IS THERE A (LITTLE OR NOT SO LITTLE) CONSTITUTIONAL CRISIS DEVELOPING IN INDIAN LAW?: A BRIEF ESSAY

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I. INTRODUCTION: BACK TO THE BEGINNING

The constitutional status of Indian tribes within the framework of the American Republic has been elusive from the very beginning. This essential point was acknowledged by the Supreme Court itself in the early case of *Cherokee Nation v. Georgia*,[1] where it noted that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else."[2] Despite this acknowledgment, the Court proceeded then, and has ever since, to routinely decide cases about the nature of tribal sovereignty and its interaction with the federal and state sovereigns with almost no reference to any constitutional benchmarks or limitations.[3]

This approach—although it has waxed and waned doctrinally[4]—has been consistently underpinned by a pragmatic necessity to decide

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[1] 30 U.S. (5 Pet.) 1 (1831).

[2] *Id.* at 16.

[3] For example, since 1986, the Court has decided almost 40 Indian law cases. In fact, tribal interests prevailed in only nine cases, or 22.5% of the total. *See* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 280 (2001). None of the cases turned on constitutional questions. *See id.* at 280-85.

[4] The Supreme Court has routinely found that Congress' power in Indian affairs is paramount and without apparent limitation. According to the Court and scholars, this power flows from either the Indian Commerce Clause that contains a very expansive plenary component or from a plenary power that transcends any constitutional grounding. See, for example, Getches, *supra* note 3, at 269-72 endorsing the former view, but see also the widespread scholarly criticism collected by Professor Clinton:

> The legitimacy of federal assertions of such sweeping unilateral authority frequently is proclaimed in Indian country. Indeed, scholars consistently have questioned the purported doctrine of plenary federal authority over Indians because of the lack of any textual roots for the doctrine in the Constitution, the breadth of its implications, and the lack of any tribal consent to such broad federal authority. Therefore, many commentators have sought out limits on that authority. *See*[, *e.*]*g.*, [Milner S.] Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1. (suggesting lack of textual authority for plenary powers); RUSSELL BARSH & JAMES HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 257-69 (1980) (suggesting limitations derived from Article I and the Ninth Amendment); Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal*

cases in a real and changing world despite the absence of any significant constitutional guidance. Indian tribes were here at the beginning of the nation and they continue as dynamic sovereigns in the current political and legal landscape. Indeed, it is this very persistence that threatens to shatter the unspoken compact of constitutional silence.[5] And even if it does not, it is time to bring the miner's canary up to the surface for a breath of fresh air.[6]

It is the goal of this brief essay to discuss the structure of the Constitution in regard to Indian tribes and the early and seminal approach of the Supreme Court of John Marshall to the legal status of Indian tribes. This essay will also explore the sweep of western expansion that caused the development of legal doctrine that was clearly extra-constitutional, if not anti-constitutional, with regard to Indian tribes. Finally, this article discusses the constitutional crisis suggested by the recent case of *United States v. Enas*,[7] and a preliminary sketch of how this constitutional issue might be addressed with a greater sense of respect and permanency.

Protection of Indian Autonomy and Self-Government, 33 STAN. L. REV. 979, 996-1001 (1981) (suggesting inherent limits in the reach of the Indian commerce clause); Richard B. Collins, *Indian Consent to American Government*, 31 ARIZ. L. REV. 365 (1989) (arguing for Indian consent as a limitation on federal authority); Robert T. Coulter, *The Denial of Legal Remedies to Indian Nations Under U.S. Law*, *in* RE-THINKING INDIAN LAW 103, 106 (National Lawyers Guild, Committee on Native American Struggles ed., 1982) ("[T]here is not textual support in the Constitution for the proposition that Congress has plenary authority over Indian nations."); Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 261-67 (1984) (suggesting due process and takings limitations).

Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 856 n.41 (1990). This notion of plenary power finds its classic formulation in *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."). The "political question" component of the doctrine has been slightly eroded in the modern era. Both *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977), and *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980), indicate that acts of Congress in Indian affairs are subject to judicial review in accordance with the rational basis test. This level of judicial scrutiny is minimal at best. *See, e.g.*, FRANK POMMERSHEIM, BRAID OF FEATHERS 46-48 (1995).

[5] *See* discussion *infra* sections IV and VI.

[6] This is a classic Indian law metaphor:

> [T]he Indian plays much the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.

Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953). Despite this powerful (and oft cited) language, much of Felix Cohen's work acknowledged and endorsed Congress' plenary power in Indian affairs as a necessary trade-off for recognition of a tribal right to exist and engage in self-governance. See, for example, the extensive discussion in Dalia Tsuk, *The New Deal Origins of American Legal Pluralism*, 29 FLA. ST. U. L. REV. 189 (2001).

[7] 255 F.3d 662 (9th Cir. 2001).

II. INDIANS, INDIAN TRIBES, AND THE STRUCTURE OF THE CONSTITUTION

Indians are mentioned once in the Constitution.[8] Indian tribes are also mentioned once.[9] Both of these mentions are more exclusive than inclusive and served to place Indians and Indian tribes at the margins of the American political fabric. Indians are identified in Article I, Section 2 on the apportionment of representatives and direct taxes in the negative as "excluding Indians not taxed."[10] This description, certainly not surprising in 1789, did not recognize Indians as participants in the American polity.[11] As a result, it is necessarily difficult to envision the primary political/cultural units of native affiliation with their tribes as fully integrated within the structure of the Constitution.

