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The U.S. Supreme Court's explication of "federal plenary power": an analysis of case law affecting tribal sovereignty, 1886-1914

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Abstract:
The concept of tribal sovereignty frequently conflicts with that of congressional plenary power, depending on the definition and basis of plenary power. Analysis of 107 federal court cases between 1886 and 1914 suggests that when plenary power is seen in terms of preemption and exclusivity, it may help to protect tribal sovereignty from private or state incursions. However, if plenary power is defined as absolute and unlimited, tribal rights are not constitutionally protected against federal actions. Although tribes are properly regarded as extra-constitutional entities, they are often treated as inferior in relation to Congress by the courts.

Full Text:
The 200-year-old political relationship between American Indian tribes and the United States remains both problematic and paradoxical because of the conjuncture of geographical, historical, political, and constitutional issues and circumstances that influence tribal-federal affairs. A central feature of this dynamic dialogue is the incongruous relationship between the United States Congress's exercise of plenary power and the tribes' efforts to exercise their sovereign political rights. This essay traces the historical, legal, and political origins and transformation of this pivotal concept from 1886 to 1914, an important period in its development. Analysis of 107 federal court cases and of the plenary power concept reveals that congressional plenary power has several distinctive definitions. Depending on which definition is used by the court and whether the term is based on constitutional or extra-constitutional doctrine, determines whether the court's decision will adversely or positively affect tribal sovereignty, political rights, and resources.

One of the perennial puzzles in intergovernmental relations and constitutional law is the following question: What is the relationship between American Indian tribal governments, that exercise certain sovereign rights, and the United States government which presumes a plenary power with regard to tribes? Despite the federal government's presumption[1] of vast authority over tribes,[2] plenary power remains a problematic concept, particularly when paired with the doctrine of tribal sovereignty.

There is also considerable disagreement among scholars on whether plenary power is a necessary congressional power which protects tribes, or whether it is an abhorrent and undemocratic concept because it entails the congressional exercise of wide political authority over tribes. While the principal focus of this essay is to detail the history and evolution of plenary power as defined by the Supreme Court during a critical historical era, it is important first to provide some discussion of an equally pivotal concept: tribal sovereignty.

There is a startling array of interpretations of tribal sovereignty. For years the classic reference has been that of Felix Cohen who asserted that "from the earliest years of the Republic the Indian tribes have been recognized as 'district, independent, political communities,' and as such, qualified to exercises powers of self-government, not by virtue of any delegation of powers from the Federal government but rather by reason of their original tribal sovereignty" (1972 ed.: 122). John Marshall, in the pivotal case Worcester v. Georgia, 21 U.S. (6 Pet.) 515, defined tribal sovereignty as a function of collective political rights. He described tribes as "distinct peoples, divided into separate nations, independent of each other, and of the rest of the world, having institutions of their own, and governing themselves by their own laws" (pp. 542-543).

For Vine Deloria Jr. (1979), on the other hand, sovereignty has less to do with self-government and political rights and more to do with "continuing cultural and communal integrity." "Sovereignty," Deloria said, "in the final instance, can be said to consist more of continued cultural integrity than of political powers and to the degree that a nation loses its sense of cultural identity, to that degree it suffers a loss of sovereignty" (pp. 26-27).
For the purpose of this essay, we define tribal sovereignty as an understanding that every tribal person has the right and the responsibility to be an actor, not merely an object, in decisions affecting his or her community. It is the political will of the people that ensures the vitality of sovereignty.

The usage of plenary power to describe the Congress's political relations with North American tribes distinguishes America's indigenous groups as the nation's original peoples. On the other hand, the fact of its persistence entails an exceptional political status for tribal nations that find their pre-constitutional sovereign political and legal status can be radically reaffirmed or unilaterally altered, even quashed, at any time by congressional laws, judicial opinions, or administrative actions of the Bureau of Indian Affairs.

The vacillations in the way the term plenary has been defined and the manner in which it has been institutionalized indicates a critical difference between the political status of American states and tribes with respect to their relationship to the federal government. The Supreme Court has held that while "the sovereignty of the States is limited by the Constitution itself," Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 528, 548 (1984), states do enjoy legal and constitutional protections against arbitrary federal action because of the doctrine of enumerated powers. In other words, while Congress can exercise significant power over the states, it is doubtful that it could legislate a state out of existence. Regarding tribes, however, the Congress has acted to "legislate tribes [and bands and rancherias] out of existence" (Rotenberg, 1987:92), through the termination[3] policy initiated in 1953 and continuing into the 1960s.

