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NOTE

THE INDIAN TREATY POWER

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*Federal Indian law is experiencing a crisis of faith. In *United States v. Kagama*, decided 140 years ago, the Supreme Court granted Congress a “plenary” power over Indian affairs, rooted not in the Constitution, but rather in a paternalistic duty to protect Indians deemed incapable of self-government. That power—exclusive and unlimited in subject matter—has been condemned as racist, hostile to tribal sovereignty, and incompatible with limited government. Yet it continues to undergird most of Title 25—the portion of the U.S. Code governing Indian healthcare, education, housing, and more.*

*That tension recently manifested in *Haaland v. Brackeen*, which challenged the Indian Child Welfare Act (“ICWA”). Uneasy with a constitutionally unmoored plenary power, the Court canvassed discrete constitutional provisions that might sustain ICWA but ultimately left the legislation’s constitutional foundation unresolved. This Note offers the Court a way forward, arguing that the Treaty Clause of Article II and the Necessary and Proper Clause of Article I provide a firm basis for legislation like ICWA. In doing so, this Note makes two novel contributions to existing scholarship. First, it argues*

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that the Necessary and Proper Clause gives Congress elastic authority to execute existing treaties through legislation that reaches all federally recognized tribes, including those that have no treaties with the United States. Second, it operationalizes that claim to show how Indian legislation could be sustained, articulating a constitutional defense of statutes like ICWA, which lack the nexus to economic activity required to be sustained under the Commerce Clause.

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INTRODUCTION

*“Great nations, like great men, should keep their word.”*¹

The Supreme Court has an Indian law problem.² For the first century of this country’s history, Indian tribes were treated as sovereign nations capable of signing treaties, selling their lands, and governing themselves. But 140 years ago, in *United States v. Kagama*, the Court changed course, bestowing upon the federal government a “plenary”—that is, an exclusive and unlimited—power over Indian affairs, which extended even to regulating the tribes’ internal affairs.³ *Kagama* has

¹ Fed. Power Comm’n v. Tuscarora Indian Nation, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

² This Note uses “Indian” and “Native American” interchangeably to refer to indigenous peoples, consistent with the norms of Indian law scholarship. See, e.g., Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012, 1014 n.3 (2015).

³ 118 U.S. 375, 384–85 (1886).

been described as “the ghost of manifest destiny that will not let go,”⁴ and the plenary power it inaugurated has been condemned by scholars as untethered from the Constitution,⁵ rooted in racialized stereotypes,⁶ at odds with historical practice recognizing Indian sovereignty,⁷ and “repugnant to the doctrine of enumerated powers.”⁸ Despite the criticisms lobbed at the plenary power, it has facilitated virtually the entire statutory framework governing Indian affairs—both good and bad. In addition to policies that have enabled the displacement and ethnic cleansing of Indian tribes,⁹ the power also serves as the basis for most of Title 25—the portion of the United States Code that houses legislation designed to benefit the tribes in areas ranging from education to healthcare to child welfare.¹⁰

But 2023’s *Haaland v. Brackeen* highlighted cracks in the plenary power’s foundation. *Brackeen* considered, but did not settle, the constitutionality of the Indian Child Welfare Act (“ICWA”),¹¹ which regulates state custody proceedings regarding the placement of Indian children with the aim of keeping them in their tribal communities.¹² If the Court had faithfully applied *Kagama*, this would have been an easy case—it could have simply invoked the plenary power without further discussion. But it did not. While the Court gestured at the doctrine, it also canvassed possible bases for ICWA rooted in the Constitution’s text and structure.¹³ Among the potential alternatives the Court considered were the Indian Commerce Clause,¹⁴ the Treaty Clause,¹⁵ and the federal

⁴ M. Henry Ishitani & Alexandra Fay, *Revising the Indian Plenary Power Doctrine*, 29 Mich. J. Race & L. 1, 2 (2024).

⁵ See, e.g., Philip P. Frickey, *Domesticating Federal Indian Law*, 81 Minn. L. Rev. 31, 43 (1996) (observing that the “text of the Constitution lacks much of a hint of any plenary power”).

⁶ See, e.g., Ishitani & Fay, *supra* note 4, at 2–3.

⁷ See, e.g., Steven Paul McSloy, *Back to the Future: Native American Sovereignty in the 21st Century*, 20 N.Y.U. Rev. L. & Soc. Change 217, 218–20 (1993).

⁸ *Id.* at 253.

⁹ See Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. Pa. L. Rev. 195, 227 (1984) (describing the criminalization of indigenous religions and the removal of Native children to boarding schools).

¹⁰ See Ishitani & Fay, *supra* note 4, at 17; Ablavsky, *supra* note 2, at 1016.

¹¹ *Haaland v. Brackeen*, 143 S. Ct. 1609, 1629–31 (2023).

¹² Indian Child Welfare Act, 25 U.S.C. §§ 1901–1963.

¹³ *Brackeen*, 143 S. Ct. at 1630–32.

¹⁴ *Id.* at 1630.

¹⁵ *Id.* at 1631.

government's inherent power over foreign affairs.¹⁶ But the opinion never settled which textual basis, if any, could sustain ICWA.¹⁷ By invoking the plenary power while in the same breath exploring specific constitutional provisions, the Court betrayed its lack of faith in the plenary power's continuing vitality. The stakes of this doctrinal instability are high; although *Brackeen* narrowly concerned ICWA, the Court's waning confidence in the plenary power imperils all of Title 25.

Some scholars have argued that abandoning the doctrine would "effectively erase[]" a myriad of essential programs covering Indian healthcare, housing, education, and more.¹⁸ But if this is the only reason for adhering to a doctrine that is both contrary to the principle of enumerated powers and unsupported by the Constitution's text, that reason has weak persuasive force. If the problem is that, without the plenary power, much of Title 25 would fall, the solution is to ground Indian legislation in a textual provision that can legitimately support it.

This Note proposes that the Treaty Clause of Article II, together with the Necessary and Proper Clause of Article I, allows the federal government to fulfill its obligations to Indian nations without resorting to plenary authority. Prior scholarship has largely converged on the Indian Commerce Clause as the proper constitutional home for Title 25;¹⁹ but, as this Note demonstrates, that provision is insufficient to sustain legislation like ICWA, which lacks any nexus to commerce. While the Court has invoked the Treaty Clause a few times in addressing federal authority over Indian affairs,²⁰ and a handful of scholars have briefly gestured at the provision,²¹ this Note is the first

¹⁶ *Id.*

¹⁷ *Id.* at 1630–31 (upholding ICWA because petitioners failed to discharge their "burden of establishing ICWA's unconstitutionality").

¹⁸ See Ablavsky, *supra* note 2, at 1016 (internal quotation marks omitted); Ishitani & Fay, *supra* note 4, at 17.

¹⁹ See, e.g., Stephen Andrews, In Defense of the Indian Commerce Clause, 9 *Am. Indian L.J.* 182, 204–06 (2021); Ablavsky, *supra* note 2, at 1029.

²⁰ *Brackeen*, 143 S. Ct. at 1628; *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973); *United States v. Lara*, 541 U.S. 193, 200 (2004); *Morton v. Mancari*, 417 U.S. 535, 552 (1974).

²¹ See, e.g., Lorianne Updike Toler, The Missing Indian Affairs Clause, 88 *U. Chi. L. Rev.* 413, 482 (2021) (arguing that, in the absence of a plenary power, the solution is to ratify new treaties with the tribes); Saikrishna Prakash, Against Tribal Fungibility, 89 *Corn. L. Rev.* 1069, 1095–97 (2004) (arguing that specific treaties might give the government narrow authority vis-à-vis particular tribes).

piece of legal scholarship to fully consider its potential and to operationalize it through the Necessary and Proper Clause.

This Note proceeds in three parts. Part I details the origins and scholarly critiques of the plenary power doctrine and traces the Supreme Court's slow retreat from it. Part II argues that the most popular alternative to the plenary power, the Indian Commerce Clause, is insufficient to sustain portions of Title 25, specifically the provisions lacking any nexus to economic enterprise. Such provisions exist in a state of constitutional limbo. Part III fills that gap, arguing that the Necessary and Proper Clause authorizes Congress to implement the United States' treaties with Indian tribes, and that Title 25 legislation is "necessary and proper" to honor those commitments. While this Note focuses on ICWA as a uniquely vulnerable statute, its arguments apply with equal force to other provisions in Title 25.²²

I. A HISTORY OF THE PLENARY POWER

In the century-plus following the Supreme Court's first articulation of the plenary power, scholars have criticized it as inconsistent with fundamental constitutional principles,²³ hostile to sovereign tribal interests,²⁴ and "a relic of a more racist, imperialist American past."²⁵

²² Doing away with the plenary power "would render much of federal Indian law . . . at least preliminarily suspect." Ishitani & Fay, *supra* note 4, at 17. Because noneconomic crimes, *United States v. Morrison*, 529 U.S. 598, 617 (2000), and land use, *Lake Country Ests., Inc. v. Tahoe Reg'l Plan. Agency*, 440 U.S. 391, 402 (1979), are traditionally regulated at the local level, Title 25 legislation that operates in these areas, similar to ICWA, cannot be sustained under the Commerce Clause. Nonetheless, this legislation too might be considered "necessary and proper" to implementing various treaties. Compare, e.g., Indian Civil Rights Act § 204, 25 U.S.C. § 1304 (authorizing tribal jurisdiction over domestic violence offenses committed on Indian lands), Indian Reorganization Act, 25 U.S.C. §§ 5101–5129 (taking land into trust for the tribes and managing its use), and 25 U.S.C. §§ 371–380 (regulating the intestacy of Indian lands), with Treaty with the Navajo Indians, Navajo-U.S., art. I, ¶ 2, June 1, 1868, 15 Stat. 667, <https://treaties.okstate.edu/treaties/treaty-with-the-navaho-1868-1015> [<https://perma.cc/2WQY-8EUN>] (providing for the punishment of white offenders in Indian country), Treaty with the Cherokees, Cherokee-U.S., arts. VIII–IX, July 2, 1791, 7 Stat. 39, <https://treaties.okstate.edu/treaties/treaty-with-the-cherokee-1791-0029> [<https://perma.cc/Z45F-ZQZ4>] (setting apart land for the tribe and providing for assistance in managing it), and Treaty with the Chickasaw, Chickasaw-U.S., art. IV, May 24, 1834, 7 Stat. 450, <https://treaties.okstate.edu/treaties/treaty-with-the-chickasaw-1834-0418> [<https://perma.cc/JX24-KPQS>] (providing for the descent of Indian lands to heirs).

²³ See, e.g., Frickey, *supra* note 5, at 35.

²⁴ McSloy, *supra* note 7, at 218–19; Newton, *supra* note 9, at 234–35.

²⁵ Ishitani & Fay, *supra* note 4.

The *Brackeen* Court had the unenviable task of responding to these critiques and, although it expressed discomfort with the plenary power as a basis for congressional authority, it failed to identify a viable alternative.²⁶ Should the plenary power be abandoned, an entire title of the United States Code—which covers programs addressing Indian healthcare, child welfare, education, housing, and more—might be left without a constitutional foundation.²⁷

A. Pre-Plenary Power: The Treaty Era

Given this nation's long history of controlling the tribes through federal policymaking, one might assume that Congress has always enjoyed a plenary power over Indian affairs. But that power was not inevitable. It emerged as a political *choice* made by Congress²⁸ and later sanctioned by the Supreme Court,²⁹ one that marked a departure from earlier practice. Before the Founding—and well into the early Republic—Indian nations were treated as sovereigns comparable to foreign states, a status reflected in dealings under the British Crown, the Continental Congress, and the early constitutional government.³⁰ Because the limited congressional legislation of this era could be tied squarely to an enumerated power,³¹ a plenary power was unnecessary and, indeed, incompatible with the prevailing understanding that tribes retained the power of self-government despite colonization.³² This history matters because a plenary power—entailing authority over a

²⁶ While the Court gestured at multiple constitutional provisions as a hook for Indian affairs and focused extensively on the Indian Commerce Clause in particular, it ultimately held that petitioners had failed to discharge their “burden” of proving the unconstitutionality of ICWA, perhaps reflecting some unease about the Indian Commerce Clause as a basis for the legislation. See *Haaland v. Brackeen*, 143 S. Ct. 1609, 1630–31 (2023).

²⁷ See Ablavsky, *supra* note 2, at 1015–16.

²⁸ Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566.

²⁹ *United States v. Kagama*, 118 U.S. 375, 384–85 (1886).

³⁰ Newton, *supra* note 9, at 200–05; Prakash, *supra* note 21, at 1082–86.

³¹ For instance, portions of the Trade and Intercourse Act of 1790 fell squarely under the Indian Commerce Clause because they regulated trade with Indian tribes. And Section 5, which prohibited white people from committing crimes on Indian lands, could be understood as “necessary and proper” to implement Indian treaties. See Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 *Denv. U. L. Rev.* 201, 252–54 (2007).

³² See *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 581 (1832); *Haaland v. Brackeen*, 143 S. Ct. 1609, 1659 (2023) (Gorsuch, J., concurring).

tribe's internal affairs—cannot coexist with tribal sovereignty.³³ Of these competing frameworks, only tribal sovereignty is supported by Founding Era practice and the Constitution's text.³⁴

As the colonies and the budding American Republic engaged with the Indian tribes, those interactions were animated by older notions of tribal sovereignty imported from Great Britain.³⁵ As a seasoned colonial power, Britain was familiar with the concept of tributary and feudatory states—polities that, though dependent in limited respects on a superior power, retained their status as distinct, self-governing political communities.³⁶ And under settled international law governing Britain's early interactions with the tribes, a weaker power did not forfeit its independence or right to self-government merely by associating with, or accepting the protection of, a stronger one.³⁷ Consistent with this understanding of retained sovereignty, the King *purchased* Native land and grounded legal title in those transactions.³⁸ The Crown likewise engaged in treaty-making with tribes just as it did with European powers, reflecting the view that tribes were nations capable of maintaining peace and war and of governing themselves.³⁹ Indeed, early “history furnishes no example . . . of any attempt, on the part of the crown, to interfere with the internal affairs of the Indians.”⁴⁰

The American Revolution dissolved the political relationship between Britain and its North American colonies, but it did not discard the British model of Indian relations. Both the Articles of Confederation and the Constitution reflected the British understanding that Indians were

³³ See Toler, *supra* note 21, at 417–18; Ishitani & Fay, *supra* note 4; McSloy, *supra* note 7, at 218–19.

