LIMITING CONGRESS' PLENARY POWER

FLETCHER

WBSA INDIAN LAW SECTION 2026 CONFERENCE

WHY PLENARY POWER?

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2. EMPOWER FEDERAL GOVERNMENT

3. GEOPOLITICAL POWER

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* OR JUST ALL THE POWER

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INDIAN ARTS AND CRAFTS ACT

INDIAN GAMING

FLETCHER'S UNCERTAINTY PRINCIPLE

Matthew L.M. Fletcher*

I am here to talk about the equal protection challenges facing Indian Country. I am going to give you my thesis right off the bat, which is that *Haaland v. Brackeen*[1] decided the equal protection issue for us already, and we should behave as if it is decided.

I will explain what I mean by that. But first, let's talk about what we will call the *Mancari* rule. The *Mancari* rule is fundamentally what Indian law is about, and it goes something like this—I am going to more or less paraphrase the guiding principle of *Morton v. Mancari* from 1974.[2] Any congressional classification based on Indian status that is rationally related to the fulfillment of the trust responsibility is constitutional.[3] That is it. Sometimes we refer to it as a rational basis-type test, and there is a sort of rational basis element to this analysis. Sometimes people point to footnote twenty-four in *Mancari* and say that Justice Blackmun created or articulated a rule that the relationship between Indian tribes, Indian people, and the United States is political, not a race-based relationship.[4] That is more or less true, but it is not the whole story.

I like the first part of the story better. That part of the story is rooted in the tradition of international law. It is rooted in the tradition of the separation of powers between the judiciary in Article III and Congress and its Indian affairs power in Article I. I will say more about what I mean by that.

I think the *Mancari* rule is the only way to interpret Indian affairs powers in relation to the equal protection principles of the Constitution. A little bit more on the *Mancari* rule—what are its origins, what are its jurisprudential underpinnings? Well, the first one is the duty of protection.[5] This is what the trust responsibility was originally known as. If you read enough treaties, you will see the word "protection" a lot.[6] The duty of protection is a creature of customary international law that existed before there was a United States.

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1. 599 U.S. 255 (2023).
2. 417 U.S. 535 (1974).
3. *Id.* at 555.
4. *Id.* at 553 n.24.
5. *See* RESTATEMENT OF THE L., THE L. OF AM. INDIANS: GEN. FED. TR. RELATIONSHIP WITH INDIAN TRIBES AND INDIVIDUAL INDIANS § 4 cmts. a, d–e (A.L.I. 2022) [hereinafter RESTATEMENT: FEDERAL TRUST RELATIONSHIP].
6. *E.g.*, Treaty of Greenville art. 5, Aug. 3, 1795, 7 Stat. 49 ("[T]he said Indian tribes again acknowledge themselves to be under the protection of the said United States, and no other power whatever.").

There have been numerous instances where a larger sovereign takes a smaller sovereign under its wing, so to speak. I will call it a nuclear umbrella of sorts. The two sovereigns can negotiate the scope of this protectorate.

The duty of protection is arguably—and, I think, conclusively—the source of the relevant Indian affairs provisions in the Constitution[7] and the Articles of Confederation,[8] but maybe not the Declaration of Independence. The "merciless Indian savages" language? We will keep that out of this conversation. The duty of protection, the guiding principle of federal Indian law, is that the United States owes a duty of protection to Indian tribes.[9] Indian tribes negotiated for the duty of protection by giving up our land, resources, and other things that we did not negotiate for—like our children, our language, and our cultures. But protection is the guiding principle. That is where the *Mancari* rule comes from—it is a creature of international law.

The earliest U.S. Supreme Court cases accepted the duty of protection as a creature of international law.[10] Even the doctrine of discovery sits within that same morass—within that swirl of international customary law.[11] If you have something in American constitutional law cloaked with international or foreign affairs principles—such as war powers, the principle of separation of powers between the judiciary and the policymaking branches that deal in foreign affairs and war powers—and Indian affairs are in that swirl, then the judiciary stays out of those kinds of cases. Those kinds of cases are considered political questions over which the state and federal judiciaries have no jurisdiction to hear.[12] The classic example of the political question doctrine is when Justice Douglas, sitting on the Supreme Court, the Supreme Court, lifted a stay on a lower court injunction that ordered Richard Nixon and the Department of Defense to stop bombing Cambodia.[13] The Supreme Court generally cannot require the president to act in that context. Even when the action is illegal or wrong, Article III grants courts little to no power to intervene.[14]

Indian affairs have moved on from being purely war powers or foreign affairs. Now Indian tribes—for the most part— reside within the exterior territorial boundaries of the United States, there is a different kind of scenario. But the separation of powers doctrine remains the foundational principle of federal Indian law, one that we still largely live by. Throughout most of U.S. history and the U.S. Supreme Court's Indian affairs

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7. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 3 (Indian Commerce Clause); *id.* art. II, § 2, cl. 2 (Treaty Clause).

