NOTE

EXAMINING THE INTERSTATE COMMERCE CLAUSE THROUGH THE LENS OF THE INDIAN COMMERCE CLAUSE

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INTRODUCTION

In the past twenty years, the Supreme Court has dramatically altered its interpretation of the Commerce Clause.[1] Prior to the mid-1990s, the Supreme Court interpreted the Commerce Clause as granting Congress significant authority over activities which, in the aggregate, "concern" the several states.[2]

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[1] *See* Steven Calabresi, *The Libertarian-Lite Constitutional Order and the Rehnquist Court*, 93 GEO. L.J. 1023, 1045 (2005) (book review) (characterizing recent developments in Commerce Clause jurisprudence as "a revolution").

[2] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194 (1824) (allowing Congress to regulate "commerce which concerns more States than one"); *see also* Wickard v. Filburn, 317 U.S. 111, 125 (1942) (holding that "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce").

Such expansive interpretation allows Congress to regulate a wide array of seemingly wholly intrastate activities, including the use of homegrown medical marijuana,[3] loan sharking conducted purely on a local level,[4] and strip mining conducted on private land.[5] For much of its history, the Supreme Court embraced the idea that "'[t]he power of Congress over interstate commerce is plenary and complete in itself.'"[6]

However, two critical Rehnquist Court decisions, *United States v. Lopez*[7] and *United States v. Morrison*,[8] dealt the "plenary" commerce power a significant blow. In *Lopez*, the Court sustained a challenge to the Gun-Free School Zones Act of 1990,[9] which prohibited carrying a gun in a school zone, on the grounds that the Act exceeded Congress' power under the Commerce Clause.[10] The Court found it significant that the Act was "not an essential part of a larger regulation of economic activity."[11] The Court reasoned that if the Commerce Clause extended to this class of activity, the Court would be "hard pressed to posit any activity by an individual that Congress is without power to regulate."[12]

[3] *See* Gonzales v. Raich, 125 S. Ct. 2195, 2201 (2005).

[4] *See* Perez v. United States, 402 U.S. 146, 154 (1971).

[5] *See* Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 281 (1981).

[6] *Filburn*, 317 U.S. at 124 (quoting United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942)). One notable exception was the Progressive Era Court, which embraced a narrow interpretation of the Commerce Clause and rejected many federal attempts to exert control over local activities. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251, 276 (1918) (holding that a federal statute prohibiting the transportation of goods made by minors "exerts a power as to a purely local matter to which the federal authority does not extend").

[7] 514 U.S. 549 (1995).

[8] 529 U.S. 598 (2000).

[9] 18 U.S.C. § 922(q)(1)(A) (Supp. V 1993).

[10] *See Lopez*, 514 U.S. at 561 ("[The Act] is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."). The Court made it clear that there were constitutional limits on Congress' commerce power:

> To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local. This we are unwilling to do.

Id. at 567-68 (citations omitted).

[11] *Id.* at 561.

[12] *Id.* at 564.

In *Morrison*, the Court heard a challenge to the Violence Against Women Act of 1994.[13] The Court decided that the Act exceeded Congress' power under the Commerce Clause.[14] According to the Court, allowing Congress to regulate purely criminal activity would "completely obliterate the Constitution's distinction between national and local authority."[15]

Morrison is even more significant than *Lopez* because, prior to passage of the Violence Against Women Act, Congress conducted extensive studies to determine the effects of domestic violence on interstate commerce.[16] The Court found that although congressional findings should be afforded some weight, they are not definitive: "'[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.'"[17]

The legal community viewed the Rehnquist Court's *Lopez* and *Morrison* decisions as dramatic shifts in the Supreme Court's willingness to limit congressional power. According to one commentator, "These two cases together mark an extraordinary departure from the prevailing understanding of the commerce power between 1937 and 1995, and . . . constitute a revolution."[18] Many commentators have been critical of the Court's willingness to make such a dramatic shift.[19] Others embrace *Lopez* and *Morrison* as "herald[ing] a greater protection for the structure of the federal system and for the liberty that this structure protects."[20]

In 2005, the Supreme Court appeared to signal a retreat from the holdings of *Lopez* and *Morrison*. In *Gonzales v. Raich*,[21] the Court held that the federal government had the authority under the Controlled Substances Act to prohibit California residents' use of homegrown medical marijuana, which had been

[13] 42 U.S.C. § 13981 (2000).

[14] *See* United States v. Morrison, 529 U.S. 598, 613 (2000).

[15] *Id.* at 615.

[16] *See id.* at 614.

[17] *Id.* (alteration in original) (quoting *Lopez*, 514 U.S. at 557 n.2).

[18] Calabresi, *supra* note 1, at 1045.

[19] Several observers have expressed concern that *Lopez* and *Morrison* will render other congressional statutes unconstitutional. *See* Christopher R. Gura, Note, United States v. Faasse*: The Beginning of the End of the Child Support Recovery Act?*, 78 U. DET. MERCY L. REV. 699, 700 (2001) ("The constitutionality of the [Child Support Recovery Act] has been under attack ever since Congress' power to regulate interstate commerce was redefined by the Supreme Court in *United States v. Lopez*."); Dave Owen, Note, Gibbs v. Babbitt, 28 ECOLOGY L.Q. 377, 378 (2001) ("Following the Supreme Court's decision in *United States v. Lopez*, numerous commentators speculated that the Endangered Species Act (ESA) 'take' provision might stand on shaky ground." (footnotes omitted)).

[20] Ronald D. Rotunda, *The New States' Rights, the New Federalism, the New Commerce Clause, and the Proposed New Abdication*, 25 OKLA. CITY U. L. REV. 869, 925 (2000).

[21] 545 U.S. 1 (2005).

legalized by California's Compassionate Use Act.[22] The Court distinguished *Lopez* and *Morrison* from *Raich* by finding that the distribution, production, and consumption of marijuana were "quintessentially economic."[23] Justice O'Connor, joined by Justice Thomas and Chief Justice Rehnquist, wrote a stinging dissent, declaring that the majority's opinion was "irreconcilable" with *Morrison* and *Lopez*.[24] Justice O'Connor further noted that "[i]f the Court always defers to Congress as it does today, little may be left to the notion of enumerated powers."[25]

While it is unclear whether *Raich* signals a definite retreat from *Lopez* and *Morrison*'s narrow interpretation of the Interstate Commerce Clause, it is clear that the proper interpretation of the Interstate Commerce Clause is more relevant now than it has been for the past sixty years. This Note recognizes this relevance and seeks to aid the search for the Interstate Commerce Clause's proper interpretation.

Article I, Section 8 of the Constitution contains the Foreign Commerce Clause, the Interstate Commerce Clause, and the Indian Commerce Clause: it grants Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[26] In this Note, I will examine early laws that regulated Indian tribes – laws that often extended well beyond the realm of trade and exchange – and attempt to determine whether the Indian Commerce Clause was ever asserted as the authority for these laws. If it was, this would suggest that the power to "regulate Commerce" was understood to cover more than just trade and exchange, and would thus support a fairly broad reading of the Interstate Commerce Clause. If, however, the Indian Commerce Clause was not asserted as the justification for these laws, this would indicate that the power to "regulate Commerce," whether "with the Indian Tribes" or "among the several States," was not understood as anything more than a power to regulate trade and exchange.

