

STANDING BEAR V. CROOK: THE CASE FOR EQUALITY UNDER WAAXE'S LAW†

MARY KATHRYN NAGLE††

This hand is not the color of yours, but if I pierce it, I shall feel pain. If you pierce your hand, you also feel pain. The blood that will flow from mine will be of the same color as yours. I am a man. The same God made us both.

Chief Standing Bear, *Standing Bear v. Crook*, May 1879.¹

In 1879, a full seventy-five years before the United States Supreme Court issued its decision in *Brown v. Board of Education*,² a Ponca Indian Chief stood up in federal court and made one of the most powerful appeals for equality under the law in the history of this nation. In a federal court tucked away in the bustling cow town and railroad hub of Omaha, Nebraska, Chief Standing Bear extended his

† “Waaxe” is the word the Ponca used when they saw the first White Man. According to Louis Headman, a Southern Ponca Tribal elder who is one of only five people left that speak Ponca fluently, *Waaxe* actually refers to God, or Wakanda. Initially, the Ponca thought the White Man was a representation of God. It wasn't very long, however, before the Ponca realized that the White Man was not a representation of God. Interview with Louis Headman, Southern Ponca Tribal Elder, in Ponca City, Okla. (Oct. 28, 2010).

†† Citizen of the Cherokee Nation of Oklahoma; Honorary Member of the Ponca Tribe of Nebraska. Tulane Law School, Class of 2008; recipient of the John Minor Wisdom Award. Special thanks to United States District Judges Joseph Bataillon and Laurie Smith Camp, as well as Dean Marianne Culhane and Professor Michael Kelly at Creighton University Law School, for their work to help spread the story of *Standing Bear v. Crook*. A very special thanks to Dean Stacy Leeds, Walter Echo-Hawk, and the numerous other Native law scholars whose inspirational work has laid the foundation for my article. And many, many thanks to Kevin Gover, Elizabeth Gische Kennedy, Laura Krafur, and everyone at the Smithsonian's National Museum of the American Indian for hosting an entire Symposium dedicated to the very issues addressed in this article. I would also like to thank Professors Hope Babcock and Benjamin Heidlage for reading earlier versions of this article and offering helpful, constructive criticism. This article is dedicated to my grandmother, Frances Polson Nagle; to her father, William Dudley Polson; to his mother, Flora Chamberlain Ridge; to her father, John Ridge; and to his father Major Ridge. May my grandfathers and grandmothers find solace in the powerful words of Chief Standing Bear, as well as Judge Dundy's deconstruction of the extraconstitutional doctrine that labeled them as inferior “ignorant and dependent” “savages.” This article is also dedicated to all members of the Northern and Southern Ponca Tribes. For anyone who has met a member of one of these two Ponca Nations, you can understand how Standing Bear was able to walk 600 miles through deadly blizzards to bury his son. The Ponca are an incredibly resilient, beautifully brilliant, and spiritually humble people. I am honored to now count them as my friends and family.

1. JOE STARITA, “I AM A MAN”: CHIEF STANDING BEAR'S JOURNEY FOR JUSTICE 151 (2009).

2. 347 U.S. 483 (1954).

hand and made a speech.³ It was a simple speech—but powerful in its appeal. By extending his hand and acknowledging that it was not white in color, Standing Bear asked the court to find he was a *person* under the law—despite the fact that he was an Indian in race.

The effect of Chief Standing Bear's words in the courtroom was palpable—leaving many courtroom observers in tears. Judge Elmer S. Dundy was not immune to the Chief's powerful plea. On May 12, 1879, ten days after the close of arguments, Judge Dundy issued his decision declaring Chief Standing Bear, and all *Indians* in the United States, to be *persons* under the law.⁴ It was the first time a judge had ever recognized a Native American's right to sue out the writ of habeas corpus in a federal court.⁵ It was the first time a federal court had found that an Indian's race did not justify the government denying him the same rights under the law as whites.

To be sure, Judge Dundy's decision in *Standing Bear v. Crook*⁶ is, doctrinally, the equivalent of *Brown v. Board of Education*. Today no one questions that the "separate but equal" doctrine announced in *Plessy v. Ferguson*⁷ was unconstitutional *because* it was premised on the notion that blacks were racially inferior to whites—and consequently, could be treated differently by the government. Furthermore, no one today questions that *Brown* rejected and eradicated the discriminatory racial classification inherent in *Plessy's* separate but equal doctrine. Likewise, in *Standing Bear v. Crook*, Judge Dundy concluded that Indians have the same rights under the law as whites—despite the numerous contemporaneously controlling Supreme Court precedents stating that Indians were racially inferior to whites and therefore did not enjoy the same rights under the law.⁸

In this nation's first significant civil rights case, Chief Standing Bear argued, and Judge Dundy agreed, that labeling an entire race "inferior" could no longer form the basis for the government's denying a *person* of that race his basic human rights under the law. Thus, almost two decades before the Supreme Court would first introduce its separate but equal doctrine in *Plessy v. Ferguson*, Chief Standing Bear and Judge Dundy, together, had already deconstructed the doctrine's basic premise.

3. STARITA, *supra* note 1, at 150-52.

4. United States *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695, 700-01 (C.C.D. Neb. 1879) (No. 14,891).

5. STARITA, *supra* note 1, at 157-58.

6. 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891).

7. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

8. *Standing Bear*, 25 F.Cas. at 700-01; *cf.* STARITA, *supra* note 1, at 145-46.

I. INTRODUCTION

It seems to me an odd feature of our judicial system that the only people in this country who have no rights under the law are the original owners of the soil.

Brig. Gen. George Crook, Defendant in *Standing Bear v. Crook*.⁹

Although he should now be recognized as one of our most important civil rights leaders, Chief Standing Bear certainly never set out to be one. It is true that the Chief wanted to see his people treated with equality before the law, but he did not set out on his six hundred mile march north back to Nebraska to make a political statement. Instead, Standing Bear decided to break federal law and leave the reservation in Indian Territory because he wanted to carry the bones of his son back to the Niobrara River. He simply wanted to bury his son with his ancestors.

The story of this nation's first civil rights decision begins in the mid-nineteenth century. In a span of just fifty-two years, the federal government signed four separate treaties with the Ponca Nation in what is now present day Nebraska, each time taking more land in return for false promises of monetary payments that the Ponca never received.¹⁰ When the federal government finally decided to forsake these treaties and take all of the Ponca's land, it forced the Ponca at gunpoint to walk more than six hundred miles south to "Indian Territory."¹¹ Thus, in May of 1877, followed by soldiers bearing bayonets, the Ponca set off on a fifty-five day journey across two states.¹² When they finally reached present-day Oklahoma in July, the Ponca had lost nine of their people (including Chief Standing Bear's daughter Prairie Flower), survived two tornadoes, witnessed the attempted murder of their principal chief, and said goodbye to their entire ancestral homeland.¹³

After just six months in the new land, malaria spread among the Ponca and they soon lost more than one-fourth of their tribe.¹⁴ One of the fallen was Chief Standing Bear's son, Bear Shield.¹⁵ As he lay dying, Bear Shield asked his father to promise that he would bury his bones with the bones of their ancestors, along the banks of their beloved Niobrara.¹⁶ Bear Shield's father kept his promise.

9. STARITA, *supra* note 1, at xi.

10. *Id.* at 28-29.

11. *Id.* at 60-67.

12. *Id.* at 67.

13. *Id.* at 75-76.

14. *Id.* at 101-03.

15. *Id.* at 103-04.

16. *Id.* at 103-05.

In the middle of a frigid winter's night in January 1879, with the bones of his son wrapped carefully in a box, Standing Bear set out on a six hundred mile walk to the north—back to the banks of the Niobrara.¹⁷ Traveling by foot in the dead of winter, Chief Standing Bear and twenty-nine other Ponca survived off of the corn and coffee they received from farmers in Kansas along the way.¹⁸ When they reached Nebraska, the Secretary of the Interior, Carl Schurz, ordered General Crook to arrest and imprison them at Fort Omaha.¹⁹ By leaving the reservation without the federal government's permission, Chief Standing Bear had defied the government and broken federal law.²⁰

In a story that demonstrates the best and worst of what we know to be the human condition, General Crook, with the help of journalist Thomas Henry Tibbles, recruited two attorneys from Omaha to file a writ of habeas corpus on Standing Bear's behalf.²¹ In response to the writ, Mr. Lambertson, the United States Attorney, argued that by the very words of the habeas statute Congress had reserved the right to file the writ to "those *persons* unlawfully detained."²² Mr. Lambertson argued that Standing Bear was not a *person* because he was an *Indian*, therefore, he had no right to sue out the writ in a court of law. To support his case, Mr. Lambertson noted that in *Dred Scott v. Sandford*,²³ Justice Taney held that Indians, like blacks, were also racially inferior—Justice Taney referred to them as "savages" and "wards" of the government—and therefore they did not have the same rights as whites to sue for their rights in a court of law.²⁴

Dred Scott was not the only United States Supreme Court case on the government's side. From *Johnson v. McIntosh*²⁵ in 1823 to *Cherokee Nation v. Georgia*²⁶ in 1831, the Supreme Court had consistently labeled Indians as "savages," "heathens," and "wards," and the Court consistently declared that Indians did not have the same rights as whites to protect their rights to life, liberty, property, and due process

17. *Id.* at 105-06 ("The boy was dressed in his best clothing and the chief gently placed him in a box and carefully lowered the box into the back of one of the covered wagons.")

18. *Id.* at 107.

19. *Id.* at 112.

20. *Id.* at 112.

21. THOMAS HENRY TIBBLES, *STANDING BEAR AND THE PONCA CHIEFS* 34-35 (Kay Graber ed., 1972).

22. United States *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695, 696-97 (C.C.D. Neb. 1879) (No. 14,891).

23. 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

24. STARITA, *supra* note 1, at 146-47.

25. 21 U.S. (8 Wheat.) 543 (1823).

26. 30 U.S. (5 Pet.) 1 (1831).

in a court of law.²⁷ In *Cherokee Nation v. Georgia*, the Supreme Court declared that it had no jurisdiction to hear the Cherokee Nation's case or controversy because an Indian's "appeal was to the tomahawk"—and not a court of law.²⁸ In 1879, all of the applicable Supreme Court precedent supported Mr. Lambertson's argument that an Indian, due to his racially inferior status in American society, could not be a person under the law.

Judge Dundy, however, thoroughly considered and dismissed the U.S. Attorney's arguments.²⁹ That is, seventy-five years before the Supreme Court applied principles of equal protection to declare the separate but equal doctrine of *Plessy v. Ferguson*³⁰ unconstitutional, a federal district court determined the Supreme Court's racial classification of Indians as inferior "wards" of the government denied Native Americans equal rights under the law.³¹ Thus, by declaring the Supreme Court's classification of Indians as "untutored" and "savage" a constitutionally irrelevant basis for denying Indians their basic rights under federal law, Judge Dundy's decision signified for Indians what the Supreme Court's decision in *Brown v. Board of Education*³² would signify for blacks in 1954.

Furthermore, by denying the government's argument that an Indian's basic liberties should be restricted on the basis of his racially inferior status in society, Judge Dundy firmly denounced the very foundation for the Supreme Court's sole constitutional mediating principle in Indian Law: the "plenary power" doctrine. Effectively, Judge Dundy's decision rejected the fundamental basis for what the Supreme Court would later define as the plenary power doctrine.³³

The Supreme Court first fabricated this doctrine in its 1886 decision in *United States v. Kagama*,³⁴ and later more clearly articulated and even named it the plenary power doctrine in *Lone Wolf v. Hitchcock*³⁵ in 1903.³⁶ Since 1903, the plenary power doctrine has consti-

27. See, e.g., *Johnson v. McIntosh* 21 U.S. (8 Wheat.) 543, 576-77 (1823) (discussing "the occupancy of the natives, who were heathens"); *id.* at 590 ("[T]he tribes of Indians inhabiting this country were fierce savages . . ."); see also *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (describing Indians as existing "in a state of pupilage" such that "[t]heir relation to the United States resemble[d] that of a ward to his guardian").

28. *Cherokee Nation*, 30 U.S. (5 Pet.) at 18.

29. See *Standing Bear*, 25 F. Cas. at 700-01.

30. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

31. See *Standing Bear*, 25 F. Cas. at 700-01.

32. 347 U.S. 483 (1954).

33. See Stacy Leeds, *The More Things Stay the Same: Waiting on Indian Law's* *Brown v. Board of Education*, 38 TULSA L. REV. 73, 78 (2002) ("What, then, can the cynic conclude is the ultimate source of congressional plenary authority? It seems to have emerged from thin air against a backdrop of Indian wardship and racial inferiority.").

34. 118 U.S. 375 (1886).

35. 187 U.S. 553 (1903).

36. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 562 (1903).

tuted the Supreme Court's sole doctrinal justification for its adjudications of disputes involving the balance of power between sovereign Indian nations and the three branches of the federal government, as well as the Court's consideration of individual Native Americans' rights as citizens of the United States.³⁷ Although the plenary power doctrine was created out of a racial classification that would not survive the scrutiny of the Supreme Court's contemporary Fourteenth Amendment jurisprudence, the Supreme Court continues to rely on the plenary power doctrine today.³⁸

Perhaps the only thing more notable than the doctrine's consistent survival is the doctrine's lack of a constitutional basis.³⁹ The plenary power doctrine is *not* based on a source of power derived from the Constitution—specifically, it is not found in the Indian Commerce Clause, the federal government's treaty power, Article III separation of powers, federalism, or theories of international law recognizing Indian tribes as sovereign nations.⁴⁰ Unfortunately, today in the twenty-first century, our Supreme Court still utilizes a nineteenth

37. See Robert N. Clinton, *There Is No Federal Supremacy Clause for Federal Indian Tribes*, 34 ARIZ. ST. L.J. 113, 116-17 (2002) ("Since its invention, the so-called federal Indian plenary power doctrine simultaneously has performed two roles for the federal government: (1) assuring a broad source of federal constitutional authority in Indian affairs and (2) unilaterally claiming federal supremacy over Indian tribes."); see also Frank Pommersheim, Lara: *A Constitutional Crisis in Indian Law?*, 28 AM. INDIAN L. REV. 299, 303 (2003-2004) ("Plenary power is firmly ingrained in Indian law jurisprudence, yet most scholars raise serious questions about it as an extraconstitutional doctrine.").

38. See Clinton, *supra* note 37, at 199 (footnotes omitted) ("Yet, the Supreme Court continues to cite them as controlling precedent. The closest analogy might be the Court unabashedly citing *Dred Scott v. Sanford* or *Plessy v. Ferguson* to make a controlling point in a modern affirmative action case. If such an event occurred, the uproar from the public and the academic and legal community undoubtedly would be deafening. Yet, unfortunately, no one notices, cares or comments when the federal courts cite and rely upon precedents of like ilk in modern Indian law decisions.").

