Revising the Indian Plenary Power Doctrine

M. Henry Ishtani
Yale University, Yale Law School

Alexandra Fay
UCLA School of Law's Native Nations Law & Policy Center

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REVISITING THE INDIAN PLENARY POWER DOCTRINE

M. Henry Ishitani* & Alexandra Fay**

ABSTRACT

The federal Indian law doctrine of Congressional plenary power is long overdue for an overhaul. Since its troubling nineteenth-century origins in Kagama v. United States (1886), plenary power has justified invasive Congressional interventions and undermined Tribal sovereignty. The doctrine’s legal basis remains a constitutional conundrum. This Article considers the Court’s recent engagement with plenary power in Haaland v. Brackeen (2023). It argues that the Brackeen opinions may signal judicial readiness to reevaluate the doctrine. The Article takes ahold of Justice Gorsuch’s critical assessment and runs with it, ultimately proposing a method for cleaning up this destructive and constitutionally dubious line of caselaw.

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* M. Henry Ishitani is a Ph.D. Candidate in History at Yale University. He received his J.D. from Yale Law School.
** Alexandra Fay is the inaugural Richard M. Milanovich Fellow at UCLA School of Law’s Native Nations Law & Policy Center. She also received her J.D. from Yale Law School.
INTRODUCTION

*Haaland v. Brackeen* marked a turning point in federal Indian law.¹ It did not eviscerate the Indian Child Welfare Act,² nor did it threaten all of Title 25 of the United States Code as Indian law scholars feared. The Court rejected the appellants’ tenuous anticommandeering and Article I claims,³ and it neatly dodged the dreaded equal protection question.⁴ Yet in affirming Congressional power in Indian affairs, the Court made some subtle and not-so-subtle challenges to the status quo. In *Brackeen*, the Court signaled its interest in reevaluating the nineteenth-century doctrine of Congressional plenary power.

The Indian law doctrine of plenary power is a relic of a more racist, imperialist American past—the ghost of manifest destiny that will not let go. Plenary power suggests broad Congressional power over Indian affairs, with limits that are undefined.⁵ The nineteenth-century cases that first articulated this doctrine, *United States v. Kagama*⁶ and *Lone Wolf v. Hitchcock*, justified Congressional intervention in internal Tribal government⁷ and the unilateral abrogation of a federal treaty,⁸ respectively. Since then, plenary power has facilitated dispossession,⁹ the horrific Indian boarding school system,¹⁰ and Tribal termination.¹¹ None of these historic abuses resulted in

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². 25 U.S.C. § 1901 et seq.

³. *Brackeen*, 599 U.S. at 280-86.

⁴. *Id.* at 292-94.


⁶. United States v. Kagama, 118 U.S. 375, 382-85 (1886); see also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (“Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.”).

⁷. Lone Wolf v. Hitchcock, 187 U.S. 553, 566-67 (1903) (“The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so.”).


enforceable limits on Congressional power. Today, plenary power still justifies paternalist national policies that harm Indian country and impede Tribal development.12

Consequentialist critiques aside, the doctrine’s foundational caselaw is flawed. It relied on racist depictions of Native people and the false presumption that Tribes were destined to disappear in the wake of American civilization.13 It explicitly relied on the Chinese Exclusion Case, Chae Chan Ping14 as precedent,15 operated in parallel to imperialist projections of national power in the territories,16 and laid the groundwork for extraconstitutional action in foreign affairs.17 In its initial articulation, the plenary power doctrine had no connection to constitutional text.18 For all these reasons, legal scholars have long criticized plenary power in the strongest of terms.19

In Brackeen, the Court at last appears to be troubled by the colonial project it has facilitated. From questioning in oral argument20 to the careful delivery of the majority opinion21 to the impassioned concurrence22 and dissents,23 plenary power remained highly visible in the fight for the Indian Child Welfare Act. In this Article, we draw out this aspect of Haaland v. Brackeen. We recount the majority’s subtle changes to the doctrine and the dissents’ furious incredulity. Most of all, we explore Justice Neil Gorsuch’s

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11. But see United States v. Sioux Nation of Indians, 448 U.S. 371, 424 (finding that the violation of the Fort Laramie Treaty of 1868 constituted a taking, such that the United States was obligated to compensate the Sioux Nation).

12. See infra Part III.


18. See Kagama, 118 U.S. at 384-85 (“The power of the general government over [the Tribes] . . . must exist in the federal government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.”); Part I.


22. Id. at 308, 318-19, 325, 327-29 (Gorsuch, J., concurring).

23. Id. at 335 (Thomas, J., dissenting); id. at 374-75 (Alito, J., dissenting).
concurrency and his call for a new accounting of Congressional power in Indian affairs. As Justice Gorsuch recognized, nothing remotely like a “plenary federal authority over the Tribes” existed at the time of the founding. Instead, the founders chose to exclusively vest the federal government with “limited and enumerated [constitutional] powers.”

These it would use specifically for the twin purposes of “preserv[ing] th[e] equilibrium between Tribes and the States,” and “regulat[ing] the ways in which non-Indians may interact with Indians.” And in exchange for surrendering control over their external relations, the Tribes would be guaranteed in their “exclusive” sovereign authority over all aspects of internal self-government, in a fundamental “Indian-law bargain written into the Constitution’s text.”

We ask, what if Justice Gorsuch is right? What if Kagama v. United States, the first case in plenary power’s genealogy, was the fatal misstep that sent federal Indian law spiraling off course from “the Constitution’s original design” for more than a century? If plenary power is fundamentally, irredeemably flawed, what then?

In this Article, we suggest an approach for identifying legislative overreach and excising the Court’s irredeemable precedents. It identifies a broad class of suspect cases—namely every major decision drawing authority from Kagama, its immediate successor Lone Wolf, and their direct progeny, or otherwise citing to the notion of federal Indian law plenary power. It then applies two criteria to screen these cases, distilled from Justice Gorsuch’s originalist conception of Congressional power.

In addition to this sorting process, we suggest an additional heuristic for flawed constitutional decisions: reliance on racist reasoning. Taken altogether, this approach flags abuses of Congressional power to invade matters of internal Tribal government or diminish Tribal sovereignty, especially when those incursions are premised on offensive racist logics.

In this way we outline a much larger, future project to carry out Justice Gorsuch’s logic to its natural end. The immediate goal is academic: we set out the conceptual groundwork for a scholarly inquiry we hope to pursue in the near future. The secondary goal is broader: by taking up the perennial critique of plenary power informed by recent developments, we hope to arm practitioners and judges with timely arguments. Finally, implicit to this entire project is the assurance that should the Supreme

24. Id. at 318 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)).
25. Id. at 308.
26. Id. at 316-19.
27. Id. at 333-35.
28. Id. at 326 (“In the late 19th century, this Court misplaced the original meaning of the Indian Commerce Clause. That error sent this Court’s Indian-law jurisprudence into a tailspin from which it has only recently begun to recover.”).
Court find the courage to admit it was wrong and repudiate the constitutionality of the doctrine, such a decision would not mean utter destruction for federal Indian policy. Rather, we tentatively suggest that a reformed, workable, constitutional account of federal power over Tribal nations can be rescued from the troubled history of federal Indian law.