Yet there is some ambiguity in this line of analysis. Indian tribes are specifically mentioned in what is known as the Indian Commerce Clause where Congress is recognized to have the power "to regulate commerce with foreign Nations and among the several states and with the Indian tribes."[12] This textual reference clearly recognizes some kind of significant and enduring sovereignty in Indian tribes as it is specifically identified in a series that includes the states and foreign nations. Nevertheless, the clause does not spell out the scope of authority for any of these entities as constitutional subjects, but merely identifies them as legitimate objects for the exercise of congressional authority.

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[8] U.S. CONST. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States . . . and excluding Indians not taxed, three fifths of all other Persons."). This language was preserved in the Fourteenth Amendment in 1868, although the three-fifths rule was abolished.

[9] U.S. CONST. art. I, § 8, cl. 3. In addition, Indian tribes are comprehended within the treaty-making power at Article II, Section 2, clause 2. Treaties clearly recognize tribal sovereignty and are a marker of constitutional status, but they are subject to unilateral abrogation under the plenary power doctrine. *See* POMMERSHEIM, *supra* note 4, at 38-41.

[10] U.S. CONST. art. I, § 2, cl. 3.

[11] Indians did not become U.S. citizens until the Citizenship Act of 1924, 8 U.S.C. § 1401(b) (2000). *See generally* DAVID GETCHES, ET AL., FEDERAL INDIAN LAW 163-65 (4th ed. 1998). Issues about state citizenship lingered even longer. *See, e.g.*, Earl M. Maltz, *The Fourteenth Amendment and Native American Citizenship*, 17 CONST. COMMENT. 555 (2000); Frank Pommersheim, *Democracy, Citizenship, and Indian Law Literacy: Some Initial Thoughts*, 14 T.M. COOLEY L. REV. 457, 462-64 (1997).

[12] The Indian Commerce Clause derives from Article IX of the Articles of Confederation, which granted Congress "the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its own limits be not infringed or violated . . . ." ARTICLES OF CONFEDERATION OF 1777, art. IX. The ambiguity of this language and its subsequent change in the Constitution is discussed in MONROE PRICE & ROBERT CLINTON, LAW AND THE AMERICAN INDIAN 131-32 (2d ed. 1983).

The Indian Commerce Clause has often been used not to demarcate tribal sovereignty within a constitutional republic, but as a source of congressional authority to legislate with regard to Indian tribes. This is, of course, structurally self-evident. Yet it has also proved extremely problematic as Congress has consistently legislated in Indian affairs well beyond the parameters of "commerce," and the justification for such legislation has pushed beyond the text of the Constitution into the realm of plenary power.[13]

The Indian Commerce Clause standing alone is hardly remarkable, but what is remarkable is the fact that the rest of the textual space in the Constitution makes no reference to Indian tribes.[14] It is this paucity of additional constitutional text that has always made it difficult to discern an adequate constitutional footing with which to parse tribal sovereignty and its relationship to the two other constitutionally defined sovereigns, namely the states and the federal government.[15]

III. THE MARSHALL TRILOGY: ESTABLISHING A FOUNDATION

Despite this constitutional shortfall, early on the Supreme Court had to confront basic questions left unanswered (even unasked) in the Constitution concerning the authority of Indian tribes and their relationship to the other enumerated sovereigns. This considerable task was primarily undertaken in the cases of *Johnson v. McIntosh*,[16] *Cherokee Nation v. Georgia*,[17] and *Worcester v. Georgia*,[18] popularly known as the Marshall trilogy. In these cases, the Court confronted basic questions about the nature of Indian property rights, whether the Cherokee Nation was a "foreign nation" capable of bringing an original action in the Supreme Court against the State of Georgia, and whether the laws of the State of Georgia (rather than the laws of the tribe) governed the actions of a non-Indian within the Cherokee Nation Reservation.

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[13] *See* discussion *supra* note 4 and *infra* Part IV.

[14] *See* discussion *infra* Part VI. *See also* POMMERSHEIM, *supra* note 4, at 39 ("In examining this relationship, one is struck almost immediately by the absence of any true constitutional benchmark to orient the federal-tribal discourse on sovereignty.").

[15] *See* POMMERSHEIM, *supra* note 4, at 40-41. In fact, treaty federalism is the doctrinal foundation for potentionally amending the constitution to reflect this fact. *See infra* notes 73-82 and accompanying text.

[16] 21 U.S. (8 Wheat.) 543 (1823) (holding that upon "discovery" by European nations, tribes lost the power to transfer land without consent of the discovering nation and to engage in external relations with other nations).

[17] 30 U.S. (5 Pet.) 1 (1831) (holding that Indian tribes are "domestic dependent nations," not foreign nations).

[18] 31 U.S. (6 Pet.) 515 (1832) (holding that state laws do not govern non-Indians within Indian reservations because of federal preemption and tribal sovereignty).

