INDIAN CONSENT TO AMERICAN GOVERNMENT

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Consent of the governed is a fundamental tenet of democratic constitutionalism. Have American Indian people consented to American government? In liberal political theory, consent is manifested through the franchise and representatives chosen by voters acting individually.[1] But Indian people could not be fitted into this constitutional scheme until relatively recently, and even now their circumstances raise unique questions about consent.

The principle of consent of the governed has an important connection to federal Indian law. Traditional Indian law theory is based upon treaties between Indian nations and the United States.[2] The treaties evidence Indian consent and proclaim promises of the United States, consent by and promises to tribes as groups rather than Indians as individuals. The commitments in Indian treaties are the claimed source of the fundamental doctrines of federal Indian law, the federal trust relationship with tribes and Indians,[3] and the Indian sovereignty doctrine that protects tribes' exclusive authority over their members in Indian country.[4]

This theory is familiar, and so are its limitations. The treaties did not provide explicitly for either retained tribal sovereignty or federal trust responsibility. While inferring retained sovereignty was a reasonable construction of some treaties, the circumstances of other treaty negotiations make it doubtful that the parties contemplated continuing tribal sovereignty.[5] Many treaty negotiations also reveal substantial coercion of the tri-

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1. *See* M. WALZER, OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP vii-xiv (1970); Whelan, *Prologue: Democratic Theory and the Boundary Problem* 24-26, in LIBERAL DEMOCRACY: NOMOS XXV (1983).

2. *See* C. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 120 (1987); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 33 (1941 ed. & 1971, 1986 reprints); MARGOLD, *Introduction*, in *id.* at VIII-XIII; Rice, *The Position of the American Indian in the Law of the United States*, 16 J. COMP. LEG. 78, 80-81 (1934).

3. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 220-28 (1982 ed.) (Trust doctrine is "one of the primary cornerstones of Indian law." *Id.* at 221.).

4. *See id.* at 229-61; F. COHEN, *supra* note 2, at 122 (sovereignty doctrine is "[p]erhaps the most basic principle of all Indian law").

5. *See infra* notes 78-97 and accompanying text. Anachronistically, one can improve the connection between treaty promises and the federal trust and tribal sovereignty doctrines by relying on modern contract theories such as adhesion, unconscionability, and implied covenants of good faith and fair dealing. *See* E. FARNSWORTH, CONTRACTS §§ 4.26-4.28, at 293-318, § 7.17, at 526-28 (1982). These doctrines were connected to federal Indian law in Wilkinson & Volkman, *Judicial*

bal party, impairing the justness of Indian consent. Further, why should treaty principles be extended to the many situations in Indian law where no treaty is involved? Why, for example, is sovereignty reserved to non-treaty tribes residing on executive order reservations? And why should federal statutes applied to Indians be construed in their favor? This Article responds to these questions and to related issues about the constitutional status of Indian nations and their members.

The claimed origin of Indian law doctrine in treaty promises is accurate, but not on the basis of the treaties alone. They do not adequately support the generality of the sovereignty doctrine applied to all tribes and reservations, nor do they sustain or define much of the federal trust responsibility. The connection between treaties and the general doctrines depends on the constitutional principle that power should be based on consent of the governed.[6]

The original understanding was that the United States would deal with Indians as national groups. Their consent to American government was sought and obtained collectively, not individually. After the Constitution was adopted, many expressions of legislative and executive policy were based on the premise that Indian consent would and should be obtained by groups rather than individually.[7]

Judicial decisions reflect this basic understanding of the original constitutional status of tribal Indians. The Supreme Court looked to the agreements reached in the early peace treaties, when the tribes had significant bargaining power, as the best measure of Indian consent. While sustaining Congress' power to override treaties and to convert Indians into citizens, the Court requires that departures from the original, collective basis for Indian consent be clearly and unambiguously adopted by the national government.[8] The government has seldom met the Court's standard to terminate tribal status. As a result, although Indians individually have the right to assume the same constitutional status as other persons, they retain the choice of separate status as tribal members as well.

The federal government continues to claim the constitutional power to eliminate the separate constitutional status of Indian nations,[9] and the Supreme Court has consistently agreed.[10] This has led some scholars to argue that the Constitution should be interpreted to protect tribes from federal power, to erect a constitutional right of tribal sovereignty, immune from congressional power, a sort of tenth amendment for tribes.[11]

It is most unlikely that the Court will declare constitutional protection

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Review of Indian Treaty Abrogations: "As Long As Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?, 63 CALIF. L. REV. 601, 617-18 (1975). However, even if these theories are properly available, they would be hard pressed to explain the generality of the trust responsibility and sovereignty doctrines. *Compare* the rules of international law on treaty interpretation, *infra* notes 106-09 and accompanying text.

6. *See infra* notes 69-120 and accompanying text.
7. *See infra* notes 51-53 and accompanying text.
8. *See infra* notes 75-120 and accompanying text.
9. *See infra* notes 23-27 and accompanying text.
10. *See infra* notes 33-34, 39-40 and accompanying text.
11. *See infra* notes 35-38 and accompanying text.

of tribal sovereignty. Moreover, the issue is less significant than many assume because the constitutional structure powerfully protects tribal status from hostile political majorities.[12] Tribal rights can be altered only by national legislation, not by the action of any state, nor by referendum. Congress has generally supported a policy of basing its actions on Indian consent, and the Supreme Court's interpretations of legislation have been grounded in the same fundamental premise. For these reasons, basic change in tribal status is unlikely without tribal consent.

When the relationship of constitutional rights to tribes is examined in its entirety, rights jurisprudence is a dubious foundation for tribal interests. Individual rights concepts have often been at war with the interests of tribes as governments, a conflict that continues.[13] Non-Indians in tribal territory raise rights-based arguments against tribes' assertions of authority over them. Federal power over tribes responds to these arguments, establishing democratic legitimacy of tribal authority.

I. INDIANS AND CONSTITUTIONAL POWER

A. *The Federal Protectorate and Plenary Power.*

The 1787 Constitution conceived of Indian tribes as outside of the body politic it established. Tribal Indians were not even to be counted in apportioning representation and taxation among the states.[14] Paramount power to regulate commerce with the Indian tribes was delegated to the new federal government, rather than to the states,[15] at a time when federal responsibilities were largely international. Treaties previously made with Indian nations were confirmed,[16] and the United States made hundreds more treaties over more than seventy years before deciding that Indian tribes were not sufficiently foreign to continue making treaties with them.[17] Thereafter, Washington continued to deal with tribes on a government-to-government basis, by means of agreements ratified by Congress.[18] During the treaty period and for some years thereafter, tribal Indians could not vote in state or federal elections.[19] As the Supreme Court described it, they were "a people distinct from others" comprising "independent political communities."[20]

12. *See infra* notes 121-28 and accompanying text.

13. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (no federal cause of action to enforce civil rights against tribe); S. 2747, 100th Cong., 2d Sess., 134 CONG. REC. 11652 (1988) (bill introduced by Senator Orrin Hatch to overturn or limit holding in *Martinez*).

14. U.S. CONST. art. I, § 2, cl. 3 (excluding "Indians not taxed"). *See also* ARTICLES OF CONFEDERATION art. IX (referring to tribal Indians as "not members of any of the States"); U.S. CONST. amend. XIV, § 2 (excluding "Indians not taxed"). The Convention labored mightily over the place of slaves in the enumeration, settling on the notorious three-fifths provision. *See* NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 103, 225, 248, 256, 259-61, 268-69, 274-76, 278, 281-82, 285-86, 309, 327, 409-13 (A. Koch ed. 1987). By contrast, excluding tribal Indians was readily accepted without debate.

15. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557-59 (1832).

16. *See* U.S. CONST. art. VI, ¶ 2 ("all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land").

17. *See* F. COHEN, *supra* note 3, at 58-107 (treaty making ended in 1871).

18. *See infra* note 54.

19. *See* F. COHEN, *supra* note 3, at 639-53.

20. *Worcester*, 31 U.S. at 559.