The Article proceeds in the following manner. First, we review the role of unchecked federal power in the history of the Indian Child Welfare Act. Second, we recount the various *Brackeen* opinions’ engagement with plenary power doctrine. We walk through Justice Gorsuch’s assessment in fine detail. Third, we imagine what Justice Gorsuch’s vision would entail, should his view ever gain majority support. We present a process for generating a revised body of federal Indian law, one in which Congressional power is still robust, but crucially limited in line with our constitutional commitments.

I. PLENARY POWER AND THE INDIAN CHILD WELFARE ACT

*Brackeen* offers an illuminating study of Congressional power. The Brackeens and their fellow petitioners argued that the Indian Child Welfare Act (ICWA) was unconstitutional because it surpassed the limits of Congressional power set out in Article I. In Article I, Congress is given the power to regulate commerce with Indian Tribes. Yet as the petitioners repeatedly intoned, “children are not commodities that can be traded.” To protect ICWA, the Court had to endorse a broader account of Congressional power.

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30. U.S. CONST. art. I, § 8, cl. 3.

31. Brief for Individual Petitioners at 16, *Brackeen*, 599 U.S. 255 (No. 21-376); Brief for Petitioner the State of Texas at 18-23, *Brackeen*, 599 U.S. 255 (No. 21-376). *But see Brackeen*, 599 U.S. at 278 (Gorsuch, J., concurring) (“Rhetorically, it is a powerful point—of course children are not commercial products. Legally, though, it is beside the point.”); see also id. at 332 (noting early American practices of using enslaved Indian children as “units of commerce.”); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1031 (2015) (historically speaking, “trade with the Indians encompassed ‘noneconomic activity such as adoption of children,’ as Natives and Anglo-Americans adopted children they had captured or purchased.”) (citing Adoptive Couple v. Baby Girl, 570 U.S. 637,
One traditional approach has been to argue that the Indian Commerce Clause, like the Interstate Commerce Clause,\textsuperscript{32} encompasses much more than material goods being bought and sold across political boundaries—\textsuperscript{33}that in fact, it authorizes federal intervention into state court child custody proceedings. But given the Court’s efforts to rein in the Interstate Commerce Clause, such an expansive reading of this provision was unlikely.\textsuperscript{34} Such an Indian Commerce Clause-reliant understanding would face attacks analogous to those that have corralled the expansive New Deal conception of Congress’ Interstate Commerce powers in recent years.\textsuperscript{35} Moreover, this approach is vulnerable to originalist criticism. Recent legal history scholarship describes it as “historically untenable,” given how it centers federal Indian-law power around an “open-ended . . . afterthought” of a clause,\textsuperscript{36} at the expense of the “bundle of [other] powers” that the founders and the Washington Administration knew to be the heart of their authority to manage Indian affairs.\textsuperscript{37} In its place, a second approach finds a broad federal power articulated in a constellation of constitutional provisions.\textsuperscript{38} This argument implicates not only the Indian
Commerce Clause, but also the Treaty Clause,\textsuperscript{39} the Territories Clause,\textsuperscript{40} the War Powers Clause,\textsuperscript{41} the Supremacy Clause,\textsuperscript{42} and the Powers Denied States Clauses.\textsuperscript{43} Taken altogether, these powers elicit a constitutional structure in which the federal government enjoys an exclusive, if not always plenary power to deal with Native Nations. This reading is backed up by federal action in Indian affairs in the Early Republic, as legal historian and Indian-law scholar Gregory Ablavsky has described.\textsuperscript{44}

Historically, the Court has also considered a third approach, one that invokes tremendous national power without reference at all to the constitutional text. In the 1886 decision of \textit{Kagama v. United States}, the Supreme Court reviewed the Major Crimes Act,\textsuperscript{45} which asserted federal criminal jurisdiction over crimes committed by Indians, against Indians, on Tribal land.\textsuperscript{46} In the Major Crimes Act, Congress sought to intervene in matters of internal Tribal governance, based on a racist perception of Tribal justice as weak and uncivilized.\textsuperscript{47} When Kagama challenged the Act’s constitutionality, the Supreme Court sided with Congress.\textsuperscript{48}

To justify its decision, the Court did not cite the Constitution. In fact, the Court explicitly rejected the suggestion that the Indian Commerce Clause could authorize the invasive criminal statute.\textsuperscript{49} Instead, the Court emphasized Tribes’ dependence on the federal government: “From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them . . . there arises a duty of protection,

\begin{itemize}
\item \textsuperscript{39} U.S. CONST. art. II, § 2, cl. 2.
\item \textsuperscript{40} Id. at art. IV, § 3, cl. 2.
\item \textsuperscript{41} Id. at art. I, § 8, cl. 11.
\item \textsuperscript{42} Id. at art. VI, cl. 2.
\item \textsuperscript{43} Id. at art. I, § 10.
\item \textsuperscript{44} Ablavsky himself denies that the “interrelated, coherent bundle of powers” that originally supported the Washington Administration’s exercise of federal power over Indian affairs included any notion that this power was “plenary” under the Constitution. Instead, that conception only developed much later, as “the United States’ military and diplomatic conquest of the continent” reached full flow in the later-nineteenth century and as political and judicial leaders sought to justify that conquest with a “racialist paradigm that denigrated Native peoples and their claims to nationhood.” Ablavsky, supra note 31, at 1040-41, 1081, 1084.
\item \textsuperscript{45} 18 U.S.C. § 1153.
\item \textsuperscript{46} Kagama, 118 U.S. at 375-77.
\item \textsuperscript{47} The Major Crimes Act was the immediate response to Crow Dog, a response spurred by American disgust for a Lakota model of restorative justice. The Americans wanted the death penalty for the murderer, whereas the tribe chose to resolve the issue and prevent future bloodshed by having one family apologize and repay the other. 18 U.S.C. § 1153. See generally Sidney L. Harring, \textit{Crow Dog’s Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century} (1994).
\item \textsuperscript{48} Kagama, 118 U.S. at 385.
\item \textsuperscript{49} Id. at 378.
\end{itemize}
and with it the power."50 The Court found that this paternalist power simply "must exist in [the federal] Government."51 Philip Frickey called this reasoning "an embarrassment of constitutional theory."52 And yet Kagama has long been cited as the precedential origin point of the Indian plenary power doctrine.53

The Court affirmed Kagama in its 1903 decision in Lone Wolf v. Hitchcock. In Lone Wolf, the United States unilaterally abridged its treaty54 with the Kiowa, Apache, and Comanche Nations in order to open reservation lands to white settlers.55 Kiowa leader Lone Wolf brought the case to federal court to enforce the treaty, to hold the federal government to its word. But the Court offered no relief. Extending the dependency reasoning of Kagama, the Lone Wolf decision held that Congress had the power to abrogate its treaties with Indian Tribes.56 In doing so, the Court announced Congressional "[p]lenary authority over the Tribal relations of the Indians."57

In the years since, the Court has shifted in its description of the plenary power. Having started with the bold Constitution-less proclamation of Kagama, it has at times reworked its reasoning to include constitutional hooks that align with the first two described accounts of Congressional power.58 Yet even as it has pointed to differing sources for its authority at different times, the Court has nevertheless repeatedly endorsed a plenary Congressional power over Tribes and their citizens.