In each of these cases, the Court reached for doctrinal guidance outside the confines of the Constitution. In *Johnson v. McIntosh*, the Court relied on the "doctrine of discovery"[19] in order to conclude that title to land held by Indian tribes nevertheless resided in the United States because of its superior arts, civilization and religion.[20] What remained to tribes was a residual right of use and occupancy of the land.[21]

In *Cherokee Nation*, the Court concluded that the Cherokee Nation was not a foreign nation for Article III purposes because it was distinctly delineated as different from a foreign nation in the Indian Commerce Clause.[22] Despite this constitutional reference, the Court went on to expound its jurisprudential notion that tribes were "domestic dependent nations"[23] whose relationship to the federal government was like that of a "ward to his guardian."[24] These conceptions were not explained in any detail. The Court also acknowledged the importance of treaties, tribal self-government, and the federal-tribal relationship as essential elements in understanding the nature of tribes.[25]

Finally in *Worcester*, the Court held that the state laws of Georgia had no effect within the boundaries of the Cherokee Nation.[26] The rationale of the Court again focused on the importance of Cherokee self-governance, treaties between the United States and the Cherokee Nation, and prior federal legislation as effectively preventing the imposition of state law within the Cherokee Nation.[27] The Court identified Indian nations as "distinct, independent political communities, retaining their original natural rights . . . ."[28]

The Cherokee cases almost brooked their own constitutional crisis. The state of Georgia refused to submit briefs and did not appear at oral argument.[29] In addition, prior to the *Cherokee Nation* case, Chief Justice Marshall issued a writ of habeas corpus in the case of George Corn Tassel, a Cherokee who was convicted in state court of killing another Indian on Cherokee land. The basis for the writ was that under the applicable treaty the Cherokees were entitled to try tribal members in their own courts. The Georgia state legislature was

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[19] *Johnson*, 21 U.S. at 573-74.

[20] *Id.* at 573.

[21] *Id.* at 574.

[22] *Cherokee Nation*, 30 U.S. at 16-17.

[23] *Id.* at 17.

[24] *Id.*

[25] *See id.*

[26] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 562-63 (1832) (reversing the state criminal conviction of Rev. Samuel Worcester for preaching in the Cherokee Nation without a state license).

[27] *Id.* at 549-63.

[28] *Id.* at 559.

[29] *See* GETCHES, *supra* note 11, at 95-126; *see also generally* _____ ().

not impressed. It condemned the Chief Justice's "interference" and Mr. Tassel was hanged five days later.[30]

Subsequent to the *Worcester* decision, President Jackson purportedly said, "John Marshall has made his decision; now let him enforce it."[31] While others consider the statement apocryphal, there is no doubt that President Jackson supported Georgia's claimed sovereignty over Cherokee land.[32] The constitutional imbroglio was only averted when the impending nullification crisis convinced President Jackson that such a constitutional crisis was not in the national interest.[33]

The essential teachings that derive from the Marshall trilogy and form the foundational basis of Indian law are the recognition of tribal sovereignty and self-government, federal exclusivity in dealing with Indian tribes as a basic tenet of an emerging federalism, a unique federal-tribal relationship often identified as the trust relationship, and, as a necessary corollary, the absence of any inherent state authority in Indian affairs.[34]

IV. THE CHANGING LANDSCAPE: EXPANSION, INCORPORATION, AND THE PLENARY POWER DOCTRINE

The Marshallian foundation assumed a static landscape where Indian territory was largely distinct from state territory, federal territory, and privately held territory, and there were few, if any, non-Indians who permanently resided on, or frequented the reservation. Reservations, particularly in the context of western expansion, were seen as islands of Indianness preserving a "measured separatism" between tribes and states, Indians and non-Indians.[35] Tribal sovereignty existed, but mostly at the margins of the more precise constitutional sovereignty of the federal government and the states.

Indian tribes began their interaction with the federal government as sovereign entities largely outside the Republic, but over time they were absorbed more and more into the Republic, eventually becoming internal sovereigns of a limited kind. This process is typified by the General Allotment Act,[36] which for the first time brought signifi-

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[30] *Id.* at 104.

[31] *Id.* at 123. For a discussion of the aftermath of the *Worcester* decision, see HORACE GREELEY, THE AMERICAN CONFLICT 106 (1864); MARQUIS JAMES, THE LIFE OF ANDREW JACKSON 603-24 (1938); Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 525-26 (1969).

[32] *See* GETCHES, *supra* note 11, at 123.

[33] *Id.*

[34] *See, e.g.*, Getches, *supra* note 3, at 269-74, 352-53.

[35] *See, e.g.*, POMMERSHEIM, *supra* note 4, at 11-36. The term "measured separatism" comes from CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 4 (1987).