Although constitutionally separate, the tribes were within the boundaries of the United States and made subject to its national laws. While the federal government dealt with tribes primarily through treaties and agreements, it also imposed statutes on Indians, a practice that grew throughout the nineteenth century.[21] When challenged, federal legislative power over tribes was consistently sustained; indeed, it was characterized as plenary.[22] Challenges by Indians increased when the government began to pursue policies designed to break up tribal societies and convert Indian people into American citizens, legally like all others.[23] Extraordinary power to manipulate tribal property was exercised and sustained against Indian objections.[24]

Indian people resisted assimilation, and the federal government eventually receded from coercive policies. Indians were made citizens without requiring abandonment of tribal ties.[25] Later the government deliberately set about to support and revitalize tribal governments, and since 1960 policy has been officially premised on Indian self-determination.[26] However, the government continues to claim discretionary power to set Indian policy.[27]

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21. *See* F. COHEN, *supra* note 3, at 108-43.

22. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903). *See* United States v. Kagama, 118 U.S. 375, 384-85 (1886); *Ex parte* Crow Dog, 109 U.S. 556, 567 (1883); United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1846). The Court continues use of the word plenary. *E.g.*, National Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 851 (1985); Antoine v. Washington, 420 U.S. 194, 203 (1975); Morton v. Mancari, 417 U.S. 535, 551 (1974).

23. *See* R. BARSH & J. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 62-63 (1980); F. COHEN, *supra* note 3, at 127-38 (describing period of federal policies of allotment and assimilation); F. COHEN, *supra* note 2, at 206-10 (describing circumstances of passage of General Allotment Act including Indian opposition).

24. *Lone Wolf*, 187 U.S. 553. *See also* Gritts v. Fisher, 224 U.S. 640, 648 (1912); Cherokee Intermarriage Cases, 203 U.S. 76, 93 (1906).

Federal plenary power has never been construed as absolute, in the sense of beyond any constitutional limits; takings of Indian property have been held to be compensable under the fifth amendment. *See infra* note 139 and accompanying text. The most extraordinary power has been that of managing and altering the form of tribal land. At various times, the federal government has leased, sold, and allotted tribal land without Indian consent. In *Lone Wolf*, it had compelled distribution of tribal land to tribal members individually, without compensation to the tribe. Whether the government could constitutionally do this to corporations or other collective entities is open to question. *Cf.* Hawaii Housing Auth. v. Midkiff, 467 U.S. 229 (1984) (sustaining state power to force sales of trust property to individuals).

The Court's essential purpose in using the term plenary power is to distinguish enumerated federal powers over other citizens from power over Indians. In other words, federal power over Indians includes the constitutional powers that both the federal government and the states exercise over other persons. Because of the modern expansion of federal authority over all persons under the commerce and spending powers, the distinction is of reduced importance except as a reminder of federal limits on state authority over Indian country. By contrast, scholars who criticize the plenary power doctrine seek to immunize tribes against both state and federal power. *See infra* notes 35-38 and accompanying text.

25. *See* F. COHEN, *supra* note 3, at 639-46.

26. *See id.* at 180-206. Since 1960, both major political parties have pledged not to alter tribal status without tribal consent. *See* IV A. SCHLESINGER, F. ISRAEL & W. HANSEN, HISTORY OF AMERICAN PRESIDENTIAL ELECTIONS 1789-1968, at 3505-06, 3529 (1971).

27. *See* Hodel v. Irving, 481 U.S. 704, 734 (1987) (Stevens, J., concurring); Brief for the United States in *id.* at 28. *Cf.* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 84 (1976) ("plenary nature of Congress' power in matters of Indian affairs 'does not mean that all federal legislation concerning Indians is . . . immune from judicial scrutiny or that claims, such as those presented by appellees, are not justiciable,' " (quoting Brief for the Department of the Interior at 19 n.19)). The Supreme Court unanimously sustained a recent exercise of federal power to override Indian treaties in United States v. Dion, 476 U.S. 734 (1986).

B. *Tribal Sovereignty at the Sufferance of Congress.*

Most Indian treaties had three explicit provisions that represented the heart of the agreement. The tribal party acknowledged the superior sovereignty of the United States, it ceded to the United States a part of its original territory, and the United States recognized the tribe's exclusive right to tribal territory not ceded.[28] Practice under the early treaties was to leave internal governance of retained tribal territory to tribal authority except for interracial trade and crimes. The Indian nations continued to exercise internal sovereignty under their own laws. When tribal sovereignty was challenged by state governments, the Supreme Court construed the treaties to guarantee internal tribal sovereignty free of interference by states.[29]

After treaty making ended, the dominant federal Indian policy became assimilation. The government took actions to undermine tribal sovereignty, by breaking up the tribal land base and by controlling tribal government through the Bureau of Indian Affairs.[30] A few tribes challenged federal power, but the courts sustained it.[31] When federal policy shifted back to Indian self-determination, the courts again protected tribal sovereignty from state governments but continued to acknowledge federal power to abolish it.[32]

In summary, while formally allowing Indians to decide about tribal sovereignty, the federal government has attempted to persuade Indians to give it up, has manipulated it in practice, and has consistently claimed the power to eliminate it. The Supreme Court has repeatedly said that tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance."[33] When Congress has explicitly exercised that power, the Court has unanimously sustained the effort.[34]

In recent years, scholars have attacked the doctrine of plenary federal power, claiming constitutional protection for tribal sovereignty against congressional interference.[35] Arguments rest on constructions of several differ-

28. *See* F. COHEN, *supra* note 3, at 232-35.

29. *E.g.*, The New York Indians, 72 U.S. (5 Wall.) 761 (1867); The Kansas Indians, 72 U.S. (5 Wall.) 737 (1867); *Worcester*, 31 U.S. 515.

30. *See* F. COHEN, *supra* note 3, at 127-43.

31. *E.g.*, *Lone Wolf*, 187 U.S. 553.

32. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1986); United States v. Wheeler, 435 U.S. 313, 323 (1978).

33. *Wheeler*, 435 U.S. at 323.

34. *E.g.*, Rice v. Rehner, 463 U.S. 713 (1983); United States v. Kagama, 118 U.S. 375, 384-85 (1886). *Rice* had a dissent, but it was not based on lack of constitutional power; not even in dissent has any justice argued in favor of constitutional limits on congressional power. The closest the Court has come, other than in cases adjudicating takings of Indian property, was the dictum in Delaware Tribe v. Weeks, 430 U.S. 73, 84 (1976), quoted *supra* note 27. However, the point of that dictum appears to be to deny that plenary power means absolute power, a point long settled by the decisions finding constitutional protections for Indian property. *See supra* note 24.

35. The article most directly on point is Newton, *Federal Power over Indians: Its Sources, Scope and Limitations*, 132 U. PA. L. REV. 195 (1984). *See also* R. BARSH & J. HENDERSON, *supra* note 23; Ball, *Constitution, Court, Indian Tribes*, 1987 AM. B. FOUND. RES. J. 1, 67-113; Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 996-1001 (1981). *Cf.* Brief for the United States as amicus curiae at 20-24; Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832 (1981) (U.S. advocated similar position re Indian immunity from state jurisdiction).

ent clauses of the Constitution.[36] Other scholars have questioned congressional power to override treaties.[37] Still others have articulated sovereign rights for tribes under international law.[38] However, these theories have made no headway in the Supreme Court. The Court adheres to the concept that Indian sovereignty and treaties depend on federal policy, so that the only task of the courts is to interpret what Congress and the executive branch have done.[39] The Court sustains attempts by states to govern Indians and reservation lands unless state power is preempted by federal treaties, statutes, and executive orders.[40]

Thus, prevailing constitutional theory recognizes Congress' power to govern Indian tribes any way it likes with virtually no substantive constitutional limitations. Congress can govern individual Indians under the same standards as other citizens, and on reservations or over Indian trust property, it has greater authority over Indians than over other persons.

II. INDIAN CONSENT

A. *The Consent of the Governed.*

That governments derive "their just powers from the consent of the governed" is among the Declaration's self-evident truths.[41] It is a fundamental principle of the Constitution. Original consent is manifest in the Preamble and in the Constitution's genesis in popular ratifying conventions.[42] This form of popular consent traces to Locke's vision of the original compact among free men.[43] Popular consent is further evidenced by the Constitution's principle that powers not expressly granted are retained by the

36. Professor Newton relied principally on the due process clause of the fifth amendment. Newton, *supra* note 35, at 261-67. Professors Barsh and Henderson relied principally on the ninth amendment and on article I, § 2, cl. 3. R. BARSH & J. HENDERSON, *supra* note 23, at 257-69. Professor Clinton relied on the commerce clause, Clinton, *supra* note 35, at 996-1001, as did the U.S. brief in *Ramah*, 458 U.S. 832. Professor Ball argued that plenary power is lacking because no provision in the Constitution authorizes it. Ball, *supra* note 35, at 46-55.

