COMMENT

FEDERAL PLENARY POWER IN INDIAN AFFAIRS AFTER *Weeks* AND *Sioux Nation*

Supreme Court opinions at the turn of the century established one of the fundamental rules of federal Indian law: Congress has a broad "plenary power" to administer the property and affairs of Indian tribes. In *Lone Wolf v. Hitchcock*,[1] the Court characterized the plenary power as "a political one, not subject to be controlled by the judicial department of the government."[2]

As a matter of constitutional law, the *Lone Wolf* plenary authority rests on vague and extraordinarily unexamined foundations. The courts have accepted without question the proposition that Congress has the constitutional authority to manage internal tribal affairs as well as to define the relationship between states, tribes, and the federal government.[3] Indian tribes traditionally have been unsuccessful in litigation involving the plenary power rule because their aboriginal and treaty rights generally are not recognized as limits upon this federal power.[4]

During the past century, the courts' deference to federal Indian legislation has permitted frequent and radical shifts in federal policy often with disastrous impact on the tribes. In 1887, the federal Allotment Acts were enacted, designed to transform the Indians into small farmers and to assimilate them into mainstream American culture.[5] Under the regime of the allotment statutes, between 1887 and 1934 the tribes lost ninety million acres of reservation lands, comprising more than eighty percent of their former holdings.[6] In 1934 the allotment

---

[1] 187 U.S. 553 (1903).

Lone Wolf, principal chief of the Kiowa tribe, sued in equity to enjoin the Secretary of the Interior from opening the Kiowa, Comanche, and Apache reservation to white settlement. The allotment and opening were enacted by Congress with the Act of June 6, 1900, ch. 813, § 6, 31 Stat. 672, 676-81, over the opposition of the tribes, who considered the bill a violation of the Medicine Lodge Treaty of Oct. 21, 1867, 15 Stat. 581 (1868).

For a discussion of the cases leading to *Lone Wolf*, see *infra* text accompanying notes 37-93.

[2] 187 U.S. at 565.

[3] The sources of plenary power are discussed *infra* at notes 37-101 and accompanying text.

[4] Aboriginal title property rights are discussed *infra* at note 57; the status of treaty rights is discussed *infra* at notes 52-62 and accompanying text.

[5] General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 381 (1976)).

[6] *Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess. 16 (1934) (Memorandum of John Collier), *reprinted in* D. GETCHES, D. ROSENFELT & C. WILKINSON, FEDERAL INDIAN LAW 73-75 (1979). *See generally* D. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS (F. Prucha ed. 1973).

policy was abandoned in favor of a different congressional conception of the tribes' future. An "Indian New Deal" was declared[7] in which European-style elective governments were imposed upon reservations in a manner that has left bitter divisions in many tribes.[8] By 1953, yet another policy had emerged from Congress, this time to "terminate" the tribes through a removal of the longstanding federal recognition and support of the Indian governments.[9] The termination acts of the 1950s were carried out with devastating effects on several once-prosperous tribes.[10]

For all their adverse impact, each of these programs was believed by Congress to be a reform when first enacted. But Congress's authority over Indians has not always taken the form of sweeping and well-intentioned policy initiatives. Often the forces lobbying for Indian legislation are groups eager for access to tribal land and resources,[11] or the representatives of state governments that have steadfastly opposed the interests of tribes within their boundaries. In the current Congress, bills have been introduced that would abrogate the treaty fishing rights of certain tribes[12] or require "settlement" of Indian treaty land claims in certain states by extinguishing judicial remedies currently available to

---

[7] Indian Reorganization (Wheeler-Howard) Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (1976)). *See generally* Comment, *Tribal Self-Government and the Indian Reorganization Act of 1934,* 70 MICH. L. REV. 955 (1972).

[8] *See generally* L. HAUPTMAN, THE IROQUOIS AND THE NEW DEAL (1981); G. TAYLOR, THE NEW DEAL AND AMERICAN INDIAN TRIBALISM (1980).

[9] *See, e.g.,* H.R. Con. Res. 108, 83d Cong., 1st Sess. (1953) (expressing sense of Congress that certain tribes should be freed from federal supervision); Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified as amended in scattered sections of 18, 28 U.S.C.) (extending state jurisdiction over Indian reservations in five states without consent of the tribes). *See generally* Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians,* 22 U.C.L.A. L. REV. 535 (1975).

[10] The Menominee Tribe in Wisconsin was "terminated" in 1954. Menominee Termination Act, ch. 303, 68 Stat. 250 (1954). The tribe's experience is described in S. REP. NO. 604, 93d Cong., 1st Sess. (1973). The Menominee were "restored" to their federal status in 1973, Menominee Restoration Act, Pub. L. No. 93-197, 87 Stat. 770 (1973) (codified at 25 U.S.C. §§ 903-903f (1976)).

The current federal policy is to support the "self-determination" of the tribes, an express repudiation of the disastrous termination policy. *See, e.g.,* Indian Self-Determination Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 450a-450n (1976)); President's Special Message to Congress on Indian Affairs, PUB. PAPERS 564 (1970).

[11] Historically, the best illustration of this conflict is the battle between tribes and the railroad companies over federal legislation granting rights-of-way to the railroads across tribal land. *See* I. CLARK, THEN CAME THE RAILROADS 119-30 (1958); *see also* Cherokee Nation v. Southern Kan. Ry. Co., 135 U.S. 641 (1890) (challenge by the tribe to federal power of eminent domain over reservation land).

[12] Steelhead Trout Protection Act, S. 874 97th Cong., 1st Sess. (1981). *See generally Steelhead Trout Protection Act: Hearings on S. 874 Before the Senate Select Comm. on Indian Affairs,* 97th Cong., 1st Sess. (1981).

This is not to suggest that tribes have never secured favorable legislation. *See, e.g.,* Act of Dec. 15, 1970, Pub. L. No. 91-550, 84 Stat. 1437 (1970) (restoring the Blue Lake to Taos Pueblo). But even congressional action considered especially benevolent, championed by bona fide "friends of the Indian," often has been strenuously opposed by the tribes themselves.

tribes.[13] Similar political battles are attested to by the many federal dams that have flooded reservation land from New York to Arizona since the Second World War.[14]

Two recent cases in the Supreme Court indicate that the breadth of the plenary power rule is shrinking and that tribes may now be able to obtain judicial review of federal Indian legislation. In *Delaware Tribal Business Committee v. Weeks,*[15] the Court reached the merits of a due process challenge to legislation distributing funds to certain Delaware Indians. Although deferring to Congress's "traditional broad authority over . . . lands and property held by recognized tribes,"[16] the Court rejected the notion that all federal legislation concerning Indian tribes is immune from scrutiny.[17] The case has broad implications in an area where very few guidelines are available to tribal litigators and the courts.

Another case, *United States v. Sioux Nation,*[18] examined the plenary power in the context of a takings clause dispute, and effectively overruled *Lone Wolf*'s conclusive presumption of congressional good faith in Indian legislation.[19] Substituting a test based on the "traditional function of a trustee,"[20] the Court for the first time described fiduciary limits to Congress's authority in Indian affairs while reiterating the *Weeks* rule that Indian legislation is amenable to judicial review.[21]

Neither *Weeks* nor *Sioux Nation* abandoned the idea of plenary

---

[13] Ancient Indian Land Claims Settlement Act, H.R. 5494, 97th Cong., 2d Sess. (1982); S. 2084, 97th Cong., 2d Sess. (1982). The bills extend to only New York and South Carolina, despite the existence of similar claims in Connecticut, Florida, Louisiana, and Massachusetts. *See Land claims by Indians would be severely limited by bill due today,* Phila. Inquirer, Feb. 9, 1982, at 9-A, col. 4.

The eastern Indian land claims are based on the 1970 Trade and Intercourse Act which requires federal approval of all state land transactions with Indian tribes. The pending bills would ratify retroactively the state acts that appropriated Indian land and limit tribal remedies to a determination by the Secretary of the Interior of monetary compensation. A negotiated settlement of similar claims has been achieved with tribal support in two other eastern states. *See* Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, 94 Stat 1785 (codified at 25 U.S.C. §§ 1721-1735 (Supp. IV 1980)); Rhode Island Indian Claims Settlement Act, Pub. L. No. 95-395, 92 Stat. 813 (1978) (codified at 25 U.S.C. §§ 1701-1712 (Supp. IV 1980)).

[14] *See, e.g.,* V. DELORIA, OF UTMOST GOOD FAITH 200-08 (1971) (reaction of tribal leaders to dams proposed for the Fort Berthold Reservation). These controversies have spilled over into the courts. *See, e.g.,* Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960).

[15] 430 U.S. 73 (1977).

[16] *Id.* at 85.

[17] *Id.* at 83-84. *See infra* note 35.

[18] 448 U.S. 371 (1980).

[19] *Id.* at 414-15.

[20] *Id.* at 409 (quoting Three Tribes of Fort Berthold Reservation v. United States, 390 F.2d 686 (Ct. Cl. 1968)).

[21] 448 U.S. at 413. Previous cases had suggested without elaborating that there are constitutional limits to congressional power. *See infra* note 142 and accompanying text.

power. Both cases rejected the notion that plenary power legislation is nonjusticiable, but the Court maintained its broad deference to the legislative branch. Much will depend upon whether *Weeks* and *Sioux Nation* are given a broad or narrow construction in future litigation. Read narrowly, the cases do not articulate a comprehensive theory of tribal rights from which limitations upon the legislative power may be implied; rather, their precise holdings set forth only specific forms of fifth amendment protection that the tribes may assert against harmful government action.

A potentially wide area of justiciable questions has therefore opened without substantial guidance for tribal litigants or the courts. This Comment examines the scope of the plenary power rule in the wake of *Weeks* and *Sioux Nation,* and the continuing problem of framing constitutional arguments to protect Indian tribes' political and property rights. It is suggested that *Weeks* and *Sioux Nation* have established a two-step scrutiny of federal Indian legislation. The first of these steps is to determine whether Congress has in fact legislated on behalf of the tribes as a trustee, or rather has legislated pursuant to its general authority, potentially adverse to tribal interests. The second step involves one of two levels of constitutional review. If a given enactment is within Congress's traditional administrative authority, the Supreme Court has required only that it meet a minimum rationality equal protection standard. If, on the other hand, Congress has acted outside its administrative role, the source of its power must be identified and appropriate constitutional limitations applied. Thus, when legislation falls outside the boundaries of the administrative power, the problem of tribal constitutional rights must be confronted directly.

Part I of this Comment describes the constitutional bases of the congressional power in Indian affairs and the legal doctrines that have grown up around it, before taking a closer look at the modern contours of the plenary power rule. Part II proposes an expansion of the test developed in *Weeks* and *Sioux Nation* to distinguish Congress's legitimate administrative legislation from other enactments, and describes the limits of constitutional rights and remedies currently available to the tribes, and the need to develop a broader constitutional theory of Indian tribal rights.

I. CONGRESSIONAL POWER OVER INDIAN TRIBES

The plenary power rule can be best summarized with the observation that treaties and statutes are of equal force under United States law. With the passage of a subsequent statute, Congress and the President have the legal authority unilaterally to modify or abrogate the

treaty-based "rights" of tribes.[22] The effect of the rule is to deny tribes judicial protection for their basic political and property rights.