However, a little-known dimension which further complicates tribal-federal intergovernmental relations involves the fact that both before and even during the period 1886 to 1914 when congressional plenary power (defined as unlimited-absolute) was exercised in its most virulent and unabashed form, there were numerous occasions where Congress and the executive branch could not or would not employ the plenary power doctrine to force tribes to comply with a particular treaty, agreement, or federal statute. Frequently, tribal leaders and their constituencies simply voted down pending bilateral agreements or laws perceived as potentially injurious or unfair. These laws, treaties, or agreements would then be returned to Washington for revision or tabled indefinitely if Washington could not secure tribal consent.[5]

This prompts an important question. If the Congress did indeed have unfettered plenary power over the tribes-and the Supreme Court in a 1903 decision, Lone Wolf v. Hitchcock, 185 U.S. 553, went so far as to say that Congress had always had this power-why did it not simply use it all the time? "Why," as Deloria asked (1989), "all the hoopla over treaties and agreements? Why, at that very moment, were a number of treaty and agreement commissions in the field on several reservations asking the tribes to make treaties and agreements with the United States?" (pp. 221-222).

In this essay we explore the following questions: What does "plenary power" mean? What conjunction of events accounts for its eruption in the area of Indian law and policy in the 1880s? What factors led the Supreme Court to suggest a modicum of moral constraint on the Congress's exercise of power in 1914, without foreclosing the possibility that Congress could still wield unfettered political authority over tribes so long as the action is not "arbitrary" and is founded on some "reasonable basis"? Finally, how and why does the concept plenary power continue to be a viable political doctrine in a democratic country founded on the principles of limited government?

Scholarly Views and Expectations

Research on plenary power has increased considerably since the 1970s. These were the halcyon days of tribal self-determination and Indian political activism, when Vine Deloria Jr. in a number of publications (1969, 1970, 1974, 1977) urged tribal people and the scholarly community to systematically investigate the linchpin legal and political doctrines that undergirded the tribal-federal relationship.

One of the first scholars to focus some attention on the relationship between federal plenary power and tribal sovereignty was Robert Coulter. He wrote two articles in the late 1970s (1977, 1978) that briefly examined how plenary power had worked to seriously disadvantage tribes in fundamental legal ways. Coulter admitted, however, that "the origins of the plenary power doctrine and the legal foundations were unclear" (1977:8).

In the 1980s two important legal studies sought to bring clarity to the subject. They focused on the origins and the factors involved in the perpetuation of the plenary power concept. These articles, the first a note titled "Federal Plenary Power in Indian Affairs after Weeks and Sioux Nation" (1982) and the second, an excellent piece by Nell Jessup Newton called "Federal Power over Indians: Its Sources, Scope, and Limitations." (1984), went far toward explaining the legal history of the concept.

Other researchers also employed the term (Barsh and Henderson, 1980; Ball, 1987; Wilkinson, 1987; Kronowitz et al., 1987; Laurence, 1988; Townsend, 1989; Williams Jr., 1990; Shattuck and Norgren, 1991; and Hauptman, 1992). Most of these commentators, excepting Shattuck and Norgren (political scientists) and Hauptman (historian), and those previously cited, are legal scholars. While law is certainly a fundamental discipline, political scientists-who should be concerned about a subject that encompasses institutional autonomy and interaction, constitutional allocations of authority, legitimate use of power, and federalism-have paid negligible attention to this concept and its relation to tribal sovereignty.[6]

Moreover, there has been no systematic or long-term examination of empirical data on the Supreme Court's activities during the critical era[7] in which the plenary power doctrine as applied to tribes by the Supreme Court first appeared, was then expanded to unparalleled proportions, and was finally dampened in the 1914 Perrin case.

This three decade period comprised the federal government's most intensive effort to assimilate American Indians. The General Allotment policy, inaugurated in 1887 (24 St. 388), whereby the Congress sought to turn American Indians into Christianized private
property landowners, was the central weapon in the federal government's assimilative arsenal. There was a multi-pronged effort to
detribalize indigenous peoples. The principal components in the federal government's assimilation policy[8] were:

Land loss via surplus land sales, specific allotment acts, amendments to the allotment policy, and fraudulent activities by land
speculators and some state officials; Sponsorship of efforts to Christianize tribal members; Imposition of federal criminal Jurisdiction
over certain crimes in. Indian Country (35 St. 1088); Eradication of Indian culture as a federal goal. This was facilitated by the
establishment of Courts of Indian Offense.

Most commentators agree that the plenary power era for Indian tribes and their relations to the federal government was inaugurated
with the Supreme Court's decision in U.S. v. Kagama, 118 U.S. 375 (1886), though the term was used in previous cases outside
Indian law.

Although the term "plenary" is absent from Kagama, other language evidences the court's support of Congress's efforts to diminish
tribal sovereignty by affirming the constitutionality of the Major Crimes Act (23 St. 362, 385). The court exercised what Deloria has
termed plenary interpretive power to rationalize Congress's "exercise of plenary legislative power (1988: 261). Unable to locate a
constitutional basis for its decision, the court crafted an ingenious and bizarre two-pronged explanation: Indian helplessness and land
ownership. First, Justice Miller transmuted John Marshall's analogy of Indians as "wards" to their federal "guardians," (see Cherokee
Nation v. Georgia, 30 U.S. (5 Pet.) 1, 1831), to a principle of law. Miller said: "These Indian tribes are wards of the nation. They are
communities dependent on the United States" (pp. 383-84).

