THE GREAT SECRET ABOUT FEDERAL INDIAN LAW— TWO HUNDRED YEARS IN VIOLATION OF THE CONSTITUTION— AND THE OPINION THE SUPREME COURT SHOULD HAVE WRITTEN TO REVEAL IT*

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INTRODUCTION

When the South African government denied native Africans the rights and sovereignty that were theirs long before the Afrikaners and English arrived, the United States and the international community responded with extensive economic and political sanctions. When Iraq invaded Kuwait, the United States and the international community refused to permit this violation of Kuwait's sovereignty and imposed severe military, economic, and political sanctions upon Iraq. Yet for two hundred years the United States has committed equivalent acts and atrocities against Native American nations, without punishment or restitution.

Is there a double standard here? A remarkable similarity exists between the homelands of South Africa and the reservations in the United States. Should not the United Nations impose sanctions upon the United States for denying Native American nations their fundamental rights of sovereignty, just

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I dedicate this article to Lucia Stauffer Savage, and to the Native Americans in the past, present, and future who have suffered and continue to suffer injustice, disrespect, and even barbarity in their home, the Mother Earth.

as the United States and the international community imposed sanctions against South Africa? Should not the international community and the United Nations impose political and economic sanctions against the United States for its continuous violation of Native American sovereignty, just as the United States imposed sanctions against Iraq for violating Kuwait's sovereignty?

For two hundred years the Supreme Court, the Congress, and the President have falsely cited the Constitution for the "plenary power" to commit these acts and to control every aspect of Native American nations and lands. The Supreme Court has held that the Constitution gives Congress "plenary authority to limit, modify or eliminate the powers of . . . [Native American] self-government";[a] that it gives Congress plenary power to determine whether a "tribe" does or does not exist and whether a Native American is or is not a member of it;[b] and that it gives Congress plenary authority to manage and control all Native American aboriginal lands—even to terminate their rights to that land.[c]

One morning, a few years ago, I discovered evidence that the United States has apparently overlooked for these past two hundred years. On August 18, 1787, during the secret deliberations of the Federal Convention, James Madison proposed a plenary power over relations with Native American nations.[d] The Framers expressly rejected such plenary power and instead greatly limited federal power to the regulation of commerce between the United States and Native American nations.[e] The national government has never had such plenary power. For two hundred years, federal Indian law has violated the Constitution and the original intent of the Framers. The evidence and analysis were published in 1991 in the *American Indian Law Review*.[f] As far as I can determine, this evidence had never before been published and has never been presented to the courts or to Congress.

Consequently, federal and state statutes, enacted over the past two hundred years to control Native Americans in such matters as taxation, civil and criminal jurisdiction, hunting and fishing rights, water rights, and religion, are unconstitutional.

Is there another, equally disturbing, double standard here? Does the Constitution apply only when it suits those in power? How could the Supreme

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a. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

b. *E.g.*, United States v. Sandoval, 231 U.S. 28, 46, 47 (1913); Cherokee Nation v. Hitchcock, 187 U.S. 294, 306-07 (1902); *see* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 85-86 (1977).

c. *E.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 288-89 (1955); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 574 (1823).

d. Notes of James Madison on the Proceedings of the Federal Convention (Aug. 18, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 324, 324 (Max Farrand ed., rev. ed. 1937).

e. U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause).

f. Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 AM. INDIAN L. REV. 57 (1991).

Court and the Congress, for two hundred years, overlook fundamental constitutional history and fail to respect the supreme law of the land and the Framers' original intent?

To illustrate concretely how this new evidence should conquer the rule of federal Indian law, I have taken the liberty of rewriting the Supreme Court's decision last year in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*,[g] as strict construction of the Constitution and the Framers' original intent would require.[h] Following the opinion is the expected dissent.

In the actual decision, the Supreme Court of the United States proclaimed once again that Native Americans have no true sovereignty in the lands of their ancestors. The Court held that the County of Yakima could tax and then foreclose on the lands of the Yakima Nation and its members.[i] The case concerns the Indian General Allotment Act of 1887,[j] one of the principal laws by which the United States has destroyed Native American nations and the reservations to which the United States has confined them. Using this statute, the United States broke the reservations into pieces, allotted some pieces to individual Native Americans, replaced tribal jurisdiction with state civil and criminal jurisdiction, and sold the surplus land to white homesteaders. Between 1887 and 1934, through operation of the Act, Native American lands were further reduced by 65 percent.[k] All of this violates the Constitution.

The corrected opinion would end two hundred years of Constitutional injustice against Native American nations. It would have much the same effect for Native Americans that *Brown v. Board of Education*[l] had for Blacks when *Brown* revoked the Constitutional imprimatur on 160 years of slavery and racial discrimination. Thus, there is precedent for demolishing a long-standing and comprehensive system of injustice, perpetuated in violation of the Constitution's most fundamental principles.

Some have expressed great concern that ending federal power over Native American nations would also terminate the federal trust responsibility to Native American nations. While this is theoretically possible, the United States would nonetheless retain its extensive obligations to Native American nations under existing treaties. The United States recognizes extensive obligations to provide aid to foreign nations and should have every reason to do the same with the Native American nations.

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g. 112 S. Ct. 683 (1992).

h. *See infra* pp. 348-372.

i. *County of Yakima*, 112 S. Ct. at 690-91.

j. Act of Feb. 8, 1887, ch. 119, 24 Stat. 338 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 382 (1988 & Supp. III 1991)) [hereinafter the General Allotment Act].

k. *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess., pt. 1, at 15, 16-17 (1934) (written statement of John Collier, U.S. Commissioner on Indian Affairs).

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

Some have asked whether ending the federal plenary power over Native American nations would enable the states to assume such power. The states themselves have undertaken to dominate Native American nations but have been even less inclined than the national government to treat Native Americans with respect. Just as Native American nations were not subject to state sovereignty in 1787,[m] when the Constitution was adopted, the states have no such authority now. Moreover, under the Constitution, treaties with Native American nations are the supreme law of the land,[n] and states may not violate them.

Some have argued that Native Americans should ignore federal Indian law altogether rather than use the United States Constitution to strike at the heart of federal injustice. Why acknowledge federal Indian law at all? To ignore federal Indian law is to assert and to practice Native Americans' right to self-determination and self-government. Others respond, however, that the reality of five hundred years of injustice has deprived Native Americans of sufficient resources for such immediate, complete independence and that Native American nations must work with the United States to end these injustices together.

Each Native American nation may answer these questions differently. Each may choose different degrees of association with, or independence from, the United States, and each may have different reasons for that choice. Each Native American nation may have different levels of resources and leadership to devote to this struggle. But knowledge is power, and this new evidence of the original intent may very well provide a powerful tool to end five hundred years of injustice.

I harbor no illusions that the Supreme Court will write an opinion like the one that follows, even though this opinion rests upon the very principles of original intent and strict construction so frequently cited by the Rehnquist Court and the Reagan and Bush administrations. Nonetheless, this new evidence provides Native Americans with a very powerful tool. Consider what would happen politically if Native American nations across the United States began to argue loudly and forcefully, in a coordinated fashion, in the press, the courts, and the Congress, that two hundred years of Supreme Court decisions and two hundred years of federal and state statutes have violated Native American sovereignty in direct conflict with the Constitution. Such efforts could well yield considerable leverage and advances in Congress, in the press, in the public arena.

A carefully crafted strategy might yield national legislation to prevent any further contravention of Native Americans' territorial and personal sovereignty. It might yield national legislation returning lands and awarding repa-

m. *See, e.g.*, Notes of John Adams on the Proceedings of the Proceedings of the Continental Congress (July 26, 1776) (statements of James Wilson), *reprinted in* 6 J. CONTINENTAL CONGRESS 1077, 1077-78 (1906).

n. U.S. CONST. art. VI, cl. 2.

rations. It might cause the President and congressional leaders to work with Native American leaders in determining how to modify numerous unconstitutional statutes regulating every aspect of Native American life. The point is to use this new evidence to put real pressure on Congress and to negotiate an end to five hundred years of injustice. These negotiations should protect Native American sovereignty and enlarge the United States' obligation to repair and compensate for the injustices it has committed.

SUPREME COURT OF THE UNITED STATES

NOS. 90-408 AND 90-577

90-408

COUNTY OF YAKIMA AND DALE A. GRAY, YAKIMA COUNTY TREASURER, PETITIONERS

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION

90-577

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, PETITIONER

v.