There are several corollaries to this rule that moderate its tremendous potential for adversely affecting Indian rights. One requires that Congress must have intended to abrogate a treaty, and that such an intent will not be lightly implied.[23] Another holds the executive branch to a higher fiduciary standard than Congress. Administrative agencies are held accountable to fulfill the commitments made by Congress.[24] Finally, a third limitation to the rule is that the plenary power applies only to Indians in their tribal relations.[25] All Indians, however defined, are United States citizens,[26] and as individuals have the same legal and constitutional rights against the United States as other citizens.[27]

Because Indian tribes were incorporated into the federal system by treaty and not by the specific terms of the Constitution, the Constitution has not been easily applied to questions of federal power over Indian tribes. Because the political and property rights of Indian tribes are defined by treaties, those rights have not been adequately protected by the Constitution or the Bill of Rights.

---

[22] The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1870). *See infra* notes 52-62 and accompanying text.

[23] *See, e.g.,* Menominee Tribe v. United States, 391 U.S. 404 (1968). The rules governing the abrogation of treaty rights are discussed in detail in Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time is That?,* 63 CALIF. L. REV. 601, 623-45 (1975).

[24] *See* Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians,* 27 STAN. L. REV. 1213, 1230-34 (1975). *But cf.* Wilkinson & Volkman, *supra* note 23, at 632-33 (Second Circuit has applied doctrine that Congress can "implicitly delegate" to administrative agencies its power to abrogate treaties).

[25] *See* United States v. Antelope, 430 U.S. 641, 646 (1977); This refinement is the product of an assumption that tribes are "wards" and individual Indians are entitled to "emancipation" when they have abandoned their tribal ways.

Whether a group of ethnic or racial Indians is considered a tribe is a complex legal issue. "Federal recognition" by treaty or statute is one criterion, and the Interior Department has regulations under which a tribe may petition for recognition, 25 C.F.R. §§ 54.1-.11 (1981). Federal recognition is typically labeled a political question analogous to the recognition of foreign governments, but the courts will not permit an "arbitrary" extension of tribal status. *See, e.g.,* Baker v. Carr, 369 U.S. 186, 215-17 (1962). A court may find that a tribe no longer exists, *see* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir.), *cert. denied,* 444 U.S. 866 (1979), or infer recognition and require the executive branch to extend assistance, *see* Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

[26] Since 1924, all Indians born within the United States have been citizens, pursuant to the Indian Citizenship Act of 1924, 8 U.S.C. § 1401(b) (Supp. IV 1980) (as amended). Before 1924, many Indian people had been naturalized under the terms of treaties and statutes. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 639 (1982 ed.).

[27] *See generally* Johnson & Crystal, *Indians and Equal Protection,* 54 WASH. L. REV. 587, 592-94 (1979).

Individual Indians also have a full range of federal legal and constitutional rights against states. *See, e.g.,* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973). The application of federal constitutional rights to actions by tribal governments, however, is more problematic. *See, e.g.,* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

A. *The* Lone Wolf *Doctrine*

The historic contours of the plenary power rule are best illustrated by the case of *Lone Wolf v. Hitchcock*.[28] A watershed case in the development of federal Indian law, *Lone Wolf* incorporated three emerging doctrines of the late nineteenth century under the rubric of federal "plenary power." First, the Supreme Court reiterated the rule that Congress has authority "to administer the property of the Indians . . . by reason of its exercise of guardianship over their interests."[29] Second, the Court held that this administrative authority "might be implied, even though opposed to the strict letter of a treaty with the Indians,"[30] thus repeating the rule that Congress has power to abrogate the provisions of an Indian treaty. Third, the *Lone Wolf* decision applied a variant of the political question doctrine to hold that challenges to congressional Indian legislation were nonjusticiable. "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."[31]

Lone Wolf's complaint challenged legislation of 1900 that had opened to settlement a major part of the Kiowa, Comanche, and Apache reservation.[32] The act passed Congress over emphatic tribal opposition on the grounds that the Act would violate the Medicine Lodge Creek Treaty of 1867. That treaty recognized and guaranteed the Indians' title to their reservation land, and provided that any future land cessions would be invalid without the consent of three-quarters of the adult male members of the reservation.[33] The claim in *Lone Wolf* was an important one for the tribes, because for the first time the Court was presented with a direct challenge to the deprivation of property rights previously recognized under a treaty. Lone Wolf's lawyers argued that, although Congress may have the power to abrogate treaties made with

---

[28] 187 U.S. 553 (1903).

[29] *Id.* at 565; *see also* Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902).

[30] 187 U.S. at 565; *see also* The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870).

[31] 187 U.S. at 565.

[32] The statute allotted separate plots of land to individual Indians, and sold the "surplus" of 2.15 million acres to white homesteaders. *Id.* at 555. The Indians were paid two million dollars for the surplus lands. *See generally* W. HAGAN, UNITED STATES-COMANCHE RELATIONS: THE RESERVATION YEARS (1976). Lone Wolf retained Judge William Springer, a former congressman and former federal judge in the Indian territory, to represent the tribes. When the case reached the Supreme Court, Springer was joined by Hampton L. Carson, a prominent lawyer and professor at the University of Pennsylvania Law School. Carson was hired by the Indian Rights Association in Philadelphia because the case was seen as urgent to protect the property rights of all Indians. *Id.* at 263, 280-81.

[33] *See supra* note 1. For a further discussion of the circumstances surrounding *Lone Wolf*, see W. HAGAN, *supra* note 32. *See also infra* notes 149-60 and accompanying text.

the Indians, the act was nevertheless a violation of the Indians' constitutional right not to be deprived of their property without due process of law.[34] Rejecting this claim, the Court went beyond its prior rulings to make clear that Indian tribes had no constitutional rights, and that the Court would infer no constitutional limits upon congressional authority over tribal affairs.

Because the Court in *Lone Wolf* spoke in broad constitutional terms, the constitutional foundations of the plenary power require a special examination. The opinion in *Lone Wolf* was a sweeping disavowal of any judicial power of review in disputes between Congress and the tribes. The nonjusticiability branch of *Lone Wolf* is the weakest link in the case today. Explicitly overruled in the contexts of *Weeks* and *Sioux Nation,*[35] the broad rule is equally invalid under modern political question analysis.[36] Recent cases, however, have left intact two other aspects of the traditional rule: the congressional power to abrogate treaties, and the notion that Congress's power extends to the internal affairs of the tribes.

---

[34] *See* Brief and Argument of Appellants, Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). Lone Wolf's lawyers urged that the case presented a judicial and not a political question, arguing that the tribes' treaty created vested property rights within the protection of the constitution. *Id.* Ironically, modern Indian land claims cases have vindicated this argument by distinguishing "aboriginal title" from treaty-recognized title, and extending fifth amendment protection only to the latter. *See infra* notes 57 & 189 and accompanying text.

[35] *See* United States v. Sioux Nation, 448 U.S. 371, 413 (1980); Delaware Tribal Business Committee v. Weeks, 430 U.S. 73, 83-84 (1977). The Court in *Weeks* reached the justiciability issue as a threshold question. Although the Court spoke of "the broad congressional power to prescribe the distribution of property of Indian tribes," *Weeks,* 430 U.S. at 84, and noted that the federal authority was " 'drawn both explicitly and implicitly from the Constitution itself,' " *id.* at 85 (quoting Morton v. Mancari, 417 U.S. 535, 551-52 (1974)), it held that the federal power was not immune from judicial scrutiny. " 'The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute.' " *Id.* at 84 (quoting United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946) (plurality opinion)). Three years later, in *Sioux Nation,* the Court rejected an argument by government attorneys that *Lone Wolf* is generally applicable to all takings of treaty-protected land. The Court distinguished the two cases, noting that in *Lone Wolf:*

> [T]he Court's conclusive presumption of congressional good faith was based in large measure on the idea that relations between this nation and the Indian tribes are a political matter not subject to judicial review. That view, of course, has long since been discredited in takings cases and was expressly laid to rest in *Delaware Tribal Business Committee v. Weeks.*

Sioux Nation, 448 U.S. at 413.

[36] *See* Baker v. Carr, 369 U.S. 186, 215-17 (1962). The Supreme Court's opinion in *Baker v. Carr* used a series of illustrations to demonstrate the application of the political question rule, including as one example "the status of Indian tribes." *Id.* at 215-16. The Court applied the same analysis to this question as it did to other "political" issues, but it did not mention the broader plenary power notion. Nevertheless, the Court's rejection of "semantic cataloging" and its demand that political questions be narrowly defined requires at a minimum that federal courts henceforth carefully weigh the factors for or against judicial review in Indian cases. For a situation in which the political question rule may still be applicable, see *infra* note 50.

B. *The Sources of Congressional Power*

The Constitution grants to the legislative branch specific powers relevant to the conduct of Indian affairs: the authority to conduct some aspects of foreign relations and national defense,[37] and to regulate commerce,[38] the latter grant explicitly mentioning Indian tribes. In addition to these powers, which have a clear textual basis, the courts have inferred a set of administrative powers possessed by Congress to regulate the property and internal affairs of Indian tribes. Although it is this administrative power that underlies the Court's broadest plenary power rulings,[39] the origin of the power within the Constitution has proved difficult to identify.

The inquiry into express and implied congressional powers is significant for two reasons. First, it is useful in determining whether a legislative action is within the dictates of *McCulloch v. Maryland*[40] and *Kansas v. Colorado*,[41] which held that Congress has no power to act in a given area unless authority is granted to it in its enumerated powers. Second, it is useful because identifying the origin of a congressional action is a necessary first step in discovering the relevant constitutional standards to apply.

1. Trade and Foreign Relations Powers

In *Worcester v. Georgia*,[42] Chief Justice John Marshall wrote that the Constitution "confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians."[43] During the early years of the Constitution, Marshall's observation was correct. The federal government had not yet had occasion to extend its jurisdiction over the internal affairs of Indian tribes. Debates over the congressional power in Indian affairs focused on questions of federalism and on the attempt to define a status for Indian nations under United States and international law.[44]

---

[37] The relevant provisions include the Senate's power to ratify treaties, U.S. CONST. art. II, § 2, cl. 2, and the legislative powers concerning national defense and war, U.S. CONST. art. I, § 8.

[38] U.S. CONST. art. I, § 8, cl. 3 provides Congress with the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

[39] *See infra* notes 63-101 and accompanying text.

[40] 17 U.S. (4 Wheat.) 316 (1819).

[41] 206 U.S. 46 (1907). This basic constitutional doctrine has been obscured by the plenary power rule. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 92 (1942 ed.).

[42] 31 U.S. (6 Pet.) 515 (1832).

[43] *Id.* at 559.

[44] Indian affairs were administered by the War Department, Act of Aug. 7, 1789, ch. 7, § 1,

Marshall characterized the tribes as "domestic dependent nations"—independent political societies under the control and protection of the United States.[45] The tribes, however, had not sacrificed their pre-existing sovereignty in accepting the guardianship of the federal government.[46] "A weak state," wrote Marshall, "in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state."[47]

The Marshall Court Indian cases inferred from the constitutional grant of commerce and foreign affairs powers to the federal government a rule of exclusive federal control over intercourse with the Indian nations.[48] Treaties between the tribes and the federal government set out the guidelines for the relationship, and those treaties were the law of the land under the Constitution.[49] Conceptually, the Marshall era cases treated the Indian nations as separate entities retaining significant remnants of their past sovereignty. The Constitution was not written to reach into the domestic affairs of foreign sovereigns, and the Marshall cases produced a theoretical structure in which the surviving "zones" of Indian sovereignty coexisted with federal and state sovereignty under the constitutional scheme.