Part I explores early regulations of Native Americans and the constitutional justifications for such regulations. Part II explores later regulations of Native Americans. Part III explores the judicial response to these later regulations, and the rise of the plenary power doctrine. Part IV synthesizes the results of Parts I, II, and III, and attempts to apply the historical evidence to the Interstate Commerce Clause. I conclude that when Congress sought to regulate Indian tribes in matters beyond trade and exchange, the Indian Commerce Clause was not asserted as a constitutional justification for doing so. Further, when Congress eventually began asserting plenary power over Indian tribes, the Supreme Court expressly rejected the assertion that the Indian Commerce Clause provided a basis for such a power. This evidence supports a narrow

[22] *See id.* at 32-33.

[23] *Id.* at 25.

[24] *Id.* at 43 (O'Connor, J., dissenting).

[25] *Id.* at 47.

[26] U.S. CONST. art. I, § 8, cl. 3.

interpretation of the power to "regulate Commerce," and in turn, a narrow interpretation of both the Indian Commerce Clause and the Interstate Commerce Clause.

I. EARLY LAWS GOVERNING INDIAN TRIBES AND THEIR JUSTIFICATIONS

A. *Early Uses of the Treaty Clause*

Two constitutional provisions grant the federal government authority to interact with Indian tribes: the Indian Commerce Clause[27] and the Treaty Clause.[28] While the Treaty Clause received considerable debate during the Constitutional Convention, its application to Indian tribes was never specifically mentioned.[29] Despite this scant attention, treaties with Indian tribes became the "primary instruments for carrying out federal Indian policy."[30] By 1871, 348 treaties were negotiated by the executive branch and ratified by the Senate.[31]

Although treaties with Indian tribes varied considerably,[32] many contained provisions that granted the federal government authority to regulate internal tribal matters.[33] Some treaties, such as the Klamath and Navajo Treaties, expressly granted plenary power to the federal government. Under the Klamath Treaty, the signatory tribes agreed to "submit to and obey all laws and regulations which the United States may prescribe for their government and conduct."[34] Under the Navajo Treaty, the federal government could "pass and execute in [Navajo] territory such laws as may be deemed conducive to the

[27] *Id.*

[28] *Id.* art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties . . . .").

[29] FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES 69 (1994).

[30] *Id.* at 103.

[31] *Id.* On March 3, 1871, Congress unilaterally ended the treaty power with respect to Native Americans. *See* Act of Mar. 3, 1871, ch. 120, 16 Stat. 544 (codified at 25 U.S.C. § 71 (2000)). *See generally* PRUCHA, *supra* note 29, at 289-310 (discussing the political reasons behind Congress' decision).

[32] Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 792 (2006).

[33] Saikrishna Prakash, *Against Tribal Fungibility*, 89 CORNELL L. REV. 1069, 1110 (2004).

[34] Treaty Between the United States of America and the Klamath and Moadoc Tribes and Yahooskin Band of Snake Indians art. IX, Oct. 14, 1864, 16 Stat. 707, *quoted in* Prakash, *supra* note 33, at 1110.

prosperity and happiness of [Navajo] Indians."[35] Similar language was employed in a number of treaties.[36]

Other treaties reserved considerable tribal autonomy, while still authorizing some federal regulation of internal tribal matters. For example, one scholar notes that in several treaties, "tribes agreed to surrender to the United States for punishment any Indians who committed serious crimes against non-Indians."[37] One such treaty was the 1825 Treaty with the Poncars, which required the tribe to "deliver up [to the federal government] the person or persons against whom [a criminal] complaint is made, to the end that he or they may be punished agreeably to the laws of the United States."[38] Nearly identical language was employed in many other treaties.[39]

These treaties were the primary source of federal law enforcement on tribal lands.[40] When the federal government sought to interfere with internal tribal matters, the Treaty Clause provided adequate authority. In fact, when the federal government began moving Native Americans from tribal lands onto reservations, it relied upon the Treaty Clause.[41]

B. *Early Uses of the Indian Commerce Clause*

Despite the great reliance on the Treaty Clause, early Congresses did enact a series of laws justified solely by the Indian Commerce Clause. These laws are collectively called the Trade and Intercourse Acts, and were originally

[35] Treaty Between the United States of America and the Navajo Tribe of Indians art. IX, Sept. 9, 1849, 9 Stat. 974, *quoted in* Prakash, *supra* note 33, at 1110.

[36] *See, e.g.*, Treaty with the Apaches art. 9, July 1, 1852, 10 Stat. 979; Treaty Between the United States of America and the Utah Indians art. VII, Dec. 30, 1849, 9 Stat. 984.

[37] Washburn, *supra* note 32, at 792.

[38] Treaty with the Poncar Tribe art. 5, June 9, 1825, 7 Stat. 247.

[39] *See, e.g.*, Treaty Between the United States of America and the Tabeguache Band of Utah Indians art. VI, Oct. 7, 1863, 13 Stat. 673; Treaty with the Ottoe and Missouri Tribe art. 5, Sept. 26, 1825, 7 Stat. 277; Treaty with the Sioune and Ogallala Tribes art. 5, July 5, 1825, 7 Stat. 252; Treaty with the Quapaws art. 6, Aug. 24, 1818, 7 Stat. 176; Treaty Between the United States of America and the United Tribes of Sac and Fox Indians art. 5, Nov. 3, 1804, 7 Stat. 84.

[40] *See* Washburn, *supra* note 32, at 794 ("[T]hrough most of the 1800s, treaties defined the respective roles of Indian tribes and the United States as to law enforcement.").

[41] *See* Indian Removal Act, ch. 148, § 8, 4 Stat. 411, 412 (1830) (appropriating $500,000 to the President for the purpose of negotiating via treaty the removal of Native Americans from tribal land); *see, e.g.*, Treaty with the Choctaws art. III, Sept. 27, 1830, 7 Stat. 333 ("In consideration of the provisions contained in the several articles of this Treaty, the Choctaw nation of Indians consent and hereby cede to the United States, the entire country they own and possess, east of the Mississippi River; and they agree to remove beyond the Mississippi River, early as practicable . . . .").

modeled after pre-existing British policy.[42] The Trade and Intercourse Acts provided a "practical and contemporaneous construction" of the Indian Commerce Clause.[43]

The first law was passed in 1790 at the behest of President Washington, who feared that continual encroachment by white settlers onto tribal lands would lead to widespread conflict.[44] The official title, "An Act to regulate trade and intercourse with the Indian tribes,"[45] suggests that the early Congress equated "commerce" with "trade and intercourse," a definition subsequently favored by originalist scholars[46] and originalist jurists.[47] For the purposes of this Note, however, it is the Act's substantive provisions that are important.