8. *See* ARTICLES OF CONFEDERATION of 1781, art. IX, para. 4 (establishing the power to manage Indian affairs).

9. *See* RESTATEMENT: FEDERAL TRUST RELATIONSHIP, *supra* note 5, § 4 cmts. a, d–e.

10. *E.g.*, Worcester v. Georgia, 31 U.S. (6. Pet.) 515, 560–61 (1832) ("[T]he settled doctrine of the law of nations is, that a weaker power does not surrender its independence—its right to self-government, by associating with a stronger, and taking its protection.").

11. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 572–77 (1823) (describing how European nations developed the right of acquisition principle to create a uniform response to land disputes after conquering new territories during the Age of Discovery).

12. *See* RESTATEMENT (THIRD) OF FOREIGN RELS. L. OF THE U.S. § 1 reporter's note 4 (A.L.I. 1987) (noting that courts often deem issues of foreign affairs, including those relating to sovereignty, as nonjusticiable political questions).

13. *See* Holtzman v. Schlesinger, 414 U.S. 1316, 1319–20 (1973) (denying request to reinstate an injunction against the bombing in Cambodia).

14. *See* U.S. CONST. art. III, § 2.

jurisprudence, the field has effectively been treated as a foreign affairs or war powers-type situation. That is why Indian tribes have treaties with the United States. The second one, of course, follows from the duty of protection. We have to look at the text of the Constitution, which, for purposes of American constitutional law, memorializes the duty of protection. Indians are the only ethnicity explicitly mentioned in the text of the Constitution. There used to be that reference—"three-fifths of all other persons"—a euphemism that was notoriously, correctly, and finally repealed by the Fourteenth Amendment.[15] You have the Indians Not Taxed Clause, which originally existed in Article I and is now incorporated into the 14th Amendment itself.[16] And, of course, there is the Indian Commerce Clause, as we call it, in which Indian tribes are mentioned alongside states and foreign nations for purposes of Congress's power to regulate commerce with those various classifications of sovereigns.[17] It is nice to be listed next to other sovereigns because the Constitution acknowledges Indian tribes, at least implicitly, as sovereign entities.

The fact that Indians and Indian tribes are mentioned in the Constitution is critically important. It is also critically important that the Constitution does not define what an Indian tribe is, or what "Indians not taxed," "Indians taxed," or even "Indian" means. In fact, for much of the history of foreign Indian affairs legislation, "Indian" was not defined at all. Someone has to make a decision when passing a statute to determine whether it will apply to "Indians." That responsibility falls to Congress, deciding whether this statute applies to Indians or Indian tribes, what an Indian is, or what an Indian tribe is. Now, "Indian tribe" is pretty straightforward. Relatively speaking, I mean. We have a long history of acknowledging nations and acknowledging each other's sovereignty. For example, the United States' recognition of the country of Mexico. It had been doing that for a long, long time. That is a political act. It is a foreign affairs kind of act. You are not going to have a successful judicial challenge to that recognition. I would imagine the Supreme Court is not going to overrule that decision to recognize Mexico. That is simply a nonjusticiable political question.

The recognition of Indian tribes is not quite nonjusticiable, but it is pretty close. If Congress passes a law acknowledging an Indian tribe, or if the United States enters into a treaty with an Indian tribe, the fact that the United States took that action and acknowledged the tribe as a nation is a nonjusticiable political question.[18] The potential exceptions to that rule are through the federal acknowledgment process, where, arguably, you can challenge the decision of the Secretary of the Interior under the Administrative Procedures Act.[19] But once that is done, a tribe is a tribe, federally acknowledged by the

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15. *Id.* amend. XIV, § 2.

16. *Id.*

17. *Id.* art. I, § 8, cl. 3.

