THE PLENARY POWER BACKGROUND OF *CURTISS-WRIGHT*

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INTRODUCTION

In his article *The Transformation of the Constitutional Regime of Foreign Relations*,[1] Professor Ted White argues that the early twentieth century saw a major shift in constitutional understandings and expectations regarding the distribution of authority in foreign affairs. According to White, until that era the foreign affairs power, like all other powers under the Constitution, were considered subject to a formalistic, essentialist world view in which powers were distributed by the text of the Constitution according to clear principles of federalism and separation of powers. Congress and the President could only exercise powers in this area that had been dedicated to them by the text of the Constitution or that were reasonably implied therefrom, with such exercise subject to the other constraints enumerated in the Constitution. Article II treaties made by the President with the advice and consent of the Senate were assumed to be the primary medium for the exercise of the foreign affairs power, and the treaty power also was assumed to be subject to the constraints of separation of powers, individual rights, and federalism.

White argues compellingly that these assumptions became muddled in the early twentieth century, as contrary visions of the foreign affairs power found expression in a series of cases addressing the constitutional status of executive agreements, the effect of treaties on "reserved" state powers, and the primacy of executive branch determinations in foreign sovereign immunity cases. Thus, in *Missouri v. Holland*,[2] the Supreme Court abandoned the theory that powers reserved to the states under the Tenth Amendment placed meaningful

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1. G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999).

2. 252 U.S. 416 (1920).

limits on the exercise of the treaty power. In *United States v. Belmont*[3] and *United States v. Pink*,[4] the Court confirmed the hegemony of the national government over foreign affairs, and drastically undermined the Senate's constitutional role in treaty making by upholding a unilateral executive agreement settling foreign claims. Similarly, with the decisions in *Ex Parte Peru*[5] and *Mexico v. Hoffman*,[6] the Supreme Court rejected the traditional role of the courts in independently evaluating sovereign immunity in favor of deference to executive determinations in this area. Finally, the decision in *United States v. Curtiss-Wright Export Corp.*[7] articulated an expansive theory of executive hegemony, grounded in the concept of the Executive as the "sole organ"[8] in foreign affairs. Each of these cases, White argues, resulted in the transfer of power from the states and Congress to the executive branch, such that "by the late 1930s federal executive hegemony in foreign relations had become constitutional orthodoxy."[9] In the process, foreign affairs law was divorced from the assumptions of the orthodox, essentialist regime.

White's analysis reveals important connections among the early-twentieth-century foreign affairs decisions and identifies a significant and undeniable trend in the Supreme Court's jurisprudence during this period. Undoubtedly, decisions such as *Missouri v. Holland* and *Curtiss-Wright* clarified the distribution of powers in foreign affairs and crystallized many modern assumptions about the foreign affairs power in American jurisprudence. White's analysis of this evolution significantly advances our understanding of contemporary doctrine in this area. Nevertheless, we should be cautious not to overdramatize the extent of the transformation, and it strikes me that neither the nineteenth-century orthodoxy, nor the assumptions that replaced it, are as unambiguous as White suggests.

Take the notion of federalism as a limitation on the treaty power before the decision in *Missouri v. Holland*, for example.

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3. 301 U.S. 324 (1937).
4. 315 U.S. 203 (1942).
5. 318 U.S. 578 (1943).
6. 324 U.S. 30 (1945).
7. 299 U.S. 304 (1936).
8. *Id.* at 320.
9. White, *supra* note 1, at 5.

From the drafting of the Constitution, the relationship among the treaty power, the Supremacy Clause, and the reserved powers was ambiguous, leading even states' rights proponents such as William Rawle to argue that, in contrast to the system under the Articles of Confederation, "[i]n our present Constitution no limitations [on the treaty power] were held necessary."[10] As White acknowledges, although the Supreme Court had addressed several cases involving conflicts between treaty provisions and existing state legislation during the nineteenth century, the Court had never invalidated a treaty provision on the grounds that it conflicted with reserved state powers.[11] To the contrary, at least with respect to the rights of aliens, the Court had repeatedly invoked the treaty power to invalidate legislation in areas traditionally addressed by states, including statutes of limitations,[12] confiscation,[13] and escheat of land.[14] As early as 1832, the Supreme Court had held that the United States, by the exercise of the treaty power, had precluded the application of state legislation in Indian territory.[15] Furthermore, the Court throughout the nineteenth century construed the treaty power as bestowing broad authority on Congress to create non-Article III courts,[16] to govern Indian tribes,[17] and to dissolve property rights[18]—

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10. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES 65 (2d ed. 1829).

11. *See* White, *supra* note 1, at 27 & n.72. In the only case in which the Court upheld the enforcement of a state law in the face of a treaty, *see* Provost v. Greneaux, 60 U.S. (19 How.) 1 (1856), the treaty's operation was expressly limited "to the States of the Union whose laws permit it." White, *supra* note 1, at 24-25 n.73 (quoting 1853 treaty).

12. *See* Hopkirk v. Bell, 7 U.S. (3 Cranch) 454 (1806).

13. *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).

14. *See* Blythe v. Hinckley, 180 U.S. 333, 340 (1901); Geofroy v. Riggs, 133 U.S. 258 (1890); Hauenstein v. Lynham, 100 U.S. 483 (1879); Chirac v. Chirac, 15 U.S. (2 Wheat.) 259, 275 (1817).

15. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). The Jackson Administration had argued that the United States would not "countenance . . . an independent [Cherokee] government" and that the Cherokees must "submit to the laws of . . . states." Andrew Jackson, Message to Congress (Dec. 8, 1829), *quoted in* G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835, at 718 (1988). Justice Marshall rejected this position, finding that prior treaties established a Cherokee territory "in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter." 31 U.S. (6 Pet.) at 561.

16. *See* American Ins. v. Cantor, 26 U.S. (1 Pet.) 511 (1828); *see also In re* Ross, 140 U.S. 453 (1891).

17. *See Ex Parte* Crow Dog, 109 U.S. 556, 567 (1883); Worcester v. Georgia,

powers which otherwise could have been considered beyond the scope of Article I. In other words, although the Court's rhetoric in decisions such as *Geofroy v. Riggs*[19] respected states' rights in this area, in practice federalism—and the Constitution as a whole—had placed few meaningful limits on the exercise of the treaty power.