³⁴ See Prakash, *supra* note 21, at 1082–86.

³⁵ Newton, *supra* note 9, at 237–38.

³⁶ Ablavsky, *supra* note 2, at 1061. Tributary and feudatory states are entities that acknowledge a superior power by paying tribute, offering gifts, or rendering some other form of service. Though this relationship may “diminish [their] dignity,” it does not “divest[] [them] of the right of government and sovereignty.” Emer de Vattel, *The Law of Nations* 83 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund 2008) (1758) (footnote omitted).

³⁷ *Worcester*, 31 U.S. (6 Pet.) at 560–61; see also Ablavsky, *supra* note 2, at 1061–62 (detailing the Washington Administration's recognition of Indian tribes as sovereign foreign nations and “disclaim[ing] [of] authority over Natives or their self-governance”).

³⁸ *Haaland v. Brackeen*, 143 S. Ct. 1609, 1648 (2023) (Gorsuch, J., concurring); *Worcester*, 31 U.S. (6 Pet.) at 544–45.

³⁹ Alvin Padilla-Babilonia, *Sovereignty and Dependence in the American Empire: Native Nations, Territories, and Overseas Colonies*, 73 *Duke L.J.* 943, 957 (2024).

⁴⁰ *Worcester*, 31 U.S. (6 Pet.) at 547.

sovereign.⁴¹ Under both regimes, the federal government continued the practice of bargaining for land and signing treaties with the tribes.⁴² The retention of Indian sovereignty was “indeed integral to the bargain struck between the federal government and tribes,” wherein the tribes ceded their aboriginal lands in exchange for the right to self-govern within federally established reservations.⁴³

The text of the Constitution confirms this sovereignty. By declaring treaties to be “the supreme Law of the Land,”⁴⁴ the Supremacy Clause explicitly incorporated and sanctioned treaties signed with Indian nations under the Articles of Confederation.⁴⁵ The Supremacy Clause therefore admits the tribes “among those powers who are capable of making treaties.”⁴⁶ This is significant because private individuals or entities cannot be parties to treaties as “treaty-making is by definition an exercise of sovereign authority.”⁴⁷ In the Commerce Clause too, “Indian Tribes” exist on equal footing with “foreign Nations” and “the several States” as entities with whom the United States may regulate “[c]ommerce.”⁴⁸ By equating Indian tribes with states and foreign nations—political entities capable of self-government—the Constitution affirms tribal sovereignty and rejects any constitutional basis for a congressional plenary power over the tribes.⁴⁹

Federal authority during this era was modest, not “plenary.”⁵⁰ Just as the British Crown recognized Indian sovereignty, so too did the new Republic.⁵¹ The United States pursued a policy of diplomacy, purchasing Native lands and engaging with tribes via treaty.⁵² The federal authority that *did* exist arose directly from, and was limited by, the Constitution. Most Indian policy was carried out by the executive

⁴¹ Prakash, *supra* note 21, at 1083; see also Newton, *supra* note 9, at 200 (noting that the Framers considered the Indian tribes as sovereign nations at the time of drafting).

⁴² Michelle Bryan, A Most Essential Power: The Case for Restoring Comprehensive Land Use Authority in Indian Country, 48 Pub. Land & Res. L. Rev. 46, 73 (2025).

⁴³ *Id.*

⁴⁴ U.S. Const. art. VI, cl. 2.

⁴⁵ *Worcester*, 31 U.S. (6 Pet.) at 559.

⁴⁶ *Id.*

⁴⁷ David P. Stewart & Diana A.A. Reisman, Who Thinks Treaties Are Like Contracts? Not John Marshall, 37 Am. U. Int'l L. Rev. 945, 951–52 (2022).

⁴⁸ U.S. Const. art. I, § 8, cl. 3.

⁴⁹ See Prakash, *supra* note 21, at 1083–84; Newton, *supra* note 9, at 201–02.

⁵⁰ Ablavsky, *supra* note 2, at 1036.

⁵¹ Newton, *supra* note 9, at 200.

⁵² *Id.*

branch, justified under its war and treaty powers.⁵³ The limited congressional legislation that emerged during this period served only to carry out the government's treaty commitments or was justified under the Indian Commerce Clause.⁵⁴ Federal legislative power during these years bore little resemblance to the expansive authority that would follow.

B. Kagama and the Plenary Power Era

The federal government's attitude toward the tribes shifted sharply in the late nineteenth century. Resentful of the Senate's exclusive role in ratifying Indian treaties, and bristling at the "comedy" of treating tribes as "great nations" or "equals," the House of Representatives threatened to block funding for the execution of treaty terms.⁵⁵ Then, in 1871, Congress officially ceased treaty-making with the tribes.⁵⁶ The transformation of federal authority over Indians during this period was one not of degree but of kind. The 1871 statute signaled a shift away from diplomatic relations *with* the tribes to an assertion of federal power *over* them, and from *executive* to *congressional* supremacy in Indian affairs⁵⁷—despite the Constitution's failure to give either branch the authority to regulate the internal affairs of sovereign tribes.⁵⁸ When this expansion of congressional authority reached the Supreme Court in *United States v. Kagama*, the Court embraced it, endorsing a plenary power theory unmoored from the Constitution's text.⁵⁹ The Court also recast the tribes as "weak[] and helpless[]" entities whose sovereignty,

⁵³ U.S. Const. art. II, § 2, cls. 1–2; see Newton, *supra* note 9, at 201–02.

⁵⁴ The centerpiece of congressional Indian policy during this period was the Trade and Intercourse Act of 1790. Its first three sections concerning licenses for trade were "standard regulations of commerce with the Indians," while its fourth and fifth sections were "designed to effectuate Indian treaties." Natelson, *supra* note 31, at 252–55.

⁵⁵ Cong. Globe, 41st Cong., 3d Sess. 764–65 (1871); Newton, *supra* note 9, at 200 n.23.

⁵⁶ Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 544, 566; Newton, *supra* note 9, at 200.

⁵⁷ *United States v. Kagama*, 118 U.S. 375, 382 (1886) ("But, after an experience of a hundred years of the treaty-making system of government, Congress has determined upon a new departure—to govern them by acts of Congress.").

⁵⁸ Newton, *supra* note 9, at 237–38; Prakash, *supra* note 21, at 1102 (discussing the executive power); Ablavsky, *supra* note 2, at 1053 (discussing congressional power).

⁵⁹ *Kagama*, 118 U.S. at 379–80.

though not formally extinguished, survived only at the mercy of Congress.⁶⁰

The Court was explicit that the plenary power it authorized did *not* arise from the Constitution.⁶¹ In *Kagama*, the Court upheld the validity of the Major Crimes Act,⁶² which asserted federal criminal jurisdiction over crimes committed by Indians, against Indians, on tribal land, and within a single state.⁶³ The Constitution withholds from Congress a “general right to punish” *intrastate* crimes,⁶⁴ granting only limited authority to adopt criminal laws in furtherance of its other enumerated powers.⁶⁵ The Indian Commerce Clause is one such enumerated power, but the Court expressly declined to make it the constitutional basis for its decision, thinking it a “very strained construction” to suggest that Congress’s power to regulate trade with Indian tribes could authorize a comprehensive criminal code addressing common law offenses like murder and arson.⁶⁶ The treaty power likewise went unmentioned because no treaty with any tribe contemplated the United States assuming jurisdiction over purely internal tribal affairs.⁶⁷

Instead, the Court advanced a theory of congressional power that was both exclusive and unlimited, one which arose not from the Constitution, but from the “very weakness” of the tribes.⁶⁸ The Court’s reasoning proceeded in three parts. First, because Indians were “weak[] and helpless[],” they could not govern themselves.⁶⁹ Second, because they existed within the boundary of the United States, *someone* had to govern them.⁷⁰ And third, because the federal government had contributed to the tribes’ helpless condition, the federal government

⁶⁰ See *id.* at 384. *Kagama*’s conception of tribal sovereignty marked a decisive break from the Court’s earlier acknowledgements of the tribes’ “right . . . to govern themselves.” *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 540 (1832).

⁶¹ *Kagama*, 118 U.S. at 379 (“[W]e are not able to see, in . . . the Constitution and its amendments, any delegation of power . . . for the punishment of . . . crimes . . . when committed by Indians . . .”).

⁶² *Id.* at 385.

⁶³ Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385.

⁶⁴ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 426 (1821).

⁶⁵ See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 417 (1819); *Sabri v. United States*, 541 U.S. 600, 605 (2004).

⁶⁶ *Kagama*, 118 U.S. at 378–79.

⁶⁷ *Ablavsky*, *supra* note 2, at 1062 (describing how treaties of this era “disclaimed authority over Natives or their self-governance” (emphasis added)).

⁶⁸ *Kagama*, 118 U.S. at 384.

⁶⁹ *Id.*

⁷⁰ *Id.* at 384–85.

owed the tribes a duty of protection, creating a corresponding power to govern.⁷¹ In just three moves, *Kagama* departed from—but did not overrule—a century of judicial and diplomatic practice recognizing tribal sovereignty, injecting lasting “incoherence into [the Court’s] Indian-law jurisprudence” and spawning a plenary power theory that lacked any basis in the Constitution.⁷²

To be sure, the *Kagama* opinion did not arise, at least not overtly, out of animus toward the “remnants of a race once powerful.”⁷³ Rather, it was a paternalistic effort to shield the tribes from the hostility of state governments.⁷⁴ After all, once the Court denied tribal sovereignty, only two sovereigns remained, and the tribes had to be governed by one of them.⁷⁵ But the Court’s starting premise—that Indian tribes were not sovereign—reflects startling deference to Congress and deserves further analysis.

First, the Court reasoned that, despite a century-long commitment to tribal sovereignty, tribes were no longer capable of governing themselves because they were now “weak and diminished in numbers,”⁷⁶ though it failed to note that tribes were “diminished” precisely because Congress had failed to honor treaty commitments that promised necessities such as land or money.⁷⁷ Second, any doubts about Indian sovereignty were resolved by Congress’s 1871 statement that tribes were no longer “great nations” with whom the United States could sign treaties.⁷⁸ But the legislative history of this Act betrays both animus toward the “savage” tribes, with whom “not a civilized nation on the

⁷¹ *Id.*

⁷² *Haaland v. Brackeen*, 143 S. Ct. 1609, 1659 (2023) (Gorsuch, J., concurring).

⁷³ *Kagama*, 118 U.S. at 384.

⁷⁴ *Id.* (describing the states as the tribes’ “deadliest enemies”).

⁷⁵ *Id.* at 379 (“The soil and the people within [the geographical] limits [of the United States] are under the political control of the Government of the United States, or of the States of the Union. There exist within the broad domain of sovereignty but these two.”).

⁷⁶ *Id.* at 384.

⁷⁷ See Wilcomb E. Washburn, *The Historical Context of American Indian Legal Problems*, 40 *Law & Contemp. Probs.*, Winter 1976, at 12, 16–18; Sarah Pripas-Kapit, “We Have Lived on Broken Promises”: Charles A. Eastman, Susan La Flesche Picotte, and the Politics of American Indian Assimilation During the Progressive Era, 35 *Great Plains Q.* 51, 65 (2015) (“[B]roken treaties and failed promises were not aberrant but typical of a century-long pattern of US-Indian relations.”); Cong. Globe, 41st Cong., 3d Sess. 766 (1871) (statement of Rep. Eugene Wilson) (“Much sympathy is expressed by eastern gentlemen for the suffering Indian . . . Let me tell them that the wrongs done the Indian have been the failure to carry out treaty stipulations.”).

⁷⁸ *Kagama*, 118 U.S. at 382; see *supra* note 55 and accompanying text.

face of the globe” would make treaties, and an overt play by the House for greater power over Indian affairs.⁷⁹ Recall that tribal sovereignty and congressional power over the tribes exist in direct tension because recognition of one necessarily limits the other.⁸⁰ By uncritically accepting Congress’s statements about tribal sovereignty, the Court effectively permitted Congress to expand its constitutional powers by fiat, using its own legislative pronouncements to validate its actions.⁸¹ Thus, the Court’s opinion in *Kagama* both assimilates congressional animus toward the tribes and gives Congress a “blank check[]” to legislate further.⁸²

Kagama’s theory of congressional power was not only unconstitutional—resting on “racialized rhetoric and theories of unenumerated federal powers”⁸³—but it also empowered the federal government to inflict severe abuses upon the tribes. It is unsurprising that the plenary power, born of hostility toward the Indians, became a tool for their further subjugation.⁸⁴ Having received judicial approval for the subversion of tribal self-government in *Kagama*, Congress continued to erode the political independence of the tribes. For example, in 1906, Congress limited the legislatures of several tribes to meeting no more than thirty days per year and subjected their legislative acts to presidential veto.⁸⁵ Congress also authorized the consolidation of tribes lacking any ethnological connection, including groups which had historically been enemies.⁸⁶ Indigenous religious practices were criminalized, and Indian children were compelled to attend boarding schools where they were forbidden to speak their native languages.⁸⁷ A year and a half before *Kagama*, the Court held in *Elk v. Wilkins* that

⁷⁹ Cong. Globe, 41st Cong., 3d Sess. 765 (1871) (statement of Rep. William Lawrence); id. at 764 (statement of Rep. Henry Dawes) (“I have a very clear notion about the idea of magnifying a roving band of Indians into the dignity of a nation of the earth . . . and then making a treaty . . . that shall not only bind those who make it, but bind the House of Representatives for all time . . .”).