37. *See* Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987); Westen, *The Place of Foreign Treaties in the Courts of the United States: A Reply to Louis Henkin*, 101 HARV. L. REV. 511 (1987); Henkin, *Lexical Priority or "Political Question": A Response*, 101 HARV. L. REV. 524 (1987). Although these writings are about foreign treaties, Indian treaties are discussed, and many of the arguments apply to both.

38. *See* R. BARSH & J. HENDERSON, *supra* note 23, at 33-49; Andress & Falkowski, *Self-Determination: Indians and the United Nations—The Anomalous Status of America's "Domestic Dependent Nations"*, 8 AM. INDIAN L. REV. 97 (1980); Barsh, *Indigenous North America and Contemporary International Law*, 62 OR. L. REV. 73 (1983); Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INT'L L. 369 (1986); Clinebell & Thomson, *Sovereignty & Self-Determination: Rights of Native Americans Under International Law*, 27 BUFFALO L. REV. 669 (1978); Ryan, *Indian Nations Compared to Other Nations*, 3 AM. INDIAN J. 2 (1977); Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Jurisprudence*, 1986 WIS. L. REV. 219 [hereinafter *Algebra*]; Williams, *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence's Learning to Live With the Plenary Power of Congress Over the Indian Nations*, 30 ARIZ L. REV. 439, 454-55 (1988).

39. *See supra* note 22.

40. *See* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141-45 (1980); McClanahan v. Arizona Tax Comm'n, 411 U.S. 164, 172 (1973).

41. The Declaration of Independence ¶ 2 (U.S. 1776).

42. U.S. CONST. preamble. *See* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 530-36 (1969).

43. *See* J. LOCKE, *An Essay Concerning the True Origin, Extent and End of Civil Government*

people, a concept so radical at the time that some were incredulous.[44] The Bill of Rights expressly withdrew powers from the government and reiterated that powers not explicitly granted were denied.[45] Continuing consent is achieved by popular election of those vested with governmental power, to serve fixed terms of moderate duration, and by the opportunity for amendment.[46] That the framers intended popular consent to be the foundation of American government is beyond cavil.[47]

Indian people did not consent to the Constitution's establishment, and the vote was denied them until this century. However, they are now citizens and entitled to vote during adulthood, which counts as the foundation of consent under the principles of liberal democracy embodied in the Constitution.[48] Are these principles properly applied to Indians?

The courts and other arms of the government must generally assume that they are. Being creatures of the Constitution, they have no license to doubt its applicability. In one of the most remarkable passages in any Supreme Court opinion, the Marshall Court expressly admitted this limit on its capacity to consider the condition of the Indians.[49] Moreover, as individuals Indians may elect to ignore or even renounce tribal ties and participate in American society on the same terms as other citizens.[50]

Yet most Indian people retain tribal ties. Many prefer to live in reservation communities despite poverty and hardship, and others would return if

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[Second Treatise of Government], in TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION, at 63-81 (C. Sherman ed. 1937, orig. publ. 1689).

Other political philosophers who influenced the framers materially differed from Locke about the concept of consent. Hobbes said that "the right of all sovereigns is derived originally from the consent of every one of those that are to be governed," but he defined consent very broadly, to include that given "to save their lives, by submission to a conquering enemy." T. HOBBES, LEVIATHAN 377 (M. Oakeshott ed. 1957). Hume ridiculed Locke, saying that the circumstances of an original compact to govern by consent had never occurred in known human history. *See* D. Hume, *Of the Original Compact*, in 3 THE PHILOSOPHICAL WORKS, at 443 (T. Green & T. Grose eds. 1964, orig. pub. 1741). But the Americans came closer to Locke's vision than Hume had thought possible. In any case, Locke's view represented the dominant social contract theory at the time of the Constitution. *See* B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 161-75 (1967); P. RILEY, WILL AND LEGITIMACY 1-2 (1982). On its continuing acceptance, see Whelan, *supra* note 1.

Locke's writings several times referred to Native American societies in relation to his vision of the original compact. *See* Deloria, *Minorities and the Social Contract*, 20 GA. L. REV. 917, 921-24 (1986). But in this country, his labor theory of property was relied on to show the allegedly superior claim of agriculturists to hunters and gatherers, thus to justify displacing Indians. *See* J. LOCKE, *supra*, at 18-33; Williams, *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 SO. CAL. L. REV. 1, 2-3 (1983).

44. *See* G. WOOD, *supra* note 42, at 536-43.

45. U.S. CONST. amends. IX, X.

46. U.S. CONST. art. I, §§ 1, 3; art. II, § 1. *See also id.* at art. IV, § 4, the republican guarantee clause, which was understood to guarantee popular government. *See* THE FEDERALIST NO. 39, at 250-51 (J. Madison), NO. 43, at 291-92 (J. Madison) (J. Cooke ed. 1961). However, the framers' concept of popular government did not equate with straightforward majority rule. The constitutional scheme deliberately divided power to blunt majority oppression. *See* THE FEDERALIST NOS. 10 & 51 (J. Madison); *infra* notes 127-28 and accompanying text.

Professor Emerson has argued that the "right of consent" is protected by the free expression clauses of the first amendment. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 8 (1970).

47. *See* THE FEDERALIST NO. 39 (J. Madison).

48. *Id.*

49. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 588-92 (1823).

50. *See* United States *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891); F. COHEN, *supra* note 2, at 177-78, 268.

economic conditions were better. As a result, the original Constitution's relationship to Indian nations remains more important than modern Indian citizenship. The original basis for Indian consent was collective, not individual. The United States addressed the tribes as national groups. The evolution of this relationship shows a continuing concern with tribal, rather than individual, consent.

B. *Political Actions Based on Indian Consent.*

Indian consent has been honored, albeit imperfectly, through policy choices of Congress and the President. Before the Constitution, the Northwest Ordinance established a compact between the federal government and new states.[51] It required that:

> The utmost good faith shall always be observed toward the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.[52]

Other statutes required federal approval to acquire land ownership from tribes, directly protecting the policy declared in the Northwest Ordinance.[53] Most importantly, in the formative years the government sought Indian consent by dealing with tribes primarily through treaties.

After treaty making ended, the government continued to deal with tribes by agreement.[54] The policy of allotment was imposed on tribes, but only after vigorous argument in Congress, in which advocates of consent lost only after years of debate.[55] The Supreme Court's 1903 decision in *Lone Wolf v. Hitchcock*[56] is the leading authority to sustain federal power to override an Indian treaty. The remarkable fact is that the decision came so late in the day, that as late as 1903 there was doubt about the question.[57]

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51. Ordinance of July 23, 1787, § 14, 32 J. CONT. CONG. 334, 340 (1787), reenacted as amended, Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.

52. *Id.* § 14, art. III, 1 Stat. at 52.

53. *See* F. COHEN, *supra* note 3, at 510-22 (describing so-called "nonintercourse acts"). *See also* Wilson v. Omaha Indian Tribe, 442 U.S. 653, 658-69 (1979) (discussing statute allocating the burden of proof to whites claiming property from Indians). The "nonintercourse" statutes prohibiting direct land purchases from tribes might seem at first look to be the antithesis of Indian consent because they prohibited voluntary tribal transfers of land. However, in the context of frontier conditions, the federal protection usually operated to prevent land acquisitions from tribes that were unfair and in reality not consensual.

54. *See* F. COHEN, *supra* note 3, at 107; F. COHEN, *supra* note 2, at 67. For many years after 1871, agreements with tribes were popularly called treaties, in and out of Congress, despite technical misuse of the term. *See, e.g.*, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 596 (1977) (quoting Cong. Burke, "In 1901 a treaty was entered into with the Rosebud Indians . . . ."). In Antoine v. Washington, 420 U.S. 194 (1975), the Court compared the legal status of treaties and agreements. *See id.* at 200-04; *id.* at 213-14 (Rehnquist, J., dissenting).

55. *See* F. PRUCHA, AMERICAN INDIAN POLICY IN CRISIS 252 (1976).

56. 187 U.S. 553 (1903).