The subsequent impact of *Missouri v. Holland* similarly should not be overstated. Despite Justice Holmes's language of expansive federal authority, federalism has retained force at least as a political limit on the treaty power, particularly in the human rights area. Federalism concerns significantly shaped the United States's negotiations over the terms of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights,[20] were a primary motivating force behind the Bricker Amendment in the 1950s,[21] and formed the basis for opposition to U.S. ratification of the International Labour Organisation Conventions.[22] More recently, federalism concerns have resulted in the attachment of a variety of reservations, understandings, and provisos to human rights conventions,[23] and remain a primary obstacle to

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31 U.S. (6 Pet.) 515, 559 (1832).

18. *See* Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890).

19. 133 U.S. 258, 267 (1890) ("It would not be contended that [the treaty power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent.").

20. *See generally* NATALIE H. KAUFMAN, HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION (1990).

21. *See* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995).

22. *See* Stephen I. Schlossberg, *United States Participation in the ILO: Redefining the Role*, 11 COMP. LAB. L.J. 48, 68 (1989).

23. *See* Henkin, *supra* note 21. The United States's 1951 reservation to the Charter of the Organization of American States, for example, provided that nothing in the Charter should be understood as enlarging the powers of the federal government or limiting the powers reserved to the states under the Constitution. *See* OAS Charter, Apr. 30, 1948, 2 U.S.T. 2394, 2484. The United States's ratification of the International Covenant on Civil and Political Rights similarly included the somewhat tortured declaration "that the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein and otherwise by the state and local governments. The Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant." International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-2

U.S. ratification of the Convention on the Rights of the Child.[24] Furthermore, recent scholarship has attempted to resurrect federalism limits on the treaty power.[25]

A complete treatment of the many interesting doctrinal developments noted in White's article is well beyond the scope of this essay. I will therefore focus my comments on one significant element of continuity between the early-twentieth-century foreign affairs jurisprudence and its predecessors, that is, the nineteenth-century origins of the doctrine of inherent plenary power[26] in *Curtiss-Wright.*

I. THE DOCTRINE OF INHERENT PLENARY POWER AND *CURTISS-WRIGHT*

Justice Sutherland's majority opinion in *Curtiss-Wright* represents the apex of the doctrine of plenary executive power over foreign affairs[27] and provides critical support for Professor White's thesis. The case presented the question whether a statute authorizing the Executive to prohibit arms sales abroad violated the nondelegation doctrine. In the opinion, Sutherland drew a clear distinction between constitutional analysis of domestic and foreign relations.[28] While accepting that authority over domestic relations was based on traditional concepts of limited government derived from enumerated and

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(1966).

24. *See, e.g.*, Susan Kilbourne, *U.S. Failure to Ratify the U.N. Convention on the Rights of the Child: Playing Politics with Children's Rights*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 437, 440-56 (1996).

25. *See, e.g.*, Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998); Thomas Healy, *Is* Missouri v. Holland *Still Good Law? Federalism and the Treaty Power*, 98 COLUM. L. REV. 1726 (1998).

26. The concept of plenary power has a range of meanings in constitutional jurisprudence extending well beyond the foreign affairs arena. For the purposes of this paper, plenary power is used to refer to power that is dedicated to the exclusive discretion of one branch of government, which derives from extra-textual sources of authority, such as international law or sovereignty, and which is largely insulated from judicial review.

27. A number of earlier decisions contained language that seemed to support broad executive authority over foreign affairs. *See, e.g.*, *In re* Neagle, 135 U.S. 1 (1890); The Prize Cases, 67 U.S. (2 Black) 635 (1862); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827); Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804). None of these cases, however, embraced the principle as explicitly, or with as little concern for an enumerated-powers grounding, as *Curtiss-Wright.*

28. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315 (1936).

reserved powers, Sutherland simultaneously unhinged the foreign affairs power from any such constraints.[29] Authority over foreign affairs, he argued, did not derive from the text of the Constitution, but was a power inherent in sovereignty:[30]

> It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.[31]

Sutherland thus abandoned the traditional distinction between enumerated, separated, and reserved powers and replaced it with a distinction between domestic and foreign affairs, with the latter derived from a broad theory of inherent plenary power that he ultimately rooted in the executive branch.[32] Participation by the other branches in this power was "significantly limited."[33] In light of "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations,"[34] he concluded, a broad delegation of authority from Congress to the President in this area did not violate the nondelegation doctrine.

Leaving aside the extensive debate over Justice Sutherland's theory of history,[35] the decision is notable for its striking contrast to the domestic opinions of the day. Two

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29. *See id.* at 315-16 ("The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper . . . is categorically true only in respect of our internal affairs.").

30. *See id.* at 316-17.

31. *Id.* at 318.

32. *See id.* at 319.

33. *Id.*

34. *Id.* at 320.

35. *See* CHARLES A. LOFGREN, *The Foreign Relations Power:* United States v. Curtiss-Wright Export Corporation*: An Historical Reassessment, in* GOVERNMENT FROM REFLECTION AND CHOICE 167 (1986); L. Fisher, *Evolution of Presidential and Congressional Powers in Foreign Affairs, in* LOUIS W. KOENIG ET AL., CONGRESS, THE PRESIDENCY, AND THE TAIWAN RELATIONS ACT 20 (1985); David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946).

terms earlier, the Court had decided *Panama Refining Co. v. Ryan*[36] and *A.L.A. Schechter Poultry Corp. v. United States*,[37] the only two cases in which the Court has ever invalidated legislation as an unconstitutional delegation of congressional authority. And only six months before, Justice Sutherland himself had authored the opinion in *Carter v. Carter Coal Co.*,[38] striking down labor legislation as violating Congress's powers under the Commerce Clause. All of these decisions were based on highly formalistic views of the enumerated authority of the federal government—views that Sutherland deemed irrelevant to the foreign affairs power in *Curtiss-Wright*.

Professor White is correct that the decision in *Curtiss-Wright* forms the cornerstone of modern day foreign affairs exceptionalism,[39] and the reasoning of the decision certainly suggests a radical break with an essentialist view of constitutional jurisprudence. Here again, however, the transformation wrought by *Curtiss-Wright* may be more limited than White asserts. Decisions of the day suggest that *Curtiss-Wright* did not radically transform executive power over foreign affairs. Moreover, the theory of inherent plenary power over foreign affairs that Sutherland articulated had lengthy roots in nineteenth-century jurisprudence.