The court said that federal power over these "weak" peoples was "necessary to their protection, as well as to the safety of those
among whom they dwell." This power, the court held, "must exist in that [United States] government, because it never has existed
anywhere else." (p. 384). However, scholars have pointed out several untenable errors in the court's analysis.

First, how could Congress apply its laws to tribes that until that time had not been subject under the Constitution to congressional

Second, if the Constitution limits the authority of the various branches to enumerated powers, why did the court cite extra-
constitutional or extra-legal[9] reasons for holding a congressional statute to be constitutional? (Deloria, 1988:261).

Finally, "consent of the governed" is a treasured democratic principle. The fact that most Indians were excluded from the American
political arena because they had an extra-constitutional status[10] and treaty-defined rights and were not U.S. citizens seemed
irrelevant to the court (Newton, 1984: 215).

Coincidentally or not, the same day as Kagama, the court unanimously held in Santa Clara v. Southern Pacific Railroad, 118 U.S.
394 (1886) that the Fourteenth Amendment's due process clause protected corporations as "legal persons" (p. 396). In effect, one
could argue that corporate property rights were extended constitutional protection, while tribal political and property rights could be
quashed.

In 1914 the Supreme Court in Perrin v. United States, 232 U.S. 478, suggested that congressional authority was limited: "As 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" (p. 486).

The Perrin court, however, remained extremely deferential[11] to Congress. In fact, Justice Van Devanter conceded that Congress,
because of its exclusive status as the branch denounced to deal with tribes, be "invested with a wide discretion, and its action,
unless purely arbitrary, must be accepted and given full effect by the Court" (p. 486).

Without stating it, the Perrin court had invoked a different definition of "plenary power" than the one developed in Kagama and Lone
Wolf Here the court was referencing Congress's "exclusive" power to "preempt" state law and authority.

Perrin arose during a time of flux in federal Indian policy, some of which was beginning to favor a degree of tribal self-governance. It
was an era of federal administrative incompetence and Bureau of Indian Affairs corruption; era in which a growing number of federal
policymakers accepted that tribal cultures could not be physically or intellectually eradicated and that the country would be better off if
it preserved some aspects of indigenous cultures.

It was also an era in which some efforts were made at political reform. In fact, several bills were introduced between 1912 and 1916
that were designed to allow reservation Indians the right to nominate and even to recall the Indian agents (Deloria & Lytle, 1984:
30-36). Most importantly, the first two decades of the twentieth century represented a period in which federal Indian legislation
focused less on protecting Indians from whites and more on "providing a form of trust for Indian property. Indians became an
attachment to their lands rather than owners, and although the avowed policy was that of assimilation, the change in emphasis within
the executive branch of the federal government meant that the vested interest of the Interior Department would always work to thwart
whatever initiatives Congress might take in resolving the Indian problem" (Deloria, 1985:248).

Hence, while Perrin represented a victory of sorts for tribes in that the court urged the Congress not to act "arbitrarily" when dealing
with Indians, administrative agencies like the Bureau of Indian Affairs remained largely unaccountable to Congress and especially to
tribes. More importantly, Congress's power was not constrained in any fundamental way.

Plenary Power Defined
First cited by the Supreme Court in the seminal case, Gibbons v. Ogden (22 U.S. (9 Wheat.) 1, 197 (1824), plenary power often has been used in cases dealing with the extent of federal powers. It is a confusing concept because it conceals several issues which, for purposes of constitutional analysis, must be kept clear and distinct” (Engdahl, 1976:363). Engdahl incorrectly posits, however, that “no federal power is plenary in the full sense of the term, because as to all of them at least the prohibition of the Bill of Rights apply” (Ibid.). The Bill of Rights, however, is somewhat problematic as applied to tribes because tribal governments were not created pursuant to the Constitution. While the Indian Civil Rights Act (82 St. 77-80) of 1968 applied portions of the Bill of Rights to tribal governments in regards to their activities over reservation residents, the Bill of Rights still does not protect tribes or their members from congressional actions aimed at reducing tribal sovereignty, political rights, or aboriginal Indian lands.

In addition, the concept of plenary "merge[s] several analytically distinct questions" (Engdahl, 1976: 363). This is the crux of the scholarly and public confusion about the term. First, and most important for our purposes, there is plenary meaning exclusive. This is the definition Congress uses most frequently in enacting Indian-specific legislation, such as the Indian Reorganization Act (48 St. 985), or when it enacts Indian preference laws that withstand reverse discrimination suits (Morton v. Mancari 417 U.S. 535 (1974). This is an exclusively legislative power Congress may exercise in keeping with its policy of treating with tribes in a distinctively political manner or top provide a recognition of rights (i.e., American Indian Religious Freedom Resolution, 92 St. 469) that Indians have been deprived of because of their extra-constitutional standing. As Deloria astutely observes:

There may indeed be some kind of establishment of religious freedom for American Indians. If so, it is because Congress has dealt with the question of the practice of Indian religions and felt it to be necessary to extend the protection of federal laws further in the case of Indians than the Constitution allows it to extend to ordinary citizens. In this instance Indians are not to be regarded as "supercitizens"; rather, the practice of Indian religion is to be regarded as under the special protection of the federal government in the same way that Indian water rights, land titles, and self-government are protected. Congress has always dealt with Indians in a special manner; that is why Congress and the federal courts cherish and nourish the doctrine of plenary powers in the field of Indian affairs" (1985:247.)