57. The Court had reached the same conclusion in The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1871), but the case was decided by six Justices, and two dissented. Apparently for this reason, it was not considered a definitive precedent. Also, the issue decided was much less important. When

In modern times, the Indian Reorganization Act[58] was made subject to Indian consent by referendum.[59] The now-discredited termination policy of the 1950s was carried out with consent of most of the affected tribes.[60] Public Law 280 was imposed on tribes in 1953, but after reconsideration in 1968, it was made subject to tribal consent by referendum.[61] Congress adopted the 1971 land settlement with Alaska Natives on the assumption that their consent should be its foundation.[62] And since 1960, both major political parties have expressly established Indian consent as the basis for federal policy.[63]

Nevertheless, the consent policies of the political branches have been uneven and imperfect. Many tribes never made treaties with the government, and the conditions under which Indian treaties and agreements were made limit their value as a just basis for Indian consent.[64] In most cases there was substantial coercion of the tribal party. The premises and terms of discourse were those of the white man's law, grounded in English history, culture, and language. The European concept of nationhood did not fit many tribal societies, so that the treating party became an artificial amalgamation of small bands of people theretofore independent.[65] In some cases the process was deliberately corrupted by federal selection of the persons to be recognized as tribal leaders.[66] At times, Indian property was seized outright with no semblance of consent, and the federal government was often unable or unwilling to control trespassing on Indian land.[67] Many statutes and bureaucratic and military rules were simply imposed on Indians.[68]

Lone Wolf was decided, the issue was considered open. *See Rosebud Sioux Tribe*, 430 U.S. at 592-94.

58. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended and supplemented at 25 U.S.C. §§ 461-467 (1982)).

59. *Id.* § 18, 25 U.S.C. § 478 (1982).

60. *See* F. COHEN, *supra* note 3, at 152-80. There can be little doubt that many Indian people who agreed to termination were either misled or came to regret their decision. But in one way or another, that is a feature of many exercises of democratic consent.

61. *See id.* at 175-77, 362-63; 25 U.S.C. § 1326 (1982).

62. *See* M. BERRY, THE ALASKA PIPELINE: THE POLITICS OF OIL AND NATIVE LAND CLAIMS 124-214 (1975) (history of ANCSA, including approval by Alaska Federation of Natives).

63. *See supra* note 26. The recent working out of competing state and tribal authority over interracial gambling in Indian country illustrates both the policy of consent and its limits. *See* Act of Oct. 17, 1988, Pub. L. No. 100-497, 102 Stat. 2467-88. The statute provides for federal regulation of gaming on Indian lands. In effect, it allows tribes to operate bingo games free of state rules and control but limits other kinds of reservation gambling enterprises to those allowed by each state. It is very much a compromise.

64. *See generally* Wilkinson & Volkman, *supra* note 5, at 608-12.

65. *See* United States v. Washington, 384 F. Supp. 312, 355 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

66. *See* United States v. Michigan, 471 F. Supp. 192, 211 (W.D. Mich. 1979), *modified*, 653 F.2d 277 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1981); G. FOREMAN, INDIAN REMOVAL 263-66 (1932).

67. *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 377-78 (1980). The most important issue was the legal response the U.S. would make to white squatters who occupied Indian lands without legal right, then politicked to validate their possession. *See, e.g.*, D. FELLER, THE PUBLIC LANDS IN JACKSONIAN POLITICS 126-29, 197-98 (1984) (describing preemption laws).

68. *See, e.g.*, F. COHEN, *supra* note 2, at 174-77 (describing administrative and military policies of forcibly confining Indians to reservations without legal authority).

C. *Judicial Actions Based on Indian Consent.*

The uneven political efforts to govern with tribal consent are not the full story. When Congress has acted with doubtful Indian consent or contrary to it, the courts have adopted ameliorative policies. Whatever the abstract constitutional theory, the devastating power of a distant legislature, not beholden to Indian votes or to Indian consent in any other way, is a jarring dissonance in a democratic polity. The courts have obviously been influenced by this inharmonious chord in the constitutional symphony.

Unable to confront the constitutional issue head on, the courts evolved strategies that to some extent resemble the emergence of courts of equity. These manifest themselves in legal analogies that don't quite fit their common law clothing, such as Indian wardship and the trust responsibility of the federal government.[69] They emerge most frankly in the Supreme Court's canons of construction for Indian treaties and for federal statutes affecting Indians.[70] While stated as several distinct rules, all of them require that courts construe ambiguities in Indian treaties and in federal statutes favorably to the Indian side of a dispute.

The Court's first analogy was to common law wardship, the Marshall Court's statement that the tribes' "relation to the United States resembles that of a ward to his guardian."[71] While this description is now viewed as demeaning to Indian people and is out of favor, its purpose when made was to imply a federal duty of protection for Indians and their property against the hostility and land hunger of frontier whites. The "resembl[ance]" to wardship was legally apt on the basis of the constitutional rule that Congress has plenary power over Indians without their consent, a description that to some extent fits the relation of guardian and ward.[72] Implying that the federal government in turn has a guardian's fiduciary duties was the more daring side of the analogy, and it developed into the trust relationship of today.

1. *Consent and the Sovereignty Doctrine.*

Under the legal and social conditions of eighteenth and nineteenth century America, Indian consent cannot be found on the basis of social contract or any like theory of individual consent.[73] The treaties and agreements tribes made with the United States are a much more satisfactory source of Indian consent to the constitutional system. But as already noted, many of them were made coercively, with at best only partial Indian consent, and many tribes made no treaties or other agreements with the government.

These limitations were least important in the earliest years of dealings between the United States and the most powerful Indian nations. When the nation was founded, some frontier tribes were a significant military threat to the national security. The United States rightly feared them in their own

69. *See infra* notes 71-72 and accompanying text.

70. *See infra* notes 105-20 and accompanying text.

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

72. *See* 39 Am. Jur. 2d, *Guardianship and Ward* § 1 (1968). The Court's rule on plenary power is outlined *supra* notes 14-34 and accompanying text. For a description of various legal uses of the guardian-ward analogy, see F. COHEN, *supra* note 2, at 169-73.

73. *See* Deloria, *supra* note 43.

right and as potential allies of Britain or other European powers.[74] Treaties under these circumstances were relatively freely made by tribal parties. They were the most voluntary basis for Indian consent before the modern period of Indian citizenship. They were the best available accommodation between the condition of the Indians and the principle of consent of the governed.

The Supreme Court has implicitly chosen early treaties with powerful tribes, which I shall call the peace treaties, as the benchmark for interpreting federal Indian policy. It has been right to do so not only because of the general legislative policy of seeking Indian consent,[75] but also because consent of the governed is a fundamental principle of our constitutional order that should guide the courts' interpretations within the bounds of other constitutional and statutory limits.

The Court's derivation of policy from the peace treaties may be seen in its decisions recognizing and defining tribal sovereignty over Indian country. As is widely known, the Court first decided that treaties reserved tribal sovereignty in *Worcester v. Georgia*.[76] None of the treaties between the Cherokee Nation and the United States explicitly reserved tribal sovereignty, and the Court decided on the basis of implications. But this did not distort the treaties' terms or conditions. The words of the early treaties, read in light of extant acts of Congress, the circumstances of the Cherokees, and the actual conduct of federal, tribal, and state governments at the time of the treaties, made the Court's construction the most reasonable reading of the actual intent of the treaty parties.[77]

The *Worcester* decision was highly controversial,[78] but not because it inaccurately reflected the intent of the parties to the basic agreements between the Cherokees and the United States in 1785 and 1791.[79] Rather, social and military conditions had vastly changed between the treaty dates and 1832. Indian tribes had ceased to be a military threat to the security of the United States itself (as opposed to isolated situations on the frontier) at least by 1814, after we had settled our differences with Britain, if not somewhat earlier.[80] Treaties after that date, including several with the Cherokees, reflected the general assumption that the United States had the power to impose any terms it wished.[81] President Jackson was elected based in part on his public recognition of this new reality and his willingness to alter the

74. *See* 1 F. PRUCHA, THE GREAT WHITE FATHER 61-80 (1984).

75. *See supra* notes 51-63 and accompanying text.

76. *Worcester*, 31 U.S. 515.