The Act consisted of seven sections. The first section provided that "no person shall be permitted to carry on any trade or intercourse with the Indian tribes, without a license for that purpose."[48] The section went on to prescribe that an individual trader petition for a license with a superintendent appointed by the President for that purpose.[49] The second section granted the superintendent the power to revoke the license of a trader who "transgress[ed] any of the regulations or restrictions provided for the government of trade and intercourse with the Indian tribes."[50] The third section outlined the civil liability of any unlicensed trader caught engaging in trade with the Indian tribes.[51] The fourth section provided that land sales between the Indian tribes and U.S. citizens would be invalid, unless executed under the terms of a public treaty.[52] The fifth and sixth sections created criminal penalties for U.S. citizens who committed "any crime upon, or trespass against, the person or

[42] Washburn, *supra* note 32, at 791 ("A series of federal statutes called the Trade and Intercourse Acts modeled a British policy created in the Proclamation of 1763 by consolidating federal authority over commerce with Indian tribes." (footnote omitted)).

[43] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.03[2], at 37 (Nell Jessup Newton et al. eds., 2005 ed.) [hereinafter COHEN'S HANDBOOK].

[44] *See* FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834, at 45 (1962).

[45] Act of July 22, 1790, ch. 33, 1 Stat. 137.

[46] *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 274-318 (2004) (arguing for a narrow interpretation of "commerce" and citing historical evidence for support). Professor Barnett would interpret "commerce" to mean "trade and exchange," and argues that "it is not at all clear that the meaning of 'intercourse' . . . was itself much broader than trade and exchange." *Id.* at 294.

[47] *See, e.g.*, United States v. Lopez, 514 U.S. 549, 585 (1995) (Thomas, J., concurring) ("At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes.").

[48] Act of July 22, 1790 § 1.

[49] *Id.*

[50] *Id.* § 2.

[51] *Id.* § 3.

[52] *Id.* § 4.

property of any peaceable and friendly Indian or Indians."[53] Finally, the seventh section provided that the Act would be effective for two years.[54]

The first four sections dealt solely with issues of trade and applied only to U.S. citizens who interacted with Native Americans, rather than to Native Americans themselves. The fifth and six sections went beyond trade and introduced criminal sanctions into the Act. Although the Act spoke of "any crime," its sanctions only applied to U.S. citizens who committed crimes against Native Americans. Thus, the tribes retained authority over crimes committed by Native Americans on tribal soil.

The Act's substantive provisions make clear that, as one scholar observes, the Act "sought to prevent abuses of the Indians and conflicts between Indians and whites, rather than to regulate the Indians themselves."[55] The laws were primarily directed at whites and only regulated the tribes to the extent that the tribes interacted with whites.[56] Thus, there was no federal regulation of internal tribal matters in the original Trade and Intercourse Act.

Given the two-year continuation clause of the original Trade and Intercourse Act,[57] Congress was forced to reconsider the Act every three years.[58] The Act was first reinstated on March 1, 1793.[59] The 1793 version contained new sections mandating forfeiture in cases of settlement of tribal land by U.S. citizens,[60] requiring a license for the purchase of horses,[61] and granting the President the authority to give the Indian tribes domesticated animals.[62] The new sections did not authorize federal regulation of internal tribal matters.

The third Trade and Intercourse Act was enacted on May 19, 1796.[63] The 1796 Act went further than the previous two versions, granting federal jurisdiction over Indians who committed crimes after crossing state or territorial lines.[64] Although this provision initially appears to regulate purely tribal matters, two important aspects of the Act undermine this presumption. First, federal jurisdiction only attached when a Native American committed a

[53] *Id.* §§ 5-6.

[54] *Id.* § 7.

[55] COHEN'S HANDBOOK, *supra* note 43, § 1.03[2], at 38.

[56] *See* 1 FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 92 (1984).

[57] Act of July 22, 1790 § 7 ("[T]his act shall be in force for the term of two years, and from thence to the end of the next session of Congress, and no longer.").

[58] Congress would have to consider the Act every three years, rather than every two, because the Act only expired after Congress had adjourned, allowing the Act to survive for another year until Congress could re-adjourn.

[59] Act of Mar. 1, 1793, ch. 19, 1 Stat. 329.

[60] *Id.* § 5.

[61] *Id.* § 6.

[62] *Id.* § 9.

[63] Act of May 19, 1796, ch. 30, 1 Stat. 469.

[64] *Id.* §§ 14-15.

crime in a state or U.S. territory. Second, the Act allowed the criminal's tribe, even under such circumstances, an initial opportunity to punish the criminal internally before there was any chance for direct U.S. government involvement.[65]

The final temporary Trade and Intercourse Act was enacted on March 3, 1799,[66] and made only slight changes to the 1796 Act.[67] On March 30, 1802, Congress enacted the first permanent Trade and Intercourse Act.[68] The only significant addition of the 1802 Act was a grant of authority to the President "to take such measures, from time to time, as to him may appear expedient to prevent or restrain the vending or distributing of spirituous liquors among all or any of the said Indian tribes."[69] This grant of power did not interfere with tribal affairs, as only liquor brought onto tribal lands by white traders was subject to regulation.

In 1817, Congress enacted a statute that made any crime committed on tribal land a federal offense.[70] On its face, this statute appears to be a direct regulation of internal tribal affairs. However, the Act's second section provided that the Act should not be interpreted "to extend to any offence committed by one Indian against another, within any Indian boundary."[71] Thus, the 1817 Act did no more than the 1796 Trade and Intercourse Act's criminal provisions.[72] The 1817 Act merely filled in some gaps in the criminal law by providing federal jurisdiction over non–Native Americans who committed crimes on tribal land.[73]

Congress again addressed the Trade and Intercourse Act on June 30, 1834.[74] The substance of the 1834 Act did not offer a "sharp break with the past but

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[65] *Id.* § 14.

[66] Act of March 3, 1799, ch. 46, 1 Stat. 743.

[67] COHEN'S HANDBOOK, *supra* note 43, § 1.03[2], at 40.

[68] Act of Mar. 30, 1802, ch. 13, 2 Stat. 139.

[69] *Id.* § 21.

[70] Act of Mar. 3, 1817, ch. 92, 3 Stat. 383, *invalidated by* United States v. Bailey, 24 F. Cas. 937 (C.C.D. Tenn. 1834) (No. 14,495).

[71] Act of Mar. 3, 1817 § 2.

[72] In fact, section 3 of the 1817 Act expressly referred to the Trade and Intercourse Act's criminal provisions. *See id.* § 3 ("[T]he President of the United States, and the governor of each of the territorial districts, where any offender against this act shall be apprehended or brought for trial, shall have, and exercise, the same powers, for the punishment of offences against this act, as they can severally have and exercise by virtue of the fourteenth and fifteenth sections of an act, entitled 'An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers,' passed thirtieth March, one thousand eight hundred and two, for the punishment of offences therein described.").

[73] This jurisdiction is similar to that of the 1825 Treaty with the Poncar Tribe. *See supra* notes 37-38 and accompanying text. While the 1817 Act dealt only with non–Native American criminals, the treaty appears to have covered both Native American and non–Native American criminals.