⁸⁰ Toler, *supra* note 21, at 417–18; McSloy, *supra* note 7, at 218–19.

⁸¹ Newton, *supra* note 9, at 222–23.

⁸² See *Haaland v. Brackeen*, 143 S. Ct. 1609, 1629 (2023).

⁸³ Ablavsky, *supra* note 2, at 1082.

⁸⁴ *Brackeen*, 143 S. Ct. at 1658 (Gorsuch, J., concurring) (“It is no coincidence either that this Court’s plenary-power jurisprudence emerged in the same era as Indian boarding schools and other assimilationist policies.”).

⁸⁵ Newton, *supra* note 9, at 223–24.

⁸⁶ Id.

⁸⁷ Id. at 227–28.

Indians were not citizens,⁸⁸ preventing them from participating in federal elections. Together, these two rulings subjected Indians to any law Congress saw fit, while stripping them of any voice in electing the lawmakers responsible.⁸⁹

But *Kagama*'s conferral of unlimited federal power also yielded valuable legislation. Beginning with the Johnson and Nixon Administrations, the federal government moved away from a model of paternalistic dominance, and toward treating tribes with dignity and working in partnership to advance their prosperity.⁹⁰ In 1970, President Nixon signed the first piece of legislation in more than two centuries that returned land previously taken from a tribe.⁹¹ Shortly thereafter, Congress passed statutes to promote tribal economic self-sufficiency,⁹² expand access to health services,⁹³ and fund the construction of tribally controlled schools in place of those overseen by the federal government.⁹⁴ Today, Title 25 houses an extensive body of legislation advancing tribal interests, from Indian child welfare and education⁹⁵ to workforce development,⁹⁶ housing assistance,⁹⁷ and land management.⁹⁸ These programs are all rooted in the congressional plenary power.⁹⁹ Modern Indian policy reveals that the plenary power was problematic not because it invariably resulted in the mistreatment of the tribes, but because, without limits, it enabled mistreatment whenever such mistreatment was politically expedient.

⁸⁸ 112 U.S. 94, 109 (1884).

⁸⁹ Newton, *supra* note 9, at 224–25.

⁹⁰ See Judith V. Royster, *The Legacy of Allotment*, 27 *Ariz. St. L.J.* 1, 18–19 (1995).

⁹¹ See Audrey Glendenning, Martin Nie & Monte Mills, (Some) Land Back . . . Sort of: The Transfer of Federal Public Lands to Indian Tribes Since 1970, 63 *Nat. Res. J.* 200, 201 (2023); Pub. L. No. 91-550, 84 Stat. 1437 (1970); Remarks on Signing Bill Restoring the Blue Lake Lands in New Mexico to the Taos Pueblo Indians, 1 *Pub. Papers* 1131 (Dec. 15, 1970).

⁹² Indian Financing Act of 1974, Pub. L. No. 93-262, 88 Stat. 77.

⁹³ Indian Health Care Improvement Act, Pub. L. No. 94-437, 90 Stat. 1400 (1976).

⁹⁴ Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975).

⁹⁵ Indian Child Welfare Act, 25 U.S.C. §§ 1901–1963.

⁹⁶ Indian Employment, Training and Related Services Act, 25 U.S.C. §§ 3401–3417.

⁹⁷ Native American Housing Assistance and Self-Determination Act, 25 U.S.C. §§ 4101–4243.

⁹⁸ Indian Mineral Development Act, 25 U.S.C. §§ 2101–2108.

⁹⁹ Ablavsky, *supra* note 2, at 1016; see Ishitani & Fay, *supra* note 4, at 17; see, e.g., Indian Child Welfare Act, 25 U.S.C. § 1901 (invoking the plenary power as a source of congressional authority for the statute).

C. After the Plenary Power: Haaland v. Brackeen

Kagama's theory of plenary power has been the target of sustained attack by judges and legal scholars alike. Described as "the ghost of manifest destiny that will not let go,"¹⁰⁰ *Kagama* and its progeny have been compared to *Plessy v. Ferguson*, *Korematsu v. United States*,¹⁰¹ and *Dred Scott v. Sandford*.¹⁰² Scholars have condemned the plenary power for being untethered from the Constitution,¹⁰³ rooted in racialized stereotypes,¹⁰⁴ at odds with historical practice recognizing Indian sovereignty, and "repugnant to the doctrine of enumerated powers."¹⁰⁵ Such perspectives have found purchase outside the academy, gradually making their way into dissents¹⁰⁶ and concurrences,¹⁰⁷ with Justice Gorsuch arguing that *Kagama*'s conception of federal authority "should make [the Supreme] Court blush."¹⁰⁸ These long-standing criticisms lurk behind the Court's (non)decision in *Haaland v. Brackeen*—the latest word on congressional authority in Indian affairs.¹⁰⁹

In *Brackeen*, the Supreme Court heard a challenge to perhaps the most significant, and controversial, piece of modern federal Indian legislation. Enacted in 1978, ICWA was Congress's response to the systematic removal of Indian children from their homes, which occurred at "alarmingly high" rates during the Assimilation Era, even when relatives or other tribal members were available to care for them.¹¹⁰ ICWA seeks to keep these children within their communities,

¹⁰⁰ Ishitani & Fay, *supra* note 4.

¹⁰¹ *Veneno v. United States*, No. 24-5191, slip op. at 7 (U.S. Nov. 10, 2025) (Gorsuch, J., dissenting from denial of cert.) (comparing *Kagama* to *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Korematsu v. United States*, 323 U.S. 214 (1944)).

¹⁰² *Sioux Nation of Indians v. United States*, 601 F.2d 1157, 1173 (Ct. Cl. 1979) (Nichols, J., concurring) (calling *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), a case which upheld the federal government's right to unilaterally abrogate Indian treaties under *Kagama*'s plenary power, "the Indians' Dred Scott decision"), *aff'd*, 448 U.S. 371 (1980).

¹⁰³ Frickey, *supra* note 5, at 43 ("[T]he text of the Constitution lacks much of a hint of any plenary power . . .").

¹⁰⁴ Ishitani & Fay, *supra* note 4.

¹⁰⁵ McSloy, *supra* note 7, at 218–19, 253.

¹⁰⁶ See, e.g., *Veneno*, slip op. at 3 (Gorsuch, J., dissenting from denial of cert.).

¹⁰⁷ See, e.g., *Haaland v. Brackeen*, 143 S. Ct. 1609, 1653 (2023) (Gorsuch, J., concurring); *Sioux Nation*, 601 F.2d at 1173 (Nichols, J., concurring); *United States v. Lara*, 541 U.S. 193, 215 (2004) (Thomas, J., concurring).

¹⁰⁸ *Veneno*, slip op. at 1 (Gorsuch, J., dissenting from denial of cert.).

¹⁰⁹ *Brackeen*, 143 S. Ct. at 1629.

¹¹⁰ 25 U.S.C. § 1901(4).

establishing a hierarchy of placement preferences to guide state court custody proceedings.¹¹¹

The plenary power was front and center in the battle over ICWA. While the majority rejected the petitioners' challenge to ICWA, it did not settle its constitutionality. The Court invoked the plenary power but did not rely on it.¹¹² It then highlighted discrete textual provisions within Article I that might replace it.¹¹³ Ultimately, however, the Court took neither route to resolve the case. Instead of affirmatively sanctioning ICWA as an expression of Congress's Article I authority, the Court chose a narrower path, holding only that ICWA was not clearly unconstitutional.¹¹⁴ It thus preserved its freedom to revisit the issue if presented with stronger or different arguments in the future.

Although the Court gestured at the plenary power as a possible way to resolve the case, its account of that power departed substantially from that of *Kagama*, which the majority did not cite once.¹¹⁵ The power the *Brackeen* Court described was "plenary" in name only, not in substance. First, the Court flatly rejected *Kagama*'s assertion that congressional authority over Indian affairs could arise from tribal dependency, a paternalistic duty of protection, or "the atmosphere."¹¹⁶ Instead, in Indian affairs as anywhere, congressional power "must derive from the Constitution."¹¹⁷ Second, since Congress's authority arises from Article I rather than tribal weakness, its power is necessarily limited. After all, "Article I gives Congress a series of enumerated powers, not a series of blank checks."¹¹⁸ In sharp contrast to *Kagama*, which endorsed an

¹¹¹ Id. § 1915.

¹¹² See *Brackeen*, 143 S. Ct. at 1627–29.

¹¹³ Id. at 1630–31.

¹¹⁴ See id. at 1630 (holding that petitioners failed to "bear the burden of establishing ICWA's unconstitutionality"); id. at 1631 (criticizing petitioners for failing to give the Court "something to work with" and noting that "[i]f there are arguments that ICWA exceeds Congress's authority . . . petitioners do not make them"); see also id. at 1662 (Thomas, J., dissenting) ("[T]he majority declines to hold that ICWA is unconstitutional, reasoning that the petitioners before us have not borne their burden of showing how Congress exceeded its powers.").

¹¹⁵ Id. at 1627–31 (majority opinion) (citing over twenty-five cases concerning congressional power in Indian affairs, *Kagama* not among them).

¹¹⁶ Id. at 1627.

¹¹⁷ Id. The majority gestures toward a variety of sources that "might" provide Congress with differing and unspecified amounts of power in Indian affairs. It fails, however, to source a "plenary" power in any one of them, instead reciting powers invoked by its prior precedents. See id. at 1627–29.

¹¹⁸ Id. at 1629.

unbounded “power of the [g]eneral [g]overnment over . . . remnants of a race once powerful,”¹¹⁹ the *Brackeen* Court stressed that congressional power over Indian affairs “is not absolute.”¹²⁰ Yet, as Justices Alito and Thomas pointed out in dissent, the majority’s articulation of congressional power was internally inconsistent because “plenary” means “absolute.”¹²¹ A plenary power which is not absolute is not a “plenary” power at all. In that sense, the *Brackeen* Court’s reference to the plenary power appears more reflexive than purposeful.¹²²

Many scholars have long anticipated the collapse of the plenary power doctrine,¹²³ and some argue that the *Brackeen* Court’s treatment of *Kagama* constitutes a break from it.¹²⁴ One of the Justices who signed the majority opinion appears to share that view. In his concurrence, Justice Gorsuch described the decision as a “step[] in the right direction” toward repudiating *Kagama*’s conception of the plenary power and grounding congressional authority in the Constitution, where it can be subject to meaningful limits.¹²⁵ The majority opinion likewise reflects the Court’s unease with an unbounded plenary power.¹²⁶ But at the same time, the Court expressed concern about the “potential consequences” of abandoning the doctrine without a clearly articulated alternative, given the extensive body of statutory law developed in reliance upon it.¹²⁷ Caught between these competing concerns, the Court opted not to confront *Kagama*’s constitutionality but chose an easier path—resolving the case on the narrow ground that petitioners failed to discharge their burden of proving ICWA’s unconstitutionality.¹²⁸ The majority’s anxieties are neither abstract nor theoretical; for all of the scholarly and judicial criticism of *Kagama*, over four hundred tribes joined an amicus

¹¹⁹ *United States v. Kagama*, 118 U.S. 375, 384 (1886).

¹²⁰ *Brackeen*, 143 S. Ct. at 1629 (quoting *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977)).

¹²¹ *Id.* at 1677 (Thomas, J., dissenting); *id.* at 1684–85 (Alito, J., dissenting).

¹²² Prakash, *supra* note 21, at 1081.

¹²³ See, e.g., Frickey, *supra* note 5, at 43 (“[T]he text of the Constitution lacks much of a hint of any plenary power . . .”); McSloy, *supra* note 7, at 252 (“[T]he vast edifice of federal Indian law rests on a constitutionally, if not morally, tenuous foundation . . .”); Prakash, *supra* note 21, at 1072.

¹²⁴ See, e.g., Ishitani & Fay, *supra* note 4, at 12.

¹²⁵ *Brackeen*, 143 S. Ct. at 1660 (Gorsuch, J., concurring).

¹²⁶ E.g., *id.* at 1629 (majority opinion) (“Article I gives Congress a series of enumerated powers, not a series of blank checks.”).

¹²⁷ *Id.* at 1631.

¹²⁸ *Id.*

brief in support of ICWA.¹²⁹ But notwithstanding its practical benefits, the plenary power faces a mounting crisis of faith.

The opinions in *Brackeen* gesture toward a variety of constitutional provisions that might serve as adequate bases for existing Indian affairs legislation, yet they do not ground ICWA in any one of them. For its part, the majority highlights the Indian Commerce Clause in Article I, the Treaty Clause in Article II, and the federal government's inherent power over foreign affairs.¹³⁰ Justice Gorsuch adds to the list, citing the war and territory powers.¹³¹ By far, the clause that has received the most serious scholarly attention is the Commerce Clause,¹³² which authorizes Congress to regulate commerce "with the Indian tribes."¹³³ Many scholars maintain that when the plenary power finally collapses, the Commerce Clause can sustain most, if not all, of the legislation codified in Title 25.¹³⁴ This Note argues otherwise. As the next Part explains, the Commerce Clause is insufficient to support legislation like ICWA, which lacks any nexus to economic activity. As Part III argues, the Treaty Clause and the Necessary and Proper Clause offer a sounder constitutional foundation for those parts of Title 25.