77. Each of these bases for inference about treaty purposes was relied on by the Court. *See id.* at 542-50, 556-57, 560. The only Indian treaties that expressly reserved tribal sovereignty were three of the "Indian Territory" removal treaties made between 1830 and 1838. They contemplated an Indian commonwealth outside the boundaries of any state or territory, a vision that lasted until the admission of Oklahoma in 1907. *See* F. COHEN, *supra* note 3, at 261-62, 770-75.

78. *See* Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 520-31 (1969).

79. *See Worcester*, 31 U.S. at 550-56.

80. *See* 1 F. PRUCHA, *supra* note 74, at 80-88, 194. The military question in particular frontier situations remained for many decades; the text refers to the security of the nation as a whole. Prucha mentions military campaigns and some concerns with foreign alliances after 1814, but even these sporadic events had ended by 1825.

81. *See* Treaty with the Creeks (Treaty of Ft. Jackson), Aug. 9, 1814, 7 Stat. 120, which reveals

relationship with Indian tribes accordingly.[82] So the *Worcester* interpretation, while accurately reflecting conditions when the treaties were made, was out of phase with circumstances at the time the case was decided.

Because of changed circumstances, the Court could have inferred that the later Cherokee treaties implicitly yielded tribal sovereignty based on the circumstances of their making. Instead, the opinion relied almost entirely on the earliest Cherokee treaty as the foundation for its decision.[83] The Court selected the treaty most accurately reflecting Cherokee consent. The opinion noted that the United States wanted peace and that the federal negotiators sought out the Cherokees in their own country.[84] In contrast, many later treaties with tribes were made at military forts or even in Washington.[85] After 1814, treaty terms were only as fair as the Government's benevolence decided to make them. But many of the early treaties were true bargains.

If one looks in isolation to most of the post-1814 Indian treaties and to the conditions of their adoption, an inference that the treaty parties intended to reserve internal self-government to the tribal party is often doubtful.[86] That the Court has uniformly implied such intent in all Indian treaties that do not expressly state the contrary[87] can be justified only by attributing a general federal policy to underlie all the treaties and by deriving the foundations of that policy from the peace treaty period.

The Court's second examination of the question did not come until its decision in the Kansas case of 1867.[88] The right of three tribes to self-government was at issue, and the governing treaties presented a much more doubtful case for reserved sovereignty than had the Cherokee treaties in *Worcester*. Moreover, conditions for these tribes had changed more radically than they had for the Cherokees in 1832. State authorities urged the Court to recognize that the Indians had become too much integrated into local life to justify continuing tribal sovereignty.[89] But the Court refused to depart from the standard it had set in *Worcester*, requiring consent of the tribes to effect a change.[90]

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the change in relationships. Its terms scolded the Creek Nation for wrongs by Creeks, and many of the treaty terms began with the words, "The United States demand . . . ."

82. *See* Burke, *supra* note 78, at 528-29. Jackson had expressed this view publicly as early as 1817. *See* 1 F. PRUCHA, *supra* note 74, at 191-92. In 1829-30, Jackson's cabinet members argued that the Cherokee treaties gave the Cherokees neither property nor governmental rights. *Id.* at 193-94. Because the state of Georgia did not appear before the Supreme Court in *Worcester*, the pertinent parts of these claims served as a surrogate brief for the state, their arguments directly answered by the Court. Thus the *Worcester* decision was as much a rebuff to the President as to the state. However, these were highly political arguments that lacked any reasoned basis in the terms and conditions of the actual treaties.

83. *See Worcester*, 31 U.S. at 550-54.

84. *Id.* at 550.

85. *See, e.g.*, 2 C. KAPPLER, INDIAN AFFAIRS, LAWS AND TREATIES 594-600, 772-90 (1904).

86. For example, consider the 1868 treaty with the Navajos, 15 Stat. 667 (1868). It was made while the tribe was imprisoned at Fort Sumner in eastern New Mexico, far from tribal territory. The treaty terms simply set aside the reservation for the exclusive use of the Navajos and other Indians under the superintendence of the government. Yet the Court has interpreted the Navajo Treaty to apply "the basic policy of *Worcester*." Williams v. Lee, 358 U.S. 217, 219 (1959).

87. *See* F. COHEN, *supra* note 3, at 259-79; *infra* notes 105-09 and accompanying text.

88. The Kansas Indians, 72 U.S. 737.

89. *See* F. COHEN, *supra* note 3, at 262-63.

90. 72 U.S. at 757, 760-61. It is interesting that the Court did not mention the possibility of

The Court again sustained tribal sovereignty in *Ex parte Crow Dog*.[91] Although, the applicable Sioux Treaty of 1868 and agreement of 1877 included express language subjecting the Sioux "to the laws of the United States,"[92] the Court sustained tribal sovereignty in terms derived from the *Worcester* precedent.[93]

Three years later, the Court reviewed the power of Congress to punish an Indian for murder committed on a reservation under a statute passed in reaction to the *Crow Dog* decision.[94] One of the issues raised was congressional power, and concomitant immunity from state law, over the reservation in question because it had been established by executive order after statehood for tribes that had no treaty or agreement with the United States. The Court sustained the statute, and its opinion affirmed the tribes' right of self-government on the reservation based on the *Worcester* precedent.[95] Modern decisions are based on the continuing validity of these principles.[96]

One might try to explain these cases on the basis of continuity of policy, the assumption that federal policy remains constant to the extent it is not deliberately changed. But this concept alone would be greatly strained to account for the decisions. Many tribal reservations were established after the dominant policy of the federal government had clearly shifted to assimilation and break-up of the tribal land base.[97] A federal statute or executive order setting aside a reservation during the assimilation period, interpreted in light of then-current policy, could reasonably be read not to reserve tribal sovereignty; that might well be the most reasonable reading of it in isolation. Even treaties or agreements of that period can reasonably be interpreted the same way.

2. *Consent and the Limits of Tribal Power.*

The Court's reliance on the peace treaties can also be seen in its decisions finding limits to tribal sovereignty. In *Oliphant v. Suquamish Indian Tribe*,[98] the Court held that tribes retain no authority to punish non-Indians who violate tribal criminal laws. The Court's opinion relied on the understandings established in early treaties. While the Court's interpretation has been questioned,[99] its point of reference in the treaties was correct.

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unilateral abrogation of tribal sovereignty by act of Congress. *See supra* notes 56-57 and accompanying text.

91. 109 U.S. 556 (1883). *See also* United States v. Joseph, 94 U.S. 614, 617 (1877) (dictum).

92. *Crow Dog*, 109 U.S. at 568 (quoting Act of Feb. 28, 1877, ch. 72, 19 Stat. 254). *See also id.* at 563 (quoting Treaty with the Sioux, Apr. 29, 1868, art. I, 15 Stat. 635) ("subject to the authority of the United States").

93. *See id.*, 109 U.S. at 572.

94. *Kagama*, 118 U.S. 375.

95. *See id.* at 381-85.

96. *E.g.*, Merrion v. Jicarilla Apache Tribe, 455 U.S 130, 133 n.1 (1982); Williams v. Lee, 358 U.S. 217, 219 (1959).

97. *See* F. COHEN, *supra* note 3, at 98-102, 127-38.

98. 435 U.S. 191 (1978).

99. *See, e.g.*, Ball, *supra* note 35, at 36-44; Williams, *Algebra*, *supra* note 38, at 267-74; Barsh & Henderson, *The Betrayal:* Oliphant v. Suquamish Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979).

Despite criticism, there has been no questioning of the decision within the Court since it was announced. Moreover, the decision's author is now Chief Justice, and Justice Kennedy had voted

The *Oliphant* Court had to contend with the general rule of *Worcester v. Georgia*, that Indian sovereignty is the retained, original sovereignty of the Indian nations, so that tribes have whatever sovereignty has not been ceded by them or taken from them.[100] The Court also had to accommodate the rule that ambiguities in treaties should be interpreted favorably to Indian sovereignty.[101] The Court decided that tribal powers can be divested implicitly as well as explicitly.[102] That proposition is relatively uncontroversial when applied to external affairs, to implicit divestment of tribal power to make war and to deal directly with foreign nations.[103] But the *Oliphant* Court applied it to the more local power to punish non-Indians and decided that that power had been implicitly given up as well.

