Lone Wolf, or How to Take Property by Calling it a "Mere Change in the Form of Investment"

LONE WOLF, OR HOW TO TAKE PROPERTY BY CALLING IT A "MERE CHANGE IN THE FORM OF INVESTMENT"©

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> [F]ull administrative power [is] possessed by Congress over Indian tribal property. In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the government.
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> Justice Edward Douglass White, *Lone Wolf v. Hitchcock*[1]

It was a dark and stormy night.[2] One hundred years have passed since the Supreme Court's ruling in *Lone Wolf v. Hitchcock.*[3] This is not an occasion for celebration. *Lone Wolf* is among the worst decisions ever made by the Supreme Court and is arguably the most unjust decision of all time in the field of federal Indian law—although several other Supreme Court decisions come close.[4] *Lone Wolf* has been called the "the Indians' *Dred Scott* Decision"[5] because, just as *Dred Scott* ruled that African-Americans were beyond the protection of the Constitution, *Lone Wolf* appeared to rule that all questions regarding federal

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1. 187 U.S. 553, 568 (1903).

2. In order to avoid facing a blank page when I begin writing, I have long started every project with the sentence "It was a dark and stormy night"—gleaned from Snoopy's novel in the Charles M. Schulz cartoon, *Peanuts*, but probably originally taken from the novel by Bulwer-Lytton. Edward George Bulwer-Lytton, *Paul Clifford* (Richard Colburn & Richard Bentley 1830). *Cf.* Scott Rice, *It Was a Dark and Stormy Night: The Best (?) from the Bulwer-Lytton Contest* (Penguin 1984) (lampooning Bulwer-Lytton through contest to write the worst possible first sentence in a novel); Madeleine L'Engle, *A Wrinkle in Time* 3 (Yearling Books 1962) (well-known children's novel that begins with the sentence "It was a dark and stormy night."). I have been doing this since I began writing papers for class in high school. I always (or almost always, *see* Joseph William Singer, *Radical Moderation*, 1985 Am. B. Found. Research J. 329) take the sentence out when I prepare the final draft. This time I have kept it in for perhaps obvious reasons. The decision in *Lone Wolf* did indeed represent a "dark and stormy night."

3. 187 U.S. 553.

4. *See e.g. U.S. v. Kagama*, 118 U.S. 375 (1886); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978); *Nev. v. Hicks*, 533 U.S. 353 (2001).

5. *Sioux Nation of Indians v. U.S.*, 601 F.2d 1157, 1173 (Ct. Cl. 1979) (Nichols, J., concurring), *aff'd, sub nom. U.S. v. Sioux Nation of Indians*, 448 U.S. 371 (1980).

power over Indians and Indian nations were "political questions" unreviewable by courts. Under this scheme, Congress has "plenary power" over Indians and Indian affairs; the Court interpreted plenary power to mean absolute power—an interpretation that would be applicable to no other class of persons. As it did in *Dred Scott,* this meant that Indians had no constitutional rights whatsoever—an uncomfortable finding for a nation supposedly devoted to the principle that individual constitutional rights are the means through which justice, liberty, equality, and government restraint are ensured.

The idea that Indians and Indian tribes have no constitutional rights and that the Constitution places no limits on the plenary power of Congress over Indian nations has been partially repudiated by the Supreme Court,[6] as has the holding of *Dred Scott.* The Supreme Court has also partially repudiated the holding that tribal property rights recognized by treaty are not "property" within the meaning of the Fifth Amendment and thus may be taken without compensation.[7] However, these rulings have *not* been entirely overruled. Congress still has plenary power over Indian nations. Although the Court has granted tribes constitutional protection against the uncompensated taking of some, but not all,[8] tribal property rights, it has never otherwise struck down an act of Congress affecting Indian affairs no matter how deeply it cut into reserved tribal rights previously protected under federal law and solemn treaties.[9]

While the Supreme Court has repudiated part of the *Lone Wolf* holding by granting tribes limited protection for tribal title recognized by treaty or statute, it has not repudiated two significant findings of the *Lone Wolf* Court. First, *Lone Wolf* held that Congress may abrogate an Indian treaty without the consent of the tribe.[10] This rule is still the law today. Second, the Supreme Court continues to

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6. *See Del. Tribal Bus. Commn. v. Weeks*, 430 U.S. 73, 84 (1977).