II. THE INADEQUATE INDIAN COMMERCE CLAUSE

The Indian Commerce Clause¹³⁵ has garnered substantial attention among judges and scholars as a suitable replacement for the plenary power. This Part argues that such faith is misplaced. Under Article I, Congress may "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."¹³⁶ Although the Commerce Clause certainly supports *some* legislation falling under Title 25, in order to sustain legislation like ICWA, "Commerce . . . with the Indian

¹²⁹ See Brief of 497 Indian Tribes & 62 Tribal & Indian Organizations as *Amici Curiae* in Support of Federal & Tribal Defendants, *Haaland v. Brackeen*, 143 S. Ct. 1609 (2023) (Nos. 21-376, 21-377, 21-378, 21-380).

¹³⁰ See *Brackeen*, 143 S. Ct. at 1630–31.

¹³¹ *Id.* at 1653 (Gorsuch, J., concurring).

¹³² See, e.g., Ablavsky, *supra* note 2, at 1030–32; Andrews, *supra* note 19, at 204–06; Natelson, *supra* note 31, at 213.

¹³³ U.S. Const. art. I, § 8, cl. 3.

¹³⁴ See, e.g., Andrews, *supra* note 19, at 204–05; Ablavsky, *supra* note 2, at 1030–32.

¹³⁵ While there is only one Commerce Clause, this Note distinguishes between Congress's interstate and Indian commerce powers for purposes of clarity, referring to them as the "Interstate" and "Indian" Commerce Clauses, respectively.

¹³⁶ U.S. Const. art. I, § 8, cl. 3.

tribes” would have to be construed to cover noneconomic subjects like child welfare. This is precisely the argument made by those who offer the Commerce Clause as a substitute for the plenary power.¹³⁷ Such scholars interpret the Clause as granting Congress authority not only over “commerce” with the Indians, but over Indian “affairs” writ large.¹³⁸ This reading would support broad federal legislative power in Indian affairs; it would even justify ICWA, which lacks any nexus to economic activity.¹³⁹ But the text of the Commerce Clause and the drafting history of the Constitution foreclose such a broad interpretation. Whether read holistically or examined in isolation, the Indian Commerce Clause requires a nexus to economic activity.

A. Reading the Commerce Clause Holistically

The Commerce Clause in Article I gives Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes.”¹⁴⁰ The word “Commerce” appears only once, so it likely means the same thing whether it occurs “among the several States” or “with the Indian tribes.”¹⁴¹

The precise contours of “commerce” have shifted over time to reflect changing notions of what is “commercial.”¹⁴² For instance, from the Founding through the 1920s, “commerce” included the exchange and transportation of commodities but did not include the production of those commodities.¹⁴³ Today, however, the definition of “commerce” is not fixed to its original meaning. Beginning in the 1930s, New Deal-era

¹³⁷ See Andrews, *supra* note 19, at 205 (arguing that “commerce” among Indians means “affairs,” which is broader than simple “economic activity”); Ablavsky, *supra* note 2, at 1029–30 (conceding that “commerce” means “trade,” but arguing that “trade” in the Indian context was the primary means for diplomacy).

¹³⁸ See, e.g., Andrews, *supra* note 19, at 205.

¹³⁹ See 25 U.S.C. § 1902.

¹⁴⁰ U.S. Const. art. I, § 8, cl. 3.

¹⁴¹ Saikrishna Prakash, *Our Three Commerce Clauses and the Presumption of Intrasentence Uniformity*, 55 Ark. L. Rev. 1149, 1149 (2003).

¹⁴² See Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations But Preserve State Control Over Social Issues*, 85 Iowa L. Rev. 1, 79–89 (1999) (describing the evolution of the Commerce Clause as interpreted by the Supreme Court from the New Deal until the late twentieth century).

¹⁴³ Eric R. Claeys, *The Living Commerce Clause: Federalism in Progressive Political Theory and the Commerce Clause After Lopez and Morrison*, 11 Wm. & Mary Bill Rts. J. 403, 409 (2002) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194–96 (1824)).

cases dramatically expanded Congress's regulatory authority under the Commerce Clause.¹⁴⁴ "Commerce" grew to include agriculture and manufacturing, at least where they have a substantial impact on the national economy.¹⁴⁵ Still, at every stage of this doctrinal evolution, "commerce" has required some nexus to economic activity.¹⁴⁶

Consistent with the economic meaning of "commerce," the Court in *United States v. Lopez* articulated a three-part framework for defining the limits of Congress's interstate commerce authority. Under *Lopez*, Congress may regulate (1) the channels of interstate commerce, (2) the instrumentalities of interstate commerce, and (3) activities that substantially affect interstate commerce.¹⁴⁷ The third category was intended to rationalize New Deal cases like *Wickard v. Filburn*, where the plausibly "non-commercial" activity—local agricultural production—came within the scope of the Clause because of its significant aggregate impact on interstate commerce.¹⁴⁸ But ever cautious of converting the commerce power into a "plenary police power,"¹⁴⁹ the Court made clear that even under "the most far reaching" definition of "commerce," the activity being regulated must have a connection to some "sort of economic enterprise," like the market for wheat.¹⁵⁰ The third category could not be read, for example, to encompass "family law (including marriage, divorce, and child custody)."¹⁵¹

Lopez's reading of the Interstate Commerce Clause is fatal to a broad interpretation of the Indian Commerce Clause for two reasons. First, much of Title 25 lacks the nexus to economic enterprise that *Lopez* requires.¹⁵² For example, ICWA regulates the placement of Indian children,¹⁵³ who are neither channels nor instrumentalities in Indian

¹⁴⁴ Nelson & Pushaw, *supra* note 142, at 79–83.

¹⁴⁵ See *United States v. Darby*, 312 U.S. 100, 118–19 (1941) (holding that Congress can regulate manufacturing if it has a "substantial effect" on interstate commerce); *Wickard v. Filburn*, 317 U.S. 111, 127–29 (1942) (holding that Congress can regulate local agriculture if, in the aggregate, such activity has a "substantial effect" on commerce).

¹⁴⁶ See *United States v. Lopez*, 514 U.S. 549, 560–61 (1995) (describing evolution of Commerce Clause doctrine).

¹⁴⁷ *Id.* at 558–59.

¹⁴⁸ See *id.* at 559–60.

¹⁴⁹ *Id.* at 566.

¹⁵⁰ *Id.* at 560–61.

¹⁵¹ *Id.* at 564.

¹⁵² See *supra* note 22; Ablavsky, *supra* note 2, at 1016.

¹⁵³ 25 U.S.C. § 1902.

commerce.¹⁵⁴ One might argue that the removal of Indian children from their homes has “substantial” downstream economic effects because their displacement diminishes tribal productivity and, in turn, adversely affects the nation’s economic well-being. But the Supreme Court has already rejected such an attenuated link to commerce in the interstate context,¹⁵⁵ and that argument must be rejected in the Indian context as well. Second, the Court has made clear that reading “commerce” to encompass wholly noneconomic activity like gun possession, education, or family law would convert the Commerce Clause into a “plenary” power, stripping the word “commerce” of any limiting content.¹⁵⁶ Yet an enumerated power cannot be absolute in this way because “[t]he enumeration of powers is also a limitation of powers.”¹⁵⁷ Congress’s authority is no less enumerated—and no less limited—for Indian commerce than for interstate commerce.

Proponents of an expansive Indian Commerce Clause do not argue that the Clause grants a plenary power but rather insist that “commerce” takes on a broader meaning with respect to the Indian tribes than with respect to the states.¹⁵⁸ However, there is little textual basis for concluding that the term “commerce” takes on a different meaning depending on whether it occurs “among the several States” or “with the Indian tribes.”¹⁵⁹ The Commerce Clause confers upon Congress the authority to regulate a single object, “Commerce,” qualified by three prepositional phrases: “with foreign Nations,” “among the several States,” and “with the Indian tribes.”¹⁶⁰ Consistent with the presumption of intratextual continuity, the meaning of “commerce” in the Indian Commerce Clause should track its meaning in the Interstate Commerce Clause.¹⁶¹ The presumption reflects an intuitive norm: “Absent some

¹⁵⁴ “Instrumentalities” of interstate commerce are commodities in interstate commerce while “channels” are vehicles for their transportation. See *Lopez*, 514 U.S. at 558.

¹⁵⁵ *Id.* at 564 (rejecting a “national productivity” argument that would allow Congress to “regulate any activity that it found was related to the economic productivity of individual citizens”—for example, things like “family law” and “child custody”); *United States v. Morrison*, 529 U.S. 598, 612–13 (2000) (rejecting the same argument because “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity”).

¹⁵⁶ *Lopez*, 514 U.S. at 564–66.

¹⁵⁷ *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534 (2012) (opinion of Roberts, C.J.).

¹⁵⁸ See, e.g., Andrews, *supra* note 19, at 205; Ablavsky, *supra* note 2, at 1029.

¹⁵⁹ Prakash, *supra* note 141, at 1149–50.

¹⁶⁰ U.S. Const. art. I, § 8, cl. 3.

¹⁶¹ Prakash, *supra* note 141, at 1149.

very strong reason to the contrary, [one] should conclude that a word or phrase found in a particular clause or sentence has the same meaning throughout the clause or sentence.”¹⁶²

Of course, this way of reading the Commerce Clause is just a presumption that could be overcome with clarifying historical evidence.¹⁶³ If the Framers thought “Commerce” meant something different with Indian tribes, one would expect statements to that effect. But because the Indian Commerce Clause was added without debate, no such evidence exists.¹⁶⁴

B. Reading the Indian Commerce Clause in Isolation

Even reading the Indian Commerce Clause in isolation and ignoring the wealth of precedent interpreting “commerce” in the interstate context, commerce “with Indian Tribes” would not cover ICWA. The Court clarified in *Brackeen* that the Indian Commerce Clause extends not just to “trade” with the Indian tribes, but also to “certain” Indian affairs.¹⁶⁵ But this construction is not unusual; after all, “commerce” in the interstate context has long been held to extend beyond mere “trade”¹⁶⁶ but to fall short of encompassing all interstate affairs.¹⁶⁷ The Court did not specify which “affairs” the Indian Commerce Clause reaches, but all available evidence suggests that such affairs must be economic in nature, excluding regulation of state custody proceedings concerning the placement of Indian children.

First, consider the Clause’s text. Like “commerce” generally, “commerce with the Indian tribes” requires a nexus to economic activity.¹⁶⁸ Linguistic studies reveal that, at the Founding, “commerce with the Indians” or with Indian tribes “invariably meant ‘trade with the Indians’ and nothing more.”¹⁶⁹ Accordingly, the “regulation” of Indian commerce was commonly understood to encompass the legal frameworks governing traders, the types of goods exchanged, and the

¹⁶² *Id.* at 1150; see also *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 329 (2000) (“[W]e refuse to adopt a [statutory] construction that would attribute different meanings to the same phrase in the same sentence, depending on which object it is modifying.”).

¹⁶³ Prakash, *supra* note 141, at 1156.

¹⁶⁴ Toler, *supra* note 21, at 466; Ablavsky, *supra* note 2, at 1023.

¹⁶⁵ *Haaland v. Brackeen*, 143 S. Ct. 1609, 1627–28 (2023).

¹⁶⁶ See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 72 (1824).

¹⁶⁷ See, e.g., *United States v. Lopez*, 514 U.S. 549, 564–66 (1995).

¹⁶⁸ See Natelson, *supra* note 31, at 215–16.

¹⁶⁹ See, e.g., *id.*

conditions of sale.¹⁷⁰ While the meaning of “commerce” has expanded over time beyond mere trade, at no point has it been understood to embrace wholly noneconomic interactions.¹⁷¹ The economic interpretation of the Indian Commerce Clause is consistent with early congressional enactments such as the Trade and Intercourse Act of 1790, which imposed licensing requirements on people trading with Indian tribes.¹⁷² It is also consistent with *Kagama*’s statement that legislation addressing general interactions between white people and tribal members, which lacked any nexus to commerce, could not be sustained under the Indian Commerce Clause.¹⁷³

When eighteenth-century English speakers referred broadly to *all* interactions with Indians, they spoke of Indian “affairs,” not Indian “commerce.”¹⁷⁴ To be sure, “commerce” and “affairs” overlap insofar as both *can* refer to economic relations, but “affairs” is a much broader category that also captures noneconomic activities.¹⁷⁵ Only a power over Indian “affairs” would support legislation like ICWA, which regulates noneconomic interactions between non-tribal families and Indian children. Advocates of a broad Indian commerce power implicitly acknowledge this point. In arguing that the Indian Commerce Clause confers the requisite constitutional authority to sustain ICWA, these scholars do not suggest that ICWA has any relation to the economy.¹⁷⁶ Instead, they argue that “commerce” can be interpreted broadly to cover “all forms of intercourse in the affairs of life.”¹⁷⁷ Yet Indian affairs and Indian commerce are two separate things. The Indian Commerce Clause grants Congress power over one, but not the other.

¹⁷⁰ *Id.*

¹⁷¹ See *Lopez*, 514 U.S. at 564–66.

¹⁷² An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, § 1, 1 Stat. 137, 137 (1790) (repealed 1793).

¹⁷³ See *United States v. Kagama*, 118 U.S. 375, 378–79 (1886) (reasoning that “it would be a very strained construction” of the Indian Commerce Clause to hold that Congress’s power to regulate commerce with the tribes could authorize “a system of criminal laws” punishing common law offenses by Indians where the crimes bore no “relation to any kind of commerce”).

¹⁷⁴ Natelson, *supra* note 31, at 217.

¹⁷⁵ *Id.*

¹⁷⁶ See, e.g., Ablavsky, *supra* note 2, at 1031.

¹⁷⁷ Toler, *supra* note 21, at 437 (quoting Akhil Reed Amar, *America’s Constitution: A Biography* 107 (2005)); see also Andrews, *supra* note 19, at 205 (endorsing Amar’s approach).