[74] Act of June 30, 1834, ch. 161, 4 Stat. 729.

embodied, sometimes in modified form, the principles that had developed through the preceding decades."[75] Among its minor changes, the 1834 Act expanded the liquor prohibition of the 1802 Act, allowing for the search and seizure of boats and wagons carrying liquor into Indian tribal land.[76] Additionally, the 1834 Act granted the federal government authority "to procure the arrest and trial of all Indians accused of committing any crime, offence, or misdemeanor, and all other persons who may have committed crimes or offences within any state or territory, and have fled into the Indian country."[77] This provision is similar to a provision of the 1796 Trade and Intercourse Act. Whereas the 1796 Act focused on regulating Native Americans who left tribal lands and committed crimes in a state,[78] the 1834 Act focused on regulating *any* criminal who committed crimes in a state and sought refuge on tribal land.[79] Neither statute, however, attempted to regulate internal tribal matters.

Although the 1834 Act did not regulate internal tribal matters, another bill, introduced with the 1834 Act, would have resulted in such internal regulation. The Western Territory bill called for the "establishment of the Western Territory, and for the security and protection of emigrant and other Indian tribes therein."[80] The bill's basic purpose was to form a confederated government of Indian tribes, subject to oversight by a presidentially appointed governor.[81] Thus, the Western Territory bill represented the first attempt by Congress to pass a law clearly regulating an internal tribal affair, namely self-government.

The Western Territory bill did not pass. After the bill was proposed, Representative John Adams of New York declared that "[i]t was as good a bill to raise a constitutional argument upon as any he had ever seen or heard of."[82] Representative Adams demanded to know "[w]hat constitutional right had the United States to form a constitution and form of government for Indians?"[83] In response, Representative Horace Everett of Vermont claimed that "[t]he clauses giving Congress power to dispose of the Territories, and to regulate trade and intercourse with the Indian tribes, were abundantly sufficient to warrant every thing in the bill."[84]

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[75] DOCUMENTS OF UNITED STATES INDIAN POLICY 63 (Francis Paul Prucha ed., 3d ed. 2000).

[76] *See* Act of June 30, 1834 § 20.

[77] *Id.* § 19.

[78] *See* Act of May 19, 1796, ch. 30, § 14, 1 Stat. 469, 472.

[79] *See* Act of June 30, 1834 § 19.

[80] 10 REG. DEB. 4763 (1834).

[81] *See* COHEN'S HANDBOOK, *supra* note 43, § 1.03[4][b], at 58.

[82] 10 REG. DEB. 4763 (1834).

[83] *Id.*

[84] *Id.*

Massachusetts Representative and former president John Quincy Adams took the floor to challenge Everett's constitutional justifications.[85] Adams' constitutional attack focused mainly on the Constitution's Territory Clause.[86] Adams argued that since the Territory Clause was insufficient, there was no clause in the Constitution that empowered Congress to regulate Native Americans as the bill proposed.[87]

After Adams' speech, the House debate focused solely on whether the Territory Clause was sufficient.[88] Not a single representative argued that the Indian Commerce Clause alone could justify the bill. In fact, besides Representative Everett's initial citation to the Indian Commerce Clause, the clause was not even mentioned.[89] The bill's proponents were unable to muster enough support to move for a vote on the bill, and the bill "was laid upon the table; from which position it was not removed during the further progress of the session, and was, of course, lost."[90]

Thus, Congress' first attempt to regulate internal tribal affairs failed due to constitutional concerns. While the debate focused on the Territory Clause, it

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[85] *See id.* at 4768-72.

[86] *See id.* at 4769 ("But what right did such a clause give to Congress over living human beings? The clause spoke of 'the Territories and other property of the United States.' Were human beings the 'property of the United States,' although in a savage condition? Surely not."). Adams also worried that the bill granted power to the executive branch at the expense of Congress. *Id.* at 4770 ("This bill went to divest Congress of all power over the relations of the people of the United States to the Indian tribes, and placed it wholly in the hands of the President.").

[87] *See id.* at 4769 (contending that there was no "article in the constitution which warranted such a measure, or conferred such a power").

[88] *See id.* at 4772-79. Representative George Rockingham Gilmer of Georgia argued that the Territory Clause was sufficient:

> Did not the gentleman [John Quincy Adams] admit that the States had jurisdiction over all their own territory, unless it had been ceded away to Government by their own act? And who should form a government over one of the Territories but Congress? Where did the people of Michigan or Arkansas get their laws from? Was it not from Congress? Such jurisdiction was inseparably connected with the dominion of the General Government. If, then, the States had no jurisdiction over the United States Territories, the question of power was no longer a constitutional question. The true question was only as to the means of exercising the power.

Id. at 4774. Representative William Archer of Virginia argued that if the Territory Clause was sufficient, "then this Territory would possess the right, in due time, to come to this House and demand to be admitted as an equal and a sovereign member of our political confederacy." *Id.* at 4776. He believed such a result was absurd and untenable: "If such a thought had been suggested in the convention which framed our constitution, what sort of reception would it have met with? Was it seriously contemplated to introduce all the Indian tribes from our frontier to the mouth of the Columbia river, as members of our confederacy?" *Id.*

[89] *See id.* at 4763-79.

[90] *Id.* at 4779.

still offers insight into the scope of the Indian Commerce Clause. If Congress understood the Indian Commerce Clause to authorize substantive regulations of internal tribal matters, then presumably the Indian Commerce Clause would have been the debate's crucial issue. Because the Indian Commerce Clause was only mentioned once, a reasonable inference can be drawn that Congress did not believe the clause conferred such a substantive power.

C. *Conclusion to Part I*

There are four distinct conclusions to draw from Congress' early interactions with Native Americans. First, Congress believed that regulating internal tribal matters benefited the United States. This belief is evidenced in the numerous treaties Congress ratified giving the federal government either plenary control over all tribal matters,[91] or more limited control over some criminal matters.[92]

Second, when Congress attempted to regulate internal tribal matters, it did so solely through treaties.[93] Although a reasonable interpretation of the Treaty Clause does not confer plenary power on Congress,[94] it does allow the federal government and Native American tribes to consent to such an arrangement.[95]

Third, the early Congresses never regulated internal tribal matters via statute. The Trade and Intercourse Acts were Congress' primary method of governing Native American tribes, and the Acts were limited in scope. The Acts aimed to limit frontier violence by regulating the interactions between non–Native Americans and Native Americans. The Acts neither granted Congress plenary power over Native American tribes nor created federal criminal penalties for crimes committed by Native Americans against Native Americans on tribal lands.[96]

Fourth, when some members of the twenty-third Congress attempted to regulate internal tribal affairs, the majority of Congress struck the attempt

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[91] *See supra* notes 33-36 and accompanying text.

[92] *See supra* notes 37-39 and accompanying text.

[93] *See supra* notes 30-31 and accompanying text.

[94] *See* Prakash, *supra* note 33, at 1095 ("Common sense suggests that the power to make bilateral and multilateral contracts with other nations does not encompass a power to unilaterally regulate the other nations themselves."). Additionally, it is difficult for Congress to justify a plenary power in the Treaty Clause because the clause is an Article II, not Article I, power.