7. *U.S. v. Sioux Nation of Indians*, 448 U.S. 371 (1980). *See* Nell Jessup Newton, *The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the* Sioux Nation *Rule*, 61 Or. L. Rev. 245 (1982). *See* Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 Ga. L. Rev. 453 (1994); Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 Am. U. L. Rev. 753 (1992); Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 Ga. L. Rev. 481 (1994).

8. *See Tee-Hit-Ton Indians v. U.S.*, 348 U.S. 272 (1955); Nell Jessup Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 Hastings L.J. 1215 (1980).

9. *See* Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. Pa. L. Rev. 195 (1984).

10. The first case to hold this was probably *The Cherokee Tobacco*, 78 U.S. 616 (1870) (providing that Congress could impose a tax on the Cherokee Nation despite the 1866 Treaty which exempted them from taxation). However, the Supreme Court repudiated the reasoning and result of *The Cherokee Tobacco* in 1883 in the case of *United States v. Forty-Three Gallons of Whisky*, 108 U.S. 491 (1883), when it held that a treaty promise not to allow liquor in Indian country cannot be abrogated by a subsequent federal act in the absence of a clear statement by Congress of its intent to do so. "The laws of [C]ongress are always to be construed so as to conform to the provisions of a treaty, if it be possible to do so without violence to their language." *Forty-Three Gallons of Whisky*, 108 U.S. at 496. This rule operates with special force where a conflict would lead to the abrogation of a stipulation in a treaty making a valuable cession to the United States. *Id.* Language in *The Cherokee Tobacco* to the contrary was repudiated. *See id.* at 497-98 ("The case of *The Cherokee Tobacco* cannot be treated as authority against the conclusion we have reached. The decision only disposed of that case, as three of the judges of the court did not sit in it, and two dissented from the judgment pronounced by the other four.").

state, as recently as 1980, that the action complained of in *Lone Wolf* was not a taking or deprivation of property rights, but rather it was "a mere change in the form of investment" of the property.[11] If these propositions are both correct, then *Lone Wolf* would have come out the same way even if Indian nations had been fully protected by the Constitution in 1903.

This view regarding the rights at stake in *Lone Wolf* suggests that what happened in that case was not so bad; even if constitutional protections had been offered, the Kiowa, Comanche, and Apache Tribes would still have lost the case. I have long thought that this conclusion is incorrect. The forced allotment practices challenged in *Lone Wolf* were not ordinary acts of Congress.[12] They fundamentally altered the constitutional framework governing the relations between Indian nations and the United States, and they did so in a manner that violated the deepest values embedded in the Constitution. Assuming that this argument is correct, *Lone Wolf* was a travesty, not only because it placed Indians beyond the reach of the Constitution, but also because it legitimated both an act of conquest[13] and what is probably the most massive uncompensated taking of property in United States history. This brief essay will explain why *Lone Wolf* should be understood in this manner.

I. HOW *LONE WOLF* EFFECTED AN ACT OF CONQUEST

As Professor Robert Clinton has recently shown,[14] the United States refrained from interfering in purely internal affairs of tribes until 1885 when Congress passed the Major Crimes Act.[15] That law provided for federal prosecution of major crimes, such as murder, by one Indian against another. Where did Congress get the power to pass such a law? The only relevant enumerated power in the Constitution is the Indian Commerce Clause. However, when the Supreme Court addressed the constitutionality of the Major Crimes Act in *United States v. Kagama*[16] in 1886, it explicitly rejected the Indian Commerce Clause as the basis for the Act. Rather, it found the power implied by the nature of the federal-tribal relationship. The Court simply assumed that the United States must have power over the tribes because they were the "wards" of the government in need of protection. And, with the need of protection came the

11. *Sioux Nation*, 448 U.S. at 413 ("given the provisions of the Act at issue in *Lone Wolf*, the Court reasonably was able to conclude that 'the action of Congress now complained of was but . . . a mere change in the form of investment of Indian tribal property.' Under the Act of June 6, 1900, each head of a family was to be allotted a tract of land within the reservation of not less than 320 acres, an additional 480,000 acres of grazing land were set aside for the use of the tribes in common, and $2 million was paid to the Indians for the remaining surplus.").