18. Matthew L.M. Fletcher, *Politics, Indian Law, and the Constitution*, 108 CALIF. L. REV. 495, 520–25 (2020) (describing how federal acknowledgment of Indian tribal sovereignty creates a nonjusticiable political question for Article III courts).

19. 25 C.F.R. pt. 83 (2025); *id.* § 83.44 ("The AS-IA's final determination is . . . a final agency action under the Administrative Procedure Act (5 U.S.C. 704)."); *see also* 5 U.S.C. § 704 (2025) ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in court are subject to

U.S., and that cannot be challenged. The U.S. might change its mind on that, and that is a different question, but at this point, those are political questions. There is a huge separation of powers issue there.

Similarly, for purposes of defining what an Indian is, there is also a separation of powers issue. Again, there is a foreign affairs/war powers-type issue in relation to who or what an Indian person is, but it is much more complicated than that. I like to say that if you ask 100 Indians in a room what an Indian is, you are going to get 100 different answers. So, who defines what an Indian is? Well, originally, either Congress or nobody. And I have to point to some of the scholarship that a friend of mine, Gregory Ablavsky at Stanford, has done.[20] My sense from reading his work is that, when Congress first legislated—probably for about 100 years after the ratification of the Constitution—it never defined what an Indian was because everybody knew what an Indian was. Because, for the Founders and several generations of American political elites, when you saw one, you knew what it was. That is not a very good definition, but it is the one that the U.S. worked with, and we are still working with it centuries later. If you look at the original Trade and Intercourse Act of 1790, it more or less says, "This statute applies to Indians."[21] In 1793, if a non-Indian committed a trespass against an "Indian," they were guilty of a federal crime.[22] We now have a working definition from federal common law in the lower courts, as well as some older, archaic Supreme Court decisions.[23] But for our purposes, we do not really have a definition of Indian, at least in the context of Indian Country criminal jurisdiction, which is a really big one.[24] And a few other federal statutes—the Indian Reorganization Act, for example, has a whole bevy of different definitions, some of which include tribal citizens, some of which include Indians who are one-quarter Indian blood, and some of which include non-members who are descendants of tribal members.[25]

That gives you a sense of the many different ways that legislators and legislatures—primarily Congress—have defined who an Indian is. The point of all of this is to say that somebody has to determine, in the first instance, as to the application of a law, who an Indian is, and what an Indian person is. That gets us to our twenty-first-century series of conundrums about the equal protection problem.

The equal protection problem, basically, is this: sometimes Congress passes a law saying this statute applies to "Indians." No definition. For many commentators, policymakers, lawyers, and judges—especially those who are initially skeptical of Indian

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judicial review.").

20. *See generally* Gregory Ablavsky, *"With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings*, 70 STAN. L. REV. 1025 (2018).

21. *E.g.*, Indian Trade and Intercourse Act of 1790, ch. 33, § 4, 1 Stat. 137, 138 ("[N]o sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state").

22. *Id.* §§ 4–5, 1 Stat. at 329.

23. RESTATEMENT OF THE L., THE L. OF AM. INDIANS: INDIAN STATUS § 69 (A.L.I. 2022) [hereinafter RESTATEMENT: INDIAN STATUS].

24. *E.g.*, Major Crimes Act, 18 U.S.C. § 1153(a) ("Any Indian who commits against the person or property of another Indian . . . ."); Indian Civil Rights Act of 1968, Pub. L. 90-284, tit. II, 82 Stat. 77, 77–81 (codified as amended at 25 U.S.C. § 1301(4)) (defining "Indian" by reference to 18 U.S.C. § 1153).

25. 25 U.S.C. § 5129.

affairs—they will say this classification violates the equal protection clause.[26] First, for purposes of federal law, the Supreme Court has implied an equal protection obligation on Congress.[27] But I am going to tell you right now: There is no way that that principle can seriously apply to Indian affairs classifications, in terms of acts of Congress. Somebody has to decide, in the first instance, who an Indian is. Sometimes Congress says that an Indian is just an Indian. Sometimes Congress uses blood quantum, and sometimes it uses tribal membership. There are probably other definitions out there, but those are the main ones. When Congress says only "this applies to Indians," maybe that is not terribly helpful, but it is Congress's choice. And if that choice is rationally related to the fulfillment of the trust responsibility/duty of protection, then it is constitutional. Full stop.