39. See WALTER ECHO-HAWK, *IN THE COURTS OF THE CONQUEROR* 163 (2010) ("The plenary-power doctrine was seemingly plucked out of thin air by the Supreme Court against the backdrop of federal guardianship of a dependent, supposedly inferior race of people—a dubious basis upon which to sanction the rule of Native people by unlimited power, a despotic power aimed at no other Americans in US history."); see also Clinton, *supra* note 37, at 195 ("Consequently, the Indian plenary power doctrine demonstrably rested solely on the claimed superiority and dominance of the federal government over Indian tribes, based solely on the race of the members of the political communities involved. It had no foundation whatsoever in the text, structure, or history of the United States Constitution.").

40. See Clinton, *supra* note 37, at 181-82 ("[A] [c]lose reading of the opinion reflects the fact that the [*Kagama*] Court clearly rejected the Indian Commerce Clause as a broad source of Congressional authority to directly regulate Indians. . . . [Furthermore,] in the absence of any textual delegation of such authority in the United States Constitution, the Supreme Court employed the wardship-based Indian plenary power doctrine to supply the source of federal Congressional authority."); see also Frank Pommersheim, *Lone Wolf v. Hitchcock: A Little Haiku Essay on a Missed Constitutional Moment*, 38 TULSA L. REV. 49, 49-50 (2002) ("Most distressing, of course, is that current Supreme

century doctrine whose creation was justified solely on the Court's conclusion that Native Americans constitute "an ignorant and dependent race."⁴¹ Given that *Standing Bear v. Crook*⁴² rejected the Supreme Court's articulation of Indians as "dependent" ward-like "savages" as a constitutionally legitimate basis for denying them access to the writ of habeas, Judge Dundy's decision—and the reasoning to support it—came as an unexpected, miraculous victory for the Ponca and for all Native Americans.

Although Judge Dundy's decision serves the same constitutional purpose as the Supreme Court's decision in *Brown*, Judge Dundy's decision has not enjoyed the same fame and recognition as *Brown*. This lack of recognition has led many Native American law scholars to offer various reasons and analyses as to "why federal Indian law has not seen its *Brown v. Board of Education*."⁴³

Although I find these scholars' various articulations of the reasons why the Supreme Court has not yet announced an equivalent Native American *Brown v. Board of Education* decision to be persuasive and quite insightful, I would argue that we do not need to wait for the Supreme Court to announce anything new. Instead, as a legal community and a nation, we simply need to remember, recognize, and consecrate the principles of fundamental equality under the law announced in 1879, in *Standing Bear v. Crook*.

In order to understand the ways in which *Standing Bear v. Crook* has deconstructed the constitutionally void and racially constructed premise of the Supreme Court's plenary power doctrine, one must first understand the extraconstitutional origins of the doctrine itself. Thus, this Article will first explore the precise origins of the plenary power doctrine.⁴⁴ Next, this Article will examine how *Standing Bear v. Crook* deconstructed the plenary power doctrine in the same manner that the *Brown* Court deconstructed and overturned *Plessy's* separate but equal doctrine.⁴⁵ Finally, this Article will highlight the ways in which the Supreme Court's failure to recognize the *Standing Bear* court's deconstruction of the plenary power doctrine has resulted in

Court jurisprudence is neither anchored in, nor constrained by, any constitutional norms or limits, and therein lies its ongoing perniciousness.").

41. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903); see also Joseph Singer, *Remembering What Hurts Us Most: A Critique of the American Indian Law Deskbook*, 24 N.M. L. Rev. 315, 320 (1994) ("[C]iting *Lone Wolf* approvingly in this manner is extremely offensive. It is as if the treatise writers had cited *Dred Scott* approvingly for the proposition that African Americans are not persons within the meaning of the Constitution, without acknowledging both the fundamental injustice of that proposition and the fact that it was altered by the Fourteenth Amendment.").

42. 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891).

43. Leeds, *supra* note 33, at 75.

44. See *infra* notes 47-211 and accompanying text.

45. See *infra* notes 212-52 and accompanying text.

several more decades of expansion for the plenary power doctrine, all based on what the Supreme Court continues to recognize as Native Americans' racially constructed "dependent status."⁴⁶

Although there was a point in time when this nation relied on the racially constructed *Johnson/Cherokee Nation* legal regime to justify America's Manifest Destiny, that time has long since passed. Today, every American should advocate for the replacement of the *Johnson*, *Cherokee Nation*, *Kagama*, and *Lone Wolf* precedents with the law espoused in *Standing Bear v. Crook*. As Americans living in a contemporary democratic society, we can no longer tolerate the perpetuation of a legal doctrine that tells a certain class of Americans they constitute an "ignorant and dependent race."

II. THE CREATION OF AN EXTRACONSTITUTIONAL SUPERPOWER

The United States, as guardian of all Indians, including the Poncas before this court, decides what is best for their well-being. At times some may disagree with decisions in that regard, but that does not mean a court is free to overrule the Indian Commissioner or the Secretary of the Interior and set itself up as a guardian in their stead.

The guardianship power lies outside the judicial system.

United States Attorney Genio Lambertson, *Standing Bear v. Crook*, May 1879.⁴⁷

When *Standing Bear* appeared before Judge Dundy in federal court in 1879, Mr. Lambertson's argument that *Standing Bear's* appeal existed outside the judicial system carried great weight.⁴⁸ A half a century earlier, the Supreme Court in *Johnson v. McIntosh*⁴⁹ laid the foundation for the plenary power doctrine.⁵⁰ Less than a decade after *Johnson*, in *Cherokee Nation v. Georgia*,⁵¹ the Court held that, because Indians were racially inferior, they had no right to pursue a lawsuit in a court of law.⁵² Consequently, by the time Justice Taney

46. See *infra* notes 253-305 and accompanying text.

47. Transcript of Trial, *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891) (on file with author); see generally STARITA, *supra* note 1, at 145.

48. See STARITA, *supra* note 1, at 145.

49. 21 U.S. (8 Wheat) 543 (1823).

50. See Matthew Fletcher, *The Supreme Court and Federal Indian Policy*, 85 NEB. L. REV. 121, 157 (2006) (discussing "normative federal Indian law" and noting that "*Johnson* illustrates that the very foundation of federal Indian law is based on the notion of implicit divestiture of inherent tribal sovereignty").

51. 30 U.S. (5 Pet.) 1 (1831).

52. See *Cherokee Nation v. Georgia*, 30 U.S. (8 Wheat.) 1, 20 (1831) (determining that the Cherokee Nation could not sue in American courts).

drafted his dicta regarding Native Americans in *Dred Scott v. Sandford*,⁵³ the plenary power doctrine was lacking in formal name only. So when Mr. Lamberton argued that Judge Dundy should rule that Indians were racially inferior “wards” with no rights to file a writ of habeas in a court of law, the controlling Supreme Court precedent squarely supported his argument. In 1879, the law was clear: Indians were racially inferior “savages”—and consequently, they did not have the same rights as whites.

The Supreme Court did not formally introduce the plenary power doctrine until its decision in *Lone Wolf v. Hitchcock*⁵⁴ in 1903.⁵⁵ The birth of this extraconstitutional doctrine, however, was well underway by the time Judge Dundy considered Chief Standing Bear’s writ of habeas—making Judge Dundy’s refusal to accept the fundamental “ward/guardian” dichotomy of the plenary power doctrine all the more remarkable—and revolutionary.

A. THE RACIALLY CONSTRUCTED DISCOVERY PRINCIPLE

Although most scholars cite *Lone Wolf v. Hitchcock*⁵⁶ and *United States v. Kagama*⁵⁷ as the primary sources of the now infamous plenary power doctrine,⁵⁸ the *Lone Wolf* and *Kagama* Courts relied on the doctrinal principles the United States Supreme Court first laid out in *Johnson v. McIntosh*⁵⁹ to justify what later became the plenary power doctrine.⁶⁰ Many law students read *Johnson* today for its eluci-

53. 60 U.S. (19 How.) 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

54. 187 U.S. 553 (1903).

55. See Joseph Singer, *Lone Wolf, or How to Take Property by Calling it a “Mere Change in the Form of Investment,”* 38 TULSA L. REV. 37, 37-38 (2002) (noting that as a result of *Lone Wolf*’s introduction of the plenary power doctrine, “Congress has ‘plenary power’ over Indians and Indian affairs; the Court interpreted plenary power to mean absolute power—an interpretation that would be applicable to no other class of persons”).

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

57. 118 U.S. 375 (1886).

58. See, e.g., Clinton, *supra* note 37, at 181 (“[T]he source of this so-called plenary power doctrine was the wardship power announced in *Kagama*.”); Singer, *supra* note 55, at 37-38 (noting that *Lone Wolf* was the source of the plenary power doctrine because the Court “appeared to rule that all questions regarding federal power over Indians and Indian nations were ‘political questions’ unreviewable by courts,” and consequently, “[u]nder this scheme, Congress has ‘plenary power’ over Indians and Indian affairs”).

59. 21 U.S. (8 Wheat.) 543 (1823).

60. See T.W. Twibell, *Rethinking Johnson v. McIntosh (1823): The Root of the Continued Forced Displacement of American Indians Despite Cobell v. Norton (2001)*, 23 GEO. IMMIGR. L.J. 129, 168 (2008) (“*Lone Wolf* cited a stream of authority beginning with *Johnson v. McIntosh* to justify its holding that the U.S. government had the ultimate authority and was the trustee of Indian affairs, even in any disputes it had with American Indians. The mentality exhibited by the court in *McIntosh* still shapes the common conception of American Indians and is used to justify their forced displacement.”).

dation of what is known as the “discovery principle”—or the idea that white settlers took title to the Indians’ land since “discovery gave exclusive title to those who made it.”⁶¹ Although the legal notion that one race can acquire title to the land of another race simply upon “discovering” it is inherently racist, the *Johnson* Court’s contribution to the plenary power doctrine runs deeper than its constitutionally infirm discovery principle.

It is the “legal” justification underlying *Johnson*’s discovery principle that paved the way for the plenary power doctrine’s continued survival today. How did the Supreme Court justify its decision that a white person’s discovery of Indian land vested in the white person colorable title to the land? The *Johnson* Court made no pretense about it. The Court did not cite any treaties or agreements in which Indians agreed to—or bargained for—exchange their lands. Quite notably, the *Johnson* Court did not cite a provision of the Constitution in support of its newfound discovery principle.⁶² Furthermore, the Court could not look to preceding legal regimes across the ocean for support for its discovery principle since “neither English nor Spanish law entertained the notion that discovery grants title to Indian land.”⁶³ As Native American law scholar Walter Echo-Hawk has noted, the *Johnson* Court was “[r]educed to playing the race card,”⁶⁴ and with no legitimate constitutional or English or Spanish legal doctrine available, the Court relied exclusively on its declaration that Indians were mere “savages” and “heathens.”⁶⁵

The *Johnson* Court described Indians as “savages,” judicially declaring that “the tribes of Indians inhabiting this country [a]re fierce savages, whose occupation [i]s war, and whose subsistence was drawn chiefly from the forest.”⁶⁶ Thus, the legal basis for denying Indians the right to hold title to the land they possessed was based on a judicially crafted finding that Indians were not farmers of their land and,

61. *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1823); see also Twibell, *supra* note 60, at 169 (“Law school curricula discuss the case in terms of the right of ‘discovery’ rather than in terms of forced displacement and the cultural, spiritual and material dispossession, ethnic cleansing or even genocide of American Indians.”).

62. See *Johnson*, 21 U.S. (8 Wheat.) at 584-85 (noting that it had never been doubted that such action would be constitutional but not specifically discussing any constitutional provision); see also Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177, 1194-95 (2001) (“First, in *Johnson*, the Court established that the federal government, not Indian tribes, has the right to sell Indian lands. To arrive at this conclusion, Marshall had to employ the harsh Anglo version of the discovery doctrine, thereby implicitly sanctioning the thesis that Indian tribes were ‘conquered’ merely by the arrival of Christians on their continent.”).

63. ECHO-HAWK, *supra* note 39, at 73 (footnote omitted).

64. *Id.* at 74.

65. *Johnson*, 21 U.S. (8 Wheat.) at 577, 590.

66. *Id.* at 590.

therefore, constituted an inferior race that could not claim title to the land they possessed.⁶⁷ Without a legal doctrine to rely upon to reach this conclusion, the Court conjured up “Locke’s image of ‘the wild Indian’ who could not feed his community and had not established any property rights in America”⁶⁸ to justify its creation of the discovery principle. This is ironic, since the very first English settlers to arrive on the continent relied on Native American harvests to survive—and would have starved to death but for their ability to eat the crops grown by Native Americans.⁶⁹ However, because the *Johnson* Court judicially classified Indians as “savages” who hunted and did not farm, the Court concluded that “[t]o leave them in possession of their country, was to leave the country a wilderness”⁷⁰ This legal fiction formed the basis for the creation of the discovery principle.⁷¹

The parallels between *Johnson v. McIntosh* and *Dred Scott v. Sandford*⁷² are striking. A review of the underlying principles in both decisions reveals that “[t]he principles espoused in *Johnson*, like those in *Dred Scott*, are tainted by colonialism and overt racism.”⁷³ Thus, the *Johnson* Court’s declaration that Indians were racially inferior—and consequently could not hold title to their land once the whites discovered it—parallels the Court’s determination in *Dred Scott* that blacks “belong to an inferior and subject race,”⁷⁴ and are therefore the property of whites since “the Constitution recognizes the right of property of the master in a slave.”⁷⁵ In both *Dred Scott* and *Johnson*, the Court relied on inferior racial classifications to strip blacks and Indians of their inherent right to their own body and physical property—while simultaneously justifying the creation of an extraconstitutional property right in whites.

67. See Hope Babcock, *The Stories We Tell, and Have Told, About Tribal Sovereignty: Legal Fictions at Their Most Pernicious*, 55 VILL. L. REV. 803, 809-10 (2010).

68. Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 607-08 (2009).

69. *Id.* at 607 (“But on reaching the New World, the colonists found that not only did the tribes they encountered farm their lands, but that the English were dependent on native harvests to survive.”).

70. *Johnson*, 21 U.S. at 590; see also Babcock, *supra* note 67, at 809 (“This view of Indians provided additional support for Marshall’s premise that leaving Indians in possession of the country ‘was to leave the country a wilderness,’ which, in turn, justified finding superior title to Indian lands in the United States on the basis of discovery alone.”).

71. See generally LINDSAY G. ROBERTSON, *CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS* (2005) (uncovering the legal fictions in *Johnson*).

72. 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

73. ECHO-HAWK, *supra* note 39, at 77.

74. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 422 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

75. *Dred Scott*, 60 U.S. (19 How.) at 451.

It is now widely recognized that the *Dred Scott* Court's racially based declaration that blacks are the property of whites constitutes a constitutionally impermissible race classification. The Supreme Court, however, has yet to reconcile its contemporary Fourteenth Amendment jurisprudence with the discovery principle's edict that an Indian's racial inferiority serves to transfer an Indian's property to a superior race. Given that the Supreme Court still approvingly cites *Johnson's* discovery principle today,⁷⁶ Judge Dundy's refusal in 1879 to apply the racially constructed discovery principle is remarkable—and cause for celebration.