The Court's opinion relied on the historical understanding of the three federal branches and of tribal parties to treaties, including those at issue in *Worcester* itself.[104] One can dispute whether the Court fairly interpreted Indian consent and expectations under those treaties; this is often open to argument and leads to disagreements within the Court itself, such as the divided vote in *Oliphant*. But using the general treaty understanding as the standard for Indian consent has broad support in the Court's decisions.

One may object that each Indian treaty is a separate agreement that should be interpreted to carry out whatever its parties intended. So it should, but the words of the treaties leave many questions unanswered. Some of these answers must be derived from the general policy of the United States, the party common to all the treaties. That policy in turn has often been complex and unclear, so that more than one interpretation was reasonably open to a reviewing court. That the courts have usually chosen the constructions most consistent with Indian consent is justified both by general legislative policies favoring Indian consent, and by higher constitutional principles.

3. *Consent and Judicial Rules of Interpretation.*

How should courts apply the sovereignty and federal trust doctrines? The Supreme Court says we are to construe Indian treaties and statutes favorably to the Indians, but what outcome is favorable to them? This question has obvious answers in some situations but not in all. The rules are in fact applied to sustain tribal sovereignty, federal restraints on alienation of tribal property, and the reservation system.[105] Are these institutions beneficial to Indian people? Social conditions on many reservations lead some

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the same way in the court of appeals. *See* 544 F.2d 1007, 1014 (9th Cir. 1976) (Kennedy, J., dissenting).

100. *See Oliphant*, 435 U.S. at 196; F. COHEN, *supra* note 2, at 122; *see also Wheeler*, 435 U.S. at 322.

101. *See infra* notes 105-09 and accompanying text. The *Oliphant* opinion did not explicitly address the rule.

102. *Oliphant*, 435 U.S. at 204.

103. *But see* Ball, *supra* note 35, at 36-44; Williams, *Algebra*, *supra* note 38, at 267-74. Treaties with tribes explicitly provided for peace between the parties, and some of them specified that the tribe would not ally itself with any other nation than the United States. *See, e.g.*, Treaty with the Cherokees, July 2, 1791, art. 2, 7 Stat. 39.

104. *Oliphant*, 435 U.S. at 197-201.

105. *See* F. COHEN, *supra* note 3, at 220-25.

observers to doubt that they are. And these are profound policy questions of a sort that we generally do not expect courts to resolve.

The Court's canon for treaties is consistent with general rules of interpretation. Indian treaties are to be interpreted as the Indian parties would have understood them, in light of language and cultural barriers.[106] This principle directly honors Indian consent, but in a circumstance when traditional law would also do so. Treaty interpretation in international law seeks to give effect to the parties' intent. When the treaty memorial is in the language of one party, at best imperfectly understood by the other, it is well established that the other party's understanding should define the scope of interpretation.[107] This reading is supported by the relative power of the two parties; there is precedent for considering the circumstances of a weaker party and reading an agreement to meet its reasonable expectations.[108] Domestic contract law has similar doctrines.[109]

However, the rule that federal Indian statutes and executive orders are interpreted favorably to Indians[110] has no analogous support in international law or in the domestic law of contracts. It must rest squarely on the principle of Indian consent. While recognizing Congress' extraordinary power over Indians and tribes, unchecked by political power or other necessary consent of the Indians, the Court has ameliorated its harshness by requiring that measures imposed on Indians be clearly stated.[111] Statutes will not be read technically against Indian interests, any more than will treaties.[112] Uncertainties in statutory words will, like treaty terms, be read to accord with the Indians' reasonable expectations and with our best measure of Indian consent, the understandings in the peace treaties.

The grounding of the Court's decisions tells us how to apply the canons of construction. When lawyers first encounter the canons, they are often perplexed. As there are always ambiguities in a statute, do these rules mean that the Indians always win? They can't mean that. If they don't, how can we tell when the rules matter? Or if the rules don't matter, is the actual rule merely congressional intent and the canons just window dressing? At least one Supreme Court justice read them that way.[113]

The answers depend on the principle of consent. The canons are based on the Court's policy of tempering unchecked federal power by relying on the best available grounds to honor Indian consent. Statutes imposed on

106. *E.g.*, Washington v. Fishing Vessel Ass'n, 443 U.S. 658, 675-76 (1978) (quoting Jones v. Meehan, 175 U.S. 1, 11 (1899)). The concept was first stated in Justice McLean's concurring opinion in *Worcester*, 31 U.S. at 582 (McLean, J., concurring). *See also* The Kansas Indians, 72 U.S. at 760; F. COHEN, *supra* note 2, at 37-38, 296.

107. *See* RESTATEMENT OF FOREIGN RELATIONS § 130 (1962).

108. *See id.*

109. *See supra* note 5.

110. *See infra* notes 111-20 and accompanying text.

111. *See* F. COHEN, *supra* note 3, at 221-25.

112. *See* Bryan v. Itasca County, 426 U.S. 373, 392-93 (1976); *Antoine*, 420 U.S. at 199-200. *Cf.* Jones v. Meehan, 175 U.S. 1, 11 (1899) ("The treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense they would naturally be understood by the Indians.").

113. *See* Northwestern Band of Shoshone Indians v. United States, 324 U.S. 335, 353 (1945) (Reed, J., writing for the Court). *See also* Squire v. Capoeman, 351 U.S. 1, 11 (1956) (Reed, J., dissenting); Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281-91 (1955).

Indians are interpreted as if they were agreements, to sustain what the Indians reasonably could have expected at the time. The benchmark for interpretation is the general understanding in the early peace treaties, when the tribes did in fact consent. We begin with the set of understandings embodied in the early treaties, and we ask whether a later treaty or statute clearly departed from that set of understandings. That is why Indian reservations established under executive orders and statutes are presumed to have the same status as those established under the peace treaties. Properly understood, the implicit judicial message to Congress is, you have plenary power to dictate to the Indians, contrary to their consent, but consent is such a vital constitutional principle that we shall require you to exercise that power openly and plainly.

Some examples involving non-treaty tribes serve to illustrate this analysis. One of the most remarkable uses of the rule that federal statutes be interpreted favorably to Indians occurred in *Alaska Pacific Fisheries v. United States*.[114] In 1887, Metlakatla Indians migrated to Alaska from British Columbia. In 1891, Congress by statute set aside the Annette Islands as a "reserve" for them.[115] Later, the United States as trustee for the Metlakatlas sued non-Indian fishermen to enjoin them from fishing in the ocean waters near the Annette Islands, on the theory that the statute implicitly reserved the waters for the Indians' exclusive use. The Supreme Court unanimously agreed, despite the usually strict rule that federal reservations of navigable waters must be explicit.[116] In this case, the particular facts gave no reason to invoke policies derived from Indian consent and federal trusteeship undertaken by treaty or agreement. Yet the tradition of addressing all Indian nations as if they had agreed is so strong that it was applied even to an "immigrant" tribe.

The Jicarilla Apache Reservation in New Mexico furnishes another example. The Jicarillas have no treaty, and the reservation was set aside by executive order of President Cleveland in 1887. Nevertheless, the tribe's right of internal sovereignty is the same as that of treaty tribes. In one of the leading precedents addressing tribal jurisdiction over non-Indians on the reservation, the Supreme Court explicitly so held.[117] Other examples are the Colville Reservation in Washington, set aside by executive order of President Grant in 1872,[118] and the Hopi Reservation in Arizona, reserved by order of President Arthur in 1884.[119] Although neither tribe has a treaty, their right of self-government is consistently respected on the same basis as that of treaty tribes.[120] Even these terse executive orders are interpreted to apply

114. 248 U.S. 78 (1918).

115. *Id.* at 86.

116. On the usual rule applied to Indians who were not fishermen, see Montana v. United States, 450 U.S. 544, 550-57 (1981).

117. *Merrion*, 455 U.S. at 133 n.1. *See also Cabazon*, 480 U.S. at 204 n.1 (1986); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 326 (1983).

118. *See* Colville Confederated Tribes v. Walton, 647 F.2d 42, 44 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

119. *See* Healing v. Jones, 210 F. Supp. 125 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963).

120. Re Colville, *see* Washington v. Colville Confederated Tribes, 447 U.S. 134, 143 n.12 (1980); *Colville*, 647 F.2d at 44. *See also* White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 138 n.1

principles derived from the peace treaties and linked to them through the principle of consent of the governed.