[36] 25 U.S.C. § 334 (1887).

cant numbers of non-Indian people to many reservations as permanent, land-holding residents.[37] This process is most accurately characterized as one of involuntary annexation. Throughout the eighteenth and nineteenth centuries and continuing well into the early twentieth century, Indian people were neither federal nor state citizens. Their physical and political incorporation was not justified by any coherent legal theory and is, arguably, directly at odds with several key legal and political premises established in the U.S. Constitution. These premises, drawn largely from the work of the political philosopher John Locke, include the principles of limited governmental sovereignty and consent of the governed.[38] As suggested by Professor Robert Clinton, "[i]n Lockean social compact terms, Indian tribes never entered into or consented to any constitutional contract by which they agreed to be governed by federal or state authority, rather than tribal sovereignty."[39]

The principle identified by Professor Clinton is, in fact, the essential core jurisprudence of the seminal cases of *Cherokee Nation* and *Worcester*. Describing Indian tribes as "domestic dependent nations"[40] and "distinct independent political communities"[41] respectively, Chief Justice Marshall's opinions in these cases placed tribes largely outside the state and national polities. Like so much federal Indian law, the tides of history, if not compelling legal analysis, have nearly obliterated these insights. Subsequent cases in the late nineteenth and early twentieth centuries, particularly *United States v. Kagama*[42] and *Lone Wolf v. Hitchcock*,[43] fully incorporated tribes into the national system and declared them subject to the "plenary power" of Congress. These cases, of course, made no mention of incorporation, but seemed to realize that the Indian Commerce Clause, while adequate when tribes were largely outside the Republic, was inadequate to deal

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[37] *See*, POMMERSHEIM, *supra* note 4, at 19-23 (noting the political and social effects attendant on the loss nationwide of over 90 million acres of tribal land to non-Indians).

[38] *See* POMMERSHEIM, *supra* note 4, at 48-50.

[39] Clinton, *supra* note 4, at 847.

[40] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

[41] Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

[42] 118 U.S. 375, 384-85 (1886):

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government [*i.e.*, federal government], because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.

Kagama also expressly rejected the Indian Commerce Clause as sufficient authorization for the Major Crimes Act, 25 U.S.C. § 1153 (2000), dealing with major crimes committed by Indians and thus gave birth to plenary power as a source of authority to sustain wide-ranging congressional legislation. *Kagama*, 118 U.S. at 378-79.

[43] 187 U.S. 553, 565 (1903).

with tribes when they were more and more inside the Republic. Hence, the creation of plenary power in Congress. Despite its lack of constitutional roots, this power nevertheless proclaims extensive—even limitless—power over tribes in blatant contradiction of the Lockean notion of limited government sovereignty. The plenary power doctrine appears to be extraconstitutional in its origins and extravagant in its placement of unlimited authority in the hands of the Congress at the expense of tribal sovereignty.[44]

This vast expansion of federal authority in Indian affairs significantly constrained the parameters of tribal sovereignty. For example, as Justice Stewart wrote in *United States v. Wheeler*, "[t]he sovereignty that Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance."[45] This language finds no support within the text of the Constitution, but apparently is justified by the process of incorporation wherein "[t]heir incorporation within the territory of the United States . . . necessarily divested them of some aspects of the sovereignty which they had previously exercised."[46] Within a national jurisprudence that recognizes the primacy of order, limits, and predictability within the legal system, such pronouncements seem especially crabbed and destabilizing, and of questionable constitutional validity.

This poverty of constitutional theory concerning tribal sovereignty and attendant federal limits contrasts sharply with the constitutional and theoretical solidity that governs the interaction of the federal and state sovereigns. The Tenth Amendment to the U.S. Constitution is the cornerstone of the dynamic relationship with its declaration that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[47] The Tenth Amendment provides a clear constitutional marker for discussions of federal-state sovereignty, while discussion of federal-tribal sovereignty takes place largely outside the text of the constitution.

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[44] POMMERSHEIM, *supra* note 4, at 38-40. Professor Phil Frickey has suggested that plenary power ought not be a congressional sword used against tribes but more as a shield against state regulation in Indian country. *See* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 395 (1993). Yet this benign approach has not been consistently followed by Congress, and the Supreme Court itself has increasingly taken up the sword.

[45] 435 U.S. 313, 323 (1978).

[46] *Id.*

[47] U.S. CONST. amend. X.

V. THE *DURO* CASE, THE *DURO* OVERRIDE, AND THE SUBSEQUENT JUDICIAL RESPONSE: A CONSTITUTIONAL CRISIS REVEALED

The state of affairs established by the plenary power doctrine—though severely criticized by scholars[48]—has been routinely and uniformly accepted by the federal courts.[49] This pragmatic regime, despite the absence of any constitutional authorization, unquestionably has held sway until a recent series of events inaugurated by the case of *Duro v. Reina*[50] and its legislative aftermath.

Duro is the most recent case in which the Supreme Court considered the nature of tribal criminal jurisdiction over various categories of defendants. Previously, the Court held that tribes did not have inherent criminal jurisdiction over non-Indians because it was inconsistent with their dependent status,[51] but they did have inherent criminal jurisdiction to prosecute tribal members.[52]

In *Duro*, the Court considered the question of whether tribal courts possessed criminal jurisdiction over nonmember Indians.[53] The Court answered the question in the negative. The result was not premised on any constitutional or statutory analysis, but rather on a historical inquiry of sorts that concluded that such authority "was a power necessarily surrendered by the tribes in their submission to the overriding sovereignty of the United States."[54] This language does not flow from any constitutional grammar. Indeed, it seems more rooted in an unwritten colonizing text that permeates the process of "incorporation." Note, too, that this was not Congress' plenary power in action. This was the Supreme Court's own venture into the plenary realm.[55]

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[48] *See, e.g.*, the sources quoted *supra* note 4 and accompanying text.

