the exercise of that sovereignty clashes with majority sentiment.[24]

However, when analyzing the entire history of the court, on balance, one finds that the bulk of the law pronounced by the court, as Shattuck and Norgren put it, "has not been 'a better way' for Indians."[25] While noting Indian legal gains, they found that those gains "are never final nor are they secure from political manipulation."[26]

The Rehnquist Court is openly supportive of the major—majoritarian—policies of the dominant national alliance, policies which generally do not reflect positively on the distinctive extraconstitutional role of tribes in the American polity. The Rehnquist Court, at least insofar as tribes are concerned, has adopted the majority criterion as its major policy perspective, and relies much less on the justice criterion when it decides to hear Indian related cases. The reinvigorated doctrine of implied repeal bears this out.

THE COURT AND "POLITICAL" QUESTIONS

Under Article 3, section 2, of the U.S. Constitution, the Supreme Court's power is said to extend to "all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority. . . ." Despite this seemingly clear authority to hear cases involving treaties, the Supreme Court has frequently declined to rule on matters involving treaties by claiming that those agreements were "political questions" that should be resolved by the political branches. The political question doctrine means what the justices say it means. The doctrine originated in *Marbury v. Madison* (5 U.S. 137 (1803)), when Chief Justice Marshall said that "the province of the Court is, solely, to decide on the rights of individuals. . . . Questions in their nature political, or which are, by the Constitution and laws, submitted to the executive can never be made in this Court."[27] Similarly, as the court held in *The Chinese Exclusion Cases* (130 U.S. 581 (1889)), "the question whether our government is justified in disregarding its engagements with another nation is not one of determination of the courts" (p. 602).

Additional rulings have elaborated on other reasons for the political

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24. See, e.g., *Worcester* (1832), *Crow Dog* (1883), and *Choate v. Trapp* (1912).

25. Petra T. Shattuck and Jill Norgren, *Partial Justice: Federal Indian Law in a Liberal Constitution System* (Providence, R.I.: Berg Publishers, 1991): 197.

26. Ibid.

27. Quoted in David M. O'Brien's *Constitutional Law and Politics: Struggle for Power and Governmental Accountability,* 2nd ed. Vol. I (New York: W.W. Norton & Co., 1995): 114.

question, besides deference to the political branches. The court sometimes lacks information and resources needed to make an informed decision. And in some areas, especially foreign policy and international relations, the court lacks appropriate standards for resolving disputes or the means to enforce its decision.[28]

In federal Indian affairs, however, the Supreme Court has used the political question doctrine in many cases,[29] often in conjunction with the congressional plenary power doctrine,[30] to either restrict or disavow Indian rights and in some cases to even deny Indians a legal venue to have their grievances heard. The political question doctrine, first used expressly in Indian law in *U.S. v. Rogers*,[31] was used most frequently during the allotment and assimilation years from the 1880s to the early 1920s, when the court was most deferential to the legislature and when the federal government used a frontal and unabashed assault in an effort to Americanize native peoples.

It was clear during the treaty making period—1778-1868—that Indian affairs, like foreign affairs, had been constitutionally delegated to Congress. Thus the power of judicial review was constrained to a similar extent as judicial power to review foreign affairs decisions were constrained, so that "the federal government's power to make treaties with the Indians was considered a political question, beyond judicial examination."[32] So long as tribes remained largely independent and were dealt with as sovereigns via treaty making, the federal government's largely

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28. Ibid., p. 115.

29. See, e.g., *U.S. v. Holliday,* 70 U.S. (3 Wall.) 407 (1866); *U.S. v. Old Settlers,* 148 U.S. 427 (1893); *Stephens v. Cherokee Nation,* 174 U.S. 445 (1899); *Cherokee Nation v. Hitchcock,* 187 U.S. 294 (1902); *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903); *U.S. v. Rickert,* 188 U.S. 432 (1903); *Blackfeather v. U.S.,* 190 U.S. 368 (1903); *Matter of Heff,* 197 U.S. 488 (1905); *U.S. v. Hitchcock,* 205 U.S. 80 (1907); *Tiger v. Western Investment Co.,* 221 U.S. 286 (1911); *U.S. v. Sandoval,* 231 U.S. 28 (1913); *Johnson v. Gearlds,* 234 U.S. 422 (1914); *U.S. v. Nice,* 241 U.S. 591 (1916); *U.S. v. Waller,* 243 U.S. 452 (1917); *Brader v. James,* 246 U.S. 88 (1918); and *U.S. v. Boylan,* 265 Fed. 165 (1920).

30. See, e.g., David E. Wilkins, "The U.S. Supreme Court's Explication of 'Federal Plenary Power,'" *American Indian Quarterly,* vol. 18, no. 3 (Summer 1994): 349-368 for an analysis of this important and variegated term. In general it has three broad meanings: exclusive, preemptive, and unlimited-absolute. In Indian affairs, particularly during the period from the 1880s to the 1920s and later during the termination era of the 1950s and 1960s, it was usually defined as a congressional power which lacked any constitutional constraints. Congress, in short, had virtually unlimited authority to do whatever it wanted regarding tribal lands, resources, or political rights.

31. 45 U.S. 567 (1846).

32. Shattuck and Norgren, *Partial Justice* (1991): 123. Generally, this is accurate. However, I would suggest that even during this long period there was a qualitative difference in the way Congress dealt with tribes versus its dealings in foreign affairs. This has to do with the unique political relationship that had already evolved, rooted in the political doctrines of consent, good faith, and trust, as laid out in congressional policy pronouncements, supreme court cases like the Cherokee cases (*Cherokee Nation v. Georgia,* 1831 and *Worcester v. Georgia,* 1832), and presidential proclamations and annual messages in which the chief executive often acknowledged the federal government's moral obligations to protect tribes.

unreviewable power to deal with tribes was justified.