Plenary also is an exercise of federal power which may preempt state law. Again, Congress's commerce power is an example, as is the treaty-making process, which precludes state involvement. Constitutional disclaimers that a majority of western states had to include in their organic documents before they were admitted into statehood are also evidence of federal preemption. Typically, these disclaimers consisted of provisions in which the state declared that it would never attempt to tax Indian lands or property without both tribal and federal consent.(12)

Finally, there is plenary meaning unlimited or absolute (Newton, 1984: 196, note 3). This third definition includes two subcategories: a) power which is not limited by other textual constitutional provisions; and b) power which is unlimited regarding congressional objectives (Ibid.). There is ample evidence in Indian law and policy of plenary power being applied by the legislative branches and the federal courts to tribes and individual Indians in all three ways.(13)

When Congress is exercising plenary power as the voice of the federal government in its relations with tribes, and is acting with the consent of the tribal people involved, it is exercising legitimate authority. When Congress is acting in a plenary way to preempt state intrusion into Indian Country, absent tribal consent, it is properly exercising an enumerated constitutional power.

However, when Congress is informed by the federal courts that it has “full, entire, complete, absolute, perfect, and unqualified” (Mashunkashey v. Mashunkashey, 134 P.2d 976 (1943) authority over tribes and individual Indians, something is fundamentally wrong. Canfield, writing in 1881, long before individual Indians were enfranchised, observed that congressional power over tribes was absolute because tribes were distinct and independent, if “Inferior” peoples, “strangers to our law, our customs, and our privileges.” He went on to say that “[t]o suppose that the framers of the Constitution intended to secure to the Indians the rights and privileges which they valued as Englishmen is to misconceive the spirit of their age.” (pp. 26-27). But by the time Mashunkgshey was decided, in 1942, all Indians had been enfranchised and yet they were informed by the court that absolute power was a reality confronting them.

Table 1 is a depiction of what we term the “plenary power spectrum.” Two authors under the orthodox heading (Collins and Laurence) assert, without citing strong evidence, that federal plenary power “has never been construed as absolute, in the sense of beyond
The United States would then disavow use of the unlimited/absolute definition as being violative of enumerated powers, the two following definitions of plenary power: a) exclusive or b) an exercise of federal power preemptive of state law (Engdahl, 1976:363). To improve intergovernmental relations, a way should be found to reconcile these two terms. The United States could settle on one of choosing which definition of plenary power to apply. Tribes lack such a definitional luxury.

A primary irreconcilable difference centers on the dissonance of the following concepts: 1) congressional plenary power (as absolute and unlimited), and 2) tribal sovereignty (a culturally distinct people within territorial limits with a leadership capable of making governmental arrangements).

Tribal sovereignty, like the sovereignty of nation-states, is a dynamic, not an absolutist concept. Plenary power, on the other hand, is considered static and absolutist whether it is wielded by proponents of federal supremacy over tribes or by advocates of tribal sovereignty. Nevertheless, as described earlier, plenary power has three meanings. Congress and the courts are the entities which unilaterally transmuted the bilateral relationship between tribes and the United States and they, not the tribes, are in the position of choosing which definition of plenary power to apply. Tribes lack such a definitional luxury.

To improve intergovernmental relations, a way should be found to reconcile these two terms. The United States could settle on one of the two following definitions of plenary power: a) exclusive or b) an exercise of federal power preemptive of state law (Engdahl, 1976:363). The United States would then disavow use of the unlimited/absolute definition as being violative of enumerated powers.


Deloria, Cohen, and Wilkinson are also listed under this category because they, in some of their writings, have utilized the "exclusive" or "preemptive" definition of plenary to argue particular points. In addition, we have shown that there is ample case law confirming the view that federal plenary power has indeed been defined as absolute, and is beyond the usual constitutional limits precisely because tribes are extra-constitutional entities.

However, the largest group of authors, listed under the radical category, argue more persuasively that as regards tribal sovereignty, treaty interpretation, and Indian property rights, federal power in relation to tribes and individual Indians has often been exercised in an "unlimited" manner. See Table 2 for a description of these cases.

A much smaller group of commentators listed under the heading "mixed" argue, however, that plenary power is a necessary congressional power "precisely because they [Indians] are outside the protection of the Constitution." (Deloria & Lytle, 1984:233; Deloria, 1985:240). Categories. First, we inquired whether the concept was contained in the court case, a yes or no question. In some cases where the concept plenary was not mentioned, it was evident by the court's use of words such as "unlimited," "absolute," or "no restrictions," that plenary power was still being exercised (i.e., Kagama and Lone Wolf). This required the addition of a third component "implicit."