[49] *See supra* note 4 and accompanying text. Yet the Court, itself, has occasionally admitted some doctrinal "confusion." See, as an example, McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 172 n.7 (1973), where the Court observed that "[t]he source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making." Yet this "confusion" has never curbed federal authority in Indian affairs.

[50] 495 U.S. 676 (1990) (finding that tribes do not have criminal jurisdiction over nonmember Indians).

[51] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

[52] United States v. Wheeler, 435 U.S. 313, 323-24 (1978).

[53] A nonmember Indian is an Indian person who is not a member of the tribe on whose reservation the alleged crime took place. *See Duro*, 495 U.S. 676.

[54] *Id.* at 693.

[55] *See, e.g.*, Frank Pommersheim, *Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy*, 58 MONT. L. REV. 313, 328 (1997):

> The plenary power doctrine can now be seen as coming in two distinct vintages. There is the classic doctrine of congressional plenary power as established in *Lone Wolf*. Yet even if Congress has not acted—where one would normally presuppose an unimpaired tribal

In this rare instance, however, Congress stepped into the fray. As a result of substantial pressure from Indian country about the likely void of criminal law enforcement occasioned by the decision, Congress passed legislation amending the Indian Civil Rights Act of 1968 to read as follows:

> "[P]owers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and means *the inherent power of Indian tribe, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.*[56]

This legislative action is popularly known as the *Duro* override. Even at the time of its passage, several scholars noted likely constitutional problems, especially in the context of separation-of-power concerns.[57] As forecast, litigation involving the meaning and constitutional integrity of the *Duro* override promptly ensued.

All of the challenges arose in the identical context. A nonmember Indian defendant was successfully prosecuted in tribal court for a crime committed on the reservation and then charged in federal court for a crime arising out of the same set of facts. The consistent defense proffered in these cases was a double jeopardy claim arguing that a subsequent prosecution in federal court after a tribal court conviction violated the double jeopardy clause.

Although *United States v. Wheeler* held that the federal and tribal governments were separate sovereigns for double jeopardy purposes, defendants in these cases claimed a new wrinkle was created by the *Duro* legislation. They claimed—despite the plain statutory text to the contrary—that the *Duro* legislation was a federal delegation of authority to tribes and therefore tribes were not separate sovereigns in this instance and the double jeopardy clause did apply.

The cases in the Eighth and Ninth Circuits took various approaches. As noted by the en banc Ninth Circuit majority in *United States v. Enas*, "[f]ew of these decisions have taken the same approach and each of the appellate panels has been divided, suggesting the underlying difficulty of the issue."[58] In *Means v. Northern Cheyenne Tribal Court*,[59] an earlier panel of the Ninth Circuit in a 2-1 decision decided that the *Duro* override legislation was indeed a delegation:

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sovereignty—the Court now recognizes a judicial plenary power to parse the limits of tribal court authority based on federal common law.

[56] 25 U.S.C. § 1301(2) (2002) (emphasis added).

[57] *See, e.g.*, Philip S. Deloria & Nell Jessup Newton, *The Criminal Jurisdiction of Tribal Courts over Non-member Indians*, 38 FED. B. NEWS & J. 70, 73 (March 1991) ("The [1990 Amendment] raises complex and subtle issues of constitutional law, especially relating to separation of powers.").

[58] United States v. Enas, 255 F.3d 662, 671 (9th Cir. 2001).

[59] 154 F.3d 941 (9th Cir. 1998).

> While the legislative history of [the 1990 amendments] suggests that Congress did not intend to *delegate*... to the tribes [the authority to prosecute non-member Indians], that is essentially the amendments' effect. While Congress is always free to amend laws it believes the Supreme Court has misinterpreted, it cannot somehow erase the fact that the Court did interpret the prior law. In other words, once the Supreme Court has ruled that the law is "X," Congress can come back and say, "no, the law is 'Y'," but it cannot say that the law was *never* "X" or *always* "Y."... Thus, regardless of the Congress' intent to declare that the tribes *always* had the inherent authority to try non-member Indians, that simply cannot be what the amendments accomplished.[60]

The Eighth Circuit also interpreted the meaning of the *Duro* legislation, reaching a different result than the *Means* case, although the permutations were similar. The District Court in *U.S. v. Weaselhead*[61] decided that the decisions in *Duro* (and *Oliphant*) were matters of federal common law subject to congressional override:

> It is axiomatic that the legitimacy of the federal common law is contingent upon the presence of a connection, however tenuous, to a determination of congressional intent. Accordingly, if a judicial body errs in determining congressional intent, Congress can permissibly legislate a correction. [The 1990 amendments] constitute such a correction.[62]

A divided panel of the Eighth Circuit reversed.[63] The majority concluded that matters of tribal sovereignty had constitutional implications and therefore the Supreme Court, not Congress, had the final word:

> We conclude that ascertainment of first principles regarding the position of Indian tribes within our constitutional structure of government is a matter ultimately entrusted to the Court and thus beyond the scope of Congress's authority to alter retroactively by legislative fiat. Fundamental, *ab initio* matters of constitutional history should not be committed to "shifting legislative majorities" free to arbitrarily interpret and reorder the organic law as public sentiment veers in one direction or another.[64]

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[60] *Id.* at 946 (internal citations omitted). Judge Reinhardt reached a different conclusion as to the effect of the 1990 amendments. Looking to the language and legislative history of the amendments, he concluded that "Congress did not intend to delegate jurisdiction to the tribes;" rather, he determined, Congress clearly intended to "recognize" that Indian tribes always had jurisdiction over nonmember Indians, *Duro* notwithstanding. *Id.* at 950-51 (Reinhardt, J., concurring).