II. CONTINUITY WITH CONTEMPORARY JURISPRUDENCE

Despite Justice Sutherland's expansive rhetoric regarding the "sole organ" power, *Curtiss-Wright* did not introduce an era of "executive hegemony" absent the wishes of Congress, nor did it eliminate the role of the courts in foreign affairs. *Curtiss-Wright* involved a case, not where the President acted independently from Congress, but where he acted pursuant to an express congressional delegation of authority and a "uniform, long-continued and undisputed legislative practice."[40] In this sense, *Curtiss-Wright* may have foreshadowed the demise of the nondelegation doctrine in constitutional jurisprudence generally, but it did not abolish the separation of

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36. 293 U.S. 388 (1935).
37. 295 U.S. 495 (1935).
38. 298 U.S. 238 (1936).
39. *See* G. Edward White, *Observations on the Turning of Foreign Affairs Jurisprudence*, 70 U. COLO. L. REV. 1109 (1999).
40. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 329 (1936).

powers in foreign affairs. As Justice Jackson later noted in his famous concurrence to *Youngstown Sheet & Tube Co. v. Sawyer*, the decision on its face stands for the unremarkable proposition that, when acting together, the Executive *and* Congress enjoy substantial discretion in this area.[41]

Decisions of the era confirm that *Curtiss-Wright* neither clearly established unilateral executive hegemony nor obliterated the judicial role in foreign affairs. Indeed, decisions rejecting unilateral executive actions were common in the 1930s. In *Cook v. United States*,[42] decided in 1933, for example, the Court held that a treaty with Great Britain barred the Executive from seeking a criminal prosecution. Only a month before the decision in *Curtiss-Wright*, the Court held that the President had no inherent authority to extradite in the absence of legislation or a treaty.[43] And in 1939 in *Perkins v. Elg*,[44] the Court interpreted a treaty against the wishes of the Executive to bar a deportation. Perhaps most importantly, a decade and a half later in *Youngstown*, the Court rejected an inherent powers argument and applied a highly formalistic concept of separation of powers to conclude that President Truman's seizure of the steel mills in the heat of the Korean War constituted an unauthorized legislative act.[45] The Court, moreover, repeatedly has confirmed its authority to review the legality of governmental action in the foreign affairs area,[46] though often with significant deference to executive action.

Nor, of course, was the concept of executive primacy in foreign affairs unknown in the pre-*Curtiss-Wright* era. Since the famous debates between "Pacificus" and "Helvedius," some jurists, lawmakers, and commentators had asserted that the foreign affairs power was exclusively an executive function,

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41. *See* 343 U.S. 579, 635 n.2 (1952) (Jackson, J., concurring).
42. 288 U.S. 102 (1933).
43. *See* Valentine v. United States *ex rel.* Neidecker, 299 U.S. 5, 8 (1936).
44. 307 U.S. 325, 335-42 (1939).
45. *See Youngstown Sheet & Tube Co.*, 343 U.S. at 579.
46. *See* Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986); INS v. Chadha, 462 U.S. 919 (1983); Dames & Moore v. Regan, 453 U.S. 654 (1981); New York Times Co. v. United States, 403 U.S. 713 (1971); United States v. Robel, 389 U.S. 258, 263 (1967); Aptheker v. United States, 378 U.S. 500 (1964); Baker v. Carr, 369 U.S. 186 (1962); Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); Kent v. Dulles, 357 U.S. 116 (1958).

subsumed by the "Executive Power."[47] Hamilton went so far as to argue that, at least where the common defense was concerned, the power "ought to exist without limitation . . . . The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed."[48]

These debates are familiar to students of the foreign affairs power. Perhaps less familiar, however, is the extent to which the doctrine of plenary power over foreign relations had been developed nearly four decades prior to *Curtiss-Wright*.

III. THE NINETEENTH-CENTURY INHERENT POWERS DOCTRINE

Although the concept of executive plenary power over foreign relations found its fullest expression in *Curtiss-Wright*, Justice Sutherland's method of finding extra-constitutional authority for federal action over foreign affairs was entirely familiar to Supreme Court jurisprudence. Indeed, the doctrine of inherent plenary power articulated by Sutherland had roots deep into the early nineteenth century, particularly in judicial decisions relating to Indians, aliens, and territories. Most of the Supreme Court decisions in these areas addressed the exercise of congressional, rather than executive, authority. Nevertheless, they formed the basis for the theory of an extra-constitutional foreign affairs authority, derived from concepts of international law and sovereignty, and not clearly subject to traditional constitutional constraints or to judicial review, which found ultimate expression in *Curtiss-Wright*. To the extent that there has been a "divorce" of foreign affairs law from traditional essentialist views of constitutional interpretation, I would argue, the divergence occurred during the course of the nineteenth century, and culminated in a series of cases decided forty years before *Curtiss-Wright*.

Controversies involving Indians, aliens, and territories shared a number of characteristics that led them to be treated

47. *See* EDWARD S. CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS 8-27 (1917).

48. THE FEDERALIST NO. 23, at 147 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); *see also* THE FEDERALIST NO. 31, at 193 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

by the courts as foreign relations issues from an early date.[49] All three areas involved non-citizens[50] and implicated lands outside the states of the Union. All three were also largely unaddressed by the Constitution's text and thus posed challenges for the enumerated powers doctrine. The Constitution, for example, mentions Native Americans in only three places,[51] and, of these, only the Indian Commerce Clause is plausibly read to bestow independent authority on Congress to legislate over Native American tribes. The Constitution similarly is silent regarding which branch, if any, retains the power to regulate immigration. Plausible enumerated sources for such authority were the foreign Commerce Clause,[52] the Naturalization Clause,[53] the War Powers Clause,[54] and the Migration Clause.[55] Finally, Article IV authorizes Congress to govern and dispose of "the Territory . . . belonging to the United States,"[56] and the power to acquire territory can be inferred from the power to enter into treaties,[57] to admit new

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49. The Marshall Court frequently emphasized the foreign, diplomatic, and occassionally warlike character of relations with the Indians. *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559-60 (1832) ("The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings . . . . We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense."). *But see* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) (though sovereign, Indian tribes were "domestic dependent nations" and could not sue as "foreign nations" in federal courts). Justice Sutherland identified in *Curtiss-Wright* "the power to expel undesirable aliens" and "[t]he power to acquire territory by discovery and occupation" as part of the foreign relations power of the United States. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).

50. Native Americans did not achieve full citizenship until 1924. *See* Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b) (1994)). Residents of the later-acquired territories of Puerto Rico and the Philippines and other aliens did not attain citizenship until 1952. *See* Act of June 27, 1952, ch. 1, 66 Stat. 266 (codified at 8 U.S.C. § 1402 (1994)).