COUNTY OF YAKIMA AND DALE A. GRAY, YAKIMA COUNTY TREASURER

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[January 14, 1992]

PER CURIAM:

In 1887, Congress sought to dismantle further the sovereignty of Native American nations by enacting the General Allotment Act, which authorized the President to divide and allot Native American lands and to subject the allotments and Native American allottees to state jurisdiction.[1] The County of Yakima, a governmental entity of the State of Washington, relies upon this statute to tax, and now to foreclose on, lands allotted to and owned in fee by the Yakima Nation and its members. The Yakima Nation disputes the County's power to tax the lands at all. The question presented by these consolidated cases is whether the County of Yakima may tax the allotted and fee-patented land owned by the Yakima Nation and its members. If that power exists, then the County may take the Yakima Nation's lands.

The Court considers once again the question at the heart of federal Indian law: Where does sovereignty lie—in Native American nations, in the United States, or in the individual states? The facts of this case illustrate once again how serious the consequences can be. The power to tax involves the power to destroy,[2] and here the process of taxation and foreclosure could destroy one more Native American reservation.

It is not for this Court to assume the role of an activist court and divine whether a power to tax and thus destroy Native American reservations is just, but only to conduct itself as a constitutional court and determine whether the

1. Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348-349, 354, 382 (1988 & Supp. III 1991)).

2. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819).

Constitution authorizes Congress and the states to tax Native American lands. We conclude that section 6 of the General Allotment Act, as amended and codified at 25 U.S.C. § 349, does authorize states to tax lands like those in question. This does not decide the matter, however.[3] If the power to enact section 6 does not exist, the grant of authority is null and void. For nearly two hundred years, the Court has uniformly held that Congress enjoys plenary power over Native Americans, a power originally without substantive check by the Constitution or judicial review by the Supreme Court.[4] More to the point at issue in this case, the Court has determined that, "[i]n keeping with its plenary authority over Indian affairs, Congress can authorize the imposition of state taxes on Indian tribes and individual Indians."[5] We must hold to the contrary today. On the basis of evidence never before presented to this Court, it is the opinion of the Court that the Constitution does not and never did grant such plenary power to Congress. Strict construction of the Constitution, tested further against the original intent of the Framers, requires the conclusion that the United States never had the power to tax the lands at issue and thus could not delegate this power to the states under section 6 of the General Allotment Act. Section 6 is therefore unconstitutional.

I
FACTS

A. Allotment

The General Allotment Act of 1887[6] authorized the President of the United States to sunder Native American reservations and subject Native Americans to the civil and criminal laws of the surrounding state or territory. Although Native Americans held lands in common, the President was permitted to divide them and allot parcels to individual Native Americans "whenever in his opinion any reservation or any part thereof . . . is advantageous for agricultural and grazing purposes."[7] The United States then held the allotments in trust for twenty-five years (or any greater time, at the President's discretion), during which period all contracts and conveyances touching the allotments were null and void. When the trust period expired, the individual

3. We initially consider whether the statute authorized the County to tax the Yakimas' lands, because the Court does not decide constitutional questions unless necessary. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 841 (1986); Jean v. Nelson, 472 U.S. 846, 854-55 (1985).

4. *E.g.*, Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989); United States *ex rel.* Hualpai Indians v. Santa Fe Pac. R.R., 314 U.S. 339, 347 (1941); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) ("Plenary authority over the tribal relations of Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832).

5. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 765 (1985).

6. Ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348-349, 354, 382 (1988 & Supp. III 1991)).

7. § 1, 24 Stat. at 388.

Native Americans received the patents in fee, became de jure citizens of the United States, and became subject to the civil and criminal laws of the state or territory in which the reservation was located. All lands not allotted became surplus lands, which the United States could purchase. The purchase money was to be held in trust for the Native American nation or appropriated for their "education and civilization," at the discretion of Congress.[8]

Through the use of allotment, the United States substantially diminished Native American lands from 138,000,000 acres in 1887 to 48,000,000 acres in 1934. The land taken was "the most valuable part."[9] John Collier, the United States Commissioner on Indian Affairs, testified that "the allotment system was devised . . . as an indirect method . . . of taking away the land that we were determined to take away but did not want to take . . . openly by breaking the treaties."[10]

Allotment substantially diminishes Native American sovereignty, too. Once the states' civil and criminal jurisdiction attached when the allotments became patented in fee, the Native American nations no longer retained sovereign power to zone or otherwise define the character of their land.[11] Likewise, they no longer retained the sole authority to regulate hunting or fishing in their lands.[12] General criminal and civil jurisdiction may reach all non-Indians and all Native Americans on non-trust lands pursuant to Public Law 280.[13] The Court has already held that such checkerboard jurisdiction over Native American lands, without the consent of the Native American nation, does not violate the Equal Protection Clause of the Fourteenth Amendment.[14] The Court has upheld these results notwithstanding prior treaties guaranteeing to the Native American nation the exclusive use and benefit of all of its land.[15]

Although Congress "repudiated" allotment and its purposes with the In-

8. §§ 5, 6, 24 Stat. at 389, 390.

9. *Readjustment of Indian Affairs: Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess., pt. 1, at 15, 16-17 (1934) (statement of John Collier, U.S. Commissioner on Indian Affairs) ("Through the allotment system, more than 80 percent of the land value belonging to all the Indians in 1887 has been taken away from them; more than 85 percent of the land value of all the allotted Indians has been taken away.") [hereinafter *Readjustment of Indian Affairs*].

10. *Id.* at 32.

11. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 422-25 (1989) (plurality opinion); *see id.* at 435-37, 444-45 (Stevens, J., joined by O'Connor, J., concurring in the judgment) (where non-members own a large percentage of land in fee, tribe lacks zoning authority).

12. Montana v. United States, 450 U.S. 544, 558-59 & n.9 (1981).

13. Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 498-99 (1979) (upholding state civil and criminal jurisdiction over Native Americans and Native American lands assumed under Act of Aug. 15, 1953, ch. 505, §§ 2, 4, 67 Stat. 588, 588, 589 (codified at 18 U.S.C. § 1162 (1988), 28 U.S.C. § 1360 (1988))).

14. *Id.* at 501-02.

15. *E.g.*, *Montana*, 450 U.S. at 558-59; *Brendale v. Confederated Tribes of the Yakima Indian Nation*, 492 U.S. at 422 (plurality opinion); *id.* at 435-37 (Stevens, J., joined by O'Connor, J., concurring in the judgment).

dian Reorganization Act of 1934,[16] Congress has never repealed the General Allotment Act or its present consequences.

B. The Yakima Nation

The Yakima Nation has approximately 7,600 enrolled members,[17] as defined by the Indian Reorganization Act.[18] The Yakima Indian Reservation was established by treaty[19] and consists of approximately 1.3 million acres of land located almost entirely in Yakima County in the eastern part of Washington State.[20] The United States holds approximately 1.04 million acres (eighty percent of the Yakima Indian Reservation) in trust for the benefit of the Yakima Nation and its members and has allotted and pateneted in fee the remaining twenty percent of the reservation. According to the Yakima Nation, less than 1 percent of these allotted lands remains with the Yakima Nation or its members.[21]

The Yakima Nation is no stranger to challenging assertions of federal and state jurisdiction over its lands and people.[22] At the time of its suit for injunctive and declaratory relief in the United States District Court below, the County of Yakima had scheduled foreclosure and sale of approximately forty parcels of the Yakima Indian Reservation, comprising approximately 20 percent of all fee lands owned by tribal members,[23] because the Yakima Nation and some of its members were at least three years behind on property taxes.[24]

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16. Ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, 479 (1988 & Supp. III 1991)); *Montana*, 450 U.S. at 559 n.9.

17. Jt. App. at 37.

18. Congress claims the power to define tribal membership differently than the tribes themselves define it. 25 U.S.C. § 450b (1988) (defining "Indian tribes" as those recognized by the United States); Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 25 C.F.R. § 83.7 (1992); *see* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 84-86 (1977).

19. Treaty Between the United States and the Yakama Nation of Indians, June 9, 1855, U.S.-Yakama Nation, 12 Stat. 951 (ratified by the Senate on March 8, 1859 and proclaimed by President James Buchanan on April 18, 1859). The Yakima Nation spells its name *Yakima*, but the treaty spelled the name as *Yakama*.

20. Jt. App. at 37.

21. Brief of Respondent/Cross-Petitioner [Yakima Nation] at 7 [hereinafter Brief of the Yakima Nation].

22. Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (plurality opinion) (holding that the Yakima Nation no longer retained the power to zone and define the character of certain allotted land held by non-members); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1979) (upholding state cigarette and sales taxes on purchases made by non-members on the Yakima Indian Reservation); Washington v. Confederated Tribe & Bands of the Yakima Indian Nation, 439 U.S. 463 (1979) (upholding state statute assuming civil and criminal jurisdiction on all fee lands of the Yakima Indian Reservation and more limited jurisdiction on trust and restricted lands); United States v. Winans, 198 U.S. 371 (1905) (upholding Yakimas' right under the treaty of 1855 to continue to fish at "all [the] usual and accustomed places" that were subsequently granted to private citizens by the United States and the State of Washington).