The question of plenary power is particularly poignant in Brackeen, because the Indian Child Welfare Act carries a troubling history of federal

50. Id. at 384.
51. Id.
52. Frickey, supra note 19, at 35 ("Its apparent inconsistency with the most fundamental of constitutional principles ... is an embarrassment of constitutional theory. Its slipshod method of bootstrapping a congressional plenary power over Indian affairs is an embarrassment of logic. Its holding, which intimates that congressional power over Indian affairs is limitless, is an embarrassment of humanity.").
55. Lone Wolf, 187 U.S. at 561. This case should be understood as part of the Allotment Era of federal Indian policy, by which Congress robbed Native Nations of 90 million acres of tribal land. See FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 1.01 (2005); Indian General Allotment Act, ch. 119, 24 Stat. 388, 25 U.S.C. 334 (1887) (repealed 2000).
57. Id.
overreach. Congress passed ICWA in 1978 to address the alarming rates of child removal from Native families.\footnote{59} In the 1970s, 25\% to 35\% of all Native children were taken from their homes and placed in adoptive homes, foster homes, or institutions.\footnote{60} 90\% of those kids were placed with non-Natives.\footnote{61} This large-scale removal of children was the product of the Bureau of Indian Affairs’ Indian Adoption Project of the 1960s,\footnote{62} as well as the legacy of the Indian boarding schools program, the devastating assimilationist policy initiated by the Bureau of Indian Affairs in 1860.\footnote{63} ICWA sought to halt the terrible rate of Indian family separation and to reject destructive federal policies of the past.\footnote{64} If the Indian boarding school and adoption programs were ever constitutional, they were justified by a theory of plenary power. The notion of remediying abuses of federal power with an assertion of more federal power is unsettling, to say the least. Behind such a resolution lurks an ongoing threat of future government abuse.\footnote{65}

Plenary power is not unlimited nor absolute, regardless of what Justice Samuel Alito’s dictionaries say.\footnote{66} However, those limitations are

\footnotesize
\begin{enumerate}
\item[61.] Id.
\item[62.] See Nowell, supra, note 59.
\item[63.] See id.; Federal Indian Boarding School Initiative Investigative Report, BIA (May 2022) at 51-56, https://www.bia.gov/sites/default/files/dup/inline-files/bsi_investigative_report_may_2022_508.pdf (reporting militarized, identity-altering methodologies of assimilation featuring corporal punishment, withholding of food, and solitary confinement as punishment for failures to assimilate and follow school rules, as well as rampant disease, malnourishment, and physical and sexual abuse). Children were put to work in lumbering, railroad work, carpentry, blacksmithing, irrigation development, well-digging, and garment-making among other forms of labor. Id. at 60-61. The official curriculum required four hours of industrial work every day, starting in grade 1. Id. at 62. Over 500 student deaths have been documented and far more likely occurred. Id. at 9.
\item[64.] In its section on Congressional findings, ICWA asserts that “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children.” 25 U.S.C. § 1901.
\item[65.] Moreover, for the present Court to affirm the plenary power doctrine without criticism or qualification would mean to recognize the constitutionality of the darkest chapters of the American colonial project. The Court has an opportunity to redeem its record in Indian law, to reject the doctrine and the harmful policies it enabled, and declare that Kagama “was gravely wrong the day it was decided . . . [and] has no place in law under the Constitution.” Trump v. Hawaii, 585 U.S. 667, 710 (2018) (renouncing Korematsu v. United States, 323 U.S. 214 (1944)).
\end{enumerate}
hardly defined. Scholars have suggested limiting plenary power by the trust relationship: Congress can only exercise its power in Indian affairs in efforts to preserve or enhance Tribal interests. But this suggestion raises a crucial follow-up question: who defines Tribal interests? If Congress believed in the late nineteenth century that integration and assimilation into white American society was the best future for Native people, was it authorized to force Native children into boarding schools? To pass the General Allotment Act and strip Tribes of 90 million acres of land so that individual Indians might become more American? Can the federal government, in good faith, place Native children with white families based on white American ideas of good parenting? An Indian law doctrine that can authorize such destructive, misguided policies is unquestionably dangerous, as it extends the pattern of non-Native elites making the essential choices of Tribal governance.

In the Brackeen oral argument, Justice Alito raised this line of questioning. Did Congress have the power to force Indian children into boarding schools? Deputy Solicitor General Edwin Kneedler struggled, understandably. Despite his prior statement that Congress’ actions must be “in service of its obligations to the Indians,” Kneedler admitted that yes, “Congress had the power at the time.” Both Edwin Kneedler and Ian Gersherhorn, the advocate for the Tribal parties, remarked that the Supreme Court had never struck down a statute for exceeding the bounds of Congress’ plenary power.

II. THE BRACKEEN OPINIONS

We begin with the majority, written by Justice Amy Coney Barrett. In the majority opinion, we observe a subtle but significant shift in the Court’s approach to plenary power. Next, we briefly recount the dissenting opinions by Justice Clarence Thomas and Justice Samuel Alito, both of whom challenge the plenary power doctrine and the constitutionality of ICWA. Finally, we get to Justice Gorsuch’s concurrence. We give the concurrence careful review because it serves as the basis for the revisionary

67. See Alex Tallchief Skibine, The Dialogic of Federalism, 8 TEX. FOR CRV. LIBERTIES & CRV. RIGHTS 1, 42 (2003). Phillip Frickey has suggested importing international law concepts, especially the internationally recognized rights of Indigenous people, into American law to limit plenary power. Frickey, supra note 19, at 37.
70. Id. at 106.
71. Id. at 108.
72. Id. at 157-58, 191.
proposal sketched out in Part III. We do not review Justice Kavanaugh’s short concurrence, because it does not engage with the issue of Congressional power.

A. The Majority

In *Haaland v. Brackeen*, the Court once again affirmed Congress’s broad power over Indian affairs to uphold the Indian Child Welfare Act. Writing for the majority, Justice Amy Coney Barrett invoked the plenary power doctrine. Echoing the second approach laid out above, she rooted the power in a collection of constitutional sources, citing the Commerce Clause and the Treaty Clause, as well as the general structure of the Constitution. She observed that “[a] power unmoored from the Constitution would lack both justification and limits.” Justice Barrett also pointed to the trust relationship as a basis and limitation of plenary power. But she did not go so far as to define that relationship or its restrictions on Congressional action.

Nevertheless, Justice Barrett adamantly insisted that Congress’s power “is not absolute.” Our constitutional structure will not stomach unchecked federal power; our national government is one of enumerated powers. Congressional power in Indian affairs is no exception. In Justice Barrett’s words: “we reiterate that Congress’s authority to legislate with respect to Indians is not unbounded. It is plenary within its sphere, but even a sizeable sphere has borders.” This description gets at the heart of a linguistic ambiguity that troubles the doctrine of plenary power: whether “plenary” means exclusive (at the expense of the states) or absolute (unrestricted in terms of substance). The sphere has borders, even if the Court will not tell us where they lie.