51. "Indians not taxed" are excluded from population enumerations for determining congressional representatives in Article I of the Constitution, and in the Fourteenth Amendment. U.S. CONST art. I, § 2, cl. 3; U.S. CONST. amend XIV, § 2. The Indian Commerce Clause authorizes Congress to "regulate Commerce with foreign Nations . . . States . . . and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. Other relevant powers include the treaty power and the war power.

52. *See* U.S. CONST. art. I, § 8, cl. 3.

53. *See id.* cl. 11.

54. *See id.* cl. 1.

55. *See id.* § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight.").

56. *Id.* art. IV, § 3, cl. 2.

57. *See id.* art. II, § 2.

states or to make war. The Constitution, however, is otherwise silent regarding the United States's authority to acquire new territory and to determine the legal status of such territory's inhabitants. Each of these areas became a source of constitutional stress for the United States by the late 1800s, and from this vacuum, the doctrine of inherent plenary power emerged.

A. Plenary Power over Indian Tribes

Chief Justice John Marshall observed in *Cherokee Nation v. Georgia* that "the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else."[58] Supreme Court jurisprudence regarding Indian tribes is generally neglected in foreign affairs analysis, likely on the grounds that the Indian cases are *sui generis*. Nevertheless, the nineteenth-century Indian cases confronted the same difficulties in applying the Constitution to unfamiliar contexts as the territory and alien cases, employed similar rationales, and were relied upon to justify later decisions regarding congressional authority in these other areas.

The doctrine of Congress's plenary authority over Native Americans has its roots in the doctrine of discovery, articulated by Chief Justice Marshall in 1823 in *Johnson v. McIntosh*.[59] The case involved a conflict in title arising from the sale of tribal lands to private individuals and the later transfer of the same lands from the tribe by treaty to the United States government. Thus, the case raised the question of the nature of Native American sovereignty over their traditional lands. While acknowledging the Native Americans' sovereign right to possession of their territory, Marshall invoked the international law doctrines of discovery and conquest—"that discovery gave exclusive title to those who made it"[60]—to conclude that Indian title was imperfect and could only be transferred to the discovering power. In other words, the United States, as a result of its accession to the authority of the British Crown, had an "exclusive right to extinguish the Indian

58. 30 U.S. (5 Pet.) 1, 16 (1831).
59. 21 U.S. (8 Wheat.) 543 (1823).
60. *Id.* at 574.

title of occupancy, either by purchase or by conquest."[61] This claim being long recognized, Marshall continued, "[i]t is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it."[62] By placing absolute title over Native American lands in the United States, and by suggesting that Congress's exercise of the power was inappropriate for judicial review, *Johnson v. McIntosh* laid the groundwork for the doctrine of plenary power to come.

During much of the nineteenth century, the United States conducted relations with Native Americans through treaties and considered the treaty power a primary basis for federal legislation relating to Native Americans.[63] In 1871, however, Congress abolished the practice of treatying with Native Americans.[64] By 1886, the Supreme Court was asked to address the source of congressional authority, in the absence of treaties, to govern Native American tribes.

United States v. Kagama[65] involved the constitutionality of a federal statute that extended United States criminal jurisdiction to crimes committed between Native Americans in Indian country. As the *Kagama* Court noted, Congress previously had adopted legislation regulating the conduct of whites in Indian country, but had not purported to regulate crimes between Native Americans on their own lands.[66] In

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61. *Id.* at 587.

62. *Id.* at 589. Marshall later suggested that the United States's claim to ultimate title to Native American lands was not derived directly from the doctrine of discovery, but was a pragmatic solution to the difficulty that possession by these "fierce savages" posed:

> 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 . . . it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of justice.

Id. at 591-92.

63. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 208 (1982).

64. The Appropriations Act of 1871, ch. 120, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71 (1994)) provides as follows:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.

Id.

65. 118 U.S. 375, 384-85 (1886).

66. *See id.* at 377-78.

upholding the statute, Justice Miller observed that the Constitution is relatively silent regarding relations between the national government and the tribes.[67] Miller rejected the government's suggestion that the requisite authority could be found in the Indian Commerce Clause[68] and concluded that none of the enumerated powers of the Constitution, including the Territory Clause, conferred the power to legislate a code of criminal law in this area.[69] Instead, Miller invoked the doctrine of discovery[70] to find that the power was a necessary incident of United States sovereignty over the territories:

> [T]his power of Congress to organize territorial governments, and make laws for their inhabitants, arises not so much from [the Territory Clause of] the Constitution . . . as from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the National Government, and can be found nowhere else.[71]

Miller closed with a sweeping statement of inherent federal power:

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre 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.[72]

Thus, the Court established an extra-textual basis, rooted in sovereignty, for the exercise of federal power. The scope of this authority, however, remained uncertain. Because *Kagama* did

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67. *See id.* at 378.

68. *See id.* at 378-79 ("[I]t would be a very strained construction of this clause, that a system of criminal laws for Indians living peaceably in their reservations . . . was authorized by the grant of power to regulate commerce with the Indian tribes.").

69. *See id.* at 379.

70. *See id.* at 381-82.

71. *Id.* at 380.

72. *Id.* at 384-85.

not involve an objection based on the violation of an individual constitutional right, it is unclear whether the Court viewed this implied power as limited by other provisions of the Constitution. Similarly, although Miller cited an earlier case for the proposition that courts would not examine the exercise of Congress's power over Native Americans, he did not pursue this line of argument.[73]

Although the power of Congress to legislate for the tribes originally had derived from the treaty power, the Court in 1903 relied upon *Kagama* to conclude that Congress could adopt legislation in direct abrogation of prior treaty agreements. *Lone Wolf v. Hitchcock*[74] involved reservation lands that had been set aside for the Kiowa and Comanche tribes by treaty in 1867. The treaty provided that the tribes could not be divested of lands held in common without the consent of three-fourths of the adult male Indians.[75] In 1892, the requisite three-quarters of the tribal members allegedly entered an agreement that surrendered the tribes' rights to the reservation to the United States.[76] Under the agreement, a portion of the reservation lands would be divided into allotments for individual Indians, with the remaining two and a half million "surplus" acres to be opened to white settlement.[77] While Congress was considering legislation to enact the allotment agreement, the tribes objected, arguing that the 1892 agreement had been based on false representations by the United States and that three-quarters of the adult males had not acceded to it.[78] The Secretary of the Interior confirmed that the agreement had not been signed by three-quarters of the adult male members.[79] Nevertheless, Congress adopted legislation enacting the allotment agreement, and in 1901, the President issued a proclamation opening the surplus reservation lands to white entry and settlement.[80] Lone Wolf challenged the action in

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73. *See id.* at 380-81 ("[W]ere the right and the propriety of exercising this power now open to question, yet it is a question for the law-making and political departments of the government, and not for the judicial.") (quoting United States v. Rogers, 45 U.S. (4 How.) 567, 572 (1846)).