[61] 36 F. Supp. 2d 908 (D. Neb. 1997).

[62] *Id.* at 914.

[63] 156 F.3d 818 (8th Cir. 1998).

[64] *Id.* at 824. Judge Arnold dissented, noting: "Chief Justice Marshall made no intimation that the Constitution had anything to say on the question of whether Indian tribes are states. The Constitution is simply silent on the matter and on the related question of inherent Indian sovereignty." *Id.* at 825.

In the proverbial close call, the Eighth Circuit sitting en banc by a 5-5 vote vacated its panel decision and affirmed the district court's opinion.[65]

In *U.S. v. Enas*, the en banc Ninth Circuit also took a divided approach. The majority took what might be called an historical approach, in which it characterized the key issue as "[w]ho prevails when the dispute between court and Congress is neither constitutional nor statutory, but a matter of common law based on history?"[66] The court concluded that the result in *Duro* was not required by either the Constitution or any federal statute and therefore was a matter of federal common law and therefore subject to adjustment by Congress. The court articulated its views thusly:

> The import of this categorization [*Duro* was a decision based on federal common law] is clear, for within the realm of federal common law—and the federal common law of tribes—Congress is supreme .... Consequently, Congress had the power to do exactly what it intended when it enacted the 1990 amendments to the ICRA.[67]

In essence, the court found no true separation of powers issue once it correctly categorized *Duro* as a decision derived solely from federal common law.

The second approach set out in the concurrence in *Enas* also concluded "that the Tribe proceeded under its inherent authority when it prosecuted Enas. Although *Duro* temporarily restricted the reach of tribal power, the inherent sovereignty of tribes is a question of federal common law which Congress has the authority to alter under the Indian Commerce Clause."[68]

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[65] 165 F.3d 1209 (8th Cir. 1999) (en banc).

[66] United States v. Enas, 255 F.3d 662, 674 (9th Cir. 2001). The term "federal common law" is sometimes elusive, but as the Ninth Circuit notes:

> It is court-made law that is neither constitutional nor statutory. *See* Erwin Chermerinsky, *Federal Jurisdiction* 349 (3d ed. 1999) (defining federal common law as "the development of legally binding federal law by the federal courts in the absence of directly controlling constitutional or statutory provisions"); Martha Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 881, 890 (1986) (defining federal common law as "any rule of federal law created by a court .... where the substance of that rule is not clearly suggested by federal enactments—constitutional or congressional").

Id. at 674-75. Interestingly, the Supreme Court itself has not used the term "federal common law" in its decisionmaking in this area, relying instead on such euphemisms as "implied divestiture" and "inconsistent with their dependent status." The one exception is the case of *National Farmers Union Insurance Company v. Crow Tribe of Indians*, 471 U.S. 845 (1985), in which the court explicitly acknowledged "federal common law" as a basis for federal court "arising under" jurisdiction pursuant to 28 U.S.C. § 1331 (2000). This was necessary, of course, to create a federal jurisdictional pathway to allow federal courts to review tribal jurisdiction in the absence of any relevant federal statute or constitutional provision.

[67] *Enas*, 255 F.3d at 675 (citation omitted). *See also* Frank Pommersheim, *"Our Federalism" in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts' Teaching and Scholarly Community*, 71 U. COLO. L. REV. 123, 175-80 (2000).

[68] *Enas*, 255 F.3d at 682 (Pregerson, J., concurring).

The concurrence authored by Judge Pregerson did not focus on "history" and separation of power concerns, but rather on the metaphor that "[tribal] sovereignty is a vessel that Congress may fill or drain at its pleasure."[69] With this metaphor in hand, Judge Pregerson noted:

> [T]he Supreme Court's decision in *Duro* may be viewed as a snapshot of the tribal sovereignty vessel as it existed at the time *Duro* was decided. Through the passage of the 1990 amendments, Congress added to the vessel of tribal sovereignty by recognizing the tribes' inherent power to prosecute members of other tribes who commit crimes on the reservation.[70]

VI. A CONSTITUTIONAL CRISIS: ACKNOWLEDGED OR DENIED?

Both the Eighth and Ninth Circuits ultimately found no constitutional crisis at hand. Properly translating *Duro* into a federal common law decision, both circuits vindicated the overriding legislation as constitutionally sound. A petition for certiorari to the United States Supreme Court was recently denied in the *Enas* case,[71] and the attendant constitutional issue has therefore, at least temporarily, been set aside. The constitutional issue acknowledged, but successfully resolved, according to the Eighth and Ninth Circuits, was that of separation of powers. Congress' plenary power trumps federal common law.