23. Memorandum of Respondent [Yakima Nation] at 4 n.2.

24. Jt. App. at 5, 14-16. Income per capita on reservations generally was $3600 in 1980,

None of these members had severed tribal affiliations with the Yakima Nation.[25] The County of Yakima justified its actions under the State of Washington's power to tax.[26]

The District Court awarded summary judgment on stipulated facts to the Yakima Nation, holding that our reasoning in *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*[27] disapproved the sort of checkerboard taxation and jurisdiction effected by the County's tax and "impliedly nullified section 6 of the General Allotment Act whenever it is applied within a reservation" to fee-patented land held by members of the Yakima Nation.[28]

The Court of Appeals reversed, holding that section 6 continues to authorize the County to tax such land. Because the District Court found that the County's imposition of ad valorem property taxes created a condition of checkerboard jurisdiction on the Yakima Indian Reservation, the Court of Appeals applied our recent decision in *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*[29] and held that the ad valorem tax would be impermissible if it would have a " 'demonstrably serious' " impact on the " 'political integrity, economic security or the health and welfare of the tribe.' "[30] It remanded the case to the District Court to make that determination.

The County of Yakima, joined by California, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, and Washington as *amici curiae*, sought review of the decision because it would allow an exemption from taxation where such taxation would "affect [the Yakima Nation] in a demonstrably serious way."[31] The Yakima Nation cross-petitioned. We granted certiorari,[32] and invited the Solicitor General to file a brief expressing the views of the United States.[33]

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and the median income per household was $11,000. DAVID GETCHES & CHARLES WILKINSON, CASES AND MATERIALS ON FEDERAL INDIAN LAW 8 (2d ed. 1986).

25. Jt. App. at 12.

26. WASH. REV. CODE § 84.52.030 (1991) (property tax); *id.* §§ 82.45.060, 82.45.070, 82.45.080, 82.45.090 (1981) (excise tax).

27. 425 U.S. 463, 478-79 (1976).

28. Order, Confederated Tribes & Bands of the Yakima Nation v. County of Yakima, No. C-87-654-AAM (E.D. Wash. May 10, 1988), *reprinted in* Petition [by County of Yakima] for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 34a, 38a-39a.

29. 492 U.S. 408 (1989).

30. 903 F.2d 1207, 1218 (9th Cir. 1990) (quoting *Brendale*, 492 U.S. at 431 (plurality opinion)) (emphasis omitted).

31. *Id.* at 1218; Brief of Petitioners/Cross-Respondents, County of Yakima and Dale A. Gray, Yakima County Treasurer at 7 [hereinafter Brief of the County of Yakima]; Brief of Amici Curiae States of Cal., Mont., Neb., Nev., N.M., N.D., Or., S.D., Utah, and Wash. in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 4-5.

32. 111 S. Ct. 1680 (1991).

33. 498 U.S. 1022 (1991).

II
GENERAL ALLOTMENT ACT OF 1887

The Court has uniformly held that states may not tax Native Americans or their lands unless Congress delegates such authority. When Kansas attempted to tax tribal lands and treaty allotments of individual Shawnees, the Court adjudged that lands held by Native Americans in common or in severalty were exempt from state taxation. "If the tribal organization . . . is preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others,' . . . separated from the jurisdiction of [the state], and to be governed exclusively by the government of the Union."[34] New York's attempt to tax Native American lands was an "illegal" exercise of state power and "an unwarrantable interference, inconsistent with the original title of the Indians, and offensive to their tribal relations."[35] We reaffirmed this rule in 1973: "[I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation .... [S]uch taxation is not permissible absent congressional consent."[36]

The parties do not dispute that section 6 of the General Allotment Act permits the states to tax allotted lands once the trust period expires.[37] Nor do they dispute the precondition that the United States has the original power to tax such lands and to delegate that jurisdiction to the states.[38] The Yakima Nation and the United States contend instead that section 6 is no longer governing law, relying upon *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*.[39] The Yakima Nation argues that, by terminating the allotment program and restoring tribal integrity through the Indian Reorganization Act of 1934, Congress impliedly repealed section 6's grant of jurisdiction to tax allotted lands patented in fee. The United States generally agrees. On review of summary judgment, the Court reviews this question of law *de novo*.[40]

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34. Blue Jacket v. Board of Comm'rs (The Kansas Indians), 72 U.S. (5 Wall.) 737, 755 (1867) (quoting Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832)).

35. Fellows v. Denniston (The New York Indians), 72 U.S. (5 Wall.) 761, 770-71 (1867).

36. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973); *see also* Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 764-65 (1985).

37. Brief of the County of Yakima at 11-13, 21-25, 27-31; Brief of the Yakima Nation at 28-31; Brief for the United States as Amicus Curiae Supporting Respondent/Cross-Petitioner at 7-10, 17 [hereinafter Brief of the United States].

38. Brief of the County of Yakima at 8-11; Brief of the United States at 6-7; Brief of the Yakima Nation at 23.

39. 425 U.S. 463 (1976).

40. While we review questions of law *de novo*, ordinarily "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." SUP. CT. R. 14.1(a). In their petitions for certiorari, neither Yakima County nor the Yakima Nation questions the plenary power of Congress over Native Americans. The issue, however, is fairly implied. Both the County of Yakima and the Yakima Nation argue in their briefs that, under the Constitution, Congress has exclusive jurisdiction to tax Native American lands. Yakima County argues that,

The Court has already considered and rejected the Yakima Nation's basic argument. In *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*,[41] the Yakima Nation maintained that the Indian Reorganization Act of 1934 repudiated the policy of the General Allotment Act. The change in policy, we responded, "was irrelevant" because Congress did not amend or repeal sections 5 and 6.[42]

Section 5 of the General Allotment Act provides that when the twenty-five year trust period has expired, "the United States will convey the same [allotted lands] by patent to said Indian . . . in fee, discharged of said trust and free of all charge or incumbrance whatsoever . . . ."[43] Once the patent in fee issues, section 6, as amended, provides that the allottee "shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory." In a proviso added in 1906, section 6 also authorizes the Secretary of the Interior to issue the patent and terminate the trust period early "whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs . . . , and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed . . . ."[44] Thus, in its principal part, section 6 only confers jurisdiction *in personam* over the allottee and subjects these Native Americans to the states' civil and criminal laws. Sections 5 and 6 do not themselves confer jurisdiction *in rem* but only evince congressional intent about jurisdiction over the land once the patent in fee simple issues.

We have already held that section 5 indicates Congress's consent to state

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in exercising this jurisdiction, Congress can authorize and has authorized the states to tax Native American lands allotted and patented in fee. Brief of the County of Yakima at 8-26. The Yakima Nation argues, on the other hand, that Congress has since denied the states such authority. Brief of the Yakima Nation at 16-24. The United States, as *amicus curiae*, likewise takes as its starting point a plenary power in Congress. Brief of the United States at 6-7. These arguments clearly imply the prior question of Congress's power under the Constitution.

Even if the prior question of Congress's power were not one presented or fairly implied, Supreme Court Rule 14.1 "does not limit our power to decide important questions not raised by the parties." Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313, 320 n.6 (1971) (discussing former Supreme Court Rule 23(1)(c)); *see also* Duignan v. United States, 274 U.S. 195, 200 (1927), *cited with aproval in* Youakim v. Miller, 425 U.S. 231, 234 (1976). We "may [also] consider a plain error not among the questions presented but evident from the record and otherwise within . . . [our] jurisdiction to decide," SUP. CT. R. 24.1(a). It is evident from our decision today that plain error has surely attended decisions of this Court for the past two hundred years.

41. 492 U.S. 408 (1989).

42. *Id.* at 423.

43. 25 U.S.C. § 348 (1988).

44. 25 U.S.C. § 349 (1988). In 1905, the Court decided *In re Heff*, which concerned the federal government's prohibition of the sale of liquor to Native Americans who had been allotted land that the United States still held in trust. We held that the petitioner was subject to state civil and criminal jurisdiction under section 6 of the General Allotment Act when the land was *first* allotted, not when the trust period expired. 197 U.S. 488, 503-04 (1905), *overruled on other grounds*, United States v. Nice, 241 U.S. 591, 597-98 (1916). In response, Congress amended section 6 to express its intention that state jurisdiction and United States citizenship not attach until the trust period expired. Congress also added the proviso at issue here. Burke Act of 1906, ch. 2348, 34 Stat. 182 (amending section 6 of General Allotment Act of 1887).

taxation of Native Americans' allotted lands once the trust period expires. In *United States v. Rickert*,[45] we held that a state's taxation of land before the trust period expired contravened the requirement of section 5 that the United States convey the allotted land "in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

Likewise, in *Squire v. Capoeman*[46]—a case involving federal taxation of income from sales of timber from allotted lands before the trust period expired—we held that the proviso to section 6 "evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee."