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74. Id. at 274.
75. Id. at 273.
76. Id. at 274-75.
77. Id. at 275 (“The contours of this ‘special relationship’ are undefined.”).
78. Id. at 276.
79. Id.
80. Id.
81. Id.
82. See, e.g., David E. Wilkins, *The U.S. Supreme Court’s Explication of “Federal Plenary Power”*, 18 Am. Indian Q. 349, 354-55 (“[T]he concept of plenary merges several analytically distinct questions . . . First . . . there is plenary meaning exclusive . . . Plenary also is an exercise of federal power which may preempt state law. Finally, there is plenary meaning *unlimited* or *absolute*. When Congress is exercising plenary power as the voice of the federal government in its relations with tribes, and is acting with the consent of the tribal people involved, it is exercising legitimate authority. When Congress is acting in a
The Brackeen majority opinion marked an important albeit subtle change in the Court’s approach to plenary power. The emphasis on a limited but exclusive power, based in and bounded by the Constitution, was backed up by a curated account of precedent. Most notably, Kagama v. United States was nowhere to be found. In her two major string cites illustrating the doctrine’s history, Justice Barrett wholly excluded Kagama.83 By excising the most dubious and offensive case from the canon, the majority appears to have shut the door on any version of plenary power not accountable to the Constitution.84

We can only speculate as to the actual intentions of Justice Barrett and the discussions that led to her choice of authorities. However, considering Justice Gorsuch’s extensive engagement with the doctrine’s genealogy and his singling out of Kagama, it seems likely that the elision was no mere accident. Optimistically, we suggest that this subtle change and the majority’s emphasis on constitutional limits denote an opportunity to reevaluate the plenary power doctrine and bring greater coherence to federal Indian law.

B. The Dissenters

Justice Clarence Thomas dissented. He found no constitutional basis for the Indian Child Welfare Act.85 In broad terms, he rejected the entire doctrine of plenary power: “I have searched in vain for any constitutional basis for such a plenary power, which appears to have been born of loose

plenary way to preempt state intrusion into Indian Country, absent tribal consent, it is properly exercising an enumerated constitutional power. However, when Congress is informed by the federal courts that it has ‘full, entire, complete, absolute, perfect, and unqualified’ (Mashunkashey v. Mashunkashey, 134 P.2d 976 (1943) authority over tribes and individual Indians, something is fundamentally wrong.”). The Court’s usage of the term is similarly ambiguous in its Commerce Clause doctrine. Compare with Chief Justice John Marshall’s original explication of Congress’ plenary power over interstate commerce in Gibbons v. Ogden, 22 U.S. 1, 75 (1824) (“If ... the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several States is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.”).

84. Was this exclusion intentional? To students of federal Indian law, the omission of the originating case in the long string of citations has obvious significance. To those less familiar with Indian law, Kagama may be totally off the radar, and Lone Wolf appears to be an obvious starting place. After all, Lone Wolf is the first decision using the term “plenary.” However, given Justice Gorsuch’s direct excoriation of Kagama, it is hard to believe that Justice Barrett and the majority could have been unaware of its place in the canon. See Part II.c. The majority and the concurrence opinions give two very different stories of Congressional plenary power, and the role of Kagama is central to that distinction.

85. Brackeen, 599 U.S. at 335 (Thomas, J., dissenting).
language and judicial *ipse dixit.*

He reviewed each constitutional source referenced by the majority and found that each individually failed to justify ICWA. In this reasoning, he declined to read a general power out of a collection of discrete, enumerated powers. He took issue with *Kagama* as “lack[ing] any constitutional basis.” Unlike the majority, he highlighted this mistake as evidence that the entire doctrine was constitutionally compromised. Justice Thomas’s hostility toward plenary power is informed by his general skepticism of Tribal sovereignty.

Justice Samuel Alito also dissented. He asserted that ICWA violated “the fundamental structure of our constitutional order” by interfering in the domain of states. He also took issue with the majority’s treatment of plenary power, namely its formulation that “Congress’s power over Indian affairs is 'plenary' but not ‘absolute.’” Relying on various dictionaries defining “plenary” as “absolute,” Justice Alito disparaged the majority’s formulation as asserting “that absolute ≠ absolute and plenary ≠ plenary, violating one of the most basic laws of logic.”

C. The Concurrence

Justice Neil Gorsuch took another route in his concurrence: he voted to uphold ICWA, but not on the basis of the plenary power. Indeed, as an originalist, Justice Gorsuch found that “our founding document does not include a plenary federal authority over Tribes” at all. Instead, he justified

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86. Id.
87. Id. at 339-45.
88. Id. at 361-62 (“Like so many cases before it, the majority’s opinion lurches from one constitutional hook to another, not quite hanging the idea of plenary power on any of them.”).
89. Id.
90. Id. (“While I empathize with the majority regarding the confusion that *Kagama* and its progeny have engendered, I cannot reflexively reaffirm a power that remains in search of a constitutional basis. At bottom, *Kagama* simply departed from the text and original meaning of the Constitution”).
91. See id. at 1679 (Justice Thomas conceded that for the purposes of this case, he would “assume that some tribes still enjoy the same sort of pre-existing sovereignty and autonomy as tribes at the Founding.”); United States v. Lara, 541 U.S. 193, 219-20 (Thomas, J., concurring) (asserting that the “1871 Act” ending formal Indian treaty-making “tends to show that . . . the United States no longer considered the tribes to be sovereigns” while offering further skepticism as to the Tribes’ separate status as a different prosecuting sovereign for purposes of the Fifth Amendment’s Double Jeopardy Clause).
93. Id.
94. Id.
95. Id. at 318. Justice Gorsuch’s vocal repudiation of the plenary power doctrine is a new development. Just four years ago in his famous majority opinion for *McGirt v.*
ICWA with an original constitutional arrangement that he labeled “the Constitution’s Indian-law bargain,” by which the federal government exercises a broad and exclusive power to manage the relations between Indians and non-Indians.  

Under that original Indian-law bargain, the Tribes are guaranteed in their “exclusive” sovereign authority in all aspects of internal self-government, while the federal government regulates all external relations for the Tribes. As a “corollary” to that fundamental commitment to Tribal self-government, Justice Gorsuch contended that the states have “virtually no role” in governing Indian affairs. Instead, the federal government exclusively holds “limited and enumerated” constitutional powers specifically for the twin purposes of “preserv[ing] th[e] equilibrium between Tribes and the States” and “regulat[ing] the ways in which non-Indians may interact with Indians.”

This bargain “predated the founding”; it developed in prior diplomacy between the Tribes and the British Empire, the colonies, and pre-Constitution Congresses. It then passed into the “Constitution’s text” at the founding, with the document affirming the specific powers of the federal government needed to fulfill its part in the bargain. But the “bundle of federal authorities” thus conveyed were emphatically not the plenary power described by the Court in *Kagama* and its progeny.

Instead, this “bundle of federal authorities” coheres out of a structural reading of the Constitution. Justice Gorsuch followed Ablavsky in looking to Constitutional Convention records and the practices of the Washington Administration in particular. There he found that Congressional power to manage the bargain functioned most prominently during the founding period through the “authority to ‘make Treaties’ with the Tribes,” with further “facilitat[ion]” by the War, Territories, and

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96. *Brackeen*, 599 U.S. at 307-08, 318 (Gorsuch, J., concurring).
97. *Id.* at 307-08.
98. *Id.* at 326; see, 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW §1.02 (discussing 17th century treaties such as the 1608 diplomatic exchange between Virginia and Powhatan of the Virginia Tidewater Confederacy, the 1621 Treaty between King James and Massasoit, and the 1679 Treaty between New York and the Mohawk Nation); Treaty with the Delawares, Art. IV, 7 Stat. 13 (1778); Treaty with Wyandot, Delaware, Chippewa, and Ottawa Nations, 7 Stat. 16 (1785); Treaty with the Shawnees, 7 Stat. 26 (1786); Treaty with the Chickasaw, 7 Stat. 24 (1786); Treaty with the Choctaw, 7 Stat. 21 (1786); Treaty with the Cherokee (1786).
100. *Id.*
Under this reading, the Commerce Power was originally intended as a backstop when “all those powers came up short.” However, given how the relationship of the Tribes to the United States developed away from frontier diplomacy to internal administration of reservations, “[m]uch of modern federal Indian law” since the mid-nineteenth century has found its basis in the Indian Commerce Clause.