However, when treaty making with tribes terminated in 1871 and Indian nations began to be treated as domestic national entities, with the federal government bent on the allotment, the assimilation, and the christianization of tribal persons; and as individual Indians were naturalized as American citizens, then the Court should have altered its stance towards tribes and individual Indians and strictly scrutinized congressional activities regarding Indians. This should have been the case especially when those activities resulted in violations of Indian treaty rights. The Court, on the contrary, continued its extreme deference to the political branches and frequently cited the political question doctrine as justification when it chose to ignore what for tribes were substantive federal violations of Indian rights.[33]

Examples of judicial deference in Indian affairs abound. In *Thomas v. Gay* (169 U.S. 264 (1897), the Court said, "it is well settled that an act of Congress may supersede a prior treaty and that any questions that may arise are beyond the sphere of judicial cognizance, and must be met by the political department of the Government." And in the most famous case, to be discussed in more detail later, which spliced the political question doctrine with the plenary power doctrine, *Lone Wolf v. Hitchcock,*[34] the Court declared that Congress's plenary power vis-á-vis tribes "has always been deemed a political one, not subject to be controlled by the judicial department of the government," and that regardless of the manner in which Congress dealt with tribes, "[i]n any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation."[35]

The Supreme Court placed some limitation on the congressional plenary power doctrine in the 1914 decision, *Perrin v. United States,*[36] by establishing the "pure arbitrariness" test. The Court, while affirming that Congress had tremendous authority over Indian affairs, nevertheless stated that "[a]s the power is incident only to the presence of the Indians and their status as wards of the Government, it must be conceded that it does not go beyond what is reasonably essential for their protection, and that, to be effective, its exercise must not be purely arbitrary but founded upon some reasonable basis."[37]

33. See, e.g., Nell Jessup Newton, "Federal Power Over Indians: Its Sources, Scope, and Limitation," *University of Pennsylvania Law Review,* vol. 132 (1984): 195-288 for a good analysis of the relationship between the Supreme Court and the Congress. The Rehnquist Court generally is less deferential to the Congress than its predecessors in many areas of law, including Indian affairs, and has actually challenged Congress' presumption of commerce power especially as it relates—or is seen as interfering with the rights of states to control their affairs. Nevertheless, in Indian affairs, there remains a presumption on the part of the Court that the federal government, and particularly the Congress, has superior standing in relation to tribes and may act accordingly.

34. 187 U.S. 553 (1903).

35. Ibid., p. 568.

36. 232 U.S. 478.

37. Ibid., p. 486.

The political question doctrine, however, remained a viable and largely unrestricted legal doctrine until it was disavowed in two late twentieth century cases: *Delaware Tribal Business Committee v. Weeks*,[38] and *United States v. Sioux Nation*.[39] In *Weeks* the Court rejected the claim that congressional power over Indian property was so all encompassing as to render legislative acts not subject to judicial review. And in *Sioux Nation*, a case with important repercussions for Indian land rights, the political question doctrine was swept away as a legal mechanism the Court could rely on to deny Indians a legal forum. As Justice Harry Blackmun said, "the doctrine was expressly laid to rest in *Delaware* . . ." and "the presumption of congressional good faith has little to commend it as an enduring principle for deciding questions of the kind presented here."[40]

The Supreme Court, then, has the constitutional authority to interpret Indian treaty rights, and should be available as a forum to which aggrieved Indian tribes or tribal members can take their treaty rights complaints. The Supreme Courts does not, however, have the constitutional authority to explicitly, and certainly does not have the authority to impliedly, abrogate those rights. The power of abrogation remains a political question.

JUDICIAL POWER AND IMPLIED REPEALS

The Supreme Court has never asserted that it has the power expressly to abrogate treaty rights. The court has instead consistently recognized that only the political branches may modify or abrogate treaty rights. As was said in *U.S. v. Old Settlers*[41] in 1893, "unquestionably a treaty may be modified or abrogated by an Act of Congress, but the power to make and unmake is essentially political and not judicial . . ." (p. 468). Thus, if the court lacks this greater, overt power, which it has recognized as belonging solely to Congress, on what legitimate basis can it assert that it has the lesser power to abrogate treaty rights by implication? Treaty interpretation, the art of deciding the meaning of language, which the court has the power to do, is one thing; treaty abrogation is a whole different matter.

However, since the 1871 Supreme Court case *The Cherokee Tobacco*,[42] the court has at times acted to abrogate expressed Indian treaty rights without specific authorization by the Congress. In *The Cherokee Tobacco*, Justice Swayne pitted the 10th article of the 1866 Cherokee Treaty with the United States against a section of the 1868 General Revenue law. He read in a congressional intent to abrogate the treaty right that was nowhere expressly stated.

Article 10 stated that Cherokee citizens had the right to sell any product or merchandise without having to pay "any tax thereon which is

38. 430 U.S. 73, 83-85 (1977).
39. 448 U.S. 371 (1980).
40. Ibid., p. 414-415.
41. 148 U.S. 427.
42. 11 Wall. 616.

now or may be levied by the United States on the quantity sold outside of the Indian Territory."[43] The provision of the General Revenue law, by contrast, imposed taxes on liquor and tobacco products "produced anywhere within the exterior boundaries of the United States."[44] While there was no language in the revenue law or in the accompanying documentary record expressly or impliedly stating that this law would apply to Indian Country, Justice Swayne, speaking for a deeply divided court (3 justices concurred, 2 dissented, and 3 did not participate), said that the case came down to which of the two laws was superior. Swayne maintained that "undoubtedly one or the other must yield" since "the repugnancy is clear and they cannot stand together" (p. 620).

Swayne went on to enunciate the infamous "last-in-time" principle, which has troubled tribes ever since. He observed that although the Constitution lacks language that might settle an alleged conflict between a treaty and a statute, it was clear to the court that "the question is not involved in any doubt as to its proper selection. A treaty may supersede a prior act of Congress and an act of Congress may supersede a prior treaty" (p. 621). This statement has proven to be a most disastrous legal rule. Two months earlier, in March 1871, Congress had attached a rider to an Indian Appropriation Act that squelched the Indian treaty process.[45] With treaty-making terminated (although agreements continued to be made until the early 1900s), any act of Congress passed subsequent to March 1871 could be interpreted as having overriden a preexisting Indian treaty right. Tribes were frozen in political limbo. They were no longer recognized as nations capable of formally treating with the federal government, yet they remained separate non-constitutional political entities.