B. CHEROKEE NATION'S CREATION OF RACIALLY INFERIOR WARDS

*Johnson v. McIntosh*⁷⁷ was the first step in the judicial creation of the plenary power doctrine. Just eight years later, in a case that Cherokee leaders John Ross, Major Ridge, and John Ridge brought to the United States Supreme Court,⁷⁸ the Court expanded on *Johnson's* racial classification of Indians to develop and articulate the more formal elements of what the Court later defined as the plenary power doctrine. In *Cherokee Nation v. Georgia*,⁷⁹ the Supreme Court relied on the *Johnson* Court's reasoning that Indians were racially inferior "savage" beings to conclude that Indians exist "in a state of pupillage" and are therefore "domestic dependent nations" with no right to enter the courthouse doors.⁸⁰

By the time Cherokee leaders had brought their case to the Supreme Court, Georgia already had been attempting to forcibly remove the Cherokee for over a decade.⁸¹ According to the Georgia state government, the federal government's failure to let Georgia take the Cherokee Nation's land "was wrongfully depriv[ing Georgia] of properties of untold worth."⁸² The State of Georgia was outraged when the

76. See, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 209 (1978) (quoting *Johnson*, 21 U.S. (8 Wheat.) at 574) (internal brackets omitted) (concluding that "rights to complete sovereignty, as independent nations, are necessarily diminished"), *superseded by statute*, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1856, 1892 (1990) (codified at 25 U.S.C. § 1301(2) (2006)), *as recognized in* *United States v. Lara*, 541 U.S. 193, 207 (2004); *Seneca Nation of Indians v. State*, 206 F. Supp. 2d 448, 503-04 (W.D.N.Y. 2002) (quoting *Johnson*, 21 U.S. (8 Wheat.) at 572-74) (concluding that "an Indian tribe has no independent power to convey its aboriginal title to another . . . [since] discovery gave exclusive title to those who made it").

77. 21 U.S. (8 Wheat.) 543 (1823).

78. See THURMAN WILKINS, *CHEROKEE TRAGEDY: THE RIDGE FAMILY AND THE DESTRUCTION OF A PEOPLE* 219-22 (2d ed. 1986).

79. 30 U.S. (5 Pet.) 1 (1831).

80. See *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); see also *Cherokee Nation*, 30 U.S. (5 Pet.) at 28 (Johnson, J., concurring).

81. ECHO-HAWK, *supra* note 39, at 95-98.

82. WILKINS, *supra* note 78, at 209.

Cherokee Nation created and signed its own constitution in 1827, and in response, on June 1, 1830, Georgia passed a law extending the state's jurisdiction and laws over all land and property situated within the Cherokee Nation.⁸³ No doubt Georgia had confidence its legislation would find approval with the newly elected President Andrew Jackson. President Andrew Jackson had recently used his first inaugural address to voice his commitment to enacting an Indian removal policy to move all Indians west of the Mississippi.⁸⁴

As Walter Echo-Hawk has noted, "*Cherokee Nation* marks the first time that an Indian tribe went to federal court in a major lawsuit to protect the political, human, and property rights of an American Indian tribe and its members from destruction by a state."⁸⁵ The Supreme Court, however, refused to strike down Georgia's law.⁸⁶ Instead, the *Cherokee Nation* Court concluded that Indian tribes were "domestic dependent nations" because they "occupy a territory to which we assert a title *independent of their will*, which must take effect in point of possession when their right of possession ceases."⁸⁷

Once again, the Supreme Court did not cite any doctrine to demonstrate that an Indian's possession of his land ceases upon a state's decision to take it.⁸⁸ Nor did the Court rely on any known constitutional provision or doctrine.⁸⁹ Instead, the entire basis for concluding that Native Americans were "domestic dependent nations" with no right to independently govern their own land was based on the Supreme Court's legal conclusion that the United States could assert title to Indian lands "independent of their will."⁹⁰ This conclusion, however, finds its roots in the *Johnson* Court's false colonial characterization of Indians as "heathens" and "savages" who do not farm the land like their white counterparts. Consequently, the labeling of Native American nations as "domestic dependent nations" is merely an

83. *Id.* at 203.

84. *Id.* at 209.

85. ECHO-HAWK, *supra* note 39, at 87.

86. *Cherokee Nation*, 30 U.S. (5 Pet.) at 20 (majority opinion).

87. *Id.* at 17 (emphasis added).

88. See Krakoff, *supra* note 62, at 1193 ("The Marshall trilogy, as it is known, accomplished by judicial fiat what otherwise would have remained a contested political matter: who has power to negotiate and legislate with respect to Indian tribes?").

89. See Clinton, *supra* note 37, at 139 ("In rejecting the right of the Cherokee Nation to initiate an original action in the United States Supreme Court against the State of Georgia to enforce federal treaty obligations of protection, the Supreme Court asserted, over two dissents, that Indian tribes were not foreign nations, but a different type of domestic nation. The dissenters would have treated the Cherokee Nation as a foreign nation within the meaning of Article III."). The words "domestic nation," however, appear nowhere in the Constitution, and the Supreme Court cited nothing in *Cherokee Nation* to support its position that the framers considered Indian nations to be "domestic" nations for legal purposes.

90. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

extension of the extraconstitutional discovery principle premised entirely on a legal fiction.

Furthermore, the *Cherokee Nation* Court infused what would later become the modern day plenary power doctrine with a twist of the "political question" doctrine—giving rise to a racially constructed doctrine of judicial abstention over Indian affairs.⁹¹ The Court reasoned that "[i]f it be true that the Cherokee nation have rights, this is not the tribunal in which those rights are to be asserted."⁹² Justice Marshall reasoned that Indian nations could not constitute foreign nations for Article III purposes, notwithstanding that Indian nations were foreign nations for purposes of federal laws and treaties.⁹³ Nothing in Article III, however, supports the conclusion that federal courts lack Article III jurisdiction to hear and decide disputes brought by sovereign Indian nations.⁹⁴

That is, the Court's decision to restrain its jurisdiction in *Cherokee Nation* was not so much predicated on its respect for federalism or separation of powers—but rather, the Court's reasoning was built on the premise that "the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government."⁹⁵ Such racial assumptions find no place within Article III. Consequently, it is clear that this sort of articulation of the crossroads between Article III and an Indian tribe is based, not on a constitutional doctrine, but instead based on the extraconstitutional consideration that Indians cannot enter the courthouse doors because they are racially inferior.

The point here, however, is quite significant. This racially constructed political question doctrine would later give rise to what we now know as the plenary power doctrine. An important ramification of *Lone Wolf v. Hitchcock*⁹⁶ is that whenever the Court applies the plenary power doctrine, it must defer to the other branches of federal government with respect to their treatment of Native Americans.⁹⁷ Today the *Cherokee Nation* Court's political question doctrine still pre-

91. See Clinton, *supra* note 37, at 140.

92. *Cherokee Nation*, 30 U.S. (5 Pet.) at 20.

93. *Id.* at 18-19.

94. See ECHO-HAWK, *supra* note 39, at 103.

95. *Cherokee Nation*, 30 U.S. (5 Pet.) at 18.

96. 187 U.S. 553 (1903).

97. See Fletcher, *supra* note 50, at 139 (footnotes omitted) ("In *Lone Wolf v. Hitchcock*, the Court recognized as a matter of federal common law that Congress possessed unprecedented plenary and exclusive power over Indian affairs, while at the same time adopting the position that congressional decisions on Indian affairs were nonjusticiable political questions.").

cludes Native Americans' access to the courts on account of their racial inferiority.⁹⁸

And yet, the *Cherokee Nation* Court took its legal explanation one step further, when for the first time, the Court decided to use the word "ward" to describe an Indian's racial status in America.⁹⁹ To further justify its conclusion that Georgia could take the Cherokee Nation's land without its consent, the Supreme Court asserted that Indians "are in a state of pupilage."¹⁰⁰ This "state of pupilage" led the Court to conclude that "[t]heir relation to the United States resembles that of a ward to his guardian."¹⁰¹ Thus, this characterization of Indians as "wards" of the government further justified the Court's decision that there was nothing the law could do to protect Cherokee life and property.¹⁰²

Coupled with the beginnings of a flawed political question doctrine, the Court's labeling of Indians as "wards" of the government cemented their position as *dependent*, racially inferior beings—a position the Supreme Court would subsequently use to formally create the plenary power doctrine. Accordingly, as of 1831, the Supreme Court had formulated all of the necessary components for the *Kagama/Lone Wolf* plenary power doctrine.

To be sure, the Supreme Court continues to cite to *Cherokee Nation* today.¹⁰³ Understanding the *Cherokee Nation* Court's construction of the "ward/guardian" dichotomy—and the resulting exclusion of Native Americans from our judicial system—underscores the significance of Judge Dundy's decision in *Standing Bear v. Crook*,¹⁰⁴ in which the United States Circuit Court for the District of Nebraska flatly rejected the racial "ward/guardian" dichotomy as a basis for denying Chief Standing Bear his rights under the law.

C. FROM WARD TO DOMESTIC DEPENDENT NATION

Still fighting for their survival, the Cherokee Nation returned to the United States Supreme Court one year later in 1832 to demand justice under the law once again for their Cherokee citizens. This

98. ECHO-HAWK, *supra* note 39, at 105-06.

99. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

100. *Id.*

101. *Id.*

102. *See id.* at 17-18.

103. *See, e.g.,* United States v. White Mountain Apache Tribe, 537 U.S. 465, 476 (2003) (quoting *Cherokee Nation*, 30 U.S. (5 Pet.) at 16) (defining "the relationship between Indian tribes and the United States as 'a ward to his guardian.'"); United States v. Lara, 541 U.S. 193, 204-05, (2004) (quoting *Cherokee Nation*, 30 U.S. (5 Pet.) at 17) (describing the traditional conception of tribes as domestic dependent nations).

104. 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891).

time, in *Worcester v. Georgia*,¹⁰⁵ the Cherokees won a decision that was initially regarded as a victory for Native Americans.¹⁰⁶ Chief Justice Marshall authored an opinion requiring the State of Georgia to respect the Cherokee's right to exist as a sovereign nation within the boundaries of their own lands.¹⁰⁷ This miraculous victory, however, has since been overshadowed by the way in which the "dependent" language in *Worcester* has been manipulated to support the Court's creation of a limitless plenary power doctrine.¹⁰⁸ That is, courts often cite *Worcester* to support their denial of certain rights to Indian nations on the basis that they are "dependent."

It is true that the *Worcester* Court used the word "dependent" in its decision.¹⁰⁹ Subsequent courts, however, have taken the word "dependent" out of context to cite the *Worcester* Court as support for the plenary power doctrine. In *Worcester*, the Supreme Court held that "[t]he Indian nations were, from their situation, necessarily dependent . . . for their protection from lawless and injurious intrusions into their country."¹¹⁰ Thus, the *Worcester* Court held that the Cherokee Nation was "dependent" on the United States government for protection from potential foreign invasions since "the extinguishment of the British power in their neighbourhood"¹¹¹ was rather a recent memory in 1832. This understanding of the term "dependent" is difficult to comprehend today, as it has been quite some time since our nation has experienced a foreign invasion. Today there is no concern that the Cherokee might support the British instead of the United States Army in the event that the British invade. Placed in the context of 1832, however, this reading is made clear by the Court's elucidation that "the Cherokee nation is under the protection of the United States of America, and of *no other sovereign whosoever*."¹¹²

There can be no doubt that in *Worcester*, the Court used the term "dependent" to define a geographic, geopolitical relationship between

105. 31 U.S. (6 Pet.) 515 (1832).

106. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 562 (1832).

107. *Worcester*, 31 U.S. (6 Pet.) at 561; see also ECHO-HAWK, *supra* note 39, at 109 ("Worcester established the principal that the borders of Indian reservations form an inviolate barrier to intrusion by state laws.").

108. See, e.g., *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 207 (1978) (emphasis added) (citations omitted) (quoting *Worcester*, 31 U.S. (6 Pet.) at 555) ("As Mr. Chief Justice Marshall explained in *Worcester v. Georgia*, such an acknowledgment is not a mere abstract recognition of the United States' sovereignty. 'The Indian nations were, from their situation, necessarily dependent on [the United States] . . . for their protection from lawless and injurious intrusions into their country.'"), *superseded by statute*, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1856, 1892 (1990) (codified at 25 U.S.C. § 1301(2) (2006)), *as recognized in United States v. Lara*, 541 U.S. 193 (2004).

109. *Worcester*, 31 U.S. (6 Pet.) at 555.

110. *Id.*

111. *Id.*

112. *Id.* (emphasis added).

the Cherokee Nation and the United States.¹¹³ As many scholars have noted, Justice Marshall's decision in *Worcester* "rejected the [discovery principle] doctrine in favor of a formulation rerecognizing indigenous ownership."¹¹⁴ Consequently, a thorough reading of *Worcester* reveals that Indian nations' "dependent" status is not predicated on notions of racial inferiority, and as such, cannot be used to justify their subjugation to a plenary power in the federal government.¹¹⁵

In 1886, however, the Court in *United States v. Kagama*¹¹⁶ justified its ruling that Congress holds unlimited power over Native Americans through a recitation of various precedents, one of which was *Worcester*.¹¹⁷ In its citation to *Worcester*, the *Kagama* Court asserted that its conclusion complied with applicable precedent since in *Worcester*, Indians are "spoken of as 'wards of the nation,' 'pupils,' [and] as local dependent communities."¹¹⁸ These three particular phrases appear *nowhere* in *Worcester*.¹¹⁹ Thus, any language in *Worcester* regarding the Cherokee's right to exist as "a distinct community occupying its own territory, with boundaries accurately described,"¹²⁰ has been lost to modern day recitations of what have now become the key buzzwords of the plenary power doctrine.¹²¹ *Kagama* effectively rewrote *Worcester*, making it indistinguishable from the *Johnson v. McIntosh*¹²² and *Cherokee Nation v. Georgia*¹²³ decisions.

113. See Clinton, *supra* note 37, at 141 ("In Cherokee Nation, Chief Justice Marshall employed the term dependent, not as a statement of political inferiority or a statement of federal supremacy, but, rather, as an implied criticism of the political branches of the United States government which had failed to enforce the treaty obligations of protection when requested to do so by the Cherokee Nation. Thus, dependence for Chief Justice Marshall was not a source of federal authority over the Cherokee Nation.")

114. ROBERTSON, *supra* note 71, at 4.

115. Unfortunately, following Chief Justice Marshall's death, President Andrew Jackson appointed several Justices to the Supreme Court that worked to ensure that the Discovery Doctrine's legacy would be restored and that the holding of *Worcester* would be ignored. See ROBERTSON, *supra* note 71, at 4 ("Various factors, including the death of Chief Justice John Marshall, facilitated a poitically driven revival of the discovery doctrine in the years immediately following *Worcester*, and the doctrine still continues to be recognized and applied by courts in the United States.")

116. 118 U.S. 375 (1886).