74. 187 U.S. 553 (1903).

75. *See id.* at 554.

76. *See id.* at 555.

77. *See id.*

78. *See id.* at 556.

79. *See id.* at 557.

80. *See id.* at 562-63.

federal court, arguing that the agreement was invalid because Congress lacked authority to open the reservation to white settlement and that the allotment statute, if carried into effect, would deprive the Indians of property without due process of law under the Fifth Amendment.[81]

The Supreme Court rejected the challenge, finding that the validity of the 1892 land agreement was irrelevant since Congress enjoyed plenary authority to legislate Native American land rights.[82] Writing for the Court, Justice Edward White cited the original *Chinese Exclusion Case*[83] for the proposition that "it was never doubted that the power to abrogate [treaties] existed in Congress."[84] White further asserted that Congress's plenary power to legislate for Indian tribes precluded the Court from questioning the exercise of that power or the validity of the 1892 agreement:

> Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.
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> . . . .
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> . . . We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned . . . by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts.[85]

Thus, by the turn of the century, the Court had annunciated an expansive theory of congressional authority over Native Americans, which derived from concepts of inherent powers and the international law of discovery, rather than from any particular constitutional text. The Court

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81. *See id.* at 561.
82. *See id.* at 565-66.
83. Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889).
84. *Lone Wolf*, 187 U.S. at 565-66 (emphasis omitted).
85. *Id.* at 565, 568.

elsewhere may have recognized that this authority was subject to some constraints of the Constitution.[86] But the decisions of the era simultaneously suggested that relations with the Indians raised "political questions" that the courts were incompetent to address.[87]

B. Plenary Power over Immigration

Like the question of congressional authority over the tribes, the source of federal authority to regulate the admission and expulsion of aliens remained uncertain until the *Chinese Exclusion Case* and its progeny at the end of the nineteenth century.[88] These decisions provided critical support not only for the concept of plenary power over Native Americans, as discussed above, but for Justice Sutherland's theory of an inherent, plenary executive power four decades later.[89]

The origins of the plenary power doctrine in immigration may be seen in the debates over the Alien Act of 1798, in which Hamiltonian Federalists asserted the theory that the Constitution was a social compact that protected only "We the People" of the several United States who were parties to it. Aliens, by definition, were not parties to the Constitution,

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86. In *Stephens v. Cherokee Nation*, 174 U.S. 445, 478 (1899), Chief Justice Fuller argued that Congress enjoyed "plenary power of legislation" over Indian tribes, and that such power was "subject only to the Constitution of the United States." *Id.*

87. *See* Cherokee Nation v. Hitchcock, 187 U.S. 294, 308 (1902) ("The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts."); *see also* Sisseton & Wahpeton Bands of Sioux Indians v. United States, 277 U.S. 424, 437 (1928) ("Jurisdiction over [the Indians] and their tribal lands was peculiarly within the legislative power of Congress and may not be exercised by the courts in the absence of legislation conferring rights upon them such as are the subject of judicial cognizance." (citations omitted)); Tiger v. Western Inv. Co., 221 U.S. 286, 311 (1911).

88. For criticisms of the persistence of the plenary power doctrine in the immigration area, see Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987); Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255; Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984).

89. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936).

enjoyed no rights under it, and received protection only from the law of nations. Citing Vattel's works on international law, the Federalists argued that because the law of nations recognized the absolute right of a nation to expel aliens, the Alien Act, which authorized the President to expel aliens whom he considered security threats, violated no constitutional provisions.[90] Writing in defense of the act, state court judge Alexander Addison articulated an early distinction between domestic and foreign affairs, only the former of which he considered governed by the Constitution.[91] Madison responded for the Jeffersonians that, although aliens may not have been parties to the Constitution, "it does not follow that the Constitution has vested in Congress an absolute power over them. The parties to the Constitution may have granted, or retained, or modified, the power over aliens, without regard to that particular consideration."[92]

Congress did not address the admission and expulsion of aliens again until it began regulating Asian immigration in the 1880s. Thus until the late nineteenth century, the Supreme Court was not directly confronted with the need to address the constitutional source of the immigration power. In the *Head Money Cases*,[93] the Court rooted the power in Congress's authority to regulate foreign commerce.[94] Apparently dissatisfied with that solution in an era of narrow Commerce Clause interpretation, however, the Court in 1889 offered its now-famous articulation of the classical plenary power

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90. For an eloquent discussion of the theories of constitutional law prevailing in the debates over the Alien and Sedition Acts, see Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 927-38 (1991).

91. *See* ALEXANDER ADDISON, ANALYSIS OF THE REPORT OF THE COMMITTEE OF THE VIRGINIA ASSEMBLY (1800), *reprinted in* 2 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1706-1805, at 1055, 1070 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

> The restrictions of the constitution are not restrictions of external and national right, but of internal and municipal right. And power over aliens is to be measured, not by internal and municipal law, but by external and national law. It affects not the people of the United States, parties and subjects to the constitution; but foreign governments, whose subjects the aliens are.

Id.

92. Madison's Report on the Virginia Resolutions, *reprinted in* 4 DEBATES, RESOLUTIONS AND OTHER PROCEEDINGS, IN CONVENTION, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 556 (J. Elliot ed., 2d ed. 1836).

93. 112 U.S. 580 (1884).

94. *See id.* at 595.

doctrine.

The original *Chinese Exclusion Case*,[95] presented the question whether Congress could retroactively terminate the right of a Chinese national to re-enter the United States, in violation of a United States treaty with China.[96] The plaintiff had resided in the United States for twelve years prior to his departure to China in 1887.[97] Upon his departure, and pursuant to existing law, the plaintiff obtained a customs certificate indicating that he was a United States resident and was entitled to return to the United States.[98] Eight days before the plaintiff's return, Congress enacted legislation revoking the right of Chinese nationals holding customs certificates to return to the United States.[99] The plaintiff was excluded in the San Francisco Harbor and challenged the 1888 Act as violating the treaty with China[100] and rights vested under federal statutes. The Supreme Court, through Justice Field, made no effort to root Congress's authority in the commerce power or elsewhere in the constitutional text. Instead, after acknowledging the power of Congress to abrogate a treaty with later legislation, Justice Field concluded that Congress's authority to legislate derived from sovereignty:

> That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a

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95. Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889).