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

13. *See* Jo Carrillo, *Disabling Certitudes: An Introduction to the Role of Mythologies of Conquest in Law*, 12 U. Fla. J.L. & Pub. Policy 13 (2000); Rennard Strickland, *The Genocidal Premise in Native American Law and Policy: Exorcising Aboriginal Ghosts*, 1 J. Gender Race & Just. 325 (1998).

14. Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 Ariz. St. L.J. 113 (2002).

15. *Major Crimes Act*, 18 U.S.C. § 1153 (2000) (enacted under *Major Crimes Act*, 23 Stat. 385 (1885)).

16. 118 U.S. 375 (1886).

power to grant it. The Court further suggested that because the tribes are "domestic dependent nations," they must be subject to overriding federal authority by definition.[17]

It had long ago been established that tribes are "domestic" rather than "foreign" nations.[18] In the 1831 case of *Cherokee Nation v. Georgia*,[19] the Supreme Court denominated tribes as "domestic dependent nations." They are "domestic" rather than "foreign" because they are within, rather than without, the United States.[20] They are "dependent" because they are disabled from entering into treaties with foreign nations.[21] It is important to note that these two limitations on tribal power in no way differentiate tribes from states. States, like tribes, are within the United States; states, like tribes, are constitutionally prohibited from entering into treaties with foreign nations.[22]

The 1886 decision in *Kagama* was the first to hold that the tribes' dependent status meant something more, i.e., that tribes are subject to overriding federal power to regulate their internal affairs.[23] Yet our constitutional system is based on the idea of consent.[24] The several states created the United States by agreeing to accept the Constitution and voting to become part of the United States. They delegated certain enumerated powers to the federal government. As recent federalism cases have dramatically shown, the Supreme Court believes that the states retained all previous powers and immunities they possessed unless they consented to relinquish them to the federal government when they joined the Union.[25] When did the tribes consent to be part of the Union? If they did so at all, it was through the treaty process.[26] As Professor Philip Frickey has argued,

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17. *Id.* at 381, 384.

18. *Id.* at 384.

19. 30 U.S. 1 (1831).

20. *Id.* at 18.

21. *Johnson v. McIntosh*, 21 U.S. 543 (1823).

22. U.S. Const art. I, § 7(10)(1) ("No State shall enter into any Treaty, Alliance, or Confederation . . . ."). The only other limitation on tribal powers recognized before 1886 is the inability of the tribes to convey fee simple title to land that would be recognized in the courts of the United States. *Johnson*, 21 U.S. 543. This restraint on alienation has never prevented tribes from transferring property under their own law and it has long been accepted as a useful protection from fraudulent loss of lands. It has been criticized as harmful to the tribes by limiting them to one buyer, thus preventing market competition for tribal lands and limiting the price the tribes can acquire for sale of their lands and allowing the United States to buy Indian land cheaply. However, the low prices paid to the tribes for their land had less to do with a lack of competition than the general policy of forcing tribes to sell their land when they did not want to sell.

23. 18 U.S. 375.

24. Clinton, *supra* n. 14, at 115 ("the most revered principle of the United States Constitution . . . [is] that all legitimate governmental authority derives from the consent of the people who have chosen to delegate only certain limited powers to the federal government (a theory often called 'popular delegation' or 'popular sovereignty')"); Richard B. Collins, *Indian Consent to American Government*, 31 Ariz. L. Rev. 365 (1989) ("Consent of the governed is a fundamental tenet of democratic constitutionalism.").

25. *Fed. Mar. Commn. v. S.C. St. Ports Auth.*, 122 S. Ct. 1864 (2002); *Alden v. Maine*, 527 U.S. 706 (1999).