117. See *United States v. Kagama*, 118 U.S. 375, 382 (1886) (citing *Worcester*, 31 U.S. (6 Pet.) at 515).

118. See *Kagama*, 118 U.S. at 382.

119. See *id.*

120. *Worcester*, 31 U.S. (6 Pet.) at 520.

121. See Babcock, *supra* note 67, at 805 (footnote omitted) ("Although Marshall tried in *Worcester v. Georgia*, the third opinion in the Trilogy, to correct the factual inaccuracies that permeate his two prior decisions, it was too late. The damage to the cause of Indian sovereignty had been done and would prove to be irreversible.")

122. 21 U.S. (8 Wheat.) 543 (1823).

123. 30 U.S. (5 Pet.) 1 (1831).

D. *KAGAMA AND THE RACIALLY INFERIOR WARD: THE BIRTH OF THE PLENARY POWER DOCTRINE*

In 1879, in sharp contrast to *Johnson v. McIntosh*¹²⁴ and *Cherokee Nation v. Georgia*,¹²⁵ Judge Dundy ruled that the classification of Indians as racially inferior “wards” did not grant the government unlimited authority to deny an Indian his basic rights under the law. Instead, in *Standing Bear v. Crook*,¹²⁶ Judge Dundy rejected the government’s argument that Chief Standing Bear’s status as a “ward” meant the government could forcibly remove him to a reservation and require him to stay there against his will. Judge Dundy dismissed the idea that Standing Bear’s race could possibly provide the government with any legitimate source of power outside that which exists within the Constitution.¹²⁷ For the first time in our nation’s history, it seemed that merely labeling Indians as “wards” would no longer suffice as a justifiable constitutional basis for the government’s Indian removal policy.

Seven years after Judge Dundy decided *Standing Bear v. Crook*, however, the United States Supreme Court took the racially constructed “ward” label to justify its creation of the plenary power doctrine. In *United States v. Kagama*,¹²⁸ the Court considered a challenge to the constitutionality of a predecessor to the Indian Major Crimes Act,¹²⁹ in what was “the first American constitutional case to contest the validity of a federal Indian statute on constitutional grounds.”¹³⁰ That is, *Kagama* presented an entirely new challenge—and therefore, demanded the invention of a new source of power.¹³¹

Prior to *Kagama*, the Supreme Court had only decided cases dealing primarily with land and boundary disputes between Native American tribes and their surrounding states.¹³² The legal question before the Court was usually who had the right to Indian lands—the Indians or the whites who “discovered” the land? By 1886, however, the federal government had either killed or forcibly removed most Native

124. 21 U.S. (8 Wheat.) 543 (1823).

125. 30 U.S. (5 Pet.) 1 (1831).

126. 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891).

127. See *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (C.C.D. Neb. 1879) (No. 14,891).

128. 118 U.S. 375 (1886).

129. Indian Appropriation Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (current version at 18 U.S.C. §§ 1151, 1153, 3242 (2006)).

130. Clinton, *supra* note 37, at 171.

131. See ECHO-HAWK, *supra* note 39, at 190-91 (“Strong legal doctrines were needed by the government during this period to consolidate the gains of Manifest Destiny . . .”).

132. See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

Americans to a reservation in Indian Territory.¹³³ Consequently, although the discovery principle successfully answered the question of whether the federal government and individual states had the power/authority to take lands away from Indians, the discovery principle did not—and could not—serve as a source of power for the federal government's authority over the Indians *after* their land had been taken and they had been removed.¹³⁴ Instead of a rationale to justify taking land from Indians, the Court needed a rationale to justify regulating the Indians' life, liberty, and property on their new lands. That is, the Court needed to justify congressional control over life on the reservation.¹³⁵

The problem, of course, was that nothing in the Constitution granted the federal government such plenary power over reservations.¹³⁶ This is not surprising, given that nothing in the Constitution even contemplated the existence of the reservation system or the genocide and forced removal that led to its creation. Despite this void in the Constitution, however, the *Kagama* Court needed to articulate a source of authority that could legitimize the Federal Major Crime Act's imposition of congressionally crafted criminal laws over Native Americans living on reservations.¹³⁷ As a result, the *Kagama* Court's search for a possible source of congressional authority took the Court straight back to the *Johnson* and *Cherokee Nation* Courts' racial classifications of Indians as inferior "savages," "domestic dependent nations," and ultimately "wards."¹³⁸ The *Kagama* Court offered no pretense of applicable constitutional text or historic common law. Instead, the Court laid out a legal rationale that was based entirely on the racial classification developed by its predecessors.

In relying solely on racial classifications, the *Kagama* Court completely dismissed the idea that the source of this new congressional authority could be found in the Constitution. That is, the *Kagama*

133. See Pommersheim, *supra* note 40, at 51 (noting that as of 1886 "[t]ribes—geographically, politically, and socially—were less and less outside or on the margins of the republic, but increasingly inside the republic").

134. See *id.* at 52 (quoting *United States v. Kagama*, 118 U.S. 375, 382 (1886)) (searching in vain for a constitutional basis to conclude that "after an experience of a hundred years of the treaty-making system of government, congress [can embark] upon a new departure, -to govern [Native Americans] by acts of congress").

135. See *id.* ("It was apparent in *Kagama*, that a (new) doctrinal footing would be necessary to justify the likely continuance and growth of federal legislation to be deployed on the reservation.").

136. See *id.* ("Kagama made it clear that no adequate conceptual mooring could be located in the Constitution.").

137. See Clinton, *supra* note 37, at 171 ("The Court's first effort at rationalizing this new federal role in *Kagama* is truly instructive. It indicates how novel, and constitutionally unfounded, the federal Indian plenary power doctrine that evolved from that case really was.").

138. See *Kagama*, 118 U.S. at 383-84.

Court summarily dismissed any reliance on the Indian Commerce Clause as the source of power enabling Congress to pass statutes regulating the affairs of Indians on reservations.¹³⁹ Notably, the United States Attorney assiduously argued that the Indian Commerce Clause provided Congress with the necessary authority.¹⁴⁰ The Court, however, disagreed and instead reasoned:

The mention of Indians in the constitution which has received most attention is that found in the clause which gives congress 'power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.' This clause is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian tribes. But we think it would be a very strained construction of this clause that a system of criminal laws for Indians living peaceably in their reservations, which left out the entire code of trade and intercourse laws justly enacted under that provision, and established punishments for the common-law crimes of murder, manslaughter, arson, burglary, larceny, and the like, without any reference to their relation to any kind of commerce, was authorized by the grant of power to regulate commerce with the Indian tribes.¹⁴¹

Consequently, in one short paragraph, the *Kagama* Court "expressly rejected the only textual source of federal power" that could possibly serve as "a source for any broad plenary authority in the field of Indian affairs."¹⁴²

On what legal basis *did* the *Kagama* Court rely? Remarkably, although the *Kagama* Court did not directly cite *Johnson*, the *Kagama* Court employed the *Johnson* Court's underlying rationale for the discovery principle. In articulating the basis for limitless congressional governing authority over Native Americans, the *Kagama* Court wrote that "[t]he right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestionable."¹⁴³ That is, the *Kagama* Court created a congressional plenary power doctrine

139. *Id.* at 378-79.

140. *See id.* at 378 (emphasis added) ("The mention of Indians in the constitution which has received most attention is that found in the clause which gives congress 'power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.' This clause is relied on in the argument in the present case, the proposition being that the statute under consideration is a regulation of commerce with the Indian tribes. But we think it would be a very strained construction of this clause . . .").

141. *Id.* at 378-79.

142. Clinton, *supra* note 37, at 171.

143. *Kagama*, 118 U.S. at 380 (internal quotation marks omitted).

based on the discovery principle. Because the United States acquired the Indian lands, the congressional power to regulate Indians displaced by the government's acquisition of their land was "unquestionable" and it mattered not from where this "source . . . of power [wa]s derived."¹⁴⁴

Like *Johnson* and *Cherokee Nation*, the *Kagama* Court's reasoning mirrors the racial classification inherent in the Court's *Dred Scott v. Sandford*¹⁴⁵ decision. In this way, the *Kagama* Court's conclusion that the federal government maintained power over Indians based on their racially inferior status echoes *Dred Scott's* declaration that, since blacks were "considered as a subordinate and inferior class of beings, . . . [they] had no rights or privileges but such as those who held the power and the Government might choose to grant them."¹⁴⁶ In both *Kagama* and *Dred Scott*, the federal government's power was contingent upon a judicial declaration that Indians and blacks were racially inferior.¹⁴⁷ Essentially, in *Kagama*, the right to remove inevitably resulted in the right to govern.

As if reliance on *Johnson's* discovery principle was not enough to justify limitless congressional power over Indians and their affairs, the *Kagama* Court made clear that this limitless power was also justified on account of the previous cases that spoke of Indians "as 'wards of the nation,' 'pupils,' [and] as local dependent communities."¹⁴⁸ In perhaps the most infamous passage of all Supreme Court Native American law decisions, the Court reasoned:

It seems to us that this is within the competency of congress. These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States,-dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government

144. *Id.*

145. 60 U.S. (19 How.) 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

146. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404-05 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

147. Compare Singer, *supra* note 41, at 41 ("*Kagama* held that the United States has plenary power over Indian tribes. It granted the United States an unenumerated power and did so based on racist assumptions."), with Leeds, *supra* note 33, at 73 n.6 (quoting *Dred Scott*, 60 U.S. (19 How.) at 404-05) ("Likewise, [in *Dred Scott*] slaves were under the subjugation of white society because they were inferior and subordinate beings.").

148. *Kagama*, 118 U.S. at 382 (quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 536 (1832)).

with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen.¹⁴⁹

Although it had not yet been labeled as such, this passage would later give rise to the Court's decision in *Lone Wolf v. Hitchcock*,¹⁵⁰ in which the Court formally defined the plenary power doctrine.¹⁵¹

A thorough unpacking of this paragraph reveals it is built upon several faulty premises. First, prior to *Kagama*, the only dependency ever discussed was the sort of dependency described in the Court's decision in *Worcester*.¹⁵² As explained above, however, labeling the Cherokee Nation as "dependent" was not a descriptive term meant to imply racial inferiority or "helplessness," but rather it was a term used to describe a Nation that—having recently been subjected to threats of invasion from the British—was now geopolitically "dependent" on the United States and "no other sovereign whosoever."¹⁵³

Furthermore, the *Kagama* Court's characterization of Indian tribes as legally "dependent" as a result of their being "dependent largely for their daily food" is nothing but a factual aberration at best—and an oppressive remnant of genocide at worst.¹⁵⁴ As discussed above, Indian tribes were fully self-sufficient and able to provide for their own farming and hunting needs prior to the arrival of the colonists.¹⁵⁵ In fact, in Chief Standing Bear's case, it was not until the United States military led a campaign to exterminate the buffalo—combined with the railroad's dissection of critical herd populations—that the Ponca could no longer count on the buffalo as a source of sustenance.¹⁵⁶ Thus, by listing Native Americans' reliance on the government for food in 1886 as its legal rationale for defining an omnipotent federal plenary power over the life and liberty of the Indian, the *Kagama* Court established that a major premise of the plenary power doctrine would be predicated on the federal government's pur-

149. *Id.* at 383-84.

150. 187 U.S. 553 (1903).

151. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

152. *See Worcester*, 31 U.S. (6 Pet.) at 555.

153. *See Clinton*, *supra* note 37, at 141 (quoting *Worcester*, 31 U.S. (6 Pet.) at 555); *see also supra* notes 109-15 and accompanying text.

154. Matthew Fletcher, Sawnawezewog: "*The Indian Problem*" and the *Lost Art of Survival*, 28 AM. INDIAN L. REV. 35, 46 (2003) (emphasis added) (footnotes omitted) ("The Supreme Court took the fact that many Indians were dependent upon the United States for their 'daily food' and used that dependency to state that, as a matter of law, 'Indian tribes are the wards of the nation.'").

155. *See Berger*, *supra* note 68, at 607-08.

156. *See STARITA*, *supra* note 1, at 84.

poseful destruction of Native American food sources.¹⁵⁷ A judicial doctrine granting limitless power over a particular race based on our government's successful eradication of that race's food source has no basis in our democratic society.

Seven years after the court in *Standing Bear v. Crook* dismissed the racial classification of Indians as inferior "wards" as a legitimate basis for denying Indians their basic rights under the law, the *Kagama* Court took that very same racial classification and declared it to be the basis for one of the most powerful doctrines ever judicially crafted. In *Kagama*, the Court conceived an extraconstitutional doctrine that would ultimately give Congress—and later the Supreme Court itself—a limitless power constrained by no law or constitutional provision over the life, liberty, and property of all Native Americans solely on account of their race and placement on a reservation.

Although the *Kagama* Court relied on pejorative racial classifications of Native Americans, the Supreme Court continues to cite *Kagama* today.¹⁵⁸ Thus, as a result of the Supreme Court's failure to acknowledge the *Standing Bear* court's deconstruction of these racial classifications, the Court continues to cite *Kagama* as a legitimate source for its classification of Indians as "dependent" "wards."

E. *LONE WOLF* AND THE CONSECRATION OF THE PLENARY POWER DOCTRINE

Just twenty-four years after Judge Dundy rejected the racially constructed "ward/guardian" dichotomy as a legitimate legal doctrine, the United States Supreme Court in *Lone Wolf v. Hitchcock*,¹⁵⁹ once again defined Native Americans' status as an "ignorant and dependent race" and formally consecrated the plenary power doctrine.¹⁶⁰ In a case where Congress unilaterally abrogated the Treaty of Medicine Lodge that the Kiowa, Comanche, and Apache Nations had entered into with the federal government, the *Lone Wolf* Court determined that such unilateral congressional abrogation of a federal treaty—and subsequent distribution of tribal lands—was well within Congress's constitutional powers pursuant to a doctrine the Court named the plenary power doctrine.¹⁶¹

157. Fletcher, *supra* note 154, at 45-46 ("Kagama is a case largely borne out of the fact that the U.S. Army had a long-standing policy to control the Indians by destroying their food supplies and feeding them enough rations to keep Indians at or below starvation levels.")

158. See, e.g., United States v. Lara, 541 U.S. 193, 206 (2004) (citing *Kagama*, 118 U.S. at 382-83, for its characterization of congressional authority concerning Indian nations).

159. 187 U.S. 553 (1903).

160. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

161. *Lone Wolf*, 187 U.S. at 566.