Because the specifically enumerated constitutional powers are premised on the government-to-government relationship between the United States and Indian tribes, they give Congress responsibility for regulating the federal government's relationship with the tribes. But

---

1 Stat. 49, until 1849, Act of Mar. 3, 1849, ch. 108, § 5, 9 Stat. 395. This illustrates that Indian matters were considered "more an aspect of military and foreign policy than a subject of domestic or municipal law." F. COHEN, *supra* note 26, at 208 (1982 ed.) (footnotes omitted).

The decisions of the Marshall era also established that tribal sovereignty within Indian territory was exempt from state control.

> The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.

Worcester, 31 U.S. at 561; *see also* United States v. Mazurie, 419 U.S. 544 (1975); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164 (1973).

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

[46] *Worcester*, 31 U.S. at 560-61. Marshall wrote that "the settled doctrine of the law of nations [i.e., international law] is, that a weaker power does not surrender its independence—its right to self-government—by associating with a stronger, and taking its protection. *Id.*

[47] *Id.* at 561.

[48] *Id.* The conflict between the Cherokee Nation and the state of Georgia that led to *Worcester* also divided the federal government, with President Andrew Jackson threatening to defy the Supreme Court opinion by John Marshall. *See generally* Burke, *The Cherokee Cases: A Study in Law, Politics and Morality*, 21 STAN. L. REV. 500 (1969).

[49] *Worcester* and *Cherokee Nation* both analyzed the specific terms of treaties with the Cherokee to decide questions of federal law, and applied the supremacy clause to bind the states as well as the federal government to the terms of the treaties.

they do not address the authority of Congress to interfere with the internal management of tribal affairs. For example, in non-Indian contexts, the foreign affairs and treaty powers, which clearly contemplate some form of intercourse with distinct sovereigns, are not thought to confer broad powers on Congress to legislate with respect to the domestic affairs of foreign nations.[50] Likewise, the grant of authority in the commerce clause, which confers power "To regulate Commerce . . . with the Indian Tribes," is analogous to the power given Congress to regulate international and interstate trade. Although Congress may reach some internal state activity under the interstate commerce clause, there must be a showing that the activity regulated has a substantial effect upon commerce.[51]

Congress's foreign affairs power has also been found by the Court to authorize the abrogation of existing treaties between the United States and foreign governments by the enactment of a subsequent statute.[52] In 1870, the Court extended this rule to Indian treaties in *The Cherokee Tobacco*.[53] The *Cherokee Tobacco* principle was expanded in subsequent cases and became one of the key aspects of the ubiquitous *Lone Wolf* decision. As such it is the only textual constitutional basis for the *Lone Wolf* holding.

The treaty abrogation rule is particularly important to the Indian nations because the primary source of tribal rights in United States law is the body of bilaterally negotiated treaties and agreements.[54] More than 400 separate treaties were concluded with the tribes prior to 1871, when an act of Congress put an end to treaty-making.[55] Unless repealed by a later statute, the treaties and treaty rights are still valid

---

[50] Perhaps the political question doctrine should apply to Indian affairs to the extent that Indian tribes are analogous to foreign nations. *But see* Baker v. Carr, 369 U.S. 186, 215-17 (1962) (the recognition of tribes, "While it reflects familiar attributes of political questions," also is unique because of the historical relationship between Indians and the United States) (footnotes and citations omitted); *see also supra* notes 25 & 35-36.

[51] The traditional law governing the reach of the interstate commerce clause might be enlisted to help define the scope of the Indian commerce power. *See generally* Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 996-1000 (1981). *See also* F. COHEN, *supra* note 26, at 208.

[52] "This Court has also repeatedly taken the position that an Act of Congress, . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." Reid v. Covert, 354 U.S. 1, 18 (1957).

[53] 78 U.S. (11 Wall.) 616 (1870). The Court in *Cherokee Tobacco* upheld application of a general federal tax on tobacco produced and sold within the Cherokee territory, despite a prior treaty exempting the tribe's tobacco from such taxes. The Court did not consider the rule to be constitutionally mandated: "The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution." *Id.* at 621.

[54] *See* Wilkinson & Volkman, *supra* note 23, at 602-08. The entire body of Indian treaties is collected in 2 C. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES (1904); *see also* F. COHEN, *supra* note 26, at 62-70.

[55] Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified at 25 U.S.C. § 71 (1976)).

today; the 1871 act provided that "no obligation of any treaty lawfully made and ratified . . . shall be hereby invalidated or impaired."[56]

The provisions of the treaties vary considerably, ranging from promises of peace and friendship to detailed land cessions, exchanges, and recognition of title.[57] Many elaborate the terms of criminal and civil jurisdiction, taxation, and trade regulation in Indian country.[58] Typically the documents reserve important property rights for the tribes in their ceded lands, particularly special hunting and fishing rights.[59]

Lone Wolf was a significant addition to the earlier treaty abrogation cases[60] because it addressed for the first time a deprivation of tribal property rights previously recognized under a treaty, and not the terms of the government-to-government relationship between the United States and an Indian nation.[61] Ironically, the rule permitting treaty abrogation came at the same time that the international aspect of Indian-white relations had begun to change. Increasingly able to assert full control over tribal groups, the United States government began to abrogate treaties, using its foreign relations powers, in order to reach the

---

[56] *Id.* Congress cannot prevent the President from negotiating treaties; the Act is usually understood as a statement by the Senate that it would no longer ratify any treaties. After 1871, the practice of bilateral negotiations continued, however, and the "agreements" with tribes were submitted to both houses of Congress for ratification.

[57] Treaty-recognized title takes on particular significance in Indian claims cases, because aboriginal title to lands is not considered compensable under the fifth amendment. Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 279-82 (1955). The rule is traced back to Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823). *See generally* Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered,* 31 HASTINGS L.J. 1215 (1980).

[58] Some treaties involved an express grant of jurisdiction over internal tribal affairs to Congress; more commonly, there is an enumeration of the respective powers of the tribal and federal governments.

[59] There is a large body of case law and literature devoted to defining and enforcing the more unusual tribal property rights. In the area of hunting and fishing rights, see Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); Menominee Tribe v. United States, 391 U.S. 404 (1968). *See generally* Comment, *Indian Fishing Rights Return to Spawn: Toward Environmental Protection of Treaty Fisheries,* 61 OR. L. REV. 93 (1982). Indian water rights are discussed in Arizona v. California, 373 U.S. 546, 595-601 (1963), and Winters v. United States, 207 U.S. 564 (1908). *See generally* Note, *Indian Reserved Water Rights: The* Winters *of Our Discontent,* 88 YALE L.J. 1689 (1979).

[60] The power of Congress to abrogate treaties was given its first general recognition in Taylor v. Morton, 23 F. Cas. 784 (C.C.D. Mass. 1855) (No. 13,799). *See also* La Abra Silver Mining Co. v. United States, 175 U.S. 423, 460 (1899); The Chinese Exclusion Case, 130 U.S. 581, 600 (1889); United States v. Forty-Three Gallons of Whiskey, 108 U.S. 491, 496 (1883); The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870).

[61] The Court had already allowed Congress: to grant railroad companies unauthorized rights-of-ways across tribal land, Cherokee Nation v. Southern Kansas Railway Co., 135 U.S. 641 (1890); to lease tribal resources for development without the tribe's consent, Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902); to fix the rolls of tribal membership, Stephens v. Cherokee Nation, 174 U.S. 445 (1899); and, to tax goods designated as tax exempt under a treaty, The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1870). Lone Wolf's lawyers attempted to distinguish these cases. *See supra* note 34.

internal affairs of the tribes.[62] Although cases such as *Lone Wolf* relied upon Congress's power to abrogate treaties to deny judicial review, the legislative "power" they described is a nontextual one: that of an implied federal administrative or guardianship role over the dependent Indian communities.

2. The Administrative Power

Both of the famous "Cherokee cases" authored by John Marshall—*Worcester v. Georgia*[63] and *Cherokee Nation v. Georgia*[64]—explicitly recognized the right of Indian nations to self-government and exclusive jurisdiction within their own boundaries.[65] The Marshall Court holdings were based upon textual grants of power to the legislature that could be found within the Constitution. Later cases, reflecting a shift in the power status between the tribes and the federal government, held that Congress has an implied administrative power[66] over the property and internal affairs of the Indian tribes. In *United States v. Kagama*[67] the Court was unable to find significant guidance in the Constitution to explain such a power. Changing Marshall's conception of the tribes, the Court held that, quite apart from any express grant of power within the Constitution,[68] Congress could legislate with respect to the internal affairs of the tribes. After *Kagama,* the implied federal authority grew to assume the dimensions of a general federal police power over Indian affairs.[69] At its apogee, exercises of the administrative power were treated as nonreviewable by the courts.[70] More recently, however, the courts have recognized justiciable limitations upon the administrative power, and this section attempts to trace the development of this administrative authority.

---

[62] At the same time, the Senate had determined that it would no longer ratify Indian treaties. *See supra* notes 55-56 and accompanying text. Because of the changed status of Indian tribes within the United States, the treaty abrogation power has come under increasing criticism. *See infra* notes 168-71 and accompanying text.

[63] 31 U.S. (6 Pet.) 515 (1832).

[64] 30 U.S. (5 Pet.) 1 (1831).

[65] 31 U.S. at 552-54, 556; 30 U.S. at 16.

[66] This Comment has avoided the label "plenary power" by dividing its contents into three distinct, yet related aspects. *See supra* notes 29-31 & 35-36 and accompanying text. The term "administrative power" is meant to include those congressional powers not granted expressly by the Constitution, but rather arising out of the unique trust relationship thought to exist between the federal government and the Indian tribes.

[67] 118 U.S. 375 (1886).

[68] *Id.* at 378-80.

[69] *See* F. COHEN, *supra* note 26, at 220 (In Indian matters, "Congress can exercise broad police power, rather than only the powers of a limited government with specifically enumerated powers.").

[70] *See, e.g.,* Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902). *See also supra* notes 34-36 and accompanying text.

The *Kagama* case arose from a federal statute passed in 1885 extending federal criminal jurisdiction for certain major crimes into Indian reservation territory.[71] Kagama, indicted for the murder of another Indian on the Hoopa Valley Reservation, challenged the indictment on the grounds that federal criminal jurisdiction could not constitutionally reach into Indian territory.[72] The Court found that Congress had full power to enact the statute even though the express terms of the Constitution failed to afford it such authority.[73]

The Court advanced two separate explanations for the constitutional oddity of a federal legislative power without a constitutional source. First, the Court promulgated what can be called the "it-must-be-somewhere" doctrine. Because the Indian nations were within the territorial boundaries of the United States, the Court concluded that the power to regulate their affairs resided of necessity either in the states or the federal government.[74] Earlier cases had established that the states had no jurisdiction over internal workings of tribal societies.[75] The Court therefore concluded that "the right of exclusive sovereignty . . . must exist in the National Government, and can be found nowhere else."[76]

The it-must-be-somewhere notion is clearly at odds with our normal understanding of the doctrine of enumerated powers. The Court in *Kansas v. Colorado*[77] laid to rest the idea that federal power could be assumed clearly upon a finding of an absence of state power. Perhaps for this reason, the *Kagama* Court offered a second rationale for the

---

[71] 118 U.S. at 376-77.

[72] The earlier case of *Ex parte* Crow Dog, 109 U.S. 556 (1883), had held that federal jurisdiction did not extend over crimes committed on Indian territory when both the criminal and the victim were Indians. The statute challenged in *Kagama* was enacted to reverse *Crow Dog.* 118 U.S. at 382-83.