[95] *See id.* ("[A]ctual Indian treaties might empower Congress to legislate in situations in which Congress otherwise would not have legislative power.").

[96] *See supra* notes 48-79 and accompanying text; *see also* Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 133-34 (2002) ("[During] the first century after adoption of the United States Constitution . . . . one can hardly find any statutes directly regulating an Indian Tribe or its members in any fashion. . . . [T]he Trade and Intercourse Acts . . . regulated only the non-Indians who venture[d] into Indian country to deal with Indians. They did not purport to regulate the tribes or their members." (footnote omitted)).

down on constitutional grounds. The Western Territory bill was the first attempt to regulate clearly internal tribal matters via statute. Congress rejected the attempt, recognizing that the Constitution did not confer such a plenary power.[97] Had the Indian Commerce Clause conferred a broad power, the clause would have surely played a more central role in the debate over the Western Territory bill.[98]

II. LATER REGULATIONS OF INDIAN TRIBES: THE MAJOR CRIMES ACT

Congress passed the Major Crimes Act on March 3, 1885.[99] The Act provided federal courts with jurisdiction over Native Americans who were charged with committing one of seven crimes against other Native Americans *or* non–Native Americans.[100] The seven particular crimes were "murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny."[101] Federal jurisdiction would be granted even if all elements of the crime were committed within the boundaries of an Indian reservation.[102] The Act marked a "major encroachment upon traditional tribal autonomy,"[103] and "constituted the very first Anglo-American colonial effort to assert direct governing power over the Indian tribes."[104]

The passage of the Major Crimes Act was sparked by the Supreme Court's decision in *Ex parte Crow Dog* in 1883.[105] In *Crow Dog*, the First Judicial

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[97] *See supra* notes 80-90 and accompanying text.

[98] A fifth conclusion may also be drawn. This last conclusion goes to the original meaning of the word "commerce." The fact that Congress never once attempted substantive federal regulations of Native Americans during this time period indicates that "commerce" was not understood to be synonymous with "gainful activity." If it were, the regulations against white traders could equally have applied to Native Americans, because both sides of the trade transactions "gained" from the "activity." While the fact that Congress did not regulate Native Americans in these transactions does not foreclose the possibility that Congress had this power, it at least suggests that Congress did not think it had the power. For further discussion of the original meaning of "commerce," see BARNETT, *supra* note 46, at 278-97 (surveying historical materials and arguing that the evidence supports a narrow interpretation of "commerce"); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 111-32 (2001) (same). *But see* Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles To Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 14-21, 35-42 (1999) (analyzing similar materials as Professor Barnett and arguing that they support a broader interpretation of "commerce").

[99] Major Crimes Act, ch. 341, § 9, 23 Stat. 362, 385 (1885) (codified as amended at 18 U.S.C. § 1153 (2000)).

[100] *See id.*

[101] *Id.*

[102] *Id.*

[103] DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 75, at 166.

[104] Clinton, *supra* note 96, at 170.

[105] *Ex parte* Crow Dog, 109 U.S. 556 (1883).

District of the Territory of Dakota convicted Crow Dog, a Native American, of the murder of Spotted Tail, also a Native American.[106] Crow Dog argued that the federal court lacked jurisdiction to impose the sentence because the crime was committed on tribal land, and both the attacker and the victim were Native American.[107] The Supreme Court referred to the codified version of the 1834 Trade and Intercourse Act, found in sections 2145 and 2146 of the Revised Statutes, and held that the 1834 Act expressly prohibited federal jurisdiction.[108] The Court granted Crow Dog's writ of habeas corpus and ordered his release, declaring that "to uphold the jurisdiction exercised in this case, would be to reverse in this instance the general policy of the government towards the Indians."[109]

The Major Crimes Act of 1885 was essentially a federalization of purely internal tribal matters, similar to the federalization of purely state matters seen in the Gun-Free School Zones Act of 1990, the statute at issue in *Lopez*,[110] and in the Violence Against Women Act of 1994, the statute at issue in *Morrison*.[111] Congress passed the Major Crimes Act "[t]o prevent a recurrence of cases like the murder of Spotted Tail by Crow Dog."[112] The Act's legislative history, however, is limited. Because the Act was attached to the end of the Indian Department's appropriations bill,[113] the majority of the Senate and House debate centered on the amount of money being allocated to the Indian Department and on the appropriateness of attaching legislation to an appropriations bill.[114] In fact, a thorough reading of the Congressional Record of March 3, 1885, does not reveal any discussion about the substance of the Major Crimes Act.[115]

The limited legislative history is surprising given the intense debate surrounding the failed Western Territory bill.[116] Placing the Major Crimes Act in its historical context best explains the legislative silence. Assimilation gained nationwide acceptance during the 1880s, and increased federal control over Native Americans was viewed as the best means of assimilating tribes.[117]

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[106] *See id.* at 557.

[107] *See id.*

[108] *See id.* at 571-72.

[109] *Id.* at 572.

[110] *See supra* notes 9-12 and accompanying text.

[111] *See supra* notes 13-17 and accompanying text.

[112] DOCUMENTS OF UNITED STATES INDIAN POLICY, *supra* note 75, at 166.

[113] The Major Crimes Act was the ninth and final section of an act entitled "An act making appropriations for the current and contingent expenses of the Indian Department." *See* Act of Mar. 3, 1885, ch. 341, 23 Stat. 362 (1885).

[114] *See* 16 CONG. REC. 2520, 2520 (1885) (statement of Rep. Thomas Ryan).

[115] *See* 16 CONG. REC. 2436, 2436-2573 (1885).

[116] *See supra* notes 82-90 and accompanying text.

[117] *See* Washburn, *supra* note 32, at 804-05.

Additionally, fears over continued frontier violence and skepticism toward the Supreme Court's *Crow Dog* decision likely aided the Act's passage.[118]

Whatever reason one attributes to the Act's speedy and silent passage, the Major Crimes Act represented a dramatic shift in federal policy toward Native American tribes. The critical question, for the purpose of this Note, is whether the Indian Commerce Clause was viewed as providing constitutional justification for the Act's intrusion on internal tribal matters.

III. JUDICIAL REVIEW OF THE MAJOR CRIMES ACT: *KAGAMA* AND THE RISE OF THE PLENARY POWER DOCTRINE

A. United States v. Kagama

The Major Crimes Act's constitutionality was first challenged in *United States v. Kagama*.[119] The case involved indictments of murder and accomplice murder against two Native Americans for a killing occurring on a Native American reservation.[120] Justice Miller, writing for a unanimous court, framed the question as "[w]hether the courts of the United States have jurisdiction or authority to try and punish an Indian belonging to an Indian tribe for committing the crime of murder upon another Indian belonging to the same Indian tribe . . . said crime having been committed upon an Indian reservation."[121]

The government contended that the Major Crimes Act was "a regulation of commerce with the Indian tribes," and thus was a constitutional exercise of the Indian Commerce Clause power.[122] The Court, however, found that the government's argument relied on "a very strained construction" of the Indian Commerce Clause.[123] According to the Court, the Indian Commerce Clause did not authorize "a system of criminal laws for Indians living peaceably in their reservations."[124] The Court found it particularly troublesome that the Major Crimes Act was passed "without any reference to [the relation of crime] to any kind of commerce."[125]

Lacking a constitutional justification to uphold the Act, the Court looked outside the Constitution. The Court asserted that Native Americans were "wards of the nation," dependent on the United States for food and political

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[118] *See id.*

[119] 118 U.S. 375 (1886).