26. Many tribes did not sign treaties with the United States. The United States has even less legitimate claim to govern these non-treaty tribes than the tribes that implicitly agreed to some kind of association with the United States through a treaty. One would think that the non-treaty tribes would get at least as much protection of their reserved sovereignty as the treaty tribes since they retain their

this means that treaties are quasi-constitutional documents; they form the basis for the relationship between the United States and the tribes.[27]

Kagama held that the United States has plenary power over Indian tribes.[28] It granted the United States an unenumerated power and did so based on racist assumptions.[29] Although federal power today over Indian affairs is presumably based on the Indian Commerce Clause, the Supreme Court has failed to repudiate the plenary power doctrine. Indeed, it cannot do so while maintaining the notion that Congress has full legislative authority over tribes. In the non-Indian area, the Court has begun to limit the Interstate Commerce Clause, striking down legislation that does not directly regulate commerce.[30] If the Court were consistent, it would have to overrule *Kagama* and strike down the Major Crimes Act. Yet the Court has distinguished the Indian Commerce Clause from the Interstate Commerce Clause and continues to justify plenary power by the United States over tribes on the basis of the Indian Commerce Clause.[31]

Lone Wolf went beyond *Kagama*, adding insult to injury. It not only justified the plenary power doctrine, but it also allowed plenary power to be exercised in a manner that violated the express terms of treaties with Indian nations.[32] Moreover, it did so to enable the United States to take tribal lands in violation of federal treaty covenants. Yet if federal power over the states is limited by the extent to which the states consented to federal power, then federal power over tribes must be similarly limited to the extent the tribes consented to federal power. The extent of tribal consent may be found in the terms of treaties—assuming that the treaties were mutually beneficial arrangements rather than coerced deals. In any event, it would seem to be inconsistent with our constitutional structure to deprive the tribes of the protections the United States actually provided to them in treaties. Even if the treaty process was coerced and unfair, it would seem that the least the United States can do is comply with the terms it committed itself to in treaties that recognize and protect tribal rights.

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sovereignty until limited by lawful federal action. Part of my argument is that unilateral assertions of power by the United States (either through actions of Congress or of the President or executive agencies such as the Bureau of Indian Affairs) are presumptively illegitimate and unconstitutional in the absence of a showing that the tribes have consented to federal jurisdiction. *See* Clinton, *supra* n. 14.

27. Philip P. Frickey, *Domesticating Federal Indian Law*, 81 Minn. L. Rev. 31 (1996); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381 (1993).

28. *Kagama*, 118 U.S. at 379.

29. Clinton, *supra* n. 14, at 116.

30. *U.S. v. Lopez*, 514 U.S. 549 (1995); *U.S. v. Morrison*, 529 U.S. 598 (2000).

31. *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 62 (1996) ("If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes"); *Cotton Petroleum Corp. v. N.M.*, 490 U.S. 163 (1989) ("It is also well established that the Interstate Commerce and Indian Commerce Clauses have very different applications. In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, . . . the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs").

32. *Lone Wolf*, 187 U.S. 553.

The treaty at issue in *Lone Wolf* created a government-to-government relationship between the affected tribes and the United States.[33] It established the constitutional terms of that relationship. It is of monumental importance that the United States took upon itself a limitation on its own prerogatives. The United States promised, as part of the terms of association between the tribes and the United States, never to take the tribes' property without the consent of three-fourths of the adult men of the tribes.[34] If this promise was a mere contract, the United States could violate it upon payment of damages.[35] But it was not a mere contract; it was a constitutional compact. The tribes became associated with the United States in a framework that resulted in giving up some powers while retaining others. The United States promised to respect those reserved powers. In the absence of consent by the tribes to federal powers to allot tribal property, the United States had no legitimate authority to order allotment.

Lone Wolf authorized the United States to force tribes to accept allotment of their property to tribal members and to accept the sale of so-called "surplus lands" to non-Indians.[36] The Court did away with the requirement that tribes consent to such arrangements. But nowhere had the tribes consented to be governed by the United States in this manner. The Supreme Court held, just a few weeks before I wrote these lines, that the federal government cannot force the states to defend suits by private citizens before federal administrative tribunals.[37] Why? Because the states did not "consent" to give up their sovereign immunity. "States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union 'with their sovereignty intact.'"[38] According to the Supreme Court, this means that states retain sovereign immunity "from 'suits, without their consent,' unless there has been a 'surrender' of that immunity 'in the plan of the convention . . . .'"[39] Retention of powers not given up is required by the "dignity that is consistent with their status as sovereign entities."[40]

The tribes are sovereign entities as well, not just in theory, but by the law of the land. If the states retain all powers they did not give up by joining the Union, and if that conclusion is justified by the nature of constitutional government, then it must similarly be the case that the tribes retain whatever powers they did not give up voluntarily. Because the tribes did not become states and did not ratify the Constitution or otherwise agree to become part of the United States, their association with the United States is set, at the very least, by the terms of the treaties by which they fashioned their relationship with the federal government. If