Justices Bradley and Davis noted, however, in a spirited dissent that Indian populations were to be treated as "autonomies" and, that being the case, "all laws of a general character passed by Congress will be considered as not applying to the Indian territory, unless expressly mentioned."[46] The dissenting justices maintained that this was true because "an expressed law [like a treaty right to be exempt from taxation] creating certain rights and privileges is held never to be repealed by implication by any subsequent law couched in general terms nor by any expressed repeal of all laws inconsistent with such general law, unless the language be such as clearly to indicate intention of the legislature to reflect such a repeal."[47]

Another decision which drew upon the implied repeal doctrine was the egregious ruling, *Lone Wolf v. Hitchcock*.[48] This opinion holds great significance for federal Indian law because, among its precedents, it held 1) that congressional plenary power had always been present and that

43. 14 Stat., 799.
44. 15 Stat., 167.
45. 16 St. 544, 566.
46. Ibid., p. 622.
47. Ibid.
48. 187 U.S. 553.

Congress' power over tribal property was unlimited; 2) that Indian treaties could be unilaterally abrogated; and 3) that congressional plenary power was not subject to judicial review because of the political question doctrine. It warrants some historical analysis because of its importance to our discussion and because of its continuing use as precedent.

INDIAN TERRITORY—INDIAN ASSIMILATION

The Kiowa, Comanche, Apaches and several other southern plains tribes negotiated a treaty with the federally sponsored Indian Peace Commission in southern Kansas in 1867.[49] This treaty, like many during that era, contained a specific clause regarding future Indian land cessions. Article 12 said that: "No treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians occupying the same. . . ."[50] Such a provision was intended to ease the concern of the Indians that federal representatives might in the future seek to gain control of Indian lands by manipulating a minority of the tribal membership.

Gradually, as more whites settled in Indian Territory the pressure mounted to allot the lands of the tribes. In 1892 the three member Cherokee Commission (also known as the Jerome Commission), despite resistance by the Indians, concluded an allotment and land cession agreement with certain representatives of the Kiowa, Comanche, and Apache (KCA) tribes. Although the commissioners secured a number of Indian signatures, the three-fourths provision was not met. Nevertheless, the controversial agreement was rushed to Washington, D.C. for congressional ratification.

Almost immediately, over 300 KCA tribal members memorialized the Senate urging that body to disapprove the 1892 agreement because 1) the negotiating sessions had not been conducted in open council or with the knowledge of tribal leaders and 2) because many of the signatures had been obtained through misrepresentations, threats, and fraudulent means. Tribal consent, in other words, of the requisite number of Indians, had never been legitimately secured.

More importantly, as the agreement wound its way through the congressional ratification process, a journey that took eight years to complete, Congress substantially revised the agreement prior to its enactment. These revisions were never submitted to the KCA tribes for their approval, as required by treaty provision. Nevertheless, on June 6, 1900, Congress ratified the amended agreement.

Lone Wolf, also known as A-Kei-Quodle, was a principal chief of

49. 15 Stat., 581. For good discussion of the treaty proceedings see Douglas C. Jones, *The Treaty of Medicine Lodge: The Story of the Great Treaty Council as Told by Eyewitnesses* (Norman: University of Oklahoma Press, 1966).

50. 15 Stat., 581.

the Kiowa Nation, and he, along with several Comanche and Apache leaders, brought suit against the U.S. challenging the legality of Congress' actions. Lone Wolf sought a permanent injunction against congressional ratification of the 1900 agreement which allotted the KCA tribes lands, a loss of over 2 million acres in Indian Territory, and contended that the federal government had directly violated Article 12 of the 1867 treaty.

Lone Wolf, supported and represented by the Philadelphia based Indian Rights Association, filed suit in the District of Columbia's Supreme Court in 1901. He lost and had his appeal rejected by the District Court of Appeals. The KCA then turned to the U.S. Supreme Court for justice. The Indians' hopes, however, and by implication, those of all tribes with treaty-based property rights, were crushed unanimously by the Court's ruling in 1903.

THE SUPREME MERGER: IMPLIED PLENARY POWER AND POLITICAL QUESTIONS

Justice Edward D. White issued the opinion which was, shortly after its pronouncement, labeled by one startled U.S. Senator, Matthew Quey (R., Pennsylvania), the "*Dred Scott* decision No. 2 except that in this case the victim is red instead of black. It practically inculcates the doctrine that the red man has no rights which the white man is bound to respect, and, that no treaty or contract made with him is binding."[51]

The Court's unanimous opinion represented a perfect and crippling synthesis of the plenary power concept and the political question doctrine. The Court refused to even consider the tribes' core argument, that of "fraudulent misrepresentation" by government officials in securing Indian signatures. The justices also refused to consider the issue of the Senate's unilateral alteration of the 1892 agreement's provisions.

The only question the Court considered was whether the Act of June 6, 1900, was constitutional. Despite Lone Wolf's treaty and constitutional arguments, Justice White accepted the government attorneys' view that since Indians were "wards" their treaty-defined property rights had not vested. The Indians' claim, said White, "in effect ignores the status of the contracting Indians and the relation of dependency they bore and continue to bear toward the government of the United States."[52] White was retroactively bestowing wardship status on the tribes to make the abrogation of their treaty rights appear legal.

In discussing congressional plenary power, White stated that: "To uphold the claim [of the Indians'] would be to adjudge that the indirect operation of the treaty was to materially limit and quality 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

51. U.S. *Congressional Record* (1903): p. 2028.

52. 187 U.S. 553, 564.