In 1906, the Court held that, when the trust period expired and the Native American allottee became subject to state laws, "[h]is property, unless exempt, became subject to taxation."[47] The state civil laws to which the principal part of section 6 subjected Native Americans included tax laws, and the Court construed "Indians to whom allotments have been made" to include the land as well as the person.[48]

Clearly, under existing federal law, sections 5 and 6 contemplate state jurisdiction *in rem* to tax Native American lands once allotted and patented in fee. Congress never repealed section 5 or section 6 of the General Allotment Act, and neither did *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*.[49]

In *Moe*, Montana sought to impose a state cigarette tax upon a member of the tribe who conducted his business on lands that he leased and the United States held in trust. Montana also sought to impose a personal property tax upon motor vehicles owned by members residing on the reservation. We rejected reliance upon section 6 for jurisdiction to impose these taxes. State jurisdiction under section 6 does not reach Native Americans where the land remains held in trust, nor does it reach Native Americans merely because they reside on the reservation.[50] Thus, section 6, we held, did not evince congressional intent to permit the state taxes at issue there.[51] Nor did Congress's "more modern legislation."[52] Montana overreached its jurisdiction under section 6 and thus, to the same extent, "substantially diminished" the Tribes' jurisdiction.[53] However, *Moe* does not govern the case at bar where the County of Yakima applies a real property tax to Native American lands already allotted and patented in fee under section 5.

While the Court of Appeals held that section 6 permits the County to tax

45. 188 U.S. 432, 437-38 (1903).
46. 351 U.S. 1, 7-8 (1956).
47. Goudy v. Meath, 203 U.S. 146, 149-50 (1906).
48. *Id.*
49. 425 U.S. 463 (1976).
50. *Id.* at 478.
51. *Id.* at 479, 480-81.
52. *Id.* at 479-80.
53. *Id.* at 478-79.

these lands, it fashioned from our recent decision in *Brendale*[54] an exception where state taxation under section 6 would create checkerboard jurisdiction on the reservation that would have a " 'demonstrably serious' " impact on the " 'political integrity, economic security or the health and welfare of the tribe.' "[55]

Like *Moe*, *Brendale* is inapposite. *Brendale* concerned the Yakima Nation's powers over land owned in fee by people not members of the Yakima Nation. The present controversy involves the State of Washington's power to tax land owned by members of the Yakima Nation. In an argument reminiscent of Montana's argument in *Moe*, the Yakima Nation contended in *Brendale* that it enjoyed exclusive power to zone all lands within the reservation. We cited the General Allotment Act as authority that the Yakima Nation no longer enjoyed the "exclusive use and benefit" of all the land reserved to it by treaty with the United States.[56] Congress had not otherwise explicitly reserved to the Yakima Nation the power to zone non-members' lands, and we therefore examined whether the Yakima Nation's inherent sovereign powers included the power to zone lands within its reservation owned in fee by non-members. With two exceptions, we held that a tribe's inherent sovereignty no longer reaches non-members.[57] But a tribe's remaining sovereignty under the General Allotment Act, and a tribe's remaining sovereignty over non-members, are not at issue here. Congress has already undertaken to divest the Yakima Nation of any authority by consenting to state jurisdiction to tax the lands once allotted and patented in fee.

Native American sovereignty was once a great tree, full of sun and waters and animals and whispers. Branch by branch, federal Indian law has reduced it from true sovereignty and freedom, first to an inherent tribal sovereignty subject to federal supremacy but not state jurisdiction,[58] then to state regulation of non-members on Native American lands,[59] and now, in the present case, to state jurisdiction to tax Native American lands and to foreclose upon these lands for failure to pay taxes. Congress might have repudiated the purposes of allotment, but Congress has never repudiated this impairment of sovereignty. It has never repealed the General Allotment Act, and section 6 continues to grant the states jurisdiction to tax fee-patented lands.

54. 492 U.S. 408, 431 (1989) (plurality opinion).

55. 903 F.2d 1207, 1218 (9th Cir. 1990) (quoting *Brendale*, 492 U.S. at 431 (plurality opinion)) (emphasis omitted).

56. *Brendale*, 492 U.S. at 422-23 (plurality opinion); *see id.* at 436-37 (Stevens, J., joined by O'Connor, J., concurring in the judgment).

57. *Id.* at 428 (citing with approval Montana v. United States, 450 U.S. 544, 563-66 (1981)).

58. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

59. *E.g.*, Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980); Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979).

III
UNITED STATES CONSTITUTION

That the General Allotment Act continues to authorize the states to impose such taxes does not decide the matter. Does the Constitution grant Congress the prerequisite power to tax Native American lands and to confer upon the State of Washington the power to tax lands owned by the Yakima Nation and its members? We hold today that it does not.

Constitutional jurisprudence concerning Native American nations originates in the Marshall Trilogy of cases. *Johnson v. McIntosh*[60] founded federal power upon a principle of federal sovereignty over all the lands of Native American nations, with the ancillary power to govern them as either an assimilated people or as a "distinct people."[61] When the Cherokee Nation averred that it was a nation foreign to the United States, exercising sovereign rights of self-government within the limits of its territory, the Court disagreed.[62] *Cherokee Nation* held that, under Article III of the Constitution, Native American nations were not sovereign foreign nations, but "domestic dependent nations . . . in a state of pupilage."[63]

Finally, *Worcester v. Georgia*[64] declared that federal plenary power preempts any state power over Native American lands and affairs. Georgia had enacted a statute that assumed jurisdiction *in rem* over the Cherokee Nation's lands and applied Georgia's civil and criminal laws to the Cherokees. The Court held the statute unconstitutional, not because Native American nations were sovereign, foreign nations, but because federal law, due to its plenary nature, preempted Georgia's act.[65]

> [The Constitution] confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions; the shackles imposed on this power, . . . [under the Articles of Confederation], are discarded.[66]

Applying these principles, this Court has uniformly held that the Constitution accords Congress plenary power over Native American nations. We have held that the Constitution gives Congress "plenary authority to limit, modify or eliminate the powers of . . . [Native American] self-government";[67] that it gives Congress plenary power to determine whether a "tribe" does or

60. 21 U.S. (8 Wheat.) 543, 587-92 (1823).
61. *Id.* at 590.
62. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 12-13 (1831).
63. *Id.* at 16-17.
64. 31 U.S. (6 Pet.) 515 (1832).
65. *Id.* at 558-63.
66. *Id.* at 559.
67. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56-57 (1978).

does not exist and whether a Native American is or is not a member;[68] and that it gives Congress plenary authority to manage and control all Native American aboriginal lands and even to terminate the rights to that land.[69] Federal Indian law has attributed to Congress power that can reach all facets—social, cultural, economic, political, and personal—of Native Americans' lives.[70] States in turn may exercise such power only to the extent that Congress delegates it.[71] Federal and state governments have thus controlled Native American nations in taxation,[72] criminal jurisdiction,[73] religion,[74] water rights,[75] fishing rights,[76] civil jurisdiction,[77] even the form of their government.[78] This plenary power, we held, justified federal and state powers to tax under the General Allotment Act.[79]

What provision of the Constitution grants such plenary power?

The Constitution treats Native Americans in three provisions, the Three-Fifths Clause, the Indian Commerce Clause, and the Fourteenth Amendment, which amends the Three-Fifths Clause.

The Three-Fifths Clause does not confer upon Congress or the President any power over Native Americans. Instead, it provides that "Indians not taxed" shall *not* be counted when determining apportionment of representatives and direct taxes among the states.[80] The Framers never discussed the meaning of "Indians not taxed"[81] and never once mentioned Native Americans as people to be represented.[82]

The term suggests, however, that some Native Americans could be taxed.

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68. *E.g.*, United States v. Sandoval, 231 U.S. 28, 46-47 (1913); Cherokee Nation v. Hitchcock, 187 U.S. 294, 306-07 (1902); *see* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 85-86 (1977).

69. *E.g.*, Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 288-89 (1955); *Johnson*, 21 U.S. (8 Wheat.) at 574.

70. *E.g.*, United States v. Wheeler, 435 U.S. 313, 319 (1978) ("undisputed fact that Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government"); *see* United States v. Kagama, 118 U.S. 375, 382 (1886) (recognizing that "the laws of the Union or of the state" may "regulat[e] the[] internal and social relations" of Native American tribes).