[73] The Court rejected the Indian commerce clause and the clause in the fourteenth amendment excluding Indians not taxed from apportionment decisions as possible sources of congressional authority. *Id.* at 378. The Court stated that "[w]e are not able to see, in either of these clauses of the Constitution and its amendments, any delegation of power to enact a code of criminal law for the punishment of the worst class of crimes known to civilized life when committed by Indians . . . ." *Id.* at 379. The Court also disavowed any reliance on the territorial clause. *Id.* at 380.

[74] *Id.* at 379-80. "There exist within the broad domain of sovereignty but these two." *Id.* at 379. The *Kagama* conception that the federal and state governments were the only source of sovereign power within U.S. borders was flatly inconsistent with the conclusion reached in *Worcester v. Georgia* and *Cherokee Nation v. Georgia* that the Indian tribes possessed sovereign powers pre-dating the formation of the Union, and that these powers had not been sacrificed when the tribes accepted the protection of the federal government. *See supra* notes 45-47 and accompanying text.

[75] *See supra* note 44.

[76] 118 U.S. at 380; *see also* Murphey v. Ramsey, 114 U.S. 15, 44 (1885). The Court based much of its analysis on the fact of original federal ownership of the Indian territory in *Kagama,* which had been purchased from Mexico along with the rest of California. 118 U.S. at 380-81.

[77] 206 U.S. 46 (1907).

exercise of federal jurisdiction over internal Indian affairs.

Specifically, the Court resurrected language from one of the early Marshall Court decisions that characterized the Indian tribes as "wards" of the nation, dependent upon the federal government for protection.[78] The *Kagama* Court built upon this description, reasoning that, in order to afford the necessary protection to the tribes, the federal government must possess the power to regulate internal tribal affairs: "From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power."[79] In the case of *Kagama,* the duty of protection evidently extended to protecting the Indians residing on the reservation from one another's criminal actions.[80] The Court therefore upheld the 1885 statute under a newly created, implied "guardianship" power.

Following *Kagama,* the Court expanded the guardianship doctrine into a blanket administrative authority to preempt tribal government powers and functions, over the strong objections of the tribes. In *Cherokee Nation v. Southern Kansas Railway Co.,*[81] the Court held that the Cherokees' inherent sovereignty did not exclude the federal government from extending its powers of eminent domain to tribal lands. In *Stephens v. Cherokee Nation,*[82] the Court upheld legislation under which Congress assumed the tribes' power to determine their own membership rolls. Finally, in *Cherokee Nation v. Hitchcock,*[83] the Court upheld an act of Congress that leased tribal oil lands for development against the will of the Cherokee Nation. These opinions were full of admonitions that the broad power be exercised in good faith, to further the best interests of the Indian "wards." But the Court did not charge Congress with the legal obligations of a guardian or trustee; the only obligation announced was a moral one.[84]

---

[78] 118 U.S. at 382 (quoting *Cherokee Nation* and *Worcester*).

[79] *Id.* at 384.

[80] The Court did not go into detail about how the principles it expounded were applied to the facts of the case, but this is the apparent meaning of the Court. *See id.* It should be noted that however accurate a description of the Hoopa tribes this may have been, the Court's characterization of Indian tribes as weak and helpless was certainly not correct for all tribes. For example, the "Five Civilized Tribes" had active and effective tribal governments and steadfastly resisted the extension of federal administrative authority over their affairs. *See infra* notes 81-84 & 91.

[81] 135 U.S. 641 (1890).

[82] 174 U.S. 445 (1899).

[83] 187 U.S. 294 (1902).

[84] *See, e.g.,* Choctaw Nation v. United States, 119 U.S. 1, 28 (1886). The Court in *Lone Wolf* quoted from an earlier opinion in Beecher v. Wetherby, 95 U.S. 517, 525 (1877): "It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race." *Lone Wolf,* 187 U.S. at 565. *See generally* R. BARSH & J. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY 85-95 (1980).

By the time the Court decided the issues in *Lone Wolf,* therefore, the Marshall Court conception of tribes and treaties had been turned on its head.[85] Tribes were no longer nations with inherent sovereign powers, and the federal authority was no longer limited to the powers granted by the Constitution or explicitly delegated in treaties. The principal holding in *Lone Wolf,* that Congress possessed full power to abrogate Indian treaties,[86] was bolstered with an alternate holding based upon "the power of Congress to administer the property of the Indians."[87] According to the *Lone Wolf* Court, Congress wielded a "paramount power over the property of the Indians" by virtue of the guardianship recognized in *Kagama.*[88] Not only did Congress possess a "[p]lenary authority over the tribal relations of the Indians,"[89] but this power was immune from any level of judicial review.[90] As wards, the tribes were accorded only whatever authority Congress determined to delegate. The broad administrative power was presumed to be in effect until the United States discharged the Indians "from their condition of pupilage."[91]

The plenary power rule that emerges from these cases has its eyes closed tight against the possibility that the tribes' interests and the national interest may conflict. The Court acknowledged in one opinion that the United States would adopt "such policy as [the United States'] own public interests may dictate."[92] In later cases, however, the Court declined even to consider such conflicts. In *Cherokee Nation v. Hitchcock* this was made clear: "We are not concerned in this case with the question whether the act . . . is or is not wise, and calculated to operate beneficially to the interests of the Cherokees. The power existing in Congress to administer upon and guard the tribal property . . . is not [a question] for the courts."[93] That theme was played again in the *Lone Wolf* opinion: "We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best

---

[85] *See supra* notes 45-49 and accompanying text.

[86] *See supra* note 30 and accompanying text.

[87] 187 U.S. at 565.

[88] *Id.* The *Lone Wolf* Court quoted extensively from *Kagama,* reciting from both the guardianship rationale and from what we have termed here the "it-must-be-somewhere" reasoning of the opinion. *Id.* at 566-67. *See supra* text accompanying notes 74-76.

[89] *Id.* at 565.

[90] *Id.* at 565, 568. *See supra* notes 34-36 and accompanying text.

[91] Cherokee Nation v. Southern Kan. Ry. Co., 135 U.S. 641, 654 (1890). Thus, the specific facts of the *Kagama* case became a conclusive presumption of tribal helplessness and dependency. *See supra* note 80. *See also* R. BARSH & J. HENDERSON, *supra* note 84, at 89-91.

[92] Choctaw Nation v. United States, 119 U.S. 1, 28 (1886).

[93] 187 U.S. at 308.

judgment in the premises."[94]

Modern cases have begun to re-examine the *Kagama-Lone Wolf* administrative power doctrine. In *Morton v. Mancari*,[95] the Court took a small step forward when it recognized that federal legislative power must originate within the terms of the Constitution itself. Beyond this minor breakthrough, however, the Court showed no signs of testing the administrative power against the constitutional document. The Court noted the existence of the Indian commerce clause and the treaty power, and offered something of a contortionist argument to explain how the administrative power derived indirectly from the foreign affairs power. Recalling a bit of history from the *Kagama* case,[96] the Court recounted that the exercise of the war and treaty powers had left the Indians " 'helpless and dependent people, needing protection against the selfishness of others and their own improvidence.' "[97] The *Morton* Court then suggested not only that the tribes' declining fortunes gave rise to a duty of protection, but also that the historical circumstances creating that necessity were sufficient to root the administrative authority in the war and treaty powers of the Constitution. This novel argument appears to be the primary constitutional foundation for the administrative authority today.

Following *Morton,* the Court in *Delaware Tribal Business Committee v. Weeks*[98] reached the merits of a constitutional challenge to legislation that distributed funds belonging to the Delaware Tribe. The Court spoke of "the broad congressional power to prescribe the distribution of property of Indian tribes"[99] and said that the federal authority was " 'drawn both explicitly and implicitly from the Constitution itself.' "[100] Nevertheless, the Court retreated dramatically from the traditional rule with the holding that the administrative power had justiciable limits. " 'The power of Congress over Indian affairs may be of a plenary nature, but it is not absolute.' "[101]

---

[94] 187 U.S. at 568.

[95] 417 U.S. 535 (1974). *See infra* notes 105-09 and accompanying text.

[96] *See supra* text accompanying note 79.

[97] 417 U.S. at 552 (quoting Board of County Comm'rs v. Seber, 318 U.S. 705, 715 (1943)). It should be noted that the *Seber* case did not involve the assertion of federal authority over Indian tribes' internal affairs, but rather an exemption from state authority to tax real estate.

[98] 430 U.S. 73 (1977).

[99] *Id.* at 84.

[100] *Id.* at 85 (quoting *Morton,* 417 U.S. at 551-52). The *Weeks* Court did not undertake to explain the constitutional origin of the power.

[101] *Id.* at 84 (quoting United States v. Alcea Band of Tillamooks, 329 U.S. 40, 54 (1946) (plurality opinion)).

C. *The New Plenary Power Rule*

The Court's most recent plenary power opinions have recognized a broad congressional authority over Indian tribes, but in these cases the Court has, for the first time, articulated specific constitutional restraints on the implied administrative power. The limits are of two sorts. The first is a general due process requirement, characterized by the Court as mandating that legislative classifications based on Indian tribal membership—statutes having specific impact on Indians—meet a minimum rationality test.[102] The second, more meaningful limit looks to whether a specific act of Congress is a good faith exercise of the administrative power, or whether the act can be sustained only on the basis of another congressional power.[103]

1. *Weeks* and the Minimum Rationality Test

The first of the Court's constitutional limits on Congress's power over Indian tribes developed in a series of equal protection cases culminating in *Delaware Tribal Business Committee v. Weeks.*[104] The Supreme Court first heard an equal protection challenge to "special" Indian legislation in 1974. In *Morton v. Mancari,*[105] an Indian preference employment policy in the Bureau of Indian Affairs was challenged by a group of non-Indian Bureau employees. The Court applied its most deferential standard of review. "As long as the special treatment can be rationally tied to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgements will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process."[106]

The Court in *Mancari* explained that it was treating Indians differently from other minority groups because of their unique status and the government's legal obligations toward the tribes. The Court noted that if classifications based on tribal membership "were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized."[107]

The Court had little difficulty upholding the Indian preference

---

[102] *See infra* notes 104-22 and accompanying text.
[103] *See infra* notes 123-38 and accompanying text.
[104] 430 U.S. 73 (1977).
[105] 417 U.S. 535 (1974).
[106] *Id.* at 555.
[107] *Id.* at 552-53.

hiring rule in *Mancari*. The opinion identified two legitimate state purposes that benefit Indians: the goals of furthering Indian self-government and of making the Bureau more responsive to its constituents.[108] In subsequent equal protection decisions, however, the Court read *Mancari* broadly as a rule of deference to congressional classifications based on membership in an Indian tribe.[109] In deciding *Delaware Tribal Business Committee v. Weeks*,[110] the Court did not scrutinize the specific goals of the legislation. Instead, the Court cited a "general rule" that Congress has "broad power . . . to prescribe the distribution of property of Indian tribes."[111] The *Weeks* case was brought by a subgroup of the Delaware Tribe, known as the "Kansas Delawares," that challenged a legislative classification alleged to discriminate unfairly between similarly situated members of the same tribe.[112] Because the Court defined its task as a determination of "what judicial review . . . is appropriate in light of the broad congressional power to prescribe the distribution of tribal property of Indian tribes,"[113] it decided to apply the minimum level of equal protection scrutiny: "the legislative judgment should not be disturbed '[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians . . . .' "[114]

Aside from the claim raised by the subgroup of the tribe, the legislation challenged in *Weeks* was not otherwise controversial: it did not abrogate treaty commitments and did not have an adverse impact on tribal political and property rights. The Court concluded that the distribution statute was within the traditional administrative power of Congress, and quoted language stating that the power was " 'drawn both explicitly and implicitly from the Constitution itself.' "[115]

Read broadly, *Weeks* establishes that the courts will afford Congress the most deference when Congress has acted under its power as a trustee. In order to argue for a stricter standard of scrutiny, therefore, Indian claimants must first assert that Congress has not acted pursuant

---

[108] *Id.* at 554.