96. *See id.* at 589.

97. *See id.* at 585 (argument for Appellant).

98. *See id.* at 586-87 (argument for Appellant).

99. *See* Act of Oct. 1, 1888, ch. 1064, § 1, 25 Stat. 504, 504 (1888).

100. See Article 6 of the 1868 treaty with China, which provided that "Chinese subjects visiting or residing in the United States, shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation." Treaty with China, July 28, 1868, U.S.-China, art. VI, 16 Stat. 731, 740. A supplemental treaty entered in 1880 authorized the United States to limit the immigration of Chinese laborers into the United States, but confirmed that "Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation." Treaty with China, Nov. 17, 1880, U.S.-China, art. II, 22 Stat. 826, 827.

> part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.[101]

Field then offered support for the power to exclude based on a broad concept of national security powers and self-preservation:

> To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination, so far as the subjects affected are concerned, are necessarily conclusive upon all its departments and officers.[102]

Thus, Field concluded, "[t]he power of exclusion of foreigners [was] an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution."[103] Congress's determination in this regard was "conclusive upon the judiciary."[104]

Justice Field's contribution to the plenary power doctrine in the immigration field presages Justice Sutherland's singular contribution to the doctrine of *Curtiss-Wright*. Although while sitting as a circuit justice, Field had invalidated local anti-Chinese legislation, he had simultaneously called for national legislation to address the problem.[105] As a presidential hopeful

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101. *The Chinese Exclusion Case*, 130 U.S. at 603-604.
102. *Id.* at 606.
103. *Id.* at 609.
104. *Id.* at 606.
105. *See* Ho Ak Kow v. Nunan, 12 F. Cas. 252, 256 (C.C.D. Cal. 1879) (No. 6546) ("[f]or restrictions necessary or desirable in these matters, the appeal must be made to the general government; and it is not believed that the appeal will ultimately be disregarded"), *discussed in* SOME ACCOUNT OF THE WORK OF STEPHEN J. FIELD AS A LEGISLATOR, STATE JUDGE, AND JUDGE OF THE SUPREME COURT OF THE UNITED STATES 390, 404-05 (Fred B. Rothman & Co. 1986) (1881); *In re* Ah Fong, 1 F. Cas. 213, 217 (C.C.D. Cal. 1874) (No. 102) ("If their further immigration is to be stopped, recourse must be had to the federal government,

in 1880 and 1884, he had urged Congress to protect the country from "the oriental gangrene."[106] And in a vigorous dissent in *Chew Heong v. United States*,[107] he had attacked the Chinese race and invited the adoption of legislation restricting their entry.[108] Five years later, Justice Field authored the majority opinion in *Chae Chan Ping*, which offered what was then the strongest articulation of an implied, plenary congressional power over immigration.[109]

Again, the relationship between this doctrine and constitutional constraints was uncertain. Like the Native American plaintiff in *Kagama*, the plaintiff in *Chae Chan Ping* did not contend that an individual constitutional right had been violated, but only that Congress lacked authority to pass the legislation. Three years later, however, a due process challenge was raised to the exclusion statute in *Ekiu v. United States*.[110] The Court took the opportunity to reaffirm and strengthen the concept of inherent power to exclude aliens[111] and concluded that, in the exercise of such authority, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, *are* due process of law."[112] Finding that the minimal procedures required by Congress had been satisfied, the Court rejected the alien's claim.

The following year, in *Fong Yue Ting v. United States*,[113] the Court extended the plenary power doctrine to the deportation of lawful Chinese residents, holding that "[t]he right of a nation to expel or deport foreigners, who have not

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where the whole power over this subject lies.").

106. PAUL KENS, JUSTICE STEPHEN FIELD 205 (1997).

107. 112 U.S. 536 (1884).

108. *See id.* at 560-78 (Field, J., dissenting).

109. For further discussion, see KENS, *supra* note 106, at 205-09; MILTON R. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 10-11 n.29 (1946).

110. 142 U.S. 651 (1892).

111. *See id.* at 659. The Court reasoned as follows:

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions . . . . In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war.

Id.

112. *Id.* at 660 (emphasis added).

113. 149 U.S. 698 (1893).

been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."[114] Relying heavily on the opinion in *Chae Chan Ping*, the majority invoked the works of Vattel to argue that the law of nations gave nations inherent authority to expel aliens.[115] The Court concluded—without textual support—that "[t]he Constitution of the United States speaks with no uncertain sound upon this subject."[116]

The Court broadly suggested that congressional determinations in this area were not proper questions for the courts.[117] Nevertheless, the Court reviewed the procedures afforded the plaintiff and suggested that they—particularly the requirement that an alien prove his or her residence through the testimony of a "credible white witness"[118]—comported with due process.[119] Apparently this extension of the plenary power doctrine to aliens inside the United States was too much for Justice Field. Although he had authored the *Chae Chan Ping* decision, Field now dissented with a direct attack on the inherent powers doctrine:

> The government of the United States is one of limited and delegated powers. It takes nothing from the usages or the former action of European governments, nor does it take any power by any supposed inherent sovereignty. . . . Sovereignty or supreme power is in this country vested in the people, and only in the people. By them certain sovereign powers have been delegated to the government of the United States and other sovereign powers reserved to the States or to themselves. . . . When, therefore, power is exercised by Congress, authority for it must be found in express terms in the Constitution, or in the means necessary or proper for the execution of the power expressed. If it cannot be thus found, it does not exist.[120]
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114. *Id.* at 707.
115. *See id.* at 707-08.
116. *Id.* at 711.
117. *See id.* at 731.
118. *Id.* at 704.
119. *See id.* at 729 ("The competency of all witnesses, without regard to their color, to testify in the courts of the United States, rests on acts of Congress, which Congress may at its discretion modify or repeal.").
120. *Id.* at 757-58 (Field, J., dissenting).