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."[53] However, there was clearly no "emergency" present to justify this violation. The congressional ratification process of the 1892 agreement had taken a full eight years to complete.

The Court's discussion of Congress' allegedly implied power over tribal rights and resources is of special importance for our discussion. After citing previous cases in which the Court had equated Indian title with fee-simple title, White set up a situation in which he was able to circumvent these prior opinions He said: "But in none of these cases was there involved a controversy between Indians and the government respecting the power of Congress to administer the property of the Indians."[54] This is correct, as written. Prior to this decision Congress had historically acknowledged that it had no right to challenge treaty-recognized Indian property rights. One of the cases cited, however, by White, *Beecher v. Wetherby,*[55] had stated that the United States had a superior authority over Indians based on guardianship and that such authority "might be implied, even though opposed to the strict letter of a treaty with the Indians."[56] This "abrogation by implication" argument allowed White to then falsely assert that congressional "plenary power 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 the control of the judicial department of the government."[57]

White said that Congress "always" had plenary authority not subject to judicial review because the Court was intent on legitimating the congressionally directed breakdown of communally held tribal lands which, the Court had determined, was essential before Euro-American civilization could be approximated by Indians. Such judicial intent to sanction the abrogation of treaty rights, notwithstanding the KCA tribes' well articulated concerns about lost land, lost rights, and denied sovereignty, is evident in the following passage where White calmly describes the traumatic breakup of Indian communal lands into individualized allotted parcels as "a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the government."[58]

Finally, the Court attempted to lessen the damage its sanctioning of Congress' power to bludgeon treaty-recognized property rights had caused by stating that the government's actions were those of a "Christian people in their treatment of an ignorant and dependent race" and that the Congress, the Court was presuming, was acting "in perfect good faith"

53. Ibid.
54. Ibid., p. 565.
55. 95 U.S. 517 (1877).
56. 187 U.S. 565.
57. Ibid.
58. Ibid., p. 568.

with the Indians and was using its "best judgment in the premises."[59] The Court had to "presume" that Congress had acted in good faith in dealing with the tribes because subsequent to the treaties' ratification it could find no historical or legal assurance to show that Congress had "in reality" acted in good faith.

The court's use of the implied repeal doctrine, or the closely related term, "implicit divestiture,"[60] has increased since the mid- 1970s in federal cases such as *Decoteau v. District Court*,[61] *Rosebud Sioux v. Kneip*,[62] *U.S. v. Dion*,[63] *Oregon Department of Fish & Wildlife v. Klamath Indian Tribe*,[64] *South Dakota v. Bourland*,[65] and *Hagen v. Utah*.[66] The increased use of the doctrine may be attributed to the Supreme Court's ideological turn towards a radical brand of conservatism combined with a resurgence of states' rights. Recently, the court frequently has favored states' rights as being superior to Indian treaty rights.[67]

PRECEDENT AGAINST IMPLIED REPEALS

In 1880 a federal district court in *United States v. Berry*,[68] held that an Indian treaty "by its terms was to be permanent, and the rights conferred thereby were not to be taken away without the consent of the Indian." While conceding that congress had the power of repeal, the judge said "it is clear to my mind that such repeal can only be enacted in expressed terms, or by such language as imports a clear purpose on the part of congress to effect that end."

In 1883 the Supreme Court turned its attention to the doctrine of implied repeals in the important Indian criminal law case *Ex parte Crow Dog*.[69] In *Crow Dog* the Supreme Court unanimously held that one of a

59. Ibid.

60. The related phrase that tribes were "implicitly divested" of certain sovereign powers by their geographic incorporation and allegedly dependent relationship to the federal government was developed by Chief Justice Rehnquist in *Oliphant v. Suquamish,* 435 U.S. 191 (1978).

61. 420 U.S. 425 (1975).

62. 430 U.S. 584 (1977).

63. 106 S.Ct. 2216 (1986).

64. 473 U.S. 753 (1985).

65. 113 S.Ct. 2309 (1993).

66. 1145 S.Ct. 958 (1994).

67. See, for example, *Cotton Petroleum Corporation v. New Mexico,* 490 U.S. 163 (1989); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation,* 492 U.S. 408 (1989); *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation,* 502 U.S. 251 (1992); *Seminole Tribe of Florida v. Florida,* 517 U.S. 44 (1996); and *Strate v. A-1 Contractors,* 520 U.S. 438 (1997). However, in the spring of 1999 the Supreme Court rendered two decisions that effectively reaffirmed Indian treaty rights against states' rights: *Minnesota v. Mille Lac Band of Chippewa Indians,* 119 S.Ct. 1187 and *Puget Sound Shellfish Growers v. United States,* 1999 U.S. Lexis, 2504.

68. 4 Fed. 779 (D.C. Colo. 1880).

69. 109 U.S. 556 (1883).

tribe's remaining sovereign powers was exclusive criminal jurisdiction over its own members. The government, in seeking to execute Crow Dog for the killing of another Sioux, Spotted Tail, had argued that it had criminal jurisdiction based on articles 1, 2, and 5 of the 1868 Sioux Treaty with the U.S., which dealt with the establishment of peace, the creation of the reservation, and the agent's appointment, and on Article 8 of the federal government's 1877 agreement with the Sioux Nation which said, "And Congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the U.S., and each individual shall be protected in his rights of property, person, and life."[70]

The court disagreed, citing the fact that section 2146 of the Revised Statutes, which excluded from the jurisdiction of the U.S. criminal cases in Indian Country by one Indian against another, had never been expressly repealed. The Sioux Nation's right of self-government, the court insisted, necessarily entailed "the regulation by themselves of their own domestic affairs, [including] the maintenance of order and peace among their own members by the administration of their own laws and customs."[71]

Important for our purposes is the court's detailed discussion of the implied repeal doctrine, which Justice Matthews and a unanimous court emphatically rebuffed:

> It must be remembered that the question before us is whether the express letter of [section] 2146 of the Revised Statutes, which excludes from the jurisdiction of the United States the case of a crime committed in the Indian country by one Indian against the person or property of another Indian, has been repealed. If not, it is in force and applies to the present case. The treaty of 1868 and the agreement and act of Congress of 1877, it is admitted, do not repeal it by any express words. What we have said is sufficient at least to show that they do not work a repeal by necessary implication . . . *Implied repeals are not favored.* The implication must be necessary. There must be a positive repugnancy between the provisions of the new laws and those of the old.[72] (emphasis added)

Justice Matthews then elaborated on the important principle that specific and express rights are not to be interpreted as being overruled by general acts unless there is explicit reference to them:

> The language of the exception is special and express; the words relied on as a repeal are general and inconclusive. The rule is *generalia specialibus non derogant.* 'The general principle to be applied,' . . . 'to the construction of acts of Parliament is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together.' 'And the reason is,' . . . 'that the legislature having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do.'[73] [emphasis his]

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70. Ibid., p. 568.
71. Ibid.
72. Ibid., p. 570.
73. Ibid., p. 571.

More recently, the Supreme Court has insisted in several important cases, *Menominee Tribe v. U.S.*,[74] *Washington v. Fishing Vessel Association*,[75] and *Minnesota v. Mille Lac Band of Chippewa*,[76] that the government's intent to abrogate Indian treaty provisions must be clear and unequivocal. This "clear and plain" standard also applies to non-treaty situations if the federal action threatens tribal rights created via statute, aboriginal title, or executive orders.[77]

There have actually been very few cases where the U.S. Congress or the President officially[78] exercised the power legislatively or administratively to abrogate treaties—Indian or international. The procedure, either an act of Congress, or some form of direct presidential action, like a proclamation, must be quite explicit. The following are two examples of official international treaty abrogation.

EXPRESS REPEALS OF FOREIGN TREATIES

First, on July 7, 1798, Congress enacted a law that directly abrogated treaties between the United States and France. The law was entitled "An act to declare the treaties heretofore concluded with France, no longer obligatory on the U.S." Congress declared that "whereas the treaties concluded between the United States and France have been repeatedly violat-

74. 391 U.S. 404 (1968).

75. 443 U.S. 658 (1979).

76. 119 S.Ct. 1187 (1999).

77. See, e.g., *U.S. ex rel. Hualpai Indians v. Sante Fe Pacific Railroad,* 314 U.S. 339 (1941) and *Bryan v. Itasca Co.,* 426 U.S. 373 (1976).

78. That is not to say that many treaties or provisions of specific treaties have not been "unofficially" violated. It is a well known fact that the federal government has on many occasions acted to abrogate or diminish the rights of other nations, including tribal nations, by either not ratifying previously negotiated treaties (e.g., the 18 treaties negotiated between the federal government and various California tribes); or by failing to enact necessary legislation to implement particular treaty provisions; or by failing to carry out treaty mandates (e.g., fishing rights of Washington, Oregon, and Wisconsin tribal members); or by enacting later laws which implicitly overrode earlier treaty rights (Kiowa, Comanche, and Apaches in Oklahoma).

As regards Indian treaties, Vine Deloria, in response to a query by Senator Daniel Inouye in 1987, on whether any Indian treaties had **not** been violated, said "there are technical attorneys' interpretations which is that various articles are specifically violated. I think the spirit of all the treaties or the pledge of good faith between Indians and the U.S.—that spirit has certainly long since been destroyed" (U.S. Senate. Hearing Before the Select Committee on Indian Affairs, on S. Concurrent Resolution 76. 100th Congress., 1st sess., (Washington, D.C.: Government Printing Office, 1988): 29.

Regarding U.S. violations of foreign treaties, see Christopher Joyner's, article, "International Law" in Peter Schraeder, *Intervention into the 1990s: U.S. Foreign Policy in the Third World* (Boulder, CO: Lynne Reinner Publishers, 1992): 229-244, in which he details how the U.S. has intervened in the affairs of many Third World countries despite its avowed support of the doctrine of non-intervention. Examples include U.S. intervention in Guatemala in 1954, Cuba in 1961, the Dominican Republic in 1965, Chile in 1973, Granada in 1983, and Panama in 1989. Joyner shows how between 1900 and 1930 the U.S. intervened militarily on some 60 occasions in several Caribbean and Central American states.

ed on the part of the French government . . . [a]nd whereas, under authority of the French government, there is yet pursued against the United States, a system of predatory violence, infracting the said treaties, and hostile to the rights of a free and independent nation . . ." it was held that "the United States are of right freed and exonerated from the stipulations of the treaties, and of the consular convention . . . and that the same shall not henceforth be regarded as legally obligatory on the government or citizens of the United States."[79]

Second, in 1978 President Jimmy Carter terminated a Mutual Defense treaty with Taiwan. The Senate considered a resolution that would have required the approval of the Senate or both houses of Congress before the President could terminate any defense treaty, but final action was never taken on the measure. A federal district court in 1979 in *Goldwater v. Carter,*[80] held that some form of congressional concurrence was required before the abrogation of a treaty, but this was overturned by an appellate court ruling,[81] which was then affirmed late in 1979 by the Supreme Court[82] because of Congress' failure to confront the President directly. The Supreme Court, in fact, split along several lines, thus providing no clear consensus on future treaty terminations by the chief executive. Moreover, Congress has not yet enacted legislation defining appropriate rules for the executive and legislature on this matter.[83]

EXPRESS CONGRESSIONAL REPEAL OF INDIAN TREATIES

Not since the end of the Nineteenth century, when Congress effectively usurped the presidential treaty-making power insofar as Indian treaties were concerned by terminating the federal government's continued negotiation of any additional Indian treaties,[84] have American presi-

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79. 2 St. 578.

80. 481 F.Supp. 949, 963-64.

81. 617 F.2d 697 (1979).

82. 444 U.S. 996 (1979).