[109] *See, e.g.*, United States v. Antelope, 430 U.S. 641 (1977); Fisher v. District Court, 424 U.S. 382 (1976). *See generally* Johnson & Crystal, *supra* note 27.

[110] 430 U.S. 73 (1977).

[111] *Id.* at 85.

[112] *Id.* at 82-83.

[113] *Id.* at 84.

[114] *Id.* at 85 (quoting *Morton*, 417 U.S. at 555). There was some debate among the justices as to the rationality of the legislative distribution scheme, with Justice Stevens' dissent calling the legislation "manifestly unjust and arbitrary." 430 U.S. at 92-96 (Stevens, J., dissenting). But there was no dispute regarding the correct standard of review.

[115] 430 U.S. at 85 (quoting *Morton*, 417 U.S. at 551-52). The *Weeks* Court did not attempt to add anything to the *Morton* analysis of the actual sources of Congress's power within the Constitution. *See supra* notes 95-97 and accompanying text.

to its administrative power. The Court did not indicate in *Weeks* when, if ever, such an argument would be successful. The announced standard requires that legislation fulfill " 'Congress' unique obligation to the Indians,' "[116] but does not suggest what would fall outside that category, or what scrutiny would be applicable in such a case.[117]

For legislation within the scope of *Weeks,* the requirement of rationality is not difficult to meet. The Court in *Weeks* found the challenged statute rational despite a showing that Congress had not been aware that its enactment would have the effect of excluding the Kansas Delawares.[118] The Court postulated and accepted its own justification: that the classification was made "to avoid undue delay, administrative difficulty, and potentially unmeritorious claims."[119] Justice Stevens, writing in dissent, thought that "it is clear that the discrimination . . . is the consequence of a legislative *accident,* perhaps caused by nothing more than the unfortunate fact that Congress is too busy to do all of its work as carefully as it should."[120] Although Stevens believed the statutory exclusion of the Kansas Delawares to be "manifestly unjust and arbitrary,"[121] it was upheld by a vote of eight to one.[122]

2. *Sioux Nation* and Limits on the Administrative Power

With its opinion in *Sioux Nation,* the Supreme Court established that Congress's administrative power is subject to certain good-faith limitations, comparable to those restricting a private law trustee or guardian.[123] *Sioux Nation* reached the Supreme Court on appeal from the Court of Claims, which had awarded the Sioux tribes fifth amendment compensation for Congress's 1877 taking of the Black Hills of South Dakota. As the Court indicated, the Sioux had claimed "[f]or over a century . . . that the United States unlawfully abrogated the Fort Laramie Treaty . . . [in] which the United States pledged that the Great Sioux Reservation, including the Black Hills, would be 'set apart for the absolute and undisturbed use and occupation of the Indians herein named.' "[124] The legal issue involved in the case was whether

---

[116] 430 U.S. at 85 (quoting *Morton,* 417 U.S. at 555).

[117] *See infra* notes 177-86 and accompanying text.

[118] 430 U.S. at 89; *see also id.* at 92-93 (Stevens, J., dissenting).

[119] *Id.* at 89 (majority opinion).

[120] *Id.* at 97 (Stevens, J., dissenting)(emphasis in original).

[121] *Id.* at 96.

[122] Justices Blackmun and Chief Justice Burger concurred in the majority's result, suggesting that "there necessarily is a large measure of arbitrariness in distributing an award for a century-old wrong." *Id.* at 91 (Blackmun, J., concurring).

[123] 448 U.S. at 415, 423-24.

[124] 448 U.S. at 374. The Court set out the long-history of the litigation, *id.* at 384-391. The Sioux first challenged the taking in the Court of Claims in 1923, after lobbying for a special

the 1877 statute was a noncompensable act of congressional guardianship over tribal property or a taking in exercise of Congress's power of eminent domain.[125] The Court agreed with the Indian Claims Commission and the Court of Claims that the statute could not be justified as an act of guardianship, and that more familiar fifth amendment takings principles should be applied.[126]

In its consideration of the congressional act, the Court refused to apply *Lone Wolf*'s conclusive presumption of congressional good faith,[127] as urged by the government, and held instead that the federal power to control and manage tribal property is not absolute.[128] The decision thus comported with a series of previous Supreme Court decisions that had held that outright takings of tribal land could not be upheld as acts of guardianship.[129] In the often-quoted words of Justice Cardozo: "Spoliation is not management."[130]

The Court in *Sioux Nation* carefully distinguished the *Lone Wolf* case, and thus left intact two aspects of the traditional plenary power concept: the rule that Congress has the power to abrogate treaties[131]

---

jurisdictional statute to encompass their claim. In 1942 the Court dismissed the claim as a "moral" one, not within the scope of the just compensation clause. After the creation of the Indian Claims Commission in 1946, the Sioux tribes pressed their Black Hills claim once again, only to fail in the Court of Claims after another 25 years of litigation on the ground of res judicata. In 1978, Congress passed a special jurisdictional act providing for *de novo* review of the case on the merits without regard to the defenses of res judicata and collateral estoppel. The validity of this statute was the subject of the first half of the Court's 1980 opinion, 448 U.S. at 390-407.

[125] For purposes of Indian claims cases, the practical distinction is that interest is awarded to tribes only for unconstitutional takings. 448 U.S. at 387. If Congress's act had been determined to be one of guardianship, the tribes would have received the fair market value of the land in 1877, a figure set at $17.1 million. *Id.* at n.16. Because the act was determined to be an unconstitutional taking, the government's obligation to make just compensation included an award of interest on the $17.1 million sum, an amount in excess of $100 million. *Id.* at 424.

[126] The Court had no difficulty concluding that the Sioux property had been confiscated within the meaning of the takings clause, and that just compensation would be due unless Congress could be found to be acting under its guardianship authority. *See* 448 U.S. at 409 n.26. The Court makes clear, however, that because of Congress's administrative power, the takings clause applies differently to Indian tribal property than in more typical takings cases. *Id.*; *see infra* note 177.

[127] 448 U.S. at 423-15 ("*Lone Wolf's* presumption of congressional good faith has little to commend it as an enduring principle for deciding questions of the kind presented here.")

[128] *Id.* at 415 (quoting United States v. Creek Nation, 295 U.S. 103, 109-10 (1935)).

[129] The first judicial modification of the broad plenary power rule came in the realm of tribal property rights. *Lane v. Pueblo of Santa Rosa,* 249 U.S. 110 (1919), and *United States v. Creek Nation* 295 U.S. 103 (1935), held that the federal power over Indian lands did not include the authority to confiscate tribal property. Both cases involved acts of the executive branch and cannot therefore be read as limits to congressional power, *see supra* note 24 and accompanying text, but in the 1937 decision of *Shoshone Tribe of Indians v. United States,* 299 U.S. 476 (1937), the Court found that Congress had overstepped its authority to "manage" tribal property and that the tribe was therefore entitled to just compensation.

[130] *Shoshone Tribe,* 299 U.S. at 498.

[131] 448 U.S. at 411 n.27 ("The Sioux do not claim that Congress was without power to take the Black Hills from them in contravention of the Fort Laramie Treaty of 1868. They claim only that Congress could not do so inconsistently with the command of the Fifth Amendment. . . .") *See generally supra* notes 22-25, 30 & 52-61.

and the implied federal power to administer tribal property.[132] Rather than eliminating the plenary power rule, the Court in *Sioux Nation* attempted to give content to the distinction between trusteeship and non-trusteeship. In the general terms it used, the administrative power extends " 'to all appropriate measures for protecting and advancing the tribe[s].' "[133] In the specific case before it, the Court applied a " 'good faith effort' test" developed by the Court of Claims for cases involving the disposition of tribal property.[134]

Sioux Nation does not of itself establish that the courts must examine Congress's behavior in every case to determine whether a challenged exercise of the trustee power in fact falls within the limits of that power. The fiduciary limits on congressional power are described only to distinguish administrative acts from fifth amendment takings; there is no suggestion that the courts will enforce a congressional trust responsibility.[135]

The close connection between the good faith requirements outlined in *Sioux Nation* and the takings clause issue of just compensation suggests that the limits drawn by the Court reflect historic concern and confusion regarding treaty-based property rights.[136] There is, however, no principled reason to confine such examinations to takings cases. As has been shown, the administrative power has been inferred as arising out of a special obligation owed by Congress to the Indian tribes.[137] When an exercise of the power does not serve the underlying obliga-

---

[132] 448 U.S. at 410 n.26 (If Congress was "acting pursuant to its unique powers to manage and control tribal property as the guardian of Indian welfare, . . . the Just Compensation Clause would not apply.") *See generally supra* notes 29 & 63-84.

[133] 448 U.S. at 415 (quoting *Creek Nation,* 295 U.S. at 110).

[134] 448 U.S. at 408-09; The test applied by the Court is called the "*Fort Berthold* test," developed by the Court of Claims to distinguish between the exercise of Congress's administrative power and its sovereign power of eminent domain. Three Tribes of Fort Berthold Reservation v. United States, 390 F.2d 686, 691 (Ct. Cl. 1968) ("Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, there is no taking. There is a mere substitution of assets or change of form and is a traditional function of a trustee.")

[135] The notion of enforcing a congressional trust responsibility was raised before *Weeks* and *Sioux Nation* in Chambers, *supra* note 24, at 1227-29. There is a relatively extensive body of law defining the trust responsibilities of the executive branch, *see infra* note 174, but given the common law origins of the federal trust responsibility it is not likely that the doctrine by itself would be a useful basis to challenge legislative acts. *See* Monaghan, *Foreword: Constitutional Common Law,* 89 HARV. L. REV. 1, 3 (1975)(arguing that there is "a federal constitutional common law subject to amendment, modification, or even reversal by Congress.") Because, however, the administrative power is itself a judicially created doctrine, *see supra* notes 63-101 and accompanying text, it is entirely appropriate for the Court to determine the limits within which it will imply the existence of the power. *See infra* notes 146-174 and accompanying text.

[136] 448 U.S. at 408. *See supra* note 129. Other potential obstacles to a broad construction of the *Sioux Nation* holding are discussed *infra* notes 190-93 and accompanying text.

[137] *See supra* notes 63-97 and accompanying text.

tion, it loses its only connection with its constitutional source.[138]

Sioux Nation establishes that courts need not recognize the administrative power every time it is asserted. The Court's language suggests that every claimed exercise of the power is subject to the challenge that it is contrary to Congress's unique obligation to the Indians and therefore beyond the limitations of that power.

II. THE CONSTITUTION AND INDIAN TRIBES

Delaware Tribal Business Committee v. Weeks[139] and *United States v. Sioux Nation*[140] represent a clear advance for Indian tribes over the historic plenary power rule. The nonjusticiability arm of *Lone Wolf v. Hitchcock*[141] has been put to rest, and the cases indicate that the Court is willing to recognize specific tribal constitutional rights. In addition, the cases suggest the contours of emerging limitations upon the scope of Congress's administrative power. What the cases do not indicate, however, is the nature and extent of the constitutionally protected rights of the tribes, and the boundaries that will be drawn around the implied legislative power.