Most Indian law scholars and historians assert that United States v. Kagama, 118 U.S. 375 (1886) is the seminal case presenting the advent of the plenary power era. However, as noted earlier, the term "plenary" does not appear in the decision, though it is clear by the court's unambiguous language that it was intent on establishing the political superiority of the federal government, no matter the constitutional cost (Deloria, 1985; Rottenberg, 1987). The first appearance of the term plenary regarding tribal sovereignty was in Stephens v. Cherokee Nation, 174 U.S. 445, 478 (1899) in which a split court held that Congress had "plenary power of legislation." In this case the Supreme Court was using two of the three analytically distinct definitions: unlimited and exclusive.

Second, if plenary power was cited we asked two further questions: 1) How is it defined - exclusive, preemptive power precluding state law, or unlimited, absolute; and 2) What is the basis of plenary power - a constitutional provision(s) (commerce or treaty clauses), or an extra-constitutional doctrine(s) (federal property ownership, Indian wardship, the theory of Indian "dependency"), or was it unclear what basis was used?

Scholars have often combined the analytically distinctive categories of plenary power into one monolithic term. This is both confusing and inaccurate. By breaking down the concept into its three components a more dynamic and slightly less complicated pattern emerges. Table 2 contains every Supreme Court case from 1886 to 1914 that involved congressional power in relation to tribes and individual Indians has often been exercised in an "unlimited" manner. See Table 2 for a description of these cases.

A primary irreconcilable difference centers on the dissonance of the following concepts: 1) congressional plenary power (as absolute and unlimited), and 2) tribal sovereignty (a culturally distinct people within territorial limits with a leadership capable of making governmental arrangements).

Tribal sovereignty, like the sovereignty of nation-states, is a dynamic, not an absolutist concept. Plenary power, on the other hand, is considered static and absolutist whether it is wielded by proponents of federal supremacy over tribes or by advocates of tribal sovereignty. Nevertheless, as described earlier, plenary power has three meanings. Congress and the courts are the entities which unilaterally transmuted the bilateral relationship between tribes and the United States and they, not the tribes, are in the position of choosing which definition of plenary power to apply. Tribes lack such a definitional luxury.

To improve intergovernmental relations, a way should be found to reconcile these two terms. The United States could settle on one of the two following definitions of plenary power: a) exclusive or b) an exercise of federal power preemptive of state law (Engdahl, 1976:363). The United States would then disavow use of the unlimited/absolute definition as being violative of enumerated powers.
political relationship, and the pre- and extra-constitutional status of tribes. The combined effect of these factors is illustrated by the

However, when Congress deals with tribes additional variables must be factored in: the treaty-defined, not constitutionally-defined

On the executive side, the Clinton Administration is on record(14) as being supportive of tribal sovereignty. In his plan Clinton noted

The Clinton Plan consists of three parts:

GUARANTEEING RIGHTS

ECONOMIC DEVELOPMENT

HEALTH CARE

incorporate goals of the Indian Health Care Improvement Act provide a core benefits package to improve:

It is, however, far too early to ascertain what will transpire from a policy perspective during the Clinton-Gore administration, though

Returning to our historical discussion, why did the Supreme Court sporadically apply the "unlimited-absolute" definition of plenary

It needs to be reiterated, however, that even the doctrine of plenary power, when defined as unlimited/absolute, was enforced only

The idea of enumeration embodies the soul of the unconstitutional conflict between tribes and the federal government. In

However, when Congress deals with tribes additional variables must be factored in: the treaty-defined, not constitutionally-defined political relationship, and the pre- and extra-constitutional status of tribes. The combined effect of these factors is illustrated by the
statement that "general acts of Congress do not apply to Indians, if their application would affect the Indians adversely, unless congressional intent to include them is clear" (Cohen, 1972 ed.:173). Moreover, there is also ample historical, political, and legal precedent for the principle that "Congress has no constitutional power over Indians except what is conferred by the Commerce Clause and other clauses of the Constitution" (Ibid.:90).

As Deloria (1985:240) noted: "Indians receive the protection of the federal government precisely because they are outside the protections of the Constitution; they need and receive special consideration when the federal government interacts with them and handles their affairs. We have often called the government's power to accomplish this task 'plenary' because we supposed that it needed to be immune from arbitrary challenges which might otherwise hamper the wise administration of the affairs of Indians."

Conclusion

This essay has attempted to explain the origins and clarify the confusion surrounding a pivotal concept undergirding the tribal-federal relationship: plenary power. The evidence shows that two of the analytical definitions of plenary power - preemption and exclusivity - sometimes are used in a constitutionally permissible way that recognizes and protects tribal autonomy. This needed protection is most evident when states and private interests have sought to make jurisdictional inroads into tribal territory or over tribal rights.