[120] *Id.* at 376.

[121] *Id.*

[122] *Id.* at 378.

[123] *Id.*

[124] *Id.*

[125] *Id.* at 379. This assertion is similar to the *Lopez* majority's criticism of the Gun-Free School Zones Act of 1990 as "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." United States v. Lopez, 514 U.S. 549, 561 (1995).

rights.[126] Under the "ward" theory, the federal government had a duty to protect Native Americans, and from this duty stemmed the power to regulate the everyday activities of the tribes.[127] The Court found it sufficient to rely upon this extra-constitutional "ward" theory, and upheld the Major Crimes Act without reference to any constitutional provision.[128]

Kagama, according to one scholar, "represented a *tour de force* in judicial constitutional creativity and marked a major departure from established norms of constitutional interpretation."[129] The Court expressly recognized that the Indian Commerce Clause did not justify the Act. In fact, it is difficult, if not impossible, to reconcile the opinion with any textual delegation of congressional authority within the Constitution.[130] Perhaps even more troubling than the *Kagama* opinion, however, is its progeny and the rise of the plenary power doctrine.

B. *The Plenary Power Doctrine*

The Supreme Court reinforced and broadened *Kagama*'s scope in subsequent cases. In *Stephens v. Cherokee Nation*,[131] the Court heard a challenge to the constitutionality of Indian Territory courts. Congress had conferred authority on these courts to resolve issues involving tribal citizenship and the allocation of tribal lands – issues that were clearly internal tribal matters – and the Cherokee Nation argued that this grant of authority exceeded Congress' enumerated powers.[132]

Justice Fuller, writing for a unanimous Court, rejected the Cherokee Nation's argument. For the first time, the Court explicitly referred to Congress' power over Native Americans as "plenary."[133] Relying heavily on

[126] *Kagama*, 118 U.S. at 383-84 ("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.").

[127] *Id.* at 384 ("From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.").

[128] *See id.* at 384-85.

[129] Clinton, *supra* note 96, at 172.

[130] *Id.* at 175 ("Nowhere does the Court cite or rely on a textual delegation of congressional authority. Rather, the Court merely asserts a colonial power to govern Indians because they are 'communities dependent on the United States.'").

[131] 174 U.S. 445 (1899).

[132] *See id.* at 477-78.

[133] *Id.* at 478. ("The United States court in the Indian Territory is a legislative court and was authorized to exercise jurisdiction in these citizenship cases as a part of the machinery devised by Congress in the discharge of its duties in respect of these Indian tribes, and assuming that Congress possesses plenary power of legislation in regard to them, subject only to the Constitution of the United States, it follows that the validity of remedial legislation of this sort cannot be questioned unless in violation of some prohibition of that instrument.").

Kagama, the Court held that there was no violation of the Constitution because the tribes were wards of the nation.[134] *Stephens* failed to cite any constitutional authority for Congress' newly found plenary power.

In *Lone Wolf v. Hitchcock*,[135] the Court held that Congress had plenary power to divest Native American tribes of tribal land by legislative decree.[136] The tribes argued that tribal lands could not be divested without the approval of three fourths of the Native Americans residing on the land, as was previously agreed to in a treaty between the tribes and the federal government.[137]

Although Congress blatantly breached the treaty,[138] the Court validated the use of legislative authority by relying on the extra-constitutional principles of *Kagama*. The Court insisted that "the action of Congress now complained of was but an exercise of [plenary] power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the government."[139] The Court went further, finding that Congress' plenary power over Native American affairs precluded the courts from exercising judicial review.[140]

Like *Stephens*, the *Lone Wolf* decision failed to cite a single constitutional authority for Congress' plenary power. Instead, the Court relied on a peculiar historical justification, claiming that the plenary power was "exercised by Congress from the beginning."[141] This historical justification, however, is simply inaccurate. The Major Crimes Act was the first attempt by Congress to assert regulatory power over Native Americans via legislation.[142] Further, the best historical evidence, such as the debates surrounding the Western Territory

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[134] *See id.* at 485-86.

[135] 187 U.S. 553 (1903).

[136] *See id.* at 565.

[137] *See id.* at 564; *see also* Treaty Between the United States and the Kiowa and Comanche Tribes of Indians art. 12, Oct. 21, 1867, 15 Stat. 581 ("No treaty for the cession of any portion or part of the reservation . . . shall be of any validity or force as against the [Kiowa and Comanche] Indians, unless executed and signed by at least three fourths of all the adult male Indians occupying the same . . . .").

[138] *See Lone Wolf*, 187 U.S. at 557 (indicating that Congress divested Native Americans of tribal land even though it was aware that it had not obtained the requisite assent of three fourths of adult male occupants).

[139] *Id.* at 568.

[140] *Id.* ("[A]s Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned . . . by the use made by Congress of its power, relief must be sought by an appeal to that body for redress, and not to the courts.").

[141] *Id.* at 565.

[142] *See* Clinton, *supra* note 96, at 184 (criticizing *Lone Wolf* and pointing out that "Congress never asserted *any* power to directly regulate Indian tribes until it enacted the Federal Major Crimes Act in 1885").

bill and the limited scope of the Trade and Intercourse Acts, suggests that Congress neither had nor exercised such a power.[143]

The modern Supreme Court continues to utilize the plenary power doctrine.[144] The Court has, however, lessened its reliance on the "ward" theory in favor of textualism. In *McClanahan v. Arizona State Tax Commission*,[145] the Court wrote that "[t]he source of federal authority over Indian matters has been the subject of some confusion, but it is now generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making."[146] This is a remarkable statement, especially given that *Kagama* expressly rejected the Indian Commerce Clause as a justification for plenary power.[147]

The Court has come to embrace this shift in explaining the source of Congress' plenary authority over Native American affairs.[148] In 1989, in *Cotton Petroleum Corp. v. New Mexico*,[149] the Court went so far as to declare that "the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."[150] As recently as 2004, in *United States v. Lara*,[151] the Court pointed to the Indian Commerce Clause as one source of Congress' plenary power.[152] Nevertheless, while the modern Court explicitly cites textual justifications for the plenary power doctrine, it also implicitly relies on the ward theory and its peculiar version of American history.[153]

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[143] *See supra* Part I.

[144] *See* Clinton, *supra* note 96, at 195 ("The modern cases blindly follow the federal Indian plenary power doctrine originally developed under the guise of a wardship power.").

[145] 411 U.S. 164 (1973).

[146] *Id.* at 172 n.7, *quoted in* Clinton, *supra* note 96, at 196.

[147] *See supra* notes 122-24 and accompanying text.

[148] *See* Clinton, *supra* note 96, at 196 ("[T]he federal judiciary simply continues to espouse an Indian plenary power doctrine, albeit now grounding it on the Indian Commerce Clause, rather than the racially-tainted colonialist wardship theory under which it first developed.").