III. INDIANS AND CONSTITUTIONAL RIGHTS

A. *The Protection of Constitutional Structure.*

Recent efforts to find a constitutional right to tribal sovereignty have at least two implicit premises. One is the fear that tribal sovereignty cannot withstand popular majorities in this country. For most of our history, this premise was clearly correct; a national referendum would have rejected tribal sovereignty. In modern times, Indian self-determination has had a degree of popular political approval, although even today the outcome of a national referendum would be uncertain. In frontier states, popular rejection would have been assured, and many states with reservations would vote that way today.[121] Moreover, the national political wind could shift again; tribes cannot take present tolerance for granted.

The second premise of the constitutional-right-to-sovereignty effort is the assumption that without it, there is no constitutional protection for tribal sovereignty. Modern constitutional law's domination by the jurisprudence of rights induces many to think that judicial protection of extra-majoritarian constitutional rights is the only secure way to protect basic values.

The premise is mistaken. For most of the history of this country, the structural and procedural devices of the Constitution did more to protect personal rights than did its formal personal rights guarantees.[122] The devices to spread power in a federal system with separation of powers, bicameralism, executive veto, judicial independence, and other checks and balances were the major bulwarks of liberty under the original Constitution and indeed until modern times.

The structural devices were inadequate to address some fundamental needs. The rights of black people, the principle of one person one vote, and humane adjustment of the criminal justice system to the industrial state are modern advances under the banner of personal rights. But what relation have these developments to tribal sovereignty?

Tribal sovereignty still rests on an 1832 decision written by a slave-owning judge from Virginia.[123] Modern personal rights law has not advanced the doctrine and is unlikely to do so. Moreover, the sovereignty doctrine has in fact been protected from majority will for over a century by the original constitutional structure, which effectively protects it today. It is structural protections that make the Court's statements about congressional

(1980). Re Hopi, *see* Lomayaktewa v. Hathaway, 520 F.2d 1324, 1326 (9th Cir. 1975), *cert. denied*, 425 U.S. 1118 (1976).

121. *See, e.g.*, D. GETCHES & C. WILKINSON, FEDERAL INDIAN LAW 733 (2d ed. 1986) (reference to 1984 Washington State referendum banning Indian treaty fishing for steelhead, although by a narrow margin).

122. For example, important judicial enforcement of the first amendment did not begin until 1930, but the United States has had substantial freedom of expression throughout its history. *See* Nagel, *How Useful Is Judicial Review in Free Speech Cases?*, 69 CORNELL L. REV. 302, 314-16 (1984).

123. *See* L. BAKER, JOHN MARSHALL: A LIFE IN LAW 715 (1974).

power over tribes far less threatening in practice than they appear in the abstract.

For Indians, the most important structural protection is the federal system itself and the allocation of paramount power to the federal government rather than the states.[124] This prevents both local authority over tribes and popular referenda under state law to determine Indian rights.

During the nineteenth century, this principle was a vital protection for Indian people. As a minority race feared and hated by many white Americans and as owners of vast tracts of land coveted by settlers, Indians and tribes would have suffered much more under state and local jurisdiction than they did under federal. Recall the sorry case of Texas, which had ten years as an independent republic, during which tribes were subject to direct popular rule. Most Texas tribes were either driven out of the state or wiped out, and their lands were taken.[125] Other infamous acts toward Native Americans can be directly traced to local hostility that overcame federal authority. For example, the notorious Sand Creek Massacre was by soldiers commanded from Denver, not Washington.[126] Federal protection of tribal land was often inadequate, but considering voters' attitudes, it is remarkable that so much was protected.

The Constitution does not authorize national referenda, about tribal sovereignty or anything else. National legislation can be adopted only according to the framers' republican system of representation, by approval of three diverse organs of government,[127] a structure that substantially blunts majority oppression. In other words, the plenary power of Congress over Indians and tribes, the bugbear itself, has the important effect of preventing a popular referendum on tribal sovereignty.

The constitutional structure protects tribal sovereignty in a third, equally important, way. The federal judiciary's extraordinary immunity from popular control guards tribal rights from transient popular will, even within the federal government.[128]

In sum, the structure of the original Constitution, so inadequate to black Americans, has provided substantial protection to Native Americans. Even in the modern era of civil rights, Indian people derive more important constitutional protections from the 1787 provisions than from the fourteenth amendment and civil rights statutes. Of course, much harm was done. But given the power of the United States and the attitude of most of its citizens, any constitution that might have been adopted would have had negative impacts on Indian people. The judgments we make now must consider the

124. *Worcester*, 31 U.S. at 557-59.

125. *See* 1 F. PRUCHA, *supra* note 74, at 354-56.

126. *See* C. ABBOTT, S. LEONARD & D. MCCOMB, COLORADO 73-78 (rev. ed. 1982). California supplies numerous examples. At many times in state history, local authorities were able to weaken and even prevent federal protection of Indian rights. The most important was defeating ratification of treaties negotiated with California tribes. *See* 1 F. PRUCHA, *supra* note 74, at 384-87. *See also* California Private Land Claims Act, Mar. 3, 1851, ch. 41, 9 Stat. 631, *interpreted in* Barker v. Harvey, 181 U.S. 481 (1901).

127. *See* INS v. Chadha, 462 U.S. 919 (1983); THE FEDERALIST No. 10 (J. Madison).

128. *See supra* notes 78-84 and accompanying text.

circumstances of past events and the alternative choices that were realistically available.

B. *The Uncertain Protections of Rights.*

The protection of constitutional structure is not alone an adequate response to advocates of a constitutional right of tribal sovereignty. One can concede structural protection, point out its failures, and claim that more protection is desirable. Thus, let us consider the feasibility of a regime of judicial protection of a constitutional right of tribal sovereignty.

1. *Tribes and the Tenth Amendment.*

A basic principle of the Constitution is that the federal government exercises only enumerated powers, and all other governmental powers are allocated to the states. The tenth amendment was meant to make that principle explicit.[129]

Beginning with the celebrated case of *McCulloch v. Maryland*,[130] the Supreme Court repeatedly attempted judicial definitions of state sovereignty protected by the Constitution from federal authority. Two opposing concepts vied for ascendancy: the view that the states' principal protection is through the political process because of their powerful influence over the federal government, and the view that the judiciary should be a primary and vigorous guardian of state sovereignty.[131] While the issue is not dead, the political process rule has been predominant since 1937. Probably the main reason for the triumph of the political process rule is the perceived failure of the Court to articulate a satisfactory theory for tenth amendment adjudications.[132]

If we hypothesize a constitutional right of tribal sovereignty, we must consider how it might work in light of the history of the constitutional right of state sovereignty. Plainly, the concept of protection through political power, the modern Court's principal ground for refraining from judicial enforcement of the tenth amendment, has no application to Indian tribes. A meaningful tribal right against the power of Congress would have to depend on judicial definition and enforcement. The challenge, then, is to explain how the Supreme Court could solve the definitional problem for tribal sovereignty that it failed to solve for state sovereignty.

This is a daunting problem. The constitutional theory of the federal system is that the federal government has full authority to carry out its enumerated powers by directly governing all persons and property in the nation.[133] When it exercises its powers, conflicting state authority is displaced under the supremacy clause.[134] Under modern interpretations of the federal powers to tax, spend, and regulate interstate and foreign commerce, federal

129. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 113 (3d ed. 1986).
130. 17 U.S. (4 Wheat.) 316 (1819).
131. *See* J. NOWAK, *supra* note 129, at 160-69.
132. *See id.* at 164-67.
133. *See id.* at 115-17.
134. U.S. CONST. art. VI, cl. 2.

power can reach a myriad of local activities.[135] To be meaningful, a tribal right of sovereignty would have to carve out a much greater immunity than does existing constitutional law for state sovereignty.

One might respond that the Court has repeatedly said that the tenth amendment does protect the core, the very existence, of state government from federal power,[136] in contrast to statements that tribal power is subject to complete defeasance by act of Congress. Thus, a tribal right of sovereignty would protect the same basic existence for tribal sovereignty. This is true but not terribly significant. Most of the actual complaints that Indian people have about unconsented exercises of federal power over tribal government would require greater judicial protection than guarding bare existence. Most obviously, tribes want authority over non-Indians in tribal territory, and existing federal law severely limits that power.[137] It is hard to see how broadening of that power would follow from judicial protection of a bare right of existence. These difficulties show why some scholars who are dissatisfied with plenary federal power do not dally with reinterpretation of the Constitution and directly invoke principles of international law or propose constitutional amendments.[138]

2. *Tribes and the Bill of Rights.*

Consider also the relation of Indians and tribes to the cherished American constitutional rights protecting property, equal protection of the laws, and due process of law. Even today, these rights are more likely to be invoked against Indian interests than for their protection.