33. *Id.*
34. *Id.* at 564.
35. *U.S. v. Winstar Corp.*, 518 U.S. 839 (1996).
36. *Lone Wolf*, 187 U.S. at 568.
37. *Fed. Mar. Commn.*, 122 S. Ct. 1864.
38. *Id.* at 1870 (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)).
39. *Id.* at 1884 (quoting *Alden v. Maine*, 527 U.S. 706, 730 (1999) (quoting The Federalist No. 81 (Alexander Hamilton)).
40. *Id.* at 1874.

those treaties are the equivalent of the Constitution in setting up the relations between sovereign governments, then it would be an act of conquest for Congress to interfere with internal tribal affairs in a manner that goes beyond the powers delegated to Congress in a treaty.[41] Yet *Lone Wolf* authorized Congress to ignore treaties with Indian nations and to abrogate them at will.

While it is true that Congress may pass a statute abrogating a prior treaty with a foreign nation, the allotment legislation upheld in *Lone Wolf* did more than that. When, for example, a treaty is abrogated between the United States and France, the parties return to the *status quo ante.* They give up their rights and their obligations under the treaty. They remain separate sovereign nations. Repudiation of a treaty by the United States does *not* result in the United States taking over France or acquiring the power to regulate affairs in France. *Lone Wolf* held that Congress could not only repudiate a treaty, but that it could regulate, *without any constitutional limitation,* the internal affairs of the tribes.[42] It did so without the consent of the tribes, without any express constitutional authority to do so, and without any basis in an existing treaty. There is no other word for this than conquest.

II. HOW *LONE WOLF* JUSTIFIED AN UNCONSTITUTIONAL TAKING OF PROPERTY

The *Lone Wolf* Court justified three separate invasions of tribal property rights. They included (1) allotment of tribal property to individual members; (2) abrogation of the contractual right not to have property taken without tribal consent; and (3) a transfer of so-called surplus lands from tribes to non-Indians in a manner that violated both the Equal Protection Clause and the "public use" requirement of the Takings Clause.

A. Allotment as an Uncompensated Taking

The Kiowa, Comanche, and Apache Nations complained that their territory was allotted and surplus lands sold against their will. Although it was less than clear on the matter, the Supreme Court appears to have concluded that both allotment and the sale of surplus lands were legitimate because they constituted a "mere change in the form of investment" of tribal property.[43] Can this conclusion be sustained? Let us first address allotment itself. Does a transfer of tribal

41. I would argue that tribal tax exemptions in treaties are similarly matters of "internal affairs" when they concern the conduct of tribal members on tribal land. The fact that non-Indians enter tribal land to do business with the tribe does not justify a federal imposition of a condition on such sales, despite the holding of *The Cherokee Tobacco* to the contrary. *Lone Wolf*, in contrast to *The Cherokee Tobacco,* validated federal regulation of tribal management of tribal property through the allotment process even when no non-Indians were involved. It thus built on the holding of *Kagama* and went beyond the ruling in *The Cherokee Tobacco.*

42. *Cf. The Cherokee Tobacco*, 78 U.S. 616 (Congress can impose a tax on a tribe despite a treaty promise not to do so).

43. *Lone Wolf*, 187 U.S. at 568.

property from the tribe to its individual members constitute a "mere change in the form of investment"? The answer is no.

Tribes are sovereign governments and own their land collectively. This ownership form is not like tenancy in common or joint tenancy; it is ownership by the collective entity itself. The property is owned and managed by the tribe. Use of the land is determined through tribal law and political processes. The ownership is therefore in a collective entity—the tribe itself. The Supreme Court in *Lone Wolf* tried to avoid this conclusion by noting that Congress had provided in 1871[44] that tribes would no longer be treated as sovereign entities capable of entering into treaties with the United States.[45] Moreover, the *Lone Wolf* case itself was styled as an action by individual tribal members rather than a suit by the tribe itself.[46] Thus the Court pretended that tribal ownership was ownership by the individual tribal members jointly—as if they were joint tenants. This assumption, however, is unwarranted; moreover, it was unwarranted in 1903. The 1868 treaty guaranteeing tribal ownership was with the tribe—not with its members. The tribe owned and managed the property as a sovereign government—a collective entity, somewhat similar to a corporate entity.[47]

The Supreme Court held in 1886 that corporations are "persons" within the meaning of the Fifth and Fourteenth Amendments and that their property rights are within the scope of the Takings Clause.[48] Thus, a transfer of property from a corporate entity to someone else—even to its members—would *a fortiori* constitute a taking of property without just compensation as required by the Fifth Amendment. If a state legislature forced General Motors to transfer ownership of its factories to its shareholders, there is no question this would effectuate an unconstitutional taking of the property of the corporation. A similar conclusion would follow if a state forced the Catholic Church to transfer a church to its parishioners or if Harvard University were forced to transfer its buildings to its alumni. Moreover, no separate rule for Indian nations can be justified. This conclusion is borne out by the recent cases of *Hodel v. Irving*[49] and *Babbitt v. Youpee*,[50] which hold that a forced transfer of property from allottees to the tribe is a taking of property within the meaning of the Constitution, even if that transfer merely destroys the allottee's right to determine who will own the property on

44. 25 U.S.C. § 71 (2000).

45. 187 U.S. at 566.

46. *Id.* at 562.

47. I mean "corporate" in the old-fashioned, nineteenth-century sense, meaning "artificial person" or "legal entity" that is separate from the individuals that otherwise might be thought to comprise the basic legal actors. The tribal government is a "person" for purposes of the Fourteenth Amendment because it has legal powers and obligations that are distinguishable from the legal rights and obligations of its members.

48. *County of Santa Clara v. So. Pacific R.R. Co.*, 118 U.S. 394 (1886) (corporations are persons under the Fifth Amendment for purposes of the Equal Protection Clause); *See Minneapolis & Saint Louis Ry. v. Beckwith*, 129 U.S. 26 (1889) (corporations are persons for purposes of the Due Process Clause); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 Hastings L.J. 577 (1990) (criticizing these developments).

49. *Hodel v. Irving*, 481 U.S. 704 (1987).

50. *Babbitt v. Youpee*, 519 U.S. 234 (1997).

death. If Congress cannot transfer property from allottees to the tribe, it similarly cannot transfer property from the tribe to allottees—at least not without compensation.

Allotment was thought at the time to benefit the tribes by converting communal ownership and management to individual private property. The allotment policy proved to be an unmitigated disaster. However, even if it had succeeded and the allotment policy had promoted a significant public policy, this does not mean that the Constitution allowed Congress to take tribal property and transfer it to tribal members without compensating the tribes for the land they lost. Through the allotment of tribal land, the tribes lost millions of acres of land. None of these losses were ever compensated, even under the Indian Claims Commission Act of 1946.[51] They were not compensated because allotment was thought to be a "mere change in the form of investment" of the property. This assumption was, and is, incorrect.

B. Abrogation of the Consent Requirement as an Uncompensated Taking

The 1868 Treaty of Medicine Lodge[52] provided that no seizure of tribal property would ever occur without a three-fourths vote of adult male members of the tribe. When Congress took tribal property without such a vote, it violated this provision. I argued earlier that this taking without tribal consent was an act of conquest. It was also a taking of property. The treaty contained a promise by the United States not to take property unless the tribe consented.[53] I also argued earlier that the treaty was a constitutional compact; it was this but it was also a contract regarding the transfer of property from one sovereign to another. Breach of contract by the United States generally subjects the United States to a damages judgment.[54] Although the Contracts Clause applies only to the states,[55] the Supreme Court has interpreted the Takings Clause to contain a similar limitation on the federal government.[56] The United States has the power to condemn property held by the states but the Takings Clause would require it to pay compensation if it did so and there is no reason to think that the tribes should have lower protection for their property rights than do the states. In fact, subsequent to the *Lone Wolf* decision, the Supreme Court has held that recognized Indian title cannot be expropriated by the United States in the absence of compensation.[57]

No compensation was ever given to the tribes in *Lone Wolf* for violation of this promise not to take land without a three-fourths vote. Moreover, this promise

51. 25 U.S.C. §§ 70-70n, 70o-70v (omitted 1978).
52. *The Treaty of Medicine Lodge* (Oct. 21, 1867), 15 Stat. 581.
53. *Id.*
54. *Winstar Corp.*, 518 U.S. 839.
55. *See* U.S. Const. art. I., § 10, cl. 1.
56. *Winstar Corp.*, 518 U.S. at 875-76 ("Although the Contract Clause has no application to acts of the United States, it is clear that the National Government has some capacity to make agreements binding future Congresses by creating vested rights.") (citations omitted).
57. *Sioux Nation*, 448 U.S. 371.

was not just any old promise; it vested title to the land in the tribe, subject to a right of preemption by the United States.[58] However, the United States' right of preemption was subject to a condition that it not be exercised unless the tribe agreed.[59] The promise by the United States was in effect a real covenant attached to the land. Most courts hold that covenants are "property" rights within the meaning of the Takings Clause and that the government cannot extinguish them without paying compensation unless some rule of common law subjects them to such extinguishment.[60] No such rule was relevant to the tribes in the *Lone Wolf* case. Deprivation of property in violation of the three-fourths rule was a separate taking of property in violation of the Constitution for which no compensation was ever given to the tribes.

C. *Unconstitutional Transfer of Ownership from Tribes to Non-Indians*

Finally, we have the transfer of surplus lands to non-Indians. Although the tribes complained about the price paid, arguing that it was not just compensation because it was below market value, there is no dispute that the United States did pay value for the surplus lands. The issue that arises here, in addition to the question of *just* compensation, is whether the taking of land was constitutionally justifiable at all. Land can be taken by the federal government for a public use but not for a private use.[61] The meaning of the public use requirement is not entirely clear. Under current law, it means that the taking must be substantially related to a legitimate government purpose.[62] What public purpose justified the transfer of property from Indian nations to non-Indians?

The allotment legislation is unclear on this point. However, we can get a clue from the terminology, as well as from history.[63] The lands were called surplus lands because it was thought the Indians owned more land than they needed.[64] Is

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58. *Lone Wolf*, 187 U.S. 553.

59. *Id.*

60. Servitudes may be extinguished by condemnation. *Restatement (Third) of Property: Servitudes* § 7.8 (Reporter's Note). Most jurisdictions hold that compensation is required when the benefit of a covenant is extinguished. *See e.g. Mercantile-Safe Deposit & Trust Co. v. Mayor of Baltimore*, 521 A.2d 734 (Md. 1987); *Restatement (Third) of Property: Servitudes* § 7.8 (Reporter's Note). Some hold that compensation is not required. *See e.g. Burma Hills Dev. Co. v. Marr*, 229 S.2d 776 (Ala. 1969); Gerald Korngold, *Private Land Use Arrangements: Easements, Real Covenants, and Equitable Servitudes* § 11.11 (McGraw-Hill 1990). However, the cases tend to be older and the modern view is that compensation is required when government extinguishes a covenant. "[I]n this Restatement, all servitude benefits are treated as property rights and thus should be entitled to the protection of the Takings Clause." *Restatement (Third) of Property: Servitudes* § 7.8 (Reporter's Note); *Cf. Blakeley v. Gorin*, 313 N.E.2d 903 (Mass. 1974) (upholding a statute that provided for damages but not injunctive relief to enforce a covenant).

61. U.S. Const. amend. V ("nor shall private property be taken for public use, without just compensation"); *See Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

62. *See Haw. Hous. Auth.*, 467 U.S. 229 (holding that the public use requirement is satisfied if the legislation is rationally related to a legitimate government purpose); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) (noting that a taking occurs when a land use regulation "does not substantially advance legitimate state interests").

63. *See* Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford U. Press 1990).

64. "We do owe the Indians sacred rights and obligations, but one of those duties is not the right to let them hold forever the land they did not occupy, and which they were not making fruitful for

this a reason to take property away from someone? Redistributive taxes are based on the idea that the wealthy should share what they have with the poor, but the taking of property has never otherwise been justified because the owner did not need the land. The lands were transferred to non-Indians because the non-Indians needed or wanted the land. Now the Supreme Court has justified the taking of property from one private owner to another to create a vigorous market for real estate,[65] to promote urban renewal, and to combat poverty.[66] State courts have justified such transfers on the ground that they create jobs.[67]

However, the Supreme Court has never found that transfers of land from one racial group to another are justified because one race is more needy than the other. Indeed, in recent years, the Supreme Court has been an enemy of affirmative action.[68] Harms to one racial group to benefit another presumptively violate the Equal Protection Clause. Yet it is arguable that the transfer of surplus lands from Indian nations to non-Indians was a huge form of affirmative action for white people, who were by far the greatest beneficiaries of the transfers. Perhaps the transfer could be justified as needed to prevent poverty. After all, the Indians were land-rich and the whites were land-poor. This justification is rather hard to sustain given the extraordinary poverty of Indians after the deprivation of the bulk of their lands and the destruction of tribal economies in the late nineteenth century. Perhaps the transfer can be explained by the conclusion that the tribes were using the land inefficiently and that it could be better used by someone else.

None of these justifications for the sale of surplus lands is particularly convincing. The fact of the matter is that the tribes had land that the whites wanted and the whites used the allotment acts to get it. It is hard to discern a legitimate public purpose here.

Perhaps I am being too lawyer-like. The actual purpose was not obscure at all. The allotment laws were a crucial part of the process by which the United States acquired Indian lands. They were an integral part of the acts of conquest imposed by the United States on Indian nations. As such, they cannot be justified. Conquest is not one of the enumerated powers granted to Congress by the Constitution. The allotment acts imposed uncompensated takings of property on Indian nations, facilitated the transfer of property from Indians to non-Indians in a manner that promoted white supremacy and deprived tribal sovereigns of retained rights without their consent. These acts were anything but a "mere change in the form of investment" of property.

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themselves or others." Lyman Abbott, *Statement to the Lake Mohonk Conference Supporting the Dawes Act* (1885) (quoted in Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* vol. 2, at 624 (U. Neb. Press 1984), and reprinted in Joseph William Singer, *Property Law: Rules, Policies & Principles* 1187 (3d ed., Aspen L. & Bus. 2002)).

65. *Haw. Hous. Auth.*, 467 U.S. 229.

66. *Berman v. Parker*, 348 U.S. 26 (1954).

67. *See Poletown Neighborhood Council v. City of Det.*, 304 N.W.2d 455 (Mich. 1981).

68. *See Adarand Constructors, Inc. v. Pena,* 515 U.S. 200 (1995); *Cf.* Carole Goldberg, *American Indians and "Preferential" Treatment*, 49 UCLA L. Rev. 943 (2002) (considering constitutional reasons for legislation singling out Indians and Indian nations).

III. WHY IT MATTERS

Why does it matter today whether allotment was an act of conquest or an unconstitutional taking of property? It matters because the Supreme Court continues to assert power over Indian nations, depriving them of retained sovereign powers without either congressional authorization or constitutional basis.[69] In recent years, the Supreme Court has all but obliterated tribal powers over non-Indians—even over non-Indians who enter tribal land.[70] The Supreme Court's recently imposed limitations on tribal sovereignty breach existing treaties, as well as both congressional and executive policies that recognize the government-to-government relationship between the tribes and the United States.[71] The attitudes that led to the *Lone Wolf* decision are still with us today. Those attitudes allow the current Supreme Court to deprive tribes of retained sovereignty at will.[72] The injustices that *Lone Wolf* allowed to occur are still being perpetrated.

69. *See* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 Cal. L. Rev. 1573 (1996); Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Nonmembers*, 109 Yale L.J. 1 (1999); Judith V. Royster, *Decontextualizing Federal Indian Law: The Supreme Court's 1997-98 Term*, 34 Tulsa L.J. 329 (1999).

70. *See Hicks*, 533 U.S. 353; Alex Tallchief Skibine, *Making Sense Out of* Nevada v. Hicks*: A Reinterpretation*, 14 St. Thomas L. Rev. 347 (2001).

71. *See* John P. LaVelle, *Sanctioning a Tyranny: The Diminishment of* Ex Parte Young*, Expansion of* Hans *Immunity, and Denial of Indian Rights in* Coeur D'Alene Tribe, 31 Ariz. St. L.J. 787 (1999).

72. On the impediments to constitutional recognition of tribal sovereignty and rights, *see* Rebecca Tsosie, *American Indians and the Politics of Recognition: Soifer on Law, Pluralism, and Group Identity*, 22 Law & Soc. Inquiry 359 (1997).