> . . . [The Act] contains within it the germs of the assertion of an unlimited and arbitrary power, in general, incompatible with the immutable principles of justice, inconsistent with the nature of our government, and in conflict with the written Constitution by which that government was created and those principles secured.[121]

Justices Fuller and Brewer also dissented, with Justice Brewer launching a lengthy and eloquent attack on the inherent powers doctrine:

> It is said that the power here asserted is inherent in sovereignty. This doctrine . . . is one both indefinite and dangerous. Where are the limits to such powers to be found, and by whom are they to be pronounced? Is it within legislative capacity to declare the limits? If so, then the mere assertion of an inherent power creates it, and despotism exists. May the courts establish the boundaries? Whence do they obtain the authority for this?
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> . . . [T]he power to remove resident aliens is, confessedly, not expressed. Even if it be among the powers implied, yet still it can be exercised only in subordination to the limitations and restrictions imposed by the Constitution.[122]

In short, during the early 1890s, the concept of powers inherent in sovereignty replaced the foreign Commerce Clause as the basis for the federal power to exclude or deport aliens. As in the Native American cases, the Court repeatedly suggested that this power was sufficiently exclusive to preclude judicial review.[123] Although the opinions are rife with inconsistencies regarding the relationship between the plenary power doctrine and the constitutional text, by 1909 the principle was sufficiently established for the Court to pronounce that "over no conceivable subject is the legislative

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121. *Id.* at 763.

122. *Id.* at 737-38 (Brewer, J., dissenting).

123. *See, e.g.*, Lees v. United States, 150 U.S. 476, 480 (1893) (Congress's "absolute" power to exclude is "not open to challenge in the courts"); Fong Yue Ting v. United States, 149 U.S. 698, 706 (1893) (Congress's decisions are "conclusive upon the judiciary"); Ekiu v. United States, 142 U.S. 651, 659 (1892) (power over entry "belongs to the political department"); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 606 (1889) (the legislative power is "conclusive upon the judiciary").

power of Congress more complete" than immigration.[124]

C. *Plenary Power over Territories*

The third line of late nineteenth-century decisions critical to the development of the inherent powers doctrine concerned the authority of Congress to acquire and govern territories, and the status of such territories vis-à-vis the existing states. These issues emerged with the question of the United States's power to make the Louisiana Purchase and remained a source of debate throughout the nineteenth century. During this evolution, judicial doctrines regarding congressional power over the territories were significantly informed by doctrines developed in the Indian and immigration contexts.

In an early case addressing the power to govern later-acquired territories, Justice Marshall had held that Congress's constitutional power to establish courts for the territories was either implicitly authorized by the war power or the treaty power, or expressly authorized by Article IV,[125] though Marshall's analysis also suggested a possible inherent basis for the authority.[126] In language that would be invoked repeatedly in the Insular Cases three-quarters of a century later,[127] Marshall observed that under the practice of nations, new territory became a part of the nation "either on the terms stipulated in the treaty of cession, or on such as its new master shall impose."[128]

The authority of Congress to legislate for the territories, of course, became embroiled in the debate over the extension of slavery to the territories with the Missouri Compromise. In *Dred Scott v. Sandford*,[129] after his infamous conclusion that the Court lacked jurisdiction because Scott, as a member of the Negro race, could not sue as a citizen of the United States, Chief Justice Taney further held that the power to acquire and

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124. Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909).

125. *See* American Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 542, 546 (1828).

126. *See id.* at 543 ("The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned.").

127. *See, e.g.*, Downes v. Bidwell, 182 U.S. 244, 302 (1901) (White, J., concurring).

128. *American Ins. Co.*, 26 U.S. (1 Pet.) at 542.

129. 60 U.S. (19 How.) 393 (1857).

govern new territories was derived from Congress's Article IV authority to admit new states.[130] This authority in the territories, however, was simultaneously constrained by the express and implied limitations of the Constitution:[131]

> The Territory being a part of the United States, the Government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out; and the Federal Government can exercise no power over his person or property beyond what that instrument confers, nor lawfully deny any right which it has reserved.[132]

Taney rejected any suggestion that either "implied or incidental powers"[133] or the law of nations[134] could expand congressional authority. Because the limitations of the Bill of Rights applied to the territories, Taney concluded, the protections of property in the Due Process Clause barred Congress from prohibiting slavery.[135]

A series of decisions after the Civil War confirmed Taney's position that the Constitution and Bill of Rights applied to the territories.[136] By the late nineteenth century, however, this "continental equilibrium"[137] was being eroded in favor of a theory of inherent powers.[138] In upholding the dissolution of the Mormon Church in 1890,[139] the Court noted that

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130. *See id.* at 446-49.
131. *See id.* at 450-51.
132. *Id.* at 449-50.
133. *Id.* at 451.
134. *See id.*
135. *See id.* at 452.
136. *See, e.g.*, Kennon v. Gilmer, 131 U.S. 22 (1889) (right to jury trial); Wilkerson v. Utah, 99 U.S. 130 (1878) (Cruel and Unusual Punishment Clause); Reynolds v. United States, 98 U.S. 145 (1878) (First and Sixth Amendments); Rice v. Railroad Co., 66 U.S. (1 Black) 358 (1861) (property rights).
137. See the discussion in Neuman, *supra* note 90, at 953-56.
138. *See, e.g.*, Murphy v. Ramsey, 114 U.S. 15, 44 (1885) ("The people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants.").
139. The Act of 1887 provided that "the acts of the legislative assembly of the Territory of Utah incorporating, continuing, or providing for the corporation known as the Church of Jesus Christ of Latter-Day Saints . . . are hereby disapproved and annulled, and the said corporation . . . is hereby dissolved." Act of Mar. 3, 1887, ch. 397, § 17, 24 Stat. 635, 638.

> [t]he power of Congress over the Territories of the United States is general and plenary .... The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty and by cession is an incident of national sovereignty.[140]

Although fundamental constitutional rights limited Congress's power to legislate for the territories, the Court continued, "these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions."[141] Chief Justice Fuller dissented with Justices Field and Lamar, arguing that Congress enjoyed only delegated, not inherent, authority, and that the Constitution did not authorize the confiscation of property in this manner.[142]

The same year in *Jones v. United States*,[143] the Court invoked a variation of the discovery doctrine to hold that the United States, as a result of nationhood, enjoyed the power to acquire territory by discovery and occupation and to exercise jurisdiction over it. "By the law of nations, recognized by all civilized States, dominion of new territory may be acquired by discovery and occupation, as well as by cession or conquest; and ... the nation ... may exercise such jurisdiction and for such period as it sees fit over territory so acquired."[144] *Jones* involved a challenge to Congress's extension of federal criminal jurisdiction (via a delegation to the President) to a recently discovered guano island in the Caribbean.[145] The Court found that the Executive's determination that the United States enjoyed sovereign control of the island was conclusive regarding the authority of Congress to legislate there[146] and was binding on the judicial department.[147]

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140. Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 42 (1890).