Eliding the distinction between “commerce” and “affairs” neglects the drafting history of Article I. Crucially, the Framers considered and *deleted* language that would have granted Congress sweeping authority over Indian “affairs.”¹⁷⁸ Under the Articles of Confederation, the powers over Indian “trade” and “affairs” were granted to the federal government through two separate provisions.¹⁷⁹ And, while both powers were slated for inclusion in the Constitution, the Framers ultimately omitted the latter.¹⁸⁰ The two were consistently treated separately throughout multiple drafts of the Constitution prepared by the Committee of Detail¹⁸¹: South Carolina’s proposal included “trade” but omitted “Indian affairs”;¹⁸² the Committee’s early sketch contained both powers, but in separate sections;¹⁸³ and the first full draft did the same.¹⁸⁴ In the final draft, however, only a power to regulate “commerce” remained, and the broader authority over “Indian affairs” disappeared.¹⁸⁵ When the Convention resumed, Madison identified the omission and urged restoration of the power “[t]o regulate *affairs* with the Indians.”¹⁸⁶ The

¹⁷⁸ See Toler, *supra* note 21, at 444–54, 464–68.

¹⁷⁹ Articles of Confederation of 1781, art. IX, ¶ 4 (“The United States in Congress assembled shall also have the sole and exclusive right and power of . . . regulating the trade *and* managing all affairs with the Indians . . .” (emphasis added)). Scholars generally agree that “trade” gave way to “commerce,” rather than “commerce” embodying a hybrid of “trade” and “affairs,” since the two terms were understood as synonymous at the Founding. See Toler, *supra* note 21, at 468; see also Prakash, *supra* note 21, at 1088 (“[D]uring the Founding era, ‘commerce’ was a synonym for trade and did not encompass all gainful activity . . .”); Natelson, *supra* note 31, at 215–16 (using corpus linguistics studies to conclude that “‘commerce with Indian tribes’ . . . almost invariably meant ‘trade with the Indians’ and nothing more”).

¹⁸⁰ See Toler, *supra* note 21, at 444. Historical evidence strongly suggests that this omission was deliberate. The “Indian affairs” power had been controversial under the Articles, in part because it left states little room to regulate and other—still more contentious—issues, such as the selection of the President, remained unresolved. In the interest of preserving momentum at a late stage in the Convention, the delegates appear to have settled on a compromise: restoring only the uncontroversial power over “Indian trade” through the Commerce Clause. *Id.* at 472.

¹⁸¹ The creation of the Committee of Detail marked the transition from political debate to the first working draft of the Constitution. The five-member committee was tasked with translating the Convention’s resolutions into detailed constitutional provisions. *Id.* at 446.

¹⁸² *Id.* at 447–48.

¹⁸³ *Id.* at 448.

¹⁸⁴ *Id.* at 452.

¹⁸⁵ *Id.* at 453.

¹⁸⁶ *Id.* at 464–65 (alteration in original) (emphasis added) (quoting James Madison, Notes on the Constitutional Convention (Aug. 18, 1787), in 2 *The Records of the Federal Convention of 1787*, at 321, 324–25 (Max Farrand ed., 1911)).

Committee rejected his proposal and instead inserted “Indian tribes” into what is now the Commerce Clause.¹⁸⁷ Contrary to the arguments of modern scholars, this history makes clear that “commerce” and “affairs” were not synonymous. The Framers were squarely presented with the option of including an “affairs” clause in Article I, but they declined to do so.¹⁸⁸

The absence of an Indian “affairs” clause has direct consequences for the constitutionality of legislation like ICWA. Such a clause would have encompassed all possible areas for regulation—economic and noneconomic alike.¹⁸⁹ But the Indian Affairs Clause was omitted from the Constitution, significantly reducing the congressional authority that existed under the Articles.¹⁹⁰ The *Brackeen* Court was right to observe that the meaning of the Indian Commerce Clause is not cabined to its Founding Era meaning of “trade,” but instead embraces “certain” Indian affairs.¹⁹¹ But even under the most capacious understanding of “commerce,” those affairs must have some nexus to economic activity.¹⁹² The Indian Commerce Clause then cannot be contorted to support legislation like ICWA, which deals exclusively in noneconomic matters. If this is right, and if the plenary power articulated in *Kagama* is on its last legs, then ICWA requires an alternative basis in Article I. As Part III makes clear, the Treaty and Necessary and Proper Clauses provide that authority.

III. THE TREATY AND NECESSARY AND PROPER CLAUSES

To date, the United States has signed nearly four hundred treaties with the Indian tribes promising care, protection, education, and health services, among other things.¹⁹³ Although the Treaty Clause in Article II does not, by itself, confer legislative power on Congress, the Necessary and Proper Clause has long been understood to authorize Congress to implement the nation’s treaty obligations.¹⁹⁴ And because both the

¹⁸⁷ Id. at 464–66.

¹⁸⁸ See id. at 468.

¹⁸⁹ See Natelson, *supra* note 31, at 238.

¹⁹⁰ See Toler, *supra* note 21, at 468.

¹⁹¹ *Haaland v. Brackeen*, 143 S. Ct. 1609, 1627–28 (2023).

¹⁹² See *United States v. Lopez*, 514 U.S. 549, 560–61 (1995).

¹⁹³ See *infra* notes 207–17 and accompanying text.

¹⁹⁴ See *Missouri v. Holland*, 252 U.S. 416, 432 (1920); Jean Galbraith, *Congress’s Treaty-Implementing Power in Historical Practice*, 56 Wm. & Mary L. Rev. 59, 67–71 (2014).

Treaty and Necessary and Proper Clauses are broad, they leave little room for states to interfere with the regulation of Indian tribes.¹⁹⁵ This is particularly important because ICWA—one of the most consequential and contested pieces of legislation promoting Indian well-being—operates in an area typically falling within the states’ exclusive authority.¹⁹⁶ While the Commerce Clause could not authorize legislation like ICWA for the reasons described in Part II, the Treaty and Necessary and Proper Clauses could bear its weight.

A. Congress’s Treaty-Implementation Power

The Treaty Clause of Article II grants the President the “Power, by and with the Advice and Consent of the Senate, to make Treaties.”¹⁹⁷ The Necessary and Proper Clause of Article I, in turn, authorizes Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution” not only those powers enumerated in Article I, but “all other Powers vested by this Constitution in the Government of the United States, or in any . . . Officer thereof.”¹⁹⁸ Taken together, the Treaty and Necessary and Proper Clauses allow Congress to pass laws “necessary and proper” to implement treaties agreed upon by the President and the Senate. This is the reading the Supreme Court adopted more than a century ago in *Missouri v. Holland*.¹⁹⁹

In *Holland*, the Court upheld the Migratory Bird Treaty Act as a valid exercise of Congress’s power under the Necessary and Proper Clause, even though, without the treaty, the statute would have exceeded Congress’s enumerated powers.²⁰⁰ In the century since, *Holland* has stood for three principles: the Necessary and Proper Clause authorizes Congress to implement treaties through legislation,²⁰¹ the Clause *adds* to Congress’s other regulatory powers contained within Article I,²⁰² and Congress is limited only by specific “prohibitory words . . . found in the

¹⁹⁵ See *infra* notes 300–01 and accompanying text.

¹⁹⁶ *Lopez*, 514 U.S. at 564 (“[A]reas such as criminal law enforcement or education [are] where States historically have been sovereign.”).

¹⁹⁷ U.S. Const. art. II, § 2, cl. 2.

¹⁹⁸ U.S. Const. art. I, § 8, cl. 18.

¹⁹⁹ 252 U.S. 416, 432 (1920).

²⁰⁰ *Id.* at 432, 435.

²⁰¹ *Id.* at 432.

²⁰² *Id.* at 433 (“[T]here may be matters . . . that an act of Congress could not deal with but that a treaty followed by such an act could . . .”).

Constitution” when legislating pursuant to the Clause.²⁰³ Often, treaties are non-self-executing, meaning they require implementing legislation by Congress to take effect.²⁰⁴ Interpreting the Necessary and Proper Clause to grant Congress this power aligns with the Framers’ intent to ensure the United States could fulfill its treaty obligations.²⁰⁵ This reading is also consistent with early congressional debates, in which both supporters and opponents of a broad treaty power accepted that “the Necessary and Proper Clause authorized Congress to pass legislation implementing treaty obligations.”²⁰⁶

B. Title 25 as Implementing Legislation

The United States has entered almost four hundred treaties with Native tribes.²⁰⁷ And for valuable consideration too: in exchange for providing the tribes with “care,”²⁰⁸ “protection,”²⁰⁹ and “means of improvement,”²¹⁰ the federal government has received “over two million square miles of land . . . at an estimated cost of at least eight hundred million dollars.”²¹¹ The breadth of the obligations the United States has assumed under such treaties is vast. In exchange for land, the federal government promised health services,²¹² education,²¹³ housing,²¹⁴

²⁰³ Id.; see, e.g., *Reid v. Covert*, 354 U.S. 1, 4–5 (1957) (plurality opinion) (holding that a treaty cannot be used to deny citizens their Sixth Amendment right to a jury trial).

²⁰⁴ See Galbraith, *supra* note 194, at 76.

²⁰⁵ The Treaty, Necessary and Proper, and Supremacy Clauses were designed to ensure federal authority to enforce state compliance with treaties, addressing frequent failures under the Articles of Confederation which sometimes had serious consequences. See Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 *Duke L.J.* 1127, 1199–1202 (2000).

²⁰⁶ Galbraith, *supra* note 194, at 81.

²⁰⁷ Christine A. Klein, *Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo*, 26 *N.M. L. Rev.* 201, 207 (1996).

²⁰⁸ See, e.g., *Treaty with the Kaskaskia, Kaskaskia-U.S.*, art. 2, Aug. 13, 1803, 7 Stat. 78, <https://treaties.okstate.edu/treaties/treaty-with-the-kaskaskia-1803-0067> [<https://perma.cc/4B3U-KSJW>].

²⁰⁹ See, e.g., *Treaty with the Choctaw, Choctaw-U.S.*, art. II, Jan. 3, 1786, 7 Stat. 21, <https://treaties.okstate.edu/treaties/treaty-with-the-choctaw-1786-0011> [<https://perma.cc/K6ZD-676Y>].

²¹⁰ See, e.g., *Treaty with the Kaskaskia, Kaskaskia-U.S.*, art. 1, Aug. 13, 1803, 7 Stat. 78, <https://treaties.okstate.edu/treaties/treaty-with-the-kaskaskia-1803-0067> [<https://perma.cc/4B3U-KSJW>].

²¹¹ Klein, *supra* note 207, at 207.

²¹² See, e.g., *Treaty with the Sioux Indians, Sioux-U.S.*, art. XIII, Apr. 29, 1868, 15 Stat. 635, <https://treaties.okstate.edu/treaties/treaty-with-the-sioux-brule-oglala-miniconjou-yankt>

food,²¹⁵ money,²¹⁶ and any other goods and services a “humane” Congress might deem appropriate for the “comfort” of the Indians.²¹⁷ Title 25 of the United States Code implements these solemn obligations through statutory provisions addressing Indian healthcare, child welfare, financial assistance, housing, and related services.²¹⁸ In calling on Congress to pass legislation regarding Indian education, health, and related matters, President Nixon invoked the nation’s enduring treaty obligations to Native tribes.²¹⁹ Congress likewise had these treaties in mind when it enacted later Title 25 legislation like ICWA.²²⁰

In *McCulloch v. Maryland*, the Court held that legislation which is “necessary and proper” to implement a constitutional power or treaty need not be *absolutely* necessary to fulfill the duty or obligation,²²¹ nor strictly drawn from the text that creates it.²²² Rather, legislation that validly implements a treaty might take “any” form which is

onai-hunkpapa-blackfeet-cuthead-two-kettle-sans-arcs-and-santee-and-arapaho-1868-0998 [https://perma.cc/W3QG-VH25] (providing for “annual[]” provision of “physician[s]”).

²¹³ See, e.g., Treaty with the Choctaw, Choctaw-U.S., art. XX, Sep. 27, 1830, 7 Stat. 333, https://www.choctawnation.com/wp-content/uploads/2022/03/1830treaty-of-dancing-rabbit-creek.pdf [https://perma.cc/472V-A2H9].

²¹⁴ See, e.g., Treaty with the Menominee, Menominee-U.S., Feb. 8, 1831, 7 Stat. 342, 344, https://treaties.okstate.edu/treaties/treaty-with-the-menominee-1831-0319 [https://perma.cc/V88H-VFM8].

²¹⁵ Id. at 345.

²¹⁶ Id. at 343.

²¹⁷ See, e.g., Treaty with the Wyandot, Etc., art. X, Jan. 21, 1785, 7 Stat. 16, https://treaties.okstate.edu/treaties/treaty-with-the-wyandot-etc-1785-0006 [https://perma.cc/2UC8-C8ED].

²¹⁸ See, e.g., Indian Health Care Improvement Act, 25 U.S.C. §§ 1601–1685 (providing healthcare); American Indian Agricultural Resource Management Act, 25 U.S.C. §§ 3701–3746 (providing agricultural management); Native American Housing Assistance and Self-Determination Act, 25 U.S.C. §§ 4101–4243 (providing housing).

²¹⁹ Special Message to the Congress on Indian Affairs, 1 Pub. Papers 565–66 (July 8, 1970) (“[T]hrough written treaties . . . our government has made specific commitments to the Indian people . . . to provide community services such as health, education and public safety . . .”).

²²⁰ 25 U.S.C. § 1901(2) (invoking treaties as a source of Congress’s duty to protect Indian tribes and their children). To be clear, the absence of contemporaneous statements by Congress invoking treaties or the Necessary and Proper Clause would not undermine a statute’s validity so long as the law is “necessary and proper” to execute a treaty. The Supreme Court has long held that “the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.” *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948). Such statements, when they appear, merely clarify that Title 25 is the way the government has chosen to make good on its promises.