[149] 490 U.S. 163 (1989).

[150] *Id.* at 192.

[151] 541 U.S. 193 (2004).

[152] *Id.* at 200 ("[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.' This Court has traditionally identified the Indian Commerce Clause and the Treaty Clause as sources of that power." (citations omitted)).

[153] For example, both *Cotton Petroleum* and *Lara* approvingly cite *Morton v. Mancari*, 417 U.S. 535 (1974). *Mancari* refers to the Indian Commerce Clause as one possible source of plenary power, but it also cites *Kagama* and focuses on the "guardian-ward" relationship between Native Americans and the federal government. *See id.* at 552-53.

C. *Conclusion to Part III*

Two conclusions can be drawn from the Indian Commerce Clause's modern usage. First, the Major Crimes Act presented the Supreme Court with an opportunity to validate Congress' regulation of internal tribal affairs under the Indian Commerce Clause. The Court, however, expressly rejected the Indian Commerce Clause as a source of Congress' plenary power. Instead, the Court relied upon extra-constitutional principles and revisionist history to create a plenary power doctrine unconnected to any constitutional provision.

Second, the modern Court has reconnected the plenary power doctrine to the Constitution. These modern connections, however, are tenuous at best and disingenuous at worst. While the modern Court consistently cites the Indian Commerce Clause and the Treaty Power as sources of the plenary power doctrine, it implicitly continues to embrace the extra-constitutional principles of *Kagama* and its progeny. Furthermore, the modern Court consistently relies upon a *combination* of constitutional provisions, and is unwilling to validate the plenary power doctrine on the basis of any *single* provision.

IV. SYNTHESIZING THE HISTORICAL EVIDENCE AND APPLYING IT TO A MODERN CONTEXT

A. *Synthesizing the Historical Evidence*

The historical evidence suggests that Congress' power under the Indian Commerce Clause is limited. For a century, the federal government did not seek to regulate internal tribal matters through legislation. Nothing in the clause's language or its use by the early Congresses suggests that it was intended to "grant Congress any power to govern the tribes directly in any fashion."[154]

Although Congress did not directly regulate the tribes through legislation, it did regulate the tribes through treaties. In fact, treaties constituted the basic form of interaction between the early federal government and the tribes. The wide-scale use of treaties indicates that the federal government was interested in regulating Native American affairs, but realized that the constitutionally proper method for creating such regulations was through bilateral treaties rather than unilateral congressional action.

In addition, early attempts to regulate the tribes via statute were met with resistance. This resistance is evident in the debate surrounding the failed Western Territory bill. The debate concerning that bill offers a critical, contemporaneous understanding of Congress' Indian Commerce Clause power, illustrating that the power was understood to be limited, not plenary. If the Indian Commerce Clause had provided Congress, in 1834, the power it is understood to give Congress in 2007, then the constitutionality of the Western Territory bill would never have been questioned.

[154] Clinton, *supra* note 96, at 133.

It was not until the late nineteenth century that the federal government became impatient with treaties and began to regulate Native Americans directly. This impatience culminated with the 1871 decision to cease entering treaties with Native American tribes. The Major Crimes Act of 1885 was the first congressional attempt to regulate internal tribal affairs via statute.

The Supreme Court's subsequent review of the Major Crimes Act gave rise to the plenary power doctrine. Under the doctrine, Congress has plenary and exclusive power over all Native American affairs. Such a broad power has never been squarely reconciled with the Constitution's text, and instead has consistently been justified with the help of revisionist history and extra-constitutional principles. Even the modern Court continues to rely upon the plenary power doctrine without questioning its constitutional basis.

This evidence suggests that the Indian Commerce Clause does not grant Congress a plenary power. All holdings to the contrary are based on extra-constitutional principles that fail to adhere to the Constitution's text.

B. *Application to a Modern Context*

The foregoing evidence clearly supports those scholars who maintain that current laws regulating internal Native American affairs are suspect, and perhaps unconstitutional.[155] More intriguing, the foregoing evidence also supports the modern Court's recent Interstate Commerce Clause jurisprudence. If Congress is not justified in asserting plenary power over internal Native American affairs under the Indian Commerce Clause, then the argument can be made that Congress lacks such plenary power over internal state affairs as well.

This argument supports the modern Court's trend away from the traditional belief that "'[t]he power of Congress over interstate commerce is plenary and complete in itself.'"[156] As illustrated by *Lopez* and *Morrison*, the modern Court requires a clear relationship between the activity being regulated and interstate commerce.[157] The foregoing evidence calling for a limited interpretation of the Indian Commerce Clause further justifies the modern Court's refined inquiry into the Interstate Commerce Clause.

There are two major differences between the Indian Commerce Clause and the Interstate Commerce Clause, but neither makes the foregoing historical

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[155] *See, e.g.*, Clinton, *supra* note 96, at 259 (referring to "the illegitimacy of the federal Indian plenary power doctrine"); Prakash, *supra* note 33, at 1081 (maintaining that the Commerce Clause "does not confer upon Congress complete power over Indian tribes"); Warren Stapleton, Note, *Indian Country, Federal Justice: Is the Exercise of Federal Jurisdiction Under the Major Crimes Act Constitutional?*, 29 ARIZ. ST. L.J. 337, 343 (1997) (describing the argument that "the Indian Commerce Clause provides a legitimate source of constitutional authority for the exercise of federal jurisdiction under the Major Crimes Act" as "flawed").

[156] Wickard v. Filburn, 317 U.S. 111, 124 (1942) (quoting United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942)).

[157] *See supra* notes 7-20 and accompanying text.

evidence irrelevant. First, there is the obvious textual distinction between "the several States" and "the Indian Tribes."[158] The Court has consistently construed the Commerce Clause to consist of three distinct classes: interstate, foreign, and Indian.[159] The Supreme Court considers these distinctions critical, and has rejected attempts to apply Interstate Commerce Clause jurisprudence to Indian Commerce Clause issues.[160] Citing the "unique historical origins of tribal sovereignty,"[161] the Court refuses to apply principles developed in Interstate Commerce Clause cases to the Indian Commerce Clause.

However, while history does not suggest that the Indian Commerce Clause and Interstate Commerce Clause are equal and should be interpreted in the exact same manner, it does suggest that Congress does not have plenary power over internal tribal affairs. It follows that if Congress lacks plenary power under the Indian Commerce Clause, it also lacks plenary power under the Interstate Commerce Clause. This inference is valid not because the clauses are identical, but because they are similar.

Furthermore, the difference between states and tribes is based on the tribes' dependent status. The Court has interpreted Congress' power over Indian tribes to be *more* extensive than over states, where no such dependent relationship exists.[162] Thus, if the broader Indian Commerce Clause does not justify a plenary power over Indian tribes, the narrower Interstate Commerce Clause likewise cannot justify such authority over states.

