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Frank Pommersheim

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# **LONE WOLF V. HITCHCOCK: A LITTLE HAIKU\***

## **ESSAY ON A MISSED CONSTITUTIONAL MOMENT**

Frank Pommersheim\*\*

For many, the decision in *Lone Wolf v. Hitchcock*<sup>1</sup> represents a jurisprudential nadir in Indian law with its formulation of the plenary power doctrine.<sup>2</sup> It is not my interest to revisit that infamy, but rather to briefly suggest that its boldly imperial notion contains another complementary and perhaps more salient, but seldom observed, aspect as a missed constitutional moment. Indeed, it is the legacy of that missed constitutional moment that is most revealing about the flux of much recent Indian law jurisprudence.<sup>3</sup> A rethinking of *Lone Wolf* further suggests that the primary hinge of Indian law is often found in Supreme Court decisions rather than in the more common scholarly notion of congressional policy.<sup>4</sup> Most distressing, of course, is that current Supreme Court jurisprudence is

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\* Haiku is an unrhymed Japanese poem of three lines containing 5, 7, and 5 syllables, respectively. This essay strives for haiku's quintessential compression, clarity, and direct meaning rendered with a light (scholarly) touch. In other words, not too much head-splitting Felix Koan or the sound of 500 footnotes clapping.

\*\* Professor of Law, University of South Dakota School of Law.

1. 187 U.S. 553 (1903). For an extensive historical exegesis, see Blue Clark, *Lone Wolf v. Hitchcock: Treaty Rights and Indian Law at the End of the Nineteenth Century* (U. Neb. Press 1994).

2. Congress has the unilateral power to abrogate treaties between the federal government and Indian tribes, and more broadly, that "[p]lenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government." *Lone Wolf*, 187 U.S. at 565. While this doctrine has been subsequently modified to allow judicial review in accordance with the rational-basis test, *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73 (1977), the Supreme Court has yet to find a single piece of congressional legislation that fails to meet this (minimal) level of scrutiny.

3. See cases identified and discussed at *infra* notes 20-22 and accompanying text.

4. The point is not to suggest that these formulations in the leading Indian law casebooks are wrong, but rather that they are so heavily weighted in favor of congressional policy that they inadvertently deflect attention from the powerful role of the Supreme Court in setting the overarching doctrines within which Congress acts. See e.g. David H. Getches, Charles F. Wilkinson & Robert A. Williams, Jr., *Federal Indian Law* 73-128, 141-90, 191-203, 204-24, 224-55 (4th ed., West 1998):

The Federal-Tribal Treaty Relationship: The Formative Years (1789-1871);

Allotments and Assimilation (1871-1928);

The Period of Indian Reorganization (1928-1945);

The Termination Period (1945-1961); and

The Era of Self-Determination (1961-present).

In each of these eras, prominence is given to the work of Congress.

In addition, see Robert N. Clinton, Nell Jessup Newton & Monroe E. Price, *American Indian Law* 138-41, 141-42, 142-44, 144-46, 146-47, 147-52, 152-55, 155-58, 158-64 (3d ed., Michie Co. 1991):

neither anchored in, nor constrained by, any constitutional norms or limits, and therein lies its ongoing perniciousness. This short essay suggests a way to doctrinally confront this danger and discusses the possibility of a constitutional adjustment to overcome it.

The critical problem posed by the *Lone Wolf* case was not really the issue identified by the Court of whether Congress could unilaterally abrogate a treaty between the federal government and an Indian tribe,<sup>5</sup> but rather the much broader question of what was the nature of the *changing* legal relationship of the federal government to Indian tribes. In this pivotal moment in Indian law, the Supreme Court chose to focus on a symptom but not the underlying cause. The press in the late nineteenth and early twentieth centuries of American history placed Indian tribes, particularly in the West, in a much different geographical, social, and political relationship to the federal government than at the time of the seminal Marshall trilogy<sup>6</sup> of the early nineteenth century. At that time, Indian tribes were largely located physically, culturally, and politically outside the orbit of, and insulated from, undue encroachment by both the federal and state governments. These sovereigns were, for all practical purposes, separated by a vertical line that ran from north to south, dividing Indian country and Indian territory from the rest of the country.<sup>7</sup> Tribal self-government and autonomy remained extensive.

Yet this basic pattern soon began to change. The design and reality of significant separation gave way more and more to a pattern of expansion and

The Colonial Period (1492-1776);  
 The Confederation Period (1776-1789);  
 The Trade and Intercourse Act Era (1789-1835);  
 The Removal Period (1835-1861);  
 The Reservation Policy (1861-1887);  
 The Allotment Period and Forced Assimilation (1871-1934);  
 The Indian Reorganization Act Period (1934-1940);  
 The Termination Era (1940-1962); and  
 The Self-Determination Era (1962-present).

Similarly, in each of the enumerated eras, primary attention is given to the work of Congress.

5. *Lone Wolf*, 187 U.S. at 566.

6. The Marshall trilogy refers to the three foundational Indian law cases decided by the Supreme Court under the leadership of Chief Justice Marshall. They include: *Johnson v. McIntosh*, 21 U.S. 543 (1823) (holding that title to Indian land is held by the “discoverer” European nation with a remaining right of use and occupancy held by the tribe); *Cherokee Nation v. Ga.*, 30 U.S. 1, 17 (1831) (denominating tribes as neither foreign nations nor states within Article III of the Constitution, but rather “domestic dependent nations”); and *Worcester v. Ga.*, 31 U.S. 515, 559 (1832) (finding that Georgia state law has no force and effect in the Cherokee Nation or elsewhere in Indian country as Indian Nations are “distinct, independent political communities”).

7. This is best seen, for example, in the various (federal) Non-Intercourse Acts enacted from 1790 through 1834. This line of demarcation was itself fraught with tension:

The goal of American statesmen was the orderly advance of the frontier. To maintain the desired order and tranquility[,] it was necessary to place restrictions on the contacts between the whites and the Indians. The intercourse acts were thus restrictive and prohibitory in nature—aimed largely at restraining the actions of the whites and providing justice to the Indians as the means of preventing hostility. But if the goal was an *orderly* advance, it was nevertheless [an] *advance* of the frontier, and in the process of reconciling the two elements, conflict and injustice were often the result.

Francis Paul Prucha, *American Indian Policy in the Formative Years* 3 (Harv. U. Press 1962).

encirclement in which non-Indian country began to surround Indian reservations with greater frequency. Much of this territory soon became the new states of the West.<sup>8</sup> The reservation itself was undergoing a fundamental change from a homeland held in common with few, if any, non-Indian residents to a place (in many situations) with a growing land tenure class of individual Indian allottees, who might sell or otherwise lose their allotments to non-Indians.<sup>9</sup> Added to this was the presence of a significant number of non-Indians who purchased federal homestead allotments on the reservation from the federal government, which acquired this “surplus land” directly from the tribe. This latter situation is, of course, the *Lone Wolf* case, in which the Supreme Court approved federal acquisition of surplus land from the tribe through a process of treaty abrogation and unilateral congressional action.

One way of thinking about the process described above—call it manifest infamy if you will—is to view it from the perspective that it was creating a new setting in which the legal regime of old was, at least from the federal perspective, insufficient to meet the new demands of the day. Tribes—geographically, politically, and socially—were less and less outside or on the margins of the republic, but increasingly inside the republic. They were, apparently with little notice or fanfare, increasingly being *absorbed* into the dominant society, and as a result both sides were drawn into an uncharted legal realm.<sup>10</sup> It is this uncharted

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8. See e.g. 9 Stat. 452 (1850) (providing for the admission of California into the Union); Exec. Procl. 6, 19 Stat. 665 (1876) (providing for the admission of Colorado into the Union); 26 Stat. 215 (1890) (providing for the admission of Idaho into the Union); 12 Stat. 126 (1861) (providing for the admission of Kansas into the Union); 14 Stat. 391 (1867) (providing for the admission of Nebraska into the Union); Exec. Procl. 22, 13 Stat. 749 (1864) (providing for the admission of Nevada into the Union); *Omnibus Bill of Feb. 22, 1889*, 25 Stat. 676 (1889) (providing for the admission of North Dakota, Montana, South Dakota, and Washington into the Union); 11 Stat. 383 (1859) (providing for the admission of Oregon into the Union); 9 Stat. 1 (1845) (extending the laws of the United States over the State of Texas); Exec. Procl. 9, 29 Stat. 876 (1896) (providing for admission of Utah into the Union); 26 Stat. 222 (1890) (providing for the admission of Wyoming into the Union).

9. This is one of the devastating effects set in motion by the allotment policy as authorized by the *General Allotment Act (Dawes Severalty Act)*, 24 Stat. 388 (1887) (codified as amended at scattered sections of 25 U.S.C. § 348 (2000)).

An enormous loss of Indian land followed, with total Indian landholdings falling from 138 million acres in 1887 to 52 million acres in 1934. More than 26 million acres of allotted land was transferred out of Indian hands after it passed out of trust. Some of this individual allotted land was sold by arms-length transactions and some of it was lost by fraud, sharp dealing, mortgage foreclosures, and tax sales. . . . In addition, great chunks were carved out of many reservations when surplus lands were opened for homesteading. Sixty million of the 86 million acres lost to Indians by the allotment regime were due to the surplus lands facet of the 1887 act.

Charles F. Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy* 20 (Yale U. Press 1987) (endnotes omitted).

10. See e.g. Frank Pommersheim, *Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy*, 58 Mont. L. Rev. 313, 318-21 (1997) [hereinafter Pommersheim, *Opportunities and Challenges*]; Frank Pommersheim, *Coyote Paradox: Some Indian Law Reflections from the Edge of the Prairie*, 31 Ariz. St. L.J. 439, 473 (1999) [hereinafter Pommersheim, *Coyote Paradox*]. That all of this was colonialist and against the will of the tribes goes without saying. The point is, what are the possibilities *now*? The impetus of this essay is to suggest one possibility; a possibility, incidentally, that is not meant to exclude other (complementary) possibilities. See e.g. the legislative proposal discussed in Tex Hall, Kelsey Begaye, John E. Echohawk & Susan M.

legal realm that confronted the Supreme Court in *Lone Wolf*, but which the Supreme Court (and the country as a whole) conveniently ignored.

As the federal government began to act more directly to establish a legal regime *within* Indian country and not just at the interface<sup>11</sup> between itself and tribes, the existing foundational rules established in the Marshall trilogy began to buckle. The beginning of this shift is readily discernible in *United States v. Kagama*.<sup>12</sup> In *Kagama*, the Supreme Court confronted the issue whether Congress could pass legislation that created federal criminal jurisdiction over acts committed by one Indian person against another Indian person *within the reservation*.<sup>13</sup> The Court could find no authorization for such legislation within the Constitution itself and settled on some vague notion of dependence and necessity.<sup>14</sup> As the Court itself (unconvincingly) noted:

The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else; because the theatre of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes.<sup>15</sup>

It was apparent in *Kagama*, that a (new) doctrinal footing would be necessary to justify the likely continuance and growth of federal legislation to be deployed on the reservation. *Kagama* made it clear that no adequate conceptual mooring could be located in the Constitution. *Lone Wolf* answered *Kagama's* source of authority dilemma with its identification of plenary power, which is clearly an extraconstitutional notion.

The point is not to rehash the extensive critique<sup>16</sup> of *Lone Wolf's* plenary power doctrine, but to note that this formulation also included a subtext that

Williams, *Tribal Governance and Economic Enhancement Initiative*, Indian Country Today A5 (Oct. 16, 2002).

11. By this, it is meant that the primary federal concern was to regulate—sometimes through the mutuality of treaties, sometimes through congressional legislation—the process of exchange (including, on occasion, appropriation) of goods, land, natural resources, and separation of the governments and their respective peoples rather than interfering very much with how tribes exercised sovereignty and self-government within the reservation.

12. 118 U.S. 375, 384 (1886) (Congress' enactment of the Major Crimes Act, while not sustainable within the text of the Constitution itself, was nevertheless permissible because of Indian tribe "weakness and helplessness" and the corresponding federal "duty of protection, and with it the power").

13. *Id.* at 375.

14. *See id.*

15. *Id.* at 384-85.

16. The plenary power doctrine is the subject of extensive scholarly criticism and commentary. Professor Judith Resnik cites the following authorities:

*See* [Milner S.] Ball, [*Constitution, Court, Indian Tribes*.] 1987 Am. Bar Found. Res. J. [1,] 46-59; Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. Pa. L. Rev. 195, 197-98, 207-28, 236 ("plenary power" doctrine has been narrowed since the 1930s, but limits on congressional power still unclear); [Jessie D. Green & Susan Work, Student Authors,] *Inherent Indian Sovereignty*, 4 Am. Indian L. Rev. 311, 316-20 (1976). For debate about the utility for Indian tribes of Congressional "plenary power," *see* Robert Laurence, *Learning to Live with the Plenary Power of Congress over the Indian*

signaled the need for a constitutional reassessment of the status of Indian tribes and tribal individuals within the Republic. Presumably, such reassessment would have led to the conclusion that the process of absorption, for better or worse, required some equivalent constitutional incorporation.<sup>17</sup> However, this subtext went unrecognized and unacknowledged.

The General Allotment Act<sup>18</sup>—the very statute at issue in *Lone Wolf*—was also creating momentum in the direction of (federal) citizenship for all Native people.<sup>19</sup> So as tribes and tribal people were coming more and more into the federal system, instead of calling attention to the necessity to make the appropriate constitutional adjustment and amendment to vouchsafe tribal sovereignty and individual integrity in order to demonstrate the true grandeur of this Republic's core organic document, the Court reached into the ether of fable and unconstrained power.

The danger of such fable and unconstrained power has erupted yet again in Indian law, this time in a particularly virulent form. In a series of cases, beginning with *Oliphant v. Suquamish Indian Tribe*<sup>20</sup> in 1978, then *Montana v. United States*<sup>21</sup>

*Nations*, 30 Ariz. L. Rev. 413 (1988) (replying to [Robert A.] Williams, [Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*,] 1986 Wis. L. Rev. 219; Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence*, 30 Ariz. L. Rev. 439 (1988); Robert Laurence, *On Eurocentric Myopia, the Designated Hitter Rule and "The Actual State of Things"*, 30 Ariz. L. Rev. 459 (1988).

Judith Resnik, *Dependent Sovereigns: Indian Tribes, States and the Federal Courts*, 56 U. Chi. L. Rev. 671, 693 n. 99 (1989). In addition, see the critique and sources cited by Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 Willamette L. Rev. 841, 847 (1990) [hereinafter Clinton, *Tribal Courts*]; Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 Ariz. St. L. J. 113 (2002) [hereinafter Clinton, *No Federal Supremacy*].

17. Such constitutional "incorporation"—at least in my thinking—would have to proceed on a consent model. See e.g. Russell L. Barsh & James Y. Henderson, *The Road: Indian Tribes and Political Liberty* 270-83 (U. Cal. Press 1980); Frank Pommersheim, *Is There a (Little or Not so Little) Constitutional Crisis Developing in Indian Law?*, 5 U. Pa. J. Const. L. \_\_ (forthcoming 2003).

18. 24 Stat. 388.

19. The General Allotment Act provided for the potential of federal citizenship for Indian allottees who held fee patents on their allotments. See e.g. 25 U.S.C. § 348 (enacted as part of 24 Stat. 388). All Native people became federal citizens pursuant to the Citizenship Act of 1924, 8 U.S.C. § 1401(b) (1994). The issue of citizenship is also significant as a force to vitiate any claim that plenary power in regard to tribes and tribal people is somehow analogous to the "plenary" power of national sovereigns under international law to deal with the immigration of "foreigners." Obviously, it was (and is) a tortured analogy to compare foreigners to indigenous people but such were (and are) the problems of colonization and the rule of law. See e.g. Philip P. Frickey, *Domesticating Federal Indian Law*, 81 Minn. L. Rev. 31 (1996). The issue of citizenship itself, both federal and state, is not without controversy. See e.g. Clinton, *No Federal Supremacy*, *supra* n. 16, at 246-52; Pommersheim, *Coyote Paradox*, *supra* n. 10, at 472-75.

20. 435 U.S. 191 (1978) (Tribes have no criminal jurisdiction over non-Indians).

21. 450 U.S. 544 (1981) (Tribes have no civil jurisdiction over non-Indians on fee land within the reservation unless there is a "consensual relationship with the tribe or its members" or the non-Indian conduct "has some direct effect on the political integrity, the economic security or the health or welfare of the tribe."). These exceptions have seldom been satisfied when scrutinized by the Supreme Court. The fee land aspect of the *Montana* landscape has been expanded to include land taken by the federal government to build a dam, *S.D. v. Bourland*, 508 U.S. 679 (1993); a state highway running through a reservation pursuant to a right of way granted by the tribe, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); and ultimately to all land on the reservation regardless of its nature or ownership, *Nev. v. Hicks*, 533 U.S. 353 (2001). In addition, see *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001)

in 1981, and culminating with *Nevada v. Hicks*<sup>22</sup> in 2001, the Supreme Court has again taken it upon itself to unilaterally abrogate tribal authority, especially in regard to non-Indians. It has done so without reference to any constitutional justification—indeed, without reference to any apposite congressional enactments, and ultimately without reference to any coherent doctrinal underpinning. The Court accomplished this through a quite brazen manipulation of precedent and an incessant repetition of the mantra that it has always been thus.<sup>23</sup> The distinction between *Lone Wolf* and these recent cases is that the Court in its current jurisprudence has arrogated the power to itself rather than to Congress.

All of this has been thoroughly noted in recent Indian law scholarship using such phrases as the “new subjectivism,”<sup>24</sup> “a common law for our age of colonialism,”<sup>25</sup> and “judicial plenary power.”<sup>26</sup> This scholarship, for the most part,

(Navajo Tribe may not assert hotel use tax on non-Indian customer staying at a non-Indian motel located on fee land within the reservation).

22. 533 U.S. 353 (The *Montana* analysis applies to all land within the reservation; service of state court process (i.e., a search warrant) is an essential, core function of state sovereignty and thus may be effectuated anywhere on the reservation).

23. The manipulation is to treat *Montana*, a case described in its own terms as involving statutory construction of the General Allotment Act, to stand for a free-floating proposition creating a presumption against tribal jurisdiction over non-Indians any place on the reservation. See *Mont.*, 450 U.S. at 559 n. 9 (“There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon *alienated allotted lands* would be subject to tribal regulatory authority.”) (emphasis added). See generally *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 422 (1989) (“We analyzed the effect of the General Allotment Act on an Indian tribe’s treaty rights to regulate activities of nonmembers on the fee land in *Montana v. United States*.”).

24. David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 Cal. L. Rev. 1573 (1996). Professor Getches detects increasing “subjectivism” in Supreme Court Indian law jurisprudence premised on judicial considerations—of “what ought to be” and he wisely counsels against this trend:

The foundation principles of Indian law demand resistance to the temptation of judicial activism. A return to foundation principles, furthermore, would spare tribes the subjective judgments of courts by requiring congressional action, with the scrutiny of the political process and the tribes’ full participation, before modifying their rights as sovereigns. Indian rights do not depend on sympathy for the plight or historical mistreatment of Native Americans. Self-determination for tribes is rooted in ancient laws and treaties, and is protected against incursions except those that Congress deliberately allows. Well-meaning judicial attempts to balance and accommodate interests of Indians and non-Indians not only are inconsistent with the limited role of courts, as sanctioned by the foundation principles of Indian law, but are inevitably culturally charged.

*Id.* at 1654-55.

25. 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). Professor Frickey discerns a seismic self-aggrandizing shift in the role of the Supreme Court in Indian law:

In establishing the plenary power of Congress over Indian affairs, the Court performed the perhaps disappointing, but nonetheless unsurprising, role of the “court of the conqueror” reflected in *Johnson v. McIntosh*: It deferred to established patterns and practices designed to centralize the colonial power in the political branches. When it, in effect, arrogated to itself a judicially enforceable “dormant” aspect of this power, however, the Court became an actor imposing its own set of colonial values, not merely an agent of congressional choices. This second step seems remarkable, even given the realities of a colonial society. The Court has transformed itself from the court of the conqueror into the court as the conqueror.

*Id.* at 68 (footnote omitted).

does not call attention to the constitutional moment at hand. If *Lone Wolf* was “necessary” to devise some (extraconstitutional) rationale to justify *unbounded* congressional authority in Indian affairs to reconfigure the federal-tribal relationship for “new” times, are we not witnessing a similar process now to again reconfigure the federal-tribal relationship to extirpate tribal authority over non-Indians through a jurisprudential sleight of hand? This is, apparently, the “new necessity” of the times, at least as seen from the rather insular, if not colonialist, vantage point of the Supreme Court.

The present predation of Indian law jurisprudence is *Lone Wolf* dressed up in a new and false pedigree that attempts to hide the constitutional vacuity at its core. The attempt to update the *Lone Wolf* style of constitutional avoidance does not work in the present day because the counterfeit thinking is so transparent. In this light, it is difficult to see how essential tribal sovereignty can be vouchsafed in any enduring way, without a recognition of the “necessity” of constitutionalizing it in a mutually acceptable way.<sup>27</sup>

Is not the way forward likely to be both surer and more honorable if it is grounded in the aspirations and potential of a *living* constitution rather than in the amnesia or historical exigencies of the various branches of the federal government? The lessons of *Lone Wolf* and its current avatars seemingly leave no doubt in their wake. The way forward is a journey back to the Constitution, lest another constitutional moment be lost in some plenary haze of common law obfuscation.

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26. Pommersheim, *Opportunities and Challenges*, *supra* n. 10. I have also identified this metastasis of plenary power:

The plenary power doctrine can now be seen as coming in two distinct vintages. There is the classic doctrine of congressional plenary power as established in *Lone Wolf*. Yet even if Congress has not acted—where one would normally presuppose an unimpaired tribal sovereignty—the Court now recognizes a judicial plenary power to parse the limits of tribal court authority based on federal common law. A federal common law that at least heretofore has not been equated with any notion of implied divestiture of tribal authority.

*Id.* at 328 (footnote omitted).

27. See Pommersheim, *supra* n. 17 and accompanying text. This is the beginning, if it is a beginning, of long arduous legal and political struggle. It would be naive to think otherwise, but then again, every journey must somehow begin. See generally Barsh & Henderson, *supra* n. 17 and accompanying text.