²²¹ 17 U.S. (4 Wheat.) 316, 413–14 (1819).

²²² Id. at 324.

“appropriate” or “conducive” to the treaty’s end.²²³ Take ICWA, which prevents the unnecessary removal of Indian children from their homes,²²⁴ an objective closely aligned with longstanding treaty commitments. Many Indian treaties address the welfare and health of the tribes—of which children are an integral part—and hundreds more provide for the care and education of Indian children specifically.²²⁵ In enacting ICWA, Congress reasonably concluded that the statute’s placement provisions are necessary to fulfill the federal government’s “responsibility for the protection and preservation of Indian tribes” assumed under treaties because “there is no resource . . . more vital to the continued existence and integrity of Indian tribes than their children.”²²⁶ By facilitating the upbringing of Indian children within supportive tribal communities, ICWA directly advances those treaty commitments and thus bears more than the “fair connection” to those commitments that *McCulloch* requires.²²⁷

²²³ Id. at 415.

²²⁴ See 25 U.S.C. § 1915.

²²⁵ Matthew L.M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 Neb. L. Rev. 885, 890, 903 (2017); see, e.g., Treaty with the Kaskaskia, Kaskaskia-U.S., art. 1, Aug. 13, 1803, 7 Stat. 78, <https://treaties.okstate.edu/treaties/treaty-with-the-kaskaskia-1803-0067> [<https://perma.cc/4B3U-KSJW>] (describing how the tribe ceded their land in exchange for “a more certain and effectual support for their women and children”); Treaty with the Choctaw, Choctaw-U.S., art. XVIII, Mar. 17, 1830, S. Exec. Doc. No. 4, <https://treaties.okstate.edu/treaties/treaty-with-the-choctaw-1830-22879> [<https://perma.cc/56T7-PH6N>] (promising that the government shall “embrace the present improvements of such families” which include “a man and his wife, or child, or children”); Treaty with the Kansas, Kansas-U.S., art. 5, June 3, 1825, 7 Stat. 244, <https://treaties.okstate.edu/treaties/treaty-with-the-kansa-1825-0222> [<https://perma.cc/3TR6-2A4X>] (pledging support for “the education of the Kansas children, *within their Nation*” (emphasis added)); Treaty with the Chippewas, Chippewa-U.S., art. 6, Aug. 5, 1826, 7 Stat. 290, <https://treaties.okstate.edu/treaties/treaty-with-the-chippewa-1826-0268> [<https://perma.cc/98T6-3W7X>] (providing for the education and “improvement of the Indian youths”); Treaty with the Delaware, Delaware-U.S., art. III, Sep. 17, 1778, 7 Stat. 13, <https://treaties.okstate.edu/treaties/treaty-with-the-delawares-1778-0003> [<https://perma.cc/Z82S-7ZTL>] (pledging the federal government to provide “for the better security of the old men, women and children of [the Delaware] nation”); Treaty with the Navajo Indians, Navajo-U.S., arts. III, VI, June 1, 1868, 15 Stat. 667, <https://treaties.okstate.edu/treaties/treaty-with-the-navaho-1868-1015> [<https://perma.cc/2WQY-8EUN>] (obligating the government to provide a schoolhouse and competent teachers so that the Navajo children may attend school); Treaty with the Shawnee, Shawnee-U.S., art. 8, May 10, 1854, 10 Stat. 1053, <https://treaties.okstate.edu/treaties/treaty-with-the-shawnee-1854-0618> [<https://perma.cc/NZX3-JMLL>] (obligating the President to appropriate financial support for “orphan children . . . in the manner deemed by him best for their interests”).

²²⁶ 25 U.S.C. § 1901.

²²⁷ *McCulloch*, 17 U.S. (4 Wheat.) at 326.

Still, some have argued that ICWA cannot be considered “necessary and proper” to implement these treaties because it does not precisely track the treaties’ language.²²⁸ They contend that upholding ICWA under the Necessary and Proper Clause would require the Court to exceed the “high-water mark in *Holland*,” which concerned implementing legislation that closely mirrored the treaty’s terms.²²⁹ While it is true that the legislation in *Holland* bore a closer fit to the language of the treaty involved, *Holland* did not set the high-water mark for legislation permissible under the Necessary and Proper Clause—*McCulloch* did.²³⁰ The *McCulloch* Court explicitly rejected this kind of textual narrow-tailoring approach, emphasizing that the Necessary and Proper Clause affords Congress flexibility and that the constitutionality of implementing legislation does not depend on whether particular means were contemplated by the Framers.²³¹ *McCulloch*’s test applies no differently when the text creating the obligation is a treaty rather than the Constitution.²³²

The hundreds of treaties obliging the United States to provide care and support for Indian tribes and their children speak in open-ended terms.²³³ Of course, treaties negotiated in the eighteenth century could not have anticipated the systematic removal of Indian children that occurred generations later, or the need for hierarchical placement preferences to remedy those harms. But where the drafters of a document did not intend “to enumerate particulars,” the Necessary and Proper Clause affords Congress the flexibility to execute government obligations through means responsive to changing circumstances.²³⁴

²²⁸ Brief for Petitioner the State of Texas at 26, *Haaland v. Brackeen*, 143 S. Ct. 1609 (2023) (Nos. 21-376, 21-377, 21-378, 21-380).

²²⁹ *Id.*

²³⁰ *McCulloch*, 17 U.S. (4 Wheat.) at 415.

²³¹ *Id.* at 324. The Court rejected a similar argument as recently as 2010, writing that any “argument that the Necessary and Proper Clause permits no more than a single step between an enumerated power and an Act of Congress” must be “reject[ed].” *United States v. Comstock*, 560 U.S. 126, 148 (2010).

²³² Virginia H. Johnson, Note, Application of the Rational Basis Test to Treaty-Implementing Legislation: The Need for a More Stringent Standard of Review, 23 *Cardozo L. Rev.* 347, 366 (2001).

²³³ See *supra* note 225; see, e.g., Treaty with the Delaware, Delaware-U.S., art. III, Sep. 17, 1778, 7 Stat. 13, <https://treaties.okstate.edu/treaties/treaty-with-the-delawares-1778-0003> [<https://perma.cc/Z82S-7ZTL>] (obligating the government to provide “for the better security of the old men, women and children of the [Delaware] nation”).

²³⁴ *McCulloch*, 17 U.S. (4 Wheat.) at 324.

McCulloch's permissive approach continues to inform our understanding of the Necessary and Proper Clause today. Just sixteen years ago, in *United States v. Comstock*, the Court reaffirmed *McCulloch* and emphasized just how attenuated congressional action can be from an enumerated power or governmental obligation while still qualifying as “necessary and proper” to its execution.²³⁵ The Court observed that, while the Constitution enumerates only a limited set of federal crimes, Congress may, in aid of its commerce power, create broad federal criminal liability.²³⁶ Having done so, it may construct prisons anywhere in the United States.²³⁷ This, in turn, gives Congress the further power to regulate the prisons’ safe and effective administration, enacting laws regarding medical care, education, security, and the conditions of entry and exit.²³⁸ None of these powers is “mentioned in the Constitution,” but all are permissible under the Necessary and Proper Clause to “carry[] into Execution” an enumerated power.²³⁹ If a statute requiring prisoners in Kansas to receive educational training is “necessary and proper” to effectuate Congress’s commerce power, it strains belief that a law preventing the forced removal of Indian children would not be “necessary and proper” to effectuate the government’s obligations to care for, and support, those children.

Importantly, as Justice Thomas has observed, the Necessary and Proper Clause is still limited to implementing “actual treaties.”²⁴⁰ That is, it does not grant Congress a “free-floating power to legislate as it sees fit on topics that could potentially implicate some unspecified treaty.”²⁴¹ Of course, there *are* “actual treaties”—hundreds of them that promise care to tribal children.²⁴² But Justice Thomas’s objection raises an important question: Why would Congress’s authority to protect the

²³⁵ *Comstock*, 560 U.S. at 135–37.

²³⁶ *Id.* at 135–36.

²³⁷ *Id.* (citing *Ex parte Karstendick*, 93 U.S. 396, 400 (1876)).

²³⁸ *Id.* at 136–37.

²³⁹ *Id.* at 137; U.S. Const. art. I, § 8, cl. 18.

²⁴⁰ *Haaland v. Brackeen*, 143 S. Ct. 1609, 1671 (2023) (Thomas, J., dissenting).

²⁴¹ *United States v. Lara*, 541 U.S. 193, 225 (2004) (Thomas, J., concurring in the judgment).

²⁴² *Supra* note 225.

children of hundreds of tribes justify legislation extending protections to hundreds more which lack such treaties?²⁴³

Crucially, the Court has held that, when Congress legislates under the Necessary and Proper Clause, if “the means adopted are really calculated to attain the end,” questions about “the closeness of th[at] relationship . . . are matters for congressional determination *alone*.”²⁴⁴ With respect to overbreadth specifically, the Court has explained that, where Congress “ha[s] a rational basis for believing” that overbreadth is “necessary” (meaning appropriate) to effectuate a legitimate government obligation, the fact that Congress has chosen to be overinclusive is “of no moment.”²⁴⁵ This is because the Necessary and Proper Clause itself “addresse[s] the choice of means” and commits that choice to Congress.²⁴⁶ Judicial review of that choice is limited,²⁴⁷ but the Court has made clear that administrability and workability concerns are legitimate considerations for Congress when opting for an overinclusive scheme.²⁴⁸ To Justice Thomas’s point, if only a single treaty obligated the United States to protect one tribe’s children, it would be doubtful whether Congress had a “rational basis” for concluding that ICWA’s overbreadth was necessary. But here, where hundreds of treaties impose similar obligations, Congress is entitled to conclude that a single, uniform statute is preferable to hundreds of separate statutory schemes for each tribe.

Congress has long legislated this way, enacting laws that apply to all tribes based on the United States’ obligations under specific treaties. Among Congress’s earliest assertions of authority in Indian affairs was

²⁴³ There are over 500 federally recognized tribes, but only approximately 368 official treaties between the federal government and Indian tribes. See Dep’t of the Interior, Indian Affs., About Us, <https://www.bia.gov/about-us> [<https://perma.cc/QZL2-BR4B>] (last visited Feb. 26, 2026); Kevin Gover, Foreword *to* Nation to Nation: Treaties Between the United States and American Indian Nations xi, xi (Suzan Shown Harjo ed., 2014).

²⁴⁴ *Comstock*, 560 U.S. at 135 (emphasis added) (quoting *Burroughs v. United States*, 290 U.S. 534, 547–48 (1934)).

²⁴⁵ *Gonzales v. Raich*, 545 U.S. 1, 22 (2005); see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819); *Burroughs*, 290 U.S. at 547–48; *Sabri v. United States*, 541 U.S. 600, 605–06 (2004); *Comstock*, 560 U.S. at 135.

²⁴⁶ *Comstock*, 560 U.S. at 135 (alteration in original) (internal quotation marks omitted) (quoting *Burroughs*, 290 U.S. at 547).

²⁴⁷ *Id.*

²⁴⁸ See *Gonzales*, 545 U.S. at 22 (upholding congressional regulation of purely intrastate marijuana production as “necessary and proper” to the regulation of interstate marijuana commerce “[g]iven the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere”).

the Trade and Intercourse Act of 1790. Section Five of that Act made it a crime for any American citizen to enter Indian country and commit an offense or trespass against the person or property of “any nation or tribe of Indians.”²⁴⁹ This provision could not be directly sustained under the Indian Commerce Clause, nor could it have been regarded as “necessary and proper” to the Clause’s execution. This is because, as Justice Thomas noted in his dissent in *Brackeen*, the Commerce Clause was understood in the years following the Founding to confer a very limited authority.²⁵⁰

Instead, many scholars understand Section Five as implementing certain treaty promises by penalizing individuals that encroached upon Indian lands.²⁵¹ Yet by 1790, the United States had ratified only a handful of treaties prohibiting crimes or trespasses on tribal lands;²⁵² many contained no such provisions,²⁵³ and many tribes had not yet entered into any treaty with the United States.²⁵⁴ Still, the Trade and Intercourse Act reaches them *all*.²⁵⁵ If the Trade and Intercourse Act is “necessary and proper” to implement certain treaties, it supports the

²⁴⁹ An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, § 5, 1 Stat. 137, 138 (1790) (repealed 1793) (emphasis added).

²⁵⁰ *Haaland v. Brackeen*, 143 S. Ct. 1609, 1671 (2023) (Thomas, J., dissenting) (“At the time the original Constitution was ratified, ‘commerce’ consisted of selling, buying, and bartering, as well as transporting for these purposes.” (quoting *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring))).

²⁵¹ See, e.g., Francis Paul Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts 1790–1834*, at 45–46 (1962); Newton, *supra* note 9, at 201; Natelson, *supra* note 31, at 254.

²⁵² See, e.g., Treaty with the Cherokee, Cherokee-U.S., art. V, Nov. 28, 1785, 7 Stat. 18, <https://treaties.okstate.edu/treaties/treaty-with-the-choerokee-1785-0008#crimes-against-Indian-country> [<https://perma.cc/5BN2-KK5D>].

²⁵³ See, e.g., Treaty with the Six Nations, Oct. 22, 1784, 7 Stat. 15, <https://treaties.okstate.edu/treaties/treaty-with-the-six-nations-1784-0005> [<https://perma.cc/6ZZJ-UETY>] (documenting a treaty between the United States and the Six Nations, consisting of the Mohawk, Onondaga, Seneca, Oneida, Cayuga, Tuscarora, and Seneca Abenaki Tribal Nations); Treaty with the Delaware, Delaware-U.S., Sep. 17, 1778, 7 Stat. 13, <https://treaties.okstate.edu/treaties/treaty-with-the-delawares-1778-0003> [<https://perma.cc/Z82S-7ZTL>].