71. *E.g.*, Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 765 (1985); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 170-71 (1973).

72. *E.g.*, The Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 620 (1871); Bryan v. Itasca County, 228 N.W.2d 249 (Minn. 1975), *rev'd on other grounds*, 426 U.S. 373 (1976).

73. *E.g.*, United States v. Kagama, 118 U.S. 375, 378-79, 383-84 (1886); Robinson v. Sigler, 187 N.W.2d 756, 758, 759 (Neb.) *appeal dismissed*, 404 U.S. 987 (1971).

74. Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872, 877-82 (1990).

75. *E.g.*, Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 567-70 (1983).

76. *E.g.*, Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165, 175-77 (1977).

77. *E.g.*, Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 498-99 (1979).

78. *E.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56-57 (1978).

79. Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 765 (1985).

80. U.S. CONST. art. I, § 2, cl. 3.

81. Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 AM. INDIAN L. REV. 57, 67 & n.32, 70-71 & n.45 (1991).

82. *Id.* at 67 & n.32.

Only Native Americans who had left their tribes permanently and had joined a community of a state could be subject to state taxation.[83] In discussing the power, under the Articles of Confederation, of "regulating the trade and managing all affairs with the Indians not members of any of the States,"[84] members of the Continental Congress understood that state laws could not reach an independent tribe of Indians "or their lands within the limits of the state."[85] James Madison believed that Native American nations were neither parts of the states nor subject to their laws.[86] James Wilson admitted that the United States had "no right over the Indians, whether within or without the real or pretended limits of any Colony . . . . Grants made three thousand miles to the eastward, have no validity with the Indians."[87] Thomas Jefferson agreed that only Native Americans who live in a colony are subject to its laws "in some degree."[88]

The only explicit grant of legislative power to Congress respecting Native Americans is the Commerce Clause: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[89] For nearly two centuries this Court has construed the Indian Commerce Clause to establish Congress's plenary power over Native Americans.[90]

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83. *Accord* Taxation of Indian Cotton, 12 Op. Att'y Gen. 208, 214 (1867) ("Even when these Indians [existing under their regular tribal associations] and their territory are situated within the bounds of a State of the Union, they are not subject to State taxation."); "Indians Not Taxed"—Interpretation of Constitutional Provision, 57 Interior Dec. 195, 196-97, 206 (1940) ("Indians, members of sovereign and separate communities or tribes were outside of the community of people of the United States even though they might be located within the geographical boundaries of a State"; they became subject to state taxation "either by settling or by purchasing property within its jurisdiction.").

84. ARTICLES OF CONFEDERATION art. IX, para. 4 (1781), *in* 9 J. CONTINENTAL CONGRESS 907, 919 col. 2 (1907) ("The United States, in Congress assembled, shall also have the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians not members of any of the states; provided that the legislative right of any State within its own limits be not infringed or violated . . . .").

85. REPORT OF THE COMMITTEE ON INDIAN AFFAIRS IN THE SOUTHERN DEPARTMENT (July 31, 1787), *in* 33 J. CONTINENTAL CONGRESS 455, 458-59 (1936).

86. Letter from James Madison to James Monroe (Nov. 27, 1784) ("By Indians not members of a State, must be meant those, I conceive who do not live within the body of the Society, or whose Persons or property form no objects of its laws."), *in* 2 THE WRITINGS OF JAMES MADISON 91, 91 (Gaillard Hunt ed., 1901).

87. Notes of John Adams on the Proceedings of the Continental Congress (July 26, 1776) (statements of James Wilson of Pennsylvania), *reprinted in* 6 J. CONTINENTAL CONGRESS 1077, 1078 (1906).

88. Notes of John Adams on the Proceedings of the Continental Congress (July 26, 1776) (statement of Thomas Jefferson of Virginia), *reprinted in* 6 J. CONTINENTAL CONGRESS 1077, 1077-78 (1906).

89. U.S. CONST. art. I, § 8, cl. 3.

90. Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980); *see also* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 n.7 (1973); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832). *But cf.* United States v. Kagama, 118 U.S. 375, 378-79, 383-84 (1886) (holding federal criminal statute constitutional, not under Indian Commerce Clause, for the code of common law crimes makes no reference to trade, but because Native Americans are "wards of the nation.").

Clearly the words themselves do not grant plenary power. The power extends only to "Commerce," and moreover, only to "Commerce . . . with the Indian Tribes," not to commerce within Native American nations and tribes. We have noted elsewhere that commerce "must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it."[91] "Commerce with foreign Nations" and "Commerce . . . among the several States" have never imputed to Congress a plenary power to regulate the essentially internal affairs of states[92] or foreign nations.[93]

However, if there remains any ambiguity that warrants that the Court look beyond the plain meaning and strict construction of the Indian Commerce Clause, to examine its history, then new evidence of the Framers' original intent, never before considered in the Court's decisions, confirms that the Constitution grants no such plenary power to Congress.

On August 18, 1787, while the Federal Convention was debating the powers of the legislative branch, James Madison first proposed the distinct power "[t]o regulate affairs with the Indians as well within as without the limits of the U. States."[94] It was this proposed power to regulate *all affairs* between Native American nations and the United States that the Framers rejected, and greatly contracted, to a power to regulate only *commerce* between the United States and Native American nations. The Committee of Detail disclaimed Madison's submitted plenary power and instead proposed to amend the power "[t]o regulate commerce with foreign nations, and among the several states"[95] to include commerce "with Indians, within the Limits of any State, not subject to the laws thereof."[96] On September 4, 1787, a second committee reported what is now the Commerce Clause, amending the power "[t]o regulate commerce with foreign nations, and among the several States"

91. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194 (1824).

92. *E.g.*, National Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) ("The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a state.").

93. Securities & Exch. Comm'n v. Myers, 285 F. Supp. 743, 746 (D. Md. 1968) (holding that the Foreign Commerce Clause does not grant the power to regulate commerce within foreign nations); United States v. Yunis, 681 F. Supp. 896, 907 n.24 (D.D.C. 1988) (under the Foreign Commerce Clause, Congress "is not empowered to regulate foreign commerce which has no connection to the United States. Unlike the states, foreign nations have never submitted to the sovereignty of the United States government nor ceded their regulatory powers to the United States."), *aff'd on other grounds*, 924 F.2d 1086 (D.C. Cir. 1991).

94. Notes of James Madison on the Proceedings of the Federal Convention (Aug. 18, 1787) (motion of James Madison), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 324, 324 (Max Farrand ed., rev. ed. 1937).

95. REPORT OF THE COMMITTEE OF DETAIL TO WHOM WERE REFERRED THE PROCEEDINGS OF THE FEDERAL CONVENTION art. VI [VII], § 1, cl. 2 (Aug. 6, 1787), *quoted in* Notes of James Madison on the Proceedings of the Federal Convention (Aug. 6, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 94, at 177, 181.

96. REPORT OF THE COMMITTEE OF DETAIL (Aug. 22, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 94, at 366, 367.

to include commerce "with the Indian tribes."[97]

The Framers intended what the Indian Commerce Clause plainly states: The national legislative power is limited to commerce between the United States and Native American nations and extends no further. The power to regulate commerce *with* Native American nations does not include a power to tax lands *within* Native American jurisdictions. The Framers clearly understood that Native American nations were not subject to the states' laws.

The dissent urges that, after two hundred years, the doctrine of stare decisis ought to prevail here. To adhere to the Constitution in this matter would unsettle a substantial body of federal and state statutes and judicial decisions and would implicate vast changes in federal and state power over Native American nations. It could disturb the extensive property rights and civil rights dependent upon that body of law and power. The benefit to Native American nations would be at substantial cost to the United States.

Not to adhere to the Constitution, however, destroys our very form of government by discarding the supreme law of the land. If Congress should retain a power notwithstanding contrary provision by the Constitution, what principle would remain to limit any other unconstitutional exercise of power by Congress, the President, or the Supreme Court? The endurance of constitutional error, whether by accident or artifice, and the neglect of constitutional and historical research, cannot create a power that never existed. "[W]hen convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions."[98] A decision to violate the Constitution is not a decision that we may let stand.[99]

Although the United States has no power to tax Native American lands under the Constitution, it remains to be asked whether the Yakima Nation granted such power by treaty. Under authority of the Treaty Clause,[100] the United States entered into a treaty with the Yakima Nation in 1855, which established the reservation lands at issue.[101] Treaties between the United

97. REPORT OF THE COMMITTEE OF ELEVEN TO WHOM SUCH PARTS OF THE CONSTITUTION, AS HAVE BEEN POSTPONED, AND SUCH PARTS OF REPORTS, AS HAVE NOT BEEN ACTED ON, WERE REFERRED para. 2 (Sept. 4, 1787), *quoted in* Notes of James Madison on the Proceedings of the Federal Convention (Sept. 4, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 94, at 496, 497.