The Indian Commerce Clause in turn provides “powers” that are “broader than those it enjoys under the Interstate Commerce Clause.” Yet these powers are in no way plenary. While Congressional authority is “robust” where it “regulates the ways in which non-Indians may interact with Indians,” “[n]othing in the Clause grants Congress the affirmative power to reassign to the federal government inherent sovereign authorities that belong to the Tribes.” Not only would this run afoul of the original Indian-law bargain’s overriding commitment to protecting Tribal sovereignty in internal self-government, something that the Constitution “promises [the Tribes] for as long as they wish to keep it.” More specifically, it is “inconceivable” to Justice Gorsuch “that a power to regulate non-Indians’ dealings with Indians could be used to divest Tribes of the right of self-government.”

Thus, for Justice Gorsuch, the Court of the “late 19th century” made a fundamental “doctrinal misstep”—one comparable to Plessy v. Ferguson—in departing from the original bargain’s limited conception of federal power in Indian affairs. In its place, the Kagama Court and its successors constructed the plenary power as a free-standing, “supposedly inherent right” of the federal government to unilaterally “enforce its laws over the remnants of a race once powerful, now weak.”

The majority’s approach of endorsing a more modest version of plenary authority therefore does not go far enough. Plenary power must be rooted out in favor of the original structure of the Indian-law bargain. This would bring “the scope of congressional authority over the Tribes

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101. Id. at 307-19 (citing Gregory Ablavsky, Beyond the Indian Commerce Clause, 124 YALE L.J. 1012, 1067 (2015); Gregory Ablavsky, The Savage Constitution, 63 DUKE L.J. 999, 1035-36 (2014)).
102. Id. at 319.
103. Id.
104. See id. at 320-25 (discussing distinctions among “three distinct [Commerce] Clauses rolled into one: a Foreign Commerce Clause, an Interstate Commerce Clause, and an Indian Commerce Clause.”).
105. Id. at 325.
106. Id. at 333.
107. Id. at 325 (citing Worcester v. Georgia, 31 U.S. 515, 554 (1832)).
108. 163 U.S. 537 (1896).
109. Brackeen, 599 U.S. at 327 (Gorsuch, J., concurring) (citing United States v. Kagama, 118 U.S. 375, 384-85 (1886)).
under the Indian Commerce Clause” back to its more modest original bounds. That scope is “best construed as a negative one,” limited only to “creating federal restrictions concerning what United States citizens and States may do in the context of Indian [T]ribes.”

Yet this more modest scope still provides more-than sufficient authority for ICWA. For while “Indian children are not (these days) units of commerce,” the Indian Commerce Clause does afford the federal government power to restrict “how non-Indians” like Texas and the Brackeens “may engage with Indians.” The “removal of Indian children by States and private parties . . . directly interferes with tribal intercourse” and “threatens the Tribes’ ‘political existence.’” Congress is thus fully empowered—if not downright obligated—to fulfill its role in the original Indian-law bargain by using its Indian Commerce Clause powers to override state family law and protect the integrity of Tribal families.

III. REFASHIONING CONGRESSIONAL POWER IN INDIAN AFFAIRS

Justice Gorsuch’s critique of plenary power suggests over a century of suspect caselaw. In this last Part, we consider the kind of precedential reckoning necessary to excise the plenary power doctrine from federal Indian law. A total doctrinal overhaul would be a large and detailed project. The language of plenary power suffuses much twentieth-century caselaw, yet not every case that invokes plenary power marks an unconstitutional overreach of federal power. The work of cataloging and evaluating every suspect case is beyond the scope of this Article. For now, we outline a potential approach, guided by criteria distilled from the Brackeen concurrence.

First, we suggest that every decision drawing authority from Kagama, Lone Wolf, or plenary power by name is suspect. This initial class of cases is overly broad and must be examined in more detail to determine which precedents would still pass constitutional muster in the absence of the plenary doctrine and which would fail.

Second, we draw two criteria from Justice Gorsuch’s reasoning to begin to make these further evaluations. We ask whether the Congressional action under review (a) infringes on Tribal self-government directly, or (b) facilitates the state encroachment into Tribal governance. These criteria present two useful and historically founded modes for approaching the core shared principle of Tribal sovereignty.

110. Id. at 325 (internal citations omitted).
112. Brackeen, 599 U.S. at 332 (Gorsuch, J., concurring).
113. Id.
Third, we suggest another heuristic for identifying faulty precedent. A troubling pattern in federal Indian law decisions is the recurring invocation of the trope of the “vanishing Indian.” Kagama itself relies on an image of a diminished people, increasingly dependent on the national government in the wake of America’s manifest destiny. When judicial reasoning rests more on racist tropes than constitutional interpretation, the decision is likely fundamentally flawed. Moreover, the narrative of the vanishing Indian is inherently hostile to Tribal survival. For these reasons, we suggest that references to vanishing Indians and vanishing Tribes can serve as additional red flags in our review of suspect caselaw.

A. Identifying Suspect Cases

According to Justice Gorsuch, the Constitution provides zero basis for a federal plenary power in Indian law. If embraced by the rest of the Court, this conclusion would render much of federal Indian law post-Kagama—and especially that implemented in the “high plenary power era of U.S. Indian law” at least preliminarily suspect. To put things in terms of analytical process, this first conclusion provides us with an initial tranche of suspect caselaw. Those being every federal Indian law case that relies upon Kagama, Lone Wolf, or the plenary power doctrine as a core part of its analysis, as well as every federal Indian law policy that the Court has defended on these same principal grounds. For instance, initial searches in Westlaw reveal that 82 Supreme Court cases cite Kagama and 45 cite Lone Wolf. Given that 16 cases cite both precedents, this leaves a first flyover population of some 111 potentially suspect Supreme Court cases. That population will fluctuate as further searches for the plenary power doctrine are added and cases are also subtracted for not relying sufficiently upon these doctrines.

To be sure, there are many policies and precedents that will not be captured by this initial study. It will not include statutes that have never

116. See generally Lauren van Schilfgaarde, (Un)Vanishing the Tribe, 66 ARIZ. L. REV. (forthcoming 2024) (manuscript at 2-4) (describing the “vanishing Tribe” trope as a closely related but distinct concept from the well-established trope of the “vanishing Indian,” with both used by courts and other actors to justify the exploitation of Native peoples based on the presumption of their “inevitable” extinction and absorption into the American polity); Fort, supra note 114 (describing the Supreme Court’s embrace of the vanishing Indian framework).
been directly challenged in the Supreme Court yet are likely unconstitutional, such as termination acts, 118 the General Allotment Act, 119 and Public Law 280. 120 It will not include judge-made law unconnected to any Congressional action, such as Oliphant v. Suquamish Indian Tribe, 121 Montana v. United States, 122 and Oklahoma v. Castro-Huerta. 123 This project of weeding out the most constitutionally offensive plenary power precedents has no pretension of fixing all of federal Indian law. But we do see this effort as a step toward reasserting a better conception of federal power in Indian affairs. We can hope that increased scrutiny from the academy and the profession can lead to a much more ambitious attack on the Indian law doctrine of plenary power in all its destructive manifestations. As we sift through Supreme Court precedent to illustrate a reformed vision of Congressional power, we can dream of a larger movement involving strategic litigators and federal judges.