²⁵⁴ See, e.g., Treaty with the Oneida, Oneida-U.S., June 4, 1802, S. Treaty Doc. No. 7-98, 663–64, <https://treaties.okstate.edu/treaties/treaty-with-the-oneida-1802-22220> [<https://perma.cc/3HT2-HDUD>] (the Oneida’s first treaty was not signed until 1802).

²⁵⁵ An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, § 5, 1 Stat. 137, 138 (1790) (repealed 1793) (making it a crime to trespass against the person or property of “any nation or tribe of Indians” (emphasis added)).

claim that the benefits of legislation enacted to execute treaties need not be precisely coextensive with the treaties' beneficiaries.²⁵⁶

In the context of ICWA, congressional discretion is not only defensible, but necessary to fulfill the United States' obligations. For reasons particular to tribal demographics and the operation of tribal membership, ICWA's supposed overbreadth is, in fact, "really calculated"²⁵⁷ to obtain the ends of specific treaties. For example, the Kaskaskia Tribe of Illinois signed a treaty with the United States to provide care for their children in exchange for ceding land.²⁵⁸ However, the Kaskaskia no longer exist.²⁵⁹ The Kaskaskia themselves were an amalgamation of multiple different tribes when they signed the 1803 treaty, but in 1832, they were absorbed into the Peoria Tribe of Oklahoma.²⁶⁰ To the extent that Congress seeks to honor its commitments to the contemporary descendants of the Kaskaskia, it would have to extend those benefits to the Peoria Tribe, with whom the United States has concluded several treaties—none pledging care for their children.²⁶¹

The Kaskaskia's disappearance as a distinct political entity reflects a broader and poorly documented pattern of federal removal, consolidation, and fragmentation of Indian nations throughout the nineteenth century. During the removal period, the United States regularly restructured tribal nations by consolidating distinct tribes into single political entities and fragmenting others into multiple groups.²⁶²

²⁵⁶ Modern cases under the Necessary and Proper Clause review congressional legislation for whether the legislation is "rationally related to the implementation of a constitutionally enumerated power." See, e.g., *United States v. Comstock*, 560 U.S. 126, 134 (2010).

²⁵⁷ *Id.* at 135 (quoting *Burroughs v. United States*, 290 U.S. 534, 547 (1934)).

²⁵⁸ Treaty with the Kaskaskia, Kaskaskia-U.S., arts. 1, 3, Aug. 13, 1803, 7 Stat. 78, 78–79, <https://treaties.okstate.edu/treaties/treaty-with-the-kaskaskia-1803-0067> [<https://perma.cc/4B3U-KSJW>].

²⁵⁹ Okla. Hist. Soc'y, 1 *The Encyclopedia of Oklahoma History and Culture* 784–85 (Dianna Everett, Linda D. Wilson, Larry O'Dell & Jon D. May eds., 2009).

²⁶⁰ *Id.*

²⁶¹ See, e.g., Treaty with the Peoria, Etc., Sep. 25, 1818, 7 Stat. 181, <https://treaties.okstate.edu/treaties/treaty-with-the-peoria-etc-1818-0165> [<https://perma.cc/ZQX8-LS9E>] (documenting a treaty between the United States and the Peoria, Kaskaskia, Mitchigamia, Cahokia, and Tamarois Tribal Nations); Treaty with the Kaskaskia, Etc., May 30, 1854, 10 Stat. 1082, <https://treaties.okstate.edu/treaties/treaty-with-the-kaskaskia-peoria-etc-1854-0636> [<https://perma.cc/LQ2M-WLFK>] (documenting a treaty between the Kaskaskia, Peoria, Piankeshaw, and Wea Tribal Nations).

²⁶² Christopher A. Ford, *Executive Prerogatives in Federal Indian Jurisprudence: The Constitutional Law of Tribal Recognition*, 73 *Denv. U. L. Rev.* 141, 156 (1995).

For example, in 1865 Congress consolidated the tribes of the Colorado River Basin into a single reservation, concentrating them in one area to separate them from white commercial interests.²⁶³ The modern Colorado River Indian Tribes now include members of Mojave, Chemehuevi, Navajo, and Hopi descent.²⁶⁴ Congress similarly divided the Great Dakota Sioux Nation into what are today ten separate federally recognized tribes.²⁶⁵ But because the United States did not consistently count Indians in the census until 1890,²⁶⁶ it is unknown just how many descendants of treated tribes, like the Kaskaskia, are present-day members of untreated tribes.

Intermarriage poses similar problems. According to contemporary U.S. Census data, “Native Americans intermarry at higher rates than any other [demographic] group in the country.”²⁶⁷ This means that, while the United States may be treaty-bound to care for the children of Choctaw members,²⁶⁸ those children might actually be enrolled in the Spokane Tribe, which offers citizenship to the children of its members²⁶⁹ but has no treaties with the federal government.²⁷⁰ These considerations explain why Congress, in discharging its treaty obligations to the children of specific tribes, legislated with respect to all federally recognized tribes.

To be sure, ICWA does not just apply to all federally recognized tribes; it also applies to children who, though not yet enrolled, are eligible for tribal membership.²⁷¹ This decision reflects the reality that

²⁶³ Sarah Krakoff, *Inextricably Political: Race, Membership, and Tribal Sovereignty*, 87 Wash. L. Rev. 1041, 1043–45 (2012).

²⁶⁴ *Id.* at 1043–44.

²⁶⁵ *Id.* at 1044.

²⁶⁶ Carol Chiago Lujan, *American Indians and Alaska Natives Count: The US Census Bureau’s Efforts to Enumerate the Native Population*, 38 Am. Indian Q. 319, 321–22 (2014).

²⁶⁷ Tristan Ahtone, *Native American Intermarriage Puts Benefits at Risk*, NPR (Mar. 31, 2011, 00:01 ET), <https://www.npr.org/2011/03/31/134421470/native-american-intermarriage-puts-benefits-at-risk> [<https://perma.cc/NSA7-DMAE>].

²⁶⁸ Treaty with the Choctaw, Choctaw-U.S., art. XX, Sep. 27, 1830, 7 Stat. 333, <https://www.choctawnation.com/wp-content/uploads/2022/03/1830treaty-of-dancing-rabbit-creek.pdf> [<https://perma.cc/472V-A2H9>].

²⁶⁹ Const. of the Spokane Tribe-Spokane Reservation art. III, <https://www.spokanetribe.com/wp-content/uploads/2023/12/2023-STOI-Constitution.pdf> [<https://perma.cc/2PUD-HDHU>].

²⁷⁰ Treaty with the Spokane, Spokane-U.S., Sep. 23, 1858, H.R. Exec. Doc. No. 36-65, <https://treaties.okstate.edu/treaties/treaty-with-the-spokane-1858-22608> [<https://perma.cc/SL7N-XDNE>] (not ratified); Agreement with the Spokane, Spokane-U.S., Mar. 18, 1887, S. Exec. Doc. No. 52-17, <https://treaties.okstate.edu/treaties/agreement-with-the-spokane-1887-22316> [<https://perma.cc/2DDW-Q9YR>] (not ratified).

²⁷¹ 25 U.S.C. § 1903(5).

most Indian children are not born into a tribe but are instead born *eligible* to join a tribe. Because most tribes require an application for membership,²⁷² the bureaucratic enrollment process can create a lag between a child's birth and their enrollment. Recognizing that custody proceedings can occur before enrollment is finalized, Congress might reasonably have concluded that modest overbreadth was necessary to effectuate the statute's purpose, causing it to extend ICWA's protections to membership-eligible children.

ICWA's placement preferences are not too attenuated from the United States' treaty obligations to care for Indian children, nor is its application so broad as to fall outside the scope of the Necessary and Proper Clause. Treaties negotiated in the eighteenth century were not drafted with particularity,²⁷³ nor does the Constitution require them to have been.²⁷⁴ Hundreds of treaties commit the United States to protecting tribal children,²⁷⁵ and ICWA's placement preferences constitute a means "conducive" or "appropriate" to fulfilling those obligations.²⁷⁶ Further, ICWA's inclusion of tribes with whom the United States does not have treaties does not undermine its validity. Widespread intermarriage and the federal government's own dismantling and consolidation efforts ensure that some descendants of treaty tribes now belong to non-treaty tribes, a reality compounded by the government's failure to keep reliable records.²⁷⁷ Faced with this uncertainty—and the impracticability of enacting tribe-by-tribe legislation—the Necessary and Proper Clause permits Congress to legislate overinclusively rather than risk underenforcing the nation's treaty obligations.²⁷⁸

²⁷² See, e.g., M(C)NCA Title 7, § 1-102 [Muscogee (Creek) Nation Code Annotated, Title 7, § 1-102, <https://creeksupremecourt.com/code> [<https://perma.cc/6W8W-QT5F>]]; Const. of the Cherokee Nation art. IV, § 2, <https://www.cherokee.org/media/1sufapj1/constitution-of-the-chokeee-nation-1999-online.pdf> [<https://perma.cc/KCX2-WNC7>]; see Dep't of the Interior, Indian Affs., Tribal Enrollment Process, <https://www.doi.gov/tribes/enrollment> [<https://perma.cc/QZL2-BR4B>] (last visited Aug. 2, 2026).

²⁷³ See supra note 225 and accompanying text.

²⁷⁴ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 324–25 (1819); *United States v. Comstock*, 560 U.S. 126, 148 (2010).

²⁷⁵ Supra note 225.

²⁷⁶ *McCulloch*, 17 U.S. (4 Wheat.) at 415.

²⁷⁷ Supra notes 259–63 and accompanying text.

²⁷⁸ See *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (affirming overinclusive regulation of marijuana that sometimes touched purely intrastate commerce under the Necessary and Proper Clause).

If this approach to federal power appears flexible or broad, that is by design. The Necessary and Proper Clause is deliberately elastic, granting Congress the discretion needed to execute federal powers over time. Consistent with that purpose, the Court has long resisted efforts to narrow Congress's discretion under the Clause or second-guess how Congress executes federal powers.²⁷⁹ In the treaty context specifically, the Court has never held that a statute implementing a valid treaty exceeded Congress's Necessary and Proper authority.²⁸⁰

C. The Federalism Objection

Even if the Treaty and Necessary and Proper Clauses could authorize legislation like ICWA, Congress is still subject to independent constitutional limits. Specifically, because some Title 25 legislation, like ICWA, operates in areas ordinarily falling within the states' exclusive jurisdiction,²⁸¹ those statutory provisions are especially vulnerable to federalism-based objections. But federalism does not constrain treaty-implementing legislation in the same way that it constrains, for example, Commerce Clause legislation.²⁸² If ICWA is "necessary and proper" to implement various treaties, it is not barred by the Tenth Amendment simply because it deals with the subject of family law. That conclusion is consistent with both the text and history of the Treaty Clause, as well as the federal "policy of leaving Indians free from state jurisdiction and control."²⁸³

In Article I, the Framers carefully enumerated eighteen distinct grants of power to Congress, and any lawmaking authority not expressly listed was withheld from the federal government and reserved instead to the

²⁷⁹ See *Sabri v. United States*, 541 U.S. 600, 605 (2004) (rejecting a requirement that Congress must show facts requisite to demonstrate that legislation is in fact necessary to effectuate an enumerated power); *Comstock*, 560 U.S. at 146 (rejecting a requirement that congressional action under the Clause be no more than one step removed from an enumerated power); *McCulloch*, 17 U.S. (4 Wheat.) at 325 (rejecting a narrow tailoring requirement for Necessary and Proper legislation).

²⁸⁰ *Bond v. United States*, 572 U.S. 844, 855 (2014).

²⁸¹ See *United States v. Lopez*, 514 U.S. 549, 564 (1995) (noting that the Commerce Clause does not reach "child custody").

²⁸² David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1286 (2000).

²⁸³ *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164, 168 (1973) (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)).

states.²⁸⁴ The Treaty Clause of Article II, by contrast, is framed quite differently. It spells out the procedure the President must follow to make a treaty, but it does not limit that power to “one, five, or eighteen subject matters,” strongly suggesting that the treaty power carries with it no subject-matter limitation.²⁸⁵ Still, the treaty power is not entirely without constraint. It remains bounded by constitutional guardrails that apply to *all* exercises of governmental authority, including protections enshrined in the Bill of Rights and categorical bans such as the Suspension Clause in Article I.²⁸⁶ On this basis, the Court has held that neither a treaty nor its implementing legislation may abrogate the Sixth Amendment right to a jury trial,²⁸⁷ and some have argued that the Tenth Amendment likewise constrains the treaty power by reserving certain powers to the states.²⁸⁸

Two general arguments run through the scholarship; the first relates to Congress’s power under the Necessary and Proper Clause, and the second relates to the scope of the actual treaties Congress may implement. As for the first line of analysis, some scholars argue that the Tenth Amendment reserves to the states certain spheres of authority, like family law or other matters of local concern.²⁸⁹ According to such scholars, this is true when Congress passes legislation under the Commerce Clause and thus should also be true if Congress passes legislation under the Necessary and Proper Clause.²⁹⁰ A second line of scholarship argues that, because the treaty power functions as a kind of substitute for ordinary federal lawmaking, its scope should be interpreted as coextensive with the legislative powers granted to Congress in Article I.²⁹¹ This theory rests on the premise that, having

²⁸⁴ U.S. Const. amend. X. The notion that the powers enumerated in Article I are exhaustive is reinforced by Article I, Section 1, which provides that Congress possesses only the legislative powers “herein granted.” U.S. Const. art. I, § 1.