However, there remains the reality that although many tribes remain extra-constitutional political bodies, their political status has sometimes been characterized by the courts as "inferior" to the "superior position" Congress is said to occupy in relation to tribes.(17) Tribes, despite a preponderance of evidence of their "foreign" political relationship to the states and the federal government, were informed beginning in the 1880s that they were to be treated as "wards of the nation," and that they were in a "condition of pupilage or dependency" (Cherokee Nation v. Southern Kansas Railway Co., 135 U.S. 654 (1980). Although the Perrin decision appeared to place some moral constraints on congressional power over tribes, the last eighty years

Key

1. If the term plenary is used in the case, then it is cited as explicit. If the concept plenary is not evident in the case, however, and the Court instead uses terms like Congress's unlimited authority, supreme right, or paramount power, then it is given an implicit citation.

2. Exclusive: Congress, because of the location of tribes in the Commerce Clause and its role in ratifying Indian treaties, is the sole branch of government constitutionally authorized to deal with tribes. The Congress has sometimes delegated its authority to federal administrative officials and occasionally to states.

Preemptive: An exercise of federal power which preempts, or precludes, state law.

Unlimited/Absolute: This category includes exercises of federal power which are unencumbered by constitutional constraints.

3. This category details the basis of the plenary power term. Historically, the court has cited constitutional clauses (i.e., Commerce, Treaty, Property, expenditures for the general welfare, and the war-making clause) to justify congressional plenary power. Other times, the court has given extra-constitutional or extra-legal reasons for holding that Congress has plenary power over tribes (i.e., federal property ownership, Indian wardship, or tribal dependency). Finally, the court has occasionally been equivocal and has failed to articulate precisely what the U.S. government's authority over tribes is based on. This is labeled unclear.

4. As Jonathan Casper (1976) has shown, judicial decision-making is often much more than a winner-take-all/loser-go-home scenario. In fact, judicial outcomes are not always decisive and sometimes even losers contribute importantly to outcomes that later emerge. For our purposes, a victory is recorded if the Supreme Court awards the tribe most of its demands, or if the court shields the tribe from constitutional or state impositions not requested or consented to by the Indians. A loss is recorded if the court offirms in the United States a legal right to confiscate Indian land, abrogate Indian treaties (or provisions of treaties), or reflects a diminution of tribal rights even when Indians are not parties in the case. The one case listed as anomalous, Matter of Heff did not involve tribal sovereignty, bear out a stark reality: there are no constitutional restrictions on what the federal government may do to tribes or the remaining vestiges of tribal sovereign rights or aboriginal lands.

This is evident in the Indian reorganization era of the 1930s which resulted in the forced abandonment and delegitimation of some traditional tribal governments.[18] It is evident in the federal government's termination 9and relocation policy of the 1940s-1960s.[19] It is most recently evidenced by a host of Supreme Court decisions effectively disregarding the rights of tribes and their citizens in several areas of law: non-member Indian criminal jurisdiction (Duro v. Reina, 110 S.Ct. 2053 (1990), double taxation (Cotton Petroleum Corporation v. New Mexico, 57 USLW 4445 (1989); zoning regulations of Indian land (Brendale v. Confederated Tribes and Bands of Yakima, 109 S. Ct. 2994 (1989); and most significantly the free exercise of religion (Lyng v. Northwest Indian Cemetery Protective Association, 484 U.S. 439 (1988) and Employment Division v. Smith, 108 L. Ed 2d 876 (1990).

Tribal nations, as pre- and extra-constitutional political-cultural-economic entities, will continue to occupy a distinctive position in the United States. Tribes have a political status that is both dynamic and extremely tenuous. Tribes face the structural disadvantage of having rights which the federal government is not constitutionally mandated to protect. Notwithstanding the Commerce Clause and the treaty relationship, tribes remain "beyond the pale of the constitutional framework ... [a]nd unless and until there is some positive move by the federal government to accept limitations on its exercise of naked political power over the tribes, Indians will remain people without a status and, more importantly, without the ability to protect themselves from the continuing exploitation visited upon them by, the U.S." (Deloria, 1988: 266).

Until this disparity in tribal-federal political power is rectified it is doubtful whether a viable domestic solution is possible to tribal-
Notes