The judiciary has strongly protected property rights against popular infringements. How does that tradition affect Indians? Surely the verdict is mixed at best. It is true that both tribal and individual Indian property has been protected under the fifth amendment,[139] and Anglo-American concepts of the sanctity of property have had something to do with the general federal policy that tribal property should be bought rather than simply seized. Federal restraints on alienation prevented greater loss of Indian property than has occurred.

Yet federal purchases from tribes often were coerced, and the courts developed the evasions that aboriginal and executive order Indian titles are not constitutionally protected.[140] More directly harmful, the Anglo-American notion of individual property rights made tribal property held in common a target for abolition, an aberration that smacked of communism. The

135. *See* J. NOWAK, *supra* note 129, at 160-61.

136. *See, e.g.*, Maryland v. Wirtz, 392 U.S. 183, 196 (1968) (The Court has "ample power to prevent . . . the utter destruction of the State as a sovereign entity."). The one clear holding enforcing this vision of the tenth amendment is Coyle v. Smith, 221 U.S. 559 (1911) (voiding federal statute dictating location of state capital city).

137. *See supra* notes 98-104 and accompanying text; F. COHEN, *supra* note 3, at 252-57.

138. On international law, see, *e.g.*, *supra* note 38 (articles by Professor Williams). Professors Barsh and Henderson propose amending the U.S. Constitution and articulate the form of a proposed amendment. R. BARSH & J. HENDERSON, *supra* note 23, at 279-82.

139. Hodel v. Irving, 481 U.S. 704 (1987); United States v. Sioux Nation, 448 U.S. 371, 417-24 (1980).

140. *See* F. COHEN, *supra* note 3, at 485-99.

government avoided simply grabbing Indian property, but it was quite willing to compel the breakup of tribal common land into individual holdings.[141] And the great concern of Anglo-American law with free alienability of property has caused frequent attacks on Indian land ownership protections.[142]

Equal protection and due process have become important in modern times with the resurgence of exercised tribal sovereignty. At every turn, tribal governments have met with rights-based arguments against the legitimacy of what they do.[143] The Supreme Court had to square the separate governance of Indian country and other distinct rights of Indians with the modern notion of race as a suspect class.[144] It reached the right conclusion but awkwardly, almost apologetically.[145]

In the Indian Civil Rights Act of 1968, Congress imposed rights-based limitations on tribes.[146] While the Supreme Court blunted federal court enforcement of that act,[147] efforts to overturn the Court's holding are alive and well.[148] Undoubtedly, tribal governments have been oppressive at times; all governments are. And it is fair to say that tribal governments could not function in modern America without accommodating modern notions of personal rights in some way. The point is simply that personal rights concepts have been more at war with tribal sovereignty than helpful to it.

In modern battles over tribal sovereignty, non-Indians persistently claim that tribal authority over them is government without representation, without consent of the governed. The claim has obvious force.[149] The usual tribal response, that non-Indians elected to settle in Indian country, is unsatisfactory for two reasons. First, in many cases non-Indians were induced to settle in Indian country by federal assimilation policies that plainly gave little warning of tribal authority.[150] Circumstances gave clear notice only to settlers in Indian Territory while it existed[151] and to those arriving after the modern resurgence of exercised tribal sovereignty. Second, the principle of consent is too fundamental to rest on a permanent waiver by one's ancestors.

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141. *See Lone Wolf*, 187 U.S. 553. *See also* F. COHEN, *supra* note 2, at 208 (disputes about whether tribal ownership was "communism").

142. *See* County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 255-73 (1985) (Stevens, J., dissenting).

143. *See, e.g.*, cases discussed in F. COHEN, *supra* note 3, at 663-72.

144. *See* United States v. Antelope, 430 U.S. 641 (1977); Fisher v. District Court, 424 U.S. 382, 390-91 (1976); *Morton*, 417 U.S. 535.

145. The Court upheld separate legal status for Indians, but it did so on the evasive basis that Indians constitute a "political" rather than a racial classification. *See* F. COHEN, *supra* note 3, at 653-60. Had these challenges succeeded, it is hard to see how tribal self-government could have survived.

Felix Cohen's 1941 treatise argued that tribes are political rather than racial groups as a basis for individual Indians to escape federal oppression. F. COHEN, *supra* note 2, at 177. *See also id.* at 268-72 (existence of tribes in a "political sense").

146. Act of Apr. 11, 1968, Pub. L. No. 90-284, tit. II, 82 Stat. 77-78 (codified at 25 U.S.C. §§ 1301-1303 (1982)).

147. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

148. *See* S. 2747, 100th Cong., 2d Sess., 134 CONG. REC. 11652-55 (1988); *Hearing Before the United States Comm'n on Civil Rights, Enforcement of the Indian Civil Rights Act*, Flagstaff, Ariz. (Aug. 13-14, 1987).

149. *See supra* notes 1, 41-47 and accompanying text.

150. *See* F. COHEN, *supra* note 3, at 128-29, 136-43, 261-66.

151. *See id.* at 770-74.

The plenary power rule, while it has sanctioned federal oppression, provides an important response to this complaint by non-Indian residents of Indian country. The federal government, a government whose political support overwhelmingly favors the values of the non-Indian residents over those of their tribal hosts, provides an avenue of relief if tribal power over non-Indians becomes truly oppressive.[152] Thus, plenary power gives democratic legitimacy to tribal jurisdiction over non-Indians.[153]

C. *Constitutional Structure Remains the Vital Protection.*

In sum, the only constitutional decision that really mattered for Indians was the *Worcester* holding that the Constitution committed overriding power to deal with tribes to the federal government and not to the states. Because of that decision, every lawsuit about tribal sovereignty is, as a constitutional matter, based on construction of federal statutes or treaties. Because of that decision and federal statutes, anyone who covets tribal land or opposes tribal sovereignty must run the gauntlet of federal legislative and administrative processes and of judicial review. And because of the Court's canons of construction, it is not even enough for coveters to get ambiguous federal approval. Structure effectively defangs the specter of plenary federal power. It also legitimizes tribal control over reservations.

CONCLUSION

The constitutional order has shown significant respect for consent of the Indian nations as a just basis for their participation in American society. In particular, the principle of consent justifies judicial rules that protect against easy invasion of tribal rights. Yet departures from the consent principle remain significant; the ultimate power to impose unconsented rules on tribes has been exercised often enough to undermine claims to have justly achieved Indian consent on any lasting and permanent basis. The oppressive conditions of some tribal societies constantly remind us that the status quo is unacceptable. The challenge to achieve a better future is as pressing now as it has ever been.

In response to this challenge, many thinkers pursue visions of greater tribal independence. However, attempting to realize these visions under the Constitution's theories of individual rights guarded by the judiciary is not a promising path. Throughout the nation's history, opponents of Indians have made claims of individual constitutional rights and of states' tenth amendment rights to try to defeat Indian interests. While it is tempting to try to fight fire with fire by erecting a tribal "tenth amendment" right, structural constitutional protections are more appropriate to the status of tribes as groups and governments. These protections require vigilance and effort,

152. *See supra* note 63 (federal regulation of gambling in Indian country); Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981) (sustaining non-Indian corporation's cause of action for damages against tribes). The *Dry Creek Lodge* decision was a very doubtful interpretation of existing law, *see* F. COHEN, *supra* note 3, at 668 n.52, but it illustrates the potential power of Congress.

153. *See Merrion*, 455 U.S. 130.

which could be dangerously relaxed if tribes came to rely on the judicial paternalism of rights-based status. Much more tribal independence can be achieved within the existing system, by doing the hard work of building up tribal governments and improving tribal economies.

Other visions go beyond the existing constitutional order and seek a more securely independent status for tribes under international law or under formal amendments to the Constitution.[154] This quest should continue to have the attention of contemporary political philosophy. It too takes the constitutional value of consent of the governed as a fundamental premise.

154. *See supra* note 138 and accompanying text.