The second difference between the Indian Commerce Clause and the Interstate Commerce Clause derives from the Commerce Clause's text, chiefly the difference between "*with* the Indian Tribes" and "*among* the several States." "[W]ith the Indian Tribes" was designed to exclude the states from any involvement in Native American affairs.[163] On the other hand, "among the

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[158] U.S. CONST. art. I, § 8, cl. 3 (granting Congress power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

[159] *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 18 (1831) ("The objects, to which the power of regulating commerce might be directed, are divided into three distinct classes – foreign nations, the several states, and Indian tribes. When forming this article, the convention considered them as entirely distinct.").

[160] *See, e.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) (holding that tribes may not be treated as states for tax apportionment purposes).

[161] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980) ("Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other.").

[162] *See* Seminole Tribe v. Florida, 517 U.S. 44, 62 (1996) ("If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause.").

[163] *See* COHEN'S HANDBOOK, *supra* note 43, § 5.02[1], at 398 (describing "the supremacy of federal over state law" with regard to Native American affairs); Robert N. Clinton, *The Dormant Indian Commerce Clause*, 27 CONN. L. REV. 1055, 1164 (1995) (suggesting that "perhaps the most important marginal contribution of the Indian Commerce Clause was to

several States" was designed to allow some state regulation of interstate commerce. The dormant Interstate Commerce Clause invalidates state regulations of interstate commerce only if the regulation is discriminatory or, while facially neutral, impermissibly burdens interstate commerce.[164] Thus, states may exercise regulatory authority in the interstate commerce context that would be impermissible in the Native American commerce context.[165]

Additionally, the use of "with" instead of "among" does not relate to the federal government's power over commerce. The use of "with" to exclude all state regulations of Native American commerce does not grant Congress plenary power over Native Americans. If "with," by itself, gave Congress plenary power over Native Americans, then it would follow that the Foreign Commerce Clause would give Congress plenary power over foreign nations. Accordingly, the difference in the use of "with" versus "among" deals entirely with federal versus state power over Native American commerce, and in no way deals with the scope of federal power over tribal affairs.

These two differences between the Indian Commerce Clause and the Interstate Commerce Clause do not negate the relevance of the historical evidence. An inference may be drawn that if Congress is unjustified in exercising plenary authority under the Indian Commerce Clause, it is also unjustified in exercising plenary authority under the Interstate Commerce Clause. Both clauses use the words "commerce" and "regulate," and traditional canons of interpretation suggest that these words should have the same meaning in each clause.[166]

limit state authority"); *see also* Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 764 (1985) ("The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes."); Washington v. Confederated Tribes, 447 U.S. 134, 154 (1980) ("[I]t must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States.").

[164] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

[165] *But see* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 191 (1989) (limiting the traditionally broad dormant Indian Commerce Clause). The Court's modern trend in limiting the broad dormant Indian Commerce Clause has come under intense criticism. *See generally* Clinton, *supra* note 163 (providing extensive historical evidence that the Indian Commerce Clause was designed to exclude *all* state regulations of Native American commerce).

[166] *See* Comm'r v. Keystone Consol. Indus., 508 U.S. 152, 159 (1993) ("It is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning . . . ." (internal quotation marks and citations omitted)); Keith Harper & Tracy A. Labin, *Brief for the Appellant*, 10 KAN. J.L. & PUB. POL'Y 419, 433 (2001) ("What the Court has never explained, and indeed cannot, is why the Framers would have so carefully chose[n] to use identical language to describe congressional authority over commerce with Indians and the states and foreign nations, while intending to

The above inference may be drawn even if one rejects the notion that Congress' power under the Indian Commerce Clause is similar to Congress' power under the Interstate Commerce Clause, as the modern Court has done. Accepting that there is a difference between the powers, the more limited power is undoubtedly the Interstate Commerce Clause power. Thus, if plenary authority cannot be justified under the broader power (the Indian Commerce Clause), it certainly cannot be justified under the narrower power (the Interstate Commerce Clause). This inference, in combination with historical evidence concerning the Interstate Commerce Clause,[167] suggests that the modern Court's Interstate Commerce Clause jurisprudence is historically accurate.

CONCLUSION

This Note argues that the Indian Commerce Clause offers independent historical support for limiting Congress' Interstate Commerce Clause power. In the past decade, the Supreme Court has shifted away from a plenary Interstate Commerce Clause power toward a more limited power, especially in the context of criminal law. This dramatic shift is supported by the Indian Commerce Clause's history.

For the nation's first century, treaties, not statutes, provided the main justification for federal governance of Native American affairs. The federal government gained control over purely internal tribal affairs through mutually agreed upon treaties. The early Congresses did not regulate Native Americans directly via legislation even once. In fact, when such an attempt was proposed in the House of Representatives, it was struck down as unconstitutional. This early history is convincing evidence that the Indian Commerce Clause does not give Congress plenary power over Native American affairs.

Beginning in the 1870s, the federal government's policy toward Native Americans changed, and attempts at direct legislation became more frequent. The first and most important attempt, the Major Crimes Act, made purely intra-tribal crimes federal offenses. The Act provided the Supreme Court with a chance to delineate the bounds of Congress' Indian Commerce Clause power. The Supreme Court expressly rejected the Indian Commerce Clause as a justification for the Major Crimes Act, and created a plenary power doctrine based on misguided and perhaps racist notions of Native Americans as

confer radically different types of powers – one virtually absolute and the other significantly limited.").

[167] *See generally* BARNETT, *supra* note 46; Barnett, *supra* note 98; Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

"wards." While the plenary power doctrine continues to surface in modern cases, its constitutional basis has rarely been questioned.[168]

This Note shows that the plenary power doctrine is not consistent with the Indian Commerce Clause's history. No Supreme Court case has directly related the plenary power doctrine to the Indian Commerce Clause without some reference to Native Americans as "wards" of the federal government. Quite simply, the Indian Commerce Clause does not support a plenary power over Native American affairs.

This Note also argues that a logical and proper inference about the Interstate Commerce Clause can be drawn from the history of the Indian Commerce Clause. If the Indian Commerce Clause does not support congressional plenary power, then the Interstate Commerce Clause cannot support such a power. The Supreme Court has consistently interpreted the Indian Commerce Clause as broader than the Interstate Commerce Clause. Thus, if plenary power is incompatible with the broader Indian Commerce Clause, it must also be incompatible with the narrower Interstate Commerce Clause.

Standing alone, this inference may be weak. Recent scholarship, however, has uncovered powerful evidence suggesting that the Supreme Court's *Lopez* and *Morrison* decisions are more faithful to the Interstate Commerce Clause's original meaning than prior Interstate Commerce Clause precedent.[169] By highlighting this inference, this Note encourages the Supreme Court to continue finding limitations on Congress' Interstate Commerce power and to be wary of ever returning to a plenary Interstate Commerce Clause.

[168] Justice Thomas, however, appears to have doubts about the doctrine's constitutional basis. *See* United States v. Lara, 541 U.S. 193, 224 (2004) (Thomas, J., concurring in judgment) ("I cannot agree that the Indian Commerce Clause provides Congress with plenary power to legislate in the field of Indian affairs . . . and I would be willing to revisit the question." (internal quotation marks and citations omitted)).

[169] *See* sources cited *supra* note 167.