(1.) The Constitution does not explicitly grant the federal government the power to regulate Indian affairs, it merely states that Congress shall be the branch with the power to "regulate commerce with foreign nations ... and with the Indian tribes." (Article 1, sec. 8, cl. 3) (emphasis added). (2.) For the purposes of this study my focus will be on tribes rather than individual Indians. The Commerce Clause empowers Congress to oversee the federal government's commercial relations with Indian tribes. Individual Indians who had not yet been naturalized were extended federal citizenship in 1924 (43 St. 253). Nearly two-thirds of all Indians, however, had already been enfranchised before 1924. Indians became citizens through several routes: as a result of treaty stipulations; the General Allotment Act of 1887, as amended; or having served in World War I (see Haas, 1957-16; and Rice, 1934:86-87). The granting of U.S. citizenship did not end tribal citizenship, however. The 1924 Act read: "That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property ..." Hence, this created a class of Americans with dual citizenship. Furthermore, as citizens, Indians are ostensibly accorded the same constitutional safeguards as other individuals. But this is problematic as well (see Ball, 1987:11; and Barsh and Henderson, 1980:96; and Deloria, 1977:6). (3.) "Termination" was the term developed in the late 1940s and eventually sanctioned in 1953 under House Concurrent Resolution 108, whereby the U.S. government sought to unilaterally sever, end, or "terminate" the federal government's political relationship with various Indian tribes, bands, and rancherias. See Donald Fieco's Termination and Relocation (Albuquerque: UNM Press, 1986); and Charles F. Wilkinson and Eric R. Biggs, "The Evolution of Termination Policy" American Indian Law Review 5 (Summer 1977):139-184. Termination, although renounced on several occasions from 1958 forward, was not congressionally disavowed until April 28, 1988 (102 St. 130). (4.) Special thanks to Professor Vine Deloria, Jr. for bringing this list of infrequently cited laws to my attention. See the following documents and their provisions for explicit examples of such tribal non-compliance: a) Treaty with Mixed Bands of Bannacks and Shoshones [sic], October 14, 1863 (Kappler, Vol. V, 1941:693). b) U.S. Statute. "An act authorizing the payment of annuities into the treasury of the Seminole tribe of Indians. April 15, 1874. 18 St. 29 (Kappler, Vol. I, 1904:150) (See the proviso which reads: "Provided, That said agreement shall provide that the sum of five thousand dollars shall be annually appropriated out of said annuity to the school fund of said tribe; and provided further, That the consent of said tribe to such expenditures and payment shall be first obtained." An attached note at the bottom of the document stated the following: "Note.-Indians withhold assent.""). c) Agreement with the Crow Nation of Indians. May 14, 1880. (Kappler, Vol. II, 1904:1063). d) U.S. Statute. "An act to graduate the price and dispose of the residue of the Osage Indian trust and diminished-reserve lands ..." March 3, 1881. 21 St. 509. [See the attached proviso which reads: "Provided, however, That no proceeding shall be taken under this act until at least two-thirds of the adult males of said Osage Indian tribes shall assent to the foregoing provisions."] e) U.S. Statute. "An act to accept and ratify the agreement (a) ["The agreement of May 14, 1880 (Letter C above) ... was not ratified by the Crow Indians and this agreement was substituted therefore.] submitted by the Crow Indians of Montana for the sale of a portion of their reservation in said Territory ..." April 11, 1882. 22 St. 40. (Kappler, Vol. I, 1904:195). f) U.S. Statute. "An act to divide a portion of the reservation of the Sioux Nation of Indians in Dakota into separate reservations and to secure the relinquishment of the Indian title to the remainder," April 30, 1888. 25 St. 94 [See section 24, which stated: "That this act shall take effect only upon the acceptance thereof and consent thereto by the different bands of the Sioux Nation of Indians and, upon failure of such proof [vote by adult Indians] and proclamation (issu ed by the President) this act becomes of no effect, and null and void."] g) U.S. Statute. An act to ratify and confirm an agreement with the Muscogee or Creek tribe of Indians, and for other purposes." March 1, 1901. 31 St. 861. [See the preamble which states in relevant parts: "That the agreement negotiated between the Commission to the Five Civilized tribes and the Muscogee or Creek tribe ... as herein amended, is hereby accepted, ratified, and confirmed, and the same shall be of full force and effect when ratified by the Creek National Council..."] (5.) Of course, history is replete with a multitude of examples where federal officials ignored the doctrine of tribal consent and proceeded to act unilaterally. (6.) Political scientists are, however, finally beginning to study some areas of the tribal-federal relationship, though they have not focused systematically on the case law during this particular era. See the writings of Fetzer (1981), McCool (1985), McCulloch (1988), Holland (1989), Gross (1989), O'brien (1989), and Shattuck and Norgren (1991). (7.) This article is extracted from my dissertation, The Legal Consciousness of the United States Supreme Court: A Critical Examination of Indian Supreme Court Decisions Regarding Congressional Plenary Power and Tribal Sovereignty-1870-1921 (Chapel Hill: University of North Carolina: 1990). That larger study looked at 107 federal court cases (ninety Supreme Court decisions: a list of the cases is available from the author) which arose during when many consider the darkest chapter in federal-tribal relations. (8.) See Loring B. Priest Uncle Sam's Stepchildren: The Reformation of United States Indian Policy, 1865-1887 (New Brunswick: Rutgers University Press, 1942); Henry E. Pritz, The Movement for Indian Assimilation, 1860-1890. Philadelphia: University of Pennsylvania Press, 1963; the diverse historical works of Francis Paul Prucha, including Americanizing the American