98. Smith v. Allwright, 321 U.S. 649, 665 (1944) (overruling the Supreme Court's precedent and holding that a resolution of the state Democratic Party that excluded Blacks from voting in the state's Democratic primary was state action in violation of the Fifteenth Amendment), *quoted with approval in* South Carolina v. Gathers, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting).

99. U.S. CONST. art. VI, cl. 2 (Supremacy Clause); *see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-80 (1803).

100. U.S.CONST. art. II, § 2, cl. 2.

101. Treaty Between the United States and the Yakama Nation of Indians, *supra* note 19.

States and Native American nations are agreements between independent sovereigns.[102] The treaty between the United States and the Yakima Nation, this Court has construed, "was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."[103]

By the treaty, the confederated tribes and bands ceded "all their right, title, and interest in and to the lands and country occupied and claimed by them," but they expressly reserved the Yakima Indian Reservation "for the[ir] exclusive use and benefit."[104] By solemn agreement the United States acquiesced.[105] Neither Congress nor the President governed the Yakima Nation: It was "distinctly understood and agreed that at the time of the conclusion of this treaty Kamaiakun is the duly elected and authorized head chief of the confederated tribes and bands aforesaid, styled the Yakama nation, and is recognized as such by them and by the commissioners on the part of the United States."[106] Nowhere does the treaty grant the United States plenary power over the Yakima Nation and its members. Nowhere does it grant the United States the power to tax either the Yakima Nation's or its members' lands.

Even if the United States does not have the power to tax the Yakima Nation's lands, the question remains whether the State of Washington has independent authority to impose such a tax. The Tenth Amendment does not vest new powers in the States; the reservoir of authority in the states under the Tenth Amendment cannot exceed its original bounds. Native American nations were not subject to the states' jurisdiction in 1787, and the states do not have any independent authority to tax Native American lands now.[107]

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102. Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675, *modified*, 444 U.S. 816 (1979); *see also* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 549-50, 559-60 (1932).

103. United States v. Winans, 198 U.S. 371, 381 (1905), *cited with approval in* United States v. Wheeler, 435 U.S. 313, 327 n.24 (1978).

104. Treaty Between the United States and the Yakama Nation of Indians, *supra* note 19, arts. I-II, 12 Stat. at 951-52.

105. In Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 478 n.22 (1979), we held that Congress need not explicitly state its intent to abrogate the treaty with the Yakima Nation, but could do so impliedly. However, to violate the Yakima Nation's reserved right of self-government and to confer upon states general jurisdiction over Native American nations at the very least would require that Congress have the constitutional power to confer such jurisdiction in the first place. This power, the Court now holds, Congress has never had.

106. Treaty Between the United States and the Yakama Nation of Indians, *supra* note 19, art. V, 12 Stat. at 954.

107. *Cf.* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 177 (1973) ("statutes authorizing States to assert tax jurisdiction over reservations in special situations are explicable only if Congress assumed that the States lacked the power to impose the taxes without special authorization."); Van Brocklin v. Tennessee, 117 U.S. 151, 155 (1886) ("All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. . . . [T]here is a plain repugnance in conferring on one government a power to control the constitutional measures of another . . . ."), *cited with approval in* United States v. Rickert, 188 U.S. 432, 438-39 (1903).

IV
SOVEREIGNTY

In *Johnson v. McIntosh*,[108] the Court decided that England discovered and consequently became sovereign over the American colonies, which sovereignty it ceded with its title[109] to the states in the Treaty of Paris in 1783.[110] This sovereignty, the Court suggested, gave the United States power over Native Americans, independent of any Constitutional authorization.[111] The question thus remains, whether such power of sovereignty over Native Americans, exists in the United States, and whether it constitutes an independent ground to enact the General Allotment Act of 1887.

This question of sovereignty originates in claims by European rulers of the fifteenth and sixteenth centuries to dominion over lands in the "new world." In 1492, Ferdinand and Isabella of Spain empowered Christopher Columbus to discover and take the lands of Asia.[112] Lost, Columbus instead landed upon Native American lands. The Spanish Pope Alexander VI subsequently sanctified Spanish sovereignty over these lands of "very many peoples living in peace."[113]

In 1496, King Henry VII of England vested John Cabot with the same authority over Native American lands—lands "of the heathen and infidels whatsoeuer they be, and in what part of the world soeuer they be, which before this time haue bene vnknowen to all Christians"—"getting vnto vs the rule, title, and iurisdiction of the same villages, townes, castles, & firme land so found."[114]

In 1584 and 1585, Sir Walter Raleigh established an English colony in Virginia. Queen Elizabeth tendered authority to him to augment the realms of England and Ireland with Native American lands, with "full power to dispose thereof, and of euery part in fee-simple or otherwise, according to the order of the lawes of England."[115] She also conferred power to rule Native Americans:

> And . . . we . . . do giue and graunt to the said *Walter Ralegh*,

108. 21 U.S. (8 Wheat.) 543 (1823).

109. Title was established by quit-claims from France and Spain. Treaty of Peace, Feb. 10, 1763, Fr.-Gr. Brit.-Spain, arts. 4, 7, 42 Consol. T.S. 279, 324, 325.

110. Definitive Treaty of Peace Between the United States of America and His Britannic Majesty, Sept. 3, 1783, U.S.-Gr. Brit., arts. 1-2, 8 Stat. 80, 81-82.

111. *Johnson*, 21 U.S. (8 Wheat.) at 587-89; Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 543-44 (1832).

112. Privileges and Prerogatives Granted by Their Catholic Majesties to Christopher Columbus (1492), *in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 39 (Francis N. Thorpe ed., 1909) [hereinafter CONSTITUTIONS].

113. THE PAPAL BULL INTER CAETERA (1493), *in* EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES TO 1684, at 71, 76 (Frances G. Davenport ed., 1967).

114. Letters Patent to John Cabot (1496), *in* 1 CONSTITUTIONS, *supra* note 112, at 46, 46.

115. Charter to Sir Walter Raleigh (1584), *in* 1 CONSTITUTIONS, *supra* note 112, at 53, 54.

> . . . that hee . . . shall . . . , within the said mentioned remote landes . . . haue full and meere power and authoritie to correct, punish, pardon, gouerne, and rule by their and euery or any of their good discretions and pollicies, as well in causes capital, or criminall, as ciuil, . . . all . . . that shall at any time hereafter inhabite any such landes, countreis, or territories as aforesaide . . . .[116]

To these grants the English Crown added others. The charters of New Jersey, Delaware, Pennsylvania, Rhode-Island and Providence Plantations, New York, Maryland, and New Hampshire specified definite limits.[117] The charters of Georgia, North Carolina, South Carolina, Connecticut, Massachusetts Bay, and Virginia all granted expanses westward "to the South Sea."[118]

After the colonies declared independence from the Crown in 1776, where did sovereignty within these lands reside? The Framers debated the question at length, employing different theories with significantly different practical consequences. In common, however, the debate focused on the locus and nature of *political* sovereignty, of governmental authority over the people, not of *territorial* sovereignty.

The task before the Framers was to design a *political* sovereignty that would represent and protect civil rights, both personal and property. The histories of the colonial period recount a transformation from royal sovereignty to popular sovereignty, from the Crown as sovereign to the People as sovereign. The sovereignty of the Crown was assumed by the People, who divided it into its parts and allocated these political powers among the states and the United States, and among the legislative, executive, and judicial branches of government. The People became the fount of political sovereignty, ratifying the Constitution and instituting a system of checks and balances to ensure representation of their diverse and opposed interests.[119]

The framing of the new constitution did not resolve any questions of *terri-*

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116. *Id.* at 55.

117. Charles II's Grant of New England to the Duke of York (1712) (charter of territory including New Jersey), *in* 5 CONSTITUTIONS, *supra* note 112, at 2590, 2590-91; Charter of Delaware (1701) ("the Territories of Pennsylvania"), *in* 1 CONSTITUTIONS, *supra* note 112, at 557, 557; Charter of the Province of Pennsylvania (1681), *in* 5 CONSTITUTIONS, *supra* note 112, at 3035, 3036; Charter of Rhode-Island and Providence Plantations (1663), *in* 6 CONSTITUTIONS, *supra* note 112, at 3211, 3220-21; Grant of the Province of Maine to the Duke of New York (1674) (charter of territory including part of the present state of New York), *in* 3 CONSTITUTIONS, *supra* note 112, at 1641, 1641; Charter of Maryland (1632), *in* 3 CONSTITUTIONS, *supra* note 112, at 1677, 1678; Grant of New Hampshire to Capt. John Mason (1629), *in* 4 CONSTITUTIONS, *supra* note 112, at 2433, 2434.