B. The Gorsuch Criteria

Having sketched out at least an initial population of suspect caselaw, we next need criteria for beginning to sift through the plenary doctrine caselaw to establish which precedents are and are not presumptively constitutional. We draw the two criteria from Justice Gorsuch’s reasoning in Haaland v. Brackeen: (1) Does the act in question interfere in Tribal self-government? (2) Does the act in question project state authority into Tribal affairs? If either of these questions are answered in the affirmative, the decision is likely unconstitutional.

1. Unilateral Federal Derogations of Tribal Self-Governance are Presumptively Unconstitutional

In rejecting the plenary doctrine, Justice Gorsuch commits wholeheartedly to the inviolability of the Tribes’ position of limited sovereignty within our constitutional order. The Tribes’ exclusive

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123. 597 U.S. 629 (2022) (expanding state criminal jurisdiction in Indian country in Oklahoma).
sovereign authority in all aspects of internal self-government cannot be abridged, except with their explicit consent to a federal offer that non-Indian institutions assume internal governance responsibilities. In Gorsuch’s words, the Constitution “promises” the Tribes this exclusive right to internal self-governance “for as long as they wish to keep it.”

In coming to this conclusion, Justice Gorsuch clearly sees that the Commerce Clause does not convey authority to the United States to unilaterally encroach on Tribal internal self-government. Such encroachment can only occur through one of the other powers in the “bundle of federal [Indian-law] authorities,” and then only with the bilateral consent of both the Tribe and the federal government—thus implicitly returning us to the Treaty Power as the original primary foundation of federal Indian-law authority. The Commerce Clause gives no “plenary power.” What it does convey is federal power to fulfill the “promise” of sovereign inviolability to the Tribes and to otherwise “regulate non-Indians’ dealings with Indians.”

To our initial class of suspect cases, we can apply the following rule: to the extent that these cases feature unilateral federal derogations of Tribal self-governance, they are presumptively unconstitutional. By contrast, where they feature federal attempts to foster and protect Tribal self-governance—often in seeking to repair what the states or the federal government has previously damaged—they are presumptively constitutional. This latter circumstance is exactly the situation with ICWA, making the Brackeen Court’s decision presumptively constitutional under this test.

Yet this rule also includes a caveat drawn from the treaty-making past. That is, where the federal government has secured the explicit consent of a Tribe to the transmission of specific internal governance responsibilities, then that transmission may still be deemed constitutional under this test. However, it is also properly subject to further judicial scrutiny as to the ability of the Tribe to make its decision free of duress.

124. Brackeen, 599 U.S. at 333 (Gorsuch, J., concurring); see also id. at 311 (describing the original constitutional understanding of the Washington Administration and Congress to be that “[s]o long as a [T]ribe exists... its title and possession are sovereign and exclusive; and there exists no authority to enter upon their lands, for any purpose whatever, without their consent.” (citing The Seneca Islands, 1 Op. Att’y. Gen. 465, 466 (1821))); id. at 315 (describing the authority of the Tribal “independent sovereigns” under the Constitution as “exclusive” in “manag[ing] their internal affairs”).


126. Id. at 332-33.

127. Id. at 325.

The foundational plenary power decisions, United States v. Kagama and Lone Wolf v. Hitchcock both fail this test. In Kagama, the Court reviewed the constitutionality of the Major Crimes Act, a statute that imposed federal criminal law jurisdiction over “major crimes” committed between Tribal members, thereby inserting federal criminal law directly into internal Tribal affairs. This legislation—which still governs Indian country today—violated the exclusive sphere of Tribal sovereignty, without Tribal consent. Under the Gorsuch account, the Major Crimes Act is beyond the limits of Congressional power and Kagama was wrongly decided.

Lone Wolf is similarly flawed. In 1900, Congress materially altered the terms of a treaty with the Kiowa, Comanche, and Apache Tribes in violation of the treaty’s explicit amendment provisions. Congress did so to enact a policy of allotment and open up the reservation to white settlement. The Court upheld the new treaty and the subsequent allotment legislation in the name of plenary power. Under our proposed test, this decision was plainly mistaken. Congress’s actions were a direct affront to Tribal sovereignty, taking away Tribal lands without proper consent. We believe that the other allotment acts of the Assimilation Era are likely unconstitutional on comparable grounds.

Other cases will pass constitutional muster under our proposed test. Consider the Court’s decision in United States v. Mazurie. In this 1975 decision, the Court cited to both Kagama and Lone Wolf to uphold Congressional action regulating the introduction of liquor into Indian trespassers out of the Black Hills, and the pattern of duress practiced by the Government on the starving Sioux to get them to agree to the sale of the Black Hills).

129. 118 U.S. 375 (1886).
130. 187 U.S. 553 (1903).
132. Kagama, 118 U.S. at 375.
133. Brackeen, 599 U.S. 326-31 (Gorsuch, J., concurring) (describing Kagama as the “error that sent this Court’s Indian-law jurisprudence into a tailspin from which it has only recently begun to recover”).
134. Lone Wolf, 187 U.S. at 561.
135. Id.
136. Id. at 565-66.
137. Federal Indian law scholars and practitioners often break up the long history of U.S.-Tribal relations into federal policy eras. The Assimilation Era is roughly 1871 to 1928, marked by the end of treaty-making, and characterized by deeply destructive federal policies to “civilize” Native people. Allotment acts were especially significant in that they broke up tribal lands in the name of industry and the civilizing effects of private property. In reality, allotment meant the devastating and largely irreversible transfer of millions of acres of tribal land into the hands of white settlers. See 1 Cohen’s Handbook of Federal Indian Law § 1.04.
country. 139 First, the Court affirmed Congress’s power to regulate the sale of alcohol by non-Indians on Tribal land. 140 This first claim of authority falls squarely in Gorsuch’s reading of the Indian Commerce Clause. Second, the Court affirmed Congress’s power to delegate that regulatory authority to the Tribe. 141 This second conclusion also succeeds under the proposed test, because it does not diminish Tribal self-government, but rather, enhances it. Thus, we find Mazurie to be presumptively constitutional.

The Court’s decision in United States v. Lara also withstands scrutiny. 142 Lara reviewed the constitutionality of the “Duro Fix,” a statutory rebuke of a former Supreme Court decision, Duro v. Reina. 143 Duro v. Reina held that Tribes had been implicitly divested of the power to prosecute non-member Indians. 144 Congress disagreed and passed the Duro Fix to restore Tribal jurisdiction over all Indians. 145 Thus, the Lara Court had to consider whether Congress had the power to reinstate an attribute of inherent Tribal sovereignty that the Court had previously restricted. 146 Finding that Congress did possess the requisite power, 147 the Court relied on the doctrine of plenary power. 148 Here, the invocation of plenary power is not fatal, because the underlying Congressional action is plainly in service of Tribal sovereignty. The restoration of powers of self-government, especially to rectify bad precedent, is compatible with our conception of Congressional power. While it has yet to be challenged, the Violence Against Women Acts of 2013 and 2022, 149 which restore some Tribal jurisdiction over non-Indians in a partial Oliphant fix, 150 should be presumptively constitutional on the same reasoning.