While the results in both the Eighth and Ninth Circuits are both pragmatic and conceptually appropriate, they nevertheless mask a deeper constitutional problem that remains unacknowledged in these discussions. This issue consists of the lack of a truly constitutionalized version of tribal sovereignty and the attendant lack of precise constitutional limitations on the federal and state sovereigns' ability to erode, and even erase, tribal sovereignty. The discussions in these cases do not identify a source or a limit on congressional plenary power.[72]

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[69] *Id.* at 680 (quoting Richard A. Friedman, counsel for the government).

[70] *Id.*

[71] 122 S. Ct. 925 (2002).

[72] This failure results from the unwillingness to confront the constitutional dilemma created by the process of incorporation. While treaties and the Indian Commerce Clause were more than adequate to deal with a tribal sovereign at the very margins of a young Republic, these sources became increasingly inadequate from the federal government's point of view to deal with tribes as their members became federal and state citizens, and non-Indians increasingly became landowners and permanent residents of the reservation. Tribes were no longer outside, but increasingly physically, socially, and politically inside the Republic, and the Constitution needed to be revised and amended to take this reality into account. Instead of taking this road, the Supreme Court fashioned the doctrine of plenary power to create an extraconstitutional doctrine to increase federal power at the expense of tribal sovereignty. The issue of con-

In addition, these decisions do nothing practically or conceptually to question, much less repudiate, judicial plenary power[73] as a rogue doctrine used to curb tribal sovereignty, save when Congress responds with its paramount legislative authority. This is a power that Congress has used quite sparingly to date. With the exception of the *Duro* override, Congress has let stand the results of disturbing cases like *Oliphant v. Suquamish Indian Tribe,*[74] *Montana v. United States,*[75] *South Dakota v. Bourland,*[76] *Strate v. A-1 Contractors,*[77] *Alaska v. Native Village of Venetie Tribal Government,*[78] *Atkinson Trading Co. v. Shirley,*[79] and *Nevada v. Hicks.*[80]

The current Supreme Court created this doctrine and therefore it is an unlikely source to disavow it. The foundational principles of Indian law[81] are gravely at risk as both promise and law. In the short run, Congress must use its extensive legislative authority to curb these denigrations of tribal sovereignty that are contrary to the longstanding congressional and executive policy of meaningful self-

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gressional plenary power has been exacerbated by the development of a judicial plenary power, where the Supreme Court now considers it within its jurisprudential domain to set limits on tribal sovereignty (especially in regard to tribal authority over non-Indians) unless explicitly limited by Congress despite the current congressional and executive policy to support meaningful tribal self-determination. *See, e.g.*, Getches, *supra* note 3, at 352-58 for an extensive catalogue of these congressional endorsements of self-determination.

[73] *See, e.g.*, Pommersheim, *supra* note 55. Other scholars have referred to this recent Supreme Court Indian law jurisprudence as the "new subjectivism" and a "common law for our age of colonialism." *See* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996). Professor Getches also quotes a memorandum from Justice Scalia to Justice Brennan in which Justice Scalia characterizes the role of the Supreme Court in Indian law as determining "what the current state of affairs *ought* to be." *Id.* at 1575 (emphasis added). *See also* Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 YALE L.J. 1 (1999).

[74] 435 U.S. 191 (1978) (holding that tribes do not have criminal jurisdiction over non-Indians).

[75] 450 U.S. 544, 566 (1981) (holding that tribes do not have civil regulatory authority over non-Indians on fee land within the reservation unless there is a consensual relationship or the conduct of non-Indians "threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the tribe").

[76] 508 U.S. 679 (1993) (holding that the Cheyenne River Sioux Tribe does not have regulatory jurisdiction over non-Indians on federal "taking land" for Oahe Dam).

[77] 520 U.S. 438 (1997) (holding that tribal courts do not have jurisdiction over car accidents involving non-Indians that take place on state highways running through a reservation).

[78] 522 U.S. 520 (1998) (holding that Alaska Native villages are not "dependent Indian communities" within the meaning of the Indian country statute, 18 U.S.C. § 1151, and therefore do not possess any governmental authority over non-Indians).

[79] 532 U.S. 645 (2001) (holding that tribes may not assert a room tax on a non-Indian staying at a motel owned by a non-Indian and located on fee land within the reservation).

[80] 533 U.S. 353 (2001) (holding that the *Montana* test applies to events that take place on trust land as well as fee land within the reservation, and tribal courts do not have jurisdiction over 42 U.S.C. § 1983 lawsuits).

[81] *See supra* Part III; *see also* Getches, *supra* note 3, at 269-73.

determination.[82] Yet in the long run, only a constitutional amendment can truly guarantee and vouchsafe an essential and enduring tribal sovereignty.

VII. CONCLUSION: A CALL FOR NEW CONSTITUTIONAL DIALOGUE AND REFORM

Tribal sovereignty has always existed. No one doubts this. Yet because it has never been adequately constitutionalized, tribal sovereignty has often been subject to congressional limitation and defeasance, and increasingly subject to judicial limitation through an expanded interpretation of the process of incorporation and use of federal common law.