83. Louis Fisher, *Constitutional Structures: Separated Powers & Federalism,* vol. I (New York: McGraw Hill, 1990): 309.

84. *See,* the Indian treaty-termination rider attached to the 1871 Indian Appropriation Act, which declared that "hereafter no Indian nation or tribe within the territory of the U.S. shall be acknowledged or recognized as an independent nation, tribe, or power with whom the U.S. may contract by treaty. This measure, however, recognized the ongoing validity of previously ratified Indian treaties (16 St. 544, 566).

Consult Francis P. Prucha's, *American Indian Treaties* (Berkeley, CA: University of California Press, 1995) for detailed examination of this intense and critical period. And see George W. Rice, "Indian Rights: 25 U.S.C. Sec. 77: the End of Sovereignty or a Self-Limitation of Contractual Ability?" *American Indian Law Review,* vol. 5 (1977): 239-253, who persuasively argues that Congress' action ending treaty making with tribes is of questionable constitutionality. More importantly, the practice of treaty making, though termed agreements, continued from 1872 to 1914. The only difference between the two is that agreements require ratification by both Houses, while treaties need only be ratified by the Senate.

dents had a significant role in Indian treaty (or agreement) negotiation or interpretation. And as a result of the recent supreme court ruling, *Minnesota v. Mille Lac Band of Chippewa Indians* (119 S.Ct. 1187) (1999), it is clear that the president lacks the power via executive order to revoke preexisting Indian treaty rights. Thus my primary focus insofar as explicit Indian treaty abrogation is concerned is on the process used by Congress expressly to terminate Indian treaties.

The most vivid and direct congressional action abrogating an Indian treaty occurred as a result of the outbreak of war between the Santee Sioux and white settlers in Minnesota in 1862. Several hundred whites were killed by Sioux who rose up in arms after having been deprived of their lifestyle and some of their treaty entitlements by government agents.[85] The U.S. Army responded quickly, and soon the Santee were defeated. General Henry Sibley, the militia commander in Minnesota and a prominent political figure in the state, ordered a court martial for several hundred of the Sioux. Three hundred Santee were sentenced to hang, regardless of their level of involvement in the outbreak of violence. President Lincoln, however, commuted the death sentences of all but 40 of the Indians. Eventually, 38 were hanged—the largest mass execution in U.S. history.

Congress responded to the eruption by enacting a law on July 5, 1862, which said that "whenever the tribal organization of any Indian tribe is in actual hostility to the United States, the President is authorized, by proclamation, to declare all treaties with such tribe abrogated by such tribe, if in his opinion the same can be done consistently with good faith and legal and national obligations."[86] In what Francis Prucha called "an unprecedented move," Congress canceled certain provisions of earlier treaties with the Sioux and the following year, February 16, 1863, enacted a law declaring that "all treaties with the Sisseton," and several other bands of Sioux, were "abrogated and annulled, so far as said treaties or any of them purport to impose any future obligation on the United States."[87]

In a second example, Congress explicitly abrogated a preexisting Indian treaty right with an act passed February 28, 1877, which also involved the Sioux. In this act, which ratified an agreement with some Sioux bands and the Northern Arapaho and Cheyenne, Congress clearly and unequivocally abrogated Article 16 of the 1868 Sioux treaty, which had guaranteed the Sioux unceded territory, permitted no whites in their borders without tribal consent, and required the U.S. to abandon all military posts and close roads. Congress succinctly said: "And Article 16 of the said treaty is hereby abrogated."

Finally, in 1895 Congress acted to "annul" and "disapprove" a

85. Edward Lazarus, *Black Hills/White Justice* (New York: Harper Collins Publishers, 1991): 27-28.

86. 12 St. 528.

87. 12 St. 652-54.

November 13, 1888 treaty (Congress in the legislation referred to this agreement[88] as a treaty, not an agreement) the United States had signed with the Southern Utes of Colorado in favor of an earlier June 15, 1880 treaty made with the tribe which called for the allotment of their lands.[89] This act also contained a consent provision in which Congress declared that the act would be inoperative until it was accepted by a majority of the adult male Indians on the reservation.

In short, when the federal government determines officially to abrogate an Indian treaty or specific provisions of a treaty, it acts invariably through the Congress which is authorized to oversee federal Indian affairs. The legislature exercises this power openly and unambiguously, and usually only after the legislature has determined that the tribe in question has somehow engaged in an act or a set of actions that warrants the termination of the specific treaty (e.g., the Santee eruption against local settlers, which was deemed a violation of their treaty agreement with the federal government not to engage in hostilities toward neighboring whites).

EXPRESS CONGRESSIONAL MODIFICATION OF PRIOR TREATIES/AGREEMENTS

On other specific occasions when Congress has sought to modify or amend existing Indian treaties or agreements, it has also acted unequivocally by enacting specific laws which have adjusted or amended the previous negotiated arrangements.

Gradually, by the late 1860s, the United States began to add specific provisions to many Indian treaties which guaranteed to the tribal participants that there would be no cession of reservation land without the express written consent of a majority (usually three-fourths) of adult males.[90] We have already discussed how in certain cases, most famously the 1867 Kiowa, Comanche, and Apache treaty provision which resulted in the devastating *Lone Wolf* precedent, that this consent provision was sometimes brushed aside or abused by federal officials.

Notwithstanding this important case and its bleak precedent, there are many other instances where the Congress acted to secure tribal consent before moving to acquire Indian lands or terminate specific treaty rights, or by acting only after it had passed an express act which had the effect of modifying or amending a prior treaty or agreement.

For example, on June 30, 1864,[91] Congress enacted a law which

88. This is technically what all bilateral negotiations between tribes and the U.S. were termed after the 1871 treaty termination law.

89. 28 St. 677.

90. See, e.g., Article 8 of the 1868 treaty between the Northern Cheyenne, Northern Arapahoe and the United States (15 Stat., 655); and Article 10 of the 1868 Navajo Treaty with the United States (15 Stat., 667).