139. Id. at 557-58.
140. Id. at 555-56.
141. Id. at 557.
143. Id. at 197-98.
146. Lara, 541 U.S. at 196.
147. Id. at 210.
148. Id. at 202.
150. In 1978, the Court held that tribes had been implicitly divested of the authority to prosecute non-Indians who commit crimes on tribal land. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978). By divesting tribes of criminal jurisdiction, the Court created a “de facto jurisdictional void” that has enabled dire rates of violence in Indian country, especially against Native women. Angela R. Riley & Sarah Glenn Thompson,
2. Federal Facilitation of State Encroachment on Tribal Self-Governance is Presumptively Unconstitutional

In his Brackeen concurrence, Justice Gorsuch repeatedly affirms that “the States have virtually no role to play when it comes to Indian affairs.”151 The guaranteed “sovereign authority of Tribes” under the Constitution comes with the “concomitant jurisdictional limit on the reach of state law” over Indian affairs, with management of interactions with the Tribes therefore “rest[ing] exclusively with the federal government.”152 Where state law conflicts with federal Indian policy, then, state law clearly loses. This was the case in Brackeen. And where states seek to apply policies to the Tribes which affect those Tribes’ internal self-government, they can only do so through voluntary cooperation.153

We translate this point into a broad formulation: wherever states unilaterally encroach on Tribal self-governance without Tribal consent, those actions are presumptively unconstitutional. Such action might be undertaken independently by the state, in violation of federal law.154 Such action might also be directly facilitated and condoned by Congress.155 Since our tranche of caselaw for this project specifically centers on plenary doctrine cases, it is only likely to capture cases in this second category.

Neionsett v. Samuels is an example of unconstitutional state encroachment facilitated by Congress.156 In Neionsett, the Court reviewed the Kansas Act,157 to determine whether it granted the state jurisdiction to prosecute state crimes committed by Indians on reservations.158 While the opinion primarily concerned statutory interpretation, the Court made a passing statement on the constitutionality of such a delegation. According to the Court: “Congress has plenary authority to alter these jurisdictional

152. Id. at 313; see also id. at 327-28, 331-32.
154. See, e.g., McGirt v. Oklahoma, 140 S.Ct. 2452, 2471 (2020) (“Oklahoma is far from the only State that has overstepped its authority in Indian Country.”).
158. 507 U.S. at 100.
guideposts." In this way, Negonsott mistakenly affirmed Congress’ power to assert state jurisdiction into internal Tribal affairs. Without any provision for Tribal consent, this result plainly violates our second rule. It would be considered presumptively unconstitutional.

The same reasoning should upset Public Law 280, by which Congress forcibly integrated reservations into state legal systems in California, Minnesota, Nebraska, Oregon, Wisconsin, and Alaska. Public Law 280 also allowed other states to voluntarily take up jurisdiction over Indian country. Like the Kansas Act, the original statute asserted state jurisdiction over Tribes without any provision for Tribal consent. While 1968 amendments incorporated a consent requirement, it did not apply retroactively. Unfortunately, the Court has never reviewed the basic constitutionality of Public Law 280. It has considered the meaning of the statute, its applications, and even its interaction with the Fourteenth Amendment. But it has never asked whether Congress had the power to pass the law in the first place.

Of course, other cases directing state jurisdiction are perfectly acceptable. In Board of Com’rs of Creek County v. Seber, the Court upheld a 1936 act shielding Indian-owned land from state taxation. The decision involved an invocation of Congressional plenary power and substantial quotations of United States v. Kagama. Unlike in Negonsott, the federal intervention here is one that shields Tribal members from state jurisdiction. Congress was fulfilling its constitutional obligation to limit state overreach in Tribal affairs. The act in question is presumptively constitutional under our test.

159. Id. at 103.


161. Id.


164. 318 U.S. 705, 707-09 (1943).

165. Id. at 715-16.

166. For parallel example with a comparable outcome, see also United States v. Rickert, 188 U.S. 432, 437-38 (1903) (upholding a federal statute that insulated Indians from state taxation, relying heavily on Kagama).
One final example worth visiting is *Morton v. Mancari*.\(^{167}\) In *Mancari*, the Court upheld the Bureau of Indian Affairs’ employment preference for Tribal members.\(^{168}\) It observed that “[r]esolution of the instant issue turns on the unique legal status of Indian Tribes under federal law and upon the plenary power of Congress.”\(^{169}\) This invocation of plenary power places the case in the suspect category. However, the decision passes both criteria. The employment preference does nothing to enhance state authority in Tribal affairs, nor does it interfere with internal Tribal government. Thus, the BIA policy should be constitutional as an extension of legitimate Congressional authority.

**C. Additional Red Flags**

By comparing *Kaiama v. United States* to *Plessy v. Ferguson*, Justice Gorsuch alludes to another telling characteristic.\(^{170}\) He observes: “as sometimes happens when this Court elides text and original meaning in favor of broad pronouncements about the Constitution’s purposes, the plenary-power idea baked in the prejudices of the day.”\(^{171}\) Throughout the opinion, Gorsuch repeatedly highlights how racist ideas plagued the emergence of this doctrine and operated to legitimate termination, child removal, and the other assimilationist policies organized under the plenary power banner.\(^{172}\) In particular, boarding schools and state adoptive programs for Indian children were often justified with the idea that they were for the “benefit to the children,” even as they inflicted untold horror and death upon Native families and their Tribes.\(^{173}\) We push Justice Gorsuch’s observations a step further with the following suggestion: reliance on racist tropes in judicial reasoning presents a red flag for dubious constitutionality.\(^{174}\) We can enhance the revisionary project by systematically noting the employment of racist tropes as we work our way through the plenary doctrine’s genealogy.

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168. Id. at 537.
169. Id. at 551.
171. Id. at 327.
172. See, e.g., id. at 297-305, 326-28.
173. Id. at 301-02.
174. Of course, we recognize that American law is generally informed by race. And race is conversely informed and produced by law. See Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1713-14 (1993). We do not mean to claim that the plenary power doctrine is exceptional in that its informed by race. We do mean to suggest that racist assumptions in judicial reasoning can (a) mask the absence of rigorous constitutional analysis, and (b) compromise otherwise sound logic because the underlying assumptions are false.
By bringing racist reasoning to light in each individual case, we strengthen the argument for overturning both the individual holdings and the doctrine as a whole. Conservative and progressive legal actors often disagree on whether formally neutral, “colorblind” policies unconstitutionally reinforce structural biases against historically marginalized groups. However, they generally share a common reaction against blatantly racist language and thinking when it is brought under scrutiny. Some observers may try to reject racist commentary as dicta with no bearing on the constitutionality of the holdings—to save the doctrinal baby while tossing out the prejudiced bathwater of the time. Indeed, this reaction resembles the majority’s approach in Brackeen—excising the most offensive cases and keeping the doctrine. It should be said that we have reservations about this approach—doubts as to whether constitutional doctrine can ever truly be extricated from its historic, racist context. Still, we believe that drawing attention to the racist assumptions underpinning foundational plenary power cases undermines the doctrine’s legitimacy. By today’s standards, indisputably racist ideas permeate many plenary power decisions, especially those drawn from the late nineteenth and early twentieth centuries.