118. Charter of Georgia (1732), *in* 2 CONSTITUTIONS, *supra* note 112, at 765, 771; Charter of Carolina (1665) (charter of territory including North Carolina and South Carolina), *in* 5 CONSTITUTIONS, *supra* note 112, at 2743, 2762-63; Charter of Connecticut (1662), *in* 1 CONSTITUTIONS, *supra* note 112, at 529, 535; Charter of Massachusetts Bay (1629), *in* 3 CONSTITUTIONS, *supra* note 112, at 1846, 1850; Charter of Virginia (1612) ("from Sea to Sea West and North-west"), *in* 7 CONSTITUTIONS, *supra* note 112, at 3802, 3803.

119. FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 276-80, 282-84 (1985); GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 344-89, 593-615 (1969). As the Court holds today, the political

torial sovereignty. At stake in the deliberations were numerous land claims by individuals, speculators, and states to territory west of the seaboard. Speculators who had purchased land directly from Native American nations maintained that these nations were the true sovereigns, thus having sovereign power to sell the lands despite any prohibition or regulation by colonial governments. In contrast, colonies with extensive land under charter from the Crown argued that the Crown's territorial sovereignty over them devolved to each state, in order to preserve the existing inequality of territory and power. Smaller colonies argued that the Western lands were unsurveyed and unsettled, that they were taken by common blood and toil, and that therefore the Crown's sovereignty over them transferred to the Continental Congress.[120]

The Framers expressly determined not to decide these issues of territorial sovereignty. As one delegate stated, they were "for doing nothing in the constitution in the present case, and for leaving the whole matter in Statu [sic] quo."[121] Therefore, the Framers provided that "nothing in this Constitution shall be so construed as to Prejudice any Claims [to territory] of the United States, or of any particular State."[122] Thus, the Constitution establishes no power of territorial sovereignty over Native American lands.

In 1823, however, Chief Justice Marshall traced a power of territorial sovereignty to the doctrine of discovery. The principle of discovery and the power it conferred, as the Chief Justice described it, operated among the European nations only. Whichever European nation first discovered lands in the new world had the first right to purchase those lands from the Native American nations. The principle governed relations among European nations and could be enforced against European nations, but Native American nations, never having agreed to it, let alone having known of it, could not be bound. So the Court wrote:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the

sovereignty delineated by the Constitution did not and does not govern Native American nations, and the Framers never intended it to do so.

120. 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 182-95 (1971); MERRILL JENSEN, THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 1774-1781, at 150-60, 211-24 (1940); MCDONALD, *supra* note 119, at 145-50.

121. Notes of James Madison on the Proceedings of the Federal Convention (Aug. 30, 1787) (statement of Hugh Williamson of North Carolina), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 94, at 461, 462.

122. U.S. CONST. art IV, § 3, cl. 2.

> inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated, as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented. Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.[123]

In these broad brushstrokes the Court accurately paraphrased the law of nations at the time.[124] Indeed, even myopic scholars of international law who

123. Johnson v. McIntosh, 21 U.S. (8 Wheat) 543, 572-73 (1823).

124. EMMERICH DE VATTEL, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE [THE LAW OF NATIONS, OR PRINCIPLES OF NATURAL LAW] bk. 1, § 207 (1st ed. 1758), *translated in* 4-3 CLASSICS OF INTERNATIONAL LAW 84 (James Scott ed., Charles G. Fenwick trans., 1916); *cf.* HUIG DE GROOT [HUGO GROTIUS], DE JURE BELLI AC PACIS LIBRI TRES [ON THE LAW OF WAR AND PEACE IN THREE VOLUMES] bk. 2, ch. 2, § XVII, ch. 3, § IV (rev. ed. 1646), *translated in* 3-2 CLASSICS OF INTERNATIONAL LAW 206 (James Scott ed., 1925) (when colonies take land from neighboring territories and assign it to colonists, "jurisdiction over the lands which were assigned nevertheless remained under the control of those from whose territory they were taken").

The doctrine of discovery, where it established title, did so to uninhabited territory only. DE VATTEL, *supra*, bk. 1, §§ 204-05, 207; *see* DE GROOT, *supra*, bk. 2, ch. 2, § XVII, ch. 3, § IV; JOHN LOCKE, TWO TREATISES OF GOVERNMENT: ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT, AND END OF CIVIL GOVERNMENT § 9 (Peter Laslett ed., rev. ed., J.M. Dent and Sons, Ltd. 1963) (rev. 3d ed. 1698); 1 FRANCISCUS DE VICTORIA, RELECTIONES THEOLOGICAE XII: DE INDIS [TWELVE THEOLOGICAL LECTURES: ON INDIANS] * 359-60 (Johann Simon ed., 1696) (1557), *translated in* 7 CLASSICS OF INTERNATIONAL LAW 138-39 (James Scott ed., 1917). *But cf.* 1 CHARLES LOUIS DE SECONDAT [BARON DE MONTESQUIEU], ESPRIT DES LOIS [THE SPIRIT OF LAWS] bk. 18, chs. 11-13 (Colonial Press, 1900) (1748); ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 653 (Edwin Cannan ed., Modern Library Random House 1937) (5th ed. 1789); DE VATTEL, *supra*, bk. 1, § 209 ("There is another . . . question which has arisen principally in connection with the discovery of the New World[,] . . . whether a Nation may lawfully occupy any part of a vast territory in which are to be found only wandering tribes whose small numbers can not populate the whole country. . . . [T]hese tribes can not take to themselves more land than they have need of or can inhabit and cultivate. Their uncertain occupancy of these vast regions can not be held as a real and lawful taking of possession; and when the Nations of Europe, which are too confined at home, come upon lands which the savages have no special need of and are making no present and continuous use of, they may lawfully take possession of them and establish colonies in them.").

defined Native Americans as barbarians deemed the Native Americans to be the "true owners."[125] As John Locke wrote, "Those who have the Supream Power of making Laws in *England*, *France* or *Holland*, are to an *Indian*, but like the rest of the World, Men without Authority . . . ."[126]

Chief Justice Marshall's opinion then proceeded to take two leaps of logic. The opinion first transformed a doctrine governing the priority of rights among European nations only, into a doctrine governing the priority of rights between European nations and Native American nations:

> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were, necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil, at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.[127]

The opinion next equated discovery of Native American lands with conquest of them:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So too, with respect to the concomitant principle, that the Indian inhabitants are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the absolute title to others. However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice.[128]

In sum, Chief Justice Marshall transformed a doctrine creating rights among European nations, establishing "title . . . against all other European governments,"[129] into a right establishing title against the indigenous nations: "dis-

125. 1 DE VICTORIA, *supra* note 124, at * 359-60.

126. LOCKE, *supra* note 124, § 9.

127. *Johnson*, 21 U.S. (8 Wheat.) at 574; *accord* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) at 17; Worcester v. Georgia, 31 U.S. (6 Pet.) at 543-44.

128. *Johnson*, 21 U.S. (8 Wheat.) at 591-92; *accord Worcester*, 31 U.S. (6 Pet.) at 544-45.

129. *Johnson*, 21 U.S. (8 Wheat.) at 573.

covery gave exclusive title to those who made it."[130] He then cast the pretense farther, "converting the discovery of an inhabited country into conquest," in order to assert the United States' territorial sovereignty over the Western territories.[131]

The claim fails to be supported not only by the Constitution and by the law of nations, but also by historical fact.[132] In 1763, Sir William Johnson wrote to the Lords of Trade:

> The Indians of the Ottawa Confederacy . . . and also the Six Nations, however their sentiments may have been misrepresented, all along considered the Northern parts of North America, as their sole property from the beginning; and although the conveniency of Trade, (with fair speaches and promises) induced them to afford both, us and the French settlements in their Country, yet they have never understood such settlement as a Dominion, especially as neither we, nor the French ever made a conquest of them; they have even repeatedly said at several conferences in my presence, that "they were amused by "both parties with stories of their upright intentions, and that they made War for the protection "of the Indians Rights, but that they plainly found, it was carried on, to see who would become "masters of what was the property of neither one nor the other."[133]

After the Declaration of Independence in 1776, the United States entered into a treaty with the Delaware Nation "guarantee[ing] to the aforesaid nation of Delawares, and their heirs, all their teritoreal rights in the fullest and most ample manner, as it hath been bounded by former treaties."[134] The treaty expressly denied the allegation that the United States "design[ed] . . . to extirpate the Indians and take possession of their country."[135] The states and the Delaware Nation became allies of each other in case of "war with any other nation or nations."[136] The indigenous nations could even form a state and join the confederation with representation in Congress.[137]

In 1789, the United States' Secretary of War admitted:

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130. *Id.* at 574.