Indians: Writings by the 'Friends of the Indian' 1880-1900. Cambridge: Harvard University Press, 1973; and Janet A. McDonnell, The Dispossession of the American Indian, 1887-1934. Bloomington: Indiana University Press, 1991. (9.) By extra-constitutional and extra-legal we mean factors that are not derived from constitutional sources. These may include non-constitutional doctrines or legal constructs like the alleged "wardship" and/or "dependent" status of Indians; the use of the "doctrine of discovery" to justify exerptions of federal power over Indians and their resources; the presumption of plenary power not related to Indian commerce; the alleged "incorporation" of Indians into the American polity; or the racial constitution of a reservation or Indian community, to name but a few. See Philip Lee Fetzer, "Jurisdictional Decisions in Indian Law: The Importance of Extra-legal Factors in Judicial Decision-Making." American Indian Law Review, 9 (1981): 253-272; and see Nancy Carol Carter, "Race and Power Politics as Aspects of Federal Guardianship Over American Indians: Land-Related Cases, 1887-1924," American Indian Law Review, 4 (1976): 197-248, for two good examples of writings which focus on some of these extra-legal factors and their implications for tribal sovereignty. (10.) Tribes have both a pre- and extra-constitutional status because of their original sovereignty. Tribal nations are sovereign since they were not created pursuant to the federal Constitution or by state action. As the Supreme Court said in Talton v. Mayes, (163 U.S. 376 (1896)), tribal rights of self-government were not delegated by Congress and were thus not powers arising from or created by the federal constitution. Tribal sovereignty, therefore, "is neither derived from nor protected by the Constitution" (dissenting opinion of Justice Stevens in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 170 (1982). Thus, the U.S. Bill of Rights does not apply to the acts of tribal governments. The continuing legality of Indian treaties and the fact that Congress and the tribes have never jointly participated in any action that would lead to an amendment to the U.S. Constitution which would effectively incorporate tribes into the American political system is all the proof
necessary evidencing this ongoing extra-constitutional tribal political status. (11.) William H. Riker and Barry R. Weingast in an article, “Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures,” 74 Virginia Law Review (February 1988):373-401, persuasively argue using modern social choice theory, that although the Court assumes that legislative and electoral majorities are effective in protecting the economic rights of citizens, particularly of minority groups, there actually is little data to support this view. They find that “majority rule provides no inherent protection for the rights of minorities” and that “the Court’s deference to legislatures in the area of economic rights is puzzling, and is inconsistent with its scrutiny of other rights.” (p. 374-375). In conclusion, Riker and Weingast explicitly state that “judicial deference to legislatures, as past actions of legislatures clearly reveal, leads to policies that compromise the rights of minorities” (p. 399). Judicial deference, particularly in the way the Supreme Court has utilized the political question doctrine to avoid examining issues in Indian law it deems more suitable for the legislative branches, has been especially problematic for tribal groups which inhabit a unique political and legal space as extra-constitutional entities. Judicial deference, therefore, continues to be one of the most troublesome areas in the tribal-federal relationship. And so long as tribes remain lodged in the Commerce Clause of the Constitution there is little chance that the Court will exercise the degree of judicial scrutiny of congressional actions that tribal nations would like to see. (12.) Article 26 of Washington State’s Constitution provides a clear example of a disclaimer clause: “That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this State....” (13.) See Table 2 for a list of historical cases citing the doctrine of plenary power in all three ways. As recently as 1989 in Cotton Petroleum Corporation v. New Mexico, 109 S. Ct. 1698, a case involving the question of whether New Mexico could apply severance taxes to a company located within the Jicarilla Indian reservation and already paying tribal taxes, the Court, utilizing the exclusive definition said that “the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.” And, in Duro v. Reina, 110 S. Ct. 2053 (1990), which dealt with whether Indian tribes had criminal jurisdiction over non-member Indians, Justice Brennan (joined by Marshall), who dissented from the majority’s ruling that tribal governments lack the power to try non-member Indians, noted that “the Court’s consent theory is inconsistent with the underlying premise of Indian law, namely, that Congress has plenary control over Indian affairs.” “Congress,” Brennan said, “presumably could pass a statute affirmatively granting Indian tribes the right to prosecute anyone who committed a crime on the reservation.” (p. 2071). Brennan in this statement seems to be utilizing both the exclusive and preemptive definitions of plenary power. The Duro decision was legislatively overturned by Congress October 28, 1191 (105 St. 646). This law “reinstated” the power of tribes to exercise criminal jurisdiction over all Indians within their jurisdiction, whether enrolled or not. (14.) Author has copy of “The Clinton Plan for Native Americans.” (15.) See “Clinton Names Dear to Head B.I.A.” in News From Indian Country, vol. 7, no. 10 (Late May, 1993):1. (16.) See note 4 which contains several examples supporting the fact of the Congress's sporadic enforcement of plenary power. (17.) See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 155, n.21 (1982) which held that Congress' paramount authority over tribes is derived “by virtue of [Congress’s] superior position over the tribes.” (18.) See Kenneth R. Philip, ed., Indian Self-Rule. (Salt Lake City, UT: Howe Brothers, 1986). (19.) See endnote 4.

References