176. For example, in Ramos v. Louisiana, Justices Gorsuch and Kavanaugh both looked explicitly to the blatantly “racist origins” of Louisiana and Oregon’s non-unanimous criminal trial juries as a primary justification for overturning these laws and a pair of Supreme Court precedents that had previously sustained their constitutionality. 140 S.Ct. 1390, 1393-94, 1400-01, 1405 (2020) (abrogating Apodaca v. Oregon, 406 U.S. 404 (1972) and Johnson v. Louisiana, 406 U.S. 356 (1972); id. at 1410 (Kavanaugh, J., concurring) (citing the express intent of leaders of the 1898 Louisiana Constitutional Convention to “establish the supremacy of the white race” and to implement “non-unanimous juries as one pillar of a comprehensive and brutal program of racist Jim Crow measures against African-Americans”); see also Trump v. Hawaii, 138 S.Ct. 2392 (2018) (Chief Justice John Roberts writing for the majority in overturning Korematsu v. United States as “gravely wrong the day it was decided” given the government’s “forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race”; Confirmation Hearing on the Nomination of the Neil M. Gorsuch to the Supreme Court, Sen. Comm. on the Judiciary, 115 Cong. 114 (2017) (Justice Gorsuch noting his removal of a sentencing judge from a case following allegations of “improper comments based on [the defendant’s] ethnicity.”).
177. See, e.g., United States v. Sandoval, 231 U.S. 28, 39-41 (1913) (“The people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government. Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetishism, and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, unformed, and inferior people . . . . the reports of the super-intendents charged with guarding their interests show they are dependent upon the fostering care and protection of the government, like reservation Indians in general; that, although industrially superior, they are intellectually and morally inferior to many of them; and that they are easy victims to
Justice Gorsuch’s \textit{Plessy} comparison is thus especially apt as the decision showcases how racist assumptions can lead the Court to fatally flawed interpretations of the Constitution. While the \textit{Plessy} majority paid lip-service to formal equality, its discussion of the Fourteenth Amendment appealed to “the nature of things” to assert that the Constitution had nothing to say about social equality or racial integration.\textsuperscript{178} The reasoning of this infamous opinion was infused with assumptions about Black inferiority and the naturality of racial difference and hierarchy.\textsuperscript{179} Justice John Marshall Harlan’s famous dissent drew attention to decision’s racist logic by highlighting the law’s nanny exception—whereby Black people were allowed in the cars for white people so long as they were attending white passengers as subordinate servants.\textsuperscript{180} Yet even Justice Harlan affirmed the dominance and superiority of the “white race,” while claiming that the “constitution is color-blind.”\textsuperscript{181}

To be sure, \textit{Plessy}’s defense of segregation was formally premised on the law’s alleged neutrality to white and Black people.\textsuperscript{182} Nevertheless, we

\textsuperscript{178.} \textit{Plessy v. Ferguson}, 163 U.S. 537, 544 (1896). The majority went on to say: “If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.” \textit{Id.} at 552. The majority also recognized white men’s property interests in maintaining their white reputations, such that being assigned to the car for Black people could be an actionable legal injury. This move betrays the majority’s implicit recognition of the racial subordination at work in the policy of segregation. \textit{Id.} at 549.

\textsuperscript{179.} \textit{Id.} at 551; \textit{Gotanda, supra} note 175, at 38.

\textsuperscript{180.} This exception demonstrated how the law was truly aimed at maintaining racial subordination, rather than coequal separation. \textit{See Plessy}, 163 U.S. at 553 (Harlan, J. dissenting); Akhil Reed Amar, \textit{Plessy v. Ferguson and the Anti-Canon}, 39 PEPPI. L. REV. 75, 85 (2011).

\textsuperscript{181.} \textit{Plessy}, 163 U.S. at 559 (Harlan, J. dissenting). Speaking of prejudices of the time and racial reasoning, Justice Harlan went on to illustrate the irrationality of the challenged statue by observing that “by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States,” whereas a Black citizen who attempted the same would be arrested. \textit{Id.} at 561.

\textsuperscript{182.} \textit{Id.} at 551 (“We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”).
now recognize *Plessy* as anathema to our constitutional commitments. An essential part of the process by which *de jure* segregation was overturned was the demonstration of the supposedly neutral policy’s prejudicial context—the racist reasons why it was repeatedly enacted, the assumptions about Black and white people that it made, and the racialized inequity it continually reproduced.183

The plenary power doctrine also rests on flawed, racist assumptions. Like *Plessy*, its judicial reasoning is inflected with ideas of white supremacy.184 Having failed to find a basis for expanding federal power into Tribal internal affairs in the Constitutional text, the *Kagama* Court could only intone that “[t]he power of the general government over these remnants of a race once powerful, now weak and diminished in numbers is necessary for their protection, as well as to the safety of those among whom they dwell.”185 This is the same “vanishing Indian” trope that stands as one of the bedrock assumptions in our myth of manifest destiny, whereby Americans recast conquest as harmless expansion.186 Along with the myth of the virgin American wilderness,187 the “vanishing Indian” has worked to absolve Americans of the colonial violence and dispossession central to westward expansion.188 The national policies of assimilation and Tribal termination—including the Indian boarding school program—emerged as variations on the same theme. In the notorious words of R. H. Pratt, founder of the archetypical Carlisle Indian Industrial School, civilizing189 efforts must “kill the Indian... and save the man.”

183. See *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 494-95 (1954) (describing how segregation perpetuates ideas of racial superiority and inferiority and finding that “[s]eparate educational facilities are inherently unequal”); see also *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (recognizing that the Virginia anti-miscegenation law was “designed to maintain White Supremacy”); AKHIL AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 383, 399-400 (2006); Amar, *supra* note 180, at 84-89.


185. *Id.* at 384.

186. See *Fort*, *supra* note 114, at 311.


188. See PHILIP DELORIA, INDIANS IN UNEXPECTED PLACES 50 (2004); BENJAMIN MADLEY, AN AMERICAN GENOCIDE 185 (2017).


In all these narratives, Tribes are cast as relics of the past, destined to fade away from American life. Legal reasoning premised on such an expectation of Tribal decline is fundamentally flawed. To state the obvious: Tribes have not disappeared. Legal decisions that lean into the story of the vanishing Indian are especially suspect because the trope is inherently hostile to Tribal sovereignty. Complementary notions of Native people as primitive, uncivilized, and racially inferior have also worked to justify incredible federal power and paternalist intervention at the expense of Tribal self-determination.

We do not assert that every decision that invokes the plenary power doctrine or the racist ideas that have surrounded it is necessarily unconstitutional. Rather, we recognize these attributes as important signals of what deserves special scrutiny in our scholarly project—and hopefully the review of the Court in the near future.

CONCLUSION

Congressional plenary power in Indian affairs has long justified extraordinary federal intervention into Tribal government, often with dire consequences for Indian country. It is well overdue for revision. In this Article, we have identified an opportunity to refashion the troubled Indian law doctrine of plenary power. In our review of Brackeen, we drew out the majority’s subtle revisionary moves, the dissenters’ wholesale rejection of the doctrine, and Justice Gorsuch’s distinct originalist account of federal power in Indian affairs. We embraced Justice Gorsuch’s conception of our constitutional order, and from that conception we outlined an approach to review and improve Indian law.


precedent. Federal intervention is inappropriate and unconstitutional when it undermines internal Tribal self-government or enhances state invasions into Tribal governance. Moreover, precedent tinged with racist language or reasoning is doubly suspect. By sifting through Supreme Court caselaw with this method, we endeavor to bring greater coherence to federal Indian law, expunge the most offensive and embarrassing judicial reasoning from the record, and ultimately vindicate the enduring role of Tribal sovereignty in our constitutional structure.