131. *Id.* at 591.

132. Savage, *supra* note 81, at 87-115.

133. Letter from Sir William Johnson to the Lords of Trade (Nov. 13, 1763), *in* 7 DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW-YORK 572, 575 (E.B. O'Callaghan ed., Albany, Weed, Parsons and Company Printers, 1856) (the quotation marks are as they appear in the original).

134. Treaty with the Delaware Nation, Sept. 17, 1778, U.S.-Delaware Nation, art. 6, 7 Stat. 13, 14.

135. *Id.*

136. *Id.* art. 2 ("if either of the parties are engaged in a just and necessary war with any other nation or nations, that then each shall assist the other in due proportion to their abilities, till their enemies are brought to reasonable terms of accommodation").

137. *Id.* art. 6 (inviting the Delawares and other tribes "to join the present confederation, and to form a state whereof the Delaware nation shall be the head, and have a representation in Congress: Provided, nothing contained in this article to be considered as conclusive until it meets with the approbation of Congress.").

> The Indians being the prior occupants, possess the right of the soil. It cannot be taken from them unless by their free consent, or by the right of conquest in case of a just war. To dispossess them on any other principle, would be a gross violation of the fundamental laws of nature, and of that distributive justice which is the glory of a nation.[138]

While the United States sometimes employed a rhetoric of sovereignty and even conquest in negotiations with Native American nations, Congress conceded "[t]he principle of the Indian right to the lands they possess."[139] There was no just war to take the lands and homes of the indigenous peoples here, and the Secretary of War admitted as much.[140] The United States professed the same truth more than a century later:

> By the year 1880 it was pretty well understood in Congress and in the Indian Bureau that the causes of the Indian wars which were still raging in the frontier were probably those continuous violations of treaties by the Government. Nearly all of the Indian wars arose out of acts of aggression by the Government directed against Indian land in violation of treaties.[141]

Any claim that the United States acquired sovereignty over Native American nations and lands, and thus independent power to enact the General Allotment Act of 1887, finds no support in the Constitution, in the judicial construct "discovery," or in historical fact. The various treaties touching the lands at issue conferred no such sovereignty, either.

In the nineteenth century, Spain, Russia, and Great Britain quit any claim to the lands at issue.[142] Quitclaims could not confer upon the United States what it did not already have. The Yakima Nation was not a party to these treaties. The treaty with Spain provided that the inhabitants within the territory "shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution."[143] After Great Britain quit its claim to the lands in question, the United States established the first temporary government of the Oregon Territory in 1848. The rights of Native Americans were not to be impaired and the provisions of the

138. Report of Henry Knox, Secretary of War, to George Washington, President of the United States, Relative to the Northwestern Indians (June 15, 1789), *in* 2-1 AMERICAN STATE PAPERS: INDIAN AFFAIRS 12, 13 (Walter Lowrie & Mathew Clarke eds., Washington, D.C., Gates and Seaton 1832).

139. *Id.*

140. *Id.*

141. *Readjustment of Indian Affairs*, *supra* note 9, at 32.

142. Treaty with Spain, Feb. 22, 1819, U.S.-Spain, art. 3, 8 Stat. 251, 254, 256; Treaty with Russia, Apr. 17, 1824, U.S.-Russia, art. 3, 8 Stat. 302, 304; Treaty with Great Britain, June 15, 1846, U.S.-Gr. Brit., art. I, 9 Stat. 869, 869.

143. Treaty with Spain, *supra* note 142, art. 6, 8 Stat. at 256, 258.

Northwest Ordinance of 1787[144] applied to Native Americans.[145] Accordingly, one provision required that "[t]he utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorised by Congress . . . ."[146] Native Americans in the Oregon Territory were not subject "to the existing laws regulating trade and intercourse with the Indian tribes in the other Territories of the United States," for the United States should first seek their agreement to these laws,[147] even if the Act then undertook to apply them.[148]

The Yakima Nation has lived upon its lands for twelve thousand years, long before the coming of the Spanish, English, French, or Russians. Spain, Russia, and Great Britain could not cede that which did not belong to them,[149] including the land and government of the Yakima Nation. Instead, the treaty between the Yakima Nation and the United States recognized that the Yakima Nation governed itself and that the Yakima Nation's land remained for its own exclusive use and benefit.[150] The United States did not acquire territorial sovereignty, and thus territorial sovereignty cannot provide an independent ground for enacting the General Allotment Act of 1887.

V
CONCLUSION

As this Court recognized long ago, when Maryland tried to tax the Bank of the United States, "the power to tax involves the power to destroy."[151] And as the Yakima Nation's suit to prevent foreclosure on the Nation's lands and the lands of its members demonstrates, a power in the State of Washington to tax the lands of the Yakima Nation and its members involves the power to destroy the reservation. The United States has no such power of taxation, and it therefore cannot delegate such power to the State of Washington. We have searched the entire Constitution for this power, and even the law of nations, but we must hold today that 25 U.S.C. § 349 is unconstitutional, that the doctrine of discovery establishes no territorial sovereignty sufficient to enact the General Allotment Act, and that the Treaty between the United States and the Yakima Nation does not provide any alternative authority for such taxes. To the extent that they are inconsistent with this opinion, prior decisions, includ-

144. [Northwest] Ordinance of July 13, 1787, *in* 32 J. CONTINENTAL CONGRESS 334, 340-41 (1936), *ratified in* Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.

145. Act of Aug. 14, 1848, ch. 177, §§ 1, 14, 9 Stat. 323, 323, 329.

146. [Northwest] Ordinance of July 13, 1787, art. 3, *in* 32 J. CONTINENTAL CONGRESS 334, 340-41 (1936), *ratified in* Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.

147. Act of June 5, 1850, ch. 16, § 1, 9 Stat. 437, 437.

148. *Id.* § 5, 9 Stat. at 437.

149. United States v. Perchman, 32 U.S. (7 Pet.) 51, 87 (1833).

150. Treaty between the United States and the Yakama Nation of Indians, *supra* note 19, arts. I, II, V, 12 Stat. at 951-52, 954.

151. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 431 (1819).

ing *Johnson v. McIntosh*[152] and *Cherokee Nation v. Georgia*[153] are hereby overruled. The tax being unconstitutional, the lands of the Yakima Nation and its members shall not be sold at the tax foreclosure sale. The judgment of the Court of Appeals is reversed, except to the extent that it enjoined the excise tax, and the cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

152. 21 U.S. (8 Wheat.) 543 (1823).
153. 30 U.S. (5 Pet.) 1 (1831).

SUPREME COURT OF THE UNITED STATES

Nos. 90-408 AND 90-577

COUNTY OF YAKIMA AND DALE A. GRAY,
YAKIMA COUNTY TREASURER, PETITIONERS
90-408 v.
CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION

CONFEDERATED TRIBES AND BANDS OF THE
YAKIMA INDIAN NATION, PETITIONER
90-577 v.
COUNTY OF YAKIMA AND DALE A. GRAY,
YAKIMA COUNTY TREASURER

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[January 14, 1992]

CONCURRING IN PART IN THE JUDGMENT AND DISSENTING IN PART FROM THE JUDGMENT:

The Court dwells upon the consequences of a power to tax for the few parcels of land at issue here, but ignores the unfathomable consequences of overruling two hundred years of law regulating the relationship between Indians and the United States. Generations of Americans, and generations of Indians for that matter, have lived and ordered their lives around the certain knowledge that the United States has plenary power over the Indian tribes. Today's decision demolishes that certainty. The benefits of the Court's decision for the Indian nations cannot outweigh the risks and costs to American property rights, civil rights, criminal rights, commercial rights, mineral rights, timber rights, and water rights on Indian reservations. Even an error of constitutional dimension does not justify the consequences of the Court's decision today.

The doctrine of stare decisis ought to govern this case. For good reason, it is a doctrine grounded in considerations of prudence and pragmatism as well as consistency in the rule of law. Five Justices may be able to reverse a judgment of the Ninth Circuit, but they cannot reverse history.

We concur in the opinion insofar as it finds that the General Allotment Act of 1887 authorizes the states to tax the Indians' lands allotted and patented in fee. We also concur in the judgment insofar as it concerns the excise tax. We assuredly dissent from any decision to overrule this Court's settled precedents and to deny to the United States plenary power over Indians and their lands, and we dissent from a judgment that refuses to abide by Congress's clear intent to permit state taxation of the Yakimas' lands.