91. 13 Stat., 324.

authorized the president to negotiate with the Confederated Tribes of Oregon in an effort to have them relinquish certain off-reservation hunting, fishing, and gathering rights the tribes had retained in an 1859 treaty. The president was authorized by Congress to defray the expenses of the treaty negotiations and to offer the tribes $5,000 for cession of those rights.

In 1872, Congress passed an act[92] to implement certain provisions of the 1866 Cherokee Treaty having to do with the so-called "Cherokee Strip" lands owned by the Cherokee Nation in Kansas. Those lands were to be surveyed and sold but only after the sale had been approved by the Cherokee National Council or by a duly authorized Cherokee delegation. In yet another example, Congress passed a measure in 1874[93] dealing with the federal government's efforts to fulfill the eighth article of the treaty between the Creek and Seminole Indians which had been concluded in 1856. Article 8 authorized the federal government to expend $5,000 annually for the "comfort, civilization, and improvement" of the Indians. However, in a proviso, Congress states that "the consent of said tribe to such expenditures and payment shall be first obtained."

The Osage Tribe also received congressional assurances[94] that their consent would be obtained before their Kansas lands, known as the Osage Indian trust and diminished reserved lands, were sold at public auction to the highest bidder. These sales were not to occur "until at least two-thirds of the adult males" agreed to the provisions outlined by Congress.

Francis P. Prucha claims that "Indian consent, however, gradually disappeared as a major element" of federal Indian policy after the 1880s, largely as a result of the force of the February 8, 1887 General Allotment Act[95] which was the policy directive issued by Congress to hasten the individualization of Indian communal land through the allotment of individual shares to Indian families and members. On a broad level, he is essentially correct because there is significant evidence that many tribes fought valiantly—and never gave their consent freely—to avoid the breakdown of their cultures and the erosion of their land bases, only to have the federal government push ahead and proceed with detribalization and allotment.

Nevertheless, while federal pursuit of American Indian assimilation was an overwhelming force from which tribes could not extricate themselves, one still finds clear examples where Congress persisted in obtaining tribal consent before enforcing or implementing agreement provisions, or, at the least, Congress, before modifying treaties or agreements, would pass subsequent acts to carry out their purpose.

For instance, on July 1, 1902, Congress passed an act to accept, ratify, and confirm the allotment agreement and memorial that had been pro-

92. 17 Stat., 98.
93. 18 Stat., 29.
94. 21 Stat., 509.
95. 24 Stat., 388.

posed by the Kansas or Kaw Tribe of Oklahoma Territory.[96] Article 13 contained the consent provision: "The said Kansas or Kaw Indians hereby memorialize Congress to ratify and confirm this agreement and to make provision for carrying it into effect: Provided, that if any material amendments are made in this agreement by Congress the same shall not become effective until such amendments are approved by a majority of the adult members of the . . . tribe. . . ." The Kaw, like most other tribes, were under enormous pressure to have their lands allotted. As Commissioner of Indian Affairs (CIA), W.A. Jones, stated in his report accompanying the Kaw agreement: "The agreement is in entire harmony with the views of this [CIA] office . . . The Indian must ultimately be thrown upon his own resources, and this agreement proposes to do this for the Kaw tribe."[97] The consent provision, however, was designed to provide the Indians with some assurance that their rights would not be unilaterally altered by Congress, though it was clear that they were going to be altered.

The 1903 *Lone Wolf* decision had established an ominous precedent in Indian affairs: that Congress could act to unilaterally abrogate Indian treaty rights over the protests of Indians by exercising an unreviewable plenary power over Indian property. And Prucha states in his most recent work, *American Indian Treaties,* that "after the *Lone Wolf* decision the idea of requiring Indian consent for the disposition of their lands was largely discarded in regard to statutes as well as to agreements, and Congress unilaterally provided for the sale of surplus lands remaining after allotments had been completed."[98]

Prucha cites as evidence a 1901 agreement with the Rosebud Sioux for the sale of their unallotted lands in which the government's Indian Inspector, James McLaughlin, properly secured the signatures of three-fourths of the adult Sioux males for the land cession. This agreement, however, was later amended and ratified by Congress in 1904 in a way that eliminated the requirement to secure Indian consent. The House Committee on Indian Affairs which made the changes in the agreement which called for the elimination of the need to get Indian consent justified their action largely on the basis of the *Lone Wolf* opinion.[99]

Although it is true that Congress less frequently acted to gain Indian consent before allotting Indian reservations or selling the surplus lands left after allotment, the fact remains that the legislature, not the judiciary, still had to formally act when it voted on measures that modified and ratified prior Indian treaties or agreements. One final example makes this point quite clearly. On June 11, 1934, exactly one week before the com-

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96. 32 Stat., 636.

97. U.S. Congress. House. "Agreement and Memorial of the Kansas (or Kaw) Indians of Oklahoma." Document No. 452, 57th Cong., 1st Sess., March 11, 1902 (Washington, D.C.: Government Printing Office, 1903): 3.

98. Francis P. Prucha, *American Indian Treaties: The History of a Political Anomaly* (Berkeley: University of California Press, 1994): 356-57.

99. Ibid., p. 357.

prehensive Indian reform measure, the Indian Reorganization Act,[100] which helped to revitalize tribes economically, politically, and culturally, Congress enacted an act[101] "to modify the effect of certain Chippewa Indian treaties . . ." and expressly amended article 7 of two Chippewa treaties—February 22, 1853 and September 30, 1854—which centered for jurisdictional purposes on defining what was "Indian Country." Again, the important point is that this modification of treaty rights required an express and unequivocal statement by the Congress which had first negotiated and ratified the original treaties.