141. *Id.* at 44.

142. *See id.* at 67-68 (Fuller, C.J., dissenting).

143. 137 U.S. 202 (1890).

144. *Id.* at 212.

145. *See id.* at 209.

146. *See id.* at 213.

147. *See id.* at 221 ("[I]t is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong; it is enough to know that in the exercise of his constitutional functions he has decided the question.").

These decisions culminated in the sweeping theory of inherent federal authority over territories that was articulated at the turn of the century in the Insular Cases. A full treatment of the positions adopted by the various justices in these cases is beyond the scope of this article, a few summary observations are in order. Writing the judgment for a sharply divided court in *Downes v. Bidwell*,[148] Justice Brown argued that Congress's power to govern the new territories arose from the power to acquire them, and that the Constitution did not apply to such territories, except for certain express limitations (such as the prohibition against bills of attainder) that the Constitution imposed on the exercise of congressional power.[149] Thus, Brown concluded, tariffs imposed on goods from Puerto Rico did not violate the constitutional mandate that duties be uniform throughout the United States,[150] since that clause did not apply to the territories. Brown asserted that the acquisition of territory brought with it the power to govern its people as the ruling power saw fit.

Unwilling so completely to abandon the essentialist regime, Justice Edward White, joined by three concurring justices, argued that the Constitution remained the ultimate source of congressional authority over the territories,[151] but that Congress's power in this area was largely unconstrained.[152] In language strongly reminiscent of *Johnson v. McIntosh*, White invoked the inherent authority of the nation to conquer and govern "uncivilized" peoples:

> It may not be doubted that by the general principles of the law of nations every government which is sovereign within its sphere of action possesses as an inherent attribute the power to acquire territory by discovery, by agreement or treaty, and by conquest. It cannot also be gainsaid that as a general rule wherever a government acquires territory as a result of any of the modes above stated, the relation of the territory to the new government is to be determined by the

148. 182 U.S. 244 (1901).

149. *See id.* at 276-77.

150. *See* U.S. CONST. art. I, § 8, cl. 1.

151. *See Downes*, 182 U.S. at 290 (White, J., concurring).

152. *See id.* at 290-91 ("[T]here is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the territories.").

> acquiring power in the absence of stipulations upon the subject.
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> . . . [I]f the conquered are a fierce, savage, and restless people, [the conquering nation] may, according to the degree of their indocility, govern them with a tighter rein, so as to curb their "impetuosity, and to keep them under subjection."[153]

The assumption that such principles of international law were rendered inapplicable to the United States by the Constitution, White argued, "rests on the erroneous assumption that the United States under the Constitution is stripped of those powers which are absolutely inherent in and essential to national existence."[154]

Both positions provoked the ire of the four dissenting justices, who viewed Congress's power to govern the territories as both derived from, and constrained by, the express terms of the Constitution.[155] Justice Harlan, in particular, struggled to sustain the principles of the essentialist regime:

> Although from the foundation of the Government this court has held steadily to the view that the Government of the United States was one of enumerated powers, . . . we are now informed that Congress possesses powers outside of the Constitution, and may deal with new territory, acquired by treaty or conquest, in the same manner as other nations have been accustomed to act with respect to territories acquired by them. In my opinion, Congress has no existence and can exercise no authority outside of the Constitution. . . . The idea that this country may acquire territories . . . and hold them as mere colonies or provinces—the people inhabiting them to enjoy only such rights as Congress chooses to accord them,—is wholly inconsistent with the spirit and genius as well as with the words of the Constitution.[156]

Justice Harlan further echoed Justice Brewer's dissent in *Fong Yue Ting*:

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153. *Id.* at 300-02.
154. *Id.* at 311.
155. *See id.* at 357-58, 369 (Fuller, C.J., dissenting).
156. *Id.* at 379-80 (Harlan, J., dissenting) (emphasis omitted).

> It is one thing to give such a latitudinarian construction to the Constitution as will bring the exercise of power by Congress, upon a particular occasion or upon a particular subject, within its provisions. It is quite a different thing to say that Congress may, if it so elects, proceed outside of the Constitution.[157]

Harlan's position, of course, did not prevail, and the Court in later cases embraced Justice White's distinction between incorporated and unincorporated territories to uphold relatively unbridled congressional authority over the territories.

As in the immigration and Indian contexts, then, the late nineteenth century saw the doctrine of congressional authority over territories evolve from a concept rooted in the Territory and Treaty Clauses of the Constitution, and limited by the Constitution's terms, to a power derived from international law concepts of discovery and sovereignty, which were relatively unhinged from judicial or constitutional constraint.

CONCLUSION

The series of cases discussed above demonstrates that in the last decade of the nineteenth century, the Supreme Court embraced the doctrine of inherent plenary power in a broad range of cases touching on Native Americans, aliens, and territories. In so doing, the Court rejected prior essentialist doctrines in favor of concepts of authority inherent in sovereignty that bore an uncertain relationship to the enumerated and reserved powers in the Constitution and that were considered largely immune from judicial review. The decisions in *Kagama*, *Lone Wolf*, *Chae Chan Ping*, *Ekiu*, *Fong Yue Ting*, *Church of Latter-Day Saints*, *Jones*, and the Insular Cases all relied on concepts of inherent powers derived from the international law concepts of discovery and sovereignty that were substantially unhinged from constitutional text. The doctrines developed in these areas are particularly striking in contrast to the strict construction the Court imposed on domestic constitutional provisions during the same period.[158]

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157. *Id.* at 380.

158. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905); *In re* Debs, 158 U.S. 564 (1895); Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895), *aff'd on*

Thus, to the extent that a divorce occurred between the nineteenth-century orthodoxy and the foreign affairs power, it appears that the separation was substantially completed some forty years before the decision in *Curtiss-Wright*. Although Justice Sutherland's effort to locate the foreign affairs power exclusively in the Executive was relatively novel, by 1936 the Court's general willingness to abandon enumerated powers analysis in cases touching on foreign affairs was well established. Indeed, by the time Justice Sutherland articulated his theory of executive hegemony in *Curtiss-Wright*, the Court was edging toward new concepts of individual rights, due process, and the role of courts in adjudicating such rights, which were fundamentally incompatible with the inherent plenary power decisions of the 1890s. In this sense, Justice Sutherland's theory of inherent powers was perhaps the culmination of the old regime, rather than the harbinger of the new.

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reh'g, 158 U.S. 601 (1895); Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362 (1894).