We have been living with this legal principle since 1790. So, for you originalists out there, that is the big year, the First Congress, the original public understanding of the Constitution. It drives some people a little nuts that Congress is authorized to enact a statute that states it applies to "Indians." It looks like a race-based statute, but it is utterly constitutional so long as it is rationally related to the fulfillment of the trust responsibility. Could Congress enact a law mandating Indian preference in college admissions? Yes, given the obligations Congress has assumed going back to the treaty era to educate Indian children, that law is rationally related to the trust responsibility. Could Congress enact a law granting preferences to Indians in vaccine administration? Yes, given the obligations that Congress has assumed to guarantee the health and safety of Indian country residents. Could Congress pass a law mandating that Indians and only Indians are subject to a mandatory draft for military service because Indians are "warrior-like?" Hell no. That is straight-up race discrimination.

Now we have a couple of things kicking around out there that are happening in the world. Issues like the Indian Child Welfare Act,[28] which, in just two slender provisions, for example, provides that Indians of any tribe in the United States get placement preferences over non-Indians, for purposes of adoption placements and foster care placements.[29] That sounds like race discrimination to a lot of people. But Congress put that in there for a particular reason. You can read the legislative history regarding why that is in there. It is there because state governments discriminated against Indian people in foster care licensing and adoptions.[30] That is why it is in there. That is a rational relationship. It is an easy answer.

Monopolies on gaming also seem to get a lot of attention.[31] In Connecticut, the tribes have a monopoly on gaming that they negotiated with the State,[32] as do the tribes in

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26. Fletcher, *supra* note 18, at 499, 503, 544.

27. *See* Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954).

28. 25 U.S.C. §§ 1901–1963.

29. 25 U.S.C. § 1915(a)–(b).

30. *See* H.R. REP. NO. 95-1386, at 11 (1978).

31. *E.g.*, Maverick Gaming LLC v. United States, 123 F.4th 960 (9th Cir. 2024) (dismissing equal protection challenge to federal approval of gaming license), *cert. denied sub nom.,* RunItOneTime, LLC v. United States, No. 24-1161 (U.S. Oct. 6, 2025).

32. *See* Randall K. Q. Akee, Katherine A. Spilde, & Jonathan B. Taylor, *The Indian Gaming Regulatory Act and Its Effects on American Indian Economic Development*, 29 J. ECON. PERSPECTIVES 185, 201 (2015).

Florida.[33] Michigan tribes used to enjoy a similar monopoly until the governor violated the deal, and the tribes stopped paying them any money,[34] which was kind of awesome. For some, a monopoly sounds like a race-based preference. A monopoly favoring Indians or Indian tribes—is it rationally related to the fulfillment of the trust responsibility? Well, the reality is that it is. Congress has the power under the Commerce Clause to enact the Indian Gaming Regulatory Act. Congress deals with commerce with Indian tribes, states, and foreign nations, and gaming is about states and Indian tribes, especially. Second, tribal nations generally have suffered from abject poverty since the colonizer took our lands and resources. Really, any federal economic support for tribal nations is rationally related to the fulfillment of the trust responsibility. These are not hard questions unless one is driven by a political commitment to forego the answers.

Now, why does *Mancari* have to be the only rule, the best rule? The alternatives are much, much worse. The alternatives require the *judiciary* to decide who an "Indian" is, allowing—even requiring—judges to second-guess Congress. We kind of have that already with the Indian status cases under the Major Crimes Act and Indian Country criminal jurisdiction in general.[35] We have a working definition of "Indian" for criminal jurisdiction purposes—primarily, it is some indicia of governmental acknowledgment that a person is an Indian.[36] Nobody really likes the definition. It is kind of silly. I like to refer to the fact that a federal prosecutor, for example, often has to prove somebody who is not a tribal member is still an Indian for jurisdiction purposes—and they have to do so beyond a reasonable doubt to a federal jury that in all likelihood does not have any Indians on it. And even if it did, even if the jury was all Indians, nobody knows what an Indian is. But we work with that. That is viable, that is acceptable. It has to be acceptable if you are an originalist, of course, because that is the jurisdictional hook given to us by the First Congress.