Native American nations are still recovering from *Lone Wolf* today, since “by legitimizing the forced government allotment of the Kiowa, Comanche, and Apache Reservation, *Lone Wolf* opened the door to the most massive, uncompensated seizure of private property ever seen in US history.”¹⁶² Beyond simply defining this newfound authority in Congress to unilaterally abrogate treaties, the Court made it clear that this newly articulated power was limitless. Consequently, following *Lone Wolf*, Native Americans were powerless to stop Congress from taking and distributing their tribal reservation lands.¹⁶³

Although the Court evoked the words “plenary power” for the very first time in *Lone Wolf*, the Court had no need to invent any new justifications or rationale for this newly named doctrine.¹⁶⁴ Instead, the Supreme Court relied strictly on *United States v. Kagama*,¹⁶⁵ adopting its holding that Indians are racially inferior beings and quoting *Kagama*, stating that “[i]t seems to us that this is within the competency of Congress. These Indian tribes are wards of the nation. They are communities dependent on the United States.”¹⁶⁶ Consequently, *Lone Wolf*'s wholesale adoption of *Kagama*'s racial characterization of Indians reveals that the plenary power doctrine, although not formally named until 1903, actually dates back to *Johnson v. McIntosh*¹⁶⁷ and *Cherokee Nation v. Georgia*;¹⁶⁸ above all it is constructed upon *Kagama*'s reliance on the fact that the federal government had succeeded in eradicating Indian food sources, leaving them “dependent largely for their daily food.”¹⁶⁹

Of course, in *Kagama*, the Court held that the existence of the discovery principle (and the white settler's ability to take Indian lands) inevitably gave rise to a congressional authority to regulate and criminalize conduct on Indian reservations.¹⁷⁰ Expanding on the *Kagama* Court's reconfiguration of *Johnson*'s discovery principle, the *Lone Wolf* Court brought it back full circle. In *Kagama*, the Court reasoned that what *Johnson* defined as the absolute right to discover and take land from an Indian nation must inevitably result in the power to

162. See ECHO-HAWK, *supra* note 39, at 181.

163. See Philip P. Frickey, *Doctrine, Context, Institutional Relationships, and Commentary: The Malaise of Federal Indian Law Through the Lens of Lone Wolf*, 38 TULSA L. REV. 5, 14 (2002).

164. Leeds, *supra* note 33, at 77 (noting that although “in *Kagama* . . . the word ‘plenary’ is absent altogether[,] *Kagama*'s language did, nevertheless, substantiate *Lone Wolf*'s premise that Indians are dependent”).

165. 118 U.S. 375 (1885).

166. *Lone Wolf*, 187 U.S. at 567 (quoting *Kagama*, 118 U.S. at 383-84).

167. 21 U.S. (8 Wheat.) 543 (1823).

168. 30 U.S. (5 Pet.) 1 (1831).

169. *Lone Wolf*, 187 U.S. at 567 (quoting *Kagama*, 118 U.S. at 384).

170. Clinton, *supra* note 37, at 184 (“The justifications [in *Lone Wolf*] offered for such sweeping federal power again derived from wardship.”).

govern the internal affairs of those who lived in that nation and now find themselves on a reservation.¹⁷¹ Continuing down this extraconstitutional tangent in *Lone Wolf*, the Court reasoned that this absolute right to govern on the reservation inevitably resulted in the absolute right to take land away from that reservation—which is precisely the congressional action the *Lone Wolf* Court upheld.¹⁷² Consequently, although *Lone Wolf* is the first instance in which the Supreme Court used the term “plenary power” in relation to Congress’s power over Native Americans—the underlying rationale for this “plenary power” is wholly predicated on the discovery principle.

Yet the *Lone Wolf* Court’s plenary power doctrine traces its ancestry beyond *Johnson* and *Kagama*. In addition to the discovery principle and *Kagama*’s “dependent/ward” classification, the *Lone Wolf* Court relied on the *Cherokee Nation* Court’s use of the political question doctrine to make congressional plenary power limitless.¹⁷³ Specifically, the *Lone Wolf* Court invoked the political question doctrine to place the dispute concerning Congress’s unilateral abrogation of the Medicine Lodge Treaty outside the reaches of the judiciary.¹⁷⁴ Notably, the Court wrote that “[p]lenary 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.*”¹⁷⁵

The *Lone Wolf* plenary power doctrine, however, “is not found in the Constitution.”¹⁷⁶ Where in the Constitution did the *Lone Wolf* Court locate a source of power sufficient to override the text of the treaty power in the Constitution, which vests the power to make treaties in *both* the President and the Senate? What text in the Constitution authorizes Congress to unilaterally abrogate treaties that the President has signed and the Senate has ratified? These questions have never been answered.

171. See *Kagama*, 118 U.S. at 380.

172. See Frickey, *supra* note 163, at 14 (noting that the underlying premise of the Court’s decision in *Lone Wolf* was the idea that “[t]he property of the tribe was subject to involuntary federal distribution to the individual members free from legal constraint”).

173. See Fletcher, *supra* note 50, at 139 (noting that *Lone Wolf* adopted “the position that congressional decisions on Indian affairs were nonjusticiable political questions”).

174. See *Lone Wolf*, 187 U.S. at 565; see also ECHO-HAWK, *supra* note 39, at 163 (“The Court declared that Congress’ plenary power over Indians is absolute—that is, beyond the rule of law—because it is not subject to judicial review, and it includes the raw power to abrogate treaties.”).

175. *Lone Wolf*, 187 U.S. at 565 (emphasis added).

176. ECHO-HAWK, *supra* note 39, at 163; Pommersheim, *supra* note 37, at 303 (emphasis added) (“Plenary power is firmly ingrained in Indian law jurisprudence, yet most scholars raise serious questions about it as an extraconstitutional doctrine. It is *not* in the Constitution.”).

Instead, as the Supreme Court has acknowledged, the *only* relevant reference in the Constitution to any specific federal government power relating to Indians comes in the Indian Commerce Clause; and yet, as Professor Clinton has noted, the Clause “consist[s] of authority to regulate commerce ‘with the Indian tribes,’ [and is therefore] not a power to regulate the commerce of the Indian tribes.”¹⁷⁷

The Supreme Court’s first real consideration of this Clause confirms Professor Clinton’s restrictive reading of the Clause. In *Kagama*, which the Supreme Court continues to cite today to support its perpetuation of the plenary power doctrine, the Court squarely rejected the notion that the Indian Commerce Clause created the foundation for the plenary power doctrine.¹⁷⁸ The *Kagama* Court dismissed the Indian Commerce Clause as the source of the federal government’s unlimited power over Indian tribes, holding that such a reading would constitute “a very strained construction of this clause.”¹⁷⁹

Consequently, a review of the plenary power doctrine’s beginnings reveal that, as a result of its exclusive reliance on the discovery principle and the *Cherokee Nation* Court’s classification of Indians as “wards,” the entirety of the plenary power doctrine is based on the idea that Indians are racially inferior to whites.¹⁸⁰ Thus, a review of *Lone Wolf*’s basic premise reveals the precise reason why *Standing Bear v. Crook*¹⁸¹ is the *Brown v. Board of Education*¹⁸² of Native American law. Although *Standing Bear* preceded the Supreme Court’s decision in *Lone Wolf* by twenty-four years, it thoroughly dismissed each of the bedrock, racially constructed, extraconstitutional principles upon which the *Lone Wolf* Court relied to articulate its plenary power doctrine.

177. Clinton, *supra* note 37, at 160 (emphasis added).

178. Cf. *Nevada v. Hicks*, 533 U.S. 353, 363 (2001) (noting in a recent decision, and incorporating a federalism justification, that in *Kagama*, the Court “expressed skepticism that the Indian Commerce Clause could justify this assertion of authority in derogation of state jurisdiction”).

179. *Kagama*, 118 U.S. at 378-79; see also Clinton, *supra* note 37, at 196 (footnotes omitted) (“Since the Supreme Court expressly held in *Kagama* that the scope of federal congressional power under the Indian Commerce Clause was not co-extensive with the plenary power developed under the wardship theory, consistent application of Supreme Court precedents would suggest that, once wardship was rejected in favor of the Indian Commerce Clause, the Indian plenary power doctrine should disappear in favor of a searching textual and historical inquiry into the limits of Indian Commerce Clause power, not unlike the similar inquiry recently undertaken by the Court with reference to the limitations on Interstate Commerce Clause power in *United States v. Morrison* and *United States v. Lopez*.”).

180. See Singer, *supra* note 55, at 41.

181. 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891).

182. 347 U.S. 483 (1954).

F. THE PARALLELS BETWEEN PLENARY POWER, *DRED SCOTT*, AND *PLESSY*

With nothing in the Constitution to justify the invention of the plenary power doctrine but a racially constructed characterization of Indians as inferior, many have heralded the Court's decision in *Lone Wolf v. Hitchcock*¹⁸³ as the *Dred Scott v. Sandford*¹⁸⁴ of Native American law.¹⁸⁵ There is, however, one stark contrast between *Dred Scott* and *Lone Wolf*.¹⁸⁶ *Dred Scott* is no longer cited as "good law." *Lone Wolf*, unfortunately, is.¹⁸⁷

Thus, it is the parallels between the origins of the plenary power doctrine and the Supreme Court's decisions in *Dred Scott* and *Plessy v. Ferguson*¹⁸⁸ that place Judge Dundy's decision in *Standing Bear v. Crook*¹⁸⁹ on par with the Supreme Court's *Brown v. Board of Education*¹⁹⁰ decision.¹⁹¹ Just like the plenary power doctrine, the separate

183. 187 U.S. 553 (1903).

184. 60 U.S. (19 How.) 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

185. See, e.g., Berger, *supra* note 68, at 630 ("Recognizing that the diminishment of tribal rights was for American Indians the equivalent of denying individual rights to African Americans, a protesting Senator called *Lone Wolf* the '*Dred Scott* decision No.2, except that in this case the victim is red instead of black."); Frickey, *supra* note 163, at 5 (footnotes omitted) ("*Dred Scott* is notorious because of its racism—its inhuman conceptualization of African-Americans—and because of its troubling aftermath—it greased the slide into the Civil War. *Lone Wolf* is similarly shocking. It, too, reeks of racism—its treatment of Indians as subjugated, backward peoples under the unconstrained rule of Congress—and had a troubling aftermath—the breakup of many Indian reservations, the disintegration of many tribal governments, and the forced assimilation of many Indians."); Singer, *supra* note 55, at 37-38 (footnotes omitted) ("*Lone Wolf* has been called the 'the Indians' *Dred Scott* Decision' because, just as *Dred Scott* ruled that African-Americans were beyond the protection of the Constitution, *Lone Wolf* appeared to rule that all questions regarding federal power over Indians and Indian nations were 'political questions' unreviewable by courts.").

186. See Leeds, *supra* note 33, at 73 n.6 (citations omitted) (comparing the many similarities between the language in *Lone Wolf* and *Dred Scott*, specifically noting that "[i]n *Lone Wolf*, Congress would not have the power to change the status of landholdings were it not for the Indians' dependant [sic] status. Likewise, [in *Dred Scott*,] slaves were under the subjugation of white society because they were inferior and subordinate beings.").

187. ECHO-HAWK, *supra* note 39, at 164; see also Leeds, *supra* note 33, at 74 (citations omitted) ("*Dred Scott* was superceded [sic] by constitutional amendments. *Dred Scott*'s legacy decision, *Plessy v. Ferguson*, was eventually overruled by *Brown v. Board of Education*. *Lone Wolf*, however, is controlling authority routinely cited by the current United States Supreme Court.").

188. 163 U.S. 537 (1896), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

189. 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891).

190. 347 U.S. 483 (1954).

191. See Leeds, *supra* note 33, at 74 (noting that in both *Lone Wolf* and *Plessy*, "the Supreme Court refused to address the substantive legal claims of the litigants on the basis of the political question doctrine"); see also Natsu Taylor Saito, *Asserting Plenary Power over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427, 434 (2002) (considering *Plessy*'s "separate but equal" doctrine as a "part of the intraconstitutional

but equal doctrine found its beginnings not in a provision of the Constitution, but rather, out of a desire to perpetuate historical racial inequalities in the face of changing times.¹⁹² That is, with the abolition of slavery and the passing of the Civil War Amendments, the separate but equal doctrine became necessary to preserve a racial hierarchy that had previously been codified in a now extinct legal regime.¹⁹³ With the loss of the legal institution of slavery, perpetuating white supremacy by law necessitated the introduction of a new legal doctrine.¹⁹⁴

Similarly, at the time the *Lone Wolf* Court labeled the plenary power doctrine, the federal government needed to justify its absolute power and authority over individual Native Americans—in *addition* to their land.¹⁹⁵ Although the discovery principle had previously served its initial purpose to confiscate lands away from Native Americans, by 1903 most Native American lands had been taken and Native Americans were, as a result, living on reservations.¹⁹⁶ Consequently, the discovery principle had become outdated. The Court needed a new doctrine that would justify the federal government's absolute authority over the life, liberty, and property of Native Americans on the reservation. Accordingly, the Supreme Court took the same racial premise used to justify its discovery principle and created the plenary power doctrine.

Yet perhaps most notable in the formation of the plenary power doctrine is the outright racial language used to justify its creation and its striking similarity to the racial language used in *Dred Scott* to justify the institution of slavery. While the *Lone Wolf* Court declared Indians to be “an ignorant and dependent race” over which the federal

alternative to the plenary power doctrine.”). Compare Mary Kathryn Nagle, *Parents Involved and the Myth of the Colorblind Constitution*, 26 HARV. J. RACIAL & ETHNIC JUST. 211, 217-18 (2010) (noting that *Plessy*'s “separate but equal” doctrine legitimized “government imposed subordination of blacks to whites.”), with Leeds, *supra* note 33, at 78 (concluding that the plenary power doctrine “emerged from thin air against a backdrop of Indian wardship and racial inferiority” to Whites).

192. See Berger, *supra* note 68, at 630.

193. Saito, *supra* note 191, at 464 (highlighting “the real significance of Jim Crow laws, which was not the furtherance of segregation per se but the perpetuation of white supremacy”).

194. See *id.* at 463 (noting that *Plessy* served to “cement th[e] reversion” that began with the Jim Crow laws, to counter the gains blacks had made as a result of the Civil War Amendments).

195. Pommersheim, *supra* note 37, at 302 (“As tribes became incorporated into the Republic in *Lone Wolf*, the Court needed a new doctrine that would allow the federal government to govern in Indians [sic] affairs, and plenary power came to be.”).

196. See Pommersheim, *supra* note 40, at 52 (“It was apparent in *Kagama*, that a new doctrinal footing would be necessary to justify the likely continuance and growth of federal legislation to be deployed on the reservation.”).

government has had “[p]lenary authority . . . from the beginning,”¹⁹⁷ the *Dred Scott* Court declared blacks to be “a subordinate and inferior class of beings, who had been subjugated by the dominant race, and . . . [who] had no rights or privileges but such as those [that] the Government might choose to grant them.”¹⁹⁸ Thus, both *Lone Wolf* and *Dred Scott* found a sort of “plenary” authority in the federal government and both *Lone Wolf* and *Dred Scott* justified this authority on judicially constructed notions of racial inferiority.

Furthermore, both *Dred Scott* and *Lone Wolf* relied on the political question doctrine discussed in *Cherokee Nation v. Georgia*¹⁹⁹ to deny blacks and Indians their constitutional rights in the courts—casting them into a sort of “plenary” black hole. The *Lone Wolf* Court invoked the political question doctrine to state that “[p]lenary 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.”²⁰⁰ Likewise, in *Dred Scott*, the Supreme Court reasoned that “[i]t is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution.”²⁰¹ The language in the two cases is cut from the same racially stained cloth.