That there are tribal rights of constitutional dimension, sufficient to limit congressional power, has been clear since before the emergence of the plenary power rule.[142] But litigation to define and protect those rights has been hampered in part by the *Lone Wolf* doctrine of nonjusticiability, and in part by persistent procedural obstacles to suits brought by the tribes.[143] The demise of the *Lone Wolf* justiciability rule opens the way for courts to develop a standard of review that more adequately reflects the theoretical bases of the congressional authority in Indian affairs.

The Court in *Sioux Nation* indicated that, in order to distinguish administrative legislation from other types of enactments, such a process should begin with a look at the "two hats" Congress wears when it

---

[138] This does not necessarily mean that the action must be invalidated because beyond the legislative authority. It may well be that the action was taken pursuant to *another* enumerated power. In *Sioux Nation,* the challenged legislation was found unsupportable as an exercise of the administrative power, yet was upheld as an exercise of Congress's "sovereign power of eminent domain." *See* 448 U.S. at 408. Of course, once it is determined that a different enumerated power is in play, the relevant constitutional restrictions upon that power must be considered. *See infra* notes 175-203 and accompanying text. Thus, the valid confiscation in *Sioux Nation* was subject to the constitutional requirement of just compensation.

[139] 430 U.S. 73 (1977).

[140] 448 U.S. 371 (1980).

[141] 187 U.S. 553 (1903).

[142] *Sioux Nation,* 448 U.S. at 415; Shoshone Tribe v. United States, 299 U.S. 476, 497-98 (1937); Stephens v. Cherokee Nation, 174 U.S. 445, 478 (1899).

[143] *See infra* note 193.

deals with Indian tribes. This distinction is particularly important given the Court's recent reiteration of the rule of judicial deference to acts of Congress taken pursuant to its role as a trustee. The Court established in *Weeks* that such actions need only be minimally rational to survive a fifth amendment equal protection challenge.[144] If, however, Congress is not acting pursuant to its administrative power, more demanding constitutional requirements may be imposed, as was the case in *Sioux Nation.*[145]

A. *When is a Trustee Not a Trustee?*

1. The Test in *Sioux Nation*

The analysis adopted by the Court in *Sioux Nation* might be called the "two-hat" analysis. Briefly, it relies upon the idea that " 'Congress can own two hats, but it cannot wear them both at the same time.' "[146] In the context of legislation affecting tribal lands, the Court has held that Congress may act either as a trustee, for the benefit of the Indians, or as a legislature, exercising the sovereign power of eminent domain. The two-hat analysis apparently is not restricted to cases, such as *Sioux Nation,* that involve takings of tribal property. Rather, the Court has adopted language noting that "[i]n any given situation in which Congress has acted with regard to Indian people, it must have acted either in one capacity or the other."[147] Thus, whenever Congress legislates with respect to Indian tribes, its action is open to the assertion that Congress has worn its "legislative hat" and not its "trustee hat." When such an argument is successful, the minimum scrutiny of *Weeks* gives way to another level of constitutional evaluation.

In *Sioux Nation,* the United States became liable to the tribe for fifth amendment compensation as a result of a finding that Congress had acted not as a trustee but rather as a sovereign when it took the Black Hills. Because of the nature of the case, the factual inquiry upon which the two-hat analysis was based went to the adequacy of the payments made to the Sioux for the lands taken. The Court contrasted the uncompensated taking of the Black Hills with the act of Congress involved in *Lone Wolf:*

> Where Congress makes a good faith effort to give the Indians the

---

[144] *See supra* notes 104-22 and accompanying text.

[145] *See supra* notes 123-38 and accompanying text.

[146] 448 U.S. at 408 (quoting Three Tribes of Fort Berthold Reservation v. United States, 390 F.2d 686, 691 (Ct. Cl. 1968)).

[147] 448 U.S. at 408.

> full value of the land and thus merely transmutes the property from land to money, there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee.[148]

Although a substitution of assets may indeed be acceptable conduct for the congressional trustee in many cases, financial management is certainly not the only standard against which the government's conduct should be measured. A closer look at the facts of *Lone Wolf* illustrates the other aspects of a trustee's responsibility that ought to be considered before Congress appropriately may be presumed to be legislating in its trustee hat.

2. *Lone Wolf* Reconsidered

The *Sioux Nation* Court characterized the facts of *Lone Wolf* as an example of acceptable trust management by Congress;[149] indeed, the Court in *Lone Wolf* indicated in dicta that it felt the same way.[150] But the legislative history of the congressional action challenged in *Lone Wolf,* carefully summarized as a preface to the opinion of the Court, demonstrates that Lone Wolf's grievance was substantial and that the presumption of congressional good faith had been largely—if not completely—discredited by evidence before the Court.

The legislation that opened the Kiowa, Comanche, and Apache reservation[151] passed Congress as a ratification of the "Jerome Agreement," negotiated with the three tribes in 1892.[152] For eight years, the tribes repeatedly memorialized Congress and traveled to Washington to plead against passage of the ratification bills.[153] Although the agreement had been signed by 456 of the adult men of the tribes, the number fell short of that required to approve land cessions under the Medicine Lodge treaty.[154] Many of the signers repudiated the "agreement" once they fully understood its contents, charging fraud, misrepresentation,

---

[148] *Id.* at 409.

[149] 448 U.S. at 410-15.

[150] 187 U.S. at 568.

[151] Act of June 6, 1900, ch. 813, § 6, 31 Stat. 672, 676-81 (1900).

[152] *See* S. EXEC. DOC. NO. 17, 52d Cong., 2d Sess. (1893) (transmitting the Jerome Agreement to Congress); *see also* S. DOC. NO. 77, 55th Cong., 3rd Sess. 8 (1899) (transcript of proceedings of the Jerome Commission at the Comanche, Kiowa, and Apache Reservation in 1892); W. HAGAN, *supra* note 32, at 203-15 (describing the negotiations with the tribes).

[153] *See, e.g.,* S. DOC. NO. 76, 56th Cong., 1st Sess. (1901) (reproducing petitions); S. MISC. DOC. NO. 102, 53d Cong., 2d Sess. (1894) (same); H. REP. NO. 1281, 55th Cong., 2d Sess. (1898) (testimony before the House Committee on Indian Affairs).

[154] *See* S. DOC. NO. 84, 55th Cong., 3rd Sess. 2 (1899) (letter from the Secretary of the Interior regarding the number of adult men in the three tribes).

and faulty translations by the government interpreter.[155] The final tribal memorial to Congress in 1899 bore 571 signatures, and was accompanied by letters from the Commissioner of Indian Affairs and the Secretary of the Interior, who also opposed the pending legislation.[156] The officials supported the tribes' complaint that the size allotments proposed were too small to support Indian families in a grazing economy, and urged that Congress accept the tribes' request to negotiate "a new treaty" to allot the lands differently.[157]

The cause of the Kiowa, Comanche, and Apache was supported by lobbyists of Indian interest groups, but their influence was overcome by the combined efforts of would-be homesteaders eager for a share of the tribal lands and lobbyists for the railroad company with a line across the reservation.[158] The legislation passed at the end of a session, appended to a completely different bill.[159]

The Supreme Court's disregard for these facts in *Lone Wolf* was explained as a function of the political question rule: "If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts."[160] If outright confiscation of tribal property—the issue in the *Sioux Nation* opinion—is the only breach of trust forbidden Congress, Lone Wolf would leave the courts today as empty-handed as he did in 1903. But if legislation that violates other fiduciary principles is not within the scope of "Congress' unique obligation" to Indians, Lone Wolf's due process argument may be vindicated.

3. A Test of Plenary Power Legislation

Sioux Nation provides the courts with the basis for principled limits to the implied congressional administrative power in Indian affairs. As articulated in *Sioux Nation,* however, the test does not go far enough to protect the range of tribal political and property rights that have been subjected to unilateral congressional authority. Three areas

---

[155] *See* S. MISC. DOC. NO. 102, 53d Cong., 2d Sess. (1894) (memorial of the Comanche, Kiowa, and Apache); *see also* S. DOC. NO. 77, 55th Cong., 3rd Sess. 7 (1899) (letter in 1893 from anthropologist James Mooney) ("this agreement was procured by threats, bribery, and deception and is utterly contrary to the wishes and understanding of the majority of the Indians concerned").

[156] S. DOC. NO. 76, *supra* note 153.

[157] *Id.* at 2, 8.

[158] *See* W. HAGAN, *supra* note 32, at 256-61. The congressional documents demonstrate the tremendous pressure brought by non-Indians to ratify the agreement. *See* S. DOC. NO. 177, 56th Cong., 1st Sess. (1900); H. REP. NO. 431, 55th Cong., 2d Sess. (1898).

[159] *See supra* note 151.

[160] 187 U.S. at 568. This aspect of *Lone Wolf* has been overruled by the Court in more recent cases. *See supra* notes 35 & 36 and accompanying text.

of inquiry are suggested here to guide the courts in their scrutiny of challenged exercises of the administrative power. First, is the legislation clearly unfavorable to tribal interests? In some cases, the answer to this question will be readily apparent from the effect of the statute. Other cases will be less clear, and the courts should look to whether the affected tribe opposed or supported the legislation when it was first enacted and whether or not the tribe is currently challenging the statute. If a court concludes, based upon an examination of the statute's effect and the tribe's reaction to it, that it is clearly adverse to the tribal interests, then it should be held beyond the scope of the administrative power. Second, the courts should inquire whether there has been an abrogation of existing treaty rights. If there has been, and there is no demonstration of tribal consent, there should be a heavy presumption that the statute does not fall within the trustee power. Third, because Congress necessarily responds to interests other than those of Indian tribes, the courts should ask whether the challenged statute represents the predominant consideration of tribal interests, or competing public interests as well. When an enactment is directed at the general welfare, or a non-Indian public purpose, it should not be shielded from judicial review by invocation of the administrative power. Rather, in such circumstances Congress should be presumed to have been wearing its legislative hat.

These three considerations all go to the question whether Congress has acted as a trustee. In the common law of trusts, the standard frequently applied to delineate the trustee's duty toward the beneficiary is whether the trustee acted as a reasonably prudent man would have acted with his own property.[161] With respect to the trustee power in Indian affairs, the analogous question is whether Congress's actions resemble those which an Indian tribe would have taken on its own behalf. The suggested considerations are in part components of such an inquiry. In addition, the considerations are the product of history, and represent a response to past congressional overreachings under the authority of the nonreviewable plenary power.

a. *What is the Statute's Effect?*

Some statutes, such as the employment preference law reviewed in *Morton v. Mancari,*[162] will be demonstrably favorable to the interests of the Indian tribes. Others, such as the termination statute considered

[161] *See* 2 A. SCOTT, THE LAW OF TRUSTS § 174 (3rd ed. 1967).
[162] 417 U.S. 535 (1974)(upholding Indian preference).

in *Menominee Tribe of Indians v. United States,*[163] will clearly run counter to those interests. Any enactment which is manifestly opposed to the interests of the affected tribes cannot be justified as an exercise of Congress's administrative power.[164] The administrative power is grounded in the idea that Congress is acting on behalf of the tribes, for their own good, and in their protection. If it is evident that the effect of legislation is to exact a sacrifice from the affected tribes, then Congress's authority under its trustee hat disappears, and some other source of power for the legislative action must be cited to fill the void.