Regardless of your political leanings, those kinds of classifications are the only way to proceed. If Congress chooses to go down that road and the judiciary is in a position to second-guess that choice, judges will make policy preferences, policy choices that they shouldn't be making. I will point to the work of people like Michalyn Steele, who has very conclusively shown that the judiciary has no institutional competence to decide who an Indian is, or anything in Indian affairs.[37] And anybody who has been to a Supreme Court oral argument and listened to the judges ask very basic, ignorant questions about what is going on in Indian Country knows that they have no institutional capacity to answer those questions. It has to be—and I hate to say this—has to be in the first instance anyway, our colonizer, Congress, at least for purposes of federal law. The options that are not tribal are simply unacceptable.

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33. *See* William Wood, *The (Potential) Legal History of Indian Gaming*, 63 ARIZ. L. REV. 969, 1029 (2021).

34. *See* Sault Ste. Marie Tribe of Chippewa Indians v. Engler, 271 F.3d 235, 239 (6th Cir. 2001).

35. *E.g.*, 18 U.S.C. §§ 1152, 1153.

36. RESTATEMENT: INDIAN STATUS, *supra* note 23.

37. *E.g.*, Michalyn Steele, *Comparative Institutional Competency and Sovereignty in Indian Affairs*, 85 U. COLO. L. REV. 759 (2014); Michalyn Steele, *Plenary Power, Political Questions, and Sovereignty in Indian Affairs*, 63 UCLA L. REV. 666 (2016).

I am going to slow down here, stop, and reach a conclusion. I think *Haaland v. Brackeen*[38] decided this case. If you look at *Brackeen*, the core of *Brackeen*, they punted a lot of things, but the core of *Brackeen* is about the Article I power of Congress. Congress has what we long have called plenary power in Indian affairs. There are two arguments behind that. One is the text of the Constitution. It separates out Indian affairs for Congress. The First Congress immediately, in 1790, in the first Trade and Intercourse Act, pre-empted the field.[39] As noted before, Congress actually forbade people from going into Indian Country without Congressional authorization. That technically is still the rule, regarding the alienation of certain lands, anyway, that Congressional authorization is required.[40]

The second big one is that there are probably a hundred or more U.S. Supreme Court cases acknowledging congressional plenary power.[41] In the history of the Supreme Court, no matter how many times Indians or others have tried to get the Supreme Court to strike down acts of Congress as being unconstitutional under any violation, any text or provision of the Constitution, or principle of the Constitution, only three times has the Supreme Court struck down an act of Congress or regulation. One of those was the same statute twice. That is the Indian Land Consolidation Act, Section 207 from *Hodel v. Irving*[42] and *Babbitt v. Youpee*.[43] The other is a case called *Muskrat v. United States*, where Congress did a really weird thing in saying, "We are going to pass a law that screws over these Minnesota Indians, and if they do not like it, they can challenge it in the federal courts for being unconstitutional before we implement it."[44] The Supreme Court said, "There is no case here yet, so we cannot accept that." Those are the only two Indian affairs statutes that have ever been struck down. It is not likely to happen again any time soon.

Final word. Maybe here is the real reason none of that matters at the Supreme Court, the real reason why there is no equal protection problem in Indian affairs. The real reason is this: If you apply strict scrutiny to strike down even one little provision, like that part of ICWA, the third placement preference, you open up every single act of Congress in Indian affairs to a strict scrutiny kind of analysis.[45] That is actually not the real reason. The real reason is Indian Country criminal jurisdiction. I believe the one thing the Supreme Court will likely never do is to tamper with the power of the government to exercise criminal jurisdiction. When one of the great things the colonizer is good at—and frankly, tribal nations are good at it right along with Congress and the federal government—is putting Indians in jail. I do not believe the Supreme Court will ever tamper with that. That has little to do with the Constitution and has nothing to do with the theoretical basis for my talk, but it is the reason why there is no equal protection problem. We will litigate over all

38. *See* 599 U.S. 255, 295 (2023).
39. *Cf. id.* at 311 (Gorsuch, J., concurring).
40. 25 U.S.C. § 177.
41. *See Brackeen*, 599 U.S. at 272–73 (listing several relevant cases).
42. 481 U.S. 704, 718 (1987).
43. 519 U.S. 234 (1997) (holding that § 207 was invalid because it effected a taking of property without just compensation).
44. 219 U.S. 346 (1911).
45. *See* Morton v. Mancari, 417 U.S. 535, 552 (1974).

of this; every lawyer in the room will hopefully bill a lot of money on the equal protection issue. But in the end, it will not work. The statutes will remain extant—they must. Otherwise, Indian country criminal jurisdiction goes away. The Major Crimes Act goes away. The Indian Country Crimes Act goes away.