And although it is clear that *Plessy*’s separate but equal doctrine was designed to perpetuate the legal inferiority of blacks to whites following the extinction of the legal institution of *Dred Scott* slavery, in *Brown*, it was the *Plessy* doctrine’s initial purpose that led the Court to find it unconstitutional under the Equal Protection Clause. That is, the *Brown* Court declared separate but equal unconstitutional because the doctrine’s separation of black children on account “of their race generate[d] a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”²⁰² Thus, the *Brown* Court rejected the separate but equal doctrine on the basis that it was designed to make one race feel inferior to another—and had succeeded in doing so. As a result, the Court held the “doctrine of ‘separate but equal’ has no place” in the Constitution.²⁰³

197. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

198. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404-05 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

199. 30 U.S. (5 Pet.) 1 (1831).

200. *Lone Wolf*, 187 U.S. at 565.

201. *Dred Scott*, 60 U.S. (19 How.) at 405.

202. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

203. *Brown*, 347 U.S. at 495.

Likewise, the United States Circuit Court for the District of Nebraska in *Standing Bear v. Crook*²⁰⁴ rejected the plenary power doctrine for the very same reason—concluding that a doctrine designed to make one race inferior to another had no place in the Constitution.²⁰⁵ Judge Dundy refused to adopt a legal doctrine that had been designed—beginning in *Johnson v. McIntosh*²⁰⁶ and subsequently culminating in *Lone Wolf*—to insulate the federal government from any and all judicial inquiries into its treatment of Native Americans based on their racial inferiority.²⁰⁷ And yet, in stark contrast to all applicable precedent, Judge Dundy rejected the legitimacy of any such doctrine that mandated a jurisdictional determination based solely on “to what race [the plaintiff] belongs.”²⁰⁸ Despite the government’s assertion that the racial inferiority of Indians as “savages” and “wards” of the government gave the government supreme power over their life and welfare, the *Standing Bear* court found there was no “authority [to] justify] . . . [the government’s] remov[al] by force of any Indians.”²⁰⁹ Absent a treaty provision or other applicable source of law, Judge Dundy concluded that “no such arbitrary authority exists” to grant the government such power over Native Americans.²¹⁰ Instead, Judge Dundy ruled that Indians have the same rights as the “more fortunate white race, [including] the inalienable right to ‘life, liberty, and the pursuit of happiness.’”²¹¹

Consequently, the stark similarities in the extraconstitutional creation of both the plenary power doctrine and the separate but equal doctrine reveal the remarkable similarities between Judge Dundy’s decision in *Standing Bear v. Crook* and the Supreme Court’s decision in *Brown*. That is, the *Standing Bear* court rejected the fundamental premise of the plenary power doctrine in the very same manner that the *Brown* Court dismissed *Plessy*’s separate but equal doctrine.

III. *STANDING BEAR V. CROOK*: EQUALITY UNDER THE LAW

It is a strange thing to plead for something that no power, either human or divine, has the right to take from any man. The question is, your honor, is Standing Bear a person? . . . If, as Counsel Lam-

204. 25 F. Cas. 695 (C.C.D. Neb. 1897) (No. 14,891).

205. See *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 696-97 (C.C.D. Neb. 1879) (No. 14,891).

206. 21 U.S. (8 Wheat.) 543 (1823).

207. See Singer, *supra* note 55, at 37-38 (noting that *Lone Wolf* held that questions regarding the federal government’s “power over Indians and Indian nations were ‘political questions’ unreviewable by courts”).

208. *Standing Bear*, 25 F.Cas. at 696-97.

209. *Id.* at 700.

210. *Id.*

211. *Id.* at 701.

bertson has said, there is no precedent for issuing a writ on behalf of an Indian, then I say in God's name, it is high time to make one. For if there is no liberty, but liberty under the law, then the law had better recognize the right of liberty for all men.

A.J. Poppleton, Attorney for Chief Standing Bear, *Standing Bear v. Crook*, May 1879.²¹²

Thus, it is because the *Standing Bear v. Crook*²¹³ court effectively overturned the *Plessy v. Ferguson*²¹⁴ of Native American law²¹⁵ that it has earned the title of the *Brown v. Board of Education*²¹⁶ for all Native Americans. Like the United States Supreme Court in *Brown*, Judge Dundy dismissed the racist assumptions that created an extraconstitutional doctrine.

Although the legal question before the *Standing Bear* court was a question of pure statutory construction (did Congress really intend for Indians to qualify as “persons” such that they could sue out the writ?), the true question before the court was whether an Indian’s racially inferior status in society gave the federal government limitless power over his life, liberty, and property.²¹⁷ Did the federal government have the absolute power to order the Ponca to leave their ancestral homelands, against their will, and move six hundred miles south? Did the federal government have the unquestionable power to prevent Chief Standing Bear from returning to the banks of the Niobrara to bury the bones of his son? Since 1823, the Supreme Court’s answer had always been yes.²¹⁸

First, Mr. Lambertson, the attorney arguing for the federal government, challenged the court’s jurisdiction to hear the case, arguing that “[t]he guardianship power lies outside the judicial system.”²¹⁹ Supporting the government’s position was the Supreme Court’s reliance on a racially constructed political question doctrine in *Cherokee Nation v. Georgia*,²²⁰ where the Court refused to acknowledge its jurisdiction to hear the Cherokee’s case, concluding that an Indian’s appeal is more properly addressed “to the tomahawk” and not a judicial

212. Transcript of Trial, United States *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891) (on file with author); see generally STARITA, *supra* note 1, at 149.

213. 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891).

214. 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

215. See *supra* notes 207-14 and accompanying text.

216. 347 U.S. 483 (1954).

217. See STARITA, *supra* note 1, at 149.

218. See *supra* notes 47-211 and accompanying text.

219. *Id.* at 145.

220. 30 U.S. (5 Pet.) 1 (1831).

court of law.²²¹ Furthermore, in *Lone Wolf v. Hitchcock*,²²² the Court later invoked the political question doctrine to hold that the federal government's power over Indians "has always been deemed a political one, not subject to be controlled by the judicial department of the government."²²³ Thus, by arguing that a federal court lacked the necessary jurisdiction to enjoin and thereby interfere with the executive branch's unlawful imprisonment of an Indian, Mr. Lambertson was effectively advocating that the district court follow a crucial jurisdictional element of what would later be consecrated the plenary power doctrine in *Lone Wolf*.²²⁴

Judge Dundy, however, summarily dismissed the notion that questioning the source of the federal government's power over Indians was beyond the reaches of a federal court. He wrote:

The district attorney very earnestly questions the jurisdiction of the court to issue the writ, and to hear and determine the case made herein, and has supported his theory with an argument of great ingenuity and much ability. But, nevertheless, I am of the opinion that his premises are erroneous, and his conclusions, therefore, wrong and unjust. . . . It is said, however, that this is the first instance on record in which an Indian has been permitted to sue out and maintain a writ of habeas corpus in a federal court, and therefore the court must be without jurisdiction in the premises. This is a non sequitur. . . . When a 'person' is charged, in a proper way, with the commission of crime, we do not inquire upon the trial in what country the accused was born, nor to what sovereign or government allegiance is due, nor to what race he belongs. . . . [I]t would indeed be a sad commentary on the justice and impartiality of our laws to hold that Indians, though natives of our own country, cannot test the validity of an alleged illegal imprisonment in this manner²²⁵

Thus, Judge Dundy not only dismissed the *Cherokee Nation/Lone Wolf* political question paradigm—more importantly, he invoked principles of equal protection to do so. Specifically, he denied the jurisdictional premise that when "a person is charged with the commission of crime" the court's jurisdiction to adjudicate the lawfulness of that im-

221. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831).

222. 187 U.S. 553 (1903).

223. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

224. See Fletcher, *supra* note 50, at 139 (noting that a major component of the *Lone Wolf* plenary power doctrine was the political question doctrine rendering questions regarding the federal government's "decisions on Indian affairs [as] nonjusticiable political questions").

225. *United States ex rel. Standing Bear v. Crook*, 25 F.Cas. 695, 696-97 (C.C.D. Neb. 1879) (No. 14,891).

prisonment could at all hinge on “what race [the accused] belongs.”²²⁶ Thus, by refusing to find that the petitioner’s race could be a basis for declining jurisdiction to hear an Article III case and controversy, the *Standing Bear* court rejected the primary purpose of the plenary power doctrine; that is, the district court denied the doctrine’s ability to shut the courthouse’s jurisdictional doors on Chief Standing Bear solely on account of his race.

The district court in *Standing Bear v. Crook*, however, dismissed more than just the jurisdictional element of the *Lone Wolf* plenary power doctrine. A review of the arguments presented during the trial reveals that Judge Dundy’s decision was a clear denouncement of the racial classification of Indians as “dependent,” “wards,” and “savages,” as a legal justification for denying Indians their constitutional rights.²²⁷ To be sure, Mr. Lambertson also invoked the plenary power doctrine’s “guardian/ward” dichotomy, asserting that Indian tribes “were dependent communities, government wards relying upon the United States for their survival . . . [and] were a people too savage to be given legal rights.”²²⁸ Undoubtedly, Mr. Lambertson considered this to be a winning argument because the Supreme Court, since 1831, had consistently held that Indians were “in a state of pupilage,” and, consequently, that “[t]heir relation to the United States resembles that of a ward to his guardian.”²²⁹ With confidence that Supreme Court precedent was on his side, Mr. Lambertson went so far as to even quote dicta in *Dred Scott v. Sandford*,²³⁰ informing the district court that Indians could not be *persons* because Chief Justice Taney had noted that due to “their then untutored and savage state, no one [in Congress] would have thought of admitting [Indians] as citizens in a civilized community.”²³¹

Judge Dundy, however, concluded otherwise. In contrast to the controlling Supreme Court precedent on point, Judge Dundy determined that the Supreme Court’s classification of Chief Standing Bear as a “savage” and a “ward” was irrelevant as to the question of whether Chief Standing Bear was within the class of individuals that “the habeas corpus act describes [as] applicants for the writ [such] as ‘persons,’ or ‘parties.’”²³² Instead of Supreme Court precedent, the honorable Judge turned to the dictionary, noting that “Webster de-

226. *Id.* at 697, 700.

227. See STARITA, *supra* note 1, at 148-52.

228. *Id.* at 145.

229. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

230. 60 U.S. (19 How.) 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

231. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 420 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

232. *Standing Bear*, 25 F. Cas. at 697.

scribes a person as 'a living soul; a self-conscious being; a moral agent; especially a living human being; a man, woman, or child; an individual of the human race.'²³³ This definition, to Judge Dundy, was "comprehensive enough . . . to include even an Indian."²³⁴

Accordingly, the district court concluded "[t]hat an Indian is a 'person' within the meaning of the laws of the United States, and has, therefore, the right to sue out a writ of habeas corpus in a federal court."²³⁵ By relying on Webster's Dictionary—and not the *Cherokee Nation* Court's "ward" classification—to determine whether Chief Standing Bear was a *person* under the law, Judge Dundy eradicated the key ingredient of the plenary power doctrine. Judge Dundy dismissed the Supreme Court's authority to limit Native Americans' legal rights based on the Court's classification of them as inferior "dependent[s]," "wards," and "savages."

Yet Judge Dundy's decision did not stop there. At the heart of Judge Dundy's decision was a clear denouncement of the racial classification of "wards" as a legal justification for a limitless plenary power in the federal government.

This is in part because Judge Dundy had to answer Mr. Lambertson's entire argument, which went even further, to the very limits of what would later become the *Lone Wolf* plenary power doctrine. By arguing that the United States' guardianship power existed outside the judicial system,²³⁶ and that the federal government could move Chief Standing Bear wherever and whenever it chose—Mr. Lambertson was effectively arguing that the discovery principle, combined with the racial classification of Indians as wards, granted the federal government an unquestionable, non-justiciable, omnipotent power over the life and liberty of all Indians. In 1886, in *United States v. Kagama*,²³⁷ the Supreme Court ratified Mr. Lambertson's interpretation of the discovery principle, holding that "[t]he right to govern may be the inevitable consequence of the right to acquire territory,"²³⁸ and in 1903, in *Lone Wolf*, the Court consecrated Mr. Lambertson's position as the plenary power doctrine, defining Indians to be "an ignorant and dependent race" over which the federal government has exercised a non-justiciable "[p]lenary authority . . . from the beginning."²³⁹

233. *Id.*

234. *Id.*

235. *Id.* at 700.

236. See STARITA, *supra* note 1, at 145 ("[The Indian tribes] were dependent communities, government wards relying upon the United States for their survival. Nowhere in the law of the land, he said, could he find any legal precedent allowing an Indian to file suit in a federal court.")

237. 118 U.S. 375 (1886).

238. *United States v. Kagama*, 118 U.S. 375, 380 (1886).

239. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

Chief Standing Bear's counsel John Webster, however, vociferously challenged any such existence of a plenary power in the federal government based on an Indian's racial status in American society.²⁴⁰ More specifically, Mr. Webster challenged the plenary power doctrine's fundamental premise that the Supreme Court's characterization of Indians as "savages" granted the federal government limitless "power to move the Indians when and where [the government] pleases."²⁴¹ Mr. Webster's argument even went so far as to challenge the foundational cornerstone of the discovery principle. In his closing argument, Mr. Webster proclaimed that the Ponca Indians were "not savages or wanderers. They cultivate the soil, live in houses, and support themselves."²⁴² By laying bare the factual errors in the United States Attorney's labeling of Chief Standing Bear as a "savage" that does not farm, Mr. Webster effectively asserted that the *Cherokee Nation* Court's "ward/guardian" dichotomy was built upon a false, racial stereotype that Indians could not fit Locke's ideal—the exact same racial stereotype the Court employed in *Johnson* to justify its colonial discovery principle.²⁴³ With no racial stereotype on which the federal government could constitutionally base its power, Mr. Webster proclaimed that "[w]hat the government now asserts is only an assumption of power over the Indians."²⁴⁴

As a result of the arguments placed before him, Judge Dundy went beyond the question of whether an Indian was entitled to file a writ of habeas and addressed the plenary power doctrine's underlying premise that the federal government enjoys limitless power over Indians. In considering whether the federal government had unlimited power to break treaties with Native Americans and forcibly remove them from their lands, Judge Dundy wrote:

I have searched in vain for the semblance of any authority justifying the commissioner in attempting to remove by force any Indians, whether belonging to a tribe or not, to any place, or for any other purpose than what has been stated. . . . In the absence of all treaty stipulations or laws of the United States authorizing such removal, I must conclude that no such arbitrary authority exists.²⁴⁵

In contrast to both *Kagama* and *Lone Wolf*, where the Court bent over backwards to invent sources of federal power, the *Standing Bear*

240. See STARITA, *supra* note 1, at 143.

241. *Id.*

242. *Id.*

243. See Berger, *supra* note 68.

244. Transcript of Trial, United States *ex rel.* Standing Bear v. Crook, 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891) (on file with author); see generally STARITA, *supra* note 1, at 143.