There will be many cases in which the effect of a law will be difficult to characterize. In these cases the courts should give great weight to the opinions of the affected tribes with respect to the challenged legislation. The Final Report to Congress of the American Indian Policy Review Commission (AIPRC)[165] emphasized this aspect of the trust relationship, pointing out that with a common law trust, title to the property is split and management is shared by the trustee and beneficiary. The principle of tribal consent is at the heart of the AIPRC recommendations on the trust responsibility, which proposed that:

> The United States not abrogate or in any way infringe any treaty rights or nontreaty rights that are protected by the trust responsibility, without first seeking to obtain the consent of the affected Indian or Indians. Such rights [should] not be abrogated or infringed without such consent except under extraordinary circumstances where a compelling national interest requires otherwise.[166]

Since the first treaty negotiated, relations between the United States and Indian tribes have been based on a theory of mutual consent. After the end of treatymaking, the practice was continued by the negotiation of agreements, until the Court's decision in *Lone Wolf* gave Congress full power to act unilaterally in setting Indian policy. Even in 1942, Felix Cohen's treatise referred to tribal consent as a fundamental basis of the relationship.

---

[163] 607 F.2d 1335 (Ct. Cl. 1979)(holding that courts lacked subject matter jurisdiction to hear claim that Congress breached its fiduciary duty to the tribe when it passed the Menominee Termination Act), *cert. denied,* 445 U.S. 950 (1980); *see supra* note 10.

[164] *See* Johnson & Crystal, *supra* note 27, at 626-27 (arguing for "strict scrutiny" of laws that disadvantage Indians). Johnson and Crystal point out that courts should not "too readily presume that legislation affecting Indians has been enacted for the benefit of Indians. With adroit draftsmanship [adverse] legislation can be couched in language ostensibly benign toward Indians." *Id.*

[165] AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT, 95th Cong., 1st Sess. (1977) [hereinafter cited as AIPRC FINAL REPORT].

[166] *Id.* at 137.

> [W]hile the form of treaty-making no longer obtains, the fact that Indian tribes are governed primarily on a basis established by common agreement remains, and is likely to remain so long as the Indian tribes maintain their existence and the Federal Government maintains the traditional democratic faith that all Government derives its just powers from the consent of the governed.[167]

b. *Does the Statute Abrogate a Treaty?*

The terms of treaties and agreements continue to have great importance to the tribes today, sometimes assuring vital economic interests that have been judicially protected from state or executive branch infringement. The fishing rights of the Pacific Northwest tribes and water rights of the tribes in arid states have been eyed enviously by neighboring non-Indian groups, who have attempted legislatively to abrogate those rights when assaults in the courts have failed.[168]

The terms of treaties between the United States and Indian nations have gone unenforced because of an analogy to foreign relations that is no longer valid.[169] The tribes for more than a century have been completely subjugated to federal authority. All Indians have full United States citizenship and bear the same civic responsibilities as other Americans.[170] There is no constitutional basis for discriminating against tribal rights because they originate in treaties; the courts might interpret them instead as charters or contracts between the government and groups of its citizens.[171]

The body of treaties and agreements establishes the terms of Congress's unique obligation to Indian nations, and is in many cases the explicit source of the trust duties. An abrogation of those terms must be by definition outside the scope of the trust. Again, when treaty rights are impinged, the element of tribal consent will gain paramount importance. The government should be allowed to "defend" against the treaty abrogation charge by demonstrating that tribal consent was obtained by the legislature before the treaty was overruled.

---

[167] F. COHEN, *supra* note 41, at 67. *See also* Newton, *The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the* Sioux Nation *Rule*, 61 OR. L. REV. 245, 264-65 (1982).

[168] *See supra* notes 12 & 59 and accompanying text.

[169] *See supra* notes 42-62 and accompanying text.

[170] *See supra* notes 26-27 and accompanying text.

[171] Chambers, *supra* note 24, at 1227, argues that "it is at least defensible to regard treaties and agreements between a nation and its dependent subjects protected by a trust responsibility as enforceable with greater rigor than those with foreign nations or private parties unprotected by a special guardianship relationship." *See also supra* note 53.

c. *Is There a Conflict of Interest?*

Political pressures in the legislature may often secure legislation that promotes interests other than those of the Indians, such as the result of the political battles that preceded *Lone Wolf*.[172] When this is the case, the courts have a special mandate to scrutinize Congress's administrative power and its trust obligation. The conflict of interest problem also goes beyond the legislative branch. Indian reservations are literally controlled by the Department of the Interior, an agency that is both historically and presently more influenced by the interests of the timber and mining industries than those of the tribes.[173]

The problem of scrutiny, however, is more difficult in the Congress because in some cases, even with all good faith toward Indians, the legislature will weigh competing public policy interests. The inquiry here is simply the two-hats analysis undertaken in *Fort Berthold* and *Sioux Nation*—has Congress responded as a trustee would respond, on behalf of Indian interests, or has it acted in its normal capacity as a legislature, in response to the demands of its broader constituency. If the latter, its actions must be subject to all the constitutional limitations applicable to federal legislation. Congress should not be permitted to claim the extreme deference afforded Indian legislation under *Weeks* if its action was not taken pursuant to its unique relationship with the Indian tribes. As in the common law of trusts, the trustee has a duty of exclusive loyalty to the beneficiary, and cannot act to advance its own interests or those of third parties over that of the beneficiary.[174]

B. *Judicial Review of Federal Indian Legislation*

With its decisions in *Sioux Nation*[175] and *Delaware Tribal Business Committee v. Weeks*,[176] the Supreme Court has developed the basis for justiciable constitutional limits to Congress's power over Indian tribes. Whether or not Congress acts pursuant to its implied administrative authority, federal Indian legislation is subject to review under

---

[172] *See supra* notes 149-59 and accompanying text.

[173] *See* AIPRC FINAL REPORT, *supra* note 165, at 129.

[174] There is a substantial body of law defining the trust responsibilities of the executive branch, based on both the specific provisions of treaties and statutes and on the analogy to private law trust principles. *See generally* Chambers, *supra* note 24, at 1230-34. The scope of this responsibility has been narrowed by the Supreme Court in recent years. *See* United States v. Mitchell, 445 U.S. 535 (1980) (tribes may sue for damages in breach of trust action only where breach of a specific treaty or statute is alleged). *See also* Comment, *Indian Breach of Trust Suits: Partial Justice in the Court of the Conqueror*, 33 RUTGERS L. REV. 502 (1981).

[175] 448 U.S. 371 (1980).

[176] 430 U.S. 73 (1977).

the due process clause of the fifth amendment.[177] Although in practice the scrutiny applied in such cases has been extremely deferential,[178] the language of the equal protection cases suggests a substantive limit on Congressional power.[179] Any act beyond the scope of the administrative power is, by definition, not "tied rationally to the fulfillment of Congress' unique obligation"[180] to the tribes, and therefore fails the due process test.

When Congress acts beyond the boundaries of its implied administrative authority, its legislation affecting Indian tribes must be either unconstitutional or enacted pursuant to another enumerated power.[181] In *Sioux Nation,* that power was the sovereign right of eminent domain.[182] If legislation is indeed the result of the exercise of a different congressional power, its validity must be tested under the relevant constitutional limits for that power. In the eminent domain example, those limits relate to due process and just compensation.

In addition to its general legislative authority, Congress has several textually based powers that apply particularly to Indian tribes: the foreign relations and war powers, the Indian commerce clause, and the territorial powers.[183] In these areas, the *Lone Wolf* plenary power rule traditionally has precluded judicial review,[184] and thus has retarded the development of a theory defining the scope of these powers. Nevertheless, there are indications in numerous Indian law opinions that these powers are indeed limited,[185] and certainly such limits may still be articulated.[186]

Related to the constitutional legitimacy of a given act of Congress is the question whether Congress has violated the rights of those affected by its legislation. Approached from this direction, the great chal-

---

[177] The Court in *Sioux Nation* stated that *Weeks* and Morton v. Mancari, 417 U.S. 535 (1974) "establish a standard of review for judging the constitutionality of Indian legislation under the Due Process Clause of the Fifth Amendment . . . ." 448 U.S. at 413 n.28.

[178] *See supra* notes 104-22 and accompanying text.

[179] This is suggested in F. COHEN, *supra* note 26, at 221. *See also* Johnson & Crystal, *supra* note 27, at 599.

[180] Morton v. Mancari, 417 U.S. at 555, *quoted in Weeks,* 430 U.S. at 85. See *supra* notes 161-75 for this writer's proposed interpretation of the "tied rationally" standard.

[181] *See supra* notes 40-41 and accompanying text.

[182] *See supra* notes 146-47 and accompanying text.

[183] *See supra* notes 42-62 and accompanying text.

[184] *See supra* notes 31, 35-36 & 50 and accompanying text.

[185] For example, in United States v. Kagama, 118 U.S. 375 (1886), the Supreme Court refused to hold that either the commerce clause or the territorial clause was a sufficient constitutional basis for enactment of a federal criminal code applicable to Indians. *See supra* note 73. *See also* Clinton, *supra* note 51, at 998. *But see* Morton v. Mancari, 417 U.S. 535, 551 (1974), discussed *supra* at notes 95-97 and accompanying text.

[186] As the Court made clear in its *Cherokee Tobacco* decision, 78 U.S. (11 Wall.) 616 (1870), even the rule permitting Congress to abrogate treaties by statute is not constitutionally compelled. *See supra* note 53.

lenge and difficulty facing tribal litigants and the courts is the determination of what tribal rights rise to constitutional dimension. Because the traditional plenary power rule has prevented the development of a body of constitutional Indian law, there is very little precedent or commentary to suggest how far Indian tribes may rely on the Constitution to protect their basic political and property rights.

Although treaty rights *per se* are not constitutionally immune from congressional abrogation,[187] some treaty-protected interests have been accorded constitutional protection. The best example, again, is the *Sioux Nation* case, in which the Court articulated constitutional limits to Congress's power to take treaty-protected land.[188] Even the *Sioux Nation* case, however, offers only limited fifth amendment protection. Because of the administrative power, the federal power over Indian tribal property remains much broader than the federal power over non-Indian property.[189] Many legislative acts disputed by the tribes will fall short of confiscation under the fifth amendment,[190] and others will infringe interests that have little or nothing to do with property.[191] Furthermore, for many tribes, the remedy typically afforded under the just compensation clause—a financial award of damages—is simply inadequate to compensate for the loss of land that bears an almost religious

---

[187] *See supra* notes 52-61 and accompanying text.

[188] *See supra* notes 123-38 and accompanying text.

[189] That the scrutiny afforded Indian plaintiffs under the just compensation clause is distinct from that applied in non-Indian takings cases was made explicit by the Court in *Sioux Nation.*

> It should be recognized at the outset that the inquiry presented by this case is different from that confronted in the more typical of our recent "taking" decisions. . . . Here there is no doubt that the Black Hills were "taken" from the Sioux in a way that wholly deprived them of their property rights to that land. The question presented is whether Congress was acting under circumstances in which that "taking" implied an obligation to pay just compensation, or whether it was acting pursuant to its unique powers to manage and control tribal property as the guardian of Indian welfare, in which event the Just Compensation clause would not apply.

448 U.S. at 409 n.26. *See also* R. BARSH & J. HENDERSON, *supra* note 84, at 95 ("A highway condemnee, for example, does not lose interest on his award because he drives a car and may use the highway"); Newton, *supra* note 167, at 248-50, 261, 264-65. Another distinction between the fifth amendment rights of Indian tribes and non-Indians is that there is no protection whatsoever extended to "aboriginal title" Indian land. *See supra* note 57.

[190] The legislation disputed in *Lone Wolf* is one example. Despite the Court's careful factual distinction, it might be difficult to convince a Kiowa or a Comanche that abrogation of the Medicine Lodge Treaty was more just than abrogation of the Fort Laramie Treaty. In either case, the act of Congress probably would not have been constitutional had the property been held by non-Indian owners. The taking in *Lone Wolf* was compensated, but it was arguably not a taking for a public purpose since the land was immediately sold to white homesteaders.