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Is the Constitution unconstitutional? I have said that for a long time, too. Where does the Indians Not Taxed Clause fit into this? Is the Indian Commerce Clause a dead letter, as implied by Justice Thomas, who has implied that tribal sovereignty died in 1871 when Congress stopped ratifying Indian treaties?[46]

I like Heisenberg's uncertainty principle. I mean, Walter White can be all sorts of different things, depending on your perspective.[47] When Indians are not observed, they are one thing, but when they are observed, especially by the Supreme Court or Congress, they can be a totally different thing, which is kind of awesome.

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46. *See* United States v. Lara, 541 U.S. 193, 219 (2004) (Thomas, J., concurring in judgment) ("If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.").

47. For the uninitiated: Heisenberg is Walter White's alter ego in *Breaking Bad*. White is a high school chemistry teacher turned methamphetamine kingpin. His alias nods to physicist Werner Heisenberg, whose Uncertainty Principle reflects the unpredictability of White's double life.

UNQUESTIONED, ROOTED IN 200 YEARS OF PRECEDENT AND PRACTICE

THREE WORKING THEORIES OF PLENARY POWER

DEEPLY QUESTIONED AS RACIST AND A DEVIATION FROM CONSTITUTIONAL TEXT, PROBABLY SHOULD RESTART TREATY ERA

MARY SMITH AND JUSTICE GORSUCH

MAGGIE MCKINLEY (NOW BLACKHAWK) AND JUSTICE THOMAS

DEEPLY QUESTION AS UTTERLY UNAUTHORIZED BY CONSTITUTIONAL TEXT, PROBABLY SHOULD ELIMINATE TRIBAL SOVEREIGNTY AND DUTY OF PROTECTION

BRACKEEN MAJORITY — **PLENARY POWER** ALIVE AND WELL BUT MUST BE CABINED (SOMEHOW)

BRACKEEN *CONCURRENCE* — POWER TO REGULATE RELATIONS WITH TRIBAL NATIONS AND *OFF-RESERVATION* INDIANS *OKAY*, REGULATING TRIBES THEMSELVES NOT *GOOD*

BRACKEEN *DISSENT* — *LITTLE OR* CONGRESSIONAL INDIAN AFFAIRS POWER *OUTSIDE OF PURE* **COMMERCE**

VENENO *DISSENTAL* — *CALLS FOR* *OVERRULING* **KAGAMA** AND **NEW TREATY ERA**

PHX

INDIANS & THE COWBOYS

BRACKEEN AND VENENO

ORIGINAL UNDERSTANDING OF PLENARY POWER

1. UNITED STATES RELATIONS WITH INDIAN TRIBES ARE ON A SOVEREIGN-TO-SOVEREIGN BASIS

2. IN TREATY PROCESS, TRIBES AGREE TO COME UNDER THE PROTECTION OF THE UNITED STATES

3. TRIBES TRADE AWAY EXTERNAL SOVEREIGNTY IN FAVOR OF PLENARY INTERNAL SOVEREIGNTY

4. CONGRESS HAS NO POWER TO REGULATE THE INTERNAL AFFAIRS OF TRIBAL NATIONS

5. CONGRESS HAS NO POWER TO UNILATERALLY TREATIES AND OTHER AGREEMENTS WITH TRIBAL NATIONS

6. CONGRESS HAS NO AUTHORITY TO CONFISCATE INDIAN AND TRIBAL ASSETS

7. UNITED STATES LIABLE FOR BREACHES OF TRUST

8. ACTS OF CONGRESS RATIONALLY RELATED TO THE FULFILLMENT OF THE DUTY OF PROTECTION ARE CONSTITUTIONALLY VALID

1. RETURN TO THE ORIGINAL UNDERSTANDING OF PLENARY POWER

2. INCORPORATE THE **UNITED NATION DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES'** "FREE, PRIOR, AND INFORMED CONSENT" REQUIREMENT

LIMITING PLENARY POWER?

3. ADOPT **GORSUCH'S** THEORY

4. ADOPT **THOMAS'** THEORY

5. GET MORE MILITANT

6. GOOD NATIVE GOVERNANCE

7. DO NOTHING

if Columbus had done it, we'd all be Indians.