It therefore seems an appropriate time to expand and to renew thinking in the area of Indian law to more fully consider the necessity for an amendment to the United States Constitution that expressly recognizes tribal sovereignty. The conceptual basis for such dialogue and understanding might properly find its roots in the principles of treaty federalism.[83] The essence of treaty federalism is the recognition that "treaties are a form of political recognition and a measure of the consensual distribution of powers between tribes and the United States."[84] In this context, treaties, according to Barsh and Henderson, are more properly understood as compacts:

> Their object is to restructure the parties and create or enlarge some common, national sovereignty. Treaties are agreements between existing sovereigns; compacts create new sovereigns. Since compacts alter the fabric of government, they require the consent of the people themselves, the same as an internal amendment of either party's constitution. Once ratified by the people, a compact cannot be modified, dissolved or superseded except by the same process. It is not alliance, but the constitution of an amalgamated body politic.[85]

The core of treaty federalism advances a distinct dialectic that serves to renovate the importance of treaties as being "analogous to

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[82] See, for example, the legislative proposal discussed in Tex Hall et al., *Tribal Governance and Economic Enhancement Initiative*, Indian Country Today, Oct. 16, 2002, at A5.

[83] *See* RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY (1980). It is worth noting that since 1980 the status of tribal sovereignty has become ever more precarious. *See, e.g.*, Getches, *supra* note 3. *See also* Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617, 633 (1994). As Professor Clinton has noted: "One important theme . . . is to encourage a dialogue on the importance of developing *positive* structural relationships between [sic] the federal, state, and tribal governments that will support full tribal government participation within the federal union." Clinton, *supra* note 4, at 936.

[84] BARSH & HENDERSON, *supra* note 83, at 270.

[85] *Id.* at 271.

the Constitution itself."[86] Treaty federalism concedes the facts of tribal absorption into the national politic and the practical inability to withdraw. Yet it does not concede a crumbling stasis, but pushes forward to another dynamic possibility:

> If tribes can no longer remove themselves from the Union, it is all the more essential that their political rights be secured on a fixed and certain basis. In an alliance of sovereigns, the ultimate relief from oppression is exit. In a national compact, the only safety is in the architecture of its constitution and laws.[87]

Such an amendment would have two broad constitutive elements: one that defines the powers of the tribal sovereign, and a second that defines the relationship of the tribal sovereign to the federal and state sovereigns with a specific focus on the limitations on the ability of these sovereigns to invade or to interfere with tribal sovereignty.[88] This is not an easy task, and surely it will take much tribal wisdom, lawyerly craft, and political acumen to succeed.[89] Yet in seeking a secure and vital future for tribal sovereignty, it makes sense to appeal to

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[86] *Id.* at 274 ("Regardless of their [i.e. treaties] original intent, they have resulted in a complete political and economic integration of tribes into the federal system. Separation is practically impossible.").

[87] *Id.* at 275.

[88] In fact, the architects of treaty federalism have begun this process as well:

> We propose to begin with the following language:
>
> *Section 1.* Except as provided by this amendment, Indian Tribes shall be deemed "States" for all purposes under this Constitution.
>
> *Section 2.* All Constitutional powers of State self-government not hereafter expressly delegated to the United Sates by the vote of three-fourths of the members of an Indian Tribe are reserved by that tribe, and cannot be divested by Congress.
>
> *Section 3.* The reserved powers of an Indian Tribe shall include, but not be limited to, the power to regulate behavior and tax persons and property within the exterior boundaries of its territory, concurrent only with the general Constitutional authority of the United States.
>
> *Section 4.* Tribes shall have power to fix criteria for membership notwithstanding the second clause of the second section of the Fourteenth Amendment.

Id. at 280. This process is also properly grounded in the necessity of obtaining *tribal* consent:

> *Section 8.* This amendment shall apply only to those Indian Tribes which were incorporated by a constitution of their choosing for five years prior to the date of ratification, and which may consent to its application to them by the vote of two-thirds of their members in a plebiscite convened for that purpose.

Id. at 282. Such an approach is necessarily based on a "consent" model. *Id.*

[89] For example, Article V of the Constitution requires ratification of amendments by the "Legislatures of three fourths of the several States." Yet national constitutions elsewhere have been successfully amended. *See,* e.g., Constitution of Canada, § 35 (1982):

> (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

the aspiration and tradition of a *living* constitution to truly become all that it can be for those who were here first.[90]

[90] Such an understanding no doubt will require a certain constitutional "faith:"

> The point of this constitutional "faith" is to identify a fruitful path in the evolving relationship of tribal courts and federal courts. This path begins in the past with an understanding of mutuality grounded in principles of treaty federalism, then moves to sweep aside the plenary brambles, and finally clears the way to complete a constitutional journey. In other words, this emerging "faith" seeks a way that respects both the aspirations of tribal courts to flourish and a national jurisprudence that regards arbitrary power as constitutionally indefensible. Without such "faith" and conscientious effort, there is little hope for meaningful growth and stability but only the likelihood of a kind of blind and erratic development that potentially exposes tribal courts (and tribes in general) to the "decisive operations of merciless power." The presence of such a "faith" is needed to provide both confident institutional grounding and principled constitutional assurance.

Pommersheim, *supra* note 55, at 330-31 (footnote omitted).