245. *Standing Bear*, 25 F. Cas. at 700.

court simply noted the manifest absence of any such power. Instead of relying on the classification of Indians as racially inferior to conceal the constitutional void of federal authority over internal Indian affairs, the *Standing Bear* court defied Supreme Court precedent to declare that Indians have the same rights as the "more fortunate white race, [including] the inalienable right to 'life, liberty, and the pursuit of happiness.'"²⁴⁶

Yet in the most sweeping rejection of the plenary power doctrine to date, perhaps the only thing more powerful than Judge Dundy's decision in *Standing Bear v. Crook* was Chief Standing Bear's speech. At the end of the trial, the Ponca Indian Chief stood and addressed the court.²⁴⁷ Extending his hand, he stated:

That hand is not the color of yours, but if I pierce it, I shall feel pain. If you pierce your hand, you also feel pain. The blood that will flow from mine will be of the same color as yours. I am a man. The same God made us both.

I seem to stand on the bank of a river. My wife and little girl are beside me. In front, the river is wide and impassable, and behind are perpendicular cliffs. No man of my race ever stood there before. There is no tradition to guide me.

I turn to my wife and child with a shout that we are saved. We will return to the Swift Running Water that pours down between the green islands. There are the graves of my fathers. There again we will pitch our teepee and build our fires.

But a man bars the passage. He is a thousand times more powerful than I. Behind him I see soldiers as numerous as the leaves of the trees. They will obey that man's orders. I too must obey his orders. If he says that I cannot pass, I cannot. The long struggle will have been in vain. My wife and child and I must return and sink beneath the flood. We are weak and faint and sick. I cannot fight.²⁴⁸

Chief Standing Bear turned to face Judge Dundy and told him, "You are that man."²⁴⁹

Just ten days later, on May 12, 1879, the United States Circuit Court for District of Nebraska published its decision and declared Indians to be *persons* under the law.²⁵⁰ In the nation's one hundred and three year history, no court had ever before declared Indians to be *persons* under federal law.²⁵¹ Prior to 1879, no federal court had ever

246. *Id.* at 701.

247. STARITA, *supra* note 1, at 150-51.

248. THOMAS HENRY TIBBLES, BUCKSKIN & BLANKET DAYS 201 (1905).

249. *Id.*

250. *Standing Bear*, 25 F. Cas. at 700-01.

251. STARITA, *supra* note 1, at 157.

found that an Indian could challenge his unlawful imprisonment in a court of law.²⁵²

In fact, *Standing Bear v. Crook* marks the first time a court in the United States had ever found that an Indian's race was *not* a legitimate basis upon which the government could deny an Indian his fundamental rights under the law. In this respect, Judge Dundy's decision in *Standing Bear v. Crook* is as significant as the Supreme Court's decision in *Brown v. Board of Education* and demands recognition as such.

IV. THE PLENARY POWER DOCTRINE TODAY

You asked us to throw off the hunter and warrior state: We did so—you asked us to form a republic government: We did so—you asked us to cultivate the earth, and learn the mechanic arts: We did so. You asked us to learn to read: We did so. You asked us to cast away our idols, and worship your God: We did so.

John Ridge, Cherokee Lawyer and Leader Who Took the Cherokee Cases to the Supreme Court in 1831 and 1832.²⁵³

What good man would prefer a country covered with forests, and ranged by a few thousand savages to our extensive Republic, studded with cities, towns, and prosperous farms . . . ?

President Andrew Jackson, Second Annual Message to Congress, December 6, 1830²⁵⁴

Established in the midst of a superior race and without appreciating the causes of their inferiority or seeking to control them, [the Indians] must yield to the force of circumstances and ere long disappear.

President Andrew Jackson, Fifth Annual Message to Congress, December 3, 1833²⁵⁵

Although the *Standing Bear v. Crook*²⁵⁶ court deconstructed the racist elements of the plenary power doctrine in the same manner that *Brown v. Board of Education*²⁵⁷ deconstructed the separate but equal doctrine, United States courts continue to cite the plenary power doc-

252. *Id.* at 157-58.

253. WILKINS, *supra* note 78, at 234.

254. Pres. Andrew Jackson, Second Annual Message to Congress (Dec. 6, 1830), transcript available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29472#axzz1rhndsfCC>.

255. Pres. Andrew Jackson, Fifth Annual Message to Congress (Dec. 3, 1833), transcript available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29475#axzz1rhndsfCC>.

256. 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891).

257. 347 U.S. 483 (1954).

trine today.²⁵⁸ In fact, within a year of deciding *Brown*, the United States Supreme Court once again referred to Native Americans as “an ignorant and dependent race” to conclude that “[t]he right of the United States to [take Native American] lands occupied by them has always been recognized by this court from the foundation of the government.”²⁵⁹ This is how, in *Tee-Hit-Ton Indians v. United States*,²⁶⁰ the Supreme Court came to conclude that “Indian occupation of land . . . creates no rights against taking or extinction . . . protected by the Fifth Amendment or any other principle of law.”²⁶¹ Thus, the same year the Supreme Court found that the separate but equal doctrine violated blacks’ rights under the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court ruled that Indians, on account of their race, had no rights under the Fifth Amendment’s Takings Clause.²⁶²

Because, as a nation, we have failed to consecrate the *Standing Bear* court’s deconstruction of the plenary power doctrine’s fundamental elements, the Supreme Court continues to rely on *Lone Wolf v. Hitchcock*’s²⁶³ racially constructed plenary power doctrine—as well as the doctrine’s key predecessors—to adjudicate cases concerning Native Americans’ property and constitutional rights. This contemporary application of a colonially constructed doctrine has resulted in disparate results. In some cases, the Supreme Court has continued to find that the plenary power doctrine vests limitless power in the legislative branch as it did in *United States v. Kagama*²⁶⁴ and *Lone Wolf*—and yet at other times (beginning in *Oliphant v. Suquamish Indian Tribe*²⁶⁵), the Supreme Court has found a plenary power in itself.²⁶⁶

258. See *infra* notes 259-305 and accompanying text.

259. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 281 (1955).

260. 348 U.S. 272 (1955).

261. *Tee-Hit-Ton Indians*, 348 U.S. at 285.

262. See Earl M. Maltz, *Brown and Tee-Hit-Ton*, 29 AM. INDIAN L. REV. 75, 75 (2004-2005) (footnotes omitted) (internal quotation marks omitted) (“[T]he ultimate result in *Tee-Hit-Ton* could not have been more different than that in *Brown*. Rather than breaking new ground in defense of Native American rights, the Court issued one of the most retrograde Indian law decisions of the twentieth century—a decision that commentators have argued is marked by blatant racism, and analogous to the Court’s infamous 1857 decision in *Dred Scott v. Sanford* [sic].”).

263. 187 U.S. 553 (1903).

264. 118 U.S. 375 (1886).

265. 435 U.S. 191 (1978), *superseded by statute*, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1856, 1892 (1990) (codified at 25 U.S.C. § 1301(2) (2006)), *as recognized in United States v. Lara*, 541 U.S. 193 (2004).

266. Compare *Duro v. Reina*, 495 U.S. 676, 707-08 (1990) (reiterating “the underlying premise of Indian law, namely, that Congress has plenary control over Indian affairs”), with *Clinton*, *supra* note 37, at 215-16 (noting that in *Oliphant*, “the exercise of judicial plenary power picks up where legislative plenary power left off, with the Court applying a wardship theory to determine limits on tribal sovereignty, limits created by their supposed dependency”).

Consequently, many Native American law scholars have claimed that since *Tee-Hit-Ton*, the Supreme Court's jurisprudence on Native American law has been doctrinally inconsistent and unpredictable.²⁶⁷

I respectfully disagree. In the last six decades, the Supreme Court's Native American law jurisprudence has been entirely consistent. For the last six decades, the Supreme Court's Native American law jurisprudence has consistently applied the plenary power doctrine—including all of its key racially constructed components: the discovery principle, the political question doctrine, and *Cherokee Nation v. Georgia's*²⁶⁸ “ward/guardian” dichotomy—to conclude that Native Americans' constitutional rights are circumscribed and subject to a limitless power in the federal government. The fact that the Supreme Court now recognizes this limitless power in *itself* is not inconsistent with the plenary power doctrine, despite the fact that the *Lone Wolf* Court originally found this power existed in “Congress from the beginning, and . . . [was] not [a power] subject to be controlled by the judicial department of the government.”²⁶⁹

Although seemingly contradictory, the Court's expansion of the plenary power doctrine to now include the judicial branch is wholly consistent with the original premise of the doctrine: limitless power over Native Americans. It is of no constitutional moment that in 1903 the Court limited this plenary power to Congress, and then in 1978 expanded it to include the judicial branch. A doctrine that has no basis in the Constitution cannot be constrained by the Constitution.²⁷⁰ Accordingly, a review of the recent evolution of the plenary power doctrine does not reveal that the Supreme Court's Native American jurisprudence has been doctrinally inconsistent; instead, it merely affirms that the doctrine has simply been extraconstitutional.

A. *TEE-HIT-TON* AND THE FIFTH AMENDMENT

The United States Supreme Court's decision in *Tee-Hit-Ton Indians v. United States*²⁷¹ confirmed that although in 1954 the Court was

267. See, e.g., Fletcher, *supra* note 50, at 160 (noting the inconsistencies that result because, following *Oliphant*, “[t]he Court and the Court alone decides what authority is inconsistent with the dependent status of Indian tribes[, and t]he Court has disregarded the Congress and Executive Branch statements of federal Indian policy in favor of its own policy choices”); Leeds, *supra* note 33, at 82 (noting that following *Oliphant*, Supreme Court cases like *Nevada v. Hicks* have been “heavily criticized and questioned by scholars and commentators as an intellectually dishonest application of federal Indian law principles”).

268. 30 U.S. (5 Pet.) 1 (1831).

269. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

270. Pommersheim, *supra* note 37, at 305 (concluding that the plenary power doctrine “is dangerous because there are no apparent constitutional limits on plenary power”).

271. 348 U.S. 272 (1955).

making progress towards equality under the law for blacks, when it came to Native Americans, the Court remained frozen in the nineteenth century. The Court's decision that "Indian occupation of land . . . creates no rights against taking" under the Fifth Amendment was simply a restatement of *Johnson v. McIntosh*²⁷² in the modern day.²⁷³ In *Tee-Hit-Ton*, the Supreme Court "upheld the government timber sale without any need to compensate Indians for the taking of aboriginal property."²⁷⁴ Consequently, an examination of *Tee-Hit-Ton* reveals that to determine that Native Americans have limited rights under the Fifth Amendment's Takings Clause, the Court relied on two of the plenary power doctrine's bedrock nineteenth century principles: the discovery principle and the political question doctrine.²⁷⁵

The *Johnson* Court justified its articulation of the discovery principle on a judicial determination that Indians are "savages" and "heathens" that do not farm—and therefore cannot hold exclusive title to the land they possess. The *Tee-Hit-Ton* Court, similarly, referred to Indian nations as "the savage tribes"²⁷⁶ that constitute "an ignorant and dependent race,"²⁷⁷ to justify its finding that nothing in the Constitution provided "that taking of Indian title or use by Congress required compensation."²⁷⁸ There can be no doubt that the *Tee-Hit-Ton* Court relied almost exclusively on the discovery principle since the Court referred to it as "[t]he great case of *Johnson v. McIntosh*, [that] denied the power of an Indian tribe to pass their right of occupancy to another."²⁷⁹ According to the Court, *Johnson* "confirmed the practice of two hundred years of American history 'that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest.'"²⁸⁰

Yet in addition to the discovery principle, the *Tee-Hit-Ton* Court also relied on the political question component of the plenary power doctrine. That is, the Court used the political question doctrine to remove the Indians' case effectively out of the Court's jurisdiction—thereby recognizing a "plenary" power in another branch of the federal

272. 21 U.S. (8 Wheat.) 543 (1823).

273. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 285 (1955).

274. ECHO-HAWK, *supra* note 39, at 362 (footnote omitted).

275. *See id.* ("[*Tee-Hit-Ton*] is the logical extension of the dark side of federal Indian law, as formulated by cases like *Johnson v. McIntosh* (1823) and *Lone Wolf v. Hitchcock* (1903): Indian homelands can be taken by outright confiscation.")

276. *Tee-Hit-Ton Indians*, 348 U.S. at 289.

277. *Id.* at 281.

278. *Id.*

279. *Id.* at 279-80 (citing *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 543 (1823)).

280. *Id.* at 280 (quoting *Johnson*, 21 U.S. (8 Wheat.) at 543).

government.²⁸¹ The Supreme Court reasoned that the “[e]xtinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable issues.”²⁸² Thus by invoking the political question doctrine, the *Tee-Hit-Ton* Court essentially reaffirmed the Court’s holding in *Cherokee Nation v. Georgia*²⁸³ that even “[i]f it be true that [an Indian] nation have rights, [a federal court] is not the tribunal in which those rights are to be asserted.”²⁸⁴ Once again, application of the plenary power doctrine distracts the Court from asking the real constitutional question: where did this power actually come from? A review of *Tee-Hit-Ton* reveals that although the Supreme Court, in 1954, succeeded in deconstructing one racist, extraconstitutional doctrine—separate but equal—the Court continued to simultaneously expand its support for the legacy of another.²⁸⁵

B. *OLIPHANT V. SUQUAMISH INDIAN TRIBE*

Following *Tee-Hit-Ton Indians v. United States*,²⁸⁶ the United States Supreme Court’s decision in *Oliphant v. Suquamish Indian Tribe*²⁸⁷ once again confirmed the continued survival of, and damage caused by, the modern day plenary power doctrine.²⁸⁸ In *Oliphant*, however, the Court took the doctrine in a new direction.²⁸⁹ For the first time in the history of the plenary power doctrine, the Supreme Court was presented with a case in which the question of *congressional* plenary power was not before the Court.

Oliphant is particularly harmful to Indian nations since the *Oliphant* Court “stripped Indian tribes of their ability to prosecute crimes

281. Leeds, *supra* note 33, at 80 (“In *Tee-Hit-Ton*, the Court rejected the tribe’s Fifth Amendment Takings claim, employing the same principles set forth in *Lone Wolf*, citing identical passages to render the taking of tribal land nonjusticiable.”).

282. *Tee-Hit-Ton Indians*, 348 U.S. at 281.

283. 30 U.S. (5 Pet.) 1 (1831).

284. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831).

285. See Singer, *supra* note 41, at 320 (footnotes omitted) (noting that as a result of “*Tee-Hit-Ton*’s implicit reliance on *Lone Wolf v. Hitchcock*, . . . the *Tee-Hit-Ton* doctrine denies American Indian nations—and their members—equal protection of the laws”).

286. 348 U.S. 272 (1955).

287. 435 U.S. 191 (1978), *superseded by statute*, Indian Civil Rights Act of 1991, Pub. L. No. 101-511, 104 Stat. 1856, *as recognized in* *United States v. Lara*, 541 U.S. 193 (2004).

288. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208-09 (1978), *superseded by statute*, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1856, 1892 (1990) (codified at 25 U.S.C. § 1301(2) (2006)), *as recognized in* *United States v. Lara*, 541 U.S. 193 (2004).

289. See Clinton, *supra* note 37, at 214 (footnotes omitted) (“The growth of judicial federal plenary power began with the United States Supreme Court decision in *Oliphant v. Suquamish Indian Tribe*, in which the Court held that Indian tribes lacked inherent criminal jurisdiction over non-Indians.”).

committed by non-Indians on Indian reservations.”²⁹⁰ As a result of *Oliphant*, Indian nations are now powerless to enforce their laws and prosecute criminal cases against non-Indians who enter their nations and commit crimes. Imagine if the Supreme Court ruled that Kansas could not prosecute individuals who were not residents of Kansas for the crimes they commit when they set foot in Kansas. Such a legal regime seems unthinkable, but today Indian nations have lost their ability to protect their own citizens and reduce crime within their borders—all because of a modern day extension of the plenary power doctrine.

Prior to *Oliphant*, the plenary power doctrine had only been used to legitimize congressional authority over internal Indian nation affairs. And yet in *Oliphant*, the Court acknowledged that Congress had not passed a law or given any inclination that it would support limiting Indian nation sovereignty in this way.²⁹¹ The Court noted that “Congress never expressly forbade Indian tribes to impose criminal penalties on non-Indians.”²⁹² That is, in a decision where the Supreme Court determined that the Suquamish Indian Tribe could no longer maintain criminal jurisdiction over non-Indians on the Tribe’s lands, the Court did not cite a single piece of congressional legislation or congressional authority that served to divest the Tribe of its inherent sovereign power over its own territory.²⁹³

And yet despite the absence of any congressional exercise of what *Lone Wolf v. Hitchcock*²⁹⁴ held to be exclusively a congressional “plenary” power, the Court held that it—the Court—would “now make express [the Court’s] *implicit* conclusion of nearly a century ago that Congress consistently believed this to be the necessary result of its repeated legislative actions.”²⁹⁵ Essentially, although Congress had not exercised its “plenary” power, the Supreme Court declared itself capable of exercising that power for Congress. For the first time in the one hundred and fifty years of the plenary power doctrine’s existence, the Court found the existence of a plenary power in itself.²⁹⁶

290. ECHO-HAWK, *supra* note 39, at 441.

291. Leeds, *supra* note 33, at 81 (citing *Oliphant*, 435 U.S. at 208) (“Congress, despite its plenary power articulated in *Lone Wolf*, had passed no statute that would divest tribes of criminal jurisdiction in this scenario.”).

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

293. See Pommersheim, *supra* note 37, at 304 (“In neither *Oliphant* nor *Duro* did the Court say it was interpreting the Constitution or a federal statute.”).

294. 187 U.S. 553 (1903).

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

296. See Frickey, *supra* note 163, at 30-31 (“More broadly, from the standpoint of the separation of powers, the [*Oliphant*] Court . . . moved from a regime of congressional plenary power to what I have called ‘a common law for our age of colonialism,’ in which the Court itself has become the primary federal decisionmaker determining when tribal

Thus, what began in *United States v. Kagama*²⁹⁷ and *Lone Wolf* as a congressional plenary power was suddenly transformed into a judicial plenary power. Unfortunately, this new judicial plenary power maintained the same racially constructed origins as its predecessor. At the very base of its foundation was the very same colonial discovery principle. That is, to justify its conclusion that a judicial power existed in the Court to divest the Suquamish Tribe of its inherent sovereign authority, the *Oliphant* Court quoted directly from *Johnson v. McIntosh*,²⁹⁸ noting that Native American nations' "rights to complete sovereignty, as independent nations, [are] necessarily diminished."²⁹⁹ The Supreme Court reasoned that the Court itself could now divest the Suquamish Tribe of what little sovereign authority it had remaining because the discovery principle had already divested Native American nations of their "complete sovereignty."³⁰⁰

Of course in *Johnson*, the Court found that the rights of Native Americans were "necessarily diminished" because Native Americans were "heathens" and "savages" who did not farm—the irony once again being that the initial white settlers were completely dependent on Native American farming for survival.³⁰¹ The significance of *Oliphant's* reliance on *Johnson*, however, cannot be overemphasized. In 1978, twenty-four years since the Court decided *Brown v. Board of Education*,³⁰² the Court was still quoting and relying on a doctrine that evoked the same harmful *Dred Scott v. Sandford*³⁰³ racial stereotypes.³⁰⁴

Consequently, the Court's 1978 decision in *Oliphant* reveals that although the plenary power doctrine did evolve from its first iterations in the nineteenth century, this twentieth century evolution did not move the doctrine in a direction towards constitutional coherency. Instead, the expansion of the plenary power doctrine in *Oliphant* exemplifies the sort of injustices that will continue to flow from our collective failure to recognize the court's deconstruction in *Standing Bear v. Cook*³⁰⁵ of the doctrine's inherently racial components.

prerogatives must be sacrificed in the face of the perceived contemporary needs of the broader American society.").

297. 118 U.S. 375 (1886).

298. 21 U.S. (8 Wheat.) 543 (1823).

299. *Oliphant*, 435 U.S. at 209 (quoting *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1823)).

300. *Id.*

301. *Johnson*, 21 U.S. (8 Wheat.) at 574.

302. 347 U.S. 438 (1954).

303. 60 U.S. (19 How.) 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

304. See *Oliphant*, 435 U.S. at 209.

305. 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891).

IV. CONCLUSION

It is a little thing, a simple thing, which my people ask of a nation whose watchword is liberty; but it is endless in its consequences.

They ask for their liberty, and law is liberty.

Bright Eyes, Daughter of Chief Iron Eye of the Omaha and Interpreter to Chief Standing Bear, in *Standing Bear v. Crook*, May 1879.³⁰⁶

Although many have lambasted the Supreme Court's extraconstitutional jurisprudence in decisions like *United States v. Kagama*³⁰⁷ and *Lone Wolf v. Hitchcock*³⁰⁸—as well as the Court's continued reliance on those cases today—scholars, students, courts, and Americans have yet to recognize the deconstructive power of *Standing Bear v. Crook*'s³⁰⁹ constitutional dialogue. If it were to be properly recognized, Judge Dundy's decision in *Standing Bear v. Crook* has the potential to achieve for Native American rights what *Brown v. Board of Education*³¹⁰ has achieved for the rights of blacks.

Although what the Supreme Court stated in *Brown* was constitutionally and doctrinally significant, *Brown*'s greatest impact on equality in this nation has come in the form of subsequent discussions of race and equality in law school classrooms, on radio talk shows, and at dinner tables across America. Any success *Brown* has had in achieving greater equality for blacks in America is in large part attributed not just to what nine Justices in black robes wrote. Instead, *Brown*'s greatest achievement has been the fact that no American law school student graduates without having first read and considered how the Supreme Court deconstructed and eradicated *Plessy v. Ferguson*'s³¹¹ extraconstitutional doctrine.

Unfortunately, the vast majority of law students in America do not read *Standing Bear v. Crook*. As a result, in stark contrast to the now extinct separate but equal doctrine, the plenary power doctrine remains alive and well. Today, courts in the United States continue to cite a nineteenth century doctrine that describes Native Americans as "savages," "heathens," and "dependent" "wards." Although most students studying Native American constitutional law will learn that Congress and the federal government have "plenary power" over Native Americans, their tribal governments, their life, liberty, and their property, very few students will study—or even question—the origins

306. TIBBLES, *supra* note 21, at 3.

307. 118 U.S. 375 (1886).

308. 187 U.S. 553 (1903).

309. 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891).

310. 347 U.S. 483 (1954).

311. 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

of the plenary power doctrine and the unconstitutional purpose it was initially designed to serve.³¹²

Furthermore, the Supreme Court's recent expansion of the plenary power doctrine—to now include a *judicial* plenary power—reveals the true ramifications of our nation's continued reliance on an extraconstitutional doctrine based solely on a racial classification. Because the doctrine exists wholly outside of the purview of the Constitution, the Supreme Court has yet to identify a single constitutional provision that could possibly constrain its interpretation—or expansion—of the plenary power doctrine. For a nation built on constitutional principles that limit the government's power to take an individual's life, liberty, or property, the existence of this omnipotent, limitless, race-based doctrine today, in twenty-first century America, threatens the fundamental rights of all Americans—and undermines the very ideals that our Constitution sought to preserve. The plenary power doctrine is the most anti-American doctrine that exists in the Supreme Court's jurisprudence today.

Our nation's failure to recognize *Standing Bear v. Crook's* denouncement of the fundamental premise of the plenary power doctrine has had a special significance to me. As a child, I grew up listening to my Cherokee grandmother recount the story of the Cherokee's forced removal along the Trail of Tears. I recall it being a story of great heartbreak, for what was lost and will never be regained. But I also remember it being a story of pride. Prior to the removal, my grandmothers' grandfathers—my great-grandfathers—just like Chief Standing Bear, achieved a victory for their people when they took their case for liberty and justice to a federal court. That is, in 1832, my Cherokee great-grandfathers, Major Ridge and John Ridge, found themselves in the same crisis the Ponca would later face in 1877. And just like Chief Standing Bear, my grandfathers believed they would find their liberty and preserve their existence in a court of law.

In 1832, Principal Chief John Ross, along with my great-grandfather John Ridge—one of the first Indian attorneys in the history of the United States—took the Cherokee's case to the United States Supreme Court. As a result of their efforts, the Supreme Court issued an unprecedented decision. For the first time in this nation's history, the United States Supreme Court held that an Indian nation was “a dis-

312. See Leeds, *supra* note 33, at 86 (footnotes omitted) (“As Indian people, we are told that we are treated differently, not because of a racial distinction, but because of our political classification. While each of these propositions possess elements of legal truth, more attention must be placed on that which has not been adequately revealed: the majority of Indian law decisions from Chief Justice Marshall's trilogy to *Lone Wolf* to the Rehnquist Court are premised on notions of racial supremacy of the United States over the perceived inferiority and dependency of Indian people.”).

tinct community, occupying its own territory,” and the Supreme Court ordered the State of Georgia to respect the Cherokee’s right to exist on their own lands.³¹³ Following the Supreme Court’s decision in *Worcester v. Georgia*,³¹⁴ my great-great-great grandfather visited the President to inquire whether the federal government would enforce the Supreme Court’s decision in accordance with the treaty signed between the Cherokee Nation and the United States. In response to John Ridge’s question, President Andrew Jackson made it quite clear that the executive branch of government would not abide by the Supreme Court’s decision. President Jackson told my grandfather: “John Marshall has made his decision; let him enforce it”³¹⁵

In 1838, President Jackson ordered the removal of the Cherokee on what is now known as the Trail of Tears. More than four thousand Cherokee died as they traveled the Trail of Tears to Oklahoma. Today my grandmother is buried in the Cherokee cemetery in Southwest City, Missouri—just a few rows down from her grandfathers, Major Ridge and John Ridge.

What gave the executive branch the constitutional authority to refuse to abide by the Supreme Court’s decision in *Worcester*? What gave the executive branch the authority to violate several treaties and violently force the Cherokee to move to Oklahoma?³¹⁶ What gave the federal government the power to forcibly remove the Ponca from their homes in what is now Nebraska to what was then “Indian Territory”? What could have possibly given the federal government the power to take—without any consent or just compensation—the life, liberty, land, and property of millions of Native Americans? In *Kagama* and *Lone Wolf*, the Supreme Court determined that the answer to this question was to find a “plenary power” in the federal government over Native Americans, based on the Court’s classification of Indians as “an ignorant and dependent race.”³¹⁷

As Americans, we can no longer tolerate this answer to such an important question. We can no longer remain complacent with a con-

313. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 520 (1832).

314. 31 U.S. (6 Pet.) 515 (1832).

315. WILKINS, *supra* note 78, at 236.

316. See Clinton, *supra* note 37, at 136 (footnotes omitted) (“While Congress debated and narrowly passed the Removal Act of 1830, establishing as national policy the removal of tribes from existing state boundaries to west of the Mississippi River, both the text and the surrounding legislative history clearly reflect the view that Congress had no authority under the Constitution to unilaterally impose this result on the Indian tribes. While President Jackson sought to remove the Indian tribes by military force, the Removal Act of 1830 expressly required tribal consent through treaty for any removal.”).

317. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903); see also *United States v. Kagama*, 118 U.S. 375, 383-84 (1816).

stitutional doctrine that nearly resulted in the genocide of an entire race.

Many people ask what constitutional doctrine I would suggest the Supreme Court use in place of the plenary power doctrine—implying that the lack of an alternative doctrine precludes the immediate eradication of the plenary power doctrine. This is an inappropriate approach to constitutional law. If no power can be found in the federal government—except that power which results from labeling an Indian as a racially inferior being under the law—then the power the government is attempting to exercise is nothing more than a constitutional fiction. Certainly, the federal government does have some power in relation to Native American nations and individuals. But in 2012, the definition and source of those powers *cannot* be predicated on nineteenth century notions that Native Americans are “heathens” who do not farm and therefore constitute an “ignorant and dependent race.”

Before I began my work as a law clerk at the United States District Court for the District of Nebraska, I had never heard of Chief Standing Bear and the story of the Ponca. I knew only my grandmother’s story and of the Cherokee Nation’s journey along the Trail of Tears. I remember the stories my grandmother would share of her Cherokee grandfather, John Ridge, who went to the Supreme Court to request equality under the law for his people. But before moving to Nebraska, I had never heard the story of the Ponca Indian Chief who stood up in a courtroom in 1879 and demanded to be recognized as a *person* under the law.

Why had I never heard the story of Chief Standing Bear and Judge Dundy’s declaration that Native Americans are “persons” under the law? Why, as a law student at a major American university, did I study the constitutional law contained within *Brown v. Board of Education* but was never informed that a federal court issued a decision equally as significant for Indian civil rights?

As Americans, we cannot move past the dark corners of our colonial past until we fully embrace and celebrate the deconstruction of the legal regime that perpetuated the evils from which we would now like to run. Certainly no American today is proud to say our nation used a racially constructed legal doctrine to justify the extermination of an entire race of people. However, until we can come together, as a nation, and recognize the manner in which Judge Dundy’s decision refuted the underlying basis of the plenary power doctrine, we will remain trapped in our nineteenth century racially constructed prison.

In 1879, in a federal courthouse in Omaha, Nebraska, a federal judge squarely refuted all of the nineteenth century doctrines that have been used to perpetuate the plenary power doctrine’s harmful

racial stereotypes of Native Americans. As Dean Stacy Leeds (the very first American Indian woman to become the dean of an American law school) eloquently stated, "Until we can discuss [the plenary power doctrine] openly in the Indian law circles, in the mainstream legal community, and in our classrooms, an Indian law *Brown v. Board of Education* decision will not be possible."³¹⁸

Judge Dundy's decision in *Standing Bear v. Crook* is that *Brown v. Board of Education*. We simply need to begin discussing it.

318. Leeds, *supra* note 33, at 86.