²⁸⁵ U.S. Const. art. II, § 2, cl. 2; Saikrishna Bangalore Prakash, *The Boundless Treaty Power Within a Bounded Constitution*, 90 *Notre Dame L. Rev.* 1499, 1511 (2015).

²⁸⁶ Prakash, *supra* note 285, at 1515–16; see U.S. Const. art. I, § 9, cl. 2 (prohibiting the government from suspending the writ of habeas corpus except in times of rebellion).

²⁸⁷ *Reid v. Covert*, 354 U.S. 1, 18–19 (1957) (plurality opinion).

²⁸⁸ Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 *Mich. L. Rev.* 390, 434–36 (1998); Ted Cruz, *Essay, Limits on the Treaty Power*, 127 *Harv. L. Rev. F.* 93, 109–13 (2014).

²⁸⁹ Bradley, *supra* note 288, at 435.

²⁹⁰ *Id.* at 434–35.

²⁹¹ Scholars frame this objection in different ways. Some read a subject-matter limitation into the Treaty Clause itself. Prakash, *supra* note 285, at 1502. Others locate it in the Necessary and Proper Clause or in Article I more generally. Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 *Harv. L. Rev.* 1867, 1893–94 (2005); Curtis A. Bradley,

carefully enumerated eighteen such powers, the Framers would not have allowed the President and Senate to circumvent those limits by invoking the treaty power to enlarge Congress's regulatory authority.²⁹² Such a reading, they contend, would render the system of enumerated powers meaningless: even where Congress lacks the authority to legislate, the President could, with the Senate's consent, make treaties on those very subjects, and Congress could implement them under the Necessary and Proper Clause.²⁹³ On this view, the Treaty Clause authorizes agreements only on subjects contemplated by Article I.²⁹⁴ However, both iterations of the federalism argument fail.

The first claim—that the Tenth Amendment constrains treaty-implementing legislation in areas of traditional state authority—fails because it assumes incorrectly that the Tenth Amendment imposes substantive limits on appropriate areas for federal regulation. A century ago, the Court in *Holland* considered the Tenth Amendment question, holding that legislation which was “necessary and proper” to implement a treaty was not “forbidden by some invisible radiation from the general terms of the Tenth Amendment.”²⁹⁵ Of course, the Tenth Amendment and federalism concerns are more robust since *Holland* was decided.²⁹⁶ Still, in nearly all its expressions, the Tenth Amendment has not been described as an affirmative list of policymaking areas reserved to the states, but rather as a mere “tautology” or “truism that all is retained which has not been surrendered.”²⁹⁷

The Tenth Amendment reserves to the states only those powers “not delegated” to the federal government by the Constitution.²⁹⁸ That is to say, the Tenth Amendment is not about what is listed, but rather what is not; it simply reflects the limits of the specific enumerated power invoked. A subject like family law is regarded as reserved to the states

The Treaty Power and American Federalism, Part II, 99 Mich. L. Rev. 98, 115–17 (2000). But whether the limitation is framed as a limit on treaties or their implementation, the claim is the same: Congress cannot implement treaties concerning subjects not enumerated in Article I.

²⁹² Prakash, *supra* note 285, at 1502; Rosenkranz, *supra* note 291, at 1893–94.

²⁹³ Prakash, *supra* note 285, at 1502.

²⁹⁴ *Id.*

²⁹⁵ *Missouri v. Holland*, 252 U.S. 416, 432–35 (1920).

²⁹⁶ Bradley, *supra* note 288, at 394 (discussing the Court's “renewed commitment to protecting federalism” in recent years).

²⁹⁷ *New York v. United States*, 505 U.S. 144, 156–57 (1992); *United States v. Darby*, 312 U.S. 100, 124 (1941).

²⁹⁸ U.S. Const. amend. X.

only because it ordinarily lies beyond Congress's reach under the Commerce Clause, not because the Tenth Amendment establishes a substantive barrier around it.²⁹⁹ Both the Treaty and Necessary and Proper Clauses, however, are *themselves* enumerated powers. When Congress implements a valid treaty, it acts pursuant to "delegated" authority,³⁰⁰ and because the Treaty Clause imposes no subject-matter limitation,³⁰¹ Congress may do so even in areas such as family law. If legislation is permissible under the Necessary and Proper Clause, the Tenth Amendment has nothing to say about it.

The second objection—that the Treaty Clause is circumscribed by the limits of Article I—fares no better because neither the Constitution's text nor Founding Era history supports imputing limits from Article I into Article II. Scholars taking this view begin from the premise that the federal government is one of limited powers.³⁰² They argue that Congress's authority is confined by Article I to a specific set of subjects, and an unlimited treaty power would violate that principle by allowing Congress to legislate in areas ordinarily beyond its reach.³⁰³ As a remedy, these scholars suggest that the Treaty Clause should be construed to permit only those treaties that deal with matters Congress could itself regulate under Article I.³⁰⁴ Not only does such a limitation ignore the Court's century-old precedent in *Holland*, which allows Congress to implement treaties on subjects beyond its enumerated powers,³⁰⁵ but it would be highly unusual. When the Constitution restricts federal power, it generally does so explicitly.³⁰⁶ Textually, the contrast between the detailed, enumerated powers of Article I and the broad, unqualified Treaty Clause in Article II suggests *not* that Article I constrains the treaty power, but rather that the treaty power is itself expansive and unrestricted.³⁰⁷

²⁹⁹ When the Court encountered the latter argument in *Brackeen*, the majority called it a "nonstarter," writing that "[f]amily law is no exception" to the principle that state laws yield to federal laws when they are a proper exercise of a power "conferred . . . on Congress." *Haaland v. Brackeen*, 143 S. Ct. 1609, 1630 (2023).

³⁰⁰ Golove, *supra* note 282, at 1280.

³⁰¹ Prakash, *supra* note 285, at 1511.

³⁰² Bradley, *supra* note 288, at 392.

³⁰³ See *id.* at 393.

³⁰⁴ *Id.* at 457.

³⁰⁵ *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

³⁰⁶ Prakash, *supra* note 285, at 1511.

³⁰⁷ *Id.*

History confirms that the Treaty Clause is not so qualified. Under both the Articles of Confederation and the Constitution, the federal government possessed the power to make treaties on subjects beyond Congress's legislative authority.³⁰⁸ This point was tested early: the very first treaty negotiated and ratified under the new Constitution was approved despite objections from several senators that it encroached on states' rights by supplanting state property law.³⁰⁹ Attentive to these concerns, President Washington sought Hamilton's advice on the treaty's constitutionality.³¹⁰ Hamilton replied that the objection was "manifestly futile," explaining that the treaty power was "plenary" and that any limitation grounded in states' rights "would totally subvert the power of making Treaties."³¹¹ Relying on that counsel, Washington signed the treaty.³¹² The expansive reach of the treaty power has long provoked unease among those who would prefer it confined, yet efforts to limit it have consistently failed. At the Constitutional Convention, several proposals to restrict the treaty power were offered and rejected.³¹³ A century and a half later, an amendment that would have done precisely what modern critics urge—limit treaties to subjects within Congress's Article I powers—met the same fate.³¹⁴

Still, the conclusion that Congress may legislate pursuant to treaties in areas that traditionally fall within the states' exclusive domain might be unsettling for many. But whatever discomfort it provokes among modern states' rights advocates, those concerns are likely overstated for three reasons. First, the political process remains a formidable check against abuse: treaties must secure the agreement of another sovereign nation, the President, and a supermajority of the Senate,³¹⁵ and if they are not self-executing, implementing legislation must pass both chambers of Congress.³¹⁶ Given the demands the Constitution places on

³⁰⁸ *Id.* at 1507 (discussing the Articles of Confederation); Golove, *supra* note 282, at 1150–53 (discussing early treaties and judicial interpretations under the Constitution).

³⁰⁹ Golove, *supra* note 282, at 1158–59.

³¹⁰ *Id.* at 1160.

³¹¹ *Id.* at 1160–61 (quoting Alexander Hamilton, Remarks on the Treaty of Amity Commerce and Navigation Lately Made Between the United States and Great Britain (July 9–11, 1795), in 18 *The Papers of Alexander Hamilton* 404, 428–29 (Harold C. Syrett ed., 1973)).

³¹² *Id.* at 1161.

³¹³ Prakash, *supra* note 285, at 1512.

³¹⁴ Golove, *supra* note 282, at 1275–77.

³¹⁵ U.S. Const. art. II, § 2, cl. 2.

³¹⁶ U.S. Const. art. I, § 1.

treaty-making, some scholars contend that states are *better* shielded from federal encroachment via treaties than via ordinary laws.³¹⁷ Second, while the Tenth Amendment is normally treated as a reflection of the limits on federal power contained in Articles I and II, to the extent that it has independent content, the anti-coercion and anti-commandeering doctrines provide additional safeguards, protecting states from being compelled to implement federal treaty objectives.³¹⁸ Although the Supreme Court found that Indian legislation like ICWA did not violate those doctrines,³¹⁹ they would nevertheless apply in cases where state sovereignty is truly imperiled. Third, to the extent that treaty-implementing legislation “radically readjust[s] the balance of state and national authority” by operating in areas traditionally reserved to the states, the Supreme Court has required a “clear statement” from Congress before concluding that such legislation displaces state authority.³²⁰ Taken together, these guardrails ensure that an elastic treaty power does not become a license to radically expand federal power or needlessly trample states’ rights.

The federalism objection resonates most strongly when the federal-state balance of power is disturbed. Here, however, those concerns are muted because laws like ICWA do not disturb the balance of authorities vis-à-vis Indians. ICWA undoubtedly curtails state authority in family matters involving tribal members, but that limitation accords with the Constitution’s very design: to remedy the Articles of Confederation’s failure to restrain state interference in tribal affairs.³²¹ Article IX of the Articles had given the federal government “the sole and exclusive right and power” to “manag[e] all affairs with the Indians.”³²² Yet in the same breath it provided that “the legislative right of any State within its own limits be not infringed.”³²³ Expansionist states seized on this ambiguity to assert jurisdiction over tribes and their lands and challenge federal

³¹⁷ Golove, *supra* note 282, at 1299.

³¹⁸ Anti-commandeering doctrine “prevents Congress from compelling the states to administer federal programs” while anti-coercion doctrine “prevents Congress from achieving the same result through offers that for practical purposes the states cannot refuse.” Daniel J. Hemel, *Federalism as a Safeguard of Progressive Taxation*, 93 N.Y.U. L. Rev. 1, 1 (2018).

³¹⁹ *Haaland v. Brackeen*, 143 S. Ct. 1609, 1641 (2023).

³²⁰ *Bond v. United States*, 572 U.S. 844, 858 (2014) (citation omitted).

³²¹ *Brackeen*, 143 S. Ct. at 1651–52 (Gorsuch, J., concurring); Ablavsky, *supra* note 2, at 1033–35.

³²² Articles of Confederation of 1781, art. IX.

³²³ *Id.*

treaties, undermining national Indian policy and causing costly wars.³²⁴ The Constitution emerged, in part, as a corrective to these state intrusions, concentrating power over Indian affairs exclusively in the federal government.³²⁵

Recognizing as much, the Marshall Court held in the seminal case *Worcester v. Georgia* that state laws “can have no force” in Indian country except “with the assent of the [tribes] themselves, or in conformity with . . . acts of [C]ongress.”³²⁶ The Supreme Court has consistently reaffirmed the tribes’ “immunity from state and local control” in the century since.³²⁷ If this immunity means anything, “it must mean that States and others cannot use their own laws to displace federal Indian policy.”³²⁸ A states’ rights exception to treaty implementation would not only be incompatible with the Constitution’s unqualified grant of the treaty power,³²⁹ but it would also grate against “[t]he policy of leaving Indians free from state jurisdiction and control . . . deeply rooted in the Nation’s history.”³³⁰

CONCLUSION

If the Supreme Court seeks to bring coherence to Indian law, its plenary power doctrine must be reconsidered. The plenary power finds no support in the Constitution’s text, which nowhere mentions such a power over Indian affairs, or in Founding Era history, which instead confirms that the Constitution recognizes some form of Indian sovereignty. These arguments have increasingly come to the fore as calls mount to overturn the plenary power articulated in *Kagama*. If such a seismic shift in the Court’s Indian law jurisprudence occurs—an outcome that appears more likely post-*Brackeen*—a new hook for congressional power in Indian affairs must be identified to avoid

³²⁴ Ablavsky, *supra* note 2, at 1034.

³²⁵ *Id.* at 1040–45.

³²⁶ 31 U.S. (6 Pet.) 515, 561 (1832).

³²⁷ *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 571 (1983); see, e.g., *Okla. Tax Comm’n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) (holding that, absent a federal statute permitting it, “a State is without power to tax reservation lands and reservation Indians”); *McGirt v. Oklahoma*, 591 U.S. 894, 898 (2020) (“State courts generally have no jurisdiction to try Indians for conduct committed in ‘Indian country.’”).

³²⁸ *Haaland v. Brackeen*, 143 S. Ct. 1609, 1661 (2023) (Gorsuch, J., concurring).

³²⁹ U.S. Const. art. II, § 2, cl. 2; Prakash, *supra* note 285, at 1511.

³³⁰ *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 168 (1973) (quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945)).

jeopardizing the government's solemn commitments to the tribes. The Commerce Clause has been hailed by many as the plenary power's heir apparent, but important portions of Indian law do not regulate "commerce." We must look elsewhere. Occasionally cited but never thoughtfully considered, the Treaty and Necessary and Proper Clauses have received scant attention from the Court and scholars alike. But properly understood, they empower Congress to implement the nation's treaty obligations—authority that is neither confined to the regulation of commerce nor vulnerable to states' rights objections. Together, they offer a path forward for a Court attentive to both the welfare of Indian tribes and the constraints of enumerated powers.