[191] One example is the termination legislation of the 1950's, *see supra* notes 9-10 and accompanying text. The Menominee Tribe has had difficulty framing a challenge to this policy that will achieve some compensation for the harms it suffered. *See* Menominee Tribe of Indians v. United States, 607 F.2d 1335 (Ct. Cl. 1979) (Court of Claims has no jurisdiction over claim that Congress breached its fiduciary duty to the tribe when it was terminated), *cert. denied,* 445 U.S. 950 (1980).

significance to Indian peoples.[192]

There may also be significant jurisdictional barriers to tribes seeking the fifth amendment scrutiny applied in *Sioux Nation.* All of the Court's fifth amendment holdings applicable to Indian tribes have been made under special jurisdictional statutes in which Congress expressly authorized tribal suits.[193] In the absence of such a stutute, it may prove difficult to secure any judicial review at all.

One important group of Indian tribal rights involves the tribes' political status as self-governing communities.[194] That Indian tribes are independent political communities with inherent sovereign powers has been a tenet of federal Indian law since the Marshall Court cases.[195] The doctrine of tribal sovereignty has not, however, exempted the

---

[192] *See* Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99, 142 (Black, J., dissenting) (1960).

> It may be hard for us to understand why these Indians cling so tenaciously to their lands and traditional way of life. The record does not leave the impression that the lands of their reservation are the most fertile, the landscape the most beautiful, or their homes the most splendid specimens of architecture. But this is their home—their ancestral home. There they, their children, and their forebears were born. They, too, have their memories and their loves. Some things are worth more than money and the costs of a new enterprise.

See also Clinton, *supra* note 51, at 1024-25; Newton, *supra* note 167, at 246-48.

[193] The most important of these statutes has been the Indian Claims Commission Act of 1946, ch. 959, 60 Stat. 1049, codified as amended at 25 U.S.C. §§ 70-70v-3 (1982). Remedies under the Claims Commission have been limited to damages even where a tribe may have grounds to seek return of tribal lands, and tribes attempting to bring direct constitutional challenges to congressional takings have been limited to this forum and this remedy. *See* Oglala Sioux Tribe of Pine Ridge v. United States, 650 F.2d 140 (8th Cir. 1981), *cert. denied,* 455 U.S. 907 (1982). The Oglala Sioux refused to accept their share of the $105 million judgment awarded by the Court in *Sioux Nation,* contending that the 1877 act was an unconstitutional exercise of the power of eminent domain because the taking was not for a public purpose. Their suit sought quieted title to the Black Hills, restoration of territorial rights to the land, and damages for trespass and mineral severance. The Eighth Circuit rejected their claim, holding that "Congress ha[d] deprived the district court of subject matter jurisdiction by expressly providing an exclusive remedy . . . through the enactment of the Indian Claims Commission Act." *Id.* at 142.

Despite the tortured jurisdictional mazes the *Sioux Nation* case had navigated, see *supra* note 124, such broad limitations on tribal remedies were not addressed in the Court's opinion. At best the Court's meaning is ambiguous: the decision announced a rule applicable to "every case where a taking of treaty-protected property is alleged," 448 U.S. at 415, but it also noted that the *Sioux Nation* case was expressly authorized by Congress with a waiver of the government's sovereign immunity, and that part of the traditional plenary power rule in *Lone Wolf* was the requirement that tribes seek a remedy from Congress and not in the courts. The Court did address the effect of the explicit waiver in *Sioux Nation* on the justiciability argument, stating that with such a waiver there was "far less reason to apply *Lone Wolf*'s principles of deference." *Id.* at 414.

Jurisdictional limits also played a role in Menominee Tribe of Indians v. United States, 607 F.2d 1335 (Ct. Cl. 1979), *cert. denied,* 445 U.S. 950 (1980). The Court of Claims in *Menominee* held it had no jurisdiction to hear the claim that Congress breached its fiduciary duty to the tribe by passage of the Menominee Termination Act.

The court identified the types of tribal claims over which it had jurisdiction: claims against the Interior Department for breach of trust, and "claims [against Congress] said to arise under the Constitution." *Id.* at 1347.

[194] *See generally* F. COHEN, *supra* note 26 at 229-57.

[195] *See supra* notes 45-49 and accompanying text.

tribes' political status, whether or not guaranteed by treaty, from the general rule that Congress has complete authority to change the scope of tribal rights.

In *United States v. Wheeler,*[196] the Court summarized its position regarding the political status of tribes.

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, the Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute or by implication as a necessary result of their dependent status.[197]

Federal Indian legislation that changes the scope of tribal political rights presents unusual constitutional issues. Clearly, all United States citizens have a fundamental right to "democratic self-government,"[198] and for many Indian tribes this right is reinforced by treaty provisions. Indians, however, have been guaranteed this right only to the extent that it involves the non-tribal aspects of their citizenship, such as the right to vote in state and federal elections.[199] In their tribal governments, the right is not secure from unilateral congressional modification or abrogation.[200]

Should Congress decide to terminate all self-governing powers of a tribe,[201] a constitutional challenge would be extremely difficult to

---

[196] 435 U.S. 313 (1978).

[197] *Id.* at 323.

Two types of tribal political rights may be distinguished here: first, the right of the community to determine its internal political and legal processes, to self-government; and second, the position of tribes as governments within the federal system. *See generally* McCoy, *The Doctrine of Tribal Sovereignty: Accommodating, Tribal, State and Federal Interests,* 13 HARV. C.R.-C.L. L. REV. 357 (1978). Federal legislation has affected both types of political rights. See, for example, the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (1976)), and the Indian Civil Rights Act of 1968, Pub. L. No. 90-284, §§ 201-701, 82 Stat. 73, 77-81 (codified at 25 U.S.C. §§ 1301-1341 (1976)), which modified the internal self-government of tribes, and Pub. L. No. 280, discussed *supra* at notes 9-10, which extended state authority over certain Indian reservations.

[198] Harjo v. Kleppe, 420 F. Supp. 1110, 1142 (D.D.C. 1976), *aff'd sub nom.*, Harjo v. Andrus, 581 F.2d 949 (D.C. Cir. 1978).

[199] *See generally* F. COHEN, *supra* note 26, at 639-53.

[200] *See, e.g.,* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56-57 (1978) ("Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess. . . . Title I of the [Indian Civil Rights Act], 25 U.S.C. §§ 1301-1303, represents an exercise of that authority.") Note, however, that the rules of treaty construction that protect treaty rights from implied abrogation or executive branch infringement, *see supra* note 24, are applied to political as well as property rights. *See Harjo,* 420 F. Supp. at 1143.

[201] The termination acts of the 1950's came close to this; however, for the most part they terminated only the special federal-tribal relationship: the tribes' status and rights as an entity persisted. *See, e.g.,* Menominee Tribe of Indians v. United States, 388 F.2d 998 (Ct. Cl. 1967), *aff'd,* 391 U.S. 404 (1967).

frame. Although such legislation directed at a state government would be unconstitutional, it has never been accepted that tribal political status be accorded the same constitutional protection as that of states.[202] Similarly, tribes have no recourse when Congress extends jurisdiction over reservation land to state governments with or without the tribes' consent.[203]

III. CONCLUSION

Congressional power over Indian tribes historically has been described as plenary, and treated as beyond the scope of judicial review. With its recent holdings in *Delaware Tribal Business Committee v. Weeks*[204] and *United States v. Sioux Nation*,[205] the Supreme Court has modified the traditional plenary power rule and opened to the federal courts a potentially large area of formerly non-justiciable questions. This Comment has explored some of the implications of *Weeks* and *Sioux Nation* for future litigation. In particular, this Comment has been concerned with whether *Weeks* and *Sioux Nation* may be read to define limits to Congress's traditionally broad authority over Indian tribal property and governments.

Congressional power in Indian affairs includes two analytically distinct types. First, there are powers explicitly conferred by the Constitution, such as the power to regulate trade with Indian tribes and the range of foreign relations and treaty powers. Second, the courts have implied a federal administrative power extending to the internal affairs of the tribes, based on the notion that the federal government plays the role of a guardian or trustee for the tribes. Despite its uncertain constitutional origins, the implied administrative authority has been the basis for most Indian legislation of the past century.

Both *Weeks* and *Sioux Nation* suggest a new delineation of the implied federal administrative power. The *Weeks* case requires, as a matter of due process, that Indian legislation be "rationally tied to the fulfillment of Congress' unique obligation toward the Indians."[206] Because this "rational relationship" standard is an extremely deferential one, there may be little practical difference between the *Weeks* test and the traditional rule. Nevertheless, the *Weeks* holding permits a court to

---

[202] R. BARSH & J. HENDERSON, *supra* note 84. Barsh and Henderson develop a theory extending ninth and tenth amendment protections to Indian tribes by analogy to the states. *Id.* at 257-69.

[203] *See, e.g., supra* notes 9-10 and accompanying text.

[204] 430 U.S. 73 (1977).

[205] 448 U.S. 371 (1980).

[206] 430 U.S. at 85 (quoting Morton v. Mancari, 417 U.S. 535, 555 (1974)).

scrutinize congressional acts, and suggests a possible substantive limitation on the federal administrative power.

In *Sioux Nation,* the Court distinguished Congress's administrative power in Indian affairs from its general legislative authority, and observed that Congress cannot act in both capacities at the same time. Under the Court's analysis, if Congress is in fact wearing its "trustee hat," the plenary power rule continues to apply. Where Congress wears its "legislative hat," however, different constitutional analysis will be appropriate. In particular, the Court held in *Sioux Nation* that the tribe was entitled to just compensation for a taking of treaty-protected tribal land.

Building upon the Court's discussion in *Sioux Nation,* and considering the facts of *Lone Wolf v. Hitchcock*[207] as an example of Congress's traditional plenary power, this Comment has proposed three additional areas of inquiry that further distinguish good faith administrative acts from general federal legislation. First, where legislation is clearly unfavorable to tribal interests, it should not be included within the scope of the federal obligation to Indian tribes. Second, where legislation abrogates treaty rights, it should be considered presumptively outside the administrative power unless there is a showing of tribal consent to the enactment. Third, where legislation reflects a conflict between tribal interests and the competing public policies Congress may have considered, the legislation should by definition be beyond the scope of the administrative power.

Pursuant to the analysis of *Sioux Nation,* where a court makes the factual determination that a given federal enactment is not within the congressional administrative power, it must go on to consider whether other constitutional doctrines permit the legislative act. The obvious problem that remains after *Weeks* and *Sioux Nation* is that it is unclear precisely how familiar constitutional guidelines should apply in the unique area of Indian tribal rights. Now that the question can be asked, it is difficult to avoid the dilemma that faced both Chief Justice Marshall[208] and the Court that decided *United States v. Kagama.*[209] The Constitution provides no clear guidance because it did not anticipate these problems. This Comment suggests that there are two ways to approach this problem. One is to attempt to define the sources and limits of congressional authority, based on the theory that Congress has no powers except those granted by the Constitution. The other approach is to generate a theory of protected tribal rights, based on analogies to

---

[207] 187 U.S. 553 (1903).

[208] *See supra* notes 42-47 and accompanying text.

[209] 118 U.S. 375 (1886). *See supra* notes 71-76 and accompanying text.

settled constitutional doctrine. Both perspectives are implicated by the holdings in *Weeks* and *Sioux Nation,* and both will continue to be important in the effort to bring American Indian tribes into the federal constitutional scheme.