The data show, therefore, that on these occasions when the Congress has officially acted to expressly abrogate or modify indigenous treaties it has done so by formally acting through the legislative process and sometimes sought tribal consent before changing the treaty/agreement. Most commentators and ample litigation confirm that Congress may, when it is deemed extremely important or vital to the national interest, enact a precise law abrogating (or amending) a prior treaty (agreement) or treaty (agreement) provision. Officially, the power to unilaterally abrogate Indian treaties has not been wielded often. This is because, as Attorney General Caleb Cushing noted in 1854 in an opinion on the land rights of several Kansas Territory tribes:

> Let me not be understood as acceding to the doctrine, that all stipulations of treaties are subject to be repealed or modified at any time by act of Congress. Without going into that question here, it suffices to remark that every treaty is an express compact, in the most solemn form in which the United States can make a compact. Not to observe a treaty, is to violate a deliberate and express engagement. To violate such engagements of a treaty with any foreign power affords, of course, good cause of war.[102]

Cushing went on to note, however, that there were some important distinctions between Indian treaties and treaties with foreign nations. As he observed, "[e]xamples may be cited of acts of Congress, which operate so as to modify or amend treaties with Indians. As their sovereign and their guardian, we have occasionally assumed to do this, acting in their interest and our own, and not, in such cases, violating engagements with them, but seeking to give a more beneficial effect to such engagements. For though they be weak, and we strong,—they subjects and we masters,—yet they are not the less entitled to the exercise towards them of the most scrupulous good faith on the part of the United States."[103] In other words, the federal government was legally and morally bound to uphold Indian treaties not only because they were important political covenants, but also because of the added trust/moral dimension: the federal government, in asserting its physical superiority, had an additional set of responsibilities to protect the lands and interests of Indians.

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100. 48 Stat., 984.

101. 48 Stat., 927.

102. U.S. Official Opinions of the Attorneys General of the United States, Vol. VI (Washington, D.C.: Government Printing Office, 1854): 663-64.

103. Ibid., p. 664.

The treaty power, as Attorney General Amos T. Akerman stated in 1870, "binding the will of the nation, must, within its constitutional limits, be paramount to the legislative power which is that will."[104] Tribes, of course, after a time, declined and in some cases surrendered their right to wage war by negotiating many treaties with the United States in which they reluctantly agreed to reduced lands and peace and amity with the United States in exchange for continued recognition of their sovereignty and all other reserved rights. Hence, although there are clearly some important distinctions between U.S. treaties with foreign powers and U.S. treaties with indigenous powers (their geographic proximity, the assumed and declared trust and plenary doctrines, military disadvantages, etc.), it must not be assumed that these differences outweigh the legal comparability of the documents. As a federal court held in *Turner v. American Baptist Missionary Union,*[105] "it is contended that a treaty with Indian tribes, has not the same dignity or effect, as a treaty with a foreign and independent nation. This distinction is not authorized by the Constitution. . . . They are treaties, within the meaning of the Constitution, and, as such, are the supreme laws of the land" (p. 346).

CONCLUSION

I have argued that the Supreme Court lacks constitutional authority to abrogate specific treaty rights by implication or to divest Indian tribes of their rights; such power is constitutionally vested and on a few occasions has been expressly wielded by the U.S. Congress. From an indigenous perspective, corroborated by a plethora of federal policy, judicial opinions, and some historical practice, the Supreme Court's decision in *The Kansas Indians,*[106] contains the most reasonable articulation of how Indian treaties/agreements may be changed. The Court held that Indian treaties and the rights affirmed or created by treaty provisions may be modified, amended, or terminated only as a result of bilateral treaty stipulations, purchase, or the voluntary abandonment of the tribal organization.

The evidence shows that the United States on a number of occasions mutually agreed to modify or amend treaties and sought on some occasions to purchase Indian treaty rights. And while congressional power over tribal lands and rights was far more oppressive after the *Lone Wolf* decision, since Congress regularly acted as if tribal consent was no longer required, it was still federal policy that changes in treaty/agreement rights required the enactment of congressional statutes with exact language specifying which treaty provision was to be modified or eliminated.

The specification of how treaty rights could be changed to allow both parties to remain within the paradigm of good faith is found in language of the federal district court ruling in the important water rights case,

104. Ibid., vol. 13 (Washington, D.C.: Government Printing Office, 1873): 358.

105. 24 Fed.Cas. 344 (1852).

106. 72 U.S. 737 (1866).

Winters v. United States,[107] in which Judge Hawley said, "We must presume that the government and the Indian, in agreeing to the terms of the treaty, acted in the utmost good faith toward each other; that they both understood its meaning, purpose, and object."[108]

In other words, the political/moral principle of "utmost good faith," when combined with the trust doctrine, requires that both parties work to fulfill not only the letter but especially the spirit of the treaties negotiated. In the event that there is to be a modification or abrogation of the treaty arrangement, it is to be carried out mutually, consensually, and voluntarily through the same political/diplomatic channels that led to the treaty's creation in the first instance. On those few occasions when the federal government has acted formally to abrogate treaties or provisions of treaties, Congress has wielded the abrogating power, but even then only through the express wording in a statute. And in the more numerous cases where Congress negotiated agreements and then sought to modify or amend them, it also passed specific legislation identifying what its intention was, and frequently sought Indian consent to concur with the change.

It is not the province of the Supreme Court to generate a congressional intent and then to unilaterally or by implication repeal specific treaty rights that have been negotiated and ratified through political channels by tribal nations and their political leaders and the U.S. government and its political leaders. Indian treaties, ultimately, are vital diplomatic arrangements between nations. And while they may be abrogated by the Congress (and the tribes, for that matter), depending on the confluence of particular if ill-defined circumstances, because of the distinctive trust and good faith doctrines, and exclusive authority of Congress with regards to Indian affairs, there must be a clear and specific intent to abrogate which must be carried out by those political branches which oversee the United States relationship with tribes. When alleged conflicts erupt between specific Indian treaty provisions and later congressional or state statutes, the principal task of the Supreme Court must be to uphold the honor and will of the nation, as outlined in the treaty, and interpret the conflicting statute in a way that conforms to the national will and the federal government's trust obligations to tribes.

107. 143 Fed. Reporter 740 (1906).

108. Ibid., p. 745.