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NOTHING TO TRUST: THE UNCONSTITUTIONAL ORIGINS OF THE POST-DAWES ACT TRUST DOCTRINE

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INTRODUCTION

Most Americans today are aware that the vast majority of the lands in the United States were acquired from Native Americans. Although Americans know that the United States took Indian lands, most Americans have no idea *how* this taking was fully accomplished — nor do they understand how the taking was ever legally justified. Indeed, numerous legal doctrines were created in the nineteenth century to justify taking Indians lands. However, Americans' collective ignorance as to the origins of these constitutionally suspect doctrines has led to the perpetuation of several nineteenth century doctrines that have no place in a post-colonial, democratic twenty-first century America. One of those doctrines is the post-Dawes Act trust doctrine.

In the beginning, the United States acquired Indian lands pursuant to treaties. That is, prior to the conclusion of the nineteenth century, the United States engaged in a sovereign-to-sovereign relationship with Indian Nations, recognizing that it could only take land from Indian Nations through the constitutionally sanctioned treaty-making process. However, there were limitations on how much land the United States could acquire by treaty. One of those limitations was the Indian Nation's acquiescence. If the Indian Nation did not agree to sign the treaty, then the United States could not take that Nation's land. Consequently, there came a point in time when the constitutionally sanctioned treaty-making power failed to keep pace with the expanding demands of the American appetite for Manifest Destiny.

Thus, in the latter half of the nineteenth century, after having signed hundreds of treaties and thereby removing Indian Nations to reservations, the United States realized the only way to *continue* to take Indian lands — now from reservations — would be to circumvent the treaty-making process in its entirety. To do this, the United States needed a legal loophole around the legally binding treaties it had signed with Indian Nations that prevented the taking of their reservation lands against their will.

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Formulating this necessary legal loophole, however, was no easy task. By the time the United States decided to abandon the treaty making process altogether, it had already signed hundreds of treaties that gave rise to a legally binding trustee/beneficiary relationship between the United States and Indian Nations. Time and time again, in exchange for the acquisition of millions of acres of Indian land, the U.S. government entered into treaties whereby the government agreed to provide "protection" and certain fiduciary trust duties to Indian Nations and their members. Consequently, by the time Congress, in a constitutionally questionable move, passed legislation to eliminate the treaty-making process with Indian Nations altogether in 1871, the federal government had already contractually agreed to provide members of Native American tribes with numerous trust benefits and fiduciary duties.

Subsequently, in *Seminole Nation v. United States*, the Supreme Court relied on the treaties the U.S. government entered into prior to 1871 to conclude that the United States had acquired broad fiduciary duties to members of federally recognized tribes under common and equitable law.[1] The fiduciary duties that the U.S. government acquired as a result of its treaty with the Seminole Nation were not the result of the racial makeup of either sovereign's citizens, but rather, were solely the result of an agreement reached between two separate sovereigns. Consequently, the trust benefits that flow to American Indians today as a result of the *Seminole Nation* trust doctrine are based on a political classification that was contractually created between two sovereign nations, wholly separate and apart from any consideration of the race of either sovereigns' citizens. That is, the *Seminole Nation* trust doctrine reflects the promises that the United States made to members of hundreds of sovereign Indian Nations, in exchange for the lands those nations ceded. Nothing in the *Seminole Nation* trust doctrine reflects the classification of American Indians as a racially inferior race — or even a race at all. Although in modern times the fulfillment of the United States' fiduciary duties requires the identification of the descendants of the members of the historical sovereign Indian Nation — the *Morton v. Mancari* Court concluded that this subsequent identification of modern American Indians based on their ancestry is a political classification — and not a discriminatory racial classification prohibited by the Fourteenth Amendment.[2]

Instead, the only true *racial* classifications in contemporary Indian trust law are those that were congressionally created in an attempt to destroy the tribal sovereignty of Indian Nations with the passage of the Dawes Act— a destruction that Congress felt was necessary in 1887 to effectuate further land confiscation that legally binding treaties forbade.[3] To justify the congressional abrogation of hundreds of legally binding treaties, the Supreme Court created a series of doctrines that vested in the U.S. government an omnipotent power to overlook the legitimate sovereignty of Indian Nations based on the alleged racial inferiority of their members — or what became defined as the Indian

1. *See* Seminole Nation v. United States, 316 U.S. 286, 297 (1942) (concluding that the federal government "has charged itself with moral obligations of the highest responsibility and trust").

2. Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974) ("[The Bureau of Indian Affairs hiring and promotion preference] operates to exclude many individuals who are racially to be classified as 'Indians.' In this sense, the preference is political rather than racial in nature.").

3. *See* Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388.

"race." Declaring Natives to be an "inferior people,"[4] the Supreme Court repeatedly found that Indians lacked the constitutional capacity to challenge the federal government's actions in a court of law because they constituted an "ignorant and dependent race."[5]

Thus, the idea that Indians constituted a racially inferior people became the foundation for the post-Dawes Act trust doctrine. With the passage of the Dawes Act in 1887, the federal government successfully transferred millions of acres of land from Indian tribal governments to white settlers and placed legal title for the remaining acres in the U.S. government in *trust* for individual Indians.[6] By classifying Indians as racially inferior, the Court justified the Dawes Act's unconstitutional land taking as a benign policy towards American Indians who thereby became the United States' *beneficiaries*.[7] The problem with this rationale, of course, is that American Indians were already the United States' trust beneficiaries, as a result of the pre-existing trust relationship Indian Nations enjoyed with the United States pursuant to hundreds of legally binding treaties. The Supreme Court's reliance on a racially altered version of this pre-existing trust relationship to justify the enactment of the Dawes Act, therefore, is particularly problematic because it takes a relationship that previously existed between two sovereigns and alters it to recognize an omnipotent power in one sovereign, the United States, to take lands against the will of another sovereign, Indian Nations, based on the alleged racial inferiority of the Indian Nations' members.

Although the justification for the Dawes Act has been predicated on a theory that Indians, and their tribal goverments, are racially inferior to whites, the Supreme Court has yet to analyze the Act's constitutionality within the framework of the Civil War Amendments' Equal Protection jurisprudence. Instead of questioning the racially-constructed powers assigned to the federal government in the Dawes Act, a review of the crossroads between the Supreme Court's contemporary trust doctrine with the Civil War Amendments reveals that the Court has mistaken the ancestrally-based political classification inherent in the pre-existing *Seminole Nation* trust doctrine for a prohibited racial classification to conclude that the Civil War Amendments apply to limit the distribution of modern day trust benefits to American Indians. This doctrinal confusion is most apparent in *Rice v. Cayetano*.[8]

4. United States v. Sandoval, 231 U.S. 28, 39 (1913).

5. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903). *See also* Stacy L. Leeds, *The More Things Stay the Same: Waiting on Indian Law's* Brown v. Board of Education, 38 TULSA L. REV. 73, 86 (2002) ("[T]he majority of Indian law decisions from Chief Justice Marshall's trilogy to Lone Wolf to the Rehnquist Court are premised on notions of racial supremacy of the United States over the perceived inferiority and dependency of Indian people.").

6. Instead of questioning the constitutional legitimacy of the Dawes Act, the Supreme Court justified it by reasoning that through the Act, "Congress aimed to promote the assimilation of Indians by dividing Indian lands into individually owned allotments. The federal policy aimed 'to substitute a new individual way of life for the older Indian communal way.'" United States v. Jicarilla Apache Nation, 131 S. Ct. 2321, 2327 n.8 (2011) (quoting F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 1.04, at 79 (2005)).

7. *See, e.g.*, Heckman v. United States, 224 U.S. 413, 417 (1912) (justifying the United States' role as trustee over Indians as benign since "the Indians [were deemed] to be untutored and improvident, and still requiring the protection and supervision of the general government.").

8. Rice v. Cayetano, 528 U.S. 495 (2000).

In *Rice v Cayetano*, the Supreme Court applied the Fifteenth Amendment to declare unconstitutional a law that the federal government (through delegation to a state government) enacted pursuant to its treaty-created trust responsibility.[9] Despite the fact that the State of Hawaii was exercising a power wholly contemplated by the Court's decision in *Seminole Nation*, the *Rice* Court struck down the State's law — declaring it to be a racial classification in violation of the Fifteenth Amendment. Although the State's classification provided a benefit to Indians pursuant to the *Seminole Nation* trust doctrine, the Court concluded the classification was based on ancestry, and the *Rice* Court found ancestry to be equivalent to race.[10] Consequently, the *Rice* Court's decision directly contradicts the Court's decision in *Morton v. Mancari* where the Court recognized that American Indians' trust relationship with the U.S. government — or state governments in instances where the federal government has delegated this authority — is based on fiduciary duties that arose pursuant to treaties entered into by two separate sovereigns, and that as a result, classifications that identify the resulting beneficiaries based on ancestry are political — not racial.[11] In this regard, the *Rice* Court's reliance on a Civil War Amendment to preclude the State of Hawaii from identifying contemporary trust beneficiaries based on ancestry is entirely misplaced.

Even more problematic, however, is the Supreme Court's failure to question the constitutionality of the racial classification used to justify the Dawes Act and the attempted congressional destruction of tribal governments. More recently, in *United States v. Jicarilla Apache Nation*, the Supreme Court relied on the same racial classifications the Court previously used to justify the Dawes Act's attempted destruction of Indian tribal governments to continue the federal government's omnipotent post-Dawes Act trust power over Indian Nations.[12] In *Jicarilla Apache Nation*, the Supreme Court denied the Jicarilla Apache Nation certain benefits that would normally flow to the beneficiary of a trust.[13] In justifying the creation of an exception to the normal rule that applies in a trust relationship, Justice Alito — who authored the opinion — justified this exception for Indians based on his conclusion that their trust relationship with the United States is the result of the federal government's plenary power over Indians — a power that other trustees do not enjoy over their beneficiaries.[14]

The problem with this reasoning, however, is that at the time of the formation of the original sovereign-to-sovereign trust relationship between the United States and Indian Nations, the racially-constructed plenary power doctrine did not yet exist. Thus, the *Jicarilla Nation* majority's application of the subsequent racially-constructed plenary power doctrine to limit the benefits that American Indians receive pursuant to the pre-

9. *See id. See also* Bethany R. Berger, *Reconciling Equal Protection and Federal Indian Law*, 98 CALIF. L. REV. 1165, 1167 (2010) ("In 2000, the Court struck down a measure that provided descendants of Native Hawaiians exclusive voting rights for state trustees of lands set aside for Native Hawaiian benefit.").

10. *Rice*, 528 U.S. at 515.

11. Morton v. Mancari, 417 U.S. 535, 553–54 (1974).

12. *Jicarilla Apache Nation*, 131 S. Ct. 2313. *See infra*, notes 76–93 and accompanying text.

13. *Jicarilla Apache Nation*, 131 S. Ct. at 2321, 2323 (noting that the rule is "that when a trustee obtain[s] legal advice to guide the administration of the trust, and not for the trustee's own defense in litigation, the beneficiaries [are] entitled to the production of documents related to that advice," but also recognizing that "the relationship between the United States and the Indian tribes is distinctive" from a typical trust relationship).

14. *Id.* at 2323–31.

existing trust doctrine violates the Court's Fourteenth Amendment Equal Protection jurisprudence in that it seeks to destroy the legitimate sovereignty of tribal governments by declaring their individual members to be racially inferior to the members of another sovereign.

The contradictions between *Rice* and *Jicarilla Apache Nation* demonstrate the Court's failure to properly address the crossroads between the United States' and Indian Nations' trust relationship and the Civil War Amendments. Because the trust relationship between Indian Nations and the federal government is based on treaties between two sovereigns, the benefits that flow to Indian Nations and their political members as a result of this relationship do not violate the Civil War Amendments. However, the Supreme Court's use of racial classifications to justify the unquestionable power the federal government enjoys to take Indian life and property pursuant to the post-Dawes Act trust doctrine *does* in fact violate the Civil War Amendments because it is not based on any sovereign-to-sovereign agreement or treaty, but rather, is wholly predicated on the unconstitutional notion that one race is inferior to another.

I. BEFORE THE DAWES ACT: THE ORIGINS OF THE TRUST RELATIONSHIP AS A SOVEREIGN-TO-SOVEREIGN RELATIONSHIP

Before Congress or the Supreme Court used the trust relationship between Indian Nations and the U.S. government to justify the congressional confiscation of Indian land, the trust relationship between Indian Nations and the U.S. government existed exclusively in treaties.[15] In this regard, the equitable fiduciary duties that the U.S. government owes Indian Nations as trustee today are not the result of any power or duty enumerated in the U.S. Constitution that necessitates judicial recognition and consecration — but rather, they are the accumulation of a series of contractual arrangements, in the form of hundreds of treaties — entered into by equal and separate sovereigns.[16] Indeed, when the Supreme Court first articulated the premise for the modern day trust doctrine in its 1942 *Seminole Nation* decision, the Court noted that the United States' fiduciary duties to the Seminole Nation arose out of "treaty obligations" the government owed to the Seminole Nation pursuant to the Treaty of 1856.[17] Likewise, nothing in the U.S. Constitution — or

15. *See* Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 610 (2009) ("Initial negotiations with Indian tribes acknowledged the sovereignty of the tribes, recognizing their leaders as 'King' and engaging in a complex set of rituals drawn from both European and tribal notions of diplomacy."); *see also* Derek H. Kauanoe & Breann Swann Nu'uhiwa, *We Are Who We Thought We Were: Congress' Authority to Recognize a Native Hawaiian Polity United by Common Descent*, 13 ASIAN-PAC. L. & POL'Y J. 117, 153 (2012) ("Early interactions between Native peoples and Europeans in the North American territory now considered the United States typically took the form of interactions between equal sovereigns.").

16. *Fulfilling the Federal Trust Responsibility: The Foundation of Government-to-Government Relationship: Oversight Hearing Before the Comm. on S. Indian Affairs*, 117th Cong. 1 (2012) (statement of Melody McCoy, staff attorney for Native American Rights Fund) ("The government's holding of trust accounts for tribes dates back to an 1820 federal policy. At that time when the United States by treaty purchased land from tribes the government did not make direct payment to tribes; rather, it held the money in trust for tribes unless and until it distributed the money to the tribal beneficiaries.").

17. *See* Seminole Nation v. United States, 316 U.S. 286, 295–96 (1942); *Fulfilling the Federal Trust Responsibility: The Foundation of Government-to-Government Relationship: Oversight Hearing Before the Comm. on S. Indian Affairs*, 117th Cong. 4 (2012) (statement of Ray Halbritter, Nation Rep. of the Oneida Indian Nation) ("[T]he federal government's trust responsibility is grounded in the United States' fulfillment of its treaty obligations, implemented based upon historic and the inherently governmental agreements between each separate Indian nation and the United States.").

the hundreds of treaties signed between Indian Nations and the United States — contemplates an omnipotent trust power in the United States to take Indian Nations' lands, jurisdiction, or sovereignty against their will.

The sovereign-to-sovereign relationship between the United States and Indian Nations is made evident by the fact that the U.S. Constitution contemplates only two powers the federal government has in relation to Indian Nations: the Indian Commerce Clause and the Treaty Power.[18] Thus, the fact that the United States required formal ratification of treaties with Indian Nations by the Senate, in exactly the same manner as treaties with other foreign nations, constitutes strong evidence that the framers perceived Indian Nations as sovereign nations and therefore believed the United States could only obtain Indian lands through entering into consensual, contractual treaties with those nations.[19] Not only did the United States engage in treaty-making with Indian Nations as though they were separate sovereigns, but other nations such as Great Britain, France, and Spain did so as well.[20] Indeed, in his dissent in *Cherokee Nation*, Justice Thompson acknowledged that

> [Indian Nations] have never been, by conquest, reduced to the situation of subjects to any conqueror, and thereby lost their separate national existence, and the rights of self government, and become subject to the laws of the conqueror. When ever wars have taken place, they have been followed by regular treaties of peace, containing stipulations on each side according to existing circumstances; the Indian nation always preserving its distinct and separate national character.[21]

Furthermore, when the Senate later drafted the Civil War Amendments, the senators' debates over potential language concerning Indians made clear that the framers regarded Indian Nations as separate, sovereign nations — nations whose members did not fall within the auspices of the Civil War Amendments and with which the federal government enjoyed only a sovereign-to-sovereign relationship.[22] Consequently, the U.S.

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18. *See* U.S. CONST. art. I, § 8, cl. 3 (Indian Commerce Clause), art. II, § 2, cl. 2 (Treaty Clause).

> The constitutional text provides for two means by which Indian tribes and the United States will interact. First, the so-called Indian Commerce Clause provides that Congress has authority to regulate commerce with the Indian tribes. One of the first acts of the First Congress was to implement the Indian Commerce Clause in the Trade and Intercourse Act of 1790. Second, the federal government's treaty power provides an additional form by which the United States deals with Indian tribes. There are hundreds of valid and extant treaties between the United States and various Indian tribes.

Fulfilling the Federal Trust Responsibility: The Foundation of Government-to-Government Relationship: Oversight Hearing Before the Comm. On S. Indian Affairs, 117th Cong. 4 (2012) (statement of Matthew Fletcher, Professor of Law and Director of the Indigenous Law and Policy Center, Michigan State University).

19. *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 30 (2002) ("The principle that Indian treaties required formal ratification in the same manner as European treaties was established by President Washington with the Fort Haramar Treaty of 1789, overcoming Senate objections that treaties with aborigines did not require the solemnities afforded to treaties with European sovereigns.").

20. *See* Kauanoe & Nu'uhiwa, *supra* note 15, at 150–51 ("In reality, many Native peoples living within the United States interacted with the United States and other imperial nations pursuant to an international independence model prior to the War of 1812. These Native peoples adopted constitutions, negotiated treaties with foreign nations, and exercised plenary governing authority within their own territories . . . .").

21. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 54–55 (1831) (Thompson, J., dissenting).

22. *See* Cleveland, *supra* note 19, at 48 ("The debates over the Civil Rights Act of 1866 and the Fourteenth

government recognized that "Indian tribes were pre-constitutional governments who maintained independent authority within their territorial boundaries."[23]

The Supreme Court's Indian law jurisprudence preceding the Dawes Act confirms the understanding that Indian Nations' initial relations with the federal government were sovereign-to-sovereign.[24] In *Worcester v. Georgia*, Justice Marshall recognized the Cherokee Nation as its own sovereign nation, reasoning that it was "a distinct community, occupying its own territory . . . in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties . . . ."[25] Thus, although the *Worcester* Court considered Indian Nations to be "domestic," this was because they were geographically located within the boundaries of the new colonial U.S. government.[26] Therefore, the Indian Nations constituted separate sovereigns because "[t]he whole intercourse between the United States and [Indian Nations], is by our constitution and laws, vested in the government of the United States."[27] That is, "in *Worcester v. Georgia*, Chief Justice Marshall confirmed that the laws of states have 'no force' in Indian Country, and that the Constitution's Supremacy Clause gave powerful effect to Indian treaties as 'the supreme law of the land.'"[28]

Because Indian Nations were recognized as separate sovereigns, prior to the enactment of the Dawes Act, the only way the federal government could obtain Indian lands was through war or treaty.[29] In a series of treaties, the United States obtained Indian lands in exchange for goods, services, and the promise to provide Indian Nations with "protection" and/or other fiduciary trust duties.[30] For instance, in the Treaty of 1856 be-

Amendment portrayed Indians as excluded from U.S. citizenship based on the tribes' status as separate, self-governing sovereigns and non-members in the U.S. polity. During the debates, Senator Trumbull advocated the exclusion of 'Indians not taxed' from the Civil Right Act's citizenship provisions . . . .").

23. Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 192 (2001); *see also id.* at 193 ("In that sense, the inherent sovereignty of Indian nations is more analogous to the sovereignty of foreign nations than that of the states, which have constitutionally ceded aspects of their sovereignty to the federal government.").

24. *See id.* at 192 ("As Chief Justice John Marshall acknowledged in his 'trilogy' of Indian law cases, the historical relationship between the United States and Indian nations had its inception in the series of treaties between the British and the Indian nations, and later the United States and the Indian nations.").

25. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 520 (1832).

26. *Id.*

27. *Id.*

28. Fletcher, *supra* note 18, at 2. Subsequent Supreme Court law has, despite some contradictory precedent, affirmed Indian Nations' inherent sovereignty. *See, e.g.*, United States v. Wheeler, 435 U.S. 313, 322 (1978) (internal citations omitted) (stating that the most basic principle of all Indian law is that those powers lawfully vested in an Indian nation are not, in general, delegated powers granted by express acts of Congress, but rather "*inherent powers of a limited sovereignty which has never been extinguished*").

29. *See* Berger, *supra* note 15, at 610 n.104 (listing examples of early treaties).

30. *Worcester*, 31 U.S. at 548–54 (discussing treaties, including land cessions, and noting that language stating that Indian Nations are "under the protection of the United States" in exchange for land "is found in Indian treaties, generally"); *see also* Fletcher, *supra* note 18, at 7 n.7 (citing Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 65 (1831) (Thompson, J., dissenting)) ("Besides the Cherokee treaties, other Indian treaties the Marshall Court discussed, including the Delaware treaty, used the term 'protection' as well."); *Fulfilling the Federal Trust Responsibility: The Foundation of Government-to-Government Relationship: Oversight Hearing Before the Comm. on S. Indian Affairs*, 117th Cong. 2 (2012) (statement of Fawn Sharp, President of the Quinault Indian Nation) ("In exchange for promises to protect Tribal peoples from depredation and provide for their needs, Tribal nations relinquished claims of title to their traditional territories and agreed to relocate to small areas of land that were to be set aside for their exclusive use and occupancy.").

tween the Seminole Nation and the United States, the United States obtained land in exchange for its promise, in Article VIII of the treaty, to "establish a $500,000 trust fund (originally two funds of $250,000 each), the annual interest therefrom ($25,000) to be paid over to the members of the Seminole Nation per capita as an annuity."[31]

The Supreme Court's decision in *Seminole Nation* is significant because it recognized the equitable duties the U.S. government owed the Seminole Nation based on the duties the United States agreed to in a *treaty*. That is, the Seminole Nation's suit was based on the United States' failure to abide by its duties as trustee with regards to certain funds it held in trust for the Nation pursuant to the Treaty of 1856.[32] Applying the common law principles of an equitable trust that applied as a result of the contractual agreement between the two parties, the *Seminole Nation* Court found the federal government liable for funds the government had paid to Seminole tribal officials, but that, due to inner-tribal corruption, had not reached the individual members of the Seminole Nation.[33] The *Seminole Nation* Court held that the United States failed to fulfill its duties as trustee pursuant to the 1856 Treaty because

> [i]t is a well established principle of equity that a third party who pays money to a fiduciary for the benefit of the beneficiary, with knowledge that the fiduciary intends to misappropriate the money or otherwise be false to his trust, is a participant in the breach of trust and liable therefor [sic] to the beneficiary.[34]

The *Seminole Nation* Court's invocation of common law principles of equity is remarkable since recently, in *Jicarilla Apache Nation*, the Supreme Court denounced any reliance on common law principles to determine the federal government's fiduciary duties, as trustee, to Indian Nations.[35] Thus, the *Seminole Nation* Court's articulation of the trust doctrine reveals the fallacies not only in the Court's *Jicarilla Nation* decision, but also in the expansion of the doctrine itself — from a judicial doctrine that was initially conceived in 1942 to provide the normative common law benefits that flow from a trust relationship created pursuant to treaties between sovereigns, to a doctrine that today only serves to vest in the federal government a racially-constructed plenary power over Indians, without affording the Indian Nations the requisite benefits that normally correspond to the status of "beneficiary."[36] Indeed, the *Seminole* Court concluded that the members of the Seminole Nation were entitled to these trust benefits *not* because they could all be

31. Seminole Nation v. United States, 316 U.S. 286, 294 (1942); *see also* Halbritter, *supra* note 17, at 5 ("The United States trust relationship with the Oneida Nation derives from the Treaty of Canandaigua, which was signed in 1794 between the Grand Council of Haudenosaunee and a representative of President George Washington.").

32. *Seminole Nation*, 316 U.S. at 293–95.

33. *Id.* at 295–96.

34. *Id.* at 296.

35. *See* United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2318 (2011) ("The trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law, and in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law.").

36. *Seminole Nation*, 316 U.S. at 297 (1942) (concluding that the federal government "has charged itself with moral obligations of the highest responsibility and trust").

classified as a certain race, but rather, because they were the direct descendants of the original citizens of the sovereign nation with which the U.S. government had entered into an agreement to create an original fiduciary/trust relationship.[37]

Thus, it is clear that the earliest trust relationships between Indian Nations and the United States were *not* predicated on the notion that Indians, as a race, were inferior to whites or the federal government. They were not predicated on any racial classifications whatsoever. Instead, because the United States recognized Indian Nations as separate sovereigns, and because the United States desired Indian lands, the U.S. government contractually agreed to — pursuant to treaties entered into and ratified by the Senate — provide certain fiduciary trust duties to American Indians in exchange for Indian lands.[38]

Furthermore, the earliest form of this trust relationship did not acknowledge an omnipotent power in the United States to take Indian land without resorting to the formal treaty-making process. Thus, the initial trust relationship was not the result of any congressional plenary power because prior to 1886, the Supreme Court had not yet recognized any such power. The doctrinal confusion inherent in the Court's post-Dawes Act trust doctrine is the result of the developments in the latter part of the nineteenth century — when Congress desired to implement legislation that would allow the federal government to circumvent the treaty-making process and obtain Indian lands without obtaining consent from the Indian Nations who owned the lands. Thus, understanding the sovereign-to-sovereign trust relationship that existed between the United States and Indian Nations *prior* to the Dawes Act is key in understanding the error in the Court's articulation of the contemporary trust doctrine *after* the Dawes Act.

II. THE POST-DAWES ACT TRUST DOCTRINE

You will not find the post-Dawes Act trust doctrine in the federal Constitution.[39] In fact, there is no evidence to support the idea that, in 1783, the framers of our Constitution and federal system envisioned a power in the federal government to take and hold the Indian Nations' land in trust against their will.[40] Likewise, prior to the Supreme Court's decision in *Seminole Nation* in 1942, the Supreme Court had not outlined any common law trust powers that the federal government could obtain as a result of its holding Indian land in trust.[41]

In 1887, however, Congress passed the Dawes Act.[42] Although there was no prior legal precedent or theory finding such a power in the federal government, Congress

37. *Id.* at 295–96.

38. *See also* Coffey and Tsosie, *supra* note 23, at 196 ("Inherent sovereignty is not dependent upon any grant, gift or acknowledgment by the federal government. It preexists the arrival of the European people and the formation of the United States.").

39. Milner S. Ball, *Constitution, Court, Indian Tribes*, 12 AM. B. FOUND. RES. J.1, 65 (1987) ("In sum, the trust is an affirmative basis for claims of power and does not arise from the Constitution.").

40. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined, and limited; and . . . those limits may not be mistaken, or forgotten . . . ."); *see also* Cleveland, *supra* note 19, at 26 ("The absence of any express federal power to regulate internal Indian affairs is not surprising given that, when the Constitution was drafted, Indian tribes were highly autonomous and viewed as a serious external threat to the security of the new nation.").

41. Ball, *supra* note 39, at 63 ("Indian trust terminology entered the Court's vocabulary in 1942 . . . .").

42. Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388.

passed a law granting the federal government the power to take title to large swaths of Indian Nations' reservation lands without their permission.[43] Congress predicated this new power on the idea that although the United States was taking title to land that properly belonged to Indian Nations pursuant to hundreds of legally binding treaties, the breaking of these treaties was inconsequential because the United States would hold the Indians' lands for them in *trust*.[44] Consequently, the Dawes Act became the birthplace for the modern trust doctrine.

In this regard, the Dawes Act achieved what the treaty-making power no longer could. In 1887, despite the fact that the United States succeeded in acquiring hundreds of millions of acres of Indian land, white settlers moving west pressured the federal government to acquire more.[45] Facing increasing pressure from newly formed state governments out west — and the settlers moving there — Congress decided to pass a new piece of legislation that it hoped would: (1) disband any remaining sovereign tribal governments existing on the reservations,[46] and (2) divide the disbanded tribal governments' reservation lands and distribute them to white settlers.[47] As President Theodore Roosevelt later described it in 1901, the Dawes Act served as "a mighty pulverizing engine to break up the tribal mass."[48]

As a result of the Dawes Act, "from 1881 to 1900, Indian lands were reduced by half, from approximately 156 million acres to 78 million."[49] "By 1934, only 52.1 million acres remained in Indian ownership . . . ."[50] The Dawes Act implemented an allotment policy that required all lands owned by an Indian Nation be divided up and parceled out to individual members of that Indian Nation — reducing entire Nations to "individual parcels of land."[51] "[T]ribal governments were never compensated for" this land that

43. *See id.*

44. *See* Ball, *supra* note 39, at 63 ("The first congressional assertion of trust power over Indian land came during this period in the form of the General Allotment Act of 1887. The Act has no apparent legitimating basis. This uninspiring heritage gave rise to the trust doctrine.").

45. Cleveland, *supra* note 19, at 54–55 ("Land hunger combined with fervent assimilationist convictions that Indian tribes must be destroyed and their members civilized, Christianized, and integrated into the white polity. As the 1889 Report of the Commissioner of Indian Affairs put it, 'tribal relations should be broken up, socialism destroyed, and the family and the autonomy of the individual substituted.'").

46. *See* Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RESOURCES J. 317, 355 (2006) ("This is what I mean when I say that the trust is flawed to its core. Many of the statutes that define the trust responsibility for Indian lands were enacted by Congresses that were working toward the elimination of tribal governments."); *see also* Stacy L. Leeds, *Moving Toward Exclusive Tribal Autonomy over Lands and Natural Resources*, 46 NAT. RESOURCES J. 439, 440 (2006) ("This series of transactions presumed that tribal governments would cease to exist . . . .").

47. Cleveland, *supra* note 19, at 55 ("The 1887 Dawes Act introduced the policy of Indian allotments on a massive scale. Tribal lands were to be dissolved, with specific acreage given to each tribal member, and the remaining lands transferred to the United States, surveyed and opened for white settlement."). *See also* 18 CONG. REC. 190 (1886) (Rep. Perkins) ("The bill provides for the breaking up, as rapidly as possible, of all the tribal organizations[.]").

48. Cleveland, *supra* note 19, at 55.

49. *Id.* at 55. *See also* WALTER ECHO-HAWK, IN THE COURTS OF THE CONQUEROR 415 (2010) (stating that as a result of these removals and the Dawes Act, by 1955, "the Indian land base had shrunk to just 2.3 percent of its original size").

50. Gover, *supra* note 46, at 326; *see also* Coffey and Tsosie, *supra* note 23, at 192 ("The territorial boundaries of Indian Country became more ambiguous as a legacy of the nineteenth-century allotment policy, which sought to break up the collective landholdings of Indian nations, distribute fee parcels to tribal members, and sell the 'excess' lands to non-Indian homesteaders.").

51. Leeds, *supra* note 46, at 443.

was taken from them and redistributed.[52] Furthermore, the General Allotment Act required that only a certain acreage be assigned to each tribal member; consequently, if after assigning each tribal member his allotted acreage there remained acres of land leftover in the tribal government's possession, the land was deemed "surplus land[]."[53] The Dawes Act gave the United States title to all "surplus lands," and the government redistributed this land to white settlers.[54] As a result of this "surplus" designation, "[b]y 1934, fully 60 million acres of tribal land had been acquired by non-Indian homesteaders pursuant to the allotment policy."[55]

And although individual members of tribes received their own allotments, the Dawes Act directed that Indians could only receive this land in *trust*.[56] Thus, the Allotment Act made the United States trustee by placing Indians' lands in trust with the federal government; the Act, however, provided that this trust relationship between the federal government and Indians would terminate after a period of twenty-five years.[57] Consequently, the Dawes Act's twenty-five year limitation demonstrates that "[t]here was never an intention on the part of the federal government to continue indefinitely as trustee over Indian lands."[58] Instead, the intent was that Indian Nations' sovereignty would disappear, and individual Indians would abandon their tribal culture and traditions — essentially becoming fully functioning members of white society.[59] The thought at the time was that once this was achieved, holding individual Indians' lands in *trust* would no longer be necessary.[60]

However, as Indian law scholar Kevin Gover explained,

> [t]his attempt at social engineering failed. Many of the allottees fell immediately into desperate economic straits. The non-Indians who entered the reservations as homesteaders were more interested in taking advantage of the Indians than in teaching them the virtues of American life. As a result, the Indians were desperately poor.[61]

Even worse, as a result of losing their tribal lands, Indian Nations lost their jurisdiction and inherent police power to protect the life, liberty, and property of their tribal

52. *Id.*

53. *Id.*

54. Mark Savage, *The Great Secret About Federal Indian Law—Two Hundred Years in Violation of the Constitution—And the Opinion the Supreme Court Should Have Written to Reveal It*, 20 N.Y.U. REV. L. & SOC. CHANGE 343, 345 (1993) ("Using this statute, the United States broke the reservations into pieces, allotted some pieces to individual Native Americans, replaced tribal jurisdiction with state civil and criminal jurisdiction, and sold the surplus land to white homesteaders.").

55. Gover, *supra* note 46, at 326; *see also* Fletcher, *supra* note 18, at 9 ("From 1887 when Congress adopted this policy until 1934 when it ended the policy, two-thirds of tribal land holdings moved into non-Indian ownership.").

56. Savage, *supra* note 54, at 349. *See also id.* at 350 ("The purchase money [the United States used to buy surplus land] was to be held in trust for the Native American nation or appropriated for their 'education and civilization' . . . .").

57. Gover, *supra* note 46, at 326.

58. Leeds, *supra* note 46, at 440.

59. *Id.* at 443.

60. *See id.*

61. Gover, *supra* note 46, at 326.

members living on those lands.[62] As a result of the distribution of tribal lands to individual Indians and white homesteaders, large portions of reservation land immediately became subject to state civil and criminal jurisdiction.[63] As Dean Stacy Leeds points out, the Dawes Act has led to the tragic irony that although "there are lands inside the Cherokee Nation's boundaries where the chain of title from the Cherokee Nation lists only Cherokees citizens, . . . the State of Oklahoma is the sovereign exercising regulatory jurisdiction," and furthermore, "[t]he Cherokee Nation continues to lose land to state jurisdiction on a daily basis. Of the original 16 million acres allotted to citizens of the Five Tribes in Eastern Oklahoma, only two hundredths of one percent remains in restricted status."[64] The Cherokee Nation's loss of land as a result of the Dawes Act is mirrored in the realities of hundreds of other Indian Nations who, like the Cherokee Nation, are left today with only a tiny fraction of their original reservation.[65]

To create a legally valid trust, however, courts require that the party contributing the property to the trust demonstrate a "manifestation and intention to create [the trust]."[66] Although the Dawes Act put Indian lands and the resulting purchase money in trust with the United States as trustee, no treaty, agreement, *nor* evidence exists to support the idea that, as the owner of the property that went into the trust, any of the hundreds of Indian Nations implicated by the Dawes Act ever manifested an intention to create it.[67]

Instead, the Dawes Act is nothing more than an unconstitutional land grab, predicated on the federal government's desire to transfer Indian lands on reservations to white settlers, and ultimately, to dissolve tribal governments.[68] That is, in 1887, Congress passed the Dawes Act to achieve what the federal government could no longer achieve by treaty or forced removal.[69] Indeed, John Collier, of the United States Commission on Indian Affairs, testified that "the allotment system was devised . . . as an indirect method

62. Ball, *supra* note 39, at 85 ("Then in 1887 the General Allotment began the liquidation of most Indian country and made allotees [sic] subject to state-territorial jurisdiction.").

63. *See* Savage, *supra* note 54, at 345. For example, because of the Dawes Act, citizens of Indian Nations cannot exchange their own freely alienable land without that exchange being held subject to state taxation. *See* Leeds, *supra* note 46, at 457.

64. Leeds, *supra* note 46, at 452–53.

65. *See* Daniel Gibson, *What is a Tribe Without Any Land?*, NATIVE PEOPLES MAG. (Aug. 22, 2012), http://www.nativepeoples.com/Native-Peoples/July-August-2011/What-is-a-tribe-Without-Any-land/; *see also* Coffey and Tsosie, *supra* note 23, at 193 ("Recent cases, such as *Hagen v. Utah* and *South Dakota v. Yankton Sioux Tribe*, employ a broad reading of the diminishment doctrine to find that tribes may not exercise regulatory jurisdiction over reservation lands alienated from tribal ownership because those lands are no longer Indian Country."); Sharp, *supra* note 30, at 3 ("The confused and complex ownership and occupancy of Indian reservations created a jurisdictional morass that allows developers to ignore laws and regulations intended to protect the environment and perpetrators of crimes such as rape or the manufacture and distribution of illegal substances to evade prosecution.").

66. RESTATEMENT (SECOND) OF TRUSTS § 2 (1957); *see also id.* § 23.

67. *See* United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2326 (2011) (internal citation and quotation marks omitted) ("No trust is created if the settlor manifests an intention to impose merely a moral obligation.").

68. Savage, *supra* note 54, at 345 ("Between 1887 and 1934, through operation of the Act, Native American lands were further reduced by 65 percent. All of this violates the Constitution.").

69. *Cf.* Leeds, *supra* note 46, at 442–43 ("[T]here were a few treaty provisions that provided for allotments.").

. . . of taking away the land that we were determined to take away but did not want to take . . . openly by breaking the treaties."[70]

III. THE POST-DAWES ACT TRUST DOCTRINE COMBINES WITH THE PLENARY POWER DOCTRINE

The post-Dawes Act trust doctrine, however, cannot be fully understood without understanding the doctrine's relationship to the Indian law plenary power doctrine. A review of these two doctrines' origins reveals that the contemporary trust doctrine and the plenary power doctrine share the same ancestry.[71] They both rely on the very same principles imbedded within the Court's earlier *guardianship* doctrine — the racially superior-guardian/racially-inferior ward dichotomy that the Court created to justify the federal government's 1830s Indian Removal policy.[72]

Thus, the post-Dawes Act and plenary power doctrines were created out of a subsequent legal vacuum during the period in American history when forced Indian removals and formal treaty-making had come to a close, and consequently, in order to continue controlling and taking Indian land, the federal government needed a legal justification to gain control over Indian life and land on the reservation.[73] For Congress, the solution was the omnipotent power of trustee that it created in the Dawes Act and placed in the federal government. For the Supreme Court, the solution came in the form of the unquestionable congressional plenary power doctrine it created in *Lone Wolf*.[74]

Furthermore, the justification for both doctrines was, and continues to be today, the same classification of Indians as racially inferior *wards* of the federal government, who acts as their *guardian*.[75] At the time that the Dawes Act was passed, its justification was the labeling of Indians and their tribal governments as racially inferior and incompetent;

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70. Savage, *supra* note 54, at 350 (internal citations omitted).

71. *See* Colette Routel & Jeffrey Holth, *Tribal Consultation in the 21st Century*, at 5–6 (William Mitchell College of Law, Legal Studies Research Papers Ser. No. 2012-02, 2012) ("In a series of cases spanning more than 100 years, federal courts vacillated between these disparate visions of the federal-tribal relationship before ultimately combining them into a doctrine that has been variously characterized as a guardian-ward relationship, a fiduciary relationship, or the federal trust responsibility. . . . [T]he federal trust responsibility . . . is the historical origin of the congressional plenary power over Indian affairs."); Gover, *supra* note 46, at 325 ("The trust responsibility of the Congress gave rise to the plenary power of the Congress. Indeed, the two ideas are inseparable.").

72. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) ("[The Indians'] relation to the United States resembles that of a ward to his guardian.").

73. Mary Kathryn Nagle, Standing Bear v. Crook: *The Case for Equality Under Waaxe's Law*, 45 CREIGHTON L. REV. 455, 472–73 (2012) (emphasis added) ("By 1886, however, the federal government had either killed or forcibly removed most Native Americans to a reservation in Indian Territory. Consequently, although the discovery principle successfully answered the question of whether the federal government and individual states had the power/authority to take lands away from Indians, the discovery principle did not—and could not—serve as a source of power for the federal government's authority over the Indians *after* their land had been taken and they had been removed.").

74. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). *See also* Coffey and Tsosie, *supra* note 23, at 193 ("Cases such as *United States v. Kagama* and *Lone Wolf v. Hitchcock* commenced in the wake of the Indian Wars, when the tribes were viewed as a continuing threat to Western expansion.").

75. Routel & Holth, *supra* note 71, at 2 ("One of the foundational principles of Indian law is that the federal government has a trust responsibility to Indian tribes. This doctrine has its origin in *Cherokee Nation v. Georgia*, where Chief Justice John Marshall described Indian tribes as being 'in a state of pupilage,' with '[t]heir relationship to the United States resembl[ing] that of a ward to his guardian.'"). Likewise, the *Lone Wolf* Court found a plenary power in Congress over Indian land and life *because* "Indian tribes *are* wards of the nation. They are communities *dependent* on the United States." *Lone Wolf*, 187 U.S. at 567.

that is, the Dawes Act was built upon the federal government's "convictions that Indian tribes must be destroyed and their members civilized, Christianized, and integrated into the white polity."[76]

The statutorily-based trust doctrine that emerged from the Dawes Act, therefore, emerged from a classification of the Indian race at that time — a classification that, as the Supreme Court concurrently explained in *Beecher v. Wetherby*, reflected the notion that the United States was a "superior and civilized" nation, and, as a result, the United States had an obligation to act as trustee over Indian property and affairs as "a Christian people in their treatment of an ignorant and dependent race."[77] Consequently, the Court has relied on the post-Dawes Act trust doctrine's classification of Indians as racially inferior to conclude that the United States is obligated to hold Indian lands and property in trust for their own benefit.[78]

In *Lone Wolf*, the Supreme Court's classification of Indians as racially inferior was even more explicit than the congressional classification in the Dawes Act. In finding a plenary power vested in Congress over all Indian land, life, and liberty, the Court justified its creation of this new legal doctrine on the basis that Indians were an "ignorant and dependent race."[79] In a case where Congress unilaterally abrogated the Treaty of Medicine Lodge that the Kiowa, Comanche, and Apache Nations had entered into with the federal government, the *Lone Wolf* Court determined that such unilateral congressional abrogation of a federal treaty — and subsequent distribution of tribal lands held by these Nations under the treaty — was well within Congress's constitutional powers pursuant to a doctrine the Court named the *plenary* power doctrine.[80] Notably, the Court derived the government's power to abrogate a legally binding treaty with Indian Nations from its conclusion that Indians were an "ignorant an dependent race . . . [and therefore, 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*."[81]

Thus, just sixteen years after the passing of the Dawes Act, the *Lone Wolf* Court's plenary power doctrine ensured that what land the federal government had not succeeded in taking through treaties and the Dawes Act, the federal government could subsequently take through the exercise of its newfound plenary power. In this regard, the plenary power doctrine is simply an extension of the congressional conception of the federal govern-

76. Cleveland, *supra* note 19, at 54–55; *see also* 18 CONG. REC. 190 (1886) (Sen. Skinner) (noting that the ultimate goal of the Act was that it "be impressed upon Indians that they must abandon their tribal relations and take lands in severalty as the corner-stone of their complete success in agriculture.").

77. Beecher v. Wetherby, 95 U.S. 517, 525 (1877); *see also* Note, *Rethinking the Trust Doctrine in Federal Indian* Law, 98 HARV. L. REV. 422, 426 (1984) ("The Court's opinions emphasized the supposed primitivism of the Indians and reasoned that the United States consequently had an obligation to protect and care for them.").

78. Note, *supra* note 77, at 426 (noting that the modern day trust doctrine "is grounded on both cultural intolerance for nonwhite institutions and the conviction that Indians are inherently inferior to Americans of European descent. Such attitudes contradict the principle, broadly reflected in American law, that all individuals should be accorded equal respect regardless of race.").

79. *Lone Wolf*, 187 U.S. at 565.

80. *Id.* at 566.

81. *Id.* at 565 (emphasis added).

ment as an omnipotent trustee in the Dawes Act.[82]

Both doctrines' reliance on the racial classification of the Indian race can be traced to a single source: the *Cherokee Nation* Court's articulation of the Indian as an inferior ward of the government. The fact that these two doctrines both rely on the same racially constructed ward/guardian dichotomy is a significant commonality. Because the existence of one doctrine is often invoked to justify the existence of the other,[83] the fact that both were formed from the same racially constructed framework reveals that neither doctrine can claim a unique, constitutional framework as its basis.[84] In fact, neither doctrine can claim *any* constitutional framework as its basis.

Indeed, the Court's earliest considerations of the statutory trust created in the Dawes Act reveal that the contemporary post-Dawes Act trust doctrine was truly built upon the same racial classifications that the guardianship and the plenary power doctrines employ. Almost forty years before the Supreme Court recognized the pre-existing treaty-created trust doctrine in *Seminole Nation*, the Supreme Court considered whether the State of South Dakota had the right to tax Indian lands that the United States acquired and held in trust under the Dawes Act.[85] In *United States v. Rickert*, the Supreme Court reasoned that South Dakota had no power to tax these lands since the lands "are held by the United States for the period of twenty-five years in trust for the Indians, such trust being an agency for the exercise of a Federal power, and therefore outside the province of state or territorial authority."[86]

The *Rickert* Court, however, did not stop there. The Court went further, providing a theoretical justification for its finding that the trust created in the Dawes Act could vest the federal government with such power over Indian lands, explaining that

> [t]hese Indians are yet *wards* of the nation, in a condition of *pupilage or dependency*, and have not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the act of 1887, and the . . . national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship.[87]

The *Rickert* Court made clear that the "ward" classification was one of racial inferiority, concluding that the relationship between the United States and Indians is "be-

82. *See* Gover, *supra* note 46, at 317 ("The statutory and policy bases of the federal trust responsibility for Indian lands arose at the end of the nineteenth century and the beginning of the twentieth century. Policy at that time was based on two related propositions: (1) Indians are incompetent and (2) Indian tribes were soon to be dismantled as political institutions separate from the United States. These notions were basic to the judicial development of the doctrine of federal plenary power over Indians and their property. With these ideas as the foundation of the trust, it grew into a stifling, paternalistic, and ultimately ineffective system of managing Indian property.").

83. Note, *supra* note 77, at 427 ("[T]he Court asserted that, by virtue of the federal government's obligations to the Indians, Congress had plenary power to deal with Indian affairs.").

84. Routel & Holth, *supra* note 71, at 2 ("In the late 1800s, the trust responsibility was used to justify congressional plenary power over Indian affairs.").

85. United States v. Rickert, 188 U.S. 432 (1903).

86. *Id.* at 439 (internal quotations omitted).

87. *Id.* at 437 (emphasis added).

tween a superior and an inferior, whereby the latter is placed under the care and control of the former."[88] Thus, the Court held that it was the Indians' racial inferiority that justified the government's trust power over them, making it necessary for the federal government to hold their "land in trust for them."[89] As a result, there can be no question that the *Rickert* Court relied on the classification of Indians as racially inferior wards to justify its finding of a federal trust power inherent in the Dawes Act.

Nine years later, the Supreme Court relied on the same theory to justify the federal government's power to cancel a conveyance of land made between two citizens of the Cherokee Nation.[90] In *Heckman v. United States*, the Court concluded that the Dawes Act gave the United States, as trustee of the Indians' lands, the authority to cancel any conveyances that Indians made of their individual allotments since, as Congress in 1902 stated, "the Indians [were deemed] to be untutored and improvident, and still requiring the protection and supervision of the general government."[91] On account of the Indians' "untutored and improvident" state of being, the Court found that Congress was empowered through the Dawes Act to provide "that the portion of the lands so allotted as homesteads should be inalienable."[92] Thus, the *Heckman* Court relied on the same guardianship doctrine as the *Rickert* Court to conclude that, because Indians were racially inferior, the United States, as trustee, knew what was best for them and therefore had a limitless power over them.

Furthermore, a review of the Court's decision in *Heckman* reveals the interdependency between the post-Dawes Act trust doctrine and *Lone Wolf*'s plenary power doctrine. In response to the argument that Indian lands should be freely alienable because Indians can better represent their own interests than the United States as trustee, the *Heckman* Court justified the federal government's limitless trust power on its conclusion that

> [t]here can be no more complete representation than that on the part of the United States in acting on behalf of these dependents, whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not depend upon the Indians' acquiescence. It does not rest upon convention, nor is it circumscribed by rules which govern private relations. It is a representation which traces its source to the *plenary* control of Congress in legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty.[93]

Thus, the *Lone Wolf* plenary power doctrine became the justification for the post-Dawes Act trust doctrine. Because Congress had plenary power over Indians, the Court concluded that Congress — and the federal government — enjoyed plenary trust power over Indians as their trustee.[94] The Supreme Court still relies on the plenary power doc-

88. *Id.* at 443.
89. *Id.*
90. Heckman v. United States, 224 U.S. 413 (1912).
91. *Id.* at 417.
92. *Id.*
93. *Id.* at 444–45 (emphasis added).
94. Lone Wolf v. Hitchcock, 187 U.S. 553, 556 (1903).

trine today to justify the existence of the post-Dawes Act trust power doctrine.[95]

Furthermore, the *Heckman* Court cited the *Cherokee Nation* guardianship doctrine to justify its conclusion that Indians were racially inferior wards, incapable of holding alienable title to their own lands.[96] In posing the question "What is the duty of the government of the United States with reference to this trust?"[97] the *Heckman* Court provided its own answer: "While we have recognized these tribes as dependent nations, the government has likewise recognized its guardianship over the Indians, and its obligations to protect them in their property and personal rights."[98] This guardianship based trust power, like its close relative the plenary power doctrine, was created to be omnipotent, and only Congress could "determine when its guardianship shall cease."[99] Until then, the *Heckman* Court reasoned that Congress "has the right to vary its restrictions upon alienation of Indian lands in the promotion of what it deems the best interest of the Indian."[100]

The fact that both the post-Dawes Act trust and plenary power doctrines can be traced back to the *Cherokee Nation* Court's guardianship doctrine explains why the trust doctrine today does little to facilitate a true common law trustee/beneficiary relationship between two sovereigns and, instead, facilitates a continued colonial plenary power over Indian Nations and their property.[101] Not too surprisingly, when Indian Nations invoke the trust doctrine to challenge the United States' failure to abide by its duties as trustee pursuant to the treaties, courts applying the modern day trust power doctrine will often rely on the post-Dawes Act trust doctrine's origins as justification for finding that, in fact, the United States has no trust duties pursuant to the legally binding treaties the two separate sovereigns previously signed.[102]

More recently, this simultaneous contraction and expansion of the contemporary post-Dawes Act trust doctrine has collided with the Court's contemporary Equal Protection jurisprudence concerning the Civil War Amendments. Confronted with a doctrine that was carved out of an explicit racial classification, the Supreme Court has struggled to define the contours of the intersections of Equal Protection jurisprudence and the post-

95. *See, e.g.*, United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2323 (2011) ("Throughout the history of the Indian trust relationship, we have recognized that the organization and management of the trust is a sovereign function subject to the plenary authority of Congress.").

96. *See* Heckman, 224 U.S. at 428 (citing Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831)) ("The relations of the United States to the Cherokees have repeatedly been described in the decisions of this court.").

97. *Id.* at 434.

98. *Id.*

99. *Id.* at 437 (concluding that "it [is] within the power of Congress to continue to restrict alienation by requiring, as to full-blood Indians, the consent of the Secretary of the Interior to a proposed alienation of lands such as are involved in this case; that it rests with Congress to determine when its guardianship shall cease; and while it still continues, it has the right to vary its restrictions upon alienation of Indian lands in the promotion of what it deems the best interest of the Indian").

100. *Id.*

101. *Compare* Seminole Nation v. United States, 316 U.S. 286, 297 (1942) ("Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards."), *with* United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2323–24 (noting that "management of the trust is a sovereign function subject to the plenary authority of Congress" and consequently, "the Government has often structured the trust relationship to pursue its own policy goals").

102. *See, e.g.*, Cherokee Nation of Okla. v. United States, 21 Cl. Ct. 565, 573 (1990) (denying the Cherokee Nation's breach of trust claim, reasoning that "[t]he general relationship between the United States and the Indian tribes is not comparable to a private trust relationship. . . . Rather, the general relationship between Indian tribes and defendant traditionally has been understood to be in the nature of a guardian-ward relationship.").

Dawes Act trust doctrine. Two of the Supreme Court's recent trust doctrine decisions, however, reveal the inherent flaws in a doctrine designed to destroy the legitimate sovereignty of Indian Nations by declaring their members to be racially inferior.[103] Furthermore, the Court's recent application of a Civil War Amendment to limit a government's use of a political, ancestrally-based classification reveals that the Court has allowed the post-Dawes Act's construction of race to undermine the legitimate duties that the United States — and in instances of delegation, the state governments — owe the descendants of the original signers of the treaties that created the trust doctrine in the first place.

IV. *RICE V. CAYETANO*

In *Rice v. Cayetano*, the Supreme Court conflated the ancestral-based classification inherent in the *Seminole Nation* trust doctrine for a constitutionally prohibited race-based classification.[104] In doing so, the *Rice* Court concluded that the government's use of a racial classification to administer indigenous trust property violated a Civil War Amendment.[105] More specifically, the *Rice* Court held that the State of Hawaii's law declaring that only Native Hawaiians could vote to elect the nine-member board that administers their trust estate was an impermissible racial classification and therefore violated the Fifteenth Amendment.[106] As described above, however, the ancestral-based classifications inherent in the *Seminole Nation* common law trust doctrine are not akin to constitutionally prohibited race-based classifications.

To be sure, the *Rice* Court did not deny that the State of Hawaii was acting pursuant to the same fiduciary duties that the Court consecrated as a common law trust doctrine in *Seminole Nation*.[107] That is, the Supreme Court did not deny the fact that the State of Hawaii was acting pursuant to its powers as trustee over property held in trust for Native Americans, nor did the Court deny the fact that Congress had formally delegated the fiduciary duties it owes American Indians to the State of Hawaii when it authorized the state's annexation in 1949.[108] Instead, the Court fully acknowledged this fact, noting that when Hawaii was added as the fiftieth state of the Union in 1949, the congressional

> legislation authorizing the grant recited that these lands, and the proceeds and income they generated, were to be held 'as a public trust' to be 'managed and disposed of for one or more of five purposes . . . [including] the betterment of the conditions of native Hawaiians.[109]

103. *See* United States v. Jicarilla Apache Nation, 131 S. Ct. 2313 (2011); Rice v. Cayetano, 528 U.S. 495 (2000).

104. *See Rice*, 528 U.S. 495.

105. *See id.*

106. *Id.*

107. *See id.* at 524 (Breyer, J., concurring) ("Hawaii seeks to justify its voting scheme by drawing an analogy between its Office of Hawaiian Affairs (OHA) and a trust for the benefit of an Indian tribe. The majority does not directly deny the analogy. It instead at one point assumes, at least for argument's sake, that the 'revenues and proceeds' at issue are from a 'public trust.'").

108. *See id.* at 507–08.

109. *Id.*; *see also* Coffey & Tsosie, *supra* note 23, at 195 ("The bitter history of injustice and dispossession of Native Hawaiian land and sovereignty that led to the creation of OHA and a 1993 Congressional Resolution

The *Rice* Court also noted that pursuant to this congressional grant and obligation, the Office of Hawaiian Affairs created a "public trust entity for the benefit of the people of Hawaiian ancestry."[110]

Thus, as the *Rice* Court noted, the State of Hawaii created the Office of Hawaiian Affairs ("OHA") in order to administer the trust created by the congressional legislation authorizing its annexation as the fiftieth state of the United States.[111] Pursuant to its authorizing legislation, the OHA was

> intended to advance multiple goals: to carry out the duties of the trust relationship between the islands' indigenous peoples and the Government of the United States; to compensate for past wrongs to the ancestors of these peoples; and to help preserve the distinct, indigenous culture that existed for centuries before Cook's arrival [in 1778].[112]

Consequently, Hawaii configured the OHA such that it "is overseen by a nine-member board of trustees, the members of which 'shall be Hawaiians' and . . . shall be 'elected by qualified voters who are Hawaiians, as provided by law.'"[113]

To the State of Hawaii, it made perfect sense that the only individuals with the right to vote in an election concerning native property held in trust would be the natives themselves. The lower court found this to be fully within the boundaries of the trust doctrine's inherent powers, concluding that Hawaii considered itself bound to "accept the trusts and their administrative structure as [it found] them, and assume[d] that both are lawful."[114] Consequently, the lower court held that Hawaii "may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be."[115]

But when Petitioner Harold Rice — who is *not* "a descendant of pre-1778 natives, and so he is neither 'native Hawaiian' nor 'Hawaiian' as defined by [Hawaii's] statute"[116] — appealed his case to the Supreme Court, the Court held that the State of Hawaii could not deny Rice the right to vote in the election of OHA's board members.[117]

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of Apology to the Native Hawaiian people is almost ignored by the majority, which finds that the 15th Amendment's design to 'reaffirm the equality of races' provides sufficient protection for the interests of Native Hawaiian people, as an 'ethnic minority' group of citizens, in their governance by a *state* agency, OHA.").

110. *Rice*, 528 U.S. at 508. *See also* Kauanoe & Nu'uhiwa, *supra* note 15, at 150 ("Likewise, for nearly a century, Congress has consistently asserted its authority to legislate with respect to the Native Hawaiian people on par with other Native peoples due to Congress' asserted trust relationship with the Native Hawaiian community."); *id.* at 150 n.161 (listing Hawaiian Homes Commission Act, ch. 42, 42 Stat. 108 (1921), reprinted in 1 HAW. REV. STAT. 261 (2009); Native Hawaiian Education Act, 20 U.S.C. § 7201 (2006); Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 (2006); Native American Languages Act, 25 U.S.C. § 2901 (2006); American Indian, Alaska Native, and Native Hawaiian Culture and Art Development Act, 20 U.S.C. § 4401 (2006).

111. *Rice*, 528 U.S. at 505, 509.

112. *Id.* at 528 (Stevens, J., dissenting).

113. *Id.* at 509 (citing HAW. CONST., art. XII, § 5).

114. Rice v. Cayetano, 146 F.3d 1075, 1079 (9th Cir. 1998).

115. *Id.*

116. *Rice*, 528 U.S. at 510.

117. *Id.* at 514–15.

Out of a desire to avoid the question of whether the federal government's omnipotent powers pursuant to the post-Dawes Act trust doctrine could be curtailed by the Civil War Amendments, the majority in *Rice* simply stated that "[e]ven were we to take the substantial step of finding authority in Congress, delegated to the State, . . . Congress may not authorize a State to create a voting scheme of this sort."[118]

Thus, the Court found that "[a]ncestry can be a proxy for race," and Hawaii's law, therefore, created an impermissible racial classification because it "used ancestry as a racial definition and for a racial purpose."[119] The Court concluded that Hawaii's voting scheme did not pass constitutional muster under the Fifteenth Amendment because it was "specific in granting the vote to persons of defined ancestry and to no others."[120]

There are two doctrinal inconsistencies inherent in the Supreme Court's decision in *Rice*. First, the Supreme Court previously made clear in its decision in *Morton v. Mancari* that in the context of the Civil War Amendments, racial classifications of "'Indians' . . . [are] political rather than racial in nature."[121] Indeed, the *Morton* Court reasoned that "federal law ordinarily uses the term 'Indian tribe' to designate a group of native people with whom the federal government has established some kind of political relationship."[122] Consequently, the *Morton* Court did not apply the typical strict standard of review to the challenged racial classification implicating "Indians" because the Court recognized that the government's use of "Indian" was not a racial classification within the context of Fourteenth Amendment Equal Protection jurisprudence, but rather, the term "Indian" refers to a political classification based on a sovereign-to-sovereign relationship that pre-dates the Civil War Amendments entirely.[123]

That is, when the United States first entered into treaties with Indian Nations, the racial classification of "Indian" did not yet exist.[124] Instead, membership in Indian Nations was based not on blood quantum or any contemporary American concepts of "race," but rather, membership was based on "traditional indigenous notions of descent [such as] . . . kinship, responsibility, and power associated with particular ancestral con-

118. *Id.* at 519.

119. *Id.* at 514–15.

120. *Id.* at 514.

121. Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974).

122. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, § 3.02[2] (LexisNexis 2005); *see also* Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 758 ("The underlying justification for a separate Indian country regime is preservation of the tribal right to remain separate and to avoid integration. In other words, discrimination, or at least separatism, is a positive normative principle in Indian law, not a negative one, and not one in favor of Indians as a race but in favor of tribes as distinct political organizations that have a right to continue to exist and exercise self-governance and self-determination.").

123. *See* Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 447 (2005) (quoting *Morton*, 417 U.S. at 554) ("To be sure, it did not apply the 'strict scrutiny' standard generally applied to classifications based on race. Instead, the Court continued along the lines of Indian law exceptionalism by crafting a unique form of rational basis review: 'As long as the special treatment [of Indians] can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.'").

124. Kauanoe & Nu'uhiaw, *supra* note 15, at 155, 159 ("The United States' current preference for rigid, monoracial race classification is a sociopolitical construction that predates the nation itself. . . .The notion of requiring a certain blood quantum for tribal membership was initially, in many cases, a foreign concept for Native communities, some of whom previously allowed for adoption and other means of incorporation into their communities."); *see also* Berger, *supra* note 9, at 603 ("The first enslavement of Africans and conquest of Indian lands were justified not by race, but by religion and national difference.").

nections."[125] Furthermore, at the time that Indian Nations first began to enter into sovereign-to-sovereign treaties and agreements with foreign nations like the United States, France, Spain, and Great Britain, the colonists differentiated themselves from the members of Indian Nations based on *religion* — not race.[126]

Indians were not classified based on *race* until the United States first attempted to deal with Indians on an individual level — as opposed to a sovereign-to-sovereign level — in its conspicuous effort to circumvent the federal treaty-making process and obtain power and control over Indian land directly from individual Indians, against their will and the will of their tribal governments.[127] As discussed in greater detail above, Congress (and the Supreme Court in subsequent decisions such as *Heckman* and *Lone Wolf*) relied on racial classifications that designated Indians as racially inferior to justify the government's taking of their lands against the will of individual Indians and their sovereign governments that previously had communal ownership of the land. This racial classification, however, was in no way implicated in the sovereign-to-sovereign treaties that the United States entered into with Indian Nations prior to the nineteenth century; and consequently, must be scrutinized by the Civil War Amendments that were in place by the time Congress and the Court crafted the classification. In contrast, the distribution of benefits to American Indians pursuant to the duties that the United States acquired as a result of the hundreds of treaties the United States signed cannot constitute a racial classification that violates any of the Civil War amendments since — as the Court in *Morton* explained — this classification is political in nature, not racial.[128]

The second fallacy in the *Rice* Court's reasoning is evident by the Court's failure to address the glaring inconsistency with its reasoning and the precedent the Court previously established in *Elk v. Wilkins*, where the Court placed Indians well outside the realm of the Civil War Amendments' domain.[129] Although the *Rice* Court struck down Hawaii's law based on the Court's reasoning that "[t]he [Fifteenth] Amendment grants protection to all persons, not just members of a particular race,"[130] the Court offered no explanation as to how its decision in *Rice* could be reconciled with its previous decision in *Elk v. Wilkins*, where the Court concluded that the Fifteenth Amendment does not apply to Indians because they are members of "an independent political community."[131]

In *Elk v. Wilkins*, John Elk, an Omaha Indian, sought the right to vote in a local election.[132] Elk cited the Fourteenth Amendment and argued that the Civil War Amend-

125. Kauanoe & Nu'uhiaw, *supra* note 15, at 154.

126. Berger, *supra* note 9, at 611 ("Red and white did not have this diplomatic significance among the tribes of the Northeast, and New Englanders in any case were slower to call themselves 'white' rather than 'Christian.'").

127. *See id.* ("But by the nineteenth century, as the division of human beings according to color progressed, red became the universal symbol of the inherent savagery and violence of Indian peoples.").

128. *Morton*, 417 U.S. at 553–54; *see also* Berger, *supra* note 9, at 1194 ("A closer examination of the historical context, however, shows that the denial of Native Hawaiian sovereignty and property followed the familiar process of treating indigenous peoples as a race in need of reformation rather than a polity with political rights. Measures that seek to restore a portion of what this racialization took away should not falter under the guise of equal protection.").

129. *See* Elk v. Wilkins, 112 U.S. 94 (1884).

130. *Rice*, 528 U.S. at 512.

131. *Elk*, 112 U.S. at 109.

132. *See id.* at 94.

ments made him a citizen and gave him the right to vote in state and federal elections.[133] The Supreme Court, however, held that the Civil War Amendments did not make Indians citizens of the United States or the states where they reside because at the time of the Amendments' creation Indians were members of "distinct political communities."[134] The Supreme Court relied not only on Indian Nations' sovereignty to deny Indians the right to vote in American elections, but the Court also explained that it was clear that the Civil War Amendments were not intended to benefit Indians because at the time of their enactment, Indians "were in a dependent condition, a state of pupilage, *resembling that of a ward to his guardian.*"[135] Thus, just as the Court has used the guardianship doctrine to justify a limitless post-Dawes Act trust power in the federal government over Indians, the Court likewise invoked the guardianship doctrine to conclude that the Civil War Amendments do not afford Indians constitutional rights. According to the Supreme Court in *Elk*, the guardianship doctrine means that state and federal governments can deny Indians the right to vote.

Elk v. Wilkins is still considered precedential constitutional law today. It was not until Congress passed the Indian Citizenship Act in 1924 that Native Americans were recognized as lawful citizens of the United States with the right to vote in state and federal elections.[136] Although Indians now have congressional recognition of their right to citizenship and to vote, the Supreme Court has *never* held that Indians have a constitutional right to citizenship and to vote as a result of the Civil War Amendments. Thus, it is disconcerting that the Supreme Court has held both that the Fifteenth Amendment provides rights to all races *except* Native Americans — and that this very same Amendment limits the benefits Native Americans receive pursuant to the *Seminole Nation* trust doctrine.[137]

To be sure, much has been written regarding the inherent conflict between the Court's Equal Protection jurisprudence and federal Indian law.[138] As Professor Washburn explained, the key principle of Equal Protection jurisprudence "antidiscrimination" is not an "appropriate norm[] for addressing a legal regime affecting Indians in Indian country."[139] This is particularly true when dealing with the benefits that the federal government provides to Indian Nations and their members pursuant to its fiduciary duties as trustee. As explained in greater detail above, the United States did not initially acquire its duties as trustee based on a racial classification, but rather, the duties the United States owes Indians are the result of treaties and contractual agreements whereby the United States acquired these duties in exchange for the Indian Nations' lands.[140] Because the

133. *See id.* at 95.

134. *Id.* at 99.

135. *Id.* (emphasis added).

136. *See* 1924 Indian Citizenship Act, ch.233, 43 Stat. 253.

137. *See* Rice v. Cayetano, 528 U.S. 514, 511 (2000).

138. *See, e.g.*, Berger, *supra* note 9; Frickey, *supra* note 123, at 441 (2005); Kauanoe & Nu'uhiwa, *supra* note 15, at 125 ("Simply put, analyses of Native peoples' authority to act in a manner that is inapposite to Western liberal ideals, and the United States' authority (or perhaps duty) to accommodate such actions, should begin, not with a liberal individual rights framework, but with a Native sovereignty framework.").

139. Washburn, *supra* note 122, at 758.

140. *Fulfilling the Federal Trust Responsibility: The Foundation of Government-to-Government Relationship: Oversight Hearing Before the S. Comm. on Indian Affairs*, 117th Cong. 3 (2012) (statement of Daniel I.S.J. Rey-Bear, Partner, Nordhaus Law Firm, LLP) (internal citations and quotation marks omitted) ("Thus,

identification of the members of a sovereign within the context of a political and contractual relationship with another sovereign cannot constitute a racial classification that falls within the purview of the Civil War Amendments, the *Rice* Court's reliance on a Civil War Amendment to limit the scope of the benefits that Indians receive pursuant to the federal government's trust duties is entirely misplaced.[141] Thus, the Supreme Court's decision in *Rice* is also flawed because it fails to recognize and deconstruct the racial construction of the post-Dawes Act trust doctrine's extraconstitutional power over Indian life and property. As *Rickert* and *Heckman* make clear, the Supreme Court justified its creation of the post-Dawes Act trust doctrine on the theory that Indians were racially inferior wards of the government — who is, as a result, their guardian.[142] The racial classification of Indians as inferior wards has been used to justify the federal government's powers as trustee to circumvent the constitutionally commanded treaty-making process and take millions of acres of Indian lands.

Indeed, the classification of the Indian as racially inferior in the Dawes Act (and subsequent Supreme Court decisions) has repeatedly been used to justify the federal government's attempts to dissolve tribal governments' sovereignty altogether. These attempts, however, have failed. Hundreds of sovereign tribal governments continue to exist today. As a result, the racial classifications of Indians as racially inferior continue to complicate and undermine the legitimacy of the Supreme Court's contemporary Indian law jurisprudence, as made clear by Justice Alito's majority opinion in *Jicarilla Apache Nation v. United States*.[143]

V. *JICARILLA APACHE NATION*

In *Jicarilla Apache Nation*, the Supreme Court relied on the same nineteenth century racial classifications used to create the post-Dawes Act trust doctrine to deny the existence of the preceding pre-Dawes Act trust doctrine. By denying the existence of the sovereign-to-sovereign trust relationship that already existed between the United States and Indian Nations, the *Jicarilla Nation* Court was able to conclude that Indian Nations are not entitled to the same benefits as other beneficiaries of a common law trust.[144] When analyzed in the context of contemporary Equal Protection jurisprudence, however, it is clear that the *Jicarilla Apache Nation* Court's reliance on past precedents declaring Indians to be racially inferior cannot be squared with the Constitution.

In *Jicarilla Apache Nation*, the Nation brought suit against the United States for the U.S. government's failure to properly manage the proceeds the government received

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the federal-tribal trust relationship is not a gratuity, but arose and remains legally enforceable because the government has over the years made specific commitments to the Indian people through written treaties and through informal and formal agreements, in exchange for which Indians . . . have often surrendered claims to vast tracts of land.").

141. *See* Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CALIF. L. REV. 799, 808 (2007) ("Tribal sovereignty necessarily situates Indian nations beyond the federal-state paradigm that dominates individual civil liberties discourse within the U.S.").

142. *See* Heckman v. United States, 224 U.S. 417 (1912); United States v. Rickert, 188 U.S. 432, 437 (1903).

143. *See* United States v. Jicarilla Apache Nation, 131 S. Ct. 2313 (2011).

144. *Id.*

from resources located on the Jicarilla Apache Nation's lands.[145] In the course of the litigation, however, the U.S. government refused to produce certain documents related to its management of the trust funds, claiming they were protected under the attorney-client privilege.[146] The Jicarilla Apache Nation brought a motion to obtain these documents — premised on the recognized rule that when a trustee obtains legal advice regarding how it should administer the funds of a trust, the trust beneficiaries are entitled to those documents since they were obtained for the beneficiaries' benefit.[147] To be sure, the Supreme Court recognized this, noting that "[t]he rule [is] that when a trustee obtained legal advice to guide the administration of the trust, and not for the trustee's own defense in litigation, the beneficiaries [are] entitled to the production of documents related to that advice."[148]

Thus, although the majority noted that "[t]he common law . . . has recognized an exception to the privilege when a trustee obtains legal advice related to the exercise of fiduciary duties,"[149] the majority reasoned that there was an exception to this exception for Indian Nations because "[the trust obligations of the United States] to the Indian tribes are established and governed by *statute* rather than the *common law*."[150] According to the majority, because the Indian Nations' trustee/beneficiary relationship with the United States was created by statute, and not by common law, Indian Nations could be distinguished from ordinary trust beneficiaries and therefore were not entitled to the same benefits.[151]

However, because the *Seminole Nation* Court found that the trust relationship between Indian Nations and the United States is a relationship based on *common* and *equitable* law, the *Jicarilla Apache Nation* Court had to resort to a series of precedents that declared Indians to be racially inferior in order to justify its refusal to recognize the true scope of the *Seminole Nation* trust doctrine.[152] Consequently, the majority opinion is flawed because it differentiates Indian Nations from common law beneficiaries based on a constitutionally impermissible racial classification that entirely overlooks the sovereign-to-sovereign relationship that existed between Indian Nations and the United States before the Dawes Act.

Indeed, the majority opinion turned the trust doctrine on its head. As Justice Sotomayor noted in her dissent, the *Seminole Nation* Court initially created the contemporary trust doctrine based on common law principles.[153] Justice Sotomayor explained the

145. *Id.* at 2318–19.

146. *Id.* at 2319.

147. *Id.* at 2321.

148. *Id.* (citations omitted).

149. *Id.* at 2318.

150. *Id.* (emphasis added).

151. *See* Elizabeth Ann Kronk, United States v. Jicarilla Apache Nation: *Its Importance and Potential Future Ramifications*, 59 FED. LAW. 6 (2012) ("Accordingly, the Court's decision in *Jicarilla Apache Nation* can be read to mean that common law principles cannot be used to establish a legally binding fiduciary relationship between the federal government and a tribe.").

152. *Jicarilla Apache Nation*, 131 S. Ct. at 2323–25.

153. *See id.* at 2339–40 (Sotomayor, J., dissenting) (citing Seminole Nation v. United States, 316 U.S. 286, 296 (1942)) ("Similarly, in *Seminole Nation*, we relied on general trust principles to conclude that the Government had a fiduciary duty to prevent misappropriation of tribal trust funds by corrupt members of a tribe, even though no specific statutory or treaty provision expressly imposed such a duty.").

fallacy in the majority's reasoning, noting that

> [t]he majority's conclusion employs a fundamentally flawed legal premise. We have never held that all of the Government's trust responsibilities to Indians must be set forth expressly in a specific statute or regulation. To the contrary, where, as here, the statutory framework establishes that the relationship between the Government and an Indian tribe 'bears the hallmarks of a conventional fiduciary relationship,' we have consistently looked to general trust principles to flesh out the Government's fiduciary obligations.[154]

As Justice Sotomayor explained, the *Seminole Nation* Court never stated that the trustee/beneficiary relationship between the United States and Indian Nations could only be recognized by congressional statute.[155] Quite to the contrary, the *Seminole Nation* Court relied on common law principles of *equity*, to conclude that because the Seminole Nation entered into a *treaty* with the U.S. government in 1856, the government owed the Seminole Nation fiduciary duties. Notably, the *Seminole Nation* Court held that the liability of the U.S. government was predicated on basic principles of common law relating to trusts, reasoning that

> [i]t is a well established principle of equity that a third party who pays money to a fiduciary for the benefit of the beneficiary, with knowledge that the fiduciary intends to misappropriate the money or otherwise be false to his trust, is a participant in the breach of trust and liable therefor [sic] to the beneficiary.[156]

Consequently, the *Jicarilla Apache Nation* majority's statement that the trust obligations of the United States are established and "governed by statutes rather than the common law"[157] directly contradicts the *Seminole Nation* Court's holding that the federal government's fiduciary duties to Indian Nations are prescribed by "principle[s] of equity" created in a treaty between two sovereigns.[158]

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154. *Id.* at 2339 (Sotomayor, J., dissenting) (citing United States v. Navajo Nation, 556 U.S. 287 (2009)). Justice Sotomayor's dissent is bolstered by the fact that at least six times over the last thirty-two years, the Supreme Court and federal appellate courts have rejected Executive Branch arguments that there is essentially no enforceable federal-tribal fiduciary relationship because the United States is not subject to any duty that is not expressly stated in statutes or regulations. *See, e.g.*, *Jicarilla*, 131 S. Ct. at 2325 ("We have looked to common-law principles to inform our interpretation of statutes and to determine the scope of liability that Congress has imposed."); United States v. White Mountain Apache Tribe, 537 U.S. 465, 476–77 (2002) (affirming trust duty even though there was not a word in the only relevant law that suggested such a mandate); Cobell v. Norton, 392 F.3d 461, 472 (D.C. Cir. 2004) (under *White Mountain Apache*, "once a statutory obligation is identified, the court may look to common law trust principles to particularize that obligation"); Cobell v. Norton, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (per *Mitchell II*, "[t]he general 'contours' of the government's obligations may be defined by statute, but the interstices must be filled in through reference to general trust law"); Duncan v. United States, 667 F.2d 36, 42 (Ct. Cl. 1981) (rejecting that "a federal trust must spell out specifically all the trust duties of the Government"); Navajo Tribe of Indians v. United States, 624 F.2d 981, 988 (Ct. Cl. 1980) ("Nor is the court required to find all the fiduciary obligations it may enforce within the express terms of an authorizing statute . . . .").

155. *See Seminole Nation*, 316 U.S. at 296.

156. *Id.*

157. *Jicarilla Apache Nation*, 131 S. Ct. at 2323.

158. *Seminole Nation*, 316 U.S. at 296. Notably, the *Seminole Nation* Court held that as a result of "numer-

Furthermore, it is alarming that the *Jicarilla Apache Nation* Court has blurred the contemporary trust doctrine with the *Lone Wolf* Court's plenary power doctrine. That is, the *Jicarilla Apache Nation* relied on the plenary power doctrine to justify its expansion of the United States' powers as a twenty-first century post-Dawes Act trustee. Indeed, one of the Court's main justifications for its finding that Indian Nations do not enjoy the same benefits as common law beneficiaries was the Court's reasoning that "[t]hroughout the history of the Indian trust relationship, we have recognized that the organization and management of the trust is a sovereign function subject to the *plenary* authority of Congress."[159] The Court cited its previous decision in *Lone Wolf* for the proposition 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.[160]

However, as discussed above, the plenary power doctrine is a doctrine that the *Lone Wolf* Court created based on its conclusion that Indians are an "ignorant and dependent race."[161] Thus, the *Jicarilla Apache Nation* Court's distinction between the common law trust and the United States/Indian Nations trust relationship is predicated on a power that the federal government maintains as a result of the Court's conclusion that Indians constitute an "ignorant and dependent race."[162]

Even more problematic, however, is that the majority's reliance on unconstitutional racial classifications is not limited to *Lone Wolf*. The majority cites a series of previous decisions that employed impermissible racial classifications to support its conclusion that the plenary power invested in Congress precludes the recognition of the common law trust/trustee relationship that the United States and Indian Nations agreed to in hundreds of different treaties and that the Supreme Court consecrated in *Seminole Nation*.[163] For instance, the majority cites its previous decision in *United States v. Candaleria*.[164] However, the *Candaleria* Court justified its conclusion that federal government maintains a limitless power over Indian Nations on its summation that Indians "always have lived in isolated communities, and are a simple, uniformed people, ill-prepared to cope with the intelligence and greed of other races."[165]

The majority did not stop there. The opinion also cited a series of cases to justify its holding that the trust relationship between Indians and the United States was created to promote the federal government's own interests, and therefore could not be used to

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ous decisions of this Court, [the federal government] has charged itself with moral obligations of the highest responsibility and trust," and that consequently, the United States "should . . . be judged by the most exacting fiduciary standards." *Id.* at 297.

159. *Jicarilla Apache Nation*, 131 S. Ct. at 2323 (emphasis added).

160. *Id.* at 2324 (quoting Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903)).

161. *Lone Wolf*, 187 U.S. at 565.

162. Cleveland, *supra* note 19, at 14 (noting that the plenary power "cannot be justified by mainstream forms of constitutional analysis [and that t]he doctrine's origins instead lie in a peculiarly unattractive, late-nineteenth-century nationalist and racist view of American society and federal power").

163. *Jicarilla Apache Nation*, 131 S. Ct. at 2323–25 (internal citations omitted).

164. *Id.* at 2324 (citing United States v. Candelaria, 271 U.S. 432, 439 (1926)).

165. *Candelaria*, 271 U.S. at 442.

promote the interests of Indian Nations as trust beneficiaries.[166] Like its plenary power cases, the cases the majority cited to support this proposition also rely on unconstitutional racial classifications that run contrary to the spirit of the Fourteenth Amendment.[167]

For instance, the majority relied on the Court's previous decision in *Sandoval v. United States*.[168] In *Sandoval*, the Court held that

> [t]he people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government. Always living in separate and isolated communities, adhering to primitive modes of life, largely influenced by superstition and fetichism, and chiefly governed according to the crude customs inherited from their ancestors, they are essentially a simple, uninformed, and *inferior* people.[169]

The *Sandoval* Court's description of Indians as an "inferior people," however, is not a permissible constitutional basis upon which to conclude that the federal government maintains a unique power over them.[170]

This is likewise true for the majority's reliance on *Choctaw Nation v. United States* for the proposition that the trust doctrine does not require the United States to observe basic fiduciary obligations because it instead "authorizes the adoption on the part of the United States of such policy as their own public interests may dictate."[171] The *Choctaw Nation* Court justified its finding of a self-interested trust power in the federal government in its conclusion that the relationship between the United States and an Indian was similar to "that between a superior and inferior."[172] Likewise, the *Jicarilla Apache Nation* majority cited *Rickert* for precisely the same proposition, despite the fact that the *Rickert* Court reasoned that the federal government enjoyed an omnipotent trust power over Indians because Indians exist "in a state of dependency and pupilage" and the relationship between the United States with an Indian "is that between a superior and an inferior."[173]

The Court's subsequent classification of Indians as an "inferior" race, however, does nothing to change the valid trust relationship that the United States entered into pursuant to the treaties it signed with hundreds of sovereign Indian Nations. As Justice So-

166. *Jicarilla Apache Nation*, 131 S. Ct. at 2326–27 (internal citations omitted).

167. Rey-Bear, *supra* note 140 (internal citations omitted) ("Likewise, the fact that 'the Government has often structured the trust relationship to pursue its own policy goals[,]' such that the relationship has been often violated and at times terminated, can no more disprove the existence of enforceable fiduciary duties than the fact of people killing others can establish that murder and genocide are not crimes.").

168. *Jicarilla Apache Nation*, 131 S. Ct. at 2325 (citing United States v. Sandoval, 231 U.S. 28 (1913)) (proposing that Indian Nations' relationship with United States does not "correspond to a common-law trust relationship").

169. *Sandoval*, 231 U.S. at 39 (emphasis added).

170. *See* Note, *supra* note 77, at 426 n.23 ("The *Sandoval* Court's description of the Indians as a people pursuing 'primitive modes of life' clearly demonstrates intolerance of Indian institutions, and its assessment of the Indians as an 'essentially . . . inferior people' indicates a virulently racist attitude.").

171. *Jicarilla Apache Nation*, 131 S. Ct. at 2327 (quoting Choctaw Nation v. United States, 119 U.S. 1, 28 (1886)).

172. *Choctaw Nation*, 119 U.S. at 90.

173. *Jicarilla Apache Nation*, 131 S. Ct. at 2327 (citing United States v. Rickert, 188 U.S. 432, 443 (1903)).

tomayor noted in her dissent:

> [T]he Indian trust fund is more than balance sheets and accounting procedures. These moneys are crucial to the daily operations of native American tribes and a source of income to tens of thousands of native Americans. Given the history of governmental mismanagement of Indian trust funds, application of the fiduciary exception is, if anything, even more important in this context than in the private trustee context. . . . By rejecting the Nation's claim on the ground that it fails to identify a specific statutory right to the communications at issue, the majority effectively embraces an approach espoused by prior dissents that rejects the role of common-law principles altogether in the Indian trust context. Its decision to do so in a case involving only a narrow evidentiary issue is wholly unnecessary and, worse yet, risks further diluting the Government's fiduciary obligations in a manner that Congress clearly did not intend and that would inflict serious harm on the already-frayed relationship between the United States and Indian tribes.[174]

Consequently, pursuant to the Court's decision in *Seminole Nation*, the U.S. government owes duties to American Indians regardless of what any congressional statute may or may not state. The majority's attempt in *Jicarilla Apache Nation* to re-write the foundation of a trust relationship entered into between two nations by relying on precedent that declare the members of one nation to be racially inferior to the other is troublesome and fails to pass constitutional muster.

VI. CONCLUSION

An omnipotent federal government trust power is contemplated nowhere in the U.S. Constitution. However, the Constitution clearly envisions a sovereign-to-sovereign relationship between Indian Nations and the United States. Pursuant to this sovereign-to-sovereign relationship, the United States obtained millions of acres of Indian lands in exchange for the promises it gave to protect Indian Nations and provide certain fiduciary trust duties to their members and descendants. Thus, before the Civil War Amendments even existed, the U.S. government accepted a fiduciary duty — under international and equitable common law — to provide certain trust benefits to Indian Nations and their members. Federal and state governments' attempts to locate the modern day descendants of the individuals who entered into these agreements with the U.S. government is — as the Court in *Morton v. Mancari* explained—a political classification, and not a racial classification that violates the spirit of the Civil War Amendments.[175]

Yet, after hundreds of years of engaging in this sovereign-to-sovereign relationship with Indian Nations, in the late nineteenth century Congress sought to unilaterally circumvent the treaty making process and obtain Indian Nations' land against their will. To accomplish this task, Congress passed the Dawes Act. Although the Dawes Act violated hundreds of legally binding treaties, the Dawes Act was justified on the theory that Indi-

174. *Jicarilla Apache Nation*, 131 S. Ct. at 2342–43 (Sotomayor, J., dissenting) (internal citations and quotation marks omitted).

175. *See* Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974).

ans were racially inferior to whites, and consequently, their tribal governments were incompetent and must be dissolved. In subsequent Supreme Court decisions such as *Heckman*, *Rickert*, and *Lone Wolf*, the Supreme Court adopted this rationale to justify a unique — and unconstitutional — congressional power to abrogate legally binding treaties. Thus, the proponents of the Dawes Act and decisions like *Lone Wolf* used the racial classification of Indians as racially inferior in an attempt to (1) destroy the legitimate sovereignty of Indian Nations and (2) create a plenary trust power in Congress and the federal government to take Indians' land and property. The *Lone Wolf* plenary power doctrine's use of racial classifications violates the spirit of the Civil War Amendments and must be scrutinized under the Fourteenth Amendment's Equal Protection Clause. This has yet to happen.

Instead, the Supreme Court's decisions in *Rice* and *Jicarilla Apache Nation* exemplify the inherent contradictions in the Court's post-Dawes Act trust doctrine and Equal Protection jurisprudence. The Court's decision in *Jicarilla Apache Nation* demonstrates that the Court still relies on the racial classifications of Indians as racially inferior, in decisions such as *Lone Wolf* and *Sandoval,* as its rationale for disregarding tribal sovereignty and concluding that the federal government maintains an unquestionable plenary power over Indians and their tribal governments.[176]

Even more problematic, however, is the Court's conclusion in *Rice* that the Civil War Amendments limit the government's ability to identify descendants of the original possessors of this soil for purposes of distributing the benefits of the trusts that their ancestors created when the United States took their land. Thus, the trust benefits that the federal government owes American Indians — although today many of them may be codified by congressional statute — originated in a series of treaties signed by two sovereigns. A trust benefit given in exchange for Indian lands cannot violate the Civil War Amendments when, several centuries later, the government uses ancestry to distribute the benefits to the descendants of the individuals from whom the government took the land. In this regard, the fact that ancestry is a proxy for race is of no constitutional moment.[177]

In contrast, the classification of Indians as racially inferior for purposes of destroying the sovereignty of their tribal governments is morally repugnant and contradictory to the spirit of the Civil War Amendments. Because the framers of the Civil War Amendments intended for Indians to remain *outside* the sphere of the those Amendments on account of their belonging to separate, sovereign nations, the Court and Congress cannot then turn around and use discriminatory racial classifications to destroy the sovereignty of those nations. Instead, "[h]istorical notions of dependency and incompetency must be abandoned. Our dialogue should be focused on the forgotten trust responsibility of the United States – the responsibility to support the capacity of Tribes to take their place alongside the American system of governments."[178]

176. *See* Leeds, *supra* note 5, at 86 ("[T]he majority of Indian law decisions from Chief Justice Marshall's trilogy to Lone Wolf to the Rehnquist Court are premised on notions of racial supremacy of the United States over the perceived inferiority and dependency of Indian people.").

177. Kauanoe & Nu'uhiwa, *supra* note 15, at 161 ("With respect to Native peoples specifically, blood quantum requirements have served as a means of perpetually shrinking the universe of persons to whom the federal government owes trust obligations until no such persons exist.").

178. Sharp, *supra* note 30, at 5.

"Today the government purports to hold about 2,900 trust accounts for about 250 tribes."[179] The government has a moral and legal obligation to fulfill its fiduciary duties to the descendants of the individuals who first entered into the treaties and agreements that created these trusts and gave the United States the lands upon which this nation has prospered. When the United States fails to abide by its fiduciary duties to the descendants of the original possessors of this soil, nothing less than the legitimacy of this nation's post-colonial democracy is at risk.

179. McCoy